

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number S-85630

Prior to issuance of a permit, recording fees in the amount of \$150.00 must be submitted to the Department. Also, you must submit the name and mailing address for the entity governing State Highway 19; as well as documentation that you have obtained easement or written authorization permitting access to lands not owned by you. In order to increase Department efficiency and expedite the processing of your application, please submit the necessary information prior to the protest deadline of May 7, 2004. Please include your application number on all materials submitted, including your check made out to the Oregon Water Resources Department. If this fee is not paid prior to May 7, 2004, issuance of a permit may be delayed.

Proposed Final Order

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

Application History

On June 2, 2003, MEHRTEN HOMER submitted an application to the Department for the following water use permit:

- Amount of Water: 5.0 CUBIC FEET PER SECOND (CFS)
- Use of Water: DOMESTIC AND OUT OF SEASON IRRIGATION USE ON 230.0 ACRES
- Source of Water: AN UNNAMED SPRING, A TRIBUTARY OF HOOVER CREEK, AND HOOVER CREEK, A TRIBUTARY OF BUTTE CREEK
- Area of Proposed Use: Wheeler County within SECTIONS 20, 21, 22, 23, 29 AND 30, TOWNSHIP 6 SOUTH, RANGE 21 EAST, W.M.

On October 17, 2003, the Department mailed the applicant notice of its Initial Review, determining that "The use of 4.75 cfs of water from Hoover Creek, a tributary of Butte Creek, for irrigation of 230.0 aces is allowable from January 1 through February 28 of each year." The applicant

did not notify the Department to stop processing the application within 14 days of that date.

On October 21, 2003, 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.

Within 30 days of the Department's public notice, written comments were received from the applicant addressing the information requested in the Initial Review. However, the information received was not complete and therefore does not support the use of human consumption.

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

- comments by or consultation with another state agency
- 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 John Day Basin Program allows the use of water for IRRIGATION.

Senior water rights exist on AN UNNAMED SPRING, A TRIBUTARY OF HOOVER CREEK, AND HOOVER CREEK, A TRIBUTARY OF BUTTE CREEK, or on downstream waters.

AN UNNAMED SPRING, A TRIBUTARY OF HOOVER CREEK, AND HOOVER CREEK, A TRIBUTARY OF BUTTE CREEK is within the John Day River State Scenic Waterway.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumption 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 an 80 percent exceedance probability) January through February, and the month of April.

The Department finds that the amount of water requested, 4.75 CFS, is an acceptable amount.

In accordance with OAR 690-33-330, 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, Fish and Wildlife (DFW), and Agriculture. WRD and DFW representatives included both technical and field staff. The interagency team did not recommend that any additional conditions of use be imposed on this application.

The use of water as proposed in this application is not allowed April 15 through September 30 per OAR 690-33, which sets additional public interest standards for threatened, endangered or sensitive fish species.

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 John Day Basin Plan, 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 March 23, 2004


Dwight French
Water Rights Section Manager

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

Protest Rights and Standing

Under the provisions of 537.621(7), you have the right to protest this proposed final order. Your protest 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 \$250 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 537.153(5), persons other than the applicant who support a proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. A request for standing shall be in writing, include a statement that the requester supports the proposed final order, and a statement of how the requester would be harmed if the proposed final order is modified. The fee required at the time of submitting this request is \$50.00. If a hearing is scheduled, an additional fee of \$200.00 must be submitted along with a request for intervention. Forms to request standing are available from the Department.

Your protest or request for standing must be received in the Water Resources Department no later than **May 7, 2004**.

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 if

- 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.

This document was prepared by Jeana Eastman. 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 503-986-0859.

If you have questions about how to file a protest or if you have previously filed a protest and want to know the status, please contact Renee Moulun at 503-986-0824.

If you have other questions about the Department or any of its programs please contact our Water Rights Information 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 97301-1271, Fax: 503-986-0901.

jme-WEEK 452

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

MEHRTEN HOMER
PO BOX 485
FOSSIL, OR 97830

(541) 763-4907

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

APPLICATION FILE NUMBER: S-85630

SOURCE OF WATER: AN UNNAMED SPRING, A TRIBUTARY OF HOOVER CREEK, AND
HOVER CREEK, A TRIBUTARY OF BUTTE CREEK

PURPOSE OR USE: OUT OF SEASON IRRIGATION USE ON 230.0 ACRES

MAXIMUM RATE: 4.75 CUBIC FEET PER SECOND

PERIOD OF USE: JANUARY 1 THROUGH FEBRUARY 28

DATE OF PRIORITY: JUNE 2, 2003

POINT OF DIVERSION LOCATIONS:

POD 1: SW $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 23, T6S, R21E, W.M.; 10 FEET NORTH & 630 FEET
EAST FROM W1/4 CORNER, SECTION 23

POD 2: NE $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 22, T6S, R21E, W.M.; 2000 FEET NORTH & 1000
FEET WEST FROM S1/4 CORNER, SECTION 22

POD 3: NW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 22, T6S, R21E, W.M.; 1900 FEET NORTH & 1330
FEET WEST FROM S1/4 CORNER, SECTION 22

POD 4: NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 21, T6S, R21E, W.M.; 2520 FEET NORTH & 1650
FEET WEST FROM SE CORNER, SECTION 21

POD 5: NW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 21, T6S, R21E, W.M.; 1700 FEET NORTH & 1150
FEET EAST FROM SW CORNER, SECTION 21

POD 6: NW $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 29, T6S, R21E, W.M.; 350 FEET SOUTH & 1500
FEET WEST FROM NE CORNER, SECTION 29

POD 7: SW $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 29, T6S, R21E, W.M.; 1830 FEET SOUTH & 1620
FEET WEST FROM NE CORNER, SECTION 29

POD 8: SW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 29, T6S, R21E, W.M.; 1530 FEET SOUTH & 900 FEET WEST FROM C-W1/16 CORNER, SECTION 29

SPRING: SW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 20, T6S, R21E, W.M.; 200 FEET NORTH & 1500 FEET WEST FROM SE CORNER, SECTION 20

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-FORTIETH of one cubic foot per second and 4.0 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE $\frac{1}{4}$ SE $\frac{1}{4}$ 1.9 ACRES
SE $\frac{1}{4}$ SE $\frac{1}{4}$ 0.3 ACRE
SECTION 20

SW $\frac{1}{4}$ NE $\frac{1}{4}$ 14.2 ACRES
SE $\frac{1}{4}$ NE $\frac{1}{4}$ 0.3 ACRE
SE $\frac{1}{4}$ NW $\frac{1}{4}$ 0.6 ACRE
NE $\frac{1}{4}$ SW $\frac{1}{4}$ 3.4 ACRES
NW $\frac{1}{4}$ SW $\frac{1}{4}$ 2.4 ACRES
NE $\frac{1}{4}$ SE $\frac{1}{4}$ 13.5 ACRES
NW $\frac{1}{4}$ SE $\frac{1}{4}$ 9.5 ACRES
SECTION 21

SW $\frac{1}{4}$ NE $\frac{1}{4}$ 8.3 ACRES
SE $\frac{1}{4}$ NE $\frac{1}{4}$ 8.0 ACRES
SW $\frac{1}{4}$ NW $\frac{1}{4}$ 7.0 ACRES
SE $\frac{1}{4}$ NW $\frac{1}{4}$ 2.4 ACRES
NE $\frac{1}{4}$ SW $\frac{1}{4}$ 3.7 ACRES
NW $\frac{1}{4}$ SW $\frac{1}{4}$ 14.2 ACRES
NE $\frac{1}{4}$ SE $\frac{1}{4}$ 0.1 ACRE
NW $\frac{1}{4}$ SE $\frac{1}{4}$ 4.0 ACRES
SECTION 22

SW $\frac{1}{4}$ NW $\frac{1}{4}$ 2.6 ACRES
SECTION 23

NW $\frac{1}{4}$ NE $\frac{1}{4}$ 16.7 ACRES
SW $\frac{1}{4}$ NE $\frac{1}{4}$ 17.3 ACRES
NE $\frac{1}{4}$ NW $\frac{1}{4}$ DOMESTIC
SE $\frac{1}{4}$ NW $\frac{1}{4}$ 12.8 ACRES
NE $\frac{1}{4}$ SW $\frac{1}{4}$ 4.0 ACRES
NW $\frac{1}{4}$ SW $\frac{1}{4}$ 28.8 ACRES
SW $\frac{1}{4}$ SW $\frac{1}{4}$ 8.8 ACRES
SECTION 29

NE ¼ SE ¼ 11.9 ACRES
SE ¼ SE ¼ 33.3 ACRES
SECTION 30

TOWNSHIP 6 SOUTH, RANGE 21 EAST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. 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.

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.

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

The permittee shall install, maintain, and operate fish screening to prevent fish from entering the proposed diversion. The permittee shall also install a fishway at the obstruction that will provide adequate upstream and downstream passage for fish. The permittee may submit evidence that the Oregon Department of Fish and Wildlife (ODFW) has determined screens and/or fishways are not necessary. The required screens and fishways are to be in place, functional, and approved by ODFW before diversion of any water.

STANDARD CONDITIONS

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.

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.

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.

The Director finds that the proposed use(s) of water described by this permit, as conditioned, will not impair or be detrimental to the public interest.

Complete application of the water to the use shall be made on or before October 1, 2008. If the water is not completely applied before this date, and the permittee wishes to continue development under the permit, the permittee must submit an application for extension of time, which may be approved based upon the merit of the application.

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 (CWRE).

Issued _____, 2004

DRAFT - THIS IS NOT A PERMIT

Paul R. Cleary, Director
Water Resources Department

REAL ESTATE TRANSACTIONS: Pursuant to ORS 537.330, in any transaction for the conveyance of real estate that includes any portion of the lands described in this permit, the seller of the real estate shall, upon accepting an offer to purchase that real estate, also inform the purchaser in writing whether any permit, transfer approval order, or certificate evidencing the water right is available and that the seller will deliver any permit, transfer approval order or certificate to the purchaser at closing, if the permit, transfer approval order or certificate is available.

CULTURAL RESOURCES PROTECTION LAWS: Permittees involved in ground-disturbing activities should be aware of federal and state cultural resources protection laws. ORS 358.920 prohibits the excavation, injury, destruction or alteration of an archeological site or object, or removal of archeological objects from public and private lands without an archeological permit issued by the State Historic Preservation Office. 16 USC 470, Section 106, National Historic Preservation Act of 1966 requires a federal agency, prior to any undertaking to take into account the effect of the undertaking that is included on or eligible for inclusion in the National Register. For further information, contact the State Historic Preservation Office at 503-378-4168, extension 232.