



BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON  
WATER RIGHTS DIVISION

In the Matter of Instream Water Right )  
Application IS 71467, Bear Creek, )  
Grant County )  
Oregon Department of Fish & Wildlife ) PROTEST TO  
Applicant. ) PROPOSED FINAL  
Grant County, ) ORDER  
Protestant. )

Protestant, Grant County, a municipal corporation, pursuant to ORS 537.153(6) and OAR 690-77-043, hereby protests the Proposed Final Order for Application IS 71467, Bear Creek, tributary to the Silvies 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 Bear Creek

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OCT - 9 1996

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that are in the public interest and are also identified in the Malheur Lake 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:

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OCT - 9 1996

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

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

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

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

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

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

While a specific water availability process is not

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OCT - 9 1996

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SALEM, OREGON

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

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

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

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

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

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**OCT - 9 1996**

**WATER RESOURCES DEPT.  
SALEM, OREGON**

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

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

(emphasis added).

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

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

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

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

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

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

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OCT - 9 1996

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SALEM, OREGON

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

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OCT - 9 1996

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SALEM, OREGON

minimums.

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

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

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

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

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OCT - 9 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

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

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

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

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

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

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OCT - 9 1996

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SALEM, OREGON

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 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 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

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OCT - 9 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

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 August, September, October, November, and December to instream values and leaves no water available for the uses described in ORS 537.143, including road construction and maintenance, general construction and forestland or rangeland management. Since these limited license activities are prohibited if they cause injury to any other water right, the granting of all of the natural flow will nullify the ability to exercise the provisions of this statute. The public interest will be detrimentally affected unless the final order is conditioned to exempt these uses from the instream flow.

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

a. providing that for the purposes of water distribution, this instream right shall not have priority over road construction, reconstruction or maintenance, human consumption, domestic expanded, livestock, and the uses

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SALEM, OREGON

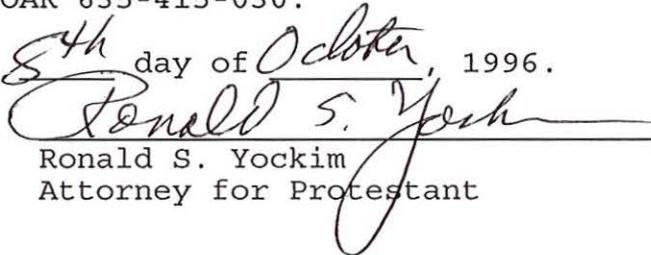
- described in ORS 537.040, ORS 537.143, and ORS 537.022;
- b. limiting the amount of instream flows to less than the natural flow of the stream in a manner that balances the public uses and allows for the activities covered by ORS 537.022, ORS 537.040, ORS 537.143, and ORS 537.170(8);

III.  
LEGAL AUTHORITIES

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

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

Respectfully submitted this 8<sup>th</sup> day of October, 1996.

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

CERTIFICATE OF SERVICE

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

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

Barbara Griffin

STATE OF OREGON  
WATER RESOURCES DEPARTMENT

RECEIPT # 7352

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

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

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

CASH:  CHECK: #  2412 OTHER: (IDENTIFY)

TOTAL REC'D \$3,800.7

**0417 WRD MISC CASH ACCT**

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

**REDUCTION OF EXPENSE**

|            |    |
|------------|----|
| CASH ACCT. | \$ |
|------------|----|

**0427 WRD OPERATING ACCT**

| PCA AND OBJECT CLASS               | VOUCHER #       |                 |
|------------------------------------|-----------------|-----------------|
| MISCELLANEOUS <u>IS 69949</u>      | <u>70640-42</u> | <u>71467-68</u> |
| 0407 COPY & TAPE FEES <u>69951</u> | <u>70645-46</u> | <u>71472</u>    |
| 0410 RESEARCH FEES <u>69960</u>    | <u>70651-55</u> |                 |
| 0408 MISC REVENUE: (IDENTIFY)      | <u>71450</u>    |                 |
| TC165 DEPOSIT LIAB. (IDENTIFY)     | <u>69963</u>    | <u>71455</u>    |

|                             | EXAM FEE | RECORD FEE  |
|-----------------------------|----------|-------------|
| 0201 SURFACE WATER          | \$       | 0202 \$     |
| 0203 GROUND WATER           | \$       | 0204 \$     |
| 0205 TRANSFER               | \$       | 0206 \$     |
|                             | 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 | \$ |
|-----------------------|----|

**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 - P.R. 1.00

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 71467

**Proposed Final Order**

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

**Application History**

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

Source: BEAR CR tributary to SILVIES 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 | DEC |
|------|-----|-----|------|------|------|------|-----|-----|-----|-----|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |

To be maintained in:

BEAR CREEK FROM ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (SENE, SECTION 34, TOWNSHIP 16S, RANGE 31E WM)

The Department mailed the applicant notice of its Initial Review on December 11, 1995. Public notice of the application was provide in the Department's weekly public notice on December 26, 1995. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Malheur Lake Basin, Oregon, and Their Water Requirements; March, 1968.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

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

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

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

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

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

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

### Findings of Fact

The basin Basin Program allows the proposed use.

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

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

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

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

| JAN  | FEB  | MAR  | APR   | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|-------|------|------|------|------|------|------|------|------|
| 10.3 | 15.7 | 34.2 | 106.0 | 86.2 | 41.5 | 11.2 | 5.82 | 5.52 | 5.47 | 7.03 | 8.27 |

### Conclusions of Law

Under the provisions of ORS 537.153, the Department must

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

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

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

The proposed use will not injure other water rights.

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

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

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

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

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

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

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

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

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

The Department therefore concludes that

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

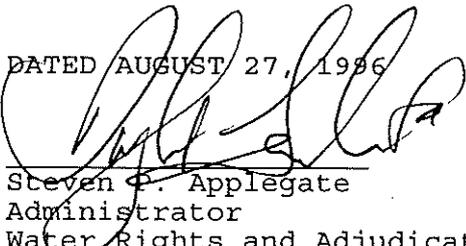
- human or livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|------|------|------|-----|-----|
| 1st% | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |
| 2nd% | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |

#### Recommendation

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

DATED AUGUST 27, 1986

  
 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: BEAR CR tributary to SILVIES R

County: Grant

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

To be maintained in:

BEAR CREEK FROM ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (SENE, SECTION 34, TOWNSHIP 16S, RANGE 31E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 3/28/91.

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

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

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|------|------|------|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |

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

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

\_\_\_\_\_, 19\_\_.

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

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

IS 71467

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 71467

WATERMASTER # BILL BEAL

REGIONAL MANAGER: KENT SEARLES

ODF&W - County: Grant

DEO

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~~

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*

Stream Applications with Protests  
2/97

| Basin                  | App Num    |           |  |
|------------------------|------------|-----------|--|
| 2                      |            |           |  |
|                        | OK 71556   | A         | OREGON DEPARTMENT OF FISH & WILDLIFE         |
| <b>Total for Basin</b> | <b>2 :</b> | <b>1</b>  |  |
| 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         |
| <b>Total for Basin</b> | <b>4 :</b> | <b>8</b>  |  |
| 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         |
| <b>Total for Basin</b> | <b>5 :</b> | <b>13</b> |  |
| 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 |

Stream Applications with Protests  
12/97

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

*Dwight Done Right!*  
70020

|       |   |  |
|-------|---|--|
| 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 |  |
|-------|---------|--|
| 14    |         |  |
|       | 70094   | A OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS |
| DWF   | 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         |

Stream Applications with Protests  
2/97

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

**Instream Applications with Protests**

4/2/97

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| <b>Basin</b> | <b>App Num</b> |
|--------------|----------------|
|--------------|----------------|

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17

|       |   |                                      |
|-------|---|--------------------------------------|
| 70229 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70230 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70348 | S | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70348 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70448 | S | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70448 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70574 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70877 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70891 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70895 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70895 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 70915 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 71697 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |
| 80446 | A | OREGON DEPARTMENT OF FISH & WILDLIFE |

**Total for Basin 17 : 15**

173

*Bill Beer  
draft #10  
9-13-96*

**Oregon Water Resources Department  
Water Rights/Adjudication Section**

Water Right Application Number: IS 71467

**Proposed Final Order**

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

**Application History**

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

Source: BEAR CR tributary to SILVIES 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 | DEC |
|------|-----|-----|------|------|------|------|-----|-----|-----|-----|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |
|      | 3.0 | 6.0 |      |      | 9.0  | 6.0  | 4.0 | 3.0 | 3.0 | 2.0 | 3.0 | 3.0 |

To be maintained in:

BEAR CREEK FROM ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (SENE, SECTION 34, TOWNSHIP 16S, RANGE 31E WM)

The Department mailed the applicant notice of its Initial Review on December 11, 1995. Public notice of the application was provide in the Department's weekly public notice on December 26, 1995. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Malheur Lake Basin, Oregon, and Their Water Requirements; March, 1968.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

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

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

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

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

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

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

### Findings of Fact

The basin Basin Program allows the proposed use.

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

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

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

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

| JAN  | FEB  | MAR  | APR   | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|-------|------|------|------|------|------|------|------|------|
| 10.3 | 15.7 | 34.2 | 106.0 | 86.2 | 41.5 | 11.2 | 5.82 | 5.52 | 5.47 | 7.03 | 8.27 |

### 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.

SEP 16 1996

WATER RESOURCES DIV  
SALEM, OREGON

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

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

The proposed use will not injure other water rights.

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

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

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

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

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

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

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

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

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

The Department therefore concludes that

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

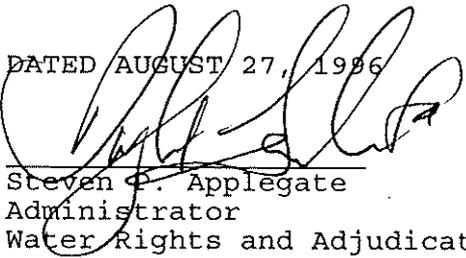
- human or livestock consumption.
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|------|------|------|-----|-----|
| 1st% | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |
| 2nd% | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |

### Recommendation

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

DATED AUGUST 27, 1986

  
 Steven C. 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.

RECEIVED

SEP 16 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

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: BEAR CR tributary to SILVIES R

County: Grant

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

To be maintained in:

BEAR CREEK FROM ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (SENE, SECTION 34, TOWNSHIP 16S, RANGE 31E WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 3/28/91.

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

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

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|------|------|------|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |

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

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

\_\_\_\_\_, 19\_\_.

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

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

IS 71467

PFO AND FO NOTIFICATION LIST FOR FILE NUMBER:

IS-71467      BASIN #12

|                            |                 |              |            |
|----------------------------|-----------------|--------------|------------|
| CLYDE HOLLIDAY FAMILY RANC | ,HCR 77 BOX 90  | ,JOHN DAY    | ,OR, 97845 |
| D & G HOPPER RANCH         | ,PO BOX 159     | ,SENECA      | ,OR, 97873 |
| JACK & TERESA SOUTHWORTH   | ,PO BOX 9       | ,SENECA      | ,OR, 97873 |
| OREGON DEPT OF FISH AND WI | ,PO BOX 59      | ,PORTLAND    | ,OR, 97207 |
| PONDEROSA RANCH            | ,HC 30 BOX 3439 | ,BURNS       | ,OR, 97720 |
| SPROUT & IMPROVE INC       | ,IZEE ROUTE     | ,CANYON CITY | ,OR, 97820 |
| WALTER HOYT                | ,PO BOX 647     | ,BURNS       | ,OR, 97720 |

For some with long names or addresses, the complete name and address are located in the file. Those who receive the Departments weekly public notice do not receive additional notice.



migration, spawning, egg incubation, fry emergence, and/or juvenile and adult rearing for specified species of fish whereas, in fact, such use as to all the species named in the various application and as to all such fish activity does not exist within all such streams. There is not allegation that such use exists within the subject streams, and there is not statutory or reasonable justification to apply for the protection of a use that does not exist.

(10) Granting the applications as filed prevents permits for the development of off-stream watering facilities for stockwater proposed, and interferes with alternatives for stockwatering as part of riparian area management. If these instream flows are approved as applied for, they will have a significant impact on many of our ranches by decreasing and/or eliminating hay production and livestock watering. With these decreases the economic viability of this family owned operation is in question. These operations and the local logging operations are the main support for the local tax bases for the counties affected, which are seriously affected by any reduction in land values.

Based on the above set forth considerations, this ranch requests that they be a party to a contested case hearing before the Water Resources Commission to review the above mentioned applications as filed by the Oregon Department of Fish and Wildlife. Due to the objections raised to said applications, the instream water rights should be rejected and the Oregon Department of Fish and Wildlife be ordered to halt any further applications for instream water rights until such time as the applications are supported by adequate factual data and proper use of acceptable scientific methodology. In the alternative, said instream water rights should be reduced to minimum flow rates necessary to support fish and wildlife subject to existing historic irrigation methods, water rights, and with a condition to exempt the use of water for domestic consumption and livestock uses.

of May, 1991.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day

By Paul Southworth  
For Southworth Boys Inc.

---

RECEIVED

FEB 17 1994

WATER RESOURCES DEP.  
SALEM, OREGON



DEPARTMENT OF  
FISH AND  
WILDLIFE

February 17, 1994

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

RE: Instream Water Right Application #s 70249, 70288, 70942 through 70944, 70946 through 70960, 71221 through 71280, 71282 through 71890, and 71921 through 72946; Reports of Technical Review

**General Comments**

According to OAR 690-77-026 (1), WRD "shall undertake a technical review...and prepare a report." This subsection further lists 8 [(a) - (h)] mandatory criteria which, as a minimum, must be assessed during the technical review. ODFW has concerns with the apparent level of assessment relative to subsection (c):

**OAR 690-77-026 (1) (c)--Assessing the proposed instream water right with respect to conditions previously imposed on other instream water rights granted for use of water from the same source.**

In the 115 subject reports of technical review, WRD is proposing to condition each application to exempt human and livestock consumption from regulation in favor of these instream rights as follows:

*This instream right shall not have priority over human or livestock consumption.*

Instream water right certificates in the North Coast basin based on conversion of minimum perennial streamflows generally contain similar conditioning language giving preference to the listed uses.

By rule, WRD's technical review process includes assessing conditions previously imposed on other instream water rights from the same source. If found to be appropriate, WRD may propose that new instream water rights contain the same exemption. There is no requirement that this exemption be automatically included as part of a technical review.



2501 SW First Avenue  
PO Box 59  
Portland, OR 97207 -  
(503) 229-5400  
TDD (503) 229-5459

When ODFW reviewed WRD files on some of these applications for documentation of assessments of prior conditions, we found nothing to indicate that any such assessments had been done. - ODFW, therefore, assumes that the required assessments were not done and, therefore, objects to the routine placement of the proposed exemption on any of these applications on the grounds that to do so would be contrary to the public's interest in maintaining fish populations in North Coast basin streams. OAR 690-11-195 (4d).

**Specific Comments**

Application # 70948

Section 5, Proposed Conditions, is missing from this Report of Technical Review.

Application # 71241

For the month of December:

1. The minimum flow level recommended by ODFW in the North Coast basin Environmental Investigation Report is 88 cfs.
2. The reported estimated average natural flow for December here is 131 cfs.
3. WRD is proposing in the Report of Technical Review to allocate 80 cfs.

ODFW believes the proper amount to be protected during December is 88 cfs.

Application # 71258

Here, the estimated average natural flow is less than the minimum flow recommended by ODFW for the entire year. Because this is the only instance where this has happened to date, the occurrence is suspect. ODFW requests that the water availability analysis for this reach of Miami River be reexamined.

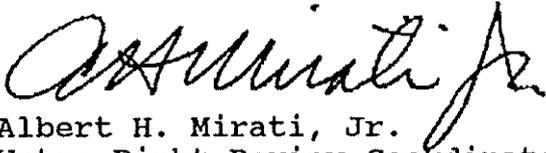
Application # 71280

The recommended flow numbers listed for September through April in the Application Information and Technical Review sections of the Report of Technical Review do not agree. Those listed in the Application Information section are correct.

North Coast Basin IWRs  
February 17, 1994  
Page 3

Thank you for the opportunity to comment.

Sincerely,

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

Albert H. Mirati, Jr.  
Water Right Review Coordinator

c. WaterWatch of Oregon (public information request)  
Jill Zarnowitz/Stephanie Burchfield  
Penny Harrison, DOJ

FILE: NCOAST.IWR

MAY 23 1991

BEFORE THE WATER RESOURCES COMMISSION OF THE STATE OF OREGON  
WATER RESOURCES DEPT.  
SALEM, OREGON

In the matter of Instream  
Water Rights Applications  
Filed by the Oregon Department  
of Fish and Wildlife

Application Nos. 71474  
71472  
71468  
71467

## REQUEST FOR REVIEW

Jim Sproul, of Sproul + Sproul Inc (Cattle Ranch)  
requests of the Water Resources Commission a review and contested  
case hearing on the above set forth applications filed by the  
Oregon Department of Fish and Wildlife for instream water rights

Said ranch is a member of the public in Grant and/or  
\_\_\_\_\_ counties, a water user, and/or a future water  
user who may apply to appropriate water at a later date. This  
ranch would be adversely affected by the granting of the subject  
applications for the following reasons:

(1) The instream water rights applied for are economically  
wasteful and unnecessary in that the flow rates applied for request  
a higher quantity of flow than is needed to support the fish and  
wildlife populations involved, nor is the amount requested even  
available in many instances.

(2) In the upper reaches of the Silvies River drainage  
along with the major tributaries, irrigation has little effect  
on stream flows because the water used returns very quickly  
to the main stream along these narrow valleys.

(3) Historically this area has irrigated these lands  
by putting out water behind large dikes to hold up soil water  
levels after the higher stream flows have fallen below diversion  
points. These pools of water provide many sources of waterfowl  
habitat during the nesting season, plus providing much green feed  
for big game animals as the feed in the surrounding hills dry up  
later in the summer.

(4) The use of the "Oregon Method" for establishing flow  
levels does not allow for seasonally natural flow deficiencies,  
nor does the Department of Fish and Wildlife have any historic  
stream flow data on which to base flow requests. Some streams  
where 2 cu ft/sec are requested during the late summer and fall  
months do not flow at all on 7 out of 10 years, and on the  
years where there is some stream flow, the amount is less than  
 $\frac{1}{2}$  cu ft/sec. Therefore this ranch requests that at least 5 years  
of actual stream flows be collected before any instream requests  
be considered.

(5) The use applied for in every stream is to provide for

migration, spawning, egg incubation, fry emergence, and/or juvenile and adult rearing for specified species of fish whereas, in fact, such use as to all the species named in the various application and as to all such fish activity does not exist within all such streams. There is not allegation that such use exists within the subject streams, and there is not statutory or reasonable justification to apply for the protection of a use that does not exist.

(10) Granting the applications as filed prevents permits for the development of off-stream watering facilities for stockwater proposed, and interferes with alternatives for stock-watering as part of riparian area management. If these instream flows are approved as applied for, they will have a significant impact on many of our ranches by decreasing and/or eliminating hay production and livestock watering. With these decreases the economic viability of this family owned operation is in question. These operations and the local logging operations are the main support for the local tax bases for the counties affected, which are seriously affected by any reduction in land values.

Based on the above set forth considerations, this ranch requests that they be a party to a contested case hearing before the Water Resources Commission to review the above mentioned applications as filed by the Oregon Department of Fish and Wildlife. Due to the objections raised to said applications, the instream water rights should be rejected and the Oregon Department of Fish and Wildlife be ordered to halt any further applications for instream water rights until such time as the applications are supported by adequate factual data and proper use of acceptable scientific methodology. In the alternative, said instream water rights should be reduced to minimum flow rates necessary to support fish and wildlife subject to existing historic irrigation methods, water rights, and with a condition to exempt the use of water for domestic consumption and livestock uses.

of May, 1991.

RESPECTFULLY SUBMITTED this 20 day

By

James T. Spaul, Jr. U-Prop.  
Spaul & Spaul, Inc.  
1322 Rt. 1, Canyon City, Ore 97820

BEFORE THE WATER RESOURCES COMMISSION OF THE STATE OF OREGON

In the matter of Instream  
Water Rights Applications  
Filed by the Oregon Department  
of Fish and Wildlife

Application Nos. 71474  
71472  
71468  
71467

RECEIVED  
MAY 22 1991  
WATER RESOURCES DEPT.  
HELM, OREGON

Clyde Holliday, Ken Holliday REQUEST FOR REVIEW

Ron Holliday, Dorez Holliday, of Clyde Holliday Family Ranches, Inc.  
requests of the Water Resources Commission a review and contested  
case hearing on the above set forth applications filed by the  
Oregon Department of Fish and Wildlife for instream water rights

Said ranch is a member of the public in Grant and/or  
\_\_\_\_\_ counties, a water user, and/or a future water  
user who may apply to appropriate water at a later date. This  
ranch would be adversely affected by the granting of the subject  
applications for the following reasons:

(1) The instream water rights applied for are economically  
wasteful and unnecessary in that the flow rates applied for request  
a higher quantity of flow than is needed to support the fish and  
wildlife populations involved, nor is the amount requested even  
available in many instances.

(2) In the upper reaches of the Silvies River drainage  
along with the major tributaries, irrigation has little effect  
on stream flows because the water used returns very quickly  
to the main stream along these narrow valleys.

(3) Historically this area has irrigated these lands  
by putting out water behind large dikes to hold up soil water  
levels after the higher stream flows have fallen below diversion  
points. These pools of water provide many sources of waterfowl  
habitat during the nesting season, plus providing much green feed  
for big game animals as the feed in the surrounding hills dry up  
later in the summer.

(4) The use of the "Oregon Method" for establishing flow  
levels does not allow for seasonally natural flow deficiencies,  
nor does the Department of Fish and Wildlife have any historic  
stream flow data on which to base flow requests. Some streams  
where 2 cu ft/sec are requested during the late summer and fall  
months do not flow at all on 7 out of 10 years, and on the  
years where there is some stream flow, the amount is less than  
 $\frac{1}{2}$  cu ft/sec. Therefore this ranch requests that at least 5 years  
of actual stream flows be collected before any instream requests  
be considered.

(5) The use applied for in every stream is to provide for

migration, spawning, egg incubation, fry emergence, and/or juvenile and adult rearing for specified species of fish whereas, in fact, such use as to all the species named in the various application and as to all such fish activity does not exist within all such streams. There is not allegation that such use exists within the subject streams, and there is not statutory or reasonable justification to apply for the protection of a use that does not exist.

(10) Granting the applications as filed prevents permits for the development of off-stream watering facilities for stockwater proposed, and interferes with alternatives for stockwatering as part of riparian area management. If these instream flows are approved as applied for, they will have a significant impact on many of our ranches by decreasing and/or eliminating hay production and livestock watering. With these decreases the economic viability of this family owned operation is in question. These operations and the local logging operations are the main support for the local tax bases for the counties affected, which are seriously affected by any reduction in land values.

Based on the above set forth considerations, this ranch requests that they be a party to a contested case hearing before the Water Resources Commission to review the above mentioned applications as filed by the Oregon Department of Fish and Wildlife. Due to the objections raised to said applications, the instream water rights should be rejected and the Oregon Department of Fish and Wildlife be ordered to halt any further applications for instream water rights until such time as the applications are supported by adequate factual data and proper use of acceptable scientific methodology. In the alternative, said instream water rights should be reduced to minimum flow rates necessary to support fish and wildlife subject to existing historic irrigation methods, water rights, and with a condition to exempt the use of water for domestic consumption and livestock uses.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May, 1991.

By Clyde Holliday  
Ron Holliday  
Darrel Holliday  
Ken Holliday

Ron Holliday  
Box 56  
Seneca, OR.

Clyde Holliday  
HCR 77 Box 151  
John Day, OR.  
97845

Ken Holliday  
HCR 77 Box 90  
John Day, OR.  
97845

97873  
Darrel Holliday  
HCR 77 Box 256  
John Day, OR.  
97845

BEFORE THE WATER RESOURCES COMMISSION OF THE STATE OF OREGON

In the matter of Instream  
Water Rights Applications  
Filed by the Oregon Department  
of Fish and Wildlife

Application Nos. 71474  
71472  
71468  
71467

RECEIVED  
MAY 22 2011  
WATER RESOURCES COMMISSION  
SALEM, OREGON

REQUEST FOR REVIEW

Ponderosa Ranch, of Silvies Valley, Oregon  
requests of the Water Resources Commission a review and contested  
case hearing on the above set forth applications filed by the  
Oregon Department of Fish and Wildlife for instream water rights

Said ranch is a member of the public in Grant and/or  
Harney counties, a water user, and/or a future water  
user who may apply to appropriate water at a later date. This  
ranch would be adversely affected by the granting of the subject  
applications for the following reasons:

(1) The instream water rights applied for are economically  
wasteful and unnecessary in that the flow rates applied for request  
a higher quantity of flow than is needed to support the fish and  
wildlife populations involved, nor is the amount requested even  
available in many instances.

(2) In the upper reaches of the Silvies River drainage  
along with the major tributaries, irrigation has little effect  
on stream flows because the water used returns very quickly  
to the main stream along these narrow valleys.

(3) Historically this area has irrigated these lands  
by putting out water behind large dikes to hold up soil water  
levels after the higher stream flows have fallen below diversion  
points. These pools of water provide many sources of waterfowl  
habitat during the nesting season, plus providing much green feed  
for big game animals as the feed in the surrounding hills dry up  
later in the summer.

(4) The use of the "Oregon Method" for establishing flow  
levels does not allow for seasonally natural flow deficiencies,  
nor does the Department of Fish and Wildlife have any historic  
stream flow data on which to base flow requests. Some streams  
where 2 cu ft/sec are requested during the late summer and fall  
months do not flow at all on 7 out of 10 years, and on the  
years where there is some stream flow, the amount is less than  
 $\frac{1}{2}$  cu ft/sec. Therefore this ranch requests that at least 5 years  
of actual stream flows be collected before any instream requests  
be considered.

(5) The use applied for in every stream is to provide for

migration, spawning, egg incubation, fry emergence, and/or juvenile and adult rearing for specified species of fish whereas, in fact, such use as to all the species named in the various application and as to all such fish activity does not exist within all such streams. There is not allegation that such use exists within the subject streams, and there is not statutory or reasonable justification to apply for the protection of a use that does not exist.

(10) Granting the applications as filed prevents permits for the development of off-stream watering facilities for stockwater proposed, and interferes with alternatives for stock-watering as part of riparian area management. If these instream flows are approved as applied for, they will have a significant impact on many of our ranches by decreasing and/or eliminating hay production and livestock watering. With these decreases the economic viability of this family owned operation is in question. These operations and the local logging operations are the main support for the local tax bases for the counties affected, which are seriously affected by any reduction in land values.

Based on the above set forth considerations, this ranch requests that they be a party to a contested case hearing before the Water Resources Commission to review the above mentioned applications as filed by the Oregon Department of Fish and Wildlife. Due to the objections raised to said applications, the instream water rights should be rejected and the Oregon Department of Fish and Wildlife be ordered to halt any further applications for instream water rights until such time as the applications are supported by adequate factual data and proper use of acceptable scientific methodology. In the alternative, said instream water rights should be reduced to minimum flow rates necessary to support fish and wildlife subject to existing historic irrigation methods, water rights, and with a condition to exempt the use of water for domestic consumption and livestock uses.

of May, 1991.

RESPECTFULLY SUBMITTED this 20 day

By

*D. Mark Johnson*

HC 30 - Box 3439

BURNS, OR 97720

December 11, 1995

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

Reference: Instream water rights in the Malheur Lake Basin,  
Files 71467, 71470, 71471, 71472, 71474, 71475

Dear Oregon Department of Fish and Wildlife:

This document, called and "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 512, the Malheur Lake Basin Program;

1. Application 71467

BEAR CR tributary to SILVIES R

BEAR CREEK FROM ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (SENE, SECTION 34, TOWNSHIP 16S, RANGE 31E WM)

a. The amount of water requested for instream use:

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG | SEP | OCT | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|-----|-----|-----|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 | 6.0 |

b. The amount of water available in the appropriate reach is at a %50 exceedence level is:

| JAN  | FEB  | MAR  | APR   | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|-------|------|------|------|------|------|------|------|------|
| 10.3 | 15.7 | 34.2 | 106.0 | 86.2 | 41.5 | 11.2 | 5.82 | 5.52 | 5.47 | 7.03 | 8.27 |

c. Allowable water use

|      | JAN | FEB | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV | DEC |
|------|-----|-----|------|------|------|------|-----|------|------|------|-----|-----|
| 1st½ | 6.0 | 6.0 | 12.0 | 12.0 | 12.0 | 12.0 | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |
| 2nd½ | 6.0 | 9.0 | 12.0 | 12.0 | 12.0 | 9.0  | 6.0 | 5.82 | 5.52 | 5.47 | 6.0 | 6.0 |



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



Rick Kruger  
Oregon Department of Fish and Wildlife  
December 11, 1995  
Page three

#### 4. Application 71471

SILVIES R tributary to W FK SILVIES R

SILVIES RIVER FROM WIKIUP CREEK AT RIVER MILE 103.5 (NWNW, SECTION 22, TOWNSHIP 16S, RANGE 29E WM); TO TROUT CREEK AT RIVER MILE 56.0 (NWNW, SECTION 13, TOWNSHIP 19S, RANGE 31E WM)

a. The amount of water requested for instream use:

|      | JAN  | FEB  | MAR  | APR  | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1st½ | 10.0 | 10.0 | 15.0 | 15.0 | 15.0 | 15.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 |
| 2nd½ | 10.0 | 12.0 | 15.0 | 15.0 | 15.0 | 12.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 |

b. The amount of water available in the appropriate reach is at a %50 exceedence level is:

| JAN  | FEB  | MAR   | APR   | MAY   | JUN   | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|-------|-------|-------|-------|------|------|------|------|------|------|
| 38.4 | 58.3 | 127.0 | 393.0 | 320.0 | 154.0 | 41.2 | 21.6 | 21.5 | 20.3 | 26.1 | 30.7 |

c. Allowable water use

|      | JAN  | FEB  | MAR  | APR  | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1st½ | 10.0 | 10.0 | 15.0 | 15.0 | 15.0 | 15.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 |
| 2nd½ | 10.0 | 12.0 | 15.0 | 15.0 | 15.0 | 12.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 | 10.0 |

#### 5. Application 71474

TROUT CR tributary to SILVIES R

TROUT CREEK FROM NORTH FORK (NENE, SECTION 6, TOWNSHIP 20S, RANGE 32E WM); TO THE MOUTH AT RIVER MILE 0.0 (NWNW, SECTION 13, TOWNSHIP 19S, RANGE 31E WM)

a. The amount of water requested for instream use:

|      | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 1st½ | 2.0 | 2.0 | 4.0 | 4.0 | 4.0 | 4.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |
| 2nd½ | 2.0 | 2.0 | 4.0 | 4.0 | 4.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |

b. The amount of water available in the appropriate reach is at a %50 exceedence level is:

| JAN  | FEB  | MAR  | APR  | MAY  | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|------|------|------|------|------|------|------|------|------|------|
| 0.82 | 5.76 | 22.0 | 27.5 | 5.12 | 2.65 | 0.64 | 0.37 | 0.37 | 0.27 | 0.27 | 0.64 |

c. Allowable water use

|      | JAN  | FEB | MAR | APR | MAY | JUN  | JUL  | AUG  | SEP  | OCT  | NOV  | DEC  |
|------|------|-----|-----|-----|-----|------|------|------|------|------|------|------|
| 1st½ | 0.82 | 2.0 | 4.0 | 4.0 | 4.0 | 2.65 | 0.64 | 0.37 | 0.37 | 0.27 | 0.27 | 0.64 |
| 2nd½ | 0.82 | 2.0 | 4.0 | 4.0 | 4.0 | 2    | 0.64 | 0.37 | 0.37 | 0.27 | 0.27 | 0.64 |

Rick Kruger  
 Oregon Department of Fish and Wildlife  
 December 11, 1995  
 Page four

## 6. Application 71475

NICOLL CR tributary to SILVER CR

NICOLL CREEK FROM JACKS CREEK (SW1/4, SECTION 32, TOWNSHIP 21S, RANGE 25E WM); TO THE MOUTH AT RIVER MILE 0.0 (SWSW, SECTION 12, TOWNSHIP 22S, RANGE 25E WM)

a. The amount of water requested for instream use:

|      | JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 1st½ | 1.0 | 1.0 | 3.0 | 3.0 | 3.0 | 3.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| 2nd½ | 1.0 | 2.0 | 3.0 | 3.0 | 3.0 | 2.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |

b. The amount of water available in the appropriate reach is at a %50 exceedence level is:

|  | JAN  | FEB  | MAR  | APR  | MAY  | JUN  | JUL | AUG  | SEP  | OCT  | NOV  | DEC |
|--|------|------|------|------|------|------|-----|------|------|------|------|-----|
|  | 0.38 | 2.69 | 10.3 | 12.9 | 2.39 | 1.24 | 0.3 | 0.17 | 0.17 | 0.13 | 0.13 | 0.3 |

c. Allowable water use

|      | JAN  | FEB | MAR | APR | MAY | JUN  | JUL | AUG  | SEP  | OCT  | NOV  | DEC |
|------|------|-----|-----|-----|-----|------|-----|------|------|------|------|-----|
| 1st½ | 0.38 | 1.0 | 3.0 | 3.0 | 2.0 | 1.24 | 0.3 | 0.17 | 0.17 | 0.13 | 0.13 | 0.3 |
| 2nd½ | 0.38 | 2.0 | 3.0 | 3.0 | 2.0 | 1.24 | 0.3 | 0.17 | 0.17 | 0.13 | 0.13 | 0.3 |

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

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

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

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

### Withdrawal:

If you choose not to proceed, you may withdraw any application. To accomplish this you must notify the Department in writing by **December 26, 1995**. For your convenience you may use the enclosed "STOP PROCESSING" form.

Rick Kruger  
Oregon Department of Fish and Wildlife  
December 11, 1995  
Page five

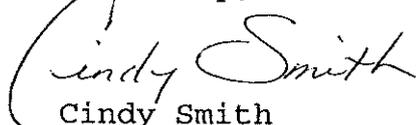
To Proceed With Your Application:

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

If you have any questions:

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

Sincerely,



Cindy Smith  
Initial Review Team

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

IWR Application # 71467 Certificate # \_\_\_\_\_

STATE OF OREGON

WATER RESOURCES DEPARTMENT

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

RECEIVED

MAR 28 1991

There is no fee required for this application. WATER RESOURCES DEPT  
SALEM, OREGON

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 Bear Creek, a tributary of Silvies River.
- 2. The public use this instream water right is based on is providing required stream flows for redband trout.
- 3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

USE(S): Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

| JAN | FEB | MAR | APR | MAY | JUN  | JUL | AUG | SEP | OCT | NOV | DEC |
|-----|-----|-----|-----|-----|------|-----|-----|-----|-----|-----|-----|
| 6   | 6/9 | 12  | 12  | 12  | 12/9 | 6   | 6   | 6   | 6   | 6   | 6   |

- 4. The reach of the stream identified for an instream water right is from (upstream end) Antelope Creek, river mile 7.4, within the SW quarter of the NE quarter of Section 28, Township 16S, Range 32E W.M., in Grant County...

Downstream to the mouth, river mile 0, within the SE quarter of the NE quarter of Section 34, Township 16S, Range 31E W.M., in Grant County.

- 5. The method used to determine the requested amounts was the Oregon Method.
- 6. When were the following state agencies notified of the intent to file for the instream water right?

|                                 |                     |
|---------------------------------|---------------------|
| Dept. of Environmental Quality  | Date: March 8, 1991 |
| ODFW (Fish, Wldlf, and Habitat) | Date: March 8, 1991 |
| Parks and Recreation Division   | Date: March 8, 1991 |

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

Establish a gaging structure at or near the lower limit of

IWR Application # 71467 Certificate # \_\_\_\_\_

the reach.

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

Local ODFW personnel will assist the watermaster in establishing a monitoring plan and program.

- 9. If possible, include other recommendations for methods or conditions necessary for managing the water right to protect the public uses [see OAR 690-77-020 (5)(c)]: None.

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

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

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

Date: 3/25/91

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director  
Habitat Conservation Div.

File: BEAR10.APP

RECEIVED

MAR 28 1991

WATER RESOURCES DEPT  
SALEM, OREGON

IWR Application # 71467 Certificate # \_\_\_\_\_

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

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

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

\_\_\_\_\_, 19\_\_\_\_.

Date: \_\_\_\_\_, 19\_\_\_\_.

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

This document was first received at the Water Resources Department in Salem, Oregon, on the 28th day of March, 1991, at 8:00 o'clock AM.

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

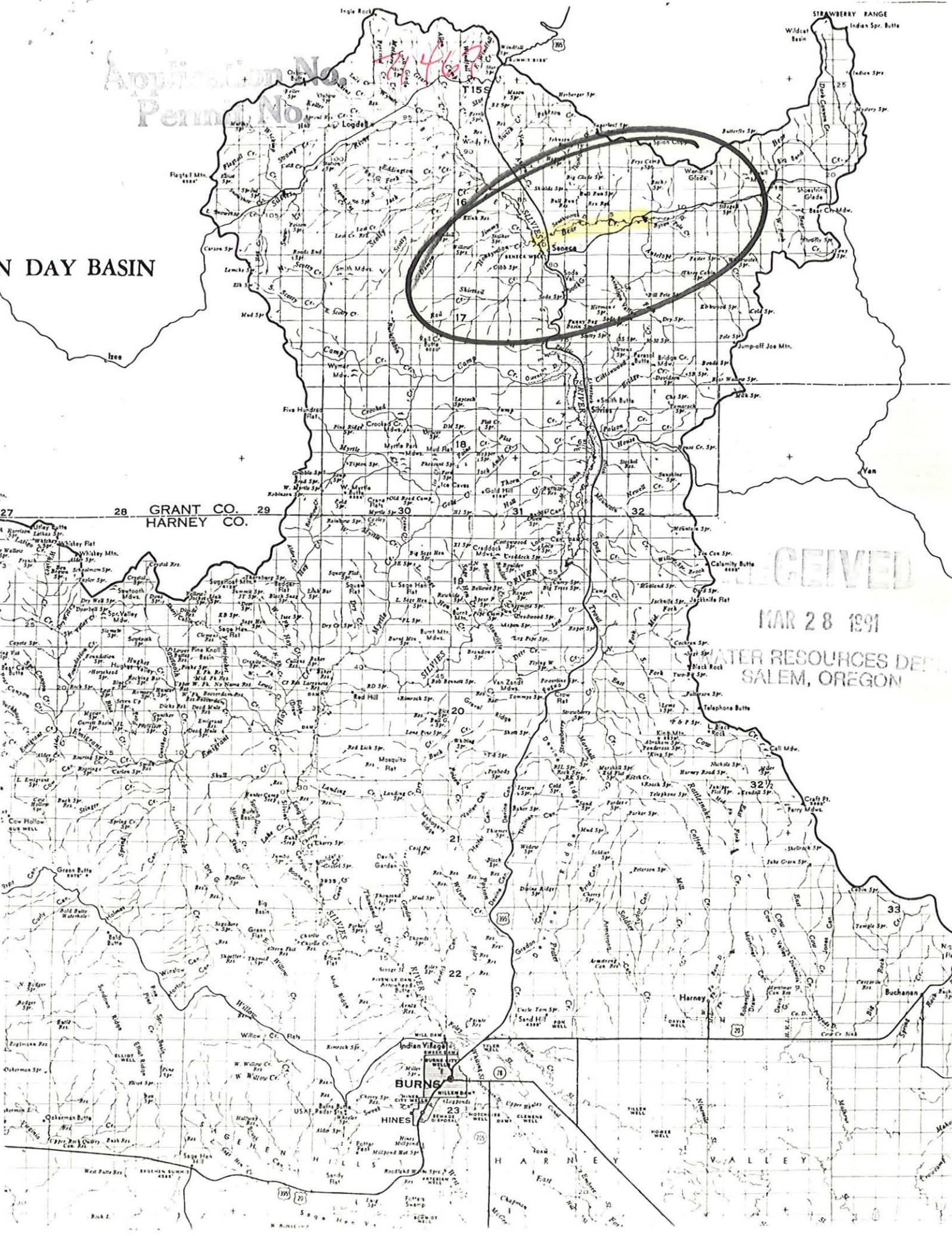
RECEIVED

MAR 28 1991

WATER RESOURCES DEPT  
SALEM, OREGON

Application No. 467  
Permit No.

N DAY BASIN



GRANT CO. HARNEY CO.

RECEIVED  
MAR 28 1991  
WATER RESOURCES DEPT.  
SALEM, OREGON

BURNS HINES

HARNEY VALLEY

January 3, 1992

Ronald S. Yockim  
Cegavske, Johnston & Associates, P.C.  
PO Box 218  
Roseburg, Oregon 97407

Re: Instream water right applications 70304, 70306, 70307, 70349  
through 70352, 70588, 71454, 71463, 71464, 71467, 71468,  
71472.

Dear Mr. Yockim,

This letter is to verify receipt of your requests, on behalf of Grant County to enter into discussions regarding the referenced instream water rights applications. We will contact you when we have completed a natural flow analysis of the remaining streams and are prepared to discuss this information and the other issues raised in your October 14, 1991 correspondence.

Enclosed is a brief discussion on the instream water right program. I hope this is informative.

Sincerely,



MICHAEL J. MATTICK  
Water Rights Specialist

MJM:

cc: Grant County Court



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3850 Portland Rd NE  
Salem, OR 97310  
(503) 378-3739  
FAX (503) 378-8130

RECEIVED

MAY 23 1991

WATER RESOURCES DEPT.  
SALEM, OREGON

BEFORE THE WATER RESOURCES COMMISSION OF THE STATE OF OREGON

In the matter of Instream  
Water Rights Applications  
Filed by the Oregon Department  
of Fish and Wildlife

Application Nos.

71474  
71472  
71468  
71467

REQUEST FOR REVIEW

Dorella Gladys Lopper, of Silvies Valley - Seneca Cr.  
requests of the Water Resources Commission a review and contested  
case hearing on the above set forth applications filed by the  
Oregon Department of Fish and Wildlife for instream water rights

Said ranch is a member of the public in Grant and/or  
\_\_\_\_\_ counties, a water user, and/or a future water  
user who may apply to appropriate water at a later date. This  
ranch would be adversely affected by the granting of the subject  
applications for the following reasons:

(1) The instream water rights applied for are economically  
wasteful and unnecessary in that the flow rates applied for request  
a higher quantity of flow than is needed to support the fish and  
wildlife populations involved, nor is the amount requested even  
available in many instances.

(2) In the upper reaches of the Silvies River drainage  
along with the major tributaries, irrigation has little effect  
on stream flows because the water used returns very quickly  
to the main stream along these narrow valleys.

(3) Historically this area has irrigated these lands  
by putting out water behind large dikes to hold up soil water  
levels after the higher stream flows have fallen below diversion  
points. These pools of water provide many sources of waterfowl  
habitat during the nesting season, plus providing much green feed  
for big game animals as the feed in the surrounding hills dry up  
later in the summer.

(4) The use of the "Oregon Method" for establishing flow  
levels does not allow for seasonally natural flow deficiencies,  
nor does the Department of Fish and Wildlife have any historic  
stream flow data on which to base flow requests. Some streams  
where 2 cu ft/sec are requested during the late summer and fall  
months do not flow at all on 7 out of 10 years, and on the  
years where there is some stream flow, the amount is less than  
 $\frac{1}{2}$  cu ft/sec. Therefore this ranch requests that at least 5 years  
of actual stream flows be collected before any instream requests  
be considered.

(5) The use applied for in every stream is to provide for

migration, spawning, egg incubation, fry emergence, and/or juvenile and adult rearing for specified species of fish whereas, in fact, such use as to all the species named in the various application and as to all such fish activity does not exist within all such streams. There is not allegation that such use exists within the subject streams, and there is not statutory or reasonable justification to apply for the protection of a use that does not exist.

(10) Granting the applications as filed prevents permits for the development of off-stream watering facilities for stockwater proposed, and interferes with alternatives for stockwatering as part of riparian area management. If these instream flows are approved as applied for, they will have a significant impact on many of our ranches by decreasing and/or eliminating hay production and livestock watering. With these decreases the economic viability of this family owned operation is in question. These operations and the local logging operations are the main support for the local tax bases for the counties affected, which are seriously affected by any reduction in land values.

Based on the above set forth considerations, this ranch requests that they be a party to a contested case hearing before the Water Resources Commission to review the above mentioned applications as filed by the Oregon Department of Fish and Wildlife. Due to the objections raised to said applications, the instream water rights should be rejected and the Oregon Department of Fish and Wildlife be ordered to halt any further applications for instream water rights until such time as the applications are supported by adequate factual data and proper use of acceptable scientific methodology. In the alternative, said instream water rights should be reduced to minimum flow rates necessary to support fish and wildlife subject to existing historic irrigation methods, water rights, and with a condition to exempt the use of water for domestic consumption and livestock uses.

RESPECTFULLY SUBMITTED this 17 day  
of May, 1991.

By Danell C Hopper  
Gladys Hopper  
PO Box 159 - Seneca Or  
97873

APPLICATION PROCESSING OUTLINE

PWK  
Application No. 71467

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

Application No. 71467  
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  
Watermaster comment form sent with copy of *draft permit*  
~~application and map~~  
Watermaster comments received \_\_\_\_\_  
Hydrographic section comments requested \_\_\_\_\_  
Hydrographic section comments received \_\_\_\_\_  
O.D.F.W. sent copy of application ~~and map~~ (except groundwater) requesting comment \_\_\_\_\_  
O.D.F.W. comments received \_\_\_\_\_  
Report from D.E.Q. received \_\_\_\_\_  
 Publish application information in weekly public notice.  
Notify other owners of development  
PROTESTED  
filed \_\_\_\_\_  
resolved \_\_\_\_\_