

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

Water Right Application R-88905 in the )  
name of BAILEY NURSERIES INC. ) PROPOSED FINAL ORDER  
)

**Summary:** The Department proposes to issue an order approving Application R-88905, as amended, 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 Willamette Basin Program (OAR 690-502). 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 December 21, 2020, Bailey Nurseries Inc. filed a complete application for the following water use:  
  
    **Source:** NORTH YAMHILL RIVER, TRIBUTARY TO YAMHILL RIVER  
    **Use:** STORAGE FOR IRRIGATION AND AGRICULTURE USE (NURSERY USE)  
    **Rate/Volume:** 145.0 ACRE-FEET (AF)  
    **Period of Use:** JANUARY 1 THROUGH DECEMBER 31  
    **County:** YAMHILL COUNTY  
    **Place of Use:** SECTION 32, TOWNSHIP 2 SOUTH, RANGE 4 WEST, W.M.
2. On January 22, 2021, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 145.0 AF of water from North Yamhill River, tributary to Yamhill River, for storage in Bailey Reservoir, for irrigation and agriculture use (nursery use) is allowable November 1 through April 30 of each year. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On January 26, 2021, 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 October 27, 2021, the applicant submitted preliminary plans and specifications of the dam/berm. On November 10, 2021, the Department approved the preliminary plans and specifications.

### **Presumption Criteria (a) Consistency with Basin Program**

5. Storage of water for irrigation and agriculture uses (nursery use) is allowed under the Willamette Basin Program from November 1 through June 30 of each year (OAR 690-502-0040(4)(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 October 1 through July 31 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 690-033-0210 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 application, as conditioned, is not presumed to impair or be detrimental to the public interest.

**OAR 690-033-0310 Statewide Rules**

- A. The proposed use occurs in an area that may affect the habitat of sensitive, threatened or
- B. endangered fish species. OAR 690-033-0310(2)
- C. 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)
- D. 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)
- E. The interagency review team was convened to review the application and recommend limiting storage to December 1 through April 30 and conditions as necessary to achieve the standards listed in 690-033-0330(2)(a) and (b). Storage in the draft permit has been limited to December 1 through April 30 and Permit Specific Conditions #3-10 have been included 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**

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 not located within or above a state scenic waterway, as designated under ORS 390.826.
13. The amount requested, 145.0 AF, is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
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**

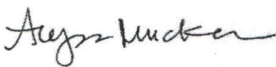
1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153(2).

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-88905 and issuance of a permit consistent with the attached draft permit.

DATED December 7, 2021



Digitally signed by Alyssa Mucken  
Date: 2021.11.30 15:35:47 -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 21, 2022**.

**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 **January 21, 2022**. 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 \$270. If a hearing is scheduled, an additional fee of \$680 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 503-979-3168.
  - 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 503-979-9160.
  - 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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**DRAFT**

**This is not a permit.**

**DRAFT**

STATE OF OREGON

COUNTY OF YAMHILL

**DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS**

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BAILEY NURSERIES INC.  
PO BOX 398  
DAYTON OR 97114

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

APPLICATION FILE NUMBER: R-88905

SOURCE OF WATER: NORTH YAMHILL RIVER, TRIBUTARY TO YAMHILL RIVER

STORAGE FACILITY: BAILEY RESERVOIR

MAXIMUM DAM HEIGHT: 28.5 FEET

PURPOSE OR USE OF THE STORED WATER: IRRIGATION AND AGRICULTURE (NURSERY USE)

MAXIMUM VOLUME: 145.0 ACRE-FEET

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: DECEMBER 1 THROUGH APRIL 30

DATE OF PRIORITY: DECEMBER 21, 2020

AUTHORIZED POINTS OF DIVERSION:

POD Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POD 1	2 S	4 W	WM	31	SE SW	2180 FEET SOUTH AND 4280 FEET WEST FROM SE CORNER, DLC 55
POD 2	2 S	4 W	WM	31	SE SE	1305 FEET NORTH AND 1195 FEET WEST FROM SE CORNER, SECTION 31

DAM LOCATION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 S	4 W	WM	32	SW SW	700 FEET NORTH AND 830 FEET EAST FROM SE CORNER, SECTION 31

THE AREA TO BE SUBMERGED BY THE RESERVOIR:

Twp	Rng	Mer	Sec	Q-Q
2 S	4 W	WM	32	SW SW

## 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 Passage:**

The permittee 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) without obtaining approval for the artificial obstruction from the Oregon Department of Fish and Wildlife (ODFW). The permittee shall submit a proposal for fish passage to ODFW or apply for a fish passage waiver or exemption.

Approval of the proposed fish passage facility, waiver, or exemption shall be obtained **prior to construction** of any in-channel obstruction or **prior to diversion of water** that may create an artificial obstruction due to low flow.

The permittee shall submit proof to ODFW that fish passage has been implemented per the plan, waiver, or exemption **prior to diversion of water**. The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) as per the approved plan, waiver, or exemption. The permittee is hereby directed to schedule a consultation with an ODFW Fish Passage Coordinator.

### 4. **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, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

**5. In-Water Work:**

Any in-water work related to construction, development, or maintenance of the proposed use shall be conducted during the preferred work period of July 15 through September 30, unless an alternate time period is approved by Oregon Department of Fish and Wildlife.

**6. Fish Stocking:**

Per ORS 498.222 and OAR 635-007-0600, all persons transporting fish in Oregon need to have a fish transport permit issued by the Oregon Department of Fish and Wildlife (ODFW). The permittee shall not stock fish in the reservoir without a fish transport permit issued by ODFW. As part of the permitting process, the permittee must also screen the inlet and outlet of their pond to ensure that fish cannot escape into public waters and/or to keep wild fish from entering the pond.

**7. Agricultural Water Quality Management Area Rules:**

The permittee shall comply with basin-specific Agricultural Water Quality Management Area Rules described in Oregon Administrative Rule Chapter 603-095. The permittee shall protect riparian areas, allowing site capable vegetation to establish and grow along streams, while providing the following functions: shade (on perennial and some intermittent streams), bank stability, and infiltration or filtration of overland runoff.

**8. Water Quality:**

All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.

**9. Riparian Area Restoration:**

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

#### 10. Off-Channel Stored Water Releases:

The permittee shall not release polluted water from this off-channel reservoir into waters of the state except when the release is directed by the State engineer to prevent dam failure.

#### DAM CONDITIONS

1. Design work shall be completed by an Engineer registered in the State of Oregon. Written approval of the design, from the State Engineer, shall be obtained prior to the start of construction. No water shall be stored until the Department receives written certification from the engineer of record that construction has been completed in accordance with the approved plans and specifications.
2. Failure to comply with any portion of Oregon Revised Statute 540.443 through 540.491 and Oregon Administrative Rules Chapter 690 Division 20 may result in action including, but not limited to, restrictions on use, civil penalties, or cancellation of the permit.
3. All construction shall be performed under the supervision by the engineer of record. If the engineer of record cannot supervise construction, the Water Resources Department Dam Safety Engineer must be notified in writing, prior to construction activity, with the name of the engineer supervising construction.
4. No embankment fill shall be placed until preparation of the foundation and the excavation of the core trench has been completed and examined in entirety by the engineer of record, or by the Water Resources Dam Safety Engineer, or both.
5. The constructed works shall conform to the approved plans and specifications on file with the Water Resources Dam Safety Program. The engineer of record shall notify the Water Resources Dam Safety Program before making any significant change to the approved design prior to or during construction.
6. No water shall be stored until the Water Resources Department receives written confirmation from the engineer of record that construction has been completed in accordance with the approved plans and specifications. A construction completion report as described by Oregon Administrative Rule (OAR) 690-020-0070(10), must accompany the engineer's letter of completion.
7. Routine maintenance or repair of the dam, its spillway, and all appurtenant structures shall be performed to include, but not be limited to, removal of woody or high vegetation from the embankment, abutments and spillway; removal of debris from the reservoir, and annual or more frequent cycling of the valve or gate for the low level conduit.
8. Repair or replacement of defective or worn out equipment (including but not limited to gates, valves, and conduits) shall be completed as needed to keep the dam safe.
9. If the dam is enlarged, modified, or otherwise altered, this work must be based on design plans and specifications prepared by a Registered Professional Engineer licensed in Oregon. These plans must



be approved by the Water Resources Dam Safety Program prior to such alterations of the dam, its spillway, or any appurtenant structure(s).

10. No valve shall be installed at the downstream end of the low level conduit, and the low level conduit shall not be operated in a pressurized condition unless the dam has been designed for pressurized operation by the design engineer. There must be an operations manual for the dam that describes pressurized operation, and necessary inspections of pressurized conduits for the dam.
11. If used, flashboards shall be maintained in good condition, replaced as needed, and removed as necessary prior to potential winter storms, or unusual rainfall or snowmelt events at any time of the year.
12. Prior to commencing construction activity, all design reports, drawings of the dam and critical appurtenant structures, specifications, and plans for construction administration must be approved by the State Engineer as indicated by the State Engineer's stamp and a written letter of approval from the State Engineer.

#### **RESERVOIR CONDITIONS**

1. The permittee shall pass all live flow outside the storage season described above.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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 work must be supervised by the Engineer of Record for the project. 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. 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.
3. 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