

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON**

In the Matter of Allocation of Conserved) PRELIMINARY DETERMINATION
Water Application CW-125,) PROPOSING APPROVAL OF ALLOCATION OF
Josephine County) CONSERVED WATER CW-125

Applicants

James B. and Jennifer Darby
1120 Huffman Rd., Suite 24-374
Anchorage, AK 99515

Applicable Law

Any person or group of persons holding a water use subject to transfer as defined in ORS 540.505 may submit an application for an Allocation of Conserved Water to the Water Resources Commission for a conservation project that has not yet been implemented or was implemented within five years prior to the submission of the application. ORS 537.465. Under the Allocation of Conserved Water Program, a portion of the water proposed to be conserved by an applicant may be used on additional lands, put to a different use, or be leased or sold to another user. OAR 690-018-0010. A portion of the water conserved is allocated to the state to be converted to an instream water right or to revert to the public for appropriation by other water users. ORS 537.470(3).

An application for an allocation of conserved water shall include: (a) A description of the measure as implemented and the date on which the measure was implemented; (b) A description of the diversion facilities before the conservation measure was implemented and the amount of water that was diverted at the facilities before the conservation measure was implemented; (c) The amount of water needed to supply existing rights after implementation of the conservation measure; (d) The amount of water conserved by implementing the conservation measure; (e) The proposed allocation and use of the conserved water if different from the allocation specified in ORS 537.470; (f) The intended use of any water allocated to the applicant and the proposed location of use; (g) The applicant's choice of priority date for the conserved water; (h) Evidence that the measure was implemented within five years prior to the date of filing the application; and (i) Any other information the commission considers necessary to evaluate the application. ORS 537.465.

Pursuant to OAR 690-018-0050, any person objecting to the proposed allocation may file a protest to this Preliminary Determination with the Water Resources Commission within 60 days of the mailing of this determination.

After determining any quantity of water needed to mitigate the effects on other water rights, 25-percent of the conserved water shall be allocated to the state and 75-percent to the applicant unless the applicant proposes a higher allocation to the state or more than 25-percent of the funds used to finance the conservation measures comes from federal or state sources not subject to repayment. ORS 537.470(3).

If an application for the allocation of conserved water is approved, the Department shall issue orders describing the changes in the original water rights. Once the conservation project is finalized, the Department shall issue new certificates preserving the previously established-priority date of the rights to reflect the unaffected portion of the water rights and new certificates reflecting the changes for the portions of the water rights involved in the conserved water application. ORS 537.470(6).

ORS 537.455 to 537.500 authorize and establish the process by which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department’s procedures and criteria for evaluating allocation of conserved water applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating proposed instream water rights.

Findings of Fact

1. On April 14, 2021, James and Jennifer Darby (Applicants) filed an allocation of conserved water application under Certificates 93295 and 93296. The Department assigned the application number CW-125.
2. On May 12, 2021, the Applicants amended their application clarifying the proposed project schedule.
3. The conservation project involves converting from flood irrigation to high-pressure sprinklers and drip irrigation. The conversion from flood irrigation to a sprinkler and drip irrigation system is a proven technology for conserving water.
4. Application CW-125 proposes a total rate reduction of approximately 0.138 cubic foot per second (cfs).

Conserved Water Description						
		Certificate Rate		Needed Rate		Conserved Water Rate
Priority	Certificate	Maximum CFS	CFS/AC	Maximum CFS	CFS/AC	Maximum CFS
8/18/1920	93295	0.13	0.0125	0.070	0.007	0.060
1888	93296	0.12	0.0200	0.042	0.007	0.078
Totals		0.25		0.112		0.138

5. The first right to be modified by CW-125 is as follows:

Certificate: 93295 in the name of JAMES B. and JENNIFER DARBY (perfected under Permit S-4743)

Use: IRRIGATION of 10.0 ACRES
Priority Date: AUGUST 18, 1920
Rate: 0.130 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent in case of rotation.
Source: JIMMY CREEK, tributary to the ILLINOIS RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17
39 S	8 W	WM	17	NE SW	730 FEET SOUTH AND 15 FEET WEST FROM THE CENTER 1/4 CORNER SECTION 17

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	8 W	WM	17	SE SW	10.00

6. Certificate 93295 does not list a period of use; therefore, pursuant to the Illinois River Decree, the season of use is April 1 to November 1.
7. Certificate 93295, the Illinois River Decree, nor the basin program list a duty per acre or volume of water. Based on the maximum rate of water of 1/80 cfs per acre, the duty of water during the irrigation season would be 5.3 acre feet per acre (.0125 cfs x 214 days (irrigation season) x 1.983471 conversion factor). Therefore, the total volume of water available under Certificate 93295 is 53.0 acre feet.
8. The second right to be modified by CW-125 is as follows:

Certificate: 93296 in the name of JAMES B. and JENNIFER DARBY (confirmed by Illinois River Decree in the Order Record of the Water Resources Director in Volume 13, at Page 70)
Use: IRRIGATION of 6.0 ACRES
Priority Date: 1888
Rate: 0.12 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually used beneficially and shall not exceed one cubic foot per second for each 50 acres of land irrigated during the irrigation season, or its equivalent in case of rotation.
Period of Use: April 1 to November 1
Source: JIMMY CREEK, tributary to the ILLINOIS RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17
39 S	8 W	WM	17	NE SW	730 FEET SOUTH AND 15 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	8 W	WM	17	NW SE	3.0
39 S	8 W	WM	17	SW SE	3.0

9. Certificate 93296 contains a scrivener's error in the total number of acres irrigated. The correct total is 6.0 acres as listed in the place of use description for Certificate 93296.
10. Certificate 93296, the Illinois River Decree, nor the basin program list a duty per acre or volume of water. Based on the maximum rate of water of 1/50 cfs per acre, the duty of water during the irrigation season would be 8.49 acre feet per acre (.02 cfs x 214 days (irrigation season) x 1.983471 conversion factor). Therefore, the total volume of water available under Certificate 93296 is 50.9 AF.
11. Water has been used within the five-year period prior to submission of the allocation of conserved water application, and no evidence is available that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
12. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of the application.
13. The Applicants request the conserved water be allocated as follows:

Certificate	State's Portion			Applicant's Portion			Conserved Water		
	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF
93295	25	0.015	6.1	75	0.045	18.3	100	0.060	24.4
93296	25	0.019	8.2	75	0.059	24.9	100	0.078	33.1
Totals		0.034	14.3		0.104	43.2		0.138	57.5

14. The Applicants propose that its portion of the conserved water be allocated for an out-of-stream use within NESE and NWSE of Section 17, Township 39 South, Range 8 West, W.M.
15. The Applicants request that the priority date for any conserved water be the same as the originating right.
16. The Applicants funded 100% of the conservation project.
17. The Applicants submitted a completed Land Use Form from Josephine County that indicated the proposed use was allowed outright or is not regulated by Josephine County's comprehensive plan.

18. The Applicants anticipate implementation of the conservation measures to occur on or before November 2, 2023.
19. The Applicants propose that any instream water right created be for the purposes of conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values.
20. The Applicants request the Department protect the new instream water right created from the conserved water under Certificate 93295 and 93296 at the authorized point of diversion on Jimmy Creek.
21. The Applicants request the deadline for submitting the Notice of Completion of November 2, 2023. The Applicant will submit a Request for Finalization of the allocation on or before November 2, 2024.
22. The application meets the requirements of OAR 690-018-0040.
23. The Department has consulted with the Oregon Department of Fish and Wildlife (ODFW) to ascertain whether the proposed instream flows are necessary to support instream flow uses. ODFW's review stated there were no instream water rights on Jimmy Creek and there were no targeted biological flows. The review further indicated the improved or increased instream flows could be beneficial to fish particularly in the warmer and dryer months.
24. Notice of the proposed conservation project was published in the Department's weekly notice on June 1, 2021, and in the Grants Pass Daily Courier newspaper on May 27, and June 3, 2021, as required under OAR 690-018-0050(1)(a) and (2). No comments were filed in response to the notices.

Allocation of Conserved Water Review Criteria [OAR 690-018-0050]

25. The proposed allocation of conserved water will result in a reduced diversion of the use allowed under the existing rights pursuant to OAR 690-0018-0050(4)(a). (Finding of Fact #4).
26. On July 2, 2021, the District #14 Watermaster performed a review of the proposed Allocation of Conserved Water Project. The Watermaster determined that the conservation project would not harm other water rights; therefore, no quantity of conserved water is needed to mitigate for harm to other water rights. OAR 690-018-0050(4)(b) and (d).
27. The conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045. (Finding of Fact #17). OAR 690-018-0050(4)(c).
28. Pursuant to OAR 690-018-0050(4)(e), the new reduced rate and duty for the existing uses involved in Allocation of Conserved Water Application CW-125 under Certificates 93295 and 93296 are as follows:

Certificate	Priority Date	Rate		Duty	
		Max. CFS	CFS/AC	Max. AF	AF/AC
93295	8/18/1920	0.070	0.007	28.6	2.86
93296	1888	0.042	0.007	17.8	2.96
Totals		0.112		46.4	

(Findings of Fact #4, #7, #10).

29. Pursuant to OAR 690-018-0050(4)(e), the rate and volume allocated to the State are as follows:

Certificate	Priority Date	Maximum CFS	Maximum AF
93295	8/18/1920	0.015	6.1
93296	1888	0.019	8.2
Totals		0.034	14.3

(Finding of Fact #13).

30. ORS 537.470(3) states if the water allocated to the state is necessary to support instream flow purposes in accordance with ORS 537.332 to 537.360, the water shall be converted to an instream water right. If the water allocated to the state is not necessary to support instream flow purposes, it shall revert to the public for appropriation by the next user in priority.

ORS 537.332 defines *instream flow* as “the minimum quantity of water necessary to support the public use requested by an agency.” The public uses as delineated in ORS 537.332 to 537.360 are recreation; conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; pollution abatement; and navigation. ORS 537.332(5)(a-d). The only agencies that may request an instream water right under 537.336 are the Oregon Parks and Recreation Department (PARKS), Oregon Department of Fish and Wildlife (ODFW), and Oregon Department of Environmental Quality (DEQ).

31. Neither PARKS, ODFW, nor DEQ have requested or applied for an instream water right on Jimmy Creek, nor has any instream water right been issued for a public use on Jimmy Creek.
32. ODFW’s review states no instream biological flow targets have been established for Jimmy Creek; however, it further states the improved/increased instream flows could be beneficial for fish.
33. The possibility that additional flows could be beneficial does not meet the statutory requirement to being “the minimum quantity of water necessary” to support instream flow purposes for public use because there are no biological flow targets identified by a qualifying agency for which any instream right has been requested. (see, Findings of Fact #31 & #32)
34. Therefore, as required by OAR 690-018-0050(4)(f), the Department has determined that an instream right is not necessary to support public uses. Pursuant to ORS 537.470(3) the water allocated to the State shall revert to the public for appropriation by the next user in priority.

35. Pursuant to ORS 537.470(3) and OAR 690-018-0050(4)(g), the amount of water allocated to the Applicant does not need to be adjusted because the Applicant funded 100% of the project. (Finding of Fact #16). The rate and volume allocated to the Applicant is as follows:

Certificate	Priority Date	Maximum CFS	Maximum AF
93295	8/18/1920	0.045	18.3
93296	1888	0.059	24.9
Totals		0.104	43.2

(Finding of Fact #13).

36. The quantity of water allocated to the state to be reverted to the public for appropriation by the next user in priority is as follow:

Certificate	Priority Date	Maximum CFS	Maximum AF
93295	8/18/1920	0.015	6.1
93296	1888	0.019	8.2
Totals		0.034	14.3

(Finding of Facts #13, #s 30-35).

37. The areas within which the conserved water is proposed to be used for out-of-stream uses are within the NESE and NWSE of Section 17, Township 39 South, Range 8 West, W.M. (Finding of Fact #14). OAR 690-018-0050(4)(h).

38. The deadline for submitting a Notice of Completion is November 2, 2023. The deadline for submitting a Request for Finalization is November 2, 2024. (Finding of Fact #21). OAR 690-018-0050(4)(i).

39. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Finding of Fact #26). OAR 690-018-0050(4)(j).

Determination and Proposed Action

The project described in Allocation of Conserved Water Application CW-125, is consistent with the criteria in ORS 537.455 to 537.500, and OAR Chapter 690, Divisions 018 and 077. *If protests are not filed pursuant to OAR 690-018-0050(6), the conserved water application will be approved.*

If Allocation of Conserved Water Application CW-125 is approved, the Order Approving will include the following:

1. *The proposed change will result in a reduced diversion for the uses allowed under the original water right. Findings of Fact #4 and #25.*
2. *The proposed allocation of conserved water will not harm existing water rights. Finding of Fact #26 and #39.*
3. *The application is consistent with the requirements established in OAR 690-005-0045. Finding of Fact #17 and #27.*

4. The changes proposed in CW-125 are approved.
5. The quantities of water conserved and allocated are as follows:

Certificate	State's Portion			Applicant's Portion			Conserved Water		
	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF
93295	25	0.015	6.1	75	0.045	18.3	100	0.060	24.4
93296	25	0.019	8.2	75	0.059	24.9	100	0.078	33.1
Totals		0.034	14.3		0.104	43.2		0.138	57.5

6. The right to the use of the water is restricted to beneficial use at the places of use described and is subject to all other conditions and limitations contained in Certificates 93295 and 93296 and any related decree.

Upon filing the Notice of Completion:

7. Water Right Certificate 93295 is cancelled. Upon finalization, a superseding Certificate will be issued for the existing use and place of use at the reduced rate and duty as follows:

Use: IRRIGATION of 10.0 ACRES

Priority Date: AUGUST 18, 1920

Rate: 0.07 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to a diversion of 1/143 (0.007) of one cubic foot per second, or its equivalent for each acre irrigated, and shall be limited to a diversion of not to exceed 2.86 acre-feet per acre for each acre irrigated during the irrigation season of each year, and shall be further limited to an annual volume limitation of 28.6 acre feet.

Source: JIMMY CREEK, tributary to the ILLINOIS RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17
39 S	8 W	WM	17	NE SW	730 FEET SOUTH AND 15 FEET WEST FROM THE CENTER 1/4 CORNER SECTION 17

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	8 W	WM	17	SE SW	10.00

8. Water Right Certificate 93296 is cancelled. Upon finalization, a superseding Certificate will be issued for the existing use and place of use at the reduced rate and duty as follows:

Use: IRRIGATION of 6.0 ACRES

Priority Date: 1888

Rate: 0.042 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 1/142 (0.007) of one cubic foot per second for each acre of land irrigated and shall be limited to a diversion of not to exceed 2.96 acre-feet per acre for each acre irrigated during the irrigation season of each year, and shall be further limited to an annual volume limitation of 17.8 acre feet.

Period of Use: April 1 to November 1

Source: JIMMY CREEK, tributary to the ILLINOIS RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17
39 S	8 W	WM	17	NE SW	730 FEET SOUTH AND 15 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	8 W	WM	17	NW SE	3.0
39 S	8 W	WM	17	SW SE	3.0

9. The Applicant shall install a weir or flume at PODs 1 and 2, or a suitable measuring device with prior approval of the Director, for the existing lands under Certificates 93295 and 93296.
10. The consumptive use of conserved water under these rights shall be subject to such water measurement conditions the Department deems necessary to prevent injury and enlargement.

Water use measurement conditions:

- a. Before the use of the Applicants' portion of conserved water, the water user shall install a weir or flume at PODs 1 and 2, or with prior approval of the Director, another suitable measuring device, at each point of diversion.
 - b. The water user shall maintain the meters or measuring devices in good working order.
 - c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.
11. All conserved water, both the Applicants' portion and the State's portion shall be managed instream until a Request for Finalization is submitted as follows:

Source: Jimmy Creek, tributary to the Illinois River

Certificate	Priority Date	Period	Rate (cfs)	Volume (acre-feet)
93296	1888	April 1 through October 31	0.078	33.1
93295	8/18/1920	April 9 through October 31	0.060	24.4
Totals			0.138	57.5

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At the authorized point of diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17

Upon Filing the Request for Finalization:

12. The project is complete, and no additional time is needed for finalization. The Applicant's portion of conserved water (0.104 cfs, 43.2 AF) shall be used and managed instream until a Notice of Use or Disposition is received pursuant to ORS 537.490 and OAR 690-018-0090. The water shall be managed instream as follows:

Source: Jimmy Creek, tributary to the Illinois River

Certificate	Priority Date	Period	Rate (cfs)	Volume (acre-feet)
93296	1888	April 1 through October 31	0.059	24.9
93295	8/18/1920	April 9 through October 31	0.045	18.3
Totals			0.104	43.2

At the authorized point of diversion:

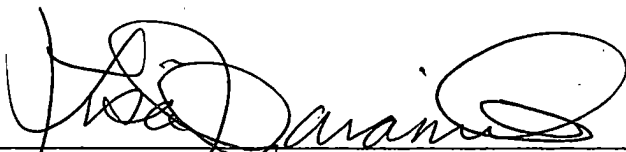
Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	8 W	WM	17	NW SW	1050 FEET SOUTH AND 1500 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 17

13. The areas within which the conserved water is proposed to be used for out-of-stream uses are within the NESE and NWSE of Section 17, Township 39 South, Range 8 West, W.M.
14. The following quantity of conserved water allocated to the State shall revert to the public for appropriation by the next user in priority as follows:

Source: Jimmy Creek, tributary to the Illinois River

Certificate	Priority Date	Period	Rate (cfs)	Volume (acre-feet)
93296	1888	April 1 through October 31	0.019	8.2
93295	8/18/1920	April 3 through October 31	0.015	6.1
Totals			0.034	14.3

Dated at Salem, Oregon SEP 17 2021



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M. BYLER, DIRECTOR
Oregon Water Resources Department

Mailing Date: SEP 20 2021

NOTICE OF RIGHTS

The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to those actions. ORS 183.415. The Commission shall notify the applicant and any other person requesting notice, of the action the Commission intends to take under ORS 537.470(3). Any person objecting to the proposed allocation may file a protest requesting a contested case hearing before the Commission. ORS 537.470(4).

If a protest to the proposed allocation of conserved water is received by the Department within 60 days of the mailing of the preliminary determination pursuant to ORS 537.470(4) and OAR 690-018-0050(4), the Director may work with the applicant and any protestant to determine whether the issues can be resolved through mutually agreeable conditions, or by modifying the application. OAR 690-018-0050(6).

If protests are received raising issues that cannot be resolved pursuant to OAR 690-018-0050(6), the Director shall present the application, all protests and a recommendation for action to the Commission for review and action. OAR 690-018-0050(8).

The Commission shall examine the application, the protests and the Director's recommendation. If the Commission finds the allocation of conserved water is likely to injure existing water rights or is otherwise inconsistent with these rules, the Commission may direct the Department to hold a contested case hearing on the application pursuant to ORS 183.413 and OAR 690, Divisions 1 and 2 or to resume attempts to resolve the disputed issues. If the Commission finds the allocation of conserved water is not likely to injure existing rights and is otherwise consistent with OAR 690-018-0050, the Commission may authorize the Director to issue an order approving the application. OAR 690-018-0050(9).

In the event of a land use dispute, as defined in OAR 690-005-0015, the Director shall follow resolution procedures provided in 690-005-0040 (Resolution of Land Use Disputes). OAR 690-018-0050(10).

If a protest is withdrawn, or any party to a hearing notifies the Department or the administrative law judge that the party will not appear, or if the party fails to appear at a scheduled hearing, the Director may issue a final order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that parties have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

Any party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions, or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 690-137-0555, an agency representative may represent partnerships, corporations, associations, governmental subdivisions or public or private organization if the Department determines that appearance of a person by an

authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

Protests should be addressed to the attention of Allocation of Conserved Water Program, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified.