

SEP 11 1990

FWR 70640
Application No.

Permit No.

Name Randy Fisher, Dept. of Fish
and Wildlife, PO Box 59,

Address Portland, OR 97207

Assign

Address

Beginning construction

Completion of construction

Extended to

Complete application of water

Extended to

Oregon Water Resources Department

Water Rights/Adjudication Section

Water Right Application Number: IS 70640

Proposed Final Order

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

Application History

On 9/11/90, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: JOHN DAY R TRIB COLUMBIA R

County: Grant

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	D	E	C
34	34	40	40	40	34	34	34/40	40	40	34	34		

To be maintained in:

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

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

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the John Day Basin, Oregon, and Their Water Requirements; September, 1979.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game

Commission Report, March 1972.

- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

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

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

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

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

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

Findings of Fact

The basin Basin Program allows the proposed use.

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

The source of water is within or above a State Scenic Waterway.

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

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

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

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.

Additional use, such as a multi-purpose storage project, may be allowed if public interest in the use is high and the use is conditioned to protect instream values.

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.

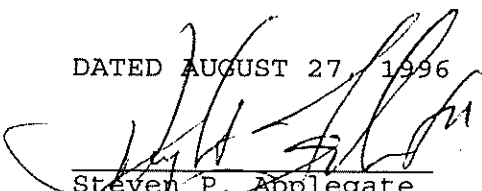
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

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

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: JOHN DAY R TRIB COLUMBIA R

County: Grant

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

To be maintained in:

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

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 9/11/90.

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
9.92	8.95	10.5	19.4	36.2	28.4	16.6	9.2	9.57	11.5	11.9	10.3

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 70640

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 70640

WATERMASTER # KELLY RISE

REGIONAL MANAGER: KENT SEARLES

ODF&W - County: Grant

DEQ

PARKS

OTHER STATE AGENCY IF NECESSARY:

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

POWER BUILDER UPDATER;

WATER FOR LIFE (TODD HEIDGERKEN)

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

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

CASEWORKER : CINDY SMITH

INTEROFFICE MEMORANDUM
Water Rights Section

~~TOP SECRET REVIEW~~

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

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 2 : 1

4
OK 71793 W

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 71798 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72076 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72077 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72078 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72079 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72080 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72081 W

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 4 : 8

5
OK 70353 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70354 A

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 70357 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 A

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 70605 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70606 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70606 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70612 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70695 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70695 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 73199 A

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 5 : 13

6
69949 A

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69949 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69951 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69951 A

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69958 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69958 A

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69958 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

69959 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

Checked out to Dwight

8
9
18
74
2
1
3
9
19
2
12
12

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
	70653	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70654	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70654	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70655	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70655	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 6 : 38

9

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

Instream Applications with Protests

4/2/97

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

Instream Applications with Protests

4/2/97

Basin	App Num
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14

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

Instream Applications with Protests

4/2/97

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

Instream Applications with Protests
4/2/97

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

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

Total for Basin 17 : 15
173

STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # 7352

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

INVOICE # _____

RECEIVED FROM: Ronald L. Yockim
BY: _____

APPLICATION	
PERMIT	
TRANSFER	

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

TOTAL REC'D \$ 3,800.7

0417 WRD MISC CASH ACCT

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

REDUCTION OF EXPENSE

CASH ACCT.	\$
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0427 WRD OPERATING ACCT

PCA AND OBJECT CLASS	VOUCHER #
MISCELLANEOUS <u>IS 69949</u>	<u>70640-42 71467-68</u>
0407 COPY & TAPE FEES <u>69951</u>	<u>70645-46 71472</u>
0410 RESEARCH FEES <u>69960</u>	<u>70651-58</u>
0408 MISC REVENUE: (IDENTIFY) <u>69963</u>	<u>71450</u>
TC165 DEPOSIT LIAB. (IDENTIFY)	<u>71455</u>

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

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

0437 WELL CONST. START FEE

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

0539 LOTTERY PROCEEDS

1302 LOTTERY PROCEEDS	\$
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0467 HYDRO ACTIVITY

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

RECEIPT # 7352

DATED: 10-9-96

BY: R. Richardson

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON
WATER RIGHTS DIVISION

In the Matter of Instream Water Right)
Application IS 70640, John Day River)
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 70640, John Day River, in Grant County.

I.

INTRODUCTION

The protestant's address and telephone number are:

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

Protestant's attorney in this matter is:

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

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 John

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

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

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

II.

ISSUES

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



following particulars:

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

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

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

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

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

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

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OCT - 9 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

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

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

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

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

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OCT - 9 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

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

(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

(ORS 537.332(2)).

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

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

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

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

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

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

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

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

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

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

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

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

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

F. The Proposed Final Order does not leave any water during the months of January, February, March, April, May, 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 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, March, April, May, 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.

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OCT - 9 1996
WATER RESOURCES DEPT.
SALEM, OREGON

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

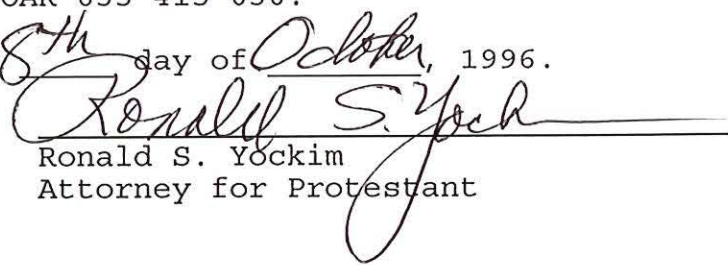
- a. providing that for the purposes of water distribution, this instream right shall not have priority over road construction, reconstruction or maintenance, human consumption, domestic expanded, livestock, and the uses described in ORS 537.040, ORS 537.143, and ORS 537.022;
- b. limiting the amount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

III.
LEGAL AUTHORITIES

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

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

Respectfully submitted this 8th day of October, 1996.


Ronald S. Yockim
Attorney for Protestant

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OCT - 9 1996
WATER RESOURCES DEPT.
SALEM, OREGON

CERTIFICATE OF SERVICE

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

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

Barbara Giffin _____

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OCT - 9 1996

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STATE OF OREGON
WATER RESOURCES DEPARTMENT

RECEIPT # **7535**

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

INVOICE # _____

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

CASH: CHECK: # 2412 OTHER: (IDENTIFY) _____
 TOTAL REC'D \$ 750.

0417 WRD MISC CASH ACCT 70653, 70651
 ADJUDICATIONS 70641, 69960 \$ _____
 PUBLICATIONS / MAPS 70647 \$ _____
 OTHER: (IDENTIFY) _____ \$ _____
 OTHER: (IDENTIFY) _____ \$ _____

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

0427 WRD OPERATING ACCT 70645, 70646, 70640,
70642, 69949, 69951
 MISCELLANEOUS IS 70654 \$ _____
 0407 COPY & TAPE FEES 70652, 69963, \$ _____
 0410 RESEARCH FEES 70655 \$ _____
 0408 MISC REVENUE: (IDENTIFY) _____ \$ _____
 TC165 DEPOSIT LIAB. (IDENTIFY) _____ \$ _____

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

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

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

RECEIVED OVER THE COUNTER

0539 LOTTERY PROCEEDS
 1302 LOTTERY PROCEEDS \$ _____

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

RECEIPT # **7535**

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

Water Watch

RIVERS NEED WATER

Delivered via messenger

October 11, 1996

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

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

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

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Dear Water Rights Section:

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

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

a. **Name, address, telephone number of requester**

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

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

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OCT 11 1996
WATER RESOURCES DEPT.
SALEM, OREGON

b. **Statement of support of the Proposed Final Order**

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

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

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

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

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

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

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

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

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

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

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

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

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

OCT 11 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

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

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

ORS 536.310(12)(emphasis added).

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

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

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

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

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

OCT 11 1996

WATCH RESOURCES DEPT.
SALEM, OREGON

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

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

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

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

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

mandates of the Scenic Waterway Act.⁴

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

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

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

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

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

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

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

OCT 11 1996
6
WATER RESOURCES DEPT.
SALEM, OREGON

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

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

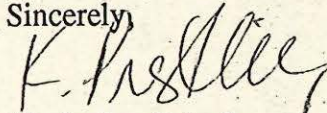
The Department has proposed a condition of use mandating measurement at the lower end of the stream reach to protect necessary flows throughout the reach. To ensure that flows are being protected throughout the reach, measurement must take place at both the upper and lower ends of the stream reach.

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

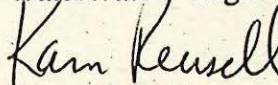
Conclusion

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

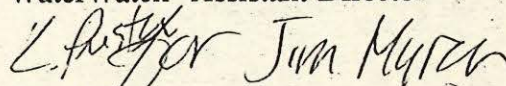
Sincerely,



Kimberley Priestley
WaterWatch--Legal/Policy Analyst



Karen Russell
WaterWatch--Assistant Director



Jim Myron
Oregon Trout--Conservation Director

RECEIVED
OCT 11 1996
RESOURCES DEPT.
SALEM, OREGON

April 10, 1996

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

WATER
RESOURCES
DEPARTMENT

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

Dear Oregon Department of Fish and Wildlife:

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

The referenced applications are complete and not defective.

The proposed use is not prohibited by law;

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

1. Application 69949 Priority date: 6/12/89

REYNOLDS CR TRIB JOHN DAY R
GRANT COUNTY

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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



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

4. Application 69959

Priority date: 6/12/89

BULL RUN CR TRIB GRANITE CR
GRANT COUNTY

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

5. Application 69961

Priority date: 6/12/89

GRANITE BOULDER CR TRIB M FK JOHN DAY R
GRANT COUNTY

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

8. Application 70590

Priority date: 8/30/90

W FK MILL CR TRIB MILL CR
CROOK COUNTY

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

9. Application 70640

Priority date: 9/11/90

JOHN DAY R TRIB COLUMBIA R
GRANT COUNTY

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

12. Application 70643

Priority date: 9/11/90

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

13. Application 70644

Priority date: 9/11/90

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

16. Application 70647

Priority date: 9/11/90

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

17. Application 70649

Priority date: 9/11/90

CRANE CR TRIB N FK JOHN DAY R
GRANT COUNTYCRANE CREEK FROM UNNAMED TRIBUTARY (SWNW, SECTION 18, T8S, R36E);
TO THE MOUTH RIVER MILE 0.0 (NENE, SECTION 10, T8S, R35E)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

20. Application 70652

Priority date: 9/11/90

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

21. Application 70653

Priority date: 9/11/90

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

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

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

c. Allowable water use:

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

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

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

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

Withdrawal:

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

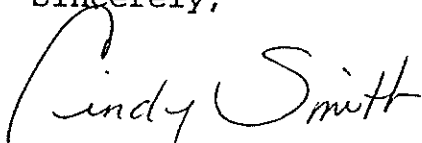
To Proceed With Your Application:

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

If you have any questions:

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

Sincerely,



Cindy Smith
Initial Review Team

Regional Manager, Watermaster, Water Availability
Section

enclosures: Stop Processing Form



RECEIVED

JUL 31 1991

WATER RESOURCES DEPT.
SALEM, OREGON

July 26, 1991

Steve Applegate
Water Resources Department
3850 Portland Road NE
Salem, Oregon 97310

Re: Water Right Application 70640, S. Horning, Two
Unamended Reservoirs and Store Waters of Swale
Runoff, tributaries of the Yamhill River.

Dear Steve:

The Oregon Department of Fish and Wildlife has
completed its review of this proposed water right
and recommends the following permit conditions:

The permittee shall not install, operate
or maintain any dam or artificial obstruction
in the channel of the Yamhill River.

The permittee shall appropriate water from the
Willamette River only after Instream
Water Rights flows for the Yamhill River
are satisfied.

The permittee shall appropriate water from these
unnamed tributaries of the Yamhill River from
November 1, to May 31, each year only.

The Yamhill River is a Water Quality Limited Stream.
The river contains coho salmon, steelhead and
cutthroat trout. Conditioning these permit to
require appropriation during the high flow months
only is important to avoid adverse impacts to these
species. from this proposed appropriation

If the applicant cannot agree to these conditions,
ODFW recommends referral of this application to the
Water Resources Commission for determination of the
public interest in accordance with OAR 690-11-080.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Gregory P. Robart".

Gregory P. Robart
Staff Biologist
Aquatic Habitats Program
Habitat Conservation Division



IWR Application # 70640 Certificate # _____

STATE OF OREGON

WATER RESOURCES DEPARTMENT

Application for Instream Water Right
by a State Agency

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 John Day River, a tributary of Columbia River.
2. The public uses this instream water right is based upon include providing required stream flows for bull and west slope cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.
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
34	34	40	40	40	34	34	34/ 40	40	40	34	34

4. The reach of the stream identified for an instream water right is from (upstream end) Snow Creek, river mile 283, within the NE quarter of the NE quarter of Section 20, Township 15S, Range 35E W.M., in Grant County...

Downstream to Rail Creek, river mile 275.8, within the NW quarter of the NE quarter of Section 24, Township 14S, Range 34E 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: August 27, 1990
ODFW (Fish, Wldlf, and Habitat)	Date: August 27, 1990
Parks and Recreation Division	Date: August 27, 1990

7. If possible, include recommendations for measuring locations

IWR Application # 70640 Certificate # _____

or methods:

Establish a gaging structure immediately below Rail Creek.

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 and implementing a monitoring 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: Bull trout and west slope cutthroat trout are listed as a "sensitive" species (a candidate for listing under the Threatened and Endangered Species Act if population declines from present level) by ODFW. West slope cutthroat are found only in the John Day River basin.

THIS APPLICATION MUST BE ACCOMPANIED BY A BASIN MAP WITH THE APPLICABLE LAKE OR STREAM REACH IDENTIFIED.

An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 9/5/90

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director
Habitat Conservation Div.

File: JOHNDAY1.APP

IWR Application # 70640 Certificate # _____

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

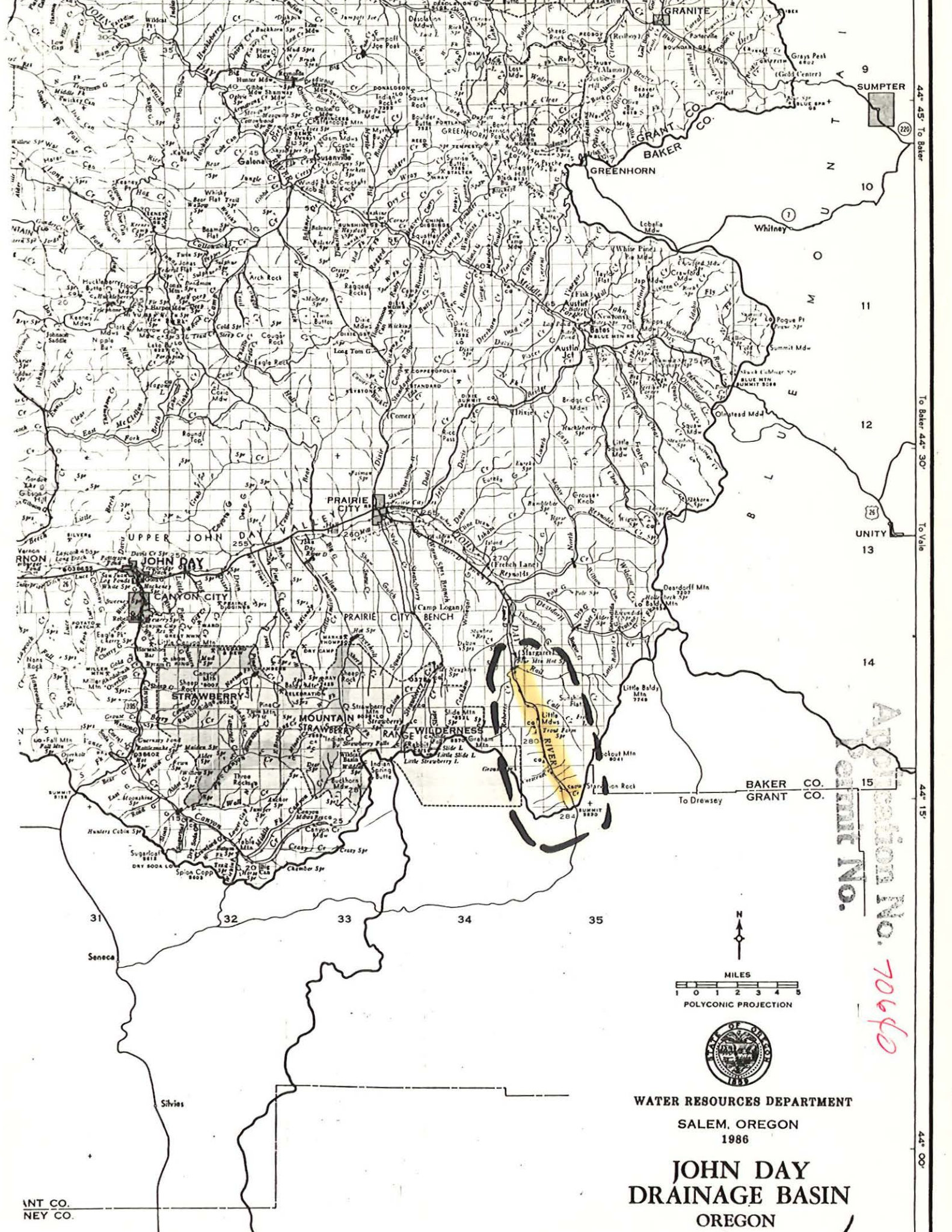
In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

_____, 19____.

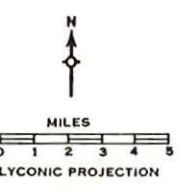
Date: _____, 19____.

This document was first received at the Water Resources Department in Salem, Oregon, on the 17th day of September, 1990, at 3:00 o'clock P. M.

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



Application No. 70640
 Permit No.



WATER RESOURCES DEPARTMENT
 SALEM, OREGON
 1986
**JOHN DAY
 DRAINAGE BASIN**
 OREGON

WINT. CO.
 NEY CO.

APPLICATION PROCESSING OUTLINE

Basin: _____
 Sub-basin: _____
 Fees paid: Examination fee: _____
 Recording fees: _____
 Totals: _____

Application No. ^{JWR} 70610
 Permit No. _____

RATE AND DUTY _____ for irrigation

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

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

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

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

IWR Application # 70640

ificate # _____

STATE OF O.

WATER RESOURCES MENT

Application for Instream Water Right
by a State Agency

There is no fee required for this application.

Applicant: Randy Fisher for Oregon Department of Fish and
Wildlife, PO Box 59, Portland, OR 97207

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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
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4. The reach of the stream identified for an instream water right is from (upstream end) Snow Creek, river mile 283, within the NE quarter of the NE quarter of Section 20, Township 15S, Range 35E W.M., in Grant County...

Downstream to Rail Creek, river mile 275.8, within the NW quarter of the NE quarter of Section 24, Township 14S, Range 34E 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: August 27, 1990
ODFW (Fish, Wldlf, and Habitat)	Date: August 27, 1990
Parks and Recreation Division	Date: August 27, 1990

7. If possible, include recommendations for measuring locations

IWR Application # 70640 Certificate # _____

or methods:

Establish a gaging structure immediately below Rail Creek.

- 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 and implementing a monitoring 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: Bull trout and west slope cutthroat trout are listed as a "sensitive" species (a candidate for listing under the Threatened and Endangered Species Act if population declines from present level) by ODFW. West slope cutthroat are found only in the John Day River basin.

THIS APPLICATION MUST BE ACCOMPANIED BY A BASIN MAP WITH THE APPLICABLE LAKE OR STREAM REACH IDENTIFIED.

An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 9/5/90

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director
Habitat Conservation Div.

File: JOHNDAY1.APP

IWR Application # 70640 Certificate # _____

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

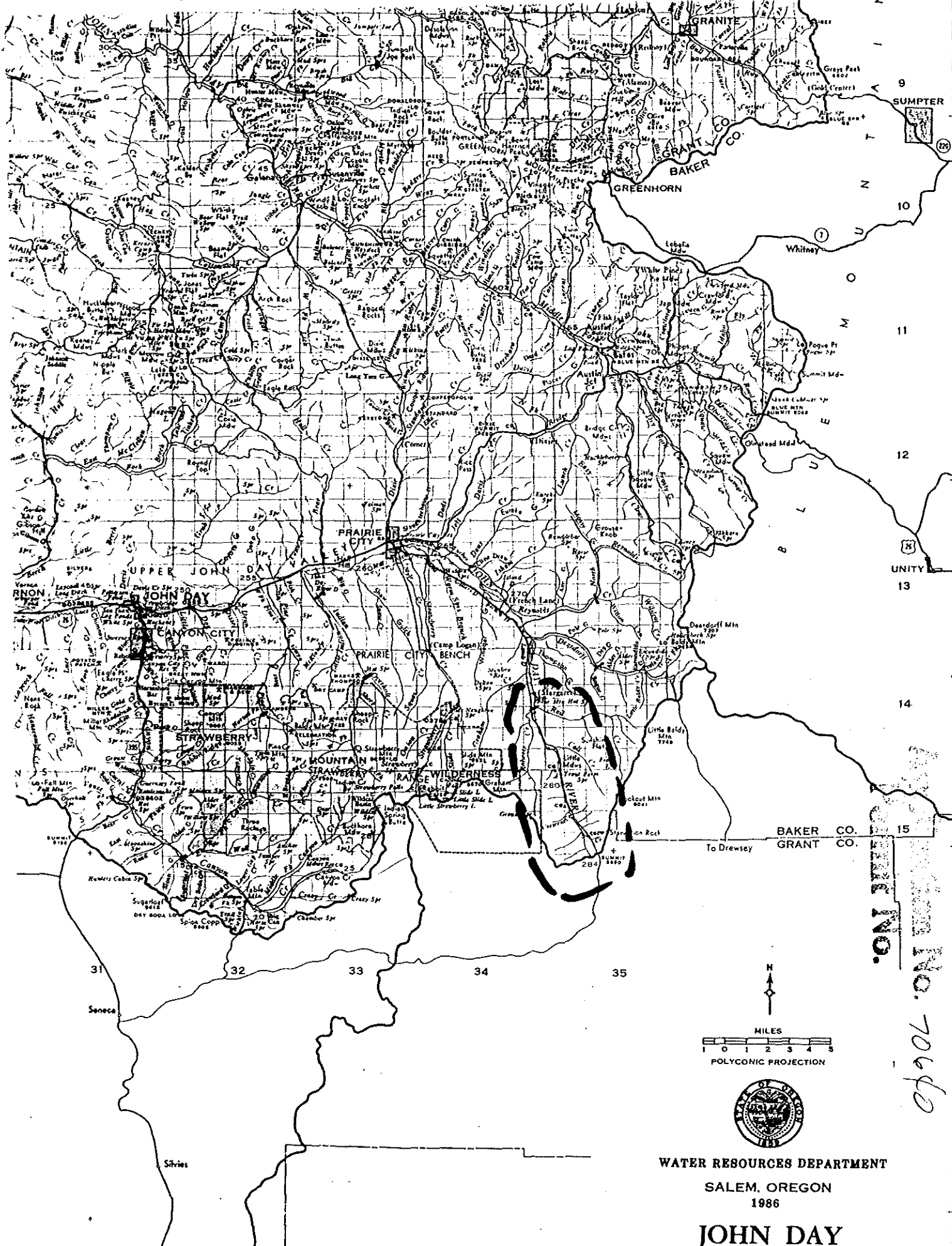
In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

_____, 19__.

Date: _____, 19__.

This document was first received at the Water Resources Department in Salem, Oregon, on the 17th day of September, 1990, at 3:00 o'clock P. M.

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



No. 70640

WATER RESOURCES DEPARTMENT
 SALEM, OREGON
 1986
**JOHN DAY
 DRAINAGE BASIN**
 OREGON

ANT CO.
 NEY CO.

44° 45' To Baker
 To Baker 44° 30'
 To Vale
 44° 15'
 44° 00'

Oregon Water Resources Department
Water Rights/Adjudication Section

Water Right Application Number: IS 70640

Proposed Final Order

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

Application History

On 9/11/90, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: JOHN DAY R TRIB COLUMBIA R

County: Grant

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

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	D	E	C
34	34	40	40	40	34	34	34/40	40	40	34		34	

To be maintained in:

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

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

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the John Day Basin, Oregon, and Their Water Requirements; September, 1979.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game

Commission Report, March 1972.

- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

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

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

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

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

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

Findings of Fact

The basin Basin Program allows the proposed use.

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

The source of water is within or above a State Scenic Waterway.

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

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

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

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.

Additional use, such as a multi-purpose storage project, may be allowed if public interest in the use is high and the use is conditioned to protect instream values.

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.

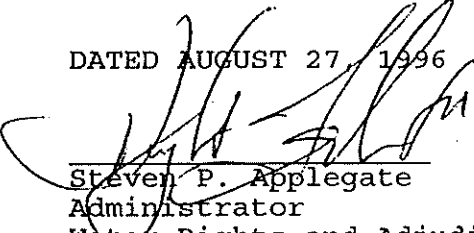
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

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

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: JOHN DAY R TRIB COLUMBIA R

County: Grant

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

To be maintained in:

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

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 9/11/90.

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
9.92	8.95	10.5	19.4	36.2	28.4	16.6	9.2	9.57	11.5	11.9	10.3

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 70640

June 17, 1996

JUN 18 1996

WATER RESOURCES DEPT.
SALEM, OREGON

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

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

Dear Water Rights Section:

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

a. Exceptions for Human Consumption and Livestock Uses

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

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

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

ORS 536.310(12)(emphasis added).

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

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SALEM, OREGON

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

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

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

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

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

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

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

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

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

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

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

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

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

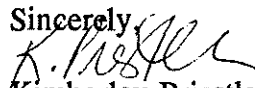
c. Measurement and reporting

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

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

Conclusion

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

Sincerely,

Kimberley Priestley
Legal/Policy Analyst

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