

BEFORE THE
OREGON WATER RESOURCES DEPARTMENT

In the matter of the Application G-16674)
In the name of Ponderosa Land and Cattle) Protest
Co., LLC)
Deschutes Basin)
Jefferson County)

Central Oregon LandWatch files this protest to the Proposed Final Order (PFO) for Application G-16674 in the Deschutes Basin along with the \$350 protest fee pursuant to ORS 537.153 and 537.621 and OAR 690-310-160. For the reasons outlined below, the application must be denied.

Protest Elements as Required by ORS 537.621(8)

a. Name, address, telephone number of protestant:

Central Oregon LandWatch
1539 NW Vicksburg
Bend, OR 97701
(541) 317-1993
Contact: Paul Dewey, pdewey@bendcable.com

b. Statement of LandWatch's interest and the public interests it represents.

Central Oregon LandWatch is a nonprofit, tax-exempt organization whose mission is the protection of Central Oregon's natural resources, including water. LandWatch's address and relevant contact information is presented above.

LandWatch's goals include seeking to encourage effective land use planning by providing information and support for meaningful public participation and by aggressively enforcing federal, state and local land use and environmental laws and codes.

For over twenty years LandWatch (formerly named the Sisters Forest Planning Committee) has dedicated substantial resources in fighting to maintain water quality and quantity in rivers within the Deschutes River Basin, from urging protection of state scenic waterways and federal wild and scenic rivers, to challenging findings on the carrying capacity and availability of water for proposed population forecasts and urban growth boundary expansions, to opposing activities that pollute the river systems, and to challenging availability of water for proposed developments.

Central Oregon LandWatch has over 100 members, most of whom reside in the Deschutes River Basin. They use and enjoy the Deschutes River system for its scenic

and recreation values and use its water for daily living. LandWatch's mission and history of involvement in protecting the water resources of the Deschutes River Basin make it qualified to represent the public's interest in protecting the instream and groundwater values of the Basin.

LandWatch has a substantial interest in the above-captioned proceeding where such large groundwater use is proposed, where the use of water may be shifted from agriculture to golf courses, where the use is to facilitate urban scale development in a rural area, where the use threatens critical springs and river flows, where the proposed use is inefficient and wasteful, and where assumptions of water consumption and mitigation are unrealistic and seriously threaten and set the stage for further overuse of water in the Basin. LandWatch's interests, the interests of its members and the public interests it represents will be adversely affected or aggrieved by the proposed use. Attached are comments earlier submitted by LandWatch and hereby included in this protest. (Ex. A)

c. How the action proposed in the PFO will impair or be detrimental to LandWatch's interests and the public interests it represents.

The proposed use of water will result in the diminishment of streamflow and water quality for the Deschutes River system. The PFO allows use without requiring that adequate mitigation eliminate the predicted impacts (in timing, amount and placement) of groundwater use on surface waters in the Deschutes River Basin. It is also inconsistent with Oregon's Statewide Planning Goals where the land is not zoned for the proposed use and where the use would violate Goal 5.

Given the connectivity between the groundwater and surface waters of the Deschutes River system and the existing inadequate streamflows for fish, wildlife, scenic and recreation values in the Basin, the failure to require full mitigation will result in further depletion of streamflows and diminished water quality, adversely affecting public instream uses of the water, including injuring senior instream rights and federal reserve rights that protect fish, wildlife and recreation.

The proposed use of water is inefficient and wasteful and the proposed mitigation is inadequate and imprecise. Water use is allowed without adequate safeguards to protect against inefficient use. Because the use is contrary to state and federal laws and policies that protect instream flows and water quality, it directly conflicts with and will impair and be detrimental to LandWatch's interests and those of its members and the public it represents. These interests will be directly and adversely affected if the application is approved, and thus LandWatch is entitled to be named as a party in this matter whether or not a contested case is scheduled.

d. The errors and deficiencies of the PFO and how they should be corrected.

1. Inadequate Facts.

A fundamental problem with the PFO is the lack of necessary information and substantial evidence on which to base its decision. The necessary correction is development of an adequate factual base.

The Proposed Use:

Ponderosa Land and Cattle Co., LLC has filed an application for 8.8 cfs with a total volume of 2,422 acre feet per year. This is an amendment of an earlier application for a right to withdraw 10.44 cfs and 2,860 acre feet. The applicant has applied for a quasi-municipal water right with the water to be used for a destination resort, including golf courses, commercial, residential and other components. There has been no application for this development, however, so the exact proposed use is unknown. This is despite a May 16, 2008, OWRD e-mail stating that the applicant would have to have filed for a county conditional use permit before a PFO could be issued.

The Mitigation Obligation:

OWRD has identified a mitigation obligation of 968.8 acre-feet annually. This mitigation obligation was apparently calculated by using a consumptive use factor of 40 percent. There is no explanation of how OWRD came up with this percentage of consumptive use, considering the variety of different uses from irrigation to commercial to residential. OWRD has described the mitigation as being required in the "General Zone of Impact."

The Resource Threatened by the Development – the Metolius River, Whychus Creek, Fly Creek, Indian Ford Creek and Deschutes River:

OWRD also fails to identify issues relevant to a determination of the preservation of the public welfare, safety and health under ORS 537.525.

The Groundwater Resource.

According to OWRD, surface waters in the Deschutes River Basin are over-allocated. As a result, there is increased reliance on groundwater as a water source in the Basin. A USGS 2001 report concluded that groundwater and surface water are directly linked and removal of groundwater will ultimately diminish streamflow. See the attached excerpt from "Ground-Water Hydrology of the Upper Deschutes Basin, Oregon, USGS Report 01-4162" at 2 (Ex. B). This report is on file with OWRD and LandWatch hereby incorporates it by reference into this protest. Another report on file with OWRD which LandWatch incorporates by reference into this protest is "Simulation of Regional Ground-Water Flow in the Upper Deschutes Basin, Oregon, USGS Report 03-4195" which states, at page 2, that pump water generally comes mostly from aquifer storage

when pumping begins but as it continues the pumping increasingly diminishes the discharge to streams and thus streamflow.

Public Instream Values and Uses in the Deschutes River Basin.

The public has several significant interests in the Deschutes River Basin and the rivers and streams referred to above. They include State Scenic Waterway designations and Federal Wild and Scenic Rivers Act designations (16 USC §1271, *et seq.*) which include, but are not limited to, the Metolius River, Whychus Creek and the Deschutes River.

In addition, ORS 537.332(2) established instream water rights in the Deschutes Basin to protect quantity of water needed to support public instream uses in the Basin. These instream water rights include fisheries such as the summer steelhead and bull trout that are listed under the Federal Endangered Species Act (16 USC §§1531-1534) as well as other key species such as fall and spring chinook. Fly Creek contains State-recognized sensitive redband.

OWRD in its 1998 memorandum, “Water Development Issues in the Deschutes Basin,” at page 4, determined that flows in the Lower Deschutes River are inadequate to meet the 1991 instream water right and scenic waterway flows at least nine months of the year, from mid-summer through early spring. Likewise, the Middle Deschutes is apparently over-appropriated as shown by OWRD water availability tables. This memorandum and tables are also hereby incorporated by reference as part of this protest.

Both USGS (in a letter of April 4, 2007, and e-mail of June 1, 2007, to Senator Westlund) (Exs. C and D) and OWRD in a letter to Governor Kulongoski of October 31, 2007, (Ex. E) have identified impacts to the Metolius from this proposed groundwater use. See the attached correspondence. See also the attached excerpts from a report by hydrogeologist Mark Yinger regarding the proposed Thornburgh destination resort and how it would impact public values. (Ex. F)

2. The PFO is inconsistent with and does not comply with Oregon’s land use laws, including Statewide Planning Goals and an acknowledged local plan.

OAR 690-005-0030 requires OWRD to comply with all Statewide Planning Goals. OWRD has clearly not done so in this case where it ignores the fact that not only no approval for a destination resort related to this water rights application, but there has not been an application and the area is not even zoned for the use intended. While Jefferson County did adopt ordinances approving of a destination resort overlay zone in this area, the Land Use Board of Appeals reversed and remanded the ordinances on the grounds that the County had failed to assess impacts to the critical deer winter range. Deer winter range is a recognized Goal 5 protected resource.

Additionally, the Oregon Supreme Court recently granted a petition for review to hear argument on whether the plan and zoning are consistent with other Goal 5 protected resources, the Metolius River and the Headwaters of the Metolius. Given that the ordinances creating a destination resort zone and amending the plan map to allow that use on the land owned by Ponderosa have been remanded by LUBA, that the land use associated with this water use is thus not in compliance with the goals and a local acknowledged comprehensive land use plan, and that outstanding Goal 5 resource issues are still in front of the Oregon Supreme Court, it is entirely premature for OWRD to be considering granting 8.8 cfs for this proposed destination resort. This deficiency should be corrected with a denial or delay until there is a conditional use approval. See the attached excerpts from the Supreme Court press release and LUBA decision. (Exs. G and H)

It should also be noted that the PFO is inconsistent with the proposed county plan/code where the County in its designation of this area for destination resorts based its decision on OWRD protecting the Metolius and its Headwaters in any water permit. See attached excerpt from Ordinance 04-07, p. 31 and 03-07, p. 27. (Exs. I and J)

3. The PFO is in error and deficient because OWRD is not requiring mitigation in all zones of impact.

Though OWRD has determined that mitigation must be located in the General Zone of Impact (March 9, 2000, letter to Ponderosa, at page 2), OWRD has also identified the “primary” zone of impact as being Whychus Creek. This suggestion of a “primary” zone of impact is of concern because OWRD has previously stated in its letter to Governor Kulongoski of October 31, 2007, that mitigation is only required in the “primary” zone, even if there are impacts in another zone. See also the attached correspondence between the USGS and Senator Westlund’s office regarding impacts of these proposed wells on the Headwaters and the Metolius River.

The required mitigation should be applied wherever there are impacts, including on Whychus Creek, the Metolius River, Fly Creek, Indian Ford Creek or the Deschutes River. There is no basis in the rules to allow OWRD and the Applicant to avoid mitigation in the zones where there are impacts. The PFO should be corrected by requiring mitigation in all zones impacted.

4. The PFO is in error where OWRD is underestimating the consumptive use associated with the proposed use.

The OWRD has assumed that there will only be 40 percent consumptive use associated with this destination resort. There is simply no basis for this assumption in the record. In fact, where a substantial amount of use is for irrigation of golf courses, very little recharge should be assumed. See the reports of hydrogeologist Mark Yinger regarding the Thornburgh Destination Resort where he concluded that consumption would actually be 90 to 100 percent. (Ex. K)

As noted in Mr. Yinger's report, it is critical in determining consumptive use to know the nature of the sewer system and how treated water will be used. If, in fact, the treated water is to be applied as irrigation, there will be little, if any, recharge to the aquifer from residential use. Failure to address these issues constitutes a violation of OAR 690-505-0610(5). The PFO should be corrected with greater mitigation.

5. The PFO fails to address other federal and state requirements of law.

Despite the fact that the Metolius River is a designated federal wild and scenic river and though the proposed well locations are in the area of a wetlands and despite the Applicant's failure to address whether its groundwater withdrawals will affect rules and regulations regarding these resources, OWRD has approved this PFO. It is necessary that OWRD address the requirements of federal law in assessing this water rights application. See the attached letter from the US Forest Service to Governor Kulongoski expressing its concern about impacts to the Metolius Wild and Scenic River. (Ex. L) See also the attached DEQ and ODFW letters regarding other state laws. (Exs. M and N)

6. There has been no showing of a capacity of the resource to satisfy the PFO.

A basic requirement for the granting of this PFO should be proof that there is an existing resource that can be tapped. There is insufficient evidence in the record that there is a sufficient capacity of the resource to even meet this application. This deficiency requires proof of a resource.

7. Conditions proposed in the PFO and its draft permit are inadequate to protect the resource.

Despite the fact that the application is explicit in stating that there will be incremental development, the PFO fails to address the requirements of OAR 690-505-0625. It is standard that incremental use permits require proof of mitigation for each stage of development. Additionally, the Applicant has failed to provide a quasi-municipal incremental development plan as required by OAR 690-505-0625(1)(c). PFO and draft permits simply do not reference this obligation.

e. Legal authority supporting the protest.

The legal authority supporting this protest include ORS Chapters 536, 537, 468B and 496; plus OAR 690-310, -33, -400, -410 and -09, plus the Endangered Species Act, 16 USC §1538, the Wild and Scenic River Act, 16 USC §1271, *et seq.*; and the other authorities cited in the protest.

f. The \$350 protest fee required by ORS 536.050 has been submitted with this protest.

g. Conclusion.

This application and the PFO should be denied for the above reasons. The proposed use will not ensure the preservation of the public welfare, safety and health as required by ORS 537.525. LandWatch hereby incorporates by reference the protests of WaterWatch and Friends of the Metolius.

DATED this 14th day of January, 2009.

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Bend, OR 97701
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CERTIFICATE OF FILING AND SERVICE

I certify that on January 14, 2009, I filed this Protest and a \$350 check by Federal Express to the Water Resources Department at the address set forth below.

Tim Wallin
Water Rights Section
Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301-1271

I further certify that I served a copy of the said Protest to the applicant by mailing said copies to the addresses set forth below, first-class mail, postage pre-paid, in the United States Mail from Bend, Oregon on January 14, 2009.

Bruce Thorn
Ponderosa Land and Cattle Company, LLC
c/o Holiday Retirement Corporation
P.O. Box 14111
Salem, OR 97309-5026

Martha Pagel
Schwabe, Williamson & Wyatt
Equitable Center
530 Center Street, NE Suite 400
Salem, OR 97301

DATED this 14th day of January, 2009.

PAUL DEWEY, OSB #78178
Attorney for Central Oregon LandWatch