

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

Water Right Application G-18851 in the)	PROPOSED FINAL ORDER
name of FIVE MILE RANCH, LLC)	TO DENY
)	

Summary: The Department proposes to issue an order denying Application G-18851 because there is a preponderance of evidence that the proposed use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife.

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:

- **Permit recording fees in the amount of \$440.00. A check should be made out to the Oregon Water Resources Department or OWRD.**

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 Klamath Basin Compact (ORS 542.620). These statutes and rules can be viewed on the following website: www.oregon.gov/OWRD/programs/policylawandrules

The Department’s main website can be found at: 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 ORS 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 August 8, 2019, Five Mile Ranch, LLC filed a complete application for the following water use:

Source: TWO WELLS IN FIVE MILE CREEK BASIN

Use: PRIMARY IRRIGATION OF 243.11 ACRES AND SUPPLEMENTAL IRRIGATION OF 72.6 ACRES

Rate/Volume: 3.94 CUBIC FEET PER SECOND (CFS), BEING 2.45 CFS, FURTHER LIMITED TO 588.0 ACRE-FEET (AF) ANNUALLY, FROM WELL 1, AND 1.49 CFS, FURTHER LIMITED TO 359.13 AF ANNUALLY, FROM WELL 2

Period of Use: MARCH 1 THROUGH OCTOBER 31

County: KLAMATH COUNTY

Places of Use: SECTIONS 27, 28, AND 34, TOWNSHIP 35 SOUTH, RANGE 13 EAST, W.M.

2. On July 24, 2020, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 3.94 CFS of water, being 2.45 CFS from Well 1 and 1.49 CFS from Well 2 in Five Mile Creek Basin, for primary irrigation of 243.11 acres and supplemental irrigation of 72.2 acres may be allowable March 1 through October 31 of each year, contingent on the submission of additional required information. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On July 28, 2020, 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 August 11, 2020, the Department received a revised map that identified 72.6 acres of supplemental irrigation as requested in the Initial Review. This is consistent with the acres requested on the application.
5. On August 11, 2020, April 23, 2021, and August 9, 2021, the applicant requested to place the application on administrative hold. The last administrative hold ended on September 24, 2021.
6. On September 24, 2021, the Department received additional information from the applicant pertaining to the opportunity to submit evidence to overcome the Department's determination that the proposed use would measurably reduce the surface water flows necessary to maintain the free-flowing character of the Klamath Scenic Waterway, as described in the Initial Review.

7. On October 19, 2023, the Department's Groundwater Section issued a re-review of the application, which indicated that groundwater for the proposed use is not over appropriated.

Presumption Criterion (a) - Consistency with Basin Program

8. The Commission has not established a basin program for the Klamath River Basin. Therefore, neither the proposed use nor the quantity of the proposed use is restricted as a result of this consideration. ORS 537.621(3)(b); OAR 690-310-0150(2)(b).
9. The proposed groundwater use is not within a designated critical groundwater area. ORS 537.621(3)(b); OAR 690-310-0150(2)(b).

Presumption Criterion (b) - Water Availability

10. 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. In addition, the Department has determined that the proposed groundwater use will not have the potential for substantial interference (PSI) with surface water. OAR 690-009-0040; ORS 537.621(3)(c); OAR 690-310-0150(2)(c); OAR 690-300-0010(57).
11. The proposed use is located above the Klamath State Scenic Waterway, as designated under ORS 390.826. The Department has determined, based upon OAR 690-310-0260, that there is a preponderance of evidence that the proposed use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife. The one CFS limit prescribed in OAR 690-310-0260(11) has been exceeded. Therefore, water is **not** available for the proposed use as requested. OAR 690-310-0260(9)(a).

Presumption Criterion (c) - Injury Determination

12. If properly conditioned (and if authorized), the proposed use of groundwater 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

13. 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).
14. The proposed use is located within or above a State Scenic Waterway. OAR 690-310-0260 establishes rules the Department uses in determining whether a proposed use will significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.

OAR 690-310-0260 Scenic Waterway Findings

- A. As described above, the Department has determined, based upon OAR 690-310-0260, that there is a preponderance of evidence that the proposed use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife. The one CFS limit prescribed in OAR 690-310-0260(11) has been exceeded. OAR 690-310-

0260(9)(a)-(c). The applicant did **not** provide mitigation consistent with the provisions of ORS 390.835(9)-(10) and the evidence submitted does **not** overcome the negative finding. OAR 690-310-0260(9)(d).

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 and the use does not comply with rules of the Commission at OAR 690-310-0260, two of the criteria necessary to establish the presumption are 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. 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).

Further Evaluation of the Proposed Use

18. No written comments were received by the close of the comment period. OAR 690-310-0150(1).

Other Criteria and Requirements

19. The amount of water requested, 3.94 CFS, further limited to 947.13 AF annually, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d).
20. The applicant proposed measures to prevent waste, 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. These measures are included in Sections 6 and 8 of the application. OAR 690-310-0150(2)(j).
21. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

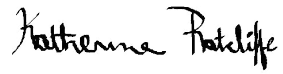
CONCLUSION OF LAW

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-18851.

DATED August 13, 2024



Katherine Ratcliffe
Water Rights Section Manager, for
Ivan Gall, 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 27, 2024**.

As provided in ORS 537.621(7), ORS 536.050(1)(j), and OAR 690-002-0025 — 0035, 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 27, 2024**. 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 timely file a protest or timely request a hearing, 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. OAR 137-003-0670.

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 To Active Duty Servicemembers: Active-duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 971-355-4127, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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- If you have any questions about statements contained in this document, please contact Lucinda Vranizan at Lucinda.R.Vranizan@water.oregon.gov or 971-375-2256.
 - 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 Will Davidson at Will.D.Davidson@water.oregon.gov or 503-507-2749.
 - 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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