

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent.*

11 LUBA No. 2021-112

12 FINAL OPINION
13 AND ORDER

14
15
16
17 Appeal from Deschutes County.

18
19 Jeffrey L. Kleinman filed a petition for review and reply brief and argued
20 on behalf of petitioner.

21
22 David Doyle filed a response brief and argued on behalf of respondent.

23
24 ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board
25 Member, participated in the decision.

26
27 AFFIRMED

 06/09/2022

28
29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner challenges a decision by a county hearings officer approving, on remand, a tentative plan, site plan review, and site plan review application modification for phased development of a destination resort.

FACTS

The challenged decision is on remand from *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021). The land use dispute around the proposed Thornburgh Destination Resort has been before LUBA many times.¹ We discuss that history only to the extent that it is relevant to this appeal.

A destination resort is a “self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities.” Statewide Planning Goal 8 (Recreational Needs); ORS

¹ The Thornburgh Resort Company, which was dissolved, sold its rights in and to the development of the Thornburgh Resort to Kameron K. DeLashmutt, who sold those rights to Central Land and Cattle Company, LLC. DeLashmutt also acquired water rights for the Thornburgh Resort and sold those water rights to Pinnacle Utilities, LLC. *Gould v. Deschutes County*, ___ Or LUBA ___, ___ n 1 (LUBA No 2020-095, June 11, 2021) (slip op at 4 n 1) (*Gould Golf*), *aff'd*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022) (citing *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326, 349 n 13, *aff'd*, 283 Or App 286, 388 P3d 739 (2016)). In this decision, we refer to the applicant as Thornburgh for ease of reference.

1 197.445. Local governments may plan for the siting of destination resorts on rural
2 lands, subject to the provisions of state law. Goal 8; ORS 197.435 - 197.467.

3 Under Deschutes County Code (DCC) 18.113.040, destination resorts are
4 subject to a three-step approval process.² The first step is Conceptual Master Plan

² 18.113.040 provides:

“The authorization of a permit for a destination resort shall consist of three steps.

“A. Conceptual Master Plan and Conditional Use Permit for Destination Resort. A conceptual master plan (CMP) shall be submitted which addresses all requirements established in DCC 18.113.040. The CMP application shall be processed as if it were a conditional use permit under DCC Title 22, shall be subject to DCC 18.128.010, 18.128.020 and 18.128.030 and shall be reviewed for compliance with the standards and criteria set forth in DCC 18.113.

“B. Final Master Plan. The applicant shall prepare a final master plan (FMP) which incorporates all requirements of the County approval for the CMP. The Planning Director shall review the FMP to determine if it complies with the approved CMP and all conditions of approval of the conditional use permit. The Planning Director shall have the authority to approve, deny or return the FMP to the applicant for additional information. When interpretations of the Planning Director involve issues which are discretionary, the FMP approval shall be treated as a land use permit in accordance with DCC Title 22.

“C. Site Plan Review. Each element or development phase of the destination resort must receive additional approval through the required site plan review (DCC 18.124) or subdivision process (DCC Title 17). In addition to findings satisfying the

1 (CMP) review, which is processed as a conditional use permit. DCC
2 18.113.040(A). The second step is Final Master Plan (FMP) review. DCC
3 18.113.040(B). The third step is land division or site plan review (third-stage
4 review).³ DCC 18.113.040(C). In addition to finding that it satisfies the site plan
5 review criteria in DCC 18.124 or the subdivision criteria in DCC Title 17, the
6 county must find at the third-stage review that the specific development proposal
7 complies with the standards and criteria of DCC 18.113 and the FMP.⁴ DCC
8 18.113.040(C).

site plan or subdivision criteria, findings shall be made that
the specific development proposal complies with the
standards and criteria of DCC 18.113 and the FMP.”

³ We recognize that the resort development approval process may actually require four or more steps. For example, the county points out that some of the uses that may occur on land subdivided by the Phase A-1 TP decision, discussed further below, “may not be developed without first obtaining site plan approvals.” Response Brief 30 n 12.

⁴ DCC 18.124.020 provides:

“The elements of a site plan are: The layout and design of all existing and proposed improvements, including, but not limited to, buildings, structures, parking, circulation areas, outdoor storage areas, bicycle parking, landscape areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut and fill actions, accessways, pedestrian walkways, buffering and screening measures and street furniture.”

DCC 17.16.030 sets out the informational requirements for tentative subdivision plans including existing conditions, the proposed physical layout, and the “[s]ource, method and preliminary plans for domestic and other water

1 The subject property consists of approximately 1,970 acres of land zoned
2 for exclusive farm use and mapped within the destination resort overlay zone.
3 The property was formerly used as a large ranch and is surrounded by public land.
4 The property was formerly used as a large ranch and is surrounded by public land.
5 In 2006, the county approved the Thornburgh Destination Resort CMP and, in
6 2008, it approved the FMP. Those approvals were ultimately upheld after
7 multiple rounds of appeals.

8 DCC 18.113.070(D) requires that, for the development of a destination
9 resort, “[a]ny negative impact on fish and wildlife resources will be completely
10 mitigated so that there is no net loss or net degradation of the resource.” We have
11 referred to that standard as the “no net loss” standard. The FMP provides for
12 phased development and includes approval of a fish and wildlife habitat
13 mitigation plan (FWMP) to satisfy the no net loss standard and offset
14 development impacts through mitigation. The FWMP contains two components.
15 The first component addresses terrestrial wildlife. The second component
16 addresses off-site fish habitat and requires Thornburgh to secure water rights for
17 fish and wildlife habitat mitigation from Big Falls Ranch and Central Oregon
18 Irrigation District (COID). FMP Condition 38, quoted in full below, requires
19 Thornburgh to “abide by” the FWMP and to provide annual reporting.

supplies, sewage disposal, solid waste disposal and all utilities.” DCC
17.16.030(C)(8).

1 The FMP divides the development into seven phases. The first phase,
2 Phase A, includes development of transportation infrastructure, a golf course, a
3 restaurant, meeting facilities, open space, 300 residential units, and 150 overnight
4 lodging units (OLUs), and implementation of the FWMP. In May 2018,
5 Thornburgh sought approval of a tentative plan for a portion of the approved
6 Phase A, calling the partial subphase “Phase A-1,” which includes a tentative
7 subdivision plat for single-family residential dwelling lots and OLU lots, together
8 with roads, utility facilities, lots, and tracts for future resort facilities and open
9 space. Thornburgh also applied for site plan review for a well, well house, pump
10 house, reservoir, and sewage disposal. We refer to those proposals, collectively,
11 as the Phase A-1 TP. The county hearings officer approved with conditions the
12 Phase A-1 TP.

13 Petitioner appealed. On June 21, 2019, we remanded the Phase A-1 TP in
14 *Gould VIII*. Our remand was narrow.

15 The resort’s impact on fish and wildlife, and the efficacy of the FWMP to
16 satisfy the no net loss standard, has been the subject of multiple prior appeals.

17 We explained in *Gould VIII*:

18 “There are no existing natural streams, ponds, wetlands, or riparian
19 areas on the site. The resort water supply will be groundwater
20 obtained from six wells on the property. The applicant obtained
21 2,129 acre-feet of water rights to support the resort development
22 year-round. The Oregon Water Resources Department (OWRD)
23 granted the water rights upon finding that [Thornburgh] is
24 responsible for providing 1,356 total acre-feet of mitigation water:
25 836 acre-feet from Deep Canyon Creek irrigation rights that were

1 granted to Big Falls Ranch, and the remaining mitigation water from
2 the Central Oregon Irrigation District (COID).

3 “The resort’s consumptive use of groundwater is anticipated to
4 impact an offsite fish-bearing stream, Whychus Creek, by reducing
5 instream water volumes and increasing water temperatures. The
6 mitigation plan requires [Thornburgh] to replace the water
7 consumed by the resort with volumes and quality of water that will
8 maintain fish habitat, especially cold water thermal refugia. The
9 county found that the mitigation plan will result in no net
10 loss/degradation to fish and wildlife resources.

11 “* * * * *

12 “The mitigation plan requires [Thornburgh] to provide in-stream
13 mitigation water ‘in advance for the full amount of water to be
14 pumped under each phase of development,’ including an estimated
15 610 acre feet (AF) of water in Phase A and 1,201 AF in Phase B.
16 Big Falls Ranch and COID were identified as sources of the
17 mitigation water.” 79 Or LUBA at 573-74 (internal footnote and
18 citations omitted).

19 In the original county proceeding on the Phase A-1 TP, petitioner
20 submitted (1) a statement from COID that there are no current or active
21 agreements between COID and Thornburgh and (2) evidence that Big Falls
22 Ranch proposed to transfer its water rights from surface water points of diversion
23 to groundwater points of appropriation, and that that transfer would affect water
24 rights that the resort had intended to acquire for mitigation water. Thornburgh
25 responded that the FWMP did not “mandate” Big Falls Ranch and COID water,
26 but instead authorized mitigation water within a general zone.

27 The hearings officer rejected Thornburgh’s argument and found that the
28 FWMP relies on Big Falls Ranch and COID water to support the conclusion that

1 mitigation is adequate to meet the no net loss standard. The hearings officer
2 concluded that petitioner's evidence was "sufficient evidence to call into
3 question whether obtaining water from those sources remains feasible," and
4 found that a change in the source of mitigation water "may constitute a
5 substantial modification to the FMP approval." *Gould VIII*, 79 Or LUBA at 578.
6 The hearings officer further found that the record did not support a conclusion
7 that a change of source for the mitigation water would satisfy both quantity and
8 quality of mitigation water. However, the hearings officer concluded that
9 compliance with the FWMP and, through it, the no net loss standard that the
10 FWMP plan is designed to satisfy, could be met by imposing the following
11 condition of approval:

12 "17. Site design approval. Prior to issuance of building permits for
13 the single-family dwellings, obtain design approval for at least 50
14 OLU's, which approval shall demonstrate that: (a) the OLU's qualify
15 as such and (b) the Big [Falls] Ranch and COID water referenced in
16 the Mitigation Plan and FMP decision have been secured, [or]
17 demonstrate that the proposed alternate source is acceptable to
18 ODFW and provides the same quantity and quality mitigation so as
19 not to constitute a substantial modification or justify a modification
20 to the FMP." *Id.*; *see also* Record 176.

21 We refer to that condition as TP Condition 17.

22 In *Gould VIII*, petitioner argued that TP Condition 17 impermissibly
23 allows a modification of the FWMP without providing an opportunity for further
24 public input on the issue of whether any proposed alternate source of mitigation

1 water provides the same quantity and quality mitigation to satisfy the no net loss
2 standard.⁵ We agreed and reasoned:

3 “[Thornburgh] responds that the FMP did not require mitigation
4 water be sourced from water provided by the COID and Big Falls
5 Ranch and that the issue of feasibility of obtaining water from COID
6 was settled in prior appeals. [Thornburgh’s] response misses the
7 mark. As the hearings officer found, the mitigation plan relies on
8 both quantity and quality of mitigation water acquired from the
9 COID and Big Falls Ranch and the record does not support a
10 conclusion that a change of source for the mitigation water would
11 satisfy both quantity and quality of mitigation water. The no net
12 loss/degradation issue has been litigated at length and affirmed
13 based on facts and expert evidence modeled on assumptions of water
14 sourced from COID and Big Falls Ranch, which includes the quality
15 of those sources, including water temperature, and impacts on
16 downstream fish habitat.” *Gould VIII*, 79 Or LUBA at 579.

17 We concluded:

18 “* * * TP Condition 17 violates the right to a public hearing on
19 whether the no net loss/degradation standard will be satisfied by
20 mitigation from water sources not specified in the mitigation plan.
21 Accordingly, the county may not rely on TP Condition 17 to
22 conclude that, as conditioned, the tentative plan approval will
23 comply with the mitigation plan and thus satisfy the no net
24 loss/degradation standard. On remand, the county must consider
25 whether, without TP Condition 17, the tentative plan for Phase A-1
26 satisfies the no net loss/degradation standard and whether a change
27 in the source of mitigation water constitutes a substantial change to

⁵ Thornburgh also argued that the county had no legal basis to impose TP Condition 17 and asked that we affirm the Phase A-1 TP approval and reverse TP Condition 17. We rejected that argument because it was improperly presented in a response brief and sought a disposition outside our authority. *Gould VIII*, 79 Or LUBA at 579.

1 the FMP approval, requiring a new application, modification of the
2 application, or other further review consistent with FMP and DCC
3 destination resort regulations.” *Id.* at 580.⁶

4 On remand, as described further below, the hearings officer again
5 approved the Phase A-1 TP approval, this time without TP Condition 17. This
6 appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 We repeat here, as important context, that our remand in *Gould VIII* was
9 very narrow. We concluded that TP Condition 17 violated the right to a public
10 hearing on whether the no net loss standard would be satisfied for Phase A-1 by
11 mitigation from water sources not specified in the FWMP. While Thornburgh did
12 not expressly seek approval of mitigation water from an alternative source,
13 Thornburgh argued that the FWMP did not specifically require Big Falls Ranch
14 and COID water. The hearings officer rejected that position and we agreed with
15 the hearings officer that the FWMP does specifically rely on Big Falls Ranch and
16 COID water. *Gould VIII*, 79 Or LUBA at 579; *see also Gould v. Deschutes*
17 *County*, 59 Or LUBA 435, 459 (2009), *aff'd*, 233 Or App 623, 227 P3d 758
18 (2010) (agreeing with Thornburgh that the FWMP obligates Thornburgh to
19 acquire Big Falls Ranch water rights and return that water to Deep Canyon
20 Creek).

⁶ FMP Condition 1 provides: “Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.” Record 1256.

1 On remand, Thornburgh did not seek approval for alternative sources of
2 mitigation water for Phase A-1 to satisfy the FWMP. Instead, Thornburgh
3 presented evidence that it has secured Big Falls Ranch water rights as the sole
4 source of mitigation water for Phase A-1.⁷ The hearings officer therefore
5 concluded that TP Condition 17 is not needed because Thornburgh did not
6 propose any source of mitigation water different from what is specified in the
7 FWMP and approved in the FMP. Thus, what was left for the hearings officer to
8 determine on remand was whether the development proposed in the Phase A-1
9 TP satisfies the no net loss standard.

10 The FMP, including the FWMP and FMP Condition 38, has been
11 conclusively determined to satisfy the no net loss standard. Any third-stage resort
12 development proposal must comply with the FMP, including the FWMP. Thus,
13 the issue is whether the hearings officer correctly concluded that the development
14 proposed in the Phase A-1 TP complies with the FWMP. *See Gould v. Deschutes*
15 *County*, ___ Or LUBA ___, ___ (LUBA No 2022-013, June 1, 2022) (*Gould X*)
16 (slip op at 18-19) (reaching the same conclusion and construing the FMP
17 Condition 38 “abide by” requirement).

18 In their first assignment of error, petitioner argues that the hearings
19 officer’s conclusion that the Phase A-1 TP complies with the FWMP without TP
20 Condition 17 misconstrues the applicable law and is not supported by adequate

⁷ COID mitigation water is not at issue in this appeal.

1 findings or substantial evidence in the whole record. Petitioner contends that the
2 approval violates the FWMP because “the county’s decision to simply eliminate
3 TP Condition 17 will allow Thornburgh to build out Phase A-1 and draw the water
4 it needs for consumption without any of the mitigation required by the FWMP.”
5 Petition for Review 27.⁸ Petitioner argues that Thornburgh has not documented
6 that Big Falls Ranch water is legally protected for instream use and physically
7 available for fish habitat mitigation purposes for Phase A-1, which petitioner
8 argues are requirements of the FWMP.⁹

9 **A. Legally Protected Water for Instream Use**

10 We start by clarifying what the FWMP requires vis-à-vis Big Falls Ranch
11 mitigation water. The county argues that “the FWMP does not require a transfer
12 of the [Big Falls Ranch] mitigation water to meet the requirements of the

⁸ In *Gould VIII*, we affirmed the hearings officer’s conclusion that the Phase A-1 TP did not propose to modify the overall amount of required mitigation water but, instead, modified the timing of when the mitigation water would be provided based upon consumptive use for Phase A-1. “Consumptive use” means the amount of ground water appropriation that will not return to surface water flows. *Gould VIII*, 79 Or LUBA at 575 (citing OAR 690-505-0605(2) OWRD definitions for Deschutes Basin Ground Water Mitigation Rules).

⁹ In *Gould VIII*, we affirmed the county’s approval of an incremental development plan that requires 50 AF of mitigation water be provided as part of Phase A-1 TP. The 50 AF represents consumptive water use of the residential units approved in Phase A-1 TP. All other uses that may occur on land platted in Phase A-1 TP may not be developed without first obtaining site plan approvals. Those subsequent site plans, not Phase A-1 TP, will be the county action that will authorize new water uses. Response Brief 30 n 12 (citing to Record 128-29).

1 FWMP.” Response Brief 22. The county is wrong in that respect. The FWMP
2 relies on Thornburgh acquiring Big Falls Ranch water rights and transferring
3 those rights to legally protected instream use. Record 575.

4 While the FWMP differentiates between mitigation water required for
5 consumptive use and specific mitigation water for fish habitat, all mitigation
6 water required by the FWMP is subject to the OWRD Deschutes Basin Program.
7 Record 578. The FWMP explains that, under OWRD mitigation requirements,
8 “[m]itigation must be in the form of legally protected water for instream use. In
9 most cases, mitigation is obtained by acquiring existing water rights for irrigation
10 use and converting them into instream water rights held by the state.” Record
11 573; *see* OAR 690-505-0610(4) (“Mitigation water must be provided within the
12 general zone of impact identified by [OWRD], legally protected for instream use
13 prior to permit issuance, and committed for the life of the permit and subsequent
14 certificate(s).”); OAR 690-505-0605(13) (providing, for purposes of the
15 Deschutes Basin Program, that “[m]itigation water’ means water that is legally
16 protected for instream use from implementation of a mitigation project,
17 calculated in acre-feet”).

18 The county points out that the Deschutes Basin Program provides a variety
19 of ways that Thornburgh may place mitigation water into an instream use, citing
20 OAR 690-505-0610.¹⁰ The county states that any action that Thornburgh takes to

¹⁰ OAR 690-505-0610(3) provides:

1 meet the OWRD requirements will also satisfy the FWMP requirements. The
2 county argues that the FWMP requires only that Thornburgh “retire” the Big Falls
3 Ranch irrigation water rights, pointing to the “Specific Mitigation from Big Falls
4 Ranch” section of the FWMP, which provides:

5 “Thornburgh will fully exercise the option for purchasing 464.9
6 acres of water rights under its existing option agreement with Big
7 Falls Ranch, Inc. in fulfilling its mitigation obligation under the
8 OWRD water right. By making this commitment, Thornburgh

“Mitigation projects may include:

- “(a) The allocation of conserved water provided under ORS 537.455 to 537.500 and OAR chapter 690, division 18, where the applicant’s portion of the conserved water is allocated and legally protected for instream use;
- “(b) The transfer of an existing water right to an instream use if the water right to be transferred is also lawfully eligible for transfer to another out-of-stream use, and for mitigation banks, the time-limited transfer or lease of an existing water right to instream use under ORS 537.348 and OAR chapter 690, division 77;
- “(c) A permit to appropriate water for the purpose of artificial recharge of a ground water reservoir pursuant to ORS 537.135 and OAR chapter 690, division 350;
- “(d) A secondary permit to use stored water from an existing reservoir obtained pursuant to ORS 537.130 to 537.211 and OAR chapter 690, division 310, provided the secondary permit is for instream use; or
- “(e) Other projects approved by the Department that result in mitigation water.”

1 ensures that nearly two-thirds of its total mitigation water (expected
2 total 836.82 AF per year) will come from a source that contributes
3 cold spring-fed water to the Deschutes River above the Thornburgh
4 location of impact. By *retiring* an existing irrigation water right, this
5 measure will also result in restoration of 5.5 cfs of cold surface water
6 flow to the Deschutes River from Deep Canyon Creek during the
7 irrigation season.” Record 579 (emphasis added).

8 The county argues that “retiring” the existing Big Falls Ranch water rights can
9 be accomplished through voluntary cancellation of the right, instead of
10 transferring the right to an instream use, again citing OAR 690-505-0610, but not
11 specifying a subsection or explaining how that administrative rule applies within
12 the specific context of the FWMP. Response Brief 27.

13 In the FWMP, Thornburgh and the county relied on the benefits of
14 transferring Big Falls Ranch irrigation water to legally protected instream water
15 rights, as illustrated in the following excerpts from the FWMP:

16 “The Resort also has entered into an agreement to purchase existing
17 surface water rights from Big Falls Ranch located near Lower
18 Bridge, within the General Zone of Impact. The 464.9 acres of
19 irrigation water rights are expected to generate a total of 836.82 AF
20 per year of mitigation water *when transferred to instream water*
21 *rights*. Thornburgh is currently working with Big Falls Ranch on
22 transfer applications for the first 175 acres of water rights to be
23 acquired under the agreement *and transferred to instream use*. The
24 *instream water right* would protect flow from a point near Lower
25 Bridge downstream to Lake Billy Chinook. This initial transfer is
26 expected to result in 315 AF of mitigation water.

27 “* * * * *

28 “* * * When the initial 175 acres of irrigation water rights are
29 *transferred to instream flow* for Phase A mitigation, up to 2.07 cubic
30 feet per second of flow that would otherwise be diverted from the

1 creek for irrigation *will remain in the creek as an instream water*
2 *right.*” Record 575-76.

3 Contrary to the county’s contention, the FWMP *does* require Thornburgh to
4 transfer Big Falls Ranch water rights to a legally protected instream water right.¹¹

5 At the time of the 2008 FMP approval, Big Falls Ranch held the right to
6 pump water out of Deep Canyon Creek for irrigation. In 2018 Big Falls Ranch
7 transferred its water right from surface water points of diversion on Deep Canyon
8 Creek to groundwater points of appropriation on the Big Falls Ranch property.

9 Petitioner argues that the Phase A-1 TP does not abide by the FWMP
10 because Thornburgh has not demonstrated, at the subdivision and site plan review
11 stage, that the Big Falls Ranch mitigation water required by the FWMP is legally
12 transferred to an instream water right, or, at a minimum, that those rights can and
13 will be transferred to instream water rights before water use for Phase A-1
14 commences. While not entirely clear from the briefing, as we understand it,
15 petitioner argues that Thornburgh must return the Big Falls Ranch water rights to
16 surface water points of diversion on Deep Canyon Creek and then transfer those
17 same water rights to the state for protected instream use before those water rights

¹¹ Presumably, the FWMP implicitly refers to the transfer of the irrigation water rights to instream water rights under the processes governed by ORS 537.348 and OAR chapter 690, division 77. OAR 690-505-0610(3)(b). *See* ORS 537.332(3) and OAR 690-077-0010(16) (providing “instream water right” “means a water right held in trust by the Water Resources Department for the benefit of the people of the state of Oregon to maintain water instream for public use. An instream water right does not require a diversion or any other means of physical control over the water.”).

1 can satisfy the mitigation required by the FWMP. Petition for Review 27 (citing
2 Record 589).

3 The hearings officer acknowledged that petitioner identified additional
4 steps that Thornburgh may need to take to “perfect” the water right that
5 Thornburgh acquired from Big Falls Ranch. Record 80. The hearings officer
6 explained that their “use of the word *perfect* is intended to convey to the reader
7 the concept that [Thornburgh], in this case, needed to accomplish additional steps
8 before [Thornburgh’s Big Falls Ranch] water rights transfer process was
9 complete.” *Id.* at n 6 (emphasis in original); *but see* OAR 690-017-0010(11)
10 (“‘Perfected Water Right’ means a water right which has been confirmed by the
11 issuance of a certificate of water right or by a court decree.”). However, the
12 hearings officer concluded that Thornburgh was not precluded as a matter of law
13 from securing Big Falls Ranch water for Phase A-1 resort mitigation use. The
14 hearings officer found:

15 “The Hearings Officer finds that [Thornburgh] may not have fully
16 completed all required steps to perfect water rights necessary to
17 meet the Mitigation Plan mitigation water rights for Phase A-1. In
18 fact, Gould’s water rights legal counsel (‘Anuta’) identified issues
19 that [Thornburgh] may need to address before finalizing the
20 necessary [Big Falls Ranch] mitigation water rights (I.e., Anuta
21 Letters July 6, 2021 and September 7, 2021). However, using the
22 LUBA Golf Course Decision as a guide, *the Hearings Officer finds*
23 *he must determine if there is persuasive evidence in the record that*
24 *[Thornburgh] is legally precluded, as a matter of law, from securing*
25 *the required [Big Falls Ranch] water rights necessary to satisfy the*
26 *Mitigation Plan mitigation water for Phase A-1.*

1 “The Hearings Officer finds [Thornburgh] did provide evidence in
2 the record of the transfer of [Big Falls Ranch] water rights (Requests
3 for Assignment of [Big Falls Ranch] water rights from Big Falls
4 Ranch Co to Pinnacle Utilities) and a Final Order Approving a
5 Change from a Surface Water Point of Diversion to Groundwater
6 Points of Appropriation. The Hearings Officer also found the
7 statements of [Thornburgh’s] water rights legal counsel (Janet
8 Neuman – September 14, 2021 letter), [Thornburgh’s] engineer
9 (David Newton – September 7, 2021 memorandum) and
10 [Thornburgh’s] legal counsel (Katzaroff – August 31, 2021 letter)
11 to be credible and add support to [Thornburgh’s] claim that it did
12 have the legal right to utilize [Big Falls Ranch] water rights, in the
13 necessary quantity, to meet the Phase A-1 Mitigation Plan
14 mitigation water requirements. The Hearings Officer finds, based
15 upon a review of the evidence presented during this remand process,
16 *that [Thornburgh] is not legally precluded, as a matter of law,* from
17 securing Phase A-1 Mitigation Plan mitigation water from the [Big
18 Falls Ranch] ‘source.’” Record 81 (emphases added).

19 Petitioner and the county agree that, in those findings, the hearings officer
20 erroneously conflated the legal statuses of Thornburgh’s quasi-municipal ground
21 water right, OWRD Permit G-17036, which is in an OWRD contested case
22 proceeding, with Thornburgh’s Big Falls Ranch water right. Petition for Review
23 23; Response Brief 18. Because the parties agree on that issue, we assume for the
24 limited purposes of this decision that the hearings officer’s findings that the Big
25 Falls Ranch water right is not “perfected” relies on a factual misunderstanding.¹²

¹² It seems likely to us that the hearings officer understood petitioner’s argument that, while Thornburgh had secured Big Falls Ranch water rights, there remained multiple administrative steps to move that water into the legal status of a protected instream water right.

1 Petitioner and the county appear to agree that the record establishes that
2 Thornburgh has acquired Big Falls Ranch water *rights* in a sufficient quantity to
3 satisfy the amount of Big Falls Ranch mitigation water for Phase A-1.¹³ With
4 respect to documenting the Big Falls Ranch water rights, the hearings officer
5 found Thornburgh provided requests to OWRD for assignment of the Big Falls
6 Ranch water rights to Thornburgh, signed by the owner of the Big Falls Ranch
7 water rights certificates, that effectively transfer Big Falls Ranch’s interest in two
8 water rights certificates to Pinnacle Utilities, LLC, which holds the water rights
9 for Thornburgh. Record 80, 284, 290-96. However, petitioner argues that the
10 legal status of those water rights at the time of the Phase A-1 TP approval fails to
11 satisfy the FWMP. Again, petitioner argues that Thornburgh was required to
12 establish that the Big Falls Ranch water right had been transferred to a legally
13 protected instream right or, at a minimum, that those rights can and will be
14 transferred to instream water rights before water use for Phase A-1 commences.
15 The county responds that the FWMP and LUBA’s narrow remand in *Gould VIII*
16 require Thornburgh to simply establish that Thornburgh had secured Big Falls
17 Ranch water rights to satisfy the mitigation requirements for Phase A-1.

18 The FWMP requires Thornburgh to provide mitigation water—of the
19 quantity, quality, and legal status required by the FWMP—before pumping water

¹³ We understand petitioner disputes that the amount of *actual* wet water does not exist instream in Deep Canyon Creek to satisfy the water rights.

1 for the uses allowed by the approved phase of development. *Gould VIII*, 79 Or
2 LUBA at 577. We agree with petitioner that the FWMP requires Thornburgh to
3 transfer the water rights to a legally protected instream use prior to using water
4 for development approved in Phase A-1 TP. However, we agree with the county
5 the FWMP does not require Thornburgh to establish that the mitigation water has
6 been or will be transferred to an instream use at the tentative plan stage.

7 In *Gould X*, we explained that the FWMP requires Thornburgh to provide
8 the full amount of mitigation water for each phase “in advance of water use.” ___
9 Or LUBA at ___ (slip op at 20). However, the FWMP does not require *proof* of
10 mitigation actions at the third-stage development application. *Id.* Accordingly,
11 the hearings officer did not err by not requiring Thornburgh to demonstrate—in
12 the Phase A-1 TP proceeding—that the Big Falls Ranch water rights will be
13 transferred to legally protected instream uses before pumping for Phase A-1
14 development begins.

15 This portion of the first assignment of error is denied.

16 **B. Paper Water Versus Wet Water**

17 Petitioner also argues that the hearings officer’s decision is not supported
18 by substantial evidence because, according to petitioner, there is evidence in the
19 record that Big Falls Ranch *water rights* (paper water) will not actually result in
20 mitigation to achieve the no net loss standard because there is not sufficient
21 *actual water* (wet water) in Deep Canyon Creek to support the rights. Petitioner
22 argues that “[i]t is questionable whether there are currently, or will in the future

1 be, an actual surface water flows in Deep Canyon Creek. This is because the [Big
2 Falls Ranch] wells are currently tapping and reducing the spring water that should
3 be present in Deep Canyon Creek.” Petition for Review 28 (quoting Record 580).

4 The hearings officer concluded that petitioner’s argument that Deep
5 Canyon Creek does not contain flowing spring water was outside the scope of the
6 remand of the Phase A-1 TP. Record 83.

7 The county responds that the FWMP requires Thornburgh “to purchase
8 water rights; not to demonstrate that a certain volume of ‘wet water’ exists in the
9 creek.” Response Brief 24. The county points out that, during the review of the
10 FMP, opponents argued that the acquisition of water rights is not enough to prove
11 that the resort development will result in no net loss or degradation of habitat.
12 The FMP hearings officer concluded that OWRD water rights are the measure
13 and proof of compliance with the no net loss standard at the FMP stage.

14 “Opponents argue that the acquisition of water rights is not evidence
15 that water will actually be returned to the rivers and streams as
16 alleged. According to opponents, water rights are merely paper
17 representations of water quantities; and do not mean that the cool
18 water needed to maintain instream temperatures *will be available*.
19 The hearings officer understands the limitations of the water right
20 process, but concludes that under Oregon water law, the only way
21 to adequately account for water in the streams is through the OWRD
22 administration. Therefore, the hearings officer concludes that
23 *evidence regarding the location and volume of water rights is*
24 *substantial evidence as to the likely location and volume of water in*
25 *the identified streams.”* Record 156-57 n 9 (emphases added).

1 Petitioner replies that while evidence of obtaining water rights was
2 sufficient to allow the county to approve the FMP, the FWMP requires *actual*
3 mitigation water for fish habitat to satisfy the no net loss standard. In other words,
4 paper water that does not supply wet water does nothing to ensure no net loss of
5 fish habitat.

6 The county argues that petitioner’s wet water argument is an impermissible
7 collateral attack on the FMP and FWMP. Under the collateral attack doctrine, in
8 reviewing a development approval that depends upon a prior land use decision,
9 LUBA will not review arguments that the prior decision was procedurally flawed
10 or substantively incorrect, because such a challenge would constitute an
11 impermissible collateral attack on a decision not before LUBA. *Gansen v. Lane*
12 *County*, ___ Or LUBA ___, ___ (LUBA No 2020-074, Feb 22, 2021) (slip op at
13 11). We agree with petitioner that while the FMP decision sets out the ongoing
14 mitigation requirements to satisfy the no net loss standard, the quoted passage
15 regarding paper water resolved only the issue of what satisfied the no net loss
16 standard at the FMP stage, which is distinct from what satisfies the ongoing
17 mitigation required by the FWMP as the resort moves through phased
18 development. The FMP hearings officer’s conclusion that “evidence regarding
19 the location and volume of water rights is substantial evidence as to the likely
20 location and volume of water in the identified streams” does not conclusively
21 decide that the FWMP requires only paper water. Record 156-57 n 9. What the
22 FWMP requires is controlled by the terms of the FWMP itself.

1 In the FWMP, Thornburgh committed to providing actual mitigation in the
2 form of wet water not simply paper water. The FWMP states:

3 “The plan was developed in consultation with ODFW to address two
4 specific areas of concern regarding the potential for negative
5 impacts: the potential for a loss of habitat due to reduced surface
6 water flows in the area of impact and the potential for loss of habitat
7 due to increased temperature from reduced stream flow or loss of
8 inflow from springs.” Record 581.

9 While ODFW acknowledged that the OWRD ground water mitigation program
10 is designed to mitigate for the impacts of flow reduction as a result of new ground
11 water pumping, ODFW also did not accept that the OWRD program, alone, is
12 sufficient to ensure no net loss of habitat quantity or quality. *See* Record 577-78.

13 Contrary to the county’s argument, the FWMP does not rely solely on
14 paper water. Instead, the FWMP provides that the transfer of water rights will
15 result in actual flowing water in the affected streams. “[T]he flow replacement
16 plan developed by Thornburgh will address both flow and temperature concerns
17 and is expected to fully mitigate for any negative impacts so that there is no net
18 loss of habitat quantity or quality for fishery resources.” Record 571. “By
19 providing mitigation water from the conversion of existing water rights,
20 Thornburgh will eliminate approximately 7.5 to 10.4 cfs of existing surface water
21 diversions during the irrigation season, *restoring natural stream flow to the*
22 *system* at or above the area of impact from Thornburgh wells during the time
23 period when stream flows are typically the lowest and temperatures are warmest.”
24 Record 579 (emphasis added). With respect to Big Falls Ranch water rights, the

1 FWMP provides: “The 464.9 acres of irrigation water rights are expected to
2 generate a total of 836.82 AF per year of mitigation water when transferred to
3 instream water rights. * * * The instream water right would protect flow from a
4 point near Lower Bridge downstream to Lake Billy Chinook.” Record 575. “The
5 initial Big Falls transfer of 175 acres is projected to result in 315 AF per year of
6 mitigation water. This water, originating from springs, will flow to the Deschutes
7 River.” Record 577. We agree with petitioner that Thornburgh’s purchase of
8 water rights is not sufficient to satisfy the requirements of the FWMP, which
9 requires actual wet water to satisfy the no net loss standard.

10 However, we agree with the county that the FWMP does not require
11 Thornburgh to establish that wet water is actually in Deep Canyon Creek at the
12 tentative plan stage. Instead, the FWMP requires Thornburgh to provide
13 mitigation water instream “before water use may begin” for development
14 approved in Phase A-1 TP. Record 573; *see Gould X*, ___ Or LUBA at ___ (slip
15 op at 20) (“[T]he FWMP requires Thornburgh to provide mitigation water—of
16 both the quantity and quality required by the FWMP—before pumping water for
17 the uses allowed by the approved phase of development.”); *Gould VIII*, 79 Or
18 LUBA at 574 (“[T]he mitigation plan requires [Thornburgh] to provide in-stream
19 mitigation water ‘in advance for the full amount of water to be pumped under
20 each phase of development[.]’”). Accordingly, the hearings officer did not err by
21 not requiring Thornburgh to demonstrate in the Phase A-1 TP proceeding that a
22 certain volume of wet water is currently available in Deep Canyon Creek.

1 This portion of the first assignment of error is denied.

2 Petitioner assigns error to other miscellaneous findings under the first
3 assignment of error. The county responds, and we agree that those arguments are
4 undeveloped for review. We do not address them further in this decision.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 In the second assignment of error petitioner argues that the county
8 committed procedural error when it denied petitioner the opportunity to rebut
9 evidence Thornburgh submitted in its final submission on remand.

10 At the August 24, 2021 remand hearing, the hearings officer established
11 the following open record period: (1) August 31, 2021, deadline for all parties to
12 submit additional evidence; (2) September 7, 2021, deadline for all parties to
13 submit responsive/rebuttal evidence; and (3) September 14, 2021, deadline for
14 Thornburgh's final argument. Record 75.

15 At the August 24, 2021 remand hearing, Thornburgh testified that it had
16 purchased Big Fall Ranch Deep Canyon Creek water rights. On August 31, 2021,
17 petitioner's written submission argued that the Thornburgh had failed to prove
18 that Thornburgh had obtained Big Falls Ranch mitigation water rights. Record
19 556. On August 31, 2021, Thornburgh submitted written testimony that it had
20 purchased 162-acre feet of Big Falls Ranch mitigation water as follows:

21 *** Pinnacle Utilities, LLC (owner of the Thornburgh water rights
22 permit) has closed on the purchase of 90 acres of the [Big Falls
23 Ranch] Deep Canyon water right. This provides 162 acre-feet of

1 mitigation water under the mitigation rules, wherein 1 acre of water
2 right provides 1.8 acre-feet of mitigation water. This volume of
3 mitigation exceeds the 50 acre-feet required by the Phase A-1
4 tentative plan.” Record 475.

5 “Thornburgh has secured all of the [Big Falls Ranch] water that is
6 required to meet the [no net loss] Standard. As of August 24, 2021,
7 Thornburgh has closed on, and received an assignment of, 162 acre
8 feet of mitigation water that was previously owned by [Big Falls
9 Ranch]; which is more than the required 50 acre feet of water
10 required for mitigation at this time.” Record 540.

11 “8/24/2021 Thornburgh closes on 162 acre feet of mitigation water.
12 Additional [Big Falls Ranch] water under contract.” Record 543.

13 On September 7, 2021, as part of its final rebuttal, Thornburgh submitted
14 a rebuttal memo responding to petitioner’s August 31, 2021 submission arguing
15 that Thornburgh had failed to prove it has obtained Big Falls Ranch water rights,
16 and attached copies of two water rights transfer documents—namely, two
17 OWRD requests for assignment of the Big Falls Ranch water rights signed by the
18 owner of the Big Falls Ranch water rights certificates. Record 284, 290-95.

19 On September 13, 2021, petitioner submitted a letter from their water
20 rights counsel, Anuta, arguing that Thornburgh’s purchase of water rights from
21 Big Falls Ranch was not legally sufficient to satisfy the FWMP because
22 additional steps must occur to place the water instream in Deep Canyon Creek.
23 Record 250-52. Petitioner requested that the hearings officer reopen the record
24 and accept that Anuta letter under ORS 197.763(6)(c) and (7) (renumbered ORS
25 197.797). Record 74-75, 248. The hearings officer denied petitioner’s request to
26 reopen the record. Record 75.

1 Petitioner argues that the hearings officer committed procedural error
2 when they denied petitioner’s request to reopen the record. Petitioner does not
3 argue that the county erred in accepting any of Thornburgh’s submitted
4 documents.

5 The county responds, and we agree, that petitioner has not demonstrated
6 any right to reopen the record to submit surrebuttal argument. ORS 197.797(6)(a)
7 applies to initial evidentiary hearings, not proceedings on remand. ORS
8 197.797(7) applies when a hearings body reopens a record to admit new evidence,
9 arguments or testimony. Petitioner has not argued, let alone established, that the
10 hearings officer reopened the record after the open record period closed.

11 Petitioner cites no other source of law to support its second assignment of
12 error. Generally, parties in quasi-judicial land use proceedings have a right to
13 present and rebut evidence. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588,
14 507 P2d 23 (1973). However, “there is no unlimited right to rebut rebuttal
15 evidence, and *Fasano* does not require endless opportunities to rebut rebuttal
16 evidence.” *Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff’d*, 211 Or
17 App 250, 154 P3d 786 (2007).

18 Moreover, we agree with the county that petitioner has failed to establish
19 any prejudice. The issue of whether Thornburgh had acquired Big Falls Ranch
20 water rights, and whether those rights are sufficient to establish satisfaction of
21 the mitigation requirements, were squarely contested throughout the remand

1 proceeding. The surrebuttal argument that the hearings officer rejected largely
2 repeats arguments and analysis already in the record.

3 The second assignment of error is denied.

4 The county's decision is affirmed.