IN THE COURT OF APPEALS OF THE
STATE OF OREGON

ANNUNZIATA GOULD, Petitioner/Cross-Respondent, v. DESCHUTES COUNTY, Respondent, and THORNBURGH RESORT COMPANY, LLC, Respondent/Cross-Petitioner.	LUBA No. 2008-203 A143430

RESPONDENT/CROSS-PETITIONER'S COMBINED BRIEF

Judicial Review of a Final Opinion and Order
of the Land Use Board of Appeals

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I. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

Petitioner/Cross-Respondent Annunziata Gould (petitioner) appeals from LUBA's Final Opinion and Order dated September 9, 2009, wherein LUBA rejected most of Gould's assignments of error, while remanding for additional evidence and findings on others.

B. Nature 0f Agency Order for Which Review Is Sought

Intervenor accepts petitioner's statement.

C. Basis of Appellate Jurisdiction

Intervenor accepts this court has jurisdiction.

D. Effective Date of Order for Purpose of Appeal

Intervenor accepts petitioner's statement, with the following addition: Intervenor timely filed a Cross-Petition for Judicial Review on September 30, 2009, within 7 days of the filing of the Petition for Judicial Review, and has paid the appropriate fee.

E. Jurisdictional Basis for Agency Action

Intervenor accepts petitioner's statement.

F. Questions Presented on Appeal

Intervenor accepts petitioner's statement.

G. Summary of Arguments

1. Response to First Assignment of Error on Petition

Because petitioner incorrectly relied on ORS 197.850(9)(c) to define this court's standard of review to include determining if LUBA's order is supported by substantial evidence, some of her arguments are out of place and should not result

in reversal or remand of LUBA's decision. The court's role is limited to determining if LUBA correctly applied the substantial evidence test to the County's decision.

A terrestrial wildlife mitigation plan that focuses on habitat mitigation to address the "no net loss or degradation" standard in DCC 18.113.070(D) is more appropriate than a 1:1 species mitigation strategy. Wildlife mitigation is a fluid process, not a rigid one, and it would be almost impossible to obtain the data necessary to support a 1:1 species mitigation strategy. The property does not contain any protected species. With respect to the species that are present, there is no intellectually sound way to identify species worth mitigating and species that are too "lesser" to qualify for consideration.

2. Response to Second Assignment of Error on Petition

Petitioner complains that the reference to "mitigation plans" in Condition of Approval 38 is not clear enough to identify all of documents comprising the fish mitigation plan. As LUBA correctly decided, the reference does make clear that it encompasses all of these documents. Intervenor, LUBA and the County are all in agreement that intervenor must abide by its fish mitigation plans in their entirety.

3. Response to Third Assignment of Error on Petition

Petitioner's complaint that the County's findings on "cool habitat patches" in the Deschutes are inadequate because they simply repeat the arguments of the parties, without more, is unjustified. The Hearings Officer specifically addressed the adequacy of mitigation measures, including a discussion of impacts to stream flow, stream temperature and mitigation measures. The issue of cool habitat patches was discussed, although in different terminology. However, the County was not

required to use "magic words" in the findings.

Petitioner urges this court to reweigh the evidence to reach a different conclusion from the Hearings Officer. However, this court's review is limited to determining if LUBA correctly applied the substantial evidence test, not to step into LUBA's shoes and review the record created by the County for substantial evidence. LUBA correctly applied the substantial evidence test, because there was substantial evidence in the record to support the County's findings.

Petitioner's argument regarding the substitution of species is based on a misunderstanding of the fish mitigation plan. The plan focused on offsetting a small potential increase in stream temperature and did not propose substituting or favoring one species over another.

4. Assignment of Error on Cross-Petition

LUBA did not correctly apply the substantial evidence test to intervenor's terrestrial wildlife mitigation plan. The plan, which calls for off-site mitigation on one of three sites on United States Bureau of Land Management (BLM) land, is consistent with BLM's requirements and was supported by the Oregon Department of Fish and Wildlife (ODFW) and BLM as a means to comply with DCC 18.113.070(D). A wildlife mitigation plan, by its nature, cannot be too specific because wildlife responses to mitigation can vary, and subsequent monitoring may require changes in any event. Intervenor's plan correctly identified the steps to be taken to establish a baseline on the selected site, implement one of a variety of mitigation strategies, monitor for success over a period of years, and then make appropriate adjustments. The Hearings Officer correctly decided that there was

substantial evidence in the whole record to support a conclusion that compliance with DCC 18.113.070(D) was likely and reasonably certain to succeed.

H. Summary of Material Facts[1]

1. The Subject Property

Like petitioner, intervenor accepts the court's description of the proposed destination resort in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007 *Gould II*):

> "Thornburgh applied to Deschutes County for approval of a conceptual master plan for a destination resort. The resort, to be located on about 1,970 acres of land west of the City of Redmond, is proposed to contain 1,425 dwelling units, including 425 units for overnight accommodations and a 50-room hotel. The resort plans also include three golf courses, two clubhouses, a community center, shops, and meeting and dining facilities. The resort property is bordered on three sides by land owned by the Bureau of Land Management. The land is zoned for exclusive farm use but designated 'destination resort' in an overlay zone." 216 Or App at 153.

The proposed development will include (1) 615 acres of managed grassland and juniper shrub-steppe (i.e., golf course); (2) 426 acres of residential use; (3) 316 acres of resort facilities; (4) 45 acres of golf course water features, streams and lakes; and (5) 568 acres in native condition. (R 2611-12).

2. Procedural History

The Deschutes County Code (DCC) establishes a three-stage process for destination resort approval. These three stages are conceptual master plan (CMP)

[1] Like petitioner, intervenor refers to the record prepared by LUBA of its own proceedings as "LUBA Rec ___." Items in the record developed before the County are cited as "R ___." The LUBA decision at issue in this appeal, the hearings officer's decision, the destination resort chapter of the County Code and other relevant items are attached as a paginated Excerpt of Record and are cited as "ER ___."

approval, final master plan (FMP) approval and subdivision approval. The County approved intervenor's CMP application for the first time on May 10, 2006. Petitioner appealed that decision on numerous grounds to LUBA (*Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*)), which remanded on a few minor issues, and from LUBA to this court, which reversed and remanded (*Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*)) on the additional issue of the wildlife mitigation plan.

On remand, the County accepted this court's suggestion that the County defer consideration of the wildlife mitigation plan to the FMP approval stage, allowing a full right of public participation in rendering the FMP decision. The County granted CMP approval for a second time on April 1, 2008, subject to a condition that the wildlife mitigation plan be presented during the FMP approval process, with notice and an opportunity for public participation.

Petitioner disputed this court's direction, as it was applied by the County, and appealed the County's second CMP approval on a number of grounds to LUBA (*Gould v. Deschutes County*, 57 Or LUBA 302 (2008) (*Gould III*)), which affirmed, and from LUBA to this court (*Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1006 (2009) (*Gould IV*)), which also affirmed. Petitioner then appealed to the Oregon Supreme Court, which denied review (*Gould v. Deschutes County*, 347 Or 258, ___ P3d ___ (2009) (*Gould V*)). The CMP approval is now final.

As petitioner was pursuing her appeal of the second CMP approval, intervenor and the County moved forward with the FMP process. Intervenor's modified application for FMP approval was filed on April 21, 2008 and, after two

lengthy public hearings and staged written submissions by those opposed and in support, was approved by the County hearings officer on October 8, 2008. Petitioner appealed that approval decision to LUBA, which issued an opinion and order on September 9, 2009, affirming on some assignments of error and remanding on others. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2008-203, September 9, 2009) (*Gould VI*). (LUBA Rec 284-318, ER 1-34)

Now petitioner appeals and intervenor cross-appeals LUBA's order.

3. The Wildlife Mitigation Plan

a. Terrestrial Wildlife Mitigation

DCC 18.113.070(D) requires that "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." To address this standard prior to *Gould II*, intervenor submitted (1) a Wildlife Report (R 2634-78), (2) a letter dated February 9, 2005 from Steven George, the Deschutes District Wildlife Biologist at ODFW (R 1298) and (3) a Memorandum of Understanding (MOU) between intervenor and the BLM (R 2894-98). Mr. George's letter stated that intervenor's wildlife report was not yet completed and suggested as a condition of approval "that the applicant provide an acceptable wildlife plan that the applicant, County, and ODFW agree with." (R 1298)

Following the *Gould II* remand, intervenor began work with ODFW to prepare a new wildlife mitigation plan. Thornburgh's wildlife mitigation plan was presented in two documents: "Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort (WMP)," April 15, 2008 (R 2609-86); and "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project"

(M&M Plan), August 12, 2008 (R 416-32, ER 71-98). In addition to these documents, Thornburgh submitted third-party documents describing and endorsing the plan, including the following:

a) A letter and emails from ODFW (R 1800-05);

b) Letters and emails from the United States Department of the Interior, Bureau of Land Management (BLM) (R 415, 470, 2687);

c) A Memorandum from Lynn Sharp, a consultant at TetraTech EC, Inc. (TetraTech), to the Hearings Officer called "Response to Wildlife Mitigation Plan Questions 2-5 dated July 7, 2008 (R 1287);

d) An August 12, 2008 letter from Ms. Sharp, in question and answer format, addressing specific arguments raised by opponents (R 732-44);

e) A Response by Ms. Sharp to petitioner's Third Supplemental Memorandum (R 126-33).

The WMP was to be implemented in part on-site and in part-off site, on BLM land. Its goal was to avoid a net loss in wildlife habitat value occurring within the resort boundary and an area within one mile of the resort property. (R 2610)

As it engaged with intervenor to help develop the WMP, ODFW suggested a habitat modeling approach that uses a modification of the United States Fish and Wildlife Service (USFW) Habitat Evaluation Procedures (HEP) analysis. A full description of the habitat modeling approach is included at R 2612-14. As explained there, HEP is an accounting method that looks at conditions before and after development, using Habitat Units (HUs) as a measurement of habitat value. At the suggestion of ODFW, Thornburgh selected seven evaluation species, which were the same (with one exception) as those used in the Eagle Crest III HEP analysis. Then, as explained in the WMP, the HUs for each species were calculated (1) before

development; (2) after development; and (3) after development and mitigation. In order to compare the impacts of development and enhancement, Thornburgh's technical consultants at TetraTech estimated Habitat Suitability Indices (HSIs) for each species, sub-area (i.e., undeveloped, residential, facilities, golf course and lakes), and stage of development. The HSIs were multiplied by the acreages associated with the sub-areas to come up with HUs for each species. The pre- and post-development HSIs were determined collaboratively with ODFW, using best professional judgment. (R 2613)

The WMP includes a discussion of the mitigation techniques that will be implemented onsite and offsite. (R 2614-21) The onsite mitigation will reduce the loss of HUs to 6,414 onsite. Approximately 8,474 HUs (6,414 HUs onsite plus 2,060 HUs in the area within one mile offsite) must be mitigated through the offsite mitigation process. As explained at R 2620, the mitigation ratio for the property will be approximately 2.3 acres of mitigation per acre of habitat developed. As illustrated in the WMP, Table 2 (R 2623), the anticipated cost of mitigation will be a total of $863,190, plus an additional $20,000 for mitigation of traffic impacts, for a grand total of $883,190 (in 2009 dollars). As described in the WMP (R 2621-22), the funding will be provided in phases to meet the no-net-loss and no-net degradation standard on the resort property. A property transfer fee shall be collected in perpetuity and used to fund ongoing mitigation. By making an annual report to Deschutes County, BLM and ODFW by December 31 of each year, Thornburgh can demonstrate compliance with the mitigation requirement. (R 2621-22) Condition 38 requires Thornburgh to follow the steps described in the WMP. (R 40)

The M&M Plan complements the WMP by clarifying how offsite mitigation will be implemented on whatever BLM land is ultimately decided upon as the receiving site for mitigation. As explained, the object of the M&M Plan is to:

> "1) outline the methods that will be used to characterize existing habitat conditions in the area proposed for mitigation; 2) specify the types of habitat treatments used to enhance habitat for wildlife, and 3) develop a monitoring plan that will monitor the effectiveness of the habitat treatments through either direct or indirect means. The methods used in this Plan have been structured such that they could be applicable to any parcel of land within the Cline Buttes Recreation Area (CBRA) that the BLM determines is suitable for mitigation once the [Cline Buttes Recreation Area Plan] CBRAP has been finalized." (R 418, ER 73)

The M&M Plan provides a clear path for successful mitigation even though, because the CBRAP still has not been finalized, it is not yet possible to identify the exact site where mitigation will occur. The M&M Plan does not substitute BLM priorities for those of the County as expressed through the WMP. Rather, it acknowledges the effect the BLM priorities will have on the sites on which mitigation will occur. Because offsite mitigation will occur on BLM land, it is essential that the BLM approve of that mitigation.

The August 12, 2008 letter from Molly M. Brown, BLM Field Manager for the Deschutes Resource Area indicates that the proposed mitigation "would meet the wildlife and habitat resource objectives of the [Upper Deschutes Resource Management Plan] UDRMP, and would help to ensure successful implementation of the CBRAP." (R 415, ER 70) Better yet, the BLM "anticipates the possibility that any support of funding provided for mitigation actions [i.e., Thornburgh's contribution to mitigation] may be used as a match for additional grant funding, to allow larger scale benefits for public land management in the area." Id. These

benefits would be in addition to the mitigation required of Thornburgh by DCC 18.113.070(D). Three areas are identified for possible mitigation: The Maston Allotment (Primary Wildlife Emphasis Area), Canyons Region (Secondary Wildlife Emphasis Area); and the Deep Canyon Region (General Wildlife Emphasis Area). (R 420) As an insurance policy, if (and only if), in the highly unlikely event that the CBRAP is not adopted, as all concerned expect it will be, and sufficient off-site areas are not available on BLM land, intervenor will provide dedicated funding for implementing mitigation. ODFW will use the dedicated fund to improve or purchase other mitigation sites within the County. (LUBA Rec 32, ER 64)

Consistent with the WMP, a baseline survey will be conducted to select the appropriate treatments within the area chosen for mitigation. The general methods used to collect baseline habitat conditions will follow methods used by the BLM to perform Ecological Site Inventory assessments but will be altered, based on site-specific conditions. (R 420) This will be a substantial effort: Thornburgh has submitted an example of such an Ecological Site Inventory. (R 475-601)

Then the mitigation techniques described in Section 4.0 of the M&M Plan (R 421-30, ER 76), which are consistent with the less specific discussion of approaches discussed in the WMP, will be selectively employed. Finally, an annual monitoring plan, as described in Section 5.0 of the M&M Plan (R 430-31, ER 85-86), will be implemented to determine the effectives of the habitat treatments and to monitor progress. "Adaptive management," as defined in the M&M Plan (R 430, ER 85), will be used to ensure the desired outcomes are reached. In layperson's terms, this means that if a particular strategy requires amendment because of

unsatisfactory results, the strategy will be amended until it works.

b. Fish Mitigation

During the CMP application process, there was not an express discussion of the need for a fish mitigation plan to comply with DCC 18.113.070(D). At that stage of the proceedings, both the intervenor's submissions and public comment relating to the Deschutes River focused on the potential for interference with surface water flows that could be attributed to ground water withdrawals proposed for the resort. The context for the discussion was a determination of compliance with DCC 18.113.050(B)(11), relating to the proposed source of water supply for the project, and intervenor's water right application, which was then pending before the Oregon Water Resources Department. (R 2711-2744, 3095-3133) The CMP process included extensive discussion regarding the sufficiency of surface flow mitigation that would be required in the state water right process to offset potential impacts from ground water use. *See Gould I*, 54 Or LUBA at 264-267.

Following the *Gould II* remand in 2007, intervenor began to work with ODFW on a new *wildlife* mitigation plan to be submitted as part of the FMP process. During the course of that effort, ODFW first identified the issue of potential impacts to surface water quality – specifically, water temperature as influenced by the inflow of ground water from seeps and springs – in addition to the flow mitigation requirements already being addressed through the water right application review process. (R 2785-86) In response to that input from ODFW, intervenor began work on a separate water- and fish-related "Addendum" to what previously had been a wildlife mitigation plan focused exclusively on terrestrial impacts.

On April 21, 2008, intervenor submitted an "Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat". (R 2690-2744) The Addendum described a number of specific mitigation measures to be implemented by intervenor in order to address both water quantity (flow) and water quality (temperature) impacts in the Deschutes River. In response to comments during the public review process for the FMP, on August 11, 2008, intervenor submitted a letter into the record to modify the April 21, 2008 Addendum. (R 378-79) The letter described an additional mitigation measure to be taken by intervenor to address potential impacts to Whychus Creek, a tributary of the Deschutes River, which was the subject of extensive public comment.

In addition to the two documents comprising the water- and fish-related component of the mitigation plan, intervenor submitted a letter from ODFW concluding that the fish-related mitigation measures contained in the original April 21, 2008 Addendum were adequate to meet the county approval standard with respect to fish resources (R 899-901) and an extensive "Evaluation of the Proposed Thornburgh Resort Project Impact on Hydrology and Fish Habitat" (R 2121-2432) prepared by intervenor's consultants, TetraTech. The TetraTech evaluation provided additional support for the conclusion reached by ODFW that the mitigation measures addressing flow and temperature were adequate to meet the county review standard. (R 2149)

Compliance with the fish-related mitigation measures contained in intervenor's Addendum and letter modifying the Addendum was required under Condition 38 of the County's FMP decision. (LUBA Rec. 183, R 40) Nothing in the

fish-related mitigation plan suggests, calls for or permits the substitution of fish species. Rather, the mitigation measures address water quantity and quality impacts in order to avoid net loss of habitat, and, therefore, net loss or net degradation of the resource.

II. CROSS-PETITIONER'S RESPONSE TO PETITIONER'S FIRST ASSIGNMENT OF ERROR

LUBA correctly determined that the Hearings Officer's finding of compliance with the DCC "no net loss" standard for fish and terrestrial wildlife mitigation did not impermissibly involve substitution of species and maintenance/replacement of species at less than a 1:1 ratio.

A. Preservation of Error

Intervenor concurs that petitioner's argument was timely raised and preserved before LUBA.

B. Standard of Review

As relevant, the standard of review is stated in ORS 197.850(9)(a): The court shall reverse or remand LUBA's order only if it finds the order to be unlawful in substance. In her brief, petitioner includes a reference to ORS 197.850(9)(c), which allows reversal or remand if LUBA's "order is not supported by substantial evidence in the whole record *as to facts found by [LUBA] under ORS 197.835(2)*." (Emphasis added.) ORS 197.835(2) states that review of LUBA's decision shall be confined to the record, except that LUBA may take evidence and make findings of fact on allegations of standing, unconstitutionality of the decision, ex parte contacts, avoidance of the time limits in ORS 215.427 or 227.178, or "other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand." Since LUBA did not take evidence or make findings of fact in its proceeding, ORS 197.850(9)(c) does not allow a substantial evidence review by this

court of LUBA's order.

Petitioner's discussion under the first assignment of error blends criticism of the way the County Hearings Officer and LUBA interpreted DCC 18.113.070(D) with a discussion of the evidence in the record and contentions that LUBA's assumptions are not supported by substantial evidence. PB, p. 13. To the extent that petitioner expects this court to reweigh the evidence, these contentions are out of line.

With respect to evidence, this court plays a different role from LUBA. As explained in *Wetherell v. Douglas County*, 209 Or App 1, 4, 146 P3d 346 (2006), when reviewing a land use decision, LUBA may reverse or remand if the *local government's* decision is based on findings of fact that are not supported by substantial evidence in the whole record. ORS 197.835(a)(C). A finding of fact is supported by substantial evidence if the record, viewed as a whole, permits a reasonable person to make the finding. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). This court's role on review of LUBA's order is to determine if LUBA has properly understood and applied the "substantial evidence" standard in reviewing the County's decision, and if it has, to affirm LUBA's order. The court is not required to accept LUBA's order if the evidence in the case is "so at odds with LUBA's evaluation that a reviewing court could infer that LUBA has misunderstood or misapplied its scope of review." *Id.* at 359.

In *Citizens for Responsibility v. Lane County*, 218 Or App 339, 345, 180 P3d 85 (2008), this court said:

> "Stated another way, LUBA considers all the evidence in the entire record in evaluating whether a factual finding is supported by substantial and determines whether a reasonable person could make that finding. *Younger*, 305 Or at 356. We review LUBA's determination of the substantiality of the evidence for a local government finding on whether the LUBA opinion is 'unlawful in substance' under ORS 197.850(9)(a). Our task is not to assess whether the local government erred in making a finding, but to determine whether LUBA properly exercised its review authority. Thus, we do not substitute our judgment for LUBA's on whether a reasonable person could make a finding of fact based upon the entire local government record. Instead, we evaluate whether LUBA properly stated and applied its own standard of review. If LUBA does not err in the articulation of its substantial evidence standard of review under ORS 197.835(9)(a)(C), we would reverse LUBA's decision only when there is no evidence to support the finding or if the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.'" *Younger*, 305 Or at 359.

There are many other decisions that state the same standard of review. In *Angel v. City of Portland*, 113 Or App 169, 831 P2d 77 (1992), the petitioner confused LUBA's task with the local government's when it came to weighing evidence. The petitioner directed its arguments at the local government's weighing of the evidence. The court held that the petitioner had failed to demonstrate error.

This court owes no deference to interpretations of local ordinances made by hearings officers or by LUBA. *Kelley v. Clackamas County*, 158 Or App 159, 165, 973 P2d 916 (1999). Such interpretations must be reasonable. The weight that a review body must accord local interpretations is "instructive rather than binding in nature." *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988).

C. Argument

1. Background

Under her first assignment of error, petitioner seeks a determination that

DCC 18.113.070(D) "does not allow for species substitution," but requires mitigation for "the impacted species" at a ratio of 1:1 or better. Petitioner then asks the court to find error in LUBA's "assumption that the wildlife HEP does not allow species substitution" and in "LUBA's inference that affected fish resources * * * in the mainstem Deschutes are mitigated for" on the basis that the "assumption" and "inference" are not based on substantial evidence. PB, p. 18.

2. Previous Reviews

DCC 18.113.070 states the approval criteria for destination resorts. DCC 18.113.070(D) provides: "Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." In *Gould II*, this court repeated the standard, emphasizing the words "any" and "completely mitigated," 216 Or App at 163, but did not say anything that addresses or supports petitioner's argument that each impacted species must be preserved through the mitigation plan so that the number of that species' representatives is the same or greater after than it was before development.

With respect to the meaning of DCC 18.113.070, the County Hearings Officer stated, "It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be difficult, if not impossible to satisfy." (R 29-30, ER 58-59) In reviewing her decision, LUBA stated:

> "While some of the hearings officer's findings, viewed in isolation, can be read to suggest that the hearings officer thought it might be acceptable to lump all fish and wildlife resources together into one fungible, undifferentiated wildlife resource, that is not what Thornburgh proposed and that is not the approach that the county approved in this

> case. The HEP analysis that was employed by Thornburgh and approved by the county uses seven indicator species to make the job of identifying the nature, quality and extent of the wildlife resource before and after development more manageable. The indicator species are selected to simplify the task of identifying and assessing the habitat needs of all resident species. That analysis produces an estimate of the nature and extent of the off-site mitigation obligation Thornburgh must shoulder to comply with the DCC 18.133.070(D) "no net loss" standard. Unless someone comes forward with evidence that the HEP analysis missed or inadequately addressed some aspect of the wildlife resource, we believe a reasonable person could rely on the HEP analysis. There is nothing inherently improper about employing such an analysis to simplify the potentially exceedingly complicated task of assessing how much damage the proposed destination resort would cause to the wildlife resource and how much mitigation should be required to ensure there is no net loss to that wildlife resource. To the extent petitioner's first subassignment of error suggests otherwise, we reject the suggestion." (LUBA Rec 258-59, ER 14-15)

3. Discussion

Petitioner argues, "The Hearings Officer's interpretation of the 'no net loss' standard as allowing substitution of species and maintenance/replacement at less than a 1:1 ratio is not reasonable and is contrary to the plain language of the Code." PB, p. 12. The argument is flawed because 'no net loss' is not plain language in this context. Webster's Ninth New Collegiate Dictionary[2] defines the adjective "net" (as relevant) to mean: "**1**: free from all charges or deductions: as **a :** remaining after the deduction of all charges, outlay, or loss (≈ earnings) (≈ worth) – compare GROSS." "Net" is a financial term, and its application to a collection of species (the resource) is unclear. It implies that losses are offset against gains, which can reasonably be understood, particularly in the extremely imprecise context of wildlife management, to mean that one species can be offset against another. Nevertheless, as LUBA stated,

[2] Merriam Webster, Inc., 1987, p. 794.

the habitat approach taken by intervenor's terrestrial wildlife and fish mitigation plans do not contemplate wiping out any species and replacing it with an interloper. LUBA also correctly states that ODFW suggested the habitat modeling approach that uses the USFW HEP analysis. (LUBA Rec 255, ER 11) The same approach has been used by ODFW, working with the USFW Service, with respect to all destination resorts in Deschutes County since 1993. (R 1800)

To accept petitioner's interpretation of DCC 18.113.070(D) would be to demand concreteness of a fluid process (wildlife mitigation), which would make compliance virtually impossible, if not absolutely impossible. Petitioner's response (PB, p. 13) to that statement – if the standard doesn't work, amend the code – is unhelpful when an applicant has proceeded in reliance on previous County interpretations and applications of the code (*see, e.g.,* R 615, 645,674, 678) and is now almost five years into the application process. It makes more sense (and is certainly closer to what the County intended when it adopted DCC 18.113.070(D)) to interpret the code as imposing requirements that are possible to satisfy.

Petitioner's approach is inherently inconsistent with the rigid interpretation of DCC 18.113.070(D) that petitioner espouses, since there is no clear delineation in the DCC of which "fish and wildlife resources" are worth preserving and which are not. There is no way to identify every species that will be impacted by the proposed development, no way to count every representative of every species and no way to avoid value judgments about which species are worth studying and preserving. Apart from those species designated for special protective measures by the Endangered Species Act and Goal 5, none of which exist on the subject property,

the wildlife on the property is typical of the general area. Under the circumstances, a habitat-based approach makes a lot more sense than what petitioner proposes.

The balance of petitioner's argument pertains to LUBA's discussion of evidence and its failure to reweigh the evidence in a way that would favor petitioner's point of view. For example, petitioner includes a long quotation from her expert witness, Dr. David Dobkin, to the effect that the species chosen by ODFW for the HEP analysis were not representative of the complete biota of the site. PB, p. 15. Petitioner describes the testimony of another consultant, Bret Michalski, to establish "that a hawk HEP analysis cannot be used to establish no negative impact on large raptors." (PB, p. 16) Since the hearings officer addressed this contention in her findings (R 32, ER 61) and clearly was not persuaded by Dr. Dobkin's or Mr. Michalski's testimony, and since her conclusions were supported by substantial evidence from ODFW and intervenor's biologist (R 1287-91), it was not LUBA's role to reweigh the evidence to reach a different conclusion.

As another example, petitioner suggests that under intervenor's terrestrial wildlife mitigation plan, starlings will replace all the songbirds and under the fish mitigation plan, whitefish will replace the endangered Bull Trout. PB, p. 12. Ms. Sharp rebutted the starling contention in her written testimony. (R 736) It certainly was not up to LUBA to make a finding on the evidence concerning starlings.

Petitioner's discussion of the fish mitigation plan in the context of the HEP analysis is unclear, which makes it difficult to respond:

> "LUBA's decision not to address the issue of interpretation of the County Code was in error where it apparently assumed the issue did not

> need to be addressed. This assumption was not based on substantial evidence where fish mitigation on the mainstem Deschutes clearly involves substituting mitigation of cool habitat patches for redband trout and mountain whitefish for impacts on cool habitat patches for bull trout, anadromous steelhead and spring Chinook salmon and where Thornburgh's wildlife habitat mitigation plans do allow for species substitution. LUBA is also wrong in suggesting that the Hearings Officer did not interpret or apply the Code as allowing substitution, overall mitigation for fish and wildlife resources and maintenance/replacement of species at less than a 1:1 ratio. PB, pp. 17-18.

In response, intervenor notes that LUBA *did* address the issue of interpretation of the County code and LUBA did *not* suggest that the Hearings Officer did not interpret or apply the Code as allowing substitution. LUBA agreed with the Hearings Officer for the reasons explained above.

Petitioner's request that this court decide that "LUBA's inference that affected fish resources * * * are mitigated for [is] in error and [is] not based on substantial evidence," is somewhat baffling. The issue of species substitution and adequacy of the HEP analysis approach before LUBA was appropriately confined to the terrestrial species component of intervenor's mitigation plan. With respect to the fish-related component of the mitigation plan, the issue was whether intervenor's proposed measures would adequately restore flow and maintain temperature within the Deschutes River and Whychus Creek. LUBA directly addressed these issues. The fish mitigation strategy has nothing to do with species substitution.

The first assignment of error should be denied

III. CROSS-PETITIONER'S RESPONSE TO PETITIONER'S SECOND ASSIGNMENT OF ERROR

LUBA correctly determined that the Hearings Officer's conditions of approval are adequate to ensure Code compliance and to identify the required fish-related mitigation plans.

A. Preservation of Error

Intervenor concurs that petitioner's argument was timely raised and preserved before LUBA.

B. Standard of Review

The standard of review is the same as stated under the first assignment of error.

C. Argument

Petitioner's second assignment of error asserts LUBA's order is unlawful because it fails to require intervenor to comply with terms of the fish component of its mitigation plan, and thereby fails to meet the approval standard relating to no net loss of fish and wildlife resources. Petitioner made the same argument to LUBA, claiming that Condition 38 of the challenged decision was deficient because it did not require compliance with fish and water-related provisions. (LUBA Rec 141) In that proceeding, intervenor acknowledged, and LUBA subsequently agreed, that the conditions of the FMP approval decision do require intervenor to comply with fish mitigation plan documents submitted to the County. (LUBA Rec 233-35; 308-10, ER 25-27) Specifically, LUBA concluded that the reference to mitigation plans in Condition 38 "includes * * * the Fish WMP dated April 21, 2008 * * * and the two-page letter regarding Whychus Creek mitigation dated August 11, 2008." (LUBA Rec 309, ER 26)

The "Fish WMP dated April 21, 2008" listed by LUBA is a document entitled "Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat," (R 2690-2744) which intervenor provided in addition to a separate April 15, 2008 submission that described the terrestrial, or wildlife component, of its overall mitigation plan. (R 2609-86) Intervenor submitted the August 11, 2008 letter referenced by LUBA (R 378-79) as a modification of the April 21, 2008 Addendum to the plan, in response to public comments regarding potential impacts to Whychus Creek. The August letter offered additional mitigation if the County determined it was necessary. (R 378-79) Together, the documents describe numerous specific fish mitigation measures that intervenor will be required to implement under Conditions 10, 38 and 39.

The County's Condition 38 does not suffer from the defects identified in *Sisters Forest Planning Committee v. Deschutes County*, 198 Or App 311, 108 P3d 1175 (2005). In that case, the county imposed a condition of approval that required implementation of recommendations described in a letter from the applicant's expert. *Id*. at 314, 316. The Court of Appeals noted that the expert's letter was not sufficiently clear in setting out recommendations for particular fire prevention measures. *Id*. at 317-18. The letter also failed to explain which recommendations were intended to address county-imposed requirements and contained at least one recommendation of "uncertain enforceability." *Id*. Finally, the letter included a recommendation that could result in violation of a county code standard.

The same cannot be said of the mitigation measures required by Condition 38, as set forth in the documents identified by LUBA as "the Fish WMP

dated April 21, 2008" and "the two-page letter regarding Whychus Creek mitigation dated August 11, 2008." (*See* LUBA Rec 270) These documents are precise in their recommended mitigation measures, state clearly that all of the measures are designed to address DCC 18.113.070(D), and do not raise issues of enforceability or potential violations of county standards. (R 378-79, 2690-2744 (especially R 2698-2702)).

Similarly, the situation in *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007) is distinguishable from this case. There, the county hearings officer specifically adopted certain recommendations from a forest plan as conditions of approval, but did not require compliance with other recommendations in the forest plan. *Id*. at 306-307. Under those circumstances, LUBA held that the hearings officer must either adopt the other recommendations and impose appropriate conditions of approval, or explain why the recommendations were not adopted or why no condition of approval was necessary to ensure compliance with the county code. *Id*. at 307. In this case, the County did require compliance with all of the mitigation measures described in the plan, documents referred to in Condition No. 38, which LUBA held to include intervenor's fish mitigation plan documents. (LUBA Rec 270) Therefore, *Central Oregon Landwatch* does not require that each individual mitigation measure be included in the County's conditions of approval.

Petitioner also maintains that the April 21, 2008 fish mitigation addendum and the August 11, 2008 modification letter "are not all of the plans submitted by Thornburgh on fish mitigation" and that a May 2008 support document should also be included. PB, p.21. The purpose of the May 2008 report (R 2121-2432) was to analyze the potential effects of intervenor's groundwater pumping,

based on the assumption that intervenor's recommended mitigation measures would be implemented as described in the April 21, 2008 fish mitigation addendum. (R 2125) The report does not propose any additional mitigation measures. Accordingly, the County did not need to impose a condition requiring compliance with the May 2008 report.

At this point, petitioner should declare victory and move on. Instead, petitioner continues to insist that the conditions "be made clear," (PB, p. 22), when it is already clear to intervenor, LUBA and the County that intervenor must abide by its fish mitigation plans in their entirety. (LUBA Rec 233-35; 308-10, ER 25-27).

Petitioner's second assignment of error should be denied.

IV. CROSS-PETITIONER'S RESPONSE TO PETITIONER'S THIRD ASSIGNMENT OF ERROR

LUBA correctly determined that the Hearings Officer made adequate findings relating to compliance with the DCC "no net loss" standard for fish mitigation and to the specific issue of "cool patches."

A. Preservation of Error

Intervenor concurs that petitioner's argument was timely raised and preserved before LUBA.

B. Standard of Review

The standard of review is the same as stated under the first assignment of error.

C. Argument

In the third assignment of error, petitioner presents a two-pronged challenge to LUBA's decision. First, petitioner repeats her argument to LUBA that the Hearings Officer's findings were inadequate to determine compliance with

DCC 18.113.070(D), because the findings fail to address "the need to mitigate for impacts to cool habitat patches in the mainstem Deschutes River." PB, pp. 23-25, 27-28; (LUBA Rec 272) Second, petitioner argues that *LUBA's* (not the County's) decision that the "no net loss" standard is satisfied for the mainstem Deschutes River is not supported by substantial evidence. PB, pp. 24-27. The argument fails on both counts.

1. The County's findings are adequate.

LUBA was correct in determining that the County's findings satisfy the requirements set forth in ORS 215.416(9). The findings include a brief statement that explains the criteria and standards considered relevant to the decision, states facts relied upon in rendering the decision and explains the justification for the decision. ORS 215.416(9); (R 29, ER 58) (explanation of relevant criteria and standards); (R 32-35, ER 61-64) (statement of facts relied upon by the Hearings Officer and explanation of justification for the decision). Petitioner characterizes the County's findings as "just a repetition of various arguments raised by the parties." PB, pp. 23-24. To the contrary, the County specifically addressed the adequacy of mitigation measures designed to offset impacts to fish in the Deschutes River and Whychus Creek. Its findings include a discussion of impacts to stream flow (water quantity) and stream temperature (water quality) and of the measures designed to mitigate those impacts. (R 32-34, ER 61)

Although the County's findings do not use the phrase "cool habitat patches," the County acknowledged and addressed this very issue. Petitioner's contention that the County "never even addressed the issue of cool patches in the

mainstem Deschutes" is not correct. PB, p. 25. The County specifically found the following regarding mitigation for the potential loss of cool water habitat in the mainstem Deschutes:

> "To address water temperatures that affect salmonid habitat, [intervenor] has entered into an agreement with Big Falls Ranch to remove two diversion dams from the [Deep Canyon] creek. As a result, water will flow directly from cold water springs and seeps into the creek. * * * In addition, the applicant proposes to abandon three on-site wells that pump approximately 3.65 acre-feet from the aquifer." (LUBA Rec 175, ER 61)

The above finding describes mitigation measures designed to address water temperature impacts in the mainstem Deschutes River. (*See* R 1249-53, 1801-1803, 2697-2702). The County's decision refers to the cool habitat patches issue in terms of "cold water springs and seeps" and water "quality" or "temperature" impacts. (LUBA Rec 175, 177, ER 61, 63) Similarly, ODFW addressed this issue in terms of impacts to "springs and seeps" and areas of "cooler water." (R 1802-1803) Intervenor also directly addressed the issue in its fish mitigation plan and expert reports. (R 1249-53, 2137-2141, 2697-2702) Petitioner would have this Court believe that the County was silent on the issue when, in reality, the County specifically discussed it, using different terminology than petitioner's expert. The fact that the evidence on this issue was not offered in direct response to the testimony of petitioner's expert, and that ODFW's letter pre-dates that testimony is irrelevant. What matters is that the County recognized the potential loss of cool water habitat, laid out the parties' arguments, and ultimately found that there was sufficient evidence to resolve the matter in intervenor's favor. (LUBA Rec 272, ER 28)

In making its findings, the County was not required to use any "magic

words," such as "cool habitat patches." *See South of Sunnyside Neighborhood League v. Board of Comm'rs*, 280 Or 3, 21, 569 P2d 1063 (1977). The Oregon Supreme Court has stated that "[w]hat is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based." *Id.* Here, the County's decision includes discussion of water quality impacts on the Deschutes River and Whychus Creek and makes findings regarding the adequacy of mitigation measures on the Deschutes River, including the removal of dams on Deep Canyon Creek that would impede flows from underground seeps and springs. (R 34, ER 63) LUBA was correct in determining the findings are adequate.

2. LUBA correctly applied the substantial evidence test.

As discussed above, under the first assignment of error, the appropriate standard of review on appeal to this court is whether LUBA's opinion is "unlawful in substance" under ORS 197.850(9)(a). The court's task is not to determine whether the County erred in making a finding, but to determine whether LUBA properly stated and applied its own standard of review for evaluating whether a finding is supported by substantial evidence. The Court may reverse LUBA's decision "only when there is no evidence to support the finding or if the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.'" *Citizens for Responsibility, supra,* 218 Or App at 345 (citing *Younger, supra,* 305 Or at 359). Applying these rules to petitioner's argument regarding cool habitat patches in the mainstem Deschutes River, LUBA

appropriately concluded that the County's findings were indeed supported by substantial evidence in the record. (LUBA Rec 272, ER 28)

Petitioner asserts that the evidence cited by the County and LUBA, including a letter from ODFW, intervenor's fish mitigation plan documents and additional technical reports prepared by two of intervenor's experts, is insufficient to demonstrate compliance with DCC 18.113.070(D). But the bulk of petitioner's argument is, in fact, an effort to convince the court that LUBA should have reweighed the evidence and come to a different conclusion than the County. When the issue is whether a finding is supported by substantial evidence, this court's review of a LUBA decision "is confined to examining whether LUBA correctly applied the test." *Save Oregon's Cape Kiwanda Organization v. Tillamook County*, 177 Or App 347, 358-359, 34 P3d 745 (2001); *see also Angel v. City of Portland*, 113 Or App 169, 172, 831 P2d 77 (1992) The fact that petitioners or this court might view the evidence differently "does not mean that LUBA erred in its review of the local decision for substantial evidence." *Save Oregon's Cape*, 177 Or App at 358-59.

LUBA correctly applied the substantial evidence test, because there is evidence in the record supporting the County's finding that water temperature impacts in the mainstem Deschutes River will be mitigated. (LUBA Rec 272; R 1249-53, 1801-1803, 2137-41, 2697-2702; *see also* R 97, 101, 106-07) There is simply no basis for the court to find that LUBA misunderstood or misapplied its scope of review. *See Younger,* 305 Or at 359. Petitioner's argument relies solely on assertions that her evidence is better. Indeed, there can be no straight-faced argument that the record lacks substantial evidence merely because the evidence relied upon by the

County uses a different set of words to describe the potential thermal impacts. This court therefore should reject petitioner's invitation to reweigh the evidence and should deny petitioner's substantial evidence challenge.

3. The proposed mitigation will not result in substitution of species.

Petitioner asserts that the proposed Deep Canyon Creek mitigation relied upon by ODFW and intervenor would support the County's finding of compliance with DCC 18.113.070(D) only if "the 'no net loss' standard were interpreted as allowing substitution of species." PB, pp. 26-27. According to petitioner, the no net loss standard should be interpreted to require species and location-specific fish mitigation, rather than mitigation for overall temperature impacts to fish habitat in the mainstem Deschutes River. *Id.* Intervenor disagrees with petitioner's interpretation of the no net loss standard for reasons given in intervenor's response to the first assignment of error.

Additionally, intervenor has never proposed to substitute one fish species for another. The issue before the County was whether intervenor's mitigation plan would be sufficient to offset extremely small, perhaps un-measurable, impacts to stream temperature (and thus fish habitat quality) in the mainstem Deschutes River. (LUBA Rec 272, ER 28; R 1249-53, 1801-1803, 2137-41, 2697-2702) The County and LUBA concluded that the proposed mitigation would resolve the temperature concerns. (LUBA Rec 272, ER 28)

V. CROSS-PETITIONER'S ASSIGNMENT OF ERROR

LUBA erred in concluding that the proposed wildlife mitigation plan does not meet the requirements of DCC 18.113.070(D) as interpreted by the Court of Appeals in *Gould II*.

A. Preservation of Error

At LUBA, intervenor argued in support of the Hearings Officer's decision that both the terrestrial wildlife and fish components of intervenor's wildlife mitigation plan satisfied the requirements of DCC 18.113.070(D). Specifically, intervenor defended the plan against petitioner's assignments of error, some of which LUBA sustained.

B. Standard of Review

The standard of review is the same as stated under the first assignment of error of the appeal.

C. Argument

1. Introduction

This cross-appeal concerns only the terrestrial wildlife mitigation plan presented by intervenor during the FMP approval process. In preparing a new plan, intervenor and its consultants were mindful of the direction of this court in *Gould II*:

> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing *the specifics of any required mitigation measures*, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision *lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan* based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of

> the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, *the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process*. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, the board's decision was 'unlawful in substance.'" 216 Or App at 159-60. (Emphasis added.)

In *Gould II* (and in *Gould IV*), this court clarified the so-called "feasibility" standard first discussed in *Meyer v. City of Portland*, 67 Or App 674, 678 P2d 741, *rev den*, 297 Or 82 (1984). The court explained:

> "[T]he governing ordinance requires a *Meyer* determination of whether 'solutions to certain problems * * * are likely and reasonably certain to succeed' – whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net los or net degradation of the resource,' as required by DCC 18.113.070(D).
>
> "The wildlife impact mitigation plan was not yet composed. Although Thornburgh's consultant proposed a number of offsite mitigation measures on federal land, the BLM reported that these measures needed 'clarification and further development.' In particular, the agency asked that the effect of the development on deer and elk winter range and habitats along a nearby river be clarified. It noted that '[i]t is unclear what types of habitat conditions the resort intends to provide on-site compared to off-site.' The BLM concluded that '[s]everal items included in the draft report would not be considered appropriate off-site mitigation,' including removal of grazing on the resort property and from offsite mitigation areas, placing rocks on offsite mitigation areas, creation of new water sources for wildlife, and closure of existing roads and trails. Thus the particular nature of the wildlife impact mitigation plan was not known at the time of the CMP hearing." 216 Or App at 162-63.

The goal of ODFW, BLM and intervenor on remand was to present a plan that was adequately described and justified, based on the standards in DCC 18.113.070(D). The particulars of the on-site mitigation were to be explained. The plan for off-site mitigation was to be entirely consistent with the BLM's requirements.

Both the on-site and off-site mitigation plans were not to be based on a future negotiation and were to be presented during the county FMP hearing process.

To meet these objectives, petitioner's consultants prepared two substantial documents: "Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort (WMP)," April 15, 2008 (R 2609-86); and "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project" (M&M Plan), August 12, 2008 (R 416-32, ER 71-98). The plans were guided and endorsed by ODFW (R 414, 1296, 1298, 1299, 1301-02, 1303, 1304, 1305, 1306, 1307, 1308, 1310, 1800-04, 2091) and the BLM (R 415, 470, 798, 2687, 2756).

In a letter submitted to the County about two months before the Hearings Officer's decision, the BLM stated:

> "Currently, the BLM is finalizing the Environmental Assessment for the Cline Buttes Recreational Area Plan (CBRAP), which is an implementation plan tiered to the Upper Deschutes Resource Management Plan, Final Environmental Impact Statement (UDRMP/FEIS). The CBRAP includes site specific implementation actions such as different vegetation treatment methods to maintain or restore desired wildlife habitat, designated road and trail systems, identification of routes to be decommissioned, and access controls/trailheads. The final version of the document is anticipated by late 2008, pending public review.
>
> "* * * *
>
> "BLM has provided [intervenor] with input on potential areas for mitigation, habitat treatments used during mitigation and monitoring to track effectiveness of vegetative treatments. The BLM believes that the vegetation management details provided to [intervenor], which are included in the [M&M] Plan, would meet the wildlife and habitat resource management objectives of the UDRMP. (R 415, ER-70)

Based on the evidence in the entire record, which included testimony from experts at two lengthy hearings, the Hearings Officer concluded:

"The applicant has agreed to restore 4,501 acres of juniper woodlands in the Cline Buttes subarea to mitigate the loss of the 8,474 [Habitat Units]. The specific BLM land on which the restoration is [to occur] is subject to the adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be finally identified. However, the applicant and BLM have identified three areas where wildlife and habitat restoration is likely to occur under the CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston Allotment. Restoration includes weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources ('guzzlers') and traffic speed monitoring devices. The specific activities and monitoring program for the BLM land are identified in an 'Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project.' (TetraTech, August 2008), included in the applicant's August 12, 2008 rebuttal, Ex. B3.

"If, at the time of development, insufficient off-site areas are not available, the applicant proposes to provide funding for implementing mitigation in a dedicated fund for use by ODFW to use to improve or purchase mitigation sites within Deschutes County. After the mitigation is established, the applicant will provide continuing funding for the lifetime of the development through a real estate transfer tax." (R 31-32, ER 60-61)

The Hearings Officer then decided:

"While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts. Its plan includes monitoring and alternatives to provide replacement in the event the anticipated BLM improvements are not successful. The hearings officer concludes that the applicant has demonstrated that the mitigation plan, as conditioned, is reasonably likely to [succeed]." (R 25, ER 64)

2. LUBA's Opinion

As relevant to this cross-appeal, LUBA found:

"The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of the 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's consultant and BLM and ODFW staff are confident that those restoration efforts will be

> successful and result in compliance with DCC 18.113.070(D). But what our description and the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a number of important parts of Thornburgh's proposal to comply with the DCC 18.113.070(D) 'no net loss' standard have not yet been determined, and will not be determined until a future date at which petitioner may or may not have any right to comment on the adequacy of the proposed mitigation. We do not know the location of the 4,501 acres that will be restored to provide the required mitigation. They may be located in the Canyons Region, the Deep Canyons Region or the Maston Allotment. Or they may be located somewhere else in Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres. We do not know what the habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HUs. The question for us is whether given all of these uncertainties, the confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that the proposed mitigation plan will result in compliance with DCC 18.113.070(D). The answer to that question under the principles articulated in *Gould II* is no." (LUBA Rec 263, ER 19).

LUBA and the Hearings Officer disagreed on whether the WMP and the M&M Plan contain "the specifics of any required mitigation measures" and "a sufficient description of the wildlife impact mitigation plan, and justification of that plan," such that a decision maker can infer that the terrestrial wildlife plan is, as presented, likely and reasonably certain to succeed. LUBA focused its attention on the fact that the specific BLM land on which mitigation was to occur was still undecided and, in fact, could not be decided until the CBRAP was completed. From that, LUBA concluded: (1) We cannot know what kind of habitat those 4,501 acres provide; (2) we cannot know what the beginning habitat value is; (3) we cannot know what particular mix of restoration techniques will be provided; (4) we cannot know what the habitat value will be after restoration. Ergo, we cannot know if that

restoration effort will result in the needed 8,474 HUs.

3. Discussion

The question before this court is whether LUBA correctly applied the substantial evidence test in light of *Gould II* and the evidence in the County record. Intervenor contends that having erred prior to *Gould II* in approving an insufficiently detailed wildlife mitigation strategy, LUBA has now erred in disapproving a solid, clearly presented strategy. Intervenor believes that the evidence is so at odds with LUBA's evaluation that a reviewing court may infer that LUBA has misapplied its scope of review.

LUBA correctly affirmed the adequacy of the on-site mitigation plan and HEP analysis contained in the WMP. LUBA's error relates only to the off-site mitigation strategy detailed in the M&M plan, under which the impact to on-site species would be mitigated by habitat modification off-site. BLM's letter establishes that since the decision in *Gould II*, any concerns about the details of on-site mitigation have been resolved and the strategies employed off-site will be consistent with BLM's own management objectives. ODFW's June 13, 2008 letter (R 1801, ER 101-03) and email (R 1800, ER-100) establish that after performing the task assigned to the agency by OAR 635-415-0020, the agency believes that DCC 18.113.070(D) will be met through intervenor's proposed terrestrial wildlife mitigation plan.

A wildlife mitigation plan cannot be as precise or certain of success as the directions for operating a radio. There are too many variables, which require an application of a number of techniques and subsequent monitoring. At one time, petitioner objected that the WMP is a "'procedure,' not a plan." (R 785) In response

(R 71), intervenor pointed out that Webster's Ninth New Collegiate Dictionary defines "plan", as relevant, to be:

> "**2 a:** a method for achieving an end. **b.** an often customary method of doing something : PROCEDURE **c :** a detailed formulation of a program of action **d** : GOAL, AIM. **3.** an orderly arrangement of parts of an overall design or objective. **4. :** a detailed program (as for payment or the provision of some service)"

In short, a wildlife mitigation plan is a procedure, a strategy. As detailed in LUBA's opinion (LUBA Rec 19-20, ER 19-20), the experts consulted by intervenor believe the M&M Plan is a strategy that is likely and reasonably certain to succeed.

As LUBA acknowledges, the M&M Plan provides "a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of 4,501 acres that are to be selected in the future." (LUBA Rec 19, ER 19) As the plan explains:

> "The objective of this Plan is to 1) outline the methods that will be used to characterize existing habitat conditions in the area proposed for mitigation, 2) specify the types of habitat treatments used to enhance habitat for wildlife, and 3) develop a monitoring plan that will monitor the effectiveness of the habitat treatments through direct or indirect means. The methods used in this Plan have been structured such that they could be applicable to any parcel of land within the [CBRAP] that the BLM determines is suitable for mitigation once the CBRAP has been finalized." (R 418, ER 73)

The plan identifies three areas where mitigation activities are likely to occur. Given the context, LUBA's statement that we cannot know what kind of habitat those 4,501 acres provide, what the beginning habitat is, what particular mix of restoration techniques will be provided and what the habitat value will be after restoration is questionable. No one has proposed one site in the Arizona Desert,

another in the Pacific Northwest and a third in Florida. The three areas are very similar, if not identical, in their characteristics. The M&M Plan provides for a baseline data survey, describes potential mitigation treatments and discusses how vegetation treatment methods will be selected, specific habitats that will be encountered in the three possible mitigation sites, and weed control. (R 421-30, ER 76-77) There is no dispute that any or all of the treatment methods will be acceptable in order to achieve the desired objective of complete mitigation.

The M&M Plan provides for ongoing monitoring over a period of years (R 430-31, ER 85-86), because it is a given that no matter where mitigation occurs, it will be necessary to make changes to the mitigation techniques employed to address unanticipated consequences. It is the monitoring piece that is the most important, since the various treatments are likely to be modified through "adaptive management," using expert judgment no matter where mitigation occurs. If the plan were much more specific about what techniques were going to be used and exactly where, it would be necessary to return to the County to seek modifications through the land use approval process whenever monitoring data required them.

That the CBRAP was not finally adopted means that at the time of the County's decision, the BLM legally could not commit itself to provide a specific location where mitigation was to occur. However, as the BLM's letter, quoted above, makes clear, there was a draft CBRAP under consideration at the time of the Hearings Officer's decision, there was an extreme likelihood that it would become a final CBRAP, and there were three areas on BLM land where off-site mitigation for the proposed development would be welcome. The final alternative – a fund to enable

mitigation elsewhere in the County – was clearly included as an ultimate backstop, in order to eliminate the remote possibility that the BLM land would somehow become unavailable and mitigation would not occur.

Based on the evidence in the whole record, it was reasonable for the Hearings Officer to conclude that substantial evidence supported a conclusion that the mitigation plan, as conditioned, was reasonably likely to succeed. LUBA should not have disturbed her conclusion.

VI. CONCLUSION

Intervenor respectfully asks the court to affirm on the petition and reverse and remand on the cross-petition.

DATED this 10th day of November, 2009.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, PC

By: _____

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed an original, together with twenty copies, of the attached **RESPONDENT/CROSS-PETITIONER'S COMBINED BRIEF AND EXCERPT OF RECORD** with the State Court Administrator by first class mail, postage prepaid, in a sealed envelope, deposited in Portland, Oregon on November 9, 2009 to:

State Court Administrator
Court of Appeals
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

and that on the same day, two true and correct copies of the same contained in a sealed envelope, first class mail, postage prepaid, were served on:

Paul D. Dewey
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Dated this 10th day of November, 2009.

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