

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

Water Right Application R-88574 in the	)	
name of RICK HALE and JODY HALE	)	PROPOSED FINAL ORDER
	)	

Summary: The Department proposes to issue an order approving Application R-88574 and a permit consistent with the attached draft permit.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and the John Day Basin Program (OAR 690-506). 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 met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, the Department must further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. OAR 690-310-0120(3).

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 April 12, 2018, Rick Hale and Jody Hale filed a complete application for the following water use:

Source: RUNOFF, SPRINGS, AND BROWN CREEK, TRIBUTARIES TO LONE ROCK CREEK
Use: FIRE PROTECTION, LIVESTOCK, AND WILDLIFE
Rate/Volume: 35.21 ACRE-FEET (AF), BEING 19.48 AF IN RESERVOIR 1 AND 7.11 AF IN RESERVOIR 2, ENLARGEMENT OF RESERVOIRS CONSTRUCTED UNDER CERTIFICATE 70284; AND 7.35 AF IN RESERVOIR 4 AND 1.27 AF IN RESERVOIR 6, ENLARGEMENT OF RESERVOIRS CONSTRUCTED UNDER CERTIFICATE 70285
Period of Use: JANUARY 1 THROUGH DECEMBER 31
County: WHEELER COUNTY
Place of Use: SECTIONS 9 AND 16, TOWNSHIP 6 SOUTH, RANGE 24 EAST, W.M.

2. On May 18, 2018, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 35.2 AF of water for storage, being 19.48 AF in Reservoir 1, 7.11 AF in Reservoir 2, enlargement of reservoirs constructed under Certificate 70284, and 7.35 AF in Reservoir 4 and 1.26 AF in Reservoir 6, enlargement of reservoirs constructed under Certificate 70285, from runoff and Brown Creek, tributaries to Lone Rock Creek, for fire protection, livestock, and wildlife is allowable February 1 through March 31 of each year. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On May 22, 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. The Department's continuing evaluation revealed that the following correction to the Initial Review is necessary to accurately reflect the application for a Permit. A numerical error occurred on the Initial Review which showed 1.26 AF of storage in Reservoir 6, when it should be 1.27 AF. The total storage volume should be 35.21 AF and not the 35.2 AF described in the initial review.

Presumption Criterion (a) Consistency with Basin Program

5. Fire protection, livestock, and wildlife use is allowed under the John Day Basin Program (OAR 690-506-0040(8)(b)). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criterion (b) Water Availability

6. An assessment of water availability at 50% exceedance for the proposed use was completed using the Department's Water Availability Reporting System. A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(c). The assessment established that surface water is available during the period February 1 through March 31 of each year. ORS 537.153(3)(c); OAR 690-310-0150(2)(c)

Presumption Criterion (c) Injury Determination

7. The proposed use will not injure other water rights. ORS 537.153(2); OAR 690-310-0150(2)(e)

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

8. 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)
9. The proposed use is in an area of the state in which OAR 690-033-0115 through -0140 and OAR 690-033-0310 through -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 690-033-0115 Upper Columbia Rules (Above Bonneville Dam)

- A. The proposed use is consistent with the Fish and Wildlife Program (Program).
- B. The application is not presumed to impair or be detrimental to the public interest. OAR 690-033-0120(1)
- C. The application, as conditioned and modified, would comply with the following OAR 690-033-0120(2) standards:
 - a. The proposed use does not involve appropriation of direct streamflow during the time period of April 15 to September 30;
 - b. The proposed use is conditioned to comply with screen design, installation, operation specifications and passage requirements as listed in ORS 498.301 through 498.346 and 509.580 through 509.910;
 - c. The proposed use complies with existing state and federal water quality standards; and
 - d. The proposed use is conditioned to comply with water use measurement, recording and reporting required by the Director.

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 recommended conditions as necessary to achieve the standards listed in OAR 690-033-0330(2)(a) and (b). As a result of this review, Permit Specific Conditions #3 through #8 have been included in the draft permit.
10. The proposed use is located above the John Day 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

Based on the review of the presumption criteria (a)-(d) above, the presumption has been established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)

Further Evaluation of the Proposed Use

11. No comments were received by the close of the comment period. OAR 690-310-0120(3)
12. Information available in Department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the presumption is overcome. ORS 537.153(2); OAR 690-310-0120(3)(a); OAR 690-310-0150(2)(i)

Other Criteria and Requirements

13. The amount requested, 35.2 acre-feet AF, is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
14. The applicant proposed measures to prevent waste, 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 4 and 5 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.

CONCLUSION OF LAW

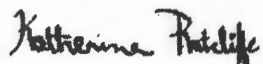
1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153(2).

NOTE: When issuing permits, ORS 537.170(6) authorizes the Department to include provisions or restrictions concerning the use, control and management of water to be appropriated for the project.

PROPOSED ORDER

The Department recommends approval of Application R-88574, and issuance of a permit consistent with the attached draft permit.

DATED May 16, 2023



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 **June 30, 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, 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 **June 30, 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 Adam Frederick at Adam.M.Frederick@water.oregon.gov or 971-707-8400.
 - 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 WHEELER

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

RICK HALE
JODY HALE
73426 HWY 207
ECHO OR 97826

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

APPLICATION FILE NUMBER: R-88574

SOURCE OF WATER: RUNOFF, SPRINGS, AND BROWN CREEK, TRIBUTARIES TO LONE ROCK CREEK

PURPOSE OR USE: FIRE PROTECTION, LIVESTOCK AND WILDLIFE

MAXIMUM VOLUME AND DAM HEIGHT:

Storage Facility	Volume	Maximum Dam Height	Enlargement of Certificate
RESERVOIR 1	19.48 AF	13.0 FEET	70284
RESERVOIR 2	7.11 AF	10.2 FEET	70284
RESERVOIR 4	7.35 AF	9.0 FEET	70285
RESERVOIR 6	1.27 AF	10.0 FEET	70285
Total Maximum Volume	35.21 AF		

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: FEBRUARY 1 THROUGH MARCH 31

DATE OF PRIORITY: APRIL 12, 2018

AUTHORIZED POINTS OF DIVERSION:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
SEEPAGE AREA FROM RES 1 TO RES 2	6 S	24 E	WM	9	NW SE	1710 FEET NORTH AND 1860 FEET WEST FROM SE CORNER, SECTION 9
BROWN CREEK POD	6 S	24 E	WM	15	NW NW	1000 FEET SOUTH AND 460 FEET EAST FROM NW CORNER, SECTION 15

RESERVOIR LOCATIONS:

Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
RES 1	6 S	24 E	WM	9	SW SE	1190 FEET NORTH AND 1700 FEET WEST FROM SE CORNER, SECTION 9
RES 2	6 S	24 E	WM	9	NW SE	2170 FEET NORTH AND 2000 FEET WEST FROM SE CORNER, SECTION 9
RES 4	6 S	24 E	WM	16	NE NW	950 FEET SOUTH AND 1750 FEET EAST FROM NW CORNER, SECTION 16
RES 6	6 S	24 E	WM	16	NE NE	320 FEET SOUTH AND 470 FEET WEST FROM SW CORNER, SECTION 16

THE AREA TO BE SUBMERGED BY THE RESERVOIRS:

Twp	Rng	Mer	Sec	Q-Q
6 S	24 E	WM	9	NW SE
6 S	24 E	WM	9	SW SE
6 S	24 E	WM	16	NE NE
6 S	24 E	WM	16	NE NW

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.
1. This permit does not authorize expanding the capacity of the impoundment structures.
2. **Water Use Measurement, Recording, and Reporting:**
 - A. Before water use may begin under this permit, the permittee shall install a lockable headgate at the Brown Creek point of diversion. The permittee shall maintain the device in good working order.
 - B. Before water use may begin under this permit, a staff gage that measures the entire range and stage between full reservoir level and dead-pool storage shall be installed in Reservoir 1. If no dead-pool, the gage must measure the full depth of the reservoir. The permittee shall maintain the device in good working order.
 - C. Before water use may begin under this permit, the permittee shall install lower conduits with bank access valve controls or other means, as approved by the watermaster, on Reservoirs 1, 2, and 4, to pass inflow. The permittee shall maintain the devices in good working order.
 - D. The permittee shall allow the watermaster access to these devices; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
 - E. water diverted, and may require the permittee to report water-use on a periodic schedule

as established by the Director. In addition, the Director may require the permittee to report general water-use information, the periods of water use and the place and nature of use of water under the permit.

- F. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

3. Fish Screen:

The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards or submit documentation that ODFW has determined fish screening is not necessary or is exempted. Fish screening is to prevent fish from entering the proposed diversion. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW **prior to diversion of any water**. The permittee shall operate and maintain the fish screen consistent with ODFW's operation and maintenance standards. The permittee is hereby directed to schedule a consultation with an ODFW Fish Screen Coordinator.

4. Fish Passage:

The permittee shall not construct, operate, or maintain any dam or artificial obstruction to fish passage across any waters of the state that are inhabited, or were historically inhabited, by native migratory fish (ORS 509.585) without obtaining approval for the artificial obstruction from the Oregon Department of Fish and Wildlife (ODFW).

The permittee shall submit a proposal for fish passage to ODFW or apply for a fish passage waiver or exemption. Approval of the proposed fish passage facility, waiver, or exemption shall be obtained **prior to construction** of any in-channel obstruction or **prior to diversion of water** that may create an artificial obstruction due to low flow. The permittee shall submit proof to ODFW that fish passage has been implemented per the plan, waiver, or exemption **prior to diversion of water**.

The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) as per the approved plan, waiver, or exemption. The permittee is hereby directed to schedule a consultation with an ODFW Fish Passage Coordinator.

5. Riparian Area Restoration:

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

6. Off-Channel Stored Water Releases:

The permittee shall not release polluted water from the off-channel reservoirs (Reservoirs 1, 2, and 6) into waters of the state except when the release is directed by the State Engineer to prevent dam failure.

7. Scenic Waterway Flows:

Diversion of water under this permit is contingent on designated scenic waterway flows being met downstream. The user is required to monitor streamflow at John Day River at McDonald Ferry, Oregon, gage 14048000, and discontinue diversion when the flows specified below are unmet at the gage. At the discretion of the Director, the location and nature of streamflow monitoring required to protect scenic waterway flows are subject to change. In addition, the watermaster may regulate diversion under this right if it is determined by the Department that the flows listed below are unmet at the gage.

John Day Scenic Waterway	
Month	Minimum Flow (CFS)
February	1000
March	2000

RESERVOIR CONDITIONS

1. The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe (with a minimum diameter of 8" for any in-channel reservoir). This requirement may be waived if the Department determines other means have been provided to evacuate water when necessary.
1. The permittee shall pass all live flow outside the storage season described above.
2. The Director may require the user to measure inflow and outflow from Reservoir 4, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.
3. The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.
4. This permit allows an annual appropriation (not to exceed the specified volume). This permit does not provide for the appropriation of water for out-of-reservoir uses, the maintenance of the water level or maintaining a suitable freshwater condition. If any water is to be used for out-of-reservoir purposes, a secondary water right is required. If any additional live flow is to be appropriated to maintain either the water level or a suitable freshwater condition, an additional water right is required.

DAM SAFETY CONDITIONS

The following conditions apply to Reservoir 1:

1. No water shall be stored until the Department receives documentation of the dam in the as-built condition.
2. Routine maintenance or repair of the dam, its spillway, and all appurtenant structures shall be performed to include, but not be limited to, removal of woody or high vegetation from the embankment, abutments and spillway; removal of debris from the reservoir, and annual or more frequent cycling of the valve or gate for the low level conduit.
3. Repair or replacement of defective or worn out equipment (including but not limited to gates, valves, and conduits) shall be completed as needed to keep the dam safe. If the dam is enlarged, modified, or otherwise altered, this work must be based on design plans and specifications prepared by a Registered Professional Engineer licensed in Oregon. These plans must be submitted to and approved by the State Engineer prior to such alterations of the dam, its spillway, or any appurtenant structure(s). No water shall be stored until the Department receives written certification from the engineer of record that construction has been completed in accordance with the approved plans and specifications.
4. No valve shall be installed at the downstream end of the low level conduit, and the low level conduit shall not be operated in a pressurized condition unless the dam has been designed for pressurized operation by the design engineer. There must be an operations manual for the dam that describes pressurized operation, and necessary inspections of pressurized conduits for the dam.
5. If used, flashboards shall be maintained in good condition, replaced as needed, and removed as necessary prior to potential winter storms, or unusual rainfall or snowmelt events at any time of the year.
6. Failure to comply with any portion of Oregon Revised Statute 540.443 through 540.491 and Oregon Administrative Rules Chapter 690 Division 20 may result in action including, but not limited to, restrictions on use, civil penalties, or cancellation of the permit.

STANDARD CONDITIONS

1. 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.
2. 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.
3. The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

DEVELOPMENT AND COMPLETION TIMELINE REQUIREMENTS

1. Construction of the water system 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 begin construction deadline is missed.
1. The permitted volume of water shall be stored within five years of the date of permit issuance. If additional time is needed, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.
2. Within one year after storage of water, 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