

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   PACIFICORP,  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   DESCHUTES COUNTY,  
10                                  *Respondent,*

11                                  and

12  
13                                  CENTRAL OREGON IRRIGATION DISTRICT,  
14                                  *Intervenor-Respondent.*

15  
16                                  LUBA No. 2014-016

17  
18                                  FINAL OPINION  
19                                  AND ORDER

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22                                  Appeal from Deschutes County.

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24                                  Jeffrey S. Lovinger, Portland, filed the petition for review and argued on  
25                                  behalf of petitioner. With him on the brief was Lovinger Kaufmann LLP.

26  
27                                  Laurie E. Craghead, Assistant Legal Counsel, Bend, filed a joint  
28                                  response brief on behalf of respondent.

29  
30                                  Elizabeth A. Dickson, Bend, filed a joint response brief and argued on  
31                                  behalf of intervenor-respondent. With her on the brief was Hurley Re, P.C.

32  
33                                  HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board  
34                                  Member, participated in the decision.

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36                                  REMANDED                                  08/01/2014

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38                                  You are entitled to judicial review of this Order. Judicial review is  
39                                  governed by the provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals a board of county commissioners’ declaratory ruling regarding the scope of the county’s historical designation for the Cline Falls Power Plant.

**REPLY BRIEF**

Petitioner moves for permission to file a reply brief. The motion is granted.

**MOTIONS TO STRIKE**

Respondent and intervenor-respondent move to strike allegations in the petition for review that they claim are not supported by the record. Petitioner also moves to strike allegations in the joint response brief that it contends are not supported by the record. It does not appear that the allegations are material to any of the issues that must be resolved in this appeal. In any event, LUBA disregards any allegations of material fact that are not supported by the record. However, a lack of evidentiary support for arguments and factual allegations in briefs filed with LUBA is not a basis for striking those portions of the brief. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d* 89 Or App 40, 747 P2d 373 (1987).

The motions to strike are denied.

**FACTS**

Petitioner’s predecessor constructed and began operation of Cline Falls Power Plant, a hydroelectric power facility on the Deschutes River, early in the twentieth century. As relevant here, in its final operating configuration, the Cline Falls Power Plant included a dam, a 260-foot long wooden flume, a penstock, a powerhouse, a switchyard and some other associated structures.

1 The central issue in this appeal is whether the penstock includes the wooden  
2 flume. Petitioner contends the penstock is limited to the 96-inch diameter  
3 metal pipe that conveys the water from the flume down a steep gradient to the  
4 powerhouse turbine.<sup>1</sup> Respondent and intervenor-respondent contend the  
5 penstock includes both the pipe and the wooden flume.

6 Intervenor-respondent Central Oregon Irrigation District (COID) owns  
7 the property on which Cline Falls Power Plant is located. Petitioner operated  
8 the Cline Falls Power Plant for many years, under a lease agreement with  
9 COID. The Cline Falls Power Plant is no longer in operation. At the end of  
10 the lease, petitioner removed the switchyard located next to the power plant  
11 and removed the electric generating equipment from the powerhouse.  
12 Petitioner also cut drainage holes in the flume to prevent water from  
13 accumulating in the flume and entering the decommissioned powerhouse.  
14 Petitioner and COID do not agree on the scope of the facilities petitioner is  
15 obligated to remove under the lease. Perhaps as a byproduct of that dispute and  
16 other disputes between the parties, COID filed a code enforcement complaint  
17 with the county. A memorandum in the record describes that code enforcement  
18 action as follows:

19 “There is a pending code enforcement investigation on this  
20 property. The complaint received by Code Enforcement alleges  
21 that a switchyard, power poles, and power lines were removed  
22 from site without obtaining necessary permits from Deschutes

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<sup>1</sup> There apparently is a structure between the wooden flume and the penstock called a “transition structure (forebay),” that is used in achieving the transition from the unpressurized water in the flume to the penstock where the change in elevation pressurizes the water before entering the powerhouse and turbines. Record 1160.

1 County. The complaint further alleges that other changes to the  
2 site may have been made without permit.” Record 2081.

3 Cline Falls Power Plant was designated as a significant historic resource  
4 under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic  
5 Areas, and Open Spaces) in 1992. The designated site is described in the  
6 county’s Goal 5 documentation as including the “dam, penstock and  
7 powerhouse.” Record 1328. That designation is significant here because a  
8 permit from the county Historic Landmarks Commission is required to alter a  
9 designated historic resource. Petitioner did not seek such a permit before  
10 removing the equipment and altering the flume shortly before the lease expired.  
11 Petitioner took the position in the code enforcement proceeding that none of  
12 the alterations it made to the property were to structures that are included in the  
13 historic designation. To resolve that dispute, the community development  
14 department sought a declaratory ruling regarding the scope of the Cline Falls  
15 Power Plant historic designation. Record 2095-2156. The Historic Landmarks  
16 Commission determined that “the entire site of the Cline Falls Power Plant is  
17 the protected historic resource \* \* \*.” Record 1398.

18 Petitioner appealed the Historic Landmarks Commission’s decision to  
19 the board of county commissioners. Record 1428-29. The county  
20 commissioners determined that the designated historic resource includes only  
21 the “dam, penstock and powerhouse.” Record 16. However, the county  
22 commissioners also determined “the flume is part of the penstock and, thus,  
23 provides a complete historic resource from the dam, through the penstock, and  
24 ending with the powerhouse.” Record 15. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The community development department sought the disputed declaratory  
3 ruling under Deschutes County Code (DCC) Chapter 22.40. DCC  
4 22.40.010(A)(1) authorizes declaratory rulings to interpret the comprehensive  
5 plan, where “there is a doubt or dispute as to its meaning or application[.]” The  
6 Cline Falls Power Plant historical designation is part of the Deschutes County  
7 Comprehensive Plan. DCC 22.40.020(A) limits the persons who may seek a  
8 declaratory ruling, and specifically authorizes the planning director to seek  
9 declaratory rulings.<sup>2</sup> DCC 22.24.050 generally places the burden of proof on  
10 an applicant: “[t]hroughout all local land use proceedings, the burden of proof  
11 rests on the applicant.” DCC 22.40.030 makes it clear that where the planning  
12 division is the applicant for a declaratory ruling, it has the burden of proof:  
13 “[w]here the Planning Division is the applicant, the Planning Division shall

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<sup>2</sup> DCC 22.40.020(A) provides:

‘[T]he following persons may initiate a declaratory ruling under  
DCC 22.40:

- “1. The owner of a property requesting a declaratory ruling relating to the use of the owner’s property;
- “2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or
- “3. In all cases arising under DCC 22.40.010, the Planning Director.

“No other person shall be entitled to initiate a declaratory ruling.”

1 bear the same burden that applicants generally bear in pursuing a land use  
2 action.”<sup>3</sup>

3 Petitioner contends the planning division never took the position below  
4 that the flume is properly viewed as part of the penstock, and the planning  
5 division submitted no evidence in support of that proposition.<sup>4</sup> Petitioner  
6 contends the theory that the penstock includes the wooden flume was advanced  
7 to the county commissioners by COID, after a planning division presentation  
8 that referred separately to the flume and the penstock. *Citing Cushman v. City*  
9 *of Bend*, 55 Or LUBA 234 (2007), petitioner contends that the county  
10 commissioners erred by relying on the evidence and argument submitted by  
11 COID to conclude the penstock includes the wooden flume, because “DCC  
12 22.40.030 explicitly requires the applicant, and only the applicant, to carry the  
13 burden of proof.” Petition for Review 15 n 8.

14 DCC 22.40.030 does not require that “the applicant, and only the  
15 applicant” carry the burden of proof. Rather, DCC 22.40.030, together with  
16 DCC 22.24.050, unremarkably place the burden of proof on the applicant,  
17 which is almost always the case in land use proceedings following the Supreme  
18 Court’s decision in *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507  
19 P2d 23 (1973). Neither DCC 22.40.030 nor DCC 22.24.050 preclude parties,  
20 other than the applicant, from advancing legal positions or presenting evidence

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<sup>3</sup> DCC 22.40.020(A)(3) refers to the “planning director.” DCC 22.40.030 refers to the “planning division.” The applicant for the declaratory ruling in this case was the community development department. No party argues these differences are significant.

<sup>4</sup> The planning division’s position was that the historic designation applied to the entire site.

1 in support of those legal positions. And neither DCC 22.40.030 nor DCC  
2 22.24.050 preclude a declaratory ruling decision maker from adopting those  
3 legal positions or relying on such evidence. A decision adopting those legal  
4 positions or relying on such evidence is certainly subject to appeal to LUBA  
5 for review on the merits. However, a declaratory ruling decision maker’s  
6 decision to adopt legal positions or rely on evidence that is submitted by non-  
7 applicant parties is not inconsistent with DCC 22.40.030 and DCC 22.24.050.  
8 Petitioner does not argue that COID should not have been allowed to  
9 participate as a party to the declaratory ruling proceeding. Neither does  
10 petitioner argue the legal position that COID took before the county  
11 commissioners went beyond the question presented in the declaratory ruling,  
12 which concerned the scope of the Cline Falls Power Plant historic designation.

13 Our decision in *Cushman* does not support a different result. The City of  
14 Bend’s declaratory ruling procedures in *Cushman* were very similar to  
15 Deschutes County’s procedures. Under both procedures standing to “initiate” a  
16 declaratory ruling is limited. *See* n 2; 55 Or LUBA at 240 n 3. In *Cushman* the  
17 applicant homeowners’ association did not have standing to initiate a  
18 declaratory ruling. When the applicant’s standing was challenged in *Cushman*,  
19 the planning director submitted a letter in which he purported to join the  
20 application to facilitate a ruling on the disputed legal issue. But the planning  
21 director “did not file an application or otherwise participate in the declaratory  
22 ruling proceeding.” 55 Or LUBA at 238. Moreover, it appeared from the  
23 record that the planning director did not agree with the position taken by the  
24 applicant in *Cushman*. *Id.* at 245. In that somewhat unusual set of  
25 circumstances, although we said it was a “close question,” we concluded the

1 planning director’s letter was not “sufficient to ‘initiate’ a declaratory ruling  
2 application \* \* \*.” *Id.* at 244.

3 Unlike *Cushman*, in the present case the applicant community  
4 development department (presumably on the planning director’s behalf) had  
5 standing under DCC 22.40.020(A)(3) to initiate the proceeding. Unlike  
6 *Cushman*, in the present case the community development department  
7 presented positions before both the historic landmarks commission and the  
8 county commissioners. The fact that COID presented a different position from  
9 the community development department’s, which was accepted by the county  
10 commissioners, is not inconsistent with DCC 22.40.030 and DCC 22.24.050.  
11 DCC 22.40.030 and DCC 22.24.050 merely assign the burden of proof to the  
12 applicant and say nothing about what arguments or evidence other parties may  
13 submit in a declaratory ruling proceeding.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 Before the county commissioners, COID argued that the penstock—  
17 which all parties agree was included as part of the designated historic Cline  
18 Falls Power Plant site—includes the wooden flume. COID resubmitted a May  
19 23, 2013 letter it had submitted to the Historic Landmarks Commission in  
20 support of that argument. That letter, in turn, relied on a present-day on-line  
21 *Merriam-Webster Dictionary* definition of “penstock:”

22 “The structures include the dam, the powerhouse and the penstock.  
23 The Merriam-Webster Dictionary defines a penstock as ‘(1) a  
24 sluice or gate for regulating a flow (as of water) and (2) a conduit  
25 or pipe for conducting water.’” Record 1757.

1 In its decision, the county commissioners agreed with COID and adopted  
2 the *Merriam-Webster Dictionary* definition of “penstock,” and concluded that  
3 under that definition the open wooden flume is part of the penstock:

4 The Board believes the designation of the power plant cannot be  
5 complete without considering the relationship between the noted  
6 structures. The arrangement of the dam, penstock, and  
7 powerhouse on the property provide the historical context for an  
8 early hydroelectric site. The structures are historically dependent  
9 on one another. At the October 21, 2013 public hearing before the  
10 Board, Central Oregon Irrigation District (COID) argued that a  
11 flume is a penstock, by definition. According to Merriam-Webster  
12 Dictionary, a penstock is ‘(1) a sluice or gate for regulating a flow  
13 (as of water) and (2) a conduit or pipe for conducting water.’ *The*  
14 *Board concurs with COID’s definition.* A penstock, complete  
15 with two different yet connected channels, one of which referred  
16 to as the open flume and another as enclosed pipe, is a conduit that  
17 conveys water to a power plant from a dam. Therefore, the Board  
18 finds that the flume is part of the penstock and, thus, provides a  
19 complete historic resource from the dam, through the penstock,  
20 and ending with the powerhouse.” Record 15 (emphasis added;  
21 footnotes omitted).<sup>5</sup>

22 Under ORS 197.829(1), the county commissioner’s interpretation of its  
23 comprehensive plan is reversible if it “is inconsistent with the express language  
24 of the comprehensive plan or land use regulation.” Under *Siporen v. City of*  
25 *Medford*, 349 Or 247, 261, 243 P3d 776 (2010), LUBA’s standard of review  
26 under ORS 197.829(1) is highly deferential, and LUBA must defer to the  
27 county commissioner’s interpretation unless it is implausible. In short, the  
28 question presented in this appeal is whether petitioner has shown that the

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<sup>5</sup> In one of the omitted footnotes, the county commissioners provided the web address for the Merriam-Webster definition: <<http://www.merriam-webster.com/dictionary/penstock>>.

1 county commissioners’ reliance on the 2014 on-line *Merriam-Webster*  
2 *Dictionary* definition of the term “penstock” is implausible.

3 As an initial point, we agree with petitioner that the issue presented to  
4 the county commissioners in this declaratory ruling was not what parts of the  
5 Cline Falls Power Plant site the county commissioners now believe are worthy  
6 of designation as a significant historic site, as the first three sentences of the  
7 county commissioner’s findings quoted above suggest. Rather, the issue is  
8 whether in designating the “dam, penstock and powerhouse” as a significant  
9 historic resource site in 1992, the county intended that its reference to the  
10 penstock included the open wooden flume. In resolving that question, the  
11 county commissioners relied on the current on-line *Merriam-Webster*  
12 *Dictionary* definition of that term. Petitioner identifies a number of problems  
13 with resolving the question in that way, none of which are addressed in the  
14 county’s decision.

15 **A. Context**

16 The county’s historic inventory only uses the term “penstock” in the  
17 Cline Falls Power Plant designation. Petitioner contends that if the county  
18 really understood the term “penstock” to include both pressurized and open,  
19 unpressurized water conveyance structures it would have referred to such open,  
20 unpressurized water conveyance structures as penstocks elsewhere in the  
21 historic inventory. Petitioner identifies other parts of the historic inventory that  
22 refer to open water conveyances as a “feed canal” and a “flume.” There are no  
23 other references to penstocks. That context lends some support to petitioner’s  
24 position.

1           **B. Penstock is a Technical Term**

2           As the Court of Appeals explained in *Karjalainen v. Curtis Johnston &*  
3 *Pennywise, Inc.*, 208 Or App 674, 681-82, 146 P3d 336 (2006):

4           “When the legislature employs terms that have acquired  
5 specialized meanings and have become recognized ‘terms of art,’ \*  
6 \* \* we give those terms the specialized meaning that they have  
7 acquired. *Tharp v. PSRB*, 338 Or. 413, 423, 110 P.3d 103 (2005)  
8 (terms of art are not given their plain, natural, and ordinary  
9 meaning).”

10          More importantly, the DCC expressly requires that technical words in the DCC  
11 that have acquired a particular meaning must be given that particular meaning:

12           “All words and phrases not specifically defined in this title or  
13 elsewhere in this code shall be construed according to the common  
14 and approved usage of the words or phrases. However, technical  
15 words and phrases and such others as may have acquired a  
16 particular meaning in the law shall be construed and understood  
17 according to such particular meaning.” DCC 1.04.030.

18          The Deschutes County Comprehensive Plan has been adopted as Title 23 of the  
19 DCC. DCC 23.01.010. Therefore, if the term “penstock” qualifies as a  
20 technical term, it must given its technical meaning.

21          Petitioner pointed out to the county commissioners that petitioner,  
22 COID, the Federal Energy Regulatory Commission (FERC) and others have for  
23 years consistently distinguished between the open wooden flume and the  
24 closed pipe at the Clines Falls Power Plant, and have referred to the closed pipe  
25 as the penstock and referred to the flume as a flume. Petitioner argued to the  
26 county commissioners that this is because the term “penstock” has a particular  
27 meaning when used in conjunction with hydroelectric facilities:

28           “It is not surprising that PP&L, COID, KC Hydro and FERC have  
29 all consistently distinguished between the open wood flume and  
30 the enclosed metal penstock. The two structures have different

1 functions and are constructed of different materials. The wooden  
2 flume is an open, unpressurized structure designed to carry water  
3 across a relatively low grade. It performs a canal-like function.  
4 The metal penstock is an enclosed, pressurized, pipe structure  
5 designed to channel water down a steep grade to the turbines  
6 located at the end of the penstock pipe. These two different  
7 structures, with their differing functions are commonly  
8 distinguished by hydroelectric engineers. The *Hydropower*  
9 *Engineering Handbook* by John S. Gulliver and Roger E. A. Arndt  
10 is a widely respected resource among hydropower engineers and is  
11 generally considered an authoritative treatise. The 1991 version of  
12 this treatise (which was the authoritative text at the time the 1992  
13 Board designated the Cline Falls penstock as a protected resource)  
14 defines ‘Penstock’ as ‘A pressurized pipeline conveying water in  
15 high-head developments from the headpond or the surge tank to  
16 the powerhouse.’ *Hydropower Engineering Handbook* by John S.  
17 Gulliver and Roger E. A. Arndt, Appendix B (Glossary) at page  
18 8.4 (1991 edition). Another authoritative and widely relied upon  
19 hydropower engineering text is *Water Resources Engineering* by  
20 Ray K. Linsley and Joseph B. Franzini. This text stresses the  
21 inherent difference between an open flume water conveyance  
22 system and an enclosed, pressurized, pipe-based water conveyance  
23 system by addressing the two different systems in two separate  
24 chapters. *Water Resources Engineering* by Ray K. Linsley and  
25 Joseph B. Franzini (1979), see Chapter 10 (open channels) and  
26 Chapter 11 (pressure conduits). As both of these specialized and  
27 widely respected texts make clear, an enclosed, pressurized  
28 penstock and an open flume are two distinct structures.”

29 “\* \* \* \* \*

30 “[E]ven if the Webster’s definition was broad enough to  
31 encompass the flume, the Board [of Commissioners] should not  
32 rely on a lay definition in Webster’s Dictionary. The Board  
33 should also consider what PacifiCorp and COID have always said  
34 regarding the flume and penstock and the Board should consider  
35 what hydropower experts such as the Federal Energy Regulatory  
36 Commission and hydroelectric engineers say about the distinction  
37 between a flume and penstock. Record 166-68.

1           Petitioner attaches to its brief eight additional technical definitions from  
2 a variety of sources that it contends are consistent with its more limited  
3 understanding of the term “penstock.” Petition for Review Appendix H.

4           Respondents object that petitioner did not cite these additional  
5 definitions to the county commissioners:

6           “\* \* \* Respondents don’t dispute that there are many and varied  
7 definitions available for the term ‘penstock’ and that these  
8 definitions may have persuaded the [county commissioners] to  
9 find differently than the [county commissioners] did. However,  
10 Petitioner did not raise these definitions or their sources before the  
11 local government. ORS 197.763(1) requires that issues a  
12 participant wishes to be considered in a quasi-judicial hearing  
13 must be raised in that hearing or submitted before the open record  
14 of that hearing. Petitioner raises extensive new definitions not  
15 offered for consideration below as evidence of the [county  
16 commissioners’] failure to decide properly. Petitioner does not  
17 cite to record locations for these definitions below, because they  
18 do not exist. These are new arguments. At issue here is not  
19 whether the definitions are persuasive, but rather whether  
20 additional evidence now presented by Petitioner is properly  
21 considered by [LUBA], when it was not raised below.  
22 Respondents argue such evidence is not properly considered here.  
23 The [county commissioners were] not afforded the opportunity to  
24 respond to the issues now raised. LUBA’s scope of review is  
25 limited to issues properly raised below. Petitioner’s second  
26 assignment of error is properly denied because it is beyond this  
27 Board’s scope of review.” Respondent and Intervenor-  
28 Respondent’s Brief 9-10.

29           We question whether dictionary definitions are accurately characterized  
30 as “evidence.” The appellate courts and LUBA routinely take official notice of  
31 dictionary definitions when attempting to determine the meaning of words.  
32 *Costco Wholesale Corp. v. City of Beaverton*, 343 Or 18, 24, 161 P3d 926  
33 (2007); *Sellwood-Moreland Imp. League v. City of Portland*, 262 Or App 9, 19,

1 324 P3d 549 (2014); *Weber Coastal Bells v. Metro*, 64 Or LUBA 221, 234 n 11  
2 (2011). Regardless, there simply is no question that petitioner preserved the  
3 issue of whether the term “penstock” is a technical term, and petitioner cited  
4 two treatises to the county commissioners to support that position. We agree  
5 with respondents that the county commissioners cannot be faulted for not  
6 considering dictionary definitions that were not provided to the county  
7 commissioners during the proceedings below. However, petitioner did cite two  
8 treatises and longstanding practice at the Cline Falls Power Plant in support of  
9 its position that the term “penstock” has particular technical meaning in the  
10 world of hydroelectric facilities. The county commissioners can be faulted for  
11 not explaining why it selected the 2014 on-line *Merriam-Webster Dictionary*  
12 definition instead of the more narrow technical meaning set out in those  
13 treatises.

#### 14 C. The County Commissioners’ Dictionary Analysis is Flawed

15 The on-line version of the *Merriam-Webster Dictionary* did not exist in  
16 1992 when the county designated the dam, penstock and powerhouse as a  
17 significant historic resource site. Petitioner argues:

18 “\* \* \* When Ordinance 92-018 was adopted in 1992, the  
19 contemporaneous edition of Webster’s Third New International  
20 Dictionary was the 1986 edition. It defines penstock as follows:

21 “**penstock 1** : a sluice gate, or valve for restraining,  
22 deviating, or otherwise regulating a flow (as of water  
23 or sewage) **2** : PENTROUGH **3** : a closed conduit or  
24 pipe for conducting water to a waterwheel.

25 “And it defines ‘pentrough’ as ‘an open usu. planked or boarded  
26 trough or tank from which water falls onto a water-wheel.’  
27 ‘Pentrough’ is the only meaning that could include a flume;  
28 however that definition is limited to structures that drop water

1 onto a water wheel. At the Cline Falls project, the open trough is  
2 the flume, which does not drop water onto a water wheel.”  
3 Petition for Review 32-33 (footnote omitted).

4 The 1986 edition of Webster’s Third New International Dictionary is consistent  
5 with petitioner’s more limited view of the meaning of the term “penstock.”

6 **D. The Complete Historic Resource Reasoning is Flawed**

7 The Deschutes County Inventory of Cultural and Historic Resources  
8 expressly provides that “[u]nless otherwise indicated the inventoried site  
9 includes only the designated structure.” Record 2102. As previously noted,  
10 only the dam, penstock and powerhouse were designated. Petitioner contends  
11 that to the extent the county commissioners relied on their current view of the  
12 “complete historic resource” to conclude that the flume should be included as  
13 an integral part of the historic resource, that more modern view of how to go  
14 about designating historic hydroelectric facilities was not in place in 1992.<sup>6</sup>  
15 Petitioner cites a message from the State Historic Preservation Office (SHPO)  
16 that explains the approach today is to ask whether a component feature of a  
17 historic power plant would be required for it to function as a power generation  
18 facility. Applying that test the flume would be included in the historical  
19 designation. Petitioner contends that the SHPO message makes it clear,  
20 however, that this more expansive approach was not in place in 1992.<sup>7</sup>

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<sup>6</sup> Petitioner also points out that if the county commissioners thought viewing the penstock as including the flume meant a complete historic resource was designated, in the sense it included all facilities necessary for the facility to operate, they were mistaken. At a minimum, the “transition structure (forebay)” would have to be included to have a fully functioning hydroelectric facility. *See* n 1.

<sup>7</sup> The SHPO message explains:

1           **E. Conclusion**

2           As noted earlier, the county commissioners’ interpretation of its  
3 comprehensive plan is entitled to the highly deferential standard of review set  
4 out in ORS 197.829(1), as described in *Siporen*. However, petitioner contends  
5 the county commissioners’ decision to adopt the 2014 on-line *Merriam-*  
6 *Webster Dictionary* definition of the term penstock either is not “an  
7 ‘interpretation’ for purposes of ORS 197.829(1), or it is an interpretation that is  
8 inadequate for review.” Petition for Review 38. We agree with petitioner that  
9 the county commissioners’ interpretation is not adequate for review. As the  
10 Supreme Court explained in *Siporen*, 349 Or at 259:

11           “[A] local government’s stated position \* \* \* would hardly qualify  
12 as an ‘interpretation’ of its own land use code unless it directly  
13 confronted the allegedly conflicting provisions and purported to  
14 make a choice between them or otherwise resolved the conflict.  
15 *Cf. Friends of the Columbia Gorge v. Columbia River Gorge*  
16 *Commission (S055722)*, 346 Or. 366, 404–05, 213 P.3d 1164  
17 (2009) (court would not defer to Columbia River Gorge  
18 Commission’s stated position that geological resources were not  
19 ‘natural resources’ for purposes of commission’s revision of its  
20 own management plan unless and until the commission took  
21 action that reflected a considered choice between two possible  
22 definitions of the term ‘natural resources’).”

23           In adopting the 2014 on-line *Merriam-Webster Dictionary* definition of  
24 “penstock,” the county commissioners left unanswered a number of questions  
25 regarding its decision to adopt that dictionary definition. First, the county

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“[I]t doesn’t surprise me that the Cline Falls Power Plant was recorded in a more piecemeal way back in the early 1990s. Power plants built or improved during WWII were just turning fifty years old at that time, and nobody knew how to identify or evaluate them; even SHPO was struggling with them.” Record 2157.

1 commissioners will need to consider the term “penstock” in context. The  
2 county’s Inventory of Cultural and Historic Resources uses the term penstock  
3 only once and refers to open water transmission facilities that are elsewhere  
4 designated as historic resources using other terms. That context lends some  
5 support to petitioner’s contention that the term “penstock” does not include  
6 open-water conveyances such as flumes.

7         Second, and perhaps most importantly, DCC 1.04.030 expressly requires  
8 that technical terms be given their technical meaning. Petitioner argued to the  
9 county commissioners that the term “penstock” is a technical term and has a  
10 technical meaning that does not include open flumes. Without confronting that  
11 argument in its decision the county commissioners adopted the 2014 on-line  
12 *Merriam-Webster Dictionary* definition. The county must consider petitioner’s  
13 contention that the term “penstock” is a technical term with a more limited  
14 meaning that excludes the open flume.

15         Third, if a general dictionary definition is to be used, and the general  
16 dictionary definition was different in 1992, the county commissioners will need  
17 to use the general dictionary definition that was in effect in 1992 or explain  
18 why the 2014 definition should apply instead. *See Doe v. Corp. of Presiding*  
19 *Bishop*, 352 Or 77, 89-90, 280 P3d 377 (2012) (consulting contemporary  
20 dictionaries to determine the meaning of the word “court,” “openly,” and  
21 “secret” in the open courts clause of Article I, section 10 of the Oregon  
22 Constitution). The *Webster’s Third New International Dictionary* definition of  
23 the term “penstock” in 1992 is consistent with petitioner’s understanding of  
24 that term to include closed pipes and inconsistent with the county  
25 commissioners’ determination that the penstock includes the open flume.

1 Finally, the relevant question that the county commissioners must answer  
2 is not the test they might apply today if it were designating the Cline Falls  
3 Power Plant as a significant historic resource today, but whether in designating  
4 the “penstock” as one part of the Cline Falls Power Plant significant historic  
5 site, the county commissioners intended in 1992 to include the 96 inch  
6 diameter pipe only or intended to include the wooden flume as well.

7 Petitioner argues that because the county’s interpretation is inadequate  
8 for review, LUBA should interpret the term “penstock” and adopt petitioner’s  
9 arguments concerning the intended meaning of that term when it was adopted  
10 in 1992. ORS 197.829(2). We decline to do so. *Wilhoft v. City of Gold Beach*,  
11 41 Or LUBA 130, 141 (2001). While petitioner advances a number of strong  
12 arguments in favor of its interpretation of that term, the term is sufficiently  
13 unusual that we conclude the county commissioners should have an additional  
14 opportunity to address petitioner’s arguments in the first instance.

15 The second assignment of error is sustained.

16 The county’s decision is remanded.<sup>8</sup>

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<sup>8</sup> Petitioner includes a third assignment of error in which it argues the county’s interpretation of the term “penstock” violates its Fifth Amendment right to due process. Our resolution of the second assignment of error means this matter may be resolved without a need to consider petitioner’s constitutional arguments. We therefore do not consider petitioner’s third assignment of error.