

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

Water Rights Application
Number S-87734

Prior to the issuance of a permit, the Department must receive Permit recording fees in the amount of \$400.00.

In addition, final dam designs and specifications for Upper Reservoir must be submitted to the Department and approved by the Department's dam-safety engineer prior to permit issuance of this secondary application.

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 July 6, 2011, Robert L. and Leann R. McKee submitted an application to the Department for the following water use permit:

- Amount of Water: 1.66 CUBIC FEET PER SECOND (CFS), BEING 1.0 CFS FOR IRRIGATION OF 103.0 ACRES AND 0.66 CFS FOR POND MAINTENANCE OF LOWER RESERVOIR AND UPPER RESERVOIR; AND 57.7 ACRE FEET (AF), BEING 3.5 AF FROM LOWER RESERVOIR AND 54.2 AF FROM UPPER RESERVOIR
- Use of Water: IRRIGATION OF 103.0 ACRES AND POND MAINTENANCE
- Source of Water: LOWER RESERVOIR AND UPPER RESERVOIR (TO BE CONSTRUCTED UNDER APPLICATION R-87735), RUNOFF, AND TWO UNNAMED SPRINGS, TRIBUTARIES TO SALT CREEK
- Area of Proposed Use: YAMHILL COUNTY WITHIN SECTION 31, TOWNSHIP 5 SOUTH, RANGE 4 WEST, W.M.; AND SECTION 6, TOWNSHIP 6 SOUTH, RANGE 4 WEST, W.M.

On August 19, 2011, the Department mailed the applicant notice of its Initial Review, determining that *"The use of 1.0 CFS of water from two unnamed springs and runoff, tributary to Salt Creek, for irrigation of 103.0 acres may be allowed from March 1 to April 30. The use of 57.7 AF of stored water, being 54.2 AF from Upper Reservoir, and 3.5 AF from Lower Reservoir, for irrigation of 103.0 acres is allowable March 1 through October 31, contingent upon approval of Application R-87735. The*

use of 0.66 CFS of water from runoff and two springs, tributary to Salt Creek, for pond maintenance may be allowed from November 1 through April 30, contingent upon approval of Application R-87735." The applicant did not notify the Department to stop processing the application within 14 days of that date.

On August 23, 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.

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 Initial Review was incorrect in describing the allowed rate for pond maintenance. The standard allowable rate of water necessary for pond maintenance is 0.01 CFS for each acre foot of stored water. The application requested 0.66 CFS for maintenance of Lower Reservoir (3.5 AF) and Upper Reservoir (60.6 AF, being 54.2 AF from surface water and 6.4 AF from ground water, Application G-17474). Therefore, if the application is approved, the rate allowed will be limited to 0.64 CFS.

The Willamette Basin Program allows the use of live flow from the Yamhill River and tributaries for irrigation March 1 through April 30 and for pond maintenance from November 1 through April 30. The Willamette Basin Program allows the use of stored water for irrigation from March 1 through October 31.

Senior water rights exist on Lower Reservoir and Upper Reservoir (to be constructed under Application R-87735), runoff, and two unnamed springs, tributaries to Salt Creek, or on downstream waters.

Lower Reservoir and Upper Reservoir (to be constructed under Application R-87735), runoff, and two unnamed springs, tributaries to Salt Creek, are 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) November 1 through May 31.

The Department finds that no more than 1.64 CFS, being 1.0 CFS for irrigation of 103.0 acres and 0.64 CFS for pond maintenance, and 64.1 AF, would be necessary for the proposed use. The amount of water allowed shall be restricted to these amounts.

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 may be appropriated from live flow November 1 through April 30.

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.

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.

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.

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 October 30, 2012

E. Timothy Wallin

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 **December 14, 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 **December 14, 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.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

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

STATE OF OREGON

COUNTY OF YAMHILL

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

ROBERT L. AND LEANN R. MCKEE
24903 SW PERRYDALE RD
AMITY, OR 97101

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

APPLICATION FILE NUMBER: S-87734

SOURCE OF WATER: LOWER RESERVOIR AND UPPER RESERVOIR (TO BE CONSTRUCTED UNDER APPLICATION R-87735), RUNOFF, AND TWO UNNAMED SPRINGS, TRIBUTARIES TO SALT CREEK

PURPOSE OR USE: IRRIGATION OF 103.0 ACRES AND POND MAINTENANCE

MAXIMUM RATE: 1.64 CUBIC FEET PER SECOND (CFS), BEING 1.0 CFS FOR IRRIGATION OF 103.0 ACRES AND 0.64 CFS FOR POND MAINTENANCE

MAXIMUM VOLUME: 57.7 ACRE FEET (AF), BEING 3.5 AF FROM LOWER RESERVOIR AND 54.2 AF FROM UPPER RESERVOIR

PERIOD OF USE: IRRIGATION FROM LIVE FLOW - MARCH 1 THROUGH APRIL 30
IRRIGATION FROM STORED WATER - MARCH 1 THROUGH OCTOBER 31
POND MAINTENANCE - NOVEMBER 1 THROUGH APRIL 30

DATE OF PRIORITY: JULY 6, 2011

POINTS OF DIVERSION LOCATIONS:

POD 1 (UPPER RESERVOIR) - NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 31, T5S, R4W, W.M.; 350 FEET SOUTH AND 400 FEET EAST FROM C1/4 CORNER, SECTION 31

POD 2 (LOWER RESERVOIR) - SW $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 31, T5S, R4W, W.M.; 1000 FEET NORTH AND 550 FEET EAST FROM C1/4 CORNER, SECTION 31

POD 3 (TWO UNNAMED SPRINGS/DIFFUSE SPRING AREA) - NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 31, T5S, R4W, W.M.; 100 FEET SOUTH AND 600 FEET EAST FROM C1/4 CORNER, SECTION 31

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 2.5 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW ¼ NE ¼ 13.4 ACRES IRRIGATION AND POND MAINTENANCE
 SE ¼ NW ¼ 3.3 ACRES IRRIGATION
 NE ¼ SW ¼ 7.3 ACRES IRRIGATION
 SW ¼ SW ¼ 0.6 ACRE IRRIGATION
 SE ¼ SW ¼ 15.6 ACRES IRRIGATION
 NW ¼ SE ¼ 12.3 ACRES IRRIGATION AND POND MAINTENANCE
 SW ¼ SE ¼ 26.0 ACRES IRRIGATION

SECTION 31

TOWNSHIP 5 SOUTH, RANGE 4 WEST, W.M.

NE ¼ NW ¼ 5.6 ACRES IRRIGATION
 NW ¼ NW ¼ 18.9 ACRES IRRIGATION

SECTION 6

TOWNSHIP 6 SOUTH, RANGE 4 WEST, 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 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.

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.

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 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

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

Mailing List for PFO Copies

Application #S-87734

PFO Date October 30, 2012

Original mailed to applicant:

ROBERT L. AND LEANN R. MCKEE
24903 SW PERRYDALE RD
AMITY, OR 97101

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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SENT VIA EMAIL:

1. WRD - Watermaster # 16

Copies sent to:

1. WRD - File # S-87734
2. WRD - Water Availability: Ken Stahr

Protest/ Standing Dates checked _____
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Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

3. Leland Hardy, PE, CWRE, H&R Engineering, LLC, 690 Loring Dr NW, Salem, OR 97304

CASEWORKER : Kerry Kavanagh