

Oregon Water Resources Department
Water Right Services Division

Water Right Application G-18392 in the)
name of LYTLE A. SIMMS, TAMERA A.)
SIMMS, DUSTIN SIMMS, AND CAITLIN)
SIMMS)

PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application G-18392 and a permit consistent with the attached draft permit.

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 Goose and Summer Lakes Basin Program (OAR 690-513). 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 <https://www.oregon.gov/OWRD>

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 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 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 September 23, 2016, Lytle A. Simms, Tamera A. Simms, Dustin Simms, and Caitlin Simms filed a complete application for the following water use:

Source	WELL 1 IN CROOKED CREEK BASIN
Use	IRRIGATION OF 160.04 ACRES
Rate	2.0 CUBIC FEET PER SECOND (CFS)
County	LAKE COUNTY
Place of Use	SECTIONS 7 AND 8, TOWNSHIP 36 SOUTH, RANGE 21 EAST, W.M.

2. On December 22, 2017, the Department mailed the applicant notice of its Initial Review, determining that **"It is unlikely that the application will be approved unless a suitable mitigation proposal is provided prior to issuance of the Proposed Final Order."** The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On December 26, 2017, 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 Goose and Summer Lakes Basin Program (OAR 690-513-0050(2)). 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 Department. A copy of this assessment is in the file and can be viewed on the Department's website. 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 the proposed use is allowed outright. ORS 537.621(3)(b); OAR 690-310-0150(2)(b)
8. The proposed groundwater use is not located 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 Crooked Creek. 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. Surface water is **not** available (at an 80 percent exceedance probability) June 1 to August 31 of each year. OAR 690-410-0070(1) and OAR 690-400-0010(11)(a)(A)
11. 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 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.
12. The proposed use complies with rules of the Water Resources Commission not otherwise described above.
 13. On January 12, 2018, the applicant submitted affidavits for the partial cancellation of Water Right Certificate 3619 for 1.59 CFS of water and Water Right Certificate 47622 for 1.10 CFS of water to mitigate for impacts to surface water and the habitat of sensitive, threatened, and endangered fish species..
 14. The Department finds that the proposed partial cancellation of Certificates 3619 and 47622 will provide sufficient mitigation for impacts on Crooked Creek.

Further evaluation of the proposed use

15. No comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
16. Information available in Department files, received from other interested agencies, and other available information does not provide a preponderance of evidence that the proposed use would not ensure the preservation of the public welfare, safety and health under ORS 537.525. OAR 690-310-0140(3)

Other Criteria and Requirements

17. The proposed use is not located within or above a state scenic waterway, as designated under ORS 390.826. 537.621(3)(a); OAR 690-310-0150(2)(a)
18. The amount requested, 2.0 CFS, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)

19. The applicant did not propose any 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. Measures addressing these requirements will be conditions of water use in the permit. OAR 690-310-0150(2)(j)

Determination of Presumption that a proposed groundwater use will ensure the preservation of the public welfare, safety and health

Based on the review of the presumption criteria (a)-(d) above, the presumption has **not** been established. ORS 537.621(2); OAR 690-310-0150(2)(g)

20. OAR 690-310-0140(2)(b) states that when the presumption is not established, the Department shall determine whether the proposed use will impair or adversely affect the public interest, and may make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public interest, and propose approval of the application with appropriate modifications or conditions.

21. To determine whether the proposed use will preserve the public interest, the factors in ORS 537.170(8) have been considered as follows:

- A. The conservation of the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.

Irrigation is classified under the Goose and Summer Lakes Basin Program, and therefore is one of the highest and best uses.

- B. The maximum economic development of the waters involved.

Water for irrigation provides economic development of land and impacts the local community by increasing employment, therefore the economic development consideration is met.

- C. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

Appropriated water will be controlled and the proposed use must be made without waste, thus the control and beneficial-use consideration is met.

- D. The amount of waters available for appropriation for beneficial use.

Water is not available for the proposed use during the full period requested, however, mitigation provided by the partial cancellation of Certificates 3619 and 47622 will sufficiently address impacts from the proposed use on surface water flows.

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 **May 15, 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, 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 **May 15, 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

- E. 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).

- F. All vested and inchoate rights to the waters of this state or to the use of the 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.

- G. The state water resources policy.

The Department determined the proposed use is consistent with the state water resources policy formulated under ORS 536.295 to 536.350.

22. The Department therefore concludes that, in accordance with OAR 690-310-0140 (2) (b), although the presumption is not established, the proposed use as modified and conditioned in the attached draft permit will ensure the preservation of the public interest.

CONCLUSION OF LAW

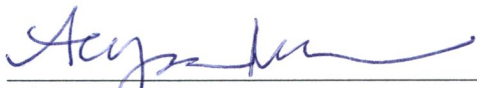
1. The proposed use, as conditioned, would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

NOTE: When issuing permits, ORS 537.628(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public welfare, safety and health.

PROPOSED ORDER

The Department recommends approval of Application G-18392 and issuance of a permit consistent with the attached draft permit.

DATED March 31, 2020



Alyssa Mucken
Water Rights Section Manager, for
Thomas M. Byler, Director
Oregon Water Resources Department

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF LAKE

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

LYTLE A. SIMMS
TAMERA A. SIMMS
DUSTIN SIMMS
CAITLIN SIMMS
27423 HWY 395
LAKEVIEW OR 97630

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

APPLICATION FILE NUMBER: G-18392

SOURCE OF WATER: WELL 1 IN CROOKED CREEK BASIN

PURPOSE OR USE: IRRIGATION OF 160.04 ACRES

MAXIMUM RATE: 2.0 CUBIC FEET PER SECOND

PERIOD OF USE: APRIL 1 THROUGH OCTOBER 15

DATE OF PRIORITY: SEPTEMBER 23, 2016

AUTHORIZED POINT OF APPROPRIATION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	21 E	WM	7	SE NE	1825 FEET SOUTH AND 23 FEET WEST FROM NE CORNER, SECTION 7

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

AUTHORIZED PLACE OF USE:

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	21 E	WM	7	NE NE	38.54
36 S	21 E	WM	7	SE NE	22.18
36 S	21 E	WM	7	NE SE	32.26
36 S	21 E	WM	7	SE SE	15.12
36 S	21 E	WM	8	SW NW	26.65
36 S	21 E	WM	8	NW SW	22.92
36 S	21 E	WM	8	SW SW	2.37

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 appropriation. **Each flow meter shall be located within 50 feet of the well with a clearly visible sign adjacent to the flow meter identifying the flow meter.** 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 used each month, and shall submit an annual report which includes the recorded 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. **Head gates and measuring devices are required on Chandler Ditch, tributary of Crooked Creek and High Line Ditch, tributary of Clover Creek.**

3. **Static Water Level 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.

4. Dedicated Measuring Tube Condition:

Wells with pumps shall be equipped with a minimum 3/4-inch diameter, unobstructed, dedicated measuring tube pursuant to Figure 200-5 in OAR 690-200. If a pump has been installed prior to the issuance of this permit, and if static water levels and pumping levels can be measured using an electrical tape, then the installation of the measuring tube can be delayed until such time that water levels cannot be measured or the pump is repaired or replaced.

5. Well Construction Condition:

Each permitted well shall obtain groundwater solely from the predominantly basalt/volcanic rock and sediment unit (which may contain some sedimentary layers) that underlies the predominantly basin-fill sediment unit (which may contain some basalt layers). Each well shall have continuous casing and continuous seal from land surface, through the predominantly basin-fill unit, and 5 feet into the predominantly basalt/volcanic rock and sediment unit at minimum. Note: the depth to the predominantly basalt unit varies with location.

6. Well Identification Tag Condition:

Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID tag), which shall be permanently

attached to the well. The Well ID shall be used as a reference in any correspondence regarding the well, including any reports of water use, water level, or pump test data.

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 surface water or 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 well(s) shall be constructed and maintained in accordance with the General Standards for the Construction and Maintenance of Water Supply Wells in Oregon. The works shall be equipped with a usable access port 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 to the Water Resources Department the results of a pump test meeting the Department's standards for each point of appropriation (well), unless an exemption has been obtained in writing under OAR 690-217. The Director may require water-level or pump-test data 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 practical 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 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 construction deadline to begin 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 - 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 G-18392

PFO Date March 31, 2020

Original mailed via CERTIFIED MAIL to applicant:

LYTLE A. SIMMS
TAMERA A. SIMMS
DUSTIN SIMMS
CAITLIN SIMMS
27423 HWY 395
LAKEVIEW OR 97630

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

SENT VIA AUTO EMAIL:

1. WRD – Brian Mayer - # 12
2. Agent – Hollie Cannon - h.k.cannon@gmail.com

Copies sent to:

3. WRD – File # G-18392
4. WRD – Surface Water Section

Application Specialist: Kim French