

FINDINGS OF FACT

Application History

1. On December 8, 2014, JR Land and Livestock filed a complete application for the following water use:

Source	WELL 1 (MALH 54108/L108947), WELL 2 (MALH 54113/L108948) AND WELL 3 (MALH 53867/L101316) IN MALHEUR RIVER BASIN
Use	PRIMARY IRRIGATION OF 166.7 ACRES AND SUPPLEMENTAL IRRIGATION OF 196.8 ACRES
Rate	4.54 CUBIC FEET PER SECOND (CFS)
County	MALHEUR COUNTY
Place of Use	SECTION 4, 21, 28 AND 29, TOWNSHIP 18 SOUTH, RANGE 42 EAST, W.M., AND SECTION 7 AND 8, TOWNSHIP 18 SOUTH, RANGE 43 EAST, W.M.

2. On July 3, 2015, the Department mailed the applicant notice of its Initial Review, determining that **“The appropriation of 2.38 CFS of water from Well 1 (MALH 54108/L108947) and Well 3 (MALH538671/L101316) in Bully Creek Basin may be allowable during the full period requested, April 1 through October 31 of each year...”** and **“...the appropriation of 2.10 CFS of water from Well 2 (MALH 54113/L108948) in Swede Flat Creek Basin for irrigation is not allowable, and it appears unlikely that you will be issued a permit that would include this well.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On July 7, 2015, 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 administrative hold, which ended January 19, 2016.
5. The Department has determined that the Initial Review erroneously described limiting the acreage proposed for irrigation to 186.4 acres. The allowable acreage proposed for irrigation shall be corrected to reflect 166.9 acres for primary irrigation and 196.4 acres for supplemental irrigation as proposed in the application.
6. The Department also erroneously omitted a finding identifying that the measurements for the location of Well 3 (MALH 53867/L101316) are incorrect. According to the well log, Well 3 is located approximately 1164 feet South and 700 feet West from the E1/4 corner, Section 7, which puts it in the NESE, Section 7, Township 18 South, Range 43 East, W.M. The application map describes Well 3 as 250 feet South and 1800 feet west from the E1/4 corner, Section 7 and identifies it in the SESE, however the measurements given measure to the NWSE. **The Department will need a corrected map identifying the correct location of Well 3 prior to issuing a permit.**

Presumption Criteria (a) - Consistency with Basin Program

7. The proposed use is allowed under the Malheur Basin Program (OAR 690-510-0010(1)). ORS 537.621(3)(b); OAR 690-310-0150(2)(b)

Presumption Criteria (b) - Water Availability

8. An assessment of groundwater availability has been completed by the Department's Groundwater Section. A copy of this 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

9. 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

10. 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)
11. The Department has determined that the proposed groundwater use from Well 1 and Well 3 will not have the potential for substantial interference with surface water. ORS 537.621(3)(b); OAR 690-009-0040(4)
12. The Department has determined that the proposed groundwater use from Well 2 will have the potential for substantial interference with surface water, namely Swede Flat Creek. ORS 537.621(3)(b); OAR 690-009-0040(4)
13. The finding of the potential for substantial interference for Well 2 requires that surface water availability be considered. Surface water is not available anytime of the year (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 located 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 from Well 2 is in an area of the state in which OAR 690-033-0115 thru -0140 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 690-033-0115 Upper Columbia Rules (Above Bonneville Dam)

- A. The proposed use is not consistent with the Fish and Wildlife Program (Program).
- B. The proposed use can be conditioned to be consistent with the Program.
- C. The application, as conditioned, is not presumed to impair or be detrimental to the public interest. OAR 690-033-0120(1)
- D. The applicant has not provided information to show compliance with the following standards: OAR 690-033-0120(1)

- a. The proposed use does not involve hydraulically connected groundwater with potential for substantial interference as listed in OAR 690-009 (division 9 of this Chapter) during the time period of April 15 to September 30, except that which is artificially recharged or as otherwise provided in OAR 690-033-0140;
 - b. The proposed use complies with existing state and federal water quality standards; and
 - c. The proposed use complies with water use measurement, recording and reporting required by the Director.
16. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

Determination of Presumption that a proposed groundwater use will ensure the preservation of the public welfare, safety and health

Based on the review of the presumption criteria (a)-(d), the presumption has been established for use of groundwater from Well 1 and Well 3. However, the presumption has **not** been established for use of groundwater from Well 2. ORS 537.621(2); OAR 690-310-0150(2)(g)

Further evaluation of the proposed use

17. No comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
18. 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 ensure the preservation of the public welfare, safety and health under ORS 537.525. OAR 690-310-0140(3)

Other Criteria and Requirements

19. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826. 537.621(3)(a); OAR 690-310-0150(2)(a)
20. The amount requested, 4.54 CFS, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)
21. The applicant proposed methods to measure the amount of water appropriated, 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)

CONCLUSIONS OF LAW

1. The proposed use, as limited and conditioned, would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

NOTE: When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety and health.

PROPOSED ORDER

The Department recommends approval of Application G-17974 and issuance of a permit consistent with the attached draft permit.

DATED January 21, 2020



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 **March 6, 2020**. 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, 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 **March 6, 2020**. 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

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF MALHEUR

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

JR LAND AND LIVESTOCK
PO BOX 800
HARPER OR 97906

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

APPLICATION FILE NUMBER: G-17974

SOURCE OF WATER: WELL 1 (MALH 54108/L108947) AND WELL 3 (MALH 53867/L101316) IN MALHEUR RIVER BASIN

PURPOSE OR USE AND MAXIMUM RATE: 4.54 CUBIC FEET PER SECOND (CFS), BEING 2.08 CFS FOR PRIMARY IRRIGATION OF 166.9 ACRES AND 2.46 CFS FOR SUPPLEMENTAL IRRIGATION OF 196.4 ACRES

PERIOD OF USE: APRIL 1 THROUGH OCTOBER 31

DATE OF PRIORITY: DECEMBER 8, 2014

WELL LOCATIONS:

POA Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
WELL 1	18 S	42 E	WM	28	NE NW	775 FEET SOUTH AND 2225 FEET EAST FROM NW CORNER, SECTION 28
WELL 3	18 S	43 E	WM	7	NW SE	250 FEET SOUTH AND 1800 FEET WEST FROM E1/4 CORNER, SECTION 7

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

PRIMARY IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
18 S	42 E	WM	4	SW NW	19.2
18 S	42 E	WM	4	SE NW	20.0
18 S	42 E	WM	4	NE SW	17.4
18 S	42 E	WM	4	NW SW	2.6
18 S	42 E	WM	4	SW SW	1.0
18 S	42 E	WM	4	SE SW	24.0

PRIMARY IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
18 S	42 E	WM	4	SW SE	2.0
18 S	42 E	WM	21	SE SW	5.5
18 S	42 E	WM	28	NW NE	2.0
18 S	42 E	WM	28	NE NW	7.0
18 S	42 E	WM	28	SE NW	5.5
18 S	43 E	WM	7	NE SE	24.2
18 S	43 E	WM	8	NW NW	0.4
18 S	43 E	WM	8	SW NW	26.1
18 S	43 E	WM	8	SE NW	10.0

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
18 S	42 E	WM	4	SW NW	20.8
18 S	42 E	WM	4	NE SW	2.4
18 S	42 E	WM	4	NW SW	37.4
18 S	42 E	WM	4	SW SW	15.1
18 S	42 E	WM	4	SE SW	8.7
18 S	42 E	WM	21	SW SW	3.0
18 S	42 E	WM	28	NE NW	16.5
18 S	42 E	WM	28	NW NW	36.5
18 S	42 E	WM	28	SW NW	33.0
18 S	42 E	WM	28	SE NW	5.5
18 S	42 E	WM	29	SE NE	17.5

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. **Static Water Level Condition:**

The Department requires the water user to obtain, from a qualified individual (see below), and report annual static water levels for each well on the permit. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter. Annual measurements are required whether or not the well is used. The first annual measurement will establish a reference level against which future measurements will be compared. However, the Director may establish the reference level based on an analysis of other water-level data. The Director may require the user to obtain and report additional water levels each year if more data are needed to evaluate the aquifer system.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor, or pump installer licensed by the Construction Contractors Board. Measurements shall be submitted on forms provided by, or specified by, the Department. Measurements shall be made with equipment that is accurate to at least the standards specified in OAR 690-217-0045. The Department requires the individual performing the measurement to:

- A. Associate each measurement with an owner's well name or number and a Department well log ID; and
- B. Report water levels to at least the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method of measurement; and
- D. Certify the accuracy of all measurements and calculations reported to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if any of the following events occur:

- A. Annual water-level measurements reveal an average water-level decline of three or more feet per year for five consecutive years; or
- B. Annual water-level measurements reveal a water-level decline of 15 or more feet in fewer than five consecutive years; or
- C. Annual water-level measurements reveal a water-level decline of 25 or more feet; or
- D. Hydraulic interference leads to a decline of 25 or more feet in any neighboring well with senior priority.

The period of restricted use shall continue until the water level rises above the decline level which triggered the action or the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or causing substantial interference with senior

water rights. The water user shall not allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

3. **Well Identification Tag Condition:**

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

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. If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.
3. If substantial interference with surface water or a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.
4. The well(s) shall be constructed and maintained in accordance with the General Standards for the Construction and Maintenance of Water Supply Wells in Oregon. The works shall be equipped with a usable access port adequate to determine water-level elevation in the well at all times.
5. Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.
6. Prior to receiving a certificate of water right, the permit holder shall submit to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data every ten years thereafter.
7. 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.
8. 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.

9. Construction of the well 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 construction deadline to begin is missed.
10. Complete application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.
11. Within one year after complete application of water to the proposed use, 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/Draft Permit Copies

Application G-17974

PFO Date January 21, 2020

Original mailed via CERTIFIED MAIL to applicant:

JR LAND AND LIVESTOCK
PO BOX 800
HARPER OR 97906

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Sent via auto email:

1. WRD – Watermaster District #9, Ronald K. Jacobs
2. WRD - Jason Spriet ER

Copies sent to:

1. WRD - File # G-17974
2. WRD – SW Section

Application Specialist: Kim French