



**Crook County Community Development
Planning Division**

300 NE 3rd Street, Room 12, Prineville Oregon 97754
541-447-3211
plan@crookcountyor.gov
www.co.crook.or.us

**APPEAL: 217-21-000321-PLNG
STAFF REPORT ADDENDEUM**

March 29, 2023

DECISION ON

APPEAL: 217-20-000581-PLNG (Conditional Use Permit)

OWNER: Ronald Raasch
PO Box 11
Powell Butte, Oregon 97753

AGENT: TSR North Solar Farm LLC
Jacob Stephens, Manager
2033 E Speedway Blvd. Ste 200
Tucson AZ, 85716

APPELLANT: Oregon Department of Fish and Wildlife
2042 SE Paulina Hwy
Prineville, OR 97754

LOCATION:	<u>Map</u>	<u>Sections</u>	<u>Tax Lots:</u>
	15S 15E	14, 15, 22	1223

REQUEST: The Applicant is requesting approval to modify an existing conditional use permit (217-19-000378-PLNG). The permit authorizes a commercial photovoltaic system on up to 320 acres in the County's EFU-3 zone. The modification would increase the project acreage from 320 acres to approximately 585 acres. This application is in conjunction with 217-21-000887-PLNG, a proposed comprehensive plan amendment for the Goal 3 exception described in the staff report findings.

I. PURPOSE

The purpose of this addendum is to address the items on appeal within a separate document. This document shall serve to amend any previously approved findings addressed within this addendum and within the original Planning Commission decision (217-20-000581-PLNG), approved on April 12, 2021. Proposed amendments to the approved findings are indicated in this document with ~~strikethroughs~~ for items to be removed and **red text** for additions.

II. PROCEDURAL BACKGROUND

The Applicant, TSR North Solar Farm LLC, requested approval to modify an existing conditional use permit (217-19-000378-PLNG) for a commercial photovoltaic facility on up to 320 acres in the County's EFU-3 zone (Exclusive Farm Use – Powell Butte Area). The Subject Property is located on 1515 tax lot 1223, owned by Ronald Raasch. The modification application requested an expansion of the facility and associated transmission lines of up to 654 acres. With the expansion, the 585-acre Subject Property now includes approximately 220 acres of mapped pronghorn winter range and is within a big game movement corridor.

Based on the staff report, application materials, findings, facts and testimony in the record, the Planning Commission voted to approve the modification application by a vote of 5 to 1. The Oregon Department of Fish and Wildlife (ODFW), represented by Greg Jackle, appealed the Planning Commission's approval based on the following statement:

"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 the Applicant's habitat assessment and proposed mitigation plan in its letters to the Crook County Planning Commission dated December 16[, 2020] and February 24, 2021 and resubmit those letters with this petition."

Though the basis for appeal was stated as above, included with the submitted appeal materials, is an April 26, 2021 letter from Greg Jackle on behalf of ODFW, the purpose of which "is to provide ... formal comments and rationale for appealing" the Planning Commission's decision and "to provide ODFW's recommendations to the County Court for its decision in this matter."

Because of the stated purpose of the April 26 letter and because many of ODFW's previous recommendations and concerns in the December 16 and February 24 letters were later addressed in a subsequent version of the mitigation plan and the Planning Commission's decision, staff interprets the grounds for appeal to be limited to the statements in the April 26 letter. This staff report is based on that interpretation. Staff suggests the County Court seek to clarify ODFW's intent for this appeal, on the record, to ensure the scope of this appeal hearing covers all issues still in contention. As such, the April 26, 2021 letter is confined to recommended modifications to the Planning Commission's Condition of Approval #20, which adds various requirements to the Applicant's wildlife mitigation plan Option 1.¹

III. PROCESS ON APPEAL

The County's appeal procedures are found in CCC 18.172.110. The Appeal was timely received and complete. Notice was timely published multiple times, the last being on January 10, 2023. The Appellant provided a copy of the transcript on April 20, 2021.

The County Court's hearing of this appeal is an "on the record review," to be based on the record made before the Planning Commission, unless the County Court elects, by motion, to supplement the record. The burden of proof shall be as allocated by applicable law. The burden remains with the applicant to show that relevant criteria were met for an application throughout the local appeal

¹ The April 26, 2021 letter offered only support for Option 2, the payment-in-lieu of mitigation option.

process. And, as this is an appeal on the record, an appellant shall have the burden to articulate reasons why the initial decision is in error. CCC 18.172.110(12)(b).

At the conclusion of this hearing, the County Court may affirm, overrule, or modify the Planning Commission's decision and shall set forth findings showing compliance with applicable standards and criteria. The County Court may also remand the Application back to the Planning Commission with instructions to consider additional facts, issues, or criteria not previously addressed.

IV. FINDINGS OF FACT

FACILITY SITING – 2019 House Bill 2329/Oregon Revised Statutes 215.446(3)

House Bill 2329 was passed by the Oregon legislature in 2019 with an effective date of January 1, 2020. It authorizes County governments to review and approve certain energy facilities that had previously been subject to permitting through the State of Oregon's Energy Facility Siting Council (ORS 469.300(11)).

215.446(2) An application for a land use permit to establish a renewable energy facility must be made under 215.416 (permit application). An applicant must demonstrate to the satisfaction of the county that the renewable energy facility meets the standards under subsection (3) of this section.

APPROVED FINDING: The County is responsible for making findings that the proposed facility meets the standards under subsection (3) of this section.

ORS 215.446(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;

APPROVED FINDING: The Applicant has provided documentation that they have consulted extensively with ODFW and have met the requirement in ORS 215.446(3)(a).² Exhibit 6 includes correspondence between the Applicant and ODFW.

The Applicant initially consulted with staff from Oregon Department of Fish and Wildlife regarding the entire 585-acre property when they applied for the conditional use permit for the 320-acre site (217-19-000378-PLNG). At that time, ODFW agreed to recommend that the County approve the original conditional use permit while the Applicant and ODFW continued to negotiate on the wildlife mitigation plan. It should be noted that the requirements of ORS 215.446(3) did not apply to the Applicant's original request. The original conditional use approval included a condition that a final "mitigation plan be prepared for ODFW and County review and approval prior to site clearing and preparation."

The Applicant reinitiated consultation with ODFW as part of the conditional use modification request to increase the Project site to 585 acres. The wildlife mitigation plan (Exhibit 3 dated February 10, 2021) and

² According to ODFW's February 24, 2021 letter, the Applicant mischaracterized statements from ODFW staff during consultations.

Exhibit 6, the supplemental burden of proof submitted March 4, 2021, document the communications between the Applicant and ODFW.

(B) Conduct a habitat assessment of the proposed development site;

APPROVED FINDING: The Applicant states that they have met the requirement to conduct a habitat assessment of the proposed 585-acre development site. The Applicant contracted with PBS Engineering and Environmental, Inc. (PBS) to conduct a site-specific habitat assessment of the entire 585-acre project site. PBS conducted site visits to the property, contacted ODFW and other agency staff, and reviewed scientific literature relevant to the Project site. PBS summarized its findings and conclusions from the assessment in the Wildlife and Federal Sensitive Plant Assessment (June 2020, submitted as the Applicant's Exhibit C).

PBS used ODFW's Centralized Oregon Mapping Products and Analysis Support System (COMPASS) geographic information system to search for winter range habitat for big game species (deer and elk) in eastern Oregon. The Project site is not in ODFW deer or elk winter range and has not been identified in Crook County's Goal 5 inventory of big game winter range. As discussed in the original conditional use findings (217-19-000378-PLNG), approximately 220 acres of the Project site is mapped by ODFW as Pronghorn antelope range, although maps for this range were not adopted as part of the County's comprehensive plan.

Despite a portion of the site being mapped by ODFW as pronghorn habitat, PBS concluded that the site does not provide optimal habitat for pronghorn. The PBS Habitat Assessment also found that the site does not appear to be optimal elk or deer habitat. PBS concluded that, based on the conditions of the study area observed during the site visit and analysis following ODFW's Fish and Wildlife Habitat Mitigation Policy flowchart, that the Project site would be classified as "Habitat Category 6" for big game, pursuant to ODFW's habitat mitigation rules at OAR Chapter 635, Division 415. "Habitat Category 6" is defined as habitat that has "low potential to become essential or important habitat for fish and wildlife with no irreplaceable habitats present." OAR 635-415- 0025(6).

ODFW disagrees with the findings of the Applicant's habitat assessment (See December 16, 2020 and February 24, 2021 letters). They suggest that the area mapped as pronghorn habitat should be characterized as Habitat Category 2 and that the remaining areas be characterized as Habitat Category 4 due to the use of the property as an elk and deer migration corridor. The characterization of the property as Habitat Category 2 is consistent with the assessment conducted on the nearby Tango and Millican solar projects, which also had mapped pronghorn habitat.

After additional consultation with ODFW, the Applicant has agreed to mitigate impacts to mapped pronghorn antelope habitat that will be permanently impacted by construction and operation of the Project, not to exceed the 220 acres of the Project site located within ODFW-mapped pronghorn winter range. The Applicant proposes to perform mitigation for impacts to those areas that achieve the mitigation standard applicable to Category 2 habitat under ODFW's habitat mitigation rules. (OAR 635-415-0025(2)(a)). Based on the habitat assessment, findings for adjacent solar projects and ODFW's comments, the County suggests that the appropriate classification for pronghorn habitat should be Category 2 and mitigation activities designed to address impacts to Category 2 habitat.

The County has applied a range of a 1.5 to 1 to 2.0 to 1 mitigation ratio for impacts to Pronghorn winter range in decisions approving the Tango, Millican and Crook Flat solar projects. Both ratios achieve

ODFW's "no-net loss" and "net benefit" mitigation standards for Category 2 habitat. The class 4 habitat on the remaining 365 acres should meet ODFW's "no-net loss" mitigation standard. **Additional findings regarding the approved ratio are addressed below in response to the appeal filed by ODFW.**

(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

APPROVED FINDING: Under ORS 215.446(3)(a)(C), the County retains the ultimate responsibility to determine, based on substantial evidence in the record, that the Applicant's final habitat mitigation plan is "consistent with" ODFW's habitat mitigation rules.

ODFW retains a consulting role and is responsible for providing mitigation recommendations to the County.³ Accordingly, while the County must consider ODFW's comments regarding the Applicant's proposed mitigation strategy as part of the record, the County is not obligated to require the Applicant to implement all of ODFW's mitigation recommendations but rather must demonstrate that the mitigation plan is consistent with ODFW's mitigation policy. ODFW suggests that the County "may not be satisfied with a mitigation plan that is inconsistent with" ODFW's administrative rules.

For local land use applications, ODFW's habitat mitigation policy requires ODFW to recommend mitigation consistent with the goals and standards of OAR 635-415-0025. (OAR 635-415-0020(3)).

ODFW's habitat mitigation goal for Category 2 habitat is that any mitigation project provides "no net loss" plus "net benefit" of either habitat quantity or quality. OAR 635-415-025(2)(a).

- The no-net-loss mitigation standard means that the Project will not result in "a loss of habitat quantity and/or habitat quality resulting from a development action despite mitigation measures having been taken." OAR 635-415-0005(22).
- The net-benefit mitigation standard means that the Project will result in "an increase in overall in-proximity habitat quality or quantity after a development action and any subsequent mitigation measures have been completed and monitored." OAR 635-415-0005(21).
- "Habitat quantity" means the amount of a given habitat type." OAR 635-415- 0005(6).
- "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).

³ The Applicant suggests comparing OAR 635-415-0020(2) (delineating ODFW's authority to "require mitigation" consistent with certain standards for development actions that impact fish and wildlife habitat for which ODFW has statutory authority to require mitigation as a condition of a permit or order) *with* OAR 635-415-0020(3) (delineating ODFW's authority to "recommend mitigation consistent with the goals and standards of OAR 635-415-0025 for development actions * * * other than Department actions when * * * [f]ederal or state * *or [l]ocal environmental laws or land use regulations authorize or require mitigation for impacts to fish and wildlife habitat").

The standards of mitigation for Category 2 require the habitat also be “in-kind” and “in-proximity.” OAR 635- 415-0025(2)(a)(B). Progress towards the goals and standards shall be reported on a schedule to monitor the mitigation plan performance measures. Id. The mitigation measures must be implemented prior to or concurrently with development. Id.

~~ODFW’s December 16, 2020 letter states that the components of OAR 635-415-0020(8) are also required to demonstrate evidentiary support for a mitigation plan subject to ORS 215.446(3). Those components set forth information that must be included in a mitigation plan prepared for ODFW, which include the location of the development action and mitigation action, how the mitigation actions will complement and not diminish mitigation provided for previous development actions, identify protocols and methods and a reporting schedule for monitoring, provide for future modification of mitigation measures, be effective through the project life, contain mitigation performance measures including provisions for long term protection and management of the mitigation site, if appropriate.~~

~~The Applicant’s mitigation plan in this case was not prepared for ODFW; it was prepared for the County. ODFW’s mitigation policy states that, at the discretion of ODFW, the components of OAR 635-415-0020(8) may be “partially or entirely fulfilled” by the County’s local land use regulations. OAR 635-415-0020(9). Thus, each individual component of OAR 635-415-0020(8) is not required for a mitigation plan to be consistent with ODFW’s policy in a local land use application. However, the components are instructive as to the composition of a mitigation plan likely to achieve its intended purpose and the basis that forms ODFW’s recommendation to the County. The County remains responsible for determining if the mitigation plan and its contents offset impacts in a manner consistent with ODFW’s policy.~~

- “In-kind Habitat Mitigation” means “habitat mitigation measures which recreate similar habitat structure and function to that existing prior to the development action.” OAR 635-415-0005(12).
- “In-proximity Habitat Mitigation” means “habitat mitigation measures undertaken within or in proximity to areas affected by a development action”—meaning “within the same home range” to have “the highest likelihood of benefiting ... wildlife populations directly affected by the development.” OAR 635-415-0005(13).

The Applicant **initially** **proposeds** to achieve mitigation for those impacts to mapped pronghorn winter range (not to exceed 220 acres) through three mitigation options designed to achieve ODFW’s Category 2 habitat mitigation policy goal of “no net loss” plus “net benefit.” **Through the initial proceedings with the Planning Commission, it was determined that Option 3 was not a suitable form of mitigation and has been removed as an option.**

“No net loss” requires a determination of the total amount of impacted acreage. The Applicant has proposed a 200-meter setback area around the aggregate mine in the southeastern portion of the site. The Applicant states that they would not be responsible for mitigating for impacts within the setback area because both ODFW and the Applicant agree that this area does not meet the definition of Category 2 habitat used by pronghorn. The 200-meter setback proposal is based on the recommendation of the Applicant’s professional wildlife biologist and is supported by a number of studies discussed in the Applicant’s Revised Wildlife Mitigation Plan, version 7, at pages 12–13. ODFW has recommended a 500-foot (152-meter) setback around the gravel mine. The 500-foot setback is

consistent with the County's Comprehensive Plan definition of "impact areas" for conditional uses adjacent to aggregate site.⁴ The intent of the impact area is to ensure that other uses (e.g., the solar facility) do not impact the operation of the mine site. A 500-foot buffer should suffice for the proposed use.

In addition, the County recommends that the remaining 365 acres not mapped as pronghorn habitat, be mitigated at a 1:1 ratio, reflecting ODFW's recommendation that the acreage is Category 4 habitat, based on the use of the property as an elk/deer migration route.

The Applicant's Final Wildlife Mitigation Plan (Exhibit 3 -February 20, 2021) and supplemental burden of proof statement (Exhibit 6) discuss the options in detail. The Applicant request~~ed~~s that the County approve all three mitigation options to provide the Applicant with necessary flexibility. The Applicant propos~~ed~~s selecting one of the three mitigation options and **would** provide the County with additional documentation of the final implementation plan for the selected option before conducting site clearing or grading. **As discussed previously, Option 3 has been removed from the list of mitigation options.**

The Applicant included a summary of options in their supplemental burden of proof statement.

Option 1 – Conservation of Like Habitat with Juniper Removal Uplift

As initially proposed in the application, Under this mitigation option, the Applicant would ensure "no net loss" to big game habitat by conserving a number of off-Project mitigation acres equivalent to the total number of acres that are located within ODFW-mapped pronghorn habitat and will be impacted by the final Project design. In other words, the Applicant will mitigate at a "scale" or "mitigation ratio" of 1:1 to achieve ODFW's habitat mitigation policy of "no net loss."⁵ **When reviewed by the Planning Commission, it was determined that the mitigation ratio would need to occur at a ratio of 1.5:1, meeting the "no net loss" and "net benefit" standard as described below in the findings for scale.**

Location: The Applicant states they will also ensure that any mitigation project pursuant to Option 1 achieves "in-kind" and "in-proximity" mitigation, consistent with OAR 635-415-0025(2)(a)(B). The mitigation project site will be within mapped big game winter range currently identified on ODFW's maps and on "sagebrush and/or bitterbrush dominant" habitat (or habitat that could be restored to be sagebrush and/or bitterbrush dominant habitat), satisfying the "in-kind" habitat requirement. The mitigation project site will be in Crook County, thus benefiting pronghorn within the same "home range" as any pronghorn impacted by the Project, satisfying the "in-proximity" habitat.

⁴ Impact areas are defined as "The impact area is that area surrounding and near a Goal 5 mineral and aggregate resource site wherein the presence or application of a conflicting use that is allowed outright or conditionally in the surrounding broad zoning district would adversely impact the resource site by limiting the mining or processing of the resource." Unless otherwise indicated...the impact area is that property extending outward from the resource site boundary to a distance of five hundred (500) feet).

⁵ The Applicant notes that the concept of "mitigation ratios" has no clear basis in ODFW's Habitat Mitigation Rules at OAR Chapter 635, Division 415. Nonetheless, the Applicant uses those ratios here as a convenient shorthand to describe the Applicant's current proposed mitigation approach that is consistent with those rules. Although not proposed for this Project, the Applicant asserts other mitigation approaches not relying on mitigation ratios at all could potentially satisfy the requirements of ORS 215.446(3) and relevant provisions in ODFW's Habitat Mitigation Rules.

ODFW continues to be concerned regarding the lack of specificity regarding a mitigation site. They recommend that the County not approve the proposed project until a specific juniper removal site (or sites) has been identified.

The Planning Commission required the mitigation site be in Crook County, within mapped big game winter range currently identified on ODFW's maps, and on "sagebrush and/or bitterbrush dominant" habitat (or habitat that could be restored to be so), satisfying both the "in-kind" and "home range" requirements. ODFW countered in its April 26, 2021, appeal submittal that "the mitigation site needs to benefit pronghorn and thus [be] within mapped pronghorn habitat in Crook County."

Assuming, for the sake of argument, that the proper approach is to set the Habitat Category 2 standards as the baseline for the entire mitigation project (as discussed above), ODFW's recommendation may be more than the law requires. A sagebrush/bitterbrush dominant site would, based on the evidence in the record, recreate a similar habitat function and structure, satisfying the "in-kind" requirement. Furthermore, the "in-proximity" requirement is not that the mitigation site be within the same "winter range" as the affected species, but the same "home range." Home range is defined in the Mitigation Policy to mean "the area that a species traverses in the scope of normal life-cycle activities." OAR 635-415-0005(9).

In additional materials submitted by the appellant as Exhibit 2, the appellant reverts to an alternate opinion with no guidance about an acceptable condition for the location of mitigation, stating:

"Mitigation for the 220-acres of impacts from the proposed development to pronghorn winter range, which is category 2 habitat, must be "in kind." While "out-of-kind habitat mitigation" may benefit fish and wildlife species other than those at the development site, "in-kind" mitigation must benefit the impacted species. The Planning Commission's decision requires that mitigation for Category 2 impacts occur in ODFW-mapped big game winter range in Crook County. Because there is not evidence in the record that mitigating any place in the approximately 1.4 million acres of mapped big game winter range will benefit wintering pronghorn (whose mapped winter range is approximately 290,000 acres), the V7 Plan, as conditioned, is inconsistent with OAR 635-415-0025(2)(b)(B)."

In additional materials submitted by the applicant as Exhibit 3, the applicant addresses the appellants opinions on this portion of the appeal, but ultimately move in the direction of resolving the appeal and agree to modify Condition 20.b.

As stated by ODFW in their April 26, 2021, appeal submittal,

"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) & 635-41-025(2)(b)(B)), the mitigation site needs to benefit pronghorn and thus within mapped pronghorn habitat in Crook County."

Additionally, in the March 17, 2021, hearing transcript, Greg Jackle states,

“So big game winter range and the soil and water conservation district proposal definitely is outside of pronghorn winter range. But because it's specific and because we had a chance to look at it and look it over, we agree that it is going to have an impact of positive impact on pronghorn.”

“So again, just that specificity allows us to be able to assess a project and see how that's going to react to the species. When we don't have that specificity, we're going to ask for a little bit more. So we asked for the project to be done in pronghorn winter range.”

Staff agrees that to meet the “in-kind” and “in-proximity” habitat mitigation policy, and since a specific location has not been identified for mitigation, requiring mitigation within mapped pronghorn winter range will address the criteria. To ensure the standard is met, staff recommends amending Condition 20.b to include a requirement that mitigation shall occur within mapped pronghorn antelope winter range identified on ODFW’s maps and within Crook County.

Timing: In the appellants grounds for appeal, they state that timing should be addressed with regard to Option 1. ODFW recommends adding a timing component to Condition 20, which would read: “Mitigation shall be implemented and completed either prior to concurrent with development impacts.” ODFW argues that without that requirement, development could precede the benefits of the completed mitigation site, thus failing to properly offset the loss in habitat quality and quantity. For both Habitat Categories 2 and 4, the Mitigation Policy states that “The fish and wildlife mitigation measures shall be implemented and completed either prior to or concurrent with the development action.” OAR 635-415-0025(2)(b)(B) & (4)(b)(B). The Planning Commission’s original requirement that the mitigation’s final implementation plan be delivered to the County before site clearing and grading does not provide an assurance that such plan will be actually implemented prior to or concurrently with the development action. Therefore, Condition 20 shall be amended to include a condition of approval that states mitigation shall be implemented and completed either prior to or concurrent with development impacts.

Exhibit 2 submitted by the appellant addresses timing, and the appellant changes their opinion stating that since the mitigation plan does not contain language that the mitigation measures shall be implemented and completed either prior to or concurrent with the development action, the County should not approve the Planning Commission’s decision. The applicant responded in Exhibit 3, agreeing to the appellant’s recommendation on timing. Staff recommends adopting the timing condition as stated previously, which matches statute and is consistent with the requirements of ORS 215.446.

Scale: The Applicant **originally** proposeds to “protect from development a number of acres equal to the number of acres ultimately disturbed by the TSR North project” within the mapped pronghorn habitat (approximately 220 acres less the setback area associated with the adjacent aggregate mine). The Applicant proposes mitigation at a 1:1 ratio to achieve ODFW’s habitat mitigation policy of “no net loss.”

ODFW’s December 16, 2020, and February 24, 2021, letters raised several concerns regarding the Applicant’s proposal. First, the mitigation ratio proposed in option 1 is 1:1, not the 2:1 ratio required for mitigation of habitat characterized as Category 2.

The County has applied both a 1.5 to 1 mitigation ratio and a 2.0 to 1 mitigation ratio for impacts to Pronghorn winter range in decisions approving the Tango, Millican and Crook Flat solar projects. The mitigation goal in ODFW's administrative rules is "to achieve no net loss of either quantity or quality and to provide a net benefit of habitat quantity or quality." OAR 635-415-00025(2)(b).

Further, the Applicant is also responsible for mitigating impacts to the remaining 365-acres characterized as Category 4 habitat. ODFW recommendeds mitigation at a 1:1 ratio (no-net loss of habitat).

The Applicant has proposed a "failure buffer" to ensure that mitigation goals are achieved. With application of the appropriate 1.5:1 mitigation ratio for the loss of pronghorn habitat and the 1:1 mitigation ration for the remaining Project acreage, this buffer would not be necessary.

In the appellants submitted appeal, they state:

"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."

The Mitigation Policy for Habitat Category 2 has a goal of "no net loss" of either pre-development habitat quantity or quality. In addition, a net benefit of habitat quantity or quality must be provided." OAR 635-415-0025(2)(b)(B). "Net benefit" means "an increase in overall in-proximity habitat quality or quantity after a development action and any subsequent mitigation measures have been completed and monitored."

Successfully mitigating 1.5 acres for each 1 acre developed should increase overall in-proximity habitat quantity by 50%, thus providing a net benefit. While a 2 to 1 ratio would result in a greater net benefit, such a ratio is more than the law expressly requires. Moreover, staff does not see a basis in the Mitigation Policy to apply and enforce the cumulative effects of neighboring developments on an individual application. If the cumulative effects of neighboring facilities are brought into question, arguably the mitigation which occurred for those individual neighboring projects with mitigation ratios of 1.5:1 and 2:1 would have already mitigated for the concerns being addressed by the appellant. Staff recommends retaining the mitigation ratios approved by the Planning Commission.

Exhibit 2 submitted by the appellant addresses scale again, changing their opinion from what was originally stated in their appeal submittal. ODFW now states that since there are no mitigation locations or potential locations identified, there is not substantial evidence in the record that mitigating at those

ratios will achieve the mitigation goals. As the applicant states in Exhibit 3, "The mitigation ratios approved by the Planning Commission are consistent with the mitigation ratios approved at other solar development sites impacting mapped pronghorn winter range in Crook County, including the Tango, Millican, and Crook Flat projects-as the Planning Commission observed." Staff again recommends retaining the mitigation ratio approved previously by the Planning Commission since it will provide "no net loss" and a "net benefit" to mapped pronghorn winter range, and has been previously utilized for previous projects

Maintenance: The Applicant agrees to revisit the mitigation site 15 years after the original juniper removal and to recut the site if necessary.

ODFW recommend~~eds~~ that juniper removal sites are revised in 12-year intervals rather than the 15-year intervals proposed by the Applicant. This is consistent with guidance provided by the Natural Resources Conservation Service.

In the appeal submitted by the appellant, ODFW included a recommendation to insert an additional sentence into condition 20 stating "Noxious weed monitoring and treatment shall also be maintained on a biennial basis." ODFW states this addition will "assure the mitigation site is still functioning wildlife habitat and not degraded due to invasion of annual grasses after the juniper treatment has occurred." ODFW's recommendation involves preserving the "habitat quality," defined as "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." During the Planning Commission hearings, it was discussed how often noxious weed monitoring and treatment would need to occur. A biannual schedule was discussed, with the availability to extend that to five year intervals if treatment was showing to be effective.

The appellant then submitted Exhibit 2 on March 21, 2023, and did not specifically address maintenance or monitoring. The applicant then submitted Exhibit 3, and addressed the issue to the extent ODFW intends to raise them again on appeal.

Within Exhibit 3, the applicant states:

"The Court should decline any request to impose additional monitoring requirements not based on the applicable legal standard or the evidence before the Planning Commission. Nonetheless, if the Court finds it necessary to impose additional monitoring conditions to satisfy the legal standards established by the Court of Appeals and LUBA, the Applicant proposes the following modifications to Condition 20.b:"

"The Applicant shall comply with the following monitoring and maintenance plan to demonstrate the efficacy of the juniper treatment project; (A) Juniper-(I) baselin photographic monitoring pre- and post-treatment; (2) periodic landowner contact to check regrowth or encroachment of juniper; and (3) revisit and conduct 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."

Within Exhibit 3, the applicant also addressed the appellant's concerns regarding noxious weeds submitted with the initial appeal application. The applicant stated:

The Applicant does not agree to the specific wording requested by ODFW, because it is not tied to a specific legal standard, and there is no evidence in the record demonstrating that weed monitoring and treatment must occur biennially to maintain habitat. In fact, ODFW acknowledged before the Planning Commission that less frequent monitoring and treatment could be appropriate. The Applicant believes that biennial weed monitoring and treatment is unnecessarily onerous. The Court could approve the Planning Commission's decision without this modification.

Nonetheless, if the Court finds it necessary to specifically address noxious weed monitoring, the Applicant proposes to add another monitoring requirement to Condition 20.b as follows:

"(B) Weeds-(1) examination of invasive weed growth at discrete intervals including (a) immediately post-treatment, (b) two year post-treatment. and (c) year 12; (2) treatment of invasive weeds if deemed necessary by the County Weedmaster."

Staff recommends adopting the applicants proposed Condition 20.b amendments. Adoption of these amendments will increase the reliability that the mitigation measures will sufficiently provide for no net loss and a net benefit of wildlife habitat for the duration of the project.

Durability: The Applicant states they will ensure that any mitigation project pursuant to Option 1 is "durable" and its mitigation benefits are maintained throughout the life of the Project. Before site clearing or grading, the Applicant will provide the County with a fully executed instrument to prevent development on the final mitigation acreage site during the life of the Project (such as a working lands agreement, deed restriction or outright purchase agreement, conservation easement, or similar instrument). This is consistent with ODFW's suggestion that mitigation benefits will need to occur for the duration of the Project (estimated at 40 years).

In the appeal submitted by the appellant, ODFW included a recommendation that the mitigated site "provides habitat for the same duration of time that the project occupies the current habitat, which must include reclamation time." The County has such authority until decommissioning is complete. As defined in OAR 635-415-0005(27), "Project Life" means the period of time during which a development action is subject to regulation by local, state, or federal agencies." This also makes intuitive sense, as the Subject Property will remain impacted by the development until decommissioning is complete. Thus no-net loss would require an available mitigation site until the Subject Property is once again suitable habitat for the wildlife of concern. Staff agrees with the inclusion of durability towards the mitigated site, and Condition 20 is amended to reflect mitigation to occur from construction of the facility through site decommissioning.

The appellant then submitted Exhibit 2 into the record, which included a differing opinion than what was originally stated in the original appeal submittal. ODFW now is of the opinion that the mitigation plan as conditioned is insufficient. They state that the mitigation plan's durability,

"does not provide substantial evidence that the mitigation site will be durable for the duration of project impacts. Condition of Approval 20 addresses durability, but it is vague and does not require any specificity until after the permit has issued and the public process has concluded. LUBA stated, "absent any sample or example instrument that evidence reliability (such as an instrument that runs with the land and is binding on future owners), we agree with petitioner

that the V2 Plan is not evidence of a mitigation plan that is 'reliable.'"12 Like the mitigation proposal reviewed by LUBA, the V7 Plan is insufficient.

In the appellant's original appeal submittal, ODFW recommended restricting "conflicting uses." The legal requirement is that the mitigation site approximate same habitat quality as the development site. Habitat quality is defined as "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." Condition 20.b has been amended to reflect these concerns.

To resolve these issues, the applicant has proposed amended conditions of approval to account for the appellants original concerns. The amended condition as proposed would address conflicting uses and would include recitals and covenants. The proposed amendments do not match the appellants original proposed condition amendments, but generally capture the nature of what was proposed. Absent of any evidence submitted into the record by the appellant during prior review proceedings, staff cannot substantiate the appellant's condition as proposed. Absent of evidence on this matter, the appellant has proposed additional condition requirements that would ensure further consistency with the applicable wildlife standards. Staff recommends adopting the Condition 20.b amendments with regard to durability, as proposed by the applicant, because, based on the evidence in the record, applicant's new condition will sufficiently ensure no new development at the mitigation site will interfere with the planned habitat restoration.

Monitoring: The Applicant states in their **burden of proof** that no monitoring will be required under Option 1, because (1) the proposed land conservation actions are "one-time" actions that will be accomplished by executing a durable instrument at the Project outset and (2) juniper removal projects require only minor updates once every fifteen years, given the slow rate of juniper growth.

The County continues to work with stakeholder groups in order to determine the best way to appropriately monitor habitat mitigation sites, and how often those sites should be revisited for juniper removal. The County recommends effectiveness monitoring to ensure that the juniper removal treatments are effective, that there is a return of desired vegetation and to assess whether or not a 12-year period is sufficient to ensure that juniper does not return to the mitigation site. Until the County has sufficient information to establish its own best practices, the County defers to the National Resources Conservation Service guidance of requiring juniper removal every 12 years.

The appellant raised issue with monitoring in its initial appeal submittal, primarily addressing the recurrence of and treatment of annual grass regrowth after juniper treatment has occurred. This issue was not further addressed in the appellants Exhibit 2 submittal, but the applicant incorporated proposed Condition 20.b amendments within Exhibit 3 and have been included in the addendum.

Option 2 – One-Time Fee-in-Lieu Payment to Established Conservation Organization (Specifically Including ~~Deschutes Land Trust Aspen Valley Ranch Conservation Project in Crook County or Crook County Soil and Water Conservation District~~)

Under this option, the Applicant states they will make a one-time mitigation payment to ~~the Deschutes Land Trust or another established land conservation organization for wildlife enhancement at the Aspen Valley Ranch or a comparable project in Crook County.~~ Crook County Soil and Water Conservation District has recently entered into an agreement with the County to accept mitigation funds and

implement mitigation projects. Exhibit 6 includes a mitigation project proposed by the Applicant and the Crook County Soil and Water Conservation District.

The Applicant's final wildlife mitigation plan sets forth the formula to calculate this payment, which is based on ODFW's mitigation recommendation pursuant to its Habitat Mitigation Rules at OAR Chapter 635, Division 415. This formula has been used to calculate mitigation requirements for similar nearby solar facilities, including the Gala Solar and Millican Solar facilities. The Applicant has proposed to calculate the mitigation payment based on a 1.5:1 mitigation ratio for impacts to mapped big game habitat (minus a 200-meter setback buffer around the adjacent aggregate mine) and 1:1 for other portions of the project site. The Applicant's wildlife mitigation plan provides current values for all other variables in the mitigation formula. The mitigation formula, once complete, will be applied to the total number of acres that will ultimately be disturbed within the mapped pronghorn winter range area by the TSR North Project, to produce a final mitigation payment amount. According to their correspondence, ODFW finds that the mitigation formula included in the plan is consistent with the requirements of OAR 635-415-0025(7).

The Applicant has not yet entered into an agreement with a conservation organization but has identified a specific mitigation project that will be funded by the payment under this Option. (See Exhibit 6, proposed project provided by the Applicant and the Crook County Soil and Water Conservation District). ~~The Applicant has been engaged in ongoing negotiations with Deschutes Land Trust to fund a mitigation project at the Aspen Valley Ranch, as recommended by ODFW.~~ The Applicant is also working with the Crook County Soil and Water Conservation District and has included a mitigation project proposal as part of Exhibit 6. This proposal includes a monitoring plan and specific mitigation activities.

~~It is not reasonable to expect that an organization like the Deschutes Land Trust or the Crook County Soil and Water Conservation District could commit property for mitigation with no certainty regarding whether or not the development project requiring mitigation will move forward.~~

ODFW recommends that the County condition approval upon the Applicant providing a map indicating the specific location of available habitat improvement projects that could serve as mitigation sites (e.g., ~~Aspen Valley Ranch or Crook County Soil and Water project site~~) prior to beginning grading and clearing operations on the site. ODFW also recommends that the Applicant include a monitoring plan consistent with criteria outlined in ODFW's December 16, 2021 prior to site clearing and grading. The Applicant shall also provide proof of mitigation payment to the County Community Development Department prior to beginning site clearing and grading.

The County suggests that the impact area around the existing aggregate site should be 500 feet rather than the 200 meters proposed by the Applicant to be consistent with provisions in the Crook County Comprehensive Plan regarding impact areas and Goal 5 aggregate sites.

Option 3 – Alternative Mitigation Project Approved by ODFW or Cooperative Mitigation Agreement with ODFW

The Applicant originally proposed a third mitigation option. The Planning Commission rejected that option and shall not be utilized as a mitigation option.

~~As a third mitigation option, the Applicant proposes an “alternative mitigation project” for ODFW to approve in the future to achieve the “no net loss” and “net benefit” mitigation goals, as well as ODFW’s habitat mitigation policy goal of achieving “in-kind” and “in-proximity” habitat mitigation. Under the Applicant’s proposal, any future mitigation agreement with ODFW would require ODFW’s approval and not the County’s. The Applicant states that if no such alternative mitigation proposal meeting these criteria is identified by the Applicant, approved by ODFW, and implemented by Applicant, then the Applicant shall implement either mitigation Option 1 or mitigation Option 2, as described above.~~

~~The Applicant states that an alternative mitigation project approved by ODFW pursuant to ODFW’s Habitat Mitigation Policy—or a mitigation agreement with ODFW—will necessarily be consistent with ODFW’s habitat mitigation rules. Therefore, an alternative mitigation option approved by ODFW pursuant to this mitigation option complies with ORS 215.446(3)(a)(C). As provided in the Applicant’s final Wildlife Mitigation Plan and proposed conditions of approval, if ODFW chooses not to approve an alternative mitigation project or enter into a cooperative mitigation agreement in the future, the Applicant will implement either mitigation Option 1 or Option 2 described in the Wildlife Mitigation Plan.~~

~~While the County agrees that Option 3 could result in a mitigation project that meets ODFW criteria, the County does not have sufficient evidence to make findings that Option 3 is consistent with ODFW’s mitigation policy. Further, the County is not comfortable delegating its responsibility for determining that the mitigation plan is consistent with ODFW’s mitigation policy and for determining that the renewable energy facility meets the standards under ORS 215.446(3). The County is concerned that the public will not have an opportunity to comment on this mitigation option in violation of Statewide Planning Goal 1 (Citizen Participation).~~

~~The Applicant states, in summary, any of the three mitigation approaches detailed in the final wildlife mitigation plan, if implemented consistently with all proposed conditions of approval, will ensure mitigation that is consistent with ODFW’s habitat mitigation rules at OAR Chapter 635, Division 415, and the requirements of ORS 215.446(3)(a)(C).~~

Based on the evidence in the record, the Planning Commission could find Option 2 consistent with ODFW’s mitigation policy. Option 1 could be consistent with the mitigation policy with implementation of recommended conditions of approval.

V. CONDITIONS OF APPROVAL

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) on a site within Crook County. 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 ~~at the juniper~~ **treatment project on the mitigation site. The mitigation site shall removal** ~~project~~ **be** located within ~~big game~~ **pronghorn antelope** winter range identified on ODFW's maps within Crook County. The Applicant shall identify the Project acreage. **Applicant shall not be permitted to select an "alternative location" as proposed on page 15 of the habitat mitigation plan. Applicant shall comply with the additional locational criteria in Applicant's habitat mitigation plan including that the site will be: (1) sagebrush/bitterbrush dominant (or would be expected to be restored to such state after mitigation efforts) but suffering from juniper encroachment; and (2) juniper removal would facilitate re-growth of vegetation to provide forage for big game.**

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 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 1.5 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~~ **shall comply with the following monitoring and maintenance plan to demonstrate the efficacy of the juniper treatment project;**

(A) Juniper

(1) baseline photographic monitoring pre- and post-treatment;

(2) periodic landowner contract to check regrowth or encroachment of juniper: and

(3) 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.

(B) Weeds

(1) examination of invasive weed growth at discrete intervals including

(a) immediately post-treatment,

(b) two year post-treatment. and

(c) year 12; (2) treatment of invasive weeds if deemed necessary by the County Weedmaster.

Durability – Before site clearing or grading at the TSR North site, the Applicant shall provide Crook County Community Development with a fully executed **durability assurance** instrument ~~preventing development~~ on the mitigation site for ~~at least~~ the duration of the Project **impacts (construction through site Decommissioning).** ~~including~~ Such instrument **may include,** but is not limited to a working lands agreement, a deed or outright purchase agreement, **a restrictive covenant,** or a conservation easement **that protects habitat by preventing conflicting improvements on the property including structural improvements.** the expansion of impervious roads and surfaces, new irrigated farming, mining, and land clearing activities. The durability assurance instrument shall include recitals and covenants substantially similar to the following:

Recitals: (A) Declarant is the owner of certain real property situated in Oregon, as more particularly described on Exhibit A. (B) Declarant desires to impose certain covenants to be binding on the property as covenants running with the land for the benefit of Beneficiary.

Covenants: Declarant, on behalf of itself and its successor owners, heirs, and assigns of the property, agree that the property shall be preserved for, and its use otherwise restricted as follows: (1) physical improvements shall not be developed, installed, or constructed on the property, except for existing improvements; (2) the property shall not be used for the following purposes: mining, development of new irrigated agricultural footprints, or expansion of impervious roads or surfaces; and (3) land clearing activities.

Duration – Mitigation shall last for the duration of the project, including decommissioning.

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.

- 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.

A handwritten signature in black ink, appearing to read "Brent Bybee", written in a cursive style.

Brent Bybee, Planning Manager
Crook County Planning Department