

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

3  
4 TAMMERA WALKER and CLAY WALKER,  
5 *Petitioners,*

6  
7 vs.

8  
9 DESCHUTES COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 4-R EQUIPMENT, LLC,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2007-013

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Deschutes County.

23  
24 Douglas M. DuPriest, Eugene, filed the petition for review and Zack P. Mittge argued  
25 on behalf of petitioners. With him on the brief were Zack P. Mittge and Hutchinson, Cox,  
26 Coons, DuPriest, Orr & Sherlock, P.C.

27  
28 Laurie E. Craghead, Assistant Legal Counsel, Bend, filed a response brief and  
29 represented respondent.

30  
31 Robert S. Lovlien, Bend, filed a response brief and argued on behalf of intervenor-  
32 respondent. With him on the brief was Bryant, Lovlien & Jarvis, P.C.

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

36  
37 REMANDED

10/03/2007

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

**NATURE OF THE DECISION**

Petitioners appeal a county decision redesignating and rezoning a 385-acre parcel to allow surface mining.

**MOTION TO INTERVENE**

4-R Equipment, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property is located on Highway 20 in the Millican Valley, approximately 25 miles southeast of the City of Bend. The 385-acre parcel is zoned Exclusive Farm Use, and is subject to Antelope Winter Range Wildlife Area (WA) and Landscape Management (LM) overlay zones. Highway 20 bisects the northern portion of the parcel. A portion of the Dry River canyon is located on the property parallel to the highway. Uses on adjacent and nearby properties include cattle ranching, wildlife habitat, the Pine Mountain Observatory, an off-road vehicle recreation site, native American archeological and cultural sites, and several dwellings.

Intervenor applied to the county for a plan amendment to include the subject property in the county’s inventory of mineral and aggregate sites, and to rezone the property to Surface Mining (SM), to facilitate proposed mining and crushing of basalt rock. The county hearings officer conducted a public hearing, and issued a decision recommending that the proposed plan amendment and zone change be denied for failure to identify measures to avoid or minimize conflicts with adjoining and nearby uses, based in part on alleged impacts on uses in the area that are located up to six and one-half miles away from the subject property. The county board of commissioners approved the application and proposed mining, concluding that the relevant impact area should extend no further than one-half mile from the property. In addition, the commissioners imposed a Surface Mining Impact Area

1 (SMIA) overlay zone on all properties within one-half mile of the boundary of the subject  
2 property. The SMIA overlay zone imposes standards on the use of nearby properties to  
3 reduce conflicts with the proposed surface mining operation. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue that the county erred in applying the SMIA overlay zone on  
6 property within one-half mile of the subject parcel. According to petitioners, under the  
7 county code only the property owner can initiate a quasi-judicial zoning map amendment.  
8 Because the nearby property owners did not sign the application, petitioners argue, the  
9 imposition of the SMIA overlay zone is invalid.

10 Deschutes County Code (DCC) 18.56.020 requires that “[t]he SMIA zone shall apply  
11 to all property located within one-half mile of the boundary of a surface mining zone.” The  
12 county responds that DCC 18.56.020 operates automatically to impose the SMIA zone on all  
13 property within one-half mile of the boundary of the SM zone. According to the county, that  
14 automatic application supersedes the general code provisions, at DCC 18.136.010 and  
15 22.08.010(B)(1), that require that the property owner or an authorized agent sign an  
16 application for a quasi-judicial zoning map amendment.

17 We agree with the county that the relevant DCC provisions do not require that the  
18 owners of property to which the SMIA overlay zone is applied under DCC 18.56.020 sign or  
19 authorize the application for SM zoning. The purpose of the SMIA overlay zone is “to  
20 protect the surface mining resources of Deschutes County from new development which  
21 conflicts with the removal and processing of a mineral and aggregate resource while  
22 allowing owners of property near a surface mining site reasonable use of their property.”  
23 DCC 18.56.010. That purpose would be frustrated if nearby property owners could  
24 effectively veto a surface mining operation by refusing to sign or authorize the application  
25 for SM zoning. Presumably for that reason, the county drafted DCC 18.56.020 so that it  
26 mandates imposition of the SMIA overlay zone on nearby properties, when the property that

1 is the subject of the application is zoned SM. That expression of specific intent overrides the  
2 general code provisions petitioners cite that require the property owner or authorized agent to  
3 sign an application for development or land use actions.

4 The first assignment of error is denied.

#### 5 **SECOND ASSIGNMENT OF ERROR**

6 OAR 660-023-0180 sets out standards governing a post-acknowledgment plan  
7 amendment to allow mineral or aggregate mining. As a general overview, the rule requires  
8 the county to (1) determine an impact or study area, (2) identify conflicts with certain uses  
9 within that impact area, (3) determine reasonable and practicable measures that would  
10 minimize identified conflicts, and (4) based on significant conflicts that cannot be  
11 minimized, conduct an analysis of the economic, social, energy and environmental (ESEE)  
12 consequences of allowing, limiting, or not allowing mining at the site.

13 The first step, identifying the impact area, is governed by OAR 660-023-0180(5)(a),  
14 which requires that:

15 “The local government shall determine an impact area for the purpose of  
16 identifying conflicts with the proposed mining and processing activities. The  
17 impact area shall be large enough to include uses listed in subsection (b) of  
18 this section and shall be limited to 1,500 feet from the boundaries of the  
19 mining area, except where factual information indicates significant potential  
20 conflicts beyond this distance.”

21 The hearings officer recommended an expanded impact area that would allow  
22 evaluation of conflicts with a number of specific uses located beyond 1,500 feet, including  
23 (1) the Pine Mountain Observatory, (2) sage grouse habitat, and (3) cattle operations on the  
24 Evans Well Ranch. The county board of commissioners ultimately adopted an impact zone  
25 that corresponds with the boundaries of the SMIA overlay zone, approximately one-half mile  
26 from the boundaries of the subject property. That one-half mile impact zone is larger than  
27 the 1,500-foot impact area specified in OAR 660-023-0180, but does not include the above  
28 uses. The commissioners determined that no “factual information indicates significant

1 potential conflicts beyond” the one-half mile boundary, and thus declined to expand the  
2 impact area or evaluate conflicts with the above uses.

3 Petitioners challenge that determination and argue that the county erred in failing to  
4 expand the impact area to evaluate the above uses. We address each in turn.

5 **A. Pine Mountain Observatory**

6 The Pine Mountain Observatory is located on Pine Mountain, approximately 6.5  
7 miles southeast of the subject property. The observatory’s resident astronomer testified that  
8 the observatory is downwind of the proposed mining site during the summer, when  
9 prevailing winds are from the northwest, and that dust from the operation would blow  
10 directly over the observatory, impacting it in two ways: (1) by refracting light, interfering  
11 with observations, and (2) by settling on the sensitive lenses and instruments at the  
12 observatory, which are open to the air, requiring increased maintenance and risk of damage.  
13 The astronomer stated that in recent years dust from development in the region has increased,  
14 reducing the quality of observations, damaging instruments and causing them to “lock up.”  
15 According to the astronomer, dust from the proposed mining operation will “greatly  
16 increas[e]” the existing dust problems. Supp Rec 3. The combination of impacts from  
17 existing dust and light pollution and the proposed quarry risks eliminating the observatory as  
18 an “actual research facility” for the University of Oregon. Supp Rec 3.

19 In response, intervenor submitted evidence that there have been no complaints  
20 regarding dust at their other mining and crushing sites, some of which are located within  
21 urban growth boundaries or close to residential uses. The commissioners ultimately agreed  
22 with intervenor that the evidence in the record did not establish that dust from the proposed  
23 mining/crushing operation would “significantly” conflict with the observatory, and the  
24 commissioners thus declined to expand the impact area to include the observatory.<sup>1</sup>

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<sup>1</sup> The commissioners’ findings state, in relevant part:

1           Petitioners argue that the commissioners’ decision with respect to the observatory is  
2 not supported by substantial evidence. According to petitioners, the astronomer’s testimony  
3 is unrefuted factual information indicating “significant potential conflicts” with the  
4 observatory, and therefore the county erred in failing to expand the impact area to include the  
5 observatory.

6           Substantial evidence is evidence a reasonable person would rely on in reaching a  
7 decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475  
8 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v.*  
9 *Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In  
10 reviewing the evidence, however, we may not substitute our judgment for that of the local  
11 decision maker. Rather, we must consider all the evidence in the record to which we are  
12 directed, and determine whether, based on that evidence, the local decision maker’s  
13 conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346,

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“The Pine Mountain Observatory is approximately 6.5 miles east of the subject property located on top of Pine Mountain. A potential conflict that was identified was dust emanating from the proposed mining operations. The issue is whether this would be a ‘significant’ potential conflict justifying an expansion of the impact area. The Observatory is a substantial distance from the subject property. There are a number of other activities occurring within the Millican Valley and surrounding Paulina Mountains that currently generate dust. These would include the off-road vehicle trails near Millican, the unpaved dirt roads throughout the Millican Valley as well as in the Paulina Mountains, which are heavily used for recreational and hunting purposes, and dust which naturally occurs in Central Oregon. Dust is most likely to occur during crushing operations on the site. However, there was testimony that the Applicant operates similar crushing sites at its Century Drive pit in Bend, Oregon, which is only 300 yards from the entrance to the Broken Top, which is an upscale, golf, planned unit development. There have been no complaints regarding dust from Applicant’s crushing operation. Applicant has also operated a crusher within the city limits of the City of Redmond at the Fireman’s Pond. There have been no complaints from the operation of that surface mine. Applicant also operates a mining operation east of Alfalfa on George Millican Road. There have been no complaints of dust emanating from this site. Applicant also operates a crusher at its O’Neil Junction pit outside of Prineville. No complaints with regard to dust have been received. Based upon the distance from the subject property to the Pine Mountain Observatory, the activities that currently exist within the Millican Valley, and evidence of Applicant’s other crushing operations in Central Oregon, dust would not be a significant potential conflict for the Pine Mountain Observatory. Therefore, the Board finds that the Pine Mountain Observatory is too far to be considered within the mining site’s impact area.” Record 9-10.

1 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584,  
2 588, 842 P2d 441 (1992).

3 The astronomer's testimony is substantial evidence, and the county almost certainly  
4 could have relied on that testimony to conclude that the proposed mine represents a  
5 significant potential conflict with the observatory, justifying an expanded impact area.  
6 However, intervenor argues, and we agree, that that testimony is not so compelling that no  
7 reasonable decision maker could reach a contrary conclusion. The astronomer's testimony  
8 assumes that the proposed mining/crushing operation would produce a significant amount of  
9 dust, and apparently did not take into account the use of water to control dust and the use of  
10 paved internal roads, as required by the county's decision. *See* Record 579-80 (colloquy  
11 between the astronomer and commissioners). As the findings note, there are many other  
12 sources of dust in the area, and it is not at all clear that whatever amount of dust the mine  
13 produces would be significant relative to the existing level of dust. In our view, a reasonable  
14 person could conclude based on the whole record that dust from the operation would not be a  
15 significant potential conflict with the observatory. Accordingly, we must affirm the county's  
16 decision not to expand the impact area to include the observatory.

17 This subassignment of error is denied.

18 **B. Sage Grouse**

19 The commissioners declined to expand the impact area to include a sage grouse lek  
20 (strutting ground) located near the subject property, finding:

21 "The proposed surface mining operation is within 1.25 miles of a sensitive  
22 bird and mammal site. This is a sage grouse site (lek), listed as Site No. DE  
23 0999-01 on the County's Wildlife Inventory \* \* \*. However, the mining site  
24 is located outside of the sensitive bird and mammal (SBM) combining zone,  
25 and does not require SMB review under [DCC 18.90]. Since the mining site  
26 is outside of the SMB combining zone and the sage grouse site is protected by  
27 the SBM combining zone, this site does not represent a significant potential  
28 conflict requiring the expansion of the impact area." Record 10.

1           Petitioners argue that the county failed to consider that the subject property is located  
2 on or near flight paths between the lek and nearby nesting sites, and that noise and dust from  
3 the mine may disrupt sage grouse flight patterns. Petitioners cite to a map from the county  
4 comprehensive plan at Supplemental Record 77 that identifies sage grouse nest sites, leks  
5 and flight paths in the Millican Valley area, which appears to show the subject property in  
6 the middle of several flight paths to and between nest sites and leks. Petitioners also cite to  
7 testimony that sage grouse are highly sensitive to disturbance. Petitioners contend that the  
8 county’s finding fails to address this testimony, indeed makes no findings regarding any  
9 “factual information” at all, but instead simply relies on the SMB combining zone to  
10 conclude that the mine will not represent a significant potential conflict with the identified  
11 lek.<sup>2</sup>

12           Respondents make no meaningful response to this argument, other than to assert that  
13 the county’s decision is supported by substantial evidence. If we understand petitioners’  
14 argument correctly, they dispute the county unexplained finding that the SBM zone is  
15 sufficient to protect the leks sites. We understand petitioners to contend that despite the  
16 SBM zone the proposed mining poses “significant potential conflicts” with the leks sites and  
17 thus the impact area needs to be expanded. According to petitioners, sage grouse use of the  
18 leks is dependent on flight patterns that cross over or near the subject property, and “factual  
19 information” in the record indicates that the mining activity may disrupt those flight patterns,  
20 which in turn may disrupt use of the leks. Absent a more focused response from the county  
21 or intervenor we agree with petitioners that the county’s findings are inadequate to explain  
22 why the county can reasonably rely on the SBM zone to conclude there will be no  
23 “significant potential conflicts” with the leks and thus decline to expand the impact area to  
24 include them.

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<sup>2</sup> Although the decision and the parties do not make this clear, we assume that the leks and other areas protected by the SBM zone are inventoried Goal 5 resources.



1 This subassignment of error is sustained.

2 **C. Evans Well Ranch**

3 The commissioners declined to expand the impact area to include the Evans Well  
4 Ranch, located four miles south of the subject property, finding:

5 “The potential conflicts [with Evans Well Ranch] would include noise, dust,  
6 traffic, vibrations, water draw down, visual impacts and quality of life. This  
7 site is located over four miles south of the subject property. There will be no  
8 traffic generated by the mining site that will go past this Ranch. There is no  
9 evidence that the Ranch will be impacted by noise. There is evidence that the  
10 proposed mining activities will not affect the valley water supply. \* \* \*”  
11 Record 10.

12 Petitioners cite to testimony from the owners of the ranch at Record 103, stating that  
13 if cattle avoid one part of a pasture due to noise or dust, they will overuse another portion,  
14 which could lead to smaller or fewer calves and resulting direct financial loss to the ranchers.  
15 The owners also speculated that if the mining operation impacts sensitive sage grouse  
16 populations, the Bureau of Land Management (BLM) may restrict grazing on the ranchers’  
17 allotments in the area, forcing the ranchers to rely more on privately owned land and  
18 incurring additional costs. Petitioners argue that this testimony is unrefuted, and that the  
19 county erred in failing to expand the study area to include the Evans Well Ranch.

20 The ranchers state that part of their BLM grazing allotment is within the half-mile  
21 impact area. Record 99. We understand the letter at Record 103 to assert that blasting and  
22 other impacts of the proposed mining will cause cattle on that allotment to abandon that  
23 pasture and instead graze more heavily on the privately owned pastures on the ranch itself,  
24 outside the impact area, significantly increasing the rancher’s costs and reducing their  
25 income. The ranchers also speculate that mining impacts on sensitive sage grouse habitat  
26 and flight patterns may cause the BLM to restrict grazing on their allotments, further  
27 impacting the ranch.

28 Intervenor does not cite to any countervailing evidence supporting the county’s  
29 finding of no “significant potential conflicts” with the Evans Well Ranch. The record may

1 include such evidence, but without some assistance from respondents on this point, we will  
2 not independently search the record for such evidence. In any event, in view of the above-  
3 noted testimony that the proposed mining will conflict with nearby cattle operations, the  
4 county must explain in its findings why it believes, despite that testimony, that the proposed  
5 mining will not result in “significant potential conflicts” with respect to the Evans Well  
6 Ranch. As it stands, on this question, the county’s decision is not supported by adequate  
7 findings or substantial evidence.

8 This subassignment of error is sustained.

9 **D. Residential Uses**

10 Petitioners argue:

11 The County’s decision excludes other residences from the impact boundary  
12 without any finding or identified reason for such exclusion. The County erred  
13 as a matter of law in so excluding those other residences identified by the  
14 Hearings Official.” Petition for Review 11.

15 Petitioners do not specify where these “other residences” are located. The hearings  
16 officer’s recommendation includes a table listing existing uses, including “Other residences.”  
17 The table simply notes that the location of these residences “varies” and that potential  
18 conflict issues include “quality of life; traffic.” Record 778. As far as we can tell, the  
19 hearings officer did not recommend that the impact area be expanded to include these  
20 unidentified residences, which perhaps accounts for why the commissioners did not adopt  
21 findings explaining why they are not included in the impact area. Petitioners do not identify  
22 their location, or explain why these dwellings should be included in the impact area. Absent  
23 a more developed argument, petitioners have not established that the county erred in  
24 excluding these unidentified residences from the impact area.

25 This subassignment of error is denied.

26 The second assignment of error is sustained, in part.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioners contend that the county misconstrued OAR 660-023-0180(5)(b)(A) in  
3 concluding that the county may not consider impacts on existing uses that involve “quality of  
4 life” and “aesthetic concerns.”

5 The county found:

6 “After reviewing all the above uses that are further than a half-mile from the  
7 property line, the Board finds that the impact on quality of life of [residents]  
8 and visitors to the Millican Valley and aesthetic concerns may not be  
9 considered because OAR 660-023-0180(5) limits the type of conflicts that  
10 may be considered to those listed in that section. *Morse Bros., Inc. vs.*  
11 *Columbia County*, 37 Or LUBA 85 (1999), *affirmed* 165 Or App 512 [996  
12 P2d 1023] (2000). \* \* \*” Record 10-11.

13 Petitioners argue, to the contrary, that OAR 660-023-0180(5)(b)(A) requires the  
14 county to consider “[c]onflicts due to noise, dust or other discharges with regard to those  
15 existing and approved uses and associated activities (e.g., house and schools) that are  
16 sensitive to such discharges.”<sup>3</sup> According to petitioners, adverse impacts on residents’

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<sup>3</sup> OAR 660-023-0180(5)(b) provides, in relevant part:

“(b) The local government shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. For purposes of this section, ‘approved land uses’ are dwellings allowed by a residential zone on existing platted lots and other uses for which conditional or final approvals have been granted by the local government. For determination of conflicts from proposed mining of a significant aggregate site, the local government shall limit its consideration to the following:

“(A) Conflicts due to noise, dust, or other discharges with regard to those existing and approved uses and associated activities (e.g., houses and schools) that are sensitive to such discharges;

“(B) Potential conflicts to local roads used for access and egress to the mining site within one mile of the entrance to the mining site unless a greater distance is necessary in order to include the intersection with the nearest arterial identified in the local transportation plan. Conflicts shall be determined based on clear and objective standards regarding sight distances, road capacity, cross section elements, horizontal and vertical alignment, and similar items in the transportation plan and implementing ordinances. Such standards for trucks associated with the mining operation shall be equivalent to standards for other trucks of equivalent size, weight, and capacity that haul other materials;

1 “quality of life” or aesthetic concerns must be considered as long as those impacts are caused  
2 by “noise, dust or other discharges.”

3 Intervenor responds that the county’s decision in fact addressed noise, dust and other  
4 impacts on the residents of the Walker dwelling, the only dwelling within the one-half mile  
5 impact area, but the commissioners properly did not consider any quality of life or aesthetic  
6 concerns that are unrelated to noise and dust discharges.

7 We agree with petitioners that any conflict with existing and approved uses, including  
8 residential uses, that are sensitive to such discharges and that are caused by “noise, dust or  
9 other discharges” from the mining operation must be considered under OAR 660-023-  
10 0180(5)(b)(A). Therefore, if “noise, dust or other discharges” result in “quality of life”  
11 concerns, and even “aesthetic concerns,” they may be considered. Although the rule limits  
12 the types of uses that can be conflicting uses, it does not qualify or limit the scope of  
13 “conflicts” that may be caused by noise, dust or other discharges. For example, if there is  
14 substantial evidence that the residents of a dwelling within the impact area will suffer an  
15 adverse impact on their “quality of life” due to noise or dust discharges from a mining  
16 operation, the county must consider such conflicts.

17 Conversely, we agree with intervenor that impacts on “quality of life” or “aesthetic  
18 concerns” that are not caused by noise, dust or other discharges from a mining operation  
19 need not be considered. Visual impacts, for example, are not “noise, dust or other  
20 discharges,” so the fact that residents may be offended at the sight of a mining operation or

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“\* \* \* \* \*

“(D) Conflicts with other Goal 5 resource sites within the impact area that are shown on an acknowledged list of significant resources and for which the requirements of Goal 5 have been completed at the time the PAPA is initiated;

“(E) Conflicts with agricultural practices[.]”

1 who feel that their quality of life has deteriorated due to the mere proximity of a mining site  
2 is not something the county must consider under OAR 660-023-0180(5)(b)(A).

3 Here, the county considered impacts caused by noise, dust and vibrations on the  
4 Walker residence, which is located approximately 2,300 feet from the subject property.  
5 Record 12-13, 16-17. The county even considered impacts on the “quality of life on the  
6 Walker Residence.” Record 17. Petitioners do not challenge those findings. If there are  
7 any impacts caused by noise, dust or other discharges on the Walker residence that the  
8 county failed to consider, petitioners do not identify what they are. Accordingly, any error  
9 the county may have made in interpreting OAR 660-023-0180(5)(b)(A) does not provide a  
10 basis for reversal or remand.

11 The third assignment of error is denied.

#### 12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners contend that the county failed to consider impacts on several existing or  
14 approved land uses either on the subject property or within the one-half mile impact area,  
15 including Spencer Wells Road, pygmy rabbit and sage grouse habitat, and possible native  
16 american archeological and cultural sites within the portion of the Dry River Canyon located  
17 on the subject property.

##### 18 **A. Spencer Wells Road**

19 Spencer Wells Road is a paved county road that is the only access road to the subject  
20 property. Petitioners argue that, while the county considered dust and traffic issues related to  
21 Highway 20, the county failed to identify Spencer Wells Road as a potential conflicting use.

22 Intervenor responds that no party identified Spencer Wells Road as a potential  
23 conflicting use or raised any issues regarding the road. The county found no traffic issues  
24 involving Spencer Wells Road.

25 Petitioners do not assert that any party below identified Spencer Wells Road as a  
26 potential conflicting use, or raised any issues regarding impacts on the road. Petitioners do

1 argue that the same “dust, traffic and maintenance issues” that the county identified with  
2 respect to Highway 20 “also apply” to Spencer Wells Road. Petition for Review 13. We  
3 reject, below, petitioners’ challenges to the county’s findings regarding impacts on Highway  
4 20. Petitioners do not explain why the county’s resolution of those issues with respect to  
5 Highway 20 does not apply with equal force to Spencer Wells Road. The only attempt, in a  
6 footnote, is a challenge to the county’s reasoning that any increased maintenance costs to  
7 Highway 20 would be offset by the fact that a similar number of trucks would use other  
8 highways if the mining is not approved.<sup>4</sup> Petition for Review 13, n 5. Petitioners argue that  
9 that reasoning would not apply to the Spencer Wells Road. However, that reasoning, for  
10 what it is worth, seems to us equally applicable to Spencer Wells Road. If the mining  
11 operation is not approved, the county will obtain the necessary aggregate from other sites  
12 that presumably are accessed by other county roads. Petitioners have not established that the  
13 county erred in failing to identify Spencer Wells Road as a potential conflicting use.

14 This subassignment of error is denied.

15 **B. Wildlife Habitat**

16 Petitioners argue that the county failed to properly consider impacts on sensitive  
17 pygmy rabbit and sage grouse habitat located on the subject property. According to  
18 petitioners, intervenor’s own wildlife expert identified what might be pygmy rabbit burrows  
19 and possible sage grouse “dusting” sites on the subject property. Yet, petitioners argue, the  
20 county concluded that “there was no conclusive evidence of [pygmy rabbits or sage grouse]  
21 being found on this project site.” Record 14.

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<sup>4</sup> The county’s analysis of economic consequences of allowing the proposing mining use includes the following finding:

“U.S. Highway 20: The only economic impact that can be identified to US. Highway 20, which is the other approved land use, would be increased maintenance on the Highway. However, this will be offset by the fact that these trucks will be on some other highway in Central Oregon if this site is not approved.” Record 17.

1 Intervenor responds that the county considered wildlife habitat on the subject  
2 property, and concluded, based on the report by intervenor’s biologist in consultation with  
3 the Oregon Department of Fish and Wildlife (ODF&W), that neither pygmy rabbits nor sage  
4 grouse were present on the property. We agree with intervenor that petitioners misread the  
5 biologist’s report. The biologist found one set of burrows with some but not all of the  
6 characteristics of pygmy rabbit burrows, and concluded that there was “some possibility”  
7 that the burrows belonged to pygmy rabbits rather than other, non-sensitive species, but  
8 ultimately found no conclusive evidence that pygmy rabbits existed on the property. With  
9 respect to the sage grouse “dusting” site, the biologist ultimately concluded that it was a  
10 dusting site for the non-sensitive kangaroo rat. The report supports the county’s finding that  
11 there is no conclusive evidence of pygmy rabbits or sage grouse on the property.

12 This subassignment of error is denied.

13 **C. Native American Archeological and Cultural Sites**

14 The northern portion of the subject property includes a section of the Dry River  
15 Canyon. Petitioners cite to evidence that the Dry River Canyon area in general is one of the  
16 most important archeological areas in the state, and an area that is used for cultural and  
17 religious purposes by several recognized Oregon tribes. Intervenor hired an expert to  
18 conduct an archeological survey of the portion of the subject property that would be mined.  
19 According to petitioners, the expert focused on the mining site itself, and did not examine the  
20 majority of the canyon area on the property, which lies mostly within a 600-foot buffer zone  
21 between the mining site and Highway 20. Nonetheless, petitioners point out, the survey  
22 found a prehistoric tool manufacturing site, among others, in or near the canyon. The expert  
23 found that none of the archeological sites were significant, however, and concluded that the  
24 proposed mining would not impact any significant archeological resources.

25 Petitioners argue that the county erred in not requiring the applicant to survey the rest  
26 of the canyon on the subject property. The ostensible reason for not surveying the rest of the

1 canyon was because that portion is within a 600-foot buffer area between the mining site  
2 itself and Highway 20 that will not be mined. However, petitioners contend, intervenor was  
3 afraid of what its expert might find if allowed to fully survey the canyon.

4 Intervenor responds that the county evaluated impacts on a known archeological site  
5 that is located on the Walker property, approximately 3,044 feet from the mining site.  
6 Pictograms are located on that site. The county found that that site would not impacted by  
7 blasting vibrations or dust. However, that response misses the mark. Petitioners' argument  
8 concerns possible archeological sites in the portion of Dry River Canyon located on the  
9 subject property, within several hundred feet of the mining site, not the known site on the  
10 Walker property. Nothing cited to us in the county's decision addresses potential mining  
11 conflicts with those possible sites.

12 Nonetheless, petitioners do not identify any administrative rule or other applicable  
13 land use regulation that requires the applicant to survey the portion of Dry River Canyon  
14 within the 600-foot buffer area between the mining site and Highway 20 for undiscovered  
15 archeological sites. Such sites, if they exist, are not inventoried Goal 5 resources. In any  
16 case, petitioners merely speculate that significant archeological sites may exist in the  
17 unsurveyed portion, but there is apparently no evidence on that point whatsoever.  
18 Accordingly, petitioners have not demonstrated that the county erred in failing to consider  
19 conflicts with unknown archeological sites within the 600-foot buffer.

20 This subassignment of error is denied.

21 The fourth assignment of error is denied.

## 22 **FIFTH ASSIGNMENT OF ERROR**

23 Petitioners contend that the county failed to address all of the potential conflicts with  
24 a known archeological site with native pictograms that is located on the Walker property  
25 within the impact area north of Highway 20. According to petitioners, the county evaluated  
26 only the impacts of vibration and dust under OAR 660-023-0180(5)(b)(A) and failed to



1 evaluate the risk that fires stemming from mining activities on the subject property could  
2 damage the pictograms. Petitioners also contend the county ignored testimony from a forest  
3 service archeologist that diesel exhaust and other discharges from mining activities might  
4 damage the pictograms.

5 Intervenor responds that the subject property is part of the Oregon high desert, and  
6 there is no reason to believe that a fire started on the subject property would significantly  
7 increase the existing chances that wildfire could damage the pictograms, which have  
8 survived thousands of years of wildfires. Intervenor notes that the pictograms are separated  
9 from the mining site by Highway 20, and that the decision requires intervenor to procure a  
10 water right and construct a storage pond on site, which reduces whatever likelihood exists  
11 that mining activities might start a fire that could spread across the highway to the pictogram  
12 site 3,000 feet away. Intervenor argues that the county properly did not consider fire and  
13 diesel exhaust as “discharges” that required consideration under OAR 660-023-  
14 0180(5)(b)(A).

15 We agree with intervenor. Even assuming a wildfire caused by mining activities is  
16 properly viewed as a “discharge” for purposes of OAR 660-023-0180(5)(b)(A), petitioners  
17 cite to no evidence suggesting that mining activities are likely to increase the risk of wildfires  
18 in the area or the risk to the pictogram site, especially given the barrier formed by Highway  
19 20. With respect to diesel exhaust, petitioners cite to no evidence suggesting that diesel  
20 emissions from mining operations are likely to impact the pictogram site, or impact it to any  
21 greater degree than emissions from existing traffic on Highway 20, which is much closer to  
22 the pictogram site. Accordingly, petitioners’ arguments under this assignment of error do not  
23 provide a basis for reversal or remand.

24 The fifth assignment of error is denied.

1 **SIXTH ASSIGNMENT OF ERROR**

2 As noted, OAR 660-023-0180(5)(b)(A) requires the county to identify conflicts due  
3 to “discharges with regard to those existing and approved uses and associated activities (e.g.,  
4 houses and schools) that are sensitive to such discharges.” Petitioners contend that the  
5 county erred in evaluating only “approved” uses under OAR 660-023-0180(5)(b)(A), and  
6 failed to properly evaluate “existing” uses such as the pictograms on the Walker property, the  
7 historic Coyote Well, Highway 20, and the Best Shelter.

8 As an initial matter, it is not clear to us that the county limited its evaluation to  
9 “approved” uses and ignored “existing” uses, as petitioners claim. Petitioners cite no finding  
10 to that effect, other than to a finding at Record 12 that the Walker residence is the only  
11 “approved” use in the impact area. However, that finding appears to be correct, as far as it  
12 goes. The finding does not suggest that the county declined to evaluate “existing” uses. That  
13 observation aside, we turn to petitioners’ particular arguments.

14 **A. Pictograms**

15 The county identified dust and vibration impacts as potential conflicts with the  
16 pictograms on the Walker property. Petitioners argue that the pictograms are “existing” uses,  
17 and repeat their above arguments that the county failed to evaluate fire and diesel exhaust  
18 emissions. In addition, petitioners dispute the evidence submitted by intervenor’s expert  
19 below that blasting from the mining site would not disturb the pictograms. Finally,  
20 petitioners argue that even if the blasting does not disturb the pictograms, it may disturb  
21 native American religious and cultural ceremonies centered around the pictogram site.

22 The county found that the pictograms are not Goal 5 inventoried resources, and so do  
23 not require evaluation under OAR 660-023-0180(5)(b)(D). Record 13. Petitioners do not  
24 dispute that finding, but instead argue that the pictograms are “existing” uses that must be  
25 evaluated under OAR 660-023-0180(5)(b)(A). Intervenor does not dispute that view, and we

1 assume for purposes of this opinion that petitioners are correct. Instead, intervenor argues  
2 only that the county properly evaluated conflicts with the pictograms.

3 We already rejected petitioners' arguments above that the county must consider fire  
4 and exhaust conflicts as well as dust and vibrations, and do not repeat that analysis here.  
5 With respect to blasting impacts on the pictograms, intervenor cites to a vibrations study  
6 concluding that the proposed blasting would fall well below European standards for  
7 protecting cultural resources from vibration and would not harm the pictograms. Although  
8 petitioners critique that study on various grounds, petitioners have not demonstrated that the  
9 study is not substantial evidence that a decision maker could rely upon to reach a conclusion  
10 regarding vibration impacts on the pictograms.

11 The issue of native American religious and cultural use of the area around the  
12 pictograms is a more difficult one. Intervenor does not respond to that argument, and  
13 nothing cited to us in the decision addresses it. Petitioners cite to testimony that the area  
14 around the pictograms includes numerous burial sites, and that tribal members visit the area  
15 to conduct religious and cultural ceremonies honoring their ancestors. A tribal cultural  
16 resource protection specialist stated that the proposed mining operation would destroy an  
17 area that demands quiet for tribal members that visit for religious and cultural purposes.  
18 Absent some response from intervenor or the county on this issue, we agree with petitioners  
19 that remand is necessary for the county to evaluate whether such visits are "existing" uses for  
20 purposes of OAR 660-023-0180(5)(b)(A) and, if so, to evaluate alleged conflicts with those  
21 uses.

22 This subassignment of error is sustained, in part.

23 **B. Coyote Well**

24 Coyote Well is a historic structure located approximately 1,350 feet from the subject  
25 property. The county identified vibrations and water draw down as potential conflicts, and  
26 concluded that the proposed mining operation would not impact the aquifer that feeds the

1 well. Record 14. However, petitioners argue that the county in fact failed to evaluate  
2 whether vibrations from blasting could impact the structure.

3 Intervenor does not respond to this argument, and does not cite to any part of the  
4 decision addressing the question of vibration impacts on Coyote Well. Accordingly, remand  
5 is necessary so that the county can adopt findings to address that issue. This subassignment  
6 of error is sustained.

7 **C. Highway 20**

8 The county identified dust as a potential conflict with Highway 20. Petitioners argue  
9 that the county inadequately evaluated dust conflicts and failed to determine how such  
10 conflicts may be mitigated under OAR 660-023-0180(5)(c). *See* n 5. Further, petitioners  
11 argue that the county failed to evaluate at all the possibility that blasting might send large  
12 rocks onto the highway, endangering motorists. Petitioners cite to testimony that blasting at  
13 one of intervenor's other mines caused rocks and debris to fall onto adjacent properties,  
14 causing property damage.

15 Intervenor responds that the county required the use of paved internal roads and water  
16 to minimize dust from mining and crushing, and that such measures are sufficient to  
17 minimize any conflict regarding dust between the mining operation and Highway 20. We  
18 agree with intervenor. Petitioners do not explain why those measures are inadequate or what  
19 further evaluation the county is required to undertake with respect to dust impacts on  
20 Highway 20.

21 With respect to blasting, intervenor responds elsewhere that petitioners rely upon one  
22 isolated incident involving a different mining operation and do not explain why there is any  
23 basis for concern that blasting on the subject property will cause rocks and debris to impact  
24 Highway 20. Again, we agree. The county required a 600-foot buffer area between the  
25 mining site and Highway 20. There may be evidence in the record indicating that that buffer  
26 area is insufficient to protect the highway from flying rocks and debris generated by blasting

1 at the proposed levels, but if so petitioners do not cite it to us. This subassignment of error is  
2 denied.

3 **D. Best Shelter**

4 The county identified dust, noise, traffic and vibrations as potential conflicts with the  
5 Best Shelter, which apparently is a historic structure of some type located on private property  
6 approximately 1,775 feet from the subject property. Petitioners argue, however, that the  
7 county failed to evaluate those potential impacts and either mitigate any impacts under  
8 OAR 660-023-0180(5)(c) or address them under the ESEE analysis at OAR 660-023-  
9 0180(5)(d). *See* ns 5 and 8, below.

10 Intervenor responds, simply, that “there is no real good identity of what that shelter  
11 consists of,” and that “[t]he owner of the property did not testify or submit any other  
12 information.” Response Brief 7. Those responses may be accurate, but they do not give us a  
13 basis to reject petitioners’ arguments. Intervenor does not cite to any findings that address  
14 conflicts with the shelter, or explain why such conflicts need not be addressed. This  
15 subassignment of error is sustained.

16 The sixth assignment of error is sustained, in part.

17 **SEVENTH ASSIGNMENT OF ERROR**

18 Petitioners repeat under this assignment of error their arguments that the county failed  
19 to address under OAR 660-023-0180(5)(b)(A) other “discharges” such as fire, diesel exhaust  
20 and flying rocks, addressed above. We reject those arguments for the reasons expressed  
21 above.

22 The seventh assignment of error is denied.

23 **EIGHTH ASSIGNMENT OF ERROR**

24 OAR 660-023-0180(5)(b)(E) requires the county to consider “[c]onflicts with  
25 agricultural uses.” *See* n 3. OAR 660-023-0180(5)(c) provides that minimizing identified

1 conflicts with agricultural practices means conforming to the requirements of ORS 215.296.<sup>5</sup>  
2 The statute, in turn, requires findings on whether the proposed use would force a significant  
3 change in or significantly increase the cost of agricultural practices on nearby lands.<sup>6</sup>

4 Petitioners challenge the following finding:

5 “Staff reviewed in detail the potential conflicts that occur for uses allowed in  
6 the EFU/HR Zone in the Staff Report dated January 6, 2005. The Board  
7 concurs with the Staff findings on these potential conflicts and, thus, excerpts  
8 from that Staff Report are incorporated herein by reference. See Exhibit G.  
9 Within the impact area itself, the only agricultural uses have been very limited  
10 dry land grazing and would not be considered significant.” Record 13-14.

11 Petitioners argue that the county misunderstood OAR 660-023-0180(5)(b)(E) to be  
12 limited to evaluation of conflicts with “significant” agricultural uses. However, petitioners  
13 argue, the rule includes no such qualification, and plainly requires that the county evaluate  
14 conflicts with *any* agricultural uses within the impact area, whether significant or not.  
15 Petitioners argue that the county failed to determine whether proposed measures would  
16 minimize conflicts to agricultural practices under ORS 215.296, and in fact did not address  
17 the statute at all. Petitioners cite to the testimony of the Evans Well ranchers that impacts of

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<sup>5</sup> OAR 660-023-0180(5)(c) sets out the third step in the Goal 5 aggregate and mineral resources evaluation process, that of minimizing conflicts identified under OAR 660-023-0180(5)(b):

“The local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section. To determine whether proposed measures would minimize conflicts to agricultural practices, the requirements of ORS 215.296 shall be followed rather than the requirements of this section. If reasonable and practicable measures are identified to minimize all identified conflicts, mining shall be allowed at the site and subsection (d) of this section is not applicable. If identified conflicts cannot be minimized, subsection (d) of this section applies.”

<sup>6</sup> ORS 215.296(1) provides:

“A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:

“(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

“(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.”

1 the proposed mining may significantly change or cause significant increase in the costs of  
2 their ranching practices.

3 Intervenor responds that nothing in the record indicates that dry land grazing within  
4 the one-half mile impact area would be affected by the proposed mining.

5 Petitioners are correct that, for purposes of identifying conflicts with agricultural uses  
6 within the impact area under the second step of the Goal 5 process at OAR 660-023-  
7 0180(5)(b)(E), the rule is not concerned with the relative significance of the agricultural use.  
8 Petitioners are also correct that, as required under the third step of the Goal 5 process, the  
9 county's decision does not address ORS 215.296, or make any explicit effort to determine  
10 whether there are proposed measures would minimize conflicts to agricultural practices  
11 under that statute.

12 As discussed under the second assignment of error, the owners of the Evens Well  
13 Ranch apparently graze their cattle on BLM allotments within the half-mile impact area, and  
14 testified that the mining operation would adversely affect grazing on those allotments, and  
15 would significantly change grazing operations and significantly increase the costs of grazing  
16 operations on the entire ranch. The county's findings do not address that testimony and, as  
17 noted, do not address ORS 215.296 or evaluate whether there are measures that would  
18 minimize conflicts with agricultural uses, under the third step of the Goal 5 process at  
19 OAR 660-023-0180(5)(c). The above-quoted findings incorporate unidentified "excerpts"  
20 from the January 6, 2005 staff report, which is found beginning at Record 1562. However,  
21 nothing cited to us in that staff report addresses impacts on grazing in general or the grazing  
22 operation of the Evens Well Ranch in particular.

23 The eighth assignment of error is sustained.

24 **NINTH ASSIGNMENT OF ERROR**

25 The proposed mining site includes the lowest area in the Dry River drainage, called  
26 Teepee Draw. Petitioners cite to testimony from a geologist expressing concern that once the

1 mining pit reached a certain depth, it will draw water from nearby shallow perched aquifers  
2 that support the Dry River and hydrologic features such as Coyote Well. Record 878-79.  
3 The county addressed these concerns by adopting the following finding:

4 “There was concern expressed about water. The Applicant has applied for a  
5 water right permit for a well to be located on the property. There is no  
6 evidence that this groundwater right will in any way impact the regional  
7 aquifer. It will not have any effect on small aquifers like the one feeding the  
8 Coyote Well. See Letter from Oregon Water Resource Dept. of 7/22/05 and  
9 E-mail from Marshall Gannit of 08/02/05, Exhibit ‘A.’” Record 14.

10 Petitioners argue that the question is not whether the well to be drilled on the subject  
11 property will impact the regional aquifer, but whether the mining pit itself will dewater  
12 nearby shallow perched aquifers. According to petitioners, the county’s findings are non-  
13 responsive to that concern expressed by the geologist.

14 Intervenor makes no meaningful response to this assignment of error. Petitioners  
15 appear to be correct that the county misunderstood the issue to be whether the groundwater  
16 well into the regional aquifer would impact the shallow perched aquifers, and did not  
17 evaluate the concern raised by the geologist that the mining pit itself might impact those  
18 aquifers. We agree with petitioners that remand is necessary to address this issue and  
19 conduct any necessary evaluations under OAR 660-023-0180(5).

20 The ninth assignment of error is sustained.

21 **TENTH ASSIGNMENT OF ERROR**

22 As noted, OAR 660-023-0180(5)(c) requires the county to determine reasonable and  
23 practicable measures that would minimize identified conflicts. *See* n 5. The only identified  
24 conflict the county considered under OAR 660-023-0180(5)(c) is with antelope winter range,  
25 a Goal 5-inventoried resource, protected by a wildlife overlay zone that applies to the subject  
26 property. The county concluded that with restrictions on blasting and crushing during certain  
27 winter periods that the conflict would be minimized.



1           Petitioners challenge those findings under this assignment of error, arguing that the  
2 county failed to adequately mitigate adverse impacts, as required by OAR 660-023-  
3 0180(5)(c), with respect to the Goal 5 protected antelope winter range, as well as non-Goal 5  
4 wildlife habitat.<sup>7</sup>

5           **A.     Antelope Winter Range**

6           Intervenor’s wildlife expert consulted with ODF&W and proposed the following  
7 mitigation or means of minimizing the conflict with antelope winter range, quoted in the  
8 county’s decision at Record 14:

9           “Blasting and crushing will cease during periods of severe winter weather  
10 conditions that may force antelope with no alternative winter range into the  
11 area adjacent to the rock pit. [ODF&W’s biologist] will monitor severe  
12 winter conditions based on snow depth, temperature, and numbers of antelope  
13 within 2 miles of the rock pit. [The biologist] will notify the applicant when  
14 cessation of crushing and blasting is deemed necessary by the [biologist] due  
15 to antelope winter range conditions. Cessation of blasting and crushing may  
16 be necessary within 24 hrs. notice due to the nature of winter storms. The  
17 applicant may choose to remove crushing equipment if crushing/blasting  
18 cessation is necessary, and this removal will take up to two weeks from the  
19 date of notice of cessation.”

20           The findings recite that ODF&W reviewed the proposed mitigation and concluded  
21 that it is sufficient to protect antelope during the winter months that the range is used.

22           Petitioners argue that the proposed mitigation and the county’s findings are  
23 inadequate, because they fail to address the possibility that the mining operation may dewater  
24 the perched aquifers that support standing water in the area, including Coyote Well.  
25 Petitioners also contend that even if blasting and crushing is stopped for certain periods  
26 during the winter, the noise of excavation, haul trucks, generators etc. is on-going and is  
27 likely to drive antelope away from the site. Further, petitioners contend that ODF&W  
28 expected further mitigations that in fact were not forthcoming. Finally, petitioners dispute

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<sup>7</sup> Petitioners also repeat their arguments under the eighth assignment of error with respect to impacts on livestock grazing, and their arguments under the fourth assignment of error with respect to pygmy rabbits and sage grouse habitat. We do not address those arguments here.

1 the adequacy of the cessation requirements, arguing that blasting and crushing could  
2 continue for up to 24 hours after a cessation warning.

3 Intervenor responds that the expert’s wildlife study and ODF&W’s letter concurring  
4 with the proposed mitigation are substantial evidence supporting the county’s findings that  
5 the proposed measures adequately minimize identified conflicts with antelope winter range.  
6 We generally agree. Petitioners cite no evidence that antelope using the winter range rely  
7 upon Coyote Well or other local sources of water supported by perched aquifers in the area.  
8 That may be the case, but without some evidence to that effect we decline to remand for  
9 findings on that issue. Similarly, petitioners cite to no evidence that noises associated with  
10 mining activities other than blasting or crushing are likely to drive antelopes away from  
11 winter range during cessation periods.

12 The ODF&W letter at Record 1665 concludes that the proposed mitigation is  
13 “sufficient” to protect antelope winter range. The letter does state that the agency is  
14 “look[ing] forward to reviewing the remaining measures that [intervenor] will put into the  
15 ESEE analysis to mitigate the effects of the surface mining activity,” but nothing in the letter  
16 suggests that the “remaining measures” that ODF&W was looking forward to reviewing  
17 related to antelope winter range, or otherwise qualifies the agency’s view that the proposed  
18 antelope winter range mitigation is “sufficient.” ODF&W’s opinion on that point is  
19 substantial evidence, and petitioners’ unsupported preference for more rigorous minimization  
20 measures is not a basis for remanding the county’s decision.

21 The tenth assignment of error is denied.

22 **ELEVENTH ASSIGNMENT OF ERROR**

23 OAR 660-023-0180(5)(d) sets out the final step in the Goal 5 analysis, requiring that  
24 the local government determine, based on significant conflicts that cannot be minimized, the

1 ESEE consequences of either allowing, limiting or not allowing mining.<sup>8</sup> The county  
2 applied OAR 660-023-0180(5)(d) to four conflicting uses: the Walker residence, antelope  
3 winter range, Highway 20, and agricultural uses, and ultimately concluded based on analysis  
4 of the ESEE consequences that “mining should be allowed on the site, subject to certain  
5 required measures to minimize conflicts.” Record 19.

6 Petitioners contend that the county’s analysis of ESEE consequences of allowing  
7 mining is inadequate, in a number of particulars. Many of petitioners’ arguments under this  
8 assignment of error rehash issues raised in earlier assignments of error, involving earlier  
9 steps of the Goal 5 process, some of which were resolved in petitioners’ favor and others that  
10 were not. The issues that were not resolved in petitioners’ favor also do not provide a basis  
11 to remand the county’s findings under the fourth step ESEE process at OAR 660-023-  
12 0180(5)(d). The issues that were resolved in petitioners’ favor may or may not require  
13 modified or additional findings under OAR 660-023-0180(5)(d), depending on how the  
14 county responds to our remand of those issues. That is, on remand, the county must adopt  
15 amended or additional findings addressing those remanded assignments or subassignments of  
16 error. Depending on the conclusions reached in those amended or additional findings, the  
17 county may be required to adopt amended or additional findings under its ESEE analysis for  
18 purposes of OAR 660-023-0180(5)(d).

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<sup>8</sup> OAR 660-023-0180(5)(d) provides:

“The local government shall determine any significant conflicts identified under the requirements of subsection (c) of this section that cannot be minimized. Based on these conflicts only, local government shall determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site. Local governments shall reach this decision by weighing these ESEE consequences, with consideration of the following:

- “(A) The degree of adverse effect on existing land uses within the impact area;
- “(B) Reasonable and practicable measures that could be taken to reduce the identified adverse effects; and
- “(C) The probable duration of the mining operation and the proposed post-mining use of the site.”

1 Under these circumstances, we see no purpose in resolving petitioners’ challenges to  
2 the county’s existing findings addressing OAR 660-023-0180(5)(d). Accordingly, we do not  
3 reach the eleventh assignment of error.

4 **TWELFTH ASSIGNMENT OF ERROR**

5 The twelfth assignment of error concerns the county’s analysis of the ESEE  
6 consequences from allowing mining to the Walker residence, which is located 2,300 feet  
7 away from the mining site across Highway 20. Petitioners challenge the county’s evaluation  
8 of noise and dust impacts on the dwelling under OAR 660-023-0180(5)(d). Because no other  
9 sustained assignment of error has involved impacts to the Walker residence, we see no reason  
10 to delay or defer consideration of the arguments in this assignment of error.

11 **A. Noise Impacts**

12 The county concluded that noise from the mining operation will be “minimized by the  
13 existence of Highway 20,” and by the fact that the mining operation will occur below grade.  
14 <sup>9</sup> Petitioners challenge those conclusions, arguing that the highway noise will not mask the  
15 mining operation noise, but rather that both sources of noise will stack on each other to  
16 cumulatively increase the ambient noise. Further, petitioners note that the first phases of the  
17 mining operation will necessarily occur above grade.

18 Intervenor argues that it submitted expert evidence as to the projected noise impact  
19 on nearby uses, which petitioners do not challenge, concluding that at a distance of 1,500 feet  
20 noise from the crusher would not rise above ambient noise levels. Record 343-44.  
21 Petitioners cite to no contrary evidence. Petitioners also cite to no evidence that noise from  
22 the highway and mining operation would “stack.” We agree with intervenor that petitioners’

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<sup>9</sup> The county found, as follows:

“\* \* \* Although the ambient noise levels should not increase with the operation of the surface mine, it is likely that there will be noise from the site itself. However, this is minimized by the existence of Highway 20, lying between the Walker residence and the proposed mining operation, which will occur below grade.” Record 17.

1 arguments regarding noise impacts on the Walker residence do not provide a basis for  
2 remand.

3 **B. Dust Impacts**

4 The county found that intervenor will use water to minimize any dust impacts on the  
5 Walker residence and further noted evidence that dust has not been an issue with intervenor's  
6 other crushing sites, including two that occur within urban growth boundaries.<sup>10</sup>

7 Petitioners dispute those findings, arguing that comparison with intervenor's other  
8 mining sites on which only crushing occurs is not sufficient, because it fails to account for  
9 dust associated with the excavation and blasting that would also occur at the subject site.  
10 Citing to photographs in the record, petitioners argue that blasting can generate considerable  
11 amounts of dust. Petitioners argue that as far as they know water cannot be used to minimize  
12 dust generated from blasting, and nothing in the decision or record quantifies or evaluates  
13 dust from blasting.

14 Intervenor's entire response consists of the following sentence:

15 "The [county] is well aware of the other sites operated by [intervenor] and it  
16 would not be appropriate for LUBA to substitute its judgment for the  
17 judgment of the [county] in evaluating the prior performance of the  
18 [intervenor]." Response Brief 11.

19 We do not understand the response, other than perhaps as a general assertion that the  
20 challenged finding is supported by substantial evidence. Intervenor does not dispute  
21 petitioners' assertions that the decision does not evaluate dust from blasting, that blasting  
22 generates significant amounts of dust, that water cannot be used to control dust from blasting,

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<sup>10</sup> The county found, in relevant part:

"Dust could also have an impact on the Walker residence. The degree of impact will depend upon the conditions imposed on any surface mining that would occur. The Applicant has a water right and will be able to utilize water to minimize dust, especially during crushing. There is evidence that the Applicant has other existing crushing sites within Central Oregon and that fugitive dust has not been an issue in the operation of these sites, even though two of them occur within urban growth boundaries." Record 17.

1 and that the comparison sites the county refers to do not involve excavation and blasting.  
2 Those assertions may or may not be correct, but without some assistance from intervenor it is  
3 difficult to agree with intervenor that the challenged finding is adequate and supported by  
4 substantial evidence.

5 OAR 660-023-0180(5)(d) requires the county to evaluate the ESEE consequences of  
6 allowing mining on those conflicts that cannot be minimized under OAR 660-023-  
7 0180(5)(c), under three additional listed considerations, including any “[r]easonable and  
8 practicable measures that could be taken to reduce the identified adverse effects.” *See* n 8.  
9 As far as we can tell, the county did not evaluate dust generated by blasting, or determine if  
10 such conflicts with the Walker residence can be minimized or reduced. It may be, as  
11 petitioners suggest, that there are no reasonable and practicable measures to minimize or  
12 reduce adverse impacts on the Walker residence caused by blasting-generated dust, in which  
13 case the ESEE analysis must consider those impacts in weighing whether to allow, limit or  
14 prohibit mining. However, the county’s ESEE findings on this point apparently did not  
15 consider or evaluate that source of dust. Accordingly, we agree with petitioners that remand  
16 is necessary to consider the issues raised under this subassignment of error.

17 The twelfth assignment of error is sustained, in part.

## 18 **CONCLUSION**

19 In this opinion we have sustained all or part of the second, sixth, eighth, ninth and  
20 twelfth assignments of error and denied the remainder, with the exception of the eleventh  
21 assignment of error, which we did not resolve. On remand the county must conduct  
22 additional proceedings that may, if the county deems it necessary, include introduction of  
23 new evidence, and adopt amended or additional findings addressing the remanded issues. As  
24 noted above under the eleventh assignment of error, depending on how the county resolves  
25 the remanded issues under the earlier steps of the Goal 5 process, the county may also be

- 1 required to adopt amended or additional findings under the ESEE analysis required by
- 2 OAR 660-023-0180(5)(d).
- 3           The county's decision is remanded.