



## **Water Right Application Initial Review**

November 15, 2024

BERNERT LAND HOLDINGS, LLC  
DAVID BERNERT  
4131 IMPERIAL DR  
WEST LINN OR 97068

Reference: Application R-89847

This document is to inform you of the preliminary analysis of the water-use permit application and to describe your options. In determining whether an application may be approved, the Water Resources Department (Department) must consider the factors listed below, all of which must be favorable to the proposed use if it is to be allowed. Based on the information supplied, the Department has made the following preliminary determinations:

### **Preliminary Determinations under Oregon Administrative Rule (OAR) 690-310-0080:**

1. The application proposes the diversion of 160.0 acre-feet (AF) of water from runoff, tributary to the Molalla River, and groundwater, for storage in 1660 S Elm Reservoir for nursery use from January 1 through December 31 of each year.
2. The proposed use is not prohibited by law or rule except where otherwise noted below.
3. The application proposes to appropriate both surface water and groundwater; however, the amount of water to be appropriated from each source has not been provided. See **Additional Information Required #1** section below for more details related to this application deficiency.
4. The application proposes to appropriate groundwater; however, information necessary to perform a technical review to assess groundwater availability, such as a groundwater appropriation application, has not been provided. See **Additional Information Required #1** section below for more details related to this application deficiency.
5. Storage of surface water for nursery use is allowable under the Willamette Basin Program (OAR 690-502-0040(4)(a)) from November 1 through June 30 of each year.

6. An assessment of surface 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 surface water is available during the period of November 1 through June 30 of each year.
7. The proposed use is not located within or above any state scenic waterway.
8. Documentation has been submitted from the relevant land-use planning jurisdiction; however, the information submitted is incomplete and does not contain required information regarding the allowability of the proposed use. The submitted form identifies “Multiple” as the intended use of water while the application is for storage for nursery use. Please see the **Additional Information Required #2** section below for additional information.

**Summary of Preliminary Determinations**

**The diversion of 160.0 AF of water from runoff, tributary to the Molalla River, and groundwater, for storage in 1660 S Elm Reservoir for nursery use from January 1 through December 31 of each year is not allowable.**

**Additional Information Required #1:**

Additional information is required to process your application prior to issuance of any Proposed Final Order. Please provide the following:

- A. Information to enable the Department to perform a technical review to assess groundwater availability, such as a groundwater appropriation application, **and**
- B. Information describing the portion (in acre-feet) of the stored volume that will be from the groundwater source and the portion that will be from the surface water source.

Alternatively, you may provide the following information:

- C. Evidence that the reservoir will be filled in such that the bottom is above the seasonal water table high, avoiding storage and appropriation of groundwater, and will only store surface water from runoff, **and**
- D. Amended application pages that describe the volume of surface water that will be stored after reservoir modifications have been completed.

**Please submit this information no later than December 19, 2024.** If you are unable to submit the information listed above by this date, you may request an administrative hold for up to an additional 180 days. You must submit the request in writing, stating how much more time is needed and why you need additional time. If an administrative hold is granted, your application will not be processed further until the requested information is received or the extended deadline has passed.

If we do not receive the information requested above or a request for an administrative hold by the above date, the Department may reject the application.

## **Additional Information Required #2:**

**Although it is unlikely that a permit will be issued**, if the Department's finding change, additional information will be required prior to issuance of any Proposed Final Order that may recommend permit approval. Please provide the following item(s):

- A. The Department must receive documentation that the proposed use, storage for nursery use, complies with the local acknowledged comprehensive land-use plan. Please submit documentation from the relevant planning jurisdiction that either a) the proposed use is allowed outright or b) that an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded. If this application proceeds with groundwater as a source, that must also be identified on the Land Use Information Form.

**Please submit this information no later than December 19, 2024.** If you are unable to submit the information listed above by this date, you may request an administrative hold for up to an additional 180 days. You must submit the request in writing, stating how much more time is needed and why you need additional time. If an administrative hold is granted, your application will not be processed further until the requested information is received or the extended deadline has passed.

If we do not receive the information requested above or a request for an administrative hold by the above date, the Department may reject the application.

## **Public Comment & Further Review:**

Public interest issues and/or public comments will be addressed as the Department prepares a Proposed Final Order. If significant public interest issues are identified, they could have an impact on the eventual outcome of the application.

Division 33 Review – The Department's Division 33 administrative rules (OAR 690-033) establish 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 (STE) fish species. This Initial Review does not address the potential impact that your proposed use may have on these species.

Your application will now undergo an additional review from numerous federal, state, local, and tribal governmental entities. This review may cause your application to be limited, conditioned, or denied. Depending on the proposed use, you may be required to mitigate for potential impacts identified in the review.

Mitigation for impacts to STE Species – Mitigation is often complicated, time consuming, and expensive, and may include, but is not limited to, actions such as replacing the proposed amount of water within the impacted reach through purchasing or transferring an existing water right. Following the Initial Review, you will be notified if mitigation is required, due to impacts to STE fish species.

If you choose to pursue mitigation, you will likely need to place your application on administrative hold in order to explore options. There will be an additional fee of \$790 required with any mitigation proposal submitted.

**At this time, you must decide whether to proceed or to withdraw the application.**

- **To Proceed** - If you choose to proceed with the application, you do not have to notify the Department. The application will be placed on the Department's Public Notice to allow others the opportunity to comment. After the comment period the Department will complete a public interest review and issue a Proposed Final Order.
- **To Withdraw** - You may withdraw the application and receive a refund (minus a \$310 processing fee). You must notify the Department **in writing by November 29, 2024**. For your convenience you may use the enclosed "STOP PROCESSING" form.

**Although it is unlikely that a permit will be issued, if the Department's findings change and a permit is issued, it will likely include the following conditions:**

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. A permit is subject to cancellation proceedings if the begin construction deadline is missed.
2. **Water Use Measurement, Recording, and Reporting:**
  - A. 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 the reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. The watermaster may determine an alternate measuring device is suitable. 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 stored each month, and shall submit a report which includes water-storage 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. 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.
4. The permittee shall pass all live flow outside the storage season described above.
5. 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.
6. The permittee may be required in the future to install, maintain, and operate fish screening and bypass devices to prevent fish from entering the proposed diversion and to provide adequate upstream and downstream passage for fish.
7. 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.

The water source identified in the application may be affected by an Agricultural Water Quality Management Area Plan. These plans are developed by the Oregon Department of Agriculture (ODA) with the cooperation of local landowners and other interested stakeholders, and help to ensure that current and new appropriations of water are done in a way that does not adversely harm the environment. You are encouraged to explore ODA's Water Quality Program website at [www.oregon.gov/ODA](http://www.oregon.gov/ODA) to learn more about the plans and how they may affect the proposed water use.

**For Further Information:**

Feel free to contact me at Adam.M.Frederick@water.oregon.gov or 971-707-8400 if you have any questions regarding the contents of this letter or the application. Please include the application number in all correspondence. General questions about water rights and water use permits should be directed to our customer service staff at 503-986-0900. When corresponding by mail, please use this address: Adam Frederick, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266. Our fax number is 503-986-0901.

Sincerely,

*Adam Frederick*

Adam Frederick  
Water Right Application Specialist  
Oregon Water Resources Department

Enclosures:   Application Process Description  
                  Stop Processing Request Form  
                  R-89847  
                  WAB: 69796  
                  Proposed to Deny

# APPLICATION FACT SHEET

Application File Number: R-89847

Applicant: BERNERT LAND HOLDINGS, LLC AND DAVID BERNERT

County: CLACKAMAS

Watermaster: AMY LANDVOIGT, #20, NWR

Priority Date: OCTOBER 7, 2024

Source: RUNOFF, TRIBUTARY TO MOLALLA RIVER, AND GROUNDWATER

Purpose or Use of the stored water: STORAGE FOR NURSERY USE

Storage Facility Name: 1660 S ELM RESERVOIR

Maximum Dam Height: THE RESERVOIR IS ENTIRELY BELOW GROUND SURFACE; THERE IS NO DAM

Volume: 160.0 ACRE-FEET

Period of Use: JANUARY 1 THROUGH DECEMBER 31

Basin Name & Number: WILLAMETTE, #2

WAB: MOLALLA R > WILLAMETTE R - AT MOUTH

Reservoir Location:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances	Area (Acres)
4 S	1 E	WM	4	SW SW	1082 FEET NORTH AND 742 FEET EAST FROM SW CORNER, SECTION 4	4.25

The Area to be submerged by the Reservoir:

Twp	Rng	Mer	Sec	Q-Q
4 S	1 E	WM	4	SW SW

**PUBLIC NOTICE DATE: November 19, 2024**

**14 DAY STOP PROCESSING DEADLINE DATE: November 29, 2024**

**30 DAY COMMENT DEADLINE DATE: December 19, 2024**

## **APPLICATION PROCESS DESCRIPTION FOR GROUNDWATER, SURFACE WATER AND REGULAR RESERVOIR APPLICATIONS**

In order to use the waters of Oregon, an application must be submitted and a permit obtained from the Water Resources Department. The water must be used for beneficial purpose without waste. For more information about water right topics, weekly public notice, forms and fees please visit our website at: [www.oregon.gov/owrd](http://www.oregon.gov/owrd)

### **1. Pre-application considerations**

- Follow instructions in the application packet.
- If you have questions about completing an application or would like to arrange a pre-application conference, contact the Department's Water Rights Customer Service Group at (503) 986-0900.

### **2. Application filing**

- Application with fee is received by the Department.
- Department determines completeness of application.
- If use is not allowed by statute (ORS 538), the application and fees are returned to the applicant.
- An incomplete application and fees are returned to the applicant.
- Only a complete application receives a tentative priority date, is assigned a caseworker, and moves forward for processing.

### **3. Initial Review (IR)**

- Caseworker reviews application by considering basin plans, water availability, statutory restrictions, and all other appropriate factors.
- Caseworker sends IR report to Applicant.
- Four days after date of the IR, it is included in Department's weekly Public Notice.
- Public comments must be submitted within 30 days after the Public Notice.

### **4. Proposed Final Order (PFO)**

- Caseworker evaluates application against required criteria and develops draft permit, if appropriate.
- PFO includes instructions for filing of protests.
- Caseworker considers public comments and mails PFO to Applicant.
- The PFO is included in Department's weekly Public Notice.
- Public protests to the PFO must be submitted within 45 days after the Public Notice.

### **5. Final Order (FO)**

- If no protest is filed, Final Order is issued.

#### ***The protest process***

If one or more protests are filed, the process consists of:

- settlement discussion;
- contested case hearing;
- Proposed Order;
- period of time to file exceptions; or
- possible hearing by Water Resources Commission.
- Final Order is issued.

#### ***Permit holder responsibilities***

- Comply with all water use conditions of the permit.
- Advise Department of address change or assignment to new permit holder.
- If need arises, request extension of time or authorize cancellation of permit.
- Submit timely claim of beneficial use (COBU) to the Department.
- Most permits require COBU to be prepared by a Certified Water Right Examiner.
- Permits may be canceled by the permit holder or by the Department for failure to comply with or one or more permit conditions.



**STOP PROCESSING REQUEST FORM**

**FOR GROUNDWATER, SURFACE WATER AND REGULAR RESERVOIR APPLICATIONS**

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- Stop processing deadline is within 14 days of Initial Review.

Applicant notification to withdraw Water Right Application **R-89847**.

After reviewing the Initial Review for my application, I request that processing be stopped, and the fees be refunded (minus a \$310 processing fee.) I understand that without a valid permit, I may not legally use the water as requested in my application.

Signature \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

Under ORS 537.150 (5) and 537.620 (5) timely submission of this request authorizes that the water right application process be stopped, and all filing fees (except \$310 processing fee) be returned.

- This notice must be received at Water Resources Department by:

**November 29, 2024**

- Return the notice to:

OWRD, Water Right Services Division  
STOP PROCESSING  
725 Summer Street, NE - Suite A  
Salem OR, 97301-1266

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