

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number G-17680

The Department must receive evidence demonstrating compliance with well construction standards for Well 2 (CLAC 2555/CLAC 2556), which must be approved by the Department's Well Construction and Compliance Section. Please include your application number on any documents submitted to the Department.

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because water is not available.

Application History

On June 4, 2013, Barlow Oaks LLC submitted an application to the Department for the following water use permit:

- Amount of Water: 1.11 cubic feet per second (CFS)
- Use of Water: Nursery Use on 44.2 acres
- Source of Water: Well 1 (CLAC 56198) and Well 2 (CLAC 2555/CLAC 2556) in Rock Creek Basin
- Area of Proposed Use: Clackamas County within Section 18, Township 5 South, Range 1 East, W.M.

On November 1, 2013, the Department mailed the applicant notice of its Initial Review, determining that "*the appropriation of 1.11 CFS of water from Well 1 (CLAC 56198) and Well 2 (CLAC 2555/CLAC 2556) in Rock Creek Basin for year-round nursery use on 44.2 acres is not allowable, and it appears unlikely that you will be issued a permit.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On November 5, 2013, 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.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- any applicable basin program
- applicable statutes, administrative rules, and case law
- the amount of water available
- the rate and duty for the proposed use

- any general basin-wide standard for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the general standard
- pending senior applications and existing water rights of record
- any applicable comprehensive plan or zoning ordinance
- recommendations by other state agencies
- the Scenic Waterway requirements of ORS 390.835
- designations of any critical ground water areas
- any comments received

Findings of Fact

Uses included in nursery use are fully included in irrigation and agriculture uses, both of which are allowed by OAR 690-502, the Willamette Basin Program. Therefore, the appropriation of water from Well 1 (CLAC 56198) and Well 2 (CLAC 2555/CLAC 2556) in Rock Creek Basin for nursery use is allowable.

An assessment of ground water availability has been completed by the Department's Ground Water/Hydrology section. A copy of this assessment is in the file. Ground water will likely be available within the capacity of the resource, and the proposed use of ground water will avoid injury to existing ground water rights.

Ground Water Findings Under OAR 690-009

The Department determined, consistent with OAR 690-009-0040(4), that the proposed ground water use will have the potential for substantial interference with surface water, namely Rock Creek.

In making this determination, the Department considered whether:

- (a) There is a hydraulic connection from the proposed well(s) to any surface water sources.
- (b) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source;
- (c) The rate of appropriation is greater than five cubic feet per second, if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (d) The rate of appropriation is greater than one percent of the pertinent adopted minimum perennial streamflow or instream water right with a senior priority date, if one is applicable, or of the discharge that is equaled or exceeded 80 percent of time, as determined or estimated by the Department, and if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (e) The ground water appropriation, if continued for a period of 30 days, would result in stream depletion greater than 25 percent of the rate of appropriation, if the point of appropriation is a horizontal distance less than one mile from the surface water source.

For this application, the Department determined that there is the potential for substantial interference because of the following items described above: (a), (d), (e)

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.

If a permit were to be approved, ODFW recommended that additional limitations or conditions of use be imposed as follows:

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 state or federal water-quality standards due to reduced flows.

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.

Because the proposed use of ground water has the potential for substantial interference with surface water, an assessment of surface water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that surface water is not available for further appropriation during the full season requested per OAR 690-300(57).

Well 1 (CLAC 56198) and Well 2 (CLAC 2555/CLAC 2556) are not within or above a State Scenic Waterway.

The proposed ground water use is not within a designated critical ground water area.

Conclusions of Law

Under the provisions of ORS 537.621, the Department must presume that a proposed use will ensure the preservation of the public welfare, safety and health 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 proposed use requested in this application is allowed in the Willamette Basin Program.

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.

No proposed flow rate and duty of water higher than the general basin-wide standard is needed.

For these reasons, the required presumption **has not** been established.

The Department therefore concludes that the proposed use **would not** ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

Recommendation

The Department recommends that the application be denied.

DATED October 21, 2014



E. Timothy Wallin, Water Rights Program Manager
for Thomas M. Byler, 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 **December 5, 2014**. 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 the 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, ensure the preservation of the public welfare, safety and health as described in ORS 537.525, ORS 537.621(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 aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected;
- If you are the applicant, the protest fee of \$350 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$700 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.

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 **December 5, 2014**. 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 \$200. If a hearing is scheduled, an additional fee of \$500 must be submitted along with a petition for party status.

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.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

This document was prepared by Barbara Park. 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 503-986-0859.

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 #G-17680

PFO Date October 21, 2014

Original **emailed** to applicant:

~~BARLOW OAKS LLC, 25571 S BARLOW RD, CANBY, OR, 97013~~

SENT VIA EMAIL:

1. Applicant - willamette@canby.com
2. Agent - steve@skookumwater.com
3. WRD -Watermaster #16

Copies sent to:

1. WRD - File # G-17680
2. Water Availability: Shawn Turner

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
--

Protest/ Standing Dates checked _____
--

CASEWORKER : Barbara Park

