

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

Water Rights Application
Number S-88126

Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the proposed use does not comply with other rules of the Commission, specifically ORS 690-033.

Findings of Fact

1. On August 28, 2015, James Farmer, Charles Warren Farmer, Margaret Farmer, and Fort Boise Produce submitted an application to the Department for the following water use:
 - Amount of Water: 4.73 cubic feet per second (CFS)
 - Use of Water: irrigation of 533.1 acres
 - Source of Water: an unnamed spring and an unnamed stream, tributaries of Locket Gulch, a tributary of Snake River
 - Area of Proposed Use: Malheur County within Section 11 and Section 12, Township 20 South, Range 46 East, W.M.
2. On October 23, 2015, the Department mailed the applicant notice of its Initial Review, determining that "...the use of 4.73 CFS of water from an unnamed spring and an unnamed stream, tributaries of Locket Gulch, a tributary of Snake River, for irrigation of 533.1 acres is not allowable..." The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On October 27, 2015, 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 November 12, 2015, the applicant put the application on administrative hold, which ended on May 12, 2016.

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 Malheur Basin Program allows irrigation (OAR-690-510-0010).
 6. Senior water rights exist on an unnamed spring and an unnamed stream, tributaries of Locket Gulch, a tributary of Snake River, or on downstream waters.
 7. An unnamed spring and an unnamed stream, tributaries of Locket Gulch, a tributary of Snake River are not within or above a State Scenic Waterway.
 8. On July 18, 2016, Andrew G Martin, representative for the applicant, submitted comments expressing concern for the water availability finding in the Initial Review. The comments were considered and discussed with the Watermaster. A subsequent assessment of water availability has been completed by the local Watermaster, Ron Jacobs, and has determined that water is available for further appropriation October 16 through March 31 of each year.
 10. In accordance with OAR 690-033-0120 and 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive 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:
 - Although ODFW indicated that there are no sensitive fish species at the proposed point of diversion, DEQ indicated that the proposed use will divert water that would otherwise contribute to the Snake River. The reduction in flow will negatively impact the Snake River by diminishing water quality for the habitat of sensitive fish species. No conditions could be recommended to offset the impacts of the proposed use.

Conclusions of Law

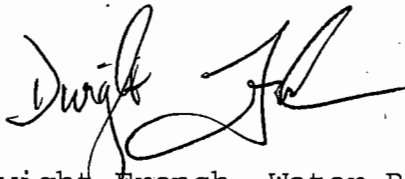
1. Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), 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 Malheur Basin Program allows the proposed use.
3. **No** preference for this use is granted under the provisions of ORS 536.310(12).
4. Water is available for the proposed use.
5. The proposed use would not injure other water rights.
6. The proposed use **does not comply** with rules of the Water Resources Commission, specifically OAR 690-033.
7. The proposed use is compatible with applicable land use plans.
8. For these reasons, the required presumption has **not** been established.
9. 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 October 3, 2017



Dwight French, Water Right Services Division Administrator
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 **November 17, 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 \$410 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$810 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 **November 17, 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 \$230. If a hearing is scheduled, an additional fee of \$580 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 Kim French. If you have any questions about any of the statements contained in this document I can be reached 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.