

**Oregon Water Resources Department  
Water Rights Division**

Water Rights Application  
Number G-15930

**Proposed Final Order**

*Summary of Recommendation:* The Department recommends that the application be denied because water is not available for the proposed use.

*Application History*

On February 21, 2003, A & R Spada Farms submitted an application to the Department for the following water use permit:

- Amount of Water: 2.23 CUBIC FEET PER SECOND (CFS)
- Use of Water: NURSERY USE ON 15.8 ACRES
- Source of Water: WELL 1 (MARI 53178) IN CASE CREEK BASIN
- Area of Proposed Use: MARION COUNTY WITHIN SECTION 35, TOWNSHIP 4 SOUTH, RANGE 2 WEST, W.M.; SECTION 1 AND SECTION 2, TOWNSHIP 5 SOUTH, RANGE 2 WEST, W.M.

On July 25, 2003, the Department mailed the applicant notice of its Initial Review, determining that *"the use of 2.23 CUBIC FEET PER SECOND of water from a well in Case Creek Basin for nursery use on 15.8 acres is not allowable, and it appears unlikely that you will be issued a permit. However, by providing additional information as described below, you may be able to pursue a limited permit for a portion of the lands proposed."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On July 29, 2003, 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.

Within 30 days of the Department's public notice, written comments were received from Jeanne Boatwright, with Boatwright Engineering Inc, on behalf of the applicant, which clarified the coordinates of Well 1 (MARI 53178). In addition, Boatwright disagreed with the Department's Initial Review stating that Well 1 (MARI 53178) will have the potential for substantial interference (PSI) with Senecal Creek.

The Department completed a second Public Interest Review on April 6, 2004.

On September 14, 2004, Steve Shropshire, Attorney with Jordan Schrader PC, requested an administrative hold so that the Department may reconsider the proposed ground water use from Well 1 (MARI 53178).

On February 25, 2008 the Department re-evaluated the April 6, 2004 Public Interest Review.

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
- designations of any critical ground water areas
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standard for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the general standard
- any comments received

#### *Findings of Fact*

On October 15, 2004, the Department sent a certified letter to the applicant, Corbey Boatwright, and Steve Shropshire which stated that the applicant could avoid PSI if the proposed rate of appropriation is not greater than one percent of the discharge that is equaled or exceeded 80 percent of the time. As of the date of this Proposed Final Order, the Department has not received a request to amend the application to reduce the rate, or a request for a withdrawal of the application.

On February 25, 2008, the Ground Water Section reviewed inquiries from Steve Shropshire requesting re-evaluation of the April 6, 2004 Public Interest Review and concluded that the proposed use from Well 1 (MARI 53178) will have the potential for substantial interference with surface water.

Uses included in nursery use are fully included in irrigation and agriculture uses, both of which are allowed by OAR 690-502, the Willamette Basin Program. Therefore, the use of water from Well 1 (MARI 53178) in Case Creek Basin for nursery use is allowable.

Well 1 (MARI 53178) in Case Creek Basin is not within or above a State Scenic Waterway.

#### Ground Water Findings Under OAR 690-009

Based on the April 6, 2004 Public Interest Review, the Department determined, consistent with OAR 690-009-0040(4), that the proposed ground water use will have the potential for substantial interference with surface water, namely Senecal Creek.

In making this determination, the Department considered whether:

- (a) There is a hydraulic connection from the proposed well(s) to any surface water sources.
- (b) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source;
- (c) The rate of appropriation is greater than five cubic feet per second, if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (d) The rate of appropriation is greater than one percent of the pertinent adopted minimum perennial streamflow or instream water right with a senior priority date, if one is applicable, or of the discharge that is equaled or exceeded 80 percent of time, as determined or estimated by the Department, and if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (e) The ground water appropriation, if continued for a period of 30 days, would result in stream depletion greater than 25 percent of the rate of appropriation, if the point of appropriation is a horizontal distance less than one mile from the surface water source.

For this application, the Department determined that there is the potential for substantial interference because of the following items described above: (a), (d)

In accordance with OAR 690-033-0330, 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 did not recommend that any additional conditions of use be imposed on this application.

An assessment of ground water availability has been completed by the Department's Ground Water/Hydrology section. A copy of this assessment is in the file. The proposed water use will, if properly conditioned, avoid injury to existing rights and the resource.

Because the proposed ground water use will have the potential for substantial interference with surface water, in accordance with Oregon Administrative Rules 690-410-0070(1) and 690-400-0010(11)(a)(A), surface water availability has also been considered. 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 not available at the amount requested for further appropriation (at an 80 percent exceedance probability) from June 1 through November 30 of each year.

Senior water rights exist on Well 1 (MARI 53178) in Case Creek Basin, or on downstream waters.

The proposed ground water use is not within a designated critical ground water area.

*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 Willamette Basin Program allows the proposed use.

**No** preference for this use is granted under the provisions of ORS 536.310(12).

Water **is not** 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.

The proposed use is compatible with applicable land use plans.

No proposed flow rate and duty of water higher than the general basin-wide standard is needed.

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

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 would not ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

Recommendation

The Department recommends that the application be denied.

DATED August 4, 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 **September 18, 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;
- If you are the applicant, the protest fee of \$300 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$600 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 **September 18, 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 \$150. If a hearing is scheduled, an additional fee of \$350 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.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

*This document was prepared by Kerry Kavanagh. 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 503-986-0816.*

*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

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Application #G-15930

PFO Date August 4, 2009

**Original mailed to applicant:**

A & R SPADA FARMS  
ATTENTION: ANGELO SPADA  
7251 SAINT PAUL HWY NE  
SAINT PAUL, OR 97137

Copies sent to:

1. WRD - File # G-15930
2. Water Availability: Ken Stahr

PFO and Map Copies sent to:

3. WRD - Watermaster # 16

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

4. Corbey Boatwright, CWRE #208, Boatwright Engineering Inc.,  
2613 12<sup>th</sup> Street SE, Salem OR 97302
5. Steve Shropshire and Justin Gericke, Jordan Schrader, Attorneys at Law,  
PO Box 230669, Portland OR 97281

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

CASEWORKER : Kerry Kavanagh