

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

08/21/18 PM 3:51 LUBA

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 CENTRAL LAND
15 AND CATTLE COMPANY, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-008

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Paul D. Dewey, Bend, filed the petition for review and argued on behalf
26 of petitioner.

27
28 No appearance by Deschutes County.

29
30 Liz Fancher, filed a response brief and argued on behalf of intervenor-
31 respondent.

32
33 ZAMUDIO Board Member; BASSHAM, Board Member, participated in
34 the decision.

35
36 RYAN, Board Member, did not participate in this decision.

37
38 AFFIRMED

08/21/2018

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

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NATURE OF THE DECISION

Petitioner appeals a county hearings officer’s decision on remand that approves with conditions an application for a destination resort final master plan.

REPLY BRIEF

Petitioner moves to file a reply brief. Intervenor does not oppose the motion or brief and they are allowed.

FACTS

In Deschutes County, a destination resort must receive conceptual master plan (CMP) and final master plan (FMP) approval. This case is the seventh time that this land use dispute around the proposed Thornburgh Resort has been before this Board. We summarized our prior cases in *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326, 328 n 1 (2016) (*CLCC (FMP)*), *aff’d* 283 Or App 286, 388 P3d 739, *rev den* 361 Or 311 (2017), and we reprise and revise that summary here, again in the margin.¹ The

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) (referred to in this opinion as “*Gould (FMP)*”) (LUBA remanded first FMP approval); *Gould v. Deschutes County*, 67 Or LUBA 1 (2013)

1 sole approval standard at issue in this appeal is Deschutes County Code (DCC)
2 18.113.070, which provides in relevant part:

3 “In order to approve a destination resort, the Planning Director or
4 Hearings Body shall find from substantial evidence in the record
5 that:

6 “* * * * *

7 “D. Any negative impact on fish and wildlife resources
8 will be completely mitigated so that there is no net
9 loss or net degradation of the resource.”

10 We refer to the DCC 18.113.070(D) standard as the “no net loss/degradation”
11 standard.

12 A summary of facts and procedural history provides useful context for
13 this decision. Prior decisions have narrowed the no net loss/degradation issue
14 to the impact on fish habitat in Lower Whychus Creek. The sole impact at issue
15 in this appeal is water temperature. Cold water provides “thermal refuge[] for
16 salmonid which thrive in cooler water.” *CLCC (FMP)*, 74 Or LUBA 326, 330
17 (quoting *Gould v. Deschutes County*, 59 Or LUBA 435, 454–57, *aff’d*, 233 Or
18 App 623, 227 P3d 758 (2010) (*Gould (FMP)*) (quoting testimony from Oregon
19 Department of Fish and Wildlife)).

(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); *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016), *aff’d* 283 Or App 286, 388 P3d 739, *rev den* 361 Or 311 (2017) (referred to in this opinion as “*CLCC (FMP)*”).

1 Thornburgh Resort proposes to use on-site groundwater to satisfy its
2 water needs. The aquifers that will provide that groundwater are hydrologically
3 connected to Alder Springs, which feeds into Whychus Creek, a tributary of the
4 Deschutes River. The county required Thornburgh Resort to acquire and retire
5 water rights to mitigate for its planned volume of water use. In *Gould (FMP)*,
6 we concluded that equal-volume mitigation water will not necessarily offset
7 thermal impacts of the resort's withdrawal of cool water from the aquifers if the
8 mitigation water is warmer than the ground water that is removed from the
9 system.

10 The resort's use of groundwater will draw down surrounding
11 groundwater for a period of time and will reduce the amount of cold water from
12 Alder Springs entering Whychus Creek. Although the parties disputed the
13 thermal impacts of the resort's water use on fish habitat in Whychus Creek,
14 Thornburgh Resort offered to provide an additional 106-acre feet of increased
15 volume mitigation water to mitigate potential thermal impacts to Whychus
16 Creek that could result from the resort's use of groundwater. That mitigation
17 water would be provided by reducing irrigation diversion from upper Whychus
18 Creek and, instead, leaving that water instream.

19 In response to that proposal, opponents submitted expert testimony and
20 argued that, based on a thermal mass balance equation, increasing the volume
21 of surface water by leaving the 106-acre feet instream does not completely
22 compensate for thermal impacts from withdrawals of cold groundwater so as to

1 satisfy the no net loss/degradation standard. In 2008, the hearings officer
2 determined that the increased instream volume resolved thermal impacts on
3 Lower Whychus Creek, except that the mitigation evidence did not “account
4 for the higher water consumption that will likely occur during the summer
5 months.” *CLCC (FMP)*, 74 Or LUBA at 332 (quoting *Gould (FMP)*, 59 Or
6 LUBA at 454–57 (emphasis in *CLCC (FMP)* omitted)). Based on that concern,
7 we remanded in *Gould (FMP)* instructing the hearings officer to provide an
8 explanation for why the additional 106-acre feet will mitigate the adverse
9 thermal impacts on Lower Whychus Creek.

10 In September 2015, intervenor Central Land and Cattle Company, LLC
11 (CLCC) initiated county proceedings on remand of the county’s approval of the
12 destination resort FMP. The hearings officer refused to accept additional
13 evidence and denied approval of the FMP based on the no net loss/degradation
14 standard. CLCC appealed in *CLCC (FMP)*. We held that the hearings officer
15 misunderstood the question on remand in *Gould (FMP)* and erred in not
16 accepting new evidence regarding the very narrow issue on remand.

17 As we explained in *CLCC (FMP)*:

18 “[I]t is clear that in *Gould (FMP)*, LUBA understood the hearings
19 officer only to be concerned with the additional thermal impact of
20 increased summer water use at Thornburgh Resort, not average
21 daily water use. As we noted earlier, the hearing officer found, at
22 least implicitly, that the proposed mitigation was sufficient to
23 ‘fully address’ thermal impact of average daily water use on lower
24 Whychus Creek, *with the exception of the additional summer*
25 *water use impact*. The hearings officer required the 106 acre-feet
26 of additional mitigation that Thornburgh offered *only to address*

1 *the impact of additional summer water usage.* The hearings officer
2 did not require the 106 acre-feet of additional mitigation to
3 address the very small thermal impact of the resort’s average daily
4 water use with the initially proposed mitigation, which
5 Thornburgh’s expert estimated would be less than .01dC.

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

14 “* * * * *

15 “On remand [in *CLCC (FMP)*] the question to be resolved by the
16 hearings officer is not whether the projected average daily water
17 use of Thornburgh Resort will violate the no net loss/degradation
18 standard. That question was resolved in *Gould (FMP)*. The
19 question on remand is whether the increased water usage of
20 Thornburgh Resort during the summer months will result in a
21 violation of the no net loss/degradation standard in Lower
22 Whychus Creek below Alder Springs, or be fully mitigated by the
23 106 acre-feet of additional in-stream flow.”

24 74 Or LUBA at 333–34, 341 (emphases added). That remand was based solely
25 on inadequate findings and addressed an extremely narrow issue.

26 In October 2017, the hearings officer held a remand hearing and left the
27 written record open for submission of evidence and rebuttal. In his written
28 decision, the hearings officer reiterated the 2008 hearings officer’s conclusion
29 that the potential for thermal impacts on Lower Whychus Creek from summer
30 groundwater use warrants mitigation. Record 72. The hearings officer
31 explained that the law of the case required the analysis to focus on Lower

1 Whychus Creek “in isolation” and that the issue on remand was “limited to
2 whether the incremental increase in usage during the summer is adequately
3 mitigated” by the proposed 106-acre feet of water left instream. Record 73.
4 After a thorough review of conflicting expert testimony, the hearings officer
5 made detailed findings and concluded that the proposed mitigation is adequate
6 to satisfy the no net loss/degradation standard and approved the FMP with a
7 revised condition requiring the addition of 106-acre feet of instream mitigation
8 water. Petitioner appeals the hearings officer’s decision.

9 **INTRODUCTION**

10 At the outset we observe that the negative thermal impact on cool water
11 thermal refuge for fish in Lower Whychus Creek due to the proposed resort’s
12 summer groundwater use is very small and the hearings officer determined that
13 it was a “close call” as to whether the thermal impacts required any mitigation.
14 Record 72.

15 “The applicant contends that mitigation is unnecessary because the
16 temperature increases modeled are very small, under the levels
17 harmful to fish and overstated by not taking into account such
18 things as groundwater recharge (consumptive use). This is a close
19 call, but I think the potential for negative impacts warrants
20 mitigation.” *Id.*

21 The only “live issue” on remand was whether the 106-acre feet of instream
22 water will completely mitigate any negative thermal impacts to fish resources
23 in Lower Whychus Creek. The hearings officer concluded that it will.

1 The narrow issue raised by petitioner in this appeal is whether the
2 hearings officer's findings were sufficient to support the decision. In the
3 context of the no net loss/degradation criteria, we will affirm the hearings
4 officer's decision if his findings adequately describe the potential negative
5 impact to Lower Whychus Creek, address expert testimony regarding those
6 impacts, and explain whether and why the proposed mitigation completely
7 mitigates the negative impact and satisfies the no net loss/degradation standard.
8 *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015)
9 (remanding for more adequate findings where the finding did not describe
10 potential adverse impacts, address expert testimony regarding those impacts, or
11 explain why compliance with city standards is sufficient to minimize potential
12 adverse impacts). We will not second-guess the hearings officer's choice
13 between conflicting expert testimony, so long as it appears that, based on all of
14 the evidence in the record, a reasonable person could decide as the hearings
15 officer did. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, *aff'd*
16 258 Or App 534, 311 P3d 527 (2013).

17 The parties disagree about the applicable standard of review. Petitioner
18 asserts that disagreement among experts required the hearings officer to adopt
19 findings explaining his choice between conflicting expert testimony. Petition
20 for Review 10. Intervenor responds that the hearings officer was not required to
21 adopt findings addressing conflicting evidence because the hearings officer

1 relied on substantial evidence in making his findings. Intervenor’s Response
2 Brief 7–8.

3 Intervenor is correct. “[W]here this Board is able to determine that a
4 reasonable decision maker would rely on the evidence the decision maker
5 chose to rely on, findings specifically addressing conflicting evidence are
6 unnecessary.” *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004); *see*
7 *also LeRoux v. Malheur County*, 30 Or LUBA 268, 271 (1995) (“[W]hen the
8 evidence is conflicting, the local government may choose which evidence to
9 accept, but must state the facts it relies on and explain why those facts lead to
10 the conclusion that the applicable standard is satisfied.”). Therefore, the
11 hearings officer’s failure to address petitioner’s evidence in his findings does
12 not necessarily mean those findings are inadequate.

13 Given the limited scope of the remand and the nature of the hearings
14 officer’s decision, petitioner appropriately acknowledges that her appeal
15 essentially poses only adequacy of the findings challenges. Petitioner attacks
16 the underlying inputs to the intervenor’s expert’s thermal mass balance
17 formula, arguing that the hearings officer failed to make correct or adequate
18 findings in rejecting petitioner’s expert’s determination of impacts, timing
19 issues of seasonal impacts, updated groundwater data, impacts *at* Alder Springs
20 (as opposed to below Alder Springs in Lower Whychus Creek), and
21 consumptive use. Petition for Review 9 (summarizing assignments of error).
22 Petitioner divides her assignments of error into two categories: (1) arguments

1 directed at impacts to fish resources (assignments of error one through five)
2 and (2) arguments directed at the adequacy of the 106-acre feet to mitigate
3 impacts (assignments of error six through eight). Petitioner argues that the
4 hearings officer failed to make “correct” findings. *See, e.g.*, Petition for Review
5 9. Petitioner’s arguments frequently veer into arguments about the weight of
6 the evidence. LUBA does not review for “correct” findings; instead, LUBA
7 reviews for adequate findings or substantial evidence to support a finding.

8 With our review task and framework set out, we turn to petitioner’s
9 assignments of error. For the reasons explained below, we conclude that the
10 hearings officer’s findings are adequate and supported by substantial evidence
11 and we therefore affirm the hearings officer’s decision.

12 **FIRST ASSIGNMENT OF ERROR**

13 In her first assignment of error, petitioner argues that the hearings officer
14 erred by rejecting petitioner’s expert’s opinion of impacts and by relying on
15 intervenor’s expert’s formula to determine the impacts. Our review under the
16 first assignment of error is whether the hearings officer’s findings are adequate
17 to support his decision.

18 The hearings officer explained that the parties submitted “multiple,
19 highly technical, and largely conflicting reports from experts on the issue of
20 whether the proposed mitigation is adequate.” Record 69. Petitioner’s experts
21 Yinger and Perrault concluded that the mitigation is not adequate, while
22 intervenor’s expert, Newton, concluded that the mitigation is adequate. The

1 hearings officer expressly relied on Newton’s calculations and conclusions.
2 The hearings officer considered and rejected Yinger’s and Perrault’s
3 conclusions.

4 **A. Irrigation season vs. summer months**

5 Petitioner argues that the hearings officer erred in rejecting the testimony
6 of petitioner’s experts, after erroneously concluding that petitioner’s experts
7 failed to respond to the remand issue of summer impacts. The hearings officer
8 accepted Newton’s conclusion after observing that Newton’s report isolated the
9 impact of increased summer pumping—which was the only issue on remand.
10 Record 70. The hearings officer explained that Yinger’s report did not isolate
11 summer pumping but instead appeared to reassert average daily impacts, which
12 was not at issue on remand and which had been settled in prior proceedings.
13 Record 71. The hearings officer explained that Perrault focused on the three
14 hottest days in two low-flow years and disregarded years that Perrault
15 concluded were “aberrantly wet.” *Id.* The hearings officer observed that
16 Perrault’s report, like Yinger’s, did not isolate the impact from summer
17 pumping as opposed to average daily use. *Id.* The hearings officer explained
18 that prior proceedings had determined that the average daily use either does not
19 violate the no net loss/degradation standard or is adequately mitigated by
20 intervenor’s proposal. The only issue on remand was mitigation of summer
21 impacts.

1 Petitioner argues that the hearings officer erred in concluding that
2 petitioner’s experts did not submit analysis of summer impacts. Petitioner
3 asserts that “summer” impacts are synonymous with irrigation season impacts
4 and that petitioner’s experts’ evidence addressed irrigation season impacts.
5 Petition for Review 13.

6 Intervenor responds that petitioner did not make the “synonymous”
7 argument below and has thereby waived the issue under ORS 197.763(1).²
8 Intervenor’s Response Brief 10. On the merits, intervenor argues that the two
9 periods are not synonymous because the 2008 hearings officer found that they
10 were not synonymous and the irrigation season is longer than the summer
11 months.

² ORS 197.763(1) provides:

“The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

“(1) An issue which may be the basis for an appeal to [LUBA] 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.”

1 Petitioner correctly replies that ORS 197.763(1) requires a party to raise
2 the issue but does not require that every argument directed at the issue be
3 raised below. Further, petitioner is correct that she raised the issue of the
4 appropriate method for measuring summer impacts. The specific argument
5 petitioner raises is that the hearings officer should have relied on her expert's
6 analysis, which was based on irrigation season impacts, to determine summer
7 pumping impacts. Petitioner's argument that the irrigation season and summer
8 are synonymous is an argument, not a new issue.

9 Intervenor is correct on the merits that irrigation season and summer
10 months are not synonymous, especially as applied to the limited issue on
11 remand, which originated from the 2008 hearings officer's statement that
12 "[intervenor's mitigation] assumptions regarding the benefits of replacing
13 more water during the irrigation season than is consumed on an average daily
14 basis by the resort does not account for the higher water consumption that will
15 likely occur during the summer months." *Gould (FMP)*, 59 Or LUBA at 456.

16 The hearings officer correctly found that petitioner's experts did not
17 isolate thermal impacts during the summer months and adequately explained
18 that was one of his reasons for rejecting petitioner's assessment of impacts and
19 adequacy of mitigation.

20 **B. Weight of expert testimony**

21 In addition to rejecting Yinger's and Perrault's expert opinions as
22 nonresponsive to the issue on remand, the hearings officer gave lesser weight

1 to Yinger’s and Perrault’s opinions. Petitioner argues that the hearings officer
2 improperly discredited her experts.

3 The hearings officer found that Perrault focused on the three hottest days
4 in two low-flow years and disregarded other years. Record 71. The hearings
5 officer also observed that Perrault’s professional experience is primarily in
6 Hawaii “so he is the least experienced in the hydrology of Central Oregon.”
7 Record 71. Finally, the hearings officer observed that Yinger and Newton
8 “largely agree as regards the creek itself” and that Perrault’s “analysis is the
9 outlier.” *Id.* The hearings officer found that the thermal impacts will be spread
10 along much of Lower Whychus Creek. The hearings officer discredited
11 Yinger’s assessment because it focused on impacts at Alder Springs. *Id.*

12 The hearings officer articulated how and why he weighed expert
13 testimony. Petitioner provides us no reason to second-guess the hearings
14 officer’s decision to give more weight to intervenor’s experts, and we conclude
15 that the findings are adequate and supported by substantial evidence, *i.e.*,
16 evidence a reasonable person could rely upon to decide as the hearings officer
17 did, based on all of the evidence in the record. *Willamette Oaks, LLC v. City of*
18 *Eugene*, 67 Or LUBA 351 (2013).

19 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In her second assignment of error, petitioner argues that the hearings
3 officer failed to adopt adequate findings regarding timing issues on seasonal
4 and durational impacts and phasing of development.

5 The hearings officer found that seasonal impacts will increase for a
6 period of time after pumping commences, due to predictable hydrological
7 behavior whereby the resort’s groundwater pumping will reduce stream flows
8 in Lower Whychus Creek. Record 70. The hearings officer noted that the
9 parties agreed that groundwater and surface water conditions will eventually
10 reach a steady state, but that the parties disagreed about the number of years it
11 would take to reach steady state. *Id.* Newton concluded that steady state would
12 be reached in approximately 16 years, while Yinger and Perrault concluded it
13 would take 30 to 40 years. *Id.* Newton noted that the resort would be developed
14 in phases, which would result in more gradual impacts over time. *Id.*

15 Petitioner correctly notes that the hearings officer did not make an
16 express finding with respect to the duration or phasing of the impacts.
17 However, the hearings officer responded to the conflicting evidence by revising
18 the mitigation condition of approval. The hearings officer explained:

19 “The condition of approval at issue in this remand states:

20 “39. The applicant shall provide funding to complete a
21 conservation project by the Three Sisters Irrigation District to
22 restore the 106 acre-feet of instream water to mitigate potential
23 increase in stream temperatures in Whychus Creek. The applicant

1 shall provide a copy of an agreement with the irrigation district
2 detailing funding agreement prior to the completion of Phase A.

3 “No one has taken issue with this language. I am concerned,
4 however, that given the issues subsequently raised, the language
5 may not be adequate. For example, it does not expressly state
6 when the diversion must take effect. For the mitigation water to be
7 effective, it must be in place prior to the start of impacts on Alder
8 Springs and lower Whychus Creek. The evidence as to when
9 summer pumping impacts become discernible is unclear to me.
10 Newton’s mass balance analysis appears to suggest that small
11 impacts may become discernible in year one. Accordingly, I find
12 the condition needs to be revised to ensure that mitigation timely
13 occurs.” Record 76.

14 The hearings officer revised the condition to require mitigation water “be
15 placed in stream no later than the date that groundwater pumping to serve the
16 development commences (not testing).” Record 76–77. Contrary to petitioner’s
17 arguments, the hearings officer did not rely on a 10-year horizon or on phasing
18 impacts to reduce the impact of the resort pumping. Instead, the hearings
19 officer determined that the impacts could commence as soon as pumping
20 commenced and he therefore required the mitigation occur at that time. The
21 mitigation condition is perpetual and is not set to expire if and when the
22 groundwater pumping impacts decrease or end due to a hydrological “steady
23 state” being reached—whether that happens at 10, 16, or 40 years. Record 70.
24 Thus, the hearings officer’s failure to adopt express findings resolving the
25 dispute between the parties regarding duration and phasing does not provide a
26 basis for reversal or remand.

27 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 In her third assignment of error, petitioner argues that the hearings
3 officer failed to adopt adequate findings based on substantial evidence because
4 the hearings officer adopted intervenor’s assessment of impacts, which relied
5 on data from different time periods for assessment of impacts on surface water
6 and groundwater.

7 The evidence before the 2008 hearings officer included 2000 surface
8 flow data for Whychus Creek and a 2001 U.S. Geological Survey (USGS)
9 report and 2004 USGS model based on 1997 groundwater data. On remand, the
10 hearings officer accepted new evidence, including a 2017 USGS report titled
11 *Simulation of Groundwater and Surface-Water Flow in the Upper Deschutes*
12 *Basin, Oregon*. Record 74, 112, 208. Petitioner argues that Newton, in applying
13 the thermal mass formula, used 2017 surface flow data but continued to rely on
14 “outdated” groundwater data. Petition for Review 29.

15 Intervenor responds initially that petitioner’s arguments under the third
16 assignment of error were not raised in the proceeding before the hearings
17 officer and are waived. ORS 197.763(1) (quoted above at n 2). On the merits,
18 intervenor responds that Newton did not input only current surface flow data
19 into the mass balance equation; instead, Newton assessed temperature impacts
20 at a wide range of streamflow levels. For example, Newton’s analysis used
21 minimum streamflow levels at or below the minimum levels used by Yinger in
22 his analysis of the 2013 USGS model, which used data from a 2008 report.

1 Intervenor argues that it is not error for the hearings officer to rely upon expert
2 testimony that utilized data from different periods, so long as the expert's
3 opinion is evidence upon which a reasonable person would rely.

4 The 2017 USGS report was published on October 20, 2017 and
5 submitted into the record on November 20, 2017, as part of intervenor's
6 rebuttal evidence. Record 108, 113. At that stage in the proceeding, petitioner
7 was not permitted to submit further evidence into the record but was provided
8 an opportunity to object to any evidence submitted into the record. Record 64.
9 Petitioner did not object to the 2017 USGS report, as explained in a letter to the
10 hearings officer dated November 27, 2017:

11 "Given LUBA's remand direction to allow new evidence on the
12 issues and the inter-related surface and groundwater issues in the
13 Basin, we are not objecting to the Applicant's evidence.

14 "The only filing about which we have concern is the submittal of
15 the 2017 USGS study, 'Simulation of Groundwater and Surface-
16 Water Flow in the Upper Deschutes Basin, Oregon.' While we do
17 not object to the submittal of this report, we believe that the
18 submittal was incomplete in not including information from USGS
19 on the date of release, the first posting of which was apparently
20 October 20, 2017." Record 111.

21 The same day that petitioner stated no objection to the 2017 USGS study,
22 petitioner requested the hearings officer reopen the record and extend the open
23 record period for three weeks to allow petitioner's experts to analyze the 2017
24 USGS report. Record 107. The hearings officer denied that request in his
25 written opinion, reasoning that "the statutory timeline on remand is short.
26 Failure of a party to be aware of new evidence published well in advance of the

1 hearing date is not grounds for an extension barring unusual circumstances.”
2 Record 69.

3 On appeal, petitioner argues that the hearings officer erred in rejecting
4 petitioner’s motion to reopen the record. However, petitioner does not assign
5 error to that ruling or assert, let alone establish, that her substantial rights were
6 prejudiced by that ruling. *See* OAR 661-010-0071(2)(c) (providing that the
7 Board shall remand when “[t]he decision is flawed by procedural errors that
8 prejudice the substantial rights of the petitioner(s).”). In the absence of a
9 developed argument from petitioner that the hearings officer’s ruling
10 constituted a procedural error, we will not remand on that basis.

11 With respect to waiver, the fact that petitioner had an opportunity to
12 object to the 2017 USGS report, and exercised that opportunity at least to
13 request additional time to respond, indicates that petitioner also had an
14 opportunity to raise the issue presented in this assignment of error, namely,
15 whether intervenor and the hearings officer must use the groundwater data
16 from the 2017 USGS Report rather than data used in previous analyses. For
17 whatever reason, petitioner did not raise that issue during the proceedings
18 below, despite opportunity to do so. Accordingly, we agree with intervenor that
19 the issues raised in the third assignment of error are waived.

20 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 In her fourth assignment of error, petitioner argues that the hearings
3 officer failed to assess impacts at Alder Springs. Petitioner argues that the issue
4 in this case is not only whether Lower Whychus Creek downstream of Alder
5 Springs is impacted and mitigated, but also whether Alder Springs itself is
6 impacted and mitigated. Petitioner is incorrect. The extremely limited scope of
7 our remand in *CLCC (FMP)* was for the hearings officer to adopt findings
8 addressing “whether the increased water usage of Thornburg Resort during the
9 summer months will result in a violation of the no net loss/degradation
10 standard in Lower Whychus Creek below Alder Springs, or be fully mitigated
11 by the 106 acre-feet of additional in-stream flow.” 74 Or LUBA 326, 341.
12 Thus, the hearings officer did not err by not addressing asserted impacts to
13 Alder Springs.

14 The fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 In her fifth assignment of error, petitioner argues that the hearings officer
17 inappropriately considered “consumptive” use. Petition for Review 45.
18 Petitioner explains that consumptive use is the difference between water that is
19 pumped, some of which will ultimately return to groundwater, and water that is
20 “consumed” and does not return to groundwater. *Id.* As an example, petitioner
21 notes that Yinger used a pumping number of 2,129 acre feet as compared to an
22 Oregon Water Resources Department “non-consumptive use number” of 1,356

1 acre feet, and the difference represents water that is pumped but not consumed.
2 *Id.* Petitioner argues that the hearings officer inappropriately “alluded to the
3 non-consumptive use as a conservative factor bolstering his decision.” *Id.*

4 However, petitioner does not argue or establish that the hearings officer
5 in fact relied on non-consumptive use in establishing negative impacts or
6 adequacy of mitigation. At best, petitioner argues that the hearings officer cited
7 non-consumptive use as an additional reason for confidence in the hearings
8 officer’s ultimate conclusion that negative impacts of pumping groundwater are
9 avoided or mitigated. Absent a sustained challenge to that ultimate conclusion,
10 the hearings officer’s alleged belief that estimates of the volume of water lost
11 to groundwater via pumping are conservative estimates, due to non-
12 consumptive return of some pumped water to groundwater, does not provide a
13 basis for reversal or remand.

14 The fifth assignment of error is denied.

15 **SIXTH ASSIGNMENT OF ERROR**

16 In her sixth assignment of error, petitioner argues that the hearings
17 officer failed to make adequate findings based on substantial evidence that the
18 instream mitigation will completely mitigate the resort impacts. Petitioner
19 argues that because the instream mitigation water is warmer than groundwater,
20 the instream mitigation water “does not mitigate lost Alder Springs water.”
21 Petition for Review 51. Petitioner also argues that the hearings officer erred by
22 relying on the temperature of the mitigation water at the point where it would

1 otherwise be diverted from Whychus Creek, upstream of the point where cold
2 water from Alder Springs enters the creek. *Id.* at 50.

3 The hearings officer found that the instream mitigation water will
4 mitigate the potential and minute negative thermal impacts from the resort's
5 summer pumping. As we understand it, the hearings officer reasoned that the
6 mitigation water is relatively cold at the diversion point on Whychus Creek
7 upstream of the point where Alder Springs water enters the creek, and that the
8 volume of that relatively cold mitigation water creates a thermal buffer so that
9 any negative thermal impacts from the resort's use of cold groundwater will be
10 mitigated at Lower Whychus Creek.

11 "Figure 64 shows Whychus Creek at roughly 13–14°C for July
12 2000 in the vicinity of the diversion. The temperatures generally
13 spike significantly after that point until the vicinity of Alder
14 Springs and below. * * *

15 "Virtually all, if not all, of the studies in the record support the
16 concept that increasing stream flow is beneficial and lowers water
17 temperatures. * * * The concept is relatively straight forward, a
18 greater mass of water heats more slowly than a larger mass of
19 water.

20 "* * * * *

21 "The preponderance of the evidence is that the water proposed to
22 be reinstated to Whychus Creek is relatively 'cold' and can be as
23 cold as Alder Springs inflow, although generally is somewhat
24 warmer. It is substantially colder than the water in Whychus Creek
25 above where it meets Alder Springs. Therefore, it is logical to
26 conclude that the additional water does not warm Whychus Creek,
27 but rather cools it slightly (or keeps it from warming). In other
28 words, more slightly cooler water at the point Whychus Creek
29 meets Alder Springs is better than less, slightly warmer water.

1 Newton both previously and in this proceeding has run numerous
2 new mass balance calculations, representing various scenarios,
3 primarily using [Upper Deschutes Watershed Council] UDWC
4 streamflow and temperature data, and reran them with USGS data.
5 Virtually all show that the mitigation, by cooling Whychus Creek
6 as it flows into the Alder Springs area, results in slightly lower
7 temperatures in lower Whychus Creek than without mitigation.
8 This includes at rates that do not account for consumptive vs
9 permitted use and otherwise appear to be conservative.” Record
10 74.

11 The hearings officer’s findings are adequate and supported by expert
12 evidence upon which a reasonable person would rely.

13 The sixth assignment of error is denied.

14 **SEVENTH ASSIGNMENT OF ERROR**

15 In her seventh assignment of error, petitioner argues that the hearings
16 officer failed to make adequate findings based on substantial evidence with
17 respect to flow fluctuations and ambient air temperature.

18 Petitioner argues that intervenor’s water temperature calculations failed
19 to consider flow fluctuations and ambient air temperatures. Intervenor responds
20 that Newton’s calculations addressed impacts from minimum flows to high
21 flows and quantified related stream temperatures. Record 292–97, 912–17. The
22 hearings officer reasonably relied on that evidence and he was not required to
23 make express findings regarding flow fluctuation assumptions.

24 Intervenor points out that no expert testimony addressed the influence of
25 ambient air temperature on water temperature. Instead, petitioner’s attorney
26 raised the issue and petitioner’s attorney is not a hydrologist or fish habitat

1 expert. Intervenor’s Response Brief 54–55. Petitioner asserts that the fact that
2 air temperature affects stream temperature is in the record in a report, *Whychus*
3 *Creek Water Quality Status, Temperature Trends, and Stream Flow*
4 *Restoration Targets*, by Lauren Mork, of the UDWC (UDWC report). Record
5 944. Intervenor responds that the UDWC report acknowledges that the
6 relationship between ambient air temperature and stream temperature “is the
7 subject of debate in the scientific community” and the UDWC report does not
8 support the assertion that a scientist must consider the effect of air temperature
9 on stream temperature to determine the effectiveness of mitigation.
10 Intervenor’s Response Brief 56.

11 Petitioner has not established that the hearings officer was required to
12 adopt findings addressing the issue raised by petitioner’s attorney—whether
13 ambient air temperature must be considered in the expert testimony regarding
14 impacts of groundwater withdrawal on water temperature. The UDWC report
15 indicates that a scientist might choose to consider air temperature’s effect on
16 water temperature, although its impact is a subject of scholarly debate. If
17 petitioner wished to elevate that issue to the point where it must be resolved in
18 the findings, petitioner should have had one of their two experts put the issue
19 into contention by addressing the impact of air temperature on water
20 temperature in their expert testimony. However, as intervenor points out,
21 petitioner’s experts also did not consider air temperature in assessing the
22 adequacy of mitigation. As it stands, the mere arguments of petitioner’s

1 attorney, based solely on an equivocal statement in a scholarly article, are
2 insufficient to compel the hearings officer to address and resolve the issue.

3 The seventh assignment of error is denied.

4 **EIGHTH ASSIGNMENT OF ERROR**

5 In her eighth assignment of error, petitioner argues that the hearings
6 officer misconstrued the no net loss/degradation standard at DCC
7 18.113.070(D). Petitioner asserts that the hearings officer erred because the
8 hearings officer did not find that every negative impact from the Thornburgh
9 Resort's summer groundwater use is completely mitigated. In petitioner's view,
10 because the hearings officer rejected her expert's opinions that were based on
11 the hottest summer temperatures and the lowest flow analysis, the hearings
12 officer failed to find that *any* negative impact would be *completely* mitigated.

13 We reject petitioner's premises underlying that argument. *First*, the
14 applicable standard does not require mitigation prevent every potential
15 negative impact. Instead, mitigation must result in no "net" loss/degradation.
16 The term "net" is an adjective that modifies loss or degradation. In that context
17 "net" means "³net * * * **3 a** : remaining after the deduction of all charges,
18 outlay, or loss * * * — opposed to *gross*." *Webster's Third New Int'l*
19 *Dictionary* 1519 (unabridged ed 2002). In that context, "gross" means "²gross
20 * * * **1 b** : an overall exclusive of deductions * * * : sum total." *Id.* at 1002.
21 "Mitigation" means the minimizing or offsetting of impacts by the provision of

1 on- or off-site improvement or compensation which benefits impacted property
2 owners, resources and the public interest. * * *” DCC 18.04.030.

3 DCC 18.113.070(D) requires any negative impact on fish resources be
4 completely mitigated so that there is no net loss or net degradation of the
5 resource. No net loss/degradation requires any negative impacts be minimized
6 or offset—it does not mean that the resort creates no negative impacts. The
7 hearings officer found that the impacts from Thornburgh Resort’s summer
8 pumping would be minimal and that those impacts would be offset by the
9 instream mitigation water. The hearings officer was entitled to rely on the net
10 effect of the instream mitigation. The Court of Appeals did not rule otherwise
11 in *Gould*, 216 Or App at 163, which petitioner invokes. There, the court simply
12 explained that DCC 18.113.070(D) is not satisfied by an uncertain mitigation
13 plan because that provision requires that “[a]ny negative impact on fish and
14 wildlife resources will be *completely* mitigated” and an uncertain mitigation
15 plan does not identify the negative impacts or establish that they will be
16 completely mitigated to result in no net loss/degradation. *Id.* at 162–63
17 (quoting the standard). That ruling does not support petitioner’s argument
18 under her eighth assignment of error.

19 *Second*, contrary to petitioner’s assertion, the hearings officer did
20 consider high temperatures and low flows. Newton assessed the temperature
21 impacts of mitigation water using the same minimum stream flows as Yinger.
22 Record 911–12. Newton, Yinger, and Perrault all used average maximum

1 temperature information to project temperature impacts for Lower Whychus
2 Creek. Record 288, 382–84, 651, 664.

3 The hearings officer found that the summertime thermal impacts to
4 Lower Whychus Creek are extremely small and that the proposed instream
5 mitigation is likely and reasonably certain to succeed in mitigating any adverse
6 impacts caused by increased summer pumping. Record 75. Those findings are
7 supported by substantial evidence. Petitioner has not demonstrated under this
8 assignment of error that DCC 18.113.070(D) requires more.

9 The eighth assignment of error is denied.

10 The hearings officer's decision is affirmed.