

If the Department determines that the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525 and may either:

- a) Propose denial of the application upon a finding that the use will impair or adversely affect the public welfare, safety and health; or
- b) Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public welfare, safety and health and propose approval of the application with appropriate modifications or conditions. OAR 690-310-0140(2)

FINDINGS OF FACT

Application History

1. On July 8, 2019, Igor Lochert filed a complete application for the following water use:

Source: WELL 1 (YAMH 2799) AND WELL 2 IN CHEHALEM CREEK BASIN
Use: IRRIGATION OF 10.0 ACRES
Rate: 0.189 CUBIC FOOT PER SECOND (CFS), FURTHER LIMITED TO 1.0 ACRE-FOOT ANNUALLY
Period of Use: MARCH 1 THROUGH OCTOBER 31
County: YAMHILL COUNTY
Place of Use: SECTION 13, TOWNSHIP 3 SOUTH, RANGE 3 WEST, W.M.
2. On December 20, 2019, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 0.125 CFS, further limited to 1.0 acre-foot annually, of water from Well 1 (YAMH 2799) and Well 2 in Chehalem Creek Basin for irrigation of 10.0 acres is allowable March 1 through May 31 and October 1 through October 31 of each year. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On December 24, 2019, 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 21, 2020, pursuant to OAR 690-300-0010(57), the Department sent a certified letter to the applicant requesting justification that the proposed use requires water only during the period of time when water is available, being March 1 through June 30 and October 1 through October 31, or demonstration that the applicant can obtain water from an alternate source during the period when water is not available, being July 1 through September 30.
5. Additionally, the July 21, 2020 letter also required that mitigation be provided at a rate of 0.125 CFS, pursuant to OAR 690-033. The applicant was given until October 21, 2020 to provide the above justification and the required mitigation or put the application on administrative hold.
6. As of the date of this proposed final order, the Department has not received the information requested in its July 21, 2020 certified letter.

Presumption Criteria (a) - Consistency with Basin Program

7. The proposed use is allowed under Willamette Basin Program OAR 690-502-0160(2). 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. 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 will have the potential for substantial interference with surface water, namely Chehalem Creek. ORS 537.621(3)(b); OAR 690-009-0040(4)
12. The finding of the potential for substantial interference requires that surface water availability be considered. Surface water is **not** available (at an 80 percent exceedance probability) July 1 through September 30 of each year. OAR 690-410-0070(1) and OAR 690-400-0010(11)(a)(A)
13. The proposed groundwater use is not within a designated critical groundwater area. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
14. The proposed use is in an area of the state in which OAR 690-033-0210 thru -0230 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 690-033-0210 Lower Columbia Rules (Below Bonneville Dam)

- A. The proposed use of water is detrimental to the protection or recovery of a threatened or endangered species. OAR 690-033-0220(1)
- B. The proposed use can be conditioned or mitigated to avoid the detriment. OAR 690-033-0220(1)
- C. The applicant did not propose mitigation compatible with OAR 690-033-0220(2), (3) and (4). OAR 690-033-0220(5)

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 and mitigation as necessary to achieve the standards listed in 690-033-0330(2)(a) and (b).
- E. Without mitigation, a net loss of essential fish habitat has been determined.
- F. The application is presumed to impair or be detrimental to the public interest.

15. No written comments were received by the close of the comment period. OAR 690-310-0140(3)(a)

Determination of Presumption and whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525

- 16. Because the criteria are not met (surface water is not available and mitigation was not provided) the presumption is **not** established. OAR 690-310-0140(1)
- 17. Because the presumption is not established the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525; OAR 690-310-0140(2)

Other Criteria and Requirements

- 18. The proposed use is not within or above a state scenic waterway. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
- 19. The amount requested, 0.189 CFS, is in excess of the standard rate for the proposed use. Although it is unlikely that a permit will be issued, if the Department's findings change and a permit is issued, the amount of water requested shall be limited to 0.125 CFS for irrigation of 10.0 acres. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)
- 20. 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)
- 21. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSIONS OF LAW

1. The proposed use will impair or adversely affect the public welfare, safety and health as described in ORS 537.525.

PROPOSED ORDER

The Department recommends issuing an order denying Application G-18837.

DATED April 6, 2021

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 **May 21, 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, 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 **May 21, 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;
- 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 service members 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 503-986-0816 or Kim.R.French@oregon.gov.
 - 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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Mailing List for PFO Copies

Application G-18837

PFO Date April 6, 2021

Original mailed via CERTIFIED MAIL to applicant:

IGOR LOCHERT
22745 NE HIGHWAY 240
NEWBERG OR 97132

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Sent via auto email:

1. Applicant - info@lochertcompany.com
2. WRD - Watermaster #, 22 Joel M. Plahn
3. WRD - Mike McCord NWR
4. WRD – SW Section

Copies sent to:

1. WRD - File # G-18837

Application Specialist: Kim French