

Final Order Incorporating Settlement Agreement

On September 11, 1990 the Oregon Department of Fish and Wildlife submitted an application to the Department for an instream water right in West Fork Silver Creek, tributary to Silver Creek, Lake County, OR. On August 27, 1996, the Department issued a Proposed Final Order proposing to issue the certificate with conditions. The amount requested in the application exceeds the estimated average natural flow. Pursuant to OAR 690-077-0015(4) the amounts allowed during any time period were reduced to amounts not exceeding the estimated average natural flow occurring from the drainage basin.

On October 10, 1996, Silver Lake Irrigation District submitted a protest to the Proposed Final Order. On November 20, 2015, the Water Resources Department, the Oregon Department of Fish and Wildlife and Silver Lake Irrigation District signed a settlement agreement resolving the protest. The Settlement Agreement is incorporated into this final order by reference and is attached hereto and made a part of the order.

Findings of Fact

The findings of fact in the Proposed Final Order are incorporated into this Final Order, with the exception of the following:

The finding of fact that states “The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.63	5.24	7.16	14.10	21.10	11.20	3.53	2.38	2.48	2.98	3.48	3.85

is **replaced** with the following to reflect that the estimated average natural flow for the reach has been updated since the Proposed Final Order was issued:

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.75	5.73	8.44	16.40	23.30	12.00	3.63	2.37	2.55	3.07	3.54	4.05

NOTICE OF RIGHT TO PETITION FOR RECONSIDERATION OR JUDICIAL REVIEW

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 183.484, ORS 536.075 and OAR 137-004-0080, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

Conclusions of Law

The conclusions of law in the Proposed Final Order are incorporated into this Final Order, with the exception of the following:

The conclusion of law that states: "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
2.00	5.00	5.00	7.00	7.00	5.00	2.00	2.00	2.00/2.48	2.98	3.48	2.00

is **replaced** with the following to reflect that the estimated average natural flow for the reach has been updated since the Proposed Final Order was issued:

The stream flows listed below represent the minimum flows necessary to support the public use.

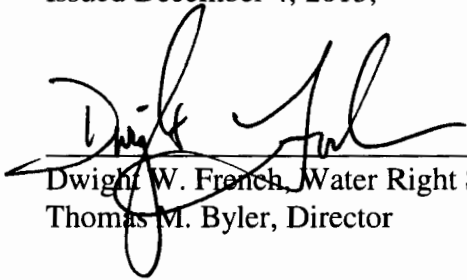
JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2.00	5.00	5.00	7.00	7.00	5.00	2.00	2.00	2.00/2.55	3.07	3.54	2.00

The proposed use would not impair or be detrimental to the public interest.

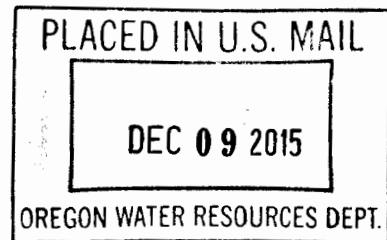
Order

IT IS HEREBY ORDERED that Application IS-70657 be approved as provided in the attached certificate.

Issued December 4, 2015,



Dwight W. French, Water Right Services Administrator, for
Thomas M. Byler, Director



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

Water Right Application Number: IS 70657

Proposed Final Order

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

Application History

On 9/11/90, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: W FK SILVER CR TRIB SILVER CR

County: Lake

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

The amount of water (in cubic feet per second) requested by month:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	D	E	C
2	5	5	7	7	5	2	2	2/5	7	7/5	2		

To be maintained in:

WEST FORK SILVER CREEK TO NORTH FORK SILVER CREEK (NENE, SECTION 10, T30S, R13E); TO USFS BOUNDARY (SWNW, SECTION 17, T29S, R14E)

The Department mailed the applicant notice of its Initial Review on April 29, 1996. Public notice of the application was provided in the Department's weekly public notice on May 13, 1996. Comments were received for 30 days.

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Goose and Summer Lake Basin, Oregon, and Their Water Requirements; November, 1971.
- (b) Determining Minimum Flow Requirements for Fish, ODFW Report January 20, 1984.
- (c) Developing and Application of Spawning Velocity and Depth Criteria for Oregon Salmonids, Alan K. Smith, Transactions of the American Fisheries Society, April 1973.
- (d) Determining Stream Flows for Fish Life, Oregon State Game Commission Report, March 1972.

- (e) A letter dated April 5, 1996, stating that the flows requested in this application are the minimum amount necessary to restore, protect and enhance populations and habitats of native wildlife species at self-sustaining levels

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- comments by or consultation with another state agency
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the proposed rate of use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

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

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

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

Findings of Fact

The basin Basin Program **allows** the proposed use.

Senior water rights exist on this source or on downstream waters.

The source of water is not above a State Scenic Waterway.

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

The estimated average natural flow for the lower end of the requested reach is as follows (in cubic feet per second):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.63	5.24	7.16	14.1	21.1	11.2	3.53	2.38	2.48	2.98	3.48	3.85

Conclusions of Law

Under the provisions of ORS 537.153, the Department must

presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complied with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the basin Basin Plan.

No preference for this use is granted under the provisions of ORS 536.310(12).

The proposed use will not injure other water rights.

The proposed use complies with rules of the Water Resources Commission.

The proposed use complies with the State Agency Agreement for land use.

The proposed instream flows do not fully appropriate this source of water year round. Water is available for additional storage.

Water is not available for the proposed use at the amount requested year round because the unappropriated water available is less than the amounts requested during some months.

For these reasons, the presumption set forth in ORS 537.153, as discussed above, has not been established. The application therefore has been processed without the statutory presumption.

"When instream water rights are set at levels which exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses." OAR 690-77-015(2).

"The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right." "The amount allowed during any time period for the water right shall not exceed the estimated average natural flow ..." (excerpted from OAR 690-77-015 (3) and (4)).

Because the proposed use exceeds the available water, it can not be presumed to be in the public interest. However, under the direction of OAR 690-77-015 (2)(3) and(4), the proposed use is in the public interest up to the limits of the estimated average natural flow.

Oregon law allows certain uses of water to take precedence over other uses in certain circumstances. When proposed uses of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over all other uses and for livestock consumption over any other use (excerpted from ORS 536.310 (12)).

The Department therefore concludes that

- the proposed use, as limited in the draft certificate, will not result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will not impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, will include the following conditions: for purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

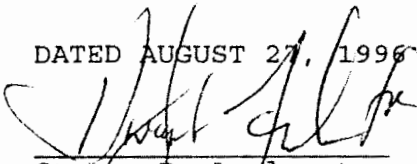
- the flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach.
- the stream flows listed below represent the minimum flows necessary to support the public use.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2	5	5	7	7	5	2	2	2/2.48	2.98	3.48	2

Recommendation

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

DATED AUGUST 27, 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 11, 1996.

After the protest period has ended, the Director will either issue a final order or schedule a contested case hearing. The contested case hearing will be scheduled *only* if a protest has been submitted and if

- upon review of the issues the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

DRAFT
STATE OF OREGON

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

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

The specific limits for the use are listed below along with conditions of use.

Source: W FK SILVER CR TRIB SILVER CR

County: Lake

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

To be maintained in:

WEST FORK SILVER CREEK TO NORTH FORK SILVER CREEK (NENE, SECTION 10, T30S, R13E); TO USFS BOUNDARY (SWNW, SECTION 17, T29S, R14E)

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 9/11/90.

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
2	5	5	7	7	5	2	2	2/2.48	2.98	3.48	2

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

Witness the signature of the Water Resources Director affixed this ___ day of _____, 19__.

Water Resources Director

Recorded in State Record of Water Right Certificate number _____.

IS 70657

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

In the Matter of Applications for Water)	
Rights IS-70656, IS-70657, and IS-70659)	
in the name of Oregon Department of Fish)	SETTLEMENT
and Wildlife)	AGREEMENT
<i>Applicant</i>)	
)	
Silver Lake Irrigation District)	
Bell "A" Land and Cattle Company)	
<i>Protestants</i>)	

The Oregon Water Resources Department ("Department"), Oregon Department of Fish and Wildlife (ODFW), Silver Lake Irrigation District and Bell "A" Land and Cattle Company do hereby stipulate and agree in this Settlement Agreement as follows:

Background

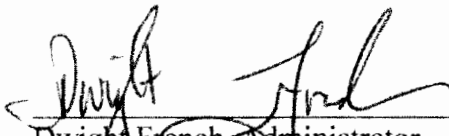
1. On September 11, 1990, ODFW submitted an application for an instream water right in Silver Creek, tributary to Silver Lake, in Lake County. The application was given the number IS-70656.
2. On September 11, 1990, ODFW submitted an application for an instream water right in West Fork Silver Creek, tributary to Silver Creek, in Lake County. The application was given the number IS-70657.
3. On September 11, 1990, ODFW submitted an application for an instream water right in Buck Creek, tributary to Silver Lake, in Lake County. The application was given the number IS-70659.
4. On August 27, 1996, the Department issued a Proposed Final Order on each application, recommending approval of the application as modified and conditioned in the Proposed Final Orders.
5. The Silver Lake Irrigation District filed a timely protest on IS-70656 and IS-70657 and Bell "A" Land and Cattle Company filed a timely protest on IS-70659.
6. Following settlement discussions between the Department, ODFW, Silver Lake Irrigation District and Bell "A" Land and Cattle Company, all parties have agreed to resolve all issues raised in the protests by this Settlement Agreement.

Terms of the Agreement

1. After receipt by the Department of a fully executed Settlement Agreement, the Department will issue a Final Order Incorporating Settlement Agreement and Certificate consistent with

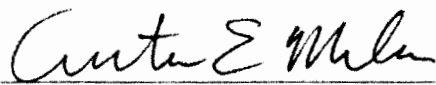
the attached draft Final Order Incorporating Settlement Agreement and draft Certificate for each application (IS-70656, IS-70657, and IS-70659).

2. All Parties waive all right and opportunity to request reconsideration and to seek judicial review of this Settlement Agreement and the Final Order Incorporating Settlement Agreement for Applications IS-70656, IS-70657, and IS-70659.
3. Each Party to this Settlement Agreement represents, warrants, and agrees that the person who executed this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and bind that Party to the terms of this Settlement Agreement.
4. Each Party to this Settlement Agreement certifies that it has had a reasonable opportunity to review and request changes to the Settlement Agreement and draft Final Order Incorporating Settlement Agreement, and that it has signed this Settlement Agreement of its own free will and accord.
5. Each Party to this Settlement Agreement certifies that it has read the entire Settlement Agreement, including the draft Final Order Incorporating Settlement Agreement and understands and agrees with the contents thereof.
6. This Settlement Agreement may be signed in counterparts.



Dwight French, Administrator,
Water Right Services Division
for Thomas M. Byler, Director

11/20/2015
Date



Oregon Department of Fish and Wildlife

10/14/15
Date

Silver Lake Irrigation District

Date

Bell "A" Land and Cattle Company

Date

the attached draft Final Order Incorporating Settlement Agreement and draft Certificate for each application (IS-70656, IS-70657, and IS-70659).

2. All Parties waive all right and opportunity to request reconsideration and to seek judicial review of this Settlement Agreement and the Final Order Incorporating Settlement Agreement for Applications IS-70656, IS-70657, and IS-70659.
3. Each Party to this Settlement Agreement represents, warrants, and agrees that the person who executed this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and bind that Party to the terms of this Settlement Agreement.
4. Each Party to this Settlement Agreement certifies that it has had a reasonable opportunity to review and request changes to the Settlement Agreement and draft Final Order Incorporating Settlement Agreement, and that it has signed this Settlement Agreement of its own free will and accord.
5. Each Party to this Settlement Agreement certifies that it has read the entire Settlement Agreement, including the draft Final Order Incorporating Settlement Agreement and understands and agrees with the contents thereof.
6. This Settlement Agreement may be signed in counterparts.

Dwight French, Administrator,
Water Right Services Division
for Thomas M. Byler, Director

Date

Oregon Department of Fish and Wildlife

Date

Tom O'Leary
Silver Lake Irrigation District
District Manager

11-4-2015
Date

[Signature]
Bell "A" Land and Cattle Company

11-4-2015
Date