



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item H, February 25, 2009
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by Hedges Creek Management #1 LLC, John L. Jersey II

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. Hedges Creek Management #1 LLC (John L. Jersey II, applicant) has requested an exception (Attachment 1) to the Willamette Basin Program based on one or more criteria provided in the statute (Attachment 2).

This report summarizes the information provided by the applicant, 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 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 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 in ORS 536.295 (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 allows the Department to further consider whether to recommend approval of an application for a water use not classified as allowable by the basin program. A granted exception request does not guarantee that a water right will be issued, or if it is issued, how it will be conditioned. In approving a basin-program exception, the Commission allows the Department to consider the application, notwithstanding the basin-program classification. All other aspects of the application-review process remain the same. If the Commission does not grant the request, the application will continue to be processed, but will likely be denied because the proposed use is not a classified use.

III. Discussion

A summary of Application G-16921, in the name of Hedges Creek Management #1 LLC (John L. Jersey II), and an evaluation of the request for an exception to the Willamette Basin Program are provided below.

A. Application summary and basis for consideration

The applicant has applied for a permit to appropriate 0.03 cubic foot per second (CFS) of water from a well for year-round industrial and commercial use. The area to be irrigated is located in the west half of the southeast quarter of Section 1, Township 3 North, Range 2 West, W.M. (Attachment 3).

The Department has determined, based upon OAR 690-09, that the proposed ground water use is hydraulically connected with Scappoose Creek. Therefore, in accordance with 690-502-240, this hydraulically-connected groundwater shall be classified the same as the surface source.

Use of live flow from Scappoose Creek for industrial and commercial uses is not a classified use; furthermore, live flow from Scappoose Creek was legislatively withdrawn from further appropriation.

In order to mitigate for appropriation of water from a withdrawn source, the applicant proposes to transfer part of an existing surface-water right (Certificate 33149) instream in Scappoose Creek, in an amount equal to that requested in the application, being 0.03 CFS (i.e., 1:1 mitigation). The Department typically regards proposals for 1:1 mitigation favorably.

B. Exception request evaluation

The applicant asserts that a basin-program exception is warranted on the basis that criteria are satisfied. A review of criteria along with staff analysis follows below.

1) Does information provided by the applicant under ORS 536.295 (1)(c), show that the use is largely nonconsumptive in nature and not likely to be regulated for other water rights?

Staff analysis: if the instream transfer described above is allowed, the impact to live flow of the use of water from a well that is hydraulically connected to Scappoose Creek will be offset.

Although the proposed use *per se* is consumptive, the proposed mitigation water would more than offset that consumptive use. Therefore, given the proposed mitigation, the use would be deemed non-consumptive. Consequently, pursuant to ORS 536.295 (1)(c), staff finds that with mitigation, the proposed use is largely non-consumptive in nature, and not likely to be regulated for other water rights.

2) Is the use consistent with the general policies of the Willamette Basin Program?

In determining whether to grant the applicant's request, the Commission is required to evaluate the proposed use for consistency with the general policies of the Willamette Basin Program (ORS 536.295(4)). Those policies are set forth in OAR 690-502-0020.

Staff analysis: granting this exemption would be consistent with the general policies of the Willamette basin program to protect instream uses, to balance appropriation and instream uses on streams already significantly developed for out-of-stream purposes, and to minimize the likelihood of over-appropriation (OAR 690-502-0020(1)). The Department's review of the mitigation proposal finds that the use of water will be offset. In addition, the application must proceed through the public-interest review process, which considers protection of stream flow and water quality, as well as fish habitat.

IV. Conclusion

To grant an exception to a basin program under ORS 536.295, the Commission must find that the request meets at least one of the statutory criteria, and that the proposed use is consistent with the general policies of the applicable basin program. The applicant has demonstrated that the mitigated use will be nonconsumptive in nature, and that it is consistent with the general policies of the Willamette Basin Program.

V. Alternatives

The Commission may:

1. Grant the request for a basin-program exception given the proposed mitigation.
2. Deny the request for a basin-program exception.
3. Take no action and direct staff to continue to work with the applicant.

VI. Recommendation

The Director recommends Alternative 1, that the Commission grant the request by the applicant for a basin-program exception, recognizing that a permit, if issued, may be conditioned further to address public-interest concerns.

Attachments:

1. Applicant's request for exception
2. ORS 536.295
3. Copy of Application G-16921
4. Map of Area

Dwight French
503-986-0819

Attachment 1



HANER, ROSS & SPORSEEN, INC.

ENGINEERS

CONSULTANTS

SURVEYORS

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ACEC

July 10, 2008

File: 1221/A

Ms. Brook Geffen
Water Right Application Caseworker
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: OWRD File G-16921

Ms. Geffen:

The applicant, Hedges Creek Management, after reviewing your letter of July 4th, 2008 and noting that the Department's Initial Review Determination has found the applicant's permit application deficient because the proposed use of the water (industrial and commercial) does not comport with the authorized uses enumerated in the Willamette Basin Program, respectfully requests reconsideration of the application.

Specifically, Hedges Creek Management requests an exemption to the Willamette Basin Program provision limiting the authorized use of the waters of Scappoose Creek.

I believe you are aware of the offer by Scott Parker, owner of the parent parcel of which the Hedges Creek Management property was a part, to execute an in-stream water right transfer to Scappoose Creek of a portion of the surface water right appurtenant to his remainder; in an amount equivalent to the Hedges Creek Management application. Given that event, it seems consideration of an exemption to the basin plan for this application would be in keeping with ORS 536.295(1)(c) which allows for an application that "Is largely nonconsumptive in nature and not likely to be regulated for other water rights" in that the amount transferred to instream use from Mr. Parker's water right will totally offset (and therefore make nonconsumptive) the groundwater withdrawals occasioned by this application.

RECEIVED

JUL 14 2008

WATER RESOURCES DEPT.
SALEM, OREGON

HANER, ROSS & SPORSEEN, INC.

J. H. Greenman, PE, PLS, CWRE

cc: J.L. Jersey
Scott Parker

ATTA

Attachment 2

ORS 536.295 Conditions for consideration of application for use not classified in basin program. (1) Notwithstanding any provision of ORS 536.300 or 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use:

- (a) Will be of short duration during each year;
- (b) Will be for a continuous period of no longer than five years;
- (c) Is largely nonconsumptive in nature and not likely to be regulated for other water rights;
- (d) Is necessary to ensure public health, welfare and safety;
- (e) Is necessary to avoid extreme hardship;
- (f) Will provide a public benefit such as riparian or watershed improvement; or
- (g) 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; or
- (D) Facilitating the watering of livestock away from a river or stream.

(2) A permit granted on or before January 1, 1993, for a quasi-municipal use of water shall be considered a permit for a classified use under ORS 536.340 if at the time the application was submitted or the permit was granted, the basin program identified municipal use as a classified use.

(3) The commission by rule may determine the specific uses permitted within a classified use.

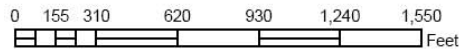
(4) In making the determination under subsection (1) of this section, the commission shall evaluate whether the proposed use is consistent with the general policies established in the applicable basin program.

(5) The Water Resources Department shall process and evaluate an application allowed by the commission under subsections (1) to (4) of this section in the same manner as any other water right application, including determining whether the proposed use would result in injury to an existing water right. [1989 c.9. 1; 1993 c.591. 1; 1999 c.703. 1]

Proposed Place of Use for App. G-16921 in T3NR2W sec.1



-  Proposed Place of Use
-  Existing Places of Use



1 inch equals 512 feet



/gtsdata/dev/projects/aremap/will/G_16921.mxd
OVRD GIS (MC) 9/24/2008