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July 21, 2005

DAVID E. FILIPPI
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VIA FACSIMILE AND OVERNIGHT MAIL

Mr. Mike Reynolds
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

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WATER RESOURCES DEPT
SALEM, OREGON

**Re: In the Matter of the Proposed Final Order for Denying Water Rights Application
No. G-16359**

Dear Mr. Reynolds:

Please find enclosed for filing the Protest and Request for Hearing of Les Peterson in the above-referenced matter.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "David E. Filippi".

David E. Filippi

Enclosures
cc (w/enc.): Client

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BEFORE THE WATER RESOURCES COMMISSION
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WATER RESOURCES DEPT
SALEM, OREGON

In the Matter of the Proposed Final Order
Proposing to Deny Water Right Application
No. G-16359

PROTEST AND REQUEST FOR
HEARING OF LES PETERSON

Les Peterson hereby protests, and otherwise appeals, the proposed final order (“PFO”) issued by the Oregon Water Resources Department (the “Department”) on June 7, 2005, proposing to deny Water Right Application No. G-16359 submitted by Mr. Peterson on December 30, 2004. By way of this protest, Mr. Peterson also hereby requests a hearing on this matter.

1. Protestant’s Name, Address, and Telephone Number. Orders, notices, and other correspondence concerning this matter should be sent to:

Les Peterson
1415 Highland Road
Walla Walla, WA 99362
(509) 522-2124

with copies to:

David E. Filippi
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 294-9529

2. Les Peterson’s Interests. Les Peterson (“Peterson”) is the named applicant for Water Right Application No. G-16359 and an owner of certain agricultural property in the Umatilla Basin. Peterson’s groundwater permit application (the “Application”), submitted on December 30, 2004 seeks to draw groundwater from a well or wells on or near Peterson’s property for irrigation use. Access to and use of groundwater is critical to Peterson’s agricultural business interests.

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As background, on February 18, 2005, the Oregon Water Resources Department (hereinafter, the "Department" or "OWRD") issued Initial Review Determinations ("Initial Review") regarding the Application No. G-16359, which stated: "The use of water from a well in Birch Creek Basin for irrigation use on 350.0 acres *is allowable* under OAR 690-507, the Umatilla Basin Program." The Initial Review also stated that the Department's conclusions were subject to change if a Water Management and Conservation Plan ("WMCP") submitted by the City of Milton-Freewater was approved before the Proposed Final Order protest deadline for the Application passes. The Department gave Peterson no notice that approval of the City's WMCP was imminent or that the legal standards by which the Application would be evaluated would change if a WMCP were to be approved.

The public comment period for Application No. G-16359 closed on March 24, 2005. No written comments were received during the 30-day period. Based on the absence of any comments and the Department's positive Initial Review of the Application, Peterson anticipated approval of the Application; however, the Commission's final approval of the City's WMCP on March 24, 2005 apparently precluded the issuance of a PFO proposing to approve Peterson's groundwater application.

Consequently, Peterson is clearly affected by the Department's PFO, which proposes to deny the Application, because such a denial impacts Peterson's viability as an agricultural landowner and business person.

3. Standing. Pursuant to ORS 537.621(7), an applicant for a water right permit may protest a proposed final order approving or denying a water rights application. ORS 537.621(7).

4. The Action Proposed in the PFO Is Improper. The PFO proposes to deny the Application on the basis that, following approval of the City of Milton-Freewater's WMCP, the applicable basin plan prohibits the use of groundwater for agricultural purposes if the source of groundwater is a basalt reservoir within a five-mile radius of any municipal

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well. OAR 690-507-0030(3)(a)(B). The City's WMCP, submitted in August 2000 and modified in part by letter on November 10, 2004, was inactive for nearly four and a half years before it was approved on March 24, 2005—without notice to Peterson or others with applications pending before the Department that approval of the WMCP would significantly shift the legal standards by which groundwater permit applicants in the basin would be evaluated.

Although Oregon has not considered the issue of shifting legal standards in the water right application context, the Oregon Supreme Court has expressly stated that where land use regulations establish a standard, those standards must be applied to a pending application regardless of subsequent changes to the regulation. *See Marbet v. Portland Gen. Elect.*, 277 Or 447, 463, 561 P2d 154 (1977) (explaining that a standard should be adopted and interpreted sufficiently in advance of the final decision to allow the parties to address it). Just as a decision-maker is required to employ standards applicable to land uses at the time of an application, the Department should be required to evaluate Peterson's groundwater application in accordance with the standards in place at the time the Application was submitted.

The March 24, 2005 approval of the City's WMCP suddenly elevated the standard for groundwater use in the basin beyond the original standard anticipated and otherwise met by Peterson. (*See Initial Review Determinations at 1-2.*) Specifically, approval of the WMCP subjects the City and affected neighboring water users to the regulations for Municipal Water Management and Conservation Plans as set forth in OAR Chapter 690, Division 86, and other provisions contained in the Umatilla Basin Program Rules related to municipal WMCPs. Becoming subject to the Umatilla Basin Program Rules for new groundwater sources in the vicinity of cities with approved WMCPs in the midst of the application process harms Peterson, as Peterson was subjected to one permitting standard (which he had met), and then suddenly in the midst of the process he was subjected to another (which the

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Department is alleging that he has not met). At a minimum, the late shift in the standard being applied to Peterson's application precluded Peterson from placing his application on administrative hold to attempt resolution of the issues raised by the Department's approval of the City of Milton-Freewater's WMCP prior to the issuance of the PFO. *See* OAR 690-507-0030(3)(a)(B) (subjecting groundwater permit applications to a different classification under the Umatilla Basin Program depending on whether affected cities have a full-time conservation program in effect).¹

The timing of the Department's approval of the WMCP, combined with the timing of the PFO is inequitable because the Department did not inform Peterson that the conditions listed in OAR 690-507-0030 would be imposed on his application or that the conditions he fulfilled based on then-existing basin standards would suddenly become inadequate. The Application was filed and reviewed based on specific standards that Peterson met—as set forth in the Department's Initial Review of the Application. That review expressly stated that the proposed use, quantity, source, and place of use were allowable under the rules then in effect. Those rules should continue to apply to the Application as filed.

After Initial Review, the Application then proceeded to the public comment period under the pretext of having met the Department's criteria for initial approval. The sudden

¹ Use of groundwater from the basalt reservoir is subject to restrictions whereby:

“Ground water from the basalt reservoir in a five-mile radius around any municipal well of the cities of Athena, Helix, Milton-Freewater, and Weston is classified for municipal, group domestic and statutorily exempt ground water uses (see definition) only. Other uses may be permitted if it is documented that a barrier to ground water movement separates a proposed well from municipal wells and there will be no interference with municipal wells. Applications for other uses of ground water within a five-mile radius of a municipal well shall automatically be referred to the Commission for review and consideration of public interest unless the affected city affirms that is in favor of the proposed appropriation. This classification applies only when the affected city(ies) have a full-time conservation program in effect.” OAR 690-507-0030(3)(a)(B).

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approval of the City's WMCP allegedly imposed a new requirement on Peterson's groundwater application—creating a moving target for approval that cannot be supported by the record to date or by applicable state law. The only basis for imposing the new standard of which we are aware is a memorandum from Dwight French to Water Right Caseworkers dated September 15, 2004, which was issued in response to a letter from Shannon O'Fallon with the Oregon Department of Justice to Tom Paul dated August 18, 2004. However, neither the memorandum nor the letter set forth any justification as to why the elevated "Five-Mile Radius" standard contained in the Umatilla Basin Plan should be applied to pending applications, where the approval of a City's WMCP occurred after the submittal of the application and after the Initial Review, but before the close of the PFO protest period. Rather, the Department should have grandfathered in all groundwater applications that were otherwise pending as of the date of the decision to approve the City of Milton-Freewater's WMCP. Instead, the Department's decision to approve the WMCP and subsequently deny previously allowable groundwater applications renders an inequitable result for groundwater applicants. In light of the proposed denial of the Application based on standards inapplicable to the Application at the time of submittal, Peterson respectfully requests that the Commission issue the permit as contemplated in the Initial Review, pursuant to the rules existing at the time the Application was originally submitted.

5. Alternatively, the Applicant Should Be Given an Opportunity to Pursue Solutions or Other Alternatives that Would Have Otherwise Been Available Had the Initial Review Revealed a Potential Inconsistency with the Applicable Basin Plan Rules.

Had the Initial Review revealed that the proposed use allegedly was not allowed by the applicable Basin Plan rules, Peterson would have had the opportunity to explore solutions or other options by placing the Application on administrative hold. For instance, Peterson would like the opportunity to discuss options with the City of Milton-Freewater. Similarly, the Applicant would like at least to explore the option of seeking a Basin Plan Exception

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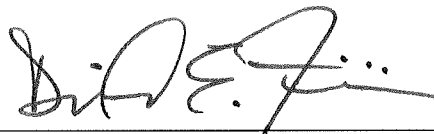
pursuant to ORS 536.295. Pursuant to ORS 536.295, a water right applicant is entitled to seek a basin plan exception for a use not classified in the applicable basin plan. A basin plan exception may provide an appropriate means of facilitating Peterson's groundwater application in light of the recently approved City WMCP. Counsel for Peterson anticipates seeking a stay of further proceedings as a result of this Protest to allow for such efforts.

6. Relief Requested. Les Peterson respectfully requests that the Commission apply the basin plan standards that were in effect at the time of the Application was submitted, and not the basin plan standards in effect at the time the protest period for the PFO expires. As such, the Department should issue the permit as requested, and as otherwise consistent with the Department's Initial Review Determinations. At a minimum, Peterson requests that the Commission allow him time to pursue solutions and alternatives as set forth above. Such solutions may involve the pursuit of an agreement with the City of Milton-Freewater or the pursuit of a basin plan exception pursuant to ORS 536.295. If the Commission does not grant the relief sought, Peterson hereby requests a contested case hearing pursuant to ORS 183.413 and OAR chapter 690, divisions 1 and 2.

7. Protest Fee. No protest fee is required, as the protestant in this instance is the applicant. *See* OAR 690-310-0160(1)(f).

DATED: July 21, 2005.

STOEL RIVES LLP



David E. Filippi, OSB No. 96509
Of Attorneys for Les Peterson

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 21, 2005, I filed **PROTEST AND REQUEST FOR HEARING OF LES PETERSON** with Mike Reynolds, Oregon Water Resources Department, 725 Summer Street NE, Suite A, Salem, OR 97301-1271 by facsimile and overnight mail.

Dated: July 21, 2005.



David E. Filippi, OSB No. 96509
Of Attorneys for Les Peterson

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