

Oregon Water Resources Department  
Water Rights Division

Water Rights Application  
Number S-86982

Proposed Final Order

*Summary of Recommendation:* The Department recommends that the application be denied because the use is not consistent with Oregon Administrative Rule (OAR) 690-033 and the maps submitted do not meet the requirements of OAR 690-310-0050.

*Application History*

On September 18, 2007, Cala Farms submitted an application to the Department for the following water use:

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- Amount of Water: 6.8 CUBIC FEET PER SECOND (CFS), BEING 5.73 CFS FROM CALAPOOIA RIVER AND 1.11 CFS FROM WALTON SLOUGH
- Use of Water: IRRIGATION USE ON 3130.93 ACRES
- Source of Water: CALAPOOIA RIVER, A TRIBUTARY OF WILLAMETTE RIVER, AND WALTON SLOUGH, A TRIBUTARY OF SHEDD SLOUGH
- Area of Proposed Use: LINN COUNTY WITHIN SECTION 18, SECTION 19, SECTION 20, SECTION 21, SECTION 28, SECTION 29, SECTION 30, SECTION 31, AND SECTION 32, TOWNSHIP 12 SOUTH, RANGE 3 WEST, W.M.; SECTION 11, SECTION 12, SECTION 13, SECTION 14, SECTION 24, AND SECTION 36, TOWNSHIP 12 SOUTH, RANGE 4 WEST, W.M.; SECTION 5, SECTION 6, SECTION 7, SECTION 8, SECTION 17, SECTION 18, AND SECTION 19, TOWNSHIP 13 SOUTH, RANGE 3 WEST, W.M.; SECTION 1, TOWNSHIP 13 SOUTH, RANGE 4 WEST, W.M. *No map.*

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On March 7, 2008, the Department mailed the applicant notice of its Initial Review, determining that "Because of the above limitations, the use of 5.73 CFS from Calapooia River, a tributary of Willamette River, and Walton Slough, a tributary of Shedd Slough, for irrigation use on 3530.93 acres is not allowable during the full period requested, April 1 through July 31, and it appears unlikely that you will be issued a permit. However, by providing additional information as described below, you may be able to pursue a limited permit." The applicant did not notify the Department to stop processing the application within 14 days of that date.

On March 11, 2008, 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 both obtaining future notices and a copy of the proposed final order. No written comments were received within 30 days.

On April 9, 2008, the applicant amended the irrigation season for diversion A, B, C, D, E, F, and H to May 1 through July 31, and to May 1 through June 30 for diversion G, and amended the total acreage to be irrigated from 3,530.93 acres to 3,501.27 acres. In addition, the applicant clarified the source for diversion H as Walton Slough.

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

- A. recommendations by other state agencies
- B. any applicable basin program
- C. any applicable comprehensive plan or zoning ordinance
- D. the amount of water available
- E. the rate and duty for the proposed use
- F. pending senior applications and existing water rights of record
- G. the Scenic Waterway requirements of ORS 390.835
- H. applicable statutes, administrative rules, and case law
- I. any comments received

#### *Findings of Fact*

The Willamette Basin Program allows the use of water from diversions A, B, C, D, E, F, and H from October 1 through July 31 of each year under OAR 690-502-0110(1)(c). The use of water from diversion G is allowable November 1 through June 30 under OAR 690-502-0110(1)(d).

The maps submitted have numerous errors that have not been rectified by the applicant, and therefore do not meet the requirements of OAR 690-310-0050.

Senior water rights exist on CALAPOOIA RIVER, A TRIBUTARY OF WILLAMETTE RIVER, AND WALTON SLOUGH, A TRIBUTARY OF SHEDD SLOUGH, or on downstream waters.

CALAPOOIA RIVER, A TRIBUTARY OF WILLAMETTE RIVER, AND WALTON SLOUGH, A TRIBUTARY OF SHEDD SLOUGH, are not within or above a State Scenic Waterway.

An assessment of 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 assessment is in the file. This assessment determined that water is available for further appropriation (at an 80 percent exceedance probability) for the amended period of use per OAR 690-300(57).

In accordance with OAR 690-33-330, 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. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

ODFW stated the proposed use will result in a loss in the essential habitat of threatened and sensitive fish species, and if any permit is issued to include the following conditions:

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 Chapter 635, Division 415, Section 030 adopted November 13, 1991 shall be followed.

The use may be restricted if the quality of the source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

Limit the period of use from diversions F and G to March 1 through April 30.

DEQ recommended the application be denied because the proposed use from the Calapooia River will have a high potential to affect water quality, specifically temperature, bacteria, and dissolved oxygen, and conditions cannot be applied to mitigate for the impact.

The Watermaster (WRD) recommended the following:

Limit the period of use to May 1 through July 31.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation. The permittee shall maintain the meter(s) in good working order. 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.

*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 Willamette Basin Program allows the proposed use, or a preference is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use would not injure other water rights.

The proposed use does not comply with other rules of the Water Resources Commission, specifically OAR 690-33.

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 water is available in the amount necessary for the proposed use; the proposed use would not result in injury to existing water rights; and 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 July 15, 2008



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

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 **August 29, 2008**. Protests must be in writing, and must include the following:

A. Your name, address, and telephone number;

B. 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;

C. A detailed description of how the action proposed in this proposed final order would impair or be detrimental to your interest;

D. A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency;

E. Any citation of legal authority to support your protest, if known; and

F. If you are not the applicant, the protest fee of \$350 required by ORS 536.050 and proof of service of the protest upon the applicant.

G. 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.

H. 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 **August 29, 2008**. Requests for standing must be in writing, and must include the following:

I. The requester's name, mailing address and telephone number;

J. If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;

K. A statement that the requester supports the proposed final order as issued;

L. A detailed statement of how the requester would be harmed if the proposed final order is modified; and

M. A standing fee of \$100.00. If a hearing is scheduled, an additional fee of \$250.00 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:

N. upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or

O. the applicant requests a contested case hearing within 30 days after the close of the protest period.

*This document was prepared by Joel Plahn. 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 503-986-0815.*

*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.*