

## Dorothy Pedersen

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**From:** Kimberley Priestley [kjp@waterwatch.org]  
**Sent:** Thursday, May 10, 2007 3:01 PM  
**To:** Dorothy Pedersen  
**Subject:** Comments, Whitehorse Ranch T-10358

**Attachments:** whitehorse transfer.doc

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SALEM, OREGON



whitehorse  
ransfer.doc (50 KB..)

Hi Dorothy,

Attached are some initial comments. I will also send a hard copy via FAX.

Thank you, Kimberley

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Dorothy Pederson  
Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301-1271

Re: Comments, Transfer Application 10358, Irrigation to Storage (two reservoirs)  
Whitehorse Creek, Malheur Lake Basin

Dear Ms. Pederson,

WaterWatch of Oregon, Oregon Natural Desert Association(ONDA), Oregon Chapter Trout Unlimited and individual Kathleen Myron have a number of concerns and/or questions about transfer application 10358 for Whitehorse Creek, tributary to the Alvord Desert.

While we have not yet had the opportunity to review the entire file, we offer the following initial comments on this application. First, Whitehorse Creek contains a rare species of fish, the Lahontan cutthroat trout. This fish is listed as threatened under the Federal Endangered Species Act and endangered under state law. It is unclear if WRD has completed any analysis of the effect of this proposed use on the federally listed Lahontan cutthroat trout. The proposed use, two storage projects (at least one of which is on channel), could certainly result in habitat modification to the level that constitutes a take under the ESA.<sup>1</sup>

Second, as we understand it nearly half of all Lahontan Cutthroat habitat available in this subbasin is found in the Whitehorse Creek drainage, where the applicant is proposing to impound water. The Lahontan Cutthroat Trout population in Whitehorse Creek is one of the last pure native populations of Lahontan Cutthroat Trout in Oregon. It is our understanding that there are currently no storage projects on this creek system. While it is clear that ODFW would prohibit the stocking of trout in the proposed reservoir, given the problem of unauthorized stocking of fish throughout Oregon, including eastern Oregon, we are concerned that the presence of a storage project in this arid high desert could attract such activity from visitors to the area. This could put the Whitehorse Creek Lahontan Cutthroat population at risk. We did not see mention of an upstream fish barrier in the application.

Third, transferring a live flow irrigation right to a storage right is arguably an enlargement of the underlying water right, which would result in injury per se. Forth, it is our understanding that the applicant has not submitted documentation of use of the 106 cfs over the past five years. It is unclear whether there might be some forfeiture or partial forfeiture issues. Fifth, aside from split season instream leases, split season transfers are not allowed under Oregon law. It is unclear if that is what is being proposed here. Sixth, if the applicant is hoping to use this stored water for later irrigation he would need to get a secondary permit to irrigate from this source, which raises questions with regards to the Whitehorse Creek Amended Withdrawal Order (WRC 4/24/92). And seventh, wholly separate from the previous point, given the significant change in use that is proposed (irrigation to storage), along with a new point of appropriation, arguably the Whitehorse

<sup>1</sup> Section 9 of the federal Endangered Species Act applies to any person, not just federal agencies. This section prohibits the "taking" of endangered species. 16 USCA § 1538(a)(1)(B).<sup>1</sup> Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3.

Creek Amended Withdrawal Order does in fact prohibit what is essentially a wholly new appropriation (as is evidenced by the fact that this request comes at the heels of WRD's orders to deny alternative reservoir applications R-86706, R-86707, R-86708, and R-86718).

Thank you for this opportunity to comment. And as we noted at the outset, we have not yet had the opportunity to review the file in full (it was in Baker City when we had allocated time to review) and thus reserve the opportunity to submit additional comments once we have reviewed the file in full. Please keep us apprised of the WRD's completion of a preliminary determination on this application.

Sincerely,



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