

Oregon Water Resources Department
Water Rights Division

Water Rights Application
Number G-13097

Final Order Incorporating Settlement Agreement

Hearing and Appeal Rights

Under the provisions of ORS 537.170 and ORS 537.622, the applicant may request a contested case hearing by submitting the information required for a protest under ORS 537.153(6) or ORS 537.621(7) to the Department within 14 days after the date of mailing of this order as shown below. If a contested case hearing is requested, the Department must schedule one. In the contested case hearing, however, only those issues based on the above modifications to the proposed final order may be addressed.

ORS 536.075 allows for additional appeal rights for orders other than contested case. This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review of this order must be filed within the 60 day time period specified by ORS 183.484(2).

This statement of judicial review rights does not create a right to judicial review of this order, if judicial review is otherwise precluded by law. Where no changes have been made to a Proposed Final Order on a water right application and no protests have been filed during the protest period, the final order is not subject to judicial review.

Application History

On August 27, 1992, the City of Bend submitted an application to the Department for a water use permit.

On August 29, 1995, OWRD issued a Proposed Final Order (PFO) recommending approval of Application G-13097.

On October 20, 1995, WaterWatch of Oregon filed a protest against the PFO for Applications G-13097.

On June 1, 2001, the applicant was notified of an opportunity to continue an administrative hold on Application G-13097 pending the adoption of ground water mitigation rules for the Deschutes Basin.

Administrative rules governing ground water applications in the Deschutes Ground Water Study Area were adopted by the Water Resources Commission in September 2002.

On August 25, 2003, the applicant was notified of the mitigation obligation for the proposed use. The mitigation obligation was determined to be 3,479.3 acre-feet (AF) for the use of 12.0 cubic

feet per second (cfs) for year round (24 hours per day, 7 days per week) municipal use.

On July 29, 2005, House Bill 3494, enacted by the 73rd Oregon Legislative Assembly, was signed by the Governor. Under Section 2 of this 2005 Act, Oregon Administrative Rules (OAR) 690-505-0600 through 690-505-0630, certified effective by the Secretary of State on September 27, 2002, satisfy the requirements relating to mitigation under ORS 390.805 to 390.925, 537.322 to 537.360, and 537.505 to 537.795.

On September 1, 2006, the Department notified the applicant of the opportunity to provide mitigation on an incremental basis. On November 29, 2006, the City of Bend, through its agent, Adam Sussman, of CH2MHill, submitted an incremental development plan pursuant to OAR 690-505-0625. The City also modified its application to limit annual volume to 3,223 AF. The incremental development plan was based upon the use of 12.0 cfs for year round municipal use, a modified annual volume of water limited to 3,223 AF, and a consumptive use coefficient of 40 percent. This resulted in a mitigation obligation of 1,289 AF.

On December 1, 2006, the Department sent a notice to Oregon Department of Fish and Wildlife, Oregon State Parks and Recreation Department, Oregon Department of Environmental Quality, and Oregon Department of State Lands (DSL) and requested comments regarding the applicant's mitigation proposal. Only one agency (DSL) responded to the notice, and their comment was that they had no comment.

On February 5, 2007, the City of Bend revised its incremental development plan to be consistent with the pending settlement agreement with WaterWatch of Oregon, Inc. The revised incremental development plan uses a 50 percent consumptive use coefficient to determine the mitigation obligation. Based on the requested annual volume of 3,223 AF, the resultant mitigation obligation is 1,611.5 AF.

As of March 22, 2007, a Settlement Agreement was entered into between the City of Bend, WaterWatch of Oregon, Inc., and the Department. The Settlement Agreement is incorporated into this Final Order by reference and as an attachment.

Mitigation

The Department has determined that the proposed use will have the potential for substantial interference with the Deschutes River. The Department also finds that, without the required mitigation, there is a preponderance of evidence that the proposed use will measurably reduce surface water flows necessary for the Deschutes River Scenic Waterway (ORS 390.835(9)). Without appropriate mitigation, the Department would be required to deny the application. The proposed ground water use is located within the Deschutes Ground Water Study Area and, pursuant to the Settlement Agreement, is subject to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505.

As required by OAR 690-505-0615, the applicant must submit proposed mitigation that meets the requirements of OAR 690-505-0610(2)-(5). Pursuant to OAR 690-505-0620, a permit shall not be issued until the applicant provides documentary evidence that mitigation water, in an amount satisfying the mitigation obligation, is legally protected instream.

Because the applicant is a municipal ground water permit applicant, the mitigation obligation may be satisfied by incrementally obtaining and providing mitigation to coincide with the incremental development of the permit, provided that mitigation is provided prior to each stage of development of the permit and in accordance with the standards in OAR 690-505-0610 (2) - (5).

The mitigation proposed by the applicant will occur within the General Zone of Impact. The incremental mitigation shall be provided, subject to the rate of permit development, as follows:

INCREMENT #	DATE OF PROPOSED IMPLEMENTATION	MAXIMUM VOLUME	MITIGATION AMOUNT	MITIGATION SOURCE
1	2006	409.0 AF	204.5 AF	Qualifying mitigation credits or a mitigation project
2	2011	717.0 AF	358.5 AF	Qualifying mitigation credits or a mitigation project
3	2016	673.0 AF	336.5 AF	Qualifying mitigation credits or a mitigation project
4	2021	673.0 AF	336.5 AF	Qualifying mitigation credits or a mitigation project
5	2026	751.0 AF	375.5 AF	Qualifying mitigation credits or a mitigation project

Pursuant to the Settlement Agreement, for the purposes of calculating the permittee's mitigation obligation, a consumptive use coefficient of 50 percent will be applied, subject to other provisions of the Permit.

In 1995, the Department found that a rebuttable presumption had been established that the use will not impair or be detrimental to the public interest. However, since that finding was made a joint study of ground water resources by the Department and U.S. Geological Survey has established a hydraulic connection between ground water and surface water within the Deschutes Ground Water Study Area. Based on the conclusions on the study, the Department determined that groundwater appropriations within the Deschutes Ground Water Study Area have the potential for substantial interference with surface water rights as described in OAR 690, Division 9, and will measurably reduce scenic waterway flows as defined in ORS 390.835 unless mitigation is provided. Thus, continuing evaluation reveals that the Proposed Final Order requires modification to correctly describe permit conditions as required by OAR 690-050-0620 necessary to ensure the preservation of the public welfare, safety and health. The mitigation conditions, along with other conditions in the attached draft permit shall be contained in the permit.

- Mitigation Obligation: 1,611.5 acre-feet in the General Zone of Impact (anywhere in Deschutes Basin above the Madras gage, which is located below Lake Billy Chinook.)
- Mitigation Source: Mitigation Credits or a Mitigation Project, in accordance with the incremental development plan on file with the Department, meeting the requirements of OAR Chapter 690, Division 505 (Deschutes Ground Water Mitigation Rules).

Mitigation water must be legally protected instream for instream use within the General Zone of Impact and committed for the life of the permit and subsequent certificate(s). Regulation of the use and/or cancellation of the permit, or subsequent certificate(s) will occur if the required mitigation is not maintained.

The permittee shall provide mitigation prior to each stage of development under the permit, as described in the incremental development plan on file with the Department, and in accordance with the standards of the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505.

If mitigation is from a secondary right for stored water from a storage project not owned or operated by the permittee, the use of water under this right is subject to the terms and conditions of a valid contract, or a satisfactory replacement, with the owner/operator of the storage project, a copy of which must be on file in the records of the Water Resources Department prior to use of water.

The permittee shall provide additional mitigation if the Department determines that the average annual consumptive use of the subject appropriation has increased beyond the originally mitigated amount.

The permittee shall provide timely written notice to the appropriate OWRD Watermaster in the event that the permittee intends to irrigate with reclaimed water that originates from water use under this permit.

Failure to comply with these mitigation conditions shall result in the Department regulating the ground water permit, or subsequent certificate(s), proposing to deny any permit extension application for the ground water permit, and proposing to cancel the ground water permit, or subsequent certificate(s).

Measurement, recording and reporting conditions

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each well. The totalizing flow meter(s) must be installed and maintained in good working order consistent with those standards identified in OAR 690-507-645(1) through (3). The permittee shall keep a complete record of the amount of water used each month and shall submit a report which includes the

recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water use information, including the place and nature of use of water under the permit.

- B. The permittee shall allow the watermaster access to the meter(s); provided however, where any meter is located within a private structure, the watermaster shall request access upon reasonable notice.

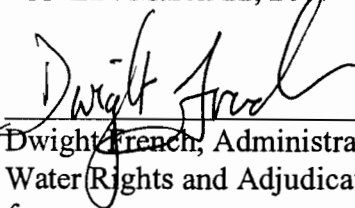
Order

Application G-13097 therefore is approved with the above modifications to the Proposed Final Order, and as conditioned, will ensure the preservation of the public welfare, safety and health.

A permit consistent with the attached draft permit shall be issued only upon submission of documentary evidence demonstrating that 204.5 AF of mitigation water (credits or mitigation project), or an alternate amount of mitigation in conjunction with a modified incremental development plan, meeting the requirements of OAR 690-505-0610(2)-(5), within the General Zone of Impact, have been obtained and satisfy the first stage of incremental development. Once the permit is issued, the permittee shall provide mitigation prior to each stage of development under the permit, as described in the incremental development plan on file with the Department, and in accordance with the standards of the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505.

This final order shall expire 5 years after issuance unless the required first increment of mitigation is provided. OAR 690-505-0620(2).

DATED: March 22, 2007



Dwight French, Administrator
Water Rights and Adjudications Division

for

Phillip C. Ward, Director
Oregon Water Resources Department

If you have questions about how to file a protest or if you have previously filed a protest and want to know the status, please contact Mike Reynolds 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 FO Copies

Application #**G-13097**

Mailing List Print Date: March 22, 2007

Original mailed to:

THE CITY OF BEND, PO BOX 431, BEND, OR 97709

Copies sent to:

1. WRD - File # G-13097
2. Water Availability: Ken Stahr
3. WRD - Laura Snedaker

FO and Map Copies sent to:

4. WRD - Watermaster # 11
5. DRC- Genevieve Hubert

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

Adam Sussman, CH2MHill, PO Box 428, Corvallis, OR 97339-0428

John Short, Deschutes Irrigation, LLC.

CASEWORKER : huffmaam

Copies Mailed SLS
Date: 3/23/07