

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

Water Rights Application
Number R-88249

Superseding Proposed Final Order

Summary of Recommendation: The Department recommends that the application be denied because the application does not comply with other rules of the commission; namely OAR 690-020-0023.

Findings of Fact

1. On June 24, 2016, Bart Barlow and Boise Cascade Wood Products LLC submitted an application to the Department for the following water use:
 - Amount of Water: 90.0 acre feet (AF)
 - Use of Water: storage for irrigation and industrial/manufacturing uses
 - Source of Water: wastewater and run-off, tributaries of Phillips Creek
 - Area of Proposed Use: Union County within Section 21, Township 1 North, Range 39 East, W.M.
2. On July 15, 2016, the Department mailed the applicant notice of its Initial Review, determining that *"The diversion of 90.0 AF of water from wastewater and run-off, tributaries of Phillips Creek, for storage in Elgin Complex PWP 2 Reservoir for irrigation and industrial/manufacturing uses is allowable December 1 through April 14 of each year."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On July 19, 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.

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
4. The Grande Ronde Basin Program allows storage for irrigation and industrial/manufacturing uses. (OAR 690-508-0020)
 5. Senior water rights exist on wastewater and run-off, tributaries of Phillips Creek, or on downstream waters.
 6. Wastewater and run-off, tributaries of Phillips Creek, are above the Grande Ronde River State Scenic Waterway.
 7. An assessment of surface water availability, including run-off, 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) December 1 through July 31 of each year per OAR 690-300(57).
 8. An assessment of wastewater availability has been completed. This assessment determined that wastewater is available for further appropriation during the entire season proposed.
 9. 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.
 10. The Department finds that the amount of water requested, 90.0 AF, is an acceptable amount.
 11. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded.
 12. In accordance with OAR 690-033-0120 and 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.

13. Continued evaluation of the application determined that the reservoir proposed under this application was not constructed in accordance with OAR 690-020-0023, which says, "Prior to beginning construction on any dam subject to these rules, written approval of dam designs, drawings, and specifications must be obtained from the State Engineer as described in OAR 690-020-0080. Written approval was not obtained, therefore the proposed reservoir will not be permitted.

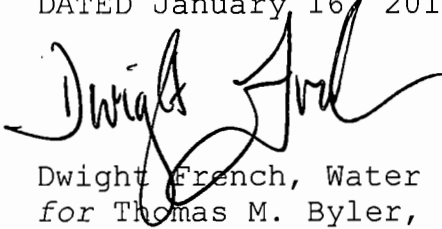
Conclusions of Law

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 Grande Ronde Basin Program allows the proposed use (OAR 690-508-0020).
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 690-020-0023.
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 January 16, 2018



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 **March 2, 2018**. 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 **March 2, 2018**. 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.