

IN THE COUNTY COURT FOR THE STATE OF OREGON  
FOR THE COUNTY OF HARNEY

IN THE MATTER OF ACCEPTING SETTLEMENT  
TERMS ON THE MALHEUR WILDLIFE REFUGE  
WATER RIGHT APPLICATION S84222

**RESOLUTION #2005-01**

WHEREAS, the United States of America acting by and through its Fish and Wildlife Service has applied for the right to divert the non-irrigation season water flow of the Donner und Blitzen River and its tributaries for the purpose of Refuge management; and

WHEREAS, the original application #S84222 covered essentially all of the winter flows of the Donner und Blitzen; and

WHEREAS, Harney County seeks to achieve a balance in the use of its natural resources; and

WHEREAS, Harney County seeks to protect it's economy and provide future economic opportunity; and

WHEREAS, the Harney County Court has determined that the application as submitted was not in the best interest of Harney County and filed a protest of the application; and

WHEREAS, the United States of America; Oregon Water Resources Department; and Harney County have in good faith sought to modify the application in a manner that achieves a balance in the use of natural resources; and

WHEREAS, the Malheur Refuge staff; Harney County Court; and citizens within the Donner und Blitzen River valley, have met on several occasions to discuss the present and future water management of the Donner und Blitzen River; and

WHEREAS, as a result of these meetings, Harney County and the Malheur National Wildlife Refuge have in good faith sought a resolution which protects the historic agricultural and Refuge activities while maintaining opportunities for future uses; and

WHEREAS, Harney County has sought public opinion on the terms of resolution from the citizens of Harney County; and

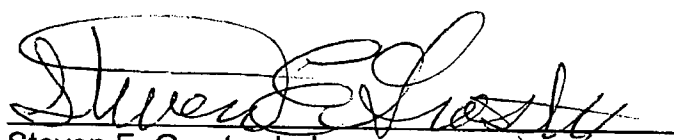
WHEREAS, Harney County is of the opinion that the settlement concepts are in the best interest of Harney County in that they (a) recognize the historic practice of the irrigators within the Donner und Blitzen River valley of utilizing spring flood waters as they become available - which may occur as early as commencing on March 1; (b) recognize the diversion of water into the various old stream channels and irrigation ditches for livestock water outside the irrigation season; (c) recognize the need for the development of additional stock watering ponds within the basin; (d) preserve the potential for large reservoirs in the basin; (e) recognize the need to protect the existing stock ponds within the basin; and, (f) preserve the wildlife management opportunities for the Malheur National Wildlife Refuge;

NOW, THEREFORE, BE IT RESOLVED that the Harney County Court accepts the settlement terms; and,

BE IT FURTHER RESOLVED that Harney County will advise the Oregon Water Resources Commission that it has resolved its contest of Water Right Application S84222.

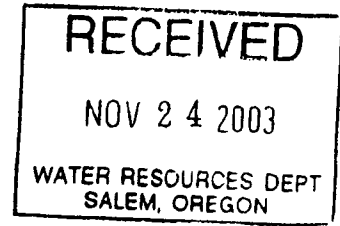
DONE this 5<sup>th</sup> day of January, 2005.

HARNEY COUNTY COURT

  
Steven E. Grasty, Judge

  
Dan Nichols, Commissioner

  
Jack Drinkwater, Commissioner



**COPY**

November 17, 2003

Dan Thorndike, Chair  
Oregon Water Resources Commission  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271

Re: Exceptions to the Proposed Order In the Matter of the Protests  
Against Water Right Application S-84222

Dear Chair Thorndike and Commission Members:

The undersigned attorney on behalf of Protestants Water for Life, Inc. and its members, Andy and Vena Dunbar, Hammond Ranches, Inc. and Harney County Haygrowers Association [collectively referred to as WFL], submits these Exceptions in the matter of Water Right Application S-84222, filed by the U.S. Fish and Wildlife Service [FWS or Applicant] for a permit to use surface water from the Donner und Blitzen River and its tributaries.

**TYPOGRAPHICAL ERRORS**

As an initial matter, Protestants note the following typographical errors in the Proposed Order issued by Administrative Law Judge Paul Vincent on October 27, 2003 [Proposed Order].

- |   |  |
|---|--|
| <p>P.O. Box 12248<br/>Salem, Oregon<br/>97309-0248</p> <p>Office:<br/>(503) 375-6003</p> <p>fax:<br/>(503) 375-9017</p> | <p>1. Andy and Vena Dunbar were represented by Water for Life, Inc. They did not appear <i>pro se</i>. Proposed Order at 1-2.</p> <p>2. WFL's client's name is Vena, not Vera. Proposed Order at 1-2.</p> <p>3. WFL's client's name is Susan Hammond, not Suzi. Proposed Order at 1.</p> |
|---|--|

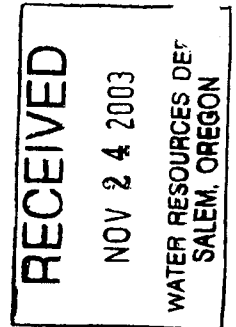
E-Mail:  
@waterforlife.net

Water for Life, Inc.'s Exceptions to Proposed Order, 11/17/03, P. 1 of 13.

Web Site:  
w.waterforlife.net

*Food and Wildlife for the Future*

4. WFL's affiant's name is Stacey Davies, not Sacey Davis. Proposed Order at 2.
5. The contested case hearing held 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. Proposed Order at 2.
6. No court reporter was present and, therefore, no written transcript is available for consideration. Proposed Order at 3.



## 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 each year (non-irrigation season). As part of the water right application, FWS is proposing to establish a new type of beneficial use in Oregon: "wildlife refuge management." According to 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.

## EVIDENCE PRESENTED

The State Senator representing the affected citizens of Harney County, Ted Ferrioli, submitted written testimony stating that Applicant's request for an 820.4 cfs water right "is unreasonable and not in the best interests of the public." *Sen. Ferrioli Affidavit* at 2. As an elected public representative and state policy maker, Sen. Ferrioli believes that creating an exception allowing the Applicant's proposed beneficial use is unwarranted and that other beneficial uses, such as off-stream storage, would be "more beneficial." *Id.*

Written testimony was submitted by Harney County rancher Stacey Davies. Mr. Davies is also a member of the Steens Mountain Advisory Committee, a committee formed under the Congressional authority creating the Steens Mountain Cooperative Management and Conservation Area. It is Mr. Davies' opinion that granting Applicant's request for an 820.4 cfs water right will preclude future development options in Harney County: "Specifically, off-stream storage of water from the Donner und Blitzen River could allow us to capture non-irrigation season water for use during summer and fall when instream flows are so critical to fish and wildlife." *Davies Affidavit* at 2. Mr. Davies believes the proposed water right is not in the best interests of the public. *Id.*

Gary Marshall, Chair of the Harney County Watershed Council, submitted written testimony in opposition to the proposed 820.4 cfs water right. Mr. Marshall reported that, on February 19, 2002, the Council officially and unanimously voted to oppose Applicant's proposed water right. Specifically, he testified that the Watershed Council opposes the water right application "because the amount requested – 820 cfs – is unreasonably large and will forever preclude future development of the Donner und Blitzen water resource for any purpose." *Marshall Affidavit* at 1. Mr. Marshall further testified "[t]he council does not believe the proposed water right is in the best interests of the public." *Id.*

In Mr. Marshall's capacity as a local rancher and Chair of the Harney County Watershed Council, he explained that "[b]oth the environmental benefit for the Harney County watershed and the economic benefit to Harney County's economy are better served by applying any available non-irrigation season water to other local projects. These projects could include off-stream storage or impoundments of winter runoff to benefit the stream system during the summer and fall when instream flows are at their most critical. This would be a tremendous advantage for sensitive fish and other aquatic species. Such storage opportunities would also provide additional benefits for haying, grazing and other economically productive activities." *Id.*

As Chair of the Harney County Watershed Council, Mr. Marshall explained that, "[o]n December 21, 1999, fellow watershed council member David Courtney sent a letter to the Water Resources Department on my behalf. See WRD Ex. 445 of 519. In that letter the council expressed our frustration of having very little information about the new water right application and asked to be involved in a cooperative approach to address concerns for the watershed. To date our request to participate in this process has been ignored. Moreover, we still contend that the potential impacts to the watershed have not been adequately assessed." *Id.*

Mr. Marshall also testified about the Council's ongoing concerns about noxious weeds and the Applicant's role in exacerbating that problem. In his opinion as chair of the Watershed Council and as a local rancher he stated "I believe the operation of the Malheur Wildlife Refuge has exacerbated the growing noxious weed problem facing our county. The Refuge has historically allowed noxious weeds to proliferate and seed on its property. These seeds are then distributed by the water flowing through the Refuge, and by the practice of hauling hay contaminated with weed seeds to other areas of the county. Providing more water to the Refuge will likely only exacerbate the proliferation and distribution of noxious weeds in Harney County, and possibly elsewhere. In particular, I understand the perennial pepperweed thrives on abundant water. Such a consequence would not be in the interest of Oregon's public." *Marshall Affidavit* at 2-3.

The Malheur Watershed Council mailed a letter to WFL expressing their concerns that the proposed water right "could very negatively impact the health of the Harney County Watershed and the Malheur Watershed." *Correspondence from*

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*Kathy Pratt to WFL, February 22, 2002.*

The amount of water requested by Applicant will only be available for a "few days during peak runoff." *Answers to WFL's First Set of Written Direct Questions for ODFW Fish Biologist Wayne Bowers at 4.*

Generally, average streamflow amounts are lower than the 820.4 cfs requested by Applicant. *Answers to WFL's First Set of Written Direct Questions for Department Watermaster Mitch Lewis at 2.*

The only time water could be available in the amounts requested by Applicant is during "peak flow" events, when the total amount of water flowing in the system is the highest possible runoff. *Lewis at 2.*

The Oregon Department of Fish and Wildlife disagreed with Applicant about the potential impact of the proposed water right on fish and wildlife. *Bowers at 4.*

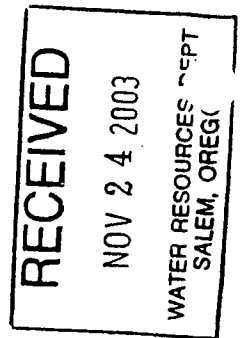
ODFW is concerned that the new water right would result in a net loss of essential habitat for Redband Trout, as well as adverse impacts on the Malheur Mottled Sculpin, the spotted frog, the American White Pelican, the Great Egret, the Greater Sandhill Crane, the Horned Grebe, the Least Bittern, the Snowy Egret, the Snowy Plover, the White-faced Ibis, and other waterfowl and fish. *WRD PFO at 20.* Specifically, ODFW believes the proposed 820.4 cfs water right "could cause all of the water to be removed from the system under normal high events. Removing a majority of the water from the system would cause adverse effects for survival of sensitive species and for the ability of the stream to make beneficial morphological changes." *Id.*

A proposed condition for the 820.4 cfs water right are month-specific "minimum instream flows." Pending completion of "a study that determines flow levels and habitat improvement measures" during the period of use proposed by Applicant, "instream flows" – also termed "bypass flows" – must be met before Applicant may divert. *WRD PFO at 10; Lewis at 2; Bowers at 5.*

## **ARGUMENTS**

### **I. THE WATER RESOURCES DEPARTMENT MAY NOT ISSUE AN INSTREAM WATER RIGHT AS A PERMIT CONDITION.**

The Department argues the instream flow requirements contained in the Proposed Final Order [PFO] are allowable as "bypass flows." Dept. Opening Br. at 4-5. The Department seems to assert an unrestricted right to place conditions on a surface water permit. *See* ORS 537.211(1). This reasoning supports protestants' contention that the Department is using permit conditions to circumvent existing statute and establish an unauthorized instream water right.



The local Watermaster recommended that the proposed permit at issue be subject to minimal flow levels and subject to future instream applications. See Division 33 Application Work Sheet For Watermasters, Application S-84222 (December 13, 1999). This recommendation from a Department expert recognizes that conditioning a permit for minimal flows levels and creating an instream water right are separate methods for leaving water in a stream.

In this situation, the Department is proposing to create an instream water right rather than a minimal flow level by permitting the FWS's use of the entire remaining stream and then restricting the amount of water the FWS can use within its own permit. This results in an implied beneficial use for "instream water values." PFO at 11.

The Department may hold a water right for instream values, and it may do so through specific statutory provisions. If the Department proposes to leave water instream for fish and aquatic species protection it must do so by limiting the Applicant's overall appropriation.

II. THE APPLICANT MUST SATISFY THE REQUIRMENTS OF THE ENDANGERED SPECIES ACT AND THE NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT.

Federal activities are subject to state regulation and control when and to the extent authorized by Congress. Envtl. Protection Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 211 (1976); Hancock v. Train, 426 U.S. 167, 179 (1976). In Envtl. Protection Agency, the Supreme Court found that the Clean Water Act did not subject federal agency installations to state regulation because the Act did not expressly provide that federal installations must obtain state permits. Envtl. Protection Agency, 426 U.S. at 212. In contrast, the National Wildlife Refuge System Administration Act (NWRSA) expressly requires the United States Fish and Wildlife Service to "acquire, under State law, water rights that are needed for refuge purposes." 16 U.S.C. 668dd(a)(4)(G) (2000). This clear and unambiguous mandate requires FWS to acquire water rights for refuge purposes under Oregon law.<sup>1</sup>

Oregon law provides the Water Resources Department with the authority to condition a surface water right permit to protect the public interest by preventing the "wasteful, uneconomic, impracticable, or unreasonable use of the waters involved." ORS 537.170(8)(e), 537.211(1). If the Department issues a permit authorizing FWS 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. To protect the public interest, before the Department issues the requested permit, it can and should

<sup>1</sup>California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), cited by FWS supports this position. In this case, the Supreme Court considered whether federal legislation pre-empted a state requirement for an environmental permit. Granite Rock, 480 U.S. at 581. Because the applicable federal laws and regulations did not express an intent to pre-empt state regulation, the Supreme Court allowed a state agency to regulate the environmental impacts of an activity on federal lands. *Id.* at 583-584. Unlike the federal laws at issue in Granite Rock, the plain language of the federal law at issue in this case, the NWRSA expresses a clear intent that FWS acquire water rights pursuant to State law. Therefore, the Department may regulate FWS's acquisition of a water right permit for the Malheur Wildlife Refuge.

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require FWS to demonstrate that it will not engage in wasteful or unreasonable use of the waters involved. The applicant can make this demonstration by providing the Department with documentation showing its requested water use will be made in compliance with the following federal laws.

A. Endangered Species Act Compliance

Applicant asserts it has initiated Section 7 consultation under the Endangered Species Act [ESA] for the Bald Eagle.<sup>2</sup> See FWS Motion at 13. Nonetheless, in order to protect the public interest pursuant to ORS 537.170(8), the Department should not approve the permit request until FWS completes the consultation process, and only then if the consultation shows the water use will not harm the bald eagle or other species protected by state or federal law. The results of FWS's consultation will determine the legality of the applicant's water use and the reasonableness of its requested water use.

B. National Wildlife Refuge System Administration Act Compatibility Analysis

Federal law requires that all uses of a wildlife refuge be "compatible" with the major purposes of a refuge. 16 U.S.C.A. secs. 668dd(d)(1) and (3), 668ee(1). Accordingly, before FWS initiates or permits a new use of a refuge or expands, renews, or extends an existing use of a refuge, it must determine that the use is a compatible use – one that will not "materially interfere with or detract from the fulfillment of the mission of the [National Wildlife Refuge] System or the purposes of the refuge."<sup>3</sup> 16 U.S.C.A. secs. 668dd(d)(3)(A), 668ee(1). Although the terms "refuge use" and "use of a refuge" are not defined in the statutes, FWS has defined them to include "a recreational use, a refuge management economic activity, or other use of a refuge by the public or other non-National Wildlife Refuge System entity." 50 C.F.R. sec. 25.12(a). Additionally, there is caselaw holding an activity performed by refuge personnel in furtherance of the refuge purposes is not subject to a compatibility analysis. Fund for Animals v. Clark, 27 F. Supp. 2d 8, 11 (D.D.C. 1998).

Relying on Fund for Animals, FWS argues that a compatibility determination is not required because its "application for a water right permit and the subsequent application of that water to refuge lands is in furtherance of the purposes of the refuge to provide a breeding and nesting ground for migratory birds and other wildlife, as well as the overall mission of the system." FWS Motion at 14. Protestants disagree.

While the water sought in FWS's permit application may further the purpose of the refuge, the beneficial uses FWS intends to apply water to include a variety of public and third-party uses. For example, FWS describes its intended beneficial use of water to include livestock watering, irrigation, and recreation. PFO at 22. Each of

<sup>2</sup> Protestants do not concede that this is the only potentially impacted species afforded ESA protection.

<sup>3</sup> The term "purposes of a refuge" means "the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit." 16 U.S.C.A. sec. 668ee(10).

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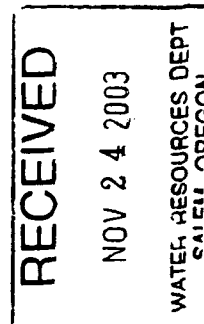
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these uses are third parties and/or the public "refuge uses." Therefore, pursuant to the NWRSA, each of these uses must be compatible with the Refuge's major purposes.

Applicant does not refute protestants' assertion that a complete compatibility analysis has not been performed. FWS Motion at 15. Until FWS completes a compatibility analyses for all refuge uses, it remains unclear that these uses are the same as those contemplated in the beneficial use description included in the PFO.<sup>4</sup> Without a complete compatibility analysis for each of the proposed beneficial uses that are also third party or public uses of the Refuge, the applicant can not demonstrate that those proposed beneficial water uses are compatible with the major purposes for which Congress reserved the Refuge. If the contemplated beneficial uses of water are not compatible with the major purposes for the Refuge, the uses are not authorized. 16 U.S.C.A. secs. 668dd(d)(3), 668(e)(1).



Applying water to an illegal use is wasteful, unreasonable, and contrary to the public interest. ORS 537.170(8)(e). Accordingly, applying water to a use that must be analyzed under federal law before it can be declared a legal use of water is also wasteful, unreasonable, and contrary to the public interest. The Department must require the applicant to document the legality of its proposed beneficial uses before it applies Oregon's limited water resources to those uses.

### III. APPLICANT MUST COMPLY WITH STATE AND LOCAL LAND USE PLANNING.

As discussed in the section above, the applicant is clearly subject to state water law governing the acquisition of water rights needed for refuge purposes. 16 U.S.C. sec. 668dd(a)(4)(G). Oregon's water laws are encompassed in Title 45 of Oregon statutes. Included in Title 45 is ORS 537.140(1)(a)(I), which explicitly requires that water right applicants submit "any other information required in the application form that is necessary to evaluate the application as established by statute and rule." This statute subjects FWS to Oregon water laws and regulations. Furthermore, ORS 197.180 also mandates that state agencies must not take actions that are incompatible with acknowledged comprehensive plans. This mandate applies to the Department.

The Department argues that OAR 690-05-0035, in conjunction with a guidance document (Land Use Planning Procedure Guide), creates an exception to otherwise applicable statutes and rules requiring water right applications be compatible with state and local land use planning requirements. Dept. Opening Br. at 9. Protestants disagree.

OAR 690-05-0035(1) provides that Commission and Department actions must be compatible with acknowledged comprehensive plans. An exception is allowed where the Commission or Department finds it necessary to take an action which is incompatible with comprehensive plans in order to meet statutory obligations. OAR 690-05-0035(5). FWS is not entitled to the exception.

<sup>4</sup>Inasmuch as the Department has not limited FWS's proposed beneficial uses of water, it is possible that FWS's water use may lead to other third party or public uses.

Neither Applicant nor the Department has argued that the application at issue must be granted to allow the Department to meet its statutory obligations. Rather, the Department has been forced to carve an exception to the standard 80 percent exceedance standard to allow the proposed permit. Furthermore, the exception provision of OAR 690-05-0035(5) requires implementation of the dispute resolution procedures of OAR 690-05-0040, rather than contested case proceedings.

Alternatively, the Department seems to argue that OAR 690-05-0035(2)(d) allows compliance with the guidance policy to substitute for compliance-in-fact with state and local land use requirements. Protestants contend that this reasoning conflicts with the plain language of OAR 690-05-0035(1) which conditions compliance with acknowledged comprehensive plans on subsection (5) discussed above.

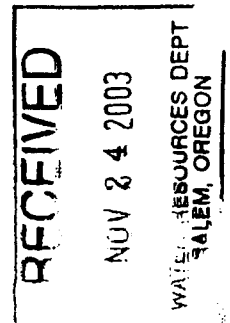
The Department is proposing to issue a permit that is incompatible with both the Malheur Lake Basin Program and Harney County Comprehensive Plan. Inasmuch as the proposed final order relies on an interpretation of administrative rules that conflict with state statute, the rules are invalid. *See* ORS 537.140(1)(a)(I); ORS 197.180. Accordingly, the Department cannot rely on its internal guidance document in lieu of compliance-in-fact.

IV. THE DEPARTMENT HAS NOT ADEQUATELY ASSESSED WHETHER THE APPLICANT'S PROPOSED USE OF OREGON WATER IS OF HIGH PUBLIC INTEREST

In Oregon, 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 690-400-010(12) (emphasis supplied). When reviewing an application for a new water right, the Department must initially presume that a proposed use of water will not impair or be detrimental to this public interest. ORS 537.153(2). If the proposed use is not allowed in the basin where the use will occur, or if water is not available for the proposed use, the public interest presumption is rebutted. *Id.*

If the public interest presumption is overcome, then before issuing a final order approving the proposed use, the Department must make a final determination whether the proposed use, as modified by the review process, would impair or be detrimental to the public interest by considering the following factors:

- (1) The conservation of the highest use of water for all purposes for which it may have a special value to the public;
- (2) The maximum economic development of the waters involved;
- (3) The control of the state's waters for all beneficial purposes;
- (4) The amount of waters available for appropriation for beneficial use;
- (5) The prevention of wasteful, uneconomic, impracticable, or unreasonable uses of the water involved;
- (6) The means necessary to protect all vested and inchoate rights to the waters or to the use of waters of this state; and
- (7) The state water resources policy. ORS 537.170(8).



If, after considering these factors, the Department determines the proposed use would still impair or be detrimental to the public interest, it may approve the application for less water than applied for or condition or limit the permit to protect the public interest. ORS 537.190(1). For example, if a stream is overappropriated, the Department *may* allow additional uses of the stream where the public interest is high and uses are conditioned to protect instream values. OAR 690-410-070.

In reviewing FWS's application for a surface water right the Department considered the public interest value of the proposed beneficial use of wildlife management. It found that the presumption of public interest was rebutted by the lack of water availability. PFO at 5. Accordingly, the Department can not allow the proposed use unless it determines that the public interest in FWS's requested use was high and that the use could be conditioned to protect instream value. PFO at 6 (relying on OAR 690-410-070(2)(a)).

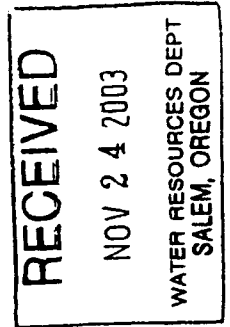
Although the Department ultimately reported that the use would be in the public interest and could be conditioned to protect instream values, the Department's analysis of whether the use is in the public interest was incomplete. PFO at 6, 16. As discussed below, the Department must provide a more thorough and comprehensive analysis of the public interest values of FWS's proposed use before it finally determines that the use is of high public interest.

First, the Department failed to consider whether FWS's proposed water right permit would "conserv[e] water resources for present and future generations." OAR 690-400-010(12). Such a determination is a fundamental component of the required public interest evaluation. *Id.*

FWS's proposed permit would allow it to withdraw essentially all of the water from the permit's designated water sources between October 1 and March 15. Although permit conditions imposed to protect instream values may leave a minimal level of water in these streams, those minimal waters are essentially unavailable to other potential users because they are tied up in FWS's proposed permit and would be subject to a water call. Issuance of the proposed permit would guarantee that the Department will be unable to issue future permits on the applicable streams because water will not be available at an eighty percent exceedance level – the test under which the public interest of a water right application is rebutted.

Therefore, issuance of the proposed water right eliminates virtually all opportunities for present and future generation appropriations. The Department's failure to even discuss these impacts of the proposed permit on future water uses, as required by OAR 690-400-010(12), demonstrates that the Department did not fully and completely consider whether proposed S-84222 was of high public interest value.

Second, the Department's assessment of whether the proposed wildlife management use is a high public interest value is flawed. In assessing whether the proposed use is of high public interest, the Department considered the role the refuge plays in providing species habitat and benefits to the local economy and the impacts of denying the application. PFO at 6-11. Protestants contend the Department's analysis



of denying the application is incomplete.

Relying on a 1994 study, the Department described a number of benefits the Malheur Wildlife Refuge currently provides to the local economy and environment – haying and grazing on the refuge, employment opportunities, payments in lieu of taxes, tourism, etc. PFO at 9. The Department then states, without any empirical evidence to support its statement, that denial of the proposed permit *could* negatively impact these benefits. PFO at 11. The Department also makes a determination, again without evidentiary support, that the proposed use will add economic benefits to the local economy. PFO at 16.

Oregon law does not allow for this type of conjecture in the public interest determination. Although the Department is allowed to presume that the proposed use will be in the public interest, once this presumption is overcome, the Department must determine whether the proposed use “*would* impair or be detrimental to the public interest.” ORS 537.170(8). By using the term “*would*,” the plain language of the statute demands that the Department substantiate its public interest determination with evidentiary support. The public interest review must be based on more than unsubstantiated speculation.

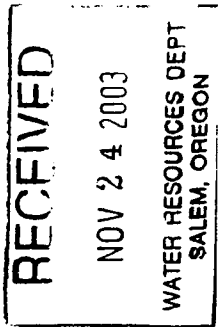
The Department must found its analysis on facts and on evidence that demonstrates the actual impacts to the environment and economy of a water right appropriation. This decision should include consideration of, among other things, the negative economic and environmental impacts of appropriating nearly the entire water flow of multiple water resources. A full examination of the actual, substantiated impacts of denying the water right will reveal that future and present economic and environmental needs tip the public interest balance in favor of limiting the applicant’s water rights. If so, the Department would be obligated to remove the “high public interest” value it has placed on the applicant’s water use. Accordingly, the Department can not make an accurate determination without actual evidence whether denial of proposed water use “*would*” impair or be detrimental to the public interest.

V. THE PROPOSED BENEFICIAL USE MUST BE STRICTLY CIRCUMSCRIBED TO AVOID CREATION OF A *DE FACTO* FEDERAL RESERVED WATER RIGHT.

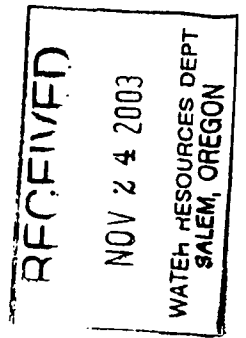
As part of the contested case proceedings, Applicant acceded to Protestants’ request that the proposed beneficial use, wildlife refuge management, be strictly limited to twelve enumerated uses: wildlife use, aquatic life, wetland enhancement, riparian area enhancement, fire protection, irrigation use, stockwatering, recreation use, construction, flood control, reservoir maintenance, and dust control. *See e.g.*, FWS Motion at 10.

Protestants continue to contend that the proposed beneficial uses should be separately enumerated within the proposed permit, rather than collectively allowed under this new proposed beneficial use.

Protestants do not claim the Applicant is asserting a legitimate federal reserved water right. Rather, the broad (and potentially unlimited) nature of the proposed



beneficial use termed "wildlife refuge management" could result in a state-sanctioned water right not subject to practical regulation. To the extent the Department's approval of the application deprives the agency of regulatory oversight, the federal applicant will have received a *de facto* federal reserved water rights. That is, a water right that in practice is immune from Oregon's regulatory mechanisms.



#### VI. WATER STORAGE IS NOT ALLOWED

Hearing Officer Vincent correctly found that the proposed water right does not include provision for storage of water, however, it was error to conclude that "standing water" is distinct and separate from storage. Proposed Order at 12. The Applicant cannot meet the distinction drawn by the Hearing Officer.

The Refuge has many ponds and reservoirs which necessarily receive water diverted from the Donner und Blitzen River. As of 1990, the Refuge average "one pond per 2 square miles of breeding habitat ranging in size from 1 to 300 acres." FWS Ex. 2, p. 7; *see e.g.*, FWS Ex. 1 pp. 39-41.

In order to divert 820.4 cfs, Applicant will likely have to store water in Refuge ponds and reservoirs. This ability to capture and store water seems consistent with the Applicant's desire to obtain the non-irrigation season water right, however, they have not applied for storage rights. This is another example of why the proposed water right is unreasonably large and has not been sufficiently studied by the Department, ODFW and other state agencies.

#### VII. THE PROPOSED WATER RIGHT MUST BE CONSISTENT WITH THE DONNER UND BLITZEN RIVER DECREE

The Hearing Officer erred in finding "[t]he proposed use is not required to be consistent with the Donner und Blitzen River decree." Proposed Order at 9.

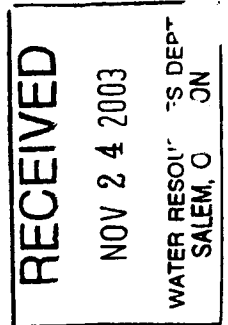
The Circuit Court for Harney County has previously issued a decree adjudicating the water rights on the Donner und Blitzen river system. *See In the Matter of the Determination of the Relative Rights to the Use of the Waters of DONNER UND BLITZEN RIVER and its Tributaries, a Tributary of Malheur Lake* (January 11, 1941); WRD Ex. 4 [Decree]. The Decree is still in effect and any water right certificate issued by the Department must comport with it.

Diamond area water users are independent from Donner und Blitzen River appropriators. The Proposed Order violates the Decree by ignoring the unique rights of the Diamond area.

The Decree provides:

**"(14) It appearing that it has long been the practice of the water users in the Diamond area to use the water on lands within said area independently from those on the Donner und Blitzen River**

**regardless of priorities** and that the most efficient use of water results from such practice it is adjudged that the practice should continue to be allowed as herein modified. The use of water in the Diamond area shall be distributed by the watermaster to each separate and distinct subdivision of tract of land contained therein, strictly in accordance with the priorities declared in this decree.” Decree at 6; WRD Ex. 4 at 6. (emphasis supplied)



By denying the applicability of the Decree, the Proposed Order would allow a permit to be issued that will conflict with the adjudicated distribution of water from Diamond area tributaries. In the event a permit is issued, the independent regulation of the Diamond area should be expressly provided.

**VIII. SPECIFIC NUMERICAL RATE LIMITS ARE REQUIRED FOR EACH POINT OF DIVERSION**

The Proposed Order declares 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.” Proposed Order at 8.

Protestants disagree and contend that it would be wasteful, and therefore prohibited, to allow Applicant to divert the entire proposed water right of 820.4 cfs from any single point of diversion. ORS 537.170(8)(e); ORS 540.720. Instead, a specific numerical limit must be established for each of the twelve points of diversion proposed by Applicant.

**IX. THE CONDITIONS PROPOSED TO AVOID HARM TO FISH AND BIRD SPECIES ARE SPECULATIVE**

As cited above, ODFW initially opposed the proposed 820.4 cfs water right because of the potential harm such a large diversion might cause fish and bird species dependent on the Donner und Blitzen River system. Applicant has agreed to accept interim bypass flow (also referred to as minimum instream flows) pending completion of flow studies in conjunction with ODFW as a condition for WRD to issue a water right certificate. The Proposed Order will allow the proposed use of 820.4 cfs to begin pending completion of the studies.

Protestants contend that the interim instream flow conditions are speculative. Accordingly, the flow studies set forth in the Department’s proposed final order and the February 21, 2002, should be completed prior to issuing a water right permit and allowing the proposed water use to begin. Considering the large volume of water requested by Applicant, the potential adverse impacts should be ascertained prior to allowing the proposed use.

## CONCLUSION

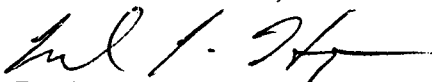
Protestants Water for Life, Inc. et al. oppose the Proposed Order granting Applicant a 820.4 cfs non-irrigation season water right. Because of both the size and nature of the proposed water right, and the fact that water is not available at the standard level of eighty percent exceedance, Protestants respectfully request the water right application be denied.

Alternatively, Protestants request the following conditions be satisfied prior to issuing a water right permit and allowing the proposed use to begin:

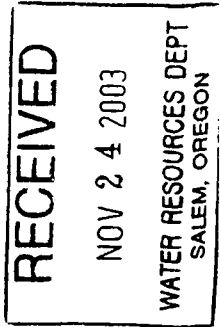
1. Direct Applicant to complete all consultation, analysis and other requirements mandated by the Endangered Species Act and the National Wildlife Refuge System Administration Act;
2. Deny the beneficial use "wildlife refuge management" and, instead, issue a permit specifically listing the allowable beneficial uses and the amount of water approved for each of those uses;
3. Prohibit Applicant from storing water as part of the proposed uses;
4. Expressly provide that the proposed uses must comply with the Donner und Blitzen River Decree, particularly the Diamond tributaries' independent status;
5. Set specific numerical rate limits for each proposed point of diversion;
6. Complete all flow studies;
7. Provide written proof of compliance with the Harney County Comprehensive Plan.

Respectfully submitted,

WATER FOR LIFE, INC.

  
Brad J. Harper

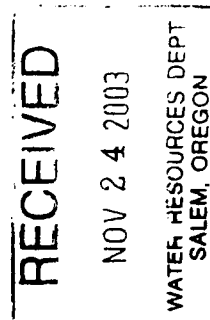
cc: certificate of service list  
clients



**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on November 17, 2003 I filed the Water for Life, Inc. EXCEPTIONS via facsimile and first class mail of the U.S. Postal Service to the following:

Dan Thorndike, Chair  
Oregon Water Resources Commission  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271  
Fax: (503) 378-8130



I further hereby certify that on November 17, 2003, I served one copy of the foregoing Water for Life, Inc. EXCEPTIONS via facsimile and first class mail of the U.S. Postal Service on the following parties:

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Roseburg, OR 97470  
Fax: (541) 957-5923

DATED: NOVEMBER 17, 2003

A handwritten signature in black ink, appearing to read "Brad J. Harper", written over a horizontal line.

Brad J. Harper  
Water for Life, Inc. et al.



DRAFT

This is not a permit!!!

DRAFT

STATE OF OREGON

COUNTY OF HARNEY

## DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

U.S. FISH AND WILDLIFE SERVICE  
 911 NE 11<sup>TH</sup> AVE.  
 PORTLAND, OREGON 97232-4181

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: S-84222

PERIOD OF USE: OCTOBER 1 THROUGH MARCH 1

DATE OF PRIORITY: JULY 28, 1999

SOURCE OF WATER: Donner Und Blitzen River, tributary to Malheur Lake, Bridge Creek, Kiger Creek, McCoy Creek, Mud Creek, and Krumbo Creek, tributaries of the Donner Und Blitzen River

PURPOSE OR USE: Wildlife Refuge Management which may include 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

The Water Resources Department has determined that the public interest in this use, as described by the type of use, place of use, and point of diversion, is a "High Public Interest" use and is conditioned to protect instream values including habitat for redband trout as set out in the specific permit conditions. OAR 690-410-0070(2)(A).

MAXIMUM RATE/VOLUME

1. MAXIMUM RATE ALLOWED: No more than 820.4 cubic feet per second (CFS). The allowed rate being 820.4 CFS from the Donner Und Blitzen River (200.0 CFS from Page Springs Dam, 20.0 CFS from New Buckaroo Dam, 10.0 CFS from Old Buckaroo Dam, 303.0 CFS from Grain Camp Dam, 166.0 CFS from Busse Dam, 84.0 CFS from Dunn Dam, and 37.0 CFS from Sodhouse Dam), 200.0 CFS from Bridge Creek, 188.0 CFS from Mud Creek, 50.0 CFS from Krumbo Creek, 200.0 CFS from McCoy Creek, and 250.0 CFS from Kiger Creek
2. MAXIMUM VOLUME ALLOWED: The amount of water authorized under this permit, together with the amount of water authorized under the USFWS'S water rights evidenced by certificates 28524, 15198, 15187, and 14367 (or subsequent orders or certificates evidencing

Application S-84222

Water Resources Department

PERMIT DRAFT

these water rights) is limited to a total volume of 145,000 acre feet (AF) annually (calculated on an annual water year of October 1 through September 30 of each year).

3. The permittee shall designate the acreage, annually, that will be irrigated. The use of the full irrigation duty of three-acre feet per acre for the designated irrigated acres will be assumed. The volume remaining will be available for other uses authorized under this permit.
4. When water is being used for irrigation under this permit, the amount of water used for irrigation, together with the amount secured for irrigation under any other right existing for the same lands, is limited to a diversion of one-fortieth of one cubic foot per second (or its equivalent) and 3.0 acre feet for each acre irrigated.

**DONNER UND BLITZEN RIVER POINT OF DIVERSION LOCATIONS:**

SODHOUSE DAM: SE 1/4 SE 1/4, SECTION 3, T27S, R31E, W.M.; 856 FEET NORTH & 4 FEET WEST FROM SE CORNER, SECTION 3; SECTION 15

DUNN DAM: NW 1/4 SE 1/4, SECTION 15, T27S, R31E, W.M.; 1436 FEET NORTH & 2527 FEET WEST FROM SE CORNER, SECTION 15

BUSSE DAM: NW 1/4 NE 1/4, SECTION 22, T28S, R31E, W.M.; 906 FEET SOUTH & 2094 FEET WEST FROM NE CORNER, SECTION 22

GRAIN CAMP DAM: NE 1/4 NE 1/4, SECTION 26, T29S, R31E, W.M.; 859 FEET SOUTH & 527 FEET WEST FROM NE CORNER, SECTION 26

OLD BUCKAROO DAM: SW 1/4 SW 1/4, SECTION 31, T31S, R32.5E, W.M.; 602 FEET NORTH & 50 FEET EAST FROM SW CORNER, SECTION 31

NEW BUCKAROO DAM: NW 1/4 NW 1/4, SECTION 6, T32S, R32.5E, W.M.; 1356 FEET SOUTH & 381 FEET EAST FROM NW CORNER, SECTION 6;

PAGE SPRINGS DAM: SW 1/4 SW 1/4, SECTION 8, T32S, R32.5E, W.M.; 815 FEET NORTH & 583 FEET EAST FROM SW CORNER, SECTION 8

**BRIDGE CREEK POINT OF DIVERSION LOCATION:**

NW 1/4 NE 1/4, SECTION 32, T31S, R32.5E, W.M.; 852 FEET SOUTH & 1796 FEET WEST FROM NW CORNER, SECTION 32

**MUD CREEK POINT OF DIVERSION LOCATION:**

EASTSIDE CANAL: NW 1/4 NE 1/4, SECTION 5, T32S, R32.5E, W.M.; 325 FEET SOUTH AND 1329 FEET WEST FROM NE CORNER, SECTION 5

MCCOY CREEK POINT OF DIVERSION LOCATION:

MCCOY CREEK STRUCTURE: NW 1/4 SW 1/4, SECTION 21, T29S, R32E, W.M.; 2260 FEET SOUTH & 960 FEET EAST FROM NW CORNER, SECTION 21

KIGER CREEK POINT OF DIVERSION LOCATION:

NW 1/4 NW 1/4, SECTION 21, T29S, R32E, W.M.; 98 FEET SOUTH & 1340 FEET WEST FROM NE CORNER, SECTION 21

KRUMBO CREEK POINT OF DIVERSION LOCATION:

KRUMBO POND DIKE: NW 1/4 NE 1/4, SECTION 24, T30S, R31E, W.M.; 635 FEET SOUTH & 1779 FEET WEST FROM NE CORNER, SECTION 24

THE PLACE OF USE IS LOCATED AS FOLLOWS:

NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 34  
TOWNSHIP 26 SOUTH,  
RANGE 31 EAST, W.M.

SE 1/4 NE 1/4  
ALL SE 1/4  
SECTION 25

ALL NE 1/4  
SECTION 36  
TOWNSHIP 27 SOUTH,  
RANGE 30 EAST, W.M.

NE 1/4 NW 1/4  
NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 2

ALL  
SECTION 3

ALL  
SECTION 4

SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 8

ALL  
SECTION 9

ALL  
SECTION 10

NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 11

NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 14

ALL  
SECTION 15

ALL  
SECTION 16

ALL NE 1/4  
NE 1/4 NW 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 17

ALL  
SECTION 31

ALL  
SECTION 32

ALL  
SECTION 33

SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 18

ALL  
SECTION 34

ALL  
SECTION 19

ALL NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 35  
TOWNSHIP 27 SOUTH,  
RANGE 31 EAST, W.M.

ALL  
SECTION 20

ALL  
SECTION 21

ALL  
SECTION 22

ALL NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 3

NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
SECTION 23

ALL  
SECTION 4

ALL NW 1/4  
ALL SW 1/4  
SECTION 26

ALL  
SECTION 5

ALL  
SECTION 27

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 6

ALL  
SECTION 28

ALL  
SECTION 29

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 7

ALL  
SECTION 30

ALL  
SECTION 8

SW 1/4 NE 1/4  
NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 25

ALL  
SECTION 9

NW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
SECTION 10

ALL NW 1/4  
ALL SW 1/4  
SECTION 15

ALL  
SECTION 26

ALL  
SECTION 16

ALL  
SECTION 27  
ALL  
SECTION 28

ALL  
SECTION 17

ALL NE 1/4  
NE 1/4 NW 1/4  
NW 1/4 NW 1/4  
SE 1/4 NW 1/4  
NE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 29

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 18

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
SECTION 32

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 19

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 33

ALL  
SECTION 20

ALL  
SECTION 21

ALL  
SECTION 34

ALL  
SECTION 22

ALL  
SECTION 35

SW 1/4 NW 1/4  
ALL SW 1/4  
SECTION 23

NE 1/4 NE 1/4  
NW 1/4 NE 1/4  
SW 1/4 NE 1/4

ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 36  
TOWNSHIP 28 SOUTH,  
RANGE 31 EAST, W.M.

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 1

ALL  
SECTION 2

ALL  
SECTION 3

NE 1/4 NE 1/4  
NW 1/4 NE 1/4  
SE 1/4 NE 1/4  
SECTION 4

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 10

ALL  
SECTION 11

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
SE 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 12

ALL  
SECTION 13  
ALL  
SECTION 14

ALL NE 1/4  
NE 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SE 1/4  
SECTION 15

NE 1/4 NE 1/4  
SECTION 22

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 23

ALL NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 24

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
NW 1/4 SW 1/4  
SE 1/4 SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 25

ALL NE 1/4  
SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 26  
SE 1/4 SW 1/4  
NE 1/4 SE 1/4  
SW 1/4 SE 1/4

SE 1/4 SE 1/4  
SECTION 34  
NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
NE 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
SECTION 35  
TOWNSHIP 29 SOUTH,  
RANGE 31 EAST, W.M.

SW 1/4 NE 1/4  
SE 1/4 NE 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 7

NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SE 1/4 SW 1/4  
SW 1/4 SE 1/4  
SECTION 8

SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
SECTION 15

ALL NE 1/4  
NE 1/4 NW 1/4  
SW 1/4 SW 1/4  
SECTION 16

ALL  
SECTION 17

ALL  
SECTION 18

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
NW 1/4 SW 1/4  
SE 1/4 SW 1/4

ALL SE 1/4  
SECTION 19

ALL  
SECTION 20

ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 21

NW 1/4 NE 1/4  
NE 1/4 NW 1/4  
NW 1/4 NW 1/4  
SECTION 29  
NE 1/4 NE 1/4  
SECTION 30  
TOWNSHIP 29 SOUTH,  
RANGE 32 EAST, W.M.

SW 1/4 SW 1/4  
SECTION 2

ALL NE 1/4  
NE 1/4 NW 1/4  
SE 1/4 NW 1/4  
NE 1/4 SW 1/4  
SW 1/4 SW 1/4  
SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 3

ALL  
SECTION 10

ALL NW 1/4  
ALL SW 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 11

SW 1/4 SW 1/4  
SECTION 12

SW 1/4 NE 1/4	SE 1/4 NW 1/4
SE 1/4 NE 1/4	SECTION 24
ALL NW 1/4	NW 1/4 NW 1/4
ALL SW 1/4	SW 1/4 NW 1/4
ALL SE 1/4	NW 1/4 SW 1/4
SECTION 13	SW 1/4 SW 1/4
	SECTION 26
ALL NE 1/4	ALL
NE 1/4 NW 1/4	SECTION 27
NW 1/4 NW 1/4	
SE 1/4 NW 1/4	NE 1/4 NE 1/4
NE 1/4 SW 1/4	SW 1/4 NE 1/4
SE 1/4 SW 1/4	SE 1/4 NE 1/4
ALL SE 1/4	ALL SE 1/4
SECTION 14	SECTION 28
NE 1/4 NE 1/4	ALL NE 1/4
NW 1/4 NE 1/4	SE 1/4 SW 1/4
SW 1/4 NE 1/4	ALL SE 1/4
NE 1/4 NW 1/4	SECTION 33
SE 1/4 NW 1/4	
NE 1/4 SW 1/4	ALL
SW 1/4 SW 1/4	SECTION 34
SE 1/4 SW 1/4	
NW 1/4 SE 1/4	NW 1/4 NE 1/4
SW 1/4 SE 1/4	SW 1/4 NE 1/4
SECTION 15	SE 1/4 NE 1/4
	ALL NW 1/4
NE 1/4 SE 1/4	ALL SW 1/4
SE 1/4 SE 1/4	ALL SE 1/4
SECTION 21	SECTION 35
	TOWNSHIP 30 SOUTH,
ALL	RANGE 31 EAST, W.M.
SECTION 22	
NE 1/4 NE 1/4	ALL SW 1/4
NW 1/4 SW 1/4	ALL SE 1/4
SW 1/4 SW 1/4	SECTION 18
SECTION 23	
ALL NE 1/4	ALL NE 1/4
NE 1/4 NW 1/4	ALL NW 1/4
NW 1/4 NW 1/4	NE 1/4 SW 1/4
	NW 1/4 SW 1/4



ALL SE 1/4  
SECTION 19

ALL NW 1/4  
ALL SW 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 20

SW 1/4 SW 1/4  
SE 1/4 SW 1/4  
SW 1/4 SE 1/4  
SECTION 27

NW 1/4 NW 1/4  
SE 1/4 NW 1/4  
NW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 28

ALL NW 1/4  
SECTION 29  
NE 1/4 NE 1/4  
SECTION 30

NE 1/4 NE 1/4  
SECTION 33  
NE 1/4 NE 1/4  
NW 1/4 NE 1/4  
NW 1/4 NW 1/4  
SECTION 34

TOWNSHIP 30 SOUTH,  
RANGE 32 EAST, W.M.

NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 1

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SE 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 12

ALL NE 1/4  
NE 1/4 SW 1/4  
SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 13

SE 1/4 SE 1/4  
SECTION 23

ALL NE 1/4  
NE 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 24

ALL  
SECTION 25

NE 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 26

NE 1/4 NE 1/4  
SW 1/4 NE 1/4  
SE 1/4 NE 1/4  
NE 1/4 SW 1/4  
SE 1/4 SW 1/4  
ALL SE 1/4  
SECTION 35

ALL  
SECTION 36  
TOWNSHIP 31 SOUTH,  
RANGE 32 EAST, W.M.

SW 1/4 NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 3

SW 1/4 NE 1/4  
SE 1/4 NE 1/4

SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 4

ALL  
SECTION 19  
  
ALL  
SECTION 20

SW 1/4 NE 1/4  
SE 1/4 NE 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 5

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 21

SW 1/4 NE 1/4  
SE 1/4 NE 1/4  
SW 1/4 NW 1/4  
SE 1/4 NW 1/4  
ALL SW 1/4  
ALL SE 1/4  
SECTION 6

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 28

ALL  
SECTION 7

ALL  
SECTION 29

ALL  
SECTION 8

ALL  
SECTION 30

NE 1/4 NE 1/4  
NW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
SECTION 9

ALL  
SECTION 31

ALL  
SECTION 32

NW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
SECTION 16

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 33

ALL  
SECTION 17

TOWNSHIP 31 SOUTH,  
RANGE 32.5 EAST, W.M.

ALL  
SECTION 18

ALL  
SECTION 1

ALL NE 1/4  
NE 1/4 SE 1/4  
SE 1/4 SE 1/4  
SECTION 2

NE 1/4 NE 1/4  
NW 1/4 NE 1/4  
SE 1/4 NE 1/4  
SECTION 11

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SE 1/4  
NW 1/4 SE 1/4  
SECTION 12

TOWNSHIP 32 SOUTH,  
RANGE 32 EAST, W.M.

NW 1/4 NE 1/4  
SW 1/4 NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
NW 1/4 SW 1/4  
NW 1/4 SE 1/4  
SECTION 4

ALL NE 1/4  
ALL NW 1/4  
ALL SW 1/4  
NE 1/4 SE 1/4  
NW 1/4 SE 1/4  
SW 1/4 SE 1/4  
SECTION 5

ALL  
SECTION 6

ALL NE 1/4  
ALL NW 1/4  
NE 1/4 SW 1/4  
NW 1/4 SW 1/4  
NE 1/4 SE 1/4  
NW 1/4 SE 1/4  
SECTION 7

NW 1/4 NE 1/4  
NE 1/4 NW 1/4  
NW 1/4 NW 1/4  
SW 1/4 NW 1/4  
NW 1/4 SW 1/4  
SW 1/4 SW 1/4  
SECTION 8  
TOWNSHIP 32 SOUTH,  
RANGE 32.5 EAST. W.M.

## Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water use information, including the place and nature of use of water under the permit.
- B. The permittee shall allow the watermaster access to any meter or measuring device. Where the meter or measuring device is located within a locked structure, the watermaster shall be given access upon reasonable notice.

Within 1 year of permit issuance, the permittee shall develop and submit a Water Quality Monitoring Plan. The Director may approve an extension of this timeline to complete the required Plan. The Plan shall be reviewed and approved by the Water Resources Department in conjunction with the Department of Environmental Quality.

In the event of a request for a change in point of appropriation, an additional point of appropriation or alteration of the appropriation facility associated with this authorized diversion, the quantity of water allowed herein, together with any other right, shall not exceed the capacity of the facility at the time of perfection of this right.

#### Flow Conditions

Before certification of this permit, the permittee shall conduct a study that determines flow levels and habitat improvement measures during the period of use covered by this permit (October 1 through March 1) necessary for maintaining and restoring Redband trout and its habitats in the Donner und Blitzen River and its tributaries within the Malheur National Wildlife Refuge. The flow study must be conducted collaboratively with the Oregon Department of Fish and Wildlife at all levels of the study development, including study design, analysis and determination of new flow levels. The flow study shall include an analysis of whether peak flows would benefit Redband trout and their habitat within the Malheur National Wildlife Refuge and, if so, determine location, duration, and amount of necessary peak flow levels. The necessary peak flows, if any, will be set within the limits of the Refuge's infrastructure. The flow levels determined by the study, including any peak flows, will become a bypass condition in the permit and subsequent certificate. In the interim the following three bypass flow conditions will apply.

1. During diversions under this permit from the Donner und Blitzen River, bypass flows in the Donner und Blitzen River within the Malheur National Wildlife Refuge must be at: 43.0 cubic foot per second (CFS) during the month of October, 45.0 CFS during the month of November, 45.0 CFS during the month of December, 54.0 CFS during the month of January, and 52.0 CFS during the month of February. The flows shall be

measured to ensure that diversions are consistent with the bypass flow conditions. Except that, when flows in the Donner und Blitzen River are at or below the prescribed bypass flow levels, up to 5.0 CFS may be diverted from the Donner und Blitzen River to East Canal as measured directly below the diversion point for the East Canal.

2. During diversions under this permit from Bridge Creek, bypass flows in Bridge Creek from the East Canal to the Donner und Blitzen River must be at: 12.0 CFS during the month of October, 11.0 CFS during the month of November, 11.0 CFS during the month of December, 11.0 CFS during the month of January, and 11.0 CFS during the month of February, or the actual flow at U.S. Fish and Wildlife Service gage number 357004 on Bridge Creek (formerly U.S. Geological Survey gage number 10397000), whichever is less. These flows shall be measured directly above the confluence of Bridge Creek and the Donner und Blitzen River.
3. During diversions under this permit from McCoy Creek, bypass flows in McCoy Creek within the Malheur National Wildlife Refuge must be at 5.0 CFS.

The permittee shall provide adequate and effective upstream and downstream fish passage past all diversions associated with this permit on the Donner und Blitzen River and its tributaries, as required by the Oregon Department of Fish and Wildlife. Oregon Department of Fish and Wildlife fish passage criteria must be used unless the U.S. Fish and Wildlife Service has developed more protective criteria specific to redband trout and other native fish species that occur in the Donner und Blitzen basin. Oregon Department of Fish and Wildlife must be consulted on design and during installation of fish passage facilities.

The permittee shall install and maintain fish screening as required by the Oregon Department of Fish and Wildlife. Oregon Department of Fish and Wildlife fish screening criteria must be used unless the permittee has developed more protective criteria specific to redband trout and other native fish species occurring in the Donner und Blitzen basin. Oregon Department of Fish and Wildlife must be consulted on design and during installation of fish screens.

The permittee shall meet state and federal water quality standards and requirements.

The permittee shall implement the provisions concerning measurement and reporting of flows contained in the existing measurement and reporting plan developed by the permittee and approved by the Oregon Water Resources Department. This plan is titled "Water Measuring Plan for Malheur National Wildlife Refuge in Compliance with ORS 537.099: Water Use Reporting for Government Entities," September, 1996. The plan was approved by the Water Resources Department in a letter dated November 4, 1996.

#### Water Sharing/Subordination - Direct Diversion

If bypass flows as measured at the McCoy Creek gaging station are met, then the permittee may divert up to 20.0 CFS from McCoy Creek. Thereafter, for purposes of water regulation, so long as at least the bypass flows plus 20.0 CFS is passing the McCoy Creek gaging station, the Diamond Valley portion of this right shall not have priority over water in excess of this amount up to 20.0 CFS, not to exceed 6,000

AF, of junior priority date water rights as may be authorized by OWRD. Thereafter, the permittee may take the remaining water as it is entitled under this right.

#### Large Storage Facility

1. In addition to the subordination above, this permit shall be subordinate, for purposes of water regulation, to junior priority date water rights as may be authorized by OWRD to store water in reservoirs greater than 9.2 AF within the Diamond Valley, not to exceed a total of 600 AF for all reservoirs.
2. This permit shall be subordinate as described in (1) above only if: (a) the junior priority date reservoir(s) will be on tributaries of the major streams (Kiger and McCoy Creek) and/or on the minor tributaries of the Diamond Valley (Cucamonga and Swamp Creeks); and (b) the applicant(s) and permittee will coordinate to condition such a new reservoir permit to ensure the Refuge reservoir and obligations including the bypass flows are protected.

#### Stockwater - Direct Diversions

In addition to the subordinations above, this permit shall be subordinate, for purposes of water regulation, to junior priority water rights as may be authorized by the OWRD to use direct flow diversions into existing ditches, for uses in existence as of December 31, 2004, for livestock purposes during the period October 1 to March 1 of each year.

#### Existing Stockwater Ponds/Reservoirs

In addition to the subordinations above, this permit shall be subordinate, for purposes of water regulation, to junior priority water rights as may be authorized by the OWRD to store water for livestock or wildlife purposes so long as: the storage permit is for 9.2 AF or less; the pond/reservoir is an existing un-permitted use that is otherwise not authorized as an exempt use or pond, constructed prior to December 31, 2004; and the application for the livestock or wildlife pond/reservoir is submitted to OWRD prior to December 31, 2009.

#### Future Stockwater Ponds/Reservoirs

1. In addition to the subordinations above, for purposes of water regulation, this permit shall not have priority over junior priority date water rights as may be authorized by the OWRD to store water for livestock and wildlife purposes in storage facilities which are less than 9.2 AF in size, up to a total of 700 AF of water subject to the following limitations:
  - (i) Up to two hundred and twenty (220) AF from the Diamond Tributaries.
  - (ii) Up to one hundred and fifty (150) AF from the Upper Donner und Blitzen River (above Page Springs Dam), Mud Creek, and Bridge Creek basins.
  - (iii) Up to three hundred and thirty (330) AF from all other basins within the Donner und Blitzen subbasin.

This being a combined total from all basins 700 acre feet.

2. This permit shall be subordinate as described in (1) above only if such storage facilities will be widely distributed throughout each basin and the permittees' ability to ensure protection of Malheur National Wildlife Refuge resources is maintained. The intent of this subordination is to ensure that the resources of the Malheur National Wildlife Refuge are protected while providing water users the opportunity to submit permit applications for new storage facilities.

### **SPECIFIC CONDITIONS**

After permit and associated certificate issuance, no proposed subsequent use of any portion of this water right, or any water right derived from this water right, shall occur unless the Department has determined, following public notice and opportunity for comment, that the proposed subsequent use, as described by the type of use, place of use and point of diversion is a "high public interest" use and is conditioned to protect instream values, including habitat for redband trout.

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. This condition will be in effect so long as the policy is in effect.

### **STANDARD CONDITIONS**

The use shall conform to such reasonable rotation system as may be ordered by the proper state officer.

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.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

Actual construction work shall begin within one year from issuance of the permit. Complete application of the water to the use shall be made on or before October 1, 2009. Within one year after complete application of water to the proposed use, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner (CWRE).

Issued \_\_\_\_\_, 2005

**DRAFT - THIS IS NOT A PERMIT**

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Phillip C. Ward, Director  
Water Resources Department