

**Oregon Water Resources Department**

**Water Right Services Division**

Water Right Application G-18342 in the ) PROPOSED FINAL ORDER  
name of HE HE Properties Of America )  
)

**Summary:** The Department proposes to issue an order approving Application G-18342, consistent with the attached draft permit.

**Authority**

The application is being processed in accordance with Oregon Revised Statute 537.615 through 537.628, and 390.826, and Oregon Administrative Rule Chapter 690, Divisions 5, 8, 9, 33, 300, 310, 400, 410, 502 and Rogue Basin Program 690-515. These statutes and rules can be viewed on the Oregon Water Resources website: <http://www.oregon.gov/owrd/pages/law/index.aspx>

The Department's main page is <http://www.oregon.gov/OWRD/pages/index.aspx>

The Department shall presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525 if:

- (a) 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);
- (b) Water is available;
- (c) The proposed use will not injure other water rights; and
- (d) The proposed use complies with the rules of the Commission. 537.621(2); 690-310-0150(2)(b)

All four criteria must be met for a proposed use to be presumed to ensure the preservation of the public welfare, safety and health. When the criteria are met and the presumption is established the Department must further evaluate the proposed use, any comments received information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. 690-310-0140.

If the Department determines that the presumption is established and not overcome the Department shall issue a proposed final order recommending issuance of the permit subject to any appropriate modifications or conditions.

## **FINDINGS OF FACT**

### **Application History**

1. On July 15, 2016, HE HE Properties of America filed a complete application for the following water use:
  - Amount of Water: 0.167 cubic foot per second (CFS)
  - Use of Water: nursery use on 30.0 acres
  - County: Jackson County
  - Location: within Sections 27 and 28, Township 35 South, Range 1 West, W.M
  - Source of Water: Well 1 in Hog Creek Basin
2. On October 7, 2016, the Department mailed the applicant notice of its Initial Review, determining that **“The appropriation of 0.167 CFS of water from Well 1 in Hog Creek Basin for year-round nursery use on 30.0 acres is allowable.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On October 11, 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.
4. The Department has determined an error was made in the Initial Review as to the proposed use. The applicant indicated on Page 5 of the application that the proposed use will also include storage. The determinations of the Initial Review should be corrected to reflect the proposed use will include storage. Additional conditions have been added to the draft permit.
5. Finding of Fact #3 in the Initial Review was in error and should read as “Uses included in nursery use are fully included in irrigation and agriculture uses, both of which are allowed under the Rogue Basin Program (OAR 690-515). 537.621(3)(b); 690-310-0150(2)(b)”, as seen below in #6.

### **Presumption Criteria (a) Consistency with Basin Program**

6. Uses included in nursery use are fully included in irrigation and agriculture uses, both of which are allowed under the Rogue Basin Program (OAR 690-515). 537.621(3)(b); 690-310-0150(2)(b).
7. The proposed groundwater use is not within a designated critical groundwater area. 537.620(4)(a), 537.621(3)(a); 690-310-0150(2)(a).

### **Presumption Criteria (b) Water Availability**

8. An assessment of groundwater availability has been completed by the 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 (and if authorized), the proposed use of groundwater will avoid injury to existing groundwater rights. 537.621(3)(c); 690-310-0150(2)(c).

**Presumption Criteria (c) Injury Determination**

9. The proposed use will not injure other water rights. 537.621(3)(d); 690-310-0150(2)(e).

**Presumption Criteria (d) Whether the use complies with rules of the Commission**

10. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. 537.621(3)(b); 690-310-0150(2)(b).
11. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

**Determination of Presumption that a proposed groundwater use will ensure the preservation of the public welfare, safety and health**

12. Based on the review of the presumption criteria (a)-(d) above, the presumption has been established. 537.621(3)(g); 690-310-0150(2)(g).

**Further evaluation of the proposed use**

13. Comments were received separately from Richard Harrington and Michelle Colby Kielman both expressing concern for senior water right users water availability and interference with domestic exempt wells, by the close of the comment period. 690-310-0140(3).
14. Information available in Department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the proposed use would not ensure the preservation of the public welfare, safety, and health under ORS 537.525. 690-310-0140(3).

**Other Criteria and Requirements**

15. The proposed use is located above the Rogue Scenic Waterways, as designated under Oregon Revised Statute 390.826. The Department has determined that 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. 537.620(4)(a), 537.621(3)(a); 690-310-0150(2)(a)
16. In accordance with Div. 33 (Additional Public Interest Standards for New Appropriations) an interagency team reviewed the 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 did not recommend that any additional conditions of use be imposed on this application. 690-033-0330
17. The amount of water requested, 0.167 CFS, is necessary for the proposed use. 537.621(3)(c); 690-310-0150(2)(b)

18. The applicant proposed to apply water when needed, and use the most efficient method of water application for the crop being irrigated (drip irrigation). These measures are adequate at this time. 690-310-0150(2)(j)
19. The applicant did not propose any measures to measure the amount of water diverted, prevent damage to aquatic life and riparian habitat, prevent discharge of contaminated water to a surface stream and to prevent damage to public uses of any affected surface waters. The lack of proposed measures is inadequate. Measures addressing these requirements will be conditions of water use in the permit. 690-310-0150(2)(j)

### CONCLUSIONS OF LAW

1. The proposed use would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

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.

### PROPOSED ORDER

The Department recommends approval of Application G-18342, as amended, and issuance of a permit consistent with the attached draft permit.

DATED August 15, 2017



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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 **Friday, September 29, 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 \$410 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$810 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.

#### 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 **Friday, September 29, 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 \$230. If a hearing is scheduled, an additional fee of \$580 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 Lisa Graham. If you have any questions about any of the statements contained in this document I can be reached at 503-986-0808 or Elisabeth.A.Graham@Oregon.gov.*

*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 JACKSON

**DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS**

THIS DRAFT PERMIT IS HEREBY ISSUED TO

HE HE PROPERTIES OF AMERICA  
544 N HEIGHTS DR  
EAGLE POINT OR 97524

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

APPLICATION FILE NUMBER: G-18342

SOURCE OF WATER: WELL 1 IN HOG CREEK BASIN

PURPOSE OR USE AND MAXIMUM RATE:

0.167 CUBIC FOOT PER SECOND FOR NURSERY USE ON 30.0 ACRES

35.0 ACRE FEET FOR STORAGE FOR NURSERY USE

PERIOD OF USE: JANUARY 1 THROUGH DECEMBER 31

DATE OF PRIORITY: JULY 15, 2016

WELL LOCATION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	1 W	WM	27	SW NW	1527 FEET SOUTH AND 392 FEET EAST FROM NW CORNER, SECTION 27

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:

Twp	Rng	Mer	Sec	Q-Q	Acres
35 S	1 W	WM	27	SW NW	15.00
35 S	1 W	WM	28	SE NE	15.00

**1. 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 permittee shall keep a complete record of the volume of water used each month, and shall submit an annual report which includes the recorded 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.

**2. Static Water Level Conditions:**

To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to obtain, from a qualified individual (see below), and report annual static water level measurements. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

Measurements must be made according to the following schedule:

**Before Use of Water Takes Place**

**Initial and Annual Measurements**

The Department requires the permittee to report an initial water level measurement in the month specified above once well construction is complete and annually thereafter until use of water begins; and

**After Use of Water has Begun**

**Seven Consecutive Annual Measurements**

Following the first year of water use, the user shall report seven consecutive annual static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on an analysis of the data collected, the Director may require the user to obtain and report additional annual static water level measurements beyond the seven year minimum reporting period. The additional measurements may

be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and be submitted to the Department on forms provided by the Department. The Department requires the individual performing the measurement to:

- A. Identify each well with its associated measurement; and
- B. Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method used to obtain each well measurement; and
- D. Certify the accuracy of all measurements and calculations reported to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if any of the following events occur:

- A. Annual water level measurements reveal an average water level decline of three or more feet per year for five consecutive years; or
- B. Annual water level measurements reveal a water level decline of 15 or more feet in fewer than five consecutive years; or
- C. Annual water level measurements reveal a water level decline of 25 or more feet; or
- D. Hydraulic interference leads to a decline of 25 or more feet in any neighboring well with senior priority.

The period of non-use or restricted use shall continue until the water level rises above the decline level which triggered the action or until the Department determines, based on the permittee's and/or the Department's data and analysis, that no action is necessary because the aquifer in question can sustain the observed declines without adversely impacting the resource or senior water rights. The water user shall in no instance allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit. If more than one well is involved, the water user may submit an alternative measurement and reporting plan for review and approval by the Department.

### 3. **Scenic Water Way Condition:**

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.

#### 4. **Groundwater Condition:**

Groundwater production shall be only from a single aquifer in the bedrock groundwater reservoir.

#### 5. **Storage Conditions:**

A berm that excludes overland flow of surface water must be installed and maintained around the reservoir.

If there is an outlet for the storage component:

- a. **Prior to stocking with fish**, you may be required to install a fish screen at the outlet to meet Oregon Department of Fish and Wildlife specifications for adequate protection of aquatic life.

### **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.

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**

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