Water Resources Department
Water Right Services Division

Water Rights Application
Number G-18243

Proposed Final Order

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

Findings of Fact

1. On January 27, 2016, Matt Dolinar submitted an application to the Department for the following water use permit:

    - Amount of Water: 0.15 cubic foot per second (CFS) and 0.62 acre foot (AF)
    - Use of Water: nursery use on 79.8 acres and storage for nursery use
    - Source of Water: Well 1 (JACK 58507/L89231) and Well 2 (JACK 54643/L48007) in East Fork Cottonwood Creek Basin; and Storage 1 and Storage 2 in East Fork Cottonwood Creek Basin
    - Area of Proposed Use: Jackson County within Section 29, Township 40 South, Range 2 East, W.M.

2. On June 10, 2016, the Department mailed the applicant notice of its Initial Review, determining that "*the appropriation of 0.15 CFS of water from Well 1 (JACK 58507/L89231) in East Fork Cottonwood Creek Basin for storage of 0.31 acre-foot (AF) of water in Storage 1 Reservoir and 0.31 AF of water in Storage 2 Reservoir in East Fork Cottonwood Creek Basin for year-round nursery use on 79.8 acres is allowable.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

3. On June 14, 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.

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 groundwater areas
- any comments received

4. Under ORS 536.340(1)(a), the Water Resources Commission may establish a basin program to classify sources of water supply as to the highest and best use and quantities of use, and that classification of sources of water supply has the effect of restricting the use and quantities of use thereof to the uses and quantities of uses specified in the classification. The Commission has not established a basin program for the Klamath River basin. Therefore, neither the proposed use nor the quantity of water is restricted as a result of this consideration.

5. 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 if properly conditioned, the proposed use of groundwater will avoid injury to existing groundwater rights.

6. Groundwater Findings Under OAR 690-009
The Department determined, consistent with OAR 690-009-0040(4), that the proposed groundwater use will not have the potential for substantial interference with surface water.

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.

According to the Department's rules, the potential for substantial interference is assumed if A and either B or C or D or E are met. For this application, the Department determined that there is no potential for substantial interference, because either A is not met, or B, C, D or E are not met, or both.

7. Well 1 (JACK 58507/L89231), Storage 1, and Storage 2 in East Fork Cottonwood Creek Basin are not within or above a State Scenic Waterway.

8. The Department finds that the amount of water requested, 0.15 CFS, is an acceptable amount.

9. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright.

10. 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 Water Resources Commission has not established a basin program for the Klamath River basin. Therefore, neither the proposed use nor the quantity of water is restricted as a result of this consideration.

3. Water is available for the proposed use.

4. The proposed use will not injure other water rights.

5. No proposed flow rate and duty of water higher than the general basin-wide standard is needed.

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. For these reasons, the required presumption has been established.

9. Under the provisions of ORS 537.621, once the presumption has been established, 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 would not ensure the preservation of the public welfare, safety and health as demonstrated in comments, in a protest . . . or in a finding of the department that shows:

      a. The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected; and

      b. Specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected.

10. 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 would impair or be detrimental to the public interest.

11. The Department therefore concludes that the proposed use would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

12. When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety, and health. The attached draft permit is conditioned accordingly.

Recommendation

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

DATED May 2, 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 groundwater), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **June 16, 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, 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 **June 16, 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.

STATE OF OREGON

COUNTY OF JACKSON

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MATT DOLINAR
9884 MOUNT ASHLAND SKI RD
ASHLAND, OR 97520

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

APPLICATION FILE NUMBER: G-18243

SOURCE OF WATER: WELL 1 (JACK 58507/L89231), STORAGE 1, AND STORAGE 2 IN EAST FORK COTTONWOOD CREEK BASIN

PURPOSE OR USE: NURSERY USE ON 79.8 ACRES AND STORAGE FOR NURSERY USE

MAXIMUM RATE: 0.15 CUBIC FOOT PER SECOND, AND 0.62 ACRE-FOOT

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: JANUARY 27, 2016

WELL LOCATION:

WELL 1 (JACK 58507/L89231): NE ¼ NW ¼, SECTION 29, T40S, R2E, W.M.; 1025 FEET SOUTH AND 2436 FEET EAST FROM NW CORNER, SECTION 29

STORAGE 1: NE ¼ NW ¼, SECTION 29, T40S, R2E, W.M.; 1228 FEET SOUTH AND 2451 FEET EAST FROM NW CORNER, SECTION 29

STORAGE 2: NW ¼ SW ¼, SECTION 29, T40S, R2E, W.M.; 3373 FEET SOUTH AND 922 FEET EAST FROM NW CORNER, SECTION 29

The amount of water used for nursery use under this right, together with the amount secured under any other right existing for the same lands, is limited to 0.15 cubic foot per second per acre and 5.0 acre feet per acre per year. For irrigation of containerized nursery plants, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-FORTIETH of one cubic foot per second and 5.0 acre feet per acre per year. For irrigation of in-ground nursery plants, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second and 2.5 acre feet per acre per year. The use of water for nursery use may be made at any time, during the period of

allowed use specified above, that the use is beneficial. For irrigation of any other crop, the amount of water diverted under this right, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second and 2.5 acre feet per acre during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

QQ	NURSERY USE	STORAGE
NE ¼ NW ¼	2.3 ACRES	X
SW ¼ NW ¼	32.5 ACRES	
SE ¼ NW ¼	10.0 ACRES	
NW ¼ SW ¼	35.0 ACRES	X

SECTION 29
TOWNSHIP 40 SOUTH, RANGE 2 EAST, W.M.

Measurement devices, and recording/reporting of annual water use and storage 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 permittee shall keep a complete record of the volume of water diverted and stored each month, and shall submit a report which includes water-use and water-storage 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.

Well Identification Tag Condition

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

Application #G-18243 PFO Date May 2, 2017

Original mailed via CERTIFIED MAIL to applicant:

MATT DOLINAR, 9884 MOUNT ASHLAND SKI RD, ASHLAND, OR 97520

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

SENT VIA EMAIL:
1. WRD - Watermaster # 13

Copies sent to:
1. WRD - File # G-18243

Protest/
Standing Dates
checked
_____

PFO and Map Copies sent to:
2. Regional Manager: SWR

CASEWORKER : Kim French