

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

Water Rights Application
Number S-87775

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 December 30, 2011, Charles K Kelley submitted an application to the Department for the following water use:

- Amount of Water: 364.0 ACRE FEET (AF)
- Use of Water: IRRIGATION OF 121.28 ACRES
- Source of Water: MUDDY CREEK RESERVOIR, CONSTRUCTED UNDER PERMIT R-2648 (1283.0 AF) AND ENLARGED UNDER PERMIT R-6442 (682.0 AF), A TRIBUTARY OF GOOSE LAKE
- Area of Proposed Use: LAKE COUNTY WITHIN SECTIONS 7 AND 18, TOWNSHIP 39 SOUTH, RANGE 19 EAST, W.M.

On August 28, 2012, 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, Muddy Creek Reservoir, constructed under Permit R-2648 and enlarged under Permit R-6442, a tributary of Goose Lake, and all secondary rights which are authorized to appropriate water from the reservoir. The Department

finds that all but 41.75 AF of stored water in Muddy Creek Reservoir has been appropriated under existing rights, being Certificate 40765 (876.0 AF), Certificate 49462 (0.53 CFS for irrigation of 35.6 acres at a duty of 2.5 AF per acre, equivalent to 89.0 AF), Permit S-49825 (276.25 AF), and Permit S-40411 (6.82 CFS for irrigation of 272.8 acres at a duty of 2.5 AF per acre, equivalent to 682.0 AF). Therefore, 364.0 AF of stored water is not available for 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 Goose and Summer Lakes Basin Program allows irrigation.

Senior water rights exist on Muddy Creek Reservoir, constructed under Permit R-2648 and enlarged under Permit R-6442, a tributary of Goose Lake.

Muddy Creek Reservoir, constructed under Permit R-2648 and enlarged under Permit R-6442, a tributary of Goose Lake, is not within or above a State Scenic Waterway.

The proposed source is not subject to review pursuant to OAR 690-033-0000.

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 Goose and Summer Lakes Basin Program allows the proposed use.

Water is not available for the proposed use.

The proposed use would 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 December 11, 2012



E. Timothy Wallin, Water Rights Program Manager
for Phillip C. Ward, Director

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 **January 25, 2013**. 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.*

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 **January 25, 2013**. 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.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

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-87775

PFO Date December 11, 2012

Original mailed to applicant:

CHARLES K KELLEY
PO BOX 711
LAKEVIEW, OR 97630

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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SENT VIA EMAIL:

1. WRD - Watermaster # 12

Protest/ Standing Dates checked _____
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Copies sent to:

1. WRD - File # S-87775
2. WRD - Water Availability: Ken Stahr

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

3. Darryl Anderson, Anderson Engineering & Surveying, Inc., PO Box 28, Lakeview OR 97630
4. DEQ, Don Butcher, 700 SE Emigrant, #330, Pendleton, OR 97801
5. Lakeview Water Users Inc., 91164 Water Users Lane, Lakeview, OR 97630

CASEWORKER : Kerry Kavanagh