



# 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 D, February 22, 2007  
Water Resources Commission Meeting

### **Public Interest Review of Application G 16618, Phillip Anderson**

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

Under OAR 690-507-0070(3)(d)(D), the Commission must review and consider the public interest for certain ground water uses within a five-mile radius of the City of Hermiston. The Department has a pending application for ground water use that falls within these rule requirements. In order for the use to be consistent with the Umatilla Basin Program, the Commission is asked to review and consider the public interest for the application.

#### **II. Background**

Under OAR 690-507-0070(3)(d)(D), the Commission must review and consider the public interest for applications for uses other than municipal, group domestic and statutorily exempt ground water uses from basalt wells within a five-mile radius of a municipal well of the City of Hermiston (Attachment 1). The Commission may permit other uses if 1) there is a documented barrier to ground water movement between a proposed well and the municipal wells, 2) there will be no interference with municipal wells, and 3) the city has an approved water management and conservation plan.

On August 18, 2004, the Department of Justice (DOJ) advised the Department that the Umatilla Basin Program rules require the Commission to make a public interest review of ground water applications for uses other than municipal, group domestic and statutorily exempt ground water uses from basalt wells within a five-mile radius of municipal wells identified in the basin program. A copy of this DOJ advice is provided in Attachment 2. There are 14 municipalities in the Umatilla Basin Program with similar provisions. However, this request deals strictly with an application within a five-mile radius of the City of Hermiston, which has an approved water management and conservation plan.

#### **III. Discussion**

Application G-16618 in the name of Phillip Anderson proposes to use 0.06 cubic foot per second (cfs) from a well in the Columbia-Umatilla Plateau Subbasin for irrigation on 1.42 acres. The well is located within a five-mile radius of the City of Hermiston's municipal wells (Attachment 3) and develops water from the basalt ground water reservoir. The Department has documented that a barrier to ground water movement separates the proposed well from the municipal wells, and, that there will be no interference with municipal wells. The City of Hermiston has an approved water management and conservation plan. Therefore, the application meets the criteria under OAR 690-507-0070(3)(d)(D).

#### **A Review and Consideration of the Public Interest**

The Umatilla Basin Program requires the Commission to review and consider the public interest for the application. OAR 690-310-0130 instructs the Department on how to determine whether the public interest presumption is met for a proposed ground water use. Specifically, subsection (1) of this rule states:

“The Department shall presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 if:

- (a) 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);
- (b) Water is available;
- (c) The proposed use will not injure other water right; and
- (d) The proposed use complies with the rules of the Commission.”

A review of the four criteria for the pending ground water application follows.

*(a) 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):*

Notwithstanding rules related to the public interest determination conducted by the Commission, the use is consistent with the Umatilla Basin Program because the Department has documented that a barrier to ground water movement separates the proposed well from the municipal wells, there will be no interference with municipal wells, and the City of Hermiston has an approved water management and conservation plan. Preference considerations under ORS 536.310(12) are not applicable to the application.

*(b) Water is available:*

For ground water applications, two separate water availability determinations are made. The Department first determines whether ground water is available within the capacity of the resource. The Department also determines whether there is the potential for substantial interference with nearby surface water sources. If the potential for substantial interference is found, then a review of the nearby surface water availability is conducted.

In this case, the Department has determined that ground water is available within the capacity of the resource and that there is no potential for substantial interference with surface waters.

*(c) The proposed use will not injure other water rights:*

The Department has determined that the proposed use will not injure other water rights. As part of this determination, the Department found that the proposed use will not interfere with any municipal well or other well.

*(d) The proposed use complies with the rules of the Commission:*

The Department has determined that the proposed use is not in conflict with any rule, beyond the requirement in the Umatilla Basin Program that the Commission conduct a public interest review.

**B Review and Consideration of the Preservation of the Public Welfare, Safety and Health**

In addition to determining whether the public interest presumption is met, the Department has also considered whether the proposed use will preserve the public welfare, safety and health using the criteria described in ORS 537.625(3), shown in italics below.

*(a) The conservation of the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.*

The proposed use will provide water for irrigation of strawberries and other berries and pasture, thus contributing to the local economy.

*(b) The maximum economic development of the waters involved.*

The use of water for strawberries, other berries, and pasture will have a beneficial economic impact to the local economy by providing water for a local farmer to grow and sell local produce thereby improving the livability and desirability of the local community.

*(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.*

The Department is not aware of any impediments to the proposed use relating to water drainage, sanitation, flood, or other control issues.

*(d) The amount of waters available for appropriation for beneficial use.*

The Department has determined that ground water is available within the capacity of the resource for this beneficial use.

*(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.*

If the application is approved, it will be conditioned so that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented. It will include water use measurement and reporting conditions commensurate with the amount of water use allowed.

*(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.*

The Umatilla River basin has been adjudicated, resulting in the confirmation of certain water rights. The pending application's priority date, in the context of Oregon's prior appropriation doctrine, and the Department's existing system of regulation are the means necessary to protect existing vested and inchoate rights.

*(g) The state water resources policy.*

The Department has determined the proposed use is consistent with the state water resources policy formulated under ORS 537.505 to 537.534. ORS 536.295 to 536.350 relate to surface water and are not relevant to this application.

**IV. Conclusion**

The Department has determined that it is necessary for the Commission to review and consider its public interest determination for the application because:

1. The well in the application is located within a five-mile radius of the City of Hermiston municipal wells;
2. There is a documented barrier to ground water movement between the proposed well and City of Hermiston municipal wells;
3. There will be no interference with municipal wells; and
4. The City of Hermiston has an approved water management and conservation plan.

With regard to the review and consideration of the public interest, the Department has found that all of the elements of the public interest presumption, besides the basin-program element, have been satisfied. With regard to the review and consideration of the preservation of the public welfare, safety and health, the Department has found that the proposed use will ensure the preservation of the public welfare, safety and health.

#### **V. Alternatives**

The Commission may consider the following actions:

1. Determine that the application as identified is consistent with the public interest and allow the Department to continue processing the application with an affirmative finding regarding the basin-program element of the public interest presumption.
2. Require the Department to conduct further review of the application and report to the Commission at a future meeting.

#### **VI. Recommendation**

The Director recommends Alternative 1, that the Commission determine the application is consistent with the public interest and allow the Department to continue processing the application with an affirmative finding regarding the basin program element of the public interest presumption.

Attachments:

1. OAR 690-507-0070(3)(d)(D)
2. DOJ Advice Received on August 18, 2004
3. Map of the City of Hermiston Area

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OAR 690-507-0070(3)(d)(D)

Subject to the more strict controls imposed by the existing State Gulch Proclamation or issuance of a critical area order for the Stage Gulch Ground Water Study Area, ground water from the basalt reservoir in a five-mile radius around any municipal well of the cities of Echo, Hermiston, Pendleton, Stanfield, and Umatilla is classified for municipal, group domestic and statutorily exempt ground water uses (see definition) only. Other uses may be permitted if it is documented that a barrier to ground water movement separates a proposed well from municipal wells and there will be no interference with municipal wells. Applications for other uses of ground water within a five-mile radius of a municipal well shall automatically be referred to the Commission for review and consideration of public interest unless the affected city affirms that is in favor of the proposed appropriation. This classification applies only when the affected city has a full-time conservation program in effect.

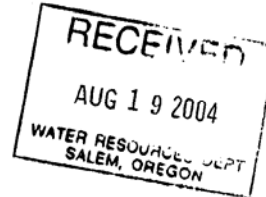
HARDY MYERS  
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DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

August 18, 2004



Tom Paul  
Administrator  
Field Services Division  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
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Re: Umatilla Basin Program and 5-mile Radius Provision  
DOJ No. 690-302-GN0175-04

Dear Mr. Paul:

In 1990, the Oregon Water Resources Commission (Commission) adopted the Umatilla Basin Program rules, OAR 690, Division 507. The rules contain a provision which limits new ground water development within five miles of a municipal well to municipal, group domestic and statutorily exempt ground water users. OAR 690-507-0060(3)(a)(B).<sup>1</sup> Notwithstanding this classification, other uses may be permitted if certain criteria are met. These other uses must be reviewed by the Commission for a consideration of the public interest, unless the affected municipality affirms it is in favor of the proposed appropriation. *Id.* You have asked whether this rule purports to give a municipality the authority to veto new ground water withdrawals within a five-mile radius of its well, and if so, whether this rule is consistent with the authorizing statute.

The rule which gives municipalities a role in the approval of new ground water development within a five-mile radius of a municipal well exceeds the statutory authority granted to the Commission for adoption of Basin Planning rules, and therefore, that portion of the rule is invalid. Even if there were authority for that portion of the rule, the rule does not give municipalities the authority to veto new ground water development within a five-mile radius of a municipal well.

**Classification of Water**

Under ORS 536.340, the Commission may classify sources of water supply "as to the highest and best use and quantities of use thereof for the future in aid of an integrated and balanced program for the benefit of the state as a whole." *Id.*, at (1)(a). "Classification or reclassification of sources of water supply as provided in this subsection has the effect of restricting the use and quantities of use thereof to the uses and quantities of uses specified in the classification or reclassification, and no

<sup>1</sup> The Umatilla Basin Program has similar provisions in other sections of the rules. This advice applies to all similar provisions.

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other uses or quantities of uses except as approved by the commission under ORS 536.370 to 536.390 or as accepted by the commission under ORS 536.295." *Id.* (Emphasis Added).

#### Commission Rule Governing Uses of Water Within the Umatilla Basin

Under its authority to classify uses of water within basins, the Commission adopted the following rule:

Groundwater from the basalt reservoir in a five-mile radius around any municipal well of the cities of Pendleton and Pilot Rock is classified for municipal, group domestic and statutorily exempt ground water uses (see definition) only. Other uses may be permitted if it is documented that a barrier to ground water movement separates a proposed well from municipal wells and there will be no interference with municipal wells. Applications for other uses of ground water within a five-mile radius of a municipal well shall automatically be referred to the Commission for review and consideration of public interest unless the affected city affirms that it is in favor of the proposed appropriation. This classification applies only when the affected city(ies) have a full time conservation program in effect.

OAR 690-507-0060(3)(a)(B)(Emphasis added). This rule purports to do a number of things. First, it limits water use within a five-mile radius of any wells to which the cities of Pendleton or Pilot Rock hold water rights, to municipal, group domestic and statutorily exempt ground water uses, if the affected cities have a full time conservation program in effect. *Id.* Second, the rule provides that other uses not classified may be allowed if it can be shown that there is a barrier to ground water movement between the proposed well and the municipal well, and there will be no interference. *Id.* Third, the rule provides that other uses must be referred to the Commission for a public interest review, unless the affected city indicates it is in favor of the proposed new well. *Id.* In other words, it appears the public interest determination that is to be performed by the Commission, could be bypassed if the affected city does not object to the proposed well. Thus, if a person applied for a ground water right for irrigation within five miles of a City of Pendleton well, and if there was evidence of (1) a barrier to the movement of water between the proposed well and the City's well; and (2) no interference between the wells, under this rule the proposed new use could be approved by the Commission without further review, if the City of Pendleton had no objection.

ORS 536.340 permits the Commission to classify water supplies as to the highest and best uses. Therefore, it is appropriate for the Commission to have given a preference to municipalities, group domestic, and other exempt ground water uses within five miles of a municipal well. It is less clear whether the Commission has the statutory authority under ORS 536.340 to consider, on an individual basis, applications for other non-classified uses, given that there is now a specific statutory process for considering applications for uses not classified within a basin program. ORS 536.295.<sup>2</sup> However, it is clear that ORS 536.340 does not authorize the Commission to delegate its decision

<sup>2</sup> OAR 690-507-0060 was adopted before statutory changes were enacted which gave the Department the authority to undertake a public interest review of water right applications. OAR 690-507-0060(3)(a)(B) provides that the Commission will undertake a public interest review of applications for uses of ground water that are not classified. It may be prudent for the Commission to either amend the rule to be consistent with ORS 536.295, or delegate the public interest review to the Department pursuant to ORS 536.025.



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making regarding which uses are classified within a basin, to a municipality. There is no express or implied authority in ORS 536.340 nor any other statute which vests the Commission with power, that would allow a municipality to affect the processing of a water right application. See *Lane County v. LCDC*, 138 Or App 635, 639, 910 P.2d 414 on recons 140 Or App 368, 914 P.2d 114 (1996)(rules invalid as exceed agency's statutory authority); *Miller v. Employment Division*, 290 Or 285, 289, 620 P2d 1377 (1980)(an agency has no authority to expand or to contract the meaning or coverage of a statute.)

Finally, the rule, as written, does not in fact give authority to a municipality to veto a ground water right application for a well within a five-mile radius of a municipality's well. Rather, as stated above, the rule allows a municipality to express its non-opposition to a proposed appropriation, which in turn allows the Commission to bypass its public interest review. OAR 690-507-0060(3)(a)(B).

Until the Commission adopts new rules repealing the objectionable language in OAR 690-507-0060(3)(a)(B)(and similarly worded rules), the language which permits a municipality to affirm that it is in favor of a proposed appropriation, thereby excusing the proposed use from a public interest review, should not be applied to pending applications. Applications that propose a well within a five-mile radius around a municipal well that is not for municipal, group domestic or statutorily exempt ground water uses, may be allowed if: (1) it is documented that a barrier to ground water movement separates a proposed well from municipal wells; and (2) there will be no interference with municipal wells. *Id.* In addition, the Commission must review the application and consider whether it is in the public interest, regardless of the affected municipalities position on the proposed use. As stated earlier in a footnote, the Commission may wish to delegate the public interest review to the Department, as is appropriate under ORS 537.615 and ORS 536.025. Finally, it should be noted that the five-mile radius classification in OAR 690-507-0060(3)(a)(B) does not apply unless the affected city has a full-time conservation program in effect.

Please let me know if I can be of further assistance.

Sincerely,



Shannon K. O'Fallon  
Senior Assistant Attorney General  
Natural Resources Section

