

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

Water Right Application S-88455 in the            )  
name of OREGON DEPARTMENT OF                )  
FISH AND WILDLIFE                                )                PROPOSED FINAL ORDER

**Summary:** The Department proposes to issue an order approving Application S-88455 and a permit consistent with the attached draft permit.

**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 Umatilla Basin Program (OAR 690-507). 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 August 22, 2017, Oregon Department of Fish and Wildlife filed a complete application for the following water use:

Source	UMATILLA RIVER, TRIBUTARY TO COLUMBIA RIVER
Use	FISH CULTURE
Rate	15.6 CUBIC FEET PER SECOND (CFS)
County	UMATILLA COUNTY
Place of Use	SECTION 7, TOWNSHIP 2 NORTH, RANGE 33 AST, W.M.

2. On October 13, 2017, the Department mailed the applicant notice of its Initial Review, determining that “...**the diversion of 15.6 CFS of water from Umatilla River, a tributary of Columbia River, for fish culture is not allowable.**” The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On October 17, 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 Umatilla Basin Program (OAR 690-507-0050(2)(c)(A). ORS 537.153(2); OAR 690-310-0110(1)(a)

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

5. An assessment of water availability at 80% exceedance for the proposed use was completed using the Department’s Water Availability Reporting System. A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). The assessment established that water surface water is not available, however because the proposed use is non-consumptive, the Department determined that water availability in downstream basins will not be adversely affected. ORS 537.153(2); 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 690-033-0115 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 consistent with the Fish and Wildlife Program (Program).
- B. The proposed use can be conditioned to be consistent with the Program.
- C. The application is not presumed to impair or be detrimental to the public interest. OAR 690-033-0120(1)
- D. The applicant has provided information to show compliance with the following standards:  
OAR 690-033-0120(1)
  - a. The proposed use does not involve appropriation of direct streamflow during the time period of April 15 to September 30, except as provided in OAR 690-033-0140;
  - b. The proposed use complies with screen design, installation, operation specifications and passage requirements as listed in ORS 498.301 through 498.346 and 509.580 through 509.910;
  - c. The proposed use complies with existing state and federal water quality standards; and
  - d. The proposed use complies with water use measurement, recording and reporting required by the Director.
- E. Based on the review pursuant to OAR 690-033, the Department of Environmental Quality (DEQ) recommends the applicant review their operations to ensure best management practices are in place to ensure that the drinking water source is protected. Best management practices may include minimizing contributions that may increase water temperature or contribute to algae and aquatic weed growth (such as nutrients like nitrate and phosphorous, organic matter, or suspended sediment contributions), and minimizing the use of antibiotics, drugs, or other chemicals (if used). DEQ also recommends that the applicant provide information to the City of Pendleton on the volume, type, and timing of use of antibiotics, drugs, or other chemicals used in facility operations.

**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 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, 15.6 CFS, is necessary for the proposed use.
13. 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)

**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 S-88455 and issuance of a permit consistent with the attached draft permit.

DATED February 4, 2020

  
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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 20, 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, 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 **March 20, 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
- 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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STATE OF OREGON

COUNTY OF UMATILLA

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

OREGON DEPARTMENT OF FISH AND WILDLIFE  
4034 FAIRVIEW INDUSTRIAL DR  
SALEM, OR 97302

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

APPLICATION FILE NUMBER: S-88455

SOURCE OF WATER: UMATILLA RIVER, TRIBUTARY TO COLUMBIA RIVER

PURPOSE OR USE OF THE WATER: FISH CULTURE

MAXIMUM RATE: 15.6 CUBIC FEET PER SECOND

PERIOD OF USE: NOVEMBER 1 THROUGH JANUARY 31

DATE OF PRIORITY: AUGUST 22, 2017

POINTS OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	33 E	WM	7	SW NW	472 FEET SOUTH AND 667 FEET EAST FROM THE NW CORNER, SWNW, SECTION 7

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q
2 N	33 E	WM	7	SW NW

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 diversion. 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 diverted each month, and shall submit a report which includes 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. 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 prior to diversion of any water. Permittee shall obtain written approval from ODFW that the installation of the required screen and by-pass devices meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens and/or by-pass devices are not necessary.
3. Water use will be regulated if Instream Water Right Certificate 59838 is not met, unless bypass water back up is returned to the point of diversion.

### **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. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.



8. 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 Draft Permit Copies

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Application S-88455

PFO Date February 4, 2020

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

OREGON DEPARTMENT OF FISH AND WILDLIFE  
4034 FAIRVIEW INDUSTRIAL DR  
SALEM, OR 97302

Copies Mailed

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

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

**Sent via auto email:**

1. Applicant – Bill Duke - william.b.duke@state.or.us
2. WRD – Watermaster District #5, Gregory M. Silbernagel
3. WRD - Chris Kowitz NCR

**Copies sent to:**

3. WRD – File # S-88455
4. WRD – SW Section

Application Specialist: Kim French