



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department
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Salem, OR 97301-1266
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October 31, 2007

Governor Theodore Kulongoski
State Capital
Salem, OR 97301-4047

Dear Governor Kulongoski:

Thank you for your July 13, 2007 letter directing the Water Resources Department (WRD) to evaluate whether the existing laws and rules that it administers are adequate to ensure that new destination resort development in or near the Metolius Basin would result in no reduction of stream flows in the Metolius River. We have completed that evaluation and offer the following for your consideration.

WRD has a number of programs in place to administer laws that ensure existing water rights and public values are protected, while allowing for new development. In the Deschutes Basin, of which the Metolius is a part, the Deschutes Mitigation Program is the strongest program available to the department to address protection of streamflow in the Metolius River.

The Deschutes Mitigation Program was established in 2002 as a result of a multi-year ground water research study conducted by WRD and the United States Geological Survey (USGS). The study confirmed that ground and surface water are directly connected within the Deschutes study area, including the Metolius sub-basin. This means any new ground water use would impact stream flow that is already fully appropriated in the Deschutes Basin.

The mitigation program divides the Upper Deschutes Basin into seven sub-basins or "zones of impact" and requires bucket for bucket mitigation for any new ground water use to protect streamflow in the primary zone of impact. Water right applicants purchase credits from a mitigation bank as needed to balance their new use. The credits are generally derived from existing out-of-stream water rights that are left instream. The program has been successful at protecting streamflow in the Deschutes Basin and at the same time allowing for economic growth in the region. While mitigation credits are available for most sub-basins, there are no credits currently available for the Metolius zone due to the lack of historic water development in that area.

Any new development would likely rely on ground water to meet its water supply needs. The study found that ground water is connected to surface water beyond the sub-basin boundary where the wells are constructed. This means that ground water withdrawal outside of the Metolius sub-basin could have an impact on stream flow in the Metolius River.

The Deschutes Mitigation Program will ensure no diminishment of flow in the Metolius River when the primary zone of impact of the new development is the Metolius sub-basin. The mitigation program, as currently administered, does not provide that same level of protection of the Metolius River when the Metolius sub-basin is not the primary zone of impact.

One option to strengthen these protections would be to require mitigation for new ground water use in all zones where state scenic waterways are impacted. The Metolius River is a designated state scenic waterway from its source at river mile 41.2 downstream to Candle Creek at river mile 29. We've been advised by the Attorney General's office that mitigation could be required for impacts to multiple zones involving state scenic waterways. This option however, could have far reaching effects that could potentially eliminate most new ground water development in portions of the Deschutes Basin. For example, using this broader "mitigate everywhere" approach could seriously constrict the economic growth in the Sisters area, since withdrawal from wells near Sisters could affect flows in the Metolius sub-basin and require mitigation where credits are not available.

A second option would be to close the Metolius Basin to new appropriations of water. This could be done by Water Resource Commission (WRC) or legislative action, however this option would not provide protection against ground water use by proposed development located outside of the Metolius sub-basin.

A third option would be for the WRC to withdraw designated areas from particular ground water uses. This would limit where new development could withdraw ground water. The difficulty with this option would be hydrologically justifying the withdrawal boundaries.

If implemented, option one could have significant consequences on economic development in the region. Option two does not provide additional protection beyond what the existing mitigation program provides. Option three would limit the development of ground water in designated areas, but without a strong hydrologic basis for delineating those areas, actions under this option would likely be subject to legal challenge.

It is the department's view that the Deschutes Mitigation Program has been successful at balancing streamflow protection with economic development in the Deschutes Basin. For this reason, we recommend this program continue to operate as it is currently administered.

Sincerely,


Phillip C. Ward
Director



Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality

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November 2, 2007

Governor Theodore Kulongoski
160 State Capitol
900 Court Street NE
Salem, OR 97301-4047

Dear Governor Kulongoski:

Thank you for your letter regarding the Metolius River Basin, and potential impacts of local development on water quality. As your letter made clear, the Metolius River is an unparalleled natural feature of Oregon's Cascade Mountains, worthy of the best protection available. You requested an assessment of the adequacy of existing state regulations to specifically protect water quality in the Metolius River.

The Metolius River rises from springs fed by snowmelt filtering through porous volcanic rock. Water in the river today fell as snow in the cascades many years ago. This process results in some of the clearest, coldest, and purest surface waters in the state. In the upper Metolius River Basin, water is fairly close to the surface, and is somewhat more vulnerable to human activity or development than areas to the north and east, where ground water lies much farther below the surface. Although there have been proposals for developments already, I am addressing the issue of environmental protection in the basin in a more general sense, rather than any specific development.

The Department of Environmental Quality (DEQ) has authorities to protect the benefits that air and water provide to people and the environment. Specifically, the water quality authorities that apply in the Metolius River Basin include anti-degradation rules, wastewater treatment including onsite and septic systems, controlling stormwater from construction activities, post-construction stormwater controls, and total maximum daily loads (TMDLs).

Large destination resort developments are densely constructed communities requiring collection, treatment and disposal of domestic wastewater and stormwater. During development, construction activities have the potential to deliver sediments and associated pollutants to flowing waters. In a community the size of a destination resort, stormwater runoff from roofs, streets, and some types of irrigated land, must be managed to minimize environmental impacts. DEQ has varying degrees of regulatory control over these sources of pollutants, and little to no authority over water use that may diminish flows in streams. Reduced flows may subsequently reduce water quality.

Anti-degradation rules: Water quality standards are designed to ensure that basic uses of water are available now and are protected from degradation in the future. Such uses include drinking,



fishing and contact recreation. The water quality standards do not necessarily ensure there is no degradation, only that degradation will not hamper or eliminate the use. In general, I believe that our rules are protective of human health and the environment to ensure that the beneficial uses are protected, though there are some gaps in stormwater regulation that are relevant to increased development in the Metolius River Basin, as described below.

Wastewater treatment, including septic systems: The treatment of wastewater is tightly regulated but there will be constituents, such as nutrients, that are still released to the environment. There is little likelihood that a development would be allowed to discharge treated wastewater directly to the Metolius River or a tributary because of existing water quality problems, and because developments outside urban growth boundaries are subject to restrictions on wastewater under land use laws. Subsurface discharge to shallow soils or land application to the surface of soils may be allowed. Even with substantial removal of nutrients and other constituents from this wastewater prior to discharge, small amounts of nutrients may reach the Metolius River or its tributaries through runoff or seepage to groundwater that flows into the Metolius. The river is sensitive to nutrients, and small increases in nutrients could result in some degradation of water quality, such as decreased dissolved oxygen, increased aquatic plant growth, and changes in pH, among others. These effects would be more significant in the western part of the basin, where the relative depth to groundwater is shallower than east of Green Ridge.

Stormwater impacts from construction activities: Construction activities that disturb the land surface are regulated through construction stormwater permits. These permits require use of practices and control technologies to keep sediments out of stormwater, but do not always result in complete control.

Post-construction stormwater control: In general, DEQ does not have a regulatory framework for controlling stormwater from these developments once they are constructed. Local governments may exercise control or, in some cases, DEQ's Underground Injection Control rules may apply to stormwater. If wetlands are impacted, there DEQ and DSL regulations would apply.

Total Maximum Daily Load: You also asked that we consider the potential effects of these types of developments as we complete a Total Maximum Daily Load (TMDL) for this area. DEQ considers both current development and potential growth as best we can during TMDL studies. It is very difficult to estimate the potential effects of wastewater and stormwater in basins where the developments have not been proposed, but are likely to occur. The majority of pollutant discharges in the Metolius River Basin will be from nonpoint sources, which, like stormwater have less stringent regulatory control. Likely authorities from the TMDLs may include stricter wastewater discharge requirements and additional stormwater controls for existing and proposed developments, depending on the outcomes of the TMDLs.

The Deschutes Basin TMDLs that will include the Metolius River Basin are currently on hold. The Water Quality Program reprioritized its schedule over the last two years in light of resource constraints, and the need to complete work in other priority basins, such as the Willamette, Umpqua, Rogue and John Day. As you've requested, we will give the Metolius River special consideration when we return to work on the Deschutes Basin TMDLs. Though we have

collected a considerable amount of data in the Deschutes Basin, we do not anticipate returning to work on these TMDLs in this biennium.

In summary, DEQ has considerable authority over the discharge of pollutants to waters of the state. Despite this, there are significant sources of pollutants that are comparatively uncontrolled, and the potential effects of these discharges, along with potential decreases in instream flow from development could have a measurable impact on an outstanding water such as the Metolius River. Because DEQ does not have a regulatory framework for stormwater management after construction, we believe these developments could pose a significant risk to water quality. The level of risk is dependent on the size and proposed location within the Metolius River Basin.

If there is anything contained in this letter you have questions about, or if you'd like additional information about this or any other aspects of the Metolius River Basin, please call me.

Sincerely,



Stephanie Hallock
Director

cc: Mike Carrier, GNRO
Tim Nesbitt, Governor's Office
Dick Pedersen, DEQ



Oregon

Theodore R. Kulongoski, Governor

Department of Fish and Wildlife

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November 2, 2007

Mr. Tim Nesbitt
Governor's Office
900 Court Street NE
Salem, OR 97301



Dear Mr. Nesbitt:

This letter is in response to Governor Kulongoski's request that ODFW evaluate whether existing laws are adequate to ensure that new destination resorts in or near the Metolius River Basin avoid any adverse effects on fish or wildlife resources, particularly threatened or endangered species.

Existing laws that may address the fish and wildlife resource effects of destination resorts include the following:

- State Endangered Species Act (ORS 496.171)
- ODFW Fish and Wildlife Habitat Mitigation Policy (OAR 635-415-000)
- Federal Endangered Species Act (USFWS)
- Jefferson County plan and ordinances (County)
- State Land Use Laws (Department of Land Conservation and Development) (ORS 92, 193, 197, and 215)
- Forest Practices Act (Department of Forestry) (ORS 527.610 – 527.992)
- Water Laws (Water Resources Department (WRD))
 - Instream Water Rights (ORS 537.332 – 537.360; OAR 690-077 and OAR 635-400)
 - Mitigation Credits for Projects in the Deschutes River Basin (ORS 537.746; OAR 690-505-0500 to 690-505-0630)
 - Additional Public Interest Standards For New Appropriations OAR 690-033
- Water Quality Regulations (Department of Environmental Quality (DEQ)). Numerous regulations would apply depending on the proposed project design and operation. Most water quality laws can be found under Chapter 468B — Water Quality.
 - Groundwater Quality Protection (OAR 340-040)
 - NPDES or WPCF (OAR 340-045)
 - Land Application of Wastewater (OAR 340-50)

- Reclaimed Water from Sewage Treatment Plants (OAR 340-55)
- Instream Water Rights (OAR 340-56)
- On Site Sewage Disposal (OAR 340-71)
- Stormwater (handled under OAR 340-045 and 340-044)
- TMDL's (OAR 340-042)
- Underground Injection Control (OAR 340-044)

Of the above regulations, only the State Endangered Species Act (ESA), the Fish and Wildlife Habitat Mitigation Policy and the ODFW Instream Water Rights rule are implemented by ODFW. There are limitations to ODFW's regulations.

- The State ESA applies primarily to state land and waters of the state. A state incidental take permit (ITP) is required for take of a state-listed species, but there is no state regulation of listed species habitat on private land. If a federal incidental take permit is required, a state ITP is not required.
- The ODFW Fish and Wildlife Habitat Mitigation Policy is required to be followed for ODFW activities and when providing ODFW recommendations for fish and wildlife mitigation. However, ODFW's recommendations are usually only advisory to other state and local agencies and these agencies take ODFW's advice into account along with other factors.
- ODFW's Instream Water Right (IWR) rule provides directions for how ODFW will determine flows necessary for fish and other aquatic life. Based on these flow determinations, ODFW can make application to WRD for an instream water right. WRD is responsible for making the final determination on the amount of the water right and holds the issued IWR in trust for the state.

State Endangered Species Act

- State listed threatened species that occur in the Metolius Basin are the bald eagle and the northern spotted owl. Other bird species in the basin that are listed on the state sensitive species list are the northern goshawk, olive-sided flycatcher, yellow-breasted chat, Lewis' woodpecker, black-backed woodpecker, Williamson's sapsucker, flammulated owl, ferruginous hawk, mountain quail, white-headed woodpecker, willow flycatcher, western bluebird, bufflehead, Swainsons hawk, northern pygmy owl and pileated woodpecker.
- The two state-listed sensitive fish species that occur in the Metolius Basin are the bull trout and redband trout.
- State-listed sensitive amphibians in the basin are the spotted frog, Cascades frog, western toad, and tailed frog.
- Mammal species on the state sensitive species list that occur in the Metolius Basin are the silver-haired bat, small-footed myotis, Townsend's big-eared bat, and American marten.

- Not listed, but other important species of concern in the basin include sockeye salmon (including kokanee), the peregrine falcon, the golden eagle, mule deer and elk. In addition, chinook salmon have recently been released in the upper basin as part of the re-introduction of anadromous fish populations.
- The bald eagle is no longer federally listed, so in the event of a take of an eagle through a development action, a state incidental take permit would be required.

ODFW would not have direct regulatory authority over the habitat of any of the above listed species. ODFW would request that any proponent of a destination resort in the Metolius Basin address potential impacts to all of the above species. ODFW would also request mitigation to offset unavoidable losses to essential or important wildlife habitat.

Fish and Wildlife Habitat Mitigation Policy

The Oregon Fish and Wildlife Commission adopted a Fish and Wildlife Habitat Mitigation Policy that guides ODFW's mitigation recommendations for development actions. The rules are not binding unless the activity is regulated directly by ODFW. ODFW uses the Mitigation Policy to guide recommendations for avoiding, minimizing and compensating adverse effects of development on fish and wildlife habitats. These recommendations are provided by ODFW when requested by a government or municipality with jurisdiction or oversight authority over the particular development project. ODFW has used the policy in making recommendations for numerous destination resorts throughout the state.

There have been a number of problems with implementation of mitigation requirements for destination resorts. These issues include lack of follow through by developers to implement agreed-upon mitigation actions; lack of county oversight to ensure agreed-upon mitigation measures are implemented; wildlife impacts are only assessed on site (adjacent off-site impacts are not included in any wildlife habitat impact analysis); and lack of cumulative impact assessment. The result has been a net loss of fish and wildlife habitat from all destination resorts in the state.

Federal Endangered Species Act

Federally listed species that occur in the Metolius Basin include bull trout, and the northern spotted owl. The Metolius Basin is a critical spawning and rearing area for bull trout. Bull trout are limited by their requirement for cold water temperatures for spawning and juvenile rearing. They are extremely sensitive to potential development effects including increased water temperatures and sedimentation changes. Some of the most productive spawning and rearing habitat for bull trout in the basin occurs in the spring-originated tributaries to the Metolius River such as Jack Creek and Roaring Springs. If a proposed destination resort would result in take of a listed species, the project proponent would be required to either obtain an incidental take permit from the US Fish and

Instream Flows

ODFW applied for instream flows in the Metolius River and nine tributaries within the basin for fish migration, spawning, egg incubation, fry emergence and juvenile rearing. WRD has issued water right certificates and holds them in trust for the state. There are a few cfs of other water uses in the basin mostly domestic and irrigation use, but the majority of the flow is protected by the IWR. There is also a tribal treaty water right that needs to be satisfied. WRD's water availability tables show that water is not available from the Metolius River for further appropriation for all months except April.

Most likely a destination resort would need to rely on groundwater which would require mitigation for water use through the Deschutes River Basin Groundwater Mitigation program. WRD indicates that a proposed groundwater development for the current proposed destination resort developments would impact the Metolius River, but the impact would be below that required to mitigate within the Metolius basin. Therefore the development could mitigate their water use elsewhere in the Deschutes basin (if the development needed to mitigate within the Metolius Basin there would be insufficient mitigation water available for mitigation). Groundwater extraction for development use would likely have some effect on instream flows and fish habitat which could affect bull trout (a listed species), redband trout, kokanee salmon and other aquatic life.

Decreases in stream flows have the potential to translate into negative impacts on fish populations. ODFW has tracked fish spawning through good and bad water years and has observed that reductions in spring flows brought on by dry climatic conditions have translated into reduced spawning rates. ODFW would expect that reductions in stream flows from springs through groundwater withdrawal would have similar effects on spawning and fish populations only it would be a more permanent reduction because of the continuing nature of the groundwater withdrawals.

Water Quality

Most of DEQ's rules are designed to minimize pollution, maintain water quality above water quality standards and in some cases prevent decreases in water quality in high quality streams. Major concerns for fish (specifically bull trout) for the Metolius River would be water quality concerns associated with:

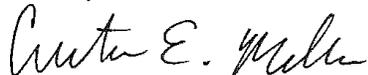
- Stormwater runoff - would likely increase with the increase in impervious surfaces which may have direct impacts by increasing potential pollution loads through runoff to local tributaries and the river; increasing the likelihood of spills; and delivering pollution to streams through groundwater discharge contaminated by stormwater.
- Sewage Treatment – Most likely the density and number of homes envisioned would require a municipal sewage treatment system of some kind. The effects on fish will depend on how the effluent from such a system is handled. DEQ would require either a NPDES or WPCF permit and would either discharge directly to a surface water

body after treatment or be applied to the land where groundwater could be affected. If the development relies on septic systems there would likely be an impact to groundwater quality which in turn could affect surface water quality through groundwater discharge to surface water.

All of the local, state, and federal regulations that apply to destination resorts are intended to avoid or minimize adverse effects of these developments on fish and wildlife habitat and other resources. However, none of the regulations are intended to avoid all adverse effects on fish or wildlife resources. Even with the best mitigation actions there will be loss of fish and wildlife habitat through habitat fragmentation, incremental reductions in stream flow, increased human interaction, road development, etc.

Thank you for the opportunity to comment on this important issue. Please contact me if you have any questions on our response.

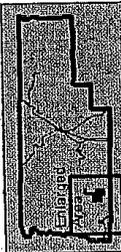
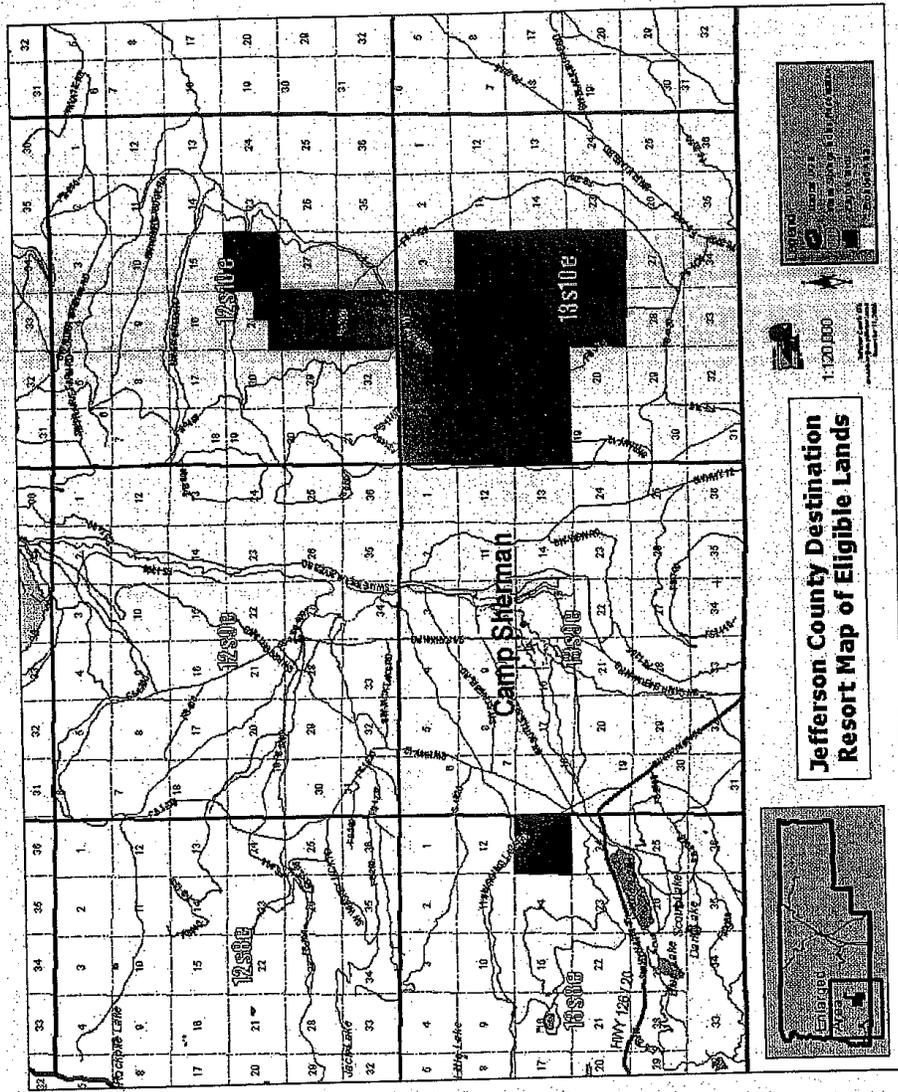
Sincerely,



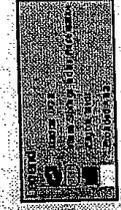
Curt Melcher
Deputy Director for Fish and Wildlife Programs

Attachment

C: Mike Carrier, Governor's Office
Suzanne Knapp, Governor's Office
Jeannie Kelso, Governor's Office



**Jefferson County Destination
Resort Map of Eligible Lands**





United States
Department of
Agriculture

Forest
Service

Deschutes National Forest

1001 SW Emkay Drive
Bend, OR 97702
(541) 383-5300

File Code: 1500

Date: April 11, 2008

Governor Kulongoski
160 State Capitol
900 Court Street
Salem, OR 97301

Dear Governor Kulongowski:

I am writing to call your attention to the legal standing of the Metolius Wild and Scenic River, and the United States Forest Service mandate and responsibility to protect the natural and cultural resource values for which it was designated. I hope this information can be useful to you as the State seeks to determine if its own laws and regulations are sufficient to adequately protect the river from adverse impacts that could be caused by development, even when that development may be several miles from the river.

I understand that you have recently asked State agencies to evaluate whether existing state laws and rules are adequate to ensure that new destination resort development in or near the Metolius basin would not have any adverse effects to important resources, including water quantity and quality. We have seen the responses from the Department Environmental Quality, Department of Fish and Wildlife, and the Water Resources Department that suggest that there will likely be adverse impacts to the river.

The Metolius River was first mentioned as a potential Wild and Scenic River in the 1982 Nationwide Rivers Study conducted by the National Park Service. Through the work of many local citizens led by then Senator Mark Hatfield, the Metolius was added to the national system in 1988 in the Omnibus Oregon Wild and Scenic Rivers Act of 1988. It was added to the State Scenic Waterways Program at the same time.

The purpose of the Wild and Scenic River designation as stated in the original Wild and Scenic Rivers Act of 1968 is to ensure that ***“certain selected rivers of the Nation, which with their environments, possess outstandingly remarkable scenic, recreation, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations.”*** Both the federal and state programs encourage cooperation between agencies to protect the river and its values. Both programs protect private property rights in and around the designated rivers, and envision a high reliance on local comprehensive plans to maintain consistency with the objectives of the program.

In the Act, Congress delegated responsibility to the Forest Service through the Secretary of Agriculture to administer the river ***“in such manner as to protect and enhance the values that caused it to be included in the system...”*** The role of the federal manager, in this case myself as

the Forest Supervisor of the Deschutes National Forest, is to identify the outstandingly remarkable values (ORVs) of the river, to develop resource management goals necessary to protect those ORVs, and to define the boundaries necessary to enhance the river values and properly protect them for the benefit of future generations. The Deschutes National Forest, with the partnership of the State and the Confederated Tribes of the Warm Springs Reservation of Oregon undertook a broad planning process beginning in 1989, with unprecedented public involvement and comment. A Management Plan was signed in May, 1997 and implementation began immediately and continues to this day.

For the Metolius River, the ORVs were determined to be geology, ecology, fish and wildlife, scenery, cultural history, recreation, and water. For water, the natural, unpolluted water quality is considered to be unique for rivers of its size and for the amount of development and recreational use that occurs. The Metolius River is also considered unique in the region for the quantity and stability of its spring-fed headwaters sources. While the possibility of destination resorts raises a number of issues that may affect the ORVs in various ways, it is the water of the Metolius River that is of most concern. Our goal for water quality in the Metolius River is to maintain the existing high quality. Our on-going water quality testing program utilizes monitoring thresholds that are higher than current state standards. Residents of our 108 recreation residences and other special use holders in the river corridor rightly consider themselves to be stewards and protectors of the river. With the help and cooperation of those summer homeowners and Jefferson County, we have replaced nearly all of the old and failing septic systems and raised the standard for new systems on National Forest Lands in the basin.

In the case of water quality, the potential for adverse impacts may come from those lands classified as suitable for destination resorts that lie to the west of the Metolius River. These lands are drained by tributaries of the Metolius that generally share and enhance its high water quality. More than half of these resort-eligible lands have very high water tables, are seasonably wet, and may be considered unsuitable for septic field development. The soil types and high water tables may also require specialized construction techniques for foundations and roads. In its letter to you, ODEQ notes that ***“Subsurface discharge (of effluent) to shallow soils or land application to the surface of soils may be allowed. Even with substantial removal of nutrients and other constraints from this waste water discharge, small amounts of nutrients may reach the Metolius River or its tributaries through run-off or seepage to groundwater that flows into the Metolius. The river is sensitive to nutrients, and small increases in nutrients could result in some degradation of water quality.”*** ODEQ goes on to note that the Total Maximum Daily Load (TMDL) analysis for the Deschutes basin is on hold for at least the next biennium. This is the process that would normally be used to estimate the potential effects of storm water and waste water, and determine acceptable amounts of discharge as well as requirements for control in existing and proposed new developments.

For water quantity, the risk may be higher from those resort-eligible lands to the east of the Metolius basin. While not connected via surface tributaries except at the lowermost limit of the river, groundwater extraction could have an impact on streamflows in the Metolius River, according to the response from the Water Resources Department. Unfortunately, as noted by WRD, the otherwise very successful Deschutes Mitigation Program, as currently administered, cannot ensure that there will be no diminishment of flows in the Metolius, nor can it require

mitigation that will benefit the Metolius as a condition of new groundwater extraction. I should note too, that reducing water quantity, especially at the headwaters, can adversely affect water quality, particularly temperature.

As the various developments move forward in their planning and local application processes, we will continue to stay involved at the local and state level to ensure that the resources entrusted to

our protection are considered. We, and the applicants, will need to address issues such as wildlife habitat, transportation, fire protection, invasive plants, and the recreational impacts to the Metolius basin from many new visitors, as well as water quality and quantity.

I greatly appreciate your efforts to protect this remarkable national and state treasure, while continuing to respect local land use processes and private property rights. We look forward to hearing from you about any new proposals to add protections under state law that will protect and enhance the ability of future citizens to enjoy the Metolius River and its environs. If you have any questions, please feel free to contact me at 541-383-5562.

Sincerely,

/s/ John Allen
JOHN ALLEN
Forest Supervisor

cc Bill Anthony, Sisters Ranger District