

Oregon Water Resources Department
Water Right Services Division

Water Right Application G-18690 in the)
name of C & E BRENTANO FAMILY LP)
)

PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application G-18690, as amended, 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 Willamette Basin Program (OAR 690-502). 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 website can be found at: <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 May 23, 2018, C & E Brentano Family LP filed a complete application for the following water use:

Source	POA 3 (MARI 1243), POA 4 (MARI 1336), POA 7 (MARI 1221), AND POA 8 (MARI 1441) IN MISSION CREEK BASIN
Use	PRIMARY IRRIGATION of 76.2 ACRES, PRIMARY IRRIGATION OT MAKE UP A DEFICIENCY IN RATE ON 363.36 ACRES, AND NURSERY USE ON 295.2 ACRES
Rate	9.73 CUBIC FEET PER SECOND (CFS)
County	MARION COUNTY
Place of Use	SECTIONS 19, 20, 28, 29, AND 30, TOWNSHIP 4 SOUTH, RANGE 2 WEST, W.M., SECTIONS 23 AND 24, TOWNSHIP 4 SOUTH, RANGE 3 WEST, W.M.,

1. On March 29, 2019, the Department mailed the applicant notice of its Initial Review, determining that **“The appropriation of 0.51 CFS from POA 8 (MARI 1441) in Mission Creek Basin for primary irrigation of 76.2 acres and primary irrigation to make up a deficiency in rate on 363.3 acres March 1 through October 31; and nursery use on 295.2 acres January 1 through December 31 of each year is allowable,”** and **“The appropriation of 9.22 CFS of water from POA 3 (MARI 1243), POA 4 (MARI 1336), and POA 7 (MARI 1221) in Mission Creek Basin for irrigation, nursery use, and irrigation to make up a deficiency in rate for primary irrigation of 76.2 acres and primary irrigation to make up a deficiency in rate on 363.3 acres March 1 through October 31; and nursery use on 295.2 acres January 1 through December 31 of each year is not allowable.”** The applicant did not notify the Department to stop processing the application within 14 days of that date.
2. On April 2, 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.
3. The Department has determined that the Initial Review erroneously described the season for nursery use as January 1 through December 31. The correct season proposed is November 1 through February 28/29 of each year.
4. On December 19, 2019, the applicant put the application on administrative hold, which was removed on April 16, 2020.
5. On April 16, 2020, the applicant removed POA 3, POA 4, and POA 7, and added POA 9 and POA 10 as proposed points of appropriation.

Presumption Criteria (a) - Consistency with Basin Program

6. Uses included in nursery use are included in irrigation and agriculture uses, both of which are allowed under the Willamette Basin Program (OAR 690-502-0160(2)). ORS 537.621(3)(b); OAR 690-310-0150(2)(b)

Presumption Criteria (b) - Water Availability

7. A re-assessment of groundwater availability was completed by the Department on April 24, 2020. A copy of this re-assessment is in the file and can be viewed on the Department's website. Groundwater from POA 8 and POA 9 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. The Department determined that groundwater from POA 10 will not likely be available without injury to existing groundwater rights. ORS 537.621(3)(c); OAR 690-310-0150(2)(c)
8. On May 11, 2020, the applicant removed POA 10 as a proposed point of appropriation.

Presumption Criteria (c) - Injury Determination

9. 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

10. 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)
11. The Department has determined that the proposed groundwater use will not have the potential for substantial interference with surface water. ORS 537.621(3)(b); OAR 690-009-0040(4)
12. 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)

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 been established. ORS 537.621(2); OAR 690-310-0150(2)(g)

Further evaluation of the proposed use

13. No comments were received by the close of the comment period. OAR 690-310-0140(3)(a)
14. 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

15. 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)
16. The amount requested, 3.69 CFS, is necessary for the proposed use. ORS 537.621(3)(c); OAR 690-310-0150(2)(d)

17. The applicant proposed methods to measure the amount of water appropriated, 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)
18. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

CONCLUSIONS OF LAW

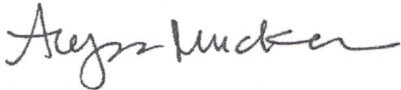
1. The proposed use, as conditioned, would ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

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-18690, as amended, and issuance of a permit consistent with the attached draft permit.

DATED June 23, 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 **August 7, 2020**.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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 **August 7, 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.

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 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 503-986-0900.
 - 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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DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF MARION

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

C & E BRENTANO FAMILY LP
5009 DAVIDSON ROAD NE
ST PAUL OR 97137

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

APPLICATION FILE NUMBER: G-18690

SOURCE OF WATER: POA 8 (MARI 1441) AND POA 9 IN MISSION CREEK BASIN

Source	Use	Acres	Maximum Rate	Period of Use
POA 8	Primary Irrigation	12.4	0.16 CFS	March 1 – October 31
POA 9	Primary Irrigation	63.8	0.80 CFS	March 1 – October 31
POA 8	Primary Irrigation – to make up a deficiency in rate	71.3	0.35 CFS	March 1 – October 31
POA 9	Primary Irrigation – to make up a deficiency in rate	292.0	1.02 CFS	March 1 – October 31
POA 9	Nursery Use	295.2	3.69 CFS	November 1 – February 28/29

DATE OF PRIORITY: MAY 23, 2018

AUTHORIZED POINTS OF APPROPRIATION:

POA Name	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
POA 8	4 S	3 W	WM	24	SW NW	1060 FEET NORTH AND 30 FEET EAST FROM W1/4 CORNER, SECTION 24
POA 9	4 S	2 W	WM	29	NE NE	350 FEET SOUTH AND 260 FEET WEST FROM NE CORNER, SECTION 29

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.

AUTHORIZED PLACE OF USE:

PRIMARY IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	2 W	WM	19	SE SW	0.6
4 S	2 W	WM	19	NE SE	2.6
4 S	2 W	WM	19	SW SE	2.8
4 S	2 W	WM	19	SE SE	5.5
4 S	2 W	WM	28	NW NW	9.8
4 S	2 W	WM	28	SW NW	3.0
4 S	2 W	WM	29	NE NE	18.6
4 S	2 W	WM	29	SE NE	7.7
4 S	2 W	WM	30	NE NE	1.6
4 S	2 W	WM	30	NE NE	8.9
4 S	2 W	WM	30	SW NE	0.7
4 S	2 W	WM	30	NE NW	0.6
4 S	2 W	WM	30	SE NW	1.4
4 S	3 W	WM	23	SE NE	2.7
4 S	3 W	WM	23	NE SE	2.3
4 S	3 W	WM	23	NW SE	0.5
4 S	3 W	WM	24	SW NW	0.9
4 S	3 W	WM	24	SE NW	1.2
4 S	3 W	WM	24	NE SW	4.5
4 S	3 W	WM	24	NW SW	0.3

PRIMARY IRRIGATION – DIR*					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	2 W	WM	29	NE NW	13.0
4 S	2 W	WM	29	NW NW	10.8
4 S	2 W	WM	29	SE NW	1.7
4 S	2 W	WM	30	NE NE	24.2
4 S	2 W	WM	30	NW NE	33.8
4 S	2 W	WM	30	SW NE	8.0
4 S	2 W	WM	30	SE NE	2.0
4 S	2 W	WM	30	NE NW	17.8
4 S	2 W	WM	30	SE NW	0.4
4 S	3 W	WM	23	SE NE	0.7
4 S	3 W	WM	23	NE SE	24.0
4 S	3 W	WM	24	SW NW	7.0
4 S	3 W	WM	24	NE SW	3.6
4 S	3 W	WM	24	NW SW	36.0

PRIMARY IRRIGATION – DIR*					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	2 W	WM	19	SE SW	0.8
4 S	2 W	WM	19	SW SE	1.9
4 S	2 W	WM	19	SE SE	10.4
4 S	2 W	WM	20	SW SW	23.4
4 S	2 W	WM	20	SE SW	24.2
4 S	2 W	WM	20	NE SE	34.4
4 S	2 W	WM	20	NW SE	4.0
4 S	2 W	WM	20	SW SE	26.6
4 S	2 W	WM	20	SE SE	35.0
4 S	2 W	WM	29	NE NE	8.6
4 S	2 W	WM	29	NW NE	11.0

NURSERY USE					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	2 W	WM	19	SE SE	9.1
4 S	2 W	WM	20	SW SW	23.4
4 S	2 W	WM	20	SE SW	24.2
4 S	2 W	WM	20	NE SE	34.4
4 S	2 W	WM	20	NW SE	4.0
4 S	2 W	WM	20	SE SE	26.6
4 S	2 W	WM	20	SE SE	35.0
4 S	2 W	WM	29	NE NE	28.5
4 S	2 W	WM	29	NW NE	32.8
4 S	2 W	WM	29	SW NE	9.8
4 S	2 W	WM	29	SE NE	6.7
4 S	2 W	WM	29	NE NW	28.4
4 S	2 W	WM	29	NW NW	26.3
4 S	2 W	WM	29	SE NW	2.0
4 S	2 W	WM	30	NE NE	4.0

*DIR = deficiency in rate

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. 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. **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.

- 3. **Groundwater production shall be only from the alluvial groundwater reservoir.**
- 4. **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/Draft Permit Copies

Application G-18690

PFO Date June 23, 2020

Original mailed via CERTIFIED MAIL to applicant:

C & E BRENTANO FAMILY LP
5009 DAVIDSON ROAD NE
ST PAUL OR 97137

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
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Sent via auto email:

1. Applicant - danb@stpaultel.com
2. Agent – Will McGill - willmcgill.surveying@gmail.com
3. WRD – Watermaster District #16, Joel M. Plahn
4. WRD - Mike McCord NWR

Copies sent to:

1. WRD - File # G-18690
2. WRD – SW Section

Application Specialist: Kim French