

Oregon Water Resources Department

Water Right Services Division

Water Right Application G-19017 in the)
name of KRISTOF FARMS)
)

PROPOSED FINAL ORDER
TO DENY

Summary: The Department proposes to issue an order denying Application G-19017 because insufficient data exist to determine that water is available.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.615 through 537.628, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 8, 9, 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 groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 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 537.621(2); OAR 690-310-0150(2)(b).

All four criteria must be met for a proposed use to be presumed to ensure the preservation of the public welfare, safety and health. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either one or more of the criteria for establishing the presumption are not satisfied, or as demonstrated in any comments received, information available in the Department’s files or received from other interested agencies, and any other available information. ORS 537.621(2); OAR 690-310-0140.

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 September 8, 2020, Kristof Farms filed a complete application for the following water use:

Source: WELL 1 (YAMH 1409) AND WELL 2 IN YAMHILL CREEK BASIN

Use: IRRIGATION OF 7.5 ACRES

Rate: 0.02 CUBIC FOOT PER SECOND (CFS)

Period of Use: MARCH 1 THROUGH OCTOBER 31

County: YAMHILL COUNTY

Place of Use: SECTION 23, TOWNSHIP 2 SOUTH, RANGE 4 WEST, W.M.

2. On September 17, 2021, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 0.02 CFS of water from Well 2 in Yamhill Creek Basin for irrigation of 7.5 acres is allowable March 1 through October 31 of each year and the appropriation of 0.02 CFS of water from Well 1 (YAMH 1409) in Yamhill Creek Basin for irrigation of 7.5 acres is not allowable March 1 through October 31 of each year, unless evidence demonstrating compliance with well construction standards is submitted and approved by the Department. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On September 21, 2021, the Department noticed 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 25, 2021, the applicant removed Well 1 (YAMH 1409) from the application because it did not meet current minimum well construction standards.

Presumption Criterion (a) - Consistency with Basin Program

5. Irrigation is allowed under the Willamette Basin Program (OAR 690-502-0160(2)). ORS 537.621(3)(b); OAR 690-310-0150(2)(b)

Presumption Criterion (b) - Water Availability

6. 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. The Groundwater Review form indicates that there is insufficient data available to indicate whether the groundwater resource is over-appropriated during any period of the proposed use. The Groundwater Review form also did not determine whether groundwater for the proposed use will likely be available within the capacity of the groundwater resource. ORS 537.621(3)(c); OAR 690-310-0150(2)(c); OAR 690-300-0010(57).

Presumption Criterion (c) - Injury Determination

7. The proposed use, if authorized and properly conditioned, will not injure other water rights. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

Presumption Criterion (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 537.621(3)(b); OAR 690-310-0150(2)(b)
9. The Department has determined that the proposed groundwater use will not have the potential for substantial interference with surface water. ORS 537.621(3)(b); OAR 690-009-0040(4)
10. The proposed groundwater use is not located within a designated critical groundwater area. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
11. No comments were received by the end of the comment period. OAR 690-310-0150(1)

Determination of presumption that a proposed groundwater use will ensure the preservation of the public welfare, safety and health

12. Because the Department cannot determine whether water is available, one of the criteria necessary to establish the presumption is not met and the presumption that the proposed groundwater use will ensure the preservation of the public welfare, safety and health under ORS 537.525 is **not** established. OAR 690-310-0140(1)
13. Because the Department does not have sufficient information, it cannot determine that the proposed use is within the capacity of available sources; therefore, the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525. ORS 537.525(3); OAR 690-310-0130; 690-310-0140(2).
14. The Department does not have any other information that would indicate that considering the factors in ORS 537.625(3)(a) – (g) the proposed use, or the proposed use as modified, would preserve the public welfare, safety and health as described in ORS 537.525. ORS 527.625(3); OAR 690-310-0140(5).

Discussion

The Groundwater Review form prepared by the Department's Groundwater Section for this application found that groundwater for the proposed use "cannot be determined to be over appropriated during any period of the proposed use." The form also did not determine whether groundwater for the proposed use will likely be available within the capacity of the groundwater resource. The form further indicates that these findings were not made due to insufficient data.

In processing groundwater applications in the past, where groundwater for the proposed use "cannot be determined to be over appropriated during any period of the proposed use," the Department has issued proposed final orders finding that "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."

In light of the increased occurrence of drought and a concurrent increase in groundwater usage, the Department can no longer assume, absent information on recharge rates and the current rate of withdrawals from the aquifer, and without adequate data at the location of the proposed point of appropriation, that water is available or may be appropriated within the capacity of available sources. ORS 537.525(3).

Water availability is one of the criteria that must be established for the Department to presume that the proposed use will ensure the preservation of public welfare, safety and health. ORS 537.621(2) and OAR 690-310-0130(1)(b). For this application, one of the necessary criteria is not met because insufficient data exist to determine that water is available. For this reason, the presumption that the proposed groundwater use will ensure the preservation of the public welfare, safety and health under ORS 537.525 is not established.

Further evaluation of the proposed use

15. No comments were received by the close of the comment period. OAR 690-310-0150(1)
16. 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 otherwise ensure the preservation of the public welfare, safety and health under ORS 537.525. ORS 537.625(3); OAR 690-310-0140(5).

Other Criteria and Requirements

17. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826. 537.621(3)(a); OAR 690-310-0260(9)(a)
18. The amount requested, 0.02 CFS, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)
19. 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 and to prevent damage to public uses of any affected surface waters. This includes that water will only be applied to orchard crops in an amount necessary to maintain crop health. Water will not be applied in excess in order to prevent runoff. OAR 690-310-0150(2)(j)
20. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSIONS OF LAW

1. The proposed use will not ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

PROPOSED ORDER

The Department recommends issuing an order denying Application G-19017.

DATED September 20, 2022

Katherine Ratcliffe

Katherine Ratcliffe
Water Right 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. If you wish to submit a protest by U.S. mail, please consider mailing early to ensure the Department receives the protest by the deadline specified. Protests must be received by the Water Resources Department no later than **November 4, 2022**.

As provided in ORS 537.621(7), ORS 536.050(1)(j) and OAR 690-002—0025 – 035 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;
- Any information or evidence that the proposed use or the proposed use as modified would preserve the public welfare, safety and health as provided in ORS 537.625(3).
- 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 **November 4, 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.

