

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

Water Right Application G-19139 in the)
name of KAMERON DELASHMUTT and) PROPOSED FINAL ORDER
PINNACLE UTILITIES, LLC)

Summary: The Department proposes to issue an order denying Application G-19139 because groundwater for the proposed use is not available within the capacity of the resource. Mitigation will not overcome this finding.

Although it is unlikely that a permit will be issued, if the Department’s findings change, prior to the issuance of a permit, the Department must receive the following:

- **Documentation that the proposed use complies with the local acknowledged comprehensive land-use plan. Please submit documentation from the relevant planning jurisdiction that either a) the proposed use is allowed outright or b) that an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded.**
- **Permit recording (mitigation) fees in the amount of \$790.00. A check should be made out to the Oregon Water Resource Department or OWRD.**
- **Documentary evidence that mitigation credits have been obtained.**

Please include the application number on any documents submitted.

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 Deschutes Basin Program (OAR 690-505). OAR 690-505 and 521 describe the process by which certain groundwaters in the Deschutes Basin may be appropriated by mitigating the impact of the proposed use. 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 690-310-0130.

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 that the proposed use would not ensure the preservation of the public welfare, safety and health 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 690-310-0130(2).

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 May 24, 2021, Kameron Delashmutt and Pinnacle Utilities, LLC filed a complete application for the following water use:
 - Source:** WELL 1, WELL 2, WELL 3, WELL 4, WELL 5, WELL 6, WELL 7 AND WELL 8 (DESC 756) IN DESCHUTES RIVER BASIN
 - Use:** QUASI-MUNICIPAL USE
 - Rate:** 9.28 CUBIC FEET PER SECOND (CFS); TOTAL ANNUAL VOLUME 2,129 AF
 - Period of Use:** JANUARY 1 THROUGH DECEMBER 31
 - County:** DESCHUTES COUNTY
 - Place of Use:** SECTIONS 17, 20, 21, 28, 29, AND 30, TOWNSHIP 15 SOUTH, RANGE 12 EAST, W.M.
2. On July 1, 2022, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 9.28 CFS of water from Well 1, Well 2, Well 3, Well 4, Well 5, Well 6, Well 7 and Well 8 (DESC 756) in Deschutes River Basin for quasi-municipal use is not allowable. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On July 5, 2022, the Department gave public notice of the application 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. On July 26, 2022, the Department approved the applicant's draft Water Management Conservation Plan (WMCP). On September 23, 2022, Annunziata Gould submitted a Petition for Reconsideration

on the Final Order approving the WMCP. On November 16, 2022, the Department informed the applicant that, pursuant to OAR 137-004-0080(5), the Department was reconsidering its Final Order approving the WMCP, and that the Final Order remained in effect during reconsideration. As of the date of this Proposed Final Order, the Department's Final Order approving the WMCP remains under reconsideration.

5. On May 3, 2023, the applicant requested to reduce the rate, duty, and place of use as follows:
 - a. The applicant requested to reduce the total maximum rate from 9.28 CFS to 6.0 CFS.
 - b. The applicant requested to reduce the annual volume from 2,129 acre-feet to 1,460 acre-feet.
 - c. The applicant requested to reduce the place of use within Tax Lot 800, section 30, township 15 south, range 12 east. The applicant explained that the requested change would remove lands zoned exclusive farm use (EFU) that were not included in the land use application submitted to Deschutes County for the broader development (Thornburgh Resort). The applicant provided a revised map. The Department reviewed the revised map and determined that the applicant requested reduced acreage in Tax Lot 8000 rather than Tax Lot 800.
6. On May 30, 2023, the applicant requested to remove well #8 (DESC 756), an existing well, from the proposed use.
7. On July 10, 2023, the Department issued a new Groundwater Review considering the applicant's requested application changes. The review determined that groundwater for the proposed use, even at the reduced rate and volume and with removal of well #8, is not available within the capacity of the resource.

Presumption Criterion (a) - Consistency with Basin Program

8. The proposed groundwater use is located within the Deschutes Groundwater Study Area and is subject to the Deschutes Groundwater Mitigation Rules (OAR 690-505-0500 – 0630).
9. Quasi-municipal use is allowed under the Deschutes Basin Program (OAR 690-505-0400). ORS 537.621(3)(b); OAR 690-310-0150(2)(b).
10. Pursuant to OAR 690-505-0500(1), there is a 200.00 CFS limit on the amount of new groundwater use that may be allocated within the Deschutes Groundwater Study Area. Any water allocated under this application may not exceed the limit.

Presumption Criterion (b) - Water Availability

11. 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 for the proposed use is not over-appropriated; however, groundwater for the proposed use is not available within the capacity of the resource. Therefore, groundwater is not available for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(c); OAR 690-300-0010(57).

Presumption Criterion (c) - Injury Determination

12. The proposed use, if authorized, will not injure other water rights if the use proposed under application G-19139 is not used in conjunction with permit G-17036. If a permit is issued for application G-19139 while permit G-17036 is in non-canceled status, issuance of the permit for application G-19139 would be contingent upon voluntary cancellation of permit G-17036. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

Presumption Criterion (d) - Whether the use complies with rules of the Commission

13. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision is being pursued. As of the date of this order, the Deschutes County Board of County Commissioners' April 17, 2023 decision approving the land use is under appeal at the Land Use Board of Appeals. Therefore, local land use approvals may be considered pending, and the Department may withhold issuance of a water use permit or approval. ORS 537.621(3)(b); OAR 690-310-0150(2)(b); OAR 690-005-0035(4)(c).
14. The proposed use is located within the Deschutes Ground Water Study Area. Without mitigation, the Department is required by law to deny groundwater permit applications in the Deschutes Ground Water Study Area. Mitigation may be provided to offset impacts to Scenic Waterway flows and senior surface water rights. OAR 690-505-0600(1)-(3).

Presumption that a proposed use will ensure the preservation of the public welfare, safety and health under ORS 537.525

15. Because water is not 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); OAR 690-310-0150(2)(h).
16. Because the presumption is not established, the Department evaluated whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525. OAR 690-310-0140(2).
17. In accordance with ORS 537.525(3), in order to insure the preservation of the public welfare, safety and health it is necessary that beneficial use without waste, within the capacity of available sources, be the basis, measure and extent of the right to appropriate ground water. Public welfare, safety and health under ORS 537.525(3) would be impaired or detrimentally affected for the following reasons. The Department finds that groundwater for the proposed use, even at the reduced rate and volume and with removal of well #8, is not available within the capacity of the resource. Observation wells in the targeted aquifer zone have seen continuous and significant year-on-year water level declines since the mid-1990s. Wells in the vicinity have exceeded decline conditions in their water rights. There is one well located 10 miles to the southeast where declines are steepest that has declined excessively. Because groundwater pumping contributes meaningfully to groundwater declines, the requested use would exacerbate declines that will increase the number of triggered decline conditions and wells that will have declined excessively. This will preclude the perpetual use of the resource. As such, the proposed use is determined to be not within the capacity of the resource. Therefore, the proposed use will impair or adversely affect the public welfare, safety, and health under ORS 537.525. ORS 537.525; ORS 537.621(2); OAR 690-310-0140(2).

Further evaluation of the proposed use

18. Oregon Department of Fish and Wildlife (ODFW) submitted comments on the application prior to release of the Initial Review. ODFW explained that it is not clear if the Oregon Water Resources Department's Deschutes Groundwater Mitigation Program and the mitigation plan approved by the County as part of the applicant's Thornburgh Resort land use application would result in no net loss of fish and wildlife habitat quantity and quality and provide a net benefit to the resource. OAR 690-310-0150(1)
19. Comments were received from David Arnold, Gabe Chladek, Annunziata Gould, Rima Givot, WaterWatch of Oregon, Winnie Givot and the applicant by the close of the Initial Review comment period. OAR 690-310-0150(1)
20. In summary, David Arnold, Gabe Chladek, Annunziata Gould, Rima Givot, WaterWatch of Oregon and Winnie Givot expressed support for the Department's unfavorable preliminary determinations in the Initial Review. The applicant identified three findings in the Initial Review which the applicant asserted needed additional review. The findings were reviewed. The Initial Review Preliminary Determination #13 regarding the WMCP has been amended. See Finding of Fact #4 above. The Initial Review Preliminary Determination #9 regarding OAR 690-505-0500(1) is a factual statement and has not been amended. The Initial Review Preliminary Determination #4 regarding groundwater not being available within the capacity of the resource has been amended. See Finding of Fact #7 above.

Other Criteria and Requirements

21. The amount of water requested for the proposed use, 6.0 CFS, further limited to 1,460 acre-feet annually, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d).
22. The applicant proposed methods to prevent waste, measure the amount of water diverted, 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. These measures are identified on page 6, Section 6, of the application. OAR 690-310-0150(2)(j).
23. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSION 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-19139.

DATED July 25, 2023

Katherine Ratcliffe

Katherine Ratcliffe
Water Rights Section Manager, for
Douglas E. Woodcock, Acting 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 **September 8, 2023**.

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 **September 8, 2023**. 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.

