

**Oregon Water Resources Department
Water Right Services Division**

Water Rights Application
Number R-87899

Proposed Final Order

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

Findings of Fact

1. On May 17, 2013, Mark Crissman submitted an application to the Department for the following water use permit:
 - Amount of Water: 18.00 Acre Feet (AF), being 2.64 AF in Deer House Pond, 3.96 AF in Mulligan House Site Pond, 4.5 AF in Buck Ridge Pond, 4.2 AF in Aspen Patch Pond, and 2.7 AF in Hyatt Place Pond
 - Use of Water: storage for aesthetics, fire protection, livestock, and wildlife
 - Source of Water: runoff and seepage, tributaries of Fox Creek
 - Area of Proposed Use: Grant County within Sections 4, 7, 9, and 17, Township 11 South, Range 30 East, W.M.
2. On May 23, 2014, the Department mailed the applicant notice of its Initial Review, determining that *"The diversion for storage of 18.0 AF of water in five reservoirs, being 2.64 AF in Deer House Pond, 3.96 AF in Mulligan House Site Pond, 4.5 AF in Buck Ridge Pond, 4.2 AF in Aspen Patch Pond, and 2.7 AF in Hyatt Place Pond, from runoff, a tributary of Fox Creek, for aesthetics, fire protection, livestock, and wildlife may be allowed January 1 through June 30."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On May 27, 2014, 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.
4. The Department has determined an error was made in the Initial Review as to the time of the year that the diversion of water for storage is allowable. The Initial Review indicated that diversion of water was allowable January 1 through June 30 of each year, however the diversion of water as proposed in this application is not allowed April 15 through September 30 per OAR 690-033, which sets public-interest standards for threatened, endangered or sensitive fish species. Therefore, the determinations of the Initial Review should be corrected to reflect the diversion of water for storage will be allowable January 1 through April 14 of each year.

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
5. The John Day Basin Program allows storage for aesthetics, fire protection, livestock, and wildlife (OAR 690-506-0080).
 6. Senior water rights exist on runoff and seepage, tributaries of Fox Creek, or on downstream waters.
 7. Runoff and seepage, tributaries of Fox Creek are above the John Day River State Scenic Waterway.
 8. An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water is available for further appropriation (at a 50 percent exceedance probability) January 1 through April 14.
 9. The Department finds that the amount of water requested, 18.0 AF, is an acceptable amount.
 10. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.
 11. 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:
 - a. 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.

12. The diversion of water as proposed in this application is not allowed April 15 through September 30 per OAR 690-033, which sets public-interest standards for threatened, endangered or sensitive fish species.

Conclusions of Law

1. 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.
2. The proposed uses requested in this application are allowed in the John Day Basin Program.
3. Water is available for the proposed use.
4. The proposed use will not injure other water rights.
5. The proposed use complies with other rules of the Water Resources Commission not otherwise described above.
6. The application is in compliance with the State Agency Coordination Program regarding land use.
7. For these reasons, the required presumption has been established.
8. 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.
9. 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.

10. The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.
11. 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 April 21, 2015



E. Timothy Wallin, Water Rights Program Manager
for Thomas M. Byler, 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 **June 5, 2015**. 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 \$350 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$700 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.

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 **June 5, 2015**. 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 \$200. If a hearing is scheduled, an additional fee of \$500 must be submitted along with a petition for party status.

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.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil/content/locator.php>

This document was prepared by Kim French. 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 GRANT

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MARK CRISSMAN
30483 HWY 395W
LONG CREEK, OR 97856

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

APPLICATION FILE NUMBER: R-87899

SOURCE OF WATER: RUNOFF AND SEEPAGE, TRIBUTARIES OF FOX CREEK

STORAGE FACILITIES: DEER HOUSE POND, MULLIGAN HOUSE SITE POND, BUCK RIDGE POND, ASPEN PATCH POND, AND HYATT PLACE POND

PURPOSE OR USE OF THE STORED WATER: AESTHETICS, FIRE PROTECTION, LIVESTOCK, AND WILDLIFE

MAXIMUM VOLUME: 18.00 ACRE FEET (AF), BEING 2.64 AF IN DEER HOUSE POND, 3.96 AF IN MULLIGAN HOUSE SITE POND, 4.5 AF IN BUCK RIDGE POND, 4.2 AF IN ASPEN PATCH POND, AND 2.7 AF IN HYATT PLACE POND

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

DATE OF PRIORITY: MAY 17, 2013

THE MAXIMUM HEIGHT OF EACH DAM SHALL NOT EXCEED 10 FEET.

DAM LOCATIONS:

DEER HOUSE POND - NE $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 9, T11S, R30E, W.M.; 70 FEET SOUTH AND 360 FEET WEST FROM NE CORNER, SECTION 9

MULLIGAN HOUSE SITE POND - SW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 4, T11S, R30E, W.M.; 940 FEET NORTH AND 1220 FEET EAST FROM SW CORNER, SECTION 4

BUCK RIDGE POND - SW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 4, T11S, R30E, W.M.; 770 FEET NORTH AND 360 FEET EAST FROM SW CORNER, SECTION 4

ASPEN PATCH POND - SE $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 7, T11S, R30E, W.M.; 4930 FEET SOUTH AND 50 FEET WEST FROM NE CORNER, SECTION 7

HYATT PLACE POND - NW $\frac{1}{4}$ NW $\frac{1}{4}$, SECTION 17, T11S, R30E, W.M.; 1720 FEET NORTH AND 820 FEET EAST FROM W1/4 CORNER, SECTION 17

THE AREAS TO BE SUBMERGED BY THE RESERVOIRS ARE LOCATED AS FOLLOWS:

SW $\frac{1}{4}$ SW $\frac{1}{4}$
SECTION 4

SE $\frac{1}{4}$ SE $\frac{1}{4}$
SECTION 7

NE $\frac{1}{4}$ NE $\frac{1}{4}$
SECTION 9

NW $\frac{1}{4}$ NW $\frac{1}{4}$
SECTION 17

TOWNSHIP 11 SOUTH, RANGE 30 EAST, W.M.

Measurement devices, and recording/reporting of annual water storage conditions:

- A. The Director may require the permittee to install a staff gage that measures the entire range and stage between full reservoir level and dead-pool level in the reservoirs. If no dead-pool, the gage must measure the full depth of the reservoir. If the Director notifies the permittee to install a staff gage, the permittee shall install such device within the period stated in the notice. Once installed, the permittee shall maintain the device in good working order and shall allow the watermaster access to the device.
- B. The Director may require the permittee to keep and maintain a record of the 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.
- C. 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.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish-screening devices to prevent fish from entering the proposed diversion.

Diversion of water under this permit is contingent on designated scenic waterway flows being met downstream. The user is required to monitor streamflow at John Day River at McDonald Ferry, Oregon, gage 14048000, and discontinue diversion when the flows specified below are unmet at the gage. At the discretion of the Director, the location and nature of streamflow monitoring required to protect scenic waterway flows are subject to change. In addition, the watermaster may regulate diversion under this right if it is determined by the Department that the flows listed below are unmet at the gage.

John Day Scenic Waterway	
Month	Minimum Flow (cfs)
January	500
February	1000
March - April 14	2000

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 Thomas M. Byler, Director

Mailing List for PFO Copies

Application #R-87899

PFO Date: April 21, 2015

Original mailed via CERTIFIED MAIL to applicant:

MARK CRISSMAN, 30483 HWY 395W, LONG CREEK, OR 97856

SENT VIA EMAIL:

1. WRD - Watermaster # 4
2. Applicant - fivespringsranch60@gmail.com

Copies sent to:

1. WRD - File # R-87899
2. Water Availability: Shawn Ortiz-Turner

PFO and Map Copies sent to:

3. Regional Manager: NCR

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

1. Michael C. Springer, CWRE, 217 N Canyon Blvd, John Day, OR 97845

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/
Standing Dates
checked

CASEWORKER : Kim French