

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

Water Rights Application
Number S-87758

Proposed Final Order

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

Application History

On September 27, 2011, James L and Donna Abernathy submitted an application to the Department for the following water use permit:

- Amount of Water: 0.01 cubic foot per second (CFS)
- Use of Water: domestic use expanded for one household
- Source of Water: North Umpqua River, a tributary of Umpqua River
- Area of Proposed Use: Douglas County within Section 27, Township 26 South, Range 6 West, W.M.

On April 6, 2012, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 0.01 CFS from North Umpqua River, a tributary of Umpqua River, for year-round domestic use expanded for one household is allowable.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On April 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.

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 proposed use is for domestic use expanded purposes for one household. This use includes water uses for sanitation. Sanitation and domestic water uses are necessary for use of the subject property. The Umpqua Basin Program allows domestic use expanded and human consumption.

Senior water rights exist on North Umpqua River, a tributary of Umpqua River, or on downstream waters.

An assessment of water availability has been completed. A copy of this calculation is in the file. The Department's analysis has concluded that water is not available for the proposed use from July 1 through November 30 of each year.

A settlement agreement regarding instream water right Application IS 71174 was entered into by the Oregon Water Resources Department (OWRD), the Oregon Department of Fish & Wildlife (ODFW), and Douglas County. The settlement agreement, which is incorporated herein by reference, was based on unique circumstances as follows:

Douglas County agreed to purchase a pump for ODFW such that ODFW could more easily utilize its hatchery right from the North Umpqua River and thereby forego using Rock Creek water for its hatchery during critical low flow periods in Rock Creek. Rock Creek is an important spawning and rearing ground for winter steelhead, cutthroat trout and coho and spring Chinook salmon. Restoring Rock Creek flows during low flow periods by pumping North Umpqua water to the Rock Creek Hatchery will enhance wild fish populations in Rock Creek and in the North Umpqua River.

In exchange for Douglas County purchasing the pump for ODFW, ODFW agreed to transfer 7.0 CFS of its Rock Creek hatchery right instream into the North Umpqua River. ODFW agreed that this transfer, along with the benefits to Rock Creek and resulting enhancement to fish populations in Rock Creek and the North Umpqua River gained through the settlement agreement, would completely mitigate any injury that may otherwise be caused by OWRD issuing up to 7.0 CFS of additional water rights that could not otherwise be issued because no water was available due in part to the certification of ODFW's instream water rights. Thus, pursuant to the OWRD, ODFW, and Douglas County Agreement, OWRD could issue up to 7.0 CFS of additional water rights without harming the public interest in protecting senior instream water rights and without harming the public interest in protecting flows for sensitive, threatened or endangered fish species. (Settlement Agreement Applications 71172, 71173, 71174, 71181, 71182, 71183, 71184, 71185, 71190, 71192, and 73350.)

The 7.0 CFS of additional water rights sets aside 4.0 CFS for human consumption, domestic use or domestic use expanded; 1.5 CFS for

industrial use or commercial use; and 1.5 CFS for irrigation use or agricultural use.

The above-referenced transfer was completed per Transfer Application T-9770 and approved per Final Order issued on January 21, 2008.

As of the date of this application, 1.01 CFS of the total 4.0 CFS for human consumption, domestic use or domestic use expanded has been appropriated for use.

The conditions that would best protect the public interest, per comments by the local watermaster (OWRD), ODFW, and DEQ are as follows:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter and a compliant in-line flow restrictor at each point of diversion. The permittee shall maintain the devices in good working order.
- B. The permittee shall allow the watermaster access to the devices; provided however, where any 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, and may require the permittee to report water use 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 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 decrease to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent

fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

If a permit is issued, it will require reasonable use of the water and include water use measurement and reporting conditions commensurate with the amount of water use allowed.

The proposed use and diversion point is covered in the settlement agreement mentioned above and is downstream of the North Umpqua Scenic Waterway.

The Department finds that the amount of water requested, 0.01 CFS, is an acceptable amount.

Discussion

1. Consideration of the Public Interest

In reviewing applications to appropriate surface water, the Department will 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. ORS 537.153(2); OAR 690-310-0120.

If the Department determines that the public interest presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) 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. ORS 537.170(8); OAR 690-310-0120(2).

Pursuant to OAR 690-310-0120(2), in determining whether a proposed use is in the public interest, the Department must consider the following as provided in ORS 537.170(8):

- (a) Conserving the highest use of 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 for the public.

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

(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

(d) The amount of waters available for appropriation for beneficial use.

(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

(f) All vested and inchoate rights to the waters of this state or to the use of waters of this state, and the means necessary to protect such rights.

(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

Water is not available from the North Umpqua River from July 1 through November 30 of each year. As such the Department cannot establish the public interest presumption for this application and instead considers the factors provided in ORS 537.170(8) to determine whether the proposed use will impair or be detrimental to the public interest. ORS 537.170(8); OAR 690-310-0120(2).

2. Analysis of Factors

Conserving the highest use of 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 for the public:

In determining the "highest use of the water for all purposes" the Department has examined the importance of water for the proposed use, has considered the importance of protecting senior water rights including instream water rights on the North Umpqua River, and the importance of restoring flows to Rock Creek during months it has historically suffered from critical low flows. A decision to allow the proposed use is at once ancillary to and central to implementing the settlement agreement entered into by the Oregon Water Resources Department, the Oregon Department of Fish and Wildlife, and Douglas County. This agreement assures that new uses will not injure senior instream water rights and assures that critical

flows will be restored to Rock Creek. Accordingly, issuing this water right conserves the highest use of water for all purposes.

The maximum economic development of the waters involved:

Domestic use expanded is necessary to a reasonable use of domestic property.

The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control:

The proposed use is domestic use expanded which includes uses of water for sanitation. OAR 690-300-0010(24). Considering that applicant may have no other viable source of water to provide sanitation to their home, the proposed use is necessary to provide the beneficial uses of human consumption and sanitation to applicant.

The amount of waters available for appropriation for beneficial use:

Water is not available at an 80% exceedance level from July 1 through November 30 of each year.

Pursuant to the settlement agreement entered into by the OWRD, ODFW, and Douglas County, ODFW agreed that the settlement agreement and transfer referenced in Findings of Fact mitigates any potential for injury that could be caused by issuing this water right. Thus only pursuant to the settlement agreement and transfer, this water right may be issued without harming instream water right Certificates 81500 and 81501 and without harming the public interest in protecting flows for fish.

The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved:

If a permit is issued, it will require reasonable use of the water and include water use measurement and reporting conditions commensurate with the amount of water use allowed.

All vested and inchoate rights to the waters of this state or to the use of waters of this state, and the means necessary to protect such rights:

Pursuant to the settlement agreement entered into by the OWRD, ODFW, and Douglas County, ODFW agreed that the settlement agreement and transfer referenced in Findings of Fact mitigates any potential for injury that could be caused by issuing this water right. Thus only pursuant to the settlement agreement

and transfer, this water right may be issued without harming instream water right Certificates 81500 and 81501 and without harming the public interest in protecting flows for fish.

The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534:

The proposed use is consistent with the Water Resource Commission's basin program for this proposed use.

3. Resolution

The criteria for establishing the public interest presumption under ORS 537.153(2) are not satisfied. Nonetheless, after considering the factors of ORS 537.170(8) and conditioning the water right as specified in the draft permit, the proposed use will not impair or be detrimental to the public interest.

Conclusions of Law

Considering the factors set forth in ORS 537.170(8), the use, as conditioned in the draft permit, will not impair or be detrimental to the public interest. ORS 537.170(8); OAR 690-310-0120.

Recommendation

OWRD recommends that the attached draft permit be issued with conditions consistent with this Proposed Final Order.

DATED January 29, 2013

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 **March 15, 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 **March 15, 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 Jeana Eastman. 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 503-986-0859.

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 DOUGLAS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

JAMES L AND DONNA ABERNATHY
3019 NW STEWART PARKWAY, STE 304, BOX 206
ROSEBURG, OR 97471

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

APPLICATION FILE NUMBER: S-87758

SOURCE OF WATER: NORTH UMPQUA RIVER, A TRIBUTARY OF UMPQUA RIVER

PURPOSE OR USE: DOMESTIC USE EXPANDED FOR ONE HOUSEHOLD

MAXIMUM RATE: 0.01 CUBIC FOOT PER SECOND

PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: SEPTEMBER 27, 2011

POINT OF DIVERSION LOCATION: SE $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 27, T26S, R6W, W.M.;
1640 FEET SOUTH AND 635 FEET WEST FROM C1/4 CORNER, SECTION 27

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE $\frac{1}{4}$ SW $\frac{1}{4}$
NW $\frac{1}{4}$ SW $\frac{1}{4}$
SECTION 27
TOWNSHIP 26 SOUTH, RANGE 6 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 and a compliant in-line flow restrictor at each point of diversion. The permittee shall maintain the devices in good working order.
- B. The permittee shall allow the watermaster access to the devices; provided however, where any 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, and may require the permittee to report water use 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 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.

The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

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-87758

PFO Date January 29, 2013

Original mailed to applicant:

JAMES L AND DONNA ABERNATHY
3019 NW STEWART PARKWAY, STE 304, BOX 206
ROSEBURG, OR 97471

SENT VIA EMAIL:

WRD - Watermaster # 15

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Copies sent to:

1. WRD - File # S-87758
2. Water Availability: Ken Stahr

PFO and Map Sheet Copies sent to:

3. Regional Manager: SW

Protest/ Standing Dates checked _____
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CASEWORKER : jme