

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

In the Matter of Water Rights Application)
S-74056, Clackamas County)

PROPOSED FINAL ORDER

Summary of Recommendation

The Department recommends that the application be denied because water is not available during the full season requested, and because the proposed use does not comply with Oregon Administrative Rule (OAR) Chapter 690 Division 33.

Authority

Oregon Revised Statutes (ORS) 537 and OAR 690-310 establish the process by which an application to use public waters may be submitted and evaluated by the Department.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty of the proposed use
- pending senior applications and existing water rights
- designations of any critical ground water areas
- Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standards for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the applicable standard
- any comments received

Findings of Fact

1. On May 18, 1994, Mount Scott Water District submitted an application for a permit to use surface water:

Amount of Water: 10.0 CUBIC FEET PER SECOND (CFS)

Proposed Use: **MUNICIPAL USE**

Source: CLACKAMAS RIVER, TRIBUTARY TO WILLAMETTE RIVER

Location: CLACKAMAS COUNTY WITHIN SECTION 24, SECTION 25, SECTION 26, SECTION 27, SECTION 28, SECTION 33, SECTION 34, SECTION 35, AND SECTION 36, TOWNSHIP 1 SOUTH, RANGE 2 EAST, W.M.; SECTION 1, SECTION 2, SECTION 3, SECTION 4, SECTION 10, SECTION 11, AND SECTION 12, TOWNSHIP 2 SOUTH, RANGE 2 EAST, W.M.; SECTION 6, SECTION 19, AND SECTION 31, TOWNSHIP 2 SOUTH, RANGE 3 EAST, W.M.

2. On May 25, 1994, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

3. On September 20, 1995, the Department mailed the applicant notice of its Initial Review, determining that *"The use of 10.0 CFS from Clackamas River for municipal use from November 1 through August 31 may be allowable."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
4. The application has been on administrative hold since the Initial Review was issued.
5. On November 7, 1995, the Department received comments from Kimberley Priestley, with WaterWatch of Oregon. Ms. Priestley had concerns regarding the proposed use:
 - a) water is not available;
 - b) does not comply with OAR 690-33
 - c) will deplete instream flows
 - d) water quality has not been addressed
 - e) measuring, recording, and reporting requirements
 - f) fish screening and fish passage
 - g) conservation
 - h) order of processing of application
6. On April 20, 1999, the application was assigned to North Clackamas County Water Commission.
7. On November 8, 2004, the application was assigned to Sunrise Water Authority, a water authority organized under ORS Chapter 450.
8. The Willamette Basin Program allows the use of water for municipal use.
9. Senior water rights exist on Clackamas River, a tributary of Willamette River, or on downstream waters.
10. Clackamas River, tributary of Willamette River is not within or above a State Scenic Waterway. The proposed point of diversion is located below the Clackamas River State Scenic Waterway.
11. An assessment of water availability has been completed. This assessment compared a calculation of natural stream flow minus the consumptive portion of all relevant rights of record. A copy of this assessment is in the file. This assessment determined that water is available for further appropriation (at an 80 percent exceedance probability) for the period November 1 through August 31. The assessment indicates that flows necessary for water rights senior to application S-74056 cause the Department to find that water is not available in the amounts requested during the period September 1 through October 31.
12. In accordance with OAR 690-33-330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (DFW), and Agriculture. WRD and DFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the meter(s) in good working order. The permittee shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as

may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.

- B. The permittee shall allow the watermaster access to the meter(s); provided however, where any meter is located within a private structure, the watermaster shall request access upon reasonable notice.

DFW noted that the Clackamas River contains four species of salmonids including fall and spring stocks of Chinook Salmon (federally listed as threatened), Winter Steelhead (federally listed as threatened), Coho Salmon (state listed as endangered), and Cutthroat Trout. DFW is concerned with the potential impact to temperature and flows below the points of diversion. DFW cannot support the approval of this application until the applicant can demonstrate how instream flows will be met.

DEQ noted that the Clackamas River violates the temperature standard in the summer, and expressed concern regarding the cumulative effects of water withdrawal on water temperature; thus DEQ does not support the approval of this application.

13. The Department finds that:

- a) water is not available during the full season requested.
- b) based on a priority date of May 25, 1994, Division 33 applies to this application.
- c) any permit issued will be regulated based on the prior appropriation doctrine; thus, the senior instream water right will have priority over junior water rights.
- d) any permit issued will be conditioned so that the use may be restricted if the quality of downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards.
- e) any permit issued will require the installation of a totalizing flow meter, and require recording of the amount of water used each month and reporting of the amounts on an annual basis.
- f) any permit issued will require the installation, maintenance, and operation of fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife's and National Marine Fisheries Service's standards.
- g) any permit issued will be conditioned to require beneficial use without waste.
- h) regardless of the order in which applications are processed, the prior appropriation doctrine protects senior water right holders based on priority date.

Conclusions of Law

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

1. The proposed use requested in this application is allowed in the Willamette Basin Program.
2. No preference for this use is granted under the provisions of ORS 536.310(12).
3. Water is not available for the proposed use during the full season requested.
4. The proposed use would not injure other water rights.

5. The proposed use does not comply with other rules of the Water Resources Commission, specifically OAR 690-033-0220(1).
6. The proposed use complies with requirements of the State Agency Coordination Program regarding land use.
7. For these reasons, the required presumption has not been established.
8. The Department therefore concludes that water is not available in the amount necessary for the proposed use; the proposed use would not result in injury to existing water rights; and the proposed use will impair or be detrimental to the public interest as provided in ORS 537.170.

Recommendation

The Department recommends that application S-74056 be denied.

Dated at Salem, Oregon on December 30, 2008.



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

Protests

Under the provisions of ORS 537.153(7), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than February 13, 2009, be in writing, and include the following:

1. Your name, address, and telephone number;
2. A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
3. A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;
4. A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
5. Any citation of legal authority to support your protest, if known.
6. If you are not the applicant, the protest fee of \$350 required by ORS 536.050, and proof of service of the protest upon the applicant.
7. If you are the applicant, a statement of whether or not you are requesting a contested case hearing. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
8. If you do not protest this Proposed Final Order, and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.

Requests for Standing

Under the provisions of ORS 537.153(7), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order, or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than February 13, 2009, be in writing, and include the following:

1. The requester's name, mailing address and telephone number;
2. If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
3. A statement that the requester supports the Proposed Final Order as issued;
4. A detailed statement of how the requester would be harmed if the Proposed Final Order is modified.
5. A standing fee of \$100.00. If a hearing is scheduled, an additional fee of \$250.00 must be submitted, along with a request for intervention.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. A contested case hearing will be scheduled only if a protest has been submitted and either:

1. upon review of the issues, the Director finds that there are significant disputes related to the proposed use of water, or
2. the applicant requests a contested case hearing within 30 days after the close of the protest period.

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

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to: Water Rights Section, Oregon Water Resources Department, 725 Summer St NE, Suite A, Salem OR 97301-1266, Fax: 503-986-0901.

Mailing List for PFO

Scheduled Mailing Date: December 30, 2008

Application: S-74056

Permit: denied

Original mailed to Applicant:

SUNRISE WATER AUTHORITY
10602 SE 129TH AVENUE
PORTLAND, OR 97236

Copies of PFO sent to:

1. WRD – File S-74056
2. Watermaster District 20
3. WRD - Water Availability: Ken Stahr
4. WRD – Bill Fujii
5. ODFW – Danette Ehlers, 17330 SE Evelyn Street, Clackamas, OR 97015
6. DEQ – Water Quality: Karen Williams, 2020 SW 4th Avenue, Ste 400, Portland, OR 97201

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

1. WaterWatch, 213 SW Ash, Suite 208, Portland, OR 97204 (Paid \$10)
2. Clark Balfour, Cable Huston Benedict Haagensen & Lloyd LLP, 1001 SW Fifth Avenue, Suite 2000, Portland, OR 97204-1136

“\$10 Letter” sent to other interested persons (CWRE, Agent, Commenter, etc.):

3. John Borge, Clackamas County Planning, 9101 SE Sunnybrook Blvd, Clackamas, OR 97015
4. Shannon Relaford, DSL 775 Summer St NE, Salem, OR 97310
5. Julie Keil, Portland General Electric, 121 SW Salmon Street, P.O. Box 4404, Portland, OR 97208
6. Michael Walker, Tualatin Valley Water District, 2330 Elm Street, Forest Grove, OR 97116

Affected Landowners (include “notice of Proposed Final Order-Affected Landowner”):

1. Porter W. Yett Company, Inc., 5949 NE Cully Blvd., Portland, OR 97218
2. Christopher Reid, 1534 SE 58th Court, Hillsboro, OR 97123

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

CASEWORKER: Kerry Kavanagh