

**Oregon Water Resources Department
Water Rights Services Division**

Water Rights Application
Number S-87499

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$150.00. Please include your application number on your check made out to the Oregon Water Resources Department.

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft permit be issued with conditions.

Application History

On September 11, 2009, Paula Rini, Kerry Krueger, Jerene F. Adler, Mason D. Williams, Duane Faulhaber, and U.S.D.A. Forest Service, Middle Fork Ranger District submitted an application to the Department for the following water use permit:

- Amount of Water: 0.045 CUBIC FOOT PER SECOND
- Use of Water: DOMESTIC USE FOR FIVE HOUSEHOLDS
- Source of Water: SALT CREEK, A TRIBUTARY OF MIDDLE FORK WILLAMETTE RIVER
- Area of Proposed Use: LANE COUNTY WITHIN SECTION 23, TOWNSHIP 21 SOUTH, RANGE 3 EAST, W.M.

On October 23, 2009, the Department mailed the applicant notice of its Initial Review, determining that *"the use of 0.025 CFS of water from Salt Creek, a tributary of Middle Fork Willamette River, for domestic use is not allowable, and it appears unlikely that you will be issued a permit. However, by providing additional information you may request a limited permit, for human consumption (indoor use only: cooking, drinking, sanitation), at a rate of 0.005 CFS per household, further limited to 500 gallons per day, per household."* The Initial Review gave the applicant the opportunity to request a limited permit for human consumption use(indoor use only: cooking, drinking, and sanitation), limited to 500 gallons per day, by supplying additional information.

On November 3, 2009, 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. No written comments were received within 30 days.

On November 18, 2009, the Department received information from the applicants intending to document that no alternate water source is available, and that denial of the permit would cause loss of reasonable expectation for use of the properties.

On December 14, 2011, the Department received an amended map and legal description of Lot 10 as requested in the Initial Review.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- any applicable basin program
- applicable statutes, administrative rules, and case law
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- any applicable comprehensive plan or zoning ordinance
- recommendations by other state agencies
- the Scenic Waterway requirements of ORS 390.835
- any comments received

Findings of Fact

The Initial Review erroneously allowed 0.025 CFS. The amount allowed for human consumption use for five households is 0.01 CFS, further limited to 500 gallons per day per household.

The Willamette Basin Program allows domestic use, which includes human consumption (cooking, drinking and sanitation).

Senior water rights exist on Salt Creek, a tributary of Middle Fork Willamette River, or on downstream waters.

Salt Creek, a tributary of Middle Fork Willamette River, is not within or above a State Scenic Waterway.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water not is available for further appropriation (at an 80 percent exceedance probability) from February through November of each year.

The Department finds that no more than 0.01 CFS would be necessary for the proposed use. The amount of water allowed shall be restricted to 0.01 CFS, further limited to 500 gallons per day.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from

the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

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.

Public Interest Findings Regarding Human Consumption Use

The proposed diversion is necessary to uses designated in ORS 536.310(12), specifically human consumption use (cooking, drinking, and sanitation).

After considering various alternative water sources, including groundwater, stored water, purchased trucked water, community and municipal suppliers, and transfers of existing water rights, the applicant provided documentation that there are no reasonable alternative sources of water.

The Department has considered the following factors:

The maximum economic development of the waters involved: The applicant has demonstrated that denial of this application would result in loss of reasonable expectations for use of the property.

The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control: Human consumption includes uses of water for sanitation (OAR 690-300-0010(24)). Because the applicant has no other reasonable source of water to provide sanitation to their home, human consumption use is necessary to provide the beneficial use of sanitation to the applicant.

The amount of waters available for appropriation for beneficial use: Water is not available for the proposed use during the full period requested.

The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved: The use will be conditioned to require reasonable use of the water and require installation of equipment to permit water-use measurement and

reporting.

All vested and inchoate rights to the waters of this state or to the use of waters of this state, and the means necessary to protect such rights: Issuance of this right may increase the likelihood that water may not be available for all water rights.

The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534: Under ORS 536.310(3) and OAR 690-410-0070(2)(a), additional human consumption use may be allowed where public interest in those uses is high and uses are conditioned to protect instream values.

Applying these factors one may conclude that the proposed use could increase the likelihood that water may not be available for all existing water rights (including those for the protection of fish and wildlife) because water is not available for the proposed use during the full period requested. However, because the proposed use is preferred above all other uses, is for sanitation and will not be wasteful, uneconomic, impracticable or unreasonable, and because denial of this application will result in the loss of reasonable expectations for use of the property, the public interest in the proposed use outweighs water availability concerns.

Conclusions of Law

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if 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), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Willamette Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water **is not** available for the proposed use.

The proposed use will not injure other water rights.

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

The proposed use complies with the State Agency Agreement for land use.

Because water **is not** available, the required presumption **has not** been established.

OAR 690-310-120(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors in ORS 537.170(8), and may make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest, and propose approval of the application with appropriate modifications or conditions.

In consideration of findings described above under "Public Interest Findings Regarding Human Consumption Use", even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest if approved with the following conditions:

1. The use shall be limited to human consumption at a diversion rate of 0.01 CFS, further limited to 500 gallons per day per household.
2. Measurement, recording and reporting conditions:
 - 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 meter in good working order.
 - B. The permittee shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded 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.
 - C. The permittee shall allow the watermaster access to the meter; provided however, where any meter is located within a private structure, the watermaster shall request access upon reasonable notice.
 - D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED December 27, 2011



E. Timothy Wallin, Water Rights Program Manager
for Phillip C. Ward, Director
Water Resources Department

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **February 10, 2012**. 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(2)(b) 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

public interest in ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified public interest in ORS 537.170(8) would be impaired or be detrimentally affected;

- If you are the applicant, the protest fee of \$300 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$600 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. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
- *If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.*

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), 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 10, 2012**. 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 \$150. If a hearing is scheduled, an additional fee of \$350 must be submitted along with a request for intervention.

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.

This document was prepared by Michele McAleer. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0853.

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 503-986-0820.

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.

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF LANE

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

PAULA RINI
2173 ESSEX LANE
EUGENE, OR 97403

KERRY KRUEGER
PO BOX 789
OAKRIDGE, OR 97463

JERENE F. ADLER
2058 OLIVE STREET
EUGENE, OR 97405-2836

DUANE FAULHABER
2190 LAW LANE
EUGENE, OR 97401

MASON D. WILLIAMS
280 WEST 26TH STREET
EUGENE, OR 97405

U.S.D.A. FOREST SERVICE
MIDDLE FORK RANGER DISTRICT
46375 HIGHWAY 58
WESTFIR, OR 97492

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

APPLICATION FILE NUMBER: S-87499

SOURCE OF WATER: SALT CREEK, A TRIBUTARY OF MIDDLE FORK WILLAMETTE RIVER

PURPOSE OR USE: HUMAN CONSUMPTION USE (INDOOR USE ONLY: COOKING, DRINKING AND SANITATION) FOR FIVE HOUSEHOLDS

MAXIMUM RATE: 0.01 CUBIC FOOT PER SECOND, FURTHER LIMITED TO 500 GALLONS PER DAY, PER HOUSEHOLD

PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: SEPTEMBER 11, 2009

POINT OF DIVERSION LOCATIONS:

POD #1 (LOT 9): NWSW, SECTION 23, T21S, R3E, W.M.; 850 FEET SOUTH AND 180 FEET EAST FROM W1/4 CORNER, SECTION 23

POD #2 (LOT 10): NWSW, SECTION 23, T21S, R3E, W.M.; 900 FEET SOUTH AND 360 FEET EAST FROM W1/4 CORNER, SECTION 23

POD #3 (LOT 11): NWSW, SECTION 23, T21S, R3E, W.M.; 960 FEET SOUTH AND 555 FEET EAST FROM W1/4 CORNER, SECTION 23

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.

STANDARD CONDITIONS

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.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

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.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet state or federal water quality standards due to reduced flows.

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.

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.

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, except where those instream water rights allow for the use authorized herein.

Completion of construction and application of the water shall be made within five years of the date of permit issuance. If beneficial use of permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after making beneficial use 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

E. Timothy Wallin, Water Rights Program Manager
for Phillip C. Ward, Director

Mailing List for PFO Copies

Application #S-87499

PFO Date December 27, 2011

Original mailed to applicants:

PAULA RINI, 2173 ESSEX LANE, EUGENE, OR 97403
KERRY KRUEGER, PO BOX 789, OAKRIDGE, OR 97463
JERENE F. ALDER, 2058 OLIVE STREET, EUGENE, OR 97405-2836
DUANE FAULHABER, 2190 LAW LANE, EUGENE, OR 97401
MASON D. WILLIAMS, 280 WEST 26TH STREET, EUGENE, OR 97405

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Copies sent to:

1. WRD - File # S-87499
2. Water Availability: Ken Stahr

PFO and Map Sheet Copies sent to:

3. WRD - Watermaster # 2

Protest/ Standing Dates checked _____
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Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

4. Shari Monson, USDA Forest Service, Special Use Administrator, Middle Fork Ranger District, 46375 Highway 58, Westfir, OR 97492

"\$20 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : Michele McAleer

