

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

Water Rights Application
Number R-88155

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the proposed use does not comply with Oregon Administrative Rule (OAR) 690-033.

Findings of Fact

1. On December 17, 2015, Waibel Ranches LLC submitted an application to the Department for the following water use:
 - Amount of Water: 108.0 acre-feet (AF)
 - Use of Water: storage for multiple purposes
 - Source of Water: Sarvis Creek, a tributary of Crooked River
 - Area of Proposed Use: Crook County within Section 9, Township 17 South, Range 21 East, W.M.
2. On February 12, 2016, the Department mailed the applicant notice of its Initial Review, determining that *"The diversion of water from Sarvis Creek, tributary of Crooked River, for storage of 108.0 AF of water in Sarvis Creek Reservoir, an enlargement of Permit R-5534, may be allowed March 1 through April 14 of each year, contingent upon submission of required information."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On February 16, 2016, 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. On March 2, 2016, the applicant submitted required information as requested in the Initial Review, clarifying beneficial use could be made with a limited season of March 1 through April 14, and specifying uses for the stored water as irrigation, livestock, recreation, and wildlife uses (OAR 690-505-0030(1)(a)).
5. On May 6, 2016, written comments were received from Kimberley Priestley of Waterwatch of Oregon, reviewed on the Department's Comment Evaluation Form, and incorporated into the Department's recommendations. Comments referenced potential for injury to downstream users and instream water rights, concerns of over-appropriation, compromise of sensitive and threatened fish habitat, and negative impact to scenic waterway flows.

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
6. The Deschutes Basin Program allows storage for irrigation, livestock, recreation, and wildlife uses (OAR 690-505-0030(1)(a)).
 7. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.
 8. Senior water rights exist on Sarvis Creek, a tributary of Crooked River, or on downstream waters.
 9. Sarvis Creek, a tributary of Crooked River, is above the Deschutes River State Scenic Waterway.
 10. 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) March 1 through May 31.
 11. The diversion of water proposed in this application is not allowed April 15 through September 30 per OAR 690-033, which sets public-interest standards for threatened, endangered and sensitive fish species.
 12. 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:
 - ODFW recommended a condition whereby the applicant must release all water stored that year if Prineville Reservoir is not filled to 148,640 AF by April 15th. ODFW recommended denial of the application if this condition is not met.

- DEQ recommended that the applicant use the following best-management-practices if permitted:
 - Maintain a vegetated buffer strip above the reservoir to trap sediment, nutrients, and other pollutants before they enter the reservoir;
 - Limit polluting activities near the reservoir or in areas that drain into the reservoir;
 - Exclude livestock from the reservoir; and
 - Carefully read and follow label directions when using aquatic herbicides.
- DEQ found that Sarvis Creek is connected to a 303(d)-listed water body (Crooked River) that is impaired year-round relative to standards for dissolved oxygen and biological criteria. DEQ considered the diversion to be *de minimis*, and therefore recommended conditions that might allow approval of the application. However, the Water Resources Department finds that the proposed use (storage of 108 AF) is not *de minimis*. Streams in the region are known to have highly variable (flashy) discharge. Reservoir permits for in-channel reservoirs are issued by the WRD on a volumetric basis, with no limitation on the instantaneous rate of diversion. Therefore, conversion of the proposed storage volume to an instantaneous rate for the purpose of assessing the impact to the Crooked River underestimates the magnitude of potential water-quality impacts on it. The year-round impairment described above indicates that the proposed use (*sic*) does not comply with state and federal water-quality standards as required by OAR 690-033-0120(2)(d).
- The OWRD Watermaster recommended a "staff plate in reservoir and record the end of season (low) elevation and beginning of season (peak) elevation." Additionally, the Watermaster stated that the requirement to release all stored water if Prineville Reservoir is not filled to capacity as specified by ODFW is not feasible due to the highly managed nature of the river and reservoir because there are (1) too many intervening users, and (2) that Ochoco Irrigation District does not make a call on junior storage rights because it releases too much water (75.0 CFS) during the storage season to meet Bureau of Reclamation requirements.

On December 14, 2016, The Department received a request for an administrative hold from James Newton. The Department finds that the request is neither reasonable nor necessary, and is denied.

Conclusions of Law

1. 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.
2. The Deschutes Basin Program allows the proposed use (OAR 690-505-0030).
3. The interagency reviews and the Department's analysis determined, per OAR 690-033, that the proposed use would impair or be detrimental to the public interest with regard to sensitive, endangered, or threatened fish species.
4. **No** preference for this use is granted under the provisions of ORS 536.310(12).
5. Water is available for the proposed use.
6. The application is compatible with applicable land-use plans.
7. For these reasons, the required presumption **has not** been established.
8. The Department therefore concludes that the proposed use **will impair or be detrimental** to the public interest as provided in ORS 537.170.

Recommendation

The Department recommends that the application be denied.

DATED December 27, 2016

E. Timothy Wallin

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 **February 10, 2017**. 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 **February 10, 2017**. 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>

This document was prepared by Barbara Park Poage. If you have any questions about any of the statements contained in this document I can be reached at Barbara.J.Poage@wrd.state.or.us or 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.