

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number R-86935

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the use is not consistent with the Deschutes Basin Program, OAR 3690-505-0030(1)(c).

Application History

On June 29, 2007, Gary Young submitted an application to the Department for the following water use:

- Amount of Water: 61.25 ACRE FEET (AF)
- Use of Water: STORAGE FOR IRRIGATION USE
- Source of Water: BEAVER CREEK, A TRIBUTARY OF CROOKED RIVER
- Area of Proposed Use: Crook County within SECTION 34, TOWNSHIP 16 SOUTH, RANGE 23 EAST, W.M.

On August 24, 2007, the Department mailed the applicant notice of its Initial Review, determining that "*The storage of 61.25 AF from Beaver Creek, a tributary of Crooked River is allowable during March 1 through April 30.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On August 28, 2007, 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.

On October 31, 2007, after the comment period ended, written comments were received from Kimberly Priestley on behalf of WaterWatch. Ms. Priestly expressed concerns about the protection of instream and scenic waterway flows, the loss of habitat for state-sensitive redband trout, the methodology used to a) perform the instream and scenic waterway flow and the water availability analyses and b) the Department's water availability determinations. In addition, Ms. Priestly pointed out that the Initial Review omitted that the point of diversion is above the Deschutes River State Scenic Waterway.

Ms. Priestley's concerns are addressed under the Findings of Fact section.

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 for the proposed use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

Findings of Fact

Upon further review, the Department finds that the Summary of Initial Determinations in the Initial Review erroneously stated the storage of water is allowable March 1 through April 30. The correct period of time when water may be diverted for storage is March 1 through April 14.

Further, the Initial Review omitted the determination that, the application for storage of water in Beaver Creek West Reservoir for irrigation use does not give proper cognizance to the multi-purpose concept. Therefore, the Department finds that the use of stored water for irrigation alone is not allowable under the Deschutes Basin Program (OAR 690-505-0030(1)(c)).

Senior water rights exist on BEAVER CREEK, A TRIBUTARY OF CROOKED RIVER, or on downstream waters.

BEAVER CREEK, A TRIBUTARY OF CROOKED RIVER is above the Deschutes River State Scenic Waterway.

The Department finds that state Scenic Waterway flows are fully protected by instream water-right certificates 74276 and 76164.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow 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 a 50 percent exceedance probability) March 1 through April 30.

Under OAR 690-033-0120(2), water may be diverted for storage March 1 through April 14.

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 (ODFW), and Agriculture. WRD and ODFW 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:

1. A. Before water may be diverted for storage under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of diversion.
B. The permittee shall keep a complete record of the amount of water diverted each month, and shall submit a report which includes the recorded measurements to the Department annually or more frequently as may be required by the Director.
2. A. Before water may be diverted for storage under this permit, a staff gage that measures the entire range between full reservoir level and dead pool storage must be installed in the reservoir. The staff gage shall be United States Geological Survey style porcelain enamel iron staff gage style A, C, E or I.
B. The Director may require the permittee to keep and maintain a record of the water level measurements on a periodic schedule as established by the Director.
3. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.
4. The Director may provide an opportunity for the permittee to submit alternative measuring procedures for review and approval.
5. The permittee shall maintain all required devices in good working order.

Conclusions of Law

Under the provisions of ORS 537.621, the Department must presume that a proposed use will ensure the preservation of the public welfare, safety and health 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.

The Deschutes Basin Program does not allow the proposed use of stored water to be appropriated for irrigation use alone.

A preference for this use is not granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use would not injure other water rights.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

The proposed use is compatible with applicable land-use plans.

For these reasons, the required presumption has not been established.

The Department therefore concludes that water is 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 not impair or be detrimental to the public interest as provided in ORS 537.170.

Recommendation

The Department recommends that the application be denied.

DATED June 9, 2009

E. Timothy Wall

for Phillip C. Ward, Director
Water Resources Department

*If you have any questions,
please check the information
box on the last page for the
appropriate names and
phone numbers.*

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this proposed final order. Protests must be received in the Water Resources Department no later than **July 24, 2009**. Protests must be in writing, and must include the following:

- Your name, address, and telephone number;

- 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;
- A detailed description of how the action proposed in this proposed final order would impair or be detrimental to your interest;
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known; and
- 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.
- 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.
- *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) (for surface water) or ORS 537.621(8) (for ground water), 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 **July 24, 2009**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the proposed final order as issued;

- A detailed statement of how the requester would be harmed if the proposed final order is modified; and
- 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. The contested case hearing will be scheduled only if a protest has been submitted and either:

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

This document was prepared by Brook Geffen. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0808.

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 Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

Mailing List for PFO Copies

Application #R-86935

PFO Date April 21, 2009

Original mailed to applicant:

GARY YOUNG, BLUE MOUNTAIN RANCH, PAULINA, OR 97751

Copies sent to:

1. WRD - File # R-86935
2. Water Availability: Ken Stahr

<p>Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)</p>

PFO and Map Copies sent to:

3. WRD - Watermaster # 11

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

10. Newton Consultants Inc, 521 SW 6th Street, Suite 100, Redmond, OR 97756
11. Kimberly Priestly, WaterWatch, 213 SW Ash St., Ste. 208, Portland OR, 97204

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : geffenba