

## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Paul R. Cleary, Director

**SUBJECT:** Agenda Item B, March 11, 2004  
Water Resources Commission Meeting

### **Request for an Exception to the Sandy Basin Program by Morse Bros. Inc. under ORS 536.295**

#### **I. Issue Statement**

Under ORS 536.295 the Water Resources Commission may, under certain circumstances, allow the Department to consider an application to appropriate water for a use not “classified” as an allowable use by the applicable basin program. Morse Bros. Inc. Application G-15324, has requested an exception to the Sandy Basin Program based on two of the criteria under ORS 536.295. First, because the proposed use “was unlikely to have been considered by the commission and is of an unusual nature that is not likely to recur” as provided for in ORS 536.295(1)(g); and second, due to “extreme hardship” as provided for in ORS 536.295(1)(e). This report summarizes the information provided by Morse Bros. Inc. and evaluates the request against statutory criteria and rules of the Commission. The question before the Commission is whether to allow the Department to consider the application even though the use is not “classified” under the Sandy Basin Program. If the exception is granted, the application will then be reviewed in the same manner as any other water right application.

#### **II. Background**

Basin programs are administrative rules adopted by the Commission that prescribe future allowable uses of water. The act of specifying the allowable future beneficial uses is called “classification” and is authorized under ORS 536.340. Classifying beneficial uses in a basin program involves analysis of basin-specific data and substantial public involvement. However, under ORS 536.295 the Commission may allow the Department to consider an application for a use not “classified” in a basin program if the use meets one or more of the criteria under Subsection (1) of ORS 536.295 (Attachment 1). The Commission also must evaluate whether the proposed use is consistent with the general policies of the applicable basin program.

Commission approval of a request for an exception to a basin program does not guarantee that a water right will be issued, or if it is issued how it would be conditioned. The Commission is not making a public interest determination on the application, but is only allowing staff to complete

the application review process where issues such as water availability, injury to existing water rights, and any other rules of the Commission will be considered. Public notice and comment opportunities will be provided in the same manner as any other water right application. If the Commission does not grant the request, the application will continue to be processed but will likely be denied due to the fact that the proposed use is not a classified use in the basin program and no exception has been granted.

### **III. Discussion**

A summary of Application G-15324 in the name of Morse Bros. Inc. and an evaluation of their request for an exception to the Sandy Basin Program are provided below:

#### ***A. Application summary and basis for consideration***

Morse Bros. Inc. has applied for a permit to appropriate 100 gallons per minute from a well for industrial use to be used for the manufacture of ready mix cement near the well site (Attachment 2). The location of the well is approximately 350 feet south of the Columbia River and 750 feet from the high water mark of Company Lake. Company Lake was previously used by Reynolds Metal as an industrial waste discharge pond and has been designated as a federal Superfund site. Attachment 3 is a map of the area. Based on the location of the official basin boundary line, Company Lake is within the Sandy Basin. However, Company Lake actually drains directly into the Columbia River.

With respect to ground water applications in the Sandy Basin, “groundwater hydraulically connected to, and within 1/4 mile of, surface water shall be classified for the same uses as the surface water source...” OAR 690-503-0050 (3). In this case, the Department has determined that the proposed ground water source is hydraulically connected to and within a quarter mile of both the Columbia River and Company Lake. Staff estimate that the majority of the surface water impacts would be on the Columbia River, with very little impact on Company Lake. The Columbia River Basin Program allows industrial use but this area of the Sandy Basin, which includes Company Lake, is only classified for fish life, domestic, stock, municipal, aesthetic, recreation and public park uses; therefore, an exception to the Sandy Basin Program has been requested.

#### ***B. Exception request evaluation***

- 1) Summary of information provided by the applicant under ORS 536.295(1)

Morse Bros. Inc. provided the Department with a basin program exception request on February 9, 2004 (Attachment 4). ORS 536.295 provides that the Commission may allow the Department to consider an application to appropriate water for a use not classified in the applicable basin

program if the use is consistent with any one of seven statutory criteria. Morse Bros. Inc. has provided the Department with two reasons why they believe an exception should be granted.

Reason 1:

ORS 536.295(1)(g). The use is of an unusual nature not likely to recur in the basin, and unlikely to have been within the uses considered by the Commission in classifying the uses presently allowed in the applicable basin program including but not limited to:

- (A) Exploratory thermal drilling;
- (B) Heat exchange;
- (C) Maintaining water levels in a sewage lagoon;
- (D) Facilitating the watering of livestock away from a river or stream.

*Department analysis:* Morse Bros. Inc.'s request does not meet this exception criterion because the "use" is for industrial use, which is not unusual and was considered by the Commission when the basin program was developed. The applicant has suggested that the "situation" is unusual and could not have been considered by the Commission when the basin program was formulated. Staff agree that this particular situation, having a well that is slightly impacting a water body that is restrictively classified but is tributary to another basin that is not restrictively classified, is unusual. However, basin programs classify water "uses" and not situations.

Reason 2:

ORS 536.295(1)(e). The use is necessary to avoid extreme hardship.

As discussed in Morse Bros. Inc.'s request for an exception (Attachment 4, page 7) "extreme hardship" is not defined by the Commission's rules or in any Oregon case law regarding water. In a previously approved request for a basin program exception, the Commission considered the term to include a situation where "the failure to allow the use would cause financial or other burdens to a water user that could not be easily overcome" (Pleasant Valley Golf Course, May 1995).

In its exception request, Morse Bros. Inc. argues that failure to allow the proposed use would cause a burden that could not be easily overcome and thus constitutes "extreme hardship." First, losing the operation due to a lack of water would severely impact Morse Bros. Inc.'s investment backed expectations in running the operation. Morse Bros. Inc. believed there would be no problem acquiring a permit from the Department because the well is close to the Columbia River which has water available and is classified for industrial use. Based on that understanding, they invested over half a million dollars to develop the ready mix concrete site that is useless without a water source.

Second, shutting down the operation due to lack of water would result in the elimination of 15 jobs that had a 2003 payroll of \$360,000. Third, Morse Bros. Inc. has explored other options for industrial water at the site but they are not feasible. An adjacent water user and water right holder, Reynolds Metal, has declined to sell or lease any of their existing water rights. Acquiring water from the City of Troutdale may be an alternative but would mean paying for a connection estimated to cost approximately \$112,000 to \$128,000, which is prohibitively expensive and would result in the use of high quality potable water for mixing cement.

*Department analysis:* "Extreme hardship" can be construed as a relative term that is directly tied to the financial resources of the Applicant. However, in past hardship decisions under ORS 536.295, the Commission has not focused on the Applicant's financial resources but instead has focused on whether denial of the use and the need for the Applicant to seek an alternative water supply would cause a burden that is not easily overcome. In this case, staff agree that the failure to allow the use would cause burdens to the water user that could not be easily overcome and that the exception is necessary to avoid extreme hardship.

2) Evaluation of whether the use is consistent with the general policies of the Sandy Basin Program

In making the determination on the Morse Bros. Inc. request, the Commission shall evaluate whether the proposed use is consistent with the general policies of the Sandy Basin Program. ORS 536.295(4). Those policies are set forth in OAR 690-503-0020 and are included as Attachment 5.

The general policies of the Sandy Basin Program are three-fold: (1) limit surface water appropriations from the Sandy River and its tributaries to municipal and non-consumptive uses; (2) limit ground water declines near Sandy, control surface water interference, and protect the quality of shallow aquifers; and (3) uphold the City of Portland's exclusive right to the waters of Bull Run and Little Sandy Rivers for municipal use. Given the fact situation of the proposed use under Application G-15324 (hydraulic connection to Company Lake, a waste discharge pond that drains directly to the Columbia River), staff believe that the proposed use is consistent with the general policies of the Sandy River Basin Program.

#### **IV. Conclusion**

To approve a basin program exception request under ORS 536.295, the Commission must find that the request meets one or more statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. Staff believe that the basin program exception submitted by Morse Bros. Inc. meets the "extreme hardship" criterion under ORS 536.295 and that the proposed use is consistent with the general policies of the Sandy Basin Program.

## **V. Alternatives**

The Commission may consider the following actions:

1. Approve the request by Morse Bros. Inc. for a basin program exception to avoid extreme hardship recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.
2. Deny the request by Morse Bros. Inc. for a basin program exception.
3. Take no action and direct staff to continue to work with the applicant.

## **VI. Recommendation**

Staff recommend Alternative 1, that the Commission approve the request by Morse Bros. Inc. for an exception to the basin to avoid extreme hardship recognizing that a permit, if issued, may be conditioned to protect the public health, safety and welfare.

Attachments:

1. ORS 536.295
2. Copy of Application G-15324
3. Map of Area
4. Morse Bros. Inc. Exception Request
5. Sandy Basin Program General Policies