

Oregon Water Resources Department



Final Order to Deny Limited License Application LL-1533

Appeal Rights

This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date, the petition was filed, the petition shall be deemed denied.

Requested Water Use

On June 5, 2014, the Water Resources Department received completed application **LL-1533** from Red Flat Nickel Corp for the use of 10 gallons per minute from an unnamed creek, located in the SE ¼, SE ¼, Section 6, Township 41 South, Range 10 West, W.M., for mineral exploration drilling, for the period July 1, 2014, through November 1, 2018.

Authorities

The Department may approve a limited license pursuant to its authority under ORS 537.143, 537.144 and OAR 690-340-0030.

ORS 537.143(2) authorizes the Director to revoke the right to use water under a limited license if it causes injury to any water right or a minimum perennial streamflow.

A license will not be issued for more than five consecutive years for the same use, as directed by ORS 537.143(8).

Findings of Fact

1. The forms, fees, and map have been submitted, as required by OAR 690-340-0030(1).
2. The Department provided public notice of the application, on June 24, 2014, as required by OAR 690-340-0030(2).
3. This license request is limited to an area within a single drainage basin as required by OAR 690-340-0030(3).
4. The Department has determined that the proposed source has not been withdrawn from further appropriation.
5. No water rights exist in Oregon on Taylor Creek or its tributaries, thus there has been no history of regulation. The Department's Water Availability Reporting System (WARS) indicates that water is available year-round in the downstream waters of Taylor Creek; the WARS does not have information for the unnamed tributary. Based on comments

received, staff visited the remote site on September 19, and found flows at the proposed point of diversion were effectively nonexistent (< 1 gpm). The Department is unable to forecast surface-water availability in low-order streams over multi-year periods as requested in the application.

6. Because the proposed use is from surface water and has the potential to impact fish, the Department finds that fish screening is required at the points of diversion to protect the public interest.
7. Because the use requested is longer than 120 days and because the use is in an area that has sensitive, threatened or endangered fish species, the use is subject to the Department's rules under OAR 690-33. These rules aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened, or endangered fish species. The Oregon Department of Environmental Quality (DEQ) commented on July 8, 2014, and provided clarifying comments on September 15, 2014.

Those comments pertained to Oregon Administrative Rules, the future development of a TMDL for temperature, and concerns about the likelihood of diminishment of water quality for sensitive, threatened, or endangered fish species if the proposed use occurred.

Three Oregon Administrative Rules state that no single activity is allowed to increase water temperature by more than 0.3 degrees Celsius above the applicable criteria prior to the development of a Total Maximum Daily Load (TMDL). The Oregon Administrative Rules which place this limit on allowable stream warming are:

- Anti-degradation rules and policy: OAR 340-041-0004(3)(c)
- Protecting Cold Water: OAR340-41-0028 (11)(a)
- Implementation of the Temperature Criteria: OAR340-41-0028 (12)(e)

Should a TMDL be developed, no more than a 0.3 degree Celsius increase in water temperature above the applicable criteria is allowed from all sources taken together at the maximum point of impact.

There are no baseline hydrographic or temperature data for the proposed source, however waters of Chrome Creek, an analogous stream nearby, currently exceed temperature standards for summer and fall months when solar loading is high.

Downstream waters of Taylor Creek are identified as having "Core-Cold Water Habitat Use" which means they are expected to maintain water temperatures generally considered optimal for salmon and steelhead rearing. Stream flows play an important role in regulating stream heating.

The DEQ recommended denial of the application because, given the sparse data available on flows and temperatures, it is not possible to recommend appropriate conditions to mitigate the likely impacts of the proposed use on water quality and sensitive, threatened, and endangered fish species under OAR 690-033-0340(2).

8. The Department received numerous public comments related to notice of the application. These comments pertained to the following topics:

- a. *California Declaration of Full Appropriation* – California Department of Corrections, several large institutional water users, large and small irrigation users and individual domestic users rely on waters of the Smith River drainage. The State of California issued a Declaration of Fully Appropriated Stream Systems on November 19, 1998, effectively removing the Smith River from further appropriation in California. The proposed source is a tributary to the Smith River. The California Department of Fish and Wildlife (CDFW) commented on July 8, 2014. These comments pertain to the Smith River being one of two watersheds in California described as “irreplaceable” with respect to salmonid population resiliency and biodiversity. The CDFW recommended denial of the application on the basis of a lack of water availability as well as highest- and best-use public-interest factors. Those factors include the Smith River basin’s uniqueness in California for the river’s free-flowing status and highly dynamic discharge, as well as the basin’s high botanical diversity, renowned anadromous fisheries, and its Wild and Scenic status. In addition, the CDFW recommended denial of the application because all subsequent phases of the project beyond exploratory drilling would have significant and irreversible deleterious effects on the Smith River watershed.
- b. *Pure drinking water for California communities* – Crescent City, the Big Rock Community Services District, and the Gasquet Community Services District all provide water from the Smith River for municipal and domestic uses. Concerns were expressed regarding potential impact to water quality for human consumption.
- c. *Critical habitat for threatened Coho salmon and other fisheries* - These tributaries contribute important water for cooling downstream flows for optimal spawning and fish rearing habitat.
- d. *Wildlife* - This largely roadless area provides critical habitat for a variety of wildlife.
- e. *Rare botanical resources* - The area in question is home to documented rare botanical resources such as Port Orford cedar, *Streptanthus howellii* (Howell’s jewelflower), and *Darlingtonia* fens that exist in sensitive wetland ecosystems.
- f. *Wild and Scenic River designations* – The North Fork Smith River is included in the National Wild and Scenic River System for Oregon and California, and has been listed as a California Wild and Scenic River since 1972.
- g. *Local economy* – The local economy depends substantially on the renewable recreational opportunities such as fishing, hiking, and kayaking afforded by high water quality in the Smith River system.
- h. *Recreation* – Described as one of the few remaining pristine water systems, the Smith River system and its tributaries afford renowned fishing and kayaking, which are important beneficial uses that require high water quality.
- i. *Mining operations with associated infrastructure and roads* – Concern about the impact of road construction and other required infrastructure needed for a working mine (that would logically follow any successful assay-drilling program). Roads would be needed to transport equipment and workers in, and ore out. In addition, full-scale mining would require the use of even greater amounts of water for construction and mining itself.
- j. *Accidental and incidental release of processing chemicals* – Concern that accidental release or escape of chemicals and/or sediment from retention pools or

runoff could find its way to the stream system. Some of the chemicals used in mining are very toxic and environmentally persistent.

- k. *Sedimentation from future mining* – Should sufficient ore be found to justify a mining operation, there is concern that mining operations could lead to increased sedimentation and result in increased turbidity and concomitant degradation of water quality.
- l. *Lack of impact analysis* – Comments received stated that a required impact analysis by the U.S. Forest Service has not been completed, and that therefore this application is premature.

9. The application did not address any plan to ensure the potability of water to be used in the subsurface. Surface water to be used in geotechnical boreholes must be potable as required by OAR 690-240-0014.

Conclusions of Law

1. Based upon a site visit, including measurements of flow and water temperature, the Department finds that water is not available for the proposed use in 2014.
2. Based upon its findings and comments received (principally from the Oregon Department of Environmental Quality), the Department finds that with the data available there is no basis for appropriate conditions that can be applied to mitigate likely impacts to water quality and sensitive, threatened, and endangered species (OAR 690-033-0340(2)).
3. Pursuant to OAR 690-340-0030(2), the Department therefore has determined that the proposed water use will impair or be detrimental to the public interest.

Order

1. Pursuant to ORS 537.143, ORS 537.144, OAR 690-340-0030, and OAR 690-033-0310, application LL-1533 is denied.

Issued September 30, 2014



E. Timothy Wallin, Water Rights Program Manager
for Director, Oregon Water Resources Department

Enclosures - limited license to deny

cc: Mitch Lewis, District 19 Watermaster
Todd Confer, ODFW
Heather Tugaw, DEQ
Hydrographics
File

If you need further assistance, please contact the Water Rights Section at the address, phone number, or fax number below. When contacting the Department, be sure to reference your limited license number for fastest service.

Remember, this limited license does not provide a secure source of water. Water use can be revoked at any time. Such revocation may be prompted by field regulatory activities or many other reasons.

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