

STAFF REPORT

Planning Department File No. 2019-01-001

SAGE GROUSE RULE PERMIT PURSUANT TO OAR 660-023-0115 FOR AN UNDERGROUND GOLD AND SILVER MINE

Malheur County Court Meeting Date: June 26, 2019

1. **APPLICANT:** Calico Resources USA Corp.
665 Anderson St.
Winnemucca, NV 89445
2. **OWNER OF RECORD:** Same as above.
3. **PROPOSED ACTION:** Sage Grouse Rule Permit pursuant to Oregon Administrative Rule (“OAR”) 660-023-0115 for an underground gold and silver mine located approximately 22 miles south of Vale on 62 acres of private property in the Exclusive Range Use zone.
4. **PROPERTY IDENTIFICATION:** Tax lot 101 of Malheur County Assessor’s Map 22S44E.
5. **PROPERTY LOCATION AND DIRECTIONS:** The property (the “Patent Parcel”) is located approximately 22 miles south of Vale. It is accessed by driving south from Highway 20 on Russell Road approximately 2.7 miles, then continuing south on Cow Hollow Road approximately 4.1 miles to Twin Springs Road, then continuing south for approximately 15.2 miles to the Patent Parcel.
6. **ZONING:** Exclusive Range Use (ERU).
7. **PARENT PARCEL:** The total parcel size is 61.98 acres.
8. **PARCEL USE:** The Patent Parcel is currently vacant. A number of testing wells are located on the parcel, as well as access roads constructed to access test drilling and well sites.
9. **SURROUNDING PARCEL USE:** The surrounding land is entirely federal and managed by the Bureau of Land Management (BLM). Land uses primarily include open cattle range, hunting, and other recreation activities.
10. **ACCESS:** The primary access is located at the intersection of Highway 20 and Russell Road. Access between Twin Springs Road and the mine site within the Patent Parcel is provided by a driveway.

11. **SANITATION REQUIREMENTS:** A DEQ approved sanitation system is required.
12. **FIRE PROTECTION:** The parcel is within the boundaries of the Vale Rangeland Fire Protection Association (letter attached).
13. **NATURAL HAZARDS:** None identified.
14. **WATER RIGHTS:** The Applicant has water rights explained in Oregon Water Resource Department (OWRD) Permit G-10994. Water will be used for mining/industrial purposes under Permit G-10994 or any later-issued superseding authorization.
15. **SOIL TYPE:** Soil on the Patent Parcel is class VI or VII, un-irrigated.
16. **ZONING HISTORY:** The Patent Parcel was created within BLM land through the patenting of Calico's mining claim in 1986. On May 23, 2019 the Malheur County Planning Commission approved the Conditional Use Permit Application and recommended approval to the County Court of the Sage-Grouse Permit. No appeals were received within the 10 days as required.
17. **BACKGROUND AND PROCEDURAL REQUIREMENTS**

This application (the "Application") is intended to demonstrate consistency with OAR 660-023-0115 "Greater Sage Grouse," of an underground mine on private property. The Application is processed separately from a recently-approved Conditional Use Permit for the same use, and is referred to as a "Sage Grouse Permit (the "SGP"). The state sage grouse rules apply directly through force of state law, but are not incorporated into the County's plan or land use regulations.

The Planning Commission held an initial evidentiary hearing to consider the Grassy Mountain Conditional Use Permit and SGP on March 28, 2019, which was continued to April 25, 2019. At the conclusion of the hearing, the Commission voted unanimously to approve Conditional Use application and recommend approval of the SGP to the County Court. On May 23, 2019, the Commission adopted final findings of fact and law, which constitutes the Commission's decision on the two applications. The Planning Commission's findings are enclosed as **Exhibit 1**.

The purpose of this hearing is for the Court to consider whether to adopt or reject the Planning Commission's recommendation, or adopt a decision modifying that recommendation. Pursuant to MCC 6-9-4, County Court decisions considering a Planning Commission recommendation are held "on the record," meaning that no new evidence may be submitted by the parties unless one or more of them provides information which shows good cause to allow a *de novo* hearing. As of the date of this Report, no party has requested that the Court allow additional evidence into the record.

The Patent Parcel is surrounded by a larger mining claim area on Bureau of Land Management (BLM) land which is outside of the County's land use planning jurisdiction. This larger area is

proposed to be developed with a processing facility, tailings storage facility, and other supporting accessory uses, and is referred to below as the “Project Area.”

Mining operations on BLM land are subject to approval under the Federal Land Policy and Management Act (FLPMA) and state and federal environmental statutes. Overall approval of the mine on both federal and County land is the responsibility of the Oregon Department of Geology and Mineral Industries (DOGAMI) through its Chemical Process Mining permitting process, which is known as the “Consolidated Permit.” Mining activities on non-federal lands, including the Patent Parcel, are subject to Oregon land use laws, the Malheur County Comprehensive Plan, and the Malheur County Code (MCC).

The Application concerns only the Patent Parcel. As part of the Applicant’s Consolidated Permit process, the Oregon Department of Fish and Wildlife (“ODFW”) will apply the Sage Grouse Rule to the entire project area—including federal lands—in order to determine appropriate habitat mitigation requirements, if any. For this reason, the Applicant has requested that the County defer any mitigation requirements ODFW. In turn, ODFW recommended the following condition of approval, which the Applicant accepts:

The applicant shall comply with OAR Chapter 660, Division 023 and OAR Chapter 635, Division 140. The applicant must coordinate with ODFW and apply the mitigation hierarchy of avoidance, minimization and compensatory mitigation to address direct and indirect impacts of the development to low-density habitat for sage grouse. A compensatory mitigation plan shall be developed by the applicant and approved by the ODFW through DOGAMI's consolidated permit process (OAR Chapter 632, Division 37) and other applicable rules, including OAR Chapter 635, Division 420 and OAR Chapter 635, Division 415, prior to any construction or ground disturbing activities.

Given the agreement of the parties, the Planning Commission recommended that this condition be imposed.

As explained in detail below, the sage grouse rule includes essentially two elements. First, it requires local governments to consider whether a project should be allowed within certain mapped sage grouse habitat. The Patent Parcel includes a small amount of mapped “low-density” sage grouse habitat, which is a secondary habitat designation. The Planning Commission found that the minerals proposed to be mined make the project dependent on its proposed location and for this and other reasons, the Project should be allowed within sage grouse habitat.

The second element consists of mitigation requirements. The Applicant conducted several wildlife surveys, which are summarized in a Wildlife Report submitted in the Application. The report demonstrates that there are no sage grouse or sage grouse leks within two miles of the exterior of the project area and in particular, no evidence of sage grouse on the Patent Parcel. The Planning Commission questioned whether compensatory mitigation was appropriate in this instance. However, the County is required to defer mitigation decisions to ODFW. OAR 660-

023-0115(10)(C).

For the following reasons, staff recommends that the County Court adopt the Planning Commission's recommendation and approve the SGP with the above condition of approval.

18. APPLICABLE CRITERIA

SAGE GROUSE PERMIT CRITERIA OAR 660-023-0115(10) and (11)

(10) Program to achieve the goal of protecting significant sage-grouse habitat in a low density area.

(a) A county may approve a large-scale development in a low density area upon applying the mitigation hierarchy as follows:

(A) Avoidance. Before proceeding with large-scale development activity that impacts a low density area, the proponent must demonstrate that reasonable alternatives have been considered and that the activity or other action cannot avoid impacts within a low density area. If the proposed large-scale development can occur in another location that avoids both direct and indirect impacts within a low density area, then the proposal must not be allowed unless it can satisfy the following criteria:

(i) It is not technically or financially feasible to locate the proposed large-scale development outside of a low density area based on accepted engineering practices, regulatory standards, proximity to necessary infrastructure or some combination thereof; or

(ii) The proposed large-scale development is dependent on geographic or other physical feature(s) found in low density habitat areas that are less common at other locations, or it is a linear use that must cross significant sage-grouse habitat in order to achieve a reasonably direct route.

(B) Minimization. If the proposed use cannot be sited by avoiding a low density area altogether, including direct and indirect impacts, it shall be located to minimize the amount of such habitat directly or indirectly disturbed, and to minimize fragmentation of the low density area(s) in question by locating the development adjacent to existing development and at the edge of the low density area when possible. Uses should minimize impacts through micro-siting, limitations on the timing of construction or use, or both, and methods of construction.

(C) Compensatory Mitigation. Required consistent with the provisions of paragraph (9)(a)(D) above.

OAR 660-023-0115(9)(a)(D):

Compensatory Mitigation. To the extent that a proposed large-scale development will have direct or indirect impacts on a core area after application of the avoidance and minimization standards and criteria, above, the permit must be conditioned to fully offset the direct and indirect impacts of the development to any core area. The required compensatory mitigation must comply with OAR chapter 635, division 140.

(b) A county may approve a conflicting use as identified at subsection (7)(b) above when found to be consistent with the provisions of subsection (9)(b).

OAR 660-023-0115(9)(b):

A county may approve a conflicting use as identified at subsection (7)(b) above upon either:

*(A) Receiving confirmation from ODFW that the proposed conflicting use does not pose a threat to significant sage-grouse habitat or the way sage-grouse use that habitat; or
(B) Conditioning the approval based on ODFW recommendations, including minimization techniques and compensatory mitigation, if necessary, to resolve threats to significant sage-grouse habitat.*

(11) Program to achieve the goal of protecting significant sage-grouse habitat on general habitat.

(a) A county may approve a large-scale development on significant sage-grouse habitat in general habitat upon requiring:

(A) General Habitat Consultation. Minimizing impacts from development actions in general habitat shall include consultation between the development proponent and ODFW that considers and results in recommendations on how to best locate, construct or operate the development action so as to avoid or minimize direct and indirect impacts on significant sage-grouse habitat within the area of general habitat. A county shall attach ODFW recommendations as a condition of approval; and

(B) Compensatory Mitigation. Required consistent with the provisions of paragraph (9)(a)(D) above.

OAR 660-023-0115(9)(a)(D):

Compensatory Mitigation. To the extent that a proposed large-scale development will have direct or indirect impacts on a core area after application of the avoidance and minimization standards and criteria, above, the permit must be conditioned to fully offset the direct and indirect impacts of the development to any core area. The required compensatory mitigation must comply with OAR chapter 635, division 140.

(b) A county may approve a conflicting use identified in subsection (7)(b) above when found to be consistent with the provisions of subsection (9)(b).

OAR 660-023-0115(9)(b):

A county may approve a conflicting use as identified at subsection (7)(b) above upon either:

(A) Receiving confirmation from ODFW that the proposed conflicting use does not pose a threat to significant sage-grouse habitat or the way sage-grouse use that habitat; or

(B) Conditioning the approval based on ODFW recommendations, including minimization techniques and compensatory mitigation, if necessary, to resolve threats to significant sage-grouse habitat.

19. PROPOSED FINDINGS OF FACT

For this report, Staff reviewed all the evidence in the record to date to determine whether, based on that evidence, the Application satisfies all applicable criteria. The evidence in the record demonstrates that the Application meets all applicable criteria.

The Applicant provided a complete narrative explaining how the project meets all applicable criteria. Staff incorporates that narrative into this Staff Report and generally concurs with the Applicant's conclusions, and finds all applicable criteria are met for the reasons stated in the Applicant's narrative and in this report.

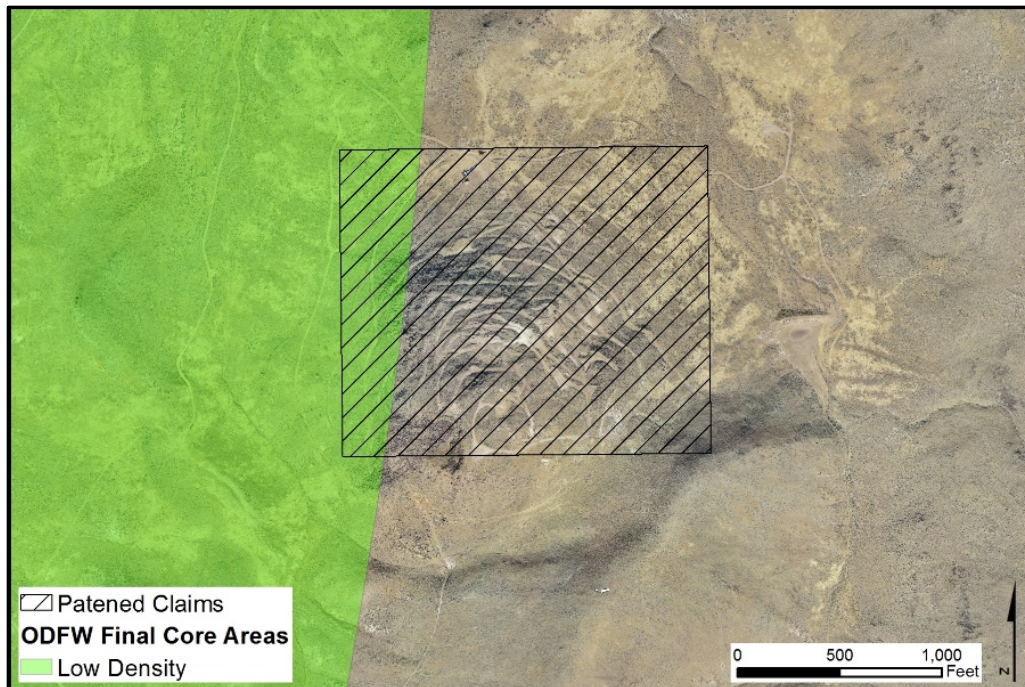
Staff does not repeat below the entirety of the application or Planning Commission findings. To aid the County Court, Staff provides the following findings:

The Sage Grouse Rule ("SGR") applies to "large scale developments," which include mining uses. The SGR requires local certain counties, including Malheur, to consider the impacts of "conflicting uses" (a definition the Project meets) on certain types of sage grouse habitat. The habitat types are "core area," "low density," and "general habitat," ranked in descending order of importance. The SGR imposes requirements for avoidance, minimization, and mitigation depending on the identified habitat type.

The requirements for core sage grouse habitat focus on avoidance. In low density and general habitat areas, the criteria allow more flexibility for minimizing and mitigating impacts.

The County's role in applying the SGR is to determine (1) whether a property is located in "core area" or "low density" sage grouse habitat, (2) whether a proposed project constitutes a "conflicting use" within that habitat, (3) if so, whether the project must be located in the proposed location due to some special characteristic of the property or location, and (4), if so, whether the proposed project can minimize potential impacts on sage grouse. Habitat mitigation requirements are imposed by the ODFW. In essence, the County must determine whether a project should be located in sage grouse habitat and if so, ODFW will impose habitat mitigation as necessary.

The Patent Parcel is located within a small amount of "low density" habitat and a large amount of general habitat, as shown on the following map:



Given that the mineral resources are located on the Patent Parcel, Staff finds that all the locational dependency requirements of the SGR are met. Staff also finds, based on the Applicant's Wildlife Report, there is no evidence of sage grouse habitat within two miles of the Project Area.

Applicable Criteria.

The Applicant's explanation of how the Project satisfies the SGR is set forth below, as are certain additional Planning Commission findings on the same criteria. See **Exhibit 1**.

- **Avoidance. A major development located in a "low density" habitat area must first try to avoid disturbance of the habitat, as OAR 660-023-0115(10)(a)(A) provides below:**

Before proceeding with large-scale development activity that impacts a low density area, the proponent must demonstrate that reasonable alternatives have been considered and that the activity or other action cannot avoid impacts within a low density area.

APPLICANT'S RESPONSE: The Project resource has only been identified on the patented mining claim, which is coterminous with the Patent Parcel boundaries. Therefore, the County can find that there is no other appropriate or feasible location for the Project.

ADDITIONAL PLANNING COMMISSION FINDING: There are no reasonable alternatives to locating the mine on the Patent Parcel because the resources sought to be mined are located beneath the Patent Parcel. The Project cannot avoid some limited impacts to the identified low density habitat for the same reason.

If the proposed large-scale development can occur in another location that avoids both direct and indirect impacts within a low density area, then the proposal must not be allowed unless it can satisfy the following criteria:

(i) It is not technically or financially feasible to locate the proposed large-scale development outside of a low density area based on accepted engineering practices, regulatory standards, proximity to necessary infrastructure or some combination thereof; or

APPLICANT'S RESPONSE: The Project resource has only been identified on the patented mining claim, which is coterminous with the Patent Parcel boundaries. Therefore, the County can find that there is no other appropriate or feasible location for the Project.

(ii) The proposed large-scale development is dependent on geographic or other physical feature(s) found in low density habitat areas that are less common at other locations, or it is a linear use that must cross significant sage-grouse habitat in order to achieve a reasonably direct route.

APPLICANT'S RESPONSE: As the Project satisfies (i), above, (ii) is inapplicable. However, to the extent that the County finds that it does apply, it can find that the Project is dependent on the geographic and physical features containing the mineral resource, which is certainly less common at other locations.

ADDITIONAL PLANNING COMMISSION FINDING: The proposed mine is dependent on geographic features found on the Patent Parcel - in this case, the resource geology of the Patent Parcel - and these features are not common at other locations. The Applicant has demonstrated based on substantial evidence, that the Patent Parcel contains the highest concentrations of valuable mineral resources within the Project Area and indeed, within all nearby mining claims, as explained on pages 41-55 of Application Exhibit 1. Furthermore, there is no evidence in the record of mineral resources of comparable value located entirely outside of mapped sage grouse habitat.

- **Minimization. As the Project cannot avoid low density habitat, we proceed to the next step, which OAR 660-023-0115(10)(a)(B) provides as follows:**

If the proposed use cannot be sited by avoiding a low density area altogether, including direct and indirect impacts, it shall be located to minimize the amount of such habitat directly or indirectly disturbed, and to minimize fragmentation of the low density area(s) in question by locating the development adjacent to existing development and at the edge of the low density area when possible. Uses should minimize impacts through micro-siting, limitations on the timing of construction or use, or both, and methods of construction.

APPLICANT'S RESPONSE: As explained above, the Project cannot avoid the low density area because it is geologically dependent on the proposed location. Within the Patent Parcel, the Project will be primarily located underground, with the only above-ground improvements being

the entry portal for the underground improvements and gravel stockpiling, and improved existing circulation roads. The Project design minimizes to the extent practicable the uses with the low-density habitat.

The primary structure on the patent parcel, the mine portal, cannot be relocated because it must face the area where processing is proposed to be conducted. Therefore, there is no basis for a finding that the underground mine can be redesigned to “minimize” impact on sage grouse habitat. Moreover, the substantial evidence in the record demonstrates that the small portion of “low density” habitat on the Patent Parcel is not actually occupied by any sage grouse.

ADDITIONAL PLANNING COMMISSION FINDING: The Proposed Mine and its related improvements (mine portal, ventilation shafts, circulation areas, backfill stockpile, backfill plant, and utilities) cannot be relocated to minimize impacts on low-density sage grouse habitat because those locations are necessary to facilitate use of the mine design presented in the Application at Exhibit 1, pages 71-78. In this instance, relocating proposed facilities could involve changing the location of the mine portal and related backfill areas, existing and proposed circulation routes, and mine ventilation portals. The Commission observes that the mine's proposed drift and fill dimensions "were defined to ensure underground stability" (Application Ex. 1, p. 71) and that the location of the above-mentioned facilities is related to the planned underground layout of the mine. The Commission finds that, in light of the obvious need to ensure the stability of the mine for safety reasons and, given the lack of evidence in the record demonstrating that a different mine design is feasible or appropriate, it is not feasible to further relocate proposed facilities on the Patent Parcel to minimize direct or indirect impacts on Sage Grouse.

In addition, the Commission adopts the following statement from the Applicant's March 26 letter:

"For purposes of this Application, the County must apply the sage grouse rule to the Patent Parcel only. The patent parcel contains only a small sliver of "low-density" sage grouse habitat along its western edge. The Applicant's Wildlife Report found no evidence of any sage grouse habitat within two miles of the boundary of the larger Project Area. The Application explains that [the] mine site may not be relocated to avoid the small low density habitat area, nor can it be developed differently to minimize impacts on that area. This is because the mineral resources are located only within the Patent Parcel.

"The primary structure on the patent parcel, the mine portal, cannot be relocated because it must face the area where processing is proposed to be conducted. Therefore, there is no basis for a finding that the underground mine can be redesigned to "minimize" impact on sage grouse habitat. Moreover, the substantial evidence in the record demonstrates that the small portion of "low density" habitat on the Patent Parcel is not actually occupied by any sage grouse."

In conclusion, the Commission finds that the SGP application satisfies OAR 660-

023-0115(10) for the above reasons.

- **Mitigation.** If impacts to the habitat are unavoidable, compensatory mitigation will be required:

To the extent that a proposed large-scale development will have direct or indirect impacts on a core area after application of the avoidance and minimization standards and criteria, above, the permit must be conditioned to fully offset the direct and indirect impacts of the development to any core area. The required compensatory mitigation must comply with OAR chapter 635, division 140. OAR 660-023-0115(10)(a)(C); (9)(a)(D).

APPLICANT'S RESPONSE: ODFW will review the Application and determine what mitigation requirements, if any, should be imposed.

ADDITIONAL PLANNING COMMISSION FINDING: The Commission observes that there appears to be insufficient evidence in the record to support a finding that sage grouse mitigation is necessary on the Patent Parcel for the reasons explained on page 22 of Applicant's April 22 letter. However, to the extent ODFW determines that mitigation is required on the Patent Parcel, the Commission finds that such a requirements will be adequately enforced by the above condition.

- **Findings for Approval.** Once the above analysis is completed, the County may approve the "conflicting use" (i.e. the mine) as follows:

(b) A county may approve a conflicting use as identified at subsection (7)(b) above upon either:

(A) Receiving confirmation from ODFW that the proposed conflicting use does not pose a threat to significant sage- grouse habitat or the way sage-grouse use that habitat; or

(B) Conditioning the approval based on ODFW recommendations, including minimization techniques and compensatory mitigation, if necessary, to resolve threats to significant sage-grouse habitat. OAR 660-023-0115(9)(b).

APPLICANT'S RESPONSE: As part of the DOGAMI Consolidated Permit process, ODFW will be completing a review of the impact of the Project on sage grouse within the entire Project Area. Construction and mining will not begin until the DOGAMI Consolidated Permit is issued. To avoid unnecessary duplication of ODFW's review process, the Applicant requests that the County impose a condition requiring compensatory mitigation for threats to significant sage grouse habitat within the Patent Parcel, as follows:

"The Applicant shall comply with ODFW minimization and compensatory mitigation requirements, if any, for threats to significant sage-grouse habitat on the Patent Parcel."

With this condition, the County may approve a conflicting use on the Patent Parcel.

STAFF FINDING: Staff concurs with the Applicant's statement, and notes that the applicant and ODFW agreed on different language for the recommended condition of approval. The resources proposed to be mined are only located on the Patent Parcel; therefore it cannot be located to avoid the habitat, nor can the facilities thereon be located to "minimize" impacts within the habitat. However, Staff notes that the complete absence of sage grouse activity or habitat, within the Patent Parcel or within the greater Project Boundary, is substantial evidence that the Project will have few impacts, if any, on sage grouse habitat. Staff also notes that the vast majority of the surface of the Patent Parcel is not proposed to be altered, further reducing the likelihood that the Project will impact sage grouse.

To satisfy OAR 660-023-0115(9)(b), Staff recommends the following condition, as requested by ODFW:

Condition 1: The Applicant shall comply with OAR Chapter 660, Division 023 and OAR Chapter 635, Division 140. The Applicant must coordinate with ODFW and apply the mitigation hierarchy of avoidance, minimization, and compensatory mitigation to address direct and indirect impacts of the development to low-density habitat for sage grouse. A compensatory mitigation plan shall be developed by the Applicant and approved by the ODFW through DOGAMI's consolidated permit process (OAR Chapter 632, Division 37) and other applicable rules, including OAR Chapter 635, Division 420 and OAR Chapter 635, Division 415, prior to any construction or ground disturbing activities.

For the above reasons, Staff finds that the Application satisfies the applicable SGR regulations.

20. PUBLIC TESTIMONY

- Four individuals, as well as the Snake River Economic Development Alliance, offered testimony in support of the Application.
- ODFW and the Department of Land Conservation and Development (DLCD) submitted a joint letter, dated March 25, which could be characterized as neutral testimony. This letter as well as the Applicant's response is enclosed as **Exhibits 2 and 3**. Staff concurs with and adopts the Applicant's response to issues raised by the state agencies.
- The Oregon Natural Desert Association and 1000 Friends of Oregon submitted written testimony in opposition to the project. The Applicant submitted a written response. These are enclosed as **Exhibit 4 and 5**, respectively. Staff concurs with and adopts the Applicants response to issues raised by the state agencies.

21. CONCLUSION

Staff recommends that the County Court APPROVE the Application with the following condition of approval:

Condition 1: The Applicant shall comply with OAR Chapter 660, Division 023 and OAR Chapter 635, Division 140. The Applicant must coordinate with ODFW and apply the mitigation hierarchy of avoidance, minimization, and compensatory mitigation to address direct and indirect impacts of the development to low-density habitat for sage grouse. A compensatory mitigation plan shall be developed by the Applicant and approved by the ODFW through DOGAMI's consolidated permit process (OAR Chapter 632, Division 37) and other applicable rules, including OAR Chapter 635, Division 420 and OAR Chapter 635, Division 415, prior to any construction or ground disturbing activities.

22. COUNTY COURT DECISION:

The County Court may approve the application, approve the application with conditions, or deny the application. The County Court may impose conditions different than, or in addition to, the conditions recommended by Staff or the Planning Commission. To aid the County Court, Staff offers the following example motions:

- Adopt the Planning Commission's recommendation and approve Application with the Condition recommended by the Planning Commission.
- Approve the Application with the following conditions of approval [list conditions].
- Deny the Application because it fails to satisfy the following criteria [list criteria].

23. EXHIBITS

- Adopted Planning Commission Findings of Fact (without attachments)
- ODFW/DLCD Letter
- Applicant's Response to ODFW/DLCD Letter
- ONDA/1000 Friends of Oregon Letter (without attachments)
- Applicant's Response to ONDA/1000 Friends of Oregon Letter (without attachment)