



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
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TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item K, February 23, 2007
Water Resources Commission Meeting

**Request for an Exception to the Willamette Basin Program by
A and R Spada Farms under ORS 536.295 (Application S-86739)**

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. A and R Spada Farms (“the applicant”) has requested an exception to the Willamette Basin Program, indicating that use of water will provide a public benefit such as riparian or watershed improvement as provided in ORS 536.295(1)(f).

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 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 ORS 536.295 (1)(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 permit 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. In allowing a basin program exception, the Commission allows the Department to consider an application despite the basin program classification. All other aspects of the application review process remain the same, and

the Department must consider issues such as water availability, injury to existing water rights, and any other rules of the Commission. Public notice and comment opportunities are provided in the same manner as any other water right application. If the Commission does not grant a request for a basin program exception, the application will be processed, but will likely be denied or limited because the proposed use is not a classified use in the basin program.

III. Discussion

A. *Application summary and basis for consideration*

Application S-86739 proposes to use 1.38 cubic feet per second (CFS) for irrigation use on 109.4 acres from a new diversion point on the main stem Willamette River. The application map showing the general location and proposed point of diversion is provided in Attachment 2. In the Department's initial review of the application dated February 9, 2007, the Department determined that water is available for new uses, but that irrigation use is not a classified use from the main stem Willamette River in the Willamette Basin Program (OAR 690-502-0050(1)(b)).

The Willamette Basin Program states:

“The Willamette River main stem downstream from the west line of the Donation Land Claim 55 in T11S, R4W, upstream from the mouth of Calapooia River near Albany, except as otherwise specified in subsection (a) of this section, is classified for domestic, livestock, municipal, industrial, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement and public instream uses” (OAR 690-502-0050(1)(b)).

B. *Exception request evaluation*

ORS 536.295 authorizes the Commission to 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 or more of seven statutory criteria (Attachment 1). The applicant provided the Department with a basin program exception request on January 3, 2007 (Attachment 3). The applicant stated that the basis for the request is that the use will provide a public benefit such as riparian or watershed improvement pursuant to ORS 536.295(1)(f). The applicant proposes to transfer existing water rights (evidenced by Certificates 13772 and 13774 provided in Attachment 4) to permanent instream use to offset the new irrigation right from live flow in the Willamette River.

In November 1991, the applicant submitted two transfer applications, T-6645 and T-6646, to the Department in order to consolidate four surface water diversion points on two old Willamette River channels under Certificates 13772 and 13774. Certificate 13772 authorizes the use of 0.65 CFS from an “old channel of Willamette River” for irrigation use on 52.0 acres. Certificate 13774 authorizes the use of 0.73 CFS from an “unnamed slough, tributary of Willamette River”, for irrigation use on 57.4 acres. During the irrigation season, the two sloughs described in Certificates 13772 and 13774 are often not connected to the present-day Willamette River channel. Thus, the Department determined that the sloughs are technically different

sources than the main-stem Willamette River under the transfer rules, and thus not subject to a simple point of diversion transfer.

In an effort to explore options with the applicant to develop alternatives for consolidating the “old channel/unnamed slough” diversions to an existing pump station on the Willamette River, the Department proposed that the applicant submit a new water right permit application with a request for a basin program exception. The applicant proposes to amend the two transfer applications, T-6645 and T-6646, to transfer the existing water rights evidenced by Certificates 13772 and 13774 to permanent instream use. The protected instream use will provide the public benefit of riparian and watershed improvement by reducing water use from the sloughs and protecting water in the sloughs. In addition, with the instream transfer, the issuance of a new water right will not result in a net reduction of Willamette River flows downstream of Grand Island. The applicant states that the proposed (existing) diversion on the main-stem Willamette River, located within ½ mile from the “old channel/slough” diversions, is screened and approved under the Oregon Department of Fish and Wildlife (ODFW) Screening and Passage Program. Staff have consulted with ODFW regarding the exception. ODFW agrees that the proposal will provide the public benefits and offset the impacts of a new permit.

Departmental analysis: The Department believes that the proposed transfer of existing surface water rights to instream use will provide a public benefit such as riparian or watershed improvement under ORS 536.295 (1)(f). The applicant proposes to offset the impact to live flow in the main stem Willamette River by transferring the same amount of water (rate of 1.38 CFS and annual duty of 273.5 acre feet) to instream use through transfers. The final order and permit, if one is issued, for this application would be issued simultaneously with final orders approving transfers T-6645 and T-6646. To ensure that the proposed public benefit is maintained, the Department will require either that the applicant record a conservation easement with an appropriate entity within a specified period of time following issuance of any permit, or submit other evidence documenting that the sloughs providing those benefits will be left in their natural state.

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

ORS 536.295(4) requires the Commission to evaluate whether the proposed use is consistent with the general policies of the Willamette Basin Program (Attachment 5). In its exception request, the applicant asserts that the proposed use is consistent with the policies of the basin program.

The proposed point of diversion is not within a reach involving an instream water right or minimum perennial streamflow. Additionally, the applicant has applied for a source of water that has no history of regulation and has water available for new appropriations year round. Therefore, the proposed use will not result in over-appropriation. The proposed use will help create opportunities for economic development in the area, and is consistent with state and local land use requirements.

Department analysis: The Department believes that the proposed use is consistent with the general policies of the Willamette 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 that the proposed use is consistent with the general policies of the applicable basin program. Staff believe that the basin program exception submitted by the applicant will provide a public benefit meeting the riparian and watershed improvement criterion under ORS 536.295, and that the proposed use is consistent with the general policies of the Willamette Basin Program.

V. Alternatives

The Commission may consider the following actions:

1. Approve the request for a basin program exception.
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 approve the request for an exception to the Willamette Basin Program to provide a public benefit, namely riparian and watershed improvement, provided that the instream transfers are approved simultaneously, and that the applicant provide documentation that benefits will be maintained, as a condition of a permit, if issued.

Attachments:

1. ORS 536.295
2. Copy of application map
3. A and R Spada Farms Exception Request
4. Certificates 13772 and 13774
5. Willamette Basin Program General Policies

Dwight French
(503) 986-0819

ORS 536.295 Conditions for consideration of application for use not classified in basin program; rules.

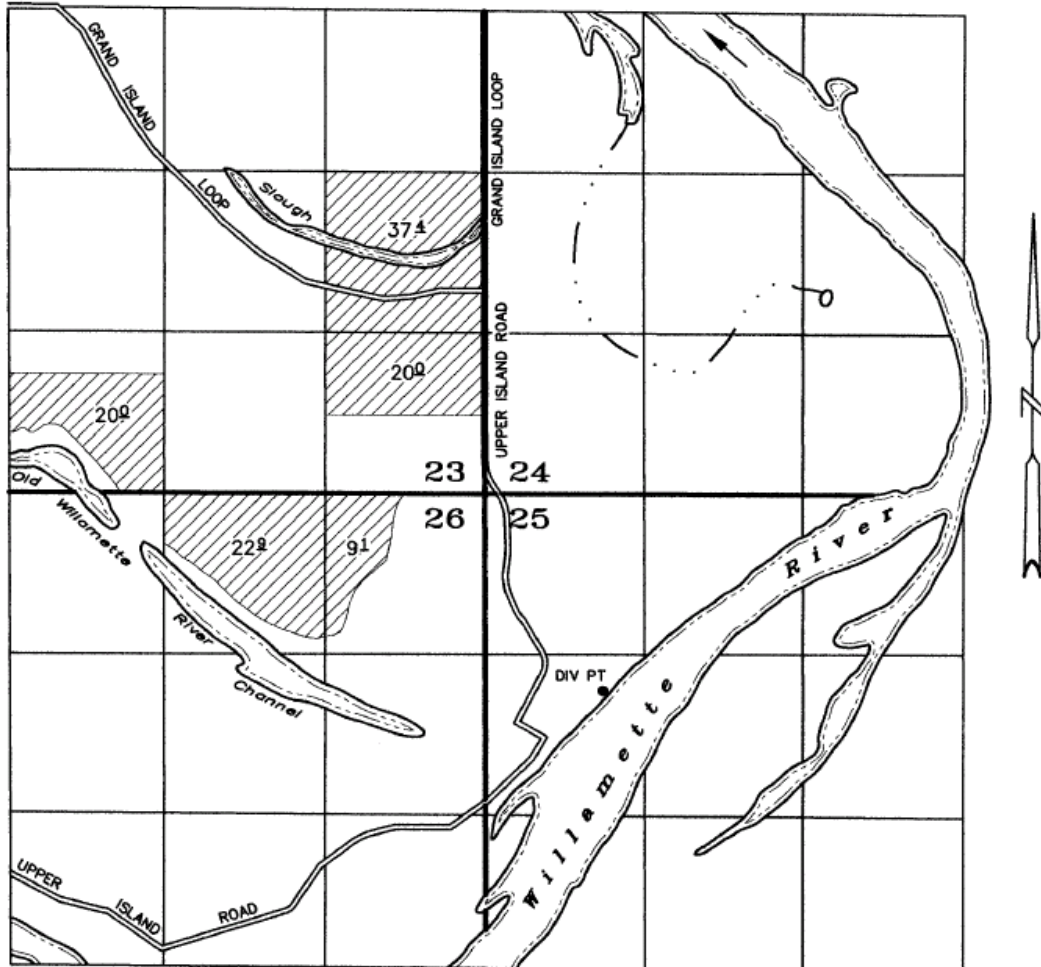
(1) Notwithstanding any provision of ORS 536.300 or 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use:

- (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.

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]

T 5 S, R 3 W, WM

MARION COUNTY



DIV PT: S 33° 30' E 1860.2' FROM NW COR SECTION 25 (Certificate 24565)

APPLICATION TO APPROPRIATE SURFACE WATER

Application No. S 86739 Permit No. _____

RECEIVED

JAN 03 2007

WATER RESOURCES DEPT
SALEM, OREGON

UNDER
IN THE NAME OF

A & R SPADA FARMS

DECEMBER 20, 2006

SCALE: 1" = 1320'



RENEWAL DATE 12-31-07

NOTE: This map is not intended to provide legal dimensions or locations of property ownership lines.



RECEIVED

JAN 03 2007
WATER RESOURCES DEPT.
SALEM, OREGON

December 29, 2006

Phil Ward
Director
Oregon Water Resources Department
725 Summer St NE Ste A
Salem OR 97301-1271

Re: A & R Spada Grand Island Diversion Consolidation Project and Request
for Basin Program Exception under ORS 536.295 (1)(f)
Our File No. 47859-34963

Dear Phil:

JUSTIN D. GERICKE

Admitted In
Oregon

Direct Dial
(503) 598-5586

E-mail
justin.gericke@jordanschrader.com

This letter is to outline the proposed A & R Spada Farms ("Spada Farms") Grand Island Diversion Consolidation Project and associated request for an exception to the Willamette Basin Program pursuant to ORS 536.295(1)(f). We are requesting the exception so that Spada Farms can exchange existing water rights for a new irrigation right on the Willamette River.

In November of 1991, Spada Farms filed Transfer Applications T-6645 and T-6646 with the Oregon Water Resources Department ("Department"). The purpose of the applications was to consolidate four surface water diversion points on two old Willamette River channels under Certificates 13772 and 13774 with an existing diversion point on the Willamette River. Certificate 13772 allows the irrigation of 52 acres from an "Old Channel of the Willamette River" and Certificate 13774 allows the irrigation of 57.4 acres from an "unnamed slough, tributary to the Willamette River." The water rights allow a combined total maximum diversion of 1.38 cfs and 273.5 acre-feet per irrigation season.

During the irrigation season, the source sloughs authorized under Certificates 13772 and 13774 are often not connected at the surface with the present Willamette River channel. Thus, the Department concluded that diversions from the sloughs involve different source waters than direct diversions from the Willamette River. Despite objections to this analysis by Spada Farms, the Department proposed to deny the transfer applications. In response to this proposed denial, Spada Farms met with Debbie Colbert and Doug Parrow in an effort to work with the Department to develop an alternative means of consolidating the "old channel" diversions with the existing pump station on the Willamette River.



5-867351

JORDAN SCHRADER, PC.
ATTORNEYS AT LAW

Phil Ward
December 29, 2006
Page 2

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WATER RESOURCES DEPT.
SALEM, OREGON

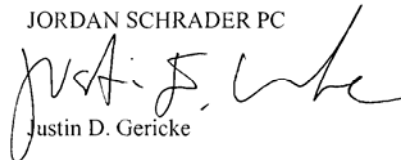
As a result of these efforts, Spada Farms is filing the enclosed application to divert water from the Willamette River at its existing Willamette River pump station at the rate and quantity authorized under Certificates 13772 and 13774 (1.38 cfs and 273.5 acre-feet per irrigation season). In exchange for receiving the new permit and after it is issued, Spada Farms will amend applications T-6645 and T-6646 to transfer the existing water rights evidenced by Certificates 13772 and 13774 to instream use. The instream transfers will produce a public benefit and watershed improvement by protecting water levels in the sloughs and ensuring that issuance of the new permit does not result in a net reduction in flows in the Willamette River downstream of Grand Island. The existing Willamette River diversion is screened and approved under the Oregon Department of Fish & Wildlife Screening & Passage Program and is located within ½ mile of the diversions from the old river channels.

Because a new water right for irrigation use is not permitted under the Willamette Basin Program, a basin program exception under ORS 536.295(1)(f) is required prior to Department consideration of the Spada Farms application. Pursuant to ORS 536.295(1)(f), by way of this letter, Spada Farms requests a basin program exception and further requests that the Oregon Water Resources Commission ("Commission") grant this exception request. Based on the public benefit and watershed improvement achieved through this proposed exchange, Spada Farms is hopeful that the Commission will approve this request for a basin program exception.

We are enclosing an application for a Surface Water Permit and a check for the required \$600 fee. An original, signed copy of the enclosed map will follow under separate cover from Boatwright Engineering, Inc. Please call with any questions, comments, or to request additional information regarding this request or the enclosed application.

Sincerely,

JORDAN SCHRADER PC



Justin D. Gericke

Enclosures

cc: A & R Spada Farms, Inc. (w/enc)
Debbie Colbert (w/o enc)
Doug Parrow (w/o enc)
Jeanne Boatwright (w/enc)

Permit A-1-500-4-39

STATE OF OREGON
COUNTY OF YAMHILL
CERTIFICATE OF WATER RIGHT

This Is to Certify, That ROY E. WILL

of Route 1, Dayton , State of Oregon , has made proof to the satisfaction of the STATE ENGINEER of Oregon, of a right to the use of the waters of Old Channel of Willamette River a tributary of for the purpose of Irrigation under Permit No. 13625 of the State Engineer, and that said right to the use of said waters has been perfected in accordance with the laws of Oregon; that the priority of the right hereby confirmed dates from April 27, 1939;

that the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 0.65 cubic foot per second,

or its equivalent in case of rotation, measured at the point of diversion from the stream. The point of diversion is located in the Lot 2 (NW $\frac{1}{4}$ -NE $\frac{1}{4}$) and Lot 1 (NE $\frac{1}{4}$ -NE $\frac{1}{4}$), Section 26, Township 5 South, Range 3 West, W. M., and Lot 1 (SE $\frac{1}{4}$ -SW $\frac{1}{4}$), Section 23, Township 5 South, Range 3 West, W. M.

The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-eightieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2 $\frac{1}{2}$ acre feet per acre for each acre irrigated during the irrigation season of each year,

and shall conform to such reasonable rotation system as may be ordered by the proper state officer.

A description of the place of use under the right hereby confirmed, and to which such right is appurtenant, is as follows:

20.0 acres in Lot 1 (SE $\frac{1}{4}$ -SW $\frac{1}{4}$)
Section 23
9.1 acres in Lot 1 (NE $\frac{1}{4}$ -NE $\frac{1}{4}$)
22.9 acres in Lot 2 (NW $\frac{1}{4}$ -NE $\frac{1}{4}$)
Section 26
Tp. 5 S., R. 3 W., W. M.

The right to the use of the water for the purposes aforesaid is restricted to the lands or place of use herein described.

WITNESS the signature of the State Engineer, affixed

this 1st day of July , 1939.

CHAS. E. STRICKLIN

State Engineer

Recorded in State Record of Water Right Certificates, Volume 12 , page 13772

Permit A-1-500-439

STATE OF OREGON
COUNTY OF YAMHILL
CERTIFICATE OF WATER RIGHT

This Is to Certify, That . MORTON TOMPKINS

of Route 1, Dayton, State of Oregon, has made proof to the satisfaction of the STATE ENGINEER of Oregon, of a right to the use of the waters of Unnamed Slough a tributary of Willamette River for the purpose of Irrigation under Permit No. 13631 of the State Engineer, and that said right to the use of said waters has been perfected in accordance with the laws of Oregon; that the priority of the right hereby confirmed dates from April 28, 1939;

that the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 0.73 cubic foot per second,

or its equivalent in case of rotation, measured at the point of diversion from the stream. The point of diversion is located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 23, Township 5 South, Range 3 West, W. M.

The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-eightieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2 $\frac{1}{2}$ acre feet per acre for each acre irrigated during the irrigation season of each year,

and shall conform to such reasonable rotation system as may be ordered by the proper state officer.

A description of the place of use under the right hereby confirmed, and to which such right is appurtenant, is as follows:

37.4 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$
20.0 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 23
Tp. 5 S., R. 3 W., W. M.

The right to the use of the water for the purposes aforesaid is restricted to the lands or place of use herein described.

WITNESS the signature of the State Engineer, affixed

this 1st day of July, 1941.

CHAS. E. STRICKLIN

State Engineer

Recorded in State Record of Water Right Certificates, Volume 12, page 13774

690-502-0020

Policies

Water Resources Commission and Department activities which affect the waters of the Willamette River Basin shall be compatible with the policies established in this rule. Surface water allocation, groundwater management, municipal and domestic water systems, reservoir coordination, conservation and land use coordination are important issues in the Willamette Basin. The Commission's policies on these issues are as follows:

- (1) Surface water allocation:
 - (a) Protect undeveloped streams with instream values for public instream uses;
 - (b) Seek a balance in the future appropriation of water between instream and total out-of-stream uses on those streams already significantly developed for out-of-stream purposes;
 - (c) Preserve opportunities for future economic development by reserving water for future use;
 - (d) Minimize the likelihood of over-appropriation due to new uses;
 - (e) Manage stored waters which have been released for instream purposes to meet flow needs reflected in established instream water rights;
 - (f) Allow irrigation use for the longest period possible between March 1 and October 31 provided sufficient water is available.
- (2) Groundwater management:
 - (a) Prevent excessive water level declines, restore aquifer stability in areas of decline and preserve with limited storage capacity for designated uses;
 - (b) Identify low-yield aquifers and inform local agencies of probable groundwater capacity limitations for some uses;
 - (c) Ensure safe municipal and domestic groundwater supplies by participating with the Department of Environmental Quality and the State Health Division in a formal monitoring program to document changes in quality and provide data for aquifer management;
 - (d) Minimize impairment of surface water uses resulting from hydraulic connection between groundwater and surface water;
 - (e) Encourage the development of programs for making groundwater resource information available to the public and local agencies.
- (3) Municipal and domestic water systems: Support coordinated water service planning and consolidation by water purveyors to preserve and protect adequate and safe drinking water supplies for human consumption in the Willamette Basin.

- (4) Reservoir coordination:
 - (a) Promote funding to study and implement the Willamette River Basin Review Study reconnaissance phase recommendations with significant potential to assist the state in meeting its resource management objectives;
 - (b) Formalize reservoir operation guidelines with the Corps of Engineers to meet state water management objectives and enter into a memorandum of understanding or other agreement that defines the reservoir coordination process and water management objectives.
- (5) Water conservation:
 - (a) Implement programs to eliminate wasteful water use;
 - (b) Improve the efficiency of water use through implementation of voluntary conservation measures;
 - (c) Give priority to developing subbasin conservation plans and providing public assistance in areas of known over-appropriation of surface water and groundwater and in water quality problem areas as listed by the Department of Environmental Quality.
- (6) Land use coordination: Promote effective state and local water resource planning and protection and efficient water use through coordination with land use programs.