

Super Seeded

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

Water Right Application Number: IS 73368

Proposed Final Order

*Pulled at request
of R. Kruger
11/8/96 WRM*

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

*fish flows in May
& August*

Application History

On 5/5/1993, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: S FK ROGUE R tributary to ROGUE R

County: JACKSON

Proposed use: Providing required stream flows for cutthroat, rainbow, brook and brown 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 1/2	100.0	100.0	100.0	100.0	100.0	60.0	40.0	40.0	100.0	100.0	100.0	100.0
2nd 1/2	100.0	100.0	100.0	100.0	60.0	60.0	40.0	100.0	100.0	100.0	100.0	100.0

To be maintained in:

SOUTH FORK ROGUE RIVER FROM WICKIUP CREEK AT RIVER MILE 18.5 (NE1/4, SECTION 14, TOWNSHIP 34S, RANGE 4E WM); TO MIDDLE FORK ROGUE RIVER AT RIVER MILE 4.3 (NW1/4, SECTION 9, TOWNSHIP 33S, RANGE 3E WM)

The Department mailed the applicant notice of its Technical Review on November 23, 1994, determining that the requested flows exceeded the estimated average natural flow during some months and that exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from OREGON DEPT OF FISH AND WILDLIFE, WATER FOR LIFE, WS).

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements; November 1970 and April 1972.
- (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 Rogue Basin Program allows the proposed use.

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

The source of water is within or 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
149	176	188	249	330	200	102	77.6	63.4	58.7	86	122

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period August 16 - 30, 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
149.0	176.0	188.0	249.0	330.0	199.0	101.2	77.0	63.0	58.7	86.0	122.0

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 Rogue 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 16 - 30, 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

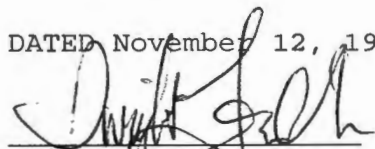
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, 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
100.0	100.0	100.0	100.0	100.0	60.0	40.0	77.6	63.4	58.7	86	100.0

⁶⁰
Recommendation

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

DATED November 12, 1996


Dwight French
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 December 27, 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.