

WaterWatch

O F O R E G O N

By Fax 378-8130 and Regular Mail

January 3, 1994

Oregon Water Resources Department
Water Rights Section
3850 Portland Road NE
Salem, Oregon 97310

Re: Objection to Technical Reports for:
72743, R 72742, McCracken, Domestic, Livestock, Irrigation, Sprng.
R 72666, Sherlock, Livestock, Unnamed Strm
73313, Harland, Irrigation, Umpqua
73126, Osekowsky, Irrigation & Livestock, Umpqua
73179, Ewing, Irrigation, Umpqua
73089, International Paper Company, Domestic, Springs
73073, Bacon, Irrigation, Umpqua
73096, Albro, Domestic, Unnamed Strm
73097, 73007, Neideigh, Domestic, Umpqua
~~73044~~ Nicasro, Irrigation, Umpqua
73160, Bemetz, Irrigation, Umpqua
R 71965, Kalchert, Livestock, Fire Protection, Recreation, Unnamed Strm
72631, Cmueller, Livestock & Irrigation, Umpqua
72902, Mills, Domestic, Umpqua
72915, Smith, Irrigation, Umpqua
73002, Preston, Irrigation, Umpqua
72263, Sand, Irrigation, Umpqua
71598, Tryon, Irrigation, Umpqua
72667, Owens, Irrigation, Umpqua
72599, 72598, McHugill, Irrigation, Umpqua
72415, Neilsen, Irrigation, Umpqua
72152, Albertson, Irrigation, Umpqua
72619, Rainbow Ranch, Irrigation, Dean Creek
71167, Elkton School District No. 34, Irrigation, Umpqua
71966, Kalchert, Domestic, Spring
71888, Lilly, Irrigation, Umpqua
71997, Scharf, Domestic, Irrigation, Livestock, Unnamed sprg. & crk
71987, Scheel, Irrigation & Stock, Umpqua & two Springs
72058, Rogers, Irrigation & Stock, Umpqua
72223, Woodruff, Irrigation, Umpqua
72405, West, Irrigation, Umpqua
72270, River Bend West Water Association, Domestic, Umpqua
72384, Gunn II, Domestic & Irrigation, Unnamed strm.
Umpqua River

WaterWatch submits the following objections pursuant to OAR 690-11-170:

◆ **The Technical Reports are Defective**

The technical reports fail to contain many of the elements and evaluations required in OAR 690-11-160(1). The areas of deficiency are the same as those identified in WaterWatch's April 5 objection to application #69165 which we hereby incorporate into this objection

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◆ **The Water Availability Analyses in the Technical Reports are Defective**

The analyses are defective for the following reasons:

- The technical reports fail to contain any analysis of water availability, contrary to OAR 690-11.
- The reports fail to take into account existing water rights of record. It is unclear from the technical reports to what extent the water availability analysis takes into account upstream water rights. As we understand it, water rights are taken into account either by assuming the streamflow data reflects the amount of use or by using estimates of consumptive use. Both methods fail to give adequate consideration to rights-of-record. Failure to account for future increases in water use pursuant to rights of record results in an over-estimation of water availability and over-allocation of the resource. This is contrary to the statewide Water Allocation Policy. OAR 690-400-010.
- The water availability analyses fail to take into account applications that have been proposed for issuance. Failure to subtract these proposed uses overestimates the amount of water available.
- The water availability analyses fails to differentiate between natural flows and regulated flows (water released from upstream storage). As you know, there are several storage facilities in the Umpqua River system. These facilities release stored water into the Umpqua mainstem. This application is for a right to use natural flow not stored water. Failure to differentiate between natural flows and regulated flows in the analyses overestimates the amount of natural flow available for use, leads to unrealistic expectations on the part of the applicant and will result in the ultimate over-allocation of the resource. This is contrary to the statewide Water Allocation Policy. OAR 690-400-010. As a policy matter the Department should be differentiating between stored water and natural flow in it's water availability analysis for new permits and in it's regulation activities on existing permits.

◆ **The Uses As Proposed are Not in the Public Interest**

The proposed uses fail to pass the public interest considerations in ORS 537.170. *See also*, OAR 690-11-195(3)(d), (4)(a), (4)(c)(A), (4)(d)(A), (4)(f).

1. The proposed uses are not in the public interest because it will interfere with flows needed to support public instream uses of water.

The proposed uses would deplete flows needed for numerous public instream uses of the Umpqua River. The Umpqua River system supports a variety of fish life including sea-run cutthroat trout, coho, spring and fall chinook, and spring and winter steelhead. A petition has been filed seeking protection for two stocks of sea-run cutthroat trout under the Federal Endangered Species Act. Two petitions have been filed requesting listings for

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coastal coho and other anadromous coastal fish populations are being considered for listing petitions. Low flows during summer months 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 by among other things 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.

The Umpqua mainstem has been identified by the Oregon Department of Environmental Quality (DEQ) as "Water Quality Limited" in the summer and cannot support the listed beneficial use of water contact. Agriculture is identified as a possible source of pollution. DEQ has identified water withdrawals as one of the causes of these stream quality problems. Further depletion of surface water flow will only exacerbate these existing water quality problems. The proposed uses will also add additional sources of pollution in the already degraded streams and the mainstem making the uses as proposed not in the public interest. The failure to prohibit livestock from entering riparian areas as a condition of use of water for livestock will also add to the already existing water quality problems. In addition, the existing poor water quality of the Umpqua makes it a questionable source of water for domestic use.

Currently there are several existing instream water rights which protect flows in the Umpqua River and an instream water right application pending for the Umpqua mainstem. These flows are needed for fish populations which rely on water instream for survival. These fish populations have statewide and even national significance. The proposed uses will likely interfere with these instream water rights and the pending application.

2. Measurement and reporting

In general, we support the proposed measurement and reporting conditions. However, these conditions should allow the Director to require measurement and reporting of both rate and duty of water use. The proposed permit conditions restrict use based upon a specific rate. Measurement and reporting of water use is to be a useful informational and regulatory tool for the Department, it should provide the information needed to ensure that water use is within the terms of the permit.

The surface waters of the Umpqua basin are overallocated. The information generated by these proposed conditions are essential to the management and control of the water resource. If these uses were to be permitted, water use measurement and reporting would be essential for protection of the public interest in the resource and must be a condition of use. However, we question the Department's ability to control this use, even with these requirements.

The applicants have asked for water to provide for multiple uses. The technical reports propose to limit the months in which water can be used for each of these proposed uses. The Department's enforcement staff is already stretched thin. These proposed uses add yet another enforcement responsibility on top of an already unmanageable load. Under these circumstances, it is difficult if not impossible for the state to ensure that the applicant will, at all times, use water in compliance with the permit conditions. Given the critical state of the water resource in the creeks and the Umpqua River basin and the Department's

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inability to control these uses, even with measurement and reporting, these uses are not in the public interest.

3. The uses will impair the public interest because fish screening and passage facilities are not a condition of use.

There are no requirements for fish screening and passage facilities. The permits must clearly require installation prior to any use. The permits must also require maintenance of screening facilities as a condition of use. Given the critical status of fish populations in the Umpqua and the adverse impact additional diversions have on fish habitat, screening and passage should clearly be required to be in place before any diversion water. In addition, failure to maintain screening and passage facilities must be grounds for shutting off water use.

4. The proposed uses are contrary to Oregon policy.

ORS 537.170(5)(a) and (c) require the Department to ensure that waters in the basin will be used and controlled for all purposes, not just consumptive purposes. The Statewide Instream Flow Protection Policy states that "(w)here streamflows have been depleted to the point that public uses have been impaired, methods to restore the flows are to be developed and implemented." OAR 690-410-030(1). When considering applications for new water rights the agency is required to consider the needs of instream and out-of-stream uses and the need to develop streamflow restoration programs. OAR 690-410-030(2)(a).

The recent petitions for listing of searun cutthroat and coho in the basin makes the protection of instream flows even more important for achieving a balance in this basin. The establishment of instream water rights will help to achieve a balanced allocation of water between public instream and other uses in Basin and throughout the state.

Establishment of the instream water right also furthers statewide policies, priorities and goals for streamflow restoration including those in OAR 690-11-030(1), 690-410-070, and 690-77-015. Providing streamflow protection for fish is also necessary in order to carry out the state policy of restoring native fish stocks. ORS 496.435. Thus, protection of the public interest requires denial of these applications.

Domestic Uses

Allowing the proposed domestic uses is contrary to the Commission's Water Allocation Policy. The policy allows additional uses on overappropriated streams only "where public interest in those uses is high and uses are conditioned to protect instream values." OAR 690-410-070(1)(a) (emphasis added). While the exceptions contained in the existing instream water rights in the basin seem to indicate high public interest in the proposed uses of human consumption, livestock and irrigation of non-commercial gardens, they are not included in the pending instream water right application for this proposed source of water.

In addition, the mere fact that the proposed uses seem to fall within the exception in the existing instream water rights does not relieve the Department from its duty to consider

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and protect the public interest, including the public value of instream flows and the needs of anadromous fish. Furthermore, these proposed uses fails to fit within the exception because it is impossible to condition these uses in a way that will protect instream values. *See above.*

The exceptions in the instream water right certificates are narrowly worded and should not be applied unless there is absolutely no other alternative sources of water. It is bad public policy to automatically apply this exemption without looking for other possible sources that can accommodate this water use. Human beings can go elsewhere for water, fish can not.

Failure by the State to look for or provide other sources of water, in the face of potential listing of the sea-run cutthroat and coastal coho, creates expectations for water that may not be fulfilled if/when the species are listed. Instream flows in the Umpqua Basin provide critical habitat for fish - without water instream there is no habitat. Continuing to issue water rights on a river with a possibility of a listed species, as well as existing water availability and water quality problems makes little sense.

There are many small domestic uses in the basin consuming both ground and surface waters, all vital sources for instream flow. Individually, the quantity of water consumed may not be large, but cumulatively these uses adversely effect instream flows and water quality. Ignoring this problem is bad public policy. The state should be looking for alternate sources for these uses and ways to provide regional water supplies for these uses in a way that will result in the least amount of impact for the resource.¹

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Conservation

Oregon statutes and rules also call for the state to "aggressively promote" water conservation and places a high priority on eliminating waste and improving the efficiency of water use. ORS 537.460(2)(a) and OAR 690-410-060(1). The proposed conditions in the technical reports do little to further these policies. Given the presence of potentially listed searun cutthroat and coho, the water quality problems and the fact that the proposed use is these type of uses are known to cause these existing problems it is imperative that the water

¹ If hypothetically, these proposed uses were allowed, they should be conditioned to protect instream flows. Critical to the protection of instream flows is knowing where water is being used and how much is instream. These and other potential water users in the basin should be required to contribute to activities that enable the state to better manage and control the resource - such as gauging stations in key locations.

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use be as efficient as possible. A conservation plan should be in place prior to any approval of these proposed uses.

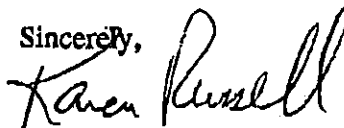
Storage

Oregon's statewide storage policy recognizes that storage is an "integral part" of the State's "strategy to enhance the public" benefits resulting from instream uses of Oregon's waters. OAR 690-410-080(1). The policy also recognizes that "(s)storage can provide increased water management flexibility and control." *Id.* One of the principles of the policy is to require that storage projects be managed in a way that will "protect and enhance the public health, safety and welfare, and the state's natural resources." OAR 690-410-080(2)(d). The Department's historic failure manage stored water once it is released from storage and to distinguish between natural and regulated flows is not consistent with these policy mandates.

◆ Conclusion

We are open to discussion with the Department and the applicants on all of the issues raised in this objection letter.

Sincerely,



Karen A. Russell
Assistant Director