

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

Water Right Application R-88766 in the	)	
name of BROTHERS RANCH LLC and	)	PROPOSED FINAL ORDER
ZADOK RANCH LLC	)	

Summary: The Department proposes to issue an order approving Application R-88766 and a permit consistent with the attached draft permit, contingent upon submittal and approval of documentary evidence for mitigation obtained under Application G-18809.

Prior to the issuance of a permit, if one is issued, 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 Resources 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) 537.153 through 537.175, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and the Deschutes Basin Program (OAR 690-505). These statutes and rules can be viewed on the following website: <https://www.oregon.gov/OWRD/programs/policylawandrules/Pages.default.aspx>.

The Department's main website can be found at: <https://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 April 2, 2019, Brothers Ranch LLC and Zadok Ranch LLC filed a complete application for the following water use:

Source	WELL 1, TO BE APPROPRIATED UNDER APPLICATION G-18809, WITHIN WHYCHUS CREEK BASIN
Use	STORAGE FOR AQUATIC LIFE, WILDLIFE, FIRE PROTECTION, AND RECREATION
Rate	19.0 ACRE-FEET (AF)
County	DESCHUTES COUNTY
Place of Use	SECTION 13, TOWNSHIP 14 SOUTH, RANGE 10 EAST, W.M.

2. On July 12, 2019, the Department mailed the applicant notice of its Initial Review, determining that **“The storage of 19.0 AF of water in a reservoir from Well 1, to be appropriated under Application G-18809, within the Whychus Creek Basin, for aquatic life, wildlife, fire protection, and recreation January 1 through December 31 of each year may be allowable, contingent upon submittal and approval of documentary evidence for mitigation obtained under Application G-18809.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On July 16, 2019, 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 uses are allowed under the Deschutes Basin Program (OAR 690-505-0040). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

5. An assessment of groundwater availability was completed under Application G-18809 by the Department’s Groundwater Section, pursuant to OAR 690-009. A copy of this assessment was added to this application file. 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 537.153(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 an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded. ORS 537.153(2)(b); OAR 690-310-0150(2)(b)

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

8. No comments were received by the close of the comment period. OAR 690-310-0120(3)
9. Information available in department files, received from other interested agencies, and other available information does provide a preponderance of evidence that the proposed use would impair or be detrimental to the public interest under ORS 537.153. OAR 690-310-0120(3)

Other Criteria and Requirements

10. The proposed use is located above the Deschutes Scenic Waterway, as designated under ORS 390.826. Without mitigation, there is a preponderance of evidence that the proposed use will measurably reduce surface water flows necessary for the Deschutes River Scenic Waterway. The applicant must mitigate for the appropriation of groundwater under Application G-18809.
11. The amount requested, 19.0 AF, is necessary for the proposed use.
12. The applicant proposed 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. These measures are adequate at this time. OAR 690-310-0150(2)(j)
13. Pursuant to ORS 390.835(9), the appropriation of groundwater under Application G-18809 shall be denied unless mitigation is provided

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.

PROPOSED ORDER

The Department recommends approval of Application R-88766 and issuance of a permit consistent with the attached draft permit, **contingent upon submittal and approval of documentary evidence for mitigation obtained under Application G-18809.**

DATED October 1, 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 **November 15, 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 **November 15, 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 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 DESCHUTES

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BROTHERS RANCH LLC
ZADOK RANCH LLC
22870 SW ENO PLACE
TUALATIN OR 97062

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

APPLICATION FILE NUMBER: R-88766

SOURCE OF WATER: WELL 1, TO BE APPROPRIATED UNDER APPLICATION G-18809,
WITHIN WHYCHUS CREEK BASIN

STORAGE FACILITY: A RESERVOIR

THE RESERVOIR IS ENTIRELY BELOW GROUND SURFACE; THERE IS NO DAM

PURPOSE OR USE OF THE STORED WATER: AQUATIC LIFE, WILDLIFE, FIRE PROTECTION,
AND RECREATION

MAXIMUM VOLUME: 19.0 ACRE-FEET

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

DATE OF PRIORITY: APRIL 2, 2019

POINT OF DIVERSION:

POA Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
WELL 1	14 S	10 E	WM	13	SW NW	1118 FEET NORTH AND 671 FEET EAST FROM W 1/4 CORNER, SECTION 13

THE AREA TO BE SUBMERGED BY THE RESERVOIR:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances	Acres
14 S	10 E	WM	13	SW NW	528 FEET NORTH AND 432 FEET EAST FROM W 1/4 CORNER, SECTION 13	1.6

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

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation. 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 used each month, and shall submit an annual report which includes the recorded water-use measurements to the Department annually, or more frequently as may be required by the Director. 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.
2. Mitigation water obtained under Permit G-XXXXX (Application G-18809) must be legally protected instream in the General Zone of Impact for the life of the permit and subsequent certificate(s). Regulation and/or cancellation of Permit R-XXXXX (Application R-88766) and Permit G-XXXXX (Application G-18809), or subsequent certificate(s) will occur if the required mitigation under Application G-18809 is not maintained.

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

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-88766

PFO Date October 1, 2019

Original mailed via CERTIFIED MAIL to applicant:

BROTHERS RANCH LLC
ZADOK RANCH LLC
22870 SW ENO PLACE
TUALATIN OR 97062

Sent via auto email:

1. Applicant - tom@sterling.net
2. Agent – Dave Newton - dnewton@newtonconsultants.com
3. WRD - Jeremy Giffin - # 11

Copies sent to:

4. WRD – File # R-88766
5. WRD – SW Section
6. DSL – Wetlands Specialist

Application Specialist: Kim French

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/Standing Dates
checked

11/15/19