

MEMORANDUM

TO: Water Resources Commission

FROM: Richard D. Bailey, Administrator
Water Rights/Adjudications Division

SUBJECT: Agenda Item E, November 20, 2003
Water Resources Commission Meeting

Consideration of Exceptions and Direction for Issuance of Final Order on Protest Filed by C.C. Meisel Co., Inc.

I. Issue Statement

The Commission is asked to consider exceptions filed by C.C. Meisel Co., Inc. in a contested case proceeding on water right applications R 83820 and S 83821.

II. Background

On April 30, 1998, TDM Co. ("Applicant") filed application R 83820 requesting to store 202.5 acre feet ("AF") of water in Muhs Quarry, an excavated gravel pit that has filled with water. TDM's associated application S 83821 requests to use stored water for supplemental irrigation of 125 acres. The storage site and proposed irrigation are in Yamhill County. (*See Attachment A.*)

On December 18, 1998, the Oregon Water Resources Department ("Department") issued its Proposed Final Order ("PFO") for applications R 83820 and S 83821 recommending approval of the applications with conditions. On January 29, 1999, C.C. Meisel Co. Inc. ("Protestant") filed protests against the PFO for both applications. Protestant raised the following issues in its protest:

1. Whether the issuance of permits pursuant to applications R 83820 and S 83821 would be in contravention of C.C. Meisel Co., Inc.'s legal rights and prejudicial to its legal position in Circuit Court litigation.
2. Whether there is a legitimate concern regarding the safety of applicant's dam structure and reservoir management capabilities.

Both applications were placed on hold at the request of the applicant pending resolution of litigation with the protestant in court. The contested case process resumed in 2003, and the protests were referred to the Office of Administrative Hearings. A prehearing

conference was held on February 24, 2003. At the prehearing conference, the participants agreed to a schedule for filing motions for rulings on legal issues.

III. Proposed Order Dismissing Protest (Order on Summary Judgment)

The applicable rules for contested case hearings before the Office of Administrative Hearings provide that before an evidentiary hearing, any party may file a motion requesting a ruling in their favor on any or all legal issues in the contested case. OAR 137-003-0580. That is, any moving party (or agency) may assert that some or all of the disputed issues can be decided on the law and therefore there is no need for an evidentiary hearing.

A. Issues the Administrative Law Judge (“ALJ”) Deemed Properly Raised

In this proceeding, the ALJ determined that both issues raised by the protestant were issues that were appropriate for motions on legal issues, and set a schedule for the parties to submit their briefs. On June 2, 2003, both applicant TDM Co. and protestant C.C. Meisel Co., Inc. filed motions for summary judgment. On June 30, 2003, the applicant and protestant filed responses to the motions. The Department also filed a response to both motions. The applicant, protestant and the Department all filed replies to the respective responses. The protestant also filed a Motion to Strike the Department’s reply.¹

On July 24, 2003, the ALJ issued an order denying the protestant’s Motion for Legal Rulings, granting the applicant’s Motion for Summary Judgment, and issued a Proposed Order Dismissing the Protests (hereinafter “Proposed Order”, *See* Attachment B). A summary of this Proposed Order follows:

Issue 1: Whether the issuance of permits pursuant to applications R 83820 and S 83821 would be in contravention of C.C. Meisel Co., Inc.’s legal rights and prejudicial to its legal position in circuit court litigation.

Regarding the first issue, the ALJ ruled that the issuance of the permits for applications R 83820 and S 83821 would not be a contravention of C.C. Meisel Co., Inc.’s legal rights and would not prejudice its legal position in circuit court primarily because the circuit court litigation has concluded.

As an element of its contravention argument, C.C. Meisel asserted that the issue of whether TDM’s easement allows TDM to “cause water to spill across C.C. Miesel’s property in the manner and to the degree caused by applicant’s current operation of the reservoir and spillway” was not properly raised in the protest and therefore could not be

¹ This motion was subsequently denied. Order Denying Motion for Legal Rulings, Granting Motion for Summary Judgment, and Proposed Order Dismissing Protests, pg. 1.

raised at hearing. (Attachment B - Proposed Order pgs. 7 & 8.) The ALJ determined the applicant has provided the required easement. The ALJ also determined that the Department does not have authority to resolve disputes involving the easement between parties nor issues of civil trespass or nuisance. The ALJ thus summarily dismissed this issue.

Issue 2: Whether there is a legitimate concern regarding the safety of applicant's dam structure and reservoir management capabilities.

The ALJ held that the record shows that the preliminary plans and specifications for the reservoir were reviewed and approved by OWRD and that final dam safety requirements for the reservoir have also been approved. Protestant's issue was thus dismissed.

B. Other Issues Raised by Protestant

Even though the ALJ dismissed issues 1 and 2, and provided that two other issues were not properly raised in the protest, he subsequently addressed the following other issues raised by the protestants in their briefs.

Issue: ORS 537.211 and TDM's authority to operate a "perpetually overflowing spillway" over Meisel's property.

The protestant argued that TDM's permit applications for storage and withdrawal of water from Muhs Quarry contravene protestant's property rights because there was no easement for the lands on which the spillway was constructed and because overflow from the spillway represents a continued trespass on the protestant's property. The protestant argued that issuing a final order under these circumstances contravenes ORS 537.211.²

The ALJ first determined that the Department can issue a final order pursuant to ORS 537.211 absent an easement for the spillway. Although the ALJ raised the possibility that there may be a question of fact regarding the extent of inundation beyond premises subject to the easement, this factual question is not material to application of ORS 537.211 which does not require easements prior to the Department issuing a final order approving an application.

² ORS 537.211(2) provides, with exceptions not relevant here, that if an application:

does not have written authorization or an easement permitting access to nonowned land crossed by the proposed ditch, canal or other work, the department may issue a final order approving the application if the approval includes a condition requiring the applicant to obtain such written authorization or easement or ownership of such land and to provide the department with a copy of the written authorization, easement or evidence of ownership.

More importantly, the ALJ determined there is the required easement, and the Department is not required to determine its scope or applicant's compliance with it.

Issue: ORS 537.211 and TDM's storage of water in quantities allegedly greater than contemplated by the parties in their 1981 Grant and Agreement.

C.C. Meisel Co. Inc. asserts that TDM has increased water levels within the dam thereby contravening the existing 1981 Grant and Agreement between the protestant and applicant. The protestant also argued that breach of this agreement violates ORS 537.211. The ALJ ruled that issues of fact remain regarding the current operation of the spillway, with one party contending that water flows into areas not covered by the easement, and the other party asserting the contrary. However, this dispute, which is purely civil in nature, is improperly before the Department.

The ALJ concluded his order by granting TDM's motion for summary judgment as the protestant presented no evidence of "legitimate" concerns regarding dam safety and because ORS 537.211 does not prohibit issuance of the applicant's permits. The ALJ recommended that the Department issue a final order dismissing the protests (Attachment B).

On August 18, 2003, C.C. Meisel Co. Inc. filed exceptions to the Proposed Order (Attachment C). On August 28, 2003, TDM filed a response to these exceptions (Attachment D). The Department's evaluation of C.C. Meisel's Co. Inc.'s exceptions is provided as Attachment E.

IV. Alternatives

The Commission may consider the following actions:

1. Deny protestant's exceptions but allow the exception to Statement 18 regarding a typographical error and direct issuance of a Final Order Dismissing Protests and Approving Applications in the form of that in Attachment F.
2. Accept certain exceptions of the protestant's and direct issuance of a modified Final Order.

V. Director's Recommendation

The Director recommends that the Water Resources Commission adopt Alternative 1 and deny protestant's exceptions but allow the exception to Statement 18 regarding a typographical error and direct issuance of a Final Order Dismissing Protests and Approving Applications in the form of that in Attachment F.

Attachments:

- A. Location of Muhs Quarry
- B. Order Denying Motion for Legal Rulings, Granting Motion for Summary Judgment, and Proposed Order Dismissing Protests, dated July 29, 2003.
- C. Exceptions filed by Protestant C.C. Meisel Co., Inc.
- D. Applicant's Response to Protestant's Exceptions to Proposed Order
- E. Staff Analysis of Exceptions
- F. Draft Final Order Dismissing Protests and Approving Applications

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