

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF PROTESTED APPLICATION)
69433 IN THE NAME OF MALHEUR BASIN WATER)
USERS ASSOCIATION AND INSTREAM WATER) FINAL ORDER
RIGHT APPLICATIONS 70325 AND 70349-70352)
IN THE NAME OF OREGON DEPARTMENT OF FISH)
AND WILDLIFE FOR USE OF WATER FROM THE)
MALHEUR RIVER AND TRIBUTARIES, MALHEUR)
COUNTY, OREGON)

HISTORY OF PROCEEDING

Application 69433 was originally filed by the Malheur Basin Water Users Association (Association) on October 23, 1987 for use of 102 cubic feet per second (cfs) of water from the Malheur River, 5 cfs from Griffin Creek, 18.2 cfs from Otis Creek, 2.8 cfs from Cottonwood Creek, and 2.2 cfs from Spring Creek, or a total of 130.2 cfs, for supplemental irrigation and alkali abatement on 5,127 acres in sections 13 and 26 located in T19S, R33½E, and sections 7, 31 and 32 located in T20S, R36E, WM, Harney County.

Protests were filed against the Association's application by WaterWatch of Oregon, Oregon Trout and the Oregon Department of Fish and Wildlife (ODFW), asserting that approval of application 69433 would not be in the public interest as there is no alkali problem in the lands to be irrigated and that use as proposed would reduce the pollution abatement capacities of the streams and interfere with the fish and wildlife habitats provided by these sources.

A protest, later withdrawn, was also filed by Wright Wilber against the application.

Applications 70325 and 70349-70352 were filed by ODFW on April 27, 1990, for use of water instream, as described below:

70325: to provide for minimum flows for resident trout and small mouth bass, and other warm-water game fish, for migration, spawning and juvenile rearing, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
30	40	40	40	40	40	30	15	15	15	15	15	cfs

These flows are to be retained instream in the Malheur River between the Highway 20 crossing at river mile 142, within the NE¼ SE¼ Section 31, T20S, R36E, downstream to the upper pool of Warm Springs Reservoir at river mile 131, within the NW¼ Section 11, T22S, R36E, all in Harney County;

70349: to provide for optimum flows for migration, spawning and rearing of resident trout, including bull trout, a sensitive species, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
35	50	50	50	50	50	50	35	35	35	35	35	cfs

These flows are to be retained in the Malheur River between Logan Valley at river mile 188, within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 36, T16S, R33E in Grant Co., downstream to the upper Drewsey Valley diversion at river mile 172, within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, T19S, R34E, WM in Harney County;

70350: to provide optimum flows for migration, spawning and rearing of resident trout and smallmouth bass, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
40	40	40	40	40	40	30	15	15	15	15	15	cfs

These flows are to be retained in the Malheur River between the upper Drewsey Valley diversion at river mile 172, within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, T19S, R34E, downstream to the Hwy. 20 crossing at river mile 140, within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 31, T20S, R36E, WM, all in Harney County;

70351: to provide minimum flows for migration, spawning and rearing of resident and bull trout, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
15	15	15	15	15	15	10	10	10	10/15	15	15	cfs

These flows are to be retained in Lake Creek, tributary to the Malheur River, from the headwaters of Lake Creek within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 18, T16S, R33 $\frac{1}{2}$ E, WM, downstream to the USFS Rd. 16 crossing at river mile 0.5, within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 16, T16S, R33 $\frac{1}{2}$ E, WM, all in Grant County; and

70352: to provide optimum flows for migration, spawning and rearing of resident and bull trout, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
20	20	20	20	20	20	15	15	15	15/20	20	20	cfs

These flows are to be retained in Big Creek, tributary of the Malheur River, from the headwaters of Big Creek within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T15S, R34E, WM, downstream to the USFS Rd. 16 crossing within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14, T16S, R33 $\frac{1}{2}$ E, WM, all in Grant County.

Protests against ODFW's applications were filed by the Association, which asserted that approval of the instream water right applications would cause a change in existing ranching and irrigation practices and reduce the recharge of the water aquifer, to the detriment of the public interest.

The matter was announced for hearing by Notice of Hearing dated April 22, 1991. Opportunity and manner of petitioning for party status were set out in the Notice.

Petitions for party status were filed for Duane and Nancy Schneider, trustees and title holders of Oxbow Ranch for the benefit of the children of Rotchy (Rochford) Barker et ux, lessors and operators of Oxbow Ranch, and for Robert and Rosita Stanbro by Roy Kilpatrick, Attorney at Law.

The petitions asserted that the instream water right applications, if granted, would cause harm to petitioners' existing senior rights and pending applications and be contrary to the public interest by eliminating wildlife habitat allegedly created by the irrigation practices of petitioners and others similarly situated. The pending applications had been objected to by ODFW, WaterWatch and Oregon Trout but were not at issue in this proceeding.

Petitioners were admitted as limited parties by Order issued May 21, 1991 for the purpose of offering evidence to demonstrate that the uses proposed by their pending applications were of greater benefit to the public than the proposed instream water rights, as claimed in their petition, and to address the concerns and conditions proposed by existing parties regarding petitioners pending applications. Petitioners were also afforded the opportunity to participate in any further negotiations between the parties.

A Motion to Amend Application 69433 was filed on July 1, 1991. As the Referee lacked authority to allow or prohibit such amendment, the amendment went forward. The hearing was postponed and a revised filing schedule established by Order issued July 5, 1991.

Also on July 1, a motion to dismiss the proceeding and summarily reject application 69433 was filed by WaterWatch. The Association filed a response to the motion. The motion was denied by Order issued August 5, 1991, which Order is incorporated by reference herein.

As amended, application 69433 requests a total of 163.2 cfs from the Malheur River and Griffin, Otis, Cottonwood and Spring creeks for use on 6,454.9 acres, being 1.194 acre feet per acre (af/ac) for alkali abatement, erosion control and fish and wildlife habitat, with a priority date of October 28, 1987, and an increased rate of appropriation from 1/80 to 1/40 for 884.2 acres, being a total of .306 af/ac, with a priority date of July 1, 1991. The request for use for alkali abatement of 33.0 cfs of water on 1,327.9 acres more than was previously requested in the original 1987 application would also have a priority date of July 1, 1991. Motions for postponement were filed by counsel for Oxbow Ranch (Schneider) on September 9 and for the Stanbros on September 11.

Counsel filed a third motion entitled Supplemental Motion to Postpone on September 12. Counsel for Oxbow Ranch and the Stanbros submitted Rule 21 Motions to Dismiss to the Referee at the commencement of the hearing.

Grounds for the motions to postpone were, generally, that there was another action pending between the parties for the same cause in that Oxbow Ranch had, on September 6, 1991, filed a complaint in the United States District Court for the District of Oregon seeking an permanent injunction against the Water Resources Commission, Director and Hearings Referee from holding the contested case hearing and a declaration that the State had no jurisdiction to consider or approve the pending applications, and in addition that there had been a failure to join the United States as a necessary party to the contested case proceeding.

Grounds for the motion to dismiss were that the Director and Commission lacked subject matter jurisdiction over the several water right applications and personal jurisdiction over the Stanbros and Oxbow Ranch, that there was another action pending in federal district court between the parties for the same cause, and that there had been a failure to join a necessary party.

The federal district court complaint asserted several grounds for relief. It was first claimed that the Desert Lands Act, 43 USC 321 et seq, prohibited the state from issuing instream water rights on streams which run through lands owned by the United States, and further that the Act prohibited any administration of Oregon waters or enforcement of Oregon water-related statutes for any purpose other than irrigation, mining and manufacturing. It was next claimed that all Oxbow Ranch lands were wetlands and any enforcement of the Oregon Instream Water Rights Law would be in direct violation of the Clean Waters Act, 33 USC 401, and the National Environmental Policy Act, 43 USC 4321. It was next claimed that the consideration of these applications in the contested case hearing was either an adjudication of Oxbow Ranch's federally-obtained riparian rights or of the federally-owned waters of a nonnavigable stream running through federal lands, and that the McCarran Amendment, 43 USC 666, required joinder of the United States as a party. Lastly, it was claimed that the upland sandpiper, which nests in the Logan Valley, was an endangered species and that its habitat would be dewatered if the instream water right applications were approved.

The claims raised in the several motions were determined to be without merit. The Desert Lands Act requires patentees to obtain water rights solely from the state. Consideration of the instream applications filed pursuant to ORS 537.336 was in no way an adjudication. Moreover, the Desert Lands Act does not limit the authority of the state to issue water rights for purposes other than irrigation, manufacturing and mining. Neither the National Environmental Policy Act, which is not applicable the actions of the Oregon Water Resources Department and Commission, nor the Clean Water Act prohibit the issuance of water rights, either for

instream or out-of-stream uses. The McCarran Amendment does not require joinder of the United States when there are neither federal rights involved nor an adjudication or administration of federal rights. The upland sandpiper is not an endangered species and approval of these instream water right applications will not result in a dewatering of its habitat. The Motions for Postponement and Dismissal were denied.

The contested case hearing was convened on September 17, 1991 in Burns, Oregon.

Shortly after the commencement of the hearing, counsel for the Stanbros and Schneiders, who were not present, left the hearing and did not participate further. The hearing continued through September 18, 1991. The record was left open for a period of time in order to allow further investigation and written testimony by soil scientists offered as witnesses by WaterWatch and the Association and for submission of post-hearing memoranda by the parties. The Association raised a number of objections in its post-hearing memorandum.

RULING ON ASSOCIATION'S OBJECTIONS

The several objections made by the Association in its post-hearing memorandum regarding adequacy or compliance of ODFW's filings with ODFW's instream water right rules have been addressed herein. Those objections relating to the validity of the Department's instream water right rules, OAR Chapter 690 Division 77 are DENIED. The rules were properly adopted by the Commission pursuant to ORS Chapter 183.325 - 183.370 and ORS 536.025 following opportunity for public comment, and are currently being considered for amendment pursuant to those same provisions. These rules are neither unconstitutional nor do they exceed the statutory authority of the Commission and Department. These rules are further the subject of a proceeding in Baker County Circuit Court. The Association may seek a further determination by a court of competent jurisdiction on appeal of the final order issued in this matter.

Following a review of the entire record, a Proposed Order was issued and served on the parties on April 8, 1992. Exceptions to the Proposed Order were timely filed by the Association, ODFW, WaterWatch and Oxbow Ranch. A subcommittee of the Water Resources Commission was appointed to review the exceptions and the record and to make recommendations to the full Commission regarding the exceptions and issuance of the Final Order in this matter.

DETERMINATION ON EXCEPTIONS

The Association, ODFW, WaterWatch and Oxbow Ranch filed a number of exceptions to the proposed order. Based on the review and recommendations of the subcommittee, the Commission concluded that alkali abatement is neither a use separate from irrigation nor a form or subcategory of irrigation but rather a potential side benefit of irrigation, as is recognized in the Malheur River Basin Plan Finding No. 15, which states that "flood irrigation in the Middle Fork Malheur Basin is beneficial in reducing alkalinity in soils and is an appropriate irrigation method." Therefore, the Commission has determined that the alkali abatement portion of Application 69433 should be denied on the following basis:

1. Alkali abatement is not specifically allowed or classified for in the basin program.
2. Irrigation is an allowable use under the Basin Program, but alkali abatement is not presently a form or subset of the classification of irrigation and is not otherwise classified as an allowable use within the basin program.
3. The SCS crop requirements for meadow grass and hay are approximately 2 af/ac and the duty allowed for irrigation in the Malheur Adjudication is 3 af/ac.
4. Even if the Basin Program contained a specific classification for use of the waters of the Malheur River for alkali abatement, there is insufficient information and evidence on either the specific extent and location of alkali-affected soils or the need for additional water for alkali abatement to approve the application at this time.
5. The Association is not foreclosed from reapplying under Division 82 (Acceptance of applications for water uses in addition to classified uses), which application would need to include additional information and facts about alkali and the location of alkali-affected soils within the application's boundaries, or to seek a basin program amendment and submit the additional information in that forum and then reapply for this use, assuming alkali abatement is added as a classified use to the basin program.

As a result of the determination to deny the alkali abatement portion of Application 60433, many of the findings of fact, ultimate facts and conclusions of law, portions of the opinion, the Interim Order and a part of the Proposed Order were modified or deleted from this Final Order. Where changes have been made to reflect the Commission's rejection of the alkali abatement portion of Application 69433, exceptions to those portions of the Proposed Order have been rendered moot and are not addressed here.

WaterWatch and ODFW asked that Finding of Fact 4 include grazing and poor management practices such as burning riparian areas to ease movement of livestock as contributing factors to streambank erosion.

Testimony at the hearing involved high flows as a cause of streambank erosion. The one reference to burning riparian areas as a management practice appeared to be an assumption on the part of

the one witness, Jim Myron, who mentioned the burn. He stated that the only thing he was personally aware of as a cause for the eroded condition of the streambank was a stretch of burned river bank and that he thought the burn was a management practice to facilitate livestock movement. There is insufficient evidence in the record to add grazing and management practices to Finding of Fact 4.

ODFW and WaterWatch excepted to the statement in Finding of Fact 26 that, with regulation, appropriation of either 3 or 4.5 af/ac in April and May would not harm or reduce the pollution abatement capacity or fish habitat of the Malheur River.

The denial of the request for 1.5 af/ac for alkali abatement renders much of this exception moot. Moreover, with a reduction in historical use via measurement and regulation, substantially less water will be diverted than has previously been taken, therefore, overland flows, temperature and pollutants would be reduced rather than increased.

The amount the Association can take under its increase in rate does not increase the duty. The irrigation rights are limited by the terms of the adjudication to 1½ af/ac during any 30-day period prior to June 1 and no more than 1 af/ac in any 30-day period thereafter, up to a total of 3 af/ac.

ODFW and WaterWatch excepted to Finding of Fact 27, arguing that flows records also show water would not generally be available in July, in addition to shortages on August and September.

The median and average monthly flows between 1927 and 1982, referred to in this Finding of Fact, are based on actual gaged flows which reflect historic appropriations at much higher levels than would be seen if monitoring and regulation are required and appropriations reduced to the allowed duty under existing rights plus 1.5 af in April and May. Despite ODFW's assertion, Ms. Zarnowitz' direct testimony was not uncontroverted. Kent Searles testified that the flow records indicate that water is available during the time period requested by the Association. He stated that he had no knowledge of lack of availability of water for the instream rights on the tributaries but the gaged flows, which measure real flows (water left after all appropriations) show water available for instream water rights on mainstem except for during low flows, usually August and September.

ODFW asked that Finding of Fact 28 be modified to find that bull trout are found within, rather than upstream from, the Logan Valley.

Jill Zarnowitz testified on cross-examination that bull trout are presently located in the tributaries high up above the Logan Valley, and that since they are sensitive to high water temperatures, their range is restricted to the forested upper reaches of the Malheur River Basin.

William Hosford testified in his written direct: "Bull trout occurred in the mainstem Middle Fork Malheur River as late as the mid-1960's. Recently bull trout have been found in only three tributary streams of the Middle Fork Malheur - Lake Creek, Big Creek and Meadow Fork Big Creek...Bull trout, as well as redband and brook trout, were observed in 1990 by ODFW personnel in irrigation ditches in the Logan Valley area of the Middle Fork Malheur."

On cross-examination, Mr. Hosford stated that "in the last few years they [bull trout] have only been found in tributaries to the middle fork of the Malheur above Logan Valley, which I mentioned in my affidavit [direct testimony by affidavit]."

The testimony supports this Finding of Fact. However, it has been modified to more accurately reflect the testimony of ODFW's witnesses.

ODFW and WaterWatch objected to the statement in Findings of Fact 32 and 34 that ODFW did not appear to have followed its own rules in making the instream requests.

Jill Zarnowitz testified in her direct testimony that "Flow levels were taken from the 1967 Basin Investigations, which were adopted by the Fish and Wildlife Commission as a source of information for ISWR applications. Flow determinations in the Basin Investigations were derived from depth and velocity measurements and adjusted for water availability..... ODFW expects these ISWR applications to be issued by WRD after analysis of naturally available flows." However, further investigation of this issue, in response to the exceptions, indicates that ODFW did not violate its own rules.

OAR 635-400-015(10) requires that "if hydrological estimates or gaging data can be obtained, the instream flow requirements shall be compared against the range of naturally occurring stream flows. Gaging data was considered by ODFW. As no explanation is given of how flows were adjusted for water availability, it could appear from ODFW's direct testimony that such a comparison was not done by ODFW.

The Commission takes administrative notice of the fact that natural flow information is provided by the Water Resources Department and that the Department staff, rather than ODFW, makes the comparison of gaged flows to estimated natural flows. The Referee did not conclude that ODFW would deliberately violate or fail to comply with its own rules, and was unaware of the Department's practice of providing natural flow information and making the comparison of gaged and estimated natural flows. The FWC did adopt the Basin Investigation recommendations as a basis for flows requested in ISWR applications. Kent Searles also testified he did not believe there was sufficient hydrographic [gaging] information available to say what the natural average flow of the stream would be or that would show what the natural flow would be without appropriations.

Given that it is the Department's practice to provide natural flow information and make this comparison, and given further that the natural average flow information was not available, it now appears that findings #32 and 34 are in error. These two findings have been deleted from the Final Order.

WaterWatch excepted to Finding of Fact 37 and argued that the actual consumptive use of meadow grass is 22" of water, not 25.65.

Dr. Jarrell stated in his direct testimony that consumptive requirements were 2.2 af/ac/year, or about 26.4". In an exhibit attached to his testimony, the Oregon Engineering Handbook Irrigation Guide, crop requirements were given as 25.65 inches. On cross-examination, he stated that the crop requirements, assuming 2½ tons of pasture grass per acre, were 25.65". In rebuttal, he revises his estimate again to 22". Dr. Vomcil testified that the requirement was 31.2" per year, without taking weather factors into consideration, which would raise the requirement to 37.4" per year. The Soil Conservation Service's Farm Irrigation Rating Index sets it at 25.65 inches. Both experts made estimates based on information from areas other than the specific area with which the Association is concerned. The Referee found the SCS credible and reliable. The Commission agrees with the finding that the consumptive use of meadow grass is 25.65" of water.

WaterWatch requested that the following language be added to Finding of Fact 42: "The 1969 survey and mapping of the soils in basin based on soil sampling representative of soils in basin showed no evidence of a problem."

The survey and mapping were general, not detailed. That work is being done now and will be completed in 1993-94. The 1969 report contained the disclaimer "Much of the soil information reported here is based on tentative information and work in progress. Therefore this report must be treated as a progress report containing information subject to change before the detailed soil survey of the basin is completed." Soil samples and testing done by the SCS on Association lands showed the presence of alkali. The requested addition to this finding is unnecessary and inappropriate.

WaterWatch, ODFW and the Association objected to the inclusion of the 15 cfs bypass flow in Finding of Fact 57, stating that this condition should only apply to the increase in rate portion of Application 69433.

This Finding and the condition have been eliminated from the Final Order.

WaterWatch asserted that the Order must contain a finding of consistency with statewide planning goals for the instream water rights under OAR 690-60-030.

The Commission concludes that no such finding was required, primarily because the issue of consistency of the instream water applications with the statewide planning goals or compatibility with the local comprehensive land use plans was not raised in the hearing and no testimony or evidence was given on this point.

However, under the procedures in place at the times of filing, the affected local governments (Harney and Grant Counties) were notified of the filing of both Application 69433 and the instream water right applications 70325 and 70349-70352 and submitted no comments or information regarding the compatibility of these applications with the acknowledged local land use plans. Under the procedures in place at the time these several applications were filed, compatibility may be presumed if no response is received from the affected local government within 30 days of receiving the notice of filing. Therefore, findings of compatibility of the increase in rate portion of Application 69433 and the instream water right applications 70325 and 70349-70352 have been added to this Final Order in Findings of Fact 51 and 52.

ODFW objects to Ultimate Fact 8, which finds that the presence of habitat and forage for a variety of wildlife and wildfowl species may be enhanced by, but is an incidental, albeit beneficial, result of flood irrigation, asserting that there is no evidence that wildlife is in better condition than it was prior to any irrigation, but the fish are worse off.

Application 69433 included wildlife habitat as one use. This Finding was directed at non-fish wildlife. Based on the testimony in the record, there is no apparent intention to provide such habitat. However, non-fish wildlife utilize the incidentally-created habitat and forage, which would not be as abundant if no irrigation occurred. ODFW Ex. B, the Basin Investigation, states: "The principal water requirement of land mammals and birds of the basin, except waterfowl and certain furbearers, is that needed to promote plant growth for food and shelter.....Extensive irrigation systems supplement the water needs of the pheasant and valley quail in the Malheur River Basin...Game water birds utilize the basin's reservoirs and rivers most during their fall and spring migrations...." The evidence supports this finding without change.

The Association asked that Ultimate Fact #8, finding that wildlife and habitat benefits are only incidental results of flood irrigation, be eliminated, as the amended application listed alkali abatement, erosion control and fish and wildlife maintenance as requested uses.

The Association further requested a finding that diversion "in excess of 3 af in April and May in addition to helping control alkali, benefit fish and wildlife through providing habitat and forage for wildlife and reducing flows and erosion during times of high water."

The results of historic illegal diversions and legally allowed uses are two different things. It is not clear in the record that April and May diversions have benefitted fish or fish habitat. Fish clearly do not live on the 6,454.9 acres. There was no testimony, nor, does it appear, any claim made that wildlife benefits, incidental or otherwise, were claimed for the entire 6,454.9 acres. There was never any identification made, despite direction to do so, of how much water was being requested for alkali, how much for fish and wildlife and how much for erosion control. The record does not support a finding that erosion control and fish and wildlife maintenance are deliberate or planned uses, only that they are incidental results of flood irrigation. On the evidence in record, the Referee found that the intended use of the water was not and had never been for fish and wildlife habitat maintenance. Ultimate Fact #8 will not be modified and the requested finding will not be made.

ODFW asserts that Condition No. 5 on the increase in rate permit should require compliance with all applicable laws requiring fish passage as well as the already-required screening. WaterWatch asserts that fish screening should be required on a date certain prior to April 1, 1993.

Screening is required prior to exercise of the increase in rate right. ODFW made no mention of either screening or fish passage in the conditions it proposed, nor did it provide any citation to the laws regarding fish passage or any explanation of what it means by fish passage and how that differs from by-pass or screening devices. The Commission will not at this time make the change requested.

The Association excepted to the language of the Proposed Order approving the portion of Application 69433 for an increase in rate of diversion. The Association asserted in its exception that it was not requesting an additional 11 cfs in connection with its increase in rate request, and requested that the order concerning the increase in rate of flow be changed to the following:

IT IS FURTHER ORDERED that the portion of the application 69433 in the name of Malheur Basin Water Users Association be approved for an increased rate of diversion from 1/80 to 1/40 cfs as an additional right from the same source for the same use at the same place of use as are permitted under the existing water rights of the Association members which contain only a 1/80 cfs diversion rate. This increase in rate is approved on 884.2 acres as designated on the amended application of Association.

The Association argued further that since modification of the rate of diversion does not affect the total amount of water diverted but only affects the timing in which diversion may occur, reference should not be made to an additional 11 cfs, no priority date should be referenced, and since the Association was only trying to correct a mistake on certificates issued between 1909 and 1937, no conditions should be attached.

It was not until July 1, 1991 that the Association amended its application and added the request for an increased rate of diversion. The draft permit offered into evidence as Association's Exhibit 17 contains the following condition: "In addition, this permit is issued approving an additional 1/80th cfs per acre diversion for all lands described in Certificates 3526, 2135, 3791, 2151, 8121 and 49682, this additional diversion rate is for irrigation **and when combined with the original certificate rate**, allows a total diversion rate of 1/40th cfs.....The use of water within this permit is allocated between other existing rights and this right as follows: The rate of flow for all water diverted **shall first be charged against the flow set out in prior rights. To the extent that flow exceeds that permitted under prior rights, additional flow shall be charged to this permit.**" (Emphasis added) The Association has previously acknowledged that, on approval of the request, two separate rights would exist. This request is inconsistent with the Association's application.

Citation to OAR 690-11-010(6) does not assist the Association in its request. OAR 690-11-010(6) reads as follows: "Deficiency of rate right: An additional right allowed from the same source for the same use at the same place of use when an earlier right does not allow a full duty or rate of flow of water" (emphasis added). This must also be read in conjunction with OAR 690-11-060, which provides if the replacement or amendment proposes additions to or increases in the source, quantity or nature of use, the additions or increases shall be assigned a new (tentative) priority date, as of the date the amendment is received by the Department.

Diversion at a rate of 1/80 cfs per acre for irrigation of 884.2 acres allows an instantaneous diversion of a total of 11 cfs. Diversion at a rate of 1/40 cfs per acre for irrigation of 884.2 acres allows an instantaneous diversion of 22 cfs. If water is available, which it normally would be in April and May, exercise of both the old 1/80th rights and the new 1/80th rights would mean a total diversion of 22 cfs for irrigation of these 884.2 acres. Since the rate and duty granted in existing rights cannot be modified, an increase in the rate of appropriation includes an additional amount of water to be diverted.

Approval of a request for an increased rate of diversion for lands with existing certificates can only be done through issuance of a new right for the additional rate, which would have a priority date

as of the date the application was made. A request for increased rate of diversion cannot be satisfied by enlarging or modifying the existing certificates. This clearly has the potential of injuring rights junior to the existing rights. In addition, there is no provision in Oregon water law that would allow this to occur. The Association's proposal for changing the Order to allow an increased rate of diversion under existing rights, rather than an additional right for a diversion of 1/80th to be used on those lands with existing rights allowing diversion of 1/80th, is denied.

Oxbow Ranch objected to the Referee signing the proposed order, asserting that ORS 536.025(2) requires the Director to sign proposed orders and that the only appealable Final Order is one signed by the Director.

With the exception of rule adoption, ORS 536.025(2) authorizes the Commission to delegate any of its powers, duties or functions to the Director. Pursuant to OAR 690-02-170 [previously OAR 690-01-041] and ORS 183.464, the Referee is authorized to sign proposed orders and, where no exceptions are filed, issue Final Orders. ORS 183.460 and OAR 137-03-060 allow for filing exceptions to proposed orders. ORS 183.470 - .482 and OAR 137-03-070, regarding appeal and judicial review of Final Orders, do not require signature by the Director before a Final Order may be appealed.

Oxbow Ranch further argued that the Commission cannot draft a Final Order for the Director's signature granting instream water rights to ODFW using the statutes and rules because:

1. There is no evidence from which the Commission can determine the necessity for any of the rights applied for, their nature or extent, and
2. The referee's conclusion that the rights cannot be granted without flexing both [statutes and rules] and considering the effect of denying the applications. (Proposed Order [Opinion], page 14.)

In support of this exception, Oxbow Ranch asserted that the Referee concluded the ODFW had not established the necessity for the amount of instream water required or any amount under existing rules and regulation. ODFW did not comply with its own rules and did not provide any information which the Commission could use to make its own determination of the appropriate amount, therefore the ISWR applications must be denied.

The Commission does not draft a final order for the Director's signature. Exceptions to proposed orders issued after contested case hearings held on applications filed under Divisions 11 or 77 are heard by the Commission, which issues the final order after considering and addressing the exceptions. In practice, after considering the exceptions, the Commission directs staff to prepare a Final Order containing its decisions on those exceptions for signature by the Commission Chair.

Nowhere in the Proposed Order is the conclusion made that ODFW had failed to establish the necessity for the amount of water requested in the instream applications. The Referee found that it did not appear that ODFW had followed its rules to the letter, in that it did not **appear** that consideration or comparison with naturally-occurring flows was made. This matter has been addressed above in response to exceptions filed by ODFW and WaterWatch on this issue.

Having now review the record, the proposed order, and the exceptions to the proposed order, this Final Order is issued.

FINDINGS OF FACT

1. The Malheur basin has a semiarid climate with hot dry summers and cold winters. Average temperature extremes usually occur in January and July, with average minimum January and average maximum July temperatures in the higher elevation agricultural valleys of 16 and 96 degrees Fahrenheit. Elevations in the Drewsey Valley average between 3,520 and 3,600 feet. Elevation in the Logan Valley area averages 5,000 feet.
2. Annual precipitation in the lower elevations of the Drewsey Valley is 10". Measured average annual precipitation at Drewsey at river mile 146.5 is 11". Measured average annual precipitation in the Logan valley is 30". Precipitation and streamflow levels vary widely with wet and dry years.
3. The Malheur River rises in the Strawberry Range of the Blue Mountains at about 5000' elevation and flows in a southeasterly direction for 190 miles to its confluence with the Snake River. Rivermile (rm) designations begin at 0 at the confluence and end at 190 at the point of origin.
4. Streambank erosion along the Malheur River is a problem in the Drewsey Valley and is exacerbated by high spring flows.
5. A minimum streamflow of 15 cfs as measured at the gauging station below Drewsey was adopted on February 26, 1985 by the Water Policy Review Board (WPRB), predecessor to the Commission, as part of the Malheur-Owyhee Basin Program.
6. Following consideration of a petition by the Association for a stay of enforcement of the minimum streamflow and a subsequent petition for amendment of the Malheur-Owyhee Basin Program, the Commission entered into rulemaking and ultimately rescinded the minimum streamflow and amended the Basin Program on January 7, 1986.
7. As part of its January 7, 1986 action, the Commission adopted a finding that flood irrigation in the Middle Fork Malheur Basin is beneficial in reducing alkalinity in soils and is an appropriate irrigation method.

8. As part of its January 7, 1986 action, the Commission further directed that the Department seek and evaluate water use data forwarded by the water users in the Middle Fork Malheur Basin, and report on its estimates and analysis of the existing diversion rates, the amount and location of return flow, the impact of current irrigation practices on downstream water needs and uses, and the impact and associated cost of conservation measures, no later than January 2, 1988. That result of that investigation and report is the 1987 WRD Malheur River Return Flow Study.

9. The 1987 WRD Malheur River Return Flow Study involved approximately 1/6 of the acreage covered by application 69433 and examined irrigation practices and return flows at the upstream end of the Drewsey Valley between rm 168-171.

10. Median (M) and average (A) monthly flows between 1927 and 1982 as measured at the Drewsey gage 13214000 (rm 142), measured in cfs, are as follows:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
M	93	195	355	563	304	108	19	7	10	36	64	78
A	146	258	427	651	345	135	26	10	12	38	66	104

The median number means that 50% of the time flows are higher than the given number and 50% of the time flows are lower.

11. Based on average monthly gaged flows, total acre feet (af) flowing monthly past the gage at Drewsey are as follows:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
	8808	15565	25761	39275	20814	8145	1569	603	724	2292	3982	6274

for an annual average of 133,300 af.

12. The reported gaged flows represent the actual amount of water in the river after diversions above the gage and including any amounts returned to the river as return flows.

13. At the maximum allowable rate under existing water rights, 580 cfs, or a total of 39,500 af, can be diverted during the period April-October between the headwaters and Warm Springs Reservoir for irrigation of 13,166 acres at 3 af/ac.

14. The relative rights of appropriation established prior to 1909 in the Malheur Basin, including the area to which these applications are applicable, were determined in the 1919 Malheur adjudication. Some additional rights have been allowed on approval of applications for permits to use water since that time.

15. There is no irrigation season set in the Malheur Adjudication Decree, but there are limitations on the amount of water that may be diverted. Holders of decreed rights may divert up to 1½ af during any 30-day period prior to June 1 and thereafter may not exceed 1 af/ac during any 30-day period, provided that the total quantity diverted during season may not exceed 3 af and the rate not exceed 1/20th of a cfs.

16. The Malheur Decree further found that in order to successfully irrigate a piece of ground, it is necessary to have a sufficient head of water, and that a flow of 1/80th cfs per acre is inadequate for purposes of irrigating an acre, although it is not necessary to keep a continuous flow of water on each and every acre.

17. Appropriative rights issued after the adjudication maintain the same duty limitations, but rights issued between 1909 and 1937 frequently allowed a diversion rate of only 1/80th.

18. The Malheur Basin Decree contains no mention of alkali or alkaline soils, and no provision for alkali or other soil problem abatement via flood irrigation was requested or granted in the rights and duty allowed.

19. The physical geography of the narrow Logan Valley and Drewsey Valley areas is such that water diverted is rarely, if ever, taken more than one-half mile away from the Malheur River, to which water not consumed by the crop or lost in transmission returns in 3-8 days.

20. The rights in the Drewsey valley have been regulated in the past for rate of appropriation. These diversions have not been regulated for total duty of water due to a lack of measuring devices capable of measuring the total volume of water diverted during the irrigation season.

21. Historical evidence indicates that the irrigators in the Drewsey Valley area of the Malheur basin have, in the early part of the irrigation season (April and May), annually diverted substantial quantities of water over their authorized rights since at least 1939.

22. The Malheur River Return Flow study area appears representative of all Association lands and practices. A total of just under 9 af/ac was diverted and applied to the lands within the study area. Although other diversions were not measured, with the exception of the Drewsey Ditch area, it appears that unpermitted diversions above the authorized 3 acre-feet range in quantity from 2.8 - 5.8 af/ac.

23. Taking the Return Flow Study as representative, a total of between 5.5 and 8.8 af/ac are diverted at 25 diversion points within the Drewsey Valley, distributed through ditches and applied on these lands during the irrigation season, with the majority of the water being applied and saturating the soil or consumed in the early spring (April-May) when flows are high.

24. Assuming past unpermitted diversions throughout the Drewsey Valley area for irrigation of 6,455 acres of 5.5 af/ac above the authorized diversion rate, the total amount of water diverted during the irrigation season would have been 54,867 af. Regulation of all authorized diversions back to a total duty of 3 af/ac would have resulted in an additional 35,502.5 af remaining in the river.

25. Given that historical diversions by the Association have been as much as 9 af/ac and given further that regulation and a limitation on appropriations to a duty of 3 af/ac will result in more water being available instream than has been available since at least 1939, more than adequate flows will be available for both the ODFW instream appropriations and the increase in rate of diversion requested under Application 69433. Diversion of 11 cfs in April and May under the increased rate of appropriation permit issued on Application 69433 as conditioned herein will not harm or reduce the pollution abatement capacity or the fish habitat of the Malheur River.

26. Available flow records show water available for the instream water rights and increase in rate of diversion applications. Gaged flows only show what amount of water is left in the river after legal and extra-legal diversions. There is no evidence in the record showing what the total natural average flow (without diversions) would be.

27. Bull trout, a cold water species listed as threatened by ODFW, were previously found in the Malheur in the reach just above the Return Flow study area as recently as 20 years ago. Bull trout are generally now found only in tributaries upstream from the Logan Valley area, although they were observed in 1990 in irrigation ditches within the Logan Valley, from which it may be inferred that bull trout are also present in tributaries to the Malheur within the Logan Valley as well as upstream from it.

28. The stretch of the Malheur River between the Highway 20 crossing and Warm Springs Reservoir is an important rearing habitat for smallmouth bass, a warm water game fish.

29. Hot springs located approximately half-way through the Drewsey Valley add some limited increment of warm water to the flows during the mid-late summer.

30. With the exception of 81.4 acres, all lands to which Application 69433 is appurtenant are upstream of the Highway 20 crossing.

31. The Fish and Wildlife Commission adopted the Oregon State Game Commission's 1967 Malheur River Basin Investigation as a basis for requesting flow levels in these instream water right applications in OAR 635-400-015(13).

32. The flow levels applied for by ODFW in the instant instream water right applications represent quantities necessary to provide the minimum flow requirements for migration, spawning and juvenile rearing and habitat for the several species identified in those applications.

33. Meadow grass is the predominant crop grown on the Association's lands. No fertilizers, pesticides or other chemicals are required or applied. Unlike alfalfa or grain crops, meadow grass hay does not require tilling or other cultivation of the soil.

34. Harvesting of the hay is generally done in late June and July and cattle pastured on the cut fields. Continued irrigation after harvest, albeit at a reduced level, provides 15-20% of the annual forage for cattle.

35. The consumptive requirement of meadow hay for water as determined by the Soil Conservation Service (SCS) in its Farm Irrigation Rating Index is approximately 25.65 inches, or just over 2 af/ac.

36. Total crop consumption reported in the Return Flow Study was 3.4 af/ac, with 1.8 af being consumed by the crop and 1.6 af lost to the system.

37. Of the total amount diverted, that which is not consumed by the meadow grass crop or lost to the system returns to the river. In the area involved in the WRD's Return Flow Study, approximately two-thirds of the water diverted returned to the river, thereby becoming available for instream use or for re-diversion downstream, a scenario repeated at each subsequent diversion within the Drewsey Valley.

38. The average efficiency rating for flood irrigation systems is 40%; the maximum efficiency that can be expected is 50%. This means that a distribution system with 50% efficiency loses half the water diverted. Consequently, only half the water diverted reaches and is available for crop consumption. In a system with a 50% efficiency rating, to provide sufficient water to a crop with a 2 af consumption requirement requires diversion of 4 af/ac.

39. Reducing the amount of transmission losses would increase delivery system efficiency. As a result, there could be expected a corresponding reduction in the amount of water needed to be diverted to achieve the same amount of water actually delivered to the fields for consumptive purposes and a corresponding increase in the amount of water left instream.

40. Beyond those tests conducted by the SCS and offered into evidence by the Association, no soil tests were conducted by the parties although the expert witness for WaterWatch testified that the only way to determine if there was a problem, and what type of problem, is to conduct soil tests.

41. Alkaline soils are high in lime. Alkaline soils can be improved and reclaimed by adding sulphur, and should not recur unless the soils are again made too alkaline by application of fertilizers or high pH or salty water, which can lead to accumulation and recurrence of alkalinity in the soil.

42. Alkali soils have an imbalance in the amount of various mineral elements, with sodium being high in comparison to the calcium and magnesium present in the soil. The sodium makes the soil less permeable and must be displaced through the addition of gypsum or sulphur and then flushed.

43. Water quality tests conducted as part of the WRD return flow study generally showed the concentration of total dissolved solids increasing during the irrigation season, with higher levels at the lower end of the Drewsey Valley. Levels of salt in the river were found to be highest in the early part of the irrigation season.

44. Some portion of the lands held by Association members do have an alkali problem. However, the extent of the problem is unclear. Estimates in testimony describe the amount of Association lands with evidence of an alkali problem as ranging from 5-20% of the land, with the extent and location of the problem areas varying as more or less water is annually available for application.

45. The addition of gypsum to lands affected by alkali is helpful in reducing or eliminating excess alkali in the soil. Tilling the soil is not necessary for the gypsum to be effective.

46. Where alkali-affected soils have been reclaimed by use of soil amendments, the application of 5% more water than is needed by the crop is generally sufficient to prevent a recurrence of the alkali for some time. Given that the consumptive crop requirements for meadow hay for water as determined by the Soil Conservation Service (SCS) in its Farm Irrigation Rating Index is approximately 25.65 inches, or just over 2 af/ac, it appears from the record in this proceeding that the 5% leaching requirement can be satisfied by existing adjudicated rights of 3 af/ac.

47. Leveling where feasible and soil amendments of gypsum or other material, as advised by the SCS following tests, will assist in further reducing alkali to a manageable level and may, in fact, be necessary to maintain the problem at its current level with a reduction of water historically applied and will certainly be necessary to improve crop production.

48. Some of the vegetation on Association lands is wetland-related species. Reduction in the total volume of water applied to these lands will result in a diminishment of these species and a change to species of vegetation associated with drier soil conditions.

49. In order to properly ensure that the total volume of water diverted does not exceed the authorized amount of 3 af/ac and to provide for the necessary regulation and management of the waters of the Malheur river and diversions therefrom, conditions proposed by both ODFW and the Association regarding installation of measuring devices should be made a part of the permit for an increase in rate of diversion issued on application 69433.

50. Limitation to April and May of diversions made under permit issued for an increase in rate of diversion under Application 69433 will ensure that diversions under this new right occur at times when water is available in more than adequate quantities.

51. Approval of the increase in rate portion of Application 69433 is compatible with the Harney County Comprehensive Land Use Plan.

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52. Approval of the instream water right applications 70325 and 70349-70352 is compatible with the Harney County and Grant County Comprehensive Land Use Plans.

ULTIMATE FACTS

1. An undetermined portion of the Association's lands currently evidences problems with alkali, alkalinity or high sodium.
2. Soil tests are necessary to determine the specific location and extent of the alkali problem throughout the Association's lands.
3. Gypsum applied as advised by the SCS to all areas demonstrating an alkali problem will reduce the amount of water required to flush the alkali from the soil and should be done before any issuance of a permit to use water for alkali abatement.
4. Where leveling of alkali-affected areas can be done with a minimum of disturbance to the surrounding area, it should be done.
5. An adequate soil moisture profile is necessary for proper crop utilization of irrigation water and may contribute to the efficiency of the delivery system and method of irrigation.
6. The majority of the Association's delivery system does not approach 50% efficiency and needs to be improved to reduce transmission losses.
7. Measuring devices capable of calculating the total volume of water diverted are necessary for proper management and regulation.
8. The presence of habitat and forage for a variety of wildlife and wildfowl species may be enhanced by, but is an incidental, albeit beneficial, result of flood irrigation.
9. Given the reported low flows in the Malheur River in the late summer months, protection of sufficient minimum flows to support the several fish species present in the Malheur is necessary.
10. Assuming only lawful use, there is sufficient water to satisfy both the requested increase in rate of diversion and instream uses applied for.

CONCLUSIONS OF LAW

1. A right for a new use with a new, junior priority date can be granted where the need for and ability to use the additional water is demonstrated and where flow is available. Such a right does not alter the rate, duty or priority of any appropriation authorized under a decreed right for a different use on the same lands.
2. Basin programs are adopted by the Water Resources Commission through rulemaking and are subject to amendment or modification from time to time through further rulemaking.

3. The purpose of classifying waters for certain listed uses in basin programs is to allow certain types of uses from a named source of water based on considerations of the amount of flow available, land use, economic, water quality and the public interest. Classification of waters for certain uses at the time a basin program is adopted or amended does not preclude the later addition of other beneficial use classifications to the basin program through further rulemaking.

4. Appropriation and use of water for alkali abatement in the Drewsey Valley area of the Malheur Basin is not presently a use for which the waters of the Malheur River are classified in the Malheur Basin Program.

5. Irrigation is an allowable use under the Basin Program, but alkali abatement is not presently a form or subset of the classification of irrigation and is not otherwise classified as an allowable use within the Basin Program.

6. The alkali abatement portion of Application 69433 cannot be approved in the absence of a classification in the Malheur-Owyhee Basin Program allowing use of the waters of the basin for that purpose.

7. The elements of appropriative water rights include appurtenancy to a specific place of use and are limited further by the amount actually needed for the beneficial use to which the water is applied, regardless of the amount of prior diversion.

8. Where, as here, the location of the area of application is limited or unknown, but is less than the entirety of the acreage held by the appropriator, to issue a water right which would allow unnecessary application of water in quantities in excess of that needed to accomplish the purpose for which the water is appropriated, or to issue a right for a beneficial use on lands which do not require it, would be contrary to law.

9. In addition to the protection of fish and wildlife, the public interest also includes consideration of the economic wellbeing of a part of the state, as well as the avoidance of actions which have the likelihood of increasing nonpoint source pollution and disturbing established and balanced land ecosystems.

10. In the absence of a Basin Program classification allowing use of water for alkali abatement, and without specific information and evidence on the specific location of alkali-affected soils within the Association's lands and need for additional water for alkali abatement, that portion of application 69433 for use of 102 cfs from the Malheur River, 5.0 cfs from Griffin Creek, 18.2 cfs from Otis Creek, 2.8 cfs from Cottonwood Creek and 2.2 cfs from Spring Creek for alkali abatement on 5,127 acres with a priority date of October 28, 1987 and for use of 33.0 cfs of water from the Malheur River for alkali abatement on 1,327.9 acres with a priority date of July 1, 1991 cannot be approved and must be denied.

11. Approval of that portion of application 69433 for an increased rate of diversion from 1/80 to 1/40 for irrigation of 884.2 acres under existing rights with a priority date of July 1, 1991, as further conditioned below, is in the public interest.

12. Approval of applications 70325 and 70349-70352 is in the public interest.

OPINION

Much testimony at the hearing focused on the Association's historic irrigation practices of taking water in quantities substantially over their authorized amount of 3 acre feet per acre. Quite possibly as a result of these unpermitted diversions, stretches of the Malheur River in the Drewsey Valley were virtually without water in the later summer months. The volumetric extent of the Association's historic unpermitted diversions is unclear, as their diversions currently lack measuring devices capable of recording and providing this information. As a condition of the approval of that portion of Application 69433 for an increase in rate of appropriation, measuring devices are required on all the Association's diversions. It is apparent to all that the cessation of these unpermitted diversions will result in substantial quantities of water being left instream not previously available over the last several decades. While it is expected that flows from now on will be more substantial than in the past, approval of the instream water right applications will do much to ensure the presence of flows at levels sufficient to meet the minimum requirements of the fish populations throughout their life cycles.

Substantial testimony was also taken on the subject of alkali soils and alkali abatement from two types of experts. One type of expert was the PhD holders in the soil science area, Dr. Jarrell and Dr. Vomicil, both of whom testified that soil sample testing was really necessary to know what kind of problem existed, the extent of the problem, and what to do about it, and neither of whom conducted any such tests. The other type were the applicants, who live in the Drewsey Valley and who have first hand knowledge and experience, acquired daily and repeatedly through each irrigation season, of the type of soil problems, plant growth, and management practices which have proven relatively effective over the decades.

Ultimately, while there was agreement on the existence of some sort of soil problem, there was no agreement on the type or extent of the problem. There was also general agreement that application of water in sufficient quantities to flush the offending salts from the soil was effective to some degree or another, but it was clear that the more effective and less water-consumptive method for elimination or control of the soil problem was through the use of gypsum or other appropriate soil amendments. Association members should, when and where necessary, apply gypsum or other appropriate soil amendments and improve the efficiency of the delivery system through reconstruction, conservation and other measures to ensure the efficacy of water use.

There are two barriers to approval of that portion of the Association's application requesting water for alkali abatement. The first is that alkali abatement is not presently a form or subset of the classification of irrigation and is not otherwise classified as an allowable use in the Malheur-Owyhee Basin Program. The second is that a water right for the beneficial use of alkali abatement cannot legally issue for use on all the Association's lands when it is clear that not all those lands have alkali-affected soils. To allow use of water for alkali abatement on lands not so affected would not be a beneficial use of the water and would constitute waste. In addition, there was insufficient information and evidence in the application on either the specific extent and location of alkali-affected soils or the need for additional water for alkali abatement.

While the portion of Application 69433 must be denied, the Association is not foreclosed from reapplying under Division 82 (Acceptance of applications for water uses in addition to classified uses), which application would need to include additional information and facts about alkali and the location of alkali-affected soils within the application's boundaries, or to seek a basin program amendment and submit the additional information in that forum. If such a classification is added to the basin plan, a new application for this use may be filed at that time.

FINAL ORDER

NOW, THEREFORE, it is **ORDERED** that applications 70325 and 20349-70352 in the name of Oregon Department of Fish and Wildlife, to be held in trust by the Oregon Water Resources Department, should be **APPROVED**.

It is **FURTHER ORDERED** that the portion of application 69433 in the name of Malheur Basin Water Users Association for use of 102 cfs from the Malheur River, 5.0 cfs from Griffin Creek, 18.2 cfs from Otis Creek, 2.8 af from Cottonwood Creek and 2.2 cfs from Spring Creek for alkali abatement on 5,127 acres with a priority date of October 28, 1987 and for use of 33.0 cfs of water from the Malheur River for alkali abatement on 1,327.9 acres be and the same is hereby **DENIED**.

It is **FURTHER ORDERED** that that portion of application 69433 in the name of Malheur Basin Water Users Association for appropriation of up to 11.0 cfs from the Malheur River, Griffin Creek, Otis Creek, Cottonwood Creek and Spring Creek for an increased rate of diversion from 1/80 to 1/40 for irrigation of 884.2 acres under existing rights with a priority date of July 1, 1991, be and the same is hereby **APPROVED**, subject to the following conditions and as may be further conditioned as is deemed appropriate by the Department:

Use of water under permit issued on application 69433 will be limited to April and May of each year;

All rights subject to the diversion and duty limitations as set out in the Malheur River Decree shall be exercised strictly within those limitations and the use allowed under this permit shall not alter those limitations in any manner;

Operating measuring devices capable of measuring the rate of appropriation and measuring and recording total volume of water appropriated during the irrigation season shall be installed at all primary diversion points identified for the Association's several rights to be served under this permit, being Certificates 3526, 2135, 3791, 2151, 8121 and 49682. Installation shall be completed under the supervision of the watermaster on a schedule to be established by the watermaster. Measuring devices shall meet the requirements of the Department. The Department shall consult with ODFW in establishing requirements for the measuring devices.

All diversions shall be in compliance with applicable laws requiring fish screening prior to any diversion under this permit.

Signed this 27 day of January, 1993.

Placed in the U.S. Mail this 1st day of February, 1993



LORNA STICKEL
Chair
Water Resources Commission

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.

Final Order on Application 69433 in the name of
Malheur Basin Water Users Association
Final Order on ISWR Applications 70325, 70349,
70350, 70351 and 70352 in the name of ODFW