

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

3
4 THE CONFEDERATED TRIBES OF THE WARM
5 SPRINGS RESERVATION OF OREGON,
6 *Petitioner,*

7
8 and

9
10 CENTRAL OREGON LANDWATCH,
11 ANNUNZIATA GOULD, and THOMAS BISHOP,
12 *Intervenors-Petitioners,*

13
14 vs.

15
16 DESCHUTES COUNTY,
17 *Respondent,*

18
19 and

20
21 CENTRAL LAND AND CATTLE COMPANY, LLC,
22 PINNACLE UTILITIES, LLC, and KAMERON DELASHMUTT,
23 *Intervenors-Respondents.*

24
25 LUBA No. 2023-038

26
27 ANNUNZIATA GOULD,
28 *Petitioner,*

29
30 and

31
32 THE CONFEDERATED TRIBES OF THE WARM
33 SPRINGS RESERVATION OF OREGON,
34 CENTRAL OREGON LANDWATCH,
35 PAUL J. LIPSCOMB, and THOMAS BISHOP,
36 *Intervenors-Petitioners,*

37
38 vs.

1
2 DESCHUTES COUNTY,
3 *Respondent,*

4
5 and

6
7 CENTRAL LAND AND CATTLE COMPANY, LLC,
8 PINNACLE UTILITIES, LLC, and KAMERON DELASHMUTT,
9 *Intervenors-Respondents.*

10
11 LUBA No. 2023-039

12
13 CENTRAL OREGON LANDWATCH
14 *Petitioner,*

15
16 and

17
18 THE CONFEDERATED TRIBES OF THE WARM
19 SPRINGS RESERVATION OF OREGON,
20 ANNUNZIATA GOULD, and THOMAS BISHOP,
21 *Intervenors-Petitioners,*

22
23 vs.

24
25 DESCHUTES COUNTY,
26 *Respondent,*

27
28 and

29
30 CENTRAL LAND AND CATTLE COMPANY, LLC,
31 PINNACLE UTILITIES, LLC, and KAMERON DELASHMUTT,
32 *Intervenors-Respondents.*

33
34 LUBA No. 2023-041

35
36 FINAL OPINION
37 AND ORDER
38

1 Appeal from Deschutes County.
2

3 Josh Newton filed a petition for review and reply brief and argued on
4 behalf of petitioner Confederated Tribes of the Warm Springs Reservation of
5 Oregon. Also on the briefs were Ellen Grover and Best Best & Krieger LLP.
6

7 Jennifer Bragar filed a petition for review, intervenors-petitioners' briefs,
8 and reply briefs, and argued on behalf of petitioner Annunziata Gould and
9 intervenors-petitioners Paul J. Lipscomb, and Thomas Bishop. Also on the briefs
10 were Jay M. Harris and Tomasi Bragar Dubay.
11

12 Carol Macbeth filed a petition for review and reply brief and argued on
13 behalf of petitioner Central Oregon Landwatch.
14

15 No appearance by Deschutes County.
16

17 J. Kenneth Katzaroff filed the intervenors-respondents' briefs and argued
18 on behalf of intervenors-respondents. Also on the briefs were Bailey M. Oswald,
19 Megan J. Breen, and Schwabe, Williamson & Wyatt, P.C.
20

21 ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board
22 Member, participated in the decision.
23

24 REMANDED 01/12/2024
25

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

1	TABLE OF CONTENTS	
2	I. NATURE OF THE DECISION	5
3	II. BACKGROUND	5
4	III. MOTIONS TO TAKE OFFICIAL NOTICE	15
5	IV. MOTIONS TO STRIKE	16
6	V. 1855 TREATY RIGHTS	
7	(Tribe First Assignment of Error)	
8	VI. DUE PROCESS AND COORDINATION OBLIGATION	23
9	(Tribe Third Assignment of Error)	
10	VII. NO NET LOSS STANDARD DCC 18.113.070(D)	27
11	(Tribe Second Assignment of Error; Bishop Assignments of Error)	
12	A. Preservation – The 1855 Treaty and ORS 197.460	28
13	B. The Tribe’s Co-manager Status, Indigenous Knowledge,	32
14	and Evidence	
15	C. ODFW critique of the 2022 FWMP	34
16	D. Baseline Habitat Conditions	37
17	E. System-wide Benefits	42
18	F. Cancellation in Lieu of Mitigation (Voluntary Cancellation)	44
19	G. OWRD Mitigation Rules	49
20	H. ORS 537.270	50
21	I. Water Rights Certificates as Evidence of Water Quantity	52
22	J. Crooked River Habitat Impacts	53
23	K. Whychus Creek Mitigation	57
24	L. 2022 FWMP Compliance Provisions	60
25	VIII. SUBSTANTIAL CHANGE	65
26	(Gould Second Assignment of Error; COLW First and Third	
27	Assignments of Error; Lipscomb First Assignment of Error)	
28	A. Economic Analysis	70
29	B. Open Space	80
30	C. Water Supply, Consumption, and Conservation	83
31	D. Water System and Wastewater Disposal Plans	88
32	IX. VOID CMP	92
33	(Gould First Assignment of Error)	
34	X. CMP CONDITION 28	96
35	(COLW Second Assignment of Error; Lipscomb Second Assignment of Error)	
36	XI. INTERNAL INCONSISTENCIES	98
37	(Gould Third Assignment of Error)	
38	XII. CONCLUSION AND DISPOSITION	98

I. NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving modification of a destination resort final master plan.

II. BACKGROUND

This appeal involves the Thornburgh Destination Resort in Deschutes County, which the county initially approved in 2006.¹ The subject property is comprised of approximately 1,970 acres of mostly undeveloped land that is located approximately three miles west-southwest of the City of Redmond.

We start by setting out the legal framework that applies to destination resorts. ORS 197.435 to 197.467 govern approval of destination resorts. “A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities.” ORS 197.445. To qualify as a destination resort in Deschutes County, the resort must be located on a site of 160 acres or more. At least 50 percent of the site must be dedicated to permanent open space. At least seven million dollars must be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations. Not less than one-third of this amount must be spent on developed recreational facilities. The resort

¹ Appeals of land use approvals related to the Thornburgh Destination Resort date back to 2006. Later in this decision, we refer to prior appeals that are relevant to the issues in this appeal.

1 must provide visitor-oriented accommodations including meeting rooms,
2 restaurants with seating for 100 persons, and 150 rentable overnight lodging units
3 (OLUs). *Id.*

4 The destination resort statutes are implemented in Deschutes County Code
5 (DCC) chapter 18.113, under which destination resorts are subject to a three-step
6 approval process. The first step is approval of a conceptual master plan (CMP).
7 DCC 18.113.040(A). The CMP stage includes a right to a public hearing and the
8 county CMP decision must be based on evidence that is submitted during that
9 public process. The CMP is “reviewed for compliance with the standards and
10 criteria set forth in DCC 18.113.” DCC 18.113.040(A). DCC 18.113.050 sets out
11 a list of information that must be included in an application for CMP approval.
12 DCC 18.113.060 and DCC 18.113.070 set out standards and approval criteria for
13 destination resorts.² The standards that apply under DCC 18.113 “may be met by
14 the imposition of conditions calculated to ensure that the standard will be met.”
15 DCC 18.113.075.

16 Once a CMP has been approved, the planning director may
17 administratively approve “insubstantial change[s]” to the CMP without notice or
18 hearing. DCC 18.113.080. Any “substantial change” must be reviewed and
19 approved under the same public process that applies to CMP review. *Id.*

² DCC 18.113.070 requires, in part, that the decision maker find from substantial evidence in the record that “All standards established by DCC 18.113.060 are or will be met.” DCC 18.113.070(B).

1 “Substantial change to an approved CMP, as used in DCC 18.113.080, means an
2 alteration in the type, scale, location, phasing or other characteristic of the
3 proposed development such that findings of fact on which the original approval
4 was based would be materially affected.” *Id.*

5 The second step in approving a destination resort is approval of a final
6 master plan (FMP), “which incorporates all requirements of the County approval
7 for the CMP.” DCC 18.113.040(B). The CMP application is processed “as if it
8 were a conditional use permit.” DCC 18.113.040(A). The planning director
9 reviews “the FMP to determine if it complies with the approved CMP and all
10 conditions of approval of the conditional use permit.” DCC 18.113.040(B). If the
11 FMP involves a substantial change from the CMP, then the applicant must apply
12 for modification of the CMP. DCC 18.113.100(B).

13 The third step is approval of individual components of the destination
14 resort through site plan or subdivision approval. DCC 18.113.040(C). “In
15 addition to findings satisfying the site plan or subdivision criteria, findings shall
16 be made that the specific development proposal complies with the standards and
17 criteria of DCC 18.113 and the FMP.” *Id.* With that legal context, we describe
18 the county’s approval of the Thornburgh Resort CMP and FMP.

19 The county approved the Thornburgh Resort CMP in 2006 and approved
20 the FMP in 2008. As we explain further below, the FMP approval has effectively
21 incorporated and displaced the CMP approval. All requirements of the CMP
22 approval are requirements of the FMP approval. CMP and FMP Condition 1

1 provides: “Approval is based upon the plan as submitted. Any substantial change
2 to the approved plan will require a new application.” Record 11426, 11725.³ The
3 county has interpreted “substantial change” in Condition 1 to have the same
4 meaning as the term is used in DCC 18.113.080, which is “an alteration in the
5 type, scale, location, phasing or other characteristic of the proposed development
6 such that findings of fact on which the original approval was based would be
7 materially affected.” Thus, Thornburgh must submit a new application for any
8 proposed modification that will alter a characteristic of the approved resort
9 development such that any finding of fact supporting the CMP or FMP approval
10 would be materially affected.⁴ In those instances, before approving the
11 modification, the county must find that the proposed resort, as modified, will
12 satisfy the approval criteria for which the supporting findings of fact are
13 materially affected by the modification.

14 The FMP provides for phased development and compliance with a fish and
15 wildlife habitat mitigation plan (2008 FWMP) designed and found to meet the
16 “no net loss standard,” which is a county criterion for destination resort
17 development that requires that “[a]ny negative impact on fish and wildlife

³ All record citations are to the Amended Consolidated Record.

⁴ The owners/applicants are intervenors-respondents Central Land and Cattle Company, LLC, Pinnacle Utilities, LLC, and Kameron DeLashmutt. For ease of reading, we refer to them individually and collectively as Thornburgh throughout this decision.

1 resources will be completely mitigated so that there is no net loss or net
2 degradation of the resource.” DCC 18.113.070(D). FMP Condition 38 required
3 Thornburgh to “abide by” the 2008 FWMP, which required mitigation in advance
4 of water use and annual reporting of mitigation actions. Record 10976. The 2008
5 FWMP relied on mitigation water from certain sources to ensure a quantity and
6 quality of water that would result in predicted benefits to fish habitat, particularly
7 cold water thermal refugia. The 2008 FWMP was supported by hydrogeologist,
8 hydrologist, and fish biologist reports and opinions. The technical information
9 supporting the mitigation plan was greatly disputed before the county and
10 challenged on appeal. Ultimately, the 2008 FWMP was decided to satisfy the no
11 net loss standard. *See Gould v. Deschutes County*, 233 Or App 623, 636-43, 227
12 P3d 758 (2010) (describing 2008 FWMP litigation).

13 The CMP approval explained that the resort will include two “villages,”
14 The Tribute and The Pinnacle, to be constructed in phases. The Tribute village
15 will be developed first, located on the southern half of the property, and was
16 “planned to include two golf courses, a golf practice area, golf clubhouse,
17 community center, golf cottages and luxury, view-oriented houses on lots of
18 various sizes on the hillside.” Record 13087. “The Pinnacle will be located
19 primarily in the northern half of the property and is planned to include one golf
20 course, a resort hotel, resort retail area, recreational lake, a lake/boating
21 clubhouse, and individually owned, resort-style residences.” Record 13088. The

- 1 CMP approval approved three golf courses and required at least one golf course
- 2 to be constructed in the first phase. Record 13091-92.⁵

⁵ The CMP approval provides:

“At least one golf course, the restaurant and the meeting rooms and facilities are required to be constructed in Phase A, which is slated to be in the Tribute Village. These are required by DCC 18.113.060(E) in order to qualify Phase A as a destination resort because each phase, together with all previous phases must meet the criteria for a destination resort. Condition of Approval #33 is included to assure this requirement is met.” Record 13092.

CMP Condition 33 provides:

“The Resort shall, in the first phase, provide for the following:

- “A. At least 150 separate rentable units for visitor-oriented lodging.
- “B. Visitor-oriented eating establishments for at least 100 persons and meeting rooms which provide eating for at least 100 persons.
- “C. The aggregate cost of developing the overnight lodging facilities and the eating establishments and meeting rooms required in DCC 18.113.060(A)(1) and (2) shall be at least \$2,000,000 (in 1984 dollars).
- “D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed recreational facilities.
- “E. The facilities and accommodations required by DCC 118.113.060 must be physically provided or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots.” Record 13115.

1 The economic benefits analysis supporting the CMP (Benefit Study)
2 concluded that that the golf course facilities would be an important source of new
3 jobs with a total of 125 newly created jobs and 3.9 million dollars in employee
4 compensation. Record 10588. Based on the Benefit Study, the county found that
5 the resort “will generate a large number of full-time positions that will have a
6 positive effect on the Deschutes County economy.” Record 11691.

7 To date, Thornburgh has obtained three third-stage county approvals for
8 (1) a golf course site plan, (2) a tentative plan for Phase A-1 of development, and
9 (3) a site plan for 80 overnight lodging units (OLUs).⁶ Those third-stage
10 approvals were challenged and ultimately affirmed on appeal. *See Gould v.*
11 *Deschutes County*, 314 Or App 636, 314 P3d 357 (2021), *rev den*, 369 Or 211
12 (2022) (affirming the approval of a golf course site plan); *Gould v. Deschutes*
13 *County*, 322 Or App 11, 518 P3d 978, *rev den*, 370 Or 694 (2022) (affirming the
14 approval of the site-plan review for 80 OLUs); *Gould v. Deschutes County*, 322
15 Or App 571 (2022) (affirming the approval of the tentative plan for Phase A-1).

16 In 2022, Thornburgh sought county approval to modify the FMP by
17 amending the 2008 FWMP. Record 13315-18. Thornburgh proposed to reduce
18 the resort’s annual groundwater pumping from 2,129 to 1,460 acre feet, an
19 approximately 30 percent reduction, and an approximately 35 percent reduction

⁶ Phase A-1 includes a tentative subdivision plat for single-family residential dwelling lots and OLU lots, together with roads, utility facilities, lots, and tracts for future resort facilities and open space.

1 in water consumption, from 1,356 to 882 acre feet, in part, by not developing one
2 of the approved golf courses.⁷ Record 13315, 13585. Thornburgh proposed to
3 obtain mitigation water rights to provide fish habitat benefits. We refer to
4 Thornburgh’s plan as the 2022 FWMP. It is attached as Exhibit B to the
5 challenged decision. Record 68. Thornburgh supported the 2022 FWMP with
6 hydrogeologist, hydrologist, and fish biologist technical reports and opinions.

7 Planning staff reviewed the application and prepared a staff report. Record
8 13309-62. The hearings officer held a public hearing and issued a decision
9 denying the application. Record 6139-45. Thornburgh and petitioner Gould
10 (Gould) each appealed and the board of commissioners accepted *de novo* review.
11 After a hearing on February 1, 2023, before the board, the open record period
12 was left open for 14 days. Following a joint request of Thornburgh and petitioner

⁷ We have previously explained that water pumping and water consumption are distinct. “Consumptive use” means the amount of ground water appropriation that will not return to surface water flows. *Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff’d*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022) (quoting OAR 690-505-0605(2) “‘Consumptive use’ means [OWRD’s] determination of the amount of a ground water appropriation that does not return to surface water flows in the Deschutes Basin due to transpiration, evaporation or movement to another basin.”) (slip op at 10 n 3); *see also Gould v. Deschutes County*, 79 Or LUBA 561, 575 n 11 (2019) (*Gould VIII*), *aff’d*, 310 Or App 868, 484 P3d 1073 (2021).

1 The Confederated Tribes of the Warm Springs Reservation (the Tribe), the open
2 record period was extended to March 1, 2023.⁸

3 Opponents, including the Tribe and the Oregon Department of Fish and
4 Wildlife (ODFW) criticized Thornburgh's experts' technical report conclusions.
5 ODFW particularly criticized the baseline assumptions for the hydrological
6 modeling as not reflective of actual observed stream conditions. Opponents also
7 criticized Thornburgh's experts' failure to model changes to stream flow timing
8 and quantity that could result from the implementation of the Deschutes Basin
9 Habitat Conservation Plan (DB HCP), which is a basin-wide plan that requires
10 eight irrigation districts and the City of Prineville (the DB HCP parties) to
11 manage irrigation activities in the Deschutes River Basin to provide habitat
12 protections for endangered fish and wildlife. Record 4237-60. The Tribe explains
13 in its brief that the DB HCP parties prepared the DB HCP to obtain incidental
14 take permits from the U.S. Fish and Wildlife Service (USFWS) and National
15 Marine Fisheries Service (NMFS) because the irrigation districts and City of
16 Prineville's water use in the Deschutes River Basin has the potential to
17 incidentally harm species that are currently listed as threatened under the
18 Endangered Species Act (ESA), namely, the Oregon spotted frog, Middle
19 Columbia River (MCR) steelhead, and bull trout. Tribe's Petition for Review 10.

⁸ Our reference to the Tribe mirrors the Tribe's self-reference in their petition for review.

1 Incidental take permits will allow the DB HCP parties to manage their water use
2 without the threat of prosecution under the ESA for the incidental taking of those
3 species. The Tribe explains that, in December 2022, NMFS released a biological
4 opinion addressing its proposed issuance of an incidental take permit for
5 implementation of the DB HCP. Record 3849, 4048-49. The Tribe explained to
6 the county that USFWS and the Bureau of Reclamation are subject to a notice of
7 federal litigation in which the plaintiff contends that those federal agencies have
8 failed to ensure that the DB HCP conservation measures will not jeopardize the
9 continued existence of the Oregon spotted frog.⁹ Record 654-56. The Tribe
10 argued to the county that it should consider the DB HCP and the threatened
11 litigation as related to Thornburgh's proposal.¹⁰ Record 656.

12 The board found that the no net loss standard did not require ODFW and
13 the Tribe's concurrence and concluded that Thornburgh's expert reports provided
14 credible, substantial evidence that the 2022 FWMP satisfies the no net loss
15 standard. The board approved the 2022 FWMP as a modification of the FMP.
16 These appeals followed.

⁹ The Tribe argued to the county that the plaintiff in that litigation, the Center for Biological Diversity, is improperly focused on the spotted frog in isolation. Record 656.

¹⁰ As explained further below, Bishop argues that the county erred by failing to consider the DB HCP impact on baseline flows.

1 **III. MOTIONS TO TAKE OFFICIAL NOTICE**

2 Our review is generally limited to the record. ORS 197.835(2)(a).
3 However, we may take official notice of relevant law as defined in ORS 40.090.
4 A motion for official notice must explain the relevance of the document to an
5 issue in the appeal and the authority for taking notice under ORS 40.090. OAR
6 661-010-046; *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians*
7 *v. City of Coos Bay*, ___ Or LUBA ___ (LUBA No 2020-012, May 4, 2021). We
8 have no authority to take official notice of facts for an “adjudicative purpose,”
9 that is, “to provide evidentiary support or countervailing evidence with respect to
10 an applicable approval criterion that is at issue in the challenged decision.”
11 *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007) (citing *Friends*
12 *of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103-04 (2005)); *see*
13 *also Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

14 Petitioners Gould, the Tribe, and Central Oregon Landwatch (COLW), and
15 Intervenors-Petitioners Bishop and Lipscomb (collectively, petitioners) argue
16 that we may take official notice of three Oregon Water Resources Department
17 (OWRD) orders as decisional law and official acts of a state agency. ORS
18 40.090(1), (2). Petitioners argue that we may take official notice of a Marion
19 County Circuit Court order as decisional law. Petitioners explain that the purpose
20 of the requested consideration of those OWRD orders and circuit court order is
21 to establish Thornburgh’s lack of access to and inability to distribute certain water
22 rights.

1 Thornburgh objects to the motion and argues that petitioners rely on the
2 OWRD and circuit court order for an adjudicative purpose—namely, to provide
3 evidentiary support for petitioners’ argument that water is unavailable. We agree
4 with Thornburgh that petitioners request that we take official notice of the orders
5 for an impermissible adjudicative purpose. The motion is denied with respect to
6 the orders.

7 Petitioners argue that we may take official notice of two county ordinances
8 as official acts of the county. ORS 40.090(7). Petitioners explain that the
9 ordinances describe the state of the law that applied to Thornburgh’s CMP in
10 2015 and support Gould’s argument that the CMP is void as uninitiated.
11 Thornburgh moves that we take official notice of Deschutes County
12 Comprehensive Plan section 2.5 and DCCP Policies 2.5.12 and 2.5.22 as relevant
13 to Thornburgh’s response to the Tribe’s arguments regarding those provisions.
14 These motions are unopposed and are granted.

15 **IV. MOTIONS TO STRIKE**

16 Thornburgh moves to strike portions of briefs submitted by Gould,
17 Lipscomb, Bishop, and COLW because Thornburgh argues that those arguments
18 rely on facts not supported by evidence in the record and that petitioners
19 attempted to introduce the facts through their motion to take official notice.

20 Petitioners respond that we should deny the motion to strike because the
21 facts about the unavailability of the referenced water rights are already
22 established in the record and petitioners’ briefing included citations to the record.

1 Petitioners argue that petitioners' briefing relies on the orders in petitioners'
2 motion to take official notice only to establish the status of the law as to the water
3 rights. Joint Response to Motion to Strike 3-4.

4 We need not resolve the parties' detailed dispute about the characterization
5 of petitioners' arguments because we agree with petitioners that many of the facts
6 that they reference in their arguments are based on citations to evidence that is
7 already in the record. Accordingly, we will not strike specific portions of
8 petitioners' briefs. Thornburgh's motion to strike is denied. However, consistent
9 with our scope of review and our ruling denying petitioners' motion to take
10 official notice of the orders, we will not consider any arguments that rely solely
11 on documents not in the record to establish any fact. Similarly, we will not
12 consider citations to the orders as support for any argument.

13 Petitioners move to strike portions of two of the intervenor-respondents'
14 briefs that incorporate by reference portions of the other intervenor-respondents'
15 briefs because the incorporation by reference results in the briefs exceeding the
16 allowed length. We issued an order permitting Thornburgh to file three
17 overlength briefs not to exceed 15,000 words each. Thornburgh filed three briefs
18 with the following word counts: 10,594, 12,197, and 13,982. None of the three
19 briefs exceed the word limits that LUBA permitted. LUBA will consider all the
20 arguments in the intervenor-respondents' briefs. Accordingly, it would be
21 meaningless to our review for us to strike any portion of any one of those briefs
22 that exceed the 15,000-word limit due to incorporation by reference. *Central*

1 *Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA Nos
2 2023-006/009, July 28, 2023) (slip op at 9). Petitioners’ motions to strike are
3 denied.

4 **V. 1855 TREATY RIGHTS**
5 **(Tribe First Assignment of Error)**

6 The Tribe argues that the decision improperly construes applicable law by
7 failing to address whether the 2022 FWMP violates the Treaty with the Tribes of
8 Middle Oregon, dated June 25, 1855 (1855 Treaty). Record 4308-18 (copy of the
9 1855 Treaty). Under the provisions of the 1855 Treaty, the Tribe ceded their
10 traditional lands to the United States, and reserved what became the Warm
11 Springs Reservation. The Tribe also reserved the exclusive right to take fish “in
12 the streams running through and bordering [the Warm Springs Reservation]” and
13 the right to take fish at “all other usual and accustomed stations.” 1855 Treaty,
14 Art 1; Record 4309.

15 “[T]he Tribe asserts that its treaty-reserved rights would be impaired
16 because groundwater pumping proposed in the 2022 FWMP would
17 negatively impact habitat for MCR steelhead and hamper habitat
18 conditions that support a traditional fishery and the reintroduction
19 of the threatened species in the upper Deschutes Basin, including the
20 Whychus Creek and the Crooked River.” Tribe’s Petition for
21 Review 28.

22 The Tribe argues that the county improperly failed to consider whether approval
23 of the proposed 2022 FWMP violates the fishing clause in the 1855 Treaty.
24 Tribe’s Petition for Review 27 (“The Decision misconstrues the 1855 Treaty by

1 failing to acknowledge it whatsoever, and thereby failing to assess whether the
2 2022 FWMP violates the Treaty by impairing the Tribe’s right to have fish to
3 take.”). The Tribe argues that the county erred by not evaluating whether the
4 approved change in the 2022 FWMP will impair the Tribe’s treaty fishing rights.
5 We understand the Tribe to argue in their petition for review that the 1855 Treaty
6 fishing right is an applicable criterion to the county’s land use decision.

7 In their reply brief, the Tribe argues that “the proper application of DCC
8 18.113.070(D) required the [board of commissioners] to consider whether the
9 2022 FWMP violates the fishing clause of the 1855 Treaty.” Tribe’s Reply Brief
10 1. At oral argument, the Tribe’s counsel stated that the Tribe is not asserting that
11 the 1855 Treaty is an applicable criterion. Rather, the Tribe’s counsel argued, the
12 county was required to construe the no net loss standard of DCC 18.113.070(D)
13 in a manner that would not impair the Tribe’s treaty rights. That argument is not
14 in the Tribe’s petition for review and we do not address issues raised for the first
15 time in the reply brief or at oral argument. *Crowley v. City of Hood River*, 81 Or
16 LUBA 490, 498, *rev’d and rem’d on other grounds*, 308 Or App 44, 480 P3d
17 1007 (2020) (issues that are raised for the first time in a reply brief or at oral
18 argument do not provide an opposing party an adequate opportunity to respond).
19 However, even if we accepted that characterization of the issue as a refinement
20 of the argument in the Tribe’s petition for review, we agree with Thornburgh that
21 issue was not raised during the local proceeding and was therefore waived, as
22 explained below.

1 Thornburgh does not dispute that the county did not make any findings
2 regarding whether and how the resort development, including water consumption
3 and mitigation under the 2022 FWMP, would impact the Tribe’s treaty fishing
4 rights. Thornburgh responds, initially, that the Tribe did not present that issue to
5 the county and, thus, the Tribe has not preserved the issue for our review. We
6 agree.

7 LUBA is an administrative agency, part of the executive branch, and
8 entirely a creature of statute. Our review authority is prescribed, and limited, by
9 those statutes, particularly the scope of review set out in ORS 197.835. ORS
10 197.835(3) requires that issues before LUBA on review “shall be limited to those
11 raised by any participant before the local hearings body as provided by ORS
12 197.195 or 197.797, whichever is applicable.” ORS 197.797(1), in turn, requires
13 that:

14 “An issue which may be the basis for an appeal to [LUBA] shall be
15 raised not later than the close of the record at or following the final
16 evidentiary hearing on the proposal before the local government.
17 Such issues shall be raised and accompanied by statements or
18 evidence sufficient to afford the governing body, planning
19 commission, hearings body or hearings officer, and the parties an
20 adequate opportunity to respond to each issue.”

21 The “raise it or waive it” principle does not limit the parties on appeal to
22 the exact same arguments made below, but it does require that the issue be raised
23 below with sufficient specificity so as to prevent “unfair surprise” on appeal.
24 *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d

1 1078 (1991); *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___
2 (LUBA No 2021-074, Apr 8, 2022), *aff'd*, 321 Or App 505 (2022), *rev den*, 370
3 Or 740 (2023) (slip op 6). A particular issue must be identified in a manner
4 detailed enough to give the governing body and the parties fair notice and an
5 adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When attempting to
6 differentiate between “issues” and “arguments,” there is no “easy or universally
7 applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690
8 (2001).

9 In their preservation statement in the petition for review, the Tribe states:

10 “The Tribe has preserved this error by raising its 1855 Treaty-
11 reserved rights to take fish throughout the Deschutes Basin and its
12 accompanying right to fish habitat protection in multiple comments
13 submitted by Austin Smith, Jr., the General Manager of the Tribe’s
14 Branch of Natural Resources [(Smith)]. *See, e.g.,* Rec[ord] 4297,
15 654 n 3.” Tribe’s Petition for Review 20-21.

16 Both Record 4297 and Record 654 n 3 discuss treaty rights to harvestable
17 fish, but neither document asserts that the county is required to find that its
18 decision will not harm the Tribe’s treaty rights or that the county must apply the
19 no net loss standard in concert with the treaty rights. *See* Record 4297
20 (“Importantly, the Tribe’s legally protected treaty-reserved rights to take fish
21 throughout includes a right to have fish to take.”); Record 654 n 3 (“The Tribe is
22 a governmental co-manager of the Deschutes Basin and possesses significant
23 sovereign, cultural and treaty-reserved interests in the Basin. The Tribe has

1 legally protected treaty-reserved rights to take fish throughout, which include a
2 right to have fish to take.”).

3 In their reply brief, the Tribe states that the county and the “parties had fair
4 notice that Tribe asserted that the fish resources affected by the 2022 FWMP are
5 protected by the 1855 Treaty.” Tribe’s Reply Brief 1 (citing Record 4300-02).
6 The Tribe also cited those record pages in its petition for review. Tribe’s Petition
7 for Review 16. Those pages include statements from Smith, (1) asserting that the
8 Tribe is a co-manager that the county must consult and obtain approval from for
9 the 2022 FWMP, and (2) arguing that the county failed to adequately consult with
10 the Tribe. For example, Smith stated:

11 “The fishery resource needs stream temperature restoration within a
12 specified time period, the achievement of which is uncertain and
13 based on assumptions that pertain to decisions like the one facing
14 the County with the Resort’s proposal. It is therefore imperative that
15 the County ensure that there is no disagreement about the Resort’s
16 no net loss or degradation impact over this specified time period
17 with the fishery co-managers.” Record 4300.

18 “It is widely acknowledged that the Tribe is a co-manager of the
19 fishery resources in the basin. The resource therefore includes
20 Tribally-managed resources including the Tribe’s treaty-reserved
21 rights to fish which includes the necessary habitat to support the
22 fisheries. The Tribe is the sole manager that can evaluate impacts to
23 its treaty-reserved fisheries resource. Neither the County, [ODFW],
24 USFWS, NMFS or any other entity has the expertise or knowledge
25 to evaluate how habitat degradation affects or causes loss to this
26 resource and its cultural and subsistence significance to the Tribe.”
27 Record 4301.

1 The Tribe does not point to any passage in the record where any party
2 raised the issue that the Tribe has raised in their petition for review, that the
3 county is independently required to evaluate whether the approved change to the
4 FWMP will impair the Tribe’s treaty fishing rights and to affirmatively find that
5 the Tribe’s treaty rights will not be impaired by the decision. We agree with
6 Thornburg that the issue is waived.

7 The Tribe’s first assignment of error is denied.

8 **VI. DUE PROCESS AND COORDINATION OBLIGATION**

9 **(Tribe Third Assignment of Error)**

10 The Tribe argues that the county violated the Tribe’s due process rights
11 under the Fifth Amendment of the United States Constitution by failing to
12 provide the Tribe with a mailed copy of the notice of application or the notice of
13 hearing before the hearings officer.¹¹ Thornburgh responds, initially, that the
14 Tribe did not raise that issue to the county and, thus, the Tribe has not preserved
15 it for our review. We agree.

16 Under ORS 197.835(9)(a)(B) a procedural error may be a basis for remand
17 where it “prejudiced the substantial rights of the petitioner.” The substantial
18 rights of petitioners include “an adequate opportunity to prepare and submit their
19 case and a full and fair hearing.” *Muller v. Polk County*, 16 Or LUBA 771, 775

¹¹ In their reply brief, the Tribe asserts that the county violated the Tribe’s rights under the Fourteenth Amendment of the United States Constitution. We do not consider or resolve issues raised for the first time in a reply brief.

1 (1988). The Tribe argues that the county’s failure to provide the Tribe mailed
2 notice of the notice of application or the notice of hearing before the hearings
3 officer prejudiced their ability to create a record before the hearings officer and
4 allowed inadequate time for the Tribe to present evidence in response to the
5 highly technical and complex scientific reports submitted by Thornburgh’s
6 experts. The Tribe argues that any prejudice was not cured by the fact that the
7 board of commissioners reviewed the matter in a *de novo* proceeding.

8 LUBA has long held that a party asserting a procedural error must
9 demonstrate that the procedural error was objected to during the proceedings
10 below if there was opportunity to lodge an objection. *Torgeson v. City of Canby*,
11 19 Or LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980).
12 This obligation to object to procedural errors overlaps with, but exists
13 independently of, ORS 197.797(1) and 197.835(3). *Confederated Tribes v. City*
14 *of Coos Bay*, 42 Or LUBA 385, 392-93 (2002); *Simmons v. Marion County*, 22
15 Or LUBA 759, 774 n 8 (1992). While the “raise it or waive it” requirement at
16 ORS 197.797(1) has a similar purpose to the requirement that a party with an
17 opportunity to object to a procedural error must do so to seek remand based on
18 that error, the two requirements share no antecedents and otherwise have no
19 relationship with each other. *McCaffree v. Coos County*, 79 Or LUBA 512, 517,
20 *aff’d*, 299 Or App 521, 449 P3d 594 (2019), *rev den*, 366 Or 205 (2020). We have
21 explained that preservation of a claim of a constitutional violation “would at a
22 minimum entail citing the constitutional provision or at least making an argument

1 based on the substance of the constitutional provision that would give fair notice
2 that the petitioner[’s] claim was based on the constitutional provision.” *Bundy v.*
3 *City of West Linn*, 63 Or LUBA 113, 121 (2011).

4 The Tribe does not point to any part of the record where the Tribe asserted
5 a due process violation or objected to the county not providing the Tribe mailed
6 notice of the application or notice of the hearing before the hearings officer. In
7 their preservation statement in the petition for review, the Tribe cites Record
8 pages 3847 to 4413 and 4302. Record pages 3847 to 4413 is 566 pages. We will
9 not search large ranges of pages to determine whether an issue is preserved for
10 review. *Rosewood Neighborhood Association v. City of Lake Oswego*, ___ Or
11 LUBA ___ (LUBA No 2023-035, Nov 1, 2023) (slip op at 7-8); *Central Oregon*
12 *Landwatch*, ___ Or LUBA at ___ (slip op at 55); *H2D2 Properties, LLC v.*
13 *Deschutes County*, 80 Or LUBA 528, 532-33 (2019).

14 Record 4302 is a page of a January 31, 2023, letter from Smith, stating that
15 Thornburgh and the county failed to consult the Tribe and that the Tribe did not
16 have adequate time to evaluate the “extensive technical record.” Smith does not
17 assert any right to mailed notice or any constitutional due process violations.

18 In support of their due process argument, the Tribe also argues that it is an
19 “affected agency” and “stakeholder” with whom the county failed to coordinate
20 in violation of Comprehensive Plan Policies 2.5.12 and 2.5.22. Tribe’s Petition
21 for Review 45. Policy 2.5.12 is “Coordinate with stakeholders to protect and
22 enhance fish and wildlife habitat in river and riparian habitats and wetlands.”

1 Policy 2.5.22 is “Coordinate with other affected agencies when a land use or
2 development application may impact river or riparian ecosystems or wetlands.”

3 Thornburgh responds that this issue is also waived. The Tribe replies that
4 it stated below that the county had not “adequately consulted” the Tribe, citing
5 Record 4302. As explained above, the letter at Record 4302 states that
6 Thornburgh and the county failed to consult the Tribe. To the extent that the Tribe
7 cites the Comprehensive Plan policies to support its constitutional due process
8 argument, we conclude that issue is derivative of the due process issue and it is
9 waived for the reasons explained above.

10 If, instead, the Tribe means to allege an independent violation of
11 Comprehensive Plan Policies 2.5.12 and 2.5.22, we conclude that those issues are
12 also waived. The Tribe did not object to the county’s procedure as violating those
13 policies. The general assertion that the county failed to adequately consult with
14 the Tribe is not sufficient to put the county on fair notice that Comprehensive
15 Plan Policies 2.5.12 and 2.5.22 were implicated or that the county’s procedure
16 violated those policies.

17 The issues raised in the Tribe’s third assignment of error are waived. The
18 Tribe’s third assignment of error is denied.

1 **VII. NO NET LOSS STANDARD DCC 18.113.070(D)**

2 **(Tribe Second Assignment of Error; Bishop Assignments of Error)**

3 The Tribe and Bishop argue that the county misconstrued the no net loss
4 standard and that the county's findings that the 2022 FWMP satisfies that
5 standard are inadequate and unsupported by substantial evidence.

6 We must defer to a governing body's plausible interpretation of its own
7 land use regulation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247,
8 243 P3d 776 (2010). A plausible interpretation is not "inconsistent with the
9 express language of the comprehensive plan or land use regulation" or
10 inconsistent with the underlying purposes and policies of the plan or regulation.

11 *Id.*

12 "[T]he plausibility determination under ORS 197.829(1) is not
13 whether a local government's code interpretation best comports with
14 principles of statutory construction. Rather, the issue is whether the
15 local government's interpretation is plausible because it is not
16 expressly *inconsistent* with the text of the code provision or with
17 related policies that 'provide the basis for' or that are 'implemented'
18 by the code provision, including any ordained statement of the
19 specific purpose of the code provision at issue." *Kaplowitz v. Lane*
20 *County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in
21 original).

22 Generally, findings must (1) address the applicable standards, (2) set out
23 the facts relied upon, and (3) explain how those facts lead to the conclusion that
24 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).
25 Findings must address and respond to specific issues relevant to compliance with
26 applicable approval standards that were raised in the proceedings below. *Norvell*

1 v. *Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). “While a local
2 government is required to identify in its findings the facts it relies upon in
3 reaching its decision, it is not required to explain why it chose to balance
4 conflicting evidence in a particular way, or to identify evidence it chose not to
5 rely on.” *Moore v. Clackamas County*, 29 Or LUBA 372, 380 (1995).

6 Substantial evidence is evidence that a reasonable person would rely on in
7 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
8 (1993). A finding of fact is supported by substantial evidence if the record,
9 viewed as a whole, would permit a reasonable person to make that finding.
10 *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In reviewing
11 the evidence LUBA may not substitute its judgment for that of the local decision
12 maker. Rather, LUBA must consider all the evidence to which it is directed, and
13 determine whether based on that evidence, a reasonable local decision maker
14 could reach the decision that it did. *Id.*

15 **A. Preservation – The 1855 Treaty and ORS 197.460**

16 The Tribe argues that the board of commissioners misconstrued the no net
17 loss standard in DCC 18.113.070(D) by concluding that the 2022 FWMP satisfies
18 that standard without expressly finding that the 2022 FWMP does not violate
19 either the 1855 Treaty or ORS 197.460, the latter of which requires that counties
20 “ensure that a destination resort is compatible with the site and adjacent land
21 uses” by retaining “[i]mportant natural features, including habitat of threatened

1 or endangered species, streams, rivers and significant wetlands.” ORS
2 197.460(1).

3 Thornburgh responds, initially, that those issues are waived because no
4 party argued below that DCC 18.113.070(D) must be construed in concert with
5 the 1855 Treaty and ORS 197.460, or that those laws provide applicable criteria
6 for the challenged decision.

7 The Tribe’s preservation statement for the second assignment of error
8 states that the issues therein were raised in written comments submitted by Smith
9 in the letters dated January 31, 2023, March 1, 2023, and March 8, 2023, citing
10 Record pages 3847 to 4413, 1817 to 1822, and 653 to 656. Tribe’s Petition for
11 Review 30. In particular, the Tribe relies on Smith’s statement concluding that
12 the proposed 2022 FWMP was not likely and reasonably certain to comply with
13 DCC 18.113.070(D). *Id.* (citing Record 1818).

14 We explained above that the issue of the applicability of the 1855 Treaty
15 as approval criteria and as context for the county’s construction of DCC
16 18.113.070(D) were not raised below and were waived. We conclude the same
17 under the second assignment of error for the same reasons explained above.

18 With respect to ORS 197.460, in the petition for review, the Tribe argues
19 that the issue was raised below sufficiently to provide the county and Thornburgh
20 fair notice because the Tribe explained that the 2022 FWMP implicated the
21 habitat of several endangered fish species, citing Record pages 3847 to 4413, 566
22 pages, and Record 1817 to 1822, and Record 653 to 656. Tribe’s Petition for

1 Review 30. As explained above, we will not search large ranges of pages to
2 determine whether an issue is preserved for review.

3 In its reply brief, the Tribe provides a more focused citation directing us to
4 two pages within the 566-page range identified in its petition for review and
5 points to its initial comment letter at Record 4298 to 4300, in which the Tribe
6 explained that the resort’s consumptive use of water and the 2022 FWMP impact
7 the habitat of multiple species listed as threatened and endangered. In *Rosewood*
8 *Neighborhood Association*, we explained that OAR 661-010-0030(4)(d) requires
9 that “[e]ach assignment of error must demonstrate that the issue raised in the
10 assignment of error was preserved during the proceedings below,” or explain why
11 preservation is not required. ___ Or LUBA at ___ (slip op at 5). OAR 661-010-
12 0030(4)(d) requires the petitioner to demonstrate preservation in the petition for
13 review. Our rules do not allow a petitioner to demonstrate preservation for the
14 first time in a reply brief. That is so because such an approach is, in effect, an
15 unauthorized amendment of the petition for review. More importantly, such an
16 approach also prejudices the responding party’s substantial rights where
17 preservation is disputed, because at the point in the adversarial proceeding that a
18 reply brief is filed, the responding party has already filed their responsive brief
19 and has no further opportunity to dispute a demonstration of preservation
20 contained in a reply brief. *Rosewood Neighborhood Association*, ___ Or LUBA
21 at ___ (slip op at 9-10).

1 Even if the Tribe were permitted to supplement its preservation statement
2 in the reply brief, the Tribe's explanation, at Record 4298 to 4300, that the
3 resort's consumptive use of water and the 2022 FWMP impact the habitat of
4 multiple species listed as threatened and endangered is insufficient to provide fair
5 notice to the county and Thornburgh of what the Tribe now alleges, which is that
6 ORS 197.460 provides criteria for the challenged decision or context for the
7 county's application of DCC 18.113.070(D).

8 Record 653 to 656 discusses the DB HCP and describes related threatened
9 litigation and an incidental take permit for the DB HCP for bull trout and the
10 spotted frog. The Tribe argued that both the DB HCP and related litigation are
11 related to the 2022 FWMP and should be considered by the county. Nothing in
12 those pages cites ORS 197.460 or makes any argument based on the substance of
13 that statute sufficient to alert the county and Thornburgh that the Tribe is alleging
14 that statute provides criteria for the challenged decision or context for the
15 county's application of DCC 18.113.070(D).

16 Similarly, Smith's statement at Record 1818 concluding that the proposed
17 2022 FWMP was not likely and reasonably certain to comply with DCC
18 18.113.070(D) is insufficient to raise the issue that the decision violates ORS
19 197.460. That statement does not cite ORS 197.460 or make any argument based
20 on the substance of that statute sufficient to provide fair notice to the county and
21 Thornburgh that the Tribe is alleging that ORS 197.460 provides criteria for the

1 challenged decision or context for the county’s application of DCC
2 18.113.070(D).

3 The issues the Tribe raises in their second assignment of error arguing that
4 the decision violates the 1855 Treaty and ORS 197.460 are waived.

5 **B. The Tribe’s Co-manager Status, Indigenous Knowledge, and**
6 **Evidence**

7 The Tribe argues that the county’s decision that the no net loss standard is
8 met is not supported by substantial evidence in the whole record because the
9 county failed to consider the Tribe’s governmental co-manager status and its
10 indigenous knowledge and supporting evidence, and that such evidence calls into
11 question the evidence that the county relied on to conclude that the no net loss
12 standard was met.

13 The county found “[t]he technical expertise provided by Thornburgh’s
14 team is vast,” and that

15 “Thornburgh’s technical evidence was prepared by credentialed
16 experts who provided an extreme level of analysis and detail.
17 Additionally, Thornburgh’s team of experts includes a
18 hydrogeologist with significant experience working in analyzing
19 waterways in the Deschutes Basin and hydrologists who have
20 completed water quality studies of the Deschutes River for private
21 and governmental clients, including the Tribe.” Record 22.

22 In contrast, the county specifically found that the opponents generally did not
23 provide any technical evidence that refuted Thornburgh’s technical evidence.
24 Record 21-22. The county also found that the Tribe provided no expert testimony

1 on water quality and modeling, water rights and mitigation, and fish and fish
2 habitat. Record 22-23.

3 The Tribe argues that the decision is not supported by substantial evidence
4 because the board of commissioners “categorically exclude[d] the Tribe[’]s
5 indigenous knowledge regarding the management of Deschutes Basin fisheries.”
6 Tribe’s Petition for Review 38-39. The Tribe argues that “[t]he Decision appears
7 to contain implicit cultural bias predicated on the antiquated notion that graduate
8 school-credentialed expertise is the only type of expertise that can or should be
9 considered in connection with natural resource planning and management.” *Id.* at
10 39. The Tribe argues that implicit bias led the county to fail to meaningfully
11 address the issues that the Tribe raised in its testimony to the county, including
12 the Tribe’s concerns that the resort water consumption under the 2022 FWMP
13 may conflict with other fish habitat protection plans and, thus, impair fish habitat,
14 and the Tribe’s concern about Thornburgh’s experts’ water modeling
15 assumptions, specifically the models being based on a 2016 hydrological year.

16 The Tribe explains that “The Tribe and its members are a ‘salmon people’
17 for whom fishing is ‘not much less necessary to [their] existence * * * than the
18 atmosphere they breathe[.]’” Tribe’s Petition for Review 1 (quoting *United States*
19 *v. Winans*, 198 US 371, 381, 25 S Ct 662, 49 L Ed 1089 (1905) (brackets and
20 ellipses in original)). LUBA respects the Tribe’s sovereignty and role as a
21 governmental co-manager of Deschutes Basin natural resources, including fish
22 resources. LUBA also acknowledges the fact that fish and fish habitat are central

1 to the Tribe's historical, present, and future subsistence and cultural identity and
2 that the Tribe's fishing rights are protected under the 1855 Treaty. However, the
3 Tribe does not identify any evidence in the record concerning fish or fish habitat
4 that is based on the Tribe's indigenous knowledge and that contradicts the
5 evidence on which the county relied.

6 The testimony in the record that the Tribe points to is primarily related to
7 the DB HCP. The Tribe does not identify any evidence in the DB HCP that is
8 based on indigenous knowledge. The county's decision demonstrates that the
9 county considered the Tribe's testimony and weighed the Tribe's testimony
10 against Thornburgh's evidence. We understand the Tribe to argue that the county
11 should have weighed the Tribe's testimony, concerns, and critique more heavily
12 given the Tribe's co-manager status and indigenous knowledge. It is not our role
13 to reweigh the evidence. *1000 Friends of Oregon v. Marion County*, 116 Or App
14 584, 587-88, 842 P2d 441 (1992). The Tribe has not established that, even if the
15 Tribe's testimony below were given additional weight based on the Tribe's co-
16 manager status and indigenous knowledge, a reasonable person would not rely
17 upon the evidence that the county relied upon when looking at the record as a
18 whole. *Younger*, 305 Or at 360.

19 **C. ODFW Critique of the 2022 FWMP**

20 The Tribe also argues that the county's decision that the no net loss
21 standard is met is not supported by substantial evidence in the whole record
22 because the county failed to give appropriate weight to ODFW's expertise and

1 concerns regarding the 2022 FWMP. The Tribe argues that, given the history of
2 this case and ODFW's involvement in and agreement with the 2008 FWMP, the
3 no net loss standard cannot be satisfied without ODFW approval of the 2022
4 FWMP.

5 ODFW staff were significantly involved in the review of the 2022 FWMP,
6 both in communication with Thornburgh's experts and in providing comments to
7 the county. ODFW did not agree with Thornburgh that the 2022 FWMP satisfies
8 the no net loss standard. Record 1823-32. ODFW generally recognized
9 Thornburgh's experts' modeling methods as acceptable and based on best
10 methods and practices, particularly the use of the modeling tools 2017 USGS
11 GSFLOW and QUAL2Kw. Record 1828. However, ODFW criticized the
12 modeling process and results because the model inputs rely on "unsubstantiated
13 assumptions of past water use," and ODFW questioned whether the
14 environmental baseline for basin conditions was accurate given that the baseline
15 conditions were "determined solely and independently by [Thornburgh's]
16 consultant team," as opposed to in concert with other fish and habitat resource
17 managers and regulators such as ODFW and the Tribe. Record 1824.

18 ODFW pointed out that some of the model inputs for baseline water
19 quantity and quality, which rely on the 2016 hydrological year, are inconsistent
20 with actual observed stream conditions in 2016. Record 1829-30. ODFW also
21 criticized Thornburgh's modeling as backwards because Thornburgh's experts
22 ran the model based on water rights available for transfer instead of first modeling

1 the impacts of resort groundwater pumping and then identifying available
2 mitigation. Further, ODFW criticized Thornburgh's modeling for failing to
3 include reasonably foreseeable future impacts and conditions, including
4 reductions in aquifer levels and stream impacts from implementation of the DB
5 HCP. ODFW opined that the water rights that Thornburgh relied upon to provide
6 mitigation water under the 2022 FWMP were not sufficiently certain to result in
7 actual cold, wet water in stream to provide fish habitat. Further, in ODFW's view,
8 the 2022 FWMP does not contain sufficient monitoring and reporting
9 requirements to ensure that the mitigation plan will result in no net loss. Thus,
10 ODFW urged that the county to not approve the 2022 FWMP. Record 1831.

11 The Tribe argues that, given ODFW's expertise, and the fact that the
12 county relied upon ODFW's agreement in approving the 2008 FWMP, ODFW's
13 concurrence was required for the county to approve the 2022 FWMP and that, in
14 light of ODFW's criticisms, the county's finding that the 2022 FWMP satisfies
15 the no net loss standard is not supported by substantial evidence.

16 Thornburgh responds that Thornburgh's experts responded to ODFW's
17 criticisms and ODFW did not provide any biological evidence or habitat impact
18 assessment that contradicted Thornburgh's experts' opinions about impacts to
19 fish resources. Thornburgh acknowledges ODFW's criticism of the modeling
20 assumptions. However, Thornburgh emphasizes, ODFW did not submit any
21 independent analysis or evidence that the 2022 FWMP would result in a net loss
22 of fish habitat. Thornburgh argues that the closest ODFW comes is ODFW's

1 opinion that, in the absence of evidence that the water rights relied upon have
2 historically been used in full, the 2022 FWMP model overestimated the benefit
3 of mitigation from water rights transfers and, thus, once the resort starts using
4 water, “more water will be leaving the system * * * than is leaving the system
5 now, yielding a potential net loss to the system and potential impacts to resources
6 that are currently utilizing that habitat.” Record 1828.

7 The Tribe does not point to any applicable standard that requires
8 Thornburgh to demonstrate that ODFW concurs with the 2022 FWMP. While
9 ODFW’s concurrence with the 2008 FWMP influenced the county’s decision that
10 the 2008 FWMP satisfied the no net loss standard, nothing cited to us compels
11 the county to find ODFW concurrence as a prerequisite for approving the 2022
12 FWMP. The county considered ODFW’s comments and criticisms and
13 nevertheless concluded that the 2022 FWMP will satisfy the no net loss standard.
14 ODFW’s testimony may contain legitimate criticisms of the 2022 FWMP but
15 ODFW’s criticisms do not so undermine Thornburgh’s experts’ analyses and
16 conclusions so that a reasonable person could not rely upon them in the absence
17 of biological evidence or habitat impact assessments contradicting Thornburgh’s
18 experts’ opinions about specific predicted impacts to fish resources and efficacy
19 of the proposed mitigation.

20 **D. Baseline Habitat Conditions**

21 As noted above, DCC 18.113.070(D) requires substantial evidence that
22 “[a]ny negative impact on fish and wildlife resources will be completely

1 mitigated so that there is no net loss or net degradation of the resource.” On
2 appeal of the 2008 FWMP approval, the Court of Appeals concluded that

3 “‘fish and wildlife resources’ refers not to species of fish and
4 wildlife, but to the habitat that supports fish and wildlife. * * * That
5 standard may be satisfied by a plan that will completely mitigate any
6 negative impact on the habitat that supports fish and wildlife,
7 without showing that each individual species will be maintained or
8 replaced on a one-to-one basis.” *Gould*, 233 Or App at 633-34.

9 The court observed that “[t]he parties seem to agree that DCC 18.113.070(D)
10 requires, first, an assessment of fish and wildlife resources before development
11 and, second, mitigation to make up for negative impacts caused by development.”
12 *Id.* at 631.

13 Bishop argues that the board of commissioners misconstrued the no net
14 loss standard by refusing to consider existing habitat conditions and foreseeable
15 impacts from other uses. The county found:

16 “Many of the arguments and issues related to Thornburgh’s 2022
17 FWMP are related to drought and regional well decline. Opponents
18 assert that these are relevant issues and should lead to denial. We
19 disagree. The No Net Loss Standard requires a resort to mitigate its
20 own impacts, not the cumulative impacts of drought or other basin-
21 wide water policy and management issues. The No Net
22 Loss/degradation test is limited to addressing potential negative
23 impacts of resort development. Impacts to habitat caused by other
24 persons or environmental conditions are not attributable to
25 Thornburgh’s use of water or the impacts of Thornburgh’s use.

26 “Thornburgh has quantified its impacts on water quality and
27 quantity and the locations where these impacts will occur. It has
28 studied waterway conditions in a typical year, and it has also
29 provided expert evidence that shows the benefits of mitigation are

1 enhanced during periods of drought. This approach properly
2 accounts for issues of drought and the low flow conditions
3 opponents argue make the results of Thornburgh's expert analysis
4 of aquatic habitat unreliable.

5 "Opponents, ODFW, and the Tribe have also raised issues that
6 pending litigation regarding flow requirements and the [DB HCP]
7 related to the Spotted Frog may lead to additional constraints on live
8 flows. These issues are outside of the scope of the Thornburgh's
9 impacts and Thornburgh is not required to mitigate for them.
10 Thornburgh must mitigate for its impacts, alone. Further,
11 Thornburgh's plan relies primarily upon groundwater water sources,
12 and its technical analysis shows that the 2022 FWMP will result in
13 increased surface flows which are beneficial to fish and wildlife.
14 Thornburgh has also provided expert testimony that its plan will not
15 result in negative impacts to the spotted frog, which we find
16 persuasive." Record 26-27.

17 Bishop argues that the county erred in approving the 2022 FWMP because
18 that plan improperly accounts only for Thornburgh's water use and no other
19 factors such as groundwater decline, drought, and changed flows resulting from
20 implementation of the DB HCP. We understand Bishop to argue that the 2016
21 hydrological year that Thornburgh's modeling relies on does not account for
22 those impacts to baseline water quantity, quality, and stream flow timing. Bishop
23 argues that the county's interpretation that omits outside habitat impacts fails to
24 accurately assess of baseline fish habitat conditions prior to assessing impacts
25 from resort development.

26 Thornburgh responds that Bishop has not established that the county's
27 interpretation is inconsistent with the text or policies of DCC 18.113.070(D).
28 Thornburgh contends that Thornburgh's experts completed an accurate baseline

1 habitat assessment. The Resource Specialists, Inc. (RSI) fish habitat assessment
2 is based on thermal data from 2016. Record 12739. No party argues that 2016 is
3 an atypical water year and Thornburgh points out that modeling includes models
4 for low-flow years, which show increased net benefit. Record 58. Thornburgh
5 argues that its modeling accounts for other existing water uses because the model
6 is based on actual stream flows and modeled groundwater pumping impacts to
7 those flows. Thornburgh acknowledges that analysis is limited to impacts based
8 on actual flows and does not analyze potential impacts from climate change,
9 drought, groundwater decline, or changed stream flows resulting from
10 implementation of the DB HCP. DeLashmutt Intervenor-Respondent's Brief 25.
11 However, Thornburgh points out that its modeling included an assumption of
12 decreased mitigation flows, which still resulted in satisfying the no net loss
13 standard. *Id.*

14 With respect to the text of DCC 18.113.070(D), we understand Bishop to
15 argue that “any negative impact” cannot be accurately identified or “completely
16 mitigated” if the baseline for modeling impacts does not accurately reflect all the
17 factors influencing the habitat. Bishop argues that habitat modeling should
18 account for impacts to the stream system habitat that are identifiable, predictable,
19 measurable, and reasonably likely to occur, such as drought and changed flows
20 in response to DB HCP implementation. That is one plausible reading of DCC
21 18.113.070(D).

1 However, the county’s interpretation is also plausible. In the county’s
2 construction, “any negative impact” may be analyzed based on a baseline flow
3 that represents a typical water year. “Any negative impact” is measured only by
4 the resort’s impact on the system. That interpretation is not expressly inconsistent
5 with the language of DCC 18.113.070(D) or the underlying policy—which is to
6 hold a proposed resort accountable to completely mitigate the resort’s impacts so
7 that there is no net loss of fish resources.

8 We do not understand any party to argue that no reasonable person could
9 conclude that the 2016 hydrological year is a typical water year. Instead, we
10 understand Bishop to argue that the baseline flows based on the 2016
11 hydrological year are reasonably likely to change in the future due to groundwater
12 decline, changing climate conditions, and implementation of the DB HCP. We
13 do not understand that those purported changes are quantified or modeled
14 anywhere in the record in relationship to Thornburgh’s water use.¹² We

¹² As quoted above, the county did not make any findings on whether, how, or when the DB HCP might impact fish habitat because the county found that Thornburgh was not required to address or mitigate for any changes in stream flow due to the DB HCP. Bishop does not explain whether, how, or when the DB HCP might impact fish habitat. The Tribe explained to the county that the DB HCP “legally mandates a new water management regime over time which has not been modeled.” Record 1821. Bishop states that the DB HCP was

“finalized in 2020, [and] is a habitat-focused plan to support and enhance seasonally and life-stage dependent species throughout the Deschutes Basin, for example, through mandated instream flow regimes at times and locations that affect instream flow availability

1 understand Bishop to argue that Thornburgh’s experts were required to model
2 those factors in assessing impacts and mitigation. However, potential and even
3 probable future changes and additional impacts do not make the county’s
4 interpretation implausible.

5 **E. System-wide Benefits**

6 Bishop next argues that the county misconstrued the no net loss standard
7 by disregarding negative impacts on fish habitat in certain river stretches and then
8 balancing those negative impacts against predicted benefits in other stretches of
9 different rivers. Bishop points to the county’s findings that “while some minor
10 stretches of certain waterways may experience slightly decreased flows or
11 extremely minor increases in temperature, the evidence shows that overall the no
12 net loss standard is met because of the extensive system-wide benefits.” Record

and temperature among other water quality and habitat factors. The DB HCP has materially altered the required seasonal streamflow in Whychus Creek, the Deschutes River, and the Crooked River.” Bishop’s Intervenor-Petitioner’s Brief 6-7 (citing Record 4294-4300, 4237-4260, 4271); *see also* Bishop Brief 47 (“Recent federal approval of the DB HCP creates a legally binding management regime under the federal ESA that currently is and will continue to affect streamflow and habitat in streams affected by the resort.”).

Bishop states that the DB HCP requires instream flow but does not explain whether that requirement is currently effective and affecting streamflow or, if not, when it will be implemented in the future. Moreover, Bishop does not point to evidence in the record explaining how the current or future implementation of the DB HCP undermines Thornburgh’s experts’ opinions.

1 58. Bishop argues that this finding misconstrues the no net loss standard because
2 river and stream segments contain distinct habitat that are not interchangeable.

3 Thornburgh responds, and we agree, that Bishop’s argument relies on a
4 single finding emphasized out of context. Thornburgh’s modeling and analyses
5 separately assessed fish habitat in different river and stream segments. The only
6 purported negative impacts that remain after mitigation measures are in the
7 Crooked River, and those impacts were found to be “effectively zero.” Record

8 59. The county found:

9 “In all cases, the changes in streamflow were minimal and the
10 change to temperature was positive at times and negative at other
11 times, but in all cases was effectively zero. ODFW stated that the
12 modeling outputs are within range of model ‘noise,’ particularly for
13 the Crooked River results. [Thornburgh’s expert] Dr. Caldwell
14 assessed the impacts to the fisheries in the Crooked River and
15 concluded [that] the 2022 FWMP would provide net benefits to fish
16 habitat quality and quantity at all sites evaluated.” *Id.*

17 Bishop acknowledges that the county found that impacts to the Crooked
18 River are “imperceptibly small and scientifically irrelevant,” yet argues that
19 finding does not solve the flawed “system-wide” interpretation. Bishop’s
20 Intervenor-Petitioner’s Brief 24-25 (quoting Record 59). We agree with
21 Thornburgh that the county did not interpret the no net loss standard to allow
22 negative impacts in one stream segment so long as those impacts are balanced by
23 benefits elsewhere in the system. Accordingly, Bishop’s interpretive argument is
24 based on an incorrect premise and provides no basis for remand.

1 **F. Cancellation in Lieu of Mitigation (Voluntary Cancellation)**

2 Bishop argues that the county misconstrued the no net loss standard by
3 concluding that Thornburgh can provide water right transfers or “cancellation in
4 lieu,” rather than by legally protected instream water rights.

5 Thornburgh proposed to obtain and use the following water rights:
6 LeBeau, Certificate 95746, 200 AF (50 acres); Tree Farm, Certificate 94948,
7 327.5 AF (.453 cfs); Big Falls Ranch, Certificates 96190 and 96192, 614.4 AF
8 (153.6 acres); Big Falls Ranch, Certificate 87558, 25.6 AF (6.4 acres); and Dutch
9 Pacific, Certificate 89259, 49.5 AF (16.5 acres). Record 13565. Thornburgh
10 proposed using those quantities of water for (1) pumping and consumptive use at
11 the resort, (2) mitigation water to satisfy OWRD mitigation rules, and (3)
12 mitigation water for fish habitat to satisfy the no net loss standard.¹³ To those

¹³ As explained in greater detail in decisions involving the 2008 FWMP, state water law requires Thornburgh to mitigate the impacts from its groundwater withdrawal to hydraulically connected surface waters in the Deschutes River Basin. See *Gould v. Deschutes County*, 54 Or LUBA 205, 264-65, *rev'd and rem'd on other grounds*, 216 Or App 150, 171 P3d 1017 (2007); *Gould v. Deschutes County*, 59 Or LUBA 435, 554-55 (2009), *aff'd*, 233 Or App 520, 301 P3d 978 (2010). We refer to that mitigation as “OWRD mitigation,” which is governed by the OWRD Deschutes Basin mitigation rules at OAR 690-505-0610. OWRD mitigation is related to but distinct from the fish mitigation plan that is required to satisfy the county’s no net loss standard. The same water that is used to satisfy OWRD mitigation requirements may also supply fish habitat benefits. However, a demonstration of compliance with the OWRD mitigation rules is not sufficient to satisfy the no net loss standard because those requirements relate only to the quantity of water in the system and not the quality of water, which is critical for fish habitat. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA

1 ends, the 2022 FWMP proposes three different water rights legal processes: (1)
2 transferring the water rights to the resort property so that the resort can withdraw
3 those quantities of water as groundwater from the resort wells; (2) transferring
4 the water rights to instream water rights; and (3) cancelling the water right in-lieu
5 of mitigation. The 2022 FWMP explains that “[c]ancelling a right is done as
6 mitigation and results in placing water back in the system by cancelling the legal
7 right to use the water at the original point of appropriation.” Record 70.

8 The 2022 FWMP provides compliance measures that are different for
9 water appropriated from surface water versus groundwater or for mitigation
10 credit. *For groundwater water rights*

11 “compliance occurs upon the cessation of pumping, along with any
12 of the following: deed evidencing the transfer of ownership, a
13 submittal to OWRD of any of the following: (i) an assignment of the
14 water right to Thornburgh, (ii) an application that seeks OWRD
15 approval of a transfer to pump at the Resort property, or (iii) a
16 cancellation in-lieu of mitigation.” Record 77.¹⁴

17 *For surface water rights*, compliance occurs upon the cessation of pumping at
18 the point of diversion

19 “and OWRD issues a final order (or its equivalent) approving any

No 2021-112, June 9, 2022), *aff'd*, 322 Or App 571 (2022), *rev den*, 370 Or 827 (2023).

¹⁴ Thornburgh states that evidence in the record demonstrates that it has already complied with the 2022 FWMP for the Big Falls Ranch, Tree Farm, and Dutch Pacific groundwater rights because Thornburgh owns those rights, has ceased pumping all of them, and submitted applications to OWRD.

1 of the following: (i) an application that transfers to pump at the
2 Resort property, (ii) an application that transfers the water to an in-
3 stream lease, (iii) the cancellation in-lieu of mitigation, or (iv) an
4 application to transfer to obtain mitigation credits, permanent or
5 temporary.” *Id.*¹⁵

6 *For mitigation credits*, compliance occurs when Thornburgh provides proof of
7 ownership or proof of submittal to OWRD to use the credits as mitigation.

8 Petitioners argued to the county that the only acceptable method to ensure
9 fish habitat mitigation water to meet the no net loss standard is transferring the
10 water rights to instream water rights and that cancelling the water right in-lieu of
11 mitigation could not satisfy the no net loss standard because the quantity of water
12 subject to cancellation could be “picked up” by junior water rights holders so that
13 quantity of water would not reliably be instream providing fish habitat, as
14 assumed by the 2022 FWMP. Bishop’s Intervenor-Petitioner’s Brief 28 (quoting
15 Record 54-55).

16 The county rejected that argument and concluded that Thornburgh may
17 rely on cancellation of a water right to mitigate for impacts to fish habitat. Record
18 29. The county found:

19 “OAR 690-505-0610 lists a number of methods to provide ‘legally
20 protected’ water and does not provide that the only method of
21 protecting flows is through an instream water right; this includes

¹⁵ Thornburgh states that evidence in the record demonstrates that the Three Sisters Irrigation District mitigation project that was required by the 2008 FWMP was completed in 2009. Thornburgh states that Thornburgh owns the LeBeau water right and pumping has ceased at the original point of diversion.

1 'cancellation in lieu' as a potential method for protecting flows. The
2 flows restored by water right transfers may not be claimed by other
3 water users in the basin because new surface water rights are not
4 being issued in the Deschutes Basin, and the evidence shows no
5 party has been regulated off of a surface or groundwater right in the
6 basin.

7 "Further, the [board] finds that the evidence in the record related to
8 cancellation in lieu does not result in the ability of a junior holder to
9 'pick up' the water. The evidence shows the watermaster has not
10 regulated any groundwater or surface water rights off. This means
11 enough water exists for all water rights (not storage), even the junior
12 holders. OWRD accepts this method for mitigating groundwater
13 permit applications and the [board] finds that OWRD is the authority
14 and controlling agency over water law. The 2022 FWMP and its
15 extensive technical evidence shows that stream flows will increase
16 and temperatures decrease as a result of implementation of the 2022
17 FWMP. As such, we find that methods provided by the groundwater
18 mitigation program, including the methods relied upon by the 2022
19 FWMP, are sufficient to meet the no net loss standard." Record 54-
20 55.

21 OAR 690-505-0610(8) provides, in part:

22 "[I]f the impact of use under a ground water permit application is
23 completely offset by a proposed voluntary cancellation of an
24 existing ground water use subject to transfer, such that impact on
25 surface waters from the new ground water use is the same as, or less
26 than, impact on surface waters from the existing ground water use
27 subject to transfer, the ground water permit application may be
28 approved without additional mitigation once the proposed voluntary
29 cancellation is complete."

30 Bishop argues that the county erred in allowing Thornburgh to rely on
31 cancellation of water rights to provide fish habitat. In essence, Bishop argues that
32 a reasonable person could not conclude that cancellation of a water right will
33 provide water for fish habitat. Bishop argues that cancellation does not

1 permanently protect the water proposed for cancellation from use by others
2 because that water can be used by other water rights holders pumping from the
3 same aquifer.

4 Thornburgh responds that the no net loss standard does not prescribe any
5 method of fish habitat mitigation or require that only instream water rights may
6 be relied upon. Thornburgh points out that Thornburgh's water rights expert,
7 Newton, opined that both transfer to an instream water rights and cancellation
8 will leave water in the system at the original pumping location because the
9 OWRD processes for transfer or cancellation ensure that the mitigation measure
10 is effective. Newton explained:

11 "All water rights that are proposed for transfer or voluntary
12 cancellation for use as mitigation for a new groundwater use are
13 required to be processed by the OWRD through the transfer or
14 voluntary cancellation process and dedicated to the new permit for
15 mitigation. During this administrative process with the OWRD, a
16 review is conducted by the OWRD as to the reliability, more
17 specifically[: H]ave the water rights offered for mitigation been used
18 in their entirety, without being regulated off because of water
19 availability, and meet a reasonable review that similar water rights
20 are offered to offset the future impacts of the new groundwater
21 permit to be issued[?] During such a review by the OWRD, the water
22 right in question must be a certificated water right, suitable evidence
23 to prove use and availability will be questioned and investigated,
24 and a decision made regarding suitability for mitigation." Record
25 749.

26 As we understand it, the 2022 FWMP modeling assumes equal efficacy
27 and reliability as between instream water right transfers and voluntary
28 cancellation of water rights so that those legal processes have the same instream

1 impacts on water quality and quantity. We agree with Thornburgh that a
2 reasonable person could conclude that voluntary cancellation of water rights
3 consistent with the OWRD rules and the 2022 FWMP will result in improved fish
4 habitat to offset the negative impacts to fish habitat caused by Thornburgh's
5 groundwater pumping.¹⁶

6 **G. OWRD Mitigation Rules**

7 Bishop argues that the county "wholly and unreasonably" relies on
8 OWRD's mitigation rules to meet DCC 18.113.070(D). Bishop's Intervenor-
9 Petitioner's Brief 30. That argument mischaracterizes the county's decision. The
10 county concluded that voluntary cancellation is a reliable way to provide
11 mitigation water for fish habitat. The county based that conclusion on the fact
12 that OWRD is the state water regulator and OWRD accepts voluntary
13 cancellation as a means of offsetting withdrawal impacts. The county does not
14 solely rely on the OWRD mitigation rules to satisfy the no net loss standard.
15 Instead, the county relies on the OWRD mitigation rules as evidence that
16 voluntary cancellation will result in the water quantity and quality modeled in the
17 2022 FWMP.

¹⁶ Later in this decision we agree with Bishop that the 2022 FWMP compliance measures that require only submittal to OWRD of applications for transfers or cancellation of groundwater water rights are inadequate to ensure no net loss of fish resources. *See* ___ Or LUBA at ___ (slip op at 64-65).

1 **H. ORS 537.270**

2 Bishop argues that the county improperly relied on ORS 537.270 to
3 support its conclusion that the water rights transfers and cancellations will result
4 in water in the stream for fish habitat. ORS 537.270 provides:

5 “A water right certificate issued in accordance with the provisions
6 of ORS 537.250 which, after the expiration of three months from the
7 date it is issued, has not been contested and canceled in the manner
8 provided in ORS 537.260, and a water right certificate, when issued
9 under ORS 539.140, shall be conclusive evidence of the priority and
10 extent of the appropriation therein described in any proceeding in
11 any court or tribunal of the state, except in those cases where the
12 rights of appropriation thereby described have been abandoned
13 subsequent to issuance of the certificate.”

14 ODFW argued to the county that the water rights Thornburgh listed and
15 relied upon in the 2022 FWMP were not sufficiently reliable to meet the no net
16 loss standard because the record did not demonstrate that the full amount of water
17 under the water rights listed in the 2022 FWMP and relied upon for Thornburgh’s
18 modeling “have been consistently used in full in the recent past.” Record 1827.

19 The county rejected that argument and found that “Thornburgh has
20 provided substantial evidence of pumping records, aerial photos, [and] affidavits
21 of use for individual water rights that indicate substantial use and that rights will
22 provide actual benefits to impacted waterways.” Record 30.

23 In addition, and in the alternative, the county found that none of the
24 identified water rights are subject to cancellation proceedings and Thornburgh is
25 entitled to rely upon water rights unless they are subject to cancellation

1 proceedings. Record 62. The county found that ORS 537.270 is a “relevant
2 consideration.” *Id.*

3 “ORS 537.270 directly relates to whether certificated water rights
4 are evidence of water priority *and* appropriation or use. We find that
5 where Thornburgh has (or is planning to use) certificated or
6 permitted water that the amount of appropriation, duty and priority
7 govern here. We find that Thornburgh’s water rights are ‘reliable’
8 for the purpose of complying with the No Net Loss Standard.”
9 Record 30 (emphasis in original).

10 For purposes of this decision, we assume without deciding that the county
11 misconstrued ORS 537.270 and erred in concluding that statute creates a legal
12 presumption that Thornburgh’s water rights certificates are conclusive evidence
13 of the availability of water for the purpose of complying with the county’s no net
14 loss standard. However, Bishop has not established that error requires remand.
15 Where an error in a finding is not critical to the local government’s ultimate
16 conclusions, the error does not provide a basis for reversal or remand. *Hunt v.*
17 *City of the Dalles*, 78 Or LUBA 509, 515 (2018), *aff’d*, 296 Or App 761, 438 P3d
18 489 (2019). The county’s finding relying on ORS 537.270 was in addition, and
19 in the alternative, to the county’s finding that Thornburgh provided substantial
20 evidence of pumping records, aerial photos, and affidavits of use for individual
21 water rights that indicate substantial use, and that rights will provide actual
22 benefits to impacted waterways. Thus, the county’s error in applying an improper
23 presumption based on ORS 537.270 was harmless in that it was not necessary to
24 the approval.

1 **I. Water Rights Certificates as Evidence of Water Quantity**

2 Bishop also argues that the county improperly relied on the listed water
3 rights as establishing the *quantity* of water available for mitigation. In other
4 words, Bishop argues, certificated water rights are not substantial evidence that
5 the 2022 FWMP will result in no net loss to fish resources. The 2022 FWMP and
6 modeling rely on the quantity of water listed in the certificate. Bishop argues that
7 the no net loss standard requires a certainty greater than listing what is shown on
8 a paper certificate. Bishop argues “[i]f less water is in the aquifer or stream than
9 the amount listed in the [c]ertificate, water does not magically come into
10 existence to meet the amount listed in the [c]ertificate.” Bishop’s Intervenor-
11 Petitioner’s Brief 31. Bishop also points out that prior certificate holders might
12 not have used the full quantity of certificated water. In that case, if Thornburgh
13 transfers that water right for resort use and the resort uses the full quantity of the
14 certificate, then the transfer will result in greater negative impacts than predicted
15 in the 2022 FWMP.

16 Bishop argues that the transfer of the LeBeau water right for resort use is
17 unreliable because OWRD has proposed to deny the transfer due to predicted
18 harm to the Crooked and Deschutes Rivers’ flows. Record 3623. Bishop argues
19 that cancellation of the Dutch Pacific right is unreliable because OWRD has
20 denied Thornburgh’s application for transfer to the resort for resort use. Record
21 3624.

1 Thornburgh responds that OWRD’s denial of transfer of the Dutch Pacific
2 water right for resort use does not undermine the 2022 FWMP conclusions
3 because that water right will be cancelled, which allows water to remain in the
4 aquifer to provide benefits to streamflow. While Thornburgh does not
5 specifically respond to Bishop’s argument regarding OWRD’s proposed denial
6 of the transfer of the LeBeau certificate, Bishop does not explain how the denial
7 of a transfer application for resort water *supply* undermines the county’s finding
8 that the listed water certificates will provide adequate water for *mitigation*.

9 Given the record as a whole, a reasonable person could conclude that the
10 water rights transactions proposed in the 2022 FWMP will result in no net loss to
11 fish habitat based on quantities and quality of water modeled based on the listed
12 water rights certificates.

13 **J. Crooked River Habitat Impacts**

14 The Tribe argues that the county’s conclusion that the 2022 FWMP
15 satisfies the no net loss standard is not supported by substantial evidence in the
16 whole record because Thornburgh’s fisheries expert concluded that, under the
17 2022 FWMP, the resort’s water consumption will result in seasonal degradation
18 of the fish habitat quantity and quality in the Crooked River. The Tribe points to
19 a report dated October 21, 2022, in which Thornburgh’s environmental science
20 expert, Mugunthan, estimated that the resort groundwater pumping in quantities
21 listed in the 2022 FWMP would reduce surface flows in the Crooked River by
22 “approximately 0.25 cfs and 0.4 cfs, at Osborne Canyon and Opal Springs,

1 respectively.” Record 12708. Mugunthan explained that change is “statistically
2 significant” and would result in depletion of groundwater recharge to surface
3 water. *Id.* Mugunthan explains that

4 “‘Statistically significant’ is a statistical term meaning the
5 probability of not having a negative flow difference is very small.
6 However, the statistical test does not provide any context on the
7 magnitude of the impact, which at 0.4 cfs at Opal Springs is
8 negligibly small (less than 0.04%) compared to the surface water
9 baseflow that ranges from 1100 to 1300 cfs.” *Id.* at n 4.

10 Thornburgh engaged RSI to model surface water temperature. RSI
11 produced a report, dated February 21, 2023, which analyzed potential
12 temperature impacts in the Crooked River resulting from reduced ground water
13 discharge caused by resort ground water pumping. Record 1028-34. RSI
14 concluded that the simulated changes in temperature were “not significantly
15 different from zero.” Record 1032.

16 With respect to impacts to the Crooked River, Thornburgh’s fish expert,
17 Caldwell, concluded as follows:

18 “When averaged across all sites evaluated within the Crooked River,
19 flow is predicted to increase or decrease by less than 0.12 cfs, with
20 decreases occurring in April through early June, again in mid-June,
21 and in late August through October, and increases occurring in early
22 June and late June through mid-August. This would constitute a net
23 decrease in habitat quantity during spring and fall, and a net increase
24 in habitat quantity during most of the summer. Temperature is
25 predicted to generally increase by less than 0.004°C from late May
26 through early October and predicted to decrease by less than
27 0.004°C from April through mid-May and in October. This would
28 constitute a net improvement in habitat quality during spring and
29 fall, and a quality degradation in summer. The maximum effect of

1 this project on predicted change in flow is a decrease of 0.11 cfs
2 (habitat quantity decrease) and occurs in early September, and the
3 maximum effect on change in temperature is an increase of 0.004°C
4 (habitat quality degradation) and occurs in early July.

5 “Overall, the combined effects of planned groundwater pumping
6 and mitigation appear to vary seasonally within the Crooked River.
7 During the spring and fall, a net impact is expected for fish habitat
8 quantity and a net benefit for fish habitat quality. During the
9 summer, a net benefit is expected for fish habitat quantity and a net
10 impact for fish habitat quality.” Record 918 (internal citations
11 omitted).

12 The county found:

13 “According to the science and technical reports, there is generally
14 no scientific or biological significance in the impacts⁸ under the
15 2022 FWMP and, as a whole, the plan provides benefits to habitat
16 for fish and aquatic species. Given this context, we find that the 2022
17 FWMP plan meets the No Net Loss Standard.

18 _____
19 “⁸ Substantial evidence shows that virtually all flow and temperature
20 changes, while mostly beneficial, are too small to measure with
21 equipment currently available. Even ODFW notes that impacts to
22 the Crooked River, for example, are ‘noise.’” Record 26.

23 The county also found:

24 “In all reaches impacted by Thornburgh’s water use, except certain
25 times and locations in the Crooked River, Thornburgh’s transfers
26 (restoration) and other measures may result in a net benefit by either
27 decreasing waterway temperatures overall or by offsetting impacts
28 of the Resort on streams to the point that increase in stream
29 temperatures are so minimal as to be not measurable. The modeling
30 also provides extensive analysis related to spring and seep impacts
31 and concluded that the 2022 FWMP meets the no net loss standard.
32 The 2022 FWMP provides substantial groundwater inputs that
33 globally offset impacts of pumping on habitat.” Record 55.

1 “In the Crooked River, there are slight decreases in flow in amounts
2 so small they cannot be measured using current technology.
3 Similarly, the change to temperature is so small as to not be
4 measurable as well.” Record 63.

5 The Tribe argues that there is no evidence in the record explaining how the
6 2022 FWMP will mitigate the impact of fish habitat quality and quantity
7 degradation in the Crooked River that Caldwell predicted. The Tribe further
8 argues that the county’s decision is not supported by substantial evidence because
9 Caldwell’s and RSI’s reports conflict with respect to the impacts of increased
10 temperatures in the Crooked River and the county erred in not addressing that
11 conflict in the findings approving the 2022 FWMP. Tribe’s Petition for Review
12 34-35.

13 Thornburgh responds that substantial evidence in the record demonstrates
14 that, under the 2022 FWMP, the resort’s water consumption will result in
15 negligible seasonal degradation of the fish habitat quantity and quality in the
16 Crooked River and that implementation of the 2022 FWMP will provide a net
17 benefit to fish habitat. Thornburgh argues that the Tribe’s citations to Caldwell’s
18 report are incomplete and inaccurate. Thornburgh characterizes Caldwell’s report
19 as identifying impacts and ultimately concluding that the 2022 FWMP will result
20 in “a net benefit for both fish habitat quantity and quality at all sites evaluated
21 and would result in no net loss of fish habitat quantity or quality.” Record 923.
22 Caldwell found that, while the model predicted reductions in fish habitat quantity
23 and quality, “these model-predicted changes are so small as to be immeasurable

1 and are not likely to cause a measurable change in habitat quantity or quality of
2 fish habitat within the Crooked River.” Record 12424-25.

3 Thornburgh argues, and we agree, that a reasonable person could rely on
4 that expert opinion to conclude that the 2022 FWMP will result in no net loss of
5 fish resources in the Crooked River. That is so even though Mugunthan estimated
6 that resort water pumping in quantities listed in the 2022 FWMP would reduce
7 surface water flows in the Crooked River by .25 cfs (at Osborne Canyon) and .40
8 cfs (at Opal Springs).¹⁷

9 **K. Whychus Creek Mitigation**

10 The county found:

11 “Whychus Creek was the subject of intense litigation that was
12 resolved with the approval of the FMP. The FMP required
13 mitigation into Whychus Creek by restoring 1.51 cfs (a minimum of
14 106 acre-feet) of conserved water from the Three Sister Irrigation
15 District [(TSID)]. The Whychus Creek mitigation is final and past
16 all appeals. As there is no change to this segment of the FWMP, any
17 attack against the plan is an impermissible collateral attack on the
18 FMP. Further, the evidence shows that Thornburgh has completed
19 the requirements pertaining to the Whychus Creek Mitigation and
20 that the water has been permanently transferred instream. Lastly,
21 Thornburgh is canceling the Dutch Pacific water right that will
22 provide additional groundwater discharge to Whychus Creek.”
23 Record 31.

¹⁷ Thornburgh emphasizes that Mugunthan and ODFW characterized those estimated impacts as “negligibly small” and “noise.” Rec 12708 n 4, 26 n 8.

1 Petitioners argued below that impacts to Whychus Creek should be
2 addressed anew in current context as part of the 2022 FWMP. Petitioners also
3 argued that leaving water instream in Whychus Creek increases temperatures
4 downstream (and negatively impacts fish habitat) because water warms as it
5 moves downstream. Record 66.

6 The county found that “the TSID project provides benefits to Whychus
7 Creek and fully offsets the impact of the Resort’s use of groundwater at a higher
8 level than proposed by the 2022 FWMP.” Record 56. The county found that the
9 efficacy of the TSID mitigation for Whychus Creek was litigated and settled by
10 *Gould v. Deschutes County*, 78 Or LUBA 118 (2018). The county also quoted
11 the expert opinion in the 2022 FWMP record stating that the TSID mitigation
12 will be effective. Record 66-67 (quoting Record 571-72).

13 Bishop argues that Thornburgh’s modification application opens the issue
14 of the current conditions of all affected habitats, including Whychus Creek, and
15 that there is no evidence in the record that rebuts the Tribe’s evidence that the
16 prior mitigation on Whychus Creek is now no longer reasonably certain or likely
17 to result in no net loss of fish and wildlife habitat. Bishop cites Record 4300,
18 4303, and 4305, wherein the Tribe explained that the DB HCP incidental take
19 permit coverage for steelhead in Whychus Creek relies on water temperature
20 decreases from TSID mitigation and the DB HCP applicants acknowledge that if
21 their assumption regarding temperature reduction is incorrect, then the DB HCP
22 applicants might need to revisit the conservation measures for Whychus Creek.

1 Nothing in those record citations contradicts Thornburgh’s experts’ opinion that
2 increased stream flow in Whychus Creek as a result of the TSID mitigation will
3 result in benefits to fish habitat.

4 The county’s observation that the efficacy of the TSID mitigation with
5 respect to fish habitat in Whychus Creek was previously litigated and resolved
6 was not the county’s sole basis for concluding that the 2022 FWMP satisfies the
7 no net loss standard with respect to Whychus Creek. The county also concluded
8 that the TSID mitigation and 2022 FWMP mitigation measures will result in no
9 net loss of fish habitat in Whychus Creek. Contrary to Bishop’s assertion, this
10 conclusion is supported by evidence in the record. Specifically, Caldwell
11 analyzed various sensitive sites in Whychus Creek identified by ODFW and
12 concluded that the mitigation under the 2022 FWMP provides “a net benefit for
13 both fish habitat quantity and quality within Whychus Creek, throughout the vast
14 majority of the irrigation season.” Record 917. That conclusion was based on
15 further thermal modeling at various sensitive sites in Whychus Creek as
16 requested by ODFW. Record 571, 1897-1898. Thornburgh also points out that
17 the required 106 acre feet of mitigation water for Whychus Creek in the 2008
18 FWMP was based on 2,129 acre feet of resort pumping. The 2022 FWMP
19 significantly decreased the amount of water the resort will pump, while the
20 completed TSID mitigation remains unchanged and cancellation of the Dutch
21 Pacific water right will increase mitigation water in Whychus Creek. The

1 county’s conclusion that Whychus Creek mitigation is sufficient to satisfy the no
2 net loss standard is supported by substantial evidence.

3 **L. 2022 FWMP Compliance Provisions**

4 Bishop argues that the 2022 FWMP groundwater rights compliance
5 provisions are inadequate to support a conclusion that the 2022 FWMP will result
6 in no net loss to fish habitat. As explained above, for groundwater water rights,
7 the 2022 FWMP provides that “compliance occurs upon the cessation of pumping
8 of the rights and along with any of the following: deed evidencing the transfer of
9 ownership, *a submittal to OWRD* of any of the following: (i) an assignment of
10 the water right to Thornburgh, (ii) *an application that seeks OWRD approval* of
11 a transfer to pump at the resort property, or (iii) a cancellation in-lieu of
12 mitigation.” Record 77 (emphases added). This provision provides the means of
13 demonstrating compliance with the 2022 FWMP during the county’s review of
14 future resort land use applications, for Thornburgh’s required annual mitigation
15 monitoring report, “or for any other purpose.” *Id.* Thornburgh proposed, and the
16 county approved, the following reporting requirements for the 2022 FWMP:

17 “In addition to any reporting required by OWRD pertaining to water
18 use or mitigation, Thornburgh will provide annual reporting (no
19 later than December 31st of each year) to Deschutes County, with a
20 copy to ODFW’s local field office, of the following information:

21 “1. The status of each of the certificated water rights discussed in
22 Section II-B2, including the status of any transfer or
23 cancellation applications affecting any of those rights.

24 “2. Copies of any annual reporting filed with OWRD.

1 “3. An accounting of the total amount of water pumped under any
2 of the water rights discussed in Section II-B (2) between
3 November 1 - October 31 of the prior year.

4 “4. An accounting of the total amount of a) groundwater left in
5 ground, b) surface water left instream (permanent or
6 temporary), or c) water held as mitigation credits (permanent
7 or temporary) in accordance with this Section D, paragraphs
8 a, b & c.

9 “5. The accounting referred to in [numbers] 3 and 4 of this section
10 will be maintained both annually, and on a cumulative basis.

11 “6. An accounting of the amount and certificate [number] of any
12 water provided to farmers for drought relief.

13 “7. The amount and source of any OWRD mitigation used to
14 mitigate for the pumping in [number] 3 of this section.

15 “8. Any change in the status of any of the three exempt wells
16 including whether they have been abandoned to date.

17 “9. Consistent with the 2008 FWMP, no additional reporting is
18 required during the review of any land use application related
19 to the Resort.” Record 78.

20 The county revised prior FMP Condition 38 so that it now applies only to
21 a distinct terrestrial wildlife mitigation plan and imposed new FMP Condition 40
22 as follows: “Thornburgh shall comply with the 2022 [FWMP], including its
23 compliance and reporting mechanisms found in Section II of that plan.” Record
24 51. *See Gould v. Deschutes County*, 233 Or App 623, 625-26, 227 P3d 758, 760
25 (2010) (describing distinct mitigation plans addressing terrestrial wildlife and
26 fish habitat). The county found that “that the 2022 FWMP ensures ongoing

1 compliance with the No Net Loss Standard and sufficient monitoring is required
2 by the 2022 FWMP and FMP Condition 40.” Record 31.

3 Bishop argues that the 2022 FWMP assumes *completion* of the listed water
4 rights transfers and cancellations. Bishop argues that, thus, the county must
5 require proof of *completion* of each alternative OWRD process, rather than mere
6 ownership of a certificate and *submittal* of an application to OWRD, before the
7 county may conclude that the no net loss standard has been satisfied. Bishop
8 argues that, under the 2022 FWMP, the county has no way to determine if fish
9 habitat mitigation water will be available before approving actual buildings on
10 site under a third-stage approval.¹⁸

11 Thornburgh responds that the county may rely upon evidence of
12 Thornburgh’s ownership of water rights, cessation of pumping, and submittal to
13 OWRD, and need not wait until OWRD has made a final adjudication.
14 Thornburgh points out that it may not pump water for resort use until it has
15 obtained and documented OWRD mitigation necessary to withdraw groundwater
16 for resort use. *See* ___ Or LUBA at ___ (slip op at 44 n 13) (describing OWRD
17 mitigation). Thornburgh cites *Gould v. Deschutes County*, ___ Or LUBA ___
18 (LUBA No. 2022-013, June 1, 2022), *aff’d*, 322 Or App 11, 518 P3d 978, *rev*
19 *den*, 370 Or 694 (2022) (slip op at 13), for support of its argument that it is entitled

¹⁸ Bishop points out the county has already issued a building permit for a pump house and well house on the property. Record 3489-99.

1 to rely on valid and existing water rights certificates to satisfy fish habitat benefit
2 requirements.

3 Our conclusion in that case does not support Thornburgh’s position here.
4 In that case, we reiterated prior decisions in *Gould v. Deschutes County*, ___ Or
5 LUBA ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff’d*, 314 Or
6 App 636, 494, P3d 357 (2021), *rev den*, 369 Or 211 (2022) and *Gould v.*
7 *Deschutes County*, 79 Or LUBA 561 (2019), *aff’d*, 310 Or App 868, 484 P3d
8 1073 (2021). In those lines of cases, we concluded that, because OWRD
9 mitigation is based on the resort’s consumptive water use, FMP Condition 10
10 “requires proof of adequate water rights and mitigation commensurate with the
11 estimated consumptive use of water for the development approved at each phase
12 of development, and in advance of actual water consumption.” 79 Or LUBA at
13 574.¹⁹ The county adopted FMP Condition 10 to satisfy DCC 18.113.070(K). We
14 agreed with the county that that showing could be satisfied by documentation of
15 a noncancelled water rights permit. Those cases do not aid Thornburgh in this
16 case, which involves satisfaction of the no net loss standard in DCC
17 18.113.070(D).

¹⁹ FMP Condition 10 provides:

“Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.” Record 33 n 13.

1 Similarly, the fact that Thornburgh may not legally pump water for resort
2 use until it has obtained and documented *OWRD mitigation* necessary to
3 withdraw groundwater for resort use does not ensure that all the required *fish*
4 *mitigation* water will be provided in advance of pumping. OWRD mitigation
5 water and fish mitigation water may sometimes be the same water, but it is
6 provided to satisfy different requirements. OWRD's mitigation rules do not
7 ensure the no net loss of fish resources.

8 Thornburgh does not argue that the reporting requirements in the 2022
9 FWMP are sufficient to demonstrate no net loss, and we do not see that they are.
10 The required report might show that the quantities and quality of water assumed
11 in the 2022 FWMP have been provided, or it might not. No additional reporting
12 is required during the review of any land use application related to the resort. As
13 we understand it, the 2022 FWMP modeling assumes equal efficacy and
14 reliability as between instream water right transfers and voluntary cancellation of
15 water rights so that those legal processes have the same instream impacts on
16 water quality and quantity.

17 We agree with Bishop that the county's findings are inadequate to explain
18 why *submittal* to OWRD is sufficient to satisfy the no net loss standard with
19 respect to groundwater sources for fish habitat mitigation. Indeed, Thornburgh
20 and the county rely upon OWRD processes to ensure that voluntary cancellation
21 of water rights consistent with OWRD rules and review processes will result in
22 improved fish habitat. *See* Record 749 (Thornburgh's expert, Newton's,

1 testimony (also quoted above ___ Or LUBA at ___ (slip op at 48))). The county
2 has failed to explain how simple submittal of an application to OWRD permits
3 the county to rely on those OWRD processes.

4 Thornburgh points to no evidence to support the county’s conclusion that
5 the “2022 FWMP ensures ongoing compliance with the No Net Loss Standard
6 and sufficient monitoring is required by the 2022 FWMP and FMP Condition
7 40.” Record 31. Thornburgh has not pointed to any evidence supporting a
8 conclusion that ground water right certificate ownership, cessation of pumping,
9 and OWRD submittal is sufficient to ensure fish mitigation water will be
10 provided as assumed in the 2022 FWMP.

11 Bishop’s second assignment of error is sustained, in part.

12 **VIII. SUBSTANTIAL CHANGE**

13 **(Gould Second Assignment of Error; COLW First and Third Assignments**
14 **of Error; Lipscomb First Assignment of Error)**

15 As explained early in this decision, CMP and FMP Condition 1 provide:
16 “Approval is based upon the plan as submitted. Any substantial change to the
17 approved plan will require a new application.” Record 11426, 11725. The county
18 has interpreted “substantial change” in Condition 1 to have the same meaning as
19 the term is used in DCC 18.113.080, which is “an alteration in the type, scale,
20 location, phasing or other characteristic of the proposed development such that
21 findings of fact on which the original approval was based would be materially
22 affected.” The county process for destination resort review and approval allows

1 for the resort development to change and evolve over time. However, the county
2 is required to revisit and find satisfaction of the resort approval criteria that the
3 county found satisfied by the CMP or FMP if a proposed modification materially
4 affects the original findings for any given criterion.

5 As explained above, the CMP approved the development of three golf
6 courses. The CMP approval required one of the golf courses to be developed in
7 the first phase of the resort development. *See* ___ Or LUBA at ___ n 5 (slip op
8 10 n 5). As far as we are aware, the FMP did not alter those approvals, so they
9 are part of the FMP. Thornburgh has obtained third-stage approval for the
10 development of one golf course. *Gould Golf*, ___ Or LUBA ___. The county
11 found that the prior approvals only require Thornburgh to develop one golf course
12 and the other two golf courses are “optional.” Record 38. No party challenges
13 that finding or that characterization of the prior approvals. 2022 FWMP proposes
14 to decrease water pumping and water consumption by abandoning one of the
15 “optional” golf courses.

16 Gould argues that the 2022 FWMP proposes a different, lesser amount of
17 water consumption than contemplated in the FMP and that is a substantial change
18 requiring a new CMP application. COLW argues that Thornburgh’s decision to
19 forego developing a golf course to decrease water consumption materially
20 changes the county’s findings regarding open space. Lipscomb argues that the
21 proposed modifications alter the facts supporting the findings for the resort

1 approval criteria related to the economic study, water supply, water system
2 master plan, and wastewater disposal plan.

3 The county found that none of those alleged changes amount to a
4 substantial change to the proposed resort development. Further, the county
5 reasoned that, even if the 2022 FWMP does represent or result in any substantial
6 change, such a change does not require a new CMP or FMP application. Instead,
7 a substantial change would require a new modification application that the county
8 reviews as a land use application—which is how the FMP modification
9 application was processed here. The county reasoned that changing mitigation
10 from the 2008 FWMP to the 2022 FWMP changes no characteristic of the
11 proposed development. Instead,

12 “the changes in the source of mitigation water from the 2008 FWMP
13 to the 2022 FWMP is merely a change to a plan that *mitigates for*
14 *the impacts* of the proposed development. It does not change the
15 proposed development or the characteristics of it beyond placing a
16 greater restriction on the maximum amount of water used and the
17 number of optional golf courses that may be developed.” Record 38
18 (emphasis in original).

19 The county further reasoned

20 “DCC 18.113.080 asks whether a proposed change to an ‘approved
21 CMP’ is a substantial change. * * * No finding of the approved CMP
22 addresses the particulars of the 2008 FWMP. Instead, Condition 37
23 of the approved CMP requires the filing and public review of an
24 FWMP with the FMP application. The requested modification of the
25 FWMP has been reviewed in the manner required by Condition 37
26 of the approved CMP, which is through a land use application
27 review.

1 “Opponents have also argued that DCC 18.113.080’s requirement
2 that any substantial change ‘be reviewed in the same manner as the
3 original CMP’ requires an entirely new CMP. That is not the case.
4 The Code merely requires that a substantial change be reviewed ‘in
5 the same manner’ as the original CMP, which is to say that it
6 proceed through land use review in the same way as the original
7 CMP in that case. Even though the [b]oard finds that no substantial
8 change is proposed here, the land use review has afforded the same
9 process provided during the original CMP, which was review before
10 a hearings officer and then the [b]oard of [c]ommissioners.

11 “The [b]oard finds that the Application does not need to meet all
12 criteria related to CMP approval. The [b]oard further finds that the
13 Application does not represent a substantial change as that term is
14 used in DCC 18.113.080.” Record 39.

15 The board found that that DCC 18.113.080 defines the meaning of
16 “substantial change” in FMP Condition 1 and that Thornburgh’s request for
17 approval of the 2022 FWMP is not a substantial change. The board found that the
18 purpose of the FWMP is to mitigate the impacts of resort development. The
19 mitigation plan is not a development plan. Thus, modification of the FWMP is
20 not a substantial change to the resort plan. The board reasoned that the 2022
21 FWMP will not impose significant additional impacts on surrounding properties
22 because the 2022 FWMP does not allow any significant change to or
23 intensification of the resort development beyond what is allowed under the FMP.

24 The county’s conclusion that a substantial change would require
25 Thornburgh to apply for a modification application, as it did here, does not
26 resolve the issues raised in these arguments because the county applied only DCC
27 18.113.070(D), the no net loss criterion, and did not apply the other approval

1 criteria that petitioners argue are implicated—namely, criteria regarding
2 economic benefits, open space, and water supply, system, and disposal. DCC
3 18.113.080 and DCC 22.36.040 provide procedures for permit modification
4 applications for discrete portions of an approved FMP. In such cases, only the
5 criteria applicable to the modified aspect of the proposal provide applicable
6 criteria. DCC 22.36.040(C).²⁰

7 Even though the 2022 FWMP is directed at satisfying only the no net loss
8 standard, if the measures proposed and approved in the FWMP alter “the type,
9 scale, location, phasing or other characteristic of the proposed development such
10 that findings of fact on which the original approval was based would be

²⁰ DCC 22.36.040 provides, in part:

“B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.

“C. An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.”

1 materially affected,” then the changes are “substantial changes” that must “be
2 reviewed in the same manner as the original CMP.” DCC 18.113.080. Changes
3 that may be aimed at satisfying one criterion may also materially affect the
4 findings that supported satisfaction of another criterion so that the later criterion
5 is implicated by the modification. The fact that the modification application is
6 not aimed at the affected criterion or related findings does not mean that the
7 county is not required to address it. If the 2022 FWMP would materially affect
8 the findings of fact on which the original approval was based, then the county is
9 required to address anew those resort development criteria. Accordingly, we
10 proceed to analyze the county’s conclusion that changes resulting from the 2022
11 FWMP are not substantial changes that require a new application addressing
12 those criteria.

13 **A. Economic Analysis**

14 DCC 18.113.070(C) is a resort approval criterion that requires the county
15 to find, as relevant here:

16 “3. The destination resort will provide a substantial financial
17 contribution which positively benefits the local economy
18 throughout the life of the entire project, considering changes
19 in employment, demands for new or increased levels of public
20 service, housing for employees and the effects of loss of
21 resource land.

22 “4. The natural amenities of the site considered together with the
23 identified developed recreation facilities to be provided with
24 the resort, will constitute a primary attraction to visitors,
25 based on the economic feasibility analysis.”

1 Lipscomb argues that the proposed change to reduce the number of golf
2 courses is a substantial change to the resort development that materially affects
3 the facts underlying the resort's economic analysis that the county relied upon to
4 find that DCC 18.113.070(C) is satisfied in the CMP approval. We agree for
5 reasons explained immediately below.

6 The county relied upon an economic analysis that was based on a total of
7 four golf courses. Record 11690-92, 10520, 10524, 10583, 10588.²¹ The
8 economic analysis concluded that the golf courses would be an important source
9 of new jobs with a total of 125 newly created jobs and 3.9 million dollars in
10 employee compensation. Record 10588. The county found that the resort "will
11 generate a large number of full-time positions that will have a positive effect on
12 the Deschutes County economy." Record 11691.

13 Lipscomb argues that the economic benefit of developing and operating
14 the resort with fewer golf courses is not explained in the record. Thornburgh
15 provided no updated economic analysis. Based on the prior economic analysis,

²¹ The economic analysis describes two golf courses to be developed at The Pinnacle Village and two golf courses to be developed at The Tribute village. Record 10520, 10524, 10588. Lipscomb mentions the Benefit Study submitted as part of the CMP application in 2005, which analyzes economic viability off of four golf courses, as part of their argument regarding DCC 18.113.070(C). Lipscomb's Intervenor-Petitioner's Brief 27-28. However, no party explains how or when the resort plans for four golf courses were reduced to three golf courses and no party argues that change has any bearing on our analysis in this appeal. Thus, we assume that it does not.

1 Lipscomb estimates the resort will lose 39 golf course related jobs and points out
2 that reduced golf facilities may also impact other resort employment and
3 economic stimulation from the resort.

4 The county found

5 “Thornburgh’s request does not implicate other elements of the
6 resort such that a substantial change is requested. Elimination of a
7 golf course and curtailment of water rights are both measures
8 allowed by the CMP and FMP as they presently exist. While the
9 CMP and FMP addressed the impacts of full development of the
10 Resort, neither plan requires that the Resort be fully developed. This
11 fact was understood by the [b]oard when it reviewed the CMP and
12 its various supporting plans. The [board] further finds a ‘substantial
13 change’ can be approved through a land use application, which is
14 the process that has occurred.” Record 61.

15 Lipscomb argues that the change of abandoning a golf course that the
16 county relied on for assessing economic benefits is a substantial change requiring
17 a new CMP application.

18 Thornburgh responds that the CMP is not implicated by the 2022 FWMP
19 and, even if it were, the CMP *only required that one* golf course be developed.
20 For the proposition, Thornburgh cites Thornburgh’s burden of proof for the 2022
21 FWMP, partially quoting the CMP approval requirement that “at least one golf
22 course, the restaurant and meeting rooms and facilities are required to be
23 constructed in Phase A[.]” Record 13565 n 2.

24 We initially observe that the fact that the CMP approval required only one
25 golf course be developed in the first phase of development does not necessarily
26 demonstrate that, at the CMP stage, the county considered the other golf facilities

1 to be “optional” with respect to the whole resort plan. However, because no party
2 challenges the county’s finding that the prior approvals require only one golf
3 course, we assume that is a correct statement, as far as it goes.

4 The destination resort statutes do not prescribe a number of golf courses.
5 To qualify as a destination resort, “[a]t least \$7 million must be spent on
6 improvements for on-site developed recreational facilities and visitor-oriented
7 accommodations exclusive of costs for land, sewer and water facilities and roads.
8 Not less than one-third of this amount must be spent on developed recreational
9 facilities.” ORS 197.445(3). “Developed recreational facilities’ means
10 improvements constructed for the purpose of recreation and may include but are
11 not limited to golf courses, tennis courts, swimming pools, marinas, ski runs and
12 bicycle paths.” ORS 197.435(1). DCC 18.113.060 requires a destination resort to
13 provide, in the first phase of development, overnight lodging facilities, developed
14 recreational facilities, eating establishments, and meeting rooms. DCC
15 18.113.060(A)(4) requires a minimum investment of \$2,333,333 (in 1993
16 dollars) be spent on developed recreational facilities.²²

17 The fact that the CMP and FMP do not condition approval on development
18 of specific golf courses does not answer the issue that Lipscomb raises. The CMP
19 and FMP approvals are expressly “based upon the submitted plan.” Record

²² No party argues that abandoning one golf course will cause Thornburgh to violate the developed recreational facility investment requirements.

1 11426, 11725. The county was not required to condition those approvals on
2 development of the recreation facilities in the submitted and approved plan. More
3 importantly, any change to the developed recreational facilities approved in the
4 CMP/FMP may constitute a substantial change.

5 We agree with Lipscomb that the county relied on the proposed and
6 approved golf courses for its economic analysis and conclusion that the proposed
7 resort satisfied DCC 18.113.070(C) in the CMP approval. We agree with
8 Lipscomb that the 2022 FWMP abandonment of golf course facilities is a
9 substantial change that impacts the underlying findings of fact for the CMP
10 approval—namely that the developed golf courses will provide 125 newly
11 created jobs and 3.9 million dollars in employee compensation. Record 10588.
12 Contrary to Thornburgh’s response, DCC 18.113.070(C) is implicated by the
13 2022 FWMP because the 2022 FWMP relies on the abandonment of one of the
14 same golf courses that the county relied upon in the CMP approval. We agree
15 with Lipscomb that, based on the CMP approval and supporting economic
16 analysis, the abandonment of the golf course is “an alteration in the type, scale,
17 location, phasing or other characteristic of the proposed development such that
18 findings of fact on which the original approval was based [are] materially
19 affected.” DCC 18.113.080.

20 Lipscomb also argues that the cost of employee housing has changed and
21 that change is a substantial change that requires a new economic analysis related
22 to “housing for employees” in DCC 18.113.070(C)(3). Thornburgh responds that

1 the 2022 FWMP does not increase the number of employees that will need to be
2 housed, and so that aspect of the findings supporting the CMP are not materially
3 affected by the potential decrease of employment resulting from not developing
4 one golf course. Pinnacle’s Intervenor-Respondent’s Brief 31.

5 We disagree with Lipscomb that a general change in rental cost and
6 availability is a “substantial change” that Thornburgh would be required to
7 address. However, we conclude that the 2022 FWMP requires changes that
8 materially affect the county’s findings that DCC 18.113.070(C)(3) and (4) are
9 satisfied. Accordingly, on remand, the county will need to consider whether, with
10 the changes proposed in the 2022 FWMP, those criteria are satisfied. On remand,
11 the county will need either to consider changes to employee housing demands
12 based on the changes in the 2022 FWMP or explain why that consideration is not
13 required.

14 The issue then becomes what is the proper remedy for this error? Lipscomb
15 argues that the phrase “new application” in Condition 1 can only mean a new
16 CMP application and a new FMP application because the findings supporting
17 those approvals must change.

18 The county found

19 “The CMP originally imposed Condition 1, which states that
20 ‘Approval is based upon the submitted plan. Any substantial change
21 to the approved plan will require a new application.’ Upon FMP
22 approval the hearings officer carried through the condition to ensure
23 compliance with the original CMP. The condition means the same
24 in both contexts, and neither require that an application for a new

1 CMP or new FMP be sought, only that a modification application
2 be filed and then reviewed in the same manner as the original
3 approval.

4 “This interpretation is consistent with the [b]oard’s previous
5 findings in Thornburgh’s CMP decision in 2006. In our 2006
6 Decision, the [b]oard determined that the substantial change of
7 converting Phase A Overnight lodging Units to single-family homes
8 would require ‘a modification of this conceptual master plan’ – not
9 approval of a new CMP. DC Document 2006-151, p. 46. This
10 finding is contained in the same decision that created Condition 1.
11 If a new CMP were required to make a substantial change such as
12 this to the CMP, Condition 1 would surely have said so.
13 Additionally, Condition 1 does not say that a substantial change
14 renders the approved CMP or FMP void. It only requires a ‘new
15 application’ which the [board’s] CMP findings indicate is an
16 application for modification of the conceptual plan.” Record 39-40.

17 Lipscomb argues that interpretation of Condition 1 is inconsistent with the
18 text of that condition, which requires a “new application.” Lipscomb argues that
19 the county’s interpretation fails to give any meaning to the term “new.” Lipscomb
20 points out that DCC 22.36.040, which applies generally to all modifications to a
21 county land use approval, requires a new application for requests that
22 substantially modify an approval. *See* ___ Or LUBA at ___ (slip op at 69 n 20).
23 Lipscomb argues DCC 22.36.040 provides context for FMP Condition 1 and that
24 the phrase “new application” must be read as providing a distinction between
25 modification applications and applications for new proposals. Lipscomb argues
26 that the county’s interpretation in this case that “new application” means a
27 modification application instead of a new CMP application fails to give meaning
28 to the term “new application.”

1 With respect to DCC 22.36.040, petitioners argued below that the 2022
2 FWMP is a “substantially new proposal” under DCC 22.36.040(B) that could not
3 be approved as a modification and, instead, required a new CMP/FMP
4 application. The county rejected that argument and found:

5 “DCC 22.36.040.B relates to whether the modification modifies the
6 actual approved use, in this case, the Resort as a whole. It relates
7 primarily to the approved FMP and, because the Application only
8 proposes an updated FWMP without substantially changing the
9 actual required development contemplated by the FMP, we cannot
10 find the proposal to be a ‘substantially new proposal.’” Record 43.

11 Thornburgh responds that Thornburgh’s application is for modification of
12 the FWMP, which is a discrete portion of the FMP. Thus, a modification
13 application is appropriate and consistent with Condition 1, DCC 18.113.080, and
14 DCC 22.36.040, which provide for modification applications for discrete
15 portions of an approval. With that context, Thornburgh argues that the board’s
16 interpretation of Condition 1 that “new application” requires only a new
17 modification application and not a new CMP/FMP application is plausible and
18 therefore entitled to deference under ORS 197.829(d) and *Siporen*, 349 Or 247.
19 Pinnacle’s Intervenor-Respondent’s Brief 34.

20 Lipscomb argues that deference applies only to the board’s interpretation
21 of provisions of the county code and not interpretation of conditions of approval.
22 As we have previously explained:

23 “ORS 197.829(1) requires LUBA to affirm a governing body’s
24 interpretation of its own comprehensive plan provision or land use
25 regulation unless the interpretation is inconsistent with the provision

1 or regulation’s express language, purpose, or underlying policy.
2 ORS 197.829(1) generally does not require LUBA to affirm a local
3 government’s interpretation of a prior land use decision or
4 conditions of approval attached to a prior land use decision. *M & T*
5 *Partners, Inc. v. City of Salem*, [80 Or LUBA 221, 229-30 (2019)],
6 *aff’d sub nom, M & T Partners, Inc. v. Miller*, 302 Or App 159, 170,
7 460 P3d 117 (2020). To a ‘limited extent,’ LUBA will defer to
8 plausible interpretations of county land use regulations that the
9 governing body made in the course of interpreting a condition of
10 approval. *Kuhn v. Deschutes County*, 74 Or LUBA 190, 194 (2016).
11 The deference question ‘reduces to whether the city was interpreting
12 a land use regulation,’ and a condition of approval is not a land use
13 regulation. *M & T Partners*, 302 Or App at 170.” *Gould Golf*, ___
14 Or LUBA at ___ (slip op at 16-17).

15 Here, the county adopted CMP/FMP Condition 1 to embed in the approval
16 the same requirement found in DCC 18.113.080. Similarly, here, the board’s
17 interpretation and application of FMP Condition 1 is couched in the board’s
18 interpretation of DCC 18.113.080 and DCC 22.36.040. Accordingly, we defer to
19 the board’s interpretation because it is plausible. While “new application” could
20 mean new CMP/FMP application, it could also plausibly mean new modification
21 application, as the county concluded.

22 The question then becomes whether the county’s error in failing to address
23 the findings regarding the economic analysis can be remedied by a remand in this
24 proceeding. LUBA’s decision to reverse or remand is not limited to the
25 disposition requested by the parties but is based on “what the nature of the
26 assigned and established error demands.” *McKay Creek Valley Assn. v.*
27 *Washington County*, 114 Or App 95, 99, 834 P2d 482, *adh’d to as modified on*
28 *recons*, 116 Or App 299, 841 P2d 651 (1992), *rev den*, 317 Or 396 (1993); OAR

1 661-010-0071 (setting forth circumstances under which LUBA “shall reverse” or
2 “shall remand”).

3 Thornburgh applied to modify the FMP. When compliance with an
4 applicable approval criterion would require more than insignificant changes to
5 the application, if not a new application, reversal is the appropriate remedy.
6 *Rogue Advocates v. City of Ashland*, ___ Or LUBA ___, ___ (LUBA No 2021-
7 009, May 12, 2021) (citing *Richmond Neighbors v. City of Portland*, 67 Or
8 LUBA 115, 129 (2013)) (slip op at 20). As we explained in *Richmond Neighbors*:

9 “OAR 661-010-0071 provides that LUBA shall reverse a decision
10 when ‘[t]he decision violates a provision of applicable law and is
11 prohibited as a matter of law,’ while LUBA shall remand a decision
12 when ‘[t]he decision improperly construes the applicable law, but is
13 not prohibited as a matter of law.’ * * * [W]hether reversal or
14 remand is appropriate depends on whether it is the decision or the
15 proposed development that must be corrected. If the identified errors
16 can be corrected by adopting new findings or accepting new
17 evidence, * * * then remand is appropriate. If the identified errors
18 require a new or amended development application, then reversal is
19 appropriate.” 67 Or LUBA at 129 (citing *Angius v. Washington*
20 *County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*,
21 24 Or LUBA 311, 314 (1992)).

22 Here, the identified error may be corrected by the county accepting a new
23 economic analysis that demonstrates that “[t]he destination resort will provide a
24 substantial financial contribution which positively benefits the local economy
25 throughout the life of the entire project, considering changes in employment,
26 demands for new or increased levels of public service, housing for employees
27 and the effects of loss of resource land” and that “[t]he natural amenities of the

1 site considered together with the identified developed recreation facilities to be
2 provided with the resort, will constitute a primary attraction to visitors, based on
3 the economic feasibility analysis.” DCC 18.113.070(C)(3), (4). Accordingly, we
4 conclude that the established error should result in remand in this case.

5 **B. Open Space**

6 DCC 18.113.060(D)(1) is a resort approval criterion that provides, in part:

7 “D. A destination resort shall, cumulatively and for each phase,
8 meet the following minimum requirements:

9 “1. The resort shall have a minimum of 50 percent of the
10 total acreage of the development dedicated to
11 permanent open space, excluding yards, streets and
12 parking areas.”

13 The county is required to find that “[a]dequate open space, facility
14 maintenance and police and fire protection shall be ensured in perpetuity in a
15 manner acceptable to the County,” and “[t]he open space management plan is
16 sufficient to protect in perpetuity identified open space values.” DCC
17 18.113.070(R), (T).

18 In the CMP approval, the County found approximately 1,358 acres or 69
19 percent of the total resort would be designated as permanent open space,
20 including common open space and three golf courses. Record 13091-92, 11651-
21 52. Thornburgh submitted, and the county approved, an open space phasing plan
22 depicting “phase-by-phase protection and development of open space areas
23 including natural common areas, trails, and golf courses.” Record 11651.

24 CMP Condition 14 provides in relevant part:

1 “Applicant and its successors shall do the following to ensure that
2 all open space used to assure the 50% open space requirement of
3 Section 18.113.060(D)(1) is maintained in perpetuity:

4 “* * * * *

5 “C. All deeds conveying all or any part of the subject property
6 shall include the following restriction: This property is part of
7 the Thornburgh Resort and is subject to the provisions of the
8 Final Master Plan for Thornburgh Resort and the Declaration
9 of Covenants, Conditions and Restrictions of Thornburgh
10 Resort. The Final Master Plan and the Declaration contain a
11 delineation of open space areas that shall be maintained as
12 open space areas in perpetuity.

13 “D. All open space areas shall be clearly delineated and labeled
14 on the Final Plat.

15 “E. Any substantial change to the open space approved under this
16 decision will require a new land use permit.” Record 11726-
17 27.

18 In the FMP approval, the county found that CMP Condition 14 was
19 satisfied because the FMP site plan delineated 1,293 acres, 66 percent of the
20 resort site, as open space comprised of “golf open space, common open space
21 and buffer open space.” Record 10958.

22 Opponents argued to the county that Thornburgh’s plan to remove a golf
23 course is a substantial change that requires review as a modification to the CMP
24 and FMP. The county disagreed and found that the CMP and FMP approvals
25 contemplated changes to the golf courses and that the county has already
26 approved various site plans, including a golf course site plan that varied from the
27 precise layout of the resort open space map approved in the FMP approval.

1 DCC 18.113.040(C), governs site plan review and provides:

2 “Each element or development phase of the destination resort must
3 receive additional approval through the required site plan review
4 (DCC 18.124) or subdivision process (DCC Title 17). In addition to
5 findings satisfying the site plan or subdivision criteria, findings shall
6 be made that the specific development proposal complies with the
7 standards and criteria of DCC 18.113 and the FMP.”

8 The board found that DCC 18.113.040(C) allows reasonable revisions to
9 the FMP layouts during third-stage review and that the FMP provides general,
10 preliminary descriptions that are subject to revision in third-stage review. Only
11 changes that result in substantial changes to the CMP or FMP require a separate
12 modification application. Record 47.

13 COLW argues that the loss of a golf course materially affects the original
14 findings of fact regarding open space. COLW argues that the 2022 FWMP
15 approves removing a golf course approved in the FMP, which COLW argues
16 thereby removes that area from being counted as open space because the
17 application and challenged decision does not explain if the removed golf course
18 will become common open space, buffer open space, or something else.

19 Thornburgh responds that while some of the area delineated as golf course
20 open space will not be developed as a golf course, the FMP approval still requires
21 that area be maintained as open space and the 2022 FWMP approval does not
22 approve any other use of the golf course area. Thornburgh points out that CMP
23 Condition 14 does not require a specific location of use of open space. Instead,

1 that condition requires that open space be included and delineated on final plats,
2 which require third-stage review and approval.

3 COLW does not challenge the county's finding regarding DCC
4 18.113.040(C) or respond to Thornburgh's argument that the open space
5 requirement is ensured through third-stage review. COLW has not demonstrated
6 that the county erred in approving the 2022 FWMP, which relies on the
7 abandonment of development of a golf course, without requiring an application
8 to modify the CMP/FMP with respect to open space.

9 **C. Water Supply, Consumption, and Conservation**

10 DCC 18.113.070(K) is a resort approval criterion that requires the county
11 to find:

12 "Adequate water will be available for all proposed uses at the
13 destination resort, based upon the water study and a proposed water
14 conservation plan. Water use will not reduce the availability of
15 water in the water impact areas identified in the water study
16 considering existing uses and potential development previously
17 approved in the affected area. Water sources shall not include any
18 perched water table. Water shall only be taken from the regional
19 aquifer. Where a perched water table is pierced to access the
20 regional aquifer, the well must be sealed off from the perched water
21 table."

22 In approving the 2022 FWMP, the county found that the CMP and FMP
23 approvals did not depend on or require the resort to be developed to utilize all of
24 the water predicted as consumptive use in the FMP. Thus, the county found that
25 Thornburgh's commitment in the 2022 FWMP to use less water than
26 contemplated in the FMP and to forego developing a golf course that was

1 approved in the FMP, does not change the approved resort in a manner that the
2 CMP/FMP findings of satisfaction of DCC 18.113.070(K) would be materially
3 affected. Record 38. The county further found that “compliance with DCC
4 18.113.070(K) is addressed by FMP Condition 10, which is not implicated in a
5 review of the FWMP, as [Thornburgh] continues to rely on G-17036 for the
6 Resort’s water source.” Record 33 (footnote omitted).

7 Gould argues that the county failed to make adequate findings that water
8 is available to satisfy DCC 18.113.070(K). COLW argues that Thornburgh has
9 lost its right to withdraw groundwater for resort use and that the loss of water
10 supply is a substantial change necessitating new CMP and FMP applications.
11 Gould and Lipscomb argue that Thornburgh’s proposed water consumption and
12 changes in water availability alter the fundamental facts supporting the county’s
13 finding that the CMP and FMP satisfied DCC 18.113.070(K). Petitioners argue
14 that the 2022 FWMP substantially changes the consumptive use of water and that
15 FMP Condition 1 and DCC 18.113.080 apply to all substantial changes—not only
16 changes that result in greater impacts.

17 The county found that DCC 18.113.070(K) is not implicated in its review
18 of the 2022 FWMP, because the 2022 FWMP is required to satisfy the no net loss
19 criteria in DCC 18.113.070(D). Record 33. Thornburgh responds that its
20 application sought to modify only the FWMP. It is undisputed that the 2022
21 FWMP requires Thornburgh to decrease the amount of water that the resort will
22 pump and consume. The issue is whether the decrease in water demand for the

1 overall resort described and approved in the 2022 FWMP is an alteration that
2 materially affects the findings of fact that DCC 18.113.070(K) is satisfied.

3 With respect to water availability, the county found during the CMP
4 approval that the source of water for the project is groundwater from the
5 Deschutes Basin regional aquifer and that Thornburgh's water study and water
6 conservation plan demonstrated that adequate water is available from the aquifer
7 for the project. Record 11702. At that time, Thornburgh had submitted to OWRD
8 an application for a water right and OWRD provided a letter indicating that
9 groundwater was available for the resort and the application was likely to be
10 approved, subject to OWRD mitigation requirements. Record 11703. The county
11 found that Thornburgh was not precluded from obtaining a state water right
12 permit to use groundwater for the resort. In addition, and in the alternative, the
13 county found that it was feasible for Thornburgh to obtain the water right based
14 on evidence of available water sources to satisfy the OWRD mitigation
15 requirements. Record 11704.

16 At the FMP stage, Thornburgh had obtained Water Right Permit G-17036
17 for a quasi-municipal use of groundwater, which authorized Thornburgh to
18 withdraw groundwater from six wells for resort use, including a golf course and
19 irrigation lakes. *Gould*, 322 Or App at 14-15 (describing OWRD right and
20 required mitigation). The county imposed FMP Condition 10 "to ensure
21 compliance with DCC 18.113.070(K), which is concerned with the availability
22 of water for resort use and mitigation for the resort's consumptive use of water,

1 which is related to but distinct from the fish and wildlife mitigation plan that is
2 required in order to satisfy DCC 18.113.070(D).”²³ *Gould Golf*, ___ Or LUBA at
3 ___ (slip op at 12). FMP Condition 10 must be satisfied at each third-stage review
4 phase. FMP Condition 10 imposes a requirement for documentation of water
5 rights and an accounting of the amount of required mitigation for each phase of
6 development. *Gould*, 322 Or App at 17.

7 Petitioners argue that the material facts are substantially different than the
8 facts the county found to support the CMP approval because, petitioners contend,
9 Water Right Permit G-17036 is expired and Thornburgh has not established, in
10 this proceeding, an alternative water right. Lipscomb argues that the proposed
11 modifications in the 2022 FWMP “alter the findings for the CMP and FMP
12 approvals relying on multiple reports.” Lipscomb’s Intervenor-Petitioner’s Brief
13 31. Lipscomb does not identify specific “findings of fact on which the original
14 approval was based [that are] materially affected” by the change of water source
15 for resort use. DCC 18.113.080.

16 It is undisputed that the 2022 FWMP relies on the transfer of a variety of
17 water rights that were not considered during the CMP and FMP approvals or
18 included as part of the 2008 FWMP. DCC 18.113.070(K) requires the resort to
19 use groundwater from the regional aquifer. No party has argued that Thornburgh

²³ FMP Condition 38 was adopted to satisfy DCC 18.113.070(D). The county amended FMP Condition 38 and imposed new FMP Condition 40 in the challenged decision.

1 proposes in the 2022 FWMP to use water from any other source. As we
2 understand it, Thornburgh proposes to seek OWRD approval to transfer existing
3 water rights to the resort for groundwater withdrawal from resort wells that draw
4 from the regional aquifer. Thornburgh responds and we agree that the CMP
5 findings do not rely on or require any particular water permit for consumptive
6 use but require that the resort use water from the regional aquifer. Thornburgh
7 also argues that the evidence before the county in this case is that G-17036
8 remained non-cancelled and the county reasonably concluded that source of
9 water remained available. Record 968. Thornburgh also responds that it has
10 “provided proof of ownership of numerous other certificated water rights that
11 may be used for consumption or mitigation following appropriate OWRD
12 processes and consistent with the 2022 FWMP.” Delashmutt’s Intervenor-
13 Respondent’s Brief 14-15.

14 Petitioners have not established that the 2022 FWMP proposes any change
15 of water supply that materially affects the findings of fact on the which the CMP
16 or FMP approvals rely. In *Gould v. Deschutes County*, ___ Or LUBA ___, ___
17 (LUBA No 2022-011, June 16, 2022) (slip op at 13), we affirmed the hearings
18 officer’s interpretation of “substantial change” in FWP Condition 1 and DCC
19 18.113.080 “as a change that will result in significant additional impacts on
20 surrounding properties.” We agree with the county’s conclusion that the 2022
21 FWMP does not propose a substantial change to the resort water supply both
22 because it proposes a decrease in water use and because it does not propose a

1 change in water source outside the required regional aquifer. For those same
2 reasons, we agree that the county did not err in concluding that DCC
3 18.113.070(K) is not applicable to its review of the 2022 FWMP. Thus, the
4 county was not required to make findings in the challenged decision that
5 demonstrate satisfaction of DCC 18.113.070(K). Assignments of error and
6 arguments that rely on DCC 18.113.070(K) provide no basis for remand and we
7 reject them.²⁴

8 **D. Water System and Wastewater Disposal Plans**

9 DCC 18.113.050(B)(11)(c) is a CMP criterion that requires

10 “[a] water conservation plan including an analysis of available
11 measures which are commonly used to reduce water consumption.
12 This shall include a justification of the chosen water conservation
13 plan. The water conservation plan shall include a wastewater
14 disposal plan utilizing beneficial use of reclaimed water to the
15 maximum extent practicable.

16 “For the purposes of DCC 18.113.050, beneficial uses shall include,
17 but are not limited to:

18 “(1) Irrigation of golf courses and greenways;

19 “(2) Establishment of artificial wetlands for wildlife
20 habitation.”

21 Similarly, DCC 18.113.070(L) requires the county to find:

22 “The wastewater disposal plan includes beneficial use to the

²⁴ Consistently with that conclusion, we do not address petitioners’ arguments that Thornburgh’s groundwater permit G-17036 has expired.

1 maximum extent practicable. Approval of the CMP shall be
2 conditioned on applicant's making application to [Department of
3 Environmental Quality (DEQ)] for a Water Pollution Control
4 Facility (WPCF) permit consistent with such an approved
5 wastewater disposal plan. Approval shall also be conditioned upon
6 applicant's compliance with applicable Oregon Administrative
7 Rules regarding beneficial use of waste water, as determined by
8 DEQ. Applicant shall receive approval of a WPCF permit consistent
9 with this provision prior to applying for approval for its [FMP]
10 under DCC 18.113."

11 The CMP approval is based on a Water System Master Plan and Sewer
12 System Master Plan submitted with the CMP. Those plans describe a water
13 supply system consisting of six wells and four storage reservoirs. Record 11655
14 (CMP approval findings and decision). A separate wastewater system would
15 store treated wastewater in lakes and ponds and use that water to irrigate golf
16 courses. *Id.* The design of the wastewater treatment system was not described
17 because it would depend on the golf course design. *Id.* A separate hydrology
18 report "identifie[d] water needs and sources, including detailed plans for
19 obtaining state water rights for new ground water development and providing
20 required mitigation for potential impacts to the Deschutes River." *Id.* The Sewer
21 System Master Plan described "self-contained, on-site community sewage
22 treatment facilities, developed in concert with phased construction of the overall
23 project" and requiring DEQ approval. *Id.* The Water System Master Plan and
24 Sewer System Master Plan did not change between the CMP and FMP.

25 The water conservation and wastewater disposal plans propose to reuse
26 wastewater to irrigate the planned golf courses. Record 11664-65. Lipscomb

1 argues that the 2022 FWMP plan to not develop one of the golf courses approved
2 in the FMP leaves Thornburgh without sufficient wastewater disposal capacity
3 because the removal of one golf course will decrease the amount of land where
4 wastewater may be applied and, therefore, reduce the amount of wastewater that
5 can be reused as irrigation water. Thornburgh responded below that they can
6 increase wastewater application on the remaining golf courses. Record 1650,
7 6293.²⁵

8 The county found that nothing in the 2022 FWMP implicates the Sewer
9 Master Plan. Record 49. Nevertheless, the county observed that

10 “the Sewer System Master Plan found that only 34.5 acres of land
11 are needed in the south basin to apply treated effluent to. The south
12 basin is the southern half of the Resort that received approval for
13 two golf courses but where only one will be built. Based upon the
14 size of the approved golf course and other open space and
15 landscaped areas already approved by previous decisions, there is
16 more than enough land to apply the effluent contemplated by the
17 Sewer Master Plan. Thornburgh has also provided a technical

²⁵ Thornburgh reasoned:

“We reduced golf course water use by 30% by not building a golf course. We did not further reduce the water use by 30% per course. The 250.5 AF per course only includes golf, not other incidental irrigation which adds another 111 AF. [Cascade Geoengineering Memo August 12, 2022, Page] 11. The extra 111 AF is another 44%, or roughly 99,000 gpd, that portions of which Thornburgh could use treated effluent on which would eliminate the excess of 58,126 cited by E-Pur. Also, the 250.5 AF per golf course is not the maximum amount of water that we can put on the golf course. It is the volume that we will pump from the aquifer.” Record 6293.

1 response to this issue, which is persuasive.” *Id.*

2 Finally, the county reasoned that Thornburgh’s sewer system, including
3 wastewater reuse for irrigation, is subject to DEQ approval, and DEQ “is the
4 correct body to approve construction drawings and requirements.” *Id.*

5 Lipscomb argues that Thornburgh’s solution—to apply additional
6 wastewater to the one golf course—“stands in contrast to the findings relied upon
7 in the water conservation program requiring [Thornburgh] to explicitly *not* over-
8 treat the golf courses with effluent.” Lipscomb’s Intervenor-Petitioner’s Brief 31
9 (emphasis in original). Lipscomb points to the water conservation objectives in
10 Thornburgh’s Water Management and Conservation Program report submitted in
11 support of the CMP, which includes the following objective: “Avoid over-
12 application of water on irrigated areas.” Record 1675-81. We understand
13 Lipscomb to argue that Thornburgh proposes overirrigation of the developed golf
14 course.

15 Lipscomb has not established that Thornburgh’s proposal to apply
16 wastewater that would otherwise have been applied to irrigate the abandoned golf
17 course to the developed golf course and other landscaping and open space is a
18 “substantial change” that materially affects the county’s conclusion for the
19 original CMP approval that the resort will conserve water and that its wastewater
20 disposal plan will result in beneficial use of reclaimed water as required by DCC
21 18.113.050(B)(11)(c) and DCC 18.113.070(L). As the county concluded, and no
22 party disputes, Thornburgh’s application of wastewater for irrigation will require

1 DEQ approval, which will require DEQ review for compliance with
2 administrative rules regarding beneficial use of wastewater. DCC 18.113.070(L)
3 contemplates that process will ensure beneficial use of resort wastewater.²⁶
4 Lipscomb's argument regarding changed application of wastewater provides no
5 basis for remand.

6 Lipscomb's first assignment of error is sustained, in part. Gould's second
7 assignment of error and COLW's first and third assignments of error are denied.

8 **IX. VOID CMP**

9 **(Gould First Assignment of Error)**

10 Gould argues that the county erred in approving amendments to the CMP
11 and FMP because, according to Gould, the CMP is void, has not been initiated,
12 and there is no CMP to amend. Gould's Petition for Review 5-6. We start by
13 summarizing prior appeals to provide context for this argument. The county's
14 decision approving the CMP with conditions became final on April 15, 2008.²⁷
15 Petitioner appealed and the CMP approval was affirmed on appeal. *Gould v.*
16 *Deschutes County*, 57 Or LUBA 403 (2008), *aff'd*, 227 Or App 601, 206 P3d

²⁶ DCC 18.113.070(L) requires an applicant to receive DEQ approval for a WPCF permit prior to applying for FMP approval. Lipscomb does not argue that Thornburgh was required to obtain a WPCF permit as a precondition to the 2022 FWMP approval.

²⁷ The CMP approval deferred determination of compliance with the DCC 18.113.070(D) no net loss standard to the FMP. We and the courts rejected challenges to that deferral determination in the CMP.

1 1106, *rev den*, 347 Or 258 (2009). While those appeals of the CMP were pending,
2 Thornburgh applied for and obtained FMP approval on October 8, 2008.
3 Petitioners appealed and we remanded. *Gould v. Deschutes County*, 59 Or LUBA
4 435 (2009), *aff'd*, 233 Or App 623, 227 P3d 758 (2010).

5 Under DCC 22.36.010(B)(1) “a land use permit is void two years after the
6 discretionary decision becomes final if the use approved in the permit is not
7 initiated within that time period.” Under DCC 22.36.020(A), there are three ways
8 a development action can be “initiated,” and one of those ways is “[w]here
9 construction is not required by the approval, the conditions of a permit or
10 approval have been substantially exercised and any failure to fully comply with
11 the conditions is not the fault of the applicant.” DCC 22.36.020(A)(3). In 2011,
12 the then resort owner obtained a declaratory ruling from the county that the CMP
13 had been timely initiated. Gould appealed that decision, which led to multiple
14 appeals and remands. Ultimately, in 2015, we remanded the county’s decision
15 that the CMP had been timely initiated. *Gould v. Deschutes County*, 72 Or LUBA
16 258 (2015). Thornburgh and the county have taken no further action on that 2015
17 remand. Gould relies on that unresolved remand to argue in this appeal that the
18 CMP is void both for failure to initiate and for failure to resolve the 2015 remand.

19 Gould argued to the county that the CMP is void and, thus, the county
20 lacked jurisdiction to approve the 2022 FWMP amendment. The county rejected
21 that argument and found:

22 “Opponents claim that LUBA held in *Central Land and Cattle*[],

1 *LLC] v. Deschutes County*, 74 Or LUBA 326[, *aff'd*, 283 Or App
2 286, 388 P3d 739 (2016), *rev den*, 361 Or 311 (2017)] land use
3 decision ([2016 FMP]) that the Thornburgh conceptual master plan
4 or ‘CMP’ is void. LUBA held that ‘[a]ll requirements of the CMP
5 approval are now requirements of the County’s FMP approval’ and
6 the FMP ‘has effectively incorporated and displaced the CMP
7 approval’ [2016 FMP, 74 Or LUBA] at 346. LUBA did not find that
8 the CMP is void. Furthermore, as is detailed in that case, the
9 County’s hearings officer *rejected* * * * Gould’s argument in that
10 case that the CMP was void and LUBA affirmed that decision.
11 Therefore, this argument is an impermissible collateral attack on the
12 resolution of this issue by the [2016 FMP]. It is also settled and
13 binding under *Gould v. Deschutes County*, _ Or LUBA _ (LUBA
14 No 2022-013, June 1, 2022), *aff'd*, 322 Or App 11, 23 (2022)
15 (explaining a party may not relitigate issues resolved in previous
16 phases of development), *rev den*, [370] Or [694].

17 “Opponents go on to claim that the CMP is void because
18 Thornburgh failed to seek and the County failed to hold a hearing
19 on remand in *Gould v. Deschutes County*, 72 Or LUBA 258 (2015)
20 within the statutory timeline under ORS 215.435. This issue is an
21 impermissible collateral attack on LUBA’s finding that the CMP has
22 been incorporated into the FMP. Furthermore, the provision of ORS
23 215.435 that terminates an application if a review on remand is not
24 requested within 180 days of the final resolution of judicial review
25 was not effective until after LUBA issued its remand decision. This
26 law may not be applied retroactively because to do so would
27 prejudice the Applicant in that case by voiding that application.
28 Furthermore, the case in question did not find that the CMP is void
29 and that was not its legal effect. LUBA approved the FMP thereafter
30 finding that it incorporated the CMP and that decision is final.

31 “The Board finds that Thornburgh’s CMP is not void.

32 “Moreover, the Board notes that the CMP required creation of a
33 FWMP to meet the No Net Loss Standard at FMP approval stage,
34 not during CMP review. Therefore, the CMP is not implicated or
35 altered by this Application; there is no change to the CMP and
36 findings from the CMP are not altered.” Record 35-36 (emphasis in

1 original).

2 We agree with the county's conclusion that the void CMP issue was raised
3 and resolved in our decision in *2016 FMP*, where we explained:

4 "For purposes of this appeal we will assume without deciding that
5 the CMP approval has become 'void' under DCC 22.36.010(B)(1).
6 However, even if we assume the County's CMP approval became
7 void on November 18, 2011, we conclude below in addressing the
8 third cross-assignment of error that the FMP remand proceedings
9 were initiated by Thornburgh Resort on August 15, 2011, which was
10 before the CMP became void. The county's first FMP approval
11 decision found, with only two exceptions, that the FMP fully
12 complies with the CMP. Those two exceptions have to do with the
13 no net loss/degradation standard that normally applies at the time of
14 CMP approval. The county's decision to defer its finding on the
15 DCC 18.113.070(D) no net loss/degradation standard until FMP
16 approval was affirmed in *Gould v. Deschutes County*, 57 Or LUBA
17 403 (2008), *aff'd*, 227 Or App 601, 206 P3d 1106 (2009).

18 "As Gould correctly notes, the CMP potentially remains a relevant
19 source of FMP approval considerations because at least some of the
20 CMP conditions of approval effectively cannot be performed until
21 after FMP approval. But those conditions of approval were carried
22 forward in the county's first FMP approval decision and remain part
23 of the current FMP approval decision. All requirements of the CMP
24 approval are now requirements of the county's FMP approval. The
25 FMP approval has effectively incorporated and displaced the CMP
26 approval. In these unusual circumstances, where the only remaining
27 questions on appeal concern two issues that were expressly deferred
28 to the FMP decision, we conclude it was not error for the county to
29 proceed to determine on remand whether the errors identified by
30 LUBA in the FMP could be corrected and the FMP approved for a
31 second time, even though the CMP approval has become void."
32 *2016 FMP*, 74 Or LUBA at 346 (footnote omitted).

33 The FMP approval has effectively incorporated and displaced the CMP
34 approval. Thus, as we have previously concluded, even if we assume that the

1 CMP is void, the FMP is the operative decision. CMP provisions remain as
2 enforceable criteria in subsequent decisions only to the extent that they are carried
3 forward in the FMP. Gould seeks to relitigate an issue that has been decided in
4 prior proceedings in this same dispute. *See Beck v. Tillamook*, 313 Or 148, 153,
5 831 P2d 678 (1992) (a party may not relitigate issues that have been resolved on
6 review of previous phases of the same land use litigation); *see also Gould*, 322
7 Or App at 23 (*Beck* law of the case doctrine includes later phases of the same
8 land use litigation). Even if Gould’s argument was not precluded by the law of
9 the case, we would reach the same conclusion for the same reasons quoted
10 directly above. That is, even if we assume that the CMP is void, the FMP is the
11 operative decision. The 2022 FWMP amends the FMP. The county correctly
12 concluded that it could approve the 2022 FWMP amendment, which the county
13 correctly observed is an amendment to the FMP.

14 Gould’s first assignment of error is denied.

15 **X. CMP CONDITION 28**

16 **(COLW Second Assignment of Error; Lipscomb Second Assignment of**
17 **Error)**

18 COLW and Lipscomb argue that the county misconstrued CMP Condition
19 28 and DCC 22.20.015(A) and contend that CMP Condition 28 requires ODFW
20 and Bureau of Land Management (BLM) agreement with the 2022 FWMP.

21 CMP Condition 28 provides:

22 “[Thornburgh] shall abide at all times with the [Memorandum of

1 Understanding (MOU)] with BLM, dated September 28, 2005,
2 regarding mitigation of impacts on surrounding federal lands, to
3 include wildlife mitigation and long-range trail planning and
4 construction of a public trail system. The mitigation plan adopted by
5 [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM
6 shall be adopted and implemented throughout the life of the resort.”
7 Record 11728.

8 DCC 22.20.015(A) provides that, if any property is in violation of the
9 conditions of approval of any previous land use decisions, then the county must
10 not make any other land use decision. We understand petitioners to argue that the
11 2022 FWMP violates CMP Condition 28 and so the county erred in approving
12 the 2022 FWMP.

13 The county found that, after a successful challenge on LUBA appeal and
14 judicial review, CMP Condition 28 was invalidated because it improperly
15 removed the right to public participation in the county’s decision on whether
16 Thornburgh’s mitigation plan satisfied the no net loss standard. The county
17 replaced CMP Condition 28 with CMP Condition 37, which provides:

18 “[Thornburgh] shall demonstrate compliance with DCC
19 18.113.070(D) by submitting a wildlife mitigation plan to the
20 County as part of its application for [FMP] approval. The County
21 shall consider the wildlife mitigation plan at a public hearing with
22 the same participatory rights as those allowed in the CMP approval
23 hearing.” Record 42.

24 Thornburgh responds, and we agree, that CMP Condition 28 is no longer
25 operative because it was invalidated and replaced by CMP Condition 37. Thus,
26 these assignments of error that rely upon CMP Condition 28 provide no basis for
27 remand and are denied.

1 COLW's second assignment of error and Lipscomb's second assignment
2 of error are denied.

3 **XI. INTERNAL INCONSISTENCIES**

4 **(Gould Third Assignment of Error)**

5 Gould argues that the decision is internally inconsistent and must be
6 reversed or remanded because the findings are inadequate. Gould's arguments
7 under this assignment of error are presented as a table with three columns for
8 "Findings," "Inconsistency," and "Additional Argument." This table ranges over
9 nine pages. To a large extent, the same findings are challenged in other arguments
10 presented by petitioners and intervenors-petitioners.

11 Thornburgh responds, and we agree, that Gould's third assignment of error
12 is scattershot and undeveloped, and we reject it for that reason. *Deschutes*
13 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) ("It is not our
14 function to supply petitioner with legal theories or to make petitioner's case for
15 petitioner."); *see also Sommer v. Josephine County*, 54 Or LUBA 507, *aff'd*, 215
16 Or App 501, 170 P3d 8 (2007) (explaining that a responding party is not obliged
17 to respond to severely disjointed arguments presented in the assignment of error).

18 Gould's third assignment of error is denied.

19 **XII. CONCLUSION AND DISPOSITION**

20 We conclude that the 2022 FWMP is a substantial change with respect to
21 the required economic analysis and remand for further findings addressing DCC
22 18.113.070(C)(3) and (4). ___ Or LUBA at ___ (slip op at 79-80). We also

1 conclude that the county's findings that the no net loss standard may be satisfied
2 by submittal to OWRD of an application for assignment, transfer, or cancellation
3 of a water right is not supported by adequate findings or substantial evidence.
4 ____ Or LUBA at ____ (slip op at 64-65).
5 The county's decision is remanded.