



Oregon

Kate Brown, Governor

Department of Land Conservation and Development

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NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

Date: February 26, 2016

Jurisdiction: City of Brookings

Local file no.: ANX-1-14

DLCD file no.: 001-14

The Department of Land Conservation and Development (DLCD) received the attached notice of adopted amendment to a comprehensive plan or land use regulation on 02/25/2016. A copy of the adopted amendment is available for review at the DLCD office in Salem and the local government office.

Notice of the proposed amendment was submitted to DLCD 55 days prior to the first evidentiary hearing.

Appeal Procedures

Eligibility to appeal this amendment is governed by ORS 197.612, ORS 197.620, and ORS 197.830. Under ORS 197.830(9), a notice of intent to appeal a land use decision to LUBA must be filed no later than 21 days after the date the decision sought to be reviewed became final. If you have questions about the date the decision became final, please contact the jurisdiction that adopted the amendment.

A notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR chapter 661, division 10).

If the amendment is not appealed, it will be deemed acknowledged as set forth in ORS 197.625(1)(a). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

DLCD Contact

If you have questions about this notice, please contact DLCD's Plan Amendment Specialist at 503-934-0017 or plan.amendments@state.or.us



NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

FOR DLCD USE
 File No.: 001-14
 {19816}
 Received: 2/25/2016

Local governments are required to send notice of an adopted change to a comprehensive plan or land use regulation **no more than 20 days after the adoption.** (See [OAR 660-018-0040](#)). The rules require that the notice include a completed copy of this form. **This notice form is not for submittal of a completed periodic review task or a plan amendment reviewed in the manner of periodic review.** Use [Form 4](#) for an adopted urban growth boundary including over 50 acres by a city with a population greater than 2,500 within the UGB or an urban growth boundary amendment over 100 acres adopted by a metropolitan service district. Use [Form 5](#) for an adopted urban reserve designation, or amendment to add over 50 acres, by a city with a population greater than 2,500 within the UGB. Use [Form 6](#) with submittal of an adopted periodic review task.

Jurisdiction: City of Brookings

Local file no.: **ANX-1-14**

Date of adoption: 02/22/2016 Date sent: 02/25/2016

Was Notice of a Proposed Change (Form 1) submitted to DLCD?

Yes: Date (use the date of last revision if a revised Form 1 was submitted): 06/10/2014

No

Is the adopted change different from what was described in the Notice of Proposed Change? Yes No

If yes, describe how the adoption differs from the proposal:

No

Local contact (name and title): Donna Colby-Hanks

Phone: (541) 469-1137

E-mail: dcolbyhanks@brookings.or.us

Street address: 898 Elk Drive

City: Brookings

Zip: 97415-

PLEASE COMPLETE ALL OF THE FOLLOWING SECTIONS THAT APPLY

For a change to comprehensive plan text:

Identify the sections of the plan that were added or amended and which statewide planning goals those sections implement, if any:

For a change to a comprehensive plan map:

Identify the former and new map designations and the area affected:

Change from industrial to residential 5.56 acres. A goal exception was required for this change.

Change from commercial to residential 7.77 acres. A goal exception was required for this change.

Change from to acres. A goal exception was required for this change.

Change from to acres. A goal exception was required for this change.

Location of affected property (T, R, Sec., TL and address): 40-13-32D; TL 1500 & 2000 North Bank Chetco River Road

The subject property is entirely within an urban growth boundary

The subject property is partially within an urban growth boundary

If the comprehensive plan map change is a UGB amendment including less than 50 acres and/or by a city with a population less than 2,500 in the urban area, indicate the number of acres of the former rural plan designation, by type, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

If the comprehensive plan map change is an urban reserve amendment including less than 50 acres, or establishment or amendment of an urban reserve by a city with a population less than 2,500 in the urban area, indicate the number of acres, by plan designation, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

For a change to the text of an ordinance or code:

Identify the sections of the ordinance or code that were added or amended by title and number:

For a change to a zoning map:

Identify the former and new base zone designations and the area affected:

Change from County Industrial (I)	to City residential (R-2)	Acres: 7.77
Change from County Comm. (C-1)	to City residential (R-2)	Acres: 5.56
Change from	to	Acres:
Change from	to	Acres:

Identify additions to or removal from an overlay zone designation and the area affected:

Overlay zone designation:	Acres added:	Acres removed:
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Location of affected property (T, R, Sec., TL and address): 40-13-32D; TL 1500 & 2000 North Bank Chetco River Road

List affected state or federal agencies, local governments and special districts: DLCD, ODOT, Curry County,

Identify supplemental information that is included because it may be useful to inform DLCD or members of the public of the effect of the actual change that has been submitted with this Notice of Adopted Change, if any. If the submittal, including supplementary materials, exceeds 100 pages, include a summary of the amendment briefly describing its purpose and requirements.

This matter was remanded by LUBA for one issue; to address Statewide Planning Goal 16 (Estuarine Resources) Implementation Requirement 1. Copies of all staff reports and the final order are attached.



City of Brookings

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TTY (800) 735-1232

dcolbyhanks@brookings.or.us

February 25, 2016

RE: File No. ANX-1-14, Remand of request to annex two parcels on North Bank Chetco River Road into the City limits

Dear Property Owner:

This letter is to inform you of the action taken at the meeting of the Brookings City Council on the above referenced matter.

At the City Council meeting of February 22, 2016 the Council adopted the Final ORDER and Findings of Fact document approving the applicants' responses to the Land Use Board of Appeals remand addressing Goal 16 Estuarine Resources, Implementation requirement 1 in the approval of the annexation.

Please be advised that decisions of the City Council may be appealed to the Land Use Board of Appeals (LUBA) within twenty-one (21) days of postmark of this decision notice. All documents pertaining to the City Council's decision, including the Final Order, are available through the Planning office located at 898 Elk Drive for public viewing from 9 AM until noon and from 1 PM to 4:30 PM and copies are available for \$.25 a page.

If there are any questions, please contact me at (541) 469-1137.

Sincerely,

Donna Colby-Hanks

Donna Colby-Hanks
Planning Manager

Encl: Final Order
cc: participants

BEFORE THE CITY COUNCIL FOR
THE CITY OF BROOKINGS, COUNTY OF CURRY,
STATE OF OREGON

In the matter of Planning Commission File No.)	
ANX-1-14/Remand; a request for approval of the)	Final ORDER
Applicant's response to the issues remanded by the)	and Findings of
Land Use Board of Appeals, LUBA No. 2015-037)	Fact
for approval of annexation, Mahar/Tribble, LCC,)	
applicant.)	

ORDER approving the materials submitted in response to the issue remanded by the Land Use Board of Appeals (LUBA), in the appeal of the City's approval of the annexation of approximately 13.33 acres of land located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 ("the subject property"), being located adjacent to the eastern boundary of the North Bank Chetco River Road right-of-way, and approximately 3,294 feet of the North Bank Chetco River Road right-of-way from the city limits boundary to the subject property.

WHEREAS:

1. In its decision of an appeal by Oregon Coast Alliance of the City of Brookings' approval of ANX-1-14, the Land Use Board of Appeals (LUBA) remanded with the *Final Opinion and Order* dated October 6, 2015, to the City for additional findings for Statewide Planning Goal 16 (Estuarine Resources) Implementation Requirement 1 to assess the potential impacts to the estuary from residential uses and identify methods of mitigation to avoid or minimize adverse impacts; and
2. The applicant submitted materials to the city in response to the issue of the remand as follows:
3. Consistent with the LUBA Remand, the City Council considered the applicant's materials at a public hearing on January 11, 2016 and continued to February 22, 2016; and
4. The planning staff presented the Council Agenda Report with recommendations, and by oral presentation and evidence and testimony by the applicant and the public at the public hearing; and
5. At the conclusion of said public hearings, after consideration and discussion of testimony and evidence presented in the public hearing and submitted as written comments, the City Council, upon a motion duly seconded, approved the materials.

THEREFORE, IT IS HEREBY ORDERED that the materials (**Attachment A**) submitted in response to the issue of the remand are approved. Findings and conclusions consistent with the LUBA Remand are set forth as follows:

Standards, Criteria, Findings and Conclusions for Statewide Planning Goal 16, Estuarine Resources

The Statewide Planning Goal 16 Chetco River Estuary Boundary (“the Estuary Boundary”) is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). Pursuant to the LUBA Remand, findings assessing potential impacts to estuarine resources and measures to prevent such impacts are required. As directed by LUBA, the relevant provisions of Statewide Planning Goal 16, Implementation Requirement 1 are set forth as follows:

1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

a. The type and extent of alterations expected;

The applicant states in the findings that the proposed residential development of the property will not include any physical intrusion into the Estuary Boundary. However, future development would be located within close proximity to the Estuary Boundary. The potential impacts to the estuary resources are primarily based on pollution resulting from the residential development. The pollution could consist of both chemicals and sediment. The applicant has submitted a *Statewide Planning Goal 16 Impact Assessment Report* prepared by Frank Galca, a certified wildlife biologist with Galea Wildlife Consulting to fulfill the requirement of an assessment from the remand.

b. The type of resource(s) affected;

According to the Impact Assessment Report provided by the applicant in the findings, the resources that could be impacted with future development of the subject property consist of wildlife resulting from water quality degradation. The location of the proposed development could also impact aesthetic views of the estuary from river users if not

protected. No physical alterations within the Estuary Boundary are proposed.

c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary;

The applicant identifies potential impacts from development of the subject property on the following estuarine resources:

1. water quality degradation within the estuary from construction activities.
2. on-going water quality degradation from residential development located within close proximity to the estuary.
3. adverse impacts on wildlife utilizing estuarine resources as a result of water quality degradation during construction and post-construction.
4. adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities.
5. adverse impacts on the aesthetic view from the estuarine resource.

Since no physical development will occur within the Estuary Boundary, there is no anticipated impacts on the physical characteristics of the estuary, navigation, or existing and potential uses of the estuary.

d. The methods which could be employed to avoid or minimize adverse impacts.

Water Quality Degradation

As stated in the Impact Assessment Report, the greatest potential for impacts to the estuary would be from the development's sewage and storm water runoff (sediment and pollution). There is also a potential for sediment to increase during the construction phase.

The residential development is proposed to be served by the City of Brookings public sewer system. This will eliminate the potential of sewage contaminants from entering the estuarine resource.

The Impact Assessment Report identified several recommendations to avoid or minimize adverse impacts on the estuarine resource from storm water runoff. The use of Best Management Practices as outlined in the report during construction will minimize potential impacts. The impacted riparian area can be enhanced by the removal of invasive plants to improve its functioning to remove sediment. Any replanting should consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

In addition, the applicant states in the findings that the storm water system for the future residential development of the property will be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The Impact Assessment Report noted this was recommended by Chuck Wheeler, Fisheries Biologist, Oregon Coast Branch, NOAA Fisheries West Coast Region.

The use of herbicides, pesticides or fertilizers can impact the estuarine resource. The applicant proposes that only herbicides, pesticides, or fertilizers approved by Oregon Department of Fish and Wildlife (ODFW) or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams or rivers shall be applied on the subject property. However, these matters are under the oversight of Oregon Department of Agriculture. Any chemicals applied to the subject property shall be approved for application near aquatic environments.

Wildlife Habitat

Several species of wildlife were identified in the detailed habitat assessment of the Impact Assessment Report as well as the optimal method for protection. Prior to any disturbance on the subject property a wildlife biologist must survey the area. Upon discovery of the western pond turtle or the northern red-legged frog, the species would need to be relocated to an undisturbed area. If any Migratory Bird Treaty Act nesting sites were discovered, a buffer of 300 feet would need to be maintained until the birds fledge.

Aesthetic Resources

The applicant states in the findings that in order to minimize impacts to the view from users of the river, the applicant proposes to enhance the impacted riparian area by removing invasive plants. The invasive species adversely impact native riparian vegetation. Any replanting would need to consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds.

In addition, this approval is supported by the findings and conclusions contained in the staff report for the February 22, 2016 City Council meeting attached to and hereby made a part of this final order. The above analysis, findings and conclusions together with the Applicant's findings and written rebuttal, and the conditions of approval below, show that the criteria for the remand have been met.

Conditions of Approval (As amended by City Council at the remand hearing of February 22, 2016, added text is **bold**)

1. Prior to approval of any new development permits or final plat approval on the subject property, the Applicant is required to record a deed declaration against the subject properties that acknowledges the existence of the Infrastructure Financing Agreement between the parties and its essential role in determining sewer feasibility to achieve municipal zoning. The Deed Declaration shall state that the existence of the Infrastructure Financing Agreement between the City and the Mahar/Tribble LLC was essential in approving the municipal zoning for the property by determining the provision of sewer was feasible and shall state that the City is under no obligation to extend sewer in a manner other than specified in the terms of the Infrastructure Financing Agreement.
2. Prior to issuance of any development permits or final plat approval, the owners must furnish the City of Brookings with a legal description prepared by a registered professional land surveyor that describes Shoreland Boundary as approved herein for the entire length of the subject properties and the boundary shall be staked at 50-foot intervals by the surveyor who

prepared the legal descriptions. Notwithstanding the foregoing, the staking of the Shoreland Boundary on that portion of the subject property included within the approved FEMA Conditional Letter of Map Revision shall be completed contemporaneously with the completion of the FEMA Letter of Map Revision.

3. Development on the site is required to comply with the following Hazard Mitigation conditions:

- a. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that the fill placed four years ago satisfies the recommended 95% compaction and is appropriate for residential and street construction.
- b. Prior to issuance of any development permits or final plat approval, Applicant will provide a statement from an Oregon Registered Engineering Geologist that any new fill will satisfy the recommended 95% compaction and is appropriate for residential and street construction.
- c. Prior to issuance of any development permits or final plat approval on the portion of the subject property located within the existing 100-year floodplain, Applicant will complete the Letter of Map Revision process with FEMA that establishes the revised 100-year floodplain elevations and the floodway boundary for the site.
- d. In the event any future development is to be located within the 100-year floodplain, topographic information will be provided for development permits that demonstrate the ground elevation building pads have been raised 1-foot above the 100-year floodplain elevation.
- e. A report from an Oregon Registered Engineer or an Oregon Registered Engineering Geologist shall be provided with all building plans for residential foundations at the time of building plan submittal to the City that explain how the proposed foundation designs are consistent with Recommendations No. 4 through 6 set forth on Page 7 of the Geologic Hazard Evaluation Report dated February 29, 2008, and prepared by Garcia Consultants. A copy of the aforementioned report being contained in the record.

4. Prior to any disturbance or development of the subject property, all required state and federal permits and approvals must be obtained and copies provided to the City. All construction activities on the subject property shall comply with Oregon Department of Environmental Quality's Best Management Practices (BMPs) in order to prevent sediment or fuel (leaked oils, diesel, gasoline or any other unnatural substance) movement to the estuary. BMPs shall include but not be limited to sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-fueling equipment.

5. Prior to any disturbance or development of the subject property, a sediment fence shall be placed between the development and the wetland delineated in the most current report with concurrence from the Department of State Lands.

6. Prior to any disturbance or development of the subject property, a riparian

enhancement plan shall be submitted to the City for approval in conference with ODFW. The plan shall show the areas where invasive species are proposed for removal and the method of removal. Any replanting will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

7. All residential development on the subject property, as well as other development allowed by the proposed zoning designation, shall be served by the City of Brookings municipal sewer and water systems.

8. The storm water system to serve the development of the subject property shall be prepared by an Oregon-licensed civil engineer in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The system must accommodate a minimum of 2.5 inches of rainfall in a 24 hour period or comply with the City standard, whichever accommodates the greater event.

9. Only pesticides registered with the United States Environmental Protection Agency (U.S. EPA) and with Oregon Department of Agriculture (ODA) for application near aquatic environments shall be utilized on the subject property. Such applications must be in compliance with the label instructions and must be consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watershed*, December, 2003, or any amendments thereof. The Applicant shall provide to the City copies of any required approvals/permits from the Department of Environmental Quality (DEQ). If the services of a Commercial Applicator are utilized, they must be licensed by ODA. The Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.

10. Prior to the initiation of construction on the subject property, including clearing and grading, a survey by a qualified wildlife biologist shall be conducted for the following species: (a) migratory birds under the Migratory Bird Treaty Act; (b) the western pond turtle; and (c) the northern red-legged frog. Upon discovery of the western pond turtle or the northern red-legged frog, these species will be relocated to undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer will be maintained from the nest until such time the nestlings fledge.

11. Prior to any disturbance or development of the subject property, a permanent riparian fence shall be installed to provide a visual boundary between riparian areas and non-riparian areas. The fence is not intended to be a security fence.

12. Except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area established as Priority Dredge Disposal Site #3 or after placement of fill per the CLOMR, the areas identified as the 100-year floodplain and the Chetco Estuary Shorelands Boundary.

LET IT FURTHER BE OF RECORD that City Council APPROVED the materials submitted in response to the issue of the remand based on the evidence in the record and the findings of fact.

Dated this 22nd day of February, 2016.

Ron Hedenskog
Ron Hedenskog, Mayor

ATTEST:

Donna Colby-Hanks
Donna Colby-Hanks, Planning Manager

Frank Galea, certified Wildlife Biologist and author of the Impact Assessment Report provided, does not identify impacts to the estuary from residential development of this property as affecting the migration of the river.

A letter (Exhibit H-2) was received from Donald Porior PE, Porior Engineering, that states the proposed storm water mitigation will prevent any increase in flows from the development. Porior advises that bank stabilization using large rocks is not proposed and neither is fill or removal activities within the channel. In summary, Porior states the proposed project will not influence stream migration of the Chetco River. Based on the information from these professionals, the residential development of this property will have no effect on impacts to the estuary from migration of the river.

2. This concerns enforcement and use of herbicides, pesticides or fertilizers on the subject property. (M. Sherwood)(A. Vileisis)

Response and findings: Galea identifies in his Impact Assessment Report that the greatest potential for impacts to the estuary from residential development are from sewage and storm water runoff. Pollutants from runoff can include herbicides, pesticides, or fertilizers. To minimize the potential impacts only chemicals that are approved for application near aquatic environments shall be utilized on the property. Condition of Approval #9 proposes a requirement for restrictive covenants to be recorded against the property implementing this restriction.

The covenant would be transferred to any future property owner upon sale or division of the property. The purpose of the covenant would alert future owners of the limits of chemical use on the property. The Applicant's attorney testified at the January 11, 2016 hearing that restrictive covenants allow for enforcement by any property owner who is affected by the covenant. The attorney also testified that restrictive covenants have proven to be highly effective in restraining private behavior on private property.

These types of chemicals are under the jurisdiction of Oregon Department of Agriculture (ODA) and they are the regulatory authority in these matters. Any potential violation would need to be reported to ODA for investigation and enforcement. The City does not have staff with expertise in these matters and according to ODA would generally have no authority.

T. Bunch, ODA, provided recommendations for revisions to Condition of Approval #9 and those recommendations have been included as presented in Exhibit B-6. T. Bunch made no suggestion in his comments that the proposed restrictive covenants would be ineffective in preventing residential application of harmful pesticides.

3. This concerns anticipated impacts on the physical characteristics of the estuary not being identified. (S. Malone)

Response and findings: The Impact Assessment Report provided by the applicant describes the potential for impacts to each of the identified estuarine resources. The report identifies pollutants, both sediment and chemicals, as well as sewage as having the greatest potential for impacts.

The assessment describes each of the Federally protected wildlife species that could potentially occur near the subject property, suitable habitat conditions for each, and the potential for impacts to each from the proposed residential development. This is followed by a section that identifies recommendations for mitigating the impacts. The recommendations from the report have been included as proposed Conditions of Approval # 4 thru #10. Further, the applicant has stated that there is no proposal for any physical development within the Estuary Boundary.

4. This concerns the applicant's failure to identify potential adverse impacts of the residential development due to the unknown scope and extent of the development. (S. Malone)(Y. Maitland)

Response and findings: LUBA recognized in the Final Opinion and Order for LUBA No. 2015-037 that the subject property could potentially be developed with 59 to 60 single family dwellings. In addition, LUBA explained that the City must review potential adverse impacts on the estuary's physical process or biological values from development allowed under the proposed amendments.

5. This concerns the assertion that the applicant has not complied with all of the requirements of Goal 16. (S. Malone)

Response and findings: In the remand, LUBA identified Goal 16, Implementation Requirement 1 as needing to be addressed. Other components of Goal 16 were not identified as not being sufficiently addressed. As the applicant's attorney states in the written rebuttal, other argument related to Goal 16 is outside the scope of the remand.

6. This concerns the applicant's failure to acknowledge that National Marine Fisheries Service plays a regulatory role under the Endangered Species Act. (S. Malone)

Response and findings: LUBA remanded the annexation approval back to the City to address specific Goal 16 requirements. The remand does not require that all agencies that play a regulatory role be identified. Therefore this concern is outside the scope of the remand.

7. This concerns the riparian area not being sufficient to prevent sediment transport. (S. Malone) Impacts from polluted storm water runoff (A. Vileisis) SLOPES not adequate for protection (C. Wiley)

Response and findings: The proposed conditions of approval take into consideration all recommendations made in the assessment report. The report advises that the riparian area is not sufficient alone as a buffer for sediment. However, the removal of invasive species would improve its functioning which is addressed in proposed Condition of Approval #6.

The storm water created from the proposed development will be treated by a system developed and constructed using the City of Portland's storm water manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch of NOAA Fisheries, as well as Best Management Practices from the Department of Environmental Quality. This is proposed in Condition of Approval #8.

8. This concerns the impact to the estuary from withdrawal of water to serve the residential development. (A. Vileisis)(C. Wiley)

Response and findings: The applicant's attorney addressed this concern in the final written argument. In *Mahar/Tribble I*, LUBA remanded for the City to adopt more adequate findings regarding the availability of city water to serve the annexation territory relative to capacity. *Mahar/Tribble I*, Final Opinion and Order of LUBA No. 2014-087, page 10. On remand in *Mahar/Tribble I*, the City found that the City's municipal water system has more than sufficient capacity to serve the potential development of the subject property. That finding was based on capacities included in the City's adopted Water Master Plan, adopted in 2014. The current application does not change the Water Master Plan. Opponents' concerns regarding municipal water withdrawals either have already been addressed during the development of the Water Master Plan, or are a collateral attack on the adoption of that plan. In all events, the newly raised concerns about municipal water withdrawal are not within the scope of LUBA's remand in *Mahar/Tribble II*.

9. This concern suggests a requirement is needed for replanting or improving the riparian setback area. (A. Vileisis)(M. Sherwood)(C. Page)

Response and findings: Frank Galea, certified Wildlife Biologist and author of the Impact Assessment Report, identifies riparian areas as important habitats for wildlife. He states they act as visual and sound screens between development and natural resources such as an estuary as well as removing sediment from storm water. Galea recommends the removal of invasive plants to enhance the riparian area. Proposed Condition of Approval #6 requires a riparian enhancement plan to be submitted to the City for approval, in conference with Oregon Department of Fish and Wildlife (ODFW), prior to any disturbance or development of the subject property. The plan shall show the areas where invasive species are proposed for removal and the method of removal. Although replanting was not a recommendation of the Assessment Report, any replanting must consist of native riparian species.

S. Mazur, ODFW, provided comments (Exhibit H-1), and stated that all riparian areas should be managed for native species not just the eastern boundary of the property. ODFW suggested that permanent fencing be used during and after construction to delineate the riparian areas as well as limiting ground disturbing activities to times when impacts to wildlife would be the least. An email clarifying ODFW's position was submitted by D. O'Connor as Exhibit I-2. The email acknowledged that the riparian area along the Chetco River, eastern boundary of the subject property, will be managed. However, the downriver portion of the subject property (commonly known as Snug Harbor) will remain undisturbed since the area has a functioning established riparian area. The suggestion of ODFW for a permanent riparian delineation fence has been included as proposed Condition of Approval #11, shown below.

11. Prior to any disturbance or development of the subject property, a permanent riparian delineation fence shall be installed to provide a visual boundary between riparian areas and non-riparian areas. The fence is not intended to be a security fence.

10. This concerns modifications or impacts to (delineated wetland) Snug Harbor (A. Vileisis)(A. Orahoske)(M. Sherwood)

Response and findings: The area of the subject property adjacent to Snug Harbor has been identified as Priority Dredge Disposal Site #3 in the Comprehensive Plan and must be protected. The area is within the 100 year floodplain as well as the Chetco Estuary Shorelands Boundary. As a protection measure, the Brookings Municipal Code Chapter 17.24.110(B) prohibits residential structures within the Chetco Estuary Shorelands Boundary.

Although the Department of State Lands wetland concurrence has expired, a small wetland has been identified that will require DSL and Army Corp approval for any alterations. The applicant has stated that no development is proposed for this area and it will remain open space.

Proposed Condition of Approval #5 will require a sediment fence to be placed between the development and the delineated wetland. Proposed Condition of Approval #4 requires all construction activities to comply with Oregon Department of Environmental Quality's Best Management Practices. The applicant has suggested in the final written rebuttal that an additional condition of approval be drafted that clarifies the development restrictions within this area. See proposed Condition of Approval #12 below. With the proposed conditions of approval, impacts to the wetland and Snug Harbor will be minimized or eliminated.

12. Except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area established as Priority Dredge Disposal Site #3 or after placement of fill per the CLOMR, the areas identified as the 100-year floodplain and the Chetco Estuary Shorelands Boundary.

11. This concerns adverse impacts to the estuary not being limited to aquatic and terrestrial species. (A. Orahoske)

Response and findings: Adequate information was not provided to allow the impact of concern to be identified.

12. This concerns the suggestion to reduce the building footprint to reduce the overall environmental impact. (Y. Maitland)

Response and findings: There is no information in the record on the expected footprint or configuration of the dwelling units. The Impact Assessment Report identified several requirements to mitigate the impacts to the estuary. A reduction in the footprints of the dwelling units was not included, and therefore limits on building footprints are not proposed as a condition.

13. This concerns claims that the City has an inadequate sewer collection system which effects the estuary. (C. Wiley)

Response and findings: An Infrastructure Financing Agreement was entered into the record on page 478 of LUBA No. 2014-087.

The City and the applicant recognize in the Agreement that the development of the subject property cannot occur without adequate public sewer infrastructure and that an expansion of the City's sewer collection system is needed to support the proposed project. The system will be required to obtain approval from Oregon Department of Environmental Quality as well as the City. The expansion of the sewer system is required to be constructed in compliance with the City's "Engineering Requirements and Standard Specifications for Public Works Infrastructure" . The purpose of the engineering requirements is to establish correct procedures, outline acceptable standards of workmanship, and indicate specifications for any projects. The standards provide assurances that the infrastructure is installed in a manner that protects the public as well as the environment such as the estuary.

Other existing City sewer infrastructure is not affected by the project and if there are impacts to the estuary from this infrastructure, it is not under the scope of the remand.

14. This concerns a suggestion to prohibit docks. (A. Vileisis)

Response and findings: The applicant has stated numerous times no physical intrusions into the estuary, including docks, are proposed.

15. This concerns the suggestion to include a conservation easement and habitat restoration projects (C. Page)

Response and findings: The Impact Assessment Report identified the riparian area as being impacted from invasive species. The invasive species reduce the ability of native riparian vegetation to remove sediment from storm water runoff. The report recommended that the invasive species be removed. Condition of Approval #6 requires the removal of invasive species to minimize impacts to the view from users of the river as well as improving the functioning of the riparian vegetation. This project must be implemented prior to any disturbance or development of the property. This was the only habitat restoration project identified to minimize impacts to the estuary.

A conservation easement will not affect the impacts of the residential development on the estuary nor will it mitigate the impacts. This matter is outside the scope of the remand hearing.

16. This concerns the adequacy of the standard for the design of storm water facilities to accommodate 2.5 inches of rain in a 24 hour period. (A. Vileisis)(M. Sherwood)(C. Wiley)

Response and findings: During the January 11, 2016 City Council meeting, the Applicant suggested that either the recommendation of Kenneth Phippen, NOAA/NMFS, for the storm water facility to be designed to accommodate 2.5 inches of rain in a 24-hour period or the City standard be used for the development of the storm water system. The current city standard is for storm drainage facilities to be engineered to accommodate a 25 year flood event (approximately eight (8) inches of rain in a 24 hour period as mapped by NOAA). That suggestion has been incorporated into proposed Condition of Approval #8 with added text being underlined as shown below.

8. The storm water system to serve the development of the subject property shall be prepared by an Oregon-licensed civil engineer in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The system must accommodate a minimum of 2.5 inches of rainfall in a 24-hour period or comply with the City of Brookings standard, whichever accommodates the greater event.

17. This concerns the need to address impacts from fill in the floodplain. (M. Sherwood)(A. Vileisis)

Response and findings: LUBA determined in the remand that assessment of the impacts to the estuary did not need to address the placement of fill in the floodplain under Curry County approval. Therefore, this issue is not under the scope of the remand.

18. This concerns the need to address impacts from, or a requirement to, restore Ferry Creek. (M. Sherwood)(A. Vileisis)(C. Page)

Response and findings: LUBA states in the remand opinion for this matter that the City is not required to address the impacts from a future project to restore Ferry Creek. The restoration project is not proposed as a component of the annexation and it is not a necessary element for the residential development of the subject property. Any impacts to the estuary from possible future restoration of Ferry Creek are outside the scope of the remand hearing.

19. This concerns the need to require the 75 foot riparian buffer be maintained. (M. Sherwood)(A. Vileisis)

Response and findings: LUBA states in the remand opinion for this matter that the City is not required to address the impacts from a possible future reduction of the 75 foot riparian setback. This concern is outside the scope of the remand hearing.

20. This concerns the lack of notification to Federal agencies of the Sept., 2014, hearing. (Y. Maitland)

Response and findings: All federal and state agencies were notified of the current remand hearing of January 11, 2016, on December 17, 2015. Comments were received and are in the record from ODFW and ODA.

21. This concerns the inclusion of the 2006 wetland delineation report into the record. (Y. Maitland)

Response and findings: The document was previously entered into the record on page 200 of LUBA No. 2014-087. It remains a part of the record. It was included as an appendix to the Impact Assessment Report as it was cited in 4.12 *Sensitive Plants* as having additional information on potential habitat for the Western Lily.

22. This concerns the suggestion that a traffic impact study should be required. (Y. Maitland)

Response and findings: Once a proposal for development is submitted and details are known, the agencies with jurisdiction of the roads will be notified and comments will be sought. This is a requirement of the Brookings Municipal Code. However, this matter is not under the scope of the remand hearing.

23. This concerns constraints identified in the City's findings regarding land excluded from the UGB expansion. (Y. Maitland)

Response and findings: The findings referenced discuss constraints on lands that were not brought into the UGB with the most recent expansion. The subject property was not involved in the UGB expansion as it was included in the original UGB. This issue is not relevant to the subject property nor to the impacts on the estuary from the proposed residential development.

24. Several concerns were raised regarding flood damages, steep slopes, Curry County's denial of an application, compaction of fill, road slippage, and lot coverage limited to 45% as well as amendments to Goal 14 in 2010 in regards to building on steep slopes and in the floodplain. (Y. Maitland) Also raised was a suggestion that the floodplain be protected and improved. (C. Page) Another concern was that the City is not in compliance with existing development needs. (C. Wiley) The City should develop a plan for additional storage of water to reduce pumping during the summer. (A. Vileisis)(C. Wiley)

Response and findings: As indicated by LUBA, none of these concerns regard the impact of the residential development of the subject property on the estuary and are not under the scope of the remand hearing.

Analysis, findings and conclusions to Statewide Planning Goal 16, Implementation Requirement 1 can be found the Council Agenda Report for the January, 11, 2016, City Council meeting, Exhibit A.

Considering the materials found in Exhibit A as well as the responses and findings in this report, Staff finds the concerns raised have been adequately addressed. Staff recommends adoption of the Applicant's findings and written rebuttal, the analysis and findings contained in the staff report dated January 11, 2016, and responses and findings contained in the staff report dated February 22, 2016 to support the approval of this remanded annexation request.

Attachment(s): A. Draft final order
B. Exhibits B thru F and H thru J

BEFORE THE CITY COUNCIL FOR
THE CITY OF BROOKINGS, OREGON

MAHAR/TRIBBLE, LLC,)	FILE NO.: ANX-1-14 (Remand)
)	
Applicant,)	
)	LUBA NO.: 2015-037
OREGON COAST ALLIANCE,)	
)	APPLICANT'S FINAL REBUTTAL
Appellant.)	

Introduction

The law firm of Huycke O'Connor Jarvis, LLP represents Applicant Mahar/Tribble, LLC, concerning the above-stated matter. This submittal provides final written argument seeking approval of the application in File No. ANX-1-14 (Remand) consistently with the limited scope of remand in *Oregon Coast Alliance v. City of Brookings*, LUBA No. 2015-037 (Oct 6, 2015) (*Mahar/Tribble II*), as expressly acknowledged by the City. The hearing notice on remand stated that the purpose of the hearing was "to consider the applicant's response to Land Use Board of Appeals' remand to the City's approval of the annexation of two lots," and that "This hearing will consider only the remand item in regards to Statewide Planning Goal 16 impact assessment on the Chetco River Estuary."

Procedural Summary

Applicant owns two parcels of real property located along the Chetco River Estuary. The City approved annexation of the two parcels and rezoned the land from light commercial/industrial to two-family residential. Oregon Coast Alliance (ORCA) appealed that decision in *Oregon Coast Alliance v. City of Brookings*, LUBA No. 2014-087 (Jan 6, 2015) (*Mahar/Tribble I*), asserting as pertinent here: (1) a challenge to City's findings regarding City water supply and capacity to serve new residential development and (2) a challenge to Goal 16 (estuarine resources) compliance regarding an impact assessment required by Goal 16, Implementation Requirement 1.

LUBA remanded the decision for the City to adopt more adequate written findings regarding the availability of the City water supply to serve the proposed annexation territory relative to capacity and for the City to perform a Goal 16 impact assessment. On remand in *Mahar/Tribble I*, the City found that the City's municipal water system has more than sufficient capacity to serve the potential development of the subject property. Final Order and Findings of Fact, File No. ANX-1-14/Remand, page 7 (April 27, 2015). That finding was based on capacities included in the City's adopted Water Master Plan, which was adopted in 2014. Final Order and Findings of Fact, File No. ANX-1-14/Remand, page 8. The current application does not change the Water Master Plan. The 2014 Water Master Plan is judicially noticeable and can be located online at <http://or-brookings.civicplus.com/ArchiveCenter/ViewFile/Item/399>.

The City also determined that the Applicant had adequately presented potential impacts from residential development to the estuarine environment and provided mitigation methods. ORCA again appealed, assigning error solely to the City's adoption of the applicant's attorney's findings regarding Goal 16. LUBA again remanded in *Mahar/Tribble II*.

On January 11, 2016, the City conducted a public hearing on remand from *Mahar/Tribble II*. The Applicant presented evidence related to LUBA's remand. Other parties, including ORCA (collectively, "opponents"), presented testimony and submitted evidence in opposition to the application.

Argument

In *Mahar/Tribble II*, LUBA held that, in assessing potential impacts to the estuary, the City should not compare potential impacts from light commercial/industrial uses to potential impacts from residential uses. LUBA held that the Applicant's attorney's statements are not substantial evidence that support technical conclusions regarding purported adverse impacts to the estuary and endangered salmon species. LUBA specifically held that the City must assess and address purported impacts from storm water runoff and the residential application of pesticides. LUBA rejected ORCA's collateral challenge to estuarine impacts from fill placed on the development site pursuant to a prior unchallenged county fill-placement approval. LUBA remanded "for the city to conduct an impacts assessment free of the identified analytical errors and adopt more adequate findings and conditions supported by substantial evidence." *Mahar/Tribble II*, slip op at 22-23.

a. The impact assessment and proposed conditions provided by Applicant sufficiently address and resolve the analytical errors identified by LUBA.

The Applicant's submissions on remand sufficiently identify the type and extent of impacts to be expected. Specifically, consistently with LUBA's remand order, the Applicant addressed potential water quality degradation that could be caused by sewage and storm water runoff. See *Mahar/Tribble Biological Assessment* at 16 (explaining that the greatest potential for impacts to estuarine resources from residential development would be sewage and storm water runoff).

The Impact Assessment Report suggests the use of best management practices such as sediment fences and fill berms during residential construction would minimize sediment and chemical migration from the property into the estuary. The Impact Assessment Report also suggested that enhancing the existing riparian area will mitigate potential future sediment and chemical migration from the property into the estuary.

The Applicant suggested and stipulated to conditions of approval to avoid or minimize potential adverse impacts to Chetco River estuarine resources. See Applicant's Submittal at 7.

b. Opposition to the approval of the application on remand.

Opponents raise the following challenges and concerns on remand.

- (1) The Applicant failed to specifically identify the extent and scope of any planned future residential development.
- (2) The Applicant failed to demonstrate compliance with all of Goal 16, including demonstrating a public need for residential development and that no feasible upland alternative exists.
- (3) The Applicant failed to respond to all prior comment letters.
- (4) Applicant has not established that the proposed condition imposing restrictive covenants on the use of pesticides can be effective in avoiding runoff into the estuary.
- (5) The evidence on remand fails to address channel migration concerns.
- (6) The evidence on remand fails to address floodplain fill.
- (7) The City should require the Applicant to restore Ferry Creek as a condition of approval.
- (8) Snug Harbor should be preserved as Coho rearing habitat.
- (9) Concern that municipal water withdrawals to accommodate residential development on the subject property will reduce water quality and quantity in the estuary.¹

c. Applicant has adequately addressed the following concerns:

The proposed condition imposing restrictive covenants on the use of pesticides will be effective in avoiding runoff into the estuary.

Applicant's attorney testified at the remand hearing that restrictive covenants allow for enforcement by any property owner who is affected by the covenant. Applicant's attorney also testified that restrictive covenants such as those proposed have proven to be highly effective in restraining private behavior on private property.

That testimony is supported by an email from Ted Bunch of the Oregon Department of Agriculture, commenting on the proposed condition for a restrictive covenant. Mr. Bunch suggested minor changes in language, but nowhere suggested that the proposed restrictive covenants would be ineffective to prevent residential application of harmful pesticides. ANX-1-

¹ Opponents submitted into the remand record the Final Recovery Plan for the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of Coho Salmon, NOAA Fisheries (2014). ANX-1-14 (Remand) Exb G. That document is 1,841 pages long. Opponents fail to specify what part of that document is relevant to the City's decision beyond those salmon-related issues already specifically raised by opponents. In the absence of direct argument, the Applicant cannot and will not speculate as to the significance of that document for rebuttal purposes.

The proposed annexation and zone change will not influence channel migration.

To the extent opponents speculate that channel migration may be impacted by residential development other than the pre-approved fill on the subject property, the application does not propose any activity that will impact channel migration. See ANX-1-14 (Remand) Exb H-2, Donald Porior Letter (“the proposed project will not influence stream migration in the Chectco River”).

Snug Harbor will be preserved as Coho rearing habitat.

The Applicant has agreed that “the downriver portion of the subject property (commonly known as the Snug Harbor area) will remain undisturbed.” ANX-1-14 (Remand) Exb I.

Applicant proposes an additional condition of approval that, except for potential future stream and riparian restoration activities, no residential development activities shall occur in the area downstream of the proposed 100 year flood elevation shoreline boundary after placement of fill per CLOMR, as depicted on the Property Map of Proposed Development on North Shore of Chectco River for Comprehensive Plan Review, previously submitted to the City in File No. ANX-1-14 and attached hereto for reference.

d. The opponents to the application raise issues that are outside the scope of LUBA’s remand. The City need not and should not address those issues.

LUBA remanded specific aspects of the City’s decision, and the City has expressly limited its consideration on remand to those issues. Thus, the City need not and should not consider and decide new arguments that are not related to or directed at the issues on remand. Limiting the scope of the remand avoids redundant proceedings and facilitates the legislative policy that “time is of the essence in reaching final decisions in matters involving land use.” ORS 197.805; *see also Beck v. City of Tillamook*, 313 Or 148, 152 (1992).

LUBA’s remand order was limited to previously raised purported estuarine impacts from storm water and pesticide runoff from residential development, and the lack of substantial evidence that those runoff impacts could and would be mitigated by storm water filtration, sewage conveyance systems, and the existing riparian buffer.

The following issues are outside the scope of remand and need not be considered or decided by the City:

Opposition: The Applicant failed to specifically identify the extent and scope of any planned future residential development.

Under the current application, the Applicant is not required to identify the scope of any future residential development. LUBA explained that under Goal 16, Implementation Requirement 1, the City must review “potential adverse impacts on the estuary’s physical

process or biological values from development allowed under the proposed amendments.” *Mahar/Tribble II*, slip op at 8. That is, the City must review general potential impacts from residential development. Nothing in Goal 16 or LUBA’s remand order require the Applicant to specify the scope of future development.

Opposition: The Applicant failed to demonstrate compliance with all of Goal 16, including demonstrating a public need for residential development and that no feasible upland alternative exists.

In *Mahar/Tribble I*, the opponents argued only that the Applicant failed to provide an impact assessment as required by Goal 16. Any other argument related to Goal 16 is outside the scope of remand and has been waived.

Opposition: The Applicant failed to respond to all prior comment letters.

Again, LUBA specified the “analytical errors” that are to be corrected on remand. Neither the Applicant nor the City is required to revisit and address all prior comments.

Opposition: The evidence on remand fails to address floodplain fill.

In *Mahar/Tribble II*, LUBA specifically stated:

“[T]he impact assessment is properly limited to the ‘actions’ that trigger Implementation Requirement 1: here, the application for annexation and zone change before the city. The city is not required to consider the potential adverse impacts of alterations approved in earlier decisions not before the city. Accordingly, the city is not required to address potential adverse impacts of the previously approved fill in approving the proposed annexation and zone change.”

Mahar/Tribble II, slip op at 21-22. Thus, any potential impacts from fill on the subject property are not at issue on remand.

Opposition: The City should require the Applicant to restore Ferry Creek as a condition of approval.

In *Mahar/Tribble II*, LUBA specifically stated:

“[R]esidential development under the proposed annexation and zone change is [not] predicated on restoration of Ferry Creek. As far as the record establishes, restoration of Ferry Creek is not proposed as part of this application, or a necessary element of residential development of the subject property under the new R-2 zoning.”

Mahar/Tribble II, slip op at 20. Thus, any potential impacts from restoration of Ferry Creek are not at issue on remand and restoration of Ferry Creek is not a necessary or appropriate condition of approval.

Opposition: Municipal water withdrawals to accommodate residential development on the subject property will reduce water quality and quantity in the estuary.

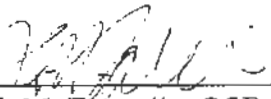
In *Mahar/Tribble I*, LUBA remanded for the City to adopt more adequate findings regarding the availability of city water to serve the annexation territory relative to capacity. *Mahar/Tribble I*, slip op at 10. On remand in *Mahar/Tribble I*, the City found that the City's municipal water system has more than sufficient capacity to serve the potential development of the subject property. That finding was based on capacities included in the City's adopted Water Master Plan, which was adopted in 2014. The current application does not change the Water Master Plan. Opponents' concerns regarding municipal water withdrawals either have already been addressed during the development of the Water Master Plan, or are a collateral attack on the adoption of that plan. In all events, the newly raised concerns about municipal water withdrawal are not within the scope of LUBA's remand in *Mahar/Tribble II*.

Conclusion

Applicant has adequately presented potential estuarine impacts of the proposed annexation and zone change and provided methods to avoid or minimize adverse impacts. The City has restricted the remand to evidence and argument related to the analytical errors identified by LUBA in *Mahar/Tribble II*. Applicant has adequately addressed opponents concerns that are within the scope of the remand. Accordingly, the City should adopt findings, impose appropriate conditions, and approve the application.


Respectfully submitted February 2, 2016.

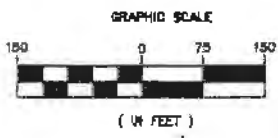
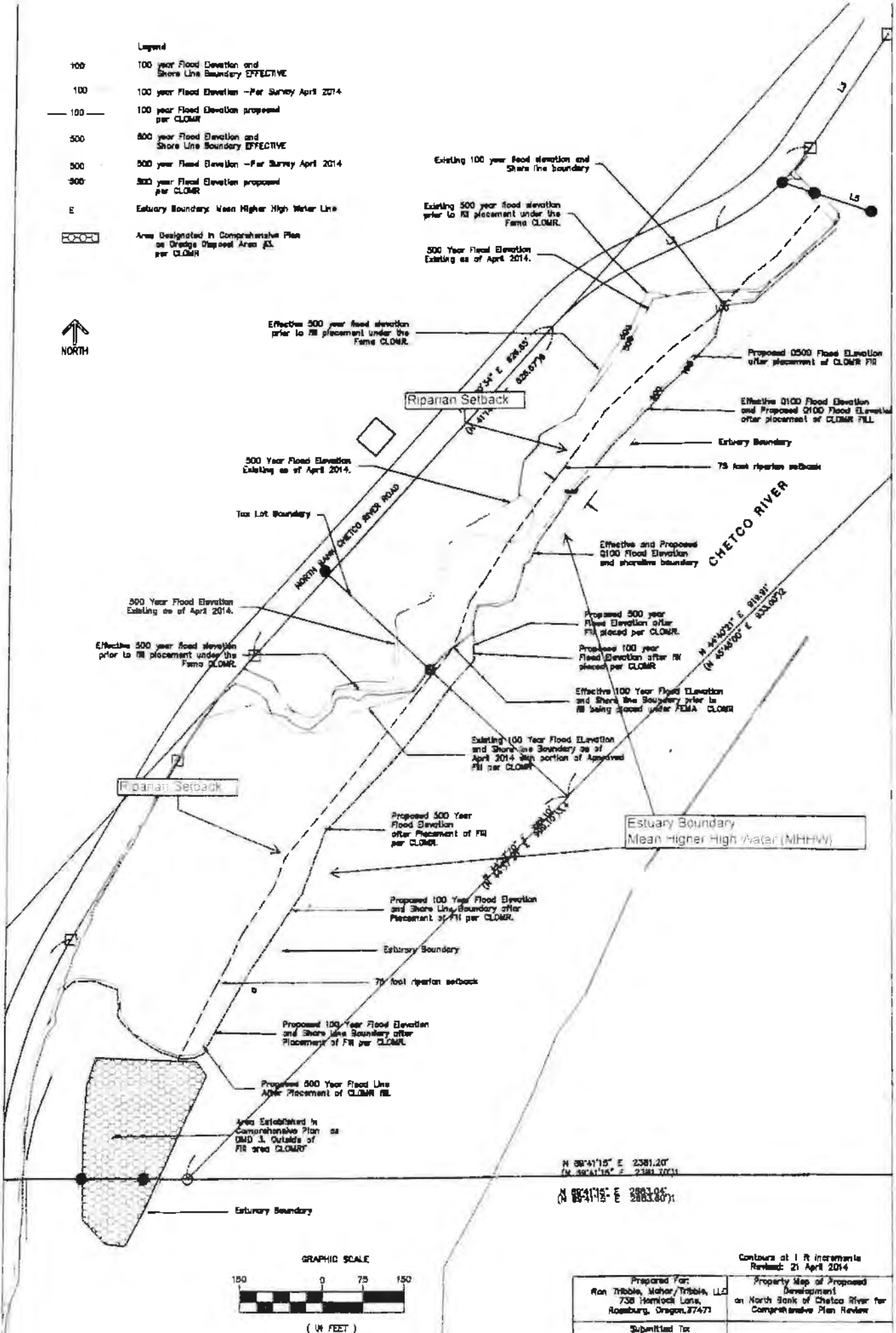
HUYCKE O'CONNOR JARVIS, LLP



H. M. Zamudio, OSB No. 121554

Attachments: Property Map of Proposed Development on North Shore of Checteo River for Comprehensive Plan Review

- Legend**
- 100 100 year Flood Elevation and Shore Line Boundary EFFECTIVE
 - 100 100 year Flood Elevation -Per Survey April 2014
 - 100 100 year Flood Elevation proposed per CLOMR
 - 500 500 year Flood Elevation and Shore Line Boundary EFFECTIVE
 - 500 500 year Flood Elevation -Per Survey April 2014
 - 500 500 year Flood Elevation proposed per CLOMR
 - E Estuary Boundary Mean Higher High Water Line
 -  Area Designated in Comprehensive Plan as Designated Area #3 per CLOMR



N 38°41'15" E 2381.20'
 N 38°41'15" E 2381.20'
 N 38°41'15" E 2381.20'

Prepared For: Ron Tribble, Mahor/Tribble, LLC 738 Homestead Lane, Roseburg, Oregon, 97471	Contours at 1 ft increments Revised: 21 April 2014 Property Map of Proposed Development on North Bank of Chetco River for Comprehensive Plan Review
Submitted To:	

CITY OF BROOKINGS

COUNCIL AGENDA REPORT

Meeting Date: January 11, 2016

Originating Dept: PWDS -Planning

Donna Colby-Hanks *DC*
Signature (submitted by)
[Signature]
City Manager Approval

Subject: Request to consider Applicant's responses to Land Use Board of Appeal's remand (LUBA No. 2015-037) to the City's approval of annexation, File No. ANX-1-14, tax lots 2000 & 1500 on Assessor's Map 40-13-32D; approximately 13.33 acres, adjacent to the Chetco River into the City of Brookings.

Recommended Motion: A motion to approve the Applicant's responses to the issues raised by Oregon Land Use Board of Appeals (LUBA) Remand; Statewide Planning Goal 16 (Estuarine Resources) impact assessment on the Chetco River estuary for File ANX-1-14 as well as approve the Remand Final Order with the additional conditions of approval.

Financial Impact: Approximately \$1,100 in additional taxes prior to development of the subject property.

Background/Discussion: The original approval of the proposed annexation was remanded by LUBA back to the City to address the availability of water in relation to capacity and to address Goal 16, Estuarine Resources. City Council conducted several meetings to consider the remand. The staff report as well as City Council's approval of the final order including findings that addressed both issues.

The Goal 16 approval was again appealed to LUBA. LUBA remanded the issue back to the City for assessment of potential impacts to the estuary as well as identification of methods of mitigation to avoid or minimize adverse impacts. LUBA determined that the assessment does not need to address a possible future reduction in the riparian buffer, placement of fill in the floodplain under Curry County approval, or the possible future restoration of Ferry Creek.

PROPOSED FINDINGS IN RESPONSE TO REMAND ISSUE

The Applicant has submitted a set of findings (**Attachment A**) to support the remand issue described above.

Statewide Planning Goal 16, Estuarine Resources, Chetco River Estuary Boundary. The Chetco River Estuary Boundary runs along the eastern boundary of the subject property and is identified as the Mean Higher High Water (MHHW) line. Pursuant to the LUBA Remand,

findings assessing potential impacts from residential development on the estuarine resources and measures to prevent such impacts are required. The relevant provisions of Statewide Planning Goal 16 are set forth in the Applicant's findings (Attachment A) and are below.

ANALYSIS, FINDINGS AND CONCLUSIONS to Statewide Planning Goal 16, Implementation Requirement 1

1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

a. The type and extent of alterations expected;

The applicant states in the findings that the proposed residential development of the property will not include any physical intrusion into the Estuary Boundary. However, future development would be located within close proximity to the Estuary Boundary. The potential impacts to the estuary resources are primarily based on pollution resulting from the residential development. The pollution could consist of both chemicals and sediment. The applicant has submitted a *Statewide Planning Goal 16 Impact Assessment Report* prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting to fulfill the requirement of an assessment from the remand.

b. The type of resource(s) affected;

According to the Impact Assessment Report provided by the applicant in the findings, the resources that could be impacted with future development of the subject property consist of wildlife resulting from water quality degradation. The location of the proposed development could also impact aesthetic views of the estuary from river users if not protected. No physical alterations within the Estuary Boundary are proposed.

c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary;

The applicant identifies potential impacts from development of the subject property on the following estuarine resources:

1. water quality degradation within the estuary from construction activities.
2. on-going water quality degradation from residential development located within close proximity to the estuary.
3. adverse impacts on wildlife utilizing estuarine resources as a result of water quality degradation during construction and post-construction.
4. adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities.
5. adverse impacts on the aesthetic view from the estuarine resource.

Since no physical development will occur within the Estuary Boundary, there is no anticipated impacts on the physical characteristics of the estuary, navigation, or existing and potential uses of the estuary.

d. The methods which could be employed to avoid or minimize adverse impacts.

Water Quality Degradation

As stated in the Impact Assessment Report, the greatest potential for impacts to the estuary would be from the development's sewage and storm water runoff (sediment and pollution). There is also a potential for sediment to increase during the construction phase.

The residential development is proposed to be served by the City of Brookings public sewer system. This will eliminate the potential of sewage contaminants from entering the estuarine resource.

The Impact Assessment Report identified several recommendations to avoid or minimize adverse impacts on the estuarine resource from storm water runoff. The use of Best Management Practices as outlined in the report during construction will minimize potential impacts. This is included as a requirement in proposed condition of approval #4. The impacted riparian area can be enhanced by the removal of invasive plants to improve its functioning to remove sediment. Any replanting should consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds. This is included in proposed condition of approval #6.

In addition, the applicant states in the findings that the storm water system for the future residential development of the property will be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). The Impact Assessment Report noted this was recommended by Chuck Wheeler, Fisheries Biologist, Oregon Coast Branch, NOAA Fisheries West Coast Region. This is addressed with proposed condition of approval #8.

The use of herbicides, pesticides or fertilizers can impact the estuarine resource. The applicant proposes that only herbicides, pesticides, or fertilizers approved by Oregon Department of Fish and Wildlife (ODFW) or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams or rivers shall be applied on the subject property. However, these matters are under the oversight of Oregon Department of Agriculture. Any chemicals applied to the subject property shall be approved for application near aquatic environments. Proposed condition of approval (#9) will require a

restrictive covenant to be recorded in the Official Records of Curry County. The covenant would be transferred to any future property owner upon sale or division of the subject property. This will alert any future owners of the limits of chemical use on the property.

Wildlife Habitat

Several species of wildlife were identified in the detailed habitat assessment of the Impact Assessment Report as well as the optimal method for protection. Prior to any disturbance on the subject property a wildlife biologist must survey the area. Upon discovery of the western pond turtle or the northern re-legged frog, the species would need to be relocated to an undisturbed area. If any Migratory Bird Treaty Act nesting sites were discovered, a buffer of 300 feet would need to be maintained until the birds fledge. This is included in proposed condition of approval #10.

Aesthetic Resources

The applicant states in the findings that in order to minimize impacts to the view from users of the river, the applicant proposes to enhance the impacted riparian area by removing invasive plants. The invasive species adversely impact native riparian vegetation. Any replanting would need to consist of plants listed in the most current Appendix A of the Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds. This impact is addressed in proposed condition of approval #6.

All recommendations from the Impact Assessment Report have been incorporated into the draft final order as conditions of approval.

Staff recommends adoption of Applicant's findings (**Attachment A**) as well as the analysis and findings contained in the staff report.

Policy Considerations: None.

Attachment(s): A. Applicant's findings
 B. Draft final order
 C. Agency comments

BEFORE THE CITY COUNCIL FOR
THE CITY OF BROOKINGS, OREGON

MAHAR/TRIBBLE, LLC,)	FILE NO.: ANX-1-14-(Remand)
)	
Applicant,)	
)	LUBA NO.: 2015-037
OREGON COAST ALLIANCE,)	
)	APPLICANT'S SUBMITTAL
<u>Appellant.</u>)	

This firm represents Mahar/Tribble, LLC, an Oregon limited liability company ("Applicant"), concerning the above-stated matter. The purpose of this submittal is to submit findings and supporting evidence pursuant to remand instructions provided by the Land Use Board of Appeals in its *Final Opinion and Order* dated October 6, 2015.

A. Property Background.

("Applicant"), is the owner of certain real property located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 (collectively, "the subject property"). The subject property is approximately 13.33 acres in size and is undeveloped. The subject property is located within the City of Brookings's ("the City") Urban Growth Boundary and has a County zoning designation of Commercial (C-1) and Industrial (I). The southern portion of the subject property (Tax Lot 2000) has a "Commercial" Comprehensive Plan designation and the northern portion of the subject property (Tax Lot 1500) has an "Industrial" Comprehensive Plan designation. The extreme southern portion of the subject property, being the area adjacent to Snug Harbor, is designated as Priority Dredge Material Disposal Site #3. The subject property fronts on the North Bank Chetco River Road right-of-way. Municipal water is available to the subject property pursuant to a 14" water main located in the North Bank Chetco River Road right-of-way. Public sewer will be provided to the subject property pursuant to a proposed Infrastructure Financing Agreement between the Applicant and the City ("the Infrastructure Agreement"). Pursuant to the Infrastructure Agreement, Applicant, at Applicant's expense, shall install a sewage lift station with sufficient capacity to serve a maximum of 217 Equivalent Dwelling Unit's ("EDU") and a pressurized 3-inch sanitary sewer main.

The Chetco River runs along the subject property's entire southeastern boundary line. Ferry Creek traverses the subject property but is located within an enclosed culvert. The subject property has been heavily impacted from historical commercial/industrial uses resulting in a significant degradation of the riparian habitat along the Chetco River. The Statewide Planning Goal 16 Chetco River Estuary Boundary ("the Estuary Boundary") is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW).

B. Procedural History.

Applicant submitted a petition/land use application with the City of Brookings, Oregon (“the Application”). The Application consisted of four (4) components: (a) annexation of the subject property into Respondent’s city limits; (b) amending the comprehensive plan designation for the subject property from Commercial/Industrial to Residential; (c) changing the zoning designation of the subject property from Commercial/Industrial to Two-Family Residential (R-2); and (d) amending the Chetco River Estuary Shorelands Boundary along the subject property’s southeastern boundary.

A public hearing was held before the City of Brookings City Council (“the Council”) on September 8, 2014. The Council approved the Application pursuant to the adoption of Ordinance 14-O-738 (“the Decision”). The Decision was appealed to the Land Use Board of Appeals (LUBA) by Oregon Coast Alliance (ORCA). In a *Final Opinion and Order* dated January 6, 2015, LUBA remanded the Decision to the City for additional findings addressing the following: (a) municipal water capacity to serve the future development of the subject property; and (b) Statewide Planning Goal 16 (Estuarine Resources) (“the LUBA Remand”). The remainder of the Decision was affirmed by LUBA.

Consistent with the LUBA Remand, a public hearing was held on April 13, 2015, before the Council to consider additional testimony and evidence to squarely address the “availability” of domestic water “relative to capacity” for the potential development of the subject property based on the Application. The public hearing was not open for issues relating to Goal 16 (Estuarine Resources) because the LUBA Remand concerning Goal 16 was for insufficient findings and was not evidence based. The Council approved the Application again on April 27, 2015 (“the 2nd Decision”).

The 2nd Decision was appealed to LUBA by ORCA. In a *Final Opinion and Order* dated October 6, 2015, LUBA remanded the Decision to the City in order to conduct a Goal 16 impact assessment (“the 2nd Remand”). LUBA made it clear that the impact assessment must be supported by substantial evidence, specifically, expert testimony. Pursuant to the aforementioned LUBA Remands, all other issues involving the application have been resolved. One important LUBA determination was that the remaining fill to be placed on the subject property pursuant to a prior CLOMR approval and fill and grade permit issued by Curry County is not to be considered in the Goal 16 impact assessment set forth below.

C. Goal 16 Impact Assessment.

As directed by LUBA, the relevant provisions of Statewide Planning Goal 16 are set forth as follows:

1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent

discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- a. The type and extent of alterations expected;*
 - b. The type of resource(s) affected;*
 - c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
 - d. The methods which could be employed to avoid or minimize adverse impacts.*
- Goal 16; Implementation Requirements 1.

1. Type and extent of alterations expected.

As set forth above, the Statewide Planning Goal 16 Chetco River Estuary Boundary is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). A map depicting the Estuary boundary is attached hereto as **Exhibit "A"** ("the Map"). The approval of the Application will not result in a physical intrusion into the Estuary Boundary. In other words, no actual development will occur within the Estuary Boundary. However, the future residential development of the subject property consistent with the Application would be located within close proximity to the Estuary Boundary. Applicant acknowledges that potential impacts on the estuary resource from development located outside the Estuary Boundary are possible unless such potential impacts are resolved or mitigated. Such potential impacts on the estuary resources are primarily based on pollution resulting from the contemplated residential development of the subject property. Such pollution consists of both chemicals (e.g. fertilizers, sewage and roadway pollutants) and sediment (*See Habitat Assessment for Federally-Listed Wildlife Species, Statewide Planning Goal 16 Estuary Resources Impact Assessment Report* attached hereto as **Exhibit "B"**) ("the Impact Assessment Report"). The Impact Assessment Report was prepared by Frank Galea, a certified wildlife biologist with Galea Wildlife Consulting.

2. Types of resources affected.

The resources that could be affected in conjunction with the future development of the subject property primarily consist of impacts on wildlife, including fisheries, resulting from water quality degradation. Also, the location of the proposed development could adversely impact aesthetic values of the estuary if such values are not properly protected. As set forth above, the Application will not authorize any physical alterations within the Estuary Boundary.

3. Potential Impacts.

The potential impacts on the estuarine resources resulting from the approval of the Application consist of the following: (a) water quality degradation within the estuarine resource from construction activities; (b) on-going water quality degradation from the residential development being located in close proximity to the estuarine resource; (c) adverse impacts on wildlife, including fisheries, utilizing estuarine resources as a result of water quality degradation during construction and post-construction; (d) adverse impacts on wildlife utilizing the estuarine resource and adjacent lands during construction activities; and (e) adverse impacts on aesthetic resources of the estuarine resource (i.e. view from the estuarine resource). There are no anticipated impacts on the physical characteristics of the estuary, navigation, or existing potential uses of the estuary because no physical development will occur within the Estuary Boundary.

4. Methods to Avoid or Minimize Adverse Impacts.

a. **Water Quality Degradation.** The Impact Assessment Report states, in part, as follows:

The greatest potential for impacts to the Chetco River estuary or any adjacent wetlands would be from the development's sewage and storm water runoff. Although the project is only 1.3 miles from the ocean and thereby this portion of the Chetco River is not likely to be used as spawning habitat for salmonids, juvenile salmonids likely frequent the area during low river flow months. Juvenile salmonids, amphibians and aquatic insects can be directly affected by pollutants entering the estuary. Every effort should be made not to allow sediments or chemicals to migrate from the project site, during construction or after the development is completed. Impact Assessment Report, Pg. 14.

As to construction activities in conjunction with the development of the subject property, the Impact Assessment Report states:

No alterations to salmonid habitats are currently proposed for this property. Any construction, vegetation clearing or heavy equipment activity on the property has the potential to increase sediment flows to the Chetco River. The limited amount of current riparian habitat between development and the river is insufficient as a buffer to prevent sediment transport. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to the river. BMPs can include sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. An enhanced riparian area will eventually mitigate by providing an enhanced buffer to the river from construction and other activities. Impact Assessment Report, Pg. 12.

In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that all construction activities on the subject property will comply with Best Management Practices as set forth in the Impact Assessment Report in order to minimize sediment and unnatural substances (i.e. diesel, oil, etc.) transported into the estuarine resource during the construction of any development on the subject property.

The Impacts Assessment Report also states that a “functioning riparian area can also act as barriers to sediment movement” and recommends that the existing impacted riparian areas be enhanced by the removal of invasive plants such as the Himalayan blackberry. Accordingly, in order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes to enhance the impacted riparian areas by removing invasive plants such as the Himalayan blackberry. Any replanting within the riparian area will consist of plants set forth in the *Plant List for Riparian Zones on the South Coast of Oregon*, being Appendix A to the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that all development on the subject property, being the proposed residential development, will be served by the City’s public sewer system (See Impact Assessment Report, Pg. 14). The foregoing will eliminate the potential of sewage contaminants from the anticipated residential development from entering the estuarine resource. Public sewer will be provided to the subject property pursuant to the Infrastructure Agreement.

In order to avoid or minimize adverse impacts on the estuarine resource, Applicant proposes that the storm water system to serve the development of the subject property be designed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). In a letter attached hereto as **Exhibit “C”** (“the Porior Letter”), Don Porior, an Oregon registered professional engineer with Porior Engineering, LLC, states, as follows:

This letter responds to our proposed Storm Water design for the Tribble Property Development in Brookings (the subject property). The final approved plans will be developed using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch NOAA Fisheries West Coast Region.

We concur with Mr. Wheeler that the use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems or comparable prior to entering the estuary. Porior Letter (explanation added).

The Impact Assessment Report also states:

A storm water runoff system is being designed by an engineer, using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for

Endangered Species (SLOPES V). Use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems, bioswales and/or comparable uses prior to entering the estuary. Impact Assessment Report, Pg. 14.

In order to avoid or minimize adverse impacts on the estuarine resource, specifically water quality, Applicant proposes that no herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

b. Wildlife Habitat.

In order to avoid or minimize impacts on estuarine based wildlife (excluding fisheries) and their respective habitats, Applicant proposes to implement the mitigation measures set forth in the Impact Assessment Report. The Impact Assessment Report contains a detailed habitat assessment of estuarine based wildlife. Species of concern specific to this Application include: (a) migratory birds under the Migratory Bird Treaty Act; (b) the Western pond turtle; and (c) the Northern Red-legged frog. In order to protect the aforementioned species, the Impact Assessment Report recommends that a wildlife biologist survey the designated construction area prior to the initiation of construction activities. Upon discovery of Western pond turtle(s) and/or Northern Red-legged frog(s), these species should simply be relocated to the undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer is recommended until such time the birds fledge (See Impact Assessment Report, Pg. 10). Applicant agrees to implement the Impact Assessment Report's recommendations as conditions of approval.

c. Aesthetic Resources.

In order to minimize impacts on the aesthetic values of the estuarine resource (e.g. view from users of the estuary such as boaters), Applicant proposes to enhance the existing impacted riparian area. Specifically, Applicant proposes to enhance the impacted riparian areas by removing invasive plants such as the Himalayan blackberry, which are unsightly and adversely impact native riparian species. Any replanting of the impacted riparian area will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.

D. Conditions of Approval.

Based on the foregoing, Applicant stipulates to the following conditions of approval in order to avoid or minimize adverse impacts on the Chetco River estuarine resource and proposes that the following conditions of approval be incorporated into an order approving the Application:

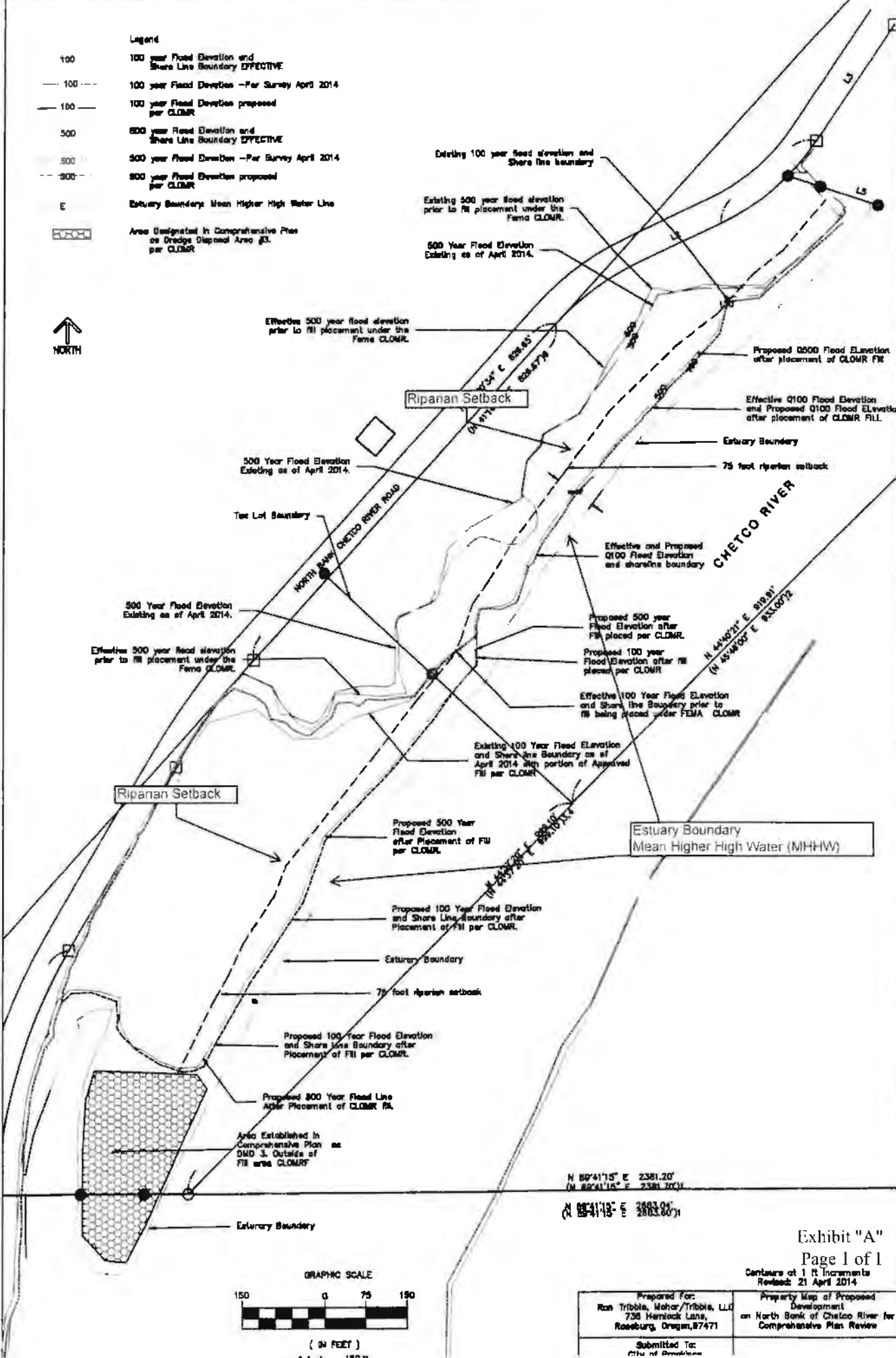
1. All construction activities on the subject property shall comply with Best Management Practices (BMPs) in order to prevent sediment or fuel (leaked oils, diesel or gasoline or any other unnatural substance) movement to the estuary. BMPs shall include but not be limited to sediment fences, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment.
2. The existing degraded riparian area along the subject property's eastern boundary shall be enhanced by the removal of invasive species such as Himalayan blackberry which is prevalent. Any replanting of the degraded riparian area will consist of native riparian species set forth in the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof.
3. All residential development on the subject property, as well as other development allowed by the proposed zoning designation, shall be served by the City's public sewer system and the City's municipal water system. Public sewer will be provided to the subject property pursuant to the Infrastructure Agreement.
4. The storm water system to serve the development of the subject property shall be developed in accordance with the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V).
5. No herbicides, pesticides or fertilizers shall be applied on the subject property unless such herbicides, pesticides and fertilizers are: (a) approved by ODFW or the Oregon Department of Environmental Quality (DEQ) for use in close proximity to streams and rivers (i.e. environmentally friendly products); and (b) such applications are consistent with the *Coastal Oregon Riparian Silviculture Guide, Oregon Plan for Salmon & Watersheds*, December, 2003, or any amendments thereof. Applicant shall cause a restrictive covenant to be recorded against the subject property implementing this restriction in the Official Records of Curry County, Oregon. A draft of the restrictive covenant shall be submitted to the City for approval prior to the execution and recording of the covenant.
6. Prior to the initiation of construction on the subject property, including clearing and grading of the subject property, a survey by a qualified wildlife biologist shall be conducted for the following species: (a) migratory birds under the Migratory Bird Treaty Act; (b) the Western pond turtle; and (c) the Northern Red-legged frog. Upon discovery of Western pond turtle(s) and/or Northern Red-legged frog(s), these species will simply be relocated to undisturbed areas of the subject property to avoid injury. In the event an active Migratory Bird Treaty Act nesting site is discovered (i.e. March through August), a 300 foot buffer will be maintained from such nest until such time the birds fledge.

HUYCKE O'CONNOR JARVIS, LLP



DANIEL B. O'CONNOR, OSB No. 950444

- Legend**
- 100 100 year Flood Elevation and Shore Line Boundary EFFECTIVE
 - 100 year Flood Elevation -Per Survey April 2014
 - - - 100 year Flood Elevation proposed per CLOMR
 - 500 500 year Flood Elevation and Shore Line Boundary EFFECTIVE
 - 500 year Flood Elevation -Per Survey April 2014
 - - - 500 year Flood Elevation proposed per CLOMR
 - E Estuary Boundary: Mean Higher High Water Line
 - [Hatched Box] Area Designated in Comprehensive Plan as Dredge Disposal Area #3, per CLOMR



N 89°41'15" E 2381.20'
 (N 89°41'15" E 2381.20')
 N 89°41'15" E 2883.80'

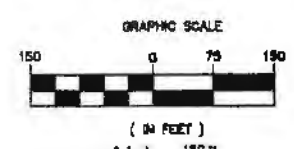


Exhibit "A"
 Page 1 of 1
 Contours at 1 ft Increments
 Revised: 21 April 2014

Prepared For: Ron Tribble, Mohr/Tribble, LLC 738 Hancock Lane, Roseburg, Oregon, 97471	Property Map of Proposed Development on North Bank of Chetco River for Comprehensive Plan Review
Submitted To: City of Roseburg	



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HABITAT ASSESSMENT FOR FEDERALLY-LISTED WILDLIFE SPECIES, STATEWIDE PLANNING GOAL 16 ESTUARY RESOURCES IMPACT ASSESSMENT REPORT, MAHAR PROJECT SITE, BROOKINGS, OREGON

Submitted to: Mr. Daniel O'Connor
Huycke O'Connor Jarvis, LLP
823 Alder Creek Drive
Medford, OR 97504

Prepared by: Frank Galea, Certified Wildlife Biologist
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Submitted: December 2015

By:

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1.0

SUMMARY

The Applicant (Mahar/Tribble, owners) propose to prepare a historically industrial property along the Chetco River for future development (Figure 1). Galea Wildlife Consulting (GWC), Incorporated, of Crescent City, California was contracted by the Applicant's agent to provide a biological assessment to determine the potential for federal and state-protected species being within the disturbance area of the project.

The Oregon Statewide Planning Goal 16 Chetco River Estuary Boundary ("the Estuary Boundary") is located along the eastern boundary of the subject property. The Estuary Boundary being the line of Mean Higher High Water (MHHW). The project, as proposed, would have minimal impacts upon the estuary. Mitigations include riparian area enhancement, a potential re-alignment of Ferry Creek through the property, and use of "best management practices" during land clearing and construction.

No potential habitats were found for the marbled murrelet (*Brachyramphus marmoratus*), snowy plover (*Charadrius alexandrinus nivosus*), the northern spotted owl (*Strix occidentalis caurina*) or the candidate species, the Pacific fisher (*Martes pennant*). No potential nesting habitat for the bald eagle (*Haliaeetus leucocephalus*) was located on or near the project site.

Wetlands are present in the western portion of the property, including potential habitat for the federally-listed western lily (*Lilium occidentale*). Recommendations include surveys for red-legged frogs (*Rana aurora aurora*) and western pond turtles (*Actinemys marmoratus marmoratus*) before any land clearing or construction.

2.0

INTRODUCTION

The Applicant proposes: (1) the annexation of the subject property into the City of Brookings; (2) an amendment of the Comprehensive Plan designation of the subject property from Commercial/Industrial to Residential; (3) change the zoning of the subject property from Commercial (C-1)/Industrial (I) to Two-Family Residential (R-2); and (4) amend the Chetco River Estuary Shorelands Boundary to be consistent with the 100-year floodplain boundary. Based on the foregoing proposed Two-Family Residential (R-2) zoning designation the maximum development potential of the subject property is 59 residential units. There would be no alterations or physical changes to the Chetco River estuary from this development.

Wildlife species potentially located in the general area which are federally-listed as threatened include snowy plover, the northern spotted owl, the Pacific fisher and the marbled murrelet. The bald eagle is de-listed but is still protected under the federal Bald and Golden Eagle Act. Listed salmonids were also considered for this biological assessment as the project is located on the north bank of the Chetco River.

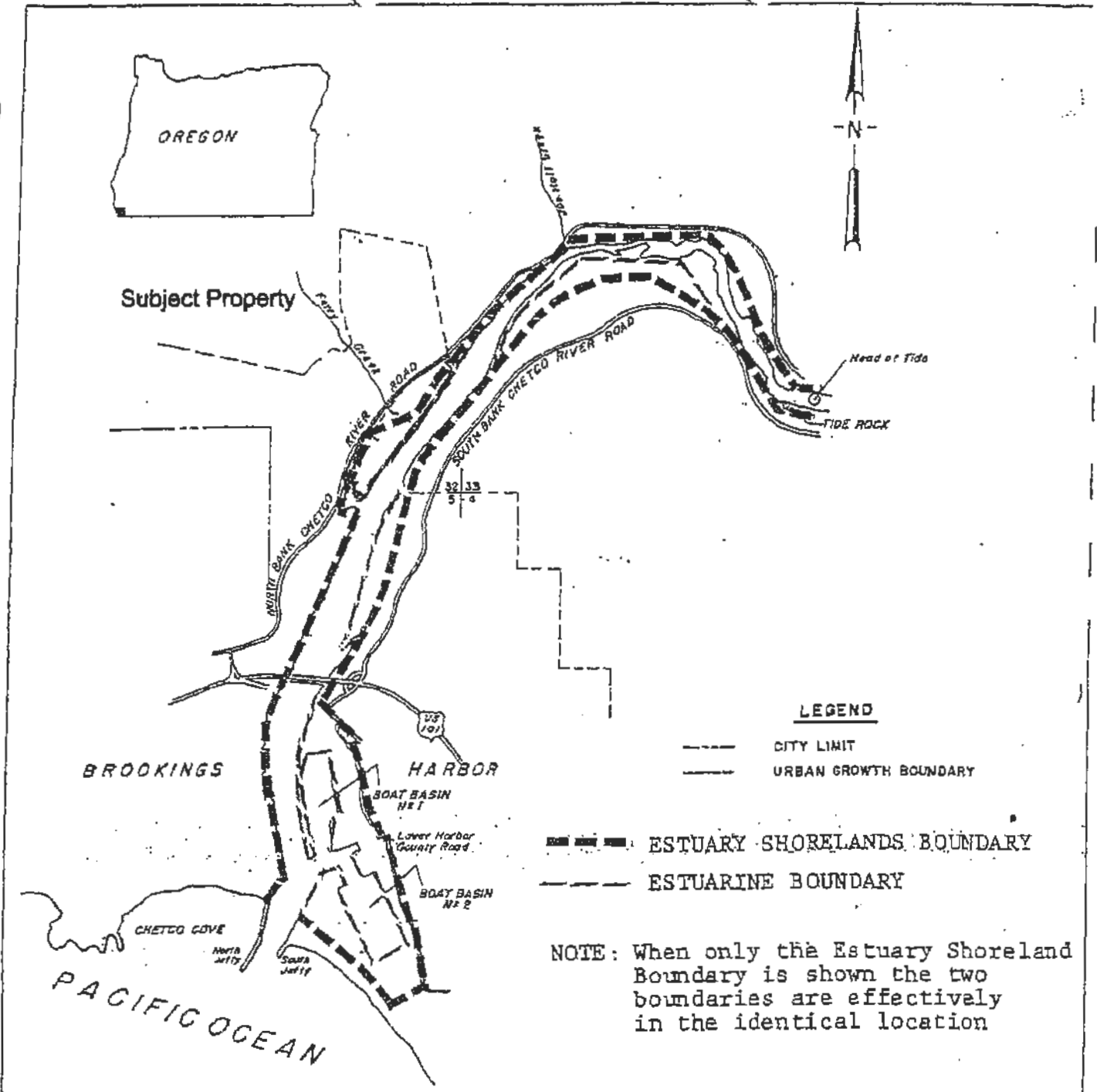


Figure 1. Location of Mahar/Tribble property relative to Brookings, Oregon

2.1 Statewide Planning Goal 16.

Oregon Statewide Planning Goal 16 (Estuarine Resources) provides for the protection of the unique environmental, economic, and social values of estuaries and associated wetlands. Goal 16 requires that actions that could potentially alter an estuarine ecosystem be subject to the following impact assessment:

1. Unless fully addressed during the development and adoption of comprehensive plans, actions which would potentially alter the estuarine ecosystem shall be preceded by a clear presentation of the impacts of the proposed alteration. Such activities include dredging, fill, in-water structures, riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged material, and other activities which could affect the estuary's physical processes or biological resources.

The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- a. The type and extent of alterations expected;*
- b. The type of resource(s) affected;*
- c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use, navigation and other existing and potential uses of the estuary; and*
- d. The methods which could be employed to avoid or minimize adverse impacts.*

2.2 Environmental Setting

The project site is located in Curry County, Oregon, and commonly known as Township 40 South, Range 13 West, Section 32D, Tax Lots 1500 and 2000 (collectively, "the subject property"). The subject property is approximately 13.33 acres in size and is undeveloped. The subject property fronts on the North Bank Chetco River Road right-of-way.

The Chetco River runs along the subject property's entire south boundary line. Immediately west of the property a small inlet off the Chetco River can be found, which runs from the river northeast towards the subject property. This site is called Snug Harbor, and used to be the historical harbor for the city of Brookings. Directly west of the inlet is the Chetco River Resort.

Ferry Creek traverses the subject property but is located almost entirely within an underground pipe. After crossing under North Bank Road via a large culvert, Ferry Creek is briefly exposed on the property, surrounded by alders and Himalayan blackberry bushes, but then continues to the Chetco River via the underground pipe.

The subject property has been heavily impacted from historical commercial/industrial uses resulting in a significant degradation of the riparian habitat along the Chetco River.

2.3 Physical Environment

The climate of southern Oregon is characterized as Mediterranean, with cool, wet winters and warm, dry summers with frequent fog. Along the coastline, proximity to the Pacific Ocean produces high levels of humidity and results in abundant fog and fog drip precipitation. The maritime influence diminishes with distance from the coast, resulting in lesser amounts of fog, drier summer conditions and more variable temperatures. Annual precipitation in the project area ranges from 40 - 120 inches occurring primarily as rain during the winter months.

2.4 Regulatory Context

The project is located within the geographic range of several special- status plant and wildlife species. Biological resources on the site may be subject to agency jurisdictions and regulations, as described below.

(a) U.S. Fish and Wildlife Service (USFWS). The USFWS has jurisdiction over species listed as threatened or endangered under the federal Endangered Species Act (ESA). The ESA protects listed species from "take," broadly defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." An activity is defined as a "take" even if unintentional or accidental. An endangered plant or wildlife species is one that is considered in danger of becoming extinct throughout all, or a significant portion of its range. A threatened species is one that is likely to become endangered within the foreseeable future. In addition to endangered and threatened species, the USFWS has a list of candidate species, which are those for which the USFWS currently has enough information to support a proposal for listing. Section 9 of the ESA and its applicable regulations restrict certain activities with respect to endangered and threatened plants. However, these restrictions are less stringent than those applicable to fish and wildlife species. These provisions prohibit the removal of, malicious damage to, or destruction of any listed plant species "from areas under federal jurisdiction." Listed plants may not be cut, dug up, damaged or destroyed, or removed from any other area (including private lands) in knowing violation of a State law or regulation.

(b) Migratory Bird Treaty Act (MBTA). The MBTA (16 United States Code [USC] 703) enacts the provisions of treaties between the United States, Great Britain, Mexico, Japan, and the Soviet Union and authorized the U.S. Secretary of the Interior to protect and regulate the taking of migratory birds. The MBTA sets seasons and bag limits for hunted species and protects migratory birds, their occupied nests, and their eggs (16 USC 703, 50 CFR 21, 50 CFR 10).

(c) The Bald and Golden Eagle Protection Act (BGEPA). The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c), enacted in 1940 and amended several times since then, prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, or golden eagles (as amended). In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment.

(c) U.S. Army Corps of Engineers. Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers is responsible for regulating the discharge of fill material into waters of the U.S. Waters of the U.S. and their lateral limits are defined in 33 CFR (Code of Federal Regulations) Part 328.3 (a) and include streams that are tributary to navigable waters and their adjacent wetlands. Wetlands that are not adjacent to waters of the U.S. are termed "isolated wetlands" and may be subject to U.S. Army Corps of Engineers jurisdiction.

(d) Oregon Department of Fish and Wildlife (ODF&W). The ODF&W has jurisdiction over threatened or endangered species that are formally listed by the State under the Oregon Endangered Species Act (OESA). The OESA is similar to the federal Endangered Species Act both in process and substance; it is intended to provide additional protection to threatened and endangered species in Oregon.

The OESA does not supersede the federal Endangered Species Act, but operates in conjunction with it. Species may be listed as threatened or endangered under both acts (in which case the provisions of both State and federal laws would apply) or under only one act. The Oregon endangered species laws prohibit the taking of any plant listed as threatened, endangered, or rare. In Oregon, an activity on private lands (such as development) will violate Section 9 of the Endangered Species Act if a plant species, listed under both State and federal endangered species laws, is intentionally removed, damaged, or destroyed. Under the State Fish and Game Code, the ODF&W also has jurisdiction over species that are designated as "fully protected." These species are protected against direct impacts.

3.0

METHODS

3.1 Records Search

A December 2015 IPaC (Information Planning and Conservation Report) report from the USFWS was used to provide potential sensitive species information. This report identified the marbled murrelet, snowy plover, the northern spotted owl, the Pacific fisher and the western lily as federally-listed species potentially occurring in the area. GWC also contributed to the sensitive species assessment list based on GWC records and previous work in the area.

The owner of the Chetco River Resort, Mr. Alan Murray, was contacted for information regarding any sensitive species information he may know of, having built and owned the resort for decades.

A wetland delineation report prepared for the Applicant in 2006 (*Wetland Delineation report, John Curry Property, Brookings, Curry County, Oregon*) was reviewed for biological information gathered at that time.

For the purposes of this report, special-status plant and animal species are defined as those listed in the as Threatened or Endangered under the Federal Endangered Species Act, or candidates for federal listing. Listed wildlife species potentially occurring within or near the assessment area are presented in Table 1.

3.2 Field Reconnaissance and Habitat Assessment

A field investigation of the project area was conducted in December of 2015. Certified Wildlife Biologist Frank Galea conducted the field review. Potential wildlife habitats within and around the project area were assessed for their potential for federally protected wildlife species. Stands in proximity to the project site were assessed for their potential as nesting, denning, resting or forage habitats for target species.

4.0

RESULTS

4.1 Records Search

The IPaC report provided a summary of those federally-listed wildlife and plant species with potential to occur near the project area. GWC supplemented this list based on our knowledge of the area and sensitive species which may occur there.

4.2 Habitat Analysis for Federally - Protected Wildlife

Table 1 provides the list of sensitive or listed wildlife species potentially occurring in the general vicinity of the project area based upon the U.S. Fish and Wildlife Service IPaC report and GWC records. The listing status of each species and if potential habitat (as determined by GWC, based upon a review of habitat available within the project area) was located within or immediately adjacent to the project area is also provided in Table 1.

4.3 Marbled Murrelet (*Brachyramphus marmoratus*)

The marbled murrelet (MAMU) occurs only in North America, from Alaska south to Santa Cruz, California (Nelson 1997). The MAMU is closely associated with old-growth and mature forests for nesting and population declines have been attributed in part to loss or modification of forest habitat (USFWS 1997). This species is state-listed as endangered in California and threatened in Oregon and Washington (Nelson and Sealy 1995). In September 1992, the U.S. Fish and Wildlife Service listed MAMU as federally threatened in Washington, Oregon, and California (USFWS 1997).

Unlike most members of the family Alcidae, MAMU most often nest in trees. MAMU prefer to nest in old-growth and mature coniferous forests throughout most of their range (Nelson and Sealy 1995, Ralph et al. 1995). They also have been found in younger forests with structural elements similar to old growth, such as remnant old-growth trees or younger trees with platforms created by deformities or dwarf mistletoe infestations (Grenier and Nelson 1995, Nelson and Wilson 2001).

Table 1 . Federally-Protected Wildlife Species Potentially Occurring near the Project Area due to Suitable Habitat Conditions (From USFWS & ODF&W lists)					
Common Name	Scientific Name	Federal Status	State Status	Breeding Habitat near Project Area?	Forage Habitat near Project Area?
BIRDS					
Marbled murrelet	<i>Brachyramphus marmoratus</i>	FT	OE	No	No
Northern spotted owl	<i>Strix occidentalis caurina</i>	FT	OT	No	No
Western snowy plover	<i>Charadrius alexandrinus nivosus</i>	FT	OT	No	No
Pacific Fisher	<i>Martes pennanti</i>	FC	NL	No	No
Western Lily	<i>Lilium occidentale</i>	FE	OE	Yes	NA
FISH					
S. OR./N. CA Coho salmon	<i>Oncorhynchus kisutch</i>	FT	NL	Yes	Yes
Chinook salmon	<i>Oncorhynchus tshawytscha</i>	FC	NL	Yes	Yes
Coastal cutthroat trout	<i>Oncorhynchus clarki clarki</i>	NL	NL	Yes	Yes
Summer-run steelhead trout	<i>Oncorhynchus mykiss irideus</i>	FC	NL	Yes	Yes

<u>Codes: Federal Status</u>		<u>State Status</u>	
FE	Federally endangered	OE	Oregon endangered
FT	Federally threatened	OT	Oregon threatened
FC	Federal candidate for listing	OCE	Oregon candidate for endangered listing
NL	Not listed Federally	NL	Oregon not listed

Potential for Impacts from this Project

MAMU are known to utilize old-growth redwood stands to the south in California, and old-growth fir stands in Oregon, for nesting. The project area is located in a rural residential / commercial area surrounded by early seral (young growth stage) commercial timberlands with no potential for MAMU nesting habitat. Due to the lack of suitable nesting habitat for murrelets near the project area it is highly unlikely that marbled murrelets would be found in proximity to this project site. This project would have no impact on MAMU. Surveys or mitigation for marbled murrelet are not necessary.

4.4 Northern Spotted Owl (*Strix occidentalis caurina*)

The northern spotted owl (NSO) is listed as federally threatened and also listed as threatened by the State of Oregon. The NSO is not uncommon over most of its range, which in southern Oregon includes late seral conifer forests and mixed-conifer woodlands of the coastal mountains. It occurs locally in old growth and mid-seral second-growth forests.

NSO prefer large diameter trees or snags within well-shaded stands for nest sites, where they will use old nests, cavities or shaded, broken-topped trees. While NSOs close association with old growth has been documented extensively (Forsman et al. 1984, Gutiérrez and Carey 1995, Thomas et al. 1990), it also nests in mid to late seral forests when stands are highly variable in structure and composition (Spies and Franklin 1991). They prefer an overhead canopy over nests and roost sites for thermal and predator protection and are intolerant to extreme heat, especially for nest sites. NSO hunt in relatively closed canopy forests with open sub-canopies and moderate stem densities.

Potential for Impacts from this Project

The project site is located in a rural residential / commercial area, with associated young, commercial timberlands. No habitat for NSO is available on or near the project site, and this project would have no impacts on NSO. Surveys or mitigations for NSO are therefore not necessary and are not recommended.

4.5 Western snowy plover (*Charadrius alexandrinus nivosus*)

The snowy plover is listed as federally threatened and State of Oregon threatened. The snowy plover is a rare bird along the Oregon coast, nesting on barren sand beaches and occasionally gravel bars along large rivers, for nest sites. The Pacific coast population of the western snowy plover breeds primarily on coastal beaches from southern Washington to southern Baja California, Mexico.

Historical records indicate that nesting western snowy plovers were once more widely distributed in coastal California, Oregon, and Washington. In Oregon, snowy plovers historically nested at 29 locations on the coast. Currently there are only 10 nesting locations, representing a 65 percent decline in active breeding areas. Plover numbers have slightly increased in the past few years.

Potential for Impacts from this Project

This project is located 1.3 miles from the ocean with no potential habitat in or near the project for this species. This project would have no impact on snowy plovers. Surveys or mitigations for snowy plovers are therefore not necessary and are not recommended.

4.6 Bald eagle (*Haliaeetus leucocephalus*)

Although the bald eagle was de-listed from the endangered species list is still protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty. Management guidelines for protection of the bald eagle and nest sites were issued by the U.S. Fish and Wildlife Service in 2007.

The bald eagle population in southern Oregon has been gradually increasing in size, and greatly re-establishing its range. In the past ten years the bald eagle population increased its range and one pair has been nesting in the Smith River area, south of the Chetco drainage, for several years.

Bald eagles prefer to nest close (within one mile, usually in view) to large, fish-rich waters such as lakes and rivers. They typically utilize large conifers to build nests in, which can be standing alone or in the midst of a dense timber stand. Bald eagles typically have alternate nest sites located within one territory, which are used some years as alternates to the primary nest site.

Potential for Impacts from this Project

According to the owner of the resort immediately west of the project, no bald eagles have been observed anywhere near the project area. No stands of large conifer are located near the project site which would provide preferred nesting habitat. This project would have no impact on bald eagles. No additional surveys or mitigations are required for this species.

4.7 Osprey (*Pandion haliaetus*)

The osprey was included in this analysis due to the proximity of the harbor and the Chetco River, both potential forage areas for osprey. Osprey utilize the same habitats as the bald eagle, feeding exclusively on fish. Nests are built on top of or close to the top of large trees or snags, usually close to feeding areas, or at least within sight of feeding areas.

One osprey nest site is known of in the general area. This is a nest site located on the southeast corner of the Chetco River Resort, directly overlooking the Snug Harbor inlet and the Chetco River. According to Mr. Murray, owner of the resort, this nest site has been used many years, and osprey return to nest at this location every year.

Potential for Impacts from this Project

A known osprey nest is located 1,000 feet west of the developed west edge of the property, with dense vegetation between the two. This constitutes a sufficient buffer between the nest site and proposed development. No additional surveys or mitigations are required for this species.

4.8 Migratory Bird Treaty Act

Potential nesting habitat for birds covered by the Migratory Bird Treaty Act occurs within the project area. As migratory birds can potentially nest in wetlands, riparian habitats and surrounding trees and brush, potential nesting habitat could be impacted during construction and vegetation removal. Nesting bird surveys should include any potential nesting of birds belonging to the Ardeidae family, which includes herons, egrets, bitterns and their allies. Locally abundant great blue herons and snowy egrets are colony nesters, forming large assemblages of nests in one location. It is therefore critical to locate any heron or egret colony nest sites which may be impacted by the project.

It is recommended that surveys for bird nests should be conducted prior to vegetation removal and construction if this is to occur during the migratory bird nesting season, March through August of any given year. If nests are found construction activities should be halted within 300 feet until nestlings fledge.

Potential for Impacts from this Project

The previously developed portion of the property contains little nesting habitat for migratory birds, and as this is where future development is planned, there would be no significant impact to migratory birds. As the Applicant intends to enhance the riparian buffer between the river and future development, nesting habitat for migratory birds would actually be improved. Mitigations include nesting bird surveys prior to land clearing and construction, plus an enhanced riparian strip along the river.

4.9 Western pond turtle (*Actinemys marmoratus marmoratus*)

The western pond turtle (WPT) is assessed here due to the proximity of the project to the Chetco River. Very little is known about the western pond turtle in Curry County, although they have been found in the Chetco River system. The western pond turtle inhabits wetlands, coastal lagoons, river, ponds and swampy areas subject to seasonal flooding. To the north, a large population can be found in the Rogue River. As their name suggests, these turtles prefer the calm, deep waters offered by ponds and will utilize man-made ponds if they have access to them. Large marsh areas are a preferred habitat.

Female western pond turtles require suitable nesting habitat near their summer forage habitats in order to lay their eggs. Preferred nesting habitat would be dry, upland sites with reduced canopy closure where eggs developing in the ground would be warmed by sunlight.

Western pond turtles also prefer to overwinter in upland habitats. Although they can successfully overwinter in mud substrates on the bottom of ponds, some populations use upland sites to overwinter under vegetation. This is especially true of WPT populations using large rivers, where they leave the river system once rivers rise and increase in flow, and move into dense vegetation above high water levels to estivate over winter.

Potential for Impacts from this Project

WPT are known to utilize the upper portions of the Chetco River. Potential habitat for WPT exists in the western portion of the property, where a backwater area is found just east of Snug Harbor and the Chetco River Resort. However, the owner of the resort reports that he has never seen turtles anywhere near the resort or the project area.

Only the westernmost portion of the property contains preferred WPT habitat. Therefore, construction on the previously developed portion of the property would have no impact upon this species. An enhanced riparian strip along the river would be beneficial for WPT, as would a restored Ferry Creek. It is recommended that a biologist survey for and move any turtles found from any area where heavy machinery is to be used and move them out of harm's way to a non-impacted location. No additional mitigations are necessary.

4.10 Northern Red-legged Frog (*Rana aurora aurora*)

The northern red-legged frog likely occurs on the west end of this property in wetland habitat. This species requires standing water for breeding, but can be found some distance from standing water for foraging. Although red-legged frog numbers are greatly diminished in most areas of California and even listed as federally-threatened in some localities, this species is relatively abundant in Del Norte County to the south and is not a protected species.

Potential for Impacts from this Project

Habitat for red-legged frogs exists on much of the property, except where paving and hard gravels persist and vegetation is limited and scarce. The previously developed area of the property may provide seasonal forage habitat during wet years for this species, however nesting habitat is limited to those areas where standing water is available all year, which only occurs in the most western portion of the property, near Snug Harbor. Therefore, land clearing and construction on the previously developed portion of the property would have an insignificant impact upon this species.

Red-legged frogs should be protected wherever possible from construction. It is recommended that a biologist survey for and move any red-legged frogs found from any area where heavy machinery is to be used and move them out of harm's way to a non-impacted location. No additional mitigations are necessary.

4.11 Salmonids

The project area is located on the north bank of the Chetco River. Coho salmon (*Oncorhynchus kisutch*), Chinook salmon (*Oncorhynchus tshawytscha*) and Klamath Mountains steelhead trout (*Oncorhynchus mykiss irrideus*) are all known to occur in the Chetco River. It is likely that Snug Harbor, immediately west of the property, provides a backwater refugia for juvenile salmonids.

Potential for Impacts from this Project

No alterations to salmonid habitats are currently proposed for this property. Any construction, vegetation clearing or heavy equipment activity on the property has the potential to increase sediment flows to the Chetco River. The limited amount of current riparian habitat between development and the river is insufficient as a buffer to prevent sediment transport. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to the river. BMPs can include sediment fences, bioswales, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. An enhanced riparian area will eventually mitigate the project by providing an improved buffer to the river from construction and other activities.

4.12 Sensitive Plants

The western lily grows at the edges of sphagnum bogs and in forest or thicket openings along the margins of ephemeral ponds and small channels. It also grows in coastal prairie and scrub near the ocean where fog is common.

Potential habitat for the western lily was found on the west side end of the property, which is undeveloped and consists of a mix of upland riparian and wetland habitats. The 2006 wetland delineation by Roberts and Associates noted that no western lily were encountered during their surveys, and mentioned a lack of wet bog conditions on site, thereby noting a lack of preferred habitat for the species.

Common Name	Scientific Name	Federal Status	State Status	Preferred Habitat	Habitat in Project Area?
Western Lily	<i>Lilium occidentale</i>	End.	End.	Bogs, fens, wet gaps in coastal conifer forest	Yes

Potential for Impacts from this Project

The only potential habitat for the western lily is within the western portion of the property, where no construction or habitat alteration is planned. Unless construction or habitat alteration is planned beyond the area of previous development and impact, no surveys or mitigations for western lily are required.

4.13 Invasive Plants

Invasive Himalayan berry (*Rubus discolor*), English ivy (*Hedera helix*) Scotch broom (*Cytisus scoparius*) and other invasive plants occur throughout the property. Wherever possible during vegetation removal and construction, invasive plants should be removed by the root. *Hedera* vines growing up trees should be cut, killing the plant above the cut and not allowing flowering and thus seed dissemination, which only occurs when the plant flowers along vines off the ground. Removal of invasive plants and the exclusion of invasive plants in the future is a positive mitigation for this project.

4.14 Wetlands

A wetland delineation report (*Wetland Delineation report, John Curry Property, Brookings, Curry County, Oregon*) was prepared for the Applicant by Roberts and Associates of Harbor, Oregon in 2006. This report identified a small (0.12 acre) wetland area on the northwest edge of the property, the west edge of which borders the Snug Harbor open water inlet. The report is attached as Appendix A.

Potential for Impacts from this Project

Any construction, vegetation clearing or heavy equipment activity on the property has the potential to cause sediment flows to wetlands located immediately west of the development site. Any activities as described should be mitigated with the best management practices (BMPs) possible, in order to prevent sediment or fuels (leaked oils, diesel or gasoline or any other unnatural substance) movement to wetland habitats. BMPs can include sediment fences, bioswales, fill berms between construction areas and sensitive habitats, fuel mats under stored vehicles and construction equipment, use of fuel mats whenever re-filling equipment, etc. Mitigation should include fencing installed between the development and wetland habitats to prevent access and thereby degradation to resources.

4.15 Ferry Creek

As noted above, Ferry Creek enters this property via a culvert under the North Bank of the Chetco River Road, where it is at first open for approximately 100 feet but then enters a pipe which runs the flow all the way down to the bank of the Chetco River. It is highly likely, given the status of Ferry Creek north of the main road, that all of the creek channel on the property is artificial.

The Applicant is amiable to restoring the creek on his property. Options vary, one of which would be to remove the conduit the creek is currently in and create a streambed through the midst of the property, directly to the Chetco. This would be the shortest route to take and the least expensive scenario.

Another option would be to create a new streambed leading west from where the creek enters the property, along the roadway edge and down to the terminus of the Snug Harbor inlet. This option would increase the length of Ferry Creek, would introduce a fresh flow of water into Snug Harbor and surrounding wetlands, and allow for maximizing the use of the already-impacted portion of the subject property. By re-directing Ferry Creek into Snug Harbor, this would likely increase the size and depth of the inlet and increase the quality and amount of juvenile salmonid rearing habitat for this location along the river. Restoring Ferry Creek in this manner would be an excellent mitigation for this project, as it would enhance wetland habitats by increasing the water source into the western portion of the property, improve conditions within the Snug Harbor portion of the Chetco River estuary and improve habitat conditions for salmonids, amphibians and potentially for the western pond turtle.

Potential for Impacts from this Project

As Ferry Creek is already severely impacted, with most of the creek running through pipe underground on the property, the project as designed would have no additional impact on the creek. Restoring Ferry Creek to a new location, or creating a new streambed where the pipe currently runs, would be an excellent mitigation.

4.16 Riparian Habitats

The State of Oregon requires riparian buffers of 75 feet. Currently, a riparian edge of alder, with a width of 50-80 feet depending upon location, borders the south edge of the developed edge of the property. The west edge of the property is undeveloped and the riparian edge is far less impacted and much greater in width. Riparian areas were dominated by red alder (*Alnus rubra*), willows (*Salix spp.*) and chitum (*Rhamnus purshiana*) trees, with an understory of salmon berry (*Rubus spectabilis*), Himalayan blackberry (*Rubis discolor*) and swordfern (*Polystichum munitum*).

Riparian habitats are important habitats for wildlife species as nesting and foraging habitat for birds, as migration corridors for terrestrial species, and as refugia for reptiles and amphibians. Riparian habitats also act as a visual and sound screen between development and natural resources such as the Chetco River estuary. An active, functioning riparian buffer can also act as barriers to sediment movement and as sediment and contaminant filters, to prevent sediment flow into river systems. As a mitigation the Applicant is proposing to enhance the current riparian area by removing invasive plants, such as Himalayan blackberry, as a mitigation for this project.

5.0 POTENTIAL IMPACTS OF DEVELOPMENT TO CHETCO RIVER ESTUARY

The project property has approximately 6.2 acres of previously developed area within which to develop the housing project. This excludes the undeveloped portion of the property to the west, and the current riparian strip along the river. The proposed project can therefore be built on land which was previously commercially impacted, with no need to degrade surrounding natural areas.

The greatest potential for impacts to the Chetco River estuary or any adjacent wetlands would be from the development's sewage and storm water runoff. Although the project is only 1.3 miles from the ocean and thereby this portion of the Chetco River is not likely to be used as spawning habitat for salmonids, juvenile salmonids likely frequent the area during low river flow months. Juvenile salmonids, amphibians and aquatic insects can be directly affected by pollutants entering the estuary. Every effort should be made not to allow sediments or chemicals to migrate from the project site, during construction or after the development is completed.

The Applicant proposes to use city water and sewer systems, thereby eliminating the need for any on-site septic disposal system or water wells. A storm water runoff system is being designed by an engineer, using the City of Portland Storm Water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V). Use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems, bioswales and/ or comparable uses prior to entering the estuary. A proposed improvement in the riparian strip along the estuary will enhance the Slopes V compliance.

To the extent allowed, pervious materials should be used for roadways and parking lots within the development to reduce the amount of stormwater runoff toward wetlands or the estuary. Landscaping methods should be considered which require the least amount of pesticides or herbicides to maintain the grounds. The selection of local plant and tree species should be used wherever possible, as these would prove most resistant to disease or insect infestation.

6.0 RECOMMENDATIONS

1. It is recommended that a biologist survey for and move any red-legged frogs found in areas where heavy machinery is to be used.
2. It is recommended that a biologist survey for and move any western pond turtles found in areas where heavy machinery is to be used.
3. It is recommended that a biologist survey for nesting migratory birds if construction or vegetation removal is to occur during the migratory bird nesting season, March through August of any given year.
4. *Hedera* vines growing up trees should be cut, killing the plant above the cut and not allowing flowering and thus seed dissemination.
5. Best management practices (BMPs) should be used wherever possible to prevent sediments, fuels or contaminants from reaching the Chetco River during any work on the property.
6. Should Ferry Creek be restored, we recommend that the creek be routed west along the northwest property line and connected to the Snug Harbor inlet via a newly created streambed.

7.0 STAFF QUALIFICATIONS

This biological assessment was prepared by Principal Biologist Frank Galea. Frank is the primary Biological Consultant and owner of Galea Wildlife Consulting, established in 1989. Frank is Certified as a Wildlife Biologist through the Wildlife Society. Frank's qualifications include a Master of Science Degree in Wildlife Management from Humboldt State University and a Bachelor of Science in Zoology from San Diego State University. Frank has been assessing habitat and conducting field surveys for Threatened and Endangered species for over 26 years. Frank has taken an accredited class on wetland delineation through the Wetland Training Institute, and has successfully completed a Watershed Assessment and Erosion Treatment course through the Salmonid Restoration Federation.

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APPENDIX A

2006 Wetland Delineation Report

WETLAND DELINEATION REPORT
JOHN CURRY PROPERTY
SE¼ OF SECTION 32, T40S, R13W
BROOKINGS, CURRY COUNTY, OREGON

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**Surveyed
Mapped by:** Roberts & Associates
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1.0 INTRODUCTION

This wetland delineation report for the Curry property was conducted and prepared by Wilbur B. Ternyik and Matthew J. Ternyik at the request of John Curry owner of the property. The purpose of the investigation was to delineate and map wetland boundaries of all jurisdictional wetlands within the identified 12.33 acre Study Area. Using as guidance for this report was the US Army Corps of Engineers (COE) 1987 Wetland Delineation Manual and new additional supplements from COE and Oregon Department of Lands (DSL). This information will be used in the planning and implementing of planning and construction future development at the site during the immediate future.

2.0 SITE LOCATION

As illustrated on the site Location Map the site is located on the North Bank of the Chetco River Estuary about 1 mile east of Highway 101. In order to reach the property coming from the north on Highway 101 you turn left just before the Chetco Bridge. Then turn right onto the North Bank-Chetco River Road. The site is easily identified as a former industrial truck yard, mostly cleared and covered with gravel. The Study Area legal description is as follows; SE¼ of Section 32, T40S, R13W, W.M. Curry County, Oregon. Longitude 42° 03'57", Latitude 124° 15'55".

2.1 HISTORIC INFORMATION

Little information was available on actual historic use of the property. We do however know that Mr. Curry for years used the location for his former Rock Crushing & Sand and

John Curry Wetland Delineation Report

Gravel business operation. This started 20 years ago and there are indications that it was initially cleared at that time. The extreme west portion which is not a part of the current Study Area was recently logged with an Oregon Department of Forestry Permit. Logging access through the property was approved during this operation.

Early contacts by Mr. Curry indicated a possible wetland violation issue by DSL in the extreme northwest corner of the current Study Area. After consulting with Bob Lobdell we examined the subject area of the complaint and determined that while some vegetation had been cleared there was not sufficient disturbance to verify any regulatory fill or removal violation.

3.0 SITE CONDITIONS

The entire Study Area site bordering the Chetco River on the south and North Bank River Road on the north is a totally disturbed site, with historic fill on the east half and historic cleared land to the west. One small patch of standing Alder trees and upland Fern benches is located at the west end next to the inner tidal channel. Recent permitted logging removed a substantial number of these mature Alders and created a cleared logging access road. No wetlands within the Study Area appeared to be disturbed. A narrow band of upland/wetland vegetation exists next to the Chetco River. All vegetation within this area protected by a regulated 35 foot riparian setback from the edge of the river OHWL.

3.1 TOPOGRAPHY

Due to past historic commercial use most of the site has been cleared. The east half slopes towards the river. The west side slopes gently into the northwest wetland area and the southwest portion to the river. HGM classification is Flat. The west portion is several feet lower than the east industrial area and as yet is unfilled.

3.2 SOILS

Soils as mapped by US Department of Agriculture, Natural Resource Conservation Service (NRCS) 1987 is as follows.

- 15A Bagnest-Pitoriver complex, 0 to 3% slopes (Map Unit 15A)
Bagness silt loam, well drained, as mapped for entire TL 2000 and southwest to southeast portion of TL 1500 within the Study Area.
- 274D Winchuck silt loam, 3 to 15% slopes (Map Unit 274D) as mapped for the northwest to the northeast portion of TL 1500 within the study area.

During our field investigations hydric soil indicators, hydrophytic vegetation and presence of hydrology were used to satisfy wetland manual criteria.

3.3 HYDROLOGY

The main source of hydrology to the site is seasonal rainfall on site with some run off from the North Bank River Road. Some winter river flooding in the west end low areas.

3.4 VEGETATION (Dominant species only)

Vegetation at this site within the Study Area will be listed in three distinct areas below.

Area (1) West Lower Portion

Sci-Name	Common Name	Plant Indicator Status
<i>Alnus rubra</i>	Red alder	FAC
<i>Cirsium arvense</i>	Thistle creeping	FACU+
<i>Equisetum telmateia</i>	Horsetail giant	FACW
<i>Polystichum munitum</i>	Pineland sword fern	FACU
<i>Rubus discolor</i>	Himalayan blackberry	FACU
<i>Rubus laciniatus</i>	Cut-leaf blackberry	FACU+
<i>Rubus spectabilis</i>	Salmon berry	FAC
<i>Symphoricarpos mollis</i>	Snowberry creeping	NOL

Area (2) East Upland Industrial Area

Sci-Name	Common Name	Plant Indicator Status
<i>Alnus Rubra</i>	Red alder	FAC
<i>Acer macrophyllum</i>	Maple big leaf	FACU
<i>Equisetum arvense</i>	Horsetail	FAC
<i>Polystichum munitum</i>	Pineland sword fern	FACU
<i>Pteridium aquilinum</i>	Bracken fern	FACU
<i>Rubus discolor</i>	Himalayan blackberry	FACU
<i>Rubus ursinus</i>	California dewberry	FACU
<i>Ranunculus repens</i>	Butter-cup creeping	FACW
<i>Sambucus racemosa</i>	European red elder	FACU
<i>Trifolium repens</i>	White clover	FACU+

Area (3) Jurisdictional Wetland Area

Sci-Name	Common Name	Plant Indicator Status
<i>Agrostis capillaris</i>	Colonial bentgrass	FAC
<i>Athyrium filix-femina</i>	Lady fern	FAC
<i>Carex obnupta</i>	Slough sedge	OBL
<i>Carex macrocephala</i>	Big-head sedge	OBL
<i>Cyperus strigosus</i>	Flatsedge straw-color	FACW
<i>Juncus effusus</i>	Rush soft	FACW
<i>Ranunculus repens</i>	Butter-cup creeping	FACW

It should be noted that the entire Study Area is a disturbed site; mainly due to historical industrial use and later a Oregon Department of Forestry logging permit operations.

3.5 RARE OR ENDANGERED SPECIES

Based on Oregon Heritage Information on nearby sites we did not observe any of the rare plants species listed for this portion of Curry County. Special attention was given to search for the listed *Lilium occidentale* (Western bog lily) as we have encountered this plant before in the Brookings area. The species is not present on the site mainly due to lack of wet bog conditions. Chetco River and Estuary does have Oregon/California Coho Salmon (*Oncorhynchus kisutch*), a listed Threatened Species (ODF&W Gold Beach office contact). Required riparian vegetation setbacks of 75-feet will protect the river banks. Future project Stormwater Management Plans will meet all federal, state, and local agency requirements for runoff water into the estuary.

3.6 CULTURAL RESOURCES

We have contacted the Siletz Indian Tribal Historian about the location of the Study Area. He expressed no documented prior Native American Indian use. However due to the disturbed conditions at the site historic evidence may have been lost. Should any artifacts or evidence be found during future development construction activities work will cease and the tribe notified.

4.0 WETLAND DELINEATION METHODS USED

The entire field investigations and report preparation was conducted to required format contained in the Corps of Engineers Wetland Delineation Manual published in 1987. With added attention to recently issued Wetland Delineation Report Guidelines developed jointly by the Portland District Corps of Engineers and US Environmental Protection Agency, Region 10, and also in line with recent Oregon Department of State Lands Administrative Rules guidelines.

Soils were inspected for evidence of hydric soil indicators in the field by use of the Munsel Soil Charts. Soil moisture content, matrix color and the presence of mottles and gleying were recorded on data sheets for each Observation test pit.

The delineation of the uplands and wetlands of this site and resulting surveyed maps was arrived at by use of field notes, colored photos, and by use of published sources.

John Curry Wetland Delineation Report

The boundary between wetlands and uplands was based on visual identification of the plant community, soil sampling to identify hydric soils and hydrology gathered and recorded during site visits. The wetland boundary on site is clearly marked by orange Wetland Boundary flagging tape. Test points upland and wetland locations are identified on site by numbered blue flagging tape. Plain blue flagging tape also used to identify on site boundaries of Waters of the U S and Oregon. Wobbe & Associates did the wetland delineation map surveying.

5.0 WETLAND DELINEATION RESULTS

As shown on the attached Wetland Delineation Map only one small jurisdictional wetland was identified. This small 0.12 of an acre wetland is located in the extreme NW corner at the bottom of the North Bank River Road steep embankment. The Cowardin Classification is PEM and HGM Classification is Flat/depressional. The hydrology is seasonal.

6.0 CONCLUSIONS & RECOMMENDATIONS

We consulted with Bob Lobdell by phone several times during this site investigation that was interrupted several times due to various circumstances, including *Alnus rubra* logging activity.

John Curry Wetland Delineation Report

In order to avoid problems with Curry County's 75-foot riparian vegetation set back the original study area was reduced; leaving the extreme west small peninsula between the main Chetco River and the interior tidal channel out of the Study Area.

Current conditions at the site verify that the vegetation cleared area has now fully recovered. If this small jurisdictional wetland is to be impacted by fill or removal; then a joint COE/DSL Section 404 Permit is necessary. Care should be taken to preserve the Chetco River riparian vegetation area.

7.0 CONSULTANT DISCLAIMER

We believe the services performed for this study site investigation were conducted with the level of care and skill ordinarily exercised in our area of expertise. The data presented in this report is believed to be representative of conditions at the site. The conclusions are professional opinions in accordance with current standards of professional practice and no warranty is expressed or implied.

7.1 DSL CONCURRENCE DECISION STATEMENT

This report documents the investigation, best professional judgment and conclusions of the investigators. It should be considered a Preliminary Jurisdictional Determination and used at your own risk until it has been reviewed and approved in writing by the Oregon

John Curry Wetland Delineation Report

Department of State Lands in accordance with OAR 141-090-0005 through 141-090-0055. Delineation reports associated with applications are given first priority for review. Be advised that review of wetland reports without an associated permit may take months for initial review.

John Curry Wetland Delineation Report

REFERENCES:

Environmental Laboratory, 1987, *Corps of Engineers Wetlands Delineation Manual*, Technical Report & 87-1, U.S. Army Corps of Engineers Waterways Experiment Station, Vicksburg, MS

Federal Interagency Committee for Wetland Delineation, 1989, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish & Wildlife Service, and U.S.D.A. Soil Conservation Service, Washington, D.C. Cooperative technical publication 238pp.

Koillmorgan Corporation, 1984 Edition, *Munsell Soil Color Charts*. Macbeth Division of Koillmorgan Instruments Corporation, Newburgh, NY

Reed, P.B. 1988 *National List of Plant Species that Occur in Wetlands: Northwest (Region 9)*, U.S. Fish and Wildlife Service, Biological Report 88 (28.9) 89 pp.

U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) *Soil Survey of Curry County Area, Oregon* (1970), Washington D.C.

US Department of the Interior, Fish and Wildlife Service *National Wetland Inventory Map of Brookings*

Oregon National Heritage Information Center, Portland, Oregon (List of ESA noted within the vicinity of the site)

John Curry Wetland Delineation Report

Tribble Property in Brookings

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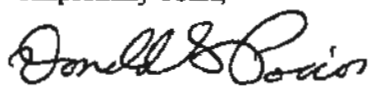
Facility: Tribble Property- Storm Water Quality

Mr. O'Connor

This letter responds to our proposed Storm Water design for the Tribble Property Development in Brookings. The final approved plans will be developed using the City of Portland Storm water Manual and the Standard Local Operation Procedures for Endangered Species (SLOPES V) as recommended by Chuck Wheeler, a Fisheries Biologist working for the Oregon Coast Branch NOAA Fisheries West Coast Region.

We concur with Mr. Wheeler that the use of the Storm Water Manual and Slope V compliance will reduce the potential for adverse impacts on the Chetco estuary resources as water are filtered through vegetative filter systems or comparable prior to entering the estuary.

Respectfully Yours,



Donald Porior, PE

Cc: Ron Tribble, Owner



EXPIRES 12/31/2016