



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: Phillip C. Ward, Director

SUBJECT: Agenda Item I, February 29, 2008
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by Paul & Patricia Jordan under 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. Paul & Patricia Jordan (“Jordans or applicants”) have requested an exception to the Willamette Basin Program in order to use water for hydropower. According to their request, the use “is largely non-consumptive in nature and not likely to be regulated for other water rights” as provided in ORS 536.295(1)(c). In addition, the applicants maintain that the use of the water will provide a public benefit 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 Willamette Basin Program. If the exception is granted, the application will be reviewed in the same manner as any other hydropower 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 subsection (1) of ORS 536.295 (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 water right will be issued, or if issued how it may 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 complete the application review process regarding acceptability of the project under the basin plan, scenic waterway flow requirements, potential conflict with existing water rights, and the resource standards in OAR 690-051-0160 through 690-051-0270. Public notice and comment opportunities will be provided in the same manner as any other hydroelectric water right application. If the Commission does not grant the request, the application will continue to be processed but will likely be denied because the proposed use is not a classified use in the basin program.

III. Discussion

A. *Application Summary*

In November 2007, the Jordans applied for a water right to divert up to 2.16 cfs (from September to June) from Wilkerson Creek, for operation of a small hydroelectric facility. This application was placed on the December 18, 2007 OWRD public notice for a 30-day comment and distributed, along with specific questions and a copy of the OWRD public notice, to 19 entities and individuals that OWRD is required to contact when it receives a minor hydroelectric application. It is noteworthy, that on October 2, 2007 the Jordans applied for a permit to store water in the aforementioned pond and that on January 17, 2008 they were issued permit R-14565 for that purpose.

Proposed Project

Water will be diverted using a manually operated headgate. This point of diversion will include a fish exclusion screen, if Oregon Department Fish & Wildlife (ODFW) fish sampling deems it necessary. This absence/presence sampling will occur at the time of year the anticipated fish specie(s) would be expected to be present. The headgate will have a staff gage on the creek-side, to measure the flow in Wilkerson Creek, and markers on the canal/impoundment side that will indicate to the operator how far to open the headgate relative to the flow in the creek. All diverted water will be impounded in Jordans Pond and returned to Wilkerson creek via nine four-inch PVC pipes, 40 feet in length with three-tenths of a foot of elevation fall. These pipes have threaded heads and caps and may be operated independently, in combination, or all together. The piped water flows into a wooden trough, approximately ten feet long, to an overshot water wheel approximately 6-7 feet in diameter that is connected to a five kilowatt generator. After powering the waterwheel, the flow returns to Wilkerson Creek. On Tuesday, January 8, representatives of OWRD, ODFW and the Oregon Department of Environmental Quality conducted a site-visit with Mr. Jordan.

A map showing the location of the facility is provided as Attachment 2.

Generally, The Willamette Basin Program classifies the allowed uses of water and when throughout the calendar year those uses are allowed. Oregon Administrative Rule (OAR) 690-502-0050(1)(e) specifies that “Except as specified in subsection (1)(a) of this rule, tributaries of the Main Stem Willamette River Subbasin are classified for domestic, livestock, municipal, industrial, irrigation, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement and public instream uses from September 1 through June 30, and only for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses from July 1 through August 31.”

B. Exception Request

The Department received the applicants’ initial basin program exception request on November 15, 2007 (Attachment 3) and their amended request December 17, 2007. The application and supporting documents are provided in (Attachment 4). ORS 536.295 provides that the Commission may 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 of seven statutory criteria. In their request, the applicants assert that their use “is largely non-consumptive in nature and not likely to be regulated for other water rights” [ORS 536.295(1)(c)] and “will provide a public benefit such as riparian or watershed improvement” [ORS 536.295(1)(f)].

Department Analysis: The Department believes that the proposed use is largely non-consumptive in nature and not likely to be regulated for other water rights since all flows are returned to the creek and both the diversion and return of flow occurs solely on the applicants’ property. There are no other water rights on Wilkerson Creek within the project zone. If a permit is issued, it would likely be conditioned such that the diverted water is returned to the creek at a point described in the permit to ensure that the non-consumptive nature of the use is maintained.

The Jordans also claim that their hydropower project provides a public benefit “since the electricity produced will be used to power our home and we will be selling excess power back to the PGE grid.” The Department does not have the information or expertise to analyze this request against ORS 536.296(f), that the use “will provide a public benefit such as riparian or watershed improvement.” As such, and because the initial reason is sufficient to grant the exception, staff requests that the Commission limit its consideration of this point.

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, provided in Attachment 5. The applicants, in their exception request, do not address whether their

proposed use is consistent with the general policies of the Willamette Basin Program. A comparison of the surface water allocation policy with information submitted by the applicants demonstrates that the proposed use is consistent with the policies of the basin program:

- The applicants' proposed point of diversion is not within an instream water right reach or minimum perennial streamflow.
- Instream water rights below the proposed project will not be affected by this diversion since the use is primarily non-consumptive.
- The applicants have applied for water from a source that has no history of regulation.
- The proposed use will not result in over-appropriation.
- Hydroelectric time-limited water rights are subordinated to all other uses, so opportunities are preserved for future economic development.
- The Willamette River has water available and this use in no meaningful way diminishes that availability as it is non-consumptive.

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 statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. The applicant has demonstrated that approval of this request will allow for consideration of a proposed use that is largely non-consumptive in nature and not likely to be regulated for other water rights and 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 plan 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 by the applicant for an exception to the Willamette Basin Program as the use is largely non-consumptive in nature.

Attachments:

1. ORS 536.295
2. Copy of application map
3. Paul and Patricia Jordans Exception Request
4. Application and supporting documents
5. Willamette Basin Program General Policies

Dwight French
(503) 986-0819

Attachment 1

ORS 536.295 Conditions for consideration of application for use not classified in basin program; rules. (1) Notwithstanding any provision of ORS 536.300 to 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 is 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 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.

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.