

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

In the Matter of Water Rights Application)
G-17553, Deschutes County)

PROPOSED FINAL ORDER

Summary of Recommendation

The Department recommends that the application be approved as conditioned in the attached draft permit.

Authority

Oregon Revised Statutes (ORS) 537 and Oregon Administrative Rules (OAR) 690-310 establish the process by which an application to use public waters may be submitted and evaluated by the Department. OAR 690-505 and 521 describe the process by which certain ground waters in the Deschutes Basin may be appropriated by mitigating the impact of the proposed use.

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 of the proposed use
- pending senior applications and existing water rights
- designations of any critical ground water areas
- Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standards for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the applicable standard
- any comments received

Findings of Fact

1. On **APRIL 13, 2012**, **JOHN M. LIPKOWITZ** submitted an application for a permit to use ground water:

Amount of Water: 5.0 ACRE FEET (AF) AND 0.05 CUBIC FOOT PER SECOND (CFS)

Proposed Use: POND MAINTENANCE; STORAGE FOR FISH AND RECREATION

Source: A WELL WITHIN LITTLE DESCHUTES RIVER BASIN

Location: DESCHUTES COUNTY IN SECTION 30, TOWNSHIP 22 SOUTH, RANGE 10 EAST, W.M.

2. On **October 26, 2012**, the Department mailed the applicant its Initial Review, determining that *“The storage of 5.0 AF of ground water in a pond for year-round fish and recreation, and the appropriation of 0.05 CFS from a well in Little Deschutes River Basin for year-round pond maintenance is not allowable. However, if you provide sufficient mitigation water to offset the proposed use, it may be allowed under OAR 690-505-0610.”* The applicant did not request that the Department stop processing of the application within 14 days of that date. The Initial Review included the Notice of Mitigation Obligation for the proposed ground water use pursuant to the Deschutes Ground Water Mitigation Rules (OAR 690-505).

3. On October 30, 2012, the Department provided public notice of the application in the Department's weekly notice, thereby initiating a 30-day comment period. The notice included a request for comments, and information about obtaining future notices or a copy of the Proposed Final Order.
4. On November 26, 2012, John Short, the authorized agent for the applicant, clarified the uses for stored ground water to include fish, recreation, wildlife, and irrigation.
5. The Department has not received adverse comments related to the possible issuance of a permit.
6. The Deschutes Basin Program allows the use of ground water for storage and pond maintenance.
7. An assessment of ground water availability has been completed by the Department's Ground water/Hydrology section, a copy of which is in the file. The proposed use of ground water will, if properly conditioned, avoid injury to existing ground water rights and the ground water resource.
8. The proposed ground water use is not within a designated critical ground water area.
9. The proposed ground water use is junior to existing water rights downstream in the Deschutes River basin.
10. The proposed ground water use is located within the Deschutes Ground Water Study Area, and is subject to the Deschutes Ground Water Mitigation Rules (OAR 690-505).
11. The proposed use will have the potential for substantial interference with the Little Deschutes River (OAR 690-09). Pursuant to ORS 390.835(9), the proposed use shall be denied unless mitigation is provided. Without the required mitigation, there is a preponderance of evidence that the proposed use will measurably reduce surface water flows necessary for the Deschutes River Scenic Waterway ORS 390.835(9). Consequently, the applicant must mitigate for the proposed use pursuant to the Deschutes Ground Water Mitigation Rules.
12. The Initial Review erroneously described the mitigation obligation as 2.67 AF; the correct mitigation obligation is 2.7 AF.
13. The mitigation obligation for the proposed use is 2.7 acre-feet, which represents the Department's determination of the consumptive portion of the proposed use (OAR 690-505-0610(5)). The required mitigation is based on the storage and maintenance of a pond with a surface area of 1.0 acre. The mitigation obligation is calculated based on a consumptive-use factor of 2.7 AF * surface area. Each mitigation credit is equivalent to 1.0 acre-foot of mitigation water.
14. Mitigation must be provided in the Little Deschutes Zone of Impact, located anywhere in the Little Deschutes River Basin above the mouth.
15. A permit may not be issued unless the mitigation obligation, as identified by the Department, is satisfied. The applicant has proposed to obtain 2.7 mitigation credits within the Little Deschutes Zone of Impact.
16. On March 13, 2013, the Department received the applicant's Response to Notice of Mitigation Obligation.
17. The Department requested comments on the application and proposed mitigation from the Oregon Departments of Fish and Wildlife, Environmental Quality, State Lands, Parks and Recreation, and Agriculture pursuant to the Deschutes Ground Water Mitigation Rules. No issues were raised in that review that required conditioning of the attached draft permit.
18. The applicant has not provided the Department with documentary evidence that the qualifying mitigation credits have been obtained. In order to obtain a permit, documentary evidence of mitigation credits must be submitted to the Department within five years of the issuance of a Final Order approving the proposed ground water use.

19. A secondary application will need to be submitted prior to any out-of-reservoir use of stored water.

Conclusions of Law

Under the provisions of ORS 537.621, 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, 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.

1. The proposed use requested in this application is allowed in the Deschutes Basin Program.
2. The applicant shall provide mitigation pursuant to the Scenic Water Way Act (ORS 390.835).
3. The mitigation obligation has been satisfied pursuant to OAR 690-505-0630; therefore, notwithstanding OAR 690-09, the proposed ground water use will not have the potential for substantial interference with surface water.
4. Groundwater is available for the proposed use.
5. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
6. The proposed use will not measurably reduce surface water flows necessary for the Deschutes Scenic Waterway.
7. The proposed use will not injure other water rights.
8. The proposed use complies with requirements of the State Agency Coordination Program regarding land use.
9. A flow rate and duty higher than the basin-wide standard is not necessary.
10. All criteria for establishing the presumption have been satisfied.
11. The Department therefore concludes that the use as proposed would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

Recommendation

The Department recommends that application [G-17553](#) be approved, and the attached draft permit be issued as limited by the conditions contained therein.

Dated at Salem, Oregon on April 23, 2013.



E. Timothy Wallin, Water Rights Program Manager
for [Phillip C. Ward](#), Director

Protests

Under the provisions of ORS 537.621(8), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than June 7 2013, be in writing, and include the following:

1. Your name, address, and telephone number;
2. 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;
3. A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;
4. A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
5. Any citation of legal authority to support your protest, if known.
6. The protest fee required by ORS 536.050, of \$300 (applicant) or \$600 (other parties), and proof of service of the protest upon the applicant.
7. 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.
8. 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 537.621(8), 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 7 2013, be in writing, and include the following:

1. The requester's name, mailing address and telephone number;
2. If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
3. A statement that the requester supports the Proposed Final Order as issued;
4. A detailed statement of how the requester would be harmed if the Proposed Final Order is modified.
5. A standing fee of \$150.00. If a hearing is scheduled, an additional fee of \$350.00 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. A contested case hearing will be scheduled only if a protest has been submitted and either:

1. upon review of the issues, the Director finds that there are significant disputes related to the proposed use of water, or
2. 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.

OAR 137-003-0505 requires that you be informed that if a party to a contested case hearing before the Water Resources Department is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, that party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise. OAR 690-002-0020 provides that a party or limited party participating in a contested case hearing before the Water Resources Department may be represented by an authorized representative in the manner and to the extent provided for in OAR 137-003-0555 of the Attorney General's Model Rules.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an authorized representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

This order was produced by Kerry Kavanagh. If you have any questions about any of the statements contained in this document, I am probably the best person to answer your questions. You may reach me at 503-986-0816 or Kerry.L.Kavanagh@wrд.state.or.us.

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, Suite A, Salem OR 97301-1266, Fax: 503-986-0901.

STATE OF OREGON

COUNTY OF DESCHUTES

DRAFT PERMIT TO APPROPRIATE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO:

JOHN M. LIPKOWITZ
9905 SPARROW HAWK CT
LAS VEGAS NV 89134

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

APPLICATION FILE NUMBER: G-17553

SOURCE OF WATER: A WELL WITHIN LITTLE DESCHUTES RIVER BASIN

RATE: 0.05 CUBIC FOOT PER SECOND

MAXIMUM VOLUME OF STORED WATER: 5.0 ACRE FEET

DATE OF PRIORITY: APRIL 13, 2012

USE: STORAGE FOR FISH, WILDIFE, RECREATION, AND IRRIGATION AND POND MAINTENANCE

PERIOD: YEAR-ROUND STORAGE AND YEAR-ROUND POND MAINTENANCE

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
22 S	10 E	WM	30	NE SE	1260 FEET SOUTH AND 500 FEET WEST FROM E1/4 CORNER, SECTION 30

Authorized Place of Use:

STORAGE AND POND MAINTENANCE				
Twp	Rng	Mer	Sec	Q-Q
22 S	10 E	WM	30	NE SE
22 S	10 E	WM	30	SE SE

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 appropriation, and maintain the device(s) in good working order. 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.

B. The permittee shall allow the watermaster access to the meter; where the meter is located within a private structure, the watermaster shall request access upon reasonable notice.

Ground Water Mitigation Conditions:

- Mitigation Obligation: 2.7 acre-feet of mitigation water in the Little Deschutes Zone of Impact.
- Mitigation Source: mitigation credits or a mitigation project

3. Mitigation water must be legally protected instream in the Little Deschutes Zone of Impact for the life of the permit and subsequent certificate(s). Regulation of the use and/or cancellation of the permit, or subsequent certificate(s) will occur if the required mitigation is not maintained.
4. The permittee shall provide additional mitigation if the Department determines that average annual consumptive use of the subject appropriation has increased beyond the originally mitigated amount.
5. If mitigation is from a secondary right for stored water from a storage project not owned or operated by the permittee, the use of water under this right is subject to the maintenance and terms and conditions of a valid contract or satisfactory replacement, with the owner/operator of the storage project, a copy of which must be on file in the records of the Water Resources Department.
6. Failure to comply with these mitigation conditions shall result in the Department regulating the ground water permit, or subsequent certificate(s), proposing to deny any permit extension application for the ground water permit, and proposing to cancel the ground water permit, or subsequent certificate(s).

Scenic Waterway Condition:

Use of water under authority of this permit may be regulated if analysis of data available after the permit is issued discloses that the appropriation will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife in effect as of the priority date of the right, or as those quantities may be reduced subsequently. However, the use of ground water allowed under the terms of this permit will not be subject to regulation for Scenic Waterway flows, provided the required mitigation is maintained.

STANDARD CONDITIONS

1. 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.
2. If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.
3. If substantial interference with a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.
4. The wells shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.
5. 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.
6. Prior to receiving a certificate of water right, the permit holder shall submit the results of a pump test meeting the department's standards, to the Water Resources Department. The Director may require water level or pump test results every ten years thereafter.

7. 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-practice technologies or conservation practices to achieve this end.
8. By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged comprehensive land-use plan.
9. Completion of construction and complete application of the water to the use shall be made within five years of the date of permit issuance. If the water is not completely applied before this date, and the permittee wishes to continue development under the permit, the permittee must submit an application for extension of time, which may be approved based upon the merit of the application.
10. Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued

DRAFT – NOT A PERMIT

for [Phillip C. Ward](#), Director
Water Resources Department

Mailing List for PFO

Scheduled Mailing Date:

Application: [G-17553](#)

Permit: DRAFT

Original mailed to Applicant:

[JOHN M. LIPKOWITZ](#)
[9905 SPARROW HAWK CT](#)
[LAS VEGAS NV 89134](#)

Copies of PFO sent to:

1. WRD - File [G-17553](#)
2. WRD - Water Availability: Ken Stahr
3. WRD – Watermaster District #11
4. WRD - Laura Wilke
5. DRC – Genevieve Hubert

Copies of PFO sent to other interested persons (CWRE, Agent, Commenter, etc.):

1. John Short, Deschutes Irrigation LLC, PO Box 1830, Bend, OR 97709

Affected Landowners (include "Notice of Proposed Final Order--Affected Landowner")

1. Kerri Bowman, 9905 Sparrow Hawk Ct, Las Vegas, NV 89134

CASEWORKER: Kerry Kavanagh

Copies Mailed
by: _____ (STAFF)
on: _____ (DATE)