

TO: Water Resources Commission

FROM: Paul R. Cleary, Director
Oregon Water Resources Department

SUBJECT: Water Resources Commission Meeting
Agenda Item E, June 7, 2002

Consideration of Exceptions and Issuance of Final Order on Water Right Application IS 70606 in the Name of the Oregon Department of Fish and Wildlife

I. Issue Statement

The Commission is asked to consider exceptions filed by WaterWatch of Oregon, the Oregon Department of Fish and Wildlife (“ODFW”), and protestant William R. McCormack in a contested case proceeding on water right application IS 70606. Application IS 70606 requests an instream water for Bear Creek, which is a tributary of the Crooked River in Crook County.

II. Background

On August 29, 1990, ODFW submitted application IS 70606 to the Oregon Water Resources Department (“OWRD”) requesting the following amounts of water (in cubic feet per second or “cfs”) for Bear Creek:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
10	10/15	25	25	25	18	10	10	10	10	10	10

The reach of the stream identified for IS 70606 is from the confluence of Little Bear Creek, river mile 9, downstream to the mouth, river mile 0. The mouth of Bear Creek empties into Prineville Reservoir. The entire reach is outside of the Deschutes Study Area, which is currently the subject of rulemaking.

Due to the backlog of water right applications, application IS 70606 was not processed for five years. In 1995, the legislature passed Senate Bill 674, which amended the procedural and substantive law by which OWRD processes applications for water use permits. The changes in the law apply to application IS 70606, and it was processed under the provisions of ORS 537.130 *et seq.*, as amended by Senate Bill 674.

Thus, on December 12, 1995, OWRD performed an Initial Review of application IS 70606; and on August 27, 1996, issued a Proposed Final Order (“PFO”) for the following amounts (cfs) of water:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.11	8.94	20.5	20.0	11.8	6.33	1.98	0.88	0.91	0.94	0.94	2.44

The PFO limited the instream water right to the estimated average natural flow of Bear Creek in accordance with Commission rules. OAR 690-077-0015(3). The “estimated average natural flow” of Bear Creek reflects the amount of water that is in Bear Creek 50% of the time, without any appropriations. The public uses identified in application IS 70606 are “migration, spawning, egg incubation, fry emergence, and juvenile rearing” of fish. Approval of this application means that no water will be available for any future storage appropriation from Bear Creek.

On October 8, 1996, McCormack and Sons Ranch filed a protest to application IS 70606. As background, there are several water rights on waters upstream from the reach described in IS 70606, some of which are held by Mr. McCormack. All of the water rights, including those for Antelope Flats Reservoir, Klootcham Reservoir, and Bear Creek Reservoir are senior to the tentative priority date in application IS 70606.

Parties to the proceeding include the applicant, ODFW, the protestant William R. McCormack, and intervenor WaterWatch of Oregon. WRD staff also participated in the hearing.

III. The Contested Case Proceeding

Oregon law requires that a protest to a water right application raise every reasonably ascertainable issue before the close of the applicable protest period. ORS 537.170(5). If a protestant does not raise an issue in its protest, then the protestant may not raise that issue at a later date unless new facts arise after the close of the protest period such that the issue could not reasonably have been ascertained before the close of the protest period.

Over the protestant’s objection, the hearing officer determined that the only issues properly in the case were those the protestant had raised in his protest, and those that could not reasonably have been ascertained before the close of the protest period. Those issues included the following:

1. Whether the rebuttable presumption that the proposed use will not impair or be detrimental to the public interest has been overcome by a preponderance of the evidence that one or more of the criteria for establishing the presumption under ORS 537.153 are not satisfied, or whether the proposed use would impair or be detrimental to the public interest, considering the following issues:
 - a. Whether the stream flows for the proposed use exceed the available water.
 - b. Whether potential future uses of water should be taken into account by the Oregon Water Resources Department in processing a water right application pursuant to ORS 537.153.
2. Whether the application should be denied because the listing status of the redband trout has changed.
3. Whether people who purchased property in the subject stream area after application IS 70606 was noticed were entitled to notice of this contested case proceeding and whether their interests are harmed.
4. Whether ODFW failed to provide timely notice to all presently interested parties.
5. Whether ODFW failed to notify proper parties.
6. Whether OWRD failed to follow statutory requirements for processing the application in a timely fashion by not meeting a statutory deadline for issuance of a final order.

After various motions for rulings on legal issues, the hearing officer concluded that no evidentiary proceeding was necessary because the protest failed as a matter of law. The hearing officer concluded:

1. No statutory or constitutional provision required notice beyond that which was provided in this case.
2. State law does not provide a remedy to a protestant for a delay in issuing a final order on a water right application. The only remedy belongs to the applicant – in this case, ODFW. Under ORS 537.175(4), if OWRD fails to schedule a contested case hearing on an application for a water right within 180 days after OWRD begins processing the application, the applicant “may apply in the Circuit Court of Marion County for a writ of mandamus to compel” OWRD to issue a final order or schedule a contested case hearing.

3. Instream water rights are intended to maintain and support public uses such as maintenance and enhancement of aquatic and fish life, regardless of whether species listed under the Endangered Species Act inhabit the reach in question. Even if there has been a change in status for the redband trout, the listing status of redband trout is not legally material to the claimed public uses for this instream water right.

4. The public interest issues in the case are limited to those that the hearing officer determined were timely raised. Those issues include whether water is available and whether OWRD is required to consider potential future uses of water in the Oregon scheme of appropriation, absent a reservation of record. Under Commission rules, an instream water right ("ISWR") application may be granted as consistent with the public interest up to the level of the estimated average natural flow. OAR 690-077-0015(2) & (3). The PFO for application IS 70606 appropriately proposed to establish the ISWR at the estimated average natural flow of Bear Creek.

Regarding consideration of potential future water uses, the hearing officer concluded that, absent a reservation of record, potential future uses of water are not properly considered in deciding whether to approve an instream water right application.

The hearing officer's Proposed Order recommended that IS 70606 be approved with the conditions stated in the PFO. The hearing officer's Proposed Order is in Attachment A.

IV. Exceptions to the Order on Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues and Proposed Order

The Hearing Officer's Proposed Order, dated April 15, 2002, is in Attachment A. Exceptions were filed by protestant William R. McCormack (Attachment B) and by WaterWatch and ODFW jointly (Attachment C). The other orders to which exceptions were filed appear in Attachment D (Order on Cross Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues, dated March 4, 2002), and Attachment E (Order on Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues, dated January 14, 2002).

A. Protestant's Exceptions on Substantive Issues

Protestant's Exception 1: *The application is based on an outdated assumption regarding the redband trout and should be denied for that reason.*

Department Response: Protestant argues that the listing status of the fish that ODFW seeks to protect with application IS 70606 determines whether there is a valid public use associated with the instream water right. However, the public uses of an instream water right applied for by ODFW include water for aquatic and fish life and wildlife habitat. Neither the statute nor the rules provide that if the status of a species changes, the public use of the instream water right is voided. Protestant also claims the hearing officer

ignored the second element of his argument on this point which was that ODFW never established a public use or beneficial use in support of its application. The hearing officer did not ignore this argument, it was specifically excluded as an issue in the case because protestant failed to raise it in a timely manner. (Order on Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues, January 14, 2002) (*See also* Department's Response to protestant's Exceptions 7, 9-11, and 14 below.) This exception should be denied.

Protestant's Exception 6: *When the statutory presumption of ORS 537.153 has not been established, "the requirements of ORS 537.170 must be met."*

Department Response: Protestant argues that, notwithstanding the "raise it or waive it" provision of ORS 537.170(5), he is entitled to raise any issue that relates to the public interest factors listed under ORS 537.170(8) in any case in which the public interest presumption has not been established. The hearing officer properly allowed protestant to argue only those public interest factors that were timely raised or not reasonably ascertainable when the protest was filed (*See* Exceptions 1 and 16). This exception should be denied.

Protestant's Exception 7: *Bear Creek is not a waterway in which in-stream rights may be granted because it is not a natural waterway.*

Protestant's Exception 9: *ODFW has not complied with stored water requirements of ORS 537.336(4).*

Protestant's Exception 10: *ODFW's application for a water right does not serve a beneficial use and should be denied.*

Protestant's Exception 11: *The application should be denied because recreational uses could be negatively impacted by this application, harming existing beneficial uses.*

Protestant's Exception 14: *OWRD acted in an arbitrary and capricious manner because it proposed approving application IS 70606.*

Department Response: Protestant did not raise these issues in his protest. Under ORS 537.170(5), the issues were properly precluded. Exceptions 7, 9, 10, 11 and 14 should be denied.

Protestant's Exception 15: *Stream flows for the proposed use exceed the available water.*

Department Response: Under Commission rules, an instream water right application may be granted as consistent with the public interest up to the level of the estimated average natural flow. OAR 690-077-0015(2) & (3). That is the level at which the application is proposed to be approved. This exception should be denied.

Protestant's Exception 16: *Future potential uses of water should be taken into account by the Oregon Water Resources Department in processing this water right application.*

Department Response: Protestant has no applications pending and has failed to claim or identify any specific future potential uses that should affect the decision whether this application meets the public interest criteria. Consequently, the Department concurs that future potential uses would not constrain approval of this application. This exception should be denied for that reason.

The hearing officer's Conclusion of Law #5 – "Potential future uses of water in the reach are not properly to be considered in deciding whether to allow an Instream Water Right" – is incorrect. (See Attachment A, p. 4). The Department of Justice advises that under ORS 537.153(2) and 537.170(8), the Department must determine in every case whether any water right application, including an instream right application, will impair or be detrimental to the public interest. In cases in which the public interest presumption is not established, the Department makes that determination taking into account a very broad range of public interest factors, which could include future demand on the requested source. Consequently, the Department recommends the changes on pgs. 5 and 7 - 8 of the Draft Final Order in Attachment F.

Protestant's Exception 17: *OWRD's characterization of the issues and OWRD's call for issues to be precluded was improper under ORS 537.170.*

Protestant's Exception 18: *All of protestant's issues raised at any point in the proceeding were properly the subject of hearing.*

Department Response: Both OWRD and the hearing officer are obligated to implement the statutes that govern water right application processing, including the "raise it or waive it" rule of ORS 537.170(5). These exceptions should be denied.

Protestant's Exception 19: *The hearing officer was incorrect in failing to rule that the application is not in the public interest.*

Department Response: The hearing officer correctly determined that application IS 70606 will not impair or be detrimental to the public interest.

B. Protestant's Procedural Exceptions

Protestant's Exception 2: *OWRD did not follow statutory requirements for processing the application in a timely fashion by: a) violating the deadline for application review, and b) violating the deadline for issuance of a proposed order.*

Department Response: The hearing officer correctly concluded that only the applicant has the right to insist on adherence to the statutory time frames. Protestant has provided no support for his assertion that such a remedy is available to him, nor has he shown any harm caused by the delay. This exception should be denied.

Protestant's Exception 3: *The extended application and protest process has violated protestant's rights.*

Department Response: Protestant argues that because the protest took six years to get to a contested case hearing, OWRD should not have been allowed to assert the "raise it or waive it" rule of ORS 537.170(5) as a defense. However, protestant has been unable to show how he has been harmed by the lapse in time, as he currently holds senior water rights and has no applications pending before OWRD. Further, the hearing officer allowed protestant to argue those issues that were not reasonably ascertainable before the end of the protest period. This exception should be denied.

Protestant's Exception 4: *The hearing officer engaged in improper actions during the contested case procedure.*

Department Response: Protestant asserts that it was improper for the hearing officer to allow opportunities for motions and oral argument in prehearing conferences. He also argues that the hearing officer "knowingly" misstated facts regarding the date of issuance of the Proposed Order.

The rules of procedure governing these hearings clearly contemplate that motions will be made during prehearing conferences. OAR 137-003-0630(1)(b). Protestant has not provided any support for his assertions about the proper scope of prehearing conferences, nor has he shown prejudice to his interests. Similarly, protestant presented no evidence to support his assertion that the hearing officer purposely misled protestant.

Protestant also argues that OWRD improperly refused to request the hearing officer to correct his order and extended the deadline for the filing of exceptions. The error that protestant takes issue with was the misstatement in the order that exceptions are due 20 days after *issuance* of the proposed order, rather than 20 days after *service* of the proposed order, as provided in rule. Protestant was not prejudiced by that error because the order was served on the same day it was issued. The exception should be denied.

Protestant's Exception 5: *The hearing officer improperly disposed of legal issues without ever clearly notifying the parties what factual issues were to be decided.*

Department Response: The hearing officer issued two orders clearly outlining the issues to be decided. In addition, two rounds of motions for ruling on legal issues provided protestant the opportunity to present both legal arguments and factual evidence to support his case. OWRD and ODFW presented affidavits asserting facts relevant to the resolution of the issues presented by the case. Although protestant had the opportunity to rebut these facts in order to show that a factual dispute remained, he did not do so. He

also had ample opportunity to ask the hearing officer to clarify the issues of fact, but he did not. Protestant's exception should be denied.

Protestant's Exception 8: *ODFW failed to provide timely notice to all presently interested parties.*

Protestant's Exception 12: *People who purchased property in the subject stream area after application IS 70606 was noticed did not receive notice of this contested case proceeding and their interests are harmed.*

Protestant's Exception 13: *The hearing officer was incorrect in failing to rule that ODFW failed to notify proper parties.*

Department Response: Protestant has been given ample opportunity, but has failed to assert any factual evidence or legal support for the argument that ODFW should continuously seek out property owners adjacent to a stream and notify any new owners of the pending application for the duration that the application is pending. This exception should be denied.

C. WaterWatch and ODFW's Exceptions

WaterWatch/ODFW Exceptions 2 through 7 and 9: *These exceptions request correction of typographical and formatting errors, and clarification of the procedural history. (Attachment C).*

Department Response: These exceptions enhance the clarity of the order and should be allowed.

WaterWatch/ODFW Exceptions 1 and 8: *These exceptions request corrections to the description of the reach covered by application IS 70606.*

Department Response: The order correctly characterizes how the reach was described in the application. However, the Department recommends incorporating the corrections to the description of the reach identified in Exceptions 1 and 8 into the certificate describing the reach for this instream water right.

V. **Director's Recommendation**

Allow ODFW/WaterWatch Exceptions 2 through 7 and 9 and direct issuance of a Final Order substantially in the form of the Draft Final Order in Attachment F.

Attachments:

- A. Hearing Officer's Proposed Order (dated April 15, 2002)
- B. Exceptions filed by protestant William R. McCormack
- C. Exceptions filed by WaterWatch and ODFW
- D. Order on Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues (dated March 4, 2002)
- E. Order on Motions and Cross Motions for Ruling on Legal Issues and Motion to Preclude Issues (dated January 14, 2002).
- F. Draft Final Order

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