

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

Water Rights Application
Number S-87833

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$400.00. 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 August 24, 2012, Opal Creek Ancient Forest Center submitted an application to the Department for the following water use permit:

- Amount of Water: 0.23 CUBIC FOOT PER SECOND (CFS)
- Use of Water: DOMESTIC USE FOR 13 HOUSEHOLDS AND 90 BOARDING HOUSE BEDS
- Source of Water: FLUME CREEK, A TRIBUTARY OF OPAL CREEK
- Area of Proposed Use: MARION COUNTY WITHIN SECTION 28 AND SECTION 33, TOWNSHIP 8 SOUTH, RANGE 5 EAST, W.M.

The application materials included information 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 property.

On September 21, 2012, the Department mailed the applicant notice of its Initial Review, determining that "...the use of 0.23 CFS of water from Flume Creek, a tributary of Opal Creek, for year-round domestic use for 13 households and 90 boarding house beds is not allowable. However, if conditions can applied to protect instream values, the Department may recommend approval of the application for year-round human consumption use (indoor use only: cooking, drinking, sanitation) at a rate of 0.04 CFS for 13 households and 90 boarding house beds, further limited to 11,900 gallons per day." The applicant did not notify the Department to stop processing the application within 14 days of that date.

On September 25, 2012, 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.

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 Willamette Basin Program allows human consumption (cooking, drinking, and sanitation) for 13 households and 90 boarding house beds.

Senior water rights exist on Flume Creek, a tributary of Opal Creek, or on downstream waters.

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 is available for further appropriation (at an 80 percent exceedance probability) January 1 through May 31, July 1 through July 31, and November 1 through December 31.

The Department finds that no more than 0.04 CFS, further limited to no more than 11,900 gallons per day, would be necessary for the proposed use.

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:

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 diverted each month, and shall submit a report which includes the recorded report 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.

Public Interest Findings Regarding Human Consumption Use

Flume Creek, a tributary of Opal Creek, is above the Little North Santiam River State Scenic Waterway.

Pursuant to ORS 390.835, the proposed use will not measurably reduce streamflows needed to maintain the free-flowing character of any scenic waterway in quantities necessary for recreation, fish and wildlife uses. (OAR 690-310-0260(2)(a))

The proposed use is consistent with the provisions of ORS 536 and ORS 537 and OAR Chapter 690. (OAR 690-310-0260(2)(b))

Construction, operation and maintenance of the diversion system will be carried out in a manner consistent with the purposes set forth in ORS 390.805 to 390.925. (OAR 690-310-0260(2)c))

Water rights for human consumption shall not exceed 0.005 cubic foot per second per household. (OAR 690-310-0260(2)(d))

The proposed diversion is necessary to uses designated in ORS 536.310(12), specifically human consumption use (cooking, drinking, and sanitation). (OAR 690-310-0260(4)(a))

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. (OAR 690-310-0260(3)(a) and 690-310-0260(4)(b))

ORS 390.835(8), (9), and (12) authorize the Water Resources Commission to issue permits for human consumption and livestock use up to a combined cumulative total of one percent of the average daily flow or one cubic foot per second, whichever is less. According to an analysis of streamflows and previously-approved applications, water remains available for allocation for human consumption and livestock use in the Little North Santiam River State Scenic Waterway. As of the date of this application, 0.551 CFS of a total 1.0 CFS has been appropriated during the month of August. (OAR 690-310-0260(8)(c) and 690-310-0260(8)(d))

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. (OAR 690-310-0260(4)(c))

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 measurement, recording and reporting conditions as required under ORS 390.835(6)(d)(C).

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: ORS 536.310(3) provides that "adequate and safe supplies be preserved and protected for human consumption, while conserving maximum supplies for other beneficial uses." Because the proposed use is human consumption there is a preference for this use over all other uses.

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.

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 application is in compliance with the State Agency Coordination Program regarding 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 for 13 households and 90 boarding house beds at a diversion rate of 0.04 CFS, further limited to 11,900 gallons per day.
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 diverted each month, and shall submit a report which includes the recorded report 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 March 19, 2013

E. Timothy Wallin

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

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 **May 3, 2013**. 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 **May 3, 2013**. 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.

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.

This document was prepared by Kerry Kavanagh. 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 503-986-0816.

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 MARION

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

OPAL CREEK ANCIENT FOREST CENTER
721 NW 9TH AVENUE, SUITE 236
PORTLAND, OR 97209-3451

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

APPLICATION FILE NUMBER: S-87833

SOURCE OF WATER: FLUME CREEK, A TRIBUTARY OF OPAL CREEK

PURPOSE OR USE: HUMAN CONSUMPTION (INDOOR USE ONLY: COOKING, DRINKING, AND SANITATION) FOR 13 HOUSEHOLDS AND 90 BOARDING HOUSE BEDS

MAXIMUM RATE: 0.04 CUBIC FOOT PER SECOND, FURTHER LIMITED TO NO MORE THAN 11,900 GALLONS PER DAY

PERIOD OF USE: YEAR ROUND

DATE OF PRIORITY: AUGUST 24, 2012

POINT OF DIVERSION LOCATION: NE $\frac{1}{4}$ NE $\frac{1}{4}$ SECTION 33, T8S, R5E, W.M.; 730 FEET SOUTH AND 1250 FEET WEST FROM NE CORNER, SECTION 33

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW $\frac{1}{4}$ SW $\frac{1}{4}$
SE $\frac{1}{4}$ SW $\frac{1}{4}$
SECTION 28
TOWNSHIP 8 SOUTH, RANGE 5 EAST, W.M.

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 diverted each month, and shall submit a report which includes the recorded report water-use measurements to the Department annually or more frequently as may be required by

Application S-87833 Water Resources Department

PERMIT DRAFT

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.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens and/or by-pass devices are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish screening and/or by-pass devices to prevent fish from entering the proposed diversion, and to provide adequate upstream and downstream passage for fish.

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-87833

PFO Date March 19, 2013

Original mailed to applicant VIA EMAIL:

~~OPAL CREEK ANCIENT FOREST CENTER
ATTENTION: KATIE RYAN
721 NW 9TH AVENUE, SUITE 236
PORTLAND, OR 97209-3451~~

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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SENT VIA EMAIL:

1. Applicant - kryan@opalcreek.org
2. Agent - lynne@lpartchan.com
3. WRD - Watermaster #16

Protest/ Standing Dates checked _____
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Copies sent to:

1. WRD - File # S-87833
2. WRD - Water Availability: Ken Stahr

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

3. USDA, US Forest Service, HC73 Box 320, Mill City, OR 97630 (a.l.o.)

CASEWORKER : Kerry Kavanagh