

**Oregon Water Resources Department
Water Rights/Adjudications Division**

Water Rights Application
Number S-86391

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the proposed use does not comply with Oregon Administrative Rules (OAR) 690-310-0040(2) and 690-310-0040(1)(a)(Q).

Application History

On August 3, 2005, KNG Inc. submitted an application to the Department for the following water use:

- Amount of Water: 10.0 ACRE FEET
- Use of Water: NURSERY USE ON 52.1 ACRES
- Source of Water: A RESERVOIR, A TRIBUTARY OF WILLAMETTE RIVER
- Area of Proposed Use: MARION COUNTY WITHIN SECTION 34, TOWNSHIP 3 SOUTH, RANGE 1 WEST, W.M.

On July 21, 2006, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 3.6 acre feet from a reservoir, constructed under Permit R-1134, a tributary of Willamette River, may be allowed for irrigation on 52.1 acres from March 1 through October 31. The use of water from an unnamed stream, tributary to Willamette River, may be allowed from September 1 through June 30.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On July 25, 2006, 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.

On August 24, 2006, the application was placed on administrative hold, which expired February 20, 2007.

On November 19, 2007, the Department mailed a certified letter to the applicant requesting payment of outstanding examination fees (OAR 690-310-0040(2)) and submittal of information necessary to evaluate the application (OAR 690-310-0040(1)(a)(Q)), as noted in the Initial Review.

On April 23, 2010, the Department mailed a certified letter to the applicant which stated that if the Department did not receive outstanding examination fees and the additional information requested in the Initial Review, or a request for an additional administrative hold by May 24, 2010, the Department would proceed with processing the application based on the materials on record. As of today's date, the Department has not received a reply.

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 application materials do not meet the minimum application requirements, which includes payment of the examination fee set forth in Oregon Revised Statutes (ORS) 536.050. The Initial Review requested payment of outstanding examination fees.

The Initial Review requested clarification of the source(s) proposed, specifically, the amount of water and location of diversion point(s) from live flow. The Initial Review considered the use of stored water and the use of live flow from an unnamed stream. As of today's date, the Department has not received a reply clarifying whether the application proposed the use of live flow from an unnamed stream. Thus, because the use of live flow was not clarified by the applicant, this document will no longer consider the use of live flow.

On May 20, 1958, Certificate 23947 (Permit R-1134) was issued for the storage of 3.6 acre feet for the purpose of irrigation. The certificate does not allow storage for general nursery use. Therefore, the appropriation of stored water from the reservoir is available for irrigation, but not for nursery use.

Because only 3.6 AF was authorized for storage under Certificate 23947 (Permit R-1134), the use of stored water under this application will be limited to 3.6 AF.

Stored water, in the amount of 3.6 AF, is available for irrigation from water legally stored under Permit R-1134.

Senior water rights exist on a reservoir, a tributary of Willamette River, or on downstream waters.

A reservoir, a tributary of Willamette River, is not within or above a State Scenic Waterway.

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 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 in good working order.
- B. 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.
- C. The Director may require the permittee to keep and maintain a record of the amount (volume) of water used, and may require the permittee to report water use on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water-use information the periods of water use and the place and nature of use of water under the permit.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

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 Willamette Basin Program allows the proposed use.

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

Water is available for the proposed use of irrigation.

The proposed use would not injure other water rights.

The proposed use **does not comply** with other rules of the Water Resources Commission, specifically OAR 690-310-0040(2) and OAR 690-310-0040(1)(a)(Q).

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 July 13, 2010

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 **August 27, 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 **August 27, 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 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

Application #S-86391

PFO Date July 13, 2010

Original mailed to applicant:

KNG INC.
RAY KLUPENGER
24885 NE BUTTEVILLE RD
AURORA, OR 97002

Copies sent to:

1. WRD - File # S-86391
2. WRD - Water Availability: Ken Stahr

PFO and Map Copies sent to:

3. WRD - Watermaster # 16

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

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

4. Schuette, James M., CWRE # 117
3000 Market St NE, Suite 510, Salem, OR 97301

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

CASEWORKER : Kerry Kavanagh