



# 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

Wildlife Service, (USFWS) or develop a Habitat Conservation Plan for USFWS approval that addressed the listed species concerns.

### **Jefferson County Plan**

In December 2006, Jefferson County adopted a map indicating what areas in the county would be eligible for destination resort siting under Goal 8, Recreational Needs. The map identified two areas in the county that are eligible for destination resorts. Both of the areas that are eligible for destination resorts are within the Metolius Basin (see attached map).

The Jefferson County plan excludes areas from destination resorts that are designated winter range or other Goal 5 resources. Goal 5 resources are natural resources that are inventoried and addressed in the county plan. There are no identified Goal 5 resources in the areas that are designated for destination resorts. However, areas that are planned and zoned for forestry are not addressed under county Goal 5 elements. This means that important natural resources such as northern spotted owl and bald eagle nest trees or significant forested wetlands are not protected by the county plan or excluded from destination resort siting. In addition, there is important wildlife habitat such as big game summer range that is not addressed by the county plan. The county plan also does not address the issue of bears and cougars which are quite numerous in the areas proposed for destination resorts.

One of the unintended consequences of destination resorts is that the area around them is managed substantially differently by federal land management agencies. For example, federal land managers are in the process of significantly altering wildlife habitat adjacent to destination resorts to protect them from wildfire. This dramatically increases the effective footprint of the destination resort.

### **State Land Use Laws**

The Department of Land Conservation and Development implements the Goal 8 rule that addresses destination resorts as well as the state statute that governs destination resorts. Neither of these provisions would apply directly to a destination resort in Jefferson County, as the county's destination resort plan element is the controlling document and is intended to carry out the land use statutes and rules.

### **Forest Practices Act**

The Oregon Forest Practices Act has provisions for sensitive bird sites, significant wetlands and threatened and endangered species. These protection measures are intended to limit the adverse effects of timber harvest activities on sensitive fish and wildlife habitat. These provisions would apply to timber harvest activities within a proposed destination resort, but once the land use conversion to a destination resort takes place, the FPA would no longer apply.

### **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:

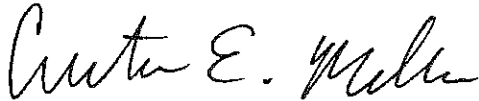
- Stormwater runoff - would likely increase with the increase in impervious surfaces which may have direct impacts by increasing potential pollution loads through runoff to local tributaries and the river; increasing the likelihood of spills; and delivering pollution to streams through groundwater discharge 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.

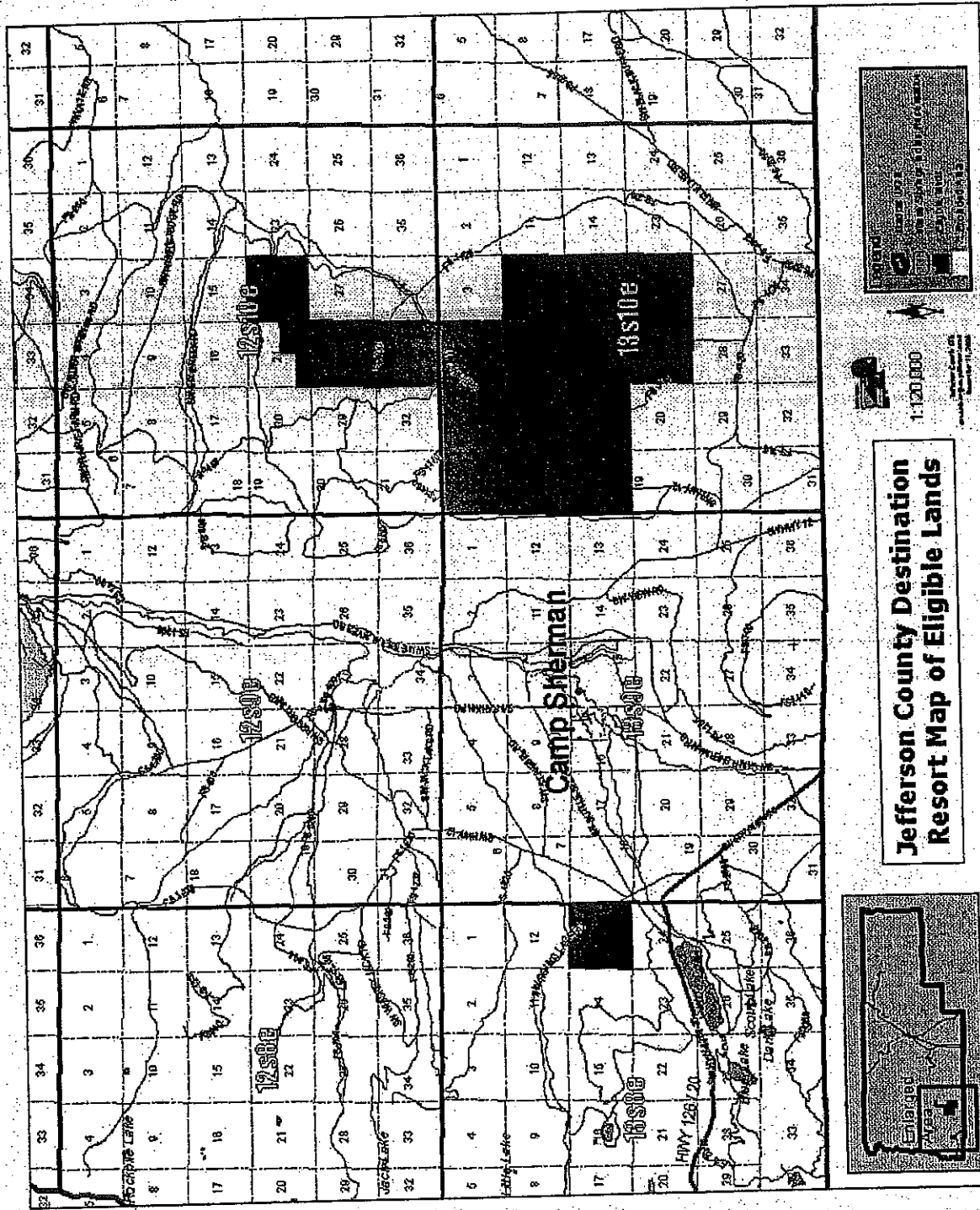
Sincerely,



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**