

November 12, 1996

VIA FAX AND US MAIL

DEPARTMENT OF

FISH AND

WILDLIFE



HABITAT  
CONSERVATION  
DIVISION

Richard Bailey, Administrator  
Water Rights and Adjudications Division  
Water Resources Department  
Commerce Building  
158 12th Street, NE  
Salem, OR 97310-0210

Subject: Comments: Rogue Basin Instream Water Rights, Proposed Final Orders:  
70565, 70681, ~~70976~~, 70995, 71032, 71036, 71198, 71618, 71626, 72517,  
72844, 73383 (ODFW Upper Rogue Fish District)

Dear Mr. Bailey:

The Oregon Department of Fish and Wildlife (ODFW) has reviewed the subject Final Orders and Certificates of Water Right. The attached list details what appears to be errors and corrections we believe are necessary. Most of the corrections have already been forwarded in our comments on the Proposed Final Orders and draft Certificates, but the requested corrections were not made to the Final Orders/Certificates. Following your review of these comments, ODFW requests that the Water Resources Department (WRD) issue Superseding Final Orders and Certificates containing the necessary corrections or place in the file of each application, a written statement of finding explaining how the Final Orders/Certificates are not in error or not in need of being re-issued.

We appreciate the opportunity to provide these comments to assist the Water Resources Department in completing its task of issuing pending instream water rights and retiring the applications backlog. If we can be of any other assistance, please do not hesitate to contact me at 503-872-5255, extension 5584.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard L. Kruger".

Richard L. Kruger  
Instream Water Right Program Leader  
Habitat Conservation Division

rlk  
attachment

c: Martha O. Pagel, Director, WRD  
Dwight French, WRD  
Jane Ard, Assistant Attorney General, DOJ

**RECEIVED**

NOV 14 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

John A. Kitzhaber  
Governor



2501 SW First Avenue  
PO Box 59  
Portland, OR 97207  
(503) 872-5255  
FAX (503) 872-5269  
TDD (503) 872-5259  
Internet WWW:http:  
//www.dfw.state.or.us/

ODFW COMMENTS AND RECOMMENDATIONS  
INSTREAM WATER RIGHT FINAL ORDERS / CERTIFICATES

WRD BASIN: **Rogue**  
ODFW FISH DISTRICT: **Upper Rogue**

1) **70565**

The reach description on the Certificate is missing the following information, which should be appended to the end:

... RIVER, RIVER MILE 0.0 (SENE SECTION 22, TOWNSHIP 5N, RANGE 36E, WM.

2) **70681**

The flow for January should be the same as EANF: 28.3 cfs

3) **70976**

The reach description on the Certificate is missing the following information, which should be appended to the end:

... 6 W.M.) TO THE MOUTH AT RIVER MILE 0.0 9NE, SECTION 3, TOWNSHIP 39S, RANGE 5W W.M.)

4) **70995**

The reach description needs to have the phrase ... FROM DEER CREEK... and the Range number of the downstream reach changed to 5W:

~~CLEAR CREEK FROM DEER CREEK~~ FROM ANDERSON CREEK (NESW, SECTION 1, TOWNSHIP 38S, RANGE 8W WM), TO THE MOUTH AT RIVER MILE 0.0 (SESE, SECTION 10, TOWNSHIP 38S, RANGE 85W WM)

5) **71032**

Flows on the Final Order and Certificate for July and August are transposed. According to the Proposed Final Order the Estimate Average Natural Flow, and consequently the Instream Water Right amounts for these months are:

|        |                 |
|--------|-----------------|
| July   | <u>4.84</u> cfs |
| August | <u>3.37</u> cfs |

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WATER RESOURCES DEPT.  
SALEM, OREGON

November 12, 1996

6) 71036

The reach description should be corrected as follows:

GRAVE CREEK FROM LAST CHANCE CREEK ~~ST~~ AT RIVER MILE 32.4 (NENW, SECTION 15, TOWNSHIP 33S, RANGE 4W WM); TO BOULDER CREEK AT RIVER MILE 26.0 (NESW, SECTION 6, TOWNSHIP 34S, RANGE 4W WM).

The flow for April should be: 59.1 cfs.

6) 71198

The flow for June should be: 1.46 cfs

7) 71618

The name of the source stream in the reach description has an extra "SON", which should be deleted:

JACKSONSON CREEK FROM AN UNNAMED TRIBUTARY...

8) 71626

A flow of 26.0 cfs for March is incorrect. The correct flow is: 22.6 cfs.

9) 72517

EANF for the month of November is 30.5 cfs, therefore the IWR flows should be: 15.0 / 26.0 cfs.

10) 72844

Spelling of the "from" stream name is incorrect in the draft Certificate. It has an extra "PHINE" in it, which should be deleted.

ILLINOIS RIVER FROM JOSEPHINE~~PHINE~~ CREEK AT RIVER MILE 48.7 ....

11) 73383

The proposed flow for October should be: 22.3 cfs.

**RECEIVED**

NOV 14 1996

WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon Water Resources Department  
Water Rights Division

Instream Water Right Application  
Number IS70976

**Final Order**

*Application History*

On 12/ 7/1990, the Department of Fish and Wildlife submitted an application to the Department for an instream water right. The Department issued a Proposed Final Order on April 30, 1996. The protest period closed June 14, 1996, and no protest was filed.

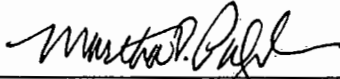
The proposed use would not impair or be detrimental to the public interest, but the Department's continuing evaluation reveals that the Proposed Final Order requires modification. Condition number three has been changed to read as follows:

For purposes of water distribution, this instream right shall not have priority over human or livestock consumption.

**Order**

IT IS HEREBY ORDERED that Application IS70976 be approved with above modifications to the Proposed Final Order, as provided in the attached certificate.

DATED August 30, 1996

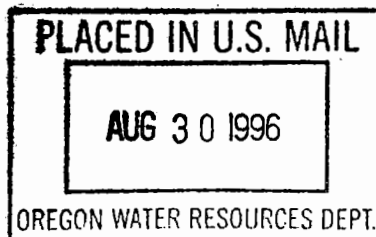


Martha O. Page  
Director

*Hearing and Appeal Rights*

Under the provisions of ORS 537.170, the applicant may request a contested case hearing by submitting the information required for a protest under ORS 527.153(6) to the Department within 14 days after this order is issued. If a contested case hearing is requested, the Department must schedule one. In the contested case hearing, however, only those issues based on the above modifications to the proposed final order may be addressed.

Under the provisions of ORS 183.484, the applicant or any person having standing may appeal this order by filing a petition for review in the Circuit Court for Marion County or the circuit court for the county in which the applicant resides or has a principal business office. The petition for review must be filed within 60 days after the date this order is served.



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 WILLIAMS CR tributary to WILLIAMS CR

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, cutthroat trout, and winter and summer steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

WEST FORK WILLIAMS CREEK FROM RIGHT HAND FORK OF THE WEST FORK OF WILLIAMS CREEK AT RIVER MILE 4.5 (NWNW, SECTION 19, TOWNSHIP 39S, RANGE

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 12/ 7/1990.

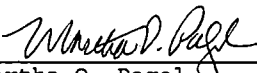
The following conditions apply to the use of water under this certificate:

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  |
|------|------|------|------|------|------|------|-----|------|------|------|------|
| 42.0 | 42.0 | 42.0 | 42.0 | 23.2 | 8.85 | 2.88 | 1.4 | 1.08 | 1.89 | 12.1 | 42.0 |

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 AUGUST 30, 1996.

  
\_\_\_\_\_  
Martha O. Pagel

Recorded in State Record of Water Right Certificate number 72666.

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

CC: FILE # all Logan River TCR TR - sent 11/23/94 *NM*

WATERWATCH

ODF&W (DEPENDING ON - IF NOT APPLICANT) COUNTY(IES): Jackson, Josephine, Curry

WATERMASTER # 14, 19

REGIONAL MANAGER - Al Cook

KEN STAHR

OTHER ADDRESSES: (OVER FOR MORE ADDRESSES)

AGRICULTURE, DEPARTMENT OF, VES GARNER

BOYER, JOHN, JR.

COALITION FOR REPONSIBLE WATER PLANNING

~~COOS COUNTY BOARD OF COMMISSIONERS, GORDON ROSS (COOS RIVER BASIN ONLY)~~

CROOK COUNTY STOCKGROWERS ASSOC., JEFF & RUNINDA MCCORMACK

DEPARTMENT OF ENVIRONMENTAL QUALITY

DOUGLAS COUNTY LIVESTOCK ASSOCIATION

CASEWORKER *NM*

ORIGINAL TO APPLICANT 10/14/94

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

OTHER ADDRESSES:

- F. A. I. R.
- FRUIT GROWERS LEAGUE
- HURRICANE CREEK IRRIGATION DITCH CORPORATION, RICHARD A. BOUCHER, SEC./TREAS.
- ILLINOIS VALLEY WATER RIGHT OWNERS ASSOC.
- LAKE COUNTY STOCKGROWERS, ANN TRACY, PRESIDENT
- MORROW COUNTY COMMISSIONER, RAY FRENCH
- MOON, DAVID, ATTORNEY
- OREGON ASSOCIATION OF NURSERYMEN, INC., CLAYTON W. HANNON, EXECUTIVE DIRECTOR
- OREGON ASSOCIATION OF REALTORS, JERRY SCHMIDT, WATER CONSULTANT
- OREGON CATTLEMEN'S ASSOC.
- OREGON HOP GROWERS ASSOC.
- OREGON SHEEP GROWERS ASSOCIATION, INC.
- OREGON WHEAT GROWERS LEAGUE, MACK KERNS
- WALLOWA COUNTY COURT, OFFICE OF THE JUDGE
- WALLOWA COUNTY STOCKGROWERS ASSOC., C/O JEAN STUBBLEFIELD, SECRETARY
- WATER FOR LIFE
- WATER RESOURCES CONGRESS

REVISED: 10/14/94

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

Water Right Application Number: IS 70976

**Proposed Final Order**

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

**Application History**

On 12/7/1990, the Oregon Department of Fish and Wildlife submitted an application to the Department for the following instream water right certificate.

Source: W FK WILLIAMS CR tributary to WILLIAMS CR

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, cutthroat trout, and winter and summer steelhead for 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  | DEC  |
|---------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1st 1/2 | 42.0 | 42.0 | 42.0 | 42.0 | 42.0 | 25.0 | 17.0 | 17.0 | 17.0 | 25.0 | 42.0 | 42.0 |
| 2nd 1/2 | 42.0 | 42.0 | 42.0 | 42.0 | 25.0 | 25.0 | 17.0 | 17.0 | 25.0 | 42.0 | 42.0 | 42.0 |

To be maintained in:

WEST FORK WILLIAMS CREEK FROM RIGHT HAND FORK OF THE WEST FORK OF WILLIAMS CREEK AT RIVER MILE 4.5 (NWNW, SECTION 19, TOWNSHIP 39S, RANGE 6W W.M.) TO THE MOUTH AT RIVER MILE 0.0 (NE, SECTION 3, TOWNSHIP 39S, RANGE 5W W.M.).

The Department mailed the applicant notice of its Technical Review on November 23, 1994, determining that the requested flows exceeded the estimated average natural flow during some months and that exceptions for human and livestock consumption, are appropriate. The objection period closed February 1, 1995. Objections and comments were received (from JOSEPHINE COUNTY FARM BUREAU, OREGON DEPT OF FISH AND WILDLIFE, WATER FOR LIFE, JOSEPHINE COUNTY, WATERWATCH OF OREGON).

The following supporting data was submitted by the applicant:

- (a) Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements; November 1970 and April 1972.
- (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 Rogue Basin Program allows the proposed use.

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

The source of water is within or 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  |
|------|-----|------|-----|------|------|------|-----|------|------|------|------|
| 82.9 | 112 | 84.2 | 55  | 23.2 | 8.85 | 2.88 | 1.4 | 1.08 | 1.89 | 12.1 | 57.3 |

Water is **NOT** available for further appropriation (at a 50 percent exceedance probability) for the period **May, June, July, August, September, October, and November.**

The flows available for further appropriation are shown below:

| JAN  | FEB   | MAR  | APR  | MAY  | JUN | JUL  | AUG  | SEP  | OCT | NOV  | DEC  |
|------|-------|------|------|------|-----|------|------|------|-----|------|------|
| 82.7 | 111.7 | 83.9 | 53.8 | 21.3 | 6.4 | -0.4 | -1.4 | -0.8 | 1.2 | 12.0 | 57.1 |

### 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 Rogue 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.

While the proposed use meets the other tests, the full amount of water requested is not available during some months of the year.

Water is not available for the proposed use at the amount requested during May, June, July, August, September, October, and November because the unappropriated water available is less than the amounts requested during these 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

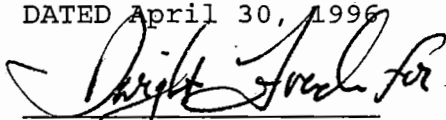
- the proposed use, as limited in the draft certificate, will **not** result in injury to other water rights,
- the proposed use, as limited in the draft certificate, will **not** impair or be detrimental to the public interest as provided in ORS 537.170.
- the proposed use, as limited in the draft certificate, shall except future use of water for human and 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  |
|------|------|------|------|------|------|------|-----|------|------|------|------|
| 42.0 | 42.0 | 42.0 | 42.0 | 23.2 | 8.85 | 2.88 | 1.4 | 1.08 | 1.89 | 12.1 | 42.0 |

#### Recommendation

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

DATED April 30, 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.

Your protest must be received in the Water Resources Department no later than June 14, 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 Department of Fish and Wildlife  
P.O. Box 59  
Portland, Oregon 97207

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

Source: W FK WILLIAMS CR tributary to WILLIAMS CR

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, cutthroat trout, and winter and summer steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing.

To be maintained in:

WEST FORK WILLIAMS CREEK FROM RIGHT HAND FORK OF THE WEST FORK OF WILLIAMS CREEK AT RIVER MILE 4.5 (NWNW, SECTION 19, TOWNSHIP 39S, RANGE

The right is established under Oregon Revised Statutes 537.341.

The date of priority is 12/ 7/1990.

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  |
|------|------|------|------|------|------|------|-----|------|------|------|------|
| 42.0 | 42.0 | 42.0 | 42.0 | 23.2 | 8.85 | 2.88 | 1.4 | 1.08 | 1.89 | 12.1 | 42.0 |

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. 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 1st day of

\_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Water Resources Director

Recorded in State Record of Water Right Certificate number \_\_\_\_\_.

IS70976

COPY CHECK-OFF SHEET FOR PROPOSED FINAL ORDERS

CC: FILE # IS 70976

WATERMASTER # (BRUCE SUND)

REGIONAL MANAGER: Al Cook

ODF&W - County: JOSEPHINE

DEO

PARKS

OTHER STATE AGENCY IF NECESSARY:

DIVISION 33 LIST: \_\_\_\_\_ COLUMBIA RIVER INTERTRIBAL FISH COMMISSION; U.S. FISH & WILDLIFE;  
(CHECK ONLY IF APPLICABLE) NORTHWEST POWER PLANNING COUNCIL & NATIONAL MARINE FISHERIES

POWER BUILDER UPDATER; FRONT COUNTER

WATER FOR LIFE (TODD HEIDGERKEN)

OTHER ADDRESSES OF PEOPLE WHO PAID THE \$10 FEE:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PEOPLE WITH OBJECTIONS, COMMENTS OR REQUESTED COPY W/O \$10 (SEND THE \$10 LETTER):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CASEWORKER : CINDY SMITH

IWR Application # 70976 Certificate # \_\_\_\_\_

STATE OF OREGON

WATER RESOURCES DEPARTMENT

RECEIVED

Application for Instream Water Right  
by a State Agency

DEC 07 1990

There is no fee required for this application.

WATER RESOURCES DEPT.  
SALEM, OREGON

Applicant: Randy Fisher for Oregon Department of Fish and  
Wildlife, PO Box 59, Portland, OR 97207

1. The name of the stream of the proposed instream water right is W. Fk. Williams Creek, a tributary of Williams Creek (> Applegate River).
2. The public use this instream water right is based on is providing required stream flows for coho and fall chinook salmon, cutthroat trout, and summer and winter steelhead for migration, spawning, egg incubation, fry emergence, and juvenile rearing.
3. The amount of water (in cubic feet per second) needed by month for each category of public use is as follows:

USE(S): Migration, spawning, egg incubation, fry emergence, and juvenile rearing.

| JAN | FEB | MAR | APR | MAY | JUN | JUL | AUG | SEP | OCT | NOV | DEC |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 42  | 42  | 42  | 42  | 42/ | 25  | 17  | 17  | 17/ | 25/ | 42  | 42  |
|     |     |     |     | 25  |     |     |     | 25  | 42  |     |     |

4. The reach of the stream identified for an instream water right is from (upstream end) Right Hand Fork of the West Fork of Williams Creek, river mile ±4.5, within the NW quarter of the NW quarter of Section 19, Township 39S, Range 3W W.M., in Josephine County...

Downstream to the mouth, river mile 0, within the NE quarter of Section 3, Township 39S, Range 5W W.M., in Josephine County.

5. The method used to determine the requested amounts was the Oregon Method.
6. When were the following state agencies notified of the intent to file for the instream water right?



IWR Application # 70976 Certificate # \_\_\_\_\_

Dept. of Environmental Quality  
ODFW (Fish, Wldlf, and Habitat)  
Parks and Recreation Division

Date: November 9, 1990  
Date: November 9, 1990  
Date: November 9, 1990

7. If possible, include recommendations for measuring locations or methods:

Establish a gaging structure at or near the lower limit of the reach.

8. If possible, include recommendations for assisting the Water Resources Department (WRD) in measuring and monitoring procedures:

Local ODFW personnel will assist the watermaster in establishing and implementing a monitoring program.

9. If possible, include other recommendations for methods or conditions necessary for managing the water right to protect the public uses [see OAR 690-77-020 (5)(c)]: None.

10. Remarks: Coho salmon are listed as "sensitive" (likely to be classified as threatened or endangered if declines continue) by ODFW.

**THIS APPLICATION MUST BE ACCOMPANIED BY A BASIN MAP WITH THE APPLICABLE LAKE OR STREAM REACH IDENTIFIED.**

An instream water right may be allowed for an instream beneficial use of water subject to existing water rights with an effective date prior to the filing date of this application.

This type of beneficial use is for the benefit of the public and a certificate issued confirming an instream water right shall be held in trust by the Water Resources Department for the people of the State of Oregon, pursuant to ORS 537.341.

Date: 12/2/90

Signed: Nancy M. MacHugh

Oregon Department of Fish and Wildlife

Assistant Director  
Habitat Conservation Div.

File: WFWILLI1.APP

IWR Application # 70976 Certificate # \_\_\_\_\_

This is to certify that I have examined the foregoing application, together with the accompanying maps and data, and return them for:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

In order to retain its priority, this application must be returned to the Water Resources Department with corrections on or before

\_\_\_\_\_, 19\_\_\_\_.

Date: \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_

\_\_\_\_\_

This document was first received at the Water Resources Department in Salem, Oregon, on the 7<sup>th</sup> day of December, 1990, at 8:00 o'clock A M.

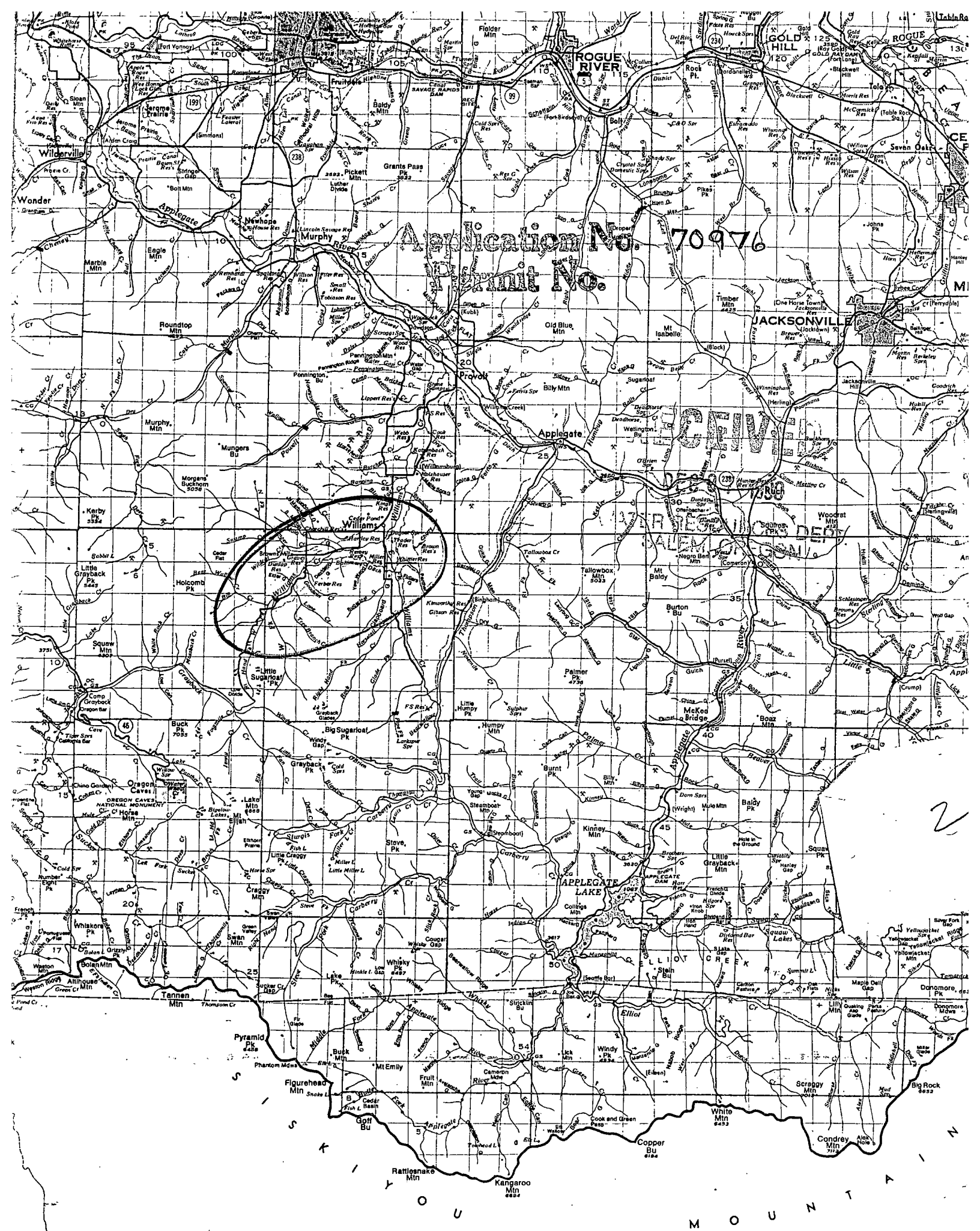
Water Resources Department  
3850 Portland Rd. NE  
Salem, OR 97310

... ..  
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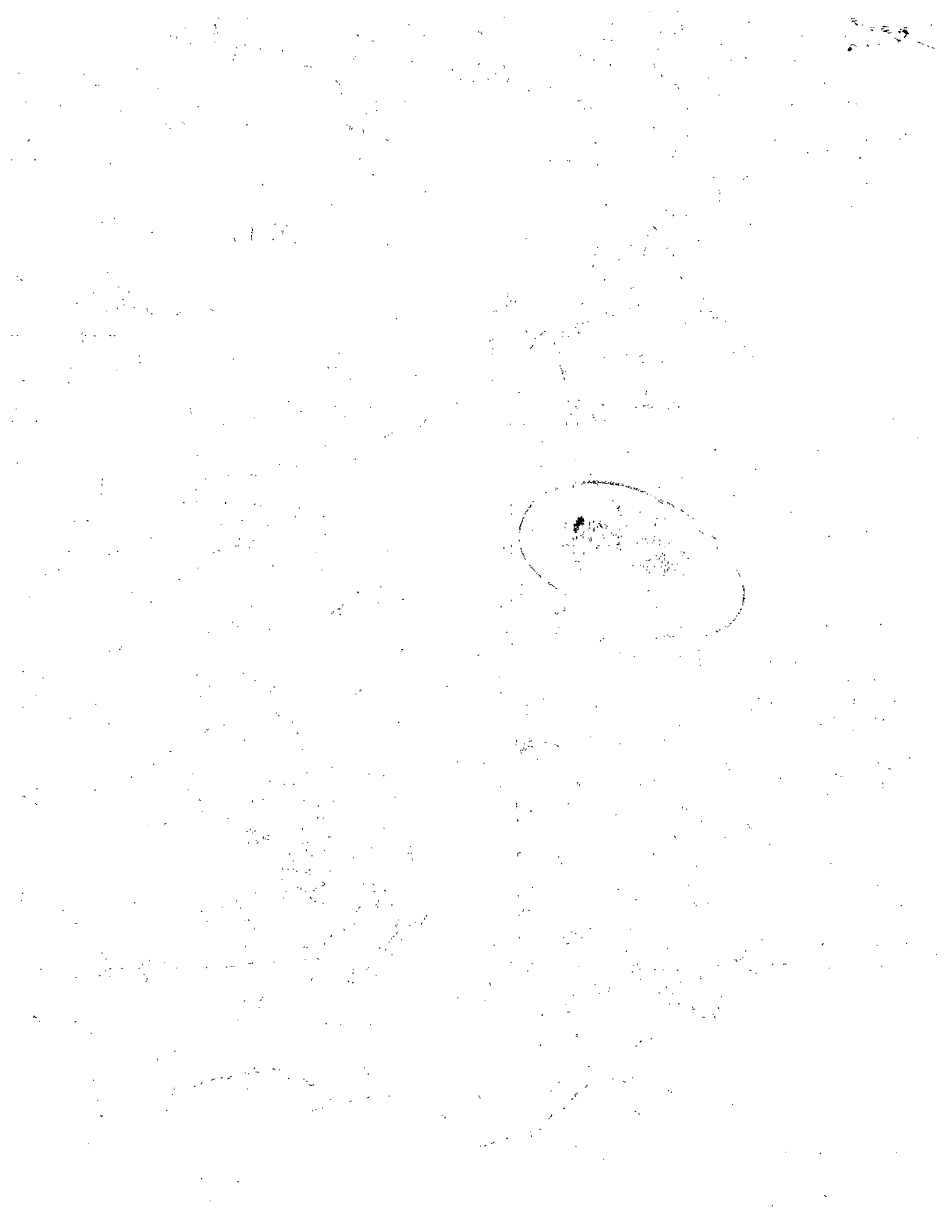
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Application No. 70976  
Patent No.



2



NOV 16 1992

WATER RESOURCES  
SALEM, OREGON

COMMENT FORM

Please list below the Application Number of the water use application(s) that are of interest to you. When the technical is completed a report of the technical review of these applications will be delivered to you.

Application #s ~~72849~~, ~~71026~~, ~~71004~~, ~~71626~~, ~~276~~, ~~70976~~

Send to: ~~Josephine County Farm Bureau~~  
~~178 Pyle Drive~~  
~~Grants Pass, Oregon 97527~~

Please include specific comments or concerns. Use additional sheets if necessary.

The quantity of water in CFS requested to sustain the Oregon Department of Fish and Wildlife proposed Instream Water Right is set too high above the adequate needs for each fish species. It will result in a vast waste of our precious water.

Return to:  
Oregon Water Resources Department  
3850 Portland Road N.E.  
Salem, Oregon 97310

This Comment corresponds to the OCT/14/1992 Public Notice.

# WaterWatch

Hand Delivered

January 31, 1995

Rec.  
2/1/95  
ke

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

Re: Technical Reports for:

Files 70975 through 70992, 70995 through 70997, 70999 through 71024, 71026 through 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71629, 72843 through 72858, 73367 through 73386.

ODFW, Instream Applications, Rogue River Basin

WaterWatch of Oregon strongly supports the flows requested in the above referenced Oregon Department of Fish and Wildlife applications. These flows are essential for survival of coastal coho, fall chinook, winter steelhead, and cutthroat trout. Coastal steelhead and coho populations are severely depressed and have been petitioned for listing under the Federal Endangered Species Act. Streamflows are critical to the survival of these sensitive fish. By this letter WaterWatch requests copies of any objections filed on these applications.

In addition, we file the following objections to the water availability analyses in the technical reports pursuant to OAR 690-77-028:

## **The Water Availability Analysis is Defective**

Instream water rights are a means for the state to achieve equitable allocation of water and Oregon Statutes place a duty on the state to act in a way that will protect instream flows needed for fish populations. OAR 690-77-015(2), ORS 496.430, OAR 690-410-070(2)(h). The agencies administrative rules require the technical reports to contain an evaluation of the estimated average natural flow (ENAF) available from the proposed source. OAR 690-77-026(1)(g). The rules also state that the amount of appropriation for out of stream uses is not a factor in determining the amount protected under the instream water right. OAR 690-77-015(3).

However, the technical reports state that they contain an:

"evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application . . .

The recommended flows take into consideration planned uses and reasonable

70976

## Water Resources Department

Page 2

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anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review . . ."

Technical reports page 2 (emphasis added). Clearly, this analysis is contrary to the agencies rules because it takes into account out-of-stream uses. These instream water right application requests must be evaluated according to the higher ENAF figures.

The technical reports for most of these applications<sup>1</sup> propose to issue instream water rights for the Department's lower "average flows" rather than those requested for several months of each year. The flows requested by ODFW are necessary for the requested beneficial use of water - fish life. These flows are needed for migration, spawning, egg incubation, fry emergence and juvenile rearing and for fish passage and habitat maintenance. There should be no reduction in the requested flows. ODFW's flow requests are either within the ENAF or are needed to account for high flow events that are needed for fish passage and habitat maintenance pursuant to OAR 690-77-015(4).

Moreover, the technical reports for 70980, 70984, 70993, 71004, 71011, 71012, 72844, 73379, 73380 propose to allow only "ODFW minimum" flows rather than the ODFW requested flows during several months even though the flows requested by ODFW are within the "average flow". The flows requested by ODFW comply with OAR 690-77-015(4) which requires that the instream flows adopted by the Commission not exceed (ENAF) unless certain circumstances are met. These requests fall within the "average flow" which is lower than the ENAF. There is no apparent justification for these proposed decreases. ODFW's requested flows should approved.

And finally, the technical reports for 71000, 71003, 71007, 71017, 71027, 71028, 71612, 71624, 72847, 72855, and 73383 did not contain proposed flows by the Department. Without this information, it is impossible for WaterWatch, and other members of the public to fully evaluate these applications.

If steelhead and/or coho are listed under the state and/or federal endangered species acts, these acts will place an additional burden on the Commission. Under the state Act, the Commission is required to consult with the Oregon Department of Fish and Wildlife to ensure that any action taken by the Commission is consistent with ODFW programs to conserve the species or, if no plan is in place, that the act will not "reduce the likelihood of the survival of recovery of the threatened species of endangered species." ORS 496.182(2). The federal Act prohibits the "taking" of endangered species. 16 USCA § 1538(a)(1)(B).

<sup>1</sup> 70975 through 70979, 70981 through 70983, 70985 through 70992, 70995, 70999, 71001, 71002, 71003 through 71006, 71008 through 71011, 71013 through 71016, 71018 through 71024, 71026, 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71611, 71613 through 71622, 71623, 71625 through 71629, 72843 through 72846, 72848, 72851, 72853, 72854, 72857, 72858, 73367, 73368, 73372 through 73374, 73376, 73377, 73381, 73384, 73385.



## Water Resources Department

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Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "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. The failure to protect sufficient instream flows for listed fish clearly causes habitat destruction or modification that can harm the fish. Habitat destruction or modification that harms fish can rise to the level of an unpermitted taking of a species under the Federal Endangered Species Act. See Palilia v. Hawaii Department of Land and Natural Resources, 649 F.Supp. 1070 (D. Hawaii 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988). In Palilia, the Court found that a state agency action that allowed goats to destroy the food source of an endangered bird was a habitat alternation that rose to the level of a take under the Endangered Species Act. Failing to protect streamflows for fish and continuing to issue water rights which taking water from fish is at least as clear a causal connection. ODFW instream flow requests should be granted in full.

These requested flows are necessary to protect severely depressed fish populations which will likely be listed under the Federal Endangered Species Act. Listing under the state and federal endangered species acts is not only a sign of the health of a particular species but also a warning signal for the health of the human environment.

### **The proposed conditions are contrary to the public interest.**

The technical reports propose to subordinate these instream flow requests to human consumption or livestock. The technical reports do not provide any support or reasoning behind its proposal. These uses, while they use small amounts of water individually, have cumulative adverse effects on streamflows needed for fish.

As noted above, the state has a duty to protect instream flows needed for public uses of water. Fish need water to survive. The Rogue River system supports a variety of fish life including coho, fall chinook, winter steelhead, and cutthroat trout. Petitions have been filed seeking protection for steelhead stocks under the Federal Endangered Species Act. Part of the decline of fish populations can be attributed to low flows during summer months which 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 in a number of ways, including 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.

Streamflows are not only critical for fish survival, they help abate water quality problems. The Department of Environmental Quality (DEQ) has designated segments of the Rogue, Little Butte Creek, Bear Creek, Ashland Creek, Butler Creek, Wagner Creek, Payne Creek, Jackson Creek, Evans Creek, Applegate River, and the Illinois River as water quality limited. These segments are not able to support the designated beneficial uses of aquatic life

**Water Resources Department**

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and/or water contact. Rivers can not assimilate pollution loadings unless there is sufficient water instream. Thus, streamflow protection is critical to pollution abatement.

These proposed conditions are contrary to the public interest in protecting the resource. The Commission's statewide policies recognize the importance of maintaining streamflows and place high priority on protecting streamflows. OAR 690-410-030(1). This policy directs the state to take action to restore flows in critical areas such as this system. Id. The public uses of the coastal river system have been impaired. Adoption of these instream water rights without conditions is just one small step towards restoring this system.

Adoption of these and other instream flows is critical to the health of Oregon's watersheds and must be a high priority for Oregon if the state is to develop solutions to the resource crises that threatens to destroy the livability of Oregon. Instream water rights not only help to achieve a more equitable allocation of water between instream and out of stream uses, they also establish management objectives for Oregon's rivers. WaterWatch supports the Department's efforts to finally begin to implement an Act that has been "on the books" for the past six years. We look forward to the adoption of these instream water rights.

Sincerely,

  
Kimberley Priestley  
Legal/Policy Analyst

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FEB - 8 1995

WATER RESOURCES DEPT.  
SALEM, OREGON

Oregon

January 23, 1995



DEPARTMENT OF  
FISH AND  
WILDLIFE

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

RE: Comments; Rogue River Basin Instream Water Right Technical Reviews; Applications 70975 through 70992, 70995 through 70997, 70999 through 71024, 71026 through 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71629, 72843 through 72858 and 73367 through 73386.

ODFW has reviewed the subject Technical Reviews and offers the following comments:

**General Comments**

1. ODFW has previously indicated it does not oppose reducing instream water right flow levels from amounts requested to the estimated average natural flow when this is less than requested flows. This is consistent with OAR 690-77-045 (3e).
2. According to OAR 690-77-026 (1), WRD "shall undertake a technical review ... and prepare a report." This subsection further lists 8 [(a) through (h)] mandatory criteria which, at a minimum, must be assessed during the technical review. ODFW has concerns with the apparent level of assessment relative to subsection (c):

*OAR 690-77-026 (1) (c)--Assessing the proposed instream water right with respect to conditions previously imposed on other instream water rights granted for use of water from the same source.*

In the subject Rogue River basin reports of technical review, WRD is proposing to condition each application to exempt human and livestock consumption from regulation in favor of these instream rights as follows:



2501 SW First Avenue  
PO Box 59  
Portland, OR 97207  
(503) 229-5400  
TDD (503) 229-5459

70976

*This instream right shall not have priority over domestic  
[or ]livestock [consumption]....*

OR

*This instream right shall not have priority over  
domestic, livestock and irrigation of noncommercial  
gardens not to exceed 1/2 acre in area, ....*

Instream water rights certificates in the Rogue River basin based on conversion of minimum perennial streamflows generally contain similar conditioning language giving preference to the listed uses.

By rule, WRD's technical review process includes assessing conditions previously imposed on other instream water rights from the same source. If found to be appropriate, WRD may propose that new instream water rights contain the same exemption. There is no requirement that this exemption be automatically included as a proposed condition.

When ODFW reviewed WRD files on some of these applications for documentation of assessments of prior conditions, we found nothing to document that any such assessments had been done. ODFW, therefore, assumes the required assessments were not done, contrary to rule. ODFW also objects to the routine placement of exemptions on any of the subject applications on the grounds that to do so does not give adequate consideration to the public's interest in maintaining fishery resources in Rogue River basin streams. OAR 690-11-195 (4dA).

### Specific Comments

1. In 31 of the subject reports of technical review, WRD has proposed reducing the requested flows levels to the minimum flow levels listed in the Rogue River Basin Investigation report even though water is available to meet, wholly or partially, the flows requested by ODFW. No explanation or rationale is provided for these reductions in the report or WRD's IWR applications files.

For application numbers 70980, 70991, 70992, 70996, 70997, 72844 and 72845, ODFW has collected information that indicates maximum summer water temperatures routinely exceed acceptable levels in the subject streams. For several, summer temperatures exceed levels considered to be lethal. Stream flow is a key factor affecting water temperatures. Because these streams support populations of coho salmon and winter steelhead, both species of concern for ODFW,

we believe the flows requested are necessary and appropriate. We must, therefore, object to the arbitrary lowering of requested flows other than to avoid exceeding the estimated average natural flow levels.

ODFW is also concerned with proposed lowering of its recommended summer-month flows for application numbers 70984, 70987, 70995, 71004, 71009, 71012, 71015, 71024, 71028, 71033, 71035, 71036, 71626 and 71198. Although ODFW has not documented high instream temperatures in these streams, field personnel with knowledge of these streams indicate water temperatures here are also of concern. We, therefore, object to the unjustified lowering of our requested flows.

For applications 71016, 70987, 70995, 71004, 71020, 71012, 71015, 71024, 71028, 71033, 71617, 71036, 71626, 71198 and 73386, WRD has proposed reducing winter flows to levels below those requested even though water is available. ODFW objects to this arbitrary lowering because appropriations (e.g., for storage) leading to lower flows during these months would tend to limit access to spawning areas in these streams for returning anadromous adults.

ODFW has no objection to the proposed lowering of flows for applications 73373, 73379, 73380 and 73381.

2. Based on the findings of the water availability analysis completed for the applications listed below, ODFW believes some technical reports contain unintended errors. In some cases, the flow level chosen for a specific month is greater than either ODFW's requested level or greater than the estimated average natural flow level. In other cases, a lower flow level was chosen than either the estimated average natural flow or ODFW's requested level. The following table suggests corrections:

| <u>Application #</u> | <u>Month</u> | <u>Suspected Errors</u> | <u>Suggested Corrections</u> |
|----------------------|--------------|-------------------------|------------------------------|
| 70976                | May/Dec      | 25/57.3                 | 23.2/42                      |
| 70985                | December     | 80.1                    | 60                           |
| 70987                | December     | 244                     | 170                          |
| 71032                | December     | 83.7                    | 31                           |
| 71035                | May          | 135                     | 88.7                         |

WRD; IWR Comments

January 23, 1995

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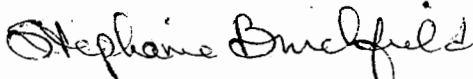
|       |          |      |      |
|-------|----------|------|------|
| 71199 | June     | 20   | 26.1 |
| 71205 | May      | 26   | 18.1 |
| 71626 | April    | 15   | 11.8 |
| 72843 | August   | 62   | 72.6 |
| 72853 | February | 29.3 | 26   |
| 72858 | December | 6.38 | 4    |
| 73372 | November | 34.6 | 34   |
| 73377 | November | 42.1 | 42   |

3. In several cases, proposed flows were omitted from the PROPOSED CERTIFICATE CONDITIONS section of the technical reports. These applications are: 71000, 71003, 71007, 71017, 71027, 71612, 71624, 72847, 72855 and 73383. For these applications, ODFW would support flows for each month based on either (1) the flow amount requested or (2) the estimated average natural flow, whichever is least.

4. For application 72856, the proposed flows under PROPOSED CERTIFICATE CONDITIONS are garbled and unreadable. Because the water availability analysis indicates water is naturally available all months to meet ODFW's request, we would expect to see the requested numbers reflected here.

Thank you for this opportunity to review the subject technical reports. We appreciate WRD's efforts to move forward with these applications and encourage you to proceed to certification as quickly as possible.

Sincerely,



Stephanie Burchfield  
Water Resources Program Manager

c: Evenson/Vogt, Central Point  
WaterWatch of Oregon (public information request)

**RECEIVED**

FEB 01 1995

WATER RESOURCES DEP.  
SALEM, OREGON

**WATER FOR LIFE'S OBJECTION TO TECHNICAL REVIEW: APPLICATION # 70976**

Submitted to the Oregon Water Resources Department, January 31, 1995

Water for Life hereby submits the following objection to Application # 70976, an instream water right application filed by the Oregon Department of Fish & Wildlife ("ODFW"). Water for Life asserts that the technical review by the Water Resources Department ("WRD" or "Department") is defective and there are elements of the water right as approved that may impair or be detrimental to the public interest, based on the facts and issues set forth below. The applicant has requested flows that exceed the level of flow necessary to support the uses applied for (ORS 537.336 and OAR 690-77-015 (9)). For the reasons set out herein, the application should be rejected or returned to the applicant for the curing of defects.

**A. WRD FAILED TO ANALYZE FLOW NEEDS**

The flow levels approved by the technical review are not based on any analysis of the need for the flows requested. ORS 537.336 sets out the statutory standard which the Department is supposed to follow when determining instream water rights; the "quantity of water necessary to support those public uses." Water for Life asserts this standard means the minimum quantity necessary to support the public use. The technical review does not address the quantity of water or flow levels necessary to support the uses applied for. A review of the WRD file shows that no such analysis has occurred. The only review undertaken by the WRD was a check to see if the requested flows are less than the average estimate natural flow ("EANF"; OAR 690-77-015 (4)). At the very least, the flows approved should not exceed the lesser of EANF or the minimum flow recommended in the Basin Investigations.

**B. NO SUPPORTING DATA SUBMITTED FOR REQUESTED FLOW LEVELS**

An integral part of the technical review by the WRD is the analysis of the application and supporting data (see OAR 690-77-026 (1)(a)). OAR 690-77-015 also requires an application to include at a minimum "a description of the technical data and methods used to determine the requested amount;" (emphasis added).

No analysis of supporting data, or the lack thereof, appears in the WRD file for the application. The technical review is defective in that the WRD did not evaluate "whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." (OAR 690-77-026 (1)(h)).

ODFW does not have specific files for their instream water right applications. The original data supporting the Basin Investigation has apparently been lost or destroyed. Such information is essential to understand and evaluate the requested flows and assess their accuracy. No supporting data or "technical data" was submitted by the applicant as required by OAR 690-77-020 (4). Since no technical data was included with ODFW's application, the application should be returned to the applicant for curing of defects or resubmittal (OAR 690-77-021 and 022).

**C. OREGON METHOD IS INHERENTLY FLAWED - WRD SHOULD REJECT APPLICATION**

The methodology used for this application, the "Oregon Method", is inherently flawed in that it is based on a methodology that has been superseded and is not reliable, and is based on outdated or insufficient information (note testimony of Albert H. Mirati, Jr. on the Oregon Method at the Water Resources Commission, December 6, 1990 meeting).

The Oregon Method was further critiqued in Instream Flow Methodologies, EA Engineering, Science and Technology, Inc. (1986), a publication referenced ODFW's own publication also entitled Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989). In that critique at page 10-71, the authors stated:

"The principal limitation is the arbitrariness of the flow criteria. There is no way of knowing if they are necessary or sufficient. The binary velocity and depth criteria are also arbitrary and can result in misleading conclusions. It [Oregon Method] is one of the earliest developments of the concept of depth, velocity, and especially substrate size and dissolved oxygen, but has now been superseded."

The determinations made for the Oregon Method are not reliable and should therefore be rejected by the WRD or the Commission as the final authority in determining the level of instream flows necessary to protect the public use (ORS 537.343).

#### D. OREGON METHOD WAS NOT FOLLOWED TO OBTAIN FLOW LEVELS REQUESTED

One of the requirements of the Department's technical review is contained in OAR 690-77-026 (1)(h): "Evaluating whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency." This requirement does not mean the Department can simply accept ODFW's assertion that the "Oregon Method" is the basis for the requested flows. The Department must actively review the application to see if the Oregon Method and ODFW's instream rules are being followed. Where applicable, ODFW must also submit supporting data to show that the standards and criteria contained in their rules have been followed.

The actual measurements used by ODFW to set requested flow levels are totally inadequate to validate those amounts; these measurements were made by ODFW's predecessor, the Oregon State Game Commission, as shown in the Appendices to the Basin Investigations. Actual measurements of streamflow were not made at times when key life stages occurred and, in fact, the severe limitations of the data available show that they are inadequate to validate the requested flows: "Actual measurement of streamflow made at or near recommended instream flow requirements and made at times when key life stages occur are important to validate the methodology use, and to validate that the recommended instream flow requirements provide desirable habitat conditions." Instream Flow Methodologies, Louis C. Fredd, Oregon Department of Fish and Wildlife (1989), p. 12.

#### E. "EANF" CALCULATIONS ARE DEFECTIVE OR INCOMPLETE

There are no calculations or information in the WRD file to show what ratios or models were used or how adjustments were made to determine the 50% exceedance flows, and there is also no information in the technical review to show the type of statistics used (see "Methods for Determining Streamflows and Water Availability in Oregon", Robison, p. 22 and 23.) The EANF calculations are defective, resulting in high EANF levels and thus allowing excessive recommended flows by the WRD. The model used to calculate EANF should be reviewed and revised to properly set EANF figures.

#### F. FISH SPECIES MAY NOT BE PRESENT IN STREAM

The application is defective in that the purpose listed in the application (to provide required stream flows for several different types of fish species) listed fish species that may not be present in the stream. Insufficient information was submitted with the application to determine if the fish species listed in the application are actually present in the stream reach applied for. No supporting data was submitted to show the presence of the listed species as required by ODFW's rules (OAR 635-400-015 (8)(a)).



#### G. "REPORT CONCLUSIONS" CONTAIN BOILERPLATE LANGUAGE

The "Report Conclusions" of the technical review contain boilerplate language apparently agreed upon by the Department and ODFW, some of which is not applicable to this application. There is no information in the application file to indicate the "conclusions" were actually reached as part of the technical review.

#### H. "OPTIMUM FLOW" REQUEST IS CONTRARY TO STATUTORY STANDARD

ODFW applied for the "optimum" flow rates listed Basin Investigation. The statutory standard for instream water rights, however, is the quantity "necessary to support" the public uses allowed (ORS 537.336 (1)), not optimum flows.

The January 1963 South Coast Basin report listed minimum flow amounts in Table D as recommendations to "provide what is considered the basic flows necessary to meet present requirements for anadromous fish passage, spawning, and rearing. These are not considered optimum flows although they may approach optimum in some instances." (South Coast Basin, State Water Resources Board, January 1963, page 73).

When new information was developed from a 1969 survey, the Oregon State Game Commission prepared the April 1972 report (Basin Investigation, also known as "Environmental Investigation"). The new report did modify some minimum flow amounts, and added "recommended optimum flows ... designed to provide instream conditions capable of maintaining an optimum desirable level of natural production." (1972 Environmental Investigation, South Coast Basin, Appendix 2, page 58). It is obvious from the data involved that both EANF and the flows allowed by the technical review are excessive.

The flow rates allowed should be reduced to the minimum flow recommendations of the Basin Investigation or EANF, whichever is less.

#### I. "REACH" REQUESTED IS TOO EXTENSIVE

A significant defect in the application and supporting data that the Department failed to consider concerns the reach of the stream allowed under this instream water right. The flow rates allowed would be applicable to the entire reach requested. This reach is far too long for the flow rates allowed, especially in light of the incoming tributaries between the mouth and the upstream end of the reach (see basin maps). The instream right "shall be approved only if the amount, timing and location serve a public use or uses." OAR 690-77-015 (9).

OAR 690-77-015 (6) states that instream rights "shall, insofar as practical, be defined by reaches of the river rather than points on the river."; OAR 690-77-202 (4)(d) requires that the application shall include the stream "reach delineated by river mile." It is neither practical nor reasonable to approve the same flow rates for the entire reach given the length of the reach applied for, the water available in the stream and the additional tributaries that flow into the stream within the reach.

The stream reach is also excessive according to ODFW's own instream rules. OAR 635-400-015 (11) details the requirements for a specific stream reach. A stream reach is limited to a point where "Streamflow diminishes by at least 30%" (OAR 635-400-015 (11)(B)). OAR 635-400-015 (11)(C) also appears to have been violated since the "stream order" (OAR 635-400-010 (19)) changes within the reach requested due to the incoming tributaries.

The flow requests by ODFW are based on the old Basin Investigations. The Basin Investigations lists the location of the recommended flows in the appendix listing the recommended flows. It is clear that the flow recommendations in the Basin Investigation did not extend upstream and the facts cited above further prove that the reach approved should be limited significantly.

**J. ODFW'S GAGE RULE NOT FOLLOWED**

The application fails to abide by another rule applicable to ODFW's instream applications, OAR 635-400-015 (10)(a). This rule requires ODFW to compare hydrological estimates or gaging data to the amount of water they request for instream flows ("instream flow requirements"). A specific evaluation is set out in subsection (10)(b) regarding appropriate levels for any given time period in relation to the naturally occurring stream flows. ODFW never performed this evaluation for the application.

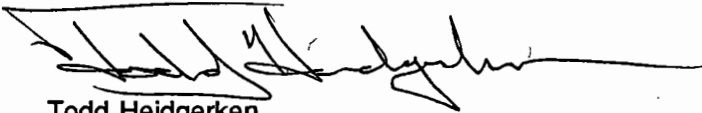
**K. FLOW LEVELS APPROVED CONFLICT WITH "EANF"**

The flow levels approved for the month of May conflicts with the Department's finding of EANF for that month. Therefore, the flow level approved should be reduced to the EANF level for that month.

**CONCLUSION**

This objection is filed in accordance with OAR 690-77-028. The issues raised should be considered as part of a contested case hearing. The WRD technical review is inadequate and defective and has failed to follow applicable rules. A thorough review of the application is necessary to determine the flow levels necessary to support the public uses applied for.

For the reasons set forth above, the objector asserts the application is defective and should be returned to the applicants. The flow levels requested are excessive and not necessary to support the public uses proposed. Flow levels set at the rates proposed interfere with future maximum economic development. Excessive flow rates for instream water rights represent a wasteful and unreasonable use of the water involved (ORS 537.170). The flow rates approved should be set the minimum quantity necessary to support the public use applied for.



Todd Heidgerken  
Executive Director of Water for Life

November 23, 1994

Oregon Department of Fish and Wildlife  
P.O. Box 59  
Portland OR 97207

WATER  
RESOURCES  
DEPARTMENT

Reference: Files 70975 through 70992, 70995 through 70997, 70999 through 71024, 71026 through 71029, 71031 through 71036, 71195 through 71199, 71202 through 71205, 71208, 71209, 71609 through 71629, 72843 through 72858, 73367 through 73386

Dear Department of Fish and Wildlife:

The Water Resources Department has finished the first step of its analysis of the above referenced applications. Enclosed are copies of this report, which is called the Report of Technical Review.

The technical review is the Department's legal and scientific analysis of the application, including a calculation of the expected availability of water for the proposed use. Step two, is the 60-day public review period.

In the case of your application, the Technical Review was satisfactory, and it concluded that water would be available for this use for the time period described in the proposed certificate conditions of the attached Report.

The Report does not represent any commitment by the Department to ultimately approve your application. Before a certificate may be granted, the Department must complete a public interest review.

In this second step of the review process, state regulations require that other water users and the general public be given an opportunity to object to your proposed water use. You also may object to any of the Department's findings or proposed certificate conditions contained in the technical report. If you wish to object, you must file your objection with the Department in writing by 5 p.m. on or before February 1, 1995. Interested parties must also submit their objections before the same deadline.

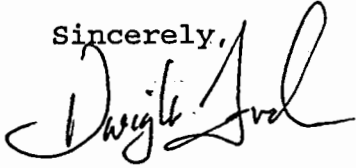
Please review the enclosed informational sheet which describes the appeals process and the steps that must be taken by any party objecting to your Report of Technical Review or by parties wishing to protest issuance of the permit.



Commerce Building  
158 12th Street NE  
Salem, OR 97310-0210  
(503) 378-3739  
FAX (503) 378-8130

If you have questions, please feel free to telephone me or any of the Department's Water Rights Division staff members. My telephone number is 378-3739 in Salem, or you may call toll-free from within the state to 1-800-624-3199.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dwight French".

Dwight French  
Manager  
Water Rights Section

Enclosures:        125 Technical Reviews  
                          Informational Sheet

t:\instream\cover.ltr

Date: November 23, 1994

OREGON WATER RESOURCES DEPARTMENT  
SATISFACTORY REPORT OF TECHNICAL REVIEW  
FOR AN INSTREAM WATER RIGHT APPLICATION

OBJECTIONS TO THE PROPOSED INSTREAM WATER RIGHT TECHNICAL REVIEW REPORT, AS DESCRIBED BELOW, MUST BE RECEIVED IN WRITING BY THE OREGON WATER RESOURCES DEPARTMENT, 3850 PORTLAND ROAD NE, SALEM, OREGON 97310, ON OR BEFORE 5 PM: February 1, 1995

1. APPLICATION FILE NUMBER -IS 70976

2. APPLICATION INFORMATION

Application name/address/phone:

Oregon Department of Fish and Wildlife  
P.O. Box 59  
Portland, Oregon 97207 503-229-5400

Date application received for filing and/or tentative date of priority: 12/ 7/1990

Source: W FK WILLIAMS CR tributary to WILLIAMS CR

County: JOSEPHINE

Proposed use: Providing required stream flows for coho and fall chinook salmon, cutthroat trout, and winter and summer steelhead for 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  | DEC  |
|---------|------|------|------|------|------|------|------|------|------|------|------|------|
| 1st 1/2 | 42.0 | 42.0 | 42.0 | 42.0 | 42.0 | 25.0 | 17.0 | 17.0 | 17.0 | 25.0 | 42.0 | 42.0 |
| 2nd 1/2 | 42.0 | 42.0 | 42.0 | 42.0 | 25.0 | 25.0 | 17.0 | 17.0 | 25.0 | 42.0 | 42.0 | 42.0 |

To be maintained in:

WEST FORK WILLIAMS CREEK FROM RIGHT HAND FORK OF THE WEST FORK OF WILLIAMS CREEK AT RIVER MILE 4.5 (NWNW, SECTION 19, TOWNSHIP 39S, RANGE 3W WM); TO THE MOUTH AT RIVER MILE 0.0 (NE1/4, SECTION 3, TOWNSHIP 39S, RANGE 5W WM)

### 3. TECHNICAL REVIEW

The application is complete and free of defects.

The proposed use is not restricted or prohibited by statute.

The following supporting data has been submitted by the applicant:

- (a) Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements; November 1970 and April 1972.
- (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.

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

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

An assessment with respect to other Commission administrative rules, including but not limited to the applicable basin program 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 administrative rule of the agency submitting this application.

The evaluation of the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application is described below. The recommended flows take into consideration planned uses and reasonably anticipated future demands for water from the source for agricultural and other uses as required by the standards for public interest review:

|      | JAN  | FEB  | MAR  | APR  | MAY   | JUN  | JUL  | AUG  | SEP   | OCT  | NOV  | DEC           |
|------|------|------|------|------|-------|------|------|------|-------|------|------|---------------|
| 1st% | 42.0 | 42.0 | 42.0 | 42.0 | 42.0  | 25.0 | 17.0 | 17.0 | 17.0  | 25.0 | 42.0 | 42.0          |
| 2nd% | 42.0 | 42.0 | 42.0 | 42.0 | 25.0  | 25.0 | 17.0 | 17.0 | 25.0  | 42.0 | 42.0 | 42.0          |
|      | 82.9 | 112  | 84.2 | 55   | 23.2  | 8.85 | 2.88 | 1.4  | 1.08  | 1.89 | 12.1 | 57.3 AVE FLOW |
|      | 25   | 25   | 25   | 25   | 25/20 | 10   | 5    | 5    | 10/20 | 20   | 25   | 25 ODFW MIN   |

#### 4. REPORT CONCLUSIONS

The proposed water use, as conditioned, passed this technical review. The information contained in the application along with the supporting data submitted by the applicant indicate that the flow levels set out in this report are necessary to protect the public use.

The supporting data states that the recommended flows are necessary to meet the biological requirements for spawning and rearing of salmonids and resident game fish. Consideration of habitat type, stream depth and water velocity were considered by the applicant in development of the flow levels. (See *Determining Minimum Flow Requirements for Fish*, ODFW Report January 20, 1984.) The recommended flow volumes are necessary to ensure appropriate levels of dissolved oxygen, turbidity, pH and temperature.

The listed flows are adequate for present fish populations; however, true optimum flows for either spawning or rearing were not determined for the 1963 Report. The flows described in the 1963 Report are believed to be below the average annual discharges for most streams, but recommended rearing flows will frequently exceed to some degree those existing naturally, particularly in the smaller and lower elevation streams. (See *Fish and Wildlife Resources of the Rogue Basin, Oregon, and Their Water Requirements*; November 1970 and April 1972.) Several times greater flow requirements are necessary to stimulate and maintain upstream migration of anadromous fish, including migratory freshwater trout. (See 1984 Report.)

Minimum stream flow recommendations developed from the 1969 survey are intended to provide enough suitable environment during appropriate seasons to perpetuate minimum desirable fish populations. Optimum flows would more nearly maximize production. The flow each location is that which should always arrive and depart from the designated point and do so without regulation which would cause portions of the stream to vary drastically from the recommended flows. The applicant has stated that as knowledge increases or environmental conditions change, it may be necessary to adjust the recommended flows either up or down to more properly fit the situations known to occur at that time. (See 1970 and 1972 Reports.)

#### 5. PROPOSED CERTIFICATE CONDITIONS

[The following proposed conditions will apply to water use and will appear on the face of the 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  |
|------|------|------|------|------|------|------|-----|------|------|------|------|
| 42.0 | 42.0 | 42.0 | 42.0 | 25.0 | 8.85 | 2.88 | 1.4 | 1.08 | 1.89 | 12.1 | 57.3 |

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. This instream right shall not have priority over domestic, livestock and irrigation of noncommercial gardens not to exceed 1/2 acre in area, water legally stored or water released from storage to satisfy a secondary water right.
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.

COPY CHECK-OFF SHEET FOR INSTREAM TECHNICAL REVIEWS

CC: FILE # 70976

WATERWATCH

ODF&W (DEPENDING ON - IF NOT APPLICANT)

WATERMASTER # 19

REGIONAL MANAGER - SW

WATER FOR LIFE

WATER RESOURCES CONGRESS

DAVID MOON, ATTORNEY

KEN STAHR

✓ OREGON HOP GROWERS

OTHER ADDRESSES:

Josephine Co. Farm Bureau

178 Tye Drive

Grants Pass, OR 97527

CASEWORKER *[Signature]* DWF

ORIGINAL TO APPLICANT 12/03/93



APPLICATION PROCESSING OUTLINE

Basin: \_\_\_\_\_  
 Sub-basin: \_\_\_\_\_  
 Fees paid: Examination fee: \_\_\_\_\_  
 Recording fees: \_\_\_\_\_  
 Total: \_\_\_\_\_

*IWR*  
 Application No. 70976  
 Permit No. \_\_\_\_\_

RATE AND DUTY \_\_\_\_\_ for irrigation

1. Check for minimum information (OAR 690-11-020)

|       |       |  |
|-------|-------|--|
| yes   | no    |  |
| _____ | _____ | Name and mailing address of the applicant.                               |
| _____ | _____ | Source of the water.   |
| _____ | _____ | Quantity of water to be appropriated.                                    |
| _____ | _____ | Location of point of diversion to 1/4 1/4 Section.                       |
| _____ | _____ | Nature and place of use.   |
| _____ | _____ | Name and mailing address of all legal owners of the properties involved. |
| _____ | _____ | Signature of the applicant   |
| _____ | _____ | Examination fees.  |

If minimum information not supplied, excepting legal owner information, then return to applicant with letter explaining deficiencies.

|       |       |   |
|-------|-------|---|
| yes   | no    |   |
| _____ | _____ | Water Resources Commission classification limits or restrictions -- If yes, note: |

\_\_\_\_\_ State Engineer's withdrawals -- If yes, note:  
 \_\_\_\_\_

\_\_\_\_\_ Legislative withdrawals -- If yes, note:  
 \_\_\_\_\_

\_\_\_\_\_ If policy statement is unclear check with Resources Management Division.

\_\_\_\_\_ Scenic Waterway: \_\_\_\_\_  
 \_\_\_\_\_ on \_\_\_\_\_ up-stream \_\_\_\_\_ v/in 1/4 mile

\_\_\_\_\_ Notify Parks and Recreation Department

\_\_\_\_\_ Out-of-basin diversion

\_\_\_\_\_ Need to route to Geology Section due to:

\_\_\_\_\_ well within one mile of a stream  
 \_\_\_\_\_ well within restricted surface water area  
 \_\_\_\_\_ wells with request for greater than 5 cfs  
 \_\_\_\_\_ well is for heating &/or cooling  
 \_\_\_\_\_ well constructed by land owner  
 \_\_\_\_\_ well is artesian

\_\_\_\_\_ artificial ground water recharge project  
 \_\_\_\_\_ ground water area under study

\_\_\_\_\_ Within Irrigation District: \_\_\_\_\_  
 \_\_\_\_\_ Notify \_\_\_\_\_ Need excerpt from District

\_\_\_\_\_ Legal description of property

\_\_\_\_\_ Ownership statement

\_\_\_\_\_ Other parties to Notify: \_\_\_\_\_

\_\_\_\_\_ Water Resources Commission review if:

\_\_\_\_\_ Request for greater than 5 cfs  
 \_\_\_\_\_ Dam height greater than 10 feet  
 \_\_\_\_\_ Storage of more than 9.2 acre-feet  
 \_\_\_\_\_ Out-of-basin diversion  
 \_\_\_\_\_ within or above a scenic waterway  
 \_\_\_\_\_ conditional uses under basin program  
 \_\_\_\_\_ requests for larger rate or duty than allowed  
 \_\_\_\_\_ ground water recharge project  
 \_\_\_\_\_ other substantial public interest issues  
 \_\_\_\_\_ requests for review by an agency or person

\_\_\_\_\_ Watersmaster comments sent with copy of ~~application~~ *permit*

\_\_\_\_\_ Watersmaster comments received \_\_\_\_\_

\_\_\_\_\_ Hydrographic section comments requested \_\_\_\_\_

\_\_\_\_\_ Hydrographic section comments received \_\_\_\_\_

\_\_\_\_\_ O.D.F.W. sent copy of application ~~and map~~ (except groundwater) requesting comment \_\_\_\_\_

\_\_\_\_\_ O.D.F.W. comments received \_\_\_\_\_

\_\_\_\_\_ Report from D.E.G. received \_\_\_\_\_

\_\_\_\_\_ Publish application information in weekly public notice.

\_\_\_\_\_ Notify other owners of development

\_\_\_\_\_ PROTESTED  
 \_\_\_\_\_ filed \_\_\_\_\_  
 \_\_\_\_\_ resolved \_\_\_\_\_