



## MEMORANDUM

**TO:** Deschutes County Board of Commissioners

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

**DATE:** June 18, 2025

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

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

### I. BACKGROUND

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

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

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

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<sup>1</sup> [bit.ly/0425ThornburghRemand](https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp)

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

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

## **II. REMAND TIMELINE**

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

## **III. LUBA REMAND**

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

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

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

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

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

2. *That the FWMP was a substantial change with respect to the required economic analysis and LUBA required further findings addressing DCC 18.113.070(C)(3) and (4) and that the County will either need to consider those changes or explain why that consideration is not required.*

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

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

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

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

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

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

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

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

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

#### **IV. DELIBERATION**

The following is a summary of the three remand topics and responses received during the hearing and open record periods that the Board needs to consider and on which findings are required. The Board also must make findings on record objections received during the remand process. Staff has included a matrix to assist the Board in making findings and reaching a decision.

##### **1. FWMP and "No Net Loss" Standard:**

###### Opponent Responses:

Opponents submit that simply providing the FWMP to OWRD, even if procedurally correct, is insufficient to meet the substantive "no net loss" standard required by County and State policy. Detailed critiques from technical consultants question whether groundwater withdrawal limits, as stated in the FWMP, are backed by enforceable benchmarks or whether they rely on projected rather than empirically verified outcomes.

Opponents argue the plan's groundwater modeling, mitigation measures, and management have not adequately accounted for fluctuations in aquifer health and stream flows, especially under long-term climate variability or drought. Several letters suggest that OWRD's administrative review does not substitute for the County's own independent ecological assessment, which, under DCC 18.113, must be robust and transparent.

Opponents of the plan argue that the FWMP falls short in guaranteeing "no net loss" of fish habitats. They highlight a perceived over-reliance on the OWRD's procedures, which, in their view, lack the empirical rigor needed to ensure substantive habitat protection. Critics express skepticism on the FWMP's water resource monitoring efficacy and suggest that the plan's

management commitments do not adequately reflect the dynamic environmental needs of the Deschutes Basin.

#### Applicant Responses:

Thornburgh maintains that mitigation strategies, outlined within the FWMP, clearly demonstrate compliance with "no net loss" objectives. This is pursued through frameworks reducing habitual groundwater utilization, enhanced by management commitments and regulatory alignment with ecological standards.

The applicant, supported by analyses from engineering experts, asserts that the 2022 FWMP is both scientifically credible and operationally robust. The plan reduces overall groundwater withdrawal made pursuant to earlier entitlements, imposes an annual withdrawal cap, and introduces management components that go beyond regulatory baselines.

The applicant places considerable emphasis on coordination with Oregon Department of Fish and Wildlife (ODFW) and OWRD, highlighting water rights cancellation and aquifer recharge as mitigation strategies. They point to the incremental streamflow benefits of juniper thinning projects and argue these activities, when taken as a unified program, produce greater net habitat benefits—meeting or exceeding “no net loss.”

Thornburgh maintains that its strategy will result in significant reductions in groundwater usage, effectively supporting habitat sustainability. It emphasizes that the mitigation approach is robust and is supported by data-driven methods. Initiatives, like the reduction of juniper trees, are highlighted as proactive measures to augment water flows beneficial to the ecosystem.

## **2. Substantial Change and Economic Analysis:**

#### Opponent Responses:

Appellants and LUBA frame the reduction in golf courses as a “substantial change” per local code, arguing this triggers new economic analysis under DCC 18.113.070(C)(3), (4). They argue that the current economic justification for project benefits—employment, visitor spending, and tax revenue—relied on outdated or inflated assumptions about amenity demand, and has not sufficiently considered post-pandemic recreation and tourism trends.

Opponents critique the applicant’s employment and housing projections as inadequate for assessing secondary impacts (e.g., employee housing demand, school enrollment, public services). Several submittals question how lost amenity value is offset elsewhere, and whether the record includes a net positive for the local economy rather than “selective accounting.”

LUBA acknowledged such adjustments disturb the originally calculated employment impact of the resort, necessitating further evaluation under DCC 18.113.070(C)(3) and (4).

### Applicant Responses:

Thornburgh, supported by economic consultant analysis, counters that the amenity modification (removal of one golf course) is an operational response, not a fundamental shift. Submitted economic models and fiscal impact analyses anticipate continued job creation, local business benefit, and sustained tax revenue, even with fewer total golf holes.

The applicant emphasizes that new and reallocated investments within the project—additional trails, upgraded open space, or improvements to existing amenities—offset any potential visitor or employment losses. Its analysis contends that core regional economic links (e.g., hospitality, construction, outdoor recreation) remain and are not materially undermined by the change.

The applicant submitted updated economic assessments showing the project's continued viability despite these adjustments. Reports indicate that planned employment and revenue remain strong, with the modifications aligning with broader regional economic strategies to ensure long-term sustainability.

### **3. Treaty Compliance:**

#### Opponent Responses:

The Confederated Tribes of Warm Springs (Tribe) and associated parties argue that the 2022 FWMP, especially in its groundwater approach, may infringe on rights reserved to the Tribe in the 1855 Treaty. Their analysis emphasizes that treaty rights are not secondary to state or local policy but are legally paramount, citing both case law and Oregon public trust doctrine. They note that the region's fish habitats, critical to tribal culture and subsistence, are already under stress from competing uses, and question whether the mitigation proposed by the applicant is sufficient to avoid "measurable harm" (a.k.a. "no net loss").

Opponents also voice concern that the County has historically failed to adequately consult with tribal governments on land use actions of this magnitude and urge that the record be supplemented with direct tribal input and technical feedback.

#### Applicant Responses:

The applicant asserts that both the FWMP's content and associated public process afforded on remand exceed typical standards of treaty compliance. It notes communication with tribal technical representatives and inclusion of tribal comments in earlier proceedings. Thornburgh asserts that, when all plan elements are implemented, the resulting fish habitat conditions are either neutral or will actually result in a net improvement over previous conditions, thereby avoiding a "take" of protected or endangered species under the Endangered Species Act (ESA), or diminishment of tribal resources.

Thornburgh underscores that additional mitigation or monitoring will function as an added check, ensuring that treaty-protected values are not merely theoretical but enforceable throughout future resort operations.

#### 4. RECORD OBJECTIONS

##### A. REMAND PARTICIPATION

Deschutes County acknowledges the strong public interest and engagement in the Thornburgh remand process and respects the fundamental importance of transparency and due process under Statewide Planning Goal 1 in quasi-judicial land use matters. The County's discernment of eligibility for participation in the remand process is governed by a combination of local code, state law, and established case law precedent, and must be applied neutrally regardless of the issues before the Board.

Deschutes County Code 22.34.030(A) states, "Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand." In practical terms, this means that only those who were parties, meaning those who provided testimony, evidence, or otherwise established "party" status during the previous proceedings, are legally permitted to submit testimony or evidence and receive formal notices of subsequent hearings on remand.

This restriction is intended to maintain fairness, preserve the integrity of the record, and ensure that the remand proceeding remains focused on issues specifically identified by LUBA, rather than opening up all issues as if the proceeding was a new original hearing on the application.

##### Objections

Some members of the public and groups argue that the County has too narrowly applied DCC 22.34.030(A) by "denying" standing to those who did not participate previously, or by sending emails that may have been perceived as overly restrictive or "chastising" of new commenters<sup>3</sup>. The County did not intend to suppress viewpoints and comments but must adhere to the statutory and local frameworks that govern the remand scope and prescribe the County's determination of standing, as clarified in mailed hearing notices and the issue Board Order. Only those commenters with standing may participate in remand proceedings. This is not new evidence or testimony and is part of the record.

The Board did clarify participation limits in the public hearing notice: "you are receiving this notice as County records show you were a party to the previous proceedings. Pursuant to DCC 22.34.030(A) only those persons who were parties to the previous proceeding are entitled to notice and entitled to participate in the remand hearing."

Some commenters cited cases such as *Siporen v. Medford*, 55 Or LUBA (2007), and *Siporen v. Medford*, 349 Or. 247 (2010) and asserting that no person wishing to participate in the remand proceedings should be denied that opportunity simply because they did not participate previously.. The County recognizes these arguments but notes the importance of adhering

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<sup>3</sup> See Central Oregon LandWatch letter dated May 21, 2025, p. 3.  
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to the specific procedural posture of each remand—namely, whether the record is reopened for new evidence and the precise scope defined by order and notice.

### Summary

Deschutes County recognizes and appreciates the considerable public interest surrounding the Thornburgh remand proceedings. The County's review process, however, is governed by the requirements of DCC 22.34.030, which stipulates that, unless state law requires otherwise, only those persons who were parties to the proceedings before the County are entitled to notice and to participate in remand hearings. This rule preserves the focus of the remand on specific legal and factual issues sent back to the County by LUBA and is rooted in statewide mandated procedures applicable to quasi-judicial appeals.

In this remand, staff received a substantial volume of public comments submitted by individuals and organizations who were not parties to the initial proceedings. A majority of these comments were in direct response to a "call to action" circulated within the community. As a result, the content of many of these submissions is nearly identical, often repeating the same text. While staff acknowledges the strong feelings and desire for civic engagement expressed by these individuals, it should be noted that the volume and similarity of such responses do not, by themselves, constitute "substantial evidence" on the issues. Nor does the volume of comments constrain the Board's weighing of competing evidence on the remanded issues.

Consistent with best practices and out of an abundance of caution, staff proactively contacted each commenting individual to confirm their participation history and eligibility status. Although comments received from parties who did not participate in the original proceedings were not required to be admitted to the official record under DCC 22.34.030(A), staff nonetheless included them in the record, with a notation, to provide full transparency. This is consistent with previous Board direction. However, inclusion in the record does not alter the legal standard for standing: under local code and applicable state law, the Board is compelled to disregard comments submitted by individuals who were not parties to the earlier County proceeding.

Staff is committed to both transparency and fairness but advises the Board and participants that only the testimony and evidence from eligible parties—those who actively participated in the original County hearings—should be considered in the County's remand findings and final decision.

If the Board has questions regarding the status of individual commenters or the application of these rules to a particular procedural context, staff is prepared to provide further documentation or clarification.

### B. NEW EVIDENCE

During the Thornburgh remand proceedings, several objections were made to the content and timing of materials submitted to the record. Notably, parties represented by Jennifer Bragar objected to what they described as new evidence introduced by the applicant during

the rebuttal period of the open record process. These parties contended that the applicant's submittals included materials that were not "rebuttal," but presented substantive new evidence that could and should have been provided earlier in the process. They argued that this new evidence could unfairly prejudice their ability to respond and asked the Board to disregard these materials. They emphasized that rebuttal evidence is intended to address only material previously introduced in the new evidence period of the open record process, and cannot introduce new factual content, referencing the requirement to preserve objections for potential appeal and citing LUBA precedent on procedural due process.

In response, the applicant's legal counsel countered that the submittals in question fit within the accepted definitions of "argument" and "evidence" as allowed under state rules, citing both OAR 661-010-0025 and ORS 197.797(9). The applicant asserted that it had not, in fact, exceeded what was permissible and pointed out that state law does not categorically prohibit the introduction of documents during rebuttal, so long as those documents are responsive to previously submitted material or serve to clarify the applicant's position on issues raised in the open record. The applicant further contended that the definitions of "argument" (as assertions and policy analysis) and "evidence" (as facts, documents, or data) are to be construed with some flexibility per LUBA custom. Its response noted that prior case law generally provides the Board discretion to determine how to handle record objections, provided that the substantial rights of parties are not prejudiced and appropriate opportunities to respond were provided or could be reasonably offered through process.

In remand proceedings, the statutory 120-day timeline, which cannot be extended, leaves little time to offer additional response (rebuttal) timelines. Staff recommends the Board find that there is no opportunity for response that could be "reasonably offered," in this process, given limited Board availability and compliance with the statutory timeline.

From staff's perspective, the essential issue is whether the applicant's materials in fact introduced new "evidence" outside the scope of what rebuttal is designed to address, and whether parties were prejudiced in their right to respond as a result. LUBA case law reiterates that the integrity of the record turns on whether all parties had a fair, clear opportunity to provide substantive input and whether clear instructions regarding rebuttal periods were followed. *E.g., Trautman v. Eugene*, 73 Or LUBA 209 (2016); *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

Ultimately, it is within the Board's discretion to accept or reject extraneous rebuttal material, if it considers such material to be beyond the scope of rebuttal, provided its decision is made with consideration of procedural fairness, transparency, and the preservation of all parties' procedural rights in the process. Should there remain concern that any party's opportunity for response was unfairly limited, the Board may consider reopening the record on a targeted basis to cure such potential prejudice, in alignment with best practices and state law requirements, although staff strongly recommends not to do so, due to the strict 120-day time limit to issue a final decision and the Board's availability, and avoid a petition for *writ of mandamus*.

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

Due to the compressed timeline for remand proceedings (120 days instead of 150 days with no option of extension), a final decision on remand must be issued by the County no later than August 5, 2025.

Mon. June 18: Meeting to review the appeal on the record, deliberate the appeal topics, and provide guidance and findings so that staff can draft a final decision.

Mon. July 23: Meeting to consider signature of the final decision.

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

Attachment A: Decision Matrix