BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL LAND AND CATTLE COMPANY, LLC,
and KAMERON DELASHMUTT,
Petitioners,
Cross-Respondents,

vs.

DESCHUTES COUNTY,
Respondent,

and

ANNUNZIATA GOULD,
Intervenor-Respondent,
Cross-Petitioner.

LUBA No. 2015-107

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Liz Fancher, Bend, filed a petition for review, a reply brief, and a response to the cross-petition for review and argued on behalf of petitioners, cross-respondents.

No appearance by Deschutes County.

Paul D. Dewey, Bend, filed a response brief, a cross-petition for review and a reply brief and argued on behalf of intervenor-respondent, cross-petitioner.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 09/23/2016

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

Opinion by Holstun.

NATURE OF THE DECISION

In this appeal petitioners and cross-petitioner Gould challenge a county hearings officer decision that denies final master plan approval for Thornburgh Resort, a proposed destination resort in Deschutes County. For simplicity and clarity, we generally refer to petitioners/cross-respondents Central Land and Cattle Company and DeLashmutt collectively as petitioners and refer to intervenor-respondent/cross-petitioner Gould as Gould.

INTRODUCTION

In Deschutes County, a destination resort must receive conceptual master plan (CMP) and final master plan (FMP) approval. The county's CMP and FMP approval decisions concerning Thornburgh Resort have both been the subject of a number of appeals. This appeal concerns the county's second approval of a FMP for Thornburgh Resort. The approval standard at issue in this appeal is Deschutes County Code (DCC) 18.113.070, which provides in relevant part:

> "In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:
>
> "D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource."

In this opinion we refer to the DCC 18.113.070(D) standard as the no net loss/degradation standard. In the decision on appeal, a county land use

hearings officer attempted to respond to our remand of the county's first FMP approval decision in *Gould v. Deschutes County*, 59 Or LUBA 435 (2009), *aff'd* 233 Or App 623, 227 P3d 758 (2010). For simplicity we will simply refer to our decision remanding the first FMP decision as *Gould (FMP)*.

A detailed discussion of all the appeals in this case would serve no useful purpose. We therefore simply identify those appeals in the margin and briefly describe the key consequences of those appeals, before moving directly to consider our remand decision in *Gould (FMP)*.[1] We do discuss some of those prior appeals at some length later in this decision. As things now stand, the county's CMP approval was affirmed on appeal. One of the questions in this appeal is whether the county may grant FMP approval if Thornburgh's approved CMP expired before the county approved the FMP for a second time. Both the appeal and cross-appeal also challenge the county hearings officer's attempt to respond to the two errors regarding the no net loss/degradation

[1] *Gould v. Deschutes County*, 51 Or LUBA 493 (2006) (LUBA dismissed a premature challenge to CMP approval); *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and rem'd* 216 Or App 150, 171 P3d 1017 (2007) (LUBA remanded the first CMP approval); *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106 (2009) (LUBA affirmed second CMP approval and LUBA's decision was affirmed on appeal); *Gould v. Deschutes County*, 59 Or LUBA 435 (2009), *aff'd* 233 Or App 623, 227 P3d 758 (2010) (LUBA remanded first FMP approval); *Gould v. Deschutes County*, 67 Or LUBA 1 (2013) (LUBA remanded county decision that CMP had been initiated before the CMP expired); *Gould v. Deschutes County*, 71 Or LUBA 78 (2015), *aff'd in part*; *rev'd in part* 272 Or App 666, 362 P3d 679 (2015) (LUBA remanded county's second decision that CMP had been initiated before it expired; Court of Appeals broadened LUBA's remand).

standard that led to LUBA's remand of the county's first FMP decision in *Gould (FMP)*.

The two errors identified by LUBA in *Gould (FMP)* concern the adequacy of Thornburgh Resort's wildlife management plan to demonstrate that Thornburgh Resort will comply with the no net loss/degradation standard. As we explained in *Gould (FMP)*:

> "Thornburgh's wildlife management plan has two components; one component addresses terrestrial wildlife impacts and the other component addresses off-site fish habitat impacts. According to Thornburgh, the terrestrial wildlife plan is made up of two documents, the 'Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort' (Terrestrial WMP) and the 'Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project' (M&M Plan). The fish component is also made up of two documents, the "Thornburgh Resort Fish and Wildlife Mitigation Plan relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat," dated April 21, 2008 (Fish WMP) and an August 11, 2008 letter that proposes additional mitigation if needed for Whychus Creek. * * *" *Gould (FMP)*, 59 Or LUBA at 444-45 (record citations and footnote omitted).

One of the errors identified in *Gould (FMP)* concerns the fish component of the wildlife plan and Lower Whychus Creek, and one of the errors concerns the terrestrial wildlife component. The parties have very different understandings of the scope and nature of the errors that LUBA identified in *Gould (FMP)*. We turn first to the Whychus Creek issue and the petition for review.

THE PETITION FOR REVIEW

To resolve the assignments of error in the petition for review we turn first to our decision in *Gould (FMP)*, where we discussed the water temperature

issues and identified the hearings officer's error in finding that the Thornburgh's proposed mitigation to address the thermal impact of Thornburgh's use of groundwater on lower Whychus Creek satisfies the no net loss/degradation standard. We do that by setting out the relevant findings below, and then clarifying some ambiguities in our *Gould (FMP)* decision.

A. *GOULD (FMP)*

Our decision in *Gould (FMP)* began with a description of the relationship between Thornburgh Resort and waterways that would be impacted by the resort's use of groundwater and then proceeded to describe the parties' arguments and the hearings officer's decision before discussing the error that we found in the appeal of the hearings officer's first FMP decision:

> "The main stem of the Deschutes River is located approximately [two] miles to the east of the eastern boundary of the proposed resort. Several tributaries of the Deschutes River, including Whychus Creek and Deep Canyon Creek, are located a number of miles north of the proposed resort. The proposed destination resort will use deep wells to supply water. The aquifers that will provide that water are hydrologically connected to off-site down-gradient surface waters and the aquifer water is cooler than the receiving surface waters of the Deschutes River and its tributaries. While Thornburgh has been required to acquire and retire water rights to mitigate for its planned volume of water use, that mitigation water will not necessarily offset thermal impacts of its withdrawal of cool water from the aquifers under the destination resort if the mitigation water is warmer than the ground water that is removed from the system. During the proceedings below, ODFW [the Oregon Department of Fish and Wildlife] submitted a letter in which it specifically recognized the value of groundwater fed springs and seeps for cooling waters in the main stem of the Deschutes River and its tributaries. ODFW recognized that this cooling groundwater "provides thermal refuge[] for salmonid

which thrive in cooler water." However, ODFW ultimately concluded that

> "'In this particular case the potential impact to springs and seeps will likely be mitigated by transferring springs flows used for irrigation directly back into Deep Canyon Creek and the Deschutes River. These springs should provide similar habitat and help with water temperatures in the Deschutes River.'

"The opponents' expert expressed concerns that the proposed mitigation would not be adequate to off-set the diversion of cool groundwater from Alder Springs, which drains into Whychus Creek, a tributary of the Deschutes River that provides habitat for the federally listed bull trout and other fish species. Thornburgh's experts submitted rebuttal testimony in which they took the position that any thermal impact on Whychus Creek would be negligible. One of those experts took the position that the thermal impact would be less than .01 degree Celsius. In an August 11, 2008 letter to the county, Thornburgh's attorney noted that Thornburgh disagreed with some of the assumptions that led the opponents' expert to conclude the proposed destination resort would have a damaging thermal impact on Alder Springs and Whychus Creek. But Thornburgh's attorney offered to provide additional mitigation if the hearings officer determined that additional mitigation was necessary to address concerns about thermal impacts on Whychus Creek:

> "'* * * Thornburgh does not want to be caught short if you determine that additional mitigation is required for possible impacts on * * * Whychus Creek. Therefore, we are providing evidence to demonstrate that it would be feasible for Thornburgh to provide additional flow of 106 acre-feet per year in Whychus Creek, if needed to meet the county approval standard. This would be in addition to the amount of mitigation water already described in Thornburgh's Addendum. * * *'

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

"In response to that proposal, opponents' expert submitted a letter, which is set out in part below:

> "'[In Thornburgh's letter of] August 11, 2008, it is proposed that Thornburgh could provide mitigation for loss of groundwater discharge to lower Whychus Creek due to the pumping of its proposed wells. The mitigation would consist of 106 acre feet of water provided by Three Sisters Irrigation District through transfer of irrigation water to instream flow. This will not mitigate impact to Whychus Creek because it replaces cold groundwater with warm water from upstream during the irrigation season. It is the cold groundwater discharge at Alder Springs that is the defining and essential factor that makes the lower reach of Whychus Creek critical habitat for native bull trout, redband trout and reintroduced steelhead trout and Chinook salmon.
>
> "'The pumping of Thornburgh wells will reduce cold groundwater discharges. Replacing this lost flow of 106 acre feet by reducing upstream irrigation diversions would result in more hot water mixing with the cold water of the lower reach of Whychus Creek. The proposed mitigation is harmful to critical fish habitat in two ways: first it would allow the reduction of cold groundwater discharge to the stream, and second it would increase the flow of warm water into the cold lower reach of the stream.
>
> "'Using the thermal mass balance equation, the calculated increase in stream temperature at Alder Springs due to the pumping of the Thornburgh wells would be 0.07° C. The calculated change in stream temperature due to both the reduction in cold groundwater discharge and the increased stream flow

> due to the proposed mitigation would result in even a greater stream temperature increase of 0.12° C at Alder Springs. It is clear that the proposed mitigation for Thornburgh's impact to Whychus Creek would only increase the impact to critical cold water habitat that native and reintroduced fish are dependent on.'

"In its August 28, 2008 argument to the county hearings officer, petitioner's attorney reiterated the above:

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

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

> "'The OWRD [Oregon Water Resources Department] mitigation requirement adequately addresses water quantity; [but] it does not *fully address* water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort *does not account for the higher water consumption that will likely occur during the summer months*. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is

> necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development.'" *Gould (FMP)*, 59 Or LUBA at 454-57 (record citations omitted; italics added).

We pause at this point to emphasize one important issue that is at the heart of the parties' disagreement in this appeal. The hearings officer's decision in *Gould (FMP)* could have been clearer, but we understand the *Gould (FMP)* hearing officer to have found the enhanced in-stream flow to be achieved by Thornburgh's initial proposal to retire irrigation rights, leaving that water in-stream, was sufficient to "fully address" the thermal impact on lower Whychus Creek, with only one stated exception.[2] That exception, which is stated in the italicized language quoted above, is that the initially proposed mitigation "does not account for the higher water consumption that will likely occur during the summer months." That is why the hearings officer accepted Thornburgh's offer to provide an additional 106 acre-feet of mitigation water. Our *Gould (FMP)* decision goes on to explain:

> "*From the above findings, it appears the hearings officer was not persuaded by Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that it could be ignored.* To ensure that there would be no adverse thermal impact, the hearings officer took Thornburgh up on its offer to secure additional mitigation water from the Three Sisters Irrigation

[2] To avoid possible confusion, we attempt in this opinion to be clear about which hearings officer we are talking about when we refer to the hearings officers: the hearings officer in the first FMP decision, which was at issue in *Gould (FMP)*, or the hearings officer that issued the second FMP decision, which is the subject of this appeal.

> District. Unfortunately, in doing so, the hearings officer either did not recognize or for some other reason failed to respond to petitioner's contention that the mitigation water from the Three Sisters Irrigation District that will be generated by eliminating upstream irrigation diversions will not mitigate the destination resort's thermal impacts on Whychus Creek because that mitigation will replace cool water with warmer water. There may be a simple answer to the opponents' concern, but it is lacking in the hearings officer's decision. *Without that explanation, the decision must be remanded for addition findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek*." *Gould FMP*, 59 Or LUBA at 457 (italics and underscoring added).

As a second point of clarification, the first italicized sentence above is ambiguous and can be read to say that LUBA understood the *Gould FMP* hearings officer was concerned about the thermal impact on Whychus Creek that might result from *average daily use* of water by the resort, which Thornburgh's expert estimated would be less than .01dC.[3] However if that sentence is read context with the balance of the quoted text, particularly the last emphasized sentence, it is clear that in *Gould (FMP)*, LUBA understood the hearings officer only to be concerned with the *additional* thermal impact of increased summer water use at Thornburgh Resort, not average daily water use. As we noted earlier, the hearing officer found, at least implicitly, that the

[3] As we explain later, the hearings officer that rendered the second FMP decision that is before us in this appeal appears to have understood our decision to take that position.

proposed mitigation was sufficient to "fully address" thermal impact of average daily water use on lower Whychus Creek, with the exception of the additional summer water use impact. The hearings officer required the 106 acre-feet of additional mitigation that Thornburgh offered only to address the impact of additional summer water usage. The hearings officer did not require the 106 acre-feet of additional mitigation to address the very small thermal impact of the resort's average daily water use with the initially proposed mitigation, which Thornburgh's expert estimated would be less than .01dC.

Having required the additional 106 acre-feet of mitigation to off-set the potential thermal impacts from additional summer water usage at Thornburgh, it remained for the first hearings officer to determine if the relatively warmer mitigation water would be effective to mitigate the loss of the relatively colder water at Alder Springs that would be diverted and used by the resort during summer months. In *Gould (FMP)* we concluded the hearings officer failed to adopt any findings addressing that question:

> "Thornburgh points to the following statement by its expert:
>
> > "'It should be noted that if there is flow in Whychus Creek that is not from Alder Springs, whether warmer than Alder Springs or not, the resulting increase in temperature at the mouth would be even less than the estimated maximum of 0.01 [degree Celsius].'
>
> "Citing *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002), Thornburgh contends that the hearings officer was entitled to choose which expert testimony she found more believable.

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

> "'The findings make clear that the county considered the issue to be a battle of the experts and chose to believe the opponents' experts. A local government may rely on the opinion of an expert if, considering all of the relevant evidence in the record, a reasonable person would have chosen to rely on the expert's conclusion.'

"In this case the hearings officer either did not recognize or for some other reason failed to address the conflicting expert testimony about the efficacy of relying on the mitigation water from the Three Sisters Irrigation District to address the hearings officer's concern about the thermal impacts water use at the destination resort would have on Whychus Creek during the summer months. Without some attempt by the hearings officer to resolve that conflict or to identify which expert testimony she found more persuasive, remand is required." *Gould (FMP)*, 59 Or LUBA at 457-58 (footnote and citations omitted).[4]

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[4] In the omitted footnote we attempted to explain our understanding of at least one aspect of the analysis that would be required to resolve the experts' competing positions on the efficacy of leaving relatively warmer water instream to mitigate for the loss of relatively cooler water that would be diverted by the resort during summer months:

> "We need not and do not decide here whether the expert statement cited by Thornburgh would be sufficient to overcome the opponents' expert's concerns. However, we note that if the water that would remain in Whychus Creek by virtue of the Three Sisters Irrigation District mitigation is only slightly warmer than Alder Springs water and significantly cooler than the in-stream water at the mouth of Whychus Creek, Thornburgh's expert's statement at Record 1248 is no doubt true. That may well be the case. But if the

We restate below the Whychus Creek issues that were resolved by *Gould (FMP)* and the reasons for our remand of the first FMP decision:

1. In the first FMP decision the hearings officer found that the initially proposed mitigation was sufficient to fully address the no net loss/degradation standard with regard to water quality and water habitat quality, with one exception that affected Lower Whychus Creek.

2. The exception to the adequacy of the initially proposed mitigation identified by the hearings officer in *Gould (FMP)* was the additional potential thermal impact on Lower Whychus Creek from increased summer water use at the Resort. This was the reason the *Gould (FMP)* hearings officer accepted Thornburgh's offer to provide an additional 106 acre-feet of mitigation.

3. The hearings officer, in accepting the additional 106 acre-feet of mitigation failed to address the disagreement between the experts regarding whether the mitigation water would be ineffective as mitigation because the mitigation water is warmer than the cooler water that will be diverted by the resort in summer months.

4. In remanding for the hearings officer to address the issue identified in paragraph 3 above, LUBA stated that in assessing Thornburgh's expert's contention that even though the mitigation water is warmer than the water that is being diverted in the summer the mitigation water is still

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water that is not going to be diverted for irrigation is significantly warmer than the Alder Springs water and approximately the same temperature as the in-stream water at the mouth of Whychus Creek, it is difficult to see how leaving that water in Whychus Creek would have any material impact on the [in-stream] water temperature at the mouth of Whychus Creek. Some effort to clarify the expert's statement will likely be required." *Gould (FMP)*, 59 Or LUBA at 458, n 13.

> cool water, "[s]ome effort to clarify the expert's statement will likely be required."

We note at this point that the opponents' point that the mitigation water is warmer than the cooler diverted groundwater almost certainly applies equally to the adequacy of the initially proposed mitigation that the *Gould (FMP)* hearings officer found fully addressed the possible thermal impact attributable to average daily resort water use, with the exception of the higher water use summer months. Nevertheless we conclude that the *Gould (FMP)* hearings officer found the initially proposed mitigation was sufficient to mitigate thermal impacts due to average daily use, with the exception of increased summer usage, with the result that the no net loss/degradation standard is satisfied with regard to the resort's average daily use. Since that aspect of the first hearings officer's decision was not disturbed by LUBA's *Gould (FMP)* decision or the Court of Appeals, that issue is now a resolved issue under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).

With the above review and clarification of our decision in *Gould (FMP)* we turn to petitioner's assignments of error.

B. Petitioners' Assignments of Error

The scope of county proceedings to respond to a LUBA remand is set out at DCC 22.34.040, which provides in relevant part:

"Scope of Proceeding.

> "A. On remand, the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, *the Board* shall have the discretion

> to reopen the record in instances in which it deems it to be appropriate.
>
> "* * * * *
>
> "C. *If additional testimony is required to comply with the remand*, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand. Other issues that were resolved by the LUBA appeal or that were not appealed shall be deemed to be waived and may not be reopened." (Emphases added.)

The second hearings officer first addressed his understanding of the scope of the remand in this matter regarding both the scope of the evidentiary record on remand and the scope of the legal issues he was to resolve on remand. We set out portions of the second hearings officer findings below, before turning to petitioners' assignments of error.

> "As noted previously, Gould acknowledged that new evidence was admissible pursuant to the LUBA remand regarding terrestrial mitigation. Gould, and others, however, objected to new evidence regarding Whychus Creek on the grounds that it exceeds the scope of the remand. * * *
>
> "The distinction between 'Hearings Body' and 'Board' in [DCC 22.34.040] is clear. One may argue that whether the DCC should preclude the hearings officer from receiving new evidence if it is thought appropriate, particularly in light of the 90 day period in which to act on remand. But my role is to apply the DCC as written, accordingly, my analysis will be based solely on the evidence in the record on appeal, and argument at the hearing related to that evidence. *All new evidence relating to the impact of the mitigation, and to changed conditions, is excluded*.
>
> "* * * * *

"It appears to me that the applicant[5] seeks to expand the scope of the remand to include the beneficial impacts of increased flow on the upper reaches of Whychus Creek. There are numerous references in the record to the need to improve flows in Whychus Creek for fish habitat. It likely is incontrovertible that this will result in a significant benefit. It might be that, starting with a clean slate, the no net loss standard could be met by a finding that this overall benefit outweighs the .01d C increase, in the same way that off-site terrestrial mitigation may offset on-site impacts. But I could find nothing making that argument to the prior hearings officer and it does not appear to have been contemplated in the finding at issue.* * *

"This is one example of how, to a great extent, the applicant appears to be hamstrung by LUBA's characterization of the finding. But the applicant did not appeal that reasoning in an attempt to give it more latitude or get a clear remand for new evidence. My reading of the finding, and LUBA's remand, is that I am to consider whether the additional water will mitigate the impact of the .01dC temperature increase on lower Whychus Creek, i.e. from the point that the Alder Springs water enters to its mouth.

"The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with 'warm' water from upstream. [second hearings officer's quotation marks]. He asserts, and I think the record supports the conclusion that the cold groundwater discharge at Alder Springs is, at least to a fair extent, the 'defining and essential factor' for fish – probably especially bull trout. He predicts a temperature increase of .12 d C 'at Alder Springs'. It is not clear whether this projected increase translates into warmer temperatures further down Whychus Creek but presumably that is his conclusion. * * *

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[5] The second hearings officer's references to the "applicant" are a reference to petitioner Central Land and Cattle Company (CLCC).

"The applicant argues that, since Yinger overstated the amount of consumptive use, as LUBA appears to have concluded, the impact on Whychus is smaller than Yinger asserts. That appears to be correct, so arguably Yinger's finding of a .12dC increase after adding the upstream water is overstated. But it does not resolve for me the fact that the Hearings Officer also apparently agreed with the applicant on that point and still found that there was a .01dC impact that needed to be mitigated. Further, the applicant did not run the numbers with the reduced consumptive use in the prior record and any such evidence now would be new. The argument, while appropriate, does not provide evidence that the addition of upstream water directly mitigates temperature or addresses impacts on refugia.[6]

"* * * * *

"The bottom line is that the offer to increase flows in Whychus Creek was made too late, with too little evidentiary basis in light of Yinger's admittedly cursory, contrary opinion. What is needed to solve this dilemma is the new evidence submitted at the hearing addressing the temperature of the 106 cfs [*sic* should be 106 acre-feet) added flow when it reaches the Alder Springs area and its resultant impact on lower Whychus Creek. Also needed, and not submitted, is evidence dealing with what, if any impact, this has on the refugia or perhaps that the refugia would not be needed or needed as much.

[6] There are numerous references to "cool patches," and "refugia" in the record. While there may be cool patches in Lower Whychus Creek, and fish apparently use the cooler water in Lower Whychus Creek as a refuge, it is the cooling effect of the groundwater from Alder Springs as it discharges into Whychus Creek that is the issue in this appeal. Specifically the issue is whether the 106 acre-feet of additional mitigation water will mitigate the loss of cooling waters at Alder Springs that is attributable to the increased summer groundwater usage at Thornburgh during summer months, such that the no net loss/degradation standard will be met.

"* * * * *." Record 106-108 (italics and underscoring added; citations omitted).

1. Failure to Consider Relevant Evidence in the *Gould (FMP)* Record (First Assignment of Error)

Petitioners first argue the second hearings officer erroneously found the *only* evidence on the issue on remand regarding the efficacy of the 106 acre-feet of mitigation water to ensure the additional water usage at Thornburgh Resort does not violate the no net loss/degradation standard was the testimony by Yinger, one of the opponents' experts. We understand petitioners' challenge to focus on the following finding by the second hearings officer:

> "* * * The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with 'warm' water from upstream. * * *." Record 107 (record citation omitted).

Petitioners contend that LUBA specifically recognized in *Gould (FMP)* that their expert TetraTech took the position that even though the mitigation water may be slightly warmer than the lost spring flow at Alder Springs, the mitigation water is still cool water and would reduce Yinger's projected thermal impacts. *Gould (FMP)*, 59 Or LUBA at 457.

One of the main points of our remand in *Gould (FMP)* was that the hearings officer failed to resolve the inconsistent positions by opponents' expert Yinger and the applicant's expert TetraTech. While the hearings officer may have meant to say that he found Yinger's testimony more detailed or credible than TetraTech's contrary testimony, the second hearings officer's

finding without further explanation says Yinger's testimony was the only relevant testimony.

We agree with petitioners that remand is required for the second hearing officer to provide a better explanation for why he found TetraTech's contrary testimony unpersuasive. We do not attempt here to decide whether Yinger's estimates of thermal impact at Alder Springs are overstated, as petitioners argue they are. That is something the hearings officer will need to address on remand, assuming Yinger's overstatement of average daily use, if it is an overstatement, would be relevant to the narrow legal and factual issue on remand, which is limited to whether the thermal impact of the additional water use by the resort in summer months and whether the additional mitigation will result in compliance with the no net loss/degradation standard.

Finally, petitioners also contend the second hearings officer failed to consider other relevant evidence from the record in *Gould (FMP)* that was called to his attention. This evidence includes a study submitted by the applicant, and evidence submitted by opponents as well, that shows well water withdrawal by Thornburgh has no immediate effect on nonadjacent waterways like Whychus Creek, but rather creates a cone of depression in groundwater and that over time that cone stabilizes so that increased seasonal pumping by Thornburgh might have no increased effect on the cool water discharge at Alder Springs, as LUBA and the hearings officer in *Gould (FMP)* seemed to assume. Record 2995. Petitioners contend this evidence was called to the

second hearings officer's attention. Record 172-73; 230-31. That evidence does appear to be relevant to the issue on remand, but it is for the hearings officer to consider in the first instance. On remand the hearings officer needs to consider any evidence from the *Gould (FMP)* record that is called to his attention if it is relevant to the Whychus Creek remand issue.

The first assignment of error is sustained.

2. The Hearings Officer Misunderstood the Question to be Resolved on Remand (Second Assignment of Error)

Petitioners contend the hearings officer misunderstood the question to be resolved on remand. There are statements in the second hearings officer's decision that appear to accurately state the Whychus Creek question to be resolved following our remand in *Gould (FMP)*.[7] But in other parts of the decision (quoted above and underlined) the second hearings officer erroneously appears to believe the 106 acre-feet of additional mitigation water, which the second hearings officer in several places mistakenly describes as 106 cfs (cubic feet per second) of mitigation water, must be sufficient to mitigate the .01dC

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[7] For example at one point the second hearings officer stated the issue on remand as follows:

> "LUBA remanded the Oct. 8, 2008 hearings officer decision, 'for additional findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek.'" Record 106.

increase that the applicant's expert estimated would result from the initially proposed mitigation:

> "My reading of the finding, and LUBA's remand, is that I am to consider whether the additional water will mitigate the impact of the .01dC temperature increase on lower Whychus Creek, i.e. from the point that the Alder Springs water enters to its mouth." Record 107.

> "[T]he Hearings Officer also apparently agreed with the applicant on that point and still found that there was a .01dC impact that needed to be mitigated." Record 108.

As we explained earlier in this opinion, while our decision in *Gould (FMP)* could have been clearer on this issue, the question of whether the initially proposed mitigation was sufficient to mitigate the average daily water use of the resort was resolved by the first hearings officer in *Gould (FMP)* in favor of the applicant. The first hearings officer apparently agreed with TetraTech that with the initially proposed mitigation the thermal impact of resort water use on Lower Whychus Creek below Alder Springs would be less than .01dC and that extremely minor impact would not violate the no net loss/mitigation standard. But notwithstanding that conclusion of the first hearings officer, an additional issue arose regarding increased summer water use by Thornburgh Resort. The question for the second hearings officer on remand was whether that increased summer water usage would result in a violation of the no net loss/degradation standard. Because the second hearings officer apparently was confused about the question to be resolved on remand, we sustain the second assignment of error.

On remand the question to be resolved by the hearings officer is not whether the projected average daily water use of Thornburgh Resort will violate the no net loss/degradation standard. That question was resolved in *Gould (FMP)*. The question on remand is whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

The second assignment of error is sustained.

3. Whether the Additional Mitigation Will Have Benefits to Upper Whychus Creek that Should be Considered on Remand (Third Assignment of Error)

Petitioners contend the second hearings officer erred by refusing to consider benefits to upper Whychus Creek that will result from the additional 106 acre-feet of mitigation, in determining whether the increased water usage at Thornburgh Resort during summer months will violate the no net loss/degradation standard. While our remand perhaps should have been broad enough to allow the hearings officer to consider benefits to Upper Whychus Creek that may result from the additional mitigation, even if those benefits are unrelated to thermal impacts on Lower Whychus Creek, our exclusive focus in *Gould (FMP)* was on the thermal impact of increased resort water use in the summer and the efficacy of the initial mitigation, as supplemented by the additional mitigation, to ensure that any thermal impact that might result from that additional summer water use would be sufficiently mitigated to ensure the

no net loss/degradation standard will not be violated in Lower Whychus Creek. The second hearings officer did not err by refusing to consider or balance unrelated benefits from the additional mitigation to Upper Whychus Creek.

The third assignment of error is denied.

4. The Second Hearings Officer Erred by Refusing to Consider New Evidence (Fourth Assignment of Error)

In the initial portion of the second hearings officer's findings quoted above, he interpreted DCC 22.34.040(A) to limit his consideration on remand to the evidentiary record in *Gould (FMP)* unless additional evidence "is required to comply with the remand." The hearings officer interpreted the language that states "the Board [of Commissioners] shall have the discretion to reopen the record in instances in which it deems it to be appropriate" to give the Board of Commissioners discretion to reopen the record on its own motion, but found no similar grant of discretion to separately referenced "Hearings Bod[ies]," like the hearings officer.

Petitioners first argue the hearings officer's interpretation is not adequate for review. We reject that argument. The hearings officer's interpretation is adequate for review. Moreover, the hearings officer's interpretation is consistent with the text of DCC 22.34.040(A). We conclude the hearings officer did not "[i]mproperly construe[] the applicable law[.]" ORS 197.835(9)(a)(D).

Petitioners also argue the hearings officer was inconsistent in allowing additional evidence on remand when considering the Terrestrial WMP and

M&M Plan issue but not allowing additional evidence when considering the Lower Whychus Creek issue. Our remand regarding the Terrestrial WMP and M&M Plan clearly required additional evidence and all parties agreed that additional evidence was required to resolve the Terrestrial WMP and M&M Plan remand issue.[8] Whether our remand on the Lower Whychus Creek thermal impact issue required consideration of evidence beyond the *Gould (FMP)* record was much less clear.

Once again, our decision in *Gould (FMP)* is unfortunately ambiguous. In describing TetraTech's statement that even though the additional mitigation water is slightly warmer than the cool water that will be diverted by the resort it is still cool water and will reduce any thermal impact of the additional summer resort water use below the .01dC impact of average daily water use, we said "[s]ome effort to clarify the expert's statement will likely be required." *See* n 4; 59 Or LUBA at 458 n 13.

We now clarify that on remand the hearings officer will need to have TetraTech clarify his contentions regarding the efficacy of the warmer 106 acre-feet of mitigation water to avoid violation of the no net loss/degradation standard at Lower Whychus Creek. That testimony, which we set out in *Gould (FMP)* and set out again earlier in this opinion, was not even specifically directed at the increased water use during summer months. Moreover, we

[8] We address the terrestrial Wildlife Management Plan remand issue in our discussion of the cross-petition for review.

agree with petitioners that, because the hearings officer's concern with the potential thermal impact of increased resort water usage during summer months appears to have arisen for the first time in the first hearings officer's decision in *Gould (FMP)*, after the evidentiary record had closed, the second hearings officer should have allowed and considered additional evidence on remand regarding that concern.

On remand all parties submitted additional evidence to the second hearings officer concerning whether the additional mitigation will be sufficient to fully mitigate impacts of the resort's additional summer water usage so that the no net loss/degradation standard will be met. While the hearings officer received that evidence, he determined that he could not consider that additional evidence under DCC 22.34.040(A), because LUBA's remand did not require that he do so. While the hearings officer's erroneous conclusion that our remand did not require additional testimony is largely attributable to ambiguities in our *Gould (FMP)* decision, we conclude that the second hearings officer erred in concluding that LUBA's remand did not require that he consider new evidence to the extent it was relevant to his inquiry regarding Lower Whychus Creek on remand. And again, that inquiry is whether the additional 106 acre-feet of additional mitigation will be effective to mitigate any thermal impact that additional water use by the resort during summer months may have on Lower Whychus Creek such that the proposed resort will comply with the no net loss/degradation standard.

The fourth assignment of error is sustained.

THE CROSS PETITION FOR REVIEW

In the cross petition for review, Gould asserts five cross-assignments of error and one contingent cross-assignment of error. Three of the cross-assignments of error allege that the county's proceedings following our remand in *Gould (FMP)* were not properly initiated. One cross-assignment of error alleges the FMP remand proceedings were improper because the CMP approval decision has expired. The remaining cross-assignment of error challenges the hearings officer's finding that the Terrestrial WMP and M&M Plan provide sufficient detail to ensure that the no net loss/degradation standard will be met for terrestrial wildlife. Finally, in the contingent cross-assignment of error, Gould argues that if the decision is remanded for any reason under the petition for review that the second hearings officer should consider whether changed conditions warrant requiring the applicant to submit a new application for destination resort approval.

A. FMP Remand Proceedings Should Not Have Been Initiated Because the CMP Approval Has Expired (First Cross Assignment of Error).

CMP approval for Thornburgh Resort became final on April 15, 2008. Under DCC 22.36.010(B)(1) "a land use permit is void two years after the discretionary decision becomes final if the use approved in the permit is not initiated within that time period." Gould contends DCC 22.36.010(B)(1) applies to the CMP decision and that the county CMP approval became void on

November 18, 2011, because the use approved in the CMP, the destination resort, was not initiated prior to November 18, 2011.[9]

DCC 18.113.040(B) requires that a FMP must comply with the CMP, and when approving a destination resort FMP, DCC 18.113.100(A) requires that the county find that "all standards of the CMP have been met * * *." We understand Gould to argue the county cannot find the FMP complies with the CMP or that "all standards of the CMP have been met * * *" if the CMP is now void. But Gould may also be arguing that if the CMP becomes void, prior to FMP approval, further action on the destination resort is simply not permissible. Whatever the case, Gould contends it was error for the county to proceed to grant the second FMP approval on remand in 2015 when the CMP approval became void in 2011.

Under DCC 22.36.020(A), there are three ways a development action can be "initiated," and one of those ways is "[w]here construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant." DCC 22.36.020(A)(3). The question of whether the destination resort was "initiated" before the CMP became "void" under DCC 22.36.010(B)(1) was presented in *Gould v. Deschutes County*, 71 Or LUBA 78

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[9] Under DCC 22.36.010(E) the two-year initiation deadline is tolled by the filing of a LUBA appeal. The April 15, 2010 two-year deadline under DCC 22.36.010(B)(1) to initiate Thornburgh Resort was tolled by the LUBA appeal that challenged the county's final CMP decision.

(2015), *aff'd in part*; *rev'd in part* 272 Or App 666, 362 P3d 679 (2015) and *Gould v. Deschutes County*, 67 Or LUBA 1 (2013). In our decision following the Court of Appeals decision that reversed one aspect of our 2015 decision, we sustained assignments of error challenging the county's findings that the "conditions of a permit or approval have been substantially exercised" and that "any failure to fully comply with the conditions is not the fault of the applicant," and the county's decision was remanded. *Gould v. Deschutes County*, 72 Or LUBA 258 (2015). As far as we are informed, the county has not taken further action to determine whether the destination resort has been initiated so that the CMP approval is not void.

The hearings officer rejected Gould's "void CMP" argument for several reasons. We only consider one of them. The hearings officer explained:

> "The relationship between the CMP and the FMP is complex. DCC 18.113.040 B states that the FMP must comply with the approved CMP. The CMP version at issue was approved by the County on April 15, 2008 and the approval ultimately was affirmed in *Gould v Deschutes County*, 227 Or App 601 (2009). (*Gould IV*) That approval properly deferred a determination of compliance with the fish and wildlife mitigation standards to the FMP (with a public hearing required).
>
> "Meanwhile, the FMP was approved on Oct. 8, 2008. * * * [T]he FMP approval was affirmed, except for the two issues present in this remand.
>
> "Thus, we have a CMP which is not effective, but which was properly structured to not have to address the issues present in this remand. We have an FMP that has been affirmed as being consistent with and containing all the required elements of the CMP, with the exception of the issues deferred to the FMP and

> remanded to this proceeding. The FMP was filed pursuant to a CMP that ultimately was affirmed. Under these circumstances, I conclude that the status of the CMP essentially is irrelevant, at least for purposes of this remand. * * *" Record 56-57.

We are not sure what the hearings officer meant when he said the CMP "is not effective." For purposes of this appeal we will assume without deciding that the CMP approval has become "void" under DCC 22.36.010(B)(1). However, even if we assume the County's CMP approval became void on November 18, 2011, we conclude below in addressing the third cross-assignment of error that the FMP remand proceedings were initiated by Thornburgh Resort on August 15, 2011, which was before the CMP became void. The county's first FMP approval decision found, with only two exceptions, that the FMP fully complies with the CMP. Those two exceptions have to do with the no net loss/degradation standard that normally applies at the time of CMP approval. The county's decision to defer its finding on the DCC 18.113.070(D) no net loss/degradation standard until FMP approval was affirmed in *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106 (2009).

As Gould correctly notes, the CMP potentially remains a relevant source of FMP approval considerations because at least some of the CMP conditions of approval effectively cannot be performed until after FMP approval. But those conditions of approval were carried forward in the county's first FMP approval decision and remain part of the current FMP approval decision. All requirements of the CMP approval are now requirements of the county's FMP

approval. The FMP approval has effectively incorporated and displaced the CMP approval. In these unusual circumstances, where the only remaining questions on appeal concern two issues that were expressly deferred to the FMP decision, we conclude it was not error for the county to proceed to determine on remand whether the errors identified by LUBA in the FMP could be corrected and the FMP approved for a second time, even though the CMP approval has become void.[10]

We briefly address one additional issue the parties dispute. Gould contends that CLCC should not be allowed to assert a legal position in this appeal (that it is legally irrelevant that the CMP approval may be void given the current state of the FMP approval) when its predecessor Loyal Land took a contrary position in the appeals we describe above in seeking a county determination that the CMP is not void because the destination resort has been initiated. The short answer to that contention is that the two positions, while perhaps somewhat related, can be viewed as alternative rather than

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[10] Citing our decision in *Gould v. Deschutes County*, 67 Or LUBA 1 (2013), the appeal of the county's first determination that the destination resort has been initiated, Gould argues that LUBA has already determined that the CMP and FMP decisions cannot be viewed as "functionally separate." All we determined in that case was that the hearings officer could not disregard as "irrelevant" all CMP conditions of approval that effectively could not be satisfied until FMP approval had been granted, when determining whether CMP conditions of approval have been "substantially exercised" under DCC 22.36.020(A) so that the CMP is not void. That determination is not inconsistent with our resolution of this cross-assignment of error.

inconsistent. The position that the CMP approval is not void is not inconsistent with the position that a void CMP does not preclude further action on the FMP. Success in arguing the first position might have made taking the second position unnecessary, but it is not inconsistent with the second position.

Finally, the parties engage in other arguments under this cross-assignment of error, which we elect not to address, because no matter how those arguments are resolved, they would not affect our ultimate conclusion under this cross-assignment of error.

The first cross-assignment of error is denied.

B. Petitioner DeLashmutt Does Not Have Standing to Appeal to LUBA (Second Cross Assignment of Error)

This cross-assignment of error is not really a cross-assignment of error. It is a challenge to petitioner DeLashmutt's standing to participate in this LUBA appeal.[11] To have standing to appeal to LUBA, a petitioner generally must appear personally or in writing during the proceedings below and must file a timely notice of intent to appeal with LUBA. Gould argues that petitioner DeLashmutt did not comply with the appearance requirement. According to Gould, all of petitioner DeLashmutt's appearances below were on behalf of LLCs, in his capacity as manager.

Petitioners respond that petitioner DeLashmutt appeared in his personal capacity on two occasions. Record 122-23, 154-57. Petitioners also point out

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[11] Gould does not challenge CLCC's standing.

the board of county commissioners recognized petitioner DeLashmutt as a party in its notice declining to review the second hearings officer's decision. We conclude petitioner DeLashmutt made the required personal appearance to have standing to appeal to LUBA.

The second cross-assignment of error is denied.

C. Thornburgh Did Not Initiate The Remand Proceedings And Central Land And Cattle Company Is Not A Proper Party To Initiate Or Pursue The FMP Remand (Third And Fourth Cross Assignment of Error).

On August 15, 2011, petitioner DeLashmutt sent an e-mail message on behalf of Thornburgh Resort to the county with the following text:

> "Thornburgh Resort Company, LLC would like to initiate the remand process for the LUBA remand of Thornburgh's Final Master Plan as of today. This is LUBA case 2008-203." Record 671.

One day later, on August 16, 2011, the county sent the following response:

> To initiate the process you will need to submit a formal application on our generic land use application form (attached). There is also a $3,000 application fee (fee schedule attached), which is primarily to cover the cost of the Hearings Officer issuing the new decision. Obviously your application should include your legal arguments pertaining to the issues described in the remand decision." Record 670.

Apparently nothing more happened with regard to the August 15, 2011 request until September 15, 2015 when CLCC's attorney sent a letter with attached application and fee. The letter includes the following text:

> "I am writing on behalf of Central Land and Cattle Company, LLC to provide you with information that supplements the request it

> has made pursuant to ORS 215.435 on the enclosed County application form asking Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application M-07-2/MA-08-6. The Oregon Land Use Board of Appeals, after review by the Oregon Court of Appeals, remanded the case to the County on August 17, 2010. Central Land and Cattle Company, LLC is the successor to Thornburgh Resort Company, LLC and its rights related to the final master plan approval."
>
> "On August 11, 2011 Thornburgh Resort Company, LLC requested in writing that the county proceed with the review of the above-referenced applications on remand in an email from Kameron DeLashmutt to former Deschutes County Community Development Director Tom Anderson. Central Land and Cattle Company, LLC reiterates that request. Central Land and Cattle Company, LLC has prepaid the remand hearings fee shown in the County's current fee schedule and has made its request on a Deschutes County land use application form but does not agree that either is required by ORS 215.435(1)." Record 4667.

Gould contends that Thornburgh's August 15, 2011 request was ineffective to "initiate" the remand proceedings.

One of the second hearings officer's theories for conducting the remand proceedings is that DeLashmutt's request on August 15, 2011, on behalf of Thornburgh Resort, was sufficient to initiate the appeal under ORS 215.435.[12] Thornburgh Resort was not administratively dissolved until September 2, 2011.

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[12] ORS 215.435 establishes deadlines for local governments to take action following a LUBA remand. In 2011, ORS 215.435(2)(a) provided, in part, that the statutory deadline for a local decision following a LUBA remand "shall not begin until the applicant requests in writing that the county proceed with the application on remand."

While the county might be able to insist that an appeal be accompanied by any locally required fee and application form before the remand proceedings will be initiated, we cannot say the second hearings officer's conclusion that DeLashmutt's August 15, 2011 request was sufficient to initiate the remand proceedings "[i]mproperly construe[s] the applicable law[.]" ORS 197.835(9)(a)(D). ORS 215.435(2)(a) says nothing about required forms or fees.

Gould also contends that there is not substantial evidence in the record to show that CLCC is the successor in interest to Thornburgh Resort and DeLashmutt's interests in the FMP. The letter that appears at Record 650-51 demonstrates just how complicated this matter has become, when it comes to figuring out who owns what parts of this proposed destination resort and the permits that will be required to construct it.[13] But we agree with petitioners,

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[13] That letter provides, in part:

> "TRC [Thornburgh Resort Company] lost its resort land property -- its primary asset -- in an August 31, 2011 foreclosure sale. (TRC has since been dissolved.) After the foreclosure TRC began to liquidate its remaining business assets and proceeded to wind up its affairs pursuant to Oregon law. In a two-stage sale (the 'Sale'), TRC sold its rights in and to the development of the Thornburgh Resort to Kameron DeLashmutt and Mr. DeLashmutt, in turn, sold those rights to CLC [Central Land and Cattle Company]. The transferred rights included TRC's rights in various permits (including the FMP remand, sewer permits, and drinking water permits), as well as planning documents, and intellectual property items that TRC had developed in furtherance of the resort project. ln connection with the sale of assets to Mr. DeLashmutt and CLC.

that that letter is evidence a reasonable hearings officer could rely on to conclude that CLCC is entitled to pursue this matter on remand from LUBA as the successor in interest to the FMP applicant Thornburgh Resort.

The third and fourth cross assignments of error are denied.

E. The Terrestrial WMP and M&M Plan Lack Necessary Specificity (Fifth Cross Assignment of Error).

Thornburgh's initial terrestrial wildlife management plan called for it to abide by a memorandum of understanding with the Bureau of Land Management and develop a plan to fully mitigate any loss of wildlife habitat, which would be approved by BLM and the Oregon Department of Fish and Wildlife (ODFW). Although LUBA found that initial plan to be adequate, the Court of Appeals concluded that the necessary details of the terrestrial wildlife

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> CLC now stands in the shoes of TRC as its successor in interest as to the assets TRC sold in that Sale. At the time of that asset sale, another sale occurred: TUG [Thornburgh Utility Group] sold its rights in the Water Rights Permit to Kameron DeLashmutt who in turn sold those rights to Pinnacle Utilities, LLC ('Pinnacle').
>
> "* * * * *
>
> "In short, CLC owns the development rights related to the resort project (rights in various permitting, FMP remand, sewer, and drinking water permits, as well as planning documents and intellectual property items and the DSL Lease and Big Falls Ranch water rights entitlement). To assure ownership of the TUG Water Rights Permit materials in an entity other than the developer (CLC), those assets are owned by Pinnacle. Any oral or written statements of [petitioner's attorney] contrary to this ownership structure are mistaken." Record 650-51.

management plan were lacking and their development had been impermissibly deferred to a stage where the public would not be allowed to participate. *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and rem'd* 216 Or App 150, 171 P3d 1017 (2007). Thornburgh later expressly deferred development of its wildlife management plans to the FMP approval stage, and provided that the public would be allowed to participate fully at that later stage. That deferral was upheld on appeal. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008), *aff'd* 227 Or App 601, 206 P3d 1106, *rev den* 347 Or 258, 218 P3d 540 (2009).

In our decision in *Gould (FMP)* we provided the following description of the Terrestrial WMP and M&M Plan that was developed by Thornburgh, BLM and ODFW:

> "* * * Thornburgh's off-site mitigation obligation would be 8,474 HUs [habitat units]. The Terrestrial WMP proposes to satisfy that mitigation obligation on 'public land managed by the BLM.' The Terrestrial WMP explains:
>
> > "'[Thornburgh] shall restore and enhance approximately 4,501 acres of juniper woodlands on public lands administered by the BLM in the Clines Buttes Sub-Area to mitigate the loss of 8,474 HUs. The specific areas, subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement. [Thornburgh] shall maintain rehabilitated areas through ongoing efforts as needed, such as reduction of weeds, thinning of junipers, and reclosing unwanted travel routes. BLM will manage public land on which this mitigation will be implemented, to

> comply with BLM's rangeland health standards to maintain desirable habitat for wildlife. * * *.'

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

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

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

> "'The proposed mitigation plan will use an adaptive approach to vegetation management that is consistent with the procedures outlined in the draft CBRAP. * * * The BLM's Land Use Planning Handbook

> defines adaptive management as '*a system of management practices based on clearly identified outcomes, monitoring to determine if management actions are meeting outcomes, and, if not, facilitating management changes that will best ensure that outcomes are met or to re-evaluate the outcomes.*' An adaptive approach to vegetation management in the Cline Buttes Area is appropriate because, in some situations, there is a lack of information available to assist in accurately predicting the response of the existing plant communities to different types and levels of ground disturbing activities related to thinning woody plants, understory shrub enhancement and reducing fuel loadings * * *.'" *Gould (FMP)*, 59 Or LUBA 447-48 (text alterations and italics in original; footnote and record citations omitted).

In *Gould (FMP)* we ultimately concluded that the Terrestrial WMP and M&M Plan were insufficient to assure compliance with the no net loss/degradation standard, primarily because the specific properties where the off-site mitigation would be carried out remained unknown and that lack of information made it impossible to provide the kind of plan details that we understood the Court of Appeals to require in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*):

> "The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of the 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's consultant and BLM and ODFW staff are confident that those restoration efforts will be successful and result in compliance with DCC 18.133.070(D). But what our description and the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a number of important parts of Thornburgh's proposal to comply with the DCC 18.133.070(D)

"no net loss" standard have not yet been determined, and will not be determined until a future date at which petitioner may or may not have any right to comment on the adequacy of the proposed mitigation. We do not know the location of the 4,501 acres that will be restored to provide the required mitigation. They may be located in the Canyons Region, the Deep Canyons Region or the Maston Allotment. Or they may be located somewhere else in Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres. We do not know what the habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HUs. The question for us is whether given all of these uncertainties, the confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that the proposed mitigation plan will result in compliance with DCC 18.133.070(D). The answer to that question under the principles articulated in *Gould II* is no.

"While we have no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW, under the Court of Appeals' decision in *Gould II*, petitioner has a right to confront the mitigation plan that Thornburgh intends to rely on to comply with DCC 18.133.070(D). While we know more about what that mitigation plan might ultimately look like than we did when *Gould I* and *Gould II* were decided, there are simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow petitioner a meaningful chance to confront the adequacy of that plan. *See Gould II*, 216 Or App 159-60 ('Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). * * * [T] hat code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record.') The details that must be supplied before petitioner can be given that meaningful chance to confront the proposed

> mitigation plan will not be known until some undetermined future date. Under the Court of Appeals' holding in *Gould II*, that is not a permissible approach for demonstrating compliance with DCC 18.133.070(D)." *Gould (FMP)*, 59 Or LUBA 452-54.

Our decision in *Gould (FMP)* was appealed to the Court of Appeals and affirmed. *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 758 (2010). However, in rejecting Thornburgh's cross-petition for judicial review, the Court of Appeals set out its understanding of the scope of its decision in *Gould II*, and after quoting the portion of our decision in *Gould (FMP)* quoted immediately above, appears to have identified what must be done to make the Terrestrial WMP and M&M Plan sufficiently detailed for opponents to challenge and LUBA to review for compliance with the no net loss/degradation standard:

> "As we explained in *Gould IV* [*Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009)], a final adjudication of compliance requires a showing that compliance with DCC 18.113.070(D) is 'likely and reasonably certain to succeed.' 227 Or App at 610 (quoting *Meyer*, 67 Or App at 280 n 5). *We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed. To the contrary, LUBA noted that it had 'no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW*.' However, as LUBA noted, it remained uncertain whether the habitat restoration would in fact occur on BLM land or, rather, elsewhere in Deschutes County, through Thornburgh's back-up plan of a dedicated fund to be used by ODFW for mitigation."

> "*If the only remaining uncertainty in Thornburgh's mitigation plan were which portion of BLM land would be the site of habitat*

> *restoration, we would conclude that LUBA erred in its application of Gould II*. There, <u>*no*</u> mitigation plan had been composed; Thornburgh was required only to complete a plan and to obtain ODFW and BLM approval of it. 216 Or App at 156–57 * * *. *Here, the nature of the mitigation plan proposed for BLM land is clear: the Terrestrial WMP provides that Thornburgh will restore and enhance about 4,501 acres of juniper woodlands within the Cline Buttes Recreation Area, and the M&M Plan sets out mitigation methods that could be applied to any parcel of land within that area*. *Thus, the adequacy of Thornburgh's mitigation efforts as they pertain to BLM land can be assessed now, based on the record as it exists*. <u>If some portion of BLM land turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those objections</u>.
>
> "LUBA also concluded, however, that it had not yet been determined whether Thornburgh's restoration efforts would in fact occur on BLM land. The BLM was still finalizing the CBRAP and so had not yet committed to allowing Thornburgh's proposed habitat restoration to occur on BLM land. Further, Thornburgh's back-up plan of a dedicated fund for mitigation suffers from the same defects as the plan at issue in *Gould II*. In light of those uncertainties, we cannot conclude that LUBA erred in exercising its review authority and concluding that Thornburgh's proposed mitigation efforts are not likely and reasonably certain to result in compliance with DCC 18.113.070(D)." *Gould*, 233 Or App at 642-43 (underscored italics in original; italics and underscoring added).

A. The *Gould II* Issue

The impediments identified by the Court of Appeals to a sufficiently certain and detailed Terrestrial WMP and M&M Plan for LUBA review have now been eliminated. The CBRAP (Cline Buttes Recreation Area Plan) has been completed, and over 10,000 acres of BLM land is potentially available for

mitigation to supply the estimated 4,500 acres of off-site mitigation needed. The backup plan that could have led to mitigation on other unidentified, non-BLM property has been withdrawn.

Gould's fifth cross-assignment of error is that "[t]he Hearings Officer erred in finding that the wildlife plan was specific enough to assure that complete mitigation would be achieved." Cross-Petition for Review 30. However most of the argument that is presented in support of the fifth cross-assignment of error relies on LUBA's reasoning in *Gould (FMP)*, where LUBA said that until the precise location of where the habitat restoration will occur is known we cannot know the "beginning habitat value," "kind of habitat," the "particular mix of restoration techniques," or "what the habitat value * * * will be after restoration." *Gould (FMP)*, 59 Or LUBA at 453. The difficulty with arguments that rely on that part of our decision in Gould *(FMP)* is that we understand the italicized language in the Court of Appeals decision quoted above to have expressly adopted a contrary position, provided the mitigation is limited to the BLM property within the CBRAP.

The meaning of the underscored language quoted above is less clear to us. But we think it should be understood to take the position that following LUBA's remand in *Gould (FMP)*, opponents would remain free to argue to the second hearings officer that the mitigation proposal contained in the Terrestrial WMP and M&M Plan for the BLM property is inadequate to satisfy the no net loss/degradation standard, even if it is sufficiently detailed to pass muster under

Gould II so that it can be reviewed by LUBA. The court specifically mentions that opponents would remain free to argue the BLM lands are "unsuitable for mitigation or * * * some mitigation methods are inappropriate." But now that the proposed mitigation is limited to BLM property within the CBRAP, we understand the Court of Appeals to have already determined that is sufficient to solve any lack of specificity problem under our decision in *Gould (FMP)* and the Court of Appeals' decision in *Gould II*.

B. The No Net Loss/Degradation Standard

We turn to the remaining disagreement between the parties, which is closely related to cross-petitioner's larger "lack of specificity" argument. We understand cross-petitioner to take the position that until the specific CBRAP lands that will be subject to mitigation are known, it is not possible to know what mitigation techniques will be used, not possible to know how many HUs that mitigation will produce and therefore not possible to know if it will be adequate to satisfy the no net loss/degradation standard. Gould's expert Dobkin took precisely that position below. Record 316.

Petitioners offer the following response to that position:

> "Gould argues that Thornburgh's mitigation plan calls for a [future] determination of specific areas for rehabilitation based on current conditions and argues this supports its position that the mitigation plan for CBRA land is too uncertain to be reviewed. * * * Thornburgh's plan does call for a determination of areas before the mitigation required by the plan is commenced; not before the County approves the wildlife plans. *Gould V*, 59 Or LUBA at 453,

> fn 10; Rec 4116 * * *.[14] The Court of Appeals found the wildlife mitigation plan to be adequate for review with this provision a part of the plan. The Court did not require Thornburgh to select specific mitigation areas and do a 'current conditions' assessment prior to review by Gould. Such an assessment, as noted by Gould, is not a part of the plan the Court of Appeals believes is sufficient for review now that the specified uncertainties have been resolved. * * * Furthermore, BLM has assessed current conditions and identified lands where Thornburgh's mitigation measure may occur." Petitioners' Response to Cross-Petition 43.

As explained, the Court of Appeals has determined that if the mitigation sites are limited to BLM land within the CBRAP the Terrestrial WMP and M&M Plan are sufficiently specific for review. But it does not necessarily follow that those plans are sufficient to comply with the no net loss/degradation standard, simply because they are now sufficiently developed to allow LUBA review. Nevertheless, the Court of Appeals was aware that the Terrestrial WMP and M&M Plan for which Thornburgh was seeking FMP approval did not identify the particular 4,500 acres within the CBRAP that will be enhanced or restored to achieve the required 8,474 HUs, and that those lands would be

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[14] That footnote is set out below:

> "As we noted earlier, the Terrestrial WMP explains:
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> "'The specific areas subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based on current conditions of the mitigation site and the agreed amount and type of enhancement.'" (Record citation omitted.)

identified after FMP approval. Moreover, the Court of Appeals specifically stated:

> "* * * We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed. To the contrary, LUBA noted that it had 'no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW.' * * *" *Gould*, 233 Or App 642 (2010).

The Court of Appeals' awareness that the Terrestrial WMP and M&M Plan do not call for identifying and assessing mitigation lands prior to FMP approval and the Court of Appeals' understanding that the Terrestrial WMP and M&M Plan approach "was likely and reasonably certain to succeed," viewed alone, lends some support to petitioners' contention that the issue of the adequacy of the Terrestrial WMP and M&M Plan to assure compliance with the no net loss/degradation standard was resolved by the Court of Appeals in its review of our *Gould (FMP)* decision.

But the Court of Appeals also stated that opponents remain free to argue that the BLM lands are "unsuitable for mitigation or * * * some mitigation methods are inappropriate." That language would be meaningless if the Court of Appeals had already decided that the Terrestrial WMP and M&M Plan are sufficient to comply with the no net loss/degradation standard. But any such arguments must go beyond arguing that the particular BLM, CBRAP lands must be known before it can be determined if the Terrestrial WMP and M&M

Plan ensure compliance with the no net loss/degradation standard. In particular, it was not sufficient for opponents to argue on remand that it is necessary that the particular BLM, CBRAP lands be identified before it can be determined if the Terrestrial WMP and M&M Plan are adequate to ensure compliance with the no net loss/degradation standard. Record 316. The Court of Appeals was fully aware that the particular BLM, CBRAP lands were not known when it affirmed our *Gould (FMP)* decision and stated the Terrestrial WMP and M&M Plan possessed the requisite detail if potential mitigation sites were limited to the CBRAP area.[15]

The BLM has identified over 10,000 acres of BLM CBRAP lands that it believes are suitable for mitigation. The Terrestrial WMP and M&M Plan has determined that only approximately 4,500 of those acres will be needed to achieve the required mitigation. It has been established in prior appeals that a variety of restoration and enhancement measures suitable for the CBRAP area are available to achieve the desired mitigation. Given the current state of the Terrestrial WMP and M&M Plan it now falls to Gould, under the reasoning adopted by the Court of Appeals in affirming our *Gould (FMP)* decision, to show that the candidate BLM lands are for some reason "unsuitable for mitigation," or that the proposed mitigation measures are "inappropriate."

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[15] The HEP (Habitat Evaluation Procedures) analysis utilized in the Terrestrial WMP and M&M Plan were described in some detail in our decision in *Gould (FMP)*, 59 Or LUBA at 445-46.

C. Cross-Petitioner's Arguments Concerning Lands Suitability for Mitigation and Mitigation Measures

Gould's expert below argued that BLM, CBRAP lands where grazing is allowed are not suitable for mitigation. Similarly opponent experts argued that areas impacted by off highway vehicles (OHVs) and areas subject to clearing to create fire defensible space are not appropriate.

Petitioners point out that OHV use and grazing is being restricted in the Maston allotment where most of the enhancement and restoration is expected to occur. More importantly, these types of habitat degradation were taken into account during the HEP analysis that ultimately led to the conclusion that approximately 4,500 acres of mitigation will be required to fully mitigate the terrestrial wildlife impact of the resort. Record 1528.

The second hearings officer ultimately concluded:

> "* * * I find that the weight of the evidence supports the conclusion that the off-site wildlife mitigation measures to be implemented in the Cline Butte Recreation Area are 'likely and reasonably certain to succeed.' The most important dispute appears to center on methodology, with opponents wanting a more static or fixed point approach and the applicant, ODFW and BLM favoring the HEP iterative process approach. I agree with the applicant and the agencies * * *." Record 105.

We conclude the above findings are supported by substantial evidence and that the arguments advanced in the fifth cross-assignment of error provide no basis for remand.

The fifth cross-assignment of error is denied.

F. Changed Conditions Warrant Requiring A New Destination Resort Application (Contingent Cross Assignment of Error).

In a single contingent cross-assignment of error, Gould alleges that the second hearings officer erred by failing to require a new destination resort application, based on changed circumstances.

DCC 18.113.070(C) requires that an application for destination resort CMP approval must include an economic analysis and requires the county to make the following finding concerning that analysis:

> "The economic analysis demonstrates that:
>
> "1. The necessary financial resources are available for the applicant to undertake the development consistent with the minimum investment requirements established by DCC 18.113.
>
> 2. Appropriate assurance has been submitted by lending institutions or other financial entities that the developer has or can reasonably obtain adequate financial support for the proposal once approved.
>
> "* * * * *."

In granting CMP approval in 2008, the board of commissioners adopted over four pages of findings addressing DCC 18.113.070(C) and finding that its requirements were met. Record 967-71. The first CMP condition of approval provides:

> "Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application." Record 1006.

Gould sets out the ownership structure of Thornburgh Resort at the time of CMP approval. Cross-Petition for Review 43. Suffice it to say it was a somewhat complicated ownership structure at the beginning, and it has become even more complicated following Thornburgh Resort, LLC's bankruptcy and dissolution. Loyal Land, LLC and now CLCC have become owners of most of the property, and a number of other entities have been created and assigned responsibility for aspects of the proposed resort. Based on these changes, Gould alleges the second hearings officer erred by not requiring that CLCC submit a new application.

The CMP condition quoted above states "[a]ny substantial change to the approved plan will require a new application." A change in "ownership" is not a change in the "approved plan." Gould identifies no changes in the "approved" plan. The contingent cross-assignment of error is denied.

The county's decision is remanded in accordance with our resolution of the first, second and fourth assignments of error in the petition for review.