

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

Water Rights Application
Number S-88285

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the proposed season of use is not allowable per the basin program, and the proposed uses do not comply with Oregon Administrative Rules (OAR 690-033).

Findings of Fact

1. On September 9, 2016, David Rogers submitted an application to the Department for the following water uses:
 - Amount of Water: 1.25 cubic feet per second (CFS) and 212.2 acre-feet (AF)
 - Use of Water: irrigation of 212.3 acres; pond maintenance
 - Source of Water: Pierce Creek, Tub Run, and runoff, tributaries of Little Muddy Creek
 - Area of Proposed Use: Linn County within Section 3, Township 15 South, Range 3 West, W.M.
2. On November 4, 2016, the Department mailed the applicant notice of its Initial Review, determining that "*The diversion of 1.25 CFS and 212.2 AF of water from Pierce Creek, Tub Run, and runoff, tributaries of Little Muddy Creek, for irrigation of 212.3 acres and pond maintenance March 1 through October 31 of each year is not allowable.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On November 8, 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. In the Department's continuing evaluation of the application, an error was noted in the Initial Review citing "the diversion of water from Pierce Creek, Tub Run, and runoff, tributaries of little Muddy Creek, for irrigation is allowable September 1 through January 31 (OAR 690-502-0050(1)(b))." The rule citation should be OAR 690-502-0050(1)(e), which allows for irrigation September 1 through June 30 of each year.

Additionally, the Initial Review stated "pond maintenance is not allowable under the Willamette Basin Program (OAR 690-502-0050); however, more accurately, OAR 690-502-0040(4)(b) states "secondary applications to maintain reservoir levels throughout the year may be processed if the proposed use is consistent with the

classification." In this application, the classification is not allowable during the months of July and August, therefore, the maintenance of reservoir levels is not allowable during July and August 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 Willamette Basin Program allows for irrigation (OAR 690-502-0050(1)(e) September 1 through June 30, and pond maintenance (OAR 690-502-0040(4)(b)).
 6. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.
 7. Senior water rights exist on Pierce Creek, Tub Run, and runoff, tributaries of Little Muddy Creek, or on downstream waters.
 8. Pierce Creek, Tub Run, and runoff, tributaries of Little Muddy Creek, are not within or above a State Scenic Waterway.
 9. 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) for the requested period of use per OAR 690-300(57).
 10. In accordance with OAR 690-033-0330, an interagency team reviewed these proposed uses 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 **denial** of the application because of the potential for loss of essential habitat for sensitive,

threatened, or endangered fish species, citing that no conditions can be applied to mitigate the impact.

- DEQ recommended **denial** of the application because of the following:
 - Pierce Creek, Tub Run, and runoff, tributaries of Little Muddy Creek, are designated for salmon and trout rearing;
 - Little Muddy Creek is 303(d) listed for biological criteria and temperature, and is a tributary of Willamette River, which has a Total Maximum Daily Load (TMDL) for temperature, mercury, and bacteria.
 - Concern over return flows that will result in negative impact to surface waters for temperature, dissolved oxygen, nutrients, mercury, and other heavy metals (sediment), toxics, and bacteria.
 - Conditions cannot be applied to mitigate the impact of the use.
- The OWRD Watermaster recommended **denial** of the application because of the following:
 - The waters are only classified for irrigation September through June, and not in July and August;
 - Per the DEQ review, draining of the ponds would likely pollute receiving streams; and
 - Senior users would likely make a call for water in summer.

Conclusions of Law

1. Under the provisions of ORS 537.153, the Department must presume that the proposed uses will not impair or be detrimental to the public interest if the proposed uses are 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 uses will not injure other water rights and if the proposed uses comply with rules of the Water Resources Commission.
2. The Willamette Basin Program allows the proposed uses (OAR 690-502); however, the proposed seasons of use are **not** allowable per the Basin Program (OAR 690-502-0050(1)(e) and OAR 690-502-0040(4)(b)).
3. The interagency review team 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 these uses is granted under the provisions of ORS 536.310(12).
5. Water is available for the proposed uses.
6. The proposed uses are compatible with applicable land use plans.
7. The proposed uses would not injure other water rights.
8. The proposed uses **do not comply** with rules of the Water Resources Commission, specifically OAR 690-033.
9. For these reasons, the required presumption **has not** been established.
10. The Department therefore concludes that the proposed uses **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 February 21, 2017

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 **April 7, 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 uses 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 **April 7, 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 uses 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 Poage. If you have any questions about any of the statements contained in this document I can be reached at Barbara.J.Poage@oregon.gov 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.

Mailing List for PFO Copies

Application #S-88285

PFO Date February 21, 2017

Original mailed via CERTIFIED MAIL to applicant:

DAVID ROGERS
26366 GAP RD
BROWNSVILLE, OR 97327

SENT VIA EMAIL:

1. WRD - Watermaster # 2
2. Agent, Eric Urstadt - ericurstadt@hotmail.com

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

Copies sent to:

1. Water Availability: Hydrographics
2. WRD - File #S-88285