

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

Water Right Application S-88653 in the)
name of BRIAN AND DUANE LLC) PROPOSED FINAL ORDER
)

Summary: The Department proposes to issue an order approving Application S-88653 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 Columbia River Basin Program (OAR 690-519). 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 2, 2018, Brian and Duane LLC filed a complete application for the following water use:
 - Source:** COLUMBIA RIVER, TRIBUTARY TO PACIFIC OCEAN
 - Use and** IRRIGATION OF 160.0 ACRES – MARCH 1 THROUGH APRIL 14 AND
 - Period of Use:** OCTOBER 1 THROUGH OCTOBER 31 AND RAISE THE SOIL MOISTURE CONTENT ON 160.0 ACRES – NOVEMBER 1 THROUGH FEBRUARY 28/29
 - Rate/Volume:** 4.0 CUBIC FEET PER SECOND (CFS)
 - County:** UMATILLA COUNTY
 - Place of Use:** SECTION 20, TOWNSHIP 4 NORTH, RANGE 30 EAST, W.M.
2. On November 9, 2018, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 4.0 CFS of water from Columbia River, tributary to Pacific Ocean, for soil preparation on 160.0 acres November 1 through February 28/29 is allowable. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On November 13, 2018, 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 December 10, 2019, the application was put on administrative hold, which ended on June 10, 2020. The administrative hold was reinstated on June 9, 2020, but was removed on August 28, 2020.
5. On October 28, 2020, the applicant clarified that raising the soil moisture (soil preparation) was being requested during the period of October 1 through April 14 of each year, which resolved the acreage conflict identified in the Initial Review.

Presumption Criteria (a) Consistency with Basin Program

6. Soil preparation (raising the soil moisture content) is a use defined under nursery use. As defined in OAR 690-500, nursery use is included in irrigation, which is allowed under the Columbia Basin Program (690-519-0000(1)). Therefore, soil preparation (raising the soil moisture content) is allowed. ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

7. An assessment of water availability utilizing discharge data produced by the U.S. Geological Survey, A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). During the period of use requested, the assessment established that water surface water is available. ORS 537.153(2); OAR 690-310-0150(2)(c)

Presumption Criteria (c) Injury Determination

8. 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

9. 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)
10. 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 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 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;

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 to achieve the standards listed in 690-033-0330(2)(a) and (b). Permit Specific Conditions #3 and #4 have been included in the draft permit as a result of this review.

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

11. No comments were received by the close of the comment period. OAR 690-310-0120(3)

12. 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

13. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826.
14. The amount requested, 4.0 CFS, is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
15. 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)
16. 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 S-88653 and issuance of a permit consistent with the attached draft permit.

DATED August 31, 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 **October 15, 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 \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 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 **October 15, 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 UMATILLA

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BRIAN AND DUANE LLC
7385 HOWELL PRAIRIE RD NE
SILVERTON OR 97381

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

APPLICATION FILE NUMBER: S-88652

SOURCE OF WATER: COLUMBIA RIVER, TRIBUTARY TO PACIFIC OCEAN

PURPOSE OR USE OF THE WATER: RAISE SOIL MOISTURE CONTENT ON 160.0 ACRES

MAXIMUM RATE: 4.0 CUBIC FEET PER SECOND

PERIOD OF USE: OCTOBER 1 THROUGH APRIL 14

DATE OF PRIORITY: AUGUST 2, 2018

AUTHORIZED POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	30 E	WM	8	SW NW	2910 FEET NORTH AND 120 FEET EAST FROM SW CORNER, SECTION 8

AUTHORIZED PLACE OF USE:

Twp	Rng	Mer	Sec	Q-Q	Acres
3 N	30 E	WM	20	NE SE	40.00
3 N	30 E	WM	20	NW SE	40.00
3 N	30 E	WM	20	SW SE	40.00
3 N	30 E	WM	20	SE SE	40.00

PERMIT SPECIFIC 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. **Water Use Measurement, Recording, and Reporting:**

- 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.

3. **Fish Screen/By-Pass:**

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.

4. **Water Use During October and November:**

The permittee shall cease pumping for any days during October and November when the U.S. Army Corps of Engineers is managing the Columbia River to meet chum targets **AND** the 7-day rolling average of the mean daily gage height below Bonneville Dam (USGS gage station #14128870) is less than the stage target set that year by the Technical Management Team for protection of chum salmon. The permittee shall discontinue pumping for the duration of time the 7-day rolling average remains below the stage target. The permittee may re-commence pumping when the 7-day rolling average is at or above the target set for that year.

The permittee may pump water during times when the stage target is not met during October and November each year, provided that real-time mitigation that meets the goals and standards of OAR 635-415-0025 (ODFW Habitat Mitigation Recommendations) has been secured during the pumping period, and proof of mitigation has been provided to the Water Resources Department. The permittee is not required to track the 7-day rolling average or cease pumping during periods when mitigation has been secured.

Any mitigation provided for the period October 1 - November 30 shall be protected instream at a point or reach above Bonneville Dam located at approximately River Mile 146.

STANDARD CONDITIONS

1. 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.
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.

DEVELOPMENT AND COMPLETION TIMELINE REQUIREMENTS

1. 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.
2. 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.
3. 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 S-88653

PFO Date August 31, 2021

Original mailed via CERTIFIED MAIL to applicant:

BRIAN AND DUANE LLC
7385 HOWELL PRAIRIE RD NE
SILVERTON OR 97381

Copies Mailed

By: _____

(SUPPORT STAFF)

on: _____

Sent via auto email:

1. Applicant - dean@gvfusa.com
2. Agent – Michael Schultz - michael.schultz@andersonschultz.com
3. WRD – Watermaster District #5, Gregory M. Silbernagel
4. WRD - Chris Kowitz NCR
5. WRD – SW Section

Copies sent to:

1. WRD – File # S-88653
2. Agent – Lolly Anderson – lolly.anderson@andersonschultz.com
3. ALO – Ditchen Land Co, 7385 Howell Prairie Rd NE, Silverton, OR 97381
4. ALO – Farmland Reserve Inc., 79 S. Main St., Ste 1000, Salt Lake City, UT 84111
5. Stanfield Irrigation District – 100 W. Coe Ave, Stanfield, OR 97875
6. East Improvement District – 84186 Hwy 37, Hermiston, OR 97838
7. Echo Irrigation District – 73120 Hwy 207, Echo, OR 97826

Application Specialist: Kim French