



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Water Resources Commission Meeting  
Agenda Item G, April 14, 2005

#### **Public Interest Review under OAR 690-507-0070(3)(d)(D) in the Umatilla Basin Program**

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

Under OAR 690-507-0070(3)(d)(D), the Commission must review and consider the public interest for certain ground water uses within a five-mile radius of the City of Hermiston. The Department has six pending applications for ground water use that fall within these rule requirements. In order for these uses to be consistent with the Umatilla Basin Program, the Commission is asked to review and consider the public interest for these applications.

#### **II. Background**

Under OAR 690-507-0070(3)(d)(D), the Commission must review and consider the public interest for applications for uses other than municipal, group domestic and statutorily exempt ground water uses from basalt wells within a five-mile radius of the City of Hermiston (Attachment 1). This review is completed if 1) there is a documented barrier to ground water movement between a proposed well and the municipal wells, 2) there will be no interference with municipal wells, and 3) the city has an approved water management and conservation plan.

Since the Umatilla Basin Program was adopted in 1988, the Commission has not been asked to review and consider the public interest under these rules for a number of reasons. The primary reason is that the water right application process was overhauled by statutory changes adopted in 1995 (Senate Bill 674, Oregon Laws 1995). The changes significantly modified how and when applications go before the Commission for a public interest review. With the adoption of SB 674 in 1995, the Department believed that basin plan rules requiring the Commission to review an application for the public interest such as OAR 690-507-0070(3)(d)(D) was overruled by the statutory changes in 1995.

However, on August 18, 2004, the Department of Justice (DOJ) advised the Department that the Umatilla Basin Program rules require the Commission to make a public interest review of ground water applications for uses other than municipal, group domestic and statutorily exempt ground

water uses from basalt wells within a five-mile radius of municipalities wells identified in the basin program. A copy of this DOJ advice is provided in Attachment 2.

This recent advice from DOJ instructs the Department to bring qualifying applications to the Commission for review and consideration of the public interest. Specifically,

“Applications that propose a well within a five-mile radius around municipal well that are not for municipal, group domestic or statutorily exempt ground water uses, may be allowed if:

- (1) It is documented that a barrier to ground water movement separates a proposed well from municipal wells; and
- (2) There will be no interference with municipal wells.”

In addition, the Commission must review the application and consider whether it is in the public interest, regardless of the affected municipalities position on the proposed use.”

There are 14 municipalities in the Umatilla Basin Program with similar provisions. However, this request deals strictly with applications within a five-mile radius of the City of Hermiston.

### **III. Discussion**

The Department has six pending applications that meet criteria under OAR 690-507-0070(3)(d)(D). Attachment 3 provides a map of the wells proposed in Applications G16084, G 16094, G 16126, G 16130, G 16313, and G16395 along with the locations of City of Hermiston municipal wells. Attachment 4 provides additional information on the quantity and type of use identified in each of these ground water applications.

All six of the pending applications are located within a five-mile radius of the City of Hermiston’s wells and are for uses other than municipal, group domestic and statutorily exempt ground water uses. In addition, the Department has documented in all six cases that a barrier to ground water movement separates the proposed wells from the municipal wells and that there will be no interference with municipal wells. The City of Hermiston also has an approved water management and conservation plan.

#### **A. Review and Consideration of the Public Interest**

The Umatilla Basin plan requires the Commission to review and consider the public interest for the six subject applications. OAR 690-310-0130 instructs the Department on how to determine whether the public interest presumption is met for a proposed ground water use. Specifically, subsection (1) of this rule states:

“The Department shall presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 if:

- (a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12);
- (b) Water is available;
- (c) The proposed use will not injure other water right; and
- (d) The proposed use complies with the rules of the Commission.”

A review of the four criteria for the six pending ground water applications follows.

- (a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12):*

Notwithstanding rules related to the public interest determination conducted by the Commission, the use is consistent with the Umatilla Basin Program. Preference considerations under ORS 536.310(12) are not applicable to the subject applications.

- (b) Water is available:*

For ground water applications, two separate water availability determinations are made. The Department first determines whether ground water is available within the capacity of the resource. The Department also determines whether there is the potential for substantial interference with nearby surface water sources. If the potential for substantial interference is found, then a review of the nearby surface water availability is conducted. In all six of these cases, the Department has determined that ground water is available within the capacity of the resource and there is no potential for substantial interference with surface waters.

- (c) The proposed use will not injure other water rights:*

The Department has determined that the proposed use will not injure other water rights. As part of this determination, the Department found that the proposed use will not interfere with any municipal well or other well.

- (d) The proposed use complies with the rules of the Commission:*

The Department has determined that the applications are not in conflict with any rule, beyond the review conducted by the Commission in the Umatilla Basin Program.

## **B. Reviewing the Public Interest for Similar Applications**

Given the statutory changes in 1995, staff recommend that the Commission consider delegating its authority to review and consider the public interest for applications meeting the criteria for public interest review in the Umatilla Basin Program.

This recommendation is based on a number of considerations. Because of statutory changes in 1995, the Department is required to review the public interest for each water right application. Commission review of the public interest under the Umatilla Basin Program repeats this review. While DOJ advised the Department that the Commission review these applications for public interest, their advice also recommended that the Department seek a delegation of this authority from the Commission since it already makes a public interest determination under its statutory requirements. This delegation would also provide for more timely review and processing of these water right applications and would allow the Department to meet water right processing timelines provided in statute.

The advice from DOJ also informed the Department that other sections of its Umatilla Basin Program are not valid as they inappropriately gave municipalities a role in processing water right applications. The Department has met with the affected municipalities to discuss its implementation of the existing Umatilla Basin Program as a result of this advice. The Department will be working with these communities and others to possibly amend these rules to ensure the rules provide the intended protection for municipal wells based on scientific information.

#### **IV. Conclusion**

Consistent with DOJ advice, the Department has determined that it is appropriate for the Commission to review and consider the public interest for the six subject applications because:

1. The wells in the applications are located within a five-mile radius of the City of Hermiston wells;
2. There is a documented barrier to ground water movement between the proposed wells and City of Hermiston municipal wells;
3. There will be no interference with municipal wells; and
4. The City of Hermiston has an approved water management and conservation plan.

With regard to the review and consideration of the public interest, the Department has found that all of the elements of the public interest presumption, besides the basin program element, have been satisfied.

#### **V. Alternatives**

The Commission may consider the following actions:

1. Determine that the six subject applications as identified are consistent with the public interest and allow the Department to continue processing the application with an affirmative finding regarding the basin plan element of the public interest presumption.

2. Determine that some subset of the six applications are consistent with the public interest and allow the Department to continue processing those applications with an affirmative finding regarding the basin plan element of the public interest presumption. The applications not included in this finding would receive a proposed final order proposing to deny the applications.
3. Require the Department conduct further review of the applications and report to the Commission at a future meeting.

In addition, the Commission may choose to delegate its authority to the Director to review and consider the public interest for ground water applications meeting criteria provided in the Umatilla Basin Program as provided in Attachment 5.

## **VI. Recommendation**

Staff recommend Alternative 1 that the Commission determine that the six subject applications are consistent with the public interest and allow the Department to continue processing the application with an affirmative finding regarding the basin plan element of the public interest presumption.

Staff also recommend that the Commission delegate its authority to the Director to review and consider the public interest for similar applications in the Umatilla Basin as provided in Attachment 5.

### Attachments:

1. OAR 690-507-0070(3)(d)(D)
2. DOJ Advice Received on August 18, 2004
3. Map of the City of Hermiston Area
4. Summary of Pending Ground Water Applications
5. Commission Delegation of Authority

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OAR 690-507-0070(3)(d)(D)

Subject to the more strict controls imposed by the existing State Gulch Proclamation or issuance of a critical area order for the Stage Gulch Ground Water Study Area, ground water from the basalt reservoir in a five-mile radius around any municipal well of the cities of Echo, Hermiston, Pendleton, Stanfield, and Umatilla is classified for municipal, group domestic and statutorily exempt ground water uses (see definition) only. Other uses may be permitted if it is documented that a barrier to ground water movement separates a proposed well from municipal wells and there will be no interference with municipal wells. Applications for other uses of ground water within a five-mile radius of a municipal well shall automatically be referred to the Commission for review and consideration of public interest unless the affected city affirms that is in favor of the proposed appropriation. This classification applies only when the affected city has a full-time conservation program in effect.

**Summary of Pending Ground Water Applications**

<b>Application</b>	<b>Name</b>	<b>Priority Date</b>	<b>Use</b>	<b>Requested Rate (CFS)</b>	<b>Requested Acres</b>
G-16084	Fordice	9/10/03	Irrigation	0.025	2.0
G-16094	Culp	9/26/03	Irrigation	0.01	1.0
G-16126	Ibarra	11/05/04	Irrigation	0.125	10.0
G-16130	Huffman	11/12/04	Irrigation	0.06	5.0
G-16313	Orr	9/16/04	Industrial	1.45	Not applicable
G-16395	Nobles	2/15/05	Irrigation	0.06	5.0

**OREGON WATER RESOURCES COMMISSION**

**ORDER**

**DELEGATING AUTHORITY**

to

**CARRY OUT DUTIES UNDER OAR 690-507**

**Relating to Considering the Public Interest for Ground Water Applications in the Umatilla Basin that Meet Certain Criteria**

Pursuant to ORS 536.025(2), the Water Resources Commission (Commission) may delegate to the Water Resources Director the exercise or discharge in the Commission's name any power, duty or function of whatever character, vested in or imposed by law upon the Commission.

The Commission hereby delegates to the Director of the Water Resources Department (Director), all power, duty and function vested in the Commission under the provisions of OAR 690-507 that relate to the review and consideration of the public interest for applications for uses other than municipal, group domestic and statutorily exempt ground water uses from certain basalt wells within a five-mile radius of a municipal well, where a documented barrier to ground water movement separates the proposed well and municipal well, and where there is no interference with the municipal well. This classification applies only to affected cities with a full-time conservation program and may include the cities of Adams, Athena, Echo, Heppner, Helix, Hermiston, Ione, Lexington, Milton-Freewater, Pendleton, Pilot Rock, Stanfield, Umatilla, and Weston.

When considering the public interest, the Director shall take into consideration the following elements:

- (a) Whether the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12);
- (b) Whether water is available;
- (c) Whether the proposed use will not injure other water rights;
- (d) Whether the proposed use complies with the rules of the Commission.



The official act of the Director acting in the Commission's name and by the authority granted herein shall be considered to be an official act of the Commission.

Dated: April 14, 2005

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Dan Thorndike, Chair

Concur by unanimous vote of Commission members present.

Dan Thorndike, Chair  
Tyler Hansell  
Jim Nakano  
Susie Smith  
Jay Rasmussen