

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

3  
4 THOMAS BISHOP and DORBINA BISHOP,  
5 TRUSTEES OF THE BISHOP FAMILY TRUST,  
6 *Petitioners,*

7  
8 vs.

9  
10 DESCHUTES COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 TUMALO IRRIGATION DISTRICT  
16 and KC DEVELOPMENT GROUP, LLC,  
17 *Intervenors-Respondents.*

18  
19 LUBA No. 2015-027 and 2015-030

20  
21 and

22  
23 TUMALO IRRIGATION DISTRICT,  
24 and KC DEVELOPMENT GROUP, LLC,  
25 *Petitioners,*

26  
27 vs.

28  
29 DESCHUTES COUNTY,  
30 *Respondent,*

31  
32 and

33  
34 THOMAS BISHOP and DORBINA BISHOP,  
35 TRUSTEES OF THE BISHOP FAMILY TRUST  
36 *Intervenors-Respondents.*

37  
38 LUBA No. 2015-028  
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1  
2 FINAL OPINION  
3 AND ORDER  
4

5 Appeal from Deschutes County.  
6

7 Jennifer M. Bragar, Portland, represented petitioners/intervenors-  
8 respondents Bishop et al.  
9

10 Elizabeth A. Dickson and J. Kenneth Katzaroff, Bend, represented  
11 petitioners/intervenors-respondents Tumalo Irrigation District et al.  
12

13 Laurie E. Craghead, Assistant County Counsel, Bend, represented  
14 respondent.  
15

16 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board  
17 Member, participated in the decision.  
18

19 TRANSFERRED (LUBA Nos. 2015-027/030) 09/09/2015

20 DISMISSED (LUBA No. 2015-028) 09/09/2015  
21

22 You are entitled to judicial review of this Order. Judicial review is  
23 governed by the provisions of ORS 197.850.  
24

**NATURE OF THE DECISIONS**

These consolidated appeals concern two decisions concluding that a proposal to transfer irrigation water to two newly constructed reservoirs requires conditional use permit approvals from the county. The appealed decisions are (1) a board of county commissioners’ decision that reviews and remands an earlier land use compatibility statement (LUCS) issued by county planning staff and (2) a planning staff decision that reissues the LUCS in accordance with the board of county commissioners’ remand.

**MOTIONS TO INTERVENE**

In LUBA No. 2015-027, Thomas and Dorbina Bishop, trustees of the Bishop Family Trust (the Bishops), appeal the board of county commissioners’ April 8, 2015 decision that characterizes the proposed use as one requiring conditional use permit approvals under the county’s land use code. The Bishops oppose the proposed use, and we understand them to challenge the April 8, 2015 decision at least in part because they believe additional discretionary approvals by the county are required. The applicants below, the Tumalo Irrigation District (TID) and KC Development Group LLC (KCDG), move to intervene on the side of the county in LUBA No. 2015-027. We refer to the applicants collectively as T/K. There is no opposition to T/K’s motion to intervene in LUBA No. 2015-027, and it is allowed.

In LUBA No. 2015-028, T/K appeals the same April 8, 2015 board of county commissioners’ decision. T/K believes that the proposed use is a permitted use under the county’s land use code, and that the board of commissioners erred in concluding that the use requires any conditional use

1 permit approvals. The Bishops move to intervene on the side of the county in  
2 LUBA No. 2015-028. There is no opposition to the motion, and it is allowed.

3 In LUBA No. 2015-030, the Bishops appeal an April 23, 2015 planning  
4 staff decision that issues a LUCS that, consistent with the board of  
5 commissioners' April 8, 2015 decision, concludes that the proposed use  
6 requires conditional use permit approval. T/K moves to intervene on the side  
7 of the county in LUBA No. 2015-030. There is no opposition to the motion,  
8 and it is allowed.

9 On May 12, 2015, LUBA consolidated these three appeals for review.

#### 10 **MOTION TO FILE REPLY**

11 T/K moves for permission to file a 15-page reply to the responses to its  
12 motion to dismiss. The Bishops object to the reply, arguing that LUBA's  
13 practice is to consider a reply to a response to a motion only if the reply is  
14 limited to new issues raised in the response. *Frevach Land Company v.*  
15 *Multnomah County*, 38 Or LUBA 729, 732 (2000). The Bishops argue that the  
16 reply is not limited to new issues, but in large part simply embellishes on  
17 arguments in the motion to dismiss. T/K subsequently filed a response to the  
18 objection, arguing that the reply is appropriate.

19 We tend to agree with the Bishops that much of the 15-page reply merely  
20 embellishes arguments made in the motion to dismiss. Nonetheless, we shall  
21 consider it, for what it is worth. The reply includes a section responding to the  
22 Bishops' alternative motion to transfer their appeals, and that response to a  
23 motion is entirely appropriate. OAR 661-010-0065(2). We decline to evaluate  
24 the parties' lengthy disputes regarding whether other sections of the 15-page  
25 reply are limited to new issues.

1 **MOTION TO DISMISS**

2 T/K moves to dismiss all three appeals, including its own, arguing that  
3 LUBA lacks jurisdiction over the challenged decisions. We first set out the  
4 relevant facts.

5 **A. Factual Background**

6 The subject property is a 79-acre property that is the site of a reclaimed  
7 surface mine. Approximately 10 years ago the property was rezoned from  
8 Surface Mining to Rural Residential 10-acre minimum (RR-10). In 2013,  
9 KCDG acquired the property with the intent of developing it as a residential  
10 cluster development, which is a conditional use in the RR-10 zone.

11 In 2014, KCDG removed 259,000 cubic yards of gravel from the  
12 property in order to construct two lined reservoirs. The larger, southern  
13 reservoir (South Pond) has a capacity of approximately 68 acre-feet of water  
14 and includes two constructed islands comprised of gravel and dirt along with a  
15 small marina, boat ramp, dock, and pilings to support a boat house at its north  
16 end. The northern reservoir (North Pond) has a capacity of approximately 57  
17 acre-feet of water. The reservoirs were filled in May and June 2014 with water  
18 from TID’s existing reservoir located elsewhere in the county.

19 On June 13, 2014, TID and KCDG representatives met with the county  
20 to discuss the transfer of water from TID’s system to the new reservoirs, and to  
21 advise the county that an application for a residential cluster development on  
22 the property would be submitted within a short period of time. On June 16,  
23 2014, the county planning director issued a determination that the county  
24 would process any request for a LUCS regarding transfer of water to the  
25 subject property as a “land use action,” which under the county’s code is a type  
26 of decision that requires notice and opportunity for hearing and appeals,

1 consistent with ORS 197.763 and ORS 215.416. Typically, under the county’s  
2 code a LUCS request would be processed as a “development action,” which  
3 does not require public notice and opportunity for hearing, and which limits  
4 local appeals to the applicant.

5 TID applied to Oregon Water Resources Department (OWRD) for  
6 permission to transfer 108 acre-feet of water held in TID’s irrigation system to  
7 the two new lined reservoirs.<sup>1</sup> Because the transfer involved “structural  
8 changes and/or the creation of new impoundment facilities,” under OWRD’s  
9 agency coordination rules OWRD required TID to obtain a LUCS from the  
10 county, to determine whether agency action to approve the transfer would be  
11 consistent with the county’s land use laws. Record 277. On August 4, 2014,  
12 TID submitted the LUCS request to the county, and argued to the county that  
13 the proposed transfer is compatible with the county’s land use regulations,  
14 because it is a use permitted outright in the RR-10 zone, as the “[o]peration,  
15 maintenance, and piping of existing irrigation systems operated by an Irrigation  
16 District[.]” Deschutes County Code (DCC) 18.60.020(I).

17 On August 13, 2014, the county planning director issued a LUCS  
18 decision, on a form provided by OWRD. The August 13, 2014 LUCS decision  
19 concluded that the proposed transfer of water constituted the “[o]peration,  
20 maintenance, and piping of existing irrigation systems operated by an Irrigation  
21 District[.]” and thus is a use permitted outright in the RR-10 zone. Pursuant to

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<sup>1</sup> TID’s application to OWRD was for a temporary transfer, apparently in order to test the functionality of the two lined reservoirs. TID later applied for a permanent transfer. We understand from the parties’ pleadings that OWRD has denied both applications in light of the county’s responses to the LUCS request, although OWRD has allowed the reservoirs to remain filled under a limited license.

1 the planning director’s June 16, 2014 decision to treat the application as one for  
2 a land use action, the planning director provided notice of the decision to  
3 adjoining property owners, including the Bishops.

4 The Bishops timely appealed the planning director’s August 13, 2014  
5 LUCS decision to the county hearings officer. The hearings officer conducted  
6 a site visit, and held a *de novo* evidentiary hearing on October 7, 2014. On  
7 December 15, 2014, the hearings officer reversed the August 13, 2014 LUCS  
8 decision and remanded to the planning director to reissue the LUCS “to  
9 categorize TID’s proposed use as one involving discretionary land use  
10 approval(s) that have not yet been obtained[.]” Rec. 44. Specifically, the  
11 hearings officer concluded that the proposed use involves not only the transfer  
12 of water, but the construction of two new reservoirs. As such, the hearings  
13 officer found, the proposed use requires conditional use permits, because  
14 construction of the new reservoirs involved “surface mining” in conjunction  
15 with operation of an irrigation system to create a “reservoir,” which is a  
16 conditional use in the RR-10 zone. DCC 18.60.030(W).<sup>2</sup> Further, the hearings  
17 officer concluded that at least the South Pond had been constructed as a private  
18 recreational lake, and thus constituted a “recreation-oriented facility requiring  
19 large acreage,” which is also a conditional use in the RR-10 zone. DCC

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<sup>2</sup> DCC 18.60.030(W) authorizes as a conditional use in the RR-10 zone “[s]urface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage and sale of excavated material.”

1 18.60.030(G).<sup>3</sup> Finally, the hearings officer rejected the Bishops’ argument  
2 that the LUCS must address whether the reservoirs require conditional use  
3 approval as the first phase of a cluster development. On a procedural issue, the  
4 hearings officer found that the August 13, 2014 LUCS decision remained a  
5 “development action” rather than a “land use action” as those terms are defined  
6 in the county’s code, but the hearings officer held that the planning director had  
7 authority under DCC 22.16.010 to process the LUCS request as a land use  
8 action, *i.e.*, a decision requiring notice, opportunity for hearing and appeal.<sup>4</sup>

9 Both TID and the Bishops appealed the hearings officer’s decision to the  
10 board of county commissioners. TID’s appeal raised a number of procedural  
11 and evidentiary issues, but primarily argued that the commissioners should  
12 reverse the hearings officer and conclude that the reservoirs are outright  
13 permitted uses in the RR-10 zone. The Bishops’ appeal challenged the hearings  
14 officer’s conclusion that the August 13, 2014 LUCS decision constituted a  
15 “development action” rather than a “land use action.” The Bishops also  
16 challenged the hearings officer’s conclusion that the reservoirs do not require  
17 conditional use approval as the first phase of cluster development.

18 On January 29, 2015, the commissioners held a consolidated hearing on  
19 the appeals. On April 8, 2015, the commissioners issued the decision  
20 challenged in LUBA No. 2015-027 and LUBA No. 2015-028. The April 8,

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<sup>3</sup> DCC 18.60.30(G) authorizes as a conditional use in the RR-10 zone a “[r]ecreation-oriented facility requiring large acreage such as an off-road vehicle track or race track, but not including a rodeo grounds.”

<sup>4</sup> DCC 22.16.010(B) provides that the planning director “has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.”

1 2015 decision addressed a number of issues. First, the commissioners agreed  
2 with the hearings officer that the August 13, 2014 LUCS decision remained a  
3 “development action,” notwithstanding that the planning director elected to  
4 process the LUCS request as a “land use action.” The commissioners also  
5 agreed that the planning director had authority to treat the LUCS request as a  
6 “land use action.” Second, the commissioners concluded that TID’s LUCS  
7 request had mischaracterized the proposed use. Because the proposed use  
8 involved the construction of new reservoirs, the commissioners concluded that  
9 the proposed use was not allowed without review as the “operation,  
10 maintenance, and piping of an existing irrigation system[.]” Third, the  
11 commissioners agreed with the hearings officer that construction of the new  
12 reservoirs constituted “surface mining” that requires a conditional use permit in  
13 the RR-10 zone. Fourth, the commissioners agreed with the hearings officer  
14 that the South Pond had been constructed as a water-skiing lake, and was  
15 therefore a “recreation-oriented facility requiring large acreage[.]” a  
16 conditional use in the RR-10 zone. Finally, the commissioners declined to  
17 reach the issue of whether the new reservoirs must be reviewed as the first  
18 phase of cluster development, because “this application must be denied on  
19 other grounds and no application for cluster development has been submitted  
20 \* \* \*.” Record 21.<sup>5</sup>

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<sup>5</sup> On the last page of their April 8, 2015 decision, the commissioners summarized their conclusions:

- “1. TID materially mischaracterized the use of the Property on the LUCS form, by failing to mention the construction of the two new reservoirs on the subject property.

1 As noted, both the Bishops and T/K appealed the commissioners' April  
2 8, 2015 decision to LUBA, and those appeals are assigned LUBA Nos. 2015-  
3 027 and 2015-028.

4 On April 23, 2015, the planning director re-issued the LUCS decision,  
5 on the OWRD form, stating that the proposed use requires discretionary land  
6 use approvals, specifically conditional use permits for surface mining and a  
7 recreation facility. The commissioners' April 8, 2015 decision is attached to  
8 the April 23, 2015 LUCS. As noted, the Bishops appealed the April 23, 2015  
9 LUCS decision to LUBA, and that appeal is assigned LUBA No. 2015-030.

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- “2. TID materially mischaracterized the use of the Property on the LUCS form, by failing to mention the use of the Property for recreation-oriented facilities requiring large acreage.
  - “3. The County incorrectly categorized TID’s proposed use on the LUCS form as a use allowed without review.
  - “4. The County erred in issuing a LUCS decision finding TID’s proposed use was allowed without review.
  - “5. The County’s LUCS decision is reversed.
  - “6. The LUCS shall characterize the use as requiring additional review pursuant to DCC 18.60.030(G) for surface mining in conjunction with an irrigation district, including the excavation for reservoirs.
  - “7. The LUCS shall characterize the use as requiring additional review pursuant to 18.60.030(W) for a recreation facility requiring large acreage.” Record 22.

1           **B.     LUBA’s Jurisdiction**

2           T/K moves to dismiss all three appeals, including its own appeal of the  
3 April 8, 2015 decision, arguing that the challenged decisions are excluded from  
4 LUBA’s jurisdiction under one or more theories. The Bishops and the county  
5 filed responses opposing the motion. The Bishops also filed a motion to  
6 transfer LUBA Nos. 2015-027 and 2015-030 to circuit court in the event that  
7 LUBA concludes that it lacks jurisdiction over those appeals. T/K has not  
8 moved to transfer its appeal.

9           Initially, we note that T/K’s motion to dismiss does not actually seek  
10 *dismissal* of these appeals. T/K asks LUBA to sustain T/K’s various procedural  
11 and substantive challenges to the commissioners’ April 8, 2015 decision,  
12 “reverse[]” that decision, and order that the original planning director’s August  
13 13, 2014 LUCS decision be “reinstated.” Motion to Dismiss 44. However, if  
14 LUBA agrees with T/K that it lacks jurisdiction over the April 8, 2015  
15 decision, we must dismiss the appeals of that decision (or transfer the appeals if  
16 a motion to transfer had been filed). We could not reverse the challenged  
17 decision, and we certainly could not order the county to reinstate a different  
18 decision instead of the challenged decision. At least T/K identifies no  
19 authority by which we could grant such relief, and we are aware of none.

20           With that observation, we turn to T/K’s jurisdictional challenges.

21                           **1.     The April 8, 2015 decision is a “land use decision” unless**  
22   **an exclusion applies**

23           As relevant here, LUBA’s jurisdiction is limited to review of land use  
24 decisions as defined at ORS 197.015(10)(a)(A). As defined, “land use  
25 decision” includes a local government decision that concerns the application of

1 a land use regulation.<sup>6</sup> To the extent that T/K argues that the commissioners’  
2 April 8, 2015 decision does not fall within the definition of “land use decision”  
3 at ORS 197.015(10)(a)(A), those arguments are not well-founded. On its face,  
4 the commissioners’ April 8, 2015 decision applied numerous land use  
5 regulations in the course of resolving the evidentiary, procedural and  
6 substantive issues raised in both local appeals of the hearings officer’s  
7 decision. Therefore, unless some statutory or other exclusion applies, the April  
8 8, 2015 decision meets the definition of “land use decision,” and is subject to  
9 LUBA’s jurisdiction.

10 The only statutory exclusion that T/K argues applies is ORS  
11 197.015(10)(b)(H), which as discussed below excludes from the definition of  
12 “land use decision” certain local government decisions on a LUCS request.  
13 Although not quite with the consequences T/K argues for, we conclude below  
14 that both the county commissioners’ April 8, 2015 decision and the planning  
15 director’s April 23, 2015 decisions fall within the scope of the exclusion at  
16 ORS 197.015(10)(b)(H)(iii).

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<sup>6</sup> ORS 197.015(10)(a)(A) provides that “land use decision” includes

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1                   **2.     ORS 197.015(10)(b)(H)**

2                   ORS 197.015(10)(b)(H) provides that a “land use decision” subject to  
3 LUBA’s jurisdiction does not include a decision by a local government:

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

7                   “(i)    The local government has already made a land use decision  
8                   authorizing a use or activity that encompasses the proposed  
9                   state agency action;

10                  “(ii)   The use or activity that would be authorized, funded or  
11                  undertaken by the proposed state agency action is allowed  
12                  without review under the acknowledged comprehensive  
13                  plan and land use regulations implementing the plan; or

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

19                  The subject of the exclusions at ORS 197.015(10)(b)(H) are certain  
20 decisions issued by local governments on a LUCS request, which conclude that  
21 a proposed state agency action is compatible with the local government’s  
22 comprehensive plan and land use regulations, for one or more of the three  
23 reasons listed in (i) through (iii). Other types of decisions resulting from a  
24 LUCS request, however, do not fall within those three exclusions. For  
25 example, if a local government decides that the proposed agency action is *not*  
26 compatible with its plan and land use regulations, or that the action is  
27 compatible for reasons other than the three listed at (i)-(iii), or if the local  
28 government decides that land use review is necessary, conducts that review and  
29 approves or denies the proposed use, then the resulting decision does not fall

1 within the exclusions at ORS 197.015(10)(b)(H)(i)-(iii). *See Campbell v.*  
2 *Columbia County*, 67 Or LUBA 53, 59-60 (2013) (a LUCS decision that also  
3 verifies a nonconforming use and approves alterations is not subject to the  
4 exclusions at ORS 197.015(10)(b)(H)(i)-(iii)).

5 In addition, we have held that ORS 197.015(10)(b)(H)(i)-(iii) is so  
6 worded that, in order to determine whether an exclusion applies, LUBA must  
7 address at least some of the likely merits of the appeal, and determine whether  
8 the local government *correctly* categorized the proposed action so as to bring it  
9 within the terms of the relevant exclusion. *McPhillips Farm Inc. v. Yamhill*  
10 *County*, 66 Or LUBA 355, 360-62 (2012), *aff'd* 256 Or App 402, 300 P3d 299  
11 (2013) (dismissing the appeal where LUBA found that the county correctly  
12 concluded that the proposed action is encompassed by a previous land use  
13 decision, and so fell within the scope of the exclusion at OAR  
14 197.015(10)(b)(H)(i)). If so, then the exclusion applies and LUBA lacks  
15 jurisdiction over the decision.<sup>7</sup>

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<sup>7</sup> In *McPhillips*, we relied on *Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 23-25, 806 P2d 162 (1991), for the proposition that, depending on the wording of a statutory exclusion to the definition of “land use decision,” LUBA must determine whether the decision is correct to the extent necessary to determine if the decision falls within the scope of the exclusion. We commented:

“This is a rather odd result, because if one of the exclusions to the definition of ‘land use decision’ in ORS 197.015(10)(b)(H) applies, then exclusive jurisdiction to review the LUCS decision lies in circuit court, via writ of review. ORS 34.020, ORS 34.102. This means that if LUBA concludes that the local government was correct that the agency action is compatible with its plan and regulations for one of the listed reasons, and therefore the exclusion at ORS 197.015(10)(b)(H) applies, the challenged

1 In sum, where a local government issues a LUCS decision concluding  
2 that a proposed agency action is compatible with the local government’s plan  
3 and land use regulations for one of the three reasons listed at ORS  
4 197.015(10)(b)(H)(i-iii), LUBA must determine whether the LUCS decision  
5 correctly categorized the proposed use in order to determine whether the  
6 exclusion applies. If the answer is yes, as we concluded in *McPhillips*, LUBA  
7 lacks jurisdiction over the appeal of that decision.

8 In the present case, the commissioners’ April 8, 2015 decision concluded  
9 that the proposed action is appropriately categorized as one requiring  
10 conditional use permit approvals under DCC 18.60.030(W) for surface mining  
11 in conjunction with operation of an irrigation system, including the excavation  
12 of reservoirs, and under DCC 18.60.030(G), for a recreational-oriented facility  
13 requiring large-acreage, for the South Pond. On its face, that determination  
14 falls squarely within the exclusion at ORS 197.015(10)(b)(H)(iii), for a LUCS  
15 determination that the proposed action “requires a future land use review under  
16 the acknowledged comprehensive plan and land use regulations implementing  
17 the plan[.]” Consistent with *McPhillips*, the key jurisdictional question in the  
18 present case is whether the commissioners correctly categorized the proposed  
19 action in a manner that brings the decision within the exclusion at ORS  
20 197.015(10)(b)(H)(iii).

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LUCS decision can be transferred to circuit court for review, if transfer has been requested pursuant ORS 34.102 and OAR 661-010-0075(11). However, such circuit court review would make little sense in that circumstance, because LUBA would have just resolved the only likely merits of the appeal. Nonetheless, that appears to be what *Southwood* requires.” 66 Or LUBA at 260-61 (footnote omitted).

1 T/K devotes the majority of the motion to dismiss to arguing that the  
2 commissioners' *incorrectly* categorized the proposed use as one that requires  
3 future land use reviews. T/K argues on appeal, as it did below, that the  
4 proposed action is correctly categorized solely as an outright permitted use in  
5 the RR-10 zone, as the "operation, maintenance, and piping of an existing  
6 irrigation system[.]" As we understand it, that argument is based on T/K's  
7 narrow view of the scope of the LUCS request. We understand T/K to argue  
8 that the LUCS request encompassed solely the request to transfer water from  
9 TID's existing reservoir, and did not encompass the construction of KCDG's  
10 new reservoirs.

11 To the extent T/K argues that the county is obligated to accept the LUCS  
12 applicant's characterization of the proposed use or the scope of the proposed  
13 use in reviewing a LUCS request, we disagree. T/K identifies no statute or  
14 other authority, and we are aware of none, that obligates the county to accept a  
15 LUCS applicant's characterization of the proposed use or the scope of the  
16 proposed use, in determining whether the proposed state agency action is  
17 compatible with the county's land use legislation.

18 OWRD required TID to obtain a LUCS from the county under its agency  
19 coordination rules because it recognized that the proposed action was not  
20 limited to the mere transfer of water, but also entailed the construction of new  
21 facilities to store the transferred water. The county's conclusion that the  
22 proposed action encompasses the construction and use of the two new  
23 reservoirs is supported by substantial evidence. Further, to the extent that  
24 conclusion embodies an interpretation of the relevant DCC use categories, that  
25 interpretation is consistent with the text of those code provisions. DCC  
26 18.60.030(W) allows as a conditional use in the RR-10 zone "[s]urface mining

1 of mineral and aggregate resources in conjunction with the operation or  
2 maintenance of irrigation systems operated by an Irrigation District, including  
3 the excavation and mining for facilities, ponds, [and] reservoirs[.]” *See* n 2. A  
4 governing body’s code interpretation made in the course of rendering a  
5 decision on a LUCS request is subject to the deferential standard of review set  
6 out in ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d  
7 776 (2010). *McPhillips*, 256 Or App at 414 n 9. Even without that deferential  
8 standard of review, the conclusion that the proposed use entails the  
9 construction of two new reservoirs to store irrigation water, and therefore falls  
10 within the use category described in DCC 18.60.030(W), is correct and must be  
11 affirmed.

12         It may be that the transfer of water, viewed in isolation, will be correctly  
13 viewed as a permitted use in the RR-10 zone, as part of the “operation” of an  
14 “existing irrigation system,” once the two reservoirs into which the transferred  
15 water is stored have received any necessary conditional use permit approvals,  
16 and thereby become part of an “existing irrigation system” for purposes of  
17 DCC 18.60.020(I). However, T/K has not demonstrated that the commissioners  
18 erred in rejecting their claim that the use proposed in the LUCS is limited to the  
19 transfer of water, or otherwise must be categorized as a permitted use in the  
20 RR-10 zone. More importantly for our jurisdictional inquiry, T/K has not  
21 demonstrated that the county erred in concluding that the proposed action  
22 requires future land use reviews. As discussed above, the commissioners  
23 correctly determined that the proposed use requires future conditional use  
24 permit approvals under at least DCC 18.60.030(W). That conclusion falls  
25 squarely within the exclusion at ORS 197.015(10)(b)(H)(iii), for a  
26 determination that the proposed action requires future land use reviews.

1           The county’s and the Bishops’ countervailing arguments are not well-  
2 taken. Both the county and the Bishops note that the commissioners exercised  
3 discretion and adopted several code interpretations in concluding that future  
4 land use reviews are required for the proposed use. Both argue that the  
5 exclusions at ORS 197.015(10)(b)(H) are not intended to encompass  
6 discretionary decisions or decisions that require interpretation of ambiguous  
7 land use standards. However, LUCS decisions almost always require the  
8 exercise of discretion and the need for interpreting code language, in order to  
9 determine how the proposed use should be characterized and categorized under  
10 the local government’s land use regulations. A LUCS decision that did not  
11 require the exercise of discretion or the need to interpret code language would  
12 be excluded from LUBA’s jurisdiction under an entirely separate exclusion, at  
13 ORS 197.015(10)(b)(A), for decisions made under land use standards that do  
14 not require interpretation or the exercise of policy or legal judgment. The  
15 county and the Bishops’ argument would conflate those two exclusions. We  
16 conclude that the exclusions at ORS 197.015(10)(b)(H) are not limited to  
17 decisions on LUCS requests that require no interpretation or the exercise of  
18 discretion.

19           The county also argues that it is the planning director’s subsequent April  
20 23, 2015 decision to issue the revised LUCS that is the only decision that is  
21 subject to the exclusion at ORS 197.015(10)(b)(H)(iii). We agree with the  
22 county that the April 23, 2015 LUCS decision falls squarely within the  
23 exclusion at ORS 197.015(10)(b)(H)(iii). However, that does not mean that the  
24 commissioners’ April 8, 2015 decision does not also fall within the exclusion.  
25 The commissioners’ April 8, 2015 decision determined the substance of the  
26 planning director’s April 23, 2015 LUCS decision, namely, that the proposed

1 use requires future land use reviews. The April 23, 2015 LUCS merely  
2 implements the commissioners' April 8, 2015 decision. Both decisions are  
3 subject to the exclusion at ORS 197.015(10)(b)(H)(iii).<sup>8</sup>

4 Finally, the Bishops argue that LUBA should not determine whether the  
5 ORS 197.015(10)(b)(H)(iii) exclusion applies until the parties have fully  
6 briefed the merits. The Bishops argue that resolving whether the county  
7 correctly categorized the proposed use as requiring future land use reviews  
8 requires LUBA to evaluate the Bishops' anticipated challenges to the April 8,  
9 2015 decision, specifically their contention that the commissioners erred in  
10 concluding that the proposed use does not require *additional* future land use  
11 reviews, for cluster development, or for the North Pond as a "recreation-  
12 oriented facility."

13 However, the Bishops do not dispute that the commissioners correctly  
14 categorized the proposed use as one that requires future land use reviews, and  
15 thus that the decision squarely falls within the exclusion at ORS  
16 197.015(10)(b)(H)(iii). The Bishops seek a ruling that the proposed use  
17 requires *additional* future land use reviews, but such a ruling would have no  
18 jurisdictional consequences as far as we can tell. Even if we agreed with the

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<sup>8</sup> We note that if we accepted the county's position that the April 23, 2015 LUCS decision is subject to the exclusion at ORS 197.015(10)(b)(H)(iii), but the commissioners' April 8, 2015 decision is not, the consequence might be that LUBA would retain jurisdiction to review the challenges to the April 8, 2015 decision, while the circuit court would review the challenges to the April 23, 2015 LUCS decision, if that appeal is transferred as the Bishops request. However, that jurisdictional division of labor would be highly problematic. If the April 23, 2015 LUCS decision simply implements the April 8, 2015 decision, then the challenges to both decisions would likely be identical, leading to the possibility of overlapping or conflicting dispositions.

1 Bishops on that point, the ultimate conclusion would still remain that the  
2 county correctly categorized the proposed use as one that requires future land  
3 use reviews, and thus the decision falls within the exclusion at ORS  
4 197.015(10)(b)(H)(iii).

5 Accordingly, we conclude that the exclusion at ORS  
6 197.015(10)(b)(H)(iii) applies to the April 8, 2015 and April 23, 2015  
7 decisions, and LUBA lacks jurisdiction over all three appeals. The only  
8 remaining question is the disposition of these appeals.

9 On that point, T/K argues:

10 “The consequence of the [commissioners’] findings that additional  
11 land use review was required is to exclude this LUCS under ORS  
12 197.015(10)(b)(H)(iii). This excludes the LUCS from the  
13 definition of ‘land use decision.’ By excluding this LUCS from  
14 the definition of ‘land use decision,’ *Deschutes County then lacks*  
15 *land use jurisdiction over it and the lower appeals must be*  
16 *reversed for lack of jurisdiction.* Similarly, LUBA also lacks  
17 jurisdiction and so this consolidated appeal must be dismissed and  
18 the original LUCS Decision reinstated.” Motion to Dismiss 35-36  
19 (emphases added).

20 We generally agree with the above argument, with the exception of the  
21 italicized and underlined language. We disagree with the italicized argument  
22 that by concluding that the use proposed in the LUCS requires future land use  
23 reviews, and thus rendering a decision that falls within the exclusion at ORS  
24 197.015(10)(b)(H)(iii), the county thereby loses “land use jurisdiction” over the  
25 LUCS request.

26 T/K’s arguments on that point are circular and difficult to follow. T/K  
27 appears to argue that where an ORS 197.015(10)(b)(H)(iii) exclusion applies,  
28 and thus a LUCS decision is excluded from the definition of “land use  
29 decision,” the consequence is that the county loses “land use jurisdiction” over

1 the LUCS request, and therefore the county erred in processing the LUCS  
2 request as a “land use action,” under procedures that provide for notice, hearing  
3 and local appeal. To the extent we understand the argument, we reject it. ORS  
4 197.015(10)(b)(H) is silent regarding what procedures a local government may  
5 apply to LUCS requests, and no other statute that we are aware of prohibits a  
6 county from processing a LUCS request under land use procedures. A  
7 conclusion that the county’s final decision on a LUCS request falls within one  
8 of the exclusions at ORS 197.015(10)(b)(H) does not mean that the county errs  
9 in processing that request under procedures that generally apply to land use  
10 decisions, or that the county otherwise loses “land use jurisdiction” over the  
11 LUCS request.

12 T/K makes a similar argument that the county’s code requires the LUCS  
13 request to be treated as a “development action” rather than as a “land use  
14 action,” and therefore the county had no “jurisdiction” to process the LUCS  
15 request under procedures that allow for notice, hearing and local appeal, or to  
16 allow the Bishops to appeal the planning director’s decision to the hearings  
17 officer. There are a number of problems with that argument, but it suffices to  
18 observe that any alleged violation of local procedures the county may have  
19 committed in processing the LUCS request can be asserted as a basis for  
20 reversal or remand under review by LUBA, or the circuit court, whichever  
21 body has jurisdiction to review the county’s final decision on a LUCS request.  
22 ORS 197.835(9)(a)(B); ORS 34.040(1)(b).<sup>9</sup> However, we do not understand

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<sup>9</sup> It seems highly unlikely that T/K can demonstrate that the county violated the county code in processing the LUCS request as a “land use action.” DCC 22.16.010(B) expressly grants the planning director the discretion and authority to process development actions as “land use action[s],” *see* n 4, and

1 the argument that any such procedural errors, if proved, means that the county  
2 loses “land use jurisdiction” over the LUCS request. Whether the LUCS  
3 request is processed as a development action or a land use action, the county  
4 has “land use jurisdiction” to determine whether the proposed use is compatible  
5 with its comprehensive plan and land use regulations. To the extent the  
6 procedure the county follows in processing a LUCS request has any bearing on  
7 the county’s “jurisdiction,” both LUBA and the circuit court have authority to  
8 review challenges that in issuing the final decision the local government  
9 “[e]xceeded its jurisdiction.” ORS 197.835(9)(a)(A); ORS 34.040(1)(a).

10 Finally, we disagree with the underlined language in the above-quoted  
11 argument that, where the ORS 197.015(10)(b)(H)(iii) exclusion applies to the  
12 county’s final decision on a LUCS request, the consequence is that LUBA must  
13 order the county to “reinstate” a lower body’s decision on the LUCS request.  
14 As explained, where an ORS 197.015(10)(b)(H) exclusion applies, LUBA must  
15 dismiss the appeal or transfer the appeal of that final decision to circuit court, if  
16 a motion to transfer has been filed. Nothing cited to us authorizes LUBA to  
17 order the county in these circumstances to “reinstate” the planning director’s  
18 August 13, 2014 decision, which never became a final decision.

19 To conclude, we agree with T/K that the ORS 197.015(10)(b)(H)(iii)  
20 exclusion applies to the April 8, 2015 and April 23, 2015 decisions, although  
21 we disagree with T/K’s argument about the consequences of that conclusion.

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commissioners expressly affirmed that exercise of discretion. T/K does not directly challenge either the planning director’s exercise of discretion under DCC 22.16.010(B) or the commissioners’ findings that affirm that exercise of discretion.

1 **MOTION TO TRANSFER**

2 As noted, pursuant to OAR 661-010-0075(11) the Bishops filed an  
3 alternative motion to transfer their two appeals to circuit court, in the event  
4 LUBA concludes that we lack jurisdiction over their appeals.<sup>10</sup>

5 T/K opposes the motion to transfer the Bishops’ appeals to circuit court,  
6 on two grounds. First, T/K argues that the motion is untimely. OAR 661-010-  
7 0075(11)(b) requires the motion to transfer to be filed within 14 days of a  
8 challenge to LUBA’s jurisdiction. The Bishops’ motion was filed within 14  
9 days of the date T/K filed its motion to dismiss. However, T/K argues that they  
10 have consistently questioned the county’s “land use jurisdiction” throughout  
11 the proceedings below, and that the 14-day deadline to file a motion to transfer

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<sup>10</sup> OAR 661-010-0075(11) provides, as relevant:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. \* \* \*
- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

1 should be measured not from the date T/K's motion to dismiss was filed with  
2 LUBA, but from some earlier date during the proceedings below. We reject the  
3 argument. OAR 661-010-0075(11)(b) clearly imposes the 14-day deadline  
4 from the date that LUBA's jurisdiction is challenged in the proceedings before  
5 LUBA.

6 Second, T/K argues that the 60-day deadline to file a writ of review at  
7 ORS 34.030 should be the proper deadline to invoke the circuit court's  
8 jurisdiction, and therefore the Bishops' failure to file a writ of review in circuit  
9 court within 60 days of the date the planning director's August 13, 2014  
10 decision was issued should preclude transfer of the Bishops' appeals to circuit  
11 court under OAR 661-010-0075(11).

12 There are too many problems with that argument to fully address, so we  
13 will simply observe that the Bishops' appeals concern the April 8, 2015  
14 decision and the April 23, 2015 LUCS decision, the county's final decisions on  
15 the LUCS request, not the planning director's August 13, 2014 LUCS decision,  
16 which never became a final decision. ORS 34.102(4) allows an appeal with  
17 LUBA to be transferred to circuit court and treated as a writ of review, if the  
18 notice of intent to appeal to LUBA was filed with LUBA within the 60-day  
19 deadline for filing a writ of review.<sup>11</sup> Under ORS 34.030, the 60-day deadline

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<sup>11</sup> ORS 34.102(4) provides:

“A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the

1 is measured from the date of the challenged decision, in this case April 8, 2015,  
2 and April 23, 2015. The Bishops' appeals to LUBA were filed well within 60  
3 days of those dates.

4 In any case, a final problem is that ORS 34.102(4) requires only one  
5 determination on LUBA's part, *i.e.*, that the appealed decision is not  
6 reviewable as a land use decision or limited land use decision as defined in  
7 ORS 197.015. Once LUBA concludes that it is not such a decision, the statute  
8 appears to require that LUBA "shall" transfer the matter to circuit court where  
9 it will be treated as a petition for writ of review. The last sentence of the  
10 statute directs "[i]f the notice was not filed with the board within the time  
11 allowed for filing a petition for writ of review pursuant to ORS 34.010 to  
12 34.100, the court shall dismiss the petition." The statute therefore appears to  
13 assign responsibility for determining whether the notice was timely filed to the  
14 circuit court.

15 **DISPOSITION**

16 The Bishops' appeals of the April 8, 2015 decision and the April 23,  
17 2015 decision, at issue in LUBA No. 2015-027 and 2015-030, are transferred  
18 to Deschutes County Circuit Court.

19 T/K have not moved to transfer their appeal of the April 8, 2015 decision  
20 at issue in LUBA No. 2015-028. Therefore, that appeal must be dismissed.  
21 OAR 661-010-0075(11)(c); *Maguire v. Clackamas County*, 250 Or App 146,  
22 160-61, 279 P3d 314 (2012).

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time allowed for filing a petition for writ of review pursuant to  
ORS 34.010 to 34.100, the court shall dismiss the petition."