

Oregon Water Resources Department
Water Rights Division

Water Rights Application
Number S-87485

Proposed Final Order

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

Application History

On June 29, 2009, USDA Forest Service, Bruce Rogers, Richard Gervais Jr, John G. Grout, Dale Tigner and Katherine Richman submitted an application to the Department for the following water use permit:

- Amount of Water: 0.005 CUBIC FOOT PER SECOND (CFS)
- Use of Water: HUMAN CONSUMPTION FOR FIVE HOUSEHOLDS
- Source of Water: ELK LAKE
- Area of Proposed Use: DESCHUTES COUNTY WITHIN SECTION 29 AND SECTION 32, TOWNSHIP 18 SOUTH, RANGE 8 EAST, W.M.

On July 31, 2009, the Department mailed the applicant notice of its Initial Review, determining that *"The use of 0.005 CFS from Elk Lake for human consumption (indoor use only: cooking, drinking, and sanitation), limited to 500 gallons per day per household, from May 1 through November 30 is allowable."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On August 4, 2009, 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 August 7, 2009, the application was assigned from Katherine Richman to M J Properties of Central Oregon.

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

The Deschutes Basin Program allows domestic use, which includes human consumption.

Senior water rights exist on Elk Lake.

Elk Lake is above the Deschutes 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 affect on downstream water given that there is no overland downstream flow from Elk Lake.

The Department finds that the amount of water requested, 0.005 CFS, further limited to 500 gallons per day per household, is an acceptable amount.

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.

The proposed use requested in this application is allowed in the Deschutes Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

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 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 November 24, 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 **January 8, 2010**. 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;
- If you are the applicant, the protest fee of \$300 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$600 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 **January 8, 2010**. 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 \$150. If a hearing is scheduled, an additional fee of \$350 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.

DRAFT

This is not a permit.
STATE OF OREGON

DRAFT

COUNTY OF DESCHUTES

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

USDA FOREST SERVICE
1230 NE 3RD ST, SUITE A-262
BEND, OR 97701

JOHN G. GROUT
2591 SW BUCKINGHAM
PORTLAND, OR 97201

BRUCE ROGERS
5494 SE 22ND COURT
PORTLAND, OR 97080

DALE TIGNER
1614 SW 16TH ST
REDMOND, OR 97756

RICHARD GERVAIS JR
19745 MT BACHELOR DR
BEND, OR 97702

M J PROPERTIES OF CENTRAL OREGON
532 SW 13th #200
BEND, OR 97702

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

APPLICATION FILE NUMBER: S-87485

SOURCE OF WATER: ELK LAKE

PURPOSE OR USE: HUMAN CONSUMPTION FOR FIVE HOUSEHOLDS

MAXIMUM RATE: 0.005 CUBIC FOOT PER SECOND, BEING 500.0 GALLONS PER DAY
PER HOUSEHOLD

PERIOD OF USE: MAY 1 THROUGH NOVEMBER 30

DATE OF PRIORITY: JUNE 29, 2009

POINT OF DIVERSION LOCATION:

POD A - SWSE, SECTION 29, T18S, R8E, W.M.; 650 FEET NORTH AND
2100 FEET WEST FROM SE CORNER, SECTION 29

POD B - SWSE, SECTION 29, T18S, R8E, W.M.; 410 FEET NORTH AND
1950 FEET WEST FROM SE CORNER, SECTION 29

POD C - SWSE, SECTION 29, T18S, R8E, W.M.; 280 FEET NORTH AND
1930 FEET WEST FROM SE CORNER, SECTION 29

POD E - NWNE, SECTION 32, T18S, R8E, W.M.; 490 FEET SOUTH AND
1800 FEET WEST FROM NE CORNER, SECTION 32

POD F - SWNW, SECTION 32, T18S, R8E, W.M.; 2150 FEET SOUTH AND
4810 FEET WEST FROM NE CORNER, SECTION 32

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW $\frac{1}{4}$ SE $\frac{1}{4}$
SECTION 29

NW $\frac{1}{4}$ NE $\frac{1}{4}$
SW $\frac{1}{4}$ NW $\frac{1}{4}$
SECTION 32

TOWNSHIP 18 SOUTH, RANGE 8 EAST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the meter in good working order.
- B. 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.
- C. The permittee shall allow the watermaster access to the meter; provided however, where any meter 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 and reporting procedures for review and approval.

Notwithstanding 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

DRAFT - THIS IS **NOT** A PERMIT

for Phillip C. Ward, Director
Water Resources Department

Mailing List for PFO Copies

Application #S-87485

PFO Date November 24, 2009

Original mailed to applicant:

USDA FOREST SERVICE
1230 NE 3RD ST, SUITE A-262
BEND, OR 97701

JOHN G. GROUT
2591 SW BUCKINGHAM
PORTLAND, OR 97201

BRUCE ROGERS
5494 SE 22ND COURT
PORTLAND, OR 97080

DALE TIGNER
1614 SW 16TH ST
REDMOND, OR 97756

RICHARD GERVAIS JR
19745 MT BACHELOR DR
BEND, OR 97702

M J PROPERTIES OF CENTRAL OREGON
532 SW 13th #200
BEND, OR 97702

Copies sent to:

1. WRD - File # S-87485
2. Water Availability: Ken Stahr

PFO and Map Sheet Copies sent to:

3. WRD - Watermaster # 11
4. Oregon State Parks

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

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

"\$20 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : plahnjm