

**Oregon Water Resources Department
Water Rights Services Division**

Water Rights Application
Number S-87597

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 April 28, 2010, John Roth submitted an application to the Department for the following water use:

- Amount of Water: 105.0 ACRE FEET (AF)
- Use of Water: CRANBERRY USE ON 58.7 ACRES
- Source of Water: WINDHURST RESERVOIR, CONSTRUCTED UNDER PERMIT R-12928, A TRIBUTARY OF GEIGER CREEK

WITHDRAWN

Area of Proposed Use: COOS COUNTY WITHIN SECTION 32, TOWNSHIP 28 SOUTH, RANGE 14 WEST, W.M.
On May 17, 2010, the Department gave public notice of the application in its weekly notice. The public notice included an invitation to raise public interest issues regarding this application within 30 days of the notice. 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

An assessment of water availability has been completed. This assessment compared the storage capacity for the proposed source, Windhurst Reservoir, constructed under Permit R-12928, and all secondary rights which are authorized to appropriate water from the proposed source. The Department finds that stored water in Windhurst Reservoir is fully appropriated under Permit S-53703 and is not available for additional appropriation.

Since a public interest issue has been raised, specifically water availability, under ORS 537.147 (3) the Department is required to move the expedited secondary application to use exclusively stored water to the standard process and review the application pursuant to ORS 537.153, by issuing a Proposed Final Order.

The South Coast Basin Program allows cranberry use.

Senior water rights exist on Windhurst Reservoir, constructed under Permit R-12928, a tributary of Geiger Creek, or on downstream waters.

Windhurst Reservoir, constructed under Permit R-12928, a tributary of Geiger Creek, is not within or above a State Scenic Waterway.

The proposed source is not subject to review pursuant to OAR 600-033-0330.

WITHDRAWN

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 South Coast 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, not otherwise described above.

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 May 17, 2011

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

WITHDRAWN
Under the provisions of ORS 537.53(4) (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 **July 1, 2011**. 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;

- To affect the Department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest ORS 537.153(2)(b) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) the specific public interest in ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified public interest in ORS 537.170(8) would be impaired or be detrimentally affected;
- 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.

WITHDRAWN

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 **July 1, 2011**. 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 disseminates the relevant portions of its files in this matter, including all materials that you have submitted relating to this matter, as the record for purposes of providing a *de novo* case upon default.

WITHDRAWN

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-87597

PFO Date May 17, 2011

Original mailed to applicant:

JOHN ROTH
PO BOX 362
BANDON, OR 97411

Copies sent to:

1. WRD - File # S-87597
2. Water Availability: Ken Stahr

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

3. WRD - Watermaster # 19
4. WRD - SW Regional Manager

WITHDRAWN

Copies sent to Other Interested Persons (WRD Agent, Mill Outlet, Commenter, etc.)

5. Clay Jordan, Jordan Engineering, 460 Jordan Lane, Roseburg, OR 97471
6. Ron Haga, Chairman,
Windhurst Road Watering Corporation, 88860 Haga Lane, Bandon, OR 97411
7. Bandon Water Control District, P.O. Box 1832, Bandon, OR 97411
8. Kim Kratz, Northwest Fisheries Science Center,
NOAA Fisheries, 2725 Montlake Blvd E, Seattle, WA 98112
9. Laura Todd, Field Supervisor, US Fish & Wildlife Service,
Coastal Oregon Field Office, 2127 SE Marine Science Drive, Newport, OR 97365-5258

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

CASEWORKER : Kerry Kavanagh