

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

4
5 CENTRAL OREGON LANDWATCH,
6 *Petitioner,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

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

17
18 LUBA No. 2015-011

19
20 TAMMERA WALKER,
21 *Petitioner,*

22
23 vs.

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25 DESCHUTES COUNTY,
26 *Respondent,*

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28 and

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30 4-R EQUIPMENT, LLC,
31 *Intervenor-Respondent.*

32
33 LUBA No. 2015-012

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35 FINAL OPINION
36 AND ORDER

37
38 Appeal from Deschutes County.

1
2 Paul D. Dewey, Bend, filed a petition for review and argued on behalf of
3 petitioner Central Oregon Landwatch.

4
5 Tammera Walker, Wasilla, Alaska, filed a petition for review on her own
6 behalf.

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8 Laurie E. Craghead, Assistant County Counsel, Bend, filed a response
9 brief.

10
11 Sharon R. Smith, Bend, filed the response brief and argued on behalf of
12 intervenor-respondent. With her on the brief were Garrett Chrostek and Bryant
13 Lovlien & Jarvis, PC.

14
15 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN Board
16 Member, participated in the decision.

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18 AFFIRMED 08/17/2015

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

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NATURE OF THE DECISION

Petitioners appeal a county decision that approves a plan amendment and zone change to allow a basalt mine on land currently zoned for exclusive farm use.

MOTION TO INTERVENE

Intervenor-respondent 4-R Equipment, LLC (intervenor or applicant) moves to intervene in LUBA Nos. 2015-011 and 2015-012. The motions are unopposed, and are granted.

FACTS

A. Prior Appeals

This matter is before us for the fourth time.¹ As noted in the third appeal, in 2006 intervenor applied to have its 385-acre property (subject 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. *Nash*, 63 Or LUBA at 28. Adjacent to the subject property is the Evans Well Ranch, an approximately 22,000-acre cattle ranching operation that is comprised in part of pasture allotments that are leased by the Bureau of Land Management (BLM). The BLM manages and controls the use of the pastures and assigns periods of grazing for each of the 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

¹ In *Walker v. Deschutes County*, 55 Or LUBA 93 (2007) (*Walker I*), *Walker v. Deschutes County*, 59 Or LUBA 488 (2009) (*Walker II*) and *Nash v. Deschutes County*, 63 Or LUBA 27 (2011) (*Nash*), we remanded the county’s decisions.

1 subject property.² The subject property is separated from Flat Pasture by a
2 fence and by Spencer Well Road, a paved road.

3 To summarize, in *Walker I*, see n 1, we remanded the county’s decision
4 approving the application because of the county’s failure to fulfill requirements
5 under OAR 660-023-0180. We directed the county to (1) consider whether to
6 expand the impact area beyond one-half mile to include additional grazing land
7 and (2) to determine possible mining conflicts with agricultural operations. We
8 sustained one assignment of error in part because of evidence that indicated
9 grazing operations beyond the one-half mile impact area may be impacted by
10 the mining and associated activities. 55 Or LUBA at 104.

11 In *Walker II*, we remanded the county’s decision again, in part because
12 the county failed to consider petitioners’ evidence that the mine would produce
13 conflicts with grazing on the Flat Pasture located within and beyond the impact
14 area. 59 Or LUBA at 495.

15 In *Nash*, we remanded the county’s decision again. As relevant here, the
16 scope of our remand in *Nash* is set out below:

17 “To summarize, remand is again necessary for (1) the county to
18 expand the impact area to include the Flat Pasture or to identify
19 substantial evidence in the record that supports its decision to limit
20 the impact area to one-half mile from the proposed mine; and (2)
21 to evaluate any conflicts with petitioners’ agricultural operations
22 in the impact area that the county designates, including whether
23 the proposed mine would cause sage grouse to abandon the area

² The county’s decision notes that there are two Flat Pastures in the general vicinity of the proposed mine, and that the two pastures have been conflated at various times throughout the record. As applicable to the impacts analysis, Horse Ridge Flat Pasture is the only Flat Pasture that shares a common boundary with the subject property, and is the “Flat Pasture” that is the subject of our prior remand. Record 9.

1 and seek winter habitat on petitioners’ other allotments.” 63 Or
2 LUBA at 36-37.

3 **B. The County’s Latest Decision to Approve the Mine**

4 In response to a request by the applicant to reinstate the remand process,
5 the county board of commissioners again approved the application. As part of
6 its decision, the board of commissioners explained that the applicant clarified
7 that the mine would operate year-round, a departure from LUBA’s
8 understanding that the mining operation was to be limited to November
9 through February. *Nash*, 63 Or LUBA at 28. The county construed the
10 applicant’s “clarification” that the mine would operate year-round not to
11 constitute a “modification” of the original application, and determined that a
12 Deschutes County Code (DCC) standard regarding modifications of
13 applications was not implicated. Record 8.

14 The county interpreted our remand narrowly and limited its review to the
15 two issues noted above, but reopened the record to receive additional evidence
16 to resolve the remand. The county responded to the first remand issue by
17 reviewing conflicting testimony regarding noise impacts on cattle, and
18 concluded that expected noise impacts from the mine on grazing cattle on
19 adjoining lands did not justify expanding the impact area beyond one-half mile.
20 On the second remand issue, the county determined that “the proposed mine
21 does not conflict with agricultural practices, of any kind or location, on account
22 of the possibility that the proposed mine could cause sage grouse to relocate to
23 areas that create conflicts with agricultural practices.” Record 12. Prior to this
24 decision, the *Nash* petitioners had put forth a similar argument, which we
25 characterized as an argument that “relies on several levels of speculative
26 causation,” but nevertheless directed the county to address that argument

1 because the county failed to do so in the decision that was before us in *Nash*.
2 *Nash*, 63 Or LUBA at 36. The argument depends on a theory that mining
3 might cause sage grouse utilizing nearby habitat to relocate, which in turn
4 could result in the BLM curtailing cattle grazing in areas where the sage grouse
5 relocate. In response to our remand, the county relied on evidence that
6 undermined this theory, including testimony by the current holder of the
7 grazing rights’ and testimony regarding current grazing practices, and the
8 presence of other external factors.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioners contend that LUBA, the board of commissioners and all
11 parties in *Nash* understood that operation of the proposed mining operation
12 would be limited to November through February. Petition for Review 11.
13 Under DCC 22.34.040(B), following a remand from LUBA, an application for
14 land use permit approval may be “modified” to respond to remand “issues,”
15 provided the modification “would not substantially alter the proposal and
16 would not have a significantly greater impact on surrounding neighbors.”³
17 Petitioners argue that the board of commissioners in its decision following
18 LUBA’s remand in *Nash* erred in finding that a change from a mine that only
19 operates November through February to a year-round mine does not result in a

³ DCC 22.34.040(B) provides:

“At the Board’s discretion, a remanded application for a land use permit may be modified to address issues involved in the remand or withdrawal to the extent that such modifications would not substantially alter the proposal and would not have a significantly greater impact on surrounding neighbors. Any greater modification would require a new application.”

1 “modified” application under DCC 22.34.040(B). The board of commissioners
2 found that the applicant’s “clarification” that the mine would operate year-
3 round did not amount to a “modified” “application” that is subject to DCC
4 22.34.040(B).⁴ Petitioners contend the purported “clarification” constitutes a
5 modification of the application and that the modification is inconsistent with
6 DCC 22.34.040(B) because it was not needed to respond to either of the
7 remand issues in *Nash* and because the modification does “substantially alter
8 the proposal” and would “have a significantly greater impact on surrounding
9 neighbors.” *See* n 3. Petitioners contend a new application should have been
10 required to change the proposed mining operation to a year-round facility.⁵

⁴ The board of commissioners finding that the applicant’s clarification that the mine would operate year-round does not implicate DCC 22.34.040(B) is set out below:

“FINDINGS: The application has not been modified. The Applicant did address instances in the record that suggested mining activities would only take place from November to February. According to the Applicant, references to this time period were meant to indicate when mining operations are most likely to occur because this is when workers, who are usually employed in construction activities for the remainder of the year, are generally available. The Board considers Applicant’s submission to constitute a mere clarification and not a modification.” Record 8.

⁵ While it does appear that LUBA, the county, petitioner and at least one of intervenor’s experts understood that the mining operation was to be limited to November through February, intervenor points out the application itself does not propose that mining operations would be limited to November through February and none of the conditions of approval in the decision that was the subject of review in *Nash* limited the mining operation to November through February.

1 Intervenor responds that petitioners waived this issue under ORS
2 197.835(4)(a). Under ORS 197.763(1), a petitioner must raise an issue which
3 may be the basis for an appeal to LUBA no later than the close of the record at
4 or following the final evidentiary hearing on the proposal.⁶ ORS 197.835(3)
5 limits LUBA’s scope of review to issues that have been raised in accordance
6 with ORS 197.763.⁷ However, the first sentence of ORS 197.835(4)(a)
7 provides that new issues may be raised for the first time at LUBA if the local
8 government failed to identify applicable criteria in the notice, “in which case a
9 petitioner may raise new issues based upon applicable criteria that were
10 omitted from the notice.”⁸ Petitioners respond that because the county failed to

⁶ ORS 197.763(1) provides that:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

⁷ ORS 197.835(3) provides: “Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

⁸ ORS 197.835(4)(a) provides a petitioner may raise new issues at LUBA if:

“The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. *However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]*” (Emphasis added.)

1 list DCC 22.34.040(B) as an applicable approval criterion they are not
2 precluded from raising the issue raised in the first assignment of error.

3 Intervenor notes that in the proceeding below no petitioner raised any
4 issue regarding: (1) DCC 22.34.040(B), (2) the proposed clarification or (3)
5 impacts to sage grouse from *year-round* mining. Intervenor first argues that
6 the county could not have identified DCC 22.34.040(B) in its notice of hearing,
7 because the notice was issued prior to receiving the “clarification” from
8 intervenor. The notice was issued on October 30, 2014, and intervenor
9 submitted its supplemental burden of proof on November 7, 2014, which
10 contained the disputed timing “clarification.” Record 173.⁹

⁹ The supplemental burden of proof clarification is set out below:

“VIII. TIMING OF MINING OPERATIONS:

“On prior occasions, representatives of the Applicant have indicated that mining operations will occur from November to February. This statement has been incorporated into past decisions and needs to be clarified. The basis for this statement is that it is Applicant’s expectation that primary mining activities (blasting and rock crushing) will predominantly occur during the winter. Applicant still anticipates primary mining operations to predominantly occur during this season because that is when workers are available. During other parts of the year, workers are primarily engaged in construction activities. Applicant has always maintained that mining may occur at other times, but would expect such mining activities to primary involve loading and trucking. However, it is possible that some blasting and crushing could occur at other times of the year, depending on worker availability, demand, and if winter operations are curtailed due to weather. In summary, there are no conditions limiting operations only in winter and no reason to impose additional conditions beyond the current 20 conditions * * *.”

1 The public hearing on the remand occurred on November 12, 2014. At
2 that hearing, copies of the supplemental burden of proof and a “decision
3 matrix” document were distributed to assist the county commissioners. Item #4
4 on the decision matrix stated that “[t]he applicant has indicated that the mining
5 site would be utilized year round.” Record 47. In addition, a staff member
6 directly addressed the year-round mining clarification as part of an oral staff
7 report. Pursuant to ORS 197.763(6)(a), petitioners requested, and the county
8 commissioners granted, an extended open record period of an additional 12
9 days.¹⁰ Intervenor argues that petitioners easily could have raised the issue of
10 whether a new application should be required under DCC 22.34.040(B) during
11 that 12-day open record period, but did not.

12 We think it would be unfair to expect petitioners to discover the
13 “clarification” in the November 7, 2014 supplemental burden of proof, which
14 was not received by the county until November 11, 2014 and made available to
15 the parties for the first time at the November 12, 2014 hearing, in time to raise
16 an objection under DCC 22.34.040(B) at the November 12, 2014 public
17 hearing. But petitioners asked that the record be held open for 12 days
18 following the close of the hearing on November 12, 2014. The relevant
19 question under the second sentence of 197.835(4)(a), *see* n 8, becomes whether

¹⁰ ORS 197.763(6)(a) provides:

“Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing * * * or leaving the record open for additional written evidence, arguments or testimony * * *.”

1 the issues petitioners raise under their first assignment of error “could have
2 been raised” during that 12 day open record period.

3 Even if we assume for purposes of this opinion that the county should
4 have listed DCC 22.34.040(B) as an approval criterion in its notice of hearing
5 on remand, any error in that regard was rendered harmless because petitioners
6 could have raised the DCC 22.34.040(B) issue they attempt to raise in the first
7 assignment of error during the 12 day extended record period, and did not do
8 so. Therefore, under the last sentence of ORS 197.835(4)(a), we conclude that
9 the issue is not within our scope of review under ORS 197.835(3) because the
10 issue could have been raised before the local government.

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioners argue that the county’s decision not to expand the impact area
14 beyond one-half mile from the proposed mine is not supported by adequate
15 findings based on substantial evidence.

16 **A. Applicable Law**

17 As we explained in the prior appeals, OAR 660-023-0180(5) sets out the
18 procedures and standards for determining whether to allow mining of a
19 significant mineral resource via a post-acknowledgement plan amendment.
20 OAR 660-023-0180(5)(a) includes a requirement to determine an “impact area”
21 in order to identify conflicts with the proposed mine.¹¹ Generally, the rule

¹¹ OAR 660-023-0180(5)(a) provides:

“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

1 limits the size of the “impact area” to 1,500 feet from the mining area, unless
2 “*factual information indicates significant potential conflicts beyond this*
3 *distance.*” (Emphasis added.) In the present case, the county chose an impact
4 area of one-half mile (or 2,640 feet) from the property boundary of the tract
5 that includes the mining site, instead of the initial maximum 1,500 foot impact
6 area required by OAR 660-023-0180(5)(a), because the half-mile distance
7 corresponded to the Surface Mining Impact Area (SMIA) overlay zone. Under
8 OAR 660-023-0180(5)(b), once the county determines the impact area to be
9 studied, the county then determines if the proposed mining results in any
10 conflicts with certain existing or approved land uses within the impact area.¹²

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.”

¹² OAR 660-023-0180(5)(b) provides in relevant part:

“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

1 As applicable here, those uses include “Goal 5 resource sites within the impact
2 area that are shown on an acknowledged list of significant resources and for
3 which the requirements of Goal 5 have been completed * * * [and] agricultural
4 practices[.]” OAR 660-023-0180(5)(b)(D)-(E). As relevant here, in order for
5 the county to be compelled to expand the impact area for this application, there
6 must be substantial evidence in the record that significant potential conflicts
7 beyond the selected one-half mile impact area exist, and such conflicts are with
8 either an acknowledged significant Goal 5 resource or agricultural practices.

9 **B. Impacts to Sage Grouse Generally**

10 Petitioners argue that the county failed to assess impacts on sage grouse
11 in determining whether the impact area should be expanded beyond one-half
12 mile. Petition for Review 17. Petitioners assert that this was improper because
13 “it ignores the previous LUBA decision stating that impacts on sage grouse are
14 relevant to the assessment of impacts on agricultural operations and because
15 the ‘designation of an impact area and the assessment of conflicts with
16 agricultural practices within the impact area are sometimes interrelated.’”
17 Petition for Review 16, *quoting Nash*, 63 Or LUBA at 29-30.

(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[.]”

1 Intervenor responds that the bulk of all sage grouse related issues were
2 resolved in *Nash* or *Walker I* or *II*, and any additional argument that the one-
3 half mile impact area must be extended based on potential impacts on sage
4 grouse has been waived. Intervenor’s Brief 21. Intervenor asserts that “[t]he
5 only remaining sage grouse issue is the Nashes’ argument that the proposed
6 mine’s noise and blasting impacts to sage grouse could cause a resulting
7 conflict to agriculture.” *Id.*

8 We agree with intervenor. Although we did note in *Nash* the interrelated
9 nature of determining the scope of the impact area, and possible conflicts with
10 existing uses, our last remand was relatively narrow in scope, and resolved all
11 issues regarding whether the impact area should be extended beyond one-half
12 mile based on direct sage grouse impacts. Based on the issues conclusively
13 decided in prior appeals and our narrow remand in *Nash*, the only remaining
14 sage grouse related issue is whether mining may cause sage grouse within the
15 impact area to relocate to other areas that are used for grazing, with the result
16 BLM may take actions that in turn will impose limitations that result in
17 conflicts with agricultural practices. *Beck v. City of Tillamook*, 313 Or 148,
18 831 P2d 678 (1992). We address that question later in this opinion.

19 This sub-assignment of error is denied.

20 **C. Noise Effects on Cattle**

21 Petitioners argue that the record does not include substantial evidence to
22 support the board of commissioner’s findings that there are not any noise
23 impacts to cattle that would justify a further expansion of the impact area under
24 OAR 660-023-0180. As noted above, under OAR 660-023-0180(5)(a), a
25 petitioner must establish that “factual information indicates significant
26 potential conflicts” with agricultural practices such that the 1,500 foot impact

1 area should be enlarged. Petitioners argue that the county erred in determining
2 that there were no such conflicts.

3 To support its conclusion that the 1,500 foot impact area, which has
4 already been extended to one-half mile, need not be further extended, the
5 county considered the testimony of Steven Roth, who is a full time rancher and
6 the current holder of the Nashes' prior grazing rights on the Flat Pasture. Roth
7 submitted testimony that indicated he has prior experience grazing cattle in
8 proximity to mining operations including another mine operated by the
9 applicant. Based on these experiences, Roth testified that he did not believe
10 there would be any conflict between surface mining and his grazing use of the
11 Flat Pasture. Record 10. The county noted that it considered Roth's testimony
12 to be more compelling than other conflicting testimony because he is the
13 current holder of the grazing rights and appears to be the closest agricultural
14 operator to the proposed mine site. *Id.* The county concluded that Roth's
15 testimony constitutes substantial evidence.

16 In addition to Roth's testimony, the county depended on the testimony of
17 Roger Borine, who submitted testimony that management techniques are
18 currently used on the portion of Flat Pasture adjacent to the mine to prevent
19 cattle from grazing near the mine. Under those management techniques cattle
20 are redirected to the southwest portion of the pasture. Record 11. Borine also
21 noted that based on a site-specific sound study previously submitted by the
22 applicant, noise impacts outside of the half-mile impact area should be
23 negligible. The county also noted that the applicant's sound study contained
24 empirical data that the opposition's contrary testimony and evidence lacked. In
25 addition, the county depended on several conditions of approval to mitigate
26 noise, dust traffic and other impacts to prevent additional impacts beyond the

1 impact area, in concluding that there is insufficient justification to expand the
2 one-half mile impact area and that factual information did not indicate any
3 significant potential conflicts. Record 10-11.

4 Petitioners argue that the testimonies of Roth and Borine do not
5 constitute substantial evidence. Petitioners argue that Roth's opinion is
6 insufficient, as he is merely a current lease holder of the grazing rights that had
7 been under the Nashes' control in prior proceedings. Moreover, petitioners
8 argue that Roth's reference to other mining operations and a lack of resulting
9 impacts to agricultural practices is not sufficient to provide an adequate factual
10 basis for the county's decision. Petitioners also take issue with Borine's
11 testimony, arguing that it does not address whether nearby grazing allotments
12 will be in fact impacted by mining, but merely states that the current operator
13 of the allotment avoids the area. Petitioners also argue that the county's
14 dependence on conditions of approval are an insufficient basis to support its
15 finding, where the county's findings were "inappropriately conclusory and fail
16 to explain how the conditions lead to the specific conclusion that one-half mile
17 is adequate." Petition for Review 19.

18 Intervenor responds that the county properly chose to rely on the
19 testimonies of Roth and Borine, both of whom concluded the mine did not
20 present a conflict with cattle. The county noted that prior testimony (including
21 the Nashes') conflicts with Roth's but explained that the county board found
22 Roth's testimony to be credible and to constitute substantial evidence. Record
23 10. The county considered Roth's testimony to indicate that "no conflicts
24 [exist] between agricultural operations either in close proximity to the proposed
25 mine or outside the half mile impact area on either the Horse Ridge Flat Pasture
26 or other lands." *Id.*

1 Here, the county was presented with testimony from two individuals who
2 are familiar with the property and grazing operations. Intervenor argues that
3 petitioners provided no substantial evidence to discredit the testimonies of
4 Roth and Borine regarding possible mining impacts on grazing. Intervenor
5 explains that due to Roth’s experience as a rancher on BLM lands adjacent to
6 active mining operations, his testimony is evidence that a reasonable person
7 would rely on and thus constitutes substantial evidence. Intervenor also notes
8 that Borine is a professional farming and wildlife habitat consultant who is
9 knowledgeable about grazing management, and thus his corroborating
10 testimony constitutes substantial evidence. Although petitioners argue that Mr.
11 Borine’s noise study makes “undocumented assessments on whether cattle will
12 be affected by the proposed blasting and other operations” (Petition for Review
13 18), in our view, Borine’s assessment is sufficiently developed to constitute
14 substantial evidence. Moreover, it bears repeating that OAR 660-023-0180
15 provides a default maximum impact area of only 1500 feet. Only when a
16 petitioner demonstrates that “factual information indicates significant potential
17 conflicts” exist beyond that 1500 foot area is expansion potentially required by
18 the rule. Petitioners’ critique of the evidence the board of commissioners relied
19 on is not sufficient to establish that the county’s decision is not supported by
20 substantial evidence.

21 This sub-assignment of error is denied.

22 The second assignment of error is denied.

23 **THIRD ASSIGNMENT OF ERROR**

24 Petitioners argue that the county’s decision that sage grouse are not
25 going to be impacted in a way that will cause the sage grouse to relocate, with

1 resulting possible conflicts with agricultural practices, is not supported by
2 adequate findings that are based on substantial evidence.

3 **A. Standing and Mootness**

4 Petitioners first argue that the county improperly restricted standing on
5 this issue to the Nashes and Roth because of their status as property owners or
6 leaseholders.¹³ Petitioners assert that the county failed to cite any authority for
7 that proposition and that OAR 660-023-0180 does not in any way suggest that
8 standing to present arguments at LUBA in this appeal is limited to property
9 owners or lease holders.

10 This assignment of error challenges the board of commissioners'
11 findings regarding the second basis for remand in *Nash*. The county's novel
12 theory that because petitioners are not the owner of the property they lack
13 standing to challenge the county's response to our second basis for remand is
14 without merit, as is its undeveloped suggestion that the issue is moot.
15 However, intervenor points out that the county adopted alternative findings that

¹³ The board of commissioners found:

“At the outset, the Board finds that only the Nashs or Stephen Roth have standing to address this issue given DCC 22.34.030 and LUBA’s specific references to impacts on the Nashs in its directive to the County. Neither Keith nor Janet Nash participated in the instant proceedings and most other parties testifying on sage grouse had not participated in the prior proceedings. In the alternative, the issue may be moot because the Nashs did not participate in the instant proceedings, the Nashs sold most of their land interests to Stephen Roth (including the disputed Horse Ridge Flat Pasture), there is no evidence in the record that the Nashs still own cattle or run an agricultural operation, and Mr. Roth has expressed support for the proposal.” Record 11-12.

1 potential impacts to sage grouse do not result in conflicts with agricultural
2 operations. Those findings render the error the board of commissioners
3 committed in finding that the issue presented in this assignment of error is
4 moot, or that petitioners lack standing to present the issue, harmless error.

5 This sub-assignment of error is denied.

6 **B. Impact of Fleeing Sage Grouse on Agricultural Practices**

7 In *Nash*, 63 Or LUBA at 36, we described petitioners’ argument
8 regarding impacts to sage grouse to be that:

9 “the proposed mining will cause sage grouse to leave the mining
10 area and flee to petitioners’ grazing lands for winter habitat, as
11 opposed to ending up on some other land, and * * * that the BLM
12 will then reduce petitioners’ grazing operation on Flat Pasture[.]”

13 After noting that the county failed to address that argument, we directed the
14 county to consider:

15 “in determining whether the proposed mine conflicts with
16 petitioners’ agricultural operations, effects of the proposed mine
17 on sage grouse that winter in the impact area and the possibility
18 that such effects could lead to a reduction in lands available for
19 grazing for petitioners’ cattle.” *Id.*

20 We summarized the remand as requiring the county:

21 “to evaluate any conflicts with petitioners’ agricultural operations
22 in the impact area that the county designates, including whether
23 the proposed mine would cause sage grouse to abandon the area
24 and seek winter habitat on petitioners’ other allotments.” *Id.* at 37.

25 In *Walker II*, we noted that, “impacts on sage grouse habitat in general are not
26 in themselves relevant for purposes of determining the impact area under OAR
27 660-023-0180(5)(a) and evaluating conflicts with identified Goal 5 resources
28 under OAR 660-023-0180(5)(b)(E).” *Walker II*, 59 Or LUBA at 497-98. We
29 determined that because only the sage grouse’s lek is identified on the county’s

1 list of significant Goal 5 resources, any conflict between the proposed mining
2 and other sage grouse habitat is irrelevant for analysis under OAR 660-023-
3 0180(5)(a), absent a connection with another identified Goal 5 resource. *Id.*

4 Petitioners now argue that the county erred in excluding consideration of
5 impacts to sage grouse with regard to conflicts with agricultural operations.
6 Petitioners asserted below and assert at LUBA that the county needs to perform
7 a cumulative effects analysis of sage grouse impacts that affect agricultural
8 practices. In addition, petitioners argue that the county’s assessment of impacts
9 on sage grouse was improperly limited to “wintering sage grouse,” as the
10 county failed to identify any impacts based on the grouses’ use of the impact
11 area in spring, summer and fall, but permitted the application to be clarified in
12 a way that allowed year-round operations. Petitioners also argue that the
13 county improperly rejected evidence indicating that sage grouse are in the
14 vicinity, disregarding such evidence because it came from “dated studies.”
15 Petition for Review 23. Petitioners point to several government documents as
16 evidence that the county ignored, including a United States Geological Survey
17 (USGS) report on sage grouse impacts (Record 84), an Oregon Department of
18 Fish and Wildlife letter calling for a 3-mile radius around occupied leks
19 (Record 74), and a Bureau of Land Management (BLM) draft environmental
20 impact statement, which is not in the record.

21 As noted above, intervenor responds that the majority of all sage grouse
22 related issues were resolved in or before *Nash* and any unresolved sage grouse
23 related issues could have been raised in prior proceedings and are thus waived.
24 *Beck*. Intervenor argues that the only remaining issue is whether mining will
25 result in sage grouse relocating to nearby grazing areas such that BLM will

1 impose additional, and conflicting, limitations on such grazing. Intervenor's
2 Brief 32.

3 Intervenor points out that the record shows that the only site-specific
4 sage grouse survey revealed no sage grouse activity in the vicinity of the mine.
5 Intervenor also explains that the county depended on Roth's oral testimony that
6 he already manages for sage grouse, hence the presence of relocated sage
7 grouse would not present a conflict with his agriculture operation. Roth
8 testified that based on his management and limited grazing season of one and
9 one-half months per year, he did not think that BLM would restrict his grazing
10 rights. Intervenor points out that the Flat Pasture allows for only 150 cattle on
11 over 5,000 acres for a month and a half.

12 The county considered, and we agree, that the remand was limited to
13 consideration of sage grouse impacts to the extent that noise and blasting from
14 the mine might cause sage grouse to relocate and in turn impact agricultural
15 practices through possible BLM curtailment of Roth's (and the Nashes'
16 previous) grazing rights. The evidence cited by petitioners is directed at
17 possible conflicts between mining and sage grouse generally and does not
18 directly address the more limited question presented in our second basis for
19 remand in *Nash*.

20 Based on the above evidence and testimony, we determine that the
21 county did not err in its analysis that there will be no conflicts with agriculture
22 under OAR 660-023-0180(5)(b)(E) that could be attributed to relocating sage
23 grouse and resultant BLM actions to limit grazing. The county found, and we
24 agree, that based on the record in this appeal, the arguments regarding such
25 conflicts are too speculative to establish that there will be such conflicts with
26 agricultural practices under OAR 660-023-0180(5)(b)(E).

- 1 Petitioners' third assignment of error is denied.
- 2 The county's decision is affirmed.