BEFORE THE
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF WATER RIGHT APPLICATION IS-72191	)	**FINAL ORDER IN CONTESTED CASE**
OREGON DEPARTMENT OF FISH AND WILDLIFE *Applicant/Proponent*	)	OAH Reference No.: 2021-OWRD-00089 Agency Case No.: IS-72191
BAKER VALLEY IRRIGATION DISTRICT *Protestant*	)	

HISTORY OF THE CASE

On May 14, 1996, the Oregon Water Resources Department (OWRD or Department) issued a Proposed Final Order (PFO or Notice), proposing to approve, with conditions, the application filed by Oregon Department of Fish and Wildlife (Applicant or ODFW), seeking instream flows for the migration, spawning, egg incubation, fry emergence, and juvenile rearing needs of rainbow trout. On July 22, 1996, Baker Valley Irrigation District (Protestant or BVID) filed a Protest to the PFO. On September 14, 2021, OWRD referred the matter to the Office of Administrative Hearings (OAH) for further proceedings. The OAH assigned Senior Administrative Law Judge (ALJ) Dove L. Gutman to preside at hearing.

On February 15, 2023, ALJ Gutman convened a prehearing telephone conference. Assistant Attorney General Anika Marriott represented ODFW. Chandra Ferrari appeared on behalf of ODFW. Attorney Laura Schroeder represented Protestant. Assistant Attorney General Sarah Rowe represented OWRD. On February 17, 2023, ALJ Gutman issued a Scheduling Order that set forth a schedule of proceedings for prehearing matters. On February 22, 2023, the parties submitted a Stipulated Statement of the Issue.

On March 1, 2023, Protestant filed a Motion to Include Issues in Statement of Issues for Contested Case Hearing (Protestant's Motion). On March 1, 2023, ODFW and OWRD filed ODFW and OWRD Joint Motion for ALJ Ruling on Issue Statement (ODFW's and OWRD's Joint Motion). On March 8, 2023, Protestant filed BVID's Response to ODFW's and OWRD's Joint Motion (Protestant's Response). On March 8, 2023, ODFW and OWRD filed ODFW and OWRD Joint Response to Protestant's Motion (ODFW's and OWRD's Joint Response). On March 17, 2023, ALJ Gutman issued a Ruling on Motions, denying Protestant's Motion and granting ODFW's and OWRD's Joint Motion.

On April 28, 2023, Protestant filed a Motion for Summary Determination or in the Alternative Motion for Stay of Contested Case Hearing (Protestant's MSD or Motion for Stay). On May 12, 2023, ODFW and OWRD filed a Joint Response to Protestant's Motion for Summary Determination or in the Alternative Motion for Stay. On May 26, 2023, ALJ Gutman

issued a Ruling denying Protestant's MSD or Motion for Stay.

On May 26, 2023, Protestant filed a Motion to Continue Prehearing Conference. On May 30, 2023, ALJ Gutman denied Protestant's Motion to Continue Prehearing Conference. On May 30, 2023, ALJ Gutman convened a prehearing telephone conference. Ms. Marriott represented Applicant. Ms. Ferrari appeared on behalf of Applicant. Ms. Schroeder represented Protestant. Ms. Rowe represented OWRD. Patricia McCarty appeared on behalf of OWRD. During the prehearing conference, Ms. Schroeder indicated that she needed to visit OWRD's regional office in Baker City to determine if it would accommodate Protestant for the proposed video conference hearing. On her own authority, ALJ Gutman continued the prehearing telephone conference to June 1, 2023.

On June 1, 2023, ALJ Gutman convened a prehearing telephone conference. Ms. Marriott represented Applicant. Ms. Ferrari appeared on behalf of Applicant. Ms. Schroeder represented Protestant. Ms. Rowe represented OWRD. Ms. McCarty appeared on behalf of OWRD. During the prehearing conference, ALJ Gutman scheduled the hearing for June 27 and June 28, 2023. Also during the prehearing conference, Ms. Rowe agreed to accept service of Protestant's subpoenas for OWRD employees. On June 2, 2023, ALJ Gutman issued an Amended Scheduling Order that set forth prehearing matters and the scheduled dates for the contested case hearing.

On June 9, 2023, Protestant served four subpoenas on Ms. Rowe, who denied acceptance of service. On June 9, 2023, Protestant served six subpoenas by sending the subpoenas via U.S. priority mail. On June 13, 2023, ODFW and OWRD filed a Joint Motion to Quash Subpoenas. On June 16, 2023, Protestant filed BVID's Response to Joint Motion to Quash Subpoenas and BVID's Motion to Produce. On June 21, 2023, ODFW and OWRD filed a Joint Response to BVID's Motion to Produce. On June 21, 2023, ALJ Gutman requested and received from Protestant copies of the original and amended subpoenas and attachments issued by Protestant. On June 23, 2023, ALJ Gutman issued Rulings on ODFW's and OWRD's Joint Motion to Quash Subpoenas, and Protestant's Motion to Produce, granting ODFW's and OWRD's Joint Motion to Quash Subpoenas in part and denying it in part, and denying Protestant's Motion to Produce.

On June 27, 2023, Protestant filed the following: Protestant's Motion to Limit Any Expert Testimony by Joseph Lemanski in Ichthyology and if Allowed as Lay Agency Witness to Strike the Written Direct and Rebuttal Testimony of Joseph Lemanski; Protestant's Motion to Limit Any Expert Testimony by Ryan Andrews and if Allowed as Lay Agency Witness to Strike the Written Direct and Rebuttal Testimony of Ryan Andrews; Protestant's Motion to Limit Any Expert Testimony by Spencer Sawaske in Ichthyology and if Allowed as Lay Agency Witness to Strike the Written Direct and Rebuttal Testimony of Spencer Sawaske; Protestant's Motion to Limit Any Expert Testimony by Dwight French and if Allowed as Lay Agency Witness to Strike the Written Direct and Rebuttal Testimony of Dwight French; and Protestant's Motion to Strike the Written Rebuttal Testimony of Marcy Osborn (collectively Protestant's Motions to Limit and/or Strike).

On June 27, 2023, ALJ Gutman convened a video conference hearing via Webex. Ms. Marriott represented Applicant. Ms. Ferrari appeared on behalf of Applicant. Ms. Schroeder

and her associate, Kelsey Seibel, represented Protestant. Ms. Rowe represented OWRD. Ms. McCarty and Will Davidson appeared on behalf of OWRD. At the start of the hearing, ALJ Gutman denied Protestant's Motions to Limit and/or Strike. Dwight French and Ryan Andrews testified on behalf of OWRD.

The video conference hearing continued on June 28, 2023. ALJ Gutman presided. Ms. Marriott represented Applicant. Ms. Ferrari appeared on behalf of Applicant. Ms. Schroeder and Ms. Seibel represented Protestant. Ms. Rowe represented OWRD. Ms. McCarty and Mr. Davidson appeared on behalf of OWRD. Mr. Andrews and Marcy Osborn testified on behalf of OWRD. Joseph Lemanski and Spenser Sawaske testified on behalf of ODFW. Mark Ward, George Chandler, Clay McEnroe, and Jeff Colton testified on behalf of Protestant. At the conclusion of the hearing, ALJ Gutman held the record open until July 21, 2023, to receive corrected exhibits, closing arguments, and reply briefs from the parties.

On June 29, 2023, Protestant filed Corrected Exhibits R34 and R35. On July 7, 2023, OWRD and ODFW filed Joint Corrected Exhibits A1, A10, A28, A32, and A37; the excerpt of Exhibit A12 that was admitted during the hearing; and Exhibits A43 through A47 that were admitted during the hearing.

On July 14, 2023, OWRD and ODFW filed OWRD and ODFW Joint Written Closing Argument. On July 14, 2023, Protestant filed Protestant's Closing Argument, and Protestant's Notice Submitting Transcript of Hearing. On July 21, 2023, OWRD and ODFW filed OWRD and ODFW Joint Response to Protestant's Closing Argument. On July 21, 2023, Protestant filed Protestant's Reply to OWRD and ODFW Joint Closing Argument. ALJ Gutman closed the record on July 21, 2023.

ALJ Gutman issued a Proposed Order on October 17, 2023 recommending that OWRD affirm the PFO issued on May 14, 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.

Protestant timely filed exceptions to the Proposed Order on November 15, 2023. OWRD and ODFW timely filed joint exceptions to the Proposed Order on November 16, 2023. Now, OWRD's Acting Director (Director) considers the exceptions, allows some and declines some, and issues this final order affirming the PFO, approving Water Right Application IS-72191, and issuing the attached Certificate 97653 with conditions.

The "History of the Case," "Stipulated Issue," "Evidentiary Ruling," "Qualifications on the Record," "Findings of Facts," "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.

STIPULATED ISSUE

Did OWRD properly determine Estimated Average Natural Streamflow (EANF) for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4).

EVIDENTIARY RULINGS[1]

On June 26, 2023, OWRD's and ODFW's Joint Exhibits A2 through A7, A39 and A40 were admitted into evidence without objection. Joint Exhibits A1, A10, A20, A27 through A30, A32, and A37 were admitted into evidence over Protestant's objections regarding qualifications, relevance, hearsay, and speculation. Joint Exhibits A8, A9, A11, A13 through A19, A21 through A26, A31, A33 through A36, A38, A41, and A42 were admitted into evidence over Protestant's objections regarding authenticity, relevance, hearsay, and unduly repetitious. Joint Exhibit A12, pages 31-33 and 106-107 were admitted into evidence over Protestant's objections regarding authenticity, relevance, and hearsay. The remaining pages of Joint Exhibit A12 were excluded from evidence on the basis of relevance. Joint Exhibits A43 through A45 were admitted into evidence over Protestant's objections regarding qualifications.

Protestant's Exhibits R1 through R27, R31 and R32 were admitted into evidence without objection. Following objections from OWRD and ODFW, Exhibits R28 and R30 were excluded on the basis that they were incomplete documents. Exhibit R29 was admitted into evidence over OWRD's and ODFW's objections regarding relevance.

On June 27, 2023, OWRD's and ODFW's Joint Exhibits A46 and A47 were admitted into evidence without objection. Following an objection from OWRD, Protestant's Exhibit R32, which had been previously admitted, was stricken from the record on the basis of accuracy. Protestant's Exhibits R33 through R36 were admitted into evidence without objection.

On June 29, 2023, Protestant's Corrected Exhibits R34 and R35 were admitted into evidence without objection. On July 7, 2023, OWRD's and ODFW's Joint Corrected Exhibits A1, A10, A28, A32, and A37 were admitted into evidence without objection.

QUALIFICATIONS ON THE RECORD

Mr. Andrews was qualified on the record as an expert hydrologist with expertise in OWRD's Water Availability Reporting System (WARS). Mr. Lemanski was qualified on the record as an expert fish biologist with expertise in fish distribution and fish habitat needs of rainbow trout. Mr. Sawaski was qualified on the record as an expert instream scientist and

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[1] OWRD's and ODFW's Pleadings P1 through P26 were submitted in the record on June 16, 2023.

hydrologist with expertise in hydrology and instream flow needs for rainbow trout.

FINDINGS OF FACTS

Legislative background

1. In 1987, the Oregon Legislature enacted Senate Bill (SB) 140 (1987); Oregon Laws 1987, chapter 859 (codified at ORS 537.332 through 537.360), creating instream water rights securable by three separate state agencies, including ODFW, for public benefit. The legislation authorized ODFW to apply for instream water rights to secure instream flows necessary for, *inter alia*, the conservation and maintenance of aquatic and fish life, wildlife, and fish and wildlife habitat. (*See* ORS 537.332 and 537.336(1).)

2. In October 1988, the Oregon Water Resources Commission adopted administrative rules for the application, processing, and administration of instream water rights created by SB 140. (*See* OAR Chapter 690, Division 77.)

Instream water rights generally

3. Instream water rights can be applied for by Department of Environmental Quality, Department of Parks and Recreation, and ODFW. When an instream application is received and accepted as complete, OWRD assigns it a tentative priority date. When a certificate is issued, that date becomes the priority date. Instream water rights go straight to certificate, there is no permit. The certificate is issued in the name of OWRD and OWRD holds the right in trust for the state of Oregon. (Ex. A1 at 2.)

4. OWRD's role is to process the application consistent with its statutes and rules. Currently, when an application is filed, OWRD's first major step is to issue an initial review of the application. For applications filed before July 1995, OWRD issued a report of technical review.[2] An initial review and a report of technical review are very similar, and represent OWRD's legal and scientific analysis of the application. (Exs. A1 at 2-3, A3 at 1.)

5. After OWRD issues the initial review or report of technical review, there is a public notice and a public comment period. Before 1996, the terminology used was that individuals could file comments or "objections." (*See e.g.*, Ex. A4 at 12, 18.) OWRD considers the public comments received in drafting the PFO. Before issuing the PFO, OWRD conducts a public interest review. (Ex. A1 at 2; *see* ORS 537.153(2), OAR 690-077-0037(1), (2).)

6. Following issuance of the PFO, OWRD provides public notice and a protest period. If no protest is received, OWRD issues a final order with an instream certificate. If a protest is received, OWRD determines if the case can be settled. If the case cannot be settled, OWRD

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[2] In January 1996, the Oregon Water Resources Commission repealed the report of technical review requirement and replaced it with the initial review requirement. (*See* OAR 690-077-0029.)

refers the application for a contested case hearing as the budget allows. (Ex. A1 at 3.)

OWRD's determinations generally

7. OWRD's major determination for an instream water right application is how much water on a month by month, or half month basis, should be in the certificate. OWRD makes that determination by comparing the instream flow amounts requested in the application to the Estimated Average Natural Flow (EANF), or natural streamflow, in the identified stream or reach. (Ex. A1 at 3.)

8. OWRD's technical staff in the surface water section determines EANF and water availability in the stream or reach, and then provides the results to the staff in the water rights section.[3] OWRD then compares EANF to the amount requested in the application and grants the lesser of the two amounts, if appropriate. (Exs. A1 at 3-4, A10 at 2; test. of Andrews.)

9. Following the initial review or technical review of the application, OWRD must determine whether the public interest presumption in ORS 537.153(2) is established for the proposed water use. If the public interest presumption is not established, the Department must then determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8).[4] (*See* ORS 537.153(2), ORS 537.170(8).)

EANF generally

10. EANF is defined as "average natural flow estimates derived from watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology." (*See* OAR 690-077-0010(10); Ex. A10 at 2.)

11. EANF is meant to represent prehistoric streamflow. EANF is the flow in a stream when there are no consumptive uses and there is no flow regulation by dams or reservoirs. EANF is natural streamflow. (Exs. A10 at 2, 7-8, A11 at 15, A32 at 5; test. of Andrews.)

12. EANF is the upper limit to the amount of instream flow OWRD will propose to approve for a given month or half month when the source of instream flow is natural streamflow.[5] (Ex. A1 at 3.)

13. OWRD's standard representation of EANF as it relates to evaluating instream water right applications is the 50 percent exceedance streamflow, or the streamflow that occurs at least

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[3] Water availability is set forth in more detail later in this order. (*See infra.*)

[4] If the requested flows exceed EANF, OWRD will limit the amounts to the level of EANF in order to find the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170. (Ex. A1 at 4.)

[5] The amount allowed for appropriation of an instream water right shall not exceed the EANF except under certain limited conditions. (*See* OAR 690-077-0015(4); Ex. A10 at 2.)

50 percent of the time. (Exs. A10 at 2, A12 at 106.)

Water availability generally

14. Water availability is the amount of water that can be appropriated for new out-of-stream consumptive uses. Water availability is obtained by subtracting existing reservoir storage, out-of-stream consumptive uses, and instream demands from natural streamflow. (Test. of Andrews; Exs. A10 at 2, A35 at 2.)

15. Water availability and EANF are calculated at the pour points (*i.e.*, mouths) of all water availability basins (WABs) across the state. WABs are pre-defined areas for which estimations of water availability and natural streamflow are produced. (Exs. A10 at 4, A32 at 3, A35 at 2.)

16. In general, the calculation of water availability at one WAB cannot be considered in isolation from other WABs in the same stream system. For water to be available at any given upstream point, it must be available at all points of calculation downstream. (Exs. A11 at 13, A35 at 2.)

17. Water availability is one of the factors considered in determining whether the public interest presumption is established. (*See* ORS 537.153(2).) Water availability is not a factor in determining the amount of an instream water right. (Test. of Andrews; Ex. A10 at 2; *see* OAR 690-077-0015(3).)

The application from ODFW

18. On January 29, 1992, ODFW filed Instream Water Right Application IS 72191 (the application) with OWRD, seeking to protect the minimum instream flows necessary for the maintenance and conservation of rainbow trout lifecycles and habitat in the Powder River, a tributary of the Snake River, in Baker County, Oregon. (Ex. A2 at 1-4.) According to the application, ODFW requested the instream water right be maintained in the Powder River from the Mason Dam at river mile 131.2 to the Thief Valley Reservoir at river mile ±74.0. (*Id.* at 1; *see also* Ex. A5 at 1.)

19. In the application, ODFW requested instream flows for the migration, spawning, egg incubation, fry emergence, and juvenile rearing needs of rainbow trout in the following amounts, measured in cubic feet per second (cfs), by month (or half month):

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st ½	25.0	25.0	40.0	40.0	40.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd ½	25.0	30.0	40.0	40.0	40.0	30.0	25.0	25.0	25.0	25.0	25.0	25.0

(Ex. A2 at 1; *see also* Ex. A5 at 1.) ODFW did not request instream flows for the restoration or enhancement of fish habitat or population. (Ex. A2 at 2.)

20. According to the application, ODFW used the Oregon Method, an acceptable method

adopted by rule by the Oregon Fish and Wildlife Commission, formerly known as the Oregon State Game Commission, for determining instream flow requirements for rainbow trout in the identified reach of the Powder River. (Exs. A2 at 1, A27 at 2-3.)

The Oregon Method

21. The Oregon Method is a procedure for determining flow requirements for different life stages of species, based upon the notion that specific life stages of specific species have a preference for different habitat types as well as hydraulic conditions within those habitat types, meaning the depth and velocity of water. (Ex. A27 at 2-3.)

22. Instream scientists determine the necessary flow needs of fish by comparing hydraulic data to known habitat suitability characteristics according to the Oregon Method. Hydraulic data (*e.g.*, velocity and depth) are collected at specific data collection transects (*i.e.*, channel cross sections) representing different habitat types over a range of flow conditions. Hydraulic conditions over the range of flows observed are then compared to species and life stage specific hydraulic preferences to determine the minimum necessary instream flows. (Ex. A27 at 3.) There are specific habitat and hydraulic requirements for the four key life stages of fish: adult migration, spawning, egg incubation, and juvenile rearing. (Ex. A27 at 3.)

ODFW's instream flow requests

23. ODFW maintains a Fish Habitat Distribution database, which compiles fish observation data and professional opinion-based data from biologists with ODFW and other natural resource agencies, tribes, universities, and non-profit contributors to that database. This database began development in the 1990s and represents a compilation of decades of information on current and historic fish distribution and habitat. This database is updated regularly – meaning approximately on an annual basis, or as new information becomes available. Any entry into the database or revision to the database goes through a validation process, essentially a quality assurance and quality control process for ensuring consistency with the Oregon Fish Habitat Distribution Data Standard. (Ex. A20 at 2.)

24. Rainbow trout are present in the Powder River and utilize the instream reach identified in the application for their life history needs. (Exs. A20 at 2, A21-A26, A27 at 2.)

25. The instream flow amounts requested in the application are based upon the flow needs for the individual life stages of rainbow trout. The requested flows are necessary to ensure the fish are able to move up and down the identified reach, including sufficient flows to allow the fish to migrate past any impediments in the stream channel. The requested flows will ensure sufficient stream depth for food, shelter, substrate, spawning, and egg incubation. The requested flows will also ensure sufficient habitat for the various stages of juvenile rearing in the stream. (Exs. A20 at 3, A27 at 4.) Lower instream flow levels will have a negative impact on the rainbow trout population in the identified reach. (Exs. A20 at 5, A27 at 4.)

26. The requested monthly instream flow amounts are the minimum amounts necessary to maintain the rainbow trout populations at their current levels in the identified reach. (Exs. A3

at 6, A5, A20 at 2, A21-A26, A27 at 4.)

27. ODFW's instream flow requests are based upon values set forth in a report titled, "The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements: A Report with Recommendations to the Oregon State Water Resources Board" (the Powder Basin Report) authored in August 1967 by James Hutchinson and John Fortune of the Oregon State Game Commission. (Exs. A20 at 4, A23, A27 at 3.) The Powder Basin Report is based on field studies conducted in the basin, including in the identified reach, in May through October of 1965 and August 1966, which collected data over a range of flow conditions and periods representative of key life stages for rainbow trout including spawning, egg incubation, rearing, and migration. The hydraulic and habitat distribution field data was compared to habitat suitability data for each life stage according to the Oregon Method to determine the recommended minimum instream flow amounts for resident fish in the Powder River Basin. (Exs. A20 at 4, A23, A27 at 3.)

28. ODFW relied on the recommended minimum instream flows identified in the Powder Basin Report when determining the appropriate amount of instream flow for the maintenance and conservation of rainbow trout present in the identified reach. (Exs. A20 at 4, A23 at 21, A27 at 3.) The recommended minimum instream flows are based on natural streamflow. (Ex. A20 at 4.)

29. ODFW also relied upon three additional reports to support its requested instream flow amounts: 1) "Determining Streamflow for Fish Life" authored in March 1972 by Ken Thompson of the Oregon State Game Commission; 2) "Development and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids" authored in April 1973 by Allan K. Smith of the Oregon State Game Commission; and 3) "Determining Minimum Flow Requirements for Fish" prepared in January 1984 by ODFW. (Exs. A22, A24, A25.)

30. The data collected in the Powder Basin Report remains reliable and accurate. (Ex. A27 at 3.) There has not been any basin-scale change in geomorphology of the stream, nor any substantial change in the depth, velocity, or habitat needs of rainbow trout since the basin studies were conducted that led to the Powder Basin Report. (Exs. A20 at 4, A27 at 3-4.)

The technical review

31. After receiving the application, OWRD determined the application was complete and gave it a tentative priority date of January 29, 1992. OWRD then began a technical review of the application. (Exs. A1 at 2, A3 at 1, 4.)

32. As part of the technical review, OWRD's technical staff in the surface water section, Richard Cooper and Ken Stahr, calculated EANF and water availability[6] in the identified reach.

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[6] The water availability results are set forth later in this final order. (*See infra.*)

The EANF results were as follows:[7]

EANF in the identified reach in cfs

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
163	230	393	740	1100	845	212	146	82.5	76.9	103	122

(Exs. A3 at 5, A10 at 9, A32 at 3.)

33. OWRD's staff in the water rights section then compared the EANF amounts to the requested flow amounts in the application and determined that the monthly requested flows were all below the monthly EANF in the identified reach. (Exs. A1 at 3, A3 at 5-6, A10 at 2.)

34. On November 25, 1994, OWRD issued a Report of Technical Review. (Ex. A3 at 3-6.) In the report, OWRD determined that the application was complete and free of defect, that the proposed use was not prohibited by law, and that the monthly instream flow amounts requested by ODFW did not exceed EANF and were allowable. (*Id.* at 5, 6.) Also in the report, OWRD concluded the following: the proposed water use, as conditioned, passed the technical review; the information contained in the application along with the supporting data submitted by applicant indicated that the flow levels were necessary to protect the public use; the supporting data stated that the recommended flows were necessary to meet the biological requirements for spawning and rearing of salmonids and resident game fish; consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels; the recommended flow volumes were necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature; the minimum stream flow recommendations developed from the 1965 and 1966 study were intended to provide suitable environment during appropriate seasons to perpetuate minimum desirable conditions capable of maintaining trout populations; and the recommended minimums were based primarily on the biological requirements of fish present and follow seasonal stream discharge patterns to which the life cycles of salmonids had become adapted. (*Id.* at 6.)

35. Following issuance of the Report of Technical Review, OWRD provided public notice and a public comment period. OWRD received and considered numerous comments on the Report of Technical Review. (Exs. A1 at 2, A3 at 4, A4.)

The public interest review

36. After conducting its technical review of the application, OWRD conducted a public interest review. OWRD first considered whether the public interest presumption set forth in ORS 537.153(2) was established for the proposed water use. As part of that consideration,

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[7] The bases for the EANF calculations are set forth later in this final order. (*See infra.*)

OWRD reviewed water availability in the identified reach as follows:

Water available for appropriation in cfs

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
103.3	145.1	225.9	503.9	454.8	-93.1	-242.0	-229.0	-150.5	58.5	61.6	68.6

(Ex. A5 at 2-3; *see* ORS 537.153(2).)

37. Because water was not available for appropriation during the months of June, July, August, and September, OWRD determined that the public interest presumption in ORS 537.153(2) was not established. (Ex. A5 at 3; *see* ORS 537.153(2).) OWRD processed the application without the public interest presumption. (Ex. A5 at 3.)

38. OWRD next considered whether the proposed use would impair or be detrimental to the public interest by considering the factors listed in ORS 537.170(8). Because the requested flow amounts in the application were below the EANF amounts in every month, OWRD determined that the proposed use would not impair or be detrimental to the public interest. (Exs. A1 at 4, A5 at 2-4.)

EANF calculations in general

39. EANF calculations are based on measured streamflow where available (*i.e.*, gaged watersheds) and for ungaged streams, by using statistical models called regional regression equations. (Ex. A10 at 2.)

40. Gaged watersheds refer to watersheds that have (or had) a streamgage that provides information necessary to compute the amount of water flowing in the river or stream, also known as discharge, in terms of cfs. (Ex. A10 at 2.) Gaged watersheds may include a single gage at the mouth of the river or multiple gages on one or many stream reaches with varying lengths and periods of record. Streamgages provide the measured data necessary to calculate natural streamflow.[8] (*Id.*)

41. Not all measured streamflow represents natural streamflow.[9] In most cases, measured streamflow needs to be naturalized to reflect natural streamflow. This is done by adding back known consumptive uses to measured streamflow in order to calculate natural streamflow. Consumptive uses represent water withdrawn from a stream for beneficial use (*e.g.*, irrigation, municipal use, etc.) and is then lost to evaporation or transpiration.[10] (Exs. A10 at 3,

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[8] OWRD maintains a hydrographics database in which it compiles all streamflow measurements from gages throughout the state. (Ex. A11 at 21.)

[9] Most measured streamflow, including what is recorded by streamgages or individual streamflow measurements, is influenced by upstream use. (Ex. A10 at 8.)

[10] Consumptive use from irrigation is obtained from estimates made by the US Geological Survey (USGS) Portland office. (Ex. A11 at 13.) Consumptive use from other uses is based on the associated

A11 at 21, 57, 65.)

42. Gaged data that has been corrected to reflect natural streamflow is then used to develop regional regression equations. (Ex. A10 at 3.)

43. Regional regression equations are statistical models that relate natural streamflow to watershed characteristics, such as physical and climatological properties, that are known to influence hydrological properties (*i.e.*, streamflow). (Ex. A10 at 3.) Regional regression equations are similar to the following, where Q_{NSF} = natural streamflow, X_n = watershed characteristic, and B_n = regression coefficient: $Q_{NSF} = \exp(B_0) X_1^{B1} X_2^{B2} X_3^{B3} \cdots$. (*Id.*) Regression coefficients are generated through calibration of the regression model by relating natural streamflow to watershed characteristics, such that any change in watershed characteristics or streamflow data used in developing the equation would have a resultant change in the regression coefficients and, ultimately, the estimates of natural streamflow produced by the equation. (*Id.*)

44. Values of watershed characteristics are typically derived by Geographical Information Systems (GIS) that summarize information over a delineated area that identifies the boundaries of a watershed. These characteristics are produced and published by agencies such as the USGS, the Oregon Climate Service, and the Natural Resources Conservation Service. Estimates of watershed characteristics are dependent upon the resolution of coverages used to extract and summarize the characteristics. Coverages refer to the data set of spatial and attribute data for geographic features. Resolution refers to the ability to recognize and distinguish features. Finer resolution coverages allow for better distinction of features and improve estimates of characteristics for watersheds. (Ex. A10 at 3-4.)

45. For watersheds where the EANF is unknown, "an estimate of the streamflow can be made by inserting the known characteristics for the watershed into the regression equation and performing the calculations." (Exs. A10 at 4, A13 at 19.) In this manner, regional regression models 'interpolate' between measured streamflow locations to unmeasured locations. (Ex. A10 at 4, A13 at 17.)

46. Correction factors are used to improve natural streamflow estimates from regional regression equations because the sum of streamflows estimated through regional regression equations for contributing areas above a gage should equal the gaged streamflow. (Exs. A10 at 4, A11 at 47.)

47. Regional regression equations are acceptable scientific and hydrological methods for determining natural streamflow. (Test. of Andrews; Ex. A11 at 40.)

OWRD's previous regression equations

48. The earliest iteration of the regional regression equation used by OWRD, the

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water rights. In these cases, consumptive use is obtained by multiplying the maximum diversion rate allowed for the water right by a consumptive use coefficient. (*Id.*)

Robison Method, included four watershed characteristics as predictors of natural streamflow: drainage area, mean annual precipitation, water rights index information, and soils index information. The Robison Method did not correct measured streamflow to natural streamflow before estimating streamflow. The Robison Method used a poor method to estimate consumptive use, resulting in overestimation of consumptive use. (Exs. A10 at 5, A13 at 22, A14 at 2.)

49. In 1992, OWRD began working on the Cooper Method 1 regression equation. The Cooper Method 1 used area, precipitation, elevation, and other watershed characteristics to estimate natural streamflow. The Cooper Method 1 corrected measured streamflow to natural streamflow by adding consumptive uses back to the measured streamflow before estimating streamflow. The Cooper Method 1 used estimates from the USGS for irrigation use, and diversion rates with realistic coefficients for other consumptive uses. (Exs. A10 at 5, A14 at 3.)

50. In the mid-1990s, OWRD began using the Cooper Method 2 regression equation, which included seven watershed characteristics to estimate natural streamflow: area; maximum relief; average slope; mean elevation; mean annual precipitation; mean minimum January temperature; and mean minimum July temperature. The Cooper Method 2 corrected measured streamflow to natural streamflow by adding consumptive uses back to the measured streamflow before estimating streamflow. The Cooper Method 2 used estimates from the USGS for irrigation use, and diversion rates with realistic coefficients for other consumptive uses. (Exs. A10 at 5, 6, A14 at 4, 10.) At the time OWRD calculated EANF for IS-72191, OWRD's model did not include soil permeability as a watershed characteristic. (Exs. A15 at 36, A14 at 10.) Since 2002, the model has used soil permeability as a watershed characteristic. (*See infra* ¶ 56; Ex. A11 at 46.)

Improvements to regression equations and calculations

51. Since the early 1990's, OWRD has worked to improve its water availability calculations. OWRD adopted a common base period of 1958 to 1987 for calculation of exceedance flows. OWRD picked that common base period as the most suitable because it represented the long term average conditions for this century and because it had the most streamflow information available. (Ex. A10 at 5, A11 at 24-25, A13 at 17-18.)

52. OWRD corrected the period of record for all gages, such as short record gages or out-of-phase records, to represent the base period. The correction was based on a linear association of the short record gage with the record of a nearby gage that did coincide with the base period. This correction allowed for the inclusion of data from additional gaging stations through various iterations of the water availability estimates, even if the data was collected post-1987. (Exs. A10 at 5, A11 at 26, A13 at 18.)

53. OWRD further improved estimates of watershed characteristics, recognizing that the accuracy of the estimates was dependent upon the resolution of the coverage used to extract and summarize values of any given watershed. The early iterations were too coarse and stopped at the state line. New coverages were obtained that resulted in better estimations, particularly for smaller watersheds. (Ex. A10 at 5, A11 at 26, A12 at 31-32, A13 at 22-23.) OWRD included a

broader set of watershed characteristics into model development, and performed a statistical analysis to identify the most important watershed characteristics that would optimize the regression equations. OWRD then revised the regional regression equations to include those additional watershed characteristics. (Exs. A10 at 6, A14 at 10, A15 at 33.)

54. OWRD performed a goodness of fit evaluation on the regional regression equations statewide. OWRD compared modeled estimates to known estimates and found the equation that best fit the known data points. OWRD chose an equation that was best able to calculate EANF, fit known values, and compare and minimize error in the regression analysis. (Test. of Andrews; Exs. A11 at 45, A15 at 38.)

55. OWRD developed correction factors based on comparison of modeled and measured streamflows and used this information to ensure that the sum of estimated streamflows matches actual flows. For instance, natural streamflow calculated for a gaged watershed is compared to the natural streamflows estimated through regional regression for the corresponding watershed, which may include one or more WABs. The correction factor is calculated by dividing the actual streamflows by the corresponding sum of streamflows estimated for each WAB through regional regression. The estimated streamflows are then multiplied by the correction factor and the corrected streamflows then sum to match the actual streamflows. (Exs. A10 at 4, A17 at 1-2.) OWRD's correction factors reduce the impact of uncertainties and errors from the regression analysis. (Exs. A11 at 45, 68, A32 at 4.)

56. OWRD's current regional regression equation relies on up to 10 watershed characteristics to predict natural streamflow. Those watershed characteristics include: watershed area; maximum watershed relief; mean watershed slope; mean slope aspect; mean elevation; mean January precipitation; mean July precipitation; mean January maximum temperature; mean July minimum temperature; and soil permeability. (Exs. A10 at 6, A11 at 39, Table 16, 46, Table 20.) OWRD has the ability to estimate 93 watershed characteristics. (Ex. A11 at 44.)

OWRD's water availability reporting system

57. In 1989, the Oregon Legislature directed OWRD to establish a Water Availability Program. The directive had three parts: 1) To set standards for evaluating whether water is available for in-stream and out-of-stream uses; 2) To establish and maintain a Water Availability Database based on these standards; and 3) To use the database to evaluate applications for new uses of surface water. (Ex. A11 at 14.)

58. In July 1992, the Water Resources Commission adopted into rule the standards for determining water availability of surface water. The purposes of those standards were to limit new appropriations of water to situations where the applicant could expect use of water a reasonable amount of time, and to limit situations where the Department would have to regulate water use. (Ex. A11 at 14.)

59. OWRD subsequently created a computer database for tracking water availability in each basin throughout the state, referred to as the Water Availability Reporting System (WARS). Because WABs and EANF are known requirements in evaluating instream water rights

applications, the developers of WARS generated WABs with pour points associated with the downstream ends of reaches with instream water rights applications. WARS became operational in 1993. (Exs. A11 at 68, A32 at 3, A35 at 2.)

60. WARS currently contains water availability calculations for over 2,300 WABs within the state. (Exs. A11 at 13, 119-169, A35 at 2.) The water availability calculations in the database considered all relevant storages, out-of-stream consumptive uses, instream water rights, and scenic waterway flows. (Ex. A11 at 67.)

61. OWRD performed a goodness of fit evaluation on all of the WABs with gages used in the development of WARS. (Test. of Andrews; Ex. A11 at 73-98.)

62. WARS divides the state into two regions: East and West of the Cascades. East of the Cascades is Region 2. (Test. Andrews.)

63. WARS contains OWRD's current regional regression equation to calculate natural streamflow. (Exs. A10 at 9, A32 at 2, A35 at 2-5.)

64. The program in WARS recognizes WABs that have contributing flows based on their location in the basin, as well as the tributary and/or river that they feed into. WARS factors those contributing flows into the natural streamflow calculation. (Test. of Andrews.)

65. Currently, a hydrologist can review an instream water right application in WARS by inserting the location of the reach by basin, watershed ID, or water right on the homepage. (Test. of Andrews; *see* Ex. A33 at 1.) WARS then produces a Water Availability Analysis "Detailed Reports" page, which includes the values for "Natural Stream Flow" by month. (Ex. A34 at 1; test. of Andrews.) The hydrologist can click on other tabs, including the "Complete Water Availability Analysis" to view additional detail on aspects of the water availability calculation, such as a breakdown on the different types of consumptive uses. (Ex. A32 at 2.)

66. WARS does not show the components that go into the regression equation because, among other things, it would be impractical to display all the data used for the watershed characteristics and regression coefficients, as well as the information used to develop correction factors for improving estimates of natural streamflow generated by the regression equation. (Ex. A32 at 1-2.)

OWRD's calculations of EANF for application IS 72191

67. In general, upstream flow values are lower than downstream EANF. (Test. of Andrews; Ex. A32 at 5.)

68. For application IS 72191, OWRD created WAB 72191 to estimate natural streamflow. (Exs. A10 at 6, A11 at 143, A16 at 1, A34 at 1.) OWRD estimated EANF at the downstream end, or pour point, of WAB 72191. (Test. of Andrews; Ex. A32 at 3.)

69. WAB 72191 included all contributing flows (*i.e.*, flows that feed into the identified

reach) from WABs upstream of the downstream end of IS 72191. WARS included the contributing flows in the natural streamflow calculation for IS 72191. (Test. Andrews; Ex. A16.)

70. OWRD calculated EANF for application IS 72191 by using gaged data from Gage ID 13281500 located on the Powder River; by using the Cooper Method 2 regional regression equation for the area of the reach where gaged data was not available; and by using a correction factor that was developed using data from Gage ID 13289500 to correct the streamflows estimated through the regression equation. (Test. of Andrews; Exs. A10 at 6-7, A16 at 1, A18, A38.)

71. OWRD first corrected the gaged data to account for consumptive uses above the gages impacted by consumptive use. (Ex. A10 at 6, A14 at 3-4.) OWRD then used the naturalized flows from gage 13281500 in calculating streamflow. This gaging station measured flow on the Powder River near Haines, Oregon, downstream of what is now Phillips Lake and upstream of Thief Valley Reservoir from 1946 to 1953. (Exs. A10 at 7, A11 at 84, A18, A19, A38.) OWRD then estimated streamflows for the non-gaged area of the reach by using the Cooper Method 2 regression equation. To correct the streamflows estimated through the regression equation, OWRD developed a correction factor using data from gage 13289500. This gaging station measured flow near the mouth of the Powder River near Robinette, Oregon, from October 1928 to September 1932. OWRD then applied the correction factor to the estimated streamflows for the non-gaged area of the reach. After performing the calculations in WARS, OWRD determined that the monthly EANF amounts in the identified reach exceeded the monthly instream flow amounts requested in the application. (Exs. A10 at 7, A11 at 84, A18, A19, A38.)

72. OWRD used watermaster distribution records, Department measurement records, USGS records, and a regional regression equation to develop the natural streamflow estimates for WAB 72191. (Exs. A10 at 7, A11 at 105-107, A14 at 3-4.)

OWRD's current calculations of EANF

73. For comparison purposes, OWRD calculated EANF within the identified reach of the Powder River using the current regression equation in WARS. The results were as follows:

EANF in cfs

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
108	158	308	702	1040	884	271	136	89.7	84.9	99.4	107

(Test. of Andrews; Exs. A10 at 9, A34 at 1.) Had the application been processed using the current regression equation in WARS, OWRD would have approved the application up to the requested flow amounts in the application. (Test. of Andrews; Ex. A10 at 9.)

PFO and Protest

74. On May 14, 1996, OWRD issued its PFO proposing to approve the application with

conditions. (Ex. A5.) In the PFO, OWRD found that the estimated average natural flow for the lower end of the requested reach was as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
163	230	393	740	1100	845	212	146	82.5	76.9	103	122

(*Id.* at 2.) OWRD also found that water was not available for further appropriation (at a 50 percent exceedance probability) for the period June, July, August and September, and that the flows available for further appropriation were, as follows:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
103.3	145.1	225.9	503.9	454.8	-93.1	-242.0	-229.0	-150.5	58.5	61.6	68.6

(*Id.* at 2-3.) OWRD concluded, in relevant part: The proposed use requested in this application was allowed in the Powder Basin Plan; the proposed use would not injure other water rights; the proposed use complied with rules of the Water Resources Commission; water was not available for the proposed use at the amount requested during June, July, August and September because the unappropriated water available was less than the amounts requested during those months; the presumption set forth in ORS 537.153 had not been established; and the application had been processed without the statutory presumption. (*Id.* at 3.) OWRD also concluded: The proposed use, as limited in the draft certificate, would not result in injury to other water rights; the proposed use, as limited in the draft certificate, would not impair or be detrimental to the public interest as provided in ORS 537.170; the proposed use, as limited in the draft certificate, shall except future use of water for human and livestock consumption; and the flows were to be measured at the lower end of the stream reach to protect necessary flows throughout the reach. (*Id.* at 4.) OWRD further concluded that the stream flows listed below represented the minimum flows necessary to support the public use[:]

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st ½	25.0	25.0	40.0	40.0	40.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd ½	25.0	30.0	40.0	40.0	40.0	30.0	25.0	25.0	25.0	25.0	25.0	25.0

(*Id.*)

75. The PFO contained a Draft Certificate of Water Right with a priority date of January 29, 1992, that limited the approved instream flow amounts in cfs as follows:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st ½	25.0	25.0	40.0	40.0	40.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd ½	25.0	30.0	40.0	40.0	40.0	30.0	25.0	25.0	25.0	25.0	25.0	25.0

(Ex. A5 at 5.) The Draft Certificate of Water Right further conditioned the water right, requiring the flows to be measured at the lower end of the stream reach to protect necessary flows throughout the reach. (*Id.*)

76. The PFO set forth Protest Rights, and indicated that any protest submitted must be in

writing and received by OWRD no later than June 28, 1996. (Ex. A5 at 4, 6.) On June 11, 1996, OWRD extended the Protest deadline to July 26, 1996. (Ex. A6 at 1.)

77. On July 22, 1996, Protestant filed a Protest, asserting that the amount of water that OWRD claimed was in the stream during June, July, August, and September was false. (Ex. A7 at 2.)

Settlement discussions

78. On March 26, 2014, OWRD sent a letter to Protestant, requesting that the parties meet to discuss Protestant's concerns regarding the impact that the proposed instream water right would have on Protestant's water rights. (Ex. A9; P19 at 16, 18, 19.)

79. In 2015, the parties worked towards a "settlement meeting." (P19 at 16, 21, 23.)

80. On September 14, 2021, OWRD referred the matter to the OAH for a contested case hearing because the parties had not reached a settlement. (P1 at 1, P19 at 16, 17, 30.)

Additional information

81. Protestant's water rights are senior to the instream water right at issue in this case. (Test. of Chandler.)

82. Jeff Colton is the manager of Protestant. Mr. Colton provided streamflow measurements from the Salsibury gaging station from 1904 to 1968. The gaged data does not account for consumptive uses above the gage. The gaged data does not reflect natural streamflow and is not comparable to OWRD's EANF calculation. (Exs. R4, A32 at 5-6.)

83. Mr. Colton produced a summary document of the Salsibury gaging station, showing dates when measurements were less than 20 cfs from 1904 to 1967. The gaged data does not account for consumptive uses above the gage. The summary document does not reflect natural streamflow and is not comparable to OWRD's EANF calculation. (Exs. R5, A32 at 6.)

84. Mr. Colton provided streamflow measurements from the Deer Creek and the Powder River Hudspeth Lane gaging stations. The gaged data does not account for consumptive uses above the gages nor tributary inflows below the gages. The gaged data does not reflect natural streamflow and is not comparable to OWRD's EANF calculation. (Exs. R10-R13, A32 at 5-6.)

85. Mr. Colton provided information from a Bureau of Reclamation (BOR) study to show that the Powder River had an annual water shortage from 1971 to 1999 of 134,000 acre-feet.[11] (Ex. R15.) The BOR information states that the natural flow computations were calculated using data from 1971 to 1999, which is not representative of the common base period used by OWRD. (Exs. R15 at 3, A32 at 4.) The BOR information does not indicate which gages were used or how they were used in generating values of average annual flow. (Exs. R15, A32

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[11] Protestant provided excerpts from the BOR study. (*See* R15.)

at 4.) The authors of the BOR report admit that "complete information is not available on the numerous water rights in the basin due to transfer and division of rights over years." (Ex. R15 at 2.) Without an accurate accounting of the water rights of record, it is not possible to calculate estimates of consumptive use which are needed to calculate naturalized streamflow. (Ex. A32 at 4.) The values of natural flow developed by the BOR study do not reflect natural streamflow and are not comparable to OWRD's EANF calculation. (Exs. R15, A32 at 4.)

86. Individual observations and/or measurements of streamflow in the identified reach do not reflect natural streamflow, and are not reflective of data over a long period of time. They are not comparable to OWRD's EANF calculation. (Exs. A10 at 7-8, A32 at 5-6.)

87. Anthony Creek is a tributary that flows into the Powder River. Anthony Creek has a contributing flow in June, July, August, and September into the Powder River downstream of BVID's boundary and upstream of the downstream end of IS-72191. (Test. of Andrews; Exs. A18, A46.)

88. Rock Creek is a tributary that flows into the Powder River. Rock Creek has a contributing flow in June, July, August, and September into the Powder River downstream of BVID's boundary and upstream of the downstream end of IS-72191. (Test. of Andrews; Exs. A18, A47.)

89. The North Powder River is a contributing tributary to the Powder River. (Ex. R22 at 112, 120; *see also* Ex. A19.)

CONCLUSION OF LAW

OWRD properly determined EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4).

OPINION

Protestant asserts OWRD erred in issuing the PFO approving Application IS 72191 because OWRD failed to properly determine EANF for June, July, August, and September consistent with ORS 537.343 and OAR 690-077-0015(4). 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 OWRD did not properly determine EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4). Protestant's burden is an affirmative one requiring evidence 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.

Overview of Instream Water Rights

In Oregon, water is a public resource to be allocated by the State for beneficial use. ORS 537.110, ORS 537.120. In the Instream Water Rights Act, set forth in ORS 537.332 – 537.360, the Oregon Legislature declared that "[p]ublic uses are beneficial uses." ORS 537.334(1). The Legislature defined "public use" to include the "[c]onservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values." ORS 537.332(5)(b).

The Legislature charged ODFW, the Department of Environmental Quality (DEQ), and the State Parks and Recreation Department (OPRD) with applying for instream water rights on waters of the state for public uses. ORS 537.336(1), (2), and (3). The Legislature required that any instream water right application from ODFW be for an amount of instream flow that ODFW recommends as "the quantity of water necessary to support those public uses." ORS 537.336(1). For applications filed after October 28, 1989, all applications for instream water rights must be based on methods of determining instream 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 instream flow requirements for fish and wildlife: the Instream Flow Incremental Methodology; the Oregon Method; and the Forest Service Method. OAR 635-400-0015(6).

The Legislature also charged OWRD with evaluating instream water right applications and issuing certificates, which are then held "in the name of Water Resources Department as trustee for the people of the State of Oregon." ORS 537.341. The Legislature identified the OWRD Director as "the final authority in determining the level of the in-stream flow necessary

to protect the public use." ORS 537.343(2).

Did OWRD properly determine EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4).

ORS 537.343 is titled "Proposed final order; conditions" and provides, in part:

> (1) A proposed final order issued under ORS 537.170(6) for an in-stream water right certificate may include any condition the Water Resources Director considers necessary, but which is consistent with the intent of ORS 537.332 to 537.360. The proposed final order may:
>
> (a) Approve the in-stream water right for the quantity of water requested;
>
> (b) Approve the requested in-stream water right for a lesser quantity of water; or
>
> (c) Reject the requested in-stream water right.
>
> (2) If the director reduces or rejects the in-stream water right as requested, or conditions the in-stream water right, the director shall include a statement of findings that sets forth the basis for the reduction, rejection or conditions. The director shall be the final authority in determining the level of in-stream flow necessary to protect the public use.

ORS 537.153(2) identifies the public interest presumption and reads, in part:

> 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 the evidence that either:
>
> (a) One or more of the criteria for establishing the presumption are not satisfied; * * *.

ORS 537.170(8) sets forth the factors that must be considered if the public interest

presumption is overcome and provides, in part:

> If the presumption of public interest under ORS 537.153(2) is overcome, then before issuing a final order, the director or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order would impair or be detrimental to the public interest by considering:
>
> (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.

OAR 690-077-0015 addresses, among other things, the EANF limitation and provides, in 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.

OAR 690-077-0010 provides applicable definitions and states, in 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.
>
> * * * * *
>
> (13) "Instream flow" means the minimum quantity of water necessary to support the public use requested by an agency.
>
> * * * * *
>
> (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.
>
> * * * * *
>
> (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[.]

Protestant contends that OWRD did not properly determine EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4). Protestant's Closing Argument at 6. OWRD and ODFW contend to the contrary. OWRD and ODFW Joint Written Closing Argument at 2-3, 17-18. I agree with OWRD and ODFW.

On January 29, 1992, ODFW filed application IS 72191 with OWRD, seeking to protect the minimum instream flows necessary for the maintenance and conservation of rainbow trout lifecycles and habitat in the Powder River from the Mason Dam at river mile 131.2 to the Thief Valley Reservoir at river mile 74.0. ODFW used the Oregon Method, an acceptable method

adopted by rule by the Oregon Fish and Wildlife Commission, for determining instream flow requirements for rainbow trout in the identified reach of the Powder River. ODFW's instream flow requests were based upon values set forth in the Powder Basin Report.

After receiving the application, OWRD determined the application was complete and gave it a tentative priority date of January 29, 1992. OWRD then began a technical review of the application. As part of its technical review, OWRD calculated EANF in the identified reach. OWRD calculated EANF by using gaged data from Gage ID 13281500 located on the Powder River; by using the Cooper Method 2 regional regression equation for the area of the reach where gaged data was not available; and by using a correction factor that was developed using data from Gage ID 13289500 to correct the streamflows estimated through the regression equation.

OWRD first corrected the gaged data to account for consumptive uses above the gages impacted by consumptive use. OWRD then used the naturalized flows from Gage ID 13281500 in calculating streamflow. This gaging station measured flow on the Powder River near Haines, Oregon, downstream of what is now Phillips Lake and upstream of Thief Valley Reservoir from 1946 to 1953. OWRD then estimated streamflows for the non-gaged area of the reach by using the Cooper Method 2 regression equation. To correct the streamflows estimated through the regression equation, OWRD developed a correction factor using data from Gage ID 13289500. This gaging station measured flow near the mouth of the Powder River near Robinette, Oregon, from October 1928 to September 1932. OWRD then applied the correction factor to the estimated streamflows for the non-gaged area of the reach. OWRD performed the calculations in WARS. As part of its program, WARS included the contributing flows upstream of the downstream end of IS 72191 in the natural streamflow calculation.

OWRD used watermaster distribution records, Department measurement records, USGS records, and a regional regression equation to develop the natural streamflow estimates for IS 72191. Following the calculations, OWRD determined that the monthly EANF amounts in the identified reach exceeded the monthly instream flow amounts requested by ODFW in the application.

OWRD then conducted a public interest review. OWRD first considered whether the public interest presumption set forth in ORS 537.153(2) was established for the proposed water use. As part of that consideration, OWRD reviewed water availability in the identified reach. Because water was not available for appropriation during the months of June, July, August, and September, OWRD determined that the public interest presumption in ORS 537.153(2) was not established. OWRD processed the application without the public interest presumption.

OWRD next considered whether the proposed use would impair or be detrimental to the public interest by considering the factors listed in ORS 537.170(8). Because the requested flow amounts in the application were below the EANF amounts in every month, OWRD determined that the proposed use would not impair or be detrimental to the public interest.

On May 14, 1996, OWRD issued its PFO proposing to approve the application with conditions. OWRD conditioned the instream water right to the flow amounts requested in the

application.

I find, by a preponderance of the evidence, that OWRD properly determined EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4). I also find that OWRD used all available streamflow data as well as a generally accepted hydrologic method for estimating streamflow where no such data was available. I further find that OWRD demonstrated that, as conditioned, the instream water right proposed in the PFO would not impair or be detrimental to the public interest.

Protestant's additional arguments

Protestant first contends that its due process rights were violated as a result of OWRD's delay in scheduling a contested case hearing. Protestant contends its "'opportunity to be heard' occurred at neither a meaningful time nor in a meaningful manner." Protestant cites to a quote in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) in support of its argument. Protestant's Closing Argument at 4-5. OWRD and ODFW contend that "Protestant has not identified any protected liberty or property interest at stake in this proceeding, nor demonstrated why the administrative process provided was insufficient." OWRD and ODFW Joint Response to Protestant's Closing Argument at 4. I agree with OWRD and ODFW.

Under both the 5th and 14th Amendments of the United States Constitution, no person shall be deprived of life, liberty, or property without due process of law. In *Mathews*, Mr. Eldridge did not receive a hearing before his disability benefits were terminated by the Social Security Administration. Mr. Eldridge argued that the lack of a pre-termination hearing was unconstitutional under the Due Process Clause of the Fifth Amendment. The Court, while acknowledging that Mr. Eldridge had a property interest in his disability benefits, held that an evidentiary hearing was not required prior to the termination of Social Security disability benefits. *Mathews*, at 332, 349. In reaching its decision, the Court identified three factors that must be considered in determining the constitutional sufficiency of administrative procedures prior to the initial termination of benefits: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional safeguards; and 3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews*, at 340, 343, 347.

In the matter at hand, Protestant did not identify any protected liberty or property interest that was at stake in the proceeding. *Accord G.A.S.P. v. Env't Quality Comm'n*, 198 Or App 182, 193 (2005) (rejecting due process arguments where "[p]etitioners simply do not identify a constitutionally protected property or liberty interest that would require us to engage in *Mathews*-like analyses."). Even if Protestant's water rights are considered a property interest, those water rights are not being terminated nor reduced in this proceeding. Moreover, Protestant's water rights are senior to the water right that is at issue in the case – meaning, Protestant will receive its water rights before water will be provided for rainbow trout along the identified reach at issue. Applying the first two factors in *Mathews*, Protestant's water rights will not be affected by this official action; and Protestant will not be deprived of its water rights through the procedures used in this matter. With regards to OWRD's delay in scheduling a

contested case hearing, between the date of the Protest and the date of the referral for hearing, OWRD worked with the parties to see if there was an opportunity for settlement. When the parties did not settle the case, OWRD referred the matter for hearing as its budget allowed, *i.e.*, the agency's fiscal and administrative burden to provide for hearing (the third factor in *Mathews*). Accordingly, I find that Protestant does not have a protected liberty or property interest at stake in this proceeding. I further find that Protestant's due process rights were not violated as a result of OWRD's delay in scheduling a contested case hearing.

Protestant next contends that "OWRD and ODFW were allowed to present their employees as witnesses and qualify them as experts without even an offer of qualifications at the time written direct testimony was due. BVID was given no notice of the witnesses' expertise or qualifications, and was not provided reports typically required of expert witnesses." Protestant's Closing Argument at 5. OWRD and ODFW contend that they did provide Protestant with their experts' qualifications in the written direct testimony. OWRD and ODFW also contend that there is no Administrative Procedures Act (APA) requirement to provide expert reports. OWRD and ODFW Joint Response to Protestant's Closing Argument at 6-7. I agree with OWRD and ODFW.

As set forth in the record, on June 2, 2023, OWRD and ODFW provided Protestant with the written direct testimony of its three experts, 24 days before the hearing. Each witness, in his respective direct testimony, addressed his foundation as an expert, his current and past work, and his specific expertise in the matters at issue in the hearing. *See* Exhibits A10, A20, and A27. Thus, Protestant had notice of OWRD's and ODFW's experts' qualifications well in advance of hearing. Moreover, there is no rule in the APA that requires an agency or party to provide expert reports to the opposing party in a contested case hearing before the Office of Administrative Hearings. *See* OAR 137-003-0501 through 137-003-0700 (Rules for Office of Administrative Hearings). Protestant's arguments are not supported by the record.

Protestant also contends that "[t]he Applicant and OWRD presented witnesses who supported their position, not with first-hand or personal knowledge or experience, but rather with information they stated was read from a case file their agency provided, but which an 'expert' file was not provided to BVID." Protestant's Closing Argument at 5-6.

However, Mr. Andrews, Mr. Lemanski, and Mr. Sawaski were all qualified on the record as experts in their respective fields based upon their respective knowledge, work experience, and expertise in the matters that were at issue in the hearing. Mr. Andrews was qualified as an expert hydrologist with expertise in WARS; Mr. Lemanski was qualified as an expert fish biologist with expertise in fish distribution and the fish habitat needs of rainbow trout; and Mr. Sawaski was qualified as an expert instream scientist and hydrologist with expertise in hydrology and instream flow needs for rainbow trout. Moreover, the testimony provided by each of these three experts was directly related to the issue for hearing, as well as the relevant exhibits that were provided to Protestant in advance of hearing and were admitted into evidence at hearing. In sum, all three experts had sufficient foundation, knowledge, experience, and expertise for their testimony regarding the matters at issue in the hearing. Protestant's argument is unpersuasive.

Protestant next contends that "Use of [a] single EANF for the entire instream water right

is not proper for the location of proposed stream reach." Protestant's Closing Argument at 6. OWRD and ODFW contend that Protestant's argument is a new issue that was not properly raised in the Protest. OWRD and ODFW Joint Response to Protestant's Closing Argument at 12. I agree with OWRD and ODFW.

ORS 537.170(5) provides:

> Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or in a hearing or failure to provide sufficient specificity to afford the Water Resources Department an opportunity to respond to the issue precludes judicial review based on that issue.

The PFO in this case states that, "the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." Exhibit A5 at 4. The Draft Certificate of Water Right attached to the PFO also states that, "the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." *Id.* at 5. Thus, Protestant's assertion that "[u]se of single EANF for the entire instream water right is not proper for the location of proposed stream reach" was a reasonably ascertainable issue from both the PFO and the attached Draft Certificate of Water Right at the time of Protestant's Protest. Protestant did not raise this reasonably ascertainable issue in its Protest. *See* Exhibit A7. Pursuant to ORS 537.170(5), because Protestant did not raise this reasonably ascertainable issue in its Protest, I conclude that Protestant is precluded from raising it now in its closing argument.

Protestant also contends that "To determine the EANF for the entire reach of IS-72191, OWRD relied on multiple EANFs for each distinct WAB, and then requested the instream water right for the entire 57 river miles – i.e., the agency generalized one EANF to the entire area." Protestant's Closing Argument at 7-8. OWRD contends that Protestant's statement is not an accurate summary of OWRD's process for calculating EANF for IS 72191. OWRD and ODFW Joint Response to Protestant's Closing Argument at 14. I agree with OWRD.

As detailed in the record, OWRD created WAB 72191 to estimate natural streamflow for application IS 72191. OWRD estimated EANF at the downstream end, or pour point, of WAB 72191, which is the normal long-used practice for OWRD. *See* Exhibit A11 at 16. WAB 72191 included all contributing flows (*i.e.*, flows that feed into the identified reach) from WABs upstream of the downstream end of IS-72191. WARS factored those contributing flows into the natural streamflow calculation for IS 72191. Testimony of Andrews. Protestant's assertion that OWRD "relied on multiple EANFs for each distinct WAB" misstates OWRD's process for calculating EANF for IS-72191. As such, Protestant's misstatement is unpersuasive.

Protestant next contends that "for a WAB such as 72191, which was specifically created for IS-72191, the watershed characteristics would be different from those of 243 or 30920327, the other two WABs used for this instream water right." Protestant's Closing Argument at 8.

OWRD and ODFW contend that Protestant's statement is not supported by any evidence in the record. OWRD and ODFW Joint Response to Protestant's Closing Argument at 15. I agree with OWRD and ODFW. There is no reliable evidence in the record that supports Protestant's argument. Thus, Protestant's argument is without merit.

Protestant also contends that "there are no other tributaries providing water to the Powder River in late July, August, or September, despite what the WABs and the EANFs derived from those WABs by a computer modeling technique attempted to illustrate." Protestant's Closing Argument at 8. OWRD and ODFW contend that Anthony Creek and Rock Creek are tributaries that provide summer water to the Powder River upstream of the downstream end of IS 72191. OWRD and ODFW Joint Response to Protestant's Closing Argument at 17. I agree with OWRD and ODFW.

As set forth in the record, Anthony Creek and Rock Creek both have water in June, July, August, and September that flows into the Powder River downstream of BVID's boundary and upstream of the downstream end of IS 72191. *See* Exhibits A46 and A47. As such, Protestant's argument is without merit.

Protestant next contends that the "Combined data approach is flawed when measuring [the] Powder River." Protestant's Closing Argument at 9.

However, OWRD's promulgated definition of EANF allows for the use of "watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology," when estimating average natural flow. *See* OAR 690-077-0010(10). As detailed previously, OWRD used gaged data as well as a generally accepted hydrologic method for estimating streamflow where no such data was available, to calculate EANF in compliance with OAR 690-077-0010(10). Testimony of Andrews; *see* OAR 690-077-0010(10). Protestant's argument is therefore unpersuasive.

Protestant also contends that "[t]he EANF determined for June, July, August, and September for this stretch of the Powder River does not represent the prehistoric streamflow of the Powder River." Protestant's Closing Argument at 9. Protestant contends that "prehistoric" streamflow is streamflow "without the influence of human activities." *Id.* Protestant also states "[b]efore human activities, the Powder River was not channelized." *Id.* OWRD and ODFW contend that EANF is a calculation of instream flow without consumptive use, not a calculation that models prehistoric river channel shape. OWRD and ODFW Joint Response to Protestant's Closing Argument at 15. I agree with OWRD and ODFW.

EANF is defined as "average natural flow estimates derived from watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology." *See* OAR 690-077-0010(10). Thus, EANF is natural streamflow. Meaning, EANF is the flow in the stream when there are no consumptive uses and there is no flow regulation by dams or reservoirs. Testimony of Andrews; Exhibit A10 at 2. OWRD calculates EANF or natural streamflow by adding back known consumptive uses to measured streamflow. Testimony of Andrews; Ex. A10 at 3. Protestant's implication that EANF is a calculation of prehistoric streamflow when the Powder River was not channelized is

not supported by the reliable expert testimony in the record.

Protestant next contends that OWRD's computer "model's conclusions are dubious, being that BVID witnesses, in sharing their personal experiences or historical family accounts, testified that the Powder River did not have channels or any regular flows 'prehistorically.'" Protestant's Closing Argument at 10.

However, Protestant did not present any expert testimony to establish that OWRD's computer model's conclusions were defective in any way, regardless of the testimony from BVID's witnesses. Protestant's argument is unpersuasive and not supported by the reliable expert testimony in the record.

Protestant also contends that "the Powder River is not accommodated by the model's generic and limited 'watershed characteristics' in the Cooper Method 2." Protestant's Closing Argument at 10.

However, Protestant did not present any expert testimony to establish that OWRD's computer model or the Cooper Method 2 regression equation failed to accommodate the Powder River or the identified reach at issue. Moreover, regional regression equations are generally accepted hydrologic methods for estimating natural streamflow. Testimony of Andrews. Protestant's argument is not supported by any reliable evidence in the record.

Protestant next contends that "[h]istorically and today, gravel dominates the Baker Valley basin, including the bed of the Powder River." Protestant's Closing Argument at 10. Protestant contends that "Permeability was not a characteristic considered in the methodology until 2002 and thus was not considered in the modeling for the EANF." *Id.* at 10-11.

However, Protestant did not provide any expert testimony to establish that permeability was required as an additional watershed characteristic in OWRD's regression equation in order for OWRD to properly calculate EANF in the identified reach or that the Cooper Method 2 regional regression equation was defective in its calculations. Moreover, as set forth in the record, for comparison purposes, OWRD calculated EANF within the identified reach using the current regression equation in WARS, which includes permeability as a watershed characteristic. The results established that EANF exceeded the requested flows in the application. Testimony of Andrews; Exhibit A10 at 9. In other words, had the application been processed using the current regression equation in WARS, OWRD would have approved the application up to the requested flow amounts in the application. Testimony of Andrews. Protestant's argument is unpersuasive.

Protestant also contends that "Three additional important characteristics that must be considered for prehistoric flows of the Powder River are channelization (or lack thereof), geomorphology, and permeability – all of which were ignored by OWRD in this instance." Protestant's Closing Argument at 11.

However, Protestant did not provide any expert testimony to establish that channelization, geomorphology, and permeability were required as additional watershed

characteristics in OWRD's regression equation in order for OWRD to properly calculate EANF in the identified reach or that the Cooper Method 2 regional regression equation was defective in its calculations. Protestant's argument is not supported by any reliable evidence in the record.

Protestant next contends that the "Model is unreliable because it has poor goodness of fit." Protestant's Closing Argument at 12. OWRD and ODFW contend that there is no evidence in the record to support Protestant's conclusion. OWRD and ODFW also contend that the two gages used in OWRD's EANF calculations were known data points in the goodness of fit evaluation. OWRD and ODFW Joint Response to Protestant's Closing Argument at 19. I agree with OWRD and ODFW.

As set forth in the record, OWRD performed a goodness of fit evaluation on all of the WABs with gages used in the development of WARS, which included Gage ID 13281500 and Gage ID 13289500, the two gages OWRD used to calculate EANF in IS 72191. Exhibit A11 at 84. As such, the gaged data from Gage ID 13281500 and Gage ID 13289500 support the accuracy of OWRD's EANF calculation for IS 72191. Protestant's argument is unpersuasive.

Protestant also contends that Mr. Colton's testimony that he would have to release 50 cfs at Mason Dam to get 25 cfs to Thief Valley, combined with his firsthand experience of managing flows in the Powder River supports the conclusion that OWRD did not properly determine EANF. Protestant's Closing Argument at 7, Protestant's Reply to OWRD and ODFW Joint Closing Argument at 2-3.

However, Mr. Colton is not an expert hydrologist. I attach greater weight of reliability to Mr. Andrews's testimony as an expert hydrologist. Protestant's argument is unpersuasive.

Protestant finally contends that the streamflow measurements provided by Mr. Colton are actual streamflow in the Powder River. Protestant's Reply to OWRD and ODFW Joint Closing Argument at 1-2.

However, the streamflow measurements provided by Mr. Colton did not account for consumptive uses above the gages nor tributary inflows below the gages. As such, the gaged data provided by Mr. Colton does not reflect natural streamflow and is not comparable to OWRD's EANF calculation. Protestant's argument is unpersuasive.

Conclusion

OWRD established that it properly determined EANF for June, July, August, and September, consistent with ORS 537.343 and OAR 690-077-0015(4). In addition, OWRD demonstrated that, as conditioned, the instream water right proposed in the PFO would not impair or be detrimental to the public interest.

In contrast, Protestant failed to meet its burden of proof in this matter, and its additional arguments detailed previously are not supported by reliable evidence in the record.

Accordingly, the PFO issued by OWRD on May 14, 1996, proposing to approve, with

conditions, Water Right Application IS 72191 for instream flows for the migration, spawning, egg incubation, fry emergence, and juvenile rearing needs of rainbow trout is correct.

CONSIDERATION OF EXCEPTIONS

The Director considers and disposes of OWRD's and ODFW's joint exceptions and Protestant's 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~~. The page numbers referenced in this section refer to this final order, not the Proposed Order.

Exception No. 1: OWRD, ODFW, and Protestant take exception to typographical errors throughout the Proposed Order.

Disposition: The exception is allowed. The language below is amended as shown to correct typographical errors identified in OWRD's and ODFW's joint exceptions, Protestant's exceptions, and errors identified in the proof reading of this final order:

> **Page 1:** On May 14, 1996, the Oregon Water Resources Department (OWRD or Department) issued a Proposed Final Order (PFO or Notice), proposing to approve, with conditions, the application filed by Oregon Department of Fish and Wildlife (Applicant or ODFW), seeking instream flows for the migration, spawning, egg incubation, fry emergence, and juvenile rearing needs of rainbow trout.
>
> On March 8, 2023, Protestant filed BVID's Response to ODFW's and OWRD's Joint Motion (Protestant's Response).
>
> On April 28, 2023, Protestant filed a Motion for Summary Determination or in the A~~a~~lternative Motion for Stay of Contested Case Hearing (Protestant's MSD or Motion for Stay).
>
> **Page 2:** Protestant's Motion to Limit Any Expert Testimony by Spencer Sawaske in Ichthyology and if Allowed as Lay Agency Witness to Strike the Written Direct and Rebuttal Testimony of Spencer S~~w~~awaske;
>
> **Page 3:** Ms. McCarty and Will~~iam~~ Davidson appeared on behalf of OWRD.
>
> **Page 6:** "OWRD makes that determination by comparing the instream flow

amounts requested in the application to the Estimated Average Natural Flow (EANF), or natural streamflow, in the identified stream or reach. (Ex. A1 at 3.)"

"The amount allowed for appropriation of an instream water right shall not exceed the EANF ~~as defined by OAR 690-077-0015~~. (*See* OAR 690-077-0015(4); Ex. A10 at 2.)"

Pages 8-9: The requested monthly instream flow amounts are the minimum amounts necessary to maintain the rainbow trout populations at their current levels in the identified reach. (Exs. A3 at 6, A5, A20 at 2, A21-A26, A27 at 4.)

Page 12: $Q_{NSF} = \exp(B_0) X_1^{B1} X_2^{B32} X_3^{B3}$

Page 13: OWRD picked that common base period as the most suitable because it represented the long term average conditions for this century and because it had the most streamflow information available. (Ex. A10 at 5, A11 at 24-25, A13 at 17-18.)

New coverages were obtained ~~the~~ that resulted in better estimations, particularly for smaller watersheds. (Ex. A10 at 5, A11 at ~~26~~ 39-46, A12 at 31-32, A13 at 22-23.).

Pages 17-18: The PFO set forth Protest Rights, and indicated that any protest submitted must be in writing and received by OWRD no later than June 28, 1996. (Ex. A5 at 4, 6.) On June 11, 1996, OWRD extended the Protest deadline to July ~~22~~ 26, 1996. (Ex. A6 at 1.)

Page 20: The Legislature defined "public use" to include the "[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)(b).

Page 25: Under both the 5th and 14th Amendments of the United States Constitution, no person shall be deprived of life, liberty, or property without due process of law.

Page 26: OWRD and ODFW also contend that there is no Administrative Procedures Act (APA) ~~APA~~ requirement to provide expert reports. OWRD and ODFW Joint Response to Protestant's Closing Argument at 6-7.

Moreover, there is no rule in the ~~Administrative Procedures Act (APA)~~APA that requires an agency or party to provide expert reports to the opposing party in a contested case hearing before the Office of Administrative Hearings. See OAR 137-003-0501 through 137-003-0700 (Rules for Office of Administrative Hearings).

Protestant also contends that "[t]he Applicant and OWRD presented witnesses

who supported their position, not with first-hand or personal knowledge or experience, but rather with information they stated was read from a case file their agency provided, but which an 'expert' file was not provided to ~~BID~~ BVID." Protestant's Closing Argument at 5-6.

Page 27: Failure to raise a reasonably ascertainable issue in a protest or in a hearing or failure to provide sufficient specificity to afford the Water Resources Department an opportunity to respond to the issue precludes judicial review based on that issue.

The Draft Certificate of Water Right attached to the PFO also states that, "the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." *Id.* at 5 4.

Protestant next contends that "for a WAB such as 72191, which was specifically created for IS-72191, the watershed characteristics would be different from those of 243 or 309203327, the other two WABs used for this instream water right." Protestant's Closing Argument at 8.

Exception No. 2: BVID states that "BVID agrees prehistoric is defined as "without the influence of human activities." Protestant's Exceptions to the Proposed Order at 3-4. BVID requests the following change to page 28 of the order: "Protestant contends that "prehistoric" streamflow is streamflow "~~before human activities~~ without the influence of human activities~~, [when] the Powder River was not channelized~~. *Id.*"

Disposition: The exception is allowed. Because BVID's requested change matches the language in Protestant's Closing Argument, the change is well supported. For reference, BVID's Closing Argument states: "BVID agrees with the former definition based on their own testimony of 'without the influence of human activities.'" Protestant's Closing Argument at 9.

BVID's change, however, requires the addition of another sentence which the Director explains here. The two paragraphs of the order that address arguments concerning the term "prehistoric" conclude with the ALJ's finding that "Protestant's implication that EANF is a calculation of prehistoric streamflow when the Powder River was not channelized is not supported by the reliable expert testimony in the record." *Supra* at 28-29. The content of this finding has two parts – whether EANF is a calculation of prehistoric streamflow, and whether EANF is a calculation of when the Powder River was not channelized. For the finding in the order to have context, it is necessary to insert a sentence with BVID's argument on when the Powder River was channelized. Referencing Protestant's Closing Argument, the sentence directly after the sentence that BVID requested in its exception reads: "Before human activities, the Powder River was not channelized." Protestant's Closing Argument at 9. Therefore, BVID's requested quote and the adjacent sentence from BVID's Closing Argument will both be included.

The bottom half of page 28 in the Opinion section is amended as follows:
Protestant contends that "prehistoric" streamflow is streamflow "~~before human~~

~~activities~~ without the influence of human activities~~, [when] the Powder River was not channelized~~. *Id.* Protestant also states "[b]efore human activities, the Powder River was not channelized." *Id.*

Exception No. 3: BVID takes exception to the findings of fact in paragraphs 52 to 55, in the section titled "*Improvements to regression equations and calculations*." *Supra* at 13-14. BVID also believes the timeline in paragraph 51 is too generalized when it states "Since the early 1990's." BVID asserts the record reflects that the watershed characteristics used in Cooper 2 changed over time with:

- 1996 PFO: latitude, longitude, area, relief, slope, aspect, elevation, precipitation, January temperature, July temperature. Ex. A15 at 36.
- 1997 after the PFO: area, maximum relief, average slope, mean elevation, mean annual precipitation, mean minimum January temperature, and mean minimum July temperature. Ex. A14 at 10.
- 2002 after the protest was filed: area, relief, slope, aspect, elevation, January precipitation, July precipitation, January maximum temperature, July minimum temperature, and soil permeability. Ex. A11 at 46.

Protestant's Exceptions to the Proposed Order at 4-5. BVID states this is an important clarification because "soil permeability is a critical characteristic for OWRD to consider when calculating EANF for the Powder River." Protestant's Exceptions to the Proposed Order at 5. BVID requests paragraph 53 read:

> 53. From 1997 to 2002, OWRD further improved estimates of watershed characteristics, recognizing that the accuracy of the estimates was dependent upon the resolution of the coverage used to extract and summarize values of any given watershed. The early iterations were too coarse and stopped at the state line. New coverages were obtained that resulted in better estimations, particularly for smaller watersheds. (Ex. A10 at 5, A11 at 39-46, A12 at 31-32, A13 at 22-23.) OWRD included a broader set of watershed characteristics into model development, and performed a statistical analysis to identify the most important watershed characteristics that would optimize the regression equations. OWRD then revised the regional regression equations in 1997 and 2002 to include the ~~those~~ additional watershed characteristics, the latter being the first-time OWRD considered soil permeability in its calculation."

Disposition: The Director declines to make the requested changes because the changes are not supported by clear and convincing evidence in the record. A finding that 2002 was the first time OWRD considered soil permeability in its calculation is not supported by the exhibits cited by BVID. Beginning with the 1996 exhibit that BVID cites (Ex. A15), it contains an overview flowchart of Water Availability Methodology by step, and for the Regional Regression Analysis step, there are 15 pages of explanation. (Ex. A15 at 24-39.) The first page of the Regional Regression Analysis explanation is a flowchart specific to the regional regression

analysis, which shows the starting point is:

GIS COVERAGE:
1. PRECIPITATION
2. ELEVATION
3. TEMPERATURE
4. SOILS INDEX
5. WATERSHED BOUNDARIES

(Ex. A15 at 25 (emphasis in original).) The next step after "GIS COVERAGE" is to "ESTIMATE WATERSHED CHARACTERISTICS FOR GAGED WATERSHEDS" and the last step is "REGRESSION COEFFICIENTS." These flowcharts show that in 1996 "soils index" was part of the GIS COVERAGE data, which are an input into the regional regression coefficients. In the regional regression equations, the coefficients are applied to the known watershed characteristics to estimate natural streamflow. (*See supra* ¶¶ 43 – 44; Ex. A11 at 42 (y represents stream flow and x^1, x^2, . . ., x^m represent the *m* watershed characteristics. b^1, b^2, . . ., b^m represent the regression coefficients which define the relationship among variables and are determined from the data.)) To insert BVID's statement that 2002 was the first time OWRD considered soil permeability would be inaccurate.

To at least partially address BVID's request for more detail on the exclusion of soil permeability as a known watershed characteristic for this instream water right review and approval, the Director finds that the record does support an additional finding of fact. The addition will go at the end of the ALJ's discussion of Cooper Method 2 as follows:

> 50. In the mid-1990s, OWRD began using the Cooper Method 2 regression equation, which included seven watershed characteristics to estimate natural streamflow: area; maximum relief; average slope; mean elevation; mean annual precipitation; mean minimum January temperature; and mean minimum July temperature. The Cooper Method 2 corrected measured streamflow to natural streamflow by adding consumptive uses back to the measured streamflow before estimating streamflow. The Cooper Method 2 used estimates from the USGS for irrigation use, and diversion rates with realistic coefficients for other consumptive uses. (Exs. A10 at 5, 6, A14 at 4, 10.) <u>At the time OWRD calculated EANF for IS-72191, OWRD's model did not include soil permeability as a watershed characteristic. (Exs. A15 at 36, A14 at 10.) Since 2002, the model has used soil permeability as a watershed characteristic. (*See infra* ¶ 56; Ex. A11 at 46.)</u>

<u>Exception No. 4</u>: BVID takes exception to reliability findings made by ALJ Gutman. In the paragraph spanning page 27 and 28, the order states "There is no reliable evidence in the record that supports Protestant's argument." *Supra* at 27-28. BVID asserts this statement is incorrect and should be stricken because BVID did provide reliable evidence that the watershed characteristics are different in WAB 72191 than in WAB 243 or WAB 30920327.

Disposition: The Director declines to make this change because BVID has not shown clear and convincing evidence in the record that the watershed characteristics for WAB 72191

would be different than those of 243 or 30920327. BVID cites to Jeff Colton's testimony from hearing, stating "Jeff Colton testified the drainage, or slope and aspect, into the Power River further downstream than BVID's district—such as in WAB 72191—mostly faces east and north so the snow stays on the slope longer and can sustain higher flows later in the summer/year. Test. Hr'g June 28, 2023 at 402, lines 8-13." Protestant's Exceptions to the Proposed Order at 6. Referencing the specific cross examination testimony of Mr. Colton, it states:

> Question from OWRD: Are you aware that Anthony Creek has a summer contributing flow into the Powder River?
>
> Answer from Mr. Colton: My drainage sit -- faces south. This drainage the most of the water comes from that goes below my district all faces east and has north, northwest affect. So the snow gets to stay there longer. I got the worst drains of them all. Mine all face south.

Test. Hr'g June 28, 2023 at 402, lines 5-19. Mr. Colton's testimony responds to a question about a tributary to the Powder River. It does not provide clear and convincing evidence to support BVID's assertion that the watershed characteristics are different in WAB 72191 than in WAB 243 or WAB 30920327.

BVID further asserts that Ryan Andrew's testimony and Exhibit A38 support a finding that the watershed characteristics are different for the three WABs. BVID, however, did not point to specific testimony of Mr. Andrews regarding differences in watershed characteristics between WAB 72191, WAB 243, or WAB 30920327. BVID describes Exhibit A38 as showing the increasing natural streamflow values for downstream WABs, but did not explain how that demonstrates the watershed characteristics are different for the 3 WABs.

Exception No. 5: In the paragraph that spans pages 29 and 30, BVID asks that the following finding be stricken: "Protestant did not provide any expert testimony to establish * * * that the Cooper Method 2 regional regression equation was defective in its calculations." BVID requests the paragraph be replaced with:

> Protestant utilized OWRD's and ODFW's current staff which the ALJ qualified as experts at the hearing and eyewitnesses Mark Ward, Clay McEnroe, and Jeff Colton to present its argument that channelization (or lack thereof), geomorphology, and soil permeability must be considered when calculating the EANF in the Power River Basin. Testimony of Ward, Testimony of McEnroe, Testimony of Colton, Exs. R33 at 1, R35 at 1, R36 at 4. WARS now considers soil permeability in its calculation and this characteristic was added to the Cooper Method 2 in 2002. Ex. A11 at 46. Protestant's argument is supported by reliable evidence in the record.

Protestant's Exceptions to the Proposed Order at 9. BVID's requested change would create inconsistency with the findings, explanation, and quotes in the two paragraphs immediately preceding the paragraph BVID asks to be altered. For example, BVID's language would conflict with the finding that "Protestant did not provide any expert testimony to establish that permeability was required as an additional watershed characteristic in OWRD's regression equation in order for

OWRD to properly calculate EANF in the identified reach or that the Cooper Method 2 regional regression equation was defective in its calculations." *Supra* at 29. This finding is similar, but precedes, the language that BVID takes exception to. The next paragraph contains a full sentence quoting BVID's closing argument. The three paragraphs go together as explanation, reasoning, and conclusion and are based on specific citations to the record. BVID's proposed replacement paragraph would insert a contrary conclusion without any supporting background and reasoning.

Although these three paragraphs are not readily editable, the Director has incorporated the content of one sentence of BVID's requested language, discussed *supra* under Exception No. 3, as an addition to finding of fact No. 50 that:

> At the time OWRD calculated EANF for IS-72191, OWRD's model did not include soil permeability as a watershed characteristic. (Exs. A15 at 36, A14 at 10.) Since 2002, the model has used soil permeability as a watershed characteristic. (*See infra* ¶ 56; Ex. A11 at 46.)

In finding of fact No. 50, the language added varies from BVID's requested language. BVID requested the more general terms "considers soil permeability in its calculation" and the Director has added the more specific terms "used soil permeability as a watershed characteristic." *Supra* ¶ 50.

Exception No. 6: Exception Nos. 1 and 2 stated in OWRD and ODFW Joint Exceptions to Proposed Order are allowed for the reasons stated and based on the evidence cited in OWRD and ODFW Joint Exceptions to Proposed Order. These exceptions were not contested by BVID.

DIRECTOR'S AMENDMENTS TO THE PROPOSED ORDER

Amendment No.1: 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. 2: On page 5, a sentence is added reading: "Before 1996, the terminology used was that individuals could file comments or "objections." (See e.g., Ex. A4 at 12, 18.)" This addition is made to explain why the January 1995 letters received by OWRD on the Technical Review (Exhibit A4), interchangeably use the term "objection" and "comment."

Amendment No. 3: The narrative of footnote 5 is amended to read: "The amount allowed for appropriation of an instream water right shall not exceed the EANF except under certain limited conditions." Under OAR 690-077-0015(4), there are limited conditions under which the amount of water appropriated for an instream water right may exceed EANF.

Amendment No. 4: The Proposed Order proposes that OWRD affirm OWRD's May 14, 1996 PFO proposing to approve Water Right Application IS-72191 with conditions. (Proposed Order at 30.) This final order amends the Proposed Order by affirming OWRD's May 14, 1996 PFO with the following corrections to the description of the insteam water right reach stated in the

PFO and draft certificate (*see* Ex. A05 at 1, 5):

> POWDER RIVER FROM MASON DAM AT RIVER MILE 131.2 (~~NW~~NE 1/4, SECTION 25~~26~~, TOWNSHIP 10S, RANGE 38E WM); TO THIEF VALLEY RESERVOIR AT RIVER MILE ~~+74.0~~ ±74.0 (SECTION 17, TOWNSHIP 6S, RANGE 40E WM)

The first change corrects the legal description of the location of Mason Dam from the northwest quarter of the northeast quarter, Section 26, Township 10S, Range 38E WM to the northeast quarter of Section 25, Township 10S, Range 38E WM. This change is supported by Exhibit R20, an OWRD water right certificate that describes the location of Mason Dam as "NE ¼, Section 25, T 10 s, R 38 E, W.M.," and by the map included with ODFW's application, Exhibit A2 at 4. The second change corrects the description of the river mile location of Thief Valley Reservoir from "RIVER MILE +74.0" to "RIVER MILE ±74.0" based on the description of the location of Thief Valley Reservoir in ODFW's application. (Ex. A2 at 1.)

Amendment No. 5: The Order section is amended to expressly state the consequences of affirming the Proposed Final Order issued on May 14, 1996.

ORDER

OWRD's PFO issued on May 14, 1996, proposing to approve, with conditions, Water Right Application IS 72191 for instream flows for the migration, spawning, egg incubation, fry emergence, and juvenile rearing needs of rainbow trout is affirmed with the corrections noted in Amendment No. 4 above, and the attached Certificate 97653 is issued with conditions.

Dated in Salem, Oregon on March 15, 2024.

/s/ Katherine Ratcliffe

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.

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. 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 **March 15, 2024**, I caused the foregoing FINAL ORDER IN CONTESTED CASE to be served by electronic mail and by mailing in a sealed envelope, with first-class postage prepaid, as follows:

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