



Columbia Seaplane Pilots Association

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December 10, 2009

Oregon State Marine Board
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RE: PROPOSED OAR 250-020-0221 (10)
NOT CORRECT REGULATORY PROCESS

To Members of the Board:

FLOATPLANES HAVE HISTORICALLY USED WALDO LAKE

Floatplanes have historically operated on Waldo Lake for two different purposes:

- a) During flights of interstate commerce as a navigable waterway, especially while flying between the Willamette Valley, over Willamette Pass, and then south along Klamath Lake to California. Waldo Lake is an important stopping point especially when clouds or fog near the summit pass make navigation to and from the Willamette Valley difficult. In addition to weather reasons, Waldo Lake is an important stopping point for purposes of fuel conservation (while awaiting better weather), meals, health of pilot or passengers, and precautionary landings for inspection of aircraft systems or other safety purposes.
- b) For recreational arrival and departure from the lake, similar to that of automobiles, after which the seaplane is parked at the shore.

It is important to note that seaplanes have no need to use Waldo Lake for purposes of touring the lake by motor, fishing by motor, or other recreational type uses similar to that of a motorboat. Seaplanes often carry inflatable boats or canoes, which are then used for recreational purposes with paddles, similar to the inflatable boats or canoes brought to the lake by automobile or truck.

NO DOCUMENTED HISTORY OF SEAPLANE PROBLEMS ON WALDO LAKE

A copy of the Columbia Seaplane Pilots Association appeal to the U.S. Forest Service is attached to this letter submittal. It contains detailed data showing that there is no record in the U.S. Forest Service planning documents, or anywhere else, of a seaplane problem on Waldo Lake. The appeal documents that the U.S. Forest Service staff admitted they had still never seen a seaplane on Waldo Lake. The U.S. Forest Service staff admitted that their goal of prohibiting seaplanes from Waldo Lake was based only on a "social" goal, not a noise or safety goal or standard.

During both the U.S. Forest Service plan comment period and the appeal period, the Columbia

Seaplane Pilots Association requested joint negotiations with the U.S. Forest Service to potentially establish seaplane restricted areas on the lake if necessary, and potential seaplane operational rules if necessary. However, the U.S. Forest Service refused to meet to discuss any potential restricted areas or operational rules.

FOREST SERVICE PLAN TO PROHIBIT SEAPLANES RULED “ARBITRARY, CAPRICIOUS, AND ABUSE OF DISCRETION”

The Columbia Seaplane Pilots Association went to federal court to attempt to allow continued access to Waldo Lake by seaplanes. Judges Hogan and Coffin of the United States Federal District Court (Oregon) in July 2009 ruled that the U.S. Forest Service rule was “arbitrary, capricious, and an abuse of discretion” which resulted in seaplanes being allowed to continue to have access to Waldo Lake.

Since Waldo Lake is navigable, under the Admissions Act and Equal Footing Doctrine, it is a “state water” not a federally-owned waterbody. Thus any rule about seaplane use should be by state regulation, not federal regulation.

THE MARINE BOARD CANNOT PASS A RULE THAT CONTRADICTS A STATUTE

The Oregon State Marine Board is considering a new rule which would prohibit seaplanes from operating on the surface of Waldo Lake:

“(10) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. “Watercraft” includes boats and floatplanes operating on the surface of Waldo Lake.” [proposed OAR 250-020-0221 (10)].

The Oregon Legislature has designated certain waters of the state on which motors are prohibited. ORS 830.180. Waldo Lake is not on the list passed by the Legislature. Waldo Lake, however, is included on the statutory list of waters on which motors are allowed at limited speeds. ORS 830.180.

The rule proposed by the Marine Board would impermissibly amend these statutes. The Marine Board cannot override a legislative directive, or pass a rule that violates a statute passed by the legislature. Any change to these regulations governing the use of motors on Waldo Lake must be authorized by the Oregon Legislature.

STATE AVIATION BOARD IS PROPER REGULATORY AGENCY FOR SEAPLANES

The regulation of seaplanes operating on state waters is governed primarily by the State Aviation Board, not the Oregon State Marine Board. ORS 835.200 through 210 provides a process for such consideration, as listed below:

SEAPLANE REGULATION

835.200 Rules for operation and safety. (1) The State Aviation Board, pursuant to ORS 835.035 and utilizing the definitions contained in ORS 830.005:

(a) Shall adopt rules governing seaplane safety and operations on state waters, as defined in ORS 830.005, that shall be applicable to all seaplanes except when inconsistent with any applicable laws or regulations of an agency of the United States.

(b) May adopt rules governing seaplane safety and operations on waters of this state, as defined in ORS 830.005, that shall be applicable to all seaplanes except when inconsistent with any applicable laws or regulations of an agency of the United States.

(2) The State Aviation Board shall adopt the rules in subsection (1) of this section in consultation with the State Marine Board and the State Parks and Recreation Department.

(3) The rules in subsection (1) of this section shall include identification of zones and bodies of water on which seaplanes may not land, take off or operate.

(4) As used in this section and ORS 835.210, "seaplane" means an aircraft equipped to land on water. [Formerly 835.080; 2005 c.22 §519]

835.205 Seaplane regulation. For purposes of ORS 830.175, 830.180, 830.185 and 830.195, the Oregon Department of Aviation, in cooperation with the State Marine Board, shall regulate boats that are seaplanes as provided in ORS 830.605 and 835.200. [Formerly 835.045; 2003 c.14 §505]

835.210 Application by political subdivision for special regulation. (1) The governing body of a political subdivision of this state may apply to the State Aviation Board for special regulations relating to the operations of seaplanes on waters within the territorial limits of the political subdivision. These regulations may include, but need not be limited to, the establishment of limits on the areas of operations, hours and time of operations, and the prohibition of seaplane landings and takeoffs. Within a reasonable time, the board shall act upon the application in accordance with ORS chapter 183.

(2) For purposes of regulation, no political subdivision of this state may enact or enforce any law or other regulation for purposes of subsection (1) of this section. [Formerly 835.085]

Seaplanes during takeoff and landing are governed by the Federal Aviation Administration and the Oregon Department of Aviation. When on the water and not operating for purposes of taking off or landing, seaplanes revert to the status of vessel and then are governed by the U.S. Coast Guard and the Oregon State Marine Board. Any regulations that affect seaplanes on waters of the state, however, must be made in cooperation and consultation with the State Board of Aviation. ORS 830.110(19).

Thus, regulation of seaplanes when arriving to or departing from Waldo Lake is under the primary jurisdiction of the State Aviation Board. The statute requires that any process to prohibit seaplanes start with the Oregon Department of Aviation and the State Aviation Board.

COLUMBIA SEAPLANE PILOTS ASSOCIATION REQUESTS TO WORK JOINTLY WITH STATE AVIATION BOARD AND OREGON STATE MARINE BOARD ON ACCESS ISSUE

The Columbia Seaplane Pilots Association is an Oregon non-profit organization representing approximately 300 seaplane pilots in the northwest. It has been in continuous existence for 30 years and has the mission of maintaining the safe capability of seaplanes as a transportation mode in Oregon and surrounding waterways.

The Columbia Seaplane Pilots Association requests that the seaplane access issue to Waldo Lake be worked on jointly with the State Aviation Board and the Oregon State Marine Board. Seaplanes commonly operate in wilderness and remote areas all across the United States and Canada, and know how to do so with minimum environmental impact. In fact seaplanes provide access to remote areas with less environmental impact than that required by cars and trucks which require the maintenance of permanent systems of roads for the motor vehicles.

The Columbia Seaplane Pilots Association requests that the Oregon State Marine Board follow its policy of promoting multiple use per OAR 250, Division 19.

250-019-0010

Policy

(1) It is the policy of the State Marine Board to promote multiple use and enjoyment of waters of the state for a variety of boating activities. The Board recognizes and will uphold to the extent practicable the universal right of the public to navigate and use the waters of the state for boating. [It is noted that per 250-019-0020 (5) "Boat" means every description of watercraft, including a seaplane on the water and not in flight.]

Columbia Seaplane Pilots Association requests that a complete and thorough analysis of the ability of Waldo Lake to handle multiple uses be performed. If there are established real conflicts with seaplanes on Waldo Lake, alternatives that would solve those specific problems can then be considered.

CONCLUSION

The Columbia Seaplane Pilots Association opposes the rule as proposed, and requests that existing State of Oregon law as written in ORS 835.200, which requires cooperation between the State Aviation Board and the Oregon State Marine Board, be utilized to determine any prohibitions or operational rules for seaplanes on Waldo Lake.

Respectfully submitted,

Columbia Seaplane Pilots Association



Aron Faegre, President

Attachment: Columbia Seaplane Pilots Association Appeal to USFS, dated June 7, 2007, which provides additional information on the reasons that seaplanes should be permitted to continue as a compatible use with needed access to Waldo Lake.

NOTICE OF APPEAL

DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT
MANAGING RECREATION USE ON WALDO LAKE
ENVIRONMENTAL ASSESSMENT
FOREST PLAN AMENDMENT NO. 47
("Decision Notice")

Lane County
USDA Forest Service
Willamette National Forest
Middle Fork Ranger District

APPELLANTS:

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APPEAL DECIDING OFFICER:

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Appellants' Brief/Submission Date: June 7, 2007

NOTICE OF APPEAL FILED PURSUANT TO 36 C.F.R § 217

Pursuant to 36 C.F.R. § 217, appellants submit this appeal objecting to *Decision Notice and Finding of No Significant Impact, Managing Recreation Use on Waldo Lake Environmental Assessment Forest Plan Amendment No. 47* (“Decision Notice”) issued by Dallas J. Emch, Forest Supervisor of the Willamette National Forest, dated April 16, 2007, and published in the *Register-Guard* newspaper on April 23, 2007. The Deciding Officer made the following errors:

1. He closed the surface of Waldo Lake to floatplanes year-round without providing any significant evidence of a problem, and without providing any scientific data of corroboration that the closure to floatplanes would result in any significant improvement. His arguments about floatplanes are conclusory and should not be allowed to have legal bearing because they are without foundation. The proposed closure has been called a “theological solution in search of a problem” by one interested party, as it is devoid of evidence that floatplanes (or boats for that matter) would adversely impact air and water quality, fish and wildlife or the integrity of Waldo Lake for public use purposes.
2. He did not consult with the Federal Aviation Administration and the United States Coast Guard, which he was obligated to do since floatplanes are primarily regulated by those federal agencies. Those two agencies have primary regulatory authority over floatplanes in order to maintain safety of aviation as a national transportation mode, as well as to maintain the viability of floatplanes as a usable transportation mode for interstate commerce.
3. He did not take into account that the floatplane use provides access for a whole class of individuals who otherwise at times will have no other

transportation mode to get to and experience Waldo Lake. Thus, his plan discriminates against people with disabilities and against people who are of a very old age and can only get to Waldo Lake by use of a floatplane.

4. He did not take into account that the floatplane use (though very important for interstate commerce and for transport of people with disabilities or of old age) is extremely small and should be considered a *de minimus* impact to the Management Plan. Furthermore, since this small use is already heavily regulated and governed by the FAA and the United States Coast Guard, it may be concluded that it is inappropriate to create more regulation under the Management Plan.
5. He violated the River and Harbor Act of 1899, The Equal Footing Doctrine, United States Coast Guard rules, Federal Aviation Administration rules, and the Public Trust Doctrine since floatplanes use Waldo Lake as a stopping point while traveling cross country under the rules of interstate commerce and have done so continuously for over 75 years (since the invention of floatplanes this route has been used to get between northern and southern portions of the western United States). Waldo Lake is owned by the State of Oregon, and thus any consideration of floatplane regulation should originate with the State of Oregon, not the Forest Service.

He made those five errors when he prohibited floatplanes from using the surface of Waldo Lake. He should have selected Alternative 1 (No new restrictions which would retain floatplane access) or Alternative 2 (Which would retain floatplane access).

I. FIRST ASSIGNMENT OF ERROR

THE CONSIDERATION OF FLOATPLANES IS CONCLUSORY AND WITHOUT EVIDENCE OF A PROBLEM. THE PROPOSED SOLUTION DOES NOT INCLUDE ANY EVIDENCE THAT IT WILL RESULT IN SIGNIFICANT IMPROVEMENT

1. Amending the Forest Plan to close the surface of Waldo Lake to floatplanes year-round requires evidence of a significant problem, and scientific analysis that the amendment would result in a significant improvement. The discussion and arguments about floatplanes in the Forest Plan are conclusory and should not be allowed to have legal bearing.

1.1 Protect Waldo Lake from the damaging effects of human use.

The decision identifies the protection of Waldo Lake from the damaging effects of human use as the first “consistent theme” shared by people in their thoughts about Waldo Lake. These would relate to “water quality” and the “surrounding forest landscape.” No discussion nor evidence is provided that would relate to negative impact by floatplanes on these items.

1.2 Keep Waldo Lake Pristine

The decision identifies the second “consistent theme” as one of keeping Waldo Lake “pristine. This theme is described as “conceptual” and focused on “visitor experiences” and how human activities “can affect these experiences.”

The document then makes the giant leap of imagination that anything that uses an “internal combustion engine” on the lake surface is contrary to the goal of keeping Waldo Lake “pristine”. Furthermore, the elimination of internal combustion engines from the surface of the lake is the only factor presented to evaluate the concept of “pristine” as it relates to the experience of the surface of the lake. Other factors, such as “overhead aircraft and trains” and “human voices, dogs, and loud music” (Environmental Assessment, page 27) are all considered acceptable within the goal of “pristine.”

The American Heritage Dictionary defines “pristine” as “remaining in a pure state; uncorrupted by civilization.” This Amendment has incorrectly chosen the internal combustion engine as the sole measure of whether a lake can be “pristine” or not, without any cultural, scientific, or other reasonable basis of argument. The Forest Supervisor appears to have simply invented and adopted his own personal opinion for what that term “pristine” means, to apparently serve his own personal agenda for how he wants Waldo Lake to be perceived by visitors. This is an unacceptable procedure for the management of public lands in that it runs contrary to the public use and recreational infrastructure already established at Waldo Lake, and because it discriminates against classes of users, like floatplanes, without reason.

The use of a cultural analysis to examine the idea of keeping Waldo Lake “pristine” would have involved a valuable public discussion of what time period of “pristine” is to be maintained. This kind of analysis could have chosen the earliest days of use, when the area was inhabited only by native peoples. However native use appears to have been minimal or non-existent within historic times. The lake had no fish or other resources of interest to Neolithic peoples. It was not in a place where it would have provided an effective transportation route for them and there was nothing to transport in bulk over it. No significant sites directly tied to the lake are indicated. Epidemics in the 1500s to 1700s reduced native populations so severely that any oral history of use in the pre-contact period has been lost. Choosing these earliest days would result in no use boats of any kind on the lake.

During a later time period, the area would have been used by sportsmen and trappers who used transportable paddle boats and rafts. The use of sails of some kind on the rafts was likely but not documented. This rapidly gave way to mechanize use to transport materials to build a dam and head gate for an

irrigation project. Steam powered vessels were used. Motors were introduced after that to support government facilities around the lake by transporting passengers, equipment and mail.

At a later period, extensive paddle boat use and outboard motor use came with the construction of roads that reached the lake from the West which allowed the practical transportation of these vessels and sailboats for casual weekend recreational use. Probably during this period, floatplanes, which have operated on the west coast as early as 1918, would have made occasional use of the lake.

Finally, modern design, trailerable sail boats and electric motor boats would clearly have come as the latest of “civilization” impact as they are more modern recreational uses that have evolved as the area has become more generally of use as a weekend place for recreation.

However, no public consideration of the cultural basis for setting the standard for “pristine” was performed as part of the Management Plan so there is no basis for setting a standard to work toward. Thus, there is no cultural basis for preventing floatplanes from using the surface of Waldo Lake.

The use of a scientific analysis to determine the goal of keeping Waldo Lake “pristine” would have focused on the environmental impacts of various human activities. This would have required the creation of surveys of visual impacts of different human activities (cars, RV’s, TV’s, radios, canoes, motorboats, sailboats, airplanes, motorcycles, snowmobiles, etc.), and the creation of noise, pollution, and other environmental impact reports showing the existing background levels and expected future impact levels from these uses based on various alternatives. However, no scientific data was created and therefore none is presented in the Environmental Assessment nor is any presented in the Decision.

An example of obvious, unfounded bias against floatplanes, is found in Environmental Assessment Table 4 “Geographical Extents of Disturbance from Motorized Devices on Waldo Lake Shoreline Sites.” (page 29). First, there is no referenced data indicating that the table is anything more than someone’s invented guess about impacts. Second, it identifies “floatplanes and helicopters” as the only devices that have visual impact and auditory extent on the “entire lake surface”. Floatplane pilots can land with little or no power, just gliding into their landing spot. The extend of take-off noise level depends on the type of seaplane, it’s horsepower and propeller RPM, and whether it takes off from behind a peninsula and out in the open. The period of duration of the noise however is very limited and for floatplanes it is noise traditionally associated with the “wilderness” and accepted as part of it by most outdoor people. It is in non-wilderness setting that this very brief noise is not expected.

The Forest Service’s own FOIA response (see Section 1.4 below) provided comments of people being surprised to find floatplanes on the lake, which contradicts the table which indicates that everyone at the lake will be aware of a floatplane. A responsible, non-biased analysis would have found that floatplanes could easily use water surface at one end of the lake and be completely unknown at other parts of the lake both visually and auditorially. The lake obviously is not a perfect circle, with available visibility to all points, so the allegation of the table concerning floatplanes always being visible to all parts of the lake are *a priori* without basis. Likewise, the claim that chainsaws and generators are only visible to 500 feet and can only be heard up to 1 mile, is clearly defined by common experience and commonly available noise data from professional noise consultants.

There is no rational or studied basis – using either cultural or environmental criteria – for the decision to close Waldo Lake to floatplanes. For that reason, this decision must be found in error.

1.3 Adjacency of Floatplanes may Enhance Human Perception of a place being “Pristine.”

Floatplanes are commonly known and used in many parts of the United States and Canada as the prime transportation mode for travelling to and experiencing “pristine” remote wilderness areas. Thus, if a detailed analysis of public perception were performed, it is even possible that it could result in a finding that the occasional presence of floatplanes on Waldo Lake enhances most visitors’ sense that this is truly a “pristine” area – off the beaten track of civilization. In that case, the presence of floatplanes could add to the sense of the Management Plan that the visitor is seeing an earlier era.

1.4 Lack of any significant evidence of a problem with Floatplanes and lack of even any comments about floatplanes during the last three years.

Columbia Seaplane Pilots Association placed a Freedom of Information Act request to Neal Forrester, FOIA Officer Willamette National Forest Supervisors Office requesting specific information related to the *Environmental Assessment (EA) for Management of Recreation Use Around Waldo Lake*. Specifically requested was all information developed and collected by the USDA and Forest Service for the purpose of developing draft plans, and related to utilization of Waldo Lake, by seaplanes and motorized vessels such as personal watercraft, jet boats, and conventional motorboats. Information requested included assessments of environmental, public health and safety, and noise impacts of these craft, as well as studies of frequency of use by these

various craft. This was to include any records of seaplane noise or safety complaints filed by the public or your staff.

The Freedom of Information Act response has confirmed that the Forest Service has neither commissioned nor performed any scientific, professional environmental, or other assessments of actual or potential floatplane impacts to Waldo Lake. There are apparently no studies of floatplane noise or safety of any kind which would have been needed for the Forest Service to form a basis as to why floatplanes should be prohibited from Waldo Lake. There were apparently no discussions held with the FAA, nor with the US Coast Guard, nor with the Oregon Department of Aviation, nor with the Oregon State Marine Board as to actual or potential safety or noise considerations concerning floatplanes. Those are the four public agencies which primarily regulate and govern floatplane operations and which would have been able to provide the Forest Service with factual data concerning safety, noise, and frequency of use.

The only information provided from the Freedom of Information Act request are eight comments received by the Forest Service from the public during the years 1998 through 2004. This represents an average of 1.25 comments per year. What was the frequency of complaints about noise from the developed campgrounds? Common sense is that it is much, much larger. Apparently there have been no complaints or comments about floatplanes of any kind during the past three years.

Four of the responses simply questioned whether floatplanes should be allowed, expressed surprise, or indicated that they are bothered by the presence of floatplanes.] These should be classed as personal preference requests by individuals. No reason was given for any of the opinions. In summary these were:

- Response form of person asking whether floatplane should be landing on

the lake? (1998)

- A letter from a person who was “astonished” by the landing of a floatplane (2004).
- A person who encountered an anchored floatplane and objects to it being there (2001).
- A person “bothered” by seeing a floatplane landing and its occupants camping at the lake (2000).

The other four responses include some reasons for requesting that floatplanes be prohibited as summarized below:

- A personal email requesting that floatplanes be prohibited because they “create a danger when taking off and landing” and “they disrupt the tranquility” (2004).
- An environmental organization suggests “floatplanes create an even greater disturbance to Waldo Lake than motor boats” and “they produce substantial amounts of noise pollution” and “pose serious safety risks to everybody on the lake” and requests that floatplanes be prohibited from the lake (2004).
- A person who says “prohibit floatplanes on the lake – Yes it is a safety issue. How can he see kayakers?” (2001)¹
- A person who wants floatplanes prohibited because of “noise” and “safety” of kayakers (2001?).

The two issues raised by these four individuals during 2001 and 2004 were “safety” and “noise”.

¹ Floatplane pilots can only receive their license after extensive training in how to see and avoid objects much smaller than a kayak, including avoiding birds, deadheads, mooring buoys, and so forth. Then the pilots are required every two years to take recurrent training in just this kind of issue, so that their skills remain high. It is also important to realize that a floatplane pilot has a good view of the area he is landing in, and unlike land planes doesn’t have to land on a specific strip of asphalt. The pilot has a birds-eye view and can choose a water area that is well away from other boats and obstructions, if they are present.

As to Safety: No evidence is presented that anyone has ever actually observed a safety problem on Waldo Lake. The people commenting appear to simply be fearful that there might be a safety problem. If the Forest Service has a similar concern they are obligated to study the history of floatplane safety and present evidence that there is a safety concern. Our organization, the Columbia Seaplane Pilots Association, specializes in tracking floatplane safety issues and we are not aware of any safety issues on Waldo Lake. If the Forest Service has specific concerns, we request that they consult with the FAA or otherwise gain expert testimony as to safety of floatplanes on Waldo Lake. Floatplane pilots are extensively trained in safety procedures of sharing water bodies with other vessels, and this training is recurrent and ongoing. Our Freedom of Information Act request provided no evidence that there are floatplane safety problems, so we request that that issue be dismissed until and unless the Forest Service gains specific, credible, scientifically prepared evidence to the contrary.

As to Noise: All motorized vehicles and equipment create noise. If the Forest Service desires to set a standard for noise at Waldo Lake, there needs to be a complete acoustic analysis of the area, including measurement of car, truck, motorcycle, aircraft, chainsaw, snowmobile, four-wheeler, radio music, dog barking, guns, and all other non-natural sounds in the area. Then there needs to be a mapping of where the sounds originate and where they cause impact – whether it is in the camp areas, on the trails, or on the lake. From our Freedom of Information Act request, we find that there have apparently been no such acoustic analyses prepared. Finally, we would point out that all noise impact studies need to include an evaluation in the context of their duration and frequency of occurrence. Even the FAA and US Park Service’s work on aircraft noise at the Grand Canyon has acknowledged that duration of noise is a key aspect of

determining aircraft noise impact. One cannot expect or demand 100% quiet. Without this kind of an acoustic study, a complaint about hearing one aircraft landing should not be given sufficient significance to prohibit a whole class of transportation. It is important to recognize that airplanes will be regularly visible above the lake, and heard, because there is no prohibition for flying over the lake. There is only a proposed prohibition against touching the surface of the lake.

Finally, the Forest Service response to the Freedom of Information Act request is puzzling in that Columbia Seaplane Pilots Association is aware that there were some floatplane pilots who sent in letters with reasons for keeping Waldo Lake open to floatplanes. Why were none of those letters in favor of floatplanes provided as part of the record presented? This indicates some kind of bias whereby positive comments are not considered of significance, and possibly intentionally not solicited throughout the entire review process.

1.4 Floatplanes could operate with Paddles while on surface of Waldo Lake.

Under Federal Aviation Administration rules, a floatplane is governed by aviation regulations while the aircraft is operating “for the purpose of flight.” After landing and before takeoff – per both FAA and Oregon law – floatplanes function as a marine vessel (boat). Under current Oregon Marine Board rules for Waldo Lake a floatplane would therefore normally taxi at idle power at those times in order to comply with the 10 mph speed limit. At idle power a floatplane makes very little noise, about the same as an idling motorcycle.

Should the Forest Service proceed with the standard of prohibiting the use of internal combustion engines on the water surface, floatplanes could in fact comply with this criterion by simply turning off the engine and the pilot using

paddles during the period the floatplane is considered a boat. At times this kind of solution to compliance could create a safety hazard – for example if there were significant wind causing use of paddles to be insufficient for safe propulsion of the floatplane. However, the point is, if the Forest Service determines this to be an appropriate criterion, floatplanes can comply with the “no internal combustion” criterion while operating as a boat.

Under the current proposed amendment, floatplanes would apparently be perfectly legal to fly low over the lake as much as they desire, as long as they never touch the surface of the water. Land planes likewise are permitted to fly over at whatever altitude they are legally permitted. Finally, there are apparently no prohibitions against ski-planes or wheel-planes landing on the lake ice during the winter, actions which undoubtedly have occurred year-to-year on occasion. There also appears to be no prohibition against helicopters, nor against wheel planes landing along the shore edge (as long as they don't touch the surface of the water), both of which are operations which have very likely occurred at the lake historically, including firefighting aircraft.

The Forest Service has not examined the aircraft issue in a comprehensive manner. It is unclear why the Forest Service sometimes refers in the document to helicopters, but did not prohibit them from landing on the surface of the lake (many helicopters have floats and can do this). Likewise, the Forest Service shows lack of understanding of the whole issue in choosing to use the term “floatplane”. There are also “amphibious” aircraft that can land on either water or earth, and there are “flying boats” which have no floats and land on their hull, and there is the term “seaplanes” which most often is used to refer to all kinds of aircraft that land on water.

Rather than consulting with the federal agency that does have expertise, it attempted to create a regulation that is not based on sound science, and does not

create a solution to an environmental problem, and may not actually govern the presence of floatplanes that opt to use paddles once they have completed the portion of their flight which is “for purpose of flight.”

1.5 Abatement Options not Considered

Since Waldo Lake is approximately 12,000 feet across at its middle, it is possible for floatplanes to land in the middle, and remain approximately 6,000 feet from shore. Floatplane pilot Jamie Greene’s comment letter to the Forest Service said that in fact he does often land and take-off from the middle of the lake to minimize noise impact to campers. Normal FAA rules would permit overflight of the lake by all aircraft at 500 feet above people on the lake and on the shore, which clearly would have much higher noise impact since it would be 1/12th the distance away. The Environmental Assessment intentionally excluded “disturbances from overhead aircraft” (p.27) “because they are far enough away to be considered part of the ‘distant sights and sounds of human activity’.” (p. 27). If overhead aircraft are “far enough away” then clearly landing in the middle of the lake, at 6,000 feet distance from shore is also “far enough away.”

Another option which the Forest Service did not consider, is to designate several areas for floatplane access. The Environmental Assessment acknowledged that portions of the lake near Shadow Bay “are almost guaranteed of seeing and/or hearing vehicle traffic” (page 30). The Forest Service could have worked cooperatively with the floatplane community and the FAA to designate particular areas of the lake for access. This would have initiated a process consistent with President George Bush’s Executive Order for Facilitation of Cooperative Conservation issued on August 26, 2004. This Order directs the Department of Interior, and other federal agencies, to promote “cooperative conservation” while implementing laws such as the Management Plan for Waldo

Lake.

The point is that the Forest Service did not consult with the FAA nor did they consult with the floatplane community. If they had, they would likely have found voluntary methods for achieving management goals that would be more successful to their intentions than the rule proposed.

To compound the problem, the Forest Service did not advertise nationally to gain floatplane pilot input. Since the Forest Service only advertised in a Eugene, Oregon newspaper, and made no attempt at outreach (though clearly it had a goal of eliminating floatplanes from a national perspective) the Columbia Seaplane Pilots Association of Portland did not even know about the proposal until near the closure time for comments. The Association asked for an extension of comment period to allow pilots from around the country to comment, but were denied a time extension to gain national input.

The Forest Service did not sample the community of potential users and stakeholders before forming the alternatives. They did not consult the floatplane operators who actually used the lake during the study period. They unscientifically sampled the opinions of the users of disbursed camp sites. They undoubtedly knew, or at least should have known, that their work did not represent the community of actual or potential users. Once the alternatives were formulated they sought comment through the Register Guard. While that would be acceptable in cases involving only local users, the Forest Service should have at least used a publication with a larger circulation, such as the Oregonian for this action that involved floatplanes coming from a larger region and publications specific to actual or potential user groups.

1.5 There is not a Floatplane problem

The above discussion establishes that there is no problem identified with floatplane use of Waldo Lake. The proposal to prohibit

floatplanes from the “surface” of the lake is not shown to have any positive result. There has been no consideration of cultural values to be preserved. There has been no creation of scientific environmental impact analysis. Rather, the discussion is circular and conclusory in nature, and should be found to be in error. The Forest Service is supposed to take a “hard look” at the alternatives without a predisposed result under NEPA. They did not do that. They started with a conclusion based upon an arbitrary and capricious set of personal preferences and then tried to martial a case to support it. The case is weak and the process is wrong.

II. SECOND ASSIGNMENT OF ERROR

THE PROPOSED AMENDMENT DID NOT INCLUDE CONSULTATION WITH THE FEDERAL AVIATION ADMINISTRATION AND THE UNITED STATES COAST GUARD.

1. The Forest Service did not consult with the Federal Aviation Administration and the United States Coast Guard, which it was obligated to do since floatplanes are primarily regulated by those federal agencies. Those two agencies have primary regulatory authority over floatplanes in order to maintain safety of aviation as a national transportation mode, as well as to maintain the viability of floatplanes as a usable transportation mode for interstate commerce.

1.1 Floatplane Regulation and Governance

The Federal Aviation Administration and the U.S. Coast Guard are the primary regulators of floatplane activity throughout the United States. The Forest Service must leave the primary analysis of safety, environmental impact, and necessary regulation of floatplanes to those agencies, just as the Forest Service would not want the FAA or the US Coast Guard to attempt to regulate the Forest Service’s forestry activities. For example, allowable floatplane noise is regulated by federal FAA rules governing manufacture of floatplanes, which is a Commerce clause problem. In addition, the FAA can recommend noise

abatement procedures that reduce impact, if it is found to exist, and can assist in developing a least restrictive alternative. The rationale, approach, purposes, and national intentions concerning aviation noise, can best be understood through direct consultation with the FAA for these issues.

1.2 Floatplanes as a basic National Transportation Mode

Aviation plays a significant role in the nation's economy and in its transportation network. Every community, whether large or small, needs access to the airways. The floatplane provides a service that is impossible with any other kind of craft. Where water landing areas are available, floatplanes combine the speed of the airplane with the accessibility of boats. They provide a service which has earned an undisputed place in air transportation. Most navigable lakes, rivers, and harbors offer natural floatplane landing and takeoff areas. Floatplane docking facilities can vary from simple use of a beach, to use of a mooring buoy or a dock.

Floatplanes serve a unique transportation niche for commercial interests throughout the country. Although floatplanes are a relatively small segment of general aviation, they perform a vital role in providing transportation to significant areas of North America not served by other forms of transportation (such as motor vehicles, boats, and land based aircraft). In some states, such as Alaska, Minnesota, and Maine (and Canadian Provinces such as British Columbia, Quebec, Ontario, and Manitoba), floatplanes are an essential form of basic transportation for people, goods, and services within the state. In other states, such as Washington, Oregon, California, Idaho, Montana, Michigan, and Florida, floatplanes are an essential form of travel, but for a smaller portion of the population due to the greater availability of roads throughout the state.

However, all of these floatplanes, in all of these states (like wheel aircraft), also regularly travel between states for the purpose of transporting

people and goods. The ability of floatplanes to transit long distances requires that landings on rivers and lakes along the way be possible, if just for gaining the basic necessities of fuel (which may be simply transfer), weather avoidance, rest, and meals (which may be prepared from food carried in the plane), along with other precautionary and emergency needs. Thus, there are several major existing flyways for floatplanes. On the west coast there is a major flyway connecting California, Oregon, Washington, British Columbia, and Alaska. Similarly, there are routes connecting Florida with Maine, and Louisiana with Minnesota. Usually these flyways follow major navigable waterways such as the Sacramento River, the Willamette River, the Columbia River, Puget Sound, the Mississippi River, the Missouri River, and so forth.

When traveling north-south in the western states, there are not many options for lakes to land in. As shown in the attached graphics, the floatplane route through southern Oregon is very limited. Low clouds and weather often force floatplane pilots to fly up the Willamette River Valley along Highway 58, with the need to get over the pass and onto the east side of the Cascade Range where weather is usually dryer providing safer flight. Waldo Lake is an essential element along this flyway because it is the last lake along that route, and if the ceiling at the pass is not sufficient, and if weather to the west has closed in, then Waldo Lake is a most important stopping point to wait out better weather. As such, Waldo Lake is at times a very important safe harbor for floatplanes transiting between north and south along the western states. Floatplanes regularly use this route and the availability of Waldo Lake for regular use by floatplanes is important to be maintained.

The graphics on the following page were created by the Seaplane Pilots Association, to show existing floatplane transit routes around the United States, for different distances between regular floatplane services. The dots on the

maps indicate locations where fuel is commonly available, and the lines indicate potential transit between these locations, up to a maximum leg distance. The map below shows routes with maximum leg distances of 300 and 500 miles.

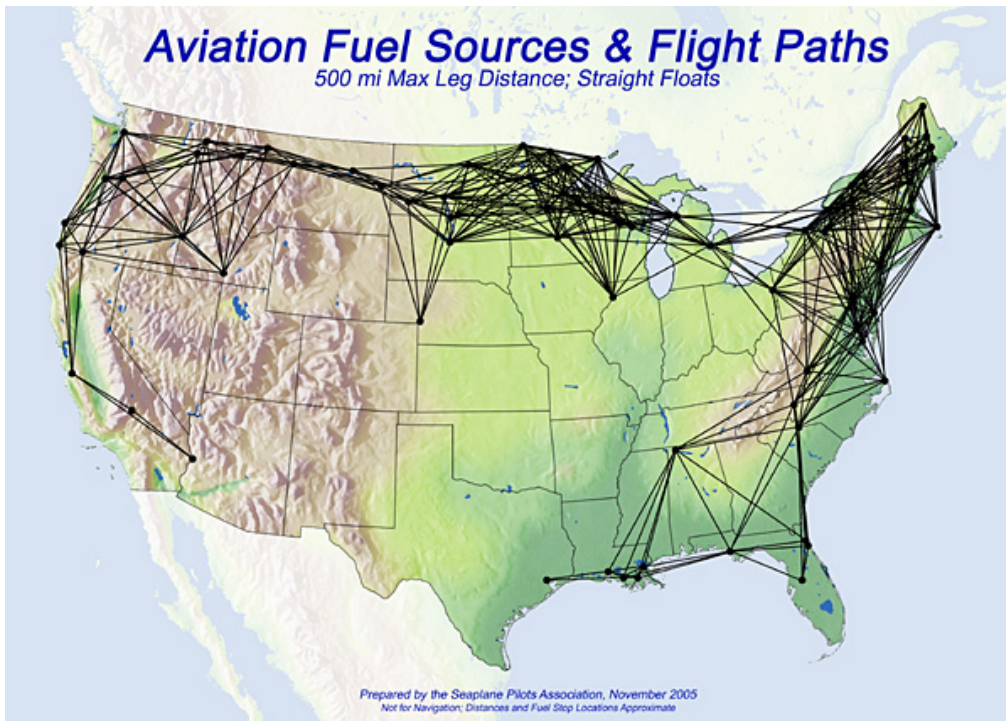
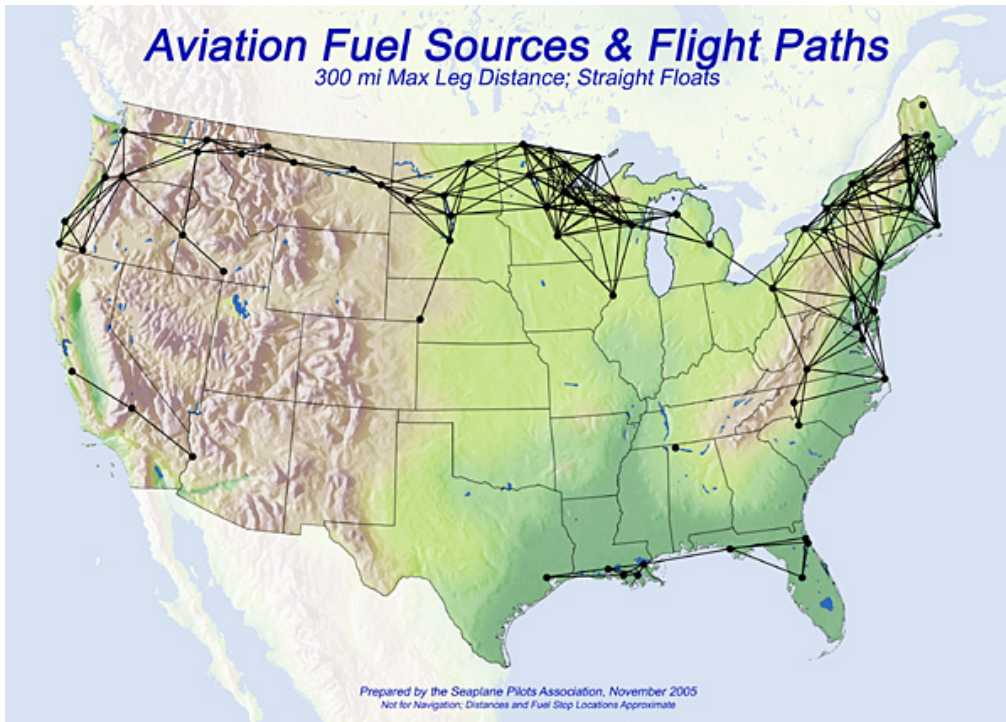
These maps relate specifically to fuel availability. In fact, trip leg distance can be reduced due to the need to stop for other reasons. These could include landings and takeoffs for transfer of fuel² (many smaller aircraft must carry additional fuel), and precautionary³ or forced⁴ landings and takeoffs to avoid inclement weather, to resolve equipment malfunction, to await return of daylight⁵, and to address the illness of the pilot or passengers.

² Aviation fuel is available at most land airports, but is only occasionally available along waterways that are frequented by seaplanes. Some seaplane engines are able to use boat gas, which provides those aircraft with many more fueling locations along waterways. In any case, it is common for seaplanes transiting long distances to carry cans of fuel with them in the aircraft. The FAA does not allow this fuel in the aircraft to be transferred to the main tanks by any mechanical means, as this would violate the FAA certificate for the aircraft. Thus, to transfer fuel from the cans to the tanks, the seaplane must land on a waterway and then physically pour the fuel into the main tanks. Small seaplanes such as Taylorcrafts and Champions carry as little as 12 gallons of fuel, and have a flight distance as little as 150 miles, when allowing for FAA required reserves.

³ The FAA has responsibility for setting standards for safety of flight. The FAA's *Airplane Flying Handbook*, publication FAA-H-8083-3A, emphasizes the importance of pilots making use of a "precautionary landings" when a potential problem arises, rather than waiting until the potential problem becomes so great that the pilot is forced to undertake a "forced landing", which by its nature is much more dangerous. The FAA document states: "A precautionary landing, generally, is less hazardous than a forced landing because the pilot has more time for terrain selection and the planning of the approach. In addition, the pilot can use power to compensate for errors in judgment or technique. The pilot should be aware that too many situations calling for a precautionary landing are allowed to develop into immediate forced landings, when the pilot uses wishful thinking instead of reason, especially when dealing with a self-inflicted predicament." page 16-1.

⁴ A forced landing is defined by the FAA as "An immediate landing, on or off airport, necessitated by the inability to continue further flight. A typical example of which is an airplane forced down by engine failure." *Airplane Flying Handbook*, page 16-1.

⁵ Seaplanes normally cannot land safely at night, so they must stop travel at sunset.



Thus, we must request that the availability of Waldo Lake as a navigable waterway for commerce purposes be protected.

Floatplanes, though a relatively minor user of the lake, do utilize

this essential function of the lake as part of a nationally important transportation pathway. We must respectfully request that the Forest Service accommodate this important use of Waldo Lake in the Management Plan, as this use is protected by federal law, as described in the sections below.

1.3 Federal Preemptive Regulation of Floatplanes

It is important to point out that federal jurisdictions (other than the Forest Service), and their preemptive regulation, control the commercial/transportation aspects, beyond the equal access considerations for recreational purposes. As such, two primary federal agencies with direct regulatory authority must be consulted; the Federal Aviation Administration, which has fundamental authority over all aviation in the US; and the US Coast Guard with authority once a floatplane lands on the water. It is our understanding that neither of these agencies has been consulted as to floatplane access to this point in the creation of the draft Management Plan. The FAA and US Coast Guard regulations should be considered and referenced in the Forest Service's analysis concerning prohibiting floatplanes, because these agencies have primary federal responsibility for floatplanes as a transportation mode. Failure to consult these agencies with primary regulatory authority over these activities renders the Forest Service's analysis inadequate for rulemaking purposes.

We also request that the US Department of Commerce be consulted if the Forest Service continues to consider the potential closing down of Waldo Lake for interstate commerce use by floatplanes. The Commerce Clause in the US Constitution, Section 9 states:

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

The federal commerce clause has been construed to be a limitation on Congress's power to enact laws, and to prohibit state or local laws that

discriminate against interstate commerce or impose undue burdens on it. This includes prohibition of laws that prevent interstate travel and navigation. The courts have also used it to strike down some local laws on the grounds that they constituted “simple economic protectionism.”

1.4 Floatplane Pilots and their Aircraft are Licensed by the FAA and are trained to maintain safe operations with Boats

Floatplanes pilots are only allowed to operate a floatplane following the passing of an extensive written and practical exam in a floatplane by an FAA designated examiner. The pilot certificate requires recurrent training and testing every two years. The aircraft are also FAA controlled, and must receive an annual inspection which includes examination of the engine components, structural components, radios, and every other significant part of the aircraft, to ensure that it is airworthy to FAA standards.

This oversight by the FAA ensures that floatplanes can operate safely with boats, because the pilots of the floatplanes are trained in how to avoid the boats. A recent analysis⁶ of NTSB records for the 10 year period 1993 to 2002 found that there were only nine incidents between floatplanes and boats – for the entire 50 states. Six of these were floatplane accidents from getting into extreme boat wake, and the boat was not affected in any way. Another involved a floatplane that crashed while trying to avoid a PWC that was chasing the floatplane. Because there is already a 10 mph speed limit for boats on Waldo Lake, floatplane access to Waldo Lake would not have even those risks. Floatplane pilots train and practice for safe operations, and the NTSB records prove that this effort has been very successful.

⁶ *A 10-Year Record of Seaplane-Boat Incidents*, Columbia Seaplane Pilots Association, Bulletin, April 2003.

1.5 Floatplanes have stringent federal Maintenance Standards

Unlike boats and cars, floatplanes require an annual maintenance checkup of all aspects of the aircraft. This annual inspection can only be done under the authority of an FAA certified mechanic with an Airframe & Powerplant (A&P) certificate and Inspection Authorization (IA). This point is made to underscore that for aircraft to be airworthy and flyable, they must be in excellent mechanical condition. This is why emergency landings are not common.

1.6 Coast Guard Rules for Navigation – Protects Use of the Lake for Floatplane Transportation

The U.S. Coast Guard was not consulted. As the primary agency with regulatory authority over floatplane operation while on the surface of a navigable stream, consultation is required.

Per the Interagency Wild and Scenic Rivers Coordinating Council's report on the roles that key federal agencies should take in implementing the Wild and Scenic Rivers Act, the US Coast Guard is a key agency that should be involved:

The United States Coast Guard (USCG) has broad, multifaceted jurisdictional authority for management of activities over all waters subject to jurisdiction of the United States. Navigable waters for USCG purposes are based on use or susceptibility for use as water traffic highways for substantial interstate or foreign commerce. USCG regulations may affect WSRs [Wild and Scenic Rivers] include the Inland Navigation Rules...⁷

Authorities/Roles: (14 USC 2) "The USCG shall enforce or assist in the enforcement of all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States." ... Inland Navigation Rules: The Inland Navigation Rules Govern the conduct of all vessels upon the inland waters of the United States.

The U.S. Coast Guard has federal preemption over navigable

⁷ "Implementing the Wild and Scenic Rivers Act: Authorities and Roles of Key Federal Agencies", Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council, US Forest Service, Portland, Oregon, January 1999.

waterways, and provides the rules for operation on these waters. The U.S. Coast Guard considers floatplanes to be vessels when they are on the water. While operating on the water they must follow the standard navigation rules covering all vessels, plus a specific rule provided for floatplanes:

"Except where Rules 9 [Narrow Channels], 10 [Traffic Separation Schemes], and 13 [Overtaking] otherwise require: ... (d) A seaplane on the water shall, in general, keep well clear of all vessels and avoid impeding their navigation. In circumstances, however, where risk of collision exists, she shall comply with the Rules of this Part." -- USCG Rule 18 (d).

During landing and takeoff while at speeds of 30 to 50 knots, most floatplanes have considerable maneuverability. At this speed the floatplane is still hydroplaning "on the step" and has the ability to stay well clear of all vessels. However, once a floatplane has slowed and is in displaced taxi mode, it is highly susceptible to the wind and current, and has a typical maximum speed of 3 to 5 knots.

Thus, a floatplane can be expected to stay well clear of other vessels while landing and taking off, but while taxiing to a dock or shore, it must revert to the same fundamental rules that all vessels use. The floatplane must follow the normal U.S. Coast Guard Steering and Sailing Rules of Part B to: "Look Out", use a "Safe Speed", determine if there is a "Risk of Collision", take "Action to Avoid Collision", and all the more detailed rules for "Overtaking", "Head-on", "Crossing", "Narrow Channel", "Traffic Separation", and "Following Current right-of-way over Upbound Vessel" situation requirements.

The Federal Aviation Administration also has rules that floatplanes must follow while on the water. These require similar piloting actions to those of the U.S. Coast Guard Rules, although they are not as comprehensive and do not cover as many conditions as the U.S. Coast Guard Rules. For reference we quote them here:

"Right-of-way rules: Water operations.

a. General. Each person operating an aircraft on the water shall, insofar as possible, keep clear of all vessels and avoid impeding their navigation, and shall give way to any vessel or other aircraft that is given the right of way by any rule of this section.

B. Crossing. When aircraft, or an aircraft and a vessel, are on crossing courses, the aircraft or vessel to the other's right has the right-of-way.

C. Approaching head-on. When aircraft, or an aircraft and a vessel, are approaching head-on, or nearly so, each shall alter its course to the right to keep well clear.

D. Overtaking. Each aircraft or vessel that is being overtaken has the right-of-way, and the one overtaking shall alter course to keep well clear.

E. Special circumstances. When aircraft, or an aircraft and a vessel, approach so as to involve risk of collision, each aircraft or vessel shall proceed with careful regard to existing circumstances, including the limitations of the respective craft." Federal Aviation Regulations 91.115

These FAA rules are generally consistent with the USCG rules.

However, the last paragraph of the FAA rules perhaps more directly identifies what is perhaps the most important aspect for maintaining safety between floatplanes and other vessels. The "limitations of the respective craft" recognizes that "existing circumstances" — for example wind, or wake, or waves — may have great impact on what maneuvers an airplane or vessel can accomplish. In this regard US Coast Guard Rule 7a carries a similar general force:

"7a. Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist." USCG Rule 7a.

The floatplane pilot by necessity has the sole responsibility to determine the location for landing and takeoff and must remain well clear of other vessels. But during taxiing the floatplane usually has much less maneuverability than other power boats, and so must rely to some extent on the other vessel's captain to recognize this.

Since floatplanes are considered vessels while on the water, and as such are governed by normal and special rules of the U.S. Coast Guard, any change to existing use of Waldo Lake by floatplanes must be done in consultation with the U.S. Coast Guard. To date, it appears that no consultation has occurred on this subject.

III. THIRD ASSIGNMENT OF ERROR

THE PROPOSED AMENDMENT TO THE FOREST PLAN DISCRIMINATES AGAINST PEOPLE WITH DISABILITIES AND OF VERY OLD AGE

1. **The Forest Service did not take into account that the floatplane use provides access for a whole class of individuals who otherwise at times will have no other transportation mode of get to and experience Waldo Lake. Thus, his plan discriminates against people with disabilities and against people who are of a very old age and can only get to Waldo Lake by use of a floatplane.**

Floatplanes provide one of the few transportation modes that can easily transport persons with disabilities and elderly people who have difficulty walking or need constant medical attention, from urban areas directly to remote wilderness areas. In this manner floatplanes provide a unique opportunity for disabled and elderly persons to retain the ability to experience wilderness areas.

The Forest Service includes on the Table of Contents page of the Environmental Assessment the following statement:

“The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability ...”

The Amendment does not consider the unique capabilities of the floatplane in helping the Forest Service comply with its prohibition against discrimination. For this reason the decision to prohibit floatplanes is in error.

IV. FOURTH ASSIGNMENT OF ERROR

THE PROPOSED AMENDMENT IGNORES THAT THE FLOATPLANE USE IS A *DE MINIMUS* USE THAT SHOULD NOT BE FURTHER REGULATED.

1. **The Forest Service did not take into account that the floatplane use (though very important for interstate commerce and for transport of people with disabilities or of old age) is extremely small and may be considered a *de minimus* impact to the Management Plan. Furthermore, since this small use is already heavily regulated and governed by the FAA and the United States Coast Guard, it may be concluded that it is inappropriate to create more regulation under the Management Plan.**

1.1 Only Eight (8) Comments about Floatplanes in Nine (9) Year Period

The discussion in Error I, Section 1.4 showed that through a FOIA query it was found that there were only eight comments on record that could in any way be interpreted as being even marginally negative about floatplanes. During the last three years there were no public recorded negative comments of any kind about floatplanes at Waldo Lake. This shows that for the 99.9% majority of the thousands of visits made to the lake by the public, the presence of floatplanes is a *de minimum* issue. There is no problem to be solved. Because floatplanes are already heavily regulated by the FAA and the US Coast Guard, there is no need to create additional regulations. Federal mandates are to not create additional regulation where it serves no purpose.

V. FIFTH ASSIGNMENT OF ERROR

THE PROPOSED AMENDMENT TO THE FOREST PLAN VIOLATES THE MANY FEDERAL ACTS, DOCTRINES, AND RULES RELATING TO FLOATPLANES.

1. The Decision violates the River and Harbor Act of 1899, The Equal Footing Doctrine, United States Coast Guard rules, Federal Aviation Administration rules, and the Public Trust Doctrine since floatplanes use Waldo Lake as a stopping point while traveling cross country under the rules of interstate commerce and have done so continuously for over 75 years (since the invention of floatplanes this route has been used to get between northern and southern portions of the western United States). 1.

1.1 Oregon's Admission to the Union – Protects Use of the Lake for Navigation, Commerce, and Transportation

As with all states upon admission to the union, the Equal Footing Doctrine affords each new state the same rights as the original thirteen colonies; fundamental to these rights are submerged lands in sovereign ownership, including navigable streams. Paramount to this ownership is reservation of the rights of the public to the use of these rivers and waters.

The State of Oregon holds ownership of the land and minerals located below the low water marks of navigable rivers and lakes as established in the Equal Footing Doctrine. Therefore, we believe the Forest Service is in error in attempting to regulate uses on Waldo Lake.

In 1921 the Oregon Legislative Assembly asserted ownership of all meandered lakes within the State by virtue of sovereignty afforded by the Admissions Act, February 14, 1859. Waldo Lake was meandered by Henry C. Perkins in October, 1884.

274.430 State ownership of meandered lakes; status as navigable and public waters. (1) All meandered lakes are declared to be navigable and public waters. The waters thereof are declared to be of public character. The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or conveyance from the State of Oregon, is vested in the State of Oregon.

Since passage of this statute, the State of Oregon has continued to assert ownership of Waldo Lake, as well as and regulatory authority for vessels operating on the lake through the Oregon State Marine Board, and water rights administered by the Oregon Department of Water Resources. Neither the U. S. Forest Service, nor any other agency of the federal government has challenged this declaration of ownership, nor the State's authority to regulate Waldo Lake. Given the absence of any claim of ownership by the federal government, additional regulation of Waldo Lake restricting use by citizens of the state is inappropriate without formal consultation with the Department of State Lands regarding such a claim of ownership, as well as concurrence with the Marine Board and the Oregon Department of Water Resources regarding their regulation.

274.510 Lake bed lands claimed by the United States. (1) If the federal government claims title or interest in any lands referred to in ORS 274.470 or 274.480 the same shall not be conveyed or otherwise disposed of, or preferential right therein accrue until such claim is settled. The Department of State Lands may enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public, and make such deeds and conveyances to the United States in consideration of the issuance of such patents by the United States to the State of Oregon of such lands within the meander lines of any such lakes as the department and the federal government agree.

(2) Nothing in this section is a recognition of any title or interest in the United

States within the meander lines of any meandered lake to any lands or waters of any such lake prior to the execution and delivery of a deed or conveyance from the State of Oregon as provided for in this section.

Equal Footing Doctrine (1844)

“Based on a U.S. Supreme Court decision (Pollard vs. Hagen 44 U.S. 212) the original 13 states held ownership of navigable riverbeds consistent with English Law. The Supreme Court held that all new states enter the union under equal footing. Therefore, all of the states would own the lands beneath the navigable rivers and lakes.”
[<http://www.dnrc.mt.gov/trust/navigablerivers.htm>]

“Navigable: Any lake or streambed that has had a history of commercial use/navigation.” [<http://www.dnrc.mt.gov/trust/navigablerivers.htm>]

Navigable waters are those water bodies which were "navigable in fact" on the date of statehood. *Utah v. United States*, 403 U.S. 9 (1971). Sovereign lands beneath navigable waters may include all parts of the water body to the mean high water line in tidal waters and to the ordinary high water mark in fresh waters. *Odom v. Deltona Corporation*, 341 So.2d 977 (Fla. 1977).

Rivers as Protected Uses and the Public Trust Doctrine

The Public Trust Doctrine dates from ancient times, when the law held that “all rivers” are public, based on the Law of Nature, and that the public can use the banks of rivers, as well as the water itself (Institutes of Justinian, 2.1.1, 2.1.2, 2.1.4). The first act passed by the first Congress of the United States declared that rivers navigable in human-powered craft shall be “forever free.” When the U.S. Supreme Court first considered public rights on rivers in 1842, it cited British common law, Roman civil law, and the ancient Law of Nature, and concluded that rivers must be “held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery.” (*Martin v. Waddell*, 41 U.S. 367, 413; 1842).

The original purpose of the Public Trust Doctrine was to assure public access to navigable waters for navigation and commerce, and for fishing as a source of food. As society has evolved, however, the types of uses of public trust lands have changed. Recognized uses of public lands today include recreational and commercial boating, bathing, fishing, sunbathing, swimming,

pushing a baby stroller, hunting, environmental protection, and preservation of scenic beauty. See, e.g., *Ferry Pass*, supra (the rights of the riparian owner are "[s]ubject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like."); *Ex Parte Powell*, 70 Fla. 363, 376, 70 So. 392 (1915).

Black's Law Dictionary defines the public trust doctrine as a doctrine which, "Provides that submerged and submersible lands are preserved for public use in navigation, fishing, and recreation and the state, as trustee for the people, bears responsibility of preserving and protecting the right of the public to the use of the these lands and the waters above them for those purposes."

This is one of the oldest legal concepts in law, with roots in Roman civil law and English common law, and it was adopted by our founding fathers; the Public Trust Doctrine is a continually evolving model for protection of the rights of the public... the *jus publicum*. In addition to assuring public use of navigable water bodies such as Waldo Lake, it embraces use of non-navigable streams, irrespective of ownership through most of the country. In Montana these typically common law principals have been codified in statutes governing recreational use. Additionally, the public trust has been expanded to include environmental protection of key resources.

Quite specifically, the Waldo Lake Management Plan must balance the rights of the public for recreation, bearing in mind the paramount reservations for navigation and commerce, while protecting this valuable natural resource for future generations. These concepts must also be accommodated and accomplished by the Forest Service and the federal government without running head-long into the State of Oregon's sovereignty and dominion over their public lands and the rights of the public that are indeed vested in each state as owner and trustee of public lands.

Examples of legal cases that are relevant include:

Weden v. San Juan County, 135 Wash 2d 678, 958 P. 2d 273 (1998) – Supreme Court of Washington held that an ordinance banning the use of motorized personal watercraft on all marine waters and one lake in San Juan County was not in violation of the public trust doctrine. The ordinance served the legitimate public purposes of preventing interference with the historical and present uses of the waters, ensuring the safety of commercial and recreational traffic, protecting wildlife, and furthering the tourism-based economy.

Applied to the Management plan this would suggest that floatplanes must be acknowledged as an historical and present use of the waters. Similarly, ensuring the safety of commercial and recreational traffic has not been adequately addressed in the Management Plan as concerns floatplanes.

Sierra Club v. Kiawah, 318 S.C. 119, 456 S.E. 2d 397 (1995) – Supreme Court of South Carolina held that the Coastal Council’s decision to permit the construction of thirty-six docks did not violate the public trust doctrine. The docks would not substantially impair marine life, water quality, or public access.

Needless to say the minimal, but essential use of Waldo Lake by floatplanes does not approach the level of protection asserted in *Sierra Club v. Kiawah*, and further will not “substantially” impair the environmental values. The proposed regulation of floatplanes would however, substantially impair legal access and preclude access under some alternatives.

Without documenting or demonstrating any actual, or even potential degradation of the environmental or wildlife values by floatplanes, the Management Plan must tend toward allowing reasonable use.

Commerce. — The word commerce is not limited to traffic; to buying and selling and the exchange of commodities; but it comprehends navigation also, and all that is included in commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing

rules for carrying on that intercourse. Amendment 14. Const., Art. I. § 8, cl. 3. Gibbons v. Ogden, 9 Wheat 1, 189; Passenger Cases, 7 How. 288; Welton v. Missouri, 91 U. S. 275; Henderson v. New York, 92 U. S

“The most important of these public rights consist in the use of the public highways, by land or by water, and to participate in the public fisheries.” (The General Principles of Constitutional Law in the United States of America, Thomas M. Cooley, LL.D., 1898)

1.2 The River and Harbor Act of 1899 – Protects Use of Waldo Lake for Transportation and Commerce through Corps of Engineers

The primary federal agency charged with assuring waters of the United States remain viable for navigation and commerce is the US Army Corp of Engineers (COE). As such, they utilize two primary distinctions for regulation; 1) all waters of the United States, under the River and Harbor Act, including navigable waters, and; 2) project waters, such as impoundments like Fern Ridge Reservoir

Waldo Lake is not designated a project water, so the COE primary interests and authority are to maintain the lake as usable for navigation, commerce, recreation, and fisheries. Because of this interest and authority, the COE must be consulted on any potential restrictions of the use of the waters for floatplane use. There is no record that such a consultation has yet occurred, otherwise the Columbia Seaplane Pilots Association FOIA request would have resulted in copies of information on such discussions.

The two key provisions for regulation in general terms are:

Section 320.1 - Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.*

(1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial

decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary federal control over activities which do not justify individual control or which are adequately regulated by another agency.

The proposed Waldo Lake Management Plan has simply not demonstrated a need for the floatplane restrictions proposed. At the very least, formal consultation with the Corps of Engineers Portland District concerning floatplane use, would be required under the River and Harbor Act of 1899 to balance the proposed protections with the commerce needs of floatplanes, prior to adoption.

Accordingly;

Section 320.1 (6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

The Corps of Engineer has general rules governing aviation and specifically floatplane, as codified in Title 36 and listed below (underlines added). Though aircraft are generally prohibited from operating on "project lands," the rules specifically allow any aircraft to operate on "project lands" for emergency forced landings. More importantly, however, the Corps has different rules for "project waters" (in distinction from "project lands"). For "project waters" as listed in Section (f) below, floatplane operations are generally allowed, as long as Coast Guard rules are followed:

TITLE 36--PARKS, FORESTS, AND PUBLIC PROPERTY PART 327--RULES AND REGULATIONS GOVERNING PUBLIC USE OF WATER RESOURCE DEVELOPMENT PROJECTS ADMINISTERED BY THE CHIEF OF ENGINEERS--

Sec. 327.4 Aircraft.

(a) This section pertains to all aircraft including, but not limited to, airplanes, seaplanes, helicopters, ultralight aircraft, motorized hang gliders, hot air balloons, any non-powered flight devices or any other such equipment.

(b) The operation of aircraft on project lands at locations other than those designated by the District Engineer is prohibited. This provision shall not be applicable to aircraft engaged on official business of Federal, state or local governments or law enforcement agencies, aircraft used in emergency rescue in accordance with the directions of the District Engineer or aircraft forced to land due to circumstances beyond the control of the operator.

(c) No person shall operate any aircraft while on or above project waters or project lands in a careless, negligent or reckless manner so as to endanger any person or property.

(d) Nothing in this section (Sec. 327.4) bestows authority to deviate from rules and regulations or prescribed standards of the appropriate State Aeronautical Agency, or the Federal Aviation Administration, including, but not limited to, regulations and standards concerning pilot certifications or ratings, and airspace requirements.

(e) Except in extreme emergencies threatening human life or serious property loss, the air delivery of any person, material or equipment by parachute, helicopter or other means onto project lands or waters without written permission of the District Engineer is prohibited.

(f) In addition to the above provisions, seaplanes, as defined below, are subject to the following restrictions:

(1) Such use is limited to aircraft utilized for water landings and takeoff, herein called seaplanes, at the risk of the owner, operator and passenger(s).

(2) Seaplane operations contrary to the prohibitions or restrictions established by the District Engineer (pursuant to part 328 of title 36) are prohibited. The responsibility to ascertain whether seaplane operations are prohibited or restricted is incumbent upon the person(s) contemplating the use of, or using, such waters..

(3) All operations of seaplanes while upon project waters shall be in accordance with marine rules of the road for power boats or vessels and Sec. 327.3 Vessels..

(4) Seaplanes on project waters and lands in excess of 24 hours shall be securely moored at mooring facilities and at locations permitted by the District Engineer.. Seaplanes may be temporarily moored on project waters and lands, except in areas prohibited by the District Engineer, for periods less than 24 hours providing that (i) the mooring is safe, secure, and accomplished so as not to damage the rights of the Government or members of the public and (ii) the operator remains in the vicinity of the seaplane and reasonably available to relocate the seaplane if necessary..

(5) Commercial operation of seaplanes from project waters is prohibited without written approval of the District Engineer following consultation with and necessary clearance from the Federal Aviation Administration (FAA) and other appropriate public authorities and affected interests.

(6) Seaplanes may not be operated at Corps projects between sunset and sunrise unless adequate lighting and supervision approved by the District Engineer are available.

In addition, the Corps of Engineers has published standards recognizing floatplane use as a legitimate activity on many of the lakes they manage:

This plan recognizes the use of Corp of Engineers managed lakes in the Omaha District by general seaplane aviation as a legitimate activity in concert with other public uses. Consistent with intelligent management of the recreational, biological, cultural and esthetic resources of these lakes, certain restrictions are established on seaplane use to preserve and maintain the environmental amenities that are the source of the lakes recreation values.

[https://www.nwo.usace.army.mil/html/Lake_Proj/Seaplane/SeaplanePlan.htm]

It does not appear that the COE was consulted concerning the preparation of the Management Plan; nor does it appear the Corp's floatplane

standards were considered or applied. Similarly, the FAA does not appear to have been consulted as required by the Corps pursuant to this aspect.

It should be noted that while restrictions on project waters are often more stringent than for other navigable waters of the United States, at the very least, the above standards should have been considered and acknowledged as part of the review. And if those standards and the intent of the Harbors and Rivers Act of 1899 had been considered, it is believed that the importance of the use of Waldo Lake for commerce by floatplanes would have been recognized and acknowledged as part of the plan.

1.3 Floatplanes as Recreational Vehicles

Much of the draft Resource Management Plan is involved with regulating recreational activities at Waldo Lake. We recognize that in addition to their ability to function as transportation for interstate travel, floatplanes are also capable of functioning as purely recreational vehicles at Waldo Lake, just like other boats. It would be possible for a floatplane to fly to Waldo Lake for a camping trip and use the lake for recreation rather than as a flyway.

Unlike many other activities regulated through this plan, floatplane use offers recreational opportunities as well as commercial transportation of goods and passengers. We recognize that this makes floatplanes somewhat unique in the Plan, in that they may have two fundamentally different uses of the lake. In this regard, we note that under federal Coast Guard rules, floatplanes are considered vessels when on the water. Thus, if a certain class of vessel is prohibited from using the lake for camping type recreation uses in certain stretches, or at certain time periods, we recognize that if floatplanes fit that class, they would also not be able to use the lake for camping type recreation uses for that same area of lake or time periods.

When a floatplane is transiting Waldo Lake as a transportation

mode, it must always be acceptable for it to land on the lake for purposes relating to the transit. These could include landings and takeoffs for transfer of fuel (many smaller aircraft must carry additional fuel), and precautionary or forced landings and takeoffs to avoid inclement weather, to resolve equipment malfunction, to await return of daylight, and to address the illness of the pilot or passengers.

It is important that these transit-based uses be clearly established as the issuance of violation tickets to pilots transiting the area would result in them needing to return from some distant location at a later time to defend themselves in court. Pilots carry logbooks which clearly document the landings and takeoffs of the aircraft, and can show the travel path of an aircraft, to establish that it is in transit, as opposed to being there strictly for recreational purposes.

1.4 Floatplane Environmental Impact: A solution looking for a problem?

While we understand the general concerns expressed in the draft plan for the management goals of Waldo Lake, we wonder what negative impact the floatplanes are believed to have. Columbia Seaplane Pilots Association placed a FOIA request to the Forest Service, and received no studies, reports, analyses, or other documents on which such a finding might be made.

Thus it appears that the prohibition for floatplanes in the draft management plan was not based on any substantial information. In this section and the following sections, we will provide detailed background regarding floatplane operational characteristics. We request that Forest Service staff and other stakeholders balance the benefits floatplanes provide with their concerns (which we feel are unfounded), and revise the draft plan in a manner that allows floatplane access for transit on the lake and in all seasons. We accept that recreational floatplane activity while operating as a “vessel” or “boat” on the lake

can be limited to the same rules as those for other boats, on the basis that they should have equal access for recreational purposes. For example, floatplanes while operating as “boats” can use electric motors, just as other boats can. Based on our research these restrictions may not be appropriate to commercial interstate operations and floatplanes using the lake as a navigable waterway.

Interestingly, many, if not most floatplane pilots are attracted by the low impact of this particular mode of transportation in addition to providing accessibility to sensitive areas without harm to the environment or fish and wildlife. There is a saying among floatplane pilots that “floatplanes leave no trace at all.” The Columbia Pilots Association have taken this notion one step further and have produced a bumper sticker that reads; “ONLY FLOATPLANES AND CANOES CAN VISIT A WILDERNESS AND LEAVE NO TRACE AT ALL.”

1.5 Floatplane No Impact Findings of other Agencies

Accordingly, the U. S. Army Corps of Engineers environmental assessment of floatplane operations on the Sacramento District Project Lakes⁸ concluded:

1. Air quality: no impact
2. Water Quality: no impact
3. Soil Quality: no impact
4. Wildlife: no impact
5. Fisheries: no impact
6. Hydrology: no impact
7. Noise: similar to that created by a large speedboat

Similarly, the U.S. Army Corps of Engineers Portland District, which Waldo Lake is within, does not regulate the use of floatplanes at Waldo Lake. They can jurisdictionally regulate use on “project waters,” however, they allow floatplanes at all but its three smallest water bodies (which due to size are inappropriate for landings), as described in their “Seaplane Operations”

⁸ See www.seaplanes.org/advocacy/environment.pdf.

publication. The publication further notes:

“Once on the water seaplanes shall be considered powerboats and must be operated in accordance with marine rules of the road. Seaplanes in the water may taxi to any area of the lake subject to the powerboating restrictions for those lakes described under Special Provisions. Under both Coast Guard Rule 18(d) and Federal Aviation Administration Regulation 91.115 “A seaplane on the water shall, in general keep well clear of all vessels and avoid impeding their navigation.”

1.6 Air Pollutants – Floatplanes no significant Impact

Floatplane landings occur under little or no power, followed by taxiing which is also under very low power settings. It is only during takeoff, and climb-out over a period of approximately two minutes that the engine is at full power. At that point the floatplane has climbed to approximately 500 feet and can usually pull the power back and return to a moderate power setting.

It should be noted that floatplane engines are all four-cycle engines, and the exhaust is not directed into the water.

The Federal Aviation Administration concluded⁹ upon analyzing potential Hazardous Air Pollutants (HAPs), taking into consideration commercial and general aviation aircraft:

“Among the most remarkable observations recorded during the testing of aircraft exhaust are:

- The extremely low concentration of HAPs found in aircraft exhaust considering the amounts of fuel burned, the amounts of energy (or thrust) generated, and the amounts of other products of combustion produced.
- The type and amounts of HAP emissions are strongly influenced by the engine load; varying by an order-of-magnitude (or more) from taxi/idle to full takeoff thrust.
- Averaging HAP emission factors from different aircraft and for different operating conditions is not considered appropriate, as there is potential for great variation. For this reason, available aircraft engine emission factors for HAPs may also not be representative of untested aircraft or the aircraft fleet as a whole.”

During dry conditions, ground vehicles such as cars, tractors, buses, motorcycles, and horses stir up dust which could create potential damage to

⁹ *Select Resource Materials and Annotated Bibliography on the Topic of Hazardous Air Pollutants (PAPs) Associated with Aircraft, Airports, and Aviation*; Prepared for Federal Aviation Administration, Office of Environment and Energy; Prepared by URS Corporation July 1, 2003.

the Waldo Lake experience goals. Since floatplanes land on the water, and they do not create dust in their operations, and thus do not have this potential for damage that other transportation modes have.

1.7 Wildlife – Floatplanes no significant Impact

There are three concerns commonly raised about floatplanes interacting with wildlife: wake impact on nests, stirring up of mud, and potential for bird strikes.

Boat Wake: Floatplanes produce very little wake when compared to boats. This is because floatplanes only create a wake during the landing and takeoff runs, and because the wake is shallower due to hull form. The landing is usually accomplished in a 500 to 1000 foot stretch of water, and the takeoff in a distance of approximately twice that distance. Otherwise, most other water operations are in slow taxi “displacement” mode, which is at a speed of approximately 3 to 5 mph. Obviously, the floatplane is designed to do most of its travel in the air, well above the water, so the impacts are limited to just the immediate locale of the landing or takeoff. Due to the hull type, the wake of a floatplane is approximately half that of a power boat.

Stirring up of Mud: Floatplanes are more like canoes than powerboats when it comes to stirring up mud in the water. They can taxi through even shallow areas without disturbing water quality. Since the floatplane propeller is above water, the mud disturbance problems created by boat propellers and boat jets do not exist with floatplanes. In the western United States, there are shallow lakes in which only sailboats, rowing boats, and floatplanes are allowed¹⁰ due to their minimal water quality impact.

Bird Strikes: A recent study¹¹ of floatplane birdstrikes used data

¹⁰ Vancouver Lake, in Vancouver, Washington is one such lake.

¹¹ *Seaplanes and Birds*, Columbia Seaplane Pilots Association, Bulletin, November 2003.

provided by USDA staff Sandra Wright from the FAA National Wildlife Strike Database. It found only one birdstrike in the lower 48 states over a 13 year period of data collection. The study concluded that:

“Near the ground, where the probability is greatest of hitting a bird, a seaplane is flying at 40 to 60 mph, which is slow enough for the birds to be able to maneuver around the plane.”

Also, unlike a land plane which must land only on a specified narrow strip of asphalt, the floatplane pilot can pick an area of water on which to land, that is out of the way of birds, other wildlife, as well as boaters.

1.8 Noise: Floatplanes are very short duration

Floatplane noise is principally created by the spinning tips of the propeller. Floatplane noise during landing and taxi is minimal, since the engine is generally at an idle or very low power setting, and the propeller is not spinning fast. During takeoff, power settings are usually at maximum, and that is a very short time period (approximately 2 minutes) when significant noise is created.

The FAA governs the noise level of aircraft and has standards that must be met during the aircraft certification process. This is in part to ensure that different jurisdictions don't create different noise standards, which would then limit the usefulness of aircraft for interstate travel. Since the FAA has full jurisdiction over aircraft when they are taking off, cruising, and landing, there should be no local noise regulations applied for those operations.

On the completion of the landing run, and prior to the start of the takeoff run, the floatplane is considered a vessel under US Coast Guard Rules, and must also abide by any rules for vessels. So during taxi it will be appropriate for floatplanes to abide by any “low noise” rules which are intended to also apply to all other vessels.

The actual noise level of a floatplane depends to a large extent on

the size of the engine which is turning the propeller. Generally, the smaller the aircraft the smaller the noise it creates. The report *Seaplane Noise*¹² provides data showing that a small Taylorcraft floatplane, with an engine of 85 hp creates a maximum noise level of 65 dBA at a distance of 1000 feet. Larger aircraft with engines up to 300 hp create maximum noise levels up to 92 dBA at 1000 feet distance during the takeoff phase (power is usually reduced after liftoff).

Below is provided a table¹³ of commonly experienced noises from the organization “No Noise”, to which has been added some other typical noise levels such as of floatplane and powerboat. It is provided to give context to the discussion:

Device	dBA Max
Grand Canyon at Night (no roads, birds, wind)	10
Quiet basement w/o mechanical equipment	20
Quiet Room	28-33
Computer	37-45
Refrigerator	40-43
Typical Living Room	40
Forced Hot Air Heating System	42-52
Radio Playing in Background	45-50
Background Music	50
Bathroom Exhaust Fan	54-55
Microwave	55-59
Normal Conversation	55-65
Clothes Dryer	56-58
Printer	58-65
Window Fan on High	60-66
Power Boat at 1000 feet	60-75
Alarm Clock	60-80
Dishwasher	63-66
Clothes Washer	65-70
Seaplane at 1000 feet	65-92
Phone	66-75
Push Reel Mower	68-72

¹² *Seaplane Noise*, Aron Faegre & Associates, 1995.

¹³ See www.nonoise.org

Inside Car, Windows Closed, 30 MPH	68-73
Handheld Electronic Games	68-76
Kitchen Exhaust Fan, High	69-71
Helicopter	70-95
Truck / Bus at 50 feet	75-85
Inside Car, Windows Open, 30 MPH	72-76
Garbage Disposal	76-83
Air Popcorn Popper	78-85
Hairdryer	80-95
Electric Can Opener	81-83
Vacuum Cleaner	84-89
Coffee Grinder	84-95
Handheld Electric Mixer	86-91
Lawn Mower	88-94
Air Compressor	90-93
1/4" Drill	92-95
Food Processor	93-100
Weed Whacker	94-96
Leaf Blower	95-105
Chain Saw at 100 feet	100-103
Circular Saw	100-104
Maximum Output of Stereo	100-110
Military Jet Low Overflight	100-120
Thunder	120 +

FAA and EPA have adopted the 65 DNL¹⁴ contour as the minimum standard for measuring noise impact per their document “Airport Noise Compatibility Planning,” dated January 18, 1985. A single floatplane landing and takeoff does not create enough noise to produce any 65 DNL area noise impact.¹⁵

As to “solitude,” or “natural quiet” as it is sometimes called, the Federal Interagency Committee on Aviation Noise (FICAN) was formed in 1993

¹⁴ DNL refers to the “day-night level” of noise, which is the only federally established noise analysis descriptor to be used for environmental impact analysis by aircraft, as approved by the US Department of Transportation, FAA, Department of Defense, US Environmental Protection Agency, US Department of Housing and Urban Development, and the Veterans Administration. The DNL is a time averaged noise level that includes a penalty such that any aircraft noise created between the hours of 10pm and 7am is counted as having the impact of 10 such flights at other hours.

¹⁵ Based on a calculation with the FAA's Integrated Noise Model INM 6.1.

to create an entity which would provide a place for debate over aviation noise impacts and standards such these. Represented on the committee are: the FAA, DOT, Dept. of the Interior, NASA, U.S. EPA, HUD, Dept. of Health & Human Services, US Army, US Air Force, and US Navy. This group is intended to provide:

- Public forums for discussion of public and private sector proposals for aviation standards changes and noise research subjects. The committee typically holds several meetings per year to discuss specific issues and take public input.
- Recommendations for future research needs and to understand, predict, and control better the effects of aviation noise.
- Publishing of an annual report, and maintenance of a Web site -- www.fican.org.

During the committee's public forums, a common subject of discussion has been the validity of DNL as a measure of long-term noise exposure as well as noise impacts to "natural quiet". Some members of the public who attended have suggested that additional metrics should be developed to take into account "single event, peak level, duration, frequency, tone, vibration, boom effect, contrast with background noise, and noise characteristics." Others have recommended that the DNL threshold level be set lower, perhaps at 55 dBA. FICAN's response to these specific suggestions has been that it "continues to support the use of DNL 65 as the level of aircraft noise which indicates a threshold incompatibility with residential land use." (FICAN Annual Report 1998, Page 6, published October, 1999)

In addition to considering the type of metrics and standards that should be used for noise impact analysis, FICAN also is considering noise issues otherwise left unaddressed under current regulations, including:

- Low frequency noise which we do not hear but which can affect health or damage structures nonetheless;
- Effects of aircraft overflights on wilderness areas and the biophony of the habitat;
- Consideration of the need for higher altitude airplane and jet overflights of rural areas where background sound levels are especially low.

Finally, FICAN is not just examining health problems related to noise, but also the human need for "quiet" as an important part of one's life. In November 1999, FICAN co-sponsored a symposium on the "Preservation of Natural Quiet". The FICAN Web site at www.fican.org/pages/sympos.html provides abstracts of eight key papers delivered at that conference to address the issue of natural quiet.

FICAN has so far not adopted any new measurement systems in lieu of the DNL method. However, experiments are being made at Grand Canyon National Park in attempting to model the extent of time that aircraft can be heard, with the goal of achieving "natural quiet" which is being defined as 50% of the park experiencing "no aircraft audible" 75 to 100% of the day¹⁶. Under this definition, it is clear that an occasional landing of a floatplane (the Forest Service has been generally unaware that they are occurring) would meet even this stringent definition being used at Grand Canyon National Park.

1.9 Positive Environmental Impact on Wilderness Areas – Floatplanes

Floatplanes have been recognized in Canada as providing an important tool for conserving and maintaining the high environmental quality of remote wilderness areas. This is because floatplanes are one of the only

¹⁶ NPS Report to Congress, July 1005, *FAA Grand Canyon Modeling Meeting, 10-27-05.pdf*.

transportation modes that can access remote wilderness areas without leaving a mark of their own. Private floatplane operations are permitted in virtually all remote Provincial Parks in British Columbia, Canada through a memorandum of understanding¹⁷ between BC Parks and the BC Floatplane Association. The objective of the MOU is that:

Through this agreement, [it will] help to maintain the outstanding wilderness qualities, minimize user conflicts and protect environmental values of the parks affected.

The agreement requires floatplane pilots to register in advance with the Provincial Parks Department for access to restricted lakes, and then agree to monitor and report any adverse conditions found at the parks back to the Parks Department. While on their visits, floatplane pilots perform clean-up of trash left by other non-aviation users and haul it out, thus providing a positive impact on the parks.

President George Bush issued an Executive Order for Facilitation of Cooperative Conservation on August 26, 2004. This Order directs the Department of Interior, and other federal agencies, to promote “cooperative conservation” while implementing laws such as the Management Plan for Waldo Lake.

As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

The Columbia Seaplane Pilots Association advocates for, and most floatplane pilots recognize, the important service that floatplanes provide to the public for “cooperative conservation” purposes. In this regard floatplane pilots regularly serve as informal volunteer forest fire spotters¹⁸ for the USDA Forest

¹⁷ The BC Floatplane Association Memo of Understanding (MOU) with BC Parks for access to restricted lakes can be found at www.bcfloatplaneassociation.com .

¹⁸ For example, on a return seaplane flight along the Missouri River from North Dakota through

Service while traveling in remote areas. The Columbia Seaplane Pilots Association requests that the Forest Service take advantage of this positive affect that floatplanes can provide to the operational management of Waldo Lake. It is proposed that the Forest Service Management Plan provide an in-place mechanism for floatplanes transiting Waldo Lake to play a positive role in reporting any problems observed at Waldo Lake – ranging from fire to vandalism to emergency access needs – to Forest Service authorities. It is further proposed that the Management Plan request floatplanes to pick up trash if it is found in remote areas of Waldo Lake, and report the location at which it was found.

It should be noted that US Fish and Wildlife, the National Park Service, and the National Oceanic and Atmospheric Administration all regularly use floatplanes in the management of their properties, as do many state fish and wildlife agencies, because they provide the transportation mode to wilderness areas that has the most utility and the least impact.

The Forest Service was in error to attempt to regulate floatplanes on a navigable water without taking into account the fact that floatplanes use Waldo Lake while traveling cross country under the rules of interstate commerce. Specifically, the Forest Service did not address the River and Harbor Act of 1899, nor the Equal Footing Doctrine, and should have consulted with the Corps of Engineers, the Federal Aviation Administration, and the US Coast Guard as to issues involving floatplane navigation and commerce.

Montana, one of our CSPA members was able to provide the first report via Great Falls Airport Control Tower, of the start of a forest fire which had started in a remote area.

VI. REMEDIES SOUGHT

Appellants respectfully request that the Deciding Officer amend the Decision and select Alternative 1 or 2, instead of Alternative 4, so that floatplanes may continue to use the surface of Waldo Lake.

If the Deciding Officer refuses to comply with these requests, appellants request that the Regional Forester take the requested actions.

Dated this 7th day of June, 2007.

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