

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number R-84768

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the proposed use is not consistent with the Deschutes Basin Program, Oregon Administrative Rules (OAR) 690-505-0020(1)(c).

Application History

On June 1, 2001, Blaine Limited Partnership submitted an application to the Department for the following water use permit:

- Amount of Water: 160.0 ACRE-FEET (AF), BEING 80.0 AF IN RESERVOIR 1 AND 80.0 AF IN RESERVOIR 2 (ENLARGEMENT, ORIGINALLY CONSTRUCTED UNDER PERMIT R-14054)
- Use of Water: STORAGE FOR SUPPLEMENTAL IRRIGATION OF 462.1 ACRES TO BE APPROPRIATED UNDER APPLICATION S-84767
- Source of Water: WINTER RUNOFF IN LOST & BOULDER DITCH, TRIBUTARY TO GATE CREEK
- Area of Proposed Use: WASCO COUNTY WITHIN SECTION 32 AND SECTION 33, TOWNSHIP 4 SOUTH, RANGE 12 EAST, W.M.

On February 22, 2002, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 160.0 acre-feet, being 80.0 AF in Reservoir #1 and 80.0 AF Reservoir #2 in runoff, a tributary of Gate Creek, for storage for supplemental irrigation of 462.1 acres is allowable from January 1 through April 14 of each year, contingent upon the approval of Application R-81465, Application S-84335, and Transfer T-8808.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On March 12, 2002, 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.

The application has been on administrative hold since the Initial Review was issued on February 22, 2002, pending processing of Application R-81465 and Transfer T-8088.

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 Initial Review described the source as runoff, tributary to Gate Creek. The correct source is runoff in Lost & Boulder Ditch, tributary to Gate Creek.

The Initial Review incorrectly referenced transfer application T-8808; the correct transfer application is T-8088.

The issuance of a Final Order approving transfer application T-8088 on October 31, 2008 as recorded in Special Order Volume 76, Pages 668-670, resolved the conflict addressed in the Initial Review.

The Initial Review omitted the determination that, under OAR 690-505-0020(1)(c), the application for storage of water in Reservoir 1 and Reservoir 2 for supplemental irrigation use does not give proper cognizance to the multi-purpose concept. On October 21, 2009, the Department sent a certified letter requesting that the applicant provide documentation that demonstrates that the applicant had given "proper cognizance to the multi-purpose concept" regarding the proposed use of storing water in Reservoir 1 and Reservoir 2.

The Deschutes Basin Program allows storage for supplemental irrigation if the applicant gives proper cognizance to the multi-purpose concept. However, as of the date of this document, the Department has not received the documentation requested. Therefore, the Department finds that the use of stored water for supplemental irrigation use alone is not allowable under the Deschutes Basin Program.

On October 21, 2009, the Department sent a certified letter requesting that the applicant submit a revised application map to clarify the location and coordinates of Pump #1, which is the point of diversion from Reservoir 1. The location of Pump #1 does not correspond with the coordinates listed on the June 2, 2001 application map. The coordinates listed on the map describe Pump #1 as being 242 feet North and 741 feet East from the SE Corner of Section 32, Township 4 South, Range 12 East, W.M. However, based on the scale of the map, it appears that Pump #1 is located approximately 950 feet North of the SE Corner of Section 32, Township 4 South, Range 12 East, W.M. As of the date of this document, the Department has not received the revised map requested.

Senior water rights exist on runoff in Lost & Boulder Ditch, a tributary of Gate Creek, or on downstream waters.

Runoff in Lost & Boulder Ditch, a tributary of Gate Creek, is above the Deschutes River State Scenic Waterway.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water is available for further appropriation (at a 50 percent exceedance probability) January 1 through June 30.

The Department finds that the amount of water requested, 160.0 AF, being 80.0 AF in Reservoir 1 and 80.0 AF in Reservoir 2, 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 recommended that additional limitations or conditions of use be imposed on this application as follows:

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 of water as proposed in this application is not allowed April 15 through September 30 per OAR 690-033, which sets public interest standards for threatened, endangered or sensitive fish species.

Conclusions of Law

Under the provisions of ORS 537.621, the Department must presume that a proposed use will ensure the preservation of the public welfare, safety and health 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 Deschutes Basin Program **does not allow** the proposed use of stored water to be appropriated for supplemental irrigation use alone.

No preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use would not injure other water rights.

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

The proposed use is compatible with applicable land use plans.

No proposed flow rate and duty of water higher than the general basin-wide standard is needed.

For these reasons, the required presumption **has not** been established.

The Department therefore concludes that the proposed use **will impair or be detrimental** to the public interest as provided in ORS 537.170.

Recommendation

The Department recommends that the application be denied.

DATED February 23, 2010



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 **April 9, 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 **April 9, 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 Kerry Kavanagh. 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 503-986-0816.

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.

Mailing List for PFO Copies

Application #R-84768

PFO Date February 23, 2010

Original mailed to applicant:

BLAINE LIMITED PARTNERSHIP
4676 HUTSON DR
PARKDALE, OREGON 97041

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Copies sent to:

1. WRD - File # R-84768
2. Water Availability: Ken Stahr

PFO and Map Copies sent to:

3. WRD - Watermaster # District 3
4. WRD - Regional Manager: NC
5. WRD - George Robison, Dam Safety
6. Oregon State Parks

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

7. Donald Branton, CWRE #24, Tenneson Engineering Corp,
PO Box 1132, The Dalles OR 97058

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

8. Lost and Boulder Ditch Improvement District,
Edwin L. (Van) Conklin II, 54829 Smock Rd, Wamic, OR 97063 (affected land owner)
9. Davis A. Harvey, 79681 Woodcock Lane, Wamic, OR 97063 (affected land owner)
10. Ogden L. Wing, 79260 Ayres Rd, Tygh Valley, OR 97063-9769 (affected land owner)
11. Wasco County Public Works, 2705 East 2nd Street, The Dalles, OR 97058,
RE: Wasco County Public Works Permit #1771

CASEWORKER : Kerry Kavanagh