

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

Water Right Application G-17898 in the)	SUPERSEDING
name of WK AND K LAND LP)	PROPOSED FINAL ORDER
)	TO DENY

Summary: The Department proposes to issue an order denying Application G-17898 because the use is not classified pursuant to the Oregon Administrative Rule (OAR) 690-502-0050(1)(b).

Although it is unlikely that a permit will be issued, if the Department’s findings change and a permit is issued, prior to the issuance of a permit, the Department must receive the following:

- **Permit recording fees in the amount of \$520.00. A check should be made out to the Oregon Water Resource Department or OWRD.**

Please include the application number on any documents submitted.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.615 through 537.628, and 390.826, and OAR Chapter 690, Divisions 5, 8, 9, 33, 300, 310, 400, 410 and the Willamette Basin Program OAR 690-502. These statutes and rules can be viewed on the following website: <http://www.oregon.gov/owrd/pages/law/index.aspx>

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

The Department shall presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 if:

- a. The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and ORS 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 537.621(2); OAR 690-310-0150(2)(b)

All four criteria must be met for a proposed use to be presumed to ensure the preservation of the public welfare, safety and health. When the criteria are met and the presumption is established 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 690-310-0140

If the Department determines that the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525 and may either:

- a. Propose denial of the application upon a finding that the use will impair or adversely affect the public welfare, safety and health; or

- b. Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public welfare, safety and health and propose approval of the application with appropriate modifications or conditions. OAR 690-310-0140(2)

FINDINGS OF FACT

Application History

1. On July 31, 2014, WK&K Land LP filed a complete application for the following water use:

Source	CORNER WELL (BENT 5189) AND DRIVEWAY WELL (BENT 5180) IN WILLAMETTE RIVER BASIN
Use	PRIMARY IRRIGATION OF 34.81 ACRES AND SUPPLEMENTAL IRRIGATION OF 134.1 ACRES
Rate	3.56 CUBIC FEET PER SECOND (CFS)
County	LINN COUNTY
Place of Use	SECTION 7, TOWNSHIP 12 SOUTH, RANGE 4 WEST, W.M., AND SECTION 13, TOWNSHIP 12 SOUTH, RANGE 5 WEST, W.M.

2. On November 28, 2014, the Department mailed the applicant notice of its Initial Review, determining that **“The appropriation of 2.11 CFS, being 0.44 CFS for primary irrigation of 34.81 acres and 1.67 CFS for supplemental irrigation of 134.1 acres from Corner Well (BENT 5189) in Willamette River Basin and Driveway Well (BENT 5180) in East Channel Willamette River Basin is allowable during the full period requested, March 1 through October 31 of each year, contingent upon the submittal of evidence demonstrating compliance with current minimum well construction standards for Corner Well (BENT 5189) and Driveway Well (BENT 5180).”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On December 2, 2014, 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 application was put on several administrative holds, the last of which ended on December 14, 2016.
5. On December 14, 2016, the applicant amended the application, reducing the proposed rate to 2.11 CFS.
6. On August 15, 2017, the Department issued a Proposed Final Order recommending “that the attached draft permit be issued with conditions.”
7. On May 21, 2018, the applicant removed the Corner Well (BENT 5189) and Driveway Well (BENT 5180) and replaced them with a proposed new well and submitted a revised map, which required a re-assessment of groundwater availability and a public interest review pursuant to OAR 690-033.

Presumption Criteria (a) Consistency with Basin Program

8. The Department has determined that the revised point of appropriation will produce groundwater from unconfined alluvium within a quarter mile of the banks of surface water and is presumed to be hydraulically connected to the surface water. Such hydraulically connected groundwater is classified the same as surface water under OAR 690-502-0240. The use of surface water for irrigation **is not a classified use** in the Willamette Basin Program, per OAR 690-502-0150(2), and therefore, is not allowable.

Presumption Criteria (b) Water Availability

9. A re-assessment of groundwater availability at the new well location has been completed by the Department's Groundwater Section. A copy of this re-assessment is in the file and can be viewed on the Department's website. Groundwater will likely be available within the capacity of the resource, and if properly conditioned (and if authorized), the proposed use of groundwater will avoid injury to existing groundwater rights. ORS 537.621(3)(c); OAR 690-310-0150(2)(c)

Presumption Criteria (c) Injury Determination

10. The proposed use (if authorized) will not injure other water rights. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

Presumption Criteria (d) whether the use complies with rules of the Commission

11. 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)
12. The Department has determined that the proposed groundwater use will have the potential for substantial interference with surface water, namely the Main Stem Willamette River and the East Channel Willamette River. ORS 537.621(3)(b); OAR 690-009-0040(4)
13. The finding of the potential for substantial interference requires that surface water availability be considered. Surface water is available during the full period requested (at an 80 percent exceedance probability). OAR 690-410-0070(1) and OAR 690-400-0010(11)(a)(A)
14. The proposed groundwater use is not within a designated critical groundwater area. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
15. The proposed use is not within or above a state scenic waterway. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
16. No written comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
17. The proposed use does **not** comply with rules of the Water Resources Commission not otherwise described above.
18. 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. Although it is unlikely that a permit will be issued, if the Department's findings change and a permit is issued, the Oregon Department Environmental Quality (DEQ) has recommended conditions to protect water quality and riparian habitat, as well as providing mitigation April 1 through August 31.
- D. The applicant did not propose mitigation compatible with OAR 690-033-0220(2), (3) and (4). OAR 690-033-0220(5)
- E. The application is presumed to impair or be detrimental to the public interest.

Determination of Presumption and whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525

- 19. Because one of the four criteria is not met (the use is not allowed), the presumption is not established. OAR 690-310-0140(1)
- 20. Because the presumption is not established the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525, OAR 690-310-0140(2)

CONCLUSIONS OF LAW

The proposed use will impair or adversely affect the public welfare, safety and health.

PROPOSED ORDER

The Department recommends issuing an order denying Application G-17898.

DATED July 9, 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 **August 23, 2019**. 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, ensure the preservation of the public welfare, safety and health as described in ORS 537.525, ORS 537.621(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 aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 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 **August 23, 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 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 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
Fax: 503-986-0901 Salem, OR 97301-1266
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Mailing List for PFO Copies

Application G-17898

PFO Date July 9, 2019

Original mailed via CERTIFIED MAIL to applicant:

WK AND K LAND LP
3122 SE STAHLBUSH ISLAND RD
CORVALLIS OR 97333

SENT VIA AUTO EMAIL:

1. WRD - Watermaster Lanaya Blakely -# 2
2. Agent – Tina Galloway – tina@stahlbush.com

Copies sent to:

3. WRD - File # G-17898
4. WRD – SW Section

Application Specialist: Kim French

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/Standing Dates
checked

08/23/19
