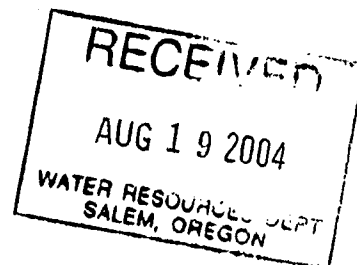




DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

August 18, 2004



Tom Paul
Administrator
Field Services Division
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

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).¹ 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

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

Tom Paul
August 18, 2004
Page 2

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 536.295.² However, it is clear that ORS 536.340 does not authorize the Commission to delegate its decision

² 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.

Tom Paul
August 18, 2004
Page 3

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

SKO:jrs/GENJ9535