

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number R-87364

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$350.00. 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 December 12, 2008, Kenny Unger submitted an application to the Department for the following water use permit:

- Amount, of Water: 100.0 ACRE FEET (AF)
- Use of Water: MULTIPLE PURPOSE
- Source of Water: HUTCHCROFT CREEK, A TRIBUTARY OF NORTH YAMHILL RIVER; UNNAMED STREAM, A TRIBUTARY OF NORTH YAMHILL RIVER
UNNAMED STREAM, A TRIBUTARY OF HUTCHCROFT CREEK
- Area of Proposed Use: YAMHILL COUNTY WITHIN SECTION 35 AND SECTION 36, TOWNSHIP 2 SOUTH, RANGE 5 WEST, W.M, AND WITHIN SECTION 2, TOWNSHIP 3 SOUTH, RANGE 5 WEST, W.M

On April 3, 2009, the Department mailed the applicant notice of its Initial Review, determining that *"The appropriation of 50.0 AF of water from Hutchcroft Creek, a tributary of North Yamhill River, for storage in Unger 1 Reservoir, and 50.0 AF of water from an unnamed stream, a tributary of North Yamhill River and unnamed stream, a tributary of Hutchcroft Creek for multiple purpose use is allowable November 1 through June 30."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On April 7, 2009, 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 April 24, 2009, on behalf of the applicant, William Kness with Stuntzner Engineering & Forestry, LLC, amended the application by

changing the location of Point of Diversion (POD) 4 and reduced the request by removing Unger 2 Reservoir and PODs 2, 5, and 6.

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

Based on amendments, the application now proposes to divert 50.0 AF of water from POD 4 (Hutchcroft Creek, tributary of North Yamhill River) for storage in Unger 1 Reservoir.

On behalf of Department of Environmental Quality (DEQ), Nancy Gramlich noted that construction of the reservoir may disturb more than 1.0 acre of soil. In order to determine if an additional permit is required, she recommended contacting DEQ at 541-686-7858.

The Willamette Basin Program allows storage of water for MULTIPLE PURPOSE.

Senior water rights exist on HUTCHCROFT CREEK, A TRIBUTARY OF NORTH YAMHILL RIVER or on downstream waters.

HUTCHCROFT CREEK, A TRIBUTARY OF NORTH YAMHILL 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 calculation is in the file. This calculation determined that water is available for further appropriation (at a 50 percent exceedance probability) October 1 through June 30.

Under the Willamette Basin Program, water may only be diverted for storage November 1 through June 30.

The Department finds that the amount of water requested, 50.0 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:

- Water from Water from Hutchcroft Creek, a tributary of North Yamhill River shall only be diverted for storage November 15 through the end of February.
- Diversion of water from Hutchcroft Creek, a tributary of North Yamhill River shall not exceed 0.5 CFS.
- 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, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing 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 Willamette 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 August 18, 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 **October 2, 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 **October 2, 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 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 YAMHILL

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

KENNY UNGER
9816 BURNETT AVE
NORTH HILLS, CA 91343

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

APPLICATION FILE NUMBER: R-87364

SOURCE OF WATER: HUTCHCROFT CREEK, A TRIBUTARY OF NORTH YAMHILL RIVER

STORAGE FACILITY: UNGER 1 RESERVOIR

PURPOSE OR USE OF THE STORED WATER: MULTIPLE PURPOSE

MAXIMUM VOLUME: 50.0 ACRE FEET EACH YEAR

MAXIMUM RATE: UNGER 1 RESERVOIR SHALL NOT BE FILLED AT A RATE GREATER THAN 0.5 CFS

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: NOVEMBER 15 THROUGH THE END OF FEBRUARY

DATE OF PRIORITY: DECEMBER 12, 2008

DAM LOCATION: SWSW, SECTION 36, T2S, R5W, W.M.; 900 FEET NORTH AND 40 FEET EAST FROM SW CORNER, SECTION 36

POINT OF DIVERSION, POD 4: NW ¼ SW ¼ SECTION 36, T2S, R5W, W.M.; 1590 FEET NORTH AND 215 FEET EAST FROM SW CORNER, SECTION 36

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

SE ¼ SE ¼
SECTION 35

SW ¼ SW ¼
SECTION 36

TOWNSHIP 2 SOUTH, RANGE 5 WEST, W.M.

The area submerged by the reservoir, when full, will be 5.0 ACRES and the maximum height of the dam shall not exceed 25.0 FEET.

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.
- 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.
- C. The Director may require the permittee to keep and maintain a record of the amount (volume) of water diverted, and may require the permittee to report amount of water diverted on a periodic schedule as established by the Director.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

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

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, and approved in writing by ODFW prior to diversion of any water. The permittee may submit

evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

DAM SAFETY CONDITIONS

The outlet gate shall be cycled at least once each year and shall be fully operational at all times.

Routine maintenance or repair of the dam, spillway and 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 replace the defective equipment necessary for the continued safe operation of the project works.

The constructed works shall conform to the approved plans and specifications on file with Oregon Water Resources Dam Safety Program. The engineer of record shall notify the Water Resources Dam Safety Program prior to any change to construction of the approved design.

Any changes in the approved design prior to construction shall be documented in a letter to Oregon Water Resources Dam Safety Program.

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

No embankment fill shall be placed until the upstream face of the dam to receive the new fill has been prepared and examined in its entirety by the engineer of record, or by the Water Resources Dam Safety Engineer.

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 construction deviates from the approved design, a set asbuilt drawings, including a revised reservoir capacity graph or table, must accompany the engineer's written certification of completion.

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

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 635-415, 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

DRAFT - THIS IS **NOT** A PERMIT

for Phillip C. Ward, Director
Water Resources Department.

Mailing List for PFO Copies

Application #R-87364

PFO Date: August 18, 2009

Original mailed to applicant:

KENNY UNGER, 9816 BURNETT AVE, NORTH HILLS, CA 91343

Copies sent to:

1. WRD - File # R-87364
2. Water Availability: Ken Stahr

PFO and Map Copies sent to:

3. WRD - Watermaster # 16
4. WRD - Dam Safety, George Robison

Copies sent to Other Interested Persons (*CWRE, Agent, Well Driller, Commenter, etc.*)

5. Bill Kness, Stuntzner Engineering, 2137 19th Ave, Forest Grove, OR 97116

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

<p>Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)</p>

CASEWORKER : Geffenba