

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

Water Right Application R-88456 in the  
name of ERIC ANTHONY URSTADT

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PROPOSED FINAL ORDER

**Summary:** The Department proposes to issue an order approving Application R-88456 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:**

- The submission of dam engineering plans and specifications (as-builts) and written approval by the Department of the engineering dam plans and specifications. The permittee shall comply with 690-020-0080(5) prior to the permit issuance.

**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 the Willamette Basin Program OAR 690-502. These statutes and rules can be viewed on the Oregon Water Resources Department's website:

<https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>

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

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 September 5, 2017, Eric Anthony Urstadt filed a complete application for the following water use:

|              |                                                               |
|--------------|---------------------------------------------------------------|
| Source       | RUNOFF, TRIBUTARY TO EAST FORK DAIRY CREEK                    |
| Use          | STORAGE FOR IRRIGATION, WILDLIFE, LIVESTOCK, AND DOMESTIC USE |
| Rate         | 12.3 ACRE-FEET (AF)                                           |
| County       | WASHINGTON COUNTY                                             |
| Place of Use | SECTION 5, TOWNSHIP 2 NORTH, RANGE 3 WEST, W.M.               |

2. On October 20, 2017, the Department mailed the applicant notice of its Initial Review, determining that **“The diversion of 12.3 AF of water from runoff, a tributary of East Fork Dairy Creek, for storage is allowable December 1 through April 30 of each year.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On October 24, 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.

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

4. The proposed use is allowed under the Willamette Basin Program (OAR 690-502-0040(4)(a)). ORS 537.153(2); OAR 690-310-0110(1)(a).

### **Presumption Criteria (b) Water Availability**

5. An assessment of water availability at 50% 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 available during the period December 1 through April 30 of each 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 690-310-0150(2)(e)

### **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 537.153(2)(b); OAR 690-310-0150(2)(b)
8. The proposed use is in an area of the state in which OAR 690-033-0210 thru -0230 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 threatened or endangered fish species.

**OAR 690-033-0210 Lower Columbia Rules (Below Bonneville Dam)**

- A. The proposed use of water is detrimental to the protection or recovery of a threatened or endangered species. OAR 690-033-0220(1)
- B. The proposed use can be conditioned or mitigated to avoid the detriment. OAR 690-033-0220(1)
- C. The application is not presumed to impair or be detrimental to the public interest.

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

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**

- 9. No comments were received by the close of the comment period. OAR 690-310-0120(3)
- 10. 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**

- 11. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826.
- 12. The amount requested, 12.3 AF, is necessary for the proposed use.
- 13. The applicant did not propose methods to measure the amount of water diverted, prevent damage to aquatic life and riparian habitat, prevent discharge of contaminated water to a surface stream, or to prevent damage to public uses of any affected surface waters. OAR 690-310-0150(2)(j)

**CONCLUSION OF LAW**

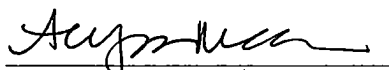
- 1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153.

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.

**PROPOSED ORDER**

The Department recommends approval of Application R-88456 and issuance of a permit consistent with the attached draft permit.

DATED June 4, 2019

A handwritten signature in cursive script, appearing to read 'Alyssa Mucken', is written over a horizontal line.

Alyssa Mucken  
Water Rights Section Manager, 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 by the Water Resources Department no later than **July 19, 2019**. Protests must be in writing and 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, a protest fee of \$410 required by ORS 536.050; and
- If you are not the applicant, a 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 **July 19, 2019**. 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 Servicemembers:** Active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have any questions about statements contained in this document, please contact Kim French at [Kim.R.French@oregon.gov](mailto:Kim.R.French@oregon.gov) or 503-986-0816.
  - 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 503-986-0900.
  - 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 WASHINGTON

**DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS**

THIS DRAFT PERMIT IS HEREBY ISSUED TO

ERIC ANTHONY URSTADT  
39290 NW MURTAUGH RD  
NORTH PLAINS OR 97133

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

APPLICATION FILE NUMBER: R-88456

SOURCE OF WATER: RUNOFF, TRIBUTARY TO EAST FORK DAIRY CREEK

STORAGE FACILITY: BLACKY BOY RESERVOIR

THE MAXIMUM HEIGHT OF THE DAM SHALL NOT EXCEED 25.0 FEET

PURPOSE OR USE OF THE STORED WATER: IRRIGATION, WILDLIFE, LIVESTOCK, AND DOMESTIC USE

MAXIMUM VOLUME: 12.3 ACRE-FEET

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: DECEMBER 1 THROUGH APRIL 30

DATE OF PRIORITY: SEPTEMBER 5, 2017

POINT OF DIVERSION/DAM LOCATION:

| Twp | Rng | Mer | Sec | Q-Q   | Measured Distances                                            |
|-----|-----|-----|-----|-------|---------------------------------------------------------------|
| 2 N | 3 W | WM  | 5   | NW NE | 730 FEET SOUTH AND 1120 FEET EAST FROM N1/4 CORNER, SECTION 5 |

THE AREA TO BE SUBMERGED BY THE RESERVOIR:

| Twp | Rng | Mer | Sec | Q-Q   |
|-----|-----|-----|-----|-------|
| 2 N | 3 W | WM  | 5   | NW NE |

**1. Water Use Measurement, Recording, and Reporting Condition:**

- A. Before water use may begin under this permit, a staff gage that measures the entire range and stage between full reservoir level and dead-pool storage shall be installed in the reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. 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 Director may require the permittee to keep and maintain a record of the volume of water stored, and may require the permittee to report water-storage on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water-use information, the periods of water use and 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.

## **2. Water Quality Conditions:**

- A. The use may be restricted if the quality of the source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.
- B. The permittee shall not release polluted off-channel stored water into waters of the state, unless under emergencies. For routine maintenance, the permittee shall land apply stored water or provide treatment prior to releasing it December 1 through April 15. The permittee shall comply with OAR 340-041 and ensure that water-quality standards are not violated by releases from storage.
- C. The permittee shall not cause pollution of any waters of the state, or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means, per ORS 468B-025(1). If the Department of Environmental Quality (DEQ) determines that pollution of waters of the state is occurring, the permittee is not in compliance with ORS 468.025(1), and DEQ shall notify the Department of the violation.
- D. The permittee shall comply with basin-specific Agricultural Water Quality Management Area Rules described in Oregon Administrative Rule Chapter 603-095. The permittee shall protect riparian areas, including through irrigation practices and the management of any livestock, allowing site capable vegetation to establish and grow along streams, while providing the following functions: shade (on perennial and some intermittent streams), bank stability, and infiltration or filtration of overland runoff.
- E. Once the allocated volume has been stored, all live flow must be passed downstream at a rate equal to that of the inflow in a method that protects instream water quality.

## **DAM CONDITIONS**

- 1. Routine maintenance or repair of the dam, its spillway, and all appurtenant structures shall be performed to include, but not be limited to, removal of woody or high vegetation from the embankment, abutments and spillway; removal of debris from the reservoir, and annual or more frequent cycling of the valve or gate for the low level conduit.

2. Repair or replacement of defective or worn out equipment (including but not limited to gates, valves, and conduits) shall be completed as needed to keep the dam safe.
3. If the dam is enlarged, modified, or otherwise altered, this work must be based on design plans and specifications prepared by a Registered Professional Engineer licensed in Oregon. These plans must be approved by the Water Resources Dam Safety Program prior to such alterations of the dam, its spillway, or any appurtenant structure(s).
4. No valve shall be installed at the downstream end of the low level conduit, and the low level conduit shall not be operated in a pressurized condition unless the dam has been designed for pressurized operation by the design engineer. There must be an operations manual for the dam that describes pressurized operation, and necessary inspections of pressurized conduits for the dam.
5. If used, flashboards shall be maintained in good condition, replaced as needed, and removed as necessary prior to potential winter storms, or unusual rainfall or snowmelt events at any time of the year.

### **RESERVOIR CONDITIONS**

1. The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe (with a minimum diameter of 8" for any in-channel reservoir). This requirement may be waived if the Department determines other means have been provided to evacuate water when necessary.
2. The permittee shall pass all live flow outside the storage season described above.
3. The Director may require the user to measure inflow and outflow, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.
4. This permit allows an annual appropriation (not to exceed the specified volume). This permit does not provide for the appropriation of water for out-of-reservoir uses, the maintenance of the water level or maintaining a suitable freshwater condition. If any water is to be used for out-of-reservoir purposes, a secondary water right is required. If any additional live flow is to be appropriated to maintain either the water level or a suitable freshwater condition, an additional water right is required.

### **STANDARD CONDITIONS**

1. 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.
2. 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.
3. 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.

4. 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.
5. 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.
6. The permitted volume of water shall be stored within five years of the date of permit issuance. If additional time is needed, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.
7. Within one year after storage of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued

**DRAFT - THIS IS NOT A PERMIT**

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

# Mailing List for PFO Copies

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Application R-88456

PFO Date June 4, 2019

**Original mailed via CERTIFIED MAIL to applicant:**

ERIC ANTHONY URSTADT  
39290 NW MURTAUGH RD  
NORTH PLAINS OR 97133

**Sent via auto email:**

1. WRD - Jake Constans - # 18

**Copies sent to:**

3. WRD – File # R-88456
4. WRD – SW Section
5. WRD – Dam Safety, Keith Mills
6. DSL – Wetlands Specialist

Application Specialist: Kim French

Copies Mailed

By: \_\_\_\_\_  
(SUPPORT STAFF)

on: \_\_\_\_\_  
(DATE)

Protest/Standing Dates  
checked  
07/19/19