

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,
Petitioners on Review,

v.

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

Respondents,
Respondents on Review,

and

IRWIN B. HOLZMAN,

Intervenor-Respondent below.

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

A138263

S056377

**BRIEF ON THE MERITS AND EXCERPT OF RECORD
OF RESPONDENTS DUTCH PACIFIC RESOURCES
AND SHANE LUNDGREN**

Judicial Review of the Decision of the Court of Appeals issued July 9, 2008

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I. NATURE OF THE PROCEEDING AND RELIEF SOUGHT

Respondents on Review Dutch Pacific Resources and Shane Lundgren (respondents) dispute the following statement in petitioners' statement of relief sought: "Additionally, petitioners seek a remand to require the County to update its Goal 5 inventory for natural resources." Petitioners' Brief 2. Petitioners did not challenge this aspect of the Court of Appeals decision as part of their petition for review. In the proceedings below, petitioners argued that the Court of Appeals should revisit and disavow its decision in *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986), which held that counties are not required to update their Goal 5 inventories when adopting a post-acknowledgement plan amendment (PAPA). The Court of Appeals rejected petitioners' arguments, holding that *Urquhart* has been codified in OAR 660-023-0250, and that the county was not required to update its Goal 5 inventory in adopting the PAPA at issue. *Johnson v. Jefferson County*, 221 Or App 156, 164 (2008). Petitioners did not petition for review of that issue, and it is not properly before this court. *Taylor v. Ramsay-Gerding Const. Co.*, 345 Or 403, 408 n. 1 (2008).

II. SUMMARY OF MATERIAL FACTS

This appeal arises out of a decision by the Jefferson County Board of Commissioners to adopt a map of county lands that are eligible for destination resort siting under ORS 197.455. In ordinance No. O-03-07 the county adopted new comprehensive plan provisions, including a map of areas eligible for siting destination

resorts. ER 1; LUBA Rec. 287.¹ As provided under the destination resort statutes, the county's adoption of a map of eligible areas does not result in the actual development of a destination resort. Rather, mapping under ORS 197.455 allows future applications for development of destination resorts to proceed subject to otherwise applicable state and local development standards, but without requiring exceptions to any applicable Statewide Planning Goals. ORS 197.450. The county also adopted companion Ordinance No. O-04-07, which creates a new section of the Jefferson County Zoning Ordinance (JCZO) establishing standards governing the development of destination resorts. Local Rec. 1729. Both of the destination resort-related ordinances were appealed by multiple petitioners, and LUBA consolidated the appeals of the two ordinances.² The issues presently before this court are focused exclusively on the application of Goal 5 to the county's amendment of its comprehensive plan map in Ordinance No. O-03-07.

The challenged plan map amendment identified two separate tracts of land as being eligible for destination resort siting. The smaller of the two tracts is controlled by Respondent Dutch Pacific Resources, and consists of a single 640-acre section located approximately three miles west of Camp Sherman and the Headwaters of the

¹ Citations to the five-volume record of proceedings before the county are designated "Local Rec." and citations to the one-volume appellate record prepared by LUBA are designated "LUBA Rec."

² In the same local proceeding, the county also adopted Ordinance No. O-01-07 and Ordinance No. O-02-07, which contained various general amendments to the county comprehensive plan and zoning ordinance. LUBA also consolidated appeals of those two decisions into a single appeal, which was the subject of a separate Court of Appeals decision in *Johnson v. Jefferson County*, 221 Or App 190 (2008).

Metolius River. ER 7; LUBA Rec. 296. The larger tract is owned by Respondent Ponderosa Land & Cattle Co., and consists of approximately 10,000 acres located approximately two miles east of Camp Sherman and the Metolius Headwaters. *Id.* Camp Sherman and the Metolius Headwaters are both located in Township 13 south, Range 9 east, Section 15. *Id.*

III. SUMMARY OF THE ARGUMENT

1. The Goal 5 rule expressly limits the geographic scope of any required analysis to the location of the resource site itself and its identified "impact area," which in the present case is more than three miles away from any potentially conflicting future uses on respondents' property.

2. There is no basis for arguments by petitioners and DLCD that destination resorts "could be" conflicting uses with the Metolius resources where those uses are miles outside of the designated impact area for the resource, and petitioners submitted no evidence regarding alleged hydrologic effects on groundwater and alleged resulting impacts on the Metolius.

3. The Court of Appeals correctly concluded that groundwater feeding the Metolius River is not included on the county's inventory of Goal 5 resources; there is no support under the Goal 5 inventory requirements or the county's inventory itself for petitioners' argument that a general description of the resource that refers to an "aquifer system" is sufficient to include such aquifer on the inventory for purposes of Goal 5.

IV. ARGUMENT

Petitioners ask this court to apply the Goal 5 rule in a way that would dramatically expand the obligations of local governments to analyze conflicting uses far beyond the geographic scope that is required under the rule. A close review of petitioners' arguments reveals that they are largely policy arguments, based on what petitioners would prefer the law to be, rather than arguments based on the text and context of the Goal 5 rule or the county's acknowledged Goal 5 inventory of significant resource sites.

Petitioners improperly describe the Court of Appeals decision as holding that the Headwaters of the Metolius and the Metolius River "are not protected under Goal 5." Petitioners' brief 4. Petitioners misstate the Court of Appeals decision, which recognizes that the Metolius Headwaters and Metolius River are protected resources on the county's Goal 5 inventory. A more accurate description of the Court of Appeals holding is that the county's Goal 5 program for the Metolius River resources does not include groundwater and therefore does not require analysis of proposed uses that are located two or three miles away from the resource sites.

A. RESPONSE TO FIRST QUESTION PRESENTED

Petitioners contend that the Goal 5 rule requires the county to apply Goal 5 to a natural resource that has been: (a) expressly excluded by the county from its inventory of Goal 5 resources; and (b) expressly prohibited by LCDC rules from being listed as a Goal 5 resource in Jefferson County. Specifically, petitioners argue that groundwater feeding the Headwaters of the Metolius is subject to analysis under Goal 5 despite the fact that the county considered and rejected groundwater as a Goal 5

resource, and despite the fact that the Goal 5 rule specifically prohibits groundwater from being considered as a Goal 5 resource in Jefferson County. OAR 660-023-0140(2).

First, the Goal 5 rule expressly limits the geographic scope of any required analysis to the location of the resource site itself and its identified "impact area," which in the present case is more than three miles away from any potentially conflicting future uses on respondents' property. Second, there is no basis for petitioners' attenuated arguments that destination resorts "could be" conflicting uses with the Metolius resources where those uses are miles outside of the designated impact area for the resource, and petitioners submitted no evidence regarding alleged hydrologic effects on groundwater and alleged resulting impacts on the Metolius. Third, the Court of Appeals correctly concluded that groundwater feeding the Metolius River is not included on the county's inventory of Goal 5 resources; there is no support under the Goal 5 inventory requirements or the county's inventory itself for petitioners' argument that a general description of the resource that refers to an "aquifer system" is sufficient to include such aquifer on the inventory for purposes of Goal 5.

1. Petitioners' arguments conflict with the text and context of the Goal 5 rule regarding the identified impact area of the resource site.

Goal 5 generally requires local governments to adopt land use programs to protect natural resources. LCDC has adopted detailed rules at OAR chapter 660, division 23 creating the framework for how Goal 5 must be implemented at the local

level.³ However, under those rules local governments are afforded considerable discretion in adopting land use planning decisions regarding the identification and protection of resources within their jurisdictions. For example, under the applicable rules it is entirely up to local governments to decide: (a) what resources are "significant" enough to be included on the inventory of significant resources; (b) the location of the "impact area" around inventoried resources for purposes of analyzing conflicting uses with such resources; and (c) whether to allow, limit, or prohibit any conflicting uses based on a discretionary analysis of the positive and negative economic, social, environmental and energy (ESEE) consequences of allowing such uses and their resulting impacts on inventoried resources.

The Goal 5 rule first requires local governments to adopt inventories of significant natural resource sites as part of their comprehensive plans. OAR 660-023-0030(5). The resource inventory creates the foundation of the Goal 5 analysis, in that it forms the basis for all future decisions regarding what uses may be allowed. *See Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 426 n. 1, 840 P2d 71 (1993) ("Goal 5 * * * requires that local governments first inventory the location, quality, and quantity of these resources. Next, the local governments are required to identify potential uses in each area containing Goal 5 resources that may conflict with the preservation of the Goal 5 resources.").

A critical point for the present appeal is that local governments may not apply Goal 5 to resources that are not included on their inventory. *Urquhart*; OAR 660-

³ LCDC adopted the division 23 rules in 1996, replacing the previously

023-0250(3). In *Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or LUBA 70, 121 n. 52, LUBA noted:

"If it is not included on the Goal 5 resource inventory, we could not remand on that basis when considering a quasi-judicial plan or UGB amendment. *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986). See also *Oregonians in Action v. LCDC*, 121 Or App 497, 501, 854 P2d 1010 (1993) (a local government need not consider uninventoried Goal 5 resources in making a post-acknowledgment land use decision)."

Once an inventory of sites is adopted, the rule then requires local governments to identify any conflicting uses that "exist, or could occur, with regard to the inventoried Goal 5 resource sites." OAR 660-023-0040(2). Conflicting uses are defined as uses or activities "that could adversely affect a significant Goal 5 resource." OAR 660-023-0010(1). Where conflicting uses are identified, the local government must analyze the ESEE consequences of allowing, limiting, or prohibiting each conflicting use. OAR 660-023-0040(4). Finally, the local government must rely upon the ESEE analysis to develop a program to achieve Goal 5 by making decisions whether to allow, limit, or prohibit the identified conflicting uses for each significant resource site. OAR 660-023-0040(5).

The essence of petitioners' argument is that the county was obligated under OAR 660-023-0250(3)(b) to undertake the analysis described above because destination resorts could create conflicts with the county's inventoried Metolius River resources. Petitioners contend that the county was required to analyze the ESEE consequences arising out of the proposed destination resort sites and to make the

resulting determinations regarding whether to allow, limit, or prohibit destination resorts as conflicting uses under the county's Goal 5 program.

a. The inventoried Metolius River resources in the county's comprehensive plan.

The county adopted the Goal 5 element of its comprehensive plan in 1981. The plan was appealed to the Court of Appeals, and ultimately acknowledged by LCDC in 1985. Local Rec. 78. As relevant to this appeal, the county adopted the following resources related to the Metolius River as part of its Goal 5 inventory:

(1) "Head of Metolius River" was identified as a scenic resource located in Township 13S, Range 9E, Section 15. ER 22; LUBA Rec. 458. The only identified conflicting use was "potential residential development on private land which includes and surrounds spring." The county decided to limit that conflicting use by rezoning the immediately adjacent land to prohibit subdivisions. *Id.*

(2) "Metolius River" was identified as a water resource, consisting of 31 river miles located in western Jefferson County on the eastern Cascade slope, flowing east to the Deschutes. ER 24; LUBA Rec. 460. The identified conflicting uses include "rafting, fishing, residential development, Indian rights, forest practices on public and private lands, boating, power production, wildlife habitat." The county's ESEE proposed to limit conflicting uses by controlling residential and other construction and forest practices to "minimize environmental disruption in riparian area." *Id.*

(3) "Metolius River" was also identified as a potential state and federal wild and scenic river resource, located "from Head of Metolius to slackwater of Lake Chinook," consisting of 24 river miles. ER 28; LUBA Rec. 464. The only identified

conflicting use is "development which would degrade overall quality of the resource," and the county decided to limit conflicting uses by placing "resource zoning on the subject area sufficient to substantially protect the national values present." *Id.*

b. The impact area requirement.

The fundamental problem with petitioners' argument is that the Goal 5 rule expressly limits the geographic scope of inventoried resource sites for purposes of the conflicting use analysis to an identified "impact area." In order to identify conflicting uses, the local government is only required to examine uses that are allowed "within the zones applied to the resource site *and in its impact area.*"⁴ OAR 660-023-0040(2) (emphasis added). The rule describes how a local government must determine the "impact area" for each inventoried resource:

"(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. *The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.*" OAR 660-023-0040(3) (emphasis added).

Under this rule, an ESEE analysis can only be required if the potential destination resort sites are located within the impact area for the Metolius Headwaters and/or Metolius River resource sites. The term "impact area" is defined as "a

⁴ Destination resorts are listed as a conditional use in the county's Forest Management zoning district; however, destination resorts are only permitted in the two locations mapped as being eligible for destination resorts. LUBA Rec. 326. No portion of the Metolius River or Head of the Metolius are included within that overlay, and therefore destination resorts are not permitted in the zone applied to the Metolius River or the Headwaters under OAR 660-023-0040(4).

geographic area within which conflicting uses could adversely affect a significant Goal 5 resource." OAR 660-023-0010(3). Thus, if the potential destination resort sites are located outside of the impact area, they are by definition not conflicting uses that "could adversely affect a significant Goal 5 resource" under OAR 660-023-0010(3) or the nearly identical language of OAR 660-023-0250(3)(b).

c. The Goal 5 rules create a maximum impact area of one-quarter mile for the Metolius River.

The Metolius River is designated as both a federal wild and scenic river and an Oregon scenic waterway. The Goal 5 rules include certain resource-specific requirements for rivers with those designations: OAR 660-023-0120 addresses federal wild and scenic rivers and OAR 660-023-0130 addresses Oregon scenic waterways. Under both of those categories, Goal 5 protections are specifically limited in geographic scope to an impact area of one-quarter mile on either side of the river.

Regarding federal wild and scenic rivers, OAR 660-023-0120 provides, in relevant part:

"(4) * * * The impact area determined under OAR 660-023-0040(3) shall be the WSR corridor that is established by the federal government. * * * "

"(5) For any lands in a designated WSR corridor that are also within the impact area of a designated Oregon Scenic Waterway, the local government may apply the requirements of OAR 660-023-0130 rather than the applicable requirements of this rule in order to develop a program to achieve Goal 5."

The WSR corridor is established by the federal Wild and Scenic Rivers Act, which regulates activities on "related adjacent land area" generally extending one-quarter mile from ordinary high water. 16 U.S.C. § 1273(b) and 1275(d).

Regarding Oregon scenic waterways, OAR 660-023-0130(4) provides, in relevant part: "The impact area determined under OAR 660-023-0040(3) shall be the scenic waterway and adjacent lands as set forth in ORS 390.805(2) and (3)." Under ORS 390.805(3), "scenic waterway" is defined to include any river designated as such under the Act, "and includes related adjacent land." The term "related adjacent land" is defined to mean "all land within one-fourth of one mile of the bank on the side of ... a river or segment of a river within a scenic waterway." ORS 390.805(1).

Thus, under the state and federal statutes and the corresponding Goal 5 rules, the county is not required to consider any potential conflicting uses with the Metolius River beyond the designated one-quarter mile impact area on either side of the river. There is no basis on which this court could require the county to expand the scope of its inventory beyond what is required under statute and rule to include alleged impacts from destination resorts that will occur a minimum of two or three miles away from the resource.

d. The impact area for the Metolius Headwaters is, at most, limited to the identified 640-acre section where it is located.

The "location" of the protected resources for the Metolius Headwaters and Metolius River are specifically described in the county's acknowledged Goal 5 inventory. For the Headwaters site, that location is identified as "13-9-15," which signifies the 640-acre section located at Township 13 south, Range 9 east, Section 15. ER 22; LUBA Rec. 458. For the Metolius River, the location of the "scenic waterway" resource is identified as "from Head of Metolius to slackwater at Lake Chinook." ER 28; LUBA Rec. 464. Because the Metolius Headwaters is part of the

designated Oregon Scenic Waterway, respondents submit that the one-quarter mile maximum impact area established under OAR 660-023-0130(4) and ORS 390.805 should also apply to potential impacts on the headwaters.

However, the *maximum* extent of an impact area for the Headwaters resource is the 640-acre (one square mile) section where the Headwaters is located. As stated above, the designated "location" of the Headwaters resource on the county inventory is Township 13 south, Range 9 east, Section 15. Petitioners argue that the county's Goal 5 inventory, which was adopted in 1981 and acknowledged in 1985, does not expressly identify impact areas for the resource sites at issue. Petitioners' brief at 19. However, under the previously applicable division 16 rule, an express identification of an impact area is only required if the boundary of the impact area is *different* than the locational boundary of the resource site:

"For site-specific resources, determination of location must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different."
OAR 660-016-0000(2).

Under this rule, because the county considered the impact area to be coterminous with the identified location of the resource boundary, no separate description of an impact area was required.

Therefore, for the Metolius resource sites, the impact areas established by the county in 1981, which define where potentially conflicting uses could occur, were necessarily the same as the identified locations of the resource sites. For the Metolius Headwaters site, that location and impact area is limited to Township 13 south, Range

9 east, Section 15, which is over three miles away from respondents' property.⁵ ER 7; LUBA Rec. 296. Because the potential conflicting uses are located more than three miles away from the resource site locations and their corresponding impact areas, there is no basis under the Goal 5 rule to require an ESEE analysis of the destination resorts as potentially conflicting uses.

- e. **The text and context of the Goal 5 rules reveal LCDC's intent to limit the geographic scope of the Goal 5 analysis of potentially conflicting uses to the identified impact area.**

It is clear from the text and context of the Goal 5 rule that the locally designated impact area of a resource site plays an essential role in the analysis of whether there is a potentially conflicting use that requires an ESEE analysis. First, the text of the relevant sections of the Goal 5 rule indicate that a conflicting use, by definition, may *only* occur within the boundaries of an impact area for a particular resource site. In order to identify conflicting uses, the rule requires local governments to examine uses that are allowed only "within the zones applied to the resource site and in its impact area." OAR 660-023-0040(2). The term "impact area" is defined as "a geographic area within which conflicting uses could adversely affect a significant Goal 5 resource." OAR 660-023-0010(3). The term "conflicting use" is similarly defined as a land use "that could adversely affect a significant Goal 5 resource." OAR 660-023-0010(1). Thus, any use that exists outside of the impact area is by definition *not* a conflicting use that could adversely affect a significant Goal 5 resource and trigger an ESEE analysis. This conclusion is also required by OAR 660-

⁵ Each 640-acre section on the map is also one square mile.

023-0040(3), which provides that "[t]he impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site." These rule provisions are not ambiguous, and plainly establish that new uses allowed by a PAPA outside of an impact area are not "uses that could be conflicting uses with a particular significant Goal 5 resource site" under OAR 660-023-0250(3)(b).

Regarding context, the impact area requirement is pervasive throughout the Goal 5 rule. In addition to the generally applicable provisions addressed above, the Goal 5 rule also includes several sections that apply to specific types of natural resources and that require consideration of conflicting uses only within the identified impact areas for such resources. For example, the rules governing federal wild and scenic rivers and Oregon scenic waterways both include specific definitions of the impact areas within which conflicting uses must be analyzed. OAR 660-023-0120(4) and 660-023-0130(4). Similarly, the rules governing wilderness areas provide that local governments may elect to regulate conflicting uses "in an impact area adjacent to the wilderness area." OAR 660-023-0170(4). Rules governing mineral and aggregate resources require local governments to identify an impact area for purposes of conflicts with mining activities, and to review land uses "within the impact area that will be adversely affected by proposed operations." OAR 660-023-0180(5). Rules governing energy sources provide that in order to protect an inventoried energy source under Goal 5, the local government must adopt regulations that "limit new conflicting uses within the impact area of the site." OAR 660-023-0190(1)(b).

Further, LCDC included an impact area requirement in the original Goal 5 rules it adopted in division 16. Petitioners are therefore incorrect in their assertion

that the impact area requirement is a new requirement that should not be applied to the county's Goal 5 inventory from 1981. Petitioners' brief 19. Rather, the original Goal 5 rules expressly require that a local government's inventory of significant Goal 5 resources must identify the specific location of the resource site and the impact area. For site-specific resources, the location determination "must include a description or map of the boundaries of the resource site *and of the impact area to be affected, if different.*" OAR 660-016-0000(2) (emphasis added). Where, as here, no specific impact area is identified, the location of the impact area must be considered to be coterminous with the designated location of the resource site itself.

Contrary to petitioners' assertion at pages 19-20 of their brief, there is no distinction in the rules between the analysis that is required for a *new* conflicting use allowed by a PAPA under OAR 660-023-0250(3) and the standard ESEE decision-making process described under OAR 660-023-0040. In fact, the rule regarding PAPAs expressly enumerates the circumstances under which a local government is "required to apply Goal 5 [*i.e.*, the remainder of the rule] in consideration of a PAPA." OAR 660-023-0250(3). Where such circumstances exist, the PAPA rule requires a local government to apply the Goal 5 rule in its entirety, including the definition of "impact area" and provisions that limit an ESEE analysis to uses that will occur within the impact area. The rule governing PAPAs does not state, as petitioners suggest, that new uses under that rule require the application of some different or limited portion of the Goal 5 rule.

In construing administrative rules, the court "must discern the meaning of the words used, giving effect to the intent of the body that promulgated the rule. * * *

To do so, we follow the same methodology for interpreting rules as for construing statutes." *Wetherell v. Douglas County*, 342 Or 666, 678, 160 P3d 614 (2007) (citations omitted). That methodology requires consideration of the text and context of the rule, giving "words of common usage * * * their plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). A statute's context "includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the law was enacted[.]" *Denton and Denton*, 326 Or 236, 241, 951 P2d 693 (1998).

Applying the familiar *PGE* analysis to the case at hand, the text and context of the rules at issue provide a clear picture of LCDC's intent regarding the geographic limitations that must be placed on the scope of a Goal 5 analysis under OAR 660-023-0250(3)(b). Applying that intent as expressed in the plain language of the rules, a proposed new destination resort use that would occur at least two or three miles away from the identified location of a Goal 5 resource and/or its impact area cannot meet the definition of a "conflicting use" that would require an ESEE analysis.

The court may reject all of petitioners' arguments and affirm the Court of Appeals decision based on the above-stated application of the Goal 5 rules.

2. **It is not possible that a new destination resort use "could be" a conflicting use with a Goal 5 resource where the new use is three miles away from the impact area for the resource.**

Petitioners and DLCD point to language in OAR 660-023-0250(3)(b) requiring the county to apply Goal 5 to any PAPA allowing new uses that "could be conflicting uses" with a Goal 5 resource site. Petitioners' brief 15-16. Petitioners and DLCD

argue that the word "could" must be construed broadly to require a full ESEE analysis of new conflicting uses whenever an opponent makes an allegation that a new use "could" affect a Goal 5 resource, whether or not that allegation is actually supported by evidence in the local record. However, petitioners and DLCD fail to consider the impact area requirements of the Goal 5 rule addressed above, and therefore assign too much significance to the word "could" in the rule.

First, as described above, the Goal 5 rule only requires analysis of a potentially conflicting use where such use will occur within the boundaries of the "impact area" for the listed resource. Because the impact areas of the Metolius resource sites are located more than three miles away from the Dutch Pacific property, it is impossible that any potential destination resort "could be" a conflicting use with that resource within the meaning of the Goal 5 rules. A conflicting use, by definition, is a use that "could adversely affect a Goal 5 resource." The impact area is the "geographic area within which conflicting uses could adversely affect a significant Goal 5 resource." OAR 660-023-0010(3). Because any destination resort uses would occur far outside of the impact area of the resource site, such uses could *not* adversely affect the resource, and therefore are not conflicting uses under the rule. For this reason alone, the arguments presented by petitioners and DLCD should be rejected.

Further, petitioners provided no actual evidence to the county sufficient to support a reasoned finding that there will be hydrologic impacts on the Metolius River caused by the proposed destination resort uses. Petitioners' entire brief is premised on the assumption that such impacts will necessarily occur if destination resorts are allowed. DLCD's entire brief is premised on the notion that petitioners and/or other

opponents presented evidence to the county regarding impacts on the Metolius from destination resorts. However, although petitioners (and other opponents) testified regarding their general concerns about such impacts, they did not submit any data sufficient to support a finding that such impacts would necessarily occur. The record for this appeal includes no data regarding impacts of potential resort uses on the hydrology of the Metolius River.⁶

Petitioners and DLCDC fault the county for not undertaking a Goal 5 analysis of theoretical hydrologic impacts of resorts on the Metolius River based on general unsubstantiated concerns stated by petitioners. However, groundwater hydrology is a complicated science, and there was no data before the county to support a conclusion that destination resorts in the proposed locations – two to three miles away from the inventoried Goal 5 resources – would cause hydrologic impacts on the inventoried Metolius resources. Therefore, the county adopted findings concluding that there was insufficient evidence of conflicts with Goal 5 resources. ER 14; LUBA Rec. 312.

Here is a summary of the facts that were before the county at the time of its decision:

- (1) The Metolius Headwaters is an inventoried "scenic" resource;
- (2) The scenic resource and the Metolius River itself are located between two and three miles away from the proposed destination resorts;

⁶ Four months after the county adopted its final decisions, petitioners obtained a letter from the USGS regarding potential hydrologic impacts on the Metolius. Petitioners asked LUBA to consider this letter despite the fact that it had not been provided to the county. LUBA correctly denied petitioners' motion to take this evidence, and it is therefore excluded from the record of this appeal.

(3) The county's existing Goal 5 program only considers uses immediately adjacent to the Metolius River as conflicting uses under Goal 5; and

(4) Petitioners presented general concerns that distant destination resorts would impact the Metolius, but provided the county with no data to support their claims.

Based on these facts, the county justifiably declined petitioners' invitation to perform a full ESEE analysis of alleged conflicting uses for which there was no actual evidence in the record. Instead, the county adopted findings that clearly addressed petitioners' arguments regarding Goal 5 and explained the county's conclusion that there was insufficient evidence regarding the presence of conflicts, and therefore no ESEE analysis was required:

"In addition, the Board finds that there is no reasonably available evidence to suggest that eligibility for destination resorts, subject to compliance with development criteria, will conflict with specific significant Goal 5 resources within or around the eligible tracts." ER 14; LUBA Rec. 312.

Given the fact that petitioners failed to submit any data to support their claim that there would be conflicts with resources located three miles away, the county's findings are responsive, correct and reasonable. The county's findings go on to state, correctly, that there are no Goal 5 resources located on the Dutch Pacific property, and that issues associated with groundwater impacts from 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." ER 15; LUBA Rec. 313.

The county's findings correctly explain the law and the future permitting process regarding water resources. Any future land use applications for destination resorts will require the applicants to obtain permits from the Oregon Water Resources Department (WRD) for any proposed groundwater withdrawals. Under applicable WRD requirements, those applications will require a thorough hydrologic review of the proposed groundwater withdrawal, including drilling and testing of the aquifer, in order to ensure that any withdrawals will ensure the preservation of the public welfare, safety and health, will not injure other water rights and will comply with applicable rules of the Water Resources Commission. ORS 537.621. Any resulting permit from WRD will likely include an ongoing monitoring requirement designed to prevent adverse impacts on water quality and availability in the Metolius River Basin.

In response to concerns raised by opponents below, and in the absence of any actual evidence regarding potential impacts on groundwater causing potential impacts on the Metolius, the county adopted a finding that "there is no reasonably available evidence" to suggest that there would be conflicts between proposed destination resorts and significant Goal 5 resources. ER 14; LUBA Rec. 312. The county's findings go on to address certain specific issues regarding bird habitat, flooding and groundwater impacts, explaining in more detail the basis for the county's conclusion that impacts to those resources would not occur as a result of the PAPA.

In its amicus brief, DLCD completely misstates the county's findings regarding Goal 5. In fact, it appears that DLCD may not have reviewed all of the county's findings regarding issues raised by opponents under Goal 5. *See* ER 13-16; LUBA Rec. 311-314. DLCD argues that once someone suggested that destination resorts

"could" have impacts on groundwater, which in turn "could" affect the Metolius, the county violated Goal 5 because it "failed to explain why such conflicts would not occur, or to apply Goal 5." Amicus brief of DLCD at 9. DLCD is completely incorrect on this point. DLCD cites one portion of the county's findings regarding the existence of new conflicting uses but ignores the above-quoted findings adopted by the county, which do explain why conflicts will not occur. ER 14-15; LUBA Rec. 312-313. DLCD is incorrect in its assertion that the county "failed to explain why such conflicts would not occur" in response to testimony regarding alleged conflicts with the Metolius River resources under Goal 5.

The position taken by DLCD in this appeal is puzzling at best. First, DLCD appears to believe that the *county's* decision is before this court for review, and asks the court to undertake an analysis of the evidence presented and findings adopted in the county proceedings. However, the question before this court is whether the Court of Appeals committed an error of law in affirming LUBA's conclusion that the "aquifer system" below the Metolius River is not a Goal 5 resource. DLCD, however, apparently seeks to have the court consider and weigh the evidence that was before the county when it adopted its finding that there was not sufficient evidence in the record to support the opponents' claims.

Second, DLCD's proposed rule of law would result in an absurd expansion of local government obligations well beyond what is actually required under Goal 5. According to DLCD, a local government considering a PAPA becomes obligated to undertake a complete Goal 5 ESEE analysis whenever a person shows up at a local

hearing and makes an unsubstantiated claim that a use allowed under the PAPA "could be" a conflicting use with a Goal 5 resource.

As an example, assume that Jefferson County were considering a plan amendment that would change a parcel of land near Sisters from a resource designation to a commercial designation to allow a new retail use. Assume that a citizen appears at the public hearing and argues that the new use "could be" a conflicting use with the Headwaters of the Metolius because the new retail use would increase automobile trips, which would contribute to global warming and reduce the Cascade snowpack, which would reduce the amount of runoff that feeds the aquifer system feeding the Metolius. According to DLCD, by making this unsubstantiated assertion, the citizen has established that there "could be" a conflicting use with a Goal 5 resource under OAR 660-023-0250(3) and triggered the local government's obligation to undertake an ESEE analysis of the potential conflicts.

3. The Court of Appeals correctly concluded that Goal 5 does not apply to groundwater in Jefferson County.

The Court of Appeals correctly concluded that there is no basis for applying Goal 5 to the groundwater that feeds the Metolius River, because groundwater is "explicitly excluded" from the county's inventory of Goal 5 resources. *Johnson*, 221 Or App at 162. Only resources that are identified on the county's "acknowledged resource list" are potentially subject to Goal 5 analysis under OAR 660-023-0250(3)(b). As explained by LUBA and the Court of Appeals, the county's acknowledged Goal 5 inventory specifically excludes groundwater. There is no dispute that the source of the Metolius Headwaters is groundwater, and that

groundwater is not part of the county's Goal 5 inventory. Therefore, the law is very clear that there is no basis to require a Goal 5 analysis of the groundwater resource.

Petitioners' primary argument to the Court of Appeals, raised again here, was that the geographic scope of the inventoried resource should be dictated by the "description" of the resource in the county's Goal 5 inventory. Petitioners argued that because the county described the Metolius Headwaters as a "large spring" that is "part of large aquifer system feeding the Metolius River from Cascades," therefore the entire aquifer must be considered as part of the inventoried Goal 5 resource.

Petitioners' Court of Appeals brief 9-11.

The Court of Appeals rejected petitioners' arguments based on the county's explicit exclusion of groundwater from its acknowledged Goal 5 inventory. The court concluded that the county's clear decision to exclude groundwater was controlling, and thereby selected only the most obvious of multiple reasons why petitioners' analysis is incorrect and must be rejected. Others are addressed below.

a. The location of groundwater in Jefferson County is not sufficiently described or mapped to be considered an inventoried resource under the Goal 5 rule.

The essential component of a Goal 5 inventory is the county's identification of the specific *location* of the resource and its impact area, rather than the more general "description" of the resource. In order for Goal 5 to operate as intended, the location of a resource site and its impact area must be sufficiently clear to determine whether an ESEE analysis is required for other potentially conflicting uses in the area. To that end, the Goal 5 rules require that information about the location of a resource "shall include a description or map of the resource area for each site. The information must

be sufficient to determine whether a resource exists on a particular site." OAR 660-023-0030(3)(a). Similarly, the older rules in division 16 require that "determination of location must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different." OAR 660-016-0000(2).

Given these unambiguous rules requiring clear and definite descriptions of the location of resource sites, petitioners fail to explain how the "aquifer system" can possibly be an inventoried Goal 5 resource when there is no description or map of the boundaries of groundwater feeding the Metolius River included in the county's Goal 5 inventory. The fact is, no such description of the aquifer system exists because the county had no intent to include it on the Goal 5 inventory.

If the county had intended to protect the entire underground aquifer system as a Goal 5 resource, the county would have been required under Goal 5, at a minimum, to identify the aquifer as a resource, describe the location of the resource, identify the potential conflicting uses with the aquifer system (as it did for all the other inventoried Goal 5 resources), and undertake an ESEE analysis of potential conflicting uses with the aquifer system. Instead, the county made an explicit decision to exclude groundwater from its inventory due to a lack of sufficient information about the resource. ER 25; LUBA Rec. 461.

In contrast, the county's Goal 5 inventory *does* include a precise description of the location of the Metolius Headwaters and the Metolius River, as required by the Goal 5 rule, and includes the requisite identification of conflicting uses and ESEE analysis of such uses. Only the Metolius Headwaters and the Metolius River are

sufficiently described to be part of the county's inventory under both the division 16 and division 23 rules, and the below-ground aquifer system is not.

Petitioners' argument provides a perfect example of why a precise description of the resource location and its impact area must be required under Goal 5. According to petitioners, the county's "description" of the Metolius resource requires that the entire "aquifer system" feeding the Metolius River must also be a protected Goal 5 resource on the county's inventory. However, the county's inventory provides no way for anyone to know precisely where that aquifer system begins or ends for purposes of determining whether or not Goal 5 should be applied to a particular site. The purpose of Goal 5 is to identify specific resources for protection, and to create a process where uses that could conflict with such resources must be analyzed in order to determine whether or not such uses should be allowed. Petitioners' argument would undermine that process by allowing the addition of an ancillary and undefined resource to a local inventory where the location of that resource is not sufficiently described to allow the necessary analysis under Goal 5 as new potentially conflicting uses are added in the future.

b. The county explicitly excluded groundwater from its inventory of Goal 5 resources.

Petitioners argued below that the inventoried Metolius resources should include the groundwater. The Court of Appeals disagreed, correctly concluding that groundwater is not an inventoried Goal 5 resource: "We agree with respondents, and LUBA, that the fact that groundwaters are explicitly excluded from the county's

Goal 5 inventory is dispositive here." *Johnson* at 163. The court's decision is correct and should be affirmed.

When the county adopted its existing Goal 5 inventories in 1981, the county expressly considered groundwater but concluded that it could not be included as a significant Goal 5 resource due to a lack of sufficient information about the resource. ER 25; LUBA Rec. 461. Under the division 16 rules applicable in 1981, this was known as a "1-B" determination. *See Beaver State Sand and Gravel, Inc. v. Douglas County*, 187 Or App 241, 243-44, 65 P3d 1123 (2003) (describing process under prior division 16 rules). The practical result of a "1-B" determination is the same as an "inadequate information" determination under the division 23 rules, which provide:

"When local governments determine that information about a site is inadequate, they shall not proceed with the Goal 5 process for such sites unless adequate information is obtained, and they shall not regulate land uses in order to protect such sites." OAR 660-023-0030(3) (emphasis added).

Notwithstanding this clear directive, petitioners contend that this court should require the county to regulate land uses to protect a resource that was deliberately excluded from the county's Goal 5 inventory. For the reasons described above, such a requirement would directly conflict with the express requirements of the Goal 5 rule.

c. The Goal 5 rule expressly prohibits the county from treating groundwater as a protected resource under Goal 5.

Further, the division 23 rules adopted in 1996 include several resource-specific rules for the application of Goal 5, including a section that applies specifically to groundwater resources. Under that rule, there are only two types of groundwater resources in the State of Oregon that can be included on a local Goal 5 inventory:

(a) critical groundwater areas designated by the Oregon Water Resources

Commission, and (b) designated wellhead protection areas. OAR 660-023-0140(2).

The rule provides that "Goal 5 does not apply to other groundwater areas." *Id.*

Neither of the two groundwater areas listed in the rule is present in Jefferson County, and Jefferson County is therefore *prohibited* by the rule from applying Goal 5 to any "other groundwater areas." *Id.* The county could not require a Goal 5 analysis of groundwater feeding the Metolius River even if it wanted to. Petitioners are asking this court to require the county to do something that is expressly prohibited by the Goal 5 rules.

d. The county comprehensive plan expressly recognizes the absence of county authority to regulate groundwater.

The absence of county authority over groundwater under the Goal 5 rule is expressly recognized in the Goal 5 element of the county's comprehensive plan, which provides: "The County does not regulate the use of groundwater resources; regulation is by the State Department of Water Resources." Local Rec. 107. This absence of county authority was also noted by the Court of Appeals in its opinion. *Johnson* at 162 n. 2. In summary, there is no legal basis under the Goal 5 rules, the county Goal 5 inventory, or the Goal 5 element of the county comprehensive plan to support petitioners' claims that groundwater should be regulated by the county as an inventoried Goal 5 resource.

e. Responses to petitioners' arguments.

Petitioners offer a series of policy-related arguments that have no basis in the law. Petitioners assert that "there is no requirement in the rules that the means of impact on a Goal 5 resource site must themselves be Goal 5 resources." Petitioners' brief 17. Although this oblique statement is at least theoretically true standing alone,

it is by no means an accurate description of the status of the alleged "means of impact" (*i.e.*, groundwater) in Jefferson County under Goal 5. Rather, as described in more detail above, Jefferson County groundwater has been: (a) specifically considered and rejected as a Goal 5 resource by the county in 1981; (b) specifically prohibited from being treated as a Goal 5 resource by LCDC under rules adopted in 1996; and (c) specifically excluded from regulation under the Goal 5 element of the county's comprehensive plan in 2006.

This is not a situation where the alleged "means of impact" has simply never been considered under Goal 5. Rather, groundwater has been explicitly and consistently excluded from the county's Goal 5 inventory since 1981, and since 1996 the county has been expressly prohibited from treating groundwater as a Goal 5 resource under LCDC's rules implementing Goal 5: "Goal 5 does not apply to other groundwater areas." OAR 660-023-0140(2). Under these circumstances, petitioners are incorrect in their assertion that the county may nonetheless elect to apply Goal 5 to the alleged "means of impact" for purposes of analyzing potential impacts from the proposed destination resorts on the Metolius resources.

Next, petitioners argue that the more specific Goal 5 descriptions regarding the Metolius resources should control over the more general county-wide rejection of "groundwater" as a Goal 5 resource. Petitioners' brief 17. However, there is nothing in the county's acknowledged 1981 analysis of groundwater under Goal 5 to indicate that it was intended to be limited to some portions of the county and not to others. In fact, the description of the resource is "Jefferson County Groundwater," clearly indicating that it was intended to apply county-wide to all groundwater resources. ER

25; LUBA Rec. 461. More importantly, petitioners' arguments are based entirely on the incorrect premise that the county's inventory of the Metolius resource sites includes groundwater as part of the inventoried resource. As addressed in detail above in Section IV.A.1, this premise is incorrect because the county's general "description" of the resource does not provide a sufficient identification of the "location" of the resource or its impact area for purposes of the Goal 5 inventory under OAR 660-016-0000(2) and OAR 660-023-0030(3).

4. Reliance on future regulation by state agencies for a conflicting use analysis is irrelevant where there is no inventoried Goal 5 resource.

In section A.4 of their brief, petitioners state that "regulation of resources by other agencies is irrelevant in determining impacts from new conflicting uses." Petitioners' brief 18. It is not entirely clear how this argument is relevant to review of the Court of Appeals decision, which concluded that there is no inventoried Goal 5 resource for which impacts from conflicting uses must be assessed. To the extent that petitioners are challenging the findings adopted by the county under Goal 5, the county's decision is not on review to this court.

Petitioners argue that the county may not avoid assessment of conflicting uses based on potential agency action. Petitioners' brief 18. Petitioners may be correct, assuming that there is an identified conflicting use with an inventoried Goal 5 resource. However, that is not the posture of the present case. The county found that there are no inventoried Goal 5 resources impacted by the proposed resorts. ER 15; LUBA Rec. 313. LUBA affirmed, concluding in part that groundwater is not an inventoried Goal 5 resource. The Court of Appeals affirmed LUBA, concluding that

no analysis of conflicting uses is required with regard to groundwater, because groundwater is not a Goal 5 resource. Thus, the issue raised by petitioners regarding whether the county can rely on future agency action in assessing a conflicting use with a Goal 5 resource is not before this court.

Petitioners also suggest that they are taking issue with statements made in responses to the petition for review wherein respondents argued against acceptance of review under ORAP 9.07. Respondents argued that the Court of Appeals decision would have limited consequences on the protection of groundwater, because groundwater in Jefferson County is entirely regulated by WRD, and any subsequent applications for development of destination resorts would require extensive review and permit approval by WRD of proposed groundwater withdrawals under state law. Respondents' arguments regarding why review should not be accepted are not relevant to review of the Court of Appeals decision.

5. The "new conflicting use analysis" under OAR 660-023-0250(3) requires application of the standard Goal 5 rules set forth in OAR 660-023-0030 and 0040.

In section A.5 of their brief, petitioners argue that the county's assessment of new conflicting uses should not be limited to the location of the resource site or its impact area. Petitioners assert that "there is nothing in the rules that suggests that the identification of a 'location' forecloses there being a new conflicting use that is outside that location." Petitioners' brief 19.

Petitioners could hardly be more mistaken – the rules do not merely "suggest" this result, they expressly *require* that conflicting uses, by definition, are only uses that exist within the location or impact area of a particular resource site: "[t]he impact

area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site." OAR 660-023-0040(3). To identify conflicting uses, local governments "shall examine" allowed uses "within the zones applied to the resource site and in its impact area." OAR 660-023-0040(2). The interpretation and application of these rules are addressed in detail in section IV.A.1 of this brief.

Petitioners offer no direct authority for their contention that OAR 660-023-0040 means something different than what it says. Petitioners appear to suggest that the rules governing "new conflicting uses" under OAR 660-023-0250(3)(b) do not require the same analysis provided for in the remainder of the Goal 5 rule. However, there is no distinction in the rules between the analysis that is required for a new conflicting use allowed by a PAPA under OAR 660-023-0250(3) and the ESEE decision process described under OAR 660-023-0040. In fact, the rule regarding PAPAs expressly enumerates the circumstances under which a local government is "required to apply Goal 5 [*i.e.*, the remainder of the rule] in consideration of a PAPA." OAR 660-023-0250(3). Where such circumstances exist, the PAPA rule requires a local government to apply the Goal 5 rule in its entirety, including the definition of "impact area" and provisions that limit an ESEE analysis to uses that will occur within the impact area.

There is no legal basis for petitioners' assertion that new uses under that rule require the application of some different or limited portion of the Goal 5 rule. Petitioners cite *Hegele v. Crook County*, 44 Or LUBA 357, 368, *aff'd*, 190 Or App 376, 78 P3d 1254 (2003), but that case is not relevant to the issue presented. In *Hegele*, the county denied an application to include an aggregate resource site on its

inventory of significant Goal 5 resources, based in part on a consideration of the impacts of aggregate extraction on surrounding uses within an identified impact area. LUBA held that the county improperly blended the identification of conflicts and ESEE analysis into what should have been a separate determination regarding the significance and location of the resource under OAR 660-016-0000. *Id.*

Petitioners argue that the present situation should not be governed by the definition of "impact area" in OAR 660-023-0010(3), because that definition post-dates the county's adoption of its inventory. This argument is addressed in section IV.A.1 of this brief, which points out that there is also a definition of "impact area" included in the division 16 rules applicable that were applicable in 1981 and in 1985 when the county's Goal 5 program was acknowledged.

Petitioners assert that "it is not logical" that OAR 660-023-0250(3) should be limited by the location of the resource site and impact area that are included as part of the county's acknowledged comprehensive plan. Apparently, in petitioners' view, there should be *no* locational limits on the county's obligation to undertake a full ESEE analysis of alleged conflicting uses, no matter how distant or attenuated such uses are from the resource site. However, the Goal 5 rule includes very clear (and logical) limitations that are designed to limit the scope and extent of a local government's obligation to consider conflicting uses. Petitioners may not agree that these rules are "logical," but petitioners have failed to explain any legal basis for why the rules do not apply.

6. Subsequent environmental review of destination resort applications is irrelevant where there is no inventoried Goal 5 resource.

The arguments presented in section A.6 of petitioners' brief are irrelevant for the same reasons explained above regarding petitioners' arguments in section A.4. The Court of Appeals held that no analysis of conflicting uses is required with regard to groundwater, because groundwater is not a Goal 5 resource. The issue raised by petitioners regarding whether or not there will be future environmental reviews of applications for destination resort development has no bearing on the issue before this court.

B. RESPONSE TO SECOND QUESTION PRESENTED

Petitioners' primary contention in the second question presented is that the scope of the Metolius resources on the county's Goal 5 inventory should be interpreted to include the groundwater that feeds the Metolius Headwaters.

1. The geographic scope of the Metolius resources is governed by the "location" of the resource identified in the county's inventory, and not by a general "description" of the resource.

Petitioners contend that because the "description" of the Metolius Headwaters and Metolius River in the county's Goal 5 inventory describe the resource as including water that flows from a "spring" and an "aquifer system," therefore the groundwater feeding the spring must also be included as part of the Goal 5 inventory for those resources.

Contrary to petitioners' claims, the boundaries of a Goal 5 resource are expressly established by the "location" that is described for the resource under the Goal 5 inventory requirements, and the geographic limits of potentially conflicting

uses are established by the "impact area" that is adopted for the resource. Regarding the inventory requirements, OAR 660-023-0030(3) provides, in relevant part:

"(3) * * * The information about a particular Goal 5 resource site shall be deemed adequate if it provides the *location*, quality and quantity of the resource, as follows:

"(a) Information about *location* shall include a description or map of the resource area for each site. The information must be sufficient to determine whether a resource exists on a particular site." (Emphasis added).

Similarly, the previously applicable division 16 rules governing Goal 5 inventories also require local governments to specifically describe the location of resource sites in order for the inventory to be valid:

"(2) A 'valid' inventory of a Goal 5 resource under subsection (5)(c) of this rule must include a determination of the location, quality, and quantity of each of the resource sites. * * * For site-specific resources, determination of *location* must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different." OAR 660-016-0000(2) (emphasis in original).

Thus, the rules governing inventories require the local government to specifically identify the "location" of any significant resources. The information regarding location "must be sufficient to determine whether a resource exists on a particular site." OAR 660-023-0030(3)(a). In contrast, the county's general resource "descriptions" relied upon by petitioners help provide a visual image regarding the nature of the resource, but do not play an essential role in the required inventory process under the rules. For example, there is no way to know where the boundaries of the "aquifer system" begin or end for purposes of applying Goal 5.

Consistent with the inventory requirements, the county adopted specific descriptions of the locations of the Metolius resources as part of its Goal 5 inventory.

For the Headwaters site, that location is identified as "13-9-15," which signifies the 640-acre section located at Township 13 south, Range 9 east, Section 15. ER 22; LUBA Rec. 458. For the Metolius River, the location is identified as "from Head of Metolius to slackwater at Lake Chinook." ER 28; LUBA Rec. 464. This location information is "sufficient to determine whether a resource exists on a particular site," as required by OAR 660-023-0030(3)(a).

As described above in section IV.A.1 of this brief, the division 16 and division 23 rules also require local governments to identify an "impact area" for every inventoried resource. Impact area is defined as "a geographic area within which conflicting uses could adversely affect a significant Goal 5 resource." OAR 660-023-0010(3). The impact area "defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site." OAR 660-023-0040(3).

Under these rules, the geographic scope of any possible Goal 5 analysis is expressly limited by the boundary of the impact area. There is no basis on which an ESEE analysis of a conflicting use could be required for a proposed use that would occur outside of the impact area identified for a particular significant resource site.

The applicable rules make clear that the determinative component of the Goal 5 inventory for purposes of any potential conflicting use analysis is the county's identification of the *location* of the resource and its impact area, and not the more general resource description relied upon by petitioners. The fact that the county elected to provide a general description of the resource including the words "spring" and "aquifer system" is not sufficient under the applicable rules to conclude that the county meant to include all groundwater in western Jefferson County on its inventory

of Goal 5 resources. This is particularly true where, as part of the same Goal 5 inventory process in 1981, the county expressly decided *not* to include groundwater on its Goal 5 inventory. Obviously, if the county had intended to include groundwater on its inventory it would have done so. Instead, there is presently *no* information in the county's inventory regarding the location of an "aquifer system" that could be relied upon for purposes of applying Goal 5 to that resource.

Finally, petitioners contend that the Court of Appeals decision is not consistent with *Friends of the Columbia Gorge v. LCDC*, 85 Or App 249, 736 P2d 198 (1987). In that case, which arose out of periodic review, LCDC approved the City of Hood River's decision to include Wells Island on its inventory of Goal 5 resource sites for bird habitat. However, in its ESEE analysis and inventory, the city only identified two of the many species of birds that used the island as the protected resource under Goal 5. The court held this was incorrect under the applicable division 16 rule, which the court said "allows a city to exclude a particular *site* from an inventory; it does not allow it to omit part of an identified *resource* from a site which it has decided to include." *Id.* at 253 (emphasis in original). Because the city determined, as part of the same inventory process, that Wells Island was a significant resource site for bird habitat, the court held that LCDC improperly allowed the city to include only two of the species of birds that comprised the resource on its Goal 5 inventory.

Petitioners' analogy to the *Friends of the Columbia Gorge* case is misplaced. In the present case, Jefferson County in 1981 identified the Metolius headwaters as a significant scenic resource under Goal 5, but expressly determined that groundwater was *not* a significant resource. Thus, the county necessarily considered the

headwaters of the Metolius as a scenic surface water resource that is separate and distinct from the below-surface groundwater that supplies it. This essential distinguishing factor was noted by the Court of Appeals in its opinion:

"In short, *Friends of the Columbia Gorge* was a challenge to the adequacy of the [Goal 5] inventory in the first instance. Our conclusion was that the plan, due to the flaw we identified in the inventory, should not have been acknowledged as drafted.

"Here, by contrast, the county's inventory specifically excluded groundwater – and that inventory was part of a plan that has long since been acknowledged. Given that exclusion, the descriptions of the Metolius River and its headwaters in the acknowledged plan cannot reasonably be interpreted to implicitly *include* the very same potential resource that the plan explicitly *excludes*." *Johnson* at 163.

Petitioners contend that the Court of Appeals decision is based on the fact that the City of Hood River was designating a resource site as part of periodic review, and that the court's decision "does not explain why" it distinguishes the present case on that basis. Petitioners' brief 22. Petitioners miss the point that is clearly explained above by the Court of Appeals, which is that the county's inventory has been acknowledged since 1985 and has explicitly excluded groundwater from its inventory since that date. The court's decision does not rely on the fact that it was in the context of a periodic review proceeding, except to the extent that it involved the initial acknowledgment of the city's comprehensive plan.

2. The county's identified conflicting uses for the Metolius resources demonstrate the intended geographic scope of resource protections.

In the proceedings below, respondents pointed out that the county limited its consideration of conflicting uses for the Metolius resource sites to uses that immediately surround the river. Therefore, respondents argued that the identified

conflicting uses provide support for the conclusion that the county intended to limit the geographic scope of the inventoried resources, and not to require consideration of new uses that could be located at least two or three miles away on respondents' property. This argument was endorsed by LUBA in its final opinion, which agreed with respondents that:

"The intended scope of the identified resource is geographically narrow: the only conflicting uses considered in the acknowledged inventory were those immediately surrounding the river. Those uses were, and continue to be, regulated through County's riparian corridor regulations. With the destination resort eligible areas located more than two miles from the river, the County was not required to recognize destination resort eligibility as a potentially conflicting use." LUBA Rec. 731.

Although this issue was not addressed by the Court of Appeals, respondents' argument is valid and relevant to this appeal. When the county adopted its inventory of Goal 5 resources related to the Metolius River, it also undertook the necessary review of uses that could be conflicting uses with those resources. The fact that the county only identified conflicting uses that immediately surround the river reveals the county's intent to limit the geographic scope of the impact area, based on its correct belief that uses outside of that immediate area would not adversely affect the Goal 5 resource sites.

The county's ESEE for the Metolius Headwaters only identifies one conflicting use: "Potential residential development on private land which includes and surrounds spring." ER 22; LUBA Rec. 458. The county decided to limit this conflicting use by rezoning the immediately adjacent land to prohibit subdivisions. *Id.*

The two county ESEEs for the Metolius River are similarly focused on conflicting uses that could occur in the immediate riparian area. The ESEE for the Metolius River "water" resource describes the following conflicting uses: "rafting, fishing, residential development, Indian rights, forest practices on public and private lands, boating, power production, wildlife habitat." ER 24; LUBA Rec. 460. The ESEE for the "Potential State and Federal Wild and Scenic River" resource identifies as a conflicting use "development which would degrade overall quality of the resource," and proposed limiting such conflicts by placing "resource zoning on the subject area sufficient to substantially protect the national values present." ER 28; LUBA Rec. 464.

Thus, in making its ESEE analysis determinations in 1981 regarding whether to allow, prohibit or limit identified conflicting uses, the county elected to limit development only in areas immediately adjacent to the inventoried resources. This approach is consistent with current Goal 5 rules applicable to riparian corridors, which provide safe harbor provisions that only require regulation of uses within a narrow area less than 75 feet from the top of bank. OAR 660-023-0090(5)(a). The county's 1981 decisions regarding the location of conflicting uses with the Metolius resources are also consistent with its conclusion that the "impact area" under Goal 5 did not extend significantly beyond the identified location of the Metolius resources.

3. The county is expressly prohibited from including groundwater as part of its inventory of Goal 5 resources under OAR 660-025-0140.

In section B.3 of petitioners brief, petitioners argue that LCDC's adoption of new Goal 5 rules governing groundwater in 1996 should not "change the scope" of

what the county previously designated. In other words, petitioners contend that the county *did* somehow designate groundwater as part of its Goal 5 inventory in 1981, and that the subsequent enactment of OAR 660-025-0140 should not affect that designation.

Petitioners' fundamental premise is incorrect because, as explained elsewhere in this brief and in the decision of the Court of Appeals, the county expressly decided *not* to include groundwater as part of its Goal 5 inventory in 1981, and the general resource "descriptions" relied upon by petitioners are not sufficient to add the "aquifer system" to the county's inventory. Therefore, LCDC's enactment of the rule in 1996 prohibiting the county from regulating groundwater under Goal 5 was entirely consistent with the county's existing Goal 5 program excluding groundwater from its resource inventory.

Petitioners go on to question whether OAR 660-023-0140 means what it says, and to note that the rule "could substantially limit protection of important Goal 5 resource sites throughout the state." Petitioners' brief 25. Petitioners appear to raise general policy questions regarding whether it was a good idea for LCDC to adopt this rule. However, petitioners in this section do not raise any discernable challenges to respondents' argument that the rule expressly prohibits Jefferson County from treating groundwater as a Goal 5 resource. This fact is no longer only reflected in the rule at issue, but is also recognized in the county's comprehensive plan, which provides: "The County does not regulate the use of groundwater resources; regulation is by the State Department of Water Resources." Local Rec. 107.

4. Petitioners' argument that OAR 660-023-0140 violates Goal 5 is not sufficiently developed for review.

In section B.4 of their brief, petitioners assert that OAR 660-023-0140 is "clearly contrary to Goal 5." However, the two paragraphs of argument presented by petitioners are anything but clear, and fail to explain any coherent theory regarding why a rule adopted by LCDC for purposes of implementing Goal 5 is "invalid as contrary to Goal 5," or why petitioners' argument is relevant to this appeal. To the extent petitioners are arguing that the rule requires the removal of groundwater from the county's previously adopted Goal 5 inventory, petitioners are mistaken for the reasons described above in section IV.B.3 of this brief.

5. Petitioners challenge aspects of the Court of Appeals decision that were not included in their petition for review.

In section B.5 of their brief, petitioners request a remand to require the county to update its Goal 5 inventory for natural resources: "a new Goal 5 inventory of what deserves protection is necessary to ensure the PAPA's consistency with Goal 5." Petitioners' brief 27. Petitioners did not challenge this aspect of the Court of Appeals decision as part of their petition for review. In the proceedings below, petitioners argued that the Court of Appeals should revisit and disavow its decision in *Urquhart*, which held that counties are not required to update their Goal 5 inventories when adopting a PAPA. The Court of Appeals rejected petitioners' arguments, holding that *Urquhart* has been codified in OAR 660-023-0250, and that the county was not required to update its Goal 5 inventory in adopting the PAPA at issue. *Johnson* at 164. Petitioners did not petition for review of that issue, and it is not properly before this court. *Taylor*, 345 Or at 408 n. 1.

V. CONCLUSION

For the above-stated reasons, the final opinion of the Court of Appeals should be affirmed.

Respectfully submitted this 18th day of March, 2009.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 18, 2009, I filed the original and 12 copies of this *Brief on the Merits and Excerpt of Record of Respondents Dutch Pacific Resources and Shane Lundgren* with the Appellate Court Administrator by first class mail at this address:

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I also certify that on March 18, 2009, I served two copies of this *Brief on the Merits and Excerpt of Record of Respondents Dutch Pacific Resources and Shane Lundgren* by first class mail on the persons listed below:

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