

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

DECISION OF THE DESCHUTES COUNTY BOARD OF COUNTY COMMISSIONERS

File Number: 247-25-000229-A; 247-22-000678-A

Subject Property: The entirety of the Thornburgh Destination Resort located at:

Address	Deschutes Co. Assessor Map & Tax Lot Number
11800 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5000
11810 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5001
11820 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5002
67205 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7700
67705 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7701
67555 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7800
67525 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7801*
67545 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7900
67400 Barr Rd, Redmond, OR 97756	15-12-00, TL 8000**

* A portion of this tax lot is not included in the FMP.

** Portions of this tax lot are not included in the FMP.

Owners/Applicants: Central Land & Cattle Company, LLC,
Kameron DeLashmutt,
Pinnacle Utilities, LLC (collectively "Applicant")

Applicant's Attorneys: J. Kenneth Katzaroff – Schwabe Williamson & Wyatt

Staff Contact: Jacob Ripper, AICP, Principal Planner – Deschutes County

Record: The official record was maintained by Deschutes County and accessible online through a project-specific website at:

bit.ly/0425ThornburghRemand

Proposal:

This remand decision (“Decision”) addresses three issues remanded by the Land Use Board of Appeals (“LUBA”) as they relate to the Applicant’s 2022 application to modify an aspect of its final master plan (“FMP”) approval, namely the mitigation measures found in its 2008 Fish and Wildlife Mitigation Plan (“FWMP”). Applicant also seeks to modify FMP conditions to reflect that change and ensure compliance with the new 2022 FWMP. The proposal is referred to as the “Application.”

I. Applicable Criteria

Deschutes County Code (“DCC”)

Title 18, Deschutes County Zoning Ordinance:

Chapter 18.113, Destination Resorts Zone

Title 22, Deschutes County Development Procedures Ordinance:

Chapter 22.04, Introduction & Definitions

Chapter 22.08, General Provisions

Chapter 22.20, Review of Land Use Action Procedures

Chapter 22.28, Land Use Action Decisions

Chapter 22.36, Limitation on Approvals

II. Basic Findings

As described below (see Resort Land Use History), the Thornburgh Destination Resort (“Thornburgh” or the “Resort”) has been litigated for nearly 20 years. During that time period, the Board of County Commissioners (“Board”) has heard numerous appeals related to the Resort.

This proceeding occurred as a remand to our 2023 decision, as directed by LUBA. LUBA, followed by the Court of Appeals, upheld much of our 2023 decision but remanded the Application to us to address three specific issues as follows:

Issue 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.

Issue 2: Additional findings on the required economic analysis under DCC 18.113.070(C)(3) and (4) based on LUBA’s determination that the FWMP was a substantial change.

Issue 3: Findings to address the Treaty with the Tribes of Middle Oregon, dated June 25, 1855 (the “Treaty”).

This Decision specifically incorporates and readopts our previous decision (the “2023 Decision”) and is controlling except where inconsistent with this Decision or as directed by LUBA.

A. Lot of Record

The Subject Property has been verified as a legal lot(s) of record in previous land use decisions including the Board's 2006 decision approving the Resort's CMP.

B. Location and Site Description

The Thornburgh Destination Resort ("Thornburgh" or "Resort") is generally comprised of a large tract of land +/- 1,970 acres in size and includes several tax lots as identified above. The Subject Property is approximately 3 miles west-southwest of the City of Redmond. The Subject Property includes variable topography, native vegetation, rock outcroppings and ridge tops. The Subject Property is largely undeveloped land at this time. However, the Applicant has started construction of access roads, other infrastructure improvements (i.e., community water system, community sewer system, etc.), and a golf course pursuant to final land use approvals. In addition, the Applicant has applied for and been issued building permits for utility facilities with additional permits pending. The southeastern corner of the Subject Property is bisected by Cline Falls Road; Barr Road bisects the southwest corner of the Resort tract.

C. Resort Land Use History

Our 2023 decision adequately summarizes the Resort's prior land use history. Since our last decision, the Applicant has sought and been granted several extensions to third-stage applications.

D. Public Agency Comments

The only agency comments received during the remand were from the Oregon Department of Fish & Wildlife ("ODFW"). These comments were general in nature and re-iterated ODFW's previous position. We do not find some of ODFW's comments persuasive given the evidence provided by the Applicant. Other ODFW comments are outside the scope of the Remand.

E. Public Comments, Testimony, and Record Submissions

As with any Thornburgh application, robust public participation occurred throughout the review of the Application. Among other participating parties, the Confederated Tribes of the Warm Springs Reservation ("Tribe")¹ presented testimony. We address the Tribe's arguments under Remand Issue 3.

F. Review Period and Procedure

On January 12, 2024, the Land Use Board of Appeals (LUBA) issued a Final Opinion and Order remanding the County's decision 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 (A183421

¹ The Confederated Tribes of the Warm Springs Reservation refer to themselves as the "Tribe" and so we do the same.
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(Control)). On February 25, 2025, LUBA remanded to the County again for the County to make findings regarding the Treaty with the Tribes of Middle Oregon, dated June 25, 1855.

Applicant initiated the remand on April 7, 2025, and requested that the Board reopen the record for the limited purpose of addressing Remand Issue 2. On April 10, 2025, the Tribe submitted a letter requesting that the Board reopen the record to address all issues. On April 11, 2025, Thornburgh stated that as the Applicant, it was requesting that the record be reopened only to address the single evidentiary question presented under Remand Issue 2. On April 16, 2025, the Board issued an order that reopened the record to address Remand Issue 2. We exercised our discretion to limit new evidence to that relating to Remand Issue 2.

A public hearing was held on Wednesday, May 7, 2025. Several parties, including the Tribe, and Ms. Jennifer Bragar (attorney representing Ms. Gould, Mr. Bishop, and Mr. Lipscomb (for convenience, we refer to these parties collectively as "Bragar")), Central Oregon LandWatch ("COLW"), and members of the public objected to the limitation in scope of new evidence and claimed that the review procedures were overly restrictive. In particular, commentators requested that the Tribe be able to submit additional evidence outside the scope of Remand Issue 2 and requested that members of the public that had not participated in the previous proceeding be able to provide testimony in the remand proceedings. Some argued that the Notice of Public Hearing was insufficient or confusing because it stated that testimony could be received on all remand issues however the reopening of the evidentiary record was limited to Remand Issue 2. We find no merit in these claims. Our decision in this regard was limited and guided by the Deschutes County Code.

Under DCC 22.34.030.A, only those persons who were parties to the previous proceedings before the County are entitled to participate. This Board therefore formally rejects oral and written comments submitted by persons who were not parties to the previous proceedings and order such comments stricken from the record.

With respect to COLW's claims that the hearing notice was insufficient because it did not list a time, that argument lacks factual support as the Notice clearly states that the hearing will take place at 9:00 a.m. on May 7, 2025.

DCC 22.34.040.A grants this Board discretion to reopen the record when it deems appropriate. This Board finds that, in order to adequately address the issues on remand, it was appropriate to limit reopening the record for new evidence on Remand Issue 2, consistent with our order issued on April 16, 2025. We are unpersuaded by the arguments that we are *required* to reopen the record to address the additional remand issues. We conclude that the parties had a full and fair opportunity to provide evidence on these issues in the previous proceedings. The parties either failed to do so or specifically chose not to fully engage in our previous decision's process. Like project applicants, project opponents that have legitimate concerns regarding a particular application must present evidence and testimony to support their position at the appropriate point in the process. The Oregon land use system adheres to long standing principles and case law regarding waiver and law of the case. All parties would do well to remember these principles.

G. Summary of Application

The Applicant seeks to replace the 2008 FWMP document with an updated 2022 FWMP.² In response to LUBA's remand, the Applicant proposes to make certain redline changes to the 2022 FWMP (as described below) to address Remand Issue 1. Those changes are shown as follows:

Section D-1(a) is revised as follows:

- a. POA - Groundwater: For any future rights that may be acquired, compliance occurs upon the:
 - 1. cessation of pumping of the rights, along with any of the following:
 - 2. a deed evidencing the transfer of ownership, or;
 - 3. an assignment of the water right to Thornburgh, or;
 - 4. ~~an~~ approval from ~~OWRD of any~~ either of the following:
 - i. ~~(i) an assignment of the water right to Thornburgh~~, an application that seeks OWRD approval of a transfer to pump at the Resort property, or
 - ii. ~~(iii)~~ (ii) a cancellation in-lieu of mitigation.

For convenience, the Board accepts the final form of the 2022 FWMP as **Exhibit A**. The Board maintains the conditions of approval in the original decision which were not challenged on appeal.

The Board accepts the Applicant's additional proposed condition of approval, that if the Applicant proposes any new changes to fish mitigation water—i.e. that provided by the FWMP are sought—then the applicant shall submit a new modification application which shall be processed in the same manner as this proceeding.

Additionally, for clarification and ease, the Board accepts the Applicant's proposed template to report mitigation, which is included as **Exhibit B**.

The Board accepts the Applicant's updated economic analysis which shows that the Resort will provide substantial economic benefit to the County throughout the life of the project.

III. Findings & Conclusions

LUBA substantially upheld the Board's previous decision on appeal but remanded on three specific issues. We address those issues in this Decision. This Decision supplements our original 2023 decision. Where a conflict exists between this Decision and our 2023 decision, this Decision controls.

A. DCC 18.113.070 Approval Criteria

Under DCC 18.113.070, approval of a destination resort application requires the Planning Director or Hearings Body to find from substantial evidence in the record that:

...

² The 2008 FWMP is comprised of two documents, the April 21, 2008 Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat and the August 11, 2008 letter from attorney Martha Pagel committing to take certain actions related to Whychus Creek.

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

The Board finds that the Application meets the No Net Loss Standard in DCC 18.128.070(D).

Thornburgh provided substantial technical analysis and reports that we find persuasive. Included in the technical analysis was a comprehensive summary of the impacts on fish habitat by Lucius Caldwell, PhD, FP-C, who concluded: *"In conclusion, the findings presented above indicate that the combination of planned groundwater pumping at Thornburgh Resort, and the associated mitigation planned to offset this pumping as described in the 2022 Fish and Wildlife Mitigation Plan (NCI 2008; Newton 2022), appear to be a net benefit for both fish habitat quantity and quality at all sites evaluated and would result in no net loss of fish habitat quantity or quality."* The Board finds that statement, while not determinative in the outcome of this case, is relevant and persuasive. Appellant Gould, ODFW, the Tribe, and others raised concerns regarding conformance with this standard, but the Board weighed the competing evidence and finds the Applicant's experts provided more persuasive evidence and testimony. For these reasons, the Board finds this criterion will be met.

1. Interpreting the Scope of the No Net Loss Provision

The Court of Appeals previously interpreted the scope of the No Net Loss Standard. *See Gould v. Deschutes County*, 233 Or App 623, 633 (2010). That decision found that the standard "may be satisfied by a plan that will completely mitigate any impact on the habitat that supports fish and wildlife, without showing that each individual species will be maintained or replaced on a one-to-one basis."³

As it relates to that standard, the 2008 FWMP was found to meet the No Net Loss Standard despite showing temperature increases in certain stretches of the Deschutes River of up to an increase of 0.1 degree C, with an average increase in temperature of 0.07-degree C⁴. Here, the evidence provided by Thornburgh through technical data, modeling, and reports, shows that Thornburgh's 2022 FWMP increases flows and decreases temperature by an average of (0.01 degree C), which improves fisheries habitat quality and quantity.⁵ Extensive technical analysis was completed on the Deschutes River, the Crooked River and Whychus Creek, that included: i) complete modeling of surface water flows resulting from changes to groundwater discharge in the 2022 FWMP using the USGS GSFlow model, ii) detailed analysis of the thermal impacts resulting from the changes in flow using the QUAL2Kw model, iii) analysis of changes in flow and temperature, employing both GSFlow and QUAL2Kw in 7 specific spring locations requested by ODFW, iv) further detailed thermal modeling of specific locations around springs in Whychus Creek, v) an analysis of the effects on fish habitat in each of 3 water ways, followed by a Comprehensive Summary of the 2022 FWMP as it

³ The Board notes that the Tribe argues that its Treaty consideration requires a species-by-species analysis. Our job is not to adjudicate the Treaty but to make findings related to our code and the Treaty, which is address in further detail under Remand Issue 3.

⁴ In contrast, Thornburgh's 2022 FWMP results in reduced temperatures.

⁵ The modeled negative impacts are so small as to be immeasurable and of no biological significance and are far less than the 0.1 degree increase that was previously determined to meet the standard when it approved the 2008 FWMP.

pertains to fish habitat. In addition to his conclusions on the entire plan quoted above, Dr. Caldwell assessed the individual streams reaching the following conclusions on each:

Deschutes River: *"Overall, the combined effects of planned groundwater pumping and mitigation appear to be a net benefit for both habitat quantity and quality within the Deschutes River, throughout the vast majority of the irrigation season."*

Crooked River: *"Overall, the combined effects of planned groundwater pumping and mitigation appear to vary seasonally within the Crooked River. During the spring and fall, a net impact is expected for fish habitat quantity and a net benefit for fish habitat quality. During the summer, a net benefit is expected for fish habitat quantity and a net impact for fish habitat quality."*

Whychus Creek: *"Overall, the combined effects of planned groundwater pumping and mitigation appear to be a net benefit for both fish habitat quantity and quality within Whychus Creek, throughout the vast majority of the irrigation season."*

Little Deschutes River: *Overall, the effects of planned groundwater pumping and mitigation appear to be one of a habitat quantity benefit throughout the irrigation season, and variable, very small impacts or benefits to habitat quality that vary throughout the irrigation season.*

Dr. Caldwell's report was submitted during the open record period. No party submitted a scientific response prepared by a biologist during rebuttal to rebut Dr. Caldwell's report. No party provided persuasive evidence to rebut his findings.

According to the science and technical reports, we find there is no scientific or biological significance in the projected impacts⁶ under the 2022 FWMP and, as a whole, the plan provides benefits to habitat for fish and aquatic species. Therefore, we find that the 2022 FWMP, as adjusted related to compliance measures related to future groundwater rights, meets the No Net Loss Standard of DCC 18.113.070(D).

Remand Issue #1: Compliance and Reporting Provisions for Future Groundwater

A. COMPLIANCE PROVISIONS:

Petitioner Bishop argued at LUBA that the 2022 FWMP groundwater rights compliance provisions for future rights are inadequate to support a conclusion that the 2022 FWMP will result in no net loss to fish habitat. The compliance provisions in the FWMP for a Point of Diversion (POA) for groundwater right found in Section D – 1(a) say:

POA - Groundwater: For any future rights that may be acquired, compliance occurs upon the cessation of pumping of the rights and along with any of the following: deed evidencing the transfer of ownership, a submittal to OWRD of any of the following: (i) an assignment of the

⁶ Substantial evidence shows that virtually all flow and temperature changes, while mostly beneficial, are too small to measure with equipment currently available. Even ODFW notes that impacts to the Crooked River, for example, are "noise."

water right to Thornburgh, (ii) an application that seeks OWRD approval of a transfer to pump at the Resort property, or (iii) a cancellation in-lieu of mitigation. **Rec. 77, FWMP.**

LUBA agreed with Bishop and remanded the compliance section of the FWMP stating:

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.

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.

See LUBA Pg. 64-65.

On remand, Applicant agreed the compliance provisions in Section D-1(a) pertaining to any future groundwater purchase that may be made allowing for a “simple submittal” of an application to OWRD⁷ would not ensure continual compliance with the No Net Loss standard. A simple submittal to OWRD of an application to transfer, or a cancellation in lieu may not work because the submittal itself would not ensure the Applicant owned or controlled the water right. For example, Thornburgh could agree to buy a future water right, get the owner to stop pumping from it, and file an application to transfer the rights to Thornburgh. Those steps do not prohibit the seller from beginning pumping anew under that permit, at least until the transfer was approved.

Because of that potential loophole, Applicant proposed changing Section D-1(a) of the FWMP addressing future groundwater rights purchases to reorder the flow of the document. Instead of only requiring “submittal” of an application to OWRD where applicable, this Section now requires “approval” of the application as follows:

- b. POA - Groundwater: For any future rights that may be acquired, compliance occurs upon the:
 - 1. cessation of pumping of the rights, along with any of the following:
 - 2. **a** deed evidencing the transfer of ownership, **or:**
 - 3. **an assignment of the water right to Thornburgh, or;**
 - 4. **an submittal approval from** ~~an submittal~~ **approval from** to OWRD of any **either** of the following:
 - i. ~~(i) an assignment of the water right to Thornburgh,~~ an application that seeks OWRD approval of a transfer to pump at the Resort property, or
 - ii. ~~(iii)~~ **(ii)** a cancellation in-lieu of mitigation.

⁷ As shown above this does not apply to the existing groundwater rights as Applicant already provided pumping records, photos, and affidavits of use to solidify reliability of prior use. **See LUBA Pg. 50.** Put more simply, no party previously challenged that the existing rights listed in the 2022 FWMP were compliant and the compliance provisions only pertained to *future* water rights.

The Board finds that this revision addresses LUBA's concerns and will ensure compliance with the FWMP language for groundwater permits acquired in the future, ensuring their ownership and control and ensuring that the water is left in the aquifer.⁸ It is important to note that future groundwater permits are not needed to comply with the 2022 FWMP because the existing rights in the FWMP already meet the standard, being found to fully mitigate (with the listed surface water rights) all impacts of Thornburgh's pumping up to the maximum of 1,460 acre-feet (AF).

The Applicant anticipates that the resort may use future groundwater rights to meet additional supply needs (not FWMP mitigation) to pump up to the full amount of 1,460 AF (if that amount is required). If the Applicant chooses to change any of the listed groundwater rights and use anything other than the listed groundwater rights for FWMP mitigation, that change will require a new public process. A condition of approval is included in this Decision to that effect. Any such modification must be permitted as a modification to the FMP and will be processed in the same manner as the modification approved in this Decision.

Findings and Response to Compliance Comments:

Argument: Opponents and the Tribes object to the proposed change, claiming that it reduces the efficacy of the plan, stating:

Applicant's 2025 FWMP submittal on remand to re-write its mitigation plan disrupts LUBA's reasoning as to multiple challenges. **Bragar 1: May 21, Pg. 11.** And:

Applicant may not amend the 2022 FWMP because it would "substantially alter the proposal" and have "significantly greater impact" on the Tribe. And: Applicant seeks to remove even the submittal of an application to OWRD as a necessary component to comply with the No Net Loss standard. **Tribes May 21, Pg. 6.**

Finding: We are not persuaded by these comments because they overlook the plain language of the 2022 FWMP that states, "along with any of the following" shown in blue below. This included options for submittal to OWRD but did not require approval in any instance. Because of this, and for the reasons noted above, the revision required in this Decision strengthens the FWMP by requiring OWRD approval instead of a simple submittal.

The language highlighted in blue states: **along with any of the following**... meaning compliance requires pumping must cease, and then provide any of the following items from the list that included;

- i) a deed evidencing transfer of ownership,
- ii) submittal to OWRD of **any of the following**:
 - a) an assignment of the water right,
 - b) of an application to transfer to the resort, or
 - c) a cancellation in lieu.

⁸ Reporting requirements also ensure that the water remains for fish mitigation. The Board adopts the template submitted by Applicant for such reporting.

Because there was no coordinating conjunction, Bragar disagreed with what the language says, and instead urged us to rewrite the language of the compliance measures, stating:

The 2022 FWMP compliance provision stated, "[c]ompliance occurs upon the cessation of pumping of the rights and along with any of the following: deed evidencing the transfer of ownership, a submittal to OWRD of any of the following: (i) an assignment of the water right to Thornburgh, (ii) an application that seeks OWRD approval of a transfer to pump at the resort property, or (iii) a cancellation in-lieu of mitigation." CR-77.

The 2022 FWMP could not have meant what Applicant DeLashmutt wants it to have meant. The 2022 FWMP did not use a coordinating conjunction such as "or" that would connect the two clauses "deed evidencing the transfer of ownership" and "a submittal to OWRD" indicating that they would be independent from one another. The only time this compliance provision used a coordinating conjunction was in the clearly separate list relating to which OWRD submittal would be made as highlighted in green above. **Bragar 1 – Pg. 13.**

Applicant responded that Bragar's interpretation would rewrite the clear language in a manner that effectively eliminates the actual words, along with any of the following, and would add words that do not appear such as: any **combination** of the following, any **group** of the following or, any **couple** of the following. That is not what the language says. The FWMP simply says, along with **any** of the following.

The Board agrees with the Applicant and accepts its interpretation of its own FWMP document.

Argument: The Tribe argued the FWMP may not be modified to require the additional measures requested by Applicant. In the Tribe's view, DCC 22.34.040(B) only permits modification if it would not substantially alter or impact surrounding neighbors. The Tribe argued that the update is "even less protective of fish resources."

Finding: The Tribe's argument is not persuasive. It does not adequately explain how revising the requirement from a simple submittal to an approval is less protective. The Board finds that the revised requirement will increase protective measures. As a result, we find there will not be no greater "impacts" resulting from the stricter requirement. We find that the proposed modification does not effectuate a substantial change.

That the Applicant proposes a change to require OWRD approval for future groundwater purchases does not change the underlying use of water, or the fact that the existing water rights in the 2022 FWMP were found to provide a net benefit to habitat quantity and quality without any benefits provided by future groundwater purchases. Future water rights are not required for FWMP mitigation but may be sources the Applicant may pursue use to allow it to pump the full amount of 1,460 acre-feet. The entirety of the FWMP groundwater mitigation is already being provided by the existing groundwater rights. The Board finds that the change does not result in greater impacts, and that the Applicant is not modifying the FWMP by suggesting the Board add a condition of approval responsive to the LUBA remand.

The BOCC has previously considered the scope of the term “surrounding” in this proceeding and determined that it does not relate to all water users within the basin. It is a much smaller geographical boundary and relates only to adjacent properties. This is a settled issue.

B. REPORTING REQUIREMENTS STRENGTHENED.

Regarding Applicant’s reporting procedures, LUBA found:

Thornburgh does not argue that the reporting requirements in the 2022 FWMP are sufficient to demonstrate no net loss, and we do not see that they are. The required report might show that the quantities and quality of water assumed in the 2022 FWMP have been provided, or it might not. **See LUBA Pg. 64.**

To the extent Applicant did not argue the reporting in the 2022 FWMP was sufficient to demonstrate no net loss, it did so in this remand (See Thornburgh letter May 28, Pg. 10 & 11). Applicant has also requested we include a condition of approval in this Decision to require the reporting be completed on the specific form below. When filled out, the completed form will show whether and in what amounts, and exactly what water has been provided to meet the No Net Loss standard.

31-Dec-24																	
THORNBURGH MITIGATION REPORT				#1 Status: Pumping, Deed, Transfer			#3		#4A	#4B	#4C & 7	#6	#5A - Annual Benefit	#5B - Cumm. Benefit		#8	
#	Water Right	Cert or Permit #	Acre-Feet Certificate	Pumping Stopped	Deed, Order or Assignment	Transfer #, Status, Date	Gallons Pumped	Acre-Feet Pumped	AF left in Ground	AF left in Stream	AF OWRD Mitigation or Credits	AF Drought Relief	Ann Benefit (Acre-Feet)	Ann Benefit (Million Gallons)	Benefit (Acre-Feet)	Benefit (Gallons)	Status: Exempt Wells
1	Tree Farm	G-13965	327.5	2021	2021												
2	Big Falls Ground	C-87758	18.9	2022	2022												
3	Big Falls DC Grnd	C-96190/2	614.8	2021/2022	2021/2022												
4	Dutch Pacific	C-89258	49.5	2019	2019												
5	LeBeau Surface	C-90239	200.0	2021	2021												
6	TSID Mitigation		106.0		2012												
7	DRC Mit Credits		6.0		2013												
8	Pinnacle Permit	G-17036	2,129.0														
Total			3,452				-	-	-	-	-	-	-	-	-	-	

The report shows the amount of water pumped in both gallons and acre-feet (#3), the acre-feet of water left in the aquifer (4A), in stream (4B), and; the acre-feet provided in mitigation credits. It also shows the annual benefits derived from #4 - #3 in acre-feet and gallons (#5A), and the cumulative benefits for AF and gallons as well (5B).

The Board finds that, with the Applicant’s requested change and clarification, the resultant reporting will show whether, and to what extent the quantities and quality of water assumed in the 2022 FWMP have been provided. We find that, by including this requirement as a condition of approval, this is sufficient to provide adequate reporting and to meet the No Net Loss Standard of DCC 18.113.070(D).

C. Response to Comments Related to Water or Plan Efficacy.

Argument: The use of any such authorized water for mitigation must mean that the water is permanently protected from other water use to mitigate the proposed resort's own impacts. This has been amply described by Petitioner Gould in the record and her water rights counsel, Mr. Anuta, as well as by ODFW. **Bragar 1, Pg. 12.**

Finding: This claim was made in the original proceeding and was denied. It was then made in front of LUBA, who noted:

Petitioners argued to the county that the only acceptable method to ensure fish habitat mitigation water to meet the no net loss standard is transferring the water rights to instream water rights. That is because other methods allow junior users to pick up and use the water.

See LUBA Pg. 46.

LUBA denied the issue on appeal. It is settled and barred from being raised again. It is also outside the scope of the remand. Nevertheless, we find there is substantial evidence in the record that disputes this claim including:

1. Average annual recharge to the ground water systems in the upper basin is estimated by the United States Geological Survey (USGS) to be about 2.7 million acre-feet. This is the equivalent of 3,800 cubic feet per second or 2,45 billion gallons per day. **See Rec. 13095**
2. Annual withdrawals from the aquifer are only about 45,000 AF (**Rec. 1037, Phil Chang article**) which logically calls into question why anyone would grab it when it was already there.
3. Grabbing water would be illegal and a violation of a water rights permit (**Rec. 745**), and;
4. The watermaster has not regulated any groundwater or surface water rights off which means enough water exists for all water rights (not storage), even the junior holders. **See LUBA Pg. 47.**

The Board finds this issue is settled and is outside the scope of the remand and is devoid of factual and legal merit.

Argument: "ODFW clearly describes the biological implications that would occur if actual water does not actually remain to support fish and wildlife habitat, for example, if the full certificated right were not available." **See Bragar-1, Pg. 11.**

LUBA noted:

ODFW argued to the county that the water rights Thornburgh listed and relied upon in the 2022 FWMP were not sufficiently reliable to meet the no net loss standard because the record did not demonstrate that the full amount of water under the water rights listed in the 2022 FWMP and relied upon for Thornburgh's modeling "have been consistently used in full in the recent past." Record 1827.

And:

The county rejected that argument and found that "Thornburgh has provided substantial evidence of pumping records, aerial photos, [and] affidavits of use for individual water rights

that indicate substantial use and that rights will provide actual benefits to impacted waterways." Record 30. **See LUBA Pg. 50.**

The Board finds that this issue is settled and barred by *Beck v. City of Tillamook*, 313 Or 148 (1992)(*"Beck"*). It is also outside the scope of this remand.

Remand Issue #2: Updated Economic Analysis

A. OVERVIEW OF ISSUE AND ECONOMIC ANALYSIS

As part of our approval of Thornburgh's CMP in 2005, Thornburgh provided an economic analysis of the fiscal impacts to Deschutes County from its planned development, which included 3 championship 18-hole golf courses, practice facilities including; a par 3 short course and driving ranges. The 2005 analysis, conducted by Peterson Economics, concluded that the Thornburgh Resort would provide overwhelming fiscal benefits to the residents of Deschutes County. The Board determined Peterson's analysis was credible and found compliance with DCC 18.113.070(C). The 2022 FWMP application eliminated the option to build one of three 18-hole championship golf courses. Opponent Paul Lipscomb argued that eliminating one 18-hole golf course would affect the economic findings the County made regarding DCC 18.113.070(C) in its CMP approval. LUBA summarized the issue stating:

Lipscomb argues that the proposed **change to reduce the number of golf courses is a substantial change** to the resort development that materially affect the facts **underlying the resort's economic analysis** that the county relied upon to find that DCC 18.113.070(0) is satisfied in the CMP approval. We agree for reasons explained immediately below.

Lipscomb argues that the economic benefit of developing and operating the resort with fewer golf courses is not explained in the record. Thornburgh provided no updated economic analysis. Based on the prior economic analysis, Lipscomb estimates the resort will lose 39 golf course related jobs and points out that reduced golf facilities may also impact other resort employment and economic stimulation from the resort.

The economic analysis concluded that the golf courses would be an important source of new jobs with a total of 125 newly created jobs and 3.9 million dollars in employee compensation. Record 10588. The county found that the resort "will generate a large number of full-time positions that will have a positive effect on the Deschutes County economy." Record 11691."

LUBA Pg. 71-72.

We agree with Lipscomb that the 2022 FWMP abandonment of golf course facilities is a substantial change that impacts 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.

LUBA remanded the issue to the County to address this issue. LUBA agreed that the removal of one golf course from the 2022 FWMP was a change that would materially affect the county's findings that DCC 18.113.070(C)(3) and (4) are satisfied, and that:

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 Pg. 74 - 75.

And;

"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." Emphasis added. **LUBA Pg. 80.**

Lipscomb argued that eliminating one golf course would cause a reduction in employment, and that the County must assess whether that change would change the economic findings the county arrived at based on the 2005 economic report. LUBA agreed that further economic analysis was required and remanded for that analysis.

Applicant retained John Burns Research and Consulting, Inc. (JBREC). JBREC, founded in 2001, is one of the leading real estate and development research and consulting firms in the United States. JBREC provides detailed analysis on the housing industry, doing roughly 1,000 studies per year for new housing in the United States, many for the nation's largest home builders and developers. Chris Dorociak, Sr. Vice President, has over 20 years of experience doing research and consulting for residential housing and has completed over 500 significant real estate consulting assignments. **See JBREC Response, Pg. 10 and Applicants Final Argument, Pg. 6.** Because of the depth of experience, the Board finds the materials provided by JBREC to be credible.

Project opponent Annunziata Gould retained Kevin Cahill, Ph.D. to respond to the JBREC Report. While Dr. Cahill does have a Ph.D. in economics, and a depth of expertise with aging and retirement related subjects, the materials he submitted evidence a lack of experience with real estate sales or values, destination resorts, golf or hospitality, or any specific element relevant to this remand. The Board finds the JBREC materials more reliable and more persuasive because JBREC's experience and credentials on the subject matter are specifically related to the areas of study required for analysis of economic impact of the Resort on Deschutes County.

Thornburgh's original economic analysis provided by Peterson Economics (the "Peterson Report"), addressed development of the resort and its: a) economic benefits based upon employment levels and compensation, b) increased tax revenue, c) demand for public services, d) need for employee

housing, and e) loss of resource lands. See: Rec. 11691, BOCC CMP Decision. The JBREC report assessed similar elements.

Employment:

The Peterson report found Thornburgh would create 1,458 new full time equivalent (FTE) jobs per year with average annual compensation of \$67.2M annually, totaling \$803 million over a 12-year period. **See Rec. 12000, Peterson Report.** The JBREC report noted:

The Economic Benefit Study by Peterson Economics in 2005 showed total new compensation peaking at \$95.0M in 2010 (due to construction jobs) and stabilizing at \$85.4M by 2015. For perspective, the median household income in the Bend MSA has increased 102% since 2010 and 75% since 2015. Demonstrating current dollars, a conservative 50% increase to the Peterson Economics estimates equates to a peak of \$142.5M, stabilizing at \$128.1M. **See JBREC Report May 7 Pg. 10.**

The JBREC report conducted a detailed analysis of golf operations and the projected changes to employment estimates that may result from the elimination of the 2nd golf course. JBREC estimated payroll by evaluating job postings at Central Oregon's golf courses, interviewing local and regional golf course management, and reviewing IRS 990 documents from Oregon golf clubs.

JBREC assessed the impact to employment resulting from eliminating one 18-hole golf course from the south side of the project. JBREC determined employment would be reduced by 24 jobs with annual payroll of \$859,090. As noted in the DeLashmutt letter of May 7, 2025, Peterson estimated peak employment during construction of 2,074 jobs. Deducting the 24 jobs eliminated from removal of the golf course would still yield peak employment of 2,050 jobs. Elimination of a single golf course and the corresponding reduction of 24 jobs with payroll of \$859,090 is 0.6% of the peak employment (\$142.5M), and 0.7% of the stabilized employment (\$128.1M). **See JBREC Report May 7 Pg. 10.**

The Board finds that the reduction in employment that may result by eliminating a single golf course is insignificant and does not affect the Board's findings from 2005. The Board therefore finds that a reduction by one golf course does not require updated findings related to DCC 18.113.070(C)(3) and (4). The Board further finds that Thornburgh's FMP, even as modified, continues to demonstrate that it will provide a significant financial benefit to the County throughout the lifetime of the resort. Because the Resort will provide substantial financial benefit, we find that this benefit outweighs the loss of resource land if the Resort was never developed or approved.

B. RESPONSE TO SPECIFIC EMPLOYMENT RELATED ARGUMENTS

Argument: Cahill notes some confusion in the JBREC Report regarding the number of golf courses analyzed. Cahill states, "To the extent that the JBREC Report conflates its defined "Current Plan" (three courses) with the "Prior Plan" (four courses), the JBREC Report does not provide a reliable economic analysis of the three-course plan." **See Bragar- 1, Cahill, Pg. 8.** Bragar also claims the Applicant is introducing two additional golf courses.

Finding: The Peterson report says:

According to current plans, the Pinnacle will be developed to include:

- A high-quality 18-hole regulation-length golf course and clubhouse;
- An 18-hole par 3 golf course;
- According to current plans, The Tribute will be developed to include:
- Two high-quality 18-hole regulation-length private golf courses and a clubhouse;

See **Rec. 11991-12013, Peterson 2005.**

The economic results in the Peterson Report, as noted by Lipscomb, studied those 4 golf courses with LUBA noting:

The county relied upon an economic analysis that was based on a total of four golf courses. Record 11690-92, 10520, 10524, 10583, 10588.

And:

Lipscomb mentions the Benefit Study submitted as part of the CMP application in 2005, which analyzes economic viability off of four golf courses, as part of their argument regarding DCC 18.113.070(C). Lipscomb's Intervenor-Petitioner's Brief 27-28.

The Board finds there is no ambiguity in the JBREC Report. Page 3 clearly describes two plans, the Current Plan and the Prior Plan. The Current Plan has one 18-hole regulation-length golf course on the south side of the Subject (plus a par-3 course and an 18-hole regulation course on the north side). The Prior Plan had two 18-hole regulation-length golf courses on the south side of the Subject (plus a par-3 course and an 18-hole course on the north side).

The scope of JBREC's analysis included the employment and housing impacts of the change between the two plans, the original plan with four golf courses (three-18-hole regulation length courses and one par-3 course) and the revised 2022 plan that eliminates a single 18-hole golf course for a total of three golf courses (two 18-hole regulation-length courses and one par-3 course) or. The JBREC Report dated May 5, 2025, summarized those impacts. **See JBREC Response, Pg. 6.** The Board rejects opponents' arguments that the Applicant is adding any additional golf courses.

Argument: Cahill comments that the 24 jobs lost by eliminating the golf course did not account for indirect and induced jobs.

Finding: The Board finds that Peterson had noted the ratio of including indirect and induced jobs increases the total by 1.2 times (See Rec. 12004). Applying that ratio to the 24 jobs eliminated would increase that figure to 29 jobs. There will be a corresponding increase in the amount of payroll to be eliminated to account for the indirect jobs lost. The Board finds that, even including loss of indirect and induced jobs, the result is still insignificant in relation to the substantial job creation and payroll numbers noted above through development of the Resort as a whole and as planned – or modified to remove a single golf course.

Argument: Comments by Cahill, Dorsey, and Bragar about low resort wages.

Finding: JBREC stated:

As a conservative approach, JBREC uses minimum wage estimates for Landscapers, General, Carts and Range, and Part-Time Attendants. **See JBREC Response May 28, Pg. 8.**

JBREC noted they employed a conservative approach in the adjustment of Peterson's overall payroll estimates. Instead of increasing the 2010 peak payroll by 102%, or the 2015 stabilized payroll by 75%, both of which were warranted, JBREC utilized a conservative increase of 50%. The net result was to understate the benefits being provided by Thornburgh job creation. If the actual increases (102% & 75%) and the higher wages were used for this purpose as Bragar or Cahill advocate, it would show Thornburgh providing even greater payroll benefits than those that JBREC stated, \$191.9M and \$149.45M respectively.

The Board finds the benefits to the local economy provided from job creation at Thornburgh are significant and substantial, with or without the second golf course, even at the wages stated. Wages at Thornburgh will be what the market will dictate to attract and retain staff. If they are higher than the estimates in the JBREC report, the employment benefits of the Resort will be even greater.

Argument: The JBREC Report's payroll estimates differ materially from those in the Peterson Report. **See Bragar-1, Cahill-A20, Pg. 9.**

Finding: JBREC responded to this stating the similarity between the \$3.6 million estimated in the JBREC report and the \$3.7 million estimated in the Peterson Report is coincidence. Because JBREC completed an independent evaluation, we noted this coincidence for the reader's benefit. **See JBREC Response, Pg. 7.** The Board finds opponents' argument unpersuasive.

Argument: "Adjusting for inflation using the Employment Cost Index (ECI), and considering four golf courses, the Peterson Report estimate is \$6.5 million (in 2025 dollars) compared with the JBREC Report's estimate of \$4.5 million (also in 2025 dollars)." **See Bragar-1, Cahill-A21, Pg. 9.**

Finding: JBREC responded, saying: The Peterson Report already incorporates inflation, and Cahill double-counts inflation by applying the Employment Cost Index (ECI) from 2005 (Peterson Report date) through 2013 (golf stabilization). The \$3.7 million payroll estimate in the Peterson Report appears when golf operations stabilize in 2013. Adjusting for inflation from 2013, not 2005 (the date of the study), places total payroll at \$5.5 million in current dollars, not \$6.5 million. **See JBREC Response, Pg. 7.** The Board finds any difference insignificant in the context of Thornburgh's overall employment and payroll.

Argument: A 30 to 45 percent reduction in payroll is not "a similar amount" to the Peterson Report, as the JBREC Report claims. **See Bragar-1, Cahill-A22, Pg. 9.**

Finding: JBREC responded, noting Cahill's comparisons are based on his own calculation error and are overstated. **See JBREC Response, Pg. 7.** The Board agrees and finds opponents' argument unpersuasive.

Argument: "Defining jobs as an FTE can be appropriate in many contexts. In the case of the Thornburgh Destination Resort, though, where staffing needs are translated into housing needs (see below), stating jobs in terms of FTEs can be misleading and misguided because one FTE is not necessarily equivalent to one person." **See Bragar-1, Cahill-A24, Pg. 10.**

Finding: JBREC notes that they use FTE because it is a standard convention for measuring job creation. Distinctions of how many individuals compose an FTE were outside the scope of JBREC's analysis. JBREC grouped seasonal and part-time work in the categories of Landscapers, General, Carts and Range, and Part-Time Attendants. For these categories, JBREC stated that they surveyed managers of golf course maintenance and operations in Central Oregon. Surveys informed JBREC's estimate that 10% of this labor derives from outside the area, while 90% is sourced locally. This estimate appears on Page 15 of the JBREC Report. **See JBREC Response, Pg. 7.** The Board finds the estimate is reasonable and notes that Peterson used the same standard in the 2005 report. Opponents' argument is unpersuasive.

Argument: The JBREC Report fails to address how their FTE metric translates into staff counts, annual hours worked per staff member, or annual compensation per staff member. **See Bragar-1, Cahill, Pg. 10**

And:

Argument: Cahill claims: "The JBREC Report's employment projections for the Thornburgh Destination Resort include 46 FTE minimum wage workers. Not only is it unclear where the supply of these minimum wage workers will come from but left unexamined is the impact to other tourist driven businesses in the County that, absent migration, compete for the same supply of workers." **See Bragar-1, Cahill, Pg. 11**

Finding: JBREC responded to these arguments by stating that JBREC uses minimum wage estimates as a conservative approach, for Landscapers, General, Carts and Range, and Part-Time Attendants. Page 15 of the JBREC Report shows estimates of the percentage of these workers from inside and outside the local area. JBREC estimates that 10% of this labor derives from outside the area, while 90% is sourced locally. If Thornburgh competes with other tourist-driven businesses, local wage growth can result. **See JBREC Response, Pg. 8.** The Board finds that JBREC's analysis is reasonable and that opponents' arguments are unpersuasive.

Argument: Bragar claims that with no water pumped at the resort there will be no employment opportunities... Bragar claims Applicant cannot use a drop of water.

Finding: The Board finds this argument is outside the scope of remand. Bragar cites to an article by Oregon Public Broadcasting (OPB) which relies on third party information, and a chart Bragar provides, that summarizes what Bragar hopes to be true. The Board finds that neither source is

reliable as to questions of water availability, and that the arguments nevertheless are outside the scope of remand.

Argument: Bragar claims that the Applicant must address the cost of water to Bend, Redmond, and Sisters, that a decision on a Limited License case was adverse, and that wells are declining in the area.

Response: The record includes many pages of similar arguments related to water (e.g. Bragar 1-Pg. 25-27). However, none of these arguments are related to the issues on remand—how the reduction of one golf course changes the underlying economic benefit assumptions of resort development. To the extent a reviewing body determines that water issues relate to economic benefits, we find that the Resort’s proposed use of less water as set forth in the 2022 FWMP, will be a beneficial change.

a. Tax Revenue

Peterson estimated residential property values at Thornburgh to total \$1,510.3M at stabilization in 2016 and that property taxes would be \$20.9M at that time divided between: schools (\$8.1M), fire department (\$3.5M), public bonds (\$2.8M), sheriff (\$2.6M), County Government (\$2.1M), County library (\$882K), parks and rec (\$596K), 9-1-1 services (\$404K) and the Redmond library (\$125K). Those estimates did not include commercial, and developer-owned assets, that would add about \$1.3M. Excluding the estimated property tax of \$75,297 attributed to the value of the eliminated golf course, tax revenues for the commercial assets would still net about \$1.2M. This amount added to the \$20.9M Peterson estimates, yields just over \$22M/yr. Elimination of one golf course would account for 0.3% of the total property tax revenue estimated in the Peterson report. **See DeLashmutt May 7 letter, Peterson Table, V-17 & V-18.**

JBREC also adjusted the values attributed to the residential units, increasing the 2016 Peterson residential value of \$1,510.3 upward to account for inflation, resulting in a total residential value of \$2,854.5M. That would generate property tax revenue to the County of \$47.5 million per year, which is over 1,000 times greater than the current property tax on the Thornburgh property of \$38,619. **See JBREC Report, Pg. 10.** The \$47.5 million in estimated taxation is more than double the \$22M noted in the 2005 report.

The Board finds the removal of a single golf course will result in an insignificant reduction in property tax revenue based upon the estimated significant tax revenues that will be generated by the Resort, and the significant increase over the 2005 report.

Findings to Specific Taxation Related Arguments

Argument: Cahill claims tax revenues are overstated.

Finding: Applicant responded that Cahill did not make an argument about the amount of tax received but argued about the cost of providing public services to Resort residents. To the extent Cahill did claim taxes were overstated on May 2⁸, 2025, the Applicant provided additional evidence

on estimated transient room taxes showing that the JBNREC report had understated taxes by nearly \$1.3M annually by not including transient room taxes.

The Board finds that Cahill's claim that taxes were overstated is unsupported by evidence. The Board also finds Applicant's information on transient room taxes is credible and shows that tax revenue estimates were understated.

Argument: Cahill questioned JBREC's use of their own proprietary Home Value Index instead of using more readily available and accepted data like the Case Schiller Home Price Index produced by the Federal Reserve Bank of St. Louis.

Finding: Cahill did not provide any persuasive argument in support of the use of Case Schiller data, why it would be better, or how by using one of the Case Schiller indexes the results would be different or more reliable. JBREC is one of the leading Real Estate research and consulting firms in America and regularly provides analysis like the reports in this record. It maintains detailed information on hundreds of markets in the United States so that it can provide detailed current market data on housing prices and activity in each of those markets. That JBREC has its own proprietary home price indexing tools on hundreds of markets is indicative of its depth of knowledge and experience in this matter. The BOCC finds JBREC's use of their own proprietary data reasonable and credible.

b. Demand for Public Services

In its 2006 report, Peterson estimated there would be little demand on public services from Thornburgh's residents and guests and that Thornburgh would generate significant tax revenue surpluses for local schools, police and fire departments, and other local government services, which is typical of upscale, second home resort communities. The Peterson Report found that Thornburgh would generate massive increases in property tax revenues while placing few new students in local public schools and placing only modest burdens on local police and fire departments and other public agencies (as most new property buyers are affluent second-home or retirement buyers and many services are provided on-site by the Homeowner's Association). **See Rec. 11992.** In the Board's decision approving the CMP, we found Peterson's conclusions to be credible and noted the condition was met. **See BOCC CMP Decision, May 10, 2006, Pg. 60.**

JBREC concurred with Peterson (Rec. 11992 and 11993) that Thornburgh Resort and similar projects will generate net benefits to the region, "placing few new students in local public schools and placing only modest burdens on local police and fire departments and other public agencies..." **See JBREC Responses Pg. 11.** The evidence from both professional real estate consulting firms states that Thornburgh will provide massive tax revenues while creating very little burden on public agencies, a finding the BOCC found credible in 2006. We again find this evidence credible in this Decision.

The issue at hand is not whether the Thornburgh Resort is consistent with DCC 18.113.070(C)(3) & (4), because those findings were already made in 2006. The issue is whether the criteria will continue to be met with the elimination of one proposed golf course. Nothing in the record shows

directly or indirectly, that the elimination of one golf course as proposed by the 2022 FWMP will create any greater need or demand on public services. The Board finds that that it will not.

Findings to Specific Public Service Related Arguments

Argument: Bragar commented that for every dollar of tax receipts from Thornburgh properties directed to schools there is a 1:1 reduction to what Redmond Schools gets from other sources.

Finding: Applicant asked Dr. Charan Cline, Superintendent of Redmond Schools about how much of the property tax paid within the Redmond School District for school funding stayed in the district to fund Redmond schools. His response was **all of it**. Therefore, we find that 100% of the estimated \$22.6M dollars in property taxes that will be paid annually from Thornburgh homes to fund Redmond Schools, will stay in the Redmond School District. Any shortfalls are made up from Income Taxes. **See Applicant Letter, May 21, Pg. 4.** The higher the amount of property tax revenue received from Thornburgh properties, the less others will have to contribute to support schools via income taxes.

No evidence was presented to rebut Applicant's evidence that taxation from Thornburgh properties directed to school funding would be approximately \$22.6M annually. Both Peterson and JBREC concluded that future Resort buyers will be mostly of retirement or pre-retirement age or will be buying vacation or second homes. JBREC noted the average age of buyers at Brasada Ranch is 58, Eagle Crest: 67, and; Black Butte Ranch: 70. **See JBREC Response Pg. 11.** In any case, few children are expected to attend school from Thornburgh.

Peterson estimated there would be 2.6 school age children per 100 homes, based on a summary of Black Butte, Eagle Crest and Pronghorn. **See Peterson Excerpts Submitted by Applicant May 7, Pg. 3.** That would equate to 25 students attending Redmond schools from Thornburgh's 950 approved homes. The cost to educate a child in the Redmond School District is between \$11,000 - \$12,000/year. **See Email from Michael Summers, Chairman, Redmond School Board.** Assuming a conservative cost at the high range of \$12,000/child, it will cost \$300,000 to educate the 25 children estimated to attend Redmond Schools from Thornburgh. Compared to the estimated tax receipts of \$22.6M for school funding that is estimated to be generated at Thornburgh, there will be a surplus of over \$22M per year above the estimated school costs that will be required to educate children living in the Resort.

The Board finds that Thornburgh tax revenues will provide a significant surplus over the cost of the demand for public school resulting from children living in the Resort.

Argument: The property tax revenues estimated for the Thornburgh Destination Resort are vastly overstated because they do not quantify the demand for new or increased levels of public service as an offset." **See Bragar-1, Cahill, Pg. 17.**

And;

Argument: Cahill states the JBREC report highlights tax revenue but fails to identify **any** offset to it. Further, that the revenue comes at a cost, that people visiting Thornburgh, just like current residents, require emergency services, police and fire services, healthcare services, and will increase road maintenance and construction, and will impact congestion, the water supply, the ecosystem, and the environment generally. **See Cahill, Bragar-1, Pg. 18.**

Finding: Applicant responded that these comments overlook all discussion about the school subsidies and disregard the fact that two professional real estate economists have concluded that Thornburgh will place very little demand on public services, which is typical for upscale, communities of this type. Applicant also provided substantial information on how the project will minimize demand on public services, showing that Thornburgh:

- i. will provide extensive services on-site via the HOA and community management,
- ii. roads are private and maintained by the resort,
- iii. is a gated community that will control access onto the property reducing the need for police presence or calls,
- iv. is a Firewise community with strict defensible spaces, and stringent vegetation management that reduces the need for fire services.
- v. will be an active affluent community promoting mental and physical health through a connection to nature. As such Thornburgh residents and guests will have low needs of any public healthcare services.

We note that Cahill's arguments concerning water supply, the ecosystem, and congestion, are all outside the scope of this remand. In an abundance of caution, the Applicant addressed these arguments as follows:

1. Water supply: The evidence shows that any impact on the water supply is minimal as Thornburgh's 2022 FWMP largely replaces any pumping with existing certificated or permitted groundwater rights. Further, the Deschutes Aquifer is vast and dynamic with annual recharge of 2.7 million acre-feet while withdrawals are about 45,000 acre-feet. **See Applicant Letter May 28, Pg. 12.**
2. The ecosystem and environment: While it is unclear what economic situation Cahill is referring to with this comment, the entire 2022 FWMP and related plans in the record support a determination that Thornburgh is a committed steward of the environment. The 2022 FWMP is the reduction of water use from 2,129 AF annually to 1,460 AF, which has been shown to provide a *net benefit* to fisheries habitat. The 2022 FWMP further reduces impacts, eliminates a golf course, reduces proposed lakes, increases the focus on sustainability, and the expansion of natural open spaces.
3. Congestion: Thornburgh is located miles from Bend, Redmond and Sisters. Cahill does not quantify where, how, or why he believes congestion will occur. Given its location, Thornburgh should disperse congestion far more than developments in either Bend or Redmond.

The Board finds each of the above arguments outside the scope of the remand. To the extent a reviewing body determines otherwise, the Board finds Applicant's responses credible and rejects opponents' arguments in this regard.

Argument: Cahill argues that simply hiring people is not necessarily a benefit stating: "For example, if a city were to hire a company to pay people to spread poison around the community, benefits would exist in terms of the wages earned by the people spreading the poison. The cost, though—the damage to the community from the poison—would far outweigh these benefits, so spreading poison would not positively benefit the local economy, even though some people would be hired and earn wages to do so." **See Bragar-1, Cahill, Pg. 18.**

Finding: JBREC responded to this stating "Cahill's critique escalates into Argumentum ad Absurdum (Appeal to Extremes), a logical fallacy and curious conclusion for a professional who has been "a doctoral-level economist for 25 years." **See JBREC Response, Pg. 11.**

The Board agrees and rejects Cahill's argument in this regard.

Argument: Applicant does not have current data related to the projected duration of occupancy of the planned-for homes. Despite Applicant DeLashmutt's jumbled testimony about secondary or seasonal use of proposed resort accommodations, resort users will not be living full time at the proposed resort. Instead, the users of this proposed destination resort will come to Deschutes County from elsewhere to stay periodically, as intended—for recreation. **See Bragar-1, Pg. 27.**

Finding: The Applicant states the duration of the home occupancy, and the exact mix of primary homeowners, flex-primary owners, and second homeowners will vary over time, along with the exact mix of age demographics of the buyers, whether retirees, pre-retirees, early retirees, or the mix of where they are in the age spread from 40-75 years old. Even so Bragar argues that resort users *will not be living full time at the proposed resort*, which, if true, there will be zero kids in school, and even lower demands on other public services.

Argument: Applicant's updated economic analysis fails to comply with ORS 197.460(3) requiring individual analysis of impacts to Bend, Redmond and Sisters. **See Bragar-1, May 21, Pg. 19.**

Finding: ORS 197.460(3) governs siting the resort and the approval of its Conceptual Master Plan (CMP). The 2005 Peterson economic report was prepared in order to comply with DCC 18.113.070(C)(3) and (4). These criterion were found to be met. Whether the 2005 Peterson report complied with ORS 197.460(3) is not an issue before the Board and is outside of the scope of remand. Had Bragar or anyone else objected to the efficacy or completeness of the 2005 report in meeting ORS 197.460(3), the time to raise that issue has long since passed.

Argument: Dr. Cahill states "the purported windfall gain with respect to education dollars noted in the Peterson Report is, notably, based on a misunderstanding of how education dollars are distributed within the State of Oregon...." **See Bragar, May 28, Pg. 2.**

Finding: Applicant provided evidence on school funding and the cost of education in the Redmond School District, including information from the Superintendent of Schools, and the Chairman of the Redmond School Board. Cahill offered no contrary evidence.

The Board finds Applicant's information credible and rejects Cahill's argument in this regard.

c. Housing

LUBA directed that, 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. **See LUBA Pg. 75.**

The 2005 Peterson report addressed the need for employee housing across the whole Thornburgh property and determined that housing for peak operations (project wide) would require a total of 140 housing units (**See Rec. 12012**) of which 31 were for employees involved in golf operations. The Board approved the 2005 plan based on the Peterson analysis. In response to the issue on remand, JBREC assessed golf operations as well. With an apples-to-apples comparison of the golf operations that Peterson assessed (3 championship and 1 par 3), JBREC estimated 22 housing units would be required. Excluding one golf course that will be eliminated reduces the housing needs to 18, a reduction of 4 housing units attributed to the changes in the 2022 FWMP, and a total reduction of 13 housing units from 31 to 18, which included savings in efficiencies and design. The Board finds that reducing the need for housing will not place further strain on tight housing supplies.

The Board agrees that reducing employees as a result of the changes to the 2022 FWMP will reduce the amount of employee housing needed. That will not further burden housing supplies.

There were several comments about housing, the tight housing market in Deschutes County, and arguments that the Resort's creation of jobs was negative because it would create the need for housing. In addition to reducing needed employee housing as described above, the Applicant responded that Thornburgh is approved for 950 single family homes that would add inventory to the region, easing market pressures on the critical need for housing. The Applicant cited to the DAS report that shows housing needs in Deschutes County are most severe at the highest income level, the very category that Thornburgh homes will serve. Bragar's comments that the DAS report includes only the housing needs within urban growth boundaries disregards the problem. The Board finds that creation of housing inventory at any level benefits the region, whether inside or outside an urban growth boundary.

Responses to Specific Housing Related Comments:

Argument: The JBREC Report does not quantify indirect or induced impacts. "In the case of Thornburgh, the spending of newly hired staff at the golf course will lead to a ripple effect of

additional economic activity, thereby creating more jobs and potentially bringing more people to the area. These indirect and induced impacts are often touted by those who want to champion the economic impacts of a proposal. In this case, however, with housing impacts being a concern, the JBREC Report does not quantify any indirect or induced impacts associated with the maintenance activities of the golf course." **See Bragar-1, Cahill, Pg. 11**

Finding: The May 5, 2025, JBREC Report states, "Within the scope of this report, JBREC estimates the potential ongoing employment, payroll, and housing impacts of golf course maintenance and operations within Thornburgh Resort." The point of concern was the difference in employment and housing impact of reducing one 18-hole regulation-length golf course (current plan vs. prior plan) from the Resort. Removing an 18-hole golf course would reduce associated housing needs, even if JBREC used a multiplier to estimate indirect and induced impacts. **See JBREC Response, Pg. 8.**

The Board agrees and rejects opponents' arguments in this regard

Argument: The housing impacts analysis understates the housing needs and availability because the JBREC methodology is flawed and unsupported. **See Bragar-1, Cahill, Pg. 12**

Response: JBREC provided significant support for its methodology to assess the housing needs between the current plan and the prior plan. Relative to the prior plan, the current plan removes an 18-hole regulation-length golf course reducing employment by 24 fewer FTEs and a reduction in housing needs of 4 units. While JBREC's project scope did not include estimating indirect and induced impacts, an analysis estimating indirect, and induced jobs would yield a similar result, lower employees and less housing needed. **See JBREC Response, Pg. 9.**

The Board finds the JBREC information credible and rejects opponents' arguments in this regard.

Argument: The JBREC Report implies a .21 ratio between housing needs and jobs while the ratio from Peterson is .25. The JBREC Report provides no explanation for this variation. **See Bragar-1, Cahill, Pg. 12**

Finding: Applicant responded that the numbers of housing units in the JBREC report are whole numbers, that have been rounded up or down. Doing so with a small sample set leads to differences in the implied ratios. The important thing to note is that if JBREC had simply applied a higher ratio, as Cahill suggests, it would show an even greater reduction in needed housing.

The Board finds the JBREC materials credible and rejects opponents' arguments in this regard.

Argument: The JBREC report does not account for seasonal work. **See Bragar-1, Cahill-B, Pg. 13.**

Finding: The JBREC Report states: "JBREC estimated housing demand (of all types) from employees to be hired from outside Central Oregon. Additional housing needs are higher for skilled labor than for unskilled labor, which can be sourced locally." **See JBREC Report, Pg. 9.** While locally sourced,

unskilled seasonal labor does not increase housing, the comment overlooks the issue at hand, that eliminating a golf course eliminates 24 jobs, reducing needed housing by 4 units.

Argument: The JBREC Report does not quantify indirect or induced impacts and as a result the County has no idea how they might exacerbate housing needs. **See Bragar-1, Cahill-C, Pg. 13.**

Finding: The Applicant responded that Cahill overlooks the fact that the change being assessed is the reduction in employment from eliminating a golf course, a change that also reduces the need for housing. While the JBREC Report did not include the indirect or induced jobs related to the reduction in golf employment, doing so would have shown even further reductions in housing needed for employees.

The Board agrees and rejects opponents' arguments in this regard.

Argument: The Peterson report does not account for indirect or induced labor in its housing estimates. **See Bragar-1, Cahill-C, Pg. 14.**

Finding: The Board finds that arguments concerning the Peterson report are untimely. The time to raise such arguments was in 2005 when the Peterson report was approved. Irrespective, the Board finds that accounting for indirect or induced labor in the 2005 Peterson report would not change the result today, with the change in the 2022 FWMP and the elimination of a golf course that housing needs will be reduced.

The Board finds this is outside of the scope of the remand. Alternatively, the Board finds opponents' arguments are without basis and rejects such arguments.

Argument: The JBREC Report's own data shows that housing supply has been low since 2015. Bragar-1, Cahill-D, Page 14.

Response: The Board finds this argument is outside of the scope of remand. Page 26 of the JBREC Report shows facts related to the months of supply in the Bend, Oregon, Metropolitan Statistical Area (MSA). Months of supply increased since 2024, an indicator of easing supply constraints. Cahill refers to colors on the JBREC chart on Page 26. These colors, indicating times of increasing, stable, and falling prices, are standard conventions, not opinions. **See JBREC Response, Pg. 10.**

Argument: The JBREC Report's 2016 benchmark year improperly masks the degree of housing underproduction in the region. Bragar-1, Cahill-E, Page 14.

Finding: The Board finds this argument is outside the scope of remand. Nonetheless, JBREC responded that they use 2016 as a benchmark year to normalize comparisons across all U.S. metros, and to show relative change. The comparison of employment to building permits shows the number of jobs added relative to homes built. This ratio in the Bend MSA has decreased since 2022. **See JBREC Response, Pg. 10.** Applicant acknowledges there is an underproduction of housing in the

region but notes that the 950 homes for which Thornburgh is approved would help to ease the very production issue Cahill refers to. The Board rejects opponents' arguments in this regard.

Argument: The JBREC Report does not account for cumulative impacts in housing underproduction in the region. Bragar-1, Cahill-F, Page 15.

Finding: Housing underproduction is outside the scope of the remand. However, as proposed, Thornburgh would add new homes to the region, a fact Cahill ignores when emphasizing housing underproduction. **See JBREC Response, Pg. 10.** The Board rejects opponents' arguments in this regard.

Argument: The JBREC Report's projections for 2026 through 2028 are inconsistent with data over the past decade. Bragar-1, Cahill-G, Page 16.

Finding: JBREC uses leading indicators to forecast housing market conditions in Bend, Oregon, and the other 100+ metro areas it covers in the U.S. Based upon its observations, it anticipates cooling real estate market conditions following the hot market of 2021-2022. Its forecasts rely on inputs from local consultants, research analysts, and the Director of Research - not simply a one-year extrapolation of data. For these reasons, it was JBREC's opinion that Cahill's speculation of recency bias is unfounded. **See JBREC Response, Pg. 10.**

The Board finds the JBREC response credible and rejects opponents' arguments in this regard.

d. Loss of Resource Lands

As resource lands, the Subject Property as rangeland has little value and it generates annual property tax of only \$38,619. As the Applicant letter of May 7, 2025 explained, the Property is not high value crop land, irrigated pasture or even dryland pasture. It consists of juniper trees and sagebrush. As rangeland, the Property was used for 60-75 days each spring when the Thornburgh's would run cattle in the spring. The loss of resource land is minimal. The Peterson report noted that the Project would remove the Property from its former use as rangeland, but that it would provide an overwhelming financial benefit that would benefit County residents. The change in the 2022 FWMP eliminating construction of one golf course does not affect the amount of resource lands, although it increases the amount of native land that will be left in a natural state within the Project. JBREC stated:

"Transitioning from rangeland to a resort, Thornburgh's fiscal benefits to the community far outweigh its value as resource land." **See JBREC Report, Pg. 11.**

The Board agrees and rejects opponents' arguments on this issue.

Responses to Specific Comments Related to Resource Lands.

Argument: Bragar states Applicant must analyze how its proposed water use will impact the outdoor recreation industry. **See Bragar-1, Pg. 25**

Finding: The Board finds this argument is outside the scope of remand. This remand requires consideration of economic impacts resulting from eliminating one golf course. Bragar overlooks the key fact that the 2022 FWMP reduces water use by one-third over the original approved water usage. The 2022 FWMP has been shown to benefit the streams and rivers and to provide a net benefit to the fisheries resource. Applicant's letter of May 7, 2025 and the JBREC Outdoor Memo demonstrate that Thornburgh will provide extensive outdoor activities and amenities and will offer a range of other outdoor adventures and experiences to its guests and owners.

Argument: Bragar claims that pumping at the resort would likely cause problems for wells in Redmond and nearby Eagle Crest Resort. **See Bragar-1, Pg. 25.**

Finding: The Board finds this argument is outside the scope of remand. The 2022 FWMP is about the elimination of a golf course and other changes that reduce the use of water by the resort by 33% or more.

Argument: The Applicant continues to lean on the outdated 20-year-old Peterson report to support the claims that the resort will be economically beneficial. **See Bragar May 28, Pg. 1.**

Finding: The Peterson report is the same report that Lipscomb submitted as evidence in the prior proceedings. The Board rejects this argument.

Argument: Lipscomb claims the Tribe has not agreed to Thornburgh transfers and absent that agreement, or a finding that no tribal rights will be injured, OWRD cannot approve those transfers. **See Bragar-1, Pg. 22-23.**

Finding: The Board finds this is outside the scope of remand. Further, Lipscomb cites to no legal authority to support this claim. Transfers have been approved in the Deschutes Basin for decades without any approval from the Tribes. The Board rejects this argument.

Argument: Lipscomb claims the that the Peterson report states with no basis, "The resort is also expected to contribute far more to the public services than it will cost to service the resort and its residents. **See Bragar May 28, Pg. 3.**

Finding: The Board previously found the Peterson report credible. JBREC also concurs with Peterson's conclusion. **See JBREC Report, Pg. 10.** Two professional real estate economics firms agree that Thornburgh will create little demand for public services and will provide significant tax surpluses across all public services. We agree and reject opponents' arguments in this regard.

Argument: Applicant's May 21, 2025 letter suggests without any basis that fisheries will benefit from the 2022 FWMP. Bragar May 28, Pg. 3.

Finding: The Board finds there is significant, substantial evidence in the record to support the conclusion in the Applicant's May 21, 2025 letter. The dozens of technical reports, including the analysis by Lucius Caldwell, Ph.D., support a finding that the 2022 FWMP will result in a net benefit

to fisheries habitat quality and quantity across all affected streams. Applicant also noted that it was in discussions with guides and outfitters to provide fishing services to Thornburgh customers that will provide a benefit to the outdoor recreation industries.

DCC 18.113.070(C)(4)

As noted in Applicant's May 7, 2025 letter, the Subject Property is large and offers spectacular views as a result of the 600' of elevation change on the property. We find that the Subject Property and the land around Cline Buttes is a significant draw for tourism and recreation. There is no evidence in the record to the contrary. The only change to the economic plan is the elimination of the second golf course. According to JBREC the current plan:

spreads an 18-hole golf course over acreage previously planned for two golf courses. This program preserves more natural open space and requires less labor than maintaining and operating two courses on similar acreage. **See JBREC Report, Pg. 7.**

And:

The Subject's current plan, with two regulation-length 18-hole golf courses instead of three, retains more natural forested areas. Increased open spaces would enhance the onsite experience, its overall attractiveness, and the economic viability of golf operations. Contemporary golf course design typically uses routing to minimally disturb the land and implements strategies to minimize maintenance costs. Onsite trails and paths would provide new opportunities for residents and visitors to enjoy improved and unimproved open spaces. **See JBREC Report, Pg. 11.**

The Board finds that eliminating one golf course will help preserve the land's natural beauty and views, while increasing the amount of natural open space. This is consistent with DCC 18.113.070(C)(4).

Conclusion

The 2005 Peterson Report determined there will be an overwhelming fiscal benefit to the community from the implementation of the Thornburgh Resort with a significant increase in tax receipts, a boost to employment, and very little increase in demand for public services, with an increase in demand for housing, along with the loss of "resource" lands. The net result will be of significant benefit to the community. The Board agreed with these conclusions in 2006. The Applicant has provided updated expert evidence to assess whether elimination of one golf course would change the economic findings in the Board's 2006 decision. The evidence shows that with the change the Resort will generate the following:

1. **Tax Revenue:** Provide annual tax revenue of approximately \$47.5 Million (excluding the \$1.3M in transient room taxes annually) that is 2.16 times the estimated tax receipts in the Peterson Report, and roughly 10% of the total 2024 tax receipts of \$478 Million in Deschutes County.

2. **Employment and Compensation:** Provide peak employment payroll (direct, indirect, and induced) of \$141.6 Million, which is 1.49 times the \$95 Million peak payroll estimated in the Peterson Report. The elimination of one golf course will reduce payroll by \$859,090, or roughly 0.6% of the peak payroll of \$141.6 Million, which the Board finds to be insignificant.
3. **Demand for Public Services:** There will be no increased demand for public services as a result of elimination of one golf course. Expert evidence shows that Thornburgh then, and today, will create very little demand for public services, such as fire, police, parks, etc. while generating substantial tax subsidies for those very services.
4. **Housing:** Elimination of one golf course will reduce needed employee housing by 4 units, reducing pressure on the housing supply. Further, full development of the Thornburgh Resort will create housing inventory of 950 homes that will assist in easing regional housing needs.
5. **Loss of Resource Lands:** The elimination of one golf course will not create a loss of any more resource lands. On the contrary, eliminating the golf course will increase the amount of native and natural open spaces.

For the reasons above, the Board finds that with the elimination of one golf course, the Thornburgh Resort will continue to provide an overwhelming fiscal benefit to the citizens of Deschutes County.

Remand Issue #3: Treaty Rights and the No Net Loss Standard

The LUBA remand required the Board to provide findings showing why the 2022 FWMP, which meets the no net loss standard in DCC.18.113.070(C), does not, in turn impact or violate the Tribe's 1855 treaty rights. LUBA stated:

On judicial review, the Court of Appeals agreed with the Tribe that the issue was raised below with sufficient specificity so that the county was obligated to make **findings addressing** it. The Tribe's first assignment of error is sustained for the reasons set out in the court's opinion. **See LUBA Remand Final Order and Opinion dated February 26, 2025.**

Critical to the issue is this Board's finding that the 2022 FWMP meets the no net loss standard in DCC 18.113.070(D). This finding was upheld by LUBA and the Court of Appeals. In oral argument before the Oregon Court of Appeals on March 28, 2024, Senior Judge Devore asked Josh Newton, Counsel for the Tribes, a question that provided the roadmap for how the BOCC could resolve the issue on remand.

Senior Judge Devore asked @ 1:52:03-1:52:54 *"Would it suffice if the county had said we concluded from all the evidence and we recognize that there is a dispute, and we recognize that not everybody is persuaded by the modeling, we recognize that, we respect that, but we have to make a judgement call, we conclude that the no net loss standard is met, therefore there is no impact by the Thornburgh proposal and therefore, there is no impact on the fishery resource protected by the treaty. Would that then have sufficed as having addressed the treaty issue?"*

Josh Newton, responded @ 1:52:55-1:53:31: *"It certainly would have been addressed. Whether the Tribes would have **agreed with the findings** and the legal analysis who knows because it didn't happen. If I'm being responsive, and I'm not trying to not be, at that point the Tribes may have had a different legal challenge or perhaps the plan would have addressed the Tribes concerns, and everybody would have been satisfied. I mean, that's at least a possibility, but the process that was chosen didn't lead to that outcome".*

During the original proceedings on this application, the Board reviewed extensive evidence that supported a finding that the 2022 FWMP met the DCC 18.113.070(C) standard. We made the following findings:

- i. Thornburgh's 2022 FWMP increases flows and decreases temperature, an average of (0.01 degree C), which improves fisheries habitat quality and quantity.
- ii. Extensive technical analysis was completed of stream flows and thermal impacts on; the Deschutes River, the Crooked River, the Little Deschutes River, and Whychus Creek, as well as 7 specific spring locations requested by ODFW, and specific locations around springs in Whychus Creek, along with an analysis of the effects on fish habitat in each of water ways, followed by a Comprehensive Summary of the 2022FWMP as it pertains to fish habitat.
- iii. Dr. Lucius Caldwell, PhD, FP-C, found: "In conclusion, the findings presented above indicate that the combination of planned groundwater pumping at Thornburgh Resort, and the associated mitigation planned to offset this pumping as described in the 2022 Fish and Wildlife Mitigation Plan (NCI 2008; Newton 2022), appear to be a net benefit for both fish habitat quantity and quality at all sites evaluated and would result in no net loss of fish habitat quantity or quality."
- iv. The Board finds that statement is, while not determinative in the outcome of this case, relevant and persuasive. While Appellant Gould, ODFW, the Tribe, and others raised concerns regarding conformance with this standard, the Board finds the Applicant's experts provided more persuasive evidence and testimony.
- v. Dr. Caldwell's report was submitted during the open record period. There was no response in the rebuttal period provided by a biologist related to habitat impacts to rebut his report.
- vi. No party provided persuasive evidence to rebut his findings.
- vii. The modeled negative impacts are so small as to be immeasurable and of no biological significance and are far less than the 0.1 degree increase that was previously determined to meet the standard when the 2008 FWMP was approved.
- viii. Given this context, we find that the 2022 FWMP plan meets the No Net Loss Standard.
See Rec 24-26.

Because our finding that the 2022 FWMP provides benefits improving the fisheries resource at all sites was upheld on appeal, to the extent the Tribe's right to harvestable fish (and associated habitat) are implicated at all, it is a positive impact, or benefit. For these reasons, the Board finds the 2022 FWMP does not violate the fishing clause of the 1855 Treaty.

Argument: The Tribe argued that it should be able to present new evidence on this issue.

Finding: The Applicant responded that the Court of Appeals' statement was *dicta* and was in reference to an issue that the Tribe *lost* on appeal - its claim that it should receive special evidentiary status due to its indigenous knowledge. LUBA's *appealable* Final Opinion and Order limited the remand to *findings* and did not direct the Board to take new evidence. The Tribe chose to not appeal. Moreover, the Court of Appeals cannot, and did not, require Deschutes County to abrogate its responsibilities and did not override the County's own authority regarding the scope of a remand. That decision reserved to the BOCC alone, which we made when we issued Order 2025-015. *See also* DCC 22.34.040(A).

The Board finds the LUBA order directed it to make findings on the remanded issue, and that it has the sole discretion to decide whether to reopen the record to accept new evidence. As noted at the hearing, this proceeding has led to the submission of volumes of evidence submitted from all sides, totaling thousands of pages and comprising at least seven binders full of evidence on the range of issues. It is appropriate for this Board to rely upon this evidence and to make appropriate findings that are supported by this evidence. The 2022 FWMP meets the No Net Loss Standard, and our approval does not violate the fishing clause of the 1855 Treaty.

Argument: The Tribe's May 7, 2025 letter addresses the re-licensing of the Pelton Project, its Fish Passage Plan, and the Deschutes Basin HCP and should be considered by the Board.

Findings: These issues are outside the scope of the proceeding, and the Court of Appeals ruled they are outside the scope of the No Net Loss standard. *See Confederated Tribes of Warm Springs v. Deschutes County*, 332 Or App 361, 378-380 (2024) (rejecting Bishop's argument that LUBA erred in accepting the County's interpretation that the No Net Loss standard did not include baseline modeling addressing drought, groundwater decline, the HCP, and other issues outside of the resort's own impacts).

Argument: The Tribe introduces, for the first time, that its Treaty right—the Fishing Clause—requires a “species by species” analysis. In one letter, the Tribe claims that other species must be addressed without any information as to what additional species. Then at the hearing, the Tribe's counsel noted that Pacific Lamprey were one such species. In its May 21, 2025 letter, the Tribe again limits its discussion of Treaty rights, stating “Salmon people for whom the right to fish (and have fish to take) is ‘not much less necessary’ to their existence ‘than the atmosphere they breathe[].’”

Finding: The Board finds the Tribe's argument is new and thus has been waived. The Tribe had ample ability to raise this argument in the prior proceedings. Moreover, the Tribe did not provide any citation or argument to support its position. This appears to be in *direct response* to the Court of Appeals' interpretation of the No Net Loss standard as *not requiring* such analysis. *See Gould v. Deschutes County*, 233 Or App 623, 631-34. In fact, the Tribe expressly cited to this case to provide the contrast. *See* Letter on Behalf of the Tribe dated May 7, 2025, pg. 11. The Tribe failed to point to any language in the Treaty itself that supports such argument. The Tribe merely states the “exclusive right of taking fish in the streams running through and bordering said reservation is

hereby secured to said Indians[.]” Rec 4309. The Board agrees the Fishing Clause has been interpreted to require sustaining harvestable populations of fish. *See United States v. Washington*, 853 F3d 956, at 965.

The Tribe points to nothing in that decision that supports the interpretation the Tribe advances here—that a species-by-species analysis is required. That case addresses *salmon* only, which was specifically addressed in the multiple expert opinions included in this record, together which support our conclusion that the 2022 FWMP will result in a *net benefit* to both *quantity and quality* of fish habitat. Those findings were unchallenged, upheld by LUBA and the Court of Appeals, and may not be relitigated here.

Argument: The Tribe argues, at page 12 of its May 7, 2025 letter that the issue of a species-by-species analysis is “of first impression for the Board, because it has not previously considered whether the 2022 FWMP violates the fishing clause of the 1855 Treaty.” The Tribe goes on to argue that waiver cannot be claimed—or more precisely that the Applicant is “estopped” from arguing waiver.

Finding: The Applicant responded that the Tribe’s argument is incorrect under Oregon land use law, which is the framework under which this proceeding is bound, stating the Tribe had every opportunity to advance its argument related to a species-by-species analysis requirement in the first proceeding and did not make such an argument until this remand. Therefore, it is proper for the Board to determine the argument was waived. *See Currie v. Douglas County*, 79 Or LUBA 585, 609 (2019), *Devon Oil v. Morrow County*, 252 Or App 101 (2012)(failure to raise claims in previous proceedings waive arguments), and *Beck v. City of Tillamook*, 313 Or 148 (1992).

The issue is waived. The Board agrees that the evidence in the record supports a determination that the 2022 FWMP will create a net benefit to fish habitat. The Board also notes that the 2022 FWMP provides for better mitigation and therefore greater benefit to fish habitat than the 2008 FWMP. As a result, if the Board did not approve the updated plan, such action could be claimed to violate the Treaty because the resultant consequence would be to allow the Applicant to continue to rely on the 2008 FWMP. The Court of Appeals interpreted the No Net Loss standard to not require a species-by-species analysis. Our job on remand is to make findings as to how this standard relates to the Treaty. We are not asked, nor do we have the authority to specifically apply or adjudicate the Treaty. That is a matter for the federal courts. On balance and considering that the Board has already determined the 2022 FWMP provides a net benefit to fish habitat, we find that the Treaty is not violated, and approval of the Applicant’s proposal will not injure the Tribe’s right to harvestable fish. Lastly, the Tribe argued alternatively that only it can adjudicate or determine whether its Treaty is violated, but that the Applicant must prove that the Treaty is not violated. This creates an impossible standard that is inconsistent with federal case law developed in adjudicating similar claims by federally recognized tribes.

The Warm Springs Tribe would have Deschutes County require the Applicant to demonstrate on a species-by-species basis that its project will not affect the Tribe’s treaty rights. That is not the means by which treaty right claims are asserted. The party asserting a Treaty right must prove that right. *See, e.g., Ground Zero Ctr. for Nonviolent Action v. United States Dep’t of the Navy*, 918 F. Supp. 2d

1132, 1152 (W.D. Wash. 2013) (tribe challenging Navy's proposed wharf, tribe had to prove the construction of the new wharf would reduce fish and shellfish populations or right to access)⁹; *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988) (a tribe asserting usual and accustomed fishing grounds has the burden to produce evidence that a particular location was customarily used at treaty time).

The Tribe, as the party asserting the Treaty right and alleging injury to that right, must proffer evidence that (1) the area is a usual and accustomed fishing area for the Tribe (2) for the particular species, and; (3) the project will impact that treaty-protected fishing activity¹⁰. The Tribe failed to do so here. It merely claims that the application must be denied because the Applicant cannot comply with its Treaty right.¹¹

Not every proposed development will violate a Treaty right simply because it would be constructed in a Tribe's usual and accustomed fishing area or would affect the water resources that support a fishery. See *Ground Zero Ctr. for Nonviolent Action*, 918 F. Supp. 2d at 1152 (in denying motion to enjoin construction of wharf in usual and accustomed fishing area, court held that the tribe had failed to show that either its right to access or its right to harvest fish would be impacted).

Background – *United States v. Oregon*

The case styled *United States v. Oregon* was the result of the consolidation of two cases filed in 1968, *Sohappy v. Smith*, No. 68-409 (D. Or.), and *United States v. Oregon*, No. 68513 (D. Or.). Those suits were brought against the State of Oregon to protect treaty fishing rights and establish the scope of the State's authority to regulate tribal off-reservation fishing on the Columbia River and its tributaries.

In September 1968, the United States filed suit against the State of Oregon seeking a judgment and injunction to enforce Indian off-reservation fishing rights in the Columbia River Basin. The Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs Reservation of Oregon intervened as plaintiff intervenors.

In 1969, the Court entered declaratory judgment in favor of the United States and the four Tribes. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The Court held that the tribes have a right to harvest "a fair share of the fish produced by the Columbia River system." *Id.*, at 911. The Court recognized the tribes retained rights protected by their specific treaties to take fish from "usual and accustomed" places on the Columbia River and its tributaries, and that the State of Oregon had only limited regulatory authority to the extent needed to effectuate conservation principles. *Id.* at 906-07.

⁹ A copy of this decision is attached for convenience.

¹⁰ In this case where the evidence shows the 2022 FWMP actually benefits fisheries habitat quantity and quality resource in affected areas this would be highly unlikely.

¹¹ The Tribe will likely argue it was not permitted to provide evidence in this remand. However, nothing prevented the Tribe from providing evidence in the previous proceeding—it simply chose not to do so.

In 1974, the State of Washington intervened to challenge the Judgment and Order. Over Washington's objection, this Court modified its original order to clarify the four tribes were entitled to 50% of the available harvest of the Spring Chinook run destined to reach the tribes' usual and accustomed grounds and stations and again retained jurisdiction. *United States v. Oregon*, Order Amending Judgment of October 10, 1969 (Order of May 8, 1974) (unpublished), *aff'd*, *Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

A key outcome of *United States v. Oregon* has been the establishment of a co-management agreement between the tribes, states, and the federal government to manage the fishery resources; this agreement being titled, "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above the Bonneville Dam." Dkt. # 2418-678 at 5.

Under its retained jurisdiction, the Court has continued to review and approve multiple fishery management agreements, most recently in 2018. *See United States v. Oregon*, 718 F.2d 299, 302 (9th Cir. 1983); *United States v. Oregon*, 699 F. Supp. at 1469; Dkt. # 2545. "The purpose of th[ese] Management Agreement[s] is to provide a framework within which the Parties may exercise their sovereign powers in a coordinated and systematic manner to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-treaty fisheries." *See 2018-2027 United States v. Oregon Management Plan* (Dkt. # 26071 at 6).

On March 19, 2018, the Court issued an Order Approving the Management Plan (Dkt. # 2614 at 1 ("The 2018-2027 United States v. Oregon Management Agreement is hereby approved and adopted as an Order of the Court.")) and an Order that dismissed the case without prejudice (Dkt. # 2615). The states of Idaho, Washington, and Oregon, all of the Tribal parties, and the United States filed motions seeking clarification of the dismissal and requesting reconsideration. Dkt. # 2617. The Court responded to the motions to reconsider by issuing an order that continued the Court's jurisdiction over the case but administratively closed it, thereby removing the case from the active calendar. Dkt. #2629.

Argument: On page 10 of its May 21, 2025 letter, and throughout its May 7, 2025 letter, the Tribe attempts to resurrect claims that the modeling is flawed when it comes to impacts of groundwater pumping.

Finding: This issue was settled against Project opponents and may not be relitigated. This is especially true regarding "climate variability," which was specifically modeled and addressed in the prior proceeding. Similarly, the Tribe's attempt to relitigate that model year (*see* May 7, 2025 letter at page 14) fails.

The Board finds this issue is resolved and is outside the scope of remand.

B. Procedural and Miscellaneous Arguments

1. ORS 197.797 has Not Been Violated

Ms. Bragar argues that the County violated ORS 197.797 because it permitted the Applicant to submit additional evidence to support the Application during the public review process. We find this argument to be unpersuasive and contrary to the plain text of the statute.

ORS 197.797(4)(a) requires that “All documents or evidence relied upon by the applicant shall be submitted to the local government and made available to the public.” Ms. Bragar argued that by the Applicant putting in any supporting evidence including an updated FWMP document, this law is violated. This is not a correct reading of that law. All that is required is that documents be available, which they clearly were, given that Ms. Bragar specifically provided rebuttal argument and evidence related to them. ORS 197.797(4) does not prevent an applicant from submitting additional information or evidence; it expressly permits additional evidence. ORS 197.797(4)(b).

Further, ORS 197.797(5)-(7) and (9) govern the receipt of evidence at and after the conclusion of a land use hearing and an initial land use hearing. None of these provisions prohibit an applicant from providing evidence at a land use hearing or during a post-hearing comment period. Additionally, ORS 197.797(6)(c) says that “[a]ny participant” may request an opportunity to respond to new evidence filed during the post-hearing comment period; making it clear that an applicant is not prohibited from providing rebuttal evidence for consideration by the Board.

2. Rebuttal and Evidentiary Objections

Ms. Gould argued after the record was closed, that Thornburgh improperly provided testimony that it “should have or could have” been submitted earlier. This argument is based upon her claim that the “structure of ORS 197.797(6) is to provide opponents the last word on evidence[.]” We disagree. Nothing in the statute provides project opponents with the ability to provide “the last word on evidence” and the statute specifically allows “any person” or “any participant” to submit new evidence during a post-hearing comment period. Other objections were made related to the inclusion of statements from the Court of Appeals oral argument as being outside the scope of evidence permitted by our remand. However, we believe that these statements should properly be before us as relevant to the case and remand at hand, and to be instructive as to how later appellate review bodies may review any decision issued by this Board. Moreover, they represent arguments made by the parties and not evidence related to specific criteria and we accept them in to this record.

The Board has reviewed the multiple objections submitted by Ms. Bragar on behalf of her clients and the responses files by the Applicant. We agree with the Applicant. All evidence or argument provided by Thornburgh is responsive to evidence, issues, or claims provided by opponents during the open record period or represents argument and not new evidence. For those reasons, the Board denies Ms. Bragar’s motions and objections.

3. Published Notice of Hearing

DCC 22.24.030 requires that notice of an initial land use hearing must be published in a newspaper of general circulation in the county at least 20 days *prior* to the hearing. The Board finds the 20th day cannot occur on the same day as the initial hearing. In this case, notice was published on

October 4, 2022, which was twenty days prior to (before) the date set for the hearing. The hearings officer's decision found that DCC 22.08.070 says that "the time within which an act is required to be done shall be computed by excluding the first day and including the last day" except when provided otherwise. We agree. We note, however, that the hearing before the Board was a *de novo* review so the error was resolved by having an additional hearing. No party has challenged notice issues regarding the Board process.

4. Alleged *Ex Parte* Communication

Ms. Bragar claims that a letter from Mr. DeLashmutt is a "*ex parte*" letter that "taints the entire public process" because it was sent to the BOCC. Ms. Bragar fails to mention that the letter was sent to all three commissioners, County land use counsel, and the planning department and was specifically included in the record before the hearing. All parties were entitled to—and in fact did—respond to the letter. The letter was in direct response to a letter submitted by the Tribe and considered by the BOCC when addressing the scope of the record on remand. Both the Tribe's letter and the Applicant's letter were considered.

ORS 215.422(3) addresses similar situations. That statute provides:

No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact

- (a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
- (b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

That is exactly what occurred in this situation. The Board finds there is no error.

5. Alleged Bias Claims

Ms. Bragar and Central Oregon LandWatch argue that two commissioners are biased because they did not take the action they would prefer. The bias standard is exceedingly high. We find that no bias has been established here. See *Redside Restoration et al v. Deschutes County*, LUBA Nos. 2024-082/083/085, slip op 31; *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578 (summarizing bias case law).

6. Court of Appeals Dicta Regarding Re-Opening the Record

Much argument was made regarding the Court of Appeals' statement in dicta regarding potentially reopening the record. It is important to look at what the Court and LUBA actually said. The Court's statement in dicta was in response to the Court *rejecting* a substantial evidence challenge by the Tribe regarding indigenous knowledge. The Court then said that *if* LUBA remanded on the basis of

the Treaty, an opportunity may be permitted. However, even the Court recognized that LUBA's disposition would control. Then, in its February 26, 2025, Final Opinion and Order—which is noted as being appealable under ORS 197.850 and the same as any other Final Opinion and Order by LUBA—LUBA address the actual error, the Tribe's First Assignment of Error and not its indigenous knowledge challenged. LUBA then provided the scope, stating that the County was "obligated to make ***findings*** addressing [the Treaty]." Emphasis added. The Tribe did not appeal this final decision. Absent an order from LUBA on the matter, the County is not bound to reopen the record accept as determined by the hearings body—or in this case, the BOCC. DCC 22.34.040(a).

IV. Decision

The Application on remand is **APPROVED**. The 2008 FWMP is replaced in its entirety by the 2022 FWMP, as adjusted.

FMP Condition 41: Any amendment by the Applicant to this 2022 FWMP shall require a new modification application.

Dated this ____ day of July, 2025.

BOARD OF COUNTY COMMISSIONERS
FOR DESCHUTES COUNTY

Anthony DeBone, Chair

Patti Adair, Vice Chair

Phil Chang, Commissioner

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