Return to Commissioner's Journal

2012-014321
Klamath County, Oregon

00129093201200143210270270

12/26/2012 02:40:05 PM Fee: NO FEE

BOARD OF COUNTY COMMISSIONERS

KLAMATH COUNTY, OREGON

IN THE MATTER OF AMENDING THE KLAMATH COUNTY COMPREHENSIVE PLAN ATLAS AND THE ZONING MAP DESTINATION RESORT OVERLAY ("DRO") TO ADD APPROXIMATELY 68,302 ACRES OF LAND TO SAID DRO AREA, KLAMATH COUNTY FILE CLUP /ZC 3-09 (ON REMAND FROM THE OREGON LAND USE BOARD OF APPEALS)	)	**ORDINANCE 44.95**

WHEREAS, the Klamath County Board of Commissioners has the authority and desires to amend the Klamath County Comprehensive Plan Atlas and the Zoning Map to add approximately 68,302 acres to the DRO Overlay Map in compliance with ORS 197.455, Statewide Planning Goals 2, "Land Use Planning", 8, "Recreation", and 12, "Transportation", OAR 660-012-0060, the Klamath County Comprehensive Plan and the Klamath County Land Development Code; and

WHEREAS, the Klamath County Board of Commissioners previously adopted the DRO amendments to the Klamath County Comprehensive Plan Atlas and the Zoning Map DRO zoning district in a final decision dated August 4, 2010; and

WHEREAS, the Oregon Land Use Board of Appeals ("LUBA") remanded the County's decision on April 19, 2011 in *Root v. Klamath County*, 63 Or LUBA 230 (2011); and,

WHEREAS, the applicant has submitted revised findings and additional substantial evidence responding to the remand issues identified by LUBA in its final opinion and order; and

WHEREAS, the Klamath County Planning Department has reviewed the revised findings and additional substantial evidence and recommended that the Board of County Commissioners approve the amendments on remand; and

WHEREAS, the Klamath County Planning Department scheduled a legislative public hearing, provided appropriate written notice to the participants at LUBA and caused notice of the legislative public hearing to be published in the Klamath Falls "Herald and News" newspaper on November 2, 2012 and November 3, 2012; and

WHEREAS, the Board held a legislative public hearing on November 27, 2012 at 6:00 p.m., and continued said hearing to December 18, 2012 at 6:00p.m.; and

WHEREAS, based on testimony entered into, and in consideration of the whole record before the Board, the Klamath County Board of Commissioners voted to approve the amendments on remand by amending the Comprehensive Plan Atlas and the Zoning Map by adding the DRO Overlay zoning district based on the findings of fact and conclusions of law approved within the final order for File CLUP/ZC 3-09 (Remand).

NOW, THEREFORE, THE BOARD OF COUNTY COMMISSIONERS OF KLAMATH COUNTY ORDAINS BY ORDINANCE THE FOLLOWING AMENDMENTS TO THE COMPREHENSIVE PLAN ATLAS AND THE ZONING MAP DRO ZONING DISTRICT;

1. The Klamath County Comprehensive Plan Atlas and the Zoning Map for the DRO Overlay zoning district is amended as shown on attached **Exhibit A.**

2. The Board adopts as findings supporting the decision the findings as shown on attached **Exhibit B.**

3. The Board adopts four (4) conditions of approval as part of the decision as shown on attached **Exhibit C.**

DATED this 20th day of December, 2012.

FOR THE BOARD OF COUNTY COMMISSIONERS

Chairman

Commissioner

Commissioner

County Counsel
Approved as to form

NOTICE OF APPEAL RIGHTS

This decision may be appealed to the Oregon Land Use Board of Appeals ("LUBA") within 21-days following the date of the mailing of this decision. A person may contact LUBA for information on how to file an appeal by phone 1-503-373-1265, or by mail at 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552. Failure to file an appeal with LUBA in a timely manner may adversely affect your rights.

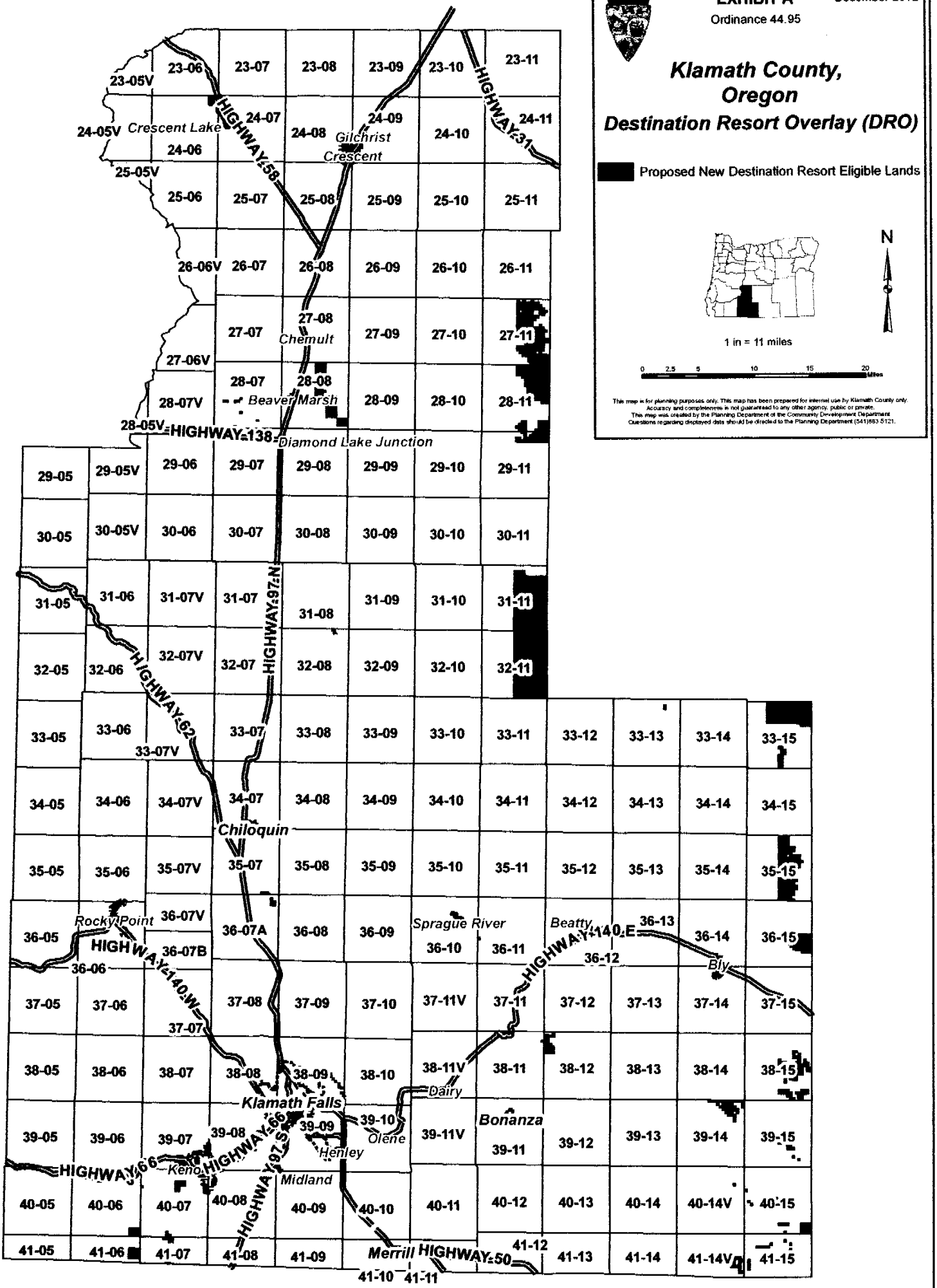
EXHIBIT A
December 2012
Ordinance 44.95
Klamath County,
Oregon
Destination Resort Overlay (DRO)
Proposed New Destination Resort Eligible Lands
N
1 in = 11 miles
0 2.5 5 10 15 20 Miles
This map is for planning purposes only. This map has been prepared for internal use by Klamath County only.
Accuracy and completeness is not guaranteed to any other agency, public or private.
This map was created by the Planning Department of the Community Development Department
Questions regarding displayed data should be directed to the Planning Department (541)883-5121.
HIGHWAY 58
HIGHWAY 31
HIGHWAY 138
HIGHWAY 97 N
HIGHWAY 62
HIGHWAY 140 W
HIGHWAY 140 E
HIGHWAY 66
HIGHWAY 97 S
HIGHWAY 50
Crescent Lake
Gilchrist
Crescent
Chemult
Beaver Marsh
Diamond Lake Junction
Chiloquin
Rocky Point
Sprague River
Beatty
Bly
Dairy
Klamath Falls
Bonanza
Olene
Henley
Keno
Midland
Merrill
23-05V
23-06
23-07
23-08
23-09
23-10
23-11
24-05V
24-06
24-07
24-08
24-09
24-10
24-11
25-05V
25-06
25-07
25-08
25-09
25-10
25-11
26-06V
26-07
26-08
26-09
26-10
26-11
27-06V
27-07
27-08
27-09
27-10
27-11
28-05V
28-07V
28-07
28-08
28-09
28-10
28-11
29-05
29-05V
29-06
29-07
29-08
29-09
29-10
29-11
30-05
30-05V
30-06
30-07
30-08
30-09
30-10
30-11
31-05
31-06
31-07V
31-07
31-08
31-09
31-10
31-11
32-05
32-06
32-07V
32-07
32-08
32-09
32-10
32-11
33-05
33-06
33-07V
33-07
33-08
33-09
33-10
33-11
33-12
33-13
33-14
33-15
34-05
34-06
34-07V
34-07
34-08
34-09
34-10
34-11
34-12
34-13
34-14
34-15
35-05
35-06
35-07V
35-07
35-08
35-09
35-10
35-11
35-12
35-13
35-14
35-15
36-05
36-06
36-07V
36-07B
36-07A
36-08
36-09
36-10
36-11
36-12
36-13
36-14
36-15
37-05
37-06
37-07
37-08
37-09
37-10
37-11V
37-11
37-12
37-13
37-14
37-15
38-05
38-06
38-07
38-08
38-09
38-10
38-11V
38-11
38-12
38-13
38-14
38-15
39-05
39-06
39-07
39-08
39-09
39-10
39-11V
39-11
39-12
39-13
39-14
39-15
40-05
40-06
40-07
40-08
40-09
40-10
40-11
40-12
40-13
40-14
40-14V
40-15
41-05
41-06
41-07
41-08
41-09
41-10
41-11
41-12
41-13
41-14
41-14V
41-15

EXHIBIT B

BEFORE THE BOARD OF COMMISSIONERS

FOR KLAMATH COUNTY, OREGON

In the Matter of an Application by JWTR, LLC to Amend the Klamath County Comprehensive Plan ("KCCP") Map and the Klamath County Land Development Code ("KCLDC") Map to Add Approximately 68,302 Acres to the Destination Resort Overlay ("DRO") Designation and Zoning District and to Add the Limited Land Use Overlay ("LU") Designation and Zoning District to the Same Acreage to the KCLDC Map, Pursuant to ORS 197.455, Statewide Planning Goal 8, "Recreation," and Applicable Provisions of the KCCP and KCLDC, As Conditioned.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE DECISION** **Klamath County File No. CLUP/ZC 3-09 (Remand)**

I. INTRODUCTION.

This is an application by JWTR, LLC, the landowner and applicant (the "Applicant") to amend the KCCP map by adding eligible areas for Destination Resort on the acknowledged KCCP map and to amend the KCLDC zoning map by adding the DRO zoning district and the LU Overlay zoning district to the acknowledged KCLDC zoning map. The Board approved the applicant's prior application on August 4, 2010 in County Ordinance No. 44.87. Four (4) opponents to the approval, James N. and Valerie Root, Kurt M. Thomas, and Central Oregon Landwatch ("Landwatch") (hereinafter, the "Petitioners") filed appeals of the County's decision with the Oregon Land Use Board of Appeals ("LUBA"). LUBA remanded the County's decision on April 19, 2011. *Root v. Klamath County* ("Root"), 63 Or LUBA 230 (2011). LUBA concluded that the County's decision required additional explanation of why the applicable approval criteria were satisfied and evidentiary support for those conclusions. No party appealed LUBA's decision to the Oregon Court of Appeals.

II. STATUS AND CHARACTERIZATION OF APPLICATION.

This application is a legislative amendment to the KCCP and KCLDC maps. *Root*, n 4, slip opinion ("slip op") 6. ORS 197.763 ("Quasi-Judicial Procedures") is inapplicable to this application and individualized notice to adjacent property owners prior to this Board hearing is not required for a legislative hearing.

The County mailed notice of the November 27, 2012 remand hearing to the LUBA participants and others on November 2, 2012. A copy of this mailed notice is in the Klamath County Planning Department ("Planning Department") file for this application and will be placed before the Board at the public hearing. The Planning

Department also caused notice of the Board's hearing to be published in the newspaper of official record, the "Klamath Falls Herald and News" newspaper, on November 2 and 3, 2012 pursuant to KCLDC 32.030(A) and 32.070. The published notice of the public hearing is in the official Planning Department file for this application and will be placed before the Board at the public hearing. The notice provided that the public hearing before the Board on remand was limited to the issues on remand. The notice also provided that no party could raise issues that were previously resolved in *Root* but not appealed or not raised in *Root*. Those issues are summarized in Part III of these findings, below. No party objected to these limitations described in the notice.

Because this application is on remand, the KCLDC does not require the Klamath County Planning Commission to hear the application again. The Board heard the application on remand without review by the Planning Commission.

III. ISSUES ON REMAND.

The Petitioners filed two (2) briefs at LUBA: one (1) by Root and Thomas ("Root") and one (1) by Landwatch. The two briefs contained a total of eight "Assignments of Error" (the reasons that Petitioners believed the County's decision was wrong). Some of the assignments of error in the two briefs overlapped and some contained "Subassignments of Error," such as Root's first assignment of error.

LUBA rejected the following assignments of error. Because LUBA rejected these arguments of the Petitioners and they did not appeal LUBA's decision to the Court of Appeals, these issues may not be raised in this proceeding by the Petitioners or others:

1. LUBA rejected the argument that the County had to reapprove all lands that the County had previously approved as eligible for Destination Resorts. (First Assignment of Error; Third Subassignment of Error; *Root.*)

2. LUBA rejected the argument that the County had to re-evaluate whether both previously and proposed lands remained eligible for inclusion on the map of eligible lands. (First Assignment of Error; First and Second Subassignments of Error; *Root.*)

3. LUBA rejected the argument that the County could not incorporate findings by reference. (Seventh Assignment of Error; *Landwatch.*)

The issues before the Board on remand are as follows:

1. The County must adopt findings based on substantial evidence demonstrating that the proposed designations will not conflict with identified Goal 5 habitat. (Third Assignment of Error; *Landwatch.*)

2. The County must find that the post-acknowledgement plan amendment will not significantly affect a transportation facility as required by OAR 660-012-0060(1), or mitigate the significant affect as required by OAR 660-012-0060(2). (Fifth Assignment of Error; *Landwatch).*

3. The County must adopt findings based on substantial evidence demonstrating why KCLDC 49.030(B) ("Public Need") is satisfied. (Second Assignment of Error; *Root* and *Landwatch*).

4. The County must evaluate the proposed eligible land for the DRO that includes ineligible land pursuant to ORS 197.455(1)(b)(A) and (1)(b)(B). (First Assignment of Error; *Root*).

5. The County must satisfy KCCP Goal 8, Policy 11 regarding "sites in which the lands were predominantly classified as being in Fire Regime Condition Class 3." (First Assignment of Error; *Landwatch*).

6. The County must include a list of properties and maps identifying the "tracts" of land for the DRO and LU designations. "Tracts" are those units of land as defined in ORS 197.435(7). (First Assignment of Error; *Landwatch*).

7. The County must adopt a decision supported by an adequate factual basis as required by Statewide Planning Goal ("Goal") 2. (First Assignment of Error; *Landwatch*).

The Board should also find that those parts of its written decision in Ordinance 44.87 not remanded by LUBA are re-adopted in this decision.

IV. BOARD HEARING ON NOVEMBER 27, 2012.

The Board opened the public hearing on the remand with a quorum present, consisting of Chair Linthicum and Vice Chair Hukill. Commissioner Switzer was absent. The Board had physically placed before it the entire Planning Department file for the remand Application, the record from *Root v. Klamath County*, 63 Or LUBA 230 (2012), a memorandum dated November 27, 2012 from Klamath County Planning Department Director Bill Adams to the Board, consisting of a cover memorandum and six (6) attachments and four (4) oversized maps. No parties objected to the jurisdiction of the Board to hear the Application on remand.

Chair Linthicum opened the public hearing. Planning Director Adams presented the staff report and read the procedure for the public hearing. Following Planning Director Adams' staff report, the Applicant's representative testified. No other party testified orally before the Board. The Board received two (2) letters submitted to the County Board of Commissioners ("Board") in opposition to the Applications from, respectively: (1) James and Valerie Root (together, "Roots") through Craig A. Stone dated November 27, 2012; and (2) LandWatch through Paul D. Dewey dated November 27, 2012. For the reasons explained below, the Board denies each of the contentions raised by the Roots and LandWatch.

The Board closed the oral portion of the public hearing but left the written record as follows:

Until Tuesday, December 4, 2012 at 5:00 pm for all parties to submit argument and evidence; and

Until Tuesday, December 11, 2012 at 5:00 pm for Applicant to submit proposed findings based on the record made as of December 4, 2012.

No party objected to the adopted open record schedule.

Prior to the close of the written record, the Board received a letter dated December 4, 2012 with eight (8) exhibits from the Applicant. No other party submitted any additional argument or evidence.

V. FINDINGS OF FACT AND SUBSTANTIAL EVIDENCE DEMONSTRATING COMPLIANCE WITH THE ISSUES IDENTIFIED IN THE LUBA DECISION.

1. The Board finds that Goal 5 and OAR 660-023-0250(3) are satisfied. (Third Assignment of Error; *Landwatch*).

For the reasons stated below, the Board finds that the proposed amendment to add eligible DRO Plan and zoning map complies with Goal 5 and its implementing administrative rules and addresses LUBA's two (2) remand issues on this issue.

A. On-Site Impacts to Big-Game Winter Range ("BGWR").

First, in the original proceedings, the County determined that the Goal 5 rule (OAR 660-023-0250(3)) would not be implicated on the destination resort sites themselves because: (1) none of the properties mapped with the DRO included Goal 5 resources; and (2) even if there were Goal 5 resources on these properties, any future applicant for a destination resort must conserve and protect such resources under ORS 197.467.

The County's reasoning was consistent with LUBA's decision in *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008) ("*Johnson II*"). In *Johnson II*, LUBA held that, in a similar mapping exercise, a county properly determined that there would be no on-site conflicts between development of a destination resort and Goal 5-inventoried deer winter range habitat when the county excluded the deer winter range from the area identified as eligible for destination resort siting and when Goal 8 and ORS 197.467 required protection of any other Goal 5 site that might lie within the mapped destination resort area.

Opponents appealed this aspect of the County's decision to LUBA, contending that there was an inadequate factual base to support the County's conclusion that there was no inventoried BGWR habitat—a Goal 5 resource—on the lands proposed to be included in the DRO. Although LUBA did not dispute the County's legal reasoning in relying upon the *Johnson II* methodology, LUBA agreed with the opponents that there was an inadequate factual base in the record for the County to conclude that there was no inventoried BGWR habitat on the properties mapped with the DRO zone:

"We agree with Landwatch that at best the expert's conclusion is called into question by some of the maps and a more detailed examination and explanation for her conclusion is required to provide an adequate factual base for the conclusion that '[t]he areas mapped by the Overlay zone do not include any Goal 5 habitat.' Record 96." *Root*, 63 Or LUBA at 247-248 (2011).

On remand, the County can find that there is an adequate factual base to support the conclusion that the areas mapped by the DRO zone do not include any Goal 5 habitat. The County should reach this conclusion for two (2) reasons. First, the County has excluded approximately 10,000 acres of property from the area proposed to be mapped with the DRO zone. The list of properties excluded to avoid conflict with BGWR habitat is shown in Applicant's November 14, 2012 Exhibit 3. As a result, there is no BGWR habitat within the area of eligible destination resort sites. A map comparing the revised properties added to the DRO zone by this ordinance and the County's inventoried BGWR habitat is shown in Applicant's November 14, 2012 Exhibit 4.

Second, Senior Environmental Consultant Andrea Rabe, MS, PWS, of Rabe Consulting, reviewed the updated map and list and determined that, because there is no overlap of the BGWR and proposed DRO zones, development of destination resorts on the eligible sites will not cause any on-site conflicts with BGWR habitat for purposes of Goal 5 and its implementing rules. *See* Rabe report dated November 13, 2012, in Exhibit 5.

Therefore, the updated map and list of properties and the accompanying expert testimony from Ms. Rabe provide an adequate factual base to support the County's original conclusions that, consistent with LUBA's decision in *Johnson II*, the Goal 5 rule (OAR 660-023-0250(3)) would not be implicated on the destination resort sites themselves because: (1) none of the new properties mapped with the DRO include Goal 5 resources; and (2) even if there were Goal 5 resources on these properties, any future applicant for a destination resort must conserve and protect such resources under ORS 197.467.

The Board finds that these findings and supporting evidence address LUBA's remand on this issue.

B. Off-Site Impacts to BGWR Caused by New Access Roads.

In the original proceedings, the County determined that any potential impacts to BGWR habitat caused by new roads needed to access a new destination resort would be mitigated by a series of best management practices identified in the record. Opponents challenged this aspect of the decision on appeal, contending that this *ad hoc* list of possible mitigation actions was inconsistent with Goal 5.

LUBA sustained the opponents' argument and remanded the County's decision to complete a more detailed analysis of the economic, social, environmental, and energy

consequences ("ESEE") of new roads needed to access new destination resorts to establish whether they would cause conflicts with inventoried BGWR:

> "* * * * [T]he mitigation measures identified in intervenor's wildlife expert's letter do not conclusively establish that there will be no conflicts with inventoried Goal 5 resources off-site from the proposed lands, and that a more detailed analysis under OAR 660-023-0040 is required. *See* n 10." *Root*, 63 Or LUBA at 248.

The rule referenced by LUBA—OAR 660-023-0040—establishes the procedures a local government must follow when conducting an analysis of the ESEE consequences that could result from a decision to allow, limit, or prohibit a conflicting use with a Goal 5 resource. LUBA has held that, even when Goal 5 applies to a post-acknowledgment plan amendment ("PAPA"), a local government need not conduct a new ESEE analysis with each proposed PAPA. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002). Instead, a local government may examine the PAPA provisions, the new conflicting uses allowed, and explain how its existing program to protect Goal 5 resources continues to be adequate to protect its inventoried Goal 5 resources:

> "In our view, the above 'standard' ESEE analysis may be considerably simplified where the local government already has an acknowledged program to achieve the goal, and is merely considering a PAPA that allows a new conflicting use that was not considered in adopting the acknowledged program. In that circumstance, the local government has already made key choices about the relative importance of the resource site and a range of conflicting uses, and has adopted a course of action based on those choices. We do not see that the local government must necessarily reconsider or re-justify those basic choices, in adopting a PAPA that allows a new conflicting use. Where, as here, the local government's acknowledged program has chosen to allow conflicting uses subject to various limitations, the local government might conclude, for example, that the new conflicting use has similar impacts to conflicting uses that were considered in adopting the acknowledged program, and simply choose to rely on the existing program." *NWDA v. City of Portland*, 50 Or LUBA 310, 338 (2005). (emphasis added).

On remand, the Board applies the holding in *NWDA* and find that the DRO amendment does not require a new ESEE under OAR 660-023-0040 to establish whether there will be conflicts between new access roads to destination resort sites and BGWR. The Board should reaches this conclusion because the County's existing Goal 5 management program, which already regulates new roads in BGWR as a limited conflicting use, continues to be adequate to protect BGWR.

Specifically, the County has previously conducted a comprehensive ESEE analysis under the Goal 5 rules, which identified and inventoried specific locations for BGWR and further determined that vehicular access is a conflicting use in the designated

BGWR locations. See excerpts of 1982 Goal 5 Packet in Applicant's November 14, 2012 Exhibit 6. The ESEE determined that this conflicting use should be "limited." *Id.*

Further, the County has adopted a Goal 5 management program designed to implement this ESEE in its Comprehensive Plan ("Plan") and the KCLDC. This acknowledged management program includes Goal 5 Element, Policy 12 of the Plan, which reads as follows: "The County shall protect significant big game winter ranges and other significant wildlife habitat." See Applicant's November 27, 2012 Exhibit 7. The Plan identifies various measures to implement Policy 12, including applying the Significant Resource Overlay ("SRO") zone to BGWR locations. Pursuant to this implementation measure, the County has applied the SRO zone to inventoried BGWR sites.

The County has set forth the requirements of the SRO in another aspect of its Goal 5 management program, KCLDC Article 57. See Applicant's November 14, 2012 Exhibit 8. According to KCLDC Article 57, the purpose of the SRO is to preserve inventoried resources by addressing the ESEE of conflicting uses:

> "* * * * [I]mplement provisions of the Klamath County Comprehensive Plan to preserve significant natural and cultural resources, to address the economic, social, environmental, and energy consequences of conflicting uses upon significant natural and cultural resources, and to permit development in a manner that does not adversely impact identified resource values."

KCLDC 57.010 (emphasis added). KCLDC Article 57 applies to all development in the County's Goal 5-inventoried areas, including on BGWR habitat.

KCLDC 57.040.D.4 identifies the list of conflicting uses in the BGWR, which includes "[r]oads and highways." Further, KCLDC 57.060 provides that, in order to develop a road or highway in the BGWR, an applicant must submit a completed application demonstrating compliance with the following review criteria designed to protect the inventoried resource site:

> "A. The resource site will not be altered or impacted to a degree that destroys its significance;
>
> "B. The proposed development will not result in the loss of habitat for threatened or endangered species of animals or plants as identified by the U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife or other appropriate state or federal agency;
>
> "C. All feasible alternatives to the development have been considered and rejected which would not result in a substantial adverse impact on an identified resource value;
>
> "D. The development is sited on the property in such a manner that minimizes adverse impacts on the identified resource; and

"E. Documentation has been provided to the County regarding requirements for state or federal permits or licenses, and that appropriate resource management agencies have reviewed the development proposal against its plans, policies and programs."

The application for a road or highway is subject to review and comment by the Oregon Department of Fish and Wildlife and Klamath Tribe. KCLDC 57.050.C.2 and KCLDC 57.090.F. Further, in the event the underlying base zoning designation at a particular site classifies a "road or highway" as a conditional use, it is also subject to review for compliance with standards applicable to conditional uses. KCLDC 57.030.A.2.

As further explained in her report in Applicant's November 14, 2012 Exhibit 5, Senior Environmental Consultant Andrea Rabe, MS, PWS, has reviewed the County's ESEE and the County's KCCP Goal 5 management program in the Goal 5 Element of the Plan and Article 57 of the KCLDC and has determined that they are adequate to protect BGWR once the DRO zoning district is expanded by this ordinance. Ms. Rabe reached this conclusion because the County's Goal 5 program already limits development of all roads in the BGWR to only those instances when the roads can be developed in a manner that protects the inventoried BGWR resource, and these same restrictions will apply to any new roads that will be required to access a new destination resort and will traverse BGWR habitat.

Based upon the foregoing evidence and analysis, the County's existing KCCP Goal 5 management program will continue to be adequate to protect BGWR sites once the DRO is expanded by this ordinance. Accordingly, the Board finds find that it is not required to conduct a new ESEE under OAR 660-023-0040 at this time.

The Board further finds that impacts to existing roads caused by a new destination resort, such as an increase in the level or distribution of traffic or the addition of travel lanes, are not within the scope of LUBA's remand, which is narrowly tailored to "new roads." Therefore, the County is not permitted to consider these issues on remand.

The Board finds that the foregoing analysis and supporting testimony addresses LUBA's two (2) remand issues relating to Goal 5.

2. Response to November 27, 2012, Letter from Craig Stone for the Roots.

In a letter from Craig Stone to the Board dated November 27, 2012, the Roots raise a variety of contentions that the Application is deficient and should not be approved. For the reasons explained below, the Board denies these contentions.

A. The Board properly considered and addressed the Goal 5 issue on remand.

The Roots contend that the County erred in limiting the Goal 5 issue on remand to consideration of impacts to Big Game Winter Range ("BGWR"). Instead, the Roots

contend that the issue extends to consideration of impacts to all inventoried Goal 5 resources. The Board denies this contention because, based upon the plain language of LUBA's order, the scope of the Goal 5 issue on remand is properly limited to consideration of impacts to BGWR. In its decision, LUBA first remanded for further consideration of on-site impacts to BGWR:

> "LandWatch next argues that there is not an adequate factual base to support the county's conclusion that there are no inventoried Goal 5 resources on the proposed lands. Specifically, we understand LandWatch to argue that there is an inventoried Goal 5 resource, especially sensitive big game habitat, located on or near some of the proposed lands, and that the applicant's wildlife expert's conclusion that there is no especially sensitive big game habitat on any of the proposed lands is contradicted by the maps in the record discussed in our resolution of the third assignment of error. We agree with LandWatch that at best the expert's conclusion is called into question by some of the maps and a more detailed examination of her conclusions is required to provide an adequate factual base for the conclusion that '[t]he areas mapped by the overlay zone do not include any Goal 5 habitat.' Record 96."

Root v. Klamath County, 63 Or LUBA 230, __ (2011) (slip op. 20-21) (Emphasis added.). Further, LUBA remanded for additional analysis and findings regarding impacts to off-site resources, that remand was limited by the context to only addressing impacts to BGWR. For example, the County findings analyzed by LUBA were limited to impacts to BGWR. *See Root*, 63 Or LUBA at __ (slip op. 21).

In the alternative, to the extent LUBA's remand to address off-site impacts from the new roads needed to access a new destination resort requires consideration of all inventoried Goal 5 resources, the Board finds that the Applications satisfy Goal 5 and its implementing rules, subject to the following condition of approval:

> "No new road needed to access a destination resort on the eligible lands added by this decision shall be approved or constructed in areas off-site of these added eligible lands."

This condition will ensure that no new roads can be developed and thus there will not be any off-site impacts to Goal 5 resources caused by new roads needed to access a destination resort. The Board finds that this condition addresses LUBA's remand on this issue.

Second, although the Roots contend that there are locations where the proposed DR sites intersect with BGWR depicted on the 1984 map adopted by the Oregon Department of Fish and Wildlife ("ODFW"), the Board should deny this contention because the Roots are mistaken. Instead, as explained by Andrea Rabe in the memorandum from Rabe Consulting dated December 3, 2012, the County has adopted

the ODFW map as the County's BGWR map. As a result, because the list of eligible lands has been revised to avoid siting any Destination Resort Overlay ("DRO") within mapped areas of the BGWR, the list of eligible lands also necessarily avoids siting DRO within areas mapped by ODFW.

For the foregoing reasons, the Board denies the Roots' contention that the County's Goal 5 findings are inadequate.

B. The proposed Land Use Overlay ("LUO") is consistent with KCLDC Article 59.8.

The Applicant responds to this issue in Section 3.B. below. Based upon that analysis, the Board denies the Roots' contention that the LUO is not consistent with KCLDC Article 59.8.

C. The Applications comply with ORS 197.455(1)(b)(A). (First Assignment of Error; *Root*).

There is substantial evidence in the whole record to support the conclusion that the Applications satisfies ORS 197.455(1)(b)(A), which prohibits a county from siting a destination resort "[o]n a site with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Natural Resources Conservation Service, or its predecessor agency." The Board reaches this conclusion for three (3) reasons.

First, there are no proposed destination resort sites with 50 or more contiguous acres of unique farmland identified and mapped by NRCS because NRCS has not classified any unique soils in the County in any of its published surveys. *See* November 27, 2012, letter from Jason Outlaw at NRCS, which is included in the record. Second, there are no proposed destination resort sites with 50 or more contiguous acres of prime farmland identified and mapped by NRCS. *See* November 30, 2012, report from Rabe Consulting.

In fact, as summarized in Ms. Rabe's report, Rabe Consulting compared the locations of prime farmland identified and mapped by NRCS with the locations of the proposed destination resort sites and determined that there was only one destination resort site with 50 or more contiguous acres of prime farmland identified and mapped by NRCS. The Applicant has revised the proposed map and list of eligible sites to delete this tract, which had been listed as Tract 31 and is located in the west 1/2 of the northwest 1/4 of Section 33, Township 40 South, Range 12 East. *See* Replacement Exhibit 17 and Replacement Exhibit 18, submitted by the Applicant on December 4, 2010. Based upon the revised map and tract list, Ms. Rabe has stated her professional opinion that there are no destination resort sites with 50 or more contiguous acres of prime farmland identified and mapped by NRCS. On the basis of the foregoing, the Board should find that the proposed mapping satisfies ORS 197.455(1)(b)(A).

Further, the Board denies the Roots' contentions to the contrary because they lack merit. First, although the Roots contend that the Applications are deficient because they

improperly defer a demonstration of compliance with ORS 197.455(1)(b)(A), the Board denies this contention because, as explained above, not only does the proposal not defer the issue, there is substantial evidence in the whole record to support the conclusion that the Applications satisfy this provision.

Second, although the Roots contend that the findings improperly rely upon Ordinance 44.41, when that ordinance is not in the record, the Board denies this contention because Ordinance 44.41 is now included in the record.

Third, although the Roots contend that there are additional destination resort sites with prime farmland, the Board denies this contention because it is not persuasive. In fact, the Roots identify two sites with prime farmland, Tract 31 and a nearby tract. The Applicant has deleted Tract 31 as described above. The second tract, depicted in Exhibit 3 to the Roots' letter, does not include 50 contiguous acres of prime farmland. Therefore, it did not need to be excluded.

Finally, although the Roots contend that the NRCS soils data may be dated and thus unreliable, the Board denies this contention because it misconstrues the law. In fact, the Legislature has identified only one acceptable source of farmland data when mapping destination resort sites—"farmland identified and mapped by the United States Natural Resources Conservation Service"—and the Applicant has consulted that source. *See* ORS 197.455(1)(b)(A). Thus, regardless of the age of the data, as a matter of law, it must be utilized, and the County did not err in relying upon it. Additionally, the County's map of eligible sites must only "be based on reasonably available information." ORS 197.455(2). This section does not require the County to go to unreasonable lengths to obtain or create data. Requesting that NRCS prepare an updated soil survey would be unreasonable and would thus exceed the scope of the County's obligation under the destination resort statutes.

For all of the foregoing reasons, the Board finds that the Application satisfies ORS 197.455(1)(b)(A).

D. It is permissible for the Board to approve the Application, subject to a condition requiring compliance with ORS 197.455(1)(b)(B). (First Assignment of Error; *Root).*

Contrary to the Roots' contention, it is permissible for the County to approve the Application and map the destination resort sites without specific findings that each site complies with ORS 197.455(1)(b)(B), which prohibits siting a destination resort "[o]n a site within three miles of a high value crop area unless the resort complies with the requirements of ORS 197.455(6) * * * *," provided the County imposes a condition that a site will not be developed unless and until it satisfies this provision. *See Central Oregon LandWatch v. Deschutes County*, __ Or LUBA __ (LUBA Nos. 2011-115/116, September 6, 2012) (so holding).

In *Central Oregon LandWatch*, LUBA held that not only is this type of conditional approval not prohibited by ORS 197.455(1)(b)(B), it is the most logical solution at the mapping stage when no specific destination resort is proposed:

> "Nothing in the text or context of ORS 197.455(1) or (2) prohibits adding lands described in ORS 197.455(1)(a), (b)(B) and (f) to the map of eligible lands, subject to a condition or restriction of some kind adopted as part of the mapping decision to ensure that a site will not be developed with a resort unless the relevant exception is satisfied. Indeed, it is difficult to imagine how the exceptions in ORS 197.455(1)(a) and (b)(B) could be satisfied in any other way. Even under petitioner's view of the statutes, the most straightforward way a county could satisfy the exceptions at ORS 197.455(1)(a) and (b)(B) at the mapping stage, when no resort application is before the county, is to impose a condition that ensures that resort development is limited consistent with the relevant exception. * * * * Similarly, to satisfy the exception in ORS 197.455(1)(b)(B) at the mapping stage, the county could impose a condition that ensures that at time of resort development appropriate limits will be placed on the number of units of overnight lodging, based on the proximity to the high value crop area."

Central Oregon LandWatch, __ Or LUBA at __ (slip op. 12). The Applicant's supplemental narrative at page 20 has proposed that the County approve the Application, subject to a condition limiting development until compliance with ORS 197.455(1)(b)(B) is demonstrated:

> "Pursuant to ORS 197.455(1)(b)(B), a destination resort and its accessory uses shall not be approved nor developed on a site within three miles of a high value crop area unless the destination resort and its accessory uses complies with the requirements of ORS 197.445(6)."

The Roots do not cite to, let alone distinguish, *Central Oregon LandWatch.* They also do not explain how the Applicant's proposed condition fails to comply with LUBA's holding in that case. Accordingly, there is no basis to sustain the Roots' contention. The Board finds that it can approve the Application, subject to a condition of approval.

E. The Application properly identify tracts for designation as possible destination resort sites. (First Assignment of Error; *LandWatch*).

There is substantial evidence in the whole record to support the conclusion that the proposed tracts satisfy the definition of "tract" in ORS 197.435(7), which reads as follows:

> "'Tract' means a lot or parcel or more than one contiguous lot or parcel in a single ownership. A tract may include property that is not included in the proposed site for a destination resort if the property to be excluded is on the boundary of the tract and constitutes less than 30 percent of the total tract."

The Board reaches this conclusion for three (3) reasons. First, as explained in the letter from Cathy Chapel, Land Use Manager for the Applicant, the Applicant is the sole owner of each tract on the list of tracts that the County is proposing to include in the DRO.

Second, there are no proposed tracts where more than 30% of the tract is excluded or where such exclusion is other than on the boundary of the tract. *See* December 4, 2012, report from Rabe Consulting. In fact, as summarized in Ms. Rabe's report, Rabe Consulting compared the locations of lands owned by the Applicant with the locations of the proposed destination resort sites and determined that there were seven (7) tracts where more than 30% of the tract had been excluded. The Applicant has revised the proposed map and list of eligible sites to delete these tracts, which had been listed as Tracts 16, 17, 28, 29, 30, 32, and 35. *See* Replacement Exhibit 17 and Replacement Exhibit 18, submitted by the Applicant on December 4, 2012. Based upon the revised map and tract list, Ms. Rabe has stated her professional opinion that each of the tracts constitutes a "tract" for purposes of ORS 197.435(7). On the basis of the foregoing, the Board finds that the proposed tracts are "tracts."

The Board further denies the Roots' contentions to the contrary. First, although the Roots contend that the record does not include Exhibit 18, the Roots are mistaken: Exhibit 18, as replaced by Replacement Exhibit 18, has been included in the record and properly depicts each tract, including section, township, and range labels for each.

Second, although the Roots contend that Exhibit 17 is deficient because it does not include "actual ownerships at a lot or parcel level," the Board denies the Roots' contention because it is baseless. In fact, as explained above, the Applicant has presented substantial evidence that the Applicant is the sole owner of each tract. The Roots do not present substantial evidence that undermines this conclusion with, for example, deed or assessor's records indicating that another party owns any part of any tract. Therefore, the Board denies the Roots' contention on this issue.

Third, although the Roots contend that the record lacks detail to determine whether the tracts constitute "tracts," the Board should deny this contention based upon the evidence set forth in the Rabe Consulting report dated December 4, 2012. As explained in that report and summarized above, Applicant has compared the locations of lands owned by Applicant with the locations of the proposed destination resort sites and determined that there were seven (7) tracts where more than 30% of the tract had been excluded. Applicant has revised the proposed map and list of eligible sites to delete these tracts, which had been listed as Tracts 16, 17, 28, 29, 30, 32, and 35. The deleted tracts include all of the tracts depicted in the Roots' Exhibits 4A and 4B. The Roots do not offer any other specific tracts that do not satisfy the definition of "tract." For these

reasons, the Board denies the Roots' contention and find that, as revised, the tract list and map only include "tracts" as defined in ORS 197.435(7).

3. Response to November 27, 2012, Letter from Paul Dewey for LandWatch.

A. There is no basis to conduct an additional Goal 5 ESEE.

The Board finds that there is no basis to conduct an additional Goal 5 ESEE in conjunction with the Application. LUBA has held that, even when Goal 5 applies to a post-acknowledgment plan amendment ("PAPA"), a local government need not conduct a new ESEE analysis with each proposed PAPA. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002). Instead, a local government may examine the PAPA provisions, the new conflicting uses allowed, and explain how its existing program to protect Goal 5 resources continues to be adequate to protect its inventoried Goal 5 resources. *NWDA v. City of Portland*, 50 Or LUBA 310, 338 (2005).

On remand, the Board finds that the County's adopted Goal 5 program—including the County's 1982 ESEE, the Goal 5 Element of the Plan, and Article 57 of the KCLDC—are adequate to protect BGWR once the DRO zoning district is expanded by this ordinance. The Board reaches this conclusion because, as explained by Andrea Rabe in Narrative Exhibit 5, the County's Goal 5 program already limits development of all roads in the BGWR to only those instances when the roads can be developed in a manner that protects the inventoried BGWR resource, and these same restrictions will apply to any new roads that will be required to access a new destination resort and will traverse BGWR habitat.

LandWatch's contention to the contrary fails to specifically articulate why the analysis in the record is lacking or otherwise fails to comply with Goal 5. Therefore, the Board denies LandWatch's contention on this issue.

B. The Board finds that OAR 660-012-0060(1), the Transportation Planning Rule (the "TPR"), is satisfied. (Fifth Assignment of Error; *Landwatch*).

1. Why LUBA found the TPR was not satisfied and how the TPR can be satisfied.

The Board finds that OAR 660-012-0060(1) is satisfied because this decision is conditioned to prohibit "development" in the added DRO eligible lands on the Plan and zoning map designations until a future post-acknowledgment plan amendment ("PAPA") as required by ORS Chapter 197 and OAR Chapter 660, Division 18, is approved by the Board. As explained below, LUBA found the County had not conducted the required "first step" analysis for the TPR. The Board finds here that the TPR can be satisfied and a condition of approval imposed to assure its compliance.

OAR 660-012-0060(1) is part of the TPR. This section requires that:

"Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation significantly affects an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to ensure that allowed land uses are consistent with the identified function, capacity and performance standard (e.g., level of service, volume to capacity ratio, etc.) as a facility."

The Board previously adopted alternate findings demonstrating compliance with this section of the TPR. The Board first concluded that there could be no "significant affect," as that term is used in OAR 660-012-0060(1), because the DRO amendment did not permit destination resort development, which would cause increased traffic, not the mere mapping of areas eligible for destination resorts. LUBA Record ("Rec.") 82. Alternatively, the Board found that the map amendment could create a significant affect and, therefore, the County must mitigate the significant affect pursuant to OAR 660-012-0060(2)(3) with a proposed condition of approval. Rec. 82.

LUBA found that the Board's approach was inconsistent with the Oregon Court of Appeals' decision in *Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009) and held ". . . as the Court instructed in *Willamette Oaks*, the time to demonstrate compliance with the TPR is prior to adopting the plan amendment that allows the uses that may be inconsistent with capacity, etc. transportation facilities." *Root*, 63 Or LUBA at 26.

LUBA also found that even had the Board adopted the proposed condition of approval found at Rec. 82 and 83, the decision would likely have been inconsistent with *Willamette Oaks* requiring the assessment of impacts of development on the transportation system before approval of an amendment.

LUBA suggested a solution to satisfying the TPR in *Root,* footnote 15 at page 28, as follows:

"A potential solution to the practical problem of addressing the TPR in the context of a large scale plan or land use regulation amendment, where it is not possible to accurately predict development effects on transportation facilities, could be that the local government impose an Overlay on the amended plan and zoning map designations that prohibits development of the properties. To remove the Overlays would require a post-acknowledgement plan and/or land use regulation amendment (PAPA) that would trigger application of the TPR. Under this approach, the county could find, accurately, that the initial plan amendment is not a plan amendment that *allows* uses potentially inconsistent with the capacity, etc. of transportation facilities, because it effectively authorizes no new land uses, and thus the initial plan amendment does not, as a matter of law, significantly affect

any transportation facility. The plan amendment that significantly affects facilities is the one that authorizes uses potentially inconsistent with the capacity, etc. of transportation facilities, which would be the subsequent plan amendment removing or modifying the Overlay zone that prohibits development." *Root* at 28.

The Board finds, as explained below, that with a condition of approval requiring the imposition of the concurrent adoption of the LU Overlay zoning district to the areas proposed to be designated as eligible for DRO, this Application does not allow development and, therefore, the amendments do not significantly affect a transportation facility under OAR 660-012-0060(1)(a) and (c).

The Board amended KCLDC Article 59.8, "Limited Use Overlay (LU)," through Ordinance 45.82. The Board gave notice of the proposed text amendment to the LU Overlay zoning district on December 22, 2011. The Board adopted Ordinance 45.82 on May 24, 2012 and mailed notice of adoption to the Oregon Department of Land Conservation and Development ("DLCD"). The Board finds that the County followed the required procedures for a post-acknowledgement plan amendment in ORS Chapter 197 and OAR Chapter 660, Division 18.

KCLDC Article 59.8 provides that the LU Overlay zoning district may be used to "prohibit certain uses until allowed by a subsequent post-acknowledgement to remove the limited use Overlay." The Board finds that the LU Overlay zoning district may be used to prohibit DRO development until such time as that zone is removed in a subsequent post-acknowledgment plan amendment complying with the TPR.

2. The Board finds that, as conditioned, the Application appropriately addresses LUBA's remand under the Transportation Planning Rule ("TPR"), and responds to LandWatch's November 27, 2012 letter.

LandWatch argues that the "LU Overlay Zoning District is no substitute for compliance with Goal 12 and the TPR, OAR 660-012-0060(1).

First, LUBA's remand required the County to address TPR, not Goal 12. The rule and the Goal are distinguishable. The TPR implements Goal 12. This remand proceeding must address only the relevant portion of the TPR.

Second, LandWatch is incorrect in its November 27, 2012 letter. LUBA held in *Root* at page 28, note 15, that:

"A potential solution to the practical problem of addressing the TPR in the context of a large scale plan or land use regulation amendment, where it is not possible to accurately predict developments effects on transportation facilities, could be that the local government impose an overlay on the amended plan and zoning map designations that prohibits development of the properties. To remove the overlays would require post-

> acknowledgment plan and/or land use regulation amendment (PAPA) that would trigger application of the TPR. Under this approach, the county could find, accurately, that the initial plan amendment is not a plan amendment that allows uses potentially inconsistent with the capacity, etc. of transportation facilities, because it effectively authorizes no new land uses, and thus the initial plan amendment does not, as a matter of law, significantly affect any transportation facility. The plan amendment that significantly affects facilities is the one that authorizes uses potentially inconsistent with the capacity, etc. of transportation facilities, which would be the subsequent plan amendment removing or modifying the overlay zone that prohibits development."
>
> *Id.*

LUBA said that the County can satisfy OAR 660-012-0060(1) (requiring that where an amendment to an acknowledged comprehensive plan or land use regulation would "significantly affect" an existing transportation facility, the local government must put in place measures provided in OAR 660-012-0060(2) to assure that the allowed land uses are consistent with the identified function, capacity and performance standards of the facility). OAR 660-012-0060(1)(c)(A) provides that a "significant affect" includes "as measured at the end of the planning period identified in the adopted transportation system plan: allow land uses for levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility." As LUBA said, if the County imposes an overlay zoning district that prohibits new uses until such time as a subsequent post-acknowledgment amendment ("PAPA") removes the overlay zoning district and complies with TPR, then the County can find that this post-acknowledgment amendment satisfies OAR 660-012-0060(1) because the application, as described in *Root*, slip op 28 n.15, would not allow new uses inconsistent with the capacity of existing transportation facilities. Furthermore, because this approach satisfies the TPR, there is no need to prepare a Transportation Impact Analysis ("TIA") at this stage of the proceedings.

The issue then arises on how to implement the overlay zoning district. Notwithstanding that the Applicant asked the Board to adopt a comprehensive plan map and zoning map designation imposing the Limited Use ("LU") Overlay zone on the new lands eligible for destination resorts in this proceeding, the Applicant withdrew that request in its December 4, 2012 letter. A condition of approval will provide that this decision is final for purposes of appeal but is not effective until such time as the County, in a separate post-acknowledgment Plan amendment proceeding, imposes the LU overlay zoning district on the additional lands made eligible for destination resorts by this decision and the LU Overlay will prohibit any new uses until such time as the LU Overlay zone is removed in a subsequent post acknowledgment Plan amendment proceeding that addresses the then-applicable TRP.

The Board adopts the following condition of approval:

"This decision is final for purposes of appeal but shall not be effective for purposes of amending the Klamath County Comprehensive Plan Map and the Klamath County Land Development Code Map to add approximately 68,302 acres to the Plan and zoning maps until such time as the County imposes the Limited Use ("LU") Overlay zoning district zone to those same properties in a post acknowledgment Plan amendment proceeding and provides in that post-acknowledgment Plan amendment proceeding at the LU Overlay zoning district shall not allow any new uses allowed by the destination resort overlay designation until such time as the LU is removed in a subsequent post-acknowledgment Plan amendment proceeding that demonstrates compliance with the then-applicable provisions of the TPR. The effect of this condition is that no new uses are allowed by this decision and, therefore, as a matter of law pursuant to OAR 660-012-0060(1), this decision does not significantly affect any transportation facility."

The Board finds that it has the authority under KCLDC 2.040(A) to impose conditions of approval. This section provides that in approving "any type of development application," the County review body, including the Board of Commissioners, is authorized to impose "such conditions as may be necessary to assure compliance with the applicable provisions of 'other requirements of law.' "Requirements of law" includes state administrative rules, such as the TPR. Further, this section provides that "Any conditions attached to approval will be directly related to the impacts of the proposed use or development, and will be roughly proportional in both extent and amount to the anticipated impacts of the proposed use or development."

The Board finds that the proposed condition is directly related to the impact of the proposed use by prohibiting new uses. Because there is no improvement required, the "roughly proportional" requirement is inapplicable. In the alternative, the Board finds that even if this application is not a "development application," it has the authority to impose a condition of approval.

The Board finds that the modification of the application as described in this section is permissible and the proposed condition of approval adequately addresses LUBA's holding that OAR 660-012-0060(1) be satisfied.

3. Conclusion.

The Board finds that the imposition of a condition of approval requiring imposition of the LU Overlay zoning district is an appropriate method to limit uses that would be authorized by the DRO zoning district so that this proposed post-acknowledgment plan amendment and zoning map amendment authorizes no new additional uses that would otherwise be allowed by the DRO zoning district until such time as a subsequent post-acknowledgment plan amendment to remove the LU Overlay zoning district is processed and approved.

The Board finds that the comprehensive plan map amendment and zoning map amendment will be conditioned upon the application of the LU Overlay zoning district in order to prohibit uses otherwise allowed by the DRO zoning district. This condition of approval requires that the LU Overlay zoning district remain in place until such time as a subsequent post-acknowledgment plan amendment is processed and approved by the Board that expressly removes the LU Overlay zoning district. Only at that time shall uses allowed in the DRO zoning district be allowed on the properties subject to this post-acknowledgment plan amendment.

Based on the above, the Board finds that this Application is not a plan amendment that allows uses potentially inconsistent with the capacity of transportation facilities because it does not authorize new land uses and, therefore, as a matter of law, does not significantly affect any transportation facility because of the condition of approval based on OAR 660-012-0060(2)(e). For these reasons, the Board finds that the TPR remand issue has been satisfied.

Mr. Johnson's February 9, 2012 letter is "factual information" documenting the public need for the change to the KCLDC. Mr. Johnson's letter explains that the public need for the change is the creation of construction employment during the development and construction of a destination resort, operational employment of persons to work at the destination resort, the generation of property taxes and other revenues for the County and special districts from the development and operation of the destination resort and various types of community support, including visitors and second home buyers making substantial expenditures in the local economy that support local restaurants and retailers.

Mr. Johnson's letter also explains the direct and secondary benefits of destination resorts. Mr. Johnson concludes that encouraging a destination resort is an economic development strategy widely recognized nationally, as well as by the State of Oregon and Klamath County. In fact, KCCP Goal 8, "Recreational Needs," calls for the County to "[e]ncourage the development of destination resorts on private lands in Klamath County identified by the County as eligible for destination resort siting." He opined that the economic and fiscal benefits are expected to be positive as well as substantial. Mr. Johnson concluded in his letter: "The mapping of additional sites for prospective destination resort development would be expected to marginally increase economic development opportunities, future recreational use activities, increase tourist development activities and generally support a broad range of express policy objectives. The mapping action would be supportive of future destination resort development and in the public interest and therefore address a public need."

The Applicant's November 14, 2012 Exhibit 11 includes a February 9, 2012 memorandum prepared by Mr. Jerry Johnson of Johnson Reid, LLC. Mr. Johnson's memorandum begins by stating: "I have been asked to prepare an assessment of the public need for mapping additional lands as eligible for Destination Resort Overlay in Klamath County, Oregon. Mr. Reid's memorandum then describes the various types of economic and social benefits to the County generated by destination resorts that benefit the public. Mr. Johnson's memorandum concludes: "The mapping action will be

supportive of future destination resort development and in the public interest, and therefore address a public need."

The Board finds that Mr. Johnson's memorandum is directly responsive to the KCLDC requirement that the proposed amendment be supported by "factual information" which documents the "public need for the change." The Board finds that a public need is present when an application such as this generates economic benefits because there is no doubt that such benefits are in the public interest. Moreover, the Board as the legislative body that enacted KCLDC 49.030(B) has the authority to interpret the phrase "public need." The Board finds that public need includes the generation of economic benefits.

The Board finds based on Mr. Johnson's letter that there is a public need for the economic benefits to the County, to special districts within the County, to businesses within the County and to individuals who would use and be employed by a destination resort. Based on this substantial evidence, the Board finds that KCLDC 49.30(B) is satisfied because the proposed amendment is supported by factual information which documents the public need for the change to the KCCP and KCLDC.

The Board finds that Mr. Johnson's February 9, 2012 memorandum is factual information demonstrating that KCLDC 49.030(B) is satisfied. The Board finds that Mr. and Mrs. Root waived this issue in the November 27, 2012 letter by Craig Stone letter at page 3.

The Board can find that this remand issue is satisfied.

4. The Board finds that the application on remand satisfies ORS 197.455(1)(e) by excluding any "tracts" from the DRO designations that contain sensitive big game habitat. (Third Assignment of Error; *Landwatch*).

ORS 197.455(1)(e) provides as follows:

> **"(1) A destination resort must be sited on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 - 197.467 to be sited in any of the following areas:**
>
> **...(e) in an especially sensitive big game habitat area as determined by the State Department of Fish and Wildlife in July 1984 or as designated in an acknowledged comprehensive plan."**

LUBA found that the Board's findings were insufficient to demonstrate compliance with this requirement and that the area mapped DRO included such especially Sensitive Big Game Habitat areas.

The Applicant's November 14, 2012 Exhibit 4 shows the areas proposed to be mapped with the DRO designation. The Applicant's November 14, 2012 Exhibit 12 is a

map showing the previous areas proposed to be designated that were approved pursuant to the Board decision remanded by LUBA. The Board finds that a comparison of the two (2) maps shows the areas proposed to be removed from the DRO mapping and designation. The Applicant's November 14, 2012 Exhibit 13 is the July, 1984 Oregon Department of Fish and Wildlife ("ODFW") map referenced in ORS 197.455(1)(e). Finally, the Applicant's November 14, 2012 Exhibit 14 is Klamath County ordinance 44.41, the County's 1994 ordinance that adopted the County's existing map of DRO eligible lands. The Board finds based on the evidence in the above four (4) exhibits that none of the areas proposed to be designated and mapped DRO contain especially Sensitive Big Game Habitat.

The Board finds that this remand issue is satisfied.

5. The Board finds that the application satisfies KCCP Goal 8, Policy 11 and it applies to lands predominantly classified as being in Fire Regime Condition Class 3 because this decision can be conditioned to prohibit destination resort *development* until County approval of a wildfire protection plan is approved. (Sixth Assignment of Error; *Landwatch*).

LUBA agreed with Landwatch that pursuant to KCCP Goal 8, Policy 11, the County must exclude from the map of eligible lands for destination resorts "sites in which the lands are predominantly classified as being in Fire Regime Condition Class 3, unless the County approves a wildfire protection plan that demonstrates the site can be developed without being at a high overall risk of fire."

The County enacted Ordinance 44.83 on March 12, 2010 in order to implement ORS 197.455(2). The County modified KCCP Goal 8, Policy 11 to exclude Fire Regime Condition Class 3 lands from those eligible for destination resorts. See Applicant's November 14, 2012 Exhibit 15. Some of the proposed lands contain Fire Regime Condition Class 3 lands. See Applicant's November 14, 2012 Exhibit 16.

KCCP Goal 8, Policy 11 and ORS 197.455(1)(f) contain the same language:

> **"1. A destination resort may be sited only on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:**
>
> *****
>
> **f. on a site in which the lands are predominantly classified as being in Fire Regime Condition Class 3, unless the County approves a wildfire plan that demonstrates the site can be developed without being at a high overall risk of fire."**

The siting of a destination resort is a two-step process. *Central Oregon Landwatch v. Deschutes County,* __ Or LUBA __ (LUBA Nos. 2011-115/116, September 6, 2012), slip op 6. The first step is mapping eligible lands for destination resorts under

the eligibility criteria at ORS 197.455. *Id.* The second step is the approval of a destination resort on an eligible site pursuant to the approval criteria in ORS 197.445. *Id.* In some cases, some of the eligibility criteria that prohibit siting resorts on certain lands include exceptions under which a resort may be sited on land that would otherwise be ineligible, unless the development is conditioned. *Id.* These include, as relevant here, ORS 197.455(1)(f), lands that are predominantly classified as being in Fire Regime Condition Class 3.

The application before the Board is for the first step of the two-step process; the mapping of eligible lands for destination resorts. This issue requires the Board to determine if KCCP Goal 8, Policy 11 and ORS 197.455(11)(f) are satisfied or if a condition of approval is warranted.

The Board finds that it does not have to determine that this requirement is met when it adopts the eligibility map because approval of a wildfire protection plan can be deferred to the second step, the destination resort siting decision. *Central Oregon Landwatch*, slip op 11 and 12 (holding that ORS 197.455(1)(f) allows adding lands described in this provision subject to a condition adopted as part of the mapping decision to ensure the site will not be developed until the condition is satisfied).

The Board finds that it can address this remand issue by imposing the following condition of approval:

> **"Pursuant to ORS 197.455(1)(f), a destination resort and its accessory uses shall not be approved nor developed on any land predominantly classified as being in Fire Regime Condition Class 3 on the DRO zoning district areas added to the KCLDC zoning map by this decision until the County approves a wildfire protection plan that demonstrates that the destination resort site can be developed without being at a high overall risk of fire."**

The Board finds that KCCP Goal 8, Policy 11 is satisfied. Pursuant to the LU Overlay zoning district designation for these properties, the Board can impose a condition of approval prohibiting development of destination resorts with Fire Regime Condition Class 3 lands until the County approves a wildfire protection plan that demonstrates that the site can be developed without being at a high overall risk of fire pursuant to a subsequent post-acknowledgement plan amendment.

The Board finds that this remand issue is satisfied.

V. CONCLUSION.

The Board finds that these revised findings and additional substantial evidence address the LUBA issues on remand. The Board reaches this decision by adopting the foregoing findings based on substantial evidence in the whole record that was physically before it prior to this final decision. The Board also adopts the following conditions of approval as proposed in the findings:

1. This decision is final for purposes of appeal but shall not be effective for purposes of amending the Klamath County Comprehensive Plan Map and the Klamath County Land Development Code Map to add approximately 68,302 acres to the Plan and zoning maps until such time as the County imposes the Limited Use ("LU") Overlay zoning district to those same properties in a post-acknowledgment plan amendment proceeding and provides in that post-acknowledgment plan amendment proceeding that the LU Overlay zone shall not allow any new uses allowed by the destination resort overlay designation until such time as the LU is removed in a subsequent post-acknowledgment plan amendment proceeding that demonstrates compliance with the then-applicable provisions of the TPR. The effect of this condition is that no new uses are allowed by this decision and, therefore, as a matter of law pursuant to OAR 660-012-0060(1), this decision does not significant affect any transportation facility.

2. Pursuant to ORS 197.455(l)(f), a destination resort and its accessory uses shall not be approved nor developed on any land predominantly classified as being in Fire Regime Condition Class 3 on the DRO zoning district areas added to the KCLDC zoning map by this decision until the County approves a wildfire protection plan that demonstrates that the destination resort site can be developed without being at a high overall risk of fire.

3. Pursuant to ORS 197.455(1)(b)(B), a destination resort and its accessory uses shall not be approved nor developed on a site within three miles of a high value crop area unless the destination resort and its accessory uses complies with the requirements of ORS 197.445(6).

4. No new road needed to access a destination resort on the eligible lands added by this decision shall be approved or constructed in areas off-site of these eligible lands.

The Board further finds that this decision is final for purposes of appeal but shall not be effective for purposes of adding eligible DRO lands until such time as the LU Overlay zoning district is adopted as described in the decision.

BEFORE THE KLAMATH COUNTY
BOARD OF COMMISSIONERS

EXHIBIT C

IN THE MATTER OF FILE NUMBER CLUP/ZC 3-09 (REMAND) FINAL ORDER

1. This decision is final for purposes of appeal but shall not be effective for purposes of amending the Klamath County Comprehensive Plan Map and the Klamath County Land Development Code Map to add approximately 68,302 acres to the Plan and zoning maps until such time as the County imposes the Limited Use ("LU") Overlay zoning district to those same properties in a post-acknowledgment plan amendment proceeding and provides in that post-acknowledgment plan amendment proceeding that the LU Overlay zone shall not allow any new uses allowed by the destination resort overlay designation until such time as the LU is removed in a subsequent post-acknowledgment plan amendment proceeding that demonstrates compliance with the then-applicable provisions of the TPR. The effect of this condition is that no new uses are allowed by this decision and, therefore, as a matter of law pursuant to OAR 660-012-0060(1), this decision does not significant affect any transportation facility.

2. Pursuant to ORS 197.455(l)(f), a destination resort and its accessory uses shall not be approved nor developed on any land predominantly classified as being in Fire Regime Condition Class 3 on the DRO zoning district areas added to the KCLDC zoning map by this decision until the County approves a wildfire protection plan that demonstrates that the destination resort site can be developed without being at a high overall risk of fire.

3. Pursuant to ORS 197.455(1)(b)(B), a destination resort and its accessory uses shall not be approved nor developed on a site within three miles of a high value crop area unless the destination resort and its accessory uses complies with the requirements of ORS 197.445(6).

4. No new road needed to access a destination resort on the eligible lands added by this decision shall be approved or constructed in areas off-site of these eligible lands.