FILE#: P 82247

WAYNE FOSTER
PO BOX 114
LANGLOIS, OR 97450

Application No. P-82247

Permit No. _____

Certificate No. _____

Stream Index, Page No. _____

See P-81857, R-81899, R-81900, G-13731432, R-73460, S-73459

FEES PAID

Date	Amount	Receipt No.
	Cert. Fee	

FEES REFUNDED

Date	Amount	Check No.

Name _____

By _____

Date filed _____

Priority _____

Action suspended until _____

Return to applicant _____

Date of approval _____

CONSTRUCTION

Date for beginning _____

Date for completion _____

Extended to _____

Date for application of water _____

Extended to _____

PROSECUTION OF WORK

Form "A" filed _____

Form "B" filed _____

Form "C" filed _____

FINAL PROOF

Blank mailed _____

Proof received _____

Date Certificate issued _____

ASSIGNMENTS

Date	To Whom	Address	Volume	Page

REMARKS

Wayne Foster

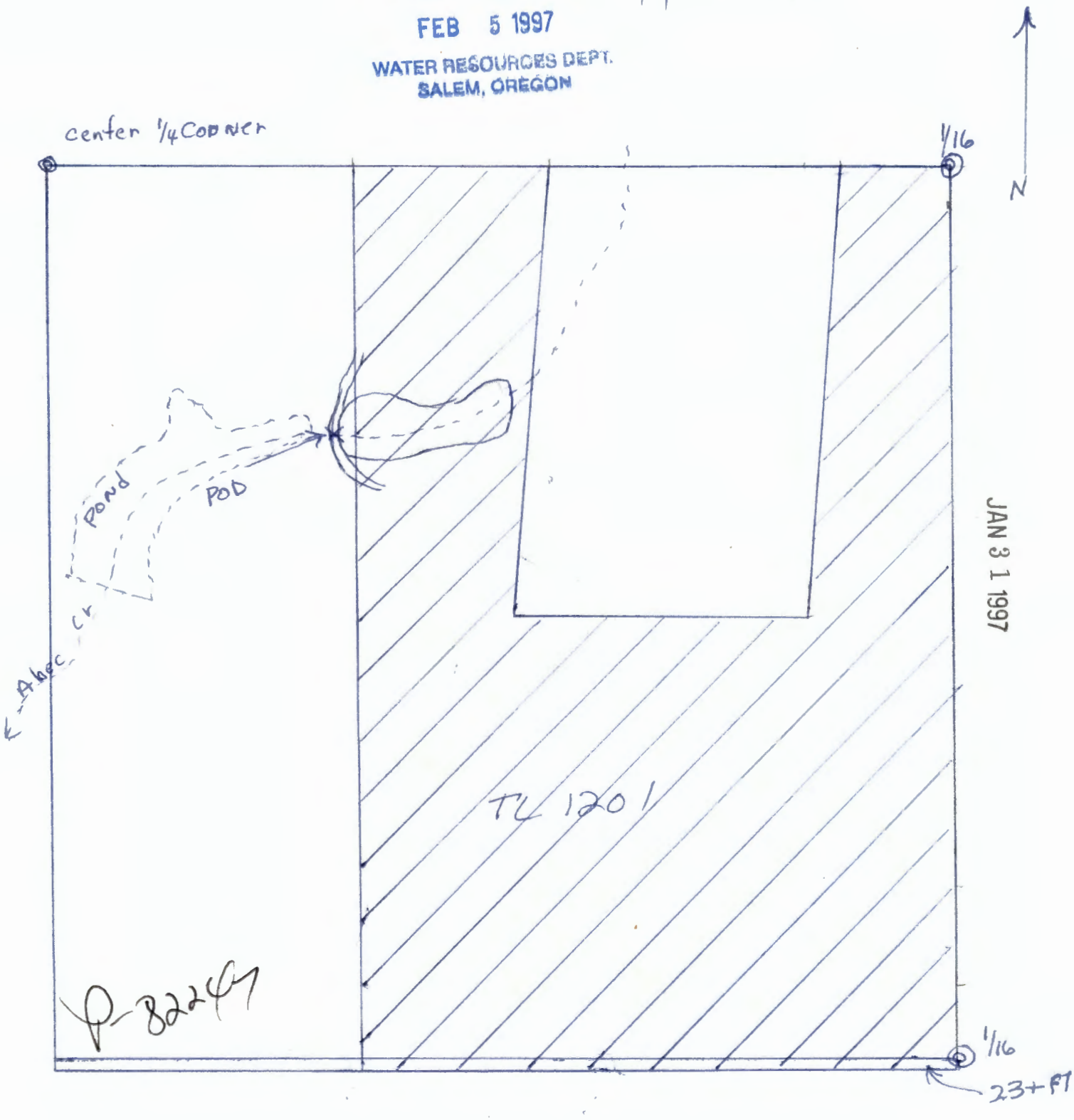
NW¼ of SE¼ Sec 11 T30S R15W

Scale 1" 200 ft

JAN 31 1997

PoD 400S-400E center ¼ Corner

RECEIVED
FEB 5 1997
WATER RESOURCES DEPT.
SALEM, OREGON



S-82247

Mailing List for Commenter Letter

File #: P 82247

Copies Mailed
By: _____
(SUPPORT STAFF)
on: 12-19-97
(DATE)

Letter & copies of rebuttal, comments, certificate or notice, and map sent to:

____ 1. Watermaster: _____

____ 2. ODFW District Bio: _____

✓ 3. Waterwatch

____ 4. Other: _____

(Note: Materials mailed only to those individuals/parties that are checked off above.)

Copy of Letter to:

✓ 1. WRD File # P 82247

Dec 9 1997

Water Resources Dept
Salem Or

Ref: P81857
Ref: P82247

Sirs:

It would appear, on the face of it, that the objection from Water Watch was not filed by Aug 1, 1997 so should not be considered in your decision on the above applications.

It would also appear that ODFW also failed for the same reason.

If you chose not to consider the above I will make the following:

1 — On Water availability the wrong formula was used. an 80% availability was used instead of 50%.

2 On these applications it was indicated that the Reservoirs would be filled from runoff from bogs that will be irrigated and Rain, As the runoff from the bogs will be much per acre than is needed for use, no water will be taken from any Creeks.

3 While runoff from the bogs is being used to fill the reservoirs, ~~the~~ there will be more than adequate flow in Davis Cr & Cowan Cr. During a period of 1 day with 1" of runoff I would collect about 1½ acre ft of water, at the same time the balance of the Davis Creek drainage (Croft Lake) would be

(To Page 2)

about 217 ac ft on 109 Cu Ft Sec on 49000 GPH.
This excess runoff occurs about 10-12 days a year max. and a max of about 30 days.

3 As to depleting the ground water.
all they say is rubbish. These Reservoirs will actually increase the ground water in late summer. While the reservoirs are kept full they will allow water to move laterally into the ground. This water will either return to the reservoir or on to the nearest Creek at a slow rate so late summer flow will actually increase.

4 The reasons there are an "abundance" of wildlife here is plainly because of what the landowners have done here with them over the 150 years. Most of this land was heavy timber 150 years ago and was producing virtually no food for any wildlife.

So with this in mind I believe both applications should approved.

Avail Meadows Farms Inc
Wayne Forte President

HB2376 EXEMPT NOTICE COMPLETENESS CHECKLIST

Statutory requirements ORS 537.405

- ✓ Landowner name and address
- ✓ Legal description of reservoir location
  - ✓ 1. Township
  - ✓ 2. Range
  - ✓ 3. Section
  - ✓ 4. Quarter/Quarter
  - ✓ 5. Tax Lot Number
- ✓ Source of water
- ✓ Quantity of water stored
- ✓ Map as required by ORS 537.405 (2)(a)
  - ✓ 1. Sufficient quality to establish general location of the reservoir
  - ✓ 2. Scale to which the map was drawn
  - ✓ 3. Township, Range and Section
  - ✓ 4. Quarter-Quarter Section
  - ✓ 5. Tax Lot Number

Date Received 01/31/97

Received By Jerri L Woods

Oregon
John A. Kitzhaber, M.D., Governor

Water Resources Department
Commerce Building
158 12th Street NE
Salem, OR 97310-0210
(503) 378-3739
FAX (503) 378-8130

December 19, 1997

Waterwatch
213 SW Ash #208
Portland, Oregon 97204

Dear Waterwatch:

You submitted comments on ponds filed under ORS 537.407 (HB 2153) or under ORS 537.405 (HB 2376). These laws provided an opportunity for the Oregon Department of Fish and Wildlife to comment on how a specific reservoir(s) will cause significant detrimental impacts to an existing fishery resource and allowed members of the public to comment on how the reservoir(s) will cause an injury to an existing water right(s). Based upon review of your comments, the Department prepared notices of proposed mitigation conditions. A notice was mailed to each of the registrants along with a copy of your comments. The registrants were provided an opportunity to submit additional information to the Department explaining how your comments were in error.

The Department received the attached rebuttals to your comments. If you do not agree with a rebuttal and believe that your comments are still valid, please send a written response to the Department identifying why you disagree with the rebuttal and affirming your position. However, if you agree with the rebuttal you need not respond, unless you determine that it is necessary. In order for us to issue a mitigation order within 180 days of receiving your comments, we need to have your response(s) received by the Department no later than January 7, 1998. If you need an additional day or two to look further at a couple of ponds, please send a request, attention to the appropriate file number.

If you choose to respond, the Department will determine whether a Mitigation Order is required based upon your response and the rebuttal submitted by the registrant. The Mitigation Order, if required, will identify any conditions that must be met in order to protect the fishery resource and/or existing water rights and for the reservoir to be authorized.

If no response to a rebuttal is received, the Department will conclude that you agree with the rebuttal and that a Mitigation Order is not necessary.

If you have any questions, please me at (503) 378-8455, extension 268, or toll free within Oregon at 1 (800) 624-3199.

Sincerely,

Dwight French
Water Rights Manager

Enclosures: Your Comments
Proposed Mitigation Conditions
Rebuttal from Registrant
Copy of Notice of Exempt Pond or Certificate and Map

If no response to a rebuttal is received, the Department will conclude that you agree with the rebuttal and that a Mitigation Order is not necessary.

If you have any questions, please me at (503) 378-8455, extension 268, or toll free within Oregon at 1 (800) 624-3199.

Sincerely,

Dwight French
Water Rights Manager

Enclosures: Your Comments
Proposed Mitigation Conditions
Rebuttal from Registrant
Copy of Notice of Exempt Pond or Certificate and Map

Oregon
John A. Kitzhaber, M.D., Governor

Water Resources Department
Commerce Building
158 12th Street NE
Salem, OR 97310-0210
(503) 378-3739
FAX (503) 378-8130

November 20, 1997

WAYNE FOSTER
PO BOX 114
LANGLOIS, OR 97450

REFERENCE: FILE#: P 82247

Dear Mr. Foster,

I want to apologize for any confusion which may have resulted from the letter we sent to you about a week ago. I hope this follow-up letter will better explain our "ponds" program, and give you a clearer picture of what is happening with your pond.

In 1995, the legislature adopted a new law intended to help address a legal problem with many existing ponds throughout the state. These ponds had been developed over the years by land owners who were not aware that water rights may have been required. In order to make sure that all the ponds were "legal" the legislature approved HB 2376 in 1995, which set out a process for filing a notice of the pond with our department. Under the law, such notices could be filed until January 31, 1997. Our job was then to determine whether any of the ponds resulted in injury to other existing water rights, or created a detrimental impact on fish.

This simplified review process was intended to make it easier for the owners of existing ponds to receive final water right certificates. The 1995 law also required that we provide a comment period, which ended on August 1, 1997. During this time, we were required to accept comments as to whether a pond may in fact be resulting in injury to other water rights or creating a detrimental impact to fish. After the close of that comment period, our department was given 180 days in which to evaluate the comments, give notice to the pond owners, and identify whether mitigation measures would be required to alleviate the injury to other water rights or impacts to fish.

This is why you received a letter from us last week. For more than 16,000 ponds on which notices were filed under HB 2376, about 960 comments were received. From those comments, we determined that about half would appear to require mitigation measures. A total of 450 letters were sent out last week to pond owners like you.

The purpose of these letters was to advise you that the comments had been received, and to provide you with an opportunity to get back to us with any information you might have to show that the mitigation should not be required — either because you disagree with the comment that we received, or because you have a better idea of how to remedy the situation.

The letter you received included a copy of the comments we received about your pond, along with our proposed mitigation plan. We need to hear from you by December 10, 1997, as to whether you disagree with the underlying comment or with our proposed mitigation. We do encourage you to get back to us by the deadline, and we will make every effort to accommodate your suggestions.

Again, I offer my sincere apology for any confusion or irritation caused by our earlier letter. I hope this letter provides additional background information that will help you respond to the questions about your pond. If you have questions about this process, please let us know. I urge you to call our Water Rights Information staff at 1-800-624-3199 extension 499. In some circumstances they may also involve your local Watermaster for additional help. We will try our best to work through this with you.

Sincerely,

Martha O. Pagel
Director

m:955

The purpose of these letters was to advise you that the comments had been received, and to provide you with an opportunity to get back to us with any information you might have to show that the mitigation should not be required — either because you disagree with the comment that we received, or because you have a better idea of how to remedy the situation.

The letter you received included a copy of the comments we received about your pond, along with our proposed mitigation plan. We need to hear from you by December 10, 1997, as to whether you disagree with the underlying comment or with our proposed mitigation. We do encourage you to get back to us by the deadline, and we will make every effort to accommodate your suggestions.

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Sincerely,

Martha O. Pagel
Director

m:955

Oregon Water Resources Department
Notice of Exempt Reservoir

RECEIVED
FEB 5 1997
WATER RESOURCES DEPT.
SALEM, OREGON
JAN 31 1997

For reservoirs built before January 1, 1995, that:

- Store less than 9.2 acre-feet of water, or
- Have a dam less than 10 feet high.

The deadline for submitting a Notice of Exempt Reservoir is January 31, 1997.

Landowner: Foster (Last name), WAYNE (First name), ____ (MI)

Authorized Agent: Foster (Last name), Wayne (First name), ____ (MI)

Address: POB 114

LANGLOIS (City) Or (State) 97450 (Zip)

Phone: 541 348 2351 (Home) ____ (Work)

FAX: ____ E-Mail Address: ____

A. County of use: Coos. B. River basin (*see reverse*): S Coast.

C. Legal description of reservoir location:

Township	Range	Section	Quarter/Quarter	Tax Lot #
30S	15W	11	NW1/4 SE1/4	1201

D. Name, if any, of reservoir: ____. E. Reservoir in existence since: 10 25 73 (MM DD YY)

F. Source of water: Abes Cr (Name of river or creek) which flows into Croft Lake New River (Name of river or creek).

G. Maximum height of dam: 9 feet.

H. Quantity of water stored in reservoir at maximum capacity (*see reverse*): 5 acre-feet.

I. Water stored in reservoir is used for (*see reverse*): Cranberry & Related Uses.

J. Rate and area of use–Refer to chart on the back of this form. For each type of water use listed in Item I., show the quantity of water used and, if applicable, the number of acres on which water is used.

BEFORE YOU SIGN AND SUBMIT THIS APPLICATION . . . HAVE YOU:

- ☐ Answered each question on this form as completely as possible?
- ☐ Attached a legible map showing township, section, range, quarter-quarter & tax lot number?

By my signature below, I swear that all statements made and information provided in this application are true to the best of my knowledge.

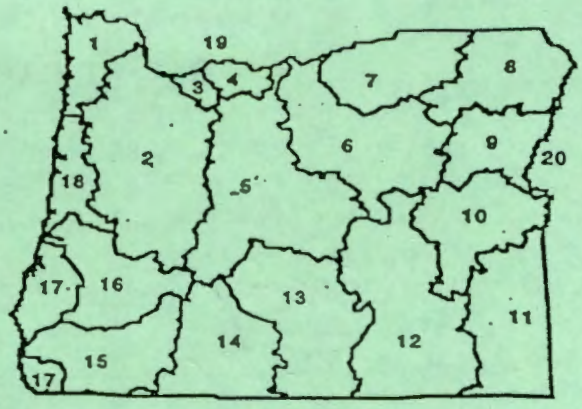
Wayne Foster (Signature of Landowner/Agent)

WAYNE Foster owner (Printed name and title) 1/31/97 (Date)

For Department Use: ____ (File #) ____ (Date received) 10-95

Oregon's major river basins:

1–North Coast	8–Grande Ronde	15–Rogue
2–Willamette	9–Powder	16. Umpqua
3–Sandy	10–Malheur	17–S. Coast
4–Hood	11–Owyhee	18–Mid Coast
5–Deschutes	12–Malheur L.	19–Columbia
6–John Day	13–Goose/Summer	20–Snake
7–Umatilla	14–Klamath	



One acre-foot is the volume of water that would cover one acre with one foot of water. To find out how much water your ponds store, multiply the surface area by the average depth; this will give you a rough estimate of cubic feet. One acre-foot equals 43,560 cubic feet. You can submit a Notice of Exempt Reservoir if your pond stores less than 4,000 acre-feet (43,560 X 92).

Rate and Area of Use

cfs–cubic feet per second gpm–gallons per minute

Agriculture, Land Management

Gen. Agriculture	cfs/gpm___	# acres___	Cranberry	cfs/gpm 5	# acres 215
Irrigation	cfs/gpm___	# acres___	Nursery Operatn.	cfs/gpm___	# acres___
Stockwater	cfs/gpm___	# acres___	Temp. Control	cfs/gpm___	# acres___
Aquatic Life	cfs/gpm___	# acres___	Forest/Range Mgt	cfs/gpm___	# acres___
Other:	cfs/gpm 10	# acres 84	Other:	cfs/gpm___	# acres___

Industrial/Commercial Uses

Industrial	cfs/gpm	10	Commercial	cfs/gpm	
Fire Protection	cfs/gpm		Mining	cfs/gpm	
Power Dev.	cfs/gpm		Other:	cfs/gpm	

Drinking Water Supply

Human Consumption	cfs/gpm		Domestic	cfs/gpm	
Domestic Expanded	cfs/gpm		Other:	cfs/gpm	

Community Water Supply

Municipal	cfs/gpm		Quasi-Municipal	cfs/gpm	
Group Domestic	cfs/gpm		Storm Water Mgt	cfs/gpm	
Other:	cfs/gpm		Other:	cfs/gpm	

Environmental Benefits

Pollution Abatement	cfs/gpm		Recreation	cfs/gpm	
Wetland Enhancement	cfs/gpm		Wildlife	cfs/gpm	
Other:	cfs/gpm		Other:	cfs/gpm	

Oregon's major river basins:

1–North Coast
2–Willamette
3–Sandy
4–Hood
5–Deschutes
6–John Day
7–Umatilla
8–Grande Ronde
9–Powder
10–Malheur
11–Owyhee
12–Malheur L.
13–Goose/Summer
14–Klamath
15–Rogue
16. Umpqua
17–S. Coast
18–Mid Coast
19–Columbia
20–Snake

One acre-foot is the volume of water that would cover one acre with one foot of water. To find out how much water your pond stores, multiply the surface area by the average depth. This will give you a rough estimate of cubic feet. One acre-foot equals 43,560 cubic feet. You can submit a Notice of Exempt Reservoir if your pond stores less than 100,752 cubic feet (43,560 X 92).

Rate and Area of Use

cfs–cubic feet per second gpm–gallons per minute

Agriculture, Land Management

Gen. Agriculture	cfs/gpm___	# acres___	Cranberry	cfs/gpm 5	# acres 215
Irrigation	cfs/gpm___	# acres___	Nursery Operatn.	cfs/gpm___	# acres___
Stockwater	cfs/gpm___	# acres___	Temp. Control	cfs/gpm___	# acres___
Aquatic Life	cfs/gpm___	# acres___	Forest/Range Mgt	cfs/gpm___	# acres___
Other:	cfs/gpm 10	# acres 2	Other:	cfs/gpm___	# acres___

Industrial/Commercial Uses

Industrial	cfs/gpm	10	Commercial	cfs/gpm	_____
Fire Protection	cfs/gpm	_____	Mining	cfs/gpm	_____
Power Dev.	cfs/gpm	_____	Other:	cfs/gpm	_____

Drinking Water Supply

Human Consumption	cfs/gpm	_____	Domestic	cfs/gpm	_____
Domestic Expanded	cfs/gpm	_____	Other:	cfs/gpm	_____

Community Water Supply

Municipal	cfs/gpm	_____	Quasi-Municipal	cfs/gpm	_____
Group Domestic	cfs/gpm	_____	Storm Water Mgt	cfs/gpm	_____
Other:	cfs/gpm	_____	Other:	cfs/gpm	_____

Environmental Benefits

Pollution Abatement	cfs/gpm	_____	Recreation	cfs/gpm	_____
Wetland Enhancement	cfs/gpm	_____	Wildlife	cfs/gpm	_____
Other:	cfs/gpm	_____	Other:	cfs/gpm	_____

Oregon
John A. Kitzhaber, M.D., Governor

Water Resources Department
Commerce Building
158 12th Street NE
Salem, OR 97310-0210
(503) 378-3739
FAX (503) 378-8130

November 12, 1997

FILE#: P 82247

WAYNE FOSTER
PO BOX 114
LANGLOIS, OR 97450

Dear Reservoir Owner,

You submitted a Notice of Exempt Reservoir under *ORS 537.405 (HB 2376)*. HB 2376 provided an opportunity for the Oregon Department of Fish and Wildlife to comment on how a specific reservoir(s) caused injury to an existing fishery resource. In addition the same law allowed members of the public to comment on how the storage or use of the water caused an injury to an existing water right. This comment period ended on August 1, 1997.

The Department received the attached injury allegation(s) related to your reservoir(s), as provided for in ORS 537.405. If you do not agree with the allegation of injury, please submit detailed information to the Department explaining why or how the allegation is in error. Your response must be postmarked no later than *December 10, 1997.*

The Department will review any submission you may make and determine if a Mitigation Order is required. If the Department finds that the allegation is factual and verifiable, the Department will issue a Mitigation Order requiring that the attached conditions, or other conditions that prove to be necessary after reviewing any information that is submitted, be met in order for the reservoir to maintain an exempt status.

If you receive a Mitigation Order, you may request a Contested Case Hearing to contest the findings of the Department and the allegation of injury. Information on how to request a Contested Case Hearing will be provided with the mitigation order, if issued.

If you have any questions, please call the Water Rights Information Group at (503) 378-3739 extension. 499.

Water Right Section

MITIGATION CONDITIONS

File # P- 82247
Date 11.7.97
DWP

Oregon Department of Fish and Wildlife Conditions

_____ In accordance with ORS 498.268 and ORS 509.605, install, maintain, and operate bypass devices as required by the Oregon Department of Fish and Wildlife that will provide adequate upstream passage for fish. (SMBS)

_____ Install, maintain, and operate fish screening devices as required by the Oregon Department of Fish and Wildlife to prevent fish from entering the diversion. (SMSS)

_____ The reservoir owner is required to by-pass flows from _____ through _____. (BPC)

Water Right Related Conditions

_____ The pond may be filled one time only per year. No diversion of water to storage can occur during times all water rights are not met on the John Day river System. (KR1)

_____ If required by the Watermaster, the water user shall install and maitain a headgate , an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Watermaster (Department). (KR2)

✓ Live stream flow must be passed when required to satisfy existing water rights. In order to substantiate live flow is being passed, measuring devices may be required. (J)

_____ Live flow must be by-passed all year. (BSD)

_____ Any secondary use of stored water is limited each year to the capacity of the reservoir. (BSD2)

_____ The water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.

14

WaterWatch

RIVERS NEED WATER

Via FAX and Regular Mail

July 9, 1997

Water Rights Section
Water Resources Department
158 12th Street NE
Salem, OR 97310

RE: Comments, Exempt Reservoir Applications in New River Basin: 81691, 81801, 81857, 81920, 82042, 82135, 82148, 82242, 82243, 82247, 82468, 82556, 82558, 82831, 83010, 83328 (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek)

Dear Water Rights Section:

WaterWatch requests that the Department deny the above listed reservoir requests on the basis that they are causing injury to both instream and out-of-stream water rights, pose a significant detrimental impact to existing fishery resources and because water is not available.[1]

I. Summary of Facts:

a. The Proposed Uses: These applicants have applied for reservoirs to capture over 67 acre feet of water in the New River basin. Most these applicants are requesting the water for year round cranberry operations (irrigation, harvesting, temperature control, etc.).

b. Water Availability: There is no water left in this basin for further appropriation. Attached water availability tables show that almost all of the affected streams are overappropriated every single month of the year. *See Water Availability Tables for Fourmile, Morton, Floras, Bethal, Davis and Twomile Creeks generated from WRD's WRIS.*[2] It is important to note that the water availability tables for these creeks do not account for the water appropriated by these "existing" reservoirs.

c. Fishery Resources: The aforementioned creeks support a wide variety of fish life, including coho and winter steelhead. Both species are in serious decline. Coho are a state sensitive species. Coho have been petitioned for listing under the Federal Endangered Species Act. In April of 1997, the National Marine Fisheries Service decided not to list coho as threatened (for

[1] Per SB 133 (which has been signed by the Governor), any person may submit comments requesting the Department to deny a reservoir application for a permit on the basis that the reservoir would result in injury to an existing water right or would pose a significant detrimental impact to existing fishery resources.

[2] It was not possible to get water availability tables for Croft Lake and Conner Creek as the data apparently is not on the Department's WRIS system.

now) based largely upon representations and commitments made in the Oregon Coastal Salmon Restoration Initiative (OCSRI) that the state, including the WRD, would work towards the recovery and restoration of coastal salmon. Though coho were not listed in April, NMFS can still list coho as threatened or endangered at any time. Winter steelhead have also been petitioned for listing under the federal ESA.

d. The New River Basin Resource: All these creeks are found in the New River Basin on the South Coast.[3] The New River is a unique estuarine and freshwater ecosystem that supports a wide mix of wildlife, fisheries, botanical, and cultural resources found in association with few other coastal rivers in the Pacific Northwest. Approximately 200 species of wildlife use the New River area for some parts of their life cycle. *See Final New River ACEC Management Plan*, Bureau of Land Management, May 1995 (hereinafter *BLM 1995*).[4]

The importance of the New River watershed has been recognized by the Bureau of Land Management (BLM) through designation of a portion of the watershed as an Area of Critical Environmental Concern (ACEC). The ACEC includes 994 acres of land bordering the New River, a little over a mile upstream from the mouth of the New River. *BLM* at 2 5. There are also several acres of land at the confluence of Fourmile Creek and the New River that are currently administered by the BLM and are proposed for inclusion in the ACEC. *See* BLM 1995 at 2-6. Essentially the ACEC is at the "bottom" of the New River watershed and thus is greatly affected by activities and water diversion that occur upstream.

Nine species of wildlife that use the area are designated as either threatened or endangered on federal lists.[5] *Id.* at 2 29. One plant species has been listed as endangered on the federal list and a number of others are listed on the state list. *Id.* at 2-26. A number of prehistoric cultural cites have been found along the banks of this drainage as well.

Importantly, the New River basin contains a diverse array of aquatic habitats and fish species including four species of anadromous fish and several freshwater lake, freshwater stream, estuarine, and marine fish species. *Id.* at 2-31. The ACEC Management Plan states concern for these species:

> While there is a diversity of fish and fish habitats in the New River Area, some fish populations are the subject of concern. Coho salmon populations in the New River system are severely depressed from historic levels, and have been petitioned for federal

---

[3] Twomile Creek, while not recognized by the Department as part of New River, is only a few hundred feet from the system and will very soon be connected to the New River.

[4] This plan is on file with the Department.

[5] These species are the Western Snowy Plover, Aleutian Canada Goose, American Bald Eagle, Brown Pelican, Harbor Seal, Peregrine Falcon, Loggerhead Turtle, Green Sea Turtle, Pacific Ridley Turtle and Leatherback Turtle.

> listing under the Endangered Species Act (July 1993). All Pacific Coast stocks of steelhead trout have also been petitioned for listing (February 1994). Coastal stocks of fall chinook and soho salmon from New River south to California are listed as state sensitive (critical) according to ODFW (1992). *Id.*
>
> Spawning and rearing habitat for coho salmon has declined throughout the New River basin....Contributing factors include elimination of wetlands and channel straightening, removal of riparian vegetation and large woody material, increased sediment yields from timber harvesting activities along tributary streams, introduction of warm water fish species to freshwater lakes, and low summer flows/high water temperatures brought on by drought and agricultural water diversions. (emphasis added) *Id.*

Surface and groundwater withdrawals are reducing stream levels in the New River watershed. This is particularly evident in the summer/fall period when rainfall is lowest and water diversion is highest. *Id.* at 2-15

The BLM has recognized that actions by state agencies, such as the Water Resource Department have significant effects on management within this ACEC. *New River, Area of Critical Environmental Concern*, June 1989, Bureau of Land Management at 7 (hereinafter BLM) at 7. Commission actions on protecting minimum flows and other water use policies greatly affect the viability of this ecosystem. One of the management objectives identified by the BLM is to maintain minimum flows because:

> New River provides important rearing habitat for juvenile salmonids during summer. Channel drying during summer may coincide with downstream migration of juveniles. This may result in high mortality if juveniles become trapped in isolated pools, where they are subject to predation, temperature stress, and suffocation. Losses of juveniles during migration may preclude full use of more stable rearing habitat present downstream in estuarine portions of the ACEC.
>
> Lack of water in the middle section of New River during summer also precludes full use of marshlands by waterfowl. During most years, water is absent from early July to early September in the areas immediately south of the ACEC. This eliminates potential habitat for rearing broods, in turn reducing the prey available to peregrine falcons and bald eagles.

Id. at 35.

Several historical land uses have altered the diversity of fish and wildlife habitat in the general New River Area. *BLM 1995* at 2-30. Existing use of water for irrigation has had significant effects on the current habitat of the New River and its tributaries. *BLM* at 17. "Increased local development and water use on nearby lands will affect water flow quantity and

quality, and the health and diversity of New River's aquatic ecosystem." *BLM 1995* at 3-15.

Resident and anadromous fish species which rely on streamflows from the New River and other coastal steams are recognized in the Water Resources Commission's South Coast Basin Program as "significant" to the State of Oregon. Finding 43, 44. The basin program also recognizes that "(a)dequate streamflow throughout the year is necessary for the maintenance of aquatic life in the coastal streams." Finding 45 (*emphasis added*). Lakes and streams in the area are also important to recreational use in the basin, a use which is a major contributor to the economy of the South Coast Basin. Program Finding 39, 40.

e. Alternative Dispute Resolution Process

As the Department is aware, because of concerns about the capacity of the New River Basin to support the tremendous growth of the cranberry industry in this area, WaterWatch objected to a large number of water right applications in the New River Basin, including the Daoust application. In these objections we requested denial of the applications. Subsequently, the Department instituted an alternative dispute resolution process to address the concerns of the many interested parties including the applicants, the Oregon Department of Fish and Wildlife, the Bureau of Land Management, the Croft Lake Association, the Kalmiopsis Audubon Society and WaterWatch. As a result of months of negotiations some water rights have been issued with certain conditions attached. As part of our compromise in these negotiations, WaterWatch, the Audubon Society, and the Croft Lake Association did not protest the applications that went through the ADR process. These reservoir requests were not part of this process. And, since, from a resource standpoint, this system is overappropriated and cannot support another use on, we are forced to oppose each and every one of these applications.

II. Objections to applications 81691, 81801, 81857, 81920, 82042, 82135, 82148, 82242, 82243, 82247, 82468, 82556, 82558, 82831, 83010, 83328 (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek)

a. Water is not available for the proposed reservoirs

As is evidenced from the attached water availability tables, all the affected tributaries of the New River are overappropriated most, if not all, months of the year. *See attachment 1.* As noted below, even these numbers over estimate the capacity of the resource as the correct instream water right numbers have not been entered into the WRIS system. Moreover, the existing water availability information does not even take the reservoirs in question into account; if it did, the streams would be even more overappropriated. To put it simply, the New River system cannot support any more uses than those that already have existing water rights.

It is important to note that the compromises arrived at in the New River ADR process were largely circumscribed by the Department's water availability calculations. The permits that resulted from the process essentially take the last of the "available" streamflows. For the Department to now propose issuing permits for reservoirs that were not part of the process and were not taken into consideration is inequitable both to all the parties of the negotiation and to the resource itself.

b. The proposed reservoirs will result in injury to both instream and out-of-stream water rights.

As noted, the affected tributaries are overappropriated most, if not all, months of the year. This means that any further use will injure existing instream and out-of-stream water rights.

Senior existing and pending instream water rights include those on Fourmile Creek and Twomile Creek (73200, 70915, 72803, 72804). These instream water rights protect water for coho, steelhead, fall chinook and cutthroat. As the Department is well aware, both coho and steelhead were proposed for issuance under the federal Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) decided not to list the coho salmon (for now), not because of the state of the fish but because of promises of "restoration" by the state of Oregon in both the Oregon Coastal Salmon Restoration Initiative (OCSRI) and in a MOU between the state and the NMFS. The adoption and fulfillment of instream water rights was a major "tool" identified by the state to help restore salmon populations.

As noted, all the affected streams are sorely overappropriated. In fact, they are even more appropriated than is shown on the Department's WRIS program. The already negative flows are in fact an overestimation of existing flows. This is because the Department has not entered the correct flows for instream water rights 73200, 70915 and 72803. So, flows are even lower than the already negative numbers. Given these low flows, any further permitting will result in the instream water rights not getting the water they are legally entitled to and thus will "injure" them.

This injury is compounded by the fact that given the lack of Department field staff and enforcement mechanisms to regulate consumptive users in times of low flows, it is often the instream water rights that suffer regardless of priority.[6] Injury of this type is not only prohibited by statute, but to jeopardize the instream water rights by issuing the reservoir permits goes against both the content and the spirit of the agreement between the state and the NMFS.

---

[6] Moreover, the Department limited these instream water rights to the estimated average natural flow (ENAF) even when more was requested. It seems that, as a rule, the Department will not issue instream water rights above ENAF despite the fact that the flow amounts are those determined by the state fisheries expert (ODFW) to be necessary for fish survival. The Department has argued that they cannot give away water that isn't there. However, at the same time they deny the instream water rights to their full degree, the WRD proposes the issuance of these reservoir permits when water availability tables show there is no water. To say the least, this practice is equitable to the aquatic resources that depend upon adequate streamflows for survival.

Senior consumptive water rights exist on all the affected streams (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek).[7] Already, some of these are not being met. To give out additional permits will only exasperate the problem. Moreover, to permit more uses will deprive existing users of the water they are legally entitled to which constitutes "injury" to an existing water right. This is prohibited by statute.

c. The reservoirs will pose a significant detrimental impact to existing fishery resources

The aforementioned reservoirs would decrease flows needed for imperiled coho and steelhead populations, as well as chinook and cutthroat. Coho salmon utilize the streams of the New River yearround. After hatching from eggs and emerging from the gravel, coho salmon commonly rear in freshwater from one to two winters (as fingerlings) before making their seaward migration (as smolts). *BLM 1995* at E-1. Steelhead also spawn in these tributaries. They rear in freshwater for at least two years before migrating to sea. *Id.* at E-3.

Adequate flows are necessary year round for all stages of the salmon and steelhead's lifecycles.

> Historically, throughout the year, lake and stream features in the New River area provided coho salmon with rearing habitat including deep pools and off channel areas in their nursery streams, as well as lakes, ponds and open wetlands. These habitats were especially important in providing slow moving water and abundant cover for young fish to survive winter floods.

Id. at 2-32. In the summer months, flows already get dangerously low throughout the New River basin, including the affected creeks.

> During drought conditions, New River often dries in several locations during the summer months, partially as a result of drought or upstream water diversion for irrigation. During these periods, lower water levels reduce productivity of the aquatic resources and have a direct impact on beaver, river otter, osprey, and the American bald eagle,as well as the fishery resources. (emphasis added)
>
> Even when flow is continuous throughout the summer, water temperatures in New River can reach 76 [degrees] F, which is outside the acceptable water temperature range of 45 [degrees] F to 65 [degrees] F. A continuous, uninterrupted surface flow in New River would allow fish to migrate through even shallow riffles (less than one foot deep), and reduce the chance of temperature stress, mortality and predation.

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[7] These include, but are not limited to: 73022, 73733, 73023, 70725, 70726, 75394, 80662, 71841, 73289, 75393, g13056, g13208, g13737 and g13128.

Id. at 2-33.

Surface and ground water withdrawals are reducing stream levels in the New River watershed. This is particularly evident in the summer/fall period when rainfall is lowest and water diversion is highest. *Id.* at 2-15. These reservoirs would capture essential streamflows needed for fish survival and would therefore pose a "significant detrimental impact to fishery resources". For this reason, these applications should be denied.

III. Conclusion

Given that there is no water available for further appropriation, that permitting the reservoirs will cause injury to both instream and consumptive water rights and that the uses will have a significant detrimental impact to existing fishery resources all of these applications should be denied.

Sincerely,

Kimberley Priestley
Legal/Policy Analyst

cc: Nancy Couch, ODFW

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5003000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:06 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5003000000000000	MORTON CR @ mouth	NO	-9.8
2	5003000000000000	MORTON CR @ mouth	NO	-9.6
3	5003000000000000	MORTON CR @ mouth	NO	-8.6
4	5003000000000000	MORTON CR @ mouth	NO	-3.7
5	5003000000000000	MORTON CR @ mouth	NO	-0.7
6	5003000000000000	MORTON CR @ mouth	NO	-1.6
7	5003000000000000	MORTON CR @ mouth	NO	-0.9
8	5003000000000000	MORTON CR @ mouth	NO	-0.5
9	5003000000000000	MORTON CR @ mouth	NO	-0.2
10	5003000000000000	MORTON CR @ mouth	NO	-0.4
11	5003000000000000	MORTON CR @ mouth	NO	-5.6
12	5003000000000000	MORTON CR @ mouth	NO	-10.2
Stor	5003000000000000	MORTON CR @ mouth	NO	0.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 2001000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:05 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available	
1	2000000000000000	FOURMILE CR @ mouth	NO	-15.8	
2	2001000000000000	FOURMILE CR ab S FK FOURMILE C	NO		-4.3
3	2001000000000000	FOURMILE CR ab S FK FOURMILE C	NO		-7.3
4	2000000000000000	FOURMILE CR @ mouth	NO	-20.1	
5	2000000000000000	FOURMILE CR @ mouth	NO	-30.9	
6	2000000000000000	FOURMILE CR @ mouth	NO	-22.0	
7	2000000000000000	FOURMILE CR @ mouth	NO	-6.9	
8	2000000000000000	FOURMILE CR @ mouth	NO	-5.0	
9	2000000000000000	FOURMILE CR @ mouth	NO	-4.2	
10	2000000000000000	FOURMILE CR @ mouth	NO	-9.0	
11	2000000000000000	FOURMILE CR @ mouth	NO	-46.6	
12	2000000000000000	FOURMILE CR @ mouth	NO	-27.9	
Stor	2001000000000000	FOURMILE CR ab S FK FOURMILE C	YES		3690.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5008000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:08 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5008000000000000	DAVIS CR @ mouth	NO	-4.0
2	5008000000000000	DAVIS CR @ mouth	NO	-1.6
3	5008000000000000	DAVIS CR @ mouth	NO	-1.9
4	5008000000000000	DAVIS CR @ mouth	NO	-1.7
5	5008000000000000	DAVIS CR @ mouth	NO	-4.2
6	5008000000000000	DAVIS CR @ mouth	NO	-5.3
7	5008000000000000	DAVIS CR @ mouth	NO	-5.8
8	5008000000000000	DAVIS CR @ mouth	NO	-5.7
9	5008000000000000	DAVIS CR @ mouth	NO	-5.4
10	5008000000000000	DAVIS CR @ mouth	NO	-5.2
11	5008000000000000	DAVIS CR @ mouth	NO	-4.0
12	5008000000000000	DAVIS CR @ mouth	NO	-4.4
Stor	5008000000000000	DAVIS CR @ mouth	YES	1550.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5001000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:13 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5001000000000000	BETHEL CR @ mouth	NO	-16.4
2	5001000000000000	BETHEL CR @ mouth	NO	-12.2
3	5001000000000000	BETHEL CR @ mouth	NO	-13.9
4	5001000000000000	BETHEL CR @ mouth	NO	-6.1
5	5001000000000000	BETHEL CR @ mouth	NO	-1.3
6	5001000000000000	BETHEL CR @ mouth	NO	-3.0
7	5001000000000000	BETHEL CR @ mouth	NO	-2.0
8	5001000000000000	BETHEL CR @ mouth	NO	-1.2
9	5001000000000000	BETHEL CR @ mouth	NO	-0.5
10	5001000000000000	BETHEL CR @ mouth	NO	-0.8
11	5001000000000000	BETHEL CR @ mouth	NO	-8.7
12	5001000000000000	BETHEL CR @ mouth	NO	-17.1
Stor	5001000000000000	BETHEL CR @ mouth	YES	211.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 1400000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:16 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	1400000000000000	TWOMILE CR @ mouth	NO	-7.5
2	1400000000000000	TWOMILE CR @ mouth	NO	-5.1
3	1400000000000000	TWOMILE CR @ mouth	NO	-5.7
4	1400000000000000	TWOMILE CR @ mouth	NO	-3.8
5	1400000000000000	TWOMILE CR @ mouth	NO	-1.5
6	1400000000000000	TWOMILE CR @ mouth	NO	-1.2
7	1400000000000000	TWOMILE CR @ mouth	NO	-0.8
8	1400000000000000	TWOMILE CR @ mouth	NO	-0.5
9	1400000000000000	TWOMILE CR @ mouth	NO	-0.2
10	1400000000000000	TWOMILE CR @ mouth	NO	-0.2
11	1400000000000000	TWOMILE CR @ mouth	NO	-2.0
12	1400000000000000	TWOMILE CR @ mouth	NO	-8.2
Stor	1400000000000000	TWOMILE CR @ mouth	YES	165.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 1900000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:16 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	1900000000000000	TWOMILE CR @ mouth	NO	-2.8
2	1900000000000000	TWOMILE CR @ mouth	YES	8.0
3	1900000000000000	TWOMILE CR @ mouth	YES	4.4
4	1900000000000000	TWOMILE CR @ mouth	NO	-6.1
5	1900000000000000	TWOMILE CR @ mouth	NO	-15.6
6	1900000000000000	TWOMILE CR @ mouth	NO	-13.0
7	1900000000000000	TWOMILE CR @ mouth	NO	-10.4
8	1900000000000000	TWOMILE CR @ mouth	NO	-10.3
9	1900000000000000	TWOMILE CR @ mouth	NO	-9.9
10	1900000000000000	TWOMILE CR @ mouth	NO	-9.6
11	1900000000000000	TWOMILE CR @ mouth	NO	-16.7
12	1900000000000000	TWOMILE CR @ mouth	NO	-5.1
Stor	1900000000000000	TWOMILE CR @ mouth	YES	8990.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5007000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:07 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5007000000000000	FLORAS CR @ mouth	YES	48.7
2	5007000000000000	FLORAS CR @ mouth	YES	154.0
3	5007000000000000	FLORAS CR @ mouth	YES	132.0
4	5007000000000000	FLORAS CR @ mouth	YES	53.7
5	5007000000000000	FLORAS CR @ mouth	NO	-35.3
6	5007000000000000	FLORAS CR @ mouth	NO	45.0
7	5007000000000000	FLORAS CR @ mouth	NO	-10.6
8	5007000000000000	FLORAS CR @ mouth	NO	-15.1
9	5007000000000000	FLORAS CR @ mouth	NO	-14.0
10	5007000000000000	FLORAS CR @ mouth	NO	-110.0
11	5007000000000000	FLORAS CR @ mouth	NO	-70.1
12	5007000000000000	FLORAS CR @ mouth	YES	53.7
Stor	5007000000000000	FLORAS CR @ mouth	YES	103000.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

WaterWatch

RIVERS NEED WATER

Via FAX and Regular Mail

July 9, 1997

Water Rights Section
Water Resources Department
158 12th Street NE
Salem, OR 97310

RE: Comments, Expedited Reservoir Applications in New River Basin: 81691, 81801, 81857, 81920, 82042, 82135, 82148, 82242, 82243, 82247, 82468, 82556, 82558, 82831, 83010, 83328 (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek)

Dear Water Rights Section:

WaterWatch requests that the Department deny the above listed reservoir requests on the basis that, if issued, they would result in injury to both instream and out-of-stream water rights, would posed a significant detrimental impact to existing fishery resources and because water is not available.[1]

I. Summary of Facts:

a. The Proposed Uses: These applicants have applied for reservoirs to capture over 67 acre feet of water in the New River basin. Most these applicants are requesting the water for year round cranberry operations (irrigation, harvesting, temperature control, etc.).

b. Water Availability: There is no water left in this basin for further appropriation. Attached water availability tables show that almost all of the affected streams are overappropriated every single month of the year. *See Water Availability Tables for Fourmile, Morton, Floras, Bethal, Davis and Twomile Creeks generated from WRD's WRIS.*[2] It is important to note that the water availability tables for these creeks do not account for the water appropriated by these "existing" reservoirs.

c. Fishery Resources: The aforementioned creeks support a wide variety of fish life, including coho and winter steelhead. Both species are in serious decline. Coho are a state sensitive species. Coho have been petitioned for listing under the Federal Endangered Species Act. In April of 1997, the National Marine Fisheries Service decided not to list coho as threatened (for

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[1] Per SB 133 (which has been signed by the Governor), any person may submit comments requesting the Department to deny a reservoir application for a permit on the basis that the reservoir would result in injury to an existing water right or would pose a significant detrimental impact to existing fishery resources.

[2] It was not possible to get water availability tables for Croft Lake and Conner Creek as the data apparently is not on the Department's WRIS system.

WaterWatch of Oregon · 213 Southwest Ash, Suite 208 · Portland, OR 97204
Phone: (503) 295-4039 Fax: (503) 295-2791 Email: watrwtch@teleport.com

now) based largely upon representations and commitments made in the Oregon Coastal Salmon Restoration Initiative (OCSRI) that the state, including the WRD, would work towards the recovery and restoration of coastal salmon. Though coho were not listed in April, NMFS can still list coho as threatened or endangered at any time. Winter steelhead have also been petitioned for listing under the federal ESA.

d. The New River Basin Resource: All these creeks are found in the New River Basin on the South Coast.[3] The New River is a unique estuarine and freshwater ecosystem that supports a wide mix of wildlife, fisheries, botanical, and cultural resources found in association with few other coastal rivers in the Pacific Northwest. Approximately 200 species of wildlife use the New River area for some parts of their life cycle. *See Final New River ACEC Management Plan*, Bureau of Land Management, May 1995 (hereinafter *BLM 1995*).[4]

The importance of the New River watershed has been recognized by the Bureau of Land Management (BLM) through designation of a portion of the watershed as an Area of Critical Environmental Concern (ACEC). The ACEC includes 994 acres of land bordering the New River, a little over a mile upstream from the mouth of the New River. *BLM* at 2-5. There are also several acres of land at the confluence of Fourmile Creek and the New River that are currently administered by the BLM and are proposed for inclusion in the ACEC. *See* BLM 1995 at 2-6. Essentially the ACEC is at the "bottom" of the New River watershed and thus is greatly affected by activities and water diversion that occur upstream.

Nine species of wildlife that use the area are designated as either threatened or endangered on federal lists.[5] *Id.* at 2-29. One plant species has been listed as endangered on the federal list and a number of others are listed on the state list. *Id.* at 2-26. A number of prehistoric cultural cites have been found along the banks of this drainage as well.

Importantly, the New River basin contains a diverse array of aquatic habitats and fish species including four species of anadromous fish and several freshwater lake, freshwater stream, estuarine, and marine fish species. *Id.* at 2-31. The ACEC Management Plan states concern for these species:

> While there is a diversity of fish and fish habitats in the New River Area, some fish populations are the subject of concern. Coho salmon populations in the New River system are severely depressed from historic levels, and have been petitioned for federal

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[3] Twomile Creek, while not recognized by the Department as part of New River, is only a few hundred feet from the system and will very soon be connected to the New River.

[4] This plan is on file with the Department.

[5] These species are the Western Snowy Plover, Aleutian Canada Goose, American Bald Eagle, Brown Pelican, Harbor Seal, Peregrine Falcon, Loggerhead Turtle, Green Sea Turtle, Pacific Ridley Turtle and Leatherback Turtle.

> listing under the Endangered Species Act (July 1993). All Pacific Coast stocks of steelhead trout have also been petitioned for listing (February 1994). Coastal stocks of fall chinook and soho salmon from New River south to California are listed as state sensitive (critical) according to ODFW (1992). *Id.*
>
> Spawning and rearing habitat for coho salmon has declined throughout the New River basin....Contributing factors include elimination of wetlands and channel straightening, removal of riparian vegetation and large woody material, increased sediment yields from timber harvesting activities along tributary streams, introduction of warm water fish species to freshwater lakes, and low summer flows/high water temperatures brought on by drought and agricultural water diversions. (emphasis added) *Id.*

Surface and groundwater withdrawals are reducing stream levels in the New River watershed. This is particularly evident in the summer/fall period when rainfall is lowest and water diversion is highest. *Id.* at 2-15

The BLM has recognized that actions by state agencies, such as the Water Resource Department have significant effects on management within this ACEC. *New River, Area of Critical Environmental Concern*, June 1989, Bureau of Land Management at 7 (hereinafter BLM) at 7. Commission actions on protecting minimum flows and other water use policies greatly affect the viability of this ecosystem. One of the management objectives identified by the BLM is to maintain minimum flows because:

> New River provides important rearing habitat for juvenile salmonids during summer. Channel drying during summer may coincide with downstream migration of juveniles. This may result in high mortality if juveniles become trapped in isolated pools, where they are subject to predation, temperature stress, and suffocation. Losses of juveniles during migration may preclude full use of more stable rearing habitat present downstream in estuarine portions of the ACEC.
>
> Lack of water in the middle section of New River during summer also precludes full use of marshlands by waterfowl. During most years, water is absent from early July to early September in the areas immediately south of the ACEC. This eliminates potential habitat for rearing broods, in turn reducing the prey available to peregrine falcons and bald eagles.

Id. at 35.

Several historical land uses have altered the diversity of fish and wildlife habitat in the general New River Area. *BLM 1995* at 2-30. Existing use of water for irrigation has had significant effects on the current habitat of the New River and its tributaries. *BLM* at 17. "Increased local development and water use on nearby lands will affect water flow quantity and

quality, and the health and diversity of New River's aquatic ecosystem." *BLM 1995* at 3-15.

Resident and anadromous fish species which rely on streamflows from the New River and other coastal steams are recognized in the Water Resources Commission's South Coast Basin Program as "significant" to the State of Oregon. Finding 43, 44. The basin program also recognizes that "(a)dequate streamflow throughout the year is necessary for the maintenance of aquatic life in the coastal streams." Finding 45 (*emphasis added*). Lakes and streams in the area are also important to recreational use in the basin, a use which is a major contributor to the economy of the South Coast Basin. Program Finding 39, 40.

c. Alternative Dispute Resolution Process

As the Department is aware, because of concerns about the capacity of the New River Basin to support the tremendous growth of the cranberry industry in this area, WaterWatch objected to a large number of water right applications in the New River Basin, including the Daoust application. In these objections we requested denial of the applications. Subsequently, the Department instituted an alternative dispute resolution process to address the concerns of the many interested parties including the applicants, the Oregon Department of Fish and Wildlife, the Bureau of Land Management, the Croft Lake Association, the Kalmiopsis Audubon Society and WaterWatch. As a result of months of negotiations some water rights have been issued with certain conditions attached. As part of our compromise in these negotiations, WaterWatch, the Audubon Society, and the Croft Lake Association did not protest the applications that went through the ADR process. These reservoir requests were not part of this process. And, since, from a resource standpoint, this system is overappropriated and cannot support another use on, we are forced to oppose each and every one of these applications.

II. Objections to applications 81691, 81801, 81857, 81920, 82042, 82135, 82148, 82242, 82243, 82247, 82468, 82556, 82558, 82831, 83010, 83328 (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek)

a. Water is not available for the proposed reservoirs

As is evidenced from the attached water availability tables, all the affected tributaries of the New River are overappropriated most, if not all, months of the year. *See attachment 1.* As noted below, even these numbers over estimate the capacity of the resource as the correct instream water right numbers have not been entered into the WRIS system. Moreover, the existing water availability information does not even take the reservoirs in question into account; if it did, the streams would be even more overappropriated. To put it simply, the New River system cannot support any more uses than those that already have existing water rights.

It is important to note that the compromises arrived at in the New River ADR process were largely circumscribed by the Department's water availability calculations. The permits that resulted from the process essentially take the last of the "available" streamflows. For the Department to now propose issuing permits for reservoirs that were not part of the process and were not taken into consideration is inequitable both to all the parties of the negotiation and to the resource itself.

b. The proposed reservoirs will result in injury to both instream and out-of-stream water rights.

As noted, the affected tributaries are overappropriated most, if not all, months of the year. This means that any further use will injure existing instream and out-of-stream water rights.

Senior existing and pending instream water rights include those on Fourmile Creek and Twomile Creek (73200, 70915, 72803, 72804). These instream water rights protect water for coho, steelhead, fall chinook and cutthroat. As the Department is well aware, both coho and steelhead were proposed for issuance under the federal Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) decided not to list the coho salmon (for now), not because of the state of the fish but because of promises of "restoration" by the state of Oregon in both the Oregon Coastal Salmon Restoration Initiative (OCSRI) and in a MOU between the state and the NMFS. The adoption and fulfillment of instream water rights was a major "tool" identified by the state to help restore salmon populations.

As noted, all the affected streams are sorely overappropriated. In fact, they are even more appropriated than is shown on the Department's WRIS program. The already negative flows are in fact an overestimation of existing flows. This is because the Department has not entered the correct flows for instream water rights 73200, 70915 and 72803. So, flows are even lower than the already negative numbers. Given these low flows, any further permitting will result in the instream water rights not getting the water they are legally entitled to and thus will "injure" them.

This injury is compounded by the fact that given the lack of Department field staff and enforcement mechanisms to regulate consumptive users in times of low flows, it is often the instream water rights that suffer regardless of priority.[6] Injury of this type is not only prohibited by statute, but to jeopardize the instream water rights by issuing the reservoir permits goes against both the content and the spirit of the agreement between the state and the NMFS.

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[6] Moreover, the Department limited these instream water rights to the estimated average natural flow (ENAF) even when more was requested. It seems that, as a rule, the Department will not issue instream water rights above ENAF despite the fact that the flow amounts are those determined by the state fisheries expert (ODFW) to be necessary for fish survival. The Department has argued that they cannot give away water that isn't there. However, at the same time they deny the instream water rights to their full degree, the WRD proposes the issuance of these reservoir permits when water availability tables show there is no water. To say the least, this practice is equitable to the aquatic resources that depend upon adequate streamflows for survival.

Senior consumptive water rights exist on all the affected streams (Fourmile Creek, Morton Creek, Floras Creek, Davis Creek, Conner Creek, Croft Lake, Bethal Creek, and Twomile Creek).[7] Already, some of these are not being met. To give out additional permits will only exasperate the problem. Moreover, to permit more uses will deprive existing users of the water they are legally entitled to which constitutes "injury" to an existing water right. This is prohibited by statute.

c. The reservoirs will pose a significant detrimental impact to existing fishery resources

The aforementioned reservoirs would decrease flows needed for imperiled coho and steelhead populations, as well as chinook and cutthroat. Coho salmon utilize the streams of the New River yearround. After hatching from eggs and emerging from the gravel, coho salmon commonly rear in freshwater from one to two winters (as fingerlings) before making their seaward migration (as smolts). *BLM 1995* at E-1. Steelhead also spawn in these tributaries. They rear in freshwater for at least two years before migrating to sea. *Id.* at E-3.

Adequate flows are necessary year round for all stages of the salmon and steelhead's lifecycles.

> Historically, throughout the year, lake and stream features in the New River area provided coho salmon with rearing habitat including deep pools and off channel areas in their nursery streams, as well as lakes, ponds and open wetlands. These habitats were especially important in providing slow moving water and abundant cover for young fish to survive winter floods.

Id. at 2-32. In the summer months, flows already get dangerously low throughout the New River basin, including the affected creeks.

> During drought conditions, New River often dries in several locations during the summer months, partially as a result of drought or upstream water diversion for irrigation. During these periods, lower water levels reduce productivity of the aquatic resources and have a direct impact on beaver, river otter, osprey, and the American bald eagle,as well as the fishery resources. (emphasis added)

> Even when flow is continuous throughout the summer, water temperatures in New River can reach 76 [degrees] F, which is outside the acceptable water temperature range of 45 [degrees] F to 65 [degrees] F. A continuous, uninterrupted surface flow in New River would allow fish to migrate through even shallow riffles (less than one foot deep), and reduce the chance of temperature stress, mortality and predation.

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[7] These include, but are not limited to: 73022, 73733, 73023, 70725, 70726, 75394, 80662, 71841, 73289, 75393, g13056, g13208, g13737 and g13128.

Id. at 2-33.

Surface and ground water withdrawals are reducing stream levels in the New River watershed. This is particularly evident in the summer/fall period when rainfall is lowest and water diversion is highest. *Id.* at 2-15. These reservoirs would capture essential streamflows needed for fish survival and would therefore pose a "significant detrimental impact to fishery resources". For this reason, these applications should be denied.

III. Conclusion

Given that there is no water available for further appropriation, that permitting the reservoirs will cause injury to both instream and consumptive water rights and that the uses will have a significant detrimental impact to existing fishery resources all of these applications should be denied.

Sincerely,

Kimberley Priestley
Legal/Policy Analyst

cc: Nancy Couch, ODFW

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5003000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:06 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5003000000000000	MORTON CR @ mouth	NO	-9.8
2	5003000000000000	MORTON CR @ mouth	NO	-9.6
3	5003000000000000	MORTON CR @ mouth	NO	-8.6
4	5003000000000000	MORTON CR @ mouth	NO	-3.7
5	5003000000000000	MORTON CR @ mouth	NO	-0.7
6	5003000000000000	MORTON CR @ mouth	NO	-1.6
7	5003000000000000	MORTON CR @ mouth	NO	-0.9
8	5003000000000000	MORTON CR @ mouth	NO	-0.5
9	5003000000000000	MORTON CR @ mouth	NO	-0.2
10	5003000000000000	MORTON CR @ mouth	NO	-0.1
11	5003000000000000	MORTON CR @ mouth	NO	-5.6
12	5003000000000000	MORTON CR @ mouth	NO	-10.2
Stor	5003000000000000	MORTON CR @ mouth	NO	0.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 2001000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:05 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available	
1	2000000000000000	FOURMILE CR @ mouth	NO	-15.8	
2	2001000000000000	FOURMILE CR ab S FK FOURMILE C	NO		-4.3
3	2001000000000000	FOURMILE CR ab S FK FOURMILE C	NO		-7.3
4	2000000000000000	FOURMILE CR @ mouth	NO	-20.1	
5	2000000000000000	FOURMILE CR @ mouth	NO	-30.9	
6	2000000000000000	FOURMILE CR @ mouth	NO	-22.0	
7	2000000000000000	FOURMILE CR @ mouth	NO	-6.9	
8	2000000000000000	FOURMILE CR @ mouth	NO	-5.0	
9	2000000000000000	FOURMILE CR @ mouth	NO	-4.2	
10	2000000000000000	FOURMILE CR @ mouth	NO	-9.0	
11	2000000000000000	FOURMILE CR @ mouth	NO	-46.6	
12	2000000000000000	FOURMILE CR @ mouth	NO	-27.9	
Stor	2001000000000000	FOURMILE CR ab S FK FOURMILE C	YES		3690.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5008000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:08 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5008000000000000	DAVIS CR @ mouth	NO	-4.0
2	5008000000000000	DAVIS CR @ mouth	NO	-1.6
3	5008000000000000	DAVIS CR @ mouth	NO	-1.9
4	5008000000000000	DAVIS CR @ mouth	NO	-1.7
5	5008000000000000	DAVIS CR @ mouth	NO	-4.2
6	5008000000000000	DAVIS CR @ mouth	NO	-5.3
7	5008000000000000	DAVIS CR @ mouth	NO	-5.8
8	5008000000000000	DAVIS CR @ mouth	NO	-5.7
9	5008000000000000	DAVIS CR @ mouth	NO	-5.4
10	5008000000000000	DAVIS CR @ mouth	NO	-5.2
11	5008000000000000	DAVIS CR @ mouth	NO	-4.0
12	5008000000000000	DAVIS CR @ mouth	NO	-4.4
Stor	5008000000000000	DAVIS CR @ mouth	YES	1550.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5001000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:13 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5001000000000000	BETHEL CR @ mouth	NO	-16.4
2	5001000000000000	BETHEL CR @ mouth	NO	-12.2
3	5001000000000000	BETHEL CR @ mouth	NO	-13.9
4	5001000000000000	BETHEL CR @ mouth	NO	-6.1
5	5001000000000000	BETHEL CR @ mouth	NO	-1.3
6	5001000000000000	BETHEL CR @ mouth	NO	-3.0
7	5001000000000000	BETHEL CR @ mouth	NO	-2.0
8	5001000000000000	BETHEL CR @ mouth	NO	-1.2
9	5001000000000000	BETHEL CR @ mouth	NO	-0.5
10	5001000000000000	BETHEL CR @ mouth	NO	0.8
11	5001000000000000	BETHEL CR @ mouth	NO	-8.7
12	5001000000000000	BETHEL CR @ mouth	NO	-17.1
Stor	5001000000000000	BETHEL CR @ mouth	YES	211.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 1400000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:16 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	1400000000000000	TWOMILE CR @ mouth	NO	-7.5
2	1400000000000000	TWOMILE CR @ mouth	NO	-5.1
3	1400000000000000	TWOMILE CR @ mouth	NO	-5.7
4	1400000000000000	TWOMILE CR @ mouth	NO	-3.8
5	1400000000000000	TWOMILE CR @ mouth	NO	-1.5
6	1400000000000000	TWOMILE CR @ mouth	NO	-1.2
7	1400000000000000	TWOMILE CR @ mouth	NO	-0.8
8	1400000000000000	TWOMILE CR @ mouth	NO	-0.5
9	1400000000000000	TWOMILE CR @ mouth	NO	-0.2
10	1400000000000000	TWOMILE CR @ mouth	NO	-0.2
11	1400000000000000	TWOMILE CR @ mouth	NO	-2.0
12	1400000000000000	TWOMILE CR @ mouth	NO	-8.2
Stor	1400000000000000	TWOMILE CR @ mouth	YES	165.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 1900000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:16 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	1900000000000000	TWOMILE CR @ mouth	NO	-2.8
2	1900000000000000	TWOMILE CR @ mouth	YES	8.0
3	1900000000000000	TWOMILE CR @ mouth	YES	4.4
4	1900000000000000	TWOMILE CR @ mouth	NO	-6.1
5	1900000000000000	TWOMILE CR @ mouth	NO	-15.6
6	1900000000000000	TWOMILE CR @ mouth	NO	-13.0
7	1900000000000000	TWOMILE CR @ mouth	NO	10.4
8	1900000000000000	TWOMILE CR @ mouth	NO	-10.3
9	1900000000000000	TWOMILE CR @ mouth	NO	-9.9
10	1900000000000000	TWOMILE CR @ mouth	NO	-9.6
11	1900000000000000	TWOMILE CR @ mouth	NO	-16.7
12	1900000000000000	TWOMILE CR @ mouth	NO	-5.1
Stor	1900000000000000	TWOMILE CR @ mouth	YES	8990.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

LIMITING WATER AVAILABILITY SUBBASINS

Water Availability Subbasin: 5007000000000000
Basin: SOUTH COAST
Exceedance Level: 80
Time: 14:07 Date: 07/03/1997

Month	Limiting Subbasin	Stream Name	Water Available?	Net Water Available
1	5007000000000000	FLORAS CR @ mouth	YES	48.7
2	5007000000000000	FLORAS CR @ mouth	YES	154.0
3	5007000000000000	FLORAS CR @ mouth	YES	132.0
4	5007000000000000	FLORAS CR @ mouth	YES	53.7
5	5007000000000000	FLORAS CR @ mouth	NO	-35.3
6	5007000000000000	FLORAS CR @ mouth	NO	-45.0
7	5007000000000000	FLORAS CR @ mouth	NO	-10.6
8	5007000000000000	FLORAS CR @ mouth	NO	-15.1
9	5007000000000000	FLORAS CR @ mouth	NO	-14.0
10	5007000000000000	FLORAS CR @ mouth	NO	-110.0
11	5007000000000000	FLORAS CR @ mouth	NO	-70.1
12	5007000000000000	FLORAS CR @ mouth	YES	53.7
Stor	5007000000000000	FLORAS CR @ mouth	YES	103000.0

Enter (1) to CONTINUE; (2) to WRITE the Table:

FILE#: P 82247

WAYNE FOSTER
PO BOX 114
LANGLOIS, OR 97450

FILE#: P 82247

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PO BOX 114
LANGLOIS, OR 97450

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WAYNE FOSTER
PO BOX 114
LANGLOIS, OR 97450

Rebuttal Y / N

Exempt by WM comments Y / N

COMMENTOR:

WM and/or WM Dist:_____

ODFW Dist:_____

WaterWatch: Y / N

_____

_____