

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KEITH NASH and JANET NASH,
5 *Petitioners,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

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

15
16 LUBA No. 2010-082

17
18 FINAL OPINION
19 AND ORDER

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21
22 Appeal from Deschutes County.

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24 David A. Moser, Portland, filed the petition for review and argued on behalf of
25 petitioner.

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27 No appearance by Deschutes County.

28
29 Robert S. Lovlien, Bend, filed the response brief and argued on behalf of intervenor-
30 respondent. With him on the brief was Bryant, Lovlien and Jarvis PC.

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

34
35 REMANDED

02/15/2011

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves a plan amendment and zone change to allow a gravel mine.

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 the third time.¹ In 2006, intervenor applied to have its 385-acre property placed on 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. Mining operations will occur on the subject property from November through February. As relevant here, the subject 385-acre property is adjacent to a cattle ranch, the Evans Well Ranch, an approximately 22,000-acre ranching operation that is comprised in part of six pastures that are leased to petitioners by the Bureau of Land Management (BLM).² The BLM manages and controls the use of the pastures and assigns periods of grazing for each of the six pastures. One of those pastures, the Flat Pasture, is approximately 5,000 acres in size and shares a common boundary of approximately 1,320 feet with the subject property. The subject property is separated from Flat Pasture by a fence and by Spencer Well Road, a paved road. A well that does not freeze in the winter is located within the Flat Pasture, more than two miles from the pasture's common boundary with the subject property.

¹ In *Walker v. Deschutes County*, 55 Or LUBA 93 (2007) (*Walker I*) and again in *Walker v. Deschutes County*, 59 Or LUBA 488 (2009) (*Walker II*), we remanded the county's decision.

² The Evans Well Ranch is sometimes referred to in the record as the BLM's Horse Ridge Allotment. Record 117.

1 After our remand in *Walker v. Deschutes County*, 59 Or LUBA 488 (2009) (*Walker*
2 *II*) to address evidence regarding impacts of the mine on the Evans Well Ranch agricultural
3 operations, intervenor submitted into the record a report (Borine Report) that concluded that
4 the proposed mine would not have an adverse effect on any of the Evans Well Ranch
5 agricultural operations that occur in the Flat Pasture. Record 114-121. Based on the Borine
6 Report, the county again approved the applications. This appeal followed.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 **A. Applicable Law**

9 OAR 660-023-0180(5) sets out the procedures and standards for determining whether
10 to allow mining of a significant mineral resource. OAR 660-023-0180(5)(a) includes a
11 requirement to determine an “impact area” in order to identify conflicts with the proposed
12 mine.³ Generally, the rule limits the size of the “impact area” to 1,500 feet from the mining
13 area, unless “*factual information indicates significant potential conflicts beyond this*
14 *distance.*” (Emphasis added.) In the present case, the county apparently chose an impact
15 area of one-half mile from the property boundary of the tract that includes the mining site,
16 instead of the 1,500 foot minimum specified by 660-023-0180(5)(a), because the half-mile
17 distance corresponds to the Surface Mining Impact Area overlay zone that is automatically
18 imposed under Deschutes County Code (DCC) 18.56.020, which requires that “[t]he SMIA
19 zone shall apply to all property located within one-half mile of the boundary of a surface
20 mining zone.”

³ 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. * * *”

1 The rule also requires the county to determine existing land uses within the impact
2 area that will be adversely affected by the proposed mine, and specifically to consider
3 “[c]onflicts with agricultural practices” within the impact area.⁴ The designation of the
4 impact area and the assessment of conflicts with agricultural practices within the impact area
5 are sometimes interrelated, because in order to determine the size of the impact area, and
6 hence which existing land uses are subject to the adversely affected analysis under OAR 660-
7 023-0180(5)(b) and (c), some evaluation of potential impacts on agricultural practices in the
8 larger vicinity of the proposed mine may be required.

9 **B Walker I and Walker II**

10 In *Walker v. Deschutes County*, 55 Or LUBA 93 (2007) (*Walker I*), we remanded the
11 county’s decision approving the applications for the county (1) to consider whether to

⁴ OAR 660-023-0180(5)(b) and (c) provide, in relevant part:

“(b) The local government shall determine existing * * * land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts. * * * 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;

 * * * * *

 “(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[.]”

“(c) “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.” (Emphasis added.)

1 expand the impact area beyond the one-half mile that the county concluded was appropriate,
2 to include other grazing lands that are part of the Evans Well Ranch, and (2) to determine
3 possible mining conflicts with agricultural operations on the Evans Well Ranch. We
4 sustained the petitioners' assignments of error in part because there was evidence and
5 testimony in the record that indicated that the Evans Well Ranch grazing operations beyond
6 the one-half mile impact area may also be impacted by the mining, and that blasting and
7 other activities from the proposed mine could adversely affect their grazing operation.

8 In *Walker II*, we sustained the petitioners' assignments of error that again challenged
9 the county's decision not to expand the impact area beyond one-half mile and its conclusion
10 that the mining would not conflict with agricultural practices within that one-half mile
11 impact area. We agreed with petitioners that the county erred in limiting its analysis to a 40-
12 acre parcel that is part of the Evans Well Ranch immediately adjacent to the subject property,
13 and failing to consider petitioners' evidence and testimony that the proposed mine would
14 produce conflicts with grazing on areas of the Flat Pasture located both within and beyond
15 one-half mile from the proposed mine.⁵

⁵ We held in *Walker II*:

“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 Well 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 Well 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 Well 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.

1 **C. The County’s Latest Decision to Approve the Mine**

2 The county found:

3 “The Board concludes that there will be no significant potential conflict with
4 the Evans Well Ranch or its grazing allotments on the BLM property adjacent
5 to the proposed mining site, including the Flat Pasture grazing allotment west
6 of the proposed mining site. The Board finds that the written report and oral
7 testimony submitted by Roger Borine, the applicant’s consultant, sufficiently
8 demonstrates that the proposed mining operation, including blasting, will not
9 impact to any great extent the cattle grazing on the Flat Pasture allotment, or
10 that other impacts of the proposed mining would cause cattle on that allotment
11 to abandon the Flat Pasture and instead graze more heavily on privately
12 owned pastures on the ranch itself, outside the impact area.

13 “The Borine agricultural report has the following conclusions on page 6 of the
14 report:

15 “The Flat Pasture is determined to be the ‘impact area’. It is the only
16 pasture in the Horse Ridge Allotment that shares a common boundary
17 with the [subject property] and is approximately 5,010 acres or 7.3
18 square miles in size. The five remaining pastures are over two air
19 miles from [the subject property.]

20 “The optimal period for grazing annual and perennial grasses by
21 livestock near the [mine] is in late March, April, May and early June.
22 Mining operations will occur during the months of November-
23 February. No ranching management practices in the northeast portion
24 of the impact area were identified to attract and evenly distribute cattle
25 and promote proper plant utilization. The occurrence of cattle near the
26 [mine] while in operation would be highly unlikely and only

“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 Well 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).” *Walker II* at 495-96.

1 incidental. Blasting and crushing operations are well within existing
2 decibel levels now occurring within the impact area.

3 “‘All relevant evidence’ * * * to the impact area that may impact a
4 ranching operation, and specifically the mining operation, was
5 identified and assessed for its potential impact. This analysis
6 determined and supports the conclusion that the [mine] will not impact
7 the Evans Well Ranch operations. In addition, the [mine] will not
8 create noise or disturbance over and above already existing conditions
9 on the cattle and the cattle operation.

10 “The Board finds that the Borine Report is sufficient evidence that no
11 significant impacts of the mine will reach the remaining pastures and that
12 there will not be an impact from the mine on either the ranch itself, or on any
13 of the related grazing allotments on the BLM land in the vicinity of the mine.
14 *Despite [petitioners’] stating in their letter that the actual graze runs longer,*
15 *the Board finds the statement by Mr. Borine that the allotment currently is not*
16 *for that longer time period to be credible. Given that the mining operations*
17 *will occur during the months of November – February, the Board finds that*
18 *the timing of allotted grazing on BLM land versus the mining operations,*
19 *significantly minimizes, if not eliminated, the impacts between the grazing and*
20 *the mining operations. Therefore, the original one-half mile impact area*
21 *chosen by the Board is still the appropriate impact area.*

22 “As a result, the Board finds the testimony and report by Mr. Borine to be
23 more persuasive than [petitioners’] comments as to the potential impact to
24 cattle grazing in the area, and specifically the Flat Pasture Allotment. Based
25 upon the size of the Evans Well Ranch BLM grazing allotment, the location
26 of the grazing allotment, and the evidence from a similar mining site, the
27 Board concludes that the proposed mining would not result in a ‘significant
28 potential conflict’ with respect to the Evans Well Ranch grazing allotment and
29 the operation of the ranch.” Record 19-20 (Emphasis added; footnote
30 omitted).

31 **D. Assignments of Error**

32 In their first assignment of error, petitioners challenge the county’s decision not to
33 expand the impact area under OAR 660-023-0180(5)(a) beyond one-half mile.⁶ According
34 to petitioners, there is no substantial evidence in the record to support the county’s decision

⁶ Although petitioners argue that the county’s decision misconstrues applicable law, is not supported by substantial evidence in the record, and that its findings are inadequate, the crux of their argument is a substantial evidence challenge to the county’s reliance on the Borine Report in light of conflicting evidence presented by petitioners. We address those substantial evidence arguments.

1 and the “factual information” in the record demonstrates that there are “significant potential
2 conflicts” with petitioners’ agricultural operations in the Flat Pasture beyond one-half mile
3 from the proposed mining area.⁷

4 Petitioners first argue that the county’s decision to limit the size of the “impact area”
5 under OAR 660-023-0180(5)(a) is not supported by the Borine Report, because according to
6 petitioners, that report concluded that the “impact area” is the entire Flat Pasture and if the
7 county based its decision on the Borine Report, it should have designated the entire Flat
8 Pasture area as the “impact area” consistent with the Borine Report’s conclusion. While the
9 Borine Report does use the phrase “impact area,” we understand the report’s use of that
10 phrase to refer to the area of analysis for purposes of determining whether there is “factual
11 information” indicating significant potential conflicts beyond the default 1,500 foot impact
12 area under OAR 660-023-0180(5), or beyond the one-half mile impact area chosen by the
13 county.

14 Petitioners next argue that a key assumption in the Borine Report and the county’s
15 findings in reliance on the Borine Report is that there are no impacts from the mine because
16 cattle will graze on the Flat Pasture only during spring months, and not during the winter
17 months when the mine is in operation. According to petitioners, evidence in the record
18 regarding the BLM-allowed time period for grazing on the Flat Pasture confirms that grazing
19 occurs from November 1 to December 15, which is during the period when mining and
20 blasting are proposed.

⁷ Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 As noted above, mining will occur on the subject property from November through
2 February of each year. Based on the above-quoted findings, we understand the county to
3 have understood the Borine Report to presume or conclude that petitioners graze their cattle
4 in the Flat Pasture from late-March through early June, and that because mining will occur
5 between November and February, there will be no cattle grazing in the Flat Pasture area
6 during the months when mining is occurring and thus there will be no conflicts with
7 petitioners' ranching operation. However, the Borine Report does not explain the basis for
8 the apparent presumption that no grazing will occur when mining is occurring, and the pages
9 of the record cited to us are to the contrary.

10 During the proceedings on remand from *Walker I*, petitioners introduced evidence
11 into the record that in 2008 the BLM-approved grazing schedule allowed petitioners to graze
12 their cattle in the Flat Pasture only from November 1 to December 15. Petition for Review
13 Appendix ER-8-10 (correspondence between BLM and petitioners stating that petitioners are
14 allowed to graze in the Flat Pasture from November 1 to December 15, 2008). During the
15 proceedings on remand from *Walker II*, petitioners testified orally and in writing that that
16 grazing schedule remained in effect, and that petitioners are allowed to graze their cattle on
17 the Flat Pasture from November 1 to December 15, 2010. Record 41 (letter from petitioners
18 so stating). That evidence is uncontroverted and is not addressed in either the Borine Report
19 or in the county's decision.⁸

20 The county's incorrect presumption that mining and grazing would not occur
21 simultaneously led the county to decide not to expand the impact area beyond one-half mile.
22 It also led the county to conclude that there would be no conflict with petitioners' ranching
23 operations within and beyond the one-half mile impact area. In their second assignment of

⁸ Although intervenor cites an email message from the author of the Borine Report which, according to intervenor, rebuts petitioners' evidence and testimony, we do not find anything in that email message that contradicts petitioners' testimony and evidence. Record 39.

1 error, petitioners argue that there is not substantial evidence in the record to support the
2 county's conclusion under OAR 660-023-0180(5)(b)(E) that the proposed mine will not
3 conflict with the Evans Well Ranch grazing operations within the Flat Pasture. Petitioners
4 point to evidence in the record that noise from the mine would conflict with cattle grazing on
5 the Flat Pasture and would force those cattle to overuse pasture areas farther away from the
6 mine, resulting in increased costs of operation. Petition for Review Appendix ER-7.
7 Because the county's conclusion that the mine will not conflict with petitioners' agricultural
8 operations is also based on their incorrect conclusion that grazing will not occur during the
9 time when the mine is operating, for the same reasons set forth above, we conclude that no
10 reasonable decision maker would rely on the Borine Report to reach that conclusion.

11 Finally, in portions of their first and second assignments of error, petitioners also
12 argue that the county erred in failing to consider whether to expand the impact area to
13 include other pastures or BLM allotments other than the Flat Pasture that are adjacent to the
14 subject property. Intervenor responds that petitioners are precluded from arguing that other
15 pastures or BLM allotments other than the Flat Pasture should have been considered, because
16 that argument could have been made but was not made, in either *Walker I* or *Walker II*. We
17 agree. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

18 Further, petitioners argue that the county erred in failing to consider the mine's
19 potential impact on sage grouse in the area, which petitioners allege might lead BLM to
20 reduce petitioners' grazing rights to protect sage grouse and if so would conflict with
21 petitioners' agricultural operations. With respect to impacts on sage grouse, intervenor
22 argues that *Walker I* and *Walker II* addressed issues regarding sage grouse and argues that
23 petitioners may not raise those issues again in this appeal. However, *Walker I* and *Walker II*
24 addressed an argument under OAR 660-023-0180(5)(b)(D) that the impact area should be
25 expanded to include a sage grouse lek, or breeding site that is an identified Goal 5 resource
26 site in the county's comprehensive plan. See n 4. *Walker I* at 101-102; *Walker II* at 496-98.

1 As we understand petitioners' argument, it is an argument under OAR 660-023-
2 0180(5)(b)(E) that noise and blasting from the mine will conflict with their agricultural
3 operations because that noise and blasting could cause sage grouse to abandon the area and
4 seek winter habitat on portions of petitioners' ranch, which might lead BLM to reduce
5 grazing rights in order to protect limited forage for sage grouse. We recognized that
6 argument in *Walker II* and in part sustained petitioners' assignment of error that set out that
7 argument.⁹ Petitioners' supposition that the proposed mining will cause sage grouse to leave
8 the mining area and flee to petitioners' grazing lands for winter habitat, as opposed to ending
9 up on some other land, and their related supposition that the BLM will then reduce
10 petitioners' grazing operation on Flat Pasture, relies on several levels of speculative
11 causation. However, as far as we can tell, the county did not address that argument on
12 remand. On remand, the county should consider, in determining whether the proposed mine
13 conflicts with petitioners' agricultural operations, effects of the proposed mine on sage
14 grouse that winter in the impact area and the possibility that such effects could lead to a
15 reduction in lands available for grazing for petitioners' cattle.

16 To summarize, remand is again necessary for (1) the county to expand the impact
17 area to include the Flat Pasture or to identify substantial evidence in the record that supports
18 its decision to limit the impact area to one-half mile from the proposed mine; and (2) to
19 evaluate any conflicts with petitioners' agricultural operations in the impact area that the

⁹ In *Walker II*, we summarized the argument as follows:

“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. * * * 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.*” *Walker II* at 494.

1 county designates, including whether the proposed mine would cause sage grouse to abandon
2 the area and seek winter habitat on petitioners' other allotments.

3 The first and second assignments of error are sustained, in part.

4 The county's decision is remanded.