



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

**BEFORE THE OREGON WATER RESOURCES DEPARTMENT
ENFORCEMENT SECTION**

In the Matter of the Violation,)
of ORS 537.130(2) by Tim)
Bevington, Respondent)

**FINAL ORDER INCORPORATING
SETTLEMENT AGREEMENT**

Based on the attached Settlement Agreement, which is incorporated herein, I find that there is no need to pursue this matter against Tim Bevington any further.

Tim Bevington agrees to resolve this matter as described in the attached Settlement Agreement.

DATED this 8th Day of April, 2005.

Phillip C. Ward, Director
Oregon Water Resources Department



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ENFORCEMENT SECTION**

In the Matter of the Violation,)
of ORS 537.130(2) by Tim)
Bevington, Respondent)

SETTLEMENT AGREEMENT

The Oregon Water Resources Department (Department) by and through Phillip C. Ward, Director, and Tim Bevington, Landowner, do hereby agree and stipulate as follows:

Stipulated Facts

1. Mr. Tim Bevington is the owner of the pond on property located at Township 5 North, Range 27 East, Section 21, NE¼, tax lot 5100, Morrow County.
2. Mr. Bevington did not have a water right permit for the pond located on tax lot 5100, in Morrow County, Oregon.
3. Mr. Bevington is in violation of ORS 537.130(2), storing water without benefit of a water right permit.
4. Mr. Bevington agrees that civil penalties in the amount of \$3,750.00 may be assessed against him for violation of ORS 537.130.

Settlement Agreement

The Department and Tim Bevington agree to resolve this matter by the following Settlement Agreement.

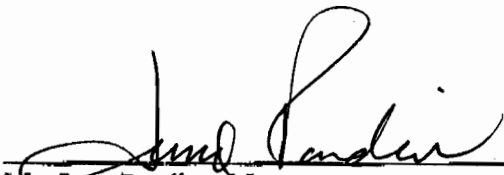
1. Tim Bevington agrees that he will withdraw his request for hearing of the Notice of Assessment of Civil Penalty, Proposed Order and Opportunity for Hearing dated November 12, 2004.
2. Tim Bevington concurs with and does not contest the Department's Proposed Order dated November 12, 2004, attached and incorporated herein and as said requirements are modified by this Settlement Agreement.
3. Tim Bevington agrees that upon withdrawal of his request for a hearing, a Final Order will be issued approving water right permit application R-86133.

- 4. The Water Resources Department agrees to suspend the civil penalty in the amount of \$3,750.00.
- 5. Tim Bevington agrees that the Department will issue a Final Order incorporating this Settlement Agreement and waives all rights to a contested case hearing or any further appeal of this matter.



Tim Bevington, Landowner

Dated 5/6/05, 2005



Ms. Juno Pandian, Manager
Enforcement Section
Oregon Water Resources Department

Dated 5/6/05, 2005



Oregon

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Water Resources Department

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BEFORE THE WATER RESOURCES DEPARTMENT ENFORCEMENT SECTION

In the Matter of the Violation)	Notice of Assessment of Civil
of ORS 537.130(2) by)	Penalty; Proposed Order; and
Tim Bevington, Respondent)	Opportunity For Hearing

TO: Tim Bevington
32278 Diagonal Rd
Hermiston OR 97838

The Water Resources Department proposes to assess civil penalties against Tim Bevington for violation of Oregon Revised Statute (ORS) 537.130(2), storing water without the benefit of a permit.

NOTICE OF HEARING OPPORTUNITY

You are entitled to a hearing on this matter as provided by the Administrative Procedures Act (Chapter 183, Oregon Revised Statutes). If you want a hearing, you must file a written request for hearing directed to Ms. Juno Pandian, Manager, Enforcement Section, Water Resources Department, 725 Summer Street NE, Suite A, Salem, Oregon 97301-1271. The request for hearing must state your grounds for disagreement with proposed action and must be received by the Department by 5:00 P.M. on November 22, 2004 (within 10 days of the date of service of this notice). You will be notified of the date set for hearing if a hearing is requested.

Failure to request a hearing by November 22, 2004, shall waive the right to hearing under ORS Chapter 183. You may choose not to request a hearing. If no request for hearing is received within the time set out above, or upon failure to appear at a hearing where one has been set, the existing agency file will be designated as the record in this case and the Department will issue a Final Order.

AUTHORITY

1. ORS 536.900(1)(b) provides in pertinent part, that in addition to any other liability or penalty provided by law, the Water Resources Commission may impose a civil penalty on a person for violation of ORS 537.130.
2. ORS 536.900(2) provides that a civil penalty may be imposed under this section for each day of violation of ORS 537.130.
3. 536.905 states that any penalty imposed under ORS 536.900 shall be imposed as provided in ORS 183.745. Notwithstanding ORS 183.745, the person to whom the notice is addressed shall have 10 days from the date of service of the notice in which to make written application for hearing before the commission.
4. ORS 536.910 states that after public hearing, the Water Resources Commission by rule shall adopt a schedule establishing the civil penalty that may be imposed under ORS 536.900 and the time allowed to correct each violation. However, the civil penalty may not exceed \$5,000 for each violation.
5. ORS 536.915 provides that a civil penalty imposed under ORS 536.900 may be remitted or reduced upon such terms and conditions as the Water Resources Commission considers proper and consistent with the public health and safety and protection of the public interest in the waters of the state.
6. ORS 536.920 provides in pertinent part, that in imposing a penalty the Water Resources Commission shall consider the past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation; any prior violations of statutes, rules or orders pertaining to water use; the economic and financial conditions of the person incurring the penalty, including any financial gains resulting from the violation; and the immediacy and extent to which the violation threatens other rights to the use of water or the public health or safety or the public interest in the waters of this state.
7. ORS 536.930 states that an owner or operator who fails without sufficient cause to take corrective action as required by an order of the Water Resources Commission shall be liable for damages not to exceed the amount of all expenses incurred by the Water Resources Department in carrying out the department's enforcement duties related to the corrective action.
8. ORS 537.7130(1) provides in pertinent part, that except for an exempt use any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, ...or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation.

9. ORS 537.130(2) provides that no person shall use, store or divert any waters until after the department issues a permit to appropriate the waters.
10. OAR 690-250-0100(1) states that the watermaster shall investigate and respond to all complaints of water shortages or unlawful use based on a review of appropriate records and performance of field inspections, as judgement may require. The watermaster's response may be oral or written communication to appropriators involved in the complaint or shortages, or by personal visits by the watermaster or assistant watermaster.
11. OAR 690-250-0120(1) provides in pertinent part, that the watermaster shall respond to complaints based on a review of appropriate records and performance of necessary field inspections as judgement may require. The watermaster's response may be by oral or written communication to the surface appropriators involved in the complaint, or by personal visits by the watermaster or assistant watermaster.
12. OAR 690-250-0120(2) states that the watermaster shall distribute the surface water and ground water by relative priority within the affected area if ground water and surface water connection and substantial interference are determined. The watermaster may request the assistance of a ground water geologist during any phase of ground water/surface water distribution.
13. OAR 690-250-0150(1) provides in pertinent part, that water which has been illegally stored is under the complete control of the watermaster. When water has been illegally stored, the watermaster shall notify the owner of the reservoir containing the illegally stored water of how much was illegally stored and how it is to be released.
14. OAR 690-260-0020 provides that upon the Director's own initiative, or in response to a complaint alleging violation of certain statutes, rules, orders, permit conditions or standards, the Director may investigate to determine if a violation occurred. If the investigation indicates a violation is occurring, or has occurred, the Director, following appropriate notice, may impose a civil penalty against the responsible party for the violation. The Director bears the burden of proof to establish a violation. Assessment of a civil penalty shall not prevent the Director from taking other regulatory actions permitted by law.
15. OAR 690-260-0030 provides that the responsible party shall be notified of a violation within five days of confirmation by the Director of the violation. Notice of the violation occurs when the Department has either delivered the notice of violation in person or mailed the notice to the responsible party by certified or registered mail. Notice may be given, if reasonably possible, by personal delivery to the responsible party. The notice shall include the statute, rule, order, permit condition or standard violated; the date the violation occurred; and a specified time for correction. If the violation is not corrected within the time given in the notice, a civil penalty and damages related to enforcement may be imposed.

16. OAR 690-260-0040(1) provides in pertinent part, that violation of ORS 537.130 is considered a Class I violation.
17. OAR 690-260-0040(2) provides that the violation is considered minor when no substantial harm is apparent.
18. OAR 690-260-0050 states that no civil penalty shall be assessed for a violation if the person or agency causing the violation, corrects the violation within the time given for correction in the notice of violation.
19. OAR 690-260-0055 states that any similar violation for which the person or agency responsible has received a notice of violation within the last three years is a repeat violation. Such notice shall serve as a continuing notice of the violation. In the case of repeat violations, a civil penalty may be imposed without providing additional time for correction.
20. OAR 690-260-0060(1) provides in pertinent part, that persons or agencies who have received a notice of violation and have not corrected the violation within the time specified in the notice or have been previously served a notice for a similar violation may be assessed a civil penalty. A notice of assessment of civil penalty shall be delivered either in person or sent by certified or registered mail to the responsible party.
21. OAR 690-260-0060(3) provides in pertinent part, that in cases of continuing violations, each occurrence of substantially the same activity and each day's continuance of a violation after the responsible party has been notified is a separate and distinct violation, but not for purposes of the five day notice requirement. A civil penalty may be imposed for each day of violation of ORS 537.130. Such violations include, but are not limited to, the following: (a) using water without a water right permit, certificate, order or claim of appropriation... (f) illegal or unauthorized use or storage of water.
22. OAR 690-260-0070 provides in pertinent part, that the base penalty for a Class I Minor violation is \$250.00 and that a repeat factor (multiplier) up to five can be incorporated into the formula for determining the civil penalty for repeat violations. For the fifth or greater occurrence of a similar violation a repeat factor of five would be applied to the civil penalty.
23. OAR 690-260-0080(1) provides in pertinent part, that in addition to the repeat factor the Director shall consider (a) the past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation; (b) any prior violations of statutes, rules or orders pertaining to water use; (c) the economic and financial conditions of the person incurring the penalty, including any financial gains resulting from the violation; and (d) the immediacy and extent to which the violation threatens other rights to the use of water or the public health or safety or the public

interest in the waters of this state. The Director may consider any other relevant factor, when imposing a civil penalty. OAR 690-260-0080(3) further provides that the Director may recommend that the Commission reduce or remit a civil penalty if appropriate and consistent with the protection of the public interest in the waters of this state.

24. OAR 690-260-0090(1) states that persons or agencies receiving a notice imposing a civil penalty may request a hearing within 10 days from the date of mailing the notice. Notice may be served personally or by mail. In the case of service by mail, the date of mailing shall serve as the notice date. The request for hearing shall be considered made on the date that the request is postmarked.
25. OAR 690-260-0090(2) states that the Commission delegates to the Director the authority to schedule and conduct a contested hearing if one is requested. The Director may issue a proposed order following the hearing. If no exceptions are filed, the proposed order becomes final. If exceptions are filed to the proposed order, the Commission shall issue the final decision.
26. OAR 690-260-0090(3) states that the Director may recommend that the Commission reduce or remit the amount of the penalty if evidence, or negotiations presented in preparation for the hearing, indicates that the amount of the penalty was inappropriate. The following factors may be considered when reducing or remitting a civil penalty: (a) history of similar violations; (b) willingness to comply; (c) impact on other water rights; economic gain resulting from the violation; financial ability of the violator to pay the penalty; and (f) incorrect identification of the responsible party.
27. ORS 690-260-0100(1) provides in pertinent part, that persons or agencies who have been ordered to take corrective action by the Water Resources Commission, and who fail to do so without sufficient cause, are liable for damages. The calculation of damages may include all expenses incurred by the Department after the time for corrective action specified in the notice of violation has passed, that are the result of the person's or agency's failure to act. The damages shall not exceed the amount of all expenses incurred by the Water Resources Department in carrying out enforcement duties related to the corrective action. Damages are in addition to the civil penalties assessed for violations.

FINDINGS OF FACT

1. Per ORS 537.130 any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation and that no person shall use, store or divert any waters until after the department issues a permit to appropriate the waters.

2. Mr. Tim Bevington is the owner of the pond on property located at Township 5 North, Range 27 East, Section 21, NE¼, tax lot 5100, Morrow County.
3. A field inspection conducted August 6, 2002, revealed that Mr. Bevington constructed a pond and was storing water without the benefit of a water right.
4. A field inspection conducted June 28, 2004, confirmed that Mr. Bevington was still storing water without the benefit of a water right.
5. Mr. Bevington received a Notice of Violation July 2, 2004, for storing water without a water right, in violation of ORS 537.130(2). The Notice of Violation gave Mr. Bevington until July 11, 2004, to correct the violation by emptying the pond.
6. Based on a telephone conversation with Mr. Bevington on July 6, 2004, a superceding Notice of Violation was issued allowing him until July 25, 2004, to correct the violation by emptying the pond.
7. Field inspections conducted on July 27, 2004, July 30, 2004, August 4, 2004, September 13, 2004, and September 28, 2004, revealed that Mr. Bevington's pond was still storing water without the benefit of a water right. This amounts to five days of violation.
8. This is the first violation of ORS 537.130, storing water without benefit of a permit, by Mr. Bevington.

CONCLUSIONS OF LAW

1. Tim Bevington is in violation of ORS 537.130, storing water without benefit of a permit.
2. Violation of ORS 537.130 is a Class I violation as set forth by OAR 690-260-0040.
3. Assessment of civil penalties as provided by ORS 536.900, OAR 690-260-0060 and OAR 690-260-0070 is appropriate. The base penalty for a Class I Minor violation is \$250.00.
4. Assessment of civil penalties for a Class I Minor violation for the five days when Mr. Bevington was storing water without a permit is appropriate per ORS 536.900 and OAR 690-260-0060.

ASSESSMENT OF CIVIL PENALTIES

1. For one day of violation of ORS 537.130, storing water without benefit of a permit, a civil penalty of \$250.00 is assessed against Mr. Bevington; for the second day of uncorrected violation of ORS 537.130, with a repeat factor of two, a civil penalty of \$500.00 is assessed against Mr. Bevington; for the third day of uncorrected violation of

ORS 537.130, with a repeat factor of three, a civil penalty of \$750.00 is assessed against Mr. Bevington; for the fourth day of uncorrected violation of ORS 537.130, with a repeat factor of four, a civil penalty of \$1,000.00 is assessed against Mr. Bevington; for the fifth day of uncorrected violation of ORS 537.130, with a repeat factor of five, a civil penalty of \$1,250.00 is assessed against Mr. Bevington.

2. The total civil penalty assessed against Mr. Bevington is \$3,750.00.


ORDER

NOW THEREFORE, it is ORDERED that civil penalties and damages incurred in the amount of \$4,000.00 are assessed against Tim Bevington for violation of ORS 537.130, storing water without the benefit of a permit.

It is FURTHER ORDERED that the damages incurred in the amount of \$250.00 is due and payable within 10 days of service of the Final Order in this matter. Failure to pay the damages incurred within 10 days of service of the Final Order may result in the referral for collection to the Oregon Department of Revenue or to a private collection agency.

It is FURTHER ORDERED that the total civil penalties in the amount of \$3,750.00 are due and payable within 10 days of service of the Final Order in this matter. Failure to pay the civil penalty within 10 days of service of the Final Order may result in the referral for collection to the Oregon Department of Revenue or to a private collection agency.

DATED this 12th day of November 2004.


Phillip C. Ward, Acting Director
Oregon Water Resources Department

**ATTACHMENT 1
DETAIL OF DAMAGES INCURRED**

	Hourly		
	<u>Rate</u>	<u>Time</u>	<u>Charge</u>
Watermaster	39.00	5 hours	195.00
Assistant Watermaster	24.00	½ hour	12.00
Other staff	26.00	2/10 hour	<u>5.00</u>
		Staff Time Total:	212.00

Mileage: 121.5 x 0.37 cents per mile = 45.00

staff time	212.00
Mileage	<u>+ 45.00</u>
	257.00