

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

Water Rights Application  
Number G-18050

**Proposed Final Order**

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

*Findings of Fact*

1. On April 13, 2015, Jason Cole and Elizabeth Cleary-Cole submitted an application to the Department for the following water use permit:
  - Amount of Water: 0.13 cubic foot per second (CFS)
  - Use of Water: irrigation of 15.0 acres
  - Source of Water: Well 1 (JOSE 59341/L114218) and Well 2 in Powell Creek Basin
  - Area of Proposed Use: Josephine County within Section 15, Township 38 South, Range 5 West, W.M.
2. On May 29, 2015, the Department mailed the applicant notice of its Initial Review, determining that "*the appropriation of 0.13 CFS of water from Well 1 (JOSE 59341/L114218) and Well 2 in Powell Creek Basin for irrigation of 15.0 acres is not allowable, and it appears unlikely that you will be issued a permit unless a suitable mitigation proposal is provided prior to issuance of the Proposed Final Order.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On June 2, 2015, 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.
4. The Department has determined an error was made in the Initial Review regarding the resolution of the conflicting acreage. The Initial Review indicated that the conflicting acreage was evidenced by Certificate 2108, which was to be diminished, however the Initial Review should be corrected to reflect that the conflicting acreage is covered by an existing water right evidenced by Certificate 54160. The applicant intends to diminish Certificate 54160 to supplemental irrigation to resolve the conflict.

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
  - any general basin-wide standard for flow rate and duty of water allowed
  - the need for a flow rate and duty higher than the general standard
  - 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
  - designations of any critical ground water areas
  - any comments received
5. The Rogue Basin Program allows irrigation (OAR 690-515-0030).
6. An assessment of groundwater availability has been completed by the Department's Groundwater/Hydrology section. A copy of this assessment is in the file. Groundwater will likely be available within the capacity of the resource, and the proposed use of groundwater will avoid injury to existing groundwater rights.
7. Groundwater Findings Under OAR 690-009  
The Department determined, consistent with OAR 690-009-0040(4), that the proposed groundwater use will have the potential for substantial interference with surface water, namely Powell Creek.

In making this determination, the Department considered whether:

- (a) There is a hydraulic connection from the proposed well(s) to any surface water sources.
- (b) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source;
- (c) The rate of appropriation is greater than five cubic feet per second, if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (d) The rate of appropriation is greater than one percent of the pertinent adopted minimum perennial streamflow or instream water right with a senior priority date, if one is applicable, or of the discharge that is equaled or exceeded 80 percent of time, as determined or estimated by the Department, and if the point of appropriation is a horizontal distance less than one mile from the surface water source;
- (e) The groundwater appropriation, if continued for a period of 30 days, would result in stream depletion greater than 25 percent of the rate of appropriation, if the point of appropriation is a horizontal distance less than one mile from the surface water source.

For this application, the Department determined that there is the potential for substantial interference because of the following items described above: (a), (b), and (d)

8. Because the proposed use of groundwater has the potential for substantial interference with surface water, an assessment of surface 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 surface water is not available for further appropriation (at an 80 percent exceedance probability) at any time of the year.
9. On April 13, 2015, the applicant submitted an Affidavit for the Cancellation of an Entire Water Right Certificate, being 0.13 CFS for irrigation of 10.0 acres under Certificate 2108.
10. The Department finds that the proposed cancellation of Certificate 2108 provides sufficient mitigation to offset pumping impacts on Powell Creek.
11. 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:
  - (a) 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.
  - (b) Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation.
12. Senior water rights exist on Well 1 (JOSE 59341/L114218) and Well 2 in Powell Creek Basin, or on downstream waters.
13. Well 1 (JOSE 59341/L114218) and Well 2 in Powell Creek Basin are above the Rogue River State Scenic Waterway.
14. The Groundwater Section finds, per ORS 390.835(9), there is not 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.

15. The Department finds that the amount of water requested, 0.13 CFS, is an acceptable amount.
16. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.
17. The proposed groundwater use is not within a designated critical groundwater area.

*Conclusions of Law*

1. Under the provisions of ORS 537.621, the Department must presume that a proposed use will ensure the preservation of the public welfare, safety and health 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.
2. The proposed use requested in this application is allowed in the Rogue Basin Program.
3. Water **is not** available for the proposed use.
4. The proposed use will not injure other water rights.
5. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
6. The application is in compliance with the State Agency Coordination Program regarding land use.
7. No proposed flow rate and duty of water higher than the general basin-wide standard is needed.
8. For these reasons, the required presumption **has not** been established.
9. OAR 690-310-0140(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public welfare, safety and health, and may 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.

To determine whether the proposed use will preserve the public welfare, safety and health, the factors in ORS 537.625(3), shown in bold below, have been considered as follows:

- (a) The conservation of the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.

*Irrigation is classified under the Rogue Basin Program, and therefore is one of the highest and best uses.*

- (b) The maximum economic development of the waters involved.

*Water for irrigation provides economic development of land and impacts the local community by increasing employment, therefore the economic development consideration is met.*

- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

*Appropriated water will be controlled until beneficial use of water via irrigation, and the proposed use must be made without waste, thus the control and beneficial-use consideration is met.*

- (d) The amount of waters available for appropriation for beneficial use.

*Groundwater will likely be available within the capacity of the resource, and the proposed use of groundwater will avoid injury to existing groundwater rights.*

*Although the proposed use has the potential for substantial interference with an over-appropriated surface-water source and surface water is not available, mitigation provided by the cancellation of Certificate 2108 will sufficiently offset impacts the proposed use will have on surface-water flows.*

- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

*The draft permit is conditioned such that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented. The proposed use, as conditioned in the attached*

*draft permit, will require conservation measures and reasonable use of the water.*

- (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.

*The pending application's priority date and the Department's existing system of regulation are the means necessary to protect existing vested and inchoate rights, thus the protection of rights consideration is satisfied.*

- (g) The state water resources policy.

*The Department determined the proposed use is consistent with the state water resources policy formulated under ORS 537.505 to 537.534.*

10. The Department therefore concludes that, in accordance with OAR 690-310-0140(2)(b), although the presumption is not established, the proposed use as modified and conditioned in the attached draft permit will ensure the preservation of the public welfare, safety and health.

#### Recommendation

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

DATED December 1, 2015



E. Timothy Wallin, Water Rights Program Manager  
for Thomas M. Byler, Director

#### 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. Protests must be received in the Water Resources Department no later than **January 15, 2016**. 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, ensure the preservation of the public welfare, safety and health as described in ORS 537.525, ORS 537.621(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 aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely 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 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 **January 15, 2016**. 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. If you have any questions about any of the statements contained in this document I can be reached 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.  
STATE OF OREGON

DRAFT

COUNTY OF JOSEPHINE

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

JASON COLE  
ELIZABETH CLEARY-COLE  
1050 HUMBUG CREEK RD  
JACKSONVILLE, OR 97530

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

APPLICATION FILE NUMBER: G-18050

SOURCE OF WATER: WELL 1 (JOSE 59341/L114218) AND WELL 2 IN POWELL  
CREEK BASIN

PURPOSE OR USE: IRRIGATION OF 15.0 ACRES

MAXIMUM RATE: 0.13 CUBIC FOOT PER SECOND

PERIOD OF USE: APRIL 1 THROUGH OCTOBER 31

DATE OF PRIORITY: APRIL 13, 2015

WELL LOCATION:

WELL 1 (JOSE 59341/L114218): NE  $\frac{1}{4}$  SW  $\frac{1}{4}$ , SECTION 15, T38S, R5W,  
W.M.; 265 FEET SOUTH AND 235 FEET WEST FROM C1/4 CORNER, SECTION  
15

WELL 2: NE  $\frac{1}{4}$  SW  $\frac{1}{4}$ , SECTION 15, T38S, R5W, W.M.; 645 FEET SOUTH  
AND 470 FEET WEST FROM C1/4 CORNER, SECTION 15

The amount of water used for irrigation under this right, together with  
the amount secured under any other right existing for the same lands, is  
limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and  
2.5 acre-feet for each acre irrigated during the irrigation season of  
each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  15.0 ACRES  
SECTION 15  
TOWNSHIP 38 SOUTH, RANGE 5 WEST, W.M.

Application G-18050 Water Resources Department

PERMIT DRAFT

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 at each point of appropriation. 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 Director may require the permittee to keep and maintain a record of the volume of water diverted, and may require the permittee to report water-use on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water-use information, the periods of water use and 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.

Use of water under authority of this permit may be regulated if analysis of data available after the permit is issued discloses that the appropriation 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 in effect as of the priority date of the right or as those quantities may be subsequently reduced.

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

**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.

If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may be subject to cancellation, unless the Department authorizes the change in writing.

If substantial interference with surface water or a senior water right occurs due to withdrawal of water from any well listed on this permit, then use of water from the well(s) shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interferences.

The well(s) shall be constructed and maintained in accordance with the General Standards for the Construction and Maintenance of Water Supply Wells in Oregon. The works shall be equipped with a usable access port adequate to determine water-level elevation in the well at all times.

If the riparian area is disturbed in the process of developing a point of appropriation, 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 downstream waters decreases to the point that those waters no longer meet state or federal water quality standards due to reduced flows.

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.

Prior to receiving a certificate of water right, the permit holder shall submit to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data every ten years thereafter.

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.

Construction of the well shall be made within five years of the date of permit issuance. The deadline to begin construction may not be extended. This permit is subject to cancellation proceedings if the begin construction deadline is missed.

Complete 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 Thomas M. Byler, Director

# Mailing List for PFO Copies

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Application #G-18050

PFO Date December 1, 2015

**Original mailed via CERTIFIED MAIL to applicant:**

JASON COLE AND ELIZABETH CLEARY-COLE, 1050 HUMBUG CREEK RD,  
JACKSONVILLE, OR 97530

**SENT VIA EMAIL:**

1. WRD - Watermaster # 14

Copies sent to:

1. WRD - File # G-18050
2. Water Availability: Shawn Ortiz-Turner

PFO and Map Copies sent to:

3. Regional Manager: SWR

|  |
|--|
| Copies Mailed<br>By: _____<br>(SUPPORT STAFF)<br>on: _____<br>(DATE) |
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| Protest/<br>Standing Dates<br>checked<br>_____ |
|--|

CASEWORKER : Kim French