

# BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the matter of the Water Rights Application G-16674, Jefferson County  
On behalf of Ponderosa Land and Cattle Co., LLC  
Jefferson County

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Native Fish Society (herein "NFS") files this protest to the Proposed Final Order (PFO) identified above for application G-16674 in the Deschutes Basin along with the \$350 protest fee pursuant to ORS 537.621(7) and OAR 690-310-160.

For the reasons outlined below, the application must be denied.

Protest Elements as Required by ORS 537.621(7)

## 1. Name, address, telephone number of protestant

Native Fish Society  
P.O. Box 568  
Molalla, Oregon 97038  
Contact: Bill Bakke,  
Executive Director  
Phone: (503) 977 0287  
email: [bmbakke@qwestoffice.net](mailto:bmbakke@qwestoffice.net)

or: Native Fish Society  
69217 Tapidero  
Sisters, Oregon 97759  
Contact: Tom Davis  
River Steward, Upper Deschutes  
Phone: (541) 549 1222  
Email: [tomlin2@bendcable.com](mailto:tomlin2@bendcable.com)

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## 2. Statement of NFS's and the public interests it represents

**History:** The Native Fish Society is a nonprofit organization founded in 1995. NFS has more than 500 members, mostly from Oregon and Washington, but also from California, British Columbia, Idaho, and Montana. NFS members are primarily adults of all ages and incomes. NFS has three fulltime staff members, one part time staff member, two contract employees and 20 volunteer River Stewards.

**Mission:** Our mission is to maintain, protect, and secure biological diversity of native fish and the habitats that support them in the Pacific Northwest. Our goal is the conservation, preservation and restoration of wild fish in the Pacific Northwest. NFS is distinguished by our science-based approach to fish protection and recovery efforts, and we support our mission with programs focusing on advocacy, stewardship, and outreach/education.

### **Programs and services**

NFS's advocacy program is dedicated to policy development and administration of fish management policy at the state, federal, and regional level. NFS initiates hatchery, harvest, and fish management reforms using best science to base decisions. Through the advocacy program, agency policy is expanded to identify native fish populations, their status, and conservation management plans that are focused on natural production, population

resilience in a fluctuating environment, and protection of habitats that sustain distinct populations.

NFS helped create a legal framework for native fish conservation in Oregon through the adoption of the Oregon Native Fish Conservation Policy (2003). Implementation of this policy is a main focus of the NFS River Steward Program. This program is carried out by River Stewards who live locally on their watersheds and who are experts on the health of native fish populations in those watersheds. There are presently 20 NFS River Stewards working on the Calapooia, Deschutes, John Day, Klamath, Lower Columbia, Lower Umpqua, Mid-Oregon Coast, Molalla, Nestucca, North Oregon Coast, North Umpqua, Salmonberry, Sandy, Southern Washington, Rogue and Yachats. More than 40,000 square miles of Oregon and Washington watersheds are covered by NFS River Stewards.

The outreach/education programs include our website that contains a unique database of scientific studies available to the public free of charge. This information is published in professional peer-reviewed journals and would normally be costly and difficult for the public to access, but the website makes this information readily available to the public. With this scientific data, NFS volunteers, employees, and the public are able to monitor fish management and advocate for conservation plans. Outreach/education work also includes holding watershed workshops that introduce people to the biological organization of aquatic life in a particular watershed and by doing so, participants develop a deeper understanding and a personal connection with rivers and fish populations. NFS is also very involved in creating coalitions and community partnerships of individuals, agencies and businesses that have a stake in the viability of their local watershed.

#### **Highlights of NFS Deschutes-Metolius Watershed accomplishments:**

- Ensured removal of catchable hatchery trout from the Metolius River: This included management changes that protect native trout with a no-kill fishery using barbless, single hooks and no bait. The Oregon Fish and Wildlife Commission (OFWC) adopted this regulation following public support, which NFS executive director Bill Bakke effectively directed. The Metolius River is recognized as one of the best wild trout fisheries on the West Coast. Since the hatchery-trout kill-fishery was terminated the wild trout population has grown in size with more older, larger fish and increased numbers of spawning fish. These wild trout are protected and support a unique fishery with important economic benefits to the local community.
- Deschutes River hatchery fish exclusion weirs: Stray hatchery steelhead from state, tribal and federal hatcheries in the Columbia River enter the Deschutes because it is a cool water source entering the Columbia River when water temperatures soar. These hatchery strays impede the recovery of native wild summer steelhead in the Deschutes River. Not one of the three distinct populations of wild summer steelhead are considered viable based on scientific analysis. To help solve this problem, the NFS raised funds and performed planning to erect flow resistant weirs on two tributaries to prevent stray steelhead from spawning with native wild steelhead. A

few foundations, the local community, and the Oregon Department of Fish and Wildlife (ODFW) are supporting the project. The weirs will be in place in 2009.

- Creating partnerships: NFS established Fish Cons, a collation of groups including Trout Unlimited, Oregon Trout, Federation of Fly Fishers, Northwest Steelheaders, Sierra Club, Oregon Wild, WaterWatch of Oregon, among others, to coordinate our respective work and assist in accomplishing the goals of fish and habitat conservation. This group helped protect ground water in the upper Deschutes River in 2007. The NFS Upper Deschutes River Steward Tom Davis is also a board member of the Upper Deschutes Watershed Council and Friends of the Metolius, and has recently been active with the Deschutes Habitat Conservation Planning, Deschutes County comprehensive plan revision, OWRD's Oregon Water Supply and Conservation Initiative, and conservation groups including Trout Unlimited. Davis has reached out to conservation-minded individuals and organizations in Central Oregon to mobilize them on issues affecting the Upper Deschutes Basin.
- Fish protection and expanded habitat in hydro dam relicensing on the Deschutes: As a party to the settlement process, NFS helped secure fish reintroduction above Pelton Dam, restoring habitat, ensuring woody debris placement in the Deschutes, and buying water rights.
- Slot regulation: Recognizing that management of the Deschutes native redband trout fishery was not protecting the fish and ensuring quality angling, Bill Bakke proposed a slot regulation for this wild trout fishery. A slot regulation allows a limited harvest for a certain size of fish. In the Deschutes River, steelhead smolts had to be protected so the slot window selected was 10 to 12 inches. ODFW adopted the slot rule, public support is strong, the potential of the fishery has been achieved and the biological goals were accomplished. The Deschutes wild trout population is one of the largest in the state and has dramatically improved with the slot limit and no-bait fishing.
- Habitat and fish projects: As a voting member of the steering committee for the investment of \$10 million from Portland General Electric for habitat, fish and wildlife projects in the Deschutes, Clackamas, and Sandy, basins, NFS was involved with the approval of many conservation projects for the Deschutes Basin, including the acquisition of the Alder Springs and Camp Polk properties on Whychus Creek in the upper Deschutes River basin.
- Recent NFS work for the Metolius and Upper Deschutes include:
  - a. Comments to the "Big Look Task Force" and the Land Conservation and Development Commission in October 2008 regarding revisions to Oregon land use laws to better protect special waters like the Metolius River and tributaries.
  - b. Preparation of alerts for NFS members and others regarding the need for support of the Forest Service's Metolius wood placement project for aquatic habitat improvement. This included a float trip with the Forest Service and boaters in September 2008 to inspect phase 1 of the Metolius wood placement project.

- c. Support, field work and COIC partnership for the Forest Service's Glaze Meadow/Forest project along the upper reaches of Indian Ford Creek.
- d. Op-Eds in the Bend Bulletin concerning congressional threats to the Endangered Species Act.
- e. PowerPoint presentation on Upper Deschutes fish resources, issues and threats/opportunities for the Trout Unlimited Nov. 1, 2008, kickoff meeting for TU's Upper Deschutes Home Rivers Initiative.
- f. Instream placement in 2007 and 2008 of steelhead fingerlings in Whychus Creek with ODFW. The fieldwork was part of the anadromous fish reintroduction involving steelhead and Chinook and sockeye salmon.
- g. Initial steps toward an Upper Deschutes Coalition of fish and related organizations for communication and strengthening of mutual efforts.

#### Summary of facts

Proposed Use: PLC applied for a groundwater right to withdraw 8.8 cfs with a total volume of 2422 acre-feet per year. This is 4.5 times the annual water use of Sisters, Oregon. The applicant identifies the peak season as July to September, with peak season per-capita daily consumption at 620 gallons per person per day, an exceptionally high water use.

The Mitigation Obligation: The Water Resources Department (WRD) has required a mitigation obligation of 968.8 acre-feet annually. The WRD determined this mitigation obligation by applying a consumptive use coefficient of 40%, which is the consumptive use coefficient the WRD generally applies to quasi-municipal uses. The WRD did not apply corresponding consumptive use coefficients to the various components of the destination resort, including irrigation of at least one golf course. The WRD is requiring mitigation be provided in the "General Zone of Impact".

The state of the resource: The Metolius River and its tributaries are excellent examples of outstanding aquatic and watershed resources. They are, however vulnerable to future threats, particularly threats related to flow. The Metolius bull trout have suffered a decline since the 2004 through 2006 period. Most fish biologists believe that an important factor was low flows during spawning periods in the western tributaries where bull trout and their prey, kokanee salmon, spawn. Fly Creek, a small, isolated tributary that flows toward Lake Billy Chinook is one of Central Oregon's best sources for the rare, wild, native redbands and their DNA. It is very small and subject to fish kills due to low flows. Indian Ford and Whychus Creeks are also important, but vulnerable, resources for both existing and reintroduced native salmonids.

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### **3. How the Action Proposed in the PFO will impair or be detrimental to NFS's interest and the public interests it represents.**

The proposed use of water by PLC will result in the diminishment of streamflows, existing and reintroduced native salmonids, health of the aquatic ecosystem and water quality needed for the Deschutes River system. This includes the Metolius River, which NFS has dedicated so much of its time towards protecting. This is because the PFO fails to recognize constraints such as the Federal Endangered Species Act; Oregon water quality requirements; Oregon, federal and Tribal systems for protecting special rivers; and the Oregon Native Fish Conservation Policy. The PFO also fails to require mitigation in all affected river reaches, fails to adequately calculate consumptive use, grants approval before crucial land use approvals are received or applied for, and fails to adequately condition the water right to ensure preservation of the health, safety and welfare of the state. Taken together, these failures will result in serious and irreversible impairment of the Metolius River, its tributaries such as Fly Creek, Whychus Creek and Indian Ford Creek.

The PFO also provides inadequate mitigation of the amount of water put back into the system and the placement of that water. In addition to the serious and irreversible damage to the Metolius River, its tributaries such as Fly Creek, Whychus and Indian Ford Creeks, a precedent for requiring accurate mitigation is essential to offsetting the predicted impacts of ground water use on surface waters in the Deschutes basin. The ground water resource contributes flows and high quality waters to the Deschutes River system, particularly the Metolius component - an ecologically sensitive system that provides critical habitat for reintroduced Chinook salmon and threatened bull trout and steelhead. The WRD has determined that streamflows needed for fish, wildlife, scenic and recreational values in the basin are not met much of the year. The further depletion of streamflows and the diminished water quality caused by the proposed PLC use will adversely affect the fish, wildlife, scenic, recreational and other public instream uses of water. These streamflows and water quality are critical to these instream values.

Without accurate determination and accounting for the consumptive use, the proposed PLC use will add to the existing overallocation of Deschutes basin resources, increasing competition for water making it even more difficult to protect and restore streamflows in the basin. This will also result in lost recreational, commercial and non-market values – including fishing, boating and swimming. These uses have immense cultural and economic importance and are public interests that NFS represents and is dedicated to protect.

Downstream of the Pelton-Round Butte complex, the reservoirs are managed as run of the river. Flows downstream are adjusted by flows coming into the reservoirs upstream. The re-regulation dam below the dams restores the historic, Deschutes even flow and moderates flow fluctuation. But this proposal along with others upstream are taking water away from the lower Deschutes as well as from upstream areas including tributaries.

The proposed use will injure existing senior instream rights that protect fish, wildlife and recreation in the basin because the PFO mitigation will not adequately offset impacts on these rights. It will measurably reduce flows needed for specially protected Oregon, federal and Tribal wild and scenic waterways in the basin. For these reasons the proposed use directly conflicts with and will impair and be detrimental to NFS's mission and goals, the interests of NFS's members and the public interests NFS represents.

## **4. The Errors and Deficiencies of the PFO**

### **A The PFO is in error and deficient because the WRD is not requiring mitigation in all zones of impact.**

The Deschutes Groundwater Mitigation Rules require that mitigation be provided in the general zone where the impact of the appropriation will occur. The rules specify that the general zone of impact means "anywhere above the Madras gage on the Lower Deschutes River or, for wells determined by the Department to have a localized impact on surface water, anywhere within the impacted subbasin of the Deschutes River including the Metolius, Squaw Creek, Little Deschutes, and Crooked River subbasins as identified by the Department." OAR 690-505-0605(2).

The WRD's groundwater review of application G-16674 found that there will likely be impacts on Wychus (formerly Squaw) Creek. See Scenic Waterway Interference & General/Local Surface Water Impact Evaluation for Deschutes Ground Water Study Area, K. Lite, 9/19/06, Page 2 & 6. The report also notes that water level in the proposed wells is likely to be roughly coincident with Indian Ford Creek, above springs adjacent to Wychus Creek and above Metolius Spring. This means that there will likely be an impact on these sources as well. The USGS, in response to a question from Senator Ben Westlund's office, stated: *"In the Metolius River Basin, ground-water pumping most likely will result in diminished discharge at principal spring complexes that occur at the head of the Metolius, along the main stem, along many of the tributaries, and near the confluence of the Metolius and Deschutes Rivers."* See attached letter from Marshall Gannett, USGS to Office of Senator Ben Westlund, 4/4/07.

Mark Yinger is a hydrogeologist experienced in the geology and hydrogeology of the upper Deschutes basin and states (letter attached): *"I can state with reasonable certainty that the primary surface water impact of the Ponderosa Land & Cattle Company resort's groundwater pumping will be to reduce spring discharges to the Metolius River and its tributaries upstream of Jefferson Creek. The pumping will also reduce flows from springs that discharge to lower Wychus Creek. Other waters that may be impacted include Fly Creek and Indian-Ford Creek. ... It is reasonable to conclude that the pumping water level in the production wells of the proposed resort will be well below the elevation of the Metolius River headwater springs. The primary surface water influence due to pumping of the production wells will be on the springs that discharge to the Metolius River."*

Despite these findings of localized impacts, the WRD is only requiring mitigation in the Deschutes Mainstem General Zone of Impact. The WRD is not requiring mitigation on Wychus Creek, the Metolius River and tributaries, Fly Creek or Indian Ford Creek.

In an October 31, 2007 letter from WRD Director Phil Ward to Governor Kulongoski (attached), Director Ward explains that the WRD is applying the Deschutes Ground rules in a manner that only requires mitigation in the "primary" zone of impact. See attached, letter from WRD Director Phil Ward to Governor Kulongoski, 10/31/07. If a proposed groundwater withdrawal will impact more than one stream, the WRD will only require mitigation in the "primary" zone.

The actual language of the rule does not support the WRD's interpretation of the rule. There is no provision that states that if more than one zone of impact is affected, that mitigation will only be required in the "primary zone". The rules do not contemplate such a situation. The rules specifically direct the WRD to require mitigation for wells determined by the Department to have a localized impact on surface water in the impacted subbasins. OAR 690-505-0605(2).

The WRD's actions are in violation of the rules, and thus the PFO is in error and deficient. In its letter to Governor Kulongoski, Director Ward acknowledges that the WRD has been advised by the Attorney General's office that mitigation could be required for impacts to multiple zones involving state scenic waterways.

The Metolius is a state scenic waterway and a component of the National Wild and Scenic Rivers System, as well as the Warm Springs Wild and Scenic Rivers System. The Wychus and Indian Ford Creeks and the Metolius - are having native salmonids reintroduced at great expense and have instream water rights that are supposed to be protected by the Deschutes Groundwater Mitigation rules. The WRD's failure to require mitigation on these streams will be detrimental to NFS's interests outlined above. To be in compliance with its rules, the WRD should require mitigation in all affected zones—including Wychus Creek, the Metolius River and tributaries, Fly Creek and Indian Ford Creek. If mitigation is not available, this application must be denied.

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**B The PFO is in error and deficient because the calculation of the mitigation obligation underestimates the amount of water that will be consumptively used.**

The applicant requested 8.8 cfs for quasi-municipal use. The WRD knows that the proposed quasi-municipal use is a "destination resort" and required more detailed information about the area of land dedicated to golf courses. The applicant reduced the rate from 10.44 cfs to 8.8 cfs. Very little detail was provided about what the 35% of non-residential water will be used for, such as to irrigate golf courses.

The rules require that the WRD determine the consumptive use of the proposed use. (OAR 690-505-0610(5)). WRD knows that the proposed use is a destination resort. Destination resorts historically have a higher consumptive use than traditional "quasi-municipal" uses, especially when irrigation of a golf course is included in the water use. The newer golf courses in Central Oregon are employing irrigation systems that range from ninety to one hundred percent efficiency. This influences the consumptive use by PLC.

The applicant indicated that the peak usage would be during the three months of July, August and September with the total used being 1313 AF. With a duty limitation of 2422 AF per year, this leaves 1109 AF for the remaining 9 months of the year. The WRD's general consumptive use factor of 40% for quasi municipal uses, is based on the application of a 30% consumptive use factor for the months of October to May, and a 60% consumptive use factor for the months of June through September.

Distributing the 1109 AF evenly over the nine "non-peak" months results in 123.22 AF being used for each of these nine months. Applying the consumptive use factor of 60% to June,

and the 30% rate to the remaining eight months of the year, the total consumptive use is 1157.46 AF, so the consumptive use of the applicant would be 1157.5 AF, not the 968.8 AF required of a “quasi municipal” use by the WRD. This is not in compliance with the rules and will impair NFS’s interest as outlined above.

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**C The PFO is in error and deficient because the proposed use would reduce flows in Fly Creek and the Metolius River, so it is not in compliance with the Oregon Native Fish Conservation Policy as it pertains to Fly Creek for redband trout, and the Metolius River and tributaries for bull trout and redband trout.**

The Oregon Native Fish Conservation Policy (Nov. 2002 with interim criteria added in Sept. 2003) identifies three goals: 1) Prevent the serious depletion of native fish, 2) Maintain & restore naturally produced fish in order to provide substantial ecological, economic and cultural benefits to the citizens of Oregon, 3) Foster & sustain opportunities for fisheries consistent with the conservation of naturally produced fish & responsible use of hatcheries.

According to Brett Hodgson, District Fisheries Biologist for ODFW (copy of email attached): *“Trout Creek and Fly Creek are two streams that harbor small redband populations and have never been stocked. Therefore, from a purity standpoint they are probably the best.”* The Fly Creek redbands are also discussed in the 1998 “Fly Creek, Level 2 Stream Inventory, by the Deschutes National Forest”.

According to Clair Kunkel, retired “Deschutes Watershed District Manager” for ODFW (letter attached) – *“However, WRD is only requiring mitigation in the Deschutes Mainstem General Zone of Impact, and no mitigation on Whychus Creek, Fly Creek, the Metolius River or Indian Ford Creek. This concerns me greatly, not only regarding the impacts of this application but the precedence that is implied for mitigation requirements of future permit applications. These impacts are cumulative, and have great potential to further harm aquatic productivity in the tributaries that are locally affected, as well as the main rivers downstream.”*

According to Brett Hodgson (copy of email attached): *“Bull trout have never been stocked in the Deschutes basin. Therefore native (pure) bull trout are present in the Metolius-Lake Billy Chinook ecosystem (and middle Deschutes up to Big Falls) and in the upper Deschutes Basin in Odell Lake-Trapper Creek and Odell Creek. As you are aware historically they were much more widely distributed in the upper Deschutes, however, habitat degradation and water management led to their extirpation outside of Odell.”*

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**D The PFO is in error and deficient because the proposed use is not in compliance with land use laws**

The current Jefferson County land use laws do not permit destination resorts in the area proposed for a well field.

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- E The PFO is in error and deficient because the proposed use would reduce flows in the Metolius River, so it is not in compliance with the Wild and Scenic Rivers Act (16 USC 1271-1287) -- Public Law 90-542, approved October 2, 1968, (82 Stat. 906); the Oregon Scenic Waterways Act; and the Warm Springs Wild and Scenic Rivers System.**

The Metolius was added to the national system in 1988 in the Omnibus Oregon Wild and Scenic Rivers Act of 1988. It was added to the State Scenic Waterways Program at the same time.

The purpose of the Wild and Scenic River designation as stated in the original Wild and Scenic Rivers Act of 1968 is to ensure that *"certain selected rivers of the Nation, which with their environments, possess outstandingly remarkable scenic, recreation, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."* Both the federal and state programs encourage cooperation between agencies to protect the river and its values.

Special protection is also provided in the WARM SPRINGS TRIBAL CODE; CHAPTER 401; WARM SPRINGS WILD AND SCENIC RIVERS ACT; 401.110 Designation of River Protected Areas. The following rivers and the land adjacent thereto are hereby designated as components of the Warm Springs Wild and Scenic Rivers System: (1) Metolius River. The Metolius River from its headwaters to Lake Billy Chinook. (2) Deschutes River. The Deschutes River from its headwaters to its mouth.

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- F The PFO is in error and deficient because the proposed use would reduce flows in Fly Creek, the Metolius River and tributaries, which will result in significant habitat modification. This constitutes a "take" under the Endangered Species Act, so it is not in compliance with the Endangered Species Act.**

"Take" is defined in the Endangered Species Act (ESA) as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species. Harm may include significant habitat modification where it actually kills or injures a listed species through impairment of essential behavior (e.g., spawning or reproduction).

According to information presented at the ESA Workshop Q & A, April 18, 2008, hosted by the cities and counties of Central Oregon and the Central Oregon Intergovernmental Council; Presenters - Rosemary Furfey from the National Marine Fisheries Service, and Nancy Gilbert from the US Fish and Wildlife Service, *"Historically bull trout occurred in the Deschutes River upstream to Wickiup Reservoir, and in the Crooked River up to Prineville. Bull trout presently occur on the Deschutes River downstream of Big Falls into the Columbia River, in the Metolius, approximately 1/2 mile upstream of Lake Billy Chinook on the Crooked River, in the Pelton project area, Shitake Creek, Warm Springs River, and White Water River. Bull trout are thought to be extirpated upstream of Big Falls on the Deschutes River."*

According to Brett Hodgson, District Fisheries Biologist for ODFW (copy of email attached): *"Bull trout have never been stocked in the Deschutes basin. Therefore native (pure) bull trout are present in the Metolius-Lake Billy Chinook ecosystem (and middle Deschutes up to Big Falls) and in the upper Deschutes Basin in Odell Lake-Trapper Creek and Odell Creek. As you are aware historically they were much more widely distributed in the upper Deschutes, however, habitat degradation and water management led to their extirpation outside of Odell."*

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**G The PFO is in error and deficient because the proposed use would cause further violation of Oregon and federal water quality requirements.**

The Metolius River and some of its tributaries are currently on the Oregon "303d Listed Streams" list, meaning that they are in violation of Oregon water quality standards. In a letter (attached) dated November 2, 2007 to Governor Kulongoski the Oregon Department of Environmental Quality stated, *"Subsurface discharge to shallow soils or land application to the surface of soils may be allowed. Even with substantial removal of nutrients and other constituents from this wastewater prior to discharge, small amounts of nutrients may reach the Metolius River or its tributaries through runoff or seepage to groundwater that flows into the Metolius. The river is sensitive to nutrients, and small increases in nutrients could result in some degradation of water quality, such as decreased dissolved oxygen, increased aquatic plant growth, and changes in pH, among others."*

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**H The PFO, and the attached draft permit, are in error and deficient because the conditions it proposes are inadequate to protect the resource.**

The PFO and draft permit are deficient because they fail to incorporate the applicant's incremental development plan, and also fail to attach the basic conditions required for quasi-municipal users who chose to develop under an incremental plan. The applicant indicated that it will be undertaking incremental mitigation, which is allowed by rule for municipal and quasi-municipal water right applicants. See OAR 690-505-0625. This is not mentioned in the PFO or the draft permit. An incremental mitigation schedule and required conditions specific to incremental development are also not outlined.

The PFO and draft permit are in error and need to be rejected since they do not include a description of the incremental mitigation plan, as well as the standard WRD conditions that normally attach to incremental use permits pursuant to OAR 690-505-0625.

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**I The PFO is in error and is deficient because it does not require documentary evidence that mitigation is legally protected instream before the permit will be issued.**

Any final order must state that mitigation water be legally protected instream before the

permit will be issued. OAR 690-505-0620(1)(b).

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**J The PFO and draft permit are in error and deficient because they do not require the applicant to submit a Water Conservation and Management Plan as required by rule:**

The rules governing quasi-municipal incremental development plans require the applicant to submit a Water Management and Conservation Plan under OAR Chapter 690, Division 86. OAR 690-505-0625(1)(c). The WRD notified, and the applicant acknowledged, that this would be required of this applicant within two years of permit issuance. See Response to notice of mitigation obligation, Municipal or Quasi-Municipal Incremental Development Plan, 8/12/08, in file. The PFO does not reference this obligation, nor does the draft permit incorporate a condition requiring this. Thus the PFO and the draft permit are in error and deficient.

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**K The PFO and draft permit are deficient because the measurement and reporting conditions are inadequate to ensure that the applicant is mitigating for its full consumptive use:**

The applicant has requested a total maximum rate of 8.8 cfs and a total maximum volume of 2422 acre feet. Given these two different limitations on this water right, the measurement and reporting should be refined to require measurement and reporting of both the rate and duty of the amount diverted. In the application PLC notes that their use represents only 90% of the amount diverted. It is the amount diverted that is important for ascertaining compliance with the permit

The proposed quasi-municipal use is to support a destination resort. Given that the water will be used for distinct uses, the applicant should be required to provide measurement and reporting of each use. The applicant should be required to report the rate and duty of water used for irrigation of golf courses so that the WRD can ensure that the applicant is providing adequate mitigation to offset consumptive use, as required by rule. OAR 690-505-0605 consumptive use means the Department's determination of the amount of a ground water appropriation that does not return to surface water flows in the Deschutes Basin due to transpiration, evaporation or movement to another basin.

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**5. Any citation of legal authority supporting the protest, if known**

This protest is filed pursuant to ORS 537.621 and OAR 690-310-160. The legal authorities currently known to NFS as supporting this protest includes the standards and process contained ORS 537; the Groundwater Act of 1995 (ORS 537.505 – 537.795), ORS 537.170, 537.220, 537.332 *et seq.*, 537.460; ORS 536.310, 536.220, 536.050, 496.435, 468B.015, 468B.020; OAR 690-310, 690-33, 690-400, 690-410, OAR 690-09; the Endangered Species Act 16 USCA § 1538; and legal authority cited elsewhere in the protest.

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6. **A \$350 protest fee, as required by ORS 536.050 has been submitted with this protest.**

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## **Conclusion**

As set forth in this protest, the mitigation obligation underestimates the amount that will be consumptively used by the applicant. It also fails to consider the reduction in streamflow and spawning-rearing habitat and the increase in water quality problems for the Metolius River, its tributaries, Indian Ford, Whychus and Fly Creeks. The proposed use will not ensure the preservation of the public welfare, safety and health; does not comply with the federal, Oregon and Tribal wild and scenic rivers systems; is incompatible with Oregon's Native Fish Conservation policies; and violates the Endangered Species Act.

**This application must be denied.**

Dated this 14<sup>th</sup> day of January 2009.

A handwritten signature in black ink, appearing to read "Bill Bakke", followed by a horizontal line extending to the right.

Bill Bakke, Executive Director;

By, Tom Davis, PE - NFS Upper Deschutes River Steward

CERTIFICATE OF SERVICE

I certify that on January 14, 2009 I filed this Protest and a \$350 check to the Water Resources Department at the address set forth below.

Water Rights Section  
Oregon Water Resources Department  
725 Summer Street N.E., Suite A  
Salem, Oregon 97301-1266

I further certify that I served a copy of the this Protest to the applicant below by mailing said copies to the address set forth below, first-class mail, postage pre-paid, in the United States Mail from Redmond, Oregon on January 14, 2009.

Ponderosa Land and Cattle Company, LLC  
Attn: Suzanne Magee  
9310 N.E. Vancouver Mall Drive  
Suite 200  
Vancouver, Washington 98662

DBN Administrative Services LLC  
2260 McGilchrist St. S.E.  
Salem, Oregon 97302

Martha Pagel  
Attorney for Applicant  
Schwabe, Williamson and Wyatt  
The Equitable Center  
530 Center St. N.E.  
Suite 400  
Salem, OR 97301

Signed this 14th day of January, 2009

A handwritten signature in black ink, appearing to read "Bill Bakke", with a long horizontal line extending to the right.

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Bill Bakke, Executive Director;

By, Tom Davis, PE - NFS Upper Deschutes River Steward