

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

Water Right Application IS-89033 in the            )  
name of Oregon Department of Fish and        )  
Wildlife    )

PROPOSED FINAL ORDER

**Summary:** The Department proposes to issue an order approving Application IS-89033 and issue a certificate consistent with the attached draft certificate.

**Authority**

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.140 to 537.250 and 537.332 through 537.360, and Oregon Administrative Rule (OAR) Chapter 690, Division 77 and Umpqua Basin Program Division 516. These statutes and rules can be viewed on the Oregon Water Resources website:

<https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>

The Department's main page is:

<http://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; OAR 690-077-0015(4)
- (c) The proposed use will not injure other water rights; and
- (d) The proposed use complies with the rules of the Commission. OAR 690-077-0033(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 690-077-0037(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 certificate subject to any appropriate modifications or conditions.

**FINDINGS OF FACT**

**Application History**

1. On November 30, 2020, Oregon Department of Fish & Wildlife filed a complete application for the following water use:

**Source:** BERRY CREEK, TRIBUTARY TO OLALLA CREEK  
**Use of Water:** PUBLIC USE, SPECIFICALLY FISH LIFE AND WILDLIFE  
**County:** DOUGLAS COUNTY  
**Location:** BERRY CREEK, TRIBUTARY TO OLALLA CREEK, BEGINNING AT RIVER MILE 7.3 (SENW, S26, T29S, R8W, WM) IN DOUGLAS COUNTY (43.020485, -123.616826) AND CONTINUING DOWNSTREAM TO THE MOUTH RIVER 0.0 (NESE, S20, T29S, R7W, WM) IN DOUGLAS COUNTY (43.03489, -123.546078).

**Rate:** SHOWN BELOW IN CUBIC FEET PER SECOND (CFS) REQUESTED BY MONTH:

Fish Life and Fish Habitat:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
34	34	34	34	20	13	13	3.6	2.8	3.4	32.8	34

2. On July 31, 2021, the Department mailed the applicant notice of its initial review, determining that "some percentage of the water applied for has been determined allocable for the purposes identified in this application." The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On August 3, 2021, the Department gave public notice of the initial review 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.
4. Numerous written comments favoring and opposing the application were received during the 30-day comment period.

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

5. "Fish life and Wildlife use's" are classified as allowed under the Umpqua Basin Program OAR (690-516-0005(1)) and OAR 690-077-0015(11). ORS 537.343(1); OAR 690-077-0039(2).

**Presumption Criteria (b) Water Availability**

6. An assessment of surface water availability was completed, and a copy of this assessment is in the file. The amount of out-of-stream appropriations is not a factor in determining the amount of an instream water right, pursuant to OAR 690-077-0015(3) and OAR 690-077-0015(4). The table below compares the requested flows in the application for Berry Creek on a monthly basis (in CFS) to the estimated average natural flow (EANF). The last row is the allowable amount and the amount in the proposed certificate, pursuant to ORS 537.343(1)(b) and OAR 690-077-0039(2)(c). The amount allocated for this application shall not exceed some months the estimated average natural streamflow occurring from the drainage system, pursuant to ORS 537.343(1)(b) and OAR 690-077-0039(2)(c).

Fish Life and Fish Habitat:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
34	34	34	34	20	13	13	3.6	2.8	3.4	32.8	34

Estimated Average Natural Flow:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
36.7	38.7	29.1	14.3	5.23	2.12	.6	.16	.03	.52	5.6	33

Allowable Instream Use:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
34	34	29.1	14.3	5.23	2.12	.6	.16	.03	.52	5.6	33

**Presumption Criteria (c) Injury Determination**

7. The proposed use is junior in priority and by operation of the prior appropriation doctrine will not injure other water rights. ORS 537.343(1); OAR 690-077-0039(2)(d)

**Presumption Criteria (d) Whether the use complies with rules of the Commission**

8. The Department placed the application on the Department's Public Notice for a 30-day comment period. Consistent with OAR 690-077-0031, copies of the notice were sent to the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse. No land use information was received by the Department during the initial review 30-day public comment period. Pursuant to OAR 690-077-0031(5) the Department may presume the proposed instream water right is compatible with the comprehensive land use plans and land use regulations of affected local governments.

9. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

**Whether the proposed use would impair or be detrimental to the public interest as provided in ORS 537.170**

10. Based on an evaluation of the proposed use, information available in its files or received from other interested agencies and any other available information, the Department has determined that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170. OAR 690-077-0039(2)(e)

**Determination of Presumption that a proposed surface water use will not impair or be detrimental to the public interest**

11. Based on the review of the presumption criteria (a)-(d) above and Finding of Fact #11, the Department finds that a rebuttable presumption has been established. 537.343(1); OAR 690-077-0039(2)(g)

**CONCLUSIONS OF LAW**

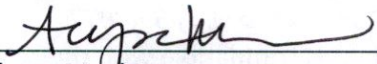
The proposed use would not impair or be detrimental to the public interest.

When issuing certificates, ORS 537.343(1) authorizes the Department to include provisions or restrictions concerning the use, control and management of the water to be appropriated for the project. The attached draft permit is conditioned accordingly.

**PROPOSED ORDER**

The Department recommends approval of Application IS-89033 and issuance of a certificate consistent with the attached draft certificate.

DATED JAN 04 2022

  
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Alyssa Mueken  
Water Rights Section Manager, for  
Thomas M. Byler, Director  
Oregon Water Resources Department

## Protests

**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.

Under the provisions of ORS 537.153(7), the Proposed Final Order may be protested. Protests must be received in the Water Resources Department no later than **February 18, 2022**. Protests must be in writing, and must 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 537.525 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, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the 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) 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 **February 18, 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 a proceeding 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 State Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a tollfree telephone number.

*This document was prepared by R. Craig Kohanek. If you have any questions about any of the statements contained in this document, I can be reached at 503-979-3185.*

*If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-979-6180.*

*If you have other questions about the Department or any of its programs, please contact our Customer Service Group at 503-986-0801. Address all other correspondence to: Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.*

STATE OF OREGON  
COUNTY OF DOUGLAS  
PROPOSED CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

OREGON WATER RESOURCES DEPARTMENT  
725 SUMMER STREET NE, STE A  
SALEM, OR 97301

The specific limits for the use are listed below along with the conditions of use.

APPLICATION FILE NUMBER: IS-89033

SOURCE OF WATER: BERRY CREEK, TRIBUTARY TO OLALLA CREEK

BENEFICIAL USE: FISH LIFE AND WILDLIFE USES

DATE OF PRIORITY: NOVEMBER 30, 2020

To be maintained in: Berry Creek, tributary to Olalla Creek, beginning at river mile 7.3 (SENW, S26, T29S, R8W, WM) in Douglas County (43.020485, -123.616826) and continuing downstream to the mouth river mile 0.0 (NESE, S20, T29S, R7W, WM) in Douglas County (43.03489, -123.546078).

The right is established under Oregon Revised Statute 537.341

The following conditions apply to the use of the water under this certificate:

1. The right is limited to not more than the amounts, in cubic feet per second, during the time periods listed below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
34	34	29.1	14.3	5.23	2.12	.6	.16	.03	.52	5.6	33

2. The water right holder shall measure and report the instream flow along the reach of the stream or river described in the certificate as may be required by the standards for instream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.



4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are measured at the lower end of the stream reach to protect necessary flows throughout the reach.

Issued \_\_\_\_\_

DRAFT

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Dwight French  
Water Right Services Division Administrator, for  
Thomas M. Byler, Director  
Oregon Water Resources Department

Mailing List for IS PFO  
Scheduled Mailing Date:

**Application: IS-89033**

**Applicant:**

Oregon Department of Fish & Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

**OWRD copies:**

WRD - Watermaster: Susan Douthit, District 15 - Electronic  
WRD - Regional Manager: Jake Johnstone - Electronic  
WRD - Data Center - Electronic  
WRD - Water Availability - Electronic  
WRD - File - Paper

**Other persons to receive copies:**

ODFW: Anne Hayden-Lesmeister - Send certified mail

Caseworker: Craig Kohanek

Copies Mailed

by:

\_\_\_\_\_  
(STAFF)

on:

\_\_\_\_\_  
(DATE)