

SPECIAL MEETING AGENDA
DESCHUTES COUNTY BOARD OF COMMISSIONERS
1:30 PM, TUESDAY, JANUARY 16, 2018

Barnes and Sawyer Rooms - Deschutes Services Center – 1300 NW Wall Street – Bend

CALL TO ORDER

ACTION ITEMS

1. Consideration of Order 2018-004, to Hear or Decline Review of Hearings Officer Decision (Thornburgh) - *Peter Gutowsky, Planning Manager*

OTHER ITEMS

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

At any time during the meeting, an executive session could be called to address issues relating to ORS 192.660(2)(e), real property negotiations; ORS 192.660(2)(h), litigation; ORS 192.660(2)(d), labor negotiations; ORS 192.660(2)(b), personnel issues; or other executive session categories.

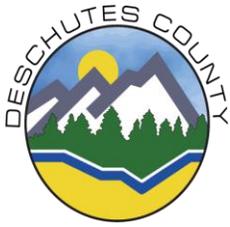
Executive sessions are closed to the public; however, with few exceptions and under specific guidelines, are open to the media.

ADJOURN

FUTURE MEETINGS:

Additional meeting dates available at www.deschutes.org/meetingcalendar

(Please note: Meeting dates and times are subject to change. All meetings take place in the Board of Commissioners' meeting rooms at 1300 NW Wall St., Bend, unless otherwise indicated. If you have questions regarding a meeting, please call 388-6572.)



Deschutes County Board of Commissioners
1300 NW Wall St, Bend, OR 97703
(541) 388-6570 – Fax (541) 385-3202 – <https://www.deschutes.org/>

AGENDA REQUEST & STAFF REPORT

For Board of Commissioners Special Meeting of January 16, 2018

DATE: January 12, 2018

FROM: Peter Gutowsky, Community Development, 541-385-1709

TITLE OF AGENDA ITEM:

Consideration of Order 2018-004, to Hear or Decline Review of Hearings Officer Decision (Thornburgh)



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
 (541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

STAFF REPORT

DATE: January 11, 2018

TO: Board of County Commissioners

FROM: Peter Gutowsky, Planning Manager

RE: Hearings Officer Decision (File No. 247-17-000761-A) and Order No. 2018-004 to Hear the Appeal or Decline Review

I. Order No. 2018-004 / Declining Review

Staff recommends the Board of County Commissioners (Board) sign Order No. 2018-004, declining review of an anticipated appeal of a Hearings Officer's decision approving Thornburgh's LUBA remand application. The reason for declining review stems from a State requirement to issue a final local decision for a LUBA remand in 120 days.¹

II. Background

On September 25, 2015, Central Land and Cattle Company, LLC asked Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort FMP in application 247-15-000529-A; M-07-2; MA-08-6. The hearings officer denied approval of the Thornburgh Destination Resort Final Master Plan, concluding that there is insufficient evidence in the record to conclude that the 106 cfs of added water to Whychus Creek offsets the .01dC and the possible impacts on refugia. LUBA remanded that decision and the Court of Appeals and Oregon Supreme Court affirmed. LUBA found the hearings officer needs to consider any evidence from the Gould FMP record that is called to his attention if it is relevant to the Whychus Creek remand issue.

- The HO failed to resolve the inconsistent positions by opponents' expert Yinger and the applicant's expert TetraTech. The HO must provide a better explanation for why he found Tetra Tech's testimony unpersuasive. TetraTech took the position that even though the mitigation water may be slightly warmer than the lost spring flow at Alder Springs, the mitigation water is still cool water and would reduce Yinger's projected thermal impacts.
- The question on remand is whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 1-6 acre-feet of additional in-stream flow.

¹ ORS 215.435(1). It is also codified in Deschutes County Code 22.34.030(C).

The applicant initiated the LUBA remand on September 18, 2017. As authorized under Deschutes County Code (DCC) 22.34.040, the Board issued Order 2017-036 on October 4, 2017. Specifically, Order 2017-036:

- Reopens the record of the Thornburgh FMP to allow parties to submit and its hearings officer to consider new evidence related to the issue whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow; and,
- Directs the hearings officer on remand not to accept new evidence on any other issues unless allowed by DCC 22.34.040(C).

On January 1, 2018, Hearings Officer Dan Olsen approved the application on remand with a revised condition (Attachment 1). His findings and decisions are summarized below.

- Is mitigation necessary? Hearings officer in 2008 did not err when requiring that the applicant address potential temperature increases through mitigation
- Is the mitigation adequate/effective? Proposed 106 AF is likely and reasonably certain to succeed in mitigating any adverse impacts of the natural resource offered by lower Whychus Creek caused by increased summer time pumping. With the mitigation, there is no net loss or net degradation of the resource.
- Condition of Approval. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The restoration shall occur as described in the applicant's submittals. The mitigation water shall be placed in stream no later than the date that groundwater pumping to serve the development commences (not testing). The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.
- Conclusion. Based on the foregoing findings and conclusions, and with the revised condition of approval, the proposed 106 AF of mitigation from Three Sisters Irrigation District is necessary to mitigate summer pumping impacts on Whychus Creek and is adequate and likely and reasonably certain to succeed in mitigating adverse impacts, resulting in no net loss nor degradation in the resource.

III. Issuance of a Final Local Decision

The 12-day appeal period for Thornburgh's LUBA Remand decision ends Tuesday, January 16, 2018 which happens to coincide with the 120 day requirement for a final decision.² To date, Paul Dewey representing Nunzie Gould has not initiated an appeal. Given the nature of the application, staff anticipates an appeal.³

² Ibid.

³ The Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). The Board initiated a review of denial. That decision was also appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Board. (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board's decision to the Land Use Board of Appeals ("LUBA"). (Nos. 2006-100 and 101). LUBA remanded the Board's decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 2005 (2007). Opponent and Munson appealed LUBA's decision to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and

Dewey has expressed concern that if a final decision is not made on January 16, the applicant could initiate a writ of mandamus, causing his client to lose an opportunity to adjudicate this matter before the Land Use Board of Appeals.⁴ The applicant has not indicated whether they will toll the clock to allow the Board to consider an appeal. They are reserving their right to first assess an appeal before determining if a hearing before the Board is warranted.

remanded LUBA's decision. *Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007). The result of this decision was that the Board's decision in CU-05-20 approving the CMP was remanded to the county for further proceedings.

On April 15, 2008 the Board issued its decision on remand again approving the CMP (Document No. 2008-151). Gould and Munson appealed the Board's decision to LUBA on May 6, 2008 (No. 2008-068). On September 11, 2008, LUBA affirmed the Board's decision. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008). Opponent and Munson appealed LUBA's decision to the Court of Appeals (A140139). On April 22, 2009 the Court of Appeals affirmed LUBA's decision. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). Gould and Munson appealed the Court of Appeals' decision to the Oregon Supreme Court (S057541). On October 9, 2009, the 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 judgment. The result of these decisions was the CMP received final approval as of December 9, 2009.

Based on the Board's April 15, 2009 decision approving the CMP for the Thornburgh Destination Resort, TRC submitted an amended application for approval of the final master plan (FMP) on April 21, 2008 (M-07/MA-08-6). By a decision dated October 8, 2008, the Hearings Officer approved the FMP. Gould and Munson appealed to the Board, who declined to hear it. Gould and Munson then appealed that decision to LUBA (No. 2008-203). On September 9, 2009 LUBA remanded the County's decision for further proceedings. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009). TRC appealed LUBA's decision to the Court of Appeals (A143430). On February 24, 2010 the Court of Appeals affirmed LUBA's decision. *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 759 (2010). LUBA issued its notice of appellate judgment on August 17, 2010 remanding the County's decision. On August 15, 2011, the review on remand of the FMP remand was initiated by TRC.

On November 1, 2011, Loyal Land Company sought a declaratory ruling that the April 15, 2008 CMP had been timely initiated. The hearings officer found the CMP was timely initiated. The Board declined to exercise discretionary review and the opponent appealed to LUBA. On appeal, LUBA remanded that decision (LUBA No 2012-042, January 8, 2013). 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 Board, which issued a declaratory ruling that the April 15, 2008 CMP decision was "initiated" before the two-year deadline for doing so expired. Gould appealed the decision to LUBA. On appeal, LUBA remanded the declaratory ruling of the Board that a CMP for destination had been "initiated" within the county code's time limitations. (LUBA No 2015-080, January 30, 2015). Gould appealed to the Court of Appeals, contending that LUBA erred by deferring to the county's implausible interpretation of a code provision that addressed whether a CMP had been "initiated." The Court reversed and remanded stating that the express language of the county code requires Defendant 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. (A158835).

On September 25, 2015, Central Land and Cattle Company, LLC asked Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort FMP in application 247-15-000529-A; M-07-2; MA-08-6. The hearings officer denied approval of the Thornburgh Destination Resort Final Master Plan. The Board declined to exercise discretionary review and Central Land and Cattle Company, LLC appealed to LUBA. On appeal, LUBA remanded that decision (LUBA No 2015-107, September 23, 2016). It also determined that the FMP approval effectively incorporates and displaces the CMP approval. Gould appealed to the Court of Appeals. LUBA's decision was affirmed by the Court of Appeals, without opinion. *Central Land and Cattle Company, LLC et al v. Deschutes County and Gould*, 283 Or App 286, A163359, (2016). Gould appealed to the Oregon Supreme Court. The Court of Appeals decision was affirmed by the Oregon Supreme Court, without opinion (S064684, 2017).

⁴ ORS 215.429. Also, under a related provision governing mandamus actions generally – ORS 34.210(2) – attorney fees are available to a successful applicant at the discretion of the trial court using the standards set out in ORS 20.075.

IV. Board Options

There are two versions of Order No. 2018-004 (Attachment 2). In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notices of appeal; and
3. Recommendations of staff.⁵

Reasons to hear:

- The Board may want to take testimony and make interpretative issues relating to the Thornburgh Final Master Plan. LUBA may defer to the Board's interpretation if they are at least plausible. The Board may want to reinforce or refute some or all of the Hearing Officer's findings/interpretations prior to LUBA review.

Reasons not to hear:

- The Hearings Officer decision is reasoned, well written, highly technical and could be supported as the record exists today on appeal.
- LUBA will likely not afford the County any deference.
- The 120th day to issue a final decision expires on January 16, 2018.
- Paul Dewey may challenge the Hearings Officer's decision at LUBA.

If the Board decides that the Hearings Officer's decision shall be the final decision of the County, the appellant may continue the appeal as provided by law. The decision on the land use application becomes final upon the mailing of the Board's decision to decline review.⁶

Attachments

1. Hearing Officer's decision for File No. 247-17-000761-A
2. Order No. 2018-004 (2 versions)

⁵ DCC 22.32.035(D)

⁶ DCC 22.32.035(B)

HEARINGS OFFICER DECISION

FILE NUMBERS: 247-17-000761-A; 247-15-000529-A; M-07-2; MA-08-6

REQUEST: Applicant requests a proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application 247-15-000529-A; M-07-02/MA-08-6.

OWNER: Agnes DeLashmutt
Loyal Land, LLC
2447 NW Canyon
Redmond, OR 97756

APPLICANT: Central Land: Cattle Co. LLC as successor in interest to Thornburgh Resort Co., LLC

LOCATION: The properties subject to this application are identified on County Assessor's map 15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000

STAFF CONTACT: Peter Gutowsky, AICP, Planning Manager

HEARINGS OFFICER: Dan R. Olsen

SUMMARY OF DECISION: The application on remand is **approved with a revised condition.**

I. STANDARDS AND APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, Zoning Ordinance:

Chapter 18.16, Exclusive Farm Use Zone (EFU-SC)
*Section 18.16.035, Destination Resorts

Chapter 18.113, Destination Resort Zone (DR)
*Section 18.113.070, Approval Criteria
*Section 18.113.090, Requirements of Final Master Plan
*Section 18.113.100, Procedure or Approval of Final Master Plan

Title 22, of the Deschutes County Code, Development Procedures Ordinance

Chapter 22.08. General Provisions
*Section 22.08.010, Application Requirements

Chapter 22.20, Review of Land Use Action Applications
*Section 22.20.040, Final Action in Land Use Actions

Chapter 22.24, Land Use Action Hearings
*Section 22.24.080, Standing

Chapter 22.28, Land Use Action Decisions

*Section 22.28.010, Decision

Proceedings on Remand

*Section 22.34.010, Purpose

*Section 22.34.020, Hearings Body

*Section 22.34.030, Notice and Hearing Requirements

*Section 22.34.040, Scope of Proceeding

II. **BASIC FINDINGS:**

- A. LOCATION:** The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by Bureau of Land Management (BLM) land, and is also in close proximity to Eagle Crest, another destination resort development. The property is identified on County Assessor's Index Map15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000.
- B. LOT OF RECORD:** As part of the Conceptual Master Plan (CMP) approval (CU-05-20), the Hearings Officer found the subject property consists of several legal lots of record based on previous county determinations (LR-91-56, LR-98-44, MP-79-159, CU-79-159 and CU-91-68).
- C. ZONING AND PLAN DESIGNATION:** The subject properties are zoned Exclusive Farm Use (EFU-TRB) within a Destination Resort (DR) Overlay Zone. The property is designated Agriculture on the Deschutes County Comprehensive Plan Map.
- D. PROPOSAL:** Applicant requests a proceeding on remand of approval of the Thornburgh Destination Resort Final Master Plan in application 247-15-000529-A; M-07-02/MA-08-6.
- E. SITE DESCRIPTION:** The subject property is approximately 1,970 acres in size and has vegetation consisting of juniper woodland. The property covers the south and west portions of the geologic feature known as Cline Buttes. The property currently is developed with three dwellings and a barn, access to which is from Cline Falls Highway. The property is engaged in farm use consisting of low-intensity livestock grazing.
- F. SURROUNDING LAND USES:** The subject property is surrounded by public land primarily owned and managed by the BLM. A portion of the public land is owned and managed by the Oregon Department of State Lands (DSL). The Eagle Crest Destination Resort is located near the northern portion of the subject property.
- G. PUBLIC COMMENTS:** Notice of this Land Use Board of Appeals (LUBA) remand was provided to persons who received the Certificate of Mailing of the Hearings Officer Decision issued on October 8, 2008, relating to M-07-2; MA-08-6.
- H. LAND USE HISTORY:** The Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). The Board initiated a review of denial. That decision was also appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Deschutes County Board of Commissioners (Board). (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board's

2 Hearings Officer Decision: 247-17-000761-A; 247-15-000529-A; M-07-01; MA-08-06

decision to the Land Use Board of Appeals (“LUBA”). (Nos. 2006-100 and 101). LUBA remanded the Board’s decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 2005 (2007). LUBA’s decision was appealed to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and remanded LUBA’s decision. *Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007). The result of this decision was that the Board’s decision in CU-05-20 approving the CMP was remanded to the County for further proceedings.

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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. (A158835).

On September 25, 2015, Central Land and Cattle Company, LLC asked Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort FMP in application 247-15-000529-A; M-07-2; MA-08-6. The hearings officer found in favor of the applicant regarding the Wildlife Mitigation standards but denied approval of the Thornburgh Destination Resort Final Master Plan based on the no net loss/degradation standard for fish related resources. The Hearings Officer declined to accept new evidence on that issue. The Board declined to exercise discretionary review and Central Land and Cattle Company, LLC appealed to LUBA. On appeal, LUBA affirmed regarding wildlife mitigation but remanded on the issue of no net loss/degradation for fish resources. It held that the Hearings Officer should have accepted new evidence on that issue. (LUBA No 2015-107, September 23, 2016). It also determined that the FMP approval effectively incorporates and displaces the CMP approval. Gould appealed to the Court of Appeals. LUBA's decision was affirmed by the Court of Appeals, without opinion. *Central Land and Cattle Company, LLC et al v. Deschutes County and Gould*, 283 Or App 286, A163359, (2016). The Supreme Court denied review. (S064684, 2017).

- I. **REVIEW PERIOD:** Deschutes County Code (DCC 22.34.030(C)), states a final decision must be made within 120 days of the date the applicant initiates the remand in accordance with state law. The applicant initiated the remand on September 18, 2017, making the 120th day for a final decision January 16, 2018.
- J. **HEARING:** The hearing was held on October 30, 2017. I provided the statutorily required statements regarding the rights of the parties. I indicated that I had no conflicts of interest. I had no ex parte contacts and did not conduct a site visit. I disclosed that in the summer of 2016 my wife and I hiked along Whychus Creek just east of Sisters but that to my knowledge I was nowhere near Alder Springs. I summarized DCC 22.34.030 A and .040A regarding the procedures and scope of remand proceedings. I admitted the record of the prior proceeding into evidence. I asked for but received no objection to my participation.

I noted that the Board of County Commissioners had remanded the proceeding, citing the following from the LUBA remand decision:

whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

In addition, LUBA concluded that I erred in not accepting evidence regarding this issue.

At the conclusion of testimony, I agreed to keep the written record open as follows:

October 30, 2017 – public hearing:

- November 13, 2017 – new evidence
- November 20 – Rebuttal to new evidence
- November 27 – Final argument (also objections) deadline.

On November 22, 2017, Ms. Fancher requested that the final argument deadline be extended one day. There was no objection from Mr. Dewey and the extension was granted.

III. **FINDINGS and CONCLUSIONS:**

SCOPE OF PROCEEDINGS ON REMAND

A. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.34, Proceedings on Remand

a. Section 22.34.010, Purpose

DCC 22.34 shall govern the procedures to be followed where a decision of the County has been remanded by LUBA or the appellate courts or a decision has been withdrawn by the County following an appeal to LUBA.

STAFF: This matter is before the Hearings Officer on remand from LUBA. Therefore, the procedures in Chapter 22.34 are applicable.

b. Section 22.34.020, Hearings Body

The Hearings Body for a remanded or withdrawn decision shall be the Hearings Body from which the appeal to LUBA was taken, except that in voluntary or stipulated remands, the Board may decide that it will hear the case on remand. If the remand is to the Hearings Officer, the Hearings Officer's decision may be appealed under DCC Title 22 to the Board, subject to the limitations set forth herein.

STAFF: The FMP was heard by a Hearings Officer. The Board of County Commissioners did not hear the appeal. A Hearings Officer under contract is reviewing this matter; therefore it is being processed properly.

c. Section 22.34.030, Notice and hearing Requirements

A. The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of DCC 22.34 and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand.

B. The hearing procedures shall comply with the minimum requirements of state law and due process for hearings on remand and need comply with the requirements of DCC 22.24 only to the extent that such procedures are applicable to remand proceedings under state law.

- C. A final decision shall be made within 120 days of the date the applicant initiates the remand in accordance with state law.
- D. In addition to the requirements of subsection (C) of this section, the 120-day period established under subsection (C) of this section shall not begin until the applicant requests in writing that the county proceed with the application on remand, but if the county does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the county shall deem the application terminated.
- E. The 120-day period established under subsection (C) of this section may be extended for up to an additional 365 days if the parties enter into mediation as provided by ORS 197.860 prior to the expiration of the initial 120-day period. The county shall deem the application terminated if the matter is not resolved through mediation prior to the expiration of the 365-day extension

STAFF: As discussed in the findings above, written notices of the remand initiation request and public hearing were provided to the parties who participated in the Hearings Officer decision issued on October 8, 2008, relating to M-07-2; MA-08-6s, and only those parties are allowed to participate in the hearing on remand. Procedures for the public hearing comply with the requirements for hearings in Chapter 22.24 of the County's development procedures ordinance. The applicant initiated the remand on September 18, 2017, making the 120th day for a final decision January 16, 2018.

d. Section 22.34.040, Scope of Proceeding

- A. On remand, the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, the Board shall have the discretion to reopen the record in instances in which it deems it to be appropriate.
- B. At the Board's discretion, a remanded application for a land use permit may be modified to address issues involved in the remand or withdrawal to the extent that such modifications would not substantially alter the proposal and would not have a significantly greater impact on surrounding neighbors. Any greater modification would require a new application.
- C. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand. Other issues that were resolved by the LUBA appeal or that were not appealed shall be deemed to be waived and may not be reopened.

STAFF: As authorized under DCC 22.34.040 above, the Board of County Commissioners (Board) issued Order 2017-036 on October 4, 2017. Specifically, Order 2017-036:

6 Hearings Officer Decision: 247-17-000761-A; 247-15-000529-A; M-07-01; MA-08-06

- Reopens the record of the Thornburgh FMP to allow parties to submit and its hearings officer to consider new evidence related to the issue whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow; and,
- Directs the hearings officer on remand not to accept new evidence on any other issues unless allowed by DCC 22.34.040(C).

Incorporated herein by reference is the record of LUBA Case No. 2015-107, *Central Land and Cattle Co. v. Deschutes County*. The applicant, Ms. Gould and LUBA, to the extent this matter is appealed, possess these materials. The LUBA record was also provided to the Hearing Officer.

HEARINGS OFFICER: The parties have several disagreements regarding the scope and meaning of the remand, most of which are relatively tangential and to the extent necessary are discussed below. But one fundamental disagreement must be addressed at the outset.

Ms. Fancher asserts that, "LUBA's remand only requires mitigation of impacts if there is a violation of the no net loss/degradation standard in lower Whychus Creek." And that, "LUBA ...stated the question remanded in a way to allow the county to require mitigation water if and only if a violation of the no net loss/degradation standard will occur without it." She makes it clear that the applicant is willing to provide the mitigation water either way, but seeks a determination on the "without mitigation" issue so that the development may be approved if, as opponent's assert, the mitigation water actually makes conditions worse. Nov. 28, Final Argument.

Mr. Dewey objects, contending that the "or" in the LUBA remand passage is not a presentation of two options. Rather, LUBA simply stated the same issue two ways, i.e. "whether the 106 acre-feet will fully mitigate the loss." LUBA's language should be interpreted as not being intended to disturb the first hearings officer ruling that mitigation is necessary. He objects to the applicant being "allowed to open all this up again". Nov. 13, letter at 8, November 20 letter at 5.

So, despite LUBA's concerted effort to provide clear direction, I am faced again with a fundamental interpretation issue. The statement of the issue quoted by the Board of Commissioners from the LUBA remand decision is not ambiguous. It clearly provides me with two options. But other portions of the LUBA decision and the history preceding it do raise a question regarding its meaning. As Mr. Dewey notes, the prior Hearings Officer concluded that the OWRD mitigation "does not fully address water habitat quality" because it failed to account for the higher water consumption "that likely will occur during the summer months". Therefore, she concluded that the proffered additional mitigation "is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development". LUBA record at 0034. That specific issue of necessity apparently was not appealed.

It its initial remand on this issue, LUBA stated that "it appears the hearings officer was not persuaded by Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that it could be ignored. To ensure that there would be no adverse thermal impact, the hearings officer took Thornburgh up on its offer to secure additional mitigation water from the Three Sisters Irrigation District.... the decision must be remanded for addition (sic) findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek." *Gould v Deschutes County*, 59

Or LUBA 435 (2009) (Gould FMP). This suggests that the issue in the initial remand was limited to whether the proposed mitigation would be effective – not whether it is necessary.

In the current remand decision, LUBA states that:

We restate below the Whychus Creek issues that were resolved by Gould (*FMP*)...The exception to the adequacy of the initially proposed mitigation...was the additional potential thermal impact on Lower Whychus Creek from increased summer water use...The hearings officer in accepting the additional 106 acre-feet of mitigation failed to address the disagreement between the experts regarding whether the mitigation would be ineffective.... Page 14

Yinger’s overstatement of average daily use, if it is an overstatement, would be relevant to the narrow issue on remand, which is limited to whether the thermal impact of the additional water use by the resort in summer months and whether the additional mitigation will result in compliance Page 20

Moreover, we agree with petitioners that, because the hearings officer’s concern with potential thermal impact of increased resort water usage during summer months appears to have arisen for the first time in the first hearing’s officer decision in *Gould* (FMP) after the evidentiary record had closed, the second hearings officer should have allowed and considered additional evidence on remand regarding that concern. Page 25

On balance, coupled with the “or” language relied on by the applicant it appears that the somewhat awkward sentence on page 20 perhaps was meant to read “whether the thermal impact” *requires mitigation*. The last quote also seems to suggest that the entire issue of summer time usage is at issue and is direction for me to address the necessity of the mitigation for summer usage/impacts that the first hearings officer assumed would occur.

I think the more prudent course is to make findings regarding the necessity for mitigation.

B. MISCELLANEOUS ISSUES RAISED BY THE PARTIES

The parties raised some issues that need to be addressed before proceeding to the merits.

1. Mr. Dewey states in a footnote to his October 30, 2017 letter, that “Mr. DeLashmutt has not established that he is authorized by the owners to pursue this remand.” The application on remand is from Central Land and Cattle Co., LLC as successor in interest to Thornburgh Resort Co., LLC. Mr. DeLashmutt signed as “agent of record”. The application references page 646 of the prior LUBA record – a letter from Agnes DeLashmutt stating that Kameron DeLashmutt is her agent of record for all land use matters and can sign any and all applications...” See *also*, page 1095, appointment as agent of record and page 1097 memorandum of purchase and sale agreement between Loyal Land LLC and Kameron DeLashmutt. As LUBA has noted, the various ownerships and interests involved with the subject property are complex and have evolved over time. Mr. Dewey simply states that old authorizations are not relevant but provides no evidence that they have expired or been revoked. Nothing in the record that I can find suggests that the authorizations are no longer valid. This objection is denied.

2. Mr. Dewey objects in his October 13, 2017 letter that his client was denied due process because CLCC “withheld” its analysis and evidence until the day of the remand and did not have a copy for him at the hearing. Accordingly, it was error for me to keep the record open

for two weeks rather than three as he requested. Nothing in state law or the Code requires that evidence be presented prior to the hearing. Remands are subject to a 120 day deadline. The two weeks granted is more than the seven day open record period provided by statute. I find that the opportunity to respond was reasonable and does not rise to a due process violation.

3. On November 20, 2017, CLCC submitted the 2017 USGS Study, "Simulation of Groundwater and Surface-Water Flow in the Upper Deschutes Basin, Oregon". In his November 27, 2017 letter Mr. Dewey states that he does not object to its inclusion in the record, but requests a three week extension to respond as he and his client were not aware that the report was being released. Again, the statutory timeline on remand is short. Failure of a party to be aware of new evidence published well in advance of the hearing date is not grounds for an extension barring unusual circumstances. Ms. Fancher objects to this request. The request is denied. Mr. Dewey also, however, asks that the "public release" posting of the report dated October 20 be admitted. This includes a short abstract of the report. Ms. Fancher does not expressly object to this request. The relevance of the posting is not evident, but I tend to agree that it is appropriate to include the complete record of the report, which includes the posting and the abstract. I do not see any prejudice to the applicant and the request is granted. The three page posting attached to Mr. Dewey's November 20, letter is accepted into the record.

C. CODE STANDARDS.

Title 18 Deschutes County Code

1. DCC 18.113.070

In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:

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

In *Gould v. Deschutes County*, 233 Or. App. 623, 227 P.3d 758, 763 (2010) the court stated:

Thus, the context of DCC 18.113.070(D) strongly suggests that "fish and wildlife resources" refers not to species of fish and wildlife, but to the habitat that supports fish and wildlife. In light of that context, we conclude that DCC 18.113.070(D) allows a focus on fish and wildlife habitat to establish that "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." That standard may be satisfied by a plan that will completely mitigate any negative impact on the habitat that supports fish and wildlife, without showing that each individual species will be maintained or replaced on a one-to-one basis.

In *Gould v. Deschutes County*, 227 Or. App. 601, 609-610, 206 P.3d 1106, (2009), the court stated:

We agree with LUBA that a finding under *Meyer* (that the local government record shows that compliance with DCC 18.113.070(D) is "likely and reasonably certain to succeed") ... would suffice to justify final adjudication of compliance with the approval criterion, as opposed to putting that determination off for another day.

Each side in this remand has submitted multiple, highly technical and largely conflicting reports from experts on the issue of whether the proposed mitigation is adequate. It must be stated that it is very difficult for a lay person to fully understand, much less evaluate, this evidence. As an

initial matter, I would urge the County to consider retaining an independent expert to peer review such evidence in future complex cases such as this. Some other jurisdictions have found this to be a cost-effective way to address such applications.

2. Is mitigation necessary?

CLCC contends that, even without the additional water, its summer water usage has no greater adverse impact than the average daily usage that the prior hearings officer found to be fully mitigated. Newton, Oct. 30, 2017 at 5: “Newton has estimated the temperature impacts of the resort’s peak use of water in the summer months and has determined that the greatest impact from the peak summer use without the TSID mitigation is less than .0077 degree Centigrade.” Pumping first draws solely from the aquifer. Over time, the “cone of depression” resulting from this pumping spreads. Eventually, it will extend far enough reduce the flow of Alder Springs water, but this will occur gradually over time. Further, at some point, the cone of depression becomes so large that pumping variations no longer manifest themselves through seasonal streamflow impacts. Page 8. This is referred to as a “steady-state condition”. Newton notes that the development will be phased, resulting in even more gradual impacts over time.

The parties appear to agree, however, that at some point and then until the “steady state” condition is reached, there will be increased summer time reductions in flow from Alder Springs, and likely elsewhere along lower Whychus Creek (depending on how one allocates where the decrease occurs). See Newton, page 2, Nov. 20, 2017 rebuttal, citing Yinger in 2008 stating that seasonal variations are “no longer discernible after 10 years.” Citing a USGS simulation, and Yinger’s 2008 report, Newton indicates that seasonal pumping variations increase until in year 10, when about 58% of water pumped is from reduced streamflow. Newton Nov. 20, rebuttal of Perrault. It stands to reason that increased summer pumping exacerbates that loss of streamflow more than winter time reduced pumping until the steady state is reached.

I think it important to note that, apparently, steady state does not mean that increased reductions in streamflow stop. They continue until 90% of the water pumped comes from diminished stream flow. The primary disagreement appears to be the degree of streamflow reduction and whether this occurs after 16 years or more like 30 to 40+ years. See e.g., Newton, Nov. 20 Yinger rebuttal at 16; Nov. 20 Perrault rebuttal at 19.

The Newton, Nov. 20 Yinger rebuttal posits numerous “mass balance” analyses of summer time impacts on temperature. The “worst case” is scenario 7B. This uses Yinger’s allocation of impacts at 50% to the Alder Springs reach and 50% to the lower area, assuming 2129 AF (full use – no deduction for recharge) on day 1 (no phasing) for Whychus Creek and no additional mitigation. It uses the .2cfs reduction in flow calculated by Yinger and Perrault at 2129 FA. It shows a .0184° Centigrade increase in year 10 (when stabilization is reached so summer time impacts merge with average impacts) at RM .62 with an average increase over years 1-10 at RM 62 of .0129°C. These increases are based on flows between 20-40 cfs for Whychus Creek, with generally lower increases for greater flows.

Newton suggests this worst case scenario is unrealistic because there is, for example, no recognition of lower consumptive use (recharge) and that the reductions in flow are more spread out over lower Whychus.

Newton took several steps to isolate the impact of increased summer pumping. See generally, Nov. Nov 20, report at 2. Yinger 2017 calculates an increase of .037 to .054°C from 2014 to 2016 at Alder Springs and .003 to .014°C to the Alder Springs reach and from RM.062 to the mouth of Whychus Creek. The report uses stream flow data from the hottest days in each of the

three years but unlike Newton, does not appear to isolate the increase from increased summer pumping. So it seems to be reasserting average daily impacts that were found in favor of the applicant by the prior hearings officer. Further, it does not explain, at least in a manner I can follow, how these impacts are allocated. On one hand, it states that Alder Springs will be the most impacted, but then states that there are two stream cells below Alder Springs that are impacted. It divides the .2cfs impact from pumping over those two cells. I think what the charts, read together, mean is that the impact on lower Whyhus Creek generally (as opposed to isolating Alder Springs) is .003 to .014°C. That reading appears generally consistent with the Newton analysis, although actually somewhat lower than the worst case scenario. See *a/so*, Yinger Nov. 6, 2015 (The volume of groundwater that discharges into Whyhus Creek not at a point, but distributed over a distance of 1.5 miles from Alder Springs, the mixing of groundwater with the stream does not occur at any specific point.)

The Perrault November 11, 2017 report is clearer, stating that Table 2 prorates the impact .1cfs to Alder Springs proper and .1cfs to lower Whyhus, showing mean daily impacts of .024 to .028°C at the confluence of Alder Springs and Whyhus on the three hottest days in 2015 and 2016, and .013 to .002°C for the remainder of Whyhus. His allocation of impacts only to Alder Springs shows an increase on those dates of .034 to .040°C. But he states that the losses would be dominantly split between Alder Springs and the reach from RM .062 to the mouth. Page 7.

It appears that the rather large (on a micro-scale) difference in temperature impacts on the creek between Perrault and Yinger is because Perrault focused on the three hottest days in two low flow years and disregarded, for example, 2016 and 2017 which he states were “aberrantly wet.” Although he used three summer days, his report does not separate out the impact from increased summer use pumping, as opposed to total average daily use. Finally, the applicant argues that I should disregard his analysis completely as he is not licensed in Oregon. I am not willing to go that far; he is a hydrologist with significant experience. On the other hand, his experience primarily appears to be in Hawaii so he is the least experienced in the hydrology of Central Oregon. In short, I find that his analysis is the outlier. Newton went to great lengths to replicate Yinger’s work and they largely agree as regards the creek itself. Accordingly, I think it appropriate not to place significant weight on Perrault’s more significant temperature impacts.

Finally, I find that the more credible evidence is that the impacts from summer pumping will not occur solely, or significantly disproportionately, at Alder Springs. Both Yinger and Perrault acknowledge that two cells, one of which is downstream from Alder Springs, are impacted, so it is hard to see the justification for attributing all of the impact to Alder Springs. The November 20, 2017 Farallon memo notes that the Yinger 2008 report appears to show flow reductions across several stream cells. Newton asserts the impacts will be spread along much of lower Whyhus. The subject property is 14 miles from Whyhus Creek. Newton October 30 at 6. Groundwater discharges in lower Whyhus are roughly 100.6 cfs of which only 8.7 cfs enters at Alder Springs. I find that relying on the “two-cell” impact is appropriately conservative and more likely to occur than the impacts being limited to Alder Springs. Cf. Yinger 2008 Report, Figures 7-1, 7-2 showing numerous points of groundwater impact along Whyhus Creek. Mr. Dewey states in his Nov. 13, letter that the determination of adequacy of the mitigation “applies to Alder Springs, not just below Alder Springs.” If he is arguing that the reduction in groundwater flow at Alder Springs must be taken into account, the applicant has done so while disagreeing that all of the impact occurs there. If he is arguing that impacts on Alder Springs, independent of Whyhus Creek must be mitigated, I disagree. No one has noted, nor have I found, any evidence that the springs in and of themselves are fish habitat. All of the studies address the springs in the context of their contribution to the fish habitat resource in Whyhus Creek, not as themselves being habitat.

The October 30, 2017 TetraTech Technical Memorandum addresses the impact on fish of temperature changes in fish habitat, apparently based on a draft of the Newton calculations referenced above. It notes that fish are “highly sensitive” to temperature changes and, depending on species, may be able to detect temperature differences of .05 to .2°C. It notes that the scientific literature typically reports to the nearest .01°C, at the “very lowest”, suggesting that lesser changes are not functionally meaningful. TetraTech also notes that the Environmental Protection Agency considers increases on the order of .025°C above natural background would not impair the designated uses and, therefore, “might be regarded as *de minimus*”. The opponents did not submit biological evidence addressing summer pumping or the effectiveness of the proposed mitigation. Cf. Clearwater BioStudies, Inc., 2008 report. Prior LUBA Record at 2587.

ODFW concluded that mitigation to Whychus Creek is not needed to meet its “No Net Loss Standard” although mitigation would provide additional benefits to the creek and to the fisheries resource.

The applicant contends that mitigation is unnecessary because the temperature increases modeled are very small, under the levels harmful to fish and overstated by not taking into account such things as groundwater recharge (consumptive use.) This is a close call, but I think the potential for negative impacts warrants mitigation. First, it is not clear that the .01°C impact that the first hearings officer found to be acceptable in the context of annual average impacts is applicable to summer time impacts associated with increased pumping. There is no doubt the summertime water flowing through Whychus Creek above Alder Springs will be warmer than the annual average and flows are lower. It seems logical that temperature impacts have at least marginally greater significance when those conditions exist. Fish no doubt are under greater stress. The County standard may well be stricter than that applied by ODFW and the EPA. Although I highlighted the “worst-case” scenario, all of the scenarios posit some increase and for several the potential impacts in year 10 that approach .01°C and per TetraTech likely would be rounded up to .01°C. See, e.g. 5B, 6B, 7A. Other variables include whether Newton accurately calculated summer usage at 2.6 times the average. Newton Oct. 30 at 9. In short, there are simply too many variables and the tolerances are so low that I find that one must look at the trend. The trend is that summer usage has some greater impact than average daily usage at least until stabilization and, under certain (albeit atypical) conditions may impact fish resources. I find that the first hearings officer did not err when requiring that the applicant address this potential through mitigation.

3. Is the mitigation adequate/effective?

The record is clear that, in general, the thermal mass from increased flow results in lower creek temperatures and improved fish habitat. Whychus Creek is the subject of a long-term, multi-entity effort to increase creek flows by keeping water in the creek that otherwise would be diverted for irrigation or other uses. In short, it appears that the applicant is proposing mitigation of the type that advocates and regulatory bodies say is needed and appropriate. See e.g. Golden & Wymore, Whychus Creek Stream Flow at 17, “Increasing [late summer and early fall base flows] should remain a priority for restoration partners...” UDWC prior LUBA record at 554. Indeed, Yinger adjusted his calculations of temperature impact downward partly because of “increased flows in Whychus Creek over the past 10 years.” Yinger, Nov. 12, page 7.

Yet, the opponents contend that this additional water not only will not mitigate summer time project impacts, but actually will degrade the habitat value of lower Whychus Creek. They do not contend that the efforts by other entities to restore Whychus Creek through increased flow are

misguided. One explanation for this seeming contradiction is that, as I previously decided and LUBA upheld, the applicant's must address lower Whychus Creek in isolation. In contrast, the other entities are willing and able to trade off some degradation in lower Whychus for improvements in the middle reaches. But I have not found, nor been pointed to, any evidence that those entities are engaged in such a trade-off. The literature in the record contains no mention of potential adverse impacts to lower creek habitat. Rather, it uniformly touts the benefits of flow restoration on habitat, including stream temperatures.

The other explanation is that there is something unique about this proposal and its impact on Whychus Creek that causes the mitigation proposed to have the opposite and negative effect from that of similar restoration efforts. In his Nov. 12, 2017 report, Yinger phrases it this way: "the proposed mitigation is harmful to critical fish habitat in two ways: first it would allow the reduction of cold groundwater discharge to the stream, and second it would increase the flow of warm water into the cold lower reach of the stream."

First, I think it important to restate that the issue in this remand is limited to whether the incremental increase in usage during the summer is adequately mitigated. It has been established that the impact of average daily use and the resulting loss of spring water either simply is not sufficient to violate the no degradation standard or is adequately mitigated by the purchase of water rights, dam removal and other steps proposed by the applicant.

Neither the Yinger nor the Perrault reports clearly delineate that distinction. They use the hottest summer time temperatures and summer stream flows, but otherwise do not segregate average and peak pumping. They use steady-state conditions rather than transient, so by definition the summer time withdrawal peaks are not discernible. Newton asserts that they actually are showing results for average daily groundwater withdrawal and so are not responsive to the issue on remand.

As discussed above, the calculations performed by Newton and Yinger to assess the loss of spring water are not that far apart when using the same assumptions (which the applicant asserts overstate the risk). But they are on opposite poles when performing similar calculations regarding the impact of restoring previously diverted stream flow.

Yinger asserts that the water left in the stream by the proposed diversion is much warmer than the springs. He cites a seven day moving average maximum stream temperature from July 23, 2016 to August 2, 2016 of 18.2 to 19.6°C upstream from the diversion. He cites to Mork (2016), which I think is the undated report titled "Whychus Creek Water Quality Status." He states that the water increases to as high as 23.7°C as it flows downstream. Yinger Nov. 12, at 3. The Alder Springs water ranges from 9° to 11°C, with all parties generally using 11°C as the standard. The stream itself appears to be in the 13°C range below Alder Springs. The creek is substantially cooled by springs upstream of Alder Springs, but primarily from Alder Springs and springs further downstream. Yinger concludes that the temperature increase with mitigation from the Alder Springs reach to the mouth ranges from .021 to .045°, vs .003 to .013°. (As noted above, I find that attributing all impacts solely to the confluence of Alder Springs and the creek as shown on page 7 is not realistic). Yinger, Nov. 12 at 8. It is not clear what temperature Perrault assigns to the non-diverted water input, but for flow he uses June 2015 and 2016, which he notes are the two lowest flow periods between 2013 and 2017. Ultimately, he finds a prorated mean daily temperature with mitigation of .023 to .042°, depending on location.

Scott Yankey, Farallon November 20, 2017 memo, contests Yinger's temperature input data. He cites Oregon Water Resources Data for station 1407500, above the proposed diversion site showing the daily mean temperatures from 9.3 to 12.3°C, with moving average maximum

stream temperatures for July 23-Aug.2, 2016, as ranging from 12.3 to 14.3°C. He contends that the moving average mean temperatures of 10.0 to 11.4°C are the best indicator of temperature. He also states that the Mork (2016) report does not, in fact, contain the temperature numbers that Yinger assigns. I also cannot find the temperatures cited by Yinger. Appendix A to the Mork report shows temperatures at Sisters City Park ranging from 20.8°C to 11.7°C, depending on flows with somewhat warmer temperatures at Road 6360. But these are several miles downstream from the diversion. I do not see any temperature measurements at the diversion point in the Mork report. The 2014 Mork report contains a graph that is hard to decipher but she states that stream temperature exceeded 18°C at five sites, all substantially downstream from the diversion site. Page 30, Whychus Creek Water Quality Status. She calls for flow restoration and states that “small gains in stream flow restoration that result in similarly small reductions in temperature are nonetheless likely to improve habitat conditions for some fish in some locations.” Page 38. Newton asserts that the water is 13°C “according to Yinger’s data” but does not provide a reference to support that assertion.

Newton’s Oct. 30, 2017 Report contains the OWRD data for Gage 14075000, showing July 2016 temperatures ranging from 9.6 to 15.2°C. Figure 64 shows Whychus Creek at roughly 13-14°C for July 2000 in the vicinity of the diversion. The temperatures generally spike significantly after that point until the vicinity of Alder Springs and below. DEQ/Watershed Sciences Stream Temperature Simulations (2008) page 80, LUBA 2015-107 Page 443, 504. Whychus Creek just upstream of Alder Springs was measured at 23-27°C in July, 2000. Id., at 443,

Virtually all, if not all, of the studies in the record support the concept that increasing stream flows is beneficial and lowers water temperatures. See e.g. Mork, page 39, “Stream flow restoration that has increased the minimum flow delivered instream...corresponding to lower observed temperatures.” LUBA 2015-107 page 553. Upper Deschutes Watershed Council, priorities include “increased summer streamflow.”) LUBA No 2017-107, page 653. The Deschutes River Conservancy has been working on streamflow restoration in Whychus Creek since the late 1990’s, and is working to protect 7 cfs of new flow. LUBA No 2015-107 page 655. The concept is relatively straight forward, a greater mass of water heats more slowly than a larger mass of water. In contrast, with the exception of the opponent’s experts I can find no support for the notion that adding water that otherwise would be diverted somehow increases water temperatures or otherwise is harmful. See e.g. TetraTech Oct. 30 memorandum.

Ms. Fancher asserts that Yinger models the effect of adding “warm” water at Alder Springs, i.e. does not reflect that restoring cool water at the diversion point lowers, or at least reduces the increase in temperature, of the water in the creek as it meets Alder Springs. It is not clear to me whether that is the case, but it would seem to explain Yinger and Perrault’s results.

The preponderance of the evidence is that the water proposed to be reinstated to Whychus Creek is relatively “cold” and can be as cold as Alder Springs inflow, although generally is somewhat warmer. It is substantially colder than the water in Whychus Creek above where it meets Alder Springs. Therefore, it is logical to conclude that the additional water does not warm Whychus Creek, but rather cools it slightly (or keeps it from warming). In other words, more slightly cooler water at the point Whychus Creek meets Alder Springs is better than less, slightly warmer water. Newton both previously and in this proceeding has run numerous new mass balance calculations, representing varying scenarios, primarily using UDWC streamflow and temperature data, and reran them with USGS data. Virtually all show that the mitigation, by cooling Whychus Creek as it flows into the Alder Springs area, results in slightly lower temperatures in lower Whychus Creek than without mitigation. This includes at rates that do not account for consumptive vs permitted use and otherwise appear to be conservative.

I find that the work performed by Newton, and backed up by Farallon is more complete and persuasive. In contrast, the analysis done by Yinger generally does not attempt to focus on the summer/irrigation impacts, appears to use erroneous or perhaps an extreme outlier for temperature input and generally provides nothing comparable to the details provided by the applicant. The Yinger/Perrault work does not demonstrate why the mitigation proposed by the applicant has the opposite effect of the comparable mitigation being pursued by numerous regulatory and nonprofit groups seeking to benefit the creek. Perrault asserts, for example, that it would take adding nearly double the state water right of 33cfs to lower Whychus Creek to meet “temperature standards” (presumably 18dC and/or 12.8dC for spawning). First, that seems to confirm that more water tends to lower temperature. But more importantly, the applicant is not charged with restoring Whychus Creek. It is charged with mitigating the apparently very slight and transient temperature impact caused by the delta between its average daily pumping rate (or even lower consumptive rate) and its summer usage. Those are small numbers, so a small increase in mitigation water would seem correspondingly appropriate – the issue being whether the quantity and quality of the mitigation is adequate.

It is worth noting that, to the extent there are impacts, positive or negative, they are very minor and occur in an area of Whychus Creek that is neither flow nor temperature limited. It was a close call as to whether the summer impacts are significantly greater enough to warrant mitigation beyond that required for average daily usage, but the applicant has demonstrated that whether “necessary” or not, it slightly benefits and does not degrade the natural resource.

Finally, Perrault argues that the applicant should be required to add 146 AF rather than 106 AF based on his analysis of the updated USGS groundwater model. He does not run scenarios showing the temperature impact of an additional 40 AF. The USGS report indicates larger than anticipated groundwater reductions and expresses concern about pumping, canal lining and other influences. But there also have been flow increases over time in Whychus Creek. Perrault states that the original modeling suggested that .0145 cfs (106AF) of mitigation water was needed assuming pumping at 2355 AF and that revised modeling performed by Yinger/Tran suggest that 2cfs is needed at 2129 AF. It is not clear to me how the modeling went from .02 cfs to .0145 cfs. Yinger Nov. 12 at 5-6.

Newton appears to acknowledge this, contending primarily that the wells simulated in the USGS report are within 5 miles of Whychus Creek whereas the proposed well is 14 miles away so the timing of impacts will be longer, but acknowledges that they may be sooner than he originally envisioned. Again, the relevance of this is unclear – all parties acknowledge that steady state conditions will be reached at some point. The transient state analysis serves the purpose of parsing out the increased summer use from annual usage. In any event, Newton reran the numbers using .20 cfs and the resulting temperature reductions are those cited above. In short, the 106AF reduces temperatures from those incurred without mitigation. The only exception is a potential .0021°C increase at the RM .062 and .0003°C at the mouth at minimum flow conditions (under 18 cfs). Newton contends that these low flows are virtually impossible given the groundwater flow into lower Whychus Creek. See *also* Prior Record at 2598. These impacts only occur if there is no groundwater recharge, almost certainly overstating the impact. That appears to be correct, but in any event the potential increases under two unlikely scenarios are so nominal that they do not warrant a finding that the proposed mitigation is inadequate.

I find that the proposed 106 AF is likely and reasonably certain to succeed in mitigating any adverse impacts of the natural resource offered by lower Whychus Creek caused by increased summer time pumping. With the mitigation, there is no net loss or net degradation of the resource.

4. Miscellaneous Issues

Mr. Dewey raises several additional issues relating to the merits of the issues on remand.

- .01°C is not a hard dividing line. I agree. As discussed above, the .01°C that the original hearings officer found to be nominal is not a hard and fast standard. Nominal temperature impacts may be more significant in the summer months. I have considered the projected impacts and the evidence in the record to conclude that the required mitigation will completely offset the small temperature increases that may occur due to summer time pumping. I am not relying on the .01° as a bright line.
- Applicant has not demonstrated TSID water is available. The issue of whether the TSID water remains available is not before me. The only new evidence in the record directly on point is the letter stating that the water is still available. In any event, the 106 AF of mitigation is required and, if unavailable, the applicant cannot proceed without a modification of the approval.
- Impact of declines in groundwater. There is evidence that Whychus Creek flows have increased and that groundwater has declined. It appears that some of this is from increased piping, which reduces groundwater recharge from open canals. But it also permits more water to be maintained in stream rather than lost to evaporation and seepage. Newton ran calculations based on a wide range of stream flows and does not appear to rely on the recent increased flows. Opponents have not demonstrated how declines in groundwater, assuming they are occurring in areas impacting Alder Springs, alter the analysis of impacts on fish habitat. Finally, again I return to the fact that the parties involved in restoring the habitat afforded by Whychus Creek appear to support increased flows that piping appears to promote, so it is unclear how piping increases the proposal's impacts on fish habitat.

5. Condition of Approval.

The condition of approval at issue in this remand states:

39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.

No one has taken issue with this language. I am concerned, however, that given the issues subsequently raised, the language may not be adequate. For example, it does not expressly state when the diversion actually must take effect. For the mitigation water to be effective, it must be in place prior to the start of impacts on Alder Springs and lower Whychus Creek. The evidence as to when summer pumping impacts become discernible is unclear to me. Newton's mass balance analysis appears to suggest that small impacts become discernible in year one. Accordingly, I find that the condition needs to be revised to ensure that mitigation timely occurs.

The condition is revised as follows (new language in italics):

39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. *The restoration shall occur as described in the applicant's submittals. The mitigation water shall be placed in stream no later than the date that*

groundwater pumping to serve the development commences (not testing). The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.

D. CONCLUSION:

Based on the foregoing findings and conclusions, and with the revised condition of approval, the proposed 106 AF of mitigation from TSID is necessary to mitigate summer pumping impacts on Whychus Creek and is adequate and likely and reasonably certain to succeed in mitigating adverse impacts, resulting in no net loss nor degradation in the resource.

Done and dated this 1st day of January, 2018

Dan R. Olsen

Dan R. Olsen
Hearings Officer

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

Attachment: Thornburgh - BOCC Consideration Staff Report (1749 : Consideration of Order)

REVIEWED
LEGAL COUNSEL

1.a

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's *
Decisions in File No. 247-17-000761-A * ORDER NO. 2018-004

WHEREAS, Paul Dewey on behalf of Nunzie Gould appealed the Deschutes County Hearings Officer's Decision on Application 247-17-000761-A;

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear Dewey's appeal, 247-18-000xxx-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be heard *de novo*.

Section 3. Staff shall set a hearing date and cause notice to be given to persons or parties entitled to notice pursuant to DCC 22.32.030.

Dated this _____ of _____, 2018

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

PHILIP G. HENDERSON, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

Attachment: Thornburgh - BOCC Consideration Staff Report (1749 : Consideration of Order)

REVIEWED
LEGAL COUNSEL

1.a

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Declining Review of Hearings Officer's *
Decisions in File No. 247-17-000761-A * ORDER NO. 2018-004

WHEREAS, Paul Dewey on behalf of Nunzie Gould appealed the Deschutes County Hearings Officer's Decision on Application 247-17-000761-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. That it will not hear on appeal 247-18-000xxx-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. Pursuant to DCC 22.32.015, there shall be a refund of the appeal in the amount of \$2,673.20.

Dated this _____ of _____, 2018

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

PHILIP G. HENDERSON, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

Attachment: Thornburgh - BOCC Consideration Staff Report (1749 : Consideration of Order)