

Oregon Water Resources Department
Water Rights Division

Water Rights Application
Number S-87480

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because water is not available and the proposed use does not comply with OAR 690-033.

Application History

On June 26, 2009, Ernie and Lu Ann Russell submitted an application to the Department for the following water use:

- Amount of Water: 0.005 cubic foot per second (CFS)
- Use of Water: domestic use for one household
- Source of Water: Cedar Creek, a tributary of Sandy River
- Area of Proposed Use: Clackamas County within Section 18, Township 2 South, Range 5 East, W.M.

On July 24, 2009, the Department mailed the applicant notice of its Initial Review, determining that "the use of 0.005 CFS of water from Cedar Creek, a tributary of Sandy River, for year-round domestic use for one household is not allowable, and it appears unlikely that you will be issued a permit unless suitable mitigation is provided. However, by providing additional information you may request a limited permit for human consumption use (indoor use only: cooking, drinking, sanitation), limited to 500 gallons per day." 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 obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

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

The Sandy Basin Program allows domestic use.

Senior water rights exist on Cedar Creek, a tributary of Sandy River, or on downstream waters.

Cedar Creek, a tributary of Sandy River, is above the Sandy River State Scenic Waterway.

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 calculation is in the file. This calculation determined that water is not available for further appropriation (at an 80 percent exceedance probability) for the requested period of use per OAR 690-300(57).

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's recommendations are below.

The local watermaster (WRD) indicated 0.005 CFS would satisfy the need at the property. The watermaster indicated there does not appear to be a viable alternative for water for the applicant.

ODFW recommended denial of the application based on the proposed use resulting in a loss of essential habitat for threatened fish species, and as conditions could not be applied to mitigate the impact, the use would harm the species. When asked what conditions are recommended if the Department finds it is in the public interest to issue a permit even if the impacts cannot be mitigated for, ODFW recommended the following:

Limit the season of use to November 1 through May 31.

If the riparian area is disturbed in the process of developing a point of diversion, 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 the source stream or downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

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.

The Sandy Basin Program allows the proposed use.

A 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 injure** other water rights.

The proposed use **does not comply** with other rules of the Water Resources Commission, specifically OAR 690-033.

The proposed use is compatible with applicable land use plans.

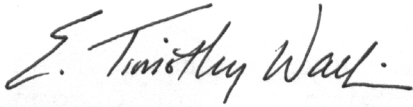
For these reasons, the required presumption **has not** been established.

The Department therefore concludes that the proposed use **will impair or be detrimental** to the public interest as provided in ORS 537.170.

Recommendation

The Department recommends that the application be denied.

DATED April 6, 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 **May 21, 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 **May 21, 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 Jeana Eastman. 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 503-986-0859.

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 #S-87480

PFO Date April 6, 2010

Original mailed to applicant:

ERNIE AND LU ANN RUSSELL, 40200 SE CEDAR CREEK LN, SANDY, OR 97055

Copies sent to:

1. WRD - File # S-87480
2. Water Availability: Ken Stahr

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

PFO and Map Copies sent to:

3. WRD - Watermaster # 20
4. Oregon State Parks
5. **ODFW District Biologist: Danette Faucera**
6. **ODFW District Biologist: Todd Alsbury**

Protest/
Standing Dates
checked

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

7. Lori Ryland, 38250 Pioneer Rd, Sandy OR 97055

CASEWORKER : jme