

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number G-16684

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$400.00. 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 June 13, 2006, Richard Hobbs submitted an application to the Department for the following water use permit:

- Amount of Water: 0.16 cubic foot per second (CFS)
- Use of Water: fish culture
- Source of Water: a sump in Lostine River Basin
- Area of Proposed Use: Wallowa County within Section 22, Township 1 South, Range 43 East, W.M.

On March 16, 2007, the Department mailed the applicant notice of its Initial Review, determining that "*the use of 0.156 [sic] CUBIC FOOT PER SECOND of water from A SUMP IN LOSTINE RIVER BASIN for FISH CULTURE is not allowable, and it appears unlikely that you will be issued a permit.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On March 20, 2007, 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.

The application has been on administrative hold since the issuance of the Initial Review.

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
- designations of any critical ground water areas
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standard for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the general standard
- any comments received

Findings of Fact

The Grande Ronde Basin Program allows fish culture.

A sump in Lostine River Basin is above the Grande Ronde River State Scenic Waterway.

The Department is unable to find that there is a preponderance of evidence that the proposed use of ground water will measurably reduce the surface water flows necessary to maintain the free-flowing character of the scenic waterway in quantities necessary for recreation, fish and wildlife pursuant to ORS 390.835(9).

An assessment of ground water availability has been completed by the Department's Ground Water/Hydrology section. A copy of this assessment is in the file. The proposed water use will likely be available in the amounts requested without injury to prior rights and/or within the capacity of the resource.

Ground Water Findings Under Oregon Administrative Rule (OAR) 690-009

The Department determined, consistent with OAR 690-009-0040(4), that the proposed ground water use will have the potential for substantial interference with surface water, namely Lostine River.

In making this determination, the Department considered whether:

- (a) There is a hydraulic connection from the proposed well(s) to any surface water sources.
- (b) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source;
- (c) The rate of appropriation is greater than five cubic feet per second, if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (d) The rate of appropriation is greater than one percent of the pertinent adopted minimum perennial streamflow or instream

water right with a senior priority date, if one is applicable, or of the discharge that is equaled or exceeded 80 percent of time, as determined or estimated by the Department, and if the point of appropriation is a horizontal distance less than one mile from the surface water source;

- (e) The ground water appropriation, if continued for a period of 30 days, would result in stream depletion greater than 25 percent of the rate of appropriation, if the point of appropriation is a horizontal distance less than one mile from the surface water source.

For this application, the Department determined that there is the potential for substantial interference because of the following items described above: (a), (b), (e)

Because the proposed groundwater use will have the potential for substantial interference with surface water, in accordance with Oregon Administrative Rules 690-410-0070(1) and 690-400-0010(11)(a)(A), surface water availability has also been considered. This assessment compared a calculation of natural stream flow 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 not available for further appropriation (at an 80 percent exceedance probability) at any time of year.

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 did not recommend that any additional conditions of use be imposed on this application.

Per OAR 690-033-0120(2)(b), the use of groundwater determined to have the potential for substantial interference with surface water is not allowed April 15 through September 30. However, the Department may approve permits for projects that provide net benefits for native resident and native anadromous fish recovery under OAR 690-033-0140(2). The Department finds the proposed use of water for a fish hatchery will provide net benefits for native resident and native anadromous fish recovery.

The applicant submitted information regarding hatchery design that informed the Department's findings regarding the consumptivity of the proposed use. The water collects in a perforated pipe and flows by gravity to the hatchery. Once in the hatchery, evaporative loss is limited because water is exposed only briefly in an environment where the air is 100% saturated. The Department finds the consumptive-use is negligible.

Senior water rights exist on a sump in Lostine River Basin, or on downstream waters.

The Department finds that the amount of water requested, 0.16 CFS, is an acceptable amount.

The proposed ground water use is not within a designated critical ground water area.

Conclusions of Law

Under the provisions of ORS 537.621, the Department must presume that a proposed use will ensure the preservation of the public welfare, safety and health 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 Grande Ronde Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Because there is the potential for substantial interference with surface water and because surface water is not available at any time of year, water **is not** 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.

No proposed flow rate and duty of water higher than the general basin-wide standard is needed.

For these reasons, the required presumption **has not** been established.

OAR 690-310-0140(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public welfare, safety and health, and may make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public welfare, safety and health, and propose approval of the application with appropriate modifications or conditions.

To determine whether the proposed use will preserve the public welfare, safety and health, the factors in ORS 537.625(3), shown in bold below, have been considered as follows:

- (a) **The conservation of the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.**

The proposed use of water is for the operation of a fish hatchery rearing rainbow trout.

- (b) **The maximum economic development of the waters involved.**

The hatchery would provide long-term renewable economic benefits to the area in the form of recreation.

- (c) **The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.**

The proposed 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.

- (d) **The amount of waters available for appropriation for beneficial use.**

Groundwater will likely be available for the proposed use in the amounts requested without injury to prior rights and/or within the capacity of the resource.

The Department determined the proposed groundwater use has the potential for substantial interference with surface water. Surface water is not available at an 80% exceedance level at any time of year. However, the Department determined the use is effectively non-consumptive based on the design of the hatchery and the use of the water.

- (e) **The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.**

The draft permit is conditioned such that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented. The proposed use as conditioned in the attached draft permit will require conservation measures and reasonable use of the water.

- (f) **All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.**

The pending application's priority date and the Department's existing system of regulation are the means necessary to protect existing vested and inchoate rights.

- (g) **The state water resources policy.**

The Department determined the proposed use is consistent with the state water resources policy formulated under ORS 537.505 to 537.534.

The Department therefore concludes that, in accordance with OAR 690-310-0140(2)(b), although the presumption is not established, after considering the factors in ORS 537.625(3), the proposed use, as modified and conditioned in the attached draft permit, will ensure the preservation of the public welfare, safety, and health.

Recommendation

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

DATED July 7, 2009

E. Timothy Wall

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 **August 21, 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;
- If you are the applicant, the protest fee of \$300 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$600 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 **August 21, 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 \$150.00. If a hearing is scheduled, an additional fee of \$350.00 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 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 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 WALLOWA

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

RICHARD HOBBS
67164 LOSTINE RIVER RD
LOSTINE, OR 97857

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

APPLICATION FILE NUMBER: G-16684

SOURCE OF WATER: A SUMP IN LOSTINE RIVER BASIN

PURPOSE OR USE: FISH CULTURE

MAXIMUM RATE: 0.16 CUBIC FOOT PER SECOND

PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: JUNE 13, 2006

WELL LOCATION: NE $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 22, T1S, R43E, W.M.; 700 FEET SOUTH
AND 2475 FEET EAST FROM NW CORNER, SECTION 22

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE $\frac{1}{4}$ NW $\frac{1}{4}$
SECTION 22
TOWNSHIP 1 SOUTH, RANGE 43 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 appropriation. The permittee shall maintain the meter or measuring device in good working order.
- B. The permittee 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.

- C. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where any meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

Use of water under authority of this permit may be regulated if analysis of data available after the permit is issued discloses that the appropriation will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife in effect as of the priority date of the right or as those quantities may be subsequently reduced.

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

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.

If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.

If substantial interference with a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.

The well(s) shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.

If the riparian area is disturbed in the process of developing a point of appropriation, 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.

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

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.

Prior to receiving a certificate of water right, the permit holder shall submit to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data every ten years thereafter.

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.

Completion of construction and application of the water shall be made within five 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.

Within one year after making beneficial use 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

for Phillip C. Ward, Director
Water Resources Department

Mailing List for PFO Copies

Application #G-16684

PFO Date July 7, 2009

Original mailed to applicant:

RICHARD HOBBS, 67164 LOSTINE RIVER RD, LOSTINE, OR 97857

Copies sent to:

1. WRD - File # G-16684
2. Water Availability: Ken Stahr

<p>Copies Mailed</p> <p>By: _____ (SUPPORT STAFF)</p> <p>on: _____ (DATE)</p>
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PFO and Map Copies sent to:

3. WRD - Watermaster # 6
4. Regional Manager: E

CASEWORKER : jme