

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

In the Matter of Water Rights Application)
G-18437, in the name of Schutt Tuten)
Family Trust Et Al, Deschutes County

PROPOSED FINAL ORDER

Summary of Recommendation

The Department recommends that the application be approved as conditioned in the attached draft permit.

Authority

Oregon Revised Statutes (ORS) 537 and Oregon Administrative Rules (OAR) 690-310 establish the process by which an application to use public waters may be submitted and evaluated by the Department. OAR 690-505 and 521 describe the process by which certain groundwaters in the Deschutes Basin may be appropriated by mitigating the impact of the proposed use.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty of the proposed use
- pending senior applications and existing water rights
- designations of any critical groundwater areas
- Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any general basin-wide standards for flow rate and duty of water allowed
- the need for a flow rate and duty higher than the applicable standard
- any comments received

Findings of Fact

1. On January 18, 2017, Schutt Tuten Family Trust Et Al submitted an application for a permit to use groundwater:

Amount of Water: 0.25 cubic foot per second (CFS)
Proposed Use: nursery use on 38.21 acres
Source: a well (DESC 60433/L119939) within the Deschutes River Basin
Location: Deschutes County in Section 7, Township 16 South, Range 12 East, W.M.

2. On August 4, 2017, the Department issued the Initial Review. The applicant did not request that the Department stop processing of the application within 14 days of that date. The Initial Review included the Notice of Mitigation Obligation for the proposed groundwater use pursuant to the Deschutes Groundwater Mitigation Rules (OAR 690-505).
3. On August 8, 2017, the Department provided public notice of the application in the Department's weekly notice, thereby initiating a 30-day comment period. The notice included a request for comments, and information about obtaining future notices or a copy of the Proposed Final Order.
4. The Department has not received adverse comments related to the possible issuance of a permit.
5. The Deschutes Basin Program allows the use of groundwater for irrigation. (OAR 690-505-0400)

6. An assessment of groundwater availability has been completed by the Department's Groundwater/Hydrology section, a copy of which is in the file. The proposed use of groundwater will, if properly conditioned, avoid injury to existing groundwater rights and the groundwater resource.
7. The proposed groundwater use is not within a designated critical groundwater area.
8. The proposed groundwater use is junior to existing water rights downstream in the Deschutes River Basin.
9. The proposed groundwater use is located within the Deschutes Groundwater Study Area, and is subject to the Deschutes Groundwater Mitigation Rules (OAR 690-505).
10. The proposed use will have the potential for substantial interference with the Deschutes River (OAR 690-009). Pursuant to ORS 390.835(9), the proposed use shall be denied unless mitigation is provided. Without the required mitigation, there is a preponderance of evidence that the proposed use will measurably reduce surface water flows necessary for the Deschutes River Scenic Waterway ORS 390.835(9). Consequently, the applicant must mitigate for the proposed use pursuant to the Deschutes Groundwater Mitigation Rules.
11. The Department requested comments on the application and proposed mitigation from the Oregon Departments of Fish and Wildlife, Environmental Quality, State Lands, Parks and Recreation, and Agriculture pursuant to the Deschutes Groundwater Mitigation Rules. No issues were raised in that review that required conditioning of the attached draft permit.
12. The mitigation obligation for the proposed use is 18.0 acre-feet (AF), which represents the Department's determination of the consumptive portion of the proposed use (OAR 690-505-0610(5)). Each mitigation credit is equivalent to 1.0 AF of mitigation water.
13. Mitigation must be provided in the General Zone of Impact, located anywhere in the Deschutes Basin above the Madras gage, which is below Lake Billy Chinook.
14. A permit may not be issued unless the mitigation obligation, as identified by the Department, is satisfied.
15. On August 6, 2013, the Department received the applicant's Response to Notice of Mitigation Obligation Credit or Project Option, wherein the applicant acknowledged that they have obtained 9.0 mitigation credits within the General Zone of Impact from mitigation project MP-91, approved under transfer T-10224, which is a permanent instream transfer; and intend to provide mitigation in the amount of 9.0AF within the General Zone of Impact from another mitigation project.
16. The Department finds that the mitigation proposed by the applicant will satisfy the mitigation required under OAR Chapter 690, Division 505; therefore, pursuant to OAR 690-505-0630, that mitigation effectively eliminates the potential for substantial interference with surface water.
17. The applicant has provided the Department with documentary evidence that half of the qualifying mitigation credits have been obtained.
18. In order to obtain a permit, documentary evidence of mitigation credits must be submitted to the Department within five years of the issuance of a Final Order approving the proposed groundwater use.

Conclusions of Law

Under the provisions of ORS 537.621, 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, 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.

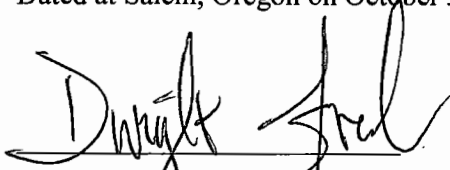
1. The proposed use requested in this application is allowed in the Deschutes Basin Program.

2. The applicant shall provide mitigation pursuant to the Scenic Water Way Act (ORS 390.835).
3. Groundwater is available for the proposed use.
4. The proposed mitigation will satisfy the mitigation obligation pursuant to OAR 690-505-0630; therefore, notwithstanding OAR 690-09, the proposed groundwater use will not have the potential for substantial interference with surface water.
5. The applicant has not provided documentary evidence that the entire necessary mitigation has been provided. In order to obtain a permit, documentary evidence of mitigation credits must be submitted to the Department within five years of the issuance of a Final Order approving the proposed groundwater use. (OAR 690-505-0620(2))
6. As mitigated, the proposed use will not measurably reduce surface water flows necessary for the Deschutes Scenic Waterway. (OAR 690-505-0600 and 690-505-0630(1)).
7. The proposed use will not injure other water rights.
8. The proposed use complies with requirements of the State Agency Coordination Program regarding land use.
9. A flow rate and duty higher than the basin-wide standard is not necessary.
10. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
11. All criteria for establishing the presumption have been satisfied. The Department therefore concludes that the use as proposed would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

Recommendation

The Department recommends that application G-18437 be approved, and the attached draft permit be issued as limited by the conditions contained therein.

Dated at Salem, Oregon on October 31, 2017



Dwight French, Water Right Services Division Administrator
for Thomas M. Byler, Director

Protests

Under the provisions of ORS 537.621(8), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **December 15, 2017**, be in writing, and include the following:

1. Your name, address, and telephone number;
2. 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;
3. A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;
4. A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
5. Any citation of legal authority to support your protest, if known.
6. The protest fee required by ORS 536.050, of \$410 (applicant) or \$810 (other parties), and proof of service of the protest upon the applicant.
7. 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 537.621(8), 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 **December 15, 2017**, be in writing, and include the following:

1. The requester's name, mailing address and telephone number;
2. If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
3. A statement that the requester supports the Proposed Final Order as issued;
4. A detailed statement of how the requester would be harmed if the Proposed Final Order is modified.
5. A standing fee of \$230.00. If a hearing is scheduled, an additional fee of \$580.00 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. A contested case hearing will be scheduled only if a protest has been submitted and either:

1. upon review of the issues, the Director finds that there are significant disputes related to the proposed use of water, or
2. 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.

OAR 137-003-0505 requires that you be informed that if a party to a contested case hearing before the Water Resources Department is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, that party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

OAR 690-002-0020 provides that a party or limited party participating in a contested case hearing before the Water Resources Department may be represented by an authorized representative in the manner and to the extent provided for in OAR 137-003-0555 of the Attorney General's Model Rules.

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 authorized 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 order was produced 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 or Kim.R.French@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, Suite A, Salem OR 97301-1266, Fax: 503-986-0901.

STATE OF OREGON

COUNTY OF DESCHUTES

DRAFT PERMIT TO APPROPRIATE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO:

SCHUTT TUTEN FAMILY TRUST ET AL
19970 INNES MARKET RD
BEND OR 97703

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

APPLICATION FILE NUMBER: G-18437

SOURCE OF WATER: A WELL (DESC 60433/L119939) WITHIN DESCHUTES RIVER BASIN

RATE: 0.25 CUBIC FOOT PER SECOND

DATE OF PRIORITY: January 18, 2017

USE: NURSERY USE ON 38.21 ACRES

PERIOD OF USE: YEAR-ROUND

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
16 S	12 E	WM	7	SE SE	1020 FEET NORTH AND 510 FEET WEST FROM SE CORNER, SECTION 7

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
16 S	12 E	WM	7	SE SE	38.21

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.

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 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.

Annual Measurement Condition:

The Department requires the water user to obtain, from a qualified individual (see below), and report annual static water levels for each well on the permit. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter. Annual measurements are required whether or not the well is used. The first annual measurement will establish a reference level against which future measurements will be compared. However, the Director may establish the reference level based on an analysis of other water-level data. The Director may require the user to obtain and report additional water levels each year if more data are needed to evaluate the aquifer system.

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. Measurements shall be submitted on forms provided by, or specified by, the Department. Measurements shall be made with equipment that is accurate to at least the standards specified in OAR 690-217-0045. The Department requires the individual performing the measurement to:

- A. Associate each measurement with an owner's well name or number and a Department well log ID; and
- B. Report water levels to at least the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method of 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 restricted use shall continue until the water level rises above the decline level which triggered the action or 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 causing substantial interference with senior water rights. The water user shall not 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.

Groundwater Mitigation Conditions:

1. Mitigation Obligation: 18.0 acre-feet of mitigation water in the General Zone of Impact.
2. Mitigation Source: 9.0 mitigation credits, associated with Mitigation Project -91 (Transfer T-10224), which is a permanent instream transfer, approved under transfer T-10224.
3. Mitigation water must be legally protected instream in the General Zone of Impact for the life of the permit and subsequent certificate(s). Regulation of the use and/or cancellation of the permit, or subsequent certificate(s) will occur if the required mitigation is not maintained.
4. The permittee shall provide additional mitigation if the Department determines that average annual consumptive use of the appropriation has increased beyond that used to compute the volume of mitigation water originally.
5. If mitigation is from a secondary right for stored water from a storage project not owned or operated by the permittee, the use of water under this right is subject to the maintenance and terms and conditions of a valid contract or satisfactory replacement, with the owner/operator of the storage project, a copy of which must be on file in the records of the Water Resources Department.
6. Failure to comply with these mitigation conditions shall result in the Department regulating the groundwater permit, or subsequent certificate(s), proposing to deny any permit extension application for the groundwater permit, and proposing to cancel the groundwater permit, or subsequent certificate(s).
7. The permittee shall report to the Department the progress of implementing the incremental mitigation development plan and related mitigation no later than April 1 of each year. The annual report shall include the annual volume of water used, the source of mitigation, and any offset used for that period. This annual notification is not necessary if the permittee has completed development and submitted a Claim of Beneficial Use to the Department.

Scenic Waterway 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 reduced subsequently. However, the use of groundwater allowed under the terms of this permit will not be subject to regulation for Scenic Waterway flows, provided the mitigation required is maintained.

STANDARD CONDITIONS

1. 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.

2. 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.
3. If substantial interference with 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.
4. The wells shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.
5. 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.
6. Prior to receiving a certificate of water right, the permit holder shall submit the results of a pump test meeting the department's standards, to the Water Resources Department. The Director may require water level or pump test results every ten years thereafter.
7. 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-practice technologies or conservation practices to achieve this end.
8. By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged comprehensive land-use plan.
9. Construction of the well 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.
10. 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.
11. Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued

DRAFT – NOT A PERMIT

Dwight French, Water Right Services Division Administrator
for Thomas M. Byler, Director