



- b) Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or adversely affect the public welfare, safety and health and propose approval of the application with appropriate modifications or conditions.

OAR 690-310-0140(2).

### **FINDINGS OF FACT**

#### **Application History**

1. On January 7, 2021, De Terra LLC and Richard Todd filed a complete application for the following water use:

**Source:** WELL 2 IN MARTIN CREEK BASIN

**Use:** NURSERY USE ON 14.5 ACRES

**Rate:** 0.25 CUBIC FOOT PER SECOND (CFS), FURTHER LIMITED TO 48.5 ACRE-  
FEET (AF) ANNUALLY

**Period of Use:** JANUARY 1 THROUGH DECEMBER 31

**County:** CLACKAMAS COUNTY

**Place of Use:** SECTION 32, TOWNSHIP 3 SOUTH, RANGE 3 EAST, W.M.

2. On March 11, 2022, the Department mailed the applicant notice of its Initial Review, determining that the appropriation of 0.25 CFS, further limited to 48.5 acre-feet (AF) annually, of water from well 2 in Martin Creek Basin for nursery use (irrigation and agriculture use) on 14.5 acres is allowable January 1 through December 31 of each year. The applicant did not notify the Department to stop processing the application within 14 days of that date.
3. On March 15, 2022, 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 Criterion (a) - Consistency with Basin Program**

4. 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 Criterion (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. The Groundwater Review form indicates that there is insufficient data available to indicate whether the groundwater resource is over-appropriated during any period of the proposed use. The Groundwater Review form also did not determine whether groundwater for the proposed use will likely be available within the capacity of the groundwater resource. ORS 537.621(3)(c); OAR 690-310-0150(2)(c); OAR 690-300-0010(57).

#### **Presumption Criterion (c) - Injury Determination**

6. The proposed use, if authorized and properly conditioned, will not injure other water rights. ORS 537.621(3)(d); OAR 690-310-0150(2)(e)

**Presumption Criterion (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 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)
9. 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**

10. Because the Department cannot determine whether water is available, one of the criteria necessary to establish the presumption is not met and the presumption that the proposed groundwater use will ensure the preservation of the public welfare, safety and health under ORS 537.525 is **not** established. OAR 690-310-0140(1)
11. Because the Department does not have sufficient information, it cannot determine that the proposed use is within the capacity of available sources; therefore, the proposed use will impair or adversely affect the public welfare, safety and health under ORS 537.525. ORS 537.525(3); OAR 690-310-0130; 690-310-0140(2).
12. The Department does not have any other information that would indicate that considering the factors in ORS 537.625(3)(a) – (g) the proposed use, or the proposed use as modified, would preserve the public welfare, safety and health as described in ORS 537.525. ORS 527.625(3); OAR 690-310-0140(5).

**Discussion**

The Groundwater Review form prepared by the Department's Groundwater Section for this application found that groundwater for the proposed use "cannot be determined to be over appropriated during any period of the proposed use." The form also did not determine whether groundwater for the proposed use will likely be available within the capacity of the groundwater resource. The form further indicates that these findings were not made due to insufficient data.

In processing groundwater applications in the past, where groundwater for the proposed use "cannot be determined to be over appropriated during any period of the proposed use," the Department has issued proposed final orders finding that "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."

In light of the increased occurrence of drought and a concurrent increase in groundwater usage, the Department can no longer assume, absent information on recharge rates and the current rate of withdrawals from the aquifer, and without adequate data at the location of the proposed point of appropriation, that water is available or may be appropriated within the capacity of available sources. ORS 537.525(3).

Water availability is one of the criteria that must be established for the Department to presume that the proposed use will ensure the preservation of public welfare, safety and health. ORS 537.621(2) and OAR 690-310-0130(1)(b). For this application, one of the necessary criteria is not met because insufficient data exist to determine that water is available. For this reason, the presumption that the proposed groundwater use will ensure the preservation of the public welfare, safety and health under ORS 537.525 is not established.

**Further evaluation of the proposed use**

13. No comments were received by the close of the comment period. OAR 690-310-0150(1)
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 otherwise ensure the preservation of the public welfare, safety and health under ORS 537.525. ORS 537.625(3); OAR 690-310-0140(5).

**Other Criteria and Requirements**

15. The proposed use is located above the Clackamas Scenic Waterway, as designated under ORS 390.826. The Department finds that there is not a preponderance of evidence that the proposed use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife. ORS 537.621(3)(a); OAR 690-310-0260(9)(a).
16. The amount requested, 0.25 CFS, further limited to 48.5 AF annually, 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 and to prevent damage to public uses of any affected surface waters. These include maximizing drip irrigation to limit total water use; monitoring water use from the source using a flow meter; and monitoring irrigation to prevent over-application and runoff. 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 will not ensure the preservation of the public welfare, safety and health as described in ORS 537.525.

**PROPOSED ORDER**

The Department recommends issuing an order denying Application G-19054.

DATED September 13, 2022

*Katherine Ratcliffe*

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Katherine Ratcliffe  
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. If you wish to submit a protest by U.S. mail, please consider mailing early to ensure the Department receives the protest by the deadline specified. Protests must be received by the Water Resources Department no later than **October 28, 2022**.

As provided in ORS 537.621(7), ORS 536.050(1)(j) and OAR 690-002—0025 – 035 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;
- Any information or evidence that the proposed use or the proposed use as modified would preserve the public welfare, safety and health as provided in ORS 537.625(3).
- 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 **October 28, 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 timely file a protest or timely request a hearing, 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. OAR 137-003-0670.

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.

- If you have any questions about statements contained in this document, please contact Kim French at [Kim.R.French@water.oregon.gov](mailto:Kim.R.French@water.oregon.gov) or 503-979-3168.
  - 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 97301-1266
- Fax: 503-986-0901