



# 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  
FAX 503-986-0904

### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item L, January 14, 2005  
Water Resources Commission Meeting

#### **Consideration of Exceptions and Direction to Issue a Final Order Approving Water Right Application S 84222 in the name of the United States Fish and Wildlife Service**

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

The Commission is asked to consider contested case hearing exceptions and direct issuance of a Final Order Approving Water Right Application S 84222 in the name of the United States Fish and Wildlife Service (USFWS).

#### **II. Background**

Staff previously developed a staff report on this matter for the Commission's March 2004 meeting. Attachment 1 is Agenda Item D, March 11, 2004 without associated attachments.

On October 27, 2003, the Office of Administrative Hearings issued a proposed order in the contested case proceeding concerning Application S 84222 in the name of the USFWS. Exceptions to the proposed order were filed by Harney County and Water for Life. Responses to the exceptions were filed by USFWS and WaterWatch of Oregon (WaterWatch).

On March 11, 2004, Harney County, Water for Life, WaterWatch, and USFWS presented oral arguments on the application and exceptions before the Commission. Following the presentations, the Commission appointed a subcommittee of two members to review the contested case record and report back to the Commission. The Commission also urged the parties to pursue settlement discussions, and continued the matter until its October 2004 meeting.

At its October 22, 2004, meeting the Commission received a report from staff on the status of negotiations. Subsequent to the report, the Commission directed the subcommittee to complete review of the hearing record by the Commission's January 2005 meeting. The Commission once again urged the parties to pursue settlement discussions. The Commission continued the matter until its January 2005 meeting.

Prior to the Commission's January 2005 meeting, the USFWS, Harney County and the Department entered into a settlement agreement. In signing the agreement Harney County withdrew its exceptions to the Administrative Law Judge's Proposed Order. Attachment 2 is the settlement agreement between USFWS, Harney County and the Department. Attachment 3 is a Resolution of the Harney County Court regarding the settlement agreement.

### **III. Discussion**

The main thrust of the settlement agreement between USFWS, Harney County and the Department is to recognize and protect historic agricultural and Refuge activities while providing opportunities for future appropriations in the Donner und Blitzen River Subbasin. The agreement provides for future water use opportunities by subordinating Application S 84222, for purposes of regulation, to certain future permits that may be issued by the Department. In addition to the subordination provisions, the agreement modifies the period of use for Application S 84222 to October 1 through March 1 of each year and establishes a volumetric limit for S 84222, in combination with other Refuge water rights, of 145,000 acre-feet annually. (*See Attachment 2*).

The settlement agreement between USFWS, Harney County and the Department results in Harney County withdrawing its exceptions to the ALJ's contested case hearing proposed order; therefore, the only exceptions that remain are those of Water for Life. Attachment 4 is Water for Life's exceptions to the proposed order. As previously recommended in Agenda Item D, March 11, 2004, staff recommend the Commission allow Water for Life's exceptions 1-6 regarding typographical errors and deny the rest of its exceptions. (*See Attachment 5, pages 34 – 41 for an analysis and determination for each Water for Life exception*).

### **IV. Alternatives**

1. Allow Water for Life's exceptions 1-6 regarding typographical errors and deny the rest of its exceptions and issue a final order substantially in the form of the DRAFT Final Order in Attachment 5 and DRAFT permit in Attachment 6.
2. Direct staff to develop a final order and permit that differs from that in Attachment 5 and 6.
3. Table the matter for further deliberations.

**V. Recommendation**

The Director recommends the Commission adopt Alternative 1 to allow Water for Life's exceptions 1-6 regarding typographical errors and deny the rest of its exceptions and issue a final order substantially in the form of the DRAFT Final Order in Attachment 5 and DRAFT permit in Attachment 6.

**Attachments:**

1. Agenda Item D, March 11, 2004 (without associated attachments).
2. USFWS, Harney County and Oregon Water Resources Department Settlement Agreement
3. Harney County Court Resolution #2005-01
4. Water for Life's Exceptions to Proposed Order
5. DRAFT Final Order Denying Protests and Approving Application S 84222
6. DRAFT Permit for Application S 84222