BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TAMMERA WALKER and CLAY WALKER,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

4-R EQUIPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2008-189

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, P.C.

No appearance by Deschutes County.

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

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

REMANDED 09/22/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a comprehensive plan amendment and zone change 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

This case is before us for a second time. We stated the facts in our first opinion:

> "The subject property is located on Highway 20 in 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 (SMIA) overlay zone on all properties within one-half mile of the boundary of the subject property. The SMIA overlay zone imposes standards on the use of nearby properties to reduce conflicts with the proposed surface mining operation." *Walker v. Deschutes County*, 55 Or LUBA 93, 96 (2007)

Petitioners appealed the commissioners' decision to LUBA. We remanded, sustaining all or part of five assignments of error. In relevant part, we remanded for the

county to adopt additional findings with respect to (1) whether to expand the "impact area" to include a protected sage grouse site and nearby grazing lands, (2) conflicts with grazing uses, Native American religious and cultural visits, and a nearby residence.

On remand, the county held a public hearing and again approved the requested plan and zoning amendments, adopting additional findings of fact and adding three conditions of approval. This appeal followed.

FIRST AND FOURTH ASSIGNMENTS OF ERROR

OAR 660-023-0180(5) sets out the procedures and standards for determining whether to allow mining of a significant mineral resource. Generally, the county must first determine the size of the "impact area" to be studied, limited to 1500 feet from the mining area, unless "factual information indicates significant potential conflicts beyond this distance[.]"[1] In the

---

[1] OAR 660-023-0180(5) states in relevant part:

> "For significant mineral and aggregate sites, local governments shall decide whether mining is permitted. * * *
>
> "(a) The local government shall determine an impact area for the purpose of identifying conflicts with proposed mining and processing activities. The impact area shall be large enough to include uses listed in subsection (b) of this section and shall be limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond this distance. For a proposed expansion of an existing aggregate site, the impact area shall be measured from the perimeter of the proposed expansion area rather than the boundaries of the existing aggregate site and shall not include the existing aggregate site.
>
> "(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;
>
> "* * * * *

present case, the county chose an impact area of one-half mile from the property boundary of the tract that includes the mining site, instead of the 1,500-foot impact area required by OAR 660-023-0180(5)(a), because the half-mile distance corresponded to the SMIA overlay zone. Under OAR 660-023-0180(5)(b), once the county selects the impact area to be studied, the county then determines whether certain existing or approved land uses within the impact area will be adversely affected by proposed mining operations, including conflicts with residential uses, agricultural practices, and acknowledged Goal 5 resource sites.

In *Walker*, LUBA remanded the county's initial decision for the county to consider whether to expand the impact area beyond one-half mile to include nearby grazing lands that are part of the Evans Well Ranch, in response to testimony from the ranchers that blasting and other impacts of the proposed mine could adversely affect their grazing operation. On remand, the county declined to expand the impact area, concluding that the record did not include factual information indicating that the mine could cause a significant potential conflict with grazing on the portion of the Evens Well Ranch closest to the mine, a 40-acre allotment adjacent to the subject property.[2] Based on similar findings, the county ultimately

---

> "(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[.]"

[2] The county's findings regarding OAR 660-023-0180(5)(a) state, in relevant part:

> "One 40-acre portion of the [Evens Well Ranch] 22,285-acre grazing allotment does abut the southwest corner of the proposed mining site. The proposed mining site will be fenced, prohibiting grazing cattle from entering the site itself. The abutting 40-acre portion of the grazing allotment amounts to only less than one percent (1%) of the total grazing allotment for Evens Wells Ranch. More than 22,245 acres of the grazing allotment lie outside of the impact area.
>
> "Both site visits and aerial photographs confirm that there are no irrigated pastures within three (3) miles of the subject property. Private property borders three sides of the 40-acre parcel of grazing pasture. The [county] relies on evidence from the Applicant, who operates a similar mining site east of Alfalfa. That property is surrounded by a BLM [Bureau of Land Management] grazing allotment[, the owner of which] has a key to the Alfalfa mining site,

concluded for purposes of OAR 660-023-0180(5)(b)(E) that mining would not conflict with agricultural practices within the impact area.[3]

Under the first assignment of error, petitioners argue that the county erred in failing to expand the impact area to include other portions of the Evans Well Ranch. Under the fourth assignment of error, petitioners challenge the county's findings with respect to conflicts with agricultural uses within the one-half mile impact area. Because the issues raised under these assignments of error overlap, we discuss them together.

With respect to the size of the impact area, petitioners argue that the county misconstrued the applicable law, by evaluating only the 40-acre grazing allotment that is immediately adjacent to the subject property, rather than evidence regarding impacts on other nearby grazing lands. Petitioners contend that the findings are inadequate, because they do

---

> allowing his cattle to use the water impound, if necessary. He also uses the scale to weigh hay that he hauls from his ranch.
>
> "Based upon the size of the Evans Wells Ranch BLM grazing allotment, the location of the grazing allotment, and the evidence from a similar mining site, the [county] concludes that the proposed mining would not result in a 'significant potential conflict' with respect to the Evans Wells Ranch grazing allotment and the operation of the ranch." Record 6.

[3] The county's findings under OAR 660-023-0180(5)(b)(E) state, in relevant part:

> "There is an adjacent 40-acre parcel to the west and additional properties administered by the BLM lying south and west of the subject property, that are part of the Evans Wells Ranch (Nash) BLM Grazing Allotment. The Evans Wells Ranch Grazing Allotment on BLM lands consists of 22,285 acres. The allotment all lies west of Spencer Wells Road and south of U.S. Highway 20. * * * The BLM assigns a time of year and length of time for each pasture within the grazing allotment. Of that portion of the grazing allotment that lies within the impact area, that portion of the grazing allotment amounts to only one percent (1%) of the total 22,285-acre grazing allotment for the Evans Wells Ranch.
>
> "The grazing allotment is separated from the subject property by Spencer Wells Road. The subject property will be fenced, along the western boundary, which will keep livestock from entering the subject property itself from the adjacent grazing allotment. There will also be a 200-foot buffer that will be provided throughout the life of the project. There is no evidence of any sources of water on the grazing allotment within the buffer area.
>
> "Therefore, within the impact area, there is only evidence of a portion of a BLM grazing allotment. The allotment is only used for the dry land grazing of cattle. The proposed use will not force a significant change in accepted farm practices or significantly impact or increase the cost of accepted farm practices in the area." Record 11.

not address testimony by the Nashes, the owners of the Evans Well Ranch, regarding impacts on other nearby grazing allotments, some of which are within the half-mile impact area and some that are outside. According to petitioners, on remand the Nashes submitted additional testimony detailing specific impacts of the proposed mine on their grazing operation, including impacts on a nearby grazing allotment known as "Flat Pasture" that has access to an important water source that does not freeze in the winter. Supplemental Record 676. The Nashes explained that BLM recently reduced their use of Flat Pasture to provide additional winter habitat for sage grouse, and argues that the impact of mine blasting on nearby sage grouse populations may cause BLM to further reduce or eliminate grazing of Flat Pasture. In addition, the Nashes identified $7,000 in recent financial losses due to cattle frightened away from water sources by the noise of hunters firing shotguns, and argued that the noise of mine blasting could have similar effects. *Id.* Petitioners argue that the Nashes' testimony is "factual information" indicating "significant potential conflicts" that the county's findings do not address at all, either in justifying the half-mile impact area for purposes of OAR 660-023-0180(5)(a), or in addressing conflicts with identified agricultural uses within the impact area, under OAR 660-023-0180(5)(b)(E).

Intervenor responds that the county's decision not to expand the one-half mile impact area to include other portions of the Evans Wells Ranch, and the ultimate determination that the mine would not conflict with grazing on the 40-acre allotment adjacent to the mine, are supported by substantial evidence. With respect to the size of the impact area, intervenor argues that the county reasonably relied on the size of the 22,285-acre Evans Wells Ranch, the buffers between the mine site and the nearest grazing allotment, and evidence of lack of conflicts between a different mining site and surrounding grazing lands to conclude that proposed mining will not result in a "significant potential conflict" with respect to the Evans Wells Ranch.

With respect to the question of conflicts with agricultural uses within the impact area under OAR 660-023-0180(5)(b)(E), intervenor argues that the county reasonably relied on the fact that 40-acre allotment is separated from the subject property by a road and fencing and that the mining site will be surrounded by a 200-foot buffer area, to conclude that mining operations will not conflict with grazing on the 40-acre allotment.

Petitioners are correct that the county's findings with respect to the size of the impact area and conflicts with agricultural uses within the one-half mile impact area appear to be based on the understanding that the only Evans Wells Ranch grazing allotment located in the vicinity of the mining site is the adjacent 40-acre parcel. The county apparently failed to appreciate that other Evans Wells Ranch grazing allotments are located nearby, some within the one-half mile SMIA overlay zone and some outside the zone. For purposes of determining the size of the impact area under OAR 660-023-0180(5)(a), and whether "factual information indicates significant potential conflicts beyond" the initial 1,500-foot impact area provided under the administrative rule, the county must sometimes evaluate evidence regarding land that is located outside that initial 1,500-foot impact area, and potentially some distance from the mining site. The county's failure to appreciate that there are Evans Wells Ranch grazing allotments in the vicinity other than the adjacent 40-acre allotment, such as the Flat Pasture area with its water source, means that the county's determination regarding the size of the impact area is flawed. Remand is necessary for the county to consider all relevant evidence regarding all Evans Wells Ranch grazing allotments that are in the vicinity and potentially affected by the proposed mining operation, and to determine the size of the impact area based on whether "factual information indicates significant potential conflicts" with grazing on those allotments.

Even if it is presumed that the one-half mile impact area chosen by the county is justified for purposes of OAR 660-023-0180(5)(a), remand is necessary in any case, because the county's findings regarding conflicts with agricultural uses under OAR 660-023-

0180(5)(b)(E) also appear to be based on the misapprehension that the only grazing within the impact area occurs on the adjacent 40-acre parcel. The Nashes testified, and intervenor does not dispute, that other Evans Wells Ranch grazing allotments are located within the one-half mile SMIA overlay zone. Finally, the county's findings under OAR 660-023-0180(5)(b)(E) do not address the Nashes' testimony regarding noise impacts on their cattle operation, or indeed noise impacts on cattle at all. The findings cite fencing and a 200-foot buffer area as the principal bases for concluding that the mine operation will not conflict with agricultural practices, that is, will not force a significant change in accepted farming practices or significantly increase the cost of accepted farming practices. However, the Nashes submitted specific testimony regarding noise impacts on their grazing operation, and the county's findings neither address that testimony nor demonstrate that fencing and a 200-foot buffer area are sufficient to ensure that the mining operation will not conflict with agricultural practices, for purposes of OAR 660-023-0180(5)(e).

The first and fourth assignments of error are sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in failing to expand the impact area to include sage grouse habitat in the area, including a sage grouse lek (strutting ground) located over a mile to the west of the mining site that is an identified Goal 5 resource site in the county's comprehensive plan. Under the county's Goal 5 protection scheme, the lek site is protected by a sensitive bird and mammal (SBM) combining zone extending 1,320 feet from the lek site. In the county's initial decision, the county relied on the fact that the lek site is more than 1,320 feet from the mining site to conclude that mining would not cause a "significant potential conflict" with the lek, and thus declined to expand the impact area to include the site.

In *Walker*, LUBA remanded the initial decision in part because in determining the size of the impact area the county failed to address evidence, a BLM map, that appears to

show that the subject property is in the middle of several flight paths to and from nest sites and the identified lek site. Based on that map, opponents argued that blasting and mining operations might disturb those flights and thus disturb use of the lek. On remand, intervenor submitted testimony from a wildlife biologist concluding that the map is not intended to indicate that sage grouse fly directly over the mining site, and that grouse may actually have moved between nest sites and the lek site by indirect flight paths. Record 572. The biologist also stated that in conversations with BLM and the Oregon Department of Fish & Wildlife (ODFW) staff, both agencies told him that they had no concerns with conflicts between sage grouse leks and the proposed mining. Based in part on that testimony, the county again concluded that there is no factual information indicating that the mine could cause a significant potential conflict with the lek site or sage grouse habitat in general, and declined to expand the impact area beyond one-half mile.[4] Under this assignment of error, petitioners challenge those findings.

---

[4] The county's findings state, in relevant part:

> "[Intervenor's wildlife biologist] analyzed a map, 'Figure 12. Sage Grouse Movement Patterns Identified Through Radio-Marked Bird Locations, Prineville District, BLM, 1991 to 1993,' showing sage grouse movement patterns based on radio-marked bird locations from 1991 to 1993. He concludes that it would be erroneous to deduce that a bird flew directly through the planned rock pit area. The map only indicates that a sage grouse was located both at the lek and at Broadman Rim. The bird may have actually taken a different flight path or moved between two locations via a combination of flights. The schematic map was meant to show well known grouse behavior when female sage grouse move between nest areas and leks during the nesting season, and not to indicate flight paths or patterns.
>
> "[The biologist] also references the consultation with the [BLM] and [ODFW] before the Application was submitted to Deschutes County and indicates they had no concerns about sage grouse.
>
> "* * * * *
>
> "The sensitive habitat area is site-specific for each sensitive bird or mammal location. The sensitive area to be protected for the sage grouse lek is a radius of 1,320 feet. Here, the proposed zone change is not within 1,320 feet from any lek.

Initially, we observe that under OAR 660-023-0180(5)(a) and (b) the relevant question is whether the impact area should be expanded to consider conflicts with Goal 5 resources "shown on an acknowledged list of significant resources[]." OAR 660-023-0180(5)(b)(D). *See* n 1. The lek site is identified on the county's list of significant Goal 5 resources, but other sage grouse habitat sites such as nesting sites are apparently not so identified. Therefore, impacts on sage grouse habitat in general are not in themselves relevant for purposes of determining the impact area under OAR 660-023-0180(5)(a) and evaluating conflicts with identified Goal 5 resources under OAR 660-023-0180(5)(b)(E). At best, such conflicts are relevant only to the extent they impact use of the lek site.

The impact identified in LUBA's remand and that forms the main focus of the testimony on remand is whether the mining operation will disturb flights to and from the lek site. On that point there is conflicting testimony in the record. Petitioners cite to testimony from an ornithologist that the disputed map indeed shows that grouse make direct flights to and from nesting sites to the lek site that pass over or near the mining site. Supplemental Record 775. The county relied on testimony from intervenor's wildlife biologist concluding that the map is not intended to show flight paths and does not necessarily indicate that grouse fly over or near the subject property. The county ultimately found that there is no evidence of significant potential conflicts with the lek site.

> "Applicant performed a survey of habitat in the rock pit area and did not discover any additional strut sties or evidence of nesting sites. The County has not received any additional comments from BLM or ODFW.
>
> "The SBM Habitat Combining Zone is designed to protect known sensitive bird sites, including sage grouse leks.
>
> "The County Commissioners concur with the conclusions of [the biologist] with regard to the issues raised regarding sage grouse habitat. There is no evidence that sage grouse habitat will be impacted.
>
> "ODFW has submitted comments and has acknowledged that the mitigation proposed by the Applicant will be sufficient to address their concerns. BLM has had repeated opportunities to comment and has decided not to make any further comments." Record 4-5.

While it is close question, we agree with intervenor that a reasonable decision maker could conclude that the record does not include factual information indicating "significant potential conflicts" with respect to disrupting sage grouse flights to and from the lek site during the breeding season. The record includes little evidence at all on that point, and the significance of the most salient evidence, the map at Record 574, is subject to conflicting expert opinion. The local government is generally entitled to choose between conflicting expert testimony, if a reasonable person could rely on the chosen testimony. *Caldwell v. Union County*, 48 Or LUBA 500, 516-17 (2005). We cannot say that the county erred in concluding that the record does not support expanding the one-half mile impact area to include the lek site.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

One basis for remand in *Walker* was for the county to consider whether Native American religious and cultural visits to pictograms and native burial sites in the vicinity are "existing uses" for purposes of OAR 660-023-0180(5)(b)(A) and if so, to evaluate alleged conflicts with those uses.[5] On remand, the county found no evidence that religious and cultural visits occurred on a "regular basis," and concluded therefore that such visits were not "existing uses" for purposes of OAR 660-023-0180(5)(b)(A).[6] Apparently in the alternative,

---

[5] OAR 660-023-0180(5)(b)(A) requires the county to consider "[c]onflicts 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[.]" *See* n 1.

[6] The county's findings state, in relevant part:

> "The pictograms themselves are located within 500 feet of U.S. Highway 20, which is an east/west highway across the State of Oregon. The pictograms are located north of U.S. Highway 20 across the highway from the proposed mining site. Furthermore, the pictograms are 3,044 feet from the nearest point that mining would occur on the subject property.
>
> "No evidence was presented that tribal members have been visiting the pictograms on a regular basis for religious and cultural purposes. However, there was evidence in the record of some religious and cultural activities. The Applicant has offered to restrict any blasting activities when it is notified that there would be a cultural or religious activity scheduled on

the county concluded that mining activities, specifically blasting noise, would not conflict with any religious or cultural visits, because intervenor agreed to a condition of approval restricting blasting activities for up to three days after being notified of a scheduled religious or cultural visit to the pictogram site.

Petitioners challenge those findings, arguing that the county erred in concluding that religious and cultural visits are not "existing uses" simply because they do not occur on a regular basis. Petitioners also challenge the finding that blasting activities at the mining site will not generate any more noise or disturbance than already exist at the pictogram site due to the presence of Highway 20, as not being supported by the record. Finally, petitioners object that the condition of approval restricting blasting activities for up to three days when the applicant is notified of scheduled religious or cultural visits is insufficient.

We agree with petitioners that the county identifies no basis under OAR 660-023-0180(5) to conclude that a use is not an "existing use" because it does not occur on a "regular basis." However, that error is harmless if the county's alternative finding that, as conditioned, there is no conflict between mining and religious and cultural activities near the pictograms are sustained. Presumably, that finding reflects OAR 660-023-0180(5)(c), which requires the county to "determine reasonable and practicable measures that would minimize conflicts" identified under OAR 660-023-0180(5)(b).

> the Walker property. Applicant has agreed to a condition of approval accordingly. Since the Applicant has consented to such a condition of approval, there would be no impact on these activities.
>
> "The Board does not find that such visits are therefore 'existing uses' for purposes of OAR 660-023-0180(5)(b)(A). Furthermore, the activities that would occur on the proposed surface mining site will not generate any more noise or disturbance than already exist with the presence of U.S. Highway 20.
>
> "* * * * *
>
> "Since there is no evidence of any regular, ongoing religious or cultural activities on the Walker property, and since the Applicant has agreed that upon prior notice, it would restrict any blasting activities on the property during any such religious or cultural activities, the [county] concludes the zone change will not have an impact on any cultural or religious activities that might occur on the Walker property." Record 6-7.

The county imposed a condition requiring the applicant to "restrict its blasting activities, upon prior written notification, of any cultural or religious activities that will occur on the Walker property. Any such restrictions, however, shall not exceed three (3) days in duration." Record 12. Based on that condition, the county found that the mining would not conflict with religious and cultural use of the pictogram site. Petitioners' only challenge to that finding and condition is to argue that the condition is limited to blasting, and does not address other sources of noise. However, petitioners cite to no evidence that any source of noise other than blasting is a significant issue with respect to visits to the pictogram site, which is located over half a mile from the mining site, across a major highway. Absent a more developed argument, petitioners have not demonstrated that the county erred in concluding that, as conditioned, the proposed mining will not conflict with existing use of the pictogram site.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Once the county has identified an impact area, identified significant conflicts with certain uses within the impact area, and determined whether those conflicts can be minimized, under OAR 660-023-0180(5)(d) the county must determine based on any significant conflicts that cannot be minimized the economic, social, environmental and energy (ESEE) consequences of either allowing, limiting, or not allowing mining of the site.[7]

---

[7] 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

In *Walker*, one basis for remand was for the county to consider the ESEE consequences of allowing mining, with respect to the impact of blasting-generated dust on the Walker residence, which is located north of the mining site more than one-half mile away. On remand, intervenor submitted wind data collected between November 19, 2007 and December 27, 2007, which showed that during that period the wind rarely blew from the mining site toward the Walker residence. In response, petitioners submitted evidence that during the same period the prevailing winds blew from the mining site toward the Walker residence approximately 58 percent of the time. The county found:

> "The County agrees with the Applicant that there are reasonable and practicable measures to minimize or reduce adverse impacts from dust. One way to minimize or even eliminate blasting-generated dust on the Walker residence is to conduct blasting when the wind directions are blowing away from the residence. The Applicant has testified that blasting activities generally occur during the winter months when there is manpower availability in the construction business. The Applicant therefore contracted with Kleinfelder West, Inc. to monitor and record wind speed and direction for the proposed site. Anemometer data was downloaded on a monthly basis beginning November 19, 2007 through December 26, 2007. The results of these preliminary studies indicated that 62.6% of the time the wind was blowing from a westerly direction to the east. * * * [Thirty-seven percent] of the time the wind was blowing from the east to the west. In both instances, the wind would be blowing away from the Walker residence." Record 10.

The county also found that blasting will occur, at most, six times per year, and that blasting is a single event, lasting a few seconds. *Id.* Based on those findings, the county imposed a condition providing:

> "Based upon the anemometer data collected by Kleinfelder, blasting will occur when the prevailing wind is blowing away from the Walker residence." Record 12.

Petitioners first argue that the county failed to determine "[t]he degree of adverse effect on existing land uses within the impact area" with respect to dust impacts on the

---

> "(C) The probable duration of the mining operation and the proposed post-mining use of the site."

Walker residence, as required by OAR 660-023-0180(5)(d)(A), but instead considered only whether "[r]easonable and practicable measures that could be taken to reduce the identified adverse effects," under OAR 660-023-0180(5)(d)(B). Petitioners argue that the county put the cart before the horse, and considered measures to reduce identified adverse impacts without first determining the *degree* of adverse impacts.

While petitioners are correct that the county's remand findings did not first determine the degree of adverse effect on the Walker residence from blasting-generated dust, petitioners have not explained what purpose would be served by remanding the decision for the county to make that initial determination, when the county has identified measures that the county found would "minimize or even eliminate [the impacts of] blasting-generated dust on the Walker residence[.]" Record 10. That finding, if accurate, would seem to demonstrate that there are "reasonable and practicable measures that would minimize" the identified conflict under OAR 660-023-0180(5)(c), in which case the county would not need to conduct an ESEE analysis at all under OAR 660-023-0180(5)(d) with respect to blasting-generated dust. The ESEE analysis under OAR 660-023-0180(5)(d) is triggered only with respect to significant conflicts that, the county has determined, cannot be minimized. Therefore, the county's failure to consider the degree of adverse effects of blasting-generated dust on the Walker residence under OAR 660-023-0180(5)(d)(A), before proceeding to consider whether measures can reduce those adverse effects under OAR 660-023-0180(5)(d)(B), appears to be harmless error, unless petitioners demonstrate that the county erred in concluding that the condition limiting blasting to times when the prevailing winds are blowing away from the Walker residence is insufficient to minimize the conflict.

With respect to the condition, petitioners contend that the wind data they submitted is more accurate and reliable than the data the applicant submitted, and that during winter months the prevailing winds blow more often than not from the mining site toward the Walker residence. However, petitioners have not demonstrated that the data they submitted

so undermines the data the county relied that no reasonable decision maker could rely on it. Further, even if the county chose to rely on petitioners' data, that data indicates that more than 40 percent of the time the wind is blowing away from the Walker residence. If, as the county found, blasting occurs at most 6 times per year, as a single event lasting seconds, there would appear to be ample opportunities to blast during periods when the wind is blowing away from the Walker residence.

Finally, petitioners argue that the condition that "[b]ased upon the anemometer data collected by Kleinfelder, blasting will occur when the prevailing wind is blowing away from the Walker residence," is indefinite and infeasible. With respect to indefiniteness, petitioners argue that it is unclear what is meant by the first phrase, "[b]ased upon the anemometer data collected by Kleinfelder[.]" Petitioners suggests this could mean that blasting can occur in 2009 and subsequent years on the days between November 19 and December 26 that the Kleinfelder study determined had favorable winds, during the same period in 2007. Petitioners also argue that it is not clear what the second phrase means, "blasting will occur when the prevailing wind is blowing away from the Walker residence." Petitioners contend that there is no indication how long a sustained wind direction must exist before it becomes "prevailing."

While the condition could certainly be worded more clearly, we believe it is sufficiently definite to inform the applicant and interested parties what is required. We do not believe the first phrase, "[b]ased upon the anemometer data collected by Kleinfelder," can reasonably be interpreted to mean that blasting can occur on any date in 2009 or in subsequent years that the Kleinfelder data collected in 2007 indicated had favorable winds, regardless of the wind direction on the actual blasting date. Based on the findings and the wording of the condition as a whole, it is clear that the county contemplates an ongoing obligation to measure wind speed and direction and, based on that current information, to conduct blasting only during periods when the winds are blowing away from the Walker

residence. Similarly, while the condition does not specify what constitutes the "prevailing" wind, the county clearly contemplates that blasting will only occur during periods when the currently collected wind data indicates a sustained wind direction away from the Walker residence.

With respect to feasibility, petitioners argue that there is no evidence in the record that is it feasible to blast only when the prevailing wind blows away from the Walker residence, or that such a condition would be effective in minimizing dust impacts. However, it is not clear what evidence regarding feasibility petitioners believe must be in the record. The county found that blasting will be infrequent and limited in duration. There is no dispute that the timing of when to blast is under the applicant's complete control. The applicant is required by the condition to collect wind data and use that data in determining when to blast, to ensure that blasting occurs only when the winds blow away from the Walker residence. Petitioners do not explain why they believe compliance with the condition is infeasible.

The only specific argument petitioners raise is to point to a statement in petitioners' final argument to the county, in which petitioners attribute to the applicant a statement that the applicant "acknowledges that once it is committed to blasting on a particular day, it will do so regardless of the wind's speed or direction at the time of the blast." Record 42. We understand petitioners to argue that the applicant has expressed an intent to conduct blasting even though the winds are blowing toward the Walker residence, which would obviously be inconsistent with the condition. However, the applicant apparently proposed or agreed to the disputed condition below, and it seems unlikely that the applicant intends to violate it. Even if that were the case, we do not see that an applicant's intent not to abide by a condition of approval demonstrates that the condition is "infeasible." If the applicant in fact chooses not to comply with the condition on a particular occasion, petitioners do not dispute that the county has the authority to take appropriate enforcement measures.

The fifth assignment of error is denied.

The county's decision is remanded.