

**Oregon Water Resources Department  
Water Rights Services Division**

Water Rights Application  
Number R-87763

**Proposed Final Order**

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

*Application History*

On November 3, 2011, Irl Davis submitted an application to the Department for the following water use permit:

- Amount of Water: 10.0 ACRE FEET (AF), BEING 0.5 AF IN RESERVOIR 1, 9.0 AF IN RESERVOIR 2, AND 0.5 AF IN RESERVOIR 3
- Use of Water: MULTIPLE PURPOSE
- Source of Water: SPRING 1, TRIBUTARY TO BUTLER CANYON, AND SPRING 2 AND SPRING 3, TRIBUTARIES TO WHITE RIVER
- Area of Proposed Use: WASCO COUNTY WITHIN SECTION 33 AND SECTION 35, TOWNSHIP 3 SOUTH, RANGE 13 EAST, W.M.

On December 16, 2011, the Department mailed the applicant notice of its Initial Review, determining that *"Because not all items above are favorable, the appropriation of 10.0 AF of water for storage for multiple purpose, being 0.5 AF in Reservoir 1 from Spring 1, tributary of Butler Canyon, 9.0 AF in Reservoir 2 from Spring 2, tributary to White River, and 0.5 AF in Reservoir 3, tributary to White River, is not allowable, and it appears unlikely that you will be issued a permit unless a suitable mitigation proposal is provided prior to issuance of the Proposed Final Order."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On December 20, 2011, 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.

On January 26, 2012, the applicant provided information requested in the Initial Review which clarified the proposed use of storage water for irrigation, recreation, wildlife, livestock, and fish life.

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

- any applicable basin program
- applicable statutes, administrative rules, and case law
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- any applicable comprehensive plan or zoning ordinance
- recommendations by other state agencies
- the Scenic Waterway requirements of ORS 390.835
- any comments received

*Findings of Fact*

The Deschutes Basin Program allows storage for irrigation, recreation, wildlife, livestock, and fish life.

Senior water rights exist on Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White River, or on downstream waters.

Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White River are above the Deschutes River 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) January 1 through June 30.

The Department finds that the amount of water requested, 10.0 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:

Limit the storage season from January 1 through April 14.

The diversion 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.

*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 Deschutes Basin Program.

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 application is in compliance with the State Agency Coordination Program regarding 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 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 4, 2012



E. Timothy Wallin, Water Rights Program Manager  
for Phillip C. Ward, Director

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 19, 2012**. 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 the 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;

- To affect the Department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest ORS 537.153(2)(b) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) the specific public interest in ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified public interest in ORS 537.170(8) would be impaired or be detrimentally affected;
- 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 19, 2012**. 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.  
STATE OF OREGON

DRAFT

COUNTY OF WASCO

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

IRL DAVIS  
82859 HWY 216  
TYGH VALLEY, OR 97063

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

APPLICATION FILE NUMBER: R-87763

SOURCE OF WATER: SPRING 1, TRIBUTARY TO BUTLER CANYON, AND SPRING 2 AND SPRING 3, TRIBUTARIES TO WHITE RIVER

STORAGE FACILITIES: RESERVOIR 1, RESERVOIR 2, AND RESERVOIR 3

PURPOSE OR USE OF THE STORED WATER: IRRIGATION, RECREATION, WILDLIFE, LIVESTOCK, AND FISH LIFE

MAXIMUM VOLUME: 10.0 ACRE FEET (AF), BEING 0.5 AF IN RESERVOIR 1, 9.0 AF IN RESERVOIR 2, AND 0.5 AF IN RESERVOIR 3

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: JANUARY 1 THROUGH APRIL 14

DATE OF PRIORITY: NOVEMBER 3, 2011

RESERVOIR 1 WILL HAVE A DAM HEIGHT OF 1.0 FOOT AND INUNDATE 0.1 ACRE WHEN FULL, RESERVOIR 2 WILL HAVE A DAM HEIGHT OF 10.0 FEET OR LESS AND INUNDATE 4.0 ACRES WHEN FULL, RESERVOIR 3 WILL HAVE A DAM HEIGHT OF 2.0 FEET AND INUNDATE 0.1 ACRE WHEN FULL

POINTS OF DIVERSION LOCATIONS:

SPRING 1 - SWNE, SECTION 33, T3S, R13E, W.M.; 2320 FEET SOUTH AND 2240 FEET WEST FROM NE CORNER, SECTION 33

SPRING 2 - SESE, SECTION 26, T3S, R13E, W.M.; 351 FEET NORTH AND 1104 FEET WEST FROM SE CORNER, SECTION 26

SPRING 3 - SWSE, SECTION 35, T3S, R13E, W.M.; 652 FEET NORTH AND 2226 FEET WEST FROM SE CORNER, SECTION 35

RESERVOIR LOCATIONS:

RESERVOIR 1 - SWNE, SECTION 33, T3S, R13E, W.M.; 2504 FEET SOUTH AND 2443 FEET WEST FROM NE CORNER, SECTION 33

RESERVOIR 2 - NENE, SECTION 35, T3S, R13E, W.M.; 1221 FEET SOUTH AND 937 FEET WEST FROM NE CORNER, SECTION 35

RESERVOIR 3 - SWSE, SECTION 35, T3S, R13E, W.M.; 436 FEET NORTH AND 2174 FEET WEST FROM SE CORNER, SECTION 35

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

SW ¼ NE ¼  
SECTION 33

NE ¼ NE ¼  
SW ¼ SE ¼  
SECTION 35

TOWNSHIP 3 SOUTH, RANGE 13 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 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 / stored, and may require the permittee to report water use / water storage 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.

If the volume of the completed reservoir is 9.2 acre feet or more and a dam is used to impound the water, the height of the dam shall be less than 10.0 feet.



The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe (with a minimum diameter of 8" for any in-channel reservoir). This requirement may be waived if the Department determines other means have been provided to evacuate water when necessary.

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

The Director may require the user to measure inflow and outflow, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.

This permit allows an annual appropriation (not to exceed the specified volume). 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 to be used for out-of-reservoir purposes, a secondary water right is required. If any additional live flow is to be appropriated to maintain either the water level or a suitable freshwater condition, an additional water right is required.

Diversion of water under this permit is contingent on designated scenic waterway flows being met downstream. The user is required to monitor streamflow at USGS gage 14103000, Deschutes River at Moody, near Biggs, OR, and discontinue diversion when the flows specified below are unmet at the gage. At the discretion of the Director, the location and nature of streamflow monitoring required to protect scenic waterway flows is subject to change. In addition, the watermaster may regulate diversion under this right if it is determined by the Department that the flows listed below are unmet at the gage.

| Deschutes River Scenic Waterway |                           |
|---------------------------------|---------------------------|
| <b>Month</b>                    | <b>Minimum Flow (cfs)</b> |
| January                         | 4500                      |
| February                        | 4500                      |
| March 1-15                      | 4500                      |
| March 16-31                     | 4000                      |
| April 1-14                      | 4000                      |

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.

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.

#### **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 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 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

E. Timothy Wallin, Water Rights Program Manager  
for Phillip C. Ward, Director

# Mailing List for PFO Copies

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Application #R-87763

PFO Date: September 4, 2012

**Original mailed to applicant:**

IRL DAVIS  
82859 HWY 216  
TYGH VALLEY, OR 97063

**SENT VIA EMAIL:**

WRD - Watermaster # 3  
WRD - NC Region Manager

Copies sent to:

1. WRD - File # R-87763
2. WRD - Water Availability: Ken Stahr

|  |
|--|
| Copies Mailed<br>By: _____<br>(SUPPORT STAFF)<br>on: _____<br>(DATE) |
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|  |
|--|
| Protest/<br>Standing Dates<br>checked<br>_____ |
|--|

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

3. Rick Harvey, 84033 Hwy 216, Tygh Valley, OR 97063

CASEWORKER : Kerry Kavanagh