8

Application No. 88968

Permit No. _____

Certificate No. _____

Name _____

By _____

Address _____

_____

_____

_____

Priority _____

County _____ WM# _____

RELATED FILES

_____

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	Date	Volume	Page
DENIED			
MISFILED			
WITHDRAWN			
CANCELLED			

FEES PAID

Date	Amount	Receipt No.
2-18-2022	$950.00	137498
	Cert. Fee	

FEES REFUNDED

Date	Amount	Receipt No.

DEVELOPMENT Date

Completion _____

Extended to _____

_____

Final Proof received _____

Proposed Cert. Mailed _____

ASSIGNMENTS

Date	To Whom	Address

REMARKS _____

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MAP LOCATION _____

Rev. 04/03

71105-21 / id134428 WR

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # 137498

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

INVOICE # _____

RECEIVED FROM: Douglas County, Oregon
BY: _____

APPLICATION	*See attached
PERMIT	
TRANSFER	

CASH: ☐ CHECK:# ☒ 77442 OTHER: (IDENTIFY) ☐ _____

TOTAL REC'D $ 103,600.00

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 47235

0407	COPY & TAPE FEES		$
0410	RESEARCH FEES	108 x $950.00	$
0408	MISC REVENUE: (IDENTIFY)	_____	$
TC162	DEPOSIT LIAB. (IDENTIFY)	_____	$
0240	EXTENSION OF TIME		$

WATER RIGHTS:

		EXAM FEE		RECORD FEE
0201	SURFACE WATER	$	0202	$
0203	GROUND WATER	$	0204	$
0205	TRANSFER	$		

WELL CONSTRUCTION

		EXAM FEE		LICENSE FEE
0218	WELL DRILL CONSTRUCTOR	$	0219	$
	LANDOWNER'S PERMIT		0220	$

0223 OTHER (IDENTIFY) Protest $ 102,600.00

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 (FW/WRD)		$
0231	HYDRO LICENSE FEE (FW/WRD)		$
_____	HYDRO APPLICATION		$

_____ TREASURY OTHER / RDX

FUND _____ TITLE _____
OBJ. CODE _____ VENDOR # _____
DESCRIPTION _____

RECEIVED
OVER THE COUNTER

RECEIPT: 137498 DATED: 2-18-2022 BY: _____

Distribution – White Copy - Customer, Yellow Copy - Fiscal, Blue Copy - File, Buff Copy - Fiscal

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Right Application IS-88968 in the name of Oregon Department of Fish and Wildlife	)))))	**PROTEST OF PROPOSED FINAL ORDER**

PROTEST

Pursuant to ORS 540.520(6), OAR 690-380-4030, and OAR 690-002-0030, Douglas County ("the County") hereby protests the Proposed Final Order ("PFO") of the Oregon Water Resources Department ("OWRD") proposing to approve water right application **IS-88968** (the "Application") submitted by Oregon Department of Fish and Wildlife ("ODFW").

I. Contact Information for the Protestant (OAR 690-077-0043(1)(a))

Douglas County
1036 SE Douglas Ave
Roseburg, OR 97470
541-672-3311

Contact and service on Protestant should be made through the undersigned counsel.

II. Summary of Protest and Requested Relief

Douglas County protests the PFO because it would result in injury to the County's proprietary interests as a water right holder, and the broader public interest, in the streams, waters, and/or tributaries claimed in the Application. The Application is one of 113 instream water right applications filed by ODFW for the appropriation of waters located within Douglas County (collectively, "the Umpqua Basin Applications"), the approval of all, or any, of which will injure

the County and be contrary to the public interest.[1] Approval of this Application would injure the County and be contrary to the public interest by exhausting available unappropriated water for the exclusive use of fish and wildlife and to the detriment of other multiple uses necessary and important to the County and public, including but not limited to: irrigation, livestock watering, off-season water storage, power production, agriculture, forestry, fire protection, mining, municipal, residential, commercial, and industrial development, and other human needs and uses.

Additionally, the Application is incomplete, defective, not supported by substantial evidence, does not meet statutory and regulatory criteria, and otherwise violates multiple statutory and regulatory provisions. Accordingly, the Application must therefore be denied.

The County requests that the Department issue a final order denying the Application.

III. Protestant's Interests and Injury or Impairment (OAR 690-077-0043(1)(b)-(c))

The County's interest in the PFO is based upon the County being a water right holder for various consumptive uses, including water storage, irrigation and power production, and in its residents holding water rights for uses such as domestic, municipal, irrigation, temperature control, power development, industrial, mining, and recreational water rights. These uses are recognized in the Umpqua Basin Program rules. *See* OAR 690-516-0005(1). Water availability, future water appropriations, the balance of beneficial water uses, in Douglas County—and the

[1] The Umpqua Basin Applications consist of: IS-89035, IS-88981, IS-89036, IS-89037, IS-88982, IS-88983, IS-88984, IS-88985, IS-88986, IS-88987, IS-89038, IS-88988, IS-88989, IS-89039, IS-88990, IS-88991, IS-89040, IS-89041, IS-89042, IS-89043, IS-88992, IS-88994, IS-88995, IS-88996, IS-88998, IS-89044, IS-89046, IS-89047, IS-89048, IS-88952, IS-88999, IS-89000, IS-89001, IS-89002, IS-89003, IS-89049, IS-89050, IS-88953, IS-89004, IS-89005, IS-88993, IS-89051, IS-88997, IS-89052, IS-89053, IS-89054, IS-89055, IS-89056, IS-89057, IS-89058, IS-89006, IS-89007, IS-88954, IS-88955, IS-88956, IS-89008, IS-89009, IS- IS-89010, IS-89011, IS-88957, IS-889858, IS-88959, IS-88960, IS-89012, IS-88962, IS-89013, IS-89014, IS-88963, IS-88964, IS-88965, IS-89015, IS-88966, IS-89017, IS-88967, IS-89018, IS-88968, IS-88969, IS-88970, IS-88971, IS-88972, IS-88973, IS-88974, IS-88975, IS-89045, IS-88976, IS-89059, IS-88977, IS-88978, IS-88979, IS-88980, IS-89060, IS-89061, IS-89062, IS-89063, IS-89064, IS-89065, IS-89019 IS-89020, IS-89021, IS-89022, IS-89024, IS-89025, IS-89026, IS-89027, IS-89028, IS-89029, IS-89030, IS-89031, IS-89032, IS-89033, IS-89034, IS-89086, and IS-89087.

communities, economies, and trade and business sectors that rely on water resources—are all emphatically matters of county concern. *See* ORS 203.035 ("counties have all powers over matters of county concern that it is possible for them to have under the Constitutions and laws of the United States and of this state."); *GTE Northwest, Inc. v. PUC*, 179 Or. App. 46 (2002). As such, Douglas County represents the public interest with respect to the Application.

The County seeks to ensure that the Umpqua Basin's waters are carefully allocated and used for the highest public benefits, and in particular for ensuring the fulfilment of the long-term present and future needs of the County's citizens and local economies. This necessarily involves a balancing of water uses including water for irrigation, livestock watering, off-season water storage, power production, agriculture, forestry, fire protection, mining, municipal, residential, commercial, and industrial development, and other human needs and uses that are in the public interest.

ODFW's proposed use for "fish life and wildlife," to the total exclusion of new and future appropriations for any other water uses, will result in a gross imbalance of water allocation and water uses that would be directly contrary to the public interest, including and particularly those represented by the County. For example, but without limitation, changes in seasonal rainfall and increases in droughts may require increased development of water storage projects, such as those like Douglas County's Galesville Reservoir project, to fulfill a variety of water resource needs. Approval of the Umpqua Basin Applications would arbitrarily preclude or restrict the future development of water storage projects, and other necessary and appropriate future water appropriations, by allocating all available unappropriated water from numerous streams and tributaries throughout Douglas County exclusively to fish and wildlife use. Quite simply, the Umpqua Basin Applications are bad policy; they seek to achieve a narrow and short-sighted

objective that is directly contrary to the interests of the County and the public interests the County represents.

In addition, the public interest requires insuring that OWRD is following the law as established by the Legislature, as well as following its own regulations, and that its decisions are supported by substantive evidence. Here, the PFO flunks each of these tests.

In February and September of 2021, the County submitted written comments regarding the Umpqua Basin Applications, which the County hereby reincorporates by reference in protest of the PFO. In the comments, the County identified numerous shortcomings and deficiencies in ODFW's applications. By not rejecting or returning the applications to ODFW, OWRD violated its statutory duty to ensure that applications are "complete and not defective" when it issued the initial review and preliminary determinations. *See* ORS 537.150(2). OWRD has now carried forward those errors, and further failed to scrutinize the Application, in issuing a PFO proposing to approve the Application. As explained below, and in the County's prior comments, the PFO should be modified to deny the Application.

IV. Arguments and Authorities (OAR 690-077-0043(1)(d)-(e))

A. Instream Water Rights Under Oregon Water Law.

Oregon's 1987 Instream Water Right Act, ORS 537.332-537.360, created a new type of water right called an instream water right. *See* OAR 635-400-0000(2); OAR 690-077-0000(3). Only three state agencies may apply for instream water rights: the Department of Environmental Quality ("DEQ"), the Parks and Recreation Department, and the Department of Fish and Wildlife ("ODFW"). ORS 537.336; OAR 690-077-0020(1). Applications for instream water rights "shall be for the quantity of water necessary" to achieve the allowed purpose. ORS 537.336(1)-(3). "In-stream flow" is defined to mean "the minimum quantity of

water necessary to support the public use requested by an agency." ORS 537.332(2) (emphasis added).

OWRD sets the standards, criteria and procedures by which the agencies may request instream water rights, based on Legislatively-set standards and policies. ORS 537.338; *see also, e.g.,* ORS 536.238 (policy on water storage facilities); ORS 536.241 (policy on water supply); ORS 536.220 (policy on water resources generally); *cf.* ORS 536.235 (policy on *minimum* streamflows) (emphasis added). OWRD's rules governing instream water rights are set forth in OAR Chapter 690, Division 77. ODFW's rules and regulations are set forth in OAR Chapter 635, Division 400. The requirements for an agency application seeking instream water rights are set out in OAR 690-077-0020. OWRD's review of the applications, including public interest review, is governed, *inter alia*, by OAR 690-077-0033, -0037, and -0039. For the reasons that follow, the Umpqua Basin Applications do not meet statutory and regulatory requirements.

B. The PFO is Inconsistent with OAR 690-077-0020 and Related Statutes and Rules.

The PFO should be modified to deny the Application because the Application does not meet the criteria of OAR 690-077-0020(4), and related statutes and rules, in the following respects.

1. Subsection (f) – the Application and PFO Fail to Ensure that the Requested Instream Flows are for the "Minimum Quantity"

OAR 690-077-0020(4)(f) requires that an application include "the instream flow requested by month and year in cubic feet per second or acre-feet or lake elevation." The term "instream flow" is defined to mean "the *minimum quantity* of water necessary to support the public use requested by an agency." OAR 690-077-0010(13) (emphasis added). Here, none of

the Umpqua Basin Applications, nor the PFO, address the "minimum quantity" factor. This is a material defect that renders the Application and PFO deficient and unlawful. Because neither the Application, nor the PFO, provide any analysis or assurance that the flow requested is the "minimum quantity," the PFO must be modified to deny the Application.

The single indication that the statutorily required "minimum quantity" factor was ever considered is found in the Umpqua Basin Investigation Report ("Umpqua BIR") which is referenced as the source for all "technical data and methods used to determine the requested amounts" in each of the Umpqua Basin Applications, but which was not filed as an attachment with any application and was not available to the public as a linked document for the applications on OWRD's website.[2] The very first sentence of the section titled "Stream Flow Study" states "[t]he investigation of stream flow requirements of fish and wildlife in the Umpqua Basin was made in 1968." In other words, Umpqua Basin Applications are based on data and methods that are *53 years old.*

Moreover, ODFW's applications do not request instream water rights consistent with the minimum flows developed in and recommended by the Umpqua BIR, the very source of the technical data on which they allegedly rely. The second sentence of the Stream Flow Study section acknowledges that minimum stream flow requirements are statutorily mandated:

> "Since ORS 536.310(7) directs the Board to consider 'The maintenance of minimum perennial stream flows sufficient to support aquatic life …', minimum flows have been recommended which will support a reasonable level of fish production."

[2] Douglas County was only able to obtain a copy from OWRD after making contact through OWRD's counsel. ODFW and OWRD never adequately informed the public about the Applications by making the Umpqua BIR publicly available and, on this basis alone, the PFO is procedurally defective and the Application should be denied.

Accordingly, the Umpqua BIR Stream Flow Study section recommends minimum stream flows that "will support a reasonable level of fish production" as shown in Appendix 1.

However, the Stream Flow Study also includes "optimum flow recommendations" which "are designed to achieve optimum productivity for fish life" in Appendix 2. Here, the water rights which ODFW is seeking in the Umpqua Basin Applications are ***not*** the statutorily prescribed "minimum flows" developed and recommended in the Umpqua BIR; rather, ODFW is seeking, and OWRD has proposed to approve in the PFO, water rights consistent with, or equivalent to, the optimum stream flows—directly contrary to statutes that are binding on both ODFW and OWRD.

Proposing to approve instream water rights in excess of the statutorily mandated minimum stream flows exceeds ODFW's and OWRD's statutory authority and is otherwise inconsistent with applicable statutory and regulatory criteria and requirements. Addressing the minimum quantity requirement is a mandatory element of the Application and, likewise, is a necessary consideration for OWRD in the PFO. Because the Application does not address or satisfy the minimum quantity requirement, the PFO must be modified to deny the Application.

2. Subsection (g) – The Application is Not Supported by Adequate Data or Methods

OAR 690-077-0020(4)(g) requires that the application include a "description of the technical data and methods used to determine the requested amounts." Here, the Umpqua Basin Applications themselves are entirely devoid of any technical data. Instead, each application contains identical statements which summarily assert that the Oregon Method "was used in the Umpqua River Basin Investigation to develop flow recommendations" followed by a brief recital of "methods for assessing flow needs" as described by the author

of the Oregon Method. Mere reference to the Oregon Method and reliance on the decades-old Umpqua BIR is not adequate to support the Application.

A review of the Umpqua BIR and its appendices, totaling 135 pages in all, reveals that both the minimum and the optimum stream flows were "principally designed to accommodate the environmental requirements" of two species: salmon and steelhead. Presumably, ODFW seeks optimum instream water rights now because, as the Umpqua BIR states, those flows "are designed to achieve optimum productivity for fish life." However, ODFW does not have statutory authority to seek optimum instream flows; it is restricted to seeking minimum flows. Put another way, the optimum flows that ODFW seeks are the antithesis of minimum flows, and that distinction itself was recognized back in 1972 in the Umpqua BIR.

There is no basis for finding that the instream water rights which ODFW now seeks are either necessary to preserve fish life and wildlife, or within the statutory authority of the agency to request. There is no specifically-identified unmet fish or wildlife need for water resources in the Umpqua BIR, nor in the Umpqua Basin Applications themselves. None of the game species identified as "Game Resources" in the Umpqua BIR are identified as having unmet water resource needs; indeed, with the exception of waterfowl (for which the Umpqua BIR summarily concludes "much could be done to more properly manage water and land" without identifying any specific unmet needs), the Umpqua BIR concludes that "[w]ater supplies are generally adequate" and characterizes the water needs of wildlife as "minimal."

ODFW has not provided any *new* or *updated* technical data or methodology supporting the Application. The information it has provided is both outdated and unreliable and, therefore, does not meet statutory and regulatory requirements. Nor has ODFW provided any new data or analysis that supports additional flows, beyond what were

originally sought and obtained pursuant to the Umpqua BIR. Further, ODFW has not described how, or in what way, the instream water rights which ODFW currently holds, which were based on the Umpqua BIR, are insufficient to meet the purported objectives of the Application.[3] Accordingly, the requisite statutory and regulatory criteria have not been met and, in addition, the PFO is not supported by substantial evidence. The PFO should be modified to deny the Application.

3. Subsection (l) – The PFO Fails to Acknowledge and Address the Adequacy of Water Rights Already Held by ODFW

OAR 690-077-0020(4)(l) requires that the agency applying for instream water rights submit "any other information required in the application form that is necessary to evaluate the application in accordance with applicable statutory requirements." Here, OWRD erred by not requiring ODFW to address the existence and adequacy of existing instream water rights for many of the same rivers, streams and tributaries covered by the Umpqua Basin Applications and explain why they are insufficient. Further, OWRD erred by not independently assessing this issue in the PFO. Absent a full accounting of the water rights already held for instream uses and the public benefits they currently provide, OWRD cannot make a rationale determination as to the necessity of the Application, whether the proposed use would qualify as a beneficial use without waste, and whether granting the Application would be in the public interest. Consequently, the PFO must be modified to deny the Application.

[3] Further, OAR 690-077-0015(4) requires OWRD to limit the approved flow such that the water rights granted do not "exceed the estimated average natural flow" (EANF). Here, the EANF data relied upon is outdated, insufficient, and unreliable. Accordingly, the PFO is deficient and not supported by substantial evidence. Applications for new instream water rights should be rejected outright by OWRD if they are not based on reliable and up-to-date scientific information and data.

4. The PFO is Inconsistent with OAR 690-077-0020(11)

OAR 690-077-0020(11) requires that "[t]he combination of instream water rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits." This requirement is crucial to ensure a proposed use qualifies as a beneficial use and, likewise, will not result in waste. Here, as discussed previously, the Umpqua Basin Applications are for instream water rights for rivers, streams and tributaries in which it already holds certificated instream water rights. The Umpqua Basin Applications do not reference the water rights which ODFW currently hold, do not explain how those rights were considered when reaching the decision to apply for additional instream water rights, and do not explain what "increased public benefits" are expected to yield from the additional water rights it now seeks. Further, the PFO fails to acknowledge or address this issue either. Accordingly, the PFO must be modified to deny the Application.

C. The Application is Not in the Public Interest.

OAR 690-077-0033(1) provides the four elements that OWRD must evaluate when determining whether or not a proposed use will be detrimental to the public interest. As the PFO notes, all four of these criteria must be met in order for the presumption to be established. Likewise, OAR 690-077-0039(2) provides the categories for OWRD's fact finding and conclusions of law when issuing a PFO. For the reasons discussed below, the PFO approving the Application fails to substantively address the requirements of both of these regulations.

1. The PFO is Inconsistent with Presumption Criteria (a): Consistency with Basin Program

OAR 690-007-0033(1)(a) requires that "[t]he 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)." OAR 690-516-005, established under ORS 536.220, 526.300, 536.310, and 536.340, provides the classifications and exceptions to those classifications for the waters of the Umpqua River Basin. Here, the Application and PFO are inconsistent with the applicable basin program rules.

OAR 690-516-005 (1)(e) provides: "[t]he unappropriated waters of the South Umpqua River and tributaries, excluding Lookingglass and Roberts Creeks, are withdrawn from further appropriation except for human consumption, livestock consumption, irrigation of up to 1/2-acre non-commercial garden and water legally released from storage from July 15 through September 30 of each year, by the Water Policy Review Board's Order of Withdrawal dated April 29, 1985." The Application, and/or many of the other Umpqua Basin Applications, are inconsistent with this provision and necessarily precludes ODFW's proposed use for "fish life and wildlife." The PFO's statement that "'[f]ish and wildlife uses' are classified as a potentially allowable use under the Umpqua Basin Program OAR 690-516-0005(1)" is technically correct as a general matter, but it fails to account for, much less address, the various withdrawals contained in the basin rules. On this basis alone, the Application and/or many of the Umpqua Basin Applications are barred by applicable basin rules and the PFO must be modified to deny the Application.

Likewise, OAR 690-516-0005(1)(c) withdraws the waters of Roberts Creek and its tributaries entirely, while OAR 690-516-005(1)(d) withdraws the unappropriated waters of Lookingglass Creek and tributaries from further appropriation except for domestic and livestock watering uses under 5,000 gallons per day per appropriation and water legally stored and released from storage from June 1 through September 30 of each year. Despite these restrictions, the Application, and/or other Umpqua Basin Applications, seek to

appropriate these waters for instream use. Consequently, the PFOs that are contrary to these basin rules must be modified to deny the applications.

Finally, and moreover, OAR 690-516-0005(1)(a) requires that when appropriating waters of the Umpqua River Basin, "[p]reference shall be given to human consumption, livestock consumption and irrigation of non-commercial gardens not to exceed one-half acre in area … **over any other beneficial uses**" (emphasis added). The PFO completely ignores this policy and directive by blindly proposing to approve the Application, and/or the Umpqua Basin Applications, which will result in precluding future appropriations for these preference water uses, as well as any other beneficial use recognized in the basin rules, for the exclusive use of fish and wildlife. The PFO is patently inconsistent with the basin rules, including their express preference for certain water uses over any other beneficial uses, and, therefore the PFO must be modified to deny the Application.[4]

2. The PFO is Inconsistent with Presumption Criteria (b): Water availability, and Presumption Criteria (c): Injury Determination

The presumption criteria found in OAR 690-007-0033(1)(b) requires a showing that "water is available." Additionally, OAR 690-077-0039(2)(c) requires "[a]n assessment of water availability and the amount of water necessary for the proposed use." As discussed previously, ODFW submitted applications for instream water rights for rivers, streams and tributaries in which it already holds certificated instream water rights. The Application does not reference the water rights which ODFW currently holds, does not explain how those rights were considered when reaching the decision to apply for additional instream water

[4] Similarly, OAR 690-077-0039(2)(b) requires "[a] brief statement that explains the criteria considered relevant to the decision, including the applicable basin program and the compatibility of the proposed use with applicable land use plans." Here, as with OAR 690-077-0033(1), the PFO fails to substantively address this rule and the Umpqua Basin Program.

rights, and does not explain what "increased public benefits" are expected to yield from the additional water rights it now seeks. Likewise, the PFO fails to mention, much less address, the existence of these water rights, and how awarding additional instream rights to ODFW will impact water availability for future appropriations, or result in injury to existing water rights, as required by OAR 690-077-0039(2)(d). This failure is arbitrary, capricious, and an abuse of discretion, particularly in light of the fact that granting the Application will appropriate any and all remaining available water to the exclusion of other beneficial uses in future appropriations.

Granting the Umpqua Basin Applications will drastically affect future appropriations. The failure of the PFO to in any meaningful way consider the trade-offs, or balancing, of likely future competing water uses and needs for present and future generations, including those vital for sustaining the needs of local communities, is a gross dereliction of OWRD's statutory duties. *See also, e.g.,* ORS 537.170(8)(a)-(g); ORS 536.238 (policy on water storage facilities); ORS 536.241 (policy on water supply); ORS 536.220 (policy on water resources generally); *cf.* ORS 536.235 (policy on *minimum* streamflows) (emphasis added). The PFO should be modified to find that granting the Application would be detrimental to the public interest and deny the Application.

V. Requested Relief and Request for Hearing

The County requests that the Application be denied, consistent with the foregoing.

If OWRD does not deny the Application outright based on this protest, the County requests a hearing, including opportunities for full discovery and offering evidence, including live testimony, on all relevant and material issues including, but not limited to: the scientific validity of the claimed flows in the Umpqua Basin Applications; methods and determinations

of minimum instream flows; and the present and future water needs in Douglas County for present and future generations.

VI. Protest Fee

The required fee of $950.00, under ORS 536.050(j)(A), is included with this protest.

VII. Conclusion

The County requests that OWRD deny the instream application, in all or in part, consistent with the foregoing.

DATED this 18th day of February, 2022.

CAROLLO LAW GROUP

/s/Dominic Carollo
Dominic M. Carollo, OSB No. 093057
Email: **dcarollo@carollolegal.com**
James C. Burton, OSB No. 192756
Email: **jburton@carollolegal.com**
Carollo Law Group LLC
630 S.E. Jackson Street, Suite 1
P.O. Box 2456
Roseburg, OR 97470
Phone: 541-957-5900

Special Counsel for Douglas County

CERTIFICATE OF FILING AND SERVICE

I certify that on February 18, 2022, I filed a separate Protest for each Proposed Final Order issued on Application Nos. IS-89035, IS-88981, IS-89036, IS-89037, IS-88982, IS-88983, IS-88984, IS-88985, IS-88986, IS-88987, IS-89038, IS-88988, IS-88989, IS-89039, IS-88990, IS-88991, IS-89040, IS-89041, IS-89042, IS-89043, IS-88992, IS-88994, IS-88995, IS-88996, IS-88998, IS-89044, IS-89046, IS-89047, IS-89048, IS-88952, IS-88999, IS-89000, IS-89001, IS-89002, IS-89003, IS-89049, IS-89050, IS-88953, IS-89004, IS-89005, IS-88993, IS-89051, IS-88997, IS-89052, IS-89053, IS-89054, IS-89055, IS-89056, IS-89057, IS-89058, IS-89006, IS-89007, IS-88954, IS-88955, IS-88956, IS-89008, IS-89009, IS- IS-89010, IS-89011, IS-88957, IS-889858, IS-88959, IS-88960, IS-89012, IS-88962, IS-89013, IS-89014, IS-88963, IS-88964, IS-88965, IS-89015, IS-88966, IS-89017, IS-88967, IS-89018, IS-88968, IS-88969, IS-88970, IS-88971, IS-88972, IS-88973, IS-88974, IS-88975, IS-89045, IS-88976, IS-89059, IS-88977, IS-88978, IS-88979, IS-88980, IS-89060, IS-89061, IS-89062, IS-89063, IS-89064, IS-89065, IS-89019 IS-89020, IS-89021, IS-89022, IS-89024, IS-89025, IS-89026, IS-89027, IS-89028, IS-89029, IS-89030, IS-89031, IS-89032, IS-89033, IS-89034, IS-89086, and IS-89087 (**"Protests"**) with the Water Resources Department by personally hand-delivering two complete sets of the Protests in electronic form on two separate flash drives, along with two checks totaling $107,350.00 (representing the protest filing fee of $950.00 per protest x 113 protests), in a sealed envelope addressed to:

Dorothy Pederson
Water Right Section, Transfers
Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301-1271

I further certify that, on the same date, I also served an electronic copy of said Protests on the applicant by prepaid certified mail, return receipt requested, to:

Oregon Department of Fish and Wildlife
Attn: Anne Hayden-Lesmeister, applicant's authorized agent
4034 Fairview Industrial Drive SE
Salem, OR 97302

/s/ Whitney Boss
Whitney Boss, paralegal
Email: **wboss@carollolegal.com**
Carollo Law Group LLC
630 S.E. Jackson Street, Suite 1
P.O. Box 2456
Roseburg, OR 97470
Phone: 541-957-5900

Mailing List for IS PFO
Scheduled Mailing Date:

Application: IS-88968

Applicant:

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

Copies Mailed

by: TM
(STAFF)

on: 1/4/2022
(DATE)

OWRD copies:

WRD - Watermaster: Susan Douthit, District 15 - Electronic
WRD – Regional Manager: Jake Johnstone - Electronic
WRD - Data Center - Electronic
WRD - Water Availability - Electronic
WRD – File - Paper

Other persons to receive copies:

ODFW: Anne Hayden-Lesmeister – Send certified mail

Caseworker: Craig Kohanek

Oregon Water Resources Department
Water Right Services Division

Water Right Application IS-88968 in the name of Oregon Department of Fish and Wildlife	)))	PROPOSED FINAL ORDER

Summary: The Department proposes to issue an order approving Application IS-88968 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 Umpqua Basin Program Division 516. These statutes and rules can be viewed on the Oregon Water Resources website:
https://www.oregon.gov/OWRD/programs/policylawandrules/Pages/default.aspx

The Department's main page is:
http://www.oregon.gov/OWRD

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 November 30, 2020, Oregon Department of Fish & Wildlife filed a complete application for the following water use:

Source: CLEGHORN CREEK, TRIBUTARY TO SMITH RIVER
Use: PUBLIC USE, SPECIFICALLY FISH LIFE AND WILDLIFE.
County: DOUGLAS COUNTY
Location: CLEGHORN CREEK, TRIBUTARY TO SMITH RIVER, BEGINNING AT RIVER MILE 1.7 (SWSE, S3, T21S, R7W, WM) IN DOUGLAS COUNTY (43.764339, -123.51579) AND CONTINUING DOWNSTREAM TO THE MOUTH RIVER MILE 0.0 (SWNW, S4, T21S, R7W, WM) IN DOUGLAS COUNTY (43.769133, -123.540886).

Rate: SHOWN BELOW IN CUBIC FEET PER SECOND (CFS) REQUESTED BY MONTH:

Fish Life and Fish Habitat:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
30.8	28.4	25.5	17.8	9.1	8.1	4.9	1.7	1	1.3	18	28

2. On July 31, 2021, 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.

3. On August 3, 2021, 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.

4. Numerous written comments favoring and opposing the application were received during the 30-day comment period.

Presumption Criteria (a) Consistency with Basin Program

5. "Fish life and Wildlife use's" are classified as allowed under the Umpqua Basin Program OAR (690-516-0005(1)) and OAR 690-077-0015(11). ORS 537.343(1); OAR 690-077-0039(2).

Presumption Criteria (b) Water Availability

6. 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). OAR 690-077-0015(4). The table below compares the requested flows in the application for Cleghorn Creek on a monthly basis (in CFS) to the estimated average natural flow (EANF). The last row is the allowable amount and the amount in the proposed certificate. ORS 537.343(1)(b); OAR 690-077-0039(2)(c). The amount allocated for this application shall not exceed the estimated average natural streamflow occurring from the drainage system. ORS 537.343(1)(b); OAR 690-077-0039(2)(c).

Fish Life and Fish Habitat:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
30.8	28.4	25.5	17.8	9.1	8.1	4.9	1.7	1	1.3	18	28

Estimated Average Natural Flow:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18.1	18.3	13.4	8.01	4.56	1.91	.82	.48	.37	.75	5.36	14.3

Allowable Instream Use:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18.1	18.3	13.4	8.01	4.56	1.91	.82	.48	.37	.75	5.36	14.3

Presumption Criteria (c) Injury Determination

7. 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

8. 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.

9. 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

10. Based on an evaluation of the proposed use, 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

11. Based on the review of the presumption criteria (a)-(d) above and Finding of Fact #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 certificate is conditioned accordingly.

PROPOSED ORDER

The Department recommends approval of Application IS-88968 and issuance of a certificate consistent with the attached draft certificate.

DATED JAN 04 2022

Alyssa Mucken
Water Rights Section Manager, for
Thomas M. Byler, Director
Oregon Water Resources Department

Protests

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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 **February 18, 2022**. 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 $480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of $950 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 **February 18, 2022**. 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 $270. If a hearing is scheduled, an additional fee of $680 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 Servicemembers:

Active duty servicemembers have a right to stay a proceeding under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260 the Oregon Military Department at 503-584-3571, or the nearest United State Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil. The Oregon Military Department does not have a tollfree telephone number.

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 503-979-3185.

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 503-979-6180.

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 DOUGLAS

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-88968

SOURCE OF WATER: CLEGHORN CREEK, TRIBUTARY TO SMITH RIVER

BENEFICIAL USE: FISH LIFE AND WILDLIFE USES

DATE OF PRIORITY: DECEMBER 7, 2020

To be maintained in: Cleghorn Creek, tributary to Smith River, beginning at river mile 1.7 (SWSE, S3, T21S, R7W, WM) in Douglas County (43.764339, -123.51579) and continuing downstream to the mouth river mile 0.0 (SWNW, S4, T21S, R7W, WM) in Douglas County (43.769133, -123.540886).

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
18.1	18.3	13.4	8.01	4.56	1.91	.82	.48	.37	.75	5.36	14.3

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

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

4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.

5. The flows are 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

Mailing List for IR Copies

Application: IS-88968

Date: August 3, 2021

Original mailed to:

Applicant:
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302-1142

Copies Mailed by:

TM
STAFF)
on: 8/3/2021
(DATE)

Send Auto Email

1. Watermaster: Susan Douthit, District #15
2. ODFW District Biologists: Laura Jackson
3. DEQ: rogue@deq.state.or.us
4. WRD – Surface Water Section

Copies sent to:

WRD - File

IR, Map, and Fact Sheet Copies provided to:

5. US Fish & Wildlife: Jim Thrailkill,
   777 NW Garden Valley Blvd. Roseburg, OR 97471
6. NW Power & Conservation Council,
   851 SW Sixth Ave., Suite 1020, Portland, OR 97204-1347
7. Department of Agriculture: Jim Johnson & Paul Measeles
   Salem OR
8. DSL:
9. Tribe(s)

Caseworker: Craig Kohanek

Oregon
Kate Brown, Governor

Water Resources Department
725 Summer St NE, Suite A
Salem, OR 97301
(503) 986-0900
Fax (503) 986-0904

August 3, 2021

Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302-1142

Reference: Instream water rights in the Umpqua Basin, Application IS-88968

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

This document is to inform you of the preliminary analysis of your water right application, the potential limitations to your proposed instream water right, and to describe your options. Based on the information you have provided the Water Resources Department has made the following preliminary determinations:

Preliminary Determinations (Oregon Administrative Rule (OAR) 690-077-0029):

1. The application proposes the instream protection of water in Cleghorn Creek for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat.

2. The referenced application is complete and not defective.

3. The proposed use is not prohibited, restricted, or limited by law except for water availability limitations in certain months as noted below.

4. The reach proposed in this application for an instream water right is in the Umpqua Basin.

5. The instream fish life, and wildlife uses are allowed under the Umpqua Basin Program OAR (690-516-0005(1)).

6. Water allocated for instream use shall be limited to the estimated average natural flow described below. 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 except where periodic flows that exceed the natural flow or level are significant for the applied public use."

7. All amounts of water in this document are shown in cubic feet per second.

Protected Reach:

Cleghorn Creek, tributary to Smith River, beginning at river mile 1.7 (SWSE, S3, T21S, R7W, WM) in Douglas County (43.764339, -123.51579) and continuing downstream to the mouth river mile 0.0 (SWNW, S4, T21S, R7W, WM) in Douglas County (43.769133, -123.540886).

Amount of Water Requested for Instream Use:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
30.8	28.4	25.5	17.8	9.1	8.1	4.9	1.7	1	1.3	18.	28

Estimated Average Natural Flow:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18.1	18.3	13.4	8.01	4.56	1.91	0.82	0.48	0.37	0.75	5.36	14.3

Allowable Instream Use:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18.1	18.3	13.4	8.01	4.56	1.91	0.82	0.48	0.37	0.75	5.36	14.3

Summary of Preliminary Determinations:

A percentage of the water applied for has been determined to be allocable for the purpose(s) identified in the application. The rate allowed is shown in the table above titled "Rate allowable for Instream Use" and, if less than the rate shown in "Rate requested for Instream Use" table, is limited to the rate shown in the "Estimated Average Natural Flow" table.

The application 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.

At this time, you must decide whether to proceed or to withdraw the application.

- To Proceed - If you choose to proceed with the application you do not have to notify the Department. The application will 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.

- To Withdraw - You may withdraw the application by notifying the Department **in writing** by **August 17, 2021.**

If you have any questions:

Feel free to contact me at (503) 986-0823 or Ron.C.Kohanek@oregon.gov . Please include the application number in all correspondence.

Sincerely,

R. Craig Kohanek
Water Rights Analyst

Cc: File
Watermaster #15

APPLICATION FACT SHEET

Application File Number: IS-88968

Applicant: Oregon Department of Fish and Wildlife

County(ies): Douglas

Watermaster: Susan Douthit District #15

Priority Date: November 30, 2020

Source: Cleghorn Creek, tributary to Smith River

Basin Name & Number: Umpqua, #516

Watershed Identification Number: 31630308

Allowable Instream Use:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
18.1	18.3	13.4	8.01	4.56	1.91	0.82	0.48	0.37	0.75	5.36	14.3

PUBLIC NOTICE DATE: Tuesday, August 3, 2021

30 DAY COMMENT DEADLINE DATE: **Thursday, September 2, 2021**

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

RECEIVED
NOV 30 2020
OWRD

SECTION 1: ORGANIZATION INFORMATION AND SIGNATURE

Organization Information

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

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

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

Applicant Signature	Print Name and Title	Date
	Anna Pakenham Stevenson **Water Program Manager**	11/30/2020
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: 10/21/2020

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

Oregon Parks and Recreation Department was notified on: 10/21/2020

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.

SECTION 4: SOURCE AND REACH

Stream or lake name: Cleghorn Creek Tributary to: Smith River

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:

Cleghorn Creek, tributary to Smith River, beginning at river mile 1.7 (SWSE, S3, T21S, R7W, WM) in Douglas County (43.764339, -123.51579) and continuing downstream to the mouth river mile 0.0 (NWSW, S4, T21S, R7W, WM) in Douglas County (43.769133, -123.540886).

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

ODFW Administrative Rule 635-400-0015(7) & (8) require ODFW to request flows that meet the following standard:

> (7) An instream flow requirement shall be specified as a quantity of water or water surface elevation as determined by the methodologies in this section and dependent upon other habitat factors, fish or wildlife species plans, basin or subbasin plans, management objectives or other commission policies for the waterway.
>
> (8)(a) The instream flow requirement for any specified period shall be no less than the highest instream flow or water surface elevation required by any of the fish or wildlife species of management interest during that period;

OWRD Administrative Rule 690-077-0015(4) requires OWRD to limit the approved flow to meet the following standard:

> (4) If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant for the applied public use. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.

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.

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
30.8	28.4	25.5	17.8	9.1	8.1	4.9	1.7	1	1.3	18.0	28	☒ 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

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 Umpqua River Basin Investigation 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 explain how you have complied with the requirements contained in your Department's own administrative rules for instream water rights, including application of the required methods to determine the requested flows.

OAR 635-400-0015 Determination of Instream Flow Measurement Methodologies
ODFW followed all procedures laid out in the agency's 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 evaluated against the range of naturally occurring streamflows and reviewed for fish periodicity by ODFW district fish biologists, yielding the recommendations in this instream water right application (see attached BIR: *Umpqua River Basin*).

OAR 635-400-0020- Standards for Selection of Streams or Stream Reaches for Instream Water Right Applications

Consistent with our rules, ODFW used the following resources and standards to prioritize waterways for instream water right applications: 1) basin and subbasin plans, management objectives, statutes, administrative rules and Commission policies; 2) the presence of fish and wildlife species that are considered endangered, threatened, sensitive or otherwise important; 3) the need to conserve, maintain or enhance fish or wildlife habitats or functions, including but not limited to, passage, spawning, incubation, rearing, and wintering habitats that maintain or improve the species.

OAR 635-400-0025- Responsibilities to WRD

ODFW will coordinate with OWRD for instream water rights monitoring as necessary for priority reaches. Specifically, ODFW will coordinate with OWRD to develop monitoring plans for instream water rights, revise or create a Memorandum of Understanding between the ODFW and WRD to include issues related to instream water rights, such as measuring, monitoring and enforcement of instream water rights.

OAR 635-400-0030- Internal Process for Instream Water Right Application

Instream Water Rights application initiation, consultation, review, processing, submittal, and record keeping was consistent with ODFW rules. Specifically, the application was initiated and processed by the proper ODFW staff, was presented to OWRD within the timelines stated in the internal rules, and ODFW shall also abide by the review requirements and make any required corrections requested by OWRD.

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.

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	Address	
City	State	Zip

SECTION 8: REMARKS

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

Copies of letters to local governments and Basin Investigation Reports are not attached to each application individually; rather, they are provided separately (hard copy and electronically) for each administrative basin.

SECTION 9: MAP

☒ Please provide a basin map that identifies the reach of the stream or the lake.

- Attached at end of application.

YOU ARE ENCOURAGED TO PROVIDE THIS INFORMATION:

A means and location for measuring the instream water right:

- Please see section 6

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

- Please see section 6

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

- Please see section 6

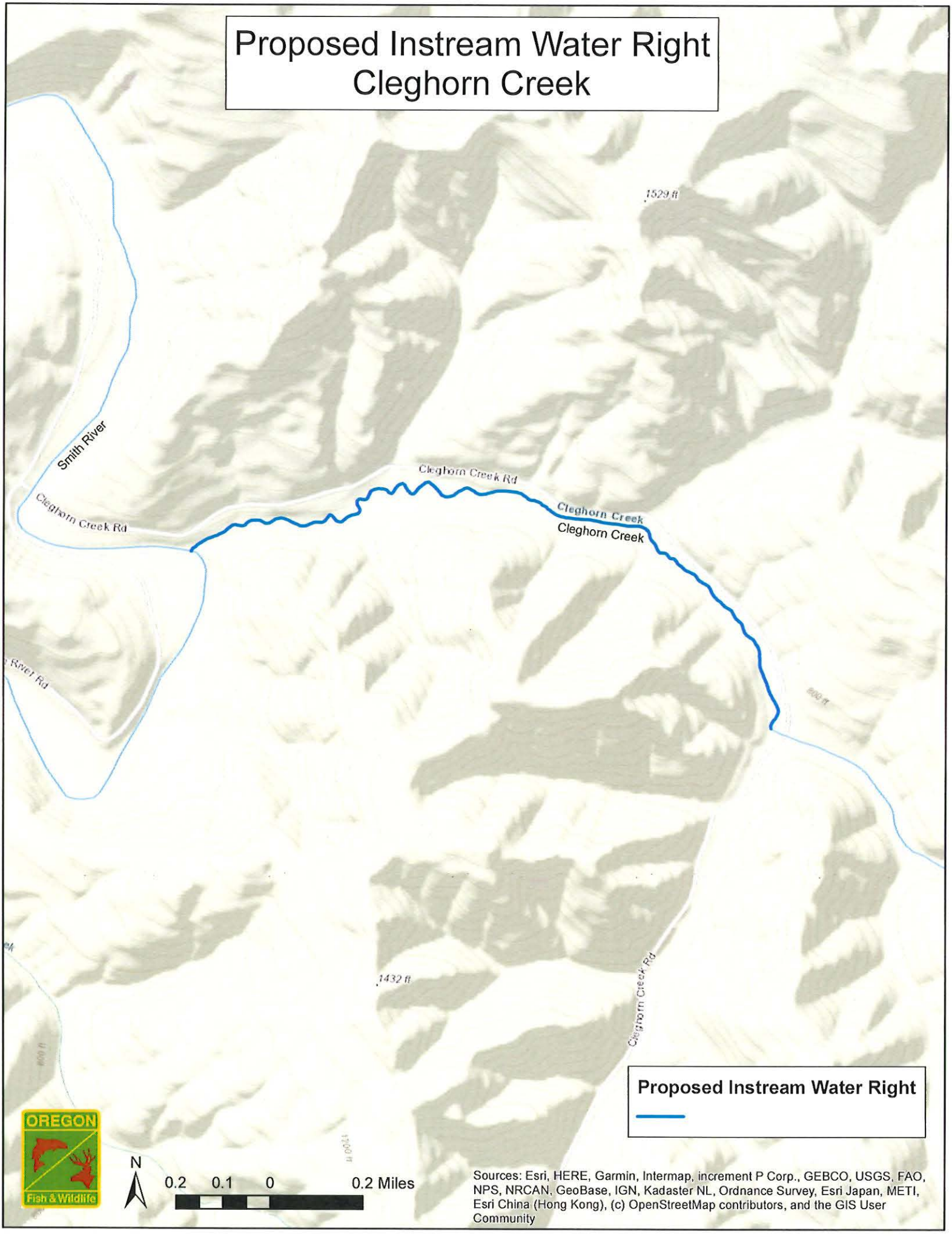
WE ARE RETURNING YOUR APPLICATION FOR THE FOLLOWING REASON(S):

- ☐ SECTION 1: _____
- ☐ SECTION 2: _____
- ☐ SECTION 3: _____
- ☐ SECTION 4: _____
- ☐ SECTION 5: _____
- ☐ SECTION 6: _____
- ☐ SECTION 7: _____
- ☐ SECTION 8: _____
- ☐ SECTION 9: _____
- ☐ Other: _____

_____

_____

_____


Proposed Instream Water Right
Cleghorn Creek
1529 ft
Smith River
Cleghorn Creek Rd
Cleghorn Creek Rd
Cleghorn Creek
Cleghorn Creek
River Rd
800 ft
1432 ft
Cleghorn Creek Rd
1200 ft
Proposed Instream Water Right
OREGON
Fish & Wildlife
N
0.2 0.1 0 0.2 Miles
Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community