

IS-72168

SALEM SHUTTLE

Department Of Fish And Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302

Date filed 1-29-1992

Priority

Action suspended until

Return to applicant

Date of approval

CONSTRUCTION

Date for beginning

Date for completion 06/27/2025

Extended to

Date for application of water

Extended to

PROSECUTION OF WORK

Form "A" filed

Form "B" filed

Form "C" filed

FINAL PROOF

Blank mailed

Proof received

Date Certificate issued

Application No. 72168

Permit No.

Certificate No. 98264

Stream Index, Page No.

ASSIGNMENTS

REMARKS

FEES PAID

Date _____

Amount

Receipt No.

9-27-2023

\$1680.00

141679

Cert. Fee

FEES REFUNDED

Date _____

Amount

Check No.

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # 141679

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

INVOICE # _____

RECEIVED FROM: Waterwatch of Oregon, Inc.
BY: _____

APPLICATION 15-72168
PERMIT
TRANSFER

CASH: ☐ CHECK: # 15477 OTHER: (IDENTIFY) ☐

TOTAL REC'D \$ 680.00

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 \$
0408 MISC REVENUE: (IDENTIFY) \$
TC162 DEPOSIT LIAB. (IDENTIFY) \$
0240 EXTENSION OF TIME \$

WATER RIGHTS:

EXAM FEE

0201 SURFACE WATER \$ 0202 \$
0203 GROUND WATER \$ 0204 \$
0205 TRANSFER \$

WELL CONSTRUCTION

EXAM FEE

0218 WELL DRILL CONSTRUCTOR \$ 0219 \$
LANDOWNER'S PERMIT 0220 \$

0234 OTHER (IDENTIFY) Request for Standing \$680.00

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
RECEIVED OVER THE COUNTER

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

RECEIPT: 141679

DATED: 9-27-23 BY: [Signature]

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

STATE OF OREGON
WATER RESOURCES DEPARTMENT

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SALEM, OR 97301-4172
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EXAM FEE

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

TREASURY OTHER / RDX
RECEIVED OVER THE COUNTER

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

RECEIPT: 141679

DATED: 9-27-23 BY: [Signature]

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

COPY

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # **6310**

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

INVOICE # _____

RECEIVED FROM: Joe L. or Ruth E. Barber
BY: Living Trust

APPLICATION	
PERMIT	
TRANSFER	

CASH: ☐ CHECK: # ☒ 24-12 OTHER: (IDENTIFY) ☐

TOTAL REC'D \$ 20.~

0417 WRD MISC CASH ACCT

ADJUDICATIONS

\$

PUBLICATIONS / MAPS

\$

OTHER: (IDENTIFY)

\$

OTHER: (IDENTIFY)

\$

REDUCTION OF EXPENSE

CASH ACCT.

\$

PCA AND OBJECT CLASS

VOUCHER #

0427 WRD OPERATING ACCT

MISCELLANEOUS IS-72168

PCA 66111

0407 COPY & TAPE FEES IS-72169

0410 RESEARCH FEES

0408 MISC REVENUE: (IDENTIFY)

TC165 DEPOSIT LIAB. (IDENTIFY)

PFO Request

WATER RIGHTS:

0201 SURFACE WATER

0203 GROUND WATER

0205 TRANSFER

WELL CONSTRUCTION

0218 WELL DRILL CONSTRUCTOR

LANDOWNER'S PERMIT

EXAM FEE

\$

\$

\$

EXAM FEE

\$

0202

0204

0206

0219

0220

RECORD FEE

\$

\$

\$

LICENSE FEE

\$

\$

OTHER (IDENTIFY)

0437 WELL CONST. START FEE

0211 WELL CONST START FEE

\$

0210 MONITORING WELLS

\$

CARD #

CARD #

OTHER (IDENTIFY)

0539 LOTTERY PROCEEDS

1302 LOTTERY PROCEEDS

\$

0467 HYDRO ACTIVITY

LIC NUMBER

0233 POWER LICENSE FEE (FW/WRD)

\$

0231 HYDRO LICENSE FEE (FW/WRD)

\$

HYDRO APPLICATION

\$

RECEIPT # **6310**

DATED: 9-10-96 BY: Barbara Bushnell

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

NUMBER 7989

Check ^{\$}200⁰⁰ Mo _____ Cash _____

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

Mailing List for FO Copies

Application IS-72168

Certificate 98264

Copies Mailed
By: <u>MA</u> (SUPPORT STAFF)
On: <u>06/27/2025</u> (DATE)

Original FO and copy of certificate mailed to applicant and copies mailed to protestant and intervenor:

(Also include a copy of the cover letter for the applicant)

Applicant:

- ✓ OREGON DEPARTMENT OF FISH AND WILDLIFE
ATTN: SPENCER SAWASKE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM OR 97302

Protestant and Intervenor:

- ✓ SHAWN KLAUS
BURNT RIVER IRRIGATION DISTRICT
19498 HWY 245
HERFORD, OR 97387
- ✓ ELIZABETH HOWARD
SCHWABE WILLIAMSON & WYATT PC
1211 SW 5TH AVENUE, SUITE 1900
PORTLAND, OR 97301
- ✓ BRIAN POSEWITZ
WATERWATCH OF OREGON
8508 SE 11TH AVE.
PORTLAND, OR 97202

Sent via auto email:

1. WRD – Watermaster District #8
2. WRD – Jason Spriet
3. WRD – SW Section

See also on back



Copies sent to:

- ✓ 1. WRD – File IS-72168
- ✓ 2. Applicant, Spencer Sawaske, Oregon Department of Fish and Wildlife – spencer.r.sawaske@odfw.oregon.gov
- ✓ 3. Applicant's attorney - Anika Marriott, Oregon Department of Justice – anika.e.marriott@doj.oregon.gov
- ✓ 4. Protestant Burnt River Irrigation District's attorney – Elizabeth Howard, Schwabe Williamson & Wyatt PC – ehoward@schwabe.com
- ✓ 5. Intervenor WaterWatch of Oregon's attorney, Brian Posewitz – brian@waterwatch.org
- ✓ 6. OWRD's attorney - Jesse Ratcliffe, Oregon Department of Justice – jesse.d.ratcliffe@doj.oregon.gov
- ✓ 7. OWRD's attorney's assistant - Denise Ruttan, Oregon Department of Justice – denise.ruttan@doj.oregon.gov

Protest Program Coordinator: Will Davidson



Oregon

Tina Kotek, 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.oregon.gov/owrd

NOTICE OF CERTIFICATE ISSUANCE

June 27, 2025

OREGON DEPARTMENT OF FISH AND WILDLIFE
ATTN: SPENCER SAWASKE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM OR 97302

Reference: Application IS-72168 (Certificate 98264)

The enclosed instream certificate confirms the water right established under the terms of the enclosed order issued by this Department. The water right is now appurtenant to the specific place as described by the certificate.

If you have any questions related to the issuance of this certificate, you may contact Amanda Mather at Amanda.L.Mather@water.oregon.gov.

Sincerely,

Amanda Mather

Amanda Mather
Water Rights Program Analyst
Oregon Water Resources Department

STATE OF OREGON

COUNTY OF BAKER

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE IS HEREBY ISSUED TO

OREGON WATER RESOURCES DEPARTMENT
725 SUMMER ST NE SUITE A
SALEM OR 97301

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

APPLICATION FILE NUMBER: IS-72168

SOURCE OF WATER: BURNT RIVER, TRIBUTARY TO SNAKE RIVER

PURPOSE: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE, AND JUVENILE REARING OF
RAINBOW TROUT

DATE OF PRIORITY: JANUARY 29, 1992

TO BE MAINTAINED IN: **REACH 1** - BURNT RIVER FROM FORMER USGS GAGE 13274200 AT
APPROXIMATELY RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE
41E, WM) TO OWRD GAGE 13274400 AT BURNT RIVER ABOVE BANKS
DIVERSION NEAR DURKEE, APPROXIMATELY RIVER MILE 31.3 (NESW, SECTION
26, TOWNSHIP 11S, RANGE 42E WM)
REACH 2 – BURNT RIVER FROM CEMENT PLANT BRIDGE AT APPROXIMATELY
RIVER MILE 22.9 (SESW, SECTION 11, TOWNSHIP 12S, RANGE 43E, WM) TO
BROWNLEE RESERVOIR POOL AT APPROXIMATELY RIVER MILE +1.0 (SW ¼,
SECTION 8, TOWNSHIP 14S, RANGE 45E, WM)

The right is established under Oregon Revised Statutes 537.341. The reaches in which water is to be maintained under this right reflect the Settlement and Water Bypass Flow Agreement entered into by the Burnt River Irrigation District and the Oregon Department of Fish and Wildlife on January 21, 2025 (Settlement Agreement). The Settlement Agreement is not incorporated into this certificate by reference and is not an "existing water right of record" as that term is defined and used in ORS 540.045 or a "relative entitlement to water" as that term is used in ORS 540.045. All terms and conditions of this right are set forth in this certificate.

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

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

Month	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1 st ½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2 nd ½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

2. The water right holder shall measure and report the in-stream flow along the reaches of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.

ISSUED JUNE 27, 2025

Katherine Ratcliffe

Katherine Ratcliffe, Administrator
Water Right Services Division
for Ivan Gall, Director
Oregon Water Resources Department

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

Water Right Application IS-72168)	
)	
Oregon Department of Fish and Wildlife,)	
Applicant)	
	)	FINAL ORDER INCORPORATING CONSENT
Burnt River Irrigation District,	)	AGREEMENT
Protestant)	
)	
WaterWatch of Oregon, Inc.,)	
Intervenor)	

Summary: Order approving Application IS-72168 and issuing Certificate 98264.

Authority

The application is being processed in accordance with Oregon Revised Statutes (ORS) 537.140 to 537.252 and 537.332 to 537.360, Oregon Administrative Rules (OAR) Chapter 690, Division 77, and the Powder Basin Program (OAR Chapter 690, Division 509).

These statutes and rules can be viewed on the Oregon Water Resources Department's website:
<https://www.oregon.gov/owrd/programs/policylawandrules/Pages/default.aspx>

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

This final order is issued pursuant to ORS 537.170(6) to (9), 183.417(3), and OAR 690-077-0047, 137-003-0510(4), and 137-003-0665(5).

APPLICATION HISTORY

1. The Application History section of the August 27, 1996, Proposed Final Order is incorporated herein by reference.

FINDINGS OF FACT

1. The findings of fact in the August 27, 1996, Proposed Final Order are incorporated herein by reference, with the additions and changes shown below.
2. On January 29, 1992, the Oregon Department of Fish and Wildlife submitted an application for an instream water right to the Oregon Water Resources Department (Department).

3. On August 27, 1996, the Department issued a Proposed Final Order recommending approval of the application.
4. On October 9, 1996, the Burnt River Irrigation District filed a timely protest of the Proposed Final Order.
5. On October 11, 1996, WaterWatch of Oregon filed a timely request for standing in support of the Proposed Final Order.
6. On August 15, 2015, WaterWatch of Oregon filed a timely petition for party status
7. On September 14, 2021, the Department referred the protest to the Oregon Office of Administrative Hearings for a contested case hearing.
8. On July 14, 2023, the Department granted WaterWatch of Oregon limited party status.
9. On January 21, 2025, the Oregon Department of Fish and Wildlife and the Burnt River Irrigation District entered into a Settlement and Water Bypass Agreement to resolve Burnt River Irrigation District's protest. The Settlement and Water Bypass Agreement was conditioned and contingent upon the Department issuing a Final Order and Certificate that sets the instream reach for the instream water right requested by the Oregon Department of Fish and Wildlife consistent with the terms of the Settlement and Water Bypass Agreement.
10. On June 2, 2025, the Department, the Oregon Department of Fish and Wildlife, the Burnt River Irrigation District and WaterWatch of Oregon (Parties) entered into a Consent Agreement to resolve this matter. The Settlement and Water Bypass Agreement is attached to the Consent Agreement as Exhibit A for convenient reference but is not incorporated into the Consent Agreement. The Consent Agreement is incorporated into this final order by reference and is attached hereto and made a part of this order. The Settlement and Water Bypass Agreement is not incorporated into or made part of this order.
11. Pursuant to the terms of the Consent Agreement, the Department shall issue a certificate that reflects an amendment of the reach of the requested instream water right from the

reach described in the August 27, 1996, Proposed Final Order to following reach (Revised Reach):

REACH 1 – BURNT RIVER FROM FORMER USGS GAGE 13274200 AT APPROXIMATELY RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E, WM) TO OWRD GAGE 13274400 AT BURNT RIVER ABOVE BANKS DIVERSION NEAR DURKEE, APPROXIMATELY RIVER MILE 31.3 (NESW, SECTION 26, TOWNSHIP 11S, RANGE 42E WM)

REACH 2 – BURNT RIVER FROM CEMENT PLANT BRIDGE AT APPROXIMATELY RIVER MILE 22.9 (SENW, SECTION 11, TOWNSHIP 12S, RANGE 43E, WM) TO BROWNLEE RESERVOIR POOL AT APPROXIMATELY RIVER MILE +1.0 (SW ¼, SECTION 8, TOWNSHIP 14S, RANGE 45E, WM)

The Revised Reach amends the reach described in the Proposed Final Order by omitting a portion of the middle of the reach, thereby shortening the reach and splitting it into two separate reaches. In addition, both the reach described in the Proposed Final Order and the Revised Reach identify the location of USGS gage 13274200 as the upstream terminus of the instream water right reach. However, the Revised Reach updates the description of the upstream terminus by adding “former” in recognition that USGS gage 13274200 no longer exists, and by describing the location of the gage as “at approximately river mile 41.7,” rather than “at approximately river mile 41.5.” These updates to the description of the upstream terminus do not change the location of the upstream terminus or expand the instream water right reach. Instead, they provide a more accurate description of the location of the upstream terminus under current conditions.

The requested instream water right, as amended to reflect the Revised Reach, is referred to herein as the Revised Proposed Use.

12. All findings of fact in the August 27, 1996, Proposed Final Order concerning the “proposed use” apply equally to the Revised Proposed Use.
13. Certificate condition #5 in the draft certificate included with the Proposed Final Order reads “[t]he flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.” Certificate condition #5 in Certificate 98264 issued with this order has been modified to reflect that the Revised Proposed Use includes two instream flow reaches and reads “[t]he flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.”

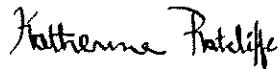
CONCLUSIONS OF LAW

1. The conclusions of law in the August 27, 1996, Proposed Final Order are incorporated herein by reference.
2. All conclusions of law in the August 27, 1996, Proposed Final Order concerning the "proposed use" apply equally to the Revised Proposed Use.

ORDER

Application IS-72168, as amended by the Consent Agreement, is approved, and Certificate 98264 is issued.

DATED JUNE 27, 2025



Katherine Ratcliffe, Administrator
Water Right Services Division
for Ivan Gall, Director
Oregon Water Resources Department

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF:

Water Right Applications IS-72168, IS-72169
and IS-72186

Oregon Department of Fish and Wildlife,
Applicant

Burnt River Irrigation District,
Protestant

WaterWatch of Oregon,¹
Intervenor.

OAH Reference Nos. 2021-OWRD-00051, 2021-OWRD-00053 and 2021-OWRD-00083

Agency Case Nos. IS-72168, IS-72169, IS-72186

**ODFW, OWRD, BRID, AND WATERWATCH
CONSENT AGREEMENT**

Whereas, on January 21, 2025, the Oregon Department of Fish and Wildlife (ODFW) and the Burnt River Irrigation District (BRID or Protestant) entered into a Settlement and Water Bypass Agreement, attached as Exhibit A (Settlement Agreement).² As set forth in Sections 9 and 31, the Settlement Agreement is conditioned and contingent on the Oregon Water Resources Department's (OWRD) issuance of Final Orders and Certificates for all of the Instream Water Rights (IS-72168, IS-72169, and IS-72186) that set instream reaches for the Instream Water Rights consistent with the terms of the Settlement Agreement. Section 31 further provides that BRID will withdraw its protests and that BRID and ODFW will not challenge OWRD's issuance of final orders for the Instream Water Rights so long as such orders are consistent with the terms of the Settlement Agreement.

Whereas, WaterWatch of Oregon (WaterWatch or Intervenor) was advised of the Settlement Agreement and given opportunity to comment on it, and does not intend to seek a

¹ WaterWatch of Oregon is a party to IS-72168 and IS-72169, but not to IS-72186.

² The Settlement Agreement is attached to this Consent Agreement only for convenient reference. The Settlement Agreement is not incorporated into this Consent Agreement.

different outcome in the contested cases for IS-72168 or IS-72169 (WaterWatch is not a party to IS-72186).

Whereas, OWRD intends to issue Final Orders and Certificates that set instream reaches for the Instream Water Rights that are consistent with the terms of the Settlement Agreement, which are attached hereto and incorporated herein as Exhibit B.

Whereas, ODFW and BRID agree that OWRD's issuance of Final Orders and Certificates attached as Exhibit B will constitute issuance of Final Orders and Certificates consistent with the terms of the Settlement Agreement as contemplated by Sections 9 and 31 of the Settlement Agreement.

The ODFW, OWRD, BRID, and WaterWatch (each individually a "Party" and collectively "Parties") do hereby stipulate and agree as follows:


A. Terms of the Agreement

1. After signing of this Consent Agreement by all Parties, the Protestant will within 7 days withdraw their protests in the above referenced matters (Water Right Applications IS-72168, IS-72169 and IS-72186), and OWRD will within 7 days thereafter withdraw the referral of the protests of these matters from the Office of Administrative Hearings.
2. Within 28 days of the signing of this Consent Agreement by all Parties, OWRD will issue final orders incorporating this Consent Agreement and certificates, in the form of the draft final orders and certificates attached hereto and incorporated herein as Exhibit B.
3. By signing this Consent Agreement, each Party waives the right to a further contested case hearing on these matters and any and all right to petition for reconsideration or judicial review of any final orders issued in these matters in accordance with this Consent Agreement.

4. All terms and conditions of the Instream Water Rights are set forth in the draft Certificates included in Exhibit B. The Settlement Agreement is not incorporated into the Instream Water Rights and is not an existing water right of record or relative entitlement to water under ORS 540.045. OWRD is not responsible for enforcing any terms of the Settlement Agreement. OWRD's agreement to this Consent Agreement does not constitute agreement to any portion of the Settlement Agreement.

B. Consent

1. Each Party to this Consent Agreement represents, warrants, and agrees that the person who executes this Agreement on its behalf has the full right and authority to enter into this Consent Agreement on behalf of that Party and bind that Party to the terms of this Consent Agreement.
2. Each Party to this Consent Agreement certifies that it has had a reasonable opportunity to review and request changes to the Consent Agreement, and that it has signed this Consent Agreement of its own free will and accord.
3. Each Party to this Consent Agreement certifies that it has read the entire Consent Agreement, including the draft final orders and draft certificates attached hereto as Exhibit B.
4. Each Party to this Consent Agreement agrees that nothing in this Consent Agreement establishes factual, legal, or policy precedent.
5. This Agreement may be signed in counterparts.



Debbie Colbert, Director, on behalf of
Oregon Department of Fish and Wildlife

May 28, 2025

DATE

Katherine Ratcliffe, Administrator,
Water Rights Services Division, on behalf of
Oregon Department of Water Resources

DATE

William Moore on behalf of
Burnt River Irrigation District

DATE

Brian Posewitz on behalf of
WaterWatch of Oregon

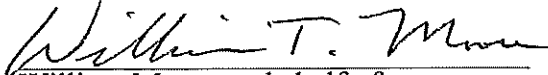
DATE

Debbie Colbert, Director, on behalf of
Oregon Department of Fish and Wildlife

DATE

Katherine Ratcliffe, Administrator,
Water Rights Services Division, on behalf of
Oregon Department of Water Resources

DATE



William Moore on behalf of
Burnt River Irrigation District

5-21-2025

DATE

Brian Posewitz on behalf of
WaterWatch of Oregon

DATE

Debbie Colbert, Director, on behalf of
Oregon Department of Fish and Wildlife


DATE

Katherine Ratcliffe, Administrator,
Water Rights Services Division, on behalf of
Oregon Department of Water Resources

DATE

William Moore on behalf of
Burnt River Irrigation District

DATE


Brian Posewitz on behalf of
WaterWatch of Oregon

DATE

5-30-25

Debbie Colbert, Director, on behalf of
Oregon Department of Fish and Wildlife

DATE

Katherine Ratcliffe

Katherine Ratcliffe, Administrator,
Water Right Services Division, on behalf of
Oregon Water Resources Department

June 2, 2025

DATE

William Moore on behalf of
Burnt River Irrigation District

DATE

Brian Posewitz on behalf of
WaterWatch of Oregon

DATE

SETTLEMENT AND WATER BYPASS AGREEMENT

Burnt River Irrigation District (“**BRID**”) and the Oregon Department of Fish and Wildlife (“**ODFW**”), referred to collectively as the “**Parties**” and each individually as “**Party**”, do hereby stipulate and agree in this Settlement and Water Bypass Agreement (“**Agreement**”), as follows:

Recitals

- A. BRID is the operator of the Unity Dam, located on the Burnt River. The dam is a channel-spanning dam, constructed by the U.S. Department of the Interior, Bureau of Reclamation in 1936 to 1938. Unity Dam is operated by BRID pursuant to the Contract Between the United States and the Burnt River Irrigation District, dated December 24, 1935, as amended.
- B. Prior to construction of Unity Dam, the Burnt River and its tributaries had robust flows in the spring, with greatly decreased flows during the summer. Tributaries froze on occasion, suspending or reducing flows in Burnt River and its tributaries during the coldest parts of the year.
- C. As of the date of this Agreement, BRID operates Unity Dam to bypass flows to the Burnt River primarily when flows are not needed for storage. BRID also bypasses high springtime flows, which may provide scouring benefits in the Burnt River. BRID generally stores water between October and April and releases stored water for irrigation use by its members between May and September. During the late fall and winter months (October through February), BRID limits releases and bypass flows, sometimes to as low as a monthly average of 1 cfs or less, depending on conditions and downstream demands. In the winter, an ice sheet may form on parts or the whole of the reservoir pool. When that condition occurs, BRID may hold the reservoir level static to prevent suspension of the ice layer, a condition that can lead to structural damage and may be a public safety hazard.
- D. Springs and return flows feed the Burnt River, maintaining base flows year round, regardless of bypass flows. The Burnt River and its tributaries also freeze on occasion such that water flows sharply decline or cease in certain parts of the system, above and below the dam.
- E. BRID’s Drought Resolutions are specific to local conditions affecting the BRID and are based on snow pack, precipitation, and water levels in the watersheds that supply water to the BRID system.
- F. BRID conducts annual maintenance activities on the dam and related structures, usually in October or November. These activities may interrupt flows for a short period, normally one to two hours, if at all. BRID is sometimes required to draw down water levels in Unity Reservoir to perform major maintenance or to allow the Bureau of Reclamation to complete inspections to verify the integrity of the dam and related structures. These activities depend on conditions of the dam and related infrastructure. They are infrequent and do not occur on a set cycle.

- G. Inflows to Unity Reservoir are estimated based on the reservoir pool elevation as measured by the staff gage located on the dam. Inflows are calculated using a rating curve that is based on a reservoir survey conducted by the Bureau of Reclamation. As of April 15, 2024, stream flows in the Burnt River are measured year round at the following gage locations:

13273000 Burnt River near Hereford (operated by OWRD; partially funded by BRID)
 13274020 Burnt River above Clarks Creek near Bridgeport (operated by Idaho Power Company; partially funded by BRID)
 13274400 Burnt River above Banks Diversion near Durkee (operated by OWRD; partially funded by BRID)
 13275000 Burnt River at Huntington (operated by Idaho Power Company)
 13272500 Hydromet Gage at Unity Dam (operated by Bureau of Reclamation; partially funded by BRID)

Data from the staff and stream gages is uploaded nearly instantaneously to the respective stream gage operator's websites.

- H. On January 29, 1992, ODFW filed instream water right applications IS-72168, IS-72169, and IS-72186 (collectively, "**ODFW Instream Applications**") with the OWRD. The ODFW Instream Applications request instream water rights in the following reaches:

IS-72168

To be maintained in:

BURNT RIVER FROM USGS GAGE 13274200 AT RIVER MILE 41.5 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E WM); TO BROWNLEE RESERVOIR POOL AT RIVER MILE +1.0 (SW1/4, SECTION 8, TOWNSHIP 14S, RANGE 45E WM)

IS-72169

To be maintained in:

BURNT RIVER FROM UNITY DAM AT RIVER MILE 77.1 (SWSE, SECTION 21, TOWNSHIP 12S, RANGE 37E WM); TO USGS GAGE 13274200 AT RIVER MILE 41.5 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E WM)

IS-72186

To be maintained in:

NORTH FORK BURNT RIVER FROM CAMP CREEK AT RIVER MILE 14.8 (NESW, SECTION 34, TOWNSHIP 10S, RANGE 36E WM); TO UNITY RESERVOIR AT RIVER MILE 2.0 (NENW, SECTION 17, T12S, R37E, WM)

- I. The purpose of the ODFW Instream Applications is to provide water for "migration, spawning, egg incubation, fry emergence and juvenile rearing of rainbow trout" ("**Fish Life Cycle Purposes**").
- J. Reaches of the Burnt River referenced in this agreement support all life stages of native Redband Trout (*Oncorhynchus mykiss gibbsi*) in addition to various native whitefish, pikeminnow, sculpin, dace, and sucker populations. Redband trout are remnants of Snake River steelhead that, along with Chinook salmon, were historically present in the Burnt River. The construction of Unity Dam in 1938 precluded fish from accessing the North and South Forks of the Burnt River, documented as principal spawning areas for steelhead and

Chinook salmon. Lower reaches of the Burnt River were subsequently blocked by the construction of the Hells Canyon Complex of dams on the Snake River, completed in 1967. A 1967 basin investigation report conducted by the Oregon State Game Commission found that guaranteed releases of water below Unity Reservoir during fall and winter filling periods would significantly increase the fish production capabilities of the Burnt River segment below the reservoir.

- K. OWRD issued a Proposed Final Order and draft water right certificate for ODFW's instream application IS-72186 on May 14, 1996, and Proposed Final Orders and draft water right certificates for ODFW's instream applications IS-72168 and IS-72169 on August 27, 1996.
- L. In July and October 1996, BRID filed timely protests of the Proposed Final Orders (collectively the "**BRID Protests**").
- M. On September 14, 2021, OWRD referred the BRID Protests to the Oregon Office of Administrative Hearings ("**OAH**") for contested case hearings.
- N. The Parties each desire to resolve the BRID Protests and support the Fish Life Cycle Purposes set forth in the ODFW Instream Applications.
- O. The Parties are entering into this Agreement on the conditions that once effective by signature of all parties:
 - a. The Parties will pursue withdrawal of the cases from the OAH by supporting OWRD's written notification to the OAH pursuant to OAR 137-003-0515(4)(b) that all of the issues in the case have been resolved without need to hold a hearing; and
 - b. The Parties will agree to OWRD's issuance of Final Orders and instream water right certificates ("**Certificates**") that are consistent with the terms and conditions of this Agreement (the "**Instream Water Rights**").

NOW, THEREFORE, IN CONSIDERATION OF MUTUAL PROMISES AND OTHER CONSIDERATION GIVEN AND RECEIVED, THE PARTIES AGREE AS FOLLOWS:

1. **Recitals.** Each of the recitals set forth above are provided for the sole purpose of explaining the understanding of the parties at the time of formation of this Agreement.
2. **Base Flows.** Except as set forth in Section 4, BRID shall modify its operations to bypass 15 cfs to the Burnt River ("**Base Flows**").
3. **Measurement of Flows; Obligation with Respect to Maintaining Gages.** For purposes of determining compliance with Base Flows and Minimum Flows required by this Agreement, flows shall be measured at the gage stations 13273000 (Burnt River near Hereford) and 13274020 (Burnt River above Clarks Creek near Bridgeport) and reservoir inflows calculated using measurements at 13272500 (Hydromet Gage at Unity Dam) (collectively "**Flow Measurement Locations**"), and BRID shall provide funding sufficient to maintain these gages absent mutual agreement on an alternative means of obtaining the necessary information obtained by such gages. If gage stations 13273000 or 13274020 are temporarily inoperable, BRID shall use the 13272500

(Hydromet Gage at Unity Dam) to provide reasonable flow estimates for the purposes of this provision. Base Flows and Minimum Flows, where applicable, shall be measured as daily averages and as weekly rolling (7 day) averages at each gage independently. Rolling 7-day averages are evaluated for each day, and are calculated as the average of daily flows for the day in question and the six previous days. For example, the 7-day average for March 7th is the average of daily flows from March 1st-7th. Base Flows and Minimum Flows requirements will be met when, at all Flow Measurement Locations being used to determine compliance, daily average flows are not less than twenty percent (20%) of the required flows, and weekly rolling (7 day) average flows are at or above the required flows. Whether BRID has complied with this Base Flows and Minimum Flows requirements will be based on raw data maintained by BRID rather than final published data. Raw discharge data can have errors. Any instantaneous measurement that is less than fifty-percent (50%) or exceeds one hundred and fifty-percent (150%) of the average daily or weekly stream flow shall be reviewed for errors. Where there is an error, BRID will evaluate the neighboring reported raw measurements that are not in error, identify the cause of the error, and when appropriate interpolate between the non-erroneous measurements to arrive at a substitute for the erroneous measurement. Final, preliminary, and provisional data can be used to aid in the error correction process. When the Burnt River freezes, water released from Unity Dam may not reach or may not be flowing past the Flow Measurement Locations (each a "**Freeze Condition**"), or both. During any Freeze Condition, the absence of some or any recorded stream flows at any one or all of the Flow Measurement Locations shall not be considered a breach of or default under this Agreement as long as BRID notifies ODFW, within a reasonable period of time not to exceed seven (7) calendar days, of the time and date the Freeze Condition commenced and concluded. However, during a Freeze Condition, BRID shall use the 13272500 (Hydromet Gage at Unity Dam) to the extent possible to provide reasonable flow estimates for the purposes of determining daily and weekly flow averages. Weekly rolling (7 day) average flows will be calculated using the day prior to commencement of a Freeze Condition.

4. Minimum Flows. BRID may bypass less than the 15 cfs Base Flows ("**Minimum Flows**") under the following limited circumstances:

a. Reduced Inflow. Where inflows to the Unity Reservoir, as measured at the Hydromet Gage at Unity Dam, drop below 15 cfs, BRID will ramp the bypass flows down to a level equal to inflows. BRID shall thereafter maintain bypass flows at a level that is at least equal to inflows, increasing bypass flows as inflows increase, until inflows to the Unity Reservoir, as measured at the Hydromet Gage at Unity Dam, return to 15 cfs.

b. Drought Declarations. Drought Declarations may be adopted by BRID board resolution, but shall only be adopted when the following criteria are met: On February 1, (1) Unity Reservoir is at less than forty-percent (40%) of its storage capacity; or, (2) the snow-water equivalent measured at the Natural Resources Conservation Service Tipton SNOTEL site is less than eight (8) inches. Provided however that for the purposes of this Agreement BRID may not adopt a Drought Declaration more than one (1) time in a three-year period. Prior to adopting a Drought Declaration, BRID shall consult with local ODFW staff to set criteria that, when met, will terminate the Drought Declaration. Each Drought Declaration shall expire on September 30, if not earlier terminated. From the effective date of a Drought Declaration until its termination or expiration, BRID shall bypass a minimum of 5 cfs and make reasonable efforts to bypass, but is not required to bypass, the 15 cfs Base Flows.

c. **Frozen Unity Reservoir Safety Hazard.** When Unity Reservoir freezes to the extent that it creates an ice layer, and outflows exceed inflows, the reservoir can experience a condition referred to as a suspended ice layer. A suspended ice layer creates a safety hazard, which is particularly of concern due to public use of the reservoir. Should a suspended ice layer occur, BRID shall, for public safety reasons, immediately reduce bypass flows to a minimum of 5 cfs, if necessary, in order to increase reservoir water levels such that the ice layer is no longer suspended and is no longer creating a safety hazard. BRID agrees to notify ODFW, within a reasonable period of time, not to exceed seven (7) calendar days, of the time and date of this safety hazard and to return to Base Flows immediately upon resolution of the safety hazard, which shall be resolved with the reservoir levels returning to the level of the ice layer or melting of the ice layer, whichever occurs first. At the commencement of this Agreement, no Party anticipates that BRID will not be able to bypass 5 cfs when a frozen Unity Reservoir safety hazard condition occurs, and BRID has provided information that this rare condition has not lasted longer than a few days historically.

d. **Minimum Pool.** When Unity Reservoir reaches its minimum pool elevation of 3776.5 feet, BRID shall not be required to bypass flows until the elevation increases to 3790 feet. Upon attaining the elevation of 3790 feet, BRID shall bypass 5 cfs and thereafter increase bypass flows by ten percent (10%) per one (1) foot of elevation gain until it reaches the Base Flow of 15 cfs. The elevation of Unity Reservoir shall be determined using the water surface elevation data available on the Bureau of Reclamation's Hydromet website for Unity Reservoir. At the commencement of this Agreement, Parties understand that Unity Reservoir rarely reaches its minimum pool elevation.

5. **Normal Maintenance and Repairs.** Routine inspections, maintenance, and repairs are required for the Unity Dam on a regular, annual basis, generally in October and November ("Normal Maintenance"). During any Normal Maintenance, BRID shall provide Base Flows or Minimum Flows, as applicable, except when doing so will create an unreasonable safety or public health risk or unreasonably impede BRID's ability to complete the inspection, maintenance or repairs in a timely and cost-effective manner, all of which shall be determined in BRID's reasonable discretion but in consultation with ODFW. BRID shall give ODFW thirty (30) calendar days advanced notice of Normal Maintenance, during which time ODFW may provide input to BRID regarding preferred timing and duration of flow interruptions, if any. BRID shall consider and incorporate ODFW's input to the maximum extent possible.

6. **Major Repairs and Modifications.** BRID may be required to drain or partially drain Unity Reservoir to inspect the dam or to perform major repairs or modifications ("Major Maintenance"). Not less than ninety (90) calendar days before drawdown will start, or as soon as possible, if less than ninety (90) calendar days, BRID shall notify and initiate consultation with ODFW regarding the planned timing and duration of the drawdown and of bypass flows during the Major Maintenance period. BRID shall implement ODFW's drawdown and flow recommendations obtained during that consultation to the maximum extent reasonable and feasible, accounting for economic, public health and safety, and environmental considerations, as well as direction from other agencies who may authorize or approve activities associated with the Major Maintenance.

7. Measurement Records. In the event that streamflow measurements at the Flow Measurement Locations become unavailable on OWRD's website or Idaho Power Company's website, or the reservoir elevation level data becomes unavailable on the Bureau of Reclamation's website, the Parties shall collaboratively secure an alternative means to maintain and provide a record of flows as contemplated in this Agreement; provided, however that BRID shall bear the expense, if any, of providing that alternative means of maintaining and providing measurement records. Except where such changes are temporary, the agreed-upon changes related to measurement records shall be in writing and documented as an addendum to this Agreement. This requirement related to measurement records is distinct from BRID's obligations set forth in Section 3 of this Agreement to provide funding sufficient to operate or otherwise operate Flow Measurement Gages absent mutual agreement on an alternative means of obtaining the necessary information obtained by such gages.

8. Annual Compliance Report. BRID shall submit an annual compliance report to ODFW that outlines the dates that Base and Minimum Flows were provided and the dates that relevant exceptions were triggered or in effect such that flow releases were minimized or curtailed. The report shall also identify any instances of non-compliance with the terms and conditions of this Agreement and provide an explanation for non-compliance. The report shall be submitted to ODFW on or before May 1 of each year, and shall cover the period of April 1 to March 31.

9. ODFW Instream Reaches. Parties agree, and this Agreement is contingent upon, OWRD issuing Final Orders and Certificates that set the instream reaches to the following:

- a) IS-72168: Reach 1- Burnt River from former USGS Gage 13274200 at approximately River Mile 41.7 (NWNW, Section 10, Township 12S, Range 41E, WM) to OWRD Gage 13274400 at Burnt River above Banks Diversion near Durkee, approximately River Mile 31.3 (NESW, Section 26, Township 11S, Range 42E, WM); Reach 2- Burnt River from cement plant bridge at approximately River Mile 22.9 (SENE, Section 11, Township 12S, Range 43E, WM) to Brownlee Reservoir Pool at approximately River Mile +1.0 (SW1/4, Section 8, Township 14S, Range 45E, WM).
- b) IS-72169: Reach 1- Burnt River from the base of Unity Dam at approximately River Mile 82.9 (SWSE, Section 21, Township 12S, Range 37E, WM), downstream approximately 2,500 ft to just upstream of High Line Ditch Diversion at approximately River Mile 82.5 (SWSW, Section 22, Township 12S, Range 37E, WM); Reach 2 - Burnt River from gage 13274020 above Clarks Creek near Bridgeport, approximately River Mile 46.1 (SWSW, Section 20, Township 12S, Range 41E, WM) to former USGS Gage 13274200 at approximately River Mile 41.7 (NWNW, Section 10, Township 12S, Range 41E, WM).
- c) IS-72186: Reach 1- North Fork Burnt River from Camp Creek at approximately River Mile 16.5 (NESW, Section 34, Township 10S, Range 36E, WM) to the OWRD Gage 13269450 above the Big Flat Diversion Ditch at approximately River Mile 8.7 (NENE, Section 25, Township 11S, Range 36E, WM); Reach 2 - North Fork Burnt River at Unity Reservoir near the outlet of North Fork Burnt River Above West Fork Burnt River Water Availability Basin, approximately River Mile 2.4 (NENW, Section 17, Township 12S, Range 37E, WM).

Specific descriptive information including published coordinates and aerial imagery reference points and locations regarding the agreed-upon reaches of the Instream Water Rights is attached as Exhibit A. Parties understand and agree that river miles are approximate and change naturally over time, and that the additional information in Exhibit A is provided to ensure more precise, durable and understandable reference points for future reference.

10. New Instream Water Right Applications. ODFW shall not file new instream water right applications on the reaches described in the ODFW Instream Applications. For avoidance of doubt, these reaches are depicted in Exhibit B.

11. Default; Remedies. Where a party fails to comply with the terms and conditions of this Agreement, the non-defaulting Party may provide written notice to the defaulting party of the default and the defaulting party shall cure, or, where such default is not immediately curable, take all reasonable steps to cure, its noncompliance within ten (10) calendar days of receipt of written notice. If the party fails to exercise reasonable efforts to cure its noncompliance, the other party's exclusive remedy, after compliance with Dispute Resolution process set forth below, will be to seek specific performance of the terms and conditions set forth in this Agreement. Either party may file for a temporary restraining order and injunction seeking to compel the other party to comply with the terms of this Agreement. In no case, however, shall any party be entitled to a remedy of monetary damages. The Parties understand and agree that OWRD watermasters will continue to regulate the distribution of water in accordance with existing water rights of record and relative entitlements to water pursuant to ORS 540.045; provided further that OWRD is not responsible for enforcing Base Flows, Minimum Flows, or other bypass flows described in this Agreement.

12. Dispute Resolution. The Parties agree to use best efforts to pursue, in good faith, implementation of the terms and conditions of this Agreement. It is the intent of the Parties to resolve any dispute arising out of this Agreement through unassisted, informal negotiations outside of court, and that litigation will be used only after good faith efforts to resolve disagreements are unsuccessful. To this end, Parties understand and agree to prioritize resolution of any noncompliance or alleged noncompliance with the terms and conditions of this Agreement through consideration of mitigation equal to the value of the flow releases as a first step in the dispute resolution process. In considering the need for mitigation, the Parties shall consider the benefits and provide credit for flows that exceeded the Base or Minimum Flows during the 15 days prior to and 15 days after (a 31 day period) the day on which noncompliance occurs. When Base Flows are not met, mitigation is two (2) times the amount of noncompliance minus credit for flows that exceeded Base Flows during the 31 day period; and when Minimum Flows are not met, mitigation is three (3) times the amount of noncompliance minus credit for flows that exceeded Minimum Flows during the 31 day period. Any mitigation shall be provided within one year of the date of default and shall occur from October – March, except that such mitigation may be deferred by up to one year where BRID adopts a Drought Declarations in accordance with Paragraph 4.b.

13. Process. The Parties agree to assign authorized representative(s) to comply with the following informal resolution process. Within five (5) business days of receipt of a written notice of default that sets forth a summary of the disagreement and any documents or supporting materials that assist in describing the issue or appropriate resolution (the “Dispute”), the Parties shall assign representatives to make good faith efforts to resolve the Dispute. If these representatives cannot resolve the Dispute within the next ten (10) business days, the Parties shall designate senior

managers, in the case of ODFW, and one or more board members and the district manager, in the case of BRID, to meet at a mutually agreed upon location, which may include an electronic meeting forum if agreed to by both Parties, to resolve the Dispute. The additional representatives shall seek to resolve the Dispute within thirty (30) calendar days of the date of receipt of the Dispute notice.

14. Attorney Fees. In the event of any litigation between the Parties with respect to this Agreement, all costs and expenses, including reasonable attorneys' fees incurred by the prevailing party at and in preparation for such litigation, excluding any mediation or non-binding arbitration, but including any court proceeding, appeal, petition for review or in any proceeding before a U.S. Bankruptcy Court, shall be paid by the other party, subject to the prevailing party's good faith participation in informal resolution efforts prior to initiating any court proceeding.

15. Force Majeure. Notwithstanding any conditions in this Agreement to the contrary, no Party shall be deemed to be in default by any other Party by reason of failure of performance caused by or resulting from an act of God, strike, lockout or other disturbance, act of public enemy, pandemic, war, blockage, riots, lightning, fire, flood, explosion, dam failure, failure to timely receive necessary government approvals, or restraints of the government, or any other cause whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the party claiming such.

16. Termination. This Agreement may not be terminated, canceled or rescinded by the Parties, except by mutual written consent of both Parties, except that after compliance with the Dispute Resolution process set forth in Section 12 above, ODFW may seek unilateral termination of the Agreement if BRID has defaulted on its obligation to provide Base or Minimum flows as required by this Agreement more than three (3) times within one (1) year and the Parties do not have an agreed-upon mitigation plan and timeline for implementation to compensate for the value of the bypass flows.

17. Five Year Reviews. The Parties shall meet on each five (5) year anniversary following the Effective Date of this Agreement and shall, at that time, discuss whether amendments to the Agreement may be necessary to address conditions that could not have been anticipated at the time the Parties entered into the Agreement, and to otherwise assess and improve the effectiveness of the Agreement. The Parties agree that conditions that could not have been anticipated shall include any change in law or change in interpretation of existing laws related to this Agreement or the Parties' compliance with its terms; the Parties further agree that such changes may necessitate a review prior to the five (5) year anniversary. No amendments shall be made without mutual consent of the Parties; provided further that no amendments shall be made that would either increase Base Flows or diminish the benefits to the fishery resource intended by the original Agreement.

18. Notices; Designated Representatives. Unless specified otherwise herein, any written notice required under this Agreement shall be given when actually delivered or forty-eight (48) hours after deposited in United States mail as certified mail with a return receipt requested, addressed to the address below or to such other address as may be specified from time to time by either of the Parties in writing.

All notices to BRID shall be sent to:

Burnt River Irrigation District (BRID)
c/o District Manager
19498 Hwy 245
Hereford, OR 97837 Tel.: 541-480-4465
Email: briver@ortelco.net
Designated Representative: District Manager

All notices to ODFW shall be sent to both:

Oregon Department of Fish and Wildlife
La Grande/Grande Ronde Watershed District Office
c/o Watershed Manager
107 20th Street
LaGrande, OR 97850
Tel: 541-963-2138 Fax: 541-963-667
Email: jeff.yanke@odfw.oregon.gov
Designated Representative: LaGrande Watershed Manager

And

Oregon Department of Fish and Wildlife
Headquarters
c/o Water Program Manager
4034 Fairview Industrial Drive SE
Salem, OR 97302
Tel: (503) 947-6000
Email: spencer.r.sawaske@odfw.oregon.gov
Designated Representative: Water Program Manager

The Parties consent that all other written communications may be by electronic mail to the Designated Representative noted above. Both Parties shall update such addresses within five (5) business days of a change in any Designated Representative or provide a replacement Designated Representative and their associated electronic mail address should the position be empty for a period of more than five (5) business days.

19. Cooperation. The Parties agree to cooperate fully to execute any and all supplemental documents, and to take all additional actions, that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

20. Choice of Law; Venue. It is understood and agreed that this Agreement shall be construed and interpreted in accordance with the laws of the State of Oregon, without giving effect to its conflict of law principles, and applicable federal law. Any circuit court action or suit brought by the Parties relating to this Agreement must be brought and conducted exclusively in the Circuit Court of Baker County for the State of Oregon; provided, however, if a claim must be brought in a federal forum, then it must be brought and conducted solely and exclusively within the United States District

Court for the District of Oregon. ALL PARTIES HEREBY CONSENT TO THE PERSONAL JURISDICTION OF THESE COURTS, WAIVE ANY OBJECTION TO VENUE IN THESE COURTS, AND WAIVE ANY CLAIM THAT THESE COURTS ARE INCONVENIENT FORUMS. In no way may this section or any other term of this Agreement be construed as (i) a waiver by the State Agencies of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise, or (ii) consent by the State Agencies to the jurisdiction of any court.

21. Constitutionality. The State's obligations under this Agreement are conditioned upon the State receiving funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow the State, in the exercise of its reasonable administrative discretion, to meet its obligations under this Agreement. Nothing in this Agreement is to be construed as permitting any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon.

22. Severability. In the event that any of the terms or conditions, or any portion of them, contained in this Agreement are unenforceable or declared invalid for any reason whatsoever, the same shall not affect the enforceability or validity of the remaining terms and conditions hereof.

23. No Waiver. No waiver of any right under this Agreement will be binding on a Party unless it is in writing and signed by the Party making the waiver.

24. Counting of Days. Any time period to be computed pursuant to this Agreement shall be computed by excluding the first day and including the last day. If the last day falls on a Saturday, Sunday or legal holiday, the time period shall be extended until the next day which is not a Saturday, Sunday or legal holiday in the State of Oregon.

25. Opportunity to Review. Each Party to this Agreement certifies that it has had a reasonable opportunity to review and request changes to the Agreement, and that it has signed this Agreement of its own free will and accord.

26. No Interpretation in Favor of Any Party. It is understood and agreed that the Parties drafted the Agreement together and that its provisions should not be interpreted to favor any Party against another Party as the drafter.

27. Review of Entire Agreement. Each Party to this Agreement certifies that it has read the entire Agreement and understands and agrees with the contents thereof.

28. No Precedent. The Parties agree that nothing in this Agreement establishes factual, legal, or policy precedent.

29. Authority of Signor; BRID Representation. Each Party to this Agreement represents, warrants, and agrees that the person who executed this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and bind that Party to the terms of this Agreement. In addition, BRID represents that it shall faithfully comply with all obligations established in its contract with the United States related to the Unity Dam and reservoir works

(contract number ILR-821) for the express purpose of ensuring no cause exists for the United States to take back such transferred works.

30. Counterparts; Electronic Signatures. The Agreement may be executed in one or more counterparts, and all counterparts so executed shall constitute one agreement, binding on all of the Parties to this Agreement, even though all of the Parties are not signatories to the original or the same counterpart. Any counterpart of this Agreement, which has attached to it separate signature pages, which altogether contain the signatures of all the Parties, is for all purposes deemed a fully executed instrument. The Agreement may be executed by electronic signature, which shall be considered as an original signature for all purposes and shall have the same force and effect as an original, manual signature. Without limitation, "electronic signature" shall include faxed versions of an original signature or electronically scanned and transmitted versions of an original signature or any symbol adopted by either party with the intent to sign this Agreement.

31. Final Orders; Consent to Withdrawal of Protests. This Agreement is conditioned on and contingent on OWRD's issuance of Final Orders and Certificates for all of the Instream Water Rights; provided further that BRID agrees to withdraw its protests and all Parties agree not to challenge OWRD's issuance of Final Orders for all of the Instream Water Rights consistent with the terms of this Agreement.

32. Defense of the Agreement. The Parties agree to support this Agreement, including responding to any third-party challenge to this Agreement or the Final Orders. However, the form, manner and timing of each Party's support are reserved to the discretion of each Party; provided further that in no case shall the BRID or any attorney engaged by the BRID defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor shall they purport to act as the legal representative of the State of Oregon or any of its agencies.

33. Consent. The Parties hereby acknowledge that they have read and understand the terms of this Agreement. The Parties understand and agree that this Agreement and all documents incorporated by reference set forth the entire Agreement of the Parties.

WHEREAS, the Parties have entered into this Agreement effective as of the date of the last signature below.

Burnt River Irrigation District

Name: _____

Date: _____

Position: _____

Oregon Department of Fish and Wildlife

Name:  _____

Date: ____01/15/25____

Position: _____
Director _____

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WHEREAS, the Parties have entered into this Agreement effective as of the date of the last signature below.

Burnt River Irrigation District

Name: William T. Moon

Date: 1-21-2025

Position: Board Chairman

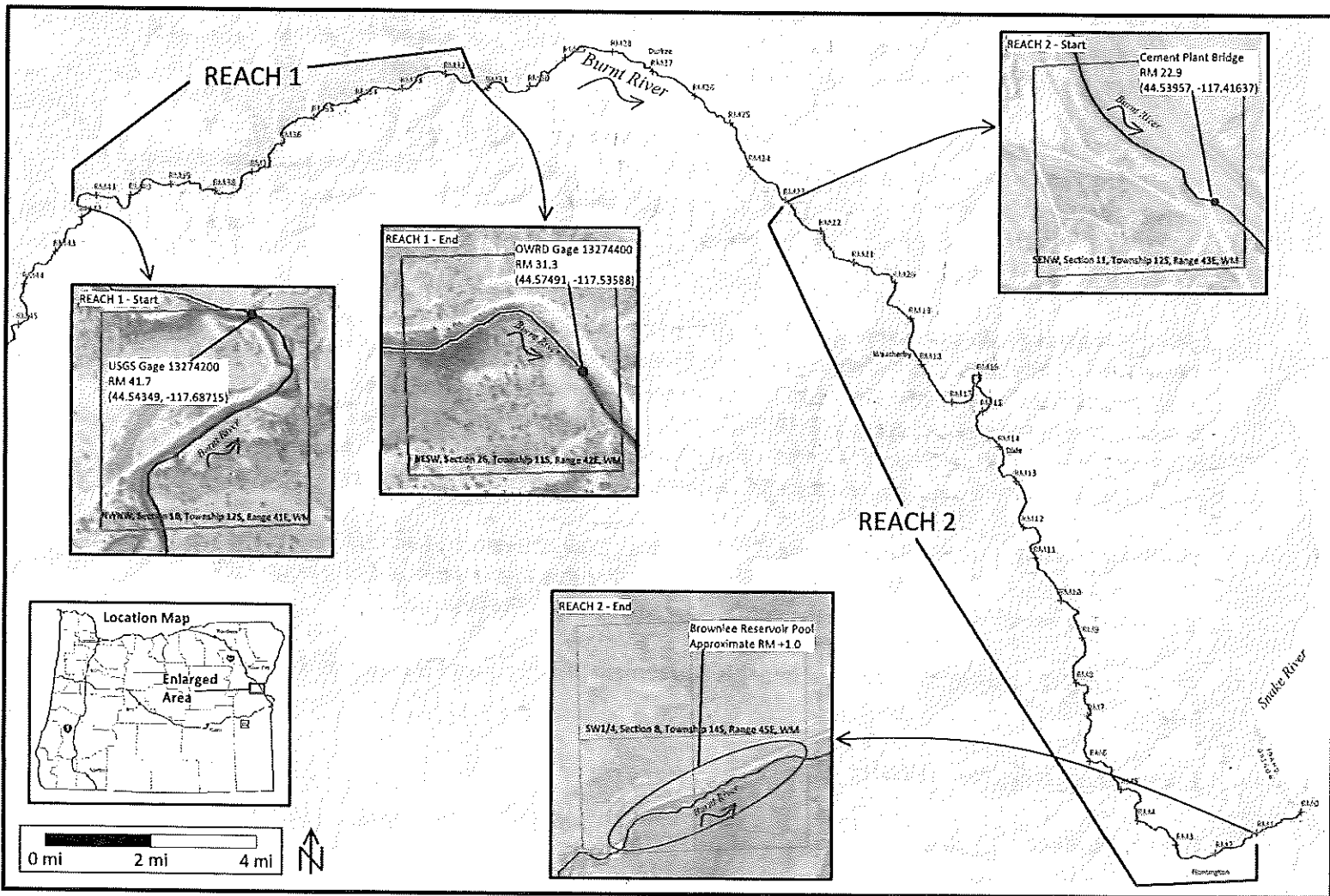
Oregon Department of Fish and Wildlife

Name: _____

Date: _____

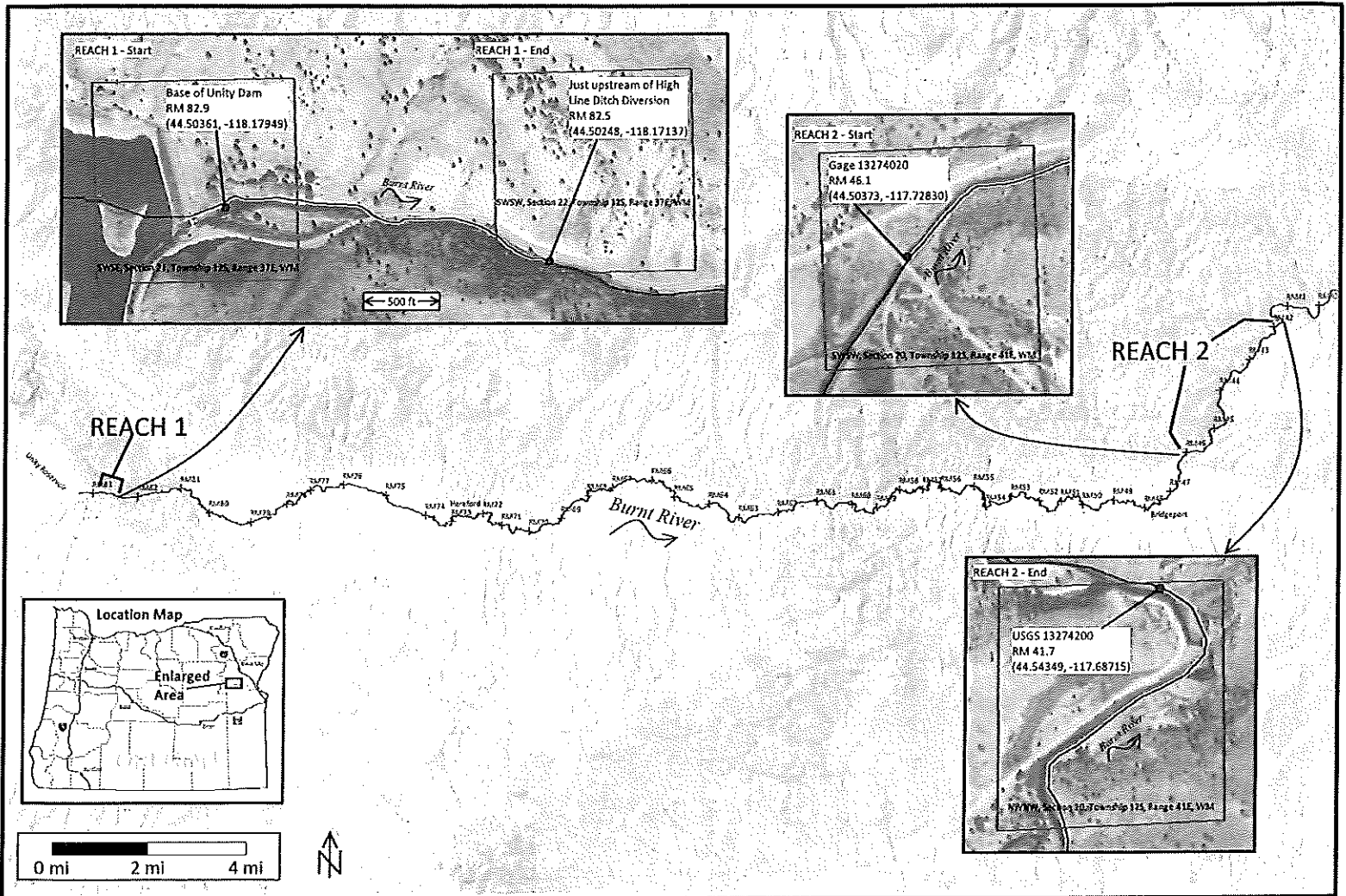
Position: _____

IS-72168 Reach Location Map



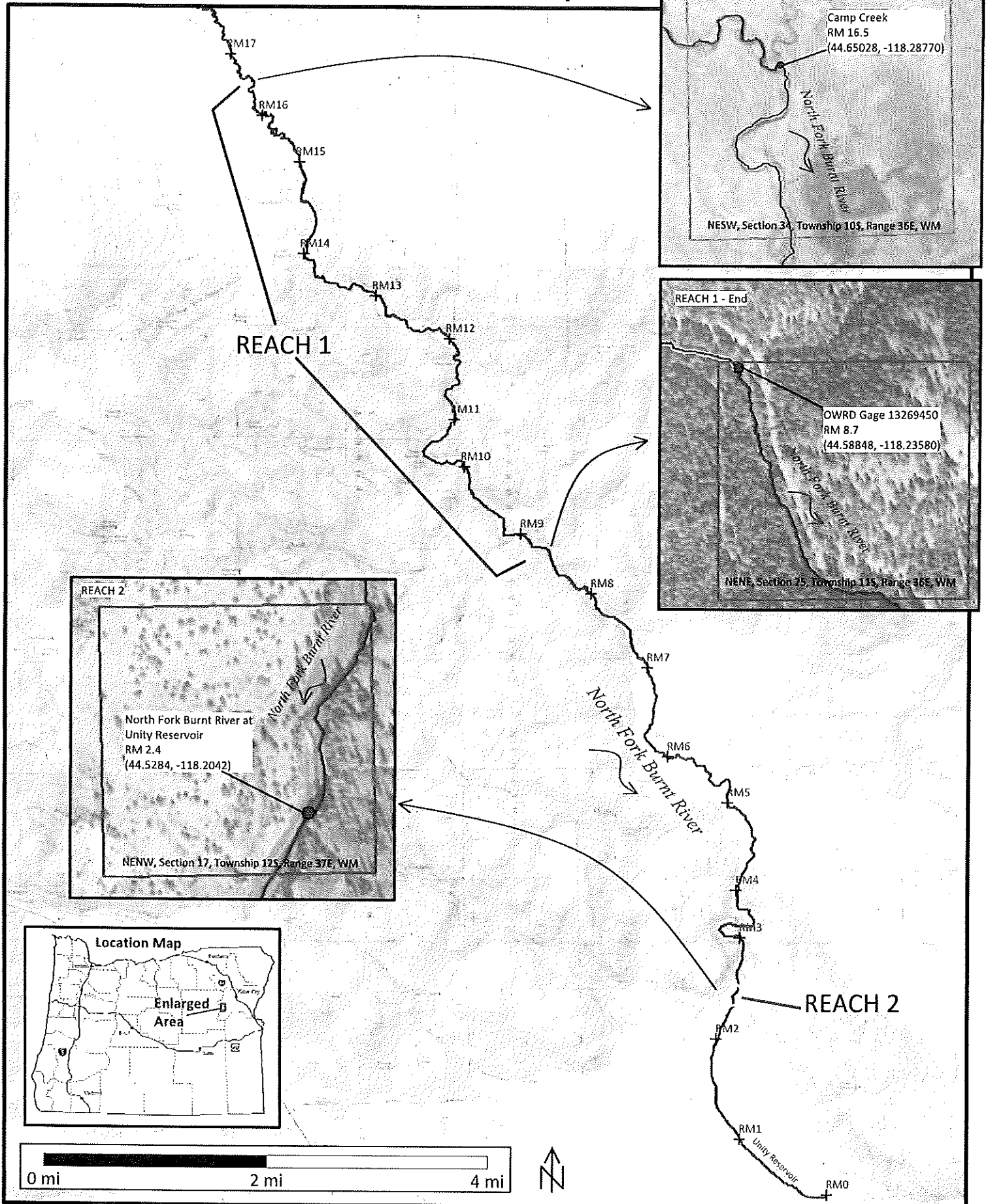
NOTE: River Miles derived from OWRD provided stream layer (5/3/24)

IS-72169 Reach Location Map



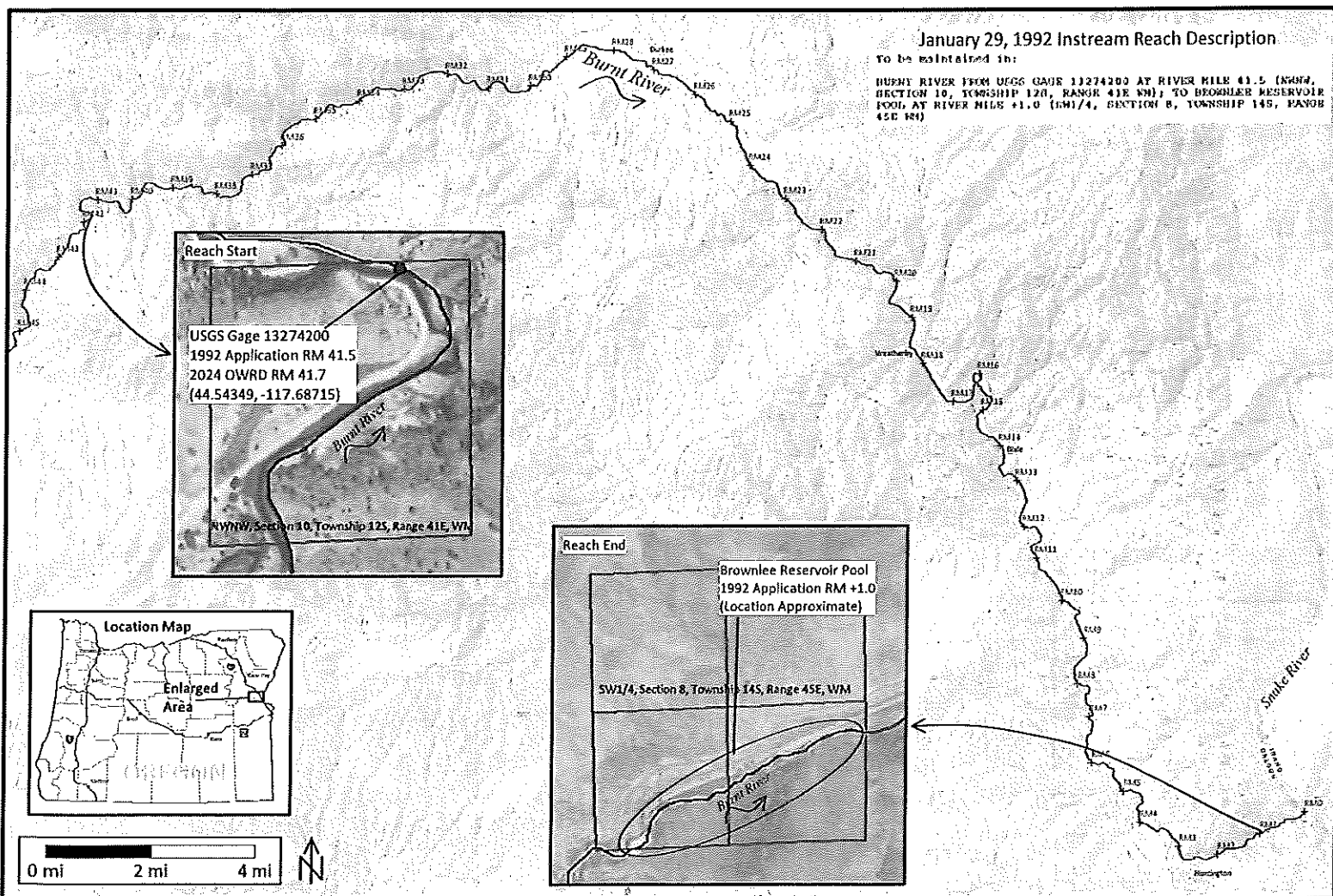
IS-72186 Reach Location Map

EXHIBIT A

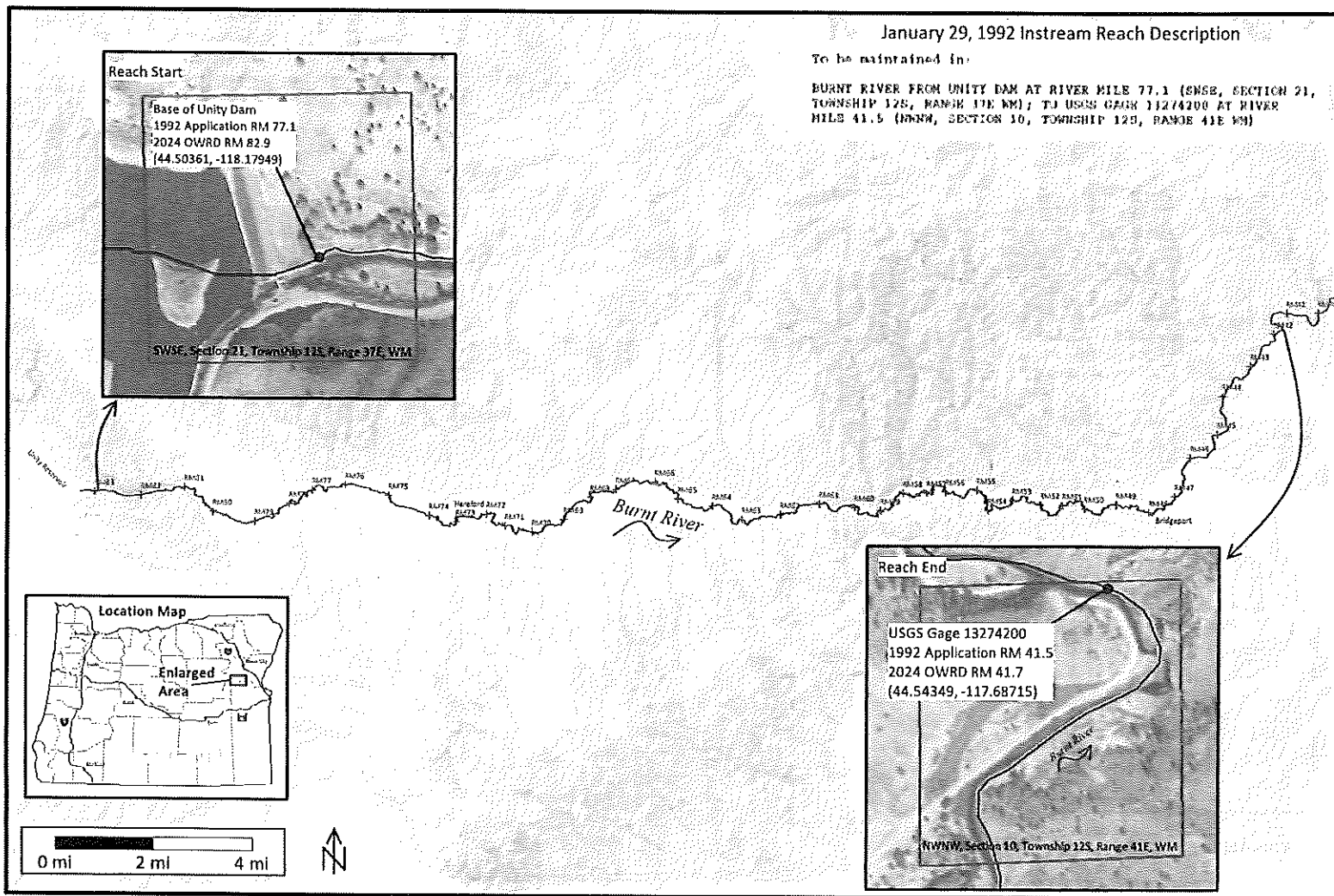


NOTE: River Miles derived from OWRD provided stream layer (5/3/24)

ODFW Instream Application IS-72168 Reach Location Map

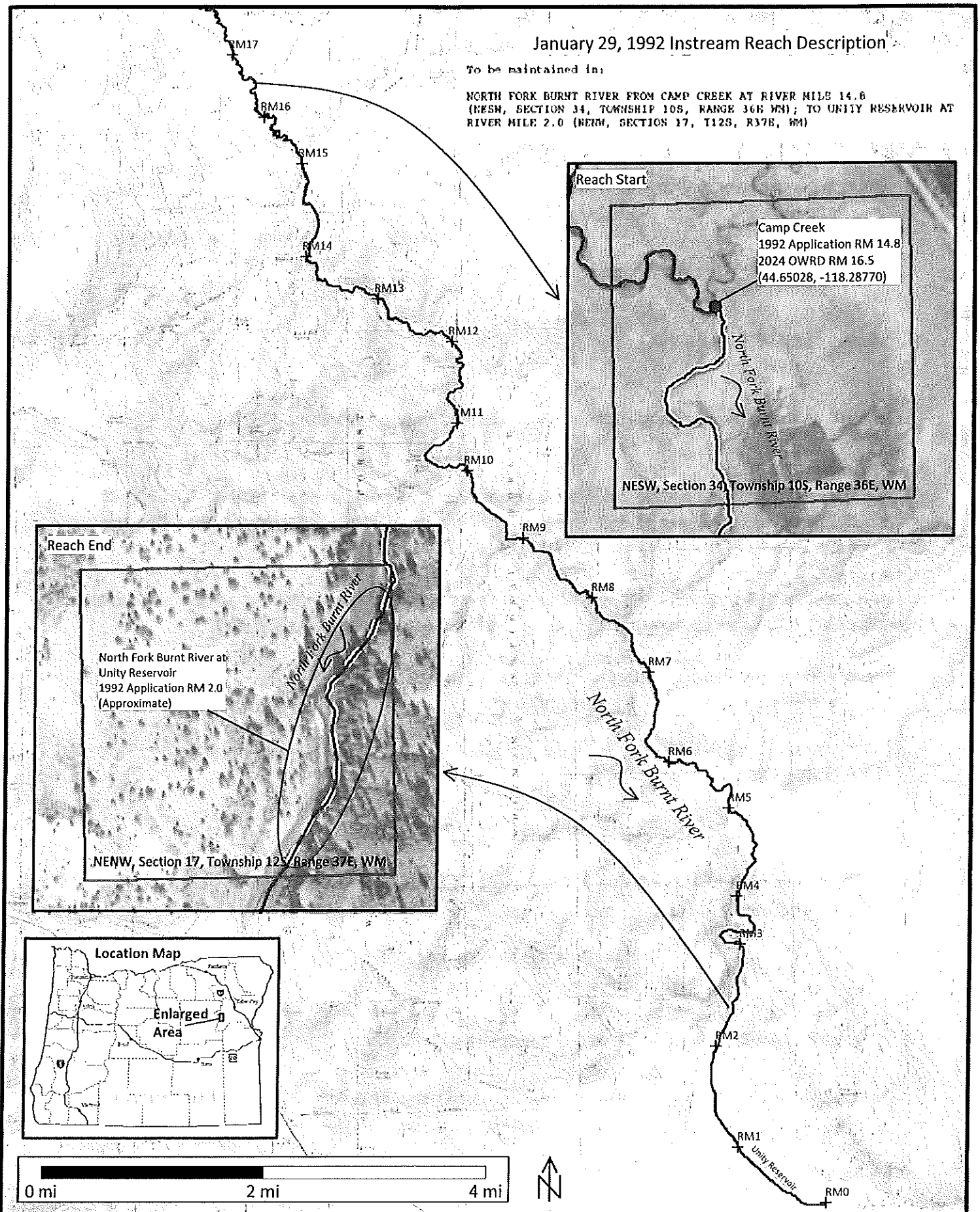


ODFW Instream Application IS-72169 Reach Location Map



ODFW Instream Application IS-72186 Reach Location Map

EXHIBIT A



NOTE: River Miles derived from OWRD provided stream layer (5/3/24)

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

Water Right Application IS-72168)	
)	
Oregon Department of Fish and Wildlife,)	
Applicant)	
	)	FINAL ORDER INCORPORATING CONSENT
Burnt River Irrigation District,	)	AGREEMENT
Protestant)	
)	
WaterWatch of Oregon, Inc.,)	
Intervenor)	

Summary: Order approving Application IS-72168 and issuing Certificate 98264.

Authority

The application is being processed in accordance with Oregon Revised Statutes (ORS) 537.140 to 537.252 and 537.332 to 537.360, Oregon Administrative Rules (OAR) Chapter 690, Division 77, and the Powder Basin Program (OAR Chapter 690, Division 509).

These statutes and rules can be viewed on the Oregon Water Resources Department's website:
<https://www.oregon.gov/owrd/programs/policylawandrules/Pages/default.aspx>

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

This final order is issued pursuant to ORS 537.170(6) to (9), 183.417(3), and OAR 690-077-0047, 137-003-0510(4), and 137-003-0665(5).

APPLICATION HISTORY

1. The Application History section of the August 27, 1996, Proposed Final Order is incorporated herein by reference.

FINDINGS OF FACT

1. The findings of fact in the August 27, 1996, Proposed Final Order are incorporated herein by reference, with the additions and changes shown below.
2. On January 29, 1992, the Oregon Department of Fish and Wildlife submitted an application for an instream water right to the Oregon Water Resources Department (Department).

3. On August 27, 1996, the Department issued a Proposed Final Order recommending approval of the application.
4. On October 9, 1996, the Burnt River Irrigation District filed a timely protest of the Proposed Final Order.
5. On October 11, 1996, WaterWatch of Oregon filed a timely request for standing in support of the Proposed Final Order.
6. On August 15, 2015, WaterWatch of Oregon filed a timely petition for party status.
7. On September 14, 2021, the Department referred the protest to the Oregon Office of Administrative Hearings for a contested case hearing.
8. On July 14, 2023, the Department granted WaterWatch of Oregon limited party status.
9. On January 21, 2025, the Oregon Department of Fish and Wildlife and the Burnt River Irrigation District entered into a Settlement and Water Bypass Agreement to resolve Burnt River Irrigation District's protest. The Settlement and Water Bypass Agreement was conditioned and contingent upon the Department issuing a Final Order and Certificate that sets the instream reach for the instream water right requested by the Oregon Department of Fish and Wildlife consistent with the terms of the Settlement and Water Bypass Agreement.
10. On _____, the Department, the Oregon Department of Fish and Wildlife, the Burnt River Irrigation District and WaterWatch of Oregon (Parties) entered into a Consent Agreement to resolve this matter. The Settlement and Water Bypass Agreement is attached to the Consent Agreement as Exhibit A for convenient reference but is not incorporated into the Consent Agreement. The Consent Agreement is incorporated into this final order by reference and is attached hereto and made a part of this order. The Settlement and Water Bypass Agreement is not incorporated into or made part of this order.
11. Pursuant to the terms of the Consent Agreement, the Department shall issue a certificate that reflects an amendment of the reach of the requested instream water right from the

reach described in the August 27, 1996, Proposed Final Order to following reach (Revised Reach):

REACH 1 – BURNT RIVER FROM FORMER USGS GAGE 13274200 AT APPROXIMATELY RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E, WM) TO OWRD GAGE 13274400 AT BURNT RIVER ABOVE BANKS DIVERSION NEAR DURKEE, APPROXIMATELY RIVER MILE 31.3 (NESW, SECTION 26, TOWNSHIP 11S, RANGE 42E WM)

REACH 2 – BURNT RIVER FROM CEMENT PLANT BRIDGE AT APPROXIMATELY RIVER MILE 22.9 (SENE, SECTION 11, TOWNSHIP 12S, RANGE 43E, WM) TO BROWNLEE RESERVOIR POOL AT APPROXIMATELY RIVER MILE +1.0 (SW ¼, SECTION 8, TOWNSHIP 14S, RANGE 45E, WM)

The Revised Reach amends the reach described in the Proposed Final Order by omitting a portion of the middle of the reach, thereby shortening the reach and splitting it into two separate reaches. In addition, both the reach described in the Proposed Final Order and the Revised Reach identify the location of USGS gage 13274200 as the upstream terminus of the instream water right reach. However, the Revised Reach updates the description of the upstream terminus by adding “former” in recognition that USGS gage 13274200 no longer exists, and by describing the location of the gage as “at approximately river mile 41.7,” rather than “at approximately river mile 41.5.” These updates to the description of the upstream terminus do not change the location of the upstream terminus or expand the instream water right reach. Instead, they provide a more accurate description of the location of the upstream terminus under current conditions.

The requested instream water right, as amended to reflect the Revised Reach, is referred to herein as the Revised Proposed Use.

12. All findings of fact in the August 27, 1996, Proposed Final Order concerning the “proposed use” apply equally to the Revised Proposed Use.
13. Certificate condition #5 in the draft certificate included with the Proposed Final Order reads “[t]he flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.” Certificate condition #5 in Certificate 98264 issued with this order has been modified to reflect that the Revised Proposed Use includes two instream flow reaches and reads “[t]he flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.”

CONCLUSIONS OF LAW

1. The conclusions of law in the August 27, 1996, Proposed Final Order are incorporated herein by reference.
2. All conclusions of law in the August 27, 1996, Proposed Final Order concerning the "proposed use" apply equally to the Revised Proposed Use.

ORDER

Application IS-72168, as amended by the Consent Agreement, is approved, and Certificate 98264 is issued.

DATED _____

Katherine Ratcliffe, Administrator
Water Right Services Division
for Ivan Gall, Director
Oregon Water Resources Department

STATE OF OREGON

COUNTY OF BAKER

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE IS HEREBY ISSUED TO

OREGON WATER RESOURCES DEPARTMENT
725 SUMMER ST NE SUITE A
SALEM OR 97301

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

APPLICATION FILE NUMBER: IS-72168

SOURCE OF WATER: BURNT RIVER, TRIBUTARY TO SNAKE RIVER

PURPOSE: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE, AND JUVENILE REARING OF
RAINBOW TROUT

DATE OF PRIORITY: JANUARY 29, 1992

TO BE MAINTAINED IN: **REACH 1** - BURNT RIVER FROM FORMER USGS GAGE 13274200 AT
APPROXIMATELY RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE
41E, WM) TO OWRD GAGE 13274400 AT BURNT RIVER ABOVE BANKS
DIVERSION NEAR DURKEE, APPROXIMATELY RIVER MILE 31.3 (NESW, SECTION
26, TOWNSHIP 11S, RANGE 42E WM)
REACH 2 – BURNT RIVER FROM CEMENT PLANT BRIDGE AT APPROXIMATELY
RIVER MILE 22.9 (SENW, SECTION 11, TOWNSHIP 12S, RANGE 43E, WM) TO
BROWNLEE RESERVOIR POOL AT APPROXIMATELY RIVER MILE +1.0 (SW ¼,
SECTION 8, TOWNSHIP 14S, RANGE 45E, WM)

The right is established under Oregon Revised Statutes 537.341. The reaches in which water is to be maintained under this right reflect the Settlement and Water Bypass Flow Agreement entered into by the Burnt River Irrigation District and the Oregon Department of Fish and Wildlife on January 21, 2025 (Settlement Agreement). The Settlement Agreement is not incorporated into this certificate by reference and is not an “existing water right of record” as that term is defined and used in ORS 540.045 or a “relative entitlement to water” as that term is used in ORS 540.045. All terms and conditions of this right are set forth in this certificate.

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

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

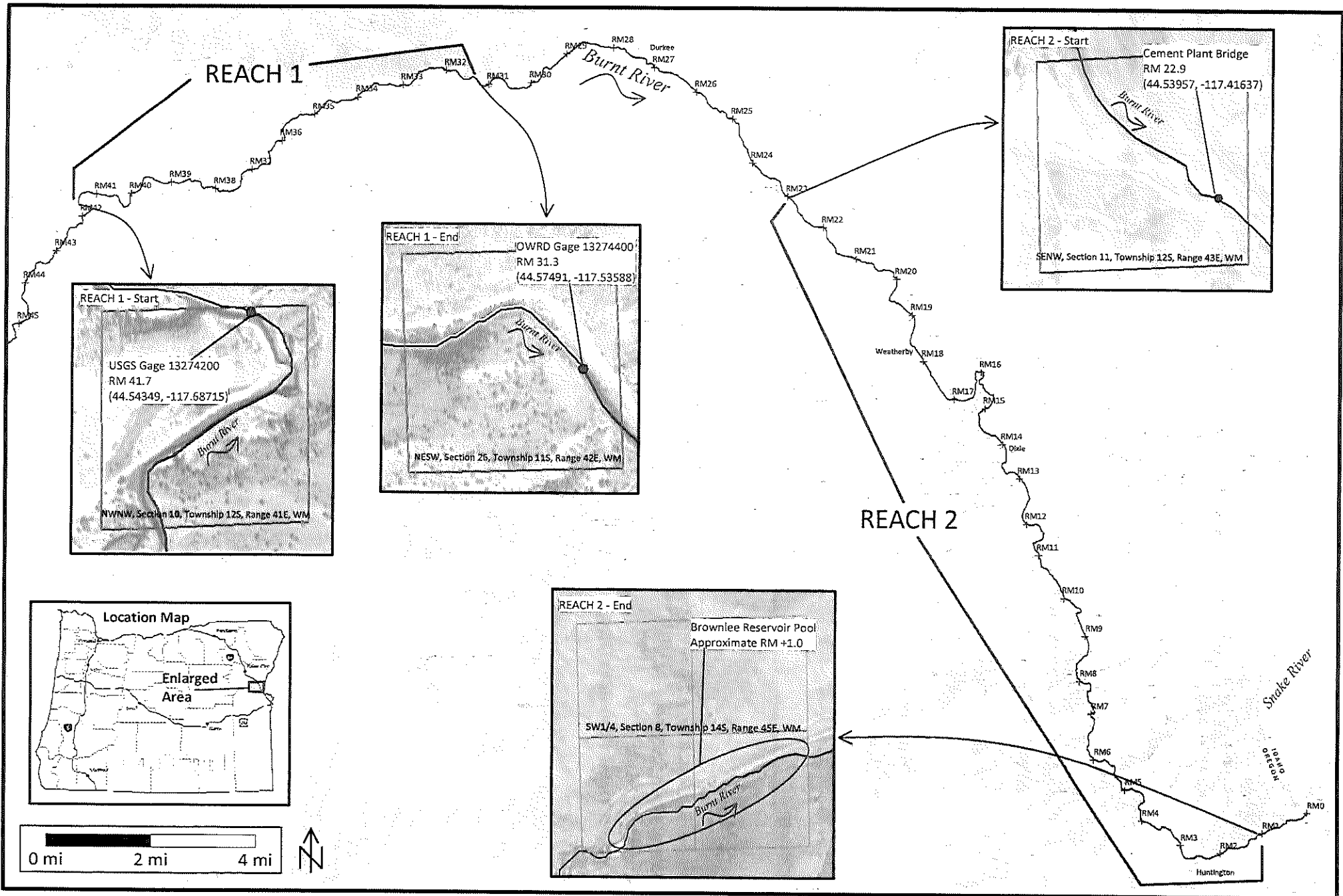
Month	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1 st ½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2 nd ½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

2. The water right holder shall measure and report the in-stream flow along the reaches of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.

ISSUED _____

Katherine Ratcliffe, Administrator
 Water Right Services Division
 for Ivan Gall, Director
 Oregon Water Resources Department

IS-72168 Reach Location Map



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

Water Right Application IS-72169)	
)	
Oregon Department of Fish and Wildlife,)	
Applicant)	
	)	FINAL ORDER INCORPORATING CONSENT
Burnt River Irrigation District,	)	AGREEMENT
Protestant)	
)	
WaterWatch of Oregon, Inc.,)	
Intervenor)	

Summary: Order approving Application IS-72169 and issuing Certificate 98265.

Authority

The application is being processed in accordance with Oregon Revised Statutes (ORS) 537.140 to 537.252 and 537.332 to 537.360, Oregon Administrative Rules (OAR) Chapter 690, Division 77, and the Powder Basin Program (OAR Chapter 690, Division 509).

These statutes and rules can be viewed on the Oregon Water Resources Department's website: <https://www.oregon.gov/owrd/programs/policylawandrules/Pages/default.aspx>

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

This final order is issued pursuant to ORS 537.170(6) to (9), 183.417(3), and OAR 690-077-0047, 137-003-0510(4), and 137-003-0665(5).

APPLICATION HISTORY

1. The Application History section of the August 27, 1996, Proposed Final Order is incorporated herein by reference.

FINDINGS OF FACT

1. The findings of fact in the August 27, 1996, Proposed Final Order are incorporated herein by reference, with the additions and changes shown below.
2. On January 29, 1992, the Oregon Department of Fish and Wildlife submitted an application for an instream water right to the Oregon Water Resources Department (Department).

3. On August 27, 1996, the Department issued a Proposed Final Order recommending approval of the application.
4. On October 9, 1996, the Burnt River Irrigation District filed a timely protest of the Proposed Final Order.
5. On October 11, 1996, WaterWatch of Oregon filed a timely request for standing in support of the Proposed Final Order.
6. On August 15, 2015, WaterWatch of Oregon filed a timely petition for party status.
7. On September 14, 2021, the Department referred the protest to the Oregon Office of Administrative Hearings for a contested case hearing.
8. On July 14, 2023, the Department granted WaterWatch of Oregon limited party status.
9. On January 21, 2025, the Oregon Department of Fish and Wildlife and the Burnt River Irrigation District entered into a Settlement and Water Bypass Agreement to resolve Burnt River Irrigation District's protest. The Settlement and Water Bypass Agreement was conditioned and contingent upon the Department issuing a Final Order and Certificate that sets the instream reach for the instream water right requested by the Oregon Department of Fish and Wildlife consistent with the terms of the Settlement and Water Bypass Agreement.
10. On _____, the Department, the Oregon Department of Fish and Wildlife, the Burnt River Irrigation District and WaterWatch of Oregon (Parties) entered into a Consent Agreement to resolve this matter. The Settlement and Water Bypass Agreement is attached to the Consent Agreement as Exhibit A for convenient reference but is not incorporated into the Consent Agreement. The Consent Agreement is incorporated into this final order by reference and is attached hereto and made a part of this order. The Settlement and Water Bypass Agreement is not incorporated into or made part of this order.
11. Pursuant to the terms of the Consent Agreement, the Department shall issue a certificate that reflects an amendment of the reach of the requested instream water right from the

reach described in the August 27, 1996, Proposed Final Order to following reach (Revised Reach):

REACH 1 - BURNT RIVER FROM THE BASE OF UNITY DAM AT APPROXIMATELY RIVER MILE 82.9 (SWSE, SECTION 21, TOWNSHIP 12S, RANGE 37E, WM), DOWNSTREAM APPROXIMATELY 2,500 FEET TO JUST UPSTREAM OF HIGH LINE DITCH DIVERSION AT APPROXIMATELY RIVER MILE 82.5 (SWSW, SECTION 22, TOWNSHIP 12S, RANGE 37E, WM)

REACH 2 – BURNT RIVER FROM GAGE 13274020 ABOVE CLARKS CREEK NEAR BRIDGEPORT, APPROXIMATELY RIVER MILE 46.1 (SWSW, SECTION 20, TOWNSHIP 12S, RANGE 41E, WM) TO FORMER USGS GAGE 13274200 AT APPROXIMATELY RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E, WM)

The Revised Reach amends the reach described in the Proposed Final Order by omitting a portion of the middle of the reach, thereby shortening the reach and splitting it into two separate reaches.

In addition, both the reach described in the Proposed Final Order and the Revised Reach identify Unity Dam as the upstream terminus of the instream water right reach. However, the Revised Reach updates the description of the upstream terminus by specifying that the upstream terminus is “the base of Unity Dam,” and by describing the location of the dam as “at approximately river mile 82.5,” rather than “at approximately river mile 77.1.” This update to the description of the upstream terminus does not change the location of the upstream terminus or expand the instream water right reach. Instead, the update provides a more accurate description of the location of the upstream terminus under current conditions.

Finally, both the reach described in the Proposed Final Order and the Revised Reach identify the location of USGS gage 13274200 as the downstream terminus of the instream water right reach. However, the Revised Reach updates the description of the downstream terminus by adding “former” in recognition that USGS gage 13274200 no longer exists, and by describing the location of the gage as “at approximately river mile 41.7,” rather than “at approximately river mile 41.5.” This update to the description of the downstream terminus does not change the location of the downstream terminus or expand the instream water right reach. Instead, the update provides a more accurate description of the location of the downstream terminus under current conditions.

The requested instream water right, as altered to reflect the Revised Reach, is referred to herein as the Revised Proposed Use.

12. All findings of fact in the August 27, 1996, Proposed Final Order concerning the "proposed use" apply equally to the Revised Proposed Use.
13. Certificate condition #5 in the draft certificate included with the Proposed Final Order reads "[t]he flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." Certificate condition #5 in Certificate 98265 issued with this order has been modified to reflect that the Revised Proposed Use includes two instream flow reaches and reads "[t]he flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2."

CONCLUSIONS OF LAW

1. The conclusions of law in the August 27, 1996, Proposed Final Order are incorporated herein by reference.
2. All conclusions of law in the August 27, 1996, Proposed Final Order concerning the "proposed use" apply equally to the Revised Proposed Use.

ORDER

Application IS-72169, as amended by the Consent Agreement, is approved, and Certificate 98265 is issued.

DATED _____

Katherine Ratcliffe, Administrator
Water Right Services Division
for Ivan Gall, Director
Oregon Water Resources Department

STATE OF OREGON

COUNTY OF BAKER

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE IS HEREBY ISSUED TO

OREGON WATER RESOURCES DEPARTMENT
725 SUMMER ST NE SUITE A
SALEM OR 97301

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

APPLICATION FILE NUMBER: IS-72169

SOURCE OF WATER: BURNT RIVER, TRIBUTARY TO SNAKE RIVER

PURPOSE: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE, AND JUVENILE REARING OF
RAINBOW TROUT

DATE OF PRIORITY: JANUARY 29, 1992

TO BE MAINTAINED IN: **REACH 1** - BURNT RIVER FROM THE BASE OF UNITY DAM AT APPROXIMATELY
RIVER MILE 82.9 (SWSE, SECTION 21, TOWNSHIP 12S, RANGE 37E, WM),
DOWNSTREAM APPROXIMATELY 2,500 FEET TO JUST UPSTREAM OF HIGH LINE
DITCH DIVERSION AT APPROXIMATELY RIVER MILE 82.5 (SWSW, SECTION 22,
TOWNSHIP 12S, RANGE 37E, WM)
REACH 2 - BURNT RIVER FROM GAGE 13274020 ABOVE CLARKS CREEK NEAR
BRIDGEPORT, APPROXIMATELY RIVER MILE 46.1 (SWSW, SECTION 20, TOWNSHIP
12S, RANGE 41E, WM) TO FORMER USGS GAGE 13274200 AT APPROXIMATELY
RIVER MILE 41.7 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E, WM)

The right is established under Oregon Revised Statutes 537.341. The reaches in which water is to be maintained under this right reflect the Settlement and Water Bypass Flow Agreement entered into by the Burnt River Irrigation District and the Oregon Department of Fish and Wildlife on January 21, 2025 (Settlement Agreement). The Settlement Agreement is not incorporated into this certificate by reference and is not an "existing water right of record" as that term is defined and used in ORS 540.045 or a "relative entitlement to water" as that term is used in ORS 540.045. All terms and conditions of this right are set forth in this certificate.

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

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

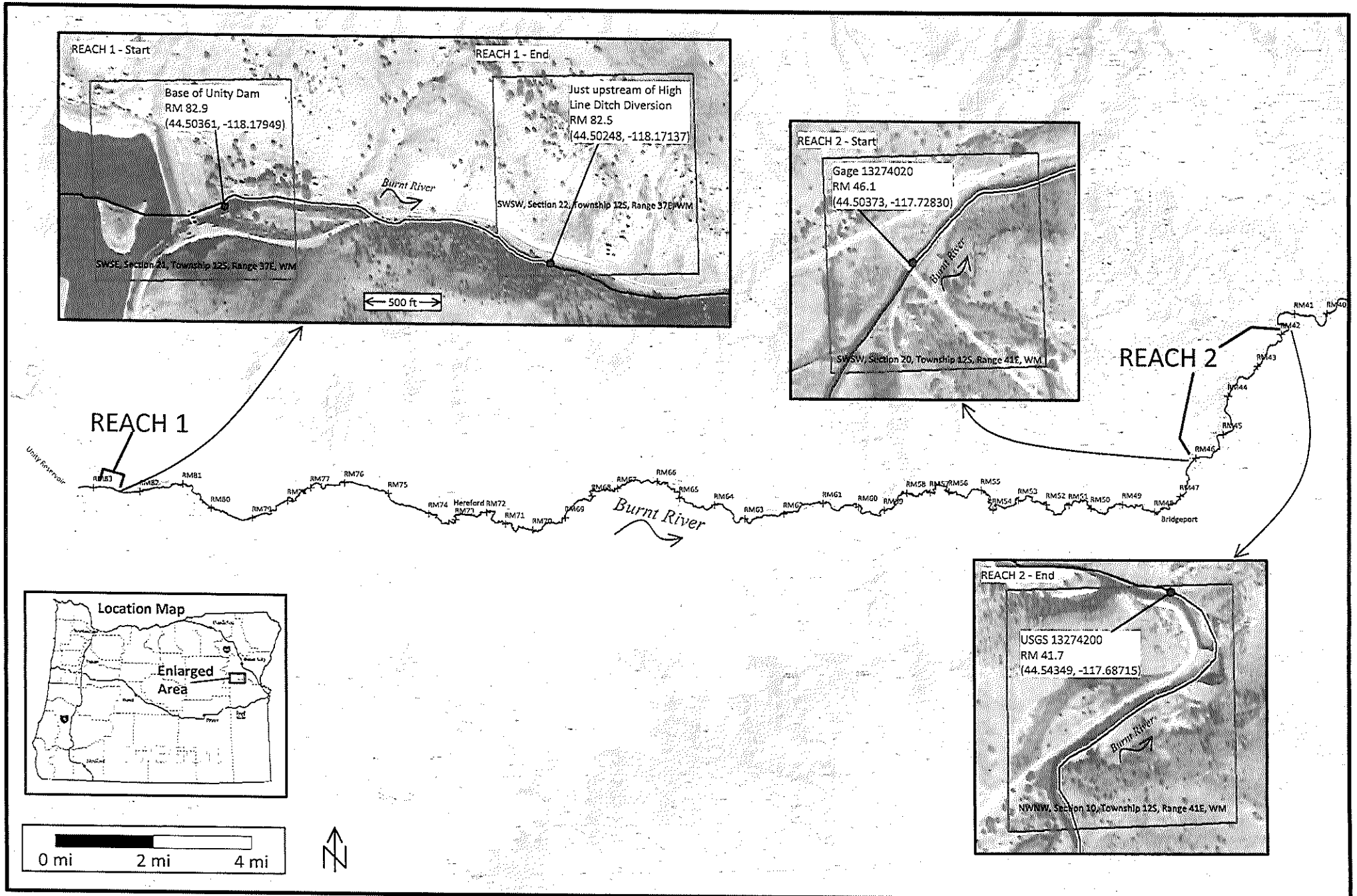
Month	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1 st ½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2 nd ½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

2. The water right holder shall measure and report the in-stream flow along the reaches of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.

ISSUED _____

Katherine Ratcliffe, Administrator
 Water Right Services Division
for Ivan Gall, Director
 Oregon Water Resources Department

IS-72169 Reach Location Map



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

Water Right Application IS-72186)	
)	
Oregon Department of Fish and Wildlife,)	
Applicant)	
	)	FINAL ORDER INCORPORATING CONSENT
Burnt River Irrigation District,	)	AGREEMENT
Protestant)	
)	

Summary: Order approving Application IS-72186 and issuing Certificate 98266.

Authority

The application is being processed in accordance with Oregon Revised Statutes (ORS) 537.140 to 537.252 and 537.332 to 537.360, Oregon Administrative Rules (OAR) Chapter 690, Division 77, and the Powder Basin Program (OAR Chapter 690, Division 509).

These statutes and rules can be viewed on the Oregon Water Resources Department's website:
<https://www.oregon.gov/owrd/programs/policylawandrules/Pages/default.aspx>

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

This final order is issued pursuant to ORS 537.170(6) to (9), 183.417(3), and OAR 690-077-0047, 137-003-0510(4), and 137-003-0665(5).

APPLICATION HISTORY

1. The Application History section of the May 14, 1996, Proposed Final Order is incorporated herein by reference.

FINDINGS OF FACT

1. The findings of fact in the May 14, 1996, Proposed Final Order are incorporated herein by reference, with the additions and changes shown below.
2. On January 29, 1992, the Oregon Department of Fish and Wildlife submitted an application for an instream water right to the Oregon Water Resources Department (Department).

3. On May 14, 1996, the Department issued a Proposed Final Order recommending approval of the application.
4. On July 25, 1996, the Burnt River Irrigation District filed a timely protest of the Proposed Final Order.
5. On September 14, 2021, the Department referred the protest to the Oregon Office of Administrative Hearings for a contested case hearing.
6. On January 21, 2025, the Oregon Department of Fish and Wildlife and the Burnt River Irrigation District entered into a Settlement and Water Bypass Agreement to resolve Burnt River Irrigation District's protest. The Settlement and Water Bypass Agreement was conditioned and contingent upon the Department issuing a Final Order and Certificate that sets the instream reach for the instream water right requested by the Oregon Department of Fish and Wildlife consistent with the terms of the Settlement and Water Bypass Agreement.
7. On _____, the Department, the Oregon Department of Fish and Wildlife and the Burnt River Irrigation District (Parties) entered into a Consent Agreement to resolve this matter. The Settlement and Water Bypass Agreement is attached to the Consent Agreement as Exhibit A for convenient reference but is not incorporated into the Consent Agreement. The Consent Agreement is incorporated into this final order by reference and is attached hereto and made a part of this order. The Settlement and Water Bypass Agreement is not incorporated into or made part of this order.
8. Pursuant to the terms of the Consent Agreement, the Department shall issue a certificate that reflects an amendment of the reach of the requested instream water right from the reach described in the August 27, 1996, Proposed Final Order to following reach (Revised Reach):

REACH 1 - NORTH FORK BURNT RIVER FROM CAMP CREEK AT APPROXIMATELY RIVER MILE 16.5 (NESW, SECTION 34, TOWNSHIP 10S, RANGE 36E, WM) TO THE OWRD GAGE 13269450 ABOVE THE BIG FLAT DIVERSION DITCH AT APPROXIMATELY RIVER MILE 8.7 (NENE, SECTION 25, TOWNSHIP 11S, RANGE 36E, WM)

REACH 2 – NORTH FORK BURNT RIVER AT UNITY RESERVOIR NEAR THE OUTLET OF NORTH FORK BURNT RIVER ABOVE WEST FORK BURNT RIVER WATER AVAILABILITY BASIN, APPROXIMATELY RIVER MILE 2.4 (NENW, SECTION 17, TOWNSHIP 12S, RANGE 37E, WM)

The Revised Reach amends the reach described in the Proposed Final Order by omitting a portion of the middle of the reach, thereby shortening the reach and splitting it into two separate reaches.

In addition, both the reach described in the Proposed Final Order and the Revised Reach identify Camp Creek as the upstream terminus of the instream water right reach. However, the Revised Reach updates the description of the upstream terminus by describing the location of Camp Creek as “at approximately river mile 16.5,” rather than “at approximately river mile 14.8.” This update to the description of the upstream terminus does not change the location of the upstream terminus or expand the instream water right reach. Instead, the update provides a more accurate description of the location of the upstream terminus under current conditions.

Finally, both the reach described in the Proposed Final Order and the Revised Reach identify Unity Reservoir as the downstream terminus of the instream water right reach. However, the Revised Reach updates the description of the downstream terminus by adding “near the outlet of North Fork Burnt River above West Fork Burnt River Water Availability Basin,” and by describing the location of Unity Reservoir as “at approximately river mile 2.4,” rather than “at approximately river mile 2.0.” This update to the description of the downstream terminus does not change the location of the downstream terminus or expand the instream water right reach. Instead, the update provides a more accurate description of the location of the downstream terminus under current conditions.

The requested instream water right, as amended to reflect the Revised Reach, is referred to herein as the Revised Proposed Use.

9. All findings of fact in the May 14, 1996, Proposed Final Order concerning the “proposed use” apply equally to the Revised Proposed Use.
10. Certificate condition #5 in the draft certificate included with the Proposed Final Order reads “[t]he flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.” Certificate condition #5 in Certificate 98266 issued with this order has been modified to reflect that the Revised Proposed Use includes two instream flow reaches and reads “[t]he flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.”

CONCLUSIONS OF LAW

1. The conclusions of law in the May 14, 1996, Proposed Final Order are incorporated herein by reference.
2. All conclusions of law in the May 14, 1996, Proposed Final Order concerning the "proposed use" apply equally to the Revised Proposed Use.

ORDER

Application IS-72186, as amended by the Consent Agreement, is approved, and Certificate 98266 is issued.

DATED _____

Katherine Ratcliffe, Administrator
Water Right Services Division
for Ivan Gall, Director
Oregon Water Resources Department

STATE OF OREGON

COUNTY OF BAKER

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE IS HEREBY ISSUED TO

OREGON WATER RESOURCES DEPARTMENT
725 SUMMER ST NE SUITE A
SALEM OR 97301

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

APPLICATION FILE NUMBER: IS-72186

SOURCE OF WATER: NORTH FORK BURNT RIVER, TRIBUTARY TO BURNT RIVER

PURPOSE: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE, AND JUVENILE REARING OF
RAINBOW TROUT

DATE OF PRIORITY: JANUARY 29, 1992

TO BE MAINTAINED IN: **REACH 1** - NORTH FORK BURNT RIVER FROM CAMP CREEK AT APPROXIMATELY
RIVER MILE 16.5 (NESW, SECTION 34, TOWNSHIP 10S, RANGE 36E, WM) TO THE
OWRD GAGE 13269450 ABOVE THE BIG FLAT DIVERSION DITCH AT
APPROXIMATELY RIVER MILE 8.7 (NENE, SECTION 25, TOWNSHIP 11S, RANGE
36E, WM)

REACH 2 – NORTH FORK BURNT RIVER AT UNITY RESERVOIR NEAR THE OUTLET
OF NORTH FORK BURNT RIVER ABOVE WEST FORK BURNT RIVER WATER
AVAILABILITY BASIN, APPROXIMATELY RIVER MILE 2.4 (NENW, SECTION 17,
TOWNSHIP 12S, RANGE 37E, WM)

The right is established under Oregon Revised Statutes 537.341. The reaches in which water is to be maintained under this right reflect the Settlement and Water Bypass Flow Agreement entered into by the Burnt River Irrigation District and the Oregon Department of Fish and Wildlife on January 21, 2025 (Settlement Agreement). The Settlement Agreement is not incorporated into this certificate by reference and is not an “existing water right of record” as that term is defined and used in ORS 540.045 or a “relative entitlement to water” as that term is used in ORS 540.045. All terms and conditions of this right are set forth in this certificate.

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

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

Month	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1 st ½	6.0	6.0	25.0	25.0	25.0	25.0	12.0	6.0	4.88	4.99	6.0	6.0
2 nd ½	6.0	12.0	25.0	25.0	25.0	20.0	6.0	6.0	4.88	4.99	6.0	6.0

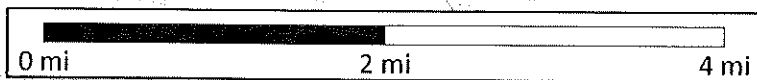
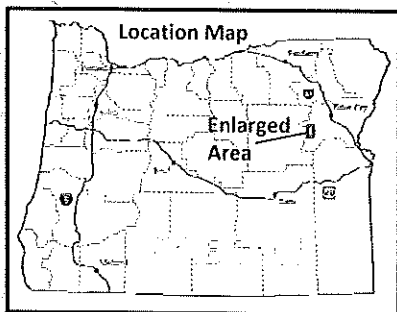
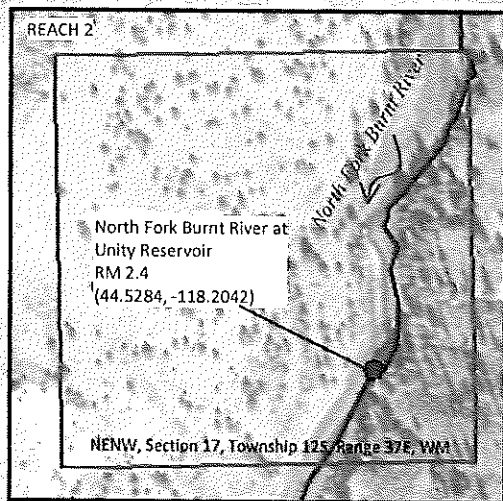
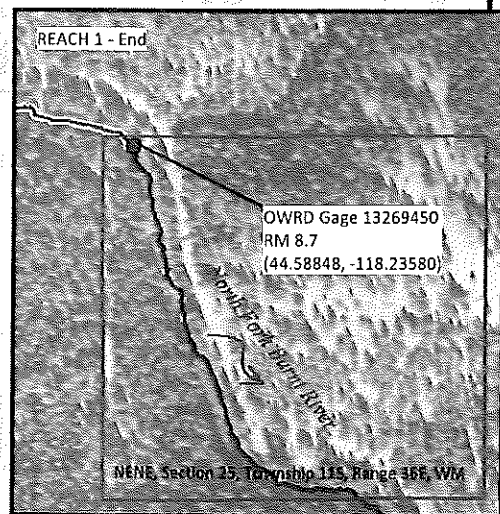
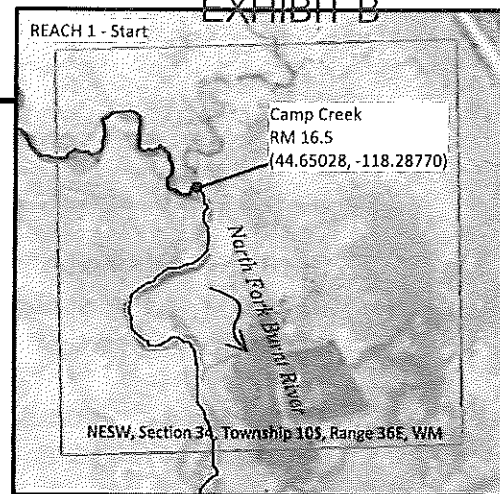
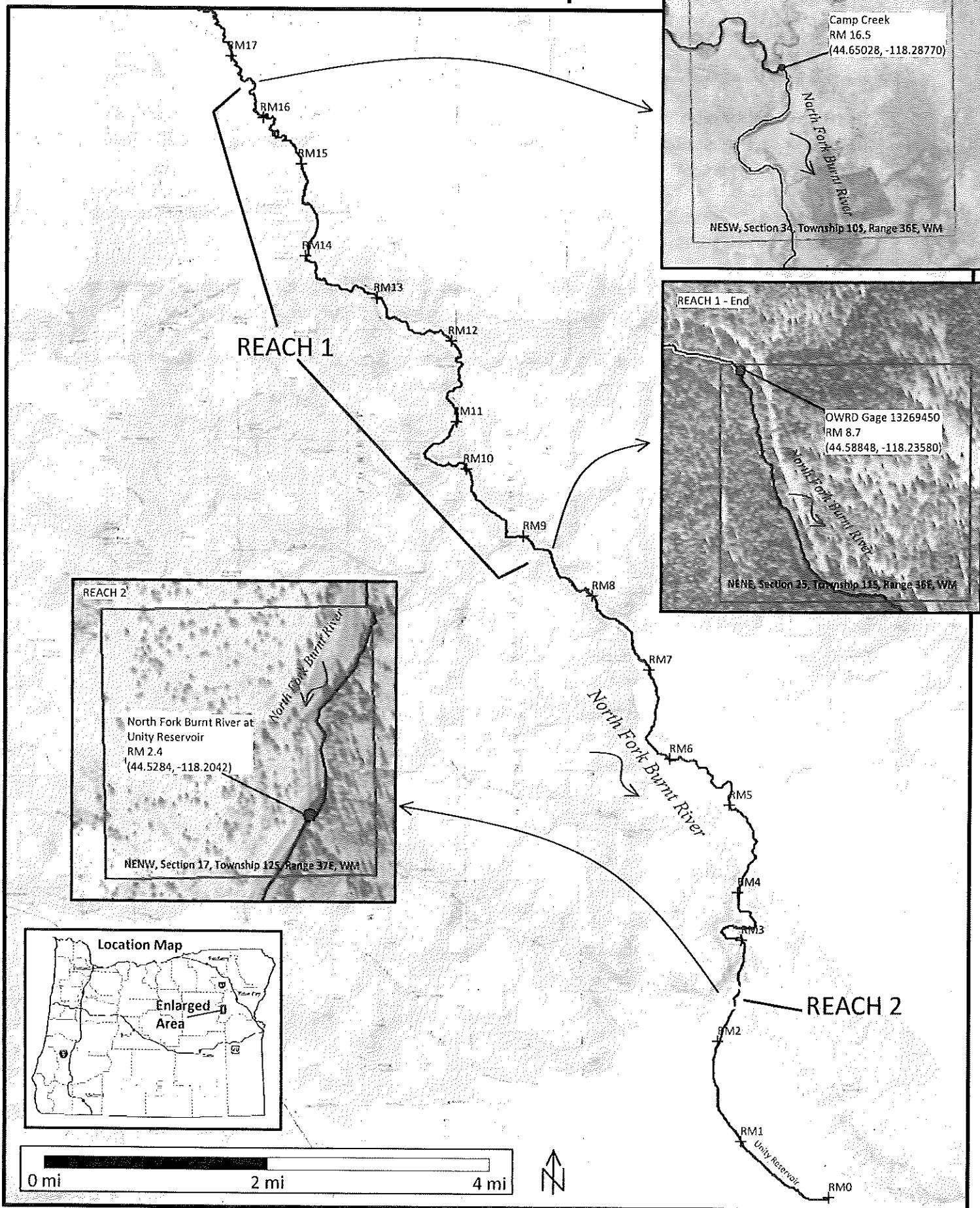
2. The water right holder shall measure and report the in-stream flow along the reaches of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.
4. The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.
5. The flows are to be measured at the lower end of reach 2 to protect necessary flows throughout reach 1 and reach 2.

ISSUED _____

Katherine Ratcliffe, Administrator
 Water Right Services Division
 for Ivan Gall, Director
 Oregon Water Resources Department

IS-72186 Reach Location Map

EXHIBIT B



NOTE: River Miles derived from OWRD provided stream layer (5/3/24)



WaterWatch of Oregon
Protecting Natural Flows in Oregon Rivers

27
September 25, 2023

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SEP 27 2023

OWRD

VIA HAND-DELIVERY

Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Contested Case Fees for IS-72168 (OAH Case No. 2021-OWRD-00051) and IS-72169 (OAH Case No. 2021-OWRD-00053)

Dear Oregon Water Resources Department:

In the above referenced matters, please find enclosed two checks from WaterWatch of Oregon in full payment of the additional fees required to participate in the contested case proceedings. The agency approved WaterWatch's participation as a party by order dated July 14, 2023, on condition WaterWatch pay the required fees. Pursuant to ORS 536.050(1)(o), each check is in the amount of \$680.

Thank you for your attention to this matter.

Sincerely,

Brian Posewitz

Brian Posewitz
Staff Attorney

cc (via email w/o enc):

Oregon Office of Administrative Hearings
Elizabeth M. Jarry, Administrative Law Judge
Elizabeth Howard
Jesse Ratcliffe
Anika Marriott

WaterWatch of Oregon
Main Office: 213 SW Ash St. Suite 208 Portland, OR 97204
Southern Oregon Office: PO Box 261, Ashland, OR, 97520

www.waterwatch.org
Main Office: 503.295.4039
S. OR Office: 541.708.0048

RECEIVED BY OWRD

AUG 31 2015

OREGON WATER RESOURCES DEPARTMENT

SALEM, OR

In the Matter of Water Right Application IS-72168 in the name of Oregon Department of Fish and Wildlife)))	WATERWATCH OF OREGON'S REPLY ON PARTY STATUS
---	-------------	---

WaterWatch of Oregon replies as follows to the response of Burnt River Irrigation

District (BRID) on WaterWatch's Petition for Party Status:

1. The Petition Is Not Premature.

BRID contends WaterWatch's petition is "premature" because no rule expressly authorizes a petition "outside a contested case." To the extent BRID is suggesting that a petition to participate in a contested case hearing must wait until after referral to the Office of Administrative Hearings, the rules suggest otherwise. OAR 690-077-0043(5), dealing specifically with instream water rights, says only that a person who has filed a request for standing may "later" file a petition to participate as a party in any contested case hearing. OAR 137-003-0535(3) says a petition for party status must be filed "at least" 21 days before "the date set for the hearing," with no limit as to how early the petition may be filed.

To the extent BRID suggests intervention may only be granted for purposes of a contested case hearing, WaterWatch disagrees. OAR 137-003-0535 authorizes a broader intervention. The rule is limited by the division title to "Contested Cases," but a "[c]ontested case" is defined broadly in ORS 183.310(2) to mean "a proceeding before an agency" in which a hearing is provided, or required to be provided, as part of the proceeding.¹

¹ Even if WaterWatch is not allowed to intervene, or if it is limited to participation only at a hearing and no hearing is held, WaterWatch would still have a right to judicial review. See ORS 537.153(5) (standing statement may be "for judicial review of a final order").

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2. The Existing Parties Cannot Adequately Represent WaterWatch's Interests.

BRID next claims that the interests WaterWatch seeks to represent will adequately be represented by ODFW. BRID cites a rule and a statute that it claims require ODFW to advance the same interests that WaterWatch seeks to represent. In fact, the rule BRID cites merely allows ODFW to pursue instream water rights, OAR 635-400-0000(2) ("may" apply), and the statute BRID cites requires ODFW to temper its enthusiasm for instream values by considering "coequal goals" such as "orderly and equitable utilization of available wildlife" and the "primary uses of the lands and waters of the state," ORS 496.012(3), (5).

In any event, BRID does not dispute that politics mute ODFW's advocacy of instream values.² This case illustrates the point. The application was filed in 1992! If ODFW could adequately represent, on its own, the interests that WaterWatch seeks to represent, this application would not still be waiting for a contested case hearing more than 20 years after it was filed. Meanwhile, for similar reasons, the "long-term goal . . . to obtain an instream water right on every waterway exhibiting fish and wildlife value," OAR 635-400-0005, remains a pipe dream.

BRID claims "[t]he rule requires a difference in interests, not a difference in ability to withstand political pressures," (p. 3), but the rule is not so limited. The rule asks about the "extent" and "adequa[cy]" of the representation, which can be affected as much by motivation as by the substance of the underlying interest.

Finally, BRID suggests WaterWatch misunderstood one of the factors for intervention because WaterWatch stated one time in its petition that ODFW "may not" adequately represent

² BRID claims WaterWatch "overstates" this point because only a small percentage of ODFW's budget comes from the general fund. However, ODFW's other sources of revenue, and the expenditure of that revenue, also are subject to decisions of the Legislature, and to decisions of political appointees (i.e., the Commissioners).

the interests that WaterWatch seeks to represent. BRID claims WaterWatch must show that ODFW “cannot” represent those interests.

BRID confuses the topics specified for a petition with the standards for a decision. Although OAR 137-003-0535(4)(f) calls for a statement of “why existing parties to the proceeding cannot adequately represent” the interests that the petitioner seeks to represent, OAR 137-003-0535(8), the standard for decision, directs only that OWRD “consider,” among other factors, “[t]he extent to which the petitioner's interest will be represented by existing parties.”

In any event, WaterWatch did argue, in several places, that ODFW “cannot” adequately represent the interests that WaterWatch seeks to represent. (Petition, Page 3.)

3. Conclusion. For the foregoing reasons, petitioner’s request for party status should be granted.

* * * * *

* * * * *

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4. Filing and Service. Petitioner filed this REPLY ON PARTY STATUS by electronic mail and facsimile to:

Patricia McCarty, Protest Program Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
Facsimile: 503-986-0904
patricia.e.mccarty@state.or.us

Petitioner served copies by electronic mail to:

jesse.d.ratcliffe@doj.state.or.us
stephen.sanders@doj.state.or.us
choward@schwabe.com
mpagel@schwabe.com

Dated: August 28, 2015

Brian Posewitz

Brian Posewitz
WaterWatch of Oregon
213 SW Ash St., Ste 208
Portland, OR 97204
Ph: 503.295.4039 x 2
Fax: 503.295.2791
brian@waterwatch.org

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AUG 31 2015

SALEM, OR



SCHWABE, WILLIAMSON & WYATT®
ATTORNEYS AT LAW

Equitable Center, 530 Center St., NE, Suite 400, Salem, OR 97301 | Phone 503.540.4262 | Fax 503.399.1645 | www.schwabe.com

MARTHA O. PAGEL

Admitted in Oregon and Washington

Direct Line: Salem 503-540-4260; Portland 503-796-2872

E-Mail: mpagel@schwabe.com

August 21, 2015

HAND DELIVERED AND VIA E-MAIL (PATRICIA.D.MCCARTY@STATE.OR.US)

Patricia McCarty
Oregon Water Resources Department
725 Summer Street, NE, Suite A
Salem, OR 97301

Dear Ms. McCarty:

Please find enclosed for filing:

1. Burnt River Irrigation District's Response to WaterWatch of Oregon's Petition for Party Status in the Water Right Application IS-72168.
2. Burnt River Irrigation District's Response to WaterWatch of Oregon's Petition for Party Status in the Water Right Application IS-72169.

Sincerely,

Martha O. Pagel

MOP:kdo

Enclosures

cc: Brian Posewitz (Via E-Mail and First Class Mail)
Jesse D. Ratcliffe (Via E-Mail and First Class Mail)
Stephen E. Sanders (Via E-Mail and First Class Mail)

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OWRD

Portland, OR 503.222.9981 | Salem, OR 503.540.4262 | Bend, OR 541.749.4044 | Eugene, OR 541.686.3299
Seattle, WA 206.622.1711 | Vancouver, WA 360.694.7551 | Washington, DC 202.488.4302

PDX\128740\203971\EEHN\16393474.1

OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Right Application	)	BURNT RIVER IRRIGATION
IS-72168 in the Name of Oregon	)	DISTRICT'S RESPONSE TO
Department of Fish and Wildlife	)	WATERWATCH OF OREGON'S
	)	PETITION FOR PARTY STATUS

The Oregon Water Resources Department ("Department") should deny WaterWatch of Oregon's ("Petitioner") petition for party status. It is premature. Further, Petitioner has not established that "existing parties to the proceeding *cannot* adequately represent" the interests it intends to represent. *See* OAR 137-003-0535(4)(f); WaterWatch of Oregon's Petition for Party Status (hereafter "Petition").

On January 29, 1992, the Oregon Department of Fish and Wildlife ("ODFW") filed an application for an instream water right under the authority provided in ORS 537.336(1). The application was for the protection of instream flows in the Burnt River for the specific purpose of supporting "migration, spawning, egg incubation, fry emergence and juvenile rearing of rainbow trout." *See* Proposed Final Order ("PFO"). The Burnt River Irrigation District ("BRID") protested the PFO. WaterWatch filed a "request for standing" in support of the PFO. To date, the Department has not referred BRID's protest to a contested case hearing.

Petitions for party status are to be filed with the Department once a contested case proceeding is underway. OAR 137-003-0535(1). (Persons "who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result..." may petition for party status.) There is no rule that authorizes WaterWatch to file a petition outside a contested case proceeding, nor is there a rule that authorizes the Department to

entertain a petition for party status prior to initiation of a contested case. For this reason, the Department has no authority to grant WaterWatch's petition at this time.

Should the Department entertain the petition, it should deny it for the reason that WaterWatch's interests will be adequately represented by ODFW. See OAR 137-003-0535(4)(f). Petitioner WaterWatch states that the interests it represents are "the public interests in protecting and restoring instream flows to preserve and enhance fish, wildlife and recreational opportunities." Petition, p. 1. These interests are shared by the applicant and proponent of a water right in this proceeding. More importantly, ODFW is legally required to protect and advance the same public interests WaterWatch seeks to represent. Under these circumstances, there is no question that WaterWatch's interest will be adequately represented by the proponent.

More specifically, ODFW is directed by rule to apply for instream water rights for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat. OAR 635-400-0000(1). These water rights are to be obtained for the purpose of meeting the agency's policy direction of managing "fish and wildlife to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state." OAR 635-400-0000(2).

By statute, the State Fish and Wildlife Commission (and by its direction, ODFW) is required to represent the *public interest* of the State by implementing co-equal goals of maintaining all species of fish and wildlife at optimum levels, managing waters of the state in a manner that will enhance the production and public enjoyment of wildlife, provide optimum recreational benefits, etc. ORS 496.012.¹ The statute and rules governing ODFW instruct it to represent public interests that are identical to those WaterWatch intends to represent.

¹ ORS 496.012 refers to "wildlife." Wildlife is defined to include fish in ORS 496.004(19).

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The fact that WaterWatch filed a Request for Standing further confirms its alignment with ODFW's interests.² By definition, a person requesting legal standing is taking the position that it supports the PFO. ORS 537.153(5). In this proceeding, WaterWatch's legal position and interests would be directly aligned with ODFW's. Both would be seeking issuance of the draft certificate prepared and published by OWRD with the PFO. WaterWatch could not argue for a result that is different from or more than what ODFW will defend and support in a contested case proceeding. Its participation would be duplicative and is therefore, unnecessary. The contested case rules are intended to avoid this exact situation. OAR 137-003-0535.³

WaterWatch's argument to the contrary is that ODFW is subject to political pressures. This argument is without legal merit. The rule requires a difference in interests, not a difference in ability to withstand political pressures.⁴ WaterWatch's interest is the same as ODFW's.

WaterWatch's argument may be based on a misunderstanding of the standard for obtaining party status under OAR 137-003-0535. The standard is not whether other parties "may" adequately represent the same interests as WaterWatch, but whether other parties *can* represent its interests. *Compare* Petition, p. 2 ("The public interest that WaterWatch seeks to represent *may* not adequately be represented by those parties.") (emphasis added) *with* OAR 137-003-0535(4)(f) (requiring a statement of the reasons why "existing parties to the proceeding

² Though WaterWatch's Request for Standing raised reasons it opposed the PFO in its request for standing, a request for standing is not the correct legal vehicle to raise those points and WaterWatch did not file a protest. *See* October 11, 1996, Request for Standing Water Rights, Powder River Basin for applications IS-72168 and IS-72169.

³ The ability to request standing under ORS 537.153(5) does not override the procedural rules in OAR Chapter 137. Rather, ORS 537.153 limits the potential universe of persons who may be allowed to participate in a contested case hearing to those who have filed a protest or a request for standing. In other words, ORS 537.153(5) does not automatically confer standing if the party is unable to meet the criteria set out in OAR 137-003-0535.

⁴ WaterWatch overstates its point. ODFW's budget is only 8.6 % general funds. *See* http://www.dfw.state.or.us/agency/budget/docs/15-17_GRB/ODFW%202015%20Legislative%20Session%20Overview_Fee%20Schedule.pdf. In other words, more than 90% of its budget is not subject to the approval of elected officials.

cannot adequately represent the interest identified..." by petitioners) (emphasis added). Under the correct legal standard, it is easy to conclude that ODFW can and will represent the same public interests WaterWatch seeks to represent.

In sum, WaterWatch's petition is premature. However, should the Department entertain it at this time, it should be denied because WaterWatch fails to establish that ODFW will not adequately represent the interests it seeks to represent. For these reasons, BRID respectfully requests that the Department deny the Petition.

DATED this 21st day of August, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:



Elizabeth E. Howard, OSB No. 012951

Email: ehoward@schwabe.com

Martha O. Pagel, OSB No. 832990

Email: mpagel@schwabe.com

Attorneys for Burnt River Irrigation District

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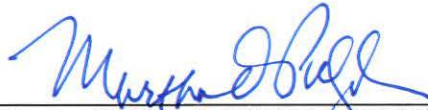
CERTIFICATE OF FILING

I hereby certify that on this 21st day of August, 2015, I filed the foregoing BURNT RIVER IRRIGATION DISTRICT'S RESPONSE TO WATERWATCH OF OREGON'S PETITION FOR PARTY STATUS with the Oregon Water Resources Department, by email and hand delivery to:

Patricia McCarty
Oregon Water Resources Department
725 Summer Street, NE, Suite A
Salem, OR 97301
Email: patricia.e.mccarty@state.or.us

SCHWABE, WILLIAMSON & WYATT, P.C.

By:



Martha O. Pagel, OSB No. 832990
Elizabeth E. Howard, OSB No. 012951

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OWRD

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2015, I served the foregoing BURNT RIVER IRRIGATION DISTRICT'S RESPONSE TO WATERWATCH OF OREGON'S PETITION FOR PARTY STATUS on the following persons:

Brian Posewitz
WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
Email: brian@waterwatch.org

Jesse D. Ratcliffe
Assistant Attorney General
General Counsel Division
1162 Court Street, NE
Salem, OR 97301
Email: jesse.d.ratcliffe@doj.state.or.us

Stephen E.A. Sanders
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Email: Stephen.sanders@doj.stte.or.us

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OWRD

by transmitting a true and correct copy of the foregoing, certified by me as such, via electronic mail to the respective parties at the addresses set forth above and by First Class Mail, placed in a sealed envelope addressed to the respective parties at the addresses set forth above and deposited in the U.S. Post office at Portland, Oregon, with postage paid.



Elizabeth E. Howard OSB No. 012951
Martha O. Pagel, OSB No. 832990



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

August 14, 2015

Rick Kepler
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97302

Re: WaterWatch Petition for Party Status on IS-72168 and IS-72169 (Oregon Department of Fish and Wildlife)

Dear Mr. Kepler,

In compliance with OAR 137-003-0535 Water Resources serves the enclosed petition. Any response is due seven calendar days from the date of agency mailing (August 14, 2015.)

Sincerely,

Patricia McCarty
Protest Program Coordinator
(503) 986-0820

Enclosures



Oregon
Kate Brown, Governor

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

August 14, 2015

Martha Pagel
Schwabe, Williamson & Wyatt
530 Center St. NE Suite 400
Salem, OR 97301

Re: WaterWatch Petition for Party Status on IS-72168 and IS-72169 (Oregon Department of Fish and Wildlife)

Dear Ms. Pagel,

In compliance with OAR 137-003-0535 Water Resources serves the enclosed petition. Any response is due seven calendar days from the date of agency mailing (August 14, 2015.)

Sincerely,

Patricia McCarty
Protest Program Coordinator
(503) 986-0820

Enclosures

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OREGON WATER RESOURCES DEPARTMENT

WATER RESOURCES DEPT
SALEM, OREGON

In the Matter of Water Right Application IS-72168 in the name of Oregon Department of Fish and Wildlife)))	WATERWATCH OF OREGON'S PETITION FOR PARTY STATUS
---	-------------	---

WaterWatch of Oregon hereby moves and petitions: to intervene, to participate as a party, and/or for full party status (or in the alternative for limited party status) in any and all aspects of the above referenced matter, including any contested case hearing. In support of this petition, and pursuant to OAR 137-003-0535, WaterWatch states as follows:

1. Standing Statement. Petitioner filed a standing statement in this matter.
2. Name and Address. Petitioner is WaterWatch of Oregon, an Oregon nonprofit corporation. Petitioner's address is 213 SW Ash St., Ste. 208, Portland, OR 97204.
3. Attorney. Petitioner intends to appear through one of its staff attorneys, Brian Posewitz, whose address for purposes of this proceeding is the same as petitioner's address.
4. Status Sought. Petitioner seeks full party status for the proceeding. In the alternative, petitioner seeks limited party status.
5. Interests Represented. Petitioner seeks to represent the public interests in protecting and restoring instream flows to preserve and enhance fish, wildlife and recreational opportunities.
6. Effects on Interests. The public interests represented by Petitioner will be affected by this proceeding because this proceeding will determine whether an instream water right is created to protect instream flows against out-of-stream demands with junior priorities.
7. Qualifications. Petitioner has unrivaled experience, knowledge and expertise in representing the public interests identified above. Petitioner has been in existence for 30 years and has focused throughout that time almost entirely on representing the public interests in

protecting and restoring instream flows in Oregon's rivers and streams. Petitioner's paid staff includes three attorneys and two policy experts with well over 50 years of collective experience in protecting and restoring instream flows in Oregon's rivers and streams. Petitioner's current board of directors, and former staff and board members who continue to contribute to the organization, bring at least another collective 100 years of water resources experience to petitioner's organization. Petitioner also benefits from the substantial institutional knowledge passed down from former staff and board members who no longer participate in the organization's activities.

8. Adequacy of Representation. The existing parties are the protestants, the Oregon Water Resources Department ("OWRD"), and the applicant Oregon Department of Fish and Wildlife ("ODFW"). The public interests that WaterWatch seeks to represent may not adequately be represented by these parties.

Protestants cannot reasonably represent the public interests in protecting instream flows for fish, wildlife and recreation. Protestants seek to defeat or minimize protections for instream flows so that more water may be diverted for out of stream uses.

OWRD cannot adequately represent the public interests identified above because its job is more intermediary than advocate. OWRD must respond to many masters -- to those who seek to store and appropriate the water (and to their advocates in politics and law) as well as those who seek to keep the water flowing in its natural state for the benefit of people who enjoy fish, wildlife and recreation. OWRD also has limited staffing and limited resources relative to the number of matters it must address. This reduces OWRD's ability to thoroughly develop the public interest issues identified above on its own. It also creates incentive to compromise for

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administrative efficiency, even when the public interests identified above are not fully protected. OWRD also lacks the necessary expertise on scientific issues of fish and wildlife biology.

This leaves only ODFW. ODFW has expertise in the scientific issues and represents, to some extent, public interests in protecting instream flows for fish, wildlife and recreation. However, ODFW cannot represent these public interests to the same extent as petitioner because ODFW is far more vulnerable to political pressure. ODFW must answer to elected officials, including the governor and state legislators, and ODFW's budget must be approved by those officials. Parties seeking more water for out of stream uses frequently complain to elected officials about positions by ODFW to protect and restore instream flows. Elected officials, in turn, pressure ODFW to moderate or abandon its positions to protect and restore instream flows. If ODFW does not comply, it risks having its budget cut, either in general or in the particular areas dedicated to protecting stream flows. The bottom line is that ODFW, despite its considerable expertise and good intentions, cannot zealously represent public interests in instream flows to the same extent as petitioner can.

9. Conclusion. For the foregoing reasons, petitioner's request for party status should be granted.

* * * * *

* * * * *

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**WATER RESOURCES DEPT
SALEM, OREGON**

10. Filing, Service Copies and Fee. Petitioner filed this petition by hand delivery on the date set forth below at:

Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Petitioner included two copies for service (one to ODFW and one to protestants in care of their attorney). As confirmed by discussions with OWRD, WaterWatch is not required to pay a fee with this filing, though it will be required to pay a fee to participate in any contested case proceeding if and when this petition is granted.

Dated: August 13, 2015



Brian Posewitz
WaterWatch of Oregon
213 SW Ash St., Ste 208
Portland, OR 97204
Ph: 503.295.4039 x 2
Fax: 503.295.2791
brian@waterwatch.org

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WATER RESOURCES DEPT
SALEM, OREGON



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department
North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

March 11, 2014

Burnt River Irrigation District
19498 Hwy. 245
Hereford, OR 97837

Re: Protest to ODFW Instream Water Right Applications IS-72168, 72169, 72186

Dear Mr. Franke:

In 1992 the Oregon Department of Fish and Wildlife filed numerous applications for instream water rights on various streams in Oregon. The District protested Applications # 72168 and 72169 on the Burnt River, and # 72186 on the North Fork of the Burnt River.

Water Resources is required by statute to determine whether to hold a contested case hearing on protests received on applications. At this time, the Department has determined not to refer the District's protests to hearing. Before the Department takes further action on this application, we would like the opportunity to meet with the District to discuss your concerns regarding the impact that this proposed instream water right would have on the District's water rights.

To refresh your memory I have enclosed copies from WRD files for the applications protested by the District. I will contact you in March to arrange a discussion with you about the Department's decision and how it may affect your organization. The number I have for the District is (541) 446-3313. Please advise me if this is not correct.

Sincerely,

Patricia McCarty
Protest Program Coordinator
Water Rights Division
Phone: 503-986-0820

INTEROFFICE MEMORANDUM
Water Rights Section

TO: ~~ADVISORY~~

FROM: Dwight French, x268 *DF*

DATE: March 26, 1997

RE: Water Availability for ISWR applications/files

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

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

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

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

cc: Mike Mattick

All Protested ISWR Files

Basin	App Num
-------	---------

2

OK 71556 A

Total for Basin 2 : 1

4

OK 71793 W

OK 71798 W

72076 W

72077 W

72078 W

72079 W

72080 W

72081 W

Total for Basin 4 : 8

5

OK 70353 A

70354 A

OK 70357 A

70358 S

70358 S

70358 A

OK 70605 A

70606 S

70606 A

70612 A

70695 A

70695 A

73199 A

Total for Basin 5 : 13

6

Checked out to Dwight

69949 A

69949 S

69951 S

69951 A

69958 S

69958 A

69958 S

69959 S

OREGON DEPARTMENT OF FISH & WILDLIFE

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OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

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Basin	App Num
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6

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

Total for Basin 6 : 38

9

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

Instream Applications with Protests

4/2/97

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

4/2/97

Page 4 of 6

Instream Applications with Protests

4/2/97

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

Basin	App Num	
17		
	70229	A
	70230	A
	70348	S
	70348	A
	70448	S
	70448	A
	70574	A
	70877	A
	70891	A
	70895	A
	70895	A
	70915	A
	71697	A
	80446	A
Total for Basin 17 :	15	

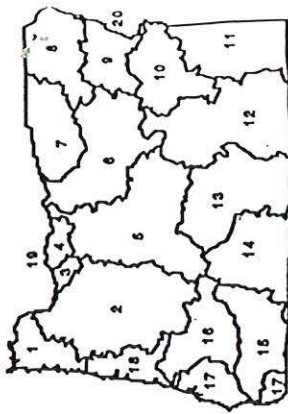
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OREGON DEPARTMENT OF FISH & WILDLIFE

173

How To Read the Listing

Applications are organized by Oregon's major river basins, as listed below:

- | | | |
|---------------|-----------------|--------------|
| 1-North Coast | 8-Grande Ronde | 15-Rogue |
| 2-Willamette | 9-Powder | 16-Umpqua |
| 3-Sandy | 10-Malheur | 17-S. Coast |
| 4-Hood | 11-Owyhee | 18-Mid Coast |
| 5-Deschutes | 12-Malheur L. | 19-Columbia |
| 6-John Day | 13-Goose/Summer | 20-Snake |
| 7-Umatilla | 14-Klamath | |



G-12345	2	Dry Cr. > Rowe R.	0.50	C	IR	40.00	Coos	1/1/1995	SENE, SECTION 9, T16S, R4W	W. Clinton...	PFO	2
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Basin number

County of use; Priority date

Amount

What it flows into

The source

Unit of measure:
C - cubic feet per second
G - gallons per minute
A - acre-feet

Application number:
G - groundwater
R - reservoir
S - surface
I - instream

Irrigated acres

Legal description of general area of use:
"Southeast quarter of the Northeast quarter of Section 9, Township 16 South, Range 4 West."

Applicant name & address

Stage of Review:
IR - initial review
PFO - proposed final order

Decision codes:
1 permit may be issued as requested by applicant.
2 permit may be issued with appropriate conditions
3 permit unlikely to be issued

Type of use (e.g.: IR - irrigation; see codes below)

Some commonly-used Type of Use abbreviations (for definitions, please consult Oregon Administrative Rules Chapter 690, Division 11):

AG-agriculture
CF/CH/CI/CR-cranberry uses
CM-commercial
CS-campground
DI-domestic, incl. lawn & garden
DN-domestic, incl. non-commercial
DO-domestic
DS-domestic/stock
FI-fish
FP-fire protection
FW-fish & wildlife

GD-group domestic
GR-groundwater recharge
GT-geothermal
IC-irrigation, primary & supplemental
ID, IL-irrigation with Domestic or Livestock use, respectively
IM-industrial, manufacturing
IR-irrigation
IS-supplemental irrigation
LV, LW-livestock/wildlife
MI-mining

MU-municipal
NU-nursery use
PA-pollution abatement
PW-power
QM-quasi-municipal
RC-recreation
RW-road construction
ST-storage
SW-swimming
TC-temperature control
WT-wildlife

PROPOSED FINAL ORDER REQUEST FORM

RECEIVED

SEP 11 1996

WATER RESOURCES DEPT.
SALEM, OREGON

Your Name, Address, and Phone Number:

Joe L. Barber
Rte 2, Box 1
Huntington Oregon 97907

Phone: (541) 869-2314

Please send me the Proposed Final Order for Water Right Application:

IS 72168
IS 72169
#

sent copy
9/17/96

Return this form and \$10 per PFO to:

PFO Requests
Proposed Final Order Team
Oregon Water Resources Department
158 12th St. NE
Salem OR 97310

Please include a check made out to the Oregon Water Resources Department in the amount of \$10 for each proposed final order you would like mailed to you. This fee entitles you to also receive a copy of the final order, when issued.

COPY

**STATE OF OREGON
WATER RESOURCES DEPARTMENT**

RECEIPT # **7343**

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

INVOICE # _____

RECEIVED FROM: Burnt River
BY: Irrigation District

APPLICATION	<u>72168</u>
PERMIT	
TRANSFER	

CASH: ☐ CHECK: # 2412 OTHER: (IDENTIFY) ☐

TOTAL REC'D \$ 200.

0417 WRD MISC CASH ACCT

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

REDUCTION OF EXPENSE

CASH ACCT.	\$
VOUCHER #	

0427 WRD OPERATING ACCT

MISCELLANEOUS		
0407	COPY & TAPE FEES	\$
0410	RESEARCH FEES	\$
0408	MISC REVENUE: (IDENTIFY)	\$
TC165	DEPOSIT LIAB. (IDENTIFY)	\$
WATER RIGHTS:		
0201	SURFACE WATER	\$
0203	GROUND WATER	\$
0205	TRANSFER	\$
WELL CONSTRUCTION		
0218	WELL DRILL CONSTRUCTOR	\$
LANDOWNER'S PERMIT		\$
OTHER (IDENTIFY) <u>Protest</u>		\$ <u>200.-</u>

0437 WELL CONST. START FEE

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

0539 LOTTERY PROCEEDS

1302	LOTTERY PROCEEDS	\$
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0467 HYDRO ACTIVITY

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

RECEIPT # **7343**

DATED: 10-9-96 BY: Darlene Bush

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

OCT - 9 1996

**WATER RESOURCES DEPT.
SALEM, OREGON**

**BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON
WATER RIGHTS DIVISION**

In the Matter of Surface Water Application	}	PROTEST TO
IS - 72168 in the Name of Oregon Department	}	PROPOSED FINAL
of Fish & Wildlife for Water Use in Baker County	}	ORDER

Protestant Burnt River Irrigation District (BRID), in accordance with ORS 537.153(6) and OAR 690-77-043, submits the following protest to Proposed Final Order for Application IS - 72168

I. INTRODUCTION

Protestant's address is HCR 86 Box 151, Hereford, Oregon 97837; phone number (541) 446-3313. Protestant is the owner and water user of irrigation water rights from the Burnt River, a tributary of the Snake River.

Protestant asserts that the Proposed Final Order by the Water Resources Department (WRD) is defective and in error and that there are elements of the water right as approved that will impair or be detrimental to the public interest, based on the facts and issues set forth below.

II. PROPOSED FLOW RATES ARE IN EXCESS OF MINIMUM NATURAL FLOW RATES AVAILABLE.

The instream water rights minimum flow rates are in excess of available natural flow rates. BRID does not protest proposed instream flows on this application from 1 April to 30 September, the authorized irrigation season, but wish to have it noted that the flows are available for the majority of this period only because of stored water in Unity Reservoir. BRID contends that October, November, December, and January flows could adversely impact the right and ability to re-fill Unity Reservoir. We also contend that the use of "average" flows to establish "minimum flow" water availability is incorrect and leads to erroneous conclusions. It is not unusual for the Burnt River flows to fluctuate between 1000 cfs and 0 cfs, this would average 500 cfs. Using an average based on this fluctuation to establish a minimum flow available would lead to a false "water availability" conclusion. We feel minimum flows should be established based on true minimum flow available. Additionally, increased flows during the late fall and mid winter freezing period will cause more ice to form, then increasing flows in mid February, on top of the existing ice will severely add to the riparian damage from ice flows and related channel scouring.

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WATER RESOURCES DEPT.
SALEM, OREGON

III. INADEQUATE/OUTDATED TECHNICAL DATA AND INFORMATION
SUBMITTED BY ODFW

Application IS 72168, as submitted by the Oregon Department of Fish & Wildlife to WRD, failed to include sufficient current technical data and information to support the flow rates requested by said agency, as required by OAR 690-77-020 and ORS 537.336.

OAR 690-77-020 (3) (g) requires an application to include at a minimum "a description of the technical data and method used to determine the requested amounts". The only information submitted in support of the application is:

- a. The Fish and Wildlife Resources of the Powder Basin and Their Requirements; August 1967.
- b. Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- c. Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, April 1973
- d. Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- e. A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels.

In reply we contend that in regards to (a) - 29 year old data is out-dated and no longer applicable; (b) - is there any information from other sources indicating fish flow requirements or is an ODF&W report the only data source; (c) - do Oregon salmonids have different requirements than salmonids in other locations? if not, do other studies exist? and is there more current information than 1973; (d) - again, is information available from other sources and more current than 1972; (e) - if flows requested are "the minimum amount necessary to restore, protect and enhance populations ..." why do the flow requests vary so greatly from stream to stream. Do Burnt River salmonids require more water than salmonids in other streams?

No analysis of supporting data appears in the WRD file for this application. The Proposed Final Order is defective in that the WRD did not evaluate whether the level of instream flow requested was "based on methods of determining instream flow needs that have been approved by administrative rule of the agencies submitting the applications". (OAR 690-77-020 (3)).

Apparently the flow levels applied for are based on an appendix in the Basin Investigation or Environmental Investigation for recommended flows. It is impossible to tell what factual data said recommendation was based on. No data has been submitted to support the flows requested and the application should therefore be rejected.

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WATER RESOURCES DEPT.
SALEM, OREGON

IV. WRD FAILED TO ANALYZE FLOW NEEDS

The flow levels approved by the Proposed Final Order are not based on any analysis of the need for the flows requested. The only apparent review undertaken by the WRD was a check to see if the requested flows are less than the average estimate of the natural flow ("EANF"; OAR 690-77-015 (4)). What happens when the minimum flow does not equal the estimated flow?

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

The methodology used for this application, the "Oregon Method", is inherently flawed in that it is based on a methodology that has been superseded, is not reliable, and is based on outdated or insufficient information (reference testimony by Al Mirati of ODFW regarding the "Oregon Method", to the Oregon Water Resources Commission on December 6, 1990).


CONCLUSION

This protest is filed in accordance with OAR 690-77-043. The issues raised should be considered as part of a contested case hearing. The WRD's Proposed Final Order is inadequate and defective and has failed to follow applicable rules. A thorough review of the application is necessary to determine the minimum quantity of water necessary to support the public uses for which applied.

For the reasons set forth above, BRID asserts that the application is defective and should be returned to the applicant. The flow levels requested are excessive and are not necessary to support the public uses proposed. Flow levels set at the rates proposed will interfere with future maximum economic development of the waters of the Burnt River sub-basin. Excessive flow rates for instream water rights represent a wasteful and unreasonable use of the water involved. (ORS 537.170 (8) (e)). If approved, an exception from use of water stored in Unity Reservoir to meet instream flows should be added as a condition of the right.

Based on the points discussed above, the Proposed Final Order should deny the application for a permit or modify the Proposed Final Order accordingly.

Respectfully submitted this 4th day of October, 1996.


Jerry Franke, Manager

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OCT - 9 1996

WATER RESOURCES DEPT.
SALEM, OREGON

Burnt River Irrigation District

~~HCR 86 Box 151~~

Hereford, Or 97837

(541) 446-3313

October 8, 1996

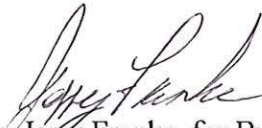
To: Oregon Water Resources Department
158 12th Street NE
Salem, Oregon 97310-0210

Subject: Protest of Instream Water Right IS - 72168

CERTIFICATE OF SERVICE

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

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



By: Jerry Franke, for Burnt River Irrigation District

**STATE OF OREGON
WATER RESOURCES DEPARTMENT**

RECEIPT # **7534**

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

INVOICE # _____

RECEIVED FROM: Water Watch of Oregon
BY: _____

APPLICATION	7216
PERMIT	
TRANSFER	

CASH: ☐ CHECK: # 24-12 OTHER: (IDENTIFY) ☐

TOTAL REC'D \$ 180

0417 WRD MISC CASH ACCT

ADJUDICATIONS

PUBLICATIONS / MAPS

OTHER: (IDENTIFY) _____

OTHER: (IDENTIFY) _____

\$
\$
\$
\$

**RECEIVED
OVER THE COUNTER**

REDUCTION OF EXPENSE

CASH ACCT.

PCA AND OBJECT CLASS

VOUCHER #

\$

0427 WRD OPERATING ACCT

MISCELLANEOUS

0407 COPY & TAPE FEES

0410 RESEARCH FEES

0408 MISC REVENUE: (IDENTIFY) _____

TC165 DEPOSIT LIAB. (IDENTIFY) _____

WATER RIGHTS:

0201 SURFACE WATER

0203 GROUND WATER

0205 TRANSFER

WELL CONSTRUCTION

0218 WELL DRILL CONSTRUCTOR

34 0207 LANDOWNER'S PERMIT

OTHER (IDENTIFY) Request for Standing #

EXAM FEE

\$
\$
\$

0202

0204

0206

RECORD FEE

\$
\$
\$

EXAM FEE

\$

0219

0220

LICENSE FEE

\$
\$

0437 WELL CONST. START FEE

0211 WELL CONST START FEE

0210 MONITORING WELLS

OTHER (IDENTIFY) _____

\$
\$

CARD #

CARD #

0539 LOTTERY PROCEEDS

1302 LOTTERY PROCEEDS

\$

0467 HYDRO ACTIVITY

LIC NUMBER

0233 POWER LICENSE FEE (FW/WRD)

0231 HYDRO LICENSE FEE (FW/WRD)

HRDRO APPLICATION

\$
\$

\$

RECEIPT # **7534**

DATED: 10-11-96

BY: D. Buckner

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

Water Watch

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

Delivered via messenger

October 11, 1996

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

RECEIVED

OCT 11 1996

WATER RESOURCES DEPT.
SALEM, OREGON

RE: Request for Standing, Instream Water Rights, Powder River Basin

72168 Burnt River

72169 Burnt River

Dear Water Rights Section:

Pursuant to ORS 537.153(5) and OAR 690-310-160(3) WaterWatch and Oregon Trout file this Request for Standing along with the required fee of \$50 per application for applications 72168 and 72169.

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

a. Name, address, telephone number of requester

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

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

b. Statement of support of the Proposed Final Order

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

OCT 11 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

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

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

If the PFOs are modified to either deny the applications, decrease the flows proposed, or otherwise alter the rights to the detriment of the resource, WaterWatch's and Oregon Trout's interest would be harmed because denial and/or lower flows pose a risk to the fish species they are intended to benefit, including rainbow trout and bull trout. It would also impair a number of other public interest values including, but not limited to, wildlife, scenic waterway values and water quality.

1. If the PFOs are modified to either decrease proposed flows and/or deny the applications, WaterWatch's interests will be harmed because flows vital to the survival of aquatic species, including rainbow trout, smallmouth bass and steelhead.

ODFW has requested these flows to provide for the minimum amount necessary for the survival of these fish. WaterWatch supports the flows requested by ODFW. If the Department modifies the PFOs to either deny the applications or propose flows lower than those requested by ODFW, the survival of all of these species will be jeopardized.

Recently the Department approved the Burnt River "reservation", which essentially locks up the last of the remaining water in the basin for consumptive uses. This reservation will have a serious impact on the instream resources of this basin. In testimony before the Commission, both the Department and agricultural interests stated that the instream needs would be protected by the instream water rights. If these instream water rights are not issued in the amounts requested, the fish will have no protection in this basin. Moreover, if they are not issued, the passage of the Burnt River reservation will have been based on erroneous representations that fish would be adequately protected by instream water rights.

If the Department modifies the PFO to the detriment of the resource, WaterWatch's and

Oregon Trout's interests will be impaired, as the result will be a negative impact on fish.¹

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

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

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

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

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

ORS 536.310(12)(emphasis added).

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

¹ Moreover, these flows are needed for the survival of downstream endangered species. To deprive the fish of these flows is not only a violation of the public interest but could result in a violation of the state and federal Endangered Species Acts for petitioned fish. Under the state act the Department is required to consult with ODFW to ensure that any action taken by the Department is consistent with ODFW programs to conserve the species, or, if no plan is in place, that the action will not "reduce the likelihood of the survival or recovery" of the state listed species. ORS 496.182(2). The flows requested by ODFW are in the amounts ODFW has determined are necessary for the survival of these fish. To comply with the intention and mandates of the State Endangered Species Act, the Department should issue the instream water rights at the amounts requested. Under the federal Act, there is a prohibition against "taking" of endangered species. 16 USCA § 1538(a)(1)(B). Issuing the instream water rights at the amounts requested by ODFW is obviously within the Department's authority. To do such is consistent with the intent and mandates of the Federal ESA. To the contrary, to deny or lower the instream water rights could result in a taking, for it would deny these fish the flows determined by ODFW as necessary for survival.

this preference has a specific statutory application.² The statute governs situations where there is a conflict between competing applications at the time the permitting decision is taking place. This statute does not address situations of conflict at some nebulous future date. Thus, while the Department may rely on this statute to subordinate the instream water right to the applications pending at the time of the instream water rights adoption, the Department's reliance on this section to attach this open-ended exception is in error.

If the statute were to mandate the open-ended subordination of new rights to human consumption and livestock uses, then equity demands that this condition be placed on every new permit or certificate issued, whether instream or out-of-stream. The statute does not differentiate between instream and out-of-stream water rights.³ Rather, it specifically states that "preference shall be given to human consumption purposes over all other uses and for livestock consumption, over any other use...." ORS 536.310(12) (*emphasis added*). Thus, if the Department finds that the law requires it to subordinate instream water rights to human consumption and livestock uses, the Department must subordinate all water rights, including agriculture, industry, municipal and mining to human consumption and livestock use. To fail to do this would not only be inequitable, but it would prove the Department insincere in their intent to protect human consumption and livestock above all else.

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

Moreover, this proposed condition is contrary to the public interest in protecting the resource. The Commission's statewide policies recognize the importance of maintaining streamflows and place high priority on protecting streamflows. OAR 690-410-030(1). This policy directs the state to take action to restore flows in critical areas such as this system. Id. The public uses of the Illinois river system have been impaired. Adoption of this instream water rights without conditions is just one small step towards restoring this system.

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WATER RESOURCES DEPT.
SALEM, OREGON

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

³ Under the law, "public uses" (recreation; conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; navigation) are legal beneficial uses. ORS 537.334(1). Instream water rights enjoy the same legal protections as consumptive water rights.

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

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

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

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

For the months that ODFW's flow requests were higher than the estimated average natural flow, the Department limited the instream water right because "water is not available for the proposed use." This limitation, and the reasoning behind it, is a clear indication that this system cannot sustain any further water withdrawals. Given this, no further appropriations can take place in this system during the months where the instream water right is limited. The Department should ensure that this basin is closed to any further allocation in order to ensure against any further overallocation of the resource. The Department should either institute closure of the basin classification or withdrawal of the resource from further appropriation. Moreover, in cases where streamflows are not being met, the Department should take steps to ensure metering and reporting of all water uses through designations of serious water management areas.

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

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

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OCT 11 1996

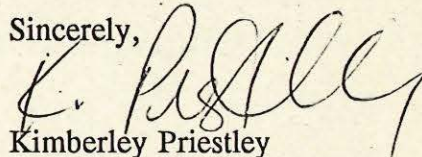
WATER RESOURCES DEPT.
SALEM, OREGON

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

Conclusion

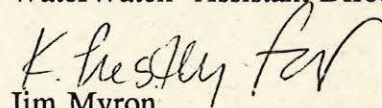
The proposed instream water rights will protect flows needed for fish life. Adoption of these and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers.

Sincerely,



Kimberley Priestley
WaterWatch--Legal/Policy Analyst

Karen Russell
WaterWatch--Assistant Director



Jim Myron
Oregon Trout--Conservation Director

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WATER RESOURCES DEPT.
SALEM, OREGON

Oregon Water Resources Department

Water Rights/Adjudication Section

Water Right Application Number: IS 72168

Proposed Final Order

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

Application History

On 1/29/92, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: BURNT R tributary to SNAKE R

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW TROUT

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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
st½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

To be maintained in:

BURNT RIVER FROM USGS GAGE 13274200 AT RIVER MILE 41.5 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E WM); TO BROWNLEE RESERVOIR POOL AT RIVER MILE +1.0 (SW1/4, SECTION 8, TOWNSHIP 14S, RANGE 45E WM)

The Department mailed the applicant notice of its Technical Review on November 25, 1994. The objection period closed February 1, 1995. Objections and comments were received (from ALFRED & JENNIE MOELLER, ALISON DERRICK, ANDREW RACEY, ANITA YORK, BAKER COUNTY COURT, BARBARA LEWIS, BERNARD HUTCHEON, BETTY BATES, BAKER COUNTY COURT, BONNIE CLUGSTON, BURNT RIVER IRRIGATION DIST, BURNT RIVER SCHOOL DISTRICT, BURNT RIVER SOIL & WATER, CHAD & DARLA DERRICK, CHARLES BATES, CHRISTENSEN RANCH, CHUCK & CHERYL BUCHANAN, CITY OF UNITY, COLLEEN HUTCHEON, DARYL HAWES, DAVID B FREEMAN, DEBBIE & ALFRED MOELLER, DOROTHY BLOOMER, DUANE BUNCH, DUSTY DERRICK, EASTERN OREGON MINING ASSOCIATION, EDITH DERRICK, EUGENE FISHER, EVELYN J KEITH, F WILBUR SMITH, FAY L ROSS, FLOYD VAUGHAN, GARY MARTIN, GORDON VANCLEAVE, GUY MICHAEL, HAROLD BAKER, IONE M WOODS, J L HINDMAN, J T TOLL, JAMES SINKBEIL, JAN ALEXANDER, JEAN BUNCH, JERRY FRANKE, JOE L & RUTH BARBER, KATHLEEN SULLIVAN, KATHRYN L VAUGHAN, KEN ALEXANDER, LARRY L SMITH, LARRY R GREEN, LAVERNE BUCHAN, LAWRENCE BUNCH, LEE LOVERIN/LOVERIN RANCH, M K HINDMAN, MABEL SHAW, MARIAN L MARTIN, MARR BENNETT, MICHELLE NEAL-PAYNE, MIKE HINDMAN, MIKE PAYNE, MIRIAM ASCHIM, NANCY & KENNETH TAYLOR, NELSON C-C RANCHES INC, NORM CHRISTENSEN, PAT

SULLIVAN, PAUL BENNETT, R KENT, RHEA BUNCH, RICHARD CARTWRIGHT, RODD BUNCH, ROGER DERRICK, SAM RAMOS, SHOLLENBERGER FARMS, SHOOK RANCH, SPEAR C HINDMAN CORP, STANLEY FOLLETT, STEPHEN HINDMAN, STEVEN J VUYOVICH, TERESA A ORR, TERRY BATES, THOMAS CLUGSTON, THOMAS R CLAYSTON, TRIMBLE LAND CO, TRIMBLE RANCH INC, VAUGHAN FAMILY LAND&CATTLE CO, VERNON SIMPSON, VIVIAN & WILLIAM ZIKMUND, WATER FOR LIFE, WATERWATCH OF OREGON, WAYNE MORIN, WILBUR SMITH, WILLIAM SHUMWAY).

The following supporting data was submitted by the applicant:

- (a) The Fish and Wildlife Resources of the Powder Basin and Their Water Requirements; August 1967.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.
- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

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

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

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

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

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

Findings of Fact

The Powder Basin Program allows the proposed use.

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

The source of water is not above a State Scenic Waterway.

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
26	165	279	469	370	230	129	104	77.3	80.6	99.9	109

Conclusions of Law

Under the provisions of ORS 537.153, the Department must

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

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

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

The proposed use will not injure other water rights.

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

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

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

Water is not available for the proposed use at the amount requested year round because the unappropriated water available is less than the amounts requested during some months.

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

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

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

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

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

The Department therefore concludes that

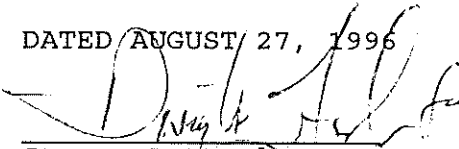
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate,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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

Recommendation

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

DATED AUGUST 27, 1996


Steven P. Applegate
Administrator
Water Rights and Adjudications Division

Protest Rights

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

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

- deficiency;
- Any citation of legal authority to support your protest, if known; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.
- Proof of service of the protest upon the applicant.

Your protest must be received in the Water Resources Department no later than October 11, 1996.

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

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

DRAFT
STATE OF OREGON

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

STATE OF OREGON
WATER RESOURCES DEPARTMENT
SALEM, OREGON 97310

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

Source: BURNT R tributary to SNAKE R

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND
JUVENILE REARING OF RAINBOW TROUT

To be maintained in:

BURNT RIVER FROM USGS GAGE 13274200 AT RIVER MILE 41.5 (NWNW,
SECTION 10, TOWNSHIP 12S, RANGE 41E WM); TO BROWNLEE RESERVOIR
POOL AT RIVER MILE +1.0 (SW1/4, SECTION 8, TOWNSHIP 14S, RANGE
45E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 1/29/92.

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

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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd½	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

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

Witness the signature of the Water Resources Director affixed this 1st day of _____, 19__.

Water Resources Director

Recorded in State Record of Water Right Certificate number _____.

IS72168

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FEB 10 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

Burnt River Irrigation District

HCR 86 Box 151

Hereford, Or 97837

(503) 446-3313

January 23, 1995

To: Water Resources Department
158 12th Street N.E.
Salem, Or 97310-0210
(Attn: Michael J. Mattick)

Subject: Objection to ODF&W Instream Water Right Application Technical Review
Reference Application File Numbers IS 72168 and IS 72169

Burnt River Irrigation District hereby objects to the above listed technical reviews on the following basis:

- (1) We object to the in-stream filing on any stream that is already classed as "over appropriated". The reason for this is: If the stream is over-appropriated, the current water rights holders are limited to a specific duty and rate. Any water over the authorized rate must be left in the stream under existing law.
- (2) The data presented is not accurate. Historical records available in the Burnt River Irrigation District show that live-stream flows in the main stem of the Burnt River are well below those presented in the applications. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this drainage basin. Measurements taken at the gaging stations are primarily water released from Unity Reservoir. Averages of the flow in the Burnt River are misleading and deceiving. The highs during major run-off are very high, while the lows, which are the normal condition, go all the way down to no natural flow.
- (3) The amount of water requested. At a public meeting in Baker City on December 8, 1994, a member of WRD staff told the assembly that these amounts of water were derived without regard to existing authorized diversion. We believe that existing and pending authorized diversions should be taken into account.
- (4) Statement: "The source of water is not withdrawn from appropriation." Believe the Burnt River is over-appropriated.
- (5) ODF&W has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.

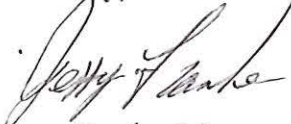
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FEB 10 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

(6) We believe that all applications should follow the same procedures and rules as to filing fees and waiting periods before certificates are issued.

Sincerely;

A handwritten signature in cursive script, appearing to read "Jerry Franke".

Jerry Franke, Manager

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JAN 23 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Burnt River Irrigation District

HCR 86 Box 151
Hereford, Or 97837
(503) 446-3313

January 23, 1995

To: Water Resources Department
158 12th Street N.E.
Salem, Or 97310-0210
(Attn: Michael J. Mattick)

Subject: Objection to ODF&W Instream Water Right Application Technical Review
Reference Application File Numbers IS 72168 and IS 72169

Burnt River Irrigation District hereby objects to the above listed technical reviews on the following basis:

- (1) We object to the in-stream filing on any stream that is already classed as "over appropriated". The reason for this is: If the stream is over-appropriated, the current water rights holders are limited to a specific duty and rate. Any water over the authorized rate must be left in the stream under existing law.
- (2) **The data presented is not accurate.** Historical records available in the Burnt River Irrigation District show that live-stream flows in the main stem of the Burnt River are well below those presented in the applications. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this drainage basin. Measurements taken at the gaging stations are primarily water released from Unity Reservoir. Averages of the flow in the Burnt River are misleading and deceiving. The highs during major run-off are very high, while the lows, which are the normal condition, go all the way down to no natural flow.
- (3) **The amount of water requested.** At a public meeting in Baker City on December 8, 1994, a member of WRD staff told the assembly that these amounts of water were derived without regard to existing authorized diversion. We believe that existing and pending authorized diversions should be taken into account.
- (4) **Statement: "The source of water is not withdrawn from appropriation."** Believe the Burnt River is over-appropriated.
- (5) ODF&W has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.

(6) We believe that all applications should follow the same procedures and rules as to filing fees and waiting periods before certificates are issued.

Sincerely;

(signed)
Jerry Franke, Manager

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JAN 23 1995

WATER RESOURCES DEPT.
SALEM, OREGON

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FEB 10 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

Burnt River Irrigation District

HCR 86 Box 151

Hereford, Or 97837

(503) 446-3313

January 18, 1995

To: Water Resources Department
158 12th Street N.E.
Salem, Or 97310-0210
(Attn: Michael J. Mattick)

Subject: Objection to ODF&W Instream Water Right Application Technical Review

Reference Application File Numbers IS 72160, Is 72161, and IS 72178.

Burnt River Irrigation District(BRID) hereby objects to the following portions of the technical reviews for the reasons indicated:

1. We object to the in-stream filing on any stream that is already classed as "over appropriated". The reason for this is: If the stream is over-appropriated, the current water rights holders are limited to a specific duty and rate. Any water over the authorized rate must be left in the stream under existing law.
2. **The amount of water requested.** At a public meeting in Baker City on December 8, 1994, a member of WRD staff told the assembly that these amounts of water were derived without regard to existing or pending authorized diversions. We believe the existing and pending authorized diversions should be taken into account. We further believe all applications should be processed in the order received.
3. **The supporting data submitted by the applicant.** Believe this data to be out-dated and un-reliable. The watershed changes over the years. Fires and forest management practices have had a significant impact on the way water goes out. With good ground-cover and root systems, the ground will retain the water longer and allow it to go out gradually. Fires and forest management practices have changed this. Water now goes out all at once in the spring melt, and late summer flows are adversely impacted.
4. **Statement: "The source of water is not withdrawn from appropriation."** On or about March 25, 1936 the Burnt River Irrigation District (BRID) adopted a resolution declaring Burnt River tributaries within the boundaries of BRID above Unity Reservoir to be over-appropriated, and petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water.

72168

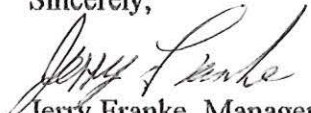
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FEB 10 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

5. We believe that all applications should follow the same procedures and rules as to filing fees and waiting periods before certificates are issued.

Sincerely;


Jerry Franke, Manager

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FEB - 6 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

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SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature: Stephen R. Hindman, Secretary
Name: SPEAR C. HINDMAN CORP.
Date: 1/31/95
Address: PO Box 204
DURKEE, OR. 97905

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FEB - 7 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
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SALEM, OREGON

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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Laverne Buchan

Name: Laverne Buchan

Date: Jan. 25, 1995

Address: RLI - Rye Valley

HUNTINGTON, OR. 97907

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FEB - 6 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Sam Ramos

Name: SAM RAMOS

Date: 1/30/95

Address: HERSLE Box 133

HERSFORD, OREGON 97837

The ODFW is way out of line on this one. Studies already done in our area have shown our district already maintains adequate flow in its normal operation and there is no need for them ^(ODFW) to have this water right.

We see it as just one more attempt on the part of a dictatorial agency to ^{force} mandate on individuals to enhance their own interest, with little thought being given to the economic well being of our small community. This river is the life blood to our existence. Had it not been for the foresight of our predecessors there would not be a stream flow for ODFW to even care about. The proponents of the afore mentioned applications certainly have not done their homework. You need to be talking to those of us who have spent our lifetimes here and know the historical back ground of stream flows, agriculture & fish!

FREEMAN ANGUS RANCH INC.
HC 87 BOX 1045 + BAKER CITY, OR 97814
(503) 523-6881

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FEB - 1995

Oregon Water Resources Department
158 12TH ST NE
Salem, Oregon 97310

WATER
SUE

January 31, 1995

Attn: Michael J. Mattick

Reference Files: 1S72160 - 1S72161 - 1S72168 - 1S72169 - 1S72178
1S72185 - 1S72186 - 1S72190 - 1S72191 - 1S72192 - 1S72193

Dear Sir

I object to the above so called "instream" applications that have been filed upon by our ODF&W. As you know these streams have already been filed on by previous older water rights so called "out-of stream" rights. There isn't any water left to give them.

As you well know the above filings are simply a legal hassle to steal water for the ODF&W for dubious purposes.

Here is a prime example of the State of Oregon working hand-in-hand with different departments of the state to steal water in the name of a new type of water called "instream". Shame on you folks! Why would the ODF&W file on nonexistent water and why would you people grant it? Again shame on you!

We the people are getting tired of paying for all sides of silly proceedings including this very questionable issue.

Check the history of Burnt River and Powder River and the North Powder River. They went dry in the summertime shortly after spring runoff. There was NO "INSTREAM". The farmers and ranchers built reservoirs: Phillips, Unity, Thief Valley to name a few for irrigation. Now we have some year around water. Shame on your department. Quit fooling with us. We are not helpless you know. We are landowner citizens. This is a vicious joke when viewed in its entirety. If the ODF&W needs some water why sneak around? "Instream vs. out-of-stream" give us a break! Fish in the Burnt River ha! Fish in the Powder River ha! Not until after the reservoirs were built. Check your records. Talk to the people!

Upset but still cordial


David B. Freeman

cc Lynn Lundquist
Greg Walden

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

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SALEM, OREGON

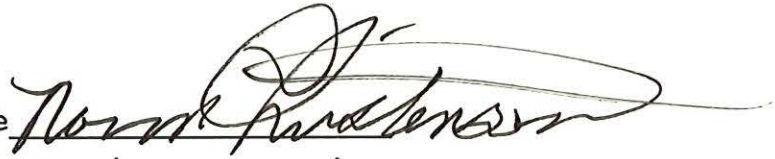
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Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature



Name: Christensen Ranch

Date: 1-29-95

Address: P.O. Box 74

Bridgeport, Or. 97819

P.O.Box 187
Hereford, Oregon 97837
January 25, 1995

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
158 12th Street NE
Salem, OR 97310-0210

Dear Mr. Mattick,

As chairman of the Burnt River School District Board of Directors I am deeply concerned about the instream water rights applications submitted by the Oregon Department of Fish and Wildlife for the Burnt River. These applications, IS 72160, IS 72161, IS 72168, IS 72169 and IS 72178, if approved, will cause undo hardship on the landowners in the district. Without water for irrigation, property values will decrease, causing the tax base to drop. Our district patrons are paying a very high tax now and the loss of crops will add to their burden.

Although I am unable to address the technical report submitted by ODFW at this time I thank you for considering the adverse affect on the public interest these applications will cause our school.

Sincerely,



Kent Nelson, Chairman
Burnt River School District Board of Directors

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

As a water right holder under Oregon law, I wish to formally object to the applications by the Oregon Department of Fish and Wildlife.

The following are objections to the Technical Review Reports:

1. The data submitted is outdated and incomplete, with no mapping as required by Oregon Law. Methods used are not adequate for the stream location, or current with technology presently available and used within scientific and biological communities.

2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.

3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is out dated.

4. Instream applications are not compatible with local government comprehensive Land Use Plan.

5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters which have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over; an estimated 8,000 acres have been logged; and an estimated 500 - 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988 - Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

If the estimated natural flow data is not current, how can the requested average be valid?

The following are objections to the Report Conclusions:

1. Data used to set flow levels was outdated. The impact of this application would be devastating to the economy of the Burnt River Valley. The instream water rights would stop any further development of lands, business or industry in the Valley. It could also have a long term negative impact on current water rights. In 1994, irrigators using water from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights.

2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. All lands below Unity Reservoir are privately owned and no permission has been granted to ODF&W to access that land. Therefore, there is no way accurate or current information could have been obtained for these applications.

3. The seasonal stream discharge patterns have changed over the last 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. I again question the data and methodology used.

2. If the water right holder is required to measure the instream flow, who is going to pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could have a long term negative impact on our current water rights. It would place the "State ODF&W" in a position that in time will lead to conflicts over water usage. The State has so many more resources that a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will become biased in favor of the State. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. As a landowner, irrigator and taxpayer I object to these addition known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other individual applicants.

3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. The proposed Ricco and Hardman Dams could possibly provide needed water but ODF&W is opposing the construction of these reservoirs. These applications will also eliminate future water storage opportunities.

4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Roger K. Derrick
Name: ROGER K. DERRICK
Date: 1-29-95
Address: P.O. Box 4
Unity Or. 97884

cc: Lundquist

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FEB - 2 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

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4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Dusty Derrick
Name: Dusty Derrick
Date: 1/29/95
Address: P.O. Box 41
Unity OR. 97884

cc: Lundquist

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FEB - 2 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Signature: Edith Derrick
Name: EDITH DERRICK
Date: 1/29/95
Address: Box 3
Unity, ORE
97884

cc: Lundquist

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FEB - 2 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

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WATER RESOURCES DEPT.
SALEM, OREGON

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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Andrew Racey

Name: Andrew Racey

Date: Jan 28-1995

Address: HCR 86 Box 49

Hereford OR. 97837

If ODFW is allowed to just take
over our Water Rights, Cancel our Rights
to a 1864 Water Right. There is no Justice.
It's just might makes Right, and Laws as
they were are no good any more.
There was no water in the Summer Time
to speak of until the Ranchers bonded
themselves for 40 years to build the Unity
Dam. And Fish are not more important
than Farmers - There are fewer people now
willing to do the hard work of farming and
Ranching - Mostly People go for Pencil Pushing
jobs now. And that won't feed The Nation -
But Bureaucrats from all directions are making our
Work & Living more Stressful Than necessary

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FEB - 2 1995

**WATER RESOURCES DEPT.
SALEM, OREGON**

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

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2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. All lands below Unity Reservoir are privately owned and no permission has been granted to ODF&W to access that land. Therefor, there is no way accurate or current information could have been obtained for these applications.

3. The seasonal stream discharge patterns have changed over the last 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. I again question the data and methodology used.

2. If the water right holder is required to measure the instream flow, who is going to pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could have a long term negative impact on our current water rights. It would place the "State ODF&W" in a position that in time will lead to conflicts over water usage. The State has so many more resources that a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will become biased in favor of the State. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. As a ^{Future} landowner, irrigator and taxpayer I object to these addition known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other individual applicants.

3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. The proposed Ricco and Hardman Dams could possibly provide needed water but ODF&W is opposing the construction of these reservoirs. These applications will also eliminate future water storage opportunities.

4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Alison J. Perri (Future
Name: Alison J. Perri C/K Landowner)
Date: 1-28-95
Address: P.O. Box 4
Unit 9, O.R. 97884

cc: Lundquist

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

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WATER RESOURCES DEPT.
SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature William D. Shumway

Name: William D. Shumway

Date: 28 January 95

Address: PO Box 58

Bridgeport, Oregon 97817

Lets go forward into the next century, Not backward,

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

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7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

I agree completely with this letter and could not have said it better. Therefore, I'm simply signing my name,

Sincerely,

Signature Barbara E. Lewis

Name: Barbara E. Lewis / Elliott Ranches, Inc.

Date: Jan. 28, 1995

Address: P.O. Box 57

Bridgeport, OR 97819

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

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WATER RESOURCES DEPT.
SALEM, OREGON

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7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Tamara Langley
Name: Tamara Langley
Date: Jan 28, 1995
Address: PO Box 328
Huntington OR

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

As a water right holder under Oregon law, I wish to formally object to the applications by the Oregon Department of Fish and Wildlife.

The following are objections to the Technical Review Reports:

1. The data submitted is outdated and incomplete, with no mapping as required by Oregon Law. Methods used are not adequate for the stream location, or current with technology presently available and used within scientific and biological communities.

2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.

3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is out dated.

4. Instream applications are not compatible with local government comprehensive Land Use Plan.

5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters which have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over; an estimated 8,000 acres have been logged; and an estimated 500 - 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988 - Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

If the estimated natural flow data is not current, how can the requested average be valid?

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WATER RESOURCES DEPT
SALEM, OREGON

The following are objections to the Report Conclusions:

1. Data used to set flow levels was outdated. The impact of this application would be devastating to the economy of the Burnt River Valley. The instream water rights would stop any further development of lands, business or industry in the Valley. It could also have a long term negative impact on current water rights. In 1994, irrigators using water from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights.

2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. All lands below Unity Reservoir are privately owned and no permission has been granted to ODF&W to access that land. Therefore, there is no way accurate or current information could have been obtained for these applications.

3. The seasonal stream discharge patterns have changed over the last 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. I again question the data and methodology used.

2. If the water right holder is required to measure the instream flow, who is going to pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could have a long term negative impact on our current water rights. It would place the "State ODF&W" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will become biased in favor of the State. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. As a landowner, irrigator and taxpayer I object to these additional known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other individual applicants.

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WATER RESOURCES DEPT
SALEM, OREGON

3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. The proposed Ricco and Hardman Dams could possibly provide needed water but ODF&W is opposing the construction of these reservoirs. These applications will also eliminate future water storage opportunities.

4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Darla S. Derrick
Name: Darla S. Derrick
Date: 1-28-95
Address: P.O. Box 4
Unity, Or. 97884

cc: Lundquist

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Matlack
Water Rights Specialist
Oregon Water Resources Dept.
State of Oregon
Commerce Building
158 12th Street N.E.
Salem, Oregon 97310-0210

Dear Mr. Matlack

As a land owner and water right holder, I would like to object to the ODF&W applications; IS 72160, IS 72161, IS 72178, IS 72815, IS 72184, IS 72168, and IS 72169.

IS 72160, IS 72161, IS 72178 are all on the South Fork of the Burnt River above Unity Dam, and the water has been over-appropriated for over 60 years.

IS 72185, IS 72186 are above the Unity Dam on the North Fork of the Burnt River. The North Fork after the 1st of June would have very little water if it were not for irrigators using their water rights to bring water in from the Pete Mann Ditch.

If ODF&W wants instream flows in Burnt River they should support

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WATER RESOURCES DEPT
SALEM, OREGON

the Hardman and Rice Dams
IS 72168 and IS 72169 between Unity
Dam and the Snake River. Historically,
without the Unity Dam, there
would be periods of no flow
in this area.

Basically I feel that, all these
should be repeated until ODFW
starts to work with the Burnt
River Irrigation District to create
new storage on the Burnt River
with the Hardman and Rice
Dams

Sincerely,
Daryl E. Hawes
Jan 28, 1995
HCR 86 Box 140
Hereford, Or.
97837

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Walter Bennett

Name: WALTER BENNETT

Date: 1/27/95

Address: P.O. BOX 145

Unity OR
97884

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WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

Dear Mr. Mattick:

As a concerned citizen residing in the lower Burnt River area, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
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7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Harold Baker Jr.

Name: Shook Ranch

Date: 1-28-75

Address: Box 256 - Durkee, Ore

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**WATER RESOURCES DEPT.
SALEM, OREGON**

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

As a water right holder under Oregon law, I wish to formally object to the applications by the Oregon Department of Fish and Wildlife.

The following are objections to the Technical Review Reports:

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2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.

3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is out dated.

4. Instream applications are not compatible with local government comprehensive Land Use Plan.

5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters which have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over; an estimated 8,000 acres have been logged; and an estimated 500 - 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988 - Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

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4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Chad E. Derrick
Name: Chad E. Derrick
Date: 1/25/95
Address: P.O. Box 4 Unity
OR 97884

cc: Lundquist

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WATER RESOURCES
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

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72168

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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Dwight Langley
Name: Dwight Langley
Date: 1/20/95
Address: Huntington Ore
97907

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30-Jun-95 FEB - 2 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Mr. Steve Applegate
Oregon Water Resources Dept.
Commerce Building
158 12th St. NE
Salem OR 97310-0210

Re: ODFW **IS72168** and IS72169

Dear Mr. Applegate;

As a Cattleman in the Burnt River Valley, I am compelled to formally object not only to the questionable data compilation for the Technical Review Report for the above mentioned instream flow applications by the ODF&W but to the entire concept of the ODF&W filing for water rights for any reason in a stream with no androgynous fish (prior to the Unity Dam completion, the stream would "go dry" during some summers), **and controlled exclusively for agricultural purposes for the last five decades.**

Even though Rep. Norris' office has kindly and expeditiously reviewed this matter for us, and advises that under ORS 537.334 -537.360, water rights which pre date the In-stream claims have precedence.....I remain deeply skeptical. Laws can be changed, particularly with respect to real or alleged "endangered species", upon which all rational thinking, honesty, and integrity seem to go "out the window".

I feel this In Stream application is merely a harbinger of bad things to come and therefor should be strongly refused. The Burnt River/Unity Dam is the sole reason for the agricultural success in Unity, Hereford, Bridgeport, and Durkee Valleys. It has resulted in long term, stable (tax paying), agricultural operations for many families (including my own) in some cases for generations.

It's not as if the ranchers have been insensitive to game management. In fact, the Elk and Deer populations in these valleys are larger than ever, they commonly graze in the **irrigated Alfalfa fields**- there is even White Tail deer showing up in Durkee. The pheasants are on the increase **along the fence lines between the irrigated fields** and the Chukkers and Antelope are recovering from the severe winter a few years ago. Bald and Golden eagles are common along the stream, especially during calving season; they like to eat the cattle after-birth. There wouldn't be as many cattle if it weren't for the reliable operation of the **irrigation district**. There are a variety of hawks as well, including Red Tailed and Harris Hawks. Many Hawks routinely follow the swather during haying to hunt field rodents...the haying activities are a **direct result of irrigation**. Canadian Geese and several species of ducks now reside permanently along the water courses because the river **now flows year-round due to the Unity Dam**. If the ODF&W wishes to have input into the operation of the irrigation district they should ask first, just like anyone else who wishes to hunt or otherwise enter upon private property.

The Ranchers have, to no small degree, aided in the health and well being of these species from placing salt, maintaining springs, and fighting wildfires through feeding deer, Elk, and Antelope in the winter or discouraging trespassing and poaching. Some ranchers, my Brother for example, have even built nesting boxes for geese.

Please reject this ODFW request.

CC: Rep. Ray Baum
Rep. Lynn Lundquist
Rep. Chuck Norris

VTY:
TERRY BATES
1404 CRIS Ct.
La Grande, OR
97850

WATER FOR LIFE'S OBJECTION TO TECHNICAL REVIEW: APPLICATION # 72168

Submitted to the Oregon Water Resources Department, January 18, 1995

Water for Life hereby submits the following objection to Application # 72168, an instream water right application filed by the Oregon Department of Fish & Wildlife ("ODFW"). Water for Life asserts that the technical review by the Water Resources Department ("WRD" or "Department") is defective and there are elements of the water right as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicant has requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicant for the curing of defects.

A. WRD FAILED TO ANALYZE FLOW NEEDS

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

B. NO SUPPORTING DATA SUBMITTED FOR REQUESTED FLOW LEVELS

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

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

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

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

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

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

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

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

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

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

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

E. "EANF" CALCULATIONS ARE DEFECTIVE OR INCOMPLETE

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

F. FISH SPECIES MAY NOT BE PRESENT IN STREAM

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

G. "REPORT CONCLUSIONS" CONTAIN BOILERPLATE LANGUAGE

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

H. "REACH" REQUESTED IS TOO EXTENSIVE

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

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

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

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

I. ODFW'S GAGE RULE NOT FOLLOWED

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

CONCLUSION

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

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



Todd Heidgerken
Executive Director of Water for Life

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WATER RESOURCES DEPT.
SALEM, OREGON

Michael J Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS72168, IS 72169.

As a water right holder under Oregon law, I wish to formally object to that applications by the Oregon Department of Fish and Wildlife.

The following are objections to the Technical Review Reports:

1. The data submitted is outdated and incomplete, with no mapping as required by Oregon Law. Methods used are not adequate for the stream location, or current with technology presently available and used within scientific and biological communities.
2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir for appropriation. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.
3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is outdated.
4. Instream applications are not compatible with local government comprehensive Land Use Plan.
5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters that have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over. An estimated 8,000 acres have been logged over. An estimated 500- 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988- Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

If the estimated natural flow data is not current, how can the requested average be valid?

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WATER RESOURCES DEPT.,
SALEM, OREGON

The following are objections to the Report Conclusions:

1. Data used to set flow levels is outdated. The impact of this application could devastate the economy of the Burnt River Valley. The instream water rights would stop any further development of lands, business, or industry in the Valley. It could also have a long term negative effect on current water rights. In 1994, irrigators using water from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights.

2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. ODF&W currently stalk Rainbow Trout fingerlings in the So. Fork of the Burnt River. All lands below Unity Reservoir are privately owned. Land owners to my knowledge did not grant ODF&W access to their land. Therefore, there was no legal way that ODF&W could have obtained accurate or current information for these applications.

3. The seasonal stream discharge patterns have changed over the past 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. Again I question the data and methodology used.

2. Who is required to measure the instream flow; who will pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could devastate our current water rights, by superseding our water rights in the future. It would place the Local ODF&W in a position that will lead to conflicts over water usage. The local ODF&W could have to measure, state ODF&W would have to monitor.

The data system will become biased in favor of the State. A private individual could not produce and present data at the same level and in the same detail as the State. The administrative costs will fall to the taxpayers. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. As a landowner, irrigator, and a taxpayer I object to these additional known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other applicants.

3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife and domestic animals. The proposed Ricco and Hardman Dams could possibly provide needed water but ODF&W is opposing the construction

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of these reservoirs. These applications will also eliminate future water storage opportunities.

4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

Signature:

Name: Teresa A. Orr

Date: January 29, 1995

Address: 4409 Frieda Ave.

Klamath Falls, Oregon 979603

cc: Lundquist

cc: Waldern

cc: Norris

BURNT RIVER



Soil and Water Conservation District

January 30, 1995

P. O. BOX 906

BAKER, OREGON 97814

Dear Mr. Mattick,

The Burnt River Soil and Water Conservation District is objecting to the Technical Review Report for instream flow applications IS 72160, IS 72161, IS 72178, IS 72168, IS 72169, IS 72185, and IS 72186.

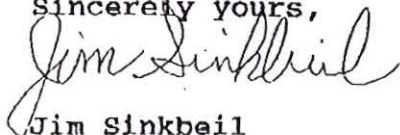
The data used by ODF&W to substantiate its instream water right application is incomplete and unreliable. An admission of this fact was made by Duane West, who was then ODF&W Regional Fish Biologist, to the South Fork Co-ordinated Resource Management Plan Committee.

Burnt River SWCD sponsored a CRMP for the North and South forks of the Burnt River. All public agencies and interested private groups and individuals were invited to attend. ODF&W, most often represented by Duane West, was an integral part of the committee. Many watershed enhancement projects have been completed, more are being planned with several major projects ongoing at this time.

Mr. West was questioned as to how many fish per mile the Burnt River could support. The answer was approximately 200. Next it was asked how many fish Unity Reservoir supports. Mr. West stated the number was many times larger than the Burnt River.

Burnt River SWCD feels very strongly the public interest is best served by co-operative efforts arrived at through the framework we worked very hard to establish with the CRMP process. The unilateral filing of instream water rights by ODF&W serves no useful purpose.

Sincerely yours,



Jim Sinkbeil
Director,
Burnt River Soil and Water Conservation District

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WATER RESOURCES DEPT.
SALEM, OREGON

21 IWP's in
Baker County

70863, 64, 70,

71864, 72160, 61, 67, 68, 69, 70, 72, 78, 81, 83, 85, 86, 89, 90, 91, 92, 93

EOMA

Eastern Oregon Mining Association, Inc.
(a nonprofit corporation)

COMMENTS RELATING TO INSTREAM WATER RIGHTS

P.O. Box 932 503-523-3285
Baker City, Oregon 97814

FILED BY

OREGON DEPARTMENT OF FISH AND WILDLIFE

January 29, 1995

The Eastern Oregon Mining Association is located in Baker County Oregon. Our membership consists of over 300 throughout Oregon, Washington, Idaho, California and Nevada. Many of the miners have claims they are actively working or under exploration in Baker County where the Oregon Department of Fish and Wildlife have filed instream water rights.

We question the validity of the data collection that is being used as a basis for the instream rights. Most of the streams that are being targeted are over appropriated now. The attack on the instream rights will hamper industrial use in the future. In most cases, during placer mining, the water is used in a non-consumptive way and the process of mining will release additional water that can be used by down stream users.

The mining association opposes the instream water right grab on the streams throughout the state of Oregon, but in particular the streams located in Baker, Grant and Union Counties. The impact to the small communities of Baker, Unity and Pine Valley where many of these streams are located could have adverse affects on the current and future economic well being; could stop future land development, business and industry that depend on water. Future reductions could make it unfeasible to operate the business that depend on future water usage if these water rights are granted. The state should be looking at ways to construct off stream impoundments to collect water during high spring run off to later put back into the streams during the summer and fall when water is low. Work with the land owners instead of taking future water rights.

We also oppose the fact that Oregon Department of Fish and Wildlife is allowed to file water rights without being assessed the same fees that are charged the public at large.

Respectfully Submitted,

Terry Drever - Gee

Terry Drever-Gee

President, Eastern Oregon Mining Assoc.

Director of Government Affairs, Oregon Independent Miners

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WATER RESOURCES DEPT.
SALEM, OREGON

Copy:

Representatives Lundquist, Norris, Baum

Senators Walden, G. Smith

Terry Drever
President

Charles E. Chase
Executive Director

Lorraine Litteral
Treasurer

72168

72168

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

As a concerned citizen residing in the lower Burnt River area, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will then become biased in favor of the State.
7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature J. J. Toll

Name: J. J. Toll

Date: 1-27-95

Address: PO Box 274 Durkee

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WATER DIVISION
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

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2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The

72168

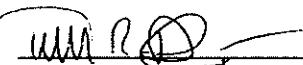
data system will then become biased in favor of the State.

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature 
Name: Michael R. Moxley
Date: Jan. 26, 1995
Address: HCR 62 Box 13
Huntington, OR 97907

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WATER RESOURCES DEPT.
SALEM, OREGON

Jan. 25, 1995

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street N.E.
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder, under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 of the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.

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SALEM, OREGON

3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.

4. The ODFW has requested flows in excess of the monthly flows?

5. The ODFW has not demonstrated, or even made a logical case, for having an instream fishery flow in months where historically the stream would not support such a fishery.

6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "State ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will then become biased in favor of the State.

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource

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SALEM, OREGON

management.

8. The basin is currently "over-appropriated", and it does not make sense to compound the problem further.

Given the above mentioned concerns, we strongly feel the applications of the ODFW be rejected!

Sincerely,

Signature Marian L. Martin

Name: MARIAN L. MARTIN

Date: JAN. 25, 1995

Address: P.O. Box 5045
Bridgeport, Oregon
97819-5045

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WATER RESOURCES DEPT.
SALEM, OREGON

Jan. 25, 1995

Michael J. MATTICK
Water Rights Specialist
Oregon Water Resources Dept.
State of Oregon
Commerce Building
158 12th Street N.E.
Salem, Oregon 97310-0210

Dear Mr. MATTICK,

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I object to the Technical Review Report for the Oregon Department of Fish and Wildlife Applications for the following reasons:

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2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.

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WATER RESOURCES DEPT.
SALEM, OREGON

3. The methodology used by O.D.F.W. leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The O.D.F.W. has requested flows in excess of the monthly flows.
5. The O.D.F.W. has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the O.D.F.W. could have a long-term negative impact on our current water rights. It would place the "STATE O.D.F.W." in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will then become biased in favor of the State.
7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

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WATER RESOURCES DEPT.
SALEM, OREGON

8. The BASIN is currently "OVER-APPROPRIATED" AND it does NOT MAKE SENSE to compound the problem further.

Given the Above mentioned CONCERNS we strongly feel the Applications of the O.D.F.W. be REJECTED.

Sincerely,

SIGNATURE Gary Martin

NAME: GARY MARTIN

DATE: 1-25-95

ADDRESS: PO Box 5045
Bridgport OR.
97819-5045

FEB - 1 1995

WA
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

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Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Deborah J. Moxley
Name: Deborah J. Moxley
Date: Jan. 25, 1995
Address: HCR 62 Box 13
Huntington, OR 97907

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JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

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The following are objections to the Technical Review Reports:

1. The data submitted is outdated and incomplete, with no mapping as required by Oregon Law. Methods used are not adequate for the stream location, or current with technology presently available and used within scientific and biological communities.

2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.

3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is out dated.

4. Instream applications are not compatible with local government comprehensive Land Use Plan.

5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters which have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over; an estimated 8,000 acres have been logged; and an estimated 500 - 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988 - Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

If the estimated natural flow data is not current, how can the requested average be valid?

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JAN 31 1995

The following are objections to the Report Conclusions:

WATER RESOURCES DEPT.
SALEM, OREGON

1. Data used to set flow levels was outdated. The impact of this application would be devastating to the economy of the Burnt River Valley. The instream water rights would stop any further development of lands, business or industry in the Valley. It could also have a long term negative impact on current water rights. In 1994, irrigators using water from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights.

2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. All lands below Unity Reservoir are privately owned and no permission has been granted to ODF&W to access that land. Therefore, there is no way accurate or current information could have been obtained for these applications.

3. The seasonal stream discharge patterns have changed over the last 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. I again question the data and methodology used.

2. If the water right holder is required to measure the instream flow, who is going to pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could have a long term negative impact on our current water rights. It would place the "State ODF&W" in a position that in time will lead to conflicts over water usage. The State has so many more resources that a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will become biased in favor of the State. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. As a landowner, irrigator and taxpayer I object to these addition known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other individual applicants.

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SALEM, OREGON

3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. The proposed Ricco and Hardman Dams could possibly provide needed water but ODF&W is opposing the construction of these reservoirs. These applications will also eliminate future water storage opportunities.

4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Debbie Moeller
Name: DEBBIE MOELLER
Date: 1/27/95
Address: PO Box 72
UNITY OR 97884

cc: Lundquist
cc: Walden
cc: Norris

RECEIVED

JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

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SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Wayne Morin

Name: WAYNE MORIN

Date: JAN - 27 - 1995

Address: HCR 86 - Box 138

Hereford ORE 97837

P.S. as a third generation Rancher and water user on the North Fork of Burnt River, there isn't enough water in July, and August to support a fishery, I've seen it Practically dry at this time of year. A reservoir that has been Proposed above Whitney would make a real difference, and take care of all Our Problems

Sincerely

Wayne Morin

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JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

As a water right holder under Oregon law, I wish to formally object to the applications by the Oregon Department of Fish and Wildlife.

The following are objections to the Technical Review Reports:

1. The data submitted is outdated and incomplete, with no mapping as required by Oregon Law. Methods used are not adequate for the stream location, or current with technology presently available and used within scientific and biological communities.

2. In 1936, Burnt River Irrigation District petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water from tributaries within the boundaries of the Burnt River Irrigation District above Unity Reservoir. All free flowing water is currently "over appropriated" and it does not make sense to compound the problem further.

3. Instream applications are not consistent with the Powder Basin Plan. The Powder Basin Plan is out dated.

4. Instream applications are not compatible with local government comprehensive Land Use Plan.

5. All instream filings on streams already classified "over appropriated" should be denied. Interviews with long time area residents have pointed out that the water goes off the watershed at a different rate than it did in previous years. Significant events have occurred in the headwaters which have major impacts on the holding capacity and discharge patterns of the watershed. An estimated 10,000 acres have been burned over; an estimated 8,000 acres have been logged; and an estimated 500 - 700 acres have been burned and logged. Fire activity occurred in 1979 - Stevens Creek Fire and 1988 - Monument Rock Fire. Documented logging activities have occurred since 1979 to present. Also, a major influencing factor has been the drought.

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2. When was data collected for Minimum flow requirements? Significant events (fire, logging, and drought) have changed the watershed ecology. All lands below Unity Reservoir are privately owned and no permission has been granted to ODF&W to access that land. Therefor, there is no way accurate or current information could have been obtained for these applications.

3. The seasonal stream discharge patterns have changed over the last 30 years. To base Minimum Stream flow recommendations on 1965 and 1966 studies, when approximately 18,000 acres within the headwaters have drastically changed, is not sound management.

The following are objections to the Proposed Certificate Conditions:

1. I again question the data and methodology used.

2. If the water right holder is required to measure the instream flow, who is going to pay for it? Where does CFS get measured, at the beginning of the reach or at the end? Who absorbs the evaporation loss?

The granting of an instream flow to the ODF&W could have a long term negative impact on our current water rights. It would place the "State ODF&W" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will become biased in favor of the State. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. As a landowner, irrigator and taxpayer I object to these addition known and unknown costs.

I also object to ODF&W not having to pay filing fees for their instream water rights as do other individual applicants.

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SALEM, OREGON

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4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Jennie E. Moeller
Name: JENNIE MOELLER
Date: 1-27-95
Address: PO BOX 147
UNITY OR 97884

cc: Lundquist
cc: Walden
cc: Norris

RECEIVED

JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick:

Subject: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169.

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SALEM, OREGON

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SALEM, OREGON

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4. A condition not listed: Multipurpose facilities have priority over instream flows.

Based on these objections, I request denial of ODF&W's applications listed under subject at the beginning of this letter.

Signature: Alfred Moeller
Name: ALFRED MOELLER
Date: 1-27-95
Address: PO Box 147
UNITY OR 97884

cc: Lundquist
cc: Walden
cc: Norris



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JAN 31 1995

BAKER COUNTY COURT
1995 Third Street
Baker City, OR 97814
(503)523-8200
Fax: (503)523-8201

WATER RESOURCES DEPT.
SALEM, OREGON

January 26, 1995

Mr. Michael Mattick
Water Rights Specialist
Oregon Water Resources Department
Commerce Building
158 Twelfth Street NE
Salem, OR 97310-0210

RE: Technical Reports for Instream Water Rights
Burnt River Application File Nos.: 72160, 72161, 72168,
72169, 72178, 72185, 72186

Dear Mr. Mattick:

After reviewing the technical reports for the above named applications, Baker County wishes to register objections to the reports. The objections are organized by their location on the Burnt River. They are presented in full in this document to show the interrelationships among the various applications.

Applications Nos.: 72160, 72161, 72178

There are no calculations or information in the technical reports to show how the Water Resources Department estimated the average natural flow for the reaches described in #72160 and #72178. The technical report should show how the flows are calculated, as there are no gages on these reaches.¹

The applicant should supply information on the means and location for measuring the instream water right; the strategy and responsibility for monitoring flows for the instream right and provisions needed to managing the water right to protect the public uses, as requested by OAR 690-77-020, so the County can better examine the benefits of the application in relation to the costs to the public.

At the very least, the technical report should condition the approval for certification so that the instream right shall not

¹Information regarding the number and location of gaging stations is from the Baker County Watermaster's Office.

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JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

have priority over rights to use the water for storage in addition to human or livestock consumption. The Oregon Department of Agriculture is sponsoring an application for a reservation of water for storage purposes on the streams named in these applications. A report by the U.S. Department of the Interior, Bureau of Reclamation on the project, dated July 1971, concluded that the Hardman Dam project "would have a beneficial effect on the basin fishery resource. The proposed Hardman...Reservoir would provide favorable habitat to support a trout population equal to or greater than that existing in the natural stream habitat to be inundated...." (Burnt River Project, Oregon, Dark Canyon Division, Wrap up Report, July 1971, U.S. Department of the Interior, Bureau of Reclamation). By conditioning the application, potential conflicts between the instream rights and the storage application can be reduced.

This request for a condition is supported by OAR 690-77-015, which states "The development of environmentally sound multipurpose storage projects that will provide instream water uses along with other beneficial uses shall be supported."

Application No. 72168

Baker County questions the basis for determining the average flow on this reach. According to information from the Water Resources Data for Oregon, Part 1, Surface Water Records (U.S. Department of the Interior, Geological Survey, 1966), the actual flow in these reaches is below those calculated by the Water Resources Department from April through September. Information from a USGS gaging station at the same location in 1993 records even lower levels.

Anecdotal information suggests that the natural stream flow is far below that calculated by the department, as the Burnt River tended to pool or dry up during the summer months prior to the installation of the Unity Dam. (Photo submitted by Richard Cartwright, c. 1933, showing Burnt River at Twp. 14, Rng. 44, Sec. 22).

It should be noted that this application requests an instream flow for a reach that exceeds 30 miles. The flow rate allowed would be applicable to the entire reach requested. It is neither practical nor reasonable to approve the same flow rates for the entire reach given the length of the reach applied for, the water available in the stream and the additional tributaries that flow into the stream within the reach. (OAR 690-77-015(6); OAR 635-40-015(11).)

This reach has a gaging station at the point of beginning, and north of Huntington, Oregon. The application or technical report should determine which gaging station should be used to determine

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SALEM, OREGON

the flow calculations.

Application No. 72169

This reach has a gaging station at the point of beginning at Unity Dam, River Mile 77.1, and at the end of the reach at USGS Gage 13274200 at River Mile 41.5. The application or technical report should determine which gaging station should be used to determine the flow calculations.

Application No. 72185

There are no calculations or information in the technical report to show how the Water Resources Department estimated the average natural flow for the reach described in this application. The technical report should show how the flows are calculated, as there is no gage on this reach.

To be consistent with average measured flows, the flows listed for June under the Proposed Permit Conditions should be changed from 20 (1st 1/2) and 15 (2nd 1/2) to 12.1 cfs.

Application No. 72186

In 1938, the Burnt River Irrigation District passed a resolution which indicated that the water above the Unity Dam was severely over appropriated (Resolution of the Burnt River Irrigation District, dated March 12, 1938). At that time the District determined that it would be in the best interest of the people of Baker County to deny future permits. While the intent was to limit out of stream uses, the extent of over appropriation (legal water rights total more than three times the average annual yield²) has an effect on the efficacy of an in-stream water right in this case.

A letter from Tom Sheehy of Wallowa, Oregon, attached, indicates that the estimated flow for this reach is excessive. Mr. Sheehy lived on a ranch located at approximately Twp. 11, Rng. 37, Sec. 31.

Finally, this application has a gaging station in the middle of the described reach. The application or technical report should indicate whether that gaging station will be used to determine

²According to the 1967 Powder River Basin Plan, legal water rights cover 294,000 acre feet, while a Water Availability Study sponsored by Oregon Department of Agriculture indicates an average annual yield of 94,000 acre feet.

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the flow calculations.

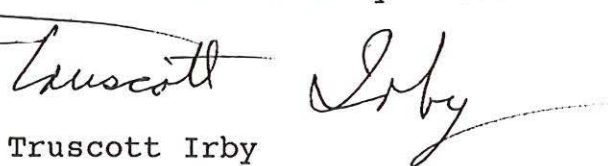
SUMMARY:

As a whole, Baker County is concerned about the precedential effect of establishing instream water rights based on theoretical modelling, when the "on the ground" conditions indicate extreme over appropriation. We ask that the optional provisions of OAR 690-77-020(5) be a requirement on applications for in-stream water rights in the county.

We ask to be included as a party to any contested case hearing which may arise out of any and all of these applications.

Sincerely,

For the Baker County Court



Truscott Irby
Commissioner

TI:ALC:a5:\ccourt\burntriv.com

Attachments — See File 72160

cc: G. Walden
L. Lundquist
File

Nelson C-C Ranches, Inc.

P.O. Box 187
Hereford, Oregon 97837
(503)446-3474

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JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 25, 1995

Michael J. Mattick
Water Rights Specialist
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

Dear Mr. Mattick,

This letter is a formal protest of the instream water rights applications filed by the Oregon Department of Fish and Wildlife numbers IS 72168, IS 72169, IS 72185 and IS 72186. The Technical Review Report which supports these applications does not provide accurate or current data on which a sound decision can be made.

If these applications are approved, the results will adversely affect our ranching operation and those of our neighbors. Our family settled near Hereford, Oregon on the Burnt River in 1882. Until the Unity Dam was built in the late 1930's, water flow in the river was seasonal. The "return flow" method of irrigation has been used in the valley for over fifty years. This proven method has enabled the Burnt River to remain a viable water source for crops, livestock, wildlife, fish and home use.

ODFW has not demonstrated that the instream flow asked for in the above applications, would support wildlife or fish any better than the present method does. However, it can be clearly demonstrated that to disallow the present use of water would dramatically affect the livelihood, economy, tax base, and businesses which depend on Burnt River water.

Given the above mentioned concerns I strongly feel the applications of the ODFW be rejected.

Sincerely,



Kent Nelson

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JAN 31 1995

Nelson C-C Ranches, Inc. WATER RESOURCES DEPT.
P.O. Box 187 SALEM, OREGON
Hereford, Oregon 97837
(503)446-3474

January 25, 1995

Michael J. Mattick
Water Rights Specialist
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

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Given the above mentioned concerns I strongly feel the applications of the ODFW be rejected.

Sincerely,

Anita M. Nelson

Anita Nelson

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JAN 31 1995

Nelson C-C Ranches, Inc. - WATER RESOURCES DEPT.
P.O. Box 187
Hereford, Oregon 97837
(503)446-3474
SALEM, OREGON

January 25, 1995

Michael J. Mattick
Water Rights Specialist
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

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Given the above mentioned concerns I strongly feel the applications of the ODFW be rejected.

Sincerely,

Katherine Nelson

Katherine Nelson

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JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Nelson C-C Ranches, Inc.

P.O. Box 187
Hereford, Oregon 97837
(503)446-3474

January 25, 1995

Michael J. Mattick
Water Rights Specialist
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

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Given the above mentioned concerns I strongly feel the applications of the ODFW be rejected.

Sincerely,

Nelson C-C Ranches, Inc.
By R. Kent Nelson Sec. Treas.
Nelson C-C Ranches, Inc.

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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JAN 31 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

As a concerned citizen residing in the lower Burnt River area, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
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5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Anita York

Name: ANITA YORK

Date: JAN 27, 1995

Address: PO BOX 169
DURKEE OR
97905-0169

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

RECEIVED
FEB - 1 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

As a concerned citizen residing in the lower Burnt River area, I wish to formally object to the Technical Review Report for the instream flow applications **IS 72168** and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

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SALEM, OREGON

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Sincerely,

Signature Gordon E. Van Cleave

Name: Gordon E. Van Cleave

Date: 1-27-95

Address: P.O. Box 282
Durkee, Or, 97905

RECEIVED

JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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SALEM, OREGON

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Sincerely,

Signature Vivian M Zickmund

Name: Vivian M Zickmund

Date: 1/26/95

Address: PO Box 192 Dunbar OR 97905

RECEIVED

JAN 31 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
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Sincerely,

Signature William J Zikmund

Name: William J Zikmund

Date: 1-25-95

Address: PO Box 192 Durkee Ore 97925

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature: Steven J. Vuyovich
Name: STEVEN J. VUYOVICH
Date: JAN 27, 1995
Address: P.O. Box 115
Unity OR 97884

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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Sincerely,

Signature Lone M. Woods

Name: Lone M. Woods

Date: Jan 26, 1995

Address: PO Box 203
Durkee, OR. 97905

RECEIVED
JAN 30 1995
WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

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Sincerely,

Signature Cheryl A. Buchanan

Name: Cheryl A. Buchanan

Date: 1/26/95

Address: Box 262 Durkee, OR 97905

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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SALEM, OREGON

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Sincerely,

Signature Richard Cartwright
Name: RICHARD CARTWRIGHT
Date: 1-26-95
Address: R.D. BOX 230
DURKEE ORE 97905

P.S

OUR FAMILY - J.L. AND ORA CARTWRIGHT with children
RICHARD & ERNEST lived near BURNT RIVER in the
vicinity of LIME ORE in the summer 1933
We have pictures of J.L. CARTWRIGHT
operating A RD75 CATERPILLAR TRACTOR pulling A
RG LETOURNEAU 12 YARD SCRAPER in the BOTTOM OF
BURNT RIVER channel. AT TIMES WATER didn't
Run between the SUCCOR HOLES

Richard

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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JAN 30 1995
WATER RESOURCES DEPT.
SALEM, OREGON

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Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature

Kathryn L. Vaughan

Name:

Kathryn L. Vaughan

Date:

Jan 26 - 95

Address:

~~Kathryn~~ P.O. Box 259

Durbin Dr.

97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Vaughan Family Land & Cattle Co.
Signature by: Floyd C. Vaughan
vice-pres.

Name: Floyd C. Vaughan

Date: 1-26-95

Address: P.O. Box 965

Baker City, Ore 97814

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature Nancy Taylor
Name: Kenneth Taylor
Date: 1/26/95
Address: Hereford Ore
97837

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

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Sincerely,

Signature

Rodd Bunch

Name:

Rodd Bunch

Date:

1/26/95

Address:

P.O. Box 212

Durkee, Ore, 97905

RECEIVED

JAN 30 1995

NATURAL RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature Betty Bates
Name: BETTY BATES
Date: 1-26-95
Address: Bx 146
Durkee Or. 97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
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Sincerely,

Signature

Rhea Bunch

Name:

Rhea Bunch

Date:

January 26, 1995

Address:

P.O. Box 212

Durkee, OR 97905

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

As a family member involved in a ranching operation which holds a water right under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Chuck Buchanan

Name: CHUCK BUCHANAN

Date: 1/26/95

Address: P.O. Box 262 DURKEE, OR
97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

Dear Mr. Mattick:

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WATER RESOURCES DEPT.
SALEM, OREGON

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9. Having lived my entire life on Burnt River, I distinctly remember summers when the river was dry except for water holes here and there. This was prior to Unity Reservoir. I do not recall any fish except trash fish in this lower stretch of Burnt River, nor do I know of any game fish in the river at this time.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Lawrence D. Bunch

Name: Lawrence D. Bunch

Date: 1-25-95

Address: Po Box 206 Durkee, Or. 97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
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WATER RESOURCES DEPT.
SALEM, OREGON

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9. Having lived most of my life on Burnt River, I remember in the 1920's and 1930's prior to Unity Reservoir, that only water holes would be in evidence during the summer months. At haying time we would lead our work horses to these holes for water. I do not recall any game fish in the river -- only trash fish could survive.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature F. Wilbur Smith
Name F. Wilbur Smith
Date 1/25/95
Address 1915 Chestnut
Baker City, Ore.

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Larry R. Green

Name: Larry R. Green

Date: 2-25-95

Address: P.O. Box 158

Hereford Oregon
97837

My feelings ARE the WATER IN the Burnt River has
All been Permitted And there no more Permits To
be Let out. If ANY Water Rights were Lost
It would Put The whole Burnt River Community's
In Jeopardy.

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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JAN 30 1995
WATER RESOURCES DEPT.
SALEM, OREGON

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Sincerely,

Signature Charlie Bates

Name: CHARLES BATES

Date: 1-25-95

Address: BX 146

DURKEE, OR. 97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

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SALEM, OREGON

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Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Jean L Bunch

Name: Jean L Bunch

Date: 1/25/95

Address: P.O. Box 306 Durkee Or 97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature

Eugene Fisher

Name:

Eugene Fisher

Date:

1-25-95

Address:

Huntington Ore.

Rye Valley Ranch

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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JAN 30 1995
WATER RESOURCES
SALEM, OREGON

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WATER RESOURCES DIV.
SALEM, OREGON

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Sincerely,

Signature S. M. Follitt

Name: STANLEY M. FOLLITT

Date: 1/25/95

Address: BOX 235

DURKEE, OR. 97905

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature Kathleen Sullivan, Sec.

Name: Sullivan Z Ranch, Inc.

Date: 1-25-95

Address: HCR 86 Box 37
Hereford, OR 97837

RECEIVED
JAN 30 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
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Commerce Building
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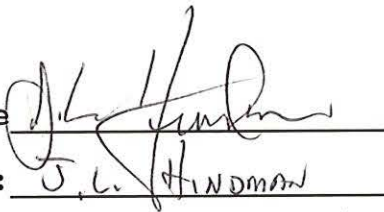
Sincerely,

Signature

Name:

Date:

Address:



J. L. HINDMAN

Box 208 1/25/95

Box 208

Dunklee, OR 97509

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

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Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature

Name:

Date:

Address:

Lee Loverin
Lee Loverin for Loverin Ranch
1/24/95
HCR 86 Box 130
Heretford Or 97837

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature Dorothy E. Bloomer

Name: DOROTHY E. BLOOMER

Date: JAN 24, 1995

Address: Box 289
DURKEE, OR. 97905

*The State of Oregon has no right to
file for dev. water after the land-
owners paid for dam at Unity.*

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Sincerely,

Signature Trumble Ranch, Inc.
Name: Beverly Duby, Sec
Date: 1-24-95
Address: P.O. Box 188
Hereford, OR 97837

RECEIVED

JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

1-24-95

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
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I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Larry L Smith

Name: LARRY L SMITH

Date: 1-24-95

Address: PO Box 5027

BRIDGEPORT OR

97819

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 24, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Water Resources Department
158 12th Street N.E.
Salem, OR 97310-0210

SUBJECT: IS 72168, IS 72169

Dear Mr. Mattick:

I hereby object to the above stated applications filed by the Oregon Department of Fish and Wildlife and the findings in the Water Resources Department's Technical Review of the applications.

1. Water Resources Department failed to analyze flow needs and O.D.F.W. did not submit adequate scientific data to justify these requirements which are excessive.

In a July 1971 wrap-up report titled Dark Canyon Division; Burnt River Project, Oregon, conducted by the Bureau of Reclamation, in cooperation with, to name a few, Federal Fish and Wildlife Service, Federal Water Pollution Control Administration, Oregon State Game Commission and the Fish Commission of Oregon. These agencies study concluded that all stream uses, including providing for the maintenance of aquatic habitat and also for pollution control, a flow of 5 cfs is required. In addition the findings indicate this level is adequate through the year 2010. This 5 cfs of flow is already exceeded in the normal operation of Unity Reservoir as shown in the attached Flow Data provided. Therefore, I object to O.D.F.W.'s application due to lack of need.

2. Where need clearly does not exist, issuance of this water right would not only be a costly act of futility, for both the State of Oregon and private landowners, but it would be detrimental to the fish they are trying to protect. Elaborate diversion structures would need to be built through out the length of the river to allow compliance with measuring requirements as set forth by law, thus restricting a virtually natural flowing river. Diversion points at this time are as close to natural as possible for two reasons. First the cost of a diversion, and secondly the fact that Mother Nature dictates what is done in this river especially during heavy spring runoffs. We as landowners have learned we have to work with the river instead of against her.

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3. I can submit much more data if needed, but I think I can be more useful in injecting some common sense and history into the way our water delivery system works. Water issues and the Burnt River system are very near and dear to me and my family as it is the lifeblood of this valley. My grandfather was a member of the Irrigation District Board when Unity Dam was constructed and for many years after. Later my father served on the Board up to a year before his death. I understand how this river flows from winter lows to spring flooding, and I am very concerned about outside forces making decisions and mandates based on poor scientific and historical data.

In conclusion, I would like to thank you for your time, and I would be happy to answer any questions you may have regarding these applications.

Sincerely,



Pat Sullivan
HCR 86 Box 34
Hereford, OR 97837

503 - 446 - 3399

January 25, 1995

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Oregon Water Resources Dept.
158 12th Street, NE
Salem, Oregon 97310

Gentlemen:

This letter is written to express my objection to Technical Review of Application Number 72169 by Oregon Department of Fish and Wildlife (hereinafter referred to as ODFW) for instream water rights.

The review is defective in the amount of water requested in low flow months. Old records of natural flow by the U. S. Bureau of Reclamation show zero (0) flow in July and August most years and zero (0) flow some years in September at Huntington (see attachment).

My family has lived on Burnt River near Bridgeport since 1920. My father told our family many times how he and neighbors would have to go up the river in late summer and fall to remove beaver dams to even have stock water in the Bridgeport area prior to the building of Unity Dam. I would also add, the Bridgeport area holds the oldest water right.

In most years, to have any flow in the lower reaches of the river in late summer, it can only come from stored water. To give ODFW an instream right can only be a taking of water from our irrigation district.

I would also like to point out that some of the valley is not trout habitat. When I was a child in the late 40s and early 50s, my brothers and I fished the river many times on the ranch. Of all those occasions, we never caught any trout, not once! I suspect much of the rest of the valley is the same.

The fisheries in Burnt River have to be much better with Unity Reservoir than before. Burnt River has sufficient average annual run-off to provide more storage. If ODFW wants a larger minimum flow, it would be much better if ODFW worked with Burnt River Irrigation District to provide more storage.

Respectfully submitted,

Walter R. Shumway

Walter R. (Ross) Shumway, Vice President
Bar Running N Ranches, Inc.

72168

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JAN 30 1995

WATER
SALE

APPENDIX

A-2

TABLE 2
NATURAL FLOW AT HUNTINGTON (ADJUSTED FOR REGULATION)
BURNI RIVER BASIN, OREGON
(cfs)

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Average
1927-28	61.8	94.8	107.3	94.0	186.7	263.8	623.8	242.8	59.3	3.3	2.6	0.0	144.3
-29	13.0	43.7	52.0	52.0	69.6	230.8	206.8	99.2	52.1	6.5	1.6	3.3	69.2
1929-30	11.4	35.3	73.1	53.6	96.4	143.2	43.7	13.0	10.1	1.6	0.0	0.0	39.9
-31	1.6	11.8	43.9	39.0	48.2	110.6	191.7	8.1	6.7	1.6	0.0	0.0	38.4
-32	0.0	3.4	19.5	35.8	48.2	299.2	719.3	291.1	50.4	3.3	0.0	0.0	122.5
-33	15.6	39.3	29.1	35.8	32.0	76.1	485.4	350.4	70.7	2.6	0.6	3.9	95.1
-34	13.3	34.6	58.2	80.5	85.9	96.0	55.5	13.0	9.6	0.0	0.0	3.9	37.4
1934-35	13.3	16.1	33.5	47.0	49.1	127.5	342.0	74.1	9.6	0.0	0.0	1.6	59.3
-36	20.2	23.2	22.4	31.2	41.8	102.8	651.8	83.4	28.8	0.6	0.0	3.9	83.6
-37	9.0	23.2	26.8	20.2	34.3	98.4	268.1	100.2	30.6	0.0	0.0	8.4	51.5
* -38	50.4	68.2	193.7	120.2	106.4	174.3	1239.8	260.5	20.7	0.0	0.0	0.0	185.4
-39	59.2	76.0	67.8	46.8	52.2	316.0	603.0	82.9	18.6	0.0	0.0	9.3	110.8
1939-40	52.3	57.5	51.4	46.3	91.6	374.1	552.1	89.8	10.1	0.0	0.0	2.8	110.4
-41	72.7	66.9	66.2	63.3	127.2	541.5	504.7	193.0	108.4	0.0	0.0	35.6	148.3
-42	138.4	117.3	181.4	173.2	153.3	292.4	1117.3	291.8	104.1	0.0	0.0	36.4	216.5
-43	74.7	69.3	106.2	150.2	260.7	534.2	1709.1	367.6	184.6	0.0	0.0	42.4	289.8
-44	93.4	134.0	133.8	58.7	58.6	105.6	161.8	105.8	29.4	0.0	0.0	36.4	76.6
1944-45	57.7	146.0	75.0	54.3	48.2	158.0	543.7	257.4	109.8	0.0	0.0	22.6	122.5
-46	100.4	75.3	80.9	86.3	153.6	483.8	1188.4	288.2	95.8	0.0	0.0	58.8	216.7
-47	122.8	108.4	170.2	162.5	189.3	247.5	482.2	139.6	82.4	0.0	0.0	46.1	145.2
-48	80.2	79.5	131.9	149.5	123.4	138.6	761.3	551.2	327.7	0.0	0.0	73.1	200.9
-49	168.8	117.4	112.6	136.5	163.1	499.0	1019.3	298.6	74.1	0.0	0.0	56.8	220.0
1949-50	176.9	138.7	106.6	110.4	124.0	212.2	839.2	308.6	122.4	0.0	0.0	50.3	181.9
-51	144.3	126.8	154.0	117.1	178.0	402.1	1112.6	225.8	62.4	0.0	0.0	24.0	211.2
-52	102.8	108.0	116.3	118.3	139.0	303.2	1514.1	308.8	121.9	0.0	0.0	57.5	239.4
-53	141.7	92.6	107.4	141.9	170.0	341.8	746.9	413.2	486.7	0.0	0.0	38.8	222.7
-54	174.9	171.2	139.7	118.8	161.6	174.0	380.6	110.3	72.1	0.0	0.0	47.5	128.6
1954-55	144.4	112.8	87.7	84.6	60.7	47.0	146.6	155.2	66.6	0.0	0.0	0.0	75.6
-56	43.4	47.4	188.8	190.9	237.8	700.8	1376.5	427.5	119.8	0.0	0.0	16.8	278.4
-57	43.1	82.0	123.4	101.9	346.6	358.0	528.9	286.1	45.1	0.0	0.0	0.0	158.1
-58	52.0	90.6	96.5	109.2	470.7	420.5	1065.5	104.2	216.5	35.3	0.0	24.2	300.3
-59	68.4	103.9	159.2	136.8	135.2	184.5	326.2	48.6	0.0	0.0	0.0	34.1	99.4
1959-60	165.9	133.8	86.2	74.3	80.9	241.4	610.8	149.5	83.2	0.0	0.0	17.0	136.6
-61	64.0	82.8	69.9	70.3	101.8	156.6	234.4	118.0	41.4	0.0	0.0	7.7	78.6
-62	38.7	62.3	66.0	76.9	85.9	142.0	611.4	151.6	0.0	0.0	0.0	0.0	102.4
-63	92.7	107.1	116.8	67.8	380.2	155.3	234.0	151.3	6.9	0.0	0.0	0.0	107.6

AVERAGE: 141.8

NOTE: The above flows are estimated for natural (unregulated) conditions and equal recorded and estimated historical flow, plus change of storage in Unity Reservoir.

SOURCE: U. S. Bureau of Reclamation.

*Unity Reservoir in operation.

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

all of the
As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

1572160-1572161-1572178-1572185-1572186

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

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SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Bernard F. Hutcheon

Name: Bernard F. Hutcheon

Date: 1-24-95

Address: Box 136
Hereford, Or 97837

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

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Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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SALEM, OREGON

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Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Joe L. Barber Ruth E. Barber

Name: Joe L. & Ruth E. Barber

Date: Jan. 24 1995

Address: Box 1 Rt. 2

Huntington, Oregon 97907

as a child in Huntington in the 1930's I played many times in Burnt River. In July and August of some years the river dried up and all that was left until fall rains came was a series of pools with dry stretches where the rapids had been. The river is now fully appropriated and if it were not for Unity dam storage which we instigated and paid for it would still be dry some summers. I think it is ludicrous to let the Fish and Wildlife to file on our water.

Ruth E. Barber



UNITY RESERVOIR

Burnt River Irrigation District

Baker County, Oregon

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WATER RESOURCES DEPT.
SALEM, OREGON

OBJECTIONS TO TECHNICAL REVIEWS - ODFW IWR APPLICATIONS

BURNT RIVER IRRIGATION DISTRICT'S OBJECTIONS TO TECHNICAL REVIEW:
Application numbers 72168, 72169, 72185, 72186, 72160, and 72161.

Submitted: January 25, 1995

Burnt River Irrigation District objects to the technical review on the main stem of the Burnt River, application numbers 72168 and 72169.

ODFW has used faulty streamflow data in their application. You will find included with our protest streamflow data compiled by the Bureau of Reclamation over a 36-year period. The data is both before and after construction of Unity Dam. We feel it is a far more accurate record of actual streamflow than what ODFW used. As you will see, there is almost no natural flow in the months of July, August, and September, with June and October also being short of water in a lot of years.

Burnt River has been my home for 55 years and I am a third generation operator on our ranch. My dad often told me of having to go up the valley tearing out beaver dams, so they could get stock water down the river in late summer and fall. That was prior to the construction of Unity Dam.

We are also enclosing page 25 from the Burnt River Project, Oregon, Wrap-up Report, 1971, Bureau of Reclamation. That portion of the report shows that ODFW had determined 25 cfs April 1 to June 30 and 10 cfs the rest of the year were sufficient for fishery needs in the reach through the lower part of Burnt River Canyon.

We further object to the fact that ODFW made no study to determine if there were indeed any rainbow trout in the reaches filed on. River miles 76 to 49 and 31 to Brownlee pool are almost exclusively private property. At no time did ODFW ask or were they granted permission to make any study on those river miles. There are no rainbow trout in the majority of that reach nor has there historically been.

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WATER RESOURCES DEPT.
SALEM, OREGON

We also object to the filing on the North Fork of Burnt River, application numbers 72185 and 72186.

Again we would challenge ODFW's streamflow data. Also, we would point out from the minutes of Burnt River Irrigation District, dated March 12, 1938, that the waters of the North Fork are over appropriated. Therefore, no further right should be granted. A copy of the above mentioned minutes are enclosed.

We also object to the filing of the South Fork of Burnt River, applications numbers 72160 and 72161.

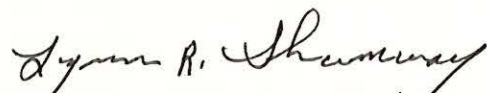
Our objections are the same as on the North Fork. We cannot see how an additional right can be issued on an over-appropriated stream. However, if that is possible, it seems it would be an unnecessary expense to the County Water Master's office to have to measure those flows in the South Fork filing as they are all above Burnt River Irrigation District's first diversion point and there is nothing to be gained by these filings.

We would again point out the study in Burnt River Project, Wrap-up Report, page 25 (enclosed). In this study ODFW acknowledges that an 1,850 acre foot minimum storage pool at the Hardman Site would be more desirable than an instream fishery.

We feel that as long as ODFW is contesting our reservation request on the South Fork, they should not be granted any instream rights on the Burnt River.

In talking with the directors of the other irrigation districts and ditch companies in the county, it has become apparent that ODFW's technical reviews were similarly botched or fraudulently done throughout Baker County. We feel very strongly that ODFW should be held to the same degree of accuracy that we as irrigation districts or individuals are held.

We request all of ODFW's technical reviews be returned to ODFW for correction and that ODFW be held to the same standards to which we are held. We also request an opportunity to enter further protest when we have had an opportunity to review the material requested earlier by Director Keith Schollenberger.



Lynn R. Shumway, Chairman
Burnt River Irrigation District

c Senator Greg Walden
Representative Lynn Lundquist
Representative Chuck Morris
Oregon Water Resource Congress

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 24, 1995

To: Water Resources Department
158 12th Street NE
Salem, Or. 97310-0210
(Attn: Michael J. Mattick)

Subject: Objection to ODF&W Instream Water Right
Application Technical Review
File # 72160, 72161, 72168, 72169, 72178, 72185, 72186.

This is an objection to the in-stream water rights filed by ODF&W on the Burnt River and its tributaries .

I am the ranch manager for Castle Rock Ranch and have been in the area for less then a year. Without being able to devote the time required to analvze in detail the technical reviews.

It was a dry year and there was not very much water to go around . but we all got by . So where is the water that ODF&W is going to use for their In-stream water. That is the million dollar question .

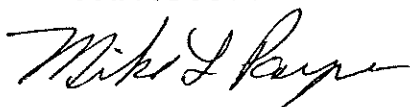
If there was water available the people that already have water rights in the area would use it . Even the State Engineer in 1936 said that this area was over-appropriated.

Will the granting of these instream water right affect prior existing water rights?

If the in-stream water right is granted there will be no more development in the future, such as hydroelectric or any other water storage like Reservoirs, Dams, Lakes, Ponds.

This will affect future generations to come.

Sincerely,



Mike Pavne
P.O. Box 149
Unity, Or. 97884
Ph. (503) 446-3321

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

165

APPENDIX

A-1

TABLE 1
HISTORICAL (REGULATED) FLOWS AT HUNTINGTON
BURNT RIVER BASIN, OREGON
(cfs)

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Average
1927-28	61.8	94.8	107.4	94.0	186.5	264.0	623.9	242.8	59.3	3.3	2.6	0.0	144.3
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33	15.6	39.4	29.1	35.8	32.0	76.1	485.4	350.4	70.7	2.6	0.6	4.0	95.1
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1934-35	13.3	16.1	33.5	47.0	49.1	127.5	342.0	74.1	9.6	0.0	0.0	1.7	59.3
-36	20.2	23.2	22.4	31.2	41.8	102.8	651.8	83.4	28.8	0.6	0.0	4.0	83.6
-37	9.0	23.2	26.8	20.2	34.3	98.5	268.0	100.2	30.6	0.0	0.0	8.7	51.5
* -38	50.3	68.2	193.8	120.3	106.5	174.3	1224.2	266.4	38.5	28.1	41.8	48.7	196.0
-39	46.6	36.1	35.0	23.4	21.4	166.6	528.2	142.6	82.0	44.1	48.6	48.7	102.0
1939-40	66.0	48.2	38.8	31.1	21.4	159.0	552.1	163.6	90.3	37.2	56.6	37.0	108.4
-41	35.0	40.2	38.8	38.9	123.4	414.0	424.2	200.5	131.1	56.6	58.8	39.3	133.5
-42	178.0	116.2	178.6	174.3	153.2	244.0	952.0	276.9	158.4	72.5	56.6	100.6	221.2
-43	73.6	48.2	93.0	151.0	293.4	461.0	1488.3	369.1	240.0	79.4	73.7	133.5	290.2
-44	83.4	144.3	162.6	35.0	25.7	23.4	56.1	142.6	41.2	57.7	56.6	88.8	77.1
1944-45	38.9	100.2	31.1	23.4	25.7	131.7	424.2	189.9	190.9	48.6	72.5	95.9	114.2
-46	110.6	42.0	35.8	45.5	146.4	432.5	1062.2	265.0	181.6	65.0	80.5	119.4	214.7
-47	120.3	77.3	113.9	191.9	121.4	47.8	463.9	214.6	166.5	59.4	61.8	119.4	146.2
-48	68.2	47.1	126.9	133.4	71.5	65.0	642.0	461.8	342.9	77.2	68.3	138.8	186.8
-49	214.5	87.4	87.9	133.4	164.4	426.0	843.7	292.7	168.1	58.5	75.2	131.5	223.3
1949-50	203.2	131.1	97.6	97.6	107.2	164.2	596.7	256.9	181.5	65.0	65.0	124.4	173.9
-51	152.9	114.3	133.4	87.9	114.4	365.9	966.4	224.4	146.3	52.8	68.3	95.8	209.7
-52	110.6	94.2	96.0	104.1	130.4	286.2	1347.9	190.2	198.3	87.0	73.1	119.4	235.2
-53	169.0	82.4	91.1	97.6	117.9	242.3	571.5	416.3	510.9	82.1	81.3	126.9	215.5
-54	242.3	174.8	130.2	96.0	71.5	61.8	215.1	185.4	105.9	50.4	71.5	124.4	127.6
1954-55	185.4	100.9	79.7	84.6	50.0	27.6	20.0	117.1	161.3	35.8	60.1	6.7	76.4
-56	29.3	30.3	29.3	178.9	228.5	614.6	1270.6	422.8	198.3	70.7	81.3	85.7	269.2
-57	76.4	67.2	65.1	50.4	232.0	315.5	539.5	382.1	163.0	84.5	58.5	55.5	173.5
-58	63.4	70.6	86.3	97.5	368.0	422.8	897.5	765.9	270.6	120.4	99.2	111.0	280.0
-59	82.9	79.0	110.6	92.7	80.4	78.0	225.2	91.0	53.8	55.3	42.3	87.4	89.8
1959-60	170.4	120.2	65.9	42.8	47.0	65.9	480.2	208.4	190.9	71.4	60.0	62.9	132.0
-61	62.2	36.1	38.8	42.8	34.1	38.8	120.2	226.8	178.2	60.0	56.6	34.6	73.6
-62	29.3	28.6	27.6	27.6	32.2	65.0	453.8	221.1	75.6	56.9	55.3	47.1	93.2
-63	71.5	55.5	53.6	34.1	232.1	71.5	215.1	177.3	94.1	66.6	63.4	72.3	99.6

SOURCE: U. S. Bureau of Reclamation

*Unity Reservoir in operation.

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SALEM, OREGON

APPENDIX

A-2

TABLE 2
NATURAL FLOW AT HUNTINGTON (ADJUSTED FOR REGULATION)
BURNT RIVER BASIN, OREGON
(cfs)

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Average
1927-28	61.8	94.8	107.3	94.0	186.7	263.8	623.8	242.8	59.3	3.3	2.6	0.0	144.3
-29	13.0	43.7	52.0	52.0	69.6	230.8	206.8	99.2	52.1	6.5	1.6	3.3	69.2
1929-30	11.4	35.3	73.1	53.6	96.4	143.2	43.7	13.0	10.1	1.6	0.0	0.0	39.9
-31	1.6	11.8	43.9	39.0	48.2	110.6	191.7	8.1	6.7	1.6	0.0	0.0	38.4
-32	0.0	3.4	19.5	35.8	48.2	299.2	719.3	291.1	50.4	3.3	0.0	0.0	122.5
-33	15.6	39.3	29.1	35.8	32.0	76.1	485.4	350.4	70.7	2.6	0.6	3.9	95.1
-34	13.3	34.6	58.2	80.5	85.9	96.0	55.5	13.0	9.6	0.0	0.0	3.9	37.4
1934-35	13.3	16.1	33.5	47.0	49.1	127.5	342.0	74.1	9.6	0.0	0.0	1.6	59.3
-36	20.2	23.2	22.4	31.2	41.8	102.8	651.8	83.4	28.8	0.6	0.0	3.9	83.6
-37	9.0	23.2	26.8	20.2	34.3	98.4	268.1	100.2	30.6	0.0	0.0	8.4	51.5
* -38	50.4	68.2	193.7	120.2	106.4	174.3	1239.8	260.5	20.7	0.0	0.0	0.0	185.4
-39	59.2	76.0	67.8	46.8	52.2	316.0	603.0	82.9	18.6	0.0	0.0	9.3	110.8
1939-40	52.3	57.5	51.4	46.3	91.6	374.1	552.1	89.8	10.1	0.0	0.0	2.8	110.4
-41	72.7	66.9	66.2	63.3	127.2	541.5	504.7	193.0	108.4	0.0	0.0	35.6	148.3
-42	138.4	117.3	181.4	173.2	153.3	292.4	1117.3	291.8	104.1	0.0	0.0	36.4	216.5
-43	74.7	69.3	106.2	150.2	260.7	534.2	1709.1	367.6	184.6	0.0	0.0	42.4	289.8
-44	93.4	134.0	133.8	58.7	58.6	105.6	161.8	105.8	29.4	0.0	0.0	36.4	76.6
1944-45	57.7	146.0	75.0	54.3	48.2	158.0	543.7	257.4	109.8	0.0	0.0	22.6	122.5
-46	100.4	75.3	80.9	86.3	153.6	483.8	1188.4	288.2	95.8	0.0	0.0	58.8	216.7
-47	122.8	108.4	170.2	162.5	189.3	247.5	482.2	139.6	82.4	0.0	0.0	46.1	145.2
-48	80.2	79.5	131.9	149.5	123.4	138.6	761.3	551.2	327.7	0.0	0.0	73.1	200.9
-49	168.8	117.4	112.6	136.5	163.1	499.0	1019.3	298.6	74.1	0.0	0.0	56.8	220.0
1949-50	176.9	138.7	106.6	110.4	124.0	212.2	839.2	308.6	122.4	0.0	0.0	50.3	181.9
-51	144.3	126.8	154.0	117.1	178.0	402.1	1112.6	225.8	62.4	0.0	0.0	24.0	211.2
-52	102.8	108.0	116.3	118.3	139.0	303.2	1514.1	308.8	121.9	0.0	0.0	57.5	239.4
-53	141.7	92.6	107.4	141.9	170.0	341.8	746.9	413.2	486.7	0.0	0.0	38.8	222.7
-54	174.9	171.2	139.7	118.8	161.6	174.0	380.6	110.3	72.1	0.0	0.0	47.5	128.6
1954-55	144.4	112.8	87.7	84.6	60.7	47.0	146.6	155.2	66.6	0.0	0.0	0.0	75.6
-56	43.4	47.4	188.8	190.9	237.8	700.8	1376.5	427.5	119.8	0.0	0.0	16.8	278.4
-57	43.1	82.0	123.4	101.9	346.6	358.0	528.9	286.1	45.1	0.0	0.0	0.0	158.1
-58	52.0	90.6	96.5	109.2	470.7	420.5	1065.5	104.2	216.5	35.3	0.0	24.2	300.3
-59	68.4	103.9	159.2	136.8	135.2	184.5	326.2	48.6	0.0	0.0	0.0	34.1	99.4
1959-60	165.9	133.8	86.2	74.3	80.9	241.4	610.8	149.5	83.2	0.0	0.0	17.0	136.6
-61	64.0	82.8	69.9	70.3	101.8	156.6	234.4	118.0	41.4	0.0	0.0	7.7	78.6
-62	38.7	62.3	66.0	76.9	85.9	142.0	611.4	151.6	0.0	0.0	0.0	0.0	102.4
-63	92.7	107.1	116.8	67.8	380.2	155.3	234.0	151.3	6.9	0.0	0.0	0.0	107.6

AVERAGE: 141.8

NOTE: The above flows are estimated for natural (unregulated) conditions and equal recorded and estimated historical flow, plus change of storage in Unity Reservoir.

SOURCE: U. S. Bureau of Reclamation.

*Unity Reservoir in operation.

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Fish and Wildlife

Conservation Pools and Sustained Streamflow

The Fish and Wildlife Service states that the proposed conservation pool (1,850 acre-feet of dead and inactive space) would provide an optimum trout fishery in Hardman Reservoir and that a minimum sustained release from the reservoir of at least 10 cubic feet per second would be desirable to maintain a stream fishery in the South Fork of the Burnt River downstream from the dam. However, the Service states that the reservoir fishery would be more significant than the limited downstream fishery; and therefore if available water supplies are inadequate to provide both the desired minimum reservoir pool and the downstream release, the latter should be sacrificed. Water-use studies show that both requirements could not be provided in many years; and, accordingly, only the minimum reservoir pool would be provided in the proposed development.

A high quality sport fishery would be created in Dark Canyon Reservoir by the proposed conservation pool (2,000 acre-feet of dead and inactive space). Further, to improve the stream fishery, the Fish and Wildlife Service requested a minimum streamflow in the river below Dark Canyon downstream to Chambeam Diversion Dam. Desired flows are 25 cubic feet per second from April 1 through June 30 and 10 cubic feet per second for the remainder of the year except in extreme drought years when flows would have to be reduced. The operating plan for the division would meet these requirements.

Access and Public-Use Facilities

Adequate access for fishermen and hunters to Hardman and Dark Canyon Reservoirs would be provided by roads paralleling the reservoirs. Only short spur roads would be necessary to connect parking-area and boat-launching facilities with the primary access roads.

Facilities needed for angler use at each reservoir would include a vehicle parking area, toilet facilities, and a boat-launching ramp. The public use facilities for recreation included in the plan of development would meet the needs of hunters and fishermen as well as other recreationists.

Big-Game Replacement-Habitat

Development of Hardman and Dark Canyon Reservoirs would inundate some big-game habitat. Lands to serve as replacement have been provided in planning at both reservoir sites.

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FROM MINUTES OF BURNT RIVER IRRIGATION DISTRICT, March 12, 1938.

"Whereas, the primary purpose of the contract entered into between the Burnt River Irrigation District and the United States, providing for the construction of the Unity Reservoir, was to provide a supplementary water supply to the irrigated land, the water certificates of which were of record and the points of diversion and canals in connection with which were recited in said contracts, and

"Whereas, certain prior storage rights to the recited water rights and diversions are recognized as being necessary, desirable and proper and

"Whereas, pursuant to that certain resolution adopted by the directors of this district on or about the 25th day of March, 1936, and approved insofar as the same applies within the boundaries of the district by Charles E. Stricklin, State Engineer, it was declared that the waters of Burnt River and its tributaries above Unity Dam are over-appropriated and the State Engineer was petitioned to deny further permits to appropriate said water, and

a
"Whereas, it is desirable that definite policy be adopted for the Board of Directors of this district to pursue,

"NOW THEREFORE, be it resolved:

"First: That no expanded or increased acreage over and above the water certificates appurtenant to the lands in what is now Unit 1 shall be permitted.

"Second: Prior and superior rights for the use of the storage waters of Unity Reservoir will be restricted to the rights appurtenant to the land, the water certificates of which were of record prior to the 25th day of March, 1936.

"Third: Contracts or agreements to furnish storage water from Unity Reservoir to increased or expanded acreage or "for other lawful purposes" shall be inferior to rights appurtenant to the lands as of record prior to the 25th day of March, 1936.

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WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

Mr. Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem OR 97310-0210

Dear Mr. Mattick:

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will then become biased in favor of the State.
7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

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8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns I strongly feel the applications of the ODFW should be rejected.

Sincerely,

Signature Mabel Shaw

Name: Mabel Shaw

Date: 1-23-95

Address: 414 E 14th Ave.
Anchorage, AK.
99501

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WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

From: *Trumble Land Co.*
P.O. Box 138
Hereford, OR 97837

Subject: Objection to ODF&W Instream Water Right Application Technical Review

To: Water Resources Department
158 12th Street N.E.
Salem, Or 97310-0210
(Attn: Michael J. Mattick)

Reference Application File Numbers IS 72168 and IS 72169

I object to the above listed technical reviews on the following basis:

- (1) I object to the in-stream filing on any stream that is already classed as "over appropriated". The reason for this is: If the stream is over-appropriated, the current water rights holders are limited to a specific duty and rate. Anything over the authorized rate they must leave in the stream anyhow.
- (2) The data presented is not accurate. Historical records available in the Burnt River Irrigation District show that live-stream flows in the main stem of the Burnt River are well below those presented in the applications. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this in this drainage basin. Measurements taken at the gaging stations are primarily water released from Unity Reservoir. Averages of the flow in the Burnt River are misleading and deceiving. The highs during major run-off are very high, while the lows, which are the normal condition, go all the way down to no natural flow.
- (3) The amount of water requested. At a public meeting in Baker City on December 8, 1994, a member of WRD staff told the assembly that these amounts of water were derived without regard to existing authorized diversion. I believe the existing authorized diversions should be taken into account.
- (4) Statement: "The source of water is not withdrawn from appropriation." Believe the Burnt River is over-appropriated.
- (5) ODF&W has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.

Sincerely;

Trumble Land Co.

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January 21, 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Mr. Michael J. Mattick
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

Re: IS 72160, 72161, 72178, 72185, 72186, 72168, 72169

Dear Mr. Mattick:

As a concerned citizen of Eastern Oregon and particularly of the Burnt River Valley, I am protesting the technical reviews of ODF&W filings for instream water rights in this area. The certificates involved are #IS 72160, 72161, 72178, 72185, 72186, 72169, 72168.

I will address the river segments in the applications individually and explain why the technical reviews are defective. In general, the fact that water in this basin has been overappropriated since before 1930 should give the Department the first clue there is no water for ODF&W to appropriate. And using average stream flows as the amount of water for appropriation is a flaw in thinking, not what I would term "scientific analysis". Many streams in this area run little or no water in late summer and fall. The main stem of the Burnt River was known to go dry by August nearly every year before Unity Dam was constructed, the North Fork still is dry every year during irrigation season, and each fall the river below the dam is nearly dry as the dam is filled. "Average" flows mean nothing. Maintaining minimum flows in these river segments during these periods would cause financial hardship on the economy of the valley. In addition, approving these instream rights would place an unfair financial burden on the Irrigation District which must bear the cost of measuring these flows. Measuring, of course, will be easier in streams which have no flows.

IS 72160, 72161, 72178

These three stream reaches of the South Fork Burnt River are located within National Forest, however, land exchanges could result in private parcels where irrigation needs could not be met, even with storage projects and temporary water rights, if instream water rights existed. Future needs might also be for mineral extraction and processing. Since the instream flow rates for these segments in many cases is far more than what the stream actually flows, these future needs have not been allowed for. These are obvious elements of the water rights as approved that may impair or be detrimental to the public interest.

The requested flows exceed the level of flow necessary to support fish rearing and spawning. This is a fact. Fish are reared and spawn now in the South Fork and it certainly does not run the amounts ODF&W has requested. Oregon law states the flow rates should be reasonable and set at the minimum quantity necessary to

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support the fish.

The Oregon Method obviously wasn't followed for these first stream segments. They are all spring fed. Also, it is not reasonable to approve the same flow rates for the entire length of the reaches. The South Fork is a good example of this. It nearly doubles in volume where Mammoth Spring flows into the river.

IS 72185

The segment of river which includes the headwaters of the North Fork Burnt clear down to Camp Creek is far too long and varies in flow too much due to tributaries flowing into the river to include in one application. The Oregon method was not followed for this stream segment since it is spring fed and also fed by water from the Pete Mann Ditch. Depending on the use, sometimes the ditch empties into the headwaters, sometimes it empties in miles downstream at Tony Creek. It is not reasonable to approve the same flow rate for the entire reach of IS 72185 and it is not even possible to come up with any kind of meaningful flow rate since the flow of the river is dependent on when the miners and irrigators use the water and which way they chose to dump it.

Mining is the big use in the area and there are many mining ditches and old water rights. There are also many irrigation ditches in the area which bring water to the Whitney Valley. Both mining and irrigation water is gathered in the Pete Mann Ditch beginning in the North Fork John Day Basin. This water empties into the North Fork of the Burnt. The river transports ditch water for many miles until the water is taken out at Big Flatt to irrigate the North Fork ranches. Although currently the water is overappropriated, early in the spring in good years there is extra water in the system which could be put to beneficial use through off-channel, non consumptive mining projects where once ponds are filled, process water is recycled. Instream water rights would preclude new water rights being filed as old ones are abandoned, would preclude temporary water rights in good years and would preclude storage projects to provide water late in the year for mining. Mining is an important industry on the National Forest and mineral extraction activities are critical for the local, State and National economy. Thus, it is obvious there are elements of the water right as approved which would be detrimental to the public interest.

The requested flows exceed the level of flow in the stream segment. By July you can step across the river unless Pete Mann Ditch water is augmenting the flows. The newly constructed gaging station on this segment of the North Fork Burnt is the first attempt made to measure these flows. The data submitted at this time by the applicant is incomplete and inaccurate with no mapping or verifiable stream flow records to back up the suggested flows. It is unreasonable to approve a water right for this stream segment. The North Fork Burnt River in this section is essentially a ditch which carries water from its headwater springs and the Pete Mann ditch downstream into the Big Flatt Ditch. The North Fork River channel is dry below the Big Flatt

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diversion. (see IS 72186).

Forage production on private land in the Whitney Valley is essential to the maintenance of the resident elk herds by ODF&W. Approving instream water rights which would preclude storage facilities such as the proposed Ricco Dam would have an adverse effect on development of new fields. And since there isn't enough water to effectively irrigate the fields now in production, any reduction in available water would cause an adverse effect of the elk population. This would constitute a detrimental effect on the public interest.

IS 72186

The North Fork Burnt River immediately below Camp Creek is essential for irrigation of the lower Whitney meadows. The river is spread on the meadows to produce hay and forage, which is utilized not only by domestic livestock but also by the same herd of over 200 head of elk mentioned in IS 72185. Instream water rights in this area which precluded future development of irrigation rights and storage rights could adversely affect forage available for the elk and be detrimental to the public interest.

This river segment is far too long and diverse to treat as one application. The upper part of the reach flows year-round because of return flows from irrigation on the Whitney meadows. The gaging station measures fairly accurate flows at Petticoat but in no way represents what the flows are near Whitney. Near Whitney this segment of the river dries up to the point where you can easily step across it unless Pete Mann Ditch water augments flows. This is private land and no permission has been granted to ODF&W to access this land to measure flows. Therefore there is no way accurate information could be obtained for this application.

And below the gaging station near the Forest Boundary where the river is diverted into Big Flatt, there is no river at all. The application is for the North Fork Burnt from Camp Creek to the Dam. However, there is no water at all for four miles of this reach during irrigation season. North Fork water enters the Burnt River below the dam during this time period. Averaging a dry river channel with a portion of the river that runs year round (just barely in the summer, good flows during the spring flood) is not a reasonable or scientific way to come up with flow amounts for this application.

The technical review states the instream water right is for migration, spawning, egg incubation, fry emergence and juvenile rearing of rainbow trout. Forest Service records show stream temperatures on the North Fork Burnt River exceed State standards for trout habitat except for a brief time in the spring during run-off. Even then when stream temperatures are low, sediment generated by melting snow usually precludes fish spawning or fry emergence. The watershed is on the mend and perhaps in years to come fish may use the North Fork. But granting a water right now for a beneficial use that does not exist for at least part of the year is not correct. The dates of trout use should be modified.

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IS 72169

The Burnt River below Unity Dam is essential for maintaining the irrigation needs of the valley. Flows fluctuate quite a bit between the two gaging stations. All the lands in the Burnt River Valley are private and no permission was granted to ODF&W to access the land. Thus, accurate information about stream flows could not have been used in this application. Often during the summer, the whole valley finishes haying at about the same time and its essential all the irrigators get their ground wet again as quickly as possible. As upper ditches are turned on to capacity, the river is dried up until more water is turned out at the dam and return flows begin to augment the flow of water to downstream users. Usually there is some water flowing in the river during irrigation season but not always. It would cause a detrimental effect on the ranchers not be able to take the water when they needed it, just because of some instream water right for water which naturally would not even be available. As stated previously, before Unity Dam was built, the Burnt River simply dried up in late summer. Issuing instream water rights for the Burnt River would not be reasonable and would be detrimental to the local economy and the public interest.

After irrigation season ends each year the gates on the dam are shut and no water is released. The river dries up to pools while the dam is being filled. There is no water available for instream water rights during the fall and winter months. Maintaining a minimum flow would have adverse affects on downstream users who expect a full reservoir in the spring.

The water rights application is in error in that the beneficial use is for migration, spawning, egg incubation, fry emergence and juvenile rearing of rainbow trout. Habitat for this use does not exist. Water temperatures during the summer are too great in this segment of the Burnt River to allow survival of trout, much less spawning, egg incubation, fry emergence and juvenile rearing. In many sections of the Bridgeport Valley the river has little gradient and braids throughout the area in separate channels which are sometimes dry, depending on which fields are being irrigated. The river is dry in the fall after the dam is shut down. None of these conditions provides habitat for trout. An occasional trout is caught in Dark Canyon by the miners there, but the fish are small and the flesh soft and inedible because of warm stream temperatures and murky water. Huge, ugly suckers are the main fish species in this segment of the Burnt. The application is for the wrong fish species.

The Burnt River from Clark's Creek to Durkee is an important mineralized area and production of minerals is important to the local, State and National economy. The lower half of IS 72169 falls into this mineralized zone. Instream water rights which preclude future temporary water rights, storage projects and filing for abandoned water rights could adversely affect these operations and would not be in the interest of developing minerals for the public good.

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IS 72168

The final segment of the Burnt River is quite similar to segment IS 72169. The first part of the segment flows through Dark Canyon and is important for its mineral resources. Filing of instream water rights that precluded future development in this area would be detrimental to the public good since minerals are necessary for the local, State and National economy.

The river then flows through the Durkee Valley where it is spread on the fields. Mineral extraction is also an important industry in this segment of the river. Finally, at Huntington the river flows into the Snake River. This river segment is too long and too diverse in flows to qualify as one segment for technical review. As with application IS 72169, flows fluctuate tremendously between the two gaging stations. The lands are all private from Durkee to the Snake River and no permission has been granted by those landowners to give ODF&W access. Thus, no accurate records of flows could have been used to arrive at the instream water right amount on the technical review.

Even the section of this segment of river which flows through Dark Canyon where no irrigation occurs is not trout habitat. Many large, healthy suckers inhabit the slow deep pools but trout do not spawn, eggs are not incubated and fry do not emerge in water where temperatures exceed 85 degrees in the summer months. Some fish from the Snake River may possibly move into the lower river near the Snake but the river above the confluence is little used, except by suckers. The application is in error as to fish species.

No application was made by ODF&W for the South Fork Burnt River stream segment from the gaging station through the South Fork Valley to the reservoir. Evidently, personnel from ODF&W could drive by on Highway 26 where the dry channel of the South Fork Burnt River crosses under the highway and see there is no water available. This is good thinking on that agency's part. There is no "extra" water anywhere in this basin to appropriate for ODF&W instream water rights. Approval of these certificates would not be in the best interest of the community or of the public. All applications should be denied.

Sincerely,



Jan Alexander
P.O. Box 153
Unity, OR 97884
503-446-3413

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

RECEIVED
JAN 30 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick,

I am writing this letter in reference to the Burnt River and its status regarding stream flow and the migration of native fish, before the building of the Unity Dam.

I am Arthur Trimble, an 85 year old rancher, who has lived and ranched all my life in the Burnt River area; in fact, my Century Farm is located in Hereford primarily along the banks of the Burnt River.

Prior to the building of the Unity Dam, Burnt River would completely dry up in the summer time (June 15-October 1). There was no fish or fishing through the Burnt River Valley (Hereford Area). Due to this dried up condition the fish that migrated in the spring died in the pot holes and stagnant water.

Now there are no native fish left above the reservoir specifically because the Game Commission on 3 different occasions, that I can remember in a 15 year time span, poisoned the reservoir and its tributaries to kill all the native fish, so they could plant the type of fish they desired.

It appears to me it is ridiculous to be arguing over water that isn't available and secondly arguing about native fish that no longer exist in the river due to the work of the Game Commission.

Sincerely,

Arthur Trimble

Arthur J. Trimble
Retired Rancher

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JAN 30 1995
WATER RES.
SALEM, OREGON

January 19, 1995

Mr. Michale J. Mattick
Water Resources Department
158 12th Street NE
Salem, OR 97310-0210

Dear Mr. Mattick:

SUBJECT: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169

We hereby submit the following objections to the above stated applications filed by the Oregon Department of Fish and Wildlife.

1. On or about March 25, 1936 the Burnt River Irrigation District adopted a resolution declaring Burnt River tributaries within the boundaries of Burnt River Irrigation District above Unity Reservoir to be over-appropriated, and petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water. This clearly indicates that all free-flowing water is already over appropriated. The proposed Ricco and Hardman Dams could possibly provide that needed water but ODF&W is apposing the construction of those reservoirs.
2. We believe the data submitted by the applicant is out-dated, unreliable, and incomplete with no mapping as required by Oregon Law. All land below the Unity Reservoir is privately owned and no permission has been granted to ODF&W to access that land. Therefore, there is no way accurate and current information could have been obtained for this application.
3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. These applications will also eliminate any future water storage opportunities.
4. The adverse impact of this application would be devastating to the economy of the Burnt River Valley. The instream water rights would stop any future development of lands, business or industry in the Valley. In 1994 irrigators using waters from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights. Folding of these businesses would have a domino effect on the community and local school.

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JAN 30 1995

5. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. We as taxpayers, landowners and irrigators object to these additional known and unknown expenditures.

6. We also object to ODF&W not having to pay filing fees for their instream water rights as other individual applicants.

For the reasons set herein, the applications should be rejected or returned to the applicants for the curing of defects.

Sincerely,

City Council of Unity

Cherry L. Dickson, Mayor

Pat Schiewe, City Recorder

CLD/ps

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JAN 30 1995

January 19, 1995

WATER RESOURCES DEPT.
SALEM, OREGON

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WATER RESOURCES DEP
SALEM, OREGON

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Sincerely

Colleen Hutcheon

COLLEEN HUTCHEON
BOX 138
HEREFORD, OR. 97837

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 19, 1995

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Water Resources Department
158 12th Street Department
Salem, OR 97310-0210

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Sincerely

Wayne E. Morin

HCR 86 Box 138

Hereford, Oregon
97837

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 19, 1995

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Water Resources Department
158 12th Street Department
Salem, OR 97310-0210

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WATER RESOURCES DEPT.
SALEM, OREGON

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For the reasons set herein, the applications should be rejected or returned to the applicants for the curing of defects.

Sincerely

Thomas L. Claggett

P.O. Box 102

Unit 5, OR 97584

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

January 19, 1995

Mr. Michale J. Mattick
Water Resources Department
158 12th Street
Salem, OR 97310-0210

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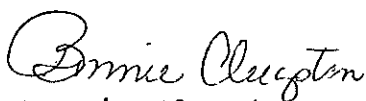
JAN 30 1995

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6. We also object to ODF&W not having to pay filing fees for their instream water rights as other individual applicants.

Objections #4 and #5 could have a big economic impact on our community. Consideration should be given to what impact new regulations will have on small rural communities such as ours. Any additional burdens put on this community could have a very negative effect on our school.

Sincerely,



Bonnie Clugston
Burnt River Community
Development Council
P.O. Box 102
Unity, OR 97884

Sincerely

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JAN 30 1995

WATER RESOURCES DEPT.
SALEM, OREGON

12/23/65

APPENDIX

A-1

TABLE 1
HISTORICAL (REGULATED) FLOWS AT HUNTINGTON
BURNT RIVER BASIN, OREGON
(cfs)

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Average
1927-28	61.8	94.8	107.4	94.0	186.5	264.0	623.9	242.8	59.3	3.3	2.6	0.0	144.3
-29	13.0	43.7	52.0	52.0	69.6	231.0	206.7	99.2	52.1	6.5	1.6	3.4	69.2
1929-30	11.4	35.3	73.1	53.6	96.5	143.2	43.7	13.0	10.1	1.6	0.0	0.0	39.9
31	1.6	11.8	43.9	39.0	48.2	110.7	191.6	8.1	6.7	1.6	0.0	0.0	38.4
32	0.0	3.4	19.5	35.8	48.2	299.2	719.3	291.0	50.4	3.3	0.0	0.0	122.5
33	15.6	39.4	29.1	35.8	32.0	76.1	485.4	350.4	70.7	2.6	0.6	4.0	95.1
34	13.3	34.6	58.2	80.5	85.8	96.1	55.5	13.0	9.6	0.0	0.0	4.0	37.4
1934-35	13.3	16.1	33.5	47.0	49.1	127.5	342.0	74.1	9.6	0.0	0.0	1.7	59.3
-36	20.2	23.2	22.4	31.2	41.8	102.8	651.8	83.4	28.8	0.6	0.0	4.0	83.6
-37	9.0	23.2	26.8	20.2	34.3	98.5	268.0	100.2	30.6	0.0	0.0	8.7	51.5
* -38	50.3	68.2	193.8	120.3	106.5	174.3	1224.2	266.4	38.5	28.1	41.8	48.7	196.0
-39	46.6	36.1	35.0	23.4	21.4	166.6	528.2	142.6	82.0	44.1	48.6	48.7	102.0
1939-40	66.0	48.2	38.8	31.1	21.4	159.0	552.1	163.6	90.3	37.2	56.6	37.0	108.4
-41	35.0	40.2	38.8	38.9	123.4	414.0	424.2	200.5	131.1	56.6	58.8	39.3	133.5
-42	178.0	116.2	178.6	174.3	153.2	244.0	952.0	276.9	158.4	72.5	56.6	100.6	221.2
-43	73.6	48.2	93.0	151.0	293.4	461.0	1488.3	369.1	240.0	79.4	73.7	133.5	290.2
-44	83.4	144.3	162.6	35.0	25.7	23.4	56.1	142.6	41.2	57.7	56.6	88.8	77.1
1944-45	38.9	100.2	31.1	23.4	25.7	131.7	424.2	189.9	190.9	48.6	72.5	95.9	114.2
-46	110.6	42.0	35.8	45.5	146.4	432.5	1062.2	265.0	181.6	65.0	80.5	119.4	214.7
-47	120.3	77.3	113.9	191.9	121.4	47.8	463.9	214.6	166.5	59.4	61.8	119.4	146.2
-48	68.2	47.1	126.9	133.4	71.5	65.0	642.0	461.8	342.9	77.2	68.3	138.8	186.8
-49	214.5	87.4	87.9	133.4	164.4	426.0	843.7	292.7	168.1	58.5	75.2	131.5	223.3
1949-50	203.2	131.1	97.6	97.6	107.2	164.2	596.7	256.9	181.5	65.0	65.0	124.4	173.9
-51	152.9	114.3	133.4	87.9	114.4	365.9	966.4	224.4	146.3	52.8	68.3	95.8	209.7
-52	110.6	94.2	96.0	104.1	130.4	286.2	1347.9	190.2	198.3	87.0	73.1	119.4	235.2
-53	169.0	82.4	91.1	97.6	117.9	242.3	571.5	416.3	510.9	82.1	81.3	126.9	215.5
-54	242.3	174.8	130.2	96.0	71.5	61.8	215.1	185.4	105.9	50.4	71.5	124.4	127.6
1954-55	185.4	100.9	79.7	84.6	50.0	27.6	20.0	117.1	161.3	39.8	60.1	6.7	76.4
-56	29.3	30.3	29.3	178.9	228.5	614.6	1270.6	422.8	198.3	70.7	81.3	85.7	269.2
-57	76.4	67.2	65.1	50.4	232.0	315.5	539.5	382.1	163.0	84.5	58.5	55.5	173.5
-58	63.4	70.6	86.3	97.5	368.0	422.8	897.5	765.9	270.6	120.4	99.2	111.0	280.0
-59	82.9	79.0	110.6	92.7	80.4	78.0	225.2	91.0	53.8	55.3	42.3	87.4	89.8
1959-60	170.4	120.2	65.9	42.8	47.0	65.9	480.2	208.4	190.9	71.4	60.0	62.9	132.0
-61	62.2	36.1	38.8	42.8	34.1	38.8	120.2	226.8	178.2	60.0	56.6	34.6	73.6
-62	29.3	28.6	27.6	27.6	32.2	65.0	453.8	221.1	75.6	56.9	55.3	47.1	93.2
-63	71.5	55.5	53.6	34.1	232.1	71.5	215.1	177.3	94.1	66.6	63.4	72.3	99.6

SOURCE: U. S. Bureau of Reclamation

*Unity Reservoir in operation.

RECEIVED
JAN 27 1995
WATER RESOURCES DEPT.
SALEM, OREGON

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

Dear Mr. Mattick,

As a water right holder under Oregon law, I wish to formally object to the Technical Review Report for the instream flow applications IS 72168 and IS 72169 by the Oregon Department of Fish and Wildlife. These applications will pose serious harm both economically and socially to ourselves and our community.

I object to the Technical Review Report for the Oregon Department of Fish and Wildlife applications for the following reasons:

1. The data presented is not accurate and better data is available from historic sources, such as our irrigation district, that more truly reflect the actual situation.
2. The methodology used by the State to determine the average annual flow is not the most reasonable method for looking at applications like this, in this drainage basin.
3. The methodology used by ODFW, leads them in some cases, to request an instream water right where historic records show that in many years there is no flow.
4. The ODFW has requested flows in excess of the monthly flows.
5. The ODFW has not demonstrated, or even made a logical case for having an instream fishery flow in months where historically the stream would not support such a fishery.
6. The granting of an instream flow to the ODFW could have a long-term negative impact on our current water rights. It would place the "STATE ODFW" in a position that in time will lead to conflicts over water usage. The State has so many more resources than a private individual it would be very costly and almost impossible for a private individual to produce and present data at the same level and in the same detail as the State. The data system will the become biased in favor of the State.

RECEIVED

JAN 27 1995

WATER RESOURCES DEPT.
SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Evelyn J. Keith

Name: Evelyn J. Keith

Date: Jan. 24, 1995

Address: 1205 Washington Av

Baker City, OR 97814

No prior pages
dep
2/16/95

Michael J. Mattick
Water Rights Specialist
Oregon Water Resources Department
State of Oregon
Commerce Building
158 12th Street NE
Salem, Oregon 97310-0210

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Signature



Name:

Mike Hanoman

Date:

1/24/95

Address:

Box 208

Dunkee, OR 97905

WATER RESOURCES DEPT.
JAN 27 1995
SALEM, OREGON

Oregon Water Resources Dept.
158 12th Street N.E.
Salem, OR 97310

January 24, 1995

OBJECTION TO TECHNICAL REVIEWS:

IS72160, IS72161, IS72178, IS72168, IS72169, IS72185, IS72186.

These are in-stream rights filed by the ODF&W on Burnt River and its tributaries.

As former Burnt River Irrigation District Manager, former deputy watermaster for this area and a local resident for over 30 years, I have some familiarity with water flows in the Burnt River reaches described in these applications.

Without being able to devote the time required to analyze in detail the deficiencies in each of the technical reviews, I see several areas where it looks like you are basing your decisions on erroneous information. I feel strongly that the WRD needs to gain a better understanding of the Burnt River watershed before it issues these in-stream water rights.

From the many conversations I had over the years with residents whose families settled this area, it is clear that before the Unity Dam was built, Burnt River dried up to stagnant pools in the late summer, even when the older downstream rights shut off all of the upstream rights and no irrigation was allowed. This is verified by hydrologic records which show a total flow of zero for entire months in the Burnt River at the Bridgeport Gaging Station before the construction of Unity Dam. (This G.S. is located approximately at the end of reach IS72169 and the beginning of reach IS72168.) These practically non-existent flows occurred even in "average" water years.

IS72185 and IS72186 cover reaches on the North Fork of the Burnt River. Historically, water in these reaches was first used by miners in the late eighteen hundreds. One of the first projects the miners had to undertake was to gather up water from other watersheds and ditch it to the N.F. of the Burnt River so they would have enough water to mine. Ranchers presently use some of this same system to bring water into the North Fork of the Burnt River from other watersheds, and they still run out of water in the late summer. Obviously, there was not enough water available to even begin to meet the needs of the first development, let alone sustain minimum flows.

IS72160, IS72161, & IS72178 apply to reaches on the South Fork of the Burnt River. The South Fork of the Burnt River is one of the few streams in the area that actually has water in it in the late summer. This is because it arises on a small watershed that is almost totally fed by springs. Unfortunately, the amount of water in the S.F. is very limited. The flow averages aprox. 22 c.f.s. which is divided among over 4,000 acres in the Unity area.

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JAN 27 1995

WATER RESOURCES DEPT.
SALEM, OREGON

7. Granting an application such as this without full public understanding and acceptance of the data base and methodology does not make for sound water resource management.

8. The basin is currently "over-appropriated" and it does not make sense to compound the problem further.

Given the above mentioned concerns we strongly feel the applications of the ODFW be rejected.

Sincerely,

Signature Vernon M. Simpson

Name: VERNON M. SIMPSON

Date: JAN 24, 1995

Address: P.O. Box 170

DURKEE, OR, 97405

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JAN 27 1995

WATER RESOURCES DEPT.
SALEM, OREGON

5. The burden of the cost of implementing the instream water rights will be born by the landowners and irrigators. The administrative costs will fall on the taxpayers. We as taxpayers, landowners and irrigators object to these additional known and unknown expenditures.

6. We also object to ODF&W not having to pay filing fees for their instream water rights as other individual applicants.

For the reasons set herein, the applications should be rejected or returned to the applicants for the curing of defects.

Sincerely

Fay L Ross

Box 11 UNITY, OREGON
97884

JAN 27 1995
WATER RESOURCES DEPT.
SALEM, OREGON

January 23, 1995

To: Water Resources Department
158 12th Street NE.
Salem, Or. 97310-0210
(Attn: Michael J. Mattick)

Subject: Objection to ODF&W Instream Water Right Application
Technical Reviews
Certificates # are 72160, 72161, 72168, 72169, 72178,
72185, 72186.


As a concerned citizen of Eastern Oregon and of the Burnt River Valley, I feel the technical reviews are defective. In general, the fact that water in this basin has been over appropriated should give Department the first clue there is no water for ODF&W to appropriate.

Many streams in this area run little or no water at all in late summer and fall. The main stream of Burnt River was known to go dry by August nearly every year. Thus asking for appropriation of water that is not there constitutes harassment of legitimate water rights holders, jeopardizes the economy of the valley (agriculture, logging and mining) and is a colossal waste of taxpayer dollars.

Who is going to pay for the monitoring of these Instream Water right?

I appreciate this opportunity to protest Water Resources Department technical review of ODF&W applications for instream water rights.

sincerely,



Michelle Neal-Payne
P.O. Box 149
Unity, Or. 97884
(503) 446-3321

January 21, 1995

RECEIVED

JAN 27 1995

Michale J. Mattick
Water Resources Department
158 12th Street
Salem, Or. 97310-0210

WATER RESOURCES DEPT.
SALEM, OREGON

Dear Mr. Mattick:

Subject: IS 72160, 72161, 72168, 72169, 72178, 72185, and IS72186

We, the land and water rights owners of the water herein-mentioned in these applications filed by the Oregon Department of Fish and Wildlife, submit the following objections to their claims as unwarranted and devastating to our community and ranch operations.

Around March 25, 1936 our Burnt River Irrigation District adopted a resolution stating that the Burnt River Irrigation District above the Unity Reservoir had been over-appropriated and asked Charles E. Stricklin, State Engineer, to deny further permits on these water rights.

The information provided by Mr. Stricklin is neither reliable nor factual since it does not provide the necessary information concerning our district and its needs. There has been no mapping as required by our Oregon Law and all the land below the Unity Reservoir is privately owned and no permission has been granted to ODF&W to have access to this land. The information used for these applications is both erroneous and not up-to-date!

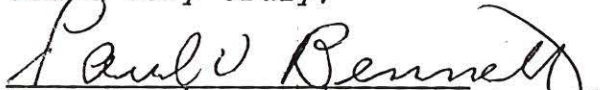
On years such as last year, the ditches did not provide enough water for the rancher on the upland. Both cattle and forage along with wildlife suffered from this shortage. Storage for protection of the rancher and wildlife would be impossible with the drain on the lack of water due to these appropriations.

It is possible that with the construction of the Ricco and Hardman Dams the needed water could provide a water source but the ODF&W opposes having these two dams constructed.

In 1994 users of the water from the South Fork Burnt River were permitted only 16% of their allocated water. A government agency taking over without a legitimate reason would effect our livelihood of ranching, stifle the community and have an adverse effect on our local school system. Future development necessary for business achievements for the land owners in the Burnt River Valley would be crippled. The known and unknown expenses to implement the instream water rights would fall on we the landowner-taxpayer.

We feel that the applications should be rejected as drawn until such time when the ODF&W study this with an honest and clear picture of our water rights and use of the water.

Yours very truly,


Paul V. Bennett (Bennett Trust)
Box 135 Loop Road
Hereford, Or. 97837

SHOLLENBERGER FARMS

VOICE/FAX
(503) 446-3365

P.O. BOX 31
UNITY, OR 97884

ORGANICALLY GROWN
POTATOES, HAY & GRAINS

SERVING AGRICULTURE IN HARMONY WITH THE ENVIRONMENT

January 27 1995

Oregon Water Resources Department
Michael J. Mattick
Commerce Building
158 12th Street NE
Salem OR 97310-8130

RE: Technical Review of ISWR 72160,72161,72178,72168,72169,72185,72186

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

The Burnt River watershed has changed dramatically due to USFS logging prescriptions, and four catastrophic fires in the basin. This in turn has changed the quantity of water released throughout the watershed and the timing of release. Current evaluation controls administered by WRD need to be updated to account for the change in watershed during the last 20 years. Water availability analysis model is not current with the basin and sub-basin changes as described above.

2. An integral part of the technical review by the WRD is the analysis of the application and supporting data. OAR 690-77-015 also requires an application to include at a minimum "description of the technical data and methods used to determine the requested amounts;"

ODFW's application under 5, states: (QUOTE FROM APPLICATION REGARDING METHODOLOGY or statement that the method used to determine the requested flows was the "Oregon Method".) No analysis of supporting data, or the lack thereof, appears in the WRD file for the application. The technical review is defective in that the WRD did not evaluate "whether the level of instream flow

requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." (OAR 690-77-026 (I) (h)). ODFW does not have specific files for their instream water right applications. The original data supporting the Basin Investigation has apparently been lost or destroyed. Such information is essential to understand and evaluate the requested flows and assess their accuracy. No supporting data or "technical data" was submitted by the applicant as required by OAR 690-77-020 (4). Since no technical data was included with ODFW's application, the application should be returned to the applicant for curing of defects or re-submittal (OAR 690-77-021 and 022).

3. The methodology used for this application, the "Oregon Method", is inherently flawed in that it is based on a methodology that has been superseded and is not reliable, and is based on outdated or insufficient information (note testimony of Albert H. Mikat, Jr. on the Oregon Method at the Water Resources Commission, December 6, 1990 meeting). The Oregon Method was further critiqued in *Instream Flow Methodologies*, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989). In that critique at page 10-71 the authors stated that:

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

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

The "Oregon Method" is the improper methodology for determining instream flow requirements pursuant to OAR 635-400-015 (13a)

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

The actual measurements used by ODFW to set requested flow levels are totally inadequate to validate those amounts; these measurements were made by ODFW's predecessor, the Oregon State Game Commission, as shown in the Appendices to the Powder Basin Plan. Actual measurements of stream flow were not made at times when key life stages occurred and, in fact, the severe limitations of the data available show that they are inadequate to validate the requested flows: "Actual measurement of stream flow made at or near recommended instream flow requirements and made at times when key life stages occur are important to validate the methodology used, and to validate that the recommended instream flow requirements provide desirable habitat conditions."

There has been no actual on site flow measurements of the reaches of streams applied for under the above ISWR 72168 and 72169. These reaches flow through private lands and have not been accessed by the ODFW. The physical stream bank properties has changed over the last 20 years and by ODFW administrative rule 635-400-015 (13,a) which denotes that the IFIM method of instream flow requirements. NOTE: U.S. Bureau of Reclamation report on Historical Natural flows of Burnt River Basin show a unique difference from flows submitted in the Powder Basin

Plan. (Taken from Page A-2 Dark Canyon Division Burnt River Project, Oregon Wrap-up Report July 1971)

5. There are no calculations or information in the WRD file to show what ratios or models were used or how adjustments were made to determine the 50% exceedance flows, and there is also no information in the technical review to show the type of statistics used. The EANF calculations are defective, resulting in high EANF levels and thus allowing excessive recommended flows by the WRD. The model used to calculate EANF should be reviewed and revised to properly set EANF figures.

Updating the model of the Burnt River is needed to reflect the large changes in the watershed which have occurred during the last 20 years. Also there is a conflicting information on stream flows depending on the source as mentioned in the last paragraph.

6. A condition should be added to the instream water right that the right shall not have priority over multipurpose storage facilities and water.

This objection is filed in accordance with OAR 690-77-028. The issues raised should be considered as part of a contested case hearing. The above WRD technical reviews are inadequate and defective and have failed to follow applicable rules. A thorough review of the applications are necessary to determine the flow levels necessary to support the public uses applied for. For the reasons set forth above, the objector asserts that the applications are defective and should be returned to the applicants. The flow levels requested are excessive and not necessary to support the public uses proposed. Flow levels set at the rates proposed will interfere with future maximum economic development. Excessive flow rates for instream water rights represent a wasteful and unreasonable use of the water involved (ORS 537.170).

Keith Shollenberger



P.O. Box 31
Unity OR 97884

January 27 1995

Oregon Water Resources Department
Michael J. Mattick
Commerce Building
158 12th Street NE
Salem OR 97310-8130

RE: Technical Review of ISWR 72160,72161,72178,72168,72169,72185,72186

I hereby submit the following objection on behalf of Burnt River Irrigation District to the above mentioned applications for instream water rights filed by the Oregon Department of Fish & Wildlife (ODFW). I assert that the technical reviews by the Water Resources Department (WRD) are defective and there are elements of the water rights as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicants have requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicants for the curing of defects.

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

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ODFW's application under 5. states: (QUOTE FROM APPLICATION REGARDING METHODOLOGY or statement that the method used to determine the requested flows was the "Oregon Method".) No analysis of supporting data, or the lack thereof, appears in the WRD file for the application. The technical review is defective in that the WRD did not evaluate "whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." (OAR 690-77-026 (1) (h)). ODFW does not have specific files for their instream water right applications. The original data supporting the Basin Investigation has apparently been lost or destroyed. Such information is essential to understand and evaluate the requested flows and assess their accuracy.

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The Burnt River Irrigation District presents its objections along with and in addition to the Baker County Court letter of objection dated January 26, 1995

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The Burnt River Irrigation District stands on its petition to the WRD for a contested case hearing dated April 6 1992. The district re-emphasizes the objections in the petition. (see attached)

Keith Shollenberger



Director Unit 1
P.O. Box 31
Unity OR 97884

SHOLLENBERGER FARMS

VOICE/FAX
(503) 446-3365

P.O. BOX 31
UNITY, OR 97884

ORGANICALLY GROWN
POTATOES, HAY & GRAINS

SERVING AGRICULTURE IN HARMONY WITH THE ENVIRONMENT

January 27 1995

Oregon Water Resources Department
Michael J. Mattick
Commerce Building
158 12th Street NE
Salem OR 97310-8130

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January 27 1995

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Keith Shollenberger



Director Unit 1
P.O. Box 31
Unity OR 97884

04/06/92 16:05

Z 503 488 3239

BEN LOMBARD, JR.

P.01

PostNet Brand

Fax Transmittal Memo 7672

To Keith
 Company Burnt River ID
 Location

Fax 446.3365
 Comments

Telephone #

No. of Pages 3
 From Penny
 Company Kip Lombard
 Location
 Fax
 Original Disposition: ☐ Destroy ☐ Retain ☐ Call for pickup
 Today's Date 4.6.92 Time 4:40
 Dept. Charge
 Telephone #

BEFORE THE WATER RESOURCES COMMISSION OF OREGON

In the Matter of
 Instream Water Rights,
 Applications No.'s 72160,
 72161, 72162, 72168, 72169,
 72177, 72178, 72185, and
 72186, being all those
 applications filed by the
 OREGON DEPARTMENT OF FISH
 AND WILDLIFE ON THE BURNT
 RIVER SYSTEM.

PETITION OF BURNT RIVER
 IRRIGATION DISTRICT FOR
 PUBLIC HEARING, UNDER
 ORS 537.343

The BURNT RIVER IRRIGATION DISTRICT respectfully petitions the Commission for a public hearing pursuant to ORS 537.343 regarding the above instream water rights applications filed by the Oregon Department of Fish and Wildlife and represents as follows in support of this petition:

1. The Burnt River Irrigation District has previously requested the Water Resources Commission to establish a reservation for unappropriated water from the South Fork of the Burnt River pursuant to OAR 690-77-200, for the reasons which are stated in said reservation request which is specifically incorporated herein. The combined rulemaking and contested case proceedings pursuant to OAR 690-77-200 have been continued by the Department pending negotiations between the District, the Oregon

Department of Fish and Wildlife, and other interested parties.

It would be in public interest to withhold action on the petition

as long as it is pending interest to withhold action on the pending

instream water rights applications in the Burnt River System

pending the conduct of the forgoing negotiations.

2. Agriculture, and particularly irrigated agriculture, is

Page 1 - PETITION

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BEN LOMBARD, JR.

P.02

the dominant land use along the Burnt River System. The Baker County Comprehensive Plan recognizes the predominance of agriculture within the area. The instream water rights as requested may preclude planned agricultural uses which have a reasonable chance of being developed and which would provide a greater benefit to the public from the use of the unappropriated water available.

3. Under its reservation request referred to above, the District is contemplating one or more multipurpose storage projects which may be a source, in part, of future instream flows. A public hearing would allow evidence to be presented and considered whether instream flows can or should be satisfied in part from future storage projects verses natural flows.

4. Existing water rights may be impaired due to the unique delivery system for most agriculture in the Burnt River System. Most irrigated lands are along side the river and the irrigators withdraw directly from the river. Any unused irrigation waters return immediately to the system and are used by downstream irrigators. Management of the requested instream flows would be very difficult if not impossible and may very well impair the rights of the irrigators who currently have rights along the system.

5. Petitioner is aware that the Northwest Power Planning Council is currently considering establishment of certain fisheries policies which may or may not require different flows

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BEN LOMBARD, JR.

P.03

in those tributaries which serve the Snake and Columbia Rivers than those flows which are being requested here. The pending applications should be coordinated and be consistent with the fisheries policies established by the Northwest Power Planning Council.

6. A hearing is further requested to determine whether the amounts applied for are those reasonably necessary to support the public uses recommended and do not exceed the estimated average natural stream flows.

Petitioner requests that the Director commence the negotiations process under OAR 690-77-030(3).

DATED: April 6, 1992.

Respectfully Submitted:

BURNT RIVER IRRIGATION DISTRICT

BY:



BEN LOMBARD, JR., OSB #65069
Attorney

~~CONFIDENTIAL~~
JAN 26 1995

Miriam K. Aschim
HCR 86 Box 168
Unity, OR 97384
January 21, 1995

Mr. Michael J. Mattick
Water Resources Dept.
158 12th Street Department
Salem, OR 97310-0210

Re: Instream water rights

Dear Mr. Mattick:

The Burnt River Irrigation District held a meeting on Jan. 17, 1995 which I attended because I have been aware of a chronic water shortage for some time. My home receives its irrigation water from the South Fork of Burnt River and our water right dates back to 1896. The instream water rights controversy affects not only my personal interests but larger local issues as well.

As a supporter of the Burnt River Economic Development council I am hoping to help Unity and the upper Burnt River community to grow a little and be more like it was when I moved here forty five years ago, especially the school. To keep our ranches functioning and if we are to grow at all we need what water we have. We need to keep our school operating. Other districts are just too far away.

I love living here in this beautiful country among people who look out for each other and for the land. I worry what might happen to the environment if ranchers are forced to leave for lack of water. Most are good husbandmen and seek to preserve the land and the balance of nature. If the Oregon Department of Fish and Wildlife applications, numbers IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168 and IS 72169, are approved it will do great harm to this area both financially and ecologically. Please reject them.

Yours truly,

Miriam K. Aschim

JAN 24 1995

1-19-95

WATER RESOURCES DEPT.
SALEM, OREGON

Water Resource Dept.

If you want History on Burnt River Flow, I
Can give you some facts.

I come to Burnt River (Bridgeport Area) in 1927
There was no river water by mid July. There
were a few boil holes with some white fish
and suckers. Then the Ranchers bonded them-
selves to build the Unity Dam. 40 years of
Payments for each of us or you wouldn't have
had any water to be calling in Stream Water
Rights. Water is a God given Gift, and
the State has no right to come in and take
what they think is needed for fish and to
hell with the farmers, who are really the
back bone of this country. We need our water
and the ODFW should not be allowed to over
estimate the water and take necessary water
from the Farmers. There's no fairness in
Government anymore just Harassment.

Our ranch has one of the oldest Water Rights
on the river - Is that now null & Void in this
new era of bureaucrats running everything?
I don't think so —

Sincerely, Andrew Racey
ANDY RACEY

HCR 86 Box 49

Hereford OR 97837

our Ranch in.

18 72169

72168

RECEIVED

JAN 27 1995

WATER RESOURCES DEPT
SALEM, OREGON

January 19, 1995

Mr. Michale J. Mattick
Water Resources Department
158 12th Street Department
Salem, OR 97310-0210

Dear Mr. Mattick:

SUBJECT: IS 72160, IS 72161, IS 72178, IS 72185, IS 72186, IS 72168, IS 72169

We hereby submit the following objections to the above stated applications filed by the Oregon Department of Fish and Wildlife.

1. On or about March 25, 1936 the Burnt River Irrigation District adopted a resolution declaring Burnt River tributaries within the boundaries of Burnt River Irrigation District above Unity Reservoir to be over-appropriated, and petitioned Charles E. Stricklin, State Engineer, to deny further permits to appropriate water. This clearly indicates that all free-flowing water is already over appropriated. The proposed Ricco and Hardman Dams could possibly provide that needed water but ODF&W is apposing the construction of those reservoirs.
2. We believe the data submitted by the applicant is out-dated, unreliable, and incomplete with no mapping as required by Oregon Law. All land below the Unity Reservoir is privately owned and no permission has been granted to ODF&W to access that land. Therefore, there is no way accurate and current information could have been obtained for this application.
3. On low water years ditches that reach into the upland sagebrush ground would not have enough water to provide for livestock and wildlife needs. These same ditches also irrigate upland ground that provides forage for wildlife as well as domestic animals. These applications will also eliminate any future water storage opportunities.
4. The adverse impact of this application would be devastating to the economy of the Burnt River Valley. The instream water rights would stop any future development of lands, business or industry in the Valley. In 1994 irrigators using waters from the South Fork Burnt River were allowed only 16% of their allocated water. Any further reductions would make it unfeasible to operate the businesses that depend on prior water rights. Folding of these businesses would have a domino effect on the community and local school.

JAN 27 1995
WATER RESOURCES DEPT
SALEM, OREGON

These Unity water rights are junior to the older downstream water rights (aprox. 8,0000 acres) and are only allowed to use the S.F. waters under a contract with the Burnt River Irrigation District as part of an exchange agreement put in place when the Unity Dam was built. This means there are aprox. 12,000 acres that have prior rights to the use of the South Fork which runs an ave. of 22 c.f.s.. In your opinion, doesn't that qualify as being "over-appropriated" with no water available for new appropriations? In fact, in order to avoid further conflicts over the already over-appropriated stream, the Burnt River Irrigation District applied to the then State Engineer in 1936 to restrict any further appropriations in the Unity area.

All of the forgoing is indicative of the water availability (or more correctly the unavailability) issue, and can be substantiated by early hydrological records as well as volumes of the early court decrees to settle battles waged by the early settlers over the limited amount of water. Isn't water availability a concern when issuing these in-stream rights?

Other issues raised by these in-stream water rights that should be addressed and corrected before any rights are granted include:

1. If reaches IS72160, IS72161, & IS72178 were determined by using the Oregon Method, was it done in error since the South Fork of the Burnt River is a spring-fed stream?
2. There are times during the summer months when inflow into Unity reservoir is zero (or negative due to evaporation). Any minimum flows required at these times would have to be maintained by releasing storage water. It is clearly beyond the authority of the WRD to require such releases, and it would further complicate a difficult job if in-stream minimum flows are thrown into the mix. How will this be resolved to prevent the waste of water being released when it is not required for irr.?
3. All the flows requested for all the months for IS72178 exceed the EANF considerably (some by over 500%, i.e. Mar.). My best guess is that the flows requested exceed any flows that have ever been in that reach. In fact, the requested flows in the applications above Unity Dam, IS72160, IS72161, IS72178, IS72185, & IS72186 all have months that exceed the EANF by several hundred per cent. Shouldn't the requested flows at least have some relation to the "average" amount of water in the stream?
4. As a practical matter, isn't it erroneous to use the "average" flows of a stream in order to make determinations of minimum streamflows? In the last 100 years of streamflow records, I doubt that you would find more than a few years that would qualify as "average." With all the variables that affect streamflow in this region besides just the amount of precipitation (temperatures, ripeness of snowpack, condition of ground, timing of rainfall, etc.) streamflows tend to range to the extremes. If WRD is trying to establish whether there is a possibility of

JAN 27 1995

WATER RESOURCES DEPT.
ST. JOHNS RIVER

maintaining a minimum streamflow for fisheries shouldn't your Department be looking at the lower end of the spectrum of flows in a stream? Otherwise, don't requested minimum streamflows just become wishful thinking with little relation to reality?

5. There will be a problem in the future in determining which channel in the Hereford and Bridgeport areas is required to maintain the minimum flows unless the channel is pinpointed in the requested right. Each affected irrigator will obviously claim that the other channel is the one that should be carrying the minimum flow. This will be a problem in IS72168, IS72169 & possibly IS72185 & IS72186 where there are multiple channels and the channels occasionally change. How will this be resolved if the channels are not definitely located?

6. In the fall, before it is known if there will be enough precipitation during the winter to provide enough water to fill Unity reservoir it is necessary to shut off the streamflow to a bare minimum. This is SOP for dams that have no minimum flow requirements. Presumably these in-stream rights will not affect prior existing rights. Therefore, there is no way these in-stream flows can be maintained during the months requested in the fall and winter. If you grant these rights, won't you be creating a presumption in the minds of many people that there actually is water available to meet this need, which is currently not true?

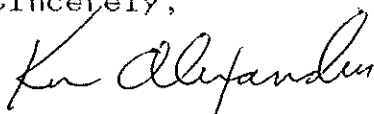
7. Are the methods used to determine these minimum streamflows and analysis of the needs of the fishery based on conditions found on Burnt River or are they based on a generic method that may or may not apply to the Burnt River and its tributaries?

8. Will granting these in-stream rights prevent building storage projects that may be of greater public benefit in the future?

9. Will the granting of these rights create an inefficiency and waste of water due to the additional complexity of attempting to deliver extra water for an uncertain goal?

Before the WRD grants these requests, I hope you will take a more realistic look at the Burnt River watershed. Fish habitat is not going to be improved by making poor decisions based on inaccurate information. Granting these in-stream rights in their present form will only complicate and delay any actual chance of reaching that goal.

Sincerely,



Ken Alexander
P.O. Box 153
Unity OR. 97884

Ph. 503 446-3413

cc. Water for Life

cc. Lynn Lundquist

November 25, 1994

Oregon Department of Fish and Wildlife
P.O. Box 59
Portland OR 97207

WATER
RESOURCES
DEPARTMENT

Reference: Files 70863, 70864, 70870, 71684, 72160, 72161, 72167,
72168, 72169, 72170, 72172, 72178, 72181, 72183, 72185,
72186, 72189, 72190, 72191, 72192 and 72193.

Dear Department of Fish and Wildlife:

The Water Resources Department has finished the first step of its analysis of the above referenced applications. Enclosed are copies of this report, which is called the Report of Technical Review.

The technical review is the Department's legal and scientific analysis of the application, including a calculation of the expected availability of water for the proposed use. Step two, is the 60-day public review period.


In the case of your application, the Technical Review was satisfactory, and it concluded that water would be available for this use for the time period described in the proposed certificate conditions of the attached Report.

The Report does not represent any commitment by the Department to ultimately approve your application. Before a certificate may be granted, the Department must complete a public interest review.

In this second step of the review process, state regulations require that other water users and the general public be given an opportunity to object to your proposed water use. You also may object to any of the Department's findings or proposed certificate conditions contained in the technical report. If you wish to object, you must file your objection with the Department in writing by 5 p.m. on or before February 1, 1995. Interested parties must also submit their objections before the same deadline.

If you have questions, please feel free to telephone me or any of the Department's Water Rights Division staff members. My telephone number is 378-3739 in Salem, or you may call toll-free from within the state to 1-800-624-3199.

Sincerely,



Michael J. Mattick
Water Right Specialist

Enclosures: 21 Technical Reviews



t:\instream\cover

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

Date: November 25, 1994

OREGON WATER RESOURCES DEPARTMENT

SATISFACTORY REPORT OF TECHNICAL REVIEW

FOR AN INSTREAM WATER RIGHT APPLICATION

OBJECTIONS TO THE PROPOSED INSTREAM WATER RIGHT TECHNICAL REVIEW REPORT, AS DESCRIBED BELOW, MUST BE RECEIVED IN WRITING BY THE OREGON WATER RESOURCES DEPARTMENT, 158 12th St. NE, SALEM, OREGON 97310, ON OR BEFORE 5 PM: February 1, 1995.

1. APPLICATION FILE NUMBER - IS 72168

2. APPLICATION INFORMATION

Application name/address/phone:

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

Date application received for filing and/or tentative date of priority: 1/29/1992

Source: BURNT R tributary to SNAKE R

County: BAKER

Purpose: MIGRATION, SPAWNING, EGG INCUBATION, FRY EMERGENCE AND JUVENILE REARING OF RAINBOW TROUT.

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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st $\frac{1}{2}$	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd $\frac{1}{2}$	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

To be maintained in:

BURNT RIVER FROM USGS GAGE 13274200 AT RIVER MILE 41.5 (NWNW, SECTION 10, TOWNSHIP 12S, RANGE 41E WM); TO BROWNLEE RESERVOIR POOL AT RIVER MILE +1.0 (SW1/4, SECTION 8, TOWNSHIP 14S, RANGE 45E WM)

The application is complete and free of defects.

The following supporting data has been submitted by the applicant:

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

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

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

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

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

The evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application is described below. The recommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st%	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd%	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0
	126	165	279	469	370	230	129	104	77.3	80.6	99.9	109
1st%	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd%	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

4. REPORT CONCLUSIONS

The proposed water use, as conditioned, passed this technical review. The information contained in the application along with the supporting data submitted by the applicant indicate that the flow levels set out in this report are necessary to protect the public use.

The supporting data states that the recommended flows are necessary to meet the biological requirements for spawning and rearing of salmonids and resident game fish. Consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels. (See *Determining Minimum Flow Requirements for Fish*, ODFW Report January 20, 1984.) The recommended flow volumes are necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature.

Minimum stream flow recommendations (ODFW MIN) developed from the 1965 and 1966 study are intended to provide suitable environment during appropriate seasons to perpetuate minimum desirable conditions capable of maintaining trout populations. The recommended minimums are based primarily on the biological requirements of the fish present and follow seasonal stream discharge patterns to which the life cycles of salmonids have become adapted. (See 1967 report)

5. PROPOSED CERTIFICATE CONDITIONS

[The following proposed conditions will apply to water use and will appear on the face of the certificate.]

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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st%	25.0	25.0	50.0	50.0	50.0	50.0	25.0	25.0	25.0	25.0	25.0	25.0
2nd%	25.0	40.0	50.0	50.0	50.0	40.0	25.0	25.0	25.0	25.0	25.0	25.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.
3. This instream right shall not have priority over rights to use water for 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.

245
23
216

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

CC: FILE # 21 Robin I Turle

✓ WATERWATCH

✓ ODF&W (DEPENDING ON - IF NOT APPLICANT) COUNTY(IES): 3 out of 2 Field office

✓ WATERMASTER # 8

✓ REGIONAL MANAGER - E

✓ KEN STAHR

OTHER ADDRESSES: (OVER FOR MORE ADDRESSES)

✓ AGRICULTURE, DEPARTMENT OF, VES GARNER

✓ BOYER, JOHN, JR.

✓ COALITION FOR REPOSNSIBLE WATER PLANNING

~~COOS COUNTY BOARD OF COMMISSIONERS, GORDON ROSS (COOS RIVER BASIN ONLY)~~

✓ CROOK COUNTY STOCKGROWERS ASSOC., JEFF & RUNINDA MCCORMACK

✓ DEPARTMENT OF ENVIRONMENTAL QUALITY

✓ DOUGLAS COUNTY LIVESTOCK ASSOCIATION

CASEWORKER

ORIGINAL TO APPLICANT 10/14/94

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

OTHER ADDRESSES:

- ✓ F. A. I. R.
- ✓ FRUIT GROWERS LEAGUE
- ✓ HURRICANE CREEK IRRIGATION DITCH CORPORATION, RICHARD A. BOUCHER, SEC./TREAS.
- ✓ ILLINOIS VALLEY WATER RIGHT OWNERS ASSOC.
- ✓ LAKE COUNTY STOCKGROWERS, ANN TRACY, PRESIDENT
- ✓ MORROW COUNTY COMMISSIONER, RAY FRENCH
- ✓ MOON, DAVID, ATTORNEY
- ✓ OREGON ASSOCIATION OF NURSERYMEN, INC., CLAYTON W. HANNON, EXECUTIVE DIRECTOR
- ✓ OREGON ASSOCIATION OF REALTORS, JERRY SCHMIDT, WATER CONSULTANT
- ✓ OREGON CATTLEMEN'S ASSOC.
- ✓ OREGON HOP GROWERS ASSOC.
- ✓ OREGON SHEEP GROWERS ASSOCIATION, INC.
- ✓ OREGON WHEAT GROWERS LEAGUE, MACK KERNS
- ✓ WALLOWA COUNTY COURT, OFFICE OF THE JUDGE
- ✓ WALLOWA COUNTY STOCKGROWERS ASSOC., C/O JEAN STUBBLEFIELD, SECRETARY
- ✓ WATER FOR LIFE
- ✓ WATER RESOURCES CONGRESS

REVISED: 10/14/94

and 216 other addresses from Cindy's list (203) and
other commentators found in Baker County E-mail & files.

RECEIVED

FEB 17 1994

WATER RESOURCES DEP.
SALEM, OREGON



721168
Oregon
DEPARTMENT OF
FISH AND
WILDLIFE

February 17, 1994

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

RE: Instream Water Right Application #s 70249, 70288,
70942 through 70944, 70946 through 70960, 71221
through 71280, 71282 through 71890, and 71921 through
72946; Reports of Technical Review

General Comments

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

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

In the 115 subject reports of technical review, WRD is proposing to condition each application to exempt human and livestock consumption from regulation in favor of these instream rights as follows:

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

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

By rule, WRD's technical review process includes assessing conditions previously imposed on other instream water rights from the same source. If found to be appropriate, WRD may propose that new instream water rights contain the same exemption. There is no requirement that this exemption be automatically included as part of a technical review.



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

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

Specific Comments

Application # 70948

Section 5, Proposed Conditions, is missing from this Report of Technical Review.

Application # 71241

For the month of December:

1. The minimum flow level recommended by ODFW in the North Coast basin Environmental Investigation Report is 88 cfs.
2. The reported estimated average natural flow for December here is 131 cfs.
3. WRD is proposing in the Report of Technical Review to allocate 80 cfs.

ODFW believes the proper amount to be protected during December is 88 cfs.

Application # 71258

Here, the estimated average natural flow is less than the minimum flow recommended by ODFW for the entire year. Because this is the only instance where this has happened to date, the occurrence is suspect. ODFW requests that the water availability analysis for this reach of Miami River be reexamined.

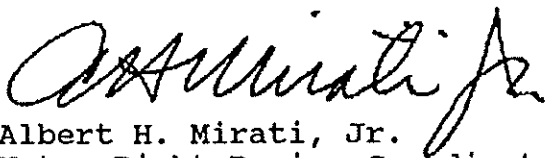
Application # 71280

The recommended flow numbers listed for September through April in the Application Information and Technical Review sections of the Report of Technical Review do not agree. Those listed in the Application Information section are correct.

North Coast Basin IWRs
February 17, 1994
Page 3

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in dark ink, appearing to read "A. Mirati Jr.", with a stylized, cursive script.

Albert H. Mirati, Jr.
Water Right Review Coordinator

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

FILE: NCOAST.IWR



United States
Department of
Agriculture

Forest
Service

Wallowa-Whitman
National Forest

P. O. Box 907
Baker City, OR 97814

Reply to: 2540

Date: March 18, 1992

72185
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State of Oregon
Water Resources Department
ATTN: Water Rights Section
3850 Portland Road NE
Salem, OR 97310

Enclosed is a summary of the impacts of 36 new ODFW instream water right applications in the Powder Basin on Forest programs associated with non-reserved acquired lands managed by the Wallowa-Whitman National Forest.

We request that the Department, the Water Resources Commission, and the Department of Fish and Wildlife review this information and discuss it with Tim Bliss, Water Rights Program Coordinator, Wallowa-Whitman NF (503-523-6391) and Mike Lohrey, Regional Water Rights Program Coordinator (503-326-5927), as needed.

The Forest is raising many of the same concerns expressed in a July 29, 1991 letter to you regarding 40 ODFW instream water right applications in the Grande Ronde Basin and adjacent basins. We acknowledge receipt of Michael J. Mattick's January 17, 1992 response to this letter. Even though Mr. Mattick's response to our concerns and requested relief appear to be adequate, we are restating many of our concerns "for the record."

The policy of the Pacific Northwest Region is to support the State's instream water right acquisition program in order to protect stream-dependent flora and fauna. Yet, the Wallowa-Whitman NF also has the obligation to notify the State of potential impacts to other Forest programs and outputs identified in our Forest Plan.

Sincerely,

R. M. RICHMOND
Forest Supervisor



Enclosure

cc: (see next page)



cc: Mike Lohrey, Watershed, Regional Office
District Rangers: Baker RD, Unity RD, La Grande RD, Pine RD

Al Mirati
Oregon Department of Fish and Wildlife
2501 SW First Avenue
Portland, OR 97207

Jim Lauman
Oregon Department of Fish and Wildlife
107 Twentieth Street
La Grande, OR 97850

V. Kent Searles, Regional Manager
Oregon Water Resources Department
Baker County Courthouse
Baker City, OR 97814



WaterWatch

O F O R E G O N

72168

February 7, 1992

Stephen C. Brown
Senior Water Rights Specialist
Applications and Permits Section
Water Resources Department
3850 Portland Rd. N. E.
Salem, OR 97310


Re: Application for Instream Water Rights #72159 thru 72194
Oregon Department of Fish and Wildlife
Powder River and Burnt River Basins, Baker & Union Co.

The Burnt and Powder River basins in Baker and Union County have been adversely effected by past water management activities. Native fish in these streams are now confined to small tributary streams because of overappropriation of the surface waters and unscreened irrigation diversions.

WaterWatch supports the efforts of the Oregon Department of Fish and Wildlife to obtain instream water rights in these streams in order to provide some level of future protection for the region's valuable fish and wildlife. WaterWatch urges the Oregon Water Resources Department to issue these instream water rights at the earliest opportunity in the amounts requested.

Please inform us of any protests that you may receive to these applications.

Sincerely,


Jim Myron

JAN 29 1992

IWR Application # 72168 Certificate # _____

STATE OF OREGON

WATER RESOURCES DEPARTMENT

**Application for Instream Water Right
by Oregon Department of Fish and Wildlife**

There is no fee required for this application.

Applicant: Randy Fisher for Oregon Department of Fish and
Wildlife, PO Box 59, Portland, OR 97207

1. The name of the stream of the proposed instream water right is Burnt River, a tributary of Snake River.
2. The public use this instream water right is based on is providing required stream flows for rainbow trout.
3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

USE(S): Migration, spawning, egg incubation, fry
emergence, and juvenile rearing.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
25	25/	50	50	50	50/	25	25	25	25	25	25
	40				40						

4. The reach of the stream identified for an instream water right is from (upstream end) USGS gage 13274200, river mile 41.5, within the NW quarter of the NW quarter of Section 10, Township 12S, Range 41E W.M., in Baker County...

Downstream to Brownlee Reservoir pool, river mile ±1, within the SW quarter of Section 8, Township 14S, Range 45E W.M., in Baker County.

5. The method used to determine the requested amounts was the Oregon Method.
6. When were the following state agencies notified of the intent to file for the instream water right?

Dept. of Environmental Quality	Date: January 8, 1992
ODFW (Fish, Wldlf, and Habitat)	Date: January 8, 1992
Parks and Recreation Division	Date: January 8, 1992

IWR Application # _____ Certificate # _____

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

Use USGS gage 13275000 (at RM 3)..

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

Local ODFW personnel will assist the watermaster in establishing a monitoring plan and program.

9. If possible, include other recommendations for methods or conditions necessary for managing the water right to protect the public uses [see OAR 690-77-020 (5)(c)]: None.

10. Remarks: The requested flows are the minimum required to maintain salmonid populations at their current levels. No provision is made at these flows for population restoration or enhancement.

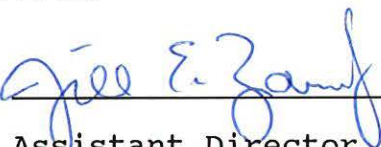
An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 1/22/92

Oregon Department of Fish and Wildlife

Signed: _____



Assistant Director
Habitat Conservation Div.

File: BURNT1.APP

IWR Application # 72168 Certificate # _____

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

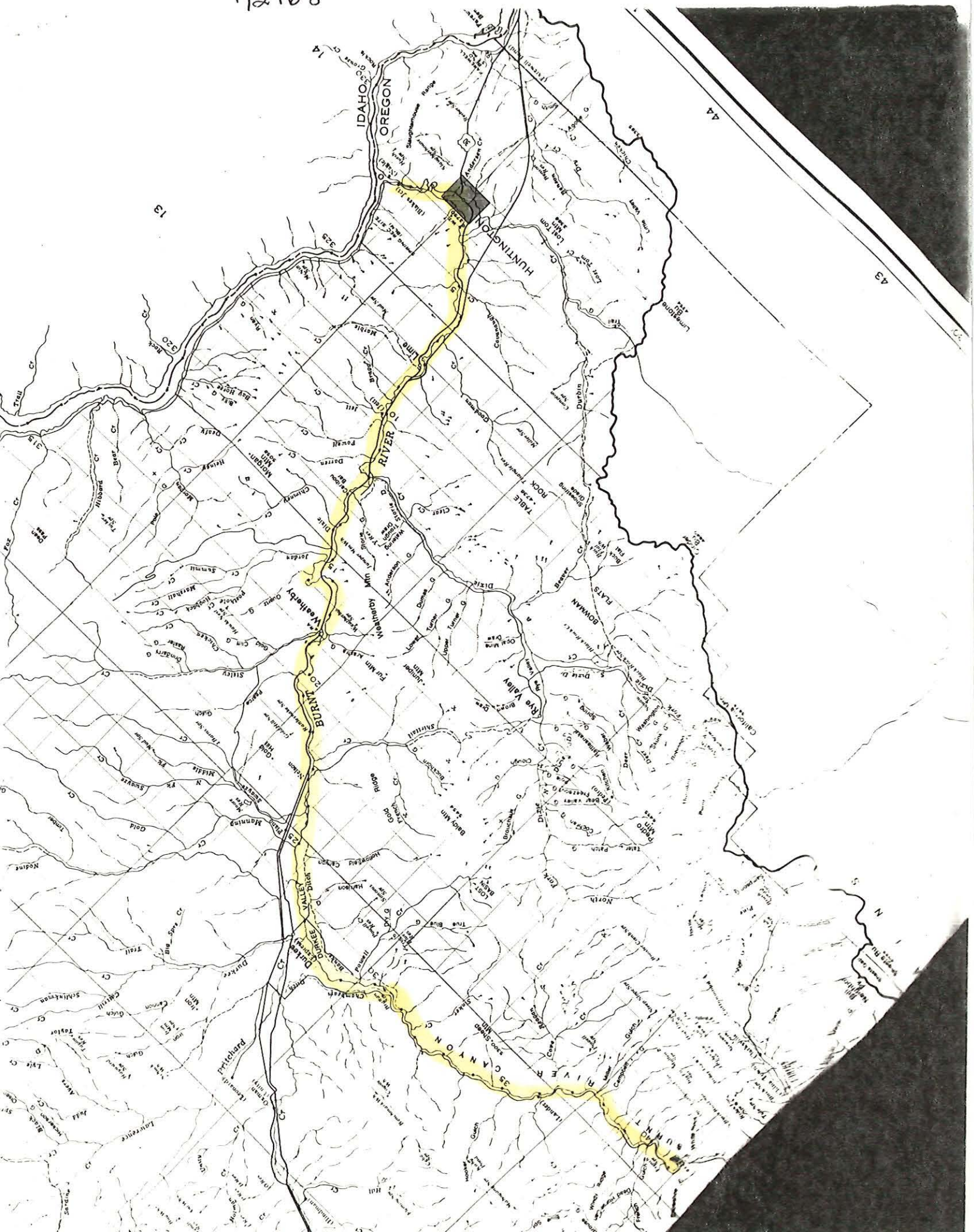
In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

_____, 19____.

Date: _____, 19____.

This document was first received at the Water Resources Department in Salem, Oregon, on the 29th day of January, 1992, at 8:00 o'clock A M.

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

[illegible]

<u>DATE</u>	<u>INITIALS</u>	<u>MINIMUM REQUIREMENTS TO FILE</u>
_____	_____	Name and mailing address
_____	_____	Source of water
_____	_____	Quantity of water
_____	_____	Location of project
_____	_____	Use of water
_____	_____	Signature of applicant
_____	_____	Allowable use by policy
_____	_____	State Engineer withdrawal
_____	_____	Legislative withdrawal
_____	_____	Land use approved _____ pending _____
		<u>FIELD OPERATIONS</u>
_____	_____	Application date stamped per money receipt date
_____	_____	Stream Indexed
_____	_____	Stream Code _____
_____	_____	Scenic Waterway _____
_____	_____	Findings:
_____	_____	1) Concluded - Scenic-Reg Ack letter
_____	_____	2) Under Study - Scenic-Ack letter
_____	_____	3) Basin 2 - Willamette-Ack letter
_____	_____	Plat Carded and copy made YES NO
_____	_____	Conflicts (well _____ surface _____)
_____	_____	Prior ISWR # _____
_____	_____	Within Irrigation District _____ (name)
_____	_____	Notified _____
_____	_____	District excerpt received _____
_____	_____	Entered in Paradox _____
_____	_____	Prepare six copies of Draft Permit
_____	_____	Send one copy to Data Center
		<u>SUPPORT SERVICES</u>
_____	_____	Stamp contents with application number
_____	_____	Mail/Provide copies of draft permits to DEQ, ODFW, PARKS, AND WATERMASTER
_____	_____	Mail ack letter (provided by Data Center) with receipt to applicant, cc to CWRE and file
_____	_____	Place label on file and card
_____	_____	If dam is over 10 feet or storage exceeds 9.2 AC-FT, route file to Dam Safety Section
_____	_____	Notify Irrigation District
		<u>FIELD OPERATIONS</u>
_____	_____	Ownership Statement YES NO
_____	_____	Name and address of all owners
_____	_____	Other landowners notified
_____	_____	Legal Description
_____	_____	Need Commission review
_____	_____	Requests greater than 5.0 cfs
_____	_____	Dam height greater than 20 feet
_____	_____	Storage greater than 100 acre-feet
_____	_____	Out of Basin diversion
_____	_____	Groundwater recharge project
_____	_____	Other substantial public interest
_____	_____	GW comments received _____ resolved _____
_____	_____	ODFW comments received _____ resolved _____
_____	_____	DEQ comments received _____ resolved _____
_____	_____	Interest Groups _____
_____	_____	Water availability received _____
_____	_____	Objections received _____ resolved _____
_____	_____	Protest received _____ resolved _____
_____	_____	Management Codes
EXAMINATION FEE:	_____	REMARKS: _____
RECORDING FEE:	_____	_____
	_____	_____
TOTAL:	_____	_____
REFUND:	_____	_____
DEFICIENT:	_____	_____



RECEIVED

SEP 27 2023

OWRD

Date Received (Date Stamp Here)

OWRD Over-the-Counter Submission Receipt

Applicant Name(s) & Address: WATER WATCH OF OREGON

Transaction Type: Contest case OAH 2021-OWRD-00053

Fees Received: \$ 680⁰⁰ / 680⁰⁰

☐ Cash

☒ Check

Check No. 15478 15477

Name(s) on Check: WATER WATCH OF OREGON INC

Thank you for your submission. Oregon Water Resources Department (Department) staff will review your submittal as soon as possible.

If your submission is determined to be complete, you will receive a receipt for the fees paid and an acknowledgement letter stating your submittal is complete.

If determined to be incomplete, your submission and the accompanying fees will be returned with an explanation of deficiencies that must be addressed in order for the submittal to be accepted.

If you have any questions, please feel free to contact the Department's Customer Service staff at 503-986-0801 or 503-986-0810.

Sincerely,

OWRD Customer Service Staff

Submission received by: C. Holmes

(Name of OWRD staff)

Instructions for OWRD staff:

- Complete this Submission Receipt and make two (2) copies. Place one copy with the check/cash; and place the other copy with the submission (i.e., the application or other document).
- Date-stamp all pages. (NOTE: Do not stamp check.)
- Give this original Submission Receipt to the applicant.
- Record Submission Receipt information on the "RECEIVED OVER THE COUNTER" log sheet.
- Fold and put one copy of the Submission Receipt with check/cash into the Safe slot. Place the other copy of the Submission Receipt with submission (application/other document) in the Safe drawer.

Application No. **72168**
Permit No.

ODFW

PO BOX 59 PORTLAND OR 97207

Assigned

Address

Beginning construction

Completion of construction

Extended to

Complete application of water

Extended to