

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item D, May 20, 2004
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by Blue Den Ranch 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. Blue Den Ranch, Application S-85965, has requested an exception to the Willamette Basin Program for commercial fish hatchery use. Blue Den Ranch asserts that the use is consistent with ORS 536.295(1)(c) in that the use “is largely nonconsumptive in nature and not likely to be regulated for other water rights.”

This report summarizes the information provided by Blue Den Ranch 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 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 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 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 complete

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 and no exception has been granted.

III. Discussion

A summary of Application S-85965 in the name of Blue Den Ranch and an evaluation of their request for an exception to the Willamette Basin Program are provided below:

A. Application Summary and Basis for Consideration

The Bentz family has been operating a fish incubation and rearing facility at their current location for nearly 40 years. In 1996, Ron Bentz applied for a water right for 350 gallons per minute (0.78 cubic feet per second) from Burmester Creek for use at this same facility. Because the use was not a classified use, the applicant requested and was granted an exception to the Willamette Basin Program. Permit S-52037 was issued for this use on April 11, 1996. In addition to the water right on Burmester Creek, the facility has other water rights from several small creeks and reservoirs on the property.

Due to the growing demand for commercially-reared trout, Blue Den Ranch would like to expand their operations. On March 22, 2004, Blue Den Ranch applied for a permit to appropriate 1 cfs from Bilyeu Creek (also called Neal Creek) for commercial fish hatchery use (Application S-85965). Bilyeu Creek is a tributary of Thomas Creek. A map showing the general location of the facility is provided as Attachment 2. The Willamette Basin Program classifies Thomas Creek and its tributaries “only for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses.”

B. Exception Request Evaluation

1) Summary of information provided by the applicant under ORS 536.295(1)(c).

Blue Den Ranch provided the Department with a basin program exception request on March 22, 2004 (Attachment 3). The application, map, and supporting materials 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. Blue Den Ranch has provided the Department with information as to why they believe their use fits criteria (c) that the use “is

largely nonconsumptive in nature and not likely to be regulated for other water rights.”

Blue Den Ranch’s delivery system is totally enclosed and leak free through a pipeline to raceways (fish rearing ponds) and incubation facilities. Water will return to the stream at the same location as it is diverted through a series of pipes, existing ponds, and small stream channels. Calculations regarding evaporation rates suggest that when the full requested amount of 1 cfs is diverted, only about one quarter of one percent of the diverted amount will be lost. Other water rights at the same facility will be used to make up for these losses.

Department analysis: The Department agrees that the use conforms to ORS 536.295(1)(c), in that the use “is largely nonconsumptive in nature and not likely to be regulated for other water rights.” Because the use is largely non-consumptive, and the water is returned to the stream where it is diverted, the Watermaster has indicated that during periods of low flow, this water right, if issued, would not be regulated off in favor of other water rights.

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

In making the determination on the Blue Den Ranch request, the Commission shall evaluate whether the proposed use is consistent with the general policies of the Willamette Basin Program. ORS 536.295(4). Those policies are set forth in OAR 690-502-0020 and are included as Attachment 5.

Staff believe that the proposed use is consistent with the general policies of the Willamette Basin Program since the use is non-consumptive and would not contribute to over-appropriation. The applicant also provided comments from the Department of Environmental Quality indicating that there are no water quality concerns and the use does not require discharge permits for the return flow that re-enters the system at the diversion point.

For these reasons, staff believe this request is consistent with the general surface water policies for 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. Blue Den Ranch has demonstrated that approval of this request will allow for consideration of a proposed use that is largely nonconsumptive 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 by Blue Den Ranch for a basin program exception because the proposed use is largely nonconsumptive in nature and not likely to be regulated for other water rights, recognizing that a permit, if ultimately issued, may be conditioned to address public interest concerns.
2. Deny the request by Blue Den Ranch 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 Blue Den Ranch for an exception to the basin program because the proposed use is largely nonconsumptive in nature and not likely to be regulated for other water rights, recognizing that a permit, if ultimately issued, may be conditioned to address public interest concerns.

Attachments:

1. ORS 536.295
2. Map of Area
3. Blue Den Ranch Exception Request
4. Copy of Application S-85965
5. Willamette Basin Program General Policies

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]

General Policies of the Willamette Basin Program

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.