



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 7, 2002

Dwight French
Water Rights Manager
Water Resources Department
158 12th St. NE
Salem, OR 97310

Re: Compliance With Permit Conditions
DOJ File No. 690-303-GN0023-98

Dear Mr. French:

Permits allowing the use of water generally include conditions on the use of that water, some of which are standard conditions on all water rights of that type and some of which are specific to the permitted use. You have asked several questions about the relationship between compliance with those conditions and the Water Resources Department's (Department) decision whether to issue a certificate for a water right use.¹ Although you raise several related sub-issues, the central question is whether the Department may issue a certificate for a water right permit in the absence of compliance with the conditions of the permit. We conclude that the Department may not issue a certificate for a permit unless the conditions of the permit have been complied with.

DISCUSSION

1. The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

The waters of the state "may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise * * *." ORS 537.120. With narrow exceptions, a person may not divert, pump or otherwise take control over surface or ground water without a permit from the Department. ORS 537.130, 537.535. The decision to issue a permit for surface water is made in the first instance following a determination by the Department that the proposed use of water will not impair and is not detrimental to the public interest factors set forth in ORS 537.153 and 537.170(8). In tandem with the public interest standard governing the decision to approve the

¹ The Department makes the decision on water right applications unless exceptions to the Department's decisions are filed with the Water Resources Commission. ORS 537.140 et seq, ORS 537.173. Our references to the Department include the Commission, as appropriate.

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proposed use, the Department is granted broad authority to impose conditions to ensure that the public interest is not impaired. A final order approving a proposed use of water "may set forth any of the provisions or restrictions to be included in the permit concerning the use, control and management of the water to be appropriated for the project * * * to protect the public interest." ORS 537.170(5). The Department "may approve an application for less water than applied for, or upon terms, limitations and conditions necessary for the protection of the public interest * * *." ORS 537.190(1). Finally, the permit "shall specify the details of the authorized use and shall set forth any terms, limitations and conditions as the Department considers appropriate * * *." ORS 537.211.² The conditions authorized by these statutes are often central to the Department's decision that the proposed use will not impair or be detrimental to the public interest. In many cases the Department *could not make* that decision but for the conditions. It is against that background that we examine whether the Department may certificate a water use absent compliance with the permit conditions.

Once a water use has been fully developed under a permit, the permit holder must apply to the Department for a certificate of water right. The certificate constitutes "conclusive" evidence of the priority and extent of the appropriation. ORS 537.270. It represents a vested right to the use of water described in the certificate. *Green v. Wheeler*, 254 Or 424 (1969); see also Letter of Advice to William R. Blosser, Chairperson, Water Resources Commission from Melinda Bruce, Assistant Attorney General, March 18, 1988 (advising that the commission may not reassess whether a previously certificated right is consistent with the public interest). To obtain a water right certificate a permit holder must, under ORS 537.230(1), begin construction and continue that work with reasonable diligence to completion, which may not exceed five years. "[U]pon completion of beneficial use," the permit holder must hire a certified water right examiner ("CWRE") to survey the appropriation. ORS 537.230(3). Once the survey has been completed, the permit holder must submit a map of the survey, with a request for a water right certificate, to the Department. ORS 537.230(3).³ The Department must decide whether or not to issue a certificate in accordance with ORS 537.250(1). That statute provides in part:

After the [Department] has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230(3) that shows, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the department shall

² Groundwater permits are issued pursuant to ORS 537.535 et.seq. Like the surface water statutes, the groundwater statutes allow for conditions and require a similar public interest review. See e.g. ORS 537.621, 537.620, 537.625, and 537.628.

³ ORS 537.230(3) provides in part:

Except as provided in ORS 537.409, upon completion of beneficial use as required under subsection (1) of this section, the permittee shall hire a water right examiner certified under ORS 537.798 to survey the appropriation. Within one year after application of water to a beneficial use or the beneficial use date allowed in the permit, the permittee shall submit a map of the survey as required by the [department], which shall accompany the request for a water right certificate submitted to the department under ORS 537.250.

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issue to the applicant a certificate of the same character as that described in ORS 539.140.

Perfection of the water right under this statute clearly requires construction of the physical means of water delivery, and application of water for the use specified in the permit, before certificate issuance. *Green v. Wheeler, supra*. The statute does not, however, specifically refer to compliance with permit conditions as a requirement for certification. The question is whether compliance with all conditions of the permit is required for perfection in accordance with the Water Rights Act. We are persuaded that the Department must require that compliance before a certificate may issue.

Issuance of a permit authorizes the holder to "proceed with the construction of the necessary works," to "take all action required to apply the water to the designated beneficial use and to perfect the proposed appropriation." ORS 537.211(1). That provision suggests three steps: construction of the works, initial application of water to beneficial use, and perfection of the appropriation. The statute does not define "perfection of the appropriation." But the phrase clearly means something in addition to construction of the project and initial application of water to beneficial use. *Green v. Wheeler, supra*, at 430 (application of water not sufficient to establish entitlement to certificate; fulfillment of other conditions also is required). That meaning may be found in ORS 537.250(1), which provides that the Department must issue a certificate if the final proof survey shows, "to the satisfaction of the department, that an appropriation *has been perfected in accordance with the provisions of the Water Rights Act * * **" *Id.*

The Water Rights Act is defined under ORS 537.010 to include ORS 537.140 to 537.252. As defined, the Water Rights Act includes the statutes discussed above that require the Department to make a public interest determination for a water right application, and to impose conditions on the use to protect the public interest. The Water Rights Act also includes other development requirements, such as pursuing completion of perfection with reasonable diligence, and hiring a CWRE to conduct a final survey proof survey upon "completion of beneficial use." ORS 537.230. These requirements must be met for a water right to be considered developed. Taken together, these statutes suggest that perfection of an appropriation is intended to encompass all of the water right development requirements in the Water Rights Act including construction of any necessary works, completion of application of water to beneficial use, compliance with the conditions of the permit, prosecuting construction with reasonable diligence and submitting final proof completed by a CWRE. It follows that the Department may not issue a certificate unless it determines that the use has been developed in compliance with the conditions of the permit, because until the conditions of a permit have been met, the appropriation has not been perfected.

This conclusion is reinforced by the central role that permit conditions play in the permitting decision. The conditions placed in a permit by the Department set out the parameters for developing the water right. Conditions ensure that a proposed water use will meet the legislative standard for water use, i.e. that the use will not impair or be detrimental to the public interest. It would be anomalous for the legislature to impose a public interest standard and to authorize the Department to impose conditions to achieve that standard, only to allow the

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Department to recognize a vested right to that water use, by issuing a certificate without finding compliance with the conditions. Likewise, it would be anomalous for the legislature to authorize cancellation of permits for willful violation of any permit provision and then allow for issuance of a certificate without requiring compliance with permit conditions. *See* ORS 537.720 (authorizing cancellation for willful violations). Moreover, the legislature has authorized the Department to institute cancellation proceedings if it determines that an appropriation has not been perfected because of a permit holder's failure to comply with permit conditions. ORS 537.260(1).⁴ The central role of permit conditions in the water right permitting process together with the text and context of the water rights statutes, leads to the conclusion that permit conditions must be met before a certificate may issue.

Although the text and context of the Water Rights Act strongly support the conclusion that permit conditions must be met as a condition of certification, it should be noted that there is no express statutory text requiring compliance with permit conditions as a condition of certification. The lack of an express statement may be used to support an argument that the Department does not have the authority to withhold certification for failure to comply with permit conditions. The problem with this argument is that it fails to consider the specific authority to impose conditions, the central role that conditions play in the scheme of the Water Rights Act, and the discretion granted to the Director in ORS 537.250 to review a final proof survey for compliance with the provisions of the Water Rights Act. For these reasons, the better argument is that permit conditions must be satisfied before a water right certificate may issue.

2. The final proof survey must provide information about compliance with every permit condition that affects perfection of the appropriation.

Permits often impose "continuing" requirements, such as a requirement that the permit holder comply with state and federal water quality standards over the life of the water use. Permits also include "warning" conditions, such as a reminder that the water use is subject to the rights of senior water right holders. You ask whether the Department may tailor the final proof survey requirements so that the survey need not address these continuous or warning conditions.

The final proof survey is vehicle by which a permit holder demonstrates the extent of the appropriation, and by which the Department makes the required determinations about the perfection of the water right. ORS 537.250(1). Under ORS 537.230(3), the final proof survey is prepared by a CWRE hired by the permit holder. The function of the final proof survey is to detail the perfection of the appropriation. Provided that central function is met, the Department and the Commission may tailor the requirements of the final proof survey to maximize its usefulness.

To that end, the commission has adopted rules that guide preparation of final proof surveys. Under OAR 690-14-100(1), the CWRE must report on "the status of conditions and limitation in permits." The rule lists the types of conditions on which a CWRE must report and includes a catch-all for "any other conditions or limitations." This rule clearly requires the

⁴ ORS 537.260(1) authorizes cancellation if the permit holder fails to submit timely "proof of the appropriation as required ORS 537.230 and 537.250."

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CWRE to report on compliance with permit conditions. That requirement is consistent with the statutory direction that the final proof survey is to demonstrate the extent of perfection of the appropriation. ORS 537.250(1). We do not believe the Department is authorized either under ORS 537.250 or OAR 690-14-100(1) to exempt from the reporting requirement conditions that affect the perfection of the appropriation. Compliance with continuous requirements at the time of the final proof survey is relevant to perfection of the appropriation, even though the requirements continue in effect after certificate issuance.

In contrast, the “warning” condition described above – the reminder that the water use is subject to the rights of senior water right holders – does not fall within the category of a condition that affects the perfection of the appropriation. It is not a condition that requires performance by the permit holder. The condition is imposed by operation of the law of prior appropriation, independently of any activity of the permit holder. Given that, there is nothing on which the CWRE would be required to report. The Department lawfully may design a final proof survey form that does not require reporting on this type of warning condition.

3. The Department may allow a permit holder to cure a failure to comply with time-sensitive permit conditions if measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.

You also have asked whether any remedy is available to a permit holder who has not complied with a time sensitive permit condition in a timely manner. Examples include permits that require particular action by the permit holder before actual diversion of water, such as installation of a water meter, and permits that require particular action by a date certain, such as submission of a water conservation and management plan within one year of permit issuance. If the permit holder begins water use without installing a water meter, or does not submit the water management plan by the date set forth in the permit, then the permit holder has not strictly complied with the permit conditions. You ask whether and in what circumstances the Department could issue a certificate for such a use, in spite of the non-compliance. In other words, may the Department allow the permit holder to “cure” the failure to comply with the permit conditions? The answer is a qualified “yes.” We believe that if steps are available that allow a permit holder to cure non-compliance in a way that serves the interests the condition was designed to protect and reaches an equivalent result, the Department may allow that remedial activity as a means of compliance with permit conditions before certification.

By requiring proof “to the satisfaction of the department,” ORS 537.250(1) confers on the Department discretion to determine whether and under what terms to issue a certificate. The Department must determine the extent of the appropriation, and whether the appropriation has been perfected in accordance with the Water Rights Act, including compliance with the terms and conditions of the permit. If a condition has not been met, the discretion granted to the Department in ORS 537.250(1) authorizes the Department to determine whether the appropriation can be brought into compliance with the Act, that is whether the condition can be satisfied.

Determining whether a time sensitive condition can be satisfied does not mean that the Department can waive the condition, impose an alternate condition or otherwise effect a permit

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amendment. See ORS 537.211 (setting out the process and the extent of permissible permit amendments). The Department is not granted the authority to reassess the public interest that underlies the condition in this manner. Rather, the Department is limited to determining whether the existing condition can be satisfied, that is whether the purpose and result of the condition can be achieved. Because permit conditions arise out of public interest consideration, the determination of whether a particular condition has been, or can be met, should be guided by the public interest considerations that prompted imposition of the condition in the permit.

One example of where failure to meet a time sensitive condition could be cured at a later day is in the case of a meter installation condition that requires installation of a meter before water use begins. The purpose of this condition is to allow the Department staff to be able to know the measure of a permittee's water use at any given time. Because the meter is for a real time purpose, rather than for a cumulative measurement purpose, the interest in having a meter can be served by installation of a meter at the time the absence of one is discovered.

In sum, permit holders may be able to cure unmet time sensitive conditions at the certification stage. Whether a condition is subject to cure will depend on the purpose for which it is imposed and whether that purpose may be met.

4. *If at the certificate stage the Department discovers that a condition has not been met, the permit holder may seek a permit extension to cure the un-met condition, prior to certification of the permit.*

The statutes that address certification of a water right give the Department considerable discretion when reviewing a final proof survey. As discussed above, ORS 537.250 vests in the Department the discretion to determine whether a water right has been perfected in accordance with the Water Rights Act, which requires consideration of whether permit conditions have been satisfied. If permit conditions have not been met, ORS 537.260 authorizes, but does not require, the Department to cancel a permit for failure to submit proof of completion of an appropriation as required by ORS 537.230 and 537.250. Neither of these statutes mandate a result where the final proof is not in compliance with the Water Rights Act. In fact, ORS 537.260, by not requiring cancellation, implicitly recognizes that the Department may proceed in a manner other than cancellation where inadequate proof of perfection has been submitted. The question is in what manner should the Department proceed.

Assuming that the development period under the permit has expired, the answer to what process applies to curing an unmet condition may be found within the extension provision in ORS 537.230(2) and the Department's extension rules in OAR chapter 690 divisions 315 and 320. ORS 537.230(2) allows the Department, for good cause shown, to order an extension of time for the period "within which irrigation or works shall be completed or the right perfected." As discussed above in section one, perfection of the right includes satisfaction of all of the water right development requirements under the Water Rights Act, including permit conditions. Thus, the statutory framework contemplates issuance of an extension where a water right has not been fully perfected at the close of the development period. The process for obtaining an extension to complete development and satisfy an un-met condition is provided in the Department's extension rules at OAR chapter 690, divisions 315 and 320.

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Based on the above statutes, the Department may allow a permittee, whose development period has ended and who has submitted final proof but has failed to comply with a permit condition, to withdraw the final proof and request for a certificate and apply instead for an extension to complete perfection of the appropriation. Where an extension is necessary and no request is made the Department may proceed to cancel the permit under ORS 537.260 for failure to submit proof of appropriation as required by ORS 537.230 and 537.250.

5. Permit conditions may be monitored and enforced through regulation and through the extension process.

Prior to the certificate stage the Department may have occasion to review compliance with permit conditions either through regulation or through the extension process. Either or both of these situations offer additional methods for monitoring and enforcing compliance with permit conditions.

The Department may enforce permit conditions through regulation by the watermaster and through imposition of civil penalties. Under ORS 540.045(1)(a), watermasters are charged with regulating the distribution of water among users "in accordance with the users' existing water rights of record in the Water Resources Department." Users' water rights of record include permits. ORS 540.045(4). Permit conditions are an integral part of the permit and describe how development and water use may occur under the permit. The watermaster is charged with insuring that water is used lawfully, which includes insuring compliance with permit conditions. In addition to regulation by the watermaster, the Department may impose civil penalties for "[v]iolations of any of the terms or condition of a permit[.]" ORS 536.900(1)(a), OAR chapter 690 division 260. In addition, for groundwater permits, willful violations of any provision of a permit subjects the permit to cancellation or suspension or imposition of conditions for future use to prevent further violations. ORS 537.720.

Another, although less direct, tool for insuring compliance with permit conditions is the permit extension process. As discussed above, a permit extension would be necessary in order to cure a failure to meet a permit condition at the certificate stage where the development period has ended. It follows from that conclusion that permit conditions do not necessarily have to be complied with to obtain a permit extension. However, under the current and future extension rules, compliance with permit conditions is a permissible factor to consider in the good cause evaluation and specifically is listed as a factor for consideration in OAR 690-315-040(3)(c).

CONCLUSION

The guidance that this advice provides for the administration of permit conditions may be summarized as follow:

- The Department may not issue a water right certificate without finding satisfaction of the permit conditions.
- The final proof survey must report on all conditions that affect perfection of the appropriation.

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- The Department may allow curing of an unmet time-sensitive condition, so long as the public interest purposes of the condition are met and an equivalent result is achieved.
- Where the Department determines that one or more permit conditions have not been met at the certificate stage, the process for cure is through the permit extension process. In the permit extension proceeding, compliance with permit conditions is a factor to be evaluated in the good cause review but is not determinative of the outcome.
- In addition to reviewing permit conditions in the extension process, the Department may review compliance with and enforce permit conditions through watermaster regulation and through imposition of civil penalties.

Please note that this advice necessarily is generalized to respond to the broad questions that were asked, please feel free to contact me if you have additional questions or questions regarding a specific case.

Sincerely,



Sharyl L. Kammerzell
Assistant Attorney General
Natural Resources Section

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