

**STATE OF OREGON
BEFORE THE OREGON**

WATER RESOURCES COMMISSION

In the Matter of Water Right Application)	DRAFT
S 84222 in the Name of the United)	FINAL ORDER
States Fish and Wildlife Service)	INCORPORATING SETTLEMENT
<i>Applicant</i>)	AGREEMENT, DENYING PROTESTS
)	AND APPROVING
Harney County)	APPLICATION S 84222
<i>Protestant</i>)	
)	
Harney County Soil & Water Conservation)	
District)	
<i>Protestant</i>)	
)	
Water for Life, Inc.)	
<i>Protestant</i>)	
)	
WaterWatch of Oregon)	
<i>Protestant</i>)	
)	
Oregon Department of Fish & Wildlife)	
<i>Intervenor</i>)	

I. HISTORY OF THE CASE

On July 28, 1999, the United States Fish & Wildlife Service (“USFWS”) filed application S 84222 with the Oregon Water Resources Department (“OWRD” or “Department”), proposing to divert up to 820.4 cubic foot per second (“cfs”) from the Donner und Blitzen River and tributaries for use in wildlife refuge management. Protests to the application were timely filed by protestants Harney County, Harney County Soil & Water Conservation District (“HSWCD”), Water for Life (representing Water for Life, Harney County Haygrowers Association, Dwight Hammond and Susan Hammond, Andy and Vena Dunbar and the Harney County Haygrowers Association) (hereinafter referred to collectively as “Water for Life” or “WFL”)¹ and WaterWatch of Oregon. The Oregon

¹ 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.

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Department of Fish & Wildlife (“ODFW”) filed a request for standing, and was later granted status as an intervenor.

The OWRD referred this matter to the Office of Administrative Hearings for a contested case hearing. On September 27, 2000, a prehearing conference was held. An Order on Prehearing Conference was issued on October 13, 2000, providing a schedule for further proceedings in this matter, identifying the issues presented in this case, and identifying those issues, among those presented, that were appropriate for determination through a motion for ruling on legal issues. A Supplemental Order on Prehearing Conference was issued on December 1, 2000, modifying the schedule of proceedings and amending the issues presented to include issues B.15., E and F, as stated in the Statement of Issues, below. The March 30, 2001, Supplemental Order further amended the schedule of proceedings, and the issues presented for hearing were amended to those stated in the Statement of Issues, below, by Order Revising Schedule and Issues for hearing on April 25, 2001.

On November 11, 2001, an Order for Ruling on Legal Issues was issued, determining as a matter of law, Issues B.2., B.3., B.8., B.12., B.14., C., D., E. and F., as stated in the Statement of Issues below. The Conclusions of Law, below, reflect the determinations made in that order.

Written direct and rebuttal testimony, together with accompanying exhibits, were filed pursuant to an Order Revising Schedule dated November 27, 2001.

On February 21, 2002, a Settlement Agreement was entered into by the ODFW, OWRD, USFWS, and WaterWatch of Oregon, whereby the OWRD agreed to modify the conditions in the proposed and final order as identified below, and WaterWatch of Oregon withdrew from its protest issues B.1., B.4., B.7., B.9. and B.13. The result of this stipulation is reflected in the Conclusions of Law regarding these designated issues below.

On April 29, 2002, a Stipulation was entered into between the USFWS and OWRD whereby it was agreed that any permit issued on the application subject to this case would include a specified general condition relating to livestock watering from a stream, as identified below. This stipulation was received into the record and is reflected in Conclusion of Law B.4., below.

A contested case hearing was held in this matter at the Harney County Courthouse, Burns, Oregon, on April 30, 2002, for the purpose of cross-examining those witnesses who had submitted written direct and rebuttal testimony, and whose cross-examination had been requested as provided in the Order Revising Schedule. Administrative Law Judge (“ALJ”) Paul Vincent presided. The applicant USFWS appeared through and with its attorney, Barbara Scott-Brier. The OWRD appeared through and with Assistant Attorney General Sharyl Kammerzell, assisted by agency representative, Renee Moulun. The ODFW appeared through and with Assistant Attorney General Shelley McIntyre. Protestant Water for Life, including Dwight and

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Susan Hammond, Andy and Vena Dunbar, and the Harney County Haygrowers Association, appeared through and with its attorney Brad Harper. Protestant Harney County appeared through its attorney Ron Yockim. Protestant Harney County Soil & Water Conservation District appeared through its attorney Joe Hobson. Protestant WaterWatch of Oregon appeared through its attorney Karen Russell.

Witnesses Dwight French, Rick Cooper and Mitch Lewis testified on behalf of the OWRD. Witnesses David Stanbrough, Dr. Bernie Weddell, Margaret Law, Richard Roy, Douglas Young, Kevin Sittauer, Michael L. Taylor, Michael Eberle, and John Haapala testified on behalf of the USFWS. Witnesses Susan Hammond, Richard Jennings and Jack McCallister testified on behalf of the HSWCD. Witnesses Wayne Bowers, Mitch Lewis, State Senator Ted Ferrioli, Stacey Davies, and Gary Marshall testified on behalf of Water for Life. Water for Life requested cross-examination of Wayne Bowers at hearing, but this request was denied because Bowers was Water for Life's own witness for direct testimony. WFL's request to cross-examine Mitch Lewis was allowed, to the extent this witness submitted direct testimony on behalf of OWRD. The record closed on May 14, 2002.

On October 27, 2003, the ALJ issued a Proposed Order recommending approval of application S 84222 with conditions.

On November 14, 2003, Harney County filed its Exceptions to the Proposed Order. On November 17, 2003, Water for Life filed its Exceptions to the Proposed Order. On November 26, 2003, applicant USFWS and WaterWatch of Oregon filed responses to the exceptions.

On March 11, 2004, Harney County and Water for Life argued their exceptions before the Water Resources Commission ("WRC"). Subsequently, the WRC appointed a subcommittee of two Commission members to review the contested case record and report back to the WRC. The WRC also urged the parties to further pursue settlement discussions, and continued the matter until the October 2004, WRC meeting.

At its October 22, 2004, meeting, the WRC received a status report from staff on the matter. Subsequent to this report, the WRC directed the subcommittee to complete review of the hearing record by the January, 2005 meeting. The WRC also once again urged the parties to pursue settlement. . The WRC tabled the matter to its January, 2005 meeting.

Prior to the WRC's January 2005 meeting, USFWS, Harney County and OWRD entered into a Settlement Agreement which is incorporated herein by reference. The Settlement Agreement modifies Application S 84222 and results in Harney County withdrawing its exceptions to the ALJ's Proposed Order. Terms of the Settlement Agreement modifying Application S 84222 are reflected in this final order.

The record of this proceeding, consisting of audiotapes from the cross-examination hearing, all evidence received, and all motions and exceptions filed, has been considered. The findings of fact and conclusions of law are based upon the entire contested case record.

II. STATEMENT OF ISSUES

Pursuant to ORS 537.170, “the issues to be considered in the contested case hearing shall be limited to issues identified by the [administrative law judge].” The issues in this matter were established by the ALJ through an April 25, 2001, Order Revising Schedule and Issues for Hearing, identifying the following issues to be resolved at hearing, and specifying issues B.2., B.3., B.8., B.12., B.14., C., D., E., and F as legal matters to be decided after written argument prior to hearing. The party who raised each issue is identified in parentheses below.

Considering the matters listed below, whether the proposed use under application S 84222 will impair or be detrimental to the public interest.

A. Water Availability

1. Whether water is available for the proposed use. (Water for Life; Harney County)
2. Whether the U.S. Fish & Wildlife Service’s use of this water for the Malheur Refuge is a high public interest value use. (Harney County; Water for Life)

B. Public Interest

1. Whether the proposed use, as conditioned, adequately protects flows for redband trout and other aquatic resources. (WaterWatch of Oregon; ODFW)
2. Whether the proposed use, as conditioned, creates an unlawful instream water right. (Water for Life; Harney County)
3. Whether the proposed use will injure existing water rights. (Water for Life)
4. Whether the proposed use must be conditioned to allow for or to prohibit livestock watering from streams on land appurtenant to the proposed use. (WaterWatch of Oregon; Harney County)
5. Whether the proposed permit provides adequate provisions for regulation and enforcement. (Harney County)

6. Whether the specific numerical rate limits given for each diversion point in the draft permit should be limited on the total quantity of water that may be diverted from each diversion point. (Harney County)
 7. Whether the proposed use, as conditioned, adequately protects water quality. (WaterWatch of Oregon)
 8. Whether the proposed use is compatible with Statewide Planning Goals and local comprehensive plans. (Harney County; Water for Life)
 9. Whether the proposed use must be conditioned to prohibit a transfer of the type and place of use under the proposed permit to any non-fish or wildlife use off Refuge lands. (WaterWatch of Oregon)
 10. Whether the proposed use, as conditioned, complies with OAR Chapter 690, Division 33. (WaterWatch of Oregon; Water for Life)
 11. Whether the proposed use is consistent with the Malheur Lake Basin Program rules. (Harney County; Water for Life)
 12. Whether the proposed use is a permissible beneficial use. (Water For Life)
 13. Whether the proposed use must be further conditioned to limit future irrigation to irrigation necessary for wildlife needs. (WaterWatch of Oregon)
 14. Whether OWRD has authority to condition the water rights as suggested in issues B.9 and B.13. (OWRD)
 15. Whether the proposed use includes storage, and if so, whether storage is a permissible beneficial use under application S 84222. (Harney County)
- C. Whether the proposed use must be consistent with the Donner und Blitzen decree and, if so, whether it is. (Harney County)
- D. Whether the proposed use may be approved prior to the applicant entering into formal consultation and formal conference under the Endangered Species Act and performing a compatibility analysis under the National Wildlife Refuge Administration Act. (Water For Life)
- E. Whether the approval of water right application S 84222 will result in a federal reserved water right. (HCSWCD)
- F. Whether there is a non-use of current water rights, and if so, whether it should be required that acres subject to non-use be forfeited. (HCSWCD)

III. EVIDENTIARY RULINGS

1. USFWS objects to Exhibit A, offered by WFL, except for pages 16, 18, and 19, as irrelevant. This objection is joined by OWRD, ODFW, and WaterWatch of Oregon. The objection to Exhibit A is sustained as to all pages except for pages 2, 16, 18 and 19.
2. USFWS objects to Exhibit B, an Abstract of Votes on a Harney County initiative measure in regard to whether the Refuge should acquire land. The objection is sustained, since the proffered evidence is irrelevant.
3. USFWS objects to Exhibit C, a November 16, 1989 letter from the Water Resources Department Director William H. Young on relevance grounds. This objection was joined by OWRD, ODFW and WaterWatch of Oregon. The matter is relevant. The objection is overruled.
4. USFWS objects to Exhibit D on grounds that it lacks foundation and relevance. This objection is overruled.
5. USFWS, joined by OWRD and ODFW, objects to Exhibits E-1 through E-9, as inaccurate and unreliable. This objection goes to weight, not admissibility. This objection is overruled.
6. USFWS, WaterWatch of Oregon, ODFW and OWRD object to Exhibits E-10 through E-19 for lack of foundation and prejudice due to timeliness. This objection is overruled. The documents will be admitted as business records.
7. USFWS objects to Exhibit F on grounds of authenticity and relevance. The primary objection is to weight, not admissibility. This objection is overruled.
8. USFW objects to Exhibits G-17 through G-19 as not part of the document in the USFWS file. OWRD objects on the grounds that it is contained in OWRD Exhibit 1 at pg. 142 and therefore duplicative. In order to assure a complete record of evidence, this objection is overruled.
9. OWRD Exhibits 1 through 7 were admitted without objection.
10. Exhibits accompanying written direct testimony offered by HCSWCD were admitted over USFWS objections to legal argument contained therein and relevance. The objection goes to weight, not admissibility. Objection overruled.
11. Exhibits 2 through 4 offered by HCSWCD are admitted over objection to relevance.

12. Water for Life objected to the second document included in Rebuttal Testimony, entitled “revenue sharing agreement.” The full document is found in Exhibit H. This document is excluded as unnecessarily duplicative.
13. Exhibits 1 through 52 offered by USFWS are admitted without objection.
14. OWRD moved to quash the subpoena for testimony by Paul Cleary, Director of the Water Resources Department at the time of the hearing. The motion was made on the grounds that Mr. Cleary was being called to testify in his role as an agency decision maker, as opposed to factual inquiry into relevant matters in dispute. *See Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 422 S Ct 814, 28 L ED2d 136 (1971). The intended line of inquiry is relevant only to the decision making process of the witness. With no showing that the director’s decision making process is properly in dispute, the subpoena was quashed.

IV. MOTIONS

At a prehearing conference, the parties identified those issues that were appropriate for resolution through written argument (briefing) prior to hearing. See OAR 137-003-0580. Those issues identified as appropriate for briefing were: B.2, B.3., B.8., B.12., B.14., C, D, E and F. Accordingly, on February 20, 2001, the OWRD, the USFWS, Water for Life, Harney County and WaterWatch of Oregon filed opening briefs. On April 16, 2001, the OWRD, USFWS, WaterWatch of Oregon, and Water for Life and Harney County filed response briefs. On May 7, 2001, the responding parties filed reply briefs. A Ruling on Legal Issues was issued by the ALJ on November 21, 2001. This order provided that Issues B.2, B.3, B.8, B.12, B.14, C, D and E, and F failed as a matter of law. An Order Revising Schedule subsequently set the dates for an evidentiary hearing on the remaining factual issues (A.1, A.2, B.1, B.4, B.5, B.6., B.7., B.9., B.10., B.11., B.13., and B.15.).

Order of Presentation is stated in OAR 690-002-0140 and was provided in the Notice of Hearing dated April 18, 2002.

Official notice was taken of the stipulation between ODFW, USFWS and OWRD. Water for Life objects to the background statements contained in the stipulation. This objection does not go to the evidentiary value of the stipulation. The objection is overruled.

Official notice was taken of the stipulation between OWRD and USFWS.

V. FINDINGS OF FACT

- (1) Application S 84222 was filed by the USFWS on July 28, 1999, requesting a diversion for a water right in addition to their existing water rights. . The proposed places of use for this right are listed at OWRD Exhibit 1, pages 17 through 49 and are hereby

adopted by reference.² The amount of water proposed for diversion is up to 820.4 cubic foot per second (“cfs”) to be used between October 1 and March 15, each year, with a priority date of July 28, 1999, the water to be diverted from 12 different points of diversions. (OWRD Ex. 1 at 352.) Each diversion point has a specified capacity stated in the Proposed Final Order that, when added together, totals more than the cumulative amount of 820.4 cfs requested. (OWRD Ex. 1 at 352.) The Proposed Final Order allows use of the Donner und Blitzen River and its tributaries, a tributary of Malheur Lake, for 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. (OWRD ex. 1 at 352.)

(2) The Malheur National Wildlife Refuge (“Refuge”) is an immense area, covering over 180,000 acres. The Blitzen Valley portion covers over 65,000 acres. The management of water on the Refuge is very complex, and has always been so, even when it was a working ranch. The Refuge’s water is managed to meet its primary purpose as a refuge and breeding ground for migratory waterfowl and other wildlife. The Refuge uses its water to provide habitat to migratory birds and other wildlife. The habitat includes grains, grasses, wetland plants (often called emergent vegetation) and small ponds. Some commercial crops are grown on the Refuge, but such plantings are integrated in the Refuge’s biological planning. Wetland plants provide a number of benefits to waterfowl, including nesting, resting, feeding, and so forth. Ponds are also necessary for wildlife species that need some amount of open water. (OWRD Ex.1 pg 61 – 69.; Affidavit and Written Direct Testimony of David A. Stanbrough; USFWS Exhibits 1 & 2; Affidavit and Written Direct Testimony of Margaret S. Laws; Affidavit and Written Direct Testimony of Bertie Josephson-Weddell; USFWS Exhibits 25 & 26.)

(3) The Malheur National Wildlife Refuge is one of the oldest and most important migratory bird refuges in the national refuge system. It has long been recognized for its contribution as a major and essential feeding and resting location for Pacific flyway birds migrating between the northern breeding grounds and wintering areas to the south. It is also an important breeding ground for wetland and upland migratory birds. Use of water for the protection and management of wetland systems in the Refuge not only contributes to management for Refuge purposes but also contributes to the national and global significance of this important bird area. (Affidavit and Written Direct Testimony of David A. Stanbrough; USFWS Exhibits 1 & 2; Affidavit and Written Direct Testimony of Margaret S. Laws; Affidavit and Written Direct Testimony of Bertie Josephson-Weddell; USFWS Exhibits 25 & 26.)

(4) The proposed use will be a value to public recreation in that it is for the management of the Malheur National Wildlife Refuge. The Refuge was established by Executive Order of President Theodore Roosevelt in 1908 to protect its natural significance as a breeding ground for many species of water birds. The Refuges resources

² There are several hundred places of use for this right. The parties did not dispute the accuracy of the legal descriptions for this water right as listed in the Draft Permit. *See* OWRD Exhibit 1 at pages 17 – 49.

include over 320 species of birds, 58 species of mammals, 10 species of native fish and a number of reptiles and amphibians. The Refuge is an important spring migrational staging area for a wide variety of birds including tundra swans, lesser snow geese, Ross's geese, tule white-fronted geese, and greater white-fronted geese from Alaska. In the early fall, up to 50% of the world's population of tule geese has been counted in the Harney basin. During fall migration, up to 500,000 ducks use the Refuge when wetland conditions are good. In addition, up to 12,000 lesser sandhill cranes (the largest breeding flock in California, Washington and Oregon) gather and breed in the basin each spring. (OWRD Ex. 1, pgs. 51 – 70; Affidavit and Written Direct Testimony of David A. Stanbrough; USFWS Exhibits 1 - 4)

(5) Wildlife viewing, and bird watching in particular, is the most popular recreation activity at the Refuge. From October 1999 through September 2000, there were 62,700 visitors to the Malheur National Wildlife Refuge. Of these visitors, 53,255 came primarily for the wildlife viewing opportunities provided by the Refuge. The majority of the visitors travel to the Refuge to view the spring and fall migrations of waterfowl as the primary focus of their trip. (Affidavit and Written Direct Testimony of Michael L. Taylor, PH.D.; USFWS Ex. 31, pg. 9.)

(6) Economic activity on the Refuge includes haying and rake-bunch-haying for which there are 22 Special Use Permits and two to three Cooperative Land Management Agreements as well as interagency/private interest Conservation Agreements. Together these total approximately 40,000 AUM's annually. Dismissing extreme conditions such as drought that impact hay prices, and using rates current as of 2002, the economic value of the Refuge's grazing and haying program is approximately \$280,000 per year. (Affidavit and Written Direct Testimony of Kevin J. Sittauer; USFWS Ex. 28).

(7) Nonconsumptive recreational activities are estimated as being from \$19 to \$76 per visitor per day and \$115 to \$3,393 per acre. Estimates of the net economic value of waterfowl hunting range from \$14 to \$76.95 per day of hunting. The total annual value of recreation fishing at the Refuge is estimated at \$356,560. Wildlife viewing, waterfowl hunting and recreational fishing combined are estimated as generating over \$3.6 million in benefits each year. (Affidavit and Written Direct Testimony of Michael L. Taylor, PH.D; USFWS Ex. 31.)

(8) Water right staff at OWRD prepared a water availability analysis for this application at the 80% exceedence level and found that water was available October through March, but not in the amounts requested by the applicant. (Testimony of Dwight French; Testimony of Richard M. Cooper; OWRD Ex. 1 pgs 5 – 6; 116 – 126; 173 – 183; OWRD Ex. 2 pg. 1.)

(9) The Department considered ten factors to determine whether the public interest in the proposed use is "high." These factors were as follows: 1) whether the public use is necessary; 2) whether there are benefits from the proposed use (from a premise that the public interest is higher for a use benefiting the public); 3) the "positive" public impacts of obtaining a permit for the proposed use; 4) how the use will benefit water users; 5)

how the use will benefit the area of the use; 6) why the use is “important” to the area of use; 7) the environmental benefits of the proposed use; 8) whether there are other sources available for the proposed use and if so whether they can or cannot be used (why one source is more preferable to another source); 9) whether the proposed source is the “best” source; 10) the negative impacts or consequences of denying the proposed use. (Direct Testimony of Dwight French; OWRD Ex.1 pgs. 59 – 70, 330; 109 – 111.)

(10) The Malheur National Wildlife Refuge is a public refuge established for the purpose of providing a refuge and breeding ground for migratory birds and other wildlife. Water is necessary for the Refuge to function for the purposes for which it was designated because the wetlands and meadows that are habitat for bird species are preserved by the application of water which is diverted from a series of canals in order to mimic natural stream conditions and floodplain function. The proposed water right under application S 84222 would serve to allow Refuge management to capture early runoff and floodwaters outside the irrigation season of March 15th to October 1st to allow approximately 33,000 acres of meadow and marsh areas in the Refuge to be watered by early March. (Affidavit and Written Direct Testimony of David A. Stanbrough)

(11) This water right is necessary to support the purpose and operation of the Malheur National Wildlife Refuge in the amounts requested during the season requested. (Affidavit and Written Direct Testimony of David A. Stanbrough; Affidavit and Written Direct Testimony of Margaret S. Laws; Affidavit and Written Direct Testimony of Bertie Jsephson Weddell).

(12) The use will benefit water users in the area because early diversion of floodwaters and spring runoff could reduce flooding problems on adjacent lands (Direct Testimony of Dwight French; OWRD Ex. 1 pgs. 59 – 70; Affidavit and Written Testimony of David A. Stanbrough; USFWS Ex. 5).

(13) Open AT Ranch, owned by Andy and Vena Dunbar, own grazing land appurtenant to the Refuge, and have expressed concern regarding the management of floodwater by the Refuge and the effect of the proposed diversion on groundwater. (Protest of Water for Life at 4.)

(14) The water rights presently held by Hammond Ranch are upstream from all diversion points proposed and senior to the proposed use. (OWRD Ex. 1 at 135.)

(15) The Malheur National Wildlife Refuge has been actively attempting to control weed spread for decades and has used methods including ground and aerial application of herbicides, release of biological controls, grazing, disking, mowing, and prescribed burns. The Refuge is specifically addressing pepper weed control and based on studies has determined that removing Refuge water or quarantining Refuge hay will not stop the spread of weeds since these are not the only ways that seed is spread and since the Refuge is not the only area with pepper weed. (Written Rebuttal Testimony of Margaret E. Laws; USFWS Exhibit 46).

(16) Mitch Lewis works for the OWRD, in the Field Services Division. At the time of the contested case hearing he was the watermaster for District 10, which includes all of the Malheur-Wright Basin and a portion of the Malheur River Basin. In this role he performed an injury review of the application and concluded that the proposed use will not injure existing water rights. (Dir. Test. Mitch Lewis at 1 – 2; OWRD Ex. 1 pgs. 314; 342.)

(17) If this water right application is denied, the unavailability of early season water will impact the Refuge's ability and flexibility to adjust wildlife management strategies to correspond to changing migration patterns of waterfowl, wading and shorebirds. Denial of the application would also affect the Refuge's ability to divert, disperse and otherwise control potentially damaging flood events. (Affidavit and Written Direct Testimony of David A. Stanbrough)

(18) The primary instream value on the Donner und Blitzen River is redband trout habitat. ODFW had originally expressed concern that the diversion for application S 84222 would diminish the amount of water directly available for fish habitat. (Direct Testimony of Dwight French; OWRD Ex. 1 335; 439 – 444) These concerns are addressed by conditioning the permit for application S 84222 to allow for bypass flows and by assuring that studies on peak flows will be conducted. (Direct Testimony Dwight French; OWRD Ex. 1 pgs. 335 – 337; Affidavit and Written Direct Testimony of Douglas Alton Young; Affidavit and Written Direct Testimony of Richard R. Roy; USFWS Exhibit 6.)

(19) OWRD concluded that the application could affect the habitat of sensitive, threatened or endangered fish species. (OWRD Ex. 1 at 83 – 84.) OWRD submitted copies of the Initial Review of the application for comment from an interagency review team composed of the ODFW, the Oregon Department of Agriculture, and the Oregon Department of Environmental Quality. (OWRD ex. 1 at 84, Dir. Test. Dwight French at 26.) Following comments from these agencies, including recommendations as to the conditions to be included, OWRD conditioned the draft permit in accordance with the recommendations. (OWRD Ex.1 at 142 – 43; 289 – 90; 362; 460.)

(20) Michael Eberle is a qualified hydrologist for the purposes of determining whether unappropriated water is available to supply the proposed use under application S 84222 at the times and in the amounts requested. (Affidavit and Written Direct Testimony of Michael Eberle, pgs. 1 – 3; Direct Testimony of Richard M. Cooper, pgs. 6 – 11).

(21) The Refuge's primary source of water in the Blitzen Valley is the Donner und Blitzen River. In addition to this source, water enters the valley via a number of tributaries including Mud Creek, Bridge Creek, Krumbo Creek, Kiger Creek, McCoy Creek, and Cucamonga Creek. Additional water is supplied by smaller tributaries such as Swamp Creek and numerous springs including Warm Springs, Knox Springs, Five-Mile Springs, Hogwallow Springs, and Webb Creek Springs. The Donner und Blitzen River supplies the majority of the water for the proposed use, the tributaries contributing far less by way of volume. The two predominant factors affecting the yearly runoff from the

Blitzen Valley drainage are the snow cover on the watershed and the spring climatic conditions. (Affidavit and Written Direct Testimony of Michael Eberle.)

(22) Water is available from the Donner und Blitzen River, McCoy Creek and Kiger Creek to supply up to 820.4 cubic foot per second (“cfs”) at times during the proposed period of use in application S 84222. The 820.4 cfs is not available at all times during the proposed period of use but is available at some time every year. (Affidavit and Written Direct Testimony of Michael Eberle, pgs. 8 – 21; USFWS Ex. 8, 9, 33, 42, and 45; Affidavit and Written Direct Testimony of Charles Haapala; Direct Testimony of Richard M. Cooper, pgs. 6 – 11; OWRD Ex. 1 pgs. 188 – 234; 255.)

(23) The Refuge uses a process called “moist soil management” and other management tools, to produce food and suitable habitat for wildlife. In order to promote plant growth and nourish plants, the Refuge has a complex management program. The Refuge uses some water to irrigate fields for farm crops. The Refuge also irrigates native grasses, only some of which is mowed and hayed. The Refuge also irrigates marshes and wetland areas, some of which have shallow standing water on a regular basis. The Refuge uses ponds as part of its biological plan. Most ponds are shallow and dense in emergent vegetation. The Refuge drains all of its ponds in a regular cycle with the intent to promote emergent plant growth as part of its biological plan. Water use in ponds and wetlands at the Refuge varies depending on their current cycle from being completely dry, to a mere sheen of water on the surface, to several feet of water. At all stages the water is being artificially applied to promote plant growth and create wildlife habitat. (OWRD Ex. 1 at 66 – 67; Affidavit and Written Direct Testimony of David A. Stanbrough; Affidavit and Written Direct Testimony of Margaret S. Laws; Affidavit and Written Direct Testimony of Bertie Josephson- Weddell)

(24) The primary goal of the Refuge is to emphasize a diverse mixture of habitats to benefit the groups of wildlife that use those habitats. That wildlife includes 320 species of birds, 58 species of mammals, 10 species of native fish and a number of reptiles and amphibians. Diversion of water outside the irrigation season allows new growth of vegetation and invertebrates, to provide food for many varieties of migratory birds that begin arriving in February of each year. The new vegetation also provides nesting cover for the birds as they arrive. Different varieties of vegetation used by birds for food and shelter require different depths of water at different times in their growing season. To accommodate this requirement, water will be diverted to ponds of different depths, which will be allowed to dry out as the season progresses. Diversion in the late winter to early spring also allows greater control of the water to avoid flooding, not only of wildlife habitat, but also of adjacent properties, and fields. Application of water outside the irrigation season also benefits grazing and an annual crop of hay within the Refuge as part of a program for developing feeding grounds. (Dir. Test. Dwight French at 9.; OWRD Ex. 1 at 66 – 68; Written Direct Testimony of David A. Stanbrough; Affidavit and Written Direct Testimony of Margaret S. Laws; Affidavit and Written Direct Testimony of Bertie Josephson- Weddell).

(25) It has been the practice of OWRD to impose specified numerical limits on recent permitted water rights involving more than one diversion point, in order to assure that the diversion can be adequately monitored and regulated. (Dir. Test. Mitchell Lewis at 4.) The Refuge has installed an extensive system of measurement devices and gauging stations around the diversion points, allowing measurement of the amount of water diverted at each diversion point, and the amount of water remaining in the stream after the diversion. In addition, the Refuge has prepared extensive and detailed maps of the Refuge and supplied these maps to OWRD. (Dir. Test. Mitchell Lewis at 5.)

VI. STIPULATIONS

In the course of this contested case proceeding, some of the parties entered into stipulated agreements that resulted in the agreement to place specific additional conditions on the permit for application S 84222 and provided for the withdrawal of specific issues from this proceeding as were raised by the parties entering into the agreements. The stipulated agreements are as follows.

A. Agreement by the ODFW, WaterWatch of Oregon, USFWS and OWRD

ODFW, WaterWatch of Oregon, the USFWS and OWRD entered into a stipulated agreement whereby WaterWatch of Oregon withdrew issues it raised in its protest on an agreement that specific conditions would be included in the permit for application S 84222. This stipulation and agreement was served on the ALJ and the parties on February 21, 2001, and received into the record on April 30, 2002.

In signing the agreement, WaterWatch of Oregon withdrew its issues B.1., B.4., B.7., B.9., B.10. and B.13.

In signing this agreement, the ODFW withdrew the concerns it expressed in its request for standing, that the PFO and permit did not “provide sufficient protection for a number of sensitive, threatened, and endangered fish species.” Accordingly ODFW’s concerns regarding the adequacy of the Division 33 review were withdrawn (Issues B.1. and B.10.)

Pursuant to this agreement, the parties agreed that the permit issuing from application S 84222 shall provide the following conditions.

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 14) 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, 52.0 CFS during the month of February, and 73.0 CFS during the period of March 1 through March 14. The flows shall be measured to ensure that diversions are consistent with the bypass flows 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, 11.0 CFS during the month of February, and 11.0 CFS during the period of March 1 through March 14 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.

Water Quality Condition

In addition, the permit for application S 84222 shall contain the following condition regarding water quality:

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

Transferability of Certificate

Pursuant to the agreement, the permit shall contain the following section under "Purpose or Use":

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).

In addition, the following shall be included in the permit under the heading “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.

B. Agreement between the USFWS and the OWRD

On April 29, 2002, the USFWS and the 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.

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.

This stipulation and settlement agreement was received into the record on April 30, 2002.

C. Agreement between the USFWS, Harney County and the OWRD

Prior to the WRC’s January 2005 meeting, the USFWS, Harney County and the OWRD entered into a settlement agreement, which is incorporated by reference into this final order. In signing the agreement, which makes modifications to Application S 84222, Harney County withdrew its exceptions to the ALJ’s Proposed Order. Pursuant to this agreement, the permit issuing from application S 84222 shall contain the following conditions:

PERIOD OF USE: OCTOBER 1 THROUGH MARCH 1.

MAXIMUM RATE/VOLUME

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1. Maximum rate allowed: no more than 820.4 cubic feet per second. The allowed rate being 820.4 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 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, 15197, and 14367 (or subsequent orders or certificates evidencing these water rights) is limited to a total volume of 145,000 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.

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 cfs from McCoy Creek. Thereafter, for purposes of water regulation, so long as at least the bypass flows plus 20 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 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 Creeks) and/or on the minor tributaries of the Diamond Valley (Cucamonga and Swamp Creeks); and (b) the applicant(s) and permittee will coordinate to

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condition such a new reservoir permit to ensure the Refuge resources 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 date 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 of 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.

VII. CONCLUSIONS OF LAW

A. Water Availability

1. The analysis of water availability is completed by the Department as part of the determination of whether the application is in the public interest. Water is not available at an 80% exceedence level for the proposed use during the months requested.
2. The USFWS's use of this water for the Malheur Wildlife Refuge is a high public interest value use and is conditioned to protect instream values.

B. Public Interest

1. The proposed use, as conditioned by stipulation between the OWRD, USFWS, ODFW and WaterWatch of Oregon, received into the record on April 30, 2002, adequately protects flows for redband trout and other aquatic resources. Notwithstanding this stipulation, the proposed use as conditioned, adequately protects flows for redband trout and other aquatic resources.
2. The proposed use as conditioned, does not create an unlawful instream water right.
3. The proposed use will not injure existing water rights.
4. 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. The proposed use, as conditioned pursuant to the agreement between the USFWS and OWRD, dated April 29, 2002, accurately reflects OWRD's policy in regards to livestock watering as articulated in OWRD's Field Enforcement Manual.
5. The proposed permit provides adequate provisions for regulation and enforcement.
6. 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 the total amount of water drawn from all diversion points does not exceed the total amount allowed under the permit.
7. The proposed use, as conditioned by stipulation between the OWRD, USFWS, ODFW and WaterWatch of Oregon, received into the record on April 30, 2002, adequately protects water quality.
8. The proposed use is compatible with Statewide Planning goals and local comprehensive plans.

9. The proposed use is not required to be conditioned to prohibit a transfer of the type and place of use under the proposed permit to any non-fish or wildlife related use off Refuge lands because the use is conditioned to require the finding and specific preamble and condition stated in the stipulation between OWRD, USFWS, ODFW and WaterWatch of Oregon as received into the record on April 30, 2002.
10. The proposed use, as conditioned in the stipulation between OWRD, USFWS, ODFW and WaterWatch of Oregon as received into the record on April 30, 2002, complies with OAR Chapter 690, division 33.
11. The proposed use is consistent with the Malheur Lake Basin Program rules as provided in OAR 690-512-0040. In addition applicant has shown that unappropriated water is available to supply the proposed use in the amounts requested.
12. The proposed use is a permissible beneficial use.
13. The proposed use need not be further conditioned beyond what was stipulated to between OWRD, USFWS, ODFW and WaterWatch of Oregon as received into the record on April 30, 2002, to limit future irrigation to irrigation necessary for wildlife needs.
14. OWRD has authority to condition the water rights as suggested in issues B.9 and B.13. Notwithstanding, this issue has been withdrawn as provided in the stipulated agreement OWRD, USFWS, ODFW and WaterWatch of Oregon as received into the record on April 30, 2002.
15. The proposed use does not include use for storage.
16. The Settlement Agreement between USFWS, Harney County and OWRD and subsequent modifications to Application S 84222 provides an opportunity for additional, future water appropriation in the Donner und Blitzen subbasin of the Malheur Lake Basin.

VIII. DISCUSSION

A. The Issues at Hearing

In reviewing an application for a proposed use, the Department shall 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 complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and may be overcome by a preponderance of the evidence that either: a) one or more of the criteria for establishing the presumption are not satisfied; or b) the proposed use will impair or be detrimental to the public interest as demonstrated in comments or in a protest. ORS 537.153(2).

In this case, the Department could not find that water is available for the proposed use pursuant to its definitions for water availability. OAR 690-300-0010(57). Therefore, the Department did not establish the public interest presumption for application S 84222. Instead, the Department made specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest. OAR 690-310-0120(2). Accordingly, the Department proposed approval of the application with appropriate modifications and conditions. OAR 690-310-0120(2)(b).

Upon issuance of the PFO for application S 84222, the Department received the protests described above. In the ensuing contested case hearing, protestants had the burden of showing by a preponderance of the evidence why the proposed use will impair or be detrimental to the public interest. As to each issue raised by the protests, protestants failed to rebut the determination that the proposed use would not impair or be detrimental to the public interest for the reasons asserted in their protests. A discussion of these issues follows.

Issue A.1. – Water is Not Available for the Proposed Use at an 80% exceedence level

As provided above, the public interest presumption can only be set if among the other factors listed at ORS 537.153, water is available for the proposed use. “Water availability” is defined at OAR 690-300-0010(57) and provides that water is available for a proposed use if the requested source is not over-appropriated during any period of the requested use. Over-appropriated in turn, means that a requested source must have unallocated water available at an 80% exceedence level. OAR 690-410-0010(11). The Department completed an assessment of water availability for application S 84222. This assessment determined that water is not available for further appropriation at an 80% exceedence level during each month of the requested use.

Issue A.2. – The Proposed Use of This Water is a High Public Interest Value Use and The Use is Conditioned to Protect Instream Values.

1. The public interest in this use is “high”

OAR 690-410-0070(2)(a) provides that when a surface water body is over-appropriated, additional uses may be allowed if it is determined that the public interest in the use is high and the use is conditioned to protect instream values. The “public interest” in turn means a beneficial use which is consistent with state law and includes

providing the greatest good for the 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).

Pursuant to OAR 690-410-0070(2)(a), the OWRD has developed a set of factors for determining whether a the public interest in a particular use is “high.” The criteria or factors for determining the value of the public interest include: the necessity of the use, the benefits of the proposed use to the public, positive impacts of the proposed permit to the public, benefit to other water users, benefit to the area of use, importance of the use to the area, environmental benefits, existence of other possible sources of water, and possible negative impacts to denial of the permit. The evidence in the record supports a finding for each of these factors and for a determination that the public interest in the use is high.

Water For Life argues that the public interest in the proposed use is not “high” because the analysis provided by OWRD does not consider future uses which should be considered since a determination of the public interest as defined at OAR 690-400-0010(12) includes reference to “protecting water rights and conserving water resources for present and future generations.” Notwithstanding this assertion, Water For Life has provided no evidence of specific future uses that would be harmed by this appropriation. Although witnesses testifying on behalf of Water for Life expressed opinions that the proposed use will “preclude potential options for future management of the Steens Mountain Cooperative Management and Conservation Area” there is no evidence in the record that the proposed use lies within the Steens Mountain Cooperative Management and Conservation Area, nor is there evidence of specific contemplated uses that would be jeopardized by the appropriation under application S 84222.

Water for Life also argues that the public interest in the proposed use is not “high” because “Harney County’s economy is better served by applying any available non-irrigation season water to other local projects.” (Direct Testimony of Gary Marshall) Notwithstanding this opinion, there is no evidence in the record to support either harm to Harney County’s economy if the proposed use is allowed, nor is there any evidence of the local projects that would be better served through disallowing this use.

Finally, Water for Life asserts that the proposed use will have a negative effect on the health of the Malheur Watershed and that the proposed use will propagate noxious weeds. Again, the record does not support this argument. Rather, the record shows that the applicant is aware of noxious weed problems and is actively engaged in programs for elimination of noxious weed on the Malheur National Wildlife Refuge. (Written Rebuttal Testimony of Margaret S. Laws; USFWS Exhibit 47, pgs. 31 – 35.)

The record provides sufficient evidence to support a finding that the public interest in the proposed use is high.

2. The use is conditioned to protect instream values.

Water for Life and WaterWatch of Oregon initially raised the issue of whether the proposed use adequately protects instream values. While WaterWatch resolved this issue by stipulation, Water for Life did not. Consequently Water for Life had the burden of showing that the proposed use does not protect instream values. ORS 537.153(2) (protestants bear the burden of proof to rebut findings that the proposed use will impair or be detrimental to the public interest). It has not met this burden.

The proposed use has been reviewed by ODFW pursuant to OAR Chapter 690 Division 33 and the permit for the proposed use incorporates the comments as ODFW recommends (see below discussion). Any other reservations ODFW had regarding the effectiveness of the bypass flow or the protection of peak flows have been addressed through its stipulated agreement with USFWS, OWRD and Water Watch. Consequently, because the OWRD has complied with the requirements of OAR 690-033-0330 and because OWRD will incorporate further conditions per the stipulations it has entered into with ODFW, USFWS and WaterWatch of Oregon, the proposed use is conditioned to protect instream values.

Because the public interest in the proposed use is “high” and the use has been conditioned to protect instream values, the proposed use will not impair or be detrimental to the public interest even though the waters requested for application S 84222 are “over-appropriated.” OAR 690-410-0070(2)(a).

Issue B.2. –The Proposed Use, As Conditioned, Does Not Create an Unlawful Instream Water Right.

The OWRD proposed a bypass flow condition for application S 84222 in response to ODFW’s concerns about the effect of the proposed water right on flows needed for sensitive fish species. A bypass flow is a specific amount of water that must flow past a particular point of diversion before the water right holder subject to the bypass flow condition may begin to divert. The stipulation discussed above identifies bypass flow for the proposed diversion of the Donner und Blitzen River, Bridge Creek and McCoy Creek.

Protestants Water for Life and HSWCD argue that the OWRD is creating an instream water right that violates Oregon law when it requires a bypass flow condition as a condition of water use under application S 84222. (Water for Life Protest at 11; Water for Life Exceptions at 4 – 5; HSWCD Protest at 3.)

The OWRD argues that the protestants have failed to acknowledge that there are important distinctions between an instream water right and a bypass flow. These bypass flows are permit conditions and, as such, are enforceable only against the permit holder. (OWRD’s Opening Brief at 4.) In contrast, an instream water right is an actual water right defined by statute:

[A] water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream

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for public use. An in-stream water right does not require a diversion or any other means of physical control over the water.

ORS 537.332(3).

We find in favor of the OWRD on this issue. The bypass flow condition for application S 84222 serves only to specify the discharge of water that must be present in the water bodies USFWS will divert from. These bypass flows are not held in trust for the people of Oregon and do not create a protected interest in the flow passing by the points of diversion.

Likewise, although Water for Life argues that the bypass flow condition on the draft permit for Application S 84222 “requires the applicant to leave a minimum perennial streamflow in the stream in order to protect fish species’ habitat,” we agree with the Department that this argument fails because a bypass flow does not create a minimum perennial streamflow. (OWRD’s Response at 1.) A minimum perennial streamflow is an administrative rule that establishes a flow necessary to support aquatic life or minimize pollution. *See* ORS 536.235; OAR 690-076-0010(7). Again, it must be pointed out that the proposed bypass flow is a permit condition applying only to the permit holder, not an administrative rule applying to all water users in the basin. It does not protect the flow passing by against other appropriators, as would a minimum perennial streamflow.

Water for Life also argues that the OWRD is giving the USFWS “responsibilities for presumably competing instream water needs” between migratory birds and fish and is thereby granting an “unauthorized delegation” of state water management responsibilities to USFWS. (Water for Life at 3.) We agree with the OWRD that the proposed permit delegates nothing to the applicant, but merely restricts applicant’s use of water under the permit. (OWRD’s Response at 2.)

Finally, Harney County argues that the OWRD has erred by creating an unlawful instream water right that does not comply with the requirements of ORS 537.338 and OAR 690-077-0020. (Harney County Brief at 9 – 11). However, whether or not the bypass flow condition complies with these statutes is irrelevant, as the bypass flow condition serves only to limit applicant’s ability to withdraw water; the status of the water comprising the flow is unaffected by the condition. (OWRD Response at 3.) The use of the term “instream flows” in the portion of the draft permit describing bypass flows does not create an instream water right where none exists. (OWRD Reply at 2.)

Issue B.3. – The Proposed Use Will Not Injure Existing Water Rights

The OWRD requests a ruling that the proposed use will not injure existing water rights. It points out that 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 536.240 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 complies with the rules of the Water Resources Commission. (OWRD's Brief at 5.) We find for the Department on this issue.

"Injury" occurs when a water right does not receive the water to which it is legally entitled. OAR 690-017-0005(5). When making water allocation decisions, the Department determines whether or not issuance of a new water right will result in injury to existing water rights such that existing water rights would not receive legally-entitled water. (OWRD's Brief at 6.) The Proposed Final Order ("PFO") for application S 84222 concludes that "proposed use will not injure other water rights" because the tentative priority date of this application sets it as the most junior use in the Basin." (OWRD's Brief, Ex. A at 17 & 26.) As the most junior use in the basin, the USFWS will not be able to request regulation on water that has a senior priority date, and would itself be regulated to meet a call by a more senior right. The permit thus reads: "[t]he 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 flow." (OWRD's Brief, Ex. A at 17.)

Protestants Water for Life and HSWCD assert that granting the water right will injure existing water rights in three aspects. (Water for Life Protest at 3; HSWCD Protest at 1; Department's Brief at 6.) First, Water for Life asserts that the proposed use "will limit the ability of Hammond Ranches to store water in Kern Reservoir." (WFL Protest at 3.) The Hammonds hold a water right upstream of the proposed point of diversion with a priority date of April 25, 1980 (R 8487) to store water from Krumbo Creek in Kern Reservoir. (Department's Brief, Ex. B.) This water right is approximately 20 years senior to the tentative priority date for application S 84222. Because application S 84222 holds a junior priority date, it would be regulated to satisfy a call for the Hammond's senior right. The proposed use, cannot be used to the injury of the Hammond's senior water right. (OWRD Brief at 6.)

Water for Life and HSWCD also argue that this application will limit protestant's ability to store water in preexisting ponds exempt from Department regulation under ORS 537.405. (WFS Protest at 3; HSWCD Protest at 1.) However, holding water under a surface water exemption means that the holder does not have a legal interest in the water that is recognized by the Department. ORS 537.141. Accordingly, such a surface water exemption is not subject to protection and regulation through the priority system. *See* ORS 540.045 (watermaster regulates according to user's "water rights of record in the [Department]"). Because an exempt surface water use does not create a water right of record subject to protection and regulation under the priority system, it is not subject to an injury analysis. (OWRD's Brief at 7.)

The Department also argues persuasively that there can be no "injury" to the protestants' interest in stock watering as this is also an exempt use under Oregon law. If protestants are using surface water pursuant to this exemption, the Department cannot regulate this use to meet the call of a water right. *See* ORS 537.141; 540.045. Water for Life argues that the term "existing rights" as used in ORS 537.160(1) includes exempt

uses which must be accounted for in determining whether a proposed use will injure existing rights pursuant to ORS 537.153. (WFS Brief at 3.) However, this analysis errs on two points. (OWRD's Brief at 7.) First, exempt uses are not "water rights." The statute refers to "rights" not "uses." The Department need only account for water rights in determining whether or not a new application is in the public interest. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993) (the text of a statute is the starting point for interpretation.) Further, exempt uses are not affected by new water allocations because they are allowed regardless of whether the water they use is appropriated by someone else. The issuance of a new water right does not preclude exempt stock watering uses. (OWRD Response at 3.)

Water for Life argues that the applicant has historically been unable to manage their water during the storage season in a way that does not result in flooding to neighboring lands, and must therefore prove that the new use "will not exacerbate flooding impacts during non-irrigation season." (WFL Protest at 4.) Again, we agree with the Department that the test for injury is whether the proposed use would result in a water right not receiving the water to which it is legally entitled. The Department's injury determination does not encompass civil claims against the applicant. (OWRD's Brief at 8.)

Finally, notwithstanding that this use is the most junior water right in the basin, the permit for application S 84222 is conditioned such that use of water may only occur at times when sufficient water is available to satisfy all prior rights. In addition the USFWS may only appropriate water when bypass flows as identified in the permit are present or exceeded. Given these flows, sufficient water should be available to satisfy downstream water rights. In conclusion, the use as conditioned will not injure existing water rights.

Issue B.5. – The Proposed Permit Provides Adequate Provisions for Regulation and Enforcement.

As a condition of the permit issuing for application S 84222, the OWRD is requiring the applicant to provide access to any meter or measuring device on the property. The record indicates that watermaster access is not a barrier to effective enforcement. In addition, the applicant has provided detailed maps of the Malheur National Wildlife Refuge so that diversion points can be readily located for enforcement purposes. Applicant has also installed an extensive gauging system, which allows monitoring of the flow at each diversion point, and has provided OWRD with a measurement plan. Finally, the Refuge has been submitting annual water user reports to OWRD. In conclusion, we find that the proposed use as conditioned can be monitored and regulated with precision and assurance.

Issue B.6. – The Specific Numerical Rate Limits for Each Diversion Point Do Not Limit the Total Quantity of Water That May Be Diverted from Each Diversion Point.

No statute or rule has been cited in the record providing that binding numerical limits must be imposed on the quantity of water that may be diverted at each diversion point. As Mitchell E. Lewis testified, (Dir. Test. Mitchell E. Lewis at 4.), there are a number of older permitted water rights that do not provide such limits. Lewis testified that it has been the practice of OWRD to impose such limits on recent permitted water rights involving more than one diversion point, in order to assure that the diversion can be adequately monitored and regulated. However, given the extensive provision for monitoring and regulation of diversions under this application, such a requirement is not necessary in this case. Moreover, while there are several points of diversion, all of them, ultimately derive from the same drainage, and use of water by the Malheur National Wildlife Refuge from all these diversion points is junior to the other holders of water rights on these sources. Consequently, the specific numerical limits given for each diversion need not be a limit on the quantity of water diverted from each diversion provided the total amount of water diverted at all diversion points does not exceed the maximum allowed under the permit.

Issue B.8 – The Proposed Use is Compatible with Statewide Planning Goals and Local Comprehensive Plans.

Protestant's Water for Life and Harney County argue that the proposed use fails to comply with statewide planning goals and local comprehensive plans and that the application is incomplete because it does not contain a compatibility statement. (WFL Brief at 4; Harney County Brief at 6 – 9.) The OWRD and USFWS argue that the Department has met the requirements of its land use compatibility program and further local land use laws do not apply to the Malheur National Wildlife Refuge because it is federal land. (OWRD's Response at 4; USFWS Memorandum Supporting Motion at 6.)

We agree with the analysis of the Department and the USFWS. First, local or state land use laws appear not to apply to the Refuge. Federal land management statutes, such as those that control Refuge management usually preempt state land use planning laws. (OWRD's Brief at 8.) Although the Supreme Court has held that state regulation of state and private activities on public lands is presumed valid unless it conflicts with federal legislation, the burden shifts when examining whether a state may regulate the activities of the federal government on federal land. In this case, the United States is not just exercising its proprietary interest in federal land, it is exercising sovereign power over property belonging to it. *United States v. Gardner*, 107 F. 3d 1314 (9th Cir. 1997). Therefore, federal legislation must specifically authorize state law to regulate the federal activity in question. If no specific federal legislation exists, then the state has no authority to regulate the particular federal activity on federal land. Here, there has been no federal legislation authorizing state regulation of federal activity on Refuge land, and, therefore, the state may not require or enforce state land use planning requirements or local comprehensive plans on the Malheur National Wildlife Refuge. (USFWS Memorandum at 9.)

Even if the proposed use is incompatible with Harney County's comprehensive plan, the proposed action is not subject to OAR 690-005-0035 or the alternative dispute

resolution process provided in the rule, as federal law does not provide for mandated alternative dispute resolution processes in the case of conflicts between federal and state law. *Kleppe v. New Mexico*, 426 US 529 (1976) (“Congress has the power to enact legislation respecting [federal] lands under the Property Clause [and] such legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const. Art. VI, cl.2.”.)

The OWRD argues that it has acted consistently with its own rules, which were adopted pursuant to and consistent with the statutory requirements of ORS 197.180. Agencies may comply with the compliance and compatibility requirements of ORS 197.180(1) by adopting and implementing a state agency coordination program that is consistent with ORS 197.180(1) that is certified by the Department of Land Conservation and Development (“DLCD”) under ORS 197.180(4), (5), and (6). DLCD certified the Department’s State Agency Coordination Program (“SAC”) on December 20, 1990. The SAC program consists of a guidance document, Land Use Planning Procedures Guide, and administrative rules set forth in OAR chapter 690, division 5. These rules provide that where the subject activity affects federal agencies, the Department shall take actions “described in its [Guide].” OAR 690-005-0055. For land use coordination with federal agencies, the Guide, in Section IV, provides that “[a]pplications for water uses on federally owned lands are not subject to land use information requirements as are other applications.”

Because the Department’s rules for compliance with local land use planning exempt federally owned lands from further land use coordination, we find for the Department on this issue.

Issue B.10 – The Proposed Use, As Conditioned, Complies with OAR Chapter 690, Division 33.

OAR 690-033-0330 provides in pertinent part as follows:

Review of Proposed Water Use

(1) If the Department concludes during the initial review that a proposed water use will occur in an area that may affect the habitat of sensitive, threatened or endangered fish species, the Department shall:

- (a) Notify the applicant that based on a preliminary determination, the proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied.
- (b) Notify the interagency review team that an application has been received in an area that may affect the habitat of sensitive, threatened or endangered fish species.

(2) The interagency review team shall be convened, as needed, to review applications which the Department determines may affect sensitive, threatened or endangered fish species. Participating agencies may also request interagency review of specific applications. When reviewing applications, the interagency review team shall apply the following standards:

(c) In areas of the state outside of the Columbia Basin where threatened and endangered fish species are located, no loss of essential habitat as defined in OAR 635-415-0005(4).

(3) The interagency review team, whenever possible, will recommend conditions to the application necessary to achieve the standards listed in OAR 690-033-0330(2)(a) and (b).

(4) If the interagency review team cannot identify conditions that meet the standards listed in OAR 690-033-0330(2)(a) and (b), the interagency review team shall recommend denial of the application unless it concludes that the proposed use would not harm the species.

In this case, OWRD concluded that the application could affect the habitat of sensitive, threatened or endangered fish species and therefore consulted the interagency review team, composed of the ODFW, the Oregon Department of Agriculture, and the Oregon Department of Environmental Quality (“DEQ”). Upon review of the application ODFW and DEQ provided comments to the OWRD regarding conditions for the water right to assure that the proposed use did not result in a net loss of essential habitat for sensitive, threatened or endangered fish species.

ODFW’s concerns regarding application S 84222 raised concerns regarding net loss of essential habitat for redband trout, an Oregon state sensitive listed fish species. ODFW comments indicated that the proposed use could affect the spawning, incubation and rearing stages of redband trout as well as passage and habitat values. ODFW was also concerned that diversion of winter flows for the purposes of this use could diminish the morphological benefits of these peak flows. ODFW’s concerns regarding fish passage were twofold and based on concerns of allowing passage for native redband trout, and preventing passage of invasive carp species that have caused declines in the productivity of habitat for water-dependent bird species. The record reflects that ODFW and OWRD worked together to fashion permit conditions to address each of these concerns and that the use as conditioned will ensure no net loss of habitat for redband trout as well as ensure proper fish screening and passage.

DEQ also commented on application S 84222 as the Donner und Blitzen River is listed as “water quality limited” pursuant to the Clean Water Act’s 303(d) list for temperature during the summer and possibly early fall months. Although DEQ did not know whether or not water quality standards would be violated as a result of both the withdrawal and the return flows from the resulting irrigation, DEQ recommended that the

permit for S 84222 contain a requirement that the “permit holder establish and implement a water quality monitoring plan to determine water quality impacts from the withdrawal and return flows.” (OWRD Ex. 1, pg. 320.) In response to DEQ’s concerns, the OWRD has conditioned the permit to provide that within one year of permit issuance, the permittee shall develop and submit a Water Quality Monitoring Plan that will then be approved by OWRD in conjunction with DEQ.

Because OWRD has submitted this application to the interagency review provided in OAR 690-033-0030 and has conditioned the permit to protect the public interest in fishery resources, the proposed use as conditioned in the permit complies with the requirements of OAR 690-033-0330.

Issue B.11 – The Proposed Use is Consistent with the Malheur Lake Basin Program Rules.

The Malheur Lake Basin Program rules provide that the Department shall not accept an application or issue a permit for any surface water use unless “the applicant shows, by a preponderance of evidence, that unappropriated water is available to supply the proposed use at the times and in the amounts requested.” OAR 690-512-0040. The water availability evidence in turn, must be “prepared by a qualified hydrologist or other water resources specialist and shall include:

- (a) Streamflow measurements or gage records from the source or, for use of groundwater, the stream in hydraulic connection with the source; or
- (b) An estimate of water availability from the source or, for use of groundwater, the stream in hydraulic connection with the source which includes correlations with streamflow measurements or gage records on other, similar streams and considers current demands for water affecting the streamflows.

OAR 690-512-0040(1)

Because of the basin program rule for the area of the proposed use, OWRD required the applicant to submit evidence to establish that water was available for the proposed use per the basin plan rule. Accordingly, applicant submitted to OWRD a water availability analysis prepared by a qualified hydrologist. This analysis, which used actual gage flow records as well as derived statistical relationships between stream flows for the Donner und Blitzen River and various tributaries established that water in the amount requested is available for the proposed use, albeit not for each month of the requested use and perhaps not every year. OWRD reviewed the evidence presented to it and concluded that for the purposes of OAR 690-512-0040, applicant had established water availability and hence compliance with the Malheur Lake Basin Program rules

Protestants assert that water is not available for the proposed use on a regular basis if at all. However, such requirement of continual availability as protestants assert is not provided in the basin program rule and nothing in the record rebuts the evidence submitted by the applicant for the purposes of illustrating compliance with OAR 690-512-0040. Though the full 820 cfs may represent a peak flow with a less than annual recurrence, applicant has established that use of any water up to 820 cfs will be beneficially used for the purposes described in the application. Accordingly, the proposed use is consistent with the Malheur Lake Basin Program.

Issue B.12 – The Proposed Use is a Permissible Beneficial Use

Protestant Water for Life argues that “wildlife refuge management” is not a beneficial use because this use is not enumerated in the Department’s statutes and rules as a beneficial use. (WFL Protest at 6.) We agree with the Department that whether or not a use is enumerated by statute or rule is not determinative of whether a use is beneficial. The lists of beneficial uses are not exclusive and “wildlife refuge management” satisfies the criteria for beneficial use. (OWRD Brief at 9.)

“Beneficial 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 for a purpose that is consistent with the laws, rules and best interests of the people of the state. *Id.*

Water for Life argues that “wildlife refuge management” is not a beneficial use because it “incorporates an unlimited number of other unspecified uses.” (WFL Brief at 4.) We agree with the Department that this use does not incorporate unspecified uses.³ The applicant itself recognizes that the use is limited as specified in the PFO. (USFWS Brief at 10.) Wildlife refuge management is a beneficial use because the use is reasonably efficient and consistent with the laws, rules and best interest of the people of the state and is not otherwise prohibited by statute or rule. OAR 690-300-0010(5).

Water for Life argues that the use is not beneficial because it does not comply with the Malheur Lake Basin Program Plan because there is no water available. (WFL Brief at 5.) We agree with the Department that the issue of availability of water is distinct from the issue of whether a use is beneficial and that the proposed use is not prohibited by the Malheur Lake Basin Plan.

³ The draft permit for application S 8422 provides that the “purpose or use” of the water is for “wildlife refuge management which may include wildlife uses, aquatic life, wetland enhancement, riparian area enhancement, fire protection, irrigation use, stock watering, recreation use, construction, flood control, reservoir maintenance, and dust control.” (OWRD Brief, Ex. A.)

Issue B.15. – The Proposed Use Does Not Include Storage

As provided in finding of facts 2, 6 and 7, the application does not include provisions to store water. The application does include provision for areas of standing water, but the uses associated with this standing water are distinct from a storage use, in that the water is intended for the propagation of vegetation within the areas of standing water, rather than for storage of water for future beneficial use. .

Issue C – The Proposed Use is not Required to be Consistent with the Donner und Blitzen River Decree

Protestants Harney County and Water for Life argue that the PFO is inconsistent with the decree determining the relative rights of claimants on the Donner und Blitzen River issued by the circuit court in Burns, Oregon, on January 8, 1942. (Donner und Blitzen Decree.) The decree specifies the relative rights of the parties to the decree and is binding on the parties and the water rights adjudicated thereunder. ORS 539.200. The decree also specifies the months in which the irrigation rights under the decree may be exercised, and specifies the duty for these irrigation rights.

The OWRD argued that the use proposed by S 84222 does not, as a matter of law, have to be consistent with the Donner und Blitzen decree. We agree. An order issuing a new water right on the Donner und Blitzen has no legal effect on the rights established by the Donner und Blitzen Decree or on the decree itself. ORS 539.200. The Department does not dispute that a decree is *res judicata* as to the claims, the parties, and their successors in the decree adjudication. However, the principle does not extend to bind future water right applications.

The Oregon Supreme Court has specifically held that adjudication decrees are not binding on rights that did not exist at the time of the decree:

A [water right adjudication] decree is not and cannot be considered as operating as an estoppel as to facts which did not occur or rights which did not accrue until after the particular judgment was rendered and which were not involved in the suit in which it was rendered. A decree is not conclusive upon any point or question which from the nature of the case, the form of the action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered; nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court.

Masterson v. Pacific Live Stock Co., 144 Or 396, 404 (1933).

We agree with the Department that the Donner und Blitzen Decree was limited in application to the water rights recognized therein. (OWRD Reply, Exhibit C at 6.) The court did not purport to establish a distribution law or

conditions of general applicability to all future water rights. Rather, it specifically confined its determination to the claims under review. Likewise, while ORS 539.200 provides that adjudication determinations “shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream,” it does not bind or determine the conditions of all future water rights determinations by parties to the decree. As the court recognized, future water rights are not within the subject matter of an adjudication.

Finally, OAR 690-250-0070(1) does not make the decree binding on this water right. Rather, the rule simply provides a default season of use “[w]henver the dates or times of the year within which an irrigation right may be exercised are not specified in decree, permit, certificate, order or basin program.” OAR 690-250-0070(1). Here, the permit specifies the times of the year in which the irrigation right may be exercised and the rule is inapplicable.

Issue D – The Proposed Use May be Approved Prior to Applicant Entering Into Formal Consultation and Formal Conference under the Endangered Species Act and Before Performing a Compatibility Analysis under the National Wildlife Refuge Administration Act.

Water for Life argues that if the OWRD issues a water right “when it is doubtful” that the use is “authorized under federal law,” it is allowing a use that is “wasteful and unreasonable” and thus a use that will impair or be detrimental to the public interest pursuant to ORS 537.153 . Protestant asserts that allowing such use is analogous to granting an applicant a permit absent proof that applicant has obtained an easement or written authorization permitting access to non-owned land crossed by the proposed ditch, canal or other work pursuant to ORS 537.211.

We agree with the Department that the analogy is inapt. ORS 537.211 is a state statute that addresses obtaining easements for lands that may be accessed but not owned by a water right applicant. Consultation under the Endangered Species Act (“ESA”) or compliance with the National Wildlife Refuge Administration Act (“NWRAA”) are matters of federal law. Nothing in OWRD’s water right permitting statutes or rules requires that the OWRD deny or hold water right applications pending federal consultation under ESA or compliance with NWRAA. Nor have protestants provided any other authority for such requirement. Accordingly, the proposed use may be approved prior to the applicant entering into formal consultation and a formal conference under the ESA or prior to performing a compatibility analysis under the NWRAA.

Issue E – The Approval of Application S 84222 Will Not Result in A Federal Reserved Water Right.

Protestant HCSWCD argues that the approval of application S 84222 will result in a federal reserved water right. (HCSWCD Protest.) Although Protestant Water for Life

did not raise this issue in its protest and cannot raise it as its own issue now,⁴ Water for Life argued in the course of briefing and in its exceptions that the state water right permit to USFWS will result in a federal reserved water right. (Water for Life Brief at 10; Exceptions at 10.)

A federal reserved water right stems from an act of the federal government. The seminal reserved water right case is *Winters v. United States*, 207 US 564 (1908). There, the Court ruled that when the federal government reserves a part of the public domain (in that case the Fork Belknap Indian Reservation) for a particular purpose, it impliedly also reserves sufficient unappropriated water to fulfill the purposes of the reservation. *See also Cappaert v. United States*, 426 US 128 (1976)(explaining and applying federal reserved water right doctrine.)

In contrast to a federal reserved water right, a water right acquired by the federal government through the state is acquired through state, not federal law. A federal reserved water right stems from a federal act reserving public lands or waters. A federal agency acquiring a water right through a state appropriation system results only in the federal government holding a state water right.

Water for Life argues that by “allowing applicant to define [the] beneficial use as unlimited,” the Department has relinquished its ability to regulate the use of this water, resulting in an “abrogation of state sovereignty” and a *de facto* federal reserved water right. (WFL Brief at 10.) We agree with the Department that the terms of the permit will not abrogate any of the state’s sovereignty. The use is not “unlimited” as evidenced by the lengthy permit conditions determining the allowed use of the water. Further, failure of the permit holder to comply with the terms of the permit could result in the state’s cancellation of the permit. ORS 537.260.

Issue F – The Non- Use of Current Water Rights and the Question of Whether Those Acres Subject to Non Use Should be Forfeited is Irrelevant to These Proceedings

Protestant HCSWCD raised the issue of whether there is non-use of current water rights, and if so, whether it should be required that acres subject to non-use be forfeited. As a preliminary matter, the OWRD and USFWS assert that this issue is irrelevant to this proceeding. HSWCD asserts in its brief that this issue is related to beneficial uses as “the Refuge is not using its existing water rights to the full allocation.” (HSWCD Brief at 1.) The Department replies by arguing that the question of whether existing water rights have been forfeited is distinct from the question of whether a new water right should be issued. This proceeding concerns an application for a new water use permit, which is reviewed to determine whether the proposed use will impair or be detrimental to the public interest. ORS 537.153. The application review process includes consideration of

⁴ ORS 537.170(5) provides that each person submitting a protest must raise “all reasonably ascertainable issues and submit all reasonably available arguments” by the close of the protest period or those issues will be precluded from judicial review. Water for Life did not raise the issue of whether the proposed use created a “de facto” federal reserved water right and accordingly, Water for Life cannot obtain judicial review on this issue.

water availability, injury to existing water rights, and impairment of the public interest. We agree with applicant and the Department that considerations of the status of existing water rights held by applicant are inapplicable to this inquiry.

B. Exceptions

Protestant Water for Life Exceptions

Exception 1: 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.)

Commission Determination: 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. This Final Order reflects 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 is allowed.*

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

Commission Determination: This Final Order reflects correction in all references to Vera Dunbar. *This exception is allowed.*

Exception 3: WFL’s client’s name is Susan Hammond, not Suzi as reflected in the Proposed Order at pg. 1. (WFL Exceptions pg. 1.)

Commission Determination: This Final Order reflects correction in all references to Suzi Hammond. *This exception is allowed.*

Exception 4: WFL’s affiant’s name is Stacey Davies, not Sacey Davis as reflected in the Proposed Order at pg. 2.

Commission Determination: This Final Order reflects correction in all references to Sacey Davis. *This exception is allowed.*

Exception 5: 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.)

Commission Determination: This Final Order reflects that the contested case hearing was held in this matter on April 30, 2002. *This exception is allowed.*

Exception 6: 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.)

Commission Determination: This Final Order reflects that the record of the cross-examination hearing consists of audiotapes. *This exception is allowed.*

Exception 7: 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.

Commission Determination: 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. This Final Order adopts the analysis and conclusions on this issue as provided in the Proposed Order. *This exception is denied.*

Exception 8: WFL requests that thirteen findings of fact be added to the Final Order. (WFL Exceptions, pgs. 2 – 4.)

Commission Determination: While the findings as WFL presents them may articulate evidence presented by WFL in the course of these proceedings, other evidence in the record outweigh the evidence and testimony presented by WFL. As such, this Final Order reflects the ultimate findings of fact that support the conclusions of law and discussion in the Final Order. *This exception is denied.*

Exception 9: 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.)

Commission Determination: 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 Proposed Order and Ruling on Legal Issues made the correct finding as to the permissibility and status of these permit conditions. *This exception is denied.*

Exception 10: 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.)

Commission Determination: 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 are adopted in this Final Order. *This exception is denied.*

Exception 11: 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.

Commission Determination: 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. This Final Order incorporates the conclusions made in the Order on Legal Issues and Proposed Order. *This exception is denied.*

Exception 12: 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.)

Commission Determination: 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 only a brief discussion of the evidence and the reasoning behind the final conclusion. This Final Order while adopting the findings in the Proposed Order, includes a more complete discussion of the evidence in the record. Moreover, the Settlement Agreement between USFWS, Harney County and OWRD and subsequent modifications to Application S 84222 provides an opportunity for additional, future water appropriation in the Donner und Blitzen subbasin of the Malheur Lake Basin. *This exception is denied.*

Exception 13: 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.)

Commission Determination: 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. This Final Order incorporates the Order on Legal Issues and the Proposed Order. *This exception is denied.*

Exception 14: 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.)

Commission Determination: The findings of fact accurately depict that the use of this water is neither for storage for future beneficial use 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.

This Final Order and permit incorporates the Order on Legal Issues and Proposed Order.

In addition, WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). *This exception is denied.*

Exception 15: 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.)

Commission Determination: The relative rights of claimants on the Donner und Blitzen River was issued by the circuit court in Burns, Oregon, on January 8, 1942. (Donner und Blitzen Decree.) The decree specifies the relative rights of the parties to the decree and is binding on the parties and the water rights adjudicated thereunder. ORS 539.200. The decree also specifies the months in which the irrigation rights under the decree may be exercised, and specifies the duty for these irrigation rights.

An order issuing a new water right on the Donner und Blitzen has no legal effect on the rights established by the Donner und Blitzen Decree or on the decree itself. ORS 539.200. The Department does not dispute that a decree is *res judicata* as to the claims, the parties, and their successors in the decree adjudication. However, the principle does not extend to bind future water right applications.

The Oregon Supreme Court has specifically held that adjudication decrees are not binding on rights that did not exist at the time of the decree:

A [water right adjudication] decree is not and cannot be considered as operating as an estoppel as to facts which did not occur or rights which did not accrue until after the particular judgment was rendered and which were not involved in the suit in which it was rendered. A decree is not conclusive upon any point or question which from the nature of the case, the form of the action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered; nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court.

Masterson v. Pacific Live Stock Co., 144 Or 396, 404 (1933).

The Donner und Blitzen Decree was limited in application to the water rights recognized therein. The court did not purport to establish a distribution law or conditions of general applicability to all future water rights. Rather, it specifically confined its determination to the claims under review. Likewise, while ORS 539.200 provides that adjudication determinations “shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream,” it does not bind or determine the conditions of all future water rights determinations by parties to the decree. As the court recognized, future water rights are not within the subject matter of an adjudication.

Finally, OAR 690-250-0070(1) does not make the decree binding on this water right. Rather, the rule simply provides a default season of use “[w]henver the dates or times of the year within which an irrigation right may be exercised are not specified in decree, permit, certificate, order or basin program.” OAR 690-250-0070(1). Here, the permit specifies the times of the year in which the irrigation right may be exercised and the rule is inapplicable.

WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). *This exception is denied.*

Exception 16: 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.) WaterWatch of Oregon provided a reply to WFL’s exception.

Commission Determination: 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. This Final Order incorporates the findings of the Order on Legal Issues and the Proposed Order.

In addition, WFL did not raise this issue in its protest and so is precluded from judicial review of this issue. ORS 537.170(5). *This exception is denied.*

Exception 17: 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.)

Commission Determination: 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 this Final Order. 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 reflect the stipulations between the USFWS, WaterWatch of Oregon, and ODFW which address concerns regarding the effectiveness of the bypass flow condition. *This exception is denied.*

C. Resolution

To defeat the Proposed Final Order, the record must show that the proposed use would impair or be detrimental to the public interest. With regard to those issues of fact for hearing (A.1., A.2., B.1., B.4., B.5., B.6., B.10., B.11., and B. 15) the evidence presented by the protestants was insufficient to rebut the Department’s determination that the proposed use will not impair or be detrimental to the public interest. In the alternative, the parties raising the issues stipulated to conditions that addressed their concerns and simultaneously withdrew their issue. With regard to those issues that were determined on briefing (B.2., B.3., B.8., B.12., B.14., C., D., E and F) these matters have been determined against protestants as a matter of law.

IX. DETERMINATION OF THE PUBLIC INTEREST

Because water is not available (as defined by OAR 690-300-0010(57)) for the proposed use, the Department has not established the public interest presumption described in ORS 537.153, but has made findings that the proposed use will not impair or be detrimental to the public interest. Because the presumption was not established, it is overcome. ORS 537.153(2) (providing that the public interest presumption is a rebuttable presumption that may be overcome by a preponderance of the evidence that “one or more of the criteria for establishing the presumption are not satisfied.”)

ORS 537.170(8) provides that if the presumption of the public interest is overcome, then “before issuing a final order, the director, or commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified would impair or be detrimental to the public interest by considering” the factors listed in the statute. These factors include:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- (f) All vested and inchoate rights to the waters of this state or the use of the waters of this state, and the means necessary to protect such rights.
- (g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

A. Analysis of Factors in ORS 537.170(8).

A. Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes,

navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.

In determining the “highest use of the water for all purposes” we have examined the public importance of the Malheur National Wildlife Refuge and have considered the importance of water use to this Refuge. First, it is clear that the Refuge provides an important ecological benefit on a national and even global scale as it provides resting and feeding grounds to migrating birds and breeding ground to several bird species that are considered endangered in other states. It is also clear that the Refuge provides other benefits including public recreation (bird and wildlife viewing, waterfowl hunting and recreational fishing). Its scenic attraction is a part of these recreational uses. The irrigation of wetland grasses and meadows to provide feeding grounds for the bird species on the Refuge is incumbent to the success of the Refuge in fulfilling its purposes.

In the course of these proceedings, Water for Life has argued not so much against these benefits as it has for a different allocation of the water (for unspecified future storage purposes) that would result in economic benefits that they assert would accrue as a result of increased unspecified economic opportunities. Notwithstanding these assertions, there is no evidence in the record that supports a determination of specifically which storage projects are currently planned by Harney County that would be affected by this use nor is there any evidence supporting a finding of what economic benefits these storage projects would yield to Harney County. However, USFWS has agreed to modify application S 84222 to ensure there are opportunities for future allocations of water in the Donner und Blitzen subbasin. These stipulations are part of the USFWS, Harney County, OWRD Settlement Agreement.

We agree with USFWS and OWRD that the proposed use provides recreation, game fishing and wildlife and scenic attraction to the residents and visitors to Harney County. Although testimony reflects that some residents of Harney County believe otherwise it cannot be concluded that such assertions reflect the larger public interest that is served by the Refuge.

B. The maximum economic development of the waters involved.

The applicant and the OWRD take the position that there are many public recreational- and scenic attraction-type benefits that accrue from operation of the Malheur National Wildlife Refuge such as wildlife viewing, bird watching, waterfowl hunting, and recreational fishing. Economic activity on the Refuge includes haying and rake-bunch-haying that yields approximately \$280,000 a year. In addition, the USFWS estimates that recreational activities such as wildlife/bird viewing, waterfowl hunting and recreational fishing total approximately \$3.6 million dollars a year. The revenue generated by these recreational and tourist activities benefit Harney County.

Water for Life argues that unspecified economic benefits would accrue by denying this right and thereby allowing opportunities for future storage in the Blitzen Valley. This may be, but Water for Life presented no evidence of future

storage projects beyond speculation by witnesses who expressed general opinions but presented no estimates as to economic value that these speculative uses would provide.

In the face of the evidence, speculative future interests can not outweigh a present and quantified economic benefit. A calculus that yielded such result would give no accord to a present interest that is accompanied by economic evidence that defines immediate public benefits. Accordingly, the proposed use represents the maximum economic development of the waters USFWS seeks to appropriate. Again, notwithstanding the record, USFWS has agreed to modify application S 84222 to ensure there are opportunities for future allocations of water in the Donner und Blitzen subbasin. These stipulations are part of the USFWS, Harney County, OWRD Settlement Agreement.

C. The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.

In its protest, Water for Life asserted that the Refuge's management of the Sodhouse Dam resulted in flooding of 120 acres during spring runoff in 1997. Notwithstanding this assertion, no evidence was provided to support this unsworn statement. Rather, evidence in the record indicates that the Refuge's management of the spring runoff will result in less flooding of adjacent lands.

D. The amount of waters available for appropriation for beneficial use.

By the OWRD's own admission, water is not available (as defined in OAR 690-300-0010(57)) for the proposed use because unappropriated water at an 80% exceedence level is not available for all months of the proposed season of use. For this reason, OWRD determined that the public interest presumption for this use could not be established. Accordingly, it processed the application pursuant to OAR 690-310-0120(2)(b) and made the finding in the Proposed Final Order that the proposed use as conditioned would not impair or be detrimental to the public interest.

Notwithstanding that water is not available for the proposed use at an 80% exceedence level for all months requested by USFWS, the OWRD may allow some additional use where the public interest in the use is high and the use is conditioned to protect instream values. OAR 690-410-0070(2)(a). Accordingly, OWRD requested information from the USFWS showing that the application meets the requirements of the rule. Applicant supplied this additional information and the Department issued a Proposed Final Order finding that the proposed use meets the requirements of OAR 690-410-0070(2)(a). This determination was challenged but un rebutted during the course of the contested case hearing.

Water for Life and Harney County contend that the 820.0 cfs requested is never present in the Donner und Blitzen River. Yet, the evidence indicates to the contrary.

Further, as required in the basin program rule for the Malheur Lake Basin, USFWS has provided studies by a qualified hydrologist that show based on gage flow records and statistical analysis, that water is present in the amounts requested during peak events on the Donner und Blitzen River. Such peak events are by their nature short-lived and are not sought nor expected for each month requested. Accordingly, the amount requested is not consistently available but is available at least annually. The assessment that this water is not consistently available, however, does not preclude the beneficial use of such water as is available. Nor does the fact that the water is not consistently available for each month requested lead to the conclusion that the proposed use is inconsistent with OAR 690-512-0040.

In conclusion, water is not available at an 80% exceedence level, but the use may be allowed per the exception provided in OAR 690-410-0070(2)(a). And, although water is not consistently present in the amounts proposed, this fact does not compromise applicant's ability to comply with the basin program rules provided at OAR 690-512-0040.

E. The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

In its protest, Water for Life argued that “to appropriate water from a basin that all parties admit is overappropriated is patently wasteful and unreasonable.” (Water for Life Protest at pg. 8.) During the course of this proceeding, however, it has been established that water is available during portions of the season of use to fulfill the needs of the Refuge and that amounts less than the full requested amount would still serve a beneficial purpose. As such, allowing the use is not unreasonable. It has also been established that the use will be monitored closely and that regulation of the use for waste, or any other violations of permit conditions, is facilitated by accurate and detailed maps, access to gage flow records and to the Refuge itself.

F. All vested and inchoate rights to the waters of this state or the use of the waters of this state, and the means necessary to protect such rights.

All vested rights to the water of this basin have been examined in the course of determining whether this use will injure such rights. As discussed above, the proposed use will not injure existing water rights. Harney County has argued throughout these proceedings that the proposed use will upset existing water distribution in the Diamond tributaries (Kiger and Cucamonga Creeks) and that the proposed use is therefore inconsistent with the Donner und Blitzen decree. As provided in the discussion above regarding this issue, the proposed use is not inconsistent with the decree, nor will existing senior rights be regulated in favor of this junior use.

G. The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

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The proposed use is consistent with the water resources policy formulated under ORS 536.295 to 536.350 in that it is consistent with the Malheur Lake Basin program rules that were formulated according to the policies set in ORS 536.295 to 536.350. ORS 537.505 to 537.534 that relate to management of groundwater are inapplicable in this circumstance.

B. Resolution

The criteria for establishing the presumption under ORS 537.153(2) are not satisfied. Nonetheless, protestants have failed to rebut the findings of the OWRD that, considering the factors of ORS 537.170(8), the proposed use will not impair or be detrimental to the public interest.

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X. ORDER

The protests by Harney County, Harney County Soil and Water Conservation District, Water for Life and WaterWatch of Oregon to application S 84222 are **DENIED**.

Application S 84222 is **APPROVED** as conditioned in the draft permit attached to this final order, and a permit substantially similar to the attached draft permit shall be issued.

DATED this _____ day of January, 2005.

Dan Thorndike, Chair
Oregon Water Resources Commission

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this order. The date of service is the date on which the order is delivered or mailed. Judicial review, pursuant to the provisions of ORS 536.075, is to the Court of Appeals.