

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

Water Rights Application
Number R-87815

Proposed Final Order

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

Application History

On May 23, 2012, Randy Roth submitted an application to the Department for the following water use permit:

- Amount of Water: 4.62 ACRE FEET (AF), BEING 2.59 AF IN BIG POND, 0.65 AF IN CATFISH POND, 0.44 AF IN TROUT POND, 0.38 AF IN DIKE POND, AND 0.56 AF IN ORCHARD POND
- Use of Water: STORAGE FOR MULTIPLE PURPOSE USE
- Source of Water: UNNAMED STREAM, A TRIBUTARY OF GEDNEY CREEK
- Area of Proposed Use: LINN COUNTY WITHIN SECTION 22, TOWNSHIP 13 SOUTH, RANGE 1 EAST, W.M.

On July 6, 2012, the Department mailed the applicant notice of its Initial Review, determining that "*The storage of 4.62 AF, being 2.59 AF in Big Pond, 0.65 AF in Catfish Pond, 0.44 AF in Trout Pond, 0.38 AF in Dike Pond, and 0.56 AF in Orchard Pond, from an unnamed stream, a tributary of Gedney Creek, for "multiple purpose", 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 July 10, 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.

On August 7, 2012, the applicant amended the application by clarifying the proposed use of water for storage, being livestock, wildlife, recreation, fish life, and irrigation.

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 Willamette Basin Program allows diversion for storage of water for livestock, wildlife, recreation, fish life, and irrigation from November 1 through June 30.

Senior water rights exist on an unnamed stream, a tributary of Gedney Creek, or on downstream waters.

An unnamed stream, a tributary of Gedney 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 a 50 percent exceedance probability) October 1 through July 31.

The Department finds that the amount of water requested, 4.62 AF, being 2.59 AF in Big Pond, 0.65 AF in Catfish Pond, 0.44 AF in Trout Pond, 0.38 AF in Dike Pond, and 0.56 AF in Orchard Pond, 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:

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.

ODFW recommended that except for normal bypass flows or during an emergency, the permittee shall not release stored water from the reservoirs from May 1 until October 1 to prevent thermal loading that may be harmful to coldwater fish species in Gedney Creek, unless determined necessary by the Water Resources Department to satisfy prior downstream rights.

DEQ stated that South Santiam and flowing tributaries in summer exceed temperatures for fish and recommended no intentional overflow to flowing surface waters June through September or no overflow if impounded water that is released is 18 degrees celsius or greater.

Water may be diverted only when Department of Environmental Quality sediment standards are being met.

The water user shall install and maintain adequate treatment facilities meeting current DEQ requirements to remove sediment before returning the water to the stream.

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 December 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 **January 18, 2013**. 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 **January 18, 2013**. 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.
STATE OF OREGON

DRAFT

COUNTY OF LINN

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

RANDY ROTH
28600 JONES RD
FOSTER, OR 97345

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

APPLICATION FILE NUMBER: R-87815

SOURCE OF WATER: UNNAMED STREAM, A TRIBUTARY OF GEDNEY CREEK

STORAGE FACILITIES: BIG POND, CATFISH POND, TROUT POND, DIKE POND, AND ORCHARD POND

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

MAXIMUM VOLUME: 4.62 ACRE FEET (AF) EACH YEAR, BEING 2.59 AF IN BIG POND, 0.65 AF IN CATFISH POND, 0.44 AF IN TROUT POND, 0.38 AF IN DIKE POND, AND 0.56 AF IN ORCHARD POND

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: NOVEMBER 1 THROUGH JUNE 30

DATE OF PRIORITY: MAY 23, 2012

DAM LOCATIONS:

BIG POND (1) - NE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 22, T13S, R1E, W.M.; 1208 FEET SOUTH AND 648 FEET WEST FROM NE CORNER, SECTION 22

CATFISH POND (2) - SE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 22, T13S, R1E, W.M.; 1365 FEET SOUTH AND 268 FEET WEST FROM NE CORNER, SECTION 22

TROUT POND (3) - NE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 22, T13S, R1E, W.M.; 822 FEET SOUTH AND 428 FEET WEST FROM NE CORNER, SECTION 22

DIKE POND (4) - NE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 22, T13S, R1E, M.D.M.; 1073 FEET SOUTH AND 796 FEET WEST FROM NE CORNER, SECTION 22

ORCHARD POND (5) - NE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 22, T13S, R1E, M.D.M.; 1064 FEET SOUTH AND 328 FEET WEST FROM NE CORNER, SECTION 22

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

NE $\frac{1}{4}$ NE $\frac{1}{4}$
SE $\frac{1}{4}$ NE $\frac{1}{4}$
SECTION 22
TOWNSHIP 13 SOUTH, RANGE 1 EAST, W.M.

Measurement, recording and reporting conditions:

- A. The Director may require the permittee to install staff gages that measure the entire range and stage between full reservoir level and dead-pool level in the reservoirs.
- B. If the Director notifies the permittee to install a staff gage, or other suitable measuring device, the permittee shall install such devices within the period stated in the notice. The permittee shall maintain the devices in good working order and shall allow the watermaster access to the devices.
- C. The Director may require the permittee to keep and maintain a record of the amount (volume) of water stored, and may require the permittee to report 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.

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.

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.

The permittee shall not release stored water from the reservoir(s) May 1 through October 1 unless determined necessary by the Water Resources Department to satisfy prior downstream rights.

Water may be diverted only when Department of Environmental Quality (DEQ) sediment standards are being met.

The water user shall install and maintain adequate treatment facilities meeting current DEQ requirements to remove sediment before returning water to the stream.

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

Application #R-87815

PFO Date: December 4, 2012

Original mailed to applicant:

RANDY ROTH
28600 JONES RD
FOSTER, OR 97345

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

SENT VIA EMAIL:

1. WRD - Watermaster # 2

Copies sent to:

1. WRD - File # R-87815
2. WRD - Water Availability: Ken Stahr

Protest/
Standing Dates
checked

CASEWORKER : Kerry Kavanagh