

FINDINGS OF FACT

Application History

1. On March 2, 2020, Johnson Livestock LLC filed a complete application for the following water use:
 - Source:** ROCK CREEK AND THREEMILE CREEK, TRIBUTARIES TO WHITE RIVER; AND NORTH FORK OF GATE CREEK AND AN UNNAMED DRAINAGE, TRIBUTARIES TO ROCK CREEK
 - Use:** STORAGE FOR LIVESTOCK, RECREATION, FISH LIFE, WILDLIFE, AND IRRIGATION
 - Period of Use:** JANUARY 1 THROUGH DECEMBER 31
 - Volume:** 68.5 ACRE-FEET (AF)
 - County:** WASCO COUNTY
 - Place of Use:** SECTIONS 15, 16, 21, AND 28, TOWNSHIP 4 SOUTH, RANGE 12 EAST, W.M.
2. On April 17, 2020, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 68.5 AF of water from Rock Creek and Threemile Creek, tributaries to White River; and North Fork of Gate Creek and an unnamed drainage, tributaries to Rock Creek, for storage in 14 reservoirs for livestock, recreation, fish life, wildlife, and irrigation is allowable January 1 through April 14 of each year, contingent on the submittal of additional required information. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On April 21, 2020, the Department provided notice of the application in its weekly public notice, requesting comments, and providing information for interested persons about obtaining future notices and a copy of the Proposed Final Order.
4. On July 6, 2020, the Department received maps that meet the minimum application requirements under OAR 690-310-0050(4)(a), as requested in the Initial Review.

Presumption Criteria (a) Consistency with Basin Program

5. Storage for livestock, recreation, fish life, wildlife, and irrigation is allowed under the Deschutes Basin Program (OAR 690-505-0020(a)). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

6. An assessment of water availability at 50% 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)(c). The assessment established that surface water is available during the period January 1 through June 30 of each year. ORS 537.153(3)(c); OAR 690-310-0150(2)(c)

Presumption Criteria (c) Injury Determination

7. 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

8. 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)
9. The proposed use is in an area of the state in which OAR 690-033-0115 thru -0140 and OAR 690-033-0310 thru -0340 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 proposed use is consistent with the Fish and Wildlife Program (Program).
- B. The application is not presumed to impair or be detrimental to the public interest. OAR 690-033-0120(1)
- C. The application shall comply with the following standard:
 - a. The proposed use shall not involve appropriation of direct streamflow during the time period of April 15 to September 30, except as provided in OAR 690-033-0140. OAR 690-033-0120(1)(a)

OAR 690-033-0310 Statewide Rules

- A. The proposed use occurs occur in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0310(2)
- B. The applicant has been notified that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied. OAR 690-033-0330(1)(a)
- C. The interagency review team has been notified that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0330(1)(b)
- D. The interagency review team was convened to review the application and recommended conditions as necessary, including limiting the period of use to February 1 through April 14, to achieve the standards listed in 690-033-0330(2)(a) and (b). The draft permit has conditions numbered 2-4 that require fish passage, an in-water work condition and a release condition, to protect fish habitat and water quality.

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

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 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

12. The proposed use is located above the Deschutes Scenic Waterway, as designated under ORS 390.826.
13. The amount requested, 68.5 AF, is necessary for the proposed use.
14. 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)
15. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

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-88813 and issuance of a permit consistent with the attached draft permit.

DATED November 24, 2020

Alyssa Mucken Digitally signed by Alyssa Mucken
Date: 2020.11.13 14:52:47 -08'00'

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 **January 8, 2021**.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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 **January 8, 2021**. 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;

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF WASCO

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

JOHNSON LIVESTOCK LLC
79681 WOODCOCK RD
WAMIC OR 97063

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

APPLICATION FILE NUMBER: R-88813

	Reservoir Name	Volume (Acre Feet)	Maximum Dam Height (Feet)	SOURCE			
				Rock Creek	Threemile Creek	North Fork Gate Creek	Unnamed Drainage
1	Pierce	8.0	15.0	X	X	X	
2	Lower Duckshack	8.1	9.0	X	X	X	
3	Duckshack North	8.9	10.0	X	X	X	
4	Duckshack South	8.0	12.0	X	X	X	
5	Upper Duckshack	5.7	11.0	X	X	X	
6	Woods	8.5	16.0	X	X	X	
7	Flood Field	0.7	5.0	X	X	X	
8	Grey Hill	2.7	9.0	X	X	X	
9	Ponderosa	7.3	11.0	X	X	X	
11	Valley 1	2.6	7.0	X	X	X	X
12	Valley 2 South	3.3	10.0	X	X	X	
13	Valley 2 North	1.1	8.0	X	X	X	X
14	Pub 2	1.1	6.0	X	X	X	
15	Valley Flood	2.5	9.0	X	X	X	X

PURPOSE OR USE OF THE STORED WATER: LIVESTOCK, RECREATION, FISH LIFE, WILDLIFE, AND IRRIGATION

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

DATE OF PRIORITY: MARCH 2, 2020

AUTHORIZED POINTS OF DIVERSION:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
ROCK CREEK	4 S	11 E	WM	14	SW SE	1000 FEET NORTH AND 1200 FEET EAST FROM S1/4 CORNER, SECTION 14
THREEMILE CREEK	4 S	11 E	WM	10	NE NE	726 FEET SOUTH AND 528 FEET WEST FROM NE CORNER, SECTION 10
N.F. GATE CREEK	4 S	11 E	WM	21	SE NE	1280 FEET NORTH AND 1500 FEET EAST FROM C1/4 CORNER, SECTION 21
UNNAMED DRAINAGE 11	4 S	12 E	WM	15	SE SE	960 FEET NORTH AND 45 FEET WEST FROM SE CORNER, SECTION 15
UNNAMED DRAINAGE 13	4 S	12 E	WM	15	SW SE	1065 FEET NORTH AND 245 FEET EAST FROM S1/4 CORNER, SECTION 15
UNNAMED DRAINAGE 15	4 S	12 E	WM	15	NE SE	745 SOUTH AND 365 EAST FROM E1/4 CORNER, SECTION 16

DAM LOCATIONS:

Res #	Reservoir Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1	PIERCE	4 S	12 E	WM	28	NE NW	645 FEET SOUTH AND 740 FEET WEST FROM N1/4 CORNER, SECTION 28
2	LOWER DUCK SHACK	4 S	12 E	WM	21	SE SE	220 FEET NORTH AND 140 FEET WEST FROM SE CORNER, SECTION 21
3	DUCKSHACK NORTH	4 S	12 E	WM	21	SE SE	110 FEET NORTH AND 800 FEET WEST FROM SE CORNER, SECTION 21
4	DUCKSHACK SOUTH	4 S	12 E	WM	28	NE NE	200 FEET SOUTH AND 640 FEET WEST FROM NE CORNER, SECTION 28
5	UPPER DUCK SHACK	4 S	12 E	WM	21	SE SW	120 FEET NORTH AND 530 FEET WEST FROM S1/4 CORNER, SECTION 21
6	WOODS	4 S	12 E	WM	21	SW SW	905 FEET SOUTH AND 485 FEET EAST FROM SW CORNER, SECTION 21
7	FLOOD FIELD	4 S	12 E	WM	21	NE SE	1205 FEET SOUTH AND 265 FEET WEST FROM E1/4 CORNER, SECTION 21
8	GREY HILL	4 S	12 E	WM	21	NW SE	820 FEET SOUTH AND 2100 FEET WEST FROM E1/4 CORNER, SECTION 21
9	PONDEROSA	4 S	12 E	WM	21	NW SW	430 FEET SOUTH AND 1160 FEET EAST FROM W1/4 CORNER, SECTION 21
11	VALLEY 1	4 S	12 E	WM	15	SE SE	960 FEET NORTH AND 45 FEET WEST FROM SE CORNER, SECTION 15
12	VALLEY 2 SOUTH	4 S	12 E	WM	15	SW SE	415 FEET NORTH AND 350 FEET EAST FROM S1/4 CORNER, SECTION 15
13	VALLEY 2 NORTH	4 S	12 E	WM	15	SW SE	1065 FEET NORTH AND 245 FEET EAST FROM S1/4 CORNER, SECTION 15
14	PUB 2	4 S	12 E	WM	15	NE SW	590 SOUTH AND 1030 WEST FROM C1/4 CORNER, SECTION 15
15	VALLEY FLOOD	4 S	12 E	WM	16	NE SE	745 SOUTH AND 365 EAST FROM E1/4 CORNER, SECTION 16

THE AREA TO BE SUBMERGED BY THE RESERVOIRS:

Twp	Rng	Mer	Sec	Q-Q
4 S	12 E	WM	15	NE SW
4 S	12 E	WM	15	SW SE
4 S	12 E	WM	15	SE SE
4 S	12 E	WM	16	NE SE
4 S	12 E	WM	21	NW SW
4 S	12 E	WM	21	SW SW

Twp	Rng	Mer	Sec	Q-Q
4 S	12 E	WM	21	SE SW
4 S	12 E	WM	21	NE SE
4 S	12 E	WM	21	NW SE
4 S	12 E	WM	21	SE SE
4 S	12 E	WM	28	NE NE
4 S	12 E	WM	28	NE 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 Director may require the permittee to keep and maintain a record of the volume of water diverted, and may require the permittee to report water-use 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. The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) and shall not construct, operate, or maintain any dam or artificial obstruction to fish passage across any waters of the state that are inhabited, or were historically inhabited, by native migratory fish (ORS 509.585). The permittee shall not create or maintain an artificial obstruction to fish passage in Rock Creek, Threemile Creek, or North Fork Gate Creek.
 - 3. Any in-water work related to construction, development, or maintenance of the proposed use shall be conducted during the preferred work period of July 1 through October 31, unless an alternate time period is approved by the Oregon Department of Fish and Wildlife.
 - 4. The permittee shall not release polluted water from these off-channel reservoirs into waters of the state except when the release is directed by the State Engineer to prevent dam failure.
 - 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.

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 Draft Permit Copies

Application R-88813

PFO Date November 24, 2020

Original mailed via CERTIFIED MAIL to applicant:

JOHNSON LIVESTOCK LLC
ATTN: BRENDON JOHNSON
79681 WOODCOCK RD
WAMIC OR 97063

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Sent via auto email:

1. Applicant - brendon.m.johnson@gmail.com
2. WRD – Watermaster District #3, Robert L. Wood
3. WRD - Kyle Gorman SCR
4. WRD – SW Section

Copies sent to:

1. WRD – File # R-88813
2. DSL – Wetlands Specialist
3. District – Rock Creek Improvement Company, PO Box 91, Wamic, OR 97063

Application Specialist: Kim French