



3/28/91

*IWK*  
Application No. 71455

Permit No. ....

Name . ODFW

Address PD BOX 59, PORTLAND OR 97207

Assigned .....

Address .....

Beginning construction .....

Completion of construction .....

Extended to .....

Complete application of water .....

Extended to .....

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON  
WATER RIGHTS DIVISION

In the Matter of Instream Water Right )  
Application IS 71455, McCoy Creek, )  
Grant County )  
Oregon Department of Fish & Wildlife ) PROTEST TO  
Applicant. ) PROPOSED FINAL  
Grant County, ) ORDER  
Protestant. )

Protestant, Grant County, a municipal corporation, pursuant to  
ORS 537.153(6) and OAR 690-77-043, hereby protests the Proposed  
Final Order for Application IS 71455, McCoy Creek, in Grant County.

I.

INTRODUCTION

The protestant's address and telephone number are:

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

Protestant's attorney in this matter is:

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

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

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

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

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

## II.

### ISSUES

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



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

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

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

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

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

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

While a specific water availability process is not

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defined in the instream water right rules (OAR 690-77), we find a number of references that indicate the Department was to examine the water availability by determining the amount of "unappropriated water available."<sup>1</sup> In addition, a requirement to determine the amount of unappropriated water can also be implied from the provisions relative to the ability to set instream flow levels that exceed current unappropriated water available (See OAR 690-77-015(2)).

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

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

The 1995 Legislature in enacting Senate Bill 674 (§19), added the requirement that the instream water rights are to be processed in accordance with the provisions for obtaining a permit to appropriate water as provided under ORS 537.140 to 537.250. Among these provisions, is the requirement to

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

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determine whether water is available (ORS 537.153(2)).

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

(emphasis added).

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

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

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

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

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

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

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minimums.

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

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

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

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

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Flow."

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

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

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

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

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

(ORS 537.332(2)).

Notwithstanding the "minimum quantity" restrictions, we are unable to find in the files any indication that findings have been made as to whether the requested flows are in fact

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

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

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

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

The requirement to notify affected governments and landowners insures the public interest issues are fully analyzed by both the agencies and public. In the absence of these elements, the application is in fact incomplete and

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

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

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

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

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

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

a. providing that for the purposes of water distribution,

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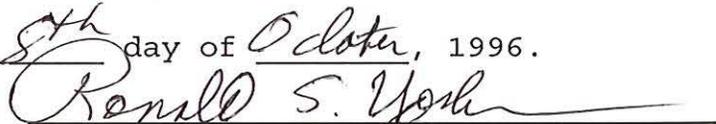
- this instream right shall not have priority over road construction, reconstruction or maintenance, human consumption, domestic expanded, livestock, and the uses described in ORS 537.040, ORS 537.143, and ORS 537.022;
- b. limiting the amount of instream flows to less than the natural flow of the stream in a manner that balances the public uses and allows for the activities covered by ORS 537.022, ORS 537.040, ORS 537.143, and ORS 537.170(8);

III.  
LEGAL AUTHORITIES

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

1. ORS 537; ORS 536; ORS 183, ORS 197.180
2. Malheur River Basin Program plan;
3. Grant County Comprehensive Plan;
4. OAR 635-100-130; OAR 635-415-030.

Respectfully submitted this 5<sup>th</sup> day of October, 1996.

  
\_\_\_\_\_  
Ronald S. Yockim  
Attorney for Protestants

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CERTIFICATE OF SERVICE

I hereby certify that on the 3<sup>th</sup> day of October, 1996 I served a true and accurate copy of the foregoing Protest to the Proposed Final Order on the applicant by mailing said copy by first class mail, postage prepaid, by depositing said copy in the United States Post Office in Roseburg, Oregon, addressed as set forth below:

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

Barbara Griffin

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STATE OF OREGON  
**WATER RESOURCES DEPARTMENT**

RECEIPT # **7352**

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

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

RECEIVED FROM: <u>Ronald L. Yockim</u>	APPLICATION
BY: _____	PERMIT
	TRANSFER

CASH:  CHECK: #  2412 OTHER: (IDENTIFY)

TOTAL REC'D \$ 3,800.

**0417 WRD MISC CASH ACCT**

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

**REDUCTION OF EXPENSE**

CASH ACCT.	\$
PCA AND OBJECT CLASS	VOUCHER #

**0427 WRD OPERATING ACCT**

0407	MISCELLANEOUS	<u>IS 69949</u>	<u>70640-42</u>	<u>71467-68</u>	\$
0410	COPY & TAPE FEES	<u>69951</u>	<u>70645-46</u>	<u>71472</u>	\$
0410	RESEARCH FEES	<u>69960</u>	<u>70651-55</u>		\$
0408	MISC REVENUE: (IDENTIFY)	<u>69963</u>	<u>71450</u>		\$
TC165	DEPOSIT LIAB. (IDENTIFY)		<u>71455</u>		\$
0201	SURFACE WATER				\$
0203	GROUND WATER				\$
0205	TRANSFER				\$
0218	WELL DRILL CONSTRUCTOR				\$
	LANDOWNER'S PERMIT				\$

0223 OTHER (IDENTIFY) Protest \$3,800. - PCA77235

**0437 WELL CONST. START FEE**

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

**0539 LOTTERY PROCEEDS**

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

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

RECEIPT # **7352**

DATED: 10-9-96

BY: R. Bushnell

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MAY 6 1991

WATER RESOURCES DEPT.  
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PROTEST AGAINST

WATER USE APPLICATION

I (We) Michael Smith  
name(s)

Rt 2 Box 621  
mailing address

PRAIRIE CITY, ORE, 97869, 820-4483  
city state zip phone

do hereby protest the approval of pending Application # 71455

made in the name(s) of Randy Fisher - Dept of Oregon Fish & Wildlife

for use of water from NW Coy Creek - tributary of Lake Creek - Malheur River  
name of water source

The proposed use is for providing required stream flows for fish

and the intended place of use is NW Quarter of the SE  
(describe by acreage, tax lot, etc.)

Quarter, Section 30, Township 15S,  
as accurately as possible)

Range 34 W 1/4, Grant County, Oregon.

Complete either A/ or B/, or both:

A/ My (Our) water rights which would be adversely affected by the proposed use are: permit # \_\_\_\_\_ Certificate # \_\_\_\_\_

A copy of the pertinent tax plat map obtained from the \_\_\_\_\_ County Assessor's Office is attached. The location of the proposed use and point of diversion, and my/our property and point of diversion have been marked on the map.

My (Our) water rights would be adversely affected in the following way(s): \_\_\_\_\_  
(provide as much detail as possible--feel free to

attach additional paper)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B/ I (We) do not have any water rights. However, I/we believe that the proposed use would have a significant adverse effect on the public interest in the following way(s): It would lower

the water table in Logan Valley - lower the  
late season stream flow in Mc Coy Creek  
the app. is for more water than flows in Mc Coy  
I/we have not attempted to resolve this matter through discussion with the applicant (circle one). I/we have proposed the following alternatives or conditions which, in my/our opinion, would resolve my/our concern(s): \_\_\_\_\_

I / We understand that if this protest is not resolved informally, it may be necessary to present testimony and evidence in an administrative contested case hearing before the Water Resources Department, in support of the allegations made in this protest. In the event this matter goes to hearing, I we do / do not (circle one) intend to have attorney representation. The attorney's name and address is \_\_\_\_\_

Proof of service of a copy of this protest on the applicant is attached.

Dated and signed this 29 day of April, 1991.

William P. [Signature]  
Signature

\_\_\_\_\_  
Signature

# Oregon Water Resources Department

## Water Rights/Adjudication Section

Water Right Application Number: IS 71455

### Proposed Final Order

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

### Application History

On 3/28/91, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: MCCOY CR TRIB LAKE CR

County: Grant

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4	4	4	4	4	4	2	1	1	1/4	4	4

To be maintained in:

MCCOY CREEK FROM AN UNNAMED TRIBUTARY (NWSE, SECTION 30, TOWNSHIP 15S, RANGE 34E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWNE, SECTION 21, TOWNSHIP 16S, RANGE 33.50E WM)

The Department mailed the applicant notice of its Initial Review on May 17, 1996. Public notice of the application was provide in the Department's weekly public notice on May 31, 1996. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Malheur River Basin, Oregon, and Their Water Requirements; September, 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 basin 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
1.45	2.58	5.93	16	9.68	3.55	0.49	0.24	0.21	0.71	1.06	1.35

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

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

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

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

The proposed use will not injure other water rights.

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

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

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

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

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

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

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

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

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

The Department therefore concludes that

- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, will include the following conditions: for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

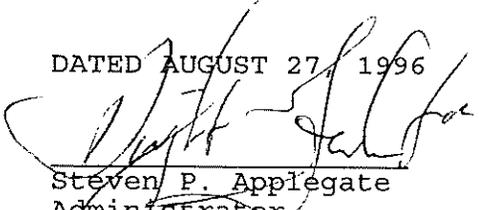
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.45	2.58	4	4	4	3.55	0.49	0.24	0.21	0.71	1.06	1.35

### Recommendation

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

DATED AUGUST 27, 1996

  
 Steven P. Applegate  
 Administrator  
 Water Rights and Adjudications Division

### Protest Rights

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

- Your name, address, and telephone number;
- A description of your interest in the proposed final order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in this proposed final order would impair or be detrimental to your interest;
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.
- Proof of service of the protest upon the applicant.

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

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

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

DRAFT  
STATE OF OREGON .

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

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

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

Source: MCCOY CR TRIB LAKE CR

County: Grant

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

To be maintained in:

MCCOY CREEK FROM AN UNNAMED TRIBUTARY (NWSE, SECTION 30, TOWNSHIP 15S, RANGE 34E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWNE, SECTION 21, TOWNSHIP 16S, RANGE 33.50E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 3/28/91.

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
1.45	2.58	4	4	4	3.55	0.49	0.24	0.21	0.71	1.06	1.35

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

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

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

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

IS 71455

Sec 71464  
71450  
71463

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PROOF OF SERVICE

I, John W Coombs, being first duly sworn,  
depose and say that on May 14, 1991, I did  
mail a copy of the attached protest against application  
number 71455 to the applicant by regular mail by placing  
a copy of the protest in an envelope addressed to:

Randy Fisher ODFW  
(applicant / applicant's attorney)

PO Box 59  
(address)

Portland, OR 97207  
(city) (State) (zip)

and depositing it in the United States Mail with sufficient  
postage prepaid thereon.

5/14/91  
(date)

John W Coombs  
(signature)

Subscribed and sworn to before me this 14 day of  
May, 1991.

F. Bunch  
Notary Public for Oregon  
My commission expires 8/23/92

F. Bunch  
F. BUNCH  
NOTARY PUBLIC OREGON  
My Commission Expires 8/23/92



B/ I (We) do not have any water rights. However, I/we believe that the proposed use would have a significant adverse effect on the public interest in the following way(s): \_\_\_\_\_

See Exhibit A

---

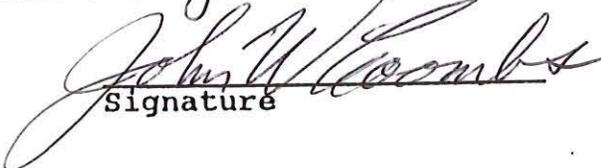
I/we have / have not attempted to resolve this matter through discussion with the applicant (circle one). I/we have proposed the following alternatives or conditions which, in my/our opinion, would resolve my/our concern(s): is that the ODFW withdraw their application, this infringes on all property owners Civil Rights.

I / We understand that if this protest is not resolved informally, it may be necessary to present testimony and evidence in an administrative contested case hearing before the Water Resources Department, in support of the allegations made in this protest. In the event this matter goes to hearing, I / we do / do not (circle one) intend to have attorney representation. The attorney's name and address is \_\_\_\_\_

---

Proof of service of a copy of this protest on the applicant is attached.

Dated and signed this 14 day of May, 19    .

  
Signature

\_\_\_\_\_  
Signature

Exhibit A

Dry Up Lands Up /

The ground now being irrigated helps keep Fire danger down. Helps keep fire from spreading from one side of forest to the other.

Irrigating on private property uplands create a reservoir effect for water use down stream for agriculture, this helps keep stream flows up for agriculture and fish in the dryer part of the season.

Fish /

Fish have plenty of water to run in, that is not the problem, dams in the river for hydro electric projects and reservoirs made so the fish cannot come and go, this is the problem, not water rights.

Proof of sensitivity  
of Redband Trout /

Dose the ODFW have any proof the Redband Trout? I have fished in the area all my life and have yet to catch one. The Grant County Court has not informed us that the Redband Trout is an Endngerd Species.

Cost/Taxpayers/

To monitor all the water rights, if this application is pased will cost the taxpaers plenty and fees for hunting and fishing to pay the bill.

If ODFW wants more water for fish they will have to find a way to finance more ponding to let water out a low times, not take water awy from agriculture.

Beauty/

The public would rather see green fields not burned grass in the mid season. Irrigation and fish have always coincided with agriculture in the area, I see no reasion wy it shouldnt continue.

History/

This area has been unspoiled by any agency thus far. To let ODFW come in and file water rihts would not help the area. Salmon run thesrivers and ceeks, lets not let goverment agentcys ruin more of our pivate land rights.

STATE OF OREGON  
**WATER RESOURCES DEPARTMENT**

RECEIPT # **7539**

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

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

RECEIVED FROM: Water Watch  
 BY: \_\_\_\_\_

APPLICATION	71455
PERMIT	
TRANSFER	

CASH:  CHECK: #  2412 OTHER: (IDENTIFY)

TOTAL REC'D \$ 50.

**0417 WRD MISC CASH ACCT**

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

**RECEIVED  
 OVER THE COUNTER**

**REDUCTION OF EXPENSE**

CASH ACCT.	\$
VOUCHER #	

**0427 WRD OPERATING ACCT**

PCA 77235

<b>MISCELLANEOUS</b>	
0407 COPY & TAPE FEES	\$
0410 RESEARCH FEES	\$
0408 MISC REVENUE: (IDENTIFY)	\$
TC165 DEPOSIT LIAB. (IDENTIFY)	\$

<b>WATER RIGHTS:</b>		
0201 SURFACE WATER	EXAM FEE \$	RECORD FEE \$
0203 GROUND WATER	EXAM FEE \$	RECORD FEE \$
0205 TRANSFER	EXAM FEE \$	RECORD FEE \$
<b>WELL CONSTRUCTION</b>		
0218 WELL DRILL CONSTRUCTOR	EXAM FEE \$	LICENSE FEE \$
LANDOWNER'S PERMIT		LICENSE FEE \$
0219		LICENSE FEE \$
0220		LICENSE FEE \$

0234 OTHER (IDENTIFY) Request for Standing \$50.

**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 (FWWRD)	LIC NUMBER	\$
0231 HYDRO LICENSE FEE (FWWRD)		\$
HRDRO APPLICATION		\$

RECEIPT # **7539**

DATED: 10-11-96 BY: D. Russell

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

# Water Watch

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

Delivered via messenger

October 11, 1996

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

**RE: Request for Standing, Instream Water Right Application 71455, McCoy Creek,  
Malheur River Basin**

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 for application 71455.

**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 this instream water right.

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OCT 11 1996  
WATER RESOURCES DEPT.  
SALEM, OREGON

*KS*

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OCT 11 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

c. **How WaterWatch and Oregon Trout would be harmed if the Proposed Final Order is 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 Malheur 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 PFO is modified to either deny the application, decrease the flows proposed, or otherwise alter the right 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 state sensitive redband trout and bull trout (warranted but precluded under the federal Endangered Species Act). 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 PFO is modified to either decrease proposed flows and/or deny the applications, WaterWatch's interests will be harmed because flows vital to the survival of aquatic species, including state sensitive redband trout and bull trout (warranted but precluded under the federal ESA), will be compromised.

ODFW has requested these flows to provide for the minimum amount necessary for the survival of state sensitive fish redband trout and bull trout. WaterWatch supports the flows requested by ODFW. If the Department modifies the PFO to either deny the applications or propose flows lower than those requested by ODFW, the survival of these species will be jeopardized.

This is not only a violation of the public interest but could result in a violation of the state Endangered Species Acts for listed 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.

Moreover, if the Bull Trout were upgraded to a listed fish, the federal ESA would come into play. 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.

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

2. If the PFO is 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 the 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 PFO contains 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, this preference has a specific statutory application.<sup>1</sup> 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.

---

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

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.<sup>2</sup> 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 group 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.

Furthermore, this open-ended exception cannot be attached given the mandates of the state Scenic WaterWay Act and the Federal Wild and Scenic Rivers Act. Both the state and federal scenic designations carry with them reserved rights that must be protected against impairment or substantial interference. *See Section I.c. above.* No diminishment of these flows are allowed from surface rights unless the new uses meet a very narrow exception under the state Scenic Waterway Act.<sup>3</sup> The federal Wild and Scenic Rivers Act mandates even greater

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<sup>2</sup> 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.

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

protections by defining impairment as any reduction in streamflows beyond the flows needed to preserve the "free-flowing condition" of designated rivers for their "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 USC § 1271.

The open-ended exception for human consumption and livestock proposed by the Department would result in impairment of the state and federal scenic designations and the reserved rights that flow from these designations and therefore is contrary to the mandates of these acts and cannot be attached to this permit. The state Scenic Waterway Act does not allow for diversions of water in or above the designated reach unless there is a finding of necessity and the use meets the extremely limited exceptions in the Act. The state Scenic Waterway Act allows for exceptions for human consumption and livestock only "upon a finding of necessity" for and only if a number of findings are made by the Department, including but not limited to, findings that the applicant cannot reasonably obtain water from any other source; that, if for human consumption, denial of the water right would result in loss of reasonable expectations for use of property; and, if for livestock use, the applicant has excluded livestock from the stream and its adjacent riparian zone. ORS 390.835(5). Moreover, exceptions cannot be in excess of a combined cumulative total of one percent of the average daily flow or one cubic foot per second, except in rare instances. ORS 390.835(7). Thus, if the Department were to allow an exception for human consumption and livestock use, then this exception must abide by the mandates of the Scenic Waterway Act.<sup>4</sup>

**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.**

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

---

wildlife uses.

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

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

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.

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.

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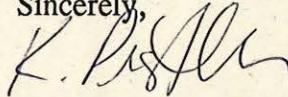
OCT 11 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

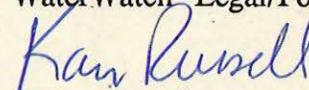
Conclusion

The proposed instream water right 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.

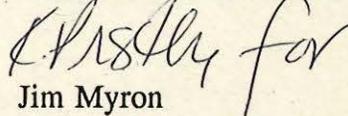
Sincerely,



Kimberley Priestley  
WaterWatch--Legal/Policy Analyst



Karen Russell  
WaterWatch--Assistant Director



Jim Myron  
Oregon Trout--Conservation Director

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OCT 11 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

INTEROFFICE MEMORANDUM  
Water Rights Section

TO: ~~DICK BANNEY~~

FROM: Dwight French, x268 *DF*

DATE: March 26, 1997

RE: Water Availability for ISWR applications/files

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

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

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

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

cc: Mike Mattick

*All Protested ISWR Files*

Basin                      App Num

2  
  
OK 71556    A  
  
Total for Basin 2 :    1

OREGON DEPARTMENT OF FISH & WILDLIFE

8  
9  
18  
74

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

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

2  
1  
3  
9  
19  
2  
12  
12

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

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

6  
  
69949       A  
69949       S  
69951       S  
69951       A  
69958       S  
69958       A  
69958       S  
69959       S

*Checked out to Dwight*

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

Basin                      App Num

6

	69959	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69959	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69961	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	S	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
	69963	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
OK	70251	A	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70589	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70640	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70641	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70642	S	OREGON DEPARTMENT OF FISH & WILDLIFE
OK	70645	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70645	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70646	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	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
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	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		
<b>9</b>			
	72168	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72169	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72169	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	72170	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72173	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72181	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72186	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72187	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72188	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72191	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72194	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>9 :</b>	<b>16</b>	
<b>10</b>			
	71450	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	71455	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>10 :</b>	<b>3</b>	
<b>11</b>			
	<i>Dwight Done Right!</i> 70020	A	OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS
<b>Total for Basin</b>	<b>11 :</b>	<b>1</b>	
<b>12</b>			
	71467	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71468	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71472	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>12 :</b>	<b>3</b>	
<b>13</b>			
	70486	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70487	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70656	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70657	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70658	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70659	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70662	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70663	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70664	A	OREGON DEPARTMENT OF FISH & WILDLIFE
<b>Total for Basin</b>	<b>13 :</b>	<b>9</b>	

Basin                      App Num

14

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

Instream Applications with Protests

4/2/97

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

**Instream Applications with Protests**

4/2/97

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

**Total for Basin 17 : 15**

173

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 71455

WATERMASTER # LARRY POWERS

REGIONAL MANAGER: KENT SEARLES

ODF&W - County: Grant

DEQ

PARKS

OTHER STATE AGENCY IF NECESSARY:

DIVISION 33 LIST: \_\_\_\_\_ COLUMBIA RIVER INTERTRIBAL FISH COMMISSION; U.S. FISH & WILDLIFE;  
(CHECK ONLY IF APPLICABLE) NORTHWEST POWER PLANNING COUNCIL & NATIONAL MARINE FISHERIES

POWER BUILDER UPDATER;

WATER FOR LIFE (TODD HEIDGERKEN)

OTHER ADDRESSES OF PEOPLE WHO PAID THE \$10 FEE:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PEOPLE WITH OBJECTIONS, COMMENTS OR REQUESTED COPY W/O \$10 (SEND THE \$10 LETTER):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CASEWORKER : CINDY SMITH

# Water Watch

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

June 17, 1996

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

**RECEIVED**

JUN 18 1996

**RE: Comments, Malheur River Basin Instream Water Rights  
70303, 70305-09, 71450, 71452, 71455, 71462-64**

WATER RESOURCES DEPT.  
SALEM, OREGON

Dear Water Rights Section:

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

#### **a. Exceptions for Human Consumption and Livestock Uses**

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

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

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

ORS 536.310(12)(emphasis added).

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

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

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

Moreover, this proposed conditions is contrary to the public interest in protecting the resource. The Commission's statewide policies recognize the importance of maintaining streamflows and place high priority on protecting streamflows. OAR 690-410-030(1). This policy directs the state to take action to restore flows in critical areas such as this system. *Id.*

---

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

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

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WATER RESOURCES DEPT.  
SALEM OREGON

The public uses of the Malheur River system has been impaired. Adoption of these instream water rights without conditions is just one small step towards restoring this system.

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

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

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

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

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

The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. Given that ODFW's flow requests are to provide for the various life cycles of fish which are already on the brink of extinction, periodic flows are necessary for fulfillment of the purpose of this instream water right. There should be no reduction in the requested flows. In sum, the agency has the information to find that the higher flows are significant. The instream water rights should be granted at the amounts requested by ODFW.

**c. Measurement and reporting**

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

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JUN 18 1996

lower ends of the stream reach.

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

### Conclusion

The proposed instream water rights will protect flows needed for fish life in and recreational use of river. These fish populations have statewide and even national significance and streamflows are essential for maintenance of these fish. Adoption of this and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers.

Sincerely,  
  
Kimberley Priestley  
Legal/Policy Analyst

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JUN 18 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

May 17, 1996

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

WATER  
RESOURCES  
DEPARTMENT

Reference: Instream water rights in the Malheur Basin,  
Files 70303, 70305-70309, 71450, 71452, 71455,  
71462-71464

Dear Oregon Department of Fish and Wildlife:

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

The referenced applications are complete and not defective.

The proposed use is not prohibited by law;

The instream use is allowed under OAR 510, the Malheur Basin Program;

1. Application 70303

Priority date: 4/19/90

N FK MALHEUR R TRIB MALHEUR R  
BAKER COUNTY

NORTH FORK MALHEUR RIVER AT FOPIAN BRIDGE (FS RD 16) CROSSING,  
(SESE, SECTION 15, T15S, R35.5E); TO MOUTH OF CRANE CREEK  
(NESE, SECTION 23, T16S, R35E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
35	35	35	35	35	35	30	30	30	30/35	35	35

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15.5	19.7	38.5	81.2	88	50.3	19.7	14.7	15.7	16.5	17.5	16.7

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15.5	19.7	35	35	35	35	19.7	14.7	15.7	16.5	17.5	16.7



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

**2. Application 70305****Priority date: 4/19/90**LITTLE MALHEUR R TRIB N FK MALHEUR R  
BAKER COUNTYLITTLE MALHEUR RIVER FROM HEADWATERS (SECTION 30, T14S, R36E);  
TO USFS RD 16 CROSSING (NESE, SECTION 25, T15S, R36E)

## a. The amount of water requested for instream use:

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

## b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10.1	12.1	21.6	44.8	53.9	32.7	13.2	9.95	10.3	11	11.8	30.9

## c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	12.1	21.6	25	25	25	13.2	9.95	10	10	10	10

**3. Application 70306****Priority date: 4/19/90**CRANE CR TRIB N FK MALHEUR R  
GRANT COUNTYCRANE CREEK AT MOUTH OF LITTLE CRANE CREEK AT RIVER MILE 1.1  
(SENE, SECTION 27, T16S, R36E); TO MOUTH OF CRANE CREEK AT  
RIVER MILE 0 (NESE, SECTION 23, T16S, R35E)

## a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
25	25	25	25	25	20/15	15	15	15	15/25	25	25

## b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
6.4	10.5	23.8	44.3	33.1	16.6	6.64	4.85	5.37	5.89	6.31	6.50

## c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
6.4	10.5	23.8	25	25	16.6/15	6.64	4.85	5.37	5.89	6.31	6.50

## 4. Application 70307

Priority date: 4/19/90

LITTLE CRANE CR TRIB CRANE CR  
GRANT COUNTYLITTLE CRANE CREEK FROM HEADWATERS AT RIVER MILE 8.0 (SECTIONS 32  
AND 33, T15S, R15.5E); TO MOUTH AT RIVER MILE 0.0 (SENE,  
SECTION 27, T16S, R35E)

## a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	10	10	10	10	8/4	4	3	3	3/10	10	10

## b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.17	3.46	7.98	16	12.7	5.97	2.29	1.64	1.78	1.88	2.10	2.24

## c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.17	3.46	7.98	10	10	5.97/4	2.29	1.64	1.78	1.88	2.10	2.24

## 5. Application 70308

Priority date: 4/19/90

ELK CR TRIB N FK MALHEUR R  
BAKER COUNTYELK CREEK (INCL BOTH NORTH AND SOUTH FORKS) FM HEADWATERS  
(SECTIONS 14 AND 23, T15S, R35E); TO MOUTH AT RIVER MILE 0  
(SWSW, SECTION 23, T15S, R35.5E)

## a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8	8	8	8	8	6	5	5	5/8	8	8

## b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.87	2.66	5.84	13	12.5	5.78	2.14	1.49	1.56	1.6	1.85	1.99

## c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.87	2.66	5.84	8	8	5.78	2.14	1.49	1.56	1.6	1.85	1.99

6. Application 70309

Priority date: 4/19/90

SWAMP CR TRIB N FK MALHEUR R  
BAKER COUNTY

SWAMP CREEK FROM HEADWATERS AT RIVER MILE 5.0 (SECTION 2, T15S, R35E); TO MOUTH OF SWAMP CREEK AT RIVER MILE 0.0 (NWNE, SECTION 10, T15S, R35.5E)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8	8	10	10	3	3	3	3	5	5	8

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.53	1.91	3.77	9.09	11.2	5.19	1.86	1.27	1.26	1.24	1.55	1.68

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.53	1.91	3.77	9.09	10	3	1.86	1.27	1.26	1.24	1.55	1.68

7. Application 71450

Priority date: 5/28/91

BOSONBERG CR TRIB LAKE CR  
GRANT COUNTY

BOSONBERG CREEK FROM AN UNNAMED TRIBUTARY (NESW, SECTION 13, TOWNSHIP 16S, RANGE 33.5E WM); TO THE MOUTH AT RIVER MILE 0.0 (SESW, SECTION 35, TOWNSHIP 16S, RANGE 33.5E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.22	2.53	6.44	15.8	7.39	2.62	0.38	0.18	0.17	0.6	0.84	1.1

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.22	2.53	5	5	5	2.62	0.38	0.18	0.17	0.6	0.84	1.1

8. Application 71452

Priority date: 5/28/91

CALAMITY CR TRIB WOLF CR  
HARNEY COUNTY

CALAMITY CREEK FROM BEAVERDAM CREEK (SENW, SECTION 30, TOWNSHIP 18S, RANGE 33E WM); TO THE MOUTH AT RIVER MILE 0.0 (NWSW, SECTION 29, TOWNSHIP 18S, RANGE 33.50E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	5	5	5	5	5	3	2/1	1	1	1	1

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
9.34	12.9	20.5	45.4	39.4	20.8	3.38	1.82	1.53	5.55	8.03	8.6

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	5	5	5	5	5	3	1.82/1	1	1	1	1

9. Application 71455

Priority date: 5/28/91

MCCOY CR TRIB LAKE CR  
GRANT COUNTY

MCCOY CREEK FROM AN UNNAMED TRIBUTARY (NWSE, SECTION 30, TOWNSHIP 15S, RANGE 34E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWNE, SECTION 21, TOWNSHIP 16S, RANGE 33.50E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4	4	4	4	4	4	2	1	1	1/4	4	4

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.45	2.58	5.93	16	9.68	3.55	0.49	0.24	0.21	0.71	1.06	1.35

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.45	2.58	4	4	4	3.55	0.49	0.24	0.21	0.71	1.06	1.35

10. Application 71462

Priority date: 5/28/91

S WILLOW CR TRIB WILLOW CR  
MALEHEUR COUNTY

SOUTH FORK WILLOW CREEK FROM DUTCH JOHN CREEK AT RIVER MILE 12.6 (NWSE, SECTION 32, TOWNSHIP 15S, RANGE 38E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWNE, SECTION 21, TOWNSHIP 14S, RANGE 39E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3	6	6	6	6	5	4	3	3	3	3	3

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.09	13.9	20.2	25.1	31.7	20.6	6.21	2.44	1.54	1.45	2.34	3.06

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3	6	6	6	6	5	4	2.44	1.54	1.45	2.34	3

11. Application 71463

Priority date: 5/28/91

SUMMIT CR TRIB MALHEUR R  
GRANT COUNTY

SUMMIT CREEK FROM SUMMIT PRAIRIE AT RIVER MILE 11.0 (NWNW, SECTION 2, TOWNSHIP 16S, RANGE 34E WM); TO THE MOUTH AT RIVER MILE 0.0 (NE1/4, SECTION 13, TOWNSHIP 17S, RANGE 34E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
15	15	15	15	15	15/12	6	6	6	6/15	15	15

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.64	10.7	20.2	55.3	48.1	21.5	3.05	1.55	1.33	4.37	6.42	7.44

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
7.64	10.7	15	15	15	15/12	3.05	1.55	1.33	4.37	6.42	7.44

12. Application 71464

Priority date: 5/28/91

SUMMIT CR TRIB MALHEUR R  
GRANT COUNTYSUMMIT CREEK FROM RIVER MILE 14.0 (NESW, SECTION 22, TOWNSHIP  
15S, RANGE 35E WM); TO SUMMIT PRAIRIE AT RIVER MILE 11.0 (NWNW,  
SECTION 2, TOWNSHIP 16S, RANGE 34E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
8	8	8	8	8	6	4	3	3	3/8	8	8

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.57	5.46	9.27	28.5	31.4	14.4	2	1.01	0.84	2.68	4.04	4.59

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.57	5.46	8	8	8	6	2	1.01	0.84	2.68	4.04	4.59

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

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

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

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

Withdrawal:

If you choose not to proceed, you may withdraw your application. To accomplish this you must notify the Department in writing by **May 31, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

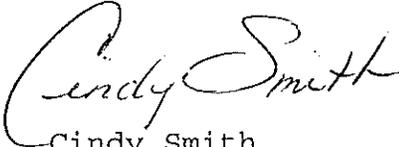
To Proceed With Your Application:

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

If you have any questions:

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

Sincerely,



Cindy Smith  
Initial Review Team

cc: Regional Manager, Watermaster, Water Availability  
Section  
enclosures: Stop Processing Form

71455

Oregon

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FEB 17 1994

WATER RESOURCES DEP.  
SALEM, 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.

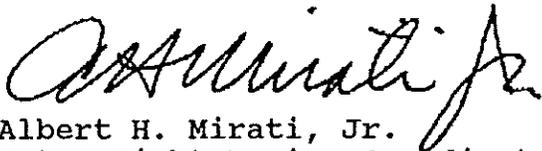
#### Application # 71280

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 cursive script, appearing to read "A. Mirati, Jr.", written in dark ink.

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

RECEIVED

MAY 20 1991

WATER RESOURCES DEPT.  
SALEM, OREGON

P R O O F   O F   S E R V I C E

I, Alan S. Jacobs, being first duly sworn,  
depose and say that on May 16, 1991, I did  
mail a copy of the attached protest against application  
number 71453 to the applicant by regular mail by placing  
a copy of the protest in an envelope addressed to:

Oregon Dept. of Fish and Wildlife  
(applicant / applicant's attorney)

P.O. Box 59  
(address)

Portland, OR 97207  
(city) (State) (zip)

and depositing it in the United States Mail with sufficient  
postage prepaid thereon.

5-16-91  
(date)

Alan S. Jacobs  
(signature)

Subscribed and sworn to before me this 16<sup>th</sup> day of  
May, 1991.

F. BUNCH  
Notary Public for Oregon  
My commission expires 8/23/92

F. Bunch  
F. BUNCH  
NOTARY PUBLIC OREGON  
My Commission Expires 8/23/92

IWR Application # 71455 Certificate # \_\_\_\_\_

STATE OF OREGON

RECEIVED

WATER RESOURCES DEPARTMENT

MAR 28 1991

Application for Instream Water Right  
by Oregon Department of Fish and Wildlife

WATER RESOURCES DEPT.  
SALEM, OREGON

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 McCoy Creek, a tributary of Lake Creek (Malheur River).
2. The public use this instream water right is based on is providing required stream flows for redband and brook 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
4	4	4	4	4	4	2	1	1	1/4	4	4

4. The reach of the stream identified for an instream water right is from (upstream end) an unnamed tributary within the NW quarter of the SE quarter of Section 30, Township 15S, Range 34E W.M., in Grant County...

Downstream to the mouth, river mile 0, within the SW quarter of the NE quarter of Section 21, Township 16S, Range 33½E W.M., in Grant 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: March 7, 1991
ODFW (Fish, Wldlf, and Habitat)	Date: March 7, 1991
Parks and Recreation Division	Date: March 7, 1991

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

Establish a gaging structure at or near the lower limit of

IWR Application # 71454 Certificate # \_\_\_\_\_

the reach.

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

Local ODFW personnel will assist the watermaster in establishing 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: Redband trout is listed as "sensitive" (candidate species for listing under the Threatened and Endangered Species Act if population declines from present level) by ODFW. Population maintenance and recovery depend on instream habitat the requested flows will provide.

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: 3/26/91

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director  
Habitat Conservation Div.

File: MCCOY1.APP

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MAR 28 1991

WATER RESOURCES DE  
SALEM, OREGON

IWR Application # 71454 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 28th day of March, 1991, at 8:00 o'clock A M.

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

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MAR 28 1991

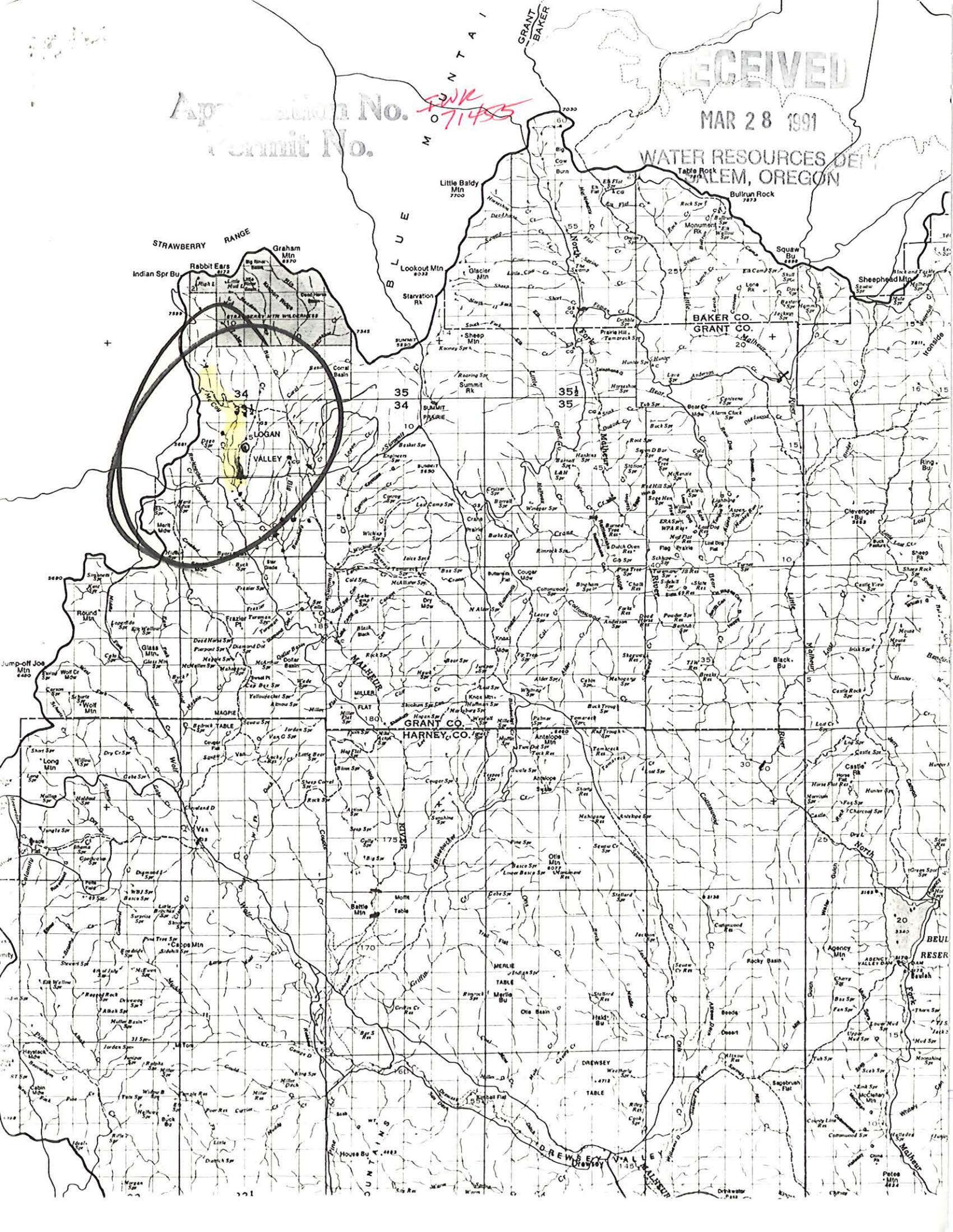
WATER RESOURCES DEPT.  
SALEM, OREGON

Application No. **71455**  
Permit No.

**71455**

**MAR 28 1991**

**WATER RESOURCES DEPARTMENT  
TALAM, OREGON**



**STRAWBERRY RANGE**

Graham Mtn 4970  
Rabbit Ears 4972  
Indian Spr Bu

34  
35

LOGAN VALLEY

Little Baldy Mtn 7700  
Lookout Mtn 8032  
Starvation Rk

**BAKER CO.  
GRANT CO.**

**MILLER FLAT**

**GRANT CO.  
HARNEY CO.**

**BEUL RESER**

**DREWSEY VALLEY**

APPLICATION PROCESSING OUTLINE

Basin: \_\_\_\_\_  
Sub-basin: \_\_\_\_\_  
Fees paid: Examination fee: \_\_\_\_\_  
Recording fees: \_\_\_\_\_  
Total: \_\_\_\_\_

*JWR*  
Application No. 71455  
Permit No. \_\_\_\_\_

RATE AND DUTY \_\_\_\_\_ for irrigation

1. Check for minimum information (OAR 690-11-020)

yes no  
Name and mailing address of the applicant.  
Source of the water.  
Quantity of water to be appropriated.  
Location of point of diversion to 1/4 1/4 Section.  
Nature and place of use.  
Name and mailing address of all legal owners of the properties involved.  
Signature of the applicant  
Examination fees.

If minimum information not supplied, excepting legal owner information, then return to applicant with letter explaining deficiencies.

yes no  
Water Resources Commission classification limits or restrictions -- If yes, note:  
-----  
State Engineer's withdrawals -- If yes, note:  
-----  
Legislative withdrawals -- If yes, note:  
-----  
If policy statement is unclear check with Resources Management Division.  
Scenic Waterway: \_\_\_\_\_  
on \_\_\_\_\_ up-stream \_\_\_\_\_ w/in 1/4 mile  
Notify Parks and Recreation Department  
Out-of-basin diversion  
Need to route to Geology Section due to:  
well within one mile of a stream  
well within restricted surface water area  
wells with request for greater than 5 cfs  
well is for heating &/or cooling  
well constructed by land owner  
well is artesian  
artificial ground water recharge project  
ground water area under study  
Within Irrigation District: \_\_\_\_\_  
Notify \_\_\_\_\_ Need excerpt from District  
Legal description of property  
Ownership statement  
Other parties to Notify: \_\_\_\_\_  
Water Resources Commission review if:  
Request for greater than 5 cfs  
Dam height greater than 10 feet  
Storage of more than 9.2 acre-feet  
Out-of-basin diversion  
within or above a scenic waterway  
conditional uses under basin programs  
requests for larger rate or duty than allowed  
ground water recharge project  
other substantial public interest issues  
requests for review by an agency or person  
Watermaster consent form sent with copy of *draft permit*  
~~application and map~~  
Watermaster comments received \_\_\_\_\_  
Hydrographic section comments requested \_\_\_\_\_  
Hydrographic section comments received \_\_\_\_\_  
O.D.F.W. sent copy of application ~~and map~~ (except groundwater) requesting comment \_\_\_\_\_  
O.D.F.W. comments received \_\_\_\_\_  
Report from D.E.G. received \_\_\_\_\_  
 Publish application information in weekly public notice.  
Notify other owners of development  
PROTESTED  
filed \_\_\_\_\_  
resolved \_\_\_\_\_