

FINDINGS OF FACT

Application History

1. On April 30, 2019, Michael Wighton filed a complete application for the following water use:

| | |
|--------------|--|
| Source | CALAPOOYA RIVER, TRIBUTARY TO UMPQUA RIVER |
| Use | HUMAN CONSUMPTION USE (INDOOR USE ONLY: COOKING, DRINKING, AND SANITATION) FOR ONE HOUSEHOLD |
| Rate | 0.005 CUBIC FOOT PER SECOND (CFS) |
| County | DOUGLAS COUNTY |
| Place of Use | SECTION 9, TOWNSHIP 25 SOUTH, RANGE 4 WEST, W.M. |

2. On May 24, 2019, the Department mailed the applicant notice of its Initial Review, determining that **“The diversion of 0.005 CFS of water from Calapooya River, tributary to Umpqua River for human consumption (indoor use only: cooking, drinking, and sanitation) for one household January 1 through December 31 is not allowable.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On May 28, 2019, 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. The proposed use is allowed under the Umpqua Basin Program (OAR 690-516-0005(1)(a)). ORS 537.153(2); OAR 690-310-0110(1)(a)

Presumption Criteria (b) Water Availability

5. 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 water surface water is **not** available during the period July 1 through November 30 of each year. ORS 537.153(2); OAR 690-310-0150(2)(c)

Presumption Criteria (c) Injury Determination

6. 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

7. 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)
8. 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.

OAR 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 690-033-0310(2)
 - 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 690-033-0330(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 and recommended conditions as necessary to achieve the standards listed in 690-033-0330(2)(a) and (b). The draft permit has been conditioned accordingly.
9. 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)
10. OAR 690-310-0120(2)(b) provides 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.

Further Evaluation of the Proposed Use

11. After considering various alternative water sources, including groundwater, stored water, purchased trucked water, community and municipal supplies, and transfer of existing water rights, there are no reasonable alternative sources of water.
12. 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 applicants.
 - C. The amount of waters available for appropriation for beneficial use: Water is available human consumption 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 installation of

equipment to permit water use measurement and reporting. Specifically, the use will be limited to 0.005 CFS, not to exceed 500 gallons per day.

- 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."

13. Applying these factors one may conclude that the proposed use could increase the likelihood that water may not be available to 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, impractical 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.

Other Criteria and Requirements

- 14. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826.
- 15. The amount requested, 0.005 CFS, further limited to 500 gallons per day, is necessary for the proposed use.
- 16. The applicant proposed methods to measure the amount of water diverted, prevent damage to aquatic life and riparian habitat, prevent discharge of contaminated water to a surface stream, or to prevent damage to public uses of any affected surface waters. These measures are adequate at this time. OAR 690-310-0150(2)(j)
- 17. No comments were received by the close of the comment period. OAR 690-310-0120(3)
- 18. The Department has determined that the proposed use will not impair or be detrimental to the public interest considering the factors in ORS 537.170(8), and even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest

CONCLUSION OF LAW

- 1. The proposed use would not impair or be detrimental to the public interest as described in ORS 537.153(2).

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.

PROPOSED ORDER

The Department recommends approval of Application S-88693 and issuance of a permit consistent with the attached draft permit.

DATED March 3, 2020



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 **April 17, 2020**. 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 **April 17, 2020**. 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.

STATE OF OREGON

COUNTY OF DOUGLAS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

MICHAEL WIGHTON
700 THOMAS RD
SUTHERLIN OR 97479

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

APPLICATION FILE NUMBER: S-88693

SOURCE OF WATER: CALAPOOYA RIVER, TRIBUTARY TO UMPQUA 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 30, 2019

POINT OF DIVERSION:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|--|
| 25 S | 4 W | WM | 9 | NW SE | 850 FEET SOUTH AND 250 FEET EAST FROM C1/4 CORNER, SECTION 9 |

THE PLACE OF USE IS LOCATED AS FOLLOWS:

| Twp | Rng | Mer | Sec | Q-Q |
|------|-----|-----|-----|-------|
| 25 S | 4 W | WM | 9 | NW SE |

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

- A. Before water use may begin under this permit, the permittee shall install an inline flow restrictor 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. 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.
 3. The use may be restricted if the quality of the source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.
 4. 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.
 5. As required by ORS 509.585, the permittee shall not construct, operate, or maintain any dam or artificial obstruction to fish passage across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without obtaining approval from the Oregon Department of Fish and Wildlife (ODFW). The permittee shall either submit a proposal for fish passage to ODFW or apply for a waiver or exemption. Approval of the proposed fish passage facility, waiver, or exemption must be obtained prior to construction of any in-channel obstruction or prior to diversion of water that may create an artificial obstruction due to low flow, and the permittee shall submit proof to ODFW that fish passage has been implemented per the plan, waiver, or exemption prior to diversion of water. The permittee shall maintain adequate passage of native, migratory fish at all times (ORS 509.601) as per the approved plan, waiver, or exemption. If ODFW determines adequate passage of native migratory fish is not being provided, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that the Department regulate the use of water until the Department receives notification from ODFW that adequate fish passage has been provided. The permittee is hereby directed to schedule a consultation with and ODFW Fish Passage Coordinator.

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. 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.
3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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

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

Mailing List for PFO Copies

Application S-88693

PFO Date March 3, 2020

Original mailed via CERTIFIED MAIL to applicant:

MICHAEL WIGHTON
700 THOMAS RD
SUTHERLIN OR 97479

Copies Mailed

By: _____
(SUPPORT STAFF)

on: _____
(DATE)

Sent via auto email:

1. Applicant - yton@msn.com
2. WRD - Susan Douthit - # 15

Copies sent to:

3. WRD – File # S-88693
4. WRD – SW Section

Application Specialist: Kim French