

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13 THORNBURGH RESORT COMPANY, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2008-203

17
18 FINAL OPINION
19 AND ORDER

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21
22 Appeal from Deschutes County.

23
24 Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

25
26 No appearance by Deschutes County.

27
28 Peter Livingston, Portland, filed the response brief. With him on the brief was
29 Schwabe, Williamson & Wyatt PC. Peter Livingston and Martha Pagel argued on behalf of
30 intervenor-respondent.

31
32 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
33 participated in the decision.

34
35 REMANDED

09/09/2009

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

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NATURE OF THE DECISION

Petitioner appeals county approval of a final master plan for Thornburgh Resort, a destination resort.

INTRODUCTION

A. Prior Appeals

Under the Deschutes County Code (DCC), destination resorts are subject to a three-step approval process. The first step is approval of a conceptual master plan (CMP), which is processed as though it were a conditional use permit. DCC 18.113.040(A). There is a right to a public hearing at the CMP stage of approval, and the county decision approving a CMP must be based on evidence that is submitted during that public process. As explained below, the county’s CMP decisions have been challenged at LUBA and at the Court of Appeals and Supreme Court. The second step in approving a destination resort is approval of a final master plan (FMP). DCC 18.113.040(B). A county decision to grant FMP approval is not required in all cases to include a public hearing. The decision that is before LUBA in this appeal is the county’s decision that grants FMP approval for the Thornburgh Resort. The final step in the county’s three-step approval process is site plan or land division approval. DCC 18.113.040(C). Presumably those decisions will be rendered once the appeals concerning the county’s CMP and FMP decisions have been finally resolved.

A central issue in petitioner’s appeals challenging the county’s CMP decision, and the central issue in this appeal of the county’s FMP decision, concerns one of the CMP approval criteria, DCC 18.113.070(D). DCC 18.113.070 provides, in relevant part:

“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.

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“* * * * .”

In this opinion we sometimes refer to DCC 18.113.070(D) as the “no net loss” standard.

The county’s initial decision granting CMP approval was appealed to LUBA. We sustained three of the petitioner’s 13 assignments of error, in part, and remanded the county’s CMP decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*). In one of the assignments of error that LUBA denied in *Gould I*, LUBA rejected petitioner’s argument that the county erroneously found that Thornburgh’s proposed wildlife mitigation plan was adequate to allow the county to make the “no net loss” finding required by DCC 18.113.070(D). Petitioner Gould appealed our decision to the Court of Appeals, assigning error to our rejection of her challenge to the county’s DCC 18.113.070(D) finding. The Court of Appeals reversed and remanded our decision in *Gould I*, finding that Thornburgh’s wildlife mitigation proposal was not sufficiently developed to allow the county to make the required DCC 18.113.070(D) “no net loss” finding. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*). As particularly relevant here, the Court of Appeals in its *Gould II* decision determined that the county must either require that Thornburgh’s wildlife mitigation proposal be adequately developed as part of the CMP approval process, or defer consideration of that more fully developed wildlife mitigation proposal to the FMP approval stage and allow a full right of public participation in rendering the FMP decision. We set out the Court of Appeals’ reasoning in its *Gould II* decision in some detail later in this opinion.

After the Court of Appeals’ decision in *Gould II*, the county granted CMP approval for a second time on April 1, 2008. In doing so the county chose the second option set out in *Gould II* and deferred its finding regarding DCC 18.113.070(D) to the FMP stage of approval and imposed a condition requiring a full public process for FMP approval.¹ The county’s

¹ That condition is set out below:

1 second CMP approval decision, which deferred the required finding on DCC 18.113.070(D)
2 to the FMP stage, was also appealed to LUBA. LUBA affirmed that decision on September
3 11, 2008. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008) (*Gould III*). Petitioner
4 appealed LUBA's *Gould III* decision to the Court of Appeals. The Court of Appeals
5 affirmed LUBA's decision on April 22, 2009. *Gould v. Deschutes County*, 227 Or App 601,
6 206 P3d 1106 (2009) (*Gould IV*). A petition for Supreme Court review of the Court of
7 Appeals' decision in *Gould IV* is presently pending before the Supreme Court.

8 On August 11, 2007, Thornburgh submitted its application for FMP approval. On
9 April 21, 2008, Thornburgh submitted an amended application for FMP approval. On
10 October 8, 2008, after LUBA's decision in *Gould III* but before the Court of Appeals'
11 decision in *Gould IV*, the county hearings officer granted FMP approval. That FMP approval
12 decision, which includes the county's finding that Thornburgh's modified proposal complies
13 with DCC 18.113.070(D), is the decision that is before us in this appeal.

14 With the above review of the appeals of the county's CMP and FMP decisions, we
15 return now to the Court of Appeals' decision in *Gould II*. Because we believe that decision
16 in large part dictates the outcome of this appeal, we quote extensively from the portion of
17 that opinion that addresses the DCC 18.133.070(D) "no net loss" standard before turning to
18 the parties' arguments:

19 "The county's findings on the submission requirements of DCC
20 18.113.050(B)(1) with respect to wildlife note the preparation of a 'Habitat
21 Evaluation Procedures' analysis for the site that described 'project impacts
22 and corresponding mitigation measures.' The [county's] findings list the
23 types of wildlife on the site and the short-term and long-term impacts on
24 wildlife and fish by the proposed development. The explanation concludes:

"37. Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for [FMP] approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing." Record 2754.

1 “According to Tetra Tech [respondent’s consultant],
2 approximately 2,149 off-site acres will be needed to offset loss
3 of habitat values on the subject property by virtue of the
4 proposed development. * * * As discussed under DCC
5 18.113.070 M., the BLM MOU [(Bureau of Land Management
6 memorandum of understanding)] requires [Thornburgh] to
7 complete a wildlife mitigation plan. [Thornburgh] and BLM
8 are currently evaluating the viability of implementing the
9 agreed mitigation measures on federal property in the vicinity
10 of the resort that is commonly known as the ‘Masten
11 Allotment.’”

12 “The [county’s] findings on compliance of the plan with the DCC
13 18.113.070(D) ‘no net loss’ requirement conclude:

14 ““The HEP analysis will be used to guide mitigation activities.
15 Due to the size and scope of the project and the related impact
16 from cessation of some cattle-grazing activities, [Thornburgh]
17 is participating with a multi-agency group to finalize the
18 mitigation area. This includes representatives of ODFW
19 [(Oregon Department of Fish and Wildlife)], BLM, Tetra Tech
20 and [Thornburgh].

21 “* * * * *

22 ““In a letter to the County dated February 9, 2005, Steven
23 George, Deschutes District Wildlife Biologist with ODFW,
24 states that ODFW is working with [Thornburgh] to develop an
25 acceptable wildlife report with mitigation measures and
26 expresses the view that ‘[Thornburgh] will be able to develop
27 an acceptable program to mitigate the impacts.’ * * *”

28 “* * * * *

29 ““The Board [of County Commissioners] finds that, as stated
30 by ODFW, it is feasible to mitigate completely any negative
31 impact on identified fish and wildlife resources so that there is
32 no net loss or net degradation of the resource. The MOU
33 between the BLM and [Thornburgh] requires [Thornburgh] to
34 complete a wildlife mitigation plan that will be reviewed and
35 approved by both ODFW and BLM. * * * The Board imposes
36 as a condition below that the mitigation plan adopted by
37 [Thornburgh] in consultation with Tetra Tech, ODFW and the
38 BLM be adopted and implemented throughout the life of the
39 resort.”

1 “In addressing a related requirement that the ‘resort mitigate any demands that
2 it creates on publicly-owned recreational facilities on public lands in the
3 surrounding area,’ the county decision details the content of the Bureau of
4 Land Management (BLM) memorandum of understanding (MOU):

5 ““In Section II.7 of the MOU, [Thornburgh] and BLM agree to
6 work cooperatively to complete a wildlife mitigation plan to
7 compensate for impacts related to the resort. The MOU
8 outlines specific mitigation measures to be undertaken by
9 [Thornburgh] to mitigate the impacts of resort development on
10 surrounding federal recreation facilities. * * * [The] BLM
11 identified federal property located to the south and east
12 (commonly known as the ‘Masten Allotment’) as an area to be
13 managed with an emphasis on the preservation and
14 enhancement of wildlife habitat. [Thornburgh], BLM and
15 ODFW are working together to evaluate whether
16 [Thornburgh’s] wildlife mitigation obligation can be
17 implemented in this location. * * *

18 ““The record contains a report * * * from Tetra Tech, which
19 describes habitat, land uses and mitigation measures to be
20 implemented on the federal lands surrounding the resort. The
21 Tetra Tech report, the BLM MOU and the AAC Agricultural
22 Assessment identify surrounding land uses and potential
23 conflicts between the resort and adjacent uses within 600 feet.
24 The data, analysis and mitigation measures contained in the
25 Tetra Tech report have been incorporated into the final MOU
26 between [Thornburgh] and BLM.””

27 “Consistently with those findings, the county approved the conceptual master
28 plan conditionally, requiring among other things that

29 ““[Thornburgh] shall abide at all times with the MOU with
30 BLM, dated September 28, 2005, regarding mitigation of
31 impacts on surrounding federal lands, to include wildlife
32 mitigation and long-range trail planning and construction of a
33 public trail system. The mitigation plan adopted by
34 [Thornburgh] in consultation with Tetra Tech, ODFW and the
35 BLM shall be adopted and implemented throughout the life of
36 the resort.’

37 “The memorandum of understanding requires Thornburgh to complete a
38 wildlife impact mitigation plan that ‘will specify mitigation measures that are
39 sufficient to insure that there is no net loss of wildlife habitat values as a result
40 of the proposed development.’ The agreement requires approval of the plan
41 by ODFW and BLM and commits Thornburgh to ‘work cooperatively with
42 ODFW and BLM to determine the specific locations where the mitigation

1 plan will be implemented.’ The agreement provides that certain mitigation
2 measures may be undertaken within the Masten Allotment, and those
3 measures ‘may include’ trail construction, removal of old trails, fencing,
4 vegetation thinning and management, and noxious weed controls.

5 “Gould sought review of the county’s land use decision by LUBA. Gould’s
6 petition for review set out 13 assignments of error by the county. * * * Gould
7 asserted that the county’s findings on the feasibility of complying with the
8 fish and wildlife protection criteria were not supported by substantial evidence
9 and that the ‘deferral of compliance with a criterion and reliance on an agency
10 to decide compliance with the [c]ounty’s requirements is not permissible.”

11 “LUBA determined that the local government record contained substantial
12 evidence to support the county’s findings on compliance with DCC
13 18.113.070(D). [LUBA] concluded:

14 “‘Where the county finds that it is feasible to satisfy a
15 mandatory approval criterion, as the county did here with
16 regard to DCC 18.113.070(D), the question is whether that
17 finding is adequate and supported by substantial evidence.
18 *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999).
19 Here, Thornburgh supplied the Wildlife Report to identify the
20 negative impacts on fish and wildlife that can be expected in
21 developing Thornburgh resort. The report also describes how
22 Thornburgh proposes to go about mitigating that damage, both
23 on-site and off-site. In response to comments directed at that
24 report, Thornburgh has entered into discussions with ODFW
25 and a MOU with the BLM to refine that proposal and come up
26 with better solutions to ensure that expected damage is
27 completely mitigated. ODFW and BLM have both indicated
28 that they believe such solutions are possible and likely to
29 succeed. We conclude that the county’s finding regarding
30 DCC 18.113.070(D) is supported by substantial evidence and
31 is adequate to explain how Thornburgh Resort will comply
32 with DCC 18.113.070(D).

33 “‘Had Thornburgh not submitted the Wildlife Report, we likely
34 would have agreed with petitioners that a county finding that it
35 is feasible to comply with DCC 18.113.070(D) would likely
36 not be supported by substantial evidence. Even though ODFW
37 and BLM have considerable expertise on how to mitigate
38 damage to fish and wildlife, bare assurances from ODFW and
39 BLM that solutions are out there would likely not be the kind
40 of evidence a reasonable person would rely on to find that the
41 damage that Thornburgh resort will do to fish and wildlife
42 habitat can be completely mitigated. But with that report, the
43 dialogue that has already occurred between Thornburgh,

1 ODFW and BLM, the MOU that provides further direction
2 regarding future refinements to ensure complete mitigation,
3 and the optimism expressed by the agencies involved, we
4 believe a reasonable person could find that it is feasible to
5 comply with DCC 18.13.070(D).'

6 “On review, Gould complains that LUBA erred ‘in determining that the
7 County’s findings and evidence concerning feasibility of mitigation for the
8 project’s negative impacts on fish and wildlife satisfy the applicable approval
9 standard.’” Gould contends that the approval standard was not met because
10 there was insufficient evidence in the record to show that any particular
11 wildlife impact mitigation plan was feasible and that LUBA erred in not
12 requiring the county to specify a particular mitigation plan and subject that
13 plan to public notice and county hearing processes. * * *

14 “* * * * *

15 “LUBA’s opinion and order was unlawful in substance for the reasons that
16 follow. First, the county’s findings were inadequate to establish the necessary
17 and likely content of any wildlife impact mitigation plan. Without knowing
18 the specifics of any required mitigation measures, there can be no effective
19 evaluation of whether the project’s effects on fish and wildlife resources will
20 be ‘completely mitigated’ as required by DCC 18.113.070(D). ORS
21 215.416(9) requires that the county’s decision approving the CMP explain
22 ‘the justification for the decision based on the criteria, standards and facts set
23 forth’ in the decision. The county’s decision is inconsistent with ORS
24 215.416(9) because the decision lacks a sufficient description of the wildlife
25 impact mitigation plan, and justification of that plan based on the standards in
26 DCC 18.113.070(D). Second, that code provision requires that the content of
27 the mitigation plan be based on ‘substantial evidence in the record,’ not
28 evidence outside the CMP record. In this case, the particulars of the
29 mitigation plan were to be based on a future negotiation, and not a county
30 hearing process. Because LUBA’s opinion and order concluded that the
31 county’s justification was adequate despite those deficiencies, the board’s
32 decision was “unlawful in substance.” *Gould II*, 216 Or App at 154-60
33 (footnotes omitted).

34 As the above-quoted language from *Gould II* makes reasonably clear, the primary
35 problem with Thornburgh’s wildlife report was that many of the details of the ultimate
36 mitigation plan remained to be resolved by Thornburgh, in conjunction with BLM and
37 ODFW. Given that state of uncertainty regarding those details, the Court of Appeals
38 concluded it was simply not possible for a reasonable person to conclude that the wildlife
39 mitigation plan would ensure compliance with the DCC 18.113.070(D) “no net loss”

1 standard. To summarize, in the Court of Appeals’ view, the county’s and LUBA’s decisions
2 in *Gould I* were erroneous for two related reasons. First, a reasonable person could not make
3 the “no net loss” finding required by DCC 18.113.070(D) until the uncertainties that were
4 present in Thornburgh’s wildlife report and the BLM MOU were resolved. Second, allowing
5 those uncertainties to be resolved *after* the finding required by DCC 18.113.070(D) was
6 adopted and *after* the county public planning process ended violated ORS 215.416(9),
7 because the “facts” necessary to make the required “no net loss” finding could not be set out
8 in the decision.² With that understanding of the problems with the initial findings and
9 evidence concerning DCC 18.113.070(D) we next describe Thornburgh’s wildlife
10 management plan, and then turn to petitioner’s challenge to the county’s findings regarding
11 DCC 18.113.070(D) in its FMP decision.

12 **B. Thornburgh’s Wildlife Management Plan**

13 Thornburgh’s wildlife management plan has two components; one component
14 addresses terrestrial wildlife impacts and the other component addresses off-site fish habitat
15 impacts. According to Thornburgh, the terrestrial wildlife plan is made up of two
16 documents, the “Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort”
17 (Terrestrial WMP) and the “Off-Site Habitat Mitigation and Monitoring Plan for the
18 Thornburgh Destination Resort Project” (M&M Plan). Record 2609-33; 416-32.³ The fish
19 component is also made up of two documents, the “Thornburgh Resort Fish and Wildlife

² ORS 215.416(9) provides:

“Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, *states the facts relied upon in rendering the decision* and explains the justification for the decision based on the criteria, standards and facts set forth.” (Emphasis added.)

³ Thornburgh also points out there are communications from the Oregon Department of Fish and Wildlife and Bureau of Land Management that express support for the Terrestrial WMP and M&M Plan and communications from Tetra Tech EC, Inc., Thornburgh’s environmental consultant, that respond to alleged deficiencies in those plans. Record 126-33, 415, 470, 732-34, 1287-95, 1800-05.

1 Mitigation Plan relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat,”
2 dated April 21, 2008 (Fish WMP) and an August 11, 2008 letter that proposes additional
3 mitigation if needed for Whychus Creek. Record 2609-2744; 378-79. We describe the key
4 features of the Terrestrial WMP and M&M Plan here and discuss the Fish WMP and August
5 11, 2008 letter in our discussion of the second assignment of error.

6 It is undisputed that development of the proposed destination resort will destroy or
7 damage some existing terrestrial wildlife habitat, making that existing terrestrial habit
8 unavailable for wildlife or less suitable for wildlife. Thornburgh proposes to mitigate for that
9 loss in two ways, on-site mitigation and off-site mitigation. The on-site mitigation will
10 reduce the amount of habitat loss that would otherwise result from construction of the
11 destination resort; the off-site mitigation is to compensate for the habitat loss that cannot be
12 avoided when the destination resort is constructed. Presumably because Thornburgh owns
13 the on-site property, a large number of on-site mitigation measures are proposed.⁴ A shorter
14 list of mitigation measures is proposed for off-site property.⁵ The Terrestrial WMP explains
15 how Thornburgh went about assessing how much mitigation will be required:

16 “ODFW suggested a habitat modeling approach that uses a modification of
17 the U.S. Fish and Wildlife Service’s (1981) Habitat Evaluation Procedures
18 (HEP) analysis. This describes existing habitat values and estimates impacts.
19 HEP is an accounting method, in which the value of each habitat type for each

⁴ Those mitigation measures include: (1) eliminate livestock grazing, (2) implement a noxious weed control program, (3) remove young junipers to return areas to old growth juniper habitat, (4) remove invasive species and enhance herbaceous vegetation to achieve conditions prior to white settlement of the area, (5) eliminate unregulated off-road vehicle use, (6) generally prohibit feeding of wildlife, (7) prohibit unrestrained outdoor pets, (8) install and maintain bluebird boxes, install and maintain kestrel nests and bat boxes, (9) retain snags over 12 inches in diameter, (10) preserve downed logs, (11) install animal underpasses, (12) encourage native landscaping, (13) preserve at least 80 percent of total acreage of rock outcrops, (14) control use of poisonous baits, (15) obtain waivers of remonstrance concerning wildlife damage control activities, and (16) implement a wildlife educational program. Record 2615-2619.

⁵ Those mitigation measures include: (1) implement a weed control program consistent with BLM’s Upper Deschutes Resource Management Program, (2) thin young junipers and manage unwanted woody debris in old-growth juniper habitats, (3) work with BLM to reduce unauthorized off-road vehicle impacts, (4) maintain two existing water supplies (guzzlers) on BLM land, (5) contribute \$20,000 towards traffic speed monitoring devices. Record 2620-2621.

1 of a series of evaluation species is expressed in terms of habitat units (HUs)
2 These are calculated as the number of acres of that habitat multiplied by an
3 index of its quality, and expressed as a number between 0 and 1, which is
4 termed the Habitat Suitability Index (HSI). One HU is the equivalent of one
5 acre of the best habitat available for a species. Two acres of habitat half as
6 good would also equal one HU, and so on. In the HEP analysis, to make the
7 process manageable, an ‘evaluation species’ is chosen to represent a number
8 of species with similar lifestyles and habitat requirements (USFWS 1980,
9 1981).

10 “Eagle Crest in collaboration with ODFW conducted a modified HEP for the
11 proposed Eagle Crest III development in 2004, and ODFW provided Tetra
12 Tech with a Tabulation of the results of that modified HEP. Eagle Crest and
13 ODFW used best-judgment estimates of the HSIs for baseline habitat quality
14 and post-development habitat quality, rather than calculating it from
15 quantitative data (from field and office measurements of vegetation and
16 habitat characteristic) and running it through formal mathematical models.
17 This estimation method is similar to the HEP process that was used by the
18 USFWS prior to their developing quantitative models for individual wildlife
19 species. The evaluation species used in the Eagle Crest III modified HEP
20 analysis were: golden eagle, American kestrel, red-tailed hawk, mountain
21 bluebird, small mammals (a generic group), western fence lizard, and mule
22 deer.” Record 2612-2613.

23 The Terrestrial WMP goes on to explain that the northern flicker was substituted in
24 place of the golden eagle as one of the indicator species, at ODFW’s request. The before-
25 development HSI was multiplied by the number of acres of habitat for each species, on-site
26 and within one mile of the site, to determine the HUs for each species. Post-development,
27 post on-site mitigation HSIs were determined and applied to those same acreages. The
28 results are displayed in a table in the Terrestrial WMP, which is reproduced below.

1

Summary of Impacts by Species and Total Habitat Units						
Evaluation Species	Pre-development HUs		Post-development HUs		Net Change	
	Onsite	Offsite	Onsite	Offsite	Onsite	Offsite
Northern flicker	2,466	10,958	487	10,877	-1,979	-82
American kestrel	487	2,159	317	2,071	-171	-88
Red-tailed hawk	630	2,651	118	2,270	-512	-381
Mountain bluebird	1,142	5,063	926	4,939	-216	-125
Small mammals	2,491	10,746	1,127	9,974	-1,364	-772
Western fence lizard	2,309	10,035	946	9,422	-1,363	-612
Mule deer	983	4,298	173	4,298	-810	0
Total	10,508	45,910	4,094	43,851	-6,414	-2,060

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3 Based on the above, the Terrestrial WMP determined that onsite total HUs would be
4 reduced from 10,508 to 4,094 (a reduction of 6,414 HUs) and off-site total HUs within one
5 mile of the proposed destination resort would be reduced from 45,910 to 43,851 (a reduction
6 of 2,060 HUs). Thornburgh’s off-site mitigation obligation would be 8,474 HUs (6,414
7 +2,060). The Terrestrial WMP proposes to satisfy that mitigation obligation on “public land
8 managed by the BLM.” Record 2614. The Terrestrial WMP explains:

9 “[Thornburgh] shall restore and enhance approximately 4,501 acres of juniper
10 woodlands on public lands administered by the BLM in the Clines Buttes
11 Sub-Area to mitigate the loss of 8,474 HUs. The specific areas, subject to
12 specific rehabilitation or enhancement actions will be determined through
13 consultation by BLM, [Thornburgh] and ODFW resource management
14 specialists, based upon the current conditions of the mitigation site and the
15 agreed amount and type of enhancement. [Thornburgh] shall maintain
16 rehabilitated areas through ongoing efforts as needed, such as reduction of
17 weeds, thinning of junipers, and reclosing unwanted travel routes. BLM will
18 manage public land on which this mitigation will be implemented, to comply
19 with BLM’s rangeland health standards to maintain desirable habitat for
20 wildlife. * * *.”⁶ Record 2620.

21 The M&M Plan elaborates on how off-site mitigation will be carried out:

⁶ It is not clear to us how the decision was made that rehabilitation of 4,501 acres of juniper woodlands will suffice to achieve the needed 8,474 HUs to completely mitigate the impact of the destination resort on the wildlife resource. However, petitioner does not assign error to that calculation.

1 “This Mitigation and Monitoring Plan * * * has been developed in
2 coordination with the [BLM]. Currently, the BLM is in the process of
3 finalizing the Cline Buttes Recreation Area Plan (CBRAP), which provides
4 management direction to over 50 square miles of public land in the Cline
5 Buttes region. Because the CBRAP is not yet final, the exact location where
6 the proposed mitigation will take place could not be identified. However, a
7 broad, adaptive management approach, consistent with BLM policy and
8 management objectives was used to structure [the M&M Plan]. The objective
9 of [the M&M Plan] is to 1) outline the methods that will be used to
10 characterize existing habitat conditions in the area proposed for mitigation, 2)
11 specify the types of habitat treatments used to enhance habitat for wildlife,
12 and 3) develop a monitoring plan that will monitor the effectiveness of the
13 habitat treatments through either direct or indirect means. The methods used
14 in [the M&M Plan] have been structured such that they could be applicable to
15 any parcel of land within the Clines Buttes Recreation Area (CBRA) that
16 BLM determines is suitable for mitigation once the CBRAP has been
17 finalized.” Record 418.

18 The M&M Plan goes on to explain that BLM methods will be followed to develop a
19 baseline habitat condition assessment. The M&M Plan also describes the mitigation
20 treatments that will be applied. The M&M Plan calls for an “adaptive approach:”

21 “The proposed mitigation plan will use an adaptive approach to vegetation
22 management that is consistent with the procedures outlined in the draft
23 CBRAP. * * * The BLM’s Land Use Planning Handbook defines adaptive
24 management as ‘*a system of management practices based on clearly identified*
25 *outcomes, monitoring to determine if management actions are meeting*
26 *outcomes, and, if not, facilitating management changes that will best ensure*
27 *that outcomes are met or to re-evaluate the outcomes.*’ An adaptive approach
28 to vegetation management in the Cline Buttes Area is appropriate because, in
29 some situations, there is a lack of information available to assist in accurately
30 predicting the response of the existing plant communities to different types
31 and levels of ground disturbing activities related to thinning woody plants,
32 understory shrub enhancement and reducing fuel loadings * * *.” Record
33 421-22 (italics in original).

1 **FIRST AND THIRD ASSIGNMENTS OF ERROR**⁷

2 In her first assignment of error, petitioner argues the county incorrectly or
3 inadequately interpreted the DCC 18.113.070(D) “no net loss” standard. In six of the ten
4 subassignments of error under the third assignment of error, petitioner alleges the county’s
5 findings and conditions of approval are inadequate to demonstrate that the Terrestrial WMP
6 will be sufficient to ensure that development of the disputed destination resort will comply
7 with the DCC 18.113.070(D) “no net loss” standard.

8 **A. Use of the Habitat Evaluation Procedures (HEP) Analysis**

9 In her first four subassignments of error under the first assignment of error, we
10 understand petitioner to challenge the county’s interpretation of DCC 18.133.070(D) to allow
11 Thornburgh to use the HEP analysis, rather than conducting a more detailed on-site study to
12 precisely identify all the wildlife now present on the proposed destination resort site and then
13 ensure that any wildlife resource damage that is caused by the destination resort is mitigated
14 on a one-for-one basis to ensure that there is no net loss in that resource. Specifically,
15 petitioner argues in subassignment of error one that the hearings officer improperly lumped
16 all fish and wildlife resources together and treated them as a whole. In subassignments of
17 error two and three, petitioner argues the county improperly interpreted DCC 18.133.070(D)
18 to allow existing species to be destroyed and replaced with other species at less than a 1:1
19 ratio. Finally, in subassignment of error four, petitioner argues that Thornburgh’s and the
20 county’s focus on fish and wildlife “habitat” is misplaced, since the DCC 18.133.070(D) “no
21 net loss” standard protects “fish and wildlife resources,” not just fish and wildlife habitat.

22 While some of the hearings officer’s findings, viewed in isolation, can be read to
23 suggest that the hearings officer thought it might be acceptable to lump all fish and wildlife

⁷ We consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion below of the second and fourth assignments of error.

1 resources together into one fungible, undifferentiated wildlife resource, that is not what
2 Thornburgh proposed and that is not the approach that the county approved in this case.⁸
3 The HEP analysis that was employed by Thornburgh and approved by the county uses seven
4 indicator species to make the job of identifying the nature, quality and extent of the wildlife
5 resource before and after development more manageable. The indicator species are selected
6 to simplify the task of identifying and assessing the habitat needs of all resident species.
7 That analysis produces an estimate of the nature and extent of the off-site mitigation
8 obligation Thornburgh must shoulder to comply with the DCC 18.133.070(D) “no net loss”
9 standard. Unless someone comes forward with evidence that the HEP analysis missed or
10 inadequately addressed some aspect of the wildlife resource, we believe a reasonable person
11 could rely on the HEP analysis. There is nothing inherently improper about employing such
12 an analysis to simplify the potentially exceedingly complicated task of assessing how much
13 damage the proposed destination resort would cause to the wildlife resource and how much
14 mitigation should be required to ensure there is no net loss to that wildlife resource. To the
15 extent petitioner’s first subassignment of error suggests otherwise, we reject the suggestion.

16 We reject petitioner’s second and third subassignments of error for similar reasons.
17 The HEP analysis that was used in this case is admittedly a less than perfect way to
18 demonstrate compliance with the DCC 18.133.070(D) “no net loss” standard. In addition to
19 using seven indicator species in place of an inventory of and explicit consideration of all

⁸ For example, the hearings officer adopted the following findings:

“While the ‘no net loss’ mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard requires an analysis of species on the site, the likely impacts of development, and the applicant’s plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time.” Record 29-30.

1 species present on the subject property, the HSIs that were used apparently were borrowed
2 from another analysis that was done for a neighboring destination resort without any on-site
3 analysis to confirm that the sites are sufficiently similar to allow the assumptions and indices
4 that were used in that analysis to be used in this case. But petitioner does not develop a
5 reviewable challenge to the “borrowed” nature of the HEP analysis. Petitioner’s argument
6 under these subassignments of error is that the hearings officer determined that one species
7 can be destroyed and replaced with another species and can be replaced at less than a 1:1
8 ratio. We do not understand the Terrestrial WMP and the M&M Plan to propose
9 replacement of one species with another or to propose on-site and off-site habitat
10 enhancements that will result in less than a complete replacement of the 8,474 HUs that
11 Thornburgh estimates will be lost due to development of the destination resort.

12 At oral argument we questioned whether a proposal to develop and thereby damage
13 or destroy wildlife habitat that is currently occupied by a threatened or endangered species
14 could be replaced with enhanced habitat that is suitable only for small mammals that are not
15 endangered or threatened. If there was evidence that the subject property contains threatened
16 or endangered species, we seriously doubt that habitat needed for those threatened or
17 endangered species could be destroyed and replaced under DCC 18.133.070(D) with an
18 equivalent amount of enhanced off-site habitat that is suitable for one or more of the seven
19 indicator species but is not suitable for the threatened or endangered species. But there are
20 no threatened or endangered species on the subject property, and there is no wildlife on the
21 subject property that the county has determined must be protected under Statewide Planning
22 Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Neither has

1 petitioner identified any wildlife species on the subject property that have habitat needs that
2 go beyond or are different from the habitat needs of the seven indicator species.⁹

3 Petitioner’s second and third subassignments of error under the first assignment of
4 error are denied.

5 Finally, petitioner’s challenge to the county’s focus on wildlife *habitat* rather than the
6 wildlife itself, while a literally plausible criticism based on the words of DCC
7 18.133.070(D), ignores the reality of wildlife resource protection. Development rarely if
8 ever is carried out in a way that purposefully causes harm to the wildlife that may actually be
9 present on a development site. The wildlife typically is gone before construction equipment
10 shows up. The harm is caused by altering or destroying the habitat that the wildlife requires
11 for continued existence, so that the habitat is no longer available for the wildlife to use or is
12 less suitable for wildlife use. The county’s focus on wildlife habitat does not constitute error.

13 Petitioner first four subassignments of error under the first assignment of error are
14 denied.

15 **B. The Terrestrial WMP is Inadequate**

16 Whereas petitioner’s first through fourth subassignments of error under the first
17 assignment of error present what is a largely abstract or philosophical dispute about the
18 county’s interpretation of DCC 18.133.070(D), petitioner’s fifth, sixth and seventh
19 subassignments of error under the first assignment of error and the first through sixth
20 subassignments of error under the third assignment of error, collectively, present a more
21 direct challenge to the adequacy of the Terrestrial WMP and the M&M Plan that the county
22 relied on to find that the proposed destination resort complies with the DCC 18.133.070(D)
23 “no net loss” standard. We will not attempt to labor through each of those subassignments of

⁹ Petitioner does argue the Fish WMP does not adequately address possible damage to off-site fish habitat that might result from withdrawal of cold water from the aquifer below the destination resort site. We address those arguments in our discussion below concerning fish resources.

1 error individually. The unifying and underlying theme of those seven subassignments of
2 error is that the Terrestrial WMP and M&M Plan fail to provide the specificity that is
3 required under the Court of Appeals’ decision in *Gould II* and therefore do not constitute
4 substantial evidence that the damage that will be caused to the wildlife resource by the
5 proposed destination resort will be “completely mitigated so that there [will be] no net loss or
6 net degradation of the resource,” as DCC 18.133.070(D) requires. We understand petitioner
7 to argue that the Terrestrial WMP and M&M Plan cannot constitute substantial evidence in
8 support of the finding required by DCC 18.133.070(D) until a number of unresolved factors
9 are resolved and that contrary to the Court of Appeals’ *Gould II* decision, these unresolved
10 factors will be resolved after petitioner’s chance to object to the adequacy of the Terrestrial
11 WMP and M&M Plan in the County FMP proceeding has passed. For the reasons that
12 follow, we agree with petitioner.

13 We earlier described the Terrestrial WMP and M&M Plan in some detail. The
14 hearings officer’s description of those plans is set out in part below:

15 “The applicant has agreed to restore 4,501 acres of juniper woodlands in the
16 Cline Buttes sub-area to mitigate the loss of the 8,474 HUs. The specific
17 BLM land on which the restoration [will be carried out] is subject to the
18 adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to
19 be finally identified. However, the applicant and BLM have identified three
20 areas where wildlife and habitat restoration is likely to occur under the
21 CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston
22 Allotment. Restoration includes weed management, vegetation enhancement,
23 reduction of unauthorized off-road motor vehicle use, creation of wildlife
24 water sources (‘guzzlers’) and traffic speed monitoring devices. The specific
25 activities and monitoring program for the BLM land are identified in [the
26 M&M Plan], included in the applicant’s August 12, 2008 rebuttal * * *.

27 “If, at the time of development, [sufficient] off-site areas are not available, the
28 applicant proposes to provide funding for implementing mitigation in a
29 dedicated fund for use by ODFW to use to improve or purchase mitigation
30 sites *within Deschutes County*. After the mitigation is established, the
31 applicant will provide continuing funding for the lifetime of the development
32 through a real estate transfer fee.” Record 31-32 (emphasis added; footnote
33 omitted).

1 The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds
2 of habitat restoration activities that might be employed to improve the habitat value of the
3 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh’s
4 consultant and BLM and ODFW staff are confident that those restoration efforts will be
5 successful and result in compliance with DCC 18.133.070(D). But what our description and
6 the hearings officer’s description of the Terrestrial WMP and M&M Plan make clear is that a
7 number of important parts of Thornburgh’s proposal to comply with the DCC 18.133.070(D)
8 “no net loss” standard have not yet been determined, and will not be determined until a
9 future date at which petitioner may or may not have any right to comment on the adequacy of
10 the proposed mitigation. We do not know the location of the 4,501 acres that will be restored
11 to provide the required mitigation. They may be located in the Canyons Region, the Deep
12 Canyons Region or the Maston Allotment. Or they may be located somewhere else in
13 Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat
14 those 4,501 acres provide, and we cannot know what the beginning habitat value of those
15 4,501 acres is. We also do not know what particular mix of restoration techniques will be
16 provided to those 4,501 acres.¹⁰ We do not know what the habitat value of those 4,501 acres
17 will be after restoration. We therefore cannot know if that restoration effort will result in the
18 needed 8,474 HUs. The question for us is whether given all of these uncertainties, the
19 confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that
20 the proposed mitigation plan will result in compliance with DCC 18.133.070(D). The
21 answer to that question under the principles articulated in *Gould II* is no.

¹⁰ As we noted earlier, the Terrestrial WMP explains:

“The specific areas subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement.” Record 2620.

1 While we have no reason to doubt the professional judgment of Thornburgh’s
2 consultant and the staff at BLM and ODFW, under the Court of Appeals’ decision in *Gould*
3 *II*, petitioner has a right to confront the mitigation plan that Thornburgh intends to rely on to
4 comply with DCC 18.133.070(D). While we know more about what that mitigation plan
5 might ultimately look like than we did when *Gould I* and *Gould II* were decided, there are
6 simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow
7 petitioner a meaningful chance to confront the adequacy of that plan. See *Gould II*, 216 Or
8 App 159-60 (“Without knowing the specifics of any required mitigation measures, there can
9 be no effective evaluation of whether the project’s effects on fish and wildlife resources will
10 be ‘completely mitigated’ as required by DCC 18.113.070(D). * * * [T] hat code provision
11 requires that the content of the mitigation plan be based on ‘substantial evidence in the
12 record,’ not evidence outside the CMP record.”) The details that must be supplied before
13 petitioner can be given that meaningful chance to confront the proposed mitigation plan will
14 not be known until some undetermined future date. Under the Court of Appeals’ holding in
15 *Gould II*, that is not a permissible approach for demonstrating compliance with DCC
16 18.133.070(D).

17 Petitioner’s first through fourth subassignments of error under the first assignment of
18 error are denied. Petitioner’s fifth through sixth assignments of error under the first
19 assignment of error and first through sixth assignments of error under the third assignment of
20 error are sustained.¹¹

¹¹ Again we sustain those subassignments of error only to the extent that they express the argument challenging the adequacy of the Terrestrial WMP and M&M Plan that we describe in the text of this opinion. To the extent those subassignments of error include additional arguments, we do not address those arguments.

1 **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR¹²**

2 **A. Whychus Creek**

3 The main stem of the Deschutes River is located approximately 2 miles to the east of
4 the eastern boundary of the proposed resort. *Gould I 54 Or LUBA at 262.* Several
5 tributaries of the Deschutes River, including Whychus Creek and Deep Canyon Creek are
6 located a number of miles north of the proposed resort. The proposed destination resort will
7 use deep wells to supply water. The aquifers that will provide that water are hydrologically
8 connected to off-site down-gradient surface waters and the aquifer water is cooler than the
9 receiving surface waters of the Deschutes River and its tributaries. While Thornburgh has
10 been required to acquire and retire water rights to mitigate for its planned volume of water
11 use, that mitigation water will not necessarily offset thermal impacts of its withdrawal of
12 cool water from the aquifers under the destination resort if the mitigation water is warmer
13 than the ground water that is removed from the system. During the proceedings below,
14 ODFW submitted a letter in which it specifically recognized the value of groundwater fed
15 springs and seeps for cooling waters in the main stem of the Deschutes River and its
16 tributaries. ODFW recognized that this cooling groundwater “provides thermal refuge[] for
17 salmonid which thrive in cooler water.” Record 900. However, ODFW ultimately
18 concluded that

19 “In this particular case the potential impact to springs and seeps will likely be
20 mitigated by transferring springs flows used for irrigation directly back into
21 Deep Canyon Creek and the Deschutes River. These springs should provide
22 similar habitat and help with water temperatures in the Deschutes River.” *Id.*

23 The opponents’ expert expressed concerns that the proposed mitigation would not be
24 adequate to off-set the diversion of cool groundwater from Alder Springs, which drains into

¹² As we noted earlier, we consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion of the second and fourth assignments of error.

1 Whychus Creek, a tributary of the Deschutes River that provides habitat for the federally
2 listed bull trout and other fish species. Thornburgh’s experts submitted rebuttal testimony in
3 which they took the position that any thermal impact on Whychus Creek would be negligible.
4 Record 1245-1253. One of those experts took the position that the thermal impact would be
5 less than .01 degree Celsius. Record 1246. In an August 11, 2008 letter to the county,
6 Thornburgh’s attorney noted that Thornburgh disagreed with some of the assumptions that
7 led the opponents’ expert to conclude the proposed destination resort would have a damaging
8 thermal impact on Alder Springs and Whychus Creek. Record 379. But Thornburgh’s
9 attorney offered to provide additional mitigation if the hearings officer determined that
10 additional mitigation was necessary to address concerns about thermal impacts on Whychus
11 Creek:

12 “* * * Thornburgh does not want to be caught short if you determine that
13 additional mitigation is required for possible impacts on to Whychus Creek.
14 Therefore, we are providing evidence to demonstrate that it would be feasible
15 for Thornburgh to provide additional flow of 106 acre-feet per year in
16 Whychus Creek, if needed to meet the county approval standard. This would
17 be in addition to the amount of mitigation water already described in
18 Thornburgh’s Addendum. * * *” Record 379.

19 We understand that the referenced 106 acre-feet of mitigation would be achieved by reducing
20 irrigation diversion from Whychus Creek and leaving that water in-stream.

21 In response to that proposal, opponents’ expert submitted a letter, which is set out in
22 part below:

23 “[In Thornburgh’s letter of] August 11, 2008, it is proposed that Thornburgh
24 could provide mitigation for loss of groundwater discharge to lower Whychus
25 Creek due to the pumping of its proposed wells. The mitigation would consist
26 of 106 acre feet of water provided by Three Sisters Irrigation District through
27 transfer of irrigation water to instream flow. This will not mitigate impact to
28 Whychus Creek because it replaces cold groundwater with warm water from
29 upstream during the irrigation season. It is the cold groundwater discharge at
30 Alder Springs that is the defining and essential factor that makes the lower
31 reach of Whychus Creek critical habitat for native bull trout, redband trout
32 and reintroduced steelhead trout and Chinook salmon.

1 “The pumping of Thornburgh wells will reduce cold groundwater discharges.
2 Replacing this lost flow of 106 acre feet by reducing upstream irrigation
3 diversions would result in more hot water mixing with the cold water of the
4 lower reach of Whychus Creek. The proposed mitigation is harmful to critical
5 fish habitat in two ways: first it would allow the reduction of cold
6 groundwater discharge to the stream, and second it would increase the flow of
7 warm water into the cold lower reach of the stream.

8 “Using the thermal mass balance equation, the calculated increase in stream
9 temperature at Alder Springs due to the pumping of the Thornburgh wells
10 would be 0.07° C. The calculated change in stream temperature due to both
11 the reduction in cold groundwater discharge and the increased stream flow
12 due to the proposed mitigation would result in even a greater stream
13 temperature increase of 0.12° C at Alder Springs. It is clear that the proposed
14 mitigation for Thornburgh’s impact to Whychus Creek would only increase
15 the impact to critical cold water habitat that native and reintroduced fish are
16 dependant on.” Record 312.

17 In its August 28, 2008 argument to the county hearings officer, petitioner’s attorney
18 reiterated the above:

19 “The Applicant in its August 12 materials for the first time proposes the
20 addition of 106 acre feet of water to Whychus Creek to make up for the water
21 withdrawal impacts to the Creek. This is discussed in the Applicant’s Exhibit
22 A-3 letter * * * and the Exhibit A-9 letter from * * * the Three Sisters
23 Irrigation District. This is apparently in response to our argument that there
24 needs to be some mitigation provided for Whychus Creek. Unfortunately,
25 what is proposed would actually compound the problem by increasing
26 temperatures in the creek. Adding more warm surface water into the creek
27 does not compensate for withdrawals of cold groundwater. * * *” Record
28 281.

29 In her decision, the hearings officer adopted findings to address the potential thermal
30 impact on Whychus Creek, including the following findings:

31 “The OWRD [Oregon Water Resources Department] mitigation requirement
32 adequately addresses water quantity; it does not fully address water habitat
33 quality. Its assumptions regarding the benefits of replacing more water during
34 the irrigation season than is consumed on an average daily basis by the resort
35 does not account for the higher water consumption that will likely occur
36 during the summer months. Therefore, the hearings officer concludes that the
37 additional mitigation offered through the Three Sisters Irrigation District
38 restoration program is necessary to assure that water temperatures in Whychus
39 Creek are not affected by the proposed development.” Record 34.

1 From the above findings, it appears the hearings officer was not persuaded by
2 Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that
3 it could be ignored. To ensure that there would be no adverse thermal impact, the hearings
4 officer took Thornburgh up on its offer to secure additional mitigation water from the Three
5 Sisters Irrigation District. Unfortunately, in doing so, the hearings officer either did not
6 recognize or for some other reason failed to respond to petitioner's contention that the
7 mitigation water from the Three Sisters Irrigation District that will be generated by
8 eliminating upstream irrigation diversions will not mitigate the destination resort's thermal
9 impacts on Whychus Creek because that mitigation will replace cool water with warmer
10 water. There may be a simple answer to the opponents' concern, but it is lacking in the
11 hearings officer's decision. Without that explanation, the decision must be remanded for
12 addition findings to explain why the additional mitigation water from the Three Sisters
13 Irrigation District will be sufficient to eliminate the hearings officer's concern that summer
14 water use by the destination resort could have adverse thermal impacts on Whychus Creek.

15 Thornburgh points to the following statement by its expert:

16 "It should be noted that if there is flow in Whychus Creek that is not from
17 Alder Springs, whether warmer than Alder Springs or not, the resulting
18 increase in temperature at the mouth would be even less than the estimated
19 maximum of 0.01 [degree Celsius]." Record 1248.

20 Citing *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002),
21 Thornburgh contends that the hearings officer was entitled to choose which expert testimony
22 she found more believable.

23 The problem with Thornburgh's attempt to rely on *Molalla River Reserve* is that in
24 that case the decision maker recognized that there was a difference of opinion between the
25 experts. As we noted in *Molalla River Reserve*:

26 "The findings make clear that the county considered the issue to be a battle of
27 the experts and chose to believe the opponents' experts. A local government
28 may rely on the opinion of an expert if, considering all of the relevant

1 evidence in the record, a reasonable person would have chosen to rely on the
2 expert’s conclusion.” 42 Or LUBA at 268.

3 In this case the hearings officer either did not recognize or for some other reason failed to
4 address the conflicting expert testimony about the efficacy of relying on the mitigation water
5 from the Three Sisters Irrigation District to address the hearings officer’s concern about the
6 thermal impacts water use at the destination resort would have on Whychus Creek during the
7 summer months.¹³ Without some attempt by the hearings officer to resolve that conflict or to
8 identify which expert testimony she found more persuasive, remand is required.

9 The second assignment of error, subassignment of error (B)(2) under the third
10 assignment of error and subassignment of error 4 under the fourth assignment of error are
11 sustained.

12 **B. The Hearings Officer’s Fish Mitigation Findings**

13 Petitioner’s entire argument under subassignment of error B(1) under the third
14 assignment of error is set out below:

15 “Unlike with the Applicant’s wildlife plans (where the Hearings Officer in her
16 conditions of approval at least attempted to identify the plans to be followed),
17 the Hearings Officer did not identify any fish mitigation plans or require
18 compliance with them in her conditions of approval. Any plans relied upon
19 must be required in conditions of approval. It cannot just be assumed that
20 everything mentioned in a land use application will be done. * * *

21 “She also made no findings of compliance with the standards for fish
22 resources, other than just saying that the OWRD mitigation requirement
23 addresses water quantity and that additional mitigation is needed for water
24 quality on Whychus Creek. She made no findings on water quality for the

¹³ We need not and do not decide here whether the expert statement cited by Thornburgh would be sufficient to overcome the opponents’ expert’s concerns. However, we note that if the water that would remain in Whychus Creek by virtue of the Three Sisters Irrigation District mitigation is only slightly warmer than Alder Springs water and significantly cooler than the in-stream water at the mouth of Whychus Creek, Thornburgh’s expert’s statement at Record 1248 is no doubt true. That may well be the case. But if the water that is not going to be diverted for irrigation is significantly warmer than the Alder Springs water and approximately the same temperature as the in-stream water at the mouth of Whychus Creek, it is difficult to see how leaving that water in Whychus Creek would have any material impact on the in steam water temperature at the mouth of Whychus Creek. Some effort to clarify the expert’s statement will likely be required.

1 Deschutes River or on impacts to fish species in Whychus Creek and the
2 Deschutes River.” Petition for Review 30.

3 Condition of approval 38 requires that Thornburgh “abide by the April 2008 Wildlife
4 Mitigation Plan, the August 2008 Supplement * * *.” Record 40. While it could certainly be
5 clearer, we conclude that that reference includes the Terrestrial WMP dated April 15, 2008,
6 the Fish WMP dated April 21, 2008, the M&M Plan dated August 20, 2008 and the two-page
7 letter regarding Whychus Creek mitigation dated August 11, 2008. With regard to the
8 findings that petitioner claims are missing, Thornburgh identifies findings that it contends are
9 adequate. Thornburgh’s Response Brief 26. Without a more developed argument from
10 petitioner, we reject this subassignment of error.

11 Subassignment of error B(1) under the third assignment of error is denied.

12 **C. Big Falls Ranch Mitigation Water**

13 In subassignment of error B(3) under the third assignment of error, petitioner
14 contends that the hearings officer found that groundwater impacts on the Deschutes River
15 would be mitigated in part by acquiring Big Falls Ranch water rights and returning that water
16 to Deep Canyon Creek. According to petitioner the hearings officer failed to condition the
17 challenged decision to require that the Big Falls Ranch water rights be acquired and that the
18 water be returned to Deep Canyon Creek.

19 Thornburgh responds that the Fish WMP and the August 11, 2008 letter to the
20 hearings officer make it clear that Thornburgh is obligated to mitigate by acquiring the Big
21 Falls Ranch water rights and returning that water to Deep Canyon Creek. Record 378, 2699.
22 We agree with Thornburgh.

23 Subassignment of error B(3) under the third assignment of error is denied.

24 **D. Central Oregon Irrigation District Mitigation Water**

25 In subassignment of error B(4) under the third assignment of error petitioner contends
26 the hearings officer failed to impose a condition requiring that Thornburgh acquire mitigation

1 water from the Central Oregon Irrigation District (COID) if necessary. In subassignment of
2 error 3 under the fourth assignment of error, petitioner argues the hearings officer erred by
3 failing to address her argument that mitigation water may not be available from COID.

4 Thornburgh responds, and we agree, that the issue of the feasibility of acquiring
5 water rights from COID if necessary was resolved in our decision in *Gould I*, and that
6 condition 10 in the FMP approval decision is adequate to ensure that those water rights are
7 secured if necessary. *Gould I*, 54 Or LUBA at 266-67.

8 Subassignment of error B(4) under the third assignment of error and subassignment
9 of error 3 under the fourth assignment of error are denied.

10 **E. Ninty Percent Consumption Versus Sixty Percent**

11 Petitioner contends the county erroneously assumed that only 60 percent of the
12 groundwater that is removed from the wells will actually be consumed and that 40 percent of
13 that groundwater withdrawal would be returned to the subsurface hydrologic system.
14 Although OWRD used a 60 percent consumption figure in computing Thornburgh's
15 mitigation responsibility, petitioner contends she submitted evidence that once the
16 destination resort is fully operational it will produce 326,000 gallons of effluent per day and
17 that under DEQ's permit much of that water will not percolate back into the groundwater.
18 Record 1145.

19 Thornburgh responds that its expert concluded that under the DEQ permits sewage
20 effluent is permitted to seep into the ground. Record 391. The hearings officer specifically
21 recognized petitioner's argument that consumption should be assumed to be 90 percent rather
22 than 60 percent. Record 33. Thornburgh contends the hearings officer was entitled to rely
23 on Thornburgh's rebuttal and to use the same assumptions that were used by OWRD. We
24 agree with Thornburgh.

25 Subassignment of error 1 under the fourth assignment of error is denied.

1 **F. Loss of Cool Patches**

2 Petitioner argues the county never responded to its concerns about the loss of “cool
3 patches” in the Deschutes River and tributaries through withdrawal of cool ground water for
4 use by the proposed destination resort.

5 Thornburgh responds that the record includes a fair amount of evidence that was
6 submitted to demonstrate that any impacts on cool water patches will be mitigated through
7 the mitigation steps Thornburgh has agreed to take. Record 97, 101, 106-107, 900-901,
8 1251, 2135-2139, 2698-2701. With the exception of the potential for impacts on Whychus
9 Creek, the hearings officer was satisfied that the proposed destination resort would not have
10 adverse impacts on cool patches in the Deschutes River basin. The hearings officer
11 concluded that with the proposed additional mitigation proposed through the Three Sisters
12 Irrigation District, that potential adverse thermal impact on Whychus Creek would be
13 avoided. We have already determined that the challenged decision must be remanded for a
14 better explanation for why the hearings officer believes the additional mitigation through the
15 Three Sisters Irrigation District will be sufficient to resolve her concerns about thermal
16 impacts on Whychus Creek. But the hearings officer apparently concluded that the proposed
17 mitigation was sufficient to resolve concerns about other cool patches, and we agree with
18 Thornburgh that that conclusion is supported by substantial evidence.

19 Subassignment of error 2 under the fourth assignment of error is denied.

20 The second assignment of error is sustained. The third and fourth assignments of
21 error are sustained in part.

22 **FIFTH ASSIGNMENT OF ERROR**

23 DCC 18.113.090 sets out the requirements for destination resort FMPs and provides
24 in relevant part:

25 “*It shall be the responsibility of the applicant to provide a Final Master Plan*
26 *(FMP) which includes text and graphics explaining and illustrating:*”

1 “A. The use, location, size and design of all important natural features,
2 open space, buffer areas and common areas;

3 “B. The use and general location of all buildings, other than residential
4 dwellings and the proposed density of residential development by
5 location;

6 “* * * * *

7 “G. A description of all commercial uses including approximate size and
8 floor area[.]”

9 Under her fifth assignment of error, petitioner contends the FMP lacks the information that is
10 required by DCC 18.113.090(A), (B) and (G) and condition 13 of CMP approval, which
11 requires that the “[a]pplicant shall specify all recreational facilities within the proposed resort
12 as part of final master plan approval.”

13 **A. Natural Areas**

14 Petitioner first argues that “the Applicant does not identify where [the] natural areas
15 are.” Petition for Review 36. Thornburgh points to a graphic that appears at Record 1232
16 and shows the locations and acreages of the “Common Area Open Space,” “Lake and Golf
17 Open Space,” and “50’ Wide Buffer Zone.” In the proceedings below, Thornburgh explained
18 that “the common [area] open space is ‘natural’ open space, in contrast with the golf courses,
19 developed open spaces and buffer.” Record 1218. Based on that response it appears that
20 Thornburgh has supplied “text and graphics explaining and illustrating” “natural areas,” as
21 required by DCC 18.113.090(A).

22 This subassignment of error is denied.

23 **B. Recreation Facilities**

24 Under CMP condition of approval 13, the applicant was to “specify all recreation
25 facilities” that will be included in the destination resort, “as part of final master plan
26 approval.” Petitioner contends that all the applicant has done is provide a list of recreational
27 uses that “would be allowed at Thornburgh Resort.” Record 2498-2501.

28 Thornburgh responds:

1 “In addition to furnishing lists of proposed recreational facilities (R 2500,
2 2879), Thornburgh explained

3 ““The common areas within the resort will include the common
4 open space areas (i.e., those that do not alter the existing or
5 natural landscape, except as permitted by DCC 18.113.030(E)).
6 Common areas within the resort will also include many of the
7 amenities and facilities listed in the Amenities Description
8 attached as revised Ex. A8d [R 2879]: the community center,
9 amphitheater, game rooms, libraries, stables and equestrian
10 facilities, swimming pools, sports fields, vista view points and
11 a cultural and interpretive center. These amenities will be
12 located in the areas depicted as ‘visitor oriented’ and
13 ‘recreational’ on the revised master Development Plan, FMP,
14 Ex. A3.1 [R 2495].’ (R 47).” Thornburgh’s Response Brief 31.

15 Although we could be mistaken, we understand petitioner to argue that every single
16 recreational use that will ultimately be constructed as part of the Thornburgh Resort must be
17 precisely identified on the FMP. We understand Thornburgh to argue the supplied list of
18 potential recreational facilities is adequate to comply with CMP condition of approval 13,
19 even though the list that begins at Record 2498 expressly provides that “[i]t does not require
20 that all of the following will be built, or be built to any specific standards.”

21 Whatever ultimate mix of recreational facilities is selected from the list that begins at
22 Record 2498 must comply with the ORS 197.445(3) requirement that “[a]t least \$7 million
23 must be spent on improvements for on-site developed recreational facilities and visitor-
24 oriented accommodations,” and at least “one-third of this amount must be spent on
25 developed recreational facilities.” With the caveat that the proposal must ultimately comply
26 with ORS 197.445(3), we agree that the list at Record 2498-2501 is sufficient to comply with
27 CMP condition 13. While that condition certainly could be interpreted to require more
28 specificity and certainty than Thornburgh has provided, we do not believe it must be
29 interpreted to do so.

1 **C. Use and General Location of All Buildings**

2 Petitioner’s argument under this assignment of error is similar to her argument under
3 the previous subassignment of error. DCC 18.113.090(B) requires that Thornburgh show
4 “the use and general location of all buildings.” We understand petitioner to argue that
5 Thornburgh failed to do so.

6 It is worth noting that DCC 18.113.090(B) does not require that Thornburgh show
7 “buildings” on the FMP, instead DCC 18.113.090(B) requires that Thornburgh show “the use
8 and general location of” the proposed buildings. Thornburgh argues that the Final Master
9 Plan graphic that appears at Record 2872 shows where “Residential,” “Visitor Oriented,”
10 “Visitor Lodging,” “Commercial,” “Recreational,” “Infrastructure,” “Open Space
11 (Common)” and “Open Space (Golf)” uses will be located and that together with the list of
12 proposed uses is sufficient to comply with DCC 18.113.090(B). We agree with Thornburgh.

13 **D. Approximate Size and Floor Area of Commercial Uses**

14 DCC 18.113.090(G) requires that the FMP include “[a] description of all commercial
15 uses including approximate size and floor area[.]” We understand petitioner to argue that the
16 exhibit list that appears at Record 2498-2501 is inadequate to comply with DCC
17 18.113.090(G). According to that exhibit, Thornburgh Resort will include “20,000 Square
18 Feet” of “Specialty Retail,” “15,000 Square Feet” of “Real Estate Sales and Related,”
19 “75,000 Square Feet” of “Hotel, Dining and Related,” “20,000 Square Feet” of “Golf
20 Clubhouse,” “25,000 Square Feet” of “Spa Facilities,” and “15,000 Square Feet” of
21 “Recreation Center.” Record 2499. We agree with Thornburgh that petitioner has not
22 demonstrated that more is required to comply with DCC 18.113.090(G).

23 This subassignment of error is denied.

24 The fifth assignment of error is denied.

1 **SIXTH ASSIGNMENT OF ERROR**

2 We understand petitioner to argue that the version of DCC 18.113.060(A)(4) that
3 applies in this matter requires that “[a]t least \$2,000,000 (in 1984) dollars shall be spent on
4 developed *recreational* facilities.” (Emphasis added.) To ensure compliance with DCC
5 18.113.060(A)(4), the hearings officer imposed the following condition of approval:

6 “33. The Resort shall, in the first phase, provide for the following

7 “* * * * *

8 “D. At least \$2,000,000 (in 1984 dollars) shall be spent on
9 developed *residential* facilities.

10 “* * * * *.” (Emphasis added.)

11 Petitioner argues that because the hearings officer mistakenly calls for at least two million
12 dollars in *residential* facilities, instead of the *recreational* facilities specified in DCC
13 18.113.060(A)(4), the decision must be remanded.

14 We agree with Thornburgh that the hearings officer almost certainly intended to
15 require that “at least \$2,000,000 (in 1984 dollars) shall be spent on developed recreational
16 facilities” and that her use of the word “residential” was likely inadvertent. However, the
17 hearings officer’s decision must be remanded for other reasons. On remand, the hearings
18 officer should correct the erroneous reference to residential facilities in Condition 33(D).

19 The sixth assignment of error is sustained.

20 **SEVENTH ASSIGNMENT OF ERROR**

21 In her seventh assignment of error, petitioner argues it was error for the hearings
22 officer to consider the DCC 18.113.070(D) “no net loss” standard in her decision granting
23 FMP approval rather than in her CMP approval decision. Petitioner argues that “a complete
24 and final CMP decision” is required before the county can grant FMP approval. Petition for
25 Review 38. Petitioner contends:

26 “It is fundamentally inconsistent for the County to have approved the CMP as
27 a land use permit (CUP) while deferring mandatory approval criteria without

1 feasibility findings that compliance is ‘likely and reasonably certain to
2 succeed’ under [*Meyer v. City of Portland*, 67 Or App 274, 280 n5, 678 P2d
3 741, *rev den* 297 Or 82 (1984)]. However, the County’s CMP approval
4 decided to defer consideration of the standard to the FMP stage. Petitioner
5 appealed this decision to LUBA (Petition at Rec. 3139) and the Court of
6 Appeals which affirmed the County decision. * * * A petition for review to
7 the Supreme Court is being filed.” Petition for Review 38-39.

8 Petitioner’s arguments under the seventh assignment of error are arguments that
9 either were made or should have been made in her appeal of the county’s second CMP
10 decision. They provide no independent basis for reversal or remand of the county’s FMP
11 decision.

12 The seventh assignment of error is denied.

13 The county’s decision is remanded.