

IN THE SUPREME COURT OF THE STATE OF OREGON

**ELIZABETH JOHNSON and THE
CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF
OREGON,**

Petitioners below,

And

**CENTRAL OREGON LANDWATCH,
FRIENDS OF THE METOLIUS, and
PETE SCHAY,**

Petitioners,

v.

**JEFFERSON COUNTY, PONDEROSA
LAND & CATTLE CO., LLC, DUTCH
PACIFIC RESOURCES, and SHANE
LUNDGREN,**

Respondents,

And

IRWIN B. HOLZMAN,

Intervenor-Respondent below.

**LUBA Case Nos. 2007-016, 2007-018,
2007-021, 2007-022, 2007-025,
2007-026, 2007-030, 2007-031**

CA A138263

**PETITION FOR REVIEW OF CENTRAL OREGON LANDWATCH,
FRIENDS OF THE METOLIUS AND PETE SCHAY**

Petition for Review of the decision of the Court of Appeals affirming the decision of the
Land Use Board of Appeals

(cont. on back)
August 2008

Opinion filed: July 9, 2008

Author of the Opinion: Haselton, Presiding Judge

Concurring Judges: Before Armstrong, Judge and Rosenblum, Judge

Notice: If Review is allowed, petitioners intend to file a brief on the merits.

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TABLE OF CONTENTS

I. STATEMENT OF FACTS..... 1

II. LEGAL QUESTIONS ON REVIEW 2

III. REASONS WHY QUESTIONS HAVE IMPORTANCE BEYOND THE PARTICULAR CASE..... 3

IV. CONCLUSION..... 6

EXCERPT OF RECORD (COURT OF APPEALS DECISION).....ER-1

TABLE OF AUTHORITIES

Cases

Cox v Polk County, 174 Or App 332, 25 P3d 970, *rev den*, 332 Or 558, 34 P3d 476 (2001) 4

Friends of the Columbia Gorge v LCDC, 85 Or App 249, 736 P2d 575 (1987) 5

Hines Lumber Co v Gallaway, 175 Or 524, 154 P2d 539 (1944) 4

Johnson v Jefferson County, (A138263), ___ Or App ___, ___ P3d ___ (July 9, 2008)..... 1

Safeway Stores v State Bd Agriculture, 198 Or 43, 255 P2d 564 (1953)..... 4

Wal-Mart Stores Inc v City of Oregon City, 204 Or App 359, 129 P3d 655, *rev den*, 341 Or 80, 136 P3d 1123 (2006) 4

OARs

OAR 660-023-0250(3) 2

OAR 660-023-0250(3)(b)..... 1, 2

Oregon Rules of Appellate Procedure

ORAP 9.07..... 3

Petitioners Central Oregon LandWatch, Friends of the Metolius and Pete Schay ("Petitioners") petition the Court for review of the Court of Appeals decision in *Johnson v Jefferson County*, (A138263), ___ Or App ___, ___ P3d ___ (July 9, 2008).

I. STATEMENT OF FACTS

The Headwaters of the Metolius is a large spring at the base of Black Butte in Central Oregon. The spring is the headwaters of the Metolius River, one of Oregon's premiere trout streams. (LUBA Rec. 458, 460)¹ The Headwaters of the Metolius and the Metolius River have been designated by Jefferson County as Goal 5 protected resources for "natural area," "scenic," "water" and "potential state and federal wild and scenic river." (LUBA Rec. 456, 458, 460, 464) Statewide Planning Goal 5 requires local governments to identify key natural resources for protection. (ER, p. 3, n.1) OAR 660-015-0000(5).

Jefferson County recently adopted a post-acknowledgement plan amendment ("PAPA") to its Comprehensive Plan and Code to designate areas for destination resorts, a new use in the County. Petitioners argued that OAR 660-023-0250(3)(b) requires a Goal 5 economic, social, environment and energy ("ESEE") analysis if a PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site. Petitioners asserted that an ESEE was required where destination resort groundwater use could impact the Headwaters.

The County adopted the new uses of destination resorts without an ESEE analysis, concluding the resorts will not conflict with specific Goal 5 resources "within or around" the resort areas and that "any destination resort development will be subject to state and local water quality and water rights laws, which will be applied to prevent adverse impacts to water quality and availability in the Metolius River Basin." (LUBA Rec. 384) Petitioners challenged these findings in their appeal to LUBA. (LUBA Rec. 384-388)

¹ The Record submitted by LUBA to the Court of Appeals is identified as "LUBA Rec. ____."

While the Court of Appeals decision in this case for the most part correctly states the facts, it errs in stating that at LUBA "petitioners' premise [was] that the groundwater that feeds the springs of the head of the Metolius River therefore must be an inventoried significant Goal 5 resource." (ER, p. 4) Petitioners' actual argument was that an ESEE needed to be done and that the County had failed to "address impacts to the Headwaters of the Metolius from destination resort groundwater use." (LUBA Rec. 387) See the Petitioners' argument to LUBA at LUBA Rec. 9-11. (LUBA Rec. 385-388) It was LUBA in its decision that separated the Headwaters as a Goal 5 protected resource from its spring water and which found that the groundwater supplying the springs had to have been separately designated as a Goal 5 resource. (LUBA Rec. 673)

II. LEGAL QUESTIONS ON REVIEW

The legal questions presented on review and the rules of law Petitioners propose be established include:

1. Whether the assessment of conflicting new uses to a protected Goal 5 resource under OAR 660-023-0250(3)(b) need not be done if the medium of impact is not a designated Goal 5 resource itself.

The administrative rules don't include the requirement that the means of impact to a Goal 5 resource be themselves protected and the rule should simply be (as it is stated in OAR 660-023-0250(3)) that if any new use could conflict with a Goal 5 resource that its impacts should be assessed.

2. Whether the rules of interpretation used to define the scope of a Goal 5 designated resource should narrow the scope required for its designation in the first place, should limit it to what conflicting uses are identified and should elevate general exclusions over specific protections.

The scope of a Goal 5 protected resource should be interpreted broadly to include all of its resources and to recognize specific protections over general exclusions. The

scope should include all resources included in an ESEE description of the Goal 5 resource being protected.

III. REASONS WHY QUESTIONS HAVE IMPORTANCE BEYOND THE PARTICULAR CASE

This case involves several of the ORAP 9.07 criteria for granting discretionary review, including:

1. The consequence of the Court of Appeals decision is important to the public not only because the Headwaters of the Metolius is a very popular and renowned site in the Pacific Northwest, but also because the decision will determine rules of interpretation being applied to other Goal 5 protected resources. The Court of Appeals decision will affect interpretation of Goal 5 protected resources throughout the state. This is not a case that is limited to the fact situation at hand. Its rules of interpretation include:

A. The Court decision means that an ESEE assessment of impacts to a Goal 5 resource is not required if the medium of impact is not itself a Goal 5 protected resource. Whether or not groundwater is a Goal 5 resource, the bottom line is that the new use of destination resorts could impact the Headwaters. It should also not be relevant that the impact may occur two miles away.

There should be no requirement that impacts of a new use to a Goal 5 resource must be proximate to the use. LUBA in this case decided that the resorts could impact the Goal 5-protected deer winter range miles away from the resorts due to roads and traffic to access the resorts. (LUBA Rec. 676-678) Just because the Headwaters springs are two miles away and the means of impact is underground should not exclude it from Goal 5 protections.

B. The Court misapplied the legal rules of statutory construction in failing to follow the prevailing rule that a specific standard controls over a general standard. The Court ruled that though the Headwaters of the Metolius is a Goal 5

protected resource that its spring waters are not protected because Jefferson County elsewhere did not generally designate groundwater throughout the county as a Goal 5 protected resource. It is a long-standing rule of statutory construction that definite provisions in a statute relating to a subject under consideration controls general provisions. *Safeway Stores v State Bd Agriculture*, 198 Or 43, 69, 255 P2d 564 (1953). *See also Hines Lumber Co v Gallaway*, 175 Or 524, 537, 154 P2d 539 (1944). Just because Jefferson County found that groundwater generally throughout Jefferson County could not be designated as a Goal 5 resource because of inadequate information does not mean that the separate, specific designation of the Headwaters of the Metolius as a Goal 5 protected resource excludes its spring water or consideration of impacts to the spring water.²

C. The Court of Appeals improperly affirmed LUBA's further limitation of the scope of the Headwaters' Goal 5 protected resource which was to define the resource by "conflicting uses" identified by the County in its Goal 5 assessment, such as developments in riparian areas. (LUBA Rec. 673) The Court of Appeals did not address Petitioners' argument that the scope of a Goal 5 resource is to be determined by its ESEE description, not its conflicting uses. Jefferson County gave this description of the resource:

"Large spring on base of Black Butte which is headwater of Metolius River. Spring is part of large aquifer system feeding Metolius River from Cascades." (LUBA Rec. 458)

² The Court of Appeals has ruled that traditional standards of statutory construction are to be used in interpreting land use ordinances. *Wal-Mart Stores Inc v City of Oregon City*, 204 Or App 359, 365, 129 P3d 655, *rev den*, 341 Or 80, 136 P3d 1123 (2006). This is also not a case where a local government is entitled to deference in interpreting its own land use regulation since the County made no finding that the Headwaters was not protected because groundwater is not protected. *Cox v Polk County*, 174 Or App 332, 339-340, 25 P3d 970, *rev den*, 332 Or 558, 34 P3d 476 (2001). Here, the County simply found without any basis that Oregon water law would protect the Headwaters of the Metolius.

There is nothing in the Goal 5 rules that limits the scope of a Goal 5 protected resource to "conflicting uses." There is also nothing in the Goal 5 rules that limits an assessment of impacts from new uses to Goal 5 resources to just uses anticipated at the time of designation of the Goal 5 resource. Just because there were no destination resorts in 1981 when the Headwaters of the Metolius was designated as a Goal 5 protected site does not mean that impacts to the Headwaters from destination resorts do not have to be considered. LUBA noted that destination resorts can resemble and have characteristics of small cities. (LUBA Rec. 676)

2. This Court of Appeals decision is inconsistent with the earlier Court of Appeals decision in *Friends of the Columbia Gorge v LCDC*, 85 Or App 249, 253, 736 P2d 575 (1987), where the Court ruled that all resources of a Goal 5 resource site must be protected. Petitioners asserted that protection of the Headwaters springs must necessarily include its spring water, without which there would be no Headwaters. The Court of Appeals distinguished the *Friends of the Columbia Gorge* decision, though, pointing out that the case involved the original designation of a resource site. (ER, pp. 7-9) However, the Court did not explain why a Goal 5 resource should be interpreted more narrowly in assessing impacts to it than it should be interpreted during its designation as a Goal 5 resource in the first place. It also did not explain how there can be a spring without water.

The Court further ruled that "groundwater" here was specifically excluded by the County on the basis of inadequate information. (ER-5) However, that exclusion was of "groundwater" in general throughout the county, and was not specifically related to the Headwaters. This treatment of "groundwater" as needing to be a Goal 5 protected resource in itself has no basis where there is an acknowledged Goal 5 resource site of the Headwaters which must be assessed for impacts, whether or not the medium impacting the Headwaters is also designated.

3. The legal issues are properly preserved and the record presents the desired issue where the Court of Appeals directly addressed the issues. (ER, pp. 2-8)

4. The Court of Appeals decision appears to be wrong and is significant for the reasons explained above.

5. Petitioners believe this is a case of first impression for the Supreme Court.

IV. CONCLUSION

For the reasons stated above, Petitioners respectfully request the Supreme Court to accept review of and reverse the Court of Appeals' decision in this case.

DATED this 13th day of August, 2008.

Respectfully submitted,

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