

**Oregon Water Resources Department  
Water Rights Division**

Water Rights Application  
Number R-87015

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$300.00. Please include your application number on your check made out to the Oregon Water Resources Department.

**Proposed Final Order**

*Summary of Recommendation:* The Department recommends that the attached draft permit be issued with conditions.

*Application History*

On October 19, 2007, J R Simplot Co. submitted an application to the Department for the following water use permit:

- Amount of Water: 888.0 ACRE FEET (AF), BEING 535.0 AF IN BUTTER CREEK RESERVOIR (CONSTRUCTED UNDER PERMIT R-12130) AND 353.0 AF IN SPARKS RESERVOIR (CONSTRUCTED UNDER PERMIT R-13872)
- Use of Water: TO BE APPROPRIATED FOR STORAGE FOR IRRIGATION
- Source of Water: UMATILLA RIVER, A TRIBUTARY OF COLUMBIA RIVER
- Area of Proposed Use: UMATILLA COUNTY WITHIN SECTIONS 5 AND 34, TOWNSHIP 3 NORTH, RANGE 28 EAST, W.M.

On February 29, 2008, the Department mailed the applicant notice of its Initial Review, determining that "*The storage of 888.0 AF of water from the Umatilla River, being 535.0 AF in Butter Creek Reservoir and 353.0 AF in Sparks Reservoir is allowable January 1 through April 14 of each year.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On March 4, 2008, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

On December 5, 12, and 19, 2008, a Notice of Water Use Request was published in the East Oregonian. A copy of the notice is in the file.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

*Findings of Fact*

The Umatilla Basin Program allows water to be appropriated for STORAGE for irrigation use.

Senior water rights exist on UMATILLA RIVER, A TRIBUTARY OF COLUMBIA RIVER or on downstream waters.

UMATILLA RIVER, A TRIBUTARY OF COLUMBIA RIVER is not within or above a State Scenic Waterway.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this assessment is in the file. This assessment determined that water is available for further appropriation (at a 50 percent exceedance probability) January 1 through April 30.

The use of water as proposed in this application is not allowed April 15 through September 30 per OAR 690-033, which sets public interest standards for threatened, endangered or sensitive fish species. Therefore, water may be diverted for storage under this application January 1 through April 14.

The Department finds that the amount of water requested, 888.0 AF, is an acceptable amount.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices

provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional prior to diversion of any water. Permittee shall obtain written approval from ODFW that the installation of the required screen and by-pass devices meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens and/or by-pass devices are not necessary.

*Conclusions of Law*

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if 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), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Umatilla Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use will not injure other water rights.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

The proposed use complies with the State Agency Agreement for land use.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
  - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
  - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that water is available in the amount necessary for the proposed use; the proposed use will not result in injury to existing water rights; and the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

#### Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED April 21, 2009



for Phillip C. Ward, Director  
Water Resources Department

*If you have any questions,  
please check the information  
box on the last page for the  
appropriate names and  
phone numbers.*

#### Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **June 5, 2009**. Protests must be in writing, and must 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 this 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; and
- If you are not the applicant, the protest fee of \$350 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. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
- *If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.*

#### Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), 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 5, 2009**. 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 \$100.00. If a hearing is scheduled, an additional fee of \$250.00 must be submitted along with a request for intervention.

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 request a hearing within 30 days after the close of the protest period, 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.

*This document was prepared by Brook Geffen. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0808.*

*If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.*

*If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:*

*Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.*

DRAFT

This is not a permit.  
STATE OF OREGON

DRAFT

COUNTY OF UMATILLA

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

J R SIMPLOT CO  
PO BOX 27  
BOISE, ID 83707

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

APPLICATION FILE NUMBER: R-87015

SOURCE OF WATER: UMATILLA RIVER, A TRIBUTARY OF COLUMBIA RIVER

STORAGE FACILITIES: BUTTER CREEK RESERVOIR (CONSTRUCTED UNDER PERMIT R-12130) AND SPARKS RESERVOIR (CONSTRUCTED UNDER PERMIT R-13172)

PURPOSE OR USE OF THE STORED WATER: TO BE APPROPRIATED FOR STORAGE FOR IRRIGATION USE

MAXIMUM VOLUME: 888.0 ACRE FEET (AF), BEING 535.0 AF IN BUTTER CREEK RESERVOIR AND 353.0 AF IN SPARKS RESERVOIR

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: JANUARY 1 THROUGH APRIL 14

DATE OF PRIORITY: OCTOBER 19, 2007

The area submerged by Butter Creek Reservoir, when full, will be 19.8 acres and the maximum height of the dam shall not exceed 46.5 feet.

The area submerged by Sparks Reservoir, when full, will be 17.0 acres and the maximum height of the dam shall not exceed 20.0 feet.

POINTS OF DIVERSION:

EAST RIVER PUMPING STATION: SESE, SECTION 27, T4N, R28E, W.M.; 150 FEET NORTH AND 4400 FEET EAST FROM SW CORNER, SECTION 27

WEST RIVER PUMPING STATION: NENW, SECTION 34, T4N, R28E, W.M.; 580 FEET SOUTH AND 1710 FEET EAST FROM NW CORNER, SECTION 34

DAM LOCATIONS:

BUTTER CREEK RESERVOIR: SESE, SECTION 5, T4N, R28E, W.M.; 600 FEET NORTH AND 600 FEET WEST FROM SE CORNER, SECTION 5

SPARKS RESERVOIR: NENW, SECTION 34, T3N, R28E, W.M.; 740 FEET SOUTH AND 1600 FEET EAST FROM NW CORNER, SECTION 34

THE AREA TO BE SUBMERGED BY THE RESERVOIRS IS LOCATED AS FOLLOWS:

SE  $\frac{1}{4}$  SE  $\frac{1}{4}$   
SECTION 5

NE  $\frac{1}{4}$  NW  $\frac{1}{4}$   
SE  $\frac{1}{4}$  NW  $\frac{1}{4}$   
SECTION 34

TOWNSHIP 3 NORTH, RANGE 28 EAST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of diversion. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month, and shall submit a 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.
- B. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.

The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe, or the provision of other means to evacuate water when determined necessary by the Water Resources Director to satisfy prior downstream rights.

The permittee shall pass all live flow outside the storage season described above.

The Director may require the user to measure inflow and outflow, 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.

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 used for out-of-reservoir purposes, or any live flow is appropriated to maintain either the water level or a suitable freshwater condition, a secondary water right is required.

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.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional prior to diversion of any water. Permittee shall obtain written approval from ODFW that the installation of the required screen and by-pass devices meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens and/or by-pass devices are not necessary.

#### **DAM CONDITIONS**

All construction shall be performed under the supervision of a registered professional engineer licensed in Oregon.

The constructed works shall conform to the approved plans and specifications on file with the Water Resources Dam Safety program. The engineer of record shall notify the Water Resources Dam Safety program before making any significant change to the approved design prior to or during construction.

No water shall be stored until the Water Resources Department receives written certification from the engineer of record that construction has been completed in accordance with the approved plans and specifications.

If final construction deviates from the approved design a set reproducible as-constructed drawings, including a revised reservoir capacity graph or table, must accompany the engineer's written certification of completion.

Routine maintenance or repair of the dam, its spillway and all appurtenant structures shall be performed to include, but not limited to, the removal of woody vegetation or debris, prompt restoration of areas of erosion or to repair defective equipment determined necessary for its safe operation.

Except for routine repair and maintenance, design plans and specifications must be prepared by an Oregon licensed professional engineer and approved by the Water Resources Dam Safety program prior to any enlargement, modification, or alteration of the dam or any appurtenant structures.

#### **STANDARD CONDITIONS**

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.

Use under this permit is limited to the reservoir area. This permit does not provide for the appropriation of water for maintaining the water level or maintaining a suitable fresh water condition.

The storage of water allowed herein is subject to the installation and maintenance of a fully functional conduit/gate assembly having a minimum diameter of 8 inches.

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 Chapter 635, Division 415, shall be followed.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

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.

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.

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.

Construction shall be completed and 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.

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 \_\_\_\_\_, 2009

DRAFT - THIS IS **NOT** A PERMIT

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for Phillip C. Ward, Director  
Water Resources Department

# Mailing List for PFO Copies

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Application #R-87015

PFO Date: April 21, 2009

## Original mailed to applicant:

J R SIMPLOT CO, ATTN: TERRY T. UHLING, PO BOX 27, BOISE, ID 83707

## Copies sent to:

1. WRD - File # R-87015
2. Water Availability: Ken Stahr

## PFO and Map Copies sent to:

3. WRD - Watermaster # 5
4. Regional Manager: NC
5. WRD - George Robison

<p>Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)</p>
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## Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

1. Dale G. VanSchoiack, 7601 W Clearwater Ave, WA 99336
2. Bill Porfily, PO Box 643, Stanfield, OR 97875
3. Julie F. Eubanks, Deborah J. Buhler, Irvin L. Mann III, Lee A Eggleston, David R. Mann, Patricia A. Hopper, Sally A. Hopper, Patricia S. Taylor, Susan K. Lyon, all c/o Double M Ranch Inc, 31466 Andrews Rd, Echo, OR 97826
4. Scott Madison, 75512 Hwy 207, Echo, OR 97826
5. John Madison, 28647 Madison Rd, Echo, OR 97826
6. Kent Madison, 29299 Madison Rd, Echo, OR 97826
7. L & L Farms, 822 Hwy 395 South, #423, Hermiston OR 97838

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : Geffenba