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DEPARTMENT OF JUSTICE

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MEMORANDUM

DATE: July 26, 1988

TO: Bill Young, Director
Water Resources Department
3850 Portland Road NE
Salem, OR 97310

FROM: Anne W. Squier *AWS*
Assistant Attorney General

SUBJECT: Informal Overview of Diack Decision
DOJ File No. 690-001-G0023-88

In the decision released this morning, the Supreme Court reversed the decisions of the Court of Appeals and the Commission. On the plus side, the court determined, in concert with the Commission's position, that:

1. The Commission does have jurisdiction over the City of Portland's application for hydroelectric development on the Bull Run River. Page 9.

2. The Commission findings that the ORS 390.835(1) requirement that the "free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses" has been met are sufficient. First, the term "free flowing" is self-explanatory and does not establish a separate statutory standard. Page 14. Second, the commission's factual findings regarding the flow levels required for protection of fishery habitat and recreational uses fully support its conclusion that the statutory standard is met. Page 16.

William Young
July 26, 1988
Page 2

Reversal and remand is based on the following points:

1. Before authorizing any diversion of water above or tributary to a scenic ^{W. 2nd Ave.} highway, the Commission must find that the requirements of ORS 390.835(1) are met. The Commission must find that the diversion "is necessary to uses designated in ORS 536.310)(12)" (beneficial uses). The Court reverses and remands to the Commission for such findings. Page 12-13.

2. The Commission's findings that accepted the revenue forecasts of the proposed project do not support its conclusion that the project, when operated under the restrictions later imposed, will be of sufficient economic value to justify issuing the permit. The Court remands for the Commission to determine the income the project will generate if it operates under the restrictions imposed by the permit, and make appropriate findings. (Note: it appears that this point at least will require reopening the hearing record). Page 14.

3. The order does not adequately explain how the Commission applied the public interest criteria set out in ORS 537.170(5) ("it is little more than a regurgitation of the statutory language, without analysis"). Page 17. On remand, the Commission "should explain more fully, pointing to the facts that it believes, "if it still does," permit it to make the ultimate findings and conclusions it draws from them. Page 17.

ljp:072688/8147G

JUL 26 1988

STATE COURT ADMINISTRATOR
By _____ DEPUTY

1 IN THE SUPREME COURT OF THE STATE OF OREGON

2 IN THE MATTER OF THE PERMIT
3 APPLICATION NO. 63266 - CITY
4 OF PORTLAND HYDROELECTRIC POWER
5 DIVERSION FROM BULL RUN RIVER
6 -----

7 ARCH W. DIACK; SAMUEL L. DIACK, JR.;
8 PORTLAND AREA RECREATION COALITION;
9 THE NATURE CONSERVANCY; RIVER
10 TRAILS, INC.; and OREGON TROUT, INC.,

Petitioners on Review,

11 v.

12 CITY OF PORTLAND, and WATER
13 RESOURCES DEPARTMENT - STATE
14 OF OREGON,

Respondents on Review.

15 * * * * *
16 (WPRB 63266; CA A37696; SC S34223)

17 In Banc

18 On review from the Court of Appeals.*

19 Argued and submitted January 19, 1988.

20 William P. Hutchison, Jr., Portland, argued the cause and
21 filed the petition on behalf of the Petitioners on Review.
22 With him on the petition were David R. Maier and Hutchinson,
23 Hutchison and Hooper, Portland.

24 Philip Schradle, Assistant Attorney General, Salem,
 argued the cause on behalf of Respondent on Review Water
 Resources Department - State of Oregon.

 Ruth M. Spetter, Office of City Attorney, Portland,
 argued the cause on behalf of Respondent on Review City of
 Portland.

 Noelle Billups, Assistant County Counsel, Portland, filed
 an amicus curiae brief on behalf of Multnomah County. With her
 on the brief was Laurence Kressel, County Counsel for Multnomah
 County, Portland.

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GILLETTE, J.

The decisions of the Court of Appeals and the Water Resources Commission are reversed. The case is remanded to the Water Resources Commission for proceedings consistent with this opinion.

*Judicial review of a Final Order of the Water Resources Commission.
85 Or App 255, 736 P2d 198 (1987).

1 GILLETTE, J.

2 In this case we are called upon to examine the impact,
3 if any, of provisions of Oregon's Scenic Waterways Act, ORS
4 390.805 et seq (the Act), on a decision to permit hydroelectric
5 generation on a portion of a river that thereafter flows into a
6 scenic waterway. The Water Resources Commission (the
7 commission) issued a permit allowing the City of Portland (the
8 city) to divert water from the Bull Run River for the
9 generation of hydroelectricity. The Bull Run River flows into
10 the Sandy River a short distance above a 12.5-mile stretch of
11 the Sandy River designated as a scenic waterway pursuant to the
12 Act and OAR 736-40-010(7). Petitioners invoke the Scenic
13 Waterways Act to support their opposition to the city's
14 application. The Court of Appeals affirmed the order granting
15 the application. We reverse.

16 At this point, a brief recitation of the city's use of
17 Bull Run water is useful. The city maintains two reservoirs on
18 the Bull Run River. Those reservoirs collect water for the
19 city's use and, from 1894 to 1984, were the sole source of the
20 city's water. Three conduits carry water from the reservoirs
21 to terminal storage facilities located on Powell Butte. The
22 maximum delivery capacity of the conduits is approximately 350
23 cubic feet per second (cfs), which is about twice the city's
24 normal requirement.

1 Before 1984, excess Bull Run water was used to
2 generate electricity, either at hydroelectric facilities
3 maintained at the city's reservoir, or at the Roslyn Lake
4 hydroelectric facility owned by Portland General Electric
5 (PGE). The water then was discharged back into the Bull Run
6 River and resumed its normal course into the Sandy River and
7 through the Sandy River Scenic Waterway.

8 In 1984, the city developed a ground water well field
9 on the south bank of the Columbia River to serve as an
10 alternate source of water. This system includes a storage
11 tank, a booster pump station and a water main connecting with
12 the three conduits that divert Bull Run water to Powell Butte.
13 The pump station pumps water from the well field storage tank
14 to Powell Butte Reservoir for distribution. When not being
15 used to pump water, the pump station's turbines may be operated
16 in reverse mode to generate electricity.

17 During certain months, when water from the well field
18 is not needed, the city proposes to pump excess Bull Run water
19 to the Columbia River booster pump station to generate
20 electricity, which it then plans to sell to PGE. After passing
21 through the booster pump station, the water would be discharged
22 into the Columbia River instead of being returned to the Bull
23 Run River. The net effect would be to reduce the flow of Bull
24 Run water into the Sandy and through the scenic waterway.

1 The city applied to the Commission for a permit to use
2 Bull Run water for generating purposes. Petitioners opposed
3 the application because the project would divert water that
4 otherwise would flow through the Sandy River scenic waterway.
5 For that reason, petitioners argued that the city must satisfy
6 the requirements of ORS 390.835(1), which provides:

7 "It is declared that the highest and best uses of
8 the waters within scenic waterways are recreation,
9 fish and wildlife uses. The free-flowing character of
10 these waters shall be maintained in quantities
11 necessary for recreation, fish and wildlife uses. No
12 dam, or reservoir, or other water impoundment
13 facilities shall be constructed or placer mining
14 permitted on waters within scenic waterways. No water
15 diversion facility shall be constructed or used except
16 by right previously established or as permitted by the
17 Water Resources Commission, upon a finding that such
18 diversion is necessary to uses designated in ORS
19 536.310(12), and in a manner consistent with the
20 policies set forth under ORS 390.805 to 390.925. The
21 Water Resources Commission shall administer and
22 enforce the provisions of this subsection." (Emphasis
23 added).

24 The Commission conducted hearings and issued a final
order granting the city a permit to divert 170 cfs from
December 1 through May 31 of each year, subject to various
minimum stream flow requirements. The Commission concluded
that:

"The Scenic Waterways Act and supporting rules apply
to this application. Operation of the proposed
project would reduce Bull Run River discharges to the
lower reach of the Sandy River which is a designated
scenic waterway. This designation requires a
determination that the free-flowing character of the
Sandy River shall be maintained in quantities
necessary for recreation, fish and wildlife uses

1 during the times of diversion of water from Bull Run
2 River by this project. Conditions on the schedule of
3 operation, maintenance of instream flows and the small
4 percentage flow reduction compared to the level of
5 flows in the Sandy would avoid impacts on scenic
6 waterway and other water use values of importance to
7 the public and insure that quantities necessary for
8 recreation, fish and wildlife uses shall be maintained
9 as further set forth in separate findings. It is
10 concluded, therefore, that the proposed project will
11 not impair or be detrimental to the public interest."

12 Petitioners petitioned for judicial review. The Court
13 of Appeals affirmed the issuance of the permit. Diack v. City
14 of Portland, 85 Or App 255, 736 P2d 198 (1987). The court
15 concluded that the emphasized portion of ORS 390.835(1), quoted
16 above, does not apply to diversions of water outside the scenic
17 waterway itself. 85 Or App at 259. Thus, the city need not
18 show that the diversion was necessary to uses designated in ORS
19 536.310(12). However, the court also concluded that the
20 Commission must ensure that water enters a scenic waterway "in
21 quantities necessary for recreation, fish and wildlife uses."
22 ORS 390.835(1). Finally, the court held that there was
23 substantial evidence in the record to support the Commission's
24 conclusion that "the diversion of a relatively small portion of
the total flow, limited to the months of highest flow and
lowest recreational use, will not affect the scenic waterway
uses." 85 Or App at 259.

Petitioners petitioned for review, arguing that the
Court of Appeals erred (1) in limiting the restrictions set out

1 in ORS 390.835(1) to diversions of water within the scenic
2 waterway itself and (2) in holding that there was sufficient
3 evidence to support issuance of the permit.

4 I

5 We first address the city's contention that the
6 Commission lacked jurisdiction over its application. The city
7 raised this issue in a letter accompanying its application, but
8 chose to "acquiesce" in the Commission's jurisdiction for the
9 purposes of this case. In its post-argument memorandum of
10 additional authorities to this court, the city resurrects its
11 jurisdictional challenge.

12 At the outset, we reject petitioners' argument that
13 the city has waived its right to challenge the Commission's
14 jurisdiction. It is well settled that an agency's jurisdiction
15 cannot be conferred by stipulation of the parties. Hoffman v.
16 City of Portland, 294 Or 150, 156, 654 P2d 1106 (1982); City of
17 Hermiston v. ERB, 280 Or 291, 295, 570 P2d 663 (1977); Lane
18 Council Govts. v. Emp. Assn., 277 Or 631, 636, 561 P2d 1012,
19 reh denied, 278 Or 335, 563 P2d 729 (1977). "Jurisdiction"
20 depends on whether the matter is one that the legislature has
21 authorized the agency to decide. If a party may not stipulate
22 to an agency's jurisdiction, it follows that the party also may
23 not waive a jurisdictional issue by "acquiescence." The issue
24 is properly before this court.

1 In general, the Commission has the authority to
2 consider applications for the appropriation of water. ORS
3 537.130 provides:

4 "(1) Except for the use exempted under ORS
5 537.142 [not applicable here], any person intending to
6 acquire the right to the beneficial use of any of the
7 surface waters of this state shall, before beginning
8 construction, enlargement or extension of any ditch,
9 canal or other distributing or controlling works, or
performing any work in connection with the
construction, or proposed appropriation, make an
application to the Water Resources Commission for a
permit to make the appropriation.

10 "(2) Except for the use exempted under ORS
11 537.142, no person shall use, store or divert any
waters until after the commission issues a permit to
appropriate the waters."

12 For the purposes of ORS chapter 537, a "person" includes a
13 municipal corporation. ORS 536.007(6). See also ORS 537.282
14 through 537.299 (special provisions covering municipal
15 applicants for permits to appropriate water for hydroelectric
16 power).

17 Standing alone, the above provisions clearly authorize
18 the Commission to conduct hearings in cases such as these.
19 However, ORS 536.320(2) provides:

20 "The commission shall not have power:

21 "* * * * *

22 "(2) To modify, set aside or alter any existing
23 right to use water or the priority of such use
24 established under existing laws * * *."

1 The city argues that the Commission does not have the power to
2 alter Portland's preexisting right to use Bull Run water. ORS
3 538.420 provides:

4 "(1) Exclusive right to the use of waters of
5 Bull Run and Little Sandy Rivers is granted to the
6 City of Portland. However, the Water Rights Act (as
7 defined in ORS 537.010) shall not impair the rights of
8 any person who, on February 24, 1909, had any vested
9 right to or valid appropriation or bona fide notice of
appropriation of the waters of either Bull Run River
or Little Sandy River, under laws theretofore in
effect or under any valid contract or deed of
conveyance theretofore made with or by the City of
Portland.

10 "(2) ORS 541.010 to 541.080 [governing water
11 companies organized under 1891 act] shall not apply to
Bull Run Creek or River."

12 We disagree that the above provision gave the city the
13 unlimited right to use Bull Run water for hydroelectric
14 generation. As originally enacted in 1909, ORS 538.420
15 provided:

16 "The exclusive right to the use of the waters of
17 Bull Run and Little Sandy rivers is hereby granted to
18 the city of Portland, and all rights to the waters of
19 the lakes, rivers and streams of this state heretofore
20 acquired for the purposes of municipal water supply
21 are hereby confirmed, and no rights which shall be
22 acquired under this act shall impair the rights of any
23 municipal corporation to waters heretofore taken. The
24 board of control shall reject, or grant, subject to
municipal use, all applications where, in its
judgment, the appropriation of the waters applied for
impair a municipal water supply. It shall be the duty
of municipal corporations of the state, on request of
the state engineer, to furnish to him a statement of
the amount and source of the municipal water supply,
with probable increase or extension of the same;
provided, that this act shall not be deemed or held to
and shall not impair the rights of any person,

1 association or corporation who may, at and prior to
2 the time this act is filed in the office of the
3 secretary of state, have any vested right to or valid
4 appropriation or bona fide notice of appropriation of
5 the waters of either the Bull Run or the Little Sandy
6 river, under laws heretofore in effect or under any
7 valid contract or deed of conveyance heretofore made
8 with or by the city of Portland."

9 Lord's Oregon Laws 1910, p 2385-86, § 6672.

10 Read as a whole, the statute defined the rights of
11 cities to use water for municipal purposes. It was codified
12 under Lord's Oregon Laws 1910, title XLIII, chapter VI, part
13 (g), and was entitled "Of Municipal Water Supply." Separate
14 provisions governed the appropriation of water for mining and
15 electrical power. Lord's Oregon Laws 1910, title XLIII,
16 chapter II. The Bull Run River was not exempted from the
17 requirements of those provisions. In comparison, section 6525
18 of chapter I, title XLIII, Lord's Oregon Laws 1910, which
19 governed the appropriation of water for "General Use and
20 Irrigation," specifically provided that "no part of this
21 chapter shall apply to Bull Run creek or river, or the waters
22 thereof, being in Clackamas and Multnomah counties, Oregon,
23 from which river or stream water is supplied to the city of
24 Portland."

From the above we conclude that ORS 538.420 was
originally enacted to ensure the City of Portland an adequate
municipal water supply by granting it exclusive access to the
Bull Run River for municipal purposes. The legislature did not

1 intend to grant the city the unrestricted use of Bull Run water
2 for purposes such as the generation of hydroelectric power.
3 The statute has not since been amended to allow the city
4 unlimited access to Bull Run water for such purposes.
5 Therefore, notwithstanding ORS 538.420, the Commission has
6 jurisdiction over the city's application for a permit to
7 operate a hydroelectric facility on the Bull Run River.

8 II

9 The next issue is the effect, if any, of the Scenic
10 Waterways Act on the city's application. The Scenic Waterways
11 Act was proposed by initiative petition and was voted into law
12 on November 3, 1970. As originally enacted, ORS 390.835(1)
13 provided:

14 "Subject to subsection (12) of ORS 536.310, it is
15 declared that the highest and best uses of the waters
16 within scenic waterways are recreation, fish and
17 wildlife uses. The free-flowing character of these
18 waters shall be maintained in quantities necessary for
19 recreation, fish and wildlife uses. No dam, or
20 reservoir, or other water impoundment facility shall
21 be constructed on waters within scenic waterways. No
22 water diversion facility shall be constructed on such
23 waters except as necessary to uses designated in
24 subsection (12) of ORS 536.310 or as necessary to
existing uses of related adjacent land. The submerged
and submersible lands under and along such waterways
shall not be modified by placering, dredging or by any
other means."

22 Or Laws 1971, ch 1, § 4.

23 In 1973, the legislature amended ORS 390.835 as
24 follows:

1 "(1) [Subject to subsection (12) of ORS
2 536.310,] It is declared that the highest and best
3 uses of the waters within scenic waterways are
4 recreation, fish and wildlife uses. The free-flowing
5 character of these waters shall be maintained in
6 quantities necessary for recreation, fish and wildlife
7 uses. No dam, or reservoir, or other water
8 impoundment facility shall be constructed or placer
9 mining permitted on waters within scenic waterways.
10 No water diversion facility shall be constructed or
11 used except by right previously established or as
12 permitted by the State Engineer, upon a finding that
13 such diversion is necessary to uses designated in
14 subsection (12) of ORS 536.310, and in a manner
15 consistent with the policies set forth under ORS
16 390.805 to 390.925. The state Engineer shall
17 administer and enforce the provisions of this
18 subsection.

19 "(2) No [water diversion] bank protection
20 works or dredging facility shall be constructed or
21 used on such waters, except as [necessary to uses
22 designated in subsection (12) of ORS 536.310 or as
23 necessary to existing uses of related adjacent land.
24 The submerged and submersible lands under and along
such waterways shall not be modified by placing,
dredging or by any other means] permitted by the
Director of the Division of State Lands and approved
by the State Land Board for purposes consistent with
the policies set forth under ORS 390.805 to 390.925
for scenic waterways, and in a manner consistent with
the policies set forth under ORS 541.605 to 541.660
for removal of material from the beds and banks and
filling of any waters of this state. The Director of
the Division of State Lands shall administer and
enforce the provisions of this subsection."

Or Laws 1973, ch 756, § 1 (additions in boldface; deletions
bracketed and italicized).

The Court of Appeals construed ORS 390.835(1) as
follows:

"ORS 390.835(1) declares that the highest and
best uses of waters within scenic waterways are
recreation, fish and wildlife uses. It then prohibits

1 dams or water impoundments within scenic waterways and
2 requires a permit for the construction of a diversion
3 facility within a scenic water way [sic]. The statute
4 does not explicitly cover diversion of water before it
5 enters the waterway. It does not even absolutely
6 prohibit diversion facilities within a scenic waterway
7 but allows them, if they have a permit or prior right
8 and are necessary for a beneficial use described in
9 ORS 536.310(12). The statutory scheme only considers
10 construction within the scenic waterway itself."

11 85 Or App at 258-59 (emphasis in original; footnote omitted).

12 The Court of Appeals read the fourth sentence in ORS
13 390.835(1) as requiring a permit only for diversion facilities
14 constructed or used within scenic waterways, even though the
15 statute itself places no such limitation on the location of the
16 diversion. Apparently, the Court of Appeals concluded that
17 those who enacted the Scenic Waterways Act, having limited the
18 scope of the third sentence in ORS 390.835(1) to waters within
19 scenic waterways, intended to include the same limitation in
20 the fourth sentence. For the reasons set out below, we
21 disagree with that interpretation.

22 The 1973 legislature rewrote the fourth sentence in
23 ORS 390.835(1) without using the limiting phrase, "in such
24 waters." The legislative history does not indicate what the
legislature meant by that change. Under the interpretation
advocated by the city and by the Commission, the change would
mean nothing.

This court has been "unwilling to deem a legislative
act meaningless unless no other reasonable conclusion is

1 available." 1000 Friends of Oregon v. Wasco County Court, 299
2 Or 344, 358, 703 P2d 207 (1985). The legislature's failure to
3 include the phrase "in such waters" was a material change in
4 the language of the fourth sentence in ORS 390.835(1), and we
5 presume that the legislature intended a material change in
6 meaning. See Fifth Ave. Corp. v. Washington County, 282 Or
7 591, 581 P2d 50 (1978). The legislature may have concluded
8 that it was insufficient to restrict only those diversions
9 located within a scenic waterway. If so, it is reasonable to
10 presume that the legislature intended to expand the scope of
11 the fourth sentence in ORS 390.835(1) in order to protect water
12 destined for a scenic waterway. We conclude that no diversion
13 of water that otherwise would enter a scenic waterway may be
14 permitted unless the requirements of ORS 390.835(1) are met.

15 Under ORS 390.835(1), the Commission may approve a
16 diversion only if it finds that the diversion is "necessary to
17 uses designated in ORS 536.310(12)." ORS 536.310(12) provides:

18 "When proposed uses of water are in mutually
19 exclusive conflict or when available supplies of water
20 are insufficient for all who desire to use them,
21 preference shall be given to human consumption
22 purposes over all other uses and for livestock
23 consumption, over any other use, and thereafter other
24 beneficial purposes in such order as may be in the
public interest consistent with the principles of
Chapter 707, Oregon Laws 1955, under the existing
circumstances * * *."

The Commission made no findings as to whether the city's
proposed diversion is necessary to a beneficial use described

1 in ORS 536.310(12). Accordingly, we reverse and remand to the
2 Commission for such findings.

3 Petitioners also object to the Commission's findings
4 that:

5 "The proposed project would generate revenues in
6 excess of those currently being realized through the
use of water from the Bull Run River;" and

7 "The proposed project would employ an established
8 technology and would produce increased economic
benefits through more intensive use of the waters
involved."

9 Under the city's original proposal, the project would
10 have operated for nine months out of the year and the city
11 would have been required to maintain a minimum stream flow of
12 850 cfs. The city estimated that, operating on that schedule,
13 the project would generate a net income of \$216,000 during the
14 first year. However, under the permit issued by the
15 department, the project will be able to operate for only six
16 months out of the year and must maintain a minimum stream flow
17 of between 1,500 and 2,000 cfs. The Commission nonetheless
18 adopted, without discussion, the city's estimate of the amount
19 of revenue the project would generate under the proposed
20 schedule of operation. The Commission does not appear to have
21 taken into account the reduction in the number of days the
22 project would be allowed to operate under the permit. The
23 Commission's findings that accepted the revenue-generating
24 capability of the proposed project do not support its

1 conclusion that the project, operating under the restrictions
2 imposed, will be of sufficient economic value to justify
3 issuing the permit. On remand, the Commission should determine
4 the income that the project will generate if it operates under
5 the restrictions imposed by the permit, and make appropriate
6 findings.

7 Petitioners also object that the Commission did not
8 adequately explain its application of some of the statutory
9 standards set out in ORS 390.835(1) and 537.170(5). They first
10 argue that the Commission did not adequately explain how its
11 order would maintain "the free-flowing character" of the waters
12 within the Sandy River scenic waterway. ORS 390.835(1). The
13 term "free-flowing" is self-explanatory and requires no
14 interpretation by the Commission or by this court. The
15 legislature appears to have used the term in a purely
16 descriptive sense; it did not intend to establish a separate
17 statutory standard. Petitioners' contentions to the contrary
18 are not well taken.

19 In contrast, the requirement that the free-flowing
20 character of the water "be maintained in sufficient quantities
21 necessary for recreation, fish and wildlife uses" does set a
22 standard the Commission must apply. See Springfield Education
23 Assn. v. School Dist., 290 Or 217, 228, 621 P2d 547 (1980). In
24 that case, this court stated:

1 ** * * The legislature may use general delegative
2 terms because it cannot foresee all the situations to
3 which the legislation is to be applied and deems it
4 operationally preferable to give to an agency the
authority, responsibility and discretion for refining
and executing generally expressed legislative policy.
* * *

5 Id.

6 ORS 390.835(1) expresses the general legislative
7 policy that recreation, fish and wildlife uses are the highest
8 and best uses of waters within scenic waterways. To that end,
9 the statute delegates to the Commission the authority to
10 determine the level of stream flow necessary to support
11 recreation, fish and wildlife uses which may themselves differ
12 from time to time. In this case, the Commission determined
13 that minimum stream flows of 1,500 cfs in December, 1,900 in
14 January and February, and 2,000 in March through May, "are
15 required for protection of salmon and steelhead habitat and
16 will also benefit other aquatic life, wildlife and recreation
17 uses in the Sandy River." The Commission also determined that
18 "[a]n instream flow of 1500 cfs would provide protection for
19 whitewater boating and angling during the period when such use
20 is most prevalent and not otherwise limited by
21 naturally-occurring low flows."¹

22 Petitioners argue that "[t]he amended order was devoid
23 of any link between the [Commission's] findings of fact and its
24 conclusions which would allow a review of the [Commission's]

1 reasoning to determine that the statutory standards were met."
2 Because petitioners' argument never becomes more specific, it
3 is difficult to determine their precise objection. The factual
4 findings made by the Commission, some of which are quoted in
5 the preceding paragraph, fully support its conclusion that the
6 stream flows designated in the order will adequately protect
7 recreation, fish and wildlife uses.² Absent a more fully
8 articulated objection, we hold that they are sufficient.

9 Petitioners also object that the Commission failed to
10 explain how it applied the standards set out in ORS
11 537.170(5)(b) and (e).³ ORS 537.170(5) provides, in part:

12 "In determining whether the proposed use would
13 impair or be detrimental to the public interest, the
Water Resources Commission shall consider:

14 * * * * *

15 "(b) The maximum economic development of the
16 waters involved.

17 * * * * *

18 "(e) The prevention of wasteful, uneconomic,
19 impracticable or unreasonable use of the waters
involved."

20 This provision represents a complete expression of
21 legislative policy. The terms, "maximum economic development"
22 and "wasteful, uneconomic, impracticable or unreasonable use,"
23 are examples of what this court has called "inexact terms."
24 Springfield Education Assn., supra, 290 Or at 224. In such a
case, it is the agency's task to interpret ambiguous statutory

1 terms in a way that effectuates the underlying statutory
2 policy. The agency may do so either by rule or by order in a
3 contested case. Id.⁴ The only statement in the
4 Commission's order addressing this provision is the following,
5 labeled "Ultimate Findings":

6 "In consideration of the provisions of ORS
7 537.170 ([5]a-g), the project proposed in Permit
8 Application 63266 is an allowed use of available water
9 providing increased economic and multiple use benefits
10 through efficiency and diversity of use without
11 detriment to existing rights or the control of the
12 water resource. Effects on other water uses which may
13 result from reduced Bull Run discharge to the Sandy
14 River would be minimized by seasonal operational
15 constraints, natural discharge patterns in the Sandy
16 River and establishment of instream flows for the
17 proposed project."

18 We agree with petitioners that the above statement
19 does not adequately explain how the Commission applied the
20 public interest criteria set out in ORS 537.170(5). It is
21 little more than a regurgitation of the statutory language,
22 without analysis. On remand, the Commission should explain
23 more fully its application of the public interest criteria,
24 pointing to the facts that it believes (if it still does)
permit it to make the "ultimate" findings and the conclusions
it draws from them.

Finally, petitioners argue that the Commission
improperly applied the public interest criteria in ORS
537.170(5). We have already determined that the agency's order
is not sufficiently explicit on that point to allow meaningful

1 judicial review. On remand, the Commission will have an
2 opportunity to explain its application of those criteria.

3 The decisions of the Court of Appeals and the Water
4 Resources Commission are reversed. The case is remanded to the
5 Water Resources Commission for proceedings consistent with this
6 opinion.

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1 FOOTNOTES

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4 The minimum stream flows set by the Commission are
5 subject to change "[i]f, after commencement of project
6 operations, the Department of Fish and Wildlife determines that
7 additional protective measures need to be taken for the benefit
8 of fish life * * *."

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11 Multnomah County filed an amicus curiae brief in which
12 it argued that the Commission's factual findings with regard to
13 minimum stream flows were not supported by substantial evidence
14 in the record. Because the issue was not presented in the
15 petition for review, we do not address it.

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18 At the time relevant to this case, ORS 537.170(5) was
19 codified at ORS 537.170(3). See Or Laws 1985, ch 569, § 19.

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22 The Commission has since promulgated an administrative
23 rule defining the terms set out in OAR 537.170(5). OAR
24 690-74-015. However, the hearing in this case took place
before the effective date of that rule. See OAR 690-74-095.