

RECEIVED

APR 02 2024

OWRD

In the matter of Application for LL-1968, please consider the following Comments:

I. Interpretation of the Controlling Statute

ORS 537.143 (6)(a) reads: "The director may issue a limited license for irrigation if the sole purpose of the use is: to provide water necessary to establish a crop for which no further irrigation will be required after the crop is established;"

Two questions must be resolved to determine if hemp irrigation qualifies for a limited license under (6)(a). First, what is meant by "to establish a crop" and "after the crop is established" — i.e., when is a crop considered "established"? The second question is whether hemp is "a crop for which no further irrigation will be required after the crop is established"?

Regarding the first question, the Oregon Revised Statutes contain no definition or contextual hint of "plant establishment". Searching the internet one finds two useful definition attempts, both indicate root formation is essential:

1. New York University at Buffalo https://soil.evs.buffalo.edu/index.php/Plant_establishment

To define a plant establishment, it must first be known what it is to establish something. Establish can be defined as "to start something that will last for a long time, or to create or set something in a particular way". [1] Based on that, a plant establishment can be defined as, "the act of a plant taking root within a soil where it can flourish".

2. University of Maryland College Park Maryland <http://www.wendyannpeer.com/seedling-establishment>

Seedling establishment is the critical stage in plant growth and development when 1) The root must penetrate into the soil so that it can successfully acquire water and nutrients. 2) The shoot must elongate and leaves must expand to begin photosynthetic activity.

Consistent with these available definitions, upon transplanting hemp seedlings need water to overcome 'transplant shock'; to grow roots into the soil; and to grow above-ground vegetation. At some point the transplants can survive without further irrigation, if necessary, relying solely upon residual soil moisture. At that point the transplants can be considered "established". The indicators of hemp transplant establishment can be provided by the expert opinion of Oregon State University hemp researchers. [Attached are email exchanges with OSU faculty hemp researchers shedding light on hemp "establishment"]

In approving LL-1950 in 2023, OWRD ignored the fact that *the sole purpose of the use is: to provide water necessary to establish a crop* as is evidenced by the approval of LL water usage through October 31, a date that tellingly ignores the fact that local hemp harvest is typically complete by that date. While "establishment" criteria are not provided by statute, the setting of such an indefensible, open-ended date by OWRD strongly suggests that from the time of transplanting through harvest, hemp "establishment" was not the sole purpose of that Limited License, but rather providing a source of unrestricted irrigation water for the Applicant, in violation of the statute.

The second question — whether hemp is "a crop for which no further irrigation will be required after the crop is established"? — is answerable. Hemp is an annual crop. There are no commercial transplanted annual crops (like lettuce, peppers, tomatoes, etc.) or direct-seeded annual crops (like cucumbers, melons, corn, pumpkins, etc.) grown in Jackson County during the summer months without irrigation (i.e., "dry farmed") following transplanting or germination, because if such plants do not die, they are stunted and are not profitable. Although OSU has demonstrated at their Central Point research farm that CBD hemp can be direct seeded and grown to maturity without any irrigation ("dry farmed"), the yields are doubtfully commercially profitable. In southern Oregon's Mediterranean climate (much drier and hotter than the Willamette Valley's) commercial hemp (and related marijuana) are typically irrigated regularly from transplanting up until some point at which water is withheld in order to stress the plants to increase concentrations of desired substances such as CBD, THC, and terpenes; and to reduce potential mold problems during wet weather before harvest and during drying after harvest.

A case in point is the Applicant's use of water in 2023 under LL-1950. Applicant reported irrigating with LL water through September 16, which is only 2 to 4 weeks before harvest. This clearly demonstrates that hemp (as grown by the Applicant) is "not a crop for which no further irrigation will be required after the crop is established".

More generally, chronic enforcement problems from illegal water use throughout the growing season by cannabis growers in southern Oregon and throughout the state is compelling (and arguably sufficient) evidence that hemp is not "a crop for which no further irrigation will be required after the crop is established". SB 5561, passed in 2021, allocated \$5 million for illegal cannabis water use enforcement because commercial cannabis requires water throughout almost all of the growing season, not merely for "plant establishment" at the beginning, and unscrupulous cannabis growers are willing to violate Oregon Water Law to obtain irrigation water. To argue otherwise is to willfully deny the obvious.

In conclusion, although ORS 537.143 (6)(a) is unnecessarily confusing because of the lack of published criteria for "plant establishment", available evidence clearly indicates that growing commercial hemp (at least) in southern Oregon requires irrigation beyond the "establishment" phase, and therefore hemp does not qualify for a limited license under the controlling Statute.

II. Problems With the Application Submitted

Under item 5. of the Application submitted, the Applicant is again requesting the use of LL water through 10/31/24. As discussed above, crop "establishment" is arguably limited to recovery from transplant shock, roots growing out of their potted rootball into the soil, and plants exhibiting visible above-ground growth. "Establishment" is complete at that point. The open-ended use of XP Reservoir stored water until October 31 under the cover of a LL will be, as it was in 2023, a violation of ORS 537.143 (6)(a) enabled by OWRD.

III. Problems Associated with Rogue Family Farms' (RFF) Past Water Use

1. In 2019, as lessee operating under LL-1790 issued to Ross Hrcncir, RFF reported using 0.23 AF of 8.2 AF available from the XP

Reservoir to grow 21.83 acres of hemp at this "Jacob 3" ODA (so designated) site. During the same period, the static water level (SWL) in my well dropped almost 25 feet from where the Watermaster had measured it for the required annual measurement. Subsequent interference testing by OWRD strongly indicates that RFF had been illegally pumping groundwater and using LL-1790 as a cover for the requirement to have a legal water source for growing hemp. OWRD refused to pursue the matter of illegal use.

2. In 2020, 2021, 2022 RFF did not have a LL for this site, but relied upon Temporary Transfers of an Eagle Point Irrigation District (EPID) water right, but in these years RFF grew double and almost triple the number of hemp acres that the EPID transfer Right allowed (as documented from ODA records), with no enforcement from ODA or OWRD. In 2022, the Watermaster refused to investigate RFF' blatant water spreading of EPID water and explained that the irrigation for the reported 25 acres harvested came from EPID, which was a right limited to 9.4 acres (not AF); and LL-1790, which had expired in 2019, and LL-1829, which was never issued!

3. On March 27, 2023, RFF applied for 3 AF of stored surface water from the XP Reservoir. On May 31, OWRD observed that RFF was planting and irrigating hemp although they did not have a valid LL Permit. A Notice Of Violation (NOV) was subsequently issued (of no practical consequences). Ten days later, on June 10, the LL-1950 Final Order (FO) was issued. RFF was limited to 3 AF from the XP Reservoir (XPR) (by item #6 of the FO) because it had not been filled to its capacity of 8.2 AF due to drought conditions.

4. Item #4 of the FO required that the licensee maintain a record of all LL water use and report such. Upon request, RFF provided a fraudulent record of use which began on June 12 and ended on September 16. Because the cumulative meter reading at the end of 2022 was photographed, the false 2023 season starting reading reported by RFF is clearly off by 2 AF, indicating that before receiving the FO, RFF had illegally pumped 2 of its allowed 3 AF. In addition to that fact, RFF reported that it had only used the allowed 3 AF in 2023, thereby putting it ostensibly into compliance with the 3 AF limit. Since it had already received a NOV for illegally using water, it is puzzling why RFF did not honestly report that it had used a total of 5 AF — since the illegal use 'cat was [already] out of the bag'.

5. This brings up the fact that RFF did not have an EPID Temporary Transfer (TT) right in 2023, only the 3 AF LL, yet it reported to ODA in its 2024 hemp license Application that it grew 40 acres of hemp at this "Jacob 3" site in 2023. I verified the lack of an EPID TT with Ann Reece of OWRD on June 12, 2023, and reported this deficiency to my Watermaster in an email on June 20. This information apparently did not lead to an investigation or enforcement action on this major violation as evidenced by RFF using EPID water unimpeded for the growing season. Consistent with this speculation, on August 23, 2023, an inspection of the site by OWRD and ODA reported that RFF to be in "compliance" with water use.

6. A question arises as to the source of the additional (illegally used) 2 AF? Because RFF had used 2 of its allowed 3 AF before they received the FO — as documented by the meter dedicated to XPR LL usage discussed above — this additional 2 AF could only have come from the illegal, non-permitted EPID water which was being commingled with the LL water in the XP Reservoir (which was also being used as a "bulge" for EPID water).

7. The relevance of this seemingly trivial amount of water is that it shows: a). that 2 AF of EPID water was definitely used illegally on hemp grown under the LL; and b)., that fact was attempted to be "covered up" by falsifying the water use records reported. If 2 AF of EPID water could so be illegally "spread", it is likely that 30 plus acres of hemp grown on land restricted by the FO to LL 3 AF were illegally irrigated using EPID water — which would have been "water spreading" of a TT Right for 9.4 acres had that Right existed in 2023. Any further analysis of what was going on is a ridiculously futile exercise — everything except the use of 1 AF of LL water was illegal. In all, 40 acres of hemp were reported grown under the cover of the 3 AF allowed under LL-1950, approaching (but failing to surpass) the 2019 record of growing 21.83 acres using 0.23 AF from the XP Reservoir under LL-1790.

IV. Problems With RFF Past EPID Temporary Transfers

EPID TTs are related to LLs because as seen above, the possession of one of these rights enables the illegal use of water under the cover of the other. In 2022 the Watermaster attempted to cover up the water spreading of the legitimate EPID water by claiming that RFF was also using LL-1790 (which had expired in 2019) and LL-1829 (that was never issued). In 2023, 40 acres were irrigated under the cover of LL-1950 as discussed above. Beyond the fraudulent LL water use coverup is the larger issue of was the permit-less use of EPID TT water a simple mistake or a conscious effort to cheat?

RFF should have known that it did not have a valid 2023 Transfer Right, because for Temporary Transfer Applications under ORS 540.570, there is (at least) "a base fee of \$950", of which more than likely RFF would have been aware if they had paid such; further, such TT Applications are typically submitted by EPID to OWRD in the month of March which gave Applicant sufficient time to inquire into the status of the TT if they were expecting such; and in addition, RFF would have likely been notified by either EPID or Salem (or both) of the approval of the TT and the current terms of the Permit. Aware that neither the LL or EPID TT had been issued and planting had been underway for some time, on June 9, 2023, I emailed the OWRD "District Transfer Team". On June 12, I received a reply from Anne Reece which read (in total): "I do not have any record of a temporary transfer application received for the 2023 irrigation from EPID." As previously noted, this information was shared with my Watermaster on June 20. When RFF knew precisely it did not have the TT is difficult to say, but certainly as early as March from not paying the Permit fee and from presumed dialogue with EPID over why it was not applying on its behalf. In any case, RFF would have known sufficiently well advance of germinating their seed, but definitely before transplanting time. To plant without the necessary TT permit was a willful decision to violate Water Law. What RFF discussed with OWRD staff about this deficiency is puzzling, since the Watermaster knew at least by June 20.

V. Recommendations

1. Obtain expert opinion on the applicability of ORS 537.143 (6)(a) to annual plants and criteria for determining "establishment";
2. Research the legislative history of ORS 537.143 (6)(a) and case law (if any) on the applicability to annuals;
3. Limit the use of LL water to "establishment", rather than allow full-season irrigation;

RECEIVED

APR 02 2024

OWRD

4. Require that distribution laterals be removed from LL fields upon "establishment";
5. Do not allow the dual-purpose use of XPR as an EPID bulge, a practice which renders honest metering of LL water use questionable; alternatively, also require tamper-proof metering of bulge water used from XPR in addition to the EPID POD metering;
6. Require local OWRD staff to research and verify current valid permits before conducting inspections at a site;
7. Provide inspection training for "inspectors" to alert them to cheating possibilities;
8. Provide interested parties a copy of draft Final Order ASAP in advance of issuing because in 2023 the late issuance of the FO made filing a Petition for Reconsideration moot.

VI. The Public Interest

Considering the serial nature of RFF' documented annual illegal water use — illegally pumping groundwater in 2019 which OWRD refused to investigate; growing 2 to 3 times the acreage allowed under the EPID TTs in 2020, 2021, and 2022 which was never investigated; the brazenness of growing 40 acres on 3 legal AF in 2023; beginning irrigation without having received their LL FO in 2023; the fraudulent reporting of LL-1968 water usage — taken together these violations add up to an enterprise flagrantly and repeatedly violating Oregon Water Laws with impunity. If repeatedly undermining the rule of law in pursuit of financial gain is detrimental to the public interest, then continuing to issue permits to RFF without strict competent monitoring must be defensible. Considering that my Comments on LL-1950 were ignored, the resulting violation disaster is not surprising. Signing an application is a promise to obey the laws. Repeatedly approving applications for RFF has not worked out in 5 years. Is more of the same enabled creative illegal water use in the public interest? How many more years should RFF be given to achieve "compliance"?

VII. And Finally

My Comments may seem overly detailed and overly "picky". However, illegal water use has been risk free and very profitable for RFF. In 2023 alone, RFF reported harvesting 15,000 lbs of hemp. From their sales website <https://rogueorigin.com/collections/all-flower>, clicking on Bulk Ordering, one finds that in 10 lb. wholesale quantities, RFF is charging \$2,500 (\$250 per pound). Assuming that not all of the 15,000 lbs. is premium flower, if only 1/3 is, that calculates to \$1.25 million in 2023. However, the same website also sells retail at \$35 per ounce, which equals \$560 per pound. The point here is that risk-free (one NOV in 5 years and no fines) water theft is not a petty crime. Continuing to enable RFF is hardly in the "public interest". Beginning in 2019, RFF has reported to ODA that they have grown 53,373 lbs. at this site. Do the math. Please do not further enable....