

REC'D JUL 22 2008



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

July 21, 2008

CERTIFIED MAIL  
7006 3450 0001 6754 1854

Mr. Todd A. Hansen  
9300 Kimmie Street SW  
Olympia, WA 98512

Re: Water Right Change Application for Surface Water Certificate 3750

Dear Mr. Hansen:

In accordance with RCW 90.80.080 the Department of Ecology has reviewed the Record of Decision (ROD), Report of Examination (ROE), and all comments, protests, objections and other relevant information submitted by the Thurston County Water Conservancy Board for the above referenced application for change.

The Department of Ecology **REVERSES** the decision of the board for the following reasons:

**The Board failed to adequately assess impairment**

- By recommending the change of water right from seasonal to year-round right without subjecting the right to the senior instream flow right (Chapter 173-513 WAC) held by the State of Washington, the Board's decision fails to guard against impairment of the Deschutes River Instream Resources Protection Program.
- Surface Water Right Certificate 3750 limited irrigation to the period of April 15 to October 1. The Board's decision allows the appropriation of water during the month of water of October when the Deschutes River is closed to further appropriation (WAC 173-513-040). The Board's decision fails to analyze impacts on closed surface waters.

**The Board failed to adequately address the availability of water in new period of use**



- The Board’s analysis of surface water impacts compares the proposed consumptive use to the “typical instream flow requirements of 400 cfs for the Deschutes River.” The Board concludes that impacts are “0.005 % of the Deschutes River instream flows...[and] that this...does not have an adverse impact upon Deschutes River flows.” In fact, the instream flow requirements vary from 150 to 400 cfs and actual instream flows in the river vary as well. The decision fails to analyze the extent to which the Deschutes River instream flow requirements are currently achieved, which is necessary to address the question of physical and legal availability of water. Our analysis indicates that Deschutes River Instream Flows are not met substantial periods of time during the November – April 15 period.

**The Board’s analysis of the extent and validity of the right was incomplete**

- The decision fails to document whether the water right was exercised while remaining in compliance with the instream flow limitation and, by extension, whether the quantity authorized by the board is in fact legally available for change.

**The Board unlawfully authorized a municipal purpose of use**

- On June 11, 2008, King County Superior Court issued a decision in Lummi Indian Nation, et al. v. State, in which sections of the Municipal Water Law, RCW 90.03.015(3) and (4) were held to be unconstitutional. These particular subsections of the Municipal Water Law defined municipal water suppliers and municipal water supply purposes. Because Keeneland Park is a private proposal – not a municipality -- it is not entitled to classification as a municipal water supplier.

**The Board failed to adequately address the potential for detriment to the public interest**

- The Board imposed no conditions on the right in order to protect instream resources of the Deschutes River. However, the option to issue a conditioned right, subject to interruption, is not appropriate for a proposed water system which lacks other water rights because it would conflict with the need to provide a reliable water supply to residential customers. It would be detrimental to the public interest to allow the change of purpose as proposed.
- By failing to maintain the 1 cubic foot per second instream flow condition on the changed water right, the recommendation enlarges the conditions under which water could be legally withdrawn, to the detriment of instream flows in the Deschutes River and Ayers Creek.

Accordingly, the requested change is denied

You have a right to appeal this decision. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the “date of receipt” of this document. Filing means actual receipt by the Board during regular office hours.
- Serve your appeal on the Department of Ecology within 30 days of the “date of receipt” of this document. Service may be accomplished by any of the procedures identified in WAC 371-08-305(10). “Date of receipt” is defined at RCW 43.21B.001(2).

Be sure to do the following:

- Include a copy of this document that you are appealing with your *Notice of Appeal*.
- Serve and file your appeal in paper form; electronic copies are not accepted.

**1. To file your appeal with the Pollution Control Hearings Board**

Mail appeal to:

The Pollution Control Hearings Board  
PO Box 40903  
Olympia WA 98504-0903

OR Deliver your appeal in person to:

The Pollution Control Hearings Board  
4224 – 6th Ave SE Rowe Six, Bldg 2  
Lacey WA 98503

**2. To serve your appeal on the Department of Ecology**

Mail appeal to:

The Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia WA 98504-7608

OR Deliver your appeal in person to:

The Department of Ecology  
Appeals Coordinator  
300 Desmond Dr SE  
Lacey WA 98503

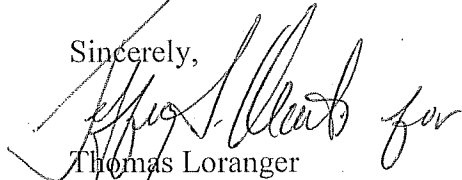
**3. And send a copy of your appeal to:**

Thomas Loranger  
Department of Ecology  
Southwest Regional Office  
PO Box 47775  
Olympia WA 98504-7775

*For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www1.leg.wa.gov/CodeReviser>.*

If you have any questions, please contact Ecology at (360) 407-6300.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Loranger for". The signature is written in a cursive style and is positioned above the printed name.

Thomas Loranger  
Water Resources Section Manager

cc: Janet Carlson, Ecology ERO  
Thurston County Water Conservancy Board  
Tom McDonald, Cascadia Law Group