Oregon Water Resources Department Water Rights Division

Water Rights Application
Number S-86994

Prior to the issuance of a permit, the Department must receive **permit recording fees in the amount of \$300.00.** Please include your application number on your check made out to the Oregon Water Resources Department.

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft permit be issued with conditions.

Application History

On September 26, 2007, Lake of The Woods Recreation Association and US Forest Service submitted an application to the Department for the following water use permit:

- Amount of Water: 0.21 CUBIC FOOT PER SECOND (CFS), BEING 0.005 CFS PER HOUSEHOLD
- Use of Water: GROUP DOMESTIC FOR 42 HOUSEHOLDS
- Source of Water: LAKE OF THE WOODS
- Area of Proposed Use: KLAMATH COUNTY WITHIN SECTION 10, SECTION 11, SECTION 14, AND SECTION 15, TOWNSHIP 37 SOUTH, RANGE 5 EAST, W.M.

On September 12, 2008, the Department mailed the applicant notice of its Initial Review, determining that "the use of 0.21 CFS of water further limited to 0.005 CFS per household from Lake of the Woods for year-round group domestic for 42 households is not allowable, and it appears unlikely that you will be issued a permit. However, by providing additional information you may request a limited permit for human consumption use (indoor use only: cooking, drinking, sanitation), limited to 500 gallons per day per household." The applicant did not notify the Department to stop processing the application within 14 days of that date.

On September 16, 2008, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

On September 26, 2008, the applicant requested an administrative hold, which the Department granted until December 15, 2008.

On December 12, 2008, the applicant amended the application to human consumption use and submitted a revised map.

On April 16, 2009, the Department sent a certified letter to the applicant stating additional fees are required to continue processing the application.

On April 27, 2009, the Department received the requested fees.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

Findings of Fact

Under ORS 536.340(1)(a), the Water Resources Commission may establish a basin program to classify sources of water supply as to the highest and best use and quantities of use, and that classification of sources of water supply has the effect of restricting the use and quantities of use thereof to the uses and quantities of uses specified in the classification. The Commission has not established a basin program for the Klamath River basin. Therefore, neither the proposed use nor the quantity of water is restricted as a result of this consideration.

Senior water rights exist on Lake of The Woods.

Lake of The Woods is above the Klamath River State Scenic Waterway.

Surface water is available for human consumption (indoor use only: cooking, drinking, and sanitation) at a rate of 0.005 CFS, further limited to 500 gallons per day per household, as this amount is *de minimis* (insignificant) and would not likely have an adverse effect on downstream water given that there is no overland downstream flow from Lake of The Woods.

The Department finds that the amount of water requested, 0.21 CFS, further limited to 500 gallons per day per household acceptable.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives

from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team did not recommended that additional limitations or conditions of use be imposed on this application.

Conclusions of Law

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

Under ORS 536.340(1)(a), the Water Resources Commission may establish a basin program to classify sources of water supply as to the highest and best use and quantities of use, and that classification of sources of water supply has the effect of restricting the use and quantities of use thereof to the uses and quantities of uses specified in the classification. The Commission has not established a basin program for the Klamath River basin. Therefore, neither the proposed use nor the quantity of water is restricted as a result of this consideration.

Water is available for the proposed use.

The proposed use will not injure other water rights.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

The proposed use complies with the State Agency Agreement for land use.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that water is available in the amount necessary for the proposed use; the proposed use will not result in injury to existing water rights; and the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED May 12, 2009

E. Timothy Wall.

for Phillip C. Ward, Director Water Resources Department

If you have any questions, please check the information box on the last page for the appropriate names and phone numbers.

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **June 26**, **2009**. Protests must be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;

- A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known; and
- If you are not the applicant, the protest fee of \$350 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
- If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **June 26, 2009.** Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and

• A standing fee of \$100.00. If a hearing is scheduled, an additional fee of \$250.00 must be submitted along with a request for intervention.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

- upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a prima facie case upon default.

This document was prepared by Joel Plahn. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0815.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:

Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

COUNTY OF KLAMATH

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

LAKE OF THE WOODS RECREATION ASSOCIATION US FOREST SERVICE 122 S 5TH ST KLAMATH FALLS, OR 97601

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: S-86994

SOURCE OF WATER: LAKE OF THE WOODS

PURPOSE OR USE: HUMAN CONSUMPTION (INDOOR USE ONLY: COOKING, DRINKING, AND SANITATION) FOR 42 HOUSEHOLDS

MAXIMUM RATE:

0.21 CUBIC FOOT PER SECOND (CFS), FURTHER LIMITED TO 500 GALLONS PER DAY PER HOUSEHOLD, NOT TO EXCEED 0.005 CFS FROM POINT OF DIVERSION (POD) S3, Q8, Q7, Q3, Q2, Q1, P10, P9, P6, P4, 08, O3, O1, N7, N3, M8, L4, L1, K10, K8, C5, C4, C3, V13, B9, T5, T9, G5, G4, F25, F10, E22, E19, E16, E17, AND 0.01 CFS FROM POD C11C12, V1V10, E14E20E21.

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: SEPTEMBER 26, 2007

POINT OF DIVERSION LOCATIONS:

POD S3 - GOV'T LOT 1 (NWNW), SECTION 10, T37S, R5E, W.M.; NORTH 66 DEGREES 29 MINUTES WEST, 1822 FEET TO NW CORNER, SECTION 10

POD Q8 - GOV'T LOT 1 (NWNW), SECTION 10, T37S, R5E, W.M.; NORTH 55 DEGREES 39 MINUTES WEST, 2068 FEET TO NW CORNER, SECTION 10

POD Q7 - GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 52 DEGREES 28 MINUTES WEST, 2155 FEET TO NW CORNER, SECTION 10

POD Q3 - GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 45 DEGREES 25 MINUTES WEST, 2394 FEET TO NW CORNER, SECTION 10

POD Q2 - GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 43 DEGREES 16 MINUTES WEST, 2469 FEET TO NW CORNER, SECTION 10

- POD Q1 GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 41 DEGREES 31 MINUTES WEST, 2544 FEET TO NW CORNER, SECTION 10
- POD P10 GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 38 DEGREES 54 MINUTES WEST, 2660 FEET TO NW CORNER, SECTION 10
- POD P9 GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 37 DEGREES 41 MINUTES WEST, 2705 FEET TO NW CORNER, SECTION 10
- POD P6 GOV'T LOT 2 (SWNW), SECTION 10, T37S, R5E, W.M.; NORTH 33 DEGREES 25 MINUTES WEST, 2922 FEET TO NW CORNER, SECTION 10
- POD P4 GOV'T LOT 4 (NWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 31 DEGREES 19 MINUTES WEST, 3029 FEET TO SW CORNER, SECTION 10
- POD 08 GOV'T LOT 4 (NWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 36 DEGREES 58 MINUTES WEST, 2465 FEET TO SW CORNER, SECTION 10
- POD 03 GOV'T LOT 4 (NWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 42 DEGREES 46 MINUTES WEST, 1966 FEET TO SW CORNER, SECTION 10
- POD 01 GOV'T LOT 5 (SWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 44 DEGREES 54 MINUTES WEST, 1823 FEET TO SW CORNER, SECTION 10
- POD N7 GOV'T LOT 5 (SWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 56 DEGREES 39 MINUTES WEST, 1470 FEET TO SW CORNER, SECTION 10
- POD N3 GOV'T LOT 5 (SWSW), SECTION 10, T37S, R5E, W.M.; SOUTH 69 DEGREES 05 MINUTES WEST, 1262 FEET TO SW CORNER, SECTION 10
- POD M8 GOV'T LOT 1 (NWNW), SECTION 15, T37S, R5E, W.M.; NORTH 87 DEGREES 0 MINUTES WEST, 1364 FEET TO NW CORNER, SECTION 15
- POD L4 GOV'T LOT 2 (SWNW), SECTION 15, T37S, R5E, W.M.; NORTH 44 DEGREES 22 MINUTES WEST, 2033 FEET TO NW CORNER, SECTION 15
- POD L1 GOV'T LOT 2 (SWNW), SECTION 15, T37S, R5E, W.M.; NORTH 37 DEGREES 20 MINUTES WEST, 2277 FEET TO NW CORNER, SECTION 15
- POD K10 GOV'T LOT 2 (SWNW), SECTION 15, T37S, R5E, W.M.; NORTH 35 DEGREES 44 MINUTES WEST, 2367 FEET TO NW CORNER, SECTION 15
- POD K8 GOV'T LOT 2 (SWNW), SECTION 15, T37S, R5E, W.M.; NORTH 32 DEGREES 54 MINUTES WEST, 2539 FEET TO NW CORNER, SECTION 15
- POD G5 GOV'T LOT 3 (SENE), SECTION 10, T37S, R5E, W.M.; NORTH 03 DEGREES 31 MINUTES EAST, 2149 FEET TO NE CORNER, SECTION 10
- POD G4 GOV'T LOT 3 (SENE), SECTION 10, T37S, R5E, W.M.; NORTH 01 DEGREE 55 MINUTES EAST, 2305 FEET TO NE CORNER, SECTION 10

- POD F25 GOV'T LOT 3 (NWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 04 DEGREES 18 MINUTES WEST, 2617 FEET TO SW CORNER, SECTION 11
- POD F10 GOV'T LOT 3 (NWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 04 DEGREES 28 MINUTES WEST, 2588 FEET TO SW CORNER, SECTION 11
- POD E22 GOV'T LOT 4 (SWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 08 DEGREES 8 MINUTES WEST, 1238 FEET TO SW CORNER, SECTION 11
- POD E14E20E21- GOV'T LOT 4 (SWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 08 DEGREES 10 MINUTES WEST, 1228 FEET TO SW CORNER, SECTION 11
- POD E19 GOV'T LOT 4 (SWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 08 DEGREES 19 MINUTES WEST, 1197 FEET TO SW CORNER, SECTION 11
- POD E16 GOV'T LOT 4 (SWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 06 DEGREES 05 MINUTES WEST, 901 FEET TO SW CORNER, SECTION 11
- POD E17 GOV'T LOT 4 (SWSW), SECTION 11, T37S, R5E, W.M.; SOUTH 02 DEGREES 25 MINUTES WEST, 720 FEET TO SW CORNER, SECTION 11
- POD C11C12 GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.;
 NORTH 04 DEGREES 47 MINUTES WEST, 294 FEET TO NW CORNER, SECTION
 14
- POD C5 GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.; NORTH 16 DEGREES 01 MINUTES WEST, 815 FEET TO NW CORNER, SECTION 14
- POD C4 GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.; NORTH 16 DEGREES 45 MINUTES WEST, 889 FEET TO NW CORNER, SECTION 14
- POD C3 GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.; NORTH 17 DEGREES 36 MINUTES WEST, 990 FEET TO NW CORNER, SECTION 14
- POD V1V10- GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.; NORTH 15 DEGREES 54 MINUTES WEST, 1262 FEET TO NW CORNER, SECTION 14
- POD V13 GOV'T LOT 1 (NWNW), SECTION 14, T37S, R5E, W.M.; NORTH 17 DEGREES 07 MINUTES WEST, 1187 FEET TO NW CORNER, SECTION 14
- POD B9 GOV'T LOT 2 (SWNW), SECTION 14, T37S, R5E, W.M.; NORTH 14 DEGREES 09 MINUTES WEST, 1447 FEET TO NW CORNER, SECTION 14
- POD T5 GOV'T LOT 2 (SWNW), SECTION 14, T37S, R5E, W.M.; NORTH 04 DEGREES 29 MINUTES WEST, 2226 FEET TO NW CORNER, SECTION 14
- POD T9 GOV'T LOT 2 (SWNW), SECTION 14, T37S, R5E, W.M.; NORTH 03 DEGREES 26 MINUTES WEST, 2251 FEET TO NW CORNER, SECTION 14

THE PLACE OF USE IS LOCATED AS FOLLOWS:

GOV'T LOT 1 (NW 1/4 NW 1/4) GOV'T LOT 2 (SW ¼ NW ¼) GOV'T LOT 3 (SE 4 NE 4) GOV'T LOT 4 (NW 4 SW 4) GOV'T LOT 5 (SW 4 SW 4) SECTION 10

> GOV'T LOT 2 (SW 1/4 NW 1/4) NE ¼ SW ¼ GOV'T LOT 3 (NW 1/4 SW 1/4) GOV'T LOT 4 (SW 1/4 SW 1/4) SECTION 11

GOV'T LOT 1 (NW 4 NW 4) GOV'T LOT 2 (SW 4 NW 4) NW 1/4 SW 1/4 SECTION 14

GOV'T LOT 1 (NW ¼ NW ¼) GOV'T LOT 2 (SW 1/4 NW 1/4) SECTION 15 TOWNSHIP 37 SOUTH, RANGE 5 EAST, W.M.

Measurement, recording and reporting conditions:

- Α. Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of diversion. The permittee shall maintain the meter or measuring device in good working order.
- В. The permittee shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- С. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring procedures for review and approval.

Not withstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens and/or by-pass devices are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish screening and/or by-pass devices to prevent fish from entering the proposed diversion, and to provide adequate upstream and downstream passage for fish.

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.

STANDARD CONDITIONS

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

Completion of construction and application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after making beneficial use of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued _____, 2009

DRAFT - THIS IS NOT A PERMIT

for Phillip C. Ward, Director Water Resources Department

Mailing List for PFO Copies

Application #S-86994

PFO Date May 12, 2009

Original mailed to applicant:

LAKE OF THE WOODS RECREATION ASSOCIATION, 122 S 5TH ST, KLAMATH FALLS, OR 97601

Copies sent to:

- 1. WRD File # S-86994
- 2. Water Availability: Ken Stahr



PFO and Map Sheet Copies sent to:

- 3. WRD Watermaster # 17
- 4. Oregon State Parks

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

- 5. USDA Forest Service, PO Box 3623 Portland OR 97208-3623
- 6. Klamath Ranger District, Margaret David Bailey, 2819 Dahlia St Klamath Falls, OR 97601
- 7. ADKINS Consulting Engineers Inc. Douglas Adkins, 2950 Shasta Way Klamath Falls, OR 97603

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER: Plahnjm