IN THE CIRCUIT COURT OF THE STATE OF OREGON

COUNTY OF DESCHUTES

PINNACLE UTILITIES, LLC, an Oregon Limited Liability Company, Petitioner, v. OREGON WATER RESOURCES DEPARTMENT, an agency of the state of Oregon, Respondent, And, WATERWATCH OF OREGON, an Oregon non-profit. Intervenor-Respondent.	Case No. 22CV08683 MEMORANDUM OPINION RE: AMENDED PETITION FOR JUDICIAL REVIEW

This matter came before the court on November 5-8, 2024, for trial on Petitioner's Amended Petition for Judicial Review of the Final Order to Deny Limited License Application LL-1879 issued by the Oregon Water Resources Department (OWRD) (Respondent) on September 15, 2021. On November 27, 2023, by stipulation of the parties, WaterWatch of Oregon (WaterWatch) (Intervenor-Respondent) was granted permission to intervene herein.

During trial, and after Petitioner had rested its case, Respondent moved for dismissal of Petitioner's claims in paragraphs 16-18 pursuant to ORCP 54B(2). The court declined to render any judgment until the close of the evidence.

Also, during trial, at the close of Petitioner's case, and as well at the close of Intervenor-Respondent's case, Petitioner moved for judgment in its favor citing ORCP 54B(2). The court denied Petitioner's motion on the basis that ORCP 54(B)(2) does not provide a basis for doing so.

At the close of trial, the court granted the parties permission to submit closing arguments in writing along with proposed findings and conclusions of law. The parties submitted their written closing arguments as allowed by the court along with proposed findings of facts and conclusions of law. Respondent OWRD also filed a Motion for Leave to file Sur-Reply, which included the sur-reply. The Motion for Leave to File Sur-Reply is denied, and any sur-reply arguments submitted shall be stricken and are not considered by the court. The court otherwise considered the evidence and arguments presented and makes the following findings and conclusions herein.

Petitioner, Pinnacle Utilities, LLC, (Pinnacle, LLC) is an Oregon domestic limited liability company that was created to provide water and other utility services to the Thornburg Resort, a destination resort being built in Deschutes County.

OWRD is an agency of the State of Oregon that is charged by statute with administering and enforcing the State's water laws pursuant to ORS 536.037.

WaterWatch is an Oregon domestic non-profit whose mission is to protect and restore flows in rivers and streams to sustain the native fish, wildlife, and people who depend on them.

Jurisdiction for judicial review of orders other than contested cases is conferred upon the circuit court for the county in which the petitioner resides or has a principal business office. ORS 183.484(1). The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

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> (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency: or
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> (C) Otherwise in violation of a constitutional or statutory provision.

ORS 183.484(5)(b). The court shall…remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.484(5)(c). If an administrative agency issues an order that is inconsistent with an earlier policy or practice, the inconsistency does not make that order impermissible or unlawful unless the agency fails to provide a rational, fair, and principled explanation for the inconsistency. *Gordon v. Bd. Of Parole & Post Prison Supervision.* 267 Or App 126, 145 (2014). An inconsistent order is subject to remand by the court only if the inconsistency is not explained by the agency. *Id.*

At issue are Petitioner's claims, set forth in the Amended Petition, paragraphs 16-19, and the ORCP 23B Stipulations that:

The Order denying Application LL-1879 is inconsistent with past agency practice and is not supported by substantial evidence because the determination that water is not available is based on water level declines in wells in an undefined "broader area" rather than on wells in the immediate vicinity of Petitioner's wells that do not show declines." (Amended Petition, ¶ 16);

The Order is inconsistent with past agency practice because previous similar applications have been approved, even though the declines in groundwater level identified in the Review as the reason for the denial of LL-1879 have existed for several years; (Amended Petition, ¶ 17).

The Order is inconsistent with Respondent's officially stated position that water is available for Thornburgh's use, as stated in Respondent's issued Permit G-17036 in 2013; (Amended Petition, ¶ 18)

The Order's determination that water is not available is intentionally inconsistent and is not supported by substantial evidence, since Respondent's own findings state that the recharge in the Basin vastly exceeds groundwater appropriation, that the groundwater is not over-appropriated, and that the proposed use would not injure other water rights (Amended Petition, ¶ 19); and

The Order is inexplicably inconsistent with prior agency practice, in particular, a practice of approving groundwater permit and limited license applications notwithstanding long-term declines in groundwater levels (ORCP 23B Stipulations, sub d).

Prior to trial, the parties jointly submitted the following stipulation of facts:

1. This case involves limited license application LL-1879 (LL-1879), which was submitted by Petitioner on June 11, 2021.

2. LL-1879 requests 4.5 cubit feet per second from five wells, one of which is constructed (DESC 756). LL-1879 contemplates the use of water for road construction or maintenance, general construction and quasi-municipal use. Such use would be year-round and would continue for up to five years from the date of issuance.

3. Respondent issued groundwater Permit G-17036 to Thornburg Utility Group LLC. That permit is now owned by Petitioner. The permit, when issued, authorized use of 9.28 cubic feet per second of groundwater from six wells, limited to a maximum annual volume of 2,129 acre-feet, for quasi-municipal uses, including irrigation of golf courses and commercial areas, and maintenance of reservoirs within the boundaries of the Thornburgh Resort. The permit has a priority date of February 9, 2005, and was issued on April 3, 2013.

4. One of the conditions of Permit G-17036 is that Petitioner complete construction and application of the water by April 3, 2018. Another condition of the permit is that Petitioner must, within one year of making beneficial use of water, submit a "claim of beneficial use…prepared by a Certified Water Rights Examiner."

5. Petitioner did not submit a claim of beneficial use. Instead, Petitioner submitted a timely application for Extension of Time to Respondent, requesting additional time to complete construction and to apply water to full beneficial use.

6. Respondent initially proposed to deny the extension, but later issued an order approving the extension after Petitioner submitted additional information. Following that, an

individual petitioned for judicial review of the approval order, in response to which Respondent withdrew the approval order for reconsideration.

7. On July 26, 2022, Respondent issued a Superseding Proposed Final Order, in which it proposed to deny Petitioner's request for extension. Petitioner has protested that Superseding Proposed Final Order. As of September 30, 2024, Respondent had not yet referred the matter for a contested-case hearing.

8. Petitioner stipulates that the use of water under LL-1879 will not occur in conjunction with Petitioner's existing Permit G-17036. Respondent in its Final Order to Deny LL-1879 (Order) states that "The Department has determined that groundwater will not likely cause injury to the prior water rights, as long as the use of the water under this limited license will not occur in conjunction with existing Permit G-17036, as stated in the application.

9. Petitioner is limited by a land use approval to a maximum annual volume of 1460 acre-feet of water use. That approval is on appeal by other parties and does not involve a challenge to the maximum volume of water use. Petitioner further stipulates that it does not intend to and will not use LL-1879 to appropriate more than 2 cubic feet per second and 635 acre feet of groundwater per year during the five year period following issuance of LL-1879, should that occur.

10. In a section tilted "Conclusion of Law," the Order states, "The proposed water use will impair or be detrimental to the public interest pursuant to OAR 690-340-0030(2)." This Conclusion of Law and Respondent's denial of LL-1879 are based solely on the Order's Finding of Fact No. 4, which states, "As part of its review to determine groundwater availability, the Department has determined that groundwater for the proposed use will not likely be available within the capacity of the groundwater resource; therefore, water is not available for the proposed use."

11. Respondent stipulates that it does not have a Groundwater Review form specific to limited licenses, such as LL-1879. The Groundwater Review form for LL-1879 is the same

form that Respondent would have used for groundwater permit reviews at the time of that review.

12. Respondent stipulates that there are no substantive or material changes-i.e., changes other than formatting or grammatical changes-to Section B ("Groundwater Availability Considerations") of its Groundwater Review Form between March 21, 2005, the date of its Groundwater Review for LL-1879.

13. Respondent stipulates that, as described in Dr. Michael Thoma's Groundwater Review dated August 12, 2021, recharge to the Deschutes Basin and the Deschutes Formation Aquifer vastly exceeds the extent of groundwater appropriations for the aquifer and that the groundwater proposed for use by LL-1879 is not over-appropriated.

14. Respondent has previously approved groundwater permits and limited licenses in the Deschutes Basin, including in the area of the use proposed by LL-1879, where there were acknowledged downward groundwater trends.

15. For the purposes of this trial, Respondent stipulates that LL-1879 was the first groundwater application in the Deschutes Basin for which Respondent has determined, based on current declining groundwater levels, that "groundwater for the proposed use will not likely be available within the capacity of the groundwater resource; therefore, water is not available for the proposed use."

16. Respondent stipulates that between 2016 and 2024, various discussions occurred between Respondent and the Water Resources Commission regarding groundwater policy and application reviews. Respondent further stipulates that the content of those discussions did not impact Respondent's approach to determining whether the proposed use in LL-1879 is within the capacity of the resource or Respondent's decision to deny LL-1879.

Under Oregon law, OWRD, when reviewing an application to acquire a wholly new right to appropriate groundwater or to enlarge upon any existing right to appropriate ground water, except for any purpose exempt under ORS 537.545, is required to:

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...determine whether the proposed use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525. The Department shall presume that a proposed use will ensure the preservation of the public welfare, safety and health if the proposed use is allowed in the applicable Basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either:

(a) One or more of the criteria for establishing the presumption are not satisfied; or

(b) The proposed use would not ensure the preservation of the public welfare, safety and health as demonstrated in comments, in a protest under subsection (7) of this section or in a finding of the department that shows:

(A) The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected; and

(B) Specifically, how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected."

ORS 537.621(2). In making the required finding, OWRD conducts a "public interest review. (Review)" OWRD must first find that the proposed water use will not impair or be detrimental to

the public interest. For a groundwater rights use application, the Review consists of an analysis of whether the proposed use is within the capacity of the resource. The analysis is conducted by OWRD's Groundwater Section. A determination by the Groundwater Section that the proposed use is not within the capacity of the resource will yield a finding by OWRD that the proposed use is not in the public interest.

In a February 11, 2005-Memo (2005-Memo), OWRD outlined the framework for what constitutes the capacity of the available groundwater resource with respect to the review of applications for the use of groundwater. The 2005-Memo provided, inter alia, the following definition of capacity of the resource pursuant to the Oregon Administrative Rules:

> **Definitions**
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> (4) "Capacity of the Resource" means the ability of a surface water or groundwater resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource.

OAR 690-400-0010(4). The 2005-Memo further discussed several criteria that may be used to determine 1) over-appropriation, 2) significantly impairing the function of the resource, or significantly impairing the function of the resource. Included within the criteria are whether 1) water levels in a groundwater reservoir or part thereof have declined excessively, 2) ongoing lowering of water level in a groundwater reservoir or part thereof have excessively declining water levels, and 3) permit condition triggers have been exceeded for the area (and aquifer) of interest. OWRD has been using these criteria when reviewing groundwater use applications since 2005, and at the time of the denial of Pinnacle's application.

The groundwater resource at issue is within the Deschutes Formation which is an aquifer system. An aquifer system consists of individual aquifers with similar hydrogeologic properties. Surface water throughout the Deschutes Basin is fully allocated or over-allocated most months of

the year, and surface water is generally not available for appropriation of new out-of-stream uses or new storage. A joint study by OWRD and the U.S. Geological Survey (USGS) of groundwater resources of the Deschutes Basin established that there is a hydraulic connection between groundwater and surface water across the Deschutes Ground Water Study Area. Based on the conclusions of the study, OWRD determined that groundwater appropriations within the Deschutes Ground Water Study Area have the potential for substantial interference with surface water as described in OAR 690-0009 and will measurably reduce scenic waterway flows as defined in ORS 390.835, unless mitigation is provided pursuant to the rules in OAR 690-505.

Rulemaking conducted by OWRD in 2002 (OAR 690-505-0500-0630 Deschutes Mitigation Rules and OAR 690-550 Mitigation Banks) established the Deschutes Basin Groundwater Mitigation program to mitigate the impact of groundwater development in the Deschutes Groundwater Study Area on the Deschutes State Scenic Waterway. This program allows for limited, additional groundwater development using mitigation to offset the impacts to the State Scenic Waterways and specific instream rights. Mitigation refers to addressing water that is not making it back into the groundwater after consumptive use. The program was not designed to mitigate for other potential impacts of groundwater development such as groundwater level declines, capture of groundwater otherwise flowing to local springs or other groundwater dependent ecosystems, or hydraulic interference with other groundwater users. In addition to the Deschutes Groundwater Mitigation Program, there are other laws and policies that affect the allocation and management of groundwater.

Long-term groundwater level records in the central part of the Deschutes Basin have shown that some areas are experiencing persistent groundwater level declines, particularly in an area extending from the vicinity of Bend, north toward Lake Billy Chinook, and northeast toward Redmond and Powell Butte. Long-term groundwater level records from select wells in this and the surrounding region were normalized to Sping-1995 levels. Water levels since Spring-1995 vary spatially and highlights different trends in different sub-areas. A collaborative OWRD-

USGS Study (Study) looked at measured groundwater level changes from 1997-2008. The Study estimated that groundwater level changes in each of the sub-areas are due to, in order of impact, 1) climate influences (i.e., changes in precipitation and recharge), 2) increased groundwater pumping, and 3) reduced recharge through canals due to canal lining.

Hydrologic trends show a shift towards drier conditions since the later 1990s that has accompanied a warming trend in the Basin. Observed changes in precipitation and snowpack due to climate change have been shown to impact groundwater levels in the region and expected changes to the climate in the future have a high likelihood of exacerbating existing groundwater level declines. Further groundwater development, specifically in areas of large population growth, is also likely to contribute to groundwater level declines. Additionally, irrigation canals have been a significant source of recharge to this region for several decades and continued lining and piping of canals (which helps to conserve surface water) is also likely to exacerbate groundwater level declines.

In an August 30, 2021-Memorandum to the Deschutes Basin Water Collaborative Groundwater Mitigation Technical Committee, OWRD announce that "[a]s groundwater levels in the central part of the Basin approach 50 feet of total decline from the highest-known water levels (50 feet being one of the thresholds in the current statewide definition of "excessively declined" in OAR 690-008), [OWRD] may enforce stricter control on future groundwater allocation. This may take the form of denying new groundwater appropriation even where State Scenic Waterway mitigation credits are available, restrictively classifying new groundwater uses, or establishing a Critical Groundwater Area."

OWRD uses groundwater levels within a particular area of the Deschutes Basin as a proxy for water budget balance in that area when making water management decisions. Groundwater and surface water are connected in the Deschutes Basin aquifer. The Crooked River is part of the Upper Deschutes Basin. The Deschutes Basin aquifer is a "flow through" aquifer. It has a saturated thickness of approximately 1,000 feet within a single geologic

formation. Water from the crest of the Cascades, Metolius River, and from canal leakage enter the Deschutes aquifer and recharges the aquifer constantly. However, precipitation is the primary source of recharge for the Deschutes Formation aquifer. Leakage from the canals started in the early 1900's leading to artificial recharge in the Deschutes River Basin, which leads to increased groundwater levels. Changes in precipitation, canal leakage, and pumping has resulted in changes in groundwater levels. The volume of pumping is relatively small compared to effects of precipitation and canal leakage on the aquifer. The USGS has determined that 20-30% of groundwater decline is due to groundwater pumping. While 60-70% of groundwater decline is due to climate. Groundwater feeds stream flow. When groundwater storage is reduced through pumping, stream flow is also reduced. The Crooked River stream flow has been decreasing year after year from current groundwater use, with an approximate 3.9 cfs per year of loss from 1961 to present. Groundwater levels around the planned Thornburg Resort have declined persistently for over 30 years, even during wet years.

The groundwater recharge is not uniform across the Deschutes Basin, meaning some parts of the Basin receive significantly less recharge than others. And the water budget is not uniform across the Deschutes Basin. Recharge to the entire basin is not necessarily an accurate way to consider recharge in a particular area. Groundwater levels correspond with the balance of the water budget in a particular part of the aquifer system and can be measured directly in existing wells. When the water budget is in surplus, water levels in wells increase, corresponding with an increase in storage. Water level data for wells in Sisters show cyclic increases and decreases. Between 1994 and 2024, water levels near Sisters increased and decreased corresponding with increases and decreases in precipitation as measured at Crater Lake. However, wells near Cline Buttes and Redmond declined even during peak wet years over the same period.

For example, Well DESC 3016 near Sisters experienced an increase in groundwater level between 1994 and 1999 of approximately 20 feet then a decline of approximately 20 feet by

2024. Meanwhile DESC 3581 near Cline Buttes has experienced approximately 25 feet of decline in groundwater level since 1994. The use of this well would cause it to excessively decline. "Excessively Declining Water Levels" ("Excessively" as used in ORS 537.730(1)(a) is taken to modify both "are declining" and "have declined") means any ongoing lowering of the water level in a groundwater reservoir or part thereof which:

(a) Precludes, or could preclude, the perpetual us of the reservoir; or

(b) Represents an average downward trend of three or more feet per year for at least 10 years; or

(c) Represents, over a five year period, an average annual lowering of the water level by 1% or more of the initial saturated thickness as determined by observation or investigation in the affected area; or

(d) Results in water quality deterioration.

OAR 690-08-001(7). Well DESC 3903 near Redmond has experienced groundwater level decline of approximately 30-35 feet since 1994 to 2020. This well is forecasted to experience excessive decline by 2026. The wells that are representative of the Deschutes aquifer near Cline Buttes with similar elevations also have similar water level elevations. All such wells are trending together at the same rate of change. Wells at approximate 2700 feet within the Cline Buttes area are experiencing decline in groundwater levels. Groundwater declines have continued even in wet years. Additional pumping in the target aquifer proposed by Pinnacle would hasten the rate the aquifer would reach excessive decline.

Pinnacle Utilities, LLC, (Pinnacle) was formed as a single purpose entity to form Thornburg LLC. Pinnacle, LLC, formed Thornburg, LLC, to acquire property and develop the Thornburg Resort. Thornburg, LLC, ultimately acquired the Cline Butte property to build Thornburg Resort, a destination resort site near Redmond, Oregon, on the side of Cline Buttes in Deschutes County.

Thornburg, LLC, filed its first Ground Water Rights Application for water rights permit with OWRD February 9, 2005, Application G-16385. That Application sought 9.97 cfs of ground water from 6 wells in the Deschutes Basin, the nearest surface water body being the Deschutes River. The Application was reviewed by Ken Lite on March 21, 2005. He found that based on the available data, groundwater for the proposed use was not over appropriated. He also found that the nearest state observation well, well 1317 (DESC 3581), showed a relatively sharp decline between 1994 and 1996, with a shallower decline slope between 1997 and 1999, and a steepening slope from 2000 to present. He found the declining trend to be coincident with climate cycles. And, since 1994, the water levels have dropped about 7 feet, mostly because of decreased recharge. He did not make a finding that water would be available in the groundwater resource. OWRD issued a Proposed Final Order on July 25, 2006. Thornburg, LLC, submitted proposed mitigation to provide 1197.0 acre feet of mitigation water on the General Zone of Impact on an incremental basis. The protest period closed on September 8, 2006.

On September 8, 2006, WaterWatch filed a protest against the Proposed Final Order. On March 22, 2007, WaterWatch and Thornburg, LLC, reached a Settlement Agreement resolving the issues raised in the protest, whereby Thornburg, LLC agreed to reduce water use. The Settlement Agreement provided for the issuance of a water right permit for up to 2,129 acre-feet per year of water for quasi-municipal use, totaling 9.97 cfs, and subject to certain conditions. OWRD issued a Final Order incorporating the Settlement Agreement on March 22, 2007. Thornburg, LLC's Application G-16685 was granted, and Permit G-17036 was issued to Thornburg, LLC, with a priority date of February 9, 2005, and conditioned on work to be completed by 2018. OWRD's water-availability determination for Permit G-17036 was not an officially stated agency position.

Thornburg, LLC, did not complete work by 2018, and applied for an extension of Permit G-17036 within the time required to apply for any extension. However, there was a proposed denial of the permit extension for G-17036. Thornburg, LLC, was informed by Dwight French,

the water rights service manager for OWRD, that if another application for a Limited Water Use License for the same cfs was filed, if approved, it would make the need for the G-17036 permit extension moot.

On June 9, 2021, Pinnacle, LLC, filed an Application for Limited Water Use License (LL-1879) with OWRD and requested 4.5 cfs of groundwater, less than half the use provided for in permit G-17036. The Application is for consumptive water use, meaning the water would not return to the aquifer. The LL-1879 Application requested uses from wells 1, 2, 4, 5, and 8 on the Cline Butte property for a 5-year period. Wells 1, 2, 4 and 5 were proposed wells and well 8 was an existing well on the Thornburg property. Groundwater well sites within the area of the wells for use are 1) DESC 1957, 2) DESC 2929, 3) DESC 3016, 4) DESC 3903, 5) DESC 5045, and 6) DESC 3581.

The review process for a Limited License Application takes less time than for a Groundwater Rights Application. Approximately 4-5 Limited License Applications are reviewed for approval each year. The Watermaster provides a Water Availability Statement as part of the review process. The purpose of the Water Availability Statement is to understand what is being seen on the ground. The Watermaster does not access capacity of the resource as part of his duties. His knowledge of the water aquifer is secondhand. And he defers to the OWRD groundwater section for determinations regarding the LL-1879 application. A Limited License may be revoked by OWRD if there is concern of causing injury to the environment.

The Watermaster provided a Water Availability Statement pertaining to Pinnacle, LLC's, Limited License Application, LL-1879. On June 3, 2021, the local Watermaster observed that there would be water available in the quantity and at the times needed to supply the use proposed by Application G-17036. The Watermaster also observed that the stream system has had annual fluctuations due to climate change and projected steady long-term decline. The Watermaster recommended conditions for approval of the LL-1879 applications to include 1) mitigation for

the consumptive use for the life of the license, and 2) for a flowmeter and for the applicant to keep records on pumping.

On August 24, 2021, the Water Right Application LL-1879 was reviewed by Dr. Michael Thoma from OWRD. He determined that groundwater for the proposed use will not likely be available within the capacity of the groundwater resource. He concluded that:

> There are several wells in the area producing from the same groundwater source as the proposed POAs (points of appropriations) that have water level records that show a long-term declining trend. There are a few wells in the immediate vicinity of Cline Buttes that do not show the same long-term declines, but the majority of wells in the broader area show significant, monotonic declines... A joint study by the USGS and OWRD concluded that this widespread decline, which extends toward Powell Butte to the east, is due to climate changes and canal lining (which have reduced recharge to the aquifer locally) as well as groundwater pumping (Gannet, et. al., 2013). The specific reason why wells closer to Cline Buttes are not showing the same declines may be due to local heterogeneity (lateral and vertical) within the aquifer system, less groundwater pumping in the immediate area, or other factors, but wells and trends do not represent the regional aquifer-system trend.

Pinnacle, LLC, agreed to reduce any water usage on the resort for any water rights granted under Application LL-1879, if issued to 2 cfs. However, Dr. Thoma explained that the technical review found that the new use would not be within the capacity of the resource, and based on the groundwater level declines in the area, any new use could injure the existing rights and could preclude the perpetual use of the aquifer. He also opined that he did not think

mitigation is an option to overcome the finding. "Mitigation" means the reduction of adverse effects of a proposed project or activity by considering, in the following order:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action;

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(c) Rectifying the impact by repairing, rehabilitating or restoring the affected environments;

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and

(e) Compensating for the impact by replacing or providing conditions of comparable substitute value.

OAR 690-400-0010(9). On September 15, 2021, OWRD issued a Final Order denying LL-1879. OWRD determined that groundwater for the proposed use will not likely be available within the capacity of the groundwater resource, and therefore, water is not available for the proposed use.

In analyzing whether Pinnacle's use would be within the capacity of the resource, ORWD examined water-level data from over 70 nearby wells that access one of two parts of the aquifer which showed persistently declining water levels. The geography and water-level data from at least two of Pinnacle's existing wells showed that they would access the same part of the aquifer as about 48 of the nearby Cline Buttes wells. OWRD found data from two of Pinnacle's existing wells would develop the same part of the aquifer as nearby wells with persistently declining water levels near Cline Buttes and pumping at those wells would exacerbate the persistent declines in the nearby wells. Additionally, OWRD found that there are no wells with non-declining water levels in the Cline Buttes area. Furthermore, OWRD found that Pinnacle's proposed use would cause or contribute to declined excessively water levels in nearby wells.

"Declined excessively" means any cumulative lowering of the water levels in a groundwater reservoir or a part thereof which:

(a) Precludes, or could preclude, the perpetual use of the reservoir; or

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(d) Constitutes a lowering of the annual high water level within a groundwater reservoir, or part thereof, greater than 50 feet below the highest known water level.

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OAR 690-008-0001(5). In this case, OWRD found nearby well DESC 3880 in Redmond, experienced groundwater declines of 41-50 feet in 2021, and four or five other wells near Redmond are now within 30 to 40 feet of decline. Other nearby wells closer to Cline Buttes, wells DESC 3479, DESC 3581, DESC 53714, DESC 9857 also experienced 21-30 feet of decline through 2021. The Eagle Crest Resort, which is also on Cline Buttes and opposite the Thornburgh Resort, provides data showing water levels in those wells are approaching but not yet reaching status of excessively declined. Water levels for the wells in the Eagle Crest area will decline past 50 feet below the highest known water level soon. Groundwater levels are not likely to improve soon because climate recharge, pumping and canal piping are predicted to persist at the same level or worsen. Pinnacle's proposed points of appropriation would develop the same part of the aquifer as wells DESC 3581 and DESC 3903 and other nearby wells trending towards declined excessively. Well DESC 3581 is close to the proposed Thornburg Resort. That well could reach declined excessively levels as soon as 2032.

In addition to the fact that Pinnacle's proposed use would cause or contribute to declined excessively water levels in nearby wells, the proposed use would also cause or contribute to groundwater levels in nearby wells to become excessively declining. Since at least 2020, nearby wells are experiencing declining rates in varying degrees, approaching, the three feet per year threshold established in OAR 690-08-001(7)(b). The groundwater level declines are predicted to continue at the same level or worsen. OWRD specifically considered whether the proposed use

would cause or contribute to an ongoing lowering of the water level in a groundwater reservoir or part thereof which: (a) precludes or could preclude, the perpetual use of the reservoir, or b) represents an average downward trend of three or more feet per year for at least 10 years. OWRD has seen declines steepen since about 2020, and those declines are not expected to improve soon.

Furthermore, in 2021, when Pinnacle's groundwater application for LL-1879 was reviewed, groundwater levels in five wells near Cline Buttes had exceeded their decline conditions. OWRD considered whether decline-based permit condition triggers have been exceeded for the area and aquifer of interest. New uses that lower water levels can cause declines to exceed permit-condition triggers in senior water rights, affecting the right-holder's ability to receive water under that right. OWRD considers exceeded triggers to be evidence of diminished function of the resource, because exceeded triggers affect the ability of senior water-right holders to access water, and because OWRD sets permit conditions to protect the public health, safety, and welfare. When the capacity of the groundwater resource has been exceeded, OWRD can require pre-existing surface and groundwater rights holders to cease water usage in order to maintain and restore the resource. When the capacity of the groundwater resource has been exceeded, it can cause harm to connected surface waters such as the Deschutes and Crooked Rivers. Currently, three other nearby wells have exceeded their triggers for decline conditions, with six other wells at risk of exceeding their triggers soon. OWRD established through substantial evidence in the record that groundwater declines have changed over time, and that the declines have gotten worse, thus Pinnacle LLC's, LL-1879 Application was not approved. The substantial evidence in the record would permit a reasonable person to make the determination that OWRD made in this case.

Petitioner argues the denial of its LL-1879 is inconsistent with prior OWRD agency practice and officially stated position that water is available for Thornburgh's use. On May 8, 2017, Pacific Northwest Water Company, LLC (Pronghorn Resort) submitted an Application for

Limited Water Use License (LL-1702) seeking 5.5 cfs from two wells for emergency water to replace lost supply and to sustain supply to the resort in transition to new supply system. The groundwater review for LL-1702 was completed May 24, 2017, by Aurora Bouchier. Aurora Bouchier found the nearest, relevant, State Observation Wells for the review were DESC 3949 (located approximately 5 miles north), DESC 3581 (located approximately 7 miles to the northwest) and DESC 5045 (located approximately 8 miles to the southwest). She noted that these State Observation Wells have been monitored periodically since, at least, the 1990's and show a relatively steady decline since 1994 to present. Over this period, the water levels have dropped approximately 20 to 22 feet. She determined that the water levels are likely a result of decreased recharge and increased pumping. She also determined that the groundwater for the proposed use is not over appropriated. The Application for Limited Water Use License (LL-1702) was granted.

However, Pronghorn Resort's Application (LL-1702) was granted while Pinnacle, LLC's Application (LL-1879) was denied based on current declining groundwater levels, which shows a steepening of declines over the past 4 years when Pinnacle's application was reviewed. There is insufficient evidence in the record to show that during the review of Pronghorn Resort's LL-1702 Application, excessively declining conditions, declined excessively conditions, and exceeded permit conditions were present during that review. By the time of Application LL-1879, sixteen years had passed since OWRD's determination in 2005 that the groundwater use Permit G-17036 was within the capacity of the resource. During those sixteen years, OWRD has observed water levels near cline Buttes persistently decline even during wet years. There is substantial evidence in the record that establishes a clear downward trend in groundwater levels in the Deschutes Basin, and many wells around the Thornburg property area are close to reaching critical decline thresholds. And because existing groundwater appropriation has been found to be contributing to water level declines in the area at issue, any new appropriation will continue or increase those declines. Therefore, OWRD's determination that Pinnacle's proposed use under

the LL-1879 Application is not within the capacity of the resource is rational, fair, and principled. OWRD's decision to deny Pinnacle-LLC's, LL-1879 Application was consistent with its prior analysis process. The court does not find that OWRD's denial of Pinnacle's LL-1879 Application is inconsistent with previously approved application, specifically, Pronghorn Resort's Application LL-1702. However, even if OWRD's denial of LL-1879 is inconsistent, any inconsistency is justified, because OWRD's explanation for the inconsistency is rational, fair, or principled.

Pinnacle, LLC's proposed use in Application LL-1879 would cause or contribute to a cumulative lowering of the water levels that precludes, or could preclude, perpetual use of the reservoir or that exceed 50 feet below the highest known water level pursuant to OAR 690-008-0001(5)(a), (d).

Pinnacle, LLC's proposed use in Application LL-1879 would cause or contribute to an ongoing lowering of the water level that precludes, or could preclude, perpetual use of the reservoir or that represents an average downward trend of three or more feet per year for at least 10 years pursuant to OAR 690-008-0001(5)(a), (d).

Permit condition triggers in the Cline Buttes area had been exceeded at the time of review of Pinnacle, LLC's Application LL-1879 in 2021.

The decision of the agency, OWRD, is hereby affirmed. YoungWoo Joh and Sara Van Loh, attorneys for Respondent, shall prepare and file a Judgment consistent with this ruling.

DATED this 31st day of March, 2025.

Raymond D. Crutchley, (He/Him)
Circuit Court Judge

Pronoun Usage. The parties and counsel are encouraged to advise the Court of their pronouns and honorifics (such as Ms., Mx., or Mr.). People appearing before this Court may provide their

pronouns and honorifics in writing or orally when appearing for conferences, hearings, or trials. Attorneys are encouraged to identify their pronouns and honorifics in their signature lines when submitting documents for filing. Parties and counsel are instructed to address each other in all written documents and court proceedings by those previously identified pronouns and honorifics.

emailed to counsel 3-21-25 by NJ.