

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

Water Rights Application  
Number S-87979

**Proposed Final Order**

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

*Application History*

On May 8, 2014, Alan and Jan Rutherford submitted an application to the Department for the following water use permit:

- Amount of Water: 0.005 cubic foot per second (CFS)
- Use of Water: human consumption (indoor use only: cooking, drinking, and sanitation) for one household
- Source of Water: Tenmile Lake, a tributary of Tenmile Creek
- Area of Proposed Use: Coos County within Section 21, Township 23 South, Range 12 West, W.M.

On May 30, 2014, the Department mailed the applicant notice of its Initial Review, determining that "*the use of 0.005 CFS, further limited to 500 GPD, from Tenmile Lake, a tributary of Tenmile Creek for year-round human consumption (indoor use only: cooking, drinking, and sanitation) for one household is allowable during the full period requested.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On June 3, 2014, 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 South Coast Basin Program allows human consumption (indoor use only: cooking, drinking, and sanitation).

Senior water rights exist on Tenmile Lake, a tributary of Tenmile Creek, or on downstream waters.

Tenmile Lake, a tributary of Tenmile Creek, 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 assessment is in the file. This assessment determined water is not available for further appropriation (at 80 percent exceedance probability) for human consumption use due to senior water rights. However, water is available for a limited number of individual rights under a settlement agreement between the Oregon Department of Fish and Wildlife, Coos Bay North Bend Water Board, and Tenmile Lake Homeowners Association. That agreement provided for 740 additional human consumption rights at a maximum diversion rate of 0.005 CFS per household. Therefore, water is available if limited to human consumption use (indoor use only: cooking, drinking, sanitation), not to exceed 500 gallons per day per household.

The Department finds that the amount of water requested, 0.005 CFS, is an acceptable amount, if 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:

Measurement devices, and recording/reporting of annual water use conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter, or other suitable measuring device as approved by the Director, at each point of diversion. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.

- C. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes 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.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. The screen mesh hole diameter shall not exceed 3/32". The required screen is to be in place and functional prior to diversion of water. The permittee shall obtain written approval from ODFW that the installation of the required screen meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens are not necessary.

#### *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 South Coast Basin Program.

Water is 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.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
  - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
  - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

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 September 2, 2014



E. Timothy Wallin, Water Rights Program Manager  
for 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 **October 17, 2014**. 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 \$350 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$700 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.

#### 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 **October 17, 2014**. 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 \$200. If a hearing is scheduled, an additional fee of \$500 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 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.

**Notice Regarding Service Members:** 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. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

*This document was prepared by Kim French-Gorski. 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 COOS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

ALAN RUTHERFORD  
JAN RUTHERFORD  
24171 OLD RIVER RD  
JUNCTION CITY, OR 97448

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

APPLICATION FILE NUMBER: S-87979

SOURCE OF WATER: TENMILE LAKE, A TRIBUTARY OF TENMILE CREEK

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

MAXIMUM RATE: 0.005 CUBIC FOOT PER SECOND, FURTHER LIMITED TO 500  
GALLONS PER DAY

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: MAY 8, 2014

POINT OF DIVERSION LOCATION: NE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , SECTION 21, T23S, R12W, W.M.;  
147 FEET SOUTH AND 1016 FEET WEST FROM N1/4 CORNER, SECTION 12

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE  $\frac{1}{4}$  NW  $\frac{1}{4}$   
SECTION 21  
TOWNSHIP 23 SOUTH, RANGE 12 WEST, W.M.

Measurement devices, and recording/reporting of annual water use  
conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter, or other suitable measuring device as approved by the Director, at each point of diversion. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within

a private structure, the watermaster shall request access upon reasonable notice.

- C. The permittee shall keep a complete record of the volume of water diverted each month, and shall submit a report which includes 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.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. The screen mesh hole diameter shall not exceed 3/32". The required screen is to be in place and functional prior to diversion of any water. The permittee shall obtain written approval from ODFW that the installation of the required screen meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens are not necessary.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that 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 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.

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 Director, Water Resources Department

# Mailing List for PFO Copies

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Application #S-87979

PFO Date September 2, 2014

**Original mailed to applicant:**

~~ALAN AND JAN RUTHERFORD, 24171 OLD RIVER RD, JUNCTION CITY, OR 97448~~

**SENT VIA EMAIL:**

1. Applicant - [alan@99w.us](mailto:alan@99w.us)
2. WRD - Watermaster # 19

Copies sent to:

1. WRD - File # S-87979
2. Water Availability: Shawn Turner

PFO and Map Sheet Copies sent to:

3. Regional Manager: SWR

Copies Mailed

By: \_\_\_\_\_  
(SUPPORT STAFF)

on: \_\_\_\_\_  
(DATE)

Protest/  
Standing Dates  
checked

\_\_\_\_\_

CASEWORKER : Kim French-Gorski