

MEMORANDUM

TO: Water Resources Commission

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

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

Consideration of Exceptions and Direction of Issuance of Final Order on Protests Filed by Harney County, Harney County Soil and Water Conservation District, Water for Life, and WaterWatch of Oregon

I. Issue Statement

The Commission is asked to consider exceptions filed by Harney County and Water for Life in a contested case proceeding on water right application S 84222 in the name of the United States Fish and Wildlife Service.

II. Background

On July 28, 1999, the United States Fish and Wildlife Service (“USFWS” or “Applicant”) filed application S 84222 with the Oregon Water Resources Department (“Department”), proposing to divert up to 820 cubic foot per second (“cfs”) of water from the Donner und Blitzen River and tributaries for wildlife refuge management on the Malheur National Wildlife Refuge (Refuge). Wildlife refuge management use may include wildlife use, aquatic life, wetland enhancement, riparian area enhancement, fire protection, irrigation use, stock watering, recreation use, construction, flood control, reservoir maintenance, and dust control. All of these uses are beneficial uses defined in the Commission’s rules under OAR Chapter 690, Division 300. The proposed use is an “off-season” water use that could be used between October 1 and March 15 of each year. There are existing water rights on the Refuge, including irrigation rights that are available for use during the “normal” irrigation season. The priority date of the proposed use is July 28, 1999.

The Malheur National Wildlife Refuge, created through an Executive Order issued by President Theodore Roosevelt in 1908, is located in Harney County and covers over 180,000 acres. The Refuge is located in the high desert and portions of it lie in the Blitzen Valley. The primary purpose of the Refuge is habitat and breeding grounds for migratory waterfowl including species such as the lesser sandhill crane. The Refuge also provides an important staging area for the Pacific Flyway where species such as tundra

swans, lesser snow geese, and tule white-fronted geese stop in annual spring and fall migrations. According to the Applicant, wildlife viewing, waterfowl hunting and recreational fishing on the Refuge generate over \$3.6 million for Harney County each year.

Water is necessary for the Refuge to function for the purposes for which it was designated. Wetlands and meadows that are habitat for bird species are preserved by the application of water that is diverted from a series of canals in order to mimic natural stream conditions and floodplain functions. The proposed water right under application S 84222 would allow Refuge management to capture early runoff and floodwaters, when available, outside the normal irrigation season of March 15 to October 1. According to the Applicant, this could allow approximately 33,000 acres of meadow and marsh areas in the Refuge to be watered by early March of each year.

The Department issued its Proposed Final Order for application S 84222 on May 30, 2000, recommending approval of the application with conditions. In its Proposed Final Order, the Department concluded that 820 cfs was not available on an 80% exceedance basis (8 out of 10 years) for every month requested as required by the Commission's rules under OAR 690-410-0070 and 690-300-0010(57); but the Applicant demonstrated that water is physically available in the amount requested, albeit often for a short duration. The Department also determined the public interest in the proposed use is high; the use can be conditioned to protect instream values; the use complies with the Malheur Lake Basin Program; and the use would not injure existing water rights. Ultimately, the Department concluded the proposed use, as requested, would not impair or be detrimental to the public interest.

Timely protests were filed by Harney County, Harney County Soil and Water Conservation District, Water for Life, and WaterWatch of Oregon. The Oregon Department of Fish and Wildlife (ODFW) filed a request for standing and later intervened in the ensuing contested case hearing. The Department referred the case to the Office of Administrative Hearings. The Administrative Law Judge ("ALJ") allowed opportunity for briefing of issues that could be resolved on the law alone and issued an Order on November 11, 2002. Thereafter, written direct and rebuttal testimony was submitted by the parties, and a contested case hearing to allow for the cross-examination of witnesses was held in Burns, on April 30, 2002.

III. Order on Legal Issues

The Order on Legal Issues disposed of nine issues in the case as a matter of law. Attachment 2 is the ALJ's order on legal issues raised by the parties. These issues were as follows:

1. Whether the proposed use, as conditioned, creates an unlawful instream water right. (Harney County; Water for Life)

2. Whether the proposed use will injure existing water rights. (Water for Life)
3. Whether the proposed use is compatible with Statewide Planning Goals and local comprehensive use plans. (Harney County; Water for Life)
4. Whether the proposed use is a permissible beneficial use. (Water for Life)
5. Whether WRD has authority to condition the water rights as suggested in issues B.9 and B.13. (Department)
6. Whether the proposed use must be consistent with the Donner und Blitzen decree and, if so, whether it is. (Harney County)
7. Whether the proposed use may be approved prior to the applicant entering into formal consultation and formal conference under the Endangered Species Act and performing a compatibility analysis under the National Wildlife Refuge Administration Act. (Water for Life)
8. Whether the approval of water right application S 84222 will result in a federal reserved water right. (Harney County Soil & Water Conservation District)
9. Whether there is a non-use of current water rights and, if so, whether it should be required that acres subject to non-use be forfeited. (Harney County Soil & Water Conservation District)

The ALJ found for the Applicant on each issue, thereby dismissing Protestants' issues as a matter of law. Following the issuance of the order on legal issues, a number of issues of fact remained for hearing.

WaterWatch of Oregon, ODFW, the Applicant, and the Department entered into a stipulated agreement that resolved the six issues raised by WaterWatch and resolved concerns expressed by ODFW in its Request for Standing. The Department also entered into a stipulated agreement with the Applicant to clarify an issue regarding stock watering.

IV. The Proposed Order

The ALJ issued a Proposed Order on October 27, 2003 (Attachment 3). This order found that the Protestants had not rebutted the Department's findings, and that the proposed use would not impair or be detrimental to the public interest. Accordingly, the ALJ found in favor of the Applicant on the following issues:

1. Whether water is available for the proposed use. (Water for Life; Harney County)

2. Whether the U.S. Fish & Wildlife Service's use of this water for the Malheur Refuge is a high public interest value use. (Harney County; Water for Life)
3. Whether the proposed permit provides adequate provisions for regulation and enforcement. (Harney County)
4. Whether the specific numerical rate limits given for each diversion point in the draft permit should be limited on the total quantity of water that may be diverted from each diversion point. (Harney County)
5. Whether the proposed use, as conditioned, complies with OAR Chapter 690, Division 33. (Water for Life)
6. Whether the proposed use is consistent with the Malheur Lake Basin Program rules. (Harney County; Water for Life)
7. Whether the proposed use includes storage and, if so, whether storage is a permissible beneficial use under application S 84222. (Harney County)

Exceptions to the Proposed Order were timely filed by Harney County and Water for Life. The Applicant and WaterWatch filed responses to these exceptions. The exceptions are in Attachments 4 and 5. Responses to exceptions are in Attachments 6 and 7. Staff analysis and recommendations on the exceptions are in Attachment 8.

V. Alternatives

1. Deny certain of Protestants' exceptions, allow certain of Protestants' exceptions as specified in the Staff Analysis of Exceptions (Attachment 8), and issue a final order substantially in the form of the Draft Final Order and draft permit in Attachments 9 and 10.
2. Table the matter until the Commission's May 2004 meeting and request staff gather additional information and/or work with the parties to see if additional issues can be resolved.

VI. Director's Recommendation

The Director recommends that the Water Resources Commission adopt Alternative 1 and deny some of Protestant's exceptions, allow others and direct issuance of a Final Order Dismissing Protests and Approving Application substantially in the form of that in Attachments 9 and 10.

Attachments:

1. Map: Location of the Malheur National Wildlife Refuge
2. Ruling on Legal Issues
3. Proposed Order
4. Exceptions filed by Harney County
5. Exceptions filed by Water for Life
6. Response to exceptions filed by applicant
7. Response to exceptions filed by WaterWatch of Oregon
8. Staff analysis of exceptions
9. Draft Final Order Dismissing Protests and Approving Application
10. Draft Permit for Application S 84222

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