

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

ANNUNZIATA GOULD,
Petitioner,

and

THE CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

KAMERON DELASHMUTT,
CENTRAL LAND AND CATTLE COMPANY, LLC, and
PINNACLE UTILITIES, LLC,
Intervenors-Respondents.

LUBA No. 2025-047

THOMAS BISHOP,
Petitioner,

and

THE CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON,
Intervenor-Petitioner,

vs.

1 DESCHUTES COUNTY,
2 *Respondent,*

3
4 and

5
6 KAMERON DELASHMUTT,
7 CENTRAL LAND AND CATTLE COMPANY, LLC, and
8 PINNACLE UTILITIES, LLC,
9 *Intervenors-Respondents.*

10
11 LUBA No. 2025-048

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13 PAUL J. LIPSCOMB,
14 *Petitioner,*

15
16 and

17
18 THE CONFEDERATED TRIBES OF THE
19 WARM SPRINGS RESERVATION OF OREGON,
20 *Intervenor-Petitioner,*

21
22 vs.

23
24 DESCHUTES COUNTY,
25 *Respondent,*

26
27 and

28
29 KAMERON DELASHMUTT,
30 CENTRAL LAND AND CATTLE COMPANY, LLC, and
31 PINNACLE UTILITIES, LLC,
32 *Intervenors-Respondents.*

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34 LUBA No. 2025-049

35
36 FINAL OPINION
37 AND ORDER
38

1 Appeal from Deschutes County.

2
3 Jennifer M. Bragar filed the petitions for review and reply briefs and
4 argued on behalf of petitioners. Also on the briefs were Jay M. Harris and Tomasi
5 Bragar Dubay.

6
7 Josh Newton filed the intervenor-petitioner's brief and argued on behalf of
8 intervenor-petitioner. Also on the brief were Ellen Grover and Best Best &
9 Krieger LLP.

10
11 Stephanie Marshall filed the respondent's brief and argued on behalf of
12 respondent.

13
14 J. Kenneth Katzaroff filed the intervenor-respondent's briefs and argued
15 on behalf of intervenors-respondents. Also on the brief was Schawbe,
16 Williamson & Wyatt, P.C.

17
18 ZAMUDIO, Board Member; BASSHAM, Board Member; WILSON,
19 Board Chair, participated in the decision.

20
21 BASSHAM, Board Member, concurring.

22
23 REMANDED 10/09/2026

24
25 You are entitled to judicial review of this Order. Judicial review is
26 governed by the provisions of ORS 197.850.

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

The challenged decision is the county's decision after remand from *Confederated Tribes of the Warm Springs Reservation v. Deschutes County*, LUBA Nos 2023-038/039/041 (Feb 26, 2025) (*CTWSR III*). We set out the underlying facts in our prior decision and restate them here only as necessary to our analysis and disposition. *Confederated Tribes of the Warm Springs v. Deschutes County*, LUBA Nos 2023-038/039/041 (Jan 12, 2024) (*CTWSR I*), *rev'd and rem'd*, 332 Or App 361, 550 P3d 443 (*CTWSR II*), *rev den*, 373 Or 121 (2024).

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

1 **III. BISHOP FIRST ASSIGNMENT OF ERROR**

2 Petitioner Bishop argues that the board erred by allowing an *ex parte* letter
3 to influence the board’s decision on the scope of the evidentiary proceeding on
4 remand, while denying the public an opportunity to rebut the substance of the
5 letter prior to determining the scope of the remand. Bishop also argues that that
6 the board erred by allowing the actual bias of two county commissioners to
7 improperly influence the decision to confine the remand proceeding.

8 **A. *Ex Parte* Letter**

9 A litigant in a land use matter is entitled to a “tribunal which is impartial
10 in the matter—*i.e.*, having had no prehearing or *ex parte* contacts concerning the
11 question at issue.” *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d
12 23 (1973); *Redside Restoration v. Deschutes County*, 344 Or App 383, 394, 581
13 P3d 501 (2025). Shortly after *Fasano*, the legislature enacted ORS 215.422(3) to
14 address when an *ex parte* contact invalidates a land use decision. ORS 215.422(3)
15 provides:

16 “No decision or action of a planning commission or county
17 governing body shall be invalid due to *ex parte* contact or bias
18 resulting from *ex parte* contact with a member of the decision-
19 making body, if the member of the decision-making body receiving
20 the contact:

21 “(a) Places on the record the substance of any written or oral *ex*
22 *parte* communications concerning the decision or action; and

23 “(b) Has a public announcement of the content of the
24 communication and of the parties’ right to rebut the substance
25 of the communication made at the first hearing following the

1 communication where action will be considered or taken on
2 the subject to which the communication related.”

3 The legislature did not define “*ex parte* contact” or “*ex parte*
4 communication.” We have defined *ex parte* communication as follows: “An *ex*
5 *parte* communication is a communication between a party and a decision-maker,
6 made outside the hearing process, concerning a decision or action before the
7 decision-maker.” *Oregon Shores Conservation Coalition v. Coos County*, 81 Or
8 LUBA 839, 846 (2020). Additionally, in applying *Fasano*, LUBA has required a
9 showing that the *ex parte* contacts were relevant to the issues before the local
10 government body. *See Link v. City of Florence*, 58 Or LUBA 348, 353 (2009)
11 (“[I]n order to provide a basis for remand based on *ex parte* contacts, there must
12 be some indication that the communication had something to do with the factual
13 determinations or legal standards that govern approval or denial of the
14 application.”).

15 To obtain a remedy on a claim of improper *ex parte* communication, a
16 petitioner must establish that an *ex parte* contact or communication occurred and
17 that the local government official who received the *ex parte* contact or
18 communication did not disclose or inadequately disclosed it. Disclosure requires
19 that the substance of the communication (1) be placed in the record and (2)
20 publicly announced (3) at the first hearing following the communication where
21 action will be considered or taken on the subject to which the communication
22 related. The local government must also (4) publicly announce the parties’ right
23 to rebut the substance of the communication and (5) provide the opportunity to

1 rebut the substance of the communication at the first hearing following the
2 communication where action will be considered or taken on the subject to which
3 the communication related. ORS 215.422(3). The statute “prohibits undisclosed
4 *ex parte* communications, whether or not those communications in fact influence
5 the [local government’s] original decision.” *Opp v. City of Portland*, 38 Or
6 LUBA 251, 264-65, *aff’d*, 171 Or App 417, 16 P3d 520 (2000), *rev den*, 332 Or
7 239 (2001). The remedy for violating ORS 215.422(3), or the city counterpart
8 ORS 227.180(3), is remand that allows interested persons the opportunity to
9 prepare and present evidence and argument in response to the substance of the *ex*
10 *parte* contact. *Housing Authority of Jackson County v. City of Medford*, 65 Or
11 LUBA 295, 312 (2012), *appeal dismissed*, 265 Or App 648, 337 P3d 146 (2014);
12 *see also Opp*, 171 Or App at 423 (the remedy for nondisclosure of an *ex parte*
13 communication “should be tailored to rectify the evil at which it is directed, in
14 the light of the particular circumstances of the case”).

15 On April 7, 2025, Thornburgh requested that the county commence
16 proceedings on remand following *CTWSR III*. Remand Record 2,685.² On April
17 9, 2025, the county issued a notice of public hearing for May 7, 2025, and
18 described the purpose of the hearing and the issues on remand as follows:

19 “Pursuant to the LUBA Final Opinions and Orders, the decision was
20 remanded back to the County to address the following issues:

² We refer to the record in these appeals as the Remand Record. We refer to the record in *CTWSR I*, LUBA Nos 2023-038/039/041 as the Initial Record.

1 “1. Additional findings to explain why the submittal of the 2022
2 Fish and Wildlife Management Plan (FWMP) to the Oregon
3 Water Resources Department [(OWRD)] is sufficient to
4 satisfy the ‘no net loss’ standard with respect to groundwater
5 sources for fish habitat mitigation.

6 “2. That the FWMP was a substantial change with respect to the
7 required economic analysis and LUBA required further
8 findings addressing [Deschutes County Code (DCC)]
9 18.113.070(C)(3) and (4) and that the County will either need
10 to consider those changes or explain why that consideration
11 is not required.

12 “3. Whether the 2022 Fish and Wildlife Management Plan
13 violates the Treaty with the Tribes of Middle Oregon, dated
14 June 25, 1855.” Remand Record 2,674-75.³

15 The notice of public hearing provided: “If you wish to provide testimony during
16 the public hearing, please contact the staff planner by 4 pm on May 6, 2025.”
17 Remand Record 2,676. The notice listed the contact information for an individual
18 staff planner, Ripper, and advised that email submittals be directed to Ripper.
19 Remand Record 2,675-77.

³ What we and the parties refer to as the “no net loss standard” is DCC 18.113.070(D), which provides:

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

“* * * * *

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

1 On April 10, 2025, intervenor-petitioner the Confederated Tribes of the
2 Warm Springs Reservation (the Tribe), emailed Ripper with a message for the
3 board of commissioners requesting that the board reset the May 7, 2025 hearing
4 date to the first week of June 2025. Remand Record 2,672. The Tribe quoted the
5 following passage from the Court of Appeals decision in *CTWSR II*:

6 “[W]e highlight that remand will allow an opportunity for the Tribe
7 to present evidence of indigenous expertise and knowledge for the
8 board’s consideration that the Tribe asserts it did not have adequate
9 time to present due to its late involvement in the proceedings.” *Id.*
10 (quoting 332 Or App at 387).

11 The Tribe asked the board to “modify its hearing time limits and to allow 30
12 minutes for testimony to be provided by the Tribe consistent with the court’s clear
13 direction” and “re-open the record to receive the evidence that the Tribe is
14 allowed to present on remand.” Remand Record 2,673.

15 On April 11, 2025, intervenor-respondent DeLashmutt emailed the three
16 county commissioners a letter in response to the Tribe’s request, requesting that
17 the county reopen the record only with respect to the economic analysis. Remand
18 Record 2,666. DeLashmutt’s letter recited the history of these appeals and the
19 long history of opposition and appeals concerning the Thornburgh Resort.
20 DeLashmutt also asserted facts and opinions regarding the Tribe’s participation
21 in these appeals, the Tribe’s interest, and Thornburgh’s efforts to understand and
22 address the Tribe’s concerns. DeLashmutt opined on the import of the Court of
23 Appeals’ oral argument colloquy. DeLashmutt’s letter concluded, “I urge you to

1 deny the Tribes request for additional time and I beg you to not open the record
2 on the Tribes issue. Both are yet another attempt to further delay Thornburgh.
3 Please say no to both.” Remand Record 2,670.

4 On April 15, 2025, county staff uploaded DeLashmutt’s letter to the county
5 website and petitioners discovered it that afternoon. Bishop Petition for Review
6 5 (citing Remand Record 2,263). On April 16, 2025, the board met to consider
7 whether to reopen the record on remand for all three remand issues or reopen the
8 record on remand only for the economic analysis issue. Remand Record 2,650,
9 2,644. Ripper and the county planning manager submitted a memorandum to the
10 board requesting them to issue Order No. 2025-014. That memorandum explains
11 that Deschutes County Code (DCC) 22.34.040, Proceedings on Remand, grants
12 the board discretion to reopen the record in instances in which it deems to be
13 appropriate and to allow parties to raise new, unresolved issues that relate to new
14 evidence directed toward the issue on remand.⁴ Remand Record 2,645. The

⁴ DCC 22.34.040 governs the scope of the county’s remand proceeding and provides:

“A. On remand, the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, the Hearings Body shall have the discretion to reopen the record in instances in which it deems it to be appropriate.

“B. At the Hearings Body’s discretion, a remanded application for a land use permit may be modified to address issues involved in the remand or withdrawal to the extent that such modifications would not substantially alter the proposal and would not have a

1 memorandum explains that staff received a request from Thornburgh to reopen
2 the record only on the topic of the economic analysis and not to reopen the record
3 to receive new evidence on the OWRD submittal condition or the Treaty. Staff
4 requested that the board decide how to proceed by selecting between two versions
5 of Order No. 2025-014—limiting the record to one remand topic or reopening
6 the record on all three remand topics. Remand Record 2,647. The board selected
7 the former. Remand Record 2,637-38.

8 On April 17, 2025, the county issued a revised notice of public hearing for
9 the May 7, 2025 public hearing on remand, including reference to Order No.
10 2025-14:

11 “Board Order No. 2025-014 specifies that the record will be
12 reopened for Issue No. 2 – economic analysis. Parties may submit
13 new evidence related to the economic analysis. No new evidence
14 may be submitted on Issue Nos. 1 and 3 – only arguments.” Remand
15 Record 2,633.

16 On May 7, 2025, at the public hearing, Bishop’s attorney objected that the
17 board had restricted reopening the record on remand. Video Recording,

significantly greater impact on surrounding neighbors. Any greater
modification would require a new application.

“C. If additional testimony is required to comply with the remand,
parties may raise new, unresolved issues that relate to new evidence
directed toward the issue on remand. Other issues that were resolved
by the LUBA appeal or that were not appealed shall be deemed to
be waived and may not be reopened.”

1 Deschutes County Board of Commissioners Meeting, May 7, 2025, at 1:28:20;
2 Remand Record 2,265-66.

3 Bishop argues that the DeLashmutt letter is *ex parte* communication
4 because DeLashmutt is a party who emailed the board outside the hearing process
5 concerning the scope of the reopened record for the May 7, 2025 public hearing
6 on remand. Bishop argues that, while the DeLashmutt letter was placed in the
7 record prior to the April 16, 2025 board meeting, that disclosure was inadequate
8 because it was posted on the county's website late on April 15, 2025. Bishop
9 argues that the board violated ORS 215.422(3) by failing to publicly announce
10 the DeLashmutt letter at the April 16, 2025 board meeting. Finally, Bishop argues
11 that the board failed to provide Bishop the opportunity to rebut the substance of
12 the DeLashmutt letter at the April 16, 2025 board meeting, which was the first
13 meeting following the DeLashmutt letter where the board considered and decided
14 how to proceed on remand by selecting the version of Order No. 2025-014 that
15 reopened the record only on the economic analysis. Bishop argues that their later
16 objection to the narrow scope of the remand record at the May 7, 2025 public
17 hearing—after the board adopted Order No. 2025-014 deciding the scope of the
18 remand record—did not remedy the procedural error in violating ORS
19 215.422(3).

20 The county responds, variously, that the DeLashmutt letter is not an *ex*
21 *parte* communication and, even if it was, it “was disclosed in advance of any
22 public meeting and all parties had a meaningful opportunity to challenge or rebut

1 the alleged violation—and in fact did so.” Respondent’s Brief 1. The county
2 argues:

3 “The [board] had discretion to decide whether to reopen the record
4 at all, and if so, to limit any reopening to those issues rather than
5 permit a wholesale reopening of the entire proceeding. DCC
6 22.34.040.A. It exercised its discretion appropriately after
7 considering letters submitted by both the Tribe and [Thornburgh]
8 and discussing the matter in a noticed, open public work session
9 meeting, noticed via posting as per the County’s standard
10 procedures.” Respondent’s Brief 8.

11 The county asserts that Bishop has not established any prejudice to its substantial
12 rights. The county argues that the purpose of ORS 215.422(3)(b) is “to protect
13 the substantive rights of the parties to know the evidence that the deciding body
14 may consider and to present and respond to evidence[.]” Respondent’s Brief 17
15 (quoting *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 253,
16 834 P2d 523 (1992)) (respondent’s emphasis omitted). The county argues that
17 the DeLashmutt letter contained no evidence or substantive arguments related to
18 the application criteria and so the DeLashmutt letter could not constitute an *ex*
19 *parte* contact.

20 We agree with Bishop that the DeLashmutt letter is *ex parte*
21 communication because DeLashmutt is a party who emailed the board outside
22 the hearing process concerning the scope of the reopened record for the May 7,
23 2025 public hearing on remand. The fact that the Tribe also submitted a letter to
24 Ripper concerning the scope of the reopen record does not change the *ex parte*
25 character of the DeLashmutt letter. DeLashmutt’s email was outside the hearing

1 process because DeLashmutt directly emailed the individual board members,
2 instead of submitting the letter to the assigned planning staff, Ripper, as directed
3 in the initial notice of public hearing. The DeLashmutt letter concerned the scope
4 of the remand record and evidentiary proceeding. The county cites nothing that
5 limits the subject of *ex parte* communication to substantive application criteria.
6 Procedural decisions in a quasi-judicial proceeding can be equally or more
7 critical to the outcome than decisions on substantive criteria. Here, the procedural
8 matter defined the issues and evidence that the county permitted to be litigated
9 by the parties on remand, which are directly related to the application criteria.
10 DeLashmutt's letter concerned "legal standards that govern approval or denial of
11 the application." *Link*, 58 Or LUBA at 353.

12 Bishop is not required to establish prejudice from a violation of ORS
13 215.422(3)(b). Violation of ORS 215.422 is not merely procedural and can only
14 be cured by remand. *Horizon Construction*, 114 Or App at 252-54; *Wal-Mart*
15 *Stores, Inc. v. City of Hood River*, 67 Or LUBA 332, 342 (2013). Bishop was not
16 required to demonstrate whether and how the board's decision to limit reopening
17 the record might have differed had the county disclosed the DeLashmutt letter
18 and provided Bishop an opportunity to rebut it.

19 The dispositive issue is whether the board provided Bishop the opportunity
20 to rebut the substance of the DeLashmutt letter at the April 16, 2025 board
21 meeting. The parties dispute the character of the April 16, 2025 board meeting.
22 Bishop argues that the April 16, 2025 board meeting was "unnoticed" and

1 “closed” and that Bishop had no opportunity to respond to the DeLashmutt letter.
2 Bishop Petition for Review 5. The county asserts that the April 16, 2025 board
3 meeting was “an open meeting” work session. Respondent’s Brief 4.

4 While the record supports the county’s assertion that the April 16, 2025
5 meeting was open to the public, the county does not point to any county notice
6 of that meeting provided to parties entitled to notice in the underlying remand
7 proceeding. Remand Record 2,652 (April 16, 2025 Board of County
8 Commissioners Meeting Agenda). Even if the county followed its normal board
9 work session public announcement procedure, the county has not demonstrated
10 that it provided Bishop notice and an opportunity to be heard on the scope of the
11 remand record. As explained above, the local government must publicly
12 announce *the parties’* right to rebut the substance of the communication.
13 Discussing the substance of the DeLashmutt letter at a board work session that is
14 open to the public falls short of announcing to Bishop a right to rebut the
15 substance of the DeLashmutt letter and providing Bishop the opportunity to rebut
16 the substance of the letter prior to taking action on the subject to which the
17 communication related by adopting Order No. 2025-014 deciding the scope of
18 the remand record.

19 The county emphasizes that, at the May 7, 2025 public hearing, Bishop
20 and others objected that the board had restricted reopening the record. The county
21 argues that opportunity to be heard satisfies ORS 215.422(3). That opportunity
22 to argue against the substance of the DeLashmutt letter came after the board had

1 already acted on the scope of the remand record. The county is required to provide
2 the parties an opportunity to rebut the substance of the *ex parte* communication
3 “at the first hearing following the communication where action will be considered
4 or taken on the subject to which the communication related.” ORS 215.422(3).
5 The April 16, 2025 work session was the first meeting where the board
6 considered and acted on the scope of the remand record. That issue was settled
7 and not reopened at the May 7, 2025 public hearing. The after-the-fact
8 opportunity for Bishop to object to the board’s decision on the scope of the
9 remand does not satisfy ORS 215.422(3).

10 We agree with Bishop that the county violated ORS 215.422(3). The
11 remedy for violating ORS 215.422(3) is remand that allows all interested persons
12 the opportunity to prepare and present evidence and argument in response to the
13 substance of the *ex parte* contact. *Housing Authority of Jackson County*, 65 Or
14 LUBA 295. The first part of Bishop’s first assignment of error is sustained.

15 Our sustaining this procedural assignment of error requires remand for the
16 county to provide a new hearing on the scope of the remand. Such a hearing could
17 result in a broader scope of remand, including additional evidence and argument
18 that could change the county’s findings and decision and make our resolution of
19 other assignments of error in these appeals extraneous or advisory. However,
20 given the totality of the long and complex challenged decision, and the longer
21 and more complex history of opposition to this resort development, we deem it
22 to be more consistent with the statutory policy to reach finality in land use

1 decisions and with sound principles of judicial review to resolve the remaining
2 assignments of error. ORS 197.805; ORS 197.835(11)(a).

3 **B. Bias**

4 Bishop argues that commissioners Adair and DeBone were actually biased
5 in favor of Thornburgh because they had prejudged their decisions to restrict the
6 remand record and approve the application. As explained below, we conclude
7 that Bishop has not established disqualifying prejudgment bias and the county
8 did not err by Adair and DeBone participating in the decisions on the scope of
9 the remand record and the merits of the application.

10 An interested party in a quasi-judicial land use proceeding has a substantial
11 right to an impartial decision maker. *Fasano*, 264 Or at 588. “An allegation of
12 decision maker bias, accompanied by evidence of that bias, may be the basis of a
13 remand under ORS 197.835(9)(a)(B).” *Halvorson-Mason Corp. v. City of Depoe*
14 *Bay*, 39 Or LUBA 702, 710 (2001). The bar for bias disqualification is high, as
15 the Court of Appeals explained in *Columbia Riverkeeper v. Clatsop County*:

16 “An elected local official is not expected to have no appearance of
17 having views on matters of community interest when a decision on
18 the matter is to be made by an adjudicatory procedure.

19 “* * * [T]he substantive standard for actual bias is that the decision
20 maker has so prejudged the particular matter as to be incapable of
21 determining its merits on the basis of the evidence and arguments
22 presented.” 267 Or App 578, 602, 341 P3d 790 (2014).

23 In order to prevail on a bias challenge, the petitioner must demonstrate that
24 the challenged decision maker was actually biased, as opposed to apparently

1 biased. “[A]ctual bias can be established, where prejudgment has been alleged,
2 by explicit statements, pledges, or commitments that the elected local official has
3 prejudged the specific matter before the tribunal.” *Columbia Riverkeeper*, 267 Or
4 App at 609-10.

5 On May 7, 2025, at the public hearing, Bishop’s attorney asserted that
6 commissioners DeBone and Adair were biased and should recuse themselves and
7 not participate in the decision. Video Recording, Deschutes County Board of
8 Commissioners Meeting, May 7, 2025, at 1:28:20. Both commissioners
9 determined that they could proceed without bias.

10 On appeal, Bishop argues that commissioners DeBone’s and Adair’s
11 statements at the April 16, 2025 work session on the scope of the remand record
12 establish actual bias. DeBone stated that, “[I]t’s a shame we’re seeing an
13 applicant getting bounced around the appeal process for 20 years. And, I worry
14 that this is kind of that classic moving the goalpost scenario.” Video Recording,
15 Deschutes County Board of Commissioners Meeting, April 16, 2025, at 17:01-
16 17:13. Adair stated, “It’s been, what, over 20 years? When did they start, in 2005
17 something like that? Yeah, I don’t think any project in this county has ever been
18 so scrutinized, and here we are sitting in 2025.” *Id.* at 17:46-18:01. DeBone
19 described the Tribe as “stepping in at the last moment.” *Id.* at 17:23-17:27.
20 Bishop argues that DeBone’s and Adair’s statements demonstrate actual bias in
21 prejudgment as to the scope of the record on remand and that prejudgment tainted

1 the rest of the proceeding so that DeBone and Adair should not have participated
2 in the decision on the merits.

3 The county responds, and we agree, the commissioners' statements quoted
4 by Bishop do not clear the very high bar for establishing actual prejudgment bias.
5 Those statements demonstrate sympathy for Thornburgh given the long history
6 of opposition to the resort development. However, they do not establish that the
7 two commissioners had so prejudged the matter as to be incapable of determining
8 its merits on the basis of the evidence and arguments presented. The county did
9 not err by allowing commissioners Adair and DeBone to participate in the
10 decision to restrict the remand record and the deliberation and decision on the
11 merits of the application.

12 Bishop's first assignment of error is sustained in part and denied in part.

13 **IV. BISHOP SECOND ASSIGNMENT OF ERROR**

14 The county identified three issues on remand: (1) why submittal of
15 applications to OWRD is sufficient to satisfy the no net loss standard with respect
16 to groundwater sources for fish habitat mitigation; (2) the economic analysis
17 required by DCC 18.113.070(C); and (3) whether the 2022 FWMP violates the
18 Treaty. The county reopened the record on remand only for evidence regarding
19 the economic analysis. The county did not reopen the record for new evidence on
20 the no net loss standard. Bishop argues that the county committed prejudicial
21 procedural error by accepting new evidence from Thornburgh on issues that the
22 county ordered closed to new evidence and by accepting new evidence in

1 Thornburgh’s rebuttal without reopening the record to allow other parties an
2 opportunity to respond. We will remand a decision when the local government
3 “[f]ailed to follow the procedures applicable to the matter before it in a manner
4 that prejudiced the substantial rights of the petitioner.” ORS 197.835(9)(a)(B).

5 **A. FWMP and No Net Loss**

6 On remand, Thornburgh submitted an updated FWMP, which we refer to
7 as the 2025 FWMP. Remand Record 2,009 (FWMP revised May 5, 2025). Bishop
8 argues that the new 2025 FWMP compliance provisions and water rights
9 reporting table are new evidence that the county improperly accepted into the
10 record to demonstrate satisfaction of the no net loss standard. We describe the
11 2022 FWMP at length as context for our conclusion that the 2025 FWMP does
12 not contain or constitute new evidence.

13 **1. Water Rights Background**

14 In *CTWSR I*, we explained the 2022 FWMP water rights. As explained
15 below, the resort’s water rights circumstances have not materially changed, and
16 Thornburgh relies on the same water rights and water rights processes in the 2025
17 FWMP. The resort Final Master Plan (FMP) provides for phased development
18 and compliance with a fish and wildlife habitat mitigation plan (FWMP). The
19 2008 FWMP relied on mitigation water from certain sources to ensure a quantity
20 and quality of water that would result in predicted benefits to fish habitat,
21 particularly cold water thermal refugia. The 2008 FWMP was supported by
22 hydrogeologist, hydrologist, and fish biologist reports and opinions. The

1 technical information supporting the mitigation plan was greatly disputed before
2 the county and challenged on appeal. Ultimately, the 2008 FWMP was decided
3 to satisfy the no net loss standard. *See Gould v. Deschutes County*, 233 Or App
4 623, 636-43, 227 P3d 758 (2010) (*Gould FMP*) (describing the 2008 FWMP
5 litigation).

6 In 2022, Thornburgh sought county approval to modify the resort FMP by
7 amending the 2008 FWMP. Thornburgh proposed to reduce the resort's annual
8 groundwater pumping from 2,129 to 1,460 acre-feet, an approximately 30 percent
9 pumping reduction, and an approximately 35 percent reduction in water
10 consumption, from 1,356 to 882 acre-feet, in part, by not developing one of the
11 approved resort golf courses.⁵ As explained in greater detail in decisions
12 involving the 2008 FWMP, state water law, administered by OWRD, requires
13 Thornburgh to mitigate the impacts from its groundwater withdrawal to
14 hydraulically connected surface waters in the Deschutes River Basin. *See Gould*
15 *v. Deschutes County*, 54 Or LUBA 205, 264-65, *rev'd and rem'd on other*

⁵ We have previously explained that water pumping and water consumption are distinct. "Consumptive use" means the amount of groundwater appropriation that will not return to surface water flows. *Gould v. Deschutes County*, 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 grounds, 216 Or App 150, 171 P3d 1017 (2007); *Gould v. Deschutes County*, 59
2 Or LUBA 435, 554-55 (2009), *aff'd*, 233 Or App 623, 227 P3d 758 (2010). We
3 refer to that mitigation as “OWRD mitigation,” which is governed by the OWRD
4 Deschutes Basin mitigation rules at OAR 690-505-0610. OWRD mitigation is
5 related to but distinct from the fish mitigation plan that is required to satisfy the
6 county’s no net loss standard. The same water that is used to satisfy OWRD
7 mitigation requirements may also supply fish habitat benefits, which we refer to
8 as “fish mitigation.” However, a demonstration of compliance with the OWRD
9 mitigation rules is not sufficient to satisfy the no net loss standard because
10 OWRD mitigation requirements relate only to the *quantity* of water in the system
11 and not the *quality* of water, including cold water temperature, which is critical
12 for fish habitat. *Gould v. Deschutes County*, LUBA No 2021-112 (June 9, 2022),
13 *aff'd*, 322 Or App 571 (2022) (nonprecedential memorandum opinion), *rev den*,
14 370 Or 827 (2023).

15 The 2008 FWMP anticipated impacts to fish and wildlife resources were
16 based on the resort’s proposed groundwater pumping under OWRD water right
17 Permit G-17036 impacting multiple seeps, springs, creeks and rivers in nearby
18 areas all hydrologically connected in the Upper Deschutes Groundwater Basin
19 and the aquifer within the basin. To mitigate those impacts on aquatic habitat
20 water quantity and quality, the 2008 FWMP identified specific existing surface
21 water rights that Thornburgh could convert to OWRD-approved instream surface

1 water rights to ensure that adequate quantity and quality of water was available
2 to support fish and aquatic habitat for the life of the resort.

3 The OWRD mitigation obligation for Permit G-17036 is 1,356 acre-feet.
4 Permit G-17036 has expired and OWRD has denied Thornburgh's requested
5 extension.⁶ Thornburgh has applied for a replacement groundwater permit, G-
6 19139, using the same consumptive use rates for Permit G-17036, and so
7 requiring the same OWRD mitigation water. Under OWRD rules, mitigation for
8 new groundwater permits must be provided in advance for the full amount of
9 water to be pumped under the new permit for each resort development phase.
10 Remand Record 76.

11 In 2022, Thornburgh proposed certain water rights to provide for resort
12 water use, OWRD mitigation, and fish mitigation. Thornburgh proposed to use
13 the following water rights and mitigation measures:

- 14 (a) LeBeau, Surface Water Certificate 95746;
- 15 (b) Big Falls Ranch, Surface Water Certificates 96190, 96192;
- 16 (c) Big Falls Ranch, Ground Water Certificate 87558;
- 17 (d) Tree Farm, Ground Water Certificate 94948;
- 18 (e) Dutch Pacific, Ground Water Certificate 89259;

⁶ At the time of the county's decision challenged in this appeal, Gould and Thornburgh were involved in a contested case hearing on the status of Permit G-17036. Remand Record 75.

1 (f) Deschutes Resource Conservancy Temporary Mitigation Credits;
2 and

3 (g) Three Sisters Irrigation District Mitigation Water.

4 Remand Record 61-63; Initial Record 71-73, 13,565. Thornburgh proposed using
5 those water rights for (1) pumping and consumptive use at the resort, (2)
6 mitigation water to satisfy OWRD mitigation rules, and (3) mitigation water for
7 fish habitat to satisfy the no net loss standard. The 2022 FWMP proposed three
8 different water rights legal processes: (1) transferring the water rights to the resort
9 property so that the resort can withdraw those quantities of water as groundwater
10 from the resort wells; (2) transferring the water rights to instream water rights;
11 and (3) cancelling the water right in-lieu of mitigation. Initial Record 29.

12 The 2022 FWMP explained the planned use of the above water rights and
13 mitigation:

14 “For the purposes of this FWMP (‘2022 FWMP’) and compliance
15 with DCC 18.113.070(D), it is assumed the certificated water rights
16 in #a-d below will be transferred to and used at the Thornburgh
17 property. Certificate 89259 (#e, below) is being cancelled in-lieu of
18 mitigation for any Thornburgh groundwater permit granted by
19 OWRD. The Temporary Credit from Deschutes River Conservancy
20 (f) have been leased since 2013 and may continue until such time
21 that Thornburgh does not require them, and the Three Sisters
22 Mitigation water (g) has been transferred instream in Whychus
23 Creek.

24 “None of these water rights require additional OWRD mitigation
25 under OWRD’s mitigation program. Thornburgh presently owns
26 items a-e which are existing water rights. Rights a-d are being
27 transferred from their original point of appropriation (POA), which

1 would be a groundwater well, or point of diversion (POD), which
2 would be a diversion from surface water, to wells at the Thornburgh
3 property, while e is being cancelled in lieu of mitigation consistent
4 with the Deschutes Basin Groundwater Mitigation rules.
5 Transferring a certificated water right does not require OWRD
6 mitigation, as it eliminates the use of this transferred water right in
7 its former location and allows it to be used, instead, on the Resort's
8 property. Cancelling a right is done as mitigation and results in
9 placing water back in the system by cancelling the legal right to use
10 the water at the original point of appropriation.

11 "While OWRD requires no mitigation for transfers, as they only
12 change the point of appropriation ('POA'), or point of diversion
13 ('POD'), transfers can change the point of impact where the
14 withdrawals will be felt in the stream from one location to the other.
15 The change from where the stream was impacted under the original
16 POA to the points of impact from the Thornburgh wells is the only
17 element that could affect the No Net Loss standard and compliance
18 with DCC 18.113.070(D). As such, [Thornburgh's consultant,
19 Cascade Geoengineering] assessed whether changes in the POA
20 would change the location where impacts are felt in the stream, and
21 if so, how and to what degree that change could affect the no net loss
22 standard and compliance with DCC 18.113.070(D)." Initial Record
23 70-71.⁷

24 The 2022 FWMP explained the status of the above-listed water rights and
25 mitigation as follows. Any changes or updates noted in the 2025 FWMP are also
26 described below. As far as we can tell, the water rights ownership statuses and
27 OWRD process statuses are unchanged from the 2022 FWMP to the 2025
28 FWMP.

⁷ Jim Newton, an engineer, geologist, and certified water rights examiner, of Cascade Geoengineering, authored the 2022 FWMP and the revised 2025 FWMP.

1 (a) LeBeau, Surface Water Certificate 95746 – Thornburgh owns this
2 certificate and has applied for a permanent transfer, T-13857, to wells located at
3 the Thornburgh Resort. These proposed changes to the certificated water right do
4 not require OWRD mitigation. Pumping has ceased. In 2021, Thornburgh placed
5 this water in an instream lease. In 2022, it was temporarily transferred to North
6 Unit Irrigation District to provide drought relief to farmers. Initial Record 71;
7 Remand Record 61.

8 (b) Big Falls Ranch, Surface Water Certificates 96190, 96192 –
9 Thornburgh owns this certificated water right that authorizes irrigation with water
10 from Deep Canyon Creek. In September 2021, pumping was stopped on 90 acres
11 of this water and the water right was assigned to Thornburgh. Pumping was
12 stopped on the remaining 63.7 acres in 2022 and a deed conveying this water to
13 Pinnacle Utilities, LLC, was executed. An application has been filed with OWRD
14 to transfer all 153.7 acres of water to wells at the Thornburgh Resort, T-14075,
15 and that application is pending. Remand Record 84. The FWMPs explain that, if
16 not approved for transfer, this water right could be cancelled in lieu of mitigation
17 for any groundwater permit serving the resort, or the POA could be returned to a
18 POD in Deep Canyon Creek from where it could be transferred to an instream
19 right. Initial Record 71-72; Remand Record 61-62.

20 (c) Big Falls Ranch, Ground Water Certificate 87558 – Pinnacle holds a
21 quantity deed and Thornburgh has filed an application to transfer the right to
22 wells at the Thornburgh Resort, T-14074, and that application is pending.

1 Remand Record 84. This certificated water requires no OWRD mitigation. It
2 could be cancelled in lieu of mitigation for any groundwater permit serving the
3 resort.⁸ Initial Record 72; Remand Record 62.

4 (d) Tree Farm, Ground Water Certificate 94948 – Thornburgh owns this
5 water right for quasi-municipal use. This certificated water requires no OWRD
6 mitigation. A temporary transfer T-13703 was approved by OWRD in 2021,
7 which changed the POA and Point of Use (POU) from wells located in the Tree
8 Farm subdivision to wells on the Thornburgh property. Thornburgh has applied
9 to OWRD for a permanent transfer. Pumping has ceased. Water under this
10 certificate can be used per the transfer order, or it could be cancelled in lieu of
11 mitigation for any groundwater permit serving the resort. Initial Record 72-73;
12 Remand Record 62-63.

13 (e) Dutch Pacific, Ground Water Certificate 89259 – Thornburgh owns this
14 certificated water right for groundwater pumped from a well in Sisters. This

⁸ In *CTWSR I*, we observed that the OWRD Deschutes Basin Program rule, OAR 690-505-0610(8), provides, in part:

“[I]f the impact of use under a ground water permit application is completely offset by a proposed voluntary cancellation of an existing ground water use subject to transfer, such that impact on surface waters from the new ground water use is the same as, or less than, impact on surface waters from the existing ground water use subject to transfer, the ground water permit application may be approved without additional mitigation once the proposed voluntary cancellation is complete.” LUBA Nos 2023-038/039/041 (slip op at 47).

1 certificated water requires no OWRD mitigation. Pumping has ceased and the
2 right is presently being cancelled in-lieu of mitigation. Initial Record 73; Remand
3 Record 63.

4 (f) Deschutes Resource Conservancy (DRC) Temporary Mitigation
5 Credits – These temporary mitigation credits have been in place since 2013 in
6 advance of pumping groundwater as mitigation for Permit G-17036. These
7 credits were not considered in the efficacy of the 2022 FWMP in meeting the no
8 net loss standard. Thornburgh may cancel the use of these temporary credits at
9 some point in the future. Initial Record 73; Remand Record 63.

10 (g) Three Sisters Irrigation District (TSID) Mitigation Water – Thornburgh
11 has completed the arrangements leaving 106 acre-feet (1.51 cfs) of surface water
12 in Whychus Creek, as required by the 2008 FWMP. The 2025 FWMP states that
13 this mitigation water completely mitigates all stream reduction impacts to
14 Whychus Creek. Initial Record 73-74; Remand Record 63-64.

15 The 2022 FWMP provided different compliance measures for water
16 appropriated from surface water versus groundwater, or for mitigation credit, as
17 follows:

18 “Section D:

19 “Compliance: The purpose of this section is to clarify what
20 constitutes compliance with this updated 2022 FWMP, whether
21 during the review of Resort land use applications, as reported as part
22 of annual monitoring, or for any other purpose. As noted above
23 Thornburgh owns 1,211 AF of water rights to be used for pumping
24 or mitigation and pumping at the point of diversion or appropriation

1 of the certificate has been discontinued. For the reasons discussed
2 herein **compliance with this FWMP has been met for rights b-f**,
3 and will be met for the TSID water (g) in the manner discussed in
4 this Section, 1b below. For any additional water rights that are
5 acquired compliance will be met as described herein.

6 “1. Compliance with this FWMP will occur differently for water
7 appropriated from a surface water Point of Diversion (POD) versus
8 a groundwater Point of Appropriation (POA) or for a mitigation
9 credit as follows:

10 “a. POA – Groundwater: For any future rights that may be
11 acquired, compliance occurs upon the cessation of pumping
12 of the rights and along with any of the following: deed
13 evidencing the transfer of ownership, **a submittal to OWRD**
14 of any of the following: (i) an assignment of the water right
15 to Thornburgh, (ii) an application that seeks OWRD approval
16 of a transfer to pump at the Resort property, or (iii) a
17 cancellation in-lieu of mitigation.

18 “b. POD – Surface Water: Once acquired, Compliance occurs
19 upon the cessation of pumping at the source and submittal to
20 OWRD, and OWRD issues a final order (or its equivalent)
21 approving any of the following: (i) an application that
22 transfers to pump at the Resort property, (ii) an application
23 that transfers the water to an in-stream lease, (iii) the
24 cancellation in-lieu of mitigation, or (iv) an application to
25 transfer to obtain mitigation credits, permanent or temporary.

26 “c. Mitigation Credit: In the event that Thornburgh acquires
27 mitigation credits, compliance occurs when Thornburgh
28 provides proof of ownership or proof of submittal to OWRD
29 to use the credits as mitigation.” Initial Record 77 (boldface
30 added).

31 In the 2022 FWMP, Newton concluded that the existing rights of 1,211
32 acre-feet described, and along with the 106 acre-feet of TSID water and the 6
33 acre-feet of DRC mitigation water, fully mitigate for pumping of 1,460 acre-feet

1 to satisfy the no net loss standard. *Id.* The 2025 FWMP reiterates that same
2 conclusion. Remand Record 65-67.

3 In the initial 2023 proceeding, petitioners argued to the county that the only
4 acceptable method to ensure fish habitat mitigation water to meet the no net loss
5 standard is transferring the water rights to instream water rights and that
6 cancelling a water right in-lieu of mitigation could not satisfy the no net loss
7 standard because the quantity of water subject to cancellation could be “picked
8 up” by junior water rights holders so that quantity of water would not reliably be
9 instream providing fish habitat, as assumed by the 2022 FWMP. In *CTWSR I*, we
10 observed that “the 2022 FWMP modeling assumes equal efficacy and reliability
11 as between instream water right transfers and voluntary cancellation of water
12 rights so that those legal processes have the same instream impacts on water
13 quality and quantity.” LUBA Nos 2023-038/039/041 (slip op at 48-49). We
14 agreed with Thornburgh that a reasonable person could conclude that voluntary
15 cancellation of water rights consistent with the OWRD rules and the 2022 FWMP
16 will result in improved fish habitat to offset the negative impacts to fish habitat
17 caused by Thornburgh’s groundwater pumping. However, we agreed with Bishop
18 that the original 2022 FWMP compliance measure (D)(1)(a)—that required only
19 submittal to OWRD of applications for transfers or cancellation of groundwater
20 water rights—was inadequate to ensure no net loss of fish resources.

21 In *CTWSR I*, we concluded that OWRD review and approval was essential
22 for voluntary cancellation of a groundwater right to supply fish mitigation. We

1 observed that Thornburgh argued and relied upon its expert Jim Newton's
2 testimony that was submitted in a memorandum in response to the Oregon
3 Department of Fish and Wildlife's (ODFW's) contention that some water rights
4 that Thornburgh proposed for fish mitigation may not provide actual and
5 adequate fish mitigation due to unverified or limited previous use. Initial Record
6 749. Newton opined that both transfer of an existing water right to instream water
7 rights and cancellation will leave water in the system at the original pumping
8 location because the OWRD processes for transfer or cancellation ensure that the
9 mitigation measure is effective. Newton explained:

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

25 Newton testified that the OWRD process determines whether a water right
26 has been used, and how much, so that the OWRD mitigation offset amount is

1 substantiated.⁹ We agreed with Thornburgh that a reasonable person could
2 conclude that voluntary cancellation of water rights consistent with the OWRD
3 rules and the 2022 FWMP will result in improved fish habitat to offset the
4 negative impacts to fish habitat caused by Thornburgh's groundwater pumping.
5 In evaluating and rejecting Bishop's argument that OWRD rules alone were
6 insufficient, we reasoned:

7 “The county concluded that voluntary cancellation is a reliable way
8 to provide mitigation water for fish habitat. The county based that
9 conclusion on the fact that OWRD is the state water regulator and
10 OWRD accepts voluntary cancellation as a means of offsetting
11 withdrawal impacts. The county does not solely rely on the OWRD
12 mitigation rules to satisfy the no net loss standard. Instead, the
13 county relies on the OWRD mitigation rules as evidence that
14 voluntary cancellation will result in the water quantity and quality
15 modeled in the 2022 FWMP.” *CTWSR I*, LUBA Nos 2023-
16 038/039/041 (slip op at 49).

17 In *CTWSR I*, we rejected Thornburgh's assertion “that ground water right
18 certificate ownership, cessation of pumping, and OWRD submittal is sufficient
19 to ensure fish mitigation water will be provided as assumed in the 2022 FWMP.”
20 *Id.* (slip op at 65). Thornburgh unsuccessfully challenged our determination at
21 the Court of Appeals. *CTWSR II*, 332 Or App at 388. The court reasoned:

22 “Thornburgh contends in its cross-petition that LUBA

⁹ The quoted Newton testimony does not indicate whether the OWRD instream lease process verifies past use of the water right. However, petitioners do not argue that it does not, so we assume for purposes of this decision that it does.

1 misunderstood the compliance provision. Thornburgh asserts that
2 there is much evidence in the record that it is the cessation of
3 pumping of any newly acquired groundwater interest that results in
4 mitigation, by allowing the water to remain in the aquifer in support
5 of fish habitat, and that the additional documentation required by an
6 application to the OWRD merely reinforces the cessation of use of
7 the water. We have reviewed the record and conclude that LUBA
8 correctly applied the substantial evidence standard in its evaluation
9 of the compliance and reporting requirements. We therefore reject
10 Thornburgh's contention on its cross-petition." *Id.*

11 The amended compliance measures in the 2025 FWMP provide:

12 **"Compliance:** The purpose of this section is to clarify what
13 constitutes compliance with this updated 2022 FWMP, whether
14 during the review of Resort land use applications, as reported as part
15 of annual monitoring, or for any other purpose. As noted above
16 Thornburgh owns 1,211 AF of water rights to be used for pumping
17 or mitigation and pumping at the point of diversion or appropriation
18 of the certificate has been discontinued. For the reasons discussed
19 herein compliance with this FWMP has been met for rights b-f and,
20 will be met for the TSID water (g) in the manner discussed in this
21 Section, 1b below. For any additional water rights that are acquired
22 compliance will be met as described herein.

23 "1. Compliance with this FWMP will occur differently for water
24 appropriated from a surface water Point of Diversion (POD)
25 versus a groundwater Point of Appropriation (POA) or for a
26 mitigation credit as follows:

27 "a. POA – Groundwater: For any future rights that may be
28 acquired, mitigation has been provide and compliance
29 occurs upon; the *cessation* of pumping of the rights,
30 along with; i) a deed evidencing the transfer of
31 ownership, *or*, ii) an assignment of the water right to
32 Thornburgh, *or*, iii) an approval of any of the
33 following: (a) an application that seeks OWRD
34 approval of a transfer to pump at the Resort property,
35 *or* (b) a cancellation in-lieu of mitigation.

1 “b. POD – Surface Water: Once acquired, compliance
2 occurs upon the cessation of pumping at the source and
3 submittal to OWRD, and OWRD issues a final order
4 (or its equivalent) approving any of the following: (i)
5 an application that transfers to pump at the Resort
6 property, (ii) an application that transfers the water to
7 an in-stream lease, (iii) the cancellation in-lieu of
8 mitigation, or (iv) an application to transfer to obtain
9 mitigation credits, permanent or temporary.

10 “c. Mitigation Credit: In the event that Thornburgh
11 acquires mitigation credits, compliance occurs when
12 Thornburgh provides proof of ownership or proof of
13 submittal to OWRD to use the credits as mitigation.”
14 Remand Record 66-67 (boldface in original; emphases
15 added).

16 The 2025 FWMP authorizes groundwater right control and cessation of pumping
17 as providing fish habitat mitigation water. We refer to that compliance method as
18 “cessation and control” in this decision.

19 **2. The 2025 FWMP is not new evidence.**

20 A local government is generally not required to repeat on remand the
21 procedures applicable to the initial proceeding. *Fraley v. Deschutes County*, 32
22 Or LUBA 27, 36, *aff’d*, 145 Or App 484, 930 P2d 902 (1996), *rev den*, 325 Or
23 45 (1997). However, when a local government reopens its record after remand, it
24 does so pursuant to ORS 197.797(7). *Beck v. City of Tillamook*, 313 Or 148, 151,
25 831 P2d 674 (1992); *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA
26 458, 461-62 (1994). ORS 197.797(7) provides:

27 “When a local governing body, planning commission, hearings body
28 or hearings officer reopens a record to admit new evidence,
29 arguments or testimony, any person may raise new issues which

1 relate to the new evidence, arguments, testimony or criteria for
2 decision-making which apply to the matter at issue.”

3 “‘Evidence’ means facts, documents, data or other information offered to
4 demonstrate compliance or noncompliance with the standards believed by the
5 proponent to be relevant to the decision.” ORS 197.797(9)(b). “‘Argument’
6 means assertions and analysis regarding the satisfaction or violation of legal
7 standards or policy believed relevant by the proponent to a decision. ‘Argument’
8 does not include facts.” ORS 197.797(9)(a).

9 Bishop argues that the 2025 FWMP and letter identifying the changes to
10 the 2022 FWMP compliance measures and reporting requirements are new facts
11 and documents offered to demonstrate compliance with the no net loss standard.
12 Bishop Petition for Review 21 (citing Remand Record 2,009-34 (2025 FWMP),
13 2,043-44 (Thornburgh slide deck for May 7, 2025 remand hearing), 2,053-56
14 (Thornburgh letter submitted for May 7, 2025 remand hearing)). Thornburgh
15 described the requested changes to the 2022 FWMP on remand as updates to
16 compliance measure (D)(1)(a) “to correct language and establish that cessation
17 and control provides mitigation water as existing evidence proves[,]” and
18 “[a]dditional findings supported by the existing evidence that groundwater
19 cessation provides mitigation benefits as described.” Remand Record 2,043.

20 In a letter to the board of commissioners submitted for the May 7, 2025
21 remand hearing, DeLashmutt explained that the only change to the 2022 FWMP
22 is the amended compliance provision (D)(1)(a). DeLashmutt asserted that
23 existing evidence—namely, statements in the 2022 FWMP—establish that

1 compliance with the FWMP is already complete “[b]ecause pumping has ceased
2 and the rights are controlled by Thornburgh[.]” Remand Record 2,051.
3 DeLashmutt also argued that the previously submitted technical reports show that
4 the 2022 FWMP fish mitigation water “provides a net benefit to habitat quantity
5 and quality.” *Id.* DeLashmutt asserted that the new 2025 FWMP compliance
6 measure (D)(1)(a) “would make clear that any OWRD process is not required but
7 that if it is used that it would require an approval of the process and not just a
8 submittal * * *.” Remand Record 2,053. DeLashmutt quoted portions of the 2022
9 FWMP as evidence that the ownership and control of the groundwater right,
10 along with cessation of pumping, provides fish mitigation water and, thus, no
11 OWRD review or approval is required. Remand Record 2,054. DeLashmutt also
12 asserted that compliance measure (D)(1)(a) pertains only to future groundwater
13 rights and does not apply to those groundwater rights already within
14 Thornburgh’s control. Remand Record 2,055.

15 Bishop argues that the county prejudiced Bishop’s participatory rights by
16 barring them from submitting new evidence rebutting the assertion that cessation
17 and control are compliance methods adequate to satisfy the no net loss standard.

18 The county responds that the county did not receive any new evidence on
19 the no net loss standard. The county argues that the 2025 FWMP amends the
20 compliance measures in the 2022 FWMP to address the remand issue and those
21 amendments are not new evidence, “but rather a clarification of how compliance
22 may occur for any future groundwater rights that may be acquired, which is akin

1 to argument (assertions and analysis regarding the satisfaction or violation of
2 legal standards).” Respondent’s Brief 25. The county responds that the reporting
3 table is not new evidence and is, instead, a compilation of evidence already in the
4 record. The county further argues that Bishop cannot establish prejudice because
5 they challenged the 2025 FWMP compliance and reporting measures in the local
6 proceeding and in this appeal.

7 We agree with the county that the 2025 FWMP and letter describing the
8 amendments are not new evidence. They are new arguments based on old
9 evidence, and a new compliance measure intended to satisfy the no net loss
10 standard. *See Central Oregon LandWatch v. Jefferson County*, LUBA No 2025-
11 023 (Oct 31, 2025) (slip op at 15-16), *aff’d*, 347 Or App 454, 586 P3d 957 (2026)
12 (rejecting the petitioner’s argument that ORS 197.797(7) required the county to
13 allow the petitioner to submit new evidence and argument in response to the
14 applicant-intervenor’s newly submitted draft findings). The county was not
15 required to allow Bishop to present new responsive evidence. We also agree with
16 the county that the reporting table is not new evidence, but a new way of
17 presenting old evidence. Most importantly, we agree with the county that Bishop
18 has not established any violation of ORS 197.797(7) or prejudice to their
19 substantial participatory hearing rights because Bishop was afforded a full and

1 fair opportunity to argue to the county that the 2025 FWMP compliance measures
2 and reporting table do not satisfy the no net loss standard.¹⁰

3 **B. Treaty**

4 Bishop also asserts that the county improperly accepted transcription of
5 the Court of Appeals’ oral argument and the Tribe’s brief in *CTWSR II* as
6 “evidence of the fact that the Tribe made certain representations to the [Court of
7 Appeals].” Bishop Petition for Review 23 (emphasis in original). The county
8 responds, and we agree, that those appellate materials are not “evidence” because
9 they were not submitted to demonstrate compliance or noncompliance with the
10 Treaty or the no net loss standard.¹¹

11 **C. Economic Analysis**

12 Finally, we agree with the county’s characterization that Bishop launches
13 a “blunderbuss attack” on several items Thornburgh submitted on the economic
14 analysis issue. We address only the first set of items and reject the remainder
15 without further discussion.

16 In the rebuttal phase of the evidentiary proceedings below on the economic
17 analysis issue, Thornburgh submitted a 2021 Peterson Memorandum Report

¹⁰ We address and sustain Gould’s substantive challenges to the 2025 FWMP compliance measures and reporting table under Gould’s First Assignment of Error.

¹¹ The county points out that the Tribe also submitted its appellate briefing materials.

1 (Peterson Memo) and Transient Room Tax Frequently Asked Questions (FAQ).
2 Remand Record 512-23. The Peterson Memo includes market data and valuation
3 and evaluation of future demand for food and beverage venues. Remand Record
4 512-15. In their final legal argument, Thornburgh referenced those materials in
5 response to petitioner's expert's report (Cahill Report), which concluded that
6 Thornburgh had overstated tax revenues. Remand Record 243. The county cited
7 the FAQ data in its final decision. Remand Record 38-39.

8 Bishop argues that the county improperly received and relied upon the
9 Peterson Memo and FAQ because those documents were not rebuttal to earlier
10 submitted evidence. Further, Bishop argues that the documents were submitted
11 in rebuttal without corresponding argument explaining the relevance of those
12 documents to the disputed issues. Bishop argues that the county erred in
13 accepting Thornburgh's rebuttal evidence regarding school district data because,
14 according to Bishop, that data was not "directly responsive to the Cahill
15 [Report]." Bishop Petition for Review 29.

16 The county responds, and we agree, that Thornburgh submitted these items
17 in direct response to the Cahill Report, including criticism that Thornburgh's
18 economic analysis evidence overstated the economic benefits, including resort
19 tax revenue. No source of law requires an applicant or any party to explain in
20 advance the relevance of evidence submitted in an open record period.

21 Bishop's second assignment of error is denied.

1 **V. BISHOP THIRD ASSIGNMENT OF ERROR**

2 Bishop argues that the county committed prejudicial procedural error by
3 chilling public participation, misleading the public, and failing to settle the local
4 record before deliberating and issuing the final decision. We will remand a
5 decision when the local government “[f]ailed to follow the procedures applicable
6 to the matter before it in a manner that prejudiced the substantial rights of the
7 petitioner.” ORS 197.835(9)(a)(B). Those rights are the right to an adequate
8 opportunity to prepare and submit one’s case and to a full and fair hearing. *Muller*
9 *v. Polk County*, 16 Or LUBA 771, 775 (1988).

10 **A. DCC 22.34.030(A) Party Status in Remand Proceeding**

11 In the public notices for the remand hearing, the county stated that only
12 those parties to the previous proceeding were entitled to participate in the remand
13 hearing. Remand Record 2,632, 2,674. In individual emails, county staff told
14 multiple commenters that they could only comment if they had previously
15 participated. Remand Record 2,065-2,229. Outside the remand hearing, the
16 county posted a notice that only parties to the original proceedings could speak
17 or submit documents at the remand hearing. Oversized Record Item 1. At the
18 hearing, county staff presented that only parties from the prior proceedings could
19 provide testimony. Video Recording, Deschutes County Board of
20 Commissioners, May 7, 2025, at 1:24:57-1:25:13; Remand Record 1,778 (staff
21 presentation slide detailing the remand procedure).

22 DCC 22.34.030(A) provides:

1 “The County shall conduct a hearing on any remanded or withdrawn
2 decision, the scope of which shall be determined in accordance with
3 the applicable provisions of DCC 22.34 and state law. Unless state
4 law requires otherwise, only those persons who were parties to the
5 proceedings before the County shall be entitled to notice and be
6 entitled to participate in any hearing on remand.”

7 In the final decision, the county concluded that DCC 22.34.030(A)
8 required that the county reject all oral and written comments submitted by
9 persons who were not parties to the previous proceeding. Remand Record 23.
10 Bishop argues that state law required the county to allow broad public
11 participation and the county misconstrued DCC 22.34.030(A).

12 Bishop cites cases where we have reviewed the propriety of excluding
13 members of the public from participating in remand hearings. In *Lengkeek v. City*
14 *of Tangent*, we concluded that, when a local government is reviewing a modified
15 proposal on remand with additional documentation, the government could not
16 limit participation to only the parties who participated in the first appeal. 52 Or
17 LUBA 509, 512 (2006). In *Siporen v. City of Medford*, we extended that holding,
18 rejecting an argument that the county could exclude from the remand proceeding
19 a party that did not participate in a prior LUBA appeal. 55 Or LUBA 29, 50-53
20 (2007).

21 In *Wetherell v. Douglas County*, we distinguished *Lengkeek* and *Siporen*,
22 and held that the county was not broadly prohibited from limiting party status in
23 subsequent hearings on a land use matter to those who demonstrate party status
24 at the initial hearing. 60 Or LUBA 131, 135 (2009), *aff'd*, 235 Or App 246, 230

1 P3d 976, *rev den*, 349 Or 57 (2010). We emphasized that the application in that
2 proceeding was not modified on remand. We explained:

3 “We would likely feel differently in the present case if the
4 application had been modified on remand. Modifications to an
5 application can result in impacts to persons who were not impacted
6 by the original proposal, or were not impacted in the same way or to
7 the same degree, and who may have had less incentive or no
8 incentive to participate in the original proceedings. Denying such
9 persons the opportunity to comment on modified applications, or
10 participate in local appeals of decisions approving or denying such
11 applications, seems inconsistent with at least the spirit of Statewide
12 Planning Goal 1 (Citizen Involvement).” *Id.* at 137 n 2.

13 Bishop argues that this case is more similar to a case in which an
14 application has been modified on remand because our remand in *CTWSR I*
15 concerned the economic analysis under DCC 18.113.070(C), which the
16 application had not addressed in the initial proceeding. Similarly, the court’s
17 decision in *CTSWR II* required the county to consider the Treaty. Bishop argues
18 that, similar to a modified application, the public should have an opportunity to
19 participate when new issues are before the county on remand.

20 No person or entity that the county excluded from participating in the
21 remand proceeding has appealed alleging procedural error and prejudice to their
22 substantial rights. Bishop has not demonstrated substantial prejudice to their
23 rights from exclusion of other unnamed nonparties. Thus, Bishop has not
24 established any basis for remand under ORS 197.835(9)(a)(B). Accordingly, we
25 reject this subassignment of error without deciding whether the county
26 misconstrued DCC 22.34.030(A).

1 **B. County Characterization of the Nature of the Application and**
2 **Remand Proceeding**

3 Bishop argues that the county erred by mischaracterizing the nature of the
4 application and misleading the public as to the scope of the remand in the hearing
5 notice. This argument is largely derivative of other arguments that we resolve
6 elsewhere in this decision and we reject this argument without further discussion.

7 **C. Local Record**

8 Bishop argues that the county erred by failing to timely accept or reject
9 new evidence before making tentative decisions on the substance of that
10 evidence. Despite county instructions limiting the issues on remand and party
11 status, multiple members of the public submitted written comments. Remand
12 Record 2,065-2,229. The board did not reject those comments prior to making
13 the final decision. Instead, the county seemingly accepted the comments,
14 deliberated, issued a tentative decision, and later rejected some of the public
15 comments in the final decision as follows:

16 “Under DCC 22.34.030.A, only those persons who were parties to
17 the previous proceedings before the County are entitled to
18 participate. This Board therefore formally rejects oral and written
19 comments submitted by persons who were not parties to the
20 previous proceedings and order such comments stricken from the
21 record.” Remand Record 23.

22 Notwithstanding that decision and statement, all the public comments that
23 the county received are included in the record before us in this appeal. Remand
24 Record 2,065-2,229. Bishop argues that the county is required to reject or accept
25 new evidence before the decision maker deliberates and reaches a decision. *Ploeg*

1 v. *Tillamook County*, 50 Or LUBA 608, 617-18 (2005). Bishop argues that it is
2 unclear from the record what evidence the board actually considered and, by
3 including all of the submitted testimony in the record, but rejecting the nonparty
4 testimony in the findings, Bishop cannot figure out what is in or out of the record,
5 which Bishop argues prejudices their substantial right to present their case.

6 The county responds, and we agree, that Bishop has failed to demonstrate
7 prejudice to their substantial rights. The county expressly rejected all evidence
8 and testimony from persons other than parties to the previous proceeding,
9 notwithstanding that the county later chose to include that rejected evidence and
10 testimony in the record transmitted to LUBA. Bishop has not identified any
11 instance in which the county relied on comments or evidence that the county
12 nominally rejected in the final decision. Bishop has not demonstrated any
13 prejudice to their substantial rights and this argument provides no basis for
14 remand.

15 Bishop's third assignment of error is denied.

16 **VI. TRIBE FIRST ASSIGNMENT OF ERROR**

17 The Tribe argues that the Court of Appeals' decision in *CTWSR II* required
18 the county to reopen the record on remand to allow the Tribe to present
19 indigenous knowledge evidence regarding fish habitat and resort impacts and that
20 the county erred by failing to open the remand record on that issue.

21 The county found:

22 "DCC 22.34.040.A grants this Board discretion to reopen the record

1 when it deems appropriate. This Board finds that, in order to
2 adequately address the issues on remand, it was appropriate to limit
3 reopening the record for new evidence on Remand Issue 2,
4 consistent with our order issued on April 16, 2025. We are
5 unpersuaded by the arguments that we are *required* to reopen the
6 record to address the additional remand issues. We conclude that the
7 parties had a full and fair opportunity to provide evidence on these
8 issues in the previous proceedings. The parties either failed to do so
9 or specifically chose not to fully engage in our previous decision's
10 process. Like project applicants, project opponents that have
11 legitimate concerns regarding a particular application must present
12 evidence and testimony to support their position at the appropriate
13 point in the process. The Oregon land use system adheres to long
14 standing principles and case law regarding waiver and law of the
15 case. All parties would do well to remember these principles."
16 Remand Record 23 (emphasis in original).

17 Thornburgh responds, first, that the Court of Appeals decision did not
18 compel the county to reopen the evidentiary record on remand and the Tribe relies
19 on *dictum* in that decision. Thornburgh next argues that, on remand from the
20 Court of Appeals in *CTWSR II*, our decision in *CTWSR III* did not require the
21 county to reopen the record on remand and, because the Tribe did not seek
22 judicial review of *CTWSR III*, the Tribe is barred from arguing that the county
23 erred in not expanding the scope of the remand record. Finally, and relatedly,
24 Thornburgh argues that the county is entitled to determine the remand hearing
25 procedure under DCC 22.34.040(A) and the Tribe has not identified any legal
26 basis that required the county to reopen the record. Thornburgh argues that ORS
27 197.850(9) authorizes the court to review LUBA's final order and the court may
28 affirm, reverse, or remand LUBA's final order and, in the absence of a sustained
29 assignment of procedural error, nothing in ORS 197.850 authorizes the court to

1 require a local government to reopen the record on remand. For the reasons
2 explained below, we agree with Thornburgh that the Court of Appeals decision
3 in *CTWSR II* did not require the county to reopen the record and the county acted
4 within its discretion to not reopen the record on remand to allow the Tribe to
5 present evidence.

6 DCC 22.34.040 provides the scope of county remand proceedings:

7 “A. On remand, the Hearings Body shall review those issues that
8 LUBA or the Court of Appeals required to be addressed. In
9 addition, the Hearings Body shall have the discretion to
10 reopen the record in instances in which it deems it to be
11 appropriate.

12 “B. At the Hearings Body’s discretion, a remanded application for
13 a land use permit may be modified to address issues involved
14 in the remand or withdrawal to the extent that such
15 modifications would not substantially alter the proposal and
16 would not have a significantly greater impact on surrounding
17 neighbors. Any greater modification would require a new
18 application.

19 “C. If additional testimony is required to comply with the remand,
20 parties may raise new, unresolved issues that relate to new
21 evidence directed toward the issue on remand. Other issues
22 that were resolved by the LUBA appeal or that were not
23 appealed shall be deemed to be waived and may not be
24 reopened.”

25 DCC 22.34.030(B) provides:

26 “The hearing procedures shall comply with the minimum
27 requirements of state law and due process for hearings on remand
28 and need comply with the requirements of DCC 22.24 [(for a county
29 land use action hearing)] only to the extent that such procedures are
30 applicable to remand proceedings under state law.”

1 The county has considerable discretion to select its remand procedures,
2 and it is not required to repeat on remand the procedures applicable to the initial
3 proceeding, unless the remanding decision requires it. In *Siporen*, we explained:

4 “In deciding what issues a local government wishes to consider
5 following a LUBA remand, a local government is certainly entitled
6 to limit the issues it will consider on remand to those issues that it
7 *must* address to adequately respond to the LUBA remand, although
8 the local government is also free to expand the issues it will consider
9 on remand. A local government also enjoys considerable discretion
10 in selecting the procedures it will follow on remand.

11 “As a general matter, the scope of proceedings on remand
12 from LUBA is governed by the terms of the remand and any
13 applicable local requirements. *Fraley*[, 32 Or LUBA at 36]
14 (absent instructions from LUBA or local provisions to the
15 contrary, a local government is not required to repeat on
16 remand the procedures applicable to the initial proceeding).
17 A local government is entitled to limit its consideration on
18 remand to correcting the deficiencies that were the basis for
19 LUBA’s remand. *Bartels v. City of Portland*, 23 Or LUBA
20 182, 185 (1992); *Von Lubken v. Hood River County*, 19 Or
21 LUBA 404, 419, *rev’d on other grounds*, 104 Or App 683
22 (1990). Conversely, while not required to do so, a city may
23 expand the scope of its remand hearing beyond the scope of
24 the remand. *Schatz v. City of Jacksonville*, 113 Or App 675,
25 680, 835 P2d 923 (1992).’ *CCCOG v. Columbia County*, 44
26 Or LUBA 438, 444 (2003).

27 “Although a local government is entitled to limit the issues it will
28 consider on remand to those that must be addressed to respond to
29 the remand, there are a variety of factors that may complicate a local
30 government’s job in distinguishing between issues that must be
31 considered on remand and issues that are resolved or have been
32 waived by virtue of prior local or appellate proceedings and no
33 longer need be addressed in the remand proceedings. The
34 procedures the local government elects to follow on remand may

1 broaden the issues that must be addressed on remand. For example,
2 if the local government holds additional evidentiary hearings, or
3 even holds additional hearings to allow additional argument only,
4 those hearings may have the effect of expanding the issues that must
5 be addressed on remand. ORS 197.7[97](7). Additionally, allowing
6 an applicant to modify the proposal that led to the remand in the first
7 place may raise issues concerning approval criteria that might
8 otherwise be resolved or waived issues if the application had not
9 been modified. But with the caveat that a local government may
10 encounter difficulties in determining what issues it must address to
11 adequately respond to a remand, a local government clearly has
12 authority to limit its proceedings on remand to addressing those
13 issues and may select the procedures it believes are most
14 appropriate, provided those procedures do not improperly exclude
15 any parties who are entitled to participate in those remand
16 proceedings.” *Siporen*, 55 Or LUBA at 48-49 (emphasis in original;
17 footnote omitted).

18 In *Citizens for Resp. Growth*, we explained:

19 “In *Beck*[, 313 Or at 151], the court explained that successive LUBA
20 appeals are ‘two phases of the same case’ where a local government
21 decision is appealed to LUBA, LUBA remands the decision, the
22 local government conducts proceedings in response to LUBA’s
23 remand and adopts a new decision, and the new decision is appealed
24 to LUBA. The court stated that when a local government reopens its
25 record to admit new evidence or testimony, after remand of its
26 decision by LUBA, it does so pursuant to ORS 197.7[97](7).
27 Further, the court’s discussion states that under ORS 197.7[97](7),
28 the issues to be considered in a local remand proceeding include
29 new, unresolved issues relating to the new evidence or testimony,
30 but not issues that LUBA resolved in its decision remanding the first
31 local government decision or any issue that could have been, but
32 was not, raised in the first LUBA appeal. In its discussion in *Beck*,
33 it is clear the court views local remand proceedings as part of a
34 single, continuous process.” 26 Or LUBA at 461-62 (footnote
35 omitted).

1 In *Wetherell v. Douglas County*, the petitioner argued that the county erred
2 in refusing to reopen the record on remand so that they could submit evidence
3 related to applicable criteria. 57 Or LUBA 434 (2008). We agreed with the
4 petitioner that the county *could have* reopened the record to receive additional
5 relevant evidence before rendering its decision on remand.¹² However, similar to
6 this case, the relevant question was whether the county was obligated to do so.

7 We explained:

8 “A local government is entitled to conduct its proceedings on
9 remand and adopt a new decision, *without* reopening the evidentiary
10 record, so long as no additional evidence is required to respond to
11 LUBA’s remand. *Dimone v. City of Hillsboro*, 44 Or LUBA 698,
12 719 (2003); *Arlington Heights Homeowners v. City of Portland*, 41
13 Or LUBA 185, 209 (2001). But if a local government applies new
14 criteria, the evidentiary record must be reopened to allow all parties
15 an opportunity to respond to the new criteria. *Nicholson v. Clatsop*
16 *County*, 32 Or LUBA 399, 413-14 (1997). Similarly, if a local
17 government adopts a new interpretation of law on remand that could
18 not reasonably have been anticipated in the initial proceeding, the
19 local government may be obligated to reopen the evidentiary record.
20 *McFall v. City of Sherwood*, 46 Or LUBA 735, 747 (2004).” *Id.* at
21 439 (quoting *Neighbors 4 Responsible Growth v. City of Veneta*, 52
22 Or LUBA 325, 338-39 (2006) (emphasis in original)).

23 Our remand in *CTWSR III* required the county to make findings addressing
24 whether the amended FWMP violates the Treaty, based on the Court of Appeals’
25 conclusion that the Tribe had raised that issue in the initial 2023 county

¹² The county may, on remand in this case under Bishop’s first assignment of error, elect to reopen the record more broadly after Bishop is provided an opportunity to respond to DeLashmutt’s letter.

1 proceeding with sufficient specificity so that the county was required to address
2 that issue, as raised in the 2023 county proceeding. The county did not need to
3 reopen the evidentiary record to make findings responsive to the Treaty issue that
4 the court concluded was raised in the 2023 county proceeding. The county did
5 not apply new criteria or adopt a new interpretation of the no net loss standard on
6 remand. The county for the first time interpreted the Treaty rights to be satisfied
7 by the satisfaction of the no net loss standard. The Tribe challenges that
8 interpretation in this appeal.

9 Our decision in *CTWSR III* did not require the county to reopen the record
10 on remand on the Treaty issue. Thornburgh argues that the Tribe should have
11 sought judicial review of our *CTWSR III* decision to preserve the issue that the
12 county was required to reopen the record on the Treaty issue. Our *CTWSR III*
13 decision sustained the Tribe's first assignment of error "for the reasons set out in
14 the court's opinion." *CTWSR III*, LUBA Nos 2023-038/039/041 (slip op at 5).
15 Our *CTWSR III* decision was necessarily consistent with the court's *CTWSR II*
16 decision. If, as the Tribe argues, the court's opinion required the county to reopen
17 the record on remand, then our decision included the court's remand
18 requirements. The Tribe was not obligated to seek judicial review of our *CTWSR*
19 *III* decision to preserve this issue.

20 The Tribe relies solely on the Court's statement in *CTWSR II* that

21 "assuming that LUBA remands the case to the board for
22 consideration of the Tribe's arguments relating to the treaty-
23 protected fishery resource on the first assignment of error, we

1 highlight that remand will allow an opportunity for the Tribe to
2 present evidence of indigenous expertise and knowledge for the
3 board's consideration that the Tribe asserts it did not have adequate
4 time to present due to its late involvement in the proceedings."
5 *CTWSR II*, 332 Or App at 387.

6 Based on that statement and DCC 22.34.040(A), the Tribe argues that the Court
7 of Appeals required the county to open the record on remand to allow the Tribe
8 to submit evidence on the Treaty-protected fishery resource and the no net loss
9 standard.¹³

10 We summarize the pertinent portions of prior appeals as context for this
11 procedural assignment of error. In *CTWSR I*, the Tribe raised three assignments
12 of error: (1) the county improperly construed applicable law by failing to address
13 whether the 2022 FWMP violates the Treaty; (2) the county misconstrued the no
14 net loss standard in DCC 18.113.070(D) by concluding that the 2022 FWMP
15 satisfies that standard without expressly finding that the 2022 FWMP does not
16 violate either the 1855 Treaty or ORS 197.460, and the county's findings on the
17 not net loss standard were inadequate and unsupported by substantial evidence;
18 (3) the county violated the Tribe's due process rights under the Fifth Amendment
19 of the United States Constitution by failing to provide the Tribe with a mailed
20 copy of the notice of application or the notice of hearing before the hearings
21 officer.

¹³ The Tribe does not quote or rely on DCC 22.34.040(C).

1 We concluded that the Tribe had failed to raise the issue of the Treaty with
2 adequate specificity during the 2023 county proceeding to provide the county and
3 Thornburgh fair notice and, thus, that issue was not preserved for our review
4 under both the first and second assignments of error. We also concluded that the
5 Tribe's third assignment of error was not preserved for our review because the
6 Tribe did not point to any part of the record where the Tribe asserted a due process
7 violation or objected to the county not providing the Tribe mailed notice of the
8 application or notice of the hearing before the hearings officer. *CTWSR I*, LUBA
9 Nos 2023-038/039/041 (slip op at 25).

10 Also, under the second assignment of error, the Tribe argued that the
11 county's decision that the no net loss standard was met was not supported by
12 substantial evidence in the whole record because the county failed to consider the
13 Tribe's governmental co-manager status and its indigenous knowledge and
14 supporting evidence, and that such evidence calls into question the evidence that
15 the county relied on to conclude that the no net loss standard was met. In
16 resolving and rejecting that substantial evidence challenge, we observed:

17 "The county found '[t]he technical expertise provided by
18 Thornburgh's team is vast,' and that

19 "Thornburgh's technical evidence was prepared by
20 credentialed experts who provided an extreme level of
21 analysis and detail. Additionally, Thornburgh's team of
22 experts includes a hydrogeologist with significant experience
23 working in analyzing waterways in the Deschutes Basin and
24 hydrologists who have completed water quality studies of the

1 Deschutes River for private and governmental clients,
2 including the Tribe.’

3 “In contrast, the county specifically found that the opponents
4 generally did not provide any technical evidence that refuted
5 Thornburgh’s technical evidence. The county also found that the
6 Tribe provided no expert testimony on water quality and modeling,
7 water rights and mitigation, and fish and fish habitat.” *CTWSR I*,
8 LUBA Nos 2023-038/039/041 (slip op at 32-33) (internal record
9 citations omitted).

10 In *CTWSR I*, the Tribe argued that the decision is not supported by
11 substantial evidence because the board of commissioners “categorically
12 exclude[d] the Tribe[’]s indigenous knowledge regarding the management of
13 Deschutes Basin fisheries.” We reasoned:

14 “LUBA also acknowledges the fact that fish and fish habitat are
15 central to the Tribe’s historical, present, and future subsistence and
16 cultural identity and that the Tribe’s fishing rights are protected
17 under the 1855 Treaty. However, the Tribe does not identify any
18 evidence in the record concerning fish or fish habitat that is based
19 on the Tribe’s indigenous knowledge and that contradicts the
20 evidence on which the county relied.” *Id.* (slip op at 33-34).

21 On judicial review in *CTWSR II*, the Tribe raised two assignments of error
22 challenging our decision in *CTWSR I*. First, the Tribe argued that we erred in
23 concluding that the Tribe had failed to preserve the issue that the county was
24 required to consider the Treaty in assessing compliance with the no net loss
25 standard. The court agreed and sustained the Tribe’s first assignment of error.

26 As to the Tribe’s second assignment of error, the court concluded that we
27 had properly applied the substantial evidence standard in concluding that county

1 had considered evidence submitted by the Tribe and weighed it against
2 Thornburgh's evidence. The court reasoned as follows:

3 "In its second assignment of error, the Tribe contends that LUBA's
4 order misapplied the substantial evidence standard of review and is
5 unlawful in substance in failing to consider evidence supplied by the
6 Tribe based on its indigenous knowledge. We have held that LUBA
7 properly deferred to the board's narrow construction of DCC
8 18.113.070(D) that negative impacts are to be measured only by
9 the *resort's* impact on the system, not the cumulative impacts of
10 drought or other basin-wide water policy and management issues.
11 As for indigenous knowledge related specifically to impacts of the
12 resort, in its briefing, the Tribe argued that 'indigenous knowledge,'
13 to which the Tribe asserts the county paid short shrift, consisted of
14 the entirety of the comments and materials submitted by the Tribe,
15 including exhibits, and testimony from Smith, regarding the fish
16 resources of the Deschutes Basin. At oral argument before us, the
17 Tribe argued that if the Tribe had had sufficient time for preparation
18 for the hearing before the board, it could also have presented as
19 indigenous knowledge evidence concerning the impact of the
20 resort's pumping on very specific seasonal fishing grounds.

21 "On this assignment, we are guided by our standard of review, under
22 which we consider only whether LUBA correctly applied the
23 substantial evidence standard in its determination that the county's
24 decision demonstrates that the county considered the Tribe's
25 evidence concerning indigenous knowledge and weighed the
26 Tribe's evidence against Thornburgh's evidence. Given the limited
27 record before the county, we conclude that LUBA did not err.

28 "But, assuming that LUBA remands the case to the board for
29 consideration of the Tribe's arguments relating to the treaty-
30 protected fishery resource on the first assignment of error, we
31 highlight that remand will allow an opportunity for the Tribe to
32 present evidence of indigenous expertise and knowledge for the
33 board's consideration that the Tribe asserts it did not have adequate
34 time to present due to its late involvement in the proceedings."

1 CTWS II, 332 Or App at 386-87.

2 The Tribe did not seek judicial review of our conclusion that the Tribe had
3 not preserved the issue that the county violated the Tribe’s due process rights by
4 failing to provide the Tribe with a mailed copy of the notice of application or the
5 notice of hearing before the hearings officer.

6 On remand from the court in CTWSR II, we explained:

7 “[The Tribe] argued that the challenged decision improperly
8 construes applicable law by failing to address whether the 2022
9 [FWMP] violates the Treaty with the Tribes of Middle Oregon,
10 dated June 25, 1855. We agreed with intervenors-respondents that
11 that issue was not raised during the local proceeding and was
12 therefore waived. [CTWSR I,] LUBA Nos 2023-038/039/041 (slip
13 op 19-23). On judicial review, the Court of Appeals agreed with the
14 Tribe that that issue was raised below with sufficient specificity so
15 that the county was obligated to make findings addressing it. The
16 Tribe’s first assignment of error is sustained for the reasons set out
17 the court’s opinion.

18 “The court’s opinion does not require us to revisit the disposition of
19 any other assignment of error.” CTWSR III, LUBA Nos 2023-
20 038/039/041 (slip op at 4-5).

21 Thornburgh responds that the court’s statement upon which the Tribe relies
22 was not necessary to the court’s decision and, thus, is nonbinding *dictum*—a
23 statement that is “not necessary to the court’s decision.” *Engweiler v. Persson*,
24 354 Or 549, 557-58, 316 P3d 264 (2013). Differently, the Tribe argues that the
25 court’s statement constitutes a binding procedural remand instruction that was
26 “necessary to disposition of the appeal.” Intervenor-Petitioner’s Brief 25 (quoting
27 *McDowell Welding & Pipefitting, Inc. v. United States Gypsum, Co.*, 260 Or App

1 589, 595-96, 320 P3d 579 (2014)). The Tribe amplified their argument during
2 LUBA oral argument as follows:

3 LUBA: Other than the Court of Appeals' decision, is there a legal
4 basis requiring the county to reopen the record on remand,
5 independent of the Court of Appeals' decision?
6

7 Tribe: Our view is that the county code that says that the county has to
8 comply with the instructions of the Court of Appeals and LUBA would
9 provide an independent basis for that.
10

11 LUBA: And was there a sustained failure, or delayed notice procedural
12 error in the prior appeal at LUBA or the Court of Appeals?
13

14 Tribe: Yeah, so the Tribe took the position in the prior appeal before LUBA
15 in 2023 and at the Court of Appeals—and this is uncontested—that it was
16 not provided notice of the land use application and didn't become aware
17 of the 2022 application until after the *de novo* appeals had been filed with
18 the board of county commissioners. So, the Tribe was deprived of the
19 opportunity to participate in the hearings officer process in the fall of 2022
20 and really became involved late in the process due to lack of notice. That
21 appeared to resonate with the Court of Appeals. The Court of Appeals, I
22 think, is saying the Tribe ought to be able to introduce evidence that it
23 alleges it was deprived of introducing during the prior proceedings.
24

25 LUBA: So, my question is, was there a procedural error articulated and
26 sustained?
27

28 Tribe: No.
29

30 LUBA: So, absent that, why is the Court of Appeals' statement not *dicta*
31 if there's no underlying procedural right? Why is what the Court of
32 Appeals, what they assumed might happen, not *dicta*?
33

34 Tribe: Yeah, I think that is a good question and I think, importantly, I think
35 the way to think about *dicta* the way I think is the appropriate way to think
36 about *dicta* is *dicta* generally applies when third parties are relying on a

1 decision for judicial precedent as opposed to instructions that the deciding
2 tribunal is giving to the parties for future proceedings in that case.

3

4 LUBA: What gave the Court of Appeals the authority to give that
5 instruction if not there being some underlying procedural right?

6

7 Tribe: I don't know the answer to that.

8 Recording, LUBA Oral Argument, July 1, 2026, at 16:46-18:59.

9 We agree with Thornburgh that the court's statement is *dictum*. *Dictum*,

10 while not binding, may nevertheless have persuasive force if the underlying

11 reasoning is sound. *Halperin v. Pitts*, 352 Or 482, 494, 287 P3d 1069 (2012). The

12 Tribe has not cited any legal authority underlying the court's statement that gives

13 the court's assumption the force of a procedural remand mandate that overrides

14 the general principles that (1) a local government is entitled to limit its

15 consideration on remand to correcting the deficiencies that were the basis for

16 remand, and (2) a local government is not required to repeat on remand the

17 procedures applicable to the initial proceeding. We agree with respondents that

18 none of the prior appellate decisions found procedural error with respect to the

19 Tribe's participation in the initial 2023 proceeding. The Tribe did not establish a

20 right to submit additional evidence in the initial 2023 evidentiary proceeding

21 before the county.

22 The Tribe has not cited any controlling authority that, in the absence of a

23 procedural error, based on a substantial right of the party, the court or LUBA has

24 authority to compel the county to reopen the record on remand. If the county had

25 violated the Tribe's right to notice and/or an opportunity to be heard in the initial

1 proceeding, and that error resulted in a remand on appeal, then the county would
2 have been required to reopen the record on remand to allow an opportunity for
3 the Tribe to present additional evidence that they were improperly prohibited
4 from presenting due to a prejudicial procedural error. However, no appellate body
5 has concluded that the county committed procedural error vis-à-vis the Tribe in
6 the initial evidentiary proceeding. Accordingly, we agree with Thornburgh that
7 the county was not compelled to reopen the record on that issue and thus, did not
8 err in exercising its discretion to not reopen the record on that issue.

9 It is not LUBA's role to define the bounds of the court's authority on
10 judicial review under ORS 197.850. The issue raised in this assignment of error
11 calls us to determine whether the court's remand decision required the county to
12 reopen the record. We review the county's conclusion that the court's remand did
13 not. In reviewing that conclusion, we are guided by the principles that (1) a local
14 government is entitled to limit its consideration on remand to *correcting the*
15 *deficiencies that were the basis for remand*, and (2) a local government is not
16 required to repeat on remand the procedures applicable to the initial proceeding.
17 To determine the deficiencies that were the bases for the court's remand, we must
18 determine whether the court's remand was based on a procedural error in the
19 county's proceeding, or some other legal basis that required the county reopen
20 the record on the Treaty issue, as opposed to making findings based on the
21 evidence in the existing record. Our disposition of this assignment of error does
22 not turn on our opinion of the scope of the court's authority under ORS 197.850.

1 Instead, it turns on whether the disputed statement was necessary to the court's
2 decision. We determine that it was not, based on the character and disposition of
3 the underlying assignments of error before LUBA and the court.

4 The Tribe's first assignment of error is denied.

5 **VII. TRIBE SECOND ASSIGNMENT OF ERROR**

6 The Tribe argues that the county misconstrued the Treaty by failing to
7 apply a species-specific habitat protection standard and incorrectly concluded
8 that the Tribe waived that issue.

9 **A. Waiver**

10 Our review is limited to issues raised before the local hearings body, as
11 provided by ORS 197.797. ORS 197.835(3). ORS 197.797(1) requires that:

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

19 The "raise it or waive it" principle does not limit the parties on appeal to
20 the exact same arguments made below, but it does require that the issue be raised
21 below with sufficient specificity so as to prevent "unfair surprise" on appeal.
22 *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d
23 1078 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074,
24 (Apr 8, 2022) (slip op at 6), *aff'd*, 321 Or App 505 (2022) (nonprecedential

1 memorandum opinion), *rev den*, 370 Or 740 (2023). A particular issue must be
2 identified in a manner detailed enough to give the governing body and the parties
3 fair notice and an adequate opportunity to respond. *Boldt v. Clackamas County*,
4 107 Or App 619, 623 (1991). In order to raise the issue of whether findings of
5 compliance with an applicable approval criterion are adequate, the petitioner
6 must demonstrate that issues regarding compliance with that criterion were raised
7 below. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993). When
8 attempting to differentiate between “issues” and “arguments,” there is no “easy
9 or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA
10 672, 690 (2001). We refer to these principles as “raise-it-or-waive-it” or statutory
11 waiver. A petitioner adequately raises an issue under ORS 197.797(1) and
12 197.835(3) by citing the relevant legal standard, presenting argument that
13 includes the operative terms of the legal standard, or taking other actions to raise
14 the issue such that the local government knows or should know that the issue is
15 one that needs to be addressed in its decision. *Reagan*, 39 Or LUBA at 690.
16 Common purpose and policy underlie both waiver and exhaustion principles and
17 the related limits on LUBA’s scope of review—*viz.*, requiring a party to raise
18 issues with sufficient specificity so that the local government and other parties
19 have reasonable notice of the issues and providing the local government the initial
20 opportunity to issue a decision on the material issues. These principles preclude
21 an opponent from raising issues piecemeal throughout the course of land use
22 decision review. *Poto v. Linn County*, 67 Or LUBA 162, 176 (2013).

1 A party at LUBA fails to preserve an issue for review by LUBA if, in a
2 prior stage of a single proceeding, that issue is decided adversely to the party, or
3 that issue could have been raised and was not raised. *Beck*, 313 Or at 151. We
4 refer to that principle as *Beck* waiver. *Windlinx Ranch Trust v. Deschutes County*,
5 LUBA No 2023-079 (Feb 29, 2024) (slip op at 7-12), *aff'd*, 335 Or App 272, 555
6 P3d 1287 (2024); *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 691 n
7 5, 191 P3d 712 (2008); *Mill Creek Glen Protec. Assn. v. Umatilla County*, 15 Or
8 LUBA 563, *aff'd*, 88 Or App 522, 746 P2d 728 (1987); *Wetherell v. Douglas*
9 *County*, 60 Or LUBA 131, 137-38 (2009), *aff'd*, 235 Or App 246, 230 P3d 976,
10 *rev den*, 349 Or 57 (2010); *Portland Audubon v. Clackamas County*, 14 Or LUBA
11 433, *aff'd*, 80 Or App 593, 722 P2d 745 (1986). The overriding principle in *Beck*
12 is that “issues in land use cases must be brought to finality at the earliest available
13 opportunity.” *McKay Creek Valley v. Washington County*, 122 Or App 59, 64,
14 857 P2d 167 (1993). The *Beck* waiver principle narrows issues in sequential
15 appeals and precludes issues from being raised piecemeal throughout the course
16 of appellate review, consistent with the legislative policy that “time is of the
17 essence in reaching final decisions in matters involving land use.” ORS 197.805.

18 The Court of Appeals has recently explained the *Beck* principle as follows:

19 “In *Griffin Oak Prop. Invest. [v. City of Rockaway Beach*, 318 Or
20 App 777, 794, 509 P3d 643 (2022)], we explained that ‘the waiver
21 principle articulated in *Beck* is a variation on the law of the case
22 doctrine.’ * * * That doctrine draws on the same principles as the
23 law of the case doctrine that applies to litigation in a circuit court. A
24 trial court must follow decisions made on appeal in the same

1 litigation, and we must adhere to our prior decisions in a subsequent
2 appeal in the same litigation. *Gould v. Deschutes County*, 272 Or
3 App 666, 686, 362 P3d 679 (2015). So too in a land use case. * * *

4 “The waiver principle explained in *Beck* is related but distinct from
5 the law of the case doctrine. A party to a land use decision waives
6 an issue by failing to raise it at the earliest opportunity. *Devin Oil*
7 *Co. [v. Morrow County]*, 252 Or App [101,] 113, 286 P3d 925; *Beck*,
8 313 Or at 153-54. That is a case-by-case inquiry akin to the appellate
9 courts’ rules on preserving claims of error on appeal. *See State v.*
10 *Skotland*, 372 Or 319, 326-27, 549 P3d 534 (2024). Sometimes, the
11 earliest opportunity to raise an issue will be before the county.
12 Sometimes, it may be on appeal to LUBA. *See Devin Oil Co.*, 252
13 Or App at 113 (holding that a petitioner’s challenge to a limitation
14 imposed by the county was waived because the challenge ‘*could*
15 *have been*, but was not raised, in the petitioner’s first appeal in [the]
16 case[.]’ (Emphasis added.)).

17 “The point, as explained in *Beck*, is that an issue could be waived
18 without the law of the case doctrine specifically applying. A party
19 may not have raised that issue to the county or to LUBA, and LUBA
20 may not have addressed the issue. If a party then raised the issue for
21 the first time on judicial review before us, there would be no prior
22 decision subject to the law of the case doctrine. However, we might
23 still conclude that the issue had been waived and refuse to reach it
24 under the principles of waiver. Whether a party to a land use
25 decision waived an issue involves a case-specific evaluation. *Beck*,
26 313 Or at 154, 831 P2d 678.” *Redside Restoration*, 344 Or App at
27 406-07.

28 During the remand proceeding, the Tribe argued to the county that the
29 Treaty requires a species-by-species analysis and that Thornburgh, as the
30 applicant, must prove that the Treaty is not violated. In its May 7, 2025 letter, the
31 Tribe argued as follows:

32 “To show that the 2022 FWMP does not violate the 1855 Treaty,
33 Applicant must establish that the 2022 FWMP will not cause a net

1 loss of fish habitat necessary to support a harvestable population of
2 *each* treaty-protected fish species affected by [Thornburgh's]
3 proposed groundwater pumping. To meet this standard,
4 [Thornburgh] must show by substantial evidence: (1) the presence
5 and current status of the treaty-protected fish resources that may be
6 affected by the proposed groundwater pumping; (2) the effects of
7 the proposed groundwater pumping on the treaty protected
8 resources; and (3) the proposed mitigation measures will completely
9 mitigate the impact on treaty-protected fish resources caused by the
10 proposed groundwater pumping. For the reasons that follow,
11 [Thornburgh] has failed to meet its burden. The Tribe requests that
12 the Board deny the application." Remand Record 1,933 (emphasis
13 in original).

14 Thornburgh's expert identified redband trout, summer steelhead, spring
15 Chinook salmon, bull trout, brown trout, and mountain whitefish as species
16 present within the study area. Initial Record 12,722; *see also* Intervenor-
17 Petitioner's Brief 33 (acknowledging Thornburgh's expert's identification of
18 such species). In its May 7, 2025 letter, the Tribe did not identify specific treaty-
19 protected fish species and instead referred to federal Endangered Species Act
20 (ESA) "listed fish species that are also protected by Indian treaties." Remand
21 Record 1,943 (citing *Baley v. United States*, 942 F3d 1312, 1337 (Fed Cir 2019)).
22 In its May 21, 2025, letter, the Tribe argued that the county no net loss standard
23 and the Treaty standard are distinct and the "Treaty standard is more rigorous."
24 Remand Record 1,739. "Unlike the County standard, the 1855 Treaty standard is
25 applied on a *species-by-species* basis. [Thornburgh] is required to establish that
26 the 2022 FWMP will not cause a net loss of fish habitat necessary to support a
27 harvestable population of *each* treaty-protected fish species." *Id.* (emphases in

1 original). The Tribe argued that Thornburgh bore the burden of identifying “each
2 treaty-protected fish species potentially affected by [Thornburgh’s] groundwater
3 pumping” and submitting an updated FWMP analysis that includes “specificity
4 and context related to each treaty-protected species, life stage, and age class
5 habitat needs as they differ spatially and temporally within [the] study area.”
6 Remand Record 1,740. The Tribe argued that Thornburgh’s expert analyses
7 failed to “assess the presence and current status of all affected treaty-protected
8 resources.” *Id.* The Tribe argued that “at a minimum,” Thornburgh was required
9 to assess “sockeye salmon, fall Chinook salmon and Pacific lamprey.” *Id.*¹⁴

10 The county found that the Tribe’s assertion of a new species-specific
11 Treaty standard violated the *Beck* waiver principle in two respects. First, the
12 Tribe’s assertion is contrary to the interpretation of the no net loss standard in
13 *Gould FMP* that the resort developer was not required to show that each
14 individual species would be maintained or replaced on a one-to-one basis to

¹⁴ In their brief in this appeal, the Tribe does not provide a list of treaty-protected fish species in the streams impacted by the Thornburgh resort. The Tribe asserts that the Pacific lamprey is a treaty-protected fish species. The Tribe’s brief refers to several different fish species without specifying whether, which, some, or all species are protected by the Treaty. In a footnote in their brief, the Tribe explains that the Tribe “was not able to provide a complete inventory of the presence and status of all treaty-protected fish resources affected by [Thornburgh’s] proposed groundwater pumping” during the initial 2023 proceeding due to lack of individual notice to the Tribe. Intervenor-Petitioner’s Brief 34 n 9. As explained above, in *CTWSR I*, we denied the Tribe’s procedural assignment of error based on lack of individual notice, and the court affirmed that portion of our final order in *CTWSR II*.

1 satisfy the no net loss standard. 233 Or App at 631-34. Thus, it is settled law of
2 this case that the no net loss standard is a habitat standard and not a species-
3 specific standard.¹⁵ Remand Record 51. Second, the Tribe did not argue a species-
4 specific standard applies to the 2022 FWMP in the initial 2023 county proceeding
5 and, thus, *Beck* waiver applies and precludes the Tribe from raising that new
6 species-specific Treaty standard issue for the first time on remand. Remand
7 Record 52.

8 On the merits, the county concluded that the Tribe's assertion that
9 Thornburgh bears the burden of establishing no net loss to Treaty-protected
10 harvestable population of individual fish species was not supported by federal
11 case law construing Treaty rights. Instead, the county concluded, the Tribe had
12 to demonstrate that the resort's activities approved under the FWMP would harm
13 its Treaty rights by reducing harvestable fish populations. The county found that
14 the 2025 FWMP provides a net benefit to fish habitat, the Treaty is not violated,
15 and approval of the 2025 FWMP will not injure the Tribe's right to harvestable
16 fish. *Id.*

¹⁵ The Tribe does not assert that the application for modification of the FWMP is not part of the resort Final Master Plan proceeding, of which *Gould FMP* was a prior stage. In *CTWSR II*, the Court of Appeals cited *Beck* as precluding petitioner Gould from attempting to relitigate an issue that had "been resolved on review of previous phases of the same land use litigation." 332 Or App at 374 (citing *Beck* and *Gould v. Deschutes County*, 322 Or App 11, 23, 518 P3d 978 (2022)).

1 The Tribe argues that the *Beck* waiver principle does not apply to the issue
2 that the no net loss standard, applied consistently with the Tribe's Treaty rights,
3 requires a species-by-species analysis and that Thornburgh, as the applicant, must
4 prove that the Treaty is not violated. The Tribe invokes *City of Edmonds v.*
5 *Oxford House, Inc.*, 514 US 725 (1995), and *Foland v. Jackson County*, 61 Or
6 LUBA 264 (2010), for the proposition that local governments may not apply land
7 use regulations in a manner that violates federal law. Intervenor-Petitioner's Brief
8 31. Thornburgh agrees with that statement of law. However, Thornburgh argues,
9 the issue is not whether, in the abstract, federal law would control, constrain, or
10 expand the county's interpretation of the no net loss standard. Instead, the issue
11 is whether the Tribe is precluded from asserting a new standard because the Tribe
12 could have but did not raise that standard at an earlier time in the same
13 proceeding.

14 The Tribe asserts that it raised the species-specific standard during the
15 2023 proceeding. The Tribe argues that *Beck* waiver does not apply "because the
16 issue falls squarely within the scope of remand" and the Court of Appeals
17 concluded that the Tribe preserved the issue of whether the 2022 FWMP violates
18 the Treaty. Intervenor-Petitioner's Brief 4, 39-40 (citing *CTWSR II*, 332 Or App
19 at 386). The Tribe quotes the following passage from *CTWSR II* and argues that
20 the court's remand acknowledges a species-level focus for the Treaty issue on
21 remand:

22 "The Tribe asserted before LUBA that its treaty-protected fishery

1 right is a resource that is at risk of potential loss or degradation as a
2 result of Thornburgh's project, which relies primarily on
3 groundwater withdrawals. Those withdrawals, the Tribe asserts, will
4 drain aquifers underlying the project that have connectivity to
5 surface water flows vital to the continued survival of at-risk fish
6 species in the Deschutes Basin. The Tribe doubts that Thornburgh's
7 proposal to mitigate those negative impacts by buying and/or
8 canceling existing water rights elsewhere in the basin will
9 sufficiently ensure that there will be enough water for fish to survive
10 in nearby streams, and to ensure that the water flow and temperature
11 will be sufficient to *allow harvestable numbers of at-risk species of*
12 *fish to survive* * * *. The Tribe asserts that the latter is necessary to
13 sustain the fishery resource in fulfillment of the Tribe's treaty-
14 protected right to that resource. * * *." *CTWSR II*, 332 Or App at
15 383 n 16 (emphasis added).

16 We understand the Tribe to argue that the species-specific Treaty standard
17 was preserved during the initial 2023 proceeding under the *Boldt* preservation
18 standard and that, even if the species-specific standard was not raised in the initial
19 proceeding, the scope of the Court's remand for the county to address the Treaty
20 rights was broad, and the species-specific standard is simply an elaborated
21 *argument* under the preserved *issue* of the Treaty rights, and not a new issue. The
22 Tribe argues that the Treaty analysis and application is not controlled by *Gould*
23 *FMP*, 233 Or App 623. The Tribe argues that the county must construe the county
24 no net loss standard in DCC 18.113.070(D) consistent with the Treaty and,
25 according to the Tribe, the Treaty protects individual fish species. Intervenor-
26 Petitioner's Brief 31-32. As we understand it, the Tribe argues that the Treaty is
27 supreme and controlling federal law and prior interpretations of DCC
28 18.113.070(D) do not control because the Treaty was not invoked in those prior

1 proceedings. In other words, the *Beck* waiver doctrine does not apply when there
2 is a new federal law issue raised because the issue of compliance with federal law
3 cannot be waived or avoided by prudential principles of preservation. The Tribe
4 does not cite any authority for that proposition and, as far as we can tell, this is a
5 novel issue.

6 **1. Statutory Waiver**

7 We agree with Thornburgh that the Tribe has not demonstrated that it
8 raised the species-specific standard in the initial 2023 proceeding in a manner
9 that gave the county and Thornburgh fair notice and an adequate opportunity to
10 respond to that issue. Intervenor-Petitioner's Brief 41. The Tribe cites the Initial
11 Record pages 3,847 to 4,413; 1,817 to 1,822; 653 to 656; and Video Recording,
12 Board of County Commissioner's Public Hearing, February 1, 2023, beginning
13 at 1:14:15. The Tribe also points to the Initial Record at pages 847 to 4,413, which
14 includes a Fish Passage Plan and the Deschutes Basin Habitat Conservation Plan
15 (DB HCP), which is a basin-wide plan that requires eight irrigation districts and
16 the City of Prineville to manage irrigation activities in the Deschutes River Basin
17 to provide habitat protections for endangered fish and wildlife. *CTWSR I*, LUBA
18 Nos 2023-038/039/041 (slip op at 13). The Tribe argues that those documents are
19 focused on at-risk species.

20 The first citation to Initial Record pages 3,847 to 4,413 is 566 pages and
21 the last citation to pages 847 to 4,413 is 3,566 pages. It is the Tribe's burden to
22 establish that an issue is preserved for LUBA review, or explain why preservation

1 is not required. ORS 197.797; OAR 661-010-0030(4)(d); *Central Oregon*
2 *Landwatch v. Deschutes County*, LUBA No 2023-049 (Feb 15, 2024) (slip op at
3 5), *aff'd*, 333 Or App 263 (2014) (nonprecedential memorandum opinion);
4 *Rosewood Neighborhood Association v. City of Lake Oswego*, LUBA No 2023-
5 035 (Nov 1, 2023) (slip op at 7). Where preservation is disputed, we will not
6 search large page ranges cited in the petition for review to determine whether an
7 issue was raised below. *Kipp v. City of Astoria*, LUBA No 2024-012 (Dec 11,
8 2024) (slip op at 19); *Rosewood*, LUBA No 2023-035 (slip op at 7); *H2D2*
9 *Properties, LLC v. Deschutes County*, 80 Or LUBA 528, 532-33 (2019).

10 The video recording citation, Video Recording, Board of County
11 Commissioner's Public Hearing, February 1, 2023, beginning at 1:14:15, is a
12 dialog between an ODFW employee and the board of commissioners, and does
13 not establish that the Tribe (or ODFW) raised the species-specific Treaty
14 standard.¹⁶

15 Initial Record pages 1,817 to 1,822 is a March 1, 2023 letter from the Tribe
16 to the board of commissioners that covers a broad range of topics, including
17 allegations of prejudicial procedure, resort water usage, and mitigation strategy.

18 The Tribe does not specify any part of that letter that raised the species-specific

¹⁶ Where a party relies on oral testimony during a local proceeding to demonstrate that an issue was raised, the better practice is to quote the testimony that the party relies upon for preservation instead of citing only a beginning time stamp for a media recording.

1 standard, and we do not see that it was raised in that letter. Initial Record pages
2 653 to 656 is a March 8, 2023 letter from the Tribe to the board of commissioners
3 that references an intent to sue for federal ESA violations and explains that “the
4 Tribe has been extensively involved in the DB HCP * * *.” Initial Record 654.
5 That letter also explains that reintroduction of salmon and Middle Columbia
6 River (MCR) steelhead above the Pelton Hydroelectric Project “precipitated the
7 development of the DB HCP” and that fifteen species were considered for
8 coverage under that plan, including bull trout, MCR steelhead, and the Oregon
9 spotted frog. *Id.* The Tribe does not specify any part of that letter that raised the
10 species-specific standard and we do not see that it was raised in that letter. That
11 letter provides background information for the Tribe’s request that the county
12 consider the DB HCP and other ESA litigation because the outcome of that
13 litigation could impact water usage and, thus, impact Thornburgh’s water model
14 assumptions for the Crooked River. Nowhere in that letter did the Tribe assert
15 that the Treaty required Thornburgh to establish that the proposed 2022 FWMP
16 would not harm any Treaty-protected fish species.

17 During the initial local proceeding and subsequent appeals, the Tribe
18 argued that the county was required to consider the Tribe’s Treaty rights in
19 applying the county no net loss standard. The Tribe does not point to anywhere
20 in the initial proceeding where the Tribe argued that the Treaty standard is more
21 rigorous than the no net loss standard and requires a species-by-species analysis
22 for which Thornburgh bears the weight of proof and persuasion. The county erred

1 in failing to address the Treaty in finding the no net loss standard was satisfied in
2 the initial 2022 FWMP proceeding, and we erred in finding that issue was not
3 preserved in *CTWSR I*. However, Thornburgh argues, and we agree, “while the
4 initial decision did not make specific findings on the Treaty, it does not follow
5 that the Tribe can advance new requirements” of what the Treaty requires
6 Thornburgh to establish and the county to find. Central Land and Cattle
7 Company, LCC Intervenor-Respondent’s Brief 35. The Tribe does not assert that
8 it could not have raised the species-specific standard issue in the initial 2023
9 proceeding. The Tribe could have raised the species-specific standard issue
10 during the initial 2023 proceeding, but it did not.

11 Thornburgh emphasizes that Thornburgh, LUBA, and the Court of
12 Appeals all operated under the existing *Gould FMP* habitat no net loss standard
13 during the initial county proceeding and first set of appellate reviews in this
14 FWMP/FMP amendment proceeding, which is a strong indication that the
15 species-specific standard is a new issue raised for the first time on remand.

16 The Tribe acknowledged and argued under the *Gould FMP* standard in the
17 initial 2023 proceeding:

18 “The fishery resource includes treaty-protected fisheries managed
19 by the Tribe.

20 “To apply this standard, it is critical to understand the resource for
21 which loss is measured. The Tribe is aware of the decision in [*Gould*
22 *FMP*] which generally provides that the standard in DCC
23 18.113.070(D) can properly be interpreted as related to habitat, not
24 to individual species. *Id.* at 633 (noting that the ‘county associated

1 damage to “fish and wildlife resources” with “loss of habitat and
2 loss of endangered species,” which suggests that the resource[]
3 concerns are closely related to habitat concerns”). The County’s
4 2011 Comprehensive Plan acknowledges the critical relationship
5 between habitats and species and further acknowledges habitat
6 conservation planning as key to identifying new policies or codes.
7 See, Section 2.5 Water Resources Policies, Goal 4 (Maintain and
8 enhance fish populations and riparian habitat) and Section 2.6
9 (Wildlife), Goal 1 (Maintain and enhance a diversity of wildlife and
10 habitats).

11 “It is widely acknowledged that the Tribe is a co-manager of the
12 fishery resources in the basin. The resource therefore includes
13 Tribally managed resources including the Tribe’s treaty-reserved
14 rights to fish which includes the necessary habitat to support the
15 fisheries. The Tribe is the sole manager that can evaluate impacts to
16 its treaty-reserved fisheries resource.” Initial Record 4,301 (January
17 31, 2023 letter).

18 On appeal to LUBA and the Court of Appeals, the Tribe did not assert a
19 species-specific standard. In its brief to the Court of Appeals, the Tribe cited the
20 *Gould FMP* standard. Remand Record 866 (“[T]he Tribe was still concerned
21 about the lack of ‘clear, concise and objective’ standards in the proposed 2022
22 FWMP that are necessary to assure compliance with the ‘no net loss’ standard as
23 required by [*Gould FMP*].”). The Tribe did not assert that its Treaty right required
24 anything more or anything different than the habitat no net loss standard in *Gould*
25 *FMP*. We and the Court of Appeals affirmed the county’s finding that the 2022
26 FWMP results in a net benefit to fish *habitat*. *CTWSR I*, LUBA Nos 2023-
27 038/039/041 (slip op at 43); *CTWSR II*, 332 Or App at 380.

28 We agree with Thornburgh that the Tribe has not demonstrated that it
29 raised the species-specific Treaty standard in the initial 2023 proceeding in a

1 manner that gave the county and Thornburgh fair notice and an adequate
2 opportunity to respond to that issue.

3 **2. Beck Waiver**

4 The Tribe asserts that, even if we conclude that the species-specific
5 standard was not raised in initial proceeding, the scope of the Court's remand for
6 the county to address the Treaty rights was broad, and the county was required to
7 consider the species-specific standard on remand in order to adequately respond
8 to the court's remand in *CTWSR II* and our subsequent remand in *CTWSR III*.
9 The Tribe argues that the *issue* on remand was whether the 2022 FWMP violates
10 the Treaty and the species-specific standard is simply an elaborated *argument*
11 under the Treaty issue.

12 Thornburgh responds, and we agree, that the *Beck* waiver doctrine's
13 purpose of narrowing issues in successive remands would be greatly undermined
14 if an issue that was not preserved in the initial proceeding, and was thus waived,
15 could nevertheless be raised for the first time on remand as a new "argument"
16 under a remanded issue. *Compare Columbia Riverkeeper v. Columbia County*,
17 LUBA Nos. 2024-045/046 (Nov 26, 2024) (slip op at 14-18) (finding issue
18 waived), *and Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074,
19 (Apr 8, 2022) (slip op at 5-9) (same), *with DTL, Inc. dba Double Tee Concerts v.*
20 *City of Portland*, LUBA No 2024-081 (June 4, 2025) (slip op at 7-10) (agreeing
21 with the petitioner that the intervenor had not established that any particular
22 argument in the petition for review raised a new issue that was not raised so that

1 the city or other parties were deprived of an opportunity to respond during the
2 local proceedings).

3 A case where we rejected a *Beck* waiver challenge because the remand was
4 broad is illustrative and distinguishable. In *Morgan v. Jackson County*, we
5 explained that we had previously remanded the hearings officer’s original
6 decision for a “plenary evidentiary re-evaluation of the elements of a
7 nonconforming use verification” and we explained that our remand “required a
8 broad evidentiary re-evaluation, with focus on the nature and extent of the auto
9 yard use in 1996.” 80 Or LUBA 59, 64, 74, *aff’d*, 300 Or App 582, 452 P3d 1088
10 (2019). We noted that the “open-ended disposition did not preclude consideration
11 of very many issues, especially of an evidentiary nature” and rejected both
12 parties’ attempts to invoke *Beck*. *Id.* at 64. Differently, here, our remand was
13 narrow, for findings addressing the issue that the Court of Appeals determined
14 was adequately raised—namely, whether the 2022 FWMP violates the Treaty.

15 We agree with Thornburgh that the central *Beck* issue is whether the Tribe
16 raised the species-specific standard in the initial proceeding or demonstrates that
17 they could not have raised it in the initial proceeding. We conclude above that
18 the Tribe did not raise that issue in the initial proceeding. The Tribe does not
19 assert that they could not have raised the species-specific issue in the initial
20 proceeding. We agree that the issue is waived under *Beck*.

1 **B. *Gould FMP***

2 The Tribe argues that the Treaty analysis and application is not controlled
3 by *Gould FMP*. The Tribe argues that the county must construe the no net loss
4 standard in DCC 18.113.070(D) consistent with the Treaty and according to the
5 Tribe, the Treaty protects individual fish species. Intervenor-Petitioner's Brief
6 31-32. As we understand it, the Tribe argues that the Treaty is supreme and
7 controlling federal law and prior interpretations of DCC 18.113.070(D) do not
8 control because the Treaty was not invoked in those prior proceedings. In other
9 words, the *Beck* waiver doctrine or law of the case does not apply when there is
10 a new federal law issue raised because the issue of compliance with federal law
11 cannot be waived or avoided by prudential principles of preservation.

12 For purposes of *Beck* and the otherwise controlling interpretation in *Gould*
13 *FMP* of the no net loss *habitat* standard, the Tribe does not assert that it could
14 not have participated in the earlier county proceeding in which the county
15 approved the FWMP as part of the resort FMP and asserted that the county was
16 required to apply a no net loss *species* standard in order to construe that local
17 code provision consistently with the federal ESA and/or the Treaty.

18 The Tribe was not a party in *Gould FMP*. When considering different
19 parties to later appeals in the same land use litigation, we have observed that

20 “the Court noted that the parties to the first appeal in *Beck* were not
21 the same as the parties to the second appeal, but found that
22 difference immaterial, because the additional parties had the
23 opportunity to participate in the first appeal but did not. The Court
24 expressly agreed with the statement of the Court of Appeals in *Mill*

1 *Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 527,
2 746 P2d 728 (1987), that a party who did not raise an issue in an
3 earlier proceeding because he chose not to participate in it should be
4 as precluded from later raising the issue as a party who did
5 participate but neglected to raise the issue. 313 Or at 153, n 2. In
6 *Mill Creek Glen Protection Assoc.*, the Court of Appeals expressly
7 agreed with LUBA that the ‘law of the case’ or ‘waiver’ doctrine
8 precludes a party from raising issues in a subsequent appeal that
9 could have been, but were not, raised in the initial appeal leading to
10 remand. In its actual holding, the Court of Appeals extended that
11 rather commonplace principle to include parties that could have
12 participated in the initial appeal but chose not to, and precluded such
13 parties from raising issues that could have been, but were not, raised
14 in the initial appeal.” *Hatley v. Umatilla County*, 66 Or LUBA 265,
15 273 (2012), *aff’d in part, rev’d and rem’d in part*, 256 Or App 91,
16 301 P3d 920, *rev den*, 353 Or 867 (2013).

17 We are not convinced that the supremacy of the Treaty precludes that
18 application of the prudential *Beck* waiver principle in this case. Under the Tribe’s
19 theory, any party could choose to not participate or not raise a federal law issue
20 and prolong land use proceedings and final decisions by raising federal issues at
21 any time during later stages of the same proceeding. *See* ORS 197.805 (“It is the
22 policy of the Legislative Assembly that time is of the essence in reaching final
23 decisions in matters involving land use and that those decisions be made
24 consistently with sound principles governing judicial review.”); *Johnson v. Lane*
25 *County*, LUBA Nos 2022-066/067 (Feb 13, 2023) (slip op at 12), *aff’d*, 327 Or
26 App 485, 536 P3d 485 (2023) (“The purpose of this statute is to provide certainty
27 in matters involving land use for local governments, developers, opponents, and
28 those who hold an interest in land.”). The *Gould FMP* no net loss habitat standard

1 is controlling and precludes the Tribe from asserting the new species-specific
2 standard.

3 The Tribe's second assignment of error is denied.

4 **VIII. GOULD FIRST ASSIGNMENT OF ERROR**

5 Gould argues that the 2025 FWMP does not comply with our remand in
6 *CTWSR I* and the approval decision lacks adequate findings establishing that the
7 2025 FWMP compliance measures will satisfy the no net loss standard. Gould
8 argues that the county erred in concluding that our remand in *CTWSR I* concerned
9 only *future* groundwater rights and the county's decision does not resolve the
10 error that we identified in *CTWSR I*. Gould asserts that the county's approval
11 reiterates the same error that we identified in *CTWSR I*, because it allows
12 Thornburgh to rely on water rights that OWRD has not reviewed or approved.
13 For that reason, Gould argues that the county decision violates our remand order
14 and lacks substantial evidence that the 2025 FWMP satisfies the no net loss
15 standard.

16 Thornburgh responds that the county made adequate findings supported by
17 substantial evidence that fully addressed the narrow issue on remand. Thornburgh
18 asserts that the county correctly found that only *future* groundwater rights are
19 bound by OWRD processes and the existing water rights described in the FWMP
20 may be used for resort consumption and fish mitigation and those rights are not
21 bound to OWRD processes. Thornburgh argues that the record demonstrates that
22 the no net loss standard is satisfied by the existing water rights. Thus, Thornburgh

1 asserts, unless Thornburgh changes the 2025 FWMP, future water rights only
2 address a water supply shortfall and do not impact the county's conclusion that
3 Thornburgh has satisfied the no net loss standard by complying with the 2025
4 FWMP.

5 Our resolution of this assignment of error is controlled by the proper
6 characterization of the appeal and decision in *CTWSR I*. We summarize *CTWSR*
7 *I* at length here and, ultimately, we agree with Gould's characterization of
8 *CTWSR I* and sustain this assignment of error for the reasons explained below.

9 **A. Cessation and Control**

10 In this appeal, the parties dispute the nature and purpose of our remand in
11 *CTWSR I* regarding the FWMP compliance measures. Gould argues that the
12 deficit that we identified in *CTWSR I*—that submittal of a groundwater rights
13 transfer or cancellation application to OWRD does not provide adequate evidence
14 of quantity of fish mitigation water to satisfy the no net loss standard—applies
15 equally to existing groundwater rights and future acquired groundwater rights
16 and the county erred by finding that it applied only to future groundwater rights.

17 Thornburgh responds that the county correctly found that the modified
18 compliance measures concern only *future* groundwater rights, because, in the
19 2023 county proceeding, Thornburgh established the reliability of prior use of
20 Thornburgh's existing groundwater rights by providing pumping records, photos,
21 and affidavits of use. Thornburgh argues that the county correctly concluded that
22 the issue of adequacy of the cessation and control compliance method was

1 resolved against opponents in *CTWSR I* and the issue is barred from being
2 relitigated in this appeal by the *Beck* doctrine.

3 During the remand proceeding, Thornburgh argued that for groundwater
4 rights, fish habitat mitigation occurs at cessation of pumping and control by
5 Thornburgh, and that OWRD review and approval *can* establish control, but a
6 deed or assignment of a water right is independently adequate *without* OWRD
7 review or approval. Remand Record 2,040. Thornburgh argued that OWRD
8 approval is only necessary when Thornburgh relies on the OWRD assignment,
9 transfer, or cancellation approval as establishing control of the groundwater right.

10 As set out above, the 2025 FWMP compliance section authorizes groundwater
11 right control and cessation of pumping as providing fish habitat mitigation water.

12 On remand, Thornburgh conceded that for *future* groundwater rights, “a
13 ‘simple submittal’ of an application to OWRD would not ensure continual
14 compliance with the No Net Loss standard * * * because the submittal itself
15 would not ensure [that Thornburgh] owned or controlled the water right.”
16 Remand Record 27. The county concluded that the need for revised compliance
17 provisions on remand “does not apply to the existing groundwater rights as
18 [Thornburgh] already provided pumping records, photos, and affidavits of use to
19 solidify reliability of prior use.” Remand Record 27 n 7. The county agreed with
20 Thornburgh that our *CTSWR I* remand regarding inadequate compliance
21 provisions “only pertained to future water rights.” *Id.* n 7. The county agreed with
22 Thornburgh that the 2022 FWMP “included *options* for submittal to OWRD but

1 *did not require approval in any instance.”* Remand Record 28 (emphases added).

2 Again, the 2022 FWMP compliance provision provided, in relevant part:

3 “a. POA – Groundwater: For any future rights that may be
4 acquired, compliance occurs upon the cessation of pumping of the
5 rights and along with any of the following: deed evidencing the
6 transfer of ownership, a submittal to OWRD of any of the following:
7 (i) an assignment of the water right to Thornburgh, (ii) an
8 application that seeks OWRD approval of a transfer to pump at the
9 Resort property, or (iii) a cancellation in-lieu of mitigation.”

10 The county reasoned that the 2022 FWMP phrase “along with any of the
11 following” meant that cessation of pumping and a deed evidencing transfer of
12 ownership were adequate to establish compliance with the FWMP and no net loss
13 standard without any OWRD review. Remand Record 29.

14 Gould argues, and we agree, that the county’s conclusion that our remand
15 in *CTWSR I* concerned only future groundwater rights misreads the prior appeal
16 and our remand decision. In *CTWSR I*, Bishop challenged the county’s
17 conclusion that the 2022 FWMP satisfied the no net loss standard as not
18 supported by substantial evidence. Bishop challenged as inadequate the evidence
19 of existing listed groundwater rights for which Thornburgh had established
20 ownership and control and cessation of pumping and the compliance measure
21 that included simple application submittal to OWRD. *See CTWSR I*, LUBA Nos
22 2023-038/039/041 (slip op at 62) (“Bishop argues that the 2022 FWMP assumes
23 **completion of the listed water rights transfers and cancellations.** Bishop
24 argues that, thus, the county must require proof of *completion* of each alternative

1 OWRD process, rather than mere ownership of a certificate and *submittal* of an
2 application to OWRD, before the county may conclude that the no net loss
3 standard has been satisfied.”) (Italics in original; boldface added). Bishop
4 challenged as inadequate the above-quoted compliance measure.

5 We sustained that part of Bishop’s assignment of error, agreeing with
6 Bishop that the 2022 FWMP compliance measure that required only submittal to
7 OWRD of applications for transfers or cancellation of groundwater rights was
8 inadequate to ensure no net loss of fish resources. We rejected Thornburgh’s
9 argument “that the county may rely upon evidence of Thornburgh’s ownership
10 of water rights, cessation of pumping, and submittal to OWRD, and need not wait
11 until OWRD has made a final adjudication.” *Id.* We observed that “Thornburgh
12 has not pointed to any evidence supporting a conclusion that ground water right
13 certificate ownership, cessation of pumping, and OWRD submittal is sufficient
14 to ensure fish mitigation water will be provided as assumed in the 2022 FWMP.”
15 *Id.* (slip op at 65).

16 We agree with Gould that the county erred in interpreting the 2022 FWMP
17 compliance provision as allowing cessation and control *or* OWRD approval. As
18 an interpretive matter, the county’s interpretation improperly inserts an “or”
19 where there is none. Under the county’s interpretation, the 2022 FWMP
20 compliance provision (D)(1)(a) would read:

21 “POA – Groundwater: For any future rights that may be acquired,
22 compliance occurs upon the cessation of pumping of the rights and
23 along with any of the following: deed evidencing the transfer of

1 ownership, [or] a submittal to OWRD of any of the following: (i) an
2 assignment of the water right to Thornburgh, (ii) an application that
3 seeks OWRD approval of a transfer to pump at the Resort property,
4 or (iii) a cancellation in-lieu of mitigation.”

5 Moreover, if cessation and control were adequate to satisfy the no net loss
6 standard, as Thornburgh claims and the county found in the challenged decision,
7 then it would not have mattered in *CTWSR I* whether OWRD submittal, as
8 opposed to review and approval, was adequate in assessing whether the 2022
9 FWMP compliance measures satisfied the no net loss standard. As explained
10 above, the record before the county and before us in this appeal evidences no
11 significant change to the existing water rights and OWRD processes that were
12 before the county in *CTWSR I*. If the existing water rights control and cessation
13 are sufficient to satisfy the no net loss standard, as the county found, then those
14 same rights and compliance measures would have been sufficient in 2023, yet we
15 concluded they were not in *CTWSR I*.

16 In *CTWSR I*, Bishop asserted that the county improperly relied on the listed
17 water rights as establishing the *quantity* of water available for mitigation. In other
18 words, Bishop argued, certificated water rights are not substantial evidence that
19 the 2022 FWMP will result in no net loss to fish resources. The 2022 FWMP and
20 modeling rely on the quantity of water listed in the water rights certificates.
21 Bishop argued that the no net loss standard requires a certainty greater than listing
22 what is shown on a paper certificate. We rejected that argument and concluded
23 that “a reasonable person could conclude that *the water rights transactions*
24 *proposed* in the 2022 FWMP will result in no net loss to fish habitat based on

1 quantities and quality of water modeled based on the listed water rights
2 certificates.” *CTWSR I*, LUBA Nos 2023-038/039/041 (slip op at 53) (emphasis
3 added). As Gould emphasizes, that analysis was based on Thornburgh’s assertion
4 and the county’s finding that the listed water rights would be (1) transferred from
5 their existing points of appropriation to wells at Thornburgh Resort, (2)
6 transferred to instream water rights, or (3) cancelled in lieu of mitigation. Gould
7 Petition for Review 4 (citing the county’s 2022 FWMP approval, Initial Record
8 29). Thus, our conclusion in *CTWSR I* with respect to existing water rights
9 providing fish mitigation water was predicated on proposed water rights
10 transactions being submitted, reviewed, and approved by OWRD. Nothing in our
11 decision blessed a compliance standard that simple control by deed or assignment
12 and cessation of pumping is adequate to satisfy the no net loss standard. We agree
13 with Gould that we did not find in *CTWSR I* that the existing water rights listed
14 in the 2022 FWMP satisfied the no net loss standard by evidence of cessation and
15 control and that the compliance deficit applied only to future acquired
16 groundwater rights.

17 On remand, the county found that “[t]he entirety of the FWMP
18 groundwater mitigation is already being provided by the existing groundwater
19 rights.” Remand Record 29. That conclusion is based on compliance with the
20 2025 FWMP being established by cessation and control. We agree with Gould
21 that the record lacks substantial evidence that cessation and control are sufficient

1 to satisfy the no net loss standard. These portions of Gould's first assignment of
2 error are sustained.

3 **B. Evidence of Use**

4 The next question is whether the county erred by finding that it may rely
5 on Thornburgh's evidence of use as substantial evidence of the quantity of water
6 in the absence of OWRD review and approval. Gould argues that the county erred
7 in finding that the "reliability of prior use" of the existing groundwater rights is
8 substantiated by Thornburgh's submitted pumping records, photographs, and
9 affidavits of use. Remand Record 27 n 7. In other words, the county found that
10 OWRD processes are not required to substantiate that the existing listed water
11 rights will provide the quantity of water listed in the water rights certificates so
12 that Thornburgh's 2022 FWMP modeling, which relied on those quantities of
13 water, was based on substantial evidence.

14 In *CTWSR I*, ODFW argued to the county that the water rights Thornburgh
15 listed and relied upon in the 2022 FWMP were not sufficiently reliable to meet
16 the no net loss standard because the record did not demonstrate that the full
17 amount of water under the water rights listed in the 2022 FWMP and relied upon
18 for Thornburgh's modeling "have been consistently used in full in the recent
19 past." Initial Record 1,827.

20 The county rejected that argument and reasoned:

21 "As noted above, ODFW disagrees with elements of OWRD water
22 law and desires to create a new standard related to the reliability of
23 water rights that is outside of typical water law, particularly for these

1 Thornburgh proceedings and to impose that standard on
2 Thornburgh. This could put Deschutes County in the position of
3 determining aspects of water law that have been delegated to
4 OWRD and not to counties. We decline to take that approach.
5 Thornburgh has provided substantial evidence of pumping records,
6 aerial photos, affidavits of use for individual water rights that
7 indicate substantial use and that rights will provide actual benefits
8 to impacted waterways. Additionally, as Thornburgh has pointed
9 out, ORS 537.270 directly relates to whether certificated water
10 rights are evidence of water priority and appropriation or use. We
11 find that where Thornburgh has (or is planning to use) certificated
12 or permitted water that the amount of appropriation, duty and
13 priority govern here. We find that Thornburgh's water rights are
14 'reliable' for the purpose of complying with the No Net Loss
15 Standard.

16 "The Board finds that, with respect to arguments that
17 [Thornburgh's] water rights cannot be considered reliable and/or
18 'wet water,' the County cannot second-guess OWRD's
19 determinations concerning the legality of water rights and/or the
20 current status of those rights *for which [Thornburgh] is requesting*
21 *transfers*. We find that the proposed water rights that will be used
22 for the Resort's water supply and mitigation are reasonably certain
23 *to be approved for transfer by ODFW.*" Initial Record 30 (emphases
24 added).

25 In addition, and in the alternative, the county found that none of the identified
26 water rights are subject to cancellation proceedings and Thornburgh is entitled to
27 rely upon water rights unless they are subject to cancellation proceedings. Initial
28 Record 62. The county found that ORS 537.270 is a "relevant consideration." *Id.*

29 In *CTWSR I*, Bishop argued that the county improperly relied on ORS
30 537.270 to support its conclusion that the water rights transfers and cancellations
31 will result in water in the stream for fish habitat. We assumed without deciding
32 that the county misconstrued ORS 537.270 and erred in concluding that statute

1 creates a legal presumption that Thornburgh's water rights certificates are
2 conclusive evidence of the availability of water for the purpose of complying
3 with the county's no net loss standard. However, we observed, the county's
4 finding relying on ORS 537.270 was in addition, and in the alternative, to the
5 county's finding that Thornburgh provided substantial evidence of pumping
6 records, aerial photos, and affidavits of use for individual water rights that
7 indicate substantial use, and that those rights will provide actual benefits to
8 impacted waterways. Thus, we concluded, the county's error in applying an
9 improper presumption based on ORS 537.270 was harmless in that it was not
10 necessary to the approval. *CTWSR I*, LUBA Nos 2023-038/039/041 (slip op at
11 50-51).

12 In *CTSWR I*, Bishop argued that pumping records, photos, and affidavits
13 of use were not substantial evidence because a reasonable person would not rely
14 on that evidence because ODFW experts opined that there was insufficient
15 information to find that there would be no net loss/degradation from water
16 consumption at the resort under the 2022 FWMP. LUBA Nos 2023-038/039/041
17 Bishop Intervenor-Petitioner's Brief 45. We did not directly address that
18 argument, probably because, as explained above, we held that 2022 FWMP
19 compliance required OWRD review and approval of the proposed water rights
20 transfers, and we assumed that OWRD processes would investigate and
21 determine the validity and the quantity of Thornburgh's water rights. In other

1 words, we implicitly reasoned that OWRD review would address ODFW's and
2 opponents' concerns and criticisms.

3 On remand, ODFW reiterated its 2022 FWMP comments about absence of
4 substantial evidence in the record to satisfy the no net loss standard. Remand
5 Record 2,600. Gould and Bishop's attorney again asserted that the full
6 certificated right might not be available. Remand Record 31. The county found
7 that issue is outside the scope of remand, is settled, and barred by *Beck*. Remand
8 Record 32.

9 Gould argues, and we agree, that the county erred in considering this issue
10 outside the scope of remand and barred by *Beck*. As explained above, that issue
11 was not before us in *CTWSR I*. In the approval of the 2022 FWMP, the county
12 found that compliance had been met for rights b through f. Initial Record 77. For
13 water rights b through e, that conclusion was based on satisfaction of compliance
14 measure (D)(1)(a), which we found in *CTWSR I* did not result in substantial
15 evidence of no net loss. *Id.* at 71-73. Thus, the adequacy of compliance for
16 existing water rights b through e were live issues on remand.

17 In the challenged approval, the county approves a revised compliance
18 measure that allows the county to find compliance by (1) pumping cessation and
19 (2) *either* a deed or an assignment to Thornburgh *or* an approval from OWRD.
20 Remand Record 67. The county concludes that cessation, control, and evidence
21 of past use (such as pumping records and affidavits of use) are adequate to
22 establish a sufficient evidentiary basis for an independent *county* conclusion that

1 the no net loss standard is satisfied without OWRD review. Similar to the 2022
2 FWMP, the 2025 FWMP states that the listed water rights b through e comply
3 with the FWMP through satisfaction of compliance measure (D)(1)(a). Remand
4 Record 61-63. Accordingly, the county's findings that the water rights b through
5 e comply with the 2025 FWMP and satisfy the not net loss standard relies on the
6 conclusion that cessation and control are adequate compliance mechanisms.

7 We agree with Gould that the county's finding that fish mitigation has been
8 provided to satisfy the no net loss standard is not supported by adequate findings,
9 substantial evidence, or substantial reason. We agree with Gould that the county
10 must address, in the first instance, whether and why *county* review of pumping
11 records, photos, and affidavits of use is a sufficient substitute for OWRD review
12 and verification of past water right use so that Thornburgh's evidence is
13 substantial evidence that the no net loss standard is satisfied by the water rights
14 and processes described in the 2025 FWMP. This portion of Gould's first
15 assignment of error is sustained. If, on remand, the county reopens the record to
16 accept additional evidence from Thornburgh intended to demonstrate whether,
17 how, and why cessation and control and county review (without OWRD review)
18 are adequate, then the county must allow other parties to submit responsive
19 evidence.

20 C. Reporting Requirements

21 Gould contends that the new reporting table listing the status of the water
22 rights and new Condition 41 do not resolve the lack of substantial evidence

1 because reporting what groundwater rights Thornburgh has control over and has
2 ceased pumping and what applications have been submitted to OWRD fails to
3 explain why submission to OWRD, and not completion of OWRD review and
4 approval, satisfies the no net loss standard, which deficit was the basis of our
5 remand in *CTWSR I*.

6 Bishop argued that the 2022 FWMP reporting requirement did not
7 demonstrate satisfaction of the no net loss standard, and we agreed. We reasoned:

8 “[T]he fact that Thornburgh may not legally pump water for resort
9 use until it has obtained and documented *OWRD mitigation*
10 necessary to withdraw groundwater for resort use does not ensure
11 that all the required *fish mitigation* water will be provided in advance
12 of pumping. OWRD mitigation water and fish mitigation water may
13 sometimes be the same water, but it is provided to satisfy different
14 requirements. OWRD’s mitigation rules do not ensure the no net
15 loss of fish resources.

16 “Thornburgh does not argue that the reporting requirements in the
17 2022 FWMP are sufficient to demonstrate no net loss, and we do not
18 see that they are. The required report might show that the quantities
19 and quality of water assumed in the 2022 FWMP have been
20 provided, or it might not. No additional reporting is required during
21 the review of any land use application related to the resort. As we
22 understand it, the 2022 FWMP modeling assumes equal efficacy and
23 reliability as between instream water right transfers and voluntary
24 cancellation of water rights so that those legal processes have the
25 same instream impacts on water quality and quantity.” *CTWSR I*,
26 LUBA Nos 2023-038/039/041 (slip op at 64) (emphases in original).

27 On remand, Thornburgh requested a condition of approval to require
28 reporting be completed on a reporting table, set out below.

31-Dec-24		THORNBURGH MITIGATION REPORT																	#1 Status: Pumping, Deed, Transfer				#3		#4A	#4B	#4C & 7	#6	#5A - Annual Benefit		#5B - Cumm. Benefit		#8
#	Water Right	Cert or Permit #	Acre-Feet Certificate	Pumping Stopped	Deed, Order or Assignment	Transfer #, Status, Date	Gallons Pumped	Acre-Feet Pumped	AF left in Ground	AF left in Stream	AF OVRD Mitigation or Credits	AF Drought Relief	Ann Benefit (Acre-Feet)	Ann Benefit (Million Gallons)	Benefit (Acre-Feet)	Benefit (Million Gallons)	Status: Exempt Wells																
1	Tree Farm	G-13965	327.5	2021	2021	TT-13703, FO 2021	-	-	327.5	-	-	-	327.5	106.72	654.2	213.30																	
2	Big Falls Ground	C-87758	18.9	2022	2022	TT-14074: Pending	-	-	18.9	-	-	-	18.9	6.16	37.8	12.32																	
3	Big Falls DC Grnd	C-96190/2	614.8	2021/2022	2021/2022	TT-14075: Pending	-	-	614.8	-	-	-	614.8	200.33	1,229.6	400.67																	
4	Dutch Pacific	C-89258	49.5	2019	2019	-	-	-	49.5	-	-	-	49.5	16.13	99.0	32.26																	
5	LeBeau Surface	C-90239	200.0	2021	2021	IL-1975, FO 2024	-	-	-	124.7	75.3	-	200.0	65.17	400.0	130.34																	
6	TSID Mitigation	-	106.0	2012	2012	Complete 2012	-	-	-	106.0	-	-	106.0	34.54	1,366.0	445.11																	
7	DRC Mit Credits	-	6.0	2013	2013	Temp Credits (TC)	-	-	-	-	6.0	-	6.0	1.96	72.0	23.46																	
8	Pinnacle Permit	G-17036	2,129.0	-	-	Mit provided # 5 & 7	-	-	-	-	-	-	-	-	-	-																	
	Total	-	3,452	-	-	-	-	-	1,011	231	81	-	1,323	431.00	3,859	1,257.46																	

Remand Record 30, 84. Thornburgh argued that the updated reporting requirement is sufficient to demonstrate no net loss. The county found that the “reporting will show whether, and to what extent the quantities and quality of water assumed in the 2022 FWMP have been provided[,]” which “is sufficient to provide adequate reporting and to meet the No Net Loss Standard of DCC 18.113.070(D).” *Id.*

The decision imposes Thornburgh’s proposed FMP Condition 41, which provides: “Any amendment by the Applicant to this 2022 FWMP shall require a new modification application.” Remand Record 24, 57.

The county found that the revised compliance measures for groundwater

“addresses LUBA’s concerns and will ensure compliance with the FWMP language for groundwater permits acquired in the future, ensuring their ownership and control and ensuring that the water is left in the aquifer.”⁸ It is important to note that future groundwater permits are not needed to comply with the 2022 FWMP because the existing rights in the FWMP already meet the standard, being found to fully mitigate (with the listed surface water rights) all impacts of Thornburgh’s pumping up to the maximum of 1,460 acre-feet (AF).

“[Thornburgh] anticipates that the resort may use future groundwater rights to meet additional supply needs (not FWMP mitigation) to pump up to the full amount of 1,460 AF (if that amount is required). If [Thornburgh] chooses to change any of the listed groundwater rights and use anything other than the listed groundwater rights for FWMP mitigation, that change will require a

1 new public process. A condition of approval is included in this
2 Decision to that effect. Any such modification must be permitted as
3 a modification to the FMP and will be processed in the same manner
4 as the modification approved in this Decision.

5 _____
6 ⁸ Reporting requirements also ensure that the water remains for fish
7 mitigation. The Board adopts the template submitted by
8 [Thornburgh] for such reporting.” Remand Record 28.

9 Gould contends, and we agree, that the new reporting table listing the
10 status of the water rights and new Condition 41 do not resolve the lack of
11 substantial evidence because reporting what groundwater rights Thornburgh has
12 control over and ceased pumping and what applications have been submitted to
13 OWRD fails to explain why submission to OWRD and not completion of OWRD
14 review and approval satisfies the no net loss standard.

15 Gould’s first assignment of error is sustained.

16 **IX. TRIBE THIRD ASSIGNMENT OF ERROR**

17 The Tribe argues that the county erred in approving the 2025 FWMP
18 because the amendments to the groundwater compliance measure (D)(1)(a) fail
19 to comply with the Treaty because the 2025 FWMP relies on unproven
20 assumptions and fails to ensure compliance with the Treaty standard on a future
21 water-right-specific basis.

22 The county found:

23 “Future water rights are not required for FWMP mitigation but may
24 be sources [Thornburgh] may pursue use to allow it to pump the full
25 amount of 1,460 acre-feet. The entirety of the FWMP groundwater

1 mitigation is already being provided by the existing groundwater
2 rights.” Remand Record 29.

3 The Tribe points out that the 2025 FWMP is premised on the assumption
4 that the water rights identified in the plan will be used for consumption and
5 mitigation and recognizes that changes in the place of use of a water right can
6 change where fish habitat is impacted. Remand Record 60-61. Thus, water rights
7 are not fungible for fish mitigation purposes. The Tribe argues that the county
8 must evaluate for compliance with the no net loss standard each water right that
9 Thornburgh acquires and proposes for future use, and the 2025 FWMP
10 compliance provisions do not ensure that any future groundwater rights acquired
11 by Thornburgh will not change the underlying assumptions or violate the no net
12 loss standard by degrading fish habitat. Thus, the Tribe asserts that each water
13 right “must be individually evaluated for compliance” with the no net loss
14 standard. Intervenor Petitioner’s Brief 44.

15 Thornburgh responds that this assignment of error raises a new issue that
16 each water right action must separately and independently satisfy the no net loss
17 standard and Treaty. Thornburgh emphasizes that the standard that has been
18 applied since the initial proceeding looks at the collective measures in the FWMP
19 and the collective impacts of the water rights actions. Moreover, Thornburgh
20 argues, the Tribe misunderstands the amendments to the FWMP compliance
21 provisions, which only relate to *future* water rights that have not been listed or
22 identified in the 2025 FWMP.

1 As explained under Gould's first assignment of error, some of
2 Thornburgh's existing groundwater rights transfers are not yet fully approved
3 through OWRD processes and we concluded above that the record lacks
4 substantial evidence that cessation and control are sufficient to satisfy the no net
5 loss standard. Accordingly, on this record, we reject Thornburgh's assertion that
6 the compliance provisions relate only to future water rights. On remand under
7 Gould's first assignment of error, the county must explain whether and how the
8 existing water rights fully satisfy the no net loss standard. To the extent the
9 Tribes' third assignment of error repeats Gould's arguments, the Tribes do not
10 provide an independent basis for remand.

11 With respect to the independent arguments in the Tribes' third assignment
12 of error, we agree with Thornburgh that the no net loss standard is a "net"
13 standard and the county may and must evaluate the collective impacts of the
14 water rights actions and the collective mitigation measures in the FWMP. The
15 FWMP recognizes that changes in water right place of use may change specific
16 stream fish habitat impacts, which may in some instances change the net impact.
17 Accordingly, we agree with the Tribe that the FWMP must account for that
18 potential, or the county must impose compliance mechanisms that ensure
19 continued compliance with the no net loss standard.¹⁷

¹⁷ This conclusion is independent from our rejection of the Tribe's species-specific Treaty standard argument in the Tribe's second assignment of error.

1 Thornburgh argues that only changes to fish mitigation water requires
2 county review and responds that the 2025 FWMP and conditions are adequate to
3 ensure the county assesses any changes to the water rights described in the
4 FWMP as relevant to fish mitigation water. We agree with Thornburgh that those
5 conditions are unchallenged and, thus, presumptively adequate. The county
6 found: “If the Applicant chooses to change any of the listed groundwater rights
7 and use anything other than the listed groundwater rights for FWMP mitigation,
8 that change will require a new public process. A condition of approval is included
9 in this Decision to that effect.” Remand Record 28; *see also* Remand Record 57
10 (“FMP Condition 41: Any amendment by the Applicant to this 2022 FWMP shall
11 require a new modification application.”). The Tribe does not address that finding
12 and condition or demonstrate that they are inadequate to ensure continued
13 compliance with the no net loss standard. In its reply brief, the Tribe asserts that

14 “[t]he issue is not whether future amendment of the FWMP requires
15 a new land use application. The issue is whether the 2025 FWMP
16 complies with the 1855 Treaty with respect to future groundwater
17 right acquisition. The plan does not establish present compliance
18 with the 1855 Treaty.” Intervenor-Petitioner’s Reply Brief 4.

19 To the extent that the Tribe asserts a Treaty standard that is independent of the
20 no net loss standard, we reject that argument for the reasons explained in our
21 disposition of the Tribe’s second assignment of error.

22 The Tribe’s third assignment of error is denied.

1 **X. GOULD THIRD ASSIGNMENT OF ERROR**

2 Gould argues that the county's conclusion that the 2025 FWMP satisfies
3 the no net loss standard is unsupported by substantial evidence because control
4 and cessation of pumping does not permanently protect water from use by others.
5 Gould argued to the county that, to provide adequate fish mitigation, Thornburgh
6 and the county must ensure that fish mitigation water is permanently protected
7 from use by other users. Remand Record 30-31.

8 The county found that issue of whether the 2022 FWMP protected water
9 rights from being used by junior holders was raised and rejected in *CTWSR I* and,
10 thus, this issue is barred by *Beck*, and also outside the scope of the remand.
11 Remand Record 31. In addition, and in the alternative, the county rejected
12 Gould's factual assertion that other water users could "grab" the fish mitigation
13 water based on evidence that enough water exists for all water rights and
14 "[g]rabbing water would be illegal." Remand Record 31.

15 In *CTWSR I*, the issue of junior water rights holders "grabbing"
16 Thornburgh's fish mitigation water was raised and resolved in the context of
17 water right voluntary cancellation, which is processed through OWRD. In
18 *CTWSR I*, Bishop argued that "cancellation does not permanently protect the
19 water proposed for cancellation from use by others because that water can be
20 used by other water rights holders pumping from the same aquifer." See *CTWSR*
21 *I*, LUBA Nos 2023-038/039/041 (slip op at 46-48). Stated differently, "the
22 quantity of water subject to cancellation could be 'picked up' by junior water

1 rights holders so that quantity of water would not reliably be instream providing
2 fish habitat, as assumed by the 2022 FWMP.” *Id.* (slip op at 46). Thornburgh
3 responded, and we agreed, that Thornburgh’s water rights expert, Newton, opined
4 that both transfer to an instream water right and cancellation will leave water in
5 the system at the original pumping location because the OWRD processes for
6 transfer or cancellation ensure that the mitigation measure is effective. *Id.* (slip
7 op at 48). We quoted the county’s finding that

8 “‘[t]he flows restored by water right transfers may not be claimed
9 by other water users in the basin because new surface water rights
10 are not being issued in the Deschutes Basin, and the evidence shows
11 no party has been regulated off of a surface or groundwater right in
12 the basin.

13 “‘Further, the [board] finds that the evidence in the record related to
14 cancellation in lieu does not result in the ability of a junior holder to
15 ‘pick up’ the water. The evidence shows the watermaster has not
16 regulated any groundwater or surface water rights off. This means
17 enough water exists for all water rights (not storage), even the junior
18 holders. OWRD accepts this method for mitigating groundwater
19 permit applications and the [board] finds that OWRD is the authority
20 and controlling agency over water law. The 2022 FWMP and its
21 extensive technical evidence shows that stream flows will increase
22 and temperatures decrease as a result of implementation of the 2022
23 FWMP. As such, we find that methods provided by the groundwater
24 mitigation program, including the methods relied upon by the 2022
25 FWMP, are sufficient to meet the no net loss standard.’” *Id.* (slip op
26 at 47) (quoting Initial Record 54-55).

27 We agreed with Thornburgh that a reasonable person could conclude that
28 voluntary cancellation of water rights consistent with the OWRD rules and the

1 2022 FWMP will result in improved fish habitat to offset the negative impacts to
2 fish habitat caused by Thornburgh's groundwater pumping. *Id.*

3 Gould argues that the county erred in applying the *Beck* doctrine because
4 the issue presented is different from the one in *CTSWR I*, in that the 2025 FWMP
5 was modified to allow cessation and control as sufficient to establish fish
6 mitigation. We agree with Gould that the issue presented in this assignment of
7 error, whether cessation and control are adequate to establish fish mitigation
8 water, is a new issue that was not decided in *CTWSR I*. However, this part of
9 Gould's second assignment of error is related to and derivative of Gould's first
10 assignment of error, which we sustain above, and thus does not provide an
11 independent basis for remand.

12 To the extent that Gould argues that the no net loss standard requires
13 Thornburgh and the county to impose or create a mechanism for preventing
14 nearby wells and junior water rights holders from using the same quantities of
15 water that count toward Thornburgh's fish mitigation, we reject that argument
16 and affirm the county's alternative findings as supported by substantial evidence
17 and substantial reason. As Thornburgh acknowledges and emphasizes in
18 response, Thornburgh must completely mitigate its consumptive use. The FWMP
19 modeling establishes the resort's potential negative impacts to fish habitat and
20 identifies mitigation to replace stream flows due to the resort's groundwater use,
21 so long as those mitigation water sources are used and the quantity and quality of
22 water is established based on substantial evidence. The evidence and findings are

1 that enough water exists in the system for all water rights and “grabbing” water
2 would be illegal. The no net loss standard does not require Thornburgh to ensure
3 that no junior water rights holders use the same water that is credited to
4 Thornburgh’s fish mitigation.

5 Gould’s third assignment of error is denied.

6 **XI. GOULD SECOND ASSIGNMENT OF ERROR**

7 Gould argues that the county committed prejudicial procedural error by
8 failing to process the 2025 FWMP as a new application. As explained above, the
9 county opened the record on remand only for evidence regarding the economic
10 analysis required by DCC 18.113.070(C). The county did not reopen the record
11 for new evidence on the no net loss standard. Petitioners and the Tribe argued
12 that the 2025 FWMP is new evidence and new expert testimony and was required
13 to be submitted as a new application. The county rejected those arguments.
14 Remand Record 29.

15 Gould argues that the county misconstrued DCC 22.34.040(B), which
16 governs the scope of remand and provides:

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

23 The county found that “surrounding neighbors” does not refer to all water
24 users in the Deschutes River Basin, but refers only to adjacent properties.

1 Remand Record 30. The county found that the 2025 FWMP compliance measure
2 (D)(1)(a) change from OWRD submittal to approval will increase protective
3 measures and rejected the Tribe's argument that the 2025 FWMP is less
4 protective of fish resources. Remand Record 29. The county found that the
5 compliance measure modification does not substantially alter the proposal or
6 impose greater impacts. *Id.*

7 On appeal, Gould argues that the county's findings are inadequate to
8 explain why the altered proposal and its potential impacts do not require a new
9 application. Gould argues that Thornburgh was required to submit the 2025
10 FWMP as a new modification application because the 2025 FWMP substantially
11 altered the 2022 FWMP by permitting the cessation and control method of
12 compliance and making OWRD review and approval optional. Gould argues that
13 "removing any OWRD submittal whatsoever is likely to have significant
14 negative consequences on surrounding neighbors who will no longer have the
15 opportunity to challenge water rights applications and impacts that include
16 review of harm and/or injury to neighbors, including Gould." Gould Petition for
17 Review 33.

18 We will remand a decision when the local government "[f]ailed to follow
19 the procedures applicable to the matter before it in a manner that prejudiced the
20 substantial rights of the petitioner." ORS 197.835(9)(a)(B). Those rights are the
21 right to an adequate opportunity to prepare and submit one's case and to a full
22 and fair hearing. *Muller*, 16 Or LUBA at 775. In order to establish a procedural

1 error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City*
2 *of Portland*, 51 Or LUBA 560, 563 (2006). We must defer to the county's
3 interpretation of DCC 22.34.040(B) if that interpretation is not "inconsistent with
4 the express language" or inconsistent with the underlying purposes and policies
5 of that provision. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243
6 P3d 776 (2010). Generally, findings must (1) address the applicable standards,
7 (2) set out the facts relied upon, and (3) explain how those facts lead to the
8 conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA
9 551, 556 (1992).

10 Thornburgh responds that the county properly found that the 2025 FWMP
11 has no greater impact on surrounding neighbors and adjacent properties.
12 Thornburgh asserts that the county properly construed DCC 22.34.040(B) by
13 assessing the impacts of the 2025 FWMP in context of the 2008 FWMP and that
14 the 2022 and 2025 FWMPs reduce resort water use and thereby reduce impacts
15 to fish habitat. The dispositive issue under DCC 22.34.040(B) is whether the
16 modification results in a significantly greater impact on surrounding neighbors.
17 Thornburgh argues that Gould has not established that the change in the FWMP
18 compliance measure results in a significantly greater impact on surrounding
19 neighbors, including Gould.

20 Gould asserts that the 2025 FWMP cessation and control compliance
21 method induces risk of harm to Gould's well. Thornburgh responds that that
22 claim is contradicted by expert evidence in the record that groundwater

1 drawdown from resort pumping would not adversely affect existing groundwater
2 uses in the basin or require deepening of current wells. Pinnacle Intervenor-
3 Respondent's Brief 41 (citing Initial Record 6,333). Gould does not explain, let
4 alone establish, that the change in the 2025 FWMP compliance measure results
5 in a significantly greater impact to their well than the 2022 FWMP.

6 Finally, Gould argues that the change in the 2025 FWMP compliance
7 measure allowing cessation and control without OWRD review deprives Gould
8 of the opportunity to challenge water rights applications. Thornburgh responds
9 that the FWMP change does not and cannot impact OWRD processes. Any
10 procedural protections and rights that Gould has in an OWRD process is under
11 the OWRD statutes and rules and not vindicated by DCC 22.34.040(B). We
12 agree.

13 Gould's second assignment of error is denied.

14 **XII. LIPSCOMB FIRST AND THIRD ASSIGNMENTS OF ERROR**

15 Lipscomb argues that the county's conclusion that the 2025 FWMP
16 satisfies DCC 18.113.070(C)(3) and (4) is not based on adequate findings and
17 substantial evidence. Lipscomb's first and third assignments of error concern
18 DCC 18.113.070(C)(3) and (4) and present related legal questions and we resolve
19 them together. DCC 18.113.070(C) is a resort approval criterion that requires the
20 county to find, as relevant here:

21 "3. The destination resort will provide a substantial financial
22 contribution which positively benefits the local economy
23 throughout the life of the entire project, considering changes

1 in employment, demands for new or increased levels of public
2 service, housing for employees and the effects of loss of
3 resource land.

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

8 In *CTWSR I*, Lipscomb argued, and we agreed, that the proposed change
9 to reduce the number of golf courses is a substantial change to the resort
10 development that materially affects the facts underlying the resort’s 2005
11 economic analysis (Peterson Report) that the county relied upon to find that DCC
12 18.113.070(C) is satisfied in the Conceptual Master Plan (CMP) approval.
13 *CTWSR I*, LUBA Nos 2023-038/039/041 (slip op at 70-80). More specifically,
14 we agreed with Lipscomb that the abandonment of golf course facilities to reduce
15 water consumption is a substantial change that impacts the underlying findings
16 of fact for the CMP approval—namely, that the developed golf courses will
17 provide 125 newly created jobs and 3.9 million dollars in employee
18 compensation. *Id.* (slip op at 71).

19 The parties disputed the remedy for that error. Lipscomb argued that the
20 change required a new CMP application. We agreed with Thornburgh and the
21 county that Thornburgh’s application was for modification of the FWMP, which
22 is a discrete portion of the FMP, and any change to the economic analysis could
23 be processed as part of the modification application and the error could be

1 corrected on remand by the county accepting a new economic analysis that
2 demonstrates compliance with DCC 18.113.070(C)(3) and (4). *Id.* (slip op at 79).

3 On remand, Thornburgh submitted an economic analysis by John Burns
4 Research and Consulting (JBREC). Remand Record 33. The county observed
5 that the Peterson Report addressed development of the resort and its: (a)
6 economic benefits based upon employment levels and compensation, (b)
7 increased tax revenue, (c) demand for public services, (d) need for employee
8 housing, and (e) loss of resource lands. The county relied on the JBREC Report
9 to conclude that DCC 18.113.070(C)(3) and (4) are satisfied because, even
10 without one of the planned golf courses, the resort will continue to provide
11 substantial economic benefit to the county throughout the life of the project.
12 Remand Record 24. The county found that elimination of one golf course
13 removes 24 golf-operations jobs, from 104 to 80 full-time equivalent jobs, and
14 \$859,090 in payroll. Remand Record 34.

15 Lipscomb argues that the county improperly relied in part on the Peterson
16 Report, which is based on 2005 economic conditions. Lipscomb argued that our
17 remand required a new, comprehensive economic analysis demonstrating that the
18 proposed resort, as revised, will provide a substantial economic benefit under
19 current economic conditions. Lipscomb argues that, because the underlying
20 economic analyses are outdated and incomplete, the resulting findings do not
21 demonstrate current compliance with DCC 18.113.070(C)(3) and (4) and the
22 findings are unsupported by substantial evidence. Lipscomb also argues that the

1 county made inadequate findings related to water supply, employment, housing,
2 tax revenue, demand for public services, loss of resource lands, and petitioners'
3 expert Cahill's credentials and conflicting evidence. Thornburgh responds that
4 Lipscomb mischaracterizes the scope of remand and the county's findings are
5 adequate and supported by substantial evidence.

6 **A. Updated Economic Analysis**

7 Lipscomb argues that the change of removing one golf course required
8 Thornburgh to update the entire economic analysis so that it reflects current
9 economic circumstances and the county erred in relying on the Peterson Report
10 as a basis to establish an overall economic benefit during the life of the resort.
11 The JBREC Report evaluates the economic impact of removing one resort golf
12 course. Lipscomb points to instances in which the JBREC report relies on figures
13 from the Peterson Report and adjusts those figures to reflect 2025 values.
14 Lipscomb asserts that methodology does not accurately establish the current
15 value or the economic impact of the modified resort.

16 Thornburgh responds, and we agree, that our remand in *CTWSR I* did not
17 prescribe the scope of, or methodology for, the economic analysis on remand.
18 The issue on remand was whether eliminating one of the approved resort golf
19 courses changes the county's prior conclusion that the resort satisfies DCC
20 18.113.070(C)(3) and (4). The essential issue is whether the JBREC Report
21 constitutes substantial evidence on which a reasonable person could rely to find
22 DCC 18.113.070(C)(3) and (4) are satisfied because the resort will provide

1 substantial economic benefit to the county throughout the life of the project. We
2 address Lipscomb's specific substantial evidence challenges below.

3 **B. Number of Golf Courses**

4 Lipscomb argues that the JBREC Report improperly analyzes the
5 economic impact of three golf courses, when the FWMP/FMP amendment
6 application is expressly limited to only two golf courses.

7 In *CTWSR I*, we observed that

8 "[t]he county relied upon an economic analysis that was based on a
9 total of four golf courses. The economic analysis concluded that the
10 golf courses would be an important source of new jobs with a total
11 of 125 newly created jobs and 3.9 million dollars in employee
12 compensation. The county found that the resort will generate a large
13 number of full-time positions that will have a positive effect on the
14 Deschutes County economy." LUBA Nos 2023-038/039/041 (slip
15 op at 71).

16 We noted that the Peterson Report describes two golf courses to be
17 developed at The Pinnacle Village and two golf courses to be developed at The
18 Tribute Village. Initial Record 10,520, 10,524, 10,588. We also observed that the
19 CMP approval approved three golf courses and required at least one golf course
20 to be constructed in the first phase. *Id.* (slip op at 10) (citing Initial Record
21 13,091-92). Regarding resort golf course development, the CMP findings state:

22 "Proposed recreational amenities are shown on the Recreational
23 Amenities Plan, BOP, Ex., A-11, and described in the Recreational
24 Amenities Description, BOP, Ex. 2, A-11 a. * * *

25 "These amenities listed by Applicant are summarized as follows:

1 “The Tribute Village plan includes the following possible amenities:

2 “Two (2) championship golf courses.

3 “A state-of-the-art golf teaching/ practice area.

4 “* * * * *

5 “Golf clubhouse with locker rooms * * *

6 “At least one golf course, the restaurant and the meeting rooms and
7 facilities are required to be constructed in Phase A, which is slated
8 to be in the Tribute Village. These are required by DCC
9 18.113.060(E) in order to qualify Phase A as a destination resort
10 because each phase, together with all previous phases must meet the
11 criteria for a destination resort. Condition of Approval #33 is
12 included to assure this requirement is met.

13 “The Pinnacle Village plan includes the following possible
14 amenities:

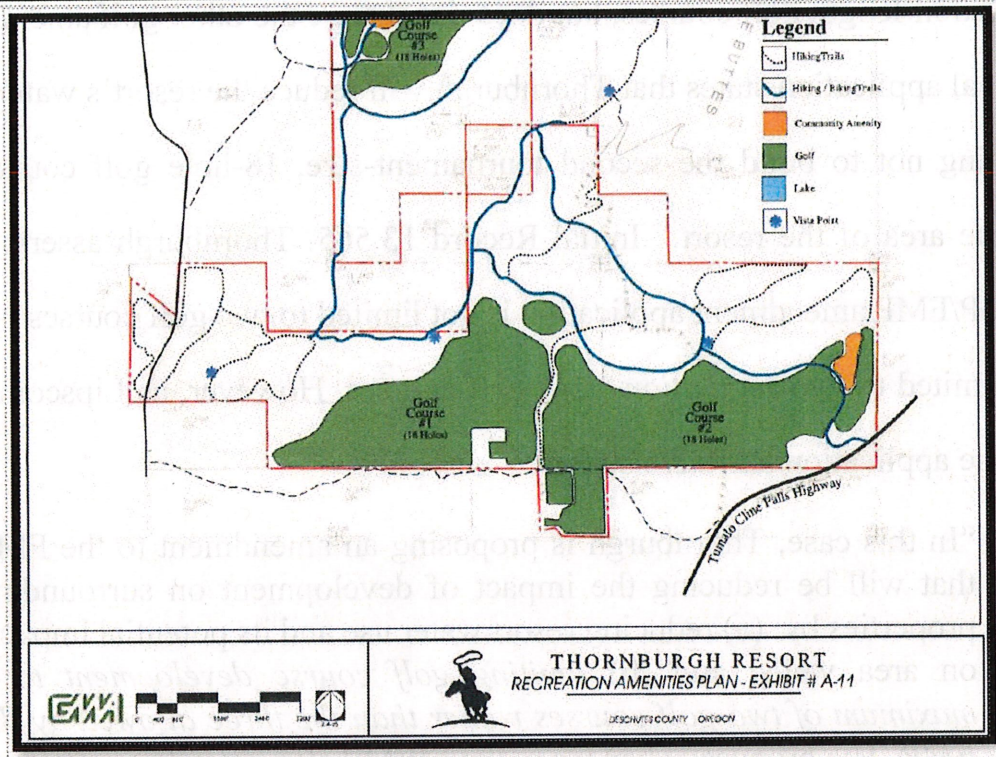
15 “One championship/resort golf course.

16 “Golf clubhouse, pro shop and grill.

17 “Practice/instruction area.” Initial Record 13,091-92.

18 Thornburgh included the following graphic in the 2022 FWMP
19 amendment application, which shows only three 18-hole golf courses.

Figure 3 – CMP Recreation Amenities Plan (CMP BOP Ex. 2, A-11) - Southern Area of the Resort



1

2 Initial Record 13,335.

3 In the 2022 FWMP approval, the county found: “Only one golf course is
 4 required. The other two are optional. This means that the third golf course that
 5 [Thornburgh] has agreed not to build is not required to be built[.]” Initial Record
 6 38. In a footnote, we observed that “no party explains how or when the resort
 7 plans for four golf courses were reduced to three golf courses and no party argues
 8 that change has any bearing on our analysis in this appeal.” *CTWSR I*, LUBA Nos
 9 2023-038/039/041 (slip op at 71 n 21).

10 In this appeal, Thornburgh contends that the CMP approved three 18-hole
 11 regulation-length golf courses, one 18-hole par 3 golf course, and other
 12 associated golf amenities and the FWMP modification removes *one* of the three

1 regulation-length golf courses, but does not change the other golf amenities. The
2 original application states that Thornburgh will reduce the resort's water use "by
3 agreeing not to build the second tournament-size, 18-hole golf course in the
4 Tribute area of the resort." Initial Record 13,565. Thornburgh asserts that the
5 FWMP/FMP amendment application is not limited to two golf courses—instead,
6 it is limited to two *regulation-sized* golf courses. However, as Lipscomb points
7 out, the application narrative states:

8 "In this case, Thornburgh is proposing an amendment to the FMP
9 that will be reducing the impact of development on surrounding
10 properties by: (a) reducing resort water use and its potential impacts
11 on area wells; and (b) *limiting golf course development to a*
12 *maximum of two golf courses rather than the three allowed by the*
13 *FMP*. The proposed changes to the FWMP also provide a water use
14 and mitigation program that will be more beneficial to distant rivers
15 and streams." Initial Record 13,568 (emphasis added).¹⁸

16 JBREC assumed and analyzed two regulation-sized courses and one par 3
17 course. Remand Record 1,964. The challenged FWMP approval amends the FMP
18 by removing one regulation-length golf course. The challenged approval could
19 not have newly approved a par 3 golf course. The substantial change that we

¹⁸ It is not clear to us whether Thornburgh's FWMP water modeling assumed and accounted for water consumption for one par 3 golf course, and that issue is not before us in this appeal. *See* Remand Record 2,024-25 (quantifying water use at full resort build-out, including golf courses). However, given that the prior application stated that Thornburgh would limit golf course development to a maximum of two golf courses, it would be surprising if the FWMP modeling included water consumption for three golf courses.

1 identified in *CTWSR I* is removing the one regulation-length golf course. Whether
2 the CMP/FMP approves a par 3 course is not before us in this appeal. The issue
3 is whether the JBREC report analyzed the economic impact of removing one
4 regulation-length golf course in a manner in which a reasonable person could rely
5 on that analysis. The county found that the JBREC Report made “an apples-to-
6 apples comparison of the golf operations that Peterson assessed (3 championship
7 and 1 par 3).” Remand Record 43.

8 The issue of whether the Peterson Report correctly characterized the
9 proposed resort development for CMP economic analysis and approval may not
10 be adjudicated now. However, we agree with Lipscomb that the county must have
11 a clear record of the approved resort development, including the total number and
12 size of golf courses, in order to properly analyze DCC 18.113.070(C) in context
13 of Thornburgh’s currently proposed amendment to the FMP removing one golf
14 course. If there is no 18-hole par 3 golf course approved in the 2008 FMP, then
15 Thornburgh and the county may not rely on it to find an economic benefit for the
16 amended FMP, even if Peterson did at the CMP stage.¹⁹ At this stage in the resort
17 development, considering an amendment to the FMP, a reasonable person would
18 not rely on an economic analysis that credits economic benefits from resort
19 development that is not established as having been approved by the county in the

¹⁹ Thornburgh does not argue that the CMP approval approved the resort development exactly as described in the Peterson Report, and we do not see that it did.

1 FMP. We agree with Lipscomb that the county failed to make sufficient findings
2 to address the number of golf courses and the county's finding that the 2025
3 FWMP satisfies DCC 18.113.070(C)(3) and (4) is not supported by substantial
4 evidence. On remand, the county must either identify where an 18-hole par 3 golf
5 course is approved in the CMP/FMP or consider the updated economic impact of
6 the resort, as amended by the application, in the absence of an 18-hole par 3 golf
7 course.

8 Lipscomb's first assignment of error is sustained, in part.

9 **C. Other Economic Issues**

10 We sustain Lipscomb's overarching assignment of error regarding the
11 number of golf courses. Accordingly, the county's analysis and findings on DCC
12 18.113.070(C)(3) and (4) may change on remand. We proceed to address the
13 remaining issues under those criteria for procedural efficiency, as they are likely
14 to rearise on remand and in subsequent appeals.

15 **1. Water Supply**

16 Lipscomb challenged the revised economic analysis based on lack of resort
17 water supply and argued that without water, there can be no economic
18 development and employment. The county found that issue is outside the scope
19 of review under DCC 18.113.070(C)(3) and (4). Remand Record 37. Lipscomb
20 argues that whether Thornburgh "has valid access to a water source capable of
21 sustaining the resort's consumption is essential to both the existence and lifetime
22 success of the project, and necessarily imposes economic costs on both

1 [Thornburgh] and the surrounding community.” Lipscomb Petition for Review
2 26-27.

3 Thornburgh responds that the county considers adequacy of resort water
4 supply under DCC 18.113.070(K), which was not at issue on remand.²⁰ See
5 *CTSWR I*, LUBA Nos 2023-038/039/041 (slip op at 84) (observing that the
6 county found that that “compliance with DCC 18.113.070(K) is addressed by
7 FMP Condition 10, which is not implicated in a review of the FWMP”). The
8 county did not misconstrue DCC 18.113.070(C)(3) and (4) in concluding that
9 those economic analysis criteria are not concerned with resort water supply.
10 Thus, Lipscomb’s water supply findings challenge provides no basis for remand.

11 **2. Employment**

12 Lipscomb argues that the county made inadequate findings related to resort
13 employment economic benefits. As explained above, the county found that the

²⁰ DCC 18.113.070(K) is a resort approval criterion that requires the county to find:

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

1 expected reduction in jobs that will result from the elimination of one golf course
2 under the 2025 FWMP is so insignificant as not to affect the county's 2005 CMP
3 economic benefit conclusion. The county found:

4 "The JBREC report conducted a detailed analysis of golf operations
5 and the projected changes to employment estimates that may result
6 from the elimination of the 2nd golf course. JBREC estimated
7 payroll by evaluating job postings at Central Oregon's golf courses,
8 interviewing local and regional golf course management, and
9 reviewing IRS 990 documents from Oregon golf clubs.

10 "JBREC assessed the impact to employment resulting from
11 eliminating one 18-hole golf course from the south side of the
12 project. JBREC determined employment would be reduced by 24
13 jobs with annual payroll of \$859,090. As noted in the DeLashmutt
14 letter of May 7, 2025, Peterson estimated peak employment during
15 construction of 2,074 jobs. Deducting the 24 jobs eliminated from
16 removal of the golf course would still yield peak employment of
17 2,050 jobs. Elimination of a single golf course and the
18 corresponding reduction of 24 jobs with payroll of \$859,090 is 0.6%
19 of the peak employment (\$142.5M), and 0.7% of the stabilized
20 employment (\$128.1 M). See JBREC Report May 7 Pg. 10.

21 "The Board finds that the reduction in employment that may result
22 by eliminating a single golf course is insignificant and does not
23 affect the Board's findings from 2005. The Board therefore finds
24 that a reduction by one golf course does not require updated findings
25 related to DCC 18.113.070(C)(3) and (4). The Board further finds
26 that Thornburgh's FMP, even as modified, continues to demonstrate
27 that it will provide a significant financial benefit to the County
28 throughout the lifetime of the resort. Because the Resort will provide
29 substantial financial benefit, we find that this benefit outweighs the
30 loss of resource land if the Resort was never developed." Remand
31 Record 34.

1 Lipscomb argues that the county's finding that 24 golf-related jobs would
2 be lost is not supported by substantial evidence because the JBREC Report states
3 that the golf operations described under the current plan are expected to create 80
4 full-time equivalent jobs compared to the 125 new jobs that were projected in the
5 2005 Peterson Report, which is a difference of 45, not 24. Thornburgh responds
6 by explaining that JBREC projected 104 new golf-related jobs under the same
7 scenario in the Peterson Report. The JBREC Report explains:

8 "JBREC projects about 80 new jobs from golf operations of the
9 proposed Thornburg[h] Resort. A 2005 study by Peterson
10 Economics projected about 125 new jobs and included a second 18-
11 hole south course. In the same scenario with a second 18-hole south
12 course, JBREC projected 104 new jobs. The difference in +/-20 new
13 jobs may derive from efforts to reduce labor in this 20-year period.
14 Golf course operators in Central Oregon in March 2025 cited
15 priorities to streamline labor due to scarcity and costs. New golf
16 course designs often incorporate ways to minimize maintenance
17 requirements." Remand Record 1,964.

18 This explanation undermines the county's finding that the JBREC Report
19 assessed golf operations "[w]ith an apples-to-apples comparison of the golf
20 operations that Peterson assessed" and also support's Lipscomb's overarching
21 contention that the 2005 economic data are stale, particularly employment and
22 housing data. Remand Record 43. However, Lipscomb does not challenge the
23 underlying JBREC explanation on which the county based the 24 golf-related

1 jobs lost, and we conclude that a reasonable person could rely on that explanation
2 and number.²¹

3 Lipscomb next contends that the county improperly compared the golf-
4 related job loss to the peak employment, which minimized the overall economic
5 significance of the golf-related job loss over the life of the resort project.
6 Lipscomb explains that estimated annual peak payroll figure of \$142.5 million
7 accounts for resort development, while the stabilized payroll estimate of \$128.1
8 million includes both operations and home building. Lipscomb Petition for
9 Review 29 (citing Remand Record 1,952). Lipscomb argues that the county
10 should have compared the golf-related job loss to \$3.6 million, the JBREC Report
11 estimate for ongoing golf course operations for three courses. Remand Record
12 1,964.

13 Thornburgh responds that the county properly considered the economic
14 loss from not developing one golf course in context of the economic benefit over
15 the life of the resort project, including the buildout phase. We agree that the
16 criteria require the county to consider the entire life of the project and the county
17 did not err in including peak employment in the analysis under DCC
18 18.113.070(C)(3) and (4).

²¹ The number of golf-related jobs may change if the county finds that the FMP does not approve a par 3 golf course.

1 Lipscomb asserts that the county's finding that the payroll reduction is
2 insignificant compared to the Peterson Report is not supported by substantial
3 evidence because the JBREC Report did not adjust the Peterson Report
4 compensation estimates upward for inflation, thereby minimizing the payroll
5 reduction. Lipscomb Petition for Review 30.

6 Thornburgh responds that the JBREC Report did adjust for inflation, albeit
7 at a conservative 50% increase. The JBREC Report explains:

8 **"Compensation:** The Economic Benefit Study by Peterson
9 Economics in 2005 showed total new compensation peaking at
10 \$95.0M in 2010 (due to construction jobs) and stabilizing at \$85.4M
11 by 2015. For perspective, the median household income in the Bend
12 MSA has increased 102% since 2010 and 75% since 2015.
13 Demonstrating current dollars, a conservative 50% increase to the
14 Peterson Economics estimates equates to a peak of \$142.5M,
15 stabilizing at \$128.1M. Eliminating JBREC's estimate of \$860K in
16 payroll from a second south 18-hole golf course puts this stabilized
17 estimate at \$127.2M." Remand Record 1,966 (boldface in original).

18 Lipscomb does not explain why a 50% increase is not an adjustment for
19 inflation or otherwise inadequate and not supported by substantial evidence. We
20 reject Lipscomb's specific substantial evidence arguments related to
21 employment. However, as explained above, the county must on remand resolve
22 the issue of the number of golf courses and address employment and payroll
23 figures in that context.

24 3. Housing

25 Again, DCC 18.113.070(C)(3) requires the county to find that "[t]he
26 destination resort will provide a substantial financial contribution which

1 positively benefits the local economy throughout the life of the entire project,”
2 considering changes in employment and housing for employees. With respect to
3 housing, the county found that, with four golf courses, JBREC estimated 22
4 housing units would be required for golf course employee housing. Remand
5 Record 43. Removing one golf course

6 “reduces the housing needs to 18, a reduction of 4 housing units
7 attributed to the changes in the 2022 FWMP, and a total reduction
8 of 13 housing units from 31 to 18, which included savings in
9 efficiencies and design. The Board finds that reducing the need for
10 housing will not place further strain on tight housing supplies.

11 “The Board agrees that reducing employees as a result of the
12 changes to the 2022 FWMP will reduce the amount of employee
13 housing needed. That will not further burden housing supplies.” *Id.*

14 Lipscomb argues that, since the 2005 economic analysis was conducted,
15 housing costs have increased and supply has decreased. Lipscomb asserts that the
16 updated JBREC Report and the county’s findings fail to adequately explain how
17 staffing needs are translated into housing needs, and how low-wage resort
18 workers will be able to afford housing near the resort. Lipscomb contends that
19 JBREC and the county erred in computing housing needs based on full-time
20 equivalent positions, because one full-time equivalent position does not
21 necessarily mean one individual who needs housing. Lipscomb argues that the
22 JBREC Report thus skews the number of actual employees who will require
23 housing, and the county failed to ever contend with that concern as outside the
24 scope of the JBREC analysis. Remand Record 37.

1 Thornburgh responds that our remand required the county “either to
2 consider changes to employee housing demands based on the changes in the 2022
3 FWMP or explain why that consideration is not required.” *CTWSR I*, LUBA Nos
4 2023-038/039/041 (slip op at 75). Thornburgh asserts that Thornburgh and the
5 county were not required to solve the regional housing shortage to determine
6 whether the reduced need for employee housing based on the amended FMP is
7 financially beneficial, detrimental, or neutral in terms of the overall resort
8 development financial contribution to the local economy. We agree that a
9 reasonable person could conclude that reducing the number of housing units
10 demanded for resort employees is neutral with respect to the overall economic
11 impact of the resort. We also agree that a reasonable person could rely on full-
12 time equivalent positions to determine housing unit demands. However, the
13 county must resolve the issue of the number of golf courses and address
14 employment and housing demand in that context.

15 **4. Tax Revenues and Demand for Public Services**

16 With respect to tax revenue, the county found:

17 “Peterson estimated residential property values at Thornburgh to
18 total \$1,510.3M at stabilization in 2016 and that property taxes
19 would be \$20.9M at that time divided between: schools (\$8.1 M),
20 fire department (\$3.5M), public bonds (\$2.8M), sheriff (\$2.6M),
21 County Government (\$2.1 M), County library (\$882K), parks and
22 rec (\$596K), 9-1-1 services (\$404K) and the Redmond library
23 (\$125K). Those estimates did not include commercial, and
24 developer-owned assets, that would add about \$1.3M. Excluding the
25 estimated property tax of \$75,297 attributed to the value of the
26 eliminated golf course, tax revenues for the commercial assets

1 would still net about \$1.2M. This amount added to the \$20.9M
2 Peterson estimates yields just over \$22M/yr. Elimination of one golf
3 course would account for 0.3% of the total property tax revenue
4 estimated in the Peterson report. * * *

5 "JBREC also adjusted the values attributed to the residential units,
6 increasing the 2016 Peterson residential value of \$1,510.3 upward
7 to account for inflation, resulting in a total residential value of
8 \$2,854.5M. That would generate property tax revenue to the County
9 of \$47.5 million per year, which is over 1,000 times greater than the
10 current property tax on the Thornburgh property of \$38,619. * * *
11 The \$47.5 million in estimated taxation is more than double the
12 \$22M noted in the 2005 report.

13 "The Board finds the removal of a single golf course will result in
14 an insignificant reduction in property tax revenue based upon the
15 estimated significant tax revenues that will be generated by the
16 Resort, and the significant increase over the 2005 report." Remand
17 Record 38.

18 Lipscomb argues that the JBREC Report and county economic benefit
19 findings overstate net tax revenues by failing to quantify and apply offsets for the
20 cost of public services to the resort. Lipscomb argues that the county's tax
21 revenue benefit finding is improperly based on a benefits-only analysis.

22 Thornburgh responds that county explained that there would be minimal
23 demand on public services and that tax revenue would generate significant tax
24 revenue surpluses typical in other resort communities because many public
25 services are provided by private homeowners associations. Remand Record 39.

26 We agree with Thornburgh that a reasonable person could rely on evidence of
27 sizable tax revenues and an unquantified assumption that public services would
28 not significantly diminish the economic benefit.

1 We also agree with Thornburgh that the focus on remand was the economic
2 consequences of eliminating one golf course. The county found: “Nothing in the
3 record shows directly or indirectly, that the elimination of one golf course as
4 proposed by the 2022 FWMP will create any greater need or demand on public
5 services. The Board finds that it will not.” Remand Record 39-40. Lipscomb does
6 not argue that *the reduction of a golf course* creates a further strain on public
7 services. The county’s findings regarding tax revenues and demand for public
8 services are adequate and supported by substantial evidence.

9 **5. Loss of Resource Lands**

10 Again, DCC 18.113.070(C)(3) requires the county to consider the
11 economic impact of loss of resource land for resort development. The resort
12 property is low-value rangeland historically used for brief seasonal grazing. The
13 county found that the property has little value as agricultural land and the loss of
14 resource land is minimal and outweighed by the financial benefit of the resort.
15 Remand Record 46. The county found that eliminating construction of one golf
16 course does not affect the amount of resource land and increases the amount of
17 land that will be left in a natural state. *Id.*

18 Lipscomb argues that the county made inadequate findings by failing to
19 address the overall effects that the loss of rangeland on the local economy in
20 relation to the total impact of the proposed resort in the present context.
21 Thornburgh responds, and we agree, that the issue on remand is whether
22 eliminating the construction of one golf course changes the county’s earlier

1 conclusion that the resort will provide a substantial financial contribution which
2 positively benefits the local economy throughout the life of the entire project. We
3 agree with Thornburgh that the county properly considered the loss of resource
4 land in the limited context of this application and the findings are adequate.

5 **6. Expert Credentials and Conflicting Evidence**

6 Gould retained Dr. Kevin E. Cahill to respond to the JBREC Report. The
7 County found that JBREC's expert opinion was more reliable. The county found:

8 "While Dr. Cahill does have a Ph.D. in economics, and a depth of
9 expertise with aging and retirement related subjects, the materials
10 he submitted evidence a lack of experience with real estate sales or
11 values, destination resorts, golf or hospitality, or any specific
12 element relevant to this remand. The Board finds the JBREC
13 materials more reliable and more persuasive because JBREC's
14 experience and credentials on the subject matter are specifically
15 related to the areas of study required for analysis of economic impact
16 of the Resort on Deschutes County." Remand Record 33.

17 Lipscomb details Dr. Cahill's experience and qualifications and asserts
18 that no reasonable decision maker could discount Dr. Cahill's assessment as the
19 county did. Thornburgh responds, and we agree, that the county did not
20 inappropriately minimize or discount Dr. Cahill's credentials. Instead, the county
21 chose to rely on JBREC's analysis. As the fact finder, the county is entitled to
22 determine which experts and which evidence it finds most credible and reliable
23 for deciding factual matters related to applicable criteria. *Willamette Oaks, LLC*
24 *v. City of Eugene*, 67 Or LUBA 351, 371, *aff'd*, 258 Or App 534, 311 P3d 527
25 (2013). Lipscomb has not established that it was unreasonable for the county to

1 find JBREC's analyses and conclusions more persuasive than Dr. Cahill's
2 critiques.

3 Lipscomb's first assignment of error is sustained in part and denied in part.

4 Lipscomb's third assignment of error is denied.

5 **XIII. LIPSCOMB SECOND ASSIGNMENT OF ERROR**

6 Lipscomb argues that the county misconstrued ORS 197.460(3) in
7 deciding that that statute does not apply to the application. ORS 197.460 governs
8 destination resort siting and, in current form, provides, in part:

9 "A county shall ensure that a destination resort is compatible with
10 the site and adjacent land uses through the following measures:

11 "** * * * *

12 "(3) If the site is west of the summit of the Coast Range and within
13 10 miles of an urban growth boundary, or if the site is east of the
14 summit of the Coast Range and within 25 miles of an urban growth
15 boundary, the county shall require the applicant to submit an
16 economic impact analysis of the proposed development that
17 includes analysis of the projected impacts within the county and
18 within cities whose urban growth boundaries are within the distance
19 specified in this subsection."

20 The current urban growth boundaries of Redmond, Sisters, and Bend are

21 all within 25 miles of the resort location. Lipscomb's attorney argued below that

22 Thornburgh's expert's economic analysis,

23 "the JBREC Report, should have included analyses for each affected
24 city with individualized determinations as to the impacts, both
25 positive and negative. * * * The JBREC Report only discusses the
26 purported economic benefits to Deschutes County, without making
27 any mention of the cities of Redmond, Sisters, or Bend, and without

1 exploring any of the negative externalities of the proposal. Without
2 the individualized analysis required under ORS 197.460(3), the
3 County cannot ensure compatibility of the use, or make the
4 necessary finding required under DCC 18.113.070(C)(3) that the
5 economic analysis demonstrates that ‘the destination resort will
6 provide a substantial financial contribution which positively
7 benefits the local economy.’” Remand Record 1,224.

8 The county found:

9 “ORS 197.460(3) governs siting the resort and the approval of its
10 Conceptual Master Plan (CMP). The 2005 Peterson economic report
11 was prepared in order to comply with DCC 18.113.070(C)(3) and
12 (4). These criteri[a] were found to be met. Whether the 2005
13 Peterson report complied with ORS 197.460(3) is not an issue
14 before the Board and is outside of the scope of remand. Had
15 [anyone] objected to the efficacy or completeness of the 2005 report
16 in meeting ORS 197.460(3), the time to raise that issue has long
17 since passed.” Remand Record 42.

18 On appeal, Lipscomb explains that no one could have challenged the 2005
19 Peterson Report on this issue because ORS 197.460(3) was amended in 2010 to
20 add the requirement that applications for destination resorts must consider
21 economic impacts on surrounding cities. Senate Bill 1031 § 2 (2010).

22 Thornburgh responds, and we agree, that ORS 197.460(3) applies to resort
23 siting and does not apply to the application to modify the FWMP/FMP.
24 Importantly, subsection (3) was amended in 2010, after the resort CMP was
25 approved and the resorted sited. Nothing in ORS 197.460 makes the subsequent
26 statutory amendment in subsection (3) retroactively applicable to the sited and
27 approved resort. In *CTWSR I*, we agreed with Lipscomb that the amended FWMP
28 changes the underlying economic assumptions underlying the county’s

1 conclusion that the FMP satisfies the economic analysis required DCC
2 18.113.070(C). *See CTWSR I*, LUBA Nos 2023-038/039/041 (slip op at 74) (“We
3 agree with Lipscomb that, based on the CMP approval and supporting economic
4 analysis, the abandonment of the golf course is ‘an alteration in the type, scale,
5 location, phasing or other characteristic of the proposed development such that
6 findings of fact on which the original approval was based [are] materially
7 affected.’” (Quoting DCC 18.113.080)). However, that change does not make
8 later-enacted ORS 197.460(3) retroactively applicable to the present application.
9 The county did not err in failing to apply ORS 197.460(3).

10 Lipscomb’s second assignment of error is denied.

11 **XIV. REMAND ISSUES SUMMARY**

12 We agree with Bishop that the county violated ORS 215.422(3) and
13 remand is required for the county to provide a new hearing on the scope of the
14 remand that provides the parties an opportunity to respond to the *ex parte*
15 DeLashmutt letter. We agree with Gould that the record lacks substantial
16 evidence that cessation and control are sufficient to satisfy the no net loss
17 standard. If, on remand, the county reopens the record to accept additional
18 evidence from Thornburgh intended to demonstrate whether, how, and why
19 cessation and control and county review (without OWRD review) are adequate,
20 then the county must allow other parties to submit responsive evidence. We agree
21 with Lipscomb that the county failed to make adequate findings addressing the
22 number of golf courses and the county’s finding that the 2025 FWMP satisfies

1 DCC 18.113.070(C)(3) and (4) is not supported by substantial evidence. On
2 remand, the county must either identify where an 18-hole par 3 golf course is
3 approved in the CMP/FMP or consider the updated economic impact of the
4 resort, as amended by the application, in the absence of an 18-hole par 3 golf
5 course.

6 The county's decision is remanded.

7 Bassham, Board Member, concurring:

8 I concur in the result and the majority's disposition of all assignments of
9 error other than the Tribe's first assignment of error, which argues that the
10 county, on remand, erred in denying the Tribe the ability to submit evidence
11 regarding the no net loss standard, as informed by the 1855 Treaty. As the
12 majority opinion notes, the Court of Appeals remand stated that

13 "assuming that LUBA remands the case to the board for
14 consideration of the Tribe's arguments relating to the treaty-
15 protected fishery resource on the first assignment of error, we
16 highlight that remand will allow an opportunity for the Tribe to
17 present evidence of indigenous expertise and knowledge for the
18 board's consideration that the Tribe asserts it did not have adequate
19 time to present due to its late involvement in the proceedings."
20 *CTWS II*, 332 Or App at 386.

21 The court could have intended this language to constitute only nonbinding
22 *dictum*, as Thornburgh argues and the majority decides. However, read in context
23 with the court's discussion of the Tribe's two assignments of error, I believe that
24 the court chose to highlight this point because the court deemed it necessary to
25 the court's analysis and disposition of the Tribe's two assignments of error.

1 As noted, the Tribe's first assignment of error challenged LUBA's finding
2 that the Tribe had failed to preserve the issue before the county, if whether the
3 1855 Treaty must be considered in determining whether the 2022 FWMP
4 satisfied the "no net loss" standard. In concluding that the Tribe had in fact
5 adequately preserved that issue, the court twice referenced the Tribe's arguments
6 to the county that it needed more time to present evidence on the complex
7 technical issues presented by the proposed 2022 FMP:

8 "In a letter of January 31, 2023, the Tribe's representative, Austin
9 Smith Jr., General Manager of the Tribe's Branch of Natural
10 Resources, raised concerns about the potential impact of the
11 proposed 2022 FWMP on ESA-listed fish species and about
12 Thornburgh's lack of consultation with the Tribe, despite the Tribe's
13 status as a sovereign co-manager of the fisheries resources
14 throughout the Deschutes Basin. Smith also observed that technical
15 expertise was required to properly evaluate the complex issues
16 implicated by the proposed 2022 FWMP and that, while the Tribe
17 possessed technical expertise, it needed time assess the issues and to
18 consult its co-managers, ODFW and the OWRD. In his letters to the
19 board, Smith specifically raised the issue of the Tribe's treaty-
20 protected rights as implicating resources under the "no net loss"
21 standard. We note, further, Smith's March 1, 2023, letter to the
22 board:

23 "[T]he Tribe does not currently have enough information to
24 evaluate whether [Thornburgh] can * * * demonstrate that its
25 water use and mitigation plan completely mitigates negative
26 impacts on the fishery resource so that there is no net loss or
27 net degradation of the resource. * * * Because the fishery
28 resources at issue are both treaty-protected and vital to the
29 Tribe's cultural identity and existence, the Tribe urges the
30 Commission to resolve these questions in favor of a more
31 deliberate process." 332 Or at 384 (footnote omitted).

1 After concluding that the Tribe's Treaty arguments had been adequately
2 preserved, the court turned to the Tribe's second assignment of error, alleging
3 that LUBA had misapplied the substantial evidence standard in rejecting the
4 Tribe's challenges to the county's consideration of the limited evidence the Tribe
5 had managed to submit below directed at the no net loss standard, as informed by
6 the Tribe's Treaty rights. That evidence addressed only general impacts within
7 the Deschutes Basin and did not address impacts of the 2022 FMP on specific
8 seasonal fishing grounds. The court noted the Tribe's arguments to the court that
9 "if the Tribe had had sufficient time for preparation for the hearing before the
10 board, it could also have presented as indigenous knowledge evidence concerning
11 the impact of the resort's pumping on very specific seasonal fishing grounds."
12 *Id.* at 386-87.

13 Immediately after this sentence, the court disposed of the Tribe's second
14 assignment of error in two brief paragraphs, which I quote again:

15 "On this assignment, we are guided by our standard of review, under
16 which we consider only whether LUBA correctly applied the
17 substantial evidence standard in its determination that the county's
18 decision demonstrates that the county considered the Tribe's
19 evidence concerning indigenous knowledge and weighed the
20 Tribe's evidence against Thornburgh's evidence. Given the limited
21 record before the county, we conclude that LUBA did not err.

22 "But, assuming that LUBA remands the case to the board for
23 consideration of the Tribe's arguments relating to the treaty-
24 protected fishery resource on the first assignment of error, we
25 highlight that remand will allow an opportunity for the Tribe to
26 present evidence of indigenous expertise and knowledge for the
27 board's consideration that the Tribe asserts it did not have adequate

1 time to present due to its late involvement in the proceedings.” *Id.*
2 at 387.

3 In my view, the coordinating conjunctive “but” that links these two
4 paragraphs carries some dispositional weight. The court clearly expected that,
5 assuming LUBA remanded for the county to consider the Treaty issue in the first
6 instance, as required by the court’s disposition of the Tribe’s first assignment of
7 error, the remand proceedings would allow the Tribe to submit the site-specific,
8 technical evidence, based on its indigenous expertise, that it argued to the court
9 it had no opportunity to present in the initial hearings. The court repeatedly
10 highlighted that argument, in addressing both of the Tribe’s assignments of error.
11 Against this background, I would reject Thornburgh’s characterization of the
12 court’s clear expectations regarding the scope of the remand proceedings as mere
13 *dictum*. In my view, the court’s expectation on this point informed its analysis
14 and disposition of the Tribe’s second assignment of error, if not also the first
15 assignment of error. In other words, the court arguably disposed of the Tribe’s
16 waiver and substantial evidence challenges in the way it did, in part *because* it
17 expected that remand proceedings would allow the Tribe to submit new site-
18 specific evidence under the no net loss/Treaty standard. If so, then court’s
19 expectations on this point cannot be fairly considered mere inconsequential
20 *dictum*.

21 In sum, I agree with the Tribe that the court’s opinion, fairly read, requires
22 the county to reopen the record on remand to allow the Tribe to present evidence
23 of indigenous expertise and knowledge regarding Treaty-protected fisheries, and

- 1 that the county erred in refusing the Tribe's request to do so. For that reason, I
- 2 would sustain the Tribe's first assignment of error.