

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

Water Rights Application
Number G-17531

Proposed Final Order

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

Application History

On February 9, 2012, Don Nienke submitted an application to the Department for the following water use permit:

- Amount of Water: 17.8 CUBIC FEET PER SECOND (CFS)
- Use of Water: IRRIGATION OF 1306.8 ACRES
- Source of Water: WELL CF1, WELL CF2, WELL CF3, WELL CF4, WELL CF5, WELL CF6, WELL CF7, AND WELL CF8 IN DONNER UND BLITZEN BASIN
- Area of Proposed Use: HARNEY COUNTY WITHIN SECTION 34, SECTION 35, TOWNSHIP 27 SOUTH, RANGE 30 EAST, W.M.; SECTION 1, SECTION 2, SECTION 3, SECTION 11, AND SECTION 12, TOWNSHIP 28 SOUTH, RANGE 30 EAST, W.M.

On March 9, 2012, the Department mailed the applicant notice of its Initial Review, determining that *"The appropriation of 17.8 CFS of water from Well CF1, Well CF2, Well CF3, Well CF4, Well CF5, Well CF6, Well CF7, and Well CF8 in Donner Und Blitzen Basin for irrigation of 1306.8 acres is allowable during the full period requested, April 1 through October 31."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On March 13, 2012, 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:

- any applicable basin program
- applicable statutes, administrative rules, and case law
- the amount of water available
- the rate and duty for the proposed use

- 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
- 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
- designations of any critical ground water areas
- any comments received

Findings of Fact

The Malheur Lake Basin Program allows irrigation.

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. Ground water will likely be available within the capacity of the resource, and if properly conditioned, the proposed use of ground water will avoid injury to existing ground water rights.

Ground Water Findings Under OAR 690-009

The Department determined, consistent with OAR 690-009-0040(4), that the proposed ground water use will not have the potential for substantial interference with surface water.

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.

According to the Department's rules, the potential for substantial interference is assumed if (a) and either (b) or (c) or (d) or (e) are met. For this application, the Department determined that there is no potential for substantial interference, because either (a) is not met, or (b), (c), (d) or (e) are not met, or both.

Well CF1, Well CF2, Well CF3, Well CF4, Well CF5, Well CF6, Well CF7, and Well CF8 in Donner Und Blitzen Basin are not within or above a State Scenic Waterway.

The application proposed a water use rate that is higher than the general basin-wide standard and submitted information that demonstrates the need for the higher rate. Oregon Revised Statute 537.621(4) allows the Department to authorize the requested rate except upon specific findings related to the application to support a determination that a lesser amount is needed. The Department has determined there is a need for the higher rate, being 17.8 CFS.

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 Malheur Lake 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.

A flow rate of water higher than the general basin-wide standard is needed, however the duty will be limited to the standard amount.

For these reasons, the required presumption has been established.

Under the provisions of ORS 537.621, once the presumption has been established, 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 would not ensure the preservation of the public welfare, safety and health as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
 - (A) The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected; and
 - (B) Specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely 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 would impair or be detrimental to the public interest.

The Department therefore concludes that the proposed use would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety, and health. 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, ensure the preservation of the public welfare, safety and health as described in ORS 537.525, ORS 537.621(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 aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely 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 HARNEY

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

DON NIENKE
21765 SW 78TH AVE
TUALATIN, OR 97062

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

APPLICATION FILE NUMBER: G-17531

SOURCE OF WATER: WELL CF1, WELL CF2, WELL CF3, WELL CF4, WELL CF5, WELL CF6, WELL CF7, AND WELL CF8 IN DONNER UND BLITZEN BASIN

PURPOSE OR USE: IRRIGATION OF 1306.8 ACRES

MAXIMUM RATE: 17.8 CUBIC FEET PER SECOND

PERIOD OF USE: APRIL 1 THROUGH OCTOBER 31

DATE OF PRIORITY: FEBRUARY 9, 2012

WELL LOCATIONS:

WELL CF1 - SW $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 1, T28S, R30E, W.M.; 1850 FEET SOUTH AND 400 FEET EAST FROM NW CORNER, SECTION 1

WELL CF2 - SE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 35, T27S, R30E, W.M.; 3630 FEET NORTH AND 40 FEET WEST FROM SE CORNER, SECTION 35

WELL CF3 - NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 35, T27S, R30E, W.M.; 1980 FEET NORTH AND 2310 FEET WEST FROM SE CORNER, SECTION 35

WELL CF4 - SE $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 35, T27S, R30E, W.M.; 3300 FEET NORTH AND 3168 FEET WEST FROM SE CORNER, SECTION 35

WELL CF5 - SW $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 35, T27S, R30E, W.M.; 3380 FEET NORTH AND 5082 FEET WEST FROM SE CORNER, SECTION 35

WELL CF6 - SE $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 2, T28S, R30E, W.M.; 1650 FEET SOUTH AND 3360 FEET WEST FROM NE CORNER, SECTION 2

WELL CF7 - SE $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 35, T27S, R30E, W.M.; 860 FEET NORTH AND 3100 FEET WEST FROM SE CORNER, SECTION 35

WELL LOCATIONS (continued):

WELL CF8 - NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 1, T28S, R30E, W.M.; 2838 FEET SOUTH
AND 2904 FEET EAST FROM NW CORNER, SECTION 1

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-SIXTIETH 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:

NE $\frac{1}{4}$	SE $\frac{1}{4}$	6.6	ACRES
NW $\frac{1}{4}$	SE $\frac{1}{4}$	3.3	ACRES
SW $\frac{1}{4}$	SE $\frac{1}{4}$	34.2	ACRES
SE $\frac{1}{4}$	SE $\frac{1}{4}$	39.0	ACRES
SECTION 34			

SW $\frac{1}{4}$	NE $\frac{1}{4}$	31.5	ACRES
SE $\frac{1}{4}$	NE $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
SE $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
NE $\frac{1}{4}$	SW $\frac{1}{4}$	31.5	ACRES
NW $\frac{1}{4}$	SW $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	SW $\frac{1}{4}$	29.5	ACRES
SE $\frac{1}{4}$	SW $\frac{1}{4}$	34.1	ACRES
NE $\frac{1}{4}$	SE $\frac{1}{4}$	31.5	ACRES
NW $\frac{1}{4}$	SE $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	SE $\frac{1}{4}$	6.0	ACRES

SECTION 35

TOWNSHIP 27 SOUTH, RANGE 30 EAST, W.M.

NW $\frac{1}{4}$	NE $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	NE $\frac{1}{4}$	31.5	ACRES
NE $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
NW $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
SE $\frac{1}{4}$	NW $\frac{1}{4}$	31.5	ACRES
NE $\frac{1}{4}$	SW $\frac{1}{4}$	17.75	ACRES
NW $\frac{1}{4}$	SW $\frac{1}{4}$	31.5	ACRES
SW $\frac{1}{4}$	SW $\frac{1}{4}$	31.5	ACRES
SE $\frac{1}{4}$	SW $\frac{1}{4}$	17.75	ACRES
NW $\frac{1}{4}$	SE $\frac{1}{4}$	17.75	ACRES
SW $\frac{1}{4}$	SE $\frac{1}{4}$	17.75	ACRES

SECTION 1

TOWNSHIP 28 SOUTH, RANGE 30 EAST, W.M.

THE PLACE OF USE IS LOCATED AS FOLLOWS (continued):

NE $\frac{1}{4}$ NE $\frac{1}{4}$ 31.5 ACRES
 NW $\frac{1}{4}$ NE $\frac{1}{4}$ 6.0 ACRES
 SE $\frac{1}{4}$ NE $\frac{1}{4}$ 31.5 ACRES
 NE $\frac{1}{4}$ NW $\frac{1}{4}$ 34.1 ACRES
 NW $\frac{1}{4}$ NW $\frac{1}{4}$ 26.2 ACRES
 SW $\frac{1}{4}$ NW $\frac{1}{4}$ 35.5 ACRES
 SE $\frac{1}{4}$ NW $\frac{1}{4}$ 14.2 ACRES
 NE $\frac{1}{4}$ SW $\frac{1}{4}$ 38.6 ACRES
 NW $\frac{1}{4}$ SW $\frac{1}{4}$ 14.2 ACRES
 SE $\frac{1}{4}$ SW $\frac{1}{4}$ 31.5 ACRES
 NE $\frac{1}{4}$ SE $\frac{1}{4}$ 31.5 ACRES
 NW $\frac{1}{4}$ SE $\frac{1}{4}$ 31.5 ACRES
 SW $\frac{1}{4}$ SE $\frac{1}{4}$ 31.5 ACRES
 SE $\frac{1}{4}$ SE $\frac{1}{4}$ 31.5 ACRES
 SECTION 2

NE $\frac{1}{4}$ NE $\frac{1}{4}$ 34.2 ACRES
 NW $\frac{1}{4}$ NE $\frac{1}{4}$ 31.6 ACRES
 SECTION 3

NE $\frac{1}{4}$ NE $\frac{1}{4}$ 31.0 ACRES
 NW $\frac{1}{4}$ NE $\frac{1}{4}$ 31.0 ACRES
 SECTION 11

NE $\frac{1}{4}$ NW $\frac{1}{4}$ 31.0 ACRES
 NW $\frac{1}{4}$ NW $\frac{1}{4}$ 31.0 ACRES
 SECTION 12

TOWNSHIP 28 SOUTH, RANGE 30 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 diverted 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.

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.

The Department requires the water user to obtain, from a qualified individual (see below), and report annual static water levels for each well on the permit. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter. Annual measurements are required whether or not the well is used. The first annual measurement will establish a reference level against which future measurements will be compared. However, the Director may establish the reference level based on an analysis of other water-level data. The Director may require the user to obtain and report additional water levels each year if more data are needed to evaluate the aquifer system.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board. Measurements shall be submitted on forms provided by, or specified by, the Department. Measurements shall be made with equipment that is accurate to at least the standards specified in OAR 690-217-0045. The Department requires the individual performing the measurement to:

- A. Associate each measurement with an owner's well name or number and a Department well log ID; and
- B. Report water levels to at least the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method of measurement; and
- D. Certify the accuracy of all measurements and calculations reported to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if any of the following events occur:

- A. Annual water-level measurements reveal an average water-level decline of three or more feet per year for five consecutive years; or
- B. Annual water-level measurements reveal a water-level decline of 15 or more feet in fewer than five consecutive years; or
- C. Annual water-level measurements reveal a water-level decline of 25 or more feet; or
- D. Hydraulic interference leads to a decline of 25 or more feet in any neighboring well with senior priority.

The period of restricted use shall continue until the water level rises above the decline level which triggered the action or the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or causing substantial interference with senior water rights. The water user shall not allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

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 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

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

Mailing List for PFO Copies

Application #G-17531

PFO Date September 4, 2012

Original emailed to applicant: dnienke@aol.com

DON NIENKE
21765 SW 78TH AVE
TUALATIN, OR 97062

SENT VIA EMAIL:

1. WRD - Watermaster #10

Copies sent to:

2. WRD - File # G-17531
3. WRD - Water Availability: Ken Stahr

PFO and Map Copies sent to:

4. WRD - Regional Manager: EASTERN

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/
Standing Dates
checked

CASEWORKER : Kerry Kavanagh