



STATE OF OREGON  
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

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

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

Source: Elk River tributary to Pacific Ocean

County: Curry

Purpose: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

Elk River from Anvil Creek to the mouth.

The right is established under Oregon Revised Statutes 537.341.

The date of priority is November 8, 1990.

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

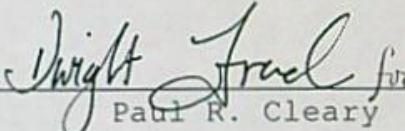
1. The right is limited to not more than the amounts, in cubic feet per second, during the time periods listed below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380	380	380	380	262	157	92.9	59.8	51.2	78.8	380	380

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.

Witness the signature of the Water Resources Director affixed  
November 14, 2001.

  
Paul R. Cleary



Recorded in State Record of Water Right Certificate 78508.

# Mailing List for Protested Application Copies

Application APPNUM

FO Date FODATE

Original mailed to: Vault

11/10/01

Applicant:

Copies sent to:

1. WRD - File # APPNUM 15 70895
2. WRD - Water Availability: Ken Stahr

PFO, Map, and Fact Sheet Copies sent to:

3. WRD - Watermaster # Lloyd Van Gordon #19
4. WRD - Regional Manager (not Bob Main): Al Cook - SW
5. ODFW District Biologist: Todd Conyer

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

6. ODFW - Portland office c/o Jill Zarnowitz

7. \_\_\_\_\_

8. \_\_\_\_\_

9. \_\_\_\_\_

10. \_\_\_\_\_

11. \_\_\_\_\_

12. \_\_\_\_\_

13. \_\_\_\_\_

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

CASEWORKER: RM

Copies Mailed	
By: <u>DG</u>	
(SUPPORT STAFF)	
on: <u>11/21/01</u>	
(DATE)	

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF Water Right Application IS )	FINAL ORDER ON CONTESTED
70895 in the Name of the Oregon Department of )	
Fish and Wildlife, )	CASE HEARING
<i>Applicant</i> )	
)	
Paul Brice Wagner, )	
<i>Protestant</i> )	
)	
Scott and Carol McKenzie )	
<i>Protestants</i> )	

HISTORY OF THE CASE

On November 8, 1990, the Oregon Department of Fish and Wildlife (ODFW) submitted an application to the Oregon Water Resources Department (OWRD) for an instream water right certificate for a reach of Elk River, Curry County, Oregon, defined therein, for the purpose of maintaining stream flow for migration, spawning, egg incubation, fry emergence and juvenile rearing for several fish species. This application was accompanied by the appropriate evidence that local governments had been notified, pursuant to OAR 690-77-020.

The OWRD served notice of its Technical Review on December 23, 1993, proposing to grant the certificate with conditions. When the objection period had closed, March 4, 1994, OWRD had received objections from Curry County Board of Realtors, Leesa Wagner, ODFW, Peggy Hennessy, Scott H. MacKenzie, Water for Life, and Waterwatch of Oregon. A proposed Final Order was issued August 20, 1996, approving the application with the following conditions:

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

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instream flows created by a prior water right or designated minimum perennial stream flow.

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The Proposed Final Order also prescribed a protest period to end October 4, 1996. Protests were filed by Paul Brice Wagner, Scott and Carol McKenzie, and Knapp Ranches.

On January 30, 2001, the matter was referred to the Hearing Officer Panel for hearing. A Prehearing Conference was conducted on March 16, 2001. On March 22, 2001, a Prehearing Order was entered setting a briefing schedule and listing the issues presented by this case. On April 30, 2001, protestants Scott H. McKenzie and Brice and Sharon Wagner filed opening briefs. On May 21, 2001 the Oregon Water Resources Department (OWRD) filed a Response and Motion for Ruling on Legal Issues. On May 24, 2001, the Oregon Department of Fish and Wildlife filed a Response Brief. On May 31, 2001, the Oregon Water Resources Department filed a Motion to Dismiss Party. On June 4, 2001, Protestant Scott McKenzie filed a Reply Brief.

On June 4, 2001, the Hearings Officer Panel transmitted electronically to all parties but Knapp Ranches, a memorandum allowing the parties to respond to the Motion to Dismiss Party by noon on June 13, 2001. The same memorandum was sent to Knapp Ranches by surface mail the same day as Knapp Ranches had not provided an electronic mail address. No response having been received from any party, on June 15, 2001, an Order was issued, dismissing Knapp Ranches as a party, granting the Motion for Ruling on Legal Issues in part and Denying the Motion for Ruling on Legal Issues in part.

A hearing was conducted June 18, 2001. OWRD appeared through Renee Moulun, and Kimberly Grigsby, agency representatives. Shelly McIntyre of the Oregon Department of Justice represented ODFW. Also appearing for ODFW were Richard Kruger and Jill Zarnowitz. Michael J. Mattick, LLOYD Charles Van Gordon, Dwight French, and Bernadette Williams testified for OWRD. Scott McKenzie and Paul Brice Wagner appeared and testified for protestants. The record was held open for specified additional evidence until June 25, 2001. The record remained open for written reply until August 14, 2001, after initial closing argument from all parties. The record is now closed.

On August 30, 2001, a Proposed Order was issued in this matter. On September 19, 2001, ODFW submitted a request that this Proposed Order be withdrawn and that a new proposed order addressing certain issues presented in the case be entered.

## ISSUES

At the close of the hearing, in light of the partial ruling on legal issues previously entered, the issues remaining to be decided were as follows:

- 1) Whether potential future uses of water, including agricultural uses, should be taken into account by OWRD in processing a water right application pursuant to ORS 537.153.
- 2) Whether the description stated in the application for instream water rights is sufficiently definite to deem the application complete under OWRD rules.
- 3) Whether the Application met the completeness requirements of OAR 690-77-020.
- 4) Whether ODFW complied with the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

## EVIDENTIARY RULING

Exhibits A through H, offered by the parties, were marked and admitted into the record. The record is now closed.

## FINDINGS OF FACT

- 1) The application seeks an instream water right to specified monthly flows for Elk River, and identifies the reach as follows:

“Elk River from Anvil Creek at River Mile 13.0 (Section 5, Township 33S, Range 14W WM); to the mouth at River Mile 0.0 (Section 19, Township 32S, Range 15 W WM).”
- 2) Protestants Wagners' dairy farm has been in existence for 50 years or more. A mistake was made in describing the land that would be irrigated under a water right application filed by the current owners' predecessor in title many years ago. Once this error was discovered, the Wagners applied for a new water right conforming to the terms previously believed to be in force. That application was denied, since it would be junior to the right of ODFW under the application at issue in this case, and the ODFW application includes all remaining water in Elk River during the months when the Wagners sought to draw water from the river.
- 3) The Wagners have arranged for the transfer of a water right from a neighbor, with the understanding that the rights will be transferred back to their original owner within a specified term of years. Although OWRD has suggested alternative sources of water, such as storage of water drawn from the river during months when ODFW's instream

right would not appropriate all the water available, the Wagners do not consider this a viable option.

- 4) Although the instream water right sought by ODFW will prevent the Wagner's dairy from operating in its current configuration, the evidence does not establish that the proposed water right will prevent agricultural land from being used for agricultural purposes.
- 5) The description of the reach contained in the application was based upon a map provided by OWRD showing that Elk River runs straight West to the Pacific Ocean, with its mouth in Section 19, Township 32S, Range 15 W WM. This map was in error. Although Elk River occasionally breaks through to enter the ocean at that point, it usually makes a sharp turn to the North just before reaching the shoreline, and travels some distance before turning West again to enter the ocean near the section corner for Sections 18 and 13.
- 6) Because of this error, the point where Anvil Creek enters Elk River may not be at river mile 13.0, and the mouth of Elk River is not in Section 19, both as stated in the application.
- 7) The determination of water availability for Elk River was based upon the entire river as a single "Water Availability Subbasin" with enforcement governed by evaluation of stream flow at the lower end of the reach, so as to assure adequate flow throughout the reach.
- 8) Protestants McKenzies have water rights senior to the application within the reach.
- 9) The application included evidence sufficient to establish that local governments had been notified of ODFW's intent to file the instream water right application.
- 10) ODFW used the Oregon State Game Commission Environmental Basin Investigation Report to determine the quantity of water to be recommended as necessary to support the intended public use. The physical condition of the waterway has not changed since the instream flow requirements were determined.

#### CONCLUSIONS OF LAW

- 1) The Department is not required by law to consider potential future uses in evaluating an instream water right application.
- 2) The application was sufficiently definite to satisfy the requirements of regulation and statute.
- 3) The application met the completeness requirements of OAR 690-77-020.



- 4) ODFW followed the applicable regulations in recommending the quantity of water necessary to support the intended public use.

### OPINION

1. The Wagners argue that the Department should consider potential future beneficial uses of the water in evaluating an instream water right application. Specifically, the Wagners contend that granting ODFW an instream water right that appropriates all unappropriated water in the river during the irrigation season will prevent the Wagners from continuing their dairy operations, and hence will prevent agricultural lands from being used for agricultural purposes. Except for a reference to Land Use Planning Goals of limited relevance to these proceedings, no party has provided any authority for the proposition that preservation of the agricultural viability of agricultural land is a factor that OWRD must allow priority in evaluating water right applications such as this. Indeed, no authority has been offered for the more basic proposition that OWRD must consider any potential future uses for the water before granting an instream application. Supposing, however, that such a consideration were relevant in opposing this application, the Wagners had the burden of presenting evidence to prove this point. They did not do so.

The Wagner's dairy farm has been in existence for 50 years or more, and has drawn water from Elk River for most of that period to irrigate a field in the belief that a water right existed to do so. Because of an error in the earlier application, the water right obtained under that application allows irrigation of only a small part of the parcel intended. In order to continue their dairy operation without significant modification, the Wagners have arranged for the transfer of a water right from their neighbor, with the understanding that the rights will be transferred back to their original owner in a specified term of years. Although OWRD and ODFW expressed some skepticism concerning this arrangement, Mr. Wagner testified credibly at hearing, and I have no reason to disbelieve his testimony. If, as Mr. Wagner testified, he gave such a promise, he is at least ethically bound to keep it. He may also be legally bound, if the incidents of a partially performed verbal contract could be established. Consequently, the Wagners find themselves today facing the likelihood that they will be unable to irrigate in their accustomed manner a parcel that, according to the Wagners, is essential to their dairy operation. I do not doubt that this is true. But this testimony does not meet the evidentiary threshold the Wagners have set for themselves to prove their case.

In order to prove their case (always supposing that there were a legal basis for the position), the Wagners would have to present evidence that granting ODFW the water right it seeks would prevent agricultural land from being used for agricultural purposes. Instead, they have shown that granting ODFW the water right requested would prevent them from operating their dairy as it is presently organized. This is not at all the same.

The Wagners' evidence shows that, if ODFW obtains the instream water right proposed, there will be no more unappropriated water to be drawn for irrigation of their

property during the months when it is needed. The Wagners state that their dairy operates at a level of production, based on the water right the Wagners believed until recently that they owned, that cannot be sustained without a water right such as that which was recently transferred to them. Consequently, it is argued, if the ODFW instream right is approved, the Wagners will not have enough water available (after returning the transferred water right as agreed) to continue their dairy operation as it is presently organized. OWRD has suggested changes in the Wagners' operation (such as storage of water from high water-flow months), but the evidence is inconclusive whether those changes would be adequate or cost-effective.

Although the Wagners have shown that allowing the ODFW appropriation would make it impossible to continue their dairy operation as it is presently organized they have not shown that granting the right would prevent some lesser, or different, agricultural use from being made of the property. The only statement specifically related to this point is the conclusory statement in the Wagners' protest, that "Without water, Elk River Valley ag land is rendered useless!" (Protest, item 2). Other items of evidence concerning soil type and suitability for certain crops may go toward showing the quality of the land in question, but do not, of themselves, permit the inference that the land will be unproductive without the water the Wagners seek. There is simply no substantial evidence in the record on this issue.

While one can sympathize with Wagners' predicament, OWRD must follow the evidence where it leads. The Wagners have not presented any proper grounds for disallowing ODFW's application, and the denial of the Wagners' own application (which appears to be the real basis for their grievance) is not before me.

2. The McKenzies argue that, because of the error in describing the reach, the application is not adequate to support allowance of the water right. It was also suggested that it was not fair to impose strict standards of description on the Wagners, so that their ability to irrigate their property is defeated, while allowing the ODFW to retain a water right even though they committed an error in describing the reach.

OWRD and ODFW respond, first, that the error in the description was not raised as an issue until briefing for the hearing was in progress, on June 4, 2001, and therefore is not a proper subject for decision, and that in any event the description was adequate under the rule that was in effect when the application was filed. The agencies also note that there is a difference between the consumptive right requested by the Wagners, which may only be perfected by beneficial use on a specified parcel of land, and the instream right requested by ODFW, to which an entirely different standard applies.

I conclude that the application is sufficient to survive the McKenzies' challenge.

In 1990, when the application was filed and reviewed for completeness, OAR 690-77-020(4) required an application for an instream water right to include *inter alia* the following information:

(c) Stream or Lake Name

(d) If a stream, the reach and stream to which it is tributary;

(e) The appropriate section of a department basin map with the applicable lake or stream reach identified.

Under OAR 690-077-0043(3), the McKenzies were required to raise any “reasonably ascertainable issues” supporting their position prior to the close of the protest period, i.e., October 4, 1996. The specific assertion that the mouth of Elk River was not located in Section 19, as described in the application, was not clearly raised until June 4, 2001. Unless that argument may be made out from an argument raised before the protest period ended, McKenzies are precluded from presenting it now. OAR 690-077-0043(3).

In the McKenzies’ protest, they argue that the application did not conform to subsection (4)(e), requiring the applicant to submit “the appropriate section of a department basin map...” Although this is not entirely clear, apparently the McKenzies now argue that the reference to the “appropriate section” in this rule refers to a public lands survey description, thus converting the reference to subsection 4(e) in the McKenzies’ protest into an argument that the description recites Section 19 when it should recite Section 13 or 18. This is not, however, a proper construction of the rule.

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), statutes and rules are to be given the meaning intended by the entity that promulgated the provision. The first step in ascertaining that meaning requires an analysis of the text and context of the provision at issue. Only if that provision is found to be ambiguous, i.e., reasonably susceptible to more than one reading, may recourse be had to legislative history and rules of construction, keeping in mind that, as the court noted in *Young v. State of Oregon*, 161 Or App 32 (1999); “[T]he legislative power includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly.”

Moreover, an agency’s interpretation of its own rules is entitled to deference, so long as that interpretation is plausible and not contrary to statutory authority of the agency.

As noted, this court is authorized to overrule an agency’s interpretation of a rule if an agency has ‘erroneously interpreted a provision of law.’ ORS 183.482(8)(a). In this case, the ‘provision of law’ is the rule itself. Where, as here, the agency’s plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted erroneously. *Don’t Waste Oregon Com. v. Energy Fac. Siting*, 320 Or 132, 881 P2d 119 (1992); *Body Imaging, P.C. v. BOLI*, 166 Or. App. 54, 999 P2d 475 (2000)

Here, the agency (OWRD) has interpreted the use of the term “section” in OAR 690-077-020(4)(e) to refer to “that portion (i.e. section) of the department basin map that

includes the applicable stream reach so that applicant need not attach the entire large map of the whole basin." *Websters Collegiate Dictionary* defines "section" as, *inter alia* "a part set off by or as if by cutting," and provides "part" as a synonym. Thus, the OWRD's interpretation is plausible under the dictionary definition. It has not been argued, and there is no reason otherwise to conclude, that the OWRD's interpretation violates any statutory authority on the subject. To the contrary, ORS 537.140, 537.338 and 537.349 invest in the agency the authority to establish forms and procedures for applications for instream water rights. Nothing in these statutes would require a description of the reach to include the public lands survey description. Moreover, as the agency notes, a rule requiring a complete public land survey description (for example, the description in this case) would necessarily require reference to Township and Range as well, so that the section actually described could be localized. Otherwise, it could not be determined which "Section 19" of a myriad "Section 19"s was intended. I am forbidden by statute to "Insert what has been omitted." (ORS 174.010). In construing this regulation, therefore, I may not add requirements to the rule that its language does not expressly provide.

Thus, the portion or section of the basin map, with the Elk River circled on it, was sufficient to satisfy the requirement of OAR 690-77-020(4)(e), and the reference in that subsection to "section" referred to a part of the basin map, not a "Section" of land described in a Public Land Survey Description. The McKenzies' attempt to bring their current argument regarding the inaccuracy of the description within their reference to 690-77-020(4) is contrary to the agency's plausible and permissible construction, and reflects an incorrect understanding of the rule. Because it is contrary to the plain meaning of the rule, the argument based on the McKenzies' interpretation was not "reasonably ascertainable" from the citation of OAR 690-77-020(4)(e) in the McKenzies' protest, and was not stated with sufficient specificity in the protest to afford the Department an opportunity to respond to the issue. [ORS 537.170(5); OAR 690-77-0043(4)].

Since the argument concerning the interpretation of the term "section" is the only part of the McKenzies' argument that could be referred back to issues raised before the end of the protest period, the remainder of the McKenzies' argument not already decided in the Order on Motion for Decision on Legal Issues is not timely, and cannot form the basis for a denial of the application.

However, even if those additional arguments were properly before me, they would be without merit.

As noted above, the regulation governing the information required in an application for instream water rights was OAR 690-077-020(4). In 1990, when the application in this case was filed, that regulation required among other matters, the following:

- (c) Stream or Lake Name
- (d) If a stream, the reach and stream to which it is tributary;
- (e) The appropriate section of a department basin map with the applicable lake or

stream reach identified.

As noted by the OWRD, this regulation was amended in July, 1992, to require additional information, including "the reach delineated by river mile."

The application described the reach as follows:

"Elk River from Anvil Creek at River Mile 13.0 (Section 5, Township 33S, Range 14W WM); to the mouth at River Mile 0.0 (Section 19, Township 32S, Range 15 W WM)."

The portion of this description that was responsive to the requirements of the regulation as it was in 1990 is as follows: "Elk River from Anvil Creek...;to the mouth..." The remaining information was not required in the application, and is, essentially, surplusage. As it happens, some of this information is demonstrably incorrect. However, that incorrect information was not required in the first place.

The question presented here would then be whether the inclusion of incorrect, but unnecessary, information in a description of the reach would defeat the application. I find it would not, at least in this case. The additional incorrect language is not referable to any feature of the land that would be visible to one actually examining the reach in question. There is no ambiguity in the operative language, i.e., where the reach begins, at Anvil Creek, and where it ends, at the river mouth. The errors in the description would be clear to anyone who attempted to check them, and thus were not inherently misleading. In any event, there is no showing that anyone relied upon the errors in the description to their prejudice in this case. There is no evidence that the McKenzies or Wagners were precluded in any way from arguing their case, and or that either protestant was lulled by the errors in the description into sleeping on their rights in the mistaken belief that their rights were not impacted. Thus, it cannot be said that the application is so erroneous that it does not give adequate notice of the extent of the proposed reach to anyone reviewing the application.

3. The preponderance of the evidence presented at the hearing established that ODFW included a copy of the memorandum that was sent to local governments notifying them of ODFW's intent to file an instream water right application, together with a mailing label list of the local governments to which that memo was sent. OWRD investigated this filing, and concluded, properly, that it met the requirement that ODFW provide notification of its application to affected local governments. No evidence to the contrary was submitted at the hearing.

4. The McKenzies argued that ODFW did not use the correct methodology in establishing the quantity of water required to support the intended public use.

OAR 635-400-0015(13) requires ODFW to use the instream flow requirements stated in the applicable Oregon State Game Commission Environmental Basin Investigation Reports, unless the physical conditions of the waterway have changed since

that report was done. Although the evidence at hearing showed that at some point the mouth of the Elk River was, for a short time, at a different location than present, there is no evidence that this change was after the Investigation Report was issued, or that it would be a sufficient change in the waterway to trigger the requirement of an alternative method of establishing the required quantity. In the state of the record in this case, a preponderance of the evidence supports the conclusion that the ODFW followed the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

### SUMMARY

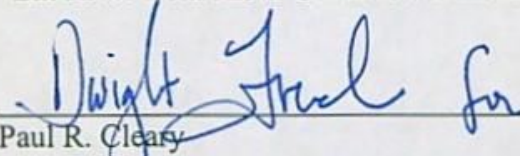
The Wagner's protest fails for two reasons; First, they did not show that the Department was required to consider potential future applications for agricultural uses of water in evaluating the ODFW application. Second, they did not prove that even were such consideration required, the ODFW appropriation would prevent agricultural use of agricultural land.

The McKenzies protest also fails. The argument concerning errors in the description of the reach are untimely. Even if they could be considered, they involve information not required by rule, and errors that do not prejudice any party or prevent them from having received adequate notice. At hearing, ODFW established that they had complied with the requirements for a complete application, and that they had used the correct standard to establish the quantity of water involved.

### PROPOSED ORDER

The application, IS 70895, is approved with the conditions noted in the Proposed Final Order of August 20, 1996, for a reach described as follows:

"Elk River from Anvil Creek to the mouth."

  
\_\_\_\_\_  
Paul R. Cleary  
Director  
Oregon Water Resources Department

**NOTICE:** You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. The date of service is the date on which the order is delivered or mailed. Judicial review is pursuant to the provisions of ORS 536.075, and is to the Oregon Court of Appeals.

### CERTIFICATE OF SERVICE

I certify that on November 14, 2001, I served the attached the FINAL ORDER ON CONTESTED CASE HEARING by mailing in a sealed envelope, first class postage prepaid to the following parties:

Pual Brice Wagner 42705 Wagner Lane Port Orford, OR 97465 <a href="mailto:Elkrivdari@harborside.com">Elkrivdari@harborside.com</a>	
Scott and Carol McKenzie P.O. Box 281 Sixes, OR 97476 <a href="mailto:Smckenzie@harborside.com">Smckenzie@harborside.com</a>	
Jill Zarnowitz Oregon Department of Fish & Wildlife Habitat Division 2501 S.W. First Ave., P.O. Box 59 Portland, OR 97207 <a href="mailto:Jill.ZARNOWITZ@state.or.us">Jill.ZARNOWITZ@state.or.us</a>	Shelley McIntyre Oregon Department of Justice 1515 S.W. Fifth Ave. Portland, OR 97201 <a href="mailto:shelley.mcintyre@state.or.us">shelley.mcintyre@state.or.us</a>



Renee Moulun  
Oregon Water Resources Department

*File*

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A hearing was conducted June 18, 2001. OWRD appeared through Renee Moulun, and Kimberly Grigsby, agency representatives. Shelly McIntyre of the Oregon Department of Justice represented ODFW. Also appearing for ODFW were Richard Kruger and Jill Zarnowitz. Michael J. Mattick, LLoyd Charles Van Gordon, Dwight French, and Bernadette Williams testified for OWRD. Scott McKenzie and Paul Brice Wagner appeared and testified for protestants. The record was held open for specified additional evidence until June 25, 2001. The record remained open for written reply until August 14, 2001, after initial closing argument from all parties. The record is now closed.

On August 30, 2001, a Proposed Order was issued in this matter. On September 19, 2001, ODFW submitted a request that this Proposed Order be withdrawn and that a new proposed order addressing certain issues presented in the case be entered.

## ISSUES

At the close of the hearing, in light of the partial ruling on legal issues previously entered, the issues remaining to be decided were as follows:

- 1) Whether potential future uses of water, including agricultural uses, should be taken into account by OWRD in processing a water right application pursuant to ORS 537.153.
- 2) Whether the description stated in the application for instream water rights is sufficiently definite to deem the application complete under OWRD rules.
- 3) Whether the Application met the completeness requirements of OAR 690-77-020.
- 4) Whether ODFW complied with the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

## EVIDENTIARY RULING

Exhibits A through H, offered by the parties, were marked and admitted into the record. The record is now closed.

## FINDINGS OF FACT

- 1) The application seeks an instream water right to specified monthly flows for Elk River, and identifies the reach as follows:

“Elk River from Anvil Creek at River Mile 13.0 (Section 5, Township 33S, Range 14W WM); to the mouth at River Mile 0.0 (Section 19, Township 32S, Range 15 W WM).”
- 2) Protestants Wagners' dairy farm has been in existence for 50 years or more. A mistake was made in describing the land that would be irrigated under a water right application filed by the current owners' predecessor in title many years ago. Once this error was discovered, the Wagners applied for a new water right conforming to the terms previously believed to be in force. That application was denied, since it would be junior to the right of ODFW under the application at issue in this case, and the ODFW application includes all remaining water in Elk River during the months when the Wagners sought to draw water from the river.
- 3) The Wagners have arranged for the transfer of a water right from a neighbor, with the understanding that the rights will be transferred back to their original owner within a specified term of years. Although OWRD has suggested alternative sources of water, such as storage of water drawn from the river during months when ODFW's instream

right would not appropriate all the water available, the Wagners do not consider this a viable option.

- 4) Although the instream water right sought by ODFW will prevent the Wagner's dairy from operating in its current configuration, the evidence does not establish that the proposed water right will prevent agricultural land from being used for agricultural purposes.
- 5) The description of the reach contained in the application was based upon a map provided by OWRD showing that Elk River runs straight West to the Pacific Ocean, with its mouth in Section 19, Township 32S, Range 15 W WM. This map was in error. Although Elk River occasionally breaks through to enter the ocean at that point, it usually makes a sharp turn to the North just before reaching the shoreline, and travels some distance before turning West again to enter the ocean near the section corner for Sections 18 and 13.
- 6) Because of this error, the point where Anvil Creek enters Elk River may not be at river mile 13.0, and the mouth of Elk River is not in Section 19, both as stated in the application.
- 7) The determination of water availability for Elk River was based upon the entire river as a single "Water Availability Subbasin" with enforcement governed by evaluation of stream flow at the lower end of the reach, so as to assure adequate flow throughout the reach.
- 8) Protestants McKenzies have water rights senior to the application within the reach.
- 9) The application included evidence sufficient to establish that local governments had been notified of ODFW's intent to file the instream water right application.
- 10) ODFW used the Oregon State Game Commission Environmental Basin Investigation Report to determine the quantity of water to be recommended as necessary to support the intended public use. The physical condition of the waterway has not changed since the instream flow requirements were determined.

#### CONCLUSIONS OF LAW

- 1) The Department is not required by law to consider potential future uses in evaluating an instream water right application.
- 2) The application was sufficiently definite to satisfy the requirements of regulation and statute.
- 3) The application met the completeness requirements of OAR 690-77-020.

- 4) ODFW followed the applicable regulations in recommending the quantity of water necessary to support the intended public use.

### OPINION

1. The Wagners argue that the Department should consider potential future beneficial uses of the water in evaluating an instream water right application. Specifically, the Wagners contend that granting ODFW an instream water right that appropriates all unappropriated water in the river during the irrigation season will prevent the Wagners from continuing their dairy operations, and hence will prevent agricultural lands from being used for agricultural purposes. Except for a reference to Land Use Planning Goals of limited relevance to these proceedings, no party has provided any authority for the proposition that preservation of the agricultural viability of agricultural land is a factor that OWRD must allow priority in evaluating water right applications such as this. Indeed, no authority has been offered for the more basic proposition that OWRD must consider any potential future uses for the water before granting an instream application. Supposing, however, that such a consideration were relevant in opposing this application, the Wagners had the burden of presenting evidence to prove this point. They did not do so.

The Wagner's dairy farm has been in existence for 50 years or more, and has drawn water from Elk River for most of that period to irrigate a field in the belief that a water right existed to do so. Because of an error in the earlier application, the water right obtained under that application allows irrigation of only a small part of the parcel intended. In order to continue their dairy operation without significant modification, the Wagners have arranged for the transfer of a water right from their neighbor, with the understanding that the rights will be transferred back to their original owner in a specified term of years. Although OWRD and ODFW expressed some skepticism concerning this arrangement, Mr. Wagner testified credibly at hearing, and I have no reason to disbelieve his testimony. If, as Mr. Wagner testified, he gave such a promise, he is at least ethically bound to keep it. He may also be legally bound, if the incidents of a partially performed verbal contract could be established. Consequently, the Wagners find themselves today facing the likelihood that they will be unable to irrigate in their accustomed manner a parcel that, according to the Wagners, is essential to their dairy operation. I do not doubt that this is true. But this testimony does not meet the evidentiary threshold the Wagners have set for themselves to prove their case.

In order to prove their case (always supposing that there were a legal basis for the position), the Wagners would have to present evidence that granting ODFW the water right it seeks would prevent agricultural land from being used for agricultural purposes. Instead, they have shown that granting ODFW the water right requested would prevent them from operating their dairy as it is presently organized. This is not at all the same.

The Wagners' evidence shows that, if ODFW obtains the instream water right proposed, there will be no more unappropriated water to be drawn for irrigation of their

property during the months when it is needed. The Wagners state that their dairy operates at a level of production, based on the water right the Wagners believed until recently that they owned, that cannot be sustained without a water right such as that which was recently transferred to them. Consequently, it is argued, if the ODFW instream right is approved, the Wagners will not have enough water available (after returning the transferred water right as agreed) to continue their dairy operation as it is presently organized. OWRD has suggested changes in the Wagners' operation (such as storage of water from high water-flow months), but the evidence is inconclusive whether those changes would be adequate or cost-effective.

Although the Wagners have shown that allowing the ODFW appropriation would make it impossible to continue their dairy operation as it is presently organized they have not shown that granting the right would prevent some lesser, or different, agricultural use from being made of the property. The only statement specifically related to this point is the conclusory statement in the Wagners' protest, that "Without water, Elk River Valley ag land is rendered useless!" (Protest, item 2). Other items of evidence concerning soil type and suitability for certain crops may go toward showing the quality of the land in question, but do not, of themselves, permit the inference that the land will be unproductive without the water the Wagners seek. There is simply no substantial evidence in the record on this issue.

While one can sympathize with Wagners' predicament, OWRD must follow the evidence where it leads. The Wagners have not presented any proper grounds for disallowing ODFW's application, and the denial of the Wagners' own application (which appears to be the real basis for their grievance) is not before me.

2. The McKenzies argue that, because of the error in describing the reach, the application is not adequate to support allowance of the water right. It was also suggested that it was not fair to impose strict standards of description on the Wagners, so that their ability to irrigate their property is defeated, while allowing the ODFW to retain a water right even though they committed an error in describing the reach.

OWRD and ODFW respond, first, that the error in the description was not raised as an issue until briefing for the hearing was in progress, on June 4, 2001, and therefore is not a proper subject for decision, and that in any event the description was adequate under the rule that was in effect when the application was filed. The agencies also note that there is a difference between the consumptive right requested by the Wagners, which may only be perfected by beneficial use on a specified parcel of land, and the instream right requested by ODFW, to which an entirely different standard applies.

I conclude that the application is sufficient to survive the McKenzies' challenge.

In 1990, when the application was filed and reviewed for completeness, OAR 690-77-020(4) required an application for an instream water right to include *inter alia* the following information:

- (c) Stream or Lake Name
- (d) If a stream, the reach and stream to which it is tributary;
- (e) The appropriate section of a department basin map with the applicable lake or stream reach identified.

Under OAR 690-077-0043(3), the McKenzies were required to raise any “reasonably ascertainable issues” supporting their position prior to the close of the protest period, i.e., October 4, 1996. The specific assertion that the mouth of Elk River was not located in Section 19, as described in the application, was not clearly raised until June 4, 2001. Unless that argument may be made out from an argument raised before the protest period ended, McKenzies are precluded from presenting it now. OAR 690-077-0043(3).

In the McKenzies’ protest, they argue that the application did not conform to subsection (4)(e), requiring the applicant to submit “the appropriate section of a department basin map....” Although this is not entirely clear, apparently the McKenzies now argue that the reference to the “appropriate section” in this rule refers to a public lands survey description, thus converting the reference to subsection 4(e) in the McKenzies’ protest into an argument that the description recites Section 19 when it should recite Section 13 or 18. This is not, however, a proper construction of the rule.

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), statutes and rules are to be given the meaning intended by the entity that promulgated the provision. The first step in ascertaining that meaning requires an analysis of the text and context of the provision at issue. Only if that provision is found to be ambiguous, i.e., reasonably susceptible to more than one reading, may recourse be had to legislative history and rules of construction, keeping in mind that, as the court noted in *Young v. State of Oregon*, 161 Or App 32 (1999); “[T]he legislative power includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly.”

Moreover, an agency’s interpretation of its own rules is entitled to deference, so long as that interpretation is plausible and not contrary to statutory authority of the agency.

As noted, this court is authorized to overrule an agency’s interpretation of a rule if an agency has ‘erroneously interpreted a provision of law.’ ORS 183.482(8)(a). In this case, the ‘provision of law’ is the rule itself. Where, as here, the agency’s plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted erroneously. *Don’t Waste Oregon Com. v. Energy Fac. Siting*, 320 Or 132, 881 P2d 119 (1992); *Body Imaging, P.C. v. BOLI*, 166 Or. App. 54, 999 P2d 475 (2000)

Here, the agency (OWRD) has interpreted the use of the term “section” in OAR 690-077-020(4)(e) to refer to “that portion (i.e. section) of the department basin map that

includes the applicable stream reach so that applicant need not attach the entire large map of the whole basin." *Websters Collegiate Dictionary* defines "section" as, *inter alia* "a part set off by or as if by cutting," and provides "part" as a synonym. Thus, the OWRD's interpretation is plausible under the dictionary definition. It has not been argued, and there is no reason otherwise to conclude, that the OWRD's interpretation violates any statutory authority on the subject. To the contrary, ORS 537.140, 537.338 and 537.349 invest in the agency the authority to establish forms and procedures for applications for instream water rights. Nothing in these statutes would require a description of the reach to include the public lands survey description. Moreover, as the agency notes, a rule requiring a complete public land survey description (for example, the description in this case) would necessarily require reference to Township and Range as well, so that the section actually described could be localized. Otherwise, it could not be determined which "Section 19" of a myriad "Section 19"s was intended. I am forbidden by statute to "Insert what has been omitted." (ORS 174.010). In construing this regulation, therefore, I may not add requirements to the rule that its language does not expressly provide.

Thus, the portion or section of the basin map, with the Elk River circled on it, was sufficient to satisfy the requirement of OAR 690-77-020(4)(e), and the reference in that subsection to "section" referred to a part of the basin map, not a "Section" of land described in a Public Land Survey Description. The McKenzies' attempt to bring their current argument regarding the inaccuracy of the description within their reference to 690-77-020(4) is contrary to the agency's plausible and permissible construction, and reflects an incorrect understanding of the rule. Because it is contrary to the plain meaning of the rule, the argument based on the McKenzies' interpretation was not "reasonably ascertainable" from the citation of OAR 690-77-020(4)(e) in the McKenzies' protest, and was not stated with sufficient specificity in the protest to afford the Department an opportunity to respond to the issue. [ORS 537.170(5); OAR 690-77-0043(4)] .

Since the argument concerning the interpretation of the term "section" is the only part of the McKenzies' argument that could be referred back to issues raised before the end of the protest period, the remainder of the McKenzies' argument not already decided in the Order on Motion for Decision on Legal Issues is not timely, and cannot form the basis for a denial of the application.

However, even if those additional arguments were properly before me, they would be without merit.

As noted above, the regulation governing the information required in an application for instream water rights was OAR 690-077-020(4). In 1990, when the application in this case was filed, that regulation required among other matters, the following:

- (c) Stream or Lake Name
- (d) If a stream, the reach and stream to which it is tributary;
- (e) The appropriate section of a department basin map with the applicable lake or

stream reach identified.

As noted by the OWRD, this regulation was amended in July, 1992, to require additional information, including “the reach delineated by river mile.”

The application described the reach as follows:

“Elk River from Anvil Creek at River Mile 13.0 (Section 5, Township 33S, Range 14W WM); to the mouth at River Mile 0.0 (Section 19, Township 32S, Range 15 W WM).”

The portion of this description that was responsive to the requirements of the regulation as it was in 1990 is as follows: “Elk River from Anvil Creek...to the mouth...” The remaining information was not required in the application, and is, essentially, surplusage. As it happens, some of this information is demonstrably incorrect. However, that incorrect information was not required in the first place.

The question presented here would then be whether the inclusion of incorrect, but unnecessary, information in a description of the reach would defeat the application. I find it would not, at least in this case. The additional incorrect language is not referable to any feature of the land that would be visible to one actually examining the reach in question. There is no ambiguity in the operative language, i.e., where the reach begins, at Anvil Creek, and where it ends, at the river mouth. The errors in the description would be clear to anyone who attempted to check them, and thus were not inherently misleading. In any event, there is no showing that anyone relied upon the errors in the description to their prejudice in this case. There is no evidence that the McKenzies or Wagners were precluded in any way from arguing their case, and or that either protestant was lulled by the errors in the description into sleeping on their rights in the mistaken belief that their rights were not impacted. Thus, it cannot be said that the application is so erroneous that it does not give adequate notice of the extent of the proposed reach to anyone reviewing the application.

3. The preponderance of the evidence presented at the hearing established that ODFW included a copy of the memorandum that was sent to local governments notifying them of ODFW’s intent to file an instream water right application, together with a mailing label list of the local governments to which that memo was sent. OWRD investigated this filing, and concluded, properly, that it met the requirement that ODFW provide notification of its application to affected local governments. No evidence to the contrary was submitted at the hearing.

4. The McKenzies argued that ODFW did not use the correct methodology in establishing the quantity of water required to support the intended public use.

OAR 635-400-0015(13) requires ODFW to use the instream flow requirements stated in the applicable Oregon State Game Commission Environmental Basin Investigation Reports, unless the physical conditions of the waterway have changed since



that report was done. Although the evidence at hearing showed that at some point the mouth of the Elk River was, for a short time, at a different location than present, there is no evidence that this change was after the Investigation Report was issued, or that it would be a sufficient change in the waterway to trigger the requirement of an alternative method of establishing the required quantity. In the state of the record in this case, a preponderance of the evidence supports the conclusion that the ODFW followed the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

### SUMMARY

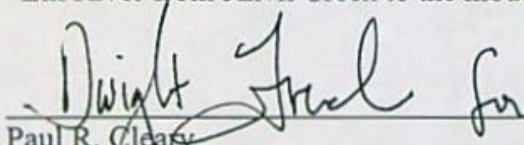
The Wagner's protest fails for two reasons; First, they did not show that the Department was required to consider potential future applications for agricultural uses of water in evaluating the ODFW application. Second, they did not prove that even were such consideration required, the ODFW appropriation would prevent agricultural use of agricultural land.

The McKenzies protest also fails. The argument concerning errors in the description of the reach are untimely. Even if they could be considered, they involve information not required by rule, and errors that do not prejudice any party or prevent them from having received adequate notice. At hearing, ODFW established that they had complied with the requirements for a complete application, and that they had used the correct standard to establish the quantity of water involved.

### PROPOSED ORDER

The application, IS 70895, is approved with the conditions noted in the Proposed Final Order of August 20, 1996, for a reach described as follows:

"Elk River from Anvil Creek to the mouth."

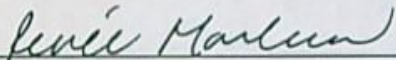
  
\_\_\_\_\_  
Paul R. Cleary  
Director  
Oregon Water Resources Department

**NOTICE:** You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. The date of service is the date on which the order is delivered or mailed. Judicial review is pursuant to the provisions of ORS 536.075, and is to the Oregon Court of Appeals.

## CERTIFICATE OF SERVICE

I certify that on November 14, 2001, I served the attached the FINAL ORDER ON CONTESTED CASE HEARING by mailing in a sealed envelope, first class postage prepaid to the following parties:

Pual Brice Wagner 42705 Wagner Lane Port Orford, OR 97465 <a href="mailto:Elkrivdari@harborside.com">Elkrivdari@harborside.com</a>	
Scott and Carol McKenzie P.O. Box 281 Sixes, OR 97476 <a href="mailto:Smckenzie@harborside.com">Smckenzie@harborside.com</a>	
Jill Zarnowitz Oregon Department of Fish & Wildlife Habitat Division 2501 S.W. First Ave., P.O. Box 59 Portland, OR 97207 <a href="mailto:Jill.ZARNOWITZ@state.or.us">Jill.ZARNOWITZ@state.or.us</a>	Shelley McIntyre Oregon Department of Justice 1515 S.W. Fifth Ave. Portland, OR 97201 <a href="mailto:shelley.mcintyre@state.or.us">shelley.mcintyre@state.or.us</a>

  
\_\_\_\_\_  
Renee Moulun  
Oregon Water Resources Department

To: Sharyl Kammerzell  
From: Renee Moulun <Renee.M.MOULUN@wrd.state.or.us>  
Subject: Final Order IS 70895  
Cc: Dwight French, Dick Bailey  
Bcc:  
Attached: M:\docs\iswr app. protests\is 70895\IS 70895 FO.doc;

Hello:

I'm attaching for your review, the final order for IS 70895. We basically adopted the proposed order. The changes I made were only symantic and grammatical. Please review and comment as needed.

Thank you.

Renee

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF Water Right Application IS )	FINAL ORDER ON CONTESTED
70895 in the Name of the Oregon Department of )	
Fish and Wildlife, )	CASE HEARING
<i>Applicant</i> )	
)	
Paul Brice Wagner, )	
<i>Protestant</i> )	
)	
Scott and Carol McKenzie )	
<i>Protestants</i> )	

HISTORY OF THE CASE

On November 8, 1990, the Oregon Department of Fish and Wildlife (ODFW) submitted an application to the Oregon Water Resources Department (OWRD) for an instream water right certificate for a reach of Elk River, Curry County, Oregon, defined therein, for the purpose of maintaining stream flow for migration, spawning, egg incubation, fry emergence and juvenile rearing for several fish species. This application was accompanied by the appropriate evidence that local governments had been notified, pursuant to OAR 690-77-020.

The OWRD served notice of its Technical Review on December 23, 1993, proposing to grant the certificate with conditions. When the objection period had closed, March 4, 1994, OWRD had received objections from Curry County Board of Realtors, Leesa Wagner, ODFW, Peggy Hennessy, Scott H. MacKenzie, Water for Life, and Waterwatch of Oregon. A proposed Final Order was issued August 20, 1996, approving the application with the following conditions:

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

JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	92.9	59.8	51.2	78.8	380.0	380.0

2. The water right holder shall measure and report the instream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other

instream flows created by a prior water right or designated minimum perennial stream flow.

5. The flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.

The Proposed Final Order also prescribed a protest period to end October 4, 1996. Protests were filed by Paul Brice Wagner, Scott and Carol McKenzie, and Knapp Ranches.

On January 30, 2001, the matter was referred to the Hearing Officer Panel for hearing. A Prehearing Conference was conducted on March 16, 2001. On March 22, 2001, a Prehearing Order was entered setting a briefing schedule and listing the issues presented by this case. On April 30, 2001, protestants Scott H. McKenzie and Brice and Sharon Wagner filed opening briefs. On May 21, 2001 the Oregon Water Resources Department (OWRD) filed a Response and Motion for Ruling on Legal Issues. On May 24, 2001, the Oregon Department of Fish and Wildlife filed a Response Brief. On May 31, 2001, the Oregon Water Resources Department filed a Motion to Dismiss Party. On June 4, 2001, Protestant Scott McKenzie filed a Reply Brief.

On June 4, 2001, the Hearings Officer Panel transmitted electronically to all parties but Knapp Ranches, a memorandum allowing the parties to respond to the Motion to Dismiss Party by noon on June 13, 2001. The same memorandum was sent to Knapp Ranches by surface mail the same day as Knapp Ranches had not provided an electronic mail address. No response having been received from any party, on June 15, 2001, an Order was issued, dismissing Knapp Ranches as a party, granting the Motion for Ruling on Legal Issues in part and Denying the Motion for Ruling on Legal Issues in part.

A hearing was conducted June 18, 2001. OWRD appeared through Renee Moulun, and Kimberly Grigsby, agency representatives. Shelly McIntyre of the Oregon Department of Justice represented ODFW. Also appearing for ODFW were Richard Kruger and Jill Zarnowitz. Michael J. Mattick, LLOYD Charles Van Gordon, Dwight French, and Bernadette Williams testified for OWRD. Scott McKenzie and Paul Brice Wagner appeared and testified for protestants. The record was held open for specified additional evidence until June 25, 2001. The record remained open for written reply until August 14, 2001, after initial closing argument from all parties. The record is now closed.

On August 30, 2001, a Proposed Order was issued in this matter. On September 19, 2001, ODFW submitted a request that this Proposed Order be withdrawn and that a new proposed order addressing certain issues presented in the case be entered.

## ISSUES

At the close of the hearing, in light of the partial ruling on legal issues previously entered, the issues remaining to be decided were as follows:

- 1) Whether potential future uses of water, including agricultural uses, should be taken into account by OWRD in processing a water right application pursuant to ORS 537.153.
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- 3) Whether the Application met the completeness requirements of OAR 690-77-020.
- 4) Whether ODFW complied with the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

## EVIDENTIARY RULING

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## FINDINGS OF FACT

- 1) The application seeks an instream water right to specified monthly flows for Elk River, and identifies the reach as follows:

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- 4) right would not appropriate all the water available, the Wagners do not consider this a viable option.
- 5) Although the instream water right sought by ODFW will prevent the Wagner's dairy from operating in its current configuration, the evidence does not establish that the proposed water right will prevent agricultural land from being used for agricultural purposes.
- 6) The description of the reach contained in the application was based upon a map provided by OWRD showing that Elk River runs straight West to the Pacific Ocean, with its mouth in Section 19, Township 32S, Range 15 W WM. This map was in error. Although Elk River occasionally breaks through to enter the ocean at that point, it usually makes a sharp turn to the North just before reaching the shoreline, and travels some distance before turning West again to enter the ocean near the section corner for Sections 18 and 13.
- 7) Because of this error, the point where Anvil Creek enters Elk River may not be at river mile 13.0, and the mouth of Elk River is not in Section 19, both as stated in the application.
- 8) The determination of water availability for Elk River was based upon the entire river as a single "Water Availability Subbasin" with enforcement governed by evaluation of stream flow at the lower end of the reach, so as to assure adequate flow throughout the reach.
- 9) Protestants McKenzies have water rights senior to the application within the reach.
- 10) The application included evidence sufficient to establish that local governments had been notified of ODFW's intent to file the instream water right application.
- 11) ODFW used the Oregon State Game Commission Environmental Basin Investigation Report to determine the quantity of water to be recommended as necessary to support the intended public use. The physical condition of the waterway has not changed since the instream flow requirements were determined.

#### CONCLUSIONS OF LAW

- 1) The Department is not required by law to consider potential future uses in evaluating an instream water right application.
- 2) The application was sufficiently definite to satisfy the requirements of regulation and statute.
- 3) The application met the completeness requirements of OAR 690-77-020.

- 4) ODFW followed the applicable regulations in recommending the quantity of water necessary to support the intended public use.

### OPINION

1. The Wagners argue that the Department should consider potential future beneficial uses of the water in evaluating an instream water right application. Specifically, the Wagners contend that granting ODFW an instream water right that appropriates all unappropriated water in the river during the irrigation season will prevent the Wagners from continuing their dairy operations, and hence will prevent agricultural lands from being used for agricultural purposes. Except for a reference to Land Use Planning Goals of limited relevance to these proceedings, no party has provided any authority for the proposition that preservation of the agricultural viability of agricultural land is a factor that OWRD must allow priority in evaluating water right applications such as this. Indeed, no authority has been offered for the more basic proposition that OWRD must consider any potential future uses for the water before granting an instream application. Supposing, however, that such a consideration were relevant in opposing this application, the Wagners had the burden of presenting evidence to prove this point. They did not do so.

The Wagner's dairy farm has been in existence for 50 years or more, and has drawn water from Elk River for most of that period to irrigate a field in the belief that a water right existed to do so. Because of an error in the earlier application, the water right obtained under that application allows irrigation of only a small part of the parcel intended. In order to continue their dairy operation without significant modification, the Wagners have arranged for the transfer of a water right from their neighbor, with the understanding that the rights will be transferred back to their original owner in a specified term of years. Although OWRD and ODFW expressed some skepticism concerning this arrangement, Mr. Wagner testified credibly at hearing, and I have no reason to disbelieve his testimony. If, as Mr. Wagner testified, he gave such a promise, he is at least ethically bound to keep it. He may also be legally bound, if the incidents of a partially performed verbal contract could be established. Consequently, the Wagners find themselves today facing the likelihood that they will be unable to irrigate in their accustomed manner a parcel that, according to the Wagners, is essential to their dairy operation. I do not doubt that this is true. But this testimony does not meet the evidentiary threshold the Wagners have set for themselves to prove their case.

In order to prove their case (always supposing that there were a legal basis for the position), the Wagners would have to present evidence that granting ODFW the water right it seeks would prevent agricultural land from being used for agricultural purposes. Instead, they have shown that granting ODFW the water right requested would prevent them from operating their dairy as it is presently organized. This is not at all the same.

The Wagners' evidence shows that, if ODFW obtains the instream water right proposed, there will be no more unappropriated water to be drawn for irrigation of their



property during the months when it is needed. The Wagners state that their dairy operates at a level of production, based on the water right the Wagners believed until recently that they owned, that cannot be sustained without a water right such as that which was recently transferred to them. Consequently, it is argued, if the ODFW instream right is approved, the Wagners will not have enough water available (after returning the transferred water right as agreed) to continue their dairy operation as it is presently organized. OWRD has suggested changes in the Wagners' operation (such as storage of water from high water-flow months), but the evidence is inconclusive whether those changes would be adequate or cost-effective.

Although the Wagners have shown that allowing the ODFW appropriation would make it impossible to continue their dairy operation as it is presently organized they have not shown that granting the right would prevent some lesser, or different, agricultural use from being made of the property. The only statement specifically related to this point is the conclusory statement in the Wagners' protest, that "Without water, Elk River Valley ag land is rendered useless!" (Protest, item 2). Other items of evidence concerning soil type and suitability for certain crops may go toward showing the quality of the land in question, but do not, of themselves, permit the inference that the land will be unproductive without the water the Wagners seek. There is simply no substantial evidence in the record on this issue.

While one can sympathize with Wagners' predicament, OWRD must follow the evidence where it leads. The Wagners have not presented any proper grounds for disallowing ODFW's application, and the denial of the Wagners' own application (which appears to be the real basis for their grievance) is not before me.

2. The McKenzies argue that, because of the error in describing the reach, the application is not adequate to support allowance of the water right. It was also suggested that it was not fair to impose strict standards of description on the Wagners, so that their ability to irrigate their property is defeated, while allowing the ODFW to retain a water right even though they committed an error in describing the reach.

OWRD and ODFW respond, first, that the error in the description was not raised as an issue until briefing for the hearing was in progress, on June 4, 2001, and therefore is not a proper subject for decision, and that in any event the description was adequate under the rule that was in effect when the application was filed. The agencies also note that there is a difference between the consumptive right requested by the Wagners, which may only be perfected by beneficial use on a specified parcel of land, and the instream right requested by ODFW, to which an entirely different standard applies.

I conclude that the application is sufficient to survive the McKenzies' challenge.

In 1990, when the application was filed and reviewed for completeness, OAR 690-77-020(4) required an application for an instream water right to include *inter alia* the following information:

(c) Stream or Lake Name

(d) If a stream, the reach and stream to which it is tributary;

(e) The appropriate section of a department basin map with the applicable lake or stream reach identified.

Under OAR 690-077-0043(3), the McKenzies were required to raise any “reasonably ascertainable issues” supporting their position prior to the close of the protest period, i.e., October 4, 1996. The specific assertion that the mouth of Elk River was not located in Section 19, as described in the application, was not clearly raised until June 4, 2001. Unless that argument may be made out from an argument raised before the protest period ended, McKenzies are precluded from presenting it now. OAR 690-077-0043(3).

In the McKenzies’ protest, they argue that the application did not conform to subsection (4)(e), requiring the applicant to submit “the appropriate section of a department basin map...” Although this is not entirely clear, apparently the McKenzies now argue that the reference to the “appropriate section” in this rule refers to a public lands survey description, thus converting the reference to subsection 4(e) in the McKenzies’ protest into an argument that the description recites Section 19 when it should recite Section 13 or 18. This is not, however, a proper construction of the rule.

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), statutes and rules are to be given the meaning intended by the entity that promulgated the provision. The first step in ascertaining that meaning requires an analysis of the text and context of the provision at issue. Only if that provision is found to be ambiguous, i.e., reasonably susceptible to more than one reading, may recourse be had to legislative history and rules of construction, keeping in mind that, as the court noted in *Young v. State of Oregon*, 161 Or App 32 (1999); “[T]he legislative power includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly.”

Moreover, an agency’s interpretation of its own rules is entitled to deference, so long as that interpretation is plausible and not contrary to statutory authority of the agency.

As noted, this court is authorized to overrule an agency’s interpretation of a rule if an agency has ‘erroneously interpreted a provision of law.’ ORS 183.482(8)(a). In this case, the ‘provision of law’ is the rule itself. Where, as here, the agency’s plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted erroneously. *Don’t Waste Oregon Com. v. Energy Fac. Siting*, 320 Or 132, 881 P2d 119 (1992); *Body Imaging, P.C. v. BOLI*, 166 Or. App. 54, 999 P2d 475 (2000)

Here, the agency (OWRD) has interpreted the use of the term “section” in OAR 690-077-020(4)(e) to refer to “that portion (i.e. section) of the department basin map that

includes the applicable stream reach so that applicant need not attach the entire large map of the whole basin." *Websters Collegiate Dictionary* defines "section" as, *inter alia* "a part set off by or as if by cutting," and provides "part" as a synonym. Thus, the OWRD's interpretation is plausible under the dictionary definition. It has not been argued, and there is no reason otherwise to conclude, that the OWRD's interpretation violates any statutory authority on the subject. To the contrary, ORS 537.140, 537.338 and 537.349 invest in the agency the authority to establish forms and procedures for applications for instream water rights. Nothing in these statutes would require a description of the reach to include the public lands survey description. Moreover, as the agency notes, a rule requiring a complete public land survey description (for example, the description in this case) would necessarily require reference to Township and Range as well, so that the section actually described could be localized. Otherwise, it could not be determined which "Section 19" of a myriad "Section 19"s was intended. I am forbidden by statute to "Insert what has been omitted." (ORS 174.010). In construing this regulation, therefore, I may not add requirements to the rule that its language does not expressly provide.

Thus, the portion or section of the basin map, with the Elk River circled on it, was sufficient to satisfy the requirement of OAR 690-77-020(4)(e), and the reference in that subsection to "section" referred to a part of the basin map, not a "Section" of land described in a Public Land Survey Description. The McKenzies' attempt to bring their current argument regarding the inaccuracy of the description within their reference to 690-77-020(4) is contrary to the agency's plausible and permissible construction, and reflects an incorrect understanding of the rule. Because it is contrary to the plain meaning of the rule, the argument based on the McKenzies' interpretation was not "reasonably ascertainable" from the citation of OAR 690-77-020(4)(e) in the McKenzies' protest, and was not stated with sufficient specificity in the protest to afford the Department an opportunity to respond to the issue. [ORS 537.170(5); OAR 690-77-0043(4)].

Since the argument concerning the interpretation of the term "section" is the only part of the McKenzies' argument that could be referred back to issues raised before the end of the protest period, the remainder of the McKenzies' argument not already decided in the Order on Motion for Decision on Legal Issues is not timely, and cannot form the basis for a denial of the application.

However, even if those additional arguments were properly before me, they would be without merit.

As noted above, the regulation governing the information required in an application for instream water rights was OAR 690-077-020(4). In 1990, when the application in this case was filed, that regulation required among other matters, the following:

- (c) Stream or Lake Name
- (d) If a stream, the reach and stream to which it is tributary;
- (e) The appropriate section of a department basin map with the applicable lake or

stream reach identified.

As noted by the OWRD, this regulation was amended in July, 1992, to require additional information, including "the reach delineated by river mile."

The application described the reach as follows:

"Elk River from Anvil Creek at River Mile 13.0 (Section 5, Township 33S, Range 14W WM); to the mouth at River Mile 0.0 (Section 19, Township 32S, Range 15 W WM)."

The portion of this description that was responsive to the requirements of the regulation as it was in 1990 is as follows: "Elk River from Anvil Creek...to the mouth..." The remaining information was not required in the application, and is, essentially, surplusage. As it happens, some of this information is demonstrably incorrect. However, that incorrect information was not required in the first place.

The question presented here would then be whether the inclusion of incorrect, but unnecessary, information in a description of the reach would defeat the application. I find it would not, at least in this case. The additional incorrect language is not referable to any feature of the land that would be visible to one actually examining the reach in question. There is no ambiguity in the operative language, i.e., where the reach begins, at Anvil Creek, and where it ends, at the river mouth. The errors in the description would be clear to anyone who attempted to check them, and thus were not inherently misleading. In any event, there is no showing that anyone relied upon the errors in the description to their prejudice in this case. There is no evidence that the McKenzies or Wagners were precluded in any way from arguing their case, and or that either protestant was lulled by the errors in the description into sleeping on their rights in the mistaken belief that their rights were not impacted. Thus, it cannot be said that the application is so erroneous that it does not give adequate notice of the extent of the proposed reach to anyone reviewing the application.

3. The preponderance of the evidence presented at the hearing established that ODFW included a copy of the memorandum that was sent to local governments notifying them of ODFW's intent to file an instream water right application, together with a mailing label list of the local governments to which that memo was sent. OWRD investigated this filing, and concluded, properly, that it met the requirement that ODFW provide notification of its application to affected local governments. No evidence to the contrary was submitted at the hearing.

4. The McKenzies argued that ODFW did not use the correct methodology in establishing the quantity of water required to support the intended public use.

OAR 635-400-0015(13) requires ODFW to use the instream flow requirements stated in the applicable Oregon State Game Commission Environmental Basin Investigation Reports, unless the physical conditions of the waterway have changed since

that report was done. Although the evidence at hearing showed that at some point the mouth of the Elk River was, for a short time, at a different location than present, there is no evidence that this change was after the Investigation Report was issued, or that it would be a sufficient change in the waterway to trigger the requirement of an alternative method of establishing the required quantity. In the state of the record in this case, a preponderance of the evidence supports the conclusion that the ODFW followed the applicable administrative rules in recommending the quantity of water necessary to support the intended public use.

### SUMMARY

The Wagner's protest fails for two reasons; First, they did not show that the Department was required to consider potential future applications for agricultural uses of water in evaluating the ODFW application. Second, they did not prove that even were such consideration required, the ODFW appropriation would prevent agricultural use of agricultural land.

The McKenzies protest also fails. The argument concerning errors in the description of the reach are untimely. Even if they could be considered, they involve information not required by rule, and errors that do not prejudice any party or prevent them from having received adequate notice. At hearing, ODFW established that they had complied with the requirements for a complete application, and that they had used the correct standard to establish the quantity of water involved.

### PROPOSED ORDER

The application, IS 70895, is approved with the conditions noted in the Proposed Final Order of August 20, 1996, for a reach described as follows:

"Elk River from Anvil Creek to the mouth."

---

Paul R. Cleary  
Director  
Oregon Water Resources Department

**NOTICE:** You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this Order. The date of service is the date on which the order is delivered or mailed. Judicial review is pursuant to the provisions of ORS 536.075, and is to the Oregon Court of Appeals.

Oregon Water Resources Department  
Water Rights/Adjudication Section

Water Right Application Number: IS 70895

Proposed Final Order

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

Application History

On 11/ 8/1990 , the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0
2nd½	380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	380.0	380.0	380.0

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6, TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE 0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

The Department mailed the applicant notice of its Technical Review on December 23, 1993, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed March 4, 1994. Objections and comments were received (from CURRY COUNTY BOARD OF REALTORS, LEESA WAGNER, OREGON DEPT OF FISH AND WILDLIFE, PEGGY HENNESSY, SCOTT H MCKENZIE, WATER FOR LIFE, WATERWATCH OF OREGON).

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the South Coast Basin, Oregon,

and Their Water Requirements (Revised); April 1972.

- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The South Coast Basin Program allows the proposed use.

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

The source of water is within or above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
870.0	956.0	866.0	511.0	262.0	157.0	92.9	59.8	51.2	78.8	489.0	1000

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period May, June, July, August, September, and October.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
867.5	953.4	863.5	510.5	260.9	152.8	87.0	55.1	49.0	78.4	488.6	997.4

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the South Coast Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during May, June, July, August, September, and October because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not



exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

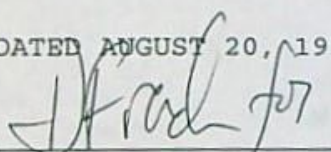
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	92.9	59.8	51.2	78.8	380.0	380.0

#### Recommendation

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

DATED AUGUST 20, 1996

  
Steven P. Applegate  
Administrator  
Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest *must* be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the proposed final order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in this proposed final order would impair or be detrimental to your

- interest;
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency;
  - Any citation of legal authority to support your protest, if known; and
  - If you are not the applicant, the \$200 protest fee required by ORS 536.050.
  - Proof of service of the protest upon the applicant.

Your protest must be received in the Water Resources Department no later than October 4, 1996.

After the protest period has ended, the Director will either issue a final order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and if

- upon review of the issues the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

**DRAFT**  
STATE OF OREGON

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

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

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

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6, TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE 0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 11/ 8/1990 .

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	92.9	59.8	51.2	78.8	380.0	380.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of the stream

reach to protect necessary flows throughout the reach.

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

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

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

IS70895

INTEROFFICE MEMORANDUM  
Water Rights Section

~~TO: Dick Bailey~~

FROM: Dwight French, x268 *DF*

DATE: March 26, 1997

RE: Water Availability for ISWR applications/files

You asked about the file copies of Estimated Average Natural Flow (EANF) for ISWR applications.

There is not a printout in each file similar to what you would generally see in an out of stream application file. The EANF information is in either the Technical Review (TR) or Initial Review (IR) as well as the Proposed Final Order (PFO).

During the processing of the ISWR applications, Rick Cooper and/or Ken Stahr would provide us with a electronic copy of the water availability information for a particular group of ISWR applications. We would then cut and paste that information directly into the TR or IR. When preparing the PFO, we would cut and paste from the TR or IR directly into the PFO.

In summary, our EANF numbers are in the TR or IR and the PFO for each particular ISWR application file.

cc: Mike Mattick

*All Protested ISWR Files*

Stream Applications with Protests  
4/2/97

Basin	App Num		
2			
	OK 71556	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>2 :</b>	<b>1</b>	
4			
	OK 71793	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	OK 71798	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72076	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72077	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72078	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72079	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72080	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	72081	W	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>4 :</b>	<b>8</b>	
5			
	OK 70353	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70354	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	OK 70357	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70358	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70358	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70358	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	OK 70605	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70606	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70606	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70612	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70695	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70695	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	73199	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>5 :</b>	<b>13</b>	
6			
	69949	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69949	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69951	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69951	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69958	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69958	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69958	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69959	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

Checked out to Dwight

8  
9  
18  
74  
2  
1  
3  
9  
19  
2  
12  
12

Basin	App Num
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6

	69959	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69959	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
OK	70251	A	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70589	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	S	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70645	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70645	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70651	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70651	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70652	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70652	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70653	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70653	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70654	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70654	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70655	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70655	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 6 : 38

9

	70863	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70864	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70870	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72163	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72168	S	OREGON DEPARTMENT OF FISH & WILDLIFE

Instream Applications with Protests

4/2/97

Basin	App Num		
9			
	72168	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72169	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72169	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	72170	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72173	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72181	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72186	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72187	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72188	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72191	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72194	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>9 :</b>	<b>16</b>	
10			
	71450	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>10 :</b>	<b>3</b>	
11			
	<i>Dwight Done Right!</i> 70020	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
<b>Total for Basin</b>	<b>11 :</b>	<b>1</b>	
12			
	71467	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71468	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71472	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>12 :</b>	<b>3</b>	
13			
	70486	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70487	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70656	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70657	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70658	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70659	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70662	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70663	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70664	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>13 :</b>	<b>9</b>	



Instream Applications with Protests

4/2/97

Basin	App Num
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14

D&F	70094	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	70094	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	70094	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	70798	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70798	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70799	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70799	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70800	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70800	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70801	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70801	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70802	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70802	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70804	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70804	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70807	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70807	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70807	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70808	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70808	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70809	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70809	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70809	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70812	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70812	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70812	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70812	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70813	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70813	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70813	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70813	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70813	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70815	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70815	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70816	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70816	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70821	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Instream Applications with Protests

4/2/97

Basin	App Num	
14		
	70824	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70826	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin 14 :</b>	<b>46</b>	
15		
	70982	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70993	A OREGON DEPARTMENT OF FISH & WILDLIFE
	70998	W OREGON DEPARTMENT OF FISH & WILDLIFE
	71008	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71201	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71614	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71622	A OREGON DEPARTMENT OF FISH & WILDLIFE
	72843	A OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin 15 :</b>	<b>8</b>	
16		
	71172	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71173	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71174	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71181	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71182	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71183	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71184	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71185	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71190	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71192	A OREGON DEPARTMENT OF FISH & WILDLIFE
	71193	A OREGON DEPARTMENT OF FISH & WILDLIFE
	73350	A OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin 16 :</b>	<b>12</b>	
17		
	70228	A OREGON DEPARTMENT OF FISH & WILDLIFE

Instream Applications with Protests

4/2/97

Basin	App Num		
17			
	70229	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70230	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70348	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70348	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70448	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70448	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70574	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70877	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70891	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70895	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70895	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70915	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71697	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	80446	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 17 : 15

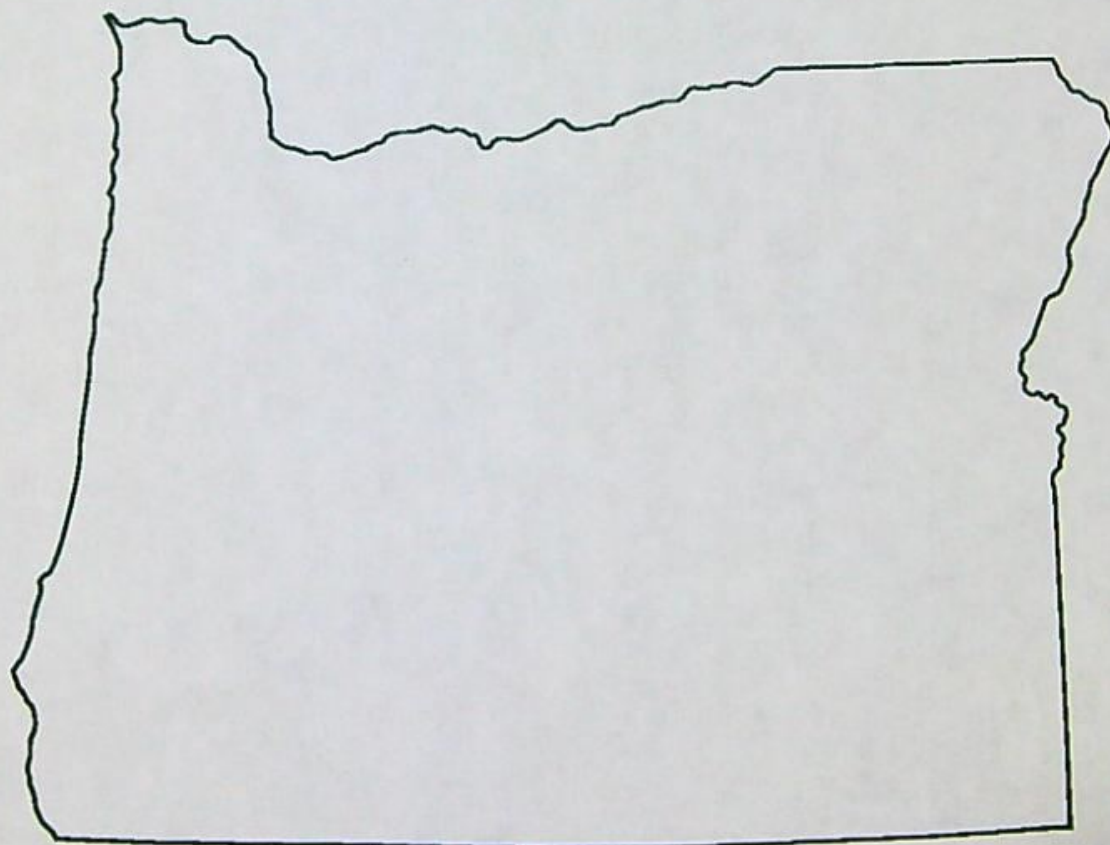
173

U.S. Department of the Interior  
U.S. Geological Survey

# Water Resources Data Oregon Water Year 1999

By L.E. Hubbard, T.A. Herrett, J.E. Poole, G.P. Ruppert, and M.L. Courts

Water-Data Report OR-99-1



Prepared in cooperation with other agencies

U.S. DEPARTMENT OF THE INTERIOR

BRUCE BABBITT, Secretary

U.S. GEOLOGICAL SURVEY

Charles G. Groat, Director

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U.S. Geological Survey  
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Portland, Oregon 97216

See additional USGS information on water resources of  
Oregon  
on the World Wide Web at  
<http://oregon.usgs.gov>

2000

amount of a given constituent that is in solution after a representative sample of bottom material has been digested by a method (usually using an acid or mixture of acids) that results in dissolution of readily soluble substances. Complete dissolution of all bottom material is not achieved by the digestion treatment and thus the determination represents less than the total amount (that is, less than 95 percent) of the constituent in the sample. To achieve comparability of analytical data, equivalent digestion procedures would be required of all laboratories performing such analyses because different digestion procedures are likely to produce different analytical results.

*Return period* is the average time interval between occurrences of a hydrological event of a given or greater magnitude, usually expressed in years. May also be called recurrence interval.

*River mile* as used herein, is the distance above the mouth of a river, measured along the center line of the channel or the main stem of the river.

*Runoff in inches (IN, in)* shows the depth to which the drainage area would be covered if all the runoff for a given time period were uniformly distributed on it.

*Sea level*, in this report, refers to the National Geodetic Vertical Datum of 1929 (NGVD of 1929)-- a geodetic datum derived from a general adjustment of the first-order level nets of both the United States and Canada, formerly called Sea Level Datum of 1929.

*Sediment* is solid material that originates mostly from disintegrated rocks and is transported by, suspended in, or deposited from water; it includes chemical and biochemical precipitates and decomposed organic material such as humus. The quantity, characteristics, and cause of the occurrence of sediment in streams are influenced by environmental factors. Some major factors are degree of slope, length of slope, soil characteristics, land usage, and quantity and intensity of precipitation.

*Bed load* is the sediment that is transported in a stream by rolling, sliding, or skipping along the bed very close to the bed surface. In this report, bed load is considered to consist of particles in transit within 0.25 ft of the streambed.

*Bed load discharge* (tons per day) is the quantity of bed load measured by dry weight that moves past a section as bed load in

a given time.

*Suspended sediment* is the sediment that at any given time is maintained in suspension by the upward components of turbulent currents or that exists in suspension as a colloid.

*Suspended-sediment concentration* is the velocity-weighted concentration of suspended sediment in the sampled zone (from the water surface to a point approximately 0.3 ft above the bed) expressed as milligrams of dry sediment per liter of water-sediment mixture (mg/L).

*Mean concentration* is the time-weighted concentration of suspended sediment passing a stream section during a 24-hour day.

*Suspended-sediment discharge* (tons/day) is the rate at which dry mass of sediment passes a section of a stream or is the quantity of sediment, as measured by dry mass or volume, that passes a section in a given time. It is calculated in units of tons per day as follows: concentration (mg/L) x discharge ( $\text{ft}^3/\text{s}$ ) x 0.0027.

*Suspended-sediment load* is a general term that refers to material in suspension. It is not synonymous with either discharge or concentration.

*Suspended total residue* at 105 Deg. C concentration is the concentration of suspended sediment in the sampled zone expressed as milligrams of dry sediment per liter of water-sediment mixture (mg/L). A small aliquot of the sample is used for the analysis.

*Total-sediment discharge* (tons/day) is the sum of the suspended-sediment discharge and the bed-load discharge. It is the total quantity of sediment, as measured by dry mass or volume, that passes a section during a given time.

*Total-sediment load* or total load is a term which refers to the total sediment (bed load plus suspended-sediment load) that is in transport. It is not synonymous with total-sediment discharge.

*Seven-day 10-year low flow (7 Q10)* is the



findings and its letter dated May 31, 2000, the permit application was denied. The MVN found that permit issuance would be contrary to the overall public interest in that it would create an unacceptable hazard to general navigation and pose a serious safety hazard. The MVN advised Mr. Yandle of the USACE Administrative Appeal Process.

An affected party appealing an approved jurisdictional determination, permit denial, or declined permit must submit an RFA that is received by the Division Engineer within 60 days of the date of the Combined Notification of Appeal Process (NAP) and RFA form. The RFA was received within the requisite 60-day time period. Mr. Robert Evans is Mr. Yandle's representative for this Administrative Appeal. Throughout this document Mr. Yandle of Industrial Pump Sales, Inc. is referred to as the Appellant, and Mr. Evans is referred to as the Appellant's Representative.

Information Received and its Disposition during the Appeal Review:

1. LT. Kevin Lynn, USCG, provided a written response to questions asked in the appeals conference. This response was considered to be clarifying information.

2. Ms. Olivia Nelson, project manager for MVN, provided a written response to the questions asked in the appeals conference. This response was also considered to be clarifying information.

All supplemental clarifying information received was provided to the Appellant, the USCG, and the MVN at the appeals conference.

**Basis for Appeal as Presented by Appellant (quoted from the Appellant's RFA and presented in bold lettering):**

**Appellant's Reason 1: The Amended Permit would keep activities within two hundred twenty nine (229') feet of the already permitted three hundred (300') feet Channelward limit in which the Corps and Coast Guard have permitted the Facility to operate with six barges, consequently creating a wider Channel.**

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Relying on U.S. Coast Guard determinations that the



permit would create an unacceptable hazard to navigation, the MVN properly determined that the permit would create an unacceptable navigation and safety hazard.

As noted by the Appellant, the original permit did authorize activities to an area 300 feet into the channel while the proposed permit would limit activities to 229 feet, consequently creating a wider buffer for river traffic by 71 feet. However, the change in width alone was insufficient to overcome the USCG's objection to the proposed permit. Their concerns were based on both the hazardous nature of the proposed activity and the planned ship/lightering vessel configuration.

The MVN's determination that the permit would create an unacceptable hazard to navigation and safety hazard was based on the proposed transfer (lightering) of a highly flammable and toxic liquid and the proposed vessel/barge configuration as well as increased river transportation.

The MVN determined that the proposed facility would place moored vessels in close proximity to the main channel and could further impede mariners, particularly down river traffic as they navigate around the lower end of a sharp bend situated just above the proposed facility. The type of vessels proposed to be moored at the project site differs from what was described in the original permit. The Appellant's revised plans (dated October 16, 1998) included a tank barge moored alongside the outboard side of the ship for the purpose of chemical cargo transfer (lightering) of acrylonitrile, a highly flammable and toxic liquid.

The MVN's evaluation properly considered comments received from the USCG and Federal Pilots Associations. These comments stated that the expansion would restrict the channel and create an unacceptable hazard to navigation. In a letter dated September 27, 1999, the USCG determined that the permit would "create an unacceptable hazard to navigation." The USCG had reviewed supplemental information provided by the appellant and strongly recommended the permit not be approved as it currently exists. The USCG letter of September 27, 1999 further stated that there would be a strong potential for a barge moored outboard of a ship at the facility to experience a suction effect away from the ship when large vessels and tows transit close to the facility when exiting the upstream bend. At the appeals conference, the MVN stated that river conditions and traffic had increased since the original permit.

Under the provisions of the Ports and Waterway Safety Act of 1972 at 33 U.S.C. Sections 1221 through 1236, the USCG is recognized as the Federal authority on matters relating to navigational safety. At the appeals conference, the USCG stated that its decision regarding the navigational safety was based on all information available and comments received from the Federal pilots. The USCG agreed with the comments of the Associated Federal Pilots and Docking Masters of Louisiana's (Associated Federal Pilots), stating the proposed mooring alongside of the ship for the purpose of transferring the dangerous liquid chemical cargo caused tremendous concern. In its letter of October 19, 1998, the Associated Federal Pilots stated:

*"I am comfortable with the mooring of the ship and feel that we could live with it in harmony. However, the chemical barge alongside causes me tremendous concern, primarily with the close proximity to the sailing line of southbound traffic, in addition to the manner in which it would be moored to the ship."*

The Associated Federal Pilots remained opposed to the location of the tank barge and urged the Appellant to investigate relocating the barge to the shore side of the ship. The USCG memo to the MVN (dated September 27, 1999) noted these concerns in its determination of navigational safety stating:

*"This permit proposal is also intended to allow for ship to barge lightering of acrylonitrile, a highly flammable and toxic liquid. I attempt to evaluate all transfers of hazardous materials for appropriateness, and the potential health and environmental threats posed by acrylonitrile are such that I would not allow a ship to barge transfer at this site."*

As such, there was substantial evidence in the record to the effect that granting the permit would create an unacceptable hazard to navigation. Accordingly, the record supports MVN's determination that permit authorization would create an unacceptable safety hazard, compromising the safety of vessel traffic in this area.

**Appellant's Reason 2: The location of the facility is Mississippi River Mile Point 100.8, not 101.5 as the stated by the Associated Federal Pilots in its most recent objection.**

FINDING: This reason for appeal does not have merit.

ACTION: No action

DISCUSSION: The Appellant contends that the Associated Federal Pilots relied on incorrect river mile location in providing its comments. The USCG was aware of the river mile misquote. There is sufficient evidence in the record to show that the persons who provided comments knew the correct location of the project site. The river mile misquote was discussed in meetings with the Associated Federal Pilots and did not influence the USCG's determination of navigational safety.

The Appellant references a letter dated February 2, 1999, from the Associated Federal Pilots to Mr. Ronald Besson of the Jefferson Parish Council, which cites an incorrect river mile location of the Appellant's facility. In this letter the Association of Federal Pilots states that a meeting was held on January 25, 1999. The Corps was not present at the meeting. The letter refers to a discussion of the berthing of a ship by the Appellant on the right descending bank of the Mississippi River in the vicinity of River Mile 101.5 LMR just below the five mile point and recommended that the appellant move its berthing plans at least 1,000 feet down river and conduct intended cargo transfers from the barges on the inside (land side) to a vessel on the outside (channel side) of the berth. Other letters from the Associated Federal Pilots (October 19, 1998, and February 18, 1998) reference the correct river mile location.

In the appeals conference, the MVN stated that it was not aware of the Associated Federal Pilot's misquote of the river mile, as noted in the letter of February 2, 1999. The MVN stated that the incorrect river mile would not have affected MVN's permit application denial because all commenting parties present at the meetings were supplied with a set of drawings which included a vicinity map indicating the exact location of the proposed work.

The Appellant discussed the river mile misquote in a letter dated March 17, 1999, that was addressed to the previous MVN project manager Mr. John Reddoch, who has passed away. The letter referred to the Associated Federal Pilot's recommendation that the facilities be moved 1,000 feet down river. The Appellant stated that he had discussed the Associated Federal Pilot's recommendation with Mr. Reddoch. The MVN stated that it had no record of any meetings between Messrs. Yandle and Reddoch. The MVN project managers do not recall Mr. Reddoch referring to any such meeting or any misquote of the river mile

by the Associated Federal Pilots.

In the appeals conference the USCG stated it was aware of the river mile misquote. The river mile misquote by the Associated Federal Pilots was discussed in a meeting with State Senator Hollis where the USCG, and the Associated Federal Pilots were present. Accordingly, the misquote is irrelevant, since the USCG stated it did consider the correct river mile location in its determination of navigational safety.

**Appellant's Reason 3: The Facility has been operated by the owners since 1981 without a single accident, so there is no history of accidents at this location.**

FINDING: This reason for appeal does not have merit.

ACTION: No action.

DISCUSSION: The Appellant's RFA states that the Associated Federal Pilots raised the issue that there is a history of accidents at the project site. The Appellant contends that comments regarding a history of accidents are unsubstantiated and lack merit. The Appellant's RFA states: " From October 28, 1981 through September 23, 1997 [date when permit was requested], Yandle operated his Facility within the boundaries of his permit without one single accident, collision, allision, or the like." They assert that the facility has been operated without a marine casualty and provided evidence that it is located in a safe area.

The USCG stated that it had reviewed casualty data for the last three years finding no other marine casualties at the site. During the site visit and appeals conference, the USCG stated that Mr. Yandle had reported a marine casualty at the site on July 13, 1999. A barge hit the Appellant's dock. The Appellant stated that the reason for that marine casualty was due to poor piloting, not the site's location. Another reported marine casualty occurred when a vessel lost power and struck a service dock facility located at Mississippi River Mile 101.4. These two marine casualties support comments that there is a history of accidents in the vicinity.

The Associated Federal Pilots provided two comment letters to the MVN (dated October 19, 1998 and February 18, 1998) and one comment letter to Mr. Ronald Besson (dated February 2, 1999). These letters do not identify or refer to a history of accidents. However, the Maritime Navigation Safety

Association's letter of March 12, 1998, and the Steamship Association of Louisiana's letter of February 23, 1998, state that the project area had a history of accidents.

Although there were no reported marine casualties from October 28, 1981 through September 23, 1997 [date when permit was requested], there is a history of two reported marine casualties at the site and the vicinity. Thus, appellant's assertion that there have been no accidents, collisions, allisions, or the like is not substantiated.

CONCLUSION: For the reasons stated above, I conclude that the Appellant's Reasons 1, 2, and 3 for this administrative appeal do not have merit.

Encl

EDWIN J. ARNOLD, JR.  
Brigadier General, USA  
Commanding

United States v. California, 382 U.S. 448 (1965)

I do not plan to detail the arguments of this long running dispute over the ownership of offshore lands abutting California; I merely want to quote the Court's definition of "inland waters." A significant baseline in this case was the "coast line," which the court defined as the line of mean lower low water and the line marking the seaward limit of inland waters. Thus the location of the line across the mouth of an inland water is significant as it forms part of the coastline:

"4. The inland waters referred to in paragraph 2(b) hereof include: (a) Any river or stream flowing directly into the sea, landward of a straight line across its mouth; (b) Any port, landward of its outermost permanent harbor works and a straight line across its entrance; (c) Any 'historic bay,' as that term is used in paragraph 6 of Article 7 of the Convention, defined essentially as a bay over which the United States has traditionally asserted and maintained dominion with the acquiescence of foreign nations; (d) Any other bay (defined as a well-marked coastal indentation having such penetration, in proportion to the width of its entrance, as to contain landlocked waters, and having an area, including islands within the bay, at least as great as the area of a semicircle whose diameter equals the length of the closing line across the entrance of the bay, or the sum of such closing lines if the bay has more than one entrance), landward of a straight line across its entrance or, if the entrance is more than 24 geographical miles wide, landward of a straight line not over 24 geographical miles long, drawn within the bay so as to enclose the greatest possible amount of water. An estuary of a river is treated in the same way as a bay.

"5. In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway." 382 U.S. at 450.

#### Conclusion

Obviously some of the questions addressed above are specific to the situation. Whether an island in the Savannah River was gained by a neighboring state by prescription, or whether land deposited as a result of navigational improvements by the Corps of Engineers amount to an avulsion, are more questions that can only be answered in reference to individual case facts. One does, however, need to remain cognizant that such questions will come up and be prepared to meet them.

How to draw the lines across the mouths of rivers and bays, as well as around islands, is of much more universal interest, and is seldom addressed in texts. This question comes up most often where two bodies of water, treated differently with respect to boundaries, come together. For example, the boundaries along a non-navigable stream might be at the thread, while the boundaries along a navigable river might end at the ordinary high-water line. The difficult question arises in locating the boundaries where a non-navigable stream empties into a navigable river or lake. Some jurisdictions might extend the

plane of the navigable river's ordinary high-water line upstream into the smaller stream; others might draw a straight line across the mouth of the stream. The solutions presented in these cases, which are about as clear and as precise as any you are likely to find in court reports, should give you food for thought.

To study this topic further, I recommend reading chapters six and seven of Water Boundaries by George M. Cole (John Wiley and Sons Inc., New York, N.Y., 1997). That book does a good job of illustrating and explaining the application of many of the principles discussed in the cases quoted above, as well as several variants on the theme.

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**STATE OF OREGON  
WATER RESOURCES DEPARTMENT**

RECEIPT # **7166**

158 12TH ST. N.E.  
SALEM, OR 97310-0210  
378-8455 / 378-8130 (FAX)

INVOICE # \_\_\_\_\_

RECEIVED FROM: <u>Stoel Rives</u>	APPLICATION
BY: _____	PERMIT
	TRANSFER

CASH:  CHECK: #  24-12 OTHER: (IDENTIFY)  \_\_\_\_\_

TOTAL REC'D \$ 200.00

**0417 WRD MISC CASH ACCT**

ADJUDICATIONS	\$
PUBLICATIONS / MAPS	\$
OTHER: (IDENTIFY) _____	\$
OTHER: (IDENTIFY) _____	\$

**REDUCTION OF EXPENSE**

PCA AND OBJECT CLASS	CASH ACCT.	\$
	VOUCHER #	

**0427 WRD OPERATING ACCT**

0407 MISCELLANEOUS	\$	
0410 COPY & TAPE FEES	\$	
0410 RESEARCH FEES	\$	
0408 MISC REVENUE: (IDENTIFY) _____	\$	
TC165 DEPOSIT LIAB. (IDENTIFY) _____	\$	
<b>WATER RIGHTS:</b>		
0201 SURFACE WATER	EXAM FEE \$	0202 RECORD FEE \$
0203 GROUND WATER	\$	0204 \$
0205 TRANSFER	\$	0206 \$
<b>WELL CONSTRUCTION</b>		<b>LICENSE FEE</b>
0218 WELL DRILL CONSTRUCTOR	EXAM FEE \$	0219 \$
LANDOWNER'S PERMIT		0220 \$
0223 OTHER (IDENTIFY) <u>PCA 77235 PROTEST</u>		\$ <u>200.00</u>

**0437 WELL CONST. START FEE**

0211 WELL CONST START FEE	\$	CARD #
0210 MONITORING WELLS	\$	CARD #
OTHER (IDENTIFY) _____		

**0539 LOTTERY PROCEEDS**

1302 LOTTERY PROCEEDS	\$
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**0467 HYDRO ACTIVITY**

0233 POWER LICENSE FEE (FW/WRD)	LIC NUMBER	\$
0231 HYDRO LICENSE FEE (FW/WRD)		\$
HRDRO APPLICATION		\$

RECEIPT # **7166**

DATED 10/4/96

BY: [Signature]



NUMBER 7949

Check 200.00 Mo \_\_\_\_\_ Cash \_\_\_\_\_

---

- Surface Application
- Reservoir Application
- Ground Water Application
- Transfer Application
- PFO Request
- Research
- Hydroelectric Fees
- Copying
- Assignment
- Extension of Time *Adam*
- Protest
- Other

# STOEL RIVES LLP

ATTORNEYS

STANDARD INSURANCE CENTER  
900 SW FIFTH AVENUE, SUITE 2300  
PORTLAND, OREGON 97204-1268  
Phone (503) 224-3380 Fax (503) 220-2480  
TDD (503) 221-1045  
Internet: www.stoel.com

October 3, 1996

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SALEM, OREGON

CHRISTOPHER R. HERMANN  
Direct Dial  
(503) 294-9123 9236  
email crhermann@stoel.com

## VIA FEDERAL EXPRESS

Mr. Richard D. Bailey  
Administrator, Water Rights and Adjudications Division  
Oregon Water Resources Department  
158 12th Street NE  
Salem, OR 97310

**Re: Protest of Carol and Scott McKenzie and the Knapp Ranches to the  
Proposed Final Order for Instream Water Right Application No. 70895**

Dear Mr. Bailey:

We represent Carol and Scott McKenzie and the Knapp Ranches in certain matters relating to their water rights. The Oregon Department of Fish and Wildlife ("ODFW") has submitted an application (application no. 70895) for an instream water right on the Elk River. Because the instream right may affect the McKenzies' and Knapps' operations, they have a strong interest in the Water Resources Department's ("the Department") review of this matter. We submit this protest to the Department's Proposed Final Order ("PFO") recommending the approval of application no. 70895 on behalf of the McKenzies and Knapps (collectively "Protestants").

The names, addresses and telephone numbers of the Protestants are: Scott and Carol McKenzie, PO Box 281, Sixes, OR 97476, (541) 332-3381; Knapp Ranches, PO Box 32, Port Orford, OR 97465, (541) 332-3755. All formal correspondence regarding the protest should be addressed to me at the address and telephone number listed above. Any questions or comments on technical or policy matters should be addressed to Mr. M. John Youngquist at 827 SE Mosher, Roseburg, OR 97470. Mr. Youngquist's telephone number is (541) 672-5692.

The McKenzie's interest in the PFO is as holders of senior downstream water rights on the Elk River. The Knapp Ranches' interest is as a rancher and owner of riparian land

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RB

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WATER RESOURCES DEPT.  
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Mr. Richard D. Bailey  
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along the Elk River. A detailed description of how the PFO would impair the Protestants' interests and how it is otherwise deficient is provided below, along with citations to legal authority and technical reports supporting the Protestants' position.

A. BACKGROUND.

1. The McKenzies' Operation.

The McKenzies operate a family feed calf and sheep ranch that includes approximately 180 acres of riparian lands along the Elk River. The McKenzie family has run the ranch since before the turn of the century. The land was originally acquired from the federal government through a donation land claim (#39). The McKenzies have a certificate for a surface water right on the Elk River. Certificate number 66100, permit number 33963, is for 2.14 cfs from an unnamed stream, Cedar Creek and the Elk River with a priority date of November 6, 1968.

In addition, the McKenzies applied for a pre-1909 water right on December 12, 1992. That application sought 0.005 cfs for stock watering based rights obtained when the family purchased the ranch lands from the original donation land claim homesteader.

2. The Knapp Ranches' Operation.

The Knapp Ranches are also a family run business operated on approximately 1,000 acres of riparian lands along the Elk River. The ranch has been run by the Knapp family since before the turn of the century. The land was originally acquired from the federal government through a donation land claim (#40). The Knapp Ranches raise beef cattle and sheep. They represent the interests of other riparian dairy, beef and cranberry operations along the lower Elk River.

3. ODFW Instream Water Rights Application.

On November 8, 1990, ODFW filed instream water right application no. 70895. The application seeks an instream water right for between 150 and 380 cfs (depending on the month) from Anvil Creek, river mile 13 to the mouth, river mile 0, of the Elk River in Curry County.

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SALEM, OREGONSTOEL RIVES LLP

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On December 23, 1993, the Department issued the technical review report for the application. The report concluded that the proposed water use, as conditioned, passed the technical review and the flow levels contained in the report were necessary to protect the public use.

The Department's published PFO concludes that ODFW's proposed use would not injure existing water rights and recommends approval of ODFW's application despite finding that the public interest presumption in ORS 537.153 has not been established. For the reasons stated below, the Protestants respectfully disagree with the Department's conclusions and protest that the PFO is technically flawed and is not in the public interest.

B. SPECIFIC OBJECTIONS.

1. The "Reach" of the Proposed Use in the Proposed Final Order is Too Extensive.

The proposed reach, which extends to the mouth of the Elk River, is too long for the use in the PFO of "[p]roviding required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing." The instream right in the PFO should only apply to the reach above the "head of tidewater" because:

- (1) it is difficult, if not impossible, to measure the natural flow of the river or stream in tidewater;
- (2) within the zone of tidal influence, water temperature and quantity is sufficient to protect the fisheries resource;
- (3) use of surface water or hydrologically connected groundwater in this area will not affect the available water supply to meet ODFW needs.

See Exhibit A, Letter from Mr. M. John Youngquist. The head of tidewater on the Elk River should be defined as the point where the Highway 101 bridge spans the river. Such a definition conforms to the Oregon State Police's longstanding practice of defining the head of tidewater on the Elk River as the Highway 101 bridge.

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There are also no limitations on the reach of the flow rates of the PFO. OAR 690-77-015(6) requires instream rights to be defined by reaches of the river rather than points on a river. The proposed flow rates would be applicable to the entire reach requested. It is impractical and unreasonable to apply the same flow rates to what is essentially the entire river, because of additional tributaries that flow into the river at different points along the reach. OAR 635-400-015(11) contains the requirements for stream reach. A stream reach is limited to a point where streamflow diminishes by at least 30 percent. OAR 635-400-015(11)(B). In addition, the PFO may violate OAR 635-400-010(19) because of "stream order" changes within the reach from incoming tributaries.

2. The Proposed Final Order Fails To Recognize Injury to and Impairment of the McKenzies' State Water Rights.

The Department may not grant instream water rights if such action would impair the exercise of preexisting water rights. ORS 537.334(2); OAR 690-77-015(l). The McKenzies' hold state water rights which are senior to the ODFW application, because of the 1968 priority date of those rights. The McKenzies have also applied for a pre-1909 water right on the Elk River which would be affected by ODFW's application.

On December 28, 1992, the McKenzies followed the statutory and regulatory filing procedures necessary to preserve their pre-1909 rights. The Department has not yet conducted an adjudication that includes the McKenzies' filings. Nonetheless, pending the completion of the adjudication, neither the Department nor any other agency or person may take any action to impair or affect the McKenzies' right to use water consistent with its filings. ORS 539.010(4). These pre-1909 rights do not terminate except as provided under the statutory abandonment procedures and must be considered as an existing water right with a priority date that will always be senior to that sought by ODFW.

The PFO impairs the McKenzies' water rights by potentially restricting their ability to transfer those rights and reallocate water among current users.

3. The Application Fails To Include All Information Required by OAR 690-77-020 and Should be Rejected as Incomplete.

ODFW's application fails to include essential information required by the Division 77 rules including: (1) the appropriate section of a Department basin map with the applicable stream reach identified, OAR 690-77-020(4)(e) (the map submitted features

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only a large circle that includes the Elk River); and (2) identification of affected local governments and copies of letters notifying these governments of the intent to file the application, OAR 690-77-020(4)(j).

Without this information, the application is incomplete. Under the applicable rules when the application was filed, the Department had no choice but to remand the application to ODFW. OAR 690-77-022(1) (repealed). This was not done. As a result, the PFO now proposes to approve an incomplete application. Under the current rules, the Department must return an incomplete application within 15 days of receiving it. OAR 690-77-027(1). The only cure for this defect is to return the application to ODFW for completion.

4. The Proposed Instream Water Rights Exceeds the Level of Flow Necessary to Protect the Intended Public Use.

Oregon law limits the amount of water that may be included in a request for a new instream right to "the quantity of water necessary to support those public uses as recommended by the State Department of Fish and Wildlife." ORS 537.336(1).

According to its application, ODFW followed the so-called "Oregon Method" for determining the flows necessary to promote the stated public use (fish migration, spawning, egg incubation, fry emergence and juvenile rearing). ODFW's own regulations indicate this method is less precise than the Instream Flow Incremental Methodology ("IFIM"). These regulations require ODFW to use IFIM instead of the Oregon Method "if Department resources are available." OAR 635-400-015(14)(c)(A). ODFW's use of the Oregon Method violates its own regulations. Consequently, the PFO is flawed in that instream flow needs are based on an imprecise methodology.

C. CONCLUSION

The Protestants recognize the important public policy considerations reflected in the instream water right statutes. Nonetheless, as discussed in the preceding paragraphs, ODFW's application no. 70895 and the Department's PFO are defective on technical grounds. For that reason, the Protestants urge the Department to deny the application in its current form, and to remand the application to ODFW for corrections consistent with the issues we have identified and facts we have provided.

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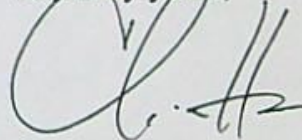
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To respond to the Protestants' concerns, the following conditions should be included in the instream water right certificate:

1. "The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights." (This is a standard condition in most water right permits).
2. "This water right shall not take away or impair any vested, permitted, certificated or decreed right to any waters or to the use of any waters vested prior to the date of the issuance of this certificate." This is consistent with ORS 537.334(2).
3. "The instream right shall not apply to the reach below the head of tidewater."

Please call me if you have any questions. The Protestants would like to schedule a meeting with Mr. Adam Sussman of your office and Mr. Todd Conifer of the local ODFW office later this month, if possible, in Port Orford to discuss and work out a resolution of their concerns about the PFO.

Very truly yours,



Christopher R. Hermann

cc (w/encs.): Carol and Scott McKenzie  
Jeff Knapp

M. JOHN YOUNGQUIST  
WATER RESOURCES CONSULTANT

827 SE MOSHER  
ROSEBURG, OREGON 97470  
PHONE/FAX: (541) 672-5692

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PROJECT MANAGEMENT

PERMITS/LICENSES

RESEARCH

PLANNING

October 1, 1996

Chris Hermann  
Stoel Rives  
900 SW 5th Avenue, Suite 2300  
Portland, Oregon 97204

Dear Mr. Hermann:

In response to your request on my thoughts on the instream water right application filed by the Oregon Department of Fish and Wildlife (ODFW) on Elk River in Curry County, I have the following thoughts:

I have reviewed the proposed final order for application number 70895. Based on this review and my 15 years of personal experience with Elk River as Water Master for District 15, I believe the instream water right's proposed reach should be to the head of tidewater and not to the mouth of Elk River as requested.

ODFW has not requested instream flows be maintained to the mouth of every stream or river upon which they filed instream water right applications. For example, the instream applications for flows on Seven Mile Creek, tributary of the Coquille River and the Umpqua River, tributary of the Pacific Ocean are requested to the head of tidewater.

In my opinion, water users should be allowed to use fresh water within the zone of tidal influence. There should be no negative impacts from this use because:

1. It is difficult, if not impossible, to measure the natural flow of the river or stream in tidewater.
2. Within the zone of tidal influence, water temperature and quantity is sufficient to protect the fisheries resource.
3. Use of surface water or hydro logically connected ground water in this area will not affect the available water supply to meet ODFW needs.

Considering the lack of any measurable impacts on the instream values within the zone of tidal influence, water users could utilize water from ground water sources developed within

EXHIBIT A  
PAGE 1 OF 2

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By 10-3-96 dye



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CERTIFICATE OF SERVICE AND FILING

I certify that I served a true and correct copy of the foregoing Protest by mailing it in a sealed envelope, with first class postage prepaid, on October 3, 1996, to the following person:

Jill Zarnowitz  
Director, Habitat & Conservation Divisions  
Oregon Department of Fish and Wildlife  
2501 SW First Street  
Portland, OR 97201

I also certify that I filed the original of the foregoing Protest by mailing it in a sealed envelope, via Federal Express overnight mail, on October 3, 1996, to:

Richard D. Bailey  
Administrator, Water Rights and Adjudications Division  
Oregon Water Resources Department  
158 12th Street, N.E.  
Salem, OR 97310-0210

STOEL RIVES LLP

By: 

Christopher R. Hermann, OSB No. 87252  
Of Attorneys for Protestants  
Carol and Scott McKenzie and  
The Knapp Ranches


1/4 mile of tidewater, devise a scheme by which they could pump fresh water from the upper strata of tidewater for their use or establish storage on tributaries to the tidal zone that do not support anadromous fish.

I have found that some of the instream water right applications may, if issued as requested, prevent storage during the winter months because of the method used by the Water Resources Department (WRD) to compute the water availability on a given reach of river or stream.

If the WRD would limit the reach of the instream water right application to the "head of tidewater," adjoining landowners would have the opportunity to develop water supplies on their lands.

Please contact me if you have any questions.

Yours truly,



M. John Youngquist

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EXHIBIT A  
PAGE 2 OF 2

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Oct 1, 1996

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Enclosures of protest

A. Protest Form

B. Proof of Service

C. Addendum of Explanatory  
Item One, Item Two,  
Item III

D. Letter of support for water use  
from Local Environmental Group  
Friends of Elk River

E. Letter of support from Local  
Environmental Group Kalimopsis Audubon  
Society for our water use

F. Coos County Electric <sup>Power</sup> Meter  
copies from 1949

G. Coos County planning Policy

H. Statewide LCDC Goals protecting Ag  
Land

I. Statement from ORE water resources  
stating we can only use water July 1  
thru July 31 Each year.

Brice Wagner Oct 1, 1996

# PROTEST FORM

Any person may submit a protest against a Proposed Final Order. For persons other than the applicant, the protest fee required at the time of submitting the protest is \$200.00. An applicant is not required to submit a fee for a protest. The protest must be submitted to the Water Resources Department, 158 12th Street NE, Salem, Oregon 97310. In addition (attach additional pages if necessary), the protest must include the following:

Application Number 70895-Elk River-Curry County — Arrival CRK to the mouth Pacific Ocean

Applicant's Name OREGON Dept of Fish and Wildlife

Name, address and telephone number of the protestant:

Paul Brice Wagner

Name

42705 Wagner Lane, Box 88

Street Address

Port Orford Ore 97465

City

State

Zip Code

541/332 8405

Telephone Number



OCT - 3 1996

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SALEM, OREGON

1. → Describe your interest in the proposed final order and, if you claim to represent the public interest, a precise statement of the public interest represented:

Our interest is our Irrigation use for our Dairy Farm which is our sole source of income and. Also a point of public interest!! Food production is in the public interest.

2. — Describe, in detail, how the proposed final order will impair or be detrimental to your interest:

Will destroy our Farms ability to be productive when All local dairy herds including ours are at peak production!! Will render our Farm totally useless as a producing, valid income Farm for anyone to make a living from.

3. — Describe, in detail, how the proposed final order is in error or deficient and how to correct the alleged error or deficiency:

According to Local Watermaster John Drolet if ODFW filing is accepted, there is no more water available for Agriculture without water Elk River Valleys ag land is rendered useless!

4. — Cite any legal authority supporting the protest:

Statewide agricultural lands Goal 3 (LCDC) requires Agricultural Lands to be preserved for the future. Ore State Law, Curry County Comprehensive plans seeks to reduce uncertainty in highly productive Ag land!

I certify that the information I have provided in this protest is accurate, true and correct to the best of my knowledge.

Paul Brice Wagner  
Signature of Protestant

June 3, 1996  
Date

Notice: The Department is required to hold a contested case hearing, if within 30 days after the close of the period for submitting protests, the applicant requests one. By signature below, I am the applicant and request a contested case hearing.

Paul Brice Wagner  
Signature of Applicant

June 3, 1996  
Date

(This proof of service, by regular mail is required for all protests by parties other than the applicant. The applicant is not required to submit a proof of service to the Water Resources Department of a protest against a Proposed Final Order.)

### PROOF OF SERVICE

I. PAUL BRICE WAGNER, being first duly sworn, depose and say that on OCTOBER 1, 1996. I mailed a copy of the attached protest against a proposed final order on application number 70895 to the applicant by regular mail. A copy of the protest was placed in an envelope addressed to:

PAUL BRICE WAGNER  
Name  
42705 WAGNER LANE  
Street Address  
PORT ORFORD OR 97465  
City State Zip Code

and deposited in the United States mail with sufficient postage.

10-1-96  
Date Paul Brice Wagner  
Signature

Subscribed to and sworn before me this 1<sup>st</sup> day of OCTOBER, 1996.



Mary O. Loan  
Notary Public for Oregon  
My commission expires 11-26-99

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ADDENDUM

Protest to 70895 - Brice Wagner, Port Orford, Oregon

ITEM ONE:

Fact - We Have been running our family farm for thirty years and during that entire time have had use of irrigation water for both the north and south pastures on our farm.

We have a water permit application on file with the Oregon Water Resources to take care of a 20 plus acre problem in our water right permit.

Fact - It is not in the publics interest to destroy our farm lands ability to produce. This is precisely what will occur if we are unable to irrigate our 20 plus acres that Oregon Water Resources Department states we have no permit to .

Our dairy farm pasture land is of the nehalem silt loam soil type. Oregon State wide planning goal three specifically requires that "these lands be inventoried and preserved."

Our pasture under irrigation is prime agricultural land. It has the soil type and climatic conditions suitablefor row crops, specialty crops, and grasses and legumes grown for pasture. Ref. - Page 42 Curry County

Comprehensive Plan in accordance with LCDC statewide goals.

ITEM TWO:

Detrimental to our interest!

Without the use of our 20 plus acres we would no longer have a viable income from our dairy farm or any other type farm, water is essential in the dry months of June, July, August and September. We cannot function pumping water for the month of July only.

We are a commercial dairy operation producing Grade A milk 365 days a year. Our dairy herd depends on economic local pasture feed for their forage. We have a long historic use of water withdrawal from Elk River.

This dairy is and has always been our sole source of income. The granting of our permit will in no way impair the publics interest in recreation or fish habitat!

ITEM THREE:

The local water master John Drolet stated: "Feels no more water is available to be appropriated."

Fact - Our present water right/permit allows our farm to pump water from Elk River on only a portion

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of our south side property.

Fact: There has been no adverse effect to aquatic life in the lower Elk River with the present in stream water right that Oregon Department of Fish and Wildlife has!!

In conclusion we are willing to negotiate our irrigation water management on our existing water permits number 36414 of August 30, 1972 and 21717 August 21, 1952.

We would appreciate discussing with both The Oregon Water Resources and Oregon Department of Fish and Wildlife about night irrigation, split application, and any other idea that can solve our 20 plus acre problem that we are short one permit for.

We also are enclosing copies of support from two local environmental groups that feel positive toward our water use.

The State of Oregon shouldn't be put in the situation of preserving agricultural land with one hand and drying up prime productive farm land with its other hand. We feel we can come to a good negotiated conclusion that will be in the public's benefit, for both in stream public recreation, fish habitat and agricultural water withdrawal.

We sincerely thank all the many Oregon Department of Fish and Wildlife staff and The Oregon Water Resources staff for their time this spring.

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FRIENDS OF ELK RIVER  
P.O. Box 891  
Port Orford, OR 97465

Oregon Department of Water Resources  
Dwight French, Western Region Water Rights Manager  
158 12 Street NE  
Salem, OR 97310

Dear Mr. French:

Friends of Elk River is an environmental organization dedicated to the protection of Elk River, in particular, the Elk's extremely valuable salmon fishery. Among our primary concerns is protecting and restoring the riparian habitat along the river banks and allowing fish habitat to return along the lower river. In order to achieve this, it is crucial that the landowners along the river are enthusiastic supporters of this endeavor.

One of the large holdings along the lower river is the dairy ranch owned by Brice and Sharon Wagner. The Wagner ranch is one of the most beautiful sights along the lower river with its lush green pastures and grazing Jersey cows. It's part of what makes the Elk so unique. Protection and restoration of the riparian habitat along the river banks on the Wagner ranch will be of utmost importance in restoring the Coho population that once thrived along the lower river.

In order for the Wagner ranch to survive economically, it is necessary to irrigate the pastures and hay fields during the summer months to be able to provide sufficient feed for the milk cows. The family has had water rights from the Elk for this purpose for several decades. We have recently learned that a large portion of the best pasture on the south side of the ranch actually was not included in the current water right and that therefore they must immediately cease irrigating this area. Apparently they believed that they did indeed have water rights on this portion of the ranch, but through an old technical error on the part of Clarence Wagner, this area was not included in the description of the land to be irrigated. While it might seem that the Friends of Elk River would prefer to let this water remain in the river for the fish, we feel that it is far more important to assure that the ranch remains an economically viable operation. The loss of this irrigation will be a severe economic blow to the Wagners. As noted above, the enthusiastic support of the local landowners for habitat restoration is probably THE most crucial part of the picture. It is hard to imagine that the Wagners would feel very enthusiastic about enhancing the fisheries when they had to give up a large portion of their water rights to this resource. It would likewise seem that the other ranchers along the lower river would feel somewhat resentful and paranoid if their neighbor's water was cut off for the fish. If loss of irrigating rights occurs to the ranches along the



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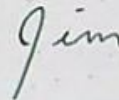
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SALEM, OREGON

Dwight French ... Page 2

river, the pressure to develop this land for real estate will be greatly increased. There is already housing development taking place on forestry/grazing land along the river that the county planning commission and county commissioners felt was not economically manageable for timber or livestock. Housing development along the river banks will result in far less protection of the riparian habitat than is currently provided by the ranches, and the prospects of restoring habitat will be non-existent. Therefore, the Friends of Elk River are urging you to help the Wagners regain this needed water right.

Please feel free to contact us if you would like to discuss this issue further or could use our help in any way.

Sincerely,



Jim Rogers

Board Member  
FRIENDS OF ELK RIVER

cc: John Drolet, Watermaster  
Governor Kitzhaber  
Senator Brecke  
Representative Tarno  
Bill Bradbury  
Curry County Commissioners

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Kalmiopsis Audubon Society  
P.O. Box 1265  
Port Orford, Oregon 97465

September 19, 1995

Oregon Department of Water Resources  
Dwight French, Western Region Water Right Manager  
158 12 Street NE  
Salem, Oregon 97310

Re: Brice Wagner  
Elk River Dairy

Dear Mr. French

It has come to our attention that Mr. Brice Wagner has been informed by the local watermaster, Mr. John Drolet, that he has no water right for a portion of his dairy farm on the Elk River near Port Orford, Oregon.

He was informed by the watermaster that if he irrigated this pasture, he would be fined and receive jail time. The watermaster showed him a copy of the water right that he holds and has held since 1972. The water right was obtained by his father, Paul Wagner for the operation of the dairy, which has been in continuous operation since 1915. It appears that his father did not identify a mistake on a map of the entire irrigated pasture area. The parcel in question is the pasture in direct proximity to the milking barn, outbuilding and home. As such it is a critical component of this operating dairy. Mr. Wagner has had buried irrigation pipes in this parcel for 23 years and was totally unaware that he had no right for irrigation of a portion of this parcel. He has a water right on his upland acres and acres across the river.

Mr. Wagner is a farmer and dairyman of long standing and it appears to us that this is a honest oversight on the part of his long deceased father and that this oversight was totally unknown to Mr. Brice Wagner.

We ask that a process be found to allow Mr. Wagner to continue irrigation of his pasture. Farming is an appropriate use this land and is to be supported as such, in our view.

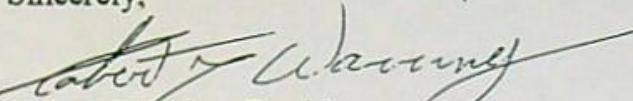
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Thank you for your attention to this very critical problem.

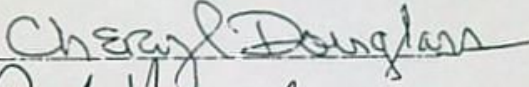
Sincerely,

  
Robert Warring, President

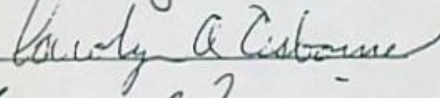
Board of Directors of Kalmiopsis Audubon Society

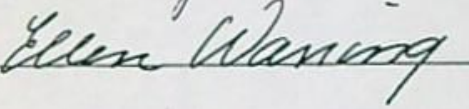
Basil Andrews 

Jim Britell 

Cheryl Douglas 

Rick Hazard 

Carolyn Osborne 

Ellen Warring 

- cc: John Drolet, Watermaster  
Al Cook, Regional Watermaster  
Bill Bradbury, Executive Director, For The Sake of the Salmon  
State Senator Brenda Brecke  
State Representative Veral Tarno  
Governor John Kitzhaber

TYPE V2S PHASE CO. # 1270 WIRE 3 AMP. 15 VOLTS 240  
 W. H. CONST. 3 DEMAND CONST. \_\_\_\_\_  
 PURCHASED FROM \_\_\_\_\_ DATE \_\_\_\_\_  
 P. O. NO. Port Oxford COST Sub 1 Code I

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 SALEM, OREGON

Name	Address	DISCONNECT Installed	Reading	CONNECTION Removed	Reading
PAUL H. WAGNER		10/21/49	2314		
"		10/1/50	3394	1/29/51	
"		10/17/52	6085	6/5/52	
"	Cap # 1401	7/22/52	7498	6/5/52	0018
"	Cap # 1433	10/1/52	1273	5/1/53	0527
"	1120 x 10	12/1/52	0997	5-2-53	0214
"	4908 x 10	12/1/52	4216	6-4-53	3252
"	4908 x 10	12/1/52	5025	6-10-53	4116
"	"	12/1/52	6085	5/23/58	5025
"	"	10/28/58	6085		
"	"	11/20/59	6981	11/17/59	76089
"	"	11/20/59	6981	11/17/59	76089
"	"	4908x RETIREMENT	6085	11/17/59	76089

DATE RETIRED: \_\_\_\_\_ READ ON: \_\_\_\_\_  
 (See Reverse Side for Meter Test Record) THE METER CO. HOUSTON, TEXAS

change to  
 10 hp and  
 one 7 1/2 hp  
 Pump

STERCO FORM 8-10 METER RECORD 22773 10-5123  
 Mfg. SERIAL No. P3-180 Our No. 4908 x10

MAKE \_\_\_\_\_ COST: \_\_\_\_\_  
 WIRE 3 AMP. 50 PHASE 3 0 240V METER \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_  
 PURCHASED FROM \_\_\_\_\_ INSTALLATION 17th July '64  
+10HP  
 DATE RECEIVED \_\_\_\_\_ CHECK No. \_\_\_\_\_ TOTAL \_\_\_\_\_

SET		REMOVED		LOCATION	
DATE	READING	DATE	READING	NAME	XXXXXNUMBER
6/20/61	8290	10/18/61	9466	WAGNER, PAUL H.	4908 x10
6-14-62	9466	12/14/62	0405	WAGNER, PAUL H.	"
5/31/63	0405	10/14/63	2502	" " "	"
7/6/64	2280	10/9/64	3595	" " "	1652 x10

DATE RETIRED \_\_\_\_\_ REASON \_\_\_\_\_

STERCO FORM 8-10 METER RECORD  
 Mfg. SERIAL No. P3-180 Our No. 1652 x10 11141  
 MAKE 10-5825 35-6999 COST: \_\_\_\_\_  
10-5827 35-7160  
 WIRE 4 AMP. 50 30 PHASE 3 METER \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_ INSTALLATION \_\_\_\_\_  
 PURCHASED FROM 422  
 DATE RECEIVED HP IRR. CHECK No. \_\_\_\_\_ TOTAL \_\_\_\_\_

REMOVED		LOCATION			
DATE	READING	DATE	READING	NAME	XXXXXNUMBER
4/14/65	3595	6/5/70	3414	WAGNER, PAUL	1652
6/5/70	00000	2/26/75	63390	WAGNER, PAUL	10021
5/30/75	00000			WAGNER, PAUL (0)	11141

DATE RETIRED \_\_\_\_\_ REASON \_\_\_\_\_

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SALEM, OREGON

3.11 GENERAL PLAN POLICIES FOR AGRICULTURAL LANDS

Curry County has adopted the following general plan policies for agricultural lands:

1. Curry County seeks retention of agricultural land for agricultural use and reduction of uncertainty regarding the status of county agricultural lands by adopting a comprehensive plan which provides zoning of agricultural lands that is appropriate for the continuation of existing commercial agricultural enterprise consistent with Oregon Revised Statutes Chapter 215 (Agricultural Land Use Section).
2. Curry County seeks expansion of the food processing industry within the county by providing commercially and industrially designated lands for the siting of such facilities.
3. Curry County seeks expansion of the storage of water for irrigation by the use of impoundment structures on agricultural lands.
4. Curry County seeks control and eradication of predators and poisonous weeds from agricultural lands to promote agricultural production with livestock.
5. Curry County promotes the opening of foreign and domestic markets for county agricultural products.
6. Curry County seeks improvement of agricultural services and facilities in the county which will assist local production.
7. Curry County seeks new lines of production which utilize local pelts and hides as well as other agricultural crops produced in the county.
8. Curry County seeks greater use of processed municipal and industrial wastes for agricultural fertilizer.
9. Curry County seeks local availability of low priced fertilizer, fuel, and other agricultural supplies.

We are also protected under  
Curry County planning Policy

Bruce Wagner Oct 1, 96

Statewide Planning Goal 3 specifically requires that "These lands shall be inventoried and preserved by adopting exclusive farm use zoned pursuant to ORS Chapter 215. Such minimum lot sizes are utilized for any farm use shall be appropriate for continuation of the existing commercial agricultural enterprise of the area. Conversion of rural agricultural land to urbanizable land shall be based upon consideration of the following factors: 1) environmental, energy, social, and economic consequences; 2) demonstrated need consistent with LCDC Goals; 3) unavailability of an alternative suitable location for the requested use; 4) compatibility of the proposed use with related agricultural land; and 5) the retention of Class I, II, III, and IV soils in farm use."

Oregon LCDC planning goals protects our  
Farm land from being destroyed by  
any outside encroachment.  
Without "water" our farm land is destroyed!!

Bruce Wagon  
Oct 1, 1996

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WATER

WATER RESOURCES DEPT. RESOURCES  
SALEM, OREGON DEPARTMENT

August 14, 1996

PAUL BRICE WAGNER and SHARON L WAGNER  
42705 WAGNER LANE  
PORT ORFORD, OREGON 97465

Reference: File S-81016

Dear Applicant:

**THIS IS NOT A PERMIT AND IS  
SUBJECT TO CHANGE DURING NEXT PHASE OF PROCESS**

This letter is to inform you of the unfavorable analysis of your proposed use of water and to describe some of your options. Based on the information you have supplied, the Water Resources Department has reached the following conclusions:

Initial Review Determinations:

1. Your application is complete and not defective.
2. The proposed use is not prohibited by law or rule.
3. The use of water for IRRIGATION OF 11.7 ACRES is allowed under OAR 517, the South Coast Basin Program (OAR 690-517-001 (8)).
4. The use of 0.15 cubic foot per second (cfs) for IRRIGATION OF 11.7 ACRES is not available April 1 through June 30 and August 1 through November 30.
5. Before surface water may be appropriated from a reservoir for Irrigation, a right to store water must be established.

Water may be appropriated for Storage from December 1 through March 30 and July 1 through July 31 based on water availability.

6. The irrigation season is limited to March 1 through October 31 by Department policy.
7. Water legally stored may be used for irrigation during the irrigation season.



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

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Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
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WATER RESOURCES DEPT.  
SALEM, OREGON

8. Because water is not available for a full season, IRRIGATION OF 11.7 ACRES cannot be allowed. However, by providing additional information, the applicant may pursue a permit for a limited season during the period when water is available.

Summary of Allowable Water Use

The use of 0.15 cubic foot per second (cfs) of water from Bagley Creek, tributary to Elk River, for Irrigation of 11.7 acres is not allowed.

It is not likely that you will be issued a permit due to # 4 and 5 above. At this time, you must decide whether to proceed or to withdraw your application as described below.

A right to store water is required before stored water may be appropriated for Irrigation. Additionally, the amount of water to be stored must be defined in acre-feet. An application to Construct a Reservoir is enclosed for your convenience. Failure to submit the Reservoir application may exclude use of stored water for Irrigation.

By supplying the Department with additional information concerning the proposed use, you may be able to use water for Irrigation of 24.4 acres during the period March 1 through March 30 and July 1 through July 31. If you do not withdraw your application and if you do not provide the additional information as described below, the Department will propose to reject your application. This information should be submitted within 30 days to avoid any further delays in the processing of your application.

Additional Information Opportunity:

If you would like to be able to use water when it is available, you must supply the Department with two items.

- Item #1 Supply information that would demonstrate that you can either make beneficial use of the water during the times it is available,

OR

Identify another source of water that you will use during the period when water use is not allowed from the source named in this application.

- Item #2 Your acknowledgement that water use will only occur, under the terms of the permit (if one is issued), during the allowed period of use.



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Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
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WATER RESOURCES DEPT.  
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Please reference the application number when sending any correspondence regarding the conclusions of this initial review. Comments received within the comment period, will be evaluated at the next phase of the process.

Withdrawal Refunds:

If you choose not to proceed, you may withdraw your application and receive a refund (minus a \$50 processing charge per application.) To accomplish this you must notify the Department in writing by August 28, 1996. For your convenience you may use the enclosed "STOP PROCESSING" form.

To Proceed With Your Application:

If you choose to proceed with your application, you do not have to notify the Department. Your application will automatically be placed on the Department's Public Notice to allow others the opportunity to comment. After the comment period the Department will complete a public interest review and issue a proposed final order.

If A Permit Is Issued It Will Likely Include The Following Conditions:

1. You may be required to measure the amount of water used and report that use annually.
2. You may be required to install fish screens at the diversion to meet Oregon Department of Fish and Wildlife specifications for adequate protection of aquatic life.
3. The priority date for this application is March 15, 1996.

**WARNING:** This initial review does not attempt to address various public interest issues such as sensitive, threatened, or endangered fish species. These issues will be addressed as the Department reviews public comments and prepares a proposed final order. You should be aware that, if significant public interest issues are found to exist, such a finding could have an impact on the eventual outcome of your application.

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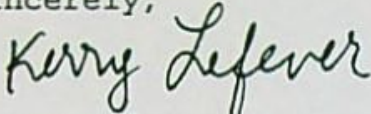
WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
Page 4

If you have any questions:

Feel free to call me at (503) 378-8455 ext. 455 or 1 (800) 624-3199 if you have any questions. Please have your application number available if you call.

Sincerely,



Kerry Lefever  
Initial Review

cc: Regional Manager, Watermaster, Water Availability  
Section

enclosures: Flow Chart of Water Right Process  
Stop Processing Form  
Application to Construct a Reservoir and  
information

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August 14, 1996

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SALEM, OREGON

WATER  
RESOURCES  
DEPARTMENT

PAUL BRICE WAGNER and SHARON L WAGNER  
42705 WAGNER LANE  
PORT ORFORD, OREGON 97465

Reference: File S-81018

Dear Applicant:

**THIS IS NOT A PERMIT AND IS  
SUBJECT TO CHANGE DURING NEXT PHASE OF PROCESS**

This letter is to inform you of the unfavorable analysis of your proposed use of water and to describe some of your options. Based on the information you have supplied, the Water Resources Department has reached the following conclusions:

Initial Review Determinations:

1. Your application is complete and not defective.
2. The proposed use is not prohibited by law or rule.
3. The use of water for IRRIGATION OF 24.4 ACRES is allowed under OAR 517, the South Coast Basin Program (OAR 690-517-001 (8)).
4. The use of 0.3 cubic foot per second (cfs) for IRRIGATION OF 24.4 ACRES is not available April 1 through June 30 and August 1 through November 30.
6. Because water is not available for a full season, IRRIGATION OF 24.4 ACRES cannot be allowed. However, by providing additional information, the applicant may pursue a permit for a limited season during the period when water is available.

Summary of Allowable Water Use

The use of 0.3 cubic foot per second (cfs) of water from Elk River, tributary to Pacific Ocean, for Irrigation of 24.4 acres is not allowed.

It is not likely that you will be issued a permit due to #4 above. At this time, you must decide whether to proceed or to withdraw your application as described below.



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

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Paul Brice Wagner and Sharon Wagner  
File S-81018  
August 14, 1996  
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WATER RESOURCES DEPT.  
SALEM, OREGON

If A Permit Is Issued It Will Likely Include The Following Conditions:

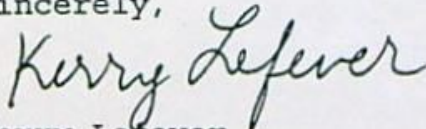
1. You may be required to measure the amount of water used and report that use annually.
2. You may be required to install fish screens at the diversion to meet Oregon Department of Fish and Wildlife specifications for adequate protection of aquatic life.
3. In the event of a request for a change in point of appropriation, an additional point of appropriation or alteration of the appropriation facility associated with this authorized diversion, the quantity of water allowed herein, together with any other right, shall not exceed the capacity of the facility at the time of perfection of this right.
4. The priority date for this application is March 15, 1996.

**WARNING:** This initial review does not attempt to address various public interest issues such as sensitive, threatened, or endangered fish species. These issues will be addressed as the Department reviews public comments and prepares a proposed final order. You should be aware that, if significant public interest issues are found to exist, such a finding could have an impact on the eventual outcome of your application.

If you have any questions:

Feel free to call me at (503) 378-8455 ext. 455 or 1 (800) 624-3199 if you have any questions. Please have your application number available if you call.

Sincerely,



Kerry Lefever  
Initial Review

cc: Regional Manager, Watermaster, Water Availability Section

enclosures: Flow Chart of Water Right Process  
Stop Processing Form

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WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81018  
August 14, 1996  
Page 2.

By supplying the Department with additional information concerning the proposed use, you may be able to use water for Irrigation of **24.4 acres** during the period **March 1 through March 30 and July 1 through July 31**. If you do not withdraw your application and if you do not provide the additional information as described below, the Department will propose to reject your application. This information should be submitted within 30 days to avoid any further delays in the processing of your application.

Additional Information Opportunity:

If you would like to be able to use water when it is available, you must supply the Department with two items.

Item #1 Supply information that would demonstrate that you can either make beneficial use of the water during the times it is available,

OR

Identify another source of water that you will use during the period when water use is not allowed from the source named in this application.

Item #2 Your acknowledgement that water use will only occur, under the terms of the permit (if one is issued), during the allowed period of use.

Please reference the application number when sending any correspondence regarding the conclusions of this initial review. Comments received within the comment period, will be evaluated at the next phase of the process.

Withdrawal Refunds:

If you choose not to proceed, you may withdraw your application and receive a refund (minus a \$50 processing charge per application.) To accomplish this you must notify the Department in writing by **August 28, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

To Proceed With Your Application:

If you choose to proceed with your application, you do not have to notify the Department. Your application will automatically be placed on the Department's Public Notice to allow others the opportunity to comment. After the comment period the Department will complete a public interest review and issue a proposed final order.

STOEL RIVES LLP

ATTORNEYS

STANDARD INSURANCE CENTER  
900 SW FIFTH AVENUE, SUITE 2300  
PORTLAND, OREGON 97204-1268

Phone (503) 224-3380 Fax (503) 220-2480

TDD (503) 221-1045

Internet: www.stoel.com

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WATER RESOURCES DEPT.  
SALEM, OREGON

CHRISTOPHER R. HERMANN

Direct Dial

(503) 294-9123 *7250*

email crhermann@stoel.com

VIA FEDERAL EXPRESS

Mr. Richard D. Bailey  
Administrator, Water Rights and Adjudications Division  
Oregon Water Resources Department  
158 12th Street NE  
Salem, OR 97310

**Re: Protest of Carol and Scott McKenzie and the Knapp Ranches to the  
Proposed Final Order for Instream Water Right Application No. 70895**

Dear Mr. Bailey:

We represent Carol and Scott McKenzie and the Knapp Ranches in certain matters relating to their water rights. The Oregon Department of Fish and Wildlife ("ODFW") has submitted an application (application no. 70895) for an instream water right on the Elk River. Because the instream right may affect the McKenzies' and Knapps' operations, they have a strong interest in the Water Resources Department's ("the Department") review of this matter. We submit this protest to the Department's Proposed Final Order ("PFO") recommending the approval of application no. 70895 on behalf of the McKenzies and Knapps (collectively "Protestants").

The names, addresses and telephone numbers of the Protestants are: Scott and Carol McKenzie, PO Box 281, Sixes, OR 97476, (541) 332-3381; Knapp Ranches, PO Box 32, Port Orford, OR 97465, (541) 332-3755. All formal correspondence regarding the protest should be addressed to me at the address and telephone number listed above. Any questions or comments on technical or policy matters should be addressed to Mr. M. John Youngquist at 827 SE Mosher, Roseburg, OR 97470. Mr. Youngquist's telephone number is (541) 672-5692.

The McKenzie's interest in the PFO is as holders of senior downstream water rights on the Elk River. The Knapp Ranches' interest is as a rancher and owner of riparian land

PDX1A-49722.1 99999-0006

*RB*

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Mr. Richard D. Bailey  
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along the Elk River. A detailed description of how the PFO would impair the Protestants' interests and how it is otherwise deficient is provided below, along with citations to legal authority and technical reports supporting the Protestants' position.

A. BACKGROUND.

1. The McKenzies' Operation.

The McKenzies operate a family feed calf and sheep ranch that includes approximately 180 acres of riparian lands along the Elk River. The McKenzie family has run the ranch since before the turn of the century. The land was originally acquired from the federal government through a donation land claim (#39). The McKenzies have a certificate for a surface water right on the Elk River. Certificate number 66100, permit number 33963, is for 2.14 cfs from an unnamed stream, Cedar Creek and the Elk River with a priority date of November 6, 1968.

In addition, the McKenzies applied for a pre-1909 water right on December 12, 1992. That application sought 0.005 cfs for stock watering based rights obtained when the family purchased the ranch lands from the original donation land claim homesteader.

2. The Knapp Ranches' Operation.

The Knapp Ranches are also a family run business operated on approximately 1,000 acres of riparian lands along the Elk River. The ranch has been run by the Knapp family since before the turn of the century. The land was originally acquired from the federal government through a donation land claim (#40). The Knapp Ranches raise beef cattle and sheep. They represent the interests of other riparian dairy, beef and cranberry operations along the lower Elk River.

3. ODFW Instream Water Rights Application.

On November 8, 1990, ODFW filed instream water right application no. 70895. The application seeks an instream water right for between 150 and 380 cfs (depending on the month) from Anvil Creek, river mile 13 to the mouth, river mile 0, of the Elk River in Curry County.

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SALEM, OREGONSTOEL RIVES LLPMr. Richard D. Bailey  
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On December 23, 1993, the Department issued the technical review report for the application. The report concluded that the proposed water use, as conditioned, passed the technical review and the flow levels contained in the report were necessary to protect the public use.

The Department's published PFO concludes that ODFW's proposed use would not injure existing water rights and recommends approval of ODFW's application despite finding that the public interest presumption in ORS 537.153 has not been established. For the reasons stated below, the Protestants respectfully disagree with the Department's conclusions and protest that the PFO is technically flawed and is not in the public interest.

B. SPECIFIC OBJECTIONS.

1. The "Reach" of the Proposed Use in the Proposed Final Order is Too Extensive.

The proposed reach, which extends to the mouth of the Elk River, is too long for the use in the PFO of "[p]roviding required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing." The instream right in the PFO should only apply to the reach above the "head of tidewater" because:

- (1) it is difficult, if not impossible, to measure the natural flow of the river or stream in tidewater;
- (2) within the zone of tidal influence, water temperature and quantity is sufficient to protect the fisheries resource;
- (3) use of surface water or hydrologically connected groundwater in this area will not affect the available water supply to meet ODFW needs.

See Exhibit A, Letter from Mr. M. John Youngquist. The head of tidewater on the Elk River should be defined as the point where the Highway 101 bridge spans the river. Such a definition conforms to the Oregon State Police's longstanding practice of defining the head of tidewater on the Elk River as the Highway 101 bridge.



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October 3, 1996  
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There are also no limitations on the reach of the flow rates of the PFO. OAR 690-77-015(6) requires instream rights to be defined by reaches of the river rather than points on a river. The proposed flow rates would be applicable to the entire reach requested. It is impractical and unreasonable to apply the same flow rates to what is essentially the entire river, because of additional tributaries that flow into the river at different points along the reach. OAR 635-400-015(11) contains the requirements for stream reach. A stream reach is limited to a point where streamflow diminishes by at least 30 percent. OAR 635-400-015(11)(B). In addition, the PFO may violate OAR 635-400-010(19) because of "stream order" changes within the reach from incoming tributaries.

2. The Proposed Final Order Fails To Recognize Injury to and Impairment of the McKenzies' State Water Rights.

The Department may not grant instream water rights if such action would impair the exercise of preexisting water rights. ORS 537.334(2); OAR 690-77-015(1). The McKenzies' hold state water rights which are senior to the ODFW application, because of the 1968 priority date of those rights. The McKenzies have also applied for a pre-1909 water right on the Elk River which would be affected by ODFW's application.

On December 28, 1992, the McKenzies followed the statutory and regulatory filing procedures necessary to preserve their pre-1909 rights. The Department has not yet conducted an adjudication that includes the McKenzies' filings. Nonetheless, pending the completion of the adjudication, neither the Department nor any other agency or person may take any action to impair or affect the McKenzies' right to use water consistent with its filings. ORS 539.010(4). These pre-1909 rights do not terminate except as provided under the statutory abandonment procedures and must be considered as an existing water right with a priority date that will always be senior to that sought by ODFW.

The PFO impairs the McKenzies' water rights by potentially restricting their ability to transfer those rights and reallocate water among current users.

3. The Application Fails To Include All Information Required by OAR 690-77-020 and Should be Rejected as Incomplete.

ODFW's application fails to include essential information required by the Division 77 rules including: (1) the appropriate section of a Department basin map with the applicable stream reach identified, OAR 690-77-020(4)(e) (the map submitted features

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only a large circle that includes the Elk River); and (2) identification of affected local governments and copies of letters notifying these governments of the intent to file the application, OAR 690-77-020(4)(j).

Without this information, the application is incomplete. Under the applicable rules when the application was filed, the Department had no choice but to remand the application to ODFW. OAR 690-77-022(1) (repealed). This was not done. As a result, the PFO now proposes to approve an incomplete application. Under the current rules, the Department must return an incomplete application within 15 days of receiving it. OAR 690-77-027(1). The only cure for this defect is to return the application to ODFW for completion.

4. The Proposed Instream Water Rights Exceeds the Level of Flow Necessary to Protect the Intended Public Use.

Oregon law limits the amount of water that may be included in a request for a new instream right to "the quantity of water necessary to support those public uses as recommended by the State Department of Fish and Wildlife." ORS 537.336(1).

According to its application, ODFW followed the so-called "Oregon Method" for determining the flows necessary to promote the stated public use (fish migration, spawning, egg incubation, fry emergence and juvenile rearing). ODFW's own regulations indicate this method is less precise than the Instream Flow Incremental Methodology ("IFIM"). These regulations require ODFW to use IFIM instead of the Oregon Method "if Department resources are available." OAR 635-400-015(14)(c)(A). ODFW's use of the Oregon Method violates its own regulations. Consequently, the PFO is flawed in that instream flow needs are based on an imprecise methodology.

C. CONCLUSION

The Protestants recognize the important public policy considerations reflected in the instream water right statutes. Nonetheless, as discussed in the preceding paragraphs, ODFW's application no. 70895 and the Department's PFO are defective on technical grounds. For that reason, the Protestants urge the Department to deny the application in its current form, and to remand the application to ODFW for corrections consistent with the issues we have identified and facts we have provided.

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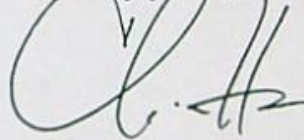
WATER RESOURCES DEPT.  
SALEM, OREGON

To respond to the Protestants' concerns, the following conditions should be included in the instream water right certificate:

1. "The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights." (This is a standard condition in most water right permits).
2. "This water right shall not take away or impair any vested, permitted, certificated or decreed right to any waters or to the use of any waters vested prior to the date of the issuance of this certificate." This is consistent with ORS 537.334(2).
3. "The instream right shall not apply to the reach below the head of tidewater."

Please call me if you have any questions. The Protestants would like to schedule a meeting with Mr. Adam Sussman of your office and Mr. Todd Conifer of the local ODFW office later this month, if possible, in Port Orford to discuss and work out a resolution of their concerns about the PFO.

Very truly yours,



Christopher R. Hermann

cc (w/encs.): Carol and Scott McKenzie  
Jeff Knapp

M. JOHN YOUNGQUIST  
WATER RESOURCES CONSULTANT

827 SE MOSHER  
ROSEBURG, OREGON 97470  
PHONE/FAX: (541) 672-5692

RECEIVED

OCT - 4 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

PROJECT MANAGEMENT

PERMITS/LICENSING

RESEARCH

PLANNING

October 1, 1996

Chris Hermann  
Stoel Rives  
900 SW 5th Avenue, Suite 2300  
Portland, Oregon 97204

Dear Mr. Hermann:

In response to your request on my thoughts on the instream water right application filed by the Oregon Department of Fish and Wildlife (ODFW) on Elk River in Curry County, I have the following thoughts:

I have reviewed the proposed final order for application number 70895. Based on this review and my 15 years of personal experience with Elk River as Water Master for District 15, I believe the instream water right's proposed reach should be to the head of tidewater and not to the mouth of Elk River as requested.

ODFW has not requested instream flows be maintained to the mouth of every stream or river upon which they filed instream water right applications. For example, the instream applications for flows on Seven Mile Creek, tributary of the Coquille River and the Umpqua River, tributary of the Pacific Ocean are requested to the head of tidewater.

In my opinion, water users should be allowed to use fresh water within the zone of tidal influence. There should be no negative impacts from this use because:

1. It is difficult, if not impossible, to measure the natural flow of the river or stream in tidewater.
2. Within the zone of tidal influence, water temperature and quantity is sufficient to protect the fisheries resource.
3. Use of surface water or hydro logically connected ground water in this area will not affect the available water supply to meet ODFW needs.

Considering the lack of any measurable impacts on the instream values within the zone of tidal influence, water users could utilize water from ground water sources developed within

EXHIBIT A  
PAGE 1 OF 2

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STOEL RIVES LLP  
By 10-3-96 dye

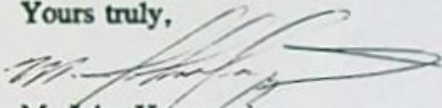
1/4 mile of tidewater, devise a scheme by which they could pump fresh water from the upper strata of tidewater for their use or establish storage on tributaries to the tidal zone that do not support anadromous fish.

I have found that some of the instream water right applications may, if issued as requested, prevent storage during the winter months because of the method used by the Water Resources Department (WRD) to compute the water availability on a given reach of river or stream.

If the WRD would limit the reach of the instream water right application to the "head of tidewater," adjoining landowners would have the opportunity to develop water supplies on their lands.

Please contact me if you have any questions.

Yours truly,



M. John Youngquist

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EXHIBIT A  
PAGE 2 OF 2

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SALEM, OREGON

**CERTIFICATE OF SERVICE AND FILING**

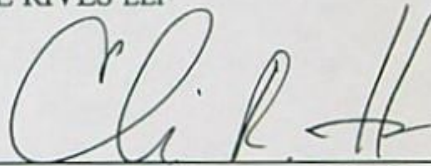
I certify that I served a true and correct copy of the foregoing Protest by mailing it in a sealed envelope, with first class postage prepaid, on October 3, 1996, to the following person:

Jill Zarnowitz  
Director, Habitat & Conservation Divisions  
Oregon Department of Fish and Wildlife  
2501 SW First Street  
Portland, OR 97201

I also certify that I filed the original of the foregoing Protest by mailing it in a sealed envelope, via Federal Express overnight mail, on October 3, 1996, to:

Richard D. Bailey  
Administrator, Water Rights and Adjudications Division  
Oregon Water Resources Department  
158 12th Street, N.E.  
Salem, OR 97310-0210

STOEL RIVES LLP

By: 

Christopher R. Hermann, OSB No. 87252  
Of Attorneys for Protestants  
Carol and Scott McKenzie and  
The Knapp Ranches

Oregon Water Resources Department  
Water Rights/Adjudication Section

Water Right Application Number: IS 70895

Proposed Final Order

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

Application History

On 11/ 8/1990 , the Oregon Department of Fish and Wildlife submitted  
an application to the Department for the following instream water right  
certificate.

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall  
chinook salmon, winter steelhead, and cutthroat trout for migration,  
spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0
2nd½	380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	380.0	380.0	380.0

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6,  
TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE  
0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

The Department mailed the applicant notice of its Technical Review on  
December 23, 1993, determining that the requested flows exceeded the  
estimated average natural flow during some months but that flows at a  
reduced amount, with exceptions for human and livestock consumption, are  
appropriate. The objection period closed March 4, 1994. Objections and  
comments were received (from CURRY COUNTY BOARD OF REALTORS, LEESA  
WAGNER, OREGON DEPT OF FISH AND WILDLIFE, PEGGY HENNESSY, SCOTT H  
MCKENZIE, WATER FOR LIFE, WATERWATCH OF OREGON).

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the South Coast Basin, Oregon,

and Their Water Requirements (Revised); April 1972.

- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved by administrative rule of the agency submitting this application.

### Findings of Fact

The South Coast Basin Program allows the proposed use.

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

The source of water is within or above a State Scenic Waterway.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
870.0	956.0	866.0	511.0	262.0	157.0	92.9	59.8	51.2	78.8	489.0	1000



Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period May, June, July, August, September, and October.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
867.5	953.4	863.5	510.5	260.9	152.8	87.0	55.1	49.0	78.4	488.6	997.4

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the South Coast Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during May, June, July, August, September, and October because the unappropriated water available is less than the amounts requested during these months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not

exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

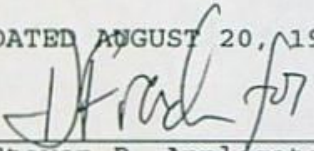
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	92.9	59.8	51.2	78.8	380.0	380.0

#### Recommendation

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

DATED AUGUST 20, 1996

  
Steven P. Applegate  
Administrator  
Water Rights and Adjudications Division

#### Protest Rights

Under the provisions of ORS 537.153(6) or 537.621(7), you have the right to submit a protest against this proposed final order. Your protest *must* be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the proposed final order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in this proposed final order would impair or be detrimental to your

- interest;
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.
- Proof of service of the protest upon the applicant.

Your protest must be received in the Water Resources Department no later than October 4, 1996.

After the protest period has ended, the Director will either issue a final order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and if

- upon review of the issues the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

**DRAFT**  
STATE OF OREGON

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

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

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

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6, TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE 0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 11/ 8/1990 .

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	92.9	59.8	51.2	78.8	380.0	380.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of the stream

reach to protect necessary flows throughout the reach.

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

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

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

IS70895

INTEROFFICE MEMORANDUM  
Water Rights Section

TO: ~~PROK, BELLEY~~

FROM: Dwight French, x268 *DF*

DATE: March 26, 1997

RE: Water Availability for ISWR applications/files

You asked about the file copies of Estimated Average Natural Flow (EANF) for ISWR applications.

There is not a printout in each file similar to what you would generally see in an out of stream application file. The EANF information is in either the Technical Review (TR) or Initial Review (IR) as well as the Proposed Final Order (PFO).

During the processing of the ISWR applications, Rick Cooper and/or Ken Stahr would provide us with a electronic copy of the water availability information for a particular group of ISWR applications. We would then cut and paste that information directly into the TR or IR. When preparing the PFO, we would cut and paste from the TR or IR directly into the PFO.

In summary, our EANF numbers are in the TR or IR and the PFO for each particular ISWR application file.

cc: Mike Mattick

*All Protested ISWR Files*

Stream Applications with Protests  
4/2/97

Basin                      App Num

2

OK 71556    A  
Total for Basin 2 :    1

OREGON DEPARTMENT OF FISH & WILDLIFE

4

OK 71793    W  
OK 71798    W  
72076    W  
72077    W  
72078    W  
72079    W  
72080    W  
72081    W  
Total for Basin 4 :    8

OREGON DEPARTMENT OF FISH & WILDLIFE  
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OREGON DEPARTMENT OF FISH & WILDLIFE

5

OK 70353    A  
70354    A  
OK 70357    A  
70358    S  
70358    S  
70358    A  
OK 70605    A  
70606    S  
70606    A  
70612    A  
70695    A  
70695    A  
73199    A  
Total for Basin 5 :    13

OREGON DEPARTMENT OF FISH & WILDLIFE  
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OREGON DEPARTMENT OF FISH & WILDLIFE

6

*Checked out to Dwight*

69949    A  
69949    S  
69951    S  
69951    A  
69958    S  
69958    A  
69958    S  
69959    S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS  
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8  
9  
18  
74  
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3  
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19  
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12  
12

Basin                      App Num

6

	69959	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69959	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
OK	70251	A	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70589	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	S	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70645	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70645	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	A	OREGON DEPARTMENT OF FISH & WILDLIFE
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	70655	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70655	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 6 : 38

9

	70863	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70864	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70870	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72163	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72168	S	OREGON DEPARTMENT OF FISH & WILDLIFE



Instream Applications with Protests

4/2/97

Basin	App Num		
9			
	72168	A	
	72169	A	
	72169	S	
	72170	A	
	72173	A	
	72181	A	
	72186	A	
	72187	A	
	72188	A	
	72191	A	
	72194	A	
Total for Basin	9 :	16	
10			
	71450	A	
	71455	S	
	71455	A	
Total for Basin	10 :	3	
11			
	<i>Dwight Done Right!</i> 70024	A	
Total for Basin	11 :	1	
12			
	71467	A	
	71468	A	
	71472	A	
Total for Basin	12 :	3	
13			
	70486	A	
	70487	A	
	70656	A	
	70657	A	
	70658	A	
	70659	A	
	70662	A	
	70663	A	
	70664	A	
Total for Basin	13 :	9	

OREGON DEPARTMENT OF FISH & WILDLIFE  
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OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

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 OREGON DEPARTMENT OF FISH & WILDLIFE



Instream Applications with Protests

4/2/97

Basin	App Num		
<b>14</b>			
	70824	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70826	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 14 : 46

**15**

	70982	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70993	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70998	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	71008	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71201	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71614	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71622	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72843	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 15 : 8

**16**

	71172	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71173	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71174	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71181	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71182	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71183	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71184	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71185	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71190	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71192	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71193	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	73350	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 16 : 12

**17**

	70228	A	OREGON DEPARTMENT OF FISH & WILDLIFE
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## Instream Applications with Protests

4/2/97

Basin	App Num		
17			
	70229	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70230	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70348	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70348	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70448	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70448	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70574	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70877	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70891	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70895	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70895	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70915	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71697	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	80446	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 17 : 15

173

March 19, 1997

TO: File - IS 70895

FROM: Adam Sussman

RE: Proof of Service to accompany protest

The protest on IS-70895 by Paul Wanger made proof of service to himself but nonetheless it was sent to ODFW. The protest is complete.

PFO AND FO NOTIFICATION LIST FOR FILE NUMBER:

IS-70895      BASIN #17

CURRY COUNTY BOARD OF REAL	, PO BOX 6307	, BROOKINGS	, OR, 97415
LEESA WAGNER	, 93363 ELK RIVER ROAD	, PORT ORFORD	, OR, 97465
OREGON DEPT OF FISH AND WI	, PO BOX 59	, PORTLAND	, OR, 97207
PEGGY HENNESSY	, 610 SW ALDER STREET #910	, PORTLAND	, OR, 97205
SCOTT H MCKENZIE	, PO BOX 281	, SIXES	, OR, 97476
WATER FOR LIFE	, PO BOX 12248	, SALEM	, OR, 97309
WATERWATCH OF OREGON	, 213 SW ASH SUITE 208	, PORTLAND	, OR, 97204

For some with long names or addresses, the complete name and address are located in the file. Those who receive the Departments weekly public notice do not receive additional notice.

June 6, 1996

Oregon Water Resources Department  
Water Rights Section  
158th 12th Street NE  
Salem, OR 97310-0210

*Sent 9-16-96*

**RECEIVED**  
JUN 10 1996  
WATER RESOURCES DEPT.  
SALEM, OREGON

Re: File No. 70895, Elk River Filing by Oregon Department of  
Fish and Wildlife

Dear Sirs:

Please send me a copy of the Proposed Final Order for this filing when it is issued. I would also like copies of the 12 pages of the objections and comments received for the Technical Review. These were from WaterWatch of Oregon, 4 pgs.; Water for Life, 4 pgs.; Peggy Hennessy for Friends of Elk River, 3 pgs.; and the Curry County Board of Realtors, 1 pg.

I am enclosing \$10 for the PFO copy and \$7.50 (\$2 for the first page and \$.50 for the 11 additional pages) for the copies of the objections and comments. I received the information on the objections and comments from Michael Mattick.

Please send these to me at the address listed below.

Thank you very much.

Sincerely,

*Mary Anne Puhl*

Mary Anne Puhl  
P.O. Box 807  
Port Orford, OR 97465  
541-332-1345

RECEIVED

FEB 28 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Peggy Hennessy  
Attorney at Law  
610 S.W. Alder Street, #910  
Portland, Oregon 97205  
Phone: (503) 227-3516  
Fax: (503) 227-2503

February 25, 1994

Oregon Water Resources Department  
Water Rights Section  
3850 Portland Road N.E.  
Salem, Oregon 97310

Re: Technical Review of Instream Water Right Applications  
70883 - Red Cedar Creek, tributary to Elk River  
70886 - Panther Creek, tributary to Elk River  
70895 - Elk River, tributary to Pacific Ocean  
70896 - Elk River, tributary to Pacific Ocean  
70897 - Elk River, tributary to Pacific Ocean  
70910 - Butler Creek, tributary to Elk River  
70911 - Bald Mountain Creek, tributary to Elk River  
70912 - Blackberry Creek, tributary to Elk River  
70914 - Anvil Creek, tributary to Elk River

Gary K. Kahn, of Reeves, Kahn & Eder and I represent the Friend of Elk River with respect to their support of the Oregon Department of Fish & Wildlife's pending applications for instream water rights affecting Elk River.

Friends of Elk River support the flows requested by ODFW, as indicated on the technical review for each of the above applications. These flows are necessary for survival of the anadromous fish in the streams, including coho and fall chinook salmon, cutthroat trout, and winter steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing. Some of the fish species found in these streams have been proposed for listing under the Endangered Species Act and will be at greater risk if these streamflows are not maintained.

The summer months are critical periods for the aquatic life in these streams. The Department has recommended allocation of substantially less water than requested for most of the above applications during the months of April through October.

The Department's estimated average natural flows are oftentimes below the amounts required by the existing minimum streamflow requirements of ODFW. The technical review indicates that the estimated average natural flows take into account planned or anticipated future demands for agricultural and other uses; however, in many instances they seem to ignore the minimum flows necessary for aquatic life.



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FEB 28 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon Water Resources Department  
February 25, 1994  
Page 2

The Oregon Department of Fish and Wildlife is the agency with the expertise to determine requirements for aquatic life. Pursuant to the applications, ODFW has concluded specific allocations are necessary for providing required streamflows for cutthroat trout and winter steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

In the above applications, the requested amounts exceed the prior minimum streamflows established by ODFW.<sup>1</sup> The current requested allocation is based upon updated scientific information indicating the amount of water necessary for the aquatic life. Therefore, considering the agency source and expertise, the requested volume of instream flow should be viewed as that volume necessary to sustain aquatic life.

Moreover, during the summer months, the estimated natural flow available, as determined by the Department of Water Resources, is not only lower than the established minimum streamflows, it is also lower than the current requested streamflows for most streams. Therefore, according to the Department's calculations, it would appear that there is not enough available water to issue sufficient rights to protect instream flows for migration, spawning, egg incubation, fry emergence and juvenile rearing in these streams.

However, we believe the process through which the "available" flow has been determined is flawed. If future uses were not considered, the availability analysis would result in more water available now. The technical reviews indicate that:

[R]ecommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agriculture and other uses . . .

However, this consideration is in direct conflict with the Department of Water Resources rules explaining that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. The consideration of these out of stream uses will necessarily decrease the estimated natural flow available.

Future municipal uses are out of stream uses which have, presumably, been included in the availability analysis. The South Coast Basin Plan acknowledges that there may be seasonal problems with municipal water shortages. However, municipalities should not

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<sup>1</sup> Most of the minimum perennial streamflows for the South Coast Basin were established in 1964 and up-dated in 1980. See Table 1, South Coast Basin Plan.

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WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon Water Resources Department  
February 25, 1994  
Page 3

be entitled to "super-priority" for future needs when there is an intervening instream right. The Basin Plan suggests storage reservoirs to meet projected municipal needs, not infringement on current aquatic life needs. Future needs should not, and according to the rules cannot, be considered in the availability decision.

The Department's interpretation of "available flow" reduces the amount of water allocated to ODFW's instream water rights and results in an insufficient amount of water to sustain aquatic life during the critical summer months.

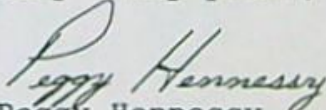
The proposed condition which would subordinate ODFW's instream water rights to uses of water for human or livestock consumption is against the public interest. The aquatic life has a current and continuing need for a viable aquatic habitat. The requested water rights would provide such a habitat. Future need for human or livestock consumption should be met through some other source which will not jeopardize the continued existence of aquatic life.

Future development for residential or agricultural purposes should be allowed only to the extent it can be accommodated by existing water resources. The instream rights are necessary to sustain the aquatic life in these streams. It is contrary to the public interest to sacrifice the existing aquatic resources for new development which goes beyond the carrying capacity of the streams. Therefore, human and livestock consumption should not have priority over the instream rights.

For the foregoing reasons, the Friends of Elk River respectfully request that ODFW's instream water right applications be granted in the amounts requested in the agency's applications.

Thank you for the opportunity to submit comments in support of ODFW's requested instream water rights.

Very truly yours,

  
Peggy Hennessy

PH/s  
cc: clients



CC. COLLEEN ~~CONFIDENTIAL~~  
NATIONAL ASSOCIATION OF REALTORS®

Curry County Board of REALTORS  
P.O. Box 6307  
Brookings, Oregon 97415

70895

March 4, 1994

Mr. Reed Marbut, Administrator  
Water Rights Section  
Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, OR 97310

RE: In-stream water right requests by ODFW - Curry County  
Technical Reviews on Application Nos. 70874-70904, 70907-70916, 73200-73215

Dear Mr. Marbut:

Our coastal communities are being bombarded by environmental activists seeking to impose their judgments on what they determine as acceptable living standards. Since we are thus already in the middle of a very difficult discussion, imagine our frustration when your agency releases 57 technical reviews and then explains that a response is required by March 4th. Maybe we should be thankful for small miracles though, since we understand that the Coos County Board of Realtors received 111 technical reviews to examine within the same timeframe. The logic your agency uses to defend its position is truly astounding. Your agency has continued to store these applications since November, 1990, and now we found ourselves immersed in a tidal wave of technical reports. These actions are neither sound government or good public policy.

Mr. Brown of your staff was kind enough to include a cover letter explaining the comment period. This letter will serve to file objections on each of the listed applications. Upon review, we find that each of the technical reviews is defective, incomplete, and are detrimental to the public interest.

Specifically, our examination found the technical reviews to be defective for the following reasons:

- The applicant's requested flows are based on the "Oregon Method" which is obsolete and has been replaced by improved methodology for determining flows.
- The applicant has requested flows within the same "reach" covering many miles (with the same flows requested at both the beginning and end) and do not correspond to the basin investigation.
- The technical reviews do not meet the intent or requirements for state agency coordination by ORS 197.707 and 197.712.
- The in-stream flows requested by ODFW are not consistent with the local acknowledged comprehensive plan and the requirements of ORS 197.180.
- By not considered the quasi-municipal users within the basin in violation of ORS 197.180 and ORS 536.310(3), the applications do not meet statutory requirements for a coordinated, integrated state water policy.
- Public notice provided for the technical reviews was inadequate, with many units of local government not notified of the actions being taken by your agency.



NATIONAL ASSOCIATION OF REALTORS®

Curry County Board of REALTORS

P.O. Box 6307

Brookings, Oregon 97415

In addition to the factual defects found in our examination, we also discovered that the applications and the technical reviews to be incomplete based on the following:

- The flows being requested are centered on basin investigations made over 20 years ago. Further inspection found supporting data to be "missing," leaving the application to be reviewed without documentation.
- No supporting documentation of your staff's technical review was included with the information provided to us.

Finally, we have found that the applications do not meet the public interest determination provided in ORS 537.170(5). Our examination indicates that the flows requested by ODFW have not been examined to determine the highest use of the water for all purposes; do not include a discussion of the economic impacts of the requested flows on the adopted local comprehensive plan; and that a potentially wasteful and unreasonable use of water could be allowed because the applicant was not required to produce evidence to support the requested flows.

From the documents provided to us, we have concluded that the technical reviews do not comply with the purpose and policies of ORS 536.310. As stated previously, the applications and technical reviews do not provide for the augmentation of existing water supplies and therefore cannot accomplish the maximum economic benefits required by statute. We recognize that any discussion of beneficial purposes will certainly include fish passage, but not to the exclusion of other uses as currently proposed in the present applications.

Sincerely,

Gary Long, President  
Curry County Board of Realtors

cc: Curry County Board of Commissioners  
Chuck Nordstrom, Curry County Planning Director  
Sen. Bill Bradbury  
Sen. Bill Dwyer  
Rep. Veral Tarno

**RECEIVED**

MAR 4 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

**WATER FOR LIFE'S OBJECTION TO TECHNICAL REVIEW: APPLICATION # 70895**

Submitted to the Oregon Water Resources Department, March 3, 1994

Water for Life hereby submits the following objection to Application # 70895, an instream water right application filed by the Oregon Department of Fish & Wildlife ("ODFW"). Water for Life asserts that the technical review by the Water Resources Department ("WRD" or "Department") is defective and there are elements of the water right as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicants have requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicants for the curing of defects.

A. WRD FAILED TO ANALYZE FLOW NEEDS

The flow levels approved by the technical review are not based on any analysis of the need for the flows requested. ORS 537.336 sets out the statutory standard which the Department is supposed to follow when determining instream water rights; the "quantity of water necessary to support those public uses." Water for Life asserts this standard means the minimum quantity necessary to support the public use. The technical review does not address the quantity of water or flow levels necessary to support the uses applied for. A review of the WRD file shows that no such analysis has occurred. The only review undertaken by the WRD was a check to see if the requested flows are less than the average estimate natural flow ("EANF"; OAR 690-77-015 (4)). At the very least, the flows approved should not exceed the lesser of EANF or the minimum flow recommended in the Basin Investigations.

B. NO SUPPORTING DATA SUBMITTED FOR REQUESTED FLOW LEVELS

An integral part of the technical review by the WRD is the analysis of the application and supporting data (see OAR 690-77-026 (1)(a)). OAR 690-77-015 also requires an application to include at a minimum "a description of the technical data and methods used to determine the requested amount;" (emphasis added).

No analysis of supporting data, or the lack thereof, appears in the WRD file for the application. The technical review is defective in that the WRD did not evaluate "whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." (OAR 690-77-026 (1)(h)).

ODFW does not have specific files for their instream water right applications. The original data supporting the Basin Investigation has apparently been lost or destroyed. Such information is essential to understand and evaluate the requested flows and assess their accuracy. No supporting data or "technical data" was submitted by the applicant as required by OAR 690-77-020 (4). Since no technical data was included with ODFW's application, the application should be returned to the applicant for curing of defects or resubmittal (OAR 690-77-021 and 022).

C. OREGON METHOD IS INHERENTLY FLAWED - WRD SHOULD REJECT APPLICATION

The methodology used for this application, the "Oregon Method", is inherently flawed in that it is based on a methodology that has been superseded and is not reliable, and is based on outdated or insufficient information (note testimony of Albert H. Mirati, Jr. on the Oregon Method at the Water Resources Commission, December 6, 1990 meeting).

The Oregon Method was further critiqued in Instream Flow Methodologies, EA Engineering, Science and Technology, Inc. (1986), a publication referenced ODFW's own publication also entitled Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989). In that critique at page 10-71, the authors stated:

"The principal limitation is the arbitrariness of the flow criteria. There is no way of knowing if they are necessary or sufficient. The binary velocity and depth criteria are also arbitrary and can result in misleading conclusions. It [Oregon Method] is one of the earliest developments of the concept of depth, velocity, and especially substrate size and dissolved oxygen, but has now been superseded."

The determinations made for the Oregon Method are not reliable and should therefore be rejected by the WRD or the Commission as the final authority in determining the level of instream flows necessary to protect the public use (ORS 537.343).

#### D. OREGON METHOD WAS NOT FOLLOWED TO OBTAIN FLOW LEVELS REQUESTED

One of the requirements of the Department's technical review is contained in OAR 690-77-026 (1)(h): "Evaluating whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." This requirement does not mean the Department can simply accept ODFW's assertion that the "Oregon Method" is the basis for the requested flows. The Department must actively review the application to see if the Oregon Method and ODFW's instream rules are being followed. Where applicable, ODFW must also submit supporting data to show that the standards and criteria contained in their rules has been followed.

The actual measurements used by ODFW to set requested flow levels are totally inadequate to validate those amounts; these measurements were made by ODFW's predecessor, the Oregon State Game Commission, as shown in the Appendices to the Basin Investigations. Actual measurements of streamflow were not made at times when key life stages occurred and, in fact, the severe limitations of the data available show that they are inadequate to validate the requested flows: "Actual measurement of streamflow made at or near recommended instream flow requirements and made at times when key life stages occur are important to validate the methodology use, and to validate that the recommended instream flow requirements provide desirable habitat conditions." Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989), p. 12.

#### E. "EANF" CALCULATIONS ARE DEFECTIVE OR INCOMPLETE

There are no calculations or information in the WRD file to show what ratios or models were used or how adjustments were made to determine the 50% exceedance flows, and there is also no information in the technical review to show the type of statistics used (see "Methods for Determining Streamflows and Water Availability in Oregon", Robison, p. 22 and 23. The EANF calculations are defective, resulting in high EANF levels and thus allowing excessive recommended flows by the WRD. The model used to calculate EANF should be reviewed and revised to properly set EANF figures.

#### F. FISH SPECIES MAY NOT BE PRESENT IN STREAM

The application is defective in that the purpose listed in the application (to provide required stream flows for several different types of fish species) listed fish species that may not be present in the stream. Insufficient information was submitted with the application to determine if the fish species listed in the application are actually present in the stream reach applied for. No supporting data was submitted to show the presence of the listed species as required by ODFW's rules (OAR 635-400-015 (8)(a)).

#### G. "REPORT CONCLUSIONS" CONTAIN BOILERPLATE LANGUAGE

The "Report Conclusions" of the technical review contain boilerplate language apparently agreed upon by the Department and ODFW, some of which is not applicable to this application. There is no information in the application file to indicate the "conclusions" were actually reached as part of the technical review.

#### H. "OPTIMUM FLOW" REQUEST IS CONTRARY TO STATUTORY STANDARD

ODFW applied for the "optimum" flow rates listed Basin Investigation. The statutory standard for instream water rights, however, is the quantity "necessary to support" the public uses allowed (ORS 537.336 (1)), not optimum flows. The Oregon State Game Commission previously prepared a Basin Investigation in which it recommended minimum flows.

The only supporting data that exists to support the "optimum" flow levels is contained in the Appendices of the later Basin Investigation (also known as "Environmental Basin Investigation Reports"). It is obvious from the data involved that both EANF and the flows allowed by the technical review are excessive.

The flow rates allowed should be reduced to the minimum flow recommendations of the Basin Investigation or EANF, whichever is less.

#### I. "REACH" REQUESTED IS TOO EXTENSIVE

A significant defect in the application and supporting data that the Department failed to consider concerns the reach of the stream allowed under this instream water right. The flow rates allowed would be applicable to the entire reach requested. This reach is far too long for the flow rates allowed, especially in light of the incoming tributaries between the mouth and the upstream end of the reach (see basin maps). The instream right "shall be approved only if the amount, timing and location serve a public use or uses." OAR 690-77-015 (9).

OAR 690-77-015 (6) states that instream rights "shall, insofar as practical, be defined by reaches of the river rather than points on the river."; OAR 690-77-202 (4)(d) requires that the application shall include the stream "reach delineated by river mile." It is neither practical nor reasonable to approve the same flow rates for the entire reach given the length of the reach applied for, the water available in the stream and the additional tributaries that flow into the stream within the reach.

The stream reach is also excessive according to ODFW's own instream rules. OAR 635-400-015 (11) details the requirements for a specific stream reach. A stream reach is limited to a point where "Streamflow diminishes by at least 30%" (OAR 635-400-015 (11)(B)). OAR 635-400-015 (11)(C) also appears to have been violated since the "stream order" (OAR 635-400-010 (19)) changes within the reach requested due to the incoming tributaries.

The flow requests by ODFW are based on the old Basin Investigations. The Basin Investigations lists the location of the recommended flows in the appendix listing the recommended flows. It is clear that the flow recommendations in the Basin Investigation did not extend upstream and the facts cited above further prove that the reach approved should be limited significantly.

#### J. EXISTING INSTREAM WATER RIGHTS NOT TAKEN INTO ACCOUNT

An instream water right already exists within the reach of the stream at issue in this application. The amount of the existing instream right should be subtracted from any instream right allowed under this application.

OAR 690-77-015 (10) requires that the "combination of instream rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits and shall be consistent with (4) and (5) above. Subsection (4) of that section deals with the "EANF" determination; the existing rights were also not accounted for in that calculation. See also OAR 690-77-015 (9).

If the existing instream water right is not subtracted from the approved flow levels, the Department should add a condition to the water right as follows: "The instream flow allocated pursuant to this water right is not in addition to any other instream water rights with a senior priority date and is not in addition to a designated minimum perennial stream flow."

#### K. ODFW'S GAGE RULE NOT FOLLOWED

The application fails to abide by another rule applicable to ODFW's instream applications, OAR 635-400-015 (10)(a). This rule requires ODFW to compare hydrological estimates or gaging data to the amount of water they request for instream flows ("instream flow requirements"). A specific evaluation is set out in subsection (10)(b) regarding appropriate levels for any given time period in relation to the naturally occurring stream flows. ODFW never performed this evaluation for the application.

#### CONCLUSION

This objection is filed in accordance with OAR 690-77-028. The issues raised should be considered as part of a contested case hearing. The WRD technical review is inadequate and defective and has failed to follow applicable rules. A thorough review of the application is necessary to determine the flow levels necessary to support the public uses applied for.

For the reasons set forth above, the objector asserts the application is defective and should be returned to the applicants. The flow levels requested are excessive and not necessary to support the public uses proposed. Flow levels set at the rates proposed interfere with future maximum economic development. Excessive flow rates for instream water rights represent a wasteful and unreasonable use of the water involved (ORS 537.170). The flow rates approved should be set the minimum quantity necessary to support the public use applied for.



Todd Heidgerken  
Executive Director of Water for Life



## COMMENT FORM

DEC 10 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s <sup>IS 70895 IS 70896</sup> ~~IS 70883 IS 70884~~ ~~IS 70896~~ IS 70897 \_\_\_\_\_

Send to: Scott H. McKenzie  
P.O. Box 281  
Sixes, Or 97476

Please include specific comments or concerns. Use additional sheets if necessary.

I have water rights for pasture irrigation  
 down stream from the Highway 101 bridge on Elk River.  
 I am concerned as to how these applications  
 will impact my current and future water use.

Return to:  
 Oregon Water Resources Department  
 3850 Portland Road N.E.  
 Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

## COMMENT FORM

OCT 14 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s <sup>IS</sup> 70895, <sup>IS</sup> 70896, <sup>IS</sup> 70897, <sup>IS</sup> 70901, <sup>IS</sup> 70914, <sup>IS</sup> 70912, <sup>IS</sup> 70911, <sup>IS</sup> 70910

Send to:

Leesa Wagner

93363 Elk River Rd.  
Port Orford, OR 97465

Please include specific comments or concerns. Use additional sheets if necessary.

I am interested in Dry Creek on Sixes River, as we own property on Grassy Knob. My primary concern is any instream applications for Elk River as we own a 500 ac. Ranch on Elk River.

I oppose instream water rights being granted, to OPW. I do not believe that this is a "grab" for water for fish. I see this as a move for the State

Return to:

Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

to control another resource. I also anticipate land owners suffering in the deal.

Leesa Wagner  
93363 Elk River Rd,  
Port Orford, OR 97465

## COMMENT FORM

DEC 10 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s IS 70895 IS 70896  
~~IS 70883 IS 70884 IS 70885 IS 70886 IS 70887~~

Send to: Scott H. McKenzie  
P.O. Box 281  
Sixes Cr 97476

Please include specific comments or concerns. Use additional sheets if necessary.

I have water rights for pasture irrigation  
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Return to:  
 Oregon Water Resources Department  
 3850 Portland Road N.E.  
 Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

# WaterWatch

O F O R E G O N

Hand Delivered

March 4, 1994

Oregon Water Resources Department  
Water Rights Section  
3850 Portland Road NE  
Salem, Oregon 97310

**RECEIVED**

MAR 4 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Re: Technical Reports for:  
70895, 70896, 70897, Elk River; 70886, Panther Crk; 70883, Red Cedar Crk;  
70910, Butler Crk; 70911, Bald Mtn Crk; 70912, Blackberry Crk; 70914,  
Anvil Crk  
ODFW, Instream Applications, Elk River, South Coast Basin

WaterWatch of Oregon strongly supports the flows requested in the above referenced Oregon Department of Fish and Wildlife applications. These flows are essential for survival of chinook, winter steelhead, coho salmon, and cutthroat trout. Coastal coho salmon and winter steelhead populations are severely depressed and have been petitioned for listing under the Federal Endangered Species Act. Streamflows are critical to the survival of these sensitive fish. By this letter WaterWatch requests copies of any objections filed on these applications.

In addition, we file the following objections to the water availability analyses in the technical reports pursuant to OAR 690-77-028:

### The Water Availability Analysis is Defective

Instream water rights are a means for the state to achieve equitable allocation of water and Oregon Statutes place a duty on the state to act in a way that will protect instream flows needed for fish populations. OAR 690-77-015(2), ORS 496.430, OAR 690-410-070(2)(h). The agencies administrative rules require the technical reports to contain an evaluation of the estimated average natural flow (ENAF) available from the proposed source. OAR 690-77-026(1)(g). The rules also state that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. OAR 690-77-015(3).

However, the technical reports state that they contain an:  
"evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application . . .  
The recommended flows take into consideration planned uses and reasonable anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review . . ."

**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

Page 2

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Technical reports page 2 (emphasis added). Clearly, this analysis is contrary to the agencies rules because it takes into account out-of-stream uses. These instream water right application requests must be evaluated according to the higher ENAF figures.

The technical reports propose to issue instream water rights for the Department's lower "average flows" rather than those requested for several months of each year.<sup>1</sup> The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4).

The technical report for application 70895 also proposes to allow the lower "ODFW minimum" flow rather than the higher "average flow" for the month of July when the requested flows appear to be higher than the "average flow". No explanation or justification is given for proposing this lower minimum flow. Given that the "average flow" is lower than the ENAF it is possible that ODFW's requests are within the ENAF. Even if the request exceeds the ENAF for these months, WRD's rules specifically allow the requested flows to exceed the ENAF in order to take into account high flow events that will be needed for fish passage or habitat maintenance. OAR 690-77-015(4). The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4). ODFW requested flows should be granted. If hypothetically these requested flows are above the ENAF and are not needed for these high flow events, then flows equivalent to the ENAF should be approved not the lower "average flows" or "ODFW minimum".

If coho and/or winter steelhead are listed under the state and/or federal endangered species acts, these acts will place an additional burden on the Commission. Under the state Act, the Commission is required to consult with the Oregon Department of Fish and Wildlife to ensure that any action taken by the Commission is consistent with ODFW programs to conserve the species or, if no plan is in place, that the act will not "reduce the likelihood of the survival of recovery of the threatened species of endangered species." ORS 496.182(2).

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<sup>1</sup> The flows recommended are less during the months of: May through June and August through October (70895), June through October (70896), May through October (70897, 70886, 70911), April through November (70883, 70912), May through November (70910) and year round (70914).

**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

Page 3

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The federal Act prohibits the "taking" of endangered species. 16 USCA § 1538(a)(1)(B). Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3. The failure to protect sufficient instream flows for listed fish clearly causes habitat destruction or modification that can harm the fish. Habitat destruction or modification that harms fish can rise to the level of an unpermitted taking of a species under the Federal Endangered Species Act. See Palilia v. Hawaii Department of Land and Natural Resources, 649 F.Supp. 1070 (D. Hawaii 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988). In Palilia, the Court found that a state agency action that allowed goats to destroy the food source of an endangered bird was a habitat alternation that rose to the level of a take under the Endangered Species Act. Failing to protect streamflows for fish and continuing to issue water rights which taking water from fish is at least as clear a causal connection. ODFW instream flow requests should be granted in full.

**The proposed conditions are contrary to the public interest.**

The technical reports propose to subordinate these instream flow requests to human consumption or livestock. The technical reports do not provide any support or reasoning behind its proposal. These uses, while they use small amounts of water individually, have cumulative adverse effects on streamflows needed for fish.

As noted above, the state has a duty to protect instream flows needed for public uses of water. Fish need water to survive. The Elk River system supports a variety of fish life including chinook, winter steelhead, coho salmon, and cutthroat trout. Petitions have been filed seeking protection for coho and winter steelhead stocks under the Federal Endangered Species Act. Part of the decline of fish populations can be attributed to low flows during summer months which impair fish survival by, among other things, raising water temperatures and decreasing aquatic habitat and trout rearing areas. Low flows in the winter adversely affect fish habitat in a number of ways, including exposing spawning gravel and reducing feeding and rearing areas in the river. In addition, water diversions create problems for fish passage and survival in the basin.

These requested flows are necessary to protect severely depressed fish populations which will likely be listed under the Federal Endangered Species Act. Listing under the state and federal endangered species acts is not only a sign of the health of a particular species but also a warning signal for the health of the human environment.

These proposed conditions are contrary to the public interest in protecting the resource. The Commission's statewide policies recognize the importance of maintaining streamflows and place high priority on protecting streamflows. OAR 690-410-030(1). This

**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

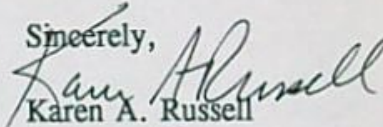
Page 4

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policy directs the state to take action to restore flows in critical areas such as this system. Id. The public uses of the coastal river system have been impaired. Adoption of these instream water rights without conditions is just one small step towards restoring this system.

Adoption of these and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers. WaterWatch supports the Department's efforts to finally begin to implement an Act that has been "on the books" for the past six years. We look forward to the adoption of these instream water rights.

Sincerely,



Karen A. Russell  
Assistant Director

## COMMENT FORM

DEC 10 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s IS 70895 IS 70896  
~~IS 70883 IS 70884 IS 70885 IS 70886 IS 70887~~

Send to:

Scott H. McKenzie  
P.O. Box 281  
Sixes, Or 97476

Please include specific comments or concerns. Use additional sheets if necessary.

I have water rights for pasture irrigation  
 down stream from the Highway 101 bridge on Elk River.  
 I am concerned as to how these applications  
 will impact my current and future water use.

Return to:

Oregon Water Resources Department  
 3850 Portland Road N.E.  
 Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.



## COMMENT FORM

OCT 14 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s <sup>IS</sup>70895, <sup>IS</sup>70896, <sup>IS</sup>70897, <sup>IS</sup>70901, <sup>IS</sup>70914, <sup>IS</sup>70912, <sup>IS</sup>70911, <sup>IS</sup>70910

Send to:

Leesa Wagner

93363 Elk River Rd.  
Port Orford, OR. 97461

Please include specific comments or concerns. Use additional sheets if necessary.

I am interested in Dry Creek on Sixes River, as we own property on Shassy knob. My primary concern is any instream applications for Elk River as we own a 500 ac. ranch on Elk River.

I oppose instream water rights being granted, to ODFW. I do not believe that this is a "grab" for water for fish. I see this as a move for the state

Return to:

Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

to control another resource. I also anticipate land owners suffering in the deal.

Leesa Wagner

93363 Elk River Rd,  
Port Orford, OR. 97465

STATE OF OREGON  
 WATER RESOURCES DEPARTMENT  
 SALEM, OREGON 97310

confirms the right to use the waters of ELK RIVER, a tributary of the PACIFIC OCEAN, in the SOUTH COAST BASIN to maintain an instream flow for the purpose of SUPPORTING AQUATIC LIFE.

The right is for flows IN THE ELK RIVER AT WATER RESOURCES DEPARTMENT GAGE 14327250 (SW SE, SECTION 6, T 33 S, R 14 W, W.M.) AND MAINTAINED TO TIDEWATER.

The right is established under Oregon Revised Statutes 537.346.

The date of priority is APRIL 1, 1980.

The right is limited to not more than the amounts during the time periods listed below:

<u>Period</u>	<u>Flows (cubic feet per second)</u>
OCT 1 - OCT 15	60
OCT 16- OCT 31	150
NOV 1 - FEB 15	300
FEB 16- MAY 31	225
JUN 1 - JUN 15	80
JUN 16- SEP 30	45

This instream water right shall not have priority over appropriations of water for human consumption, livestock consumption and irrigation of non-commercial gardens not to exceed one-half acre in area and waters legally released from storage.

Sand bars may prevent direct surface flow to the ocean. During such periods, minimum flows shall apply to the head of the pools formed by the sand bars.

Witness the signature of the Water Resources Director affixed this 9th day of JUNE, 1989.

*William H. Young*  
 Water Resources Director

Recorded in State Record of Water Right Certificates number 59869.

MF393 17.ELK R & MISC.VOL3.DIST19

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MAR - 7 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

70895  
Oregon

DEPARTMENT OF  
FISH AND  
WILDLIFE



March 2, 1994

Water Rights Section  
Water Resources Department  
3850 Portland Rd., NE  
Salem, OR 97310

RE: Instream Water Right Applications 70228, 70230, 70231, 70449, 70450, 70574, 70688 through 70690, 70874 through 70916, 70988, 70993, 71200, 71201, 71206, 71207, 71696, 71697, 72500 through 72528, 72782 through 72802, 72804 through 72842, 72940 through 72974, 73012 and 73200 through 73215; 201 Reports of Technical Review

#### General Comments

According to OAR 690-77-026 (1), WRD "shall undertake a technical review...and prepare a report." This subsection further lists 8 [(a) - (h)] mandatory criteria which, as a minimum, must be assessed during the technical review. ODFW has concerns with the apparent level of assessment relative to subsection (c):

**OAR 690-77-026 (1) (c) --Assessing the proposed instream water right with respect to conditions previously imposed on other instream water rights granted for use of water from the same source.**

In the 201 Reports of Technical Review examined by ODFW, WRD is proposing to condition each certificate to exempt human and livestock consumption from regulation in favor of these instream rights as follows:

*This instream right shall not have priority over human or livestock consumption.*

Instream water right certificates in the South Coast basin based on conversion of minimum perennial streamflows generally contain similar conditioning language giving preference to the listed uses.

By rule, WRD's technical review process includes assessing conditions previously imposed on other instream water rights from the same source. If found to be appropriate, WRD may propose that new instream water rights contain the



2501 SW First Avenue  
PO Box 59  
Portland, OR 97207  
(503) 229-5400  
TDD (503) 229-5459

same exemption. There does not appear to be any statutory requirement that this exemption be automatically included as part of a technical review.

When ODFW reviewed WRD files on some of these applications for documentation of assessments of prior conditions, we found nothing to indicate that any such assessments had been done. ODFW, therefore, must assume that the assessments were not done and objects to the routine placement of the proposed exemption on any of these applications on the grounds that to do so would be contrary to the public's interest in maintaining fish populations in South Coast basin streams. OAR 690-11-195 (4d).

ODFW supports an exemption for livestock uses if livestock water right permits are conditioned to provide benefits to instream resources and are not detrimental to wildlife. Some example conditions might be fencing to exclude stock from entering the riparian area, establishing limited use of riparian areas as "riparian pastures", and piping of water to troughs with water level-dependent shutoff valves to prevent overflow and waste. We also believe the open-ended nature of the currently proposed exemption for domestic and livestock uses should be limited to a cumulative 1% of the remaining flow of the lowest flow month. Otherwise, instream flows on some urbanized streams will be subject to continual diminishment through the endless granting of consumptive rights for these uses.

#### Missing Reports of Technical Review

Two Reports of Technical Review, 70897 and 72837, were not included with the others listed above. ODFW did, however, receive these from WRD by FAX on March 1, 1994, and has had an opportunity to review WRD's technical analysis and proposed permit conditions. We do not need additional time to review these applications and our concerns regarding same are included in this letter.

#### Specific Comments

Application # 70231--It appears from the Technical Review section that the flow authorized for June should be 4.38 cfs, not 8 cfs.

Application # 71206--In the Proposed Permit Condition section, September flow should be 2 cfs, not 1 cfs.

Application # 72832--ODFW requests that the upper limit of this application be changed from the headwaters (NW $\frac{1}{4}$ , Section 9, T28S, R11W) to the mouth of the unnamed tributary in SE $\frac{1}{4}$ , Section 17, T28S, R11W.

South Coast Basin IWRs  
March 2, 1994  
Page 3

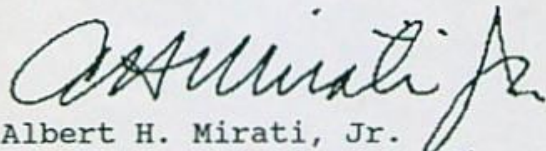
Application # 72971--The flow listed for March in the Proposed Permit Condition section should be 15 cfs, not 125 cfs.

Application #s 72802, 72827, 72830, 72957, 72964 and 72972--For these applications, the estimated average natural flows listed in the Technical Review sections are less than ODFW's minimum recommended flow for every month of the year. Because this is very unusual, it raises the concern that something, either the minimum streamflow methodology employed or the average estimated natural flow calculation, is in error. In a brief discussion with Rick Cooper, WRD hydrologist, he indicated that there is a general lack of stream gaging facilities in the South Coast basin upon which to base the predictive models used to produce the average flow estimates. ODFW requests WRD take another look at the estimated average natural flow calculations for these applications.

Application #'s 70449, 70450, 72501, 72516, 72521, 72525 through 72527 and 72947--These applications were submitted to upgrade existing instream water rights (based on conversion of established minimum perennial streamflows) to flows considered to be more appropriate by ODFW. Because the flows proposed (based on WRD's water availability analysis) in the Proposed Permit Conditions are not significantly better than those already protected by the senior instream water rights, ODFW hereby withdraws these applications.

Thank you for the opportunity to comment.

Sincerely,



Albert H. Mirati, Jr.  
Water Right Review Coordinator

c. WaterWatch of Oregon (public information request)  
Zarnowitz/Burchfield  
Penny Harrison, DOJ

Date: December 23, 1993

OREGON WATER RESOURCES DEPARTMENT  
SATISFACTORY REPORT OF TECHNICAL REVIEW  
FOR AN INSTREAM WATER RIGHT APPLICATION

OBJECTIONS TO THE PROPOSED INSTREAM WATER RIGHT TECHNICAL REVIEW REPORT, AS DESCRIBED BELOW, MUST BE RECEIVED IN WRITING BY THE OREGON WATER RESOURCES DEPARTMENT, 3850 PORTLAND ROAD NW, SALEM, OREGON 97310, ON OR BEFORE 5 PM: March 4, 1994.

1. APPLICATION FILE NUMBER -IS 70895
2. APPLICATION INFORMATION

Application name/address/phone:

Oregon Department of Fish and Wildlife  
P.O. Box 59  
Portland, Oregon 97207 503/229-5400

Date application received for filing and/or tentative date of priority: 11/ 8/1990

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6, TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE 0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

### 3. TECHNICAL REVIEW

The application is complete and free of defects.

The proposed use is not restricted or prohibited by statute.

The following supporting data has been submitted by the applicant:

- (a) Fish and Wildlife Resources of the South Coast Basin, Oregon, and Their Water Requirements (Revised); April 1972.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An assessment with respect to other Commission administrative rules, including but not limited to the applicable basin program has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved administrative rule of the agency submitting this application.

The evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application is described below. The recommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0
870.0	956.0	866.0	511.0	262.0	157.0	92.9	59.8	51.2	78.8	489.0	1000
300	300/225	225	225	225	180	60	60	60	60/300	300	300
											ODFW MIN

#### 4. REPORT CONCLUSIONS

The proposed water use, as conditioned, passed this technical review. The information contained in the application along with the supporting data submitted by the applicant indicate that the flow levels set out in this report are necessary to protect the public use.

The supporting data states that the recommended flows are necessary to meet the biological requirements for the passage, spawning, egg incubation and larval development and rearing of salmonids. Consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels. (See *Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.*) The recommended flow volumes are necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature.

The minimum flow requirements for adult fish only ensure that fish have physical freedom to move in the stream. Several times greater flow requirements are necessary to stimulate and maintain upstream migration of anadromous fish, including migratory freshwater trout. (See 1984 Report.) Although flows listed by the applicant in early reports indicated that the minimum flows for some streams seemed adequate for present fish populations, subsequent review of these flow recommendations caused the applicant to modify the original listing. (See *Fish and Wildlife Resources of the South Coast Basin, Oregon, and Their Water Requirements (Revised); April 1972.*)

Minimum stream flow recommendations developed from the 1969 survey are intended to provide enough suitable environment during appropriate seasons to perpetuate minimum desirable fish populations. Optimum flows set out in the 1972 report would more nearly maximize production. The applicant has stated that enhancement of production would require further evaluation. (See 1972 Report.)

#### 5. PROPOSED CERTIFICATE CONDITIONS

[The following proposed conditions will apply to water use and will appear on the face of the certificate.]

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	60.0	59.8	51.2	78.8	380.0	380.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. This instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.



IWR Application # 70895 Certificate # \_\_\_\_\_

STATE OF OREGON

WATER RESOURCES DEPARTMENT

Application for Instream Water Right  
by a State Agency

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NOV 08 1990

There is no fee required for this application.

Applicant: Randy Fisher for Oregon Department of Fish and  
Wildlife, PO Box 59, Portland, OR 97207

1. The name of the stream of the proposed instream water right is Elk River, a tributary of Pacific Ocean.
2. The public use this instream water right is based upon includes providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

USE(S): Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380	380	380	380	380	225	150	150	150	150/	380	380
									380		

4. The reach of the stream identified for an instream water right is from (upstream end) Anvil Creek, river mile 13, within Section 6, Township 33S, Range 14W W.M., in Curry County...

Downstream to the mouth, river mile 0, within Section 19, Township 32S, Range 15W W.M., in Curry County.

5. The method used to determine the requested amounts was the Oregon Method.
6. When were the following state agencies notified of the intent to file for the instream water right?

Dept. of Environmental Quality	Date: October 19, 1990
ODFW (Fish, Wldlf, and Habitat)	Date: October 19, 1990
Parks and Recreation Division	Date: October 19, 1990

IWR Application # 70895 Certificate # \_\_\_\_\_

7. If possible, include recommendations for measuring locations or methods:

Establish a gaging structure at or near the lower limit of the reach.

8. If possible, include recommendations for assisting the Water Resources Department (WRD) in measuring and monitoring procedures:

Local ODFW personnel will assist the watermaster in establishing and implementing a monitoring program.

9. If possible, include other recommendations for methods or conditions necessary for managing the water right to protect the public uses [see OAR 690-77-020 (5)(c)]: None.

10. Remarks: One or more species noted as present in this reach is/are listed by ODFW as "sensitive" in response to declining numbers and habitat limitations.

This application will serve to update two inadequate instream water rights (converted minimum perennial streamflow) previously filed for this reach.

**THIS APPLICATION MUST BE ACCOMPANIED BY A BASIN MAP WITH THE APPLICABLE LAKE OR STREAM REACH IDENTIFIED.**

An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 11/6/90

Signed: Nancy W. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director  
Habitat Conservation Div.

File: ELK4.APP

IWR Application # 70895 Certificate # \_\_\_\_\_

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

\_\_\_\_\_, 19\_\_.

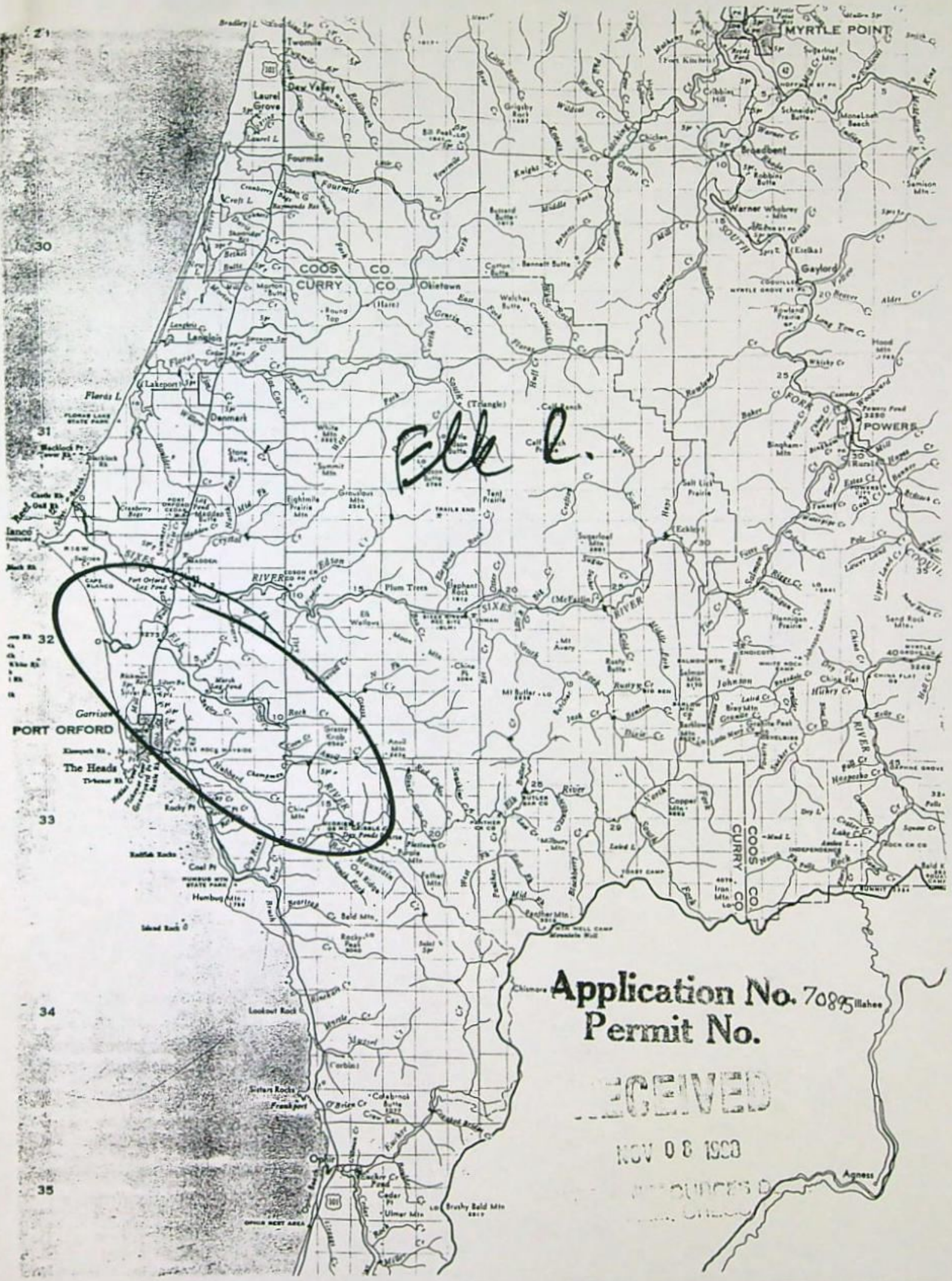
Date: \_\_\_\_\_, 19\_\_.

\_\_\_\_\_

\_\_\_\_\_

This document was first received at the Water Resources Department in Salem, Oregon, on the 8<sup>th</sup> day of November, 1990, at 8:00 o'clock A. M.

Water Resources Department  
3850 Portland Rd. NE  
Salem, OR 97310



*Elk L.*

Application No. 70895  
Permit No.

RECEIVED

NOV 08 1933

INDUSTRY DIVISION

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# Oregon

John A. Kitzhaber, M.D., Governor

## Water Resources Department

Commerce Building  
158 12th Street NE  
Salem, OR 97301-4172  
(503) 378-3739  
FAX (503) 378-8130

### MEMORANDUM

TO: Interested parties

FR: Renee Moulun  
Agency Representative

DT: March 16, 2001

RE: Prehearing Conference for IS 70895

---

The following parties may be participating by telephone:

1. Paul Brice Wagner, Protestant
2. Scott McKenzie, Protestant
3. David Van't Hof, Attorney for Scott McKenzie
4. Todd Confer, Oregon Department of Fish and Wildlife(?)
5. Shelley McIntyre, Department of Justice, for Oregon Dept. of Fish & Wildlife
6. Paul Knapp, Protestant (?)

**NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES**  
**OREGON WATER RESOURCES DEPARTMENT**  
**January 2001**

**Contested Case:** An administrative hearing is a quasi-judicial proceeding defined by Oregon law as a contested case. The procedures for conducting the hearing are established by the Oregon Administrative Procedures Act (Oregon Revised Statutes Chapter 183) and the Oregon Administrative Rules (OAR) of the Water Resources Commission, found at OAR 137-03-501 to 137-03-700 and OAR 690-02-000 to 690-02-180.

**Presiding Officer:** A Hearing Officer assigned from the Hearing Officer Panel will preside at the hearing. The Hearing Officer rules on all matters that arise in the course of the hearing including any discovery matters that may arise. The Department may or may not be represented by the Attorney General at the hearing. If the Department is not represented by the Attorney General, it may be represented by an employee, the Agency Representative.

**Right to Attorney:** Individual parties may appear on their own behalf, or be represented by an attorney. Individuals are not required to hire an attorney. Partnerships, corporations, associations, public and private organizations *must* be represented by an attorney or authorized representative. Subject to the discretion of the hearings officer, a party that is not represented may during the course of proceedings request a recess if the party determines that representation by an attorney is necessary to the protection of the party's rights.

**Witnesses:** Each party has the right to present witnesses and question them about their personal knowledge of the facts, and to question the other party's witnesses in regards to testimony the witness has given. All witnesses must take an oath to tell the truth before testifying. Testifying falsely under oath could result in perjury charges.

**Discovery:** Prior to the hearing the parties may conduct discovery. Any party may petition the agency pursuant to the requirements of OAR 137-003-570 for an order requiring discovery. Before requesting a discovery order, a party or the agency must seek the discovery through an informal exchange of information. Only the agency may issue subpoenas in support of discovery. Subpoenas for the attendance of witnesses or the production of documents at the hearing may be issued by the agency or Hearing Officer upon the request of a party to a contested case upon a showing of general relevance and reasonable scope of the evidence sought, or by an attorney representing a party on behalf of that party. Costs of service, mileage and other fees are the responsibility of the party requesting subpoena issuance.

**Purpose for Hearing and Basis for Decision:** The purpose of the hearing is to allow each party the opportunity to put into the hearing record first-hand knowledge of witnesses through testimony, records, documents, and/or objects that will establish the truth of the matter asserted. The hearing record consists of all of the documents, other evidence, and testimony submitted by the parties during the contested case process as well as all pre-hearing filings and documents. **ONLY** the information and facts that are part of the record can be considered in making the determination in the case.

**Burden of Presenting Evidence:** The burden of presenting evidence to support a fact or position rests upon the party who proposed that fact or position. All parties must be prepared to present their own testimony, the testimony of their witnesses, and other evidence that will fully support that party's position in the matter being heard. All witnesses are subject to cross examination and also to questioning by the Hearing Officer.

**Order of Presentation:** At the Hearing Officer's discretion and depending on the subject of the case, the order of presenting evidence is:

1. Statement and evidence of the party:
  - a. Protesting an application for water permits (ORS 537.170 or 537.622);
  - b. Applying for a water right transfer (ORS 540.530);
  - c. Seeking cancellation of a perfected water right (ORS 540.631 and 540.610(2));
  - d. Seeking a water right certificate on which a protest has been filed (ORS 537.260(3)); or
  - e. The Department, in a civil enforcement hearing.
2. Statement and evidence of parties opposing to claim or position asserted in #1;
3. Rebuttal evidence.

**Admissible Evidence:** All parties have the right to offer relevant testimony and physical evidence and documents. Evidence of a type commonly relied upon by reasonable prudent persons in the conduct of their serious affairs is admissible and will be received. Hearsay evidence is not automatically excluded, but the fact that it is hearsay will affect how much reliance will be placed on it in reaching a decision. In reaching a final decision, the agency will consider only admitted evidence. Four kinds of evidence may be admitted at the hearings:

1. Testimony of witnesses. This includes your own testimony.
2. Writings, including letters, maps, diagrams, and other written materials offered as evidence or entered into the record by the Hearing Officer.
3. Photographs, demonstrations, and similar means to prove a fact.
4. Knowledge of the agency. The agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency. You will be informed prior to a final decision whether the Hearing Officer takes official notice of any fact. You may contest those facts.

**Objections to Evidence:** It is permissible to object to the admissibility of evidence. Objections to the admissibility of evidence must be made at the time the evidence is offered and may be made on the following grounds:

1. Irrelevant: the evidence has no tendency to prove or disprove any issue involved; it is not related to the matter at issue.
2. Immaterial: the evidence is offered to prove a proposition which is not a matter at issue in the hearing.
3. Unduly repetitious: the evidence is merely cumulative and repetitive of what has already been offered and admitted.
4. Unreliable: the evidence is offered from an unreliable or unidentifiable source.

**Continuances:** At the end of the hearing, a party may request a continuance and reopening of the hearing record at a later date to present additional relevant evidence. However, a continuance will not be granted without a showing of good and sufficient cause, for example, why it was beyond the party's reasonable control to present the evidence at the hearing.

**Transcript:** A tape recording is made of the entire proceeding to preserve the testimony and other evidence. The record need not be transcribed unless there is a petition for judicial review of the Final Order filed with the Court of Appeals. However, you may pay the copying costs and obtain a copy of the tape recording. A transcription may be obtained by paying transcription and copying costs.

**Proposed Order:** After the hearing, the Hearing Officer will make the initial decision on the subject matter of the hearing and issue a Proposed Order. That decision will be based on the Hearing Officer's independent review of the facts and legal arguments that are in the record. A copy of the Proposed Order will be served on each part or on the party's attorney of record.

**Exceptions:** Any party may file exceptions to the Proposed Order. Depending on the subject matter of the hearing, exceptions may be due either within 20 or 30 days of Order issuance. Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. Depending on the subject matter of the hearing, either the Director or the Commission will consider the exceptions, make a final decision, and issue a Final Order. The final decision maker may modify the Proposed Order, reject it and prepare a different Order, or adopt the Proposed Order. If no exceptions are filed within the specified time period, a Final Order will be issued.

**Judicial Review:** After a Final Order is issued, any party has the right to seek judicial review of the Final Order by the Court of Appeals. Review of a contested case by the Court of Appeals is confined to the record. New evidence may not be submitted to the Court of Appeals. The court may not substitute its judgment for that of the agency as to any issue of fact or agency discretion. A written petition requesting review of the record must be filed within 60 days from date of



service of the Final Order. See ORS 183.480 *et seq.*

**Alternative Dispute Resolution Process:** A collaborative dispute resolution process is available as an alternative to a contested case hearing. Parties may choose this alternative and such request will not affect the right to a contested case hearing if the matter is not resolved through the collaborative process.

To: Dick Bailey, Jill.Zarnowitz@STATE.OR.US  
From: Renee Moulun <Renee.M.MOULUN@wrд.state.or.us>  
Subject: IS 70895  
Cc:  
Bcc:  
Attached:

Hello

I have referred IS 70895 (instream water right application on the Elk River) to the Hearing Officer Panel.

I anticipate that a prehearing conference will occur sometime in March or April. The Department will be issuing the Notice of Prehearing Conference and the Notice of Contested Case Hearing/Notice of Parties Rights.

Jill, I will be sure to call you re: scheduling of the prehearing conference as well as work with you on characterizing the proposed issues for hearing.

Renee



# Oregon

John A. Kitzhaber, M.D., Governor

Water Resources Department

Commerce Building  
158 12th Street NE  
Salem, OR 97301-4172  
(503) 378-3739  
FAX (503) 378-8130

VIA MAIL

January 30, 2001

Cheryl Lien  
Hearing Officer Panel  
P.O. Box 14020  
Salem, OR 97309-4020

RE: Referral of Water Right Application IS 70895 in the Name of the Oregon  
Department of Fish and Wildlife

Dear Ms. Lien:

Enclosed are referral materials for the above-captioned matter. I am sending a complete copy of the record as of this date, the Hearing Referral Form and an attachment that lists the names and addresses of the parties.

Please feel free to call or email if you have any questions: (503) 378-8455 ext. 239 or  
Renee.M.Moulun@ wrd.state.or.us.

Sincerely,

Renee Moulun  
Agency Representative



In the Matter of Water Right Application IS 7-895 in the Name of the Oregon Department of Fish and Wildlife

**Parties Requesting Hearing**

1. Paul Brice Wagner  
42705 Wagner Lane, Box 88  
Port Orford, OR 97465  
(541) 332-8405
  
2. Scott and Carol McKenzie  
P.O. Box 281,  
Sixes, OR 97476  
(541) 332-3381
  
3. Knapp Ranches  
P.O. Box 32  
Port Orford, OR 97465  
(541) 332-3755

The McKenzie's and the Knapp's are represented by:

Christopher R. Hermann  
Stoel Rives LLP  
Standard Insurance Center  
900 SW Fifth Ave., Ste. 2300  
Portland, OR 97204-1268

**For Panel Use Only**

Date Rcvd. \_\_\_\_\_

Assigned Case No. \_\_\_\_\_

**HEARING OFFICER PANEL**

**Agency/Board/Commission Hearing Referral Form**

(Instructions are on page 2)

**Required Case Information**

Referral Date: January 30, 2001

Agency/Board/Commission Name: Oregon Water Resources Department

If this is a corporation, please list the name: \_\_\_\_\_

Agency Case No: IS 70895 Case Type: Water Right Application Protest

Date of document or action from which hearing is requested: October 1996

Has this case been previously referred? Yes  No

If yes, complete only the items that need changing or updating since your previous referral.

**Identify the following parties with name, address and phone number:**

1. Party requesting hearing:

Please see attached sheet

2. Representative of requestor:

Please see attached sheet.

3. Agency representative for hearing:

Renee Moulun

4. Agency contact (if different from question 3):

Agency Representative, Water Resources Dept.

158 12<sup>th</sup> St. N.E., Salem, OR 97310-0210

(503) 378-8455 ext. 239

5. What is the expected length of the hearing? 2 days

6. Is the hearing to be set and notice mailed by your Agency? Yes  No  If yes, contact us regarding the date and location, if necessary, to ensure that we have an ALJ available.

Date: \_\_\_\_\_ Time: \_\_\_\_\_

Location: \_\_\_\_\_

(Street address, City, Room no.)

**and provide a copy of your hearing notice with this transmittal.**

7. If the hearing is to be set and notice mailed by the Hearing Officer Panel, answer a) & b).

a) Is a pre-hearing conference necessary? Yes  No

b) Give date and time scheduling preferences, requirements or restrictions.

\_\_\_\_\_ N/A \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

8. Is there specific language of issue(s) that you want to have stated on the notice of hearing?

The Agency Representative will send out the hearing notice with a list of proposed issues to be heard. These issues will be the subject of the prehearing conference.

9. Does the notice of hearing require certified mailing? Yes  No  See above

10. May we conduct the hearing by telephone? Yes  No

11. If hearing must be in person, will your agency provide the location? Yes  No

Location: Will schedule  
 (Street address, City, Room no.)

12. Does this case require : Proposed Order  Final Order

13. Does the order require certified mailing? Yes  No

**Instructions:**

This is the Hearing Officer Panel's referral form. This form, together with the appropriate documents, is to be completed and sent to your assigned section within the Hearing Officer Panel every time you wish to refer a case for hearing. We will use the information both for scheduling cases and for collecting statistical data.



# Oregon

John A. Kitzhaber, M.D., Governor

## Water Resources Department

Commerce Building  
158 12th Street NE  
Salem, OR 97301-4172  
(503) 378-3739  
FAX (503) 378-8130

VIA MAIL

November 27, 2000

P. Brice and Sharon Wagner  
42705 Wagner Lane  
Port Orford,  
OR 97465

RE: Protests to Application S 81018 and S 81016 in the Name of Brice and Sharon Wagner and Protest to IS 70895 in the Name of the Oregon Department of Fish and Wildlife

Dear Mr. and Mrs. Wagner:

It was a pleasure meeting you last week. Thank you for taking the time to come and talk with us and the Oregon Department of Fish and Wildlife regarding your protest to instream water right application 70895.

With this letter I would like to go over with you once again the reasons why the Department has recommended denial of your water right applications S 81016 and S 81018 and suggest some options that may get you the 160 gallons per minute you say you need to irrigate your bottom and bench lands.

First, your water right applications, which were filed on March 15, 1996 were denied by the Oregon Water Resources Department because there is no water available for the proposed use in April through June, and August through November. As I outlined in our meeting yesterday, the Oregon Water Resources Department cannot issue you a water right if there is no water available for the requested period of use unless you can show that you can use the water for the shortened period it is available, or if you can show that you have an alternate source during those months when it is not available. You have made it clear that you need the water during the summer months when the water is not available.

As we discussed yesterday, it would be a good idea for you to look into some alternatives that may provide you the water you need. The following page goes over these options.



**STATE OF OREGON  
WATER RESOURCES DEPARTMENT**

RECEIPT # **7149**

158 12TH ST. N.E.  
SALEM, OR 97310-0210  
378-8455 / 378-8130 (FAX)

INVOICE # \_\_\_\_\_

RECEIVED FROM: Echo Dell Dairy  
BY: \_\_\_\_\_

APPLICATION	70895
PERMIT	
TRANSFER	

CASH:  CHECK: #  OTHER: (IDENTIFY)

TOTAL REC'D \$ \_\_\_\_\_

**0417 WRD MISC CASH ACCT**

ADJUDICATIONS	\$
PUBLICATIONS / MAPS	\$
OTHER: (IDENTIFY)	\$
OTHER: (IDENTIFY)	\$

**REDUCTION OF EXPENSE**

CASH ACCT. \$ \_\_\_\_\_  
VOUCHER # \_\_\_\_\_

**0427 WRD OPERATING ACCT**

0407	MISCELLANEOUS		\$
	COPY & TAPE FEES		\$
0410	RESEARCH FEES		\$
0408	MISC REVENUE: (IDENTIFY)		\$
TC165	DEPOSIT LIAB. (IDENTIFY)		\$
<b>WATER RIGHTS:</b>			
0201	SURFACE WATER	EXAM FEE	RECORD FEE
0203	GROUND WATER	\$	0202 \$
0205	TRANSFER	\$	0204 \$
<b>WELL CONSTRUCTION</b>			
0218	WELL DRILL CONSTRUCTOR	EXAM FEE	LICENSE FEE
	LANDOWNER'S PERMIT	\$	0219 \$
0223	OTHER (IDENTIFY)	77235 Protest Fee	0220 \$
			8200.00

**0437 WELL CONST. START FEE**

0211	WELL CONST START FEE	\$	CARD #
0210	MONITORING WELLS	\$	CARD #
	OTHER (IDENTIFY)		

**0539 LOTTERY PROCEEDS**

1302	LOTTERY PROCEEDS	\$
------	------------------	----

**0467 HYDRO ACTIVITY**

0233	POWER LICENSE FEE (FWWRD)	LIC NUMBER	\$
0231	HYDRO LICENSE FEE (FWWRD)		\$
	HRDRO APPLICATION		\$

RECEIPT # **7149**

DATED: 10-3-96 BY: CAK



NUMBER

7940

Check

\$ 200<sup>00</sup>

Mo

Cash

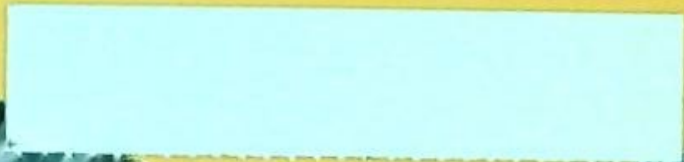
- \_\_\_\_ Surface Application  
\_\_\_\_ Reservoir Application  
\_\_\_\_ Ground Water Application  
\_\_\_\_ Transfer Application  
\_\_\_\_ PFO Request  
\_\_\_\_ Research  
\_\_\_\_ Hydroelectric Fees  
\_\_\_\_ Copying  
\_\_\_\_ Assignment  
\_\_\_\_ Extension of Time  
 Protest  
\_\_\_\_ Other

*adam*

P. B. Wagner .

P.O. Box 88

Post Oxford, Ok 97465



March 19, 1997

TO: File - IS 70895  
FROM: Adam Sussman  
RE: Proof of Service to accompany protest

The protest on IS-70895 by Paul Wanger made proof of service to himself but nonetheless it was sent to ODFW. The protest is complete.

RECEIVED

OCT - 3 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

Oct 1, 1996

- Enclosures of protest
- A. Protest Form
  - B. Proof of Service
  - C. Addendum of Explanatory  
Item One, Item Two,  
Item III
  - D. Letter of support for water use  
from Local Environmental Group  
Friends of Elk River
  - E. Letter of support from Local  
Environmental Group Kalimopsis Audubon  
Society for our water use
  - F. Coos County Electric <sup>Power</sup> Meter  
copies from 1949
  - G. Coos County planning Policy
  - H. Statewide LCDC Goals protecting Ag  
Land
  - I. Statement from ORE water resources  
stating we can only use water July 1  
thru July 31 Each year.
- Brice Wegner Oct 1, 1996

# PROTEST FORM

Any person may submit a protest against a Proposed Final Order. For persons other than the applicant, the protest fee required at the time of submitting the protest is \$200.00. An applicant is not required to submit a fee for a protest. The protest must be submitted to the Water Resources Department, 158 12th Street NE, Salem, Oregon 97310. In addition (attach additional pages if necessary), the protest must include the following:

Application Number 70895-ELK River-Curry County — Arrival CRK to the mouth Pacific Ocean  
Applicant's Name OREGON Dept of Fish and Wildlife

Name, address and telephone number of the protestant:

Paul Brice Wagner  
Name  
42705 Wagner Lane, Box 88  
Street Address  
Port Orford Ore 97465  
City State Zip Code  
541/332 8405  
Telephone Number



OCT - 3 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

- Describe your interest in the proposed final order and, if you claim to represent the public interest, a precise statement of the public interest represented:  
Our interest is our Irrigation use for our Dairy Farm which is our sole source of income and also a point of public interest!! Food production is in the public interest.
- Describe, in detail, how the proposed final order will impair or be detrimental to your interest:  
Will destroy our Farms ability to be productive when All local Dairy herds including ours are at peak production!! Will render our Farm totally useless as a producing, valid income farm for anyone to make a living from.
- Describe, in detail, how the proposed final order is in error or deficient and how to correct the alleged error or deficiency:  
According to Local Watermaster John Drolet if ODFW filing is accepted, there is no more water available for Agriculture without water Elk River Valleys ag land is rendered useless!
- Cite any legal authority supporting the protest:  
Statewide agricultural lands Goal 3 (LCDC) requires Agricultural Lands to be preserved for the future. Ore State Law, Curry County Comprehensive plans seeks to reduce uncertainty in highly productive Ag land!

Paul Brice Wagner  
Signature of Protestant

June 3, 1996  
Date

Notice: The Department is required to hold a contested case hearing, if within 30 days after the close of the period for submitting protests, the applicant requests one. By signature below, I am the applicant and request a contested case hearing.

Paul Brice Wagner  
Signature of Applicant

June 3, 1996  
Date

(This proof of service, by regular mail is required for all protests by parties other than the applicant. The applicant is not required to submit a proof of service to the Water Resources Department of a protest against a Proposed Final Order.)

### PROOF OF SERVICE

I, PAUL BRICE WAGNER, being first duly sworn, depose and say that on OCTOBER 1, 1996. I mailed a copy of the attached protest against a proposed final order on application number 70895 to the applicant by regular mail. A copy of the protest was placed in an envelope addressed to:

PAUL BRICE WAGNER  
Name  
42705 WAGNER LANE  
Street Address  
PORT ORFORD OR 97465  
City State Zip Code

and deposited in the United States mail with sufficient postage.

10-1-96  
Date Paul Brice Wagner  
Signature

Subscribed to and sworn before me this 1<sup>ST</sup> day of OCTOBER, 1996.



Mary O. Loan  
Notary Public for Oregon  
My commission expires 11-26-99

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WATER RESOURCES DEPT.  
SALEM, OREGON

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OCT - 3 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

ADDENDUM

Protest to 70895 - Brice Wagner, Port Orford, Oregon

ITEM ONE:

Fact - We Have been running our family farm for thirty years and during that entire time have had use of irrigation water for both the north and south pastures on our farm.

We have a water permit application on file with the Oregon Water Resources to take care of a 20 plus acre problem in our water right permit.

Fact - It is not in the public's interest to destroy our farm lands ability to produce. This is precisely what will occur if we are unable to irrigate our 20 plus acres that Oregon Water Resources Department states we have no permit to .

Our dairy farm pasture land is of the nehalem silt loam soil type. Oregon State wide planning goal three specifically requires that "these lands be inventoried and preserved."

Our pasture under irrigation is prime agricultural land. It has the soil type and climatic conditions suitable for row crops, specialty crops, and grasses and legumes grown for pasture. Ref. - Page 42 Curry County

Comprehensive Plan in accordance with LCDC statewide goals.

ITEM TWO:

Detrimental to our interest!

Without the use of our 20 plus acres we would no longer have a viable income from our dairy farm or any other type farm, water is essential in the dry months of June, July, August and September. We cannot function pumping water for the month of July only.

We are a commercial dairy operation producing Grade A milk 365 days a year. Our dairy herd depends on economic local pasture feed for their forage. We have a long historic use of water withdrawal from Elk River.

This dairy is and has always been our sole source of income. The granting of our permit will in no way impair the public's interest in recreation or fish habitat!

ITEM THREE:

The local water master John Drolet stated: "Feels no more water is available to be appropriated."

Fact - Our present water right/permit allows our farm to pump water from Elk River on only a portion

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WATER RESOURCES DEPT.  
SALEM, OREGON

of our south side property.

Fact: There has been no adverse effect to aquatic life in the lower Elk River with the present in stream water right that Oregon Department of Fish and Wildlife has!!

In conclusion we are willing to negotiate our irrigation water management on our existing water permits number 36414 of August 30, 1972 and 21717 August 21, 1952.

We would appreciate discussing with both The Oregon Water Resources and Oregon Department of Fish and Wildlife about night irrigation, split application, and any other idea that can solve our 20 plus acre problem that we are short one permit for.

We also are enclosing copies of support from two local environmental groups that feel positive toward our water use.

The State of Oregon shouldn't be put in the situation of preserving agricultural land with one hand and drying up prime productive farm land with its other hand. We feel we can come to a good negotiated conclusion that will be in the public's benefit, for both in stream public recreation, fish habitat and agricultural water withdrawal.

We sincerely thank all the many Oregon Department of Fish and Wildlife staff and The Oregon Water Resources staff for their time this spring.



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WATER RESOURCES DEPT.  
SALEM, OREGON

FRIENDS OF ELK RIVER  
P.O. Box 891  
Port Orford, OR 97465

Oregon Department of Water Resources  
Dwight French, Western Region Water Rights Manager  
158 12 Street NE  
Salem, OR 97310

Dear Mr. French:

Friends of Elk River is an environmental organization dedicated to the protection of Elk River, in particular, the Elk's extremely valuable salmon fishery. Among our primary concerns is protecting and restoring the riparian habitat along the river banks and allowing fish habitat to return along the lower river. In order to achieve this, it is crucial that the landowners along the river are enthusiastic supporters of this endeavor.

One of the large holdings along the lower river is the dairy ranch owned by Brice and Sharon Wagner. The Wagner ranch is one of the most beautiful sights along the lower river with its lush green pastures and grazing Jersey cows. It's part of what makes the Elk so unique. Protection and restoration of the riparian habitat along the river banks on the Wagner ranch will be of utmost importance in restoring the Coho population that once thrived along the lower river.

In order for the Wagner ranch to survive economically, it is necessary to irrigate the pastures and hay fields during the summer months to be able to provide sufficient feed for the milk cows. The family has had water rights from the Elk for this purpose for several decades. We have recently learned that a large portion of the best pasture on the south side of the ranch actually was not included in the current water right and that therefore they must immediately cease irrigating this area. Apparently they believed that they did indeed have water rights on this portion of the ranch, but through an old technical error on the part of Clarence Wagner, this area was not included in the description of the land to be irrigated. While it might seem that the Friends of Elk River would prefer to let this water remain in the river for the fish, we feel that it is far more important to assure that the ranch remains an economically viable operation. The loss of this irrigation will be a severe economic blow to the Wagners. As noted above, the enthusiastic support of the local landowners for habitat restoration is probably THE most crucial part of the picture. It is hard to imagine that the Wagners would feel very enthusiastic about enhancing the fisheries when they had to give up a large portion of their water rights to this resource. It would likewise seem that the other ranchers along the lower river would feel somewhat resentful and paranoid if their neighbor's water was cut off for the fish. If loss of irrigating rights occurs to the ranches along the

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OCT - 3 1996

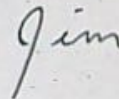
WATER RESOURCES DEPT.  
SALEM, OREGON

Dwight French ... Page 2

river, the pressure to develop this land for real estate will be greatly increased. There is already housing development taking place on forestry/grazing land along the river that the county planning commission and county commissioners felt was not economically manageable for timber or livestock. Housing development along the river banks will result in far less protection of the riparian habitat than is currently provided by the ranches, and the prospects of restoring habitat will be non-existent. Therefore, the Friends of Elk River are urging you to help the Wagners regain this needed water right.

Please feel free to contact us if you would like to discuss this issue further or could use our help in any way.

Sincerely,



Jim Rogers

Board Member  
FRIENDS OF ELK RIVER

cc: John Drolet, Watermaster  
Governor Kitzhaber  
Senator Brecke  
Representative Tarno  
Bill Bradbury  
Curry County Commissioners

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OCT - 3 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

**Kalmiopsis Audubon Society**  
P.O. Box 1265  
Port Orford, Oregon 97465

September 19, 1995

Oregon Department of Water Resources  
Dwight French, Western Region Water Right Manager  
158 12 Street NE  
Salem, Oregon 97310

Re: Brice Wagner  
Elk River Dairy

Dear Mr. French

It has come to our attention that Mr. Brice Wagner has been informed by the local watermaster, Mr. John Drolet, that he has no water right for a portion of his dairy farm on the Elk River near Port Orford, Oregon.

He was informed by the watermaster that if he irrigated this pasture, he would be fined and receive jail time. The watermaster showed him a copy of the water right that he holds and has held since 1972. The water right was obtained by his father, Paul Wagner for the operation of the dairy, which has been in continuous operation since 1915. It appears that his father did not identify a mistake on a map of the entire irrigated pasture area. The parcel in question is the pasture in direct proximity to the milking barn, outbuilding and home. As such it is a critical component of this operating dairy. Mr. Wagner has had buried irrigation pipes in this parcel for 23 years and was totally unaware that he had no right for irrigation of a portion of this parcel. He has a water right on his upland acres and acres across the river.

Mr. Wagner is a farmer and dairyman of long standing and it appears to us that this is a honest oversight on the part of his long deceased father and that this oversight was totally unknown to Mr. Brice Wagner.

We ask that a process be found to allow Mr. Wagner to continue irrigation of his pasture. Farming is an appropriate use this land and is to be supported as such, in our view.

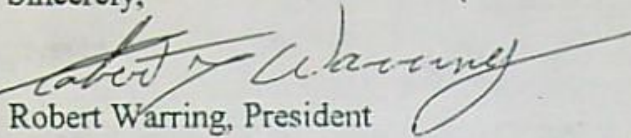
RECEIVED

OCT - 3 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

Thank you for your attention to this very critical problem.

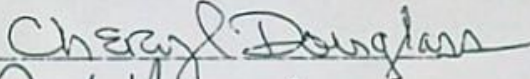
Sincerely,

  
Robert Warring, President

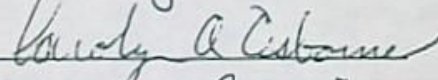
Board of Directors of Kalmiopsis Audubon Society

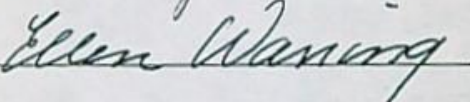
Basil Andrews 

Jim Britell 

Cheryl Douglas 

Rick Hazard 

Carolyn Osborne 

Ellen Warring 

cc: John Drolet, Watermaster  
Al Cook, Regional Watermaster  
Bill Bradbury, Executive Director, For The Sake of the Salmon  
State Senator Brenda Brecke  
State Representative Veral Tarno  
Governor John Kitzhaber

P.O. 527 f3 131  
P3-180

# METER RECORD

IRRIGATION

METER SERIAL NO. #22854303 MFG. G.E. K 10  
 TYPE V2S PHASE CO. #1270 WIRE 3 AMPT 15 VOLTS 240  
 W. H. CONST. 3 DEMAND CONST. H.P. 10  
 PURCHASED FROM \_\_\_\_\_ DATE \_\_\_\_\_  
 P. O. NO. Port Oxford OREGON COST Sch 1 Code I

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 SALEM, OREGON

Name	Address	DISCONNECT Installed	Reading	CONNECT Removed	Reading
PAUL H. WAGNER		10/11/49	2314		
"		10/1/50	3394	1/29/51	
"		10/17/52	1685	6/5/52	
"	Cap # 1624	9/29/53	7498	6/5/53	0018
"	Cap # 1437	10/18/54	1373	10/5/54	0537
"	1129 x 10	10/11/55	0999	2-2-55	0214
"	4908 x 10	12/11/56	4116	6-4-56	3243
"	4908 x 10	10/16/57	5025	6-20-57	4116
"	"	10/28/58	6089	5/23/58	5025
"	"	11/20/59	6981	11/12/59	76089
"	"	11/27/60	8200	11/6/60	6087

DATE RETIRED: \_\_\_\_\_ READ ON: \_\_\_\_\_  
 (Turn Reverse Side for Meter Test Record) THE ROSSBUD NEWS, ROSSBUD, TEXAS

Change to  
10 hp and  
one 7 1/2 hp  
Pump

STEBCO FORM G-10 METER RECORD 2-7R3 10-5823  
 P3-180 MFG. SERIAL NO. 4908 x 10 OUR NO. 1652 x 10  
 MAKE \_\_\_\_\_ COST: \_\_\_\_\_  
 WIRE 3 AMP 50 PHASE 3 0 240V METER \$ \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_ INSTALLATION \$ \_\_\_\_\_  
 PURCHASED FROM \_\_\_\_\_ 17th July '64 10HP \$ \_\_\_\_\_  
 DATE RECEIVED \_\_\_\_\_ CHECK NO. \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

SET		REMOVED		LOCATION	
DATE	READING	DATE	READING	NAME	ACCOUNT NUMBER
6/20/61	8290	10/18/61	9466	WAGNER, PAUL H.	4908 x 10
6-14-62	9466	12/14/62	0405	WAGNER, PAUL H.	"
5/31/63	0405	10/14/63	2502	" " "	"
7/6/64	2280	10/9/64	3595	" " "	1652 x 10

DATE RETIRED \_\_\_\_\_ REASON \_\_\_\_\_

STEBCO FORM G-10 METER RECORD 2-7R3 10-5827  
 P3-180 MFG. SERIAL NO. 1652 x 10 OUR NO. 11141  
 MAKE \_\_\_\_\_ COST: \_\_\_\_\_  
 WIRE 8 4 AMP 50 30 PHASE 3 METER \$ \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_ INSTALLATION \$ \_\_\_\_\_  
 PURCHASED FROM 42 1/2 HP IRR. \$ \_\_\_\_\_  
 DATE RECEIVED 1/15/75 CHECK NO. \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

SET		REMOVED		LOCATION	
DATE	READING	DATE	READING	NAME	ACCOUNT NUMBER
4/14/65	3595	8/5/70	3414	WAGNER, PAUL	1652
6/5/70	00000	2/26/75	63390	WAGNER, PAUL	10021
5/30/75	00000			WAGNER, PAUL (0)	11141

DATE RETIRED \_\_\_\_\_ REASON \_\_\_\_\_

TYPE V2S PHASE CO. 3270 WIRE 3 AMPT 15 VOLTS 240  
 W. H. CONST. 3 DEMAND CONST. \_\_\_\_\_  
 PURCHASED FROM \_\_\_\_\_ DATE \_\_\_\_\_  
 P. O. No. Port Orford ORMATE COST Sch 1 Code I

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 SALEM, OREGON

Name	Address	DISCONNECT Installed	Reading	CONNECT Removed	Reading
PAUL H. WAGNER		10/11/49	2314	1/29/51	
"		10/1/50	3394	6/5/52	
"		10/17/52	5089	6/5/52	
"	<u>Comp # 1627</u>	7/29/52	7498	6/5/53	0018
"	<u>Comp # 1237</u>	10/1/52	1273	5/1/54	0527
"	<u>1129 x 10</u>	12/1/52	0989	5-9-55	0214
"	<u>4908 x 10</u>	12/1/52	4116	4-4-53	3242
"	<u>4908 x 10</u>	12/1/52	5025	4-30-53	4116
"	<u>1908 x 10</u>	10/28/58	6089	5/23/58	5025
"	<u>4908 x 10</u>	11/20/59	6987	11/21/59	16089
"	<u>4908 x RETIRE</u>	11/21/60	8200	11/6/60	6087

DATE RETIRED: \_\_\_\_\_ READ ON: \_\_\_\_\_  
 (If on Reverse Side for Meter Test Record) THE ROBERTS NEWS, ROBERTS, TEXAS

*change to  
10 hp and  
one 7 1/2 hp  
pump*

STEPCO FORM G-10 METER RECORD 2-7R3 10-5823  
 P3-180 MFC SERIAL NO. 4908 x 10 DWP NO. 1652 x 10  
 MAKE \_\_\_\_\_ COST: \_\_\_\_\_  
 WIRE 3 AMP 50 PHASE 3 Ø 240V METER \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_  
 PURCHASED FROM \_\_\_\_\_ INSTALLATION 17th July '64  
10HP  
 DATE RECEIVED \_\_\_\_\_ CHECK NO. \_\_\_\_\_ TOTAL \_\_\_\_\_

SET		REMOVED		LOCATION	
DATE	READING	DATE	READING	NAME	METER NUMBER
6/20/61	8290	10/18/61	9466	WAGNER, PAUL H.	4908 x 10
6-14-62	9466	12/14/62	0405	WAGNER, PAUL H.	"
5/31/63	0405	10/14/63	2502	" " "	"
7/6/64	2280	10/9/64	3595	" " "	1652 x 10

STEPCO FORM G-10 METER RECORD 2-7R3 10-5823  
 P3-180 MFC SERIAL NO. 1652 x 10 DWP NO. 11141  
 MAKE \_\_\_\_\_ COST: \_\_\_\_\_  
 WIRE Ø 4 AMP 50 30 PHASE 3 METER \_\_\_\_\_  
 TYPE OF DIAL \_\_\_\_\_ CONSTANT \_\_\_\_\_  
 PURCHASED FROM 42 1/2 INSTALLATION \_\_\_\_\_  
 DATE RECEIVED 5/31/75 HP 10 CHECK NO. \_\_\_\_\_ TOTAL \_\_\_\_\_

SET		REMOVED		LOCATION	
DATE	READING	DATE	READING	NAME	METER NUMBER
4/14/65	3595	8/5/70	3114	WAGNER, PAUL	1652
6/5/70	00000	2/26/75	63390	WAGNER, PAUL	10024
5/30/75	00000			WAGNER, PAUL	(0) 11141

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WATER RESOURCES DEPT.  
SALEM, OREGON

3.11 GENERAL PLAN POLICIES FOR AGRICULTURAL LANDS

Curry County has adopted the following general plan policies for agricultural lands:

1. Curry County seeks retention of agricultural land for agricultural use and reduction of uncertainty regarding the status of county agricultural lands by adopting a comprehensive plan which provides zoning of agricultural lands that is appropriate for the continuation of existing commercial agricultural enterprise consistent with Oregon Revised Statutes Chapter 215 (Agricultural Land Use Section).
2. Curry County seeks expansion of the food processing industry within the county by providing commercially and industrially designated lands for the siting of such facilities.
3. Curry County seeks expansion of the storage of water for irrigation by the use of impoundment structures on agricultural lands.
4. Curry County seeks control and eradication of predators and poisonous weeds from agricultural lands to promote agricultural production with livestock.
5. Curry County promotes the opening of foreign and domestic markets for county agricultural products.
6. Curry County seeks improvement of agricultural services and facilities in the county which will assist local production.
7. Curry County seeks new lines of production which utilize local pelts and hides as well as other agricultural crops produced in the county.
8. Curry County seeks greater use of processed municipal and industrial wastes for agricultural fertilizer.
9. Curry County seeks local availability of low priced fertilizer, fuel, and other agricultural supplies.

We are also protected under  
Curry County planning Policy

Bruce Wagner Oct 1, 96

Statewide Planning Goal 3 specifically requires that "These lands shall be inventoried and preserved by adopting exclusive farm use zoned pursuant to ORS Chapter 215. Such minimum lot sizes are utilized for any farm use shall be appropriate for continuation of the existing commercial agricultural enterprise of the area. Conversion of rural agricultural land to urbanizable land shall be based upon consideration of the following factors: 1) environmental, energy, social, and economic consequences; 2) demonstrated need consistent with LCDC Goals; 3) unavailability of an alternative suitable location for the requested use; 4) compatibility of the proposed use with related agricultural land; and 5) the retention of Class I, II, III, and IV soils in farm use."

Oregon LCDC planning goals protects our  
Farm land From being destroyed by  
any outside encroachment,  
Without "water" our farm land is destroyed!!

Bruce Wagon  
Oct 1, 1996

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OCT - 3 1996

WATER

WATER RESOURCES DEPT. RESOURCES  
SALEM, OREGON DEPARTMENT

August 14, 1996

PAUL BRICE WAGNER and SHARON L WAGNER  
42705 WAGNER LANE  
PORT ORFORD, OREGON 97465

Reference: File S-81016

Dear Applicant:

**THIS IS NOT A PERMIT AND IS  
SUBJECT TO CHANGE DURING NEXT PHASE OF PROCESS**

This letter is to inform you of the unfavorable analysis of your proposed use of water and to describe some of your options. Based on the information you have supplied, the Water Resources Department has reached the following conclusions:

Initial Review Determinations:

1. Your application is complete and not defective.
2. The proposed use is not prohibited by law or rule.
3. The use of water for IRRIGATION OF 11.7 ACRES is allowed under OAR 517, the South Coast Basin Program (OAR 690-517-001 (8)).
4. The use of 0.15 cubic foot per second (cfs) for IRRIGATION OF 11.7 ACRES is not available April 1 through June 30 and August 1 through November 30.
5. Before surface water may be appropriated from a reservoir for Irrigation, a right to store water must be established.

Water may be appropriated for Storage from December 1 through March 30 and July 1 through July 31 based on water availability.

6. The irrigation season is limited to March 1 through October 31 by Department policy.
7. Water legally stored may be used for irrigation during the irrigation season.



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

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OCT - 3 1996

Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
Page 2

WATER RESOURCES DEPT.  
SALEM, OREGON

8. Because water is not available for a full season, IRRIGATION OF 11.7 ACRES cannot be allowed. However, by providing additional information, the applicant may pursue a permit for a limited season during the period when water is available.

Summary of Allowable Water Use

The use of 0.15 cubic foot per second (cfs) of water from Bagley Creek, tributary to Elk River, for Irrigation of 11.7 acres is not allowed.

It is not likely that you will be issued a permit due to # 4 and 5 above. At this time, you must decide whether to proceed or to withdraw your application as described below.

A right to store water is required before stored water may be appropriated for Irrigation. Additionally, the amount of water to be stored must be defined in acre-feet. An application to Construct a Reservoir is enclosed for your convenience. Failure to submit the Reservoir application may exclude use of stored water for Irrigation.

By supplying the Department with additional information concerning the proposed use, you may be able to use water for Irrigation of 24.4 acres during the period March 1 through March 30 and July 1 through July 31. If you do not withdraw your application and if you do not provide the additional information as described below, the Department will propose to reject your application. This information should be submitted within 30 days to avoid any further delays in the processing of your application.

Additional Information Opportunity:

If you would like to be able to use water when it is available, you must supply the Department with two items.

- Item #1 Supply information that would demonstrate that you can either make beneficial use of the water during the times it is available,

OR

Identify another source of water that you will use during the period when water use is not allowed from the source named in this application.

- Item #2 Your acknowledgement that water use will only occur, under the terms of the permit (if one is issued), during the allowed period of use.

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WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
Page 3

Please reference the application number when sending any correspondence regarding the conclusions of this initial review. Comments received within the comment period, will be evaluated at the next phase of the process.

Withdrawal Refunds:

If you choose not to proceed, you may withdraw your application and receive a refund (minus a \$50 processing charge per application.) To accomplish this you must notify the Department in writing by **August 28, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

To Proceed With Your Application:

If you choose to proceed with your application, you do not have to notify the Department. Your application will automatically be placed on the Department's Public Notice to allow others the opportunity to comment. After the comment period the Department will complete a public interest review and issue a proposed final order.

If A Permit Is Issued It Will Likely Include The Following Conditions:

1. You may be required to measure the amount of water used and report that use annually.
2. You may be required to install fish screens at the diversion to meet Oregon Department of Fish and Wildlife specifications for adequate protection of aquatic life.
3. The priority date for this application is March 15, 1996.

**WARNING:** This initial review does not attempt to address various public interest issues such as sensitive, threatened, or endangered fish species. These issues will be addressed as the Department reviews public comments and prepares a proposed final order. You should be aware that, if significant public interest issues are found to exist, such a finding could have an impact on the eventual outcome of your application.

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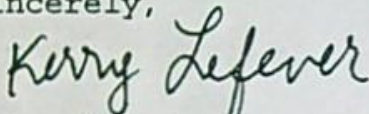
WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81016  
August 14, 1996  
Page 4

If you have any questions:

Feel free to call me at (503) 378-8455 ext. 455 or 1 (800) 624-3199 if you have any questions. Please have your application number available if you call.

Sincerely,



Kerry Lefever  
Initial Review

cc: Regional Manager, Watermaster, Water Availability  
Section

enclosures: Flow Chart of Water Right Process  
Stop Processing Form  
Application to Construct a Reservoir and  
information

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OCT - 3 1996

August 14, 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

WATER  
RESOURCES  
DEPARTMENT

PAUL BRICE WAGNER and SHARON L WAGNER  
42705 WAGNER LANE  
PORT ORFORD, OREGON 97465

Reference: File S-81018

Dear Applicant:

**THIS IS NOT A PERMIT AND IS  
SUBJECT TO CHANGE DURING NEXT PHASE OF PROCESS**

This letter is to inform you of the unfavorable analysis of your proposed use of water and to describe some of your options. Based on the information you have supplied, the Water Resources Department has reached the following conclusions:

Initial Review Determinations:

1. Your application is complete and not defective.
2. The proposed use is not prohibited by law or rule.
3. The use of water for IRRIGATION OF 24.4 ACRES is allowed under OAR 517, the South Coast Basin Program (OAR 690-517-001 (8)).
4. The use of 0.3 cubic foot per second (cfs) for IRRIGATION OF 24.4 ACRES is not available April 1 through June 30 and August 1 through November 30.
6. Because water is not available for a full season, IRRIGATION OF 24.4 ACRES cannot be allowed. However, by providing additional information, the applicant may pursue a permit for a limited season during the period when water is available.

Summary of Allowable Water Use

The use of 0.3 cubic foot per second (cfs) of water from Elk River, tributary to Pacific Ocean, for Irrigation of 24.4 acres is not allowed.

It is not likely that you will be issued a permit due to #4 above. At this time, you must decide whether to proceed or to withdraw your application as described below.



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

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WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81018  
August 14, 1996  
Page 3

If A Permit Is Issued It Will Likely Include The Following Conditions:

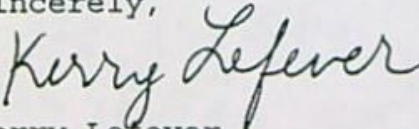
1. You may be required to measure the amount of water used and report that use annually.
2. You may be required to install fish screens at the diversion to meet Oregon Department of Fish and Wildlife specifications for adequate protection of aquatic life.
3. In the event of a request for a change in point of appropriation, an additional point of appropriation or alteration of the appropriation facility associated with this authorized diversion, the quantity of water allowed herein, together with any other right, shall not exceed the capacity of the facility at the time of perfection of this right.
4. The priority date for this application is March 15, 1996.

**WARNING:** This initial review does not attempt to address various public interest issues such as sensitive, threatened, or endangered fish species. These issues will be addressed as the Department reviews public comments and prepares a proposed final order. You should be aware that, if significant public interest issues are found to exist, such a finding could have an impact on the eventual outcome of your application.

If you have any questions:

Feel free to call me at (503) 378-8455 ext. 455 or 1 (800) 624-3199 if you have any questions. Please have your application number available if you call.

Sincerely,



Kerry Lefever  
Initial Review

cc: Regional Manager, Watermaster, Water Availability  
Section

enclosures: Flow Chart of Water Right Process  
Stop Processing Form

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WATER RESOURCES DEPT.  
SALEM, OREGON

Paul Brice Wagner and Sharon Wagner  
File S-81018  
August 14, 1996  
Page 2.

By supplying the Department with additional information concerning the proposed use, you may be able to use water for Irrigation of **24.4 acres** during the period **March 1 through March 30 and July 1 through July 31**. If you do not withdraw your application and if you do not provide the additional information as described below, the Department will propose to reject your application. This information should be submitted within 30 days to avoid any further delays in the processing of your application.

Additional Information Opportunity:

If you would like to be able to use water when it is available, you must supply the Department with two items.

Item #1 Supply information that would demonstrate that you can either make beneficial use of the water during the times it is available,

OR

Identify another source of water that you will use during the period when water use is not allowed from the source named in this application.

Item #2 Your acknowledgement that water use will only occur, under the terms of the permit (if one is issued), during the allowed period of use.

Please reference the application number when sending any correspondence regarding the conclusions of this initial review. Comments received within the comment period, will be evaluated at the next phase of the process.

Withdrawal Refunds:

If you choose not to proceed, you may withdraw your application and receive a refund (minus a \$50 processing charge per application.) To accomplish this you must notify the Department in writing by **August 28, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

To Proceed With Your Application:

If you choose to proceed with your application, you do not have to notify the Department. Your application will automatically be placed on the Department's Public Notice to allow others the opportunity to comment. After the comment period the Department will complete a public interest review and issue a proposed final order.

PFO AND FO NOTIFICATION LIST FOR FILE NUMBER:

IS-70895      BASIN #17

CURRY COUNTY BOARD OF REAL	, PO BOX 6307	, BROOKINGS	, OR, 97415
LEESA WAGNER	, 93363 ELK RIVER ROAD	, PORT ORFORD	, OR, 97465
OREGON DEPT OF FISH AND WI	, PO BOX 59	, PORTLAND	, OR, 97207
PEGGY HENNESSY	, 610 SW ALDER STREET #910	, PORTLAND	, OR, 97205
SCOTT H MCKENZIE	, PO BOX 281	, SIXES	, OR, 97476
WATER FOR LIFE	, PO BOX 12248	, SALEM	, OR, 97309
WATERWATCH OF OREGON	, 213 SW ASH SUITE 208	, PORTLAND	, OR, 97204

For some with long names or addresses, the complete name and address are located in the file. Those who receive the Departments weekly public notice do not receive additional notice.



Sent 9-16-96

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JUN 10 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

June 6, 1996

Oregon Water Resources Department  
Water Rights Section  
158th 12th Street NE  
Salem, OR 97310-0210

Re: File No. 70895, Elk River Filing by Oregon Department of  
Fish and Wildlife

Dear Sirs:

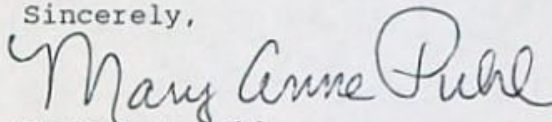
Please send me a copy of the Proposed Final Order for this filing when it is issued. I would also like copies of the 12 pages of the objections and comments received for the Technical Review. These were from WaterWatch of Oregon, 4 pgs.; Water for Life, 4 pgs.; Peggy Hennessy for Friends of Elk River, 3 pgs.; and the Curry County Board of Realtors, 1 pg.

I am enclosing \$10 for the PFO copy and \$7.50 (\$2 for the first page and \$.50 for the 11 additional pages) for the copies of the objections and comments. I received the information on the objections and comments from Michael Mattick.

Please send these to me at the address listed below.

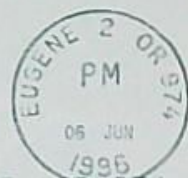
Thank you very much.

Sincerely,



Mary Anne Puhl  
P.O. Box 807  
Port Orford, OR 97465  
541-332-1345

Puhl  
P.O. Box 807  
Port Orford, OR 97465



EUGENE, OR 974

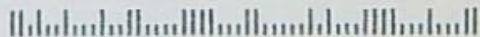
06/06/96 22:07



OCR-1

Oregon Water Resources Department  
Commerce Building  
Water Rights Section  
158th 12th Street NE  
Salem, OR 97310-0210

97310-0210



**STATE OF OREGON  
WATER RESOURCES DEPARTMENT**

RECEIPT # **3104**

158 12TH ST. N.E.  
SALEM, OR 97310-0210  
378-8455 / 378-8130 (FAX)

INVOICE # \_\_\_\_\_

RECEIVED FROM: Ronald D Puhle

70895

APPLICATION	
PERMIT	
TRANSFER	

CASH:  CHECK: # 96-455 OTHER: (IDENTIFY)

TOTAL REC'D \$ 175

**0417 WRD MISC CASH ACCT**

ADJUDICATIONS	\$
PUBLICATIONS / MAPS	\$
OTHER: (IDENTIFY)	\$
OTHER: (IDENTIFY)	\$

**REDUCTION OF EXPENSE**

CASH ACCT. \$

PCA AND OBJECT CLASS VOUCHER #

**0427 WRD OPERATING ACCT**

0407 MISCELLANEOUS COPY & TAPE FEES	\$ <u>750</u>
0410 RESEARCH FEES	\$
0408 MISC REVENUE: (IDENTIFY) <u>PFO pca66111</u>	\$ <u>100</u>
TC165 DEPOSIT LIAB. (IDENTIFY)	\$

0201 SURFACE WATER	EXAM FEE \$	0202 RECORD FEE \$
0203 GROUND WATER	EXAM FEE \$	0204 RECORD FEE \$
0205 TRANSFER	EXAM FEE \$	0206 RECORD FEE \$
0218 WELL DRILL CONSTRUCTOR	EXAM FEE \$	0219 LICENSE FEE \$
LANDOWNER'S PERMIT		0220 LICENSE FEE \$
OTHER (IDENTIFY)		

**0437 WELL CONST. START FEE**

0211 WELL CONST START FEE	\$	CARD #	
0210 MONITORING WELLS	\$	CARD #	
OTHER (IDENTIFY)			

**0539 LOTTERY PROCEEDS**

1302 LOTTERY PROCEEDS	\$
-----------------------	----

**0467 HYDRO ACTIVITY**

0233 POWER LICENSE FEE (FW/WRD)	LIC NUMBER	\$
0231 HYDRO LICENSE FEE (FW/WRD)		\$
HRDRO APPLICATION		\$

RECEIPT # **3104**

DATED: 6-11-96 BY: Jlo L

RECEIVED

FEB 28 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Peggy Hennessy  
Attorney at Law  
610 S.W. Alder Street, #910  
Portland, Oregon 97205  
Phone: (503) 227-3516  
Fax: (503) 227-2503

February 25, 1994

Oregon Water Resources Department  
Water Rights Section  
3850 Portland Road N.E.  
Salem, Oregon 97310

Re: Technical Review of Instream Water Right Applications  
70883 - Red Cedar Creek, tributary to Elk River  
70886 - Panther Creek, tributary to Elk River  
70895 - Elk River, tributary to Pacific Ocean  
70896 - Elk River, tributary to Pacific Ocean  
70897 - Elk River, tributary to Pacific Ocean  
70910 - Butler Creek, tributary to Elk River  
70911 - Bald Mountain Creek, tributary to Elk River  
70912 - Blackberry Creek, tributary to Elk River  
70914 - Anvil Creek, tributary to Elk River

Gary K. Kahn, of Reeves, Kahn & Eder and I represent the Friend of Elk River with respect to their support of the Oregon Department of Fish & Wildlife's pending applications for instream water rights affecting Elk River.

Friends of Elk River support the flows requested by ODFW, as indicated on the technical review for each of the above applications. These flows are necessary for survival of the anadromous fish in the streams, including coho and fall chinook salmon, cutthroat trout, and winter steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing. Some of the fish species found in these streams have been proposed for listing under the Endangered Species Act and will be at greater risk if these streamflows are not maintained.

The summer months are critical periods for the aquatic life in these streams. The Department has recommended allocation of substantially less water than requested for most of the above applications during the months of April through October.

The Department's estimated average natural flows are oftentimes below the amounts required by the existing minimum streamflow requirements of ODFW. The technical review indicates that the estimated average natural flows take into account planned or anticipated future demands for agricultural and other uses; however, in many instances they seem to ignore the minimum flows necessary for aquatic life.

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FEB 28 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon Water Resources Department  
February 25, 1994  
Page 2

The Oregon Department of Fish and Wildlife is the agency with the expertise to determine requirements for aquatic life. Pursuant to the applications, ODFW has concluded specific allocations are necessary for providing required streamflows for cutthroat trout and winter steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

In the above applications, the requested amounts exceed the prior minimum streamflows established by ODFW.<sup>1</sup> The current requested allocation is based upon updated scientific information indicating the amount of water necessary for the aquatic life. Therefore, considering the agency source and expertise, the requested volume of instream flow should be viewed as that volume necessary to sustain aquatic life.

Moreover, during the summer months, the estimated natural flow available, as determined by the Department of Water Resources, is not only lower than the established minimum streamflows, it is also lower than the current requested streamflows for most streams. Therefore, according to the Department's calculations, it would appear that there is not enough available water to issue sufficient rights to protect instream flows for migration, spawning, egg incubation, fry emergence and juvenile rearing in these streams.

However, we believe the process through which the "available" flow has been determined is flawed. If future uses were not considered, the availability analysis would result in more water available now. The technical reviews indicate that:

[R]ecommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agriculture and other uses . . .

However, this consideration is in direct conflict with the Department of Water Resources rules explaining that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. The consideration of these out of stream uses will necessarily decrease the estimated natural flow available.

Future municipal uses are out of stream uses which have, presumably, been included in the availability analysis. The South Coast Basin Plan acknowledges that there may be seasonal problems with municipal water shortages. However, municipalities should not

---

<sup>1</sup> Most of the minimum perennial streamflows for the South Coast Basin were established in 1964 and up-dated in 1980. See Table 1, South Coast Basin Plan.

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WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon Water Resources Department  
February 25, 1994  
Page 3

be entitled to "super-priority" for future needs when there is an intervening instream right. The Basin Plan suggests storage reservoirs to meet projected municipal needs, not infringement on current aquatic life needs. Future needs should not, and according to the rules cannot, be considered in the availability decision.

The Department's interpretation of "available flow" reduces the amount of water allocated to ODFW's instream water rights and results in an insufficient amount of water to sustain aquatic life during the critical summer months.

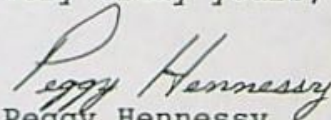
The proposed condition which would subordinate ODFW's instream water rights to uses of water for human or livestock consumption is against the public interest. The aquatic life has a current and continuing need for a viable aquatic habitat. The requested water rights would provide such a habitat. Future need for human or livestock consumption should be met through some other source which will not jeopardize the continued existence of aquatic life.

Future development for residential or agricultural purposes should be allowed only to the extent it can be accommodated by existing water resources. The instream rights are necessary to sustain the aquatic life in these streams. It is contrary to the public interest to sacrifice the existing aquatic resources for new development which goes beyond the carrying capacity of the streams. Therefore, human and livestock consumption should not have priority over the instream rights.

For the foregoing reasons, the Friends of Elk River respectfully request that ODFW's instream water right applications be granted in the amounts requested in the agency's applications.

Thank you for the opportunity to submit comments in support of ODFW's requested instream water rights.

Very truly yours,

  
Peggy Hennessy

PH/s  
cc: clients

# WaterWatch

O F O R E G O N

Hand Delivered

March 4, 1994

Oregon Water Resources Department  
Water Rights Section  
3850 Portland Road NE  
Salem, Oregon 97310

**RECEIVED**

MAR 4 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

Re: Technical Reports for:  
70895, 70896, 70897, Elk River; 70886, Panther Crk; 70883, Red Cedar Crk;  
70910, Butler Crk; 70911, Bald Mtn Crk; 70912, Blackberry Crk; 70914,  
Anvil Crk  
ODFW, Instream Applications, Elk River, South Coast Basin

WaterWatch of Oregon strongly supports the flows requested in the above referenced Oregon Department of Fish and Wildlife applications. These flows are essential for survival of chinook, winter steelhead, coho salmon, and cutthroat trout. Coastal coho salmon and winter steelhead populations are severely depressed and have been petitioned for listing under the Federal Endangered Species Act. Streamflows are critical to the survival of these sensitive fish. By this letter WaterWatch requests copies of any objections filed on these applications.

In addition, we file the following objections to the water availability analyses in the technical reports pursuant to OAR 690-77-028:

### **The Water Availability Analysis is Defective**

Instream water rights are a means for the state to achieve equitable allocation of water and Oregon Statutes place a duty on the state to act in a way that will protect instream flows needed for fish populations. OAR 690-77-015(2), ORS 496.430, OAR 690-410-070(2)(h). The agencies administrative rules require the technical reports to contain an evaluation of the estimated average natural flow (ENAF) available from the proposed source. OAR 690-77-026(1)(g). The rules also state that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. OAR 690-77-015(3).

However, the technical reports state that they contain an:  
"evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application . . .  
The recommended flows take into consideration planned uses and reasonable anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review . . ."

**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

Page 2

Technical reports page 2 (emphasis added). Clearly, this analysis is contrary to the agencies rules because it takes into account out-of-stream uses. These instream water right application requests must be evaluated according to the higher ENAF figures.

The technical reports propose to issue instream water rights for the Department's lower "average flows" rather than those requested for several months of each year.<sup>1</sup> The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4).

The technical report for application 70895 also proposes to allow the lower "ODFW minimum" flow rather than the higher "average flow" for the month of July when the requested flows appear to be higher than the "average flow". No explanation or justification is given for proposing this lower minimum flow. Given that the "average flow" is lower than the ENAF it is possible that ODFW's requests are within the ENAF. Even if the request exceeds the ENAF for these months, WRD's rules specifically allow the requested flows to exceed the ENAF in order to take into account high flow events that will be needed for fish passage or habitat maintenance. OAR 690-77-015(4). The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4). ODFW requested flows should be granted. If hypothetically these requested flows are above the ENAF and are not needed for these high flow events, then flows equivalent to the ENAF should be approved not the lower "average flows" or "ODFW minimum".

If coho and/or winter steelhead are listed under the state and/or federal endangered species acts, these acts will place an additional burden on the Commission. Under the state Act, the Commission is required to consult with the Oregon Department of Fish and Wildlife to ensure that any action taken by the Commission is consistent with ODFW programs to conserve the species or, if no plan is in place, that the act will not "reduce the likelihood of the survival of recovery of the threatened species of endangered species." ORS 496.182(2).

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<sup>1</sup> The flows recommended are less during the months of: May through June and August through October (70895), June through October (70896), May through October (70897, 70886, 70911), April through November (70883, 70912), May through November (70910) and year round (70914).



**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

Page 3

The federal Act prohibits the "taking" of endangered species. 16 USCA § 1538(a)(1)(B). Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3. The failure to protect sufficient instream flows for listed fish clearly causes habitat destruction or modification that can harm the fish. Habitat destruction or modification that harms fish can rise to the level of an unpermitted taking of a species under the Federal Endangered Species Act. See Palilia v. Hawaii Department of Land and Natural Resources, 649 F.Supp. 1070 (D. Hawaii 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988). In Palilia, the Court found that a state agency action that allowed goats to destroy the food source of an endangered bird was a habitat alternation that rose to the level of a take under the Endangered Species Act. Failing to protect streamflows for fish and continuing to issue water rights which taking water from fish is at least as clear a causal connection. ODFW instream flow requests should be granted in full.

**The proposed conditions are contrary to the public interest.**

The technical reports propose to subordinate these instream flow requests to human consumption or livestock. The technical reports do not provide any support or reasoning behind its proposal. These uses, while they use small amounts of water individually, have cumulative adverse effects on streamflows needed for fish.

As noted above, the state has a duty to protect instream flows needed for public uses of water. Fish need water to survive. The Elk River system supports a variety of fish life including chinook, winter steelhead, coho salmon, and cutthroat trout. Petitions have been filed seeking protection for coho and winter steelhead stocks under the Federal Endangered Species Act. Part of the decline of fish populations can be attributed to low flows during summer months which impair fish survival by, among other things, raising water temperatures and decreasing aquatic habitat and trout rearing areas. Low flows in the winter adversely affect fish habitat in a number of ways, including exposing spawning gravel and reducing feeding and rearing areas in the river. In addition, water diversions create problems for fish passage and survival in the basin.

These requested flows are necessary to protect severely depressed fish populations which will likely be listed under the Federal Endangered Species Act. Listing under the state and federal endangered species acts is not only a sign of the health of a particular species but also a warning signal for the health of the human environment.

These proposed conditions are contrary to the public interest in protecting the resource. The Commission's statewide policies recognize the importance of maintaining streamflows and place high priority on protecting streamflows. OAR 690-410-030(1). This

**Water Resources Department**

70895, 70896, 70897, 70886, 70883, 70910, 70911, 70912, 70914

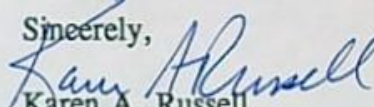
Page 4

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policy directs the state to take action to restore flows in critical areas such as this system. Id. The public uses of the coastal river system have been impaired. Adoption of these instream water rights without conditions is just one small step towards restoring this system.

Adoption of these and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers. WaterWatch supports the Department's efforts to finally begin to implement an Act that has been "on the books" for the past six years. We look forward to the adoption of these instream water rights.

Sincerely,



Karen A. Russell

Assistant Director

## COMMENT FORM

DEC 14 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s <sup>IS</sup>70895, <sup>IS</sup>70896, <sup>IS</sup>70897, <sup>IS</sup>70901, <sup>IS</sup>70914, <sup>IS</sup>70912, <sup>IS</sup>70911, <sup>IS</sup>70910

Send to:

Leesa Wagner  
 93363 Elk River Rd.  
 Port Orford, OR. 97461

Please include specific comments or concerns. Use additional sheets if necessary.

I am interested in Dry Creek on Sixes River, as we own property on Grassy knob. My primary concern is any instream applications for Elk River as we own a 500 ac. Ranch on Elk River.

I oppose instream water rights being granted, to ODFW. I do not believe that this is a "grab" for water for fish. I see this as a move for the State

Return to:

Oregon Water Resources Department  
 3850 Portland Road N.E.  
 Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

to control another resource. I also anticipate land owners suffering in the deal.

Leesa Wagner  
 93363 Elk River Rd.  
 Port Orford, OR. 97461

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MAR 4 1994

WATER RESOURCES DEPT.  
SALEM, OREGON

**WATER FOR LIFE'S OBJECTION TO TECHNICAL REVIEW: APPLICATION # 70895**

Submitted to the Oregon Water Resources Department, March 3, 1994

Water for Life hereby submits the following objection to Application # 70895, an instream water right application filed by the Oregon Department of Fish & Wildlife ("ODFW"). Water for Life asserts that the technical review by the Water Resources Department ("WRD" or "Department") is defective and there are elements of the water right as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicants have requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicants for the curing of defects.

A. WRD FAILED TO ANALYZE FLOW NEEDS

The flow levels approved by the technical review are not based on any analysis of the need for the flows requested. ORS 537.336 sets out the statutory standard which the Department is supposed to follow when determining instream water rights; the "quantity of water necessary to support those public uses." Water for Life asserts this standard means the minimum quantity necessary to support the public use. The technical review does not address the quantity of water or flow levels necessary to support the uses applied for. A review of the WRD file shows that no such analysis has occurred. The only review undertaken by the WRD was a check to see if the requested flows are less than the average estimate natural flow ("EANF"; OAR 690-77-015 (4)). At the very least, the flows approved should not exceed the lesser of EANF or the minimum flow recommended in the Basin Investigations.

B. NO SUPPORTING DATA SUBMITTED FOR REQUESTED FLOW LEVELS

An integral part of the technical review by the WRD is the analysis of the application and supporting data (see OAR 690-77-026 (1)(a)). OAR 690-77-015 also requires an application to include at a minimum "a description of the technical data and methods used to determine the requested amount;" (emphasis added).

No analysis of supporting data, or the lack thereof, appears in the WRD file for the application. The technical review is defective in that the WRD did not evaluate "whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." (OAR 690-77-026 (1)(h)).

ODFW does not have specific files for their instream water right applications. The original data supporting the Basin Investigation has apparently been lost or destroyed. Such information is essential to understand and evaluate the requested flows and assess their accuracy. No supporting data or "technical data" was submitted by the applicant as required by OAR 690-77-020 (4). Since no technical data was included with ODFW's application, the application should be returned to the applicant for curing of defects or resubmittal (OAR 690-77-021 and 022).

C. OREGON METHOD IS INHERENTLY FLAWED - WRD SHOULD REJECT APPLICATION

The methodology used for this application, the "Oregon Method", is inherently flawed in that it is based on a methodology that has been superseded and is not reliable, and is based on outdated or insufficient information (note testimony of Albert H. Mirati, Jr. on the Oregon Method at the Water Resources Commission, December 6, 1990 meeting).

The Oregon Method was further critiqued in Instream Flow Methodologies, EA Engineering, Science and Technology, Inc. (1986), a publication referenced ODFW's own publication also entitled Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989). In that critique at page 10-71, the authors stated:

"The principal limitation is the arbitrariness of the flow criteria. There is no way of knowing if they are necessary or sufficient. The binary velocity and depth criteria are also arbitrary and can result in misleading conclusions. It [Oregon Method] is one of the earliest developments of the concept of depth, velocity, and especially substrate size and dissolved oxygen, but has now been superseded."

The determinations made for the Oregon Method are not reliable and should therefore be rejected by the WRD or the Commission as the final authority in determining the level of instream flows necessary to protect the public use (ORS 537.343).

#### D. OREGON METHOD WAS NOT FOLLOWED TO OBTAIN FLOW LEVELS REQUESTED

One of the requirements of the Department's technical review is contained in OAR 690-77-026 (1)(h): "Evaluating whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." This requirement does not mean the Department can simply accept ODFW's assertion that the "Oregon Method" is the basis for the requested flows. The Department must actively review the application to see if the Oregon Method and ODFW's instream rules are being followed. Where applicable, ODFW must also submit supporting data to show that the standards and criteria contained in their rules has been followed.

The actual measurements used by ODFW to set requested flow levels are totally inadequate to validate those amounts; these measurements were made by ODFW's predecessor, the Oregon State Game Commission, as shown in the Appendices to the Basin Investigations. Actual measurements of streamflow were not made at times when key life stages occurred and, in fact, the severe limitations of the data available show that they are inadequate to validate the requested flows: "Actual measurement of streamflow made at or near recommended instream flow requirements and made at times when key life stages occur are important to validate the methodology use, and to validate that the recommended instream flow requirements provide desirable habitat conditions." Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989), p. 12.

#### E. "EANF" CALCULATIONS ARE DEFECTIVE OR INCOMPLETE

There are no calculations or information in the WRD file to show what ratios or models were used or how adjustments were made to determine the 50% exceedance flows, and there is also no information in the technical review to show the type of statistics used (see "Methods for Determining Streamflows and Water Availability in Oregon", Robison, p. 22 and 23. The EANF calculations are defective, resulting in high EANF levels and thus allowing excessive recommended flows by the WRD. The model used to calculate EANF should be reviewed and revised to properly set EANF figures.

#### F. FISH SPECIES MAY NOT BE PRESENT IN STREAM

The application is defective in that the purpose listed in the application (to provide required stream flows for several different types of fish species) listed fish species that may not be present in the stream. Insufficient information was submitted with the application to determine if the fish species listed in the application are actually present in the stream reach applied for. No supporting data was submitted to show the presence of the listed species as required by ODFW's rules (OAR 635-400-015 (8)(a)).

#### G. "REPORT CONCLUSIONS" CONTAIN BOILERPLATE LANGUAGE

The "Report Conclusions" of the technical review contain boilerplate language apparently agreed upon by the Department and ODFW, some of which is not applicable to this application. There is no information in the application file to indicate the "conclusions" were actually reached as part of the technical review.

#### H. "OPTIMUM FLOW" REQUEST IS CONTRARY TO STATUTORY STANDARD

ODFW applied for the "optimum" flow rates listed Basin Investigation. The statutory standard for instream water rights, however, is the quantity "necessary to support" the public uses allowed (ORS 537.336 (1)), not optimum flows. The Oregon State Game Commission previously prepared a Basin Investigation in which it recommended minimum flows.

The only supporting data that exists to support the "optimum" flow levels is contained in the Appendices of the later Basin Investigation (also known as "Environmental Basin Investigation Reports"). It is obvious from the data involved that both EANF and the flows allowed by the technical review are excessive.

The flow rates allowed should be reduced to the minimum flow recommendations of the Basin Investigation or EANF, whichever is less.

#### I. "REACH" REQUESTED IS TOO EXTENSIVE

A significant defect in the application and supporting data that the Department failed to consider concerns the reach of the stream allowed under this instream water right. The flow rates allowed would be applicable to the entire reach requested. This reach is far too long for the flow rates allowed, especially in light of the incoming tributaries between the mouth and the upstream end of the reach (see basin maps). The instream right "shall be approved only if the amount, timing and location serve a public use or uses." OAR 690-77-015 (9).

OAR 690-77-015 (6) states that instream rights "shall, insofar as practical, be defined by reaches of the river rather than points on the river."; OAR 690-77-202 (4)(d) requires that the application shall include the stream "reach delineated by river mile." It is neither practical nor reasonable to approve the same flow rates for the entire reach given the length of the reach applied for, the water available in the stream and the additional tributaries that flow into the stream within the reach.

The stream reach is also excessive according to ODFW's own instream rules. OAR 635-400-015 (11) details the requirements for a specific stream reach. A stream reach is limited to a point where "Streamflow diminishes by at least 30%" (OAR 635-400-015 (11)(B)). OAR 635-400-015 (11)(C) also appears to have been violated since the "stream order" (OAR 635-400-010 (19)) changes within the reach requested due to the incoming tributaries.

The flow requests by ODFW are based on the old Basin Investigations. The Basin Investigations lists the location of the recommended flows in the appendix listing the recommended flows. It is clear that the flow recommendations in the Basin Investigation did not extend upstream and the facts cited above further prove that the reach approved should be limited significantly.

#### J. EXISTING INSTREAM WATER RIGHTS NOT TAKEN INTO ACCOUNT

An instream water right already exists within the reach of the stream at issue in this application. The amount of the existing instream right should be subtracted from any instream right allowed under this application.

OAR 690-77-015 (10) requires that the "combination of instream rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits and shall be consistent with (4) and (5) above. Subsection (4) of that section deals with the "EANF" determination; the existing rights were also not accounted for in that calculation. See also OAR 690-77-015 (9).

If the existing instream water right is not subtracted from the approved flow levels, the Department should add a condition to the water right as follows: "The instream flow allocated pursuant to this water right is not in addition to any other instream water rights with a senior priority date and is not in addition to a designated minimum perennial stream flow."

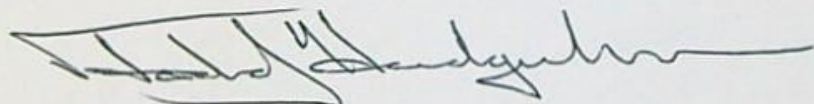
#### K. ODFW'S GAGE RULE NOT FOLLOWED

The application fails to abide by another rule applicable to ODFW's instream applications, OAR 635-400-015 (10)(a). This rule requires ODFW to compare hydrological estimates or gaging data to the amount of water they request for instream flows ("instream flow requirements"). A specific evaluation is set out in subsection (10)(b) regarding appropriate levels for any given time period in relation to the naturally occurring stream flows. ODFW never performed this evaluation for the application.

#### CONCLUSION

This objection is filed in accordance with OAR 690-77-028. The issues raised should be considered as part of a contested case hearing. The WRD technical review is inadequate and defective and has failed to follow applicable rules. A thorough review of the application is necessary to determine the flow levels necessary to support the public uses applied for.

For the reasons set forth above, the objector asserts the application is defective and should be returned to the applicants. The flow levels requested are excessive and not necessary to support the public uses proposed. Flow levels set at the rates proposed interfere with future maximum economic development. Excessive flow rates for instream water rights represent a wasteful and unreasonable use of the water involved (ORS 537.170). The flow rates approved should be set the minimum quantity necessary to support the public use applied for.



Todd Heidgerken  
Executive Director of Water for Life

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COMMENT FORM

DEC 10 1992

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s ~~IS 70883~~ ~~IS 70884~~ ~~IS 70886~~ ~~IS 70887~~ IS 70895 IS 70896 \_\_\_\_\_

Send to: Scott H. McKenzie  
P.O. Box 281  
Sixes, Or 97476

Please include specific comments or concerns. Use additional sheets if necessary.

I have water rights for pasture irrigation down stream from the Highway 101 bridge on Elk River. I Am concerned as to how these applications will impact my current and future water use.

Return to:  
Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.





CC. Colleen  
NATIONAL ASSOCIATION OF REALTORS®

Curry County Board of REALTORS  
P.O. Box 6307  
Brookings, Oregon 97415

70895

March 4, 1994

Mr. Reed Marbut, Administrator  
Water Rights Section  
Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, OR 97310

RE: In-stream water right requests by ODFW - Curry County  
Technical Reviews on Application Nos. 70874-70904, 70907-70916, 73200-73215

Dear Mr. Marbut:

Our coastal communities are being bombarded by environmental activists seeking to impose their judgments on what they determine as acceptable living standards. Since we are thus already in the middle of a very difficult discussion, imagine our frustration when your agency releases 57 technical reviews and then explains that a response is required by March 4th. Maybe we should be thankful for small miracles though, since we understand that the Coos County Board of Realtors received 111 technical reviews to examine within the same timeframe. The logic your agency uses to defend its position is truly astounding. Your agency has continued to store these applications since November, 1990, and now we found ourselves immersed in a tidal wave of technical reports. These actions are neither sound government or good public policy.

Mr. Brown of your staff was kind enough to include a cover letter explaining the comment period. This letter will serve to file objections on each of the listed applications. Upon review, we find that each of the technical reviews is defective, incomplete, and are detrimental to the public interest.

Specifically, our examination found the technical reviews to be defective for the following reasons:

- The applicant's requested flows are based on the "Oregon Method" which is obsolete and has been replaced by improved methodology for determining flows.
- The applicant has requested flows within the same "reach" covering many miles (with the same flows requested at both the beginning and end) and do not correspond to the basin investigation.
- The technical reviews do not meet the intent or requirements for state agency coordination by ORS 197.707 and 197.712.
- The in-stream flows requested by ODFW are not consistent with the local acknowledged comprehensive plan and the requirements of ORS 197.180.
- By not considered the quasi-municipal users within the basin in violation of ORS 197.180 and ORS 536.310(3), the applications do not meet statutory requirements for a coordinated, integrated state water policy.
- Public notice provided for the technical reviews was inadequate, with many units of local government not notified of the actions being taken by your agency.



Curry County Board of REALTORS

P.O. Box 6307

Brookings, Oregon 97415

In addition to the factual defects found in our examination, we also discovered that the applications and the technical reviews to be incomplete based on the following:

- The flows being requested are centered on basin investigations made over 20 years ago. Further inspection found supporting data to be "missing," leaving the application to be reviewed without documentation.
- No supporting documentation of your staff's technical review was included with the information provided to us.

Finally, we have found that the applications do not meet the public interest determination provided in ORS 537.170(5). Our examination indicates that the flows requested by ODFW have not been examined to determine the highest use of the water for all purposes; do not include a discussion of the economic impacts of the requested flows on the adopted local comprehensive plan; and that a potentially wasteful and unreasonable use of water could be allowed because the applicant was not required to produce evidence to support the requested flows.

From the documents provided to us, we have concluded that the technical reviews do not comply with the purpose and policies of ORS 536.310. As stated previously, the applications and technical reviews do not provide for the augmentation of existing water supplies and therefore cannot accomplish the maximum economic benefits required by statute. We recognize that any discussion of beneficial purposes will certainly include fish passage, but not to the exclusion of other uses as currently proposed in the present applications.

Sincerely,

Gary Long, President  
Curry County Board of Realtors

cc: Curry County Board of Commissioners  
Chuck Nordstrom, Curry County Planning Director  
Sen. Bill Bradbury  
Sen. Bill Dwyer  
Rep. Veral Tarno

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 70895

WATERMASTER # (JOHN DROLET)

REGIONAL MANAGER: AL COOK

ODF&W - County: CURRY

DEQ

PARKS

OTHER STATE AGENCY IF NECESSARY:

DIVISION 33 LIST: \_\_\_\_\_ COLUMBIA RIVER INTERTRIBAL FISH COMMISSION; U.S. FISH & WILDLIFE;  
(CHECK ONLY IF APPLICABLE) \_\_\_\_\_ NORTHWEST POWER PLANNING COUNCIL & NATIONAL MARINE FISHERIES

POWER BUILDER UPDATER; FRONT COUNTER

WATER FOR LIFE (TODD HEIDGERKEN)

OTHER ADDRESSES OF PEOPLE WHO PAID THE \$10 FEE:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PEOPLE WITH OBJECTIONS, COMMENTS OR REQUESTED COPY W/O \$10 (SEND THE \$10 LETTER):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CASEWORKER : CINDY SMITH

SYSTEM' OREGON 23370  
WATER RESOURCES DEPARTMENT

**THIS CERTIFICATE ISSUED TO**

STATE OF OREGON  
WATER RESOURCES DEPARTMENT  
SALEM, OREGON 97310

confirms the right to use the waters of ELK RIVER, a tributary of the PACIFIC OCEAN, in the SOUTH COAST BASIN to maintain an instream flow for the purpose of SUPPORTING AQUATIC LIFE.

The right is for flows IN THE ELK RIVER AT WATER RESOURCES DEPARTMENT GAGE 14327250 (SW SE, SECTION 6, T 33 S, R 14 W, W.M.) AND MAINTAINED TO TIDEWATER.

The right is established under Oregon Revised Statutes 537.346.

The date of priority is APRIL 1, 1980.

The right is limited to not more than the amounts during the time periods listed below:

<u>Period</u>	<u>Flows (cubic feet per second)</u>
OCT 1 - OCT 15	60
OCT 16- OCT 31	150
NOV 1 - FEB 15	300
FEB 16- MAY 31	225
JUN 1 - JUN 15	80
JUN 16- SEP 30	45

This instream water right shall not have priority over appropriations of water for human consumption, livestock consumption and irrigation of non-commercial gardens not to exceed one-half acre in area and waters legally released from storage.

Sand bars may prevent direct surface flow to the ocean. During such periods, minimum flows shall apply to the head of the pools formed by the sand bars.

Witness the signature of the Water Resources Director affixed this 9th day of JUNE, 1989.

*William H. Young*  
Water Resources Director

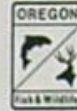
Recorded in State Record of Water Right Certificates number 59869.

MF393 17.ELK R & MISC.VOL3.DIST19

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MAR - 7 1994

WATER RESOURCES DEPT.  
SALEM, OREGON



70895  
Oregon

DEPARTMENT OF  
FISH AND  
WILDLIFE

March 2, 1994

Water Rights Section  
Water Resources Department  
3850 Portland Rd., NE  
Salem, OR 97310

RE: Instream Water Right Applications 70228, 70230, 70231, 70449, 70450, 70574, 70688 through 70690, 70874 through 70916, 70988, 70993, 71200, 71201, 71206, 71207, 71696, 71697, 72500 through 72528, 72782 through 72802, 72804 through 72842, 72940 through 72974, 73012 and 73200 through 73215; 201 Reports of Technical Review

#### General Comments

According to OAR 690-77-026 (1), WRD "shall undertake a technical review...and prepare a report." This subsection further lists 8 [(a) - (h)] mandatory criteria which, as a minimum, must be assessed during the technical review. ODFW has concerns with the apparent level of assessment relative to subsection (c):

**OAR 690-77-026 (1)(c)--Assessing the proposed instream water right with respect to conditions previously imposed on other instream water rights granted for use of water from the same source.**

In the 201 Reports of Technical Review examined by ODFW, WRD is proposing to condition each certificate to exempt human and livestock consumption from regulation in favor of these instream rights as follows:

*This instream right shall not have priority over human or livestock consumption.*

Instream water right certificates in the South Coast basin based on conversion of minimum perennial streamflows generally contain similar conditioning language giving preference to the listed uses.

By rule, WRD's technical review process includes assessing conditions previously imposed on other instream water rights from the same source. If found to be appropriate, WRD may propose that new instream water rights contain the



2501 SW First Avenue  
PO Box 59  
Portland, OR 97207  
(503) 229-5400  
TDD (503) 229-5459

same exemption. There does not appear to be any statutory requirement that this exemption be automatically included as part of a technical review.

When ODFW reviewed WRD files on some of these applications for documentation of assessments of prior conditions, we found nothing to indicate that any such assessments had been done. ODFW, therefore, must assume that the assessments were not done and objects to the routine placement of the proposed exemption on any of these applications on the grounds that to do so would be contrary to the public's interest in maintaining fish populations in South Coast basin streams. OAR 690-11-195 (4d).

ODFW supports an exemption for livestock uses if livestock water right permits are conditioned to provide benefits to instream resources and are not detrimental to wildlife. Some example conditions might be fencing to exclude stock from entering the riparian area, establishing limited use of riparian areas as "riparian pastures", and piping of water to troughs with water level-dependent shutoff valves to prevent overflow and waste. We also believe the open-ended nature of the currently proposed exemption for domestic and livestock uses should be limited to a cumulative 1% of the remaining flow of the lowest flow month. Otherwise, instream flows on some urbanized streams will be subject to continual diminishment through the endless granting of consumptive rights for these uses.

#### Missing Reports of Technical Review

Two Reports of Technical Review, 70897 and 72837, were not included with the others listed above. ODFW did, however, receive these from WRD by FAX on March 1, 1994, and has had an opportunity to review WRD's technical analysis and proposed permit conditions. We do not need additional time to review these applications and our concerns regarding same are included in this letter.

#### Specific Comments

Application # 70231--It appears from the Technical Review section that the flow authorized for June should be 4.38 cfs, not 8 cfs.

Application # 71206--In the Proposed Permit Condition section, September flow should be 2 cfs, not 1 cfs.

Application # 72832--ODFW requests that the upper limit of this application be changed from the headwaters (NW $\frac{1}{4}$ , Section 9, T28S, R11W) to the mouth of the unnamed tributary in SE $\frac{1}{4}$ , Section 17, T28S, R11W.

South Coast Basin IWRs  
March 2, 1994  
Page 3

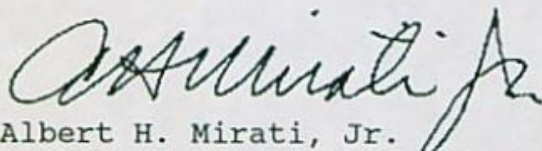
Application # 72971--The flow listed for March in the Proposed Permit Condition section should be 15 cfs, not 125 cfs.

Application #s 72802, 72827, 72830, 72957, 72964 and 72972--For these applications, the estimated average natural flows listed in the Technical Review sections are less than ODFW's minimum recommended flow for every month of the year. Because this is very unusual, it raises the concern that something, either the minimum streamflow methodology employed or the average estimated natural flow calculation, is in error. In a brief discussion with Rick Cooper, WRD hydrologist, he indicated that there is a general lack of stream gaging facilities in the South Coast basin upon which to base the predictive models used to produce the average flow estimates. ODFW requests WRD take another look at the estimated average natural flow calculations for these applications.

Application #'s 70449, 70450, 72501, 72516, 72521, 72525 through 72527 and 72947--These applications were submitted to upgrade existing instream water rights (based on conversion of established minimum perennial streamflows) to flows considered to be more appropriate by ODFW. Because the flows proposed (based on WRD's water availability analysis) in the Proposed Permit Conditions are not significantly better than those already protected by the senior instream water rights, ODFW hereby withdraws these applications.

Thank you for the opportunity to comment.

Sincerely,



Albert H. Mirati, Jr.  
Water Right Review Coordinator

- c. WaterWatch of Oregon (public information request)  
Zarnowitz/Burchfield  
Penny Harrison, DOJ

IWR Application # 70895 Certificate # \_\_\_\_\_

STATE OF OREGON

WATER RESOURCES DEPARTMENT

Application for Instream Water Right  
by a State Agency

RECEIVED

NOV 08 1990

There is no fee required for this application.

WATER RESOURCES DEPT.

Applicant: Randy Fisher for Oregon Department of Fish and  
Wildlife, PO Box 59, Portland, OR 97207

1. The name of the stream of the proposed instream water right is Elk River, a tributary of Pacific Ocean.
2. The public use this instream water right is based upon includes providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.
3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

USE(S): Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380	380	380	380	380	225	150	150	150	150/	380	380
									380		

4. The reach of the stream identified for an instream water right is from (upstream end) Anvil Creek, river mile 13, within Section 6, Township 33S, Range 14W W.M., in Curry County...

Downstream to the mouth, river mile 0, within Section 19, Township 32S, Range 15W W.M., in Curry County.

5. The method used to determine the requested amounts was the Oregon Method.
6. When were the following state agencies notified of the intent to file for the instream water right?

Dept. of Environmental Quality	Date: October 19, 1990
ODFW (Fish, Wldlf, and Habitat)	Date: October 19, 1990
Parks and Recreation Division	Date: October 19, 1990



IWR Application # 70895 Certificate # \_\_\_\_\_

7. If possible, include recommendations for measuring locations or methods:

Establish a gaging structure at or near the lower limit of the reach.

8. If possible, include recommendations for assisting the Water Resources Department (WRD) in measuring and monitoring procedures:

Local ODFW personnel will assist the watermaster in establishing and implementing a monitoring program.

9. If possible, include other recommendations for methods or conditions necessary for managing the water right to protect the public uses [see OAR 690-77-020 (5)(c)]: None.

10. Remarks: One or more species noted as present in this reach is/are listed by ODFW as "sensitive" in response to declining numbers and habitat limitations.

This application will serve to update two inadequate instream water rights (converted minimum perennial streamflow) previously filed for this reach.

**THIS APPLICATION MUST BE ACCOMPANIED BY A BASIN MAP WITH THE APPLICABLE LAKE OR STREAM REACH IDENTIFIED.**

An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 11/6/90

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director  
Habitat Conservation Div.

File: ELK4.APP

IWR Application # 70895 Certificate # \_\_\_\_\_

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

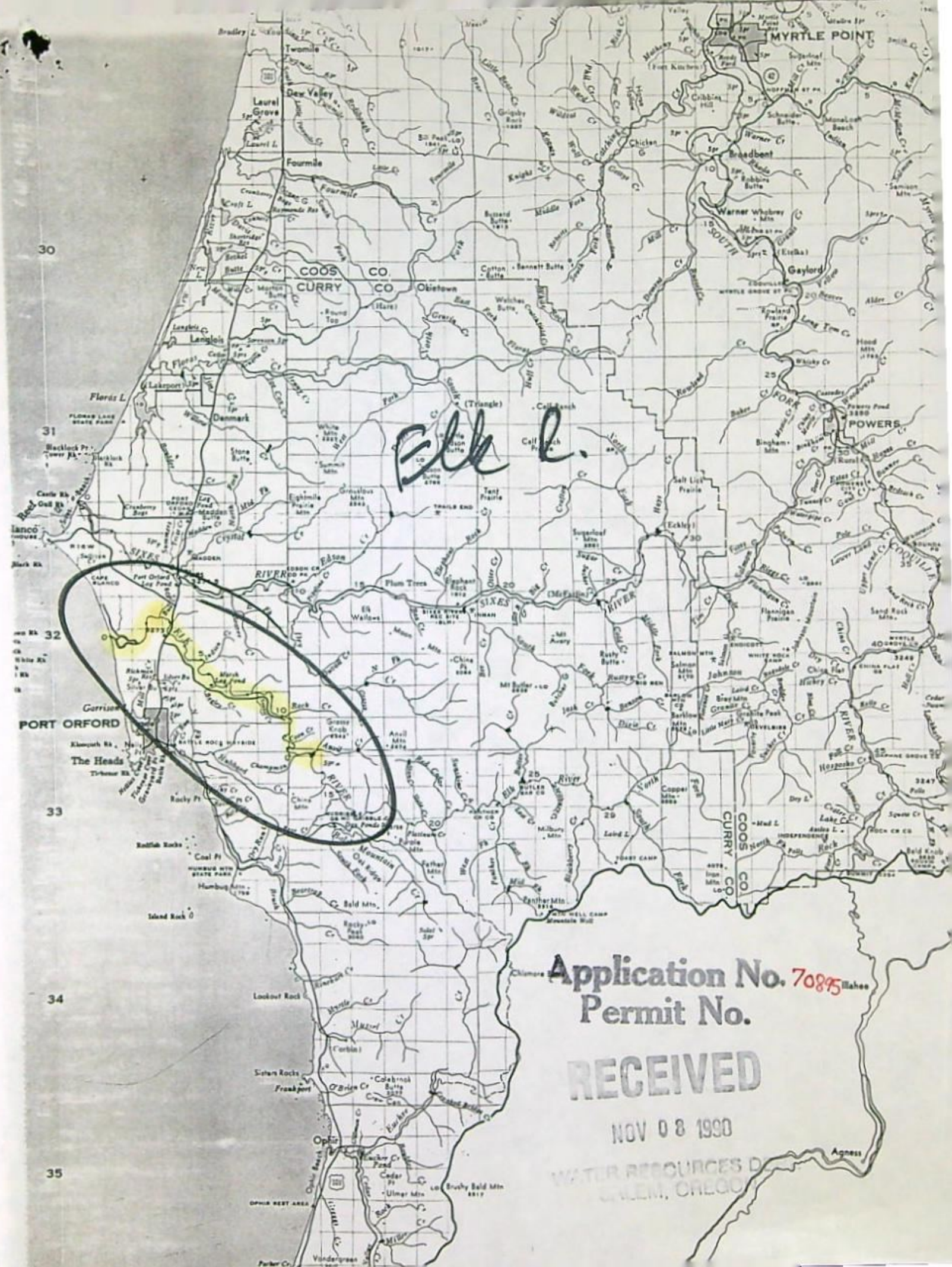
\_\_\_\_\_, 19\_\_\_\_.

Date: \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_

This document was first received at the Water Resources Department in Salem, Oregon, on the 8<sup>th</sup> day of November, 1990, at 8:00 o'clock A. M.

Water Resources Department  
3850 Portland Rd. NE  
Salem, OR 97310



Application No. 70895

Permit No.

RECEIVED

NOV 08 1990

WATER RESOURCES DIVISION  
ASHELAND, OREGON

Date: December 23, 1993

OREGON WATER RESOURCES DEPARTMENT  
SATISFACTORY REPORT OF TECHNICAL REVIEW  
FOR AN INSTREAM WATER RIGHT APPLICATION

OBJECTIONS TO THE PROPOSED INSTREAM WATER RIGHT TECHNICAL REVIEW REPORT, AS DESCRIBED BELOW, MUST BE RECEIVED IN WRITING BY THE OREGON WATER RESOURCES DEPARTMENT, 3850 PORTLAND ROAD NE, SALEM, OREGON 97310, ON OR BEFORE 5 PM: March 4, 1994.

1. APPLICATION FILE NUMBER -IS 70895

2. APPLICATION INFORMATION

Application name/address/phone:

Oregon Department of Fish and Wildlife  
P.O. Box 59  
Portland, Oregon 97207 503/229-5400

Date application received for filing and/or tentative date of priority: 11/ 8/1990

Source: ELK R tributary to PACIFIC OCEAN

County: CURRY

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The amount of water (in cubic feet per second) requested by month:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0

To be maintained in:

ELK RIVER FROM ANVIL CREEK AT RIVER MILE 13.0 (SECTION 6, TOWNSHIP 33S, RANGE 14W WM); TO THE MOUTH AT RIVER MILE 0.0 (SECTION 19, TOWNSHIP 32S, RANGE 15W WM)

### 3. TECHNICAL REVIEW

The application is complete and free of defects.

The proposed use is not restricted or prohibited by statute.

The following supporting data has been submitted by the applicant:

- (a) Fish and Wildlife Resources of the South Coast Basin, Oregon, and Their Water Requirements (Revised); April 1972.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

The source of water is not withdrawn from appropriation by order of the State Engineer or legislatively withdrawn by ORS 538.

An assessment with respect to conditions previously imposed on other instream water rights granted for the same source has been completed.

An assessment with respect to other Commission administrative rules, including but not limited to the applicable basin program has been completed.

An evaluation of the information received from the local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations has been completed.

The level of instream flow requested is based on the methods of determining instream flow needs that have been approved administrative rule of the agency submitting this application.

The evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application is described below. The recommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	
380.0	380.0	380.0	380.0	380.0	225.0	150.0	150.0	150.0	150.0	380.0	380.0	
870.0	956.0	866.0	511.0	262.0	157.0	92.9	59.8	51.2	78.8	489.0	1000	AVE FLOW
300	300/225	225	225	225	180	60	60	60	60/300	300	300	ODFW MIN

#### 4. REPORT CONCLUSIONS

The proposed water use, as conditioned, passed this technical review. The information contained in the application along with the supporting data submitted by the applicant indicate that the flow levels set out in this report are necessary to protect the public use.

The supporting data states that the recommended flows are necessary to meet the biological requirements for the passage, spawning, egg incubation and larval development and rearing of salmonids. Consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels. (See *Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.*) The recommended flow volumes are necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature.

The minimum flow requirements for adult fish only ensure that fish have physical freedom to move in the stream. Several times greater flow requirements are necessary to stimulate and maintain upstream migration of anadromous fish, including migratory freshwater trout. (See *1984 Report.*) Although flows listed by the applicant in early reports indicated that the minimum flows for some streams seemed adequate for present fish populations, subsequent review of these flow recommendations caused the applicant to modify the original listing. (See *Fish and Wildlife Resources of the South Coast Basin, Oregon, and Their Water Requirements (Revised); April 1972.*)

Minimum stream flow recommendations developed from the 1969 survey are intended to provide enough suitable environment during appropriate seasons to perpetuate minimum desirable fish populations. Optimum flows set out in the 1972 report would more nearly maximize production. The applicant has stated that enhancement of production would require further evaluation. (See *1972 Report.*)

#### 5. PROPOSED CERTIFICATE CONDITIONS

[The following proposed conditions will apply to water use and will appear on the face of the certificate.]

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
380.0	380.0	380.0	380.0	262.0	157.0	60.0	59.8	51.2	78.8	380.0	380.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. This instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.

December 23, 1993

WATER  
RESOURCES  
DEPARTMENT

Al Mirati  
Oregon Department of Fish and Wildlife  
P.O. Box 59  
Portland, Oregon 97207

Reference: Files 70230, 70231, 70449, 70450, 70574, 70688 through  
70690, 70874 through 70916, 71696, 71697, 72500  
through 72528, 72782 through 72802, 72804 through  
72842, 72940 through 72974, 73012, 73200 through  
73215.

Dear Mr. Mirati:

This letter informs you of the current status of your applications for instream water rights and accompanies the Satisfactory Reports of Technical Review For Instream Water Rights.

The enclosed Reports of Technical Review are the Department's summary of a specialized analysis of various legal and scientific aspects of your applications and proposed water use. We are required by the state of Oregon's administrative rules (in OAR 690-77-026) to conduct this official technical review of each application submitted to the Oregon Water Resources Department for an instream water right. This process was designed to insure that your applications receive fair evaluation and to secure protection of existing water rights and of the public at large.

**AS THE RESULT OF OUR TECHNICAL EVALUATION, WE HAVE DETERMINED THAT YOUR APPLICATIONS SATISFY THE REQUIREMENTS OF THE TECHNICAL REVIEW.**

The Department will now move your applications to the next phase of processing. This phase includes a public interest review of your proposed water use.

You should also note that the Report of Technical Review describes conditions currently anticipated which may condition the instream water right proposed by your applications.

If you wish to object to any of the analyses contained in the Reports, you must submit your objection to the Department in writing within 60 days of the date of mailing of the Reports or by the date specified below. Your objection must allege that the technical review is defective and you may also submit evidence which demonstrates that your proposed water use will not impair or be detrimental to the public interest.

Copies of the Report of Technical Review will be distributed to all persons who have filed comments or otherwise expressed an interest in the water use proposed in your applications. Interested parties must also submit their objections within the prescribed objection period. Those



3850 Portland Rd NE  
Salem, OR 97310  
(503) 378-3739  
FAX (503) 378-8130

objections must allege that the technical review is defective and/or that the proposed water use may impair or be detrimental to the public interest.

If an objection contains allegations that the technical review is defective, it must be accompanied by facts which support such allegations. If an objection contains allegations that the proposed water use may impair or be detrimental to the public interest, the objection must specify the particular public interest standards which apply as set out in Oregon Revised Statutes (ORS 537.170(5)) and Oregon Administrative Rules (OAR 690-77-042) and state facts showing how such standards would be violated.

All evidence and objections must be received by our Salem office no later than 5:00 p.m. on or before March 4, 1994, or the Department may presume there is no opposition to any of the analyses set out in the technical review report. Evidence and objections must be addressed and delivered to: Oregon Water Resources Department, Water Rights Section, 3850 Portland Road NE, Salem, Oregon 97310.

If objections and evidence are submitted on or before the above time and date, the Director of the Water Resources Department will evaluate each issue raised in the objections and either accept or deny them. Objectors are encouraged to indicate whether they would be interested in resolving their concerns through alternative dispute resolution.

If any of the objections are denied, the objector will be allowed thirty days to submit a protest to the denial. The protest must meet the standards set forth in OAR 690-02-030 through 080.

If you have any questions, please feel free to telephone me or any of the Department's Water Rights Section staff. My telephone number is 378-3739, in Salem, or you may call toll free from within the state to 1-800-624-3199.

Sincerely,



Steve Brown  
Manager  
Water Rights Division

enclosures



COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

✓ CC: FILE # 70895

WATERWATCH

ODF&W (DEPENDING ON - IF NOT APPLICANT)

WATERMASTER # 19 - John Dvolet

REGIONAL MANAGER - SW - Al Cook

WATER FOR LIFE

WATER RESOURCES CONGRESS

DAVID MOON, ATTORNEY

✓ KEN STAHR

✓ OTHER ADDRESSES: Leesa Wagner / 93363 Elk River Rd / Prt Orford 97465

Scott H. McKenzie / PO Box 281 / Sixes, OR 97476

CASEWORKER DWF

ORIGINAL TO APPLICANT 12/03/93

APPLICATION PROCESSING OUTLINE

Basin: \_\_\_\_\_  
 Sub-basin: \_\_\_\_\_  
 Fees paid: Examination fee: \_\_\_\_\_  
 Recording fees: \_\_\_\_\_  
 Total: \_\_\_\_\_

IWR  
 Application No. 70895  
 Permit No. \_\_\_\_\_

RATE AND DUTY \_\_\_\_\_ for irrigation

1. Check for missing information (OAR 690-11-020)

yes	no	
_____	_____	Name and mailing address of the applicant.
_____	_____	Source of the water.
_____	_____	Quantity of water to be appropriated.
_____	_____	Location of point of diversion to 1/4 1/4 Section.
_____	_____	Nature and place of use.
_____	_____	Name and mailing address of all legal owners of the properties involved.
_____	_____	Signature of the applicant
_____	_____	Examination fees.

If missing information not supplied, excepting legal owner information, then return to applicant with letter explaining deficiencies.

yes	no	
_____	_____	Water Resources Commission classification limits or restrictions -- If yes, note:

_____	_____	State Engineer's withdrawals -- If yes, note:
-------	-------	---

_____	_____	Legislative withdrawals -- If yes, note:
-------	-------	--

_____	_____	If policy statement is unclear check with Resources Management Division.
-------	-------	--

_____	_____	Scenic Waterway: _____
_____	_____	_____ on _____ up-stream _____ w/in 1/4 mile
_____	_____	Notify Parks and Recreation Department

_____	_____	Out-of-basin diversion
_____	_____	Need to route to Geology Section due to:
_____	_____	well within one mile of a stream
_____	_____	well within restricted surface water area
_____	_____	wells with request for greater than 3 cfs
_____	_____	well is for heating &/or cooling
_____	_____	well constructed by land owner
_____	_____	well is artesian
_____	_____	artificial ground water recharge project
_____	_____	ground water area under study

_____	_____	Within Irrigation District:
_____	_____	Notify _____ Need excerpt from District

_____	_____	Legal description of property
_____	_____	Ownership statement

_____	_____	Other parties to Notify: _____
_____	_____	Water Resources Commission review if:

_____	_____	Request for greater than 3 cfs
_____	_____	Dam height greater than 10 feet
_____	_____	Storage of more than 9.2 acre-feet
_____	_____	Out-of-basin diversion
_____	_____	within or above a scenic waterway
_____	_____	conditional uses under basin program
_____	_____	requests for larger rate or duty than allowed
_____	_____	ground water recharge project
_____	_____	other substantial public interest issues
_____	_____	requests for review by an agency or person

X	_____	Veteranaster <del>comment</del> forms sent with copy of draft permit
---	-------	--

_____	_____	_____ application and map
-------	-------	---------------------------

_____	_____	Veteranaster comments received _____
-------	-------	--------------------------------------

_____	_____	Hydrographic section comments requested _____
-------	-------	---

_____	_____	Hydrographic section comments received _____
-------	-------	--

X	_____	O.D.F.V. sent copy of application and map (except
---	-------	---

_____	_____	groundwater) requesting comment _____
-------	-------	---------------------------------------

_____	_____	O.D.F.V. comments received _____
-------	-------	----------------------------------

_____	_____	Report from D.L.G. received _____
-------	-------	-----------------------------------

X	_____	Publish application information in weekly public
---	-------	--

_____	_____	notice.
-------	-------	---------

_____	_____	Notify other owners of development
-------	-------	------------------------------------

_____	_____	PROTESTED
-------	-------	-----------

_____	_____	filed _____
-------	-------	-------------

_____	_____	resolved _____
-------	-------	----------------

APPLICATION  
CHECK-OFF LIST

RECEIPT POSTED  
STREAM INDEXED & STREAM CODED  
CONTENTS MARKED/STAMPED  
SCENIC WATERWAY NOTED  
FILE FOLDER TYPED  
CALENDAR CARD TYPED  
MAPS COPIED  
APPLICATION COPIED  
ACK LETTER TYPED

10/1  
G