

**BEFORE THE OREGON WATER RESOURCES DEPARTMENT**

**IN THE MATTER OF WATER** ) **FINAL ORDER IN CONTESTED CASE**  
**RIGHT APPLICATION IS-72188** )  
)  
OREGON DEPARTMENT OF FISH ) OAH Reference No.: 2021-OWRD-00087  
AND WILDLIFE ) Agency Case No.: IS-72188  
*Applicant/Proponent* )  
)  
POWDER VALLEY WATER )  
CONTROL DISTRICT )  
*Protestant* )

**HISTORY OF THE CASE**

On August 27, 1996, Oregon Water Resources Department (OWRD or Department) issued Proposed Final Orders (PFO or Notice) proposing to approve four applications for in-stream water rights (ISWR) filed by the Oregon Department of Fish and Wildlife (ODFW), seeking in-stream water rights for fish passage and habitat. On October 11, 1996, the Powder Valley Water Control District (Protestant or PVWCD) filed a protest to the PFOs. On September 14, 2021, OWRD referred this matter to the Office of Administrative Hearings (OAH) for contested case hearing. The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing.

On December 29, 2022, the OAH issued a Notice of Status Conference setting this matter for telephonic status conference on January 24, 2023. Sarah Rowe, Assistant Attorney General (AAG) appeared on behalf of OWRD. AAG Anika Marriott appeared with Chandra Ferrari on behalf of ODFW. Doug Birdsall appeared on behalf of Protestant. The purpose of the status conference was to assess the parties’ readiness for hearing, receive updates on any settlement negotiations, and provide an overview of hearing procedures. The parties consented to conducting a consolidated status conference in four related cases at that time.<sup>1</sup> At the conference, OWRD indicated a motion to consolidate the four cases for hearing purposes would be forthcoming shortly after the conference. The parties agreed to a prehearing conference on February 9, 2023 and agreed to submit a list of stipulated issue statements prior to that date.

On January 24, 2023, the OAH issued a Notice of Prehearing Conference. On February 7, 2023, OWRD filed a Motion to Consolidate seeking consolidation of the four cases for hearing and prehearing purposes. On February 8, 2023, ODFW filed a Partial Stipulated Statement of the Issue representing ODFW and Protestant had agreed on the language of a single issue statement and indicating Protestant would be filing a second proposed issue statement separately. Also on February 8, 2023, Protestant filed a Request for Consideration of Second

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<sup>1</sup> Those cases were identified as 2021-OWRD-00049, IS-72163; 2021-OWRD-00085, IS-72187; 2021-OWRD-00087, IS-72188; and 2021-OWRD-00091, IS-72194.

Issue.<sup>2</sup> Finally, on February 8, 2023, OWRD issued an Amended Notice applicable to each of the four cases.<sup>3</sup>

On February 9, 2023, ALJ Allen convened a prehearing conference via telephone. AAG Rowe appeared on behalf of OWRD with Patricia McCarty. AAG Marriott appeared with Ms. Ferrari on behalf of ODFW. Mr. Birdsall and Jerry Gray appeared on behalf of Protestant. During that conference, the ALJ accepted the stipulated issue statement and rejected Protestant's proposed second issue statement as irrelevant and not properly raised in the Protest. At that time, the ALJ granted OWRD's unopposed motion to consolidate four contested cases for hearing purposes. The ALJ also advised the parties that the OAH would issue a separate order for each case, despite consolidating the matters for hearing. The ALJ agreed to schedule a second prehearing conference in April 2023 to allow the parties to conduct discovery proceedings prior to scheduling the hearing. Following the prehearing conference, the ALJ issued a Partial Scheduling Order. Pursuant to a request from OWRD, the ALJ also included a statement on the allocation of the burden of proof in this matter. No party objected to the ALJ's statement regarding the burden of proof.

On April 10, 2023, ALJ Allen convened a second prehearing conference via telephone for the purpose of receiving an update on the status of discovery and prehearing motions, selecting hearing dates, and establishing filing deadlines for exhibits and witness lists. AAG Rowe appeared with Ms. McCarty for OWRD. AAG Marriott appeared with Ms. Ferrari on behalf of ODFW. Mr. Birdsall appeared on behalf of PVWCD with Board members Jake Bingham and Drew Martin. At that time, the parties agreed to a hearing via Webex virtual conference software to be held on May 22-23, 2023.

On April 26, 2023, the OAH received a Notice of Representation from Attorney Andrew G. Martin informing the OAH and state agencies of his representation of PVWCD.

ALJ Allen convened a hearing via Webex on May 22 and 23, 2023. Mr. Martin appeared with Mr. Birdsall on behalf of PVWCD. AAG Rowe appeared with Ms. McCarty and Dwight French, Water Right Services Division Administrator, on behalf of OWRD. AAG Anika Marriott appeared with Chandra Ferrari on behalf of ODFW. Testifying on behalf of the OWRD were Mr. French and OWRD hydrologist Ryan Andrews.<sup>4</sup> Testifying on behalf of ODFW were Joe Lemanski,<sup>5</sup> fish biologist and project leader for ODFW and Spencer Sawaske,<sup>6</sup> in-stream

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<sup>2</sup> That proposed issue statement read, "Whether the amount of the ISWR would adversely affect the Protestant and other potential water users by further over appropriating the stream and preventing any other new appropriations of water. This is of great concern to the Protestant and their obligations and responsibilities now and in the future to water users and storage projects." Request for Consideration of Second Issue at 2.

<sup>3</sup> According to the Amended Notice, OWRD issued that document to ensure compliance with ORS 183.415. The Amended Notice makes no substantive changes to the PFO. Amended Notice at 1.

<sup>4</sup> OWRD designated Mr. Andrews as an expert in the field of hydrology based on education and experience presented at hearing. Protestant did not object and the ALJ accepted the expert designation for this witness.

<sup>5</sup> ODFW designated Mr. Lemanski as an expert in fish habitat needs. Protestant did not object and the ALJ accepted this designation based on education and experience presented at hearing.

<sup>6</sup> ODFW designated Mr. Sawaske as an expert in in-stream flow needs for fish species relevant to the application in issue. Protestant did not object and the ALJ accepted the expert designation based on education and experience presented at hearing.

hydrologist for ODFW. Following the hearing, the ALJ left the record open to allow the parties to file written closing arguments. On June 23, 2023, the state agencies filed OWRD and ODFW Joint Written Closing Argument. On that date, Mr. Martin filed Protestant's Closing Argument. On July 14, 2023, the state agencies filed OWRD and ODFW Joint Response to Protestant's Closing Argument. The record closed on July 17, 2023 after notification from Mr. Martin that he would not be filing a response to the state agencies' closing argument.

On August 31, 2023, the ALJ issued a Proposed Order in 2021-OWRD-00087/IS-72188 recommending that OWRD affirm the Proposed Final Order issued in IS-72188 on August 27, 1996. The Proposed Order stated that any party to the proceeding or OWRD could file exceptions to the Proposed Order no later than 30 days after service of the order.

OWRD and ODFW timely filed joint exceptions to the Proposed Order. Protestant did not file exceptions to the Proposed Order. Now, the OWRD's Acting Director (Director) considers the exceptions, allows them, and issues this final order affirming the Proposed Final Order, approving Water Right Application IS-72188, and issuing the attached Certificate 97532 with conditions.

The "History of the Case," "Issue," "Evidentiary Ruling," "Findings of Fact," "Conclusion of Law," "Opinion," and "Order" sections of this final order set forth the ALJ's Proposed Order as modified by the Director in response to the exceptions and on the Director's own motion. The "Consideration of Exceptions" and "Director's Amendments to the Proposed Order" sections identify and explain the Director's modifications of the ALJ's Proposed Order.

## **ISSUE**

Whether the amount of the in-stream water right authorized in the Proposed Final Order is excessive because it is not necessary to protect the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, or any other ecological value. ORS 537.332(5)(b); ORS 537.336(1); OAR 690-077-0010(27)(b); and OAR 690-077-0020.

## **EVIDENTIARY RULING**

Exhibits A1 through A5 and A7 through A28, offered jointly by the OWRD and ODFW, were admitted into the record without objection.<sup>7</sup> Exhibits S1 through S6, offered by Protestant, were admitted into the record without objection.

## **FINDINGS OF FACT**

1. In 1987, the Oregon legislature enacted Senate Bill (SB) 140 (codified at ORS 537.332 through 537.360) creating in-stream water rights securable by three separate state agencies – including ODFW – for public benefit. That legislation authorized ODFW to apply for in-stream water rights to secure in-stream flows necessary for, *inter alia*, the conservation and

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<sup>7</sup> The state agencies did not offer an exhibit marked A6.

maintenance of aquatic and fish life, wildlife, and fish and wildlife habitat. (Test. of French; Ex. A25 at 2; *see also* ORS 537.332 and 537.336(1).)

2. In October 1988, the Oregon Water Resources Commission (the Commission) adopted administrative rules for the application, processing, and administration of in-stream water rights created by SB 140. (Test. of French; Ex. A25 at 2; *see also* OAR Chapter 690 Division 077.)

3. Following passage of SB 140, OWRD received more than 300 applications from authorized state agencies seeking in-stream water rights. Approximately 177 of those applications were filed between September and December 1990. (Test. of French.)

4. At that time, OWRD did not have enough employees in its water rights section to process the volume of in-stream water right applications received. (Test. of French.)

5. On January 29, 1992, ODFW filed In-Stream Water Right Application 72188 (the application), along with several other applications, seeking to protect minimum stream flows necessary for the maintenance and conservation of rainbow trout lifecycles and habitat in the North Powder River, a tributary to the Powder River. According to the application, ODFW seeks to secure the enumerated flows from river mile 10.1 at Anthony Fork to river mile 0 at the mouth of the North Powder River. (Test. of French; Ex. A03 at 1, 4.)

6. In the application, ODFW seeks to secure in-stream flows to support migration, spawning, egg incubation, fry emergence, and juvenile rearing of rainbow trout in the following amounts (measured in cubic feet per second (cfs)) by month: January – 12 cfs; February – 12 cfs for the first half and 20 cfs for the second half of the month; March through June – 25 cfs each month; July – 20 cfs for the first half and 15 cfs for the second half of the month; and August through December – 12 cfs each month. (Ex. A03 at 1.) The application does not request in-stream flows for restoration or enhancement of fish habitat or population. (Test. of Lemanski and Sawaske.)

7. To determine the appropriate amount of in-stream flow in a given reach, ODFW will evaluate the fish species present, determine which life stages are present in the stream or reach by half-month, and calculate the required flows for each life stage. (Test. of Sawaske; Ex. A19.)

8. The in-stream flows requested in the application will enable migration in the stream and are necessary to ensure the target fish species is able to move up and down the identified stream or reach, including sufficient flows to allow fish to migrate past any impediments in the stream channel. (Test. of Lemanski.)

9. The requested flows will also ensure sufficient stream depth to allow the target species to create redds, or nests, for egg incubation. The requested flow level will also allow sufficient habitat for the various stages of juvenile rearing in the stream. Lower in-stream flow levels have a negative impact on fish habitat and fish populations. (Test. of Lemanski.)

10. According to the application, ODFW used the Oregon Method for determining in-stream flow requirements for rainbow trout in the relevant reach of the North Powder River. Under the Oregon Method, ODFW personnel evaluated each stream or reach for habitat distribution for the identified species. ODFW collected data along various transects of the stream or reach. (Ex. A03 at 1; test. of Sawaske.)

11. In determining minimum flow requirements for identified fish species, ODFW also relies in part on a report titled, “The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements: A Report with Recommendations to the Oregon Water Resources Board” (the report) authored in August 1967 by James Hutchinson and John Fortune of the Oregon State Game Commission.<sup>8</sup> (Test. of Lemanski; Ex. A18.)

12. ODFW relied on recommended minimum flows for resident fish identified in the report when determining the appropriate amount of in-stream flow for maintenance and conservation of target species present in the stream or reach in issue. (Test. of Sawaske; *see* Ex. A18 at 15-16.)

13. In 1995, the Oregon legislature passed SB 674, which altered the statutory review process for water right applications and provided OWRD with significant discretion in determining how to process applications pending at the time of the statutory and administrative rule changes. (Test. of French.)

14. In January 1996, OWRD adopted permanent administrative rules, which implemented changes to the administrative rules pertaining to processing water right applications. Among those amendments, OWRD repealed OAR 690-77-026, pertaining to the technical review requirement, and adopted OAR 690-077-0029<sup>9</sup> replacing the prior technical review with similar criteria under the heading “Initial Review.” The new initial review criteria incorporated the criteria from the prior technical review. At that time, OWRD also adopted OAR 690-310-005, which provided it the ability to determine the appropriate step in the new review process for each then-pending application. (Test. of French; Ex. A24 at 148-149.)

15. OWRD staff were unable to process the application, and others filed by ODFW, until sometime after January 1996. As of January 1996, OWRD had completed a completeness review of the application pursuant to OAR 690-077-0027.<sup>10</sup> Therefore, OWRD determined the most appropriate step in the new review process for pending ISWR applications was the initial review phase pursuant to OAR 690-077-0029. (Test. of French.)

16. When reviewing applications for ISWRs, OWRD’s surface water section will determine the estimated average natural flow (EANF), or prehistoric flow levels, in a particular stream or reach. The surface water section then provides the results to the water rights section for staff to include in the initial review required by administrative rule. OWRD will then compare the

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<sup>8</sup> The former name for the Oregon Fish and Wildlife Commission.

<sup>9</sup> Then numbered OAR 690-77-029.

<sup>10</sup> Then numbered OAR 690-77-027.

EANF to the amount requested in an ISWR application and grant the lesser of the two amounts, if appropriate. (Test. of French and Andrews.)

17. OWRD maintains a computer database for tracking water availability in each basin throughout the state, referred to as the Water Availability Reporting System (WARS). OWRD manages a hydrographics database in which it compiles all streamflow measurements from gages as well as a database on water right and consumptive uses including watermaster reports statewide. In calculating EANF, OWRD hydrologists created an internal database of water availability basins (WABs) which detail watersheds within the state used for water availability calculations. (Test. of Andrews; Ex. A15 at 1-2; *see also* Ex. A16 at 2.)

18. Since its implementation in the early 1990's, OWRD has worked to refine its WARS as technology and data provide opportunities to refine the system for more accurate results. Generally, OWRD determines water availability in a basin or watershed using measured streamflow data where stream gages are in place to provide that information. For streams or reaches where no gage exists, OWRD hydrologists use a regional regression model – in conjunction with data from gaged locations in the same basin – to estimate streamflow and water availability. To ensure greater accuracy of the regression model, OWRD hydrologists use a correction factor derived by comparing regression model results to a known stream measurement. That comparison produces a correction factor that is then applied to regression calculations in non-gaged streams. This method of calculating streamflow and water availability in unmeasured reaches is widely accepted as a standard practice in hydrology. (Test. of Andrews; Ex. A15; *see also* Ex. A26 at 40.)

19. Early iterations of the regional regression equation used by OWRD included four watershed characteristics as predictors of natural streamflow: drainage area; mean annual precipitation; water rights index information; and soils index information. More recent iterations of the equation rely on as many as 10 watershed characteristics to predict natural streamflow. Calculation of EANF within the relevant reach of the North Powder River using the current regional regression equation shows greater natural streamflow than determined under the 1996 version in several months. Although the amounts requested in this application did not exceed the EANF in any month, had the application been processed using the current regression equation, OWRD could have approved a greater amount of ISWR during months showing greater natural flow, up to the requested amount. (Test of Andrews; Ex. A15 at 2-4).

20. Within the Powder River Basin, OWRD obtained data from several index and short record stream gages<sup>11</sup>, including at least one gage on Wolf Creek and one on Rock Creek in the vicinity of the requested ISWR. That data is derived from gages maintained by OWRD and others maintained by the United States Geological Survey (USGS). (Test. of Andrews; Ex. A26 at 73-98.)

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<sup>11</sup> Index gages have at least 30 years of record spanning the entire base period of 1958-1987. Short-record gages typically have at least five years of consecutive record, but do not encompass the entire base period. (Test. of Andrews Day 1 p.m. at 2:15).

21. PVWCD personnel were unaware of gages in Wolf Creek other than those used by them to track irrigation water use by members. (Test. of Birdsall.)

22. On May 20, 1996, OWRD issued an Initial Review report for 22 ISWR applications filed by ODFW, including Application 72188. OWRD assigned the application a priority date of January 29, 1992. In the initial review, OWRD found EANF in the relevant reach of the North Powder River exceeds the amount requested by ODFW in every month of the year. Accordingly, OWRD determined the in-stream flows requested by ODFW were allowable. (Test. of French; Ex. A05 at 11.)

23. In the initial review, OWRD determined the application to be complete and not defective in any way. OWRD also found the proposed use was not prohibited by law and that that use (in-stream flow protection) was permitted by the administrative rules governing the Powder Basin Program. (Test. of French; Ex. A5 at 1.)

24. OWRD concluded that this, and other applications filed by ODFW, did not qualify for the statutory presumption of public interest because water was not available in the requested amounts.<sup>12</sup> As such, OWRD processed the application without the presumption in place. OWRD determined the requested ISWR to be in the public interest. (Test. of French.)

25. Following issuance of the initial review, OWRD opened a 30-day comment period. OWRD received and considered comments from multiple sources pertaining to the application. (Test. of French; *see* Ex. A7.)

26. On August 27, 1996, OWRD issued its PFO finding ODFW had satisfied all application requirements and proposing to approve the application, as conditioned to adjust for EANF. The PFO contained a draft water right certificate identifying the approved in-stream flow amounts as: January – 12 cfs; February – 12 cfs for the first half and 20 cfs for the second half of the month; March through June – 25 cfs each month; July – 20 cfs for the first half and 15 cfs for the second half of the month; and August through December – 12 cfs each month. (Test. of French; Ex. A10 at 1-5.)

27. Since issuance of the PFO, there have been no alterations to basin characteristics that would affect OWRD's calculations of water availability and natural streamflow in the Powder River Basin or within the North Powder River specifically. (Test. of Lemanski and Andrews.)

28. The in-stream flow requirements for the target species have not changed between 1967 and the date of hearing. (Test. of Lemanski and Sawaske.)

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<sup>12</sup> The record demonstrates that, based on OWRD's EANF calculations, natural streamflow in the specific reach of the North Powder River for each month exceeded the amount requested in the application. However, the record also demonstrates two of the four applications filed by ODFW in this basin requested ISWRs that exceeded, in at least some months of the year, EANF calculations.

## CONCLUSION OF LAW

Protestant failed to show the amount of the in-stream water right authorized in the Proposed Final Order is excessive because it is not necessary to protect the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, or any other ecological value.

## OPINION

Protestant asserts OWRD erred in issuing the Proposed Final Order because the amount of water authorized for the in-stream water right exceeds the amount necessary under applicable statutes and rules. As the proponent of that position, Protestant bears the burden of proving its contention by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Rencken v. Young*, 300 Or 352, 364-365 (1985) (finding that proponents of a cancellation proceeding had the burden of proving by reliable, probative, and substantial evidence that the water right holder had ceased using the water right in issue for the statutorily prescribed period, citing ORS 183.450(5)); *Gallant v. Board of Medical Examiners*, 159 Or App 175, 183 (1999) (finding that in enacting ORS 183.450(5) the legislature intended to prescribe a standard of proof that corresponded to the preponderance of the evidence standard); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); and *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position. A party may not rely on an absence of evidence in the record to meet its burden. *May Trucking Co. v. Dept. of Transportation*, 203 Or. App. 564, 572-573, 126 P.3d 695, 700-701 (2006) (rejecting petitioner's contention of an absence of evidence in the record and finding, "It was petitioner's obligation to make sure that there is evidence in the record supporting its position.").

To meet its burden, Protestant must prove – by a preponderance of the evidence – that the level of instream flow secured by the PFO and attached draft water right certificate exceeds the amount necessary to protect the public use within the context of the applicable statutes and administrative rules. Importantly, Protestant's burden is an affirmative one requiring evidence sufficient to overcome OWRD's conclusions in the PFO. Collateral attacks drawing into question OWRD's methodologies and underlying data, without more, are insufficient to meet Protestant's burden.



In Oregon, water is a public resource to be appropriated (or otherwise apportioned by the State) only for beneficial use. See ORS 537.110 and ORS 537.120. Through ORS 537.332 through 537.360, the Oregon legislature declared that “[p]ublic uses are beneficial uses,” see ORS 537.334(1), and defined public use to include, *inter alia*, “[r]ecreation[,] [c]onservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values[.]” ORS 537.332(5)(a),(b). The legislature authorized three state agencies to apply for instream water rights for public benefit and required that any such application made by ODFW be for an amount of instream flow necessary to support the public uses of conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat. ORS 537.336(1). For applications filed after October 28, 1989, all applications for in-stream water rights must be based on methods of determining in-stream flow needs that have been approved by administrative rule of the agencies submitting the applications. OAR 690-077-0020(3). ODFW approved three methods for determining in-stream flow requirements for fish and wildlife: the IFIM<sup>13</sup> habitat suitability curves published by the United States Fish and Wildlife Service; the Oregon Method<sup>14</sup>; and the Forest Service Method. OAR 635-400-0015.

Under ORS 537.341, the legislature charged OWRD with evaluating ISWR applications and issuing certificates to be held in the name of OWRD as trustee for the people of the State of Oregon. See also ORS 537.332(3). ORS 537.343(2) identifies the Director of OWRD as “the final authority in determining the level of the instream flow necessary to protect the public use.” ORS 537.349 requires OWRD to process applications for ISWRs in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.252. Pursuant to OAR 690-077-0000(6), in-stream water rights do not take away or impair any legally established right to the use of water having an earlier priority date than the in-stream right.

OAR 690-077-0010 provides definitions applicable to ISWRs and provides, in relevant part:

(10) “Estimated Average Natural Flow” means average natural flow estimates derived from watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology.

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(13) “Instream flow” means the minimum quantity of water necessary to support the public use requested by an agency.

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<sup>13</sup> Instream Flow Incremental Methodology. See OAR 635-400-0010(10).

<sup>14</sup> Pursuant to OAR 635-400-0010(14), the “Oregon Method” means a methodology to determine instream flow requirements for fish, developed by the OSGC (Thompson, K.E. 1972). Determining streamflows for fish life. pp. 31–50. In Proceedings of the Instream Flow Requirement Workshop, Pacific N.W. River Basins Commission, Portland, Ore.

(16) “Instream Water Right” as defined in ORS 537.332, means a water right held in trust by the Water Resources Department for the benefit of the people of the state of Oregon to maintain water instream for public use. An instream water right does not require a diversion or any other means of physical control over the water.

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(26) “Public Benefit,” as defined in ORS 537.332, means a benefit that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.

(27) “Public Use,” as defined in ORS 537.332, includes but is not limited to:

\* \* \* \* \*

(b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values[.]

ORS 537.150 identifies the requirements for filing an application along with OWRD’s determination of completeness, initial review, and preliminary determination and provides, in relevant part:

(1) Within 15 days after receiving an application, the Water Resources Department shall determine whether the application contains the information listed under ORS 537.140(1) and is complete and not defective\* \* \*.

(2) Upon determining that an application contains the information listed under ORS 537.140(1) and is complete and not defective, the department shall indorse on the application the date upon which the application was received at the department, which shall be the priority date for any water right issued in response to the application. \* \* \*.

(3) If an application is complete and not defective, the department shall determine whether the proposed use is prohibited by ORS chapter 538 \* \* \*.

(4) If the proposed use is not prohibited by ORS chapter 538, the department shall undertake an initial review of the application and make a preliminary determination of:

(a) Whether the proposed use is restricted or limited by statute or rule;

(b) The extent to which water is available from the proposed source during the times and in the amounts requested; and

(c) Any other issue the department identifies as a result of the initial review that may preclude approval of or restrict the proposed use.

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(7) Within 30 days after the public notice under subsection (6) of this section, any person interested in the application shall submit written comments to the department. \* \* \*.

ORS 537.153 identifies OWRD's obligations for review of applications, issuance of a PFO, and the public interest presumption and reads, in pertinent part:

(1) Within 60 days after the Water Resources Department proceeds with the application under ORS 537.150 (5), the department shall complete application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. \* \* \*.

(2) In reviewing the application under subsection (1) of this section, the department shall 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 complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and 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 under subsection (6) of this section 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.

(3) The proposed final order shall cite findings of fact and conclusions of law and shall include but need not be limited to:

(a) Confirmation or modification of the preliminary determinations made in the initial review;

- (b) A brief statement that explains the criteria considered relevant to the decision, including the applicable basin program and the compatibility of the proposed use with applicable land use plans;
- (c) An assessment of water availability and the amount of water necessary for the proposed use;
- (d) An assessment of whether the proposed use would result in injury to existing water rights;
- (e) An assessment of whether the proposed use would impair or be detrimental to the public interest as provided in ORS 537.170;
- (f) A draft permit, including any proposed conditions, or a recommendation to deny the application;
- (g) Whether the rebuttable presumption that the proposed use will not impair or be detrimental to the public interest has been established[.]

OAR 690-077-0015 provides general statements regarding the purpose and administration of ISWRs and provides, in relevant part:

- (1) Instream water rights shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any rights vested prior to the date of the instream water right.
- (2) The implementation of the instream water rights law is a means of achieving an equitable allocation of water between instream public uses and other water uses. When instream water rights are set at levels that 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.
- (3) The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right.
- (4) If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant for the applied public use. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.

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(9) Instream water rights shall conform with state statutes and basin programs. All natural lakes and streams in the state shall be considered classified to allow all instream public uses unless specifically withdrawn from appropriation for such use.

(10) Instream water rights shall be approved only if the amount, timing and location serve a public use or uses.

OAR 690-077-0033 identifies rules pertaining to the public interest presumption during an application review and provides, in part:

(1) The Department shall presume that a proposed water use will not impair or be detrimental to the public interest if:

(a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under 536.310(12);

(b) Water is available;

(c) The proposed use will not injure other water rights; and

(d) The proposed use complies with the rules of the Commission.

Pursuant to OAR 690-077-0037(2), if OWRD determines that the public interest presumption is not established, it must determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) and may either propose denial of the application or condition the application so the proposed use, as conditioned, will not impair the public interest. If a party protesting the application does not overcome this finding, OWRD must issue a final order approving the application subject to appropriate modifications or conditions. OAR 690-077-0037(6) & (7); OAR 690-077-0047(2).

These provisions of statute and administrative rule together grant OWRD authority and discretion to condition applications approvals as necessary to satisfy the purpose of the ISWR requirements while ensuring those approvals will not cause impairment or detriment to public interests.

The gravamen of Protestant's challenge to the PFO is the limited assertion that the ISWR authorized therein is excessive because it is not necessary to protect the conservation or maintenance of habitat for all life stages of the identified fish species. As such, an exhaustive discussion of the application review process is unnecessary. For this order, it is sufficient to note that, as part of its review of the application, OWRD satisfied the requirements in statute and rule and determined a conditional approval of the application to be appropriate.

Because OWRD determined water was not available in the amount requested from each month identified in the application, OWRD concluded it could not apply the statutory

presumption – found in ORS 537.153(2) – that the proposed use would not impair or be detrimental to the public interest. *See also* OAR 690-077-0033. Therefore, according to the record, OWRD followed the direction in OAR 690-077-0037(2) and evaluated whether the proposed use – in-stream flows for conservation and maintenance of fish habitat – will be detrimental to the public interest. After evaluation of the proposed use and EANF in the relevant reach, OWRD determined the proposed use will not cause impairment or detriment to the public interest in the amount requested for each month. At hearing, Protestant provided no evidence to rebut OWRD’s conclusion that the proposed use, as conditioned in the PFO and draft certificate, would not impair or be detrimental to the public interest.

Moreover, according to OAR 690-077-0000(6) ISWRs do not take away or impair any legally established right to the use of water having an earlier priority date than the ISWR. At hearing, Protestant failed to present evidence indicating the proposed use, as conditioned, would injure existing water rights on the relevant reach of the North Powder River.

As for Protestant’s assertion that the quantity of water identified in the PFO and draft water right certificate is excessive, Protestant failed to meet its burdens of production and persuasion. The record shows resident rainbow trout are present in the relevant reach of the North Powder River during all life stages. Protestant presented no evidence on the presence or absence of fish species in the relevant reach. The record also shows ODFW developed the necessary streamflow amounts in the application using the Oregon Method, which is an approved method found in ODFW administrative rules. ODFW’s use of the Oregon Method complies with the application requirements in OAR 690-077-0020(3). Moreover, the record shows ODFW relied on comprehensive field studies conducted in 1965 and 1966 related to the habitat needs of various fish species – including resident rainbow trout – in calculating in-stream flow needs. Protestant, by contrast, provided no evidence showing ODFW’s use of the Oregon Method was impermissible or that the habitat needs of the target fish species was different in any material respect from that stated in the application.

At hearing, Protestant targeted the underlying data used by OWRD to calculate EANF in the relevant reach of the North Powder River and the lack of a technical review in OWRD’s evaluation of the application. Protestant takes issue with the lack of raw data in the record showing the actual stream gage and other data used in the EANF calculations. Nonetheless, Protestant failed to present any evidence to rebut those numbers. Moreover, despite the extensive period between filing of the protest and hearing in this matter, Protestant appears to have made no effort to obtain that underlying data from OWRD through prehearing discovery proceedings. As set forth above, it was incumbent upon Protestant to ensure evidence supporting its position was offered into the record. *See May Trucking Co.*, 203 Or. App. at 572-573. Without more, I find Protestant’s argument that OWRD’s EANF calculation is unreliable because the hearing record does not contain the exhaustive records contained in OWRD’s databases to be unpersuasive.

Finally, Protestant argues OWRD failed to follow the appropriate administrative rules when processing the application because it applied the Initial Review rule found at OAR 690-077-0029 rather than the Technical Review rule found at *former* OAR 690-77-026. I find this argument to be

without merit. The record reveals that – while ODFW filed the application in 1992 – due to a lack of staff in the water rights section at the time, OWRD was unable to process the application until 1996. In the intervening period, OAR 690-77-026 was repealed and replaced with the current OAR 690-077-0029.

At that time, OWRD adopted OAR 690-310-0005, providing guidance on processing applications pending as of June 30, 1995, which reads:

Pursuant to section 46, chapter 416, Oregon Laws 1995, for each application described under OAR 690-310-0000 that was pending or filed with the Commission or the Department on June 30, 1995, the Department shall determine an appropriate step in the process established in chapter 416, Oregon Laws 1995 and this division at which to continue the application process for the application. The definitions and provisions of this division shall be applied as appropriate, to reflect the step determined by the Department.

Under that rule, OWRD was authorized to determine the most appropriate step in the application process for all pending ISWR applications. According to the record, Dwight French, then manager of OWRD’s water rights section, determined the most appropriate step in the process for the pending application as of 1996 was the initial review. At that time, the application had not progressed beyond a completeness review required by prior and current rules. Moreover, the technical review rule advocated for by Protestant had been repealed and was no longer available to OWRD. Accordingly, I find OWRD’s determination to use the initial review rather than the technical review appropriate under the statutes and administrative rules in effect at the time the application was processed.

OWRD established that it complied with the statutes and administrative rules in place at the time it processed the application. Moreover, the record shows OWRD used all available streamflow data as well as generally accepted hydrologic methods for estimating streamflow where no such data was available. Finally, OWRD demonstrated that, as conditioned, the ISWR proposed in the PFO would not impair or be detrimental to the public interest. In contrast, Protestant failed to establish the amount of water authorized for the ISWR exceeds the amount necessary for maintenance and conservation of aquatic and fish life, wildlife, fish and wildlife habitat, or any other ecological value.

### **CONSIDERATION OF EXCEPTIONS**

The Director considers and disposes of OWRD’s and ODFW’s joint exceptions to the ALJ’s Proposed Order as shown below. The Director may modify a proposed finding of historical fact only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. ORS 183.650(3); OAR 137-003-0665(4). A finding of historical fact is a determination “that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.” ORS 183.650(3); OAR 137-003-0665(4). The Director finds that all changes to the Proposed Order made in response to the exceptions are supported by evidence in the record that meets the

highest potentially applicable standard of “clear and convincing.” In this section, additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

**Exception No. 1:** OWRD and ODFW take exception to typographical errors throughout the Proposed Order, including typographical errors in the History of the Case that use the singular “a Proposed Final Order” and “PFO” and do not match the plural “applications.”

**Disposition:** The exception is allowed. The Proposed Order is amended as described below to correct the typographical errors identified in OWRD’s and ODFW’s joint exceptions:

**First sentence of first paragraph of History of the Case:** “On August 27, 1996, Oregon Water Resources Department (OWRD or Department) issued ~~a~~ Proposed Final Orders (PFO or Notice) proposing to approve four applications for in-stream water rights (ISWR) filed by the Oregon Department of Fish and Wildlife (ODFW), seeking in-stream water rights for fish passage and habitat.”

**Second sentence of first paragraph of History of the Case:** “On October 11, 1996, the Powder Valley Water Control District (Protestant or PVWCD) filed a protest to the PFOs.”

**Fourth sentence of seventh paragraph of History of the Case:** “AAG Anika Marriott appeared with Chandra Ferrari ~~Donetta Faucera~~ on behalf of ODFW.

**First sentence of Finding of Fact 7:** “To determine the appropriate amount of in-stream flow in a given reach, ODFW will evaluate the fish species present, determine which life stages are present ~~the species spends~~ in the stream or reach by half-month, and calculate the required flows for each life stage.”

**First sentence of Finding of Fact 12:** “ODFW relied on recommended minimum flows for resident fish identified in the report when determining the appropriate amount of in-stream flow for maintenance ~~of~~ and conservation of target species present in the stream or reach in issue.”

**First sentence of Finding of Fact 20:** “Within the Powder River Basin, OWRD ~~obtains~~ obtained data from several index and short record stream gages<sup>11</sup>, including at least one gage on Wolf Creek and one on Rock Creek in the vicinity of the requested ISWR.”

**First sentence of first paragraph of Opinion:** “Protestant asserts OWRD erred in issuing the Proposed Final Order because the amount of water authorized for the in-stream water right exceeds the amount necessary under applicable statutes and rules.”

**Fifth sentence of seventeenth paragraph of Opinion:** “As set forth above, it was incumbent upon Protestant to ensure evidence supporting its position ~~positon~~ was offered into the record.”



**Exception No. 2:** OWRD and ODFW take exception to the reference to determining “availability of water” in Finding of Fact 16, and further take exception to multiple instances (described in Exception Nos. 4, 5, and 6) in which OWRD and ODFW allege the Proposed Order reverses the terms “EANF” and “water availability” and thus incorrectly describes the role that EANF and water availability play in OWRD’s analysis of instream water right applications.

**Disposition:** The exception is allowed with respect to Finding of Fact 16. The first sentence in Finding of Fact 16 summarizes OWRD’s process whereby the surface water section calculated EANF and provided the “water availability information” for inclusion in the initial review. (Ex. A12.) The record reflects that the specific information in the initial review is EANF. The reference to determining the “availability of water” should be deleted because it suggests available water, and water availability data is not in the initial review. (Ex. A05.)

**The first sentence of Finding of Fact 16 is amended as follows:** "When reviewing applications for ISWRs, OWRD’s surface water section will determine the estimated average natural flow (EANF), or prehistoric flow levels, in a particular stream or reach to ~~determine availability of water.~~"

The exception is also allowed with respect to the Proposed Order’s reversal of the terms “EANF” and “water availability.” The record reflects that, when OWRD calculates EANF and water availability, EANF (also referred to as “natural streamflow”) is first determined. After EANF is determined, water availability may be calculated. “Water availability is the amount of water that is available for appropriation from a given point on a given stream for new out-of-stream consumptive uses. It is obtained from the natural streamflow by subtracting existing instream water rights and out-of-stream consumptive uses.” (Ex. A23 at 10.)

In the legal analysis of an instream application, water availability is first considered because ORS 537.153(2) describes a rebuttable presumption of being in the public interest if “water is available,” among other factors. A second step involves EANF. As stated in the Opinion of the Proposed Order, “[p]ursuant to OAR 690-077-0037(2), if OWRD determines that the public interest presumption is not established, it must determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) and may either propose denial of the application or condition the application so the proposed use, as conditioned, will not impair the public interest.” One of the conditions that may be applied is limiting the amount of an instream water right to EANF following OAR 690-077-0015(4) which states “the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system.”

Changes to the Proposed Order to address the reversal of “EANF” and “water availability” are further described in the responses to Exception Nos. 4, 5, and 7.

**Exception No. 3:** OWRD and ODFW take exception to language in Finding of Fact No. 17 that suggests that all water availability basins (WABs) have water available for appropriation and ask that Finding of Fact No. 17 be modified to remove that suggestion.

**Disposition:** The exception is allowed. The record reflects that OWRD delineated WABs to calculate water availability, without any reference to the results of a water availability calculation, such that WABs exist both for areas in which water is available for appropriation and areas in which water is not available for appropriation. (Ex. A15 at 2, 4; Ex. A16 at 1.)

**The second sentence of Finding of Fact No. 17 is amended as follows:** “In calculating EANF, OWRD hydrologists created an internal database of water availability basins (WABs) which detail watersheds within the state used for water availability~~that have water available for appropriation and have existing streamflow~~ calculations.”

**Exception No. 4:** OWRD and ODFW take exception to use of the phrase “water availability” rather than the phrase “EANF” (estimated average natural flow) in Finding of Fact No. 19 and ask that “water availability” be replaced with “EANF.” OWRD and ODFW also take exception to Finding of Fact No. 19’s characterization of the comparison of current EANF values to 1996 EANF values, and ask that Finding of Fact No. 19 be revised to more accurately represent that comparison.

**Disposition:** The exception is allowed. Replacing “water availability” with “EANF” more accurately reflects Ryan Andrews’ expert report, which is cited to support Finding of Fact No. 19 and discusses “[c]omparison of estimated average natural flow between initial review (IR) and values currently in WARS database.” (Ex. A15 at 3-4.) The remaining alterations result in a more accurate summary of the comparison between current EANF values and 1996 EANF values for IS-72188 in Ryan Andrews’ expert report. *Id.*

**The third and fourth sentences of Finding of Fact 19 is amended as follows:** “Calculation of ~~water availability~~EANF within the relevant reach of the North Powder River using the current regional regression equation shows greater natural streamflow than determined under the 1996 version in several months~~during all months except June through October.~~” Although the amounts requested in this application did not exceed the EANF in any month, ~~h~~Had the application been processed using the current regression equation, OWRD could ~~would likely~~ have approved a greater amount of ISWR during months showing greater natural flow, up to the requested amount.

**Exception No. 5:** OWRD and ODFW take exception to the last two sentences in footnote 12 and assert that those sentences should be deleted because they incorrectly state that OWRD committed a harmless error in not applying the public interest presumption provided by ORS 537.153(2) to ISWR applications IS-72163, IS-72187, IS-72188 and IS-72194.

**Disposition:** The exception is allowed. The last two sentences of footnote 12 are deleted because they incorrectly state that OWRD erred by failing to apply the public interest presumption to the ISWR applications. The record reflects that OWRD correctly did not apply the ORS 537.153(2) public interest presumption because OWRD determined that water was not available at “the amount requested year-round because the unappropriated water available is less than the amounts requested during some months.” (Exs. A08 at 3; A09 at 3; A10 at 3; A11 at 4.)

**Footnote 12 is amended as follows:** The record demonstrates that, based on OWRD’s EANF calculations, natural streamflow in the specific reach of the North Powder River for each month exceeded the amount requested in the application. However, the record also demonstrates two of the four applications filed by ODFW in this basin requested ISWRs that exceeded, in at least some months of the year, EANF calculations. ~~Consequently, OWRD processed all applications without the statutory presumption. Because OWRD found, and the ALJ concurs, that the proposed use will not impair or be detrimental to the public interest, failure to apply the statutory presumption constitutes harmless error.~~

**Exception No. 6:** OWRD and ODFW take exception to Finding of Fact No. 26’s statement of the amount of the approved instream amount for the second half of February and ask that the amount be changed to 20 cfs.

**Disposition:** The exception is allowed. The record reflects that the approved instream flow amount for the second half of February is 20 cfs. (Ex. A10 at 4-5).

**Finding of Fact No. 26 is amended as follows:** On August 27, 1996, OWRD issued its PFO finding ODFW had satisfied all application requirements and proposing to approve the application, as conditioned to adjust for EANF. The PFO contained a draft water right certificate identifying the approved in-stream flow amounts as: January – 12 cfs; February – 12 cfs for the first half and ~~10~~20 cfs for the second half of the month; March through June – 25 cfs each month; July – 20 cfs for the first half and 15 cfs for the second half of the month; and August through December – 12 cfs each month. (Test. of French; Ex. A10 at 1-5.)

**Exception No. 7:** OWRD and ODFW take exception to a reference to ORS 534.349 in the fifth paragraph of the Opinion and ask that it be corrected to ORS 537.349. OWRD and ODFW also take exception to a reference to water availability and EANF in the fourteenth paragraph of the Opinion and ask that it be corrected so the term water availability is associated with whether water is available for appropriation, and EANF is associated with whether the applied-for instream amounts were reduced.

**Disposition:** The exception is allowed with respect to the reference to ORS 534.349 in the fifth paragraph of the Opinion. The reference to ORS 534.349 is clearly a typographical error, because 537.349 requires OWRD to process applications for ISWRs in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.252, while ORS 534.349 does not.

**The third sentence of the fifth paragraph of the Opinion is amended as follows:**  
“ORS ~~534~~537.349 requires OWRD to process applications for ISWRs in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.252.”

The exception is also allowed with respect to the reference to water availability and EANF in the fourteenth paragraph of the Opinion. The record reflects that OWRD concluded it

could not apply the ORS 537.153(2) presumption because calculations showed that water was not available for appropriation in the amounts requested in certain months, but that, after considering EANF in the relevant reach, OWRD determined that the proposed use could be conditioned to avoid impairment or detriment to the public interest by limiting the ISWR to the EANF calculations for each month. (Ex. A10 at 2-4.)

**The first sentence of the fourteenth paragraph of the Opinion is amended as follows:** “Because ~~EANF~~ calculations showed water was not available in the amount requested from each month identified in the application, OWRD concluded it could not apply the statutory presumption – found in ORS 537.153(2) – that the proposed use would not impair or be detrimental to the public interest.”

**The third sentence of the fourteenth paragraph of the Opinion is amended as follows:** “After evaluation of the proposed use and ~~EANF water availability~~ in the relevant reach, OWRD determined the proposed use could be conditioned to avoid impairment or detriment to the public interest by limiting the ISWR to EANF calculations for each month.”

**Change to footnote 11:** OWRD’s and ODFW’s joint exceptions include a proposed change to footnote 11, which describes what constitutes an “index gage” versus a “short-record gage.”

**Disposition:** The exception is allowed. Based on Ryan Andrews’s testimony, OWRD’s and ODFW’s proposed footnote 11 describes the natures of index and short-record gages more comprehensively and accurately than the Proposed Order’s footnote 11. (Test. of Andrews Day 1 p.m. at 2:15.)

**Footnote 11 is amended as follows:** “Index gages have at least 30 years of record spanning the entire base period of 1958-1987. Short-record gages typically have at least five years of consecutive record, but do not encompass the entire base period. (Test. of Andrews Day 1 p.m. at 2:15.)~~Index gages cover a significant period ranging from 31 to 95 years in length. (Ex. A26 at 73-78.) Short record gages generally cover periods ranging between 1 and 60 years in length. (Ex. A26 at 80-98.)~~”

## **DIRECTOR’S AMENDMENTS TO THE PROPOSED ORDER**

In addition to the amendments discussed in the “Consideration of Exceptions” section, the Director has amended the Proposed Order as described below. The Director finds that none of the changes described below constitute changes to a finding of historical fact as “finding of historical fact” is defined in ORS 183.650(3) and OAR 137-003-0665(4). In this section, underlined text indicates additions to the text of the Proposed Order and ~~strikeout~~ text indicates deletions from the Proposed Order.

**Amendment No. 1:** The fourth paragraph of the History of the Case is amended to reference scheduling a second prehearing conference “in April 2023” rather than “April 2023.”

**Amendment No. 2:** The seventh paragraph of the History of the Case is amended to change “was” to “were” to agree with the number of witnesses that testified on behalf of OWRD.

**Amendment No. 3:** The History of the Case is updated to reflect issuance of the Proposed Order, the filing and consideration of exceptions, and issuance of this Final Order.

**Amendment No. 4:** The Evidentiary Ruling is amended to replace “Appellant” with “Protestant” to agree with the way Protestant Powder Valley Water Control District is referenced throughout the order.

**Amendment No. 5:** Finding of Fact No. 17 is amended to correct the spelling of “water master” to “watermaster.”

**Amendment No. 6:** The final sentence of the eleventh paragraph of the Opinion is amended as follows:

If a party protesting the application does not overcome this finding, OWRD must issue a proposed final order ~~recommending issuance of a water right certificate approving the application~~ subject to appropriate modifications or conditions. ~~OAR 690-077-0037(4)~~ OAR 690-077-0037(6) and (7) and OAR 690-077-0047(2).

"Proposed final order" is amended to "final order" because under OWRD's instream water right application processing procedure, issuance of a proposed final order occurs before, rather than after, protests are filed, such that if a party has protested an instream water right application, OWRD has already issued a proposed final order. OAR 690-077-0043(1) (providing that "[a]ny person may submit a protest against a proposed final order"); OAR 690-077-0037(4) (describing receipt of a protest after issuance of a proposed final order). "Recommending issuance of a water right certificate" is amended to "approving the application" because final orders approve or deny instream water right applications, rather than recommending approval or denial. OAR 690-077-0047(2). Finally, the citation to OAR 690-077-0037(4) is replaced with a citation to OAR 690-077-0037(6) and (7) and OAR 690-077-0047(2), because it is OAR 690-077-0037(6) and (7) and OAR 690-077-0047(2), rather than OAR 690-077-0037(4), that require OWRD to issue a final order approving a protested instream water right application if the Director determines, either with or without a contested case hearing, that the proposed use would not impair or be detrimental to the public interest.

**Amendment No. 7:** The "Order" section is amended to expressly state the consequences of affirming the Proposed Final Order issued on August 27, 1996.

**Amendment No. 8:** Footnote 2 is amended as follows to accurately quote the Request for Consideration of Second Issue:

That proposed issue statement read, "Whether the amount of the ISWR would adversely affect the Protestant and other potential water users by further over appropriating the stream and preventing any other new appropriations of water.

This is of great concern to the Protestant and their obligations and responsibilities now and in the future to water users and storage projects.” Request for Consideration of Second Issue at 2.

**Amendment No. 9:** The second sentence of the fourth paragraph of the “Opinion” section is amended as follows to accurately quote ORS 537.322(5)(b):

Through ORS 537.332 through 537.360, the Oregon legislature declared that “[p]ublic uses are beneficial uses,” see ORS 537.334(1), and defined public use to include, inter alia, “[r]ecreation[,] [c]onservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat ~~or~~ and any other ecological values[.]” ORS 537.332(5)(a),(b).

### ORDER

The Proposed Final Order issued by OWRD on August 27, 1996, is AFFIRMED. Consistent with the Proposed Final Order’s recommended action, Water Right Application IS-72188 is approved and the attached Certificate 97532 is issued with conditions.

Dated in Salem, Oregon on December 29, 2023.

/s/ 

Katherine Ratcliffe  
Water Rights Section Manager  
For DOUGLAS E. WOODCOCK, ACTING DIRECTOR  
Oregon Water Resources Department

### NOTICE

Under ORS 537.349, ORS 537.173(1), and OAR 690-002-0190(1), any party to this matter may file exceptions to this order with the Oregon Water Resources Commission. Exceptions must be filed within 20 days following the date of service of the order. If the order was mailed, the date of service is the day it was mailed. Parties must file any exceptions by emailing the exceptions to [will.d.davidson@water.oregon.gov](mailto:will.d.davidson@water.oregon.gov).

Appeal of this order is to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075(2). If no exceptions to this order are filed with the Oregon Water Resources Commission, petitions for judicial review of this order must be filed with the Court of Appeals within 60 days from the day this order was served. If the order was mailed, the date of service is the day it was mailed. Failure to file exceptions within the 20-day time period or a petition for judicial review within the 60-day time period will waive your right of appeal. An issue that was not raised before the administrative law judge or in exceptions filed with OWRD or the Oregon Water Resources Commission cannot be raised on appeal to the Oregon Court of Appeals. *Innovative Design & Constr., LLC v. Constr. Contractors Bd.*, 278 Or. App. 448, 454, 375 P.3d 533, 536 (2016); *Watts v. Oregon State Bd. of Nursing*, 282 Or. App. 705, 386 P.3d 34 (2016).

**CERTIFICATE OF SERVICE**

I certify that on **December 29, 2023**, I served the foregoing FINAL ORDER IN CONTESTED CASE by electronic mail and by mailing in a sealed envelope, with first-class postage prepaid, as follows:

BY ELECTRONIC MAIL:

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*/s/ Will Davidson*  
Will Davidson  
Protest Program Coordinator  
Oregon Water Resources Department