

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number G-17219

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft permit be issued with conditions.

Application History

On May 13, 2009, Hunter Hill Properties LLC and Stukel Mountain Properties LLC submitted an application to the Department for the following water use permit:

- Amount of Water: 6.28 CUBIC FEET PER SECOND (CFS)
- Use of Water: SUPPLEMENTAL IRRIGATION USE ON 502.0 ACRES
- Source of Water: A WELL (KLAM 52973) IN LOST RIVER BASIN
- Area of Proposed Use: KLAMATH COUNTY WITHIN SECTION 21, SECTION 22, SECTION 27, AND SECTION 28, TOWNSHIP 40 SOUTH, RANGE 10 EAST, W.M.

On July 24, 2009, the Department mailed the applicant notice of its Initial Review, determining that "...the use of 6.28 CFS of water from a well (KLAM 52973) in Lost River Basin for supplemental irrigation use on 502.0 acres is not allowable, and it appears unlikely that you will be issued a permit unless suitable mitigation is provided." The applicant did not notify the Department to stop processing the application within 14 days of that date.

On July 28, 2009, 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.

On November 6, 2009, the application was placed on administrative hold.

On February 9, 2010, Andrew Hansen with Adkins Consulting Engineers, Inc., on behalf of the applicant, requested the following amendments to the application: 1) reduce the rate from 6.28 CFS to 0.94 CFS, and 2) reduce the place of use from 502.0 acres to 322.3 acres.

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

Due to the application amendment, which reduced the rate from 6.28 CFS to 0.94 CFS, the Department finds the proposed ground water use will not have the potential for substantial interference with surface water.

Under ORS 536.340(1)(a), the Water Resources Commission may establish a basin program to classify sources of water supply as to the highest and best use and quantities of use, and that classification of sources of water supply has the effect of restricting the use and quantities of use thereof to the uses and quantities of uses specified in the classification. The Commission has not established a basin program for the Klamath River basin. Therefore, neither the proposed use nor the quantity of water is restricted as a result of this consideration.

A WELL (KLAM 52973) IN LOST RIVER BASIN is not within or above a State Scenic Waterway.

Ground Water Findings Under OAR 690-009

The Department determined, consistent with OAR 690-009-0040(4), that the proposed ground water use will not have the potential for substantial interference with surface water.

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.

According to the Department's rules, the potential for substantial interference is assumed if (a) and either (b) or (c) or (d) or (e) are met. For this application, the Department determined that there is no potential for substantial interference, because either (a) is not met, or (b), (c), (d) or (e) are not met, or both.

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.

The Department finds that the amount of water requested, 0.94 CFS, is an acceptable amount.

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 proposed use requested in this application is allowed in the Klamath Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use will not injure other water rights.

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

The proposed use complies with the State Agency Agreement for land use.

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

For these reasons, the required presumption has been established.

Under the provisions of ORS 537.621, once the presumption has been established, it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use would not ensure the preservation of the public welfare, safety and health as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - (A) The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected; and
 - (B) Specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use would impair or be detrimental to the public interest.

The Department therefore concludes that the proposed use would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety, and health. The attached draft permit is conditioned accordingly.

Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED March 9, 2010



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 **April 23, 2010**. 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 **April 23, 2010**. 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 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.

DRAFT

This is not a permit.
STATE OF OREGON

DRAFT

COUNTY OF KLAMATH

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

HUNTER HILL PROPERTIES LLC
STUKEL MOUNTAIN PROPERTIES LLC
7552 E WETHERSFIELD
SCOTTSDALE, AZ 85260

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: G-17219

SOURCE OF WATER: A WELL (KLAM 52973) IN LOST RIVER BASIN

PURPOSE OR USE: SUPPLEMENTAL IRRIGATION USE ON 322.3 ACRES

MAXIMUM RATE: 0.94 CUBIC FOOT PER SECOND

PERIOD OF USE: MARCH 1 THROUGH SEPTEMBER 30

DATE OF PRIORITY: MAY 13, 2009

WELL LOCATION (KLAM 52973): SW $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 8, T40S, R10E, W.M.;
SOUTH 49 DEGREES 34 MINUTES 5 SECONDS EAST, 3908 FEET FROM NW CORNER,
SECTION 8

POINT OF RE-DIVERSION 1: SW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 21, T40S, R10E, W.M.; 440
FEET NORTH AND 1460 FEET WEST FROM SE CORNER, SECTION 21

POINT OF RE-DIVERSION 2: NW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 27, T40S, R10E, W.M.; 1335
FEET NORTH AND 1030 FEET EAST FROM SW CORNER, SECTION 27

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SE $\frac{1}{4}$ SE $\frac{1}{4}$ 36.6 ACRES
SECTION 21

SW ¼ SW ¼ 21.8 ACRES
SE ¼ SW ¼ 2.0 ACRES
SECTION 22

NW ¼ NE ¼ 7.0 ACRES
SW ¼ NE ¼ 5.3 ACRES
NE ¼ NW ¼ 31.8 ACRES
NW ¼ NW ¼ 35.9 ACRES
SW ¼ NW ¼ 28.8 ACRES
SE ¼ NW ¼ 32.4 ACRES
NE ¼ SW ¼ 50.1 ACRES
NW ¼ SW ¼ 14.0 ACRES
NW ¼ SE ¼ 7.0 ACRES
SECTION 27

NE ¼ NE ¼ 49.6 ACRES
SECTION 28
TOWNSHIP 40 SOUTH, RANGE 10 EAST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each well and point of re-diversion. The permittee shall maintain the meter(s) in good working order.
- B. The permittee shall keep a complete record of the amount of appropriated and diverted each month, and shall submit this record 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.
- C. The permittee shall allow the watermaster access to the meter; provided however, where any meter is located within a private structure, the watermaster shall request access upon reasonable notice.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

The Department requires the water user to obtain, from a qualified individual (see below), and report annual static water levels for each well on the permit. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter. The ground water reference level at well KLAM 52973 (Well Tag: L 49301) shall be 8.7 feet below land surface. Annual measurements are required whether or not the well is used. The Director may require the user to obtain and report additional water levels each year if more data are needed to evaluate the aquifer system.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board. Measurements shall be submitted on forms provided by, or specified by, the Department. Measurements shall be made with equipment that is accurate to at least the standards specified in OAR 690-217-0045. The Department requires the individual performing the measurement to:

- A. Associate each measurement with an owner's well name or number and a Department well log ID; and
- B. Report water levels to at least the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method of measurement; and
- D. Certify the accuracy of all measurements and calculations reported to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if any of the following events occur:

- A. Annual water-level measurements reveal an average water-level decline of three or more feet per year for five consecutive years; or
- B. Annual water-level measurements reveal a water-level decline of 15 or more feet in fewer than five consecutive years; or
- C. Annual water-level measurements reveal a water-level decline of 25 or more feet; or
- D. Hydraulic interference leads to a decline of 25 or more feet in any neighboring well with senior priority.

The period of restricted use shall continue until the water level rises above the decline level which triggered the action or the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the

resource or causing substantial interference with senior water rights. The water user shall not allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

The well shall produce ground water only from consolidated basalt below the basin fill.

STANDARD CONDITIONS

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.

If substantial interference with a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.

The well(s) shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.

If the riparian area is disturbed in the process of developing a point of appropriation, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

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 due to reduced flows.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system

Mailing List for PFO Copies

Application #G-17219

PFO Date February 23, 2010

Original mailed to applicant:

Hunter Hill Properties LLC and STUKEL MOUNTAIN PROPERTIES LLC, 7552 E WETHERSFIELD, SCOTTSDALE, AZ 85260

Copies sent to:

1. WRD - File # G-17219
2. Water Availability: Ken Stahr
3. Regional Well Inspector: NC

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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PFO and Map Copies sent to:

3. WRD - Watermaster # 17

Protest/ Standing Dates checked _____
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Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

4. Andrew Hanson, Adkins Consulting Engineers, Inc., 2950 Shasta Way, Klamath Falls, Oregon 97603

"\$20 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : Geffenba