

**Oregon Water Resources Department  
Water Right Services Division**

Water Right Application S-88659 in the name of GARY WHEELER	) ) )	PROPOSED FINAL ORDER TO DENY
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**Summary:** The Department proposes to issue an order denying Application S-88659. The use does not comply with rules of the Commission, specifically Oregon Administrative Rule (OAR) Chapter 690, Division 33.

**Authority**

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 390.826, and OAR Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and the Willamette Basin Program (OAR 690-502). 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 use will not impair or be detrimental to the public interest 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
- d) The proposed use complies with the rules of the Commission.

ORS 537.153(2); OAR 690-310-0110(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are not met and the presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) and OAR 690-310-0120(2).

If the Department determines that the proposed use will impair or be detrimental to the public interest, the Department may issue a proposed final order recommending denial of the application.

## FINDINGS OF FACT

### Application History

1. On August 10, 2018, Gary Wheeler filed a complete application for the following water use:

**Source:** JACKSON CREEK, SANTOSH SLOUGH, AN UNNAMED DITCH, KESSI DITCH, SANTOSH DITCH AND JOHNSON DITCH, TRIBUTARIES TO MULTNOMAH CHANNEL

**Use:** IRRIGATION OF 69.19 ACRES

**Rate:** 0.86 CUBIC FOOT PER SECOND (CFS)

**Period of Use:** MARCH 1 THROUGH OCTOBER 31

**County:** COLUMBIA COUNTY

**Place of Use:** SECTIONS 7, 8, AND 18, TOWNSHIP 3 NORTH, RANGE 1 WEST, W.M.

2. On November 2, 2018, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 0.86 CFS of water from Jackson Creek, Santosh Slough, an unnamed ditch, Kessi Ditch, Santosh Ditch and Johnson Ditch, tributaries to Multnomah Channel for irrigation of 69.19 acres, March 1 through October 31 is allowable. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On November 6, 2018, the Department provided notice of 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 October 2, 2019, the Department sent the applicant correspondence outlining the requirements from the interagency review team to mitigate the impacts to water quality for the habitat of sensitive, threatened, or endangered fish species. The correspondence gave the applicant until December 2, 2019, to notify the Department if they plan on pursuing mitigation. As of the date of this order, the Department had not received indication that mitigation is being pursued.
5. The application was placed on administrative hold several times, the last of which expired on July 17, 2022.

### Presumption Criterion (a) Consistency with Basin Program

6. Irrigation is allowed under the Willamette Basin Program (OAR 690-502-0150(3)). ORS 537.153(2); OAR 690-310-0110(1)(a)

### Presumption Criterion (b) Water Availability

7. Based on a preliminary review, an analysis of water availability using the Department's Water Availability Reporting System is not possible for the proposed points of diversion. Therefore, a site-specific determination must be made by the Watermaster. An assessment of water availability has been completed by the local Watermaster and has determined that water is available for further appropriation March 1 through October 31 of each year. A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). ORS 537.153(2); OAR 690-310-0110(1)(b)

**Presumption Criterion (c) Injury Determination**

8. The proposed use, if authorized, will not injure other water rights. ORS 537.153(3)(d); OAR 690-310-0150(2)(e)

**Presumption Criterion (d) Whether the Use Complies with Rules of the Commission**

9. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.153(3)(b); OAR 690-310-0150(2)(b)
10. The proposed use is in an area of the state in which OAR 690-033-0210 thru -0230 and OAR 690-033-0310 thru -0340 apply. These rules establish definitions, additional procedures, and standards to 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.

**OAR 690-033-0210 Lower Columbia Rules (Below Bonneville Dam)**

- A. The proposed use of water is detrimental to the protection or recovery of a threatened or endangered species. OAR 690-033-0220(1)
- B. The proposed use can be conditioned or mitigated to avoid the detriment. OAR 690-033-0220(1)
- C. The applicant did not propose mitigation compatible with OAR 690-033-0220(2), (3) and (4). OAR 690-033-0220(5)
- D. The application is presumed to impair or be detrimental to the public interest under the OAR 690-033-0220 evaluation criteria.

**OAR 690-033-0310 Statewide Rules**

- A. The proposed use occurs in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0310(2)
  - B. The applicant has been notified that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied. OAR 690-033-0330(1)(a)
  - C. The interagency review team has been notified that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0330(1)(b)
  - D. The interagency review team was convened to review the application and recommend conditions and mitigation as necessary to achieve the standards listed in OAR 690-033-0330(2)(a) and (b).
11. The proposed use is not located within or above a Scenic Waterway, as designated under ORS 390.826.

**Determination of Presumption that a Proposed Surface Water Use will not Impair or be Detrimental to the Public Interest**

Because the criteria are not met (the use does not comply with rules of the Commission) the presumption is **not** established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)

**Further Evaluation of the Proposed Use**

12. No comments were received by the close of the comment period. OAR 690-310-0120(3)(a)
13. 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 impair or be detrimental to the public interest under ORS 537.153. OAR 690-310-0150(2)

**Other Criteria and Requirements**

14. The applicant proposed methods to measure the amount of water diverted, 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 included in Sections 6 and 7 of the application. OAR 690-310-0150(2)(j)
15. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

**CONCLUSIONS OF LAW**

1. The proposed use will impair or be detrimental to the public interest as described in ORS 537.153(2).

**PROPOSED ORDER**

The Department recommends issuing an order denying Application S-88659.

DATED April 4, 2023



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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 **May 19, 2023**.

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 effect the Department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest, ORS 537.153(6) 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 interest under ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified aspect of the public interest under ORS 537.170(8) would be impaired or be detrimentally affected;
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the 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 **May 19, 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 Lucinda Vranizan at 971-375-2256 or [Lucinda.R.Vranizan@water.oregon.gov](mailto:Lucinda.R.Vranizan@water.oregon.gov).
  - 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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