

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.	\$
PCA AND OBJECT CLASS	VOUCHER #

0427 WRD OPERATING ACCT

0407 MISCELLANEOUS <u>IS 69949</u>	<u>70640-42</u>	<u>71467-68</u>	\$
0410 COPY & TAPE FEES <u>69951</u>	<u>70645-46</u>	<u>71472</u>	\$
0410 RESEARCH FEES <u>69960</u>	<u>70651-59</u>		\$
0408 MISC REVENUE: (IDENTIFY)	<u>71450</u>		\$
TC165 DEPOSIT LIAB. (IDENTIFY)	<u>71455</u>		\$

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

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

0437 WELL CONST. START FEE

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

0539 LOTTERY PROCEEDS

1302 LOTTERY PROCEEDS	\$
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0467 HYDRO ACTIVITY

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

RECEIPT # 7352

DATED: 10-9-96

BY: R. Bushnell

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON
WATER RIGHTS DIVISION

In the Matter of Instream Water Right)	
Application IS 71468, Bear Creek,)	
Grant County)	
)	
Oregon Department of Fish & Wildlife)	PROTEST TO
Applicant.)	PROPOSED FINAL
)	ORDER
)	
Grant County,)	
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 71468, 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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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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A. Neither the instream application nor the Water Resources Department's ("Department") file provide sufficient technical data or information to support the flow rates requested. The record not only lacks substantial evidence, it also lacks the information required by OAR 690-77-020 and ORS 537.336.

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

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

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

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

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

While a specific water availability process is not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. providing that for the purposes of water distribution,

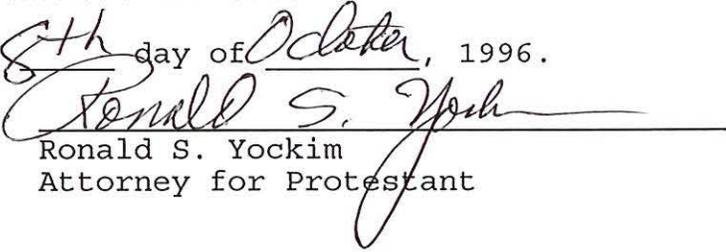
- this instream right shall not have priority over road construction, reconstruction or maintenance, human consumption, domestic expanded, livestock, and the uses described in ORS 537.040, ORS 537.143, and ORS 537.022;
- b. limiting the amount of instream flows to less than the natural flow of the stream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

III.
LEGAL AUTHORITIES

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

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

Respectfully submitted this 8th day of October, 1996.



Ronald S. Yockim
Attorney for Protestant

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CERTIFICATE OF SERVICE

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

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

Barbara Giffin

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

Water Right Application Number: IS 71468

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 TRIB 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	D	E	C
6	6/9	12	12	12	12/9	6	6	6	6	6	6	6	6

To be maintained in:

BEAR CREEK FROM THE HEADWATERS AT RIVER MILE 27.7 (SECTION 11, TOWNSHIP 15S, RANGE 33E WM); TO ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM)

The Department mailed the applicant notice of its Initial Review on April 29, 1996. Public notice of the application was provided in the Department's weekly public notice on May 13, 1996. 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
4.87	8.29	19.9	53.4	43	19.8	5.05	2.47	2.27	2.28	3.25	3.99

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.

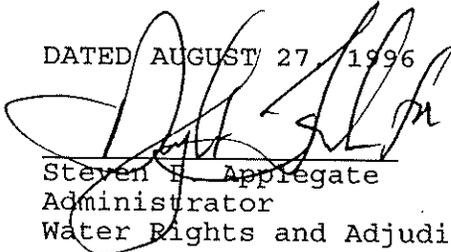
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.87	6/8.29	12	12	12	12/9	5.05	2.47	2.27	2.28	3.25	3.99

Recommendation

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

DATED AUGUST 27, 1996



Steven F. 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 TRIB SILVIES R

County: Grant

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

To be maintained in:

BEAR CREEK FROM THE HEADWATERS AT RIVER MILE 27.7 (SECTION 11, TOWNSHIP 15S, RANGE 33E WM); TO ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E 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
4.87	6/8.29	12	12	12	12/9	5.05	2.47	2.27	2.28	3.25	3.99

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 71468

INTEROFFICE MEMORANDUM
Water Rights Section

~~TOP SECRET BATTLE~~

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

4/2/97

Basin App Num

2

OK 71556 A

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 2 : 1

4

OK 71793 W

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 71798 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72076 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72077 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72078 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72079 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72080 W

OREGON DEPARTMENT OF FISH & WILDLIFE

| 72081 W

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 4 : 8

5

OK 70353 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70354 A

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 70357 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70358 A

OREGON DEPARTMENT OF FISH & WILDLIFE

OK 70605 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70606 S

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70606 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70612 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70695 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 70695 A

OREGON DEPARTMENT OF FISH & WILDLIFE

| 73199 A

OREGON DEPARTMENT OF FISH & WILDLIFE

Total for Basin 5 : 13

6

Checked out to Dwight

| 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

| 69958 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

| 69959 S

OREGON DEPARTMENT OF FISH & WILDLIFE & PARKS

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

Instream Applications with Protests
4/2/97

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

Instream Applications with Protests

4/2/97

Basin	App Num
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14

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

Instream Applications with Protests

4/2/97

Basin	App Num		
14			
	70824	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70826	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70829	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70830	S	OREGON DEPARTMENT OF FISH & WILDLIFE
Total for Basin	14 :	46	

15			
	70982	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70993	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	70998	W	OREGON DEPARTMENT OF FISH & WILDLIFE
	71008	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71201	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71614	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71622	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	72843	A	OREGON DEPARTMENT OF FISH & WILDLIFE
Total for Basin	15 :	8	

16			
	71172	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71173	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71174	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71181	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71182	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71183	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71184	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71185	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71190	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71192	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	71193	A	OREGON DEPARTMENT OF FISH & WILDLIFE
	73350	A	OREGON DEPARTMENT OF FISH & WILDLIFE
Total for Basin	16 :	12	

17			
	70228	A	OREGON DEPARTMENT OF FISH & WILDLIFE

Instream Applications with Protests

4/2/97

Basin	App Num		
17			
	70229	A	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

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SEP 16 1996

WATER RESOURCES DEPT.
SALEM, OREGON

*Bill Beal
Dist #10
9-13-96*

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

Water Right Application Number: IS 71468

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 TRIB 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	D	E	C
6	6/9	12	12	12	12/9	6	6	6	6	6	6	6	6
2.5						3	3	3	2.5	2.0	2.0		

To be maintained in:

From Personal Knowledge

BEAR CREEK FROM THE HEADWATERS AT RIVER MILE 27.7 (SECTION 11, TOWNSHIP 15S, RANGE 33E WM); TO ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM)

The Department mailed the applicant notice of its Initial Review on April 29, 1996. Public notice of the application was provided in the Department's weekly public notice on May 13, 1996. 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
4.87	8.29	19.9	53.4	43	19.8	5.05	2.47	2.27	2.28	3.25	3.99

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.

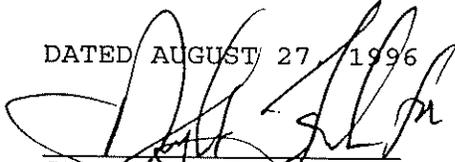
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.87	6/8.29	12	12	12	12/9	5.05	2.47	2.27	2.28	3.25	3.99

Recommendation

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

DATED AUGUST 27, 1996



Steven E. 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.

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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 TRIB SILVIES R

County: Grant

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

To be maintained in:

BEAR CREEK FROM THE HEADWATERS AT RIVER MILE 27.7 (SECTION 11, TOWNSHIP 15S, RANGE 33E WM); TO ANTELOPE CREEK AT RIVER MILE 7.4 (SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E 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
4.87	6/8.29	12	12	12	12/9	5.05	2.47	2.27	2.28	3.25	3.99

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 71468

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 71468

WATERMASTER # BILL BEAL

REGIONAL MANAGER: KENT SEARLES

ODF&W - County: Grant

DEQ _____

PARKS _____

OTHER STATE AGENCY IF NECESSARY: _____

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

POWER BUILDER UPDATER; _____

WATER FOR LIFE (TODD HEIDGERKEN) _____

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

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

CASEWORKER : CINDY SMITH

April 29, 1996

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

WATER
RESOURCES
DEPARTMENT

Reference: Instream water rights in the Malheur Lake Basin,
Files 70022-70024, 71468, 71473, 72023

Dear Oregon Department of Fish and Wildlife:

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

The referenced applications are complete and not defective.

The proposed use is not prohibited by law;

The instream use is allowed under OAR 512, the Malheur Lake Basin Program;

1. Application 70022

Priority date: 8/8/89

LITTLE WHITEHORSE CR TRIB WHITEHORSE CR
MALHEUR COUNTY

LITTLE WHITEHORSE CREEK FM HEADWATERS (SECTION 24, T40S, R38E WM)
TO THE DOWNSTREAM END AT WHITEHORSE RANCH PROPERTY BOUNDARY
(SESE, SECTION 30, T38S, R39E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.36	2.25	4.61	12.1	15.4	5.61	1.72	0.79	0.82	1.01	1.08	1.26

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.36	2.25	4.61	10	10	3	1.72	0.79	0.82	1.01	1.08	1.26



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

2. Application 70023

Priority date: 8/8/89

WHITEHORSE CR TRIB ALVORD DESERT
MALHEUR COUNTY

WHITEHORSE CREEK FM HEADWATERS (SECTION 33, T40S, R40E WM);
TO THE DOWNSTREAM END AT WHITEHORSE RANCH PROPERTY BOUNDARY
(SESW, SECTION 29, T38S, R39E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.39	6.91	11.9	33	59	26.6	8.34	4.03	4.1	5	5.04	5.25

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5.39	6.91	11.9	20	20	8	8	4.03	4.1	5	5.04	5.25

3. Application 70024

Priority date: 8/8/89

WILLOW CR TRIB ALVORD DESERT
HARNEY COUNTY

WILLOW CREEK FM HEADWATERS (SECTION 22, T40S, R38E WM); TO
THE UPPER BLM ROAD CROSSING (NWNW, SECTION 2, T39S, R38E WM)

a. The amount of water requested for instream use:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
5	5	5	20	20	2	2	2	2	5	5	5

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.42	2.14	3.99	10.6	15.7	5.9	1.83	0.84	0.84	1.04	1.14	1.32

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.42	2.14	3.99	10.6	15.7	2	1.83	0.84	0.84	1.04	1.14	1.32

4. Application 71468

Priority date: 3/28/91

BEAR CR TRIB SILVIES R
GRANT COUNTYBEAR CREEK FROM THE HEADWATERS AT RIVER MILE 27.7 (SECTION 11,
TOWNSHIP 15S, RANGE 33E WM); TO ANTELOPE CREEK AT RIVER MILE 7.4
(SWNE, SECTION 28, TOWNSHIP 16S, RANGE 32E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.87	8.29	19.9	53.4	43	19.8	5.05	2.47	2.27	2.28	3.25	3.99

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.87	6/8.29	12	12	12	12/9	5.05	2.47	2.27	2.28	3.25	3.99

5. Application 71473

Priority date: 3/28/91

SAWMILL CR TRIB SILVER CR
HARNEY COUNTYSAWMILL CREEK FROM AN UNNAMED TRIBUTARY (NWNW, SECTION 26,
TOWNSHIP 20S, RANGE 25E WM); TO THE MOUTH AT RIVER MILE 0.0
(NWSE, SECTION 20, TOWNSHIP 21S, RANGE 26E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
0.44	0.71	4.76	20	3.02	0.82	0.25	0.11	0.12	0.16	0.22	0.29

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
0.44	0.71	3	3	3	0.82	0.25	0.11	0.12	0.16	0.22	0.29

6. Application 72023

Priority date: 11/19/91

SAWTOOTH CR TRIB EMIGRANT CR
HARNEY COUNTYSAWTOOTH CREEK FROM AN UNNAMED TRIBUTARY (NENE, SECTION 27,
TOWNSHIP 19S, RANGE 28E WM); TO THE MOUTH AT RIVER MILE 0.0
(SESE, SECTION 25, TOWNSHIP 20S, RANGE 28E WM)

a. The amount of water requested for instream use:

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

b. The estimated average natural flow:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1.36	2.81	7.55	19	12.1	4.62	1.18	0.56	0.5	0.52	0.78	1.08

c. Allowable water use

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	1/2	4	4	4	4/2	1	0.56	0.5	0.52	0.78	1

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

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

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

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

Withdrawal:

If you choose not to proceed, you may withdraw your application. To accomplish this you must notify the Department in writing by **May 13, 1996**. For your convenience you may use the enclosed "STOP PROCESSING" form.

To Proceed With Your Application:

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

If you have any questions:

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

Sincerely,

A handwritten signature in cursive script that reads "Cindy Smith". The signature is written in black ink and is positioned to the left of the typed name.

Cindy Smith
Initial Review Team

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

IWR Application # 71468 Certificate # _____

STATE OF OREGON

WATER RESOURCES DEPARTMENT

RECEIVED

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

MAR 28 1991

WATER RESOURCES DEPT.
SALEM, OREGON

There is no fee required for this application.

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

1. The name of the stream of the proposed instream water right is 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 and brook trout.
3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
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) the headwaters, river mile 27.7, within Section 11, Township 15S, Range 33E W.M., in Grant County...

Downstream to 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.

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 # 71468 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: BEAR11.APP

RECEIVED
MAR 28 1991
WATER RESOURCES DEPT
SALEM, OREGON

IWR Application # 71468 Certificate # _____

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

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

_____, 19__.

Date: _____, 19__.

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

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

RECEIVED
MAR 28 1991
WATER RESOURCES DEPT.
SALEM, OREGON

Y BASIN

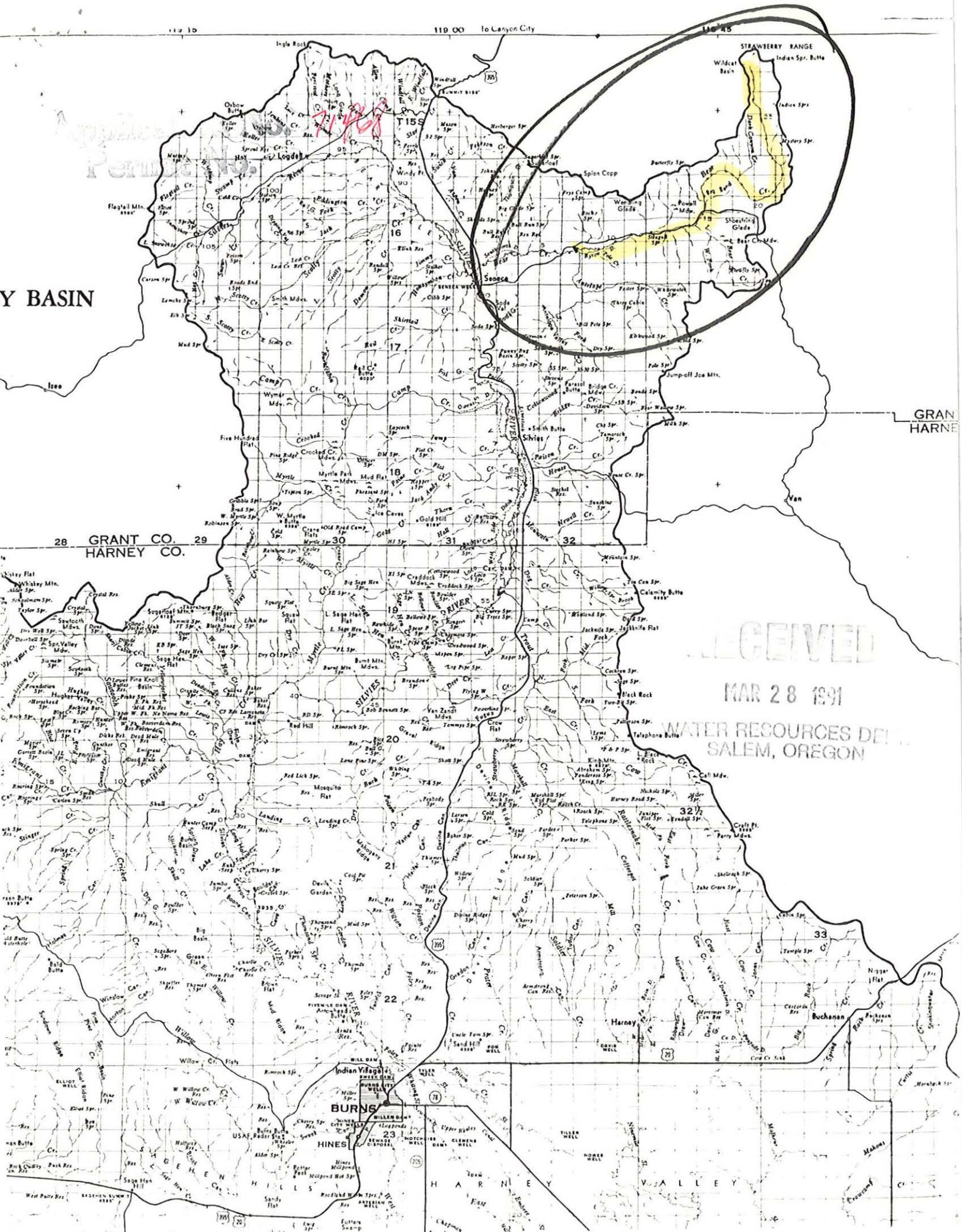
28 GRANT CO. 29 HARNEY CO.

GRAN HARNEY

RECEIVED

MAR 28 1931

WATER RESOURCES DEPT. SALEM, OREGON



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.

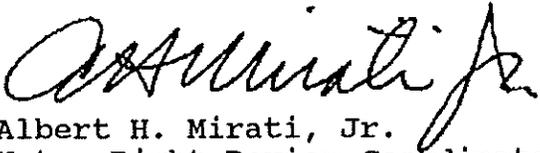
Application # 71280

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,



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

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



APPLICATION PROCESSING OUTLINE

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

FWK
Application No. 71468
Permit No. _____

RATE AND DUTY _____ for irrigation

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

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

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

yes no
Water Resources Commission classification limits or restrictions -- If yes, note:

State Engineer's withdrawals -- If yes, note:

Legislative withdrawals -- If yes, note:

If policy statement is unclear check with Resources Management Division.
Scenic Waterway: _____
on _____ up-stream _____ w/in 1/4 mile
Notify Parks and Recreation Department
Out-of-basin diversion
Need to route to Geology Section due to:
well within one mile of a stream
well within restricted surface water area
wells with request for greater than 5 cfs
well is for heating &/or cooling
well constructed by land owner
well is artesian
artificial ground water recharge project
ground water area under study
Within Irrigation District: _____
Notify _____ Need excerpt from District
Legal description of property
Ownership statement
Other parties to Notify: _____
Water Resources Commission review if:
Request for greater than 5 cfs
Dam height greater than 10 feet
Storage of more than 9.2 acre-feet
Out-of-basin diversion
within or above a scenic waterway
conditional uses under basin programs
requests for larger rate or duty than allowed
ground water recharge project
other substantial public interest issues
requests for review by an agency or person
Watermaster 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.O. received _____
 Publish application information in weekly public notice.
Notify other owners of development
PROTESTED
filed _____
resolved _____

FWK

Application No. 71468

Permit No.

3/28/91

Name ODFW

Address PO BOX 59, PORTLAND OR 97207

Assigned

Address

Beginning construction

Completion of construction

Extended to

Complete application of water

Extended to