



January 21, 2010

Water Rights Section
Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301

Re: Comments, Applications R-87387, G-17171, S-87388, R.J. & Susan Claus, 86 in-channel reservoirs, 200.55 AF John Day River Basin

Dear Water Rights Section,

WaterWatch of Oregon and the Native Fish Society thank you for the opportunity to comment on applications R-87387, G-17171, S-87388 in the name of R.J. and Susan Claus. WaterWatch is a nonprofit river conservation group dedicated to protecting and restoring Oregon's rivers. We have over 800 members throughout the state, including some the John Day River Basin. The Native Fish Society (NFS) protects and restores native, wild fish and their habitats in the Pacific Northwest. NFS works with public agencies and governments to get native fish conservation policies implemented and to ensure that native fish policies are indeed followed once implemented. NFS has 600 members and 27 volunteer River Stewards covering more than 50,000 square miles of Oregon and Washington watersheds.

The Clauses have submitted one reservoir application to appropriate 200.55 AF of water at eighty six points of diversion into eighty six reservoirs. They have also submitted a secondary surface water right to divert water from these reservoirs for irrigation, as well as one application for ten wells to be used for reservoir maintenance and supplemental irrigation. The proposed use is fish culture, irrigation, livestock and wildlife uses. The WRD's initial review has found that 146.74 AF of water is available for storage from November through April 14 of each year.

WaterWatch and the Native Fish Society submit the following comments in opposition to these applications.

1. The proposed use will be detrimental to the public interest because the state Scenic Waterway analysis for these applications is flawed.

The proposed reservoirs are above the John Day Scenic Waterway. The State Scenic Waterway Act declares that the highest and best uses of the waters within a state scenic waterway are recreation, fish, and wildlife uses. ORS 390.835(1). The Act mandates that the free-flowing character of these waters be maintained in quantities necessary for recreation, fish and wildlife. Id. WRD rules specifically state that "[a]ll locations to new out-of-stream uses in and above State Scenic Waterways shall not interfere with the maintenance of flow levels necessary for the purposes of the Scenic Waterways." OAR 690-410-070(2)(g).

a. To ensure that the John Day Scenic Waterway flows are protected, the WRD should have used a 100% exceedence level for its water availability review of the reservoir application. The WRD evaluated the reservoir application at a 50% exceedence level. Under such a review, the WRD can only assure that scenic waterway flows are met for the months in question 50% of the time. That means that 50% of the time they are not being met. The Act does

not allow new appropriations if scenic waterway flows are not being met, period.¹ Thus, to determine if any flows are available above the scenic waterway flows that would allow this application to move forward, the WRD should evaluate the application at a 100% exceedence level. Even at an 80% exceedence level, there is no water available during nine months of the year (*See WRD water availability model for Thirtymile Creek, water available only Jan, April and May, which for this application would result in a limited season of January and April 1-14 only*)).

b. The WRD can only issue a water right above a scenic waterway for limited uses of livestock and human consumption, and only upon a number of findings. The Scenic Waterway Act sets forth a number of findings that must be met before a new water right can be issued within or above a scenic waterway. In addition to limiting the use to livestock and human consumption, the WRD must make a finding of necessity and a finding that the use will not significantly impair the free-flowing character of these waters necessary for recreation, fish and wildlife. ORS 390.835(6). The initial review for the three applications (R-87387, G-17171, and S-87388) do not appear to apply this section of the statute to these applications. This is in error and needs to be part of the upcoming PFO evaluation of these three applications.

c. The John Day River Basin Plan requires the applicant to show that the use of water will not conflict with existing instream fish life, wildlife, or recreation uses. Under OAR 690-80-060(4)(k)(D), the WRD can issue a permit for appropriation of water (groundwater or surface water) only if, among other things, the applicant shows that the use of water will not conflict with existing instream fish life, wildlife or recreation uses. The applicant has not made this showing as of the date of these comments.

d. To ensure that the John Day Scenic Waterway flows are protected, if a permit is issued it should be conditioned to require regulation if scenic waterway flows are not being met. The Initial Review for the reservoir permit does state that the use of water is contingent upon scenic waterway flows being met and outlines a draft condition of use to capture this sentiment. We support the inclusion of this finding and a condition to address this. However, while the draft condition says the use of water is contingent upon scenic waterway flows being met and that the user is required to monitor streamflows and discontinue storage when scenic waterway flows are unmet, the draft condition then goes on to say that “in addition, the Watermaster may regulate storage under this right if it is determined by the Department that the flows listed below are unmet.” The “may” should be a “shall”. As we have seen in the Deschutes basin, conditions regarding scenic waterway flows that state the WRD “may” regulate have resulted in no regulatory action by the WRD and threats of lawsuits by permit holders if in fact the WRD does regulate (i.e. Jan Wick of Avion Water District asserted this in a public meeting of the Deschutes Basin Workgroup in 2009). The Scenic Waterway Act is clear, flows must be protected. WRD has a duty to require regulation if flows are not being met and the scenic waterway condition should clearly reflect this.

2. The WRD cannot authorize an action that results in the take of a species listed under the federal Endangered Species Act.

Mid-Columbia wild summer steelhead are listed under the federal Endangered Species Act (ESA) as a threatened species. Steelhead spawn and rear in Thirtymile Creek and its tributaries during the late winter and early spring of the year, at the same time that the WRD has indicated in its Initial Review that the proposed the diversion of water for this application would be allowed. Appropriating water from these streams during this time of year and constructing in-channel storage reservoirs could have a serious adverse impact on listed steelhead and their habitat. This impact may occur even if the streams in question are seasonal. During wet cycles, even seasonal streams can provide critical habitat for steelhead and other salmonids. Adult steelhead will venture into these small streams to spawn and the fry will migrate downstream as water flows decrease.

a. The ESA prohibition against take of listed species.

The ESA prohibits all actions that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Section 3(19), 16 U.S.C. § 1532(19). Congress intended the term “take” to be defined in the “broadest

¹ In fact, the Scenic Waterway Act has an outright prohibition of new water right appropriations, with limited exception for livestock and human consumption. The statute does not limit this restriction to times when scenic waterway flows are not being met. ORS

possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995.

The take prohibition applies only to endangered species but under § 4(d), 16 U.S.C. § 1533(d), may be extended to threatened species by regulation. National Marine Fisheries Service promulgates 4(d) rules on a species by species basis and adopted a 4(d) rule making the take prohibition applicable to several evolutionarily significant units of west coast salmon and steelhead that became effective in January of 2001. 65 Fed. Reg. 42,422 (July 10, 2000). The Fish and Wildlife Service (FWS) has extended the take prohibition by regulation to all threatened species under its jurisdiction.

NMFS, responsible for ESA listed marine species and ocean going fish including salmon, has defined “harm” by regulation to include:

significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102.

FWS has similarly defined harm as including:

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.

“Take” is also defined to include harassment of listed species. FWS regulations define “harass” as

an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3.

b. The 86 water withdrawals under the reservoir application are likely to cause the “take” of listed fish.

The use of water under the proposed reservoir application is likely to result in the take of listed fish. For example, the significant streamflow reductions and dewatering of the stream resulting from the proposed water withdrawal to fill 86 reservoir, as well as the construction of these reservoirs across the stream channel, is likely to result in “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

c. WRD cannot authorize actions that result in the take of listed fish.

A long line of cases supports the Federal District Court ruling in Pacific Rivers Council v. Brown, Civ. No. 02-0243-BR, Opinion and Order (D. Or. Dec. 23, 2002) that the Oregon State Forester can be found liable for take if the activities authorized by him harm or harass a listed species. Plaintiffs there alleged that the Oregon State Forester was violating § 9 of the ESA by authorizing clear cutting on private industrial forest lands on high risk sites that would cause take of threatened coho. The court found that plaintiffs’ allegations were sufficient to state a claim against the State Forester for violation of the ESA. See also, Seattle Audubon Society, et al. v. Sutherland, Order Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction (W. Dist. Wa. Aug. 1, 2007) (2007 WL 2220256) (enjoining state authorized logging on private timber land in four Northern spotted owl circles based on ESA § 9). The same liability rests with the WRD here because the water withdrawal, the building of 86 instream dams and associated activities that result from an agency permit are likely to result in the take of listed fish.

3. The proposed use will be detrimental to the public interest because the WRD did not consider or propose protection of peak and ecological flows necessary for federally listed species and other river values.

ODFW has developed a peak flow guidance policy in an effort to help the WRD in its water allocation decisions, especially in regard to new applications. We saw no mention of this peak flow guidance policy, nor any analysis of the peak flows or ecological flows needed for this system in the Initial Review.

The WRD analyzed these applications at a 50% exceedence level. As the 50% exceedence level represents the exception to the 80% exceedence level, the WRD had a duty to look at instream flow protections beyond established instream water rights and scenic waterway flows. The rules specifically call upon the WRD to look at protective measures such as by-pass flows and seasons of use that would protect flows needed to support public uses. OAR 690-410-070(2)(c). WRD rules give WRD wide discretion to incorporate the analysis of instream values into its water availability analysis beyond those afforded by instream water rights. *See e.g.* OAR 690-410-030(1), 2(a). Moreover, where streamflows have been depleted to the point that public uses have been impaired, such as they have in the John Day, the WRD is directed to develop and implement methods to restore flows. *Id.* at (1).

Given the implications for a federally listed species, the WRD should conduct a peak flow and ecological flow analysis, and, if the application is approved, attach conditions to the permit that protect peak flows.

4. The proposed use will be detrimental to the public interest because the proposed measurement conditions are inadequate to protect the resource

The conditions identified in the IR, which indicate the WRD “may” require measurement, are inadequate to ensure that water is in fact only captured when downstream scenic waterway flows and instream water rights are being met, as well as to ensure that appropriation is limited on to the limited seasons of use proposed by the applicant.

The applicant applied for the right to appropriate water year round. There are 86 reservoirs in question. The John Day River Basin is very large and the WRD does not have adequate field staff to ensure, via site visits, that the applicant would be withdrawing water in accordance to the seasonal restrictions the WRD is proposing. If this application is approved, the WRD should require, at a minimum:

- Before water use begins at any of the 86 proposed reservoirs, the permittee shall install staff gages that measure the entire range and stage between full reservoir level and dead-pool storage at all 86 reservoirs.
- The permittee shall be required to complete record of the water used each month and submit reports monthly on all 86 reservoirs.
- Permittee shall be required to measure inflow and outflow at all 86 reservoirs, above and below each reservoir to ensure that live flow is not impeded outside the storage seasons. Reporting monthly to the WRD.

5. The proposed use will be detrimental to the public interest because the fish screening and passage conditions are inadequate

The IR states that the applicant “may” be required to install fish screens at the point of diversion. There is no mention of fish passage, despite the fact that all of the proposed reservoirs are in-channel. Since 2001, Oregon law has required upstream and downstream passage at all artificial obstructions in those Oregon waters in which migratory native fish are currently or have historically been present, regardless of stream size. ORS 509.585 . Thus, if the WRD approves these 86 reservoirs encompassed under this one permit application, WRD must require passage at all 86 reservoirs.

6. The proposed use be detrimental to the public interest because it will impair water quality

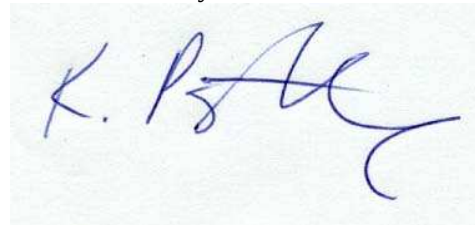
The Thirtymile system is listed under the state’s water quality limited 303(d) list for flow, habitat modification, sedimentation and temperature. The Lower John Day River, the receiving stream, is also listed for a plethora of water quality parameters. Diversion of water and storing it in reservoirs will likely exacerbate existing water quality problems

by depleting flows and raising water temperatures—both of which will likely have an adverse effect on fish. Moreover, the proposed use of “livestock” will most certainly draw livestock to the “in channel” reservoirs, which will likely further aggravate already existing sedimentation problems.

The proposed reservoirs fall within the Agricultural Water Quality Management Program for the Lower John Day River, which, among other things requires minimizing erosion and maintaining streamside vegetation. OAR 603-095-2940. The proposed use of “livestock watering” appears to be in direct conflict with Management Plan for this subbasin. Aside from referencing this plan, the IR does not contain any review of the impacts of this application on water quality, nor does it propose its fairly standard condition that restricts the use of water if the quality of the source stream or any downstream waters if those waters no longer meet existing state or federal water quality standards due to reduced flows.

Conclusion: The John Day River Basin is severely overappropriated and suffers from degraded water quality. The basin is of great importance to steelhead and other cold water native fish. The Thirtymile Creek system is currently the focus of numerous restoration efforts by a number of nongovernmental organizations, as well as the local Soil and Water Conservation District. The Oregon Plan also identifies this system as a priority for stream restoration. The proposed applications will allow the use of water that is directly contrary to the many efforts to restore both flow and watershed health, and will lead to the further degradation of the Thirtymile and John Day River systems. For the reasons outlined above, these applications should be denied.

Sincerely,



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WaterWatch of Oregon



Bill Bakke, Executive Director
Native Fish Society