

## Staff Analysis of Exceptions

### I. Protestant Harney County's Exceptions

**Exception 1:** The Proposed Order's Conclusions of Law at page 8, paragraph B.4, does not accurately reflect the agreed upon stipulation presented at hearing. Harney County requests that the Proposed Order be reworded to clarify the Oregon Water Resources Department's ("OWRD's") policy on livestock watering directly from streams. (Harney County's Exceptions to Proposed Order at pgs. 1 & 2, hereinafter "Harney County's Exceptions.")

Department's Response and Recommendation: On April 29, 2002, the USFWS and OWRD entered into an agreement whereby the OWRD's policy on livestock watering is clarified and the following condition was stipulated for the permit issuing from application S 84222. This condition articulates the OWRD's policy with regard to livestock watering directly from streams and reads as follows:

Livestock watering directly from a stream does not establish a right to make a call against any junior water users holding water rights nor may livestock watering uses be regulated in favor of this or any other right. This condition is a statement of OWRD's policy in regards to livestock watering as articulated in the Field Enforcement Manual. This policy applies to all water rights, whether or not the water right includes this condition.

The Department agrees that the Final Order should reflect the language of the settlement agreement and clarify the Department's policy regarding livestock watering directly from streams. *The Department recommends that this exception be allowed and the Final Order amended to reflect the agreement by OWRD and USFWS.*

**Exception 2:** Harney County takes exception with the Proposed Order's opinion that the application does not involve the storage of water and believes that the application and facts at hearing demonstrate the proposed use includes the storage of water (pg. 12, item 15 of the Proposed Order and at Finding of Fact #6 pgs. 6 & 7 of the Proposed Order). Harney County requests that the final order address the issue of storage and provide that the storage or impoundment of water in excess of three feet is not authorized under the permit. (Harney County's Exceptions at pgs. 2 & 3.)

Department's Response and Recommendation: The findings of fact accurately depict that the use of this water is neither for storage nor for reservoir maintenance but is instead for a regime of moist soil management that includes propagating wetland grasses for habitat and feeding of refuge waterfowl and birds. To accommodate moist soil management, water will be diverted into ponds of different depths that will be allowed to dry out as the season progresses. The permit provides that the use is limited to a rate of

1/40 of a cfs and a duty of three acre-feet per acre irrigated. The permit also contains the standard condition providing that:

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

The Order on Legal Issue and Proposed Order and draft permit address the concerns raised by Harney County as to this issue. A Final Order should be issued consistent with the Order on Legal Issues and Proposed Order and a permit issued consistent with the draft permit. *The Department recommends that this exception be denied.*

**Exception 3:** Harney County takes exception with the Proposed Order provision that:

“The specific numerical rate limits given for each diversion point in the draft permit are not a limit on the total quantity of water that may be diverted from each diversion point provided that the total amount of water drawn from all diversion points does not exceed the total amount allowed under the permit.”

Harney County requests that the final order specifically address the amount of water that may be diverted from each part of the drainage basin.

Harney County also argues that the Proposed Order states that there are several points of diversion that ultimately derive from the same source (Proposed Order, pg. 11) and that this statement ignores the regulatory history of the Donner und Blitzen in that traditionally various streams that comprise this river system have been treated as separate sources. (Harney County Exceptions, pgs. 4 & 5.)

Department’s Response and Recommendation: The draft permit for this application specifies that the right be for up to 820.0 cfs from the Donner und Blitzen River. In parenthesis immediately following this description are the maximum amounts of water that can be taken from each point of diversion on the Donner und Blitzen (e.g. 200 cfs from Page Springs Dam, 20 cfs from the New Buckaroo Dam etc.). In addition, the permit specifies that the maximum amount of water that may be taken from tributaries of the Donner und Blitzen; specifically, from Bridge Creek, Mud Creek, Krumbo Creek, McCoy Creek and Kiger Creek. If one adds up the total amount of water described on the draft permit it far exceeds 820 cfs. However, at no time may the USFWS withdraw more than a total of 820 cfs from all of these specified sources and points of diversion combined. The amounts listed for each point of diversion or tributary serve as the upper limit for each of these points of diversion. It is highly unlikely that the USFWS will be able to draw the full 820 cfs from any one of these points of diversions or sources as protestant asserts because each of these sources individually could not yield the full 820 cfs. Rather, a combination of diversions as water is available will serve to yield up to the full amount requested.

It is unclear how the draft permit will “ignore” or otherwise disrupt the regulatory regime of the Donner und Blitzen River. First, this permit does not dictate how other decreed rights on these tributaries should be regulated. Conversely, the decree is not binding upon this water right. Second, this right is the most junior right in the basin and will only receive water after all other rights have been satisfied. The right as it stands serves to grant the Refuge the flexibility it needs to draw a total of 820 cfs from the points of diversions and tributaries listed. The right will not injure existing water rights on the system nor affect the current regulatory scheme of the Diamond Valley tributaries. The Final Order should incorporate the findings of the Order on Legal Issues and the Proposed Order. *This exception should be denied.*

## **II. Protestant Water for Life Exceptions**

**Exception 4:** Andy and Vena Dunbar were represented by Water for Life, Inc. They did not appear pro se as characterized in the Proposed Order pgs. 1 & 2. (Water for Life (“WFL”) Exceptions pg. 1.)

Department’s Response and Recommendation: ORS 537.170 provides that any person may submit a protest against a proposed final order. The statute also provides that a person may represent the public interest provided that public interest is precisely articulated. Further, a protest must be accompanied by the protest fee described in ORS 536.050. Water for Life filed one protest and one protest fee and articulated that it, as an organization, was representing the public interest of its constituents Hammond Ranches, Inc.; Andy and Vena Dunbar dba Open AT Ranch; and Harney County Haygrowers Association. Therefore, Water for Life only is the protestant and party to this matter. The record reflects that WFL filed a protest on behalf of the public interest. The Final Order should reflect the appearance of Andy and Vena Dunbar at the contested case hearing: “Protestant Water for Life, including Dwight and Susan Hammond, Andy and Vena Dunbar, and the Harney County Haygrowers Association, appeared through and with its attorney Brad Harper.” *This exception should be allowed.*

**Exception 5:** WFL’s client’s name is Vena, not Vera, Proposed Order at 1-2. (WFL Exceptions pg. 1.)

Department’s Response and Recommendation: The Final Order should reflect correction in all references to Vera Dunbar. *This exception should be allowed.*

**Exception 6:** WFL’s client’s name is Susan Hammond, not Suzi as reflected in the Proposed Order at pg. 1. (WFL Exceptions pg. 1.)

Department’s Response and Recommendation: The Final Order should reflect correction in all references to Suzi Hammond. *This exception should be allowed.*

**Exception 6:** WFL's affiant's name is Stacey Davies, not Sacey Davis as reflected in the Proposed Order at pg. 2.

Department's Response and Recommendation: The Final Order should reflect correction in all references to Sacey Davis. *This exception should be allowed.*

**Exception 7:** The contested case hearing was held in Burns, Oregon on April 30, 2002, and was completed that same day with the record left open for submission of maps from Protestant Harney County Soil and Water Conservation District and a stipulation from Harney County. The hearing did not last two days as is reflected in the Proposed Order at pg. 2. (WFL Exceptions pg. 2.)

Department's Response and Recommendation: The Final Order should reflect that the contested case hearing was held in this matter on April 30, 2002. *This exception should be allowed.*

**Exception 8:** No court reporter was present and, therefore, no written transcript is available for consideration as reflected in the Proposed Order at pg. 3. (WFL Exceptions pg. 2.)

Department's Response and Recommendation: The Final Order should reflect that the record of the cross-examination hearing consists of audiotapes. *This exception should be allowed.*

**Exception 9:** WFL asks that the following paragraph be added to the Final Order (WFL Exceptions, pg. 2):

### **BACKGROUND**

Applicant is seeking a water right for 820.4 cubic feet per second [cfs] from the Donner und Blitzen River for use within the boundaries of the Malheur National Wildlife Refuge from October 1 through March 15 of each year (non-irrigation season). As part of the water right application, USFWS is proposing to establish a new type of beneficial use in Oregon: "wildlife refuge management." According to the Applicant and the Water Resources Department [Department], wildlife refuge management comprises the following beneficial uses currently recognized by administrative rule: wildlife use, aquatic life, wetland enhancement, riparian area enhancement, fire protection, irrigation use, stock watering, recreation use, construction, flood control, reservoir maintenance, and dust control. Proposed Order at 6.

Department's Response and Recommendation: The statement "[a]ccording to the Applicant and the Water Resources Department [Department], wildlife refuge management comprises the following beneficial uses" is not an accurate reflection of the record. In his Order on Legal Rulings, issued, on November 11, 2001, the Administrative

Law Judge (“ALJ”) determined that wildlife refuge management is a permissible beneficial use notwithstanding WFL’s arguments to the contrary. The ALJ found that:

“‘[b]eneficial use’ is the ‘basis, the measure and the limit of all rights to the use of water in this state.’ ORS 540.610. ‘Beneficial use’ is the ‘reasonably efficient use of water without waste for purposes consistent with the laws, rules and the best interests of the people of the state.’ OAR 690-300-0010(5). Although the OWRD’s rules identify many specific beneficial uses, beneficial uses are not limited to those uses enumerated by Department rules. The limit on whether a use is beneficial is whether the use is reasonably efficient, and is the purpose that is consistent with the laws, rules and best interests of the people of the state.” Order on Legal Rulings, pgs. 9 – 11.

Accordingly, the ALJ found that WFL’s arguments that “wildlife refuge management” is not a beneficial use failed as a matter of law. The Department recommends that the Commission adopt in the Final Order the analysis and conclusions on this issue as provided in the Proposed Order and that background statements should not be amended as WFL suggests. *This exception should be denied.*

**Exception 9:** WFL requests that thirteen findings of fact be added to the Final Order. (WFL Exceptions, pgs. 2 – 4.)

Department’s Response and Recommendation: While the findings as WFL presents them may articulate evidence presented by WFL in the course of these proceedings, other evidence in the record outweighed the evidence and testimony presented by WFL. As such, the Draft Final Order reflects the ultimate findings of fact that support the conclusions of law and discussion in the Draft Final Order. *This exception should be denied.*

**Exception 10:** WFL asserts that the Water Resources Department may not issue an instream water right as a permit condition. WFL argues that the Department is using the bypass flow condition on the proposed permit for application S 84222 to circumvent existing statutes and establish an unauthorized instream water right. (WFL Exception, pgs. 4 – 5.)

Department’s Response and Recommendation: The proposed permit for application S 84222 specifies the flow that must be present in the Donner und Blitzen River, Bridge Creek, and Mc Coy Creek. These flows must be present or exceeded before applicant may begin diverting from these water bodies. These bypass flow conditions were added to the draft permit in response to ODFW’s concerns regarding redband trout habitat. The flows serve to assure adequate habitat for redband trout and maintain channel integrity resulting from peak flows. These bypass flows are permit conditions and, as such, are enforceable only against the permit holder. These flows are not protected as to any other water right holders. The Department agrees that the Proposed Order and Ruling on Legal Issues made the correct finding as to the permissibility and status of these permit

conditions and suggests that these conclusions be adopted in the Final Order. *The Department recommends this exception be denied.*

**Exception 11:** The Applicant must satisfy the requirements of the Endangered Species Act and the National Wildlife Refuge System Administration Act. WFL argues that if the Department issues “a permit authorizing USFWS to use water in a way that is or could be unlawful under federal law, the Department would be authorizing a wasteful and unreasonable use of Oregon’s waters.” WFL further argues that obtaining a water right under Oregon state statutes contravenes the Endangered Species Act and the National Wildlife Refuge System Administration Act Compatibility Analysis and therefore results in an “illegal” use of water that is therefore wasteful, unreasonable and contrary to the public interest. (WFL Exceptions, pg. 7.)

Department’s Response and Recommendation: This argument attempts to import federal law requirement into the state water right process. However, there is nothing in the Department’s statutes or rules requiring the Department to hold permit applications pending federal consultation or to review applications for federal law requirements. The Department’s review is limited to the review scheme provided in ORS 537.153, and OAR 690-310-0120. The conclusions in the Order on Legal Issues and Proposed Order should be adopted in the Final Order. *This exception should be denied.*

**Exception 12:** Applicant must comply with state and local land use planning. WFL argues that the applicant is subject to state water law governing the acquisition of water rights for the Refuge purposes. As such, they argue that water rights may not be issued by the Department unless they are found to be compatible with acknowledged comprehensive land use plans. WFL argues that the use is incompatible with Harney County’s comprehensive plan and that the Department should have proceeded under the process for dispute resolution provided in OAR 690-005-0035(5) rather than a contested case hearing.

Department’s Response and Recommendation: With exceptions not relevant here, state agency permitting decisions must be made in compliance with statewide planning goals and in a manner compatible with acknowledged local government comprehensive and land use regulations. ORS 197.180. Agencies may comply with the compliance and compatibility requirements by adopting and implementing a state agency coordination program (or “SAC”) that is consistent with ORS 197.180, and that is certified by the Department of Land Conservation and Development (DLCD) under ORS 197.180(4 – 6). The Department’s compliance with its certified state agency coordination program constitutes compliance with the requirements of ORS 197.180(1) and OAR 690-030-0000. The Department’s SAC program was certified by DLCD and consists of a guidance document and administrative rules set forth in OAR chapter 690, Division 5. The Guide specifically addresses land use coordination with federal agencies, providing that “[a]pplications for water uses on federally owned lands are not subject to land use information requirements as are other applications.” Guide at 101-102. Consistent with that direction, the Department maintained, and the ALJ agreed, that the land use information requirement for application S 84222 has been met. The Final Order should

incorporate the conclusions made in the Order on Legal Issues and Proposed Order. *This exception should be denied.*

**Exception 13:** The Department has not adequately assessed whether the applicant's proposed use of Oregon water is of high public interest. WFL argues that the "public interest," as a standard for reviewing new uses of water means a beneficial use that "includes providing the greatest good for people of the state based on current values, protecting water rights, and conserving water resources for present and future generations." OAR 690-400-0010(12). WFL maintains that the Department did not adequately analyze this application in light of the public interest in conserving water resources for future generations. WFL argues that the Department has failed to discuss the impact the proposed permit will have on future water uses and thus did not adequately assess whether the public interest in the proposed use is "high." (WFL Exceptions, pgs. 8 – 10.)

Department's Response and Recommendations: In determining whether a proposed use will impair or be detrimental to the public interest the Department must determine, among other factors, whether water is available for the proposed use. Water availability is defined in the Department's rules and includes a provision stating that surface water must be available at an 80% exceedence level (in other words the amount requested must be determined to be present in the stream at least 8 out of 10 days). Because insufficient water was available for the amount requested under application S 84222, the Department processed the application under an exception to the water availability rule provided in OAR 690-410-0070(2)(a). This exception provides that when a stream is over-appropriated, the Department may still allow additional uses where the "public interest in the use is high" and the use is conditioned to protect instream values. Although the record supports a finding that the proposed use is consistent with OAR 690-410-0070(2)(a), the Proposed Order provides scant discussion of the evidence and the reasoning behind the final conclusion. The Final Order while adopting the findings in the Proposed Order, should include a more complete discussion of the evidence in the record. *This exception should be allowed to the extent that the Final Order provides a more extensive analysis of whether the proposed use is consistent with OAR 690-410-0070(2)(a).*

**Exception 14:** The proposed beneficial use must be strictly circumscribed to avoid creation of a *de facto* federal reserved right. WFL argues that the proposed beneficial use must be limited to its twelve enumerated uses rather than allowed for the general use of wildlife refuge management. They argue that allowing the use of the water for wildlife refuge management generally is to allow the federal government a *de facto* federal reserved right. (WFL Exceptions, pgs. 10 – 11.)

Department's Response and Recommendation: WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). A federal reserved water right stems from an act of the federal government in that when the federal government reserves a part of the public domain for a particular purpose it may explicitly or implicitly reserve sufficient unappropriated water to fulfill the purposes of the

reservation. In the present case, the federal government is seeking a state water right through the state appropriation system. This may result in the federal government holding a state-issued water right that is subject to cancellation if the permit holder does not comply with the terms of the permit. The Final Order should be consistent with the Order on Legal Issues and the Proposed Order. *This exception should be denied.*

**Exception 15:** WFL argues that the Proposed Order correctly finds that the proposed water right does not include provisions for storage of water, but is in error to conclude that “standing water” is separate from storage. (WFL Exceptions, pg. 11.)

Department’s Response and Recommendation: WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). With regard to a response to this exception, this issue was raised by Harney County in its exceptions. *See Department’s Response to Harney County’s exception #2 above. This exception should be denied.*

**Exception 16:** WFL takes exception to the Proposed Order’s finding that “[t]he proposed use is not required to be consistent with the Donner und Blitzen River decree,” as provided in the Proposed Order, pg. 9. (WFL Exceptions, pg. 11 – 12.)

Department’s Response and Recommendation: WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). With regard to a response to this exception, this issue was raised by Harney County in its exceptions. *See Department’s Response to Harney County’s exception # 3 above. This exception should be denied.*

**Exception 17:** WFL excepts to the Proposed Order’s finding that “[t]he specific numerical rate limits given for each diversion point in the draft permit are not a limit on the total quantity of water that may be diverted from each diversion point provided the total amount of water drawn from all diversion points does not exceed the total amount allowed under the permit.” WFL argues that it would be wasteful and prohibited to allow applicant to divert the entire proposed water right of 820.4 cfs from any single point of diversion and that the permit must therefore specify specific numerical limits. (WFL Exceptions, pg. 12.)

Department’s Response and Recommendation: WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). With regard to a response to this exception, this issue was raised by Harney County in its exceptions. *See Department’s Response to Harney County’s exception #3 above. This exception should be denied.*

**Exception 18:** WFL argues that the conditions such as the bypass flow condition proposed to avoid harm to fish and bird species is speculative and that the flow studies set forth in the Proposed Final Order should be completed prior to issuing a water right. (WFL Exceptions, pg. 12.)



Department's Response and Recommendation: Concerns regarding the effectiveness of the bypass flow condition was an issue that was also raised by WaterWatch of Oregon and a concern expressed by ODFW in its request for standing. WaterWatch and ODFW resolved this issue by stipulation with USFWS as described in the Draft Final Order pgs. 12 – 14. In signing the agreements, these parties stated that the conditions as altered by the stipulated agreement were adequate to address their fisheries concerns. Consequently, because WFL did not enter into these stipulations, they had the burden of proving that the proposed use as conditioned does not protect fisheries. They have provided no evidence to meet this burden and have instead relied on emails that were written by ODFW before it engaged with applicant in the process of writing conditions that would address its concerns regarding the effect of the proposed use on fisheries resources. The Final Order and permit should reflect the stipulations between the USFWS, WaterWatch of Oregon, and ODFW. *This exception should be denied.*