

## MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item H, February 14, 2003  
Water Resources Commission Meeting

### **Request for an Exception to the Willamette Basin Program Due to Extreme Hardship [ORS 536.295(1)(e)] by Greenberry Irrigation District**

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

Under ORS 536.295, the Water Resources Commission may, under certain conditions, allow the Department to consider an application to appropriate water for a use not allowed by the applicable basin program. Greenberry Irrigation District (GID), Application S-85410, has requested an exception to the Willamette Basin Program due to extreme hardship as provided for in ORS 536.295 (1)(e). This report summarizes the information provided by GID 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 allowable under the Willamette 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 future allowable use 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 an 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 allowed in a basin program if the use meets one 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 it is issued, how it would be conditioned. The Commission is not making a public interest determination on the application, but is only allowing staff to begin the application review process where issues such as water availability, injury to existing water rights, and any other rules of the Commission will be considered. Public notice and comment opportunities will be provided in the same manner as any other water right application. 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. The applicant has an opportunity to withdraw the application and receive a refund of all fees paid except \$50 after an Initial Review is issued.

### **III. Discussion**

A summary of Application S-85410 in the name of Greenberry Irrigation District (GID) and an evaluation of their request for an exception to the Willamette Basin Program are provided below.

#### ***A. Application summary and basis for consideration***

GID has applied for a permit to divert 52.93 cubic feet per second (cfs) of "live flow" from the Willamette River for irrigation of 4,234.5 acres. The application (S-85410) is provided as Attachment 2. The area to be irrigated is generally located on the south end of Corvallis near the airport as shown in Attachment 3. The Willamette Basin Program classifies the applicable reach of the Willamette River (down-stream from the west line of Donation Land Claim 55 in T11S, R4W, upstream from the mouth of the Calapooia River near Albany, except as otherwise specified) for domestic, livestock, municipal, industrial, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement, and public instream uses (OAR 690-502-050[1][b]).

Use of live flow from the Willamette River for irrigation is not a classified use. When developing the Willamette Basin Plan, the Commission did not allow irrigation from live flow in this section of the Willamette River because the Bureau of Reclamation had over one million acre-feet of storage water readily available in various Willamette Project reservoirs to meet irrigation needs.

GID has another application pending (File S-84426) that proposes to use stored water from Willamette Project reservoirs for irrigation of nearly the same acreage. It is likely that a permit to use stored water will be issued as soon as an executed contract with the Bureau of Reclamation has been received by the Department. The use of stored water for irrigation is allowable under the Willamette Basin Program.

If a permit is issued under S-85410 to appropriate "live flow," depending on the outcome of the application's public interest review process, it could act as a temporary bridge for GID until contract stored water is available under S-84426, or it could become a permanent supplemental right once contract water is available.

***B. Exception request evaluation***

**1) Summary of information provided by the applicant under ORS 536.295 (1)(e) extreme hardship**

GID has submitted information to support their argument that denial of the requested exception to the basin program would constitute an extreme hardship. Attachment 4 is a copy of the applicant's exception request. In summary, the applicant argues that restrictions on field burning imposed in 1991 have led to a new need for irrigation. Without a sustainable source of irrigation water, farms within the district will not be able to grow high quality grass seed needed to remain economically viable in the future. Securing a sustainable source of water is also necessary to obtain financing for the irrigation project. If water is not secured, GID anticipates a loss of farms within its district with resulting losses in jobs and impacts to the local economy.

The applicant's substantive points regarding the extreme hardship request include the following:

- Economically Viability

The farms within GID have primarily been grass seed producers. Restrictions on field burning have increased since 1991. For grass seed farming to be profitable, weed counts must be kept at very low levels, and field burning is the cheapest method of reducing weed growth in grass seed. Without field burning, farmers must rotate their fields to other crops and use approved pesticides so weed counts stay low on those years the fields grow grass seed.

- Potential Loss of Jobs/Local Economic Impact

There are over 50 farms within GID covering approximately 13,000 acres and employing nearly 2,000 people. The failure of these farms would result in the loss of these jobs with an attendant negative economic impact on the local economy.

- Financing a New Irrigation System

Without a stable source of water, the district will not be able to obtain financing to build the irrigation system needed to deliver water to its patrons. The U.S. Army Corps of Engineers (Corps) operates 13 dams and stores 1.64 million acre-feet of water in the reservoirs on the Willamette River and its tributaries, and the Bureau of Reclamation (Bureau) contracts for stored water from these reservoirs. In April 2000, a study of the

reservoir system (co-sponsored by the Corps and the Department) as well as new contracts for stored water were delayed while the Corps consulted with National Marine Fisheries Service (NMFS) and U. S. Fish and Wildlife Service (USFWS) regarding the affects of continued operation of the Willamette River Projects on fish, wildlife and plant species listed as threatened or endangered under the Endangered Species Act (ESA). In the interim, the Department, the Corps and the Bureau have been working toward resolution of the pending applications for water service contracts. However, the Bureau has not issued any new irrigation contracts in the Willamette Basin since 1999. Recently, the Bureau has decided to resume contracting activities for pending applications for irrigation water from the Willamette Basin Project. The Bureau indicated its decision to resume contracting in a letter to the Corps, which is provided as Attachment 5. It is unclear when contracting will resume. GID also asserts that Bureau contracts for stored water are not a stable source of water at this time.

Staff believe that failure to allow the exception to the basin program would cause extreme hardship due to the loss of economic viability of farms within GID and the potential loss of jobs. The applicant has pursued an alternative source of water through a Bureau contract for Willamette River Project water. However, contract water is not currently available, and it is uncertain when a new contract will be available. Moreover, there are no other surface water alternatives and requiring the applicant to construct a new and separate system to say, use ground water until stored water is available, would be an extreme hardship.

Beyond their request for an exemption to the basin program due to extreme hardship, GID also asserts that their application should be exempt from the basin program because the use being requested was not considered when the basin program was adopted. Under ORS 536.295(1)(g), 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 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.” GID’s request does not meet this exemption as the use is for irrigation, which is not unusual and was considered by the Commission when the basin program was developed.

## **2) Evaluation of whether the use is consistent with the general policies of the Willamette Basin Program**

In determining whether to allow GID’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.

Granting this exemption would be consistent with the general basin program surface water

policies to protect instream uses, to balance appropriation and instream uses on streams already significantly developed for out-of-stream purposes, and to minimize the likelihood of over-appropriation (OAR 690-502-0020[1]). The Department's water availability data demonstrates that sufficient water is available. Consistent with the Commission's water allocation policy, water is available at an 80% exceedance level from unsupplemented natural flows in the Willamette River mainstem to meet this request. Thus, granting this request will not increase the likelihood of over-appropriation. In addition, the application must proceed through the public interest review process, which considers protection of streamflow and water quality as well as fish habitat.

The Commission policies under the Willamette Basin Program also instruct the Department to preserve opportunities for future economic development. Granting this request would allow the Commission to provide an opportunity for economic development in Benton County, Corvallis, and Greenberry. Additionally, approving GID's request would provide an opportunity for the Commission to better accomplish its policy objective of allowing irrigation uses for the longest period between March 1 and October 31 provided sufficient water is available (OAR 690-502-0020[1][f]). At this time, because irrigation using "live flow" is not a classified use and Bureau contracts are not available, no irrigation is allowed during any part of the irrigation season on this portion of the Willamette River mainstem even though water is available at an 80% exceedance level.

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

#### **IV. Conclusion**

To accept an application 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. GID has demonstrated an extreme hardship due to loss of farm viability; potential loss of jobs; need for a secure water source to secure financing; and lack of another reasonable alternative source of water that could act as a bridge to a stored water contract. Their request is also consistent with the general policies of the Willamette Basin Program.

#### **V. Alternatives**

The Commission may consider the following actions:

1. Approve the request by Greenberry Irrigation District for a basin program exception due to

extreme hardship; recognizing that a permit, if ultimately issued, may be conditioned to address public interest concerns.

2. Deny the request by Greenberry Irrigation District for a basin program exception.
3. Take no action and direct staff to continue to work with the applicant.

#### **VI. Recommendation**

Staff recommend Alternative 1, that the Commission approve the request by Greenberry Irrigation District for a basin program exception due to extreme hardship; recognizing that a permit, if ultimately issued, may be conditioned to address public interest concerns.

#### Attachments:

1. ORS 536.295
2. Copy of Application S-85410
3. Map of Area
4. Greenberry Irrigation District Request
5. Letter from Ronald Eggers, Area Manager, Bureau of Reclamation

## 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]