

1 **Appendix II.B.9.d) Example Assignment of Error (AOE)**
2 **For “Other” Forested Lands**
3 **Assignments of Error (AOEs) Format**
4

5 **The County’s Findings That the Subject Property Is Not Other Forested Lands That**
6 **Maintain Soil, Air, Water, and Fish and Wildlife Resources Are Inadequate and Not**
7 **Supported by Substantial Evidence in the Record.**
8

9 **Assignments of Error (AOEs)** have four sections.

- 10
11 1. Potential Assignment of Error
12 2. Standards & Criteria, Relevant Laws & Rules
13 3. Analysis of Facts
14 4. Conclusion Statement
15

16 **2008 Example AOE**

17 **C. THIRD ASSIGNMENT OF ERROR**

18 **The County’s Findings That the Subject Property Is Not Other Forested Lands**
19 **That Maintain Soil, Air, Water, and Fish and Wildlife Resources Are**
20 **Inadequate and Not Supported by Substantial Evidence in the Record.**

21 **1. Assignment of Error**

22 The county failed to make the required finding that the subject property is not “other
23 forested lands that maintain soil, air, water and fish and wildlife resources.” There is not
24 substantial evidence in the record to establish that the subject property does not maintain soil,
25 air, water, fish and wildlife resources. The county's findings failed to address the issue that the
26 subject property is “other forest lands” because it conserves and protects impacted deer winter
27 range and provides critical resources for protecting and conserving the fisheries habitat of the
28 California coho salmon, a federally listed “threatened” species. The findings that the subject
29 property is not *managed* for other forest uses are conclusory and fail to address the required

1 inquiry: whether the subject property consists of lands that *maintain* soil, air, water and fish
2 and wildlife resources.

3 **2. Summary Of Standards And Criteria, Relevant Laws, And Rules**

4 Approval of the plan amendment requires findings of compliance with Oregon
5 Statewide Goal 4 - Forest Land; JCCP Goal 11, Policy 3.D; JCCP Goal 11, Policy 3.E; JCCP
6 Goal 2, Policy 7; RLDC 46.050.D; and RLDC 46.050.E. App B1

7 In addition to “lands which are suitable for commercial forest uses,” Goal 4 protects
8 “other forested lands that maintain soil, air, water and fish and wildlife resources.” A decision
9 to remove land from the forest land inventory must be accompanied by findings that the land is
10 not “other forested lands” that maintain the enumerated Goal 4 resources.

11 Josephine County Comprehensive Plan (JCCP) Goal 2, Policy 7 requires that forest
12 lands as defined by Goal 4 be protected and conserved (App B2):

13 “Josephine County shall provide zoning classifications which will protect and conserve
14 for forestry uses all rural commercial forest lands, non-commercial forest lands, and
15 any other forest lands as defined in LCDC Goal 4. . . .”

16
17 JCCP Goal 11, Policy 3.D (App B2) and RLDC 46.050.D (Rec 54) reiterate the
18 requirement of Goal 4 that redesignation of land to a nonresource designation requires
19 findings that the land is not “other forested lands that maintain soil, air, water and fish and
20 wildlife resources.”

21 JCCP Goal 11, Policy 3.E (App B2) and RLDC 46.050.E (Rec 54) both require:

22 “E. If the proposed plan designation is Rural Residential, the lot or parcel must be
23 shown to be entirely outside of the critical habitat area (i.e., above 2500' or designated
24 as impacted) on the official 1985 Deer Winter Range map, as adopted or amended.”
25

1 **3. Summary Of Applicable Findings Of Fact**

2 The county has several vague findings perhaps concluding that the land is not other
3 forested lands that maintain soil, air, water and fish and wildlife resources. App C The
4 county’s sole findings regarding the “other forested lands” component of the Goal 4 definition
5 of “forest lands” are found in Finding III.M and Finding III.O.:

6 Finding III.M “. . . In order to be regarded as forest lands, the soils must have a rating
7 for timber production or the site needs to be managed for other forest uses such as
8 watershed protection or wildlife of fisheries habitat. This site is found to have not have
9 any of the above required characteristics.” Rec 64

10

11 Finding III.O. “The Board finds that based on studies submitted and testimony offered
12 that the quality of air, water, and land resources will be maintained by the approval of
13 this request. . . .” Rec 64

14

15 The county’s Finding III.M that the subject property is not *managed* for other forest
16 uses are conclusory and fail to address the required inquiry whether the subject property
17 consists of lands that *maintain* soil, air, water and fish and wildlife resources.

18 The county's findings are further inadequate because they fail to address testimony that
19 the subject lands maintain deer and fish habitats.

20 **4. Analysis Of Facts And Arguments**

21 Uncontroverted evidence in the record established that the subject property is largely
22 forested and that it is surrounded by even more forest cover. Recs. 136 - 137, 798, 800,
23 1,464, 1,466, 2,112 - 2,114, 2,118

24 **a) Acknowledged Impacted Deer Habitat Is Other Forested Lands That**
25 **Maintain Wildlife**

26 The issue was raised in testimony. Recs 1,866, 2,032 - 2,033, 2,109 The subject
27 property is inventoried as impacted deer habitat (i.e., winter range). Recs 82, 761, 2,126,

1 1,662 Evidence in the record establishes that one of the wildlife species identified by the
2 ODF that require low elevation hardwoods as their primary source of habitat are deer. Recs
3 2,032 - 2,033, 2,189

4 The entire 1983 *Soil Survey of Josephine County, Oregon* by the Soil Conservation
5 Service is the acknowledged soils inventory for the Josephine County Comprehensive Plan
6 (County Ordinance No. 85-29). Exhibit A of Ordinance 85-29 was the “Non-Resource
7 Justification for Josephine County” which included the county’s IRR system and the entire
8 1983 *Soil Survey*. The *Soil Survey* specifically documents that the majority soil (86%) for the
9 subject property is 42E Holland sandy loam cool and it is good for wildlife, especially deer.
10 Recs 1,702 - 1,704, 2,033, 2,074, 2,083 - 2,084, 2,086, 2,109, App B5

11 The evidence in the record cited to above establishes that the land falls within the
12 definition of "other forested lands.”

13 The county in its decision and findings is required to address legitimate issues raised in
14 a quasi-judicial land use proceeding. *Knight v. City of Eugene*, 41, Or LUBA 279 (2002);
15 *Boly v. City of Portland*, 40 Or LUBA 537 (2001); *Dayton Prairie Water Assoc. v. Yamhill*
16 *County*, 38 Or LUBA 14 (2000); *Wood v. Crook County*, 36 Or LUBA 143 (1999).

17 The county's findings failed to address the issue that the subject property is “other
18 forest lands” because, however minimally, it conserves and protects impacted deer winter
19 range. Therefore the county’s decision should be remanded.

20 **b) Soil, Water, Streams, Wetlands, and Uplands Are Other Forest Lands**
21 **Maintaining the Critical Fisheries Habitat Of The California Coho**
22 **Salmon As A Federally Listed “Threatened” Species**

1 The county heard testimony that the subject property is land that maintain the fishery
2 resource. Recs 75, 364, 663, 720, 722 - 723, 1,866 - 1,878, 2,031 - 2,035, 2,330, 2333 -
3 2,382 The county’s decision failed to make findings regarding the fisheries resource. The
4 county’s findings that the subject property is not “other forested lands” that protect the
5 fisheries resource are inadequate and not supported by substantial evidence in the record.

6 Quartz Creek (most of the record identifies it as Bummer Creek), a tributary of
7 Jumpoff Joe Creek, is a perennial stream in the western portion of the subject property. It is
8 considered to be “water quality limited” by the Department of Environmental Quality (DEQ)
9 because of high summer water temperatures. Recs 123, 364, 720, 1,867, 1,874, 2,032 It is a
10 Class 1 stream, a perennial anadromous fish stream.

11 The western portion of the site is partially subject to flooding. Recs 83, 87, 91, 137,
12 204, 210, 2,124 Some of the soils on the property are subject to erosion by water and others
13 are wet lands. Recs 91, 123, 135, 138 - 139, 206 - 208, 883, 1,057, 1,697 The subject
14 property is vegetated with a mixture of open grass land and forested areas. Vegetative cover
15 on the subject property helps prevent erosion and maintains soil and water quality Recs
16 2,033, 2,074, 2,086, 2,109

17 The Middle Rogue Watershed Council identified coho salmon use Quartz Creek for
18 spawning, migration, and rearing and that it considered Quartz Creek as one of **two core**
19 **salmonid areas** in the Middle Rogue Watershed as identified by the Oregon Department of
20 Fish and Wildlife (ODFW). Recs 123, 720, 772 - 723, 1,866 - 1,867, 2,330, 2,033 The
21 ODFW considers Quartz Creek important habitat for salmonids. Recs 1,874 - 1,875, 2,181

1 The Josephine County Soil and Water Conservation District identified Quartz Creek as
2 a fish bearing stream on the DEQ 303-D list which included coho. It identified Quartz Creek
3 as very likely to suffer damage from development of the subject property:

4 “These waterways are very likely to suffer damage from excessive water entering from
5 the subject property if developed. Other troubling concerns are bank erosion along
6 each side of the waterways, sediment pollution and pollutants entering the water
7 system if homesites and roads are developed.” Rec 123

8
9 Fisheries biologists for the Bureau of Land Management (BLM) identified that Quartz
10 Creek supports cutthroat and steelhead salmonids, and that the stream and its riparian areas
11 protected significant fisheries resources:

12 “Quartz Creek is the most productive stream in Jumpoff Joe Creek for coho salmon.
13 Quartz Creek is considered a **core coho salmon area** in the Rogue River basin.
14 Streambank stability and canopy shade are diminishing in the watershed. Decomposed
15 granite is prevalent in the watershed. Winter coho rearing habitat is limited. Major
16 limiting factors include lack of large wood in the stream and riparian areas; lack of
17 riparian diversity of trees; high summer water temperatures; poor winter habitat; and
18 marginally limiting from upland sedimentation.” [emphasis added] Recs 1,868 - 1,869,
19 1,874

20
21 “Quartz Creek is a lowland agricultural stream which quickly becomes a steeper
22 stream in mountainous forested lands. The **core coho area** is in the low gradient 3%
23 or less, low width to depth ratio with a gravel substrate. Stream sinuosity is restricted
24 from land development and several stream reaches have been rechannelized over past
25 years.” [emphasis added] Recs 1,869, 1,874

26
27 “Riparian areas are one of the most heavily used habitat found in the watershed, both
28 by humans and by wildlife. Many life cycle requirements of animals are met in these
29 areas. Aquatic and amphibious species are intrinsically tied to these habitats, as are all
30 the species that feed on these animals. The Jumpoff Joe watershed is composed of
31 several fish bearing streams including Horse, Joe, Jack, Quartz, Bummer, Cove, Fall,
32 Louse and many unnamed creeks and gulches. Riparian habitats have been heavily
33 impacted by mining, road building, urbanization, logging, and agriculture.” Recs
34 1,869, 1,874

35
36 The National Marine Fisheries Service identified the Southern Oregon/Northern
37 California Coho as a federally listed “threatened” species in the Rogue River. Recs 1,871 -

1 1,874, 2,333 - 2,382 This listing included the sub-drainages of Jumpoff Joe Creek and Quartz
2 Creek. The Endangered Species Act (ESA) defines an endangered species as one that is in
3 danger of extinction throughout all or a significant portion of its range, and a threatened
4 species as one that is likely to become endangered in the foreseeable future. The status
5 requires the determination to be based on any of five factors: present or threatened
6 destruction of its habitat, overexploitation, disease or predation, the inadequacy of existing
7 regulatory mechanisms, or any other natural or manmade factors. Recs 1,871 - 1,874, 2,333 -
8 2,382

9 The Southern Oregon/Northern California Coast Coho Salmon ESU was listed as
10 threatened on May 6, 1997; threatened status was reaffirmed on June 28, 2005. The
11 Evolutionary Significant Unit (ESU) includes all naturally spawned populations of coho
12 salmon in coastal streams between Cape Blanco, Oregon, and Punta Gorda California, as well
13 as three artificial propagation programs. *62 Federal Register* 24588, May 6, 1997; 70
14 *Federal Register* 39231, June 28, 2005. Recs 2,361 - 2,382, 2,334 - 2,344

15 The ESA requires the federal government to designate “critical habitat” for any species
16 listed under the ESA, in this case, salmon and steelhead. “Critical habitat” is defined as
17 specific areas on which are found physical or biological features essential to the conservation
18 of the species, and which may require special management considerations or protection. A
19 final designation on critical habitat for the Southern Oregon/Northern California Coast Coho
20 Salmon ESU was published on May 5, 1999 (*64 Federal Register* 24049, May 5, 1999). This
21 critical habitat designation includes the Rogue River and the sub-drainages of the “water
22 quality limited” Jumpoff Joe Creek and Quartz Creek. Recs 2,346 - 2,359

1 The county's findings failed to address testimony that the subject property is “other
2 forest lands” that maintain soil, water, streams, wetlands, and upland resources on the subject
3 property that are critical to protecting and conserving the fisheries habitat of the California
4 coho salmon as a federally listed “threatened” species. Therefore the county’s decision should
5 be remanded.

6 **5. Conclusion Statement**

7 The county failed to make the required finding that the subject property is not “other
8 forested lands that *maintain* soil, air, water and fish and wildlife resources.” There is not
9 substantial evidence in the record to establish that the subject does not maintain soil, air,
10 water, fish and wildlife resources. The county’s conclusion that the subject property is not
11 “managed for other forest uses such as watershed protection or wildlife of fisheries
12 habitat” does not address applicable law and is not supported by substantial evidence in the
13 whole record. Therefore the county’s decision should be remanded. ORS 197.835(6);
14 197.835(7)(a); 197.835(8); 197.835(9)(a)(C); 197.835(11).

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