

Hannah Elliott



From: Moeller, Merissa A. <merissa.moeller@stoel.com>
Sent: Thursday, March 23, 2023 8:52 AM
To: Plan; Lindsay Azevedo; John Eisler
Cc: Max Yoklic; Donald Erin L
Subject: Applicant's Written Argument for Appeal No. 217-20-000581-PLNG [SR-ACTIVE.FID5059719]
Attachments: 2023.03.23 NewSun Energy Written Argument for Appeal 217-21-000321-PLNG.pdf

Dear Crook County Planning Department,

On behalf of NewSun Energy, please see the Applicant's written argument for Crook County Court Appeal No. 217-20-000581-PLNG, attached. Please include this letter in the County Court's record.

Thank you,

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March 23, 2023

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VIA EMAIL

**Re: Applicant's Written Argument for Appeal of TSR North Solar Facility CUP
Modification, Appeal No. 217-21-000321-PLNG**

Dear Judge Crawford, Commissioner Brummer, and Commissioner Barney:

On behalf of NewSun Energy and its agents Jacob Stephens and TSR North Solar Farm LLC ("Applicant"), this letter provides the Applicant's written argument in Crook County Appeal No. 217-21-000321-PLNG (the "Appeal"). This Court should reject the Oregon Department of Fish and Wildlife's ("ODFW") eleventh-hour request to rewrite the Applicant's habitat mitigation plan, based on new arguments and new evidence that ODFW did not present to the Planning Commission.

The habitat mitigation plan approved by the Planning Commission satisfies the legal standard solidified by the Oregon Court of Appeals, and it reflects a reasonable policy compromise that will promote solar development in Crook County *and* protect habitat. Meanwhile, ODFW's most recent comments push for a more restrictive habitat mitigation plan than the agency has ever requested—for this project or (as far as the Applicant is aware) for any other solar development in Crook County.

For these reasons, the Applicant respectfully urges this Court to resolve all outstanding Appeal items in the Applicant's favor and affirm the Planning Commission's decision.

I. Legal Background

The Planning Commission approved this Application in April 2021. ODFW appealed, alleging that the Applicant's habitat mitigation plan did not satisfy the legal requirements of ORS 215.446. The parties agreed to defer this hearing, pending further guidance from the Land Use Board of Appeals ("LUBA") and the Oregon Court of Appeals in the West Prineville Solar litigation, another Crook County land use appeal involving similar legal issues.¹

¹ See *Or. Dep't of Fish and Wildlife v. Crook County*, 315 Or App 625 (2021); *Or. Dep't of Fish and Wildlife v. Crook County*, LUBA No. 2020-114 (2022) (order on remand).

The West Prineville Solar litigation clarified the requirements of ORS 215.446. Most importantly, the Court of Appeals affirmed that the County is the ultimate decisionmaker, and ODFW is a consulting state agency that may make recommendations to the County.² The Court of Appeals and LUBA identified certain details that an applicant *must* provide to ensure that a mitigation plan is “consistent with” ODFW’s habitat mitigation policy. But they also recognized that most details remain within the County’s discretion.

Like the West Prineville Solar litigation, this Appeal involves a habitat mitigation plan with two mitigation options. Generally, “**Option 1**” would require habitat conservation and juniper treatment on a separate mitigation site. “**Option 2**” would require a one-time payment to a qualified conservation organization to perform mitigation. Importantly, neither the Court of Appeals nor LUBA has rejected this approach out of hand. Instead, they approved and upheld certain elements of this general approach in the West Prineville mitigation plan, while ultimately remanding to the County to further refine other elements.

The Applicant has gone to significant effort to incorporate guidance from LUBA and the Court of Appeals into *this* mitigation plan, as discussed further below. In short, this Appeal is not the West Prineville Solar litigation. This mitigation plan is not inherently flawed, and it has not already been rejected by LUBA or the Court of Appeals. ODFW incorrectly argues otherwise.

II. Applicant’s Habitat Mitigation Plan

The Applicant’s habitat mitigation plan previously approved by the Planning Commission appears as Exhibit 3 to the Planning Commission record. As noted, the plan includes two potential mitigation “options.” The Planning Commission also adopted Condition 20, which further details the requirements for the Applicant to implement either option.

Under “**Option 1**,” the Applicant would conserve and improve pronghorn habitat in Crook County through a juniper removal habitat improvement project at a mitigation site. The mitigation plan identifies a discrete set of locational criteria for where the mitigation project must occur. Condition 20.b further requires the Applicant to provide location information to the County before breaking ground on the proposed solar facility; the mitigation site and the implementation of the juniper removal project on that mitigation site must comply with the additional parameters set forth in Condition 20.b. Condition 20.b. also requires the Applicant to submit documentation to the Crook County Planning Department, confirming that the mitigation project complies with Condition 20.b, before breaking ground on the proposed solar facility.

Under “**Option 2**,” the Applicant would make a one-time payment to a qualified conservation organization, to be used for the purpose of conserving pronghorn habitat in Crook County. Pursuant to Condition 20.c, The Applicant must submit documentation of this payment to the Crook County Planning Department before breaking ground on the proposed solar facility. The Planning Commission supported using this payment for a habitat restoration project on Shotgun

² *Crook County*, 315 Or App at 639 (“[T]he county is the decisionmaker[.]”).

Ranch, near Post, Oregon, to be overseen by the Crook County Soil and Water Conservation District (“SWCD”), as Condition 20.c acknowledges. Alternatively, Condition 20.c would allow the Planning Commission or Planning Director to consider another project if Shotgun Ranch is not available.

III. Applicant’s Settlement Efforts

Following the West Prineville Solar decisions, the Applicant corresponded and met with ODFW regularly over more than six months in an effort to further negotiate the details of the Applicant’s habitat mitigation plan, and with the hope of resolving this Appeal without the need for a hearing. The Applicant appreciates this Court’s patience during those negotiations. As of the date of this submittal, the Applicant understands that two issues previously raised by ODFW (specifically, timing and duration) have been resolved.

The parties were unable to reach agreement on other items. Many of the agency’s additional requests continue to exceed the legal standards established in the West Prineville Solar litigation and, therefore, fall squarely within the County’s discretion to approve or reject.³ Frankly, the new requests in ODFW’s March 21, 2023 hearing statement reflect a more restrictive policy position than the agency has ever taken for this project—particularly when compared to the agency’s December 16, 2020 submittal to the Planning Commission and its April 26, 2021 letter to this Court. Many of these requests conflict with (or ignore) County Counsel’s August 11, 2022 Staff Report. The Applicant has struggled to understand what, exactly, the agency would like to see for this project, and it appears that the target continues to move.

Nonetheless, the Applicant remains interested in resolving this Appeal without further litigation, in order to achieve its business goal: building responsible renewable energy in Crook County. Therefore, to the extent that the Court decides to address any of ODFW’s previous, current, or future requests, the Applicant requests that the Court do so by modifying Condition of Approval 20 to the Planning Commission’s decision.⁴ Rejecting portions of the mitigation plan altogether would not be legally appropriate, and remanding to the Planning Commission for further proceedings will only prolong this dispute unnecessarily.

To that end, the Applicant believes the Court could resolve this Appeal by adopting the Applicant’s proposed modifications to Condition 20. A complete redline of these proposed modifications appears as **Attachment 1** to this submittal. These proposed edits are also discussed further below.

³ In addition, other commenters raised similar issues relating to requirements of ORS 215.446 before the Planning Commission and this Court. The Applicant’s arguments and proposed modifications to Condition 20 would, likewise, resolve these issues raised by other commenters, which appear to be largely identical to arguments made by ODFW.

⁴ See Crook County Code (“CCC”) 18.172.110(13) (providing that the County Court may “modify” the Planning Commission’s decision)

IV. Option 1 – Juniper Removal

As noted, Option 1, as approved by the Planning Commission for this project, shares some similarities with the mitigation plan at issue in the West Prineville Solar litigation. For that project, the Court of Appeals and LUBA ultimately remanded the habitat mitigation plan for specific, limited updates and refinements to ensure that Option 1 was “consistent with” applicable requirements of ODFW’s Habitat Mitigation Policy appearing at OAR 635-415-0000 through -0025. Specifically, the Court of Appeals and LUBA directed that the West Prineville Solar mitigation plan: (1) needed to provide more specific evidence regarding the **location** and **quality** of the mitigation site; (2) needed a sample or example instrument evidencing **durability**; (3) needed to identify specific treatment options to ensure that mitigation will last for the **duration** of the project; and (4) needed to identify a schedule of **performance measures**.

This is a different appeal with a different mitigation plan. The Applicant believes that this mitigation plan satisfies the legal standard established by the Court of Appeals and LUBA. But if the Court has any lingering concerns, they can be resolved by adopting Applicant’s proposed modifications to Condition 20.

A. Habitat Location and Quality

The parties do not agree on a description of the required “location” for the juniper removal mitigation site for Option 1. The Planning Commission previously required, through Conditions 20.b and 20.d, that the Applicant “provide location information (map and tax lot number)” for its juniper removal project before breaking ground at the project site. The Planning Commission further specified that the juniper removal project “must be located within big game winter range identified on ODFW’s maps within Crook County.” The Applicant believes this condition satisfies the legal standard, based on the analysis in County Counsel’s August 11, 2022 Staff Report.

ODFW appears to believe, as a practical matter, that the “location” and “quality” elements cannot be satisfied unless the Applicant presents one or more specific pieces of property for the County’s (and ODFW’s) consideration. Yet neither the Court of Appeals nor LUBA reached this conclusion—despite this being one of ODFW’s central themes throughout the West Prineville Solar litigation. Instead, LUBA explained that a developer must identify its future mitigation site with enough detail “to allow any interested party to evaluate the quality of the replacement acreage ultimately chosen” and conclude it meets the habitat mitigation standard.⁵

The Applicant believes that this standard can be satisfied by defining and describing the necessary characteristics of a permissible mitigation site, as the habitat mitigation plan and Condition 20 approved by the Planning Commission already do. ODFW’s position not only demands more from developers and from the County than the applicable legal standard requires, it would also result in an unworkable and impractical habitat mitigation standard that undermines

⁵ *Or. Dep’t of Fish and Wildlife v. Crook County*, LUBA No. 2020-114, slip op at 20.

renewable energy development and hinders counties from realizing its associated local economic benefits. The Court could affirm the Planning Commission's decision on this issue without any modification.

Nonetheless, in the interest of resolving this Appeal, the Applicant would agree to modify Condition 20.b to clarify that the juniper removal project must occur

“within mapped pronghorn antelope winter range within Crook County.”

This modification is consistent with ODFW's prior April 26, 2021 request that this Court “amend Condition 20 to require that mitigation occur in winter range habitat that is mapped for pronghorn specifically.” The agency further explained that “[t]he 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’ [standards], the mitigation site needs to benefit pronghorn and thus be within mapped pronghorn habitat in Crook County.” In other words, the agency specifically requested that the Court modify Condition 20.b to describe the future juniper treatment project location as being “within mapped pronghorn habitat in Crook County,” and the agency took the position that this language would satisfy the applicable legal standard.

As the August 11, 2022 Staff Report explains, this concession from the Applicant is likely more than the law requires. Yet the Applicant believes that it would satisfy the legal requirements to define habitat “location” and “quality” for the mitigation site. As the Staff Report notes, a portion of the mitigation acreage must be “in-kind” and “in-proximity” to mitigate for the 220 acres of Category 2 habitat at the project site. That is, it must “recreate a similar habitat function and structure” as the project site (in-kind), and it must be located in the same “home range” or “area that a species traverses in the scope of normal life-cycle activities” (“in-proximity”) as the project site. By definition, mapped pronghorn winter range is habitat utilized by pronghorn that would “recreate a similar habitat function and structure” as the project site and is located within an “area that [pronghorn] traverses.” Thus, a mitigation site in mapped pronghorn winter range would necessarily meet the “in-kind” and “in-proximity” mitigation standard for Category 2 habitat. The remaining 365 acres of the project site are subject to a lower mitigation standard that also allows (but does not require) “in-kind” or “in-proximity” mitigation and, therefore, would be satisfied by the same condition as a matter of logic.

Accordingly, the Applicant proposes to modify Condition 20.b as follows:

“Location – the Applicant shall provide location information (map and tax lot number) for the juniper treatment project on the mitigation site. The mitigation site shall be located within mapped pronghorn winter range 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.”

With these modifications, Condition 20.b provides enough specificity for this Court (and any other interested party) to conclude that the juniper removal project will be implemented in a location that satisfies the habitat mitigation requirements for Category 2 habitat and for Category 4 habitat, as applicable.

B. Timing

In ODFW’s April 26, 2021 letter, the agency requested that the Court “amend Condition 20 to make explicit that Applicant must implement and complete mitigation either prior to or concurrent with development impacts.” In ODFW’s most recent submittal, the agency changed course and cited this issue as a reason to reject Option 1 entirely.

The Applicant agrees that ODFW’s original April 26, 2021 request is consistent with the requirements of ORS 215.446 and would agree to this request. The Applicant proposes adding a requirement to Condition 20.b to implement this request as follows:

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

The Court can easily resolve this issue by modifying Condition 20. The Court should reject ODFW’s request to throw out Option 1 on this basis.

C. Scale

As the August 11, 2022 Staff Report explains, the Planning Commission approved a “1.5 to 1” mitigation ratio—*i.e.*, “scale”—for the 220-acre portion of the project site identified as Category 2 habitat. The Planning Commission further required the remaining portion of the project site, identified as lower-quality Category 4 habitat, to be mitigated at a ratio of “1 to 1.” These ratios satisfy the legal standards requiring Category 2 mitigation to achieve “no net loss and a benefit” and Category 4 mitigation to achieve “no net loss.”

The Planning Commission’s decision was based, in part, on ODFW’s December 16, 2020 direction stating that a “1:1 ratio would be appropriate for meeting the no-net-loss mitigation goal for the impacts to . . . Category 4.” However, in ODFW’s December 16, 2020 letter and April 26, 2021 letter, the agency argued to increase the mitigation ratio for Category 2 habitat to “2 to 1.” Now ODFW appears to argue that the County cannot satisfy this standard through mitigation ratios at all—unless the Applicant has identified a specific piece of mitigation property.

As with ODFW's arguments regarding habitat location and quality, this position demands more from developers and from the County than the applicable legal standard requires. 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.

The Court should affirm the Planning Commission's decision on this issue without any modification.

D. Monitoring and Maintenance

The Planning Commission previously adopted a maintenance and monitoring requirement in Condition 20.b based on ODFW's December 16, 2020 recommendation to the Planning Commission. ODFW subsequently identified "maintenance and monitoring," generally, as an issue in its April 26, 2021 submittal.

ODFW did not specifically identify monitoring and maintenance as an issue for Option 1 in its March 21, 2023 hearing statement. Nonetheless, the Applicant addresses ODFW's previous comments here, to the extent the agency intends to raise them again on appeal.

i. Monitoring Measures and Maintenance

Many of ODFW's various requests for monitoring and maintenance exceed the requirements of ORS 215.446 and are unsupported by the evidence in the record. Some requests appear to be based on the monitoring provisions of OAR 635-415-0020(8), which the Court of Appeals expressly held does not apply in County land use proceedings.⁶ To the extent that ORS 215.446 requires a monitoring plan at all, it is to ensure that habitat mitigation will be maintained throughout the life of the development project.

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 – (1) baseline 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

⁶ *Or Dep't of Fish and Wildlife v. Crook County*, 315 Or App at 645.

standard specified by the U.S. Department of Agriculture's Natural Resources Conservation Service, whichever is shorter."

ii. Noxious Weeds

In ODFW's April 26, 2021 letter, the agency further requested that, "[i]n addition to the monitoring and maintenance required by the Planning Commission," the Court require "an annual grass monitoring and maintenance plan for the mitigation site." ODFW requested that the Court modify Condition 20.b to further require that "[n]oxious weed monitoring and treatment shall also be maintained on a biennial basis." The agency stated that this request was intended to "assure the mitigation site is still functioning wildlife habitat and not degraded due to invasion of annual grasses after the juniper treatment has occurred."

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 years post-treatment, and (c) year 12; (2) treatment of invasive weeds if deemed necessary by the County Weedmaster."

E. Durability

i. Reliability

ODFW argues that the Court should reject Option 1 because it is not "reliable." ODFW cites to the West Prineville Solar litigation, where LUBA held that a developer must provide a "sample or example instrument that evidences reliability (such as an instrument that runs with the land and is binding on future owners)."⁷ The purpose of this requirement is to ensure that mitigation plan is "reliable" and will ensure that the applicable habitat mitigation standard will be met.⁸

The Applicant believes that Condition 20.b already ensures reliable mitigation by requiring the Applicant to provide, before side grading or clearing, a "fully executed instrument preventing development on the mitigation site for at least the duration of the Project." The requirements

⁷ *Or. Dep't of Fish and Wildlife v. Crook County*, LUBA No. 2020-114 (slip op at 22).

⁸ *Id.*

that the instrument “prevent[] development” and persist “for at least the duration of the Project” are objective standards that ensure no new development will interfere with the habitat restoration at the mitigation site.

However, to the extent there is any ambiguity about what that instrument will require, the Applicant proposes the following modifications to Condition 20.b:

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~~ for the mitigation site for at least the duration of the Project, including decommissioning. 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, agrees 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.

ii. Conflicting Uses

In ODFW’s April 26, 2021 letter, the agency requested that the Court add a requirement to prevent land “uses conflicting with habitat function” at the mitigation site, including increased grazing and nonagricultural uses (unless approved by ODFW); grading, mowing, blading, or expansion of impervious surfaces or access road networks; or property divisions. In the agency’s March 21, 2023 hearing statement, the agency further suggested that the Court should prohibit recreational uses at the mitigation site. These arguments are not based on an express requirement of ORS 215.446.

The Applicant notes that its proposed modifications to Condition 20 (above) would expressly prohibit certain land uses, including mining, development of new irrigated agricultural footprints,

expansion of impervious roads or surfaces, and land clearing activities. These modifications largely track ODFW's previous requests.

However, the Applicant does not agree to ODFW's other requests to address specific land uses. These requests exceed the requirements of ORS 215.446, and they are unsupported by the evidence in the record. Prohibiting certain land uses is not an applicable legal standard. There was no evidence before the Planning Commission that restricting particular land uses is necessary to ensure "reliable" mitigation that achieves the applicable mitigation standard.⁹

ODFW incorrectly asks this Court to construe the absence of testimony regarding conflicting land uses against the Applicant. The Applicant does not have an affirmative burden to prove that ODFW's request to address conflicting land uses is unnecessary.¹⁰ The Applicant's burden is to prove that all applicable legal standards are met, which the Applicant has done. The Court should reject this request to modify the Planning Commission's decision.

iii. Duration

In ODFW's April 26, 2021 letter, the agency requested that the Court modify Condition 20 to "[e]nsure [the] mitigation site provides habitat for the same duration of time that the Project occupies the current habitat, which must include reclamation time." In ODFW's most recent submittal, the agency cited this issue as a reason to reject Option 1 entirely.

The Applicant agrees that ODFW's April 26, 2021 request is consistent with the requirements of ORS 215.446 and would agree to this request. The Applicant proposes adding a requirement to Condition 20.b to implement this request as follows:

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

The Court can easily resolve this issue by modifying Condition 20. The Court should reject ODFW's request to throw out Option 1 on this basis.

F. Performance Measures

ODFW did not raise any arguments relating to performance measures in its April 26, 2021 letter. Nonetheless, the agency has now identified this issue as another reason for the Court to reject

⁹ However, ODFW's March 21, 2023 hearing statement offers new testimony about the impacts of recreational uses on animals. This new evidence is improper. It was not before the Planning Commission, and the Court should reject it in this on-the-record appeal. The agency's opportunity to present this testimony has passed.

¹⁰ For example, in its March 21, 2023 hearing statement, ODFW argues that "there is no evidence in the record that the development site is impacted by recreational uses" and, therefore, the Court should affirmatively prohibit recreational uses at the mitigation site. This argument misstates the applicable legal burdens and relies on an erroneous evidentiary presumption. It would be legal error for the Court to construe ODFW's failure to present evidence to support its own discretionary request against the Applicant.

Option 1, based on the agency's position that performance measures cannot be defined without the agency reviewing a specific mitigation site. To reiterate, that position demands more from developers and the County than the law requires.

In the West Prineville Solar litigation, the Court of Appeals observed that a "mitigation plan" as defined in OAR 635-415-0005(18) includes a schedule of performance measures.¹¹ At the same time, however, the Court of Appeals concluded that the performance measures outlined in ODFW's own Habitat Mitigation Policy at OAR 635-415-0020(8)(h) are not binding or applicable standards for a habitat mitigation plan submitted to a county for review pursuant to ORS 215.446.¹² Based on that guidance, so long as a mitigation plan includes a schedule of performance measures, this standard is satisfied. It remains within the County's discretion to determine which performance measures are appropriate for a particular mitigation plan.

To date, ODFW has declined to provide the Applicant with any guidance about the specific performance measures that the agency would like to see to implement Option 1. Accordingly, lacking specific guidance from ODFW, the Applicant proposes adding a requirement to Condition 20 to address performance measures as follows:

Schedule of Performance Measures – A qualified wildlife biologist shall: (1) review the results of mitigation implementation after it is completed and provide a certifying letter stating that the mitigation has been completed in accordance with the approved wildlife mitigation plan and conditions of approval; (2) review maintenance and monitoring activities on the schedule provided under that section and provide a certifying letter stating that the mitigation meets those standards; (3) review any retreatment actions; and (4) provide activity reports to the County with supporting documentation on an annual basis. A qualified professional wildlife biologist, for the purpose of these conditions of approval, shall mean a person with a minimum of a Bachelor of Science degree in Wildlife Management, Range Management, or similar biological discipline and no less than five years of professional experience in the field. Such qualified wildlife professional biologists may be currently or recently employed by governmental entities like ODFW or independent third-party consulting agencies like PBS Engineering and Environmental Inc., Fosters Natural Resource Contracting, West Consulting, Jacobs Engineering, or others with a similar specialty and focus.

This proposed modification is consistent with ORS 215.446, as interpreted by the Court of Appeals to require only a "schedule" of performance measures, and this Court has discretion to modify the Planning Commission's decision accordingly.

¹¹ *Dep't of Fish and Wildlife v. Crook County*, 315 Or App at 645.

¹² *Id.* at 645–46.

V. Option 2 – One-Time Conservation Payment

Until ODFW's March 21, 2023 hearing statement, Applicant understood that mitigation Option 2 was not seriously in dispute in this Appeal. ODFW expressly endorsed "Option 2," as approved by the Planning Commission, in its April 26, 2021 letter to this Court and stated that Option 2 "meet[s] the standards of our mitigation policy." Option 2 satisfies the legal requirements of ORS 215.446 and is supported by the evidence in the record at the time of the Planning Commission's approval.

For these reasons, the Court may affirm the Planning Commission's decision to approve Option 2 without modifications. In the interest of compromise, the Applicant would also agree to ODFW's proposed modifications that (1) the Court clarify that "mitigation must be implemented and completed either prior to or concurrent with the development action" and (2) adjust the mitigation formula to account for future inflation, if the Court finds either of these changes necessary and supported by evidence in the record.

However, the Applicant does not agree with ODFW's request that the Court hold a subsequent public hearing in the event that the specific mitigation site (Shotgun Ranch) identified in the SWCD plan becomes unavailable. The Planning Commission specifically debated and rejected this concept, noting the potentially significant lag between project approval and project development, and concluding that maintaining flexibility was important to protect the commercial feasibility of this development.

For the same reasons that Option 1 satisfies the legal requirements of ORS 215.446, it is not necessary for the Applicant to commit to a specific piece of mitigation property for Option 2 at this time. It is fully possible that the SWCD could identify a *better* piece of property than the Shotgun Ranch and could apply the applicant's mitigation payment to protect that habitat. Indeed, the very goal of a one-time conservation payment is to enable an applicant to pay a qualified third party to implement mitigation on the applicant's behalf. The Applicant's habitat mitigation plan and SWCD mitigation plan in the Planning Commission record meets the legal standard for a "mitigation plan" even if Option 2 is ultimately implemented at a site other than the Shotgun Ranch.

Nonetheless, if the Court has any questions about the future availability of the Shotgun Ranch project, the Applicant proposes the following modifications to Condition 20.c:

"If the Applicant elects to implement Option 2, the Applicant shall make a one-time mitigation payment to Crook County for implementation of the County Soil and Water Conservation District (SWCD) mitigation plan provided in Applicant's wildlife mitigation plan, subject to the Memorandum of Understanding between SWCD and the County and 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). If such project becomes unavailable, Applicant shall make a one-time mitigation payment

to Crook County for SWCD to implement another project within Crook County, subject to the Memorandum of Understanding between SWCD and the County and 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.”

These modifications further ensure that Option 2 satisfies the legal requirements of ORS 215.446.


VI. Conclusion

As the Court is aware, the Applicant has invested significant resources to resolve the central dispute in this Appeal. Crook County has, likewise, invested significant resources to further clarify the legal requirements of ORS 215.446 and to ensure that counties can approve responsible renewable energy development, while also protecting local habitat.

The Applicant fervently believes that resolving this Appeal is possible—without resorting to the extreme litigation position set forth in ODFW's March 21, 2023 hearing statement. It is absolutely possible to satisfy the legal requirements of ORS 215.446 without identifying a specific piece of property for ODFW to evaluate. The Applicant believes that the Planning Commission's decision already satisfies the legal standard. But, if this Court has any doubt, the Applicant's proposed modifications to Condition 20 offer a possible compromise, to further ensure that the habitat mitigation plan complies with ORS 215.446 and all recent guidance from LUBA and the Court of Appeals.

The Applicant respectfully requests that the Court affirm the Planning Commission's decision or modify that decision as proposed by the Applicant. Thank you for your willingness to support solar development in Crook County and throughout the state.

Respectfully,



Merissa A. Moeller

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Applicant's Attachment 1
Applicant's Proposed Modifications to Planning Commission
Condition of Approval 20

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

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

b. Implement Mitigation Option 1 (juniper removal) 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 a the juniper removal project 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.

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 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.~~

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 for the mitigation site for at least the duration of the Project, including decommissioning. 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, agrees 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.

Monitoring and Maintenance - The Applicant shall submit a comply with the following monitoring and maintenance plan prior to site clearing and grading to demonstrate the efficacy of the one-time juniper clearing treatment project: (A) Juniper – (1) baseline 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; "(B) Weeds – (1) examination of invasive weed growth at discrete intervals including (a) immediately post-treatment, (b) two years post-treatment, and (c) year 12; (2) treatment of invasive weeds if deemed necessary by the County Weedmaster." This shall include "before" and "after" photos of the site and reports on juniper regrowth during the initial 12-year period.

Schedule of Performance Measures – A qualified wildlife biologist shall: (1) review the results of mitigation implementation after it is completed and provide a certifying letter stating that the mitigation has been completed in accordance with the approved wildlife mitigation plan and conditions of approval; (2) review maintenance and monitoring activities on the schedule provided under that section and provide a certifying letter stating that the mitigation meets those standards;

(3) review any retreatment actions; and (4) provide activity reports to the County with supporting documentation on an annual basis. A qualified professional wildlife biologist, for the purpose of these conditions of approval, shall mean a person with a minimum of a Bachelor of Science degree in Wildlife Management, Range Management, or similar biological discipline and no less than five years of professional experience in the field. Such qualified wildlife professional biologists may be currently or recently employed by governmental entities like ODFW or independent third-party consulting agencies like PBS Engineering and Environmental Inc., Fosters Natural Resource Contracting, West Consulting, Jacobs Engineering, or others with a similar specialty and focus.

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

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

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, Crook County for implementation of the County Soil and Water Conservation District (SWCD) mitigation plan provided in Applicant's wildlife mitigation plan, subject to the Memorandum of Understanding between SWCD and the County and 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). If such project becomes unavailable, Applicant shall make a one-time mitigation payment to Crook County for SWCD to implement another project within Crook County, subject to the Memorandum of Understanding between SWCD and the County and 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). Mitigation shall be implemented and completed either prior to or concurrent with development impacts. 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.