

CROOK COUNTY WORK SESSION

Administration Conference Room
203 NE Court Street, Prineville, OR

Tuesday **May 11, 2021** at 9 a.m.

Members of the public and media are welcome to attend in person with social distancing
or via Webex 1-408-418-9388; Access Code: 623 057 025
Meeting Password: zRNvGMYM286

Discussion Items

	<i>Requester's Name</i>	<i>Matter</i>	<i>Docs in Packet?</i>
1	Katie Plumb	COVID-19 Update (if any)	
2	John Eisler	ODFW Appeal of TSR North Solar Facility CUP Modification	✓
3			

Executive Discussion Items

	<i>Requester's Name</i>	<i>Matter</i>	<i>Docs in Packet?</i>
Exec #1		ORS 192.660(2)(h) legal consultation regarding current litigation or litigation likely to be filed	✓
Exec #2		ORS 192.660(2)(f) Review of documents exempt from disclosure	✓

Items placed on the Work Session agenda are intended for discussion only, without making decisions or finalizing documents unless an emergency exists.

**The Court may add additional items arising too late to be part of this Agenda. Agenda items may be rearranged to make the best use of time.*

**The meeting location is accessible to persons with disabilities. If additional accommodations are required, please submit your request 48 hours prior to the meeting by contacting County Administration at 541-447-6555.*

*Requests to be placed on the Work Session agenda are due at **5 p.m. on Thursday** before the Work Session*

May 11, 2021 Work Session Agenda Items

Crook County Counsel's Office

267 NE 2nd St., Ste 200 • Prineville, Oregon 97754 • (541) 416-3919 • FAX (541) 447-6705

MEMO

FOR WORK SESSION
May 11, 2021

TO: Crook County Court

FROM: John Eisler, Crook County Legal Counsel's Office

DATE: May 6, 2021

RE: ODFW Appeal of TSR North Solar Facility CUP Modification
Our File No.: Community Development 63

The Planning Commission held a public hearing on March 17, 2021 and met again for deliberation only regarding a modification request of a conditional use permit for the TSR North Solar Facility. The original CUP was for a 320-acre facility. The modification sought to expand the facility to approximately 585 acres, under 2019 House Bill 2329, codified at ORS 215.446. The Planning Commission approved the application via a written decision on April 12, 2021.

The Oregon Department of Fish and Wildlife (ODFW) timely appealed the permit on specificity/detail grounds on April 26, 2021, attached herein. Pursuant to our recently amended code language, Planning Director Ann Beier reviewed the appeal for completeness. The County Court must now set the appeal hearing for a date not later than 60 calendar days after receipt of the notice of appeal, or by June 25th.

Notice of the appeal hearing date must be published in the paper and sent to the parties no less than 10 calendar days before the appeal hearing. However, other code obligations such as the appellant's obligation to submit a written transcript and staff's obligation to prepare a staff report warrant setting the date and sending out notice much earlier than 10 calendar days before the hearing.

In lieu of hearing the appeal, the County Court has the option of using the Planning Commission's decision as the final decision of the County and sending the appeal directly to LUBA.

The purpose of this memo is to advise the County Court of the appeal itself, and to discuss if and when the County Court desires to hear the appeal or if it would prefer to send the appeal directly to LUBA. Please also take note that the same parties are currently in litigation at LUBA, case number 2020-114, for which oral arguments are scheduled for May 18, 2021.



RECORD # 217 - 21 - 000321 - PLNG
Planning Commission: \$250
County Court: \$2000.00 + 20% of initial application fee (deposit)
Actual costs with deposit required at time of appeal submission

Crook County
APR 26 2021
Community Development

Crook County Community Development/ Planning Division
300 NE 3rd Street, Room 12, Prineville Oregon 97754
Phone: 541-447-3211
plan@co.crook.or.us
www.co.crook.or.us

APPEAL PETITION TO PLANNING COMMISSION or COUNTY COURT

Appellant Information

Last Name: Oregon Department of Fish and Wildlife First Name: _____

Mailing Address: 2042 SE Paulina Hwy

City: Prineville State: OR Zip: 97754

Day-time phone: (541) 447 - 5111 Cell Phone: (_____) _____

Email: greg.s.jackle@state.or.us

If group, name of representative: Greg Jackle

Land Use Application Being Appealed: (file number) 217-20-000581-PLNG

Property Description: Township 15S Range 15E Section _____ Tax lot(s) 1226

Appellant's Signature: *Greg Jackle* Date: _____

I/We, the undersigned, wish to appeal the decision made by the Crook County Planning Commission regarding application no. 217-20-000581-PLNG, that a final decision was made on the 2nd day of April, 2021.

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. The appeal shall be in writing and shall contain:
 - a. Name, signature, and address of the appellant(s).
 - b. Reference to the application title and case number, if any;
2. A statement of the nature of the decision:
 - a. A statement of the specific grounds for the appeal, setting forth the error(s) and the basis of the error(s) sought to be reviewed; and
 - b. A statement as to the appellant's standing to appeal as an affected party.
3. Proper filing fee in accordance with Section 18.172.050.
4. If the decision appealed from is a decision made without a hearing or without notice to area property owners, written notice of appeal must be filed within twelve (12) calendar days of the date written notice of the decision is mailed to those entitled to such notice. With respect to all other appeals, written notice of appeal must be filed within 10 calendar days of

the date written notice of the decision is mailed to those entitled to decision. If the last day of the appeal period falls on a Saturday, Sunday or legal holiday, the notice of appeal is due on the next business day.

5. An appeal shall be filed:
 - a. With the County Court for appeals from final decisions by the Planning Commission;
 - b. With the Planning Commission for appeals from final decisions by the Planning Director or Planning Department staff; and
 - c. Shall cite the specific "Zoning Ordinance Section" and "Comprehensive Plan Policies" alleged to be violated.

The Notice of Appeal must include the items listed above. Failure to complete all of the above will render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

TRANSCRIPT: The appellant must provide a copy of the transcript of the proceedings (at the appellants' expense) appealed to the County Planning Department not less than seven (7) calendar days before the hearing date set by the County Court or Planning Commission.

SCOPE AND STANDARD OF REVIEW OF APPEAL: An appeal to the County Court is not a new hearing; it is a review of the decision. Subject to the exception in paragraph (6) below, the review of the final decision shall be confined to the record of the proceeding below, which shall include, if applicable:

1. All material, pleadings, memoranda, stipulations and motions submitted by any party to the proceeding and received by the Commission or Court as evidence.
2. All material submitted by Crook County Staff with respect to the application.
3. The transcript of the Planning Commission hearing(s).
4. The written final decision of the Commission and the petition of appeal.
5. Argument (without introduction of new or additional evidence) by parties or their Legal representative.
6. The appellate body may, at its option, admit additional testimony and other evidence from an interested party or party of record to supplement the record of prior proceedings. The record may be supplemented by order of the appellate body upon written motion by a party. The written motion shall set forth with particularity, the basis for such request and the nature of the evidence sought to be introduced. Prior to supplementing the record, the appellate body shall provide an opportunity for all parties to be heard on the matter. The appellate body may grant the motion upon a finding that the supplement is necessary to take into consideration the inconvenience of locating the evidence at the time of initial hearing, with such inconvenience not being the result of negligence or dilatory act by the moving party.

An appeal from the Planning Director or Planning Department staff to Planning Commission shall be de novo; meaning that the burden of proof remains with the applicant and that new testimony and evidence, together with the existing Planning Department file, may be received at the hearing on the appeal.


STANDARD OF REVIEW ON APPEAL: The burden of proof remains with the applicant. The burden is not met by merely showing that the appellate body might decide the issue differently.

APPELLATE DECISION: Following the hearing of the appeal, the appellate body may affirm, overrule or modify the Planning Commission’s final decision.

This appeal is made pursuant to Section 18.172.110 of the Crook County Code. The required fee has been received by the Crook County Planning Department as the filing fee for this appeal.

I / We are appealing the decision for the following reasons: (be specific)

The Oregon Department of Fish and Wildlife (ODFW) is appealing the Planning Commission's decision because the findings and evidence on which the approval is based are insufficient to demonstrate or ensure compliance with ORS 215.446 (HB 2329 (2019)) and OAR Chapter 635, Division 415, which implements ORS 496.012. ODFW detailed the inadequacies of Applicant's habitat assessment and proposed mitigation plan in its letters to the Crook County Planning Commission dated December 16 and February 24, 2021 and resubmit those letters with this petition.

Name (print)	Signature	Address
Greg Jackle		2042 SE Paulina Hwy, Prineville, OR 97754

(If additional space is needed attach another sheet)

Each party that authorizes the "Representative" to speak on their behalf must submit a letter stating so, which is signed, dated, and attached to this appeal.



Oregon

Kate Brown, Governor

Department of Fish and Wildlife
Prineville Field Office
High Desert Region
 2042 SE Paulina Hwy.
 Prineville, OR 97754
 (541) 447-5111
 FAX (541) 447-8065
 www.dfw.state.or.us

April 26, 2021

Crook County Court
 203 NE Court St.
 Prineville, OR 97754

RE: Appeal Statement TSR North 217-20-000581-PLNG

Dear Judge Crawford, Commissioner Brummer and Commissioner Barney:

The purpose of this letter is to provide the Crook County Court with the Oregon Department of Fish and Wildlife's (ODFW) formal comments and rationale for appealing the Crook County Planning Commission's decision in TSR-North 217-20-000581-PLNG, and to provide ODFW's recommendations to the County Court for its decision in this matter. ODFW has standing to file this appeal pursuant to CCC 18.172.110(6)(b) because it provided written comments to the Planning Commission dated December 26, 2020 and February 24, 2021 and oral testimony on March 17, 2021. ODFW would like to summarize its recommended changes to Condition 20 related to option 1 of the mitigation plan. ODFW would like to further recommend its support of option 2 as meeting the standards of our mitigation policy.

To comply with ORS 215.446 and be consistent with the ODFW Habitat Mitigation Policy, option 1 should include greater specificity and include the following information;

- **Location.** ODFW recommends that the County Court amend Condition 20 to require that mitigation occur in winter range habitat that is mapped for pronghorn specifically. The wildlife habitat impacts of TSR North are to identified pronghorn winter range, so to recreate the habitat function that would be lost by development and to meet the "in-kind" and "in-proximity" ODFW Habitat Mitigation Policy standard (OAR 635-415-0005 (12),(13) & 635-41-0025(2)(b)(B)), the mitigation site needs to benefit pronghorn and thus within mapped pronghorn habitat in Crook County.
- **Timing of mitigation.** ODFW recommends that the County Court amend Condition 20 to make explicit that Applicant must implement and complete mitigation either prior to or concurrent with development impacts. This addition is explicitly stated in the ODFW Habitat Mitigation Policy (OAR 635-415-0025(2)(b)(B) & (4)(b)(B)), and the County's decision must be consistent with that rule.

The reason for this requirement in the ODFW Habitat Mitigation Policy is to ensure the mitigation plan will achieve the standard of no net loss of habitat quantity and quality (for Category 4 and Category 2 habitat) plus a net benefit of habitat quantity or quality (for Category 2 habitat). For example, if development impacts the habitat starting in Year 1, but the mitigation plan is not implemented until Year 3, there would be two years of impacts to habitat quantity and quality that are not mitigated.

- **Scale.** ODFW recommends that impacts in Category 2 habitat be mitigated at a ratio of 2:1. This mitigation ratio meets the standard of no net loss and a net benefit of habitat quantity and quality. ODFW Habitat Mitigation Policy (OAR 635-415-0025(a)(b)(B)). While a ratio of 1.5:1 provides a ½ acre net benefit to each acre impacted, ODFW continues to argue for a 2:1 mitigation ratio in category 2 impacted habitats. These habitats are limited on the landscape and thus protecting an additional acre of habitat that has been impacted by development should provide the "net benefit" of both habitat

- quantity and quality. Please refer to our figure 1 of the area from our December 26, 2020 letter for added context. ODFW would like to point out the rapid accumulation of impacts to category 2 pronghorn habitat due to multiple solar projects being proposed and approved in the area. It is critical if development proposals are going to continue to impact limited habitat, the mitigation ratio is appropriate in protecting and preserving the amount of habitat so that it provides a net benefit of habitat quantity and quality.

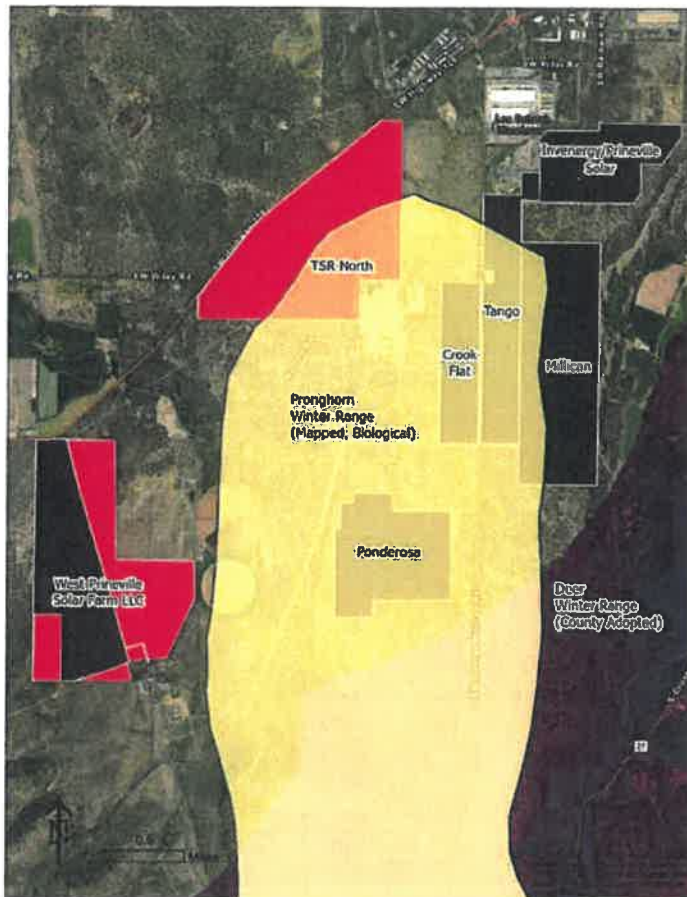


Figure 1. Map of Recently Proposed (Red) and Surrounding County Approved Solar Facilities (Gray).

- **Maintenance and Monitoring.** Likewise, ODFW Habitat Mitigation Policy standards (OAR 635-415-0025(a)(b)(B), OAR 635-415-0020(e)) require that the mitigation plan include a monitoring plan and maintenance plan for the mitigation site. In addition to the monitoring and maintenance required by the Planning Commission, ODFW recommends an annual grass monitoring and maintenance plan for the mitigation site to assure the mitigation site is still functioning wildlife habitat and not degraded due to invasion of annual grasses after the juniper treatment has occurred.
- **Durability.** To achieve the mitigation standard, the mitigation site must provide functioning habitat for the duration of impacts from the Project.
 - **Prevent conflicting uses.** The purpose of the mitigation site is to replace lost habitat quantity and quality. To accomplish this, the durability instrument must prohibit uses that conflict with the habitat purpose. These include: (i) increased grazing above levels approved under existing grazing management plans unless otherwise approved in writing by ODFW; (ii) all

nonagricultural uses unless agreed to by ODFW; (iii) grading, mowing, blading, or expansion of impervious surfaces or access road networks, and (iv) divisions of the mitigation site.

Ensure mitigation site provides habitat for the same duration of time that the Project occupies the current habitat, which must include reclamation time. When the Project stops producing energy, it will take time to remove the panels and for the land to revegetate and provide any functioning habitat for wildlife. The Project is still impacting the habitat during this time, and so to meet the mitigation standards the mitigation site must provide replacement habitat until the Project stops impacting habitat. To address these concerns, ODFW recommends that the County Court amend Condition of Approval 20 adopted by the Planning Commission to specifically state the required duration of the mitigation site.

ODFW recommended changes to Condition 20 below in RED.

CONDITION 20

20. The Applicant shall conduct mitigation for impacts to the Project site as follows:

a. The Applicant will implement migratory bird conservation measures to conduct vegetation removal and construction activities from August 2 – February 28 to avoid impacts to active nest sites (March 1 – August 1) or to monitor for nest sites if construction occurs during normal nesting periods.

b. Implement Mitigation Option 1 (juniper removal). Prior to Site clearing and grading, the Applicant shall submit the following information for a juniper removal project:

Location – The Applicant shall provide location information (map and tax lot number) for a juniper removal project located within pronghorn winter range identified on ODFW's maps within Crook County. The Applicant shall identify the Project acreage.

Timing – Mitigation shall be implemented and completed either prior to or concurrent with development impacts.

Scale – The Applicant shall perform juniper removal on the number of acres disturbed by the TSR North project, including the associated transmission line that occurs with the approximately 220-acre portion of the site within mapped pronghorn winter range. The area within the 500 feet of the boundary of the adjacent aggregate site, as measured from the boundary of the mining area permitted by the Oregon Department of Geology and Mineral Industries, shall be excluded from the acreage requirement. The area within ODFW's mapped pronghorn habitat (approximately 220 acres) is characterized as category 2 habitat and shall be mitigated at a ratio of 2 acres to 1 acre disturbed. The remainder of the acreage (approximately 365 acres) is characterized as category 4 habitat and shall be mitigated at a ratio of 1 to 1.

Maintenance – The Applicant agrees to revisit and conduct additional juniper removal as needed in consecutive intervals of 12 years following the initial treatment or to the standard specified by the U.S. Department of Agriculture's Natural Resources Conservation Service, whichever is shorter. Noxious weed monitoring and treatment shall also be maintained on a biennial basis.

Durability – Before site clearing or grading at the TSR North site, the Applicant shall provide Crook County Community Development with a fully executed instrument preventing development and uses conflicting with habitat function on the mitigation site for at least the duration of the Project impacts (construction through site reclamation), including but not limited to a working lands agreement, a deed or outright purchase agreement, or a conservation easement. Uses conflicting with habitat function include (i) increased grazing above levels approved under existing grazing management plans unless otherwise approved in writing by ODFW; (ii) all nonagricultural uses unless agreed to by ODFW; (iii) grading, mowing, blading, or expansion of impervious surfaces or access road networks, and (iv) divisions of the mitigation site.

Monitoring – The Applicant shall submit a monitoring plan prior to site clearing and grading to demonstrate the efficacy of the one-time juniper clearing project. This shall include “before” and “after” photos of the site and reports on juniper regrowth during the initial 12-year period. Applicant shall submit a biennial report on noxious weed monitoring and treatment.

c. Implement Mitigation Option 2 (One-time Fee-in-lieu payment). If the Applicant elects to implement Option 2, the Applicant shall make a one-time mitigation payment to a qualified conservation organization, based on the formula identified in the Applicant’s wildlife mitigation plan and applying the ratios and acreage requirements listed for option 1 (condition 20.b). Documentation of said payment shall be submitted to Crook County Community Development before site clearing and grading at the TSR North site. The Planning Commission supports the project proposed by the Crook County Soil and Water Conservation District (Exhibit 6). If that project is not feasible, another project within Crook County would be considered by the Crook County Planning Director or the Planning Commission.

d. Prior to site clearing and grading, the Applicant shall submit a checklist to the Planning Director to demonstrate that it has met all outstanding conditions of approval. This checklist shall include information on the option chosen for mitigation of wildlife habitat loss and information on how mitigation has been/will be implemented.

ODFW appreciates the opportunity to work with Crook County and the applicant to get this application meeting the standards of approval. Thank you for the opportunity to comment and for your continued commitment to protecting Crook County’s fish and wildlife habitat resources. Should you have any questions or require additional information, I can be reached at (541) 447-5111 x26 or by e-mail at greg.s.jackle@state.or.us.

Sincerely,



Greg Jackle
District Wildlife Biologist
ODFW – Ochoco District

Attachments – December 26, 2020 letter, and February 24, 2021 letter

cc. Sarah Reif, Joy Vaughn, Sara Gregory, Mike Harrington – ODFW
Erin Donald - ODOJ



Oregon

Kate Brown, Governor

Department of Fish and Wildlife
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 East Region
 2042 SE Paulina Hwy.
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 www.dfw.state.or.us

December 16, 2020

Ann Beier, Crook County Planning Director
 Community Development
 300 NE 3rd Street, Room 12
 Prineville, OR 97754

RE: Conditional Use – TSR North Solar Energy Facility Modification Number 217-20-000581-PLNG (Mitigation Plan Version 4, June 10, 2020)

Dear Ms. Beier,

The purpose of this letter is for the Oregon Department of Fish and Wildlife (ODFW) to provide formal comments to the Crook County Planning Commission on Record Number 217-20-000581-PLNG, TSR North Solar Energy Facility Modification (Project). The Applicant is requesting approval to modify Permit 217-19-000378-PLNG for a photovoltaic power generating facility from 320 to up to 585 acres. This expansion triggers 2019 Oregon House Bill 2329, now codified at ORS 215.446.

This letter begins by describing the Project site and providing an overview of the applicable law. As the Planning Commission is aware, ORS 215.446 is a new statute that very few solar projects have triggered. While the Crook County Code (CCC 18.16.060(3)(h)(vi)) requires appropriate mitigation for adverse impacts on wildlife habitat from solar development that occupies up to 320-acres, the mitigation required by ORS 215.446, which must be consistent with the Fish and Wildlife Habitat Mitigation Policy (Mitigation Policy; codified at OAR chapter 635, division 415), is different. ORS 215.446 projects can occupy between 320 and 1,920 acres, and the applicable mitigation goals and standards that apply to these larger projects are more tailored than the one size fits all standard in CCC 18.16.060(3)(h)(vi).¹ Mitigation plans for projects under ORS 215.446 must adhere to a higher level of specificity consistent with the Mitigation Policy and demonstrate that the planned mitigation will achieve the applicable mitigation goals and standards. For Crook County, this means that past precedent on mitigation

¹ The mitigation goal for all solar projects governed by CCC 18.16.060(3)(h)(vi) is that project specific mitigation offset the potential adverse effects of the facility. This applies to impacts to big game winter range, and all other types of protected habitat.

plan approvals may not comply with the new law. This is not because Crook County's past mitigation approvals have been deficient—it is because the Legislature adopted a new law.

After describing the Project site and the applicable law, this letter describes ODFW's concerns with the Applicant's draft mitigation plan (Plan) including those specific to the three mitigation options included in the Plan. To the best of its ability, ODFW has provided recommendations on how the Plan could be amended to be consistent with the Mitigation Policy, as required by ORS 215.446. Please do not hesitate to contact ODFW representatives with any questions or if additional information would be helpful.

Project Site Description

The Project site is 585-acres. This includes approximately 220 acres of mapped pronghorn winter range (Figure 1) and, as records of wildlife vehicle collisions confirm, is within an important big game movement corridor (Figure 2). In addition, ODFW District Wildlife Biologists have observed that the entire 585-acre site generally serves as habitat for a variety of wildlife including reptiles, small mammals, and migratory birds. The site is uncultivated and non-irrigated and comprised of sagebrush and juniper steppe woodland in good functioning condition despite the presence of grazing and a nearby gravel pit.

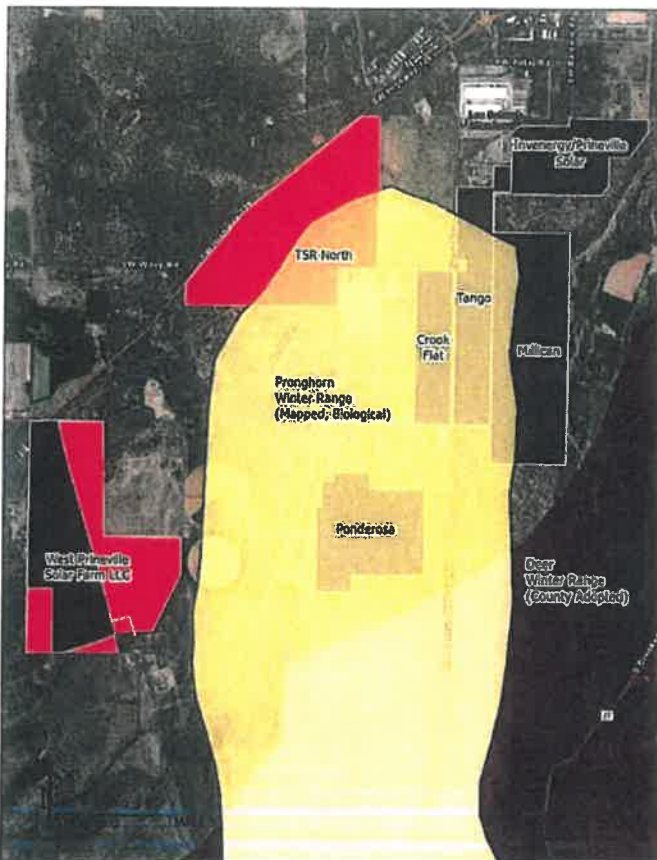


Figure 1. Map of Recently Proposed (Red) and Surrounding County Approved Solar Facilities (Gray).

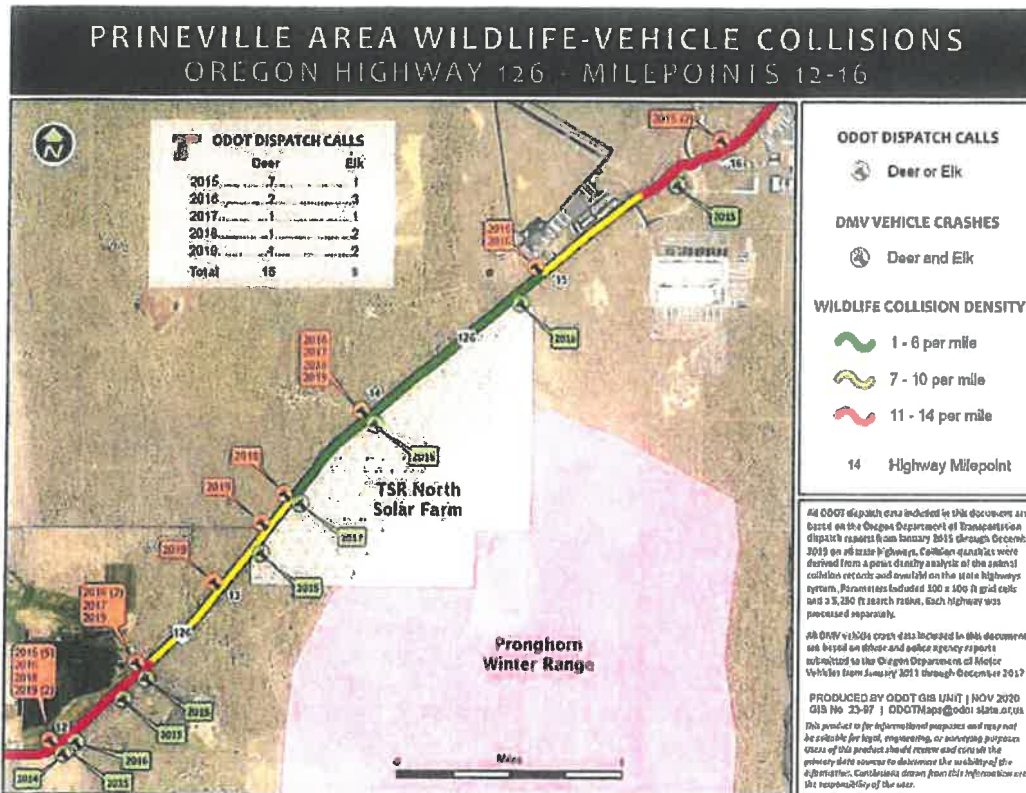


Figure 2. Map of ODOT recorded Wildlife Vehicle Collisions adjacent to project site 2015-2019.

Overview of ORS 215.446 (HB 2329 (2019) and the Fish and Wildlife Habitat Mitigation Policy (OAR chapter 635, division 415)

As stated above, the Project is governed by ORS 215.446 because it exceeds 320 acres. With respect to impacts to fish and wildlife habitat, and as relevant here, ORS 215.446(2) and (3)(a) read:

- (2) An application for a land use permit to establish a renewable energy facility must be made under ORS 215.416. An applicant must demonstrate to the satisfaction of the county that the renewable energy facility meets the standards under subsection (3) of this section.
- (3) In order to issue a permit, the county shall require that the applicant:
 - (a)(A) Consult with the State Department of Fish and Wildlife, prior to submitting a final application to the county, regarding fish and wildlife habitat impacts and any mitigation plan that is necessary;
 - (B) Conduct a habitat assessment of the proposed development site;

(C) Develop a mitigation plan to address significant fish and wildlife habitat impacts consistent with the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012; and

(D) Follow administrative rules adopted by the State Fish and Wildlife Commission and rules adopted by the Land Conservation and Development Commission to implement the Oregon Sage-Grouse Action Plan and Executive Order 15-18.

ORS 215.446(3)(a) begins by requiring that an applicant consult with ODFW regarding fish and wildlife habitat impacts and any mitigation plan that is necessary prior to submitting a final application to the county. Also, an applicant must conduct a habitat assessment of the proposed development site. The statute is not specific as to what amount of consultation is sufficient, and what constitutes an acceptable habitat assessment. These each must be done “to the satisfaction of the county.”²

Moving on to ORS 215.446(3)(a)(C), an applicant must develop a mitigation plan to address significant fish and wildlife habitat impacts consistent with certain administrative rules adopted by the Fish and Wildlife Commission for the purpose of preventing serious depletion of any native wildlife and to provide the optimum recreation and aesthetic benefits for present and future generations of Oregonians.³ So, while a mitigation plan must be “to the satisfaction of the county,” because of the additional statutory requirement that a mitigation plan be “consistent with” the Fish and Wildlife Commission’s administrative rules, a county may not be satisfied with a mitigation plan that is inconsistent with those administrative rules.

The administrative rules to which ORS 215.446(3)(a)(C) refers are in OAR chapter 635, division 415, and are referred to as the ODFW Habitat Mitigation Policy (Mitigation Policy). The Mitigation Policy applies to mitigation that ODFW requires, or to ODFW’s recommendations to other permitting entities on appropriate mitigation, depending on the context in which they are invoked. Consistency with the Mitigation Policy has long been required for solar projects on non-arable land above 320-acres—ORS 215.446 did not change that. Before ORS 215.446, the Energy Facility Siting Council (EFSC) had jurisdiction to approve facilities of that size. The EFSC standard required that mitigation for those facilities be “consistent with * * * the general fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025(1) through (6).”⁴ With the adoption of ORS 215.446, the Legislature shifted jurisdiction to permit solar facilities that will occupy between 320 and 1920 acres of nonarable lands from EFSC to the counties. While the permitting authority changed, the requirement that mitigation for impacts from the facility to fish and wildlife habitat did not because ORS 215.446(3)(a)(C) also requires that a mitigation plan be consistent with the Mitigation Policy (which includes OAR 635-415-0025(1) through (6)). ODFW’s role when EFSC or a county is deciding whether to permit solar

² ORS 215.446(2).

³ ORS 496.012.

⁴ OAR 345-022-0060.

facilities is to make recommendations on whether a proposed mitigation plan is consistent with the Mitigation Policy. That is the purpose of this letter.

Generally, the Mitigation Policy defines and categorizes habitat types based on the function they provide to wildlife species, how plentiful each type of habitat is in Oregon, and how difficult it is to replace it through mitigation.⁵ The Mitigation Policy then assigns a mitigation goal to each habitat category, and includes standards to achieve that goal. As would be expected, the mitigation goal for impacts to more important, less available, and less replaceable habitat types is more stringent than the mitigation goal for impacts to less important, plentiful, and easily recreated habitat types. The mitigation goals and standards that apply to Category 2 and 4 habitats, the categories of habitat that the Project would impact, are as follows:

- (2) "Habitat Category 2" is essential habitat for a fish or wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage.
 - (a) The mitigation goal if impacts are unavoidable, is no net loss of either habitat quantity or quality and to provide a net benefit of habitat quantity or quality.
 - (b) The Department shall act to achieve the mitigation goal for Category 2 habitat by recommending or requiring;
 - (A) Avoidance of impacts through alternatives to the proposed development action; or
 - (B) Mitigation of impacts, if unavoidable, through reliable, in-kind, in-proximity habitat mitigation to achieve no net loss of either pre-development habitat quantity or quality. In addition, a net benefit of habitat quantity or quality must be provided. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.
 - (c) If neither 635-415-0025(2)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.⁶
- (4) "Habitat Category 4" is important habitat for fish and wildlife species.

⁵ OAR 635-415-0005; OAR 635-415-0025.

⁶ OAR 635-415-0025(2).

- (a) The mitigation goal is no net loss in either existing habitat quantity or quality.
- (b) The Department staff shall act to achieve the mitigation goal for Category 4 habitat by recommending or requiring:
 - (A) Avoidance of impacts through alternatives to the proposed development action; or
 - (B) Mitigation of impacts, if unavoidable, through reliable in-kind or out-of-kind, in-proximity or off-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. Progress towards achieving the mitigation goals and standards shall be reported on a schedule agreed to in the mitigation plan performance measures. The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.
- (c) If neither 635-415-0025(4)(b)(A) or (B) can be achieved, the Department shall recommend against or shall not authorize the proposed development action.⁷

Using the Category 2 goals and standards as the example, to be consistent with the requirements of OAR 635-415-0025(2), and therefore comply with ORS 215.446(3)(a)(C), an applicant must develop a mitigation plan that will achieve the mitigation goal of “no net loss of either habitat quantity or quality, and to provide a net benefit of habitat quantity or quality.”⁸ The mitigation plan must also be consistent with the applicable mitigation standards, including that mitigation must be in-kind⁹ and in-proximity,¹⁰ there must be progress reports on the performance measures, and mitigation must be implemented and completed prior to or concurrent with the development action.¹¹

Importantly, a mitigation ratio of mitigation acres to impacted acres (*e.g.* 2 mitigation acres: 1 impacted acre) is not itself sufficient to demonstrate compliance with the mitigation goal. While a mitigation ratio is an important component to demonstrating that the project won’t result in a net loss of habitat *quantity*,¹² the applicant must also demonstrate that the project will

⁷ OAR 635-415-0025(4).

⁸ OAR 635-415-0025(2)(a).

⁹ “In kind Habitat Mitigation” means habitat mitigation measure which recreate similar habitat structure and function to that existing prior to the development action. OAR 635-415-0005(12).

¹⁰ “In proximity Habitat Mitigation” means habitat mitigation measures undertaken within or approximate to areas affected by a development action. OAR 635-415-0005(13).

¹¹ OAR 635-415-0025(2)(b)(B).

¹² “Habitat quantity” means the amount of a given habitat type. OAR 635-415-0005(6).

not result in a net loss of habitat *quality*.¹³ (And for impacts to Category 2 habitat, a net benefit of habitat quantity or quality is also required.) For there to be no net loss of habitat quality, it is necessary to compare the quality of the impacted habitat with the quality of the habitat at the site proposed for mitigation to ensure that no habitat quality is lost, and to demonstrate that planned habitat improvements at the mitigation site are appropriate and reliable to ensure no net loss. To accurately make this comparison, it is necessary to have an identified mitigation site, or a suite of potential mitigation sites to achieve sufficient acreage.

Further, for a mitigation plan to achieve the mitigation goal, it must ensure that the habitat improvements will persist for the same duration as the development. In this case, the Applicant anticipates that the Project will impact wildlife habitat for the 40-year life of the facility, plus the time it takes to reclaim the habitat. This means that a mitigation site must be secured from future development and other uses inconsistent with functioning wildlife habitat for that same amount of time. And, because not all mitigation work is successful, a mitigation plan must include monitoring of the initial treatment/habitat improvement, retreatment if necessary, and performance measures including a reporting schedule and success criteria. Without these components, a mitigation plan does not satisfactorily ensure that the benefits of a mitigation project will last for 40-plus years, and therefore does not demonstrate achievement of the mitigation goal or compliance with the mitigation standards.

The Mitigation Policy sets out the components of a mitigation plan that are necessary to provide evidentiary support for compliance with the mitigation goals and standards:

(8) In addition to any other information that may be required by law, a written mitigation plan prepared for the Department shall:

(a) Include the information required in OAR 635-415-0020(4)(a)-(d) [which is (a) the location, physical and operational characteristics, and duration of the proposed development action; and (b) the alternatives to the proposed development action; and (c) the fish and wildlife species and habitats which will be affected by the proposed development action; and (d) the nature, extent and duration of impacts expected to result from the proposed development action];

(b) Describe the mitigation actions which shall be taken to achieve the fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025; and

(c) Describe and map the location of [t]he development action and mitigation actions including the latitude and longitude, township, range, section, quartersection and county; and

¹³ "Habitat quality" means the relative importance of a habitat with regard to its ability to influence species presence and support the life-cycle requirements of the fish and wildlife species that use it. OAR 635-415-0005(7).

- (d) Complement and not diminish mitigation provided for previous development actions; and
- (e) Include protocols and methods, and a reporting schedule for monitoring the effectiveness of mitigation measures. Monitoring efforts shall continue for a duration and at a frequency needed to ensure that the goals and standards in OAR 635-415-0025 are met, unless [ODFW] determines that no significant benefit would result from such monitoring; and
- (f) Provide for future modification of mitigation measures that may be required to meet the goals and standards of OAR 635-415-0025; and
- (g) Be effective throughout the project life or the duration of project impacts whichever is greater;
- (h) Contain mitigation plan performance measures; including:
 - (A) Success Criteria. The mitigation plan must clearly define the methods to meet mitigation goals and standards and list the criteria for measuring success;
 - (B) Criteria and a timeline for formal determination that the mitigation goals and standards have been met;
 - (C) Provisions for long-term protection and management of the site if appropriate;
 - (D) A reporting schedule for identifying progress toward achieving the mitigation goals and standards and any modification of mitigation measures. Mitigation goals and standards must be achieved within a reasonable time frame to benefit the affected fish and wildlife species.¹⁴

Agency Consultation and Habitat Assessment

The property owner's agent (Applicant) discussed the Project, as well as potential mitigation options, with ODFW on March 2 and 19 and May 5, 2020, and submitted their Draft Wildlife Conservation Plan Version 4 to ODFW on June 10, 2020. ODFW provided feedback to the Applicant on July 24, which is attached to this letter as evidence of good-faith consultation between both parties. At that time, ODFW expressed concerns with the draft Plan relating to its habitat categorization, the lack of specificity, and insufficient demonstration of adequate, reliable, and durable mitigation consistent with the Mitigation Policy and therefore inconsistency with ORS 215.446. ODFW received an e-mail on December 7, 2020, prior to a phone call with

¹⁴ OAR 635-415-0020(8).

the Applicant and the Crook County Planning Staff discussing the mitigation plan. At the time of this letter, ODFW has not received a revised plan and therefore the comments herein still refer to the June 10 draft.

The Applicant also conducted a habitat assessment. As described below, ODFW disagrees with Applicant's habitat assessment and proposed categorization. In short, the Applicant proposes to categorize the acres outside pronghorn winter range (Figure 1) as Category 6 habitat, which traditionally applies to paved parking lots, industrial brownfields, and heavily-tilled agriculture monocrops. The appropriate categorization is Category 2 for the pronghorn winter range, and Category 4 for the remainder of the impacted habitat.

Mitigation Plan Consistency with the ODFW Habitat Mitigation Policy

In its current state, the Plan is not consistent with the Mitigation Policy. As explained below, there are fundamental, overarching problems with (1) the limited number of acres the Plan proposes to mitigate; (2) the habitat assessment; (3) the proposed mitigation ratio; and (4) the lack of any specificity for the revegetation plan.

Regarding the Plan's three options, the mitigation proposed in Option 1—juniper treatment—lacks the necessary specificity. The mitigation proposed in Option 2—payment to provide—is promising and could be approved with conditions. Finally, the mitigation proposed in Option 3—alternate mitigation agreed to by ODFW—is a complete unknown, and there is no way the County could find that it complies with ORS 215.446 and is consistent with the Mitigation Policy. Therefore, ODFW recommends the County reject Option 3.

Acres of Impact

The Plan states that Applicant “has agreed to mitigate impacts to big game habitat on non-previously permitted incremental acres that will be permanently impacted by construction and operation of the Project, not to exceed 220 acres, by either one of three options presented below, such that there is no net loss of habitat quantity.”¹⁵ To be consistent with the ODFW Habitat Mitigation Policy as required by ORS 215.446(3)(a)(C), the Applicant must mitigate for the entire amount of wildlife habitat that the Project would impact, which is 585 acres.

Capping the mitigation acreage at 220 acres, which is the amount of pronghorn winter range that the Applicant anticipates the Project will impact, indicates a lack of understanding that mitigation is required for impacts to wildlife habitat beyond mapped big game winter range. The Mitigation Policy is in no way so limited, and to the extent it is relevant, neither is CCC 18.16.060(3)(h)(vi).^{16, 17} CCC 18.16.060(3)(h)(vi) requires mitigation if the potential exists for

¹⁵ TSR North Solar Farm LLC, Wildlife Mitigation Plan, v. 4 June 10, 2020, page 6.

¹⁶ CCC 18.16.060(3)(h)(vi) provides in relevant part: “If the applicant's site assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility.”

¹⁷ Because the County must take an exception to Statewide Planning Goal 3 to approve this CUP, the comprehensive plan policies and land use regulations that implement Goal 3, such as CCC 18.16.060(3)(h)(vi), will not apply. See *Friends of Marion County v. Marion County*, 59 Or LUBA 323, 350-51 (2009) (stating that when a goal exception is taken to facilitate proposed development, any comprehensive plan policies and land use regulations that implement

adverse effects to big game winter range. As the County recently explained, “a solar project site that is directly adjacent to pronghorn winter range and within an important elk movement corridor and generally serves as important habitat for a variety of wildlife including reptiles, small mammals and migratory birds” “has the potential to adversely affect big game winter range and the movement corridor, sufficiently triggering [CCC 18.16.060(3)(h)(vi)] by its plain terms.”¹⁸ The habitat that the proposed Project would impact is the same as described in the County’s interpretation of CCC 18.16.060(3)(h)(vi), so mitigation for the full acres of impact is required by both ORS 215.446 and CCC 18.16.060(3)(h)(vi).

The Planning Commission approved the original CUP for this Project despite the Applicant having submitted no mitigation plan. Instead, that final decision states that “[t]he Applicant is working with the Oregon Department of Fish and Wildlife (ODFW) to determine mitigation requirements and will submit a wildlife mitigation plan for review and approval by the County and ODFW prior to site clearing and grading.”¹⁹ The original project approved the 320 acre site plan to be developed anywhere within the 585 parcel, with no indication as to whether impacts would occur on the pronghorn winter range or on the adjacent Category 4 habitats. Now the Applicant is proposing to develop up to 585 acres. To be consistent with the Mitigation Policy, the Applicant’s Plan must mitigate for impacts to all 585 acres of wildlife habitat.

ODFW Recommendation: The County should only approve a mitigation plan that mitigates for the full impacts of the Project (up to 585-acres)

Habitat Assessment

The Plan does not provide reasonable justification for the classification of the Project site as category 6 (per OAR 635-415-0025) and incorrectly applies an ODFW mitigation flow chart for habitat assessment in their wildlife and sensitive plant review (Exhibit C). The Applicant’s consultant, PBS, incorrectly interprets Step 2 and classifies the habitat as not important for wildlife because it has been grazed by cattle and is near disturbed and developed land. It is worth noting that many wildlife species sustain and persist on landscapes grazed by cattle and near disturbed and developed land. By answering yes on Step 2, the next question becomes whether the habitat is limited or not. In the same paragraph PBS describes that the study area is not unique and similar conditions exist on surrounding lands, i.e. it is not limited (ODFW agrees with this assessment). Thus, correct application of the ODFW mitigation flow chart would categorize the 365 acres of the Project occurring outside the pronghorn winter range boundary as Habitat Category 4. The Project site’s habitat functions and values are not consistent with a Category 6 determination, which, as mentioned above, is reserved for paved parking lots, industrial brownfields, and heavily-tilled agriculture monocrops. ODFW has consistently shared this with the Applicant on multiple projects to date and yet this misclassification remains in the Project’s mitigation plan.

the goal for which the exception is taken no longer govern the development), citing *1000 Friends of Oregon v. LCD, 73 Or App 350, 352 (1985)*. Despite this, ODFW includes the explanation of CCC 18.16.060(3)(h)(vi) because the County recently maintained in the West Prineville Solar Farm decision that that code provision continued to apply to a project governed by ORS 215.446 even though the County approved a Goal 3 exception.

¹⁸ Supplemental Staff Report West Prineville Solar Appeal – 217-20-000375-PLNG, page 2.

¹⁹ Crook County Planning Commission Final Decision – 217.19-000378-PLNG, page 7.

Based on current knowledge of the Project site, ODFW would categorize the 220 acres of pronghorn winter range habitat as Category 2 because of the essential and limited role it plays for this pronghorn herd.²⁰ Pronghorn have been documented to utilize large intact landscapes to satisfy all components of their life history needs, especially for seasonal movements during harsh winters or in search of essential nutrition during the fawning and wintering periods. For more information on the importance of winter range and its crosswalk with the Fish and Wildlife Habitat Mitigation Policy goals, please see the ODFW 2013 Big Game Winter Range White Paper.²¹ Crook County has recognized the importance of pronghorn winter range in neighboring solar projects (Gala, Ponderosa, Tango, Millican, Crook Flat), and has agreed to ODFW's recommendation that it is Category 2 habitat. Solar development will increasingly fragment the northern portion of the mapped pronghorn winter range as approved and planned projects move toward construction, rendering the remaining pronghorn habitats in the area even more essential and limited (Figure 1).

The Project site consists of open sagebrush and sagebrush with juniper encroachment, with sufficient abundance of forb species that pronghorn prefer. Openings created by existing powerline corridors as well as openings classified as historic wetlands (100-year floodplain) are components of pronghorn habitat because of the increased sight-distances pronghorn use to avoid predators (See Applicant's Exhibit C photos). While the bulk of this herd's range is to the South and encompasses a large area of the North Paulina wildlife management unit (WMU), some pronghorn from the Project site attempt to cross highway 126. Small groups have frequently been observed utilizing habitats adjacent to the Prineville regional airport or near the Houston Lakes area of Powell Butte.

In order to achieve the Habitat Category 2 mitigation goal of no net loss plus a net benefit in habitat quality and quantity, ODFW recommends mitigation occur at a 2:1 ratio. However, while ODFW recommends the pronghorn habitat on the impact site be classified as Habitat Category 2, ODFW recognizes the disturbance associated with the gravel pit. In acknowledgement of the decreased habitat function due to the disturbance of the gravel pit, ODFW recommends excluding a 500-foot buffer adjacent to the gravel pit where offsets would not be needed.

As state above, ODFW considers the remaining 365 acres as Category 4 habitat given its importance for a variety of wildlife including reptiles, small mammals, and migratory birds associated with sagebrush-steppe and juniper woodlands (per OAR 635-415-0025) and thus would need to be mitigated to account for the no net loss criteria (1:1 ratio).

ODFW Recommendation: The County should only approve a mitigation plan that categorizes big game winter range as Category 2 habitat and satisfies the goals and standards in OAR 635-415-0025(2); and that categorizes the remaining acreage as Category 4 habitat and is consistent with the goals and standards in OAR 635-415-0025(4).

Mitigation Ratios

²⁰ See 2013 ODFW Oregon Big Game Winter Habitat whitepaper.

²¹ The ODFW 2013 Big Game Winter Range Whitepaper is attached to these comments for inclusion in the record. While the Whitepaper specifically addresses elk and mule deer, the analysis and explanation applies to pronghorn.

The Plan incorrectly states that ODFW agreed that a 1:1 ratio, plus some undetermined buffer, would be an appropriate mitigation ratio for the Project. ODFW made no such agreement. A 1:1 ratio would be appropriate for meeting the no-net-loss mitigation goal for the impacts to the 365 acres of Category 4 sagebrush-juniper steppe, however, ODFW has consistently recommended a mitigation ratio of 2:1 for impacts to Category 2 pronghorn winter range.

Lack of Specificity in Revegetation Plan

The Plan commits to revegetation of temporary disturbance areas with native and desired seed mixes in accordance with a weed plan. However, the Plan does not describe whether and how monitoring of revegetation areas will take place to ensure success, and what criteria will be used to evaluate the success.

ODFW Recommendation: The Plan should include revegetation monitoring and adaptive management to address the risk of revegetation failure and to prevent temporary disturbance areas from becoming areas of permanent habitat loss.

Lack of Specificity in Mitigation Options

The draft Plan proposes three options for mitigation with the specific option to be decided by Applicant at a future date, prior to construction. For the County to approve the CUP, each of the mitigation options proposed in the Plan must be specific enough to support a finding of compliance with the applicable law.²² As the Court of Appeals has explained, without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the Project's impacts to wildlife resources will be mitigated in accordance with the applicable standard.²³

In addition, deferring discretionary decision making to a later process without the opportunity for public participation and review is not a permissible approach under Statewide Planning Goal 1,²⁴ and is contrary to the long line of cases in which the Land Use Board of Appeals and the Court of Appeals have remanded decisions by local governments because they deferred discretionary decisions that were necessary to establish compliance with the applicable legal standards to a later process that lacked the rights of public participation and review.²⁵

²² *ODFW v. Lake County*, LUBA Nos. 2019-084/85/86/87/88/93 (April 29, 2020) at 31-32 (stating that compliance with applicable land use regulations be determined in a land use proceeding that offers minimum procedural and participatory rights, and that the required determination of compliance be based upon substantial evidence submitted during the land use proceeding, is one of the fundamental tenets of land use decision-making.); *Gould v. Deschutes County*, 216 Or App at 159.

²³ *Gould v. Deschutes County*, 216 Or App 150, 159 (2007).

²⁴ Statewide Planning Goal 1 is to "develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." Option 3 is a blatant violation of Goal 1, because there would never be an opportunity for the public to participate in, and seek review of, mitigation pursuant to Option 3.

²⁵ See, e.g., *Van Dyke v. Yamhill County*, LUBA No. 2019-047 (October 11, 2019) at 43 (remanding decision because county "simply punted all determinations regarding fence design, materials, construction etc. to a master planning process that does not offer opportunity for public hearing or other public input"); *Johnson v. City of Gladstone*, 65 Or LUBA 223, 242, 244 (2012) (remanding decision and explaining that "a local government may not simply defer required findings of compliance with applicable approval standards or impose a condition of approval

Option 1

The mitigation proposed in Option 1—juniper treatment—is an appropriate and well-documented means of improving habitat quality to increase the carrying capacity of lands within range of the impacted pronghorn population, among other wildlife impacted by the project (assuring no net loss, and net benefit). However, in addition to ODFW’s overarching concerns with the Plan addressed above, Option 1 of the Plan is not sufficiently specific to approve it at this time. Therefore, ODFW recommends that the Planning Commission delay approving Option 1 of the Plan until the Applicant provides evidence of its consistency with the Mitigation Policy. Final approval must occur at a land use hearing infused with participatory rights. Below is ODFW’s recommended changes Crook County would need for Option 1 to meet the standards.

- This option describes general habitat improvements that could serve as appropriate mitigation actions. However, the current conceptual proposal is not adequate because it does not provide evidence that mitigation will achieve the applicable goals and standards (Category 2 – OAR 635-415-0025(2); Category 4 - (OAR 635-415-0025(4)). In addition to the overarching concerns addressed above, ODFW notes the following deficiencies, and provides the following recommendations, for Option 1:
 - Map with Specific Mitigation Site. The Plan is deficient because it does not identify a specific mitigation site. A specific site is instrumental to support a finding that mitigation to the required standard will occur. For example, mitigation at a site that is currently high performing will result in less of an offset of impacts to habitat quality than mitigation performed at a low functioning site. Also, the appropriate mitigation methods and treatment prescriptions differ depending on the specific nature of the mitigation site.

ODFW Recommendation: The County should delay final approval until the Applicant has identified one or more mitigation sites, or a suite of potential mitigation sites, on which it will perform the juniper treatment. That site(s) should be:

- **For the 220-acres of impact to pronghorn winter range, included in ODFW-mapped big game winter range for pronghorn;**
- **Sage-brush and/or bitterbrush dominant habitat;**

that the required finding be made in the future without providing a right of public participation”); *Friends of Marion County v. Marion County*, 59 Or LUBA 323, 354-55 (holding that a county errs in failing to address whether a mitigation plan for a destination resort is consistent with applicable comprehensive plan policies governing wildlife protection, and instead finding that issues raised regarding compliance with those policies will be addressed by requiring the applicant to obtain approval of the plan from ODFW); *McKay Creek Valley Ass’n v. Washington County*, 24 Or LUBA 187, 198 (1992), *aff’d*, 118 Or App 543 (1993) (stating “A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later state. However, if the decision to be made at a later stage is itself discretionary, the approval process for the alter stage must provide the statutorily-required notice and opportunity for hearing, even though the local code may not require such notice and hearing in other circumstances.”).

- Currently underperforming so that mitigation actions (habitat improvements) will achieve increased function commensurate with lost habitat function from development impacts;
 - Adequately connected to other habitat in the lands adjacent to the mitigation property (e.g. not between a subdivision and a highway);
 - In Crook County (required for the Category 2 impacts, preferable for the Category 4 impacts)
- Scale. As detailed above, the Plan is deficient because it proposes a mitigation ratio of 1:1 for all impacts of the proposed facility.

ODFW Recommendation: The County should only approve a mitigation plan that mitigates for impacts to pronghorn winter range (220 acres) at a 2:1 ratio (less a 500-foot buffer adjacent to the gravel pit). ODFW agrees with the proposed 1:1 ratio for impacts to the remaining 365 acres of Category 4 habitat.

- Maintenance. The Plan is deficient because it does not provide any specific requirements for maintenance. Not all juniper treatment is successful and invasive weeds can encroach the treatment area, so maintenance is necessary to ensure the mitigation goal is achieved.

ODFW Recommendation: The County should only approve a mitigation plan that requires the Applicant to contract to have newly established juniper in cut units removed 12 years after the original mitigation treatment, and that establishes weed monitoring and treatment for the life of the development's impacts.

- Durability. The Plan is deficient because it does not include the specificity to ensure the benefits of the mitigation project persist on the landscape for the duration of the project impacts – anticipated to be 40 years, plus the time it takes to reclaim the site into functioning habitat. While the Plan states that durability could be achieved by an outright purchase of the mitigation site or a conservation easement, it also allows for more vague instruments like “a working lands agreement, or other materially similar restriction” without providing any specificity on the instrument or whether the County will review and approve it.

ODFW Recommendation: The County either (1) approve a mitigation plan subject to a condition that the Applicant either purchase the mitigation site or secure it with a conservation easement consistent with ORS 271.715 – 271.795; or (2) delay final approval until the Applicant demonstrates through a legally enforceable agreement between the landowner and the entity responsible for the mitigation that defines

prohibited/allowable uses consistent with the wildlife habitat mitigation goals in the Plan.

ODFW Recommendation: Crook County require at least a template for the durability instrument at the time of final project approval. In addition, ODFW requests the opportunity to review the terms of the durability instrument to assure that the standard of no net loss and net benefit is achieved and that the area identified is protected as a mitigation site for the life of the Projects' impacts (to include reclamation time at the impact site). At a minimum, the template should address the following:

- Mutual commitment from the landowner and the applicant to maintain the habitat goals of the Plan as approved by Crook County;
 - Clearly identified conflicting uses that would be restricted by the agreement;
 - The term of the agreement to include the life of the facility, and the period of decommissioning and reclamation;
 - A clearly identified third party responsible for monitoring and enforcement;
 - Access to the County and ODFW for secondary monitoring and enforcement (note: this is not a suggestion that ODFW be responsible for monitoring).
- Monitoring Plan. The Plan is deficient because it does not include a monitoring plan or performance measures, including success criteria. Rather, the Plan proposes developing these components of the mitigation plan as part of the "Final Mitigation Plan" prior to construction.

ODFW Recommendation: The County should delay final approval until the Plan includes a monitoring plan so that there is evidence to support a finding that the Plan will achieve the mitigation goals and standards. An effective monitoring plan must include:

- Identification of party responsible for mitigation;
- A baseline assessment of habitat and vegetation conditions in the mitigation action areas;
- Protocols and methods for monitoring allowable uses on the mitigation site;
- Protocols and methods for monitoring vegetation and success of mitigation actions;
- Provide for future modification of mitigation measures, after consultation with ODFW, that may be required to meet the applicable standards;
- Be effective throughout the life of the project, including reclamation;

- Include clearly defined methods and criteria for measuring success, developed in consultation with ODFW;
- A timeline for formal determination that the mitigation goals and standards are met, developed in consultation with ODFW; and
- A process established for remedial actions to be identified and agreed upon by the Applicant, Crook County, and ODFW in the event success criteria are not achieved.

Option 2

Option 2, Applicant's payment to provide option, is more consistent with the Mitigation Policy and specifically OAR 635-415-0025(7)(a-b).

- (7) [ODFW] may consider the use of mitigation banks or payment-to-provide mitigation based on the nature, extent, and duration of the impact and/or the risk of the mitigation plan not achieving mitigation goals.
 - (a) [ODFW] may consider the use of mitigation banks and payment-to-provide mitigation only for habitat categories two through six and only if they are consistent with the mitigation goals and standards identified in OAR 635-415-0025
 - (b) The amount of payment-to-provide mitigation, recommended or required, shall include at a minimum the cost of property acquisition, mitigation actions, maintenance, monitoring, and any other actions needed for the long term protection and management of the mitigation site.

ODFW finds the mitigation formula submitted as part of this mitigation plan to be consistent with OAR 635-415-0025(7)(b). ODFW agreed to this option with the first HB 2329 project to be completed in the State of Oregon with the Millican Solar Wildlife Conservation Strategy expansion (approved by Crook County in January 2020 – 217-19-0012228-PLNG) and has confirmed that at this time the calculation is still appropriate. The Applicant has two options utilizing a payment-to-provide option: one with Deschutes Land Trust and the other with Crook County and the Crook County Soil and Water Conservation District (SWCD). Both of these options have ODFW concurrence that they meet OAR 635-415-0025 (7) if the following details are provided:

- Map with Specific Site for Mitigation. To ensure that mitigation will achieve the required standard, it is necessary to select an appropriate site. For the Project, an appropriate site must contain the following features: (1) it must contain sufficient acreage to offset the impacts to pronghorn winter range as mapped by ODFW as well as the Category 4 habitat, and (2) it must be in need of reasonable and appropriate habitat improvements.
- **ODFW Recommendation: The County should condition approval upon the Applicant providing a map indicating the specific location of available habitat improvement projects that could serve as mitigation sites on Aspen Valley Ranch or at SWCD project sites, prior to issuance of a building**

permit. In addition, Applicant should submit documentation regarding whether Deschutes Land Trust or SWCD, after coordination with ODFW, supports use of the specific sites because they contain the appropriate features listed above. In the event there are no longer available mitigation options at Aspen Valley Ranch or on SWCD project sites, ODFW recommends a revised mitigation plan for Crook County approval subject to additional public participation and review.

- **Monitoring Plan.** A mitigation monitoring plan is necessary to ensure that the mitigation performs and the mitigation standard is achieved. To be effective, a mitigation monitoring plan must include:
 - Identification of party responsible for mitigation;
 - A baseline assessment of habitat and vegetation conditions in the mitigation action areas within Aspen Valley Ranch;
 - Protocols and methods for monitoring allowable uses of the Conservation Easement;
 - Protocols and methods of monitoring vegetation and success of mitigation actions;
 - Provide for future modification of mitigation measures, after consultation with ODFW, that may be required to achieve the mitigation standard;
 - Be effective throughout the life of the project, including reclamation;
 - Include clearly defined methods and criteria for measuring success, developed in consultation with ODFW;
 - A timeline for formal determination that the mitigation goals and standards are met;
 - A process established for remedial actions to be identified and agreed upon by all parties (Applicant, Crook County and ODFW) in the event success criteria are not achieved.

- **ODFW Recommendation: The County should condition approval upon Applicant providing a Monitoring Plan consistent with the criteria outlined above, prior to issuance of a building permit.**

Option 3

Option 3, is referred to as Alternative Mitigation Measures Agreed to by ODFW. While ODFW understands it is a convenient option for the Applicant, Option 3 is not appropriate because it provides no information whatsoever on what the mitigation might entail, and there would never be an opportunity for public participation and review. As the County eloquently described a previous submittal from the Applicant that included an identical Option 3: “Option 3 is a plan to make a plan.” It proposes some to-be-determined mitigation measures, which ODFW “shall reasonably approve.” Option 3 suffers from the same legal problems as Option 1, but to the most extreme extent. If the Applicant prefers a new mitigation approach when the time comes to build the Project, Applicant can seek a CUP modification with the new mitigation proposal.

ODFW Recommendation: The County should reject Option 3.

ODFW Recommendation on the Planning Commission's Decision

At this time, the Plan does not provide the specific mitigation to warrant approval of this CUP. The mitigation approach proposed in Option 2 is sufficient to meet the applicable criteria if the County conditions its approval on Option 2 only, requires a future public process if no mitigation acreage exists at AVR or on SWCD project sites when the Applicant applies for a building permit, and requires an appropriate mitigation ratio for the two categories of impacted habitat. Specifically, impacts to pronghorn winter range (anticipated to be 220 acres) should be mitigated using the 2:1 ration, while impacts to the remaining 365 acres can be mitigation at 1:1. With those adjustment, it is appropriate for the County to approve Option 2.

The mitigation proposed in Option 1 is largely conceptual. To approve Option 1, the County should consider the proposal at a future public hearing after the Applicant has developed that option so there is evidence of compliance with ORS 215.446 and consistency with the ODFW Habitat Mitigation Policy. As for Option 3, there is no way to make it approvable, and the County should reject it.

Thank you for the opportunity to comment, and for your continued commitment to protecting Crook County's fish and wildlife habitat resources. Should you have any questions or require additional information, I can be reached at (541) 447-5111 x26 or by email at greg.s.jackle@state.or.us.

Sincerely,



Greg Jackle
District Wildlife Biologist
ODFW – Ochoco District

cc. Sarah Reif, Joy Vaughan, Sara Gregory, Corey Heath, Mike Harrington – ODFW
Erin Donald – ODOJ



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February 24, 2021

Ann Beier, Crook County Planning Director
Community Development
300 NE 3rd Street, Room 12
Prineville, OR 97754

RE: Conditional Use – TSR North Solar Energy Facility Modification Number 217-20-000581-PLNG
(Mitigation Plan Version 7, February 10, 2021)

Dear Director Beier,

The purpose of this letter is for the Oregon Department of Fish and Wildlife (ODFW) to provide formal comments to the Crook County Planning Commission on Version 7 (V7) of the Wildlife Mitigation Plan (WMP) for Record Number 217-20-000581-PLNG, TSR North Solar Energy Facility Modification (Project). The Applicant is requesting approval to modify Permit 217-19-000378-PLNG for a photovoltaic power generating facility from 320 to up to 585 acres. This expansion triggers 2019 Oregon House Bill 2329, now codified at ORS 215.446.

ODFW previously submitted detailed comments (December 16, 2020; attached) on the Project, including a review of the Applicant's WMP Version 4 for its consistency with ORS 215.446 as well as the State of Oregon's Wildlife Policy (ORS 496.012) and its associated administrative rules. This letter addresses the Applicant's proposed revisions as found in the new WMP Version 7 (February 10, 2021), however ODFW requests that the Crook County Planning Commission continue to refer to ODFW's December 16, 2020 letter alongside this letter, as the comments submitted in the original letter remain germane to the Project's application.

Consultation

The Applicant has misinterpreted statements from ODFW staff during consultation meetings. The WMP characterizes ODFW as giving verbal approval of the Applicant's proposed mitigation. In fact, throughout conversations that began in March 2020, ODFW has only said that conceptually the Applicant's proposed options might suffice, but that more detail and specifics would be necessary to meet the wildlife standards required in a HB 2329 project. The WMP is still lacking the specificity that ODFW has requested in all previous comments. Therefore ODFW requests the Commission refer to the comments and recommendations in ODFW's December 16, 2020 letter.

Habitat Categorization

In all previous meetings, as well as the December 16, 2020 letter, ODFW has consistently provided its professional assessment of the Project site's habitat condition under the Mitigation Policy. ODFW biologists have been on adjacent lands and have flown over the Project site. The habitat is no different from the neighboring Tango and Millican solar projects where biologists working for those developers classified the habitat as Category 2 and the County subsequently accepted that classification as part of its approval. ODFW recommends the Commission refer to the habitat classifications used in the Tango and Millican projects' habitat assessments and mitigation plans (submitted with this letter) for further details as to how a Category 2 designation in this case is consistent with those neighboring lands.

ODFW recommended a 500 foot – 152 meter buffer zone around the gravel mine. While not much larger, the applicant has proposed a 656 foot -- 200 meter. ODFW recommends the applicant calculate the acres associated with both buffers.

Mitigation Measures

Unlike the prior Harney- and Lake County projects referenced in the WMP for which the mitigation standard was pursuant to OAR 660-033-0130(38)(j)(G), TSR North is a House Bill 2329 project and therefore subject to the wildlife standards set forth in ORS 215.446. This statute requires consistency with the administrative rules ODFW uses to ensure the Wildlife Policy is met (ORS 496.012); in this case, the ODFW Fish and Wildlife Habitat Mitigation Policy (OAR 635 Division 415). As outlined in ODFW's December 16, 2020 letter, a HB 2329 project is subject to different mitigation standards than an OAR 635-033-0130(38)(j)(G) project, and a certain level of specificity is necessary to demonstrate those wildlife habitat mitigation standards will be met. ODFW has not seen any change in the level of specificity between Versions 4 and 7 of the WMP; please refer to ODFW's December 2020 letter for an enumeration of the ways in which the TSR North WMP does not achieve the necessary specificity.

The Millican Solar Project was also a HB 2329 project in Crook County that exercised a mitigation payment option with Deschutes Land Trust (DLT) for the Aspen Valley Ranch (AVR). As previously stated, ODFW supports this option in concept for TSR North. However, other regional solar projects have already submitted multiple mitigation payments to DLT for the AVR acquisition and habitat improvements. ODFW recommended that the Applicant and DLT provide documentation demonstrating that habitat improvement mitigation opportunities for TSR North still exist on AVR, thereby showing that the opportunities have not already been exhausted by other mitigation plans and payments. To date, this documentation has not been included in the TSR North WMP.

Mitigation Options

Option 1

- The V7 WMP is internally inconsistent with respect to Applicant's proposed mitigation ratio for impacts to Category 2 habitat. (E.g. compare page 2 proposing to mitigate impacts to mapped pronghorn winter range/Category 2 habitat at a ratio of 1.5:1, and page 14 proposing a mitigation ratio of 1:1 to achieve the Category 2 mitigation standard). As stated in previous ODFW comments, a 1:1 mitigation ratio will not meet the net benefit in quantity standard for impacts to Category 2 pronghorn habitat. ODFW continues to recommend mitigation ratio of 2:1 for impacts in Category 2 habitat.

- In its V7 WMP, Applicant proposed retreatment of acres on which juniper removal is performed at 15-year intervals. ODFW recommends that retreatment occur at 12-year intervals based on Natural Resource Conservation Service (NRCS) standards.

Option 2

- This option could meet the standards of HB 2329 if the Applicant provided documentation of acres available for habitat improvement at AVR, or other DLT project sites where there is a demonstrated mitigation need (See comments under "Mitigation Measures" above).

Option 3

Deferring all mitigation components does not comply with ORS 215.446 (3) "IN ORDER TO ISSUE A PERMIT the county shall require that the applicant:" "(c) Develop a mitigation plan... consistent with 496.012..." ODFW strongly recommends that the County deny an option that lacks detail.

In addition to the comments raised in this letter and the December 16, 2020 letter, there are other outstanding issues that have not been addressed regarding the transmission line and roads. It is not clear if temporary disturbance was ever assessed for the transmission line, or if a plan exists for revegetation? Without a sufficient revegetation plan for the transmission line and roads, temporary impacts can become permanent. Therefore, a complete revegetation plan should be required for the transmission line and roads. This can either be included in the HMP or a separate document and monitored/reported upon.

Thank you for the opportunity to comment, and for your continued commitment to protecting Crook County's fish and wildlife habitat resources. Should you have any questions or require additional information, I can be reached at (541) 447-5111 x26 or by email at greg.s.jackle@state.or.us.

Sincerely,



Greg Jackle
District Wildlife Biologist
ODFW – Ochoco District

cc: Sarah Reif, Joy Vaughan, Sara Gregory, Corey Heath, Mike Harrington – ODFW
Erin Donald – ODOJ