

March 27, 2019

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**VIA E-MAIL**

Mr. Eric Evans  
Planning Director  
Malheur County  
251 "B" St. West #12  
Vale, OR 97918

**Re: ODFW/DLCD Comments on Calico Resources' Conditional Use Permit Application**

Dear Mr. Evans:

As you know, this office represents Calico Resources USA Corp. in its application for a conditional use permit. This letter is respectfully submitted in response to the joint letter of the Oregon Department of Fish and Wildlife (ODFW) and Oregon Department of Land Conservation and Development (DLCD) (together, the "state agencies"). We request that you place this letter before the Planning Commission for its March 28, 2019 hearing. As explained below, Calico agrees with the state agencies' letter in part and disagrees in part.

The state agencies' letter makes a number of recommendations regarding potential conditions of approval and provides their view of the County's land use process. Calico has worked closely with Oregon Department of Geology and Mineral Industries (DOGAMI) as the lead agency in Calicos' chemical mining permit, as well as DLCD and ODFW, and although the state agencies did not clearly express their concerns regarding the Application prior to issuing this letter, Calico appreciates their feedback and perspective on the County's proceedings. Calico also looks forward to continuing to work with the state agencies as it continues through the state's chemical mining permit process.

As an initial matter, the state agencies' letter makes few distinctions between the land use activities on federal land and those on the Patent Parcel. While this may be appropriate from a state agency standpoint, the distinction matters for purposes of the Planning Commission's review. As the letter correctly observed, the County does not assert jurisdiction over federal lands. Therefore, potential project impacts on such federal lands are beyond the scope of the Commission's review in this case, which is expressly for an underground mining activity on the Patent Parcel. Similarly, with respect to the state's new Sage Grouse Rules, the task before the Commission is to apply those rules to the patent parcel only.

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With that context established, Calico respectfully offers the following responses to the comments and recommendations from the state agencies:

- *Proposed condition regarding compliance with Sage Grouse Rules.*

As explained in the Staff Report, the Sage Grouse Rules require findings by the County regarding whether or not the proposed mine must be located within mapped low-density sage grouse habitat, or whether it can sited to “avoid” that habitat by locating the project elsewhere. OAR 660-023-0115(10)(a). Once the County makes that finding, it must consider whether the impact can be “minimized” by avoiding a low density area altogether or by locating the use to minimize the amount of habitat directly or indirectly disturbed, and to minimize fragmentation by locating the development at the edge of the low density area when possible. *Id.* (B).

Ultimately, the County may approve a conflicting use (in this case, the underground mine) 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(10)(a).

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 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.

However, ODFW will have the opportunity to take a holistic look at the sage grouse habitat impacts on the entirety of the Project Area. In order to relieve ODFW of having to make two sets of mitigation requirements (one for the Patent Parcel and the other for

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the federal land), Calico and state agency representatives met in September of 2018 to discuss a condition that the County could apply that would require Calico to comply with whatever mitigation requirements ODFW ultimately imposes. The state agencies orally agreed to this approach at that meeting. Accordingly, Calico proposed the following condition of approval, which was recommended by Staff as Condition 5:

“The Applicant shall comply with ODFW minimization and compensatory mitigation requirements, if any, for threats to significant sage-grouse habitat on the patent parcel.”

The state agencies recommend a different, more complicated condition:

“To satisfy the requirements of approving a conflicting use within significant sage-grouse habitat, 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.”

As the state agencies' proposed condition would accomplish the same thing as Condition 5, Calico supports the County applying the above condition in lieu of Condition 5.

- *“CUP application references these requirements, but it does not sufficiently demonstrate how OAR 660-023-0115(10) and OAR 635-140-0025(2) and 0025(3) are satisfied.”*

While Calico understands that the state agencies will require more analysis of the minimization techniques used within the processing area on federal land, Calico addressed each requirement of OAR 660-023-0115(10) with respect to the Patent Parcel in the Application.

The state agencies do not explain how OAR 635-140-0025(2) or 0025(3) are directly applicable to a land use application before the County, which pursuant to ORS 197.175(2) provides that the County must make its decision based on its own comprehensive plan and land use regulations. For these reasons, the County can find that OAR Chapter 635 regulations do not directly apply to the Application.

- *“The Applicant did not conduct a pre-application conference.”*

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OAR 660-023-0115(8) provides only that an Applicant “should” conduct a pre-application conference, it does not *require* such a conference. However, the Commission can find that the meetings Calico has held with regulators provided all relevant agencies with sufficient information. The Applicant met with County staff to discuss the application and the Sage Grouse Rules on July 31, 2018. The Applicant met with relevant staff from DLCD and ODFW, both in person and via conference call, on September 5, 2018, to discuss the requirements of the Sage Grouse Rule.

- *“The access road bisects ODFW designated “big game winter range” for approximately five miles on the north end.” “ODFW recommends a condition of approval that requires bussing from Vale.”*

All roads leading to the Patent Parcel are already in place and a proposal for reconstruction of that road is not currently before the Commission. While Calico does intend to provide shuttles, potential changes to the processing area may make this more or less difficult. The Applicant’s trip generation estimate is conservatively based on a “worst case scenario” in which each employee drives his or her own vehicle. Even under this scenario, trip generation is anticipated to be no more than 250 average daily trips, which is far below the County’s 400 trip threshold for requiring a full transportation impact analysis. The state agencies have not identified any County criterion that the Application fails to meet that could only be met with this condition; therefore, the Commission can find that such condition is unnecessary.

- *“ODFW and DLCD recommend the County include a condition of approval that Calico reapply to the County if there are inconsistencies identified or significant modifications.”*

The only application before the County is for an underground mine on the Patent Parcel. All of the issues identified by the state agencies related to this request appear to address improvements outside of the Patent Parcel. Therefore, the agencies have not identified any basis in the County’s Plan or land use regulations to require “reapplication.” Similarly, they have not identified any provisions of the County’s Plan or land use regulations that would require such a condition. And, doing so could prove extremely prejudicial to Calico by providing continued avenues for project opponents to further delay what the County approves.

Moreover, the condition is unnecessary: if the activity on the Patent Parcel changes with respect to any of the applicable County land use regulations, the County can review and approve a modification of the conditional use permit, provided that the permit is still valid.

Finally, there is practical a problem with ODFW’s approach. The agencies stated position is that it may require substantial changes throughout the Project Area to comply with state habitat regulations after the chemical mining permit has been submitted. While

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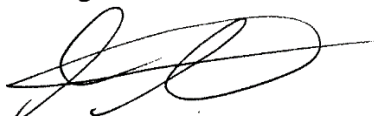
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that may be the case, such requirements should not, in themselves, serve to invalidate the County's *prior* approval of the mining activity. This condition implicitly defers to the state agencies the County's authority to decide for itself whether changes on the Patent Parcel would be in substantial conformance with an approved conditional use permit. The County should avoid taking this approach.

In conclusion, the central thrust of the state agencies letter is consistent with Calico's and the County's interpretation and application of the Sage Grouse Rules. For that reason, Calico has no objection to the agencies' proposed re-wording of Condition 5. The state agencies' other observations and recommendations do not appear to be related to the applicable criteria in the County's Plan or land use regulations. Given the fact that state agencies will have ultimate authority to grant or deny Calico's chemical mining permit, without which mining cannot begin, the additional conditions recommended by the agencies are unnecessary.

Best regards,



Garrett H. Stephenson

GST:jmhi

Enclosure

Cc Ms. Stephanie Williams (*via email*) (*w/enclosure*)  
Ms. Nancy Wolverson (*via email*) (*w/enclosure*)  
Mr. Carlo Buffone (*via email*) (*w/enclosure*)  
Mr. Glen Van Treek (*via email*) (*w/enclosure*)  
Mr. Brien Flanagan (*via email*) (*w/enclosure*)

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# Oregon

Kate Brown, Governor

**Department of Fish and Wildlife**  
Klamath-Malheur Watershed District Office  
Klamath Wildlife Area  
1850 Miller Island Rd.  
Klamath Falls, Oregon 97603  
(541) 883-5732  
FAX (541) 883-5521

March 25, 2019

Malheur County Planning Department  
Attn: Eric Evans, Planning Director  
251 B. Street West, Vale, Oregon 97918



RE: ODFW/DLCD Comments on the Conditional Use Permit Application for Calico  
Resources USA Corp/Grassy Mountain Mine Project

Dear Director Evans,

The Oregon Department of Land Conservation and Development (DLCD) and the Oregon Department of Fish and Wildlife (ODFW) appreciate the opportunity to review the Malheur County Conditional Use Permit (CUP) Application for Calico Resources USA/Grassy Mountain Mine Project (Calico), dated January 15 2019. DLCD and ODFW are *Cooperating Agencies* per the Chemical Process Mining statutes and rules administered by the Department of Geology and Mineral Industries (DOGAMI)<sup>1</sup>, and staff within our agencies have been participating in the planning and pre-application phase of the mine project. We will continue to work collaboratively with DOGAMI through the state's Consolidated Application Process, including compliance with ODFW's Chemical Process Mining Rules<sup>2</sup>. Please include the following comments and recommendations in the record for the local land use hearing scheduled for March 28, 2019.

DLCD and ODFW understand that Malheur County is only asserting jurisdiction and Conditional Use Permit review to the patented parcel of the project, which includes the underground gold and silver mine on approximately 62 acres of land zoned Exclusive Range Use. As the CUP application outlines, the proposed underground mine within the patented claim area is one element of the larger Project Area that includes federal land managed by the Bureau of Land Management and will require state and federal permitting. The other interrelated project elements includes the processing facility, tailings storage facility, waste rock storage facility, borrow pits for production of backfill rock, ancillary buildings and facilities, interior circulation roads, on-site septic systems, and the access roads to the site. The entire project, including elements associated with the patented claim area, have direct and indirect impacts to wildlife and habitat resources of the state, as described below, which will be addressed through the consolidated permit process.

The proposed project elements of the Conditional Use Permit Application located on the patented parcel includes mapped low density sage-grouse habitat and requires compliance with the administrative rules<sup>3</sup> adopted for the purpose of implementing the Oregon Sage-Grouse

<sup>1</sup> ORS 517; [OAR Chapter 632, Division 037](#)

<sup>2</sup> OAR Chapter 660, Division 420: <https://www.dfw.state.or.us/OARs/420.pdf>

<sup>3</sup> <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=175722>;  
<https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=2977>

Action Plan and Executive Order 15-18, including the Greater Sage-Grouse Conservation Strategy for Oregon. Per OAR 660-023-0115, Greater Sage-Grouse habitat is identified as a Significant Goal 5 resource. Large-scale developments, such as mining, are considered a conflicting use that require application of the mitigation hierarchy set forth at OAR 660-023-0115(10) and OAR Chapter 635, Division 140. This three step process has been designed to foster coordination between an applicant, the county and ODFW.

To properly apply the mitigation hierarchy, the county must find that impacts within Significant Sage-Grouse habitat cannot be avoided. If this test is satisfied, the county must then find that the proposal has been minimized to the extent possible. If a project proposal is suitably minimized, and direct or indirect impacts remain outstanding, the county must then proceed to consideration of compensatory mitigation. In this context, the compensatory mitigation shall be responsive to direct and indirect impacts to all levels of significant sage-grouse habitat, including general, low-density and core habitat. Compensatory mitigation requirements consistent with OAR Chapter 635, Division 140 must be attached to the county decision as a condition of approval.

The CUP application references these requirements, but it does not sufficiently demonstrate how OAR 660-023-0115(10) and OAR 635-140-0025(2) and -0025(3) are satisfied. In an effort to demonstrate findings for approval, Calico approached DLCD and ODFW with a proposal to defer mitigation requirements to be addressed through DOGAMI's consolidated permit process. In order to comply with OAR 660-023-0115(9)(b), Calico proposed a condition that requires compliance with ODFW requirements (page 40 of the CUP application<sup>4</sup>). Given that the DOGAMI consolidated permit process requires local land use approval, DLCD and ODFW are willing to consider this proposed approach if the county approves the following condition of approval to address significant sage-grouse habitat. The Departments' willingness to consider this approach is due to both the unique nature of the State's chemical mining process and rules as well as factors unique to the proposed Grassy Mountain Project, such as the project's location on both private land (over which the County asserts jurisdiction) and federal land (where the County does not assert jurisdiction). This approach However, this alternate proposal should not be considered applicable or in compliance with OAR Chapter 660, Division 23 for any other project without DLCD's and ODFW's review and consent. DLCD and ODFW requests that the County adopt the following condition to address significant sage-grouse habitat:

- **Proposed Condition:** To satisfy the requirements of approving a conflicting use within significant sage-grouse habitat, 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,

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<sup>4</sup> See page 40 of CUP application, "ODFW will review the Application and determine what mitigation requirements, if any, should be imposed."



Division 420 and OAR Chapter 635, Division 415, prior to any construction or ground-disturbing activities.

If the county does not adopt the above recommendation to address compliance with OAR Chapter 635, Division 140 and OAR Chapter 660, Division 023, ODFW recommends the county require Calico to apply the mitigation hierarchy including developing a compensatory mitigation plan to address the threats to significant sage-grouse habitat (i.e., core, low density, general habitat within 3.1 mile of a lek). Since Calico has not initiated development of the mitigation plan or thoroughly addressed the avoidance and minimization standards and criteria in the CUP application, the absence of a condition to satisfy these requirements would render the CUP application incomplete. In addition, it is important to note that approval of the required habitat mitigation plans by the State is a prerequisite to a *Consolidated Permit Application* being deemed complete.

As discussed above, DLCD and ODFW would like to highlight some additional elements of the CUP application:

**Greater Sage-Grouse:** DLCD and ODFW acknowledge that Calico has been coordinating through DOGAMI's consolidated permit application process, per OAR Chapter 632, Division 37, and as a requirement will need to satisfy the rules for compliance with the Greater Sage-Grouse Conservation Strategy. However, per OAR 660-023-0115(8), a pre-application conference was not convened by the county to discuss the conflicting use in significant sage-grouse habitat. The CUP application does not thoroughly evaluate or address the requirements for avoidance, minimization and compensatory mitigation to fully offset the direct and indirect impacts of the development action to low-density or general sage-grouse habitat. This includes the demonstration that reasonable alternatives have been considered. The State will be reviewing the Consolidated Application, where Calico will be required to address the wildlife requirements on both the patented claim area and larger Permit Area.

**Wildlife Resources Baseline Report:** Calico has included a Wildlife Resources Baseline Report (Report) in Exhibit 7 of the CUP application, which the county references this document to support findings. It is important to note that the Wildlife Resources Baseline Report is a draft report that has not yet been accepted by the Technical Review Team as part of the DOGAMI consolidated permitting process. Moreover, the express purpose of the Report, per the approved Baseline Data Work Plans in 2017, is to document existing conditions of wildlife habitat and populations – not to draw conclusions in project impacts, mitigation, or permitting.

As ODFW understands it, Calico will be providing an amended Report to DOGAMI to address ODFW concerns. However, we are concerned that it appears as if the county referenced this Report to demonstrate compliance with the Fish and Wildlife Habitat Protection Plan, and ultimately OAR Chapter 660, Division 23 and OAR Chapter 635,



Division 140. For example, the CUP application states that habitat was characterized in accordance the ODFW Fish and Wildlife Habitat Mitigation Policy and includes references to habitat categories based solely on vegetation, which have not been verified or concurred with by ODFW. Final habitat characterization will require consideration for mapped or known special status species occurrence or other factors that will modify a habitat category. Examples include but are not limited to mapped sage-grouse habitat, big game winter range, burrowing owls or sensitive raptor nest locations.

**Wildlife Habitat:** DLCD and ODFW acknowledge that the county comprehensive plan and implementing ordinances do not designate Goal 5 resources, other than Greater Sage-Grouse per OAR Chapter 660, Division 23, on the patented parcel. However, ODFW would like to acknowledge this does not demonstrate the absence of wildlife habitat, and specifically wildlife habitat that should be considered for planning decisions. For example, while the patented claim area does not include county acknowledged winter range for big game through the Goal 5 process, the access road bisects ODFW designated big game winter range<sup>5</sup> for approximately 5 miles on the north end. In addition, there are many other wildlife species, such as raptor nests and burrowing owls, which will need to be addressed during DOGAMI's consolidated permit application. This includes compliance with ODFW's chemical mining rules (OAR Chapter 635, Division 420) and compliance with the Fish and Wildlife Habitat Mitigation Policy (OAR Chapter 635, Division 415).

**Consistency with Local and State Conditions:** The CUP application includes narratives or statements that propose compliance or findings of fact to support county approval. DLCD and ODFW believe that proposed actions are not sufficient, and recommend that the county adopt specific standards and conditions. For example, the CUP application references that mine employees will be provided a daily bus shuttle option from Vale to limit the number of personal vehicles travelling to the site. ODFW recommends the county include a condition of approval that requires bussing employees from Vale. In addition, improvements to Mitchell Butte Road have not been discussed in the DOGAMI or county processes thus far, however, a requirement to bus from Vale could alleviate potential traffic concerns and specifically concerns related to wildlife.

ODFW and DLCD will continue to coordinate with DOGAMI and Calico during the consolidated permit application process to address the concerns raised in this letter. During that review process, there may be significant modifications to the proposed project referenced in the CUP application. Therefore, ODFW and DLCD recommend the County include as a condition of approval, a requirement for Calico to reapply to the County if there are inconsistencies identified or significant modifications, such as but not limited to access routes, power and water, fire

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<sup>5</sup> <https://nrimp.dfw.state.or.us/DataClearinghouse/default.aspx?p=202&XMLname=885.xml>

protection, water sourcing and employee bussing. Thank you for the opportunity to include these comments in the record. If you have any questions, please contact our office at any time.

Sincerely,

A handwritten signature in blue ink that reads "Trevor Watson". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Trevor Watson  
Oregon Department of Fish and Wildlife  
Klamath and Malheur District Manager

A handwritten signature in blue ink that reads "Jon Jinings". The signature is stylized and cursive, with the first name and last name clearly distinguishable.

Jon Jinings  
DLCD Community Services Specialist