



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item K, April 20, 2012
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program under Application G-17486 Pursuant to ORS 536.295

I. Issue Statement

Under ORS 536.295 (Attachment 1), 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 Harcombe has requested an exception (Attachment 2)¹ to the Willamette Basin Program based on one or more criteria provided in statute.

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.

¹ The applicant submitted multiple attachments with the request. Those not included in this packet may be viewed online at http://apps.wrd.state.or.us/apps/wr/wrinfo/wr_folder_image.aspx?snp_id=172649.

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 subject basin program. An exception 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 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 because the proposed use is not a classified use in the basin program.

III. Discussion

A. Application summary and basis for consideration

Paul Harcombe applied for a groundwater permit to divert 0.18 cubic foot per second from a well in Horseshoe Lake Basin for irrigation of 4.0 acres from April 1 through October 15 (Figs. 1 & 2). The application form is provided as Attachment 3.

The Department determined the well is in unconfined alluvium within 1/4 mile of Horseshoe Lake.

The Willamette Basin Program states, in part:

Groundwater in unconfined alluvium within 1/4 mile of the banks of a stream or surface water source is presumed to be in hydraulic connection with the surface water source, unless the applicant or appropriator provides satisfactory information or demonstration to the contrary. This hydraulically connected groundwater shall be classified the same as the surface source.

The exception request is necessary because the applicable portion of the Willamette Basin Program allows irrigation September 1 through June 30, and not in July and August as requested by the applicant (Oregon Administrative Rule (OAR) 690-502-0050(1)(e)).

B. Summary of information provided by the applicant under ORS 536.295 (1)(f), the use will provide a public benefit such as riparian or watershed improvement, and whether the use is consistent with the general policies of the Willamette Basin Program:

The applicant has an existing surface-water right² from Horseshoe Lake to irrigate 4.0 acres that proposes to irrigate under this application (G-17486). If G-17486 is approved, the inchoate right under Transfer T-9111 will voluntarily be cancelled simultaneously,

² Evidenced by the inchoate right under Transfer T-9111, for which a Claim of Beneficial Use has been submitted.

thereby providing 1:1 mitigation for the impact of all groundwater pumping, but particularly during the months of July and August.

Horseshoe Lake has been identified as part of a Conservation Opportunity Area (Area #11 - Bowers Rock-Truax Island) in the Oregon Conservation Plan by the Oregon Department of Fish and Wildlife, Oregon State Parks Department, and The Nature Conservancy. Furthermore, Horseshoe Lake contains three specific habitats identified for protection under Goal 5 of Oregon's Statewide Land-Use Planning Program, namely riparian corridors, wetlands, and wildlife habitat. Consequently, any project that enhances functional aspects of this aquatic ecosystem arguably meets the criterion of providing a public benefit such as riparian or watershed improvement.

C. Staff Analysis:

Normally, this type of a change in point of diversion would be accomplished via a surface-water to groundwater transfer. However, the applicant's pump test data indicated to him that the hydraulic connection between the well and Horseshoe Lake, while assumed, is relatively inefficient and thus likely insufficient to meet the quantitative thresholds required for approval of a surface-water to groundwater transfer. Additionally, the distance between the well and the surface-water point of diversion is greater than that allowed by surface- to groundwater transfer rules. Consequently, prior to submission of the application, Department staff met with the applicant and suggested that he might pursue use of the existing surface-water right as mitigation for the impact of pumping from the well, a concept which would also allow irrigation during July and August, which would otherwise be problematic due to the basin-program classification.

After submission of the application, the Department's groundwater review found that the lake level is coincident with the static water level in the well. This finding reflects the strongly coupled nature of surface water and groundwater in the unconfined alluvial aquifer. The Department is required by rule to manage surface water and groundwater conjunctively whenever possible, and the proposed project is win-win for conjunctive management, where both the applicant and ecological function benefit. Specifically, approving G-17486 and cancelling the existing surface-water right will reduce the seasonal reduction in lake level caused by pumping water directly from Horseshoe Lake, and thus maintain the various associated habitats at their natural level of ecological function. The proposed 1:1 mitigation will fully offset the impact of all new groundwater pumping on the coupled surface-water/groundwater system. From his perspective, the applicant will no longer have to maintain a point of diversion in riparian habitat on third-party property.

ODFW staff support this project, indicating there would be a benefit to multiple species of sensitive, threatened, and endangered anadromous and native fish. ODFW indicated it would prefer the use of the well as long as the overall allocation remains the same.

The Department finds that the applicant has made a persuasive case that the proposed project would indeed provide a public benefit (riparian and watershed enhancement) as required under ORS 536.295(1)(f). Use of the well is not inconsistent with any policy of the basin program, and in particular is consistent with that allowing irrigation “for the longest period possible between March 1 and October 31 provided sufficient water is available” (OAR 690-502-0020(1)(f)).

IV. Conclusions

To grant an exception to a basin program under ORS 536.295, the Commission must find that the request meets at least one of the statutory criteria, and that the proposed use is consistent with the general policies of the applicable basin program.

1. The Department finds that the applicant has demonstrated that the proposed mitigation will provide a public benefit such as riparian or watershed improvement.
2. The Department finds that the 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 for a basin-program exception because the use will provide a public benefit such as riparian or watershed improvement; and because the use is consistent with the general policies of the Willamette Basin Program. If a permit is issued for G-17486, a cancellation order will be issued for the existing surface-water right concurrently.
2. Deny the request for a basin-program exception because the necessary criteria have not been met.
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 for a basin-program exception because the use will provide a public benefit such as riparian or watershed improvement; and because the use is consistent with the general policies of the Willamette Basin Program.

Attachments:

1. ORS 536.295
2. Basin Program Exception Request
3. Copy of Application G-17486

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Fig. 1. Setting of Horseshoe Lake, an oxbow lake in an abandoned meander, immediately east of the Willamette River midway between Corvallis and Albany.



Fig. 2. Detail of Horseshoe Lake and applicant's nearby property. Place of use shown by rectangle, solid dot = existing surface-water point of diversion, open circle = existing well location. Arrow distance = approximately 1550 feet.

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]