



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item H, November 30, 2007
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by Cougar Creek Water Company pursuant to ORS 536.295

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. Cougar Creek Water Company¹ (CCWC) has requested an exception to the Willamette Basin Program (Attachment 1) based on one or more criteria provided in ORS 536.295(1) (Attachment 2).

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 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 in ORS 536.295 (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 allows the Department to consider an application to appropriate water for a purpose not classified as allowable by the

¹ The development associated with this application is also commonly referred to as the Elkhorn Estates or the Elkhorn Preserve Golf Resort.

subject basin program. This does not guarantee that a water right will be issued, or if it were issued, how it would be conditioned. In approving a basin program exception, the Commission allows the Department to consider the application, notwithstanding the basin program classification. All other aspects of the application review process remain the same. If the Commission does not grant the request, the application will continue to be processed but will likely be denied due to the fact that the proposed use is not a classified use in the basin program.

III. Discussion

A summary of Application G-16960 in the name of Cougar Creek Water Company and an evaluation of their request for an exception to the Willamette Basin Program are provided below.

A. Application summary and basis for consideration

CCWC has applied for a permit to divert 0.45 cubic foot per second for quasi-municipal use from one well near the Little North Fork of the Santiam River. The application (G-16960) is provided as Attachment 3. The subject property is approximately 36 miles east of Salem, the general location is shown in Attachment 4. The Willamette Basin Program does not allow quasi-municipal use from alluvial wells that are within a quarter mile from Little North Fork of the Santiam River during the months of July and August (OAR 690-502-0110(1)(b)).

B. Exception request evaluation

CCWC asserts that a basin program exception is warranted on the basis that the use will be largely nonconsumptive in nature and is not likely to be regulated for other water rights. The CCWC also claims that an exception is warranted because the project will result in a public benefit. A review of the criteria along with staff analysis follows below.

1) Summary of information provided by the applicant under ORS 536.295 (1)(c) Is largely nonconsumptive in nature and not likely to be regulated for other water rights

As explained in their request for an exception, CCWC proposes that they will have no impact on the nearby Little North Fork of the Santiam River because they will forego the diversion of an equal amount of their surface water rights. This type of mitigation, referred to as “avoidance” because it avoids the impact, has been a recognized method of mitigation by Oregon Water Resources and the Oregon Department of Fish and Wildlife. To make sure that the avoidance lasts as long as the use, conditions are placed on the new permit.

Staff Analysis: Staff concur that the use, with conditions to require that the impact to the nearby river be avoided, is nonconsumptive in nature and not likely to be regulated for other water

rights. The applicant's estimates of impact to nearby surface water sources appear reasonable. During the application review process Department staff will affirm that the "avoidance" water is accurately calculated to ensure there are no impacts to nearby surface water sources and condition the permit appropriately.

2) Summary of information provided by the applicant under ORS 536.295 (1)(f) will provide a public benefit such as riparian or watershed improvement rights

CCWC claim that because they will not be using all of their surface water rights for irrigating the golf course more water will be left in the river during the critical, dry summer months when the water is needed most. The ground water impacts to surface water will be delayed.

Staff Analysis: Staff agree that there will be a public benefit as long as conditions are tied to the permit that require they forego the diversion of an equal amount of water under the surface water right be left instream as compared to the amount of ground water that is pumped from the wells for the new quasi-municipal use.

C. *Evaluation of whether the use is consistent with the general policies of the Willamette Basin Program*

In determining whether to allow CCWC's request, the Commission is required to evaluate the proposed use for consistency with the general policies of the Willamette Basin Program (ORS 536.295(4)). Those policies are set forth in OAR 690-502-0020.

The proposed use, with conditions to avoid impacts to nearby surface water sources, supports the relevant policies of coordinated water service planning and consolidation and preserves the existing balance between instream and out-of-stream uses. For example, the applicant's commitment to avoid impacts to surface water will minimize impairment of surface water uses resulting from hydraulic connection between ground water and surface water.

In addition, this request for an exception is not inconsistent with any of the general policies of the Willamette Basin Program.

For these reasons, staff believe this request is consistent with the general surface water policies of the Willamette Basin Program.

IV. Conclusion

To accept an application under ORS 536.295, the Commission must find that the request meets at least one of the statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. CCWC has demonstrated that the use qualifies for an exception by

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meeting two criteria: 1) Is largely nonconsumptive in nature and not likely to be regulated for other water rights; 2) Will provide a public benefit such as riparian or watershed improvement.

This request is consistent with the general policies of the Willamette Basin Program.

V. Alternatives

The Commission may consider the following actions:

1. Approve the request by Cougar Creek Water Company for a basin program exception.
2. Deny the request by Cougar Creek Water Company for a basin program exception.
3. Take no action on the request and direct staff to continue to work with the applicant.

VI. Recommendation

The Director recommends Alternative 1, that the Commission approve the request by Cougar Creek Water Company for a basin program exception because the use, with conditions, is largely nonconsumptive in nature and not likely to be regulated for other water rights and will provide a public benefit such as riparian or watershed improvement.

Attachments:

1. Exception Request by Cougar Creek Water Company
2. ORS 536.295
3. Copy of Application G-16960
4. Map of Area

Dwight French
503-986-0819

ORS 536.295

ORS 536.295 Conditions for consideration of application for use not classified in basin program. (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.
- (5) 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]