

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

Water Right Application G-18445 in the)
name of SAM HEATH and MOUNTAIN)
TOP CROP)

PROPOSED FINAL ORDER
TO DENY

Summary: The Department proposes to deny Application G-18445 for groundwater use because the appropriation will have the potential for substantial interference with surface water and surface water is not available for the proposed use.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.615 through 537.628, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 8, 9, 33, 300, 310, 400, 410 and the Rogue Basin Program OAR 690-515. These statutes and rules can be viewed on the Oregon Water Resources Department's 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 ORS 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. ORS 537.621(2); OAR 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. OAR 690-310-0140

If the Department determines that the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525 and may either:

- a. Propose denial of the application upon a finding that the use will impair or adversely affect the public welfare, safety and health; or
- b. Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public welfare, safety and health and propose approval of the application with appropriate modifications or conditions. OAR 690-310-0140(2)

FINDINGS OF FACT

Application History

1. On January 26, 2017, Sam Heath and Mountain Top Crop filed a complete application for the following water use:
 - Amount of Water: 0.008 cubic foot per second (CFS)
 - Use of Water: nursery use on 3.3 acres
 - County: Josephine County
 - Location: within Section 35, Township 37 South, Range 8 West, W.M.
 - Source of Water: a well (JOSE 56633/L77411), in Anderson Creek Basin
2. On April 13, 2018, the Department mailed the applicant notice of its Initial Review, determining that **"The appropriation of 0.008 CFS of water from a well (JOSE 56633/L77411) in Anderson Creek Basin for year-round nursery use on 3.3 acres is not allowable..."** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On April 17, 2018, 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.

Presumption Criteria (a) Consistency with Basin Program

4. Uses included in nursery use are included in irrigation and agriculture uses, both of which are allowed under the Rogue Basin Program OAR 690-515. ORS 537.621(3)(b); OAR 690-310-0150(2)(b)

Presumption Criteria (b) Water Availability

5. 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. ORS 537.621(3)(c); OAR 690-310-0150(2)(c)

Presumption Criteria (c) Injury Determination

6. The proposed use (if authorized) will not injure other water rights. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

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

7. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates an approved land-use decision is being pursued. ORS 537.621(3)(b); OAR 690-310-0150(2)(b)
8. The proposed groundwater use is not within a designated critical groundwater area. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
9. The Department has determined that the proposed groundwater use will have the potential for substantial interference with surface water, namely Anderson Creek and Clear Creek. The Division 9 (Ground Water Interference with Surface Water) review is in the file and can be viewed on the Department's website. ORS 537.621(3)(b); OAR 690-009-0040(4)

10. The finding of the potential for substantial interference requires that surface water availability be considered. The Water Availability Reporting System reports on the amount of water available in the surface water affected is in the file and can be viewed on the Department's website. The report shows that surface water is not available anytime of the year (at an 80 percent exceedance probability). OAR 690-410-0070(1) and OAR 690-400-0010(11)(a)(A)

OAR 690-033-0310 Statewide Rules

The proposed use is in an area of the state in which OAR 690-033-0310 thru -0340 applies. These rules establish definitions, additional procedures, and standards to aid the Department in determining whether a proposed use will impair or be detrimental to the public interest with regard to sensitive, threatened, or endangered fish species.

11. The proposed use occurs occur in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0310(2)
12. The applicant has been notified that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied. OAR 690-033-0330(1)(a)
13. The interagency review team has been notified that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0330(1)(b)
14. The interagency review team was convened to review the application and recommended denial of the application or conditions as necessary to achieve the standards listed in 690-033-0330(2)(a) and (b).
15. The proposed use is within or above the Rogue State Scenic Waterway, as designated under ORS 390.826. The Groundwater Section finds, per ORS 390.835(9), 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. ORS 537.620(4)(a), 537.621(3)(a); OAR 690-310-0150(2)(a)
16. No written comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
17. The proposed use does not comply with rules of the Water Resources Commission not otherwise described above.

Determination of Presumption and whether the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525

18. Because one of the four criteria is not met (surface water is not available) the presumption is not established. OAR 690-310-0140(1)
19. Because the presumption is not established the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525; OAR 690-310-0140(2)

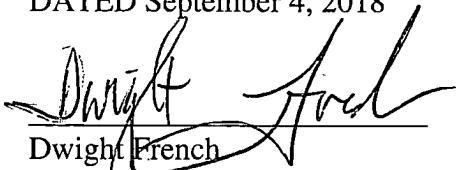
CONCLUSIONS OF LAW

The proposed use will impair or adversely affect the public welfare, safety and health.

PROPOSED ORDER

The Department recommends issuing an order denying Application G-18445.

DATED September 4, 2018

A handwritten signature in cursive script, appearing to read "Dwight French", written over a horizontal line.

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

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 by the Water Resources Department no later than **October 19, 2018**. 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, a protest fee of \$410 required by ORS 536.050; and
- If you are not the applicant, a 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 **October 19, 2018**. 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>

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- If you have any questions about statements contained in this document, please contact Barbara Poage at 503-986-0859 or Barbara.J.Poage@oregon.gov.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
- Fax: 503-986-0901
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