

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

Water Rights Application
Number S-88228

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$450.00. 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.

Findings of Fact

1. On May 9, 2016, John Law and Ruth Law submitted an application to the Department for the following water use permit:
 - Amount of Water: 4.5 acre-feet (AF) and 0.005 cubic foot per second (CFS)
 - Use of Water: irrigation of 1.0 acre and year-round domestic use for one household;
 - Source of Water: Lost Creek Reservoir, constructed under Permits R-8141 and R-8142, tributary of Rogue River, and Rogue River, a tributary of Pacific Ocean
 - Area of Proposed Use: Josephine County Within Section 2, Township 36 South, Range 7 West, W.M.

2. On May 27, 2016, the Department mailed the applicant notice of its Initial Review, determining that "*The diversion of 4.5 AF of water from Lost Creek Reservoir, constructed under Permits R-8141 and R-8142, a tributary of Rogue River, for irrigation of 1.0 acre is allowable during the full period requested, April 1 through October 31 of each year, contingent on the Department receiving a valid and executed contract from the Bureau of Reclamation; and the diversion of 0.005 CFS of water from Rogue River, a tributary of Pacific Ocean, for year-round domestic use for one household is not allowable, and it appears unlikely that you will be issued a permit for this use. However, by providing additional information you may request a limited permit for human consumption use (indoor use only: cooking, drinking, sanitation) at 0.005 CFS, further limited to 500 gallons per day.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

3. On May 31, 2016, 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. On May 9, 2016, the Department received a valid and executed contract from the Bureau of Reclamation (BOR) (Contract No. 169E101894).
5. On January 3, 2017, the Department received information from the applicant 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 their property as required by OAR 690-310-0260(3)(a) and (b).

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
6. The Rogue Basin Program allows irrigation and domestic use, which includes human consumption (indoor use only: cooking, drinking, and sanitation) (OAR 690-515-0040).
 7. Senior water rights exist on Lost Creek Reservoir, tributary of Rogue River, and Rogue River, a tributary of Pacific Ocean, or on downstream waters.
 8. 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 from Rogue River is not available for further appropriation (at an 80 percent exceedance probability) at any time of the year, due to instream water rights. The Department has consulted with ODFW regarding the instream water rights and the proposed use under application S-88228. The Department and ODFW have determined that instream values in Rogue River can be protected if the permit is properly conditioned, including limiting the use to human consumption.

9. Water is available for irrigation from Lost Creek Reservoir, constructed under Permits R-8141 and R-8142, under BOR contract No.169E101894.
10. The Department finds that the amount of water requested, 4.5 AF for irrigation is an acceptable amount, however, 0.005 CFS requested for human consumption shall be limited to no more than 500 gallons per day.
11. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.
12. 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. 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.
 - c. The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion. The required screen **shall 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 are not necessary. This permit is subject to cancellation proceeding if water use begins before installation of fish screening.
 - d. The period of use for irrigation should be limited to April 1 through October 31.

- e. Diversion of surface water shall be limited to human consumption (indoor use only: cooking, drinking and sanitation).
- f. 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 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.

13. Public Interest Findings Regarding Human Consumption Use

Lost Creek Reservoir, tributary of Rogue River, and Rogue River, tributary of Pacific Ocean, are above the Rogue 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 (indoor use only: 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 in the Rogue River State Scenic Waterway. As of the date of this application, 0.041 CFS of a total 1.0 CFS has been appropriated during the months of July, August, and September. (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.

Conclusions of Law

1. 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.
2. The proposed uses requested in this application are allowed in the Rogue Basin Program.
3. Water **is not** available for the proposed use of human consumption.
4. Because water **is not** available, the required presumption **has not** been established.
5. The proposed use will not injure other water rights.
6. The application is in compliance with the State Agency Coordination Program regarding land use.
7. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
8. Because water **is not** available, the required presumption **has not** been established.
9. 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.

10. 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:

a. 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 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.
- b. The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion. The required screen **shall 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 are not necessary. This permit is subject to cancellation proceeding if water use begins before installation of fish screening.
- c. 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.

11. 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.
12. The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

Recommendation

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

DATED April 25, 2017



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 ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **June 8, 2017**. 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 **June 8, 2017**. 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.

DRAFT

STATE OF OREGON

COUNTY OF JOSEPHINE

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

JOHN LAW
RUTH LAW
233 HIDDEN CREEK COURT
MARTINEZ, CA 94553

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

APPLICATION FILE NUMBER: S-88228

SOURCE OF WATER: LOST CREEK RESERVOIR, CONSTRUCTED UNDER PERMITS R-8141 AND R-8142, TRIBUTARY OF ROGUE RIVER AND ROGUE RIVER, A TRIBUTARY OF PACIFIC OCEAN

PURPOSE OR USE AND VOLUME: 4.5 ACRE-FEET EACH YEAR FOR IRRIGATION OF 1.0 ACRE AND 0.005 CFS, FURTHER LIMITED TO 500 GALLONS PER DAY, FOR YEAR-ROUND HUMAN CONSUMPTION (INDOOR USE ONLY: COOKING, DRINKING, AND SANITATION) FOR ONE HOUSEHOLD

PERIOD OF USE: IRRIGATION: APRIL 1 THROUGH OCTOBER 31
HUMAN CONSUMPTION: YEAR-ROUND

DATE OF PRIORITY: MAY 9, 2016

POINT OF DIVERSION LOCATIONS:

POD 1: NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 2, T36S, R7W, W.M.; 925 FEET SOUTH AND 1510 FEET WEST FROM E1/4 CORNER, SECTION 2

POD 2: NW $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 2, T36S, R7W, W.M.; 945 FEET SOUTH AND 1490 FEET WEST FROM E1/4 CORNER, SECTION 2

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 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

<u>OO</u>	<u>IRRIGATION</u>	<u>DOMESTIC</u>
SE $\frac{1}{4}$ NE $\frac{1}{4}$	1.0 ACRE	X
	SECTION 2	
TOWNSHIP 36 SOUTH, RANGE 7 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 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. Fish screening is to prevent fish from entering the proposed diversion. The required screen **shall 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 are not necessary. This permit is subject to cancellation proceeding if water use begins before installation of fish screening.

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.

The use of water under this right is subject to the terms and conditions of contract No. 169E101894, or a satisfactory replacement, between the Bureau of Reclamation and the permittee, a copy of which must be on file in the records of the Water Resources Department.

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.

Construction of the water system shall begin 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

Application #S-88228

PFO Date April 11, 2017

Original mailed via CERTIFIED MAIL to applicant:

JOHN LAW AND RUTH LAW, 233 HIDDEN CREEK COURT, MARTINEZ, CA 94553

SENT VIA EMAIL:

1. WRD - Watermaster # 13

Copies sent to:

1. Water Availability: Hydrographics

PFO and Map Sheet Copies sent to:

1. WRD - File # S-88228
2. Regional Manager: SWR

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Protest/
Standing Dates
checked

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

1. Bureau of Land Management, Medford District Office, 3040 Biddle Rd, Medford, OR 97504
2. Josephine County, Public Works Dept, 201 River Heights Way, Grants Pass, OR 97527
3. Wilma G. Rosenthal, 1080 Ferry Rd, Grants Pass, OR 97526

CASEWORKER : Kim French