



MEMORANDUM

Oregon Department of Fish and Wildlife

Date: August 20, 2003

To: Phil Ward Deputy Director Oregon Water Resources Department

From: Roy Elicker, Deputy Director

Subject: ODFW Comments on Proposed Mid-Columbia Water Withdrawals S-70734 and S-81070

The Department of Fish and Wildlife was asked by the Water Resources Department (WRD) to review two water right applications requesting water withdrawals from the Columbia River for effects on fish and wildlife resources. WRD also asked ODFW to recommend under what conditions could Columbia River water be withdrawn from the Oregon mid-Columbia area and what mitigation measures might be appropriate under state rules.

Water Right Applications

As ODFW understands the request there are two water rights applications: 1) 6.5 cfs for the Port of Morrow (S-70734 applied for in 1990); and 2) 697.35 cfs for Hermiston Development Corp (HDC) (S-81070 applied for in 1996). WRD determined that two different sets of its rules apply for these applications based on the date of the application. WRD has indicated that these applications have been on a combination of administrative holds and time outs awaiting proposed solutions and mitigation proposals from the applicants. To this point the applicants have not provided any proposals to address the fish and wildlife issues involved.

For the older water right application (Port of Morrow), WRD determined that the application will not impair or be detrimental to the public interest based on 4 factors in OAR 690-310-0110 (1)

- a. allowed in the basin plan,
- b. water is available (there is no Oregon in-stream water right on the Columbia),
- c. does not injure other water rights; and
- d. complies with the Water Resource Commission rules.

This determination (presumption of public interest) can be over come by evidence that it is not in the public interest through potential effects on one of 7 factors, two of which relate to fish and wildlife concerns (690-310-0120 (3)(b).

- (B) Threatened, endangered or sensitive species, and
- (D) Fish and wildlife.

For the HDC water right application (1996) in addition to WRD making the above findings they also find that Division 33 (OAR 690-033) (related to sensitive, threatened and endangered fish species) applies. Under Division 33, an application cannot appropriate direct streamflow between April 15 and

September 30, must address the Northwest Power Planning Council (NPPC) Fish and Wildlife Program needs and meet screening and passage requirements, water quality standards and measure use. There are several exemptions allowed by the rule: domestic uses, projects that provide net benefits for fish and wildlife, emergency use necessary for public health and safety, some existing water uses or multipurpose storage or other projects with measurable public benefits. Mitigation for water withdrawal impacts is allowed under the rules.

Species Affected by Proposed Columbia Water Withdrawals

The Columbia River Basin historically supported many anadromous species including populations of chinook, sockeye, coho, chum and pink salmon as well as steelhead, coastal cutthroat trout, white and green sturgeon, eulachon, and Pacific lamprey. In 1991, the Natural Marine Fisheries Service (NMFS) listed Snake River sockeye as endangered, followed closely by listings of Snake River spring/summer and fall chinook. In all NMFS has listed 12 Columbia River Basin salmon and steelhead Evolutionarily Significant Units (ESU) as threatened or endangered under the Endangered Species Act.

Oregon's Position on Columbia Biological Opinion

The State of Oregon has asserted in the past that the federal suite of actions contained in the Federal Biological Opinion (BiOp) will not result in recovery of the listed species (Oregon's Comments on NOAA Fisheries 2000 BiOp September 29, 2000). Oregon is an amicus participant in a lawsuit seeking improvements and changes in the actions recommended in the "Reasonable and Prudent Alternative" (RPA) of the federal biological opinion. Oregon has held that the RPA has not addressed the impacts of the hydropower system sufficiently, especially water flow needs for listed species. Instead the RPA relies too heavily on the other H's (Habitat, Harvest and Hatcheries) to offset impacts from the hydropower component to achieve recovery of the listed species. Mainstem flows are a major component for the recovery of listed fish species and the recommended BiOp flows are considered by Oregon to be the minimum necessary to sustain the several species of listed fish, but are not sufficient to recover these species. Oregon has maintained that the target flows should be met consistently and that any additional water flow above the target flows should be used for fish until such time as these species consistently reach recovery as defined by the smolt-to-adult return rate (SAR) targets of 2 to 6%. This translates into requiring all water either below or above the targeted BiOp flows in the Columbia between April 10th and August 31st be left in the Columbia to benefit migration and survival of the listed species.

Under the recovery target argument presented above, ODFW has cited the current "Fish and Wildlife Habitat Mitigation Policy" (OAR 635-415) and determined that the flows in the Columbia River during the time period 4/10-8/31 would fall into Habitat Category 2. Category 2 habitat is essential and limited habitat, in this case, the habitat is a migration corridor for several fish species that are federally listed and use the river to get to and from their spawning and rearing habitat. ODFW rules recommend avoidance of this impact, but if not avoidable then the mitigation policy directs ODFW to recommend in-kind/in-proximity mitigation. **The goal for category 2 habitat is no net loss of either habitat quantity or quality and to provide a net benefit for the impact. In this case, replacement of the in-stream water flows of equal quantity and quality and contribute to the flow of the Columbia River would be recommended** or what is called "bucket-for-bucket" replacement of water, plus a net benefit.

Additionally, WRD indicates that OAR 690-033 also applies to the Hermiston Development Corporation application because it was filed after July 17, 1992 and is upstream of the Bonneville Dam. OAR 690-033-0120 (2)(a) does not allow direct appropriation of stream flows between April 15 and September 30. This is roughly the same time period as when the target flows in the federal BiOp

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need to be met. These flows are needed both in the Columbia and its tributaries to facilitate out-migration of salmonid smolts and adult migration to their spawning grounds. The rules do allow the applicant to propose mitigation for the impact of a proposed withdrawal if it is consistent with the Fish and Wildlife Program (OAR 690-033-0120 (4)). Additionally, WRD's OAR 690-033 cites ODFW's Fish and Wildlife Habitat Mitigation Policy (OAR 635-415) from 1991. Although ODFW has modified this policy several times since 1991 and follows its current rule in making OAR 690-033 ODFW believes the proposed water withdraw from the Columbia would fall into Category 1(b) of the 1991 rules which does allow for mitigation of impacts.

The Oregon Department of Fish and Wildlife would be glad to work with the Oregon Water Resources Department to discuss any options for avoidance of impacts or mitigation for the proposed water withdrawals.



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

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Date: August 14, 2003
To: Roy Elicker, Deputy Director
From: Phil Ward *Phil*
Subject: Avoidance and Mitigation Approaches to Columbia River Withdrawals

Thank you for providing recommendations for avoiding or mitigating impacts to fish from new water withdrawals from the mainstem Columbia River (August 5, 2003 ODFW memorandum).

OWRD comments on your August 5, 2003 memo are provided below. These comments are not intended as our agency's technical review of the feasibility of the avoidance and mitigation approaches recommended by ODFW. Rather, our comments are provided to further clarify some of the options identified in your memo.

General Comments

In the discussion of OAR Chapter 690, Division 33 rules ("Division 33 rules"), a number of exceptions to those rules are not listed in the memorandum (OAR 690-0330-0140). These include: emergency uses necessary for public health and safety, some existing water uses, and multipurpose storage projects or other projects with measurable public benefits.

Under the Division 33 rules, an applicant may propose mitigation for new withdrawals from the Columbia River. The Water Resources Director must determine if the proposed mitigation is consistent with ODFW's Fish and Wildlife Mitigation Goals and Standards, OAR Chapter 635, Division 415, Section 030 adopted November 13, 1991. We understand that ODFW has revised the mitigation rules several times since 1991 and want to verify that the avoidance and mitigation approaches recommended by ODFW are consistent with the 1991 mitigation rules used in the water right application review.

Comments on Specific Recommendations

One avoidance approach you identified was aquifer recharge. It is unclear whether this approach would involve Umatilla River water and/or mainstem Columbia River water. If Columbia River water is used for aquifer recharge, would there be concerns about peak flows and effects on stream channel formation, as mentioned in your memorandum?

You also mentioned rotation agreements as a possible avoidance approach. Could you clarify how you envision this approach providing avoidance for new water withdrawals?

You identified two approaches available to the Port of Morrow. One of these approaches would allow the Port to replace water withdrawn under a new permit with their existing municipal, industrial, and irrigation water rights from the Columbia River. In your memo, you limited this option to the Port of Morrow. We understood from prior discussions that this would be an option for HDC as well. Also, we would like to know if the replacement water could come from other water rights in the same proximity, not just water rights held by the Port (or HDC).

Finally, it would be helpful if you could number the avoidance and mitigation options to aid in future discussions of these options.

Thank you again for your assistance in identifying options for applicants for new water rights from the mainstem Columbia River. This guidance will be useful to our staff and applicants for new Columbia River water rights. You have identified a number of creative approaches. It is unlikely that any single approach will provide sufficient mitigation water or avoidance for a large application such as the Hermiston Development Corporation (HDC) application for 697 cfs; however, some combination of mitigation and avoidance approaches may be possible for these large water right applications.

Please contact Dwight French (503) 378 – 8455 ext. 268 for further questions or clarification.

DRAFT

Undeveloped Water Rights for the Columbia River Mainstem above Bonneville

Water Right Holder	Use	Sum of Rate cfs	cfs developed	cfs remaining	AF remaining	Mainstem Reach
Port of Umatilla	MU	155	24.6	130.4	61,966	Umatilla
City of Boardman	MU	36	12.5	23.5	11,162	Umatilla
City of Umatilla	MU	23	0	23	10,930	Umatilla
Dalles Irrigation District	IR	12	8.1	3.9	468	Hood
Dalles Irrigation District	IR	7.4	4.06	3.31	794	Hood
Dalles Irrigation District	IC	54.2	52.5	1.7	408	Hood
Orchard View Farms Inc	IR	0.5	0	0.5	90	Hood
Howard Houston	CM/ IM	0.22	0	0.22	106	Deschutes
Hat Rock Water Co. Inc	GD	0.19	0.03	0.16	76	Umatilla
Weyerhaeuser Co	IM	0.03	0	0.03	16	Umatilla

	cfs remaining	AF remaining
Total undeveloped rights	187	86,016
Irrigation, Combined Irrigation	9	1,760
Industrial, Manufacturing, Commercial	0.3	122
Municipal, Group Domestic, Domestic	177	84,134