

Oregon Water Resources Department
Water Rights Division

Instream Water Right Application
Number IS70992

Final Order

Application History

On 12/ 7/1990, the Department of Fish and Wildlife submitted an application to the Department for an instream water right. The Department issued a Proposed Final Order on AUGUST 20, 1996. The protest period closed October 4, 1996, and no protest was filed.

The proposed use would not impair or be detrimental to the public interest, but the Department's continuing evaluation reveals that the Proposed Final Order requires modification.

The purpose has been modified to accurately describe the use.

Order

IT IS HEREBY ORDERED that Application IS70992 be approved with above modifications to the Proposed Final Order, as provided in the attached certificate.

DATED October 18, 1996


Martha O. Pagel
Director

Hearing and Appeal Rights

Under the provisions of ORS 537.170, the applicant may request a contested case hearing by submitting the information required for a protest under ORS 527.153(6) to the Department within 14 days after this order is issued. If a contested case hearing is requested, the Department must schedule one. In the contested case hearing, however, only those issues based on the above modifications to the proposed final order may be addressed.

Under the provisions of ORS 183.484, the applicant or any person having standing may appeal this order by filing a petition for review in the Circuit Court for Marion County or the circuit court for the county in which the applicant resides or has a principal business office. The petition for review must be filed within 60 days after the date this order is served.

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: DEER CR tributary to ILLINOIS R

County: JOSEPHINE

Purpose: Providing required stream flows for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

DEER CREEK FROM THOMPSON CREEK AT RIVER MILE 6.1 (SESW, SECTION 12, TOWNSHIP 38S, RANGE 8W WM); TO THE MOUTH AT RIVER MILE 0.0 (NENW, SECTION 18 TOWNSHIP 38S, RANGE 8W WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 12/ 7/1990.

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	100.0	100.0	100.0	100.0	100.0	43.0	15.8	9.51	6.45	9.23	58.8	100.0
2nd½	100.0	100.0	100.0	100.0	60.0	43.0	15.8	9.51	6.45	9.23	58.8	100.0
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 OCTOBER 18, 1996.


Martha O. Pagel

Recorded in State Record of Water Right Certificate number 73029.

Oregon Water Resources Department Water Rights/Adjudication Section

Water Right Application Number: IS 70992

Proposed Final Order

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

Application History

On 12/7/1990, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: DEER CR tributary to ILLINOIS R
County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead and cutthroat trout for 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
1st $\frac{1}{2}$	100.0	100.0	100.0	100.0	100.0	60.0	40.0	40.0	40.0	60.0	100.0	100.0
2nd $\frac{1}{2}$	100.0	100.0	100.0	100.0	60.0	60.0	40.0	40.0	60.0	100.0	100.0	100.0

To be maintained in:

DEER CREEK FROM THOMPSON CREEK AT RIVER MILE 6.1 (SESW, SECTION 12, TOWNSHIP 38S, RANGE 8W WM); TO THE MOUTH AT RIVER MILE 0.0 (NENW, SECTION 18 TOWNSHIP 38S, RANGE 8W WM)

The Department mailed the applicant notice of its Technical Review on November 23, 1994, determining that the requested flows exceeded the estimated average natural flow during some months but that flows at a reduced amount, with exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from OREGON DEPT OF FISH AND WILDLIFE, WATER FOR LIFE, WATERWATCH OF OREGON.).

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements; November 1970 and April 1972.
- (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 Rogue 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
314.0	446.0	320.0	260.0	127.0	43.0	15.8	9.51	6.45	9.23	58.8	246.0

Water is NOT available for further appropriation (at a 50 percent exceedance probability) for the period June, July, August, September, October, and November.

The flows available for further appropriation are shown below:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
314.0	446.0	320.0	258.0	124.5	39.7	11.3	5.7	3.8	8.3	58.6	245.8

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 Rogue 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.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during June, July, August, September, October, and November because the unappropriated water available is less than the amounts requested during these 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

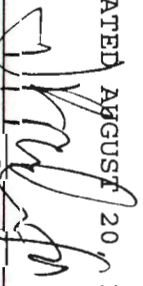
- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate,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

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st½	100.0	100.0	100.0	100.0	100.0	43.0	15.8	9.51	6.45	9.23	58.8	100.0
2nd½	100.0	100.0	100.0	100.0	60.0	43.0	15.8	9.51	6.45	9.23	58.8	100.0

Recommendation

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

DATED AUGUST 20, 1996


Steven P. Applegate

Administrator

Water Rights and Adjudications Division

Protest Rights

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

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

- known; and
- If you are not the applicant, the \$200 protest fee required by ORS 536.050.
- Proof of service of the protest upon the applicant.

Your protest must be received in the Water Resources Department no later than October 4, 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: DEER CR tributary to ILLINOIS R

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, winter steelhead and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

DEER CREEK FROM THOMPSON CREEK AT RIVER MILE 6.1 (SESW, SECTION 12, TOWNSHIP 38S, RANGE 8W WM); TO THE MOUTH AT RIVER MILE 0.0 (NENW, SECTION 18 TOWNSHIP 38S, RANGE 8W WM)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 12/ 7/1990.

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	100.0	100.0	100.0	100.0	100.0	43.0	15.8	9.51	6.45	9.23	58.8
2nd½	100.0	100.0	100.0	100.0	60.0	43.0	15.8	9.51	6.45	9.23	58.8
											100.0

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

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

Water Resources Director

Recorded in State Record of Water Right Certificate number _____.

IS70992

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 70992

WATERMASTER # #14 Bruce Seind
~~(DAVE JARRET OR GENE MCGINNIS)~~ (FOUR FOR GARY BALL)

REGIONAL MANAGER: AL COOK OR TOM PAUL

ODF&W - County: Josephine

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; FRONT COUNTER

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

PFO AND FO NOTIFICATION LIST FOR FILE NUMBER:

IS-70992 BASIN #15

OREGON DEPT OF FISH AND WI, PO BOX 59	, PORTLAND	, OR, 97207
WATER FOR LIFE , PO BOX 12248	, SALEM	, OR, 97309
WATERWATCH OF OREGON , 213 SW ASH SUITE 208	, PORTLAND	, OR, 97204

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.

IWR Application # 70992 Certificate # _____

STATE OF OREGON

WATER RESOURCES DEPARTMENT

RECEIVED

Application for Instream Water Right DEC 07 1990

by a State Agency

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 Deer Creek, a tributary of Illinois River.
2. The public use this instream water right is based on is providing required stream flows for coho and fall chinook salmon, winter steelhead, and cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing.
3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
100	100	100	100	100/	60	40	40	40/	60/	100	100
				60					60	100	
4. The reach of the stream identified for an instream water right is from (upstream end) Thompson Creek, river mile 6.1, within the SE quarter of the SW quarter of Section 12, Township 38S, Range 8W W.M., in Josephine County...
5. Downstream to the mouth, river mile 0, within the NE quarter of the NW quarter of Section 18, Township 38S, Range 8W W.M., in Josephine 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: November 9, 1990
ODFW (Fish, Wildf, and Habitat)	Date: November 9, 1990
Parks and Recreation Division	Date: November 9, 1990

IWR Application # 70992 Certificate # _____

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

Establish a gaging structure at or near the lower limit of 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 and implementing a monitoring program.

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

10. Remarks: Coho salmon are listed as "sensitive" (likely to be classified as threatened or endangered if declines continue) by ODFW.

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

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

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

Date: 12/2/96 signed: Deacy M. MacHugh

Oregon Department of Fish and Wildlife
Assistant Director
Habitat Conservation Div.

File: DEER1.APP

IWR Application # 70992 Certificate # _____

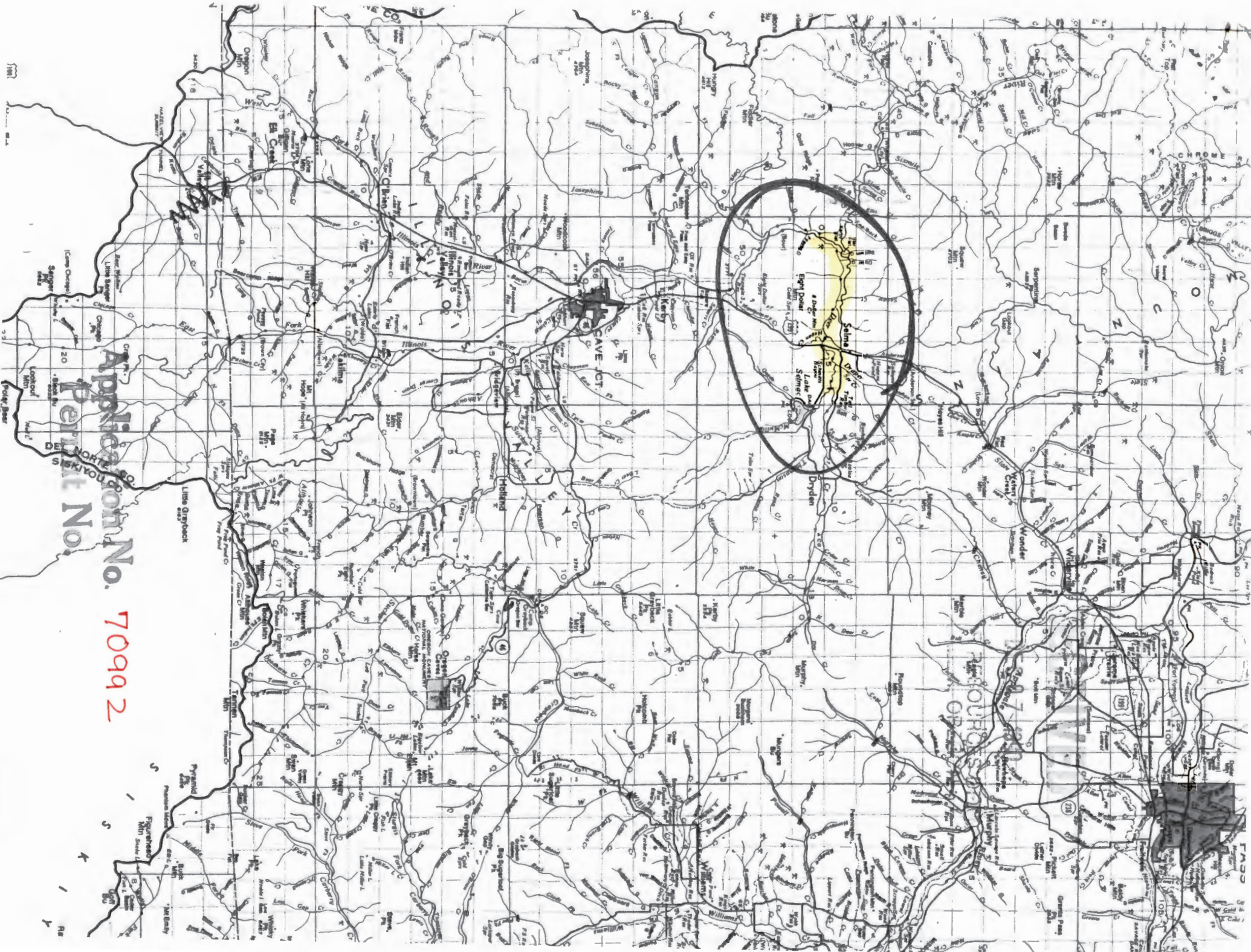
This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

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 7th day of December, 1990, at 8:00 o'clock A.M.

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



Application No. 70992
Permit No.

Date: November 23, 1994

OREGON WATER RESOURCES DEPARTMENT
SATISFACTORY REPORT OF TECHNICAL REVIEW
FOR AN INSTREAM WATER RIGHT APPLICATION

OBJECTIONS TO THE PROPOSED INSTREAM WATER RIGHT TECHNICAL REVIEW REPORT,
AS DESCRIBED BELOW, MUST BE RECEIVED IN WRITING BY THE OREGON WATER
RESOURCES DEPARTMENT, 3850 PORTLAND ROAD NE, SALEM, OREGON 97310, ON OR
BEFORE 5 PM: February 1, 1995

1. APPLICATION FILE NUMBER -IS 70992

2. APPLICATION INFORMATION

Application name/address/phone:

Oregon Department of Fish and Wildlife
P.O. Box 59
Portland, Oregon 97207 503-229-5400

Date application received for filing and/or tentative date of
priority: 12/7/1990

Source: DEER CR tributary to ILLINOIS R

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall
chinook salmon, winter steelhead and cutthroat trout for 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
1st 1/4	100.0	100.0	100.0	100.0	100.0	60.0	40.0	40.0	40.0	60.0	100.0	100.0
2nd 1/4	100.0	100.0	100.0	100.0	60.0	60.0	40.0	40.0	60.0	100.0	100.0	100.0

To be maintained in:

DEER CREEK FROM THOMPSON CREEK AT RIVER MILE 6.1 (SESW, SECTION 12,
TOWNSHIP 38S, RANGE 8W WM); TO THE MOUTH AT RIVER MILE 0.0 (NENW, SECTION
18 TOWNSHIP 38S, RANGE 8W WM)

3. TECHNICAL REVIEW

The application is complete and free of defects.

The proposed use is not restricted or prohibited by statute.

The following supporting data has been submitted by the applicant:

- (a) Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements; November 1970 and April 1972.
- (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.

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

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

An assessment with respect to other Commission administrative rules, including but not limited to the applicable basin program has been completed.

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

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

The evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application is described below. The recommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review:

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1st%	100.0	100.0	100.0	100.0	100.0	60.0	40.0	40.0	40.0	60.0	100.0	100.0
2nd%	100.0	100.0	100.0	100.0	60.0	60.0	40.0	40.0	60.0	100.0	100.0	100.0
314	446	320	260	127	43	15.8	9.51	6.45	9.23	58.8	246	AVE FLOW
60	60	60	60	40/30	20	10	5	5	30/80	80	80	ODFW MIN

4. REPORT CONCLUSIONS

The proposed water use, as conditioned, passed this technical review. The information contained in the application along with the supporting data submitted by the applicant indicate that the flow levels set out in this report are necessary to protect the public use.

The supporting data states that the recommended flows are necessary to meet the biological requirements for spawning and rearing of salmonids and resident game fish. Consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels. (See *Determining Minimum Flow Requirements for Fish*, ODFW Report January 20, 1984.) The recommended flow volumes are necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature.

The listed flows are adequate for present fish populations; however, true optimum flows for either spawning or rearing were not determined for the 1963 Report. The flows described in the 1963 Report are believed to be below the average annual discharges for most streams, but recommended rearing flows will frequently exceed to some degree those existing naturally, particularly in the smaller and lower elevation streams. (See *Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements*, November 1970 and April 1972.) Several times greater flow requirements are necessary to stimulate and maintain upstream migration of anadromous fish, including migratory freshwater trout. (See 1984 Report.)

Minimum stream flow recommendations developed from the 1969 survey are intended to provide enough suitable environment during appropriate seasons to perpetuate minimum desirable fish populations. Optimum flows would more nearly maximize production. The flow each location is that which should always arrive and depart from the designated point and do so without regulation which would cause portions of the stream to vary drastically from the recommended flows. The applicant has stated that as knowledge increases or environmental conditions change, it may be necessary to adjust the recommended flows either up or down to more properly fit the situations known to occur at that time. (See 1970 and 1972 Reports.)

5. PROPOSED CERTIFICATE CONDITIONS

[The following proposed conditions will apply to water use and will appear on the face of the certificate.]

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

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
100.0	100.0	100.0	100.0	100.0	20	10	5	5	9.23	58.8	100.0

2. The water right holder shall measure and report the in-stream flow along the reach of the stream or river described in the certificate as may be required by the standards for in-stream water right reporting of the Water Resources Commission.

3. This instream right shall not have priority over domestic, livestock, water legally stored or water released from storage to satisfy a secondary water right. Domestic use does not include irrigation of lawns and gardens.

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.

RECEIVED

FEB 01 1995

WATER RESOURCES DEP.
SALEM, OREGON

WATER FOR LIFE'S OBJECTION TO TECHNICAL REVIEW: APPLICATION # 70992

Submitted to the Oregon Water Resources Department, January 31, 1995

Water for Life hereby submits the following objection to Application # 70992, an instream water right application filed by the Oregon Department of Fish & Wildlife ("ODFW"). Water for Life asserts that the technical review by the Water Resources Department ("WRD" or "Department") is defective and there are elements of the water right as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicant has requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicant for the curing of defects.

A. WRD FAILED TO ANALYZE FLOW NEEDS

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

B. NO SUPPORTING DATA SUBMITTED FOR REQUESTED FLOW LEVELS

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

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

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

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

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

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

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

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

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

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

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

E. "EANF" CALCULATIONS ARE DEFECTIVE OR INCOMPLETE

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

F. FISH SPECIES MAY NOT BE PRESENT IN STREAM

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

G. "REPORT CONCLUSIONS" CONTAIN BOILERPLATE LANGUAGE

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

H. "OPTIMUM FLOW" REQUEST IS CONTRARY TO STATUTORY STANDARD

ODFW applied for the "optimum" flow rates listed Basin Investigation. The statutory standard for instream water rights, however, is the quantity "necessary to support" the public uses allowed (ORS 537.336 (1)), not optimum flows.

The January 1963 South Coast Basin report listed minimum flow amounts in Table D as recommendations to "provide what is considered the basic flows necessary to meet present requirements for anadromous fish passage, spawning, and rearing. These are not considered optimum flows although they may approach optimum in some instances." (South Coast Basin, State Water Resources Board, January 1963, page 73).

When new information was developed from a 1969 survey, the Oregon State Game Commission prepared the April 1972 report (Basin Investigation, also known as "Environmental Investigation"). The new report did modify some minimum flow amounts, and added "recommended optimum flows ... designed to provide instream conditions capable of maintaining an optimum desirable level of natural production." (1972 Environmental Investigation, South Coast Basin, Appendix 2, page 58). It is obvious from the data involved that both EANF and the flows allowed by the technical review are excessive.

The flow rates allowed should be reduced to the minimum flow recommendations of the Basin Investigation or EANF, whichever is less.

I. "REACH" REQUESTED IS TOO EXTENSIVE

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

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

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

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

J. EXISTING INSTREAM WATER RIGHTS NOT TAKEN INTO ACCOUNT

An instream water right already exists within the reach of the stream at issue in this application. The amount of the existing instream right should be subtracted from any instream right allowed under this application.

OAR 690-77-015 (10) requires that the "combination of instream rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits and shall be consistent with (4) and (5) above. Subsection (4) of that section deals with the "EANF" determination; the existing rights were also not accounted for in that calculation. See also OAR 690-77-015 (9).

If the existing instream water right is not subtracted from the approved flow levels, the Department should add a condition to the water right as follows: "The instream flow allocated pursuant to this water right is not in addition to any other instream water rights with a senior priority date and is not in addition to a designated minimum perennial stream flow."

K. ODFW'S GAGE RULE NOT FOLLOWED

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

L. FLOW LEVELS EXCEED REQUEST

The flow level approved for the month of May exceeds the amount requested by the Oregon Department of Fish & Wildlife. The flow level should be reduced.

CONCLUSION

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

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



Todd Heidgerken
Executive Director of Water for Life

RECEIVED

FEB - 2 1995

WATER RESOURCES DEPT
SALEM, OREGON



DEPARTMENT OF
FISH AND
WILDLIFE

January 23, 1995

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

RE: Comments; Rogue River Basin Instream Water Right
Technical Reviews; Applications 70975 through 70992,
70995 through 70997, 70999 through 71024, 71026
through 71029, 71031 through 71036, 71195 through
71199, 71202 through 71205, 71208, 71209, 71609
through 71629, 72843 through 72858 and 73367 through
73386.

ODFW has reviewed the subject Technical Reviews and offers
the following comments:

General Comments

1. ODFW has previously indicated it does not oppose reducing instream water right flow levels from amounts requested to the estimated average natural flow when this is less than requested flows. This is consistent with OAR 690-77-045 (3e).
2. According to OAR 690-77-026 (1), WRD "shall undertake a technical review ... and prepare a report." This subsection further lists 8 [(a) through (h)] mandatory criteria which, at 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 subject Rogue River basin 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:



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

*This instream right shall not have priority over domestic
[or livestock [consumption]....*

OR

*This instream right shall not have priority over
domestic, livestock and irrigation of noncommercial
gardens not to exceed 1/2 acre in area,*

Instream water rights certificates in the Rogue River 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 a proposed condition.

When ODFW reviewed WRD files on some of these applications for documentation of assessments of prior conditions, we found nothing to document that any such assessments had been done. ODFW, therefore, assumes the required assessments were not done, contrary to rule. ODFW also objects to the routine placement of exemptions on any of the subject applications on the grounds that to do so does not give adequate consideration to the public's interest in maintaining fishery resources in Rogue River basin streams. OAR 690-11-195 (4dA).

Specific Comments

1. In 31 of the subject reports of technical review, WRD has proposed reducing the requested flows levels to the minimum flow levels listed in the Rogue River Basin Investigation report even though water is available to meet, wholly or partially, the flows requested by ODFW. No explanation or rationale is provided for these reductions in the report or WRD's IWR applications files.

For application numbers 70980, 70991, 70992, 70996, 70997, 72844 and 72845, ODFW has collected information that indicates maximum summer water temperatures routinely exceed acceptable levels in the subject streams. For several, summer temperatures exceed levels considered to be lethal. Stream flow is a key factor affecting water temperatures. Because these streams support populations of coho salmon and winter steelhead, both species of concern for ODFW,

we believe the flows requested are necessary and appropriate. We must, therefore, object to the arbitrary lowering of requested flows other than to avoid exceeding the estimated average natural flow levels.

ODFW is also concerned with proposed lowering of its recommended summer-month flows for application numbers 70984, 70987, 70995, 71004, 71009, 71012, 71015, 71024, 71028, 71033, 71035, 71036, 71626 and 71198. Although ODFW has not documented high instream temperatures in these streams, field personnel with knowledge of these streams indicate water temperatures here are also of concern. We, therefore, object to the unjustified lowering of our requested flows.

For applications 71016, 70987, 70995, 71004, 71020, 71012, 71015, 71024, 71028, 71033, 71617, 71036, 71626, 71198 and 73386, WRD has proposed reducing winter flows to levels below those requested even though water is available. ODFW objects to this arbitrary lowering because appropriations (e.g., for storage) leading to lower flows during these months would tend to limit access to spawning areas in these streams for returning anadromous adults.

ODFW has no objection to the proposed lowering of flows for applications 73373, 73379, 73380 and 73381.

2. Based on the findings of the water availability analysis completed for the applications listed below, ODFW believes some technical reports contain unintended errors. In some cases, the flow level chosen for a specific month is greater than either ODFW's requested level or greater than the estimated average natural flow level. In other cases, a lower flow level was chosen than either the estimated average natural flow or ODFW's requested level. The following table suggests corrections:

<u>Application #</u>	<u>Month</u>	<u>Suspected Errors</u>	<u>Suggested Corrections</u>
70976	May/Dec	25/57.3	23.2/42
70985	December	80.1	60
70987	December	244	170
71032	December	83.7	31
71035	May	135	88.7

WRD; IWR Comments
January 23, 1995
Page 4

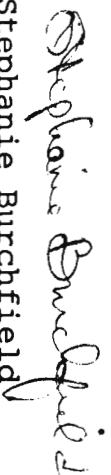
71199	June	20	26.1
71205	May	26	18.1
71626	April	15	11.8
72843	August	62	72.6
72853	February	29.3	26
72858	December	6.38	4
73372	November	34.6	34
73377	November	42.1	42

3. In several cases, proposed flows were omitted from the PROPOSED CERTIFICATE CONDITIONS section of the technical reports. These applications are: 71000, 71003, 71007, 71017, 71027, 71612, 71624, 72847, 72855 and 73383. For these applications, ODFW would support flows for each month based on either (1) the flow amount requested or (2) the estimated average natural flow, whichever is least.

4. For application 72856, the proposed flows under PROPOSED CERTIFICATE CONDITIONS are garbled and unreadable. Because the water availability analysis indicates water is naturally available all months to meet ODFW's request, we would expect to see the requested numbers reflected here.

Thank you for this opportunity to review the subject technical reports. We appreciate WRD's efforts to move forward with these applications and encourage you to proceed to certification as quickly as possible.

Sincerely,


Stephanie Burchfield

Water Resources Program Manager

c: Evenson/Vogt, Central Point
WaterWatch of Oregon (public information request)

WaterWatch

Hand Delivered

January 31, 1995

Re.
2/1/95
re

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

Re: Technical Reports for:

Files 70975 through 70992, 70995 through 70997, 70999 through 71024, 71026 through 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71629, 72843 through 72858, 73367 through 73386.

ODFW, Instream Applications, Rogue River Basin

WaterWatch of Oregon strongly supports the flows requested in the above referenced Oregon Department of Fish and Wildlife applications. These flows are essential for survival of coastal coho, fall chinook, winter steelhead, and cutthroat trout. Coastal steelhead and coho populations are severely depressed and have been petitioned for listing under the Federal Endangered Species Act. Streamflows are critical to the survival of these sensitive fish. By this letter WaterWatch requests copies of any objections filed on these applications.

In addition, we file the following objections to the water availability analyses in the technical reports pursuant to OAR 690-77-028:

The Water Availability Analysis is Defective

Instream water rights are a means for the state to achieve equitable allocation of water and Oregon Statutes place a duty on the state to act in a way that will protect instream flows needed for fish populations. OAR 690-77-015(2), ORS 496.430, OAR 690-410-070(2)(h). The agencies administrative rules require the technical reports to contain an evaluation of the estimated average natural flow (ENAF) available from the proposed source. OAR 690-77-026(1)(g). The rules also state that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. OAR 690-77-015(3).

However, the technical reports state that they contain an:
"evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application . . .
The recommended flows take into consideration planned uses and reasonable

anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review . . . "

Technical reports page 2 (emphasis added). Clearly, this analysis is contrary to the agencies rules because it takes into account out-of-stream uses. These instream water right application requests must be evaluated according to the higher ENAF figures.

The technical reports for most of these applications¹ propose to issue instream water rights for the Department's lower "average flows" rather than those requested for several months of each year. The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4).

Moreover, the technical reports for 70980, 70984, 70993, 71004, 71011, 71012, 72844, 73379, 73380 propose to allow only "ODFW minimum" flows rather than the ODFW requested flows during several months even though the flows requested by ODFW are within the "average flow". The flows requested by ODFW comply with OAR 690-77-015(4) which requires that the instream flows adopted by the Commission not exceed (ENAF) unless certain circumstances are met. These requests fall within the "average flow" which is lower than the ENAF. There is no apparent justification for these proposed decreases. ODFW's requested flows should approved.

And finally, the technical reports for 71000, 71003, 71007, 71017, 71027, 71028, 71612, 71624, 72847, 72855, and 73383 did not contain proposed flows by the Department. Without this information, it is impossible for WaterWatch, and other members of the public to fully evaluate these applications.

If steelhead and/or coho are listed under the state and/or federal endangered species acts, these acts will place an additional burden on the Commission. Under the state Act, the Commission is required to consult with the Oregon Department of Fish and Wildlife to ensure that any action taken by the Commission is consistent with ODFW programs to conserve the species or, if no plan is in place, that the act will not "reduce the likelihood of the survival of recovery of the threatened species of endangered species." ORS 496.182(2). The federal Act prohibits the "taking" of endangered species. 16 USCA § 1538(a)(1)(B).

¹ 70975 through 70979, 70981 through 70983, 70985 through 70992, 70995, 70999, 71001, 71002, 71003 through 71006, 71008 through 71011, 71013 through 71016, 71018 through 71024, 71026, 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71611, 71613 through 71622, 71623, 71625 through 71629, 72843 through 72846, 72848, 72851, 72853, 72854, 72857, 72858, 73367, 73368, 73372 through 73374, 73376, 73377, 73381, 73384, 73385.

Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3. The failure to protect sufficient instream flows for listed fish clearly causes habitat destruction or modification that can harm the fish. Habitat destruction or modification that harms fish can rise to the level of an unpermitted taking of a species under the Federal Endangered Species Act. See Palilia v. Hawaii Department of Land and Natural Resources, 649 F.Supp. 1070 (D. Hawaii 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988). In Palilia, the Court found that a state agency action that allowed goats to destroy the food source of an endangered bird was a habitat alternation that rose to the level of a take under the Endangered Species Act. Failing to protect streamflows for fish and continuing to issue water rights which taking water from fish is at least as clear a causal connection. ODFW instream flow requests should be granted in full.

These requested flows are necessary to protect severely depressed fish populations which will likely be listed under the Federal Endangered Species Act. Listing under the state and federal endangered species acts is not only a sign of the health of a particular species but also a warning signal for the health of the human environment.

The proposed conditions are contrary to the public interest.

The technical reports propose to subordinate these instream flow requests to human consumption or livestock. The technical reports do not provide any support or reasoning behind its proposal. These uses, while they use small amounts of water individually, have cumulative adverse effects on streamflows needed for fish.

As noted above, the state has a duty to protect instream flows needed for public uses of water. Fish need water to survive. The Rogue River system supports a variety of fish life including coho, fall chinook, winter steelhead, and cutthroat trout. Petitions have been filed seeking protection for steelhead stocks under the Federal Endangered Species Act. Part of the decline of fish populations can be attributed to low flows during summer months which impair fish survival by, among other things, raising water temperatures and decreasing aquatic habitat and trout rearing areas. Low flows in the winter adversely affect fish habitat in a number of ways, including exposing spawning gravel and reducing feeding and rearing areas in the river. In addition, water diversions create problems for fish passage and survival in the basin.

Streamflows are not only critical for fish survival, they help abate water quality problems. The Department of Environmental Quality (DEQ) has designated segments of the Rogue, Little Butte Creek, Bear Creek, Ashland Creek, Butler Creek, Wagner Creek, Payne Creek, Jackson Creek, Evans Creek, Applegate River, and the Illinois River as water quality limited. These segments are not able to support the designated beneficial uses of aquatic life

Water Resources Department

Page 4

and/or water contact. Rivers can not assimilate pollution loadings unless there is sufficient water instream. Thus, streamflow protection is critical to pollution abatement.

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

Adoption of these and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers. WaterWatch supports the Department's efforts to finally begin to implement an Act that has been "on the books" for the past six years. We look forward to the adoption of these instream water rights.

Sincerely,



Kimberley Priestley
Legal/Policy Analyst



November 23, 1994

WATER

RESOURCES

DEPARTMENT

Oregon Department of Fish and Wildlife
P.O. Box 59
Portland OR 97207

Reference:

Files 70975 through 70992, 70995 through 70997, 70999
through 71024, 71026 through 71029, 71031 through 71036,
71195 through 71199, 71202 through 71205, 71208, 71209,
71609 through 71629, 72843 through 72858, 73367 through
73386

Dear Department of Fish and Wildlife:

The Water Resources Department has finished the first step of its analysis of the above referenced applications. Enclosed are copies of this report, which is called the Report of Technical Review.

The technical review is the Department's legal and scientific analysis of the application, including a calculation of the expected availability of water for the proposed use. Step two, is the 60-day public review period.

In the case of your application, the Technical Review was satisfactory, and it concluded that water would be available for this use for the time period described in the proposed certificate conditions of the attached Report.

The Report does not represent any commitment by the Department to ultimately approve your application. Before a certificate may be granted, the Department must complete a public interest review.

In this second step of the review process, state regulations require that other water users and the general public be given an opportunity to object to your proposed water use. You also may object to any of the Department's findings or proposed certificate conditions contained in the technical report. If you wish to object, you must file your objection with the Department in writing by 5 p.m. on or before February 1, 1995. Interested parties must also submit their objections before the same deadline.

Please review the enclosed informational sheet which describes the appeals process and the steps that must be taken by any party objecting to your Report of Technical Review or by parties wishing to protest issuance of the permit.



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

If you have questions, please feel free to telephone me or any of the Department's Water Rights Division staff members. My telephone number is 378-3739 in Salem, or you may call toll-free from within the state to 1-800-624-3199.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dwight French", is written over the typed name.

Dwight French
Manager
Water Rights Section

Enclosures: 125 Technical Reviews
 Informational Sheet

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

CC: FILE # all Pagan River TCR 7K sent 11/23/94 MM

☒ WATERWATCH

☒ ODF&W (DEPENDING ON - IF NOT APPLICANT) COUNTY(IES): Jackson, Josephine, Curry

☒ WATERMASTER # 14, 19

☒ REGIONAL MANAGER - Al Cook

☒ KEN STAHR

OTHER ADDRESSES: (OVER FOR MORE ADDRESSES)

☒ AGRICULTURE, DEPARTMENT OF, VES GARNER

☒ BOYER, JOHN, JR.

☒ COALITION FOR RESPONSIBLE WATER PLANNING

☒ ~~COOS COUNTY BOARD OF COMMISSIONERS, GORDON ROSS (COOS RIVER BASIN ONLY)~~

☒ CROOK COUNTY STOCKGROWERS ASSOC., JEFF & RUNINDA MCCORMACK

☒ DEPARTMENT OF ENVIRONMENTAL QUALITY

☒ DOUGLAS COUNTY LIVESTOCK ASSOCIATION

CASEWORKER MM

ORIGINAL TO APPLICANT 10/14/94

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

OTHER ADDRESSES:

- ✓ F. A. I. R.
- ✓ FRUIT GROWERS LEAGUE
- ✓ HURRICANE CREEK IRRIGATION DITCH CORPORATION, RICHARD A. BOUCHER, SEC./TREAS.
- ✓ ILLINOIS VALLEY WATER RIGHT OWNERS ASSOC.
- ✓ LAKE COUNTY STOCKGROWERS, ANN TRACY, PRESIDENT
- ✓ MORROW COUNTY COMMISSIONER, RAY FRENCH
- ✓ MOON, DAVID, ATTORNEY
- ✓ OREGON ASSOCIATION OF NURSERYMEN, INC., CLAYTON W. HANNON, EXECUTIVE DIRECTOR
- ✓ OREGON ASSOCIATION OF REALTORS, JERRY SCHMIDT, WATER CONSULTANT
- ✓ OREGON CATTLEMEN'S ASSOC.
- ✓ OREGON HOP GROWERS ASSOC.
- ✓ OREGON SHEEP GROWERS ASSOCIATION, INC.
- ✓ OREGON WHEAT GROWERS LEAGUE, MACK KERNS
- ✓ WALLOWA COUNTY COURT, OFFICE OF THE JUDGE
- ✓ WALLOWA COUNTY STOCKGROWERS ASSOC., C/O JEAN STUBBLEFIELD, SECRETARY
- ✓ WATER FOR LIFE
- ✓ WATER RESOURCES CONGRESS

REVISED: 10/14/94

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

CC: FILE # 70992

WATERWATCH

ODF&W (DEPENDING ON - IF NOT APPLICANT)

WATERMASTER # 19

REGIONAL MANAGER - SW

WATER FOR LIFE

WATER RESOURCES CONGRESS

DAVID MOON, ATTORNEY

KEN STAHR

OREGON HOP GROWERS

OTHER ADDRESSES:

~~JOSEPHINE COUNTY FARM BUREAU, 178 PYLE DRIVE, GRANTS PASS, OR 97527~~

ILLINOIS VALLEY WATER RIGHT OWNERS ASSOCIATION, P.O. BOX 329, CAVE JUNCTION, OR 97523

CASEWORKER

DWF

ORIGINAL TO APPLICANT 12/03/93

December 28, 1993

L. F. Leseman, Vice Chairman
Illinois Valley Water Right Owners Association
P.O. Box 329
Cave Junction, OR 97523

WATER
RESOURCES
DEPARTMENT

Reference: In-stream Water Right Files 69809, 69810, 71018, 70991, 70992, 70979, 70980, 70978, 71022, 71021, 71199, 70977, 71031, 71202, 7-204, 71205, 71010, 71014, 71019, 69808, 70996, 70997, 71034, 72843, 72844 and 72845

Converted Minimum Flows 252, 253 and 277
In-stream Water Right Certificates 59768, 59769 and 59773

Dear Mr. Leseman:

Thank you for your letter reminding us that you have requested copies of the technical reviews of the above referenced in-stream water right applications and minimum stream flows.

As of this date, no technical reviews have been prepared for any of the applications for which you have made your request. Staff will forward copies to you as soon as the Department prepares the technical reviews for the above referenced applications.

Minimum stream flow numbers 252, 253 and 277 were converted to in-stream water right certificates on March 13, 1989. There are no provisions under the law that would allow you an opportunity at this time, or at the time of your letter of November 11, 1992, to review or comment on the conversion of these minimum stream flows to certificates of water right.

I am enclosing copies of Instream Water Right Certificates 59768, 59769 and 59773 for your review.

Your letter of December 22, 1993, indicates that you previously requested copies of all technical reviews of in-stream water rights. If you will review your letters, no request for all in-stream technical reviews was submitted. However, under separate cover I have forwarded copies of the 476 technical review of in-stream water rights issued to date.

Please feel free to contact me if you have any questions and I will be happy to address any concerns you may have.

Sincerely,


Steve Brown
Manager
Water Rights Division

1136



ILLINOIS VALLEY WATER RIGHT OWNERS ASSOCIATION
P.O. Box 329
Cave Junction, OR 97523

RECEIVED

NOV 16 1992

WATER RESOURCES DEP.
SALEM, OREGON

November 11, 1992

Oregon Water Resources Department
3850 Portland Road, NE
Salem, OR 97310

Gentlemen:

Please forward copies of the technical reviews for the following pending or finalized instream water right applications:

<u>Watercourse</u>	<u>App. Date</u>	<u>Reach</u>	<u>App. #</u>
Althouse Creek	1/20/89	MP 9.5 to 0.0	69809 (IS)
Althouse Creek	1/20/89	7.4 to 0.0	69810 (IS)
Briggs Creek	12/07/90	0.0 to 0.0	71018 (IS)
Deer Creek	11/03/83	4.3 to 0.0	252 (MF)
Deer Creek	12/07/90	14.0 to 6.1	70991 (IS)
Deer Creek	12/07/90	6.1 to 0.0	70992 (IS)
East Fork Illinois River	11/03/83	1.1 to 0.0	252 (MF)
East Fork Illinois River	12/07/90	14.3 to 8.5	70979 (IS)
East Fork Illinois River	12/07/90	8.5 to 0.0	70980 (IS)
East Fork Illinois River	12/07/90	3.0 to 0.0	70978 (IS)
Elder Creek	12/07/90	0.0 to 0.0	71022 (IS)
Elk Creek	12/07/90	2.5 to 0.0	71021 (IS)
Fall Creek	1/16/91	6.0 to 0.0	71199 (IS)
Grayback Creek	12/07/90	0.0 to 0.0	70977 (IS)
Josephine Creek	12/07/90	4.0 to 0.0	71031 (IS)
Lawson Creek	1/16/91	4.5 to 0.0	71202 (IS)
Little Elder Creek	1/16/91	1.0 to 0.0	71204 (IS)
Mendenhall Creek	1/16/91	0.5 to 0.0	71205 (IS)
Rancherie Creek	12/07/90	0.0 to 0.0	71010 (IS)
Rough and Ready Creek	12/07/90	5.0 to 0.0	71014 (IS)
South Fork Deer Creek	12/07/90	0.0 to 0.0	71019 (IS)
Sixmile Creek	1/20/89	11.0 to 0.0	69808 (IS)
Sucker Creek	11/03/83	0.0 to 0.0	277 (MF)
West Fork Illinois River	12/07/90	13.5 to 6.9	70996 (IS)
West Fork Illinois River	12/07/90	6.9 to 0.0	70997 (IS)
Wood Creek	12/07/90	2.5 to 0.0	71034 (IS)

These technical reviews are requested under the authority given in the terms of settlement in the action between Water for Life and the Water Resources Dept.

Sincerely,
IV WATER RIGHT OWNERS ASSN.

cc: T. Heidgerken,
Water for Life
David Moon, AAL

L.F. Leseman
Vice Chairman

APPLICATION PROCESSING OUTLINE

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

Total: _____

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

well 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 program

requests for larger rate or duty than allowed

ground water recharge project

other substantial public interest issues

requests for review by an agency or person

Watermaster consent for sent with copy of draft permit

application, and map.

Watermaster comments received _____

Hydrographic section comments requested _____

Hydrographic section comments received _____

O.D.F.V. sent copy of application and map (except

groundwater) requesting consent _____

O.D.F.V. comments received _____

Report from D.E.D. received _____

Publish application information in weekly public

notice.

Notify other owners of development

PROTESTED

filed _____

resolved _____

Application No. *JWR* 70962
 Permit No. 0