

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

Water Right Application R-88470 in the)
name of MOMTAZI FAMILY LLC) PROPOSED FINAL ORDER
)

Summary: The Department proposes to issue an order approving Application R-88470 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 October 24, 2017, Momtazi Family LLC filed a complete application for the following water use:

Source	UNNAMED STREAM, TRIBUTARY TO MUDDY CREEK
Use	STORAGE FOR AESTHETICS, FISH LIFE, AND WILDLIFE
Rate	17.4 ACRE-FEET (AF)
County:	YAMHILL COUNTY
Location	SECTIONS 9 AND 16, TOWNSHIP 5 SOUTH, RANGE 5 WEST, W.M.

2. On November 10, 2017, the Department mailed the applicant notice of its Initial Review, determining that **"The diversion of 17.4 AF of water from an unnamed stream, a tributary of Muddy Creek, for storage in Small Reservoir #1, enlargement of a reservoir constructed under Permit R-12823, for aesthetics, fish life, and wildlife 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 November 14, 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). 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. The Department uses WARS at 50% exceedance for determining water availability to provide a consistent method of avoiding periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows are needed to support public uses. 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 to 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 and OAR 690-033-0310 thru -0340 apply. 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 690-033-0210 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, but can be conditioned or mitigated to avoid the detriment. OAR 690-033-0220(1).
- B. The application is presumed to not impair or be detrimental to the public interest.

OAR 690-033-0310 Statewide Rules

- C. The proposed use occurs in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0310(2)
- D. 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)
- E. The interagency review team 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)
- F. The interagency review team was convened to review the application and recommended conditions as necessary to achieve the standards listed in 690-033-0330(2)(a) and (b). The draft permit has been conditioned accordingly.

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

- 9. 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

- 10. No comments were received by the close of the comment period. OAR 690-310-0120(3)
- 11. 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

- 12. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826.
- 13. The amount requested, 17.4 AF, is necessary for the proposed use.
- 14. The applicant did not propose any 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 and to prevent damage to public uses of any affected surface waters. Measures addressing these requirements will be conditions on water use in the permit. OAR 690-310-0120(3)(b)(A)

CONCLUSION OF LAW

1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153(2).

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 R-88470 and issuance of a permit consistent with the attached draft permit.

DATED June 11, 2019



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 26, 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 26, 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 Service Members: Active duty service members 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 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 YAMHILL

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MOMTAZI FAMILY LLC
15765 MUDDY VALLEY RD
MCMINNVILLE OR 97128

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

APPLICATION FILE NUMBER: R-88470

SOURCE OF WATER: UNNAMED STREAM, TRIBUTARY TO MUDDY CREEK

STORAGE FACILITY: SMALL RESERVOIR #1, ENLARGEMENT OF RESERVOIR
CONSTRUCTED UNDER PERMIT R-12823

PURPOSE OR USE OF THE STORED WATER: AESTHETICS, FISH LIFE, WILDLIFE

MAXIMUM VOLUME: 17.4 ACRE-FEET

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: JANUARY 1
THROUGH MARCH 31

DATE OF PRIORITY: OCTOBER 24, 2017

POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	5 W	WM	9	SW SW	119 FEET NORTH AND 154 FEET EAST FROM SW CORNER, SECTION 9

DAM LOCATION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances	Dam Height*	Area Acres
5 S	5 W	WM	9	SW SW	119 FEET NORTH AND 154 FEET EAST FROM SW CORNER, SECTION 9	27.8 FEET	3.6

*DAM HEIGHT SHALL NOT EXCEED

THE AREA TO BE SUBMERGED BY THE RESERVOIR:

Twp	Rng	Mer	Sec	Q-Q
5 S	5 W	WM	9	SW SW

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

- A. The Director may require the permittee to install a staff gage that measures the entire range and stage between full reservoir level and dead-pool level in the reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. If the Director notifies the permittee to install a staff gage, the permittee shall install such device within the period stated in the notice. Once installed, the permittee shall maintain the device in good working order and shall allow the watermaster access to the device.
- B. 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.
- C. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

2. Withdrawal Limitation Condition:

No water shall be diverted under this permit unless the flow in Deer Creek is at or above 80 cubic feet per second.

3. Riparian Condition:

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.

4. Water Quality Condition:

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.

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. The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.
5. The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary or are exempted.
6. 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

Application R-88470

PFO Date June 11, 2019

Original mailed via CERTIFIED MAIL to applicant:

MOMTAZI FAMILY LLC
15765 MUDDY VALLEY RD
MCMINNVILLE OR 97128

Sent via auto email:

1. WRD - Joel Plahn - # 16

Copies sent to:

3. WRD – File # R-88470
4. WRD – SW Section
5. WRD – Dam Safety, Keith Mills
6. DSL – Wetlands Specialist
7. CWRE – Leland Hardy, 690 Loring Dr NW, Salem, OR 97304

Application Specialist: Kim French

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
Protest/Standing Dates checked 07/26/19 _____