

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

Water Right Application S-86823 in the )  
name of KENNETH ROSENBAUM ) PROPOSED FINAL ORDER  
)

**Summary:** The Department proposes to issue an order approving Application S-86823, as amended, and a permit consistent with the attached draft permit.

**Prior to the issuance of a permit, if one is issued, the Department must receive the following:**

- **Permit recording fees in the amount of \$520.00. A check should be made out to the Oregon Water Resources Department or OWRD.**

**Please include the application number on any documents submitted.**

***Authority***

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 390.826, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 5, 33, 300, 310, 400, 410, and the Rogue Basin Program OAR 690-515. These statutes and rules can be viewed on the following website: <https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>

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

The Department shall presume that a proposed use will not impair or be detrimental to the public interest 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. ORS 537.153(2); OAR 690-310-0110(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, 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 690-310-0120(3).

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 April 2, 2007, Kenneth Rosenbaum filed a complete application for the following water use:

Source	MILL CREEK VIA NYE DITCH, TRIBUTARY OF ROGUE RIVER AND HURD CREEK RESERVOIR, CONSTRUCTED UNDER PERMIT R-8201, TRIBUTARY TO HURD CREEK
Use	DOMESTIC USE FOR ONE HOUSEHOLD
Rate	0.005 CUBIC FOOT PER SECOND (CFS) AND 0.12 ACRE-FOOT (AF)
County	JACKSON COUNTY
Location	SECTION 11, TOWNSHIP 33 SOUTH, RANGE 2 EAST, W.M.

2. On September 12, 2008, the Department mailed the applicant notice of its Initial Review, determining that **“The use of 0.12 AF from Hurd Creek Reservoir, tributary to Hurd Creek, for domestic use for one household may be allowed year round”** and **“...the use of 0.005 CFS of water from Mill Creek via Nye Ditch, a tributary of Rogue River, for domestic use for one household is not allowable, and it appears unlikely that you will be issued a permit for live flow. However, by providing additional information you may be able to pursue a limited permit for human consumption use from live flow (indoor use only: cooking, drinking, sanitation), limited to 500 gallons per day per household.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On September 16, 2008, 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. On September 19, 2008, the Department received the Application Supplement for Human Consumption & Livestock Uses demonstrating that the applicant has no reasonable alternative to obtaining water for human consumption use for one household and that denial of the application will result in loss of reasonable expectations for use of the property. The applicant also confirmed that he does not have access to water in Hurd Creek Reservoir, and removed it as a source under this application.

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

5. The proposed use is allowed under the Rogue Basin Program (OAR 690-515-0000). ORS 537.153(2); OAR 690-310-0110(1)(a)

### Presumption Criteria (b) Water Availability

6. An assessment of water availability at 80% exceedance for the proposed use was completed using the Department’s Water Availability Reporting System (WARS). A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). The assessment established that **surface water is not available at any time of the year**. ORS 537.153(3)(c); OAR 690-310-0150(2)(c)



**Presumption Criteria (c) Injury Determination**

7. The proposed use will not injure other water rights. ORS 537.153(2); OAR 690-310-0150(2)(e)

**Presumption Criteria (d) Whether the Use Complies with Rules of the Commission**

8. Documentation has been submitted from the relevant land-use planning jurisdiction that indicates the proposed use is allowed outright. ORS 537.153(2)(b); OAR 690-310-0150(2)(b)
9. 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.

**690-033-0310 Statewide Rules**

- A. The proposed use occurs occur in an area that may affect the habitat of sensitive, threatened or endangered fish species. OAR 690-033-0330(1)
- B. 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 690-033-0310(1)(a)
- C. 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)
- D. The interagency review team was convened to review the application, but did not recommend any additional conditions.
10. Based on the review of the presumption criteria (a)-(d) above, the presumption has **not** been established. ORS 537.153(2); OAR 690-310-0110(1)(a)-(d)
11. 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 of the application with appropriate modifications or conditions.

**690-310-0260 Public Interest Findings**

12. The proposed use is located above the Rogue Scenic Waterway, as designated under ORS 390.826.
13. The proposed diversion and use of water does not significantly impair the free-flowing character of these waters in quantities necessary for recreation, fish and wildlife.
14. The proposed diversion and use of water is consistent with the provisions of ORS Chapters 536 and 537 and OAR 690.

15. 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.
16. Water rights for human consumption use shall not exceed 0.005 cubic feet per second per household. OAR 690-310-0260(2)(d)
17. After considering alternative water sources, including groundwater, stored water, purchased trucked water, community and municipal suppliers, and transfers of existing water rights, the applicant provided documentation that there are no reasonable alternative sources of water.
18. Denial of the application will result in loss of reasonable expectations for use of the property.

**Further Evaluation of the Proposed Use**

19. Pursuant to ORS 537.170(8), the Department has considered the following factors:
  - A. The maximum economic development of the waters involved: The applicant has demonstrated that denial of this application would result in loss of reasonable expectations for use of the property. OAR 690-310-0260(4)(c)
  - B. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control: Human consumption use 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.
  - C. The amount of waters available for appropriation for beneficial use: Water is not available for the proposed use during the full period requested.
  - D. 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).
  - E. 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: Issuance of this right may increase the likelihood that water may not be available for all water rights.
  - F. The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534: ORS 536.310(3) provides that "adequate and safe supplies be preserved and protected for human consumption use, while conserving maximum supplies for other beneficial uses." Because the proposed use is human consumption there is a preference for this use over all other uses.
20. No comments were received by the close of the comment period. OAR 690-310-0120(3)
21. Information available in department files, received from other interested agencies, and other available information does provide a preponderance of evidence that the proposed use would not impair or be detrimental to the public interest under ORS 537.153. OAR 690-310-0120(3)

**CONCLUSION OF LAW**

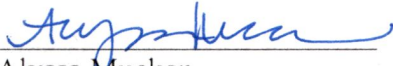
1. The proposed use would not impair or be detrimental to the public interest.

NOTE: When issuing permits, ORS 537.170(6) authorizes the Department to include provisions or restrictions concerning the use, control and management of water to be appropriated for the project. The attached draft permit is conditioned accordingly.

**PROPOSED ORDER**

The Department recommends approval of Application S-86823, as amended, and issuance of a permit consistent with the attached draft permit.

DATED July 16, 2019



Alyssa Mucken  
Water Rights Section Manager, 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 **August 30, 2019**. Protests must be in writing and 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(6) 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 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.170 (8) 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 **August 30, 2019**. 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 Servicemembers:** Active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have any questions about statements contained in this document, please contact Kim French at [Kim.R.French@oregon.gov](mailto:Kim.R.French@oregon.gov) or 503-986-0816.
  - 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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STATE OF OREGON

COUNTY OF JACKSON

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

KENNETH ROSENBAUM  
1942 MILL CREEK RD  
PROSPECT OR 97536

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

APPLICATION FILE NUMBER: S-86823

SOURCE OF WATER: MILL CREEK VIA NYE DITCH, TRIBUTARY OF ROGUE RIVER

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

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

PERIOD OF USE: JANUARY 1 THROUGH DECEMBER 31

DATE OF PRIORITY: APRIL 2, 2007

POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
32 S	3 E	WM	28	NW SE	1860 FEET NORTH AND 2690 FEET EAST FROM SW CORNER, SECTION 28

THE PLACE OF USE IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q
33 S	2 E	WM	11	SW NW

1. **Water Use Measurement, Recording, and Reporting Condition:**

- 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 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.
- 2. The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to 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 and/or by-pass devices are not necessary.

### **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. 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.
- 3. 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.
- 4. 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.
- 5. 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.
- 6. 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.
- 7. 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 - THIS IS NOT A PERMIT**

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



# Mailing List for PFO Copies

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Application S-86823

PFO Date July 16, 2019

**Original mailed via CERTIFIED MAIL to applicant:**

KENNETH ROSENBAUM  
1942 MILL CREEK RD  
PROSPECT OR 97536

**Sent via auto email:**

1. WRD - Shavon Haynes - # 13

**Copies sent to:**

3. WRD – File # S-86823
4. WRD – SW Section
5. James Hibbs, CWRE, 419 Phoenix Hills Drive, Phoenix, OR 97535
6. ALO – James & Polly Devore, 1944 Mill Creek Dr, Prospect, OR 97536
7. ALO – Steven & Roberta Brent, 1946 Mill Creek Dr, Prospect, OR 97536
8. ALO – James & Sarah Shannon, 1964 Mill Creek Dr, Prospect, OR 97536
9. ALO – John & Ruth Lucas, 11105 Redwood, Fontana, CA 92335

Application Specialist: Kim French

Copies Mailed
By: _____ (SUPPORT STAFF)
on: _____ (DATE)
Protest/Standing Dates checked <b>08/30/19</b>
_____