

Oregon Water Resources Department
Water Right Services Division

Water Right Application G-18802 in the)
name of DALE BERRETT, TONY BERRETT and)
BERRETT RANCHES INC.) PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application G-18802, and a permit consistent with the attached draft permit.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.615 through 537.628, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 8, 9, 33, 300, 310, 400, 410, and the Owyhee Basin Program (OAR 690-511). These statutes and rules can be viewed on the following website: <https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>.

The Department’s main website can be found at: <https://www.oregon.gov/OWRD>.

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 rights; and
- a) The proposed use complies with the rules of the Commission.

ORS 537.621(2); OAR 690-310-0150(2)(b).

All four criteria must be met for a proposed use to be presumed to ensure the preservation of the public welfare, safety and health. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either one or more of the criteria for establishing the presumption are not satisfied, or as demonstrated in any comments received, information available in the Department’s files or received from other interested agencies, and any other available information. ORS 537.621(2); OAR 690-310-0140.

If the Department determines that the presumption is established and not overcome, the Department shall issue a Proposed Final Order recommending issuance of the permit subject to any appropriate modifications or conditions.

FINDINGS OF FACT

Application History

1. On March 11, 2019, Dale Berrett, Tony Berrett and Berrett Ranches Inc. filed a complete application for the following water use:
 - Source:** WELL 1 (MALH 54279/ L114885) IN JORDAN CREEK BASIN
 - Use:** SUPPLEMENTAL IRRIGATION OF 263.7 ACRES
 - Rate:** 4.0 CUBIC FEET PER SECOND (CFS)
 - Period of Use:** MARCH 1 THROUGH NOVEMBER 1
 - County:** MALHEUR COUNTY
 - Place of Use:** SECTION 27, TOWNSHIP 30 SOUTH, RANGE 44 EAST, W.M.
2. On September 27, 2019, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 4.0 CFS of water from Well 1 (MALH 54279/ L114885) in Jordan Creek Basin for supplemental irrigation of 263.7 acres is allowable March 1 through November 1 of each year. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On October 1, 2019, the Department noticed the application in its weekly public notice, requesting comments, and providing information for interested persons about obtaining future notices and a copy of the Proposed Final Order.
4. On January 29, 2021, the Department emailed the applicant regarding the 16.8 acres of primary irrigation identified in the Initial Review. The Department asked if the applicant intended to modify the application to consider the surplus acres as primary irrigation (which would require the submission of necessary map revisions and fees) or if the applicant intended to remove the 16.8 acres from the application.
5. As of the date of this document, the Department has not received a response to the above inquiry. As a result, the supplemental acreage included in the draft permit has been reduced to the 246.9 acres with a primary irrigation water right (Certificate 75583).
6. The Department has determined an error was made in the Initial Review as to the allowable supplemental irrigation season. The determinations of the Initial Review should be corrected to reflect the period of use will be limited to April 1 through October 15 of each year. (OAR 690-250-0070(1))

Presumption Criteria (a) - Consistency with Basin Program

7. Irrigation is allowed under the Owyhee Basin Program (OAR 690-511-0010(1)). ORS 537.621(3)(b); OAR 690-310-0150(2)(b)

Presumption Criteria (b) - Water Availability

8. An assessment of groundwater availability has been completed by the Department. A copy of this assessment is in the file and can be viewed on the Department's website. Groundwater for the proposed use is not over appropriated. ORS 537.621(3)(c); OAR 690-310-0150(2)(c)

Presumption Criteria (c) - Injury Determination

9. The proposed use, if authorized, will not injure other water rights. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

Presumption Criteria (d) - Whether the use complies with rules of the Commission

10. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.621(3)(b); OAR 690-310-0150(2)(b)
11. The Department has determined that the proposed groundwater use will not have the potential for substantial interference with surface water. ORS 537.621(3)(b); OAR 690-009-0040(4)
12. The proposed groundwater use is not located within a designated critical groundwater area. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)

Determination of presumption that a proposed groundwater use will ensure the preservation of the public welfare, safety and health

Based on the review of the presumption criteria (a)-(d) above, the presumption has been established. ORS 537.621(2); OAR 690-310-0150(2)(g)

Further evaluation of the proposed use

13. No comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
14. Information available in Department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the proposed use would not ensure the preservation of the public welfare, safety and health under ORS 537.525. OAR 690-310-0140(3)

Other Criteria and Requirements

15. The proposed use is located above the Owyhee Scenic Waterway, as designated under ORS 390.826. The Department finds that there is not a preponderance of evidence that the proposed use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife. ORS 537.621(3)(a); OAR 690-310-0260(9)(a)
16. The amount requested, 4.0 CFS, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)
17. The applicant proposed methods to measure the amount of water appropriated, prevent damage to aquatic life and riparian habitat, prevent discharge of contaminated water to a surface stream and to prevent damage to public uses of any affected surface waters. These measures are identified on page 6, Section 6C, of the application. OAR 690-310-0150(2)(j)
18. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSIONS OF LAW

1. The proposed use, as conditioned, would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

NOTE: When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety and health.

PROPOSED ORDER

The Department recommends approval of Application G-18802, and issuance of a permit consistent with the attached draft permit.

DATED November 29, 2022



Katherine Ratcliffe
Water Rights Section Manager, for
Douglas E. Woodcock, Acting Director
Oregon Water Resources Department

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), you can protest this Proposed Final Order. If you wish to submit a protest by U.S. mail, please consider mailing early to ensure the Department receives the protest by the deadline specified. Protests must be received by the Water Resources Department no later than **January 13, 2023**.

As provided in ORS 537.621(7), ORS 536.050(1)(j), and OAR 690-002-0025 — 0035, protests must be in writing and include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in the Proposed Final Order would impair or be detrimental to your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known;
- To affect the Department's determination that the proposed use in this application will, or will not, ensure the preservation of the public welfare, safety and health as described in ORS 537.525, ORS 537.621(2)(b) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected;
- If you are the applicant, a protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **January 13, 2023**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;

- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and
- A standing fee of \$270. If a hearing is scheduled, an additional fee of \$680 must be submitted along with a petition for party status.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

- upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not timely file a protest or timely request a hearing, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail 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 you have submitted relating to this matter, as the record for purpose of proving a prima facie case upon default. OAR 137-003-0670.

You 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 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision 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 servicemembers 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.

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- If you have any questions about statements contained in this document, please contact Amanda Mather at Amanda.L.Mather@water.oregon.gov or 971-718-7937.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-979-9160.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to: Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
- Fax: 503-986-0901
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DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF MALHEUR

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

DALE BERRETT
TONY BERRETT
BERRETT RANCHES INC.
3540 HWY 95
JORDAN VALLEY OR 97910

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: G-18802

SOURCE OF WATER: WELL 1 (MALH 54279/ L114885) IN JORDAN CREEK BASIN

PURPOSE OR USE: SUPPLEMENTAL IRRIGATION OF 246.9 ACRES

MAXIMUM RATE: 4.0 CUBIC FEET PER SECOND

PERIOD OF USE: APRIL 1 THROUGH OCTOBER 15

DATE OF PRIORITY: MARCH 11, 2019

AUTHORIZED POINT OF APPROPRIATION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
30 S	44 E	WM	27	SE NW	2302 FEET SOUTH AND 2569 FEET EAST FROM NW CORNER, SECTION 27

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-SIXTIETH of one cubic foot per second and 2.0 acre-feet for each acre irrigated prior to June 1, thereafter, 0.5 acre-feet for each acre irrigated per month, with the total quantity not to exceed 4.0 acre-feet for each acre irrigated during the irrigation season of each year.

AUTHORIZED PLACE OF USE:

Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	44 E	WM	27	NE NE	20.0
30 S	44 E	WM	27	NW NE	39.5
30 S	44 E	WM	27	SW NE	36.9
30 S	44 E	WM	27	SE NE	35.1
30 S	44 E	WM	27	NE NW	38.8
30 S	44 E	WM	27	NW NW	33.5
30 S	44 E	WM	27	SW NW	21.3
30 S	44 E	WM	27	SE NW	21.8

PERMIT SPECIFIC CONDITIONS

1. Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.
2. **Water Use Measurement, Recording, and Reporting:**
 - A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation. The permittee shall maintain the device in good working order.
 - B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
 - C. The permittee shall keep a complete record of the volume of water used each month, and shall submit an annual report which includes the recorded water-use measurements to the Department annually, or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
 - D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

3. Groundwater Condition:

The permittee shall allow Department staff access to Well 1 (MALH 54279/ L114885) to conduct routine water level measurements to assess potential changes to groundwater elevation with increased use.

4. Well Identification Tag:

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

STANDARD CONDITIONS

1. If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.
2. If substantial interference with surface water or a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.
3. The well(s) shall be constructed and maintained in accordance with the General Standards for the Construction and Maintenance of Water Supply Wells in Oregon. The works shall be equipped with a usable access port adequate to determine water-level elevation in the well at all times.
4. Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.
5. This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.
6. By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

DEVELOPMENT AND COMPLETION TIMELINE REQUIREMENTS

1. Prior to receiving a certificate of water right, the permit holder shall submit to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data every ten years thereafter.
2. Construction of the well shall begin within five years of the date of permit issuance. The deadline to begin construction may not be extended. This permit is subject to cancellation proceedings if the construction deadline to begin is missed.
3. Complete application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

4. Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued _____

DRAFT - THIS IS NOT A PERMIT

Katherine Ratcliffe
Water Rights Section Manager, for
Douglas E. Woodcock, Acting Director
Oregon Water Resources Department