

Oregon Water Resources Department

Water Right Services Division

Water Right Application R-88590 in the)
name of MGN LLC)
)

PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application R-88590 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:

- **Permit recording fees in the amount of \$518.80. 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 John Day Basin Program OAR 690-506. These statutes and rules can be viewed on the Oregon Water Resources Department's website: <http://www.oregon.gov/owrd/pages/law/index.aspx>

The Department's main page is <http://www.oregon.gov/OWRD/pages/index.aspx>

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 June 11, 2018, MGN LLC filed a complete application for the following water use:

Source	RUNOFF, TRIBUTARY TO FOX CREEK
Use	STORAGE FOR FIRE PROTECTION, LIVESTOCK, WILDLIFE, AND AESTHETICS
Volume	28.2 ACRE-FEET (AF), BEING 6.2 ACRE-FEET (AF) IN RESERVOIR 1, 6.3 AF IN RESERVOIR 2, 6.3 AF IN RESERVOIR 3, 4.7 AF IN RESERVOIR 4, AND 4.7 AF IN RESERVOIR 5
County	GRANT COUNTY
Place of Use	SECTIONS 4, 8, 9, AND 17, TOWNSHIP 11 SOUTH, RANGE 30 EAST, W.M.

2. On August 3, 2018, the Department mailed the applicant notice of its Initial Review, determining that **"The diversion of 28.2 AF of water from runoff, tributary to Fox Creek, for storage in Reservoir 1, Reservoir 2, Reservoir 3, Reservoir 4, and Reservoir 5, for fire protection, livestock, and wildlife is allowable January 1 through April 14 of each year."** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On August 7, 2018, 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 John Day Basin Program (OAR 690-506-0040). 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 electronic application file. This review is done consistent with OAR 690-410-0070(2)(c). The assessment established that surface water is available January 1 to June 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 537.621(3)(b); OAR 690-310-0150(2)(b) ORS 537.153(2)(b);

8. The proposed use is in an area of the state in which OAR 690-033-0115 thru -0140 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 690-033-0115 Upper Columbia Rules (Above Bonneville Dam)

- A. The application is not presumed to impair or be detrimental to the public interest. OAR 690-033-0120(1)
- B. The applicant has provided information to show compliance with the following standards:
OAR 690-003-0120(1)(a)
 - 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;

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 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 located above the John Day Scenic Waterway, as designated under ORS 390.826.
13. The amount requested, 28.2 AF, is necessary for the proposed use.

CONCLUSION OF LAW

1. The proposed use would not impair or be detrimental to the public interest.

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-88590 and issuance of a permit consistent with the attached draft permit.

DATED February 4, 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 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 Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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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 503-986-0801.
 - 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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DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF GRANT

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MGN LLC
30483 HWY 395 N
FOX OR 97856

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

APPLICATION FILE NUMBER: R-88590

SOURCE OF WATER: RUNOFF, TRIBUTARY TO FOX CREEK

STORAGE FACILITIES: RESERVOIR 1, RESERVOIR 2, RESERVOIR 3, RESERVOIR 4, AND
RESERVOIR 5

PURPOSE OR USE OF THE STORED WATER: FIRE PROTECTION, LIVESTOCK, AND
WILDLIFE

MAXIMUM VOLUME: 28.2 ACRE-FEET (AF), BEING 6.2 AF IN RESERVOIR 1, 6.3 AF IN
RESERVOIR 2, 6.3 AF IN RESERVOIR 3, 4.7 AF IN RESERVOIR 4, AND 4.7 AF IN RESERVOIR 5

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: JANUARY 1
THROUGH APRIL 14

DATE OF PRIORITY: JUNE 11, 2018

DAM LOCATIONS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances	Dam Height	Area Acres
RESERVOIR 1	11 S	30 E	WM	4	SW SE	820 FEET NORTH AND 2880 FEET EAST FROM SW CORNER, SECTION 4	10	0.7
RESERVOIR 2	11 S	30 E	WM	8	NW NE	710 FEET SOUTH AND 1540 FEET WEST FROM NE CORNER, SECTION 8	10	0.7
RESERVOIR 3	11 S	30 E	WM	9	NE NW	620 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER, SECTION 8	10	0.7
RESERVOIR 4	11 S	30 E	WM	9	SE SE	690 FEET NORTH AND 2070 FEET EAST FROM S1/4 CORNER, SECTION 9	10	0.5
RESERVOIR 5	11 S	30 E	WM	17	NW SE	3040 FEET SOUTH AND 1460 FEET WEST FROM NE CORNER, SECTION 17	10	0.5

THE AREA TO BE SUBMERGED BY THE RESERVOIRS:

Twp	Rng	Mer	Sec	Q-Q
11 S	30 E	WM	4	SW SE
11 S	30 E	WM	8	NW NE
11 S	30 E	WM	9	NE NW
11 S	30 E	WM	9	SE SE
11 S	30 E	WM	17	NW SE

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

- A. Before water use may begin under this permit, a staff gage that measures the entire range and stage between full reservoir level and dead-pool storage shall be installed in each reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. 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 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.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

2. Off-Channel Stored Water Release Condition:

The permittee shall no release polluted water from any off-channel reservoir into waters of the state except when the release is directed by the State Engineer to prevent dam failure.

3. 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.

4. Scenic Waterway Condition:

Diversion of water under this permit is contingent on designated scenic waterway flows being met downstream. The user is required to monitor streamflow at John Day River at McDonald Ferry, Oregon, gage 14048000, and discontinue diversion when the flows specified below are unmet at the gage. At the discretion of the Director, the location and nature of streamflow monitoring required to protect scenic waterway flows are subject to change. In addition, the watermaster may regulate diversion under this right if it is determined by the Department that the flows listed below are unmet at the gage.

John Day Scenic Waterway

Month	Minimum Flow (CFS)
January	500
February	1000
March	2000
April 14	2000

5. Agricultural Water Quality Management Area Rules Condition:

The permittee shall comply with basin-specific Agricultural Water Quality Management Area Rules in OAR 603-095. Livestock management and cropping must protect riparian areas on the property, allowing site capable vegetation along streams to establish and grow to provide the following functions; shade (on perennial and some intermittent streams), bank stability, and infiltration or filtration of overland runoff. Active management of livestock and/or a livestock exclusion fence is needed to protect riparian areas and provide the required functions.

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. 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-88590

PFO Date

Original mailed via CERTIFIED MAIL to applicant:

MGN LLC
30483 HWY 395 N
FOX OR 97856

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

SENT VIA AUTO EMAIL:

1. WRD - Eric Julsrud - # 4

Copies sent to:

2. WRD – Surface Water Section
3. Agent – Bob Bagett, Bob@johndaysurveyors.com
4. WRD – File # R-88590

SPECIALIST: Kim French