

**Oregon Water Resources Department  
Water Rights Division**

Water Rights Application  
Number S-87605

**Proposed Final Order**

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

*Application History*

On May 10, 2010, Dennis Werner submitted an application to the Department for the following water use permit:

- Amount of Water: 11.00 CUBIC FEET PER SECOND (CFS) DURING THE PERIOD MARCH 1 THROUGH OCTOBER 31 AND 3.0 CFS DURING THE PERIOD NOVEMBER 1 THROUGH FEBRUARY 28/29
- Use of Water: WETLAND ENHANCEMENT
- Source of Water: NORTH ALKALI CREEK, A TRIBUTARY OF ALKALI CREEK
- Area of Proposed Use: MALHEUR COUNTY WITHIN SECTION 14, TOWNSHIP 22 SOUTH, RANGE 46 EAST, W.M.

On June 17, 2010, the Department mailed the applicant notice of its Initial Review, determining that *"The use of 11.0 CFS from North Alkali Creek, a tributary of Alkali Creek, for wetland enhancement is allowable from March 1 through April 14 and October 1 through October 31 and the use of 3.0 CFS from North Alkali Creek, a tributary of Alkali Creek, for wetland enhancement is allowable November 1 through February 28/29. However, at the next stage of the application process, the Department may find that the proposed use is in the public interest and allow the full season requested."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On June 22, 2010, 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 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 Oregon Revised Statute (ORS) 390.835
- applicable statutes, administrative rules, and case law
- any comments received

*Findings of Fact*

The Owyhee Basin Program allows wetland enhancement for wildlife.

Senior water rights exist on North Alkali Creek, a tributary of Alkali Creek, or on downstream waters.

North Alkali Creek, a tributary of Alkali Creek, 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 an 80 percent exceedance probability) during the full season requested.

The Department finds that the amounts of water requested, 11.0 CFS from March 1 through October 31 and 3.0 CFS from November 1 through February 28/29, are acceptable.

In accordance with Oregon Administrative Rule (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 local watermaster stated that the required measurement devices are already in place.

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. However, the Department may approve permits for projects that provide measurable public health benefits under OAR 690-033-0140(5).

*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 Owyhee 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 during the period April 15 through September 30 **does not comply** with other rules of the Water Resources Commission, specifically OAR 690-033-0120(2)(a).

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

Because the proposed use during the period April 15 through September 30 does not comply with other rules of the Water Resources Commission, the required presumption **has not** been established.

OAR 690-310-0120(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest, and may make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest, and propose approval of the application with appropriate modifications or conditions.

To determine whether the proposed use will impair or be detrimental to the public interest, the factors in ORS 537.170(8)(a) - (g), shown in bold below, have been considered as follows:

- (a) **Conserving 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 will divert return flow from Alkali Creek into engineered wetlands, allowing for sediment settling and nutrient removal. Once the water has passed through the three wetlands, the cleaner water will be returned to Alkali Creek and will then flow to the Snake River. Evapotranspiration and seepage losses are likely to be negligible. The proposed project will provide measurable public benefits including, but not limited to, fish and wildlife, recreation, and aesthetics.

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

Improving the water quality of North Alkali Creek will provide long-term renewable economic benefits to the area in the form of tourism and 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.**

Surface water is available at an 80% exceedance level for the proposed year-round use.

**(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 formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.**

The Department determined the proposed use is consistent with the state water resources policy formulated under ORS 536.295 to 536.350. ORS 537.505 to 537.534 relate to groundwater and are not relevant to this application.

The Department therefore concludes that, in accordance with OAR 690-310-0120(2)(b), although the presumption is not established, the proposed use as modified and conditioned in the attached draft permit will not impair or be detrimental to the public interest.

Recommendation

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

DATED February 15, 2011

*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 **April 1, 2011**. 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 **April 1, 2011**. 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 Kerry Kavanagh. 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 503-986-0816.*

*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

COUNTY OF MALHEUR

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

DENNIS WERNER  
463 S MOON BEAM WAY  
EAGLE, ID 83616

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

APPLICATION FILE NUMBER: S-87605

SOURCE OF WATER: NORTH ALKALI CREEK, A TRIBUTARY OF ALKALI CREEK

PURPOSE OR USE: WETLAND ENHANCEMENT FOR WILDLIFE

MAXIMUM RATE: 11.0 CUBIC FEET PER SECOND (CFS) DURING THE PERIOD  
MARCH 1 THROUGH OCTOBER 31 AND 3.0 CFS DURING THE PERIOD NOVEMBER 1  
THROUGH FEBRUARY 28/29

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: MAY 10, 2010

POINT OF DIVERSION LOCATION: NE ¼ SW ¼, SECTION 14, T22S, R46E, W.M.;  
3800 FEET SOUTH AND 2900 FEET WEST FROM NE CORNER, SECTION 14

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW ¼ NE ¼  
SE ¼ NW ¼  
NE ¼ SW ¼  
NW ¼ SE ¼  
SECTION 14

TOWNSHIP 22 SOUTH, RANGE 46 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.

- 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.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens and/or by-pass devices are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish screening and/or by-pass devices to prevent fish from entering the proposed diversion, and to provide adequate upstream and downstream passage for fish.

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.

#### **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

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for Phillip C. Ward, Director  
Water Resources Department

# Mailing List for PFO Copies

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Application #S-87605

PFO Date February 15, 2011

**Original mailed to applicant:**

DENNIS WERNER  
463 S MOON BEAM WAY  
EAGLE, ID 83616

|  |
|--|
| Copies Mailed<br>By: _____<br>(SUPPORT STAFF)<br>on: _____<br>(DATE) |
|--|

Copies sent to:

1. WRD - File # S-87605
2. Water Availability: Ken Stahr

|  |
|--|
| Protest/<br>Standing Dates<br>checked<br>_____ |
|--|

PFO and Map Sheet Copies sent to:

3. WRD - Watermaster # 9
4. WRD Regional Manager: EASTERN

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

"\$20 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : Kerry Kavanagh