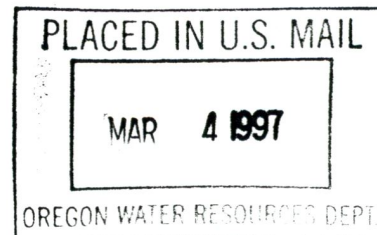


Oregon Water Resources Department  
Water Rights/Adjudication Section

Water Right Application Number: IS 73370



Superseding Proposed Final Order

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

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: M FK ROGUE R tributary to S FK 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	135.0	135.0	135.0	135.0	135.0	80.0	54.0	54.0	135.0	135.0	135.0	135.0
2nd 1/2	135.0	135.0	135.0	135.0	80.0	80.0	54.0	135.0	135.0	135.0	135.0	135.0

To be maintained in:

MIDDLE FORK ROGUE RIVER FROM BESSIE CREEK (SW1/4, SECTION 32, TOWNSHIP 32S, RANGE 4E WM); TO THE MOUTH (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 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, WATERWATCH OF OREGON).

The Department issued a Proposed Final Order (PFO) on April 30, 1996. No protests were filed and a Final Order and Certificate were issued on August 30, 1996. On October 28, 1996, the Department cancelled the certificate because adequate public notice had not been provided when the PFO had been issued.

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
322	341	345	394	458	411	270	229	216	222	251	304

Water is available for further appropriation (at a 50 percent exceedance probability) for the period year round.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
322.0	341.0	345.0	394.0	458.0	410.0	269.0	228.0	216.0	222.0	251.0	304.0

This stream segment is affected by Hydroelectric Power Claim 721, Certificate 9688.

### 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.

The full amount of water requested is available year round.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
  - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
  - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome

by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that water is available in the amount necessary for the proposed use; the proposed use will not result in injury to existing water rights; and the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

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

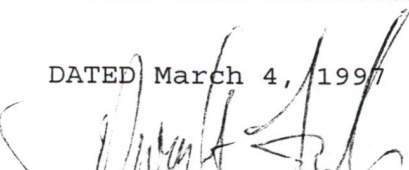
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption.
- the instream water right will have no effect on hydroelectric uses authorized by the State of Oregon
- the instream water right will not be enforceable against non-consumptive hydroelectric uses.
- the instream water right will have no call on water legally stored under a senior water right.
- 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	135.0	135.0	135.0	135.0	135.0	80.0	54.0	54.0	135.0	135.0	135.0	135.0
2nd	135.0	135.0	135.0	135.0	80.0	80.0	54.0	135.0	135.0	135.0	135.0	135.0

#### Recommendation

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

DATED March 4, 1997

  
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;

DRAFT  
STATE OF OREGON

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

Oregon Water Resources Department  
158 12th Street NE  
Salem, Oregon 97310

The specific limits for the use are listed below along with conditions of use.

Source: M FK ROGUE R tributary to S FK ROGUE R

County: JACKSON

Proposed use: Providing required stream flows for cutthroat, rainbow, brook and brown trout.

To be maintained in:

MIDDLE FORK ROGUE RIVER FROM BESSIE CREEK (SW1/4, SECTION 32, TOWNSHIP 32S, RANGE 4E WM); TO THE MOUTH (NW1/4, SECTION 9, TOWNSHIP 33S, RANGE 3E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 5/5/1993.

The following conditions apply to the use of water under this certificate:

1. The right is limited to not more than the amounts, in cubic feet per second, during the time periods listed below:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st	135.0	135.0	135.0	135.0	135.0	80.0	54.0	54.0	135.0	135.0	135.0	135.0
2nd	135.0	135.0	135.0	135.0	80.0	80.0	54.0	135.0	135.0	135.0	135.0	135.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
6. The instream water right will have no effect on hydroelectric uses authorized by the State of Oregon.

- 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 **April 18, 1997**.

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.

7. The instream water right will not be enforceable against non-consumptive hydroelectric uses.
8. The instream water right will have no call on water legally stored under a senior water right.

Witness the signature of the Water Resources Director affixed this 1st day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Water Resources Director

Recorded in State Record of Water Right Certificate number \_\_\_\_\_.

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