

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

Water Right Application S-88915 in the)
name of CITY OF BANKS)
)

SUPERSEDING
PROPOSED FINAL ORDER

This Proposed Final Order supersedes the Proposed Final Order issued March 21, 2023

Summary: The Department proposes to issue an order approving Application S-88915 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 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 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 January 22, 2021, the City of Banks filed a complete application for the following water use:

Source: WEST FORK DAIRY CREEK, TRIBUTARY TO DAIRY CREEK

Use: MUNICIPAL USE

Rate/Volume: 2.0 CUBIC FEET PER SECOND (CFS)

Period of Use: DECEMBER 1 THROUGH APRIL 30

County: WASHINGTON COUNTY

Places of Use: SECTION 30 & 31 TOWNSHIP 2 NORTH, RANGE 3 WEST, W.M.
SECTION 25 & 36 TOWNSHIP 2 NORTH, RANGE 4 WEST, W.M.

2. On March 26, 2021, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 2.0 CFS of water from West Fork Dairy Creek, tributary to Dairy Creek, for municipal use is allowable December 1 through April 30 of each year, contingent upon the submission and approval of an updated "*Form M for Municipal and Quasi-Municipal Water Uses*". The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On March 30, 2021, 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 April 22, 2021, the Department received an updated "*Form M for Municipal and Quasi-Municipal Water Uses*".
5. On March 21, 2023, the Department issued a Proposed Final Order proposing to approve the application.
6. On April 24, 2023, the applicant contacted the Department requesting corrections to the place of use description, water system construction timeline requirements and a typographical error under Permit Specific Condition #3. The Department reviewed the request and determined the corrections were appropriate.

Presumption Criterion (a) Consistency with Basin Program

7. Municipal use is allowed under the Willamette Basin Program (OAR 690-502-0130(1)(b)). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criterion (b) Water Availability

8. An assessment of water availability at 80% 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)(a). During the period of use requested, the assessment established that surface water is available December 1 through April 30 of each year. ORS 537.153(2); OAR 690-310-0150(2)(c)

Presumption Criterion (c) Injury Determination

9. 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

10. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is not regulated. ORS 537.153(3)(b); OAR 690-310-0150(2)(b)
11. The proposed use is in an area of the state in which OAR 690-033-0210 through -0230 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 690-033-0210 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 to avoid the detriment. OAR 690-033-0220(1)
- C. The application is not 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 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 #2 through #7 have been included in the draft permit.
12. The proposed use is not located within or above a state 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

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

Other Criteria and Requirements

15. The amount requested, 2.0 CFS, has been determined to be necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
16. 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 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)
17. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSION OF LAW

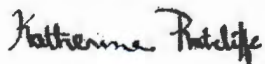
1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153(2).

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 S-88915 and issuance of a permit consistent with the attached draft permit.

DATED August 1, 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 **September 15, 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 **September 15, 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 service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 971-355-4127, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

-
- If you have any questions about statements contained in this document, please contact Lucinda Vranizan at Lucinda.R.Vranizan@water.oregon.gov or 971-375-2256.
 - 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 Will Davidson at Will.D.Davidson@water.oregon.gov or 503-507-2749.
 - 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
-

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF WASHINGTON

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

CITY OF BANKS

POC: JOLYNN BECKER

13680 NW MAIN ST

BANKS OR 97106

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

APPLICATION FILE NUMBER: S-88915

SOURCE OF WATER: WEST FORK DAIRY CREEK, TRIBUTARY TO DAIRY CREEK

PURPOSE OR USE: MUNICIPAL USE

MAXIMUM RATE: 2.0 CUBIC FEET PER SECOND

PERIOD OF USE: DECEMBER 1 THROUGH APRIL 30

DATE OF PRIORITY: JANUARY 22, 2021

AUTHORIZED POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	4 W	WM	36	NE NE	60 FEET SOUTH AND 820 FEET WEST FROM NE CORNER, SECTION 36

AUTHORIZED PLACE OF USE: CITY SERVICE AREA

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 diversion. 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 diverted each month, and shall submit a report which includes 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. **Maintain Passage:**

The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) and 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).

4. **In-Water Work:**

Any in-water work related to construction, development, or maintenance of the proposed use shall be conducted during the preferred work period of July 15 through September 30, unless an alternate time period is approved by Oregon Department of Fish and Wildlife.

5. **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 is 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.

6. 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.

7. Water Quality:

All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.

STANDARD CONDITIONS

1. 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.
2. 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.
3. 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.
4. 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 twenty 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.
2. Complete application of the water shall be made within twenty 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.

3. 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