

# Oregon Water Resources Department

## Water Right Services Division

Water Right Application S-88363 in the )  
name of RUDOLF FEIMER AND )  
CAROLYN A. FEIMER )

PROPOSED FINAL ORDER  
TO DENY

**Summary:** The Department proposes to issue an order denying Application S-88363. Surface water in the amount of 0.005 cubic foot per second (CFS) is not available from the requested source.

### ***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 South Coast Basin Program OAR 690-517. 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 not met and the presumption is not established. The Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) OAR 690-310-0120(2).

If the Department determines that the proposed use will impair or be detrimental to the public interest, the Department may issue a proposed final order recommending denial of the application.

### **FINDINGS OF FACT**

#### **Application History**

1. On January 31, 2017, Rudolf Feimer and Carolyn A. Feimer filed a complete application for the following water use:
  - Amount of Water: 0.005 cubic foot per second (CFS)
  - Use of Water: human consumption for one household
  - County: Curry County
  - Location: within Section 36, Township 40 South, Range 13 West, W.M

Source of Water: Chetco River tributary of Pacific Ocean and unnamed stream, a tributary of Chetco River

2. On March 17, 2017, the Department mailed the applicant notice of its Initial Review, determining that "...the diversion of 0.005 CFS of water from Chetco River tributary of Pacific Ocean and Unnamed Stream, a tributary of Chetco River, for year-round domestic use for one household is not allowable..." The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On March 21, 2017, 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.

**Presumption Criteria (a) Consistency with Basin Program**

4. The proposed use is allowed under the South Coast Basin Program (OAR 690-517). ORS 537.153(2); OAR 690-310-0110(1)(a)

**Presumption Criteria (b) Water Availability**

5. An assessment of water availability at 80% exceedance for the proposed use was completed using the Department's Water Availability Reporting System (WARS). A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(c). The assessment established that surface water is not available at an 80 % exceedance any time of the year ORS 537.153(3)(c); OAR 690-310-0150(2)(c)

**Presumption Criteria (c) Injury Determination**

6. 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**

7. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.621(3)(b); OAR 690-310-0150(2)(b)
8. The proposed use is in an area of the state in which OAR 690-033-0310 thru -0340 applies. These rules establish definitions, additional procedures, and standards to aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened, or endangered fish species.

**OAR 690-033-0310 to -0340 Statewide Rules**

9. The proposed use occurs in an area that may affect the habitat of sensitive fish species, and or outside the Columbia Basin, where, threatened or endangered fish species are located. OAR 690-033-0310
10. The applicant has been notified that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied. OAR 690-033-0330(1)(a)

11. The interagency review team (IRT) has been notified that an application has been received in an area that may affect the habitat of sensitive, threatened, or endangered fish species. OAR 690-033-0330(1)(b)

a. The IRT determined that the proposed use will result in diminution of water quality for the habitat of sensitive, threatened, or endangered species and there are no conditions to mitigate the impact of use.

12. The proposed use does comply with rules of the Water Resources Commission not otherwise described above.

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

13. Based on the review of the presumption criteria (a)-(d) above, the presumption has not been established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)

**Further evaluation of the proposed use**

14. 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**

15. The proposed use is not located within or above a Scenic Waterway, as designated under ORS 390.826.

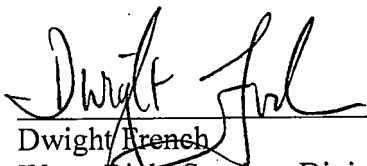
**CONCLUSIONS OF LAW**

The proposed use will impair or be detrimental to the public interest.

**PROPOSED ORDER**

The Department recommends issuing an order denying Application S-88363.

DATED April 24, 2018



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, June 8, 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, June 8, 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 Scott Grew at 503-986-0899.
  - 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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