

HEARINGS OFFICER DECISION

FILE NUMBER: 247-22-000678-MC

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

APPLICANT'S ATTORNEYS: J. Kenneth Katzaroff – Schwabe Williamson & Wyatt, PC
Liz Fancher

REQUEST: See Applicant's Summary of Modification Request below.

STAFF CONTACT: Caroline House, Senior Planner
Phone: 541-388-6667
Email: Caroline.House@deschutes.or

RECORD: Record items can be viewed and downloaded from:
<https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp>

I. APPLICABLE CRITERIA

Staff, in the Staff Report, set forth the following as applicable and relevant approval criteria. Applicant, Staff and persons in opposition disagreed as to which criteria should be considered relevant for the review of Applicant's 2022 FWMP modification proposal in this case. The Hearings Officer addressed the relevant approval criteria in various decision findings below.

Relevant Approval Criteria (per Staff Report):

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

LOT OF RECORD:

The subject property has been verified as a legal lot(s) of record in previous land use decisions.

LOCATION:

The Thornburgh Destination Resort ("Resort") is comprised of a large tract of land +/-1,970 acres in size and includes several tax lots as shown in *Table 1* and *Figure 1* below.

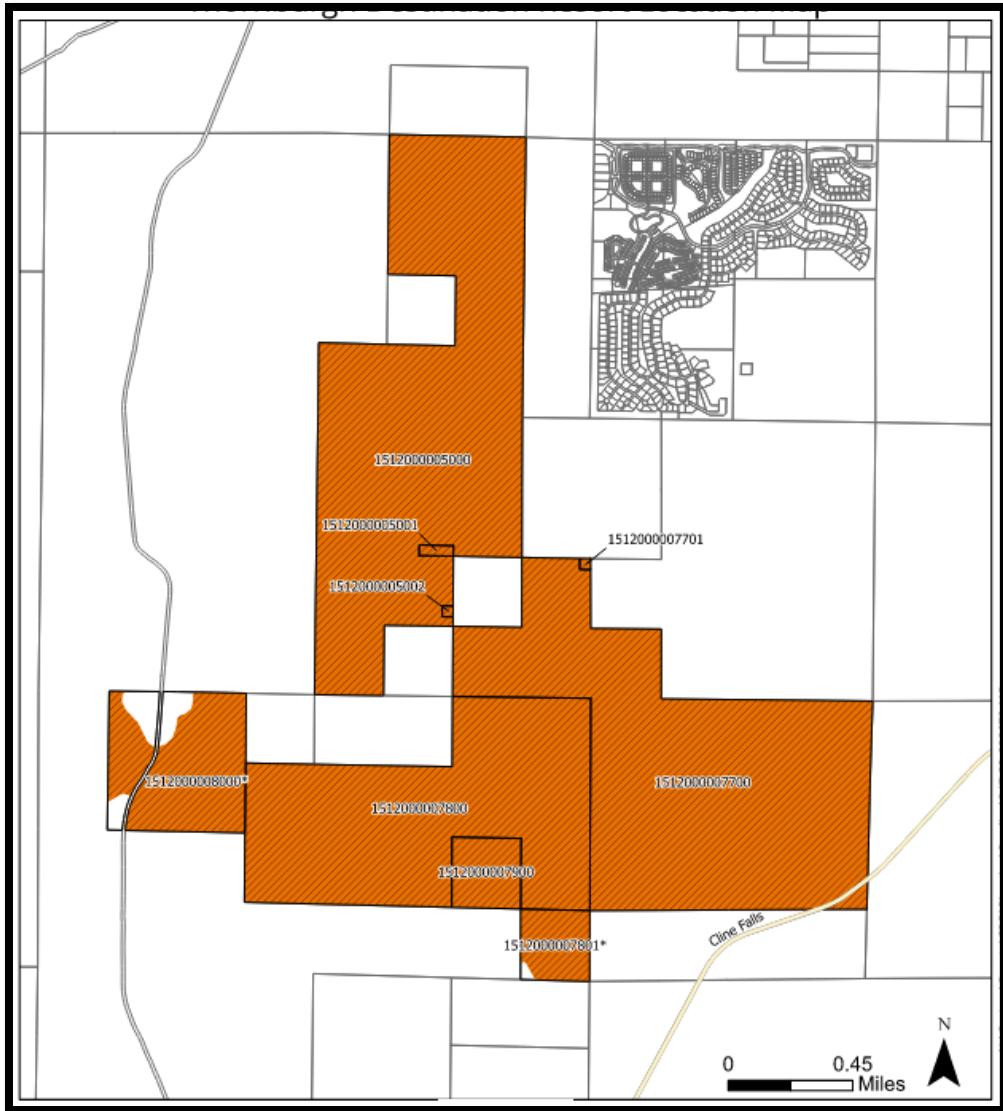
Table 1 - Thornburgh Destination Resort Location

Map Number & Tax Lot	Address
15-12-5000	11800 Eagle Crest Blvd.
15-12-5001	11810 Eagle Crest Blvd.
15-12-5002	11820 Eagle Crest Blvd.
15-12-7700	67205 Cline Falls Rd.
15-12-7701	67705 Cline Falls Rd.
15-12-7800	67555 Cline Falls Rd.
15-12-7801 ¹	67525 Cline Falls Rd.
15-12-7900	67545 Cline Falls Rd.
15-12-8000 ²	67400 Barr Rd.

¹ A portion of this tax lot is not included in the Final Master Plan (FMP) approval.

² Portions of this tax lot are not included in the Final Master Plan (FMP) approval

Figure 1 – Thornburgh Destination Resort Location Map



SITE DESCRIPTION:

The property described and displayed 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. At this time, the Subject Property is largely undeveloped land. 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 prior land use approvals. In addition, the Applicant has applied for building permits for utility facilities³ and overnight lodging units ("OLUs"). The southeastern corner of the subject property is bisected by Cline Falls Road and Barr Road bisects the southwest corner of the Resort tract.

³ Staff (Staff Report, page 3) noted that these building permits are ready for issuance, but have not been issued at the time the Staff Report was written. The Hearings Officer is uncertain as to the status of the permits.

SURROUNDING USES:

The surrounding lands, not including other tax lots within the Subject Property, are primarily comprised of tracts owned by the Federal Government, State of Oregon, or Deschutes County. Most of this public land is part of the Cline Buttes Recreation Area and is zoned Exclusive Farm Use – Sisters/Cloverdale Subzone (EFU-SC) or Open Space & Conservation (OS&C). Further northeast is the Eagle Crest Destination Resort, and a property with an approved Surface Mining site (Site No. 252) and Wireless Telecommunication Facility. To the east-northeast of the Subject Property are Rural Residential (RR10) zoned lots that are generally five (5) to ten (10) acres in size. Most of these properties are developed with a single-family dwelling and related accessory structures.

RESORT LAND USE HISTORY:

Staff, in the Staff Report, provided the following summary of the land use history associated with the Thornburgh Resort. The summary below is included only to provide the reader of this decision Staff's overview of the general scope of some of the applications, decisions and appeals associated with the Thornburgh Resort.

Conceptual Master Plan (File No. CU-05-20): On February 16, 2005, Thornburgh Resort Company, LLC ("TRC") applied for the Resort Conceptual Master Plan (CMP) approval for the Thornburgh Destination Resort. The application was denied by the Hearings Officer on November 9, 2005. The Board of County Commissioners ("BOCC") issued Order Nos. 2005-143 and 2006-016 to call-up the Hearings Officer decision for review. On May 11, 2006, the BOCC approved the CMP. Annunziata Gould ("Gould") and Steve Munson ("Munson") appealed the BOCC decision to the Land Use Board of Appeals (LUBA / LUBA Nos. 2006-100 & 2006-101). LUBA remanded the BOCC decision on May 14, 2007 (*Gould v. Deschutes County*, 54 Or LUBA 2005 (2007)). The LUBA decision was appealed to the Court of Appeals. On November 7, 2007, the Court of Appeals reversed and remanded LUBA's decision (*Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007)). The result was the BOCC decision in CU-05-20 approving the CMP was remanded to the County for further proceedings.

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

CMP Initiation of Use (File No. DR-11-8): On November 1, 2011, TRC applied for a Declaratory Ruling to demonstrate the CMP had been timely initiated. The Hearings Officer found the CMP was timely initiated. The BOCC declined to hear the appeal and Gould filed a LUBA appeal. On appeal, LUBA remanded that decision (LUBA No. 2012-042). LUBA's decision was affirmed by the Court of Appeals, without opinion (*Gould v. Deschutes County*, 256 Or App 520, 301 P3d 978 (2013)). On remand, the Hearings Officer found the CMP was not timely initiated. TRC appealed the Hearings Officer's decision to the BOCC. The BOCC issued a decision finding the CMP was initiated before the two-year deadline expired. Gould appealed the BOCC decision to LUBA. On appeal, LUBA remanded this

decision back to the BOCC decision on January 30, 2015 (LUBA No 2015-080). However, LUBA's decision was appealed and the Court of Appeals reversed and remanded stating that the express language of the County Code requires Defendant to substantially exercise the permit conditions as a whole, and any failure to initiate development by fully complying with the conditions should not be the fault of the applicant, a determination of which must be based on more than just the complexity of the process. The Court also held that the County could not interpret the County Code contrary to a prior LUBA order in this same litigation, as the lower tribunal was bound to follow the appellate Court's Ruling (*Gould v Deschutes County*, 272 Or App 666 (2015)). Later, as part of the submitted application materials for the Golf Course Site Plan review, the applicant included the following clarification on the status of the remand:

"Loyal Land has not initiated a review on remand. This application is moot, however, because the Resort's Final Master Plan (FMP) incorporates and satisfies all conditions of the CMP and has received final approval."

Final Master Plan (File Nos. M-07-2/MA-08-6): Thornburgh Resort Company filed for approval of the Resort Final Master Plan (FMP) in 2007, which was later amended in 2008. The application was approved by the County, appealed by Gould, and subsequently remanded by LUBA to address issues regarding the Thornburgh Wildlife Mitigation Plan (*Gould v. Deschutes County*, 59 Or LUBA 435 (2009)). The LUBA decision was appealed to the Court of Appeals. The Court affirmed LUBA's decision (*Gould v. Deschutes County*, 233 Or App 623, 227 P3d 759 (2010)). In 2015, on remand, the County denied approval of the FMP. Central Land and Cattle Company, LLC ("Central") successfully appealed the denial and LUBA remanded the County decision (*Central Land and Cattle Company v. Deschutes County*, 74 Or LUBA 326 (2016)). The Court of Appeals affirmed LUBA's decision without opinion (A163359). On the second remand, the FMP was approved by the County. The County decision was appealed by Gould. The County's approval was affirmed by LUBA (LUBA No. 2018-008, August 21, 2018) and the FMP is now final.

Tentative Plan & Site Plan - Phase A-1 Residential/OLU Lots & Utility Facilities (File Nos. 247-18-000386-TP/247-18-000454-SP/247-18-000592-MA): In May 2018, Central filed for approval of its Phase A-1 Tentative Plan and Site Plan review for utility facilities authorized by the CMP and FMP. The Hearings Officer approved the request with conditions. The BOCC declined review of an appeal (Order No. 2018-073). Gould filed an appeal to LUBA (LUBA No. 2018-140). LUBA remanded the County's decision on the following issue:

"On remand, the county must consider whether, without TP Condition 17, the tentative plan for Phase A-1 satisfies the no net loss/degradation standard and whether a change in the source of mitigation water constitutes a substantial change to the FMP approval, requiring a new application, modification of the application, or other further review consistent with FMP and DCC destination resort regulations."

The LUBA remand decision was appealed to the Court of Appeals (A171603), but the appeal was dismissed based on the filing deadline. The Court of Appeals denied reconsideration of said order of dismissal. The Oregon Supreme Court accepted review of Court of Appeals order denying reconsideration of the order-dismissing petition for review (S067074). The Supreme Court agreed with Gould and instructed the Court of Appeals to hear that matter. The Court of Appeals subsequently affirmed LUBA's decision in LUBA No. 2018-140 (A171603). In August 2021, Central initiated a second a remand application (file no. 247-21-000731-A). The Hearings Officer issued a

remand decision approving 247-21-000731-A (the Tentative Plan for Phase A-1 of the Thornburgh Destination Resort), thus clarifying and affirming the County's past approval of 247-18-000386-TP, 18-000454-SP, and 18-000542-MA. The BOCC declined review of an appeal (Order No. 2021-059). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2021-112). A petition for judicial review has been filed to the Oregon Court of Appeals.

Site Plan – Phase A Golf Course (File No. 247-19-000881-SP): In December 2019, Central filed for Site Plan approval for a golf course authorized by the CMP and FMP. In April 2020, the Deschutes County Planning Division administratively approved the application. The BOCC called up an appeal filed by Gould and Central Oregon LandWatch (Order No. 2020-016). The BOCC affirmed the administrative approval on August 31, 2020. The County decision was appealed to LUBA and LUBA affirmed (LUBA No. 2020-095). The LUBA decision was appealed by Gould to the Court of Appeals (A176353). The Court of Appeals affirmed and the Oregon Supreme Court declined review (S069050). Therefore, the Site Plan approval for the golf course is final.

Site Plan – Phase A 80 OLU's (File No. 247-21-000508-SP): In May 2021, Central filed for site plan approval for 80 overnight lodging units authorized under the CMP and FMP. In September 2021, the Deschutes County Planning Division administratively approved the site plan. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-000849-A) and approved the site plan. The BOCC declined review of an appeal (Order No. 2022-002). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-013). The Court of Appeals affirmed LUBA's decision. It is unknown at this time if a petition for review has/will be filed to the Oregon Supreme Court.

Site Plan - Phase A-1 Resort Facilities (File No. 247-21-000537-SP): In May 2021, Central filed for Site Plan approval for a Welcome Center, Gatehouse, Golf Clubhouse and Community Hall authorized under the CMP and FMP. In November 2021, the Deschutes County Planning Division administratively approved the Site Plan. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-001009-A) and approved the site plan. The BOCC declined review of an appeal (Order No. 2022-012). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-026). A petition for judicial review has been filed to the Oregon Court of Appeals.

Modification of FMP – OLU Ratio (File No. 247-21-000553-MC): In June 2021, Central filed a Modification to amend the ratio of OLU's per single-family dwelling unit (from 2:1 to 2.5:1) and related bonding requirements. In October 2021, the Deschutes County Planning Division administratively approved the modification. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-000920-A) and approved the Modification. The BOCC declined review of an appeal (Order No. 2022-003). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-011). A petition for judicial review has been filed to the Oregon Court of Appeals.

Tentative Plan - Phase A-2 Residential Lots (File No. 247-21-000637-TP): In June 2021, Central filed for Tentative Plan approval for 108 single-family dwelling lots authorized under the CMP and FMP. The total development area included in the request encompasses 135 acres and the single-family dwelling lots on the tentative plan drawings identify the lots as lot numbers 193-300. In October 2021, the Deschutes County Planning Division administratively approved the application. An appeal was filed by Christine Larson, and the Hearings Officer denied the issues on appeal (file no. 247-21-

00948-A) and approved the Tentative Plan. The BOCC declined review of an appeal (Order No. 2022-011). Gould has filed an appeal to LUBA (pending LUBA No. 2022-025).

Site Plan – Phase A 70 OLU's (File No. 247-21-001111-SP): In December 2021, Central filed for Site Plan approval for 70 overnight lodging units. This application is pending review.

PUBLIC AGENCY COMMENTS:

The Staff Report contained a summary of public agency comments submitted into the record as of the date the Staff Report was issued. The Hearings Officer directs interested persons to review the Staff Report and public record if he/she/they are interested in the details of public agency comments. The Hearings Officer notes that additional public agency comments were received after the issuance of the Staff Report. Public agency comments that are considered relevant to this decision will be addressed in the findings below.

PUBLIC COMMENTS, TESTIMONY AND RECORD SUBMISSIONS:

This application, as is typical of all Thornburgh land use applications, generated significant interest from neighbors, nearby residents/farmers and public interest groups and the public in general. The Hearings Officer reviewed each record submission. The Hearings Officer, where related to a relevant approval criterion, will identify specific participants and their comments.

REVIEW PERIOD:

The application subject to this decision was submitted on August 17, 2022. On September 16, 2022, the County mailed an incomplete letter to the applicant requesting additional information necessary to complete the review. The applicant provided responses to the incomplete letter on September 22, 2022, and notified the County that no additional information would be submitted. For this reason, the application was deemed complete and a public hearing before a Hearings Officer was scheduled for October 24, 2022. The County mailed a Notice of a Public Hearing to all parties on September 30, 2022, and published a Public Notice in the Bend Bulletin on October 4, 2022. The Hearings Officer, at the October 24, 2022, public hearing kept the record open for the submission of new evidence until November 7, 2022; the record open for the submission of rebuttal evidence until November 14, 2022; and provided for the Applicant to submit a final argument until November 21, 2022. The Hearings Officer finds that Applicant supported/concurred with the Hearings Officer's open-record period. The Hearings Officer finds the Applicant consented to an additional 14 days which shall not be counted towards the 150-day clock. Additionally, the 7-day Applicant final argument period does not count towards the 150-day clock pursuant to ORS 197.797 (6)(e). Therefore, the Hearings Officer finds the 150th day in which the County must take final action on the subject application is March 12, 2023.

APPLICANT'S SUMMARY OF MODIFICATION REQUESTS:

Applicant (Katzaroff, November 7, 2022, Exhibit 1) provided the following "summary letter" of Applicant's proposal in this case. Attached to the "summary letter" was a "*reorganized and updated November 7, 2022 Thornburgh Resort 2022 Fish and Wildlife Mitigation Plan (2022 FWMP) Relating to the Potential Impacts of Thornburgh's Reduced Ground Water Withdrawals on Fish Habitat.*"

The “summary letter,” in full, is set forth below:

“This summary letter has been prepared by Jim Newton, PE, RG, CWRE, Principal of Cascade Geoengineering (‘CGE’) on behalf of Central Land and Cattle Company, LLC, owner, and developer of the Thornburgh Resort (‘Thornburgh’) to provide a simplified summary of the 2022 ‘Thornburgh Resort Fish and Wildlife Mitigation Plan, Addendum #2 (2022 FWMP) Relating to Potential Impacts of Thornburgh’s Reduced Ground Water Withdrawals on Fish Habitat’ dated August 16, 2022. The 2022 FWMP presented very detailed changes to the original 2008 FWMP that was approved by the Oregon Department of Fish and Wildlife (ODFW). Both the 2008 and 2022 FWMP provided mitigation to offset any potential impacts on fisheries and aquatic habitat and the specific measures to mitigate for any negative impacts.

Thornburgh estimated in 2008 the Resort’s water needs at full build out were up to 2,129 AF per year, having consumptive use of 1,356 AF, and a maximum withdrawal rate of 9.28 cubic feet per second (cfs). The Thornburgh Resort revised water needs at full build out by reducing some water intensive amenities and reducing irrigated landscaping for resort facilities and individual homes. The Resort will also implement the use of improvements in the type and method of fixtures used in Resort buildings to reduce consumption. As a result of this Thornburgh is reducing its total water needs from 2,129 AF to 1,460 AF. A summary table of the 2008 estimated water demand and the 2022 revised water demand are shown below:

2008

Original Water Use Full Resort Build-Out

<u>WATER USE</u>	<u>ANNUAL VOLUME</u>	<u>CONSUMPTIVE USE</u>
Golf Courses	717 AF	645 AF
Irrigation	195 AF	117 AF
Reservoir Maintenance	246 AF	206 AF
Other Q/M	971 AF	388 AF
TOTALS	9.28 CFS	2,129 AF
		1,356 AF

2022

Reduced/Revised Water Use at Full Resort Build-Out

<u>WATER USE</u>	<u>ANNUAL VOLUME</u>	<u>CONSUMPTIVE USE</u>
Golf Courses	501 AF	451 AF
Irrigation	111 AF	66 AF
Reservoir Maintenance	51 AF	43 AF
Other Q/M	797 AF	319 AF
TOTALS	1,460 AF	882 AF

The above reductions in estimated annual water usage reflect roughly a one-third in water savings at full buildout of the Resort. Further, the water used for mitigation of the new Resort water usage relies more on groundwater, groundwater that is intended to offset groundwater pumping that could reduce discharges of seeps and springs that contribute cool water to surface flows in the Deschutes River and Whychus Creek at gaining reaches of the River and Creek, respectively. A list of the water rights to be used for mitigation of the Resort water uses are shown below by the referenced name, volume and the water right certificate, transfer or otherwise a cancellation:

Water Rights: Certificated, Transfers, and Cancellations.

1. LeBeau (200 AF) – Surface Water POD: Certificate 95746 and transfer T-13857.
2. Big Falls Ranch (614.4 AF) – Surface Water: Certificate 96192 & 96190 and transfer T-12651 to a groundwater Point of Appropriation.
3. Big Falls Ranch (25.6 AF) – Groundwater POA: Certificate 87558.
4. Tree Farm (327.5 AF) – Groundwater POA: Certificate 94948 and Transfer T13703.
5. Dutch Pacific (49.5 F) – Groundwater POA: Certificate 89259.
6. DRC Temporary Mitigation Credits – 6 AF of mitigation.
7. Three Sisters Irrigation District (1.51 cfs minimum 106 AF) – Surface water. Final order signed for instream transfer. This TSID water will only be used for quality mitigation, not as part of any OWRD mitigation or transfer program.

These above mitigative water rights, upon approval by the Oregon Water Resources Department, will provide mitigation for 1,217 AF of the 1,460 AF required for fully mitigation the estimated Resort water uses. The remaining approximately 243 AF of mitigation will be completed in the future, prior to the OWRD authorizing the full annual water use of 1,460 AF. If the additional 243 AF of mitigation is not necessary, or unavailable, the Resort will be limited to 1,217 AF annually.

Based on the detailed surface and groundwater modelling prepared by Four Peaks Environmental Consulting, and Resource Strategies, Inc., and the analysis of the impacts on Fish Habitat provided by Four Peaks (all submitted into the county written record as of the date of this letter), the mitigation of the Thornburgh Resort groundwater usage achieves compliance with DCC 18.113.070(D), Deschutes County’s “No Net Loss/Degradation” standard as it pertains to fishery resources. Considering the reduced Thornburgh Resort water usage and superior mitigation of future Resort water uses provided by the 2022 FWMP and the ample technical support for the plan, the County should approve the Thornburgh 2022 FWMP.”

III. FINDINGS & CONCLUSIONS

SIGNIFICANT ISSUES RAISED:

The Hearings Officer organized this decision somewhat differently than prior Thornburgh land use decisions. The Hearings Officer recognized that the Staff, Applicant and opponents raised a number of issues that were best addressed at the beginning of the decision. The Hearings Officer notes that in many cases these issues could be determinative of the Hearings Officer’s ultimate decision in this case. The Hearings Officer addresses below the issues the Hearings Officer believes were raised clearly with sufficient detail to allow the Hearings Officer to make a reasoned and supportable determination. The Hearings Officer first deals with **procedural issues** and then addresses what the Hearings Officer characterizes as **substantive issues**.

Procedural Issue #1: Timing of Notice of Hearing

Staff, (Staff Report, page 13), made the following comments related to the notice of hearing in this case:

“...a public hearing before a Hearings Officer was scheduled for October 24, 2022. The County mailed a Notice of a Public Hearing to all parties on September 30, 2022, and published a Public Notice in the Bend Bulletin on October 4, 2022....”

STAFF COMMENT: Staff notes the hearing will occur on the 20th day [footnote 6] from when the Public Notice was published in the Bend Bulletin. DCC 22.24.030(C) requires notice of an in the County at least 20 days prior to the hearing. Staff asks the Hearings Officer to confirm if the notice requirements of DCC 22.24.030 have been met.”

footnote 6: “DCC 22.08.070. Time Computation. Except when otherwise provided, the time within which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business pursuant the County is not open for business pursuant to a county ordinance, in which case it shall also be excluded.”

The Hearings Officer finds that the Bend Bulletin published a notice of the October 24, 2022, hearing (the “Hearing”) in this case on October 4, 2022. The Hearings Officer finds that the Hearing did occur on October 24, 2022, which is 20 days after the published notice of hearing. The Hearings Officer finds that DCC 22.24.030 requires that the published notice happen/occur “at least 20 days **prior** to the hearing.” (Emphasis added by the Hearings Officer)

“Prior” is defined in the Meriam-Webster online dictionary as “earlier in time or order.” The Hearings Officer finds that technically DCC 22.24.030, along with DCC 22.08.070, requires 20-days pass *prior* to the scheduled hearing. The October 24, 2022 Hearing in this case was an initial public hearing. The notice of hearing was published on October 4, 2022, and DCC 22.08.070 mandates that day (October 4, 2022) not be counted towards the 20-day requirement. The first “counting” day for DCC 22.24.030 (C) purposes is October 5, 2022 and the 20th day would be October 24, 2022. The Hearings Officer finds that the October 24, 2022 hearing date is *the* 20th day. The Hearings Officer finds that the earliest that a hearing could be scheduled to meet the “20 days *prior*” requirement would have been October 25, 2022. The Hearings Officer finds that technically the county did not meet the DCC 22.24.030 (C) notice requirement.

The Hearings Officer did not make an oral ruling, at the Hearing, related to the published notice comments made by Staff. The Hearings Officer reviewed the entire October 24, 2022, hearing recording and attempted to ascertain whether any person provided comments about the hearing notice in the public record. While the Hearings Officer found various procedural objections to the hearing (See Procedural Error findings related to the open-record period, notice signage and County delays in uploading submissions to the online record), the Hearings Officer found no testimony, evidence, argument arguing that the notice of published notice somehow prejudiced any person’s/participant’s substantial rights.

The Hearings Officer finds the relevant law holds that a failure to provide a required notice provides a basis for reversal or remand *only if* an identifiable person’s/participant’s substantial rights were prejudiced by the error. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993). The Hearings Officer takes note that at least sixteen persons attended the Hearing in person and testified and two testified via the telephone. The Hearings Officer also notes that approximately 275 written submissions were received in the public record prior to the hearing and approximately 17 public agency comments were received. Additionally, the Hearings Officer notes that approximately 101 “new

evidence” submissions were received during the first open-record period and approximately 40 submissions were received during the rebuttal open-record period. The Hearings Officer finds that the public and interested persons actively participated in the hearing process for this case; including attending the Hearing in person, via zoom or by telephone. The Hearings Officer finds the technical error made by the County related to DCC 22.24.030(C) is harmless error and that no identifiable person’s rights were substantially prejudiced.

Procedural Issue #2: Notice of Hearing Signage

Hearing participant Christine Larson (“Larson”) objected to the location of the notice of hearing sign placed on the Thornburgh property. In summary, Larson stated that the location where the notice of hearing sign was placed was difficult to safely read. Larson asserted that the location of the notice of hearing sign did not provide meaningful notice to the community.

Applicant provided the following response to Larson’s notice sign placement argument (Katzaroff, November 21, 2022, pages 12 & 13):

“Ms. Larson, in a Friday, October 21, 2022 Email, suggests the land use notice sign has no hearing date, is posted in “hard to view areas,” are on Thornburgh’s property but “far away from any development” and that there is an entry gate with parking that may make a better location. Respectfully, Thornburgh complied with the code related to posting of notice. As discussed by the planning staff at the Hearing, the land use action sign was filled out properly by staff. DCC 22.24.030(B)(1) requires that the notice be provided on the “subject property” and “where practicable, be visible from any adjacent public right of way.” While we understand the concerns of Ms. Larson, as shown on the map provided in the Staff Report, the only public right of way in the vicinity is Cline Falls Hwy.”

The Hearings Officer notes that the Katzaroff November 21, 2022, submittal also included two maps and additional discussion related to the logistics of the placement of notice signage. The Hearings Officer finds Katzaroff’s comments and maps to be persuasive. Also, the Hearings Officer finds Staff, at the Hearing, concurred that notice of hearing signage met code requirements. The Hearings Officer finds Larson’s notice sign placement argument is not persuasive.

Procedural Issue #3: Open-Record

At the October 24, 2022, public hearing Jennifer Bragar (“Bragar”), an attorney representing Annunziata Gould (“Gould”), requested a period of time for the record to remain open. Bragar requested the record to be kept open for a period of 30-days for new evidence and 30-days for rebuttal evidence and a final 7-days for applicant rebuttal. In Bragar’s initial open-record written submission (Bragar, November 7, 2022, page 4) she stated, in part, the following:

“At the public hearing, Ms. Gould requested an additional 17 days for the record to remain open to account for the missing 10 days and provide the statutorily required seven day period for an open record request under ORS 197.797(6). The Hearings Officer improperly decided that the record should be left open for 14 days. This does not account for the minimum time Ms. Gould and the public would have had available if Thornburgh’s materials had been made available in a timely manner on September 22, 2022 [footnote omitted]. Another way to look at this is that the 10 day delay of posting the Applicant’s Response to Incomplete Letter is overcome, but with only a 14-day

open record period, the statutory seven day open record period has been shortened by three days. In either event, the public has been substantially prejudiced and did not have adequate time to prepare substantive comments for the hearing before the Hearings Officer.”

The Hearings Officer, at the Hearing, requested Applicant’s response to the Gould’s/Bragar’s open-record request. Kameron DeLashmutt (“Applicant” or “DesLashmutt”) and Kenneth Katzaroff (attorney for Applicant - “Katzaroff”) both expressed opposition to the 17-day open-record request and indicated that Applicant would not agree to extend the 150-day clock for any time period exceeding that required by Deschutes County code.

The Hearings Officer takes note of Deschutes County Code (“DCC”) 22.24.140 D. which states:

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

The Hearings Officer also takes note of ORS 197.797 (6). ORS 197.797 (6) sets out the minimum procedures that the county is required to follow when conducting quasi-judicial land use hearings (See, *Emmert v. Clackamas County*, LUBA No. 2011-052). Specifically, ORS 197.797 (6)(c) provides that land use hearing participants must be given an opportunity to rebut evidence submitted during a “first” open-record period.

The Hearings Officer finds that DCC 22.24.141 (D) provides that *if* a hearings officer keeps the record open for the submission of *new* written evidence or testimony *then* the hearings officer *must* allow at least seven additional days for responsive evidence. The Hearings Officer finds that the DCC 22.24.141 (D) responsive open record period satisfies the ORS 197.797(6)(c) opportunity to rebut evidence requirement.

The Hearings Officer finds nothing in the DCC or Oregon Revised Statutes (“ORS”) requiring the Hearings Officer to keep a record open beyond the “seven, seven, seven” DCC 22.24.141 (D) requirement. The Hearings Officer finds that he may exercise discretion in establishing an open-record period so long as the DCC and ORS minimum times requirements are met.

In this case the Hearings Officer extended the first (initial open-record period) from seven days to fourteen days. The Hearings Officer kept the record open for seven days for responsive evidence. The Hearings Officer acknowledged the Applicant’s right to a seven-day final written argument. The Hearings Officer, in this case, provided an additional seven days for any interested person/entity to submit evidence into the record.

The Hearings Officer’s open-record schedule, as set forth at the Hearing and the preceding paragraph, was established considering Bragar’s/Gould’s request in the context of statutory time limitations established to render a local decision. The Hearings Officer finds Bragar provided no persuasive evidence or argument that any party’s rights, in this case, would be substantially prejudiced. The Hearings Officer finds that Bragar’s/Gould’s open-record procedural error argument is not legally persuasive.

Procedural Issue #4: County Delay in Submitting Items to Public Record

Bragar (November 7, 2022, pages 3 & 4) argued that the County delayed “uploading” materials submitted by the Applicant to the online public record. Bragar argued that such delay “robbed Ms. Gould and the public of valuable time to prepare for the public hearing for a highly technical and complicated land use decision.” Bragar went on to say that “this oversight by the County to only maintain a digital record, but to not keep it up to date, substantially prejudiced Ms. Gould and the public in their preparation for the hearing and the land use process more broadly.”

Katzaroff provided Applicant’s response to Bragar’s delay in “uploading” argument, as follows:

“Nothing in the County’s procedures ordinance or state law required the County to immediately upload to the County’s website or Accela the Applicant’s Response to Incomplete Letter. In fact, there is no law or requirement that would have required the County to upload the response in advance of the County issuing a decision on the Application, or in advance of determining that it would send the Application to a hearing. The County complied with DCC 22.20.020, which is all that was required. Like any member of the public, Ms. Gould had the opportunity to specifically request documents or to otherwise seek information from County planning staff related to the Application. The County owes no additional process to Ms. Gould or the general public above what the law required.”

The Hearings Officer concurs generally with Katzaroff’s above-quoted comments. In addition, the Hearings Officer finds that an the open-record period to submit new evidence was extended from seven to fourteen days to allow Bragar, Gould, Applicant and the public to review the record of this case and provide written evidence and argument. As noted by Janet Neuman (“Neuman”), water rights attorney for Applicant (Neuman, November 14, 2022, page 1), “Ms. Gould’s Open Record materials consist of over 3,000 pages of documents attached to a November 7, 2022 letter from her land use counsel, Jennifer Bragar...”

While the Hearings Officer admits to not **counting** the number of pages submitted by Bragar, Gould and the public (nor the Applicant’s submissions) the Hearings Officer can reasonably characterize the opposition open-record submissions as voluminous, extensive and some very technical. In a perfect world all documents submitted to the County would be instantly become a part of the online public record and accessible to all. The Hearings Officer finds that there is no substantial evidence in the record that Bragar, Gould and/or the public was/were substantially prejudiced through the County’s delay in “uploading” documents.

Procedural Error #5: Goal 1

Bragar (November 7, 2022, page 3) stated the following:

“The opportunity for citizens to be involved on all phases of the planning process’ is an integral component to Oregon’s land use planning program. Statewide Planning Goal 1. The public must have access to all documents and evidence in a timely manner to allow adequate opportunity to prepare for a public hearing. Transparency and the availability of documents in the record is the cornerstone for implementing Goal 1 citizen involvement, and ensuring the public’s due process rights. The inability to access record information substantially prejudices the public’s ability to participate in the planning process and disables widespread citizen involvement.”

The Hearings Officer incorporates the findings **Procedural Issue #4: County Delay in Submitting Items to Public Record** as additional findings for the Goal 1 findings. Further, the Hearings Officer finds that Bragar did not reference any case law that would be relevant and in support of her Goal 1 argument. The Hearings Officer finds Bragar's Goal 1 argument is general in nature and lacking sufficient specificity to allow the Hearings Officer to authoritatively respond.⁴ The Hearings Officer finds, based upon the findings for "open-record," "failure to timely upload," and those set forth above that Bragar's Goal 1 argument is not persuasive.

Procedural Error #6: ORS 197.797 & DCC 22.20.055

Bragar (November 14, 2022, pages 5 & 6) argued that "Applicant's continued submission of application materials after the hearing constitutes a violation of ORS 197.797 and substantially prejudices the public." Bragar asserted that Applicant, on November 7, 2022, submitted a "new FWMP as an open record submission." Bragar went on to say that "the public did not have 20 days before a hearing to review Thornburgh's proposed additions to its application." Bragar requested that the Hearings Officer order a "new hearing."

Bragar, in her November 14, 2022 open-record submission (page 6), provided additional comments relevant to her ORS 197.797 argument:

"Significantly, at least 44% of the text in the November 7, 2022 FWMP is brand new. Attachment D, where the yellow highlights indicate new text that was not contained in the August 16, 2022 version. [footnote omitted] The August 16, 2022 version of the FWMP contained six more pages of language no longer found anywhere in the brand new November 7, 2022 FWMP. These significant changes to the Application, at a minimum, signify that under DCC 22.20.055 the Hearings Officer should require the Applicant to submit an application to modify, and restart the 150-day time clock."

Applicant responded to the above-quoted Bragar argument. First, Applicant highlighted (Katzaroff, November 21, 2022, pages 10 & 11) a prior Deschutes County Board ("BOCC") decision (involving opponent Gould) addressing DCC 22.040.010 and DCC 22.20.055 (Case No. CU-05-10, DC No. 2006-151). In that case the BOCC noted that Opponent Gould "argued that Applicant's rebuttal materials, dated September 28, 2005, included so many changes that it resulted in a modification of the application..." The BOCC, in that case, concluded that "Gould did not identify one new DCC criterion that had to be applied or one finding of fact that had to be changed as a result of the alteration she lists. None of the changes made by Applicant in its rebuttal materials required the application of new criteria to the proposal."

Applicant's second response to Bragar's modification argument referenced specific/actual changes made by the November 7, 2022, FWMP submission to the original application 2022 FWMP document (dated August 16, 2022). Applicant concluded that "the updated 2022 document [September 7, 2022 FWMP document] was provided in response to the request from the Hearings Officer to clarify the 2022 FWMP [August 16, 2022 FWMP document]. It provided **no new mitigation measures** or evidence, it simply provides a greater level of description as to how the 2022 FWMP is intended to work." (bold/underline included in original).

⁴ 22.24.120 APPENDIX A PRELIMINARY STATEMENT IN LAND USE ACTION HEARINGS OR APPEALS BEFORE THE BOARD, section titled Hearings Procedures

The Hearings Officer reviewed Bragar's "marked-up" copy of the August 16, 2022, Thornburgh Resort 2022 Fish and Wildlife Mitigation Plan (2022 FWMP) Relating to Potential Impacts of Thornburgh's Reduced Ground Water Withdrawals on Fish Habitat. The Hearings Officer also engaged in the lengthy process of comparing each Bragar yellow highlighted section of the August 16, 2022, FWMP to the November 7, 2022, FWMP which Bragar argued should be considered a DCC 22.20.055 modification (requiring Applicant to submit an application to modify and restart the 150-day time clock).

The Hearings Officer concluded, following the review of the August 16, 2022, and September 7, 2022, versions of Applicant's proposed 2022 FWMP that the September 7, 2022, FWMP version was an Applicant effort to repackage, reorganize and clarify the August 16, 2022 version. The Hearings Officer finds that the September 7, 2022, FWMP version did not change any proposed use, operating characteristic, intensity, scale, site lay out or landscaping element/item that was set forth in the August 16, 2022 FWMP. The Hearings Officer finds that the September 7, 2022, version did not change Applicant's 2022 FWMP proposal in a manner that would require the application of new criteria to the proposal or would require the findings of fact to be changed.

The Hearings Officer finds that the September 7, 2022, FWMP submission was provided in response to a Hearing request, made by the Hearings Officer to the Applicant, to clarify the August 16, 2022, FWMP. The Hearings Officer finds the September 7, 2022, FWMP submission constitutes evidence submitted into the record after the application was deemed complete and prior to the close of the evidentiary record. The Hearings Officer finds Applicant's submission of the September 7, 2022, FWMP is not a "modification of application" as defined by DCC 22.04.020. The Hearings Officer finds Bragar's ORS 197.797 and DCC 22.20.055 arguments are not persuasive.

Substantive Issue #1: Property Considered

Bragar (November 7, 2022, page 25) stated that

"Thornburgh's slide presentation shows a road traversing tax lot 5300, but tax lot 5300 is not included in this Application ... Further tax lots 5103 and 5104 also need to be included in the Application because the Applicant's road and water system are located on those properties."

Applicant provided the following response (Katzaroff, November 14, 2022, page 7):

"Tax Lots 5300, 5103 and 5104 are presumably Tax Lots 5300, 5103 and 5104, Map 15-12-00. These properties are owned by the State of Oregon (DSL) and are leased to Thornburgh on a long-term lease. Thornburgh has easements to build roadways across these properties but the properties are not part of the property subject to the CMP and FMP. This is evident from a review of the CMP and FMP decisions Ms. Bragar filed with her November 7, 2022 letter. At the time the CMP was approved, Tax Lots 5300, 5103 and 5104 were not located in the DR overlay zone. Ms. Gould argued that these access roads were, however, resort development that was prohibited because neither property was zoned with Destination Resort overlay zoning. Her claim was summarily rejected by the Oregon Court of Appeals. Gould v. Deschutes County, 216 Or App 150, 158, 171 P3d 1017, footnote 1 (2007) presumably because the access roads may be built outside of the Resort that is subject to the CMP/FMP."

The Hearings Officer finds the Applicant's above-quoted statement to be credible and responsive to Bragar's above-quoted comments. The Hearings Officer finds, based upon the evidence in the record, that the Applicant included all necessary tax lots in the modification application subject to this decision.

Substantive Issue #2: Intermittent Streams

Bragar (November 7, 2022, page 25) asserted, based upon correspondence from the Oregon Department of State Lands ("DSL") (Bragar attachment 35, page 2), that intermittent streams "crisscross the entirety" of a portion of the Thornburgh Resort property. Bragar argued that the environmental impacts of the intermittent streams must be analyzed prior to approval of the current application to modify.

The Hearings Officer finds the "intermittent streams" issue has been raised in the past by opponents and has been adequately addressed. The Hearings Officer takes note that DSL has previously emailed Staff indicating that notice to DSL was not necessary (October 19, 2022). Further, the Hearings Officer takes note that Applicant submitted a letter from HWA engineering stating that "there are no intermittent streams on the Thornburgh Resort property" (Applicant Exhibit rebuttal exhibit 8).

The Hearings Officer finds the DSL email and HWA letter referenced above are substantial evidence that there are no intermittent streams on the property subject to this application.

Substantive Issue #3: Removal of one golf course

Staff (Staff Report, page 20) and opponents asserted that the Applicant's proposed elimination/removal of one golf course from the Thornburgh project would amount to a substantial change of the CMP/FMP approvals. The Hearings Officer will address the "substantial change" issue in later findings. However, the Hearings Officer addresses the status of the golf course to be removed at this time.

The Hearings Officer reviewed the CMP and FMP documents. The Hearings Officer finds the CMP/FMP approved three golf courses for the Thornburgh Resort. The Hearings Officer finds that one golf course is required and two are optional. The Hearings Officer finds the golf course Applicant proposes to eliminate through the 2022 FWMP modification application is an optional course. The Hearings Officer finds that the removal of one of the optional golf courses cannot be considered a substantial change to the CMP/FMP. The CMP/FMP authorized not building two of the approved golf courses and the application in this case is following that CMP/FMP authorization.

Substantive Issue #4: On-the-ground changes

Staff (Staff Report, page 10) expressed concern about possible "on the ground" changes being requested in Applicant's 2022 FWMP modification proposal. The Hearings Officer finds that Applicant has proposed no "on the ground changes" in the 2022 FWMP application being reviewed in this case. The Hearings Officer finds that map references related to the one optional golf course to be eliminated will need to be addressed in a future site plan or preliminary plan review application. The one golf course proposed to be eliminated was at the time of the CMP and FMP approvals purely optional; it was anticipated during the CMP and FMP stages of approval that the one golf course to be eliminated would in fact not be constructed. If this application is approved such approval will limit golf course development to one required course and one optional course (not two optional courses).

Substantive Issues #5: Additional development

This issue is closely related to **Substantive Issue #4: On-the-ground changes**. Staff (Staff Report, page 52) asked the Hearings Officer to “make findings on whether the applicant’s proposal only modifies the FWMP”. Applicant (Katzaroff, October 2, 2022, page 6) responded by saying that

“Staff request[s] a finding as to whether the Applicant’s tailored request should be broadened beyond the request of the Applicant. It should not, nor is there authority in the code for staff to so require. As noted, the code requires a modification to be related to a discrete aspect of the proposal.”

The Hearings Officer reviewed the hearings officer’s FMP remand decision and Applicant’s Modification proposal in this case. The Hearings Officer finds that the FMP decision (M-07-2, MA-08-6) approved the 2008 FWMP. The Hearings Officer finds the primary references to water use (i.e., consumptive and mitigation -quantity and quality) at the Thornburgh Resort are found in the 2008 FWMP. The Hearings Officer finds that Applicant’s Modification proposal in this case is to update/change only the 2008 FWMP.

The Hearings Officer finds that Applicant’s proposed reduction in water use, changes in the sources of mitigation water and changes to the source of Thornburgh consumptive water are all related to Applicant’s proposed update to the 2008 FWMP. The Hearings Officer finds Applicant’s proposed modification in this case does not propose changes to CMP / FMP approved development at the Thornburgh Resort. No changes are proposed in the location of streets, open space, number of single-family residences, number of overnight living units or resort amenities (welcome center, clubhouse, etc.). The only development being proposed in this case is a reduction in CMP/FMP optional development (the optional golf course).

Substantive Issue #6: Illustrations/Graphics Required

Staff, as part of its incomplete letter response to Applicant indicated that it had requested Applicant to provide updated illustrations and graphics. Staff (Staff Report, pages 29 – 32) included Applicant’s comments in response to its request to provide updated illustrations and graphics. Applicant also addressed the illustrations and graphics issue in a record submission (October 21, 2022, page 3).

The Hearings Officer finds that Applicant’s modification proposal relates specifically to the FWMP. The Hearings Officer does acknowledge that the Applicant proposed to eliminate one golf course. The golf course to be eliminated, per the CMP, was optional; not required. The Hearings Officer agrees with Staff that updated illustrations and graphics would provide the county and persons interested in the Thornburgh Resort project with a timely picture of what has already been approved and what the Applicant is expecting to occur in the future. However, the Hearings Officer finds no participant in this case has provided the Hearings Officer with any legal authority and/or justification to require the Applicant to provide updated illustrations and graphics.

Substantive Issue #7: Number and Location of Onsite Wells

Staff (Staff Report, page 26) “asks the Hearings Officer to make findings on well location requirements for the Resort and to review the applicable criteria, if any, associated with changes to the location of and/or the number of wells for the Resort’s water supply.”

Applicant (Katzaroff, October 21, 2022, page 3) responded that Applicant is “not seeking the approval of new well sites.” The Hearings Officer reviewed the Applicant’s modification proposal in this case and concludes that Applicant is not formally applying for a change in the number or location of wells on the Thornburgh Resort property. The Hearings Officer finds that if the 2022 FWMP were to be approved in this decision that approval cannot be considered approval of any specific number of wells or any specific location of wells on the Thornburgh Resort property.

Substantive Issue #8: Definition of Surrounding properties – DCC 22.36.040

Staff (Staff Report, page 52) asked the Hearings Officer to define “surrounding properties” as that phrase is used in DCC 22.36.040 (C). Applicant (Katzaroff, October 21, 2022, pages 5 & 6) provided a response to Staff’s “surrounding properties” inquiry. The Hearings Officer agrees with Applicant that “surrounding properties,” as used in DCC 22. 36.040 (C), literally means the real property ownerships that are directly adjacent to (surrounding) the Subject Property.

Substantive Issue #9: ODFW – Agreement

The level of (required or optional input) participation of the Oregon Department of Fish and Wildlife’s (“ODFW”) was hotly debated during the record of this case. Many opponents argue that the ODFW must “agree” to Applicant’s proposed 2022 FWMP and must agree to measures assuring the satisfaction of the County “No Net Loss” standard. Applicant disagreed and argued ODFW “agreement” with the proposed 2022 FWMP is not necessary. This section of findings addresses the ODFW level of participation issue.

Staff, in the Staff Report (page 43), requested that the Hearings Officer “determine what authority, if any, shall be given to the ODFW’s verification that the Resort’s proposal complies with DCC 18.113.070(D).” Bragar (November 7, 2022, page 5) stated that “*Ms. Gould continues to think that the Hearings Officer erred in finding that Thornburgh’s failure to obtain ODFW, and as described below, BLM agreement with its FWMP modification is integral to a complete application.*”

Applicant (Katzaroff, October 21, 2022, page 4) provided the following comments related to ODFW authority in this case:

“Staff requests finding on whether ODFW has been granted specific review authority of the FWMP and compliance with the no net loss/degradation standard. ODFW has no authority over Thornburgh’s application. The County code does not provide for any jurisdictional oversight by ODFW. ODFW has not asserted that it has any jurisdiction to approve or deny wildlife management plans. To the extent ODFW provides testimony it should be weighed and reviewed the same as any evidence in the record.”

DCC 18.113.070(D) states any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.”

The Hearings Officer concurs with Applicant’s above-quoted statement that there is nothing in DCC 18.113.070 (D) requiring participation and/or agreement of ODFW in determining whether or not an application impacting fish and wildlife resources results in “No Net Loss.” Stated another way, the Hearings Officer finds that DCC 18.113.070 (D) does not require ODFW approval of Applicant’s 2022

FWMP proposal. This finding does not mean that ODFW comments, recommendations, or technical expertise are irrelevant or not to be considered. To the contrary, as noted in findings below, the Hearings Officer considered ODFW comments in this case to be very relevant. The Hearings Officer considered the ODFW comments to be provided by persons within ODFW who are competent and technically skilled in matters related to fish and wildlife habitats.

Substantive Issue #10: Is the Thornburgh CMP “void”

Bragar (November 7, 2022, pages 6 – 9) provided a historical and analytical analysis of Gould’s argument that because the CMP was void there is nothing to modify in this case. The conclusion of Bragar’s “CMP void” argument was that Applicant must submit an application for a “new” CMP before requesting approval of any proposed 2022 FWMP. The Hearings Officer finds that Bragar made frequent reference to the *Central Land and Cattle Co. v. Deschutes County*, 74 Or LUBA 236 (2016) land use decision (hereafter referred to as the case as the “*LUBA FMP 2016 Decision*”). Bragar argued that the *LUBA FMP 2016 Decision* held that the Thornburgh CMP was “ineffective and void.”

The Hearings Officer finds that Bragar’s “void CMP” argument, and even the *LUBA FMP 2016 Decision* related to the “void CMP issue,” a bit puzzling. This Hearings Officer has presided over and decided a number of post *LUBA FMP 2016 Decision* Thornburgh cases.⁵ The “void CMP” issue has not been effectively raised in any of the prior Thornburgh cases where this Hearings Officer presided. Further, the Hearings Officer notes that in those prior cases the Thornburgh CMP was referenced and in numerous instances CMP conditions of approval were reviewed to determine if an application should be approved. This Hearings Officer finds it difficult to comprehend the “void CMP” issue is relevant at this late stage of the development process. With that said the Hearings Officer did review and consider carefully Bragar’s argument.

The Gould “void CMP” considered was by LUBA in the *LUBA FMP 2016 Decision* (see pages 27 – 32). LUBA noted, in the *LUBA FMP 2016 Decision* (pages 29 & 30) that a Deschutes County Hearings Officer (not the Hearings Officer in this case) “*rejected Gould’s ‘void CMP’ argument for several reasons.*” As noted in the *LUBA FMP 2016 Decision* the Hearings Officer found that “*the FMP was filed pursuant to a CMP that ultimately was affirmed.*” LUBA found, in the *LUBA FMP 2016 Decision* that the appropriate approach to the CMP and FMP relationship is that the FMP “*has effectively incorporated and displaced the CMP approval*” (page 31).

The Hearings Officer, based upon a review of the record and relevant appellate decisions, finds that there is no substantial evidence or persuasive legal authority in the record of this case to allow the Hearings Officer to conclude that the CMP is “void.” As such, the Hearings Officer finds the CMP is not “void” and that the Applicant’s modification proposal may be processed in this case.

Substantive Issue #11: Overview of the Interaction Between the CMP and FMP

Closely related to the previous issue (**Substantive Issue #10: Is the Thornburgh CMP “void”**) is a staff (Staff Report, page 35) and opposition (Bragar, November 7, 2022, page 9) concern related to an Applicant representation that “*the CMP/FMP is one document.*” (Applicant’s Response to Issues Raised in Incomplete Application Letter, page 41). The Hearings Officer believes that Applicant’s position is

⁵ Including, but not limited to, the following: Phase A-1 Remand, Phase A 80 OLUs, Phase A-1 Resort Facilities, Modification of FMP regarding OLUs, Welcome Center and other resort amenities, Phase A-2.

sourced from LUBA language contained in the *LUBA FMP 2016 Decision*. LUBA stated, in the *LUBA FMP 2016 Decision*, the following:

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

Bragar provided the following comments related to the “CMP/FMP **one** document” issue:

“The Applicant’s attempt to redefine its CMP and FMP approvals as a single step instead of two separate distinct steps does not tell the whole story. Characterizing the CMP and FMP as one and the same decision based on the FMP containing some mirror, but not always identical conditions of approval or otherwise attempting to address the CMP conditions with a ‘satisfied’ statement, does not by mere assertion change the nature of each independent decision.”

Bragar’s comments quoted above are generally consistent with the Gould argument presented in the *LUBA FMP 2016 Decision* (See *LUBA FMP 2016 Decision* page 31, footnote 10).

The Hearings Officer, while appreciating the Applicant’s definitional efforts (Katzaroff, November 14, 2022, page 4, footnote 4), conceptually agrees with Bragar, Gould’s and possibly Staff’s description of the relationship between the CMP and FMP. The Hearings Officer finds the County has a three-step destination resort application/approval process. The CMP, the first step, is a singularly unique document not dependent upon any prior approval. The FMP, the second step, is a document that may well be dependent upon the CMP but from a legal perspective is itself an independent document. Site plan or preliminary plan approval documents may well be dependent upon the CMP **and/or** the FMP. Site plan and preliminary plan approvals are legally independent documents.

The Hearings Officer concurs with LUBA (*LUBA FMP 2016 Decision*) that the FMP “effectively incorporated and displaced the CMP approval.” However, that LUBA language does not state that the CMP and FMP are “one document.” In this case the Hearings Officer finds that the Thornburgh CMP and Thornburgh FMP are legally distinct documents and not technically “one document.” The Hearings Officer finds that such a conclusion is appropriate considering that the Deschutes County Code provides a process to modify a CMP (DCC 18.113.080) but not a separate process to modify a FMP document. The Hearings Officer finds that in this case the CMP approval deferred the FWMP decision to be made as part of the FMP. Therefore, the Hearings Officer finds that any decision to change the FMP by changing the FWMP necessarily implicates the CMP. The Hearings Officer finds that modifying a second stage FMP document may require a modification of the first stage CMP document. That appears to the Hearings Officer what is being done in this case.

SUBSTANTIVE ISSUES - SUBSTANTIAL CHANGE OVERVIEW

A significant number of opponents asserted that Applicant’s 2022 FWMP modification proposal constituted a “substantial” or “significant” change from past approvals. The “substantial change” issue is addressed in a number of findings below. The Hearings Officer chose to address the interpretation of the phrase in the two specific sections where that phrase is used (DCC 18.113.080 and Condition 1). The

Hearings Officer, in separate findings, considers how the phrase “substantial change,” as used in the two specific instances, can be “harmonized” by reference to DCC 22.36.040.

Substantive Issue #12: Substantial Change - DCC 18.113.080

DCC 18.113.080 states:

“Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.”

The Hearings Officer finds that the DCC 18.113.080 “as determined by the Planning Director” includes Planning Director designees. The Hearings Officer finds that a hearings officer is a Planning Director designee. The Hearings Officer finds the DCC 18.113.080 language “as determined by the Planning Director” allows, permits and authorizes this Hearings Officer to determine if Applicant’s proposed modifications in this case are “substantial changes.” The Hearings Officer takes note that Staff, Applicant and opponents all raised the issue of “substantial changes” in their evidentiary and legal arguments. Applicant, Staff and opponents all asked the Hearings Officer to determine whether or not its proposed modifications were “substantial changes.” No arguments were presented by any participant that the Hearings Officer in this case could not interpret DCC 18.113.080.

This is not the first instance where this Hearings Officer has been required to address the “substantial” or “significant” change issue. The latest instance where the Hearings Officer addressed this issue was in Applicant’s request to modify the Thornburgh CMP/FMP in relation to CMP/FMP Overnight Lodging Units (“OLU’s”) (the Hearings Officer’s “*OLU Modification Decision*”). Gould appealed the OLU Modification Decision to LUBA. LUBA addressed the “substantial” or “significant” change issue, in part, as follows:

“The hearings officer interpreted FMP Condition 1, DCC 18.113.080, and DCC 22.36.40 in a manner that harmonizes and gives effect to all those provisions. While FMP Condition 1 or DCC 18.113.080 do not expressly define ‘substantial change’ as a change that will result in significant additional impacts on surrounding properties, the hearings officer did not err in interpreting those criteria as implying that analysis. See ORS 174.010 (‘Where there are several provisions or particulars such construction, if possible, to be adopted as will give effect to all.’) In that context, the hearings officer did not err in concluding that a potential loss of 95 units of overnight tourist lodging is not a substantial change that would require a new application. Substantial change to an approved CMP, as used in DCC 18.113.080 means an alteration in type, scale, location, phasing or other characteristic proposal development such that findings of fact on which the original approval was based would be materially affected.’ DCC 18.113.080. Importantly, petitioner does not identify any ‘findings of fact on which the original approval was based that would be materially affected by a decrease in the overall number of OLU’s. DCC 18.113.080” Gould v. Deschutes County, LUBA No. 2022-011 (2022).

The Hearings Officer, in the OLU Modification Decision, was faced with Applicant requests that reduced, by a relatively small amount, the number of OLU’s required to be constructed and also proposed to change “bonding” requirements. The Hearings Officer found, in the OLU Modification Decision, the

reduction of number of OLU units and the changes in bonding requirements would reduce the scope of the Thornburgh project and correspondingly reduce impacts from the development. The Hearings Officer, in the OLU Modification Decision, did not hold that **any** proposed modification of the CMP/FMP that reduces impacts could not be considered a “substantial change.” By way of example only, if the Thornburgh Applicant offered a modification proposal that reduced the number of single-family units to be constructed to under 10, eliminated all golf courses, restaurants and club house facilities then the decision maker would likely be justified, despite a reduction in impacts, to find that such an application was a “substantial change.”

In this instance the Applicant is seeking approval to modify the CMP/FMP/FWMP in two ways (Hearings Officer summary):

- (1) Limit (lower) the amount of annual water use at the Resort; and
- (2) Change the source of FWMP mitigation water.

The first modification, the limitation of the amount of annual water use allowed by the Resort, proposes to reduce the Resort’s water use from 2,129 Acre Feet (“AF”) to an estimated 1,460 AF. The Applicant proposes to achieve this reduction by “agreeing” not to build a golf course (which the CMP/FMP designated as “optional”) and reducing the amount of water used by Resort lakes and various irrigation systems. Many opponents argue that the imposition of a lower use of water limitation meets the DCC 18.113.080 definition of “substantial change.” Opponents argue that Applicant’s proposed 2022 FWMP changes/alters the “*type, scale, location, phasing or other characteristic of the proposed development.*”

Applicant argued that placing a lower limit on the amount of annual water that can be used by the FWMP is not “development.” The Hearings Officer agrees a reduction of water use is not “development.” However, the Hearings Officer finds that what DCC 18.113.080 language “of the proposed development” is directed to is **THE** “proposed development.” In this case **THE** “proposed development” is the “Thornburgh Resort.” DCC 18.113.080 is asking whether or not the Thornburgh Resort, is being altered in type, scale, etc.

Clearly, the “scale” of water use is being proposed to change at the Thornburgh Resort (the “proposed development”); Thornburgh proposes to place a limit (lower than approved) on the water use at the Resort. Additionally, it is clear to the Hearings Officer that reducing the number of golf courses at a destination resort can reasonably be considered a change in scale and location of an important resort amenity at the Thornburgh Resort (the “proposed development”). The Hearings Officer finds that both the Applicant’s proposed reduced water use limitation and the elimination of one of three proposed golf courses meet the “alteration” portion of DCC 18.113.080.

The second aspect of Applicant’s proposal is the FWMP modification (from 2008 FWMP to 2022 FWMP) involving the change of sources of water to be used for fish and wildlife mitigation. Applicant, in its Burden of Proof (page 8) suggests that changing the source of mitigation water is not DCC 18.113.080 “development.” Again, the Hearings Officer agrees with Applicant that changing FWMP mitigation water sources is not “development.” But (once again), the Hearings Officer notes that DCC 18.113.080 is not asking if the alteration is in and of itself “development” but rather is asking if the “proposed development” (Thornburgh Resort) is being altered in type, scale, location, phasing or other characteristic? The Hearings Officer finds that a characteristic (source of water for the FWMP) of the “proposed development” (Thornburgh Resort) is being “altered.”

Staff inquired, in the Staff Report, as to whether “other characteristics” of the Thornburgh Resort were being proposed to be altered. Staff was unsure if Applicant’s proposed elimination of a golf course somehow altered the Thornburgh open space requirements. The Hearings Officer finds that the golf course being proposed to be eliminated was designated as open space in the CMP/FMP. The Hearings Officer finds Applicant did not propose to change any open space requirements. The Hearings Officer finds that so long as the Applicant meets its CMP/FMP and third level application requirements (i.e., tentative plan and site plan approval criteria) then this application does not allow the Hearings Officer to conclude that there is a proposed change in CMP/FMP open space obligations.

Opponents (i.e., Bragar, November 14, 2022, page 12) suggested that Applicant’s reduction of water (limitation) would result in changes to fire and sewage disposal CMP/FMP obligations. The Hearings Officer finds that Applicant did not propose any changes to the CMP/FMP fire suppression and sewage disposal obligations. The Hearings Officer finds opposition allegations related to changes in CMP fire suppression and sewage disposal obligations are not supported by substantial evidence in the record and/or legal authority.

The DCC 18.113.080 definition of “substantial change” has a second requirement (in addition to the “alteration” requirement addressed in the previous paragraphs). That requirement is that the “alteration” must materially affect findings of fact on which the original approval was based. The Hearings Officer reviewed the record in this case to determine if one or more specific CMP/FMP findings would be materially affected by Applicant’s proposed reduction (limitation) on the use of water. As stated by LUBA, in *Gould v. Deschutes County*, LUBA No. 2022-011 (2022), case participants must identify “any findings of fact on which the original approval was based that would be materially affected...” Since no participant in this case identified for the Hearings Officer one or more finding of fact in the original decisions (CMP/FMP) that would be materially affected the Hearings Officer finds Applicant’s proposal to modify the CMP/FMP water usage or elimination of an optional golf course are not a “substantial changes” under DCC 18.113.080.

With respect to Applicant’s proposed changes in the source of FWMP mitigation water the Hearings Officer takes note of the following Applicant statement (Burden of Proof, page 8):

“The applicant acknowledges that an amendment of the FWMP would materially affect the findings of compliance with the ‘no net loss/degradation’ standard but in a way that would reduce impacts.”

The Hearings Officer agrees with Applicant that an amendment to the FWMP changing water sources would materially affect the findings related to DCC 18.113.070 (D). Further, the Hearings Officer takes note that the FMP hearings officer findings (Hearings Officer Decision: M-07-2 & MA-08-6, hereafter the “HO FMP Decision) specifically identified water sources proposed to supply mitigation obligations and considered the impacts of those specific sources upon equally specific fish and wildlife habitat. These findings need to be changed in a wholesale fashion and not just tweaked. No reasonable person could conclude that the CMP/FMP findings related to the 2008 FWMP need only minor changes if the proposed 2022 FWMP is approved.

The Hearings Officer finds that Applicant’s proposed changes in sources of FWMP mitigation water would materially affect the FMP findings related to the FWMP. The Hearings Officer finds, based upon the evidence and analysis set forth above, that Applicant’s proposed modification of the FWMP mitigation water sources is a DCC 18.113.080 “substantial change.”

The Hearings Officer will address processing issues related to DCC 18.113.080 (“reviewed in the same manner”), Condition 1 (“will require a new application”) and DCC 22.36.040 in separate findings below.

Substantive Issue #13: Substantial Change - Condition 1

FMP Condition 1 states the following:

“Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.”

The Hearings Officer incorporates the preceding findings (**Substantive Issue #12: Substantial Change – DCC 18.113.080**) as additional findings for this section. LUBA generally agreed with the Hearings Officer’s analysis as set forth in the OLU Modification Decision. LUBA concurred with the Hearings Officer that Condition 1 does not include a definition of “substantial change” and that the Hearings Officer’s utilization of the DCC 18.113.080 “substantial change” definition was appropriate.

The Hearings Officer, therefore, finds that Applicant’s proposed modification related to reducing (limiting) the amount of water use at Thornburgh is not a Condition 1 “substantial change” to the CMP/FMP/FWMP. The Hearings Officer finds that Applicant’s proposed modification to the FWMP mitigation water sources is a Condition 1 “substantial change.”

The Hearings Officer will address processing issues related to DCC 18.113.080 (“in the same manner”) Condition 1 (“will require a new application”) and DCC 22.36.040 (subsections 3. And 4.) in the findings for **Substantive Issue #15: Process**.

Substantive Issue #14: DCC 22.36.040

The Hearings Officer incorporates the findings for **Substantive Issue #12: Substantial Change – DCC 18.113.080** as additional finding for this section.

DCC 22.36.040 (A) states:

“An applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final.”

The Hearings Officer finds that six months have elapsed since the FMP became final. The Hearings Officer finds this section of DCC 22.36.040 is met.

DCC 22.36.040 (B) states:

“Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.”

The Hearings Officer finds that DCC 18.113.080 (B) sets forth a number of requirements. Those requirements include (1) a change in circumstances has occurred since the approval, (2) the application

for modification is not a “substitute for an appeal,” (3) the application is not a “substantially new proposal,” and (4) the application would not have “significant additional impacts on surrounding properties.” DCC 322.36.040 (B) also states “unless otherwise specified in a particular zoning ordinance.” The Hearings Officer finds that no participant in this case presented credible evidence or persuasive argument that there is a “particular zoning ordinance” that overrides or otherwise makes DCC 18.113.080 inapplicable. The Hearings Officer finds no credible evidence or persuasive argument in the record suggesting that DCC 18.113.080 (B) is not relevant to this case.

Applicant provided the following comments related to DCC 22.36.040 (B) (Katzaroff, November 21, 2022, page 26):

“To the extent the hearings officer determines that a change of circumstances is necessary, both Thornburgh and project opponents have argued that current conditions related to drought and water constraints warrant reduction in water use and to provide better mitigation for water use. Thornburgh is requesting just that, an update from the 2008 FWMP to the 2022 FWMP that will provide more water instream with net benefits to habitat quality through decreases in water temperatures.”

Applicant provided additional support that there have been changes in circumstances (Burden of Proof, pages 6-8). The Hearings Officer concurs with the Applicant conclusionary comments quoted above and Applicant’s Burden of Proof comments that there has been a change in circumstances. The Hearings Officer takes notice that the FMP proposal was originally submitted in 2008 and since that time the concepts of climate change and need for water conservation have become more accepted. The Hearings Officer also takes notice that during the interim between CMP/FMP/FWMP approval opponents have raised concerns about the amounts and sources of water to be used at the Thornburgh Resort and also challenged the viability of actually completing the current FWMP. The Hearings Officer finds that circumstances related to the Thornburgh Resort CMP/FMP/FWMP have changed making it *desirable* for the Applicant to modify the CMP/FMP/FWMP.

The Hearings Officer finds there is no credible or substantial evidence in the record to conclude that Applicant is filing the modification requests in lieu of an appeal. Opponents have suggested that Applicant submitted the 2022 FWMP application as a substitute for an appeal. The Hearings Officer finds that opponents have not identified any specific land use decision(s) where the current application would in any way act as a “substitute for appeal” for that/those decisions.

The Hearings Officer acknowledges that the 2022 FWMP modification application is a “new FWMP.” However, the Hearings Officer interprets DCC 22.36.040 (B) phrase “substantially new proposal” relates to the CMP that is being proposed to be modified (See findings for DCC 18.113.080, the Destination Resort code section relating to modifications of approved CMP’s). The Hearings Officer finds that the current 2022 FWMP modification application relates to a discrete and relatively small element of the CMP/FMP approval. The application in this case is not a proposal for new resort it is a proposal to modify one part of the CMP/FMP approved resort project.

The Hearings Officer finds Applicant’s reduction of water use is in fact just that: a request to reduce (limit) water use at the Thornburgh Resort. The Hearings Officer finds Applicant’s request to eliminate one of three golf courses at the Thornburgh resort is not a new proposal; it is a request to clarify the number of golf courses that must and/or can be constructed at the Thornburgh Resort (one golf course is currently required and two may be constructed at the option of the Applicant). The changing of the

FWMP water sources is a requested *change* of the existing FWMP. The Hearings Officer finds, based upon the record in this case, that Applicant’s modification proposals are not “substantially new proposal(s).” The Hearings Officer finds Applicant is proposing no new or additional housing units, infrastructure or amenities as part of the current modification proposal. While the application for the 2022 FWMP approval is a *change* the Hearings Officer finds there is no credible and persuasive evidence in the record that even attempts to demonstrate that the application “substantially” changes the CMP.

The final requirement of DCC 22.36.040 (B) asks if the Applicant’s modification proposal will have “significant additional impacts on surrounding properties.” The Hearings Officer incorporates the findings for **Substantive Issue #8: Definition of Surrounding properties – DCC 22.36.040** as additional findings for this section. The Hearings Officer acknowledges that opponents have made general reference to “potential impacts” on surrounding properties but have not provided the Hearings Officer with credible and persuasive evidence that those impacts are “significant” and are “additional” to the impacts of the current CMP/FMP/FWMP.

DCC 22.36.040 (C) states:

“An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.”

The Hearings Officer addressed the “substantially new proposal” and “significant additional impacts on surrounding properties” issues in the findings for DCC 22.36.040 (B) above. Those findings are applicable to DCC 22.36.040 (C).

The Hearings Officer finds that Applicant’s proposed modification of the use of water, elimination of one (of three) golf courses and changing the source of FWMP mitigation water are “discrete” aspects of the CMP/FMP approval. The Hearings Officer finds no credible and substantial evidence in the record to support a conclusion that Applicant’s proposal, in this case, is a modification of an approval (CMP/FMP/FWMP). The Hearings Officer finds that the proposals, in this case, are not such that they are greater in scope than allowable as a modification. The Hearings Officer finds DCC 22.36.040 allows Applicant’s proposals to be treated as a modification.

DCC 22.36.040 (D) states:

“An application for a modification shall be handled as a land use action.”

The Hearings Officer finds that Applicant’s proposed modifications to the CMP/FMP/FWMP have been processed as a land use action. There is no evidence in the record to support a contrary conclusion.

Substantive Issue #15: Process

Many opponents of Applicant’s 2022 FWMP proposal argued that the Applicant should be required to submit an entirely new CMP/FMP application; in essence “start the resort approval process over.” (i.e.,

Bragar referenced the need for a new CMP/FMP application in her November 7, 2022 submission on at least the following pages – 2, 3, 9, 13, 14, 15, 17, 18, 20, 23, 25, 26, 27, 28, 35 and 37).

DCC 18.113.080 states, in part, the following:

“Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP.” (underlining added by the Hearings Officer)

Condition 1 states, in part, the following:

“Any substantial change to the approved plan will require a new application.” (underlining added by the Hearings Officer)

The Hearings Officer found that Applicant’s proposal to change the 2008 FWMP mitigation water sources, by adopting the 2022 FWMP, was a “substantial change” as described in DCC 18.113.080 (See findings above for **Substantive Issue #12: Substantial Change - DCC 18.113.080**) and Condition 1 (**Substantive Issue #13: Substantial Change – Condition 1**). Therefore, the Hearings Officer finds that the 2022 FWMP modification application must be “reviewed in the same manner as the original CMP” (DCC 18.113.080) and as “a new application.” (Condition 1). The balance of these Substantive Issue #15 findings address the phrases “reviewed in the same manner” and “new application.” Neither of these phrases is defined in the Deschutes County Code or in the CMP/FMP.

The Hearings Officer’s initial attempt to interpret the phrases “reviewed in the same manner” and “new application” considered dictionary definitions.⁶ The phrase “reviewed in the same manner” (DCC 18.113.080) is not defined in the Deschutes County Code (“DCC” or the “Code”).⁷ The word “**review**” is defined in the Merriam-Webster Online dictionary as “a formal assessment or examination of something with the possibility or intention of instituting change if necessary.” The word “**same**” is defined in the Merriam-Webster Online Dictionary as “resembling in every relevant respect” and “conforming in every respect.” Merriam-Webster lists the word “identical” as a synonym to the word same. The word “**manner**” is defined in the Merriam-Webster Online Dictionary as “a characteristic or customary mode of acting” and “a mode of procedure or way of acting.” Combining these three terms (“review,” “same” and “manner”) the Hearings Officer finds a reasonable interpretation of “reviewed in the same manner” is: “**identical procedure or identical way of acting.**”

The phrase “new application” is not a defined in the Code. DCC 1.04.010 does define “Applicant and application” as “the person who applies, and the process for applying, for a franchise, license, permit or other benefit or privilege given by the County.” That definition does employ the word “process” but otherwise is not useful in addressing the Condition 1 “new application” issue. The Hearings Officer notes that no participant in this case provided to the Hearings Officer a BOCC case decision or relevant LUBA or appellate decision case that provided any useful insight into a defensible interpretation of “new application.” The Hearings Officer finds, based upon the evidence in the record, that the Condition 1 phrase “new application” is unique to the Thornburgh CMP/FMP.

⁶ The Hearings Officer acknowledges that DCC 22.36.040 may assist in interpreting “reviewed in the same manner” and “new application.” The Hearing Officer, later in these findings, does address the interpretive impact of DCC 22.36.040.

⁷ The complete first sentence of DCC 18.113.080 states: Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. (underlining added by the Hearings Officer)

The phrase “new application” is also not defined in Code. The term “**new**” has a temporal connotation; something that is recent and not old. The singular term “**application**” is defined in the code (DCC 1.04.010) as “the process for applying, for a franchise, license, permit or other benefit or privilege given by the County.” The Hearings Officer finds a reasonable interpretation of “new application,” utilizing definitions, is: “**filing a new request for approval.**”

The Hearings Officer attempted a slightly different definition based interpretative approach. The Hearings Officer finds that the “review in the same manner” phrase is directed towards a *process* that is the “same.” The Hearings Officer finds that “new application” is directed towards something “*new*.” The Hearings Officer finds that both the phrase “review in the same manner” and “new application” are directed to “process.” DCC 18.113.080 mandates the same process as used for reviewing the CMP be used if a modification request is deemed a substantial change. The Hearings Officer finds the Condition 1 “new application” language is also focused on process. Condition 1 requires that a substantial change request must be processed through a new application. The Hearings Officer finds that the DCC 18.113.080 “reviewed in the same manner” language and Condition 1 “new application” language are functionally equivalent as both address processing applications.

The Hearings Officer finds that an attempted harmonization of DCC 18.113.080 and Condition 1 does not assist in answering the “new application” interpretation issue. The Hearings Officer next considered the possibility that DCC 22.36.040 might assist in providing Deschutes County Code insight into how Condition 1 may be interpreted.

The Hearings Officer finds that the dictionary definitions discussed above and the Hearings Officer’s dictionary interpretation of the phrases at issue do not convince the Hearings Officer that “reviewed in the same manner” and/or “new application” require a “start-over” new CMP application or, in the alternative, simply a “modification of the CMP” application. The Hearings Officer next considers the relevance of DCC 22.36.040 to this interpretive issue.

DCC 22.36.040 (C) states in part the following:

“Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.”

The Hearings Officer, in earlier findings, concluded that the Applicant’s proposed 2022 FWMP application did meet the requirements of DCC 22.36.040 (A) and (B). The Hearings Officer found that Applicant’s proposed 2022 FWMP application was a DCC 22.36.040 allowable modification. The Hearings Officer, in the alternative, found that Applicant’s 2022 FWMP proposal was not a request to modify an approval in a scope greater than allowable as a DCC 22.36.040 modification.

The Hearings Officer finds the DCC 22.36.040 (C) language “*shall be reviewed only under the criteria applicable to that particular aspect of the proposal*” provides important interpretative assistance. The Hearings Officer finds, at least under DCC 22.36.040, that if an application is deemed a modification (not exceeding scope greater than allowable as a modification) then review is limited to only the discrete modification request. The Hearings Officer interprets the “*reviewed only under the criteria applicable to that particular aspect of the proposal*” as meaning that only a modification application is necessary and

not an application considering the entire scope of the prior approval (a “start-over” CMP/FMP application).

The Hearings Officer, in the “substantial change” findings, with at least tacit support of LUBA (*Gould v. Central Land and Cattle Company*, LUBA No. 2022-011 (2022)) attempted to “harmonize” the DCC 18.113.080 and Condition 1 “substantial change” language. The Hearings Officer extends that “harmonization” approach to the DCC 18.113.080, Condition 1 and DCC 22.36.040 process issue. The Hearings Officer was also not comfortable interpreting “reviewed in the same manner” and “new application” phrases using dictionary definitions of the included words/terms. The Hearings Officer then attempted to use a relevant DCC section addressing “modifications of proposals” (DCC 22.36.040) to assist in interpreting “reviewed in the same manner” and “new application” phrases.

The Hearings Officer finds that it is appropriate to utilize DCC 22.36.040 (C) as an interpretive aide. Hearings Officer finds that the DCC 18.113.080 phrase (“reviewed in the same manner”) and the Condition 1 phrase (“new application”) means that so long as a modification application meets the requirements of DCC 22.36.040 (A) and (B), and can be reasonably considered a modification request in a scope allowed by DCC 22.36.040, then only a modification application -- not a brand new CMP/FMP application -- is required by DCC 18.113.080 and Condition 1 when a substantial change modification to a CMP/FMP is requested.

The Hearings Officer, in addition to the above “reviewed in the same manner” and “new application” findings takes this opportunity to respond to selected Applicant comments (Katzaroff, November 21, 2022, pages 14 & 15) set forth below:

Opponent Gould argues, at Bragar OR, p. 15, and Bragar Rebuttal, p. 8, that FMP Condition 1 on its own requires a ‘new application.’

FMP Condition 1 states that ‘Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.’ What is not contained in that condition is a requirement that a new destination resort (or CMP or FMP) must be applied for; it only requires a ‘new application.’ This makes sense because it makes it clear that any substantial change must be reviewed by a land use process before the County that allows public input regarding the proposed changes [footnote 16: No substantial change was requested here. However, it goes without saying that Thornburgh filed ‘a new application’ which is all that condition requires for compliance.] In this case, the land use process to be followed to review a new or amended FWMP is set out in CMP Condition 37 and is a review at a public hearing. As with any land use approval, the approval is limited to a review of what is requested and the land use criteria relevant to the request. This reading of Condition 1 is consistent with the code. DCC 18.113.080 specifically allows modification of a Conceptual Master Plan which in this case has been incorporated into the FMP. It provides: “Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected. DCC 18.113.100 says that the new application required when an FWMP proposes a significant change from the CMP is an application to modify or amend the CMP – not to file a new CMP.

Further, the County has routinely permitted other destination resorts to modify their resort master plans utilizing the same process as applied to Thornburgh's same request. Exhibit 23, p. 5 (highlighting six other modification requests with the same housekeeping changes).[footnote omitted]

Importantly, this argument also relies on the idea that a condition can impose additional requirements that are not authorized or based in the law or relevant code. They cannot. ORS 215.416(4)(a) only permits "such conditions as are authorized by statute or county legislation." It does not authorize a Hearings Officer to adopt conditions separately. See also, ORS 215.416(8)(a); ORS 215.427(3)(a)(approval or denial must only be based upon the County's land use regulations). The most reasonable and logical interpretation is that FMP Condition 1 is a reference to the provisions of the County code that govern amendments of land use decisions and resort plans. This requires any changes be authorized during land use review but does not require an entirely new resort application be filed."

The Hearings Officer agrees with Applicant that Condition 1 does not contain a "requirement that a new destination resort (or CMP or FMP) must be applied for." As noted in the finding above the Hearings Officer concluded only a modification application and not an entirely new ("start-over") CMP/FMP application was required in this case. Applicant also stated its interpretation of the Condition 1 requirement for a "new application" makes sense because Condition 1 "makes it clear" that any substantial change must be reviewed by a public land use process. The Hearings Officer finds Condition 1 does not say that a substantial change requires a land use process requiring public input regarding the proposed changes. The Applicant certainly may infer a land use process requiring public input but the Hearings Officer finds Condition 1 does not explicitly say that.

Applicant, in the comments quoted above, suggests CMP Condition 37 sets forth the land use process that applies in this case.⁸ The Hearings Officer notes that CMP Condition 37 was "satisfied" through the approval process of the FMP (Hearings Officer FMP Decision, page 29). This Hearings Officer finds CMP 37 does not reference a modification of the CMP/FMP/FWMP but rather is only directed towards to initial approval of the wildlife mitigation plan. The Hearings Officer finds that even if Condition 37 language were to be considered relevant and/or instructive to Condition 1, the process in this case does in fact involve a public hearing with the same participatory rights allowed in the CMP approval hearing. Condition 37 is not helpful in interpreting Condition 1. Had the FMP hearings officer intended to incorporate CMP condition 37 into Condition 1, that hearings officer could have done so; however, she did not.

Applicant comments that DCC 18.113.080 specifically allows for the modification of the CMP. The Hearings Officer agrees. However, what is being considered here is the interpretation of language contained in a specific condition of approval. The Hearings Officer finds the Condition 1 "new application" language somehow must defer to the language of DCC 18.113.080 is not correct.

Applicant argues that the county has routinely permitted other destination resorts to modify FMP's using the same process proposed by Applicant in this case is true. However, the Hearings Officer notes that the cases reviewed by the Hearings Officer either (1) do not contain the exact language of the

⁸ CMP Condition 37: Applicant shall demonstrate compliance with DCC 18.,113.070 (D) by submitting a wildlife mitigation plan to the County as part of its application for Final master plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as to allowed in the CMP approval hearing.

Thornburgh CMP/FMP Condition 1, or (2) those cases do not involve requests to make substantial changes (exception: Eagle Crest Long-Term Sewage Case, MC-02-3, MC-02-4, MC-02-5).

The Eagle Crest – Long Term Sewage Case was processed as a modification proposal and only addressed the modification relevant criteria but there is no reference in the decision to the Eagle Crest FMP containing the CMP/FMP Condition 1 “new application” language. The Hearings Officer finds that blindly deferring to DCC 18.113.080, when Condition 1 does in fact exist and is relevant and applicable, is not legally justified.

Finally, Applicant argues that somehow ORS 215.416(4)(a) applies to the Condition 1 analysis in this case. The Hearings Officer references Applicant’s oft-used “collateral attack” argument; it is improper to contest the validity of a final decision. The FMP is a final decision. Condition 1 is included in the FMP final decision. Applicant had the right to object to Condition 1 as being violative of ORS 215.416 and/or ORS 215.427. The Hearings Officer finds Applicant’s ORS 215.416 and/or ORS 215.427 argument was not sufficiently developed to allow the Hearings Officer to meaningfully review and decide that issue.

The Applicant also argued that the Hearings Officer should consider DCC 18.113.100 in the context of interpreting “new application” in Condition 1. DCC 18.113.100 (B) states:

“If the Planning Director finds evidence in the FMP of a substantial change from the CMP, the Planning Director shall advise the applicant to submit an application for modification or amendment of the CMP.”

The Hearings Officer finds Applicant’s DCC 18.113.100 (B) argument inapposite. This section only relates to the “process for approval of Final Master Plan.” The CMP and FMP are finalized and no longer subject to approval and/or appeal. DCC 18.113.100 was pertinent at one time but that time has passed.

In conclusion the Hearings Officer, in this case, was faced with a difficult issue – what does the DCC 18.113.080 language “reviewed in the same manner” and Condition 1 language “new application” mean? The Hearings Officer found the record to contain a dearth of legal support for any particular definition/interpretation of “reviewed in the same manner” and “new application.” In the end the Hearings Officer reviewed Deschutes County Code, prior modification land use decisions and the comments of Applicant, Staff and opponents. In the end the Hearings Officer found the DCC 18.113.080 language “reviewed in the same manner” and Condition 1 language “new application” means that Applicant was required to submit a “new modification application” and not a “new CMP/FMP application.”

Substantive Issue # 16: Relevant Approval Criteria

Staff, in response to a request by the Hearings Officer at the Hearing, provided an open-record memorandum (House, November 7, 2022). Staff addressed the issue of what criteria should be considered in this case as follows:

“Staff agrees with the applicant that the review in these land use review proceedings for the application is such that, if the Hearings Officer determines the proposal will effect a ‘substantial change,’ the application may nonetheless be considered as against the applicable criteria per DCC 18.113.080, which requires review of a proposed modification of a CMP ‘in the same manner as the original CMP.’ The ‘same manner’ provision in DCC 18.113.080 means an evaluation of the entire

resort, as modified, against all of the approval criteria under 18.113.070, Approval Criteria, and all criteria under DCC 18.113.050, Requirements for Conditional Use Permit and Conceptual Master Plan Applications. The applicant appears to argue the question of ‘substantial change’ is not determinative and asserts that there will not be any procedural error, or resulting substantial prejudice, because the applicant has consented to a heightened process. This position is based in part on the applicant’s position that DCC 18.113.100 allows FMPs to vary from CMPs in ways that are not substantial, and the position that ‘reduction of water use and choice to not build an optional golf course is not a substantial change.’ Similarly, DCC 18.113.080 allows for Planning Director review of insubstantial changes to an approved CMP, but requires a full review of a proposed modification that results in ‘substantial change.’”

The Hearings Officer incorporates the findings for **Substantive Issue #15: Process** as additional findings for this section. The Hearings Officer finds that DCC 22.36.040 (D) is applicable to this application. The Hearings Officer finds the relevant approval criteria for a DCC 22.36.040 modification of approval application are only those that relate to the discrete changes being requested. The Hearings Officer, in the context of DCC 22.36.040 (C), finds Staff’s recommendation that “all CMP” approval criteria must be considered is not correct.

Substantive Issue # 17: DCC 18.113.070 (D) – “No Net Loss”

Overview: The Hearings Officer finds DCC 18.113.070 (D) to be the most important criterion in this case. DCC 18.113.070 (D) is commonly referred to as the “No Net Loss” standard or test. No participant in this case indicated that DCC 18.113.070 (D) was irrelevant to the determination of whether Applicant’s proposed 2022 FWMP modification should be approved.

DCC 18.113.070 (D) states:

“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 primary Thornburgh Resort document addressing DCC 18.113.070 (D) is the Thornburgh Fish and Wildlife Mitigation Plan. The existing Thornburgh Fish and Wildlife Mitigation Plan shall be referred to as the 2008 FWMP. The current proposal, for the purposes of this decision, shall be referred to as the 2022 FWMP. The version of Applicant’s 2022 FWMP considered by the Hearings Officer is identified by Applicant as the Fish and Wildlife Mitigation Plan – 2022 FWMP Relating To Potential Impacts of Thornburgh’s Reduced Ground Water Withdrawals on Fish Habitat, Cascade Geoengineering, LLC, August 16, 2022 Reorganized and Updated November 7, 2022. The Hearings Officer refers to this document in the findings for this section as the 2022 FWMP.

Even though a detailed history of the 2008 FWMP will not be given in this decision some history of the development and interpretation of the 2008 FWMP is appropriate. The wildlife mitigation topic was first considered as part of the CMP approval process. The BOCC, at the CMP stage (1st application/approval stage in Deschutes County for a Destination Resort), deferred a final decision related to adoption of a FWMP until the FMP stage (2nd application/approval stage for Destination Resort) *Central Land and Cattle Company, LLC. V Deschutes County & Gould*, LUBA No. 2015-107 @37 (2016). The 2008 FWMP was eventually approved as part of the FMP application/approval process. After extensive litigation the FMP and FWMP were finally approved. The 2008 FWMP was found to meet

the DCC 18.113.070 (D) “No Net Loss” standard *Gould v. Deschutes County*, LUBA No 2021-112 @ 11 (2022).

The hearings officer issuing the Hearings Officer FMP Decision (October 8, 2008 – Hearings Officer Corcoran-Briggs) provided insight into the evidence and arguments leading to approval of the 2008 FWMP. The Hearings Officer FMP Decision (Page 24)⁹, in part, made the following findings:

“The applicant acknowledges that the proposal require[s] the development of wells on the property that will affect basin water flows. However, the applicant argues that it has addressed those Impacts by purchasing mitigation credits from COID, and by acquiring irrigation water rights that will return water to Deep Canyon Creek. They argue that both OWRD and ODFW have reviewed its proposal and have agreed that the proposal mitigates both water quantity and quality that will be removed from the aquifer due to the resort development. The applicant supplied a copy of an agreement between the owners of Deep Falls Ranch and the Daniels Group showing those owners have agreed to the removal of two dams that diverted flow from Deep Canyon Creek. [footnote omitted] In response to testimony from opponents that the proposed mitigation does not adequately address increases in water temperature in Whychus Creek, the applicant argues its proposal will have little or no impact on water temperatures on the creek. Even if water temperatures in Whychus Creek does increase incrementally, the applicant asserts that the increase can be addressed by requiring the applicant to fund a water conservation project sponsored by the Three Sisters Irrigation District to return 106 acre-feet of water to instream uses.

The OWRD mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development.”

The hearings officer, in the FMP HO Decision, imposed conditions of approval in order to assure the 2008 FWMP fully met the “No Net Loss” mitigation obligations; the most relevant is FMP Condition 38. The Hearings Officer notes that in addition to the FMP HO Decision the BOCC, LUBA and Oregon appellate courts have all taken the opportunity to refine how the DCC 18.113.070 (D) “No Net Loss” standard should be interpreted. The Hearings Officer, in this decision, intends to follow the interpretive guidance set forth in relevant hearings officer, BOCC, LUBA and appellate court decisions related to approval of the FMP and 2008 FWMP.

The Hearings Officer does take note of a few of the LUBA and Oregon Court of Appeals holdings that are relevant to this decision.¹⁰ First, to satisfy the “No Net Loss” standard the record must contain

⁹ See also, FMP HO Decision, page 24 *“The meaning of the standard, and the sufficiency of the evidence to address it was the major focus of the parties in the FMP proceeding. The applicant provided a wildlife mitigation plan that had been reviewed by the BLM and ODFW, and both agencies endorse the applications identification of likely impacts on fish and wildlife, and conclude that the applicant’s plan addresses the impact of the development on those resources such that the ‘no net loss’ standard of DCC 18.113.070(D) is satisfied.”*

¹⁰ The Hearings Officer does not represent that the cited BOCC, LUBA or Oregon Court of Appeals cases are the only cases addressing and/or resolving a particular issue. The citations are intended only to direct the reader to at least one relevant case and holding.

substantial evidence that the 2022 FWMP provides mitigation water – of both the quantity and quality required by the 2022 FWMP – before pumping water for uses allowed by the approved phase of development. *Gould v. Deschutes County & Thornburgh Resort Company, LLC*. 233 and *Gould & Central Oregon LandWatch v. Central Land and Cattle Company, LLC*, LUBA No. 2022-026 @ 13 (2022). The focus of the “No Net Loss” standard is the preservation of habitat *Gould v. Deschutes County & Thornburgh Resort Company, LLC*. 233 Or App 623 @ 634 (2022). The 2022 FWMP does not need to mitigate every potential impact on habitat rather impacts must be minimized or offset impacts. *Gould v. Deschutes County & Central Land and Cattle Company, LLC*. 2018-008 @ 26 (2018). The 2022 FWMP mitigation plan, to meet the “No Net Loss” Standard, must provide mitigation water that is likely and reasonably certain to succeed in mitigating any adverse impacts. *Gould v. Deschutes County & Central Land and Cattle Company, LLC*. 2018-008 @ 28 (2018).

Technical Evidence Related to the “No Net Loss” Standard

Applicant, in its final argument (Katzaroff, November 21, 2022, pages 3 & 4) provided a listing of reports/memorandums/models submitted in support of the proposed 2022 FWMP satisfying the “No Net Loss” standard. The Hearings Officer includes Applicant’s list below:

- 1. Flow and Temperature Modeling of the Middle Deschutes River, Kellie Vache, Ph.D., and Joe Eilers, PH-WQ, Resource Specialists, Inc., dated October 2022. (RSI-1)*
- 2. Evaluation of the Impacts of Proposed Groundwater Pumping at Thornburgh Resort Project, Pradeep Mugunthan, Ph.D., Four Peaks Environmental Consulting, dated 10/19/22. (GSFlow).*
- 3. Flow and Temperature Modeling of the Middle Deschutes River, Part II-Impacts of GSFlow-based Changes in Stream Discharge, Kellie Vache, Ph.D., and Joe Eilers, PHWQ, Resource Specialists, Inc., dated October 22, 2022. (RSI-2)*
- 4. Evaluation of the Fish Habitat Impacts of Proposed Groundwater Pumping at Thornburgh Resort Project from RSI-1, Lucius Caldwell, Ph.D., Four Peaks Environmental, dated 10/21/22. (Fish 1)*
- 5. Evaluation of the Fish Habitat Impacts of Proposed Groundwater Pumping at Thornburgh Resort Project to Include Modeled Changes in Surface Water Resulting from Changes in Groundwater Discharge, Lucius Caldwell, Ph.D., Four Peaks Environmental, dated 10/21/22. (Fish 2)*
- 6. Evaluation of Flow and Temperature Mass Balance Calculations for Crooked River. Lucius Caldwell, Ph.D., Four Peaks Environmental, dated 10/24/22. (Fish-Crooked River)*
- 7. Evaluation of Flow and Temperature Mass Balance Calculations for Little Deschutes River. Lucius Caldwell, Ph.D., Four Peaks Environmental, dated 10/24/22. (Fish-Little Deschutes)*
- 8. Supplemental Memorandum Regarding Reduction of Water Needs and Amendment of FWMP for Thornburgh Resort. Jim Newton, C.W.R.E., P.E., R.G., Cascade GeoEngineering, dated October 24, 2022. (CGE -2)*
- 9. Updated Fish Habitat Evaluations in the Crooked River, Whychus Creek, and the Deschutes River, Lucius Caldwell, Ph.D., Four Peaks Environmental, dated 11/14/22. (Fish-Spring Evaluations)*
Additional flow and thermal modeling work which was undertaken in response to questions and requests by staff at the Oregon Department of Fish and Wildlife. This work included:
- 10. Flow Modeling by Four Peaks to determine impacts of Thornburgh pumping with and without additional flow from the transfer wells. Report to ODFW in email on November 2, 2022. See Exhibit 30.*
- 11. Flow Modeling by Four Peaks to determine the seasonality of impacts. Reported to ODFW in email on November 2, 2022. See Exhibit 30.*

12. *Flow Modeling by Four Peaks to determine the impacts of the ODFW requested “Spring” reaches in the Deschutes River, Whychus Creek, and the Crooked River. Reported to ODFW in email on November 14, 2022. See Exhibit 26.*

13. *Thermal and Flow analysis by RSI to determine thermal impacts in the ODFW Springs. Reported to ODFW in email on November 14, 2022. See Exhibit 26.*

The technical work was completed by 4 individuals, 3 holding Ph.D.’s, 1 holding a master’s degree, all in relevant disciplines. Mr. James Newton, Cascade GeoEngineering, holds the professional designations of Certified Water Rights Examiner C.W.R.E., Professional Engineer, P.E., and Registered Geologist R.G. (See Resumes previously submitted) The extensive technical analysis these scientists performed provides detailed support for the original conclusions reached by Cascade GeoEngineering, that the 2022 FWMP complied with the NNL found in DCC 18.113.070(D).

In addition, Thornburgh’s experts provided rebuttal evidence, including:

14. *Four Peaks – November 14: Comments on E-PUR Memorandum Regarding Groundwater Impacts. (Exhibit 29)*

15. *CGE – November 14: Responses to E-PUR Memorandum Dated November 4, 2022, and General Responses to ODFW Concerns. (Exhibit 33)*

16. *RSI – November 14: Response to Reviewer Comments Regarding QUAL2Kw Model Application. (Exhibit 34)”*

Applicant, in its Final Argument (Katzaroff, November 21, 2022, pages 4 & 5) also volunteered a brief summary of “technical” evidence provided by opponents. The Hearings Officer finds the Applicant’s comments quoted below are a fair summary of opponents’ opposition technical evidence but certainly do not represent a complete or comprehensive discussion of that evidence. Applicant’s summary follows:

“The only technical evidentiary submittals in this record from another party are three technical memorandums submitted on behalf of Ms. Gould. All three memorandums are drafted by E-PUR LLC’s Mr. John Lambie:

** E-PUR LLC Technical Memorandum dated September 9, 2022; Bragar OR, Attachment 16, pps. 294-303.*

** This memorandum comments only two transfers (T-14074 and T-14075) proposed by Thornburgh and does not comment on the 2022 FWMP.*

** E-PUR LLC Technical Memorandum dated November 4, 2022; Bragar OR, Attachment 38.*

** This memorandum appears to be the only memorandum that provides any sort of technical response to the 2022 FWMP. CGE, RSI, and Four Peaks each address it as outlined above.*

** E-PUR LLC Technical Memorandum dated November 14, 2022; Bragar Rebuttal, Attachment B.*

** This memorandum argues three things, summarized at Attachment B, p. 1-2:*

- o 1) that “water rights identified in Thornburgh’s FWMP demonstrates that it cannot provide sufficient water for fire safety protection”⁴;*
- o 2) that “water rights identified in Thornburgh’s FWMP demonstrates that it cannot handle wastewater load without revising the CMP”⁵; and*

- 3) the “water rights identified in Thornburgh’s FWMP demonstrate that its plan for water supply does not have the resilience that is required by OWRD for a municipal water supply.

The Hearings Officer is tasked with weighing technical evidence in the record. The Hearings Officer finds that the technical evidence submitted by Applicant is extensive. The Hearings Officer finds Applicant’s technical evidence appears to utilize recognized modeling methods, and contain data/conclusions related addressing habitat impacts resulting from the proposed 2022 FWMP. The Hearings Officer finds Applicant’s technical evidence constitutes substantial evidence of the facts and conclusions stated in its submitted technical reports. The Hearings Officer acknowledges that the opposition technical evidence does challenge Applicant’s consultant’s modeling and data. The Hearings Officer finds that Applicant’s technical evidence was prepared by credentialed experts who provided an extreme level of analysis and detail. The Hearings Officer finds opponents expert evidence is not nearly as comprehensive as Applicant’s. The Hearings Officer finds opponents expert evidence is less focused on the specific water sources proposed by Applicant and their impacts on fish habitat. The Hearings Officer finds opponents technical evidence is less credible and persuasive than the technical evidence proved by Applicant.

ODFW Input

The Hearings Officer finds that the Hearings Officer FMP Decision appeared to rely heavily upon the Oregon Department of Fish and Wildlife’s (“ODFW”) conclusion that the proposed 2008 FWMP met the “No Net Loss” standard. In this case the ODFW strongly indicated, based upon the evidence it reviewed prior to making its final submission (November 7, 2022), that the proposed 2022 FWMP does not meet the DCC 18.113.070 (D) “No Net Loss” standard. ODFW concluded (Page 4 of 8) that:

“Based on our current understanding of the 2022 Mitigation Proposal, it is yet unclear if the 2022 will result in outcomes that meet the County’s standard in DCC 18.113.070(D), including actions that fully mitigate the Habitat Category 2 impact through in-kind, in-proximity mitigation. The proposed 2022 Plan is lacking in detail to provide substantial evidence for stated claims, though some of the follow up correspondence and information submitted late to ODFW (and perhaps to the record) may include applicable evidence.”

ODFW (November 7, 2022, pages 4 of 8) listed “specific concerns” leading up to the agency’s conclusion that the 2022 Mitigation Proposal did not meet the “No Net Loss” standard. While likely oversimplifying ODFW’s concerns in lay terms the Hearings Officer summarizes reasons ODFW appears to conclude that the 2022 FWMP does not meet the “No Net Loss” standard:

- Deep Canyon Creek mitigation water (per 2008 FWMP) provided **local/nearby habitat benefits in close proximity** to the Thornburgh Resort (where consumptive water would be sourced) and the proposed 2022 FWMP plan relies upon discontinuing use of groundwater sources “which allegedly provide benefits to the basin for over 100 miles. The claims for these distances are unsubstantiated and unlikely to be realized for this distance” (bolding added by the Hearings Officer); and
- “Discontinuation of groundwater use does not necessarily result in an equal amount of surface flow, nor does it discharge at the same period or at the same location;” and
- Modeling used by Applicant’s experts/consultants was limited; and
- Some water rights relied upon by Applicant in the 2022 FWMP “lack verified past use data;” and

- Offsetting Thornburgh Resort pumping with groundwater transfers “provides no assurances that groundwater discharge from ecologically important seeps and springs and surface water flows are protected in the future;” and
- “Additional water use” is proposed to be mitigated “solely through OWRD’s Groundwater Mitigation Program” which does not account for thermal impacts on fish habitat; and
- **Assurance of compliance with the FWMP 2022 water mitigation proposal is uncertain and/or ambiguous** (bolding added by the Hearings Officer); and
- The quantity of “excess water” mitigation is uncertain; and
- Protection of habitat during “shoulder months” (period of time prior to and immediately after irrigation season) is not assured; and
- **Condition 38 may not provide an objective** process to assure compliance with the proposed 2022 FWMP (bolding added by the Hearings Officer).

Applicant (DeLashmutt, November 14, 2022) provided a comprehensive bullet point by bullet point response to the ODFW November 7, 2022, concerns which are summarized above. The Hearings Officer also finds that the DeLashmutt November 14, 2022, record submission provides a comprehensive response to the ODFW concerns.

The Hearings Officer, despite the findings in the preceding paragraph, remains concerned about how to deal with the ODFW November 7, 2022, comments. Recall that the hearings officer issuing the Hearings Officer FMP Decision emphasized that the ODFW conclusion that the 2008 FWMP met the “No Net Loss” standard was an important factor. The Hearings Officer FMP Decision made it clear that ODFW’s support of the 2008 FWMP was relevant and perhaps critical to her decision to find the “No Net Loss” standard was met. While not required by the Deschutes County Code, or other law/rule, the Hearings Officer finds that ODFW’s input is a relevant **evidentiary consideration** in determining if the “No Net Loss” standard is met.¹¹

ODFW requested prior to, at and after the Hearing (ODFW letters dated October 21, 2022, November 7, 2022 and Hearing public testimony) additional time to review, analyze and then coordinate with Applicant regarding the proposed 2022 FWMP. Applicant’s legal counsel, at the Hearing, declined the Hearings Officer’s invitation to provide additional time (beyond the open-record schedule set by the Hearings Officer) for ODFW to submit a comprehensive review and analysis of Applicant’s technical submissions.

Pursuant to Applicant’s listing of its technical studies¹² they were dated October 19, 2022 (item 2), October 21, 2022 (items 4 & 5), October 22, 2022 (item 3), October 24, 2022 (items 6, 7 & 8), November 2, 2022 (items 10 & 11), and November 14, 2022 (items 9, 12, 13, 14, 15 & 16). The Hearing occurred on October 24, 2022, the open-record period for new evidence ended November 7, 2022, and the open-record period for rebuttal evidence ended on November 14, 2022. As noted in the procedural issue findings above the Hearings Officer is fully aware of relevant state statutes and county code related to post hearing submissions.

¹¹ Cascade Geoengineering, November 7, 2022, page 1 – “The 2022 FWMP presented very detailed changes to the original 2008 FWMP that was **approved** by the Oregon Department of Fish and Wildlife (ODFW).” [emphasis added by the Hearings Officer]

¹² See Katzaroff, November 21, 2022, Final Argument; dates and item number references are extracted from technical expert listing found on pages 3 and 4.

The Hearings Officer is also fully aware of the quantity (number of pages) and complexity of the Applicant's post hearing record submissions. Having reviewed, as best a lay person can do that, Applicant's technical submissions it is easy for the Hearings Officer to say that expecting an authoritative response from ODFW, within the time allowed by the open-record schedule, was not likely. The Hearings Officer finds that Applicant, fully within its legal rights, denial of additional time for ODFW review of Applicant's technical submissions, precluded the Hearings Officer from being able to consider a meaningful ODFW response.

The 2022 FWMP – Is the 2022 FWMP likely and reasonably certain to succeed

Moving on from the "technical evidence" aspect of the proposed 2022 FWMP the Hearings Officer next considers whether the 2022 FWMP is "likely and reasonably certain to succeed." As noted by the Oregon Court of Appeals, in a case they reference as *Gould IV*, "a final adjudication of compliance requires a showing that compliance with DCC 18.113.070 (D) is 'likely and reasonably certain to succeed.'" *Gould v. Deschutes County*, 233 Or App 623 (2010) citing 227 Or App at 610. In this decision the Hearings Officer interprets the "likely and reasonably certain to succeed" language in the context of the proposed 2022 FWMP plan logistics. Restated, this Hearings Officer inquiry asks if the 2022 FWMP, as drafted, provides the Applicant, interested persons, and future decision makers (including but not limited to the public, County Staff, hearings officers, BOCC, LUBA, Oregon Court of Appeals and Oregon Supreme Court) clear and enforceable standards that ensure the plan is likely and reasonably certain to succeed?

At this point the Hearings Officer steps back to recognize the reality facing the Applicant, opponents and Staff with respect to the Thornburgh Resort: The Thornburgh Resort is one of the most litigated development projects in the State of Oregon. It is not lost on this Hearings Officer (who has presided over and issued at least five Thornburgh land use decisions) that the 2008 FWMP mitigation obligations have been the focus of multiple disputes requiring, in many instances, BOCC, LUBA, Oregon Court of Appeals and Oregon Supreme Court intervention.

Even during this case issues have been raised as to whether or not the Applicant has strictly met the requirements of the 2008 FWMP. For example, the 2008 FWMP states (page 1) that "Thornburgh will use a total of 2,129 acre feet of water..." The source of **that** water remains controversial as of the date of this decision.

The Hearings Officer notes that the 2008 FWMP used phrases such as "*most likely*," "*if needed, can be secured from sources*," and "*continue to pursue*." The Hearings Officer notes that Condition 10, which is closely related to the 2008 FWMP, uses terminology "*updated documentation for the state water right permit and an accounting of the full amount of mitigation*." Condition 38 requires the Applicant to "*abide by the April 2008 Mitigation Plan...and agreements with the BLM and ODFW for management of off-site mitigation efforts*." Hindsight is 20/20 and had the hearings officer and other decision makers involved with the FMP and FWMP approval process had been aware of the challenges the language contained in those decisions has caused she/they may have imposed more definitive and objective language in those documents.

The Hearings Officer, in this case, finds that the proposed 2022 FWMP is certainly longer (number of pages) and contains significantly more narrative description than the 2008 FWMP. The Hearings Officer is appreciative of Applicant's November 7, 2022 "Executive Summary" and "Reorganized and Updated November 7, 2022 FWMP" documents.

The Hearings Officer believes that the actual “plan” which must be adhered to if the 2022 FWMP modification application is approved is described in Section H (starting on page 14). But this interpretation may be wrong. What is clear to the Hearings Officer is that the 2022 FWMP commits to reduce water use (needs from 2129 AF to 1,460 AF and consumptive use from 1,356 AF to 882 AF). Section H.A.1. (Limit Pumping to a Maximum of 1,460 AF Annually) includes the statement “*Thornburgh will submit as part of the annual Mitigation Report summaries of the resort’s annual water reports that are required to be provided to OWRD.*” This part of the proposed 2022 FWMP is clear and Applicant’s commitment may reasonably be considered likely and reasonably certain of success (page 4, and page 14 – Section H.A.1).

Sections D and H address directly the DCC 18.113.070 (D) “No Net Loss” standard. As best the Hearings Officer can ascertain Sections D and H are the “meat” of the 2022 FWMP. These sections appear to set forth Applicant’s mitigation obligations.

The Hearings Officer finds Sections D and H seem to be interrelated in some way but the two sections leave a great deal to the imagination.¹³ The Hearings Officer attempted, on multiple occasions and for varying lengths of time, to outline Sections D and Section H; particularly the portions of Sections D and H that relate to the various water rights associated with use at the Thornburgh Resort and water rights intended for mitigation purposes. The Hearings Officer is certain that the Applicant, Applicant’s legal counsel and Applicant’s experts/consultants believe that what is presented in sections D and H of the 2022 FWMP are clear. However, the Hearings Officer finds interpreting Sections D and H is challenging because these sections overlap and supplement each other in ways that are not clear to the Hearings Officer.

The 2022 FWMP Section D appears to establish a series of options open to the Applicant to meet the “No Net Loss” standard. For example, Section D. states that the Applicant commits to “*discontinue pumping water in the location appurtenant to the right*” then states “*if any transfer is not approved, the water right could be cancelled in lieu of mitigation (both the groundwater and surface water rights) or transferred instream (just the surface water rights) for mitigation credits.*” The Hearings Officer finds the “if any transfer is not approved...” language is not mirrored or reflected in Section H. The Hearings Officer is unsure if the inclusion of the quoted language was not intended to be in Section H was intentional.

The Hearings Officer believes that the Applicant, public, Staff, BOCC and any appellate authority should be able, without resorting to an “expert” or “consultant” or “attorney,” to comprehend and apply the language used in the 2022 FWMP. Sections D and H of the proposed 2022 FWMP do not meet or satisfy that goal.

Section H.4 (remaining water use BFR...) provides an additional area of confusion and imprecision of the proposed 2022 FWMP. This paragraph begins by stating that “*the water rights described in 1. above will provide up to 1,217 AF of the resort’s total water needs of 1,460 AF leaving at least 243 AF of additional water needed.*” Footnote 20 follows the quoted statement and says that “*if there was some reduction in the amount Thornburgh is allowed to transfer under the LeBeau water right, like the 7% reduction*

¹³ The Hearings Officer references section labels (i.e., Section D and Section H) as set forth in the 2022 FWMP. The Hearings Officer does, however, note that the Section labeling (Reorganized and Updated November 7, 2022) does not include not a “Section E.”

expected in the NUID transfer, the amount of additional water could be increased somewhat.” The Hearings Officer defies an attorney or professional planner, let alone a lay person, to objectively describe the meaning of that language. The Hearings Officer finds the language contained in Applicant’s proposed 2022 FWMP Section H. is imprecise.

The Hearings Officer in this case is fully aware that the primary reporting and enforcement mechanisms for matters related to the FWMP are FMP Conditions 38 and 39. Condition 38 states:

“The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.”

The Hearings Officer reviewed Applicant’s Burden of Proof and notes that it provided (page 3, paragraph 7) a clarification of what constitutes compliance under Condition 38.¹⁴ The Hearings Officer could find no language remotely similar to the Burden of Proof Condition 38 language in the 2022 FWMP version 1 (August 16, 2022) or version 2 (November 7, 2022). Applicant, in its pre-hearing record submission (Kataroff, October 21, 2022, page 4), stated that:

“Staff is concerned with the implementation of FMP Condition 38 and assurance of ongoing compliance. Condition 38 was adopted as part of the FMP approval. It requires that Thornburgh follow the FWMP and its mitigation measures and to report mitigation actions to the County. Thornburgh will follow the plan.”

Applicant, in its pre-hearing record submission (Kataroff, October 21, 2022, page 4), also said that Condition 38 ***“is imprecisely worded.”*** (emphasis added by the Hearings Officer)

The Hearings Officer finds Applicant’s approach to Condition 38 in the context of the 2008 FWMP and, if approved, 2022 FWMP misses the mark. The Hearings Officer finds that as it now stands (per 2008 FWMP) and as proposed (2022 FWMP), Condition 38 must be viewed as the only practical method of

¹⁴ Burden of Proof, Page 3, Item 7. “The purpose of this paragraph 7 is to clarify what constitutes compliance with FMP Condition 38, whether during the review of Resort land use applications, as reported as part of annual monitoring, or for any other purpose. Once the Resort’s water provider [footnote omitted] has purchased water rights to be used for pumping or mitigation and pumping at the point of diversion or appropriation of the certificate has been discontinued, compliance with Conditions 3, 4 and 6 shall be found to be met in the manner discussed in this paragraph 7. As noted below, compliance will occur differently for water appropriated from a surface water Point of Diversion versus a groundwater Point of Appropriations or for a mitigation credit that is acquired as follows:

- a. Point of Appropriation-Groundwater: Compliance occurs upon submittal to OWRD of any of the following: an assignment of the water right to Thornburgh, an application that seeks OWRD approval of a transfer to pump at the Resort property, or cancellation in-lieu of mitigation so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
- b. Point of Diversion-Surface Water: Compliance occurs upon submittal to OWRD, and OWRD approves any of the following: an application that transfers to pump at the Resort property, application that transfers the water to an in-stream lease, cancellation in-lieu of mitigation, or transfer to obtain mitigation credits, so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
- c. Mitigation Credit: In the event that Thornburgh acquires mitigation credits, compliance occurs when Thornburgh provides proof of ownership or proof of submittal to OWRD of an application to transfer water in-stream.”

assuring compliance with the FWMP.¹⁵ It cannot be said that the 2008 FWMP or the proposed 2022 FWMP can be considered likely and reasonably certain to succeed without something akin to Condition 38.

The Hearings Officer finds, at a minimum, Condition 38 needs to be modified to reference the 2022 FWMP. Condition 38, as it currently exists, mandates that Applicant “shall abide” by “agreements with BLM and ODFW for the management of off-site mitigation efforts.” Applicant represented (Katzaroff, October 21, 2022, page 4) that no Applicant/ODFW agreement exists. While Condition 38 is not clear on timing, whether required to *have been done* or *must be done at some time in the future*, the Applicant has not provided any evidence of well removal on the Subject Property. The Hearings Officer also finds that Condition 38 requires coordination with ODFW to model stream temperatures. The Hearings Officer, based on the evidence in the record, is uncertain if that provision remains relevant. The Hearings Officer finds that Applicant’s statement that Condition 38 is “imprecisely worded” is an understatement.

The Hearings Officer’s above stated Condition 38 comments are amplified by ODFW. ODFW stated, in its November 7, 2022 record submission (page 6 of 8) the following:

“ODFW is concerned with the lack of information regarding how compliance will be ensured over time. Compared to legally protected instream water rights, the monitoring, reporting, compliance, and enforcement of mitigation via groundwater transfer is complex and difficult to quantify. It is our understanding that compliance (or noncompliance) with the mitigation measures will be established by annual reporting required by FMP Condition 38, but it is unclear who reviews the reports, who has access to the reports, what repercussions are in place for non-compliance, and if/how ODFW would be engaged in habitat protection. OWRD administrative processes will only address part of the compliance necessary, and sole reliance on OWRD well and streamflow monitoring data is unlikely to be at the appropriate scale and locations to track compliance. Surface water quality and quantity must be replaced in perpetuity or for the life of the project as intended or continued pumping at the Resort would result in a net loss of the resource.”

Applicant responded to the above-quoted ODFW comments (DeLashmutt, November 14, 2022, page 8) as follows:

“Thornburgh will provide annual reporting of mitigation measures taken under both the terrestrial wildlife and FWMP plans. This reporting will include the water usage and the mitigation measures taken under this 2022 FWMP. Thornburgh agrees to provide copies of reporting to Deschutes County, ODFW and in case of that mitigation measures taken on the Terrestrial Wildlife plan, the BLM.”

The Hearings Officer finds the Thornburgh quoted comments to simply repeat the Condition 10 and Condition 38 reporting requirements that currently exist and then to proceed to propose language to modify those conditions by adding recipients of the reports.¹⁶ The Hearings Officer repeats that the proposed 2022 FWMP does not include any reporting requirements. As such the proposed 2022 FWMP is totally reliant upon Conditions 38 and 39 to assure compliance.

¹⁵ Condition 39 relates to Three Rivers Irrigation District conservation project. Applicant did not propose to change its Condition 39 obligations.

¹⁶ Condition 38 requires annual reporting to the county only. Condition 10 is silent who the required documentation must be sent to; presumably it is the county as the information must be provided “at the time of tentative plat/site plan review.

The Hearings Officer finds that unless clear, objective and enforceable compliance language contained in the 2022 FWMP, or a meaningful modification of the existing Condition 38, there can be no assurance that the 2022 FWMP is “likely or reasonably certain to succeed.” The Hearings Officer finds that Applicant did not propose modifying the language of Condition 38 and if it did the Hearings Officer could not find it in the proposed 2022 FWMP.

The Hearings Officer finds the application in this case does not provide clear, concise and objective compliance standards to assure that the 2022 FWMP will secure the water rights represented in the 2022 FWMP and that its proposed 2022 FWMP mitigation is likely and reasonably certain to assure that the DCC 18.113.070 (D) “No Net Loss” standard is met. The Hearings Officer finds Applicant failed to carry its burden of proof requirement that its proposed 2022 FWMP meets relevant approval criteria. The Hearings Officer finds, based upon the findings above, that Applicant’s proposed 2022 FWMP modification application must be denied.

Summary & Conclusion – DCC 18.113.070 (D)

The Hearings Officer finds Applicant’s technical data and conclusions related to the impacts of various water rights proposed to be used as OWRD and DCC 18.113.070(D) mitigation is generally credible in relation to the proposed 2022 FWMP *potentially* meeting the “No Net Loss” standard. The ODFW questioned Applicant’s technical data, modeling, approach and conclusions. Opponents questioned the credibility of Applicant’s technical data, modeling, approach and conclusions.

ODFW expressed reservations about the proposed 2022 FWMP meeting ODFW standards *and* the DCC 18.113.070 (D) “No Net Loss” standard. The Hearings Officer finds that Applicant (DeLashmatt, November 14, 2022) provided a thoughtful response to ODFW comments. The Hearings Officer also takes notice that ODFW did not have an opportunity to respond to Applicant’s (DeLashmatt’s) comments. The Hearings Officer finds that the hearings officer, in the Hearings Officer FMP Decision (who approved the 2008 FWMP), appeared to rely heavily upon ODFW’s concurrence/support of the data, modeling and approach taken by Applicant in the 2008 FWMP. As at least one other hearings officer dealing with the “No Net Loss” issue stated: “It is a close call” and ultimately concluded that Applicant’s 2008 FWMP met DCC 18.113.070 (D) requirements in part because of ODFW’s approval of the plan.

The Hearings Officer finds the proposed 2022 FWMP includes a number of very important sections that are subject to multiple interpretations and likely to lead to appeals seeking interpretive declarations. The Hearings Officer finds that the proposed 2022 FWMP does not provide objective reporting, compliance/enforcement provisions. The Hearings Officer finds that relying upon the current version of Condition 38 is not appropriate if the 2022 FWMP is approved as proposed. The Hearings Officer finds Condition 38, if the 2022 FWMP were approved, would need to be revised to reflect 2022 FWMP changes and ensure that the Applicant, public and future decision makers can reasonably be expected to understand the Applicant’s mitigation obligations and the consequences for failure to meet those obligations.

The Hearings Officer believes it is inappropriate for the Hearings Officer to revise the proposed 2022 FWMP to assure it contains clear and objective Applicant obligations. The Hearings Officer finds it is inappropriate to revise Condition 38 when it is clear that Applicant did not include any proposed revisions in its application for this case.

The Hearings Officer finds, based upon the record of this case, that Applicant has failed to satisfy the one criterion it argues is relevant: DCC 18.113.070 (D). The Hearings Officer denies Applicant's request to revise the 2008 FWMP with a proposed 2022 FWMP.

IV. DECISION

Applicant's proposal to modify the CMP/FMP by replacing the 2008 FWMP with a 2022 FWMP proposal is denied.

Dated this 19th day of December, 2022.

A handwritten signature in black ink that reads "Gregory J. Frank". The signature is written in a cursive, flowing style.

Gregory J. Frank
Deschutes County Hearings Officer