

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   JAMES CURL and SHERYL CURL,  
5   *Petitioners* ,

6  
7   vs.

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9                                   DESCHUTES COUNTY,  
10   *Respondent*,

11  
12   and

13  
14                                   CENTRAL OREGON IRRIGATION DISTRICT,  
15   *Intervenor-Respondent*.

16  
17                                   LUBA No. 2013-086/095

18  
19   FINAL OPINION  
20   AND ORDER

21  
22                   Appeal from Deschutes County.

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24                   Bruce W. White, Bend, filed the petition for review and argued on behalf  
25 of petitioners.

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27                   No appearance by Deschutes County.

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29                   Elizabeth A. Dickson, Bend, filed a response brief and argued on behalf  
30 of intervenor-respondent. With her on the brief was Hurley Re PC.

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32                   BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board  
33 Member, participated in the decision.

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35                                   REMANDED (LUBA No. 2013-086)                   03/19/2014  
36                                   AFFIRMED (LUBA No. 2013-095)                   03/19/2014

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38                   You are entitled to judicial review of this Order. Judicial review is  
39 governed by the provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal two related decisions: (1) a land use compatibility statement (LUCS) concluding that a proposal to pipe an existing irrigation canal is a permitted use in the Suburban Residential (SR 2.5) zone, and (2) a decision rejecting petitioners’ local appeal of the LUCS decision. Both appeals are consolidated for review.<sup>1</sup>

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief to address issues regarding standing and jurisdiction raised in intervenor-respondent’s (intervenor’s) response brief. There is no opposition to the motion, and it is allowed.

**MOTION TO STRIKE PORTIONS OF RESPONSE BRIEF**

Petitioners move to strike page 6, line 3 to page 7 line 2 of the response brief, a portion of the statement of material facts, on the grounds that the statement includes a number of factual assertions not found in the record. Intervenor filed no response to the motion, and petitioners are correct that the disputed pages include a number of factual assertions not found in the record. Accordingly, LUBA will not consider those assertions.

**FACTS**

Petitioners own and reside on a four-acre parcel zoned SR 2.5, located within the City of Bend urban growth boundary (UGB). Petitioners’ property and surrounding properties are subject to the Bend Urban Area Comprehensive

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<sup>1</sup> Due to the timing of the decisions, the county did not file a consolidated record. Unless noted otherwise, all citations to the record or supplemental record are to the record or supplemental record filed in LUBA No. 2013-086, challenging the LUCS decision.

1 Plan and the Bend Urban Area Zoning Ordinance, which is Title 19 of the  
2 Deschutes County Code (DCC). The SR 2.5 zone allows residential  
3 development as a permitted use. The SR 2.5 zone and residential development  
4 ends three lots to the north of petitioners' property at the UGB. The property  
5 north of the UGB is zoned exclusive farm use (EFU) and subject to the  
6 county's comprehensive plan and Title 18 of the DCC.

7 Petitioners' property is bounded on its west side by the Pilot Butte Canal,  
8 part of the irrigation system owned and operated by intervenor. The canal is  
9 located in a right-of-way granted to intervenor's predecessor in 1901, which  
10 diverts from the Deschutes River south of Bend, travels north through the Bend  
11 Urban Area, and continues north across lands within the county. The portion  
12 of the canal bordering petitioners' property and within the UGB is an open  
13 unpiped ditch. As discussed below, the SR 2.5 zone does not allow irrigation  
14 canals as a permitted or conditional use, but does allow, as a conditional use,  
15 hydroelectric facilities. DCC 19.20.030(L).

16 Several miles north of the UGB along the Pilot Butte Canal intervenor  
17 operates a hydroelectric facility known as the Juniper Ridge facility, which was  
18 approved earlier by the county on land zoned Open Space and Conservation  
19 (OS&C). The OS&C zone allows as a permitted use construction, operation  
20 and maintenance of a small hydroelectric facility. DCC 18.48.020(G). At  
21 some point, intervenor also completed piping of the Pilot Butte Canal from the  
22 Juniper Ridge facility upstream to the edge of the Bend Urban Area, which  
23 ends near petitioners' property. A map in the record indicates that the piping of  
24 this portion of the Canal is referred to as the Juniper Ridge "Phase 1 Pipe"  
25 project. Supplemental Record 3. Piping of an existing irrigation system

1 operated by an irrigation district is a permitted use in the OS&C and EFU  
2 zones under DCC Title 18. DCC 18.48.020(F) and DCC 18.16.020(M)

3 Intervenor subsequently applied to the Oregon Department of  
4 Environmental Quality (DEQ) for funding to construct Phase 2 of the Juniper  
5 Ridge piping project. Phase 2 extends piping of the Canal from the point  
6 where Phase 1 piping ends further south into the Bend Urban Area, including  
7 the portion of the Canal adjacent to petitioners' property. At the southern end  
8 of Phase 2, just outside the City limits, intervenor proposes a "forebay," which  
9 is apparently a small artificial body of water used for flood control and other  
10 purposes. Supplemental Record 3. As required by state coordination rules,  
11 DEQ required that intervenor obtain a LUCS from the county to determine  
12 whether the proposed Phase 2 piping is compatible with the county's plan and  
13 land use regulations.

14 In April 2013, intervenor submitted a LUCS request to the county, on a  
15 form provided by DEQ. Intervenor described the proposal as "pip[ing] 4,500  
16 feet of its Pilot Butte Canal. The piping will eliminate water loss through the  
17 canal and place 7.95 cfs [cubic feet per second] of water permanently instream  
18 in the Deschutes and Crooked Rivers." Record 1.

19 On April 25, 2013, a county planner issued the LUCS. Page two of the  
20 DEQ LUCS form asks whether the proposed use is compatible with the  
21 acknowledged comprehensive plan, and lists several potential responses. The  
22 planner checked the box for "YES, the activity or use is allowed outright by"  
23 and hand-wrote "DCC Section 18.16.020(M) and 19.88.120." Record 2. As  
24 noted, DCC 18.16.020(M) allows piping of an existing irrigation canal in the  
25 EFU zone. DCC 19.88.120, which is part of a set of "special use" regulations

1 governing uses within the Bend Urban Area, allows certain types of “utilities.”  
2 The April 25, 2013 LUCS decision was issued without notice or hearing.

3 On August 16, 2013, petitioners became aware of the April 25, 2013  
4 LUCS decision and attempted to file a local appeal of that decision. On  
5 September 5, 2013, the county advised petitioners that no local appeal of the  
6 April 25, 2013 LUCS decision is available under the county’s code. On  
7 September 6, 2013, petitioners appealed the April 25, 2013 LUCS decision to  
8 LUBA, and that appeal was assigned LUBA No. 2013-086. On September 26,  
9 2013, petitioners appealed to LUBA the September 5, 2013 county decision  
10 that no local appeal is available. That appeal is assigned LUBA No. 2013-095.  
11 LUBA consolidated the two appeals for review.

## 12 **JURISDICTION**

13 In earlier pleadings, intervenor moved to dismiss LUBA No. 2013-086  
14 and 2013-095 on a number of different grounds. LUBA rejected intervenor’s  
15 jurisdictional challenges, but reserved judgment with respect to the parties’  
16 arguments regarding the effect of ORS 197.015(10)(b)(H)(ii).<sup>2</sup> *Curl v.*

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<sup>2</sup> ORS 197.015(10)(b)(H) excludes from the definition of “land use decision,” and therefore excludes from LUBA’s jurisdiction, a decision of a local government

“That a proposed state agency action subject to ORS 197.180 (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

- “(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;
- “(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed

1 *Deschutes County*, \_\_ Or LUBA \_\_ (LUBA Nos. 2013-086/095 Order on  
2 Motion to Dismiss, January 8, 2014), slip op 11-12. Briefly, ORS  
3 197.015(10)(b)(H)(ii) excludes from LUBA’s jurisdiction a LUCS decision that  
4 determines that a proposed use is “allowed without review” under the local  
5 government’s plan and land use regulations. We concluded that determining  
6 whether the exclusion at ORS 197.015(10)(H)(ii) applies will depend on  
7 whether the county planner *correctly* concluded that the proposed Phase 2  
8 piping project is “allowed outright” in the SR 2.5 zone under DCC 19.88.120.<sup>3</sup>  
9 *Id.* Because that issue had not been adequately briefed, we deferred further  
10 consideration of the jurisdictional question until after the briefing was  
11 completed.

12 In the response brief, intervenor renews its argument that the April 25,  
13 2013 LUCS decision is excluded from LUBA’s jurisdiction under ORS  
14 197.015(10)(H)(ii). According to intervenor, the planner correctly concluded

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without review under the acknowledged comprehensive  
plan and land use regulations implementing the plan; or

“(iii) The use or activity that would be authorized, funded or  
undertaken by the proposed state agency action requires a  
future land use review under the acknowledged  
comprehensive plan and land use regulations implementing  
the plan[.]”

<sup>3</sup> Because DCC 18.16.020(M) applies only in the EFU zone, not in the SR  
2.5 zone, intervenor did not seriously contend that DCC 18.16.020(M)  
authorizes the proposed Phase 2 piping project in the SR 2.5 zone. On appeal,  
intervenor does not attempt to argue that the planner correctly concluded that  
DCC 18.16.020(M) authorizes the proposed piping in the SR 2.5 zone.  
Therefore the focus of the jurisdictional question under ORS  
197.015(10)(b)(H)(ii) is on whether the planner correctly concluded that DCC  
19.88.120 authorizes the proposed piping project in the SR 2.5 zone as a  
“utility.”

1 that the proposed piping is allowed outright in the SR 2.5 zone as a “utility”  
2 pursuant to DCC 19.88.120, or is “allowed without review,” in the terminology  
3 of ORS 197.015(10)(H)(ii), and therefore LUBA lacks jurisdiction over the  
4 April 25, 2013 LUCS decision.

5 For the reasons set out below under the third assignment of error in  
6 LUBA No. 2013-086, we conclude that the planner erred in concluding that the  
7 proposed Juniper Ridge Phase 2 piping is allowed outright in the SR 2.5 zone  
8 under DCC 19.88.120. It follows that the April 25, 2013 LUCS decision does  
9 not fall within the exclusion at ORS 197.015(10)(H)(ii). Intervenor has not  
10 demonstrated that LUBA lacks jurisdiction over the April 25, 2013 decision.

11 **FIRST ASSIGNMENT OF ERROR (LUBA No. 2013-095)**

12 LUBA No. 2013-095 challenges the county’s September 5, 2013  
13 decision that no local appeal of the April 25, 2013 LUCS decision is available  
14 under the county’s code. In what petitioners label as an “alternative”  
15 assignment of error, petitioners argue that the county erred in concluding that  
16 no local appeal is available to petitioners.<sup>4</sup>

17 We address this “alternative” assignment of error first, because as these  
18 appeals are presented to us, we cannot proceed to review petitioners’ main  
19 assignments of error challenging the April 25, 2013 LUCS decision unless we  
20 first reject petitioners’ argument that they were entitled to a local appeal of the

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<sup>4</sup> Petitioners initially suggested suspending LUBA No. 2013-095 and proceeding to resolve the challenges to the April 25, 2013 LUCS decision at issue in LUBA No. 2013-086. However, that would put the cart before the horse, and could potentially result in LUBA issuing a decision on the merits of an appeal over which, it transpires, LUBA had no jurisdiction. *See Curl v. Deschutes County*, \_\_Or LUBA \_\_ (LUBA Nos. 2013-086/095, Order, October 30, 2013) (denying motion to suspend LUBA No. 2013-095).

1 LUCS decision. ORS 197.825(2)(a) limits LUBA’s jurisdiction to those cases  
2 in which the petitioners have exhausted “all remedies available by right” before  
3 petitioning the Board for review. If petitioners are correct that they were  
4 entitled to a local appeal under the county’s code, then the September 5, 2013  
5 decision rejecting their local appeal would have to be remanded to provide  
6 them with that local appeal, in which case we would not review petitioners’  
7 challenges to the April 25, 2013 LUCS decision.

8 However, we agree with the county that petitioners had no right to a  
9 local appeal of the LUCS decision under the county’s code. The county’s code  
10 distinguishes between two types of decision: (1) a “land use action” and (2) a  
11 “development action.”<sup>5</sup> As relevant here, a “land use action” includes approval

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<sup>5</sup> DCC 22.04.020 includes the following relevant definitions:

“Development action’ means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that \* \* \*:

“A. Involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action as defined below[.]

“Land use action’ includes \* \* \* any consideration for approval of a land use permit \* \* \*

“Land use permit’ includes any approval of a proposed development of land under the standards in the County zoning ordinances or subdivision or partition ordinances involving the exercise of significant discretion in applying those standards.

“By way of illustration, ‘land use permit’ includes review of conditional use permits, landscape management plans, farm or nonfarm dwellings, forest management plans, partition, master

1 of a “land use permit,” which means approval of a proposed development of  
2 land under the county land use standards that involve the exercise of significant  
3 discretion. A “land use permit” and associated procedures parallel the  
4 definition and procedures that apply to a “permit” decision as defined at ORS  
5 215.402(4) (discretionary approval of proposed development of land).<sup>6</sup> In  
6 contrast, a “development action” is a county catch-all category that involves the  
7 review of any permit, authorization or determination that is not a “land use  
8 action.” For present purposes, the critical difference between a “land use  
9 action” and a “development action” is that only the *applicant* has the right to  
10 file a local appeal of a decision that is a “development action.” DCC  
11 22.32.050. Petitioners are not the applicant for the challenged LUCS  
12 determination, so if the April 25, 2013 LUCS decision is a “development  
13 action,” then the county correctly concluded that petitioners had no right of  
14 local appeal, and accordingly we must deny the first alternative assignment of  
15 error and affirm LUBA No. 2013-095. As a further consequence, the  
16 exhaustion requirement at ORS 197.825(2)(a) would not apply and would not  
17 preclude petitioners’ direct appeal to LUBA of the April 25, 2013 LUCS  
18 decision.

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plan, river setback exception, riverfront design review, site plan,  
site plan change of use, modification of approval, solar access,  
solar shade exception, subdivision, and subdivision variance and  
variance.”

<sup>6</sup> ORS 215.402(4) provides, in relevant part:

“‘Permit’ means discretionary approval of a proposed  
development of land under ORS 215.010 to 215.311, 215.317,  
215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county  
legislation or regulation adopted pursuant thereto. \* \* \*”

1           Petitioners contend that the April 25, 2013 LUCS decision is properly  
2 characterized as a “land use action” instead of a “development action,” because  
3 determining whether the proposed piping complies with the county’s land use  
4 regulations constituted the “approval of the proposed development of land”  
5 under the county’s land use regulations, and required the exercise of significant  
6 discretion. Consistent with that position, petitioners argue under the first and  
7 second assignments of error in LUBA No. 2013-086 that the LUCS decision  
8 constitutes a “permit” as defined at ORS 215.402(4), and therefore the county  
9 erred in failing to provide notice and a hearing, and to follow the other  
10 procedural requirements in ORS 215.416 for making a “permit” decision.

11           We disagree with petitioners that the April 25, 2013 LUCS decision is a  
12 “land use permit” or, for that matter, a “permit” as defined at ORS 215.402(4).  
13 As with many LUCS decisions, the initial question posed to the county is  
14 whether a proposed use—piping of an irrigation canal—is allowable or not  
15 under the county’s comprehensive plan and land use regulations. As presented,  
16 that question basically requires the county to categorize the proposed use under  
17 its land use regulations, and determine whether the proposed use is not allowed  
18 in the applicable zone, or whether it is allowed without review, allowed with  
19 review under certain standards or upon obtaining certain county permits (e.g.  
20 site or design review), allowed as a conditional use, allowed as a  
21 nonconforming use, etc. In short, the initial question posed and answered by a  
22 LUCS is typically a determination of the use category that best fits the  
23 proposed use. That initial inquiry will determine whether county *approval* of  
24 the proposed use is required, and if so what standards will apply or which  
25 permits will be required. If that is all the LUCS decision determines, then it is  
26 very similar in function to a use or zoning classification decision described in

1 ORS 215.402(4)(b).<sup>7</sup> A LUCS decision that is limited to a categorization of the  
2 proposed use is not a “land use action” as defined at DCC 22.32.050 (or a  
3 “permit” as defined at ORS 215.402(4)) for the simple reason that the LUCS  
4 decision does not *approve* the proposed development of land, no matter how  
5 much interpretation or discretion may go into that use categorization.

6 Where the lines between a LUCS decision and a statutory “permit” can  
7 blur is where in response to a LUCS request the county goes further and  
8 actually *applies* the approval standards to conduct any required reviews, and in  
9 the same decision issues the required permits or approvals for the proposed use.  
10 In that circumstance, the county has “approved” the proposed development of  
11 land and, if the applicable land use standards require the exercise of discretion,  
12 the county’s resulting decision is a “permit” as defined at ORS 215.402(4) or,  
13 in the county’s parlance, a “land use permit.” In that circumstance, the county  
14 must apply the procedures applicable to ORS 215.402(4) permits, set out in  
15 ORS 215.416, including the right of local appeal for permit decisions made  
16 without a hearing at ORS 215.416(11)(a)(A). The county’s final decision in  
17 that circumstance is a land use decision and does not fall within any of the  
18 exclusions at ORS 197.015(10)(b)(H). *See Campbell v. Columbia County*, \_\_  
19 Or LUBA \_\_ (LUBA No. 2012-060, January 28, 2013), slip op 7-9 (a LUCS  
20 decision that also verifies or approves an alteration of a nonconforming use is a  
21 permit decision and not subject to the exclusions at ORS 197.015(10)(b)(H)).

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<sup>7</sup> ORS 215.402(4)(b) excludes from the definition of “permit” a “decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

1 In the present case, the county’s decision does not approve the proposed  
2 development of land, but simply determines that the proposed use is allowed  
3 without review under the county’s code. Putting aside for the moment the  
4 correctness of that conclusion, on its face the decision clearly is limited to a  
5 LUCS decision, and does not purport to apply any land use regulations to  
6 *approve* the proposed use.

7 Petitioners argue nonetheless that the conclusion that the proposed use is  
8 “allowed without review” is tantamount to “approval” of that use for purposes  
9 of ORS 215.402(4), because the applicant may immediately proceed to develop  
10 the property with the proposed use. However, the conclusion that the use is  
11 “allowed without review” means essentially that no county approval is  
12 necessary. A determination that no county approval is necessary for a proposed  
13 use does not “approve” the use for purposes of ORS 215.402(4).

14 Petitioners also argue that the county incorrectly concluded that the  
15 proposed piping project is “allowed without review,” and that the correct  
16 conclusion is that the proposed project requires conditional use approval as part  
17 of a hydroelectric facility allowed as a conditional use in the SR 2.5 zone. As  
18 explained below, we agree with petitioners that the county planner incorrectly  
19 categorized the proposed use. However, that error does not mean that the  
20 planner “approved” the proposed use, or that the error converts the LUCS  
21 decision into a “permit” decision as defined at ORS 215.402(4) or a “land use  
22 permit” as defined at DCC 22.04.020. It simply means that the county made an  
23 erroneous LUCS decision.

24 In sum, the county correctly treated the appeal of the April 25, 2013  
25 LUCS decision as an appeal of a “development action,” and therefore correctly  
26 concluded that no local appeal is available to petitioners under the county’s

1 code. Accordingly, the first alternative assignment of error in LUBA No. 2013-  
2 095 is denied, and the county’s decision in LUBA No. 2013-095 is affirmed.

3 **FIRST AND SECOND ASSIGNMENTS OF ERROR (LUBA No. 2013-**  
4 **086)**

5 Under the first and second assignments of error, petitioners argue that  
6 the April 25, 2013 LUCS decision is a “permit” decision as defined at ORS  
7 215.402(4), and therefore the county erred in failing to follow the procedures at  
8 ORS 215.416, and the corresponding code procedures, applicable to permit  
9 decisions. Further, petitioners argue that the county erred in failing to adopt  
10 findings to support the permit decision, as required by ORS 215.416(9).

11 As explained above, the April 25, 2013 LUCS decision did not approve  
12 or deny the proposed development of land and, for that reason alone, was not a  
13 “permit” decision as defined at ORS 215.402(4). Therefore, petitioners’  
14 arguments under the first and second assignments of error do not provide a  
15 basis for reversal or remand.

16 The second and third assignments of error (LUBA No. 2013-086) are  
17 denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 The third assignment of error in LUBA No. 2013-086 argues that the  
20 LUCS decision misconstrued the applicable law in concluding that the  
21 proposed piping project is a use allowed in the SR 2.5 zone as a “utility” under  
22 DCC 19.88.120.<sup>8</sup> Petitioners contend that, based on the text and context of

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<sup>8</sup> DCC 19.88 provides “Special Use” standards for certain uses. DCC 19.88.120, adopted in 1990, is entitled “Utilities,” and applies to all zones within the Bend urban growth area. It provides:

1 DCC 19.88.120, the “water” utility facilities authorized in the SR 2.5 zone  
2 under DCC 19.88.120 are intended to include domestic water facilities  
3 typically provided by municipal water suppliers, and is not intended to include  
4 irrigation canals or piping of irrigation canals, which are not listed uses  
5 allowed or conditionally allowed in the SR 2.5 zone. According to petitioners,  
6 the correct categorization for the proposed use is that it is a part of a  
7 “hydroelectric facility” allowed as a conditional use in the SR 2.5 zone, under  
8 DCC 19.20.030(M).

9 Intervenor responds that the county correctly concluded that the  
10 proposed piping project is a “utility” authorized in the SR 2.5 zone under DCC  
11 19.88.120, because that code provision expressly allows “piping” of “water.”  
12 However, intervenor does not respond to petitioners’ detailed textual and  
13 contextual analysis of DCC 19.88.120. Moreover, intervenor does not respond

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“The erection, construction, alteration or maintenance by public utility or municipal or other governmental agencies of underground, overhead, electrical, gas, steam or water transmission or distribution systems, collection, communication, supply or disposal system, including poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, but excluding buildings, may be permitted in any zone. Utility transmission and distribution lines, poles and towers may exceed the height limits otherwise provided for in DCC Title 19. However, in considering an application for a public utility use, the Hearings Body or Planning Director shall determine that the site, easement or right of way is located to best serve the immediate area, and in the case of a right of way or easement, will not result in the uneconomic parceling of land. As far as possible, transmission towers, poles, overhead wires, pumping stations and similar gear shall be located, designed and installed to minimize their effect on scenic values.”

1 at all to the merits of petitioner’s argument that the proposed piping project is  
2 correctly viewed as part of a “hydroelectric facility” allowed as a conditional  
3 use in the SR 2.5 zone, under DCC 19.20.030(M).

4 As we noted in our order denying intervenor’s motion to dismiss, DCC  
5 19.88.120 is ambiguous, and it is unclear whether that code provision, in  
6 authorizing certain utility facilities in all Bend Urban Area zones, is intended to  
7 authorize irrigation canals or the piping of irrigation canals. The text of DCC  
8 19.88.120 allows “water transmission or distribution systems \* \* \*, including  
9 \* \* \* pipes \* \* \*,” and those words considered in isolation are probably broad  
10 enough to include irrigation canals or the proposed piping of an irrigation  
11 canal.<sup>9</sup> However, as petitioners point out, the types of facilities and  
12 infrastructure listed in DCC 19.88.120—including fire alarm boxes, police call  
13 boxes, traffic signals, hydrants and other similar equipment—appear to be  
14 typical urban area public utilities and facilities appropriate in urban zones like  
15 the SR 2.5 zone, which suggests that “water transmission and distribution  
16 systems” is referring to urban domestic water transmission and distribution  
17 systems, not agricultural irrigation systems typical of, and expressly allowed as  
18 such in, agricultural resource zones.

19 However, we need not attempt to discern the scope of DCC 19.88.120 as  
20 applied generally to irrigation canals and the piping of irrigation canals,  
21 because we agree with petitioners that the particular use proposed in this

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<sup>9</sup> However, even if so, it is probably not accurate to conclude that construction of a water transmission or distribution pipeline is “allowed without review” under DCC 19.88.120 for purposes of making a LUCS decision. The last two sentences of DCC 19.88.120 set out two discretionary review standards for utility facilities that might well apply to the proposed construction of a water transmission or distribution pipeline. *See* n 8.

1 case—the Phase 2 piping project of the Juniper Ridge hydroelectric facility—is  
2 correctly characterized as part of that hydroelectric facility, and therefore the  
3 piping project requires conditional use review in the SR 2.5 zone, pursuant to  
4 DCC 19.20.030(L).<sup>10</sup>

5 There is no dispute that the proposed use is Phase 2 of a piping project  
6 associated with the Juniper Ridge hydroelectric facility. DCC 19.04.40  
7 supplies definitions for terms as used in DCC Title 19, and defines  
8 “hydroelectric facility” broadly to mean “all aspects of any project or  
9 development necessary for or related to the generation of hydroelectric  
10 energy,” including but not limited to “conduits.” “Conduit” is defined in turn  
11 to mean “any tunnel, canal, pipeline, aqueduct, flume, ditch or similar man-  
12 made structure which is or may be used to convey water.” *Id.* Petitioners  
13 argue that the proposed piping project is a conduit that is necessary or related  
14 to the Juniper Ridge hydroelectric facility and therefore the proposed piping in  
15 the SR 2.5 zone requires conditional use approval pursuant to DCC  
16 19.20.030(L).

17 As noted, the response brief does not provide any response to  
18 petitioners’ arguments regarding DCC 19.20.030(L) or the related definitions.  
19 Absent some response, we agree with petitioners that, under those definitions,  
20 the piping proposed in this case appears to require conditional use review under  
21 DCC 19.20.030(L), subject to applicable standards in DCC 19.88 and 19.100.  
22 If the proposed piping in the SR 2.5 zone were not associated with a  
23 hydroelectric facility, it might be possible to categorize such project solely as a

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<sup>10</sup> DCC 19.20.030(L) allows in the SR 2.5 zone as a conditional use a  
“Hydroelectric facility subject to DCC 19.88 and 19.100.”

1 “utility” for purposes of DCC 19.88.120.<sup>11</sup> However, even if that is the case,  
2 because the piping proposed in the present case is indisputably associated with  
3 a hydroelectric facility, we agree with petitioners that the county erred in  
4 concluding that the proposed use is “allowed without review” under DCC  
5 19.88.120.

6 On remand, one option for the county is to issue a new LUCS decision  
7 concluding that the proposed use is “allowed *with* review” under DCC  
8 19.20.030(L), and defer approval of the proposed use to a future decision based  
9 on an application for a conditional use. If that is all the decision on remand  
10 does, it would probably fall within the exception at ORS 197.015(10)(b)(H)(iii)  
11 for LUCS decisions concluding that the proposed use “requires a future land  
12 use review[.]” *See* n 2. In that event, the decision on remand would be  
13 excluded from LUBA’s jurisdiction. Another option is for the county to  
14 proceed to issue decisions approving or denying a conditional use permit and  
15 any other reviews necessary under its plan and code for a piping project in the  
16 SR 2.5 zone associated with a hydroelectric facility. In that event, different  
17 procedural requirements would apply and, as explained above, the resulting  
18 decision would almost certainly constitute a “land use decision” subject to

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<sup>11</sup> Because the SR 2.5 zone does not list irrigation canals or the piping of irrigation canals as permitted or conditional uses, as the county’s EFU zone does, it is also possible to argue that the existing Pilot Butte canal is a nonconforming use rather than a “utility,” and the proposed piping is therefore an alteration of a nonconforming use that requires review under the standards for alterations of nonconforming uses. Given our conclusion that the proposed use is properly categorized as part of a “hydroelectric facility” conditionally allowed in the SR 2.5 zone, we need not address this question.

1 LUBA’s review as well as a “permit” for purposes of ORS 215.416 and  
2 corresponding county provisions.

3 The third assignment of error is sustained.

4 **FOURTH ASSIGNMENT OF ERROR**

5 The fourth assignment of error in LUBA No. 2013-086 argues that the  
6 LUCS decision misconstrued the applicable law in concluding that the  
7 proposed piping project is a use allowed without review in the SR 2.5 zone  
8 under DCC 18.16.020(M), which allows in the EFU zone the operation,  
9 maintenance or piping of an existing irrigation canal operated by an irrigation  
10 district.

11 The response brief does not address the fourth assignment of error, and  
12 we understand intervenor to concede that DCC 18.16.020(M) has no  
13 applicability in the SR 2.5 zone. We agree with petitioners that the county  
14 erred in concluding that DCC 18.16.020(M) authorizes the proposed piping  
15 project in the SR 2.5 zone.

16 The fourth assignment of error is sustained.

17 The county’s decision in LUBA No. 2013-086 is remanded.