

**Oregon Water Resources Department
Water Rights Division**

Water Rights Application
Number S-86881

Prior to the issuance of a permit, the Department must receive the following information:

1. Evidence of ownership or easement/authorization to the property in the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 30, Township 6 North, Range 35 East, W.M., where the pipeline and point of diversion are.
2. Documentation that the proposed use in the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 30, Township 6 North, Range 35 East, W.M., 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.

Please include your application number on any documents submitted, including 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 May 29, 2007, David Lesser submitted an application to the Department for the following water use permit:

- Amount of Water: 0.2 cubic foot per second (CFS)
- Use of Water: irrigation of 16.14 acres
- Source of Water: tail water and wastewater piped from Johnson Creek to Dugger Creek by Hudson Bay Improvement Company (HBIC)
- Area of Proposed Use: Umatilla County within Section 30, Township 6 North, Range 35 East, W.M.

On June 15, 2007, the Department mailed the applicant notice of its Initial Review, determining that *"the use of 0.2 cubic foot per second of water from Johnson Creek, a tributary of Swartz Spring Creek [sic] for irrigation use on 16.14 acres 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 June 19, 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.

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 source of water for this application is provided by tail water and wastewater piped from Johnson Creek to Dugger Creek by HBIC. Johnson Creek has been dry since the mid-1970's, and did not have an outlet to any stream. The HBIC 2004 ground water recharge project established some flow in Johnson Creek. In addition, HBIC installed a pipeline for overflow of tail water and wastewater that is routed to Johnson Creek about one-quarter mile upstream of the proposed point of diversion for this application. These two projects created flooding on local landowner properties, so an additional pipeline was installed (as shown on the S-86881 application map) to convey water from the formerly flooded area of Johnson Creek to the lower end of Dugger Creek. The newly constructed outlet for this tail water and wastewater routes the water into Dugger Creek. The source of water for the proposed use is the pipe containing tail water and wastewater from HBIC, therefore, OAR 690-33 does not apply to this source.

Tail water and wastewater piped from Johnson Creek to Dugger Creek is not subject to State Scenic Waterway requirements.

An assessment of water availability has been completed. Tail water and wastewater entering the pipeline in the flooded area of Johnson Creek is available for the proposed use. Water available for this use is limited by the quantity that enters the pipe at the end of Johnson Creek.

Senior water rights exist on Johnson Creek, but all associated points of diversion for these senior rights are upstream from the proposed point of diversion. Since the source of water for this use is tail water and wastewater, water rights on Johnson Creek would not be subject to any call by this proposed use.

The Umatilla Basin Program allows irrigation.

The Department finds that the amount of water requested, 0.2 CFS, is an acceptable amount.

The Department has determined the lands proposed under this application have an existing water right evidenced by Certificate 45705. If a permit is issued, the Department will concurrently issue a partial diminution for Certificate 45705 for the conflicting lands.

The irrigation season is limited to March 1 through October 31.

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 September 15, 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 30, 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 30, 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. If a hearing is scheduled, an additional fee of \$350 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.

DRAFT

STATE OF OREGON

COUNTY OF UMATILLA

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

DAVID LESSER
84573 RINGER RD
MILTON FREEWATER, OR 97862

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

APPLICATION FILE NUMBER: S-86881

SOURCE OF WATER: TAIL WATER AND WASTEWATER PIPED FROM JOHNSON CREEK TO
DUGGER CREEK BY HUDSON BAY IMPROVEMENT COMPANY

PURPOSE OR USE: IRRIGATION USE ON 16.14 ACRES

MAXIMUM RATE: 0.2 CUBIC FOOT PER SECOND

PERIOD OF USE: MARCH 1 THROUGH OCTOBER 31

DATE OF PRIORITY: MAY 29, 2007

POINT OF DIVERSION (PIPELINE) LOCATION: NW $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 30, T6N,
R35E, W.M.; 660 FEET SOUTH AND 1320 FEET EAST FROM NW CORNER, SECTION 30

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-EIGHTIETH of one cubic foot per second and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW $\frac{1}{4}$ NW $\frac{1}{4}$ 16.14 ACRES
SECTION 30
TOWNSHIP 6 NORTH, RANGE 35 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.

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PERMIT DRAFT

- 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 used, and may require the permittee to report water use on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water-use information, the periods of water use and 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.

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.

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.

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.

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 #S-86881

PFO Date September 15, 2009

Original mailed to applicant:

DAVID LESSER, 84573 RINGER RD, MILTON FREEWATER, OR 97862

Copies sent to:

1. WRD - File # S-86881
2. Water Availability: Ken Stahr

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

PFO and Map Sheet Copies sent to:

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

CASEWORKER : jme