

**Oregon Water Resources Department  
Water Right Services Division**

Water Right Application IS-70863 in the name	)	FINAL ORDER
of OREGON DEPARTMENT OF FISH AND	)	INCORPORATING
WILDLIFE	)	SETTLEMENT AGREEMENT

**Summary:** Order approving Application IS-70863 and issuing Certificate 97023.

**Authority**

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.153 through 537.175, and 537.332 through 537.360, and Oregon Administrative Rule (OAR) Chapter 690, Divisions 77, 400, and 410, and the Powder Basin Program (OAR 690-509). These statutes and rules can be viewed on following website:

<https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx>

The Department's main page is <https://www.oregon.gov/OWRD>.

This Final Order is issued pursuant to ORS 537.170(6) to (9) and OAR 690-077-0047.

**FINDINGS OF FACT**

1. On November 8, 1990, the Oregon Department of Fish and Wildlife submitted an application to the Department for an instream water right in Pine Creek, tributary to the Snake River.
2. On May 14, 1996, the Department issued a Proposed Final Order proposing to issue the Certificate with conditions. Pine Valley Irrigation Association filed a protest on July 26, 1996.
3. On March 14, 2023, the Water Resources Department, Oregon Department of Fish and Wildlife and Pine Valley Irrigation Association signed a settlement agreement resolving the protest. The Settlement Agreement is incorporated into this final order by reference and is attached hereto and made a part of the order.
4. The findings of fact in the Proposed Final Order are incorporated herein.

**CONCLUSIONS OF LAW**

1. The conclusions of law in the Proposed Final Order are incorporated herein.

**NOTICE OF RIGHT TO PETITION FOR RECONSIDERATION OR JUDICIAL REVIEW**

This order is subject to judicial review under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(2). Pursuant to ORS 183.482, ORS 536.075 and OAR 137-003-0080, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

2. The proposed use, as conditioned, would not impair or be detrimental to the public interest. The Applicant, Protestant, and the Department have agreed to conditions set forth in the certificate.

**ORDER**

Application IS-70863 is approved and Certificate 97023 is issued.

DATED APR 14 2023



Katherine Ratcliffe  
Water Rights Section Manager, for  
Douglas E. Woodcock, Acting Director  
Oregon Water Resources Department

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- If you have any questions about statements contained in this document, please contact Adam Frederick at [Adam.M.Frederick@water.oregon.gov](mailto:Adam.M.Frederick@water.oregon.gov) or 971-707-8400.
  - If you have other questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503 986-0900.
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## SETTLEMENT AGREEMENT

The Oregon Water Resources Department (“OWRD”), the Oregon Department of Fish and Wildlife (“ODFW”), and Pine Valley Irrigation Association, (“PVIA”), referred to collectively as the “Parties” and each individually as “Party,” do hereby agree as follows:

### A. Recitals

1. Pursuant to Oregon Revised Statute (“ORS”) 537.341, the Water Resources Commission (the “Commission”) may issue certificates for instream water rights.
2. On November 8, 1990, ODFW applied for instream water right applications IS-70863, IS-70864, and IS-70870. On January 29, 1992, ODFW applied for instream water right applications IS-72170, IS-72179, and IS-72180. The six instream applications are referred to herein individually by their application number or as an “**Instream Application**,” and collectively as the “**Instream Applications**”.
3. For each of the Instream Applications, OWRD issued Proposed Final Orders (“**PFOs**”) recommending issuance of draft water right certificates with conditions. Each of the PFOs set out the purpose for the instream water right and propose to approve specified bi-monthly cubic feet per second amounts of water and a reach where the instream water right would be located. The Proposed Final Orders are attached hereto as Exhibits A to F.
4. The PVIA was organized on January 9, 1996, for the purpose, among other things, of providing “all water right owners in Pine Valley” with “assistance in preserving water rights and ditch rights of ways.”
5. In July and October 1996, PVIA protested OWRD’s Proposed Final Orders for the Instream Applications. Ditch companies, improvement companies, and water right holders with points of diversions in reaches where instream water rights were proposed signed each of the protests as members of the PVIA.
6. On September 13 and 14, 2021, OWRD referred the cases to the Office of Administrative Hearings (“**OAH**”).
7. In 2021, PVIA registered as a nonprofit mutual benefit corporation with the Oregon Secretary of State. PVIA continues to provide “owners of irrigation water rights in Pine Valley” “assistance in preserving water rights and ditch rights of ways.” PVIA is governed by a five member board of directors.
8. Certain Pine Valley landowners and members of PVIA hold water rights confirmed by the 1911 Decree on Mandate of waters of Pine Creek, 1930 Pine Creek Decree, the 1933 Order Correcting Errors of the Pine Creek Decree, and subsequent orders related to the 1930 Pine Creek Decree (collectively referred to as the “**Pine Creek Decree**”) and water rights otherwise confirmed by certificates. The Pine Creek Decree and water right certificates authorize the use of Pine Creek, East Pine Creek, Clear Creek, and Lake Fork Creek for irrigation, stock water, and other beneficial uses.

9. The priority date for each of the Instream Water Rights will be the date the associated Instream Application was filed. Permitted, certificated, or decreed water rights held by Pine Valley landowners or PVIA members vested prior to the filing date of Instream Applications are senior in priority to the proposed instream water rights for Pine Creek, East Pine Creek, Clear Creek, and Lake Fork Creek.
10. ORS 540.510 authorizes the holder of a water use subject to transfer, upon compliance with the provisions of ORS 540.520 and 540.530, to change the use and place of use, the point of diversion or the use of the water without losing the priority of the right. As provided in ORS 540.530(1), if the OWRD or the Commission finds that a proposed change can be effected without injury to existing water rights, the OWRD or the Commission shall approve the transfer. In evaluating whether a proposed transfer of a water use subject to transfer will cause injury, OWRD analyzes potential injury to junior water rights, including instream water rights. If, after hearing or examination, the OWRD finds that a proposed change in point of diversion cannot be effected without injury to an in-stream water right, the OWRD may consent to the change only upon a recommendation that the OWRD may do so from the agency that requested the in-stream water right. ORS 540.530(1)(c). The recommendation from the agency that requested the in-stream water right must be in writing and, if the recommendation is to consent to the change, must describe the extent of the injury to the in-stream water right, the effect on the resource and the net benefit that will occur as a result of the proposed change.
11. Consistent with ORS 540.510(5), the relocation of a point of diversion as necessary to follow the movements of a naturally changing stream channel does not constitute a change of the point of diversion for the purposes of ORS 540.510(1)(a) if the diversion point stays within five hundred (500) feet of the point of diversion on record with the OWRD, the change does not move the diversion point upstream or downstream beyond the diversion point of another appropriator, and the diversion is provided with a proper fish screen, if requested by ODFW. Provided the relocation is consistent with ORS 540.510(5), the change is not subject to the "no injury" or consent to injury review and recommendation process as provided in ORS 540.530(1)(c) – (e) and OAR 690-380-5050. Only as consistent with ORS 540.532 and OAR 690-380-2120(5), a request for a change in the point of diversion to reflect the historical use of water at a point of diversion other than that described in the water right certificate or decree is not subject to the provisions of ORS 540.510 to ORS 540.530 including a determination of injury to existing water rights or the consent to injury review and recommendation process as described in ORS 540.530.
12. Water right holders in Pine Valley, including members of PVIA, have been engaged in irrigation modernization projects and intend to continue pursuing such projects. Irrigation modernization projects can provide improvements to instream habitats and improvements to irrigation systems and agricultural operations.
13. The Parties acknowledge and recognize recent investments of resources to enhance native salmonid habitat in some or all of Pine Creek, East Pine Creek, Clear Creek, and Lake Fork Creek.

14. As of the date of this Agreement and consistent with existing law, ODFW has determined that the habitat for each of the Instream Water Right reaches is categorized between Habitat Categories 2 and 4, as those categories are defined in OAR 635-415-0025, based upon existing facts and circumstances relevant to such determinations.

#### **B. Consent**

1. Each Party to this Settlement Agreement (“**Agreement**”) certifies that it has read the entire Agreement and understands and agrees with the contents thereof.
2. The Parties understand and agree that this Agreement and all documents incorporated by reference set forth the entire Agreement of the Parties.
3. The Parties understand and agree that this Agreement constitutes the final resolution of the protests of the Instream Applications.

#### **C. Terms of the Agreement**

1. PVIA agrees to engage in good faith in ongoing efforts to reduce water loss by improving water conveyance infrastructure and to reduce water consumption by seeking efficient means of irrigation.
2. ODFW will work in good faith with PVIA members to implement its Habitat Mitigation Recommendations (OAR 635-415-0025) for any application for a transfer of a water right associated with irrigation modernization projects (as described in Section C.5.a) if OWRD finds the transfer will injure existing instream water rights. ODFW will work in good faith with PVIA to find a mitigation path for any application for the transfer of a water right with a point of diversion within the reaches set forth in the Instream Applications that will affect resources in Habitat Categories 2 – 6, consistent with the following agreements and process:
  - a. ODFW will agree that irrigation modernization projects such as, but not limited to, fish passage barrier removal, improvements to stream complexity, improvements and protections for riparian areas, or other projects that have been demonstrated to have meaningful and measurable habitat benefits to aquatic resources as an integral component of the project and that are consistent with the factors in (b) below, will be found to provide a net benefit as required in ORS 540.530, without the need for a landowner to diminish an existing water right by reducing the duty, rate, or season of use, consistent with ODFW’s Fish and Wildlife Habitat Mitigation Policy (OAR 635-415).
  - b. When an application for the transfer of a water right is filed that will affect a water right with a point of diversion within the reaches set forth in the Instream Applications, ODFW will consider the following in order to make its requisite net benefit finding:

- i. Whether the application for the transfer of a water right and associated irrigation modernization project is consistent with the purposes of the instream water right as set forth in the associated certificate;
  - ii. The extent to which the application for the transfer of a water right, associated irrigation modernization project, and required mitigation increases the quantity and quality of fish habitat of similar or better structure and function to pre-project conditions;
  - iii. The extent to which the aquatic resource benefits provided by the application for the transfer of a water right, associated irrigation modernization project, and required mitigation will be provided for the duration of the water right transfer or in perpetuity, and
  - iv. The degree to which the application for the water right transfer, associated irrigation modernization project, and required mitigation will address key factors limiting aquatic species recovery.
3. ODFW agrees, to the extent that sufficient information is available, to discuss with PVIA specific projects and accompanying stream reaches that may, in the future, necessitate an application for a water right transfer that could injure the Instream Water Rights, and to provide PVIA with a preliminary determination regarding the likely Habitat Categories; provided, however, that any such preliminary determination made in regards to a Habitat Category is subject to modification based upon new species or habitat information not considered by ODFW at the time of its preliminary determination. Further, this Agreement may not be construed as restricting ODFW's authority or discretion as provided under any new law subsequently enacted after this Agreement.
4. OWRD will regulate strictly by priority date regardless of the water right use. OWRD will not regulate any senior water right to satisfy a junior Instream Water Right.
5. All certificates issued for the Instream Water Rights shall, be consistent with the draft certificates in Exhibit G and include the following language: "For purposes of water distribution, this instream water right shall not have priority over water rights with a senior priority date or over human or livestock consumption."
6. OWRD shall issue Final Orders for each Instream Application consistent with the draft certificates attached hereto as Exhibit G.

7. Upon execution of this Agreement, PVIA's protest is withdrawn. PVIA waives any and all rights to a contested case hearing, request for reconsideration, or petition for judicial review of the Final Order incorporating this Agreement.
8. Subject to Section D.6 below, the Parties agree to support this Settlement, including responding to any third-party challenges to the Final Orders. However, the form, manner, and timing of each Party's support are reserved to the discretion of each Party; provided further that in no case shall the PVIA or any attorney engaged by the PVIA defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor shall they purport to act as the legal representative of the State of Oregon or any of its agencies.

#### **D. General**

1. Each Party to this Agreement represents, warrants, and agrees that the person who executed this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and to bind that Party to the terms of this Agreement. The PVIA representative/signatory warrants it has authority to bind itself and its members.
2. Each Party to this Agreement certifies that it has had a reasonable opportunity to review and request changes to the Agreement, and that it has signed this Agreement of its own free will and accord.
3. The Parties shall have a right to enforce the terms of this Agreement in Oregon Circuit Court and such rights shall include, but not be limited to, specific enforcement of the Agreement.
4. The laws of the State of Oregon (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Agreement, including without limitation, its validity, interpretation, construction, performance, and enforcement. Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement shall bring the legal action or proceeding in the Circuit Court of the State of Oregon for Baker County (unless Oregon law requires that it be brought and conducted in another county). Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.
5. The Parties agree that nothing in this Agreement establishes factual, legal, or policy precedent. Without limiting the generality of the foregoing, this Agreement establishes no principle or precedent with regard to any issue addressed herein; provided further that this Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in any litigation, arbitration, or other adjudicative proceeding, except in a proceeding to establish the existence of or to enforce or implement this Agreement. This section shall survive any termination of this Agreement.
6. The State's obligations under this Agreement are conditioned upon the State receiving funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow the State, in the exercise of its reasonable administrative discretion, to meet its obligations under this Agreement. Nothing in this Agreement is to be construed as permitting

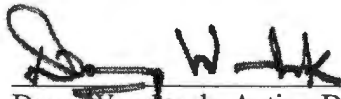
any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon.

7. This Agreement may be signed in counterparts, all of which when taken together shall constitute one agreement.

[signatures on following page]



AGREED TO BY:

  
\_\_\_\_\_  
Doug Woodcock, Acting Director  
Oregon Water Resources Department

\_\_\_\_\_  
March 14, 2023  
Date

\_\_\_\_\_  
Curt Melcher, Director  
Oregon Department of Fish and Wildlife

\_\_\_\_\_  
Date

\_\_\_\_\_  
Barry Del Curto, President  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
George Gover, Vice President  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
Ron Still  
Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
Jay Sly, Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
Blake Dennis, Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

AGREED TO BY:

\_\_\_\_\_  
Doug Woodcock, Acting Director  
Oregon Water Resources Department

\_\_\_\_\_  
Date

*Curt E Melcher*

\_\_\_\_\_  
Curt Melcher, Director  
Oregon Department of Fish and Wildlife

*3/10/23*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Barry Del Curto, President  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
George Gover, Vice President  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
Ron Still  
Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
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Pine Valley Irrigation Association

\_\_\_\_\_  
Date

\_\_\_\_\_  
Blake Dennis, Director  
Pine Valley Irrigation Association

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Date

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\_\_\_\_\_  
Doug Woodcock, Acting Director  
Oregon Water Resources Department

\_\_\_\_\_  
Date

\_\_\_\_\_  
Curt Melcher, Director  
Oregon Department of Fish and Wildlife

\_\_\_\_\_  
Date

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Barry Del Curto  
Barry Del Curto, President  
Pine Valley Irrigation Association

\_\_\_\_\_  
3-5-23  
Date

\_\_\_\_\_  
George L. Gover  
George Gover, Vice President  
Pine Valley Irrigation Association

\_\_\_\_\_  
2/25/2023  
Date

\_\_\_\_\_  
Ron Still  
Ron Still, Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
3-5-23  
Date

\_\_\_\_\_  
Jay Sly  
Jay Sly, Director  
Pine Valley Irrigation Association

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3/5/23  
Date

\_\_\_\_\_  
Blake Dennis, Director  
Blake Dennis, Director  
Pine Valley Irrigation Association

\_\_\_\_\_  
3/5/23  
Date

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 70863

**Proposed Final Order**

**Summary of Recommendation:** The Department recommends that the attached draft certificate be issued with conditions.

**Application History**

On 11/ 8/1990, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: PINE CR tributary to SNAKE R

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW TROUT.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st%	40.0	40.0	65.0	65.0	65.0	65.0	40.0	40.0	40.0	40.0	40.0	40.0
2nd%	40.0	50.0	65.0	65.0	65.0	50.0	40.0	40.0	40.0	40.0	40.0	40.0

To be maintained in:

PINE CREEK FROM FULLER CREEK AT RIVER MILE 27.0 (SESE, SECTION 15, TOWNSHIP 7S, RANGE 45E WM); TO LONG BRANCH AT RIVER MILE 13.5 (NESW, SECTION 7, TOWNSHIP 8S, RANGE 47E WM)

The Department mailed the applicant notice of its Technical Review on November 25, 1994, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from DARYL ROBERTSON, DAVID & LYNDIA BIRD, DONALD MARTIN, FOOTHILL DITCH CO, GEORGE TAVER, HENRY HARRIS, INEZ CARTWRIGHT, J V & ARLENE THOMAS, LLOYD & BERDEAN WHITELEY, LUCILLE WOLFE, RICHARD CARTWRIGHT, STAN GULICK, WATER FOR LIFE, WATERWATCH OF OREGON, WAYNE TYLER).

The following supporting data was submitted by the applicant:

- (a) The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements; August 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.

- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The Powder Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
90.5	163	271	361	512	472	101	58.2	52.8	52.9	62.3	96.3

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period July, August and September.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
89.7	161.8	269.0	322.0	459.0	407.0	18.1	-2.2	10.8	52.2	61.6	95.5

## Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Powder Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during July, August and September because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

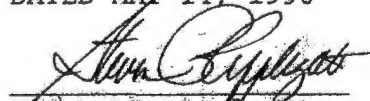
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	40.0	40.0	65.0	65.0	65.0	65.0	40.0	40.0	40.0	40.0	40.0	40.0
2nd½	40.0	50.0	65.0	65.0	65.0	50.0	40.0	40.0	40.0	40.0	40.0	40.0

#### Recommendation

The Department recommends that the attached draft certificate be issued with conditions.

DATED MAY 14, 1996



Steven P. Applegate  
 Administrator  
 Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest must be in writing, and must 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 this 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; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.

Your protest must be received in the Water Resources Department no later than June 28, 1996.

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 if

- 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.



Oregon Water Resources Department  
Water Rights/Adjudication Section

Water Right Application Number: IS 70864

Proposed Final Order

Summary of Recommendation: The Department recommends that the attached draft certificate be issued with conditions.

Application History

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County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW, AND BULL TROUT.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	20.0	20.0	30.0	30.0	30.0	30.0	20.0	20.0	20.0	20.0	20.0	20.0
2nd½	20.0	25.0	30.0	30.0	30.0	25.0	20.0	20.0	20.0	20.0	20.0	20.0

To be maintained in:

PINE CREEK FROM WEST FORK PINE CREEK AT RIVER MILE 34.0 (SWSE, SECTION 16, TOWNSHIP 6S, RANGE 45E WM); TO FULLER CREEK AT RIVER MILE 27.0 (SESE, SECTION 15, TOWNSHIP 7S, RANGE 45E WM)

The Department mailed the applicant notice of its Technical Review on November 25, 1994, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from DONALD MARTIN, EASTERN OREGON MINING ASSOCIATION, INEZ CARTWRIGHT, RICHARD CARTWRIGHT, ROBERT CRESS, WATER FOR LIFE, WATERWATCH OF OREGON, WAYNE TYLER).

The following supporting data was submitted by the applicant:

- (a) The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements; August 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth

Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.

- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The Powder Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
28.9	52.1	86.7	115	164	151	32.4	18.6	16.9	16.9	19.9	30.7

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period August, September, October and November.

The flows available for further appropriation are shown below:

up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that


- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st $\frac{1}{2}$	20.0	20.0	30.0	30.0	30.0	30.0	20.0	18.6	16.9	16.9	19.9	20.0
2nd $\frac{1}{2}$	20.0	25.0	30.0	30.0	30.0	25.0	20.0	18.6	16.9	16.9	19.9	20.0

#### Recommendation

The Department recommends that the attached draft certificate be issued with conditions.

DATED MAY 14, 1996

  
Steven P. Applegate  
Administrator  
Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest *must* be in writing, and must 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 this 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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
28.7	51.8	86.2	113.1	161.0	148.2	29.2	16.3	15.2	16.7	19.7	30.5

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Powder Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during August, September, October and November because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2) (3) and (4), the proposed use is in the public interest

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 70870

**Proposed Final Order**

**Summary of Recommendation:** The Department recommends that the attached draft certificate be issued with conditions.

**Application History**

On 11/ 8/1990, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: E PINE CR tributary to PINE CR

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW TROUT.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	6.0	6.0	16.0	16.0	16.0	16.0	6.0	6.0	6.0	6.0	6.0	6.0
2nd½	6.0	10.0	16.0	16.0	16.0	10.0	6.0	6.0	6.0	6.0	6.0	6.0

To be maintained in:

EAST PINE CREEK FROM BEECHER CREEK AT RIVER MILE 10.3 (SE1/4, SECTION 16, TOWNSHIP 7S, RANGE 46E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWNW, SECTION 18, TOWNSHIP 8S, RANGE 47E WM)

The Department mailed the applicant notice of its Technical Review on November 25, 1994, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from DON HAIGHT, DONALD MARTIN, EASTERN OREGON MINING ASSOCIATION, INEZ CARTWRIGHT, RICHARD CARTWRIGHT, WATER FOR LIFE, WATERWATCH OF OREGON).

The following supporting data was submitted by the applicant:

- (a) The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements; August 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.

- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The Powder Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
18.9	34	56.6	75.3	107	98.3	21.1	12.1	11	11	13	20.1

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period July, August and September.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
18.7	33.7	56.1	64.1	91.7	79.3	-3.1	-5.5	-1.3	10.9	12.9	19.9

## Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Powder Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during July, August and September because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are

insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

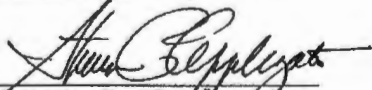
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st%	6.0	6.0	16.0	16.0	16.0	16.0	6.0	6.0	6.0	6.0	6.0	6.0
2nd%	6.0	10.0	16.0	16.0	16.0	10.0	6.0	6.0	6.0	6.0	6.0	6.0

#### Recommendation

The Department recommends that the attached draft certificate be issued with conditions.

DATED MAY 14, 1996



Steven P. Applegate  
Administrator  
Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest *must* be in writing, and must 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 this 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; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.



Your protest must be received in the Water Resources Department no later than June 28, 1996.

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 if

- 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.

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 72170

**Proposed Final Order**

**Summary of Recommendation:** The Department recommends that the attached draft certificate be issued with conditions.

**Application History**

On 1/29/1992, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: CLEAR CR tributary to PINE CR

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW AND BROOK TROUT.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	15.0	15.0	30.0	30.0	30.0	30.0	15.0	15.0	15.0	15.0	15.0	15.0
2nd½	15.0	23.0	30.0	30.0	30.0	23.0	15.0	15.0	15.0	15.0	15.0	15.0

To be maintained in:

CLEAR CREEK FROM EAST AND WEST FORKS AT RIVER MILE 17.0 (NWNW, SECTION 18, TOWNSHIP 6S, RANGE 46E WM); TO RIVER MILE 10.6 (NW1/4, SECTION 8, TOWNSHIP 7S, RANGE 46E WM)

The Department mailed the applicant notice of its Technical Review on November 25, 1994, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from BRUCE LINDLEY, DAN WHITELEY, DARYL ROBERTSON, DAVID & LYNDA BIRD, DON & MABLE WHITELEY, DON HAIGHT, DONALD MARTIN, DOUGLAS PAYTON, EASTERN OREGON MINING ASSOCIATION, INEZ CARTWRIGHT, LLOYD & BERDEAN WHITELEY, OREGON DEPT OF FISH AND WILDLIFE, RICHARD CARTWRIGHT, ROBERT MASTASON, STAN GULICK, WATER FOR LIFE, WATERWATCH OF OREGON).

The following supporting data was submitted by the applicant:

- (a) The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements; August 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.

- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The Powder Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15.4	27.8	46.3	61.6	87.4	80.5	17.3	9.93	9	9.02	10.6	16.4

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period August, September, October and November.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15.2	27.5	45.7	60.6	86.0	79.5	16.9	9.6	8.7	8.8	10.4	16.2

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Powder Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during August, September, October and November because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2) (3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

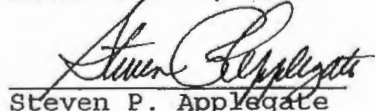
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	15.0	15.0	30.0	30.0	30.0	30.0	15.0	9.93	9.0	9.02	10.6	15.0
2nd½	15.0	23.0	30.0	30.0	30.0	23.0	15.0	9.93	9.0	9.02	10.6	15.0

#### Recommendation

The Department recommends that the attached draft certificate be issued with conditions.

DATED MAY 14, 1996



Steven P. Applegate  
 Administrator  
 Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest must be in writing, and must 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 this proposed final order would impair or be detrimental to your interest;

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 72179

**Proposed Final Order**

**Summary of Recommendation:** The Department recommends that the attached draft certificate be issued with conditions.

**Application History**

On 1/29/92, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: LAKE FK CR TRIB N PINE CR

County: Baker

Purpose: Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2	2/5	8	8	8	8/5	2	2	2	2	2	2

To be maintained in:

LAKE FORK CREEK FROM SUGARLOAF RESERVOIR (NESW, SECTION 5, TOWNSHIP 6S, RANGE 46E WM); TO ELK CREEK AT RIVER MILE +2.0 (TOWNSHIP 6S, RANGE 47E WM)

The Department mailed the applicant notice of its Initial Review on May 20, 1996. Public notice of the application was provide in the Department's weekly public notice on June 3, 1996. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) (a) Fish and Wildlife Resources of the Powder Basin, Oregon, and Their Water Requirements; August, 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The basin Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
14.2	16.6	23.8	49.2	103	106	16.4	9.65	9.12	8.97	10.3	14.1

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the basin Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

Water is not available for the proposed use at the amount requested year round because the unappropriated water available is less than the amounts requested during some months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow:

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, will include the following conditions: for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.



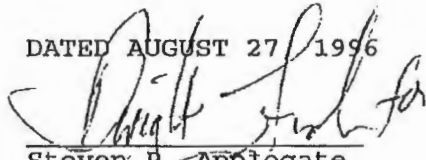
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2	2/5	8	8	8	8/5	2	2	2	2	2	2

#### Recommendation

The Department recommends that the attached draft certificate be issued with conditions.

DATED AUGUST 27 1996



Steven P. Applegate  
 Administrator  
 Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest must be in writing, and must 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 this 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; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.
- Proof of service of the protest upon the applicant.

Your protest must be received in the Water Resources Department no later than October 11, 1996.

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 if

- 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.

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 72180

**Proposed Final Order**

**Summary of Recommendation:** The Department recommends that the attached draft certificate be issued with conditions.

**Application History**

On 1/29/92, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: LAKE FK CR TRIB N PINE CR

County: Baker

Purpose: Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7	7/15	25	25	25	25/15	7	7	7	7	7	7

To be maintained in:

LAKE FORK CREEK FROM ELK CREEK AT RIVER MILE +2.0 (TOWNSHIP 6S, RANGE 47E WM); TO THE MOUTH AT RIVER MILE 0.0 (TOWNSHIP 6S, RANGE 47E WM)

The Department mailed the applicant notice of its Initial Review on May 20, 1996. Public notice of the application was provide in the Department's weekly public notice on June 3, 1996. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) (a) Fish and Wildlife Resources of the Powder Basin, Oregon, and Their Water Requirements; August, 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The basin Basin Program allows the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
28.8	35.7	54.8	114	217	201	29.3	17.3	16.5	16.5	19.8	28

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the basin Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

Water is not available for the proposed use at the amount requested year round because the unappropriated water available is less than the amounts requested during some months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, will include the following conditions: for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

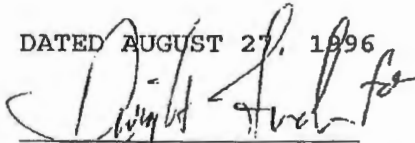
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JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7	7/15	25	25	25	25/15	7	7	7	7	7	7

**Recommendation**

The Department recommends that the attached draft certificate be issued with conditions.

DATED AUGUST 27, 1996



Steven P. Applegate  
 Administrator  
 Water Rights and Adjudications Division

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