

Name OREGON DEPARTMENT OF FISH AND WILDLIFE
 By 4034 FAIRVIEW INDUSTRIAL DRIVE SE
 Address SALEM, OR 97302-1142

Application No. IS 88329

Permit No. _____

Certificate No. _____

Date

DENIED _____

MISFILED _____ Volume _____ Page _____

WITHDRAWN _____

CANCELLED _____

FEES PAID

Date	Amount	Receipt No.
11/30/17	810.00	125324
12-1-17	810.00	125337
	Cert. Fee	

FEES REFUNDED

Date	Amount	Receipt No.

Priority Dec 1 2016

County Wasco WM# 3

RELATED FILES

DEVELOPMENT

Date

Completion _____

Extended to _____

Final Proof received _____

Proposed Cert. Mailed _____

ASSIGNMENTS

Date	To Whom	Address

REMARKS

14 ISNR Application Hard Basin SFK Mill Creek

MAP LOCATION _____

MCCARTY Patricia E * WRD

From: MCCARTY Patricia E * WRD
Sent: Monday, January 22, 2018 2:11 PM
To: STEVENSON Anna P; FAUCERA Danette L; ZATTA Jaclyn D
Cc: STEVENSON Anna P; MCCARTY Patricia E * WRD
Subject: RE: New ISWRs Protests and administrative hold

Hi Anna,
OWRD will take no action on the listed applications before April 20, 2018.

Sincerely,
Patricia McCarty
Protest Program Coordinator
Oregon Water Resources Department
503-986-0820

From: Anna Pakenham Stevenson [<mailto:Anna.P.Stevenson@state.or.us>]
Sent: Thursday, January 18, 2018 10:03 AM
To: FAUCERA Danette L; ZATTA Jaclyn D; MCCARTY Patricia E * WRD
Cc: STEVENSON Anna P
Subject: New ISWRs Protests and administrative hold

Hello Patricia,
I wanted to let you know that ODFW reached out to the protestants associated with the new ISWR applications in the Hood and Sandy Basins (IS-88322, IS-88323, IS-88326, IS-88327, IS-88328, IS-88329, IS-88330, IS-88331, IS-88334, IS-88335, IS-88337, IS-88355, IS-88332, IS-88333, and IS-88336). We have requested meetings with these groups to discuss their concerns pertinent to ODFW aspects of the applications and if a resolution can be found. To allow time for this conversation ODFW is requesting from OWRD a 90-day administrative hold on these applications. We will be sure to let you know how those discussions proceed. Please let me know if you need further information.

Have a great day,
Anna

Anna Pakenham Stevenson
ODFW Water Program Manager
503-947-6084 (office)
971-718-2058 (cell)
anna.p.stevenson@state.or.us

STATE OF OREGON
WATER RESOURCES DEPARTMENT

725 Summer St. N.E. Ste. A
SALEM, OR 97301-4172
(503) 986-0900 / (503) 986-0904 (fax)

RECEIPT # 125337

INVOICE #

RECEIVED FROM: Steel Rives LLP

APPLICATION IS88329

BY:

PERMIT

TRANSFER

CASH: ☐ CHECK: # 907932 OTHER: (IDENTIFY) ☐

TOTAL REC'D \$ 810.00

1083 TREASURY 4170 WRD MISC CASH ACCT

0407 COPIES \$

OTHER: (IDENTIFY) \$

0243 I/S Lease 0244 Muni Water Mgmt. Plan 0245 Cons. Water

4270 WRD OPERATING ACCT

MISCELLANEOUS

0407 COPY & TAPE FEES \$

0410 RESEARCH FEES \$

0408 MISC REVENUE: (IDENTIFY) \$

TC162 DEPOSIT LIAB. (IDENTIFY) \$

0240 EXTENSION OF TIME \$

WATER RIGHTS:

0201 SURFACE WATER \$

0203 GROUND WATER \$

0205 TRANSFER \$

WELL CONSTRUCTION

0218 WELL DRILL CONSTRUCTOR \$

LANDOWNER'S PERMIT \$

0223 OTHER (IDENTIFY)

EXAM FEE

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0202

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0204

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EXAM FEE

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0219

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RECORD FEE

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LICENSE FEE

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0536 TREASURY 0437 WELL CONST. START FEE

0211 WELL CONST START FEE \$

0210 MONITORING WELLS \$

OTHER (IDENTIFY)

CARD #

CARD #

0607 TREASURY 0467 HYDRO ACTIVITY LIC NUMBER

0233 POWER LICENSE FEE (FW/WRD) \$

0231 HYDRO LICENSE FEE (FW/WRD) \$

HYDRO APPLICATION \$

TREASURY

OTHER / RDX

FUND TITLE

OBJ. CODE VENDOR #

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RECEIPT: 125337

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760 SW Ninth Ave., Suite 3000
Portland, OR 97205-2584

State of Oregon Water Resources D

SUPPLIER NUMBER

16765

CHECK NUMBER

907932

CHECK DATE

11-30-17

INVOICE NUMBER

SR112917-6

INVOICE DATE

11-29-17

DESCRIPTION

FILING FEE-Protest of
IS-88329

AMOUNT

810.00

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TOTAL

810.00

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STATE OF OREGON
WATER RESOURCES DEPARTMENT
WATER RIGHTS DIVISION

Before the Director of the Water Resources Department

In the Matter of Water Right	)	PROTEST OF OREGON FARM
Application IS-88329 in the name of	)	BUREAU FEDERATION, WASCO
Oregon Department of Fish and Wildlife	)	COUNTY FARM BUREAU, AND
	)	COLUMBIA GORGE FRUIT
	)	GROWERS, AND REQUEST FOR
	)	CONTESTED CASE

On October 17, 2017, the Oregon Water Resources Department (the "Department") issued a proposed final order ("PFO") recommending approval of water right application IS-88329 (the "Application") filed by Oregon Department of Fish and Wildlife ("ODFW") on December 1, 2016. The PFO is attached hereto as Exhibit A, and the Application is attached hereto as Exhibit B. Pursuant to ORS 537.170 and OAR 690-077-0043, Oregon Farm Bureau Federation ("OFB"), Wasco County Farm Bureau ("WFB"), and Columbia Gorge Fruit Growers ("CGFG") (collectively, "Protestants") protest the PFO and request a contested case hearing. Approval of the Application would limit the ability of Protestants and their members to respond to instream and out-of-stream water resources demands in the Hood River basin, and the Application is contrary to extensive cooperative planning efforts undertaken by Protestants and their members.

1. Protestants' Name, Address, and Telephone Number

The Protestants' contact information is as follows:

Mary Anne Cooper
Public Policy Counsel, Oregon Farm Bureau Federation
1320 Capitol Street NE, Suite 200
Salem, OR 97301
(503) 399-1701 (telephone)

Ken Polehn
President, Wasco County Farm Bureau
1320 Capitol Street NE, Suite 200
Salem, OR 97301
(503) 399-1701 (telephone)

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Mike Doke
Executive Director, Columbia Gorge Fruit Growers
P.O. Box 168
Odell, OR 97044
(541) 387-4769 (telephone)

Orders, notices, and other correspondence concerning this matter should be sent to legal counsel representing Protestants in this matter as follows:

David Filippi
Hayley Siltanen
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
(503) 294-9529 (telephone)
david.filippi@stoel.com (email)
hayley.siltanen@stoel.com (email)

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2. Protestants' Interest in the PFO

a. OFB and WFB's Interests

OFB is a voluntary, grassroots, nonprofit organization representing Oregon's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry. Today, OFB represents over 7,000-member farm families professionally engaged in the industry and has a total membership of over 60,000 Oregon families. WFB is the voice of agriculture in Wasco County, representing member farm families across the county.

c. CGFG's Interests

CGFG is a non-profit organization of 440 growers and 20 shippers of tree fruit in the Mid-Columbia area, including Hood River County and Wasco County. The Mid-Columbia area in which CGFG's members operate produces more than 225,000 tons of cherries, apples and pears each year. CGFG encourages and promotes the fruit industry through legislation, research, education and marketing and supports growers through the exchange of information regarding sound practices and regulations. In so doing, CGFG aims to work cooperatively with other industries and organizations.

d. Injury to the Protestants' Interests

Water is essential for agriculture across the Hood River basin. In recent years, the water supply from the Hood River Basin has been barely sufficient or insufficient to meet irrigators' needs during the late summer and fall months. The instream water rights proposed to be granted in the PFO could severely curtail Protestants' and their members' ability to utilize their water

rights as needed to successfully manage their operations and adapt to changing circumstances. The instream water rights could also limit Protestants' and their members' ability to apply for new water rights in the Hood River basin in the future and to access the water already reserved for future multipurpose storage in the basin. Protestants were among the primary proponents of the recent extension of the Hood River basin reservation, and the instream filing has the potential to limit future use of and access to that water.

3. Argument

a. The Department wrongly determined that ODFW established a presumption that the Application is in the public interest.

An application for an instream water right is presumed to be in the public interest when each of the following criteria is met:

- “(a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under 536.310(12);
- “(b) Water is available;
- “(c) The proposed use will not injure other water rights; and
- “(d) The proposed use complies with the rules of the Commission.”

OAR 690-077-0033(1). If any one of the above-listed criteria is not satisfied, the presumption that the proposed instream use is in the public interest must be reversed. OAR 690-077-0033(2)(a).

Here, the public interest presumption is not established, because the proposed instream use has the potential to injure other water rights and the proposed use does not comply with the rules of the Water Resources Commission (“Commission”). Given that the criteria at OAR 690-077-0033(1) are not satisfied, the Department erred by failing either to deny the Application or to make “specific findings” that the Application will not impair or be detrimental to the public interest. See OAR 690-077-0037(2).

i. The Application will impair other water rights.

To establish a presumption that a proposed instream use is in the public interest, the Department must determine that the proposed use will not impair other water rights. Specifically, ORS 537.334(2) requires that an instream water right “not take away or impair any permitted, certificated or decreed right to any waters or to the use of any waters vested prior to the date the in-stream water right is established[.]” (Emphasis added.) In this case, the Department wrongly concluded that the Application will not impair existing water rights on the sole basis that “the proposed use is junior in priority and by operation of the prior appropriation doctrine will not injure other water rights.” PFO, at 3. As discussed in more detail in the pages that follow, the Application has the potential to impair not only future water right applications pursuant to the existing reservation, but the Application also has the potential to impair existing water rights that may be subject to future transfer applications or other proposed modifications, as well as other water-right related activities, whether related to storage, aquifer recharge, aquifer

storage and recovery, etc. In addition, the Protestants are concerned that the establishment of the instream water rights as proposed in the Application, without appropriate findings in the final order or conditions in the final certificate, could undermine and result in impairment to existing water rights in other state and federal environmental reviews and permitting processes.

- ii. **The Application does not comply with the Commission's rules, because ODFW did not provide written documentation of compliance with OAR 635-400-0020.**

The Commission's rules require ODFW to provide written documentation of compliance with the "requirements contained in [ODFW's] administrative rules for instream water rights, including application of the required methods to determine the requested flows." See OAR 690-077-0020(4)(k). Among the administrative rules with which ODFW must comply is OAR 635-400-0020, which provides standards for selection of streams or stream reaches for instream water right applications. In the Department's Initial Review of the Application, the Department asked ODFW to "provide additional documentation of how it has complied with its own administrative rules for instream water rights . . . specifically those found in OAR 635-400-0020." Based on a review of the Application case file, it does not appear that ODFW provided evidence of compliance with OAR 635-400-0020. On that basis, the Application does not comply with the Commission's rules as required by OAR 690-077-0033(1)(a).

- b. **The Department violated its rules by failing to adequately consider factors necessary to determine whether the public interest presumption was overcome.**

Even assuming that the Department correctly determined that the Application satisfies the criteria necessary to establish a public interest presumption, the Department erroneously failed to evaluate whether the presumption was overcome. Pursuant to OAR 690-077-0037(3), if the Department determines that the criteria for the public interest presumption are satisfied, the Department must "further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the public interest presumption is overcome." OAR 690-077-0037(3)(a). Such evaluation requires the Department to consider, "at minimum," the following factors:

- "(A) Threatened, endangered or sensitive species;
- "(B) Water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set under Section 303(d) of the federal Clean Water Act and sources which the Environmental Quality Commission has classified as outstanding resource waters as defined in OAR 340-041-0002(42);
- "(C) Fish or wildlife;
- "(D) Recreation;
- "(E) Economic development; and
- "(F) Local comprehensive plans, including supporting provisions such as public facilities plans."

OAR 690-077-0037(3)(b).

In this case, the PFO suggests that the Department did not properly “further evaluate the proposed use . . . to determine whether the public interest presumption is overcome.” See OAR 690-077-0037(3). The Department’s statement that, “[b]ased on an evaluation of the proposed use, the comments received, information available in its files or received from other interested and any other available information, . . . the proposed use will not impair or be detrimental to the public interest,” is conclusory and does not address the above-listed factors. See Protest, at 3. Specifically, the PFO fails to evaluate the likely effect of the Application on economic development. See OAR 690-077-0037(3)(b)(E). As discussed more fully in Part 3.c, the Application would further constrain the already limited supply of available irrigation water in the Hood River basin, which is necessary to sustain the Hood River basin’s agriculture-based economy. The Department erred by not considering the effect of additional water supply constraints on agricultural users.

In addition, the PFO does not contain any indication that the Department meaningfully considered public comments, including the April 20, 2017 letter submitted by East Fork Irrigation District (“EFID”), attached hereto as Exhibit C. Although the Department need not address every comment individually, the Department nevertheless must “consider all comments received[.]” OAR 690-077-0037(1). The Department’s conclusions in the PFO are unchanged from the Department’s Initial Review, and the PFO does not include any response to concerns voiced by EFID in its comment letter. Thus, there is no evidence that the Department considered EFID’s comments.

Because the PFO does not include any discussion of the effect of the Application on the factors listed at OAR 690-077-0037(3)(b), including economic development, and because there is no evidence that the Department considered the public comments submitted on the Application, the Department failed to comply with the requirements of OAR 690-077-0037.

- c. The proposed instream use would be detrimental to the public interest because it limits the ability of agricultural users to secure future water rights and to develop needed storage.**

If a proposed use “may impair or be detrimental to the public interest according to standards described in ORS 537.170(8),” the public interest presumption is overcome, and an application must be denied or conditioned to prevent harm to the public interest. OAR 690-077-0037(4)(b). Several of the standards listed in ORS 537.170(8) apply to evaluation of the Application.¹ Especially relevant here, ORS 537.170(8) requires the Department to consider

¹ ORS 537.170(8) lists, in full, the following standards:

- “(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to

(continued . . .)

whether a proposed use “[c]onserv[es] the highest use of the water for all purposes, including irrigation, . . .” and provides for “[t]he maximum economic development of the waters involved.” ORS 537.170(8)(a),(b).

The economy of Wasco County is heavily dependent on irrigated agriculture.² Because the Application would impair the ability of agricultural users to secure irrigation water, today and in the future, ORS 537.170(8) weighs against approval of the Application.

i. The Department must consider potential future uses of water when evaluating the public interest.

As a threshold matter, the Department must consider potential future water uses when evaluating whether the Application is detrimental to or impairs the public interest. Previously, the Department *expressly rejected* the argument that “[p]otential future uses of water are not properly to be considered in deciding whether to allow an Instream Water Right.”³ The Department explained that, because the public interest factors at ORS 537.170(8) are “very broad,” potential future uses of water *must* be considered when determining whether a proposed instream water right will impair or be detrimental to the public interest. *Id.*

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(. . . continued)

which the water may be applied for which it may have a special value to the public.

- “(b) The maximum economic development of the waters involved.
- “(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- “(d) The amount of waters available for appropriation for beneficial use.
- “(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- “(f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
- “(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.”

² See Nat. Res. Conservation Serv., *Wasco County Long Range Strategy: 2017-2022*, 5–7.

³ Memorandum from Paul R. Cleary, Director, to Water Resources Commission, 6 (June 7, 2002) (Agenda Item E: Considerations of Exceptions and Issuance of Final Order on Water Right Application 70606 in the Name of Oregon Department of Fish and Wildlife).

ii. The Application blocks future appropriations for landowners who are already seeking water rights.

In this case, the proposed instream use could affect potential future uses of water in several ways. First, approval of the Application would prevent landowners who are already seeking water rights from securing water rights in the future. The demand for water rights stems from the fact that the Hood River Basin is closed to new appropriations of water. If the Application is approved, and should water rights be cancelled in the future, such cancellation would not make water available for new appropriations. Instead, the cancelled water rights would be swallowed up by the instream rights proposed in the Application. Thus, the Application significantly reduces the ability of landowners already seeking water rights to secure water rights in the future.

iii. The Application precludes future appropriation for storage, counter to the recommendations in Oregon's 2017 Integrated Water Resources Strategy and the Hood River Basin Study.

The proposed instream use further injures the public interest by limiting future appropriations from the Hood River basin for storage. This outcome conflicts with the recommendations in Oregon's 2017 Integrated Water Resources Strategy (the "Water Resources Strategy") and in the locally-developed Hood River Basin Study (the "Basin Study"), both of which recognize storage as an important tool for satisfying water resource needs.

The Water Resources Strategy recognizes that, "[i]ncreasingly, water users are relying on tools such as water conservation, re-use, transferring existing water rights, and water storage to meet their needs during the summer months." *Id.* at 16. For that reason, the Water Resources Strategy concludes that "[s]toring water, via built and natural systems, will be an important tool to meet Oregon's water needs." *Id.* at 59. To help meet future instream and out-of-stream water needs, the Water Resources Strategy recommends improving water-use efficiency and conservation and improving access to built storage. *Id.* at 95.

The need for increased storage is similarly recognized at a local level in the Basin Study. The Basin Study is the product of collaborative efforts by the U.S. Bureau of Reclamation and the Hood River County Water Planning Group (the "Planning Group"), who worked together to assess current and future water supply and demand in the Hood River basin and adjacent areas, and to identify a range of potential strategies to address any projected imbalances. Basin Study, at ES-1. Planning Group members included the Hood River Watershed Group, Columbia Gorge Fruit Growers Association, Hood River County Soil and Water Conservation District, multiple water districts, environmental groups, local resource specialists, Confederated Tribes of Warm Springs Oregon, Natural Resources Conservation Service, and a number of irrigation districts. *Id.* at ES-3.

The Basin Study determined that, "[i]f no action is taken, potable and irrigation demands will continue to increase and exacerbate water imbalances in the future, particularly during the summer months." *Id.* at ES-7. To address water demand challenges, the study evaluated three categories of actions: water conservation, groundwater recharge, and surface water storage. *Id.*

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Ultimately, the Basin Study concluded that “no single alternative will satisfy all of the water resource needs,” but that “due to the projection that summer streamflows are expected to get lower, a priority could be given to projects in the basin that have the ability to increase summer streamflow.” *Id.* at ES-10. Beyond conservation strategies (e.g., conversion of sprinkler systems to micro- or drip-irrigation), which are not independently sufficient to satisfy all water needs, the Basin Study’s top recommendation for safeguarding water resources related to increased storage. *Id.* at ES-10, 103.

The Application runs counter to the recommendations in the Water Resources Strategy and in the Basin Study because it inhibits Protestants’ members and irrigation districts’ ability to appropriate water for future storage. Approval of the Application could result in the loss of benefits associated with increased storage, which include: increased flows during low water months, water supply security for irrigators, and improved water quality. For those reasons, the Application is detrimental to the public interest.

iv. The Application contradicts the Commission’s renewal of water reservations in the Hood River basin.

Finally, approval of the Application does not align with the Commission’s recent decision to extend reservations for future economic development in the Hood River basin. In 2016, the Commission voted to extend reservations for the West Fork Hood River subbasin, East Fork Hood River subbasin, Neal Creek subbasin, Mosier Creek subbasin, Eightmile Creek subbasin and Fifteenmile Creek subbasin of the Hood River basin for an additional 20 years.⁴ Reservations for future economic development are intended “to ensure sufficient surface water will be available in the future to meet expected needs.” OAR 690-504-0100(1). Although water rights developed from the reservations in the Hood River basin have a priority date of November 6, 1992, which would make them senior to instream rights proposed in the Application, approval of the Application still has the potential to frustrate the purpose of the reserved rights. Specifically, water right permit applications to store reserved water must undergo public interest review. OAR 690-504-0100(6). Approval of the Application would likely increase the difficulty of successfully applying for reserved water rights in the future.

d. The instream water quantities proposed to be allowed in the Application are not supported by substantial evidence.

As a final matter, the monthly streamflow quantities proposed to be allowed in June and August are not supported by substantial evidence. The amount of water allocable to an instream water right is limited to the estimated natural average flow (“ENAF”) occurring from the drainage system.⁵ OAR 690-077-0015(4). In this case, ODFW requested streamflows in an

⁴ Meeting Minutes, Joint Water Resources Commission and Environmental Quality Commission Meeting Hermiston, Oregon, 4 (Aug. 18, 2016).

⁵ The amount of water allocable to an instream water right may exceed ENAF where periodic flows that exceed the natural flow are significant for the applied public use. OAR 690- (continued . . .)

amount exceeding ENAF during the months of June and August. For that reason, the PFO proposes to limit the allowable amount of the instream water right in June and August to the ENAF for South Fork Mill Creek. The PFO states that the ENAF for South Fork Mill Creek is 12.1 cubic feet per second ("cfs") in June and 8.7 cfs in August.

However, the ENAF quantities specified in the PFO are significantly *higher* than quantities previously determined by the Department for South Fork Mill Creek, and the Department has not provided an explanation for the differences. In a previous order, the Department determined that the ENAF for South Fork Mill Creek was 7.8 cfs in June and 5.4 cfs in August. *See Exhibit D, Proposed Final Order for Instream Water Right Application IS-72078.* Thus, under the previously determined ENAF quantities, the allowable amount for the proposed instream right would be limited to 7.8 cfs in June and 5.4 cfs in August. Moreover, the instream quantities requested by ODFW for the months of July, September, October and November exceed the ENAF quantities previously calculated by the Department for those months.⁶ Because the Department has not provided a basis for changing the ENAF quantities for South Fork Mill Creek, the instream water right quantities for are not supported by substantial evidence.

4. Protest Filing Requirements

This Protest is timely filed. Any person may submit a written a protest to the PFO within 45 days from the date of publication of the PFO in the Department's Weekly Notice. OAR 690-077-0043(6). The Department published notice of the PFO on October 17, 2017. Therefore, this protest must be filed on or before December 1, 2017.

Protestants have included with this Protest the protest fee of \$ 810. *See* ORS 536.050(j).

Protestants have complied with the provisions of OAR 690-077-0043 and OAR 690-002-0030. The Protest is in writing and signed by the Protestant or the Protestant's attorney. OAR 690-002-0030(1). The Protest also includes:

- "(a) The name, address and telephone number of the protestant;
- "(b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;

(... continued)

077-0015(4). Here, the Department did not find that flows in exceedance of ENAF are significant for public use.

⁶ The PFO proposes to allow in the months of July, September, October and November instream flows of 10 cfs, 7 cfs, 7 cfs, and 7 cfs respectively. The proposed allowed quantities exceed the previously determined ENAF quantities for those months, which were 4.8 cfs, 6.1 cfs, 4.8 cfs, and 5.5 cfs respectively. *See Exhibit D.*

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- “(c) A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant’s interest;
- “(d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
- “(e) Any citation of legal authority supporting the protest, if known[.]”

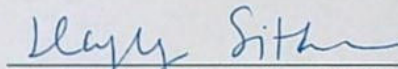
OAR 690-077-0043(1).

5. Conclusion and Request for Contested Case Hearing

For the reasons set forth above, the Department should either deny the Application or condition approval of the Application to subordinate instream rights to water rights for irrigation use.

DATED: December 1, 2017

Respectfully submitted,



David Filippi, OSB No. 965095
Hayley Siltanen, OSB No. 164825
Of Attorneys for Oregon Farm Bureau
Federation, Wasco County Farm Bureau,
and Columbia Gorge Fruit Growers

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VENDOR: 1004 OREGON WATER RESOURCES

11/30/2017

Check No: 130990

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INV DATE

DESCRIPTION

NOVEMBER 2

11/29/2017

PROTEST FEE IS-88329

INV AMOUNT

810.00

STATE OF OREGON
WATER RESOURCES DEPARTMENT
725 Summer St. N.E. Ste. A
SALEM, OR 97301-4172
(503) 986-0900 / (503) 986-0904 (fax)

RECEIPT # 125324

INVOICE #

RECEIVED FROM: City of The Dalles

BY:

CASH: CHECK: # OTHER: (IDENTIFY)



APPLICATION	15-88329
PERMIT	
TRANSFER	

TOTAL REC'D \$ 810.00

1083 TREASURY 4170 WRD MISC CASH ACCT

0407 COPIES \$

OTHER: (IDENTIFY) \$

0243 I/S Lease 0244 Muni Water Mgmt. Plan 0245 Cons. Water

4270 WRD OPERATING ACCT

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0408 MISC REVENUE: (IDENTIFY) \$

TC162 DEPOSIT LIAB. (IDENTIFY) \$

0240 EXTENSION OF TIME \$

WATER RIGHTS:

0201 SURFACE WATER EXAM FEE RECORD FEE \$

0203 GROUND WATER EXAM FEE RECORD FEE \$

0205 TRANSFER EXAM FEE RECORD FEE \$

WELL CONSTRUCTION

0218 WELL DRILL CONSTRUCTOR EXAM FEE LICENSE FEE \$

LANDOWNER'S PERMIT

0223 OTHER (IDENTIFY) Protest Fees \$810.00

0536 TREASURY 0437 WELL CONST. START FEE

0211 WELL CONST START FEE \$ CARD #

0210 MONITORING WELLS \$ CARD #

OTHER (IDENTIFY)

0607 TREASURY 0467 HYDRO ACTIVITY LIC NUMBER

0233 POWER LICENSE FEE (FWWRD) \$

0231 HYDRO LICENSE FEE (FWWRD) \$

HYDRO APPLICATION \$

TREASURY OTHER / RDX

FUND TITLE

OBJ. CODE VENDOR #

DESCRIPTION \$

RECEIPT: 125324

DATED: 11/30/17 BY: C. Walenrich



CITY OF THE DALLES
Department of Public Works
1215 West First Street
The Dalles, Oregon 97058

November 29, 2017

Mr. Dwight French
Water Rights Services Division Administrator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Protest - Proposed Final Order for Water Right Application IS-88329, South Fork Mill Creek

Dear Mr. French:

The City of The Dalles has concerns related to the Proposed Final Order for Water Right Application IS-88329 on South Fork Mill Creek as applied for by Oregon Department of Fish and Wildlife, and how this instream right, if granted, could impair the City's existing water rights. The City also has concerns about certain technical aspects of the proposed instream water right which need to be addressed. Due to these concerns, the City is hereby protesting the Proposed Final Order.

Background

The City holds a number of municipal water rights on South Fork Mill Creek that include rights for live flow, storage, and release of stored water for municipal purposes; those rights include Certificates 5691, 60410 and 44917, and Permits S-53930 and R-13105. All of these rights are senior to the proposed instream right. These surface water supplies, combined with water supplied from Dog River under Certificate 14954, provide about 90% of the City's annual water supply for domestic, commercial and industrial uses. There are significant constraints on other potential sources. There is a federal restriction on the Columbia River. Though the City does have wells and groundwater rights, the State has designated The Dalles and vicinity as a Critical Groundwater Area so no new groundwater rights are available. Surface water supply is critical for our growing community and continued economic development. Therefore, any additional actions which may interfere with the City's ability to utilize its existing rights is detrimental to the City's interest and would be detrimental to the public interest.

Potential Adverse Impacts to the City

As we have seen in a number of instances around the state, the existence of an unfulfilled instream water right is often misused and misrepresented in public interest and permitting processes. Instream rights are represented as "biological mandates" that must be met at the expense of other beneficial uses, even those with senior rights. When this happens, the holder of senior water rights must spend considerable resources defending their existing rights. This exact scenario has played out in Bend, on the Clackamas River, and now for City of The Dalles in a federal permitting process. It cannot be denied that the issuance of the instream water right had an adverse impact on senior water right holders and was detrimental to their interest.

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The City's concern is that any type of permitting or public interest-type review related to its existing water rights will impair the City's existing water supply due to the existence of a new unfulfilled instream water right and would be detrimental to the City's interest and the public interest in maintaining water for municipal supply. Examples of the types of actions include relocating a point of diversion due to damage from flood or landslide, seeking an extension of time for an existing permit, or constructing a storage reservoir that will use an existing water right. History has shown that, under all these actions (and more), existing water rights have been impaired by the existence of an unfulfilled instream water right and that issuance of this instream water right, as proposed, is detrimental to the City's interest in maintaining a secure and adequate supply of water for municipal use under its existing senior water rights.

Under ORS 537.334(2) the Oregon Legislature established that "The establishment of an in-stream water right under the provisions of ORS 537.332 to 537.360 shall **not take away or impair any permitted, certificated or decreed right to any waters** or to the use of any waters vested prior to the date the in-stream water right is established pursuant to the provisions of ORS 537.332 to 537.360." Unfortunately, that has not been the case and proposed instream water right is not sufficiently conditioned to ensure this statutory requirement is adhered to.

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Technical Deficiencies in the Proposed Final Order

It appears that there are a number of technical deficiencies associated with the Proposed Final Order. The first is the issue of consistency. An instream water right, Certificate 76266, was issued for South Fork Mill Creek in 1999. The Proposed Final Order for that instream right (IS 72078) identified the estimated average natural flow, in cubic feet per second, for the stream as follows:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
15.9	29.6	37.5	35.2	17.6	7.8	4.8	5.4	6.1	4.8	5.5	9

However, this new Proposed Final Order now indicates that the estimated average natural stream flow for this same stream is as follows:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
16.2	37.4	40	35.3	20.6	12.1	10.1	8.7	8.3	7.2	7.6	10.2

These values represent significant increases in the estimated average natural stream flow, especially during the summer months. The Proposed Final Order allocates all of these "additional" summer flows to instream use, subject to senior water rights. But the technical question exists – Where did this additional water come from?

To the City's knowledge, no new stream gauging stations have been installed on South Fork Mill Creek, so the increases in estimated natural flows are not the result of new, better data. However, it may be possible that the data used has not adequately accounted for "unnatural" impacts on the flow regime in South Fork Mill Creek. Summer flows in South Fork Mill Creek are augmented by water that is diverted from Dog River and released from Crow Creek Dam. If these supplemental flows have not been accurately accounted for, the estimated natural flows could be inflated, and in turn could inflate the proposed instream water rights during summer months.

The second technical deficiency relates to the amount of water requested for the instream right. The proposed use of the instream water right is for "fish life and wildlife". The assumed goal is to recover and maintain sustainable fish populations, and that the requested flows are necessary to meet that goal. However, there is already an existing and viable, self-sustaining fish population present in South Fork Mill Creek. The assertion that more water is needed to sustain viable, self-sustaining fish populations is shown to be false in light of the existing population and casts doubts on the ODFW methodology used to

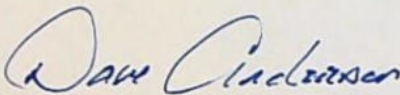
establish target stream flows. In addition, the Department's Proposed Final Order never makes any finding that the amount of water requested is actually needed for fish. Instream water rights should be issued based upon the flows necessary to maintain fish populations, not the "more is better" principle as this one seems to be.

Summary

The City values both water for fish and wildlife and water for people. It has a long standing commitment to stewardship of the South Fork Mill Creek watershed and has undertaken many projects over the years to benefit fish populations in South Fork Mill Creek and Mill Creek. These projects include the voluntary installation of fish screening and fish passage systems at the City's point of diversion on South Fork Mill Creek, and the removal or mitigation of potential impediments to fish passage at five locations along the stream system. Operational practices have also been modified to provide bypass flows when needed to benefit fish. However, the Proposed Final Order for Application IS-88329 should not be issued due to the detrimental impacts to the City's interests related to its existing senior water rights and the technical deficiencies of the Proposed Final Order.

Thank you for your consideration of this protest and please feel free to contact me at your convenience with any questions you may have.

Respectfully submitted,



Dave Anderson
Public Works Director
City of The Dalles
1215 W 1st Street
The Dalles, OR 97058
(541) 506-2008

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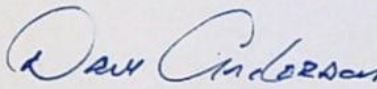
Certificate of Service

I certify that on this 30th day of November, 2017, a copy of the foregoing protest of the Proposed Final Order for an instream water right, Application IS-88329, was served on each of the following by the method indicated:

Mr. Dwight French
Water Rights Services Division Administrator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
Delivered by hand

Anna Pakenham Stevenson
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Dr SE
Salem, OR 97302-1142
Sent by US Postal Service certified mail

Signed this 30th day of November, 2017



Dave Anderson
City of The Dalles

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Oregon

Kate Brown, Governor

Water Resources Department

North Mall Office Building
725 Summer St NE, Suite A
Salem, OR 97301
Phone (503) 986-0900
Fax (503) 986-0904
www.wrd.state.or.us

December 1, 2017

Dave Anderson, Public Works Director
City of The Dalles
1215 W 1st Street
The Dalles, OR 97058

Re: Receipt of protests on Applications IS-88326 and IS-88329 in the name of Oregon
Department of Fish and Wildlife

Dear Mr. Anderson,

Enclosed is receipt #125323 for check #130989 and receipt #125324 for check #130990, each in the amount of \$810.00 in payment of the fees to file the protests to the Proposed Final Orders on the above applications. I will review the protest and contact you regarding the concerns raised. At that time I will be happy to answer any questions about the next steps. If you have questions in the meantime, please feel free to contact me directly.

Sincerely,

Patricia McCarty
Protest Program Coordinator
Water Right Services Division
503-986-0820
patricia.e.mccarty@oregon.gov



Instream Water Right Proposed Final Orders

Proposed Final Order Stage (PFO)

The proposed final order is the Department's penultimate decision on the water use request. The PFO documents the agency's decision through specific findings, including review of comments received. If appropriate, it includes a draft permit specifying any conditions or restrictions on the use. Persons interested in receiving a mailed copy of a PFO must pay a statutorily-required fee of \$25. (Any person paying \$25 to receive a PFO by mail will also receive a copy of the Final Order when it is issued.) PFO's may be viewed free of charge online at: <http://apps.wrd.state.or.us/apps/wr/wrinfo/>. Those disagreeing with the Department's decision as expressed in the PFO have 45 days to file a protest.

The protest deadline for proposed final orders appearing in this public notice is 5 p.m., Friday, December 1, 2017.

The protest filing fee is \$410 for the applicants and \$810 for non-applicants. Detailed requirements for filing a protest are included in the PFO. Persons who support the PFO may file a "standing" fee of \$230 to retain the ability to participate in future proceedings relating to an application. Before participation in a hearing is allowed, an additional \$580 will be required to request to participate as a party or limited party.

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

App#	<u>IS-88322</u>
County/Basin	Hood River / Hood (4)
Applicant Name	OREGON DEPARTMENT OF FISH AND WILDLIFE 4034 FAIRVIEW INDUSTRIAL DR SE SALEM, OR 97302-1142
Sources/TRSQ40Q160	EAST FORK HOOD RIVER > HOOD RIVER / 1.00N 10.00E 28 SENW
Use/Quantity	INSTREAM USES / 210.000 CFS
Quantity by month	JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS	180 210 210 210 210 210 150 150 169 160 180 180
Stream Reach	River Mile 6.2 to Mouth
Priority Date	12/01/2016
Stage/Status	PFO / PROPOSE TO APPROVE

App#	<u>IS-88323</u>
County/Basin	Hood River / Hood (4)
Applicant Name	OREGON DEPARTMENT OF FISH AND WILDLIFE 4034 FAIRVIEW INDUSTRIAL DR SE SALEM, OR 97302-1142
Sources/TRSQ40Q160	GREEN POINT CREEK > WEST FORK HOOD RIVER / 1.00N 9.00E 9 NWNE
Use/Quantity	INSTREAM USES / 120.000 CFS
Quantity by month	JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS	90 110 107 120 120 64.7 26.8 16.5 16.2 29 65.2 87.9
Stream Reach	River Mile 3.1 to Mouth
Priority Date	12/01/2016
Stage/Status	PFO / PROPOSE TO APPROVE

App# IS-88326
County/Basin Wasco / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 MILL CREEK > COLUMBIA RIVER / 1.00N 12.00E 22 SESW
Use/Quantity INSTREAM USES / 26.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 10 10 15 26 25.5 15.4 12.6 10.7 9.72 8.43 10 10
Stream Reach River Mile 8.1 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88327
County/Basin Hood River / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 NEAL CREEK > HOOD RIVER / 1.00N 11.00E 6 SWSW
Use/Quantity INSTREAM USES / 41.900 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 26.4 41.9 40.1 27.6 9.98 4.91 2.41 1.95 2.15 2.96 4.8 10.6
Stream Reach River Mile 5.8 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88328
County/Basin Hood River / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 ODELL CREEK > HOOD RIVER / 2.00N 10.00E 34 NESW
Use/Quantity INSTREAM USES / 16.300 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 8.55 15.7 16.3 9.25 .88 .17 .08 .09 .07 .13 .43 2.75
Stream Reach River Mile 4.0 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88329
County/Basin Wasco / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 SOUTH FORK MILL CREEK > MILL CREEK / 1.00S 11.00E 20 NENW
Use/Quantity INSTREAM USES / 12.100 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 0 0 0 0 0 12.1 10 8.7 7 7 7 0
Stream Reach River Mile 10.1 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88330
County/Basin Hood River / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 WEST FORK HOOD RIVER > HOOD RIVER / 1.00S 8.00E 25 SWNW
Use/Quantity INSTREAM USES / 250.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 150 250 250 250 250 250 150 147 139 141 190 190
Stream Reach River mile 14.7 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88331
County/Basin Wasco / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 FIFTEENMILE CREEK > COLUMBIA RIVER / 1.00S 13.00E 25 SWSE
Use/Quantity INSTREAM USES / 34.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 13 13 20 34 34 34 12.8 5.9 6.1 7.9 11.2 13
Stream Reach River Mile 30.6 to Mouth
Priority Date 12/01/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88337
County/Basin Wasco / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 FIFTEENMILE CREEK > COLUMBIA RIVER / 2.00S 11.00E 28 NWSW
Use/Quantity INSTREAM USES / 26.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 10 10 15 26 26 26 9 4 4 7 10 10
Stream Reach River Mile 49.4 to 30.6
Priority Date 12/31/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88334
County/Basin Hood River / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 EAST FORK HOOD RIVER > HOOD RIVER / 2.00S 10.00E 5 SESE
Use/Quantity INSTREAM USES / 175.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 175 175 175 175 175 175 110 110 145 145 175 175
Stream Reach River Mile 16.8 to 6.2
Priority Date 12/31/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88335
County/Basin Hood River / Hood (4)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 EAST FORK HOOD RIVER > HOOD RIVER / 2.00S 10.00E 8 SWSE
Use/Quantity INSTREAM USES / 127.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 75 75 75 127 127 127 127 75 75 50 50 75
Stream Reach River Mile 17.8 to 16.8
Priority Date 12/31/2016
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88355
County/Basin Clackamas / Sandy (3)
Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302-1142
Sources/TRSQ40Q160 CLEAR CREEK > SANDY RIVER / 2.00S 7.00E 13 SENW
Use/Quantity INSTREAM USES / 45.000 CFS
Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
In CFS 45 45 45 45 45 45 27 8/6 6 6/35 45 45
Stream Reach River Mile 4.3 to Mouth
Priority Date 01/16/2017
Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88332
 County/Basin Hood River / Hood (4)
 Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
 4034 FAIRVIEW INDUSTRIAL DR SE
 SALEM, OR 97302-1142
 Sources/TRSQ40Q160 CLEAR BRANCH > MIDDLE FORK HOOD RIVER / 1.00S 9.00E 27 NWNE
 Use/Quantity INSTREAM USES / 45.000 CFS
 Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
 In CFS 44 39 42 50 50 50 30 21 18 21 34 35
 Stream Reach River Mile 1.2 to Mouth
 Priority Date 05/01/2017
 Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88333
 County/Basin Hood River / Hood (4)
 Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
 4034 FAIRVIEW INDUSTRIAL DR SE
 SALEM, OR 97302-1142
 Sources/TRSQ40Q160 COE BRANCH > CLEAR BRANCH / 2.00S 9.00E 4 NWSE
 Use/Quantity INSTREAM USES / 20.000 CFS
 Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
 In CFS 14 14 20 20 20 14 14 20 20 20 14 14
 Stream Reach River Mile 3.5 to Mouth
 Priority Date 05/01/2017
 Stage/Status PFO / PROPOSE TO APPROVE

App# IS-88336
 County/Basin Hood River / Hood (4)
 Applicant Name OREGON DEPARTMENT OF FISH AND WILDLIFE
 4034 FAIRVIEW INDUSTRIAL DR SE
 SALEM, OR 97302-1142
 Sources/TRSQ40Q160 ELIOT BRANCH > CLEAR BRANCH / 2.00S 9.00E 10 NESW
 Use/Quantity INSTREAM USES / 11.000 CFS
 Quantity by month JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
 In CFS 11 11 11 11 11 11 11 11 11 11 11 11
 Stream Reach River Mile 4.5 to Mouth
 Priority Date 05/01/2017
 Stage/Status PFO / PROPOSE TO APPROVE

**Oregon Water Resources Department
Water Right Services Division**

Water Right Application IS-88329 in the	)	PROPOSED FINAL ORDER
name of Oregon Department of Fish &	)	
Wildlife	)	

Summary: The Department proposes to issue an order approving Application IS-88329 and issue a certificate consistent with the attached draft certificate.

Authority

The application is being processed in accordance with Oregon Revised Statute (ORS) 537.140 to 537.250 and 537.332 through 537.360, and Oregon Administrative Rule (OAR) Chapter 690, Division 77 and Hood Basin Program Division 504. These statutes and rules can be viewed on the Oregon Water Resources website: <http://www.oregon.gov/owrd/pages/law/index.aspx>

The Department's main page is <http://www.oregon.gov/OWRD/pages/index.aspx>

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

- (a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12);
- (b) Water is available; OAR 690-077-0015(4)
- (c) The proposed use will not injure other water rights; and
- (d) The proposed use complies with the rules of the Commission. OAR 690-077-0033(1)

All four criteria must be met for a proposed use to be presumed to not impair or be detrimental to the public interest. When the criteria are met and the presumption is established, or if the proposed use can be modified or conditioned to meet the presumption criteria, the Department must further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. OAR 690-077-0037(3).

If the Department determines that the presumption is established and not overcome the Department shall issue a proposed final order recommending issuance of the certificate subject to any appropriate modifications or conditions.

FINDINGS OF FACT

Application History

1. On December 1, 2016, Oregon Department of Fish & Wildlife filed a complete application for the following water use:

Use of Water: Public use, specifically fish life and wildlife.

County: Wasco County

Location: SOUTH FORK MILL CREEK, TRIBUTARY TO MILL CREEK, BEGINNING AT THE CROW CREEK RESERVOIR DAM AT APPROXIMATELY RIVER MILE 10.1 (45.4751, -121.4544) (NENW, SECTION 20, TOWNSHIP 1S, RANGE 11E, WM); CONTINUING DOWNSTREAM TO THE MOUTH AT APPROXIMATELY RIVER MILE

0.0 (45.5506, -121.3079) (SESW, SECTION 22, TOWNSHIP 1N, RANGE 12E, WM)
WASCO COUNTY

Source of Water: South Fork Mill Creek in Hood River Basin

Amount of Water (in cubic feet per second "CFS") requested by month

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
0	0	0	0	0	17	10	10	7	7	7	0

- On March 17, 2017, the Department mailed the applicant notice of its Initial Review, determining that "Some percentage of the water applied for has been determined allocable for the purposes identified in this application." The applicant did not notify the Department to stop processing the application within 14 days of that date.
- On March 21, 2017, the Department gave public notice of the initial review in its weekly notice. The public notice included a request for comments, and information for interested persons about obtaining future notices and a copy of the Proposed Final Order.
- Written comments were received from WaterWatch of Oregon and the East Fork Irrigation District. The Department has carefully considered the comments.
- This Proposed Final Order confirms the preliminary findings made in the initial review.

Presumption Criteria (a) Consistency with Basin Program

- "Fish life" is a classified use allowed under the Hood River Basin Program (OAR 690-504-0000(1)). ORS 537.343(1); OAR 690-077-0039(2)

Presumption Criteria (b) Water Availability

- An assessment of surface water availability was completed and a copy of this assessment is in the file. The amount of out-of-stream appropriations is not a factor in determining the amount of an instream water right. OAR 690-077-0015(3). The amount allocable to an instream water right is limited to the estimated average natural streamflow occurring from the drainage system, except where periodic flows that exceed the natural flow are significant for the applied public use. OAR 690-077-0015(4). The table below compares the estimated average natural flow (EANF) of the South Fork of Mill Creek in the Hood River basin on a monthly basis (in CFS) to the requested flows in the application. The last row is the allowable amount and the amount in the proposed certificate. Water is not available in the times and amounts requested. ORS 537.343(1); OAR 690-077-0039(2)(c)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
EANF	16.2	37.4	40	35.3	20.6	12.1	10.1	8.7	8.3	7.2	7.6	10.2
Flows Requested	0	0	0	0	0	17	10	10	7	7	7	0

Allowable amount	0	0	0	0	0	12.1	10	8.7	7	7	7	0
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Presumption Criteria (c) Injury Determination

8. The proposed use is junior in priority and by operation of the prior appropriation doctrine will not injure other water rights. ORS 537.343(1); OAR 690-077-0039(2)(d)

Presumption Criteria (d) Whether the use complies with rules of the Commission

9. The Department placed the application on the Department's Public Notice for a 30-day comment period. Consistent with OAR 690-077-0031, copies of the notice were sent to the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse. No land use information was received by the Department during the initial review 30 day public comment period. Pursuant to OAR 690-077-0031(5) the Department may presume the proposed instream water right is compatible with the comprehensive land use plans and land use regulations of affected local governments.
10. The proposed use complies with rules of the Water Resources Commission not otherwise described above.

Whether the proposed use would impair or be detrimental to the public interest as provided in ORS 537.170

11. Based on an evaluation of the proposed use, the comments received, information available in its files or received from other interested agencies and any other available information, the Department has determined that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170. OAR 690-077-0039(2)(e)

Determination of Presumption that a proposed surface water use will not impair or be detrimental to the public interest

12. Based on the review of the presumption criteria (a)-(d) above, and Finding of Fact #9, #10 and #11, the Department finds that a rebuttable presumption has been established. 537.343(1); OAR 690-077-0039(2)(g)

CONCLUSIONS OF LAW

The proposed use would not impair or be detrimental to the public interest.

When issuing certificates, ORS 537.343(1) authorizes the Department to include provisions or restrictions concerning the use, control and management of the water to be appropriated for the project. The attached draft permit is conditioned accordingly.

PROPOSED ORDER

The Department recommends approval of Application IS-88329 and issuance of a certificate consistent with the attached draft certificate.

DATED October 17, 2017

Dwight French

Dwight French, Water Rights Services Division Administrator, for
Thomas M. Byler, Director

Protests

Under the provisions of ORS 537.153(7), the Proposed Final Order may be protested. Protests must be received in the Water Resources Department no later than **December 1, 2017**. Protests 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 the 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;
- To affect the department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest ORS 537.153(6) requires that a protest demonstrate by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) The specific aspect of the public welfare, safety and health under ORS 537.525 that would be impaired or detrimentally affected, and specifically how the identified aspect of the public welfare, safety and health under ORS 537.525 would be impaired or be adversely affected;
- If you are the applicant, the protest fee of \$410 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$810 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing.

Requests for Standing

Under the provisions of ORS 537.153(7) persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **December 1, 2017**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and
- A standing fee of \$230. If a hearing is scheduled, an additional fee of \$580 must be submitted along with a petition for party status.

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 either:

- 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.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

This document was prepared by R. Craig Kohanek. If you have any questions about any of the statements contained in this document I can be reached at 503-986-0823.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to: Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

STATE OF OREGON
COUNTY OF WASCO
PROPOSED CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

OREGON WATER RESOURCES DEPARTMENT
725 SUMMER STREET NE, STE A
SALEM, OR 97301

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

APPLICATION FILE NUMBER: IS-88329

SOURCE OF WATER: SOUTH FORK MILL CREEK, TRIBUTARY TO MILL CREEK

COUNTY: WASCO

BENEFICIAL USE: PUBLIC USE, SPECIFICALLY FISH LIFE AND WILDLIFE

DATE OF PRIORITY: DECEMBER 1, 2016

To be maintained in:

SOUTH FORK MILL CREEK, TRIBUTARY TO MILL CREEK, BEGINNING AT THE CROW CREEK RESERVOIR DAM AT APPROXIMATELY RIVER MILE 10.1 (45.4751, -121.4544) (NENW, SECTION 20, TOWNSHIP 1S, RANGE 11E, WM): CONTINUING DOWNSTREAM TO THE MOUTH AT APPROXIMATELY RIVER MILE 0.0 (45.5506, -121.3079) (SESW, SECTION 22, TOWNSHIP 1N, RANGE 12E, WM) WASCO COUNTY.

The right is established under Oregon Revised Statute 537.341

The following conditions apply to the use of the 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
0	0	0	0	0	12.1	10	8.7	7	7	7	0

The water right holder shall measure and report the instream flow along the reach of the stream or river described in the certificate as may be required by the standards for instream water right reporting of the Water Resources Commission.

For purposes of water distribution, this instream right shall not have priority over human consumption.

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.

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

Issued _____

DRAFT

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department



April 20, 2017

Water Rights Section
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

RE: Comments, Hood River Basin Instream Water Rights Applications, IS 88321, IS 88322, IS 88324, IS 88325, IS 88326, IS 88327, IS 88329, IS 88330, IS 88331, IS 88334, IS 88335, IS 88337

Dear Oregon Water Resources Department,

Thank you for the opportunity to comment on the IRs for ODFW's fourteen applications for instream water rights in the Hood River Basin (IS 88321, IS 88322, IS 88324, IS 88325, IS 88326, IS 88327, IS 88329, IS 88330, IS 88331, IS 88334, IS 88335, IS 88337).

WaterWatch strongly supports the issuance of the fourteen Hood River Basin instream water rights in the amounts requested by ODFW in its applications. That said, we did have some comments/concerns with the IRs as proposed.

1. There is no statutory authority to restrict ODFW requested flow amounts to ENAF

The IRs propose to limit the flow amounts protected by the instream water rights to the estimated average natural flow (ENAF). In all but two of the fourteen applications, this would result in instream protections of less flow than requested by ODFW.¹ The OWRD is relying on OAR 690-077-0015(4) as support for this restriction. As the OWRD is aware, there is currently an ongoing rulemaking regarding Division 77. One of the outstanding issues is the legality of this provision of rule. The Rules Advisory Committee has been advised that this, among other issues, is under review by the Department of Justice. There are two issues related to this rule.

First, there is no statutory authority that allows carte blanche limitation on instream water rights applications. While the Instream Water Right Act does allow the WRD to reduce the amount applied for in an instream water right application by another state agency, this is only allowed upon findings that sets for the basis for the reduction in the specific instance associated with the facts of a specific application. ORS 537.343(2). Moreover, the OWRD can only do this if the conditioning is consistent with the intent of ORS 537.332 to 537.360. To set an overarching limit to all agency applied instream water rights based on an overall "estimated average natural flow" (ENAF) is not supported by statute and is contrary to the intent of the Act to protect water instream for the beneficial uses of fish, wildlife, recreation and pollution abatement. The ENAF flow number has nothing to do with the beneficial use that these rights are supposed to protect and simply provides a false ceiling for the purposes of application processing. As to the IRs, the OWRD simply applied the ENAF to all the applications to reduce the amounts requested by ODFW; OWRD did not make any findings that set the basis for the reduction specific to the circumstances of each of the fourteen applications as is required by statute. The OWRD was in error in this regard.

¹ For IS 88334 and IS 88335 the ENAF is greater than the amount requested thus these are the only two applications where the IR's reflect the amount requested by ODFW.

Second, even if DOJ were to find that the noted section of the Division 77 rules were consistent with statute (which we do not believe is the case), the OWRD appears to be ignoring the whole of the section of rule they cite. The IRs state that:

"Water allocable for instream use is limited to the average natural flow. Specifically, (OAR 690-077-0015(4)) states "If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system....."

The IRs fail to completely cite OAR 690-077-0015(4) which continues on with:

.....except where periodic flow or level are significant for the uses applied for. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.

In other words, even if the DOJ were to determine that a carte blanche ENAF screen could be applied to instream water rights, the OWRD would still need to make findings that the requested amount was not significant for the uses applied for for each individual application in order to reduce the amount requested to ENAF. The OWRD did not do this and thus the IRs are in error.

As a factual matter, the ODFW requested flow numbers are to support the conservation, maintenance and enhancement of aquatic, fish and wildlife. The flows applied for include water for fish and wildlife migration, spawning, nesting, brooding, egg incubation, larval or juvenile development and aquatic rearing and aquatic life. Flows vary based on life cycle and life stage development needs. These flows were determined by ODFW, the state agency with expertise to determine the amount of water needed for fish and wildlife. Thus, even if the OWRD were to apply the above noted provision of the Division 77 rules, it is clear that the flows are significant for the uses applied for. Thus, even under the disputed rule, OWRD analysis should have resulted in a recommendation that the full amount of the water right be approved as the flows are "significant" for the uses applied for. Thus, under both statute and rule the IR is in error.

2. The OWRD erred in its application of the state's water allocation policy

In addition to restricting the flow amounts requested by ODFW by ENAF, the OWRD also applies its water availability screen to the application to further reduce requested amount. While we do not disagree that the permitting statutes require that the WRD find that water is available for the use, we believe the OWRD was in error in how it applied the state's water allocation policy. The state's water allocation policy, read as a whole, is clearly focused on protecting streams against further depletion. See OAR 690-400(11), OAR 690-410-070. Specifically, the water allocation policy makes clear that the waters of the state shall be protected from over-appropriation by new out of stream users of surface water or new uses of groundwater. OAR 690-410-070(1). To achieve this the OAR 690-410-070(2)(a) states:

The surface waters of this state shall be allocated to new out-of-stream uses only during the months or half month periods when the allocations will not contribute to over-appropriation. However, when a stream is over-appropriated, some additional uses may be allowed where the public interest in those uses is high and uses are conditioned to protect instream values (emphasis added).

In other words, the water availability restrictions under this rule apply to out-of-stream diversions. The allocation policy is not designed to restrict instream water rights. The Division 77 rules corroborate this

interpretation by directing that "the amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." OAR 690-77-0015(3)². To try to restrict water that remains instream via a rule that is supposed to apply to consumptive uses of surface water is in error, and frankly, makes no sense.

Moreover, even if the Division 410 rules did apply to instream applications, instream water rights would easily meet the "exception" to the rule which is that, notwithstanding that a stream is over-appropriated, additional uses can be approved where the public interest is high and uses are conditioned to protect instream values. See OAR 690-410-070(2)(a). Clearly, instream water rights that are held in trust for all Oregonians to protect water instream easily meet both of these hurdles.

3. The OWRD fails to analyze the fourteen applications in light of the many public interest factors that would support the issuance of the instream water rights in the amount requested by ODFW.

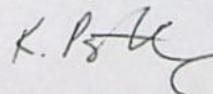
In looking at this application, the WRD failed to analyze a number of public interest factors that would support issuance the ODFW applications in the amount requested, which includes, but is not limited to:

- The Hood River Basin supports five fish species protected by the Federal Endangered Species Act.³ Flow is listed as a limiting factor.
- OAR 690-410-030 (d) states that protecting streamflows which are needed to support public uses is a high priority for the state. Public use is defined as, among other things, protection and enhancement of fish life, wildlife and fish and wildlife habitat and any other ecological values OAR 690-400-010(13).
- The 2012 Integrated Water Resources Strategy directs the state to apply for instream water rights to protect both base and elevated flows.⁴
- As noted, the Division 77 rules state that the amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right.

Conclusion: WaterWatch supports issuance of the fourteen Hood River instream water rights in the amounts requested by ODFW. As to the amounts proposed under the IRs that restrict twelve of the fourteen applications, we do not believe the OWRD has a factual, legal or policy basis upon which to support the restrictions proposed in the IRs.

Thank you for consideration of our comments.

Sincerely,



Kimberley Priestley
Sr. Policy Analyst

Cc: Laurie Aunan, Governor's Natural Resources Policy Advisor

² The state's water availability model is subtracts out the consumptive uses of water rights, thus would not comport with the Division 77 regarding analysis of out-of-stream rights in relation to instream rights.

³ Bull trout, spring chinook, fall chinook, summer steelhead and winter steelhead.

⁴ WRC 2012 Integrated Water Resources Strategy, Page 100.



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

March 17, 2017

Director

In Care of Anna Pakenham-Stevenson
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302-1142

Reference: Instream water rights in the Hood Basin, Files IS 88321, IS 88322, IS 88323, IS 88324, IS 88325, IS 88326, IS 88327, IS 88328, **IS 88329**, IS 88330, 88331, IS 88334, IS 88335, IS 88337.

Dear Oregon Department of Fish and Wildlife:

**THIS IS NOT A WATER RIGHT CERTIFICATE
AND IS SUBJECT TO CHANGE AT THE NEXT PHASE OF PROCESSING**

This letter is to inform you of the preliminary analysis of your water right applications. 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 provided, the Water Resources Department has made the following preliminary determinations:

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

Initial Review Determinations:

1. The referenced applications are complete and not defective. However, OWRD requests the applicant provide additional information of how it has complied with its own administrative rules for instream water rights, as required by OAR 690-077-0020(4)(k), specifically those found in OAR 635-400-0020.
2. The proposed use is not prohibited, restricted or limited by law except for water availability limitations in certain months as depicted below.
3. The reach proposed in this application for an instream water right is in the Hood Basin.
4. The instream fish life uses and wildlife use are allowed under the Hood Basin Program OAR (690-504-0000(1)).
5. Water allocable for instream use is limited to the estimated average natural flow. Specifically, (OAR 690-077-0015(4) states "If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system ..."
6. All amounts of water identified in this document are in cubic feet per second.

7. Summary of determination: Some percentage of the water applied for has been determined allocable for the purpose identified in each application. That volume is shown in the table below titled "Allowable instream use" and if less than the volume shown in "Requested for Fish life and fish habitat" table is limited to the volume shown "Estimated average natural flow" table.

1. Application 88321

Priority date: 01/01/2016

Description:

- Eagle Creek, tributary to the Columbia River, beginning at river mile 2.1 (SWNW, S25, T2N, R7E, WM) in Hood River County (45.6278, -121.8988) and continuing downstream to river mile 0.0 (SWNE, S22, T2N, R7E, WM) in Multnomah County (45.6405, -121.9319).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
70	70	70	120	120	120	70	84	143	143	120	120

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
358	360	271	277	270	158	78.7	54.8	52.5	95.1	240	354

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
70	70	70	120	120	120	70	54.8	52.5	95.1	120	120

2. Application 88322

Priority date: 01/01/2016

Description:

- East Fork Hood River Creek, tributary to the Hood River, beginning at river mile 6.2 (SENW, S28, T1N, R10E, WM) in Hood River County (45.5451, -121.5814) and continuing downstream to river mile 0.0 (NWNE, S1, T1N, R9E, WM) in Hood River County (45.6053, -121.6333).

Based on OWRD's review, the Lat/Long (45.5451, -121.5814) for the start of the reach does not correspond to river mile (RM) 6.2 as indicated in the application. Please verify the QQ in which the start of the reach is located.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
180	210	210	210	210	210	150	150	175	175	180	180

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
325	351	340	359	392	367	272	197	169	160	201	282

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
70	70	70	120	120	120	150	150	169	160	180	180

3. Application 88323**Priority date: 01/01/2016**Description:

- Green Point Creek, tributary to West Fork Hood River, beginning at the confluence of the Green Point Creek and Long Branch Creek at river mile 3.1 (NWNE, S9, T1N, R9E, WM) in Hood River County (45.5914, -121.6987) and continuing downstream to river mile 0.0 (SENE, S12, T1N, R9E, WM) in Hood River County (45.5873, -121.6439).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
90	120	120	120	120	120	50	80	80	80	120	120

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
93.9	110	107	124	125	64.7	26.8	16.5	16.2	29	65.2	87.9

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
90	110	107	120	120	64.7	26.8	16.5	16.2	29	65.2	87.9

4. Application 88324**Priority date: 01/01/2016**Description:

- Confluence of East Herman Creek and Herman Creek, tributary to Columbia River, beginning at river mile 4.2 (NWSW, S15, T2N, R8E, WM) in Hood River County (45.6549, -121.819) and continuing downstream to river mile 0.0 (NESE, S6, T2N, R8E, WM) in Hood River County (45.6834, -121.8616).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
60	60	60	102	102	102	60	72	122	122	102	72

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
115	124	107	122	135	77.1	33.4	20.7	18.1	32.5	81.5	113

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
60	60	60	102	102	77.1	33.4	20.7	18.1	32.5	81.5	72

5. Application 88325**Priority date: 01/01/2016**Description:

- Lindsay Creek, tributary to Columbia River, beginning at the North Lake Dam at river mile 4.2 (NESE, S24, T2N, R8E, WM) in Hood River County (45.6429, -121.757) and continuing downstream to river mile 0.0 (NENE, S5, T2N, R9E, WM) in Hood River County (45.6903, -121.7136).

Based on OWRD's review of the application, if RM 4.2 is the start of the instream reach then it is located in the

SENE of Section 2 not the NESE of Section 24. Please verify the QQ in which the start of the reach is located. IS 72081 is for the same reach of Lindsay Creek and indicates NE SE of Section 24.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
20	20	20	34	34	34	20	20	41	41	34	20

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18	18.8	16.9	22.7	31.4	17.9	5.7	2.64	3.31	6.22	20	20

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18	18.8	16.9	22.7	31.4	17.9	5.7	2.64	3.31	6.22	20	20

6. Application 88326

Priority date: 01/01/2016

Description:

- Mill Creek, tributary to Columbia River, beginning at the confluence of North Fork and South Fork Mill Creek at river mile 8.1 (SESW, S22, T1N, R12E, WM) in Wasco County (45.5506, -121.3079) and continuing downstream to river mile 0.0 (SWSW, S34, T2N, R13E, WM) in Wasco County (45.5506, -121.3079).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	10	15	26	26	26	15	15	10	10	10	10

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
25.8	61	65.1	45.3	25.5	15.4	12.6	10.7	9.72	8.43	10.3	15.8

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	10	15	26	25.5	15.4	12.6	10.7	9.72	8.43	10	10

7. Application 88327

Priority date: 01/01/2016

Description:

- Neal Creek, tributary to Hood River, beginning at the confluence of West Fork Neal Creek and Neal Creek at river mile 5.8 (SESW, S6, T1N, R11E, WM) in Hood River County (45.5951, -121.4995) and continuing downstream to river mile 0.0 (NENE, S14, T2N, R10E, WM) in Hood River County (45.6639, -121.5256).

Based on OWRD's review of the application, the Lat/Long (45.5951, -121.4995) would put the start of the reach in the SWSW of section 6 not the SESW as indicated in the application. Please verify the QQ in which the start of the reach is located.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
45	45	45	45	45	45	45	45	45	25	25	25

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
26.4	41.9	40.1	27.6	9.98	4.91	2.41	1.95	2.15	2.96	4.8	10.6

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
26.4	41.9	40.1	27.6	9.98	4.91	2.41	1.95	2.15	2.96	4.8	10.6

8. Application 88328

Priority date: 01/01/2016

Description:

- Odell Creek, tributary to Hood River, beginning at river mile 4.0 (NESW, S34, T2N, R10E, WM) in Hood River County (45.6121, -121.5587) and continuing downstream to river mile 0.0 (NESW, S14, T2N, R10E, WM) in Hood River County (45.6566, -121.5396).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
20	50	50	50	50	50	20	20	20	20	20	20

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
8.55	15.7	16.3	9.25	.88	.17	.08	.09	.07	.13	.43	2.75

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
8.55	15.7	16.3	9.25	.88	.17	.08	.09	.07	.13	.43	2.75

9. Application 88329

Priority date: 01/01/2016

Description:

- South Fork Mill Creek, tributary to Mill Creek, beginning at the Crow Creek Reservoir Dam at river mile 10.1 (NENW, S20, T1S, R11E, WM) in Wasco County (45.474998, -121.451698) and continuing downstream to river mile 0.0 (SESW, S22, T1N, R12E, WM) in Wasco County (45.5506, -121.3079).

Based on OWRD's review of the application, The Lat/Long (45.474998, -121.451698) places the start of the reach in the NWNE of Section 20 not the NENW as indicated in the application. Please verify the QQ in which the start of the reach is located.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
0	0	0	0	0	17	10	10	7	7	7	0

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
16.2	37.4	40	35.3	20.6	12.1	10.1	8.7	8.3	7.2	7.6	10.2

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
0	0	0	0	0	12.1	10	8.7	7	7	7	0

10. Application 88330

Priority date: 01/01/2016

Description:

- West Fork Hood River, tributary to Hood River, beginning at the confluence of Elk Creek and McGee Creek at river mile 14.7 (SWNW, S25, T1S, R8E, WM) in Hood River County (45.4569, -121.7818) and continuing downstream to river mile 0.0 (NWNE, S1, T1N, R9E, WM) in Hood River County (45.6052, -121.6333).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
150	250	250	250	250	250	150	165	165	165	190	190

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
270	271	263	311	376	290	193	147	139	141	296	303

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
150	250	250	250	250	250	150	147	139	141	190	190

11. Application 88331

Priority date: 01/01/2016

Description:

- Fifteenmile Creek, tributary to the Columbia River, beginning at river mile 30.6 (SWSE, S25, T1S, R13E, WM) in Wasco County (45.4504, -121.1198) and continuing downstream to the mouth at river mile 0.0 (SWNW, S31, T2N, R14E, WM) in Wasco County (45.6141, -121.1231).

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
13	13	20	34	34	34	20	20	13	13	13	13

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
62.1	91.6	78	64	65	49.6	12.8	5.9	6.1	7.9	11.2	23.1

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
13	13	20	34	34	34	12.8	5.9	6.1	7.9	11.2	13

12. Application 88334

Priority date: 01/24/2016

Description:

- East Fork Hood River, tributary to the Hood River, just above the confluence of Polallie Creek with the East Fork Hood River at river mile 16.8 (SESE, S5, T2S, R10E, WM) in Hood River County (45.4185, -121.5685) and continuing downstream to river mile 6.2 (SESE, S5, T2S, R10E, WM) in Hood River County (45.5451, -121.5814).

Based on OWRD's review of the application, the start of the reach is listed at RM 16.8 miles just above the confluence of Polallie Creek and East Fork Hood River, in the SESE QQ, which is RM 14.3. The application lists the end of the reach at RM 6.2, which is RM 3.6. The listed Lat/Long's seemed more accurate and were used by OWRD. Please verify the RM and the QQ for the start of the reach and end of the downstream reach.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
175	175	175	175	175	175	110	110	145	145	175	175

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
271	260	260	349	509	409	255	170	163	171	267	269

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
175	175	175	175	175	175	110	110	145	145	175	175

13. Application 88335

Priority date: 01/24/2016

Description:

- East Fork Hood River, tributary to the Hood River, at the confluence of Cold Spring Creek and East Fork Hood River at river mile 17.8 (SWSE, S8, T2S, R10E, WM) in Hood River County (45.4048, -121.5703) and continuing downstream to river mile 16.8, just above the confluence with Polallie Creek (SESE, S5, T2S, R10E, WM) in Hood River County (45.4185, -121.5685).

Based on OWRD's review of the application, we ask that ODFW please verify the RM and QQ for the start and end of the reach. OWRD used the Lat/Long to place the start of the reach RM and the end of the reach RM.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
75	75	75	127	127	127	127	75	75	50	50	75

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
120	106	108	164	290	260	162	101	92	94	140	124

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
75	75	75	127	127	127	127	75	75	50	50	75

14. Application 88337

Priority date: 01/24/2016

Description:

- Fifteenmile Creek, tributary to the Columbia River, at the unnamed barrier at river mile 49.4 (NWSW, S28, T2S, R11E, WM) in Wasco County (45.3656, -121.4402) and continuing downstream to river mile 30.6 in Dufur at the Highway 197 crossing, (SWSE, S25, T1S, R13E, WM) in Wasco County (45.4504, -121.1196).

Based on OWRD's review of the application, the start of the reach is in Section 28 in the NWSE. However, RM 49.4 would put the start of the reach in the NWSE of Section 29. OWRD used the Lat/Long to place the start of the upstream reach. Please verify the QQ in which the start of the upstream reach is located.

a. The amount of water requested for instream use:

Requested for Fish life and fish habitat

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	10	15	26	26	26	15	15	10	10	10	10

Estimated average natural flow

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
38	47	33	28	34	28	9	4	4	7	11	17

Allowable instream use

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	10	15	26	26	26	9	4	4	7	10	10

The applications can be moved to the next phase of the water rights application review process. Comments received within the comment period will be evaluated at the next phase of the process.

Withdrawal:

If you choose not to proceed, you may withdraw your application. To accomplish this you must notify the Department in writing by March 31, 2016.

To Proceed with Your Application:

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

If you have any question:

Feel free to call Craig Kohanek at (503) 986-0823 if you have questions. Please have the application number(s) available if you call.

April 20, 2017

Ronald C. Kohanek
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Sent via email to: ron.c.kohanek@oregon.gov

Subject: Instream Water Rights in the Hood Basin, Files IS88321, IS88322, IS88323, IS88324, IS88325, IS88326, IS88327, IS88328, IS88329, IS88331, IS88334, IS88335, IS88337

Dear Oregon Water Resources Department:

East Fork Irrigation District (EFID) is submitting comments on the Hood River Basin instream water right applications Oregon Department of Fish and Wildlife (ODFW) have submitted to Oregon Water Resources Department (OWRD). Hood River is a leader in locally driven watershed planning, and EFID is concerned that in ODFW's efforts to protect instream water throughout Oregon, they failed to engage with the local communities.

Hood River, in partnership with the US Bureau of Reclamation and the Hood River County Water Planning Group (HRCWPG), completed a basin study that assesses the current and future water supply and demand in the Hood River Basin. The HRCWPG included Hood River County, Hood River Watershed Group, Columbia Gorge Fruit Growers Association, Hood River County Soil and Water Conservation District, multiple water districts, environmental groups, local resource specialist, irrigation districts, OWRD, the Confederated Tribes of Warm Springs and the Natural Resources Conservation Service. The collaborative process developed various projects that could address both instream and out-of-stream needs. Additionally, in 2015 the Hood River Water Conservation Strategy, which stemmed from the Hood River Basin Study, identified, quantified and prioritized the opportunities for water conservation and instream flow enhancement in the Hood River Basin.

EFID is concerned that ODFW will upend all the hard work Hood River has put into local planning by attempting to appropriate all remaining water on 14 stream systems in the Hood Basin for instream use without considering the creative options for addressing instream needs development by the community. Unfortunately, it appears to EFID that ODFW is operating in a vacuum which undermines all the efforts already put forth by the basin. Our district has worked well with the Hood River Watershed Group and its many partners in the Hood River Basin. Moving forward, ODFW should involve all stakeholders in the community, especially when the community has water planning groups in place. Meeting with the water stewards of the community would only be beneficial to ODFW in addressing the needs of a specific basin.

Additionally, EFID has some specific concerns with the application pertaining to the East Fork Hood River (EFHR). The district currently has one point of diversion on the EFHR with a single headgate delivery system. The district's water supply comes from the NE slopes of Mt. Hood. EFID is in the process of exploring the possibility of a reservoir site, as an alternate water source to help meet late season water demands when the flow on the river is low. If a reservoir site is built, EFID could potentially capture winter water runoff, drainage or district water, benefiting not only EFID patrons, but the flows of the EFHR during low water months.

Had ODFW engaged with the HRCWPG before applying for instream water rights within the Hood River Basin, they would have a more complete picture of the instream water needs and the well thought out projects the local community plans to implement in order to address those needs. One of the biggest issues EFID has with the instream water rights applied for by ODFW is that they will remove any flexibility the basin has to be creative in addressing all of the water supply demands now and into the future. The Hood River Basin's success in watershed planning illustrates that planning efforts work best when diverse interests develop and implement plans at the local watershed level, with the support from state government. In this instance, ODFW is not working as a collaborative partner, but is operating outside of the process and potentially restricting it. EFID requests that OWRD deny the instream water right applications put forth by ODFW and encourage them to work with the HRCWPG in developing instream protections that will work within the already identified plans.

Thank you for the opportunity for EFID to comment and express our concerns with the Hood River Basin instream water right applications submitted by ODFW. Please do not hesitate to contact me if you have any questions about our comments or would like to discuss this issue further.

Thank-You
John Buckley-District Manager
East Fork Irrigation District
PO Box 162
Odell , Oregon 97044
Office Phone: 541-354-1185
Cell Phone: 541-490-6127
E-Mail : johnefid@hoodriverelectric.net

APPLICATION FACT SHEET

Application File Numbers: IS 88321, IS 88322, IS 88323, IS 88324, IS 88325, IS 88326, IS 88327, IS 88328, IS 88329, IS 88330, IS 88331, IS 88334, IS 88335, IS 88337.

Applicant: Oregon Department of Fish and Wildlife

Counties: Hood & Wasco

Watermaster: Bob Wood, District 3

Priority Date: December 1, 2016

Sources: 1) Eagle Creek, tributary to the Columbia River; 2) East Fork Hood River Creek, tributary to the Hood River; 3) Green Point Creek, tributary to West Fork Hood River; 4) Confluence of East Herman Creek and Herman Creek; 5) Lindsay Creek, tributary to Columbia River; 6) Mill Creek, tributary to Columbia River; 7) Neal Creek, tributary to Hood River; 8) Odell Creek, tributary to Hood River; 9) South Fork Mill Creek, tributary to Mill Creek; 10) West Fork Hood River, tributary to Hood River; 11) Fifteen Mile Creek, Tributary to Columbia River; 12) East Fork Hood River, tributary to Hood River; 13) East Fork Hood River, tributary to the Hood River 14) Fifteen Mile Creek, Tributary to Columbia River.

Uses: Fish life and wildlife

Quantity:

Basin Name & Number: Hood Basin, #3

Stream Index Reference: OWRD Streamcode: 0400101460 - Eagle Cr, 0417400150 - E Fk Hood R, 04174001400040050 - Long Branch Cr, 0400101500 - Herman Cr, 0400101600 - Lindsay Cr, 04001019000200 - N Fk Mill Cr, 0417400070 - Neal Cr, 0417400090 - Odell Cr, 04001019000190 - S Fk Mill Cr, 0417400140 - W Fk Hood R, 0400101940 - Fifteenmile Cr, 0417400150 - E Fk Hood River, 0417400150 - E Fk Hood River, 1707010503 - Fifteenmile Cr.

PUBLIC NOTICE DATE:

30 DAY COMMENT DEADLINE DATE:



Oregon Water Resources Department
Water Availability Analysis

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Water Availability Analysis

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S FK MILL CR > MILL CR - AT MOUTH
HOOD BASIN

Water Availability as of 12/27/2016

Watershed ID #: 72078 [\(Map\)](#)

Date: 12/27/2016

Exceedance Level: 50%

Time: 2:18 PM

[Download Data](#)

Water Availability

Select any Watershed for Details

Nesting Order	Watershed ID #	Stream Name	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Sto
1	70246	MILL CR> COLUMBIA R- AT MOUTH	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	Yes	No	No	Yes
2	72078	S FK MILL CR> MILL CR- AT MOUTH	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	Yes	No	No	Yes

Limiting Watersheds

Monthly Streamflow in Cubic Feet per Second
Annual Volume at 50% Exceedance in Acre-Feet

Month	Limiting Watershed ID #	Stream Name	Water Available?	Net Water Available
JAN	70246	MILL CR > COLUMBIA R - AT MOUTH	Yes	4.12
FEB	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	15.30
MAR	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	15.00
APR	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	8.65
MAY	70246	MILL CR > COLUMBIA R - AT MOUTH	Yes	0.95
JUN	70246	MILL CR > COLUMBIA R - AT MOUTH	No	-7.56

JUL	70246	MILL CR > COLUMBIA R - AT MOUTH	No	-1.55
AUG	70246	MILL CR > COLUMBIA R - AT MOUTH	No	-2.59
SEP	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	1.56
OCT	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	1.03
NOV	70246	MILL CR > COLUMBIA R - AT MOUTH	No	-7.25
DEC	70246	MILL CR > COLUMBIA R - AT MOUTH	No	-2.04
ANN	72078	S FK MILL CR > MILL CR - AT MOUTH	Yes	2,760.00

Detailed Reports for Watershed ID #70246

MILL CR > COLUMBIA R - AT MOUTH
HOOD BASIN

Water Availability as of 12/27/2016

Watershed ID #: 70246 ([Map](#))

Date: 12/27/2016

Exceedance Level: 50%

Time: 2:18 PM

Water Availability Calculation

Monthly Streamflow in Cubic Feet per Second
Annual Volume at 50% Exceedance in Acre-Feet

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Month	Natural Stream Flow	Consumptive Uses and Storages	Expected Stream Flow	Reserved Stream Flow	Instream Flow Requirement	Net Water Available
JAN	25.80	6.68	19.10	0.00	15.00	4.12
FEB	61.00	17.50	43.50	0.00	15.00	28.50
MAR	65.10	17.50	47.60	0.00	15.00	32.60
APR	45.30	13.60	31.70	0.00	15.00	16.70
MAY	25.50	9.55	15.90	0.00	15.00	0.95
JUN	15.40	7.96	7.44	0.00	15.00	-7.56
JUL	12.60	4.15	8.45	0.00	10.00	-1.55
AUG	10.70	3.29	7.41	0.00	10.00	-2.59
SEP	9.72	3.27	6.45	0.00	4.00	2.45
OCT	8.43	3.28	5.15	0.00	4.00	1.15
NOV	10.30	2.55	7.75	0.00	15.00	-7.25
DEC	15.80	2.84	13.00	0.00	15.00	-2.04
ANN	18,300.00	5,520.00	12,800.00	0.00	8,920.00	5,120.00

Detailed Report of Consumptive Uses and Storage

Consumptive Uses and Storages in Cubic Feet per Second

Month	Storage	Irrigation	Municipal	Industrial	Commercial	Domestic	Agricultural	Other	Total
JAN	4.67	0.00	2.00	0.00	0.00	0.01	0.00	0.00	6.68
FEB	15.50	0.00	2.00	0.00	0.00	0.01	0.00	0.00	17.50
MAR	15.50	0.00	2.00	0.00	0.00	0.01	0.00	0.00	17.50
APR	9.33	2.26	2.00	0.00	0.00	0.01	0.00	0.00	13.60
MAY	1.33	6.21	2.00	0.00	0.00	0.01	0.00	0.00	9.55
JUN	0.81	5.14	2.00	0.00	0.00	0.01	0.00	0.00	7.96
JUL	0.66	1.48	2.00	0.00	0.00	0.01	0.00	0.00	4.15
AUG	0.56	0.72	2.00	0.00	0.00	0.01	0.00	0.00	3.29
SEP	0.51	0.75	2.00	0.00	0.00	0.01	0.00	0.00	3.27
OCT	1.27	0.00	2.00	0.00	0.00	0.01	0.00	0.00	3.28
NOV	0.54	0.00	2.00	0.00	0.00	0.01	0.00	0.00	2.55
DEC	0.83	0.00	2.00	0.00	0.00	0.01	0.00	0.00	2.84

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Detailed Report of Reservations for Storage and Consumptive Uses

Reserved Streamflow in Cubic Feet per Second

No reservations were found for this watershed.

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Detailed Report of Instream Flow Requirements

Instream Flow Requirements in Cubic Feet per Second

Application #	Status	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MF194A	CERTIFICATE	15.00	15.00	15.00	15.00	15.00	15.00	10.00	10.00	4.00	4.00	15.00	15.00
IS70246A	CERTIFICATE	4.00	4.00	10.00	15.00	15.00	15.00	10.00	10.00	4.00	4.00	4.00	4.00
Maximum		15.00	15.00	15.00	15.00	15.00	15.00	10.00	10.00	4.00	4.00	15.00	15.00

Detailed Reports for Watershed ID #72078

S FK MILL CR > MILL CR - AT MOUTH
HOOD BASIN

Water Availability as of 12/27/2016

Watershed ID #: 72078 ([Map](#))

Date: 12/27/2016

Exceedance Level: 50%

Time: 2:18 PM

Water Availability Calculation

Monthly Streamflow in Cubic Feet per Second
Annual Volume at 50% Exceedance in Acre-Feet

Month	Natural Stream Flow	Consumptive Uses and Storages	Expected Stream Flow	Reserved Stream Flow	Instream Flow Requirement	Net Water Available
JAN	16.20	4.53	11.70	0.00	7.00	4.67

FEB	37.40	15.10	22.30	0.00	7.00	15.30
MAR	40.00	15.00	25.00	0.00	10.00	15.00
APR	35.30	9.65	25.60	0.00	17.00	8.65
MAY	20.60	1.69	18.90	0.00	17.00	1.91
JUN	12.10	1.03	11.10	0.00	7.80	3.27
JUL	10.10	0.79	9.31	0.00	4.80	4.51
AUG	8.70	0.67	8.03	0.00	5.40	2.63
SEP	8.30	0.64	7.66	0.00	6.10	1.56
OCT	7.20	1.37	5.83	0.00	4.80	1.03
NOV	7.60	0.57	7.03	0.00	5.50	1.53
DEC	10.20	0.76	9.44	0.00	7.00	2.44
ANN	12,800.00	3,080.00	9,730.00	0.00	6,000.00	3,730.00

Detailed Report of Consumptive Uses and Storage

Consumptive Uses and Storages in Cubic Feet per Second

Month	Storage	Irrigation	Municipal	Industrial	Commercial	Domestic	Agricultural	Other	Total
JAN	4.53	0.00	0.00	0.00	0.00	0.00	0.00	0.00	4.53
FEB	15.10	0.00	0.00	0.00	0.00	0.00	0.00	0.00	15.10
MAR	15.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	15.00
APR	9.59	0.06	0.00	0.00	0.00	0.00	0.00	0.00	9.65
MAY	1.54	-0.15	0.00	0.00	0.00	0.00	0.00	0.00	1.69
JUN	0.90	0.13	0.00	0.00	0.00	0.00	0.00	0.00	1.03
JUL	0.75	0.04	0.00	0.00	0.00	0.00	0.00	0.00	0.79
AUG	0.65	0.02	0.00	0.00	0.00	0.00	0.00	0.00	0.67
SEP	0.62	0.02	0.00	0.00	0.00	0.00	0.00	0.00	0.64
OCT	1.37	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.37
NOV	0.57	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.57
DEC	0.76	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.76

Detailed Report of Reservations for Storage and Consumptive Uses

Reserved Streamflow in Cubic Feet per Second

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No reservations were found for this watershed.

Detailed Report of Instream Flow Requirements

Instream Flow Requirements in Cubic Feet per Second

Application #	Status	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
IS72078A	CERTIFICATE	7.00	7.00	10.00	17.00	17.00	7.80	4.80	5.40	6.10	4.80	5.50	7.00
Maximum		7.00	7.00	10.00	17.00	17.00	7.80	4.80	5.40	6.10	4.80	5.50	7.00

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Oregon Water Resources Department Attribute Report

Report Date: Dec 27, 2016

General:

TRSQQ:	WM1.00S11.00E20NENE WM1.00S11.00E17SWSE WM1.00S11.00E20SWNE WM1.00S11.00E20SENW WM1.00S11.00E20NWNE WM1.00S11.00E20NENW WM1.00S11.00E17SESW
DLC:	-
Latitude:	45.4750568714
Longitude:	-121.4517522339
Buffer (ft):	1320
Elevation (ft):	2607
Basin Name:	Hood
Basin Plan:	2-Wasco
County:	Wasco
WM District:	3
WM Region:	NORTH CENTRAL
ODFW Region, District:	High Desert, Mid-Columbia District
Irrigation District AOI:	-
Irrigation District, Other:	-
Dams (Permit):	CROW CREEK RESERVOIR (WASCO) <u>-null</u>

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Water Rights:

[Platcard for WM1.00S11.00E20](#)
[Platcard for WM1.00S11.00E17](#)
[Platcard for WM1.00S11.00E20](#)
[Platcard for WM1.00S11.00E20](#)
[Platcard for WM1.00S11.00E20](#)
[Platcard for WM1.00S11.00E20](#)
[Platcard for WM1.00S11.00E17](#)

Well Logs:

[Logs for WM1.00S11.00E20](#)
[Logs for WM1.00S11.00E17](#)
[Logs for WM1.00S11.00E20](#)
[Logs for WM1.00S11.00E20](#)
[Logs for WM1.00S11.00E20](#)
[Logs for WM1.00S11.00E20](#)
[Logs for WM1.00S11.00E17](#)

Rules:

Withdrawn Authority:

-

Groundwater Retricted:

-

GW Retricted Subunit:

-

GW ODEQ Management Area:

-

GW Umatilla Muni Wells (5mile):

-

Rule 4D:

Rules apply

Division 33 (Area, Watershed,
species):

UPPER COLUMBIA, Mill Creek-Columbia River, Pacific
Lamprey, Coastal Cutthroat Trout, Chinook Salmon, Steelhead,
Redband Trout

Water Quality Limited Pollutant:

South Fork Mill Creek
R. Mile: 0 to 10.6
HUC4: 17070105
Pollutant: Temperature
Season: NaN
Uses: Salmon and trout rearing and migration

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Status: Cat 4A: Water quality limited, TMDL approved
Action: Delisted - TMDL approved

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Is in Deschutes Study Area: -
Deschutes Zone Impact: -
Deschutes Zone Overlay: -
Scenic Water Way: -

Hydrography:

OWRD Streamcode: 04001019000190 - S Fk Mill Cr
04001019000190240 - Unn Str
04001019000190280 - Crow Cr
Waterbody Name: -
HUC 10: 1707010504
HUC Watershed: Mill Creek-Columbia River
WAB Wshed Order: 2
WAB Analysis: S FK MILL CR > MILL CR - AT MOUTH
Streamflow: OWRD Opportunities: Fair
ODFW Needs: High
Combined Priority: Not a priority
Gaging Station Data: -

Sources:

General
Oregon Public Land Survey Quarter-quarters. Bureau of Land Management, Oregon Water Resources Department.. n.d. 1:24,000.

Donated Land Claims. Oregon Water Resources Department. January 1, 1995. 1:100,000.

Elevation. ESRI World Elevation. February 2000. 1:121,000.

OWRD Administrative Basins. Oregon Water Resources Department. January 1, 1995.

Oregon Counties. Bureau of Land Management (BLM), Oregon State Office.. January 1, 2008.

OWRD Watermaster Districts. Oregon Water Resources Department. March 31, 2014.

OWRD Regions. Oregon Water Resources Department. January 1, 1995.

ODFW Districts and Regions. Oregon Department of Fish and Wildlife. August 28, 2012.

Water Organizations Oregon Water Resources Department. April 1, 2013. 1:24,000.

Large Dams Inventory. Oregon Water Resources Department. August 12, 2014. 1:24,000.

Rules

Withdrawn Authority Areas. Oregon Water Resources Commission. January 1, 2007.

OWRD Groundwater Restricted Areas. Oregon Water Resources Department. October 5, 2016.

OWRD Groundwater Restricted Areas - Subunits. Oregon Water Resources Department. April 1, 2009.

ODEQ Groundwater Management Areas (GWMAs). Oregon Department of Environmental Quality. April 21, 2008.

Groundwater Umatilla Municipal Wells 5-mile buffer. Oregon Water Resources Department. June 28, 2012.

National Marine Fisheries Service (NMFS) 4(d) Rule. National Marine Fisheries Service. January 1, 2007.

OAR Chapter 690, Division 33 - HUC 10 . Oregon Department of Fish & Wildlife. January 1, 2003.

Oregon Water Quality Assessment 2010. This data set was assembled by the Oregon Department of Environmental Quality, Water Quality Division, Standards and Assessments Section. GIS data prepared by the Watershed Management Section, Drinking Water Program.. August 16, 2013.

Deschutes USGS Groundwater Study Area. Water Resources Commission, U.S. Geological Survey (USGS) Water Resources Division

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(Portland, OR), Oregon Water Resources Department.. January 1, 2001. 1:100,000.

Deschutes Zones of Impact. Oregon Water Resources Department.. October 25, 2007.

Deschutes Zones Overlay. Oregon Water Resources Department. October 25, 2007.

Oregon State Scenic Waterway areas. Oregon Water Resources Department, Oregon Parks and Recreation Department.. January 1, 2007.

Hydrography

Routed OWRD Streamcodes (conflated to the NHD). Oregon Water Resources Dept.. August 11, 2014.

. Unknown. n.d.

Watershed Boundary Dataset (WBD), 10-digit (watershed). Pacific Northwest Hydrography Framework, U.S. Geological Survey (USGS), National Resources Conservation Service (NRCS).. June 11, 2014. 1:24,000.

Water Availability Basins. Oregon Water Resources Department.. n.d. 1:100,000.

Priority Watersheds for Streamflow Restoration. Oregon Water Resources Dept. and the Oregon Dept. of Fish & Wildlife.. January 15, 2004.

Stream Gage Stations. Oregon Water Resources Department and US Geological Survey. n.d.

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Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem OR 97301-1266
503-986-0900
www.oregon.gov/owrd

Application for Instream Water Right Certificate

SECTION 1: ORGANIZATION INFORMATION AND SIGNATURE

Organization Information

NAME OREGON DEPT. OF FISH AND WILDLIFE		PHONE 503-947-6000	FAX 503-947-6202
ADDRESS 4034 FAIRVIEW INDUSTRIAL DR. SE			CELL
CITY SALEM	STATE OR	ZIP 97302-1142	E-MAIL *

Agent Information – The agent is authorized to represent the applicant in all matters relating to this application.

AGENT / BUSINESS NAME ANNA PAKENHAM STEVENSON / OREGON DEPT. OF FISH AND WILDLIFE		PHONE 503-947-6084	FAX 503-947-6202
ADDRESS 4034 FAIRVIEW INDUSTRIAL DR. SE			CELL
CITY SALEM	STATE OR	ZIP 97302-1142	E-MAIL * ANNA.P.STEVENSON@STATE.OR.US

* By providing an e-mail address, consent is given to receive all correspondence from the Department electronically. (Note that paper copies of the Final Order documents will also be mailed.)

Anna Pakenham Stevenson
Water Program Manager

12/1/16

Applicant Signature

Print Name and Title

Date

Applicant Signature

Print Name and Title

Date

SECTION 2: NOTIFICATION TO DEQ, ODFW, AND PARKS

Please indicate the date you notified other state agencies of your intent to file an instream water right application.

Oregon Department of Environmental Quality was notified on: October 17 2016

Oregon Department of Fish and Wildlife was notified on: N/A

Oregon Parks and Recreation Department was notified on: October 17 2016

SECTION 3: NOTIFICATION TO AFFECTED LOCAL GOVERNMENTS

☒ Please provide copies of letters of your intent to file an instream water right application to each affected local government within whose jurisdiction the instream use is proposed. Affected local government means any city, county or metropolitan service district formed under ORS Chapter 268 or an association of local governments performing land-use planning functions under ORS 197.190.

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SECTION 4: SOURCE AND REACH

Stream or lake name: South Fork Mill Creek

Tributary to: Mill Creek

If the source is a stream, indicate the reach delineated by river mile (the upstream point to the downstream point) of the proposed instream water right:

Beginning at the mouth of South Fork Mill Creek, tributary to Mill Creek, river mile 0.0 in the SESW quarter of Section 22, Township 1 N, Range 12 E W.M. in Wasco County (45.5506, -121.3079) and continuing upstream to the Crow Creek Reservoir Dam at river mile 10.1 in the NENW quarter of Section 20, Township 1 S, Range 11 E W.M. in Wasco County (45.474998, -121.451698).

If the source is stored water that is authorized under a water right permit, certificate, or decree, attach a copy of the document or list the document number (for decrees, list the volume and page, or decree name). _____

☐ If the source is stored water and you do not, or will not, own the reservoir(s), please enclose a copy of your written agreement with the owner of the reservoir to release flows identified in this application.

SECTION 5: PUBLIC USES AND AMOUNTS

The public uses to be served by the requested instream water right are: For the conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat. Applied flows include water for fish and wildlife migration, spawning, nesting, brooding, egg incubation, larval or juvenile development, juvenile and adult rearing and aquatic life. Flow levels will vary based on life cycle and life stage development needs.

The monthly (or half-monthly) flows in cubic feet-per-second (CFS) or acre-feet (AF) or by lake elevation (LE) necessary to support the public uses are:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	Unit
0	0	0	0	0	17	10	10	7	7	7	0	CFS

If this is a multi-agency request, please indicate the monthly (or half-monthly) flows in cubic feet-per-second (cfs) or acre-feet (af) or by lake elevation (le) that are necessary to support the public uses for each category of public use.

USE	J	F	M	A	M	J	J	A	S	O	N	D	
													☐ CFS ☐ AF ☐ LE
													☐ CFS ☐ AF ☐ LE

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SECTION 6: DATA, METHODS, AND COMPLIANCE

Please describe the technical data and methods used to determine the requested amounts.

The Oregon Method (Thompson 1972) was used in the Basin Investigations to develop flow recommendations. The Oregon Method is a habitat based method that determines the degree of habitat at different streamflow rates and life stages. It requires repeated measurements at different flows. The criteria cover fish spawning, adult migration, and rearing habitat. The desired flow levels are determined by examining flow vs. habitat at different flow levels. Methods for assessing flow needs for spawning, rearing and passage were described by Thompson (1972) as follows:

- Spawning and incubation flows were based on transect measurements with species-specific depth, velocity, and substrate criteria. Repeated measurements over a range of flows were used to develop a relationship of total spawning area vs. discharge.
- Rearing flows were based on repeated measurements, over a range of flows, of the following parameters: adequate depth over key riffles, riffle-pool ratio (i.e. sufficient connectivity between pools), average riffle and pool depths and velocities, and availability of instream cover.
- Passage flows were based on repeated depth measurements at transects across the shallowest riffles judged most likely to impede upstream migration of adult salmonids. Passage criteria were based on the percentage of adequate depth along the transects as a function of discharge.

Please provide written documentation of how your agency complied with the requirements contained in your own administrative rules for instream water rights, including application of the required methods to determine requested flows.

ODFW followed all procedures laid out in the agency's 635-400-0015 rules- Determination of Instream Flow Measurement Methodologies. Specifically, the Basin Investigation Report (BIR) flows for this instream flow recommendation were based on 'The Oregon Method', an approved method for determining an instream flow requirement. The BIR identifies fish and wildlife resources of the basin, their distribution, limiting factors, harvest, and water requirements. Stream flow recommendations of the BIR are specifically designed to meet the seasonal biological requirements of the basin's fish. These BIR flow recommendations were used in this instream water right application (see attached BIR: "Hood Basin Supplement" Appendix 2 page 18).

ODFW will also coordinate with OWRD instream water rights monitoring (635-400-0025). Specifically, ODFW will coordinate with OWRD to develop monitoring plans for instream water rights and to revise the existing Memorandum of Understanding between the Department and WRD to include issues related to instream water rights, such as measuring, monitoring and enforcement of instream water rights.

References:

Thompson, K.E., 1972. Determining stream flows for fish life. Pages 31-50 plus appendices in Proceedings of the Instream Flow Requirement Workshop, March 15-16, 1972, Portland, Oregon. Pacific Northwest River Basins Commission.

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SECTION 7: WITHIN A DISTRICT

If the reach is located within an irrigation district or other water district, please provide their contact information.

Irrigation District Name None	Address	
City	State	Zip
Water District Name City of The Dalles	Address 1215 West 1st Street	
City The Dalles	State OR	Zip 97058

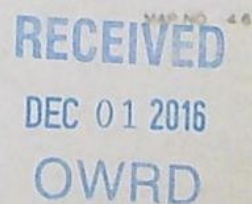
SECTION 8: REMARKS

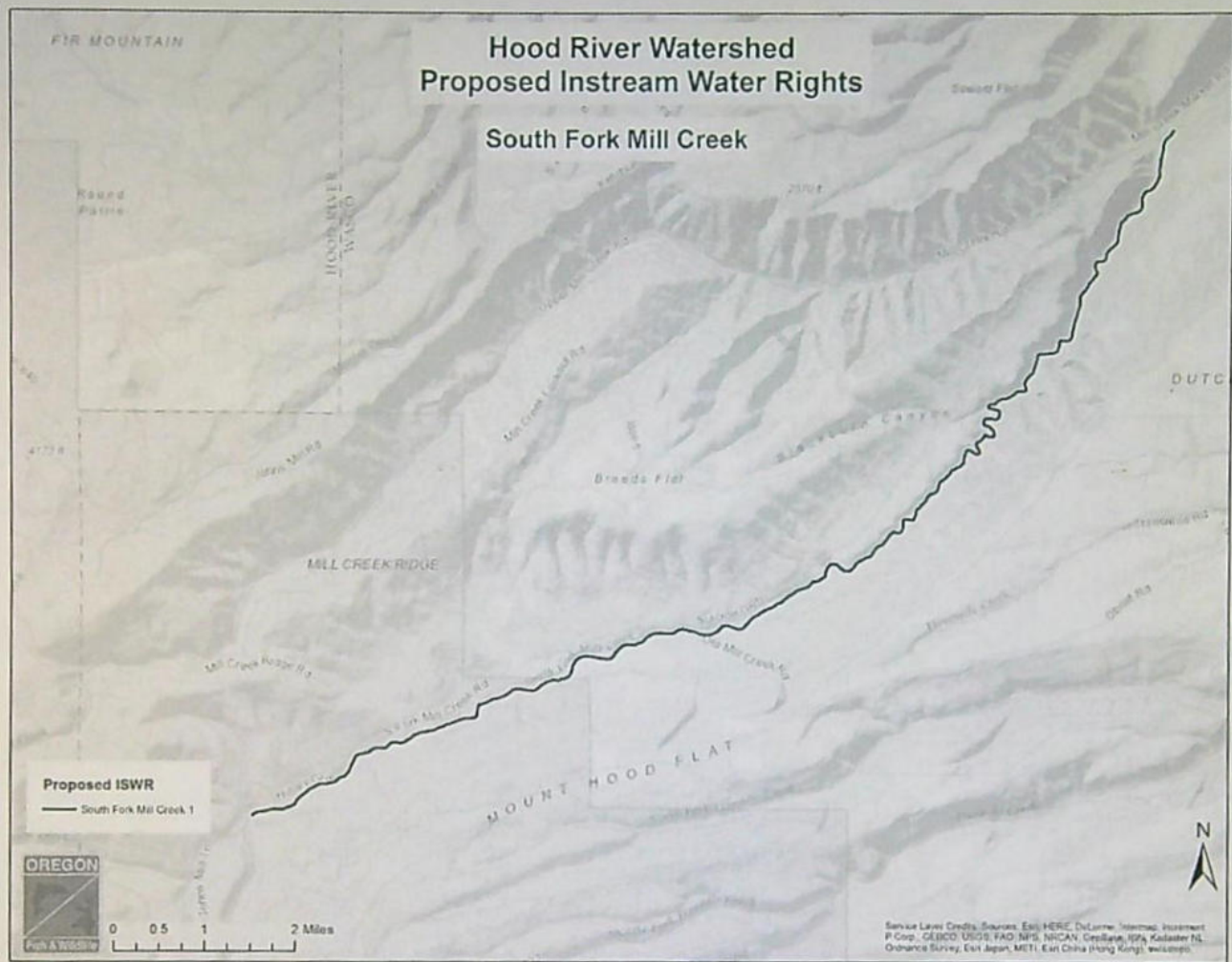
Use this space to clarify any information you have provided in the application. _____

SECTION 9: MAP

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South Fork Mill Creek





YOU ARE ENCOURAGED TO PROVIDE THIS INFORMATION:

A means and location for measuring the instream water right:

The strategy and responsibility for monitoring flows for the instream right:

Any provisions needed for managing the water right to protect the public uses: None

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760 SW Ninth Ave., Suite 3000
Portland, OR 97205
T. 503.224.3380
F. 503.220.2480
www.stoel.com

HAYLEY K. SILTANEN
D. 503.294.9295
hayley.siltanen@stoel.com

December 1, 2017

BY HAND DELIVERY

Tom Byler
Director
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Protests to PFOs Issued for Water Right Application Nos. IS-88322, IS-88323, IS-88326, IS-88327, IS-88328, IS-88329, IS-88330, IS-88331, IS-88332, IS-88333, IS-88334, IS-88335, IS-88336, IS-88337, and IS-88355

Dear Director Byler:

Please find enclosed protests of the above-referenced instream water right applications and required filing fees.

This firm represents East Fork Irrigation District, Oregon Farm Bureau Federation, Hood River County Farm Bureau, and Columbia Gorge Fruit Growers in connection with protests of application numbers IS-88322, IS-88327, IS-88334, and IS-88335.

This firm represent Oregon Farm Bureau Federation, Hood River County Farm Bureau, and Columbia Gorge Fruit Growers in connection with protests of application numbers IS-88323, IS-88328, IS-88330, IS-88332, IS-88333, and IS-88336.

This firm represent Oregon Farm Bureau Federation, Wasco County Farm Bureau, and Columbia Gorge Fruit Growers in connection with protests of application numbers IS-88326, IS-88329, IS-88331, and IS-88337.

Finally, this firm represents Oregon Farm Bureau Federation and Clackamas County Farm Bureau in connection with protest of application number IS-88355.

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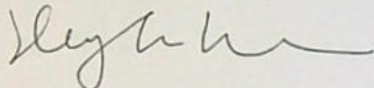
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Tom Byler
December 1, 2017
Page 2

Please contact David Filippi at (503) 294-9529 or david.filippi@stoel.com if you have any questions regarding this letter or the above-listed protests.

Sincerely,



Hayley K. Siltanen

Enclosures

cc (via email):

John Buckley
Mary Anne Cooper
Randy Kiyokawa
Ken Polehn
Mike Doke
Matt Bunch

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Mailing List for IR Copies

Application: IS 88321 through IS 88331 and IS 88334, IS 88335, IS 88337

Date: March 17, 2017

Original mailed to:

Applicant:

Director
In Care of Anna Pakenham-Stevenson
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302-1142

Copies Mailed	
by:	<u>SP</u> (STAFF)
on:	<u>3-20-17</u> (DATE)

Copies sent to:

- ☒ 1. WRD - File
- ☒ 2. WRD - Water Availability: Carlos Ortiz-Turner
- ☒ 3. WRD - Laura Wilke

IR, Map, and Fact Sheet Copies sent to:

(NOTE: please send only one copy per office, even if there is more than one name on the list)

- ☒ 1. Watermaster: Bob Wood, District 3
- ☒ 2. ODFW District Biologists: Rod French
- ☒ 3. ODFW: Anna Pakenham Stevenson
- ☒ 4. Columbia River Intertribal Fish Commission:
- ☒ 5. US Fish & Wildlife: Nancy Gilbert, 63095 Deschutes Market Rd, Bend OR 97701-9794
- ☒ 6. NW Power & Conservation Council, 851 SW Sixth Ave., Suite 1020, Portland, OR 97204-1347
- ☒ 7. DEQ: Eric Nigg & Bonnie Lamb, Eastern Region
- ☒ 8. DOA: Salem: Jim Johnson & Paul Measeles
- ☒ 9. DSL: Shawn Zumwalt
- ☒ 10. Confederated Tribes of the Warm Springs Indian Reservation: Robert Brunhoe - Natural Resources Mgr.

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

Caseworker: Ronald C. Kohanek

Instream Water Right Application Completeness Checklist

Minimum Requirements OAR 690-077-0020

Application IS88329 County WASCO Priority Date 12/1/2016

Township 11E Range 15 Section 20

Amount 0-17 cfs Use INstream WM Dist. # 3

Agency (ies) Applying ODFW

Caseworker Assigned: ☐ Barbe ☒ Craig ☐ Kim ☐ Lisa ☐ Scott

☒ Contact info: Name(s) and address(es) of the agency(ies) applying (OAR 690-077-0020(4)(a));

☒ Public uses that will be served by the requested instream water right and the flows necessary to support the public uses (OAR 690-077-0020(4)(b));

☒ River, stream, or lake name (OAR 690-077-0020(4)(c));

☒ If a stream, the reach delineated by river mile and stream to which it is tributary (OAR 690-077-0020(4)(d));

☒ The appropriate section of a Department basin map with the applicable lake or stream identified (OAR 690-077-0020(4)(e));

☒ The instream flow requested by month and year in cubic feet per second or acre-feet or lake elevation (OAR 690-077-0020(4)(f));

☒ A description of the technical data and methods used to determine the requested amounts (OAR 690-077-0020(4)(g));

☒ Evidence of notification of other qualified applicant agencies (OAR 690-077-0020(4)(h));

☒ If a multi-agency request, the amounts and times requested for each category of public use (OAR 690-077-0020(4)(i));

☒ Identification of affected local governments (pursuant to OAR 690-077-0010) and copies of letters notifying each affected local government of the intent to file the instream water right application (OAR 690-077-0020(4)(j));

☒ Written documentation of how the agency applying for an instream water right has complied with the requirements contained in its own administrative rules for instream water rights including application of the required methods to determine the requested flows (OAR 690-077-0020(4)(k));

☒ Any other information required in the application form that is necessary to evaluate the application in accordance with applicable statutory requirements (OAR 690-077-0020(4)(l))

Does the applicant:

☒ propose a means and location for measuring the instream water right; (OAR 690-077-0020(5)(a))

☒ propose a strategy and responsibility for monitoring flows for the instream right; (OAR 690-077-0020(5)(b))

☒ Identify any provisions needed for managing the water right to protect the public uses; (OAR 690-077-0020(5)(c))

Instream Water Right Application Completeness Checklist

Minimum Requirements OAR 690-077-0020

H/X If this is a request for an instream water right to be supplied from stored water, does it identify the reservoir and have documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the request. (OAR 690-077-0020(6));

☐ Yes

☐ No

Reviewed by: B.C. j KRS

Date: 12/29/2016

S:\groups\wr\instream - state agency\Application checklist

Mailing List for IS PFO
Scheduled Mailing Date:

Application: IS-88329

Applicant:

Oregon Department of Fish & Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302

WRD - Watermaster: Bob Wood, District 3
WRD - Regional Manager: Mike Ladd
WRD - Data Center
WRD - Water Availability
WRD - File

Caseworker: Craig Kohanek

Copies Mailed

by:

SP

(STAFF)

on:

10-17-17

(DATE)