

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In The Matter of Applications for Extension of)	SETTLEMENT
Time for Permit S-43837 (Application S-58045),)	AGREEMENT
Permit S-31365 (Application S-41825), Permit G-)	(Attachment A)
3240 (Application G-3361) and Permit G-9438)	
(Application G-9502) in the name of Harbor)	
Water People's Utility District in Curry County,)	
Oregon)	
<i>Applicant, and</i>)	
)	
WaterWatch of Oregon, Inc.)	
<i>Protestant</i>)	

The Oregon Water Resources Department (OWRD), Harbor Water People's Utility District (District or Harbor) and WaterWatch of Oregon, Inc. (WaterWatch), (collectively "the Parties") do hereby stipulate and agree in this "Settlement Agreement" (Agreement) as follows:

A. Background

1. The District has four permits: G-3240 (3.5 cfs; Group Domestic; priority date 1/28/1966), S-31365 (3.5 cfs; Quasi-Municipal; priority date 1/28/1966), G-9438 (7.0 cfs; Quasi-Municipal, priority date 1/3/1980), and S-43837 (7.0 cfs; Municipal; priority date 10/26/1978). The District currently utilizes one point of diversion/point of appropriation on the Chetco River (located 800 ft north and 1000 ft east of the southwest corner of Section 34, T40S, R13W, WM.)
2. On May 14, 2003, OWRD received an application from the District for an extension of time for Permit G-3240. On October 26, 2004, OWRD issued a Proposed Final Order approving an extension of time from October 1, 2000 to October 1, 2008. WaterWatch filed a protest on December 10, 2004.
3. On May 14, 2003, OWRD received an application from the District for an extension of time for Permit G-31365. On November 13, 2007, OWRD issued a Proposed Final Order approving an extension of time from October 1, 2000 to October 1, 2008. WaterWatch filed a protest on December 28, 2007.
4. On May 14, 2003, OWRD received an application from the District for an extension of time for Permit G-9438. On November 13, 2007, OWRD issued a Proposed Final Order approving an extension of time from October 1, 1999 to October 1, 2020. WaterWatch filed a protest on December 28, 2007.
5. On May 14, 2003, OWRD received an application from the District for an extension of time for Permit S-43837 from October 1, 2000 to October 1, 2050. OWRD has not yet issued a Proposed Final Order.

6. The Parties enter into this settlement agreement to resolve the protests to the proposed final orders on three permits and to agree on conditions for approval of an extension of time for Permit S-43837.

B. Consent

1. The Parties understand and agree that this Agreement, including the draft Final Orders Incorporating Settlement Agreement for Permits G-3240, G-9438 and S-31365 and the draft Proposed Final Order for Permit S-43837, sets forth the entire Agreement of the Parties and constitutes the complete and final resolution of the WaterWatch protests.

2. The District and WaterWatch hereby waive their respective rights to petition for reconsideration and for judicial review of this Agreement and the Final Orders Incorporating Settlement Agreement for Permits G-3240, G-9438 and S-31365 and the subsequent Final Order Incorporating Settlement Agreement for Permit S-43837, provided each of the Final Orders is issued consistent with this Agreement.

3. Each Party, and each individual signing this agreement on behalf of a Party, hereby represents, warrants, and agrees that the person who executes this Agreement on the Party's behalf has the full right and authority to bind that Party to the terms of this Agreement.

4. Each Party hereby certifies that it has had a reasonable opportunity to review and request changes to this Agreement, and that it has signed this Agreement of its own free will and accord.

C. Terms of Agreement

1. Within 30 days following full execution of this Settlement Agreement, OWRD shall issue a Proposed Final Order for extension of Permit S-43837 in accordance with the terms and conditions of the Settlement Agreement and the draft Proposed Final Order attached hereto. The parties agree not to file protests on any such proposed order. If protests are filed by any persons not party to this agreement, the Parties will work cooperatively to attempt to resolve the protests in accordance with this agreement.

2. Within 30 days following the close of the protest period for the Proposed Final Order on S-43837, if no protests are filed, OWRD shall issue Final Orders extending Permits G-3240, S-31365, G-9438 and S-43837 in accordance with the terms and conditions of the Settlement Agreement and the draft proposed final order on Permit S-43837 and draft final orders on Permits G-3240, S-31365 and G-9438 attached hereto.

3. Notwithstanding any other term of this Settlement Agreement, any Party may petition OWRD to correct any scrivener's error in the Final Orders Incorporating Settlement Agreement.

4. This Settlement Agreement is made upon the express understanding that it constitutes a negotiated resolution. The Parties agree that nothing in this Settlement Agreement establishes factual, legal, or policy precedent.

5. For purposes of this Settlement Agreement and the Final Orders Incorporating Settlement Agreement, "permit" shall mean the permit being referred to and any certificates, transfers, or

permits arising out of the permit; "Water Rights" shall mean the four permits and any certificates or permits arising out of them; "Harbor" or "permit holder" shall mean Harbor Water PUD or any future assignee or holder of Permits G-3240, S-31365, G-9438 and S-43837 or any certificates or permits arising out of those permits.

6. Extensions of Permits G-3240, G-9438, and S-31365, and any proposed extension of Permit S-43837 shall include the following conditions which were agreed to pursuant to this Settlement Agreement. In addition to being agreed to in this Settlement Agreement, Condition (C), the portion of Condition (E) that limits diversion to 5 cfs when flows at the mouth of the Chetco River are at or below 80 cfs, and Condition (F) are also conditions recommended in the ODFW Advice for Permit S-43837.

A. Future Use Condition:

Any change of character of use under Permits G-3240, G-9438, S-31365 and S-43837 shall comply with existing statutes and rules and shall be limited to municipal purposes. Any change in the location of use shall comply with existing statutes and rules and shall be limited to the designated service areas for Harbor or the City of Brookings. This condition reflects an agreement that the Water Rights will not be offered for sale or be used by parties other than municipal providers, and will be limited to municipal purposes within the service area of Harbor and potentially City of Brookings in the future under a cooperative arrangement with the City of Brookings.

B. Water Management and Conservation Plan

Permit holder shall submit a Water Management and Conservation Plan under OAR Chapter 690, Division 86 within 3 years of issuance of a final order approving extensions of Permits G-3240, G-9438, and S-31365. The Water Management and Conservation Plan for S-43837 shall be submitted in accordance with ORS 537.230, relating to permits issued for "municipal" use.

C. Combined Rate Limitation

The point of appropriation for ground water permits G-3240 and G-9438 is identical to the points of diversion for surface water permits S-31365 and S-43837, and authorization for the use of ground water under Permits G-3240 and G-9438 is intended as an alternative to the use of surface water under Permits S-31365 and S-43837, respectively. Use of ground water or surface water under the four permits included in this Settlement Agreement, and under any certificates issued for the four permits shall be limited to the rates specified in each permit, and further limited pursuant to the conditions below, to a combined instantaneous rate of no more than 10.5 cfs.

The extension orders for the following permits shall add the following condition to the respective permit:

Extension order for Permit G-9438:

"The total quantity of water withdrawn under this permit together with the quantity under permit S-43837 shall not exceed 7.0 cubic feet per second."

Extension order for Permit S-43837:

“The total quantity of water withdrawn under this permit together with the quantity under permit G-9438 shall not exceed 7.0 cubic feet per second.”

Extension order for Permit S-31365:

“The total quantity of water withdrawn under this permit together with the quantity under permit G-9438 shall not exceed 3.5 cubic feet per second.”

D. Point of Diversion Limitation

Use of the Harbor point(s) of diversion specified in the permits or any subsequently issued certificates, transfers or permit amendments shall be limited to a combined total of no more than 10.5 cfs under any water rights held by Harbor or in combination with any permits held or utilized by the City of Brookings using the Harbor point(s) of diversion.

E. Limiting Water Use When Flows are at or below 80 cfs at the Mouth of the Chetco River.

When the three-day average in-stream flow in the Chetco River is less than 80 cfs at the mouth of the river, use of water under Permits G-3240, G-9438, S-31365 and S-43837 shall be limited to a combined total of 5.0 cfs and shall be further limited to use within the place of use of those permits. This limit shall also apply to any other water rights using the Harbor point(s) of diversion. For purposes of this condition, flow at the mouth shall be calculated by using the three-day average of the mean daily flows measured at USGS Gage # 14400000 plus 15% to account for inflow below the gage. If a future replacement gage is installed, WRD, WaterWatch, Harbor and ODFW shall confer regarding a suitable way to calculate flow at the mouth of the Chetco River.

F. Proportional Reduction

The following conditions to maintain the persistence of listed fish species will be included in the extension orders for all permits.

1. Conditions to Maintain the Persistence of Listed Fish Species

A. Use of any water under Permit S-43837 and any subsequent water right(s) originating from this permit are subject to the following provisions:

- a. Water diverted and/or appropriated at any one time from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, may not exceed 10.5 cfs.
- b. The use of the first 5.0 cfs of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, is not and will not be subject to the fish persistence conditions described at 1.C.a below.
- c. The use any water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights

originating from these permits, beyond the first 5.0 cfs expressed in 1.A.b., above and up to the maximum allowed amount of 10.5 cfs, is subject to: 1) curtailment based on the Fish Persistence Target Flows described at 1.C.a below; and 2) limiting the combined diversion under Permits S-43837, S-31365, G-3240, or G-9438 to 5.0 cfs when the flow at or near the mouth of the Chetco River is less than or equal to 80 cfs described at 1.C.b below.

Therefore, all subsequent water right(s) originating from any of these water rights will include these Conditions to Maintain the Persistence of Listed Fish Species. The legal use of this permit which is subject to conditions to maintain the persistence of listed fish species shall be determined among all the permit/water right holders of record; all the permit/water right holders of record subject to these Conditions to Maintain the Persistence of Listed Fish must ensure that these fish persistence conditions are met.

B. Fish Persistence Target Flows

Fish persistence target flows in the Chetco River as recommended by ODFW are in Table 2, below; flows “at or near the mouth of the Chetco River near Brookings, Oregon” are to be calculated by using the three-day average of the mean daily flows measured at the USGS Gage 14400000 plus 15%.

Table 2

ODFW’S RECOMMENDED FISH PERSISTENCE TARGET FLOWS IN CHETCO RIVER AT OR NEAR THE MOUTH near Brookings, Oregon	
Month	Cubic Feet per Second
January – May	595
June	350
July	213
August	129
September	101
October	246
November – December	595

a. Alternate Streamflow Measurement Point

The location of a streamflow measurement point as established in these Conditions to Maintain the Persistence of Listed Fish Species may be revised if the permit or water right holder provides evidence in writing that ODFW has determined that persistence flows may be measured at an alternate streamflow measurement point and provides an adequate description of the location of the alternate streamflow measurement point, and the Water Resources Director concurs in writing.

C. Determining Water Use Reductions – Generally

a) Curtailment based on the Fish Persistence Target Flows

The maximum amount of water that can be diverted as a result of this fish persistence condition is determined by the total amount of water beyond 5.0 cfs being diverted and/or appropriated from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, in proportion to the amount by which the flows shown in Table 2 are missed. The percent of missed target flows is defined as:

$$(1 - [(QADJ - 5.5) / QT]) \times 100\%$$

where QADJ is the flow measured at USGS Gage 14400000 based on a three-day rolling average, plus 15%; QT is the target flow (from Table 2); and 5.5 cfs is the amount of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, subject to curtailment under these fish persistence conditions.

The percent by which the target flow is missed applied to the 5.5 cfs provides the maximum combined amount of water from these four permits that can be used as a result of this fish persistence condition, and is defined as:

$$5.5 - (5.5 \times \% \text{ missed target flows}),$$

where 5.5 cfs is the maximum amount of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, subject to curtailment under these fish persistence conditions.

b) Limiting the combined diversion under Permits S-43837, S-31365, G-3240, or G-9438 to 5.0 cfs when the flow at or near the mouth of the Chetco River is less than or equal to 80 cfs

When $QADJ > 80.0$ and $QADJ - 5.5 > QT$, the amount of water being diverted and/ or appropriated from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, would not need to be reduced as a result of this fish persistence condition.

When $QADJ \leq 80.0$ cfs, diversion and/or appropriation of water from any combination, as authorized by Permits S-43837, S-31365, G-3240, or G-9438, or subsequent water rights originating from these permits, is limited to 5.0 cfs.

D. Examples

Example 1: Target flow met

If on September 15, the last three mean daily flows at the gage were 109, 106, and 104 cfs, then the three-day rolling average would be 106.3 cfs, and QADJ would be 122.2 cfs.

$$106.3 + [(15\%/100\%) \times 106.3] = 122.2$$

The target flow (QT) for September 15 is 101 cfs. In this example, $QADJ - 5.5 \geq QT$.

$$122.2 - 5.5 \geq 101$$

Thus, the target flow (QT) would be met and the water user could divert and/or appropriate up to 10.5 cfs of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438.

Example 2: Target flow missed; QADJ > 80.0

Step 1: If on September 15, the average of the last three mean daily flows was 74.3 cfs, then the adjusted flow (QADJ) would be 85.4 cfs

$$74.3 + [(15\%/100\%) \times 74.3] = 85.4$$

Step 2: The adjusted flow of 85.4 is greater than 80.0, therefore $QADJ > 80.0$. Thus, the diversion and/or appropriation of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 is not limited to 5.0 cfs, however, the use of water up to an additional 5.5 cfs is subject to curtailment under these fish persistence conditions as illustrated in Step 3, below.

Step 3: Since the adjusted flow (QADJ) is 85.4 cfs and the target flow (QT) is 101 cfs, then the target flow would be missed by 20.9%.

$$(1 - [(85.4 - 5.5) / 101]) \times 100\% = 20.9\%$$

Step 4: Given that 5.5 cfs is subject to curtailment, and this amount needs to be reduced by 20.9% (from Step 3), or 1.1 cfs, then 4.4 cfs is the maximum amount of the 5.5 cfs that could be diverted under any combination of the four permits.

$$(5.5 \times 20.9\%) / 100\% = 1.1$$

$$5.5 - 1.1 = 4.4$$

Step 5: The maximum amount of water that may be diverted and/or appropriated from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438 after curtailment would be 9.4 cfs (4.4 cfs from Step 4,

plus the 5.0 cfs not subject to curtailment). (This maximum amount may be limited as illustrated in Step 6, below.)

$$4.4 + 5.0 = 9.4$$

Step 6: The calculated maximum amount of water that could be diverted due to the fish persistence condition may not exceed the amount of water to which the City is legally entitled to divert. For example, if the water user is only accessing water under the surface water rights, and the amount of water legally authorized¹ for diversion is 2.5 cfs under Permit S-31365 and 2.0 cfs under Permit S-43837 then 4.5 cfs would be the maximum amount of diversion allowed under these permits, rather than 9.4 cfs from Step 5.

(Conversely, if the amount of water legally authorized for diversion under both permits is 10.5 cfs, then 9.4 cfs (from Step 5) would be the maximum amount of diversion allowed under these two permits – again assuming for the purpose of this example that the water user is only accessing surface water rights).

Example 3: Flows are less than or equal to 80.0 cfs (QADJ ≤ 80.0)

Step 1: If on September 15, the average of the last three mean daily flows was 61.9 cfs, then the adjusted flow (QADJ) would be 71.2 cfs

$$61.9 + [(15\%/100\%) \times 61.9] = 71.2$$

Step 2: The adjusted flow of $71.2 \leq 80.0$, therefore $QADJ \leq 80.0$.

Because the $QADJ \leq 80.0$, the water user could not divert and/or appropriate more than 5.0 cfs of water from any combination as authorized by Permits S-43837, S-31365, G-3240, or G-9438.

7. This Settlement Agreement may be signed in counterparts.



Dwight French, Water Right Services Administrator
for Thomas M. Byler, Director
Oregon Water Resources Department

11-19-2018
Date

¹ For example, authorization provided through a WMCP or partial perfection.

RECEIVED

AUG 29 2018

OWRD

Harbor Water People's Utility District

Date

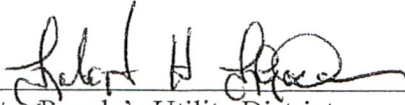
72

WaterWatch of Oregon, Inc.

Executive Director

8/24/18

Date



Harbor Water People's Utility District

Robert H. Rhodes,
Secretary

WaterWatch of Oregon, Inc.

8.9.18

Date

Date