

Dept. of Fish & Wildlife
by Randy Fisher
PO Box 59
Portland, OR 97207
Oregon State Parks Division
by David G. Talbot
525 Trade Street SE
Salem, OR 97310

INS
Application No. 69951
Permit No. _____
Certificate No. _____

Stream Index, Page No. 6.222
06.2160.2510

FEES PAID		
Date	Amount	Receipt No.
10-09-96	\$200.00	7352
FEES REFUNDED		
Date	Amount	Check No.

Name
By
Address
Date filed 6/12/89
Priority
Action suspended until
Return to applicant
Date of approval

ASSIGNMENTS

Date	To Whom	Address	Volume	Page

REMARKS

CONSTRUCTION

Date for beginning
Date for completion
Extended to
Date for application of water
Extended to

PROSECUTION OF WORK

Form "A" filed
Form "B" filed
Form "C" filed

FINAL PROOF

Blank mailed
Proof received
Date certificate issued

**Oregon Water Resources Department
Water Rights/Adjudication Section**

Water Right Application Number: IS 69951

Proposed Final Order

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

Application History

On 6/12/89, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: DEARDORFF CREEK TRIB JOHN DAY RIVER

County: Grant

Purpose: 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	D	E	C
15	15	19	19	19	15	10/4	4/10	10/4	4	4		10	

To be maintained in:

AT MOUTH OF BOQUE GULCH, RIVER MILE 4.6 (NWNE, SECTION 9, T14S, R35E WM);
TO MOUTH RIVER MILE 0.0 (NESW, SECTION 35, T13S, R34E WM)

The Department mailed the applicant notice of its Initial Review on April 10, 1996. Public notice of the application was provide in the Department's weekly public notice on April 24, 1996. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the John Day Basin, Oregon, and Their Water Requirements; September, 1979.
- (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 basin 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
8.08	7.84	10.4	21.4	34.4	21.7	10.5	5.97	6.33	7.92	8.91	8.18

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 basin 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.

Water is not available for the proposed use at the amount requested year round because the unappropriated water available is less than the amounts requested during some 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, will include the following conditions: for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

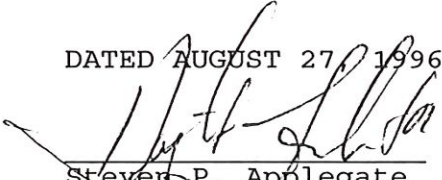
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8.08	7.84	10.4	19	19	15	10/4	4/5.97	6.33/4	4	4	8.18

Recommendation

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

DATED AUGUST 27, 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 11, 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: DEARDORFF CREEK TRIB JOHN DAY RIVER

County: Grant

Purpose: Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

AT MOUTH OF BOQUE GULCH, RIVER MILE 4.6 (NWNE, SECTION 9, T14S, R35E WM); TO MOUTH RIVER MILE 0.0 (NESW, SECTION 35, T13S, R34E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 6/12/89.

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
8.08	7.84	10.4	19	19	15	10/4	4/5.97	6.33/4	4	4	8.18

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 ____ day of _____, 19__.

Water Resources Director

Recorded in State Record of Water Right Certificate number _____.

IS 69951

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 69951

WATERMASTER # KELLY RISE

REGIONAL MANAGER: KENT SEARLES

ODF&W - County: Grant

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;

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

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # 7352

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

INVOICE # _____

RECEIVED FROM: Ronald L. Yockim
BY: _____

APPLICATION	
PERMIT	
TRANSFER	

CASH: CHECK: # 2412 OTHER: (IDENTIFY)

TOTAL REC'D \$ 3,800.7

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	<u>IS 69949</u>	<u>70640-42</u>	<u>71467-68</u>	\$
0410	COPY & TAPE FEES	<u>69951</u>	<u>70645-46</u>	<u>71472</u>	\$
0410	RESEARCH FEES	<u>69960</u>	<u>70651-55</u>		\$
0408	MISC REVENUE: (IDENTIFY)	<u>69963</u>	<u>71450</u>		\$
TC165	DEPOSIT LIAB. (IDENTIFY)		<u>71455</u>		\$

0201	SURFACE WATER	EXAM FEE	0202	RECORD FEE
0203	GROUND WATER	\$	0204	\$
0205	TRANSFER	\$	0206	\$
	WELL CONSTRUCTION	EXAM FEE	0219	LICENSE FEE
0218	WELL DRILL CONSTRUCTOR	\$	0220	\$
	LANDOWNER'S PERMIT			\$

0223 OTHER (IDENTIFY) Protest \$3,800. - PCA 77235

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 # 7352

DATED: 10-9-96

BY: R. Bushnell

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 1996 I served a true and accurate copy of the foregoing Protest to the Proposed Final Order on the applicant by mailing said copy by first class mail, postage prepaid, by depositing said copy in the United States Post Office in Roseburg, Oregon, addressed as set forth below:

Oregon Department of Fish & Wildlife
2501 SW First Avenue
P.O. Box 59
Portland, Oregon 97207

Barbara Griffin

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WATER RESOURCES DEPT.
SALEM, OREGON

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON
WATER RIGHTS DIVISION

In the Matter of Instream Water Right)	
Application IS 69951, Deardorf Creek,)	
Grant County)	
)	
Oregon Department of Fish & Wildlife)	PROTEST TO
Applicant.)	PROPOSED FINAL
)	ORDER
)	
Grant County,)	
)	
Protestant.)	
)	

Protestant, Grant County, a municipal corporation, pursuant to ORS 537.153(6) and OAR 690-77-043, hereby protests the Proposed Final Order for Application IS 69951, Deardorf Creek, tributary to the John Day River, in Grant County.

I.

INTRODUCTION

The protestant's address and telephone number are:

Grant County Court
P.O. Box 220
Canyon City, Oregon 97820
(541) 575-0059

Protestant's attorney in this matter is:

Ronald S. Yockim
Attorney At Law
P.O. Box 2456
548 SE Jackson, Suite 7
Roseburg, Oregon 97470
(541) 957-5900

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The protestant's interest in the Proposed Final Order is based upon Grant County having identified irrigation, domestic livestock, ground water recharge, fire protection, fish life, wildlife, pollution abatement, and recreation as uses of Deardorf

Creek that are in the public interest and are also identified in the John Day Basin Plan as being in the public interest (See OAR 690). It is Grant County's interest to conserve the highest use of the water for all purposes including irrigation, domestic use, municipal water supply, recreation, fish and wildlife, navigation, and road construction, maintenance, and reconstruction.

Protestant represents its own interest as well as the public interest in the filing of this protest. The specific public interest that protestant represents is the use of this water for the highest public benefit, which in this case involves a balancing of public interests including water for irrigation, domestic use, municipal water supply recreation, fish and wildlife, navigation, and road construction, maintenance, and reconstruction. In addition, the applicant represents the public interest in insuring that the Director is following the law as established by the Legislature and as adopted in the Grant County Comprehensive Plan.

Grant County also brings this protest to exercise the agreement with the Water Resources Department wherein it was stipulated that the Water Resources Department would consult with the County prior to proceeding further with the instream applications (See Jan. 3, 1992 Letter OWRD to Ronald S. Yockim)

II.

ISSUES

1. The Proposed Final Order is in error or deficient in the following particulars:

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A. Neither the instream application nor the Water Resources Department's ("Department") file provide sufficient technical data or information to support the flow rates requested. The record not only lacks substantial evidence, it also lacks the information required by OAR 690-77-020 and ORS 537.336.

OAR 690-770-020(3)(g) requires an application to include at a minimum "a description of the technical data and methods used to determine the requested amounts;" (emphasis added).

In this case the file does not contain any "technical data", or any factual data, that supports the proposed instream flows.

B. In reviewing the documentation in the Water Resources Department's files, we are unable to find any "water availability" analysis.

This is a critical omission in that the "water availability" analysis provides information that is essential for determining the proper public interest balance between out-of-stream and instream needs.

The requirement to conduct the "water availability" analysis for instream water rights is found in OAR 690-77-029(1)(b), wherein it is specified that as part of the initial review of the application, the Department is to determine the extent to which water is available from the proposed source during the times and in the amounts requested.

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While a specific water availability process is not defined in the instream water right rules (OAR 690-77), we find a number of references that indicate the Department was to examine the water availability by determining the amount of "unappropriated water available."¹ In addition, a requirement to determine the amount of unappropriated water can also be implied from the provisions relative to the ability to set instream flow levels that exceed current unappropriated water available (See OAR 690-77-015(2)).

It is our opinion that these references indicate an intent that the water availability is to be calculated in part by reference to the amount of out-of-stream appropriations.

Further support for the position that "water availability" must include an examination of out-of-stream appropriations is found in the administrative rules relating to out-of-stream appropriations (OAR 690-300). While these rules address the out-of-stream permitting process, they are arguably applicable to the instream rights as well, as a result of Senate Bill 674.

The 1995 Legislature in enacting Senate Bill 674 (§19), added the requirement that the instream water rights are to be processed in accordance with the provisions for obtaining a permit to appropriate water as provided under ORS 537.140 to

¹. "Unappropriated Water Available: means water that exceeds the quantities required to meet existing water rights of record, minimum streamflows and instream water rights and for known and yet to be quantified Native American treaty rights." OAR 690-77-010(29)

537.250. Among these provisions, is the requirement to determine whether water is available (ORS 537.153(2)).

"In reviewing the application under subsection (1) of this section, the department shall presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basins program . . . or given a preference under ORS 536.310(12), if water is available, . . ."

(emphasis added).

The rules implementing ORS 537.153(2) specify that the term "water is available" is defined as:

(a)(A) The requested source is not over-appropriated under OAR 690-400-100 and 690-410-070 during any period of the proposed use; or . . .

(b) For surface water applications received before July 17, 1992, the provisions of subsection (a) of this section shall apply except that the determination of whether a requested source is over-appropriated under OAR 690-400-010 and 690-410-070 shall be based upon whether the quantity of water available during a specified period is not sufficient to meet the expected demands for all water rights at least 50 percent of the time during that period."

OAR 690-300-010(58) (emphasis added)

Since the instream applications are to be processed in the same manner as out-of-stream applications, we believe they must be accompanied by the "water availability" analysis described in subsection (b) above.

We note that although the Proposed Final Order does contain a reference relative to the "amount of water available", this reference is misleading in that it implies a water availability analysis was performed, when in fact it was not. The "amount of water available" data presented in the

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"Initial Reviews" is in fact the "Estimated Average Natural Flow."

The "Estimated Average Natural Flow" calculations incorporated into the Proposed Final Order are not only legally insufficient, reliance upon these calculations alone deprives the public of the opportunity to fully consider and comment on the proposed action.

A complete water availability analysis must be conducted and the public afforded an opportunity to review the results. The water availability analysis will provide the public a benchmark upon which to review whether the request is in the public interest and whether it is for the minimum amount necessary as required by Senate Bill 674.

- C. The administrative file lacks information as to whether the amount of water requested is in fact the "minimum quantity of water necessary" as required by Senate Bill 674.

In enacting Senate Bill 674, the Legislature modified the instream water right law to limit the amount of water that could be requested for instream flows to the minimum amount necessary.

"In-stream flow means the minimum quantity of water necessary to support the public use requested by an agency."

(ORS 537.332(2)).

Notwithstanding the "minimum quantity" restrictions, we are unable to find in the files any indication that findings

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have been made as to whether the requested flows are in fact minimums.

This is an essential element of an instream filing and is particularly suspect in this case for the instream applications were filed at a time when the Oregon Department of Fish and Wildlife's ("ODF&W") policy was to seek optimum flows.

We note that the ODF&W administrative rules in place at the time the instream applications were submitted state that it is the policy of the Fish and Wildlife Commission to apply for instream water rights to provide optimum benefits. (OAR 635-400-005). Furthermore, the regulations specify that the instream flow requirement is to be no less than the highest instream flow or water surface elevation required by any of the fish and wildlife species during the specified period (OAR 635-400-015(8)).

While the applications do not state on their face that they seek the optimum or highest flow, both regulations would lead to the presumption that the ODF&W did not apply for the minimum quantity as required by Senate Bill 674. Support for this conclusion is found in the application wherein the amount of flow requested exceeds the "estimated average natural flow" at the 50% exceedence.

In addition, ODF&W regulations also specify that if an instream request is for greater than 70% or less than 30% of the naturally occurring stream flows for any given time period

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it is to be evaluated for appropriateness in relation to naturally occurring stream flows. The appropriateness review would be essential information to both the Department and the public in considering whether the application is in the public interest. Unfortunately, none of the Department's files contain references as to whether this essential evaluation has in fact occurred.

- D. The Proposed Final Order also fails to disclose whether the various local governments and landowners have been contacted relative to this application.

We note that under the existing regulations, the instream applicants are to provide, as part of the application, a copy of any letters they have issued that notify the affected local government of the intent to file the instream water right application (OAR 690-77-020940(j)). The application did not include letters from ODF&W to the Grant County Court.

In addition, under OAR 690-77-019(1), each application for an instream water right is to comply with ORS 537.140, wherein each application for a water right permit is to include the name and mailing address of any owner of the land upon which the source of the water supply is located. In this case, there has been no statement as to land ownership.

The requirement to notify affected governments and landowners insures the public interest issues are fully analyzed by both the agencies and public. In the absence of

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SALEM, OREGON

these elements, the application is in fact incomplete and should be returned (OAR 690-77-027(1)). Returning the applications will allow the public, county and applicant to resolve a number of the public interest questions raised by the applications.

E. The Proposed Final Order allocates all of the natural stream flow during the months of January, February, March, August, September, and December for instream purposes. This allocation is detrimental to the public interest since it does not allow any water for other beneficial uses such as road construction, reconstruction and maintenance (ORS 537.040); storage of surface water (ORS 537.143); or otherwise consider a balance of all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attractions or any other beneficial use which may have a special value to the public (ORS 537.170(8)(a)).

F. The Proposed Final Order does not leave any water during the months of January, February, March, August, September, and December for uses covered in ORS 537.022 (wetland enhancement, stream restoration, off-channel reservoirs, livestock and wildlife watering, storm water management, etc). Since these projects are subject to regulation if any injury to a water

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right with an earlier priority occurs (ORS 537.032), they will be limited in their effectiveness if the instream water right is granted in a manner that allocates all of the natural flow to instream. These projects are in the public interest and will be detrimentally affected if the Proposed Final Order is not modified.

G. The Proposed Final Order is not in the public interest in that it allocates all of the natural flow during January, February, March, August, September, and December to instream values and leaves no water available for the uses described in ORS 537.143, including road construction and maintenance, general construction and forestland or rangeland management. Since these limited license activities are prohibited if they cause injury to any other water right, the granting of all of the natural flow will nullify the ability to exercise the provisions of this statute. The public interest will be detrimentally affected unless the final order is conditioned to exempt these uses from the instream flow.

2. The Proposed Final Order can be modified to correct the alleged errors and deficiencies by issuing the final order with the following:

a. providing that for the purposes of water distribution, this instream right shall not have priority over road construction, reconstruction or maintenance, human

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WATER RESOURCES DEPT.

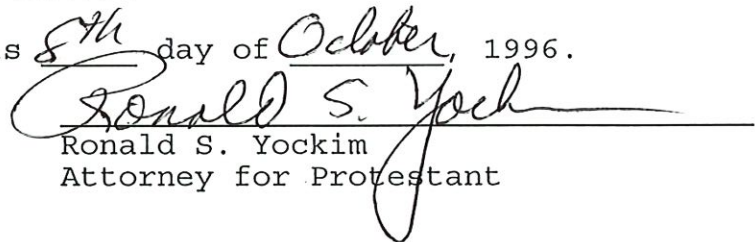
- consumption, domestic expanded, livestock, and the uses described in ORS 537.040, ORS 537.143, and ORS 537.022;
- b. limiting the amount of instream flows to less than the natural flow of the stream in a manner that balances the public uses and allows for the activities covered by ORS 537.022, ORS 537.040, ORS 537.143, and ORS 537.170(8);

III.
LEGAL AUTHORITIES

The protestant relies upon the following citations for legal authority supporting the protest:

1. ORS 537; ORS 536; ORS 183, ORS 197.180
2. John Day River Basin Program plan;
3. Grant County Comprehensive Plan;
4. OAR 635-100-130; OAR 635-415-030.
5. The requirement that any Water Resources Department decision be based upon substantial evidence and rationale, substantial reason, and be rational, are found in Armstrong v. Asten-Hill, 90 Or App 200, 205-207 (1988); Furnish v. Mantavilla Lumber Co., 124 Or App 622, 625 (1993); Stalder v. Bd of Medical Examiners, 37 Or App 853, 858 (1978); Reynolds v. Children's Services Div., 280 Or 431, 434 (1977).

Respectfully submitted this 8th day of October, 1996.



Ronald S. Yockim
Attorney for Protestant

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WATER RESOURCES DEPT.
SALEM, OREGON

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

Basin App Num

2

OK 71556 A

Total for Basin 2 : 1

OREGON DEPARTMENT OF FISH & WILDLIFE

8
9

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
OREGON DEPARTMENT OF FISH & WILDLIFE
OREGON DEPARTMENT OF FISH & WILDLIFE
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18
74
2
1
3
9
19
2
12
12

5

OK 70353 A
I 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
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
OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
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OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

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
Total for Basin	9 :	16	
10			
	71450	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	A	OREGON DEPARTMENT OF FISH & WILDLIFE
Total for Basin	10 :	3	
11			
	<i>Dwight Done Right!</i> 70020	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
Total for Basin	11 :	1	
12			
	71467	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71468	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71472	A	OREGON DEPARTMENT OF FISH & WILDLIFE
Total for Basin	12 :	3	
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
Total for Basin	13 :	9	

Instream Applications with Protests

4/2/97

Basin	App Num
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14

DWF	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
	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

Instream Applications with Protests
4/2/97

Basin	App Num
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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

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # **7535**

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

INVOICE # _____

RECEIVED FROM: Water Watch of Oregon INC APPLICATION _____
 BY: _____ PERMIT _____
 TRANSFER _____

CASH: CHECK: # 3412 OTHER: (IDENTIFY) _____
 TOTAL REC'D \$ 750.

0417 WRD MISC CASH ACCT	<u>70653, 70651</u>	
ADJUDICATIONS	<u>70646, 69960</u>	\$
PUBLICATIONS / MAPS	<u>70647</u>	\$
OTHER: (IDENTIFY)	_____	\$
OTHER: (IDENTIFY)	_____	\$

REDUCTION OF EXPENSE CASH ACCT. \$ _____
 PCA AND OBJECT CLASS _____ VOUCHER # _____

0427 WRD OPERATING ACCT	<u>70645, 70646, 70640,</u>	
MISCELLANEOUS <u>IS</u>	<u>70642, 69949, 69951</u>	
0407 COPY & TAPE FEES	<u>70654</u>	\$
0410 RESEARCH FEES	<u>70652, 69963,</u>	\$
0408 MISC REVENUE: (IDENTIFY)	<u>70655</u>	\$
TC165 DEPOSIT LIAB. (IDENTIFY)	_____	\$
WATER RIGHTS:		
0201 SURFACE WATER	EXAM FEE \$ _____	0202 RECORD FEE \$ _____
0203 GROUND WATER	\$ _____	0204 \$ _____
0205 TRANSFER	\$ _____	0206 \$ _____
WELL CONSTRUCTION		
0218 WELL DRILL CONSTRUCTOR	EXAM FEE \$ _____	0219 LICENSE FEE \$ _____
LANDOWNER'S PERMIT	\$ _____	0220 \$ _____

0234 OTHER (IDENTIFY) Request for Standing \$750.

0437 WELL CONST. START FEE		
0211 WELL CONST START FEE	\$ _____	CARD # _____
0210 MONITORING WELLS	\$ _____	CARD # _____
OTHER (IDENTIFY)	_____	

RECEIVED OVER THE COUNTER

0539 LOTTERY PROCEEDS	
1302 LOTTERY PROCEEDS	\$ _____

0467 HYDRO ACTIVITY	LIC NUMBER	
0233 POWER LICENSE FEE (FW/WRD)	_____	\$
0231 HYDRO LICENSE FEE (FW/WRD)	_____	\$
HRDRO APPLICATION	_____	\$

RECEIPT # **7535** DATED: 10-11-96 BY: D. Bushnell
 Distribution-White Copy-Customer, Yellow Copy-Fiscal, Blue Copy-File, Buff Copy-Fiscal

Water Watch

R I V E R S N E E D W A T E R

Delivered via messenger

October 11, 1996

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

RE: Request for Standing, Instream Water Rights, John Day River Basin

70645 Canyon Creek
70642 Roberts Creek
70654 SF Long Creek
70652 Big Boulder Creek
70646 Pine Creek
70640 John Day River
69949 Reynolds Creek
69951 Deardorf Creek
69963 Fields Creek
70655 McCleannan Creek
70653 Big Creek
70651 Indian Creek
70641 Rail Creek
69960 NF John Day River
70647 NF John Day River

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SALEM, OREGON

Dear Water Rights Section:

Pursuant to ORS 537.153(5) and OAR 690-310-160(3) WaterWatch and Oregon Trout file this Request for Standing along with the required fee of \$50 per application for applications 70645, 70642, 70654, 70652, 70646, 70640, 69949, 69951, 69963, 70655, 70653, 70651, 70641, 69960, and 70647.

Elements for Request for Standing as required by OAR 690-310-160(3)

a. Name, address, telephone number of requester

WaterWatch of Oregon
213 SW Ash, Suite 208
Portland, OR 97204
(503) 295-4039
contacts: Kimberley Priestley, Karen Russell

Oregon Trout
117 NW Front
Portland, OR 97204
(503) 222-9091
contact: Jim Myron

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b. Statement of support of the Proposed Final Order

WaterWatch and Oregon Trout support the proposed issuance of these instream water rights.

c. How WaterWatch and Oregon Trout would be harmed if the Proposed Final Orders are modified

WaterWatch of Oregon is a nonprofit organization dedicated to promoting water policies for Oregon that provide the quality and quantity of water necessary to support fish, wildlife, recreation, biological diversity, ecological values, public health and a sound economy. Oregon Trout is a nonprofit organization dedicated to promoting and restoring wild native fish habitat.

In requesting standing for the aforementioned instream water right applications, WaterWatch and Oregon Trout are representing the general public interest in the water resources and associated fish and wildlife resources of this state, as well as the specific interest of WaterWatch and Oregon Trout members. WaterWatch and Oregon have members throughout the Pacific Northwest, including the John Day River basin specifically, who use and enjoy the watershed. All of WaterWatch's and Oregon Trout's members, board members and staff benefit from knowing that such a resource exists even if they have not visited the watershed.

If the PFOs are modified to either deny the applications, decrease the flows proposed, or otherwise alter the rights to the detriment of the resource, WaterWatch's and Oregon Trout's interest would be harmed because denial and/or lower flows pose a risk to the fish species they are intended to benefit, including federally petitioned steelhead, bull trout (warranted but precluded under the federal ESA), state sensitive redband trout, west slope cutthroat, and pacific lamprey, and chinook salmon. It would also impair a number of other public interest values including, but not limited to, wildlife, scenic waterway values and water quality.

1. If the PFOs are modified to either decrease proposed flows and/or deny the applications, WaterWatch's interests will be harmed because flows vital to the survival of aquatic species, including state sensitive fish (redband trout, pacific lamprey, and west slope cutthroat), federal petitioned steelhead, bull trout (warranted but precluded), and chinook will be compromised.

ODFW has requested these flows to provide for the minimum amount necessary for the survival of state sensitive fish (redband trout, pacific lamprey, and west slope cutthroat), federal petitioned steelhead, bull trout (warranted but precluded), and chinook salmon. WaterWatch supports the flows requested by ODFW. If the Department modifies the PFOs to either deny the applications or propose flows lower than those requested by ODFW, the survival of all of these species will be jeopardized.

This is not only a violation of the public interest but could result in a violation of the state and federal Endangered Species Acts for listed fish (as well as petitioned fish if listed). Under the state act the Department is required to consult with ODFW to ensure that any action taken by the Department is consistent with ODFW programs to conserve the species, or, if no plan is in place, that the action will not "reduce the likelihood of the survival or recovery" of the state listed species. ORS 496.182(2). The flows requested by ODFW are in the amounts ODFW has determined are necessary for the survival of these fish. To comply with the intention and mandates of the State Endangered Species Act, the Department should issue the instream water rights at the amounts requested.

Under the federal Act, there is a prohibition against "taking" of endangered species. 16 USCA § 1538(a)(1)(B). Issuing the instream water rights at the amounts requested by ODFW is obviously within the Department's authority. To do such is consistent with the intent and mandates of the Federal ESA, which may soon come into play if steelhead are listed. To the contrary, to deny or lower the instream water rights could result in a taking, for it would deny these fish the flows determined by ODFW as necessary for survival.

Again, if the Department modifies the PFOs to either deny the applications or propose flows lower than those requested by ODFW, the survival of all of these species will be jeopardized and WaterWatch's and Oregon Trout's interests, including ensuring the viability of these fish, will be impaired.

2. If the PFOs are modified, WaterWatch's and Oregon Trout's interests will be harmed because we will have been precluded from fully evaluating the actions of the Department. Thus, WaterWatch and Oregon Trout, by filing this standing statement, reserve the right to raise the following concerns in any contested case hearing or judicial review if any PFO is modified:

a. The condition of use proposed in the PFO exempting human consumption and livestock use will impair WaterWatch's and Oregon Trout's interest in ensuring that the purposes of the instream water rights are fulfilled.

The PFOs contain a condition that subordinates the instream water right to human consumption and livestock uses in perpetuity. Individual exceptions will directly lessen the amount of water available instream to satisfy the purposes of the instream water right. Since the flows represented by the instream water right are those ODFW has determined are needed for fish, even the slightest diminishment of these flows will have adverse effects on the fishery

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resource. Moreover, the cumulative effects that will result from this exception could eventually lead to the total negation of the instream water right.

The Department has cited to ORS 536.310(12) as authority for allowing this condition. This section of the statute states that:

When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposed over all other uses and for livestock consumption, over any other use....

ORS 536.310(12)(emphasis added).

While this statute does provide for a preference for human consumption and livestock, this preference has a specific statutory application.¹ The statute governs situations where there is a conflict between competing applications at the time the permitting decision is taking place. This statute does not address situations of conflict at some nebulous future date. Thus, while the Department may rely on this statute to subordinate the instream water right to the applications pending at the time of the instream water rights adoption, the Department's reliance on this section to attach this open-ended exception is in error.

If the statute were to mandate the open-ended subordination of new rights to human consumption and livestock uses, then equity demands that this condition be placed on every new permit or certificate issued, whether instream or out-of-stream. The statute does not differentiate between instream and out-of-stream water rights.² Rather, it specifically states that "preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use...." ORS 536.310(12) (*emphasis added*). Thus, if the Department finds that the law requires it to subordinate instream water rights to human consumption and livestock uses, the Department must subordinate all water rights, including agriculture, industry, municipal and mining to human consumption and livestock use. To fail to do this would not only be inequitable, but it would prove the Department insincere in their intent to protect human consumption and livestock above all else.

WaterWatch and Oregon Trout acknowledge that under the law, the Director may include any condition she considers necessary; however, **it must be consistent with the intent** of ORS 537.332 to 537.360 (Instream Water Right Statutes). ORS 537.343. An instream water right is a water right held by the Department in trust for the benefit of the people of the State of Oregon to maintain water in-stream for public use. ORS 537.332(3). "Public benefit" means a benefit that accrues to the public at large rather than to a person, a small groups of persons

¹ In addition, this policy is one of the "purposes and polices to be considered in formulating the state water resources program" under ORS 536.300(2). ORS 536.310 (*emphasis added*). The statute referred to, ORS 536.300(2), is the law specifically guiding the formulation of basin plans.

² Under the law, "public uses" (recreation; conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; navigation) are legal beneficial uses. ORS 537.334(1). Instream water rights enjoy the same legal protections as consumptive water rights.

or to a private enterprise. ORS 537.332(3). To subordinate an instream water right to human consumption and/or livestock uses would specifically benefit a person, or a small group of persons rather than the public at large. This is not consistent with the intent of the instream water right act. Thus, this type of conditioning is not allowed under the Instream Water Right Act.

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

Furthermore, this open-ended exception cannot be attached given the mandates of the state Scenic Waterway Act and the Federal Wild and Scenic Rivers Act. Both the state and federal scenic designations carry with them reserved rights that must be protected against impairment or substantial interference. *See Section I.c. above.* No diminishment of these flows are allowed from surface rights unless the new uses meet a very narrow exception under the state Scenic Waterway Act.³ The federal Wild and Scenic Rivers Act mandates even greater protections by defining impairment as any reduction in streamflows beyond the flows needed to preserve the "free-flowing condition" of designated rivers for their "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 USC § 1271.

The open-ended exception for human consumption and livestock proposed by the Department would result in impairment of the state and federal scenic designations and the reserved rights that flow from these designations and therefore is contrary to the mandates of these acts and cannot be attached to this permit. The state Scenic Waterway Act does not allow for diversions of water in or above the designated reach unless there is a finding of necessity and the use meets the extremely limited exceptions in the Act. The state Scenic Waterway Act allows for exceptions for human consumption and livestock only "upon a finding of necessity" for and only if a number of findings are made by the Department, including but not limited to, findings that the applicant cannot reasonably obtain water from any other source; that, if for human consumption, denial of the water right would result in loss of reasonable expectations for use of property; and, if for livestock use, the applicant has excluded livestock from the stream and its adjacent riparian zone. ORS 390.835(5). Moreover, exceptions cannot be in excess of a combined cumulative total of one percent of the average daily flow or one cubic foot per second, except in rare instances. ORS 390.835(7). Thus, if the Department were to allow an exception for human consumption and livestock use, then this exception must abide by the

³ The exception allowed under the Scenic Waterway Act is only allowed upon a finding that such diversion is necessary to uses designated in ORS 536.310(12) and in a manner consistent with the policies set forth in the Instream Water Right Act. Both aspects of this must be met. ORS 390.835(1). Thus, even though human consumption and livestock are given preference over all other uses in ORS 536.310, these uses cannot be allowed unless the free flowing character of the scenic waterway is maintained in quantities necessary for recreation, fish and wildlife uses.

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mandates of the Scenic Waterway Act.⁴

b. The flows proposed in the PFO that are less than those requested by ODFW will impair WaterWatch's and Oregon Trout's interest in ensuring that flows for optimizing habitat are protected.

For some of these applications, ODFW's requested flows exceed the Department's estimated average natural flow for some months. For these months, the Department has proposed to limit the flows requested by ODFW to the estimated average natural flow.

The Department's rules mandate that instream water rights cannot be granted for amounts greater than the estimated average natural flow, except where periodic flows that exceed the natural flow or level are significant for the public use applied for. OAR 690-77-015(4). An example of such an exception would be high flow events that allow for fish passage or migration over obstacles. *Id.* It appears that the Department has limited all the instream water right applications to the estimated average natural flow without determining whether the periodic flows that exceed the natural flow are "significant" for the public use applied for.

The flows requested by ODFW are necessary for the requested beneficial use of fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. Given that ODFW's flow requests are to provide for the various lifecycles of fish which are already on the brink of extinction, periodic flows are necessary for fulfillment of the purpose of this instream water right. There should be no reduction in the requested flows. The Department's rules specifically state "an example of such an exception would be high flow events that allow for fish passage or migration over obstacles." OAR 690-77-015(4). This is exactly the type of event ODFW's instream water right application includes. In sum, the agency has the information to find that the higher flows are significant. The instream water rights should be granted at the amounts requested by ODFW.

For the months that ODFW's flow requests were higher than the estimated average natural flow, the Department limited the instream water right because "water is not available for the proposed use." This limitation, and the reasoning behind it, is a clear indication that this system cannot sustain any further water withdrawals. Given this, no further appropriations can

⁴ In cases of instream water rights not in or above scenic waterways, the Department should, at the very least, put a cap on the amount that can be exempted for human consumption or livestock for any single stream. Without such a cap, instream water rights will be undercut bit by bit until there are insufficient flows left to fulfill the senior instream water rights. Instream water rights are legally protected rights. To allow such a diminution of such a vested water right at some point in the future is inconsistent with the underlying premise of the prior appropriation doctrine--first in time, first in right.

In addition, if the Department allows this exception, the exception should be limited to human consumption where (1) measurement and reporting are mandatory, (2) the applicant has demonstrated that no other alternative supply exists, and (3) the permit is subject to periodic review to ensure that there is still no alternative water source. The exception should be limited to livestock where (1) watering is off stream and (2) the cows are prevented from entering the riparian zone and stream bed.

take place in this system during the months where the instream water right is limited. The Department should ensure that this basin is closed to any further allocation in order to ensure against any further overallocation of the resource. The Department should either institute closure of the basin classification or withdrawal of the resource from further appropriation. Moreover, in cases where streamflows are not being met, the Department should take steps to ensure metering and reporting of all water uses through designations of serious water management areas.

c. The measurement and reporting condition proposed in the PFO will impair the WaterWatch's and Oregon Trout's interest in ensuring that the instream water right is fulfilled throughout the reach.

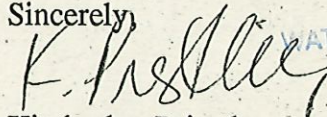
The Department has proposed a condition of use mandating measurement at the lower end of the stream reach to protect necessary flows throughout the reach. To ensure that flows are being protected throughout the reach, measurement must take place at both the upper and lower ends of the stream reach.

In any given stream reach, there are a number of ways water enters the stream whether it be tributaries, runoff, or groundwater seepage. If, for instance, there was a major inputting factor near the lower end of the reach where the measuring device was located this could artificially inflate the amount of water in the stream upstream from that spot. Thus, to ensure that the instream water rights are protected throughout their reach, there should be measuring devices at both the upper and lower end of the reach.

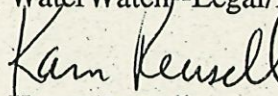
Conclusion

The proposed instream water rights will protect flows needed for fish life. 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.

Sincerely,



Kimberley Priestley
WaterWatch--Legal/Policy Analyst



Karen Russell
WaterWatch--Assistant Director



Jim Myron
Oregon Trout--Conservation Director

OCT 11 1996

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WATER RESOURCES DEPT.
SALEM, OREGON

June 17, 1996

JUN 18 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

RE: Comments, John Day River Basin Instream Water Rights
69949, 69951, 69958-59, 69961, 69963, 70589-90, 70640-47, 70649-55

Dear Water Rights Section:

WaterWatch of Oregon strongly supports the flows requested in these Oregon Department of Fish and Wildlife instream water right applications for the John Day River Basin. These flows are essential for survival of a number of fishery resources. However, while we fully support the adoption of these instream water right, we have some concerns with the initial reviews as issued.

a. Exceptions for Human Consumption and Livestock Uses

The Department is proposing the following condition on all instream water rights: "This instream right shall not have priority over human or livestock consumption." This condition subordinates this instream flow requests to human consumption and livestock uses in perpetuity. Individual exceptions will directly lessen the amount of water available instream to satisfy the purposes of the instream water right. Since the flows represented by the instream water right are those ODFW has determined are needed for fish, even the slightest diminishment of these flows will have adverse effects on the fishery resource. Moreover, the cumulative effects that will result from this exception could eventually lead to the total negation of the instream water right.

The Department has cited to ORS 536.310(12) as authority for allowing this condition. This section of the statute states that:

When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposed over all other uses and for livestock consumption, over any other use....

ORS 536.310(12)(emphasis added).

While this statute does provide for a preference for human consumption and livestock,

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this preference has a specific statutory application.¹ The statute governs situations where there is a conflict between competing applications at the time the permitting decision is taking place. This statute does not address situations of conflict at some nebulous future date. Thus, while the Department may rely on this statute to subordinate the instream water right to the applications pending at the time of the instream water rights adoption, the Department's reliance on this section to attach this open-ended exception is in error.

If the statute were to mandate the open-ended subordination of instream water rights to human consumption and livestock uses, then equity would demand that this condition be placed on every new permit or certificate issued, whether instream or out-of-stream. The statute does not differentiate between instream and out-of-stream water rights.² Rather, it specifically states that "preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use..." ORS 536.310(12) (*emphasis added*). Thus, if the Department finds that the law requires it to subordinate instream water rights to human consumption and livestock uses, the Department must subordinate all water rights, including agriculture, industry, municipal and mining to human consumption and livestock use. To fail to do this would not only be inequitable, but it would prove the Department insincere in their intent to protect human consumption and livestock above all else.

We acknowledge that under the law, the Director may include any condition she considers necessary; however, **it must be consistent with the intent** of ORS 537.332 to 537.360 (Instream Water Right Statutes). ORS 537.343. An instream water right is a water right held by the Department in trust for the benefit of the people of the State of Oregon to maintain water in-stream for public use. ORS 537.332(3). "Public benefit" means a benefit that accrues to the public at large rather than to a person, a small groups of persons or to a private enterprise. ORS 537.332(3). To subordinate an instream water right to human consumption and/or livestock uses would specifically benefit a person, or a small group of persons rather than the public at large. This is not consistent with the intent of the instream water right act. Thus, this type of conditioning is not allowed under the Instream Water Right Act.

Moreover, this proposed conditions is 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 policy directs the state to take action to restore flows in critical areas such as this system. Id. The public uses of the John Day River system have been impaired. Adoption of these instream

¹ In addition, this policy is one of the "purposes and polices to be considered in formulating the state water resources program" under ORS 536.300(2). ORS 536.310 (*emphasis added*). The statute referred to, ORS 536.300(2), is the law specifically guiding the formulation of basin plans.

² Under the law, "public uses" (recreation; conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; navigation) are legal beneficial uses. ORS 537.334(1). Instream water rights enjoy the same legal protections as consumptive water rights.

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water rights without conditions is just one small step towards restoring this system.

If the Department is going to attach such a permit condition, the Department should, at the very least, put a cap on the amount that can be exempted for human consumption or livestock for any single stream. Without such a cap, instream water rights will be undercut bit by bit until there are insufficient flows left to fulfill the senior instream water rights. Instream water rights are legally protected rights. To allow such a diminution of such a vested water right at some point in the future is inconsistent with the underlying premise of the prior appropriation doctrine--first in time, first in right.

In addition, if the Department allows this exception, the exception should be limited to human consumption where (1) measurement and reporting are mandatory, (2) the applicant has demonstrated that no other alternative supply exists, and (3) the permit is subject to periodic review to ensure that there is still no alternative water source. The exception should be limited to livestock where (1) watering is off stream and (2) the cows are prevented from entering the riparian zone and stream bed.

b. The flows proposed are less than those requested by ODFW

For some months of the year, ODFW's requested flows exceed the Department's estimated average natural flow for these months. For these months the Department proposed issuance of flows at the estimated average natural flow.

The Department's rules mandate that instream water rights cannot be granted for amounts greater than the estimated average natural flow, except where periodic flows that exceed the natural flow or level are significant for the public use applied for. OAR 690-77-015(4). An example of such an exception would be high flow events that allow for fish passage or migration over obstacles. *Id.* It appears that the Department has limited all the instream water right applications to the estimated average natural flow without determining whether the periodic flows that exceed the natural flow are "significant" for the public use applied for.

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. Given that ODFW's flow requests are to provide for the various life cycles of fish which are already on the brink of extinction, periodic flows are necessary for fulfillment of the purpose of this instream water right. There should be no reduction in the requested flows. In sum, the agency has the information to find that the higher flows are significant. The instream water rights should be granted at the amounts requested by ODFW.


c. Measurement and reporting

The Department has proposed a condition of use mandating measurement at the lower end of the stream reach to protect necessary flows throughout the reach. To ensure that flows are being protected throughout the reach, measurement must take place at both the upper and lower ends of the stream reach.

In any given stream reach, there are a number of ways water enters the stream whether it be tributaries, runoff, or groundwater seepage. If, for instance, there was a major inputting factor near the lower end of the reach where the measuring device was located this could artificially inflate the amount of water in the stream upstream from that spot. Thus, to ensure that the instream water rights are protected throughout their reach, there should be measuring devices at both the upper and lower end of the reach.

Conclusion

The proposed instream water rights will protect flows needed for fish life in and recreational use of river. These fish populations have statewide and even national significance and streamflows are essential for maintenance of these fish. Adoption of this 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.

Sincerely,

Kimberley Priestley
Legal/Policy Analyst

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JUN 18 1996
WATER RESOURCES DEPT.
SALEM, OREGON

April 10, 1996

Director
Oregon Department of Fish and Wildlife
2501 SW First Ave
PO Box 59
Portland OR 97207

WATER
RESOURCES
DEPARTMENT

Reference: Instream water rights in the John Day Basin,
Files 69949, 69951, 69958, 69959, 69961, 69963,
70589, 70590, 70640-70647, 70649-70655

Dear Oregon Department of Fish and Wildlife:

This document, called an "Initial Review", is to inform you of the potential limitations to your proposed instream water right and to describe some of your options. Based on the information you have supplied, the Water Resources Department has made several determinations:

The referenced applications are complete and not defective.

The proposed use is not prohibited by law;

The instream use is allowed under OAR 506, the John Day Basin Program;

1. Application 69949

Priority date: 6/12/89

REYNOLDS CR TRIB JOHN DAY R
GRANT COUNTY

REYNOLDS CREEK FM MOUTH OF N FK REYNOLDS CREEK AT RIVER
MILE 5.0 (NESE, SECTION 20, T13S, R35E WM); TO MOUTH OF REYNOLDS
CREEK AT RIVER MILE 0.0 (NESW, SECTION 26, T13S, R34E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15	18	18	18	15	12/5	5/12	12/5	5	5	12

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
11.6	11.7	15.9	32.3	47.8	28.2	13.2	7.62	8.18	10.4	12.2	11.5

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
11.6	11.7	15.9	18	18	15	12/5	5/7.62	8.18/5	5	5	11.5



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

2. Application 69951

Priority date: 6/12/89

DEARDORFF CREEK TRIB JOHN DAY RIVER
GRANT COUNTY

AT MOUTH OF BOQUE GULCH, RIVER MILE 4.6 (NWNE, SECTION 9, T14S,
R35E WM); TO MOUTH RIVER MILE 0.0 (NESW, SECTION 35, T13S, R34E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15	19	19	19	15	10/4	4/10	10/4	4	4	10

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8.08	7.84	10.4	21.4	34.4	21.7	10.5	5.97	6.33	7.92	8.91	8.18

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8.08	7.84	10.4	19	19	15	10/4	4/5.97	6.33/4	4	4	8.18

3. Application 69958

Priority date: 6/12/89

CLEAR CR TRIB GRANITE CR
GRANT COUNTY

CLEAR CREEK FM MOUTH OF BEAVER CREEK AT RIVER MILE 4.3 (NWNW,
SECTION 24, T9S, R35E WM); TO MOUTH OF CLEAR CREEK AT RIVER
MILE 0.0 (NENE, SECTION 1, T9S, R35E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
30	30	48	48	48	30	15	15/48	48/15	15	15	15

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
13.1	15.4	19.1	76.8	194	70.9	13.1	4.1	4	5.57	9.26	12.1

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
13.1	15.4	19.1	48	48	30	13.1	4.1	4	5.57	9.26	12.1

4. Application 69959

Priority date: 6/12/89

BULL RUN CR TRIB GRANITE CR
GRANT COUNTY

BULL RUN CREEK FM MOUTH OF BOUNDARY CREEK AT RIVER MILE 3.0
(NENE, SECTION 14, T9S, R35.5E WM); TO MOUTH OF BULL RUN
CREEK AT RIVER MILE 0.0 (NESW, SECTION 4, T9S, R35.5E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15	22	22	22	6	4	4/22	22/15	6	6	6

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.1	8.9	11.4	43.7	92.8	37.9	6.38	2.31	2.04	2.95	4.09	6.39

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.1	8.9	11.4	22	22	6	4	2.31	2.04	2.95	4.09	6

5. Application 69961

Priority date: 6/12/89

GRANITE BOULDER CR TRIB M FK JOHN DAY R
GRANT COUNTY

GRANITE BOULDER CREEK FM MOUTH OF PORKY CREEK AT RIVER MILE 3.5
(SWNE, SECTION 28, T10S, R34E WM); TO MOUTH OF GRANITE BOULDER
CREEK AT RIVER MILE 0.0 (SENE, SECTION 6, T11S, R34E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
12	12	15	15	15	13	7/3	3	3	3	3	7

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.4	4.7	8.31	20.5	33.4	26	4.82	3.38	3.01	3.49	4.25	3.99

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.4	4.7	8.31	15	15	13	4.82/3	3	3	3	3	3.99

6. Application 69963

Priority date: 6/12/89

FIELDS CR TRIB JOHN DAY R
GRANT COUNTY

FIELDS CREEK FM MOUTH OF WICKIUP CREEK AT RIVER MILE 5.0
(SWNW, SECTION 12, T14S, R28E WM); TO MOUTH OF FIELDS CREEK
AT RIVER MILE 0.0 (NWSE, SECTION 13, T13S, R28E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
20	20/25	25	25	25	20	12/4	4	4	4	4	12

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.47	5.41	9.51	14.8	12.8	8.19	2.33	0.55	0.37	1.74	3.31	4.03

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.47	5.41	9.51	14.8	12.8	8.19	2.33	0.55	0.37	1.74	3.31	4.03

7. Application 70589

Priority date: 8/30/90

SUGAR CR TRIB BEAVER CR
CROOK COUNTY

SUGAR CREEK FROM AN UNNAMED TRIBUTARY (SWSE, SECTION 26, T15S,
R 24E); TO THE MOUTH RIVER MILE 0.0 (SESW, SECTION 14, T16S, R24E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3	3/5	8	8	8	5	3	3	3	3	3	3

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.17	3.56	8.84	7.04	2.45	0.99	0.34	0.13	0.05	0.11	0.13	0.63

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.17	3/3.56	8	7.04	2.45	0.99	0.34	0.13	0.05	0.11	0.13	0.63

8. Application 70590

Priority date: 8/30/90

W FK MILL CR TRIB MILL CR
CROOK COUNTY

WEST FORK MILL CREEK FROM HARVEY CREEK RIVER MILE 1.5 (NENW, SECTION 8, T13S, R18E); TO THE MOUTH RIVER MILE 0.0 (NWSW, SECTION 16, T13S, R18E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8/12	20	20	20	12	8	8	8	8	8	8

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.98	4.69	5.94	6.49	3.65	0.96	0.17	0.06	0.04	0.06	0.28	1.12

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.98	4.69	5.94	6.49	3.65	0.96	0.17	0.06	0.04	0.06	0.28	1.12

9. Application 70640

Priority date: 9/11/90

JOHN DAY R TRIB COLUMBIA R
GRANT COUNTY

JOHN DAY RIVER FROM SNOW CREEK, RIVER MILE 283.0 (NENE, SECTION 20, T15S, R35E); TO RAIL CREEK, RIVER MILE 275.8 (NWNE, SECTION 24, T14S, R34E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
34	34	40	40	40	34	34	34/40	40	40	34	34

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
9.92	8.95	10.5	19.4	36.2	28.4	16.6	9.2	9.57	11.5	11.9	10.3

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
9.92	8.95	10.5	19.4	36.2	28.4	16.6	9.2	9.57	11.5	11.9	10.3

10. Application 70641

Priority date: 9/11/90

RAIL CR TRIB JOHN DAY R
GRANT COUNTYRAIL CREEK FROM AN UNNAMED TRIBUTARY, RIVER MILE 5.0 (NESW,
SECTION 22, T14S, R35E); TO THE MOUTH, RIVER MILE 0.0 (NWNE,
SECTION 24, T14S, R35E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	10	17	17	17	10	7	7/17	17/7	7	7	10

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.11	4.45	5.28	10	20.2	16	9.07	5.1	5.18	6.18	6.33	5.38

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.11	4.45	5.28	10	17	10	7	5.1	5.18	6.18	6.33	5.38

11. Application 70642

Priority date: 9/11/90

ROBERTS CR TRIB JOHN DAY R
GRANT COUNTYROBERTS CREEK FROM AN UNNAMED TRIBUTARY, RIVER MILE 4.5 (NENW,
SECTION 1, T15S, R34E); TO THE MOUTH, RIVER MILE 0.0 (NWNE,
SECTION 24, T14S, R34E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8	14	14	14	8	5	5/14	14/5	5	5	8

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.76	3.34	4.19	8.31	16.1	11.6	5.97	3.46	3.47	4.24	4.53	3.91

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.76	3.34	4.19	8.31	14	8	5	3.46	3.47	4.24	4.53	3.91

12. Application 70643

Priority date: 9/11/90

M FK CANYON CR TRIB CANYON CR
GRANT COUNTYMIDDLE FORK CANYON CREEK FROM THE HEADWATERS RIVER MILE 8.0
(NENE, SECTION 9, T15S, R33E); TO THE MOUTH (NESW, SECTION 2,
T16S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
16	16	25	25	25	16	11	11	11	11	11	16

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.47	3.1	6.32	15.6	20.4	11.1	2.88	1.32	1.06	1.38	2.05	2.43

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.47	3.1	6.32	15.6	20.4	11.1	2.88	1.32	1.06	1.38	2.05	2.43

13. Application 70644

Priority date: 9/11/90

E FK CANYON CR TRIB CANYON CR
GRANT COUNTYEAST FORK CANYON CREEK FROM MINERS CREEK RIVER MILE 8
(SWNE, SECTION 7, T15S, R33E)' TO THE MOUTH RIVER MILE 0.0
(NENE, SECTION 30, T15S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15	22	22	22	15	10	10	10	10	10	15

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.76	5.83	11.9	29.4	41.9	24.6	6.63	2.55	2.1	2.73	4.11	4.65

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.76	5.83	11.9	22	22	15	6.63	2.55	2.1	2.73	4.11	4.65

14. Application 70645

Priority date: 9/11/90

CANYON CR TRIB JOHN DAY R
GRANT COUNTY

CANYON CREEK FROM THE HEADWATERS RIVER MILE 28.0 (SESE, SECTION 15, T15S, R33E); TO EAST FORK CANYON CREEK RIVER MILE 15.3 (NENE, SECTION 30, T15S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
11	11	17	17	17	11	7	7	7	7	7	11

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.03	10.1	20.3	45.1	50.2	25.1	6.77	3.02	2.45	3.23	4.92	6.78

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.03	10.1	17	17	17	11	6.77	3.02	2.45	3.23	4.92	6.78

15. Application 70646

Priority date: 9/11/90

PINE CR TRIB JOHN DAY R
GRANT COUNTY

PINE CREEK FROM NORTON FORK RIVER MILE 8.0 (SWNE, SECTION 23, T14S, R32E); TO THE MOUTH RIVER MILE 0.0 (NWSE, SECTION 14, T13S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
16	26/22	22	22	22	16	11	11	11	11	11	16

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.93	3.14	3.76	5.54	7.15	9.85	2.63	1.88	1.24	1.48	2.01	2.6

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.93	3.14	3.76	5.54	7.15	9.85	2.63	1.88	1.24	1.48	2.01	2.6

16. Application 70647

Priority date: 9/11/90

N FK JOHN DAY R TRIB JOHN DAY R
GRANT COUNTY

NORTH FORK JOHN DAY RIVER FROM THE HEADWATERS RIVER MILE
112.0 (NWNE, SECTION 13, T8WS, R36E); TO TRAIL CREEK RIVER
MILE 101.0 (NWNE, SECTION 34, T7S, R35.5E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
58	58	80	80	80	58	40	40/80	80	58	58	58

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
16.7	15.4	15.8	32.7	210	260	72.6	36.3	28.6	28.2	23.5	15.7

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
16.7	15.4	15.8	32.7	80	58	40	36.3	28.6	28.2	23.5	15.7

17. Application 70649

Priority date: 9/11/90

CRANE CR TRIB N FK JOHN DAY R
GRANT COUNTY

CRANE CREEK FROM UNNAMED TRIBUTARY (SWNW, SECTION 18, T8S, R36E);
TO THE MOUTH RIVER MILE 0.0 (NENE, SECTION 10, T8S, R35E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8	14	14	14	8	5	5/14	14	14	5	5

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.88	3.19	4.25	18.2	45	19.1	3.11	0.97	0.83	1.21	1.81	2.59

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.88	3.19	4.25	14	14	8	3.11	0.97	0.83	1.21	1.81	2.59

18. Application 70650

Priority date: 9/11/90

TRAIL CR TRIB N FK JOHN DAY R
GRANT COUNTYTRAIL CREEK FROM NORTH/SOUTH FORKS TRAIL CREEK RIVER MILE
2.0 (SESW, SECTION 23, T7S, R35.5E); TO THE MOUTH RIVER MILE
0.0 (NE, SECTION 34, T7S, R35.5E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
33	33	50	50	50	33	22	22/50	50/22	22	22	22

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
6.06	6	7.29	19.6	109	97.2	20.3	10.2	8.27	8.46	7.8	5.6

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
6.06	6	7.29	19.6	50	33	20.3	10.2	8.27	8.46	7.8	5.6

19. Application 70651

Priority date: 9/11/90

INDIAN CR TRIB M FK JOHN DAY R
GRANT COUNTYINDIAN CREEK FROM UNNAMED TRIBUTARY (NWSE, SECTION 36,
T8S, R32E); TO THE MOUTH RIVER MILE 0.0 (SWSE, SECTION 7,
T9S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
18	18/23	23	23	23	18	12	12	12	12	12	18

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.79	8.26	18	29	17.3	7.94	1.53	0.78	0.55	0.76	1.07	2.72

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.79	8.26	18	23	17.3	7.94	1.53	0.78	0.55	0.76	1.07	2.72

20. Application 70652

Priority date: 9/11/90

BIG BOULDER CR TRIB M FK JOHN DAY R
GRANT COUNTYBIG BOULDER CREEK FROM AN UNNAMED TRIBUTARY (NENW, SECTION 1,
T10S, R33E); TO THE MOUTH (SWSW, SECTION 26, T10S, R33E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
25	25	43	43	43	25	16	16	16	16	16	16

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.91	7.5	12.8	29.6	43.8	27.6	5.5	3.97	3.73	4.3	5.09	5.24

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.91	7.5	12.8	29.6	43	25	5.5	3.97	3.73	4.3	5.09	5.24

21. Application 70653

Priority date: 9/11/90

BIG CR TRIB M FK JOHN DAY R
GRANT COUNTYBIG CREEK FROM POLE CREEK (SENE, SECTION 15, T9S, R33E);
TO THE MOUTH RIVER MILE 0.0 (SWSW, SECTION 21, T9S, R32E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15/26	26	26	26	15	10	10	10/15	15/10	10	15

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.76	11.3	19.5	42.3	57	36.4	7.47	4.56	4.27	5.06	5.41	6.52

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.76	11.3	19.5	26	26	15	7.47	4.56	4.27	5.06	5.41	6.52

22. Application 70654

Priority date: 9/11/90

S FK LONG CR TRIB LONG CR
GRANT COUNTYSOUTH FORK LONG CREEK TO THE HEADWATERS (SWSW, SECTION 15,
T11S, R31E); TO THE MOUTH RIVER MILE 0.0 (NENW, SECTION 20,
T10S, R31E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15/25	25	25	25	15	10	10	10	10	10	15

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.77	5.01	8.65	18.2	24.4	11.2	2.79	0.69	0.76	0.91	2.15	2.94

c. Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.77	5.01	8.65	18.2	24.4	11.2	2.79	0.69	0.76	0.91	2.15	2.94

23. Application 70655

Priority date: 9/11/90

MCCLELLAN CR TRIB E FK BEECH CR
GRANT COUNTYMCCLELLAN CREEK FROM NIPPLE CREEK RIVER MILE 4.0 (SENE,
SECTION 2, T12S, R31E); TO THE MOUTH RIVER MILE 0.0 (SENW,
SECTION 22, T12S, R31E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	10/17	17	17	17	10	7	7	7	7	7	10

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.96	2.82	4.93	7.98	7.04	2.49	0.85	0.13	0.09	0.45	1.24	1.69

c Allowable water use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.96	2.82	4.93	7.98	7.04	2.49	0.85	0.13	0.09	0.45	1.24	1.69

NOTE: Exceptions to the instream water right flows are likely to appear on the certificate if one is issued. The Department is working on the exact wording of the conditions. The conditions are likely to allow some amount of additional appropriations for human and livestock consumption.

Your applications can be moved to the next phase of the water rights application review process.

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.

At this time, you must decide whether to proceed or to withdraw your applications as described below.

Withdrawal:

If you choose not to proceed, you may withdraw your application. To accomplish this you must notify the Department in writing by **April 24, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

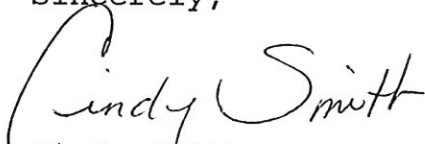
To Proceed With Your Application:

If you choose to proceed with an application, you do not have to notify the Department. Your applications 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 you have any questions:

Feel free to call Michael Mattick at (503) 378-8455 ext. 276 or 1 (800) 624-3199 if you have any questions. Please have your application number(s) available if you call.

Sincerely,



Cindy Smith
Initial Review Team

Regional Manager, Watermaster, Water Availability
Section

enclosures: Stop Processing Form

October 8, 1991

Ronald S. Yockim
Cegavske, Johnston & Associates, P.C.
PO Box 218
Roseburg, Oregon 97407

Re: Instream water right applications 70641 through 70655, 69949,
69951, 69958 through 69963.

Dear Mr. Yockim,

This letter is to verify receipt of your requests, on behalf of Grant County to enter into discussions regarding the referenced instream water rights applications. Application 69962 was certificated on November 27, 1989. We will contact you when we have completed a natural flow analysis of the remaining streams and are prepared to discuss this information and the other issues raised in your September 25, 1991, correspondence.

Sincerely,



MICHAEL J. MATTICK
Water Rights Specialist

MJM:

cc: Sen. Gene Timms
Rep. Mike Nelson
Grant County Court
Al Mirati (ODFW)



CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

STATE OF OREGON
WATER RESOURCES DEPARTMENT
SALEM, OREGON 97310

confirms the right to use the waters of BIG WALL CREEK , a tributary of the NORTH FORK JOHN DAY RIVER, in the JOHN DAY BASIN to maintain an instream flow for the purpose of ANADROMOUS AND RESIDENT FISH HABITAT AND RECREATIONAL FISHING.

The right is for flows to be maintained in BIG WALL CREEK FROM THE MOUTH OF WILSON CREEK AT RIVER MILE 15, (SW 1/4 SW 1/4, SECTION 25, T 7 S, R 26 E, W.M); TO THE MOUTH OF LITTLE WALL CREEK AT RIVER MILE 4.5, (NE 1/4 NW 1/4, SECTION 31, T 7 S, R 28E, W.M) .

The right is established under Oregon Revised Statutes 537.346.

The date of priority is JUNE 12, 1989.

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

<u>Period</u>	<u>Flows (cubic foot per second)</u>
OCTOBER 1 THRU OCTOBER 31	7
NOVEMBER 1 THRU NOVEMBER 30	15
DECEMBER 1 THRU DECEMBER 31	25
JANUARY 1 THRU FEBRUARY 15	30
FEBRUARY 16 THRU MAY 31	44
JUNE 1 THRU JUNE 30	30
JULY 1 THRU JULY 15	15
JULY 16 THRU SEPTEMBER 30	7

Witness the signature of the Water Resources Director affixed this 27TH day of NOVEMBER, 1989.

William H. Young
Water Resources Director

Recorded in State Record of Water Right Certificates number 63259.
IS 69962 BASIN 6 N FK JOHN DAY RIVER & MISC VOLUME 2 DISTRICT 4



Department of Fish and Wildlife

2501 SW FIRST AVENUE, PO BOX 59, PORTLAND, OREGON 97207 PHONE (503) 229-5400

July 30, 1990

Jake Szramek
Water Resources Department
3850 Portland Rd., NE
Salem, OR 97310

Dear Jake:

The following details ODFW's rationale for the requested instream flows in 17 applications (previously submitted) for instream water rights in the Trout Creek and John Day River basins.

Before addressing each application individually, a few general comments:

1. It is acknowledged that, in most of the subject applications, requested flows exceed estimated average natural flows during some part of the year. OAR 690-77-015 (4) allows for flows above the average when "...significant for the public use applied for."
2. It is understood that WRD is bound by administrative rule to consider the "estimated average natural flow" when establishing flows for IWR's. It is also understood that flow regimes for streams without flow information are routinely modeled by WRD from stream basins that have adequate instream flow information. In some cases, the model stream is not in the same basin as the stream in question.

It is our position that estimated average flows determined by modeling flows from other streams or systems are likely to contain a high degree of computational and subjective error. In each of the subject applications, stream flows requested by ODFW are based on on-site instream flow studies conducted by fishery professionals using established methodologies. When discrepancies exist between estimated and requested flows, significant weight should be given to the nature by which each number was obtained.

3. The requested flows are generally calculated minimum flows (based on critical lifestage requirements) to maintain populations of fish that are already depleted. At the requested levels, we make no provision for restoring or enhancing populations. There is, therefore, very little room for error. We cannot lightly accept flows below the established minimum.
4. In the Trout Creek watershed, we are dealing with small isolated populations of unique resident fishes which are very sensitive to changes in their environment. Lahonton cutthroat trout are listed as endangered by the State and the Federal governments under the appropriate threatened and endangered species acts. This species has been documented in some of the subject reaches and is suspected (undergoing study) in others. Once lost, Lahonton cutthroat and other unique fish populations cannot be replaced.

John Day River Basin

Reynolds Creek (69949)

As we discussed by phone, the 5 cfs requested in December here is a typographical error the number should be 12 cfs. Please make this change.

Aug-Oct--Reynolds Creek is a major water contributor to the mainstem John Day River in an important spring chinook salmon spawning area. Peaks in flow above the estimated average natural flow need to be protected to stimulate spring chinook salmon movement and spawning and for temperature moderation in this area where temperatures can be critical.

Actual flow measurements taken during the Aug-Oct period in 1966, 1967, and 1970 indicate the requested minimum flows were available instream at the time of measurement (see John Day River Basin Investigation report, Appendix 4).

Deardorff Creek (69951)

Aug-Oct--Deardorff Creek is a major water contributor to the mainstem John Day River in an important spring chinook salmon spawning area. Peaks in flow above the estimated average natural flow need to be protected to stimulate spring chinook salmon movement and spawning and for temperature moderation in this area where temperatures can be critical.

Actual flow measurements taken during the Aug-Oct period in 1966, 1967, and 1970 indicate the requested minimum flows were available instream at the time of measurement (see John Day River Basin Investigation report, Appendix 4).

Jan--Instream flow studies indicate 4 cfs is a minimum for January. Peak flows of at least this amount need to be protected.

Clear Creek (69958)

Aug-Oct--The minimum instream flows requested are required for spring chinook salmon spawning in the subject reach. Peaks in flow above the estimated average natural flow are necessary to stimulate spring chinook salmon movement and spawning and for temperature moderation.

Actual flow measurements taken during the Aug-Oct period in 1966, 1967, and 1970 indicate flows ranging from 8.5 cfs to 17 cfs were available instream at the time of measurement (see John Day River Basin Investigation report, Appendix 4). These are instantaneous flow measurements and do not necessarily indicate absolute peak flows during these months.

Bull Run Creek (69959)

Aug-Sep--The minimum instream flows requested are required for spring chinook salmon spawning in the subject reach. Peaks in flow above the estimated average natural flow are necessary to stimulate spring chinook salmon movement and spawning and for temperature moderation.

N. Fk. John Day River (69960)

ODFW policy precludes subordination of an IWR to a future water right unless that water right benefits fish and/or wildlife. By rule, flows for instream water rights must be based on accepted methodologies. Arbitrarily reducing properly determined instream flows in not one of the accepted methodologies. Also, since Monument is applying for 1 cfs of groundwater, subordination here would seem to be unnecessary.

Granite Boulder Creek (69961)

The requested flows are necessary for minimum lifestage needs for spring chinook salmon, especially for spawning and juvenile rearing.

Fall redistribution of juvenile salmonids is an often overlooked but important life history strategy. Eastern Oregon tributary streams the size of Granite Boulder Creek often have only a minimum of flow increase prior to freeze up in the fall. Juveniles trapped in low flow ice conditions often do not survive. Reserving small natural increases in flow for instream use during late summer and early fall will provide a means of escape for juvenile fish, at least in some years. Preserving options "at least in some years", years where enough water is

present, has potentially significant positive impacts on juvenile survival in systems where conditions can be as harsh as in the John Day River basin.

Field's Creek (69963)

Aug-Oct--Reductions in instream flow indicated on the draft certificate for this stream during this period are acceptable based on Oregon Method information.

Feb-Mar--Flows requested here are minimums required to support summer steelhead migration needs during this period. The proposed reductions do not accommodate summer steelhead needs for flow peaks which stimulate movement and provide adequate flows for passage to spawning areas.

Trout Creek Basin

In general, streams in this basin freeze from October through March when flows are at their lowest. Freshet flow protection is needed to keep ice in the streams from freezing solid. In order to alleviate the effects of freezing, flows should be kept at or above 2 cfs in the smaller tributaries (E. Fk. Trout Cr., Big Trout Creek, and McDermitt Cr.) whenever natural flows will support that level. Also, peak flows serve to remove sediments from, and redistribute, in-channel gravels used for spawning.

There is a perpetual threat in this basin of development by mining interests. Needed freshets frequently occur October through March. Impounding or diverting of peak flows during this period jeopardizes fragile wild resident fish populations.

The flow levels requested in the subject applications are necessary to maintain basin fish resources. In some cases (e.g., Willow and Whitehorse creeks), fish species listed as sensitive in Oregon are present. Except as listed below, our instream flow requests in the Trout Creek basin must remain unchanged.

Willow Creek (70025)

Oct-Jan--The flows recommended here by WRD are acceptable.

Sincerely,



Albert H. Mirati, Jr.
Instream Water Right Coordinator
Habitat Conservation Division



Department of Fish and Wildlife

P.O. BOX 59, PORTLAND, OREGON 97207

RECEIVED

APR 09 1990

WATER RESOURCES DEPT.
SALEM, OREGON

April 3, 1990

Jake Szramek
Water Resources Department
3850 Portland Rd., NE
Salem, OR 97310

Dear Jake:

I have discussed with the district fish biologists involved the WRD Recommendation flows proposed in your March 21st correspondence on the Trout Creek and John Day basins. Based on their information and that of others in ODFW, I am convinced that the flow levels requested in our applications are appropriate and should not be reduced to the extent indicated in the draft certificates of water right.

The ODFW requested flows were based on actual instream measurements taken by experienced personnel using recognized methodologies.¹ On the other hand, the "natural" flows on which most of the WRD-recommended flows were based are the product of a more abstract methods, subject to the inaccuracies inherent with making and relying on assumptions. The lower Big Trout Creek (Appl. # 70026) is a good example. The model employed does not take into account significant contributions to the flow of Big Trout Creek by springs in the subject reach. Instream flow observations and measurements indicate that the stream rarely drops below 3.5 CFS. I believe it would be reasonable to suggest remodeling the estimated flows here.

There also seems to be a problem with data presented under "Water Rights" on Willow Creek (Appl. #70025). All points of diversion are reportedly below the subject reach and should, therefore, not figure into the picture here.

In general, there appears to be a lack of understanding of why increased flows are required during certain times of the year. On the John Day River system, spring chinook salmon require increased flows for migration during August and September above the

¹Two to 4 biologists in the field 1961 - 72 developing and refining methods while collecting data (minimum flow requirement surveys).

hydrologic average. We need to protect periodic spikes in the flow regime during this time of year if spring chinook populations are to be maintained or improved. The same argument applies to periods of spring chinook spawning and to summer steelhead (for migration) during February and March.

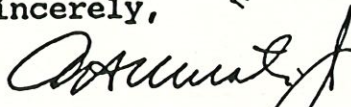
In the Trout Creek Basin, we are dealing with small isolated populations of unique resident fishes which are very sensitive to changes in their environment. Lahonton cutthroat trout are listed as endangered by the State and the Federal governments under the appropriate threatened and endangered species acts. This species has been documented in some of the subject reaches and is suspected (undergoing study) in others. Once lost, Lahonton cutthroat and other unique fish populations cannot be replaced. The requested flows indicated in our applications are the calculated minimum (based on life stage requirements) that it will take to maintain these populations. We cannot, in good conscience, accept less in protected flow than indicated if we are to meet our statutory obligations to the citizens of Oregon.

To summarize the above, the indicated flows are requirements for either fish passage conditions, water quality, or threatened species and, as such, should not be reduced without extremely strong justification. Oregon's Instream Water Right program is "getting in line" for water rather late in the game. Hopefully, it's not too late.

In the matter of subordinating our instream water right on N. Fk. John Day River to Monument, we can not agree. ODFW policy precludes subordination of an IWR to a future water right unless that water right benefits fish and wildlife. Also, we have twice attempted in the past to establish an IWR on the N. Fork without success. We are already later than we need to be to protect fish and wildlife values here. For 1 CFS, Monument could look toward purchasing (all or part) an existing water right or explore other sources of diversion.

Thank you for the opportunity to review your recommendations. I hope my comments are of value in explaining our concerns.

Sincerely,



Albert H. Mirati, Jr.
Instream Water Right Coordinator
Habitat Conservation Division

cc John Lilly, Parks and Recreation
Neil Mullane, DEQ

STATE OF OREGON

RECEIVED

WATER RESOURCES DEPARTMENT

JUN 12 1989

**Application for Instream Water Right
by a State Agency**

WATER RESOURCES DEPARTMENT
SALEM, OREGON

There is no fee required for this application.

A. Applicant: Randy Fisher for Oregon Dept. Fish & Wildlife
(Director) (Agency)

Mailing Address: Box 59
Portland, OR 97207 229-5403
City State Zip Phone No.

B. Applicant: David G. Talbot for Division of Parks & Recreation
(Director) (Agency)

Mailing Address: Vick Bldg., 525 Trade St., #301
Salem, OR 97310 378-5000
City State Zip Phone No.

C. Applicant: _____ for _____
(Director) (Agency)

Mailing Address: _____
_____, _____, _____, _____
City State Zip Phone No.

1. The name of stream or lake of the proposed instream water right is Deardorff
Creek
a tributary or source (if lake) of John Day River

2. The public use(s) this instream water right is based upon include:
Spawning, rearing and migration of anadromous and resident salmonids including
summer steelhead, Bull trout, rainbow trout and cutthroat trout and rearing
for spring chinook. These flows will also provide for recreational fishing,
but not drift boating.

3. The amount of water needed by month and/or year for each category of public use. If more space is needed, use a separate sheet of paper.

List quantities in either cfs, acre-feet, or lake elevation above Mean Sea Level

Use(s)	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Fish & fish habitat	15	15	19	19	19	15	10/4	4/10	10/4	4	4	10
* fishing	15	15	19	19	19	15	10/4	4/10	10/4	4	4	10

* These flows are not in addition to the flows above, but are for a different use.

4. The reach of the stream identified for an instream water right is from the:

upstream end at the mouth of Boque Gulch
 River Mile (if known) 4.6
 within the NW 1/4 of the NE 1/4 of
 Section 9 Township 14 S Range 35 E W.M.,
 County Grant.

downstream end at the mouth
 River Mile (if known) 0.0
 within the NE 1/4 of the SW 1/4 of
 Section 35 Township 13 S Range 34 E W.M.,
 County Grant.

Lake identified for an instream water right is
 within the _____ 1/4 of the _____ 1/4 of
 Section _____ Township _____ Range _____ W.M.,
 County _____.

5. Method(s) used to determine the requested amounts:
The Oregon Method - minimum

6. When were the following state agencies notified of the intent to file for the instream water right?

Department of Environmental Quality	Date	<u>4-24-89</u>
Department of Fish and Wildlife	Date	<u>-</u>
Parks and Recreation Division	Date	<u>4-24-89</u>

7. If possible, include recommendations for measuring locations or methods:

The instream water right should be for the entire reach, measured at the mouth RM 0.0

8. If possible, include recommendations for assisting the Water Resources Department (WRD) in measuring and monitoring procedures:

By State WRD in cooperation with ODFW

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)):

Attention to water appropriation and enforcement of water rights

Remarks: Segment of John Day Basin map attached

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.

6/6/89 Date 6/12/89
ODFW /Div. of Parks & Rec. Agency

Nancy M. MacKush Signature Joly Kelly
Chief, HCD Title ASST ADMIN

Instream Application No. 69951 Certificate No. _____

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 ____.

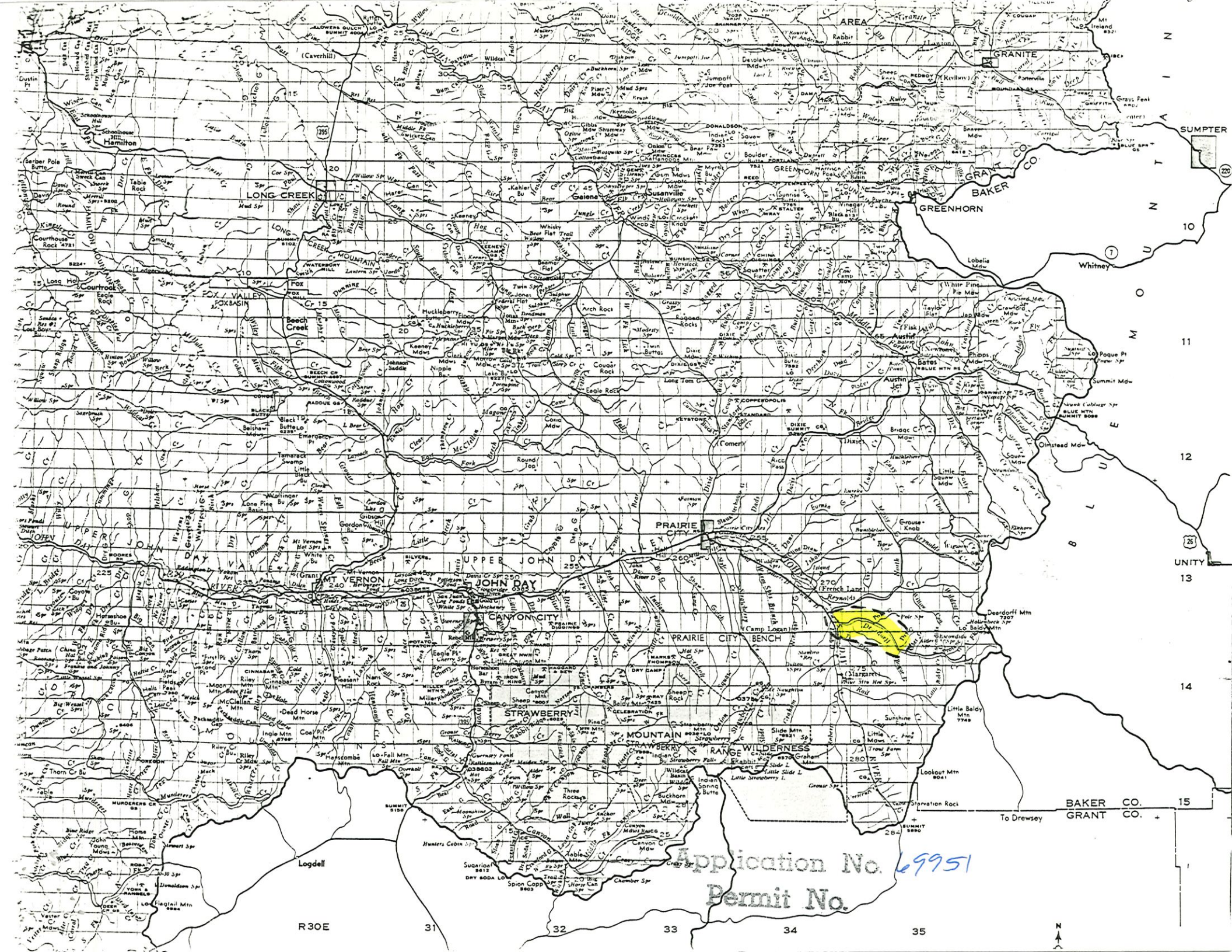
Date: _____, 19 ____.

Water Resources Department

Title

This document was first received at the Water Resources Department in Salem, Oregon, on the 12th day of JUNE, 19 89, at 1:20 o'clock P. M.

**WATER RESOURCES DEPARTMENT
3850 Portland Road NE
SALEM, OREGON 97310**



LONG CREEK

Logdell

R30E

31

32

33

34

35

SUMPTER

10

11

12

13

14

15

BAKER CO. GRANT CO.

Application No. 69951
Permit No.



BASIN SUMMARY REPORT
DEARDORFF CR TRIBUTARY OF JOHN DAY R

69951

TOTAL DIVERTED
=====

TOTAL CFS: 0.00
TOTAL ACF: 0.00

TOTALS BY USE
=====

	<u>AGRICULTURE</u>	<u>INDUSTRIAL</u>	<u>MUNICIPAL</u>	<u>DOMESTIC</u>	<u>RECREATIONAL</u>	<u>MISCELLANEOUS</u>
(CFS)	0.00	0.00	0.00	0.00	0.00	0.00
(ACF)	0.00	0.00	0.00	0.00	0.00	0.00

B A S I N S U M M A R Y R E P O R T

DEARDORFF CR TRIBUTARY OF JOHN DAY R

SOURCE > TRIBUTARY

TOTAL DIVERTED

AGRIC.

INDUST.

MUNIC.

DOMEST.

RECREAT.

MISC.

UNKNOWN

DEARDORFF CR > JOHN DAY R

0.00 CFS
0.00 ACF

0.00
0.00

0.00
0.00

0.00
0.00

0.00
0.00

0.00
0.00

0.00
0.00

7

APPLICATION PROCESSING OUTLINE

Basin: _____

Sub-basin: _____

Fees paid: Examination fee: _____

Recording fees: _____

Total: _____

Application No. _____

69951

Permit No. _____

RATE AND DUTY _____ for irrigation

1. Check for minimum 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 minimum 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 _____ v/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 5 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 5 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 programs |
| ---- | ---- | ---- 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 |
| ---- | ---- | Watermaster comment form sent with copy of application and map. _____ |
| ---- | ---- | Watermaster comments received _____ |
| ---- | ---- | Hydrographic section comments requested _____ |
| ---- | ---- | Hydrographic section comments received _____ |
| ---- | ---- | O.D.F.W. sent copy of application and map(except groundwater) requesting comment _____ |
| ---- | ---- | O.D.F.W. comments received _____ |
| ---- | ---- | Report from D.E.O. received _____ |
| ---- | ---- | Publish application information in weekly public notice. |
| ---- | ---- | Notify other owners of development |
| ---- | ---- | PROTESTED |
| ---- | ---- | filed _____ |
| ---- | ---- | resolved _____ |

Application No. JAS 69951
Permit No.

6/12/89
Name Dept. Fish & Wildlife/ O S Parks Div., 525 Trade
Address PO Box 59, Port., OR/ St., SE, Salem, OR
Assigned
Address
Beginning construction
Completion of construction
Extended to
Complete application of water
Extended to