

FINDINGS OF FACT

Application History

1. On March 11, 2021, Blaine Messerle filed a complete application for the following water use:
 - Source:** UNNAMED STREAM, TRIBUTARY TO MARLOW CREEK
 - Use:** HUMAN CONSUMPTION USE FOR ONE HOUSEHOLD
 - Rate/Volume:** 0.005 CUBIC FOOT PER SECOND (CFS)
 - Period of Use:** JANUARY 1 THROUGH DECEMBER 31
 - County:** COOS COUNTY
 - Place of Use:** SECTION 5, TOWNSHIP 25 SOUTH, RANGE 11 WEST, W.M.
2. On April 23, 2021, the Department mailed the applicant notice of its Initial Review, determining that the diversion of 0.005 CFS of water from an unnamed stream, tributary to Marlow Creek, for human consumption may be allowable, contingent upon the review of additional information. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On April 27, 2021, the Department noticed the application in its weekly public notice, requesting comments, and providing information for interested persons about obtaining future notices and a copy of the Proposed Final Order.

Presumption Criteria (a) - Consistency with Basin Program

4. Human consumption use is allowed under the South Coast Basin Program (OAR 690-517-0000(4)). 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. A copy of this assessment is in the application file. This review is done consistent with OAR 690-410-0070(2)(a). During the period of use requested, the assessment established that water surface water is **not** available. ORS 537.153(2); OAR 690-310-0150(2)(c)

Presumption Criteria (c) - Injury Determination

6. The proposed use, if authorized, will not injure other water rights. ORS 537.153(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 537.153(3)(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 Permit Specific conditions #3-7 in the attached draft permit to achieve the standards listed in 690-033-0330(2)(a) and (b).
9. No written comments were received by the close of the comment period. OAR 690-310-0120(3)
 10. The proposed use is not within or above a state scenic waterway under ORS 390.826
 11. The amount requested, 0.005 CFS, is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d)
 12. 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)
 13. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

Determination of Presumption and whether the proposed use will impair or be detrimental to the public interest under ORS 537.153

14. Because the criteria are not met (surface water is not available) the presumption is not established. OAR 690-310-0120(1)

15. OAR 690-310-0120(4) 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.

16. 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.

Domestic use (including human consumption) is classified under the South Coast Basin Program, and therefore is one of the highest and best uses.

- B. 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.

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

Human consumption 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.

- 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, human consumption use for one household for 0.005 cubic foot per second, further limited to 500 gallons per day, is allowable.

In addition, the Oregon Department of Fish and Wildlife and Department for Environmental Quality have recommended approval of the application with the conditions described above to reduce the impacts of the proposed use.

- 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.

17. The Department therefore concludes that, in accordance with OAR 690-310-0120(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.

CONCLUSIONS OF LAW

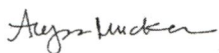
1. The proposed use, as conditioned, would not impair or be detrimental to the public interest as described in ORS 537.153.

NOTE: When issuing permits, ORS 537.170(6) 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 S-88928 and issuance of a permit consistent with the attached draft permit.

DATED November 30, 2021



Digitally signed by Alyssa Mucken
Date: 2021.11.24 15:56:40 -08'00'

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 537.153(8) (for groundwater), you can protest this Proposed Final Order. Protests must be received by the Water Resources Department no later than **January 14, 2022**.

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, 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 \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 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 **January 14, 2022**. 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 \$270. If a hearing is scheduled, an additional fee of \$680 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 service members 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 Lisa Graham at 503-979-3130 or Elisabeth.A.Graham@oregon.gov.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-979-9160.
 - 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 97301-126
Fax: 503-986-0901
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DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF COOS

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

BLAINE MESSERLE
63098 N BARRY RD
COOS BAY OR 97420

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

APPLICATION FILE NUMBER: S-88928

SOURCE OF WATER: UNNAMED STREAM, TRIBUTARY TO MARLOW CREEK

PURPOSE OR USE: HUMAN CONSUMPTION USE 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: MARCH 11, 2021

AUTHORIZED POINT OF DIVERSION:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
25 S	11 W	WM	5	NW NE	1125 FEET SOUTH AND 1475 FEET WEST FROM NE CORNER, SECTION 5

AUTHORIZED PLACE OF USE:

Twp	Rng	Mer	Sec	Q-Q
25 S	11 W	WM	5	NE NE

PERMIT SPECIFIC 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. **Water Use Measurement, Recording, and Reporting:**
 - 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.

3. Riparian Area Restoration:

If the riparian area is disturbed in the process of developing, modifying or repairing a point of diversion under this water use permit, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with the Oregon Department of Fish and Wildlife's Habitat Mitigation Policy described in Oregon Administrative Rule OAR Chapter 635-415.

4. Water Quality:

All water use under this permit shall comply with state and federal water quality laws. The permittee shall not violate any state and federal water quality standards, shall not cause pollution of any waters of the state, and shall not place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means. The use may be restricted if the quality of source stream or downstream waters decrease to the point that those waters no longer meet existing state or federal water quality standards.

5. Fish Passage:

The permittee shall maintain adequate passage of native migratory fish at all times (ORS 509.610) and shall not construct, operate, or maintain any dam or artificial obstruction to fish passage across any waters of the state that are inhabited, or were historically inhabited, by native migratory fish (ORS 509.585).

6. Fish Screen:

The permittee shall install, maintain, and operate fish screening consistent with current Oregon Department of Fish and Wildlife (ODFW) standards or submit documentation that ODFW has determined fish screening is not necessary or is exempted. Fish screening is to prevent fish from entering the proposed diversion. The required screen is to be in place, functional, and approved in writing by ODFW prior to diversion of water. The water user shall operate and maintain the fish screen consistent with ODFW's operation and maintenance standards. The permittee is hereby directed to schedule a consultation with an ODFW Fish Screening Coordinator.

7. In-Water Work:

Any in-water work related to construction, development, or maintenance of the proposed use shall be conducted during the preferred work period of July 1 through September 15 unless an alternate time period is approved by the Oregon Department of Fish and Wildlife.

STANDARD CONDITIONS

1. 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.
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.

DEVELOPMENT AND COMPLETION TIMELINE REQUIREMENTS

1. 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.
2. 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.

3. 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