

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

Water Rights Application
Number S-88091

Proposed Final Order

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

Findings of Fact

1. On May 26, 2015, Michael K Hamilton submitted an application to the Department for the following water use permit:
 - Amount of Water: 0.005 cubic foot per second (CFS)
 - Use of Water: human consumption (indoor use only: cooking, drinking, and sanitation) for one household
 - Source of Water: Mill Creek, a tributary of Rogue River
 - Area of Proposed Use: Jackson County within Section 16, Township 33 South, Range 2 East, W.M.
2. On June 19, 2015, the Department mailed the applicant notice of its Initial Review, determining that *"the use of 0.005 CFS of water from Mill Creek, a tributary of Rogue River for year-round human consumption use for one household is not allowable, and it appears unlikely that a permit will be issued. However, if conditions can be applied to protect instream values, the Department may recommend approval of the application for year-round human consumption use (indoor use only: cooking, drinking, sanitation) at a rate of 0.005 CFS, further limited to 500 gallons per day per household, at the next stage of processing."* The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On June 23, 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.

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
4. The Rogue Basin Program allows domestic use (OAR 690-515-0000), which includes human consumption use (indoor use only: cooking, drinking, and sanitation).
 5. Senior water rights exist on Mill Creek, a tributary of Rogue River, or on downstream waters.
 6. Mill Creek, a tributary of Rogue River, is above the Rogue River State Scenic Waterway.
 7. 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 is not available for further appropriation (at an 80 percent exceedance probability) at any time of the year.
 8. The Department finds that the amount of water requested, 0.005 CFS, is an acceptable amount, if further limited to 500 gallons per day.
 9. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded.
 10. 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. 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 devices in good working order.
 - 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.

Public Interest Findings Regarding Human Consumption Use:

10. Mill Creek, a tributary of Rogue River, is within the Rogue River State Scenic Waterway.
11. 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))
12. The proposed use is consistent with the provisions of ORS 536 and ORS 537 and OAR Chapter 690. (OAR 690-310-0260(2)(b))
13. 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))
14. Water rights for human consumption shall not exceed 0.005 cubic foot per second per household. (OAR 690-310-0260(2)(d))
15. The proposed diversion is necessary to uses designated in ORS 536.310(3), specifically human consumption use (indoor use only: cooking, drinking, and sanitation).
16. The applicant provided documentation that there are no reasonable alternative sources of water. (OAR 690-310-0260(3)(a))
17. 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, 0.956 CFS of the total 1.0 CFS is available. (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 in application materials that denial of this application would result in loss of reasonable expectations for use of the property and has therefore demonstrated maximum economic development of the water. (ORS 390.835(d)(B))

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), preventing wasteful, uneconomic, impracticable, or unreasonable use of the waters. (ORS 390.835(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:

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.

The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534:

The Department determined the proposed use is consistent with the State Water Resources Policy formulated under ORS 536.295 to 536.350.

Applying these factors may conclude that the proposed use could increase the likelihood that water may not be available for all existing water rights (including those for the protection of fish and wildlife) because water is not available for the proposed use during the full period requested. However, because the proposed use is preferred above all other uses, is for sanitation, and will not be wasteful, uneconomic, impracticable, or unreasonable, and because denial of this application will result in the loss of reasonable expectations for use of the property, the public interest in the proposed use outweighs water-availability concerns.

Conclusions of Law

1. The proposed use requested in this application is allowed in the Rogue Basin Program. (ORS 537.153(2))
2. Water **is not** available for the proposed use. (ORS 537.153(2))
3. The proposed use will not injure other water rights. (ORS 537.153(2))
4. The proposed use complies with rules of the Water Resources Commission not otherwise described above. (ORS 537.153(2))
5. The application is in compliance with the State Agency Coordination Program regarding land use. (ORS 537.153(3)(b))
6. Because water **is not** available, the required presumption **has not** been established. (ORS 537.153(2))
7. 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 with appropriate modifications or conditions.

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. Human consumption for one household shall be limited to a diversion rate of 0.005 CFS, further limited to 500 gallons per day.
- B. Measurement, recording and reporting 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 devices in good working order.
 - b. The permittee shall allow the watermaster access to the devices; 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 amount of water diverted each month, and shall submit a report which includes the recorded report 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.
- 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.
8. 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.
9. 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 September 19, 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 **November 3, 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 **November 3, 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 JACKSON

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MICHAEL K HAMILTON
2541 MILL CREEK DR
PROSPECT, OR 97536

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

APPLICATION FILE NUMBER: S-88091

SOURCE OF WATER: MILL CREEK, A TRIBUTARY OF ROGUE RIVER

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

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

PERIOD OF USE: YEAR-ROUND

DATE OF PRIORITY: MAY 26, 2015

POINT OF DIVERSION LOCATION: NE $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 28, T32S, R3E, W.M.;
1860 FEET NORTH AND 2690 FEET EAST FROM SW CORNER SECTION 28

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NE $\frac{1}{4}$ NE $\frac{1}{4}$
SECTION 16
TOWNSHIP 33 SOUTH, RANGE 2 EAST, 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 devices in good working order.
- B. The permittee shall allow the watermaster access to the devices; 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.

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-88091

PFO Date September 19, 2017

Original mailed via CERTIFIED MAIL to applicant

MICHAEL K HAMILTON, 2541 MILL CREEK DR, PROSPECT, OR 97536

SENT VIA EMAIL:

1. WRD - Watermaster # 13

Copies sent to:

1. WRD - File # S-88091
2. WRD- Hydrographics

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

Affected Landowners (include "Notice of Initial Review--Affected Landowner")

4. Nye Ditch Users Improvement District Inc, PO Box 93, Prospect, Or 97536

SPECIALIST : Kim French