

Oregon Water Resources Department

Water Right Services Division

Water Right Application S-88064 in the)
name of J C WATSON CO.) PROPOSED FINAL ORDER
)

Summary: The Department proposes to issue an order approving Application S-88064, as amended, and a permit consistent with the attached draft permit.

Prior to the issuance of a permit, if one is issued, the Department must receive the following:

- **Approval of Application G-17923**

Please include the application number on any documents submitted.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and Malheur Basin Program OAR 690-510. These statutes and rules can be viewed on the Oregon Water Resources website: <http://www.oregon.gov/owrd/pages/law/index.aspx>

The Department's main page is <http://www.oregon.gov/OWRD/pages/index.aspx>

The Department shall presume that a proposed use will not impair or be detrimental to the public interest if:

- a) 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);
- b) Water is available;
- c) The proposed use will not injure other water rights; and
- d) The proposed use complies with the rules of the Commission. ORS 537.153(2); OAR 690-310-0110(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, the Department must further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. OAR 690-310-0120(3).

If the Department determines that the presumption is established and not overcome, the Department shall issue a proposed final order recommending issuance of the permit subject to any appropriate modifications or conditions.

FINDINGS OF FACT

Application History

1. On March 23, 2015, J C Watson Co. filed a complete application for the following water use:
Amount of Water: 7.26 cubic feet per second (CFS)
Use of Water: supplemental irrigation of 435.0 acres
County: Malheur County
Location: within Sections 13 & 14, Township 20 South, Range 46 East, W.M., and Sections 7 & 18, Township 20 South, Range 47 East. W.M.
Source of Water: Locket Gulch, tributary to Snake River
2. On February 2, 2018, the Department mailed the applicant notice of its Initial Review, determining that **“Not all determinations herein are favorable; therefore it is unlikely that Application S-88064 will be approved, unless a suitable mitigation proposal is provided prior to issuance of the Proposed Final Order.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On February 6, 2018, 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.
4. The Department’s continuing evaluation reveals that the following corrections to the Initial Review are necessary to accurately reflect water availability. The Watermaster determined that water will be available for use March 1 through March 31 and October 16 through October 31 of each year for supplemental irrigation.
5. As noted in the Initial Review, this application proposes supplemental irrigation on underlying acreage proposed for primary irrigation under Application G-17923. Any supplemental irrigation approved under this application must be limited to match that of the primary water right. Application G-17923 proposed primary irrigation on 434.7 acres; therefore the acreage under this application would be limited to 434.7 acres for supplemental irrigation.

Presumption Criteria (a) Consistency with Basin Program

6. The proposed use is allowed under the Malheur Basin Program (OAR 690-510). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

7. The Watermaster’s assessment of water availability for the proposed use determined that water is available March 1 through March 31 and October 16 through October 31 of each year. A copy of this assessment is in the application file. ORS 537.153(2); OAR 690-310-0110(1)(b)

Presumption Criteria (c) Injury Determination

8. The proposed use will not injure other water rights. ORS 537.153(2); OAR 690-310-0110(1)(c)

Presumption Criteria (d) Whether the Use Complies with Rules of the Commission

9. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.153(2)(b); OAR 690-310-0110(1)(d)

Determination of Presumption that a Proposed Surface Water Use will not Impair or be Detrimental to the Public Interest

10. Based on the review of the presumption criteria (a)-(d) above, the presumption has been established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)

Further Evaluation of the Proposed Use

11. No comments were received by the close of the comment period. OAR 690-310-0120(3).
12. Information available in department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the proposed use would not impair or be detrimental to the public interest under ORS 537.153. OAR 690-310-0120(3)

Other Criteria and Requirements

13. The proposed use is not located within or above a scenic waterway, as designated under ORS 390.826.
14. The amount requested, 7.26 CFS, is excessive for the proposed use. The limit shall be reduced to match that of the underlying application G-17923, being 1/80 CFS per acre. Therefore, the rate allowed shall be restricted to 5.43 CFS. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
15. The applicant proposed to apply water when needed and use the most efficient method of water application for the crop being irrigated. These measures are adequate at this time. OAR 690-310-0150(2)(j)
16. Prior to the issuance of a permit, if one is issued, the Department must receive the following:
- a. Approval of Application G-17923.

CONCLUSION OF LAW

1. The proposed use would not impair or be detrimental to the public interest.

NOTE: When issuing permits, ORS 537.170(6) authorizes the Department to include provisions or restrictions concerning the use, control and management of water to be appropriated for the project. The attached draft permit is conditioned accordingly.

PROPOSED ORDER

The Department recommends approval of Application S-88064, as amended, and issuance of a permit consistent with the attached draft permit.

DATED March 27, 2018

A handwritten signature in cursive script, appearing to read "Dwight French", is written over a horizontal line.

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **Friday, May 11, 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(6) 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 aspect of the public welfare, safety and health under ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.170 (8) would be impaired or be adversely 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.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for groundwater), 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 **Friday, May 11, 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>

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- If you have any questions about statements contained in this document, please contact Kim French at 503-986-0816 or Kim.R.French@oregon.gov.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF MALHEUR

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

J C WATSON CO.
PO BOX 300
PARMA ID 83660

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

APPLICATION FILE NUMBER: S-88064

SOURCE OF WATER: LOCKET GULCH, TRIBUTARY TO SNAKE RIVER

USE: SUPPLEMENTAL IRRIGATION ON 434.7 ACRES

MAXIMUM RATE: 5.43 CUBIC FEET PER SECOND

PERIOD OF USE: MARCH 1 THROUGH MARCH 31 AND OCTOBER 16 THROUGH OCTOBER 31

DATE OF PRIORITY: MARCH 23, 2015

POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
20 S	47 E	WM	7	SW SW	1240 FEET NORTH AND 230 FEET EAST FROM SW CORNER, SECTION 7

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	Acres
20 S	46 E	WM	13	NE NE	24.7
20 S	46 E	WM	13	NW NE	35.0
20 S	46 E	WM	13	SW NE	37.0
20 S	46 E	WM	13	SE NE	30.5
20 S	46 E	WM	13	NE NW	37.0
20 S	46 E	WM	13	NW NW	36.0
20 S	46 E	WM	13	SW NW	35.0
20 S	46 E	WM	13	SE NW	38.0
20 S	46 E	WM	14	NE NE	29.0
20 S	46 E	WM	14	SE NE	23.0
20 S	46 E	WM	14	NE SE	28.0
20 S	46 E	WM	14	NW SE	5.0
20 S	46 E	WM	14	SE SE	22.0
20 S	47 E	WM	7	SW SW	21.0

Twp	Rng	Mer	Sec	Q-Q	Acres
20 S	47 E	WM	7	SE SW	0.5
20 S	47 E	WM	18	NW NW	24.0
20 S	47 E	WM	18	SW NW	9.0

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

Measurement Devices and Recording/Reporting of Annual Water Storage Conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
- C. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes water-use. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

A fishway to ensure adequate upstream and downstream passage for fish is required for any in-channel obstruction, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission.

The permittee may be required in the future to install, maintain, and operate fish screening and by-pass devices to prevent fish from entering the proposed diversion and to provide adequate upstream and downstream passage for fish.

At the time of perfection, the permittee may request that the use be certificated as primary irrigation, if water has been used beneficially according to the terms and conditions of this permit, and if underlying primary water rights are simultaneously diminished or canceled.

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.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

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 of the water system shall begin within five years of the date of permit issuance. The deadline to begin construction may not be extended. This permit is subject to cancellation proceedings if the begin construction deadline is missed.

Complete application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Issued

DRAFT - THIS IS NOT A PERMIT

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director