

Kerry Kavanagh

From: Filippi, David [DEFILIPPI@stoel.com]
Sent: Thursday, July 07, 2011 4:01 PM
To: Kerry Kavanagh
Cc: Tom Paul; 'Tom Adams'; Matt McKamey; Eric Urstadt
Subject: IR comment letter re App S-87342
Attachments: 2011-07-07 Letter to Kerry Kavanagh re App S-87342.pdf; Atchmt1 2011-05-09 Letter to Tom Paul at OWRD.pdf

Hello Kerry,

Please find attached comments regarding the Initial Review for Application S-87342, on behalf of the applicant. The second document is an attachment referenced in the comments. Please call me if you have any questions or would like to discuss further. Thank you.

David.

David E. Filippi
Stoel Rives LLP
(503) 294-9529

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SALEM, OREGON



900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

July 7, 2011

DAVID E. FILIPPI
Direct (503) 294-9529
defilippi@stoel.com

VIA ELECTRONIC MAIL

Ms. Kerry Kavanagh
Oregon Water Resources Department
725 Summer St NE Ste A
Salem, OR 97301-1266

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Re: Comments on Initial Review Determinations for Application S-87342

Dear Ms. Kavanagh:

We represent the Applicant with respect to the above-referenced application, and we provide these comments in response to the Department's Initial Review (IR) issued on June 3, 2011.

As a starting point, the IR determines that much of the proposed use is not allowable due to what we understand is the Department's unwritten policy regarding the use of "thin water." On May 9, 2011, we sent a letter on behalf of Premier Pacific Vineyards, Inc. (PPV) to the Department objecting to the Department's new policy regarding the use of "thin water." A copy of the letter is attached. The letter referenced a series of pending water right applications including Application S-87342. (PPV is responsible for managing the land to which Application S-87342 is appurtenant.) The letter explained why the thin water policy is inconsistent with Oregon water law, provided examples of how the policy is inconsistent with the Department's past practices, and identified ways in which the policy is inconsistent with the Department's stated policies and objectives. Rather than repeat all of those arguments in this comment letter, we request that the letter be incorporated by reference into these comments.

In follow-up discussions with Department staff, we understand that the Department is in the process of revisiting the policy. We further understand that the IR was issued without the benefit of the Department's revised approach. We look forward further discussion with Department staff on these issues, and understand that the Proposed Final Order (PFO) will reflect the revised approach. We would request an opportunity to review a draft of the PFO prior to it being formally issued.

In addition, we have the following specific comments to the IR. The numbers below correspond to the paragraph numbers in the IR.

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1. We are in agreement with this paragraph as it correctly summarizes the application
2. The three referenced applications that were withdrawn have since been requested to be reinstated. The requests were sent via certified mail on June 13, 2011.
3. No comment.
4. No comment.
5. No comment.
6. No comment.
7. While we agree with the final conclusion of this paragraph, we do not agree with the reasoning. This paragraph suggests that the proposed secondary use of stored water would not have been allowed if there had been any other existing secondary right. We know of no statute or administrative rule that either expressly states or implies that multiple secondary uses of stored water are not allowed. This is also inconsistent with past Department practices, and is inconsistent with direction the Department provided to the Applicant in formulating this and other applications.
8. Similar to the comment regarding paragraph 7 above, we agree with the end result, but the statement suggests that the water is available only if the existing secondary uses are cancelled. Again, we know of no statute or administrative rule that either expressly states or implies that multiple secondary uses of stored water are not allowed. And again, this is inconsistent with past Department practices, and is inconsistent with direction the Department provided to the Applicant in formulating this and other applications.
9. No comment.
10. We disagree with the conclusion in this paragraph. The initial determination should be reconsidered, and the requested use should be allowed. The use of the total volume capacity of Zena East Reservoir should be allowed for primary irrigation of Zena East and for supplemental irrigation as described in the application. Our justification is as follows:
 - a. The applied-for-use is a beneficial use allowed in the basin plan.
 - b. The water is available for that use.
 - c. The proposed use does not expand or change the storage right.
 - d. We find no conflict with applicable laws or administrative rules.
 - e. We suspect from the implied reasoning in items 6 and 7 that this initial determination was arrived because a secondary use exists for the reservoir storage capacity in Zena East Reservoir (per another application). While we agree there is another secondary use for the water, multiple secondary uses of stored water have been allowed in the past, are allowed by current statute and administrative rule, and are required to make full beneficial use of stored water.



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- f. To clarify, the Applicant never intended to use more than the reservoir volume capacity in a single year. If the Department was under the impression that the Applicant was asking for twice as much as the storage capacity of the reservoir in a single year, this was not intended. The metering requirements will track and effectively preclude this from occurring. We are confident that an agreement between the various farms will also help to ensure that multiple uses from storage will not use more than the reservoir volume capacity in a single year, and will further ensure that the storage will be managed efficiently and collaboratively.
 - g. The Applicant simply wants and needs the capability to use the water where it needs the water the most. If all of the multiple secondary uses are disallowed as suggested by the IR, all of the farms (Zena West, Middle, and East) will have a much more difficult time providing adequate irrigation supplies. Vines may die, crop yields may be lessened, acres of crop may be lowered, and property values devalued, even as stored water sits in an adjoiner's pond.
 - h. The initial determination actually precludes the beneficial use of water.
 - i. The Applicant's representative at the time the application was prepared was told by the Department that multiple secondary uses of stored water was allowed.
11. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of Zena West Reservoir #1 should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.
12. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of Zena West Reservoir #2 should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.
13. No comment.
14. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of Zena West Reservoir #4 should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.
15. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of Zena West Reservoir #5 should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.
16. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of

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Zena West Reservoir #6 should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.

17. We disagree with the conclusion in this paragraph. This initial determination should be reconsidered, and the requested use should be allowed. The total volume capacity of all of these reservoirs should be allowed for supplemental irrigation as described in the application. Our argument is the same as in Paragraph 10, above.

We also have comments on the likely conditions. The numbers below correspond to the condition numbers in the IR.

1. No comment
2. There is no reason for requirements for fish screens to pump out of any of the reservoirs on Zena West or Zena East, as there is no way for fish to access the ponds or get near the ponds. This requirement should be removed.
3. We disagree with this proposed condition, and it should be removed for the following reasons:
 - a. Drip irrigation or "an equally efficient method" is not required by the basin plan in this situation, and therefore should not be required by the Department as a condition of the water right permit.
 - b. While the application did indicate that drip irrigation is planned to be used, it will not likely be the only method used. The Applicant may need some overhead sprinkling or other type of irrigation system for irrigation of stored vines or erosion cover crops. The Applicant could also need to hand water isolated vines not having a drip setup. The proposed condition as draft would preclude these beneficial uses.
 - c. The requirement for drip irrigation severely diminishes the capacity of the applicant to change or rotate crops. Nothing in the basin plan, applicable statute, or administrative rule precludes changing crops or crop rotations, and in fact, such practices are routinely encouraged.



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Please feel free to contact me or Eric Urstadt with Stuntzner Engineering & Forestry, LLC, who serves as the Applicant's consultant, with any questions. We look forward to discussing these matters further with you.

Sincerely,

David E. Filippi

Enclosure

cc: Client
Eric Urstadt



900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

May 9, 2011

DAVID E. FILIPPI
Direct (503) 294-9529
defilippi@stoel.com

VIA ELECTRONIC MAIL

Mr. Thomas J. Paul
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

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**Re: Water Right Applications R-86762, R-86763, S-86764, R-86760, S-86761, S-86759,
R-86143, R-86144, R-86145, S-87342, R-85954, S-85955, S-86175, S-81071**

Dear Tom:

Per our discussion on Friday afternoon, we represent the applicants for the above-referenced applications. Collectively, these applicants are either owned or controlled by our client, Premier Pacific Vineyards, Inc. ("PPV"), and/or PPV is responsible for managing the lands to which the water rights would otherwise be appurtenant. We have been told that the Department has recently adopted, or is considering adopting, a new policy regarding the use of "thin water" that applies to applications for new water rights. We understand that no written policy exists, but staff at the Department have confirmed that such a policy is being implemented to representatives of the applicants for the applications listed above. As we understand the new policy, the Department intends to deny applications for secondary water rights to use stored water for the purpose of irrigation or supplemental irrigation unless the amount of legally stored water is sufficient to provide 2.5 acre-feet of water per acre to each acre identified for irrigation in the respective application. This policy is inconsistent with Oregon water law and with the Department's past practice. It is also contrary to the Department's stated policies and objectives regarding the use of water in the Willamette Basin.

This letter explains the practical effect of the Department's policy on our client, PPV, which filed the above-referenced water right applications based on the advice of Department staff prior to the adoption of the new thin water policy. This letter will also explain why the policy is inconsistent with Oregon water law, provide examples of how the policy is inconsistent with the Department's past practice, and identify ways in which the policy is inconsistent with the Department's stated policies and objectives. We request that the Department proceed to issue permits or certificates for the water right applications identified in the subject line of this letter, which would be consistent with the favorable initial reviews and, in some instances, final orders

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the Department has already issued for many of these applications. If the Department is not prepared to continue processing these application without applying the new thin water policy, we request a meeting with you to explain why the Department should abandon the policy.

A. PPV submitted these water right applications based on the Department's advice.

PPV owns several independent legal entities, each of which owns a separate vineyard. This letter relates to water right applications associated with six of these vineyards. The six vineyards are divided into two groups. The first group is comprised of Popcorn Hill Vineyard LLC, Eagle Crest Vineyard LLC, and Gibson Ridge Vineyard LLC (the "PEG Vineyards"). The second group is comprised of Zena Heights Vineyard, Middle Zena Vineyard, and Bethel Hill Vineyard (the "Zena Vineyards"). Each vineyard has at least one reservoir that can be used to store water for use on that vineyard. Most of these reservoirs already have certificated storage rights. Each vineyard has also applied for or obtained water rights to use direct flow and/or stored water from the reservoir located on the vineyard for the purpose of primary or supplemental irrigation on the vineyard where the reservoir is located.

To increase the reliability of the water supply for each vineyard, PPV wanted to have the ability to use water from any of the reservoirs to supply stored water for the purpose of supplemental irrigation on each of the other two vineyards within the same group. In 2006, Joseph Richards, who was working on behalf of PPV, discussed with staff from the Department the best way to secure the necessary water rights. PPV followed the recommendations of Department staff and submitted the necessary water right applications. For example, PPV submitted an application to use the water from a reservoir located on Eagle Crest Vineyard for the purpose of supplemental irrigation on Popcorn Hill Vineyard and Gibson Ridge Vineyard. *See* Application S-86761 (proposing to use 0.20 cubic feet per second ("cfs") direct flow and 3.0 acre-feet of stored water for irrigation of 50.0 acres and supplemental irrigation of 197.71 acres, with all acres included within the PEG Vineyards).

Even though PPV completed its water right applications based on the advice of Department staff, the Department has refused to issue a permit for these supplemental irrigation rights based on the new thin water policy. Similar applications for each vineyard are in various stages of processing within the Department, but it appears that many of these applications will be affected by the Department's thin water policy. The Department should be estopped from implementing the recently adopted, unwritten policy to deny water rights applications when the applicant has relied on the Department's advice and past practice in applying for the water rights.



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B. The Department's thin water policy is inconsistent with Oregon water law.

The Willamette Basin Program provides:

Water legally stored may be released or used at any time for any beneficial purpose, such as domestic, livestock, irrigation (during the irrigation season as specified in section (6) of this rule), agricultural, commercial, municipal, industrial, power, mining, recreation, fish life, wildlife, pollution abatement, wetland enhancement, public instream uses and uses allowed under a limited license.

OAR 690-502-0040(4)(c) (emphasis added). The thin water policy is inconsistent with this rule because the policy places additional restrictions on the use of legally stored water, despite the fact that the rule explicitly allows the use of legally stored water at any time for any beneficial purpose. *Id.* Although the Department must protect the waters of the state from over-appropriation, OAR 690-410-0070(1), over-appropriation is not a concern where the use of legally stored water is at issue. "A determination that a stream is over-appropriated does not affect the allocation of legally stored water from existing or future facilities." OAR 690-410-0070(2)(d). Thus, PPV should be able to obtain rights to use stored water for the purpose of supplemental irrigation on any number of acres that PPV desires.

The Department's thin water policy would also work against conservation-related statutes, such as the allocation of conserved water statute. This statute allows a water right holder who implements a conservation measure to use a portion of the conserved water on additional lands, to lease or sell that portion of the conserved water, or to dedicate all of the conserved water to instream use. ORS 537.455–537.500. The statute recognizes that a water right holder may be able to satisfy the beneficial use specified in the water right using less than the full duty of water specified in the right. In those situations, the statute promotes the conservation of water, maximizes beneficial use, and enhances streamflow. OAR 690-018-0010(2).

Similar to a water right holder who utilizes the allocation of conserved water statute by installing drip irrigation, PPV recognizes that its decision to grow grapes—a crop that requires less water than many other crops—has the effect of conserving water. The use of water to irrigate grapes does not require the full 2.5 acre-feet of water per acre typically specified in an irrigation water right. In fact, PPV intends to generally use only 0.3–0.6 acre-feet per acre to establish its grapes. PPV may need even less water once the grapes are established. As such, PPV is amenable to obtaining water rights that specify a reduced duty. The Department can promote conservation of

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water and maximize the beneficial use of water by specifying a reduced duty in the permits and certificates issued for PPV's pending applications.

C. The Department's thin water policy is inconsistent with the Department's past practices.

The thin water policy is inconsistent with the Department's past practice for issuing water rights. In fact, some of the water rights already held by PPV would be prohibited under the new thin water policy. For example, under Certificate 40633, PPV has a right to use 0.30 cfs for the purpose of irrigation of 18.8 acres and supplemental irrigation of 12.8 acres. The duty specified in the certificate is 2.5 acre-feet per acre. The source of the water is direct flow from Gibson Gulch and a reservoir constructed under Permit R-1763 (Certificate 29899). The storage right is for 16.45 acre-feet, and only stored water can be used on lands designated for supplemental irrigation.

The Department could not have issued Certificate 40633 under its current thin water policy. Under the policy, the maximum number of acres for which a supplemental water right could have been issued is 6.58 acres (16.45 / 2.5). Yet, Certificate 40633 includes a supplemental right of nearly double that amount—12.8 acres.

As another example, Certificate 39304 authorizes the holder to use water stored under Certificate 39303 for the purpose of irrigation of 20.2 acres. However, Certificate 39303 authorizes the storage of only 10.5 acre-feet for the purpose of irrigation. Under the thin water policy, the maximum number of acres that could be irrigated using 10.5 acre-feet of stored water is 4.2 acres. But Certificate 39304 allows for the irrigation of 20.2 acres—nearly five times the number of acres that could be irrigated under the thin water policy.

PPV relied on the past practice of the Department and, as discussed in Section A above, the advice of Department staff when it submitted these water right applications. The Department should continue processing PPV's water right applications consistent with its past practice.

D. The Department's thin water policy is inconsistent with the Department's stated policies and objectives.

The thin water policy is contrary to the Department's stated policies and objectives regarding use of water in the Willamette Basin. Specifically, the policy fails to promote the efficient use of water through the implementation of voluntary conservation measures (e.g., the selection of crops that use less water). *See* OAR 690-502-0020(5)(b) (explaining that the Water Resources



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Commission's policy is to "[i]mprove the efficiency of water use through implementation of voluntary conservation measures"). As discussed in Section B above, grapes do not require 2.5 acre-feet of water per acre. Yet, by requiring that 2.5 acre-feet of water per acre be available in order to issue a new water right, the Department is tying up water that could be better used to irrigate additional acres or to fulfill some other beneficial use. This policy does not promote the efficient use of water.

The policy also fails to "encourage use of water which sustains economic development." OAR 690-502-0030(10). Vineyards are an expanding industry, and policies that fail to recognize the differences between the irrigation of vineyards and the irrigation of crops that require more water per acre will thwart the industry's growth.

E. Conclusion

We urge the Department to issue permits or certificates for the water right applications identified in the subject line of this letter. If the Department is not prepared to issue these permits or certificates, we would like to meet with you at your earliest convenience to discuss the thin water policy. Please feel free to contact me if you have any questions.

Very truly yours,

David E. Filippi

cc: Client