



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

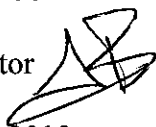
Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

MEMORANDUM

TO: Oregon Water Resources Commission

FROM: Thomas M. Byler, Director 

SUBJECT: Agenda Item A, July 13, 2019
Water Resources Commission Meeting

In the Matter of Water Right Application R-87871 in the Name of East Valley Water District: Planning for the Commission's Consideration of Anticipated Exceptions to Director's Final Order and Issuance of the Commission's Final Order

I. Introduction

In June 2019, the Director is expected to issue a Final Order in the Matter of Water Right Application R-87871 in the Name of East Valley Water District. Oregon law requires the Commission to consider any exceptions to the Director's Final Order. During this agenda item, staff will brief the Commission on the East Valley Water District application and the process, in anticipation that exceptions will be filed to the Director's Final Order.

II. Background

On February 21, 2013, East Valley Water District submitted an application to the Department for a water storage permit. The application proposed to store 12,000 acre-feet of water, primarily for irrigation, in a reservoir located on Drift Creek near Silverton. On July 22, 2014, the Department issued its Proposed Final Order (PFO) approving application R-87871 with conditions.

Joel D. Rue, Bruce P. Jaquet, Robert B. Qualey, Steve Lierman, David Doerfler, Zach Taylor, Tom and Karen Fox, and John and Sharon Fox (collectively, the Rue Protestants), and the public interest group WaterWatch of Oregon, Inc. (WaterWatch) filed protests to the PFO on September 8, 2014. The protests asserted, among other issues, that the proposed use would impair or be detrimental to the public interest under ORS 537.153(2); that the proposed use does not comply with the rules of the Water Resources Commission regarding water appropriation, instream flow protection, impacts of water storage projects, access rights, peak and ecological stream flows, the Integrated Water Resources Strategy and off-channel storage policy, and sensitive, threatened, or endangered fish species; that the proposed use will impair or be detrimental to the public interest under ORS 537.170(8); and that the PFO did not adequately address public comments opposing the project.

On November 3, 2016, the Department referred the PFO to the Office of Administrative Hearings (OAH) for a contested case hearing. An Administrative Law Judge (ALJ) with OAH conducted a two-week contested case hearing in Salem from June 18 through June 29, 2018. At the hearing, the Department, East Valley Water District, the Rue Protestants, and WaterWatch were each represented by counsel. Thousands of pages of exhibits were admitted into the record, and dozens of witnesses provided oral testimony.

The ALJ issued a 93-page Proposed Order on February 25, 2019. The ALJ's Proposed Order largely affirmed the Department's Proposed Final Order, with some recommended modifications.

III. Discussion

On March 27 and 28, 2019, East Valley Water District, the Rue Protestants, and WaterWatch each filed exceptions to the ALJ's Proposed Order. The Department is currently considering the parties' exceptions, which number more than 400 in total.

Once the Director issues a Final Order, the parties must file any exceptions within 20 days (ORS 537.173; OAR 690-002-0190). If any party files exceptions to the Director's Final Order, the Commission must consider the arguments contained in each party's exceptions. The Commission may also allow and consider oral arguments by all parties to the contested case hearing prior to issuing a Final Order. Within 60 days after the close of the exceptions period, the Commission must issue a modified Final Order, or deny the exceptions and affirm the Director's Final Order (ORS 537.173; OAR 690-002-0190).

IV. Recommendation

In light of the complexity of the issues in this case and the voluminous nature of the record, the Director recommends that the Commission form a subcommittee to review the anticipated exceptions to the Director's Final Order (OAR 690-002-0190).

Attachments:

1. Department's Proposed Final Order & Draft Permit (7/22/2014)
2. Protest of Rue Protestants (9/5/2014)
3. Protest of WaterWatch of Oregon (9/5/2014)
4. Administrative Law Judge's Proposed Order (2/25/2019)

**Oregon Water Resources Department
Water Right Services Division**

Water Rights Application
Number R-87871

Proposed Final Order

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

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- any applicable basin program
- applicable Oregon Revised Statutes (ORS), Oregon Administrative Rules (OAR), and case law
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- any applicable comprehensive plan or zoning ordinance
- recommendations by other state agencies
- the Scenic Waterway requirements of ORS 390.835
- any comments received

Findings of Fact

On February 21, 2013, East Valley Water District submitted an application to the Department for the following water use permit:

- Amount of Water: 12,000 acre feet (AF)
- Use of Water: storage for irrigation and flow augmentation
- Appropriation season: October 1 through April 30
- Source of Water: unnamed streams, tributaries of Drift Creek, and Drift Creek, tributary of Pudding River
- Area of Proposed Use: Marion County within Section 31, Township 7 South, Range 1 East, W.M.; Section 36, Township 7 South, Range 1 West, W.M.; Section 6, Township 8 South, Range 1 East, W.M.; Section 1, Township 8 South, Range 1 West, W.M.

On October 18, 2013, the Department mailed the applicant notice of its Initial Review, determining that *"The storage of 12,000 AF of water from unnamed streams, tributaries of Drift Creek, and Drift Creek, tributary of Pudding River for irrigation and flow augmentation may be allowed November 1 through April 30, contingent upon the submission of the additional required information."* The applicant did not notify the Department to stop processing the application within 14 days of that date.

On October 22, 2013, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about obtaining future notices and a copy of the Proposed Final Order.

Within 30 days of the Department's public notice, written comments were received from Steven Lierman, Lucas J. Rue, Jesse Rue, Joel D. Rue, and Cliff McGuffin, all of whom oppose approval of the application. The comments generally raised concerns about East Valley Water District's eminent domain rights, the taking of privately-owned land, impacts to ecosystems, potential failure of the dam, the funding of the project, and the lack of information available about the project, including any future conveyance of water for out-of-reservoir uses.

The Department acknowledges receipt of the public comments and has considered them. The comments that are applicable to the Department's review of an application for a permit to store water have been addressed through conditions contained in this document; the comments not addressed are outside the scope of this review.

On November 12, 2013, the applicant submitted a copy of the legal description of the property from which the water is to be diverted and the property upon which the water is to be stored, as requested in the Initial Review.

On February 12, 2014, the Department received a letter from the applicant in response to Joel D. Rue's comments.

The Willamette Basin Program allows storage for irrigation and flow augmentation from November 1 through June 30.

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this calculation is in the file. This calculation determined that water is available for further appropriation (at a 50 percent exceedance probability) November 1 through June 30.

Water may be appropriated for storage when the season requested, the season defined in the basin program, and the period when water is available coincide. Therefore, water may be appropriated for storage November 1 through April 30.

The proposed use will not injure other water rights.

The Department finds that the amount of water requested, 12,000 AF, is an acceptable amount.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and

endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team recommended that additional limitations or conditions of use be imposed on this application as follows:

The local watermaster, (WRD), did not recommend any additional conditions beyond those included in the Initial Review.

As a preferred alternative, DEQ recommended the applicant assess off-channel construction opportunities.

ODFW prefers that upstream and downstream fish passage be provided at the reservoir site, but state law does allow for other options to address fish passage.

Water may be appropriated for storage November 1 through April 30.

The permittee shall pass all live flow during May 1 through October 31.

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

Fish passage condition: Prior to commencing construction, the permittee shall address Oregon's fish-passage laws with the assistance of ODFW, and shall provide ODFW-approved fish passage or obtain a fish-passage waiver. If the permittee obtains a fish-passage waiver from the Oregon Department of Fish and Wildlife Commission, a copy of the waiver shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The permittee may submit evidence in writing that ODFW has determined that fish passage is not necessary.

Riparian condition: Prior to commencing construction, the permittee shall conduct an assessment of the riparian area disturbed or inundated by the reservoir in coordination with Oregon Department of Fish and Wildlife (ODFW), and shall develop a mitigation plan to restore or enhance riparian habitat function according to ODFW's Fish and Wildlife Habitat Mitigation Policy (OAR 635-415), and shall obtain written approval from ODFW that the mitigation plan is acceptable. A copy of the mitigation plan shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The riparian mitigation plan may be separate from any other mitigation plan for wetland and waterway impacts required by ODFW.

Water quality condition: The reservoir shall not impact water quality of the source streams or downstream waters detrimentally to the point that those waters no longer meet existing state or federal water-quality standards due to reduced flows. The permittee shall ensure that the operation of the reservoir meets water-quality requirements year-round to minimize impacts to aquatic species.

Endangered Species Act (ESA) mitigation condition: Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW to determine the Habitat Category within the reaches of the streams impacted by the project and shall develop a mitigation plan to offset impact to sensitive, threatened or endangered (STE) fish species according to ODFW's Fish and Wildlife Habitat Mitigation Policy (OAR 635-415), and shall obtain written approval from ODFW that the mitigation plan is acceptable. A copy of the STE mitigation plan shall be provided to the local watermaster's office as soon as practicable after receiving the approval.

Wetlands mitigation condition: Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and Oregon Department of State Lands (ODSL) to fully assess results of a wetland delineation and the impacts to the habitat of fish species listed under the Endangered Species Act from loss of wetlands associated with the development of the project. Wetland mitigation shall be coordinated with other mitigation proposals for wetland and waterway impacts. A copy of ODFW's and ODSL's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval.

Fish screening and by-pass condition: If the reservoir is constructed off-channel, prior to the diversion of water, the permittee shall install fish screening and by-pass devices consistent with current ODFW standards, and shall obtain written approval from ODFW that the fish screening and by-pass devices are acceptable. A copy of ODFW's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The fish screening and by-pass devices shall be operated and maintained consistent with ODFW standards. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

The safety of the dam and impoundment will be assessed and addressed by the Department's Dam Safety Engineer. Consistent with ORS 537.248(1), if a permit is issued, the permit holder may not begin construction of the reservoir until the Department approves the engineering plans and specifications.

Consistent with ORS 537.400(5), if a permit is issued, the permit holder may not fill the reservoir until evidence has been submitted to the Department demonstrating that the permit holder owns, or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.

Senior water rights exist on unnamed streams, tributaries of Drift Creek, and Drift Creek, tributary of Pudding River, or on downstream waters.

Unnamed streams, tributaries of Drift Creek, and Drift Creek, tributary of Pudding River, are not within or above a State Scenic Waterway.

The application is in compliance with the State Agency Coordination Program regarding land use.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

Under the provisions of ORS 537.153 and OAR 690-310-0110, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. The public interest presumption has been established for Application R-87871.

When the presumption is established, OAR 690-310-0120(3)(a) requires the Department to further evaluate the proposed use, any comments received, information available in the Department's files or received from other interested agencies, and any other available information to determine whether the presumption is overcome. The factors in ORS 537.170(8), shown in bold below, have been considered as follows:

(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.

The proposed use is storage for irrigation and flow augmentation, both of which are beneficial uses and allowed by the Willamette Basin Program.

If a permit is issued, it would be junior in priority to existing water rights, including instream uses. As a result, the proposed use of water would conserve water for other uses,

and allow the highest use of the water when it is available based on the relative priority of the water rights.

(b) The maximum economic development of the waters involved.

Irrigation use facilitates economic development of the local community, and is an important economic activity in the Willamette Valley.

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

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

(d) The amount of waters available for appropriation for beneficial use.

Water is available for storage for the proposed uses November 1 through June 30.

(e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.

The draft permit is conditioned such that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented. The proposed use, as conditioned in the attached draft permit, will require conservation measures and reasonable use of the water. In addition, the attached draft permit requires the applicant to measure and report the volume of water stored.

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

All vested water rights are protected by their respective priority dates, the prior appropriation system, and the Department's regulatory procedures.

(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

The proposed use is consistent with state water resources policy formulated under ORS 536.295 to 536.350, which govern classification of the waters in the state's basins. ORS 537.505 to 537.534 govern the appropriation of ground water and are not applicable to this application.

Conclusions of Law

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

Recommendation

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

DATED July 22, 2014

E. Timothy Wallin

E. Timothy Wallin, Water Rights Program Manager
for Director, Oregon Water Resources Department

Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **September 5, 2014**. Protests must be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in the Proposed Final Order would impair or be detrimental to your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;

- Any citation of legal authority to support your protest, if known;
- To affect the Department's determination that the proposed use in this application will, or will not, impair or be detrimental to the public interest ORS 537.153(2)(b) requires that a protest demonstrate, by a preponderance of evidence any of the following: (a) One or more of the criteria for establishing the presumption are, or are not, satisfied; or (b) the specific public interest in ORS 537.170(8) that would be impaired or detrimentally affected, and specifically how the identified public interest in ORS 537.170(8) would be impaired or be detrimentally affected;
- If you are the applicant, the protest fee of \$350 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$700 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.

Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **September 5, 2014**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and

- A standing fee of \$200. If a hearing is scheduled, an additional fee of \$500 must be submitted along with a petition for party status.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

- upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

This document was prepared by Jeana Eastman. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0812.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.

If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:

Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.

DRAFT

This is not a permit.

DRAFT

STATE OF OREGON

COUNTY OF MARION

DRAFT PERMIT TO CONSTRUCT A RESERVOIR AND STORE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

EAST VALLEY WATER DISTRICT
PO BOX 1046
MOUNT ANGEL, OR 97362

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

APPLICATION FILE NUMBER: R-87871.

SOURCE OF WATER: UNNAMED STREAMS, TRIBUTARIES OF DRIFT CREEK, AND DRIFT CREEK, TRIBUTARY OF PUDDING RIVER

STORAGE FACILITY: DRIFT CREEK RESERVOIR

PURPOSE OR USE OF THE STORED WATER: STORAGE FOR IRRIGATION AND FLOW AUGMENTATION

MAXIMUM VOLUME: 12,000 ACRE FEET EACH YEAR

WATER MAY BE APPROPRIATED FOR STORAGE DURING THE PERIOD: NOVEMBER 1 THROUGH APRIL 30

DATE OF PRIORITY: FEBRUARY 21, 2013

DAM LOCATION: NW ¼ NE ¼, SECTION 36, T7S, R1W, W.M.; 3990 FEET NORTH AND 355 FEET EAST FROM S1/4 CORNER, SECTION 36

THE AREA TO BE SUBMERGED BY THE RESERVOIR IS LOCATED AS FOLLOWS:

NE ¼ SW ¼
NW ¼ SW ¼
SW ¼ SW ¼
SE ¼ SW ¼

SECTION 31

TOWNSHIP 7 SOUTH, RANGE 1 EAST, W.M.

NE ¼ NE ¼
NW ¼ NE ¼
SW ¼ NE ¼
SE ¼ NE ¼
NE ¼ SE ¼
NW ¼ SE ¼
SW ¼ SE ¼

SE ¼ SE ¼
SECTION 36
TOWNSHIP 7 SOUTH, RANGE 1 WEST, W.M.

NW ¼ NE ¼
SW ¼ NE ¼
NE ¼ NW ¼
NW ¼ NW ¼
SW ¼ NW ¼
SE ¼ NW ¼
NE ¼ SW ¼
NW ¼ SW ¼
NW ¼ SE ¼
SW ¼ SE ¼

SECTION 6
TOWNSHIP 8 SOUTH, RANGE 1 EAST, W.M.

NE ¼ NE ¼
SECTION 1
TOWNSHIP 8 SOUTH, RANGE 1 WEST, W.M.

Measurement devices, and recording/reporting of annual water storage conditions:

- A. Before water use may begin under this permit, a staff gage that measures the entire range and stage between full reservoir level and dead-pool storage must be installed in the reservoir. If no dead-pool, the gage must measure the full depth of the reservoir. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device; provided however, where any device is located within a private structure, the watermaster shall request access upon reasonable notice.
- C. The permittee shall keep a complete record of the volume of water stored each month, and shall submit a report which includes water-storage measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- D. The Director may provide an opportunity for the permittee to submit alternative measuring and reporting procedures for review and approval.

The permit holder may not begin construction of the reservoir until the Department approves the engineering plans and specifications.

The permit holder may not fill the reservoir until evidence has been submitted to the Department demonstrating that the permit holder owns, or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.

Fish passage condition:

Prior to commencing construction, the permittee shall address Oregon's fish-passage laws with the assistance of Oregon Department of Fish and Wildlife (ODFW), and shall provide ODFW-approved fish passage or obtain a fish-passage waiver. If the permittee obtains a fish-passage waiver from the Oregon Department of Fish and Wildlife Commission, a copy of the waiver shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The permittee may submit evidence in writing that ODFW has determined that fish passage is not necessary.

Riparian condition:

Prior to commencing construction, the permittee shall conduct an assessment of the riparian area disturbed or inundated by the reservoir in coordination with ODFW, and shall develop a mitigation plan to restore or enhance riparian habitat function according to ODFW's Fish and Wildlife Habitat Mitigation Policy (OAR 635-415), and shall obtain written approval from ODFW that the mitigation plan is acceptable. A copy of the mitigation plan shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The riparian mitigation plan may be separate from any other mitigation plan for wetland and waterway impacts required by ODFW.

Water quality condition:

The reservoir shall not impact water quality of the source streams or downstream waters detrimentally to the point that those waters no longer meet existing state or federal water-quality standards due to reduced flows. The permittee shall ensure that the operation of the reservoir meets water-quality requirements year-round to minimize impacts to aquatic species.

Endangered Species Act (ESA) mitigation condition:

Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW to determine the Habitat Category within the reaches of the streams impacted by the project and shall develop a mitigation plan to offset impact to sensitive, threatened or endangered (STE) fish species according to ODFW's Fish and Wildlife Habitat Mitigation Policy (OAR 635-415), and shall obtain written approval from ODFW that the mitigation plan is acceptable. A copy of the STE mitigation plan shall be provided to the local watermaster's office as soon as practicable after receiving the approval.

Wetlands mitigation condition:

Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and Oregon Department of State Lands (ODSL) to fully assess results of a wetland delineation and the impacts to the habitat of fish species listed under the Endangered Species Act from loss of wetlands associated with the development of the project. Wetland mitigation shall be coordinated with other mitigation proposals for wetland and waterway impacts. A copy of ODFW's and ODSL's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval.

Fish screening and by-pass condition: If the reservoir is constructed off-channel, prior to the diversion of water, the permittee shall install fish screening and by-pass devices consistent with current ODFW standards, and shall obtain written approval from ODFW that the fish screening and by-pass devices are acceptable. A copy of ODFW's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval. The fish screening and by-pass devices shall be operated and maintained consistent with ODFW standards. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.

The storage of water allowed herein is subject to the installation and maintenance of an outlet conduit that will permit drainage of the reservoir in a safe and timely manner, and for passage of flow to downstream senior water rights. The dimensions of the outlet must be approved by the Department as part of the final dam plans and specifications.

This permit allows an annual appropriation (not to exceed the specified volume). This permit does not provide for the appropriation of water for out-of-reservoir uses, the maintenance of the water level or maintaining a suitable freshwater condition. If any water is to be used for out-of-reservoir purposes, a secondary water right is required. If any additional live flow is to be appropriated to maintain either the water level or a suitable freshwater condition, an additional water right is required.

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.

The permittee shall pass all live flow during May 1 through October 31.

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

The Director may require the user to measure inflow and outflow, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.

DAM CONDITIONS

Conditions may be added upon approval of dam designs and specifications.

STANDARD CONDITIONS

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

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

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

Construction shall be completed and the permitted volume of water shall be stored within ten years of the date of permit issuance. If additional time is needed, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after storage of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued

DRAFT - THIS IS NOT A PERMIT

E. Timothy Wallin, Water Rights Program Manager
for Director, Oregon Water Resources Department

Mailing List for PFO Copies

Application #R-87871

PFO Date: July 22, 2014

Original mailed to applicant:

EAST VALLEY WATER DISTRICT, PO BOX 1046, MOUNT ANGEL, OR 97362

SENT VIA EMAIL:

WRD - Watermaster # 16

Copies Mailed By: _____ (SUPPORT STAFF) on: _____ (DATE)
--

Protest/ Standing Dates checked _____
--

Copies sent to:

1. WRD - File # R-87871
2. Water Availability: Shawn Turner

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

1. KATHLEEN E JAQUET & CHERI PERRY-HARBOUR, PO BOX 533, HOBART WA 98025
2. KATHLEEN E JAQUET, ET AL, PO BOX 44, MOCLIPS WA 98562
3. ROBERT B QUALEY, 15256 FOX RD SE, SILVERTON OR 97381
4. NORBERT V AND GAIL K DOMINICK, 1116 VICTOR POINT RD SE, SILVERTON 97381
5. JOEL D & DONNA L RUE, 1316 VICTOR POINT RD SE, SILVERTON OR 97381
6. BRUCE P JAQUET, 14752 DOERFLER RD SE, SILVERTON OR 97381
7. FOX LAND CO LLC, 16364 FOX RD SE, SILVERTON OR 97381
8. TODD F PETERS, 4742 LIBERTY RD #173, SALEM OR 97302
9. FLOYD T FOX JR., 16364 FOX RD SE, SILVERTON OR 97381
10. FRERES TIMBER INC, PO BOX 276, LYONS OR 97358
11. ROBERT LIERMAN, STEVEN LIERMAN, 1985 VICTOR POINT RD S, SILVERTON OR 97381
12. ADAM SUSSMAN, GSI WATER SOLUTIONS,
1600 SW WESTERN BLVD, STE 240, CORVALLIS OR 97333
13. KORY SLAYTON, 29885 EASY ST LN, HILLSBORO OR 97123
14. DUSTIN CZAPLA, 644 W PAGOSA DR, GRAND JUNCTION CO 81506
15. ZACH TAYLOR, 2538 DRIFT CR RD NE, SILVERTON OR 97381

16. RICHARD & MARY JO MOLES, 14823 RICHES RD SE, SILVERTON OR 97381
17. LUCAS J RUE, 1316 VICTOR POINT RD SE, SILVERTON OR 97381
18. JESSE RUE, 12320 STATE ST SALEM, OR 97317
19. CLIFF MCGUFFIN, 2100 ENDRESEN LN NE, SILVERTON OR 97381
20. JANET E NEUMAN, TONKON TORP LLP,
1600 PIONEER TOWER, 888 SW FIFTH AVE, PORTLAND OR 97204
21. ODFW, DANETTE FAUCERA, 4034 FAIRVIEW INDUSTRIAL DR SE, SALEM OR 97302
22. DEQ, NANCY GRAMLICH, 750 FRONT STREET NE, #120, SALEM OR 97301-1039

CASEWORKER : jme

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Rights)
Application R-87871, East Valley)
Water District)

PROTEST OF PROPOSED
FINAL ORDER

I represent Joel Rue, Bruce Jaquet, Robert Qualey, Steven Lierman, Zach Taylor/Taylor Farms, Inc., Dave Doerfler/Ioka Farms, Thomas and Karen Fox, and John and Sharon Fox ("Protestants"). Protestants hereby protest the Water Resources Department's Proposed Final Order ("PFO") on Water Rights Application R-87871. This Protest is filed pursuant to ORS 537.153(6) and OAR 690-310-0160.

1. Protestants' names, addresses, and telephone numbers:

Joel D. Rue
1316 Victor Point Road SE
Silverton, OR 97381
503-588-7176

Bruce P. Jaquet
14752 Doerfler Road SE
Silverton, OR 97381
503-873-2291

Robert B. Qualey
15256 Fox Road SE
Silverton, OR 97381
503-873-6156

Steve Lierman
1985 Victor Point Road S
Silverton, OR 97381
503-873-5953

David Doerfler
Ioka Farms
13512 Doerfler Road
Silverton, OR 97381
503-874-0707

RECEIVED
SEP 05 2014
OWRD

Zach Taylor
Taylor Farms, Inc.
2538 Drift Creek Road NE
Silverton, OR 97381
503-871-1194

Tom and Karen Fox
6 El Greco St.
Lake Oswego, OR 97035
503-699-9509

John and Sharon Fox
7784 SW Ashford St
Tigard, OR 97224
503-624-1166

2. Protestants' interest in the PFO

The PFO recommends issuance of a permit to the East Valley Water District (the "District") to build a dam and reservoir on Drift Creek near Victor Point in Marion County for the storage and supply of irrigation water. All of the Protestants own or lease land that would be inundated by the Drift Creek Dam and Reservoir. The Protestants' lands are entirely outside the boundaries of the East Valley Water District. The precise boundaries of the reservoir are not yet possible to determine, but it appears that the dam could be located on Mr. Qualey's property. The reservoir would flood approximately 100 acres of Mr. Jaquet's property (about half of his land), including a house and associated outbuildings; the project would also cut off access between two parcels of his land. Mr. Jaquet's property has been in his family for 113 years. The reservoir would also flood significant portions of the Rue, Qualey, Lierman, and Fox property, as well as property belonging to other neighbors. Taylor Farms, Inc. leases Mr. Jaquet's property. Ioka Farms leases other land from the Jaquet family, as well as nearby land from Mr. Lierman. The Protestants and/or their lessees are active agricultural producers, growing grass seed, Christmas trees, hay, cattle, and/or timber on the lands proposed for inundation by the Drift Creek Dam and Reservoir project, and on adjacent and nearby properties. Some of the Protestants also live on the properties where flooding will occur, and others live adjacent or nearby.

3. Description of impairment of Protestants' interest

The PFO recommends issuance of a permit to build a dam and reservoir on Drift Creek where it flows through the Protestants' lands. The dam would be approximately 70 feet tall and approximately 850 feet long. It would impound 12,000 acre feet of water over an area of approximately 384 acres. The reservoir would store water from November 1st to April 30th. During the irrigation season, the water would be conveyed a minimum of 5-10 miles from the Protestants' lands to the District, to be used by District members for irrigation. The Protestants do not own any land within the District, are not members of the District, and would not receive any irrigation water from this project, but the proposal would inundate their lands. In other

words, the Protestants would bear all of the project's harms and reap none of the benefits. The project would supply irrigation water to District farmers and growers, some of whom are direct competitors of the Protestants. Issuing a permit to the District would allow the District farmers and growers to take land from their competitors for a water storage project to benefit themselves while shrinking the Protestants' landholdings and damaging the Protestants' agricultural operations. Several of the Protestants' landholdings and agricultural operations would also be disrupted by relocation of Victor Point Road as part of the project construction. Indeed, the entire Victor Point community would feel the impacts of this road relocation.

Because East Valley Water District is organized as an irrigation district under ORS Chapter 545, the District can ultimately use eminent domain to force the Protestants to sell their land involuntarily. Even though condemnation requires compensation at fair market value for specific acreage actually taken, such payments would not adequately compensate the Protestants for being forced to give up land to benefit competing farms some distance away. Nor would it necessarily make up for the diminution in the value of their remaining lands and businesses. Indeed, losing significant acreage could force some of the Protestants to cease operations entirely.

The project would also impair the Protestants' interest in and enjoyment of Drift Creek's fish and wildlife and scenic values. Drift Creek is currently a small, meandering stream through the Protestants' properties. The Creek and its tributaries contain anadromous fish, including coho salmon and Pacific lamprey, as well as other fish species. The Creek also provides habitat for winter steelhead, a listed threatened species. The riparian areas and surrounding meadows provide habitat for a herd of elk and other wildlife. The District's proposed dam and reservoir would destroy the habitat and scenic values of Drift Creek and replace the flowing stream with a 384-acre standing water pool for much of the year. At the end of the irrigation season, the reservoir would be drained, inevitably leaving behind a mudflat. These values are not just important to the Protestants, but to the public as well. Furthermore, the Protestants now have access to Drift Creek as it flows through their property, but no access would be allowed to the District's reservoir.

4. Description of the errors and deficiencies in the PFO

The PFO is deficient in at least the following respects:

- a. The PFO does not adequately acknowledge and address the volume and the substance of the comments received in opposition to this project.*

The PFO notes that WRD received comments opposing the project from Joel Rue, Jesse Rue, Lucas Rue, Steve Lierman, and Cliff McGuffin opposing approval of Application R-87871. The Department summarizes the comments as follows: "[t]he comments generally raised concerns about East Valley Water District's eminent domain rights, the taking of privately-owned land, impact to ecosystems, potential failure of the dam, the funding of the project, and the lack of information available about the project, including any future conveyance of water for out-of-reservoir uses." The PFO then says that the Department considered the comments, and that they were either addressed through conditions contained in the PFO or are "outside the scope

RECEIVED
SEP 05 2014
OWRD

of this review." That is the full extent of the PFO's mention of any of the specific content of public comments, and this discussion is inadequate.

The Department does not say which comments it believes are outside the scope of its review, and does not link any specific conditions proposed for the project to the commenters' concerns. These individual farmers and growers whose property is proposed to be taken for the benefit of providing irrigation water to competing farmers and growers deserve better than a conclusory dismissal of their concerns. They are entitled to fully understand the justification for the Department's decision to recommend issuing this permit. Our preliminary research suggests that this proposal presents a unique situation, where an irrigation district seeks to site a project on private land belonging to competing farmers located several miles from the District. The District is able to harness considerable governmental power and funds to aid in its efforts, while the Protestants are unable to muster similar resources to protect their lands and businesses from the District's reach. The unprecedented nature of the proposal and the imbalance in tools and resources make it imperative for the Department to carefully consider and thoughtfully address the Protestants' and others' concerns.

Furthermore, the PFO's list of public comments received understates the opposition to this project. The Department received other comments opposing this project, though perhaps outside of the specific 30-day comment period following notice of the Initial Review on October 18, 2013. The Department itself notes that it may consider "any relevant sources of information" in reviewing a water rights application. Application R-87871 was initially filed several months prior to the time that the Department began its official review. During March through September of 2013, a number of other comments opposing the project were submitted to the Department, including comments from Richard and Mary Jo Moles, Kory Slayton, Bob Qualey and Melinda Hendricks, Bruce Jaquet, and Zach Taylor, in addition to Joel Rue. The comments I submitted on Joel Rue's behalf in November, as well as Joel and Jesse Rue's own comments submitted directly, all informed the Department of a community meeting hosted by the District at which approximately 70 people from the surrounding area expressed opposition to the project. The Department also received opposing comments more recently from Kathleen Jaquet and Cheri Harbour, and from Terri Allen.

Just last month, in August of 2014, the Department received a letter from ODFW saying that the PFO did not accurately reflect and incorporate the issues raised by ODFW during the Division 33 consultation process. The Department responded that it would "correct these conditions when the Final Order is issued." The problem with this response is that by leaving the PFO unchanged in the face of ODFW's specific objections, the PFO does not fully address the fish and wildlife concerns about the project.

The PFO as written does not do justice to the level of opposition registered against this project. If the concerns expressed by the Protestants and other commenters were fairly represented, they would support the conclusion that the public interest would not be served by issuance of this permit, as further discussed below.

RECEIVED
SEP. 05 2014
OWRD

b. *The Department erred in finding that the proposed water use is in the public interest.*

ORS 537.170(8) requires the Department to consider seven listed factors in making its public interest determination. The Department did not adequately evaluate and apply these factors, as further discussed below. Under a full and fair evaluation of the public interest criteria, the preponderance of the evidence demonstrates that the public interest would be impaired or detrimentally affected by this project.¹

i. *The PFO's consideration of ORS 537.170(a) is inadequate and unsupported.*

The statute requires WRD to consider "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." The PFO's analysis of this factor consists of three conclusory sentences, which boil down to two points: (1) the proposed use (storage for irrigation and flow augmentation) is allowed by the applicable basin plan; and (2) the "highest use" of water will be assured by simply enforcing priority dates.

The first point simply restates one of the factors used to determine if the proposed use qualifies for a public interest presumption and does nothing to further evaluate the proposal against the additional factors as required by OAR 690-310-0120(3)(a). This statutory requirement is superfluous if it can be satisfied by repeating the finding that a proposed use is allowed by the applicable basin program.

The second point also fails to further the required analysis. Priority is an after-the-fact mechanism to allocate water in times of shortage among water rights that have already been issued. In contrast, "conserving the highest use of water for all purposes" when reviewing a new water right application requires a forward-looking analysis of how the state's water could and should be used. The statement in the PFO that "the proposed use of water would conserve water for other purposes and allow the highest use of water when it is available *based on the relative priority of the water rights*" completely sidesteps any thoughtful consideration of this factor and improperly uses priority as a proxy for "conserving the highest use of water for all purposes."

If priority of appropriation is the way to determine whether a new water use serves the public interest by "conserving the highest use of water," then ORS 537.170(8)(a) is a completely superfluous requirement. The statute cannot be read out of existence in this way, and the Department should be required to provide a truly thoughtful analysis of this factor that assesses the proposal in light of the other potential uses of water included in the statute, including leaving the water right where it is, supporting fish and wildlife in the midst of a thriving agricultural community.

¹ I have made public records requests to both the Department and the District about this project, but have not yet received responsive documents. Those documents will likely produce additional evidence pertinent to this Protest.

ii. The PFO's consideration of ORS 537.170(8)(b) is inadequate and unsupported.

The PFO is similarly conclusory in its discussion of the second statutory public interest factor: "the maximum economic development of the waters involved." This factor is addressed in a single sentence: "[i]rrigation use facilitates economic development of the local community, and is an important economic activity in the Willamette Valley." This may be a true statement, but it provides no analysis whatsoever that is responsive to the statutory requirement.

First of all, the "local community" surrounding this project consists of the Protestants and the rest of the Victor Point community along Drift Creek, and this community's economy will be harmed, not helped, by this irrigation project. The PFO does not even acknowledge the economic interests of the Protestants' agricultural operations. The Protestants are dry land farmers and growers, in part because irrigation is not feasible on their hilly properties. This project proposes to take water from their community to a different "community" several miles away—and to take portions of their land out of production—in order to facilitate economic development for their competitors.

Second, the statement that "irrigation . . . is an important economic activity in the Willamette Valley" is so broad as to be nonsensical. The Willamette Valley is a very big place—much bigger than the East Valley Water District. It includes the Victor Point agricultural community where the Protestants live, a good part of the Oregon wine industry, many other farms—both irrigated and non-irrigated, the "Silicon Forest," numerous recreation and travel sites, and approximately 70% of the state's urban population, with all of the concomitant economic development. An irrigation project may provide short-term construction jobs, and may increase agricultural productivity and revenue for some water users, but that does not automatically translate to "maximum economic development of the waters involved." The Department needs to do much better than this to provide a convincing analysis of how this particular water use promotes maximum economic development.

In fact, a cost-benefit analysis of the proposal raises questions of the project's overall economic utility. The cost of constructing the project was estimated at over \$20 million in 2011. The 2011 price tag was only for the dam and reservoir, without including the cost of fish passage or mitigation, the costs of other environmental permitting and mitigation, land acquisition for the project site, costs associated with conveying water from the reservoir to the District many miles away (including additional construction and land acquisition costs), and completing a distribution system for the water inside District boundaries, which does not yet exist. A more recently-reported cost estimate was approximately \$60 million. The project has already received nearly a million dollars in public funding during the planning phase, including an outright appropriation of \$500,000 in state general funds, which can be used for match for other public moneys. Recently, the District has hired a lobbying firm to help them obtain federal funds as well.

As a statutorily-organized irrigation district, the East Valley Water District has authority to assess its members for its costs of operation. Meanwhile, the Protestants have no access to public funds or assessments to help them respond to this proposal. To date, the District's costs of

operation consist entirely of project planning, as the District does not have any irrigation facilities or water distribution system. Indeed, the District was formed for the purpose of seeking future water supplies. Although we are not privy to details about the District's budget, we believe that a small minority of the District's landowners are footing the bill for this project. Some of the Protestants have been regularly attending the monthly District Board meetings, and have thus listened to Board discussions and obtained summary budget documents. It is their impression that a core group of only about a dozen landowners are paying the bulk of the District assessments to pursue this project, thus suggesting that most of the projected benefits will also accrue primarily to a small portion of the District.

As noted earlier, many of the most expensive aspects of this project have not yet been developed. The project proponents themselves have said that if they are not able to get a waiver from the fish passage requirements, the project may not be feasible. The District has also not yet proposed how it will convey water from the Drift Creek reservoir to District lands, but it has acknowledged that if it is required to use a pipeline for conveyance, that will add significant cost to the project. The Protestants have also heard discussion at Board meetings between the District and consultants performing economic studies for the project, in which the District has argued for more favorable cost-benefit analysis to support the project.

The District has prepared several lengthy reports in conjunction with state grant funds received for project planning. Given the amount of information available to the Department, it is rather astounding to read a two sentence discussion of how this project fares under the "maximum economic development" public interest factor. In fact, the preponderance of the evidence suggests that this component of the public interest should be determined against the project.

iii. The PFO's evaluation of ORS 537.170(8)(c) is inadequate and unsupported.

ORS 537.170(8)(c) requires consideration of "[t]he control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control." The PFO says only that "[t]he proposed permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end." It is difficult to understand what these statements have to do with the statutory language, since the statements contain no mention whatsoever of drainage, sanitation, or flood control.

Indeed, comments submitted on Application R-87871 raised questions about drainage, sanitation, and flood control that are not addressed in the PFO. Given the intended operation of the reservoir, when the water level is drawn down at the end of the irrigation season, the flooded area will become an unsightly, unsafe, and unusable mudflat where a beautiful pasture exists now—a pasture which is frequented by elk and other wildlife. We also raised issues of flooding in Drift Creek in our comments. The District has said that its preferred method of conveying water from the proposed reservoir to its land is to release water from the reservoir, convey it down Drift Creek, and divert it to a District distribution system (not yet built) several miles downstream. The alternative of building an overland pipeline from the reservoir to the District

boundary would be considerably more expensive and difficult, due to the need to negotiate or condemn a right of way across approximately ten miles of land owned by numerous property owners, many of whom will likely oppose the pipeline. But conveyance down the creek bed raises other costs and problems to the riparian landowners, including a busy church camp. As we noted in earlier comments to the Department, lower Drift Creek's normal late summer flows range from .31 cfs to 9.9 cfs, while the District proposes to transport up to 40 cfs down the Creek. The impacts of flooding Drift Creek with many times its normal summer flows in order to deliver irrigation water downstream were not addressed by the Department at all. Without this discussion, the PFO is deficient in addressing this public interest factor.

The Drift Creek Dam project was initially proposed as a single-purpose irrigation storage project. However, in the past few years, the project proponents have added a second purpose of "flow augmentation," arguing that releasing irrigation water during the summer will benefit streamflows in Drift Creek. Now the project can be called "multi-purpose," which is important for receiving public grants and other funds. However, it is important to point out that there are very few water rights that currently allow diversion from Drift Creek. Thus, the Creek's low summer flows are largely a natural condition and potential benefits from augmenting flows are overstated.

Another issue pertaining to flooding that received no analysis in the PFO is the question of the proposed dam's location relative to earthquake fault zones. In addition to comments I submitted on this issue, other residents of the area also raised this point, noting that the 1993 "Spring Break Quake" caused damage to their property, which is located directly across Victor Point Road from the proposed dam site. (The comments from Richard and Mary Jo Moles were noted above.). The PFO does not devote any discussion to this hazard, but simply defers this question to a later review of the project by the Department's Dam Safety Engineer. This is too important an issue to justify completely deferring its discussion.

iv. The PFO's evaluation of ORS 537.170(d) is inadequate and unsupported.

ORS 537.170(8)(d) requires attention to "the amount of water available for appropriation for beneficial use." All the PFO says about this factor is that water is available for storage for the proposed uses November 1 through June 30. Once again, this statement simply repeats the water availability finding that forms the basis for the public interest presumption. If this is all that is necessary, then this statutory provision is completely superfluous. At this stage of the review, the Department must take a broader look at how this project will affect the availability of water for beneficial uses, generally, as a matter of the public interest, not whether water is specifically available for this proposed use. The basic water availability analysis has already been performed under ORS 537.153(2) as part of establishing the public interest presumption. Determining whether the presumption is overcome requires a deeper look.

As noted in the previous section, this project is primarily a single-purpose irrigation storage project. Damming up Drift Creek will impound water that currently supports the beneficial use of anadromous fish habitat, among other things. At the very least, that direct trade-off ought to be acknowledged here.

v. *The PFO's evaluation of ORS 537.170(e) is inadequate and unsupported.*

The Department's discussion about "the prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved," as required by ORS 537.170(8)(e), is also conclusory and inadequate. The Department says, without explanation, that "[t]he draft permit is conditioned such that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented." The only condition in the draft permit explicitly referring to waste is a boilerplate standard condition saying "[t]his permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end."² This condition is essentially toothless. It leaves the determination of what is wasteful to the water user, unless and until the Department decides to promulgate regulations at some future date. In this case, the water users are all of the various District members, each with an individual interpretation of waste.

The rest of the discussion of this factor consists of the following statements: "[t]he proposed use, as conditioned in the attached draft permit, will require conservation measures and reasonable use of the water. In addition, the attached draft permit requires the applicant to measure and report the volume of water stored." Yet the draft permit contains no reference to "reasonable use" or to any specific conservation measures, except those that might be promulgated sometime in the future, as noted above.

The draft permit requires measurement of the inflow, outflow, and storage volume of the reservoir, but that narrow focus does not satisfy the public interest review under this factor. First of all, the PFO doesn't impose any conditions to minimize losses from evaporation or seepage at the reservoir site. Furthermore, storage isn't the end use of the water here. The stored waters will irrigate lands within the boundaries of the East Valley Water District, and the Department cannot adequately evaluate how this project meets the public interest requirements without considering this end use. This is ultimately an irrigation project, not simply a storage project.

In this regard, it is critical to recognize that the water is not needed at this time; the District claims that it needs this project for a *future* water supply. The District justifies its search for new water supplies partly because some of the District's lands are within a designated Groundwater Limited Area, thus preventing further groundwater access. However, it is interesting to note that the Cities of Silverton and Mt. Angel are investigating aquifer storage and recover ("ASR") as a way of reviving the area's groundwater and meeting future municipal water needs. As we have pointed out in our comments to the Department, ASR and other alternatives for meeting the District's members irrigation needs have not been adequately assessed. Such alternatives include placing a storage project within the District boundaries, creating smaller, localized water sources on the farmers' own properties, such as some of the Protestants have done, and improving irrigation efficiencies to make the current supplies last as long as possible.

The PFO does not contain any analysis of the need for this project or alternative ways of meeting the District's water needs, yet these issues are central to assessing whether the project is

² Note that this is the same language that serves as the full "discussion" of ORS 537.170(8)(c), as covered earlier.

truly in the public interest under ORS 537.170(8)(e) (and under factors a and d as well). It is wasteful, unreasonable, and uneconomic to spend 60 million dollars to build a new dam and reservoir without first assuring that the farmers seeking the new supply are currently employing all reasonable conservation measures. We raised these issues in our comments to the Department, but the PFO contains no mention of them whatsoever.

It is particularly unreasonable under these circumstances to build a dam on a stream that currently provides important fish and wildlife habitat. Drift Creek is an anadromous fish-bearing stream. It is the only major tributary in the Pudding River Basin that is currently free-flowing. The other major tributaries—Silver Creek, Rock Creek, Abiqua Creek, and Butte Creek all contain dams. Furthermore, all of these dams are listed on ODFW's fish passage priority list because they block fish passage. It is unreasonable to dam the remaining free-flowing tributary when the other streams already present fish passage problems. Although the draft permit does condition this project on providing ODFW-approved fish passage or obtaining a fish passage waiver, the Department cannot shirk its duty to fully consider and address the public interest by simply punting this issue to ODFW. Damming up Drift Creek, even with fish passage or mitigation, is a step backward rather than forward in terms of preserving anadromous fish habitat, and makes absolutely no sense.

It is also unreasonable, wasteful, uneconomic, and therefore against the public interest to allow a small group of farmers and growers to reach several miles outside their district to acquire private land from competing farmers and growers for their own benefit, and to use the power of public funds, mandatory assessments, and eminent domain to do so. How can a decision to issue a permit in this situation be in the public interest, unless there are no reasonable alternatives? The Department must make a good faith effort to make explicit findings about how this project satisfies the statutory requirement to prevent "wasteful, uneconomic, impracticable or unreasonable" use of Drift Creek. A thoughtful effort in this regard would reveal that the preponderance of the evidence is against this project.

vi. The PFO's evaluation of ORS 537.170(8)(f) is inadequate and unsupported.

The sixth factor required to be considered for the public interest analysis under ORS 537.170(8)(f) is "[a]ll vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights." The PFO's discussion of this component suffers from the same errors described above. The PFO simply restates that vested rights are protected by "their respective priority dates, the prior appropriation system, and the Department's regulatory procedures." This is insufficient. If it were this simple, this statutory provision would serve no purpose. As noted earlier, there are not many vested rights to the waters of Drift Creek and its tributaries. However, there is an instream right. Although the PFO acknowledges that any water right issued to the project would be junior to the instream right, that protection is somewhat superficial. Currently, the instream right attaches to a free-flowing anadromous-fish-bearing stream. If the project is built, the right will exist in a very different system that will be controlled for the primary purpose of providing water storage and irrigation water deliveries. A legitimate public interest review requires addressing this issue more broadly than simply saying that priority takes care of everything.

vii. *The PFO's evaluation of ORS 537.170(8)(g) is inadequate and unsupported.*

At the risk of sounding like a broken record, our argument here is similar to our argument for the first six public interest factors above. The PFO does not contain any real analysis of this factor whatsoever, and thus compounds the errors discussed throughout this Protest. The PFO makes the following conclusory statement: "[t]he proposed use is consistent with state water resources policy formulated under ORS 536.295 to 536.350, which govern classification of the waters in the state's basins." If all that is required by this factor is to say that the use is allowed in the basin plan—which is essentially what this statement says—then the provision is meaningless. The examination of whether the proposed use complies with the basin plan is part of ORS 537.153(2), while ORS 537.170(8)(g) requires something more. ORS 536.295-350 contain many important policy statements about the use of the state's water resources. These enumerated standards are not just window dressing, but are actual factors to be considered in making water allocation decisions. *Cf. Steamboaters v. Winchester Water Control District*, 69 Or. App. 596 (1984) (noting that the factors in ORS 537.170(8) and the additional listed standards incorporated from Chapter 536 by ORS 537.170(g) provide specific decision-making guidance).

Although the basin plans certainly should have considered and integrated those policies, that assumption does not give the Department a pass on considering the policies again in light of the particular application being reviewed. The Department is authorized (indeed, compelled, depending on the results of its analysis) to find that the public interest presumption is overcome for a particular project based on an analysis of the project against the long list of policy values and goals expressed in ORS 536.310. The fact that the list is long, and some of the policies are perhaps in conflict, does not excuse the Department from making at least a good faith attempt at addressing the relevant issues.

5. Citation of legal authority

Citations to relevant legal authorities are integrated into Parts 1-4 above.

6. Rebuttal of the public interest presumption


This Protest outlines numerous ways in which the PFO is deficient and how the deficiencies could begin to be addressed. Part 4 details the deficiencies specifically related to the Department's finding that the public interest presumption "has not been overcome." The foregoing discussion demonstrates significant gaps and omissions in the PFO's justification of that finding. The discussion further demonstrates a number of particular ways in which this project will impair or be detrimental to the public interest under each of the seven statutory public interest factors. The preponderance of the evidence does not support the Department's decision. In fact, even the brief discussion of the evidence in this Protest demonstrates that the preponderance of the evidence supports the opposite conclusion, and shows that the public interest presumption has been rebutted. The Department should set this matter for a contested case hearing to further develop and resolve the issues raised by this Protest.

7. Protest fee and proof of service

A protest fee in the amount of \$700 was delivered to the Department on September 5, 2014, as required by ORS 536.050. A copy of this Protest has been delivered to East Valley Water District as certified by the attached Certificate of Service.

DATED: September 5, 2014.

TONKON TORP LLP

By 
Janet E. Neuman, Senior Counsel
OSB #813258
Attorney for Protestants

Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
Direct Dial: 503.802.5722
Direct Fax: 503.972.7422
Email: janet.neuman@tonkon.com

037082/00001/5862871v1

RECEIVED
SEP 05 2014
OWRD

CERTIFICATE OF SERVICE


I hereby certify that I served the foregoing **PROTEST OF PROPOSED
FINAL ORDER** on:

Kristina McNitt
Executive Secretary
East Valley Water District
PO Box 1046
Mt. Angel, OR 97362

by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to the address listed above and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

DATED: September 5, 2014.

TONKON TORP LLP

By 
Janet E. Neuman
Attorneys for Protestants

037082/00001/5864901v1

RECEIVED
SEP 05 2014
OWRD

SEP. 05 2014

OWRD

**Oregon Water Resources Department
Water Rights Division**

In the Matter of Application) R-87871 in the Name of East) Valley Water District.)	PROTEST TO PROPOSED FINAL ORDER
---	------------------------------------

I. Name, Address and Telephone Number of Protestant

WaterWatch of Oregon, Inc.
213 SW Ash Street, Suite 208
Portland, OR 97204
Phone: 503.295.4039
Fax: 503.295.2791
Contact: Kimberley Priestley

II. Interests of Protestant

WaterWatch of Oregon ("WaterWatch") is a nonprofit membership organization dedicated to promoting water allocation decisions in Oregon that provide the quality and quantity of water necessary to support fish, wildlife, recreation, biological diversity, ecological values, public health and a sound economy. In protesting this application, WaterWatch is representing the general public interest in the water resources of this state, as well as the specific interest of its members and the organization itself. WaterWatch has members throughout the Pacific Northwest, including the Willamette Valley, that use and enjoy the rivers of the affected basin. Moreover, WaterWatch's members, board members and staff benefit from knowing that such a resource exists even if they have not visited the watershed. In addition, WaterWatch has direct and real interests that will be adversely affected by this decision.

The interests represented by WaterWatch and its members are multifaceted and include, but are not limited to: (1) the interest of protecting streamflows (in both quantity and quality) in Drift Creek, and the Pudding and Willamette River systems, necessary for public instream uses of water which include fish (including ESA listed steelhead and state listed pacific lamprey), wildlife, the habitat necessary for fish and wildlife survival; (2) the interest in ensuring a balance between instream and out-of-stream uses in the basin; (3) the interest of ensuring that the agency not over allocate the resource; (4) the interest in ensuring that out-of-stream uses are efficient and not wasteful or uneconomical and the permits are not allowed for more water than is necessary for their beneficial use; (5) the interest in ensuring that the agency has the tools and mechanisms in place to regulate water use in the basin; (6) the interest in ensuring that the agency implements water laws and policies in a manner that manages and allocates the water resource so as to maintain the ecological integrity the Willamette River Basin and (7) the interest in ensuring that new storage projects are consistent with state policies and goals regarding storage.

WaterWatch represents the public's interest in protecting Oregon's waterways from exploitation and waste, investing its time and resources to ensure the highest beneficial use is realized from public waterways and groundwater. WaterWatch does this by participating in the water

permitting process, including reviewing and filing protests, as appropriate, to water permitting decisions; participating in the public review process for Water Management and Conservation Plans; and working in the Oregon legislature and on rules advisory committees, all with the goal of ensuring water laws are properly implemented so to achieve the sustainable and beneficial use of Oregon's waterways.

WaterWatch has invested time and money protecting and restoring in-stream flows and surface waters in Oregon, including areas that would be affected by the Proposed Final Order ("PFO"). WaterWatch also has members who regularly use and enjoy surface waters that would be affected by the PFO. For all of these reasons, WaterWatch and its members will be adversely and practically affected by the PFO.

III. The PFO Would Impair And Be Detrimental To Protestant's Interests

1. Issuance of the permit consistent with the PFO would impair and be detrimental to WaterWatch's interest and the public's interest in ensuring that the state not issue water rights in violation of statutes, rules and policies established to protect the public interest.

2. Issuance of the permit consistent with the PFO would impair and be detrimental to WaterWatch's interest in protecting surface waters (quality and quantity) of the Drift Creek, Pudding and Willamette River systems.

3. Issuance of the permit consistent with the PFO would impair and be detrimental to WaterWatch's interest and the public's interest in ensuring Oregon's water laws are properly implemented and Oregon's water resources are allocated fairly.

4. Issuance of the permit would impair and be detrimental to WaterWatch's interest and the public interest in ensuring that aquatic species, including fish listed under either the Federal or State Endangered Species Act, are not harmed by new storage projects.

IV. How The PFO Is In Error And Deficient And How To Correct The Errors And Deficiencies

The PFO is in error and deficient, and thus not in the public interest, for reasons including the following:

A. The proposed use will impair or be detrimental to the public interest because it does not comply with the rules of the Water Resources Commission. ORS 537.153(2); OAR 690-310-0110(1)(d). Specifically, water is not available and the proposed project does not comply with the following Commission Rules:

a. Division 33 Sensitive Stock Rules, OAR 690-33: DEQ determined the proposed use has a high likelihood of impacting a 303(d) listed water quality limited stream, namely Drift Creek, and would result in the diminution of water quality for the habitat of sensitive, threatened or endangered fish. See DEQ Div 33 review, 11/21/13. DEQ recommends a number of conditions of use (i.e. water quality, flow augmentation, off channel storage, etc) that are not included in the

RECEIVED

SEP. 05 2014

OWRD

PFO or proposed permit and, as such, the proposed use will impair or be detrimental to the public interest.

ODFW also found that the proposed use would impact the essential habitat of winter steelhead and pacific lamprey. See ODFW Div 33 review, 2/18/14. Steelhead are listed as threatened under the federal Endangered Species Act and Pacific Lamprey are listed as sensitive under the state Endangered Species Act. The PFO and proposed permit conditions are not consistent with the advice of ODFW regards to fish passage, screening and bypass conditions, water quality (i.e. temperature), year round flow augmentation, and off-channel storage and others, and, as such, will not protect the public interest.

Moreover, given the presence of endangered species the WRD should ensure that the proposed use maintains its habitat, thus protection of channel maintenance flows and ecological flows should be a condition of use, as allowed under OAR 690—033.000(1)&(2), OAR 690-033-0020, OAR 690-033-0230. The WRD did not include a condition of use to protect peak and ecological flows and thus the proposed use will not protect the public interest.

b. Protection of Instream Flows in water allocation decisions: The Commission's rules on instream flow protection (OAR 690-410-030) and water allocation (OAR 690-410-0070(2(a))), read together, direct the WRD to protect instream flow needs beyond those protected by instream rights. Currently, no instream rights in the state protect peak and ecological flows, also known as seasonally varying flows or elevated flows. Instream rights in the Drift Creek/Pudding system do not protect peak and ecological flows. However, in recent years the state has begun to understand the need for the protection of these flows, as is evidenced by provisions in state loan programs that require the protection of these flows for storage projects funded by state monies (i.e. SB 839, 2013) and inclusion of the protection of these flows in the Integrated Water Resources Strategy developed under ORS 536.220. Even the applicant, in materials found in the file, acknowledges that the WRD will be conditioning the permit to protecting peak and ecological flows. Despite that, the WRD failed to include any provisions to protect peak and ecological flows. Lack of protection of peak and ecological flows impairs the public interest and is not consistent with Commission rules on water allocation and instream flow protection.

c. Water Availability, OAR 690-410 and OAR 690-400: The WRD has determined that water is available at a 50% exceedance level from November 1 through April 30. The PFO proposes a storage season of November 1 through April 30, which includes part of the spring irrigation season. Drift Creek has been withdrawn from appropriation. See Order In the matter of the acceptance of applications for permits to appropriate water from Drift Creek, 8/8/1951. The state found that "there is not sufficient water flowing in the stream in question and its tributaries, during the irrigation season, to satisfy existing rights....". Id. The Order does allow for appropriation for storage, but the construct of the order makes clear that the storage season must be limited to the non-irrigation season. Moreover, the state rules on allocation direct the WRD to set storage seasons that avoid periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows are needed for public uses. OAR 690-410-070(2)(c). The PFO fails to impose this limitation as to water availability, thus the presumption has been overcome and the project not in compliance with the rules of the Commission regarding water allocation and violates the Order of 8/8/1951.

Moreover, the PFO fails to limit the amounts in each month to the amount that WRD has determined is available during each month. As such, the District could take more water than the allocation policy would allow.

Additionally, the PFO fails to incorporate the protection of peak and ecological flows into its water availability determination as allowed under OAR 690-410-070(2)(c). See argument in b above.

And finally, the Commission's water allocation rules state, definitively, that "water shall not be allocated if the proposed use would injure the exercise of existing water rights or permits". OAR 690-410-0070(2)(f). As noted below, the issuance of this permit that will result in the inundation of existing water right holder's lands, as well as Drift Creek, which will injure existing water right holders (instream and out-of-stream) and thus the allocation policy prohibits approval of the permit. For all these reasons, the PFO is not in compliance with Commission rule and is not in the public interest.

d. Water Storage Policy, OAR 690-410-0080: The Commission rules call on the state to apply the following criteria in evaluating the impacts of a storage application:

- (A) Purpose (e.g., type, location and extent of use, benefits);
- (B) Legal (e.g., state, federal and local legal requirements);
- (C) Social (e.g., recreational, public support, cultural, historic);
- (D) Technical (e.g., siting issues, public safety and structural integrity);
- (E) Financial (e.g., project financing including site costs, cost sharing and repayment, and operating, maintenance and rehabilitation costs);
- (F) Economic (e.g., project benefit/cost analysis);
- (G) Land use (e.g., ownership, comprehensive plans, coordination);
- (H) Environmental (e.g., impacts on streamflows, fisheries, wildlife, wetlands, habitat, biological diversity, water quality and opportunities for mitigation)

The application is devoid of information on most, if not all, of these areas. For example, among other things, under A. Purpose there is no discussion of the instream flow augmentation benefit that this reservoir will purportedly provide. The applicant has used the purported instream benefit to apply for and get substantial state funds for feasibility studies and to market the reservoir as a benefit to the environment, yet the application says nothing except "flow augmentation as may be required for the approval of this irrigation reservoir by OWRD". Moreover, under B. Legal, as is evidenced by EVID's recent 1069 grant application submitted to the WRD in 2014, EVID have not received most, if not all, required federal and state permits nor have they even done the analysis. Under C. Social, there is no discussion of the inundation of over a dozen farms that will occur if this reservoir is built. Stripping farmers of their livelihoods should not be condoned by the state and is contrary to the Governor's pledge to help

RECEIVED

SEP. 05 2014

OWRD

rural economies. Under D, technical, alarmingly, the district is arguing that they should get the permit in advance of submitting engineering plans of sufficient detail that could be reviewed under the state's dam safety rules. While the statute does allow for this exception, it is discretionary and the WRD is not required to move forward without specific plans. As a public interest matter the state should not grant water permits when it is very unclear if a safe structure can even be built. Further, it is patently impossible to conduct the required technical assessment when it is unknown whether the dam will be on-channel or off-channel (see I. below). Under E. Financial, there is no certainty that the district will have the funding to construct this dam. Under E. Economic, there is no cost/benefit analysis in the application. Under G. Land Use, the District does not in fact own or have easements to all the lands that will be affected by this reservoir, and landowners have made it very clear they will not sell to the District. And H. Environmental, as with B, the district has not completed many, if not all, required environmental assessments. Further it is patently impossible to evaluate the environmental impacts here when it has not yet been determined if the dam will be on channel or off-channel (see I below) In a nutshell, this application does not contain the information to allow the WRD to do the analysis as set forth in OAR 690-410-0080 and WRD has not done the required analysis. The application is not ripe for review, and the PFO cannot be found to be compliance with the rules of the Commission and thus would impair the public interest. The application should be returned as incomplete and the PFO withdrawn and reissued if and when WRD has adequate information.

e. The Integrated Water Resources Strategy and off channel storage policy: In 2013 the WRC adopted the Integrated Water Resources Strategy (IWRS). This is a state policy developed under ORS 536.220. . The IWRS sets state policy that supports the development of "off channel storage" with regards to above ground storage. The IWRS does not support on channel storage. Four state agencies were involved in the drafting of this plan, which was adopted by the WRC. The IWRS states: "the state will continue to help water users identify potential above ground storage sites, supporting the development of additional above ground, off channel storage opportunities, where needed, in locations where no know listed fish species exist." See IWRS at 93. The associated Recommended Action states: "Develop additional above-ground, off-channel storage sites where needed". See IWRS Recommended Action 10.B, Improve Access to Built Storage. This plan reflects the state's current policy regarding the building of new above ground storage projects. To build a 70 foot stream spanning dam on a stream that supports endangered species is not consistent with current state policy on storage and thus would impair the public interest.

f. Permitting Rules of the Commission land ownership, OAR 690-310: Commission rules require the applicant to submit, among other things, a statement declaring the existence of written authorization of an easement permitting access to land crossed by the proposed ditch, canal or other work. OAR 690-310-0040(1)(a)(G). The applicant has requested that the WRD waive this requirement under ORS 537.211(6). Given the level of controversy over this dam the WRD should not allow the application to go forward under the statute. Regardless, WRC rules do not in fact allow exception. The rules still require proof to ownership and/or easement. The application does not include this, thus the PFO is in error for recommending approval despite this fatal flaw. The PFO is not in the public interest.

g. Permitting rules of the Commission regarding public interest review of surface waters, OAR 690-310-0120: The PFO fails to do the full public interest review as required by OAR 690-310-

0120(3)(b) which requires the WRD to, at a minimum when analyzing the public interest under ORS 537.170(8) to consider the threatened, endangered or sensitive species, water quality, with special attention to sources listed as water quality limited (such as Drift Creek), fish or wildlife, including any potential effects that the proposed use might have on these factors. Thus the PFO is not in compliance with WRC rules and is not in the public interest

B. The proposed use will impair or be detrimental to the public interest because it will injure other water right holders

There are at least a dozen landowners that will be inundated by the proposed reservoir. Some of these landowners hold senior surface water rights. Injury is defined as an existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0010(3). Given that the approval and ultimate construction of the reservoir will make exercise of existing water rights for lands that will be inundated impossible, the proposed use will injure existing water right holders and thus is not in compliance with the law or in the public interest.

Moreover, the existing conditions of use will not protect instream water rights from injury. An instream right exists for Drift Creek (IS 721591). The reservoir will inundate part of the Creek, thus the "flow" right will not be able to be utilized as protected under the law. Thus, the instream water right would be injured by this water right and thus the PFO and associated permit is not in the public interest.

C. The proposed use will impair or be detrimental to the public interest because the measurement conditions do not ensure that all water outside the storage season will be bypassed. The WRD has set a storage season for this reservoir yet the PFO and draft permit fail to incorporate adequate measuring conditions that will ensure that no water is stored outside this season, and that the dam is bypassing water at all times (even during storage season) to meet downstream instream and consumptive rights (throughout the system). The Draft permit says the WRD "may" require the user to measure inflow and outflow above and below the reservoir to ensure live flow is not impeded outside the storage season, but does not say that they "shall" require this. Without a clear directive that the user "shall" measure both inflow and outflow, the PFO and permit do not ensure that the use will in fact be limited to the storage season and thus the public interest will be impaired. It is frankly, unbelievable, that the WRD would fail to require this in today's day and age where water is scarce and precise measurement is necessary to ensure the proper management of our state's waters.

D. The proposed use will impair or be detrimental to the public interest under ORS 537.170(8)(a)-(e). Among other things, conserving the highest use of the water for all purposes (OAR 537.170(8)(a)) requires an assessment of the proposed use. The application proposes flow augmentation as a purpose only as required by the WRD, yet the WRD does no analysis nor makes any findings/conditions as to this purpose. Moreover, there is no analysis of the effect of this application on existing landowners, who will be inundated and put out of business by this building of this reservoir. ORS 537.170(b) requires findings as to the maximum economic benefit. Here again, the WRD fails to analyze the financial impact of the landowners who will be inundated and put out of business by the building of this reservoir. ORS 537.170(e) requires a finding as to the prevention of wasteful, uneconomic, impracticable or unreasonable use of the

RECEIVED

SEP. 05 2014

OWRD

waters involved. Here again, the WRD fails to evaluate the effect of the inundation of existing farms. Arguably, the building of a reservoir that will inundate over a dozen longstanding family farms is uneconomic, impracticable, and unreasonable. Moreover, there is no certainty that the district will be able to procure funding for this project. ORS 537.170(g) requires a finding that the use is consistent with state water resources policy. As noted above, the building of an on channel dam is not consistent with the state's articulated policy on storage found in the Integrated Water Resources Strategy. Moreover, as noted above, the WRD failed to do the full public interest analysis under the rules that implement the permitting statutes, as required by OAR 690-310-120 which sets for the requirements for implementing ORS 537.170(8)(a)-(e). For all these reasons, and others, the PFO is not in the public interest.

E. The proposed use is not in the public interest because it does not comply with Fish Passage laws.

A person owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish. ORS 509.585. The WRD must condition all new water rights to provide fish passage. In this case the WRD did not require fish passage but instead simply said "prior to commencing construction, the permittee shall address Oregon's fish passage laws with the assistance of ODFW, and shall provide ODFW approved fish passage or obtain a fish passage waiver." This is a departure from WRD past conditions and is not consistent with law. Fish passage is required. The statutes do allow applicants to seek a waiver with mitigation, but there is no certainty. The PFO needs to simply state fish passage is required, period. Without this condition the PFO and proposed permit are not in compliance with the law and do not protect the public interest.

F. The PFO does not adequately consider endangered species issues under the Federal ESA (16 USCA §§ 1531 to 1534).

The federal ESA prohibits WRD from authorizing projects that "take" threatened or endangered species. 16 USCA § 1538(a)(1)(B). Taking is defined in Section (3)(18) includes "harm" as well as killing and capturing. 16 USCA § 1532 (19). The regulatory definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3. Water is critical to the survival of listed fish in the waterways affected by this project. The reservoir at issue is a stream spanning dam of 70 feet for which the Applicant has made clear they do not want to provide fish passage on despite the fact that the stream supports listed species. Drift Creek already suffers from low flows and water quality issues and WRD's issuance of a permit that would degrade fish habitat, including migration, flow and water quality among other things, could rise to the level of a "taking".

G. The PFO would authorize a project in violation of the federal Clean Water Act.

Drift Creek is 303(d) listed for temperature under the federal Clean Water Act. In its 11/21/13 DEQ Div 33 review, DEQ determined the proposed use has a high likelihood of impacting Drift Creek and would result in the diminution of water quality for the habitat of sensitive, threatened or endangered fish. DEQ specifically determined that the project would increase temperature in Drift Creek and notes that the 2008 Pudding River Basin TMDL found that temperatures for cold water fish are too warm and exceed water quality criteria in summer months, and that DO is a

RECEIVED

SEP 05 2014

OWRD

parameter of concern in summer months. DEQ recommends, in its Div 33 review and in additional correspondence, a number of conditions of use (i.e. water quality, flow augmentation, off channel storage, etc) that are not included in the PFO or proposed permit. The proposed water quality condition (PFO, p. 4) is inadequate to control temperature effects from the dam/reservoir. If a permit is issued consistent with the PFO, the project will impact water quality of Drift Creek in violation of the federal Clean Water Act.

H. The PFO is inconsistent with the application. The application map shows that the storage project will be an on-channel reservoir. However language in the PFO and in the draft permit indicate that it might be an "off channel reservoir". Moreover, the Division 33 agency reviews make clear that it is still unclear to the agencies if the dam will be on or off channel. That the agencies (WRD, DEQ and ODFW) are all unclear as to whether the dam will be on or off channel makes this application impossible to evaluate. To suggest approval of a large dam that the agencies apparently do not yet know will be, definitively, on or off channel is not in the public interest.

Correction of the errors and deficiencies: The errors and deficiencies should be corrected by issuing a Final Order denying the permit.

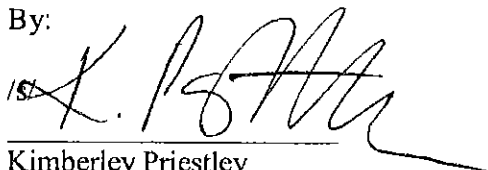
V. Citation Of Legal Authority: Applicable legal authorities include those cited in this protest as well as: ORS 537.153(1)-(8); ORS 537.170; OAR 690-310-0110; OAR 690-410-0070; ORS 537.230(1) and (2); WaterWatch of Oregon, Inc. v. Water Resources Commission, 193 Or.App. 87, 88 P.3d 327 (Or. App., 2004).

VI. Protest Fee: The required fee of \$700.00 is included with this protest.

VII. Request For Hearing: Protestant requests a contested case hearing.

Dated: September 5, 2014

By:



Kimberley Priestley
WaterWatch of Oregon
213 SW Ash St., STE 208
Portland, OR 97204
Ph: 503.295.4039 x3
Fax: 503.295.2791
kjp@waterwatch.org

RECEIVED

SEP 05 2014

OWRD

Certificate of Service

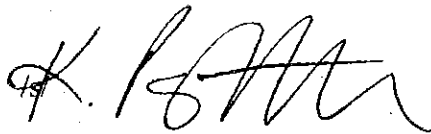
I certify that on this date, a copy of the foregoing protest was served on each of the following by the method indicated:

East Valley Water District
P.O. Box 1046
Mt. Angel, OR 97362

By placing in the US Postal Mail, first class postage prepaid, from Portland, Oregon

Water Rights Section
Oregon Water Resources Department
725 Summer St. NE, STE A
Salem, OR 97301
By hand delivery

Dated: September 5, 2014.



Kimberley Priestley
WaterWatch of Oregon
213 SW Ash St., STE 208
Portland, OR 97204
Ph: 503.295.4039 x3
Fax: 503.295.2791
kjp@waterwatch.org

During the prehearing conferences, the parties agreed to hearing dates on March 12, 2018 through March 21, 2018. Given a variety of scheduling issues, the hearing was reset to June 18 to 29, 2018.

In January 2018, Senior ALJ Barber granted the parties' request for a ruling regarding the burden of proof at the hearing. After receiving written briefing from the parties, Senior ALJ Barber issued a ruling. This Proposed Order reflects the burden of proof set forth in Senior ALJ Barber's ruling.

On March 20, 2018, the OAH reassigned the case from Senior ALJ Barber to ALJ D. McGorin. The parties submitted prehearing memoranda on June 11, 2018.

Three of the parties offered written direct testimony before the hearing. The Department submitted the written direct testimony of Dwight French, Tom Murtagh, and Danette Faucera.² EVWD offered the written direct testimony of Lucius Caldwell, David Dekrey, and Glenn Goschie. The Rue Protestants submitted the written direct testimony of Alyssa Mucken, Bruce Jaquet, Steven Lierman, Stephen Fox, Anna Rankin, Zach Taylor, Joel Rue, and David Doerfler.³ WaterWatch offered no written direct testimony.

The parties filed their statements of issues to be decided at the hearing on March 1, 2017. On June 7, 2018, WaterWatch moved to amend its list of issues for the hearing. The Department and EVWD filed written opposition to WaterWatch's motion on June 12, 2018. WaterWatch filed a reply brief that same day.

On June 14, 2018, ALJ McGorin denied WaterWatch's motion because it was untimely. Oregon Administrative Rule (OAR) 137-003-0630(3) requires such motions to be filed no less than 14 days before the hearing. WaterWatch's motion was filed 11 days before the scheduled hearing, and did not show good cause for its untimely filing. On June 14, 2018, ALJ McGorin advised the parties that she was adopting the issues statement submitted by EVWD because it was neutral and encompassed all of the issues raised in the September 8, 2014 protests of the Protestants. No party objected.

At the beginning of the hearing, WaterWatch requested clarification regarding the issues for the hearing. WaterWatch argued that two additional issues should be included.

The first was whether EVWD's application complies with OAR 690-033-0220(3), which requires permit applications seeking more than one cubic foot per second (cfs) of water to describe measures to assure reasonably efficient water use. This conservation rule is part of the Department's Division 33 administrative rules (OAR 690-033-0000 to 690-033-0340), which

² As explained below under the heading Evidentiary Rulings, the written direct testimony of Danette Faucera was excluded because she did not appear at the hearing, and therefore was unavailable for cross examination.

³ David Doerfler's written direct testimony was excluded because he declined to appear at the hearing, and therefore was not available for cross examination.

assist the Department in determining whether a proposed use will be detrimental to sensitive, threatened, or endangered (STE) fish species.

The second issue arose under Oregon Revised Statute (ORS) 540.350(2) and (3). That statute requires dams to be readily adaptable to power generation in a manner consistent with safe fish passage. WaterWatch noted that this issue was raised by the Department in the written testimony of Dwight French, Administrator of the Department's Water Right Services Division.

ORS 537.170(5) requires that an entity protesting a PFO notify the Department of all issues that the protestor is raising. Issues not raised are precluded from review. ORS 537.170(5) provides:

Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available argument supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or in a hearing or failure to provide sufficient specificity to afford the Water Resources Department an opportunity to respond to the issue precludes judicial review based on that issue.

With regard to the conservation issue, WaterWatch concedes that it did not list this particular rule on its proposed issues list. WaterWatch argues that the administrative law judge may add issues because he or she has the authority to identify issues for the hearing. WaterWatch relies on ORS 537.170(1), which states in relevant part: "The issues to be considered in the contested case hearing shall be limited to issues identified by the administrative law judge."

Although ORS 537.170(1) states that administrative law judges shall identify the issues for hearing, the provision does not give judges the authority to include issues not raised by a protestant. The administrative law judge therefore does not have the authority to add issues unless an issue is not reasonably ascertainable at the time the protest was filed. Here, WaterWatch did not claim that the conservation issue was not reasonably ascertainable from the PFO when it filed its protest or proposed issues list.

WaterWatch contends that because it raised other portions of the Division 33 rules, it implicitly raised the conservation issue. However, the requirement that an application for water use exceeding one cfs contain conservation measures is a specific one. A general reference to Division 33 is insufficient to raise this particular requirement. The conservation issue therefore will not be addressed in this Proposed Order.

The issue of power generation was raised by the Department when Mr. French testified in his written declaration that power generation compatibility was inadvertently left out of the PFO, and would be addressed in the FO. WaterWatch contends that the omission of this issue renders the PFO invalid, and that the PFO cannot be amended to include the issue. Because WaterWatch did not know when it filed its protest of the

Department's plan to amend the PFO, WaterWatch's argument that the amendment does not remedy the deficiency in the PFO will be addressed in this Proposed Order.

The hearing was held on June 18-29, 2018, in Salem, Oregon. The Department called as witnesses Dwight French, Jeana Eastman, Nancy Gramlich, Anna Pakenham Stevenson, and Tom Murtagh. Michael L. McCord, Lucius Caldwell, Justin Iverson, David McKrey, Bolyvong Tanovan, Mark Dickman, Glenn Goschie, and Barbara Wyse testified for EVWD. Greg Apke, Elizabeth Goodman, John Fagan, Alyssa Mucken, Kevin Loe, Bruce Jaquet, Steven Lierman, Stephen Fox, Anna Rankin, David Bielenberg, Duane Eder, Ryan Eder, Zach Taylor, Lauren Reese, Kevin Crew, and Joel Rue were called as witnesses by the Rue Protestants. WaterWatch called as witnesses Greg Apke, Adam Sussman, James Fraser, Richard Cuenca, John Yearsley, Elizabeth Ruther, and Conrad Gowell.

Written transcripts were received by the parties and ALJ McGorin on July 23, 2018. The parties submitted initial closing briefs on August 13, 2018. The parties filed responsive closing briefs on September 12, 2018. The record closed at 5:00 p.m. on September 12, 2018.

ISSUES

1. Whether the Department showed that a presumption was established under ORS 537.153(2) that the proposed use will not impair or be detrimental to the public interest;
2. Whether the proposed use complies with the rules and policies of the Water Resources Commission, including:
 - a. OAR 690-033-0000 to 690-033-0340 (sensitive, threatened, and endangered species);
 - b. OAR 690-410-0030 (instream flow protection);
 - c. OAR 690-410-0070(2)(a) (water appropriation);
 - d. OAR 690-410-0080 (impacts of water storage projects);
 - e. Integrated Water Resources Strategy and off-channel storage policy;
 - f. OAR 690-310-0040(1)(a)(G) (access rights);
 - g. OAR 690-033-0220(1) and 690-033-0330(2) and (3) (peak and ecological flows);
3. Whether the Protestants demonstrated under ORS 537.170(8) that the proposed use will impair or be detrimental to the public interest.
4. Whether the PFO adequately considered endangered species under the federal Endangered Species Act, 16 USC Sections 1531 *et. seq.*,⁴
5. Whether the PFO adequately acknowledges and addresses public comments opposing EVWD's storage application under OAR 690-310-0150(1); and

⁴ This Proposed Order addresses the issues listed in the EVWD issues statement as well as the power generation issue raised in Mr. French's written testimony.

6. Whether the PFO addresses power generation consistent with safe fish passage under ORS 540.350(2) and (3).

EVIDENTIARY RULINGS

Admitted Exhibits

Exhibits A1 to A9, offered by the Department, were admitted into the record without objection. Exhibit A10, also offered by the Department, was excluded because it was the written direct testimony of Danette Faucera, who was unavailable for cross examination, as detailed below.

EVWD's Exhibits EV1-4, EV9-16, EV 23-42, EV44-48, EV50-54, EV56-58, EV60, EV62, EV64-70, and EV72-100 were admitted without objection. EVWD withdrew Exhibit EV 43.

The Rue Protestants' objection to the relevance of Exhibits EV5-8, documents regarding access rights to property along Drift Creek, was overruled. Exhibits EV5-8 are relevant to the issues in this case, and were given due weight. WaterWatch's objection that Exhibit EV55 is duplicative of Exhibit EV3 was overruled because WaterWatch did not establish that those two exhibits contain the same information. The Rue Protestants' objection to Exhibit EV 17-22 that the exhibits are inadmissible because of an inability to cross examine the consultant who prepared these studies was overruled. These exhibits were given due weight. WaterWatch's objection to Exhibits EV49, EV59, EV61, EV63, and EV71 that the exhibits are inadmissible because of an inability to cross examine the consultants who prepared these studies was overruled. These exhibits were given due weight.

The Rue Protestants' Exhibits R1-39, R43-99, R101-117, R119-139, R141-148, R150-159, R161-172, and R175-176 were admitted without objection. The Rue Protestants withdrew Exhibits R41, R42, R100, R118, R125, R140, R149, R160 and R174. Exhibit R40, also offered by the Rue Protestants, was excluded because it was the written direct testimony of David Doerfler, who was unavailable for cross examination, as detailed below.

EVWD's objection to R173 and R174 that these were incomplete maps was overruled. These exhibits were given due weight.

WaterWatch's Exhibits WW1, WW3-52, WW54-63, WW65-68, WW70-102, WW101-112, WW117, WW119-123, WW125-136, and WW140-157 were admitted without objection. WaterWatch withdrew Exhibits WW 53, WW64, WW69, WW124, WW137-139, and WW114.

EVWD's objection to WW113, WW115, WW116, and WW118 on relevance grounds was overruled. These exhibits, which relate to alternative supplemental water sources for EVWD, were given due weight.

The Rue Protestant Exhibits R1-39, R43-89, R91-99, R101-117, R119-124, R126-139, R141-148, R150-159, R161-173, R174A, R175, R176, and R178 were admitted. WaterWatch exhibits WW1, WW3-6, WW8-43, WW45-52, WW54-58, WW60-63, WW65-68, WW75-84, WW85-113, WW115-121, WW125-134, and WW141-157 were admitted.

Excluded Written Direct Testimony

At the beginning of the hearing, WaterWatch moved to exclude the written direct testimony of Danette Faucera, offered by the Department, and the written direct testimony of David Doerfler, offered by the Rue Protestants.

The Department offered written direct testimony from Ms. Faucera as Exhibit A10. Ms. Faucera is an employee of the Oregon Department of Fish and Wildlife (ODFW), and provided input to the Department during the review of EVWD's permit application. WaterWatch and the Rue Protestants included Ms. Faucera on their witness lists, and advised the Department in writing that they would cross examine all witnesses that submitted written direct testimony.

At the hearing, however, the parties stipulated that Ms. Faucera was unavailable to testify at the hearing because of medical issues. The Department's counsel indicated that Ms. Faucera would not be available to testify until October 2018.

The Rue Protestants offered written direct testimony from Mr. Doerfler. Mr. Doerfler is one of the Rue Protestants, and owns property that he contends will be impacted by EVWD's proposed project. During the hearing, Ms. Neuman advised ALJ McGorin and the other parties that Mr. Doerfler had decided against appearing for cross examination. Ms. Neuman indicated that Mr. Doerfler's decision was a personal preference to not testify at the hearing, and that nothing prevented him from doing so.

After Water Watch moved to exclude the written direct testimony of Ms. Faucera and Mr. Doerfler, ALJ McGorin gave the parties several days during the hearing to meet and confer to resolve the issue. ALJ McGorin asked the parties to determine whether there were facts in the written testimony of Ms. Faucera and Mr. Doerfler that were undisputed and could be admitted as stipulated facts. Additionally, ALJ McGorin offered to hold the record open to allow the parties to cross examine Ms. Faucera when her medical issues allowed her to appear. ALJ McGorin also asked Ms. Neuman to determine whether Mr. Doerfler would appear for cross examination via telephone.

After conferring, the parties advised ALJ McGorin that they would not stipulate to any facts from the Faucera and Doerfler written direct testimony. The Department stated that it was not requesting that the record be held open to permit cross examination of Ms. Faucera. Ms. Neuman reported that Mr. Doerfler was unwilling to appear either in person or by telephone for cross examination.

Thus, neither Ms. Faucera nor Mr. Doerfler was available for cross examination. The Department and EVWD argued that Ms. Faucera's testimony constituted substantial reliable

hearsay evidence under ORS 183.482(8)(c) and *Reguero v. Teacher Standards and Practice*, 312 Or 402 (1991).

ALJ McGorin excluded the written direct testimony of Ms. Faucera and Mr. Doerfler based on fundamental fairness and the due process right to cross examine witnesses who testify on direct examination. *See, e.g., Cole/Dinsmore v. DMV*, 366 Or 565 at 581 (even if hearsay evidence is sufficiently reliable to constitute substantial evidence, a driver's inability to cross examine undisclosed witness supporting suspension of driver's license "did not comport with the fundamental requirements of due process.")

Written Testimony Evidentiary Rulings

EVWD objected to testimony of the Rue Protestants identifying fish species that they observed in Drift Creek. The Rue Protestants laid no foundation demonstrating that they have training or background in identifying specific fish species. Accordingly, EVWD's objection was sustained. Although the Rue Protestants' testimony that they observed fish was admitted, testimony about the species of the fish was excluded.

EVWD objected to testimony of the Rue Protestants describing potential impacts to wildlife habitat from the proposed project. The Rue Protestants laid no foundation demonstrating that they have the expertise to ascertain wildlife habitat impacts from a dam or reservoir. EVWD's objection therefore was sustained. Testimony from the Rue Protestants about such impacts was excluded.

EVWD objected to lay testimony of Alyssa Mucken purporting to identify objects that she found on the property of Bruce Jaquet as "Native American artifacts" and "early settlement artifacts." The Rue Protestants laid no foundation demonstrating that Ms. Mucken has any training or background in identifying historical artifacts. EVWD's objection was sustained and testimony from Ms. Mucken characterizing objects that she found was excluded. Ms. Mucken was allowed to testify that she found objects on the property.

EVWD objected to the testimony and written declaration of Anna Rankin. Ms. Rankin is the Executive Director of the Pudding River Watershed Council (the Council). She testified that the Council opposed EVWD's proposed application. EVWD objected on the basis that the Council did not submit a protest to the Department regarding its PFO and draft permit. EVWD's objection was overruled because although the Council is not one of the Protestants, its opposition to the proposed application is relevant, and was given due weight.

EVWD objected to the Rue Protestants' testimony about the loss of the private recreational use of their land. That evidence is relevant to whether the proposed use is in the public interest. EVWD's objection was overruled. The evidence was admitted and was given due weight.

EVWD objected to the Rue Protestants' testimony regarding the District's ability as a water district to acquire private land through eminent domain. That evidence is relevant to

requirements applicable to EVWD in the application process, and the objection was overruled. The evidence was admitted and was given due weight.

EVWD objected to the Rue Protestants' testimony about the adequacy of compensation for their land. That evidence is relevant to whether the proposed use is in the public interest. EVWD's objection was overruled. The evidence was admitted and was given due weight.

FINDINGS OF FACT

Overview

1. More than 60 years ago, a group of long-established farmers in the Willamette Valley began looking for additional water sources to irrigate their crops. Subsequent generations continued the search. In 2000, the farmers organized themselves into a water district. In 2013, the District filed an application with the Department for a water storage permit. The proposed project involves building a dam and reservoir along Drift Creek, a creek near Silverton, Oregon. (Tr. at 1027-1028; Ex. A1 at 490-496.)⁵

2. Another group of multi-generational farmers, who live and farm land along Drift Creek, oppose the project. Although these farmers do not irrigate their crops with water from Drift Creek, portions of the farmers' land will be inundated at the proposed reservoir site. The District plans to take that land through eminent domain. A non-profit organization, WaterWatch, contends that the project is against the public interest, primarily because of its impact on fish habitat. (Ex. A1 at 15-29 and 37-59.)

3. In 2014, the Department issued a proposed final order granting EVWD's application for a water storage permit. (Ex. A1 at 123-132.)

East Valley Water District

4. In the 1950's, a group of farmers in the Willamette Valley, located about twelve miles from Drift Creek, began looking for alternative water sources to the ground and surface water they were using to water their crops. The land in the area where they farm is primarily flat and conducive to crop watering. (Tr. at 1027, 1028, 1152 and 1155.)

5. Between the 1950's and the year 2000, these farmers formed various water-developing committees. The first committee was the Butte Creek Water Committee, whose purpose was to develop a water storage project. (Tr. at 1027 and 1028.)

6. In the late 1980's, the Department designated the Mt. Angel Groundwater Limited Area, recognizing that groundwater in that area was declining. At that time, several farmers, including current EVWD member Mark Dickman, applied for additional groundwater rights. The Department denied these applications based on lack of groundwater available for

⁵Testimony from the hearing transcripts will be cited as (Tr. at [page].) Declarations will be cited as (Decl. of [Declarant Last Name] at [page].) Exhibits will be cited as (Ex. [A for Department Exhibits, EV for EVWD Exhibits, WW for WaterWatch Exhibits and R for Rue Exhibits] [number] at [page].)

appropriation. That denial was the impetus for the farmers to form the Pudding River Basin Water Resources Development Association, whose mission was to find additional sources for irrigation water. (Tr. at 1028.)

7. In or about 2000, the farmers created EVWD as an irrigation district under ORS 545.025. (Tr. at 1026-1027.) The District's purpose is to develop a secure source of future agricultural water for its members. (Tr. at 1073.) Many of the members of the former Pudding River Water Resources Development Association are also members of EVWD. (Tr. at 1261.)

8. EVWD owned no land until 2016, when it acquired property near Drift Creek. At that time, the District took out a property loan from a lending company to acquire the property. Five EVWD members also loaned the District part of the purchase price. (Tr. at 1094, 1095, 1301, and 1302.)

9. The geographic boundaries of the District are in Marion County and extend from north of Silverton to south of Woodburn and Molalla. The District is bordered by the Pudding River on the west and the Cascade Mountain foothills on the east. The land is owned by private farmers. (Decl. of Goschie at 1.)

10. Oregon's Water Resources Commission has identified land within the District as having significant groundwater challenges. The boundaries overlie most of two Groundwater Limited Areas⁶: Mt. Angel and Glad Tidings.⁷ When water levels drop to a certain level in wells in these areas, the Department imposes water use restrictions. (Tr. at 536 and 537; Decl. of Goschie at 3; Ex. A1 at 356.)

11. Some EVWD members had time-limited groundwater permits in the Groundwater Limited Areas that have expired. The Department has declined to renew some of these permits. (Tr. at 1041, 1043, 1065, and 1066; Decl. of Goschie at 3; Ex. A1 at 356.)

12. Most of the available surface water within the District boundaries has been fully appropriated by existing water rights. This means that available water has already been secured by those water rights. (Tr. at 537.)

13. Phil Ward, who was the Director of the Department from 2004 to 2014, believed during his tenure that EVWD members need another water source to support existing agriculture as well as future crops. (Tr. at 572 and 573.)

14. There are approximately 35,000 acres of tillable land within the geographic boundaries of the District that could be irrigated. Approximately 15,000 to 17,000 of those acres are currently being irrigated with existing water rights. Farmers within the District irrigate their

⁶ Groundwater Limited Areas are areas where there is insufficient water to meet existing water rights or the potential exists for such over-appropriation. (Tr. at 824.)

⁷ The Department is currently not issuing new water rights for these areas. Water users with existing rights may continue exercising their water rights unless certain draw-down conditions exist and water use is curtailed by the Department. (Tr. at 828, 877, 878, and 879.)

land with a combination of groundwater from individual farm wells and local surface water rights. (Tr. at 1701; Decl. of Goschie at 1.)

15. Farmers do not have to own or operate land within the District boundaries to become District members. (Tr. at 1747.) Should the District develop a water storage facility, it would consider selling water to landowners and operators farming land outside of its boundaries. (Tr. at 1309 and 1748.)

16. EVWD is run by a five-member board of directors. The directors are private farmers within EVWD who volunteer their time to serve on the board. (Tr. at 1172, 1252, and 1267.) Since the District's inception, there have been no contested elections for board members. (Tr. at 1694.)

17. As of June 2018, there were approximately 45 District members, 30 of which regularly attend the annual meeting. (Tr. at 1291, 1726, and 1978.) Membership is voluntary. (Tr. at 1726.)

18. All members pay operational assessments, which are used to pay for EVWD's operational expenses such as mailings and executive secretary fees. (Tr. at 1256 and 1257.) Members pay \$1.80 per year for each acre owned or operated within the District boundaries. As of June 2018, members were paying operational assessments on a total of 12,000 acres. (Tr. at 1978 and 1982.)

19. Members may opt out of paying operational assessments, allowing their membership to lapse. EVWD allows them to subsequently renew their membership by paying the operational assessments they would have owed if they had remained members. Some members allow their membership to lapse because property is sold or land use changes, making irrigation water unnecessary. (Tr. at 1261 and 1262.)

20. Some members also choose to pay annual developmental charges. Developmental charges finance pre-construction project expenses such as environmental studies. (Tr. at 1257-1258.) Payment of those fees allows members to reserve water from any storage project that EVWD successfully brings to fruition. Developmental fees are based on the number of acre feet of water that a member wants to reserve. The charge was \$25 per acre foot in 2018. (Tr. at 1128.)

21. As of June 2018, 34 EVWD members have reserved about 4,000 annual acre feet of water.⁸ (Decl. of Goschie at 1.) EVWD expects the acre feet of reserved water to increase if it successfully develops a water source. (Tr. at 1851-1852.)

22. To pay developmental assessments and reserve water, an entity must be a member of EVWD. However, after the project is built, non-members may potentially purchase unreserved water. (Tr. at 2031 and 1308-1309.)

⁸ As discussed below, the total annual acre feet requested by EVWD in its Drift Creek storage application is 12,000. (Ex. A1 at 494.)

23. As of June 11, 2018, EVWD members have contributed a total of approximately \$1.5 million in a combination of operational and developmental assessment fees. (Tr. at 1259.)

Representative EVWD Members

Dickman Farms

24. Mark Dickman operates Dickman Farms, a multi-generational family operation. Mr. Dickman's grandfather purchased property in the Willamette Valley in 1929. (Tr. at 1023.) Mr. Dickman has farmed in the Willamette Valley since 1975. He and his wife have raised their daughters on the homestead. Mr. Dickman's brother and his wife are part of the farming operation. Mr. Dickman's nephew recently joined the operation as a fourth generation farmer. (Decl. of Dickman at 1; Tr. at 1024.)

25. Dickman Farms employs five full-time, non-owner employees. The farm also employs 6-20 seasonal workers. (Decl. of Dickman at 2.)

26. The operation farms 2,500 acres of owned and leased land. Approximately 800 of those acres are within EVWD's boundaries. (Tr. at 1048.)

27. Dickman Farms rotates vegetable and seed crops. Crops requiring irrigation include green beans, cauliflower, sweet corn, storage onions, crimson clover, and nursery plants. Some of these crops, such as onions, are high-value crops, which generate more revenue per acre than other crops. Dickman Farms also grows grass seed, including perennial ryegrass and tall fescue. Grass seed can be grown without irrigation but in dry years, perennial rye grass crop yield is enhanced with irrigation. (Tr. at 1031 and 1050-1051; Decl. of Dickman at 2.)

28. Dickman Farms has water rights that can be used for at least some of its growing season on 95 percent of its operation. Dickman Farms is currently able to farm all of its property within the EVWD District with existing water rights. The operation has over 30 water rights attached to owned or leased properties. Dickman Farms irrigates its crops predominantly in June, July, and August. (Tr. at 1031-1032, 1035, and 1053.)

29. Dickman Farms relies on groundwater rights for most of its irrigable acres, 600 of which are in a Groundwater Limited Area. The farm cannot obtain any new groundwater irrigation rights from the aquifer underlying the Mr. Angel Groundwater Limited Area.⁹ Well water in that area has declined, on average, by 10 feet in the last 20 years. (Tr. at 1038 and 1041.)

30. Dickman Farms had two limited-period groundwater permits that the Department did not renew. The Department had previously extended those permits several times. The farm has

⁹ In January 2018, the Department granted Dickman Farms a conditional permit for groundwater which will be used to irrigate crops on land that will not be provided water by EVWD. (Tr. at 1144 and 1145.)

not had its current groundwater permits regulated back.¹⁰ However, four or five of Dickman's surface water rights are regulated back each year. (Tr. at 1041-1042, and 1063-1066.)

31. Dickman Farms has surface water rights to divert water from Butte Creek. On that creek, there are more than 100 water rights attached to various properties owned by several farmers. In one prior year, all farmers' water rights were regulated off except for one. (Tr. at 1076.)

32. In July 2018, all of Dickman Farms' Butte Creek surface water rights were regulated off for the season, impacting about 75 acres, which had no supplemental water rights.¹¹ (Tr. at 1032-1034.)

33. Dickman Farms typically does not need to supplement its water supply when its surface water rights are regulated back. The farm plans its crop rotation knowing that some of its surface water rights will be limited. (Tr. at 1068.) The limitation on crop rotation can negatively impact yields, reducing net farm revenue. (Decl. of Dickman at 3.)

34. Dickman Farms has limited options for expanding its surface water rights. Nearly all Willamette Valley streams are fully appropriated. In some years, existing surface water rights exceed available water. In high precipitation years, there is enough water to satisfy all surface water rights. (Tr. at 1032.)

35. In drought years, Dickman Farms has considered a temporary transfer, which allows water rights for one acre to be used on a different acre. However, it can take months for the Department to grant a temporary transfer application. (Tr. at 1035-1037.)

36. Dickman Farms is currently able to farm all of its property in the District without resorting to supplemental water rights. If the Department regulates back the farm's existing groundwater rights in the future, Dickman Farms would need supplemental water rights to irrigate all of its property. (Tr. at 1131.)

37. As population increases in the Willamette Valley, there will be constant competition for agricultural water as well as water for other community needs. If EVWD cannot address the long-term water supply needs of its members, Dickman Farms' ability to farm for another generation will be jeopardized. Having a reliable source of supplemental water is necessary for the farm's survival. (Decl. of Dickman at 2; Tr. at 1039-1040 and 1044-1045.)

¹⁰ The phrase "regulated back" means that when there is insufficient water to meet all water rights, the Department limits junior water users from exercising all of their water rights until more senior water rights can be satisfied. The phrase "regulated off" means that the junior water users are prohibited from exercising their water rights during at least a portion of the irrigation season. (Tr. at 161.)

¹¹ Supplemental water rights are a secondary source of water for farmland. (Tr. at 1033-1034.)

Goschie Farms

38. Glenn Goschie is vice chair of EVWD's board of directors. His operation, Goschie Farms, encompasses more than 900 acres within the District. Goschie Farms owns 700 of those acres and leases the rest. The operation grows high-value crops requiring irrigation such as hops and wine grapes. Goschie Farms also grows small grains, including wheat, oats, and barley. (Decl. of Goschie at 1; Tr. at 1253.)

39. Hops are a perennial crop; growing them is a multi-year investment. Having a reliable water source would enable Goschie Farms to know at planting time that it will have the water to irrigate its hop crop for a number of years. Otherwise, the operation will not invest in the supplies and labor necessary for establishing a hop crop. (Tr. at 1273-1274.)

40. Goschie Farms irrigates its hops from June to August. All hops grown in the Willamette Valley are irrigated because they cannot be grown with water from precipitation alone. (Tr. at 1269 and 1284.)

41. Goschie Farms irrigates its grape crops at times. Most grapes require watering while getting established. Other grapes grown in light soil require irrigation during production years. (Tr. at 1269-1270 and 1284-1285.)

42. Goschie Farms sells its hops to craft brewers or microbrewers primarily within Oregon. Goschie Farms sells its grapes to wineries in Oregon. (Tr. at 1253-1254.)

43. Goschie Farms employs between 15 and 100 employees throughout the year. The farm buys agricultural supplies such as fertilizers and chemicals from suppliers in the Willamette Valley. The farm hires local construction and electrical contractors. (Tr. at 1254-1255.)

44. Nearly all of Goschie Farms' 900 acres are covered by water rights. Sixty percent of those water rights are surface rights and forty percent are groundwater rights. Goschie Farms holds surface water rights on Abiqua Creek and the Pudding River. (Tr. at 1294-1295.)

45. Goschie Farms' groundwater rights, which do not draw water from Groundwater Limited Areas, have not ever been curtailed. However, some of the farm's surface water rights have been regulated off in one or more years between 2013 and June 2018. (Tr. at 1294-1295.)

46. In 2018, some of Goschie Farm's surface water rights were regulated off during the month of June, which is the earliest month in the farm's growing season that the farm was precluded from using those rights. Typically, those rights are regulated off in late July or August, at the earliest. And, in 2018, those surface water rights were regulated off for the remainder of the irrigation season. In previous years, Goschie Farms was able to use the surface water rights for part of the remaining irrigation season. (Tr. at 1270-1272.)

47. Goschie Farms has been able to continue farming despite the surface water regulation. However, the farm has been forced to limit some water-intensive, high-value crops that it might otherwise grow. (Tr. at 1348.)

48. Goschie Farms has a salmon-safe certification. One requirement for that certification is efficient irrigation practices. The farm conserves water by using drip irrigation. (Tr. at 1300-1302 and 1352-1353.)

49. If Goschie Farms is unable to maintain a reliable, supplemental source of irrigation water, Mr. Goschie believes that its property value will decrease. Reliable water rights allow farmers to grow higher-value crops. Land that has reliable water rights is therefore more valuable. (Tr. at 1268-1269.)

50. Goschie Farms and other EVWD members want to secure the viability of their farm operations for future generations of their families. Mr. Goschie believes that a reliable, supplemental water supply is critical for that viability. (Tr. at 1260.)

David Bielenberg

51. David Bielenberg has been the chair of EVWD's board since its inception. He was a board member of EVWD's predecessor organization, the Pudding River Basin Water Resource Development Association. (Tr. at 1688-1690.)

52. Mr. Bielenberg owns 1200 to 1500 acres of land, portions of which are in the Mt. Angel and Glad Tidings Groundwater Limited Areas. He leases an additional 150 acres for farming. (Tr. at 1702-1703.)

53. Mr. Bielenberg's primary crop is grass seed, which he irrigates. He has also grown vegetable and specialty seed crops. (Tr. at 1737-1738.)

54. Mr. Bielenberg has groundwater rights for irrigating his crops. The Department previously issued him a five-year groundwater permit but the Department did not renew that permit. (Tr. at 1723.) Mr. Bielenberg also has surface water rights on the Abiqua and Pudding Rivers, as well as water storage rights. (Tr. at 1701-1702.)

55. Mr. Bielenberg has lost no groundwater rights other than the five-year groundwater permit. The Department has never threatened to take away any of Mr. Bielenberg's other groundwater rights or any of his surface water rights. One of the reasons that Mr. Bielenberg is seeking alternative water sources is the authority of the Department to curtail or eliminate water rights at any time. (Tr. at 1725-1726.)

56. If Mr. Bielenberg's access to irrigation water is limited, he will have to plant crops requiring less water to grow. Because those crops yield smaller profit, Mr. Bielenberg would have to reduce the number of employees working at the farm. (Tr. at 1836.)

57. If EVWD successfully makes supplemental water supplies available to its members, Mr. Bielenberg believes that the value of his land will increase. (Tr. at 1854.)

Triangle Farms

58. Kevin Loe joined the EVWD board of directors in 2012. He and his family operate Triangle Farms, consisting of about 2,500 acres. Mr. Loe and his family own 1,500 of those acres and lease the remainder. (Tr. at 1511-1513.) The operation employs between 17 and 50 employees. (Tr. at 1553.)

59. Triangle Farms grows grass seed, grain, vegetable and flower seed, custom seed, and Christmas trees. The operation also raises cattle. Triangle Farms irrigates from 100 to 300 acres per year. The farm primarily irrigates the flower seed crops, and usually does not irrigate its grass seed crops. (Tr. at 1514-1518.)

60. Triangle Farms has several groundwater rights. Approximately 114 acres of the farmland is within the Mt. Angel Groundwater Limited Area. (Tr. at 1520-1521.) Triangle Farms has groundwater rights that pre-date the designation of the Mt. Angel Groundwater Limited Area. The farm has never been required to use less water than the rights allow. (Tr. at 1518 and 1521.)

61. Triangle Farms has filed three separate applications for new groundwater rights outside of the Mt. Angel and Glad Tidings Groundwater Limited Areas. The Department denied each application. (Tr. at 1551 and 1566-1567.)

62. Triangle Farms has surface water rights. Those rights permit the operation to divert water from Evans Creek and Butte Creek. In 2017 and 2018, some of Triangle Farms' surface water rights were regulated off. Triangle Farms was not always successful in finding alternative water sources. The inability to fully use its surface water rights restricted Triangle Farms' ability to select crops, and limited its crop yields. (Tr. at 1521-1522, 1545, and 1554.)

63. A reliable, supplementary water source would allow Triangle Farms to diversify its crops. Also, water shortages compel a shorter growing season. A reliable water source would allow Triangle Farms to have a longer, more productive crop season. (Tr. at 1521, 1553-1554, and 1570.)

Duane Eder

64. Duane Eder has been an EVWD board member since 2005. He owns 420 acres and leases an additional 270 farming acres. Mr. Eder farms with his sons. Three quarters of Mr. Eder's crops are grass seed. He also grows onions, green beans, cauliflower, cucumber seed, and hazelnuts. (Tr. at 1883, 1868-1869, and 1890.)

65. Mr. Eder irrigates all of his vegetable crops. He sometimes waters hazelnuts and grass seed. In some years he does not water the grass seed at all; in other years he waters it half the season. Although many grass seed crops can be grown without water, some varieties such as tall fescue must be watered or they will not produce a crop the following year. If watered, tall fescue will produce a crop every year. (Tr. at 1869-1870 and 1888-1889.)

66. Mr. Eder has existing water rights on all but 16 of the acres that he owns and leases. If those water rights were restricted, his crop choices would be limited. (Tr. at 1889-1890 and 1892.)

Ryan Eder

67. In 2011, Ryan Eder was elected to the EVWD board of directors. He farms with his father and uncles in an operation called Chuck Eder Farms. The operation farms 850 acres, 250 acres of which it owns. The majority of the crop is grass seed. Chuck Eder Farms also grows onions, green beans, cauliflower, peas, cucumber, cabbage seed, hazelnuts, and nursery plants. Given the seasonal variability in crop yield and price, planting a variety of crops helps Chuck Eder Farms to produce a steady revenue stream. (Tr. at 1910-1911, 1920, and 1939-1940.)

68. Chuck Eder Farms irrigates 400 to 500 acres of vegetables, vegetable seed plants, and hazelnuts. (Tr. at 1912-1914.) The farm also irrigates hazelnut trees because irrigation increases the trees' longevity and allows their nuts to be harvested sooner. (Tr. at 1914 and 1937-1938.)

69. Approximately 700 to 750 acres of Chuck Eder Farms is covered by water rights. Sixty to seventy percent of those rights are groundwater water rights. None of the farmed property is in a Groundwater Limited Area. (Tr. at 1915, 1931, and 1942.)

70. Chuck Eder Farms has surface water rights on the Pudding River, and from Abiqua and Butte Creeks. The Department has regulated off the operation on some of its surface water rights on the Pudding River and Butte Creek. Ryan Eder recalls three such instances. None resulted in the loss of crops. The amount of regulated-off acreage was less than 10 percent of Chuck Eder's farmed acres. (Tr. at 1916-1917 and 1949-1950.)

The Rue Protestants

71. The Rue Protestants are ten farmers who own land along Drift Creek. They live in the small, tight-knit community of Victor Point. Most of the Rue Protestants have owned and farmed their land for multiple generations. All of their land is outside of EVWD's boundaries. (Decl. of Jaquet at 1-9 ; Decl. of Lierman at 1-3; Decl. of Jaquet at 1-8; Decl. of Qualey at 1-4; Decl. of Stephen Fox at 1-5; Decl. of Rue at 1-9; Decl. of Taylor at 1-5; Ex. A1 at 39.)

72. The Rue Protestants' primary crop is grass seed. The land in the Victor Point area is uneven, steeply sloped, and highly erodible, making irrigation cost-prohibitive. The steep terrain also makes drilling for wells impractical. Thus, the Rue Protestants are dry land farmers who mainly grow their crops without irrigation. (Decl. of Jaquet at 1-8; Decl. of Lierman at 1-3; Decl. of Qualey at 1-4; Decl. of Stephen Fox at 1-5; Decl. of Rue at 3 and 4, Tr. at 2437-2438; Decl. of Taylor at 1-5; Ex. A1 at 47.)

73. Grass seed grown by EVWD farms such as Dickman Farms is sold in the same market as that grown by the Rue Protestants. (Tr. at 1096-1097.)

74. None of the Rue Protestants irrigate their crops with water from Drift Creek. What irrigation water rights the Rue Protestants have come from other water sources in the area. (Decl. of Jaquet at 1-9 ; Decl. of Lierman at 1-3; Decl. of Jaquet at 1-8; Decl. of Qualey at 1-4; Decl. of Stephen Fox at 1-5; Decl. of Rue at 1-9; Decl. of Taylor at 1-5.)

75. The only water right on Drift Creek held by a Rue Protestant is a right to store water for a fish pond. Water from this right cannot be used to irrigate crops.¹² (Decl. of Jaquet at 2.)

Individual Protestants¹³

Joel Rue

76. Joel Rue's family has farmed in Victor Point for approximately 108 years. Mr. Rue's grandfather moved to Oregon from Minnesota in 1910. (Decl. of Rue at 1.)

77. Mr. Rue owns about 900 acres of land. He and his sons farm approximately 2,200 acres of owned and leased land. Mr. Rue's sons and their families all live in Victor Point. The Rues employ several seasonal employees. (Decl. of Rue at 1.)

78. For the last 25 years, the Rues' specialty has been grass seed. The Rues sell their grass seed to companies in the Willamette Valley which, in turn, sell the seed to retailers such as Lowe's and Home Depot.¹⁴ Ultimately, the grass seed is used on golf courses, parks, athletic fields, and lawns in the United States and abroad. The Rues also grow peas, oats, wheat, sugar beets, and brassicas. They manage timber on additional acres. (Decl. of Rue at 1-4; Tr. of Rue at 2435, 2439, and 2455.)

79. Mr. Rue's five-year average yield for ryegrass is approximately \$1,315 in gross revenue per acre. His five-year yield for fine fescue is about \$1,350. (Decl. of Rue at 3.)

80. Farms within EVWD exceed Mr. Rue's ryegrass yield by 20-25 percent. Mr. Rue believes the increase is caused by irrigation. (Decl. of Rue at 4.)

81. When growing wheat in the past, Mr. Rue has received public funding that supported his private farming operation. (Tr. of Rue at 2463-2464.)

82. Mr. Rue has no intention of becoming an EVWD member. He neither wants nor needs to irrigate his land. Even if he did irrigate, he believes that it would make no sense to buy

¹² This right, held by Rue Protestant Bruce Jaquet, is discussed in more detail below, where it is referred to as the Schact water right.

¹³ Rue Protestants John and Sharon Fox offered no evidence. As indicated in the procedural history, the declaration of David Doerfler was excluded.

¹⁴ EVWD farmers sell their grass seed to some of the same companies. For this reason, Mr. Rue considers the EVWD farmers to be his competitors. (Decl. of Rue at 3; Tr. at 2439-2440 and 2457.)

water taken from a creek along his property and transported miles away to the District, and then brought back to his land. (Decl. of Rue at 7.)

83. Mr. Rue has seen wildlife, including elk, near Drift Creek. He and his family enjoy recreational activities on the family farm. Mr. Rue's sons fished in the creek when they were children. (Decl. of Rue at 4.)

Bruce Jaquet

84. Bruce Jaquet's great-grandfather settled in Victor Point in the late 1800's. Mr. Jaquet has lived in the area his entire life. He was a fourth generation farmer before retiring in 2005. Mr. Jaquet enjoys the close farming community and activities in Victor Point. (Decl. of Jaquet at 1 and 2.)

85. Mr. Jaquet currently owns a 193-acre farm known as the Schact Farm, which was built by his great-grandfather. The Schact Farm has approximately 125 acres of tillable land and 55 acres of timberland. (Decl. of Jaquet at 2.)

86. Mr. Jaquet leases the 125 acres to Taylor Farms for \$150.00 per acre per year. Taylor Farms grows grass seed on the land. The lease runs through September 2021 and gives Taylor Farms a right of first refusal to purchase the leased land if Mr. Jaquet sells it. That land will be inundated by the reservoir. (Decl. of Jaquet at 3.)

87. Mr. Jaquet has rented the Schact farmhouse to Alyssa Mucken and her family for fifteen years. Currently, the Mucken family pays \$600 in monthly rent. The land on which the farmhouse sits will be inundated by the reservoir. (Decl. of Jaquet at 3 and 6.)

88. Mr. Jaquet and Ms. Mucken's family have seen wildlife on the Schact farm. Mr. Jaquet has seen fish in Fox Creek, a tributary of Drift Creek that crosses the farm. (Decl. of Jaquet at 4.) Ms. Mucken has also seen objects that she believes to be spear points¹⁵ along Drift Creek. (Mucken Decl. at 1 and 3; Tr. at 1437-1438.)¹⁶

89. The Taylor Farms lease payments and Schact farmhouse rent constitute Mr. Jaquet's total annual income. (Decl. of Jaquet at 3 and 6.)

¹⁵ Stone tools, projectile points, flakes from tools, and fire-cracked rock were also found near the proposed project site during a limited archaeological survey conducted by Archaeological Investigations Northwest, Inc. (Ex. R49 at 7-8.) The historical and archeological significance of these finding has not been assessed. Additional studies would have to be done before that assessment could be made. (Tr. at 1402 and 1416.)

¹⁶ Ms. Mucken's declaration is marked as Exhibit R43 and documents attached to the declaration are marked as Exhibit R44.

Steven Lierman

90. Steven Lierman is Bruce Jaquet's cousin. Mr. Lierman is also a fourth generation farmer in the Victor Point area. He was raised on the same land where his great-grandfather, grandfather, and parents lived. Mr. Lierman owns 244 acres of land. (Decl. of Lierman at 1; Tr. of Lierman at 1598.)

91. For more than 80 years, Mr. Lierman's land has been used to grow grass seed. Currently, Mr. Lierman leases 130 acres to Ioka Farms for grass seed production for \$150 per acre per year.¹⁷ Mr. Lierman leases 8 acres to Joel Rue, owner of Victor Point Farms, to grow grass seed at \$135 per acre per year. Mr. Lierman leases 30 acres to McKenzie Farms for Christmas tree production for \$150 per acre per year. Mr. Lierman also raises sheep and manages 80 acres of timber. (Decl. of Lierman at 2.)

92. Mr. Lierman and his family regularly gather at the farm. They enjoy recreational activities in and around Drift Creek, including swimming, walking and exploring. Mr. Lierman has seen wildlife such as elk, deer, coyotes, and birds near the creek. He has also seen fish in Drift Creek. (Decl. of Lierman at 3-4.)

Robert Qualey

93. Another multi-generational farmer, Robert Qualey, owns 244 acres of land in Victor Point. (Decl. of Qualey at 1.)

94. Mr. Qualey leases 85 acres of land to Ioka Farms, which grows grass seed and brassica. Mr. Qualey uses the rest of his land to grow timber and hay, and to graze cattle. (Decl. of Qualey at 1.)

95. Mr. Qualey's family enjoys spending recreational time along Drift Creek. Mr. Qualey has seen fish in Drift Creek. (Decl. of Qualey at 2.)

Stephen Fox¹⁸

96. Stephen Fox's family has lived and farmed in Victor Point for 115 years. He and his brother grew up on the farm. Stephen Fox operates the Fox Land Company with his brother John. The company owns 1910 acres. Approximately 1050 of those acres are in Victor Point. (Decl. of Stephen Fox at 1 and 2.)

97. Fox Land Company leases 530 acres to R & T Farms for grass seed farming at \$185 per acre per year. He leases 820 acres to McKenzie Farms and BTN Enterprises for Christmas tree farming. For the most part, Stephen Fox's tenants do not irrigate the crops they grow. (Decl. of Stephen Fox at 2 and 3; Tr. at 1616.)

¹⁷ Ioka Farms is owned by David Doerfler, one of the Rue Protestants. (Decl. of Qualey at 1.)

¹⁸ Stephen Thomas Fox is also known as Rue Protestant Tom Fox. He is referred to as Stephen Fox to distinguish him from Rue Protestant John Fox.

98. On its unleased land, Fox Land Company raises barley, wheat, and peas. (Decl. of Stephen Fox at 2.)

99. Fox Land Company has four water rights on Fox Creek, which is a tributary of Drift Creek and flows across company property. Fox Land Company uses stored water from two small reservoirs for fish culture and occasional crop irrigation. (Decl. of Stephen Fox at 3; Tr. at 1616-1617.)

100. Mr. Fox and his family live in the Portland area. They regularly use their Victor Point land for fishing, boating, and swimming in Fox Creek. (Decl. of Stephen Fox at 3.)

Zach Taylor

101. More than a hundred years ago, Zach Taylor's great-grandfather moved to Victor Point. Mr. Taylor is the fourth generation of his family to work the farm. His farming operation is called Taylor Farms, Inc. (Decl. of Taylor at 1-2.)

102. Mr. Taylor farms 2,200 acres. He has 2000 acres in grass seed, 150 acres in timber, and 45 acres in hazelnuts. Mr. Taylor owns forty percent of the land he farms. The rest of the land he leases from others. (Decl. of Taylor at 1-2.)

103. The land that Mr. Taylor farms has no water rights. Mr. Taylor does not irrigate his crops with the exception of hazelnuts. When he waters that crop, Mr. Taylor purchases water and transports it to the farm. (Decl. of Taylor at 1 and 2; Tr. at 1953.)

104. Mr. Taylor leases 125 acres of the Schact Farm from Bruce Jaquet. Mr. Taylor grows grass seed on Mr. Jaquet's property. (Decl. of Taylor at 2.)

105. Mr. Taylor has seen wildlife on the Schact Farm and fish in Drift Creek. (Decl. of Taylor at 3.)

106. In 2015, Mr. Taylor drove by property that he believes is within the District boundaries. He observed sprinklers that appeared to be watering gravel. (Tr. at 1956; Decl. of Taylor at 4.)

WaterWatch

107. WaterWatch is a non-profit membership organization. Its mission is to promote water allocation in Oregon that provides the quality and quantity of water necessary to support fish, wildlife, recreation, biological diversity, ecological values, public health, and a sound economy. (Ex. A1 at 631.)

108. WaterWatch has members throughout the Pacific Northwest, including the Willamette Valley. WaterWatch's members use and enjoy the rivers in the Columbia basin, of which Drift Creek is a part. (Ex. A1 at 631.)

109. In addition to representing its members' interests, WaterWatch represents the general public interest with regard to Oregon water resources. (Ex. A1 at 631.)

The Pudding River Watershed Council

110. The Pudding River Watershed Council (the Council) is a non-profit entity. The Council is one of more than 60 local watershed councils in Oregon that are eligible for programs and funding from the Oregon Watershed Enhancement Board, a state agency that provides grants for preserving local streams, wetlands, and natural areas. The Council's mission is "to provide voluntary collaborative opportunities for local private citizens and interested stakeholder groups to cooperate in protecting, restoring, improving, and sustaining the health of the watershed." (Decl. of Rankin at 2 and 3.)

111. The Council works to preserve or improve the water quality and quantity of water in the Pudding River and its tributaries, and to protect wildlife habitat and biodiversity. (Decl. of Rankin at 2.)

112. The Council did not file a protest after the Department issued the PFO. (Tr. at 1658-1659.) However, in August 2017, the Council issued a position statement opposing the project. Two of the fourteen voting members recused themselves from the vote. One member had ties to the EVWD and another owned Victor Point farmland. (Decl. of Rankin at 7-8.)

113. The Council's opposition is based, in part, on a rapid bio-assessment (RBA) of the Pudding River streams by Bio-Surveys LLC in 2014. (Decl. of Rankin at 3; Ex. R3.)

114. One of the recommendations of the RBA was to remove existing culverts and irrigation dams that block migrations of juvenile Coho Salmon and Winter Steelhead in the Pudding River tributaries. (Ex. R3 at 63.) Dams and other obstructions in five of the six Pudding River main tributaries inhibit fish from migrating, although some of the dams allow for partial passage of fish. (Decl. of Rankin at 4.)

Integrated Water Resources Strategy

115. A project team of OWRD, Oregon Department of Environmental Quality (DEQ), ODFW, and the Department of Agriculture (ODA) met to develop integrated water resources strategies, which were issued by the Commission in 2012 and 2017. (Exs. EV77 and EV78.) These strategies were designed to promote healthy water resources to meet the needs of Oregonians and the environment. (Ex. EV78 at 5.) The 2017 strategy recommends over 50 actions for the state. Each recommended action is combined with possible ways to implement the action. (Ex. EV78 at 13.)

116. The December 2017 strategy expresses a preference for storage of water off of stream channels (off-channel). Off-channel storage reduces ecological harm to fish species and does not block fish passage. (Tr. at 1448.)

117. The December 2017 strategy states in part that:

Oregon has moved away from locating dams on significant streams and river channels in large part because of effects on fish and aquatic life that must migrate through these streams. There has been very limited evaluation of above-ground storage sites that are located off-stream, on very small stream channels, or at sites with little or no effect on migration of fish and other aquatic life.

(Ex. EV78 at page 128.)

118. The strategy does not define “significant” or identify the channels to which it is referring. (Ex. EV78 at 128.)

119. The strategy encourages the increased use of below-ground storage, using water in federal reservoir systems, and investigating off-channel sites for above-ground storage projects. (Ex. EV78 at 129.)

120. The Department does not use integrated water resources strategies as rules that it must consider when acting on water storage applications. Instead, the Department considers the strategies when promulgating rules. (Tr. at 125 and 126.)

121. The Department does not consider policies contained in its administrative rules that do not pertain specifically to application requirements when deciding on specific applications, but considers them when generating rules. (Tr. at 125 and 126.)

Alternatives To Drift Creek Considered By EVWD

122. Before selecting Drift Creek, EVWD considered other options for the storage project. EVWD received a five hundred thousand dollar grant from the State of Oregon to conduct studies of possible sites and methods for storing water. EVWD also received monetary grants from the Department to conduct project feasibility studies. One of the Department grants totaled \$258,952. (Tr. at 540 and 2012.) As of July 2014, EVWD had received and spent over \$1 million publicly funded dollars on project studies. (Ex. R120 at 1; Tr. at 1313.)

123. EVWD assessed diverting water from Silver Creek and/or the Pudding River, and building an off-channel storage facility on the site of a former dairy. EVWD rejected this option because 19 million cubic yards of earth would need to be removed to build the facility. The estimate for completing the project was \$235 million dollars, which the EVWD considered to be cost-prohibitive. (Tr. at 2227-2228; Ex. R132.)

124. EVWD also evaluated diverting water from Rock Creek. After obtaining a water storage permit from the Department in 2003, EVWD discontinued the project because it concluded that the expense of wetlands mitigation and delivery pumping was too high. (Tr. at 1788 and 1789; Ex. EV54 at 11.)

125. EVWD considered the site of a former ranch, Del Aire, as a possible location for water storage. EVWD did not pursue this option because the land around the ranch had significant seismic issues from a fault line in the area. Additionally, anadromous fish were found in the creek from which the water was to be diverted. The presence of the fish would have required costly fish passage or other measures to mitigate the impact to the fish from the proposed storage facility. (Tr. at 1692 and 1693.)

126. EVWD also evaluated the use of treated water from the Salem-Keizer sewage treatment plant. EVWD abandoned that idea because of food safety concerns arising from using wastewater on crops grown for human consumption. (Tr. at 1143.)

127. The District assessed an option of obtaining water from one or more of the Army Corps of Engineers reservoirs on the Willamette River. Water was available¹⁹ but the District determined that the cost of piping the water to the place of use would be too expensive, given the distance and changes in elevation from the reservoirs to District land. (Tr. at 1134; Tr. at 1528-1529.)

128. EVWD explored the possibility of aquifer recharge as a source of groundwater. However, EVWD does not own a water treatment plant, which would be necessary to treat water before injecting it into an aquifer. Dickman Farms attempted an unsuccessful natural filtration process before the District rejected aquifer recharge as a supplemental water source. (Tr. at 1102 and 1143.)

129. After rejecting these and other potential water source projects, EVWD concluded that a surface water storage facility on Drift Creek was the most viable option for a future water supply. (Ex. A1 at 109.)

Drift Creek's Place in the Pudding River Watershed

130. The Pudding River watershed is a 528-square mile area from which water flows into the Pudding River. (Decl. of Rankin at 3.) The Pudding River is part of the Molalla-Pudding River sub basin of the Willamette Basin in the Lower Columbia River area. (Ex. A1 at 516.)

131. Over 70 percent of the Pudding River Watershed is in Marion County. The majority of the land in the watershed is privately-owned farmland, timberland, and cities, including Aurora, Gervais, Hubbard, Molalla, Monitor, Mt. Angel, Salem, Scotts Mills, Silverton, and Woodburn. The rest of the watershed land is owned by Oregon and the federal government, and includes state parks and federal Bureau of Land Management lands. (Decl. of Rankin at 3 and 4.)

132. The main stem of the Pudding River is 62 miles long, beginning in the Cascade foothills, and flowing south to north until joining the Molalla River near Canby, Oregon. Five main tributaries flow into the Pudding River from the east. These include Drift Creek, Silver

¹⁹ The federal reservoirs store approximately 1.64 million acre feet of water for irrigation. (Tr. at 1457.)

Creek, Abiqua Creek, Butte Creek, and Rock Creek. Drift Creek is the only main tributary that is not blocked by a dam. (Decl. of Rankin at 3; Tr. at 2149-2151.)

EVWD's Application To Store Water From Drift Creek

133. On February 21, 2013, EVWD filed a water storage application with the Department. The application was a form developed by the Department. The application requests a permit to build a dam and reservoir to store water from Drift Creek and unnamed tributaries of the Pudding River.²⁰ (Ex. A1 at 490-516.)

134. The application states that the reservoir will store 12,000 acre feet of water each year from October 1 through April 30 for "irrigation, supplemental irrigation, and flow augmentation as may be required for the approval of this irrigation reservoir by OWRD." (Ex. A1 at 492 and 494.)

135. A map attached to the application indicates that the reservoir will be built on-channel or in Drift Creek's streambed. (Ex. A1 at 504.)

136. Construction of the project is to begin within 10 years of the permit issuance. The proposed height of the dam is approximately 70 feet above the streambed or ground surface at the center of the dam's crest. The area submerged by the reservoir when full will be approximately 384 acres. (Ex. A1 at 490, 402, and 494.)

137. The form application asks for information about the dam's composition, the locations and dimensions of its outlet conduits, and its emergency spillway. In response to each of these questions, EVWD states that because it is a water district, such plans and specifications are not required before the Department issues a permit. EVWD promises to work cooperatively with the Department to provide plans and specifications as they become available. (Ex. A1 at 492.)²¹

138. The form application asks whether the applicant owns the land from which the storage water will be diverted and transported. EVWD responds that it does not own the land, and does not currently have written authorization or easements permitting access to the land. (Ex. A1 at 494.)

²⁰ The map that EVWD submitted with its application shows that the site of the proposed dam is located in Marion County at 3,990 feet North and 355 feet East from the S ¼ corner of Section 36, Township 7 south, Range 1 West. The proposed reservoir is to be contained within Section 36, Township 7 South, Range 1 West; Section 31, Township 7 South, Range 1 east; Section 1, Township 8 South, Range 1 West, and Section 6, Township 8 South, Range 1 East. (Ex. A1 at 504.) Despite this specificity as to township/range, the precise boundaries of the reservoir are unknown. (Ex. A1 at 39.)

²¹ Before issuing a water storage permit, the Department does not require water districts to provide dam and reservoir plans. One reason for not imposing that requirement is the expense of having these specifications prepared. (Tr. at 104.)

Information Not Requested By the Form Application

139. The Department's form storage permit application does not ask any details about the container or reservoir in which the water will be stored. The application does not require EVWD to provide any details about its shape or materials. (Ex. A1 at 490-516.)

140. The application does not require EVWD to specify the amount of water it will release from the reservoir on a monthly or yearly basis. (Ex. A1 at 490-516.) The amount that EVWD expects to release will depend on demand for water. EVWD estimates that it will initially be releasing approximately 8,000 acre feet per year. (Tr. at 2272.)

141. The application does not require EVWD to approximate the cost of the project. EVWD does not know the cost of building the dam and reservoir. Additional costs will include the cost of acquiring necessary land and easements. The District expects to pay fair market value to the Rue Protestants for their land inundated by the reservoir. Estimates range from \$12-40 million dollars for the dam and reservoir, and an additional \$45-60 million for a pipeline conveying water to EVWD property. (Ex. A1 at 490-516; Tr. at 1142-1143, 1290-1291, 1529, 1708, and 1710.)

142. The form application does not ask an applicant to explain how the water will be conveyed to the place of use or the expense of the conveyance. (Ex. A1 at 490-516.) EVWD has considered two conveyance methods. The first would involve piping water 12-15 miles from the reservoir to the place of use. The second would be a live stream flow conveyance method. The second option would involve releasing water from the dam, capturing the water downstream once it enters the Pudding River, and pumping it to the place of use. EVWD has not determined which method it will use or the cost of either method. The estimated cost for pipeline conveyance ranges from \$40 to 60 million. The live stream conveyance method would carry additional costs such as a fish screen installation.²² (Tr. at 1290-1291, 1315, 1530, 2204, and 2267.)

143. The application does not require EVWD to explain how the project will be financed. (Ex. A1 at 490-516.) EVWD hopes to finance the dam and reservoir through private long-term funding, and from a combination of local, state and federal public funding. The required public funding portion is estimated to be substantial. (Tr. at 2209-2210 and 2023; Ex. R120 at 1; Ex. R96 at 1.)

144. EVWD will consider a 50-year loan with the federal Bureau of Reclamation's long-term funding program. The Oregon Departments of Environmental Quality (DEQ) and Department of Energy may also have loan options that EVWD will consider. (Tr. at 2258.)

145. EVWD's project manager estimates the total cost of the project, including the dam, reservoir and conveyance at approximately \$84 million. (Tr. at 2205.)

²² A fish screen prevents fish from entering the area where water is diverted from the reservoir. (Tr. of Pakenham Stevenson at 499:9-25.)

146. The application does not require EVWD to estimate the amount that it will charge farmers for water. Estimates range from less than \$75 per acre foot to \$200 per acre foot. (Tr. at 1099, 1305, and 1706.)

Additional Required Approvals

147. The District's application is limited to a storage permit, which will only allow EVWD to store water. Thus, if the storage application is granted, the District will not be able to use the water without obtaining another water permit from the Department to use the water. That application will go through the same process as the storage application. Thus, the Department will allow for public comments after receiving the application, will prepare a new PFO, and will allow protests to that PFO to be submitted. (Decl. of French at 2.)

148. Additionally, if the storage permit is granted, EVWD will have to obtain authority to build the dam and reservoir, construct a conveyance method, and use the water for irrigation from a variety of state agencies such as the DEQ, ODFW, and the Department of State Lands (DSL), the latter of which will require a wetlands mitigation permit. Federal agencies such as U.S. Fish and Wildlife Service, and the National Marine Fisheries Service will have to approve portions of the project as well. Local agencies may have their own requirements that must be met as well. (Tr. at 442, 2201-2202, and 2256-2257; Ex. A1 at 251.)

149. Before construction starts on the dam, its plans and specifications must be approved by the Department's Dam Safety Office. That review is separate from the water storage application process. Based on the initial description of the dam, including its height, the dam will be subject to the highest dam safety design and review standards. (Ex. A1 at 257 and 354; Tr. at 2264-2265.)

150. The dam design will have to be approved by the federal Army Corps of Engineers. That federal agency requires a 401²³ certification issued from DEQ, confirming that EVWD can meet water quality standards. (Tr. at 442, 465, 469, and 479; Ex. A1 at 251.)

151. At the 401 certification stage, DEQ will have the dam and reservoir specifications, will assess their impact on water quality, and consider additional conditions that EVWD must meet to comply with the CWA. (Tr. at 479.)

Project Impact on Rue Protestants

152. If the proposed storage project moves forward, the reservoir's footprint will cover approximately 340-384 acres of land in Victor Point. The land will be inundated when the reservoir is full, and unusable mudflats when the reservoir is empty. As a result, the Rue Protestants will lose portions of their land, which EVWD, as a water district, plans to take ownership of through the exercise of eminent domain. (Ex. A1 at 39 and 356; Decl. of Rue at 3.)

153. Ten acres of Mr. Rue's own land that he farms, as well as 14 acres of land that he leases and farms, will be inundated. The combined land constitutes one percent of Mr. Rue's

²³ "401" refers to Section 401 of the Clean Water Act, 33 U.S.C. 1151, *et seq.* (CWA).

farm operation, and an average annual crop yield valued at about \$30,000. The loss will not compel Mr. Rue to stop farming. (Decl. of Rue at 3; Tr. at 2434 and 2458.)

154. Mr. Rue will also lose 20 acres of merchantable timber, which generates \$85,000 on a 40-50 year rotation cycle. Additionally, Mr. Rue will be unable to log land in the area of a 100-foot buffer around the reservoir. The cost of future logging on Mr. Rue's remaining timber acreage will be more expensive because the logging will have to be done from uphill instead of the easier method of pulling logs downhill. (Decl. of Rue at 3.)

155. Mr. Rue is unwilling to voluntarily sell his land to EVWD. He does not believe that monetary compensation through the eminent domain process will compensate him for losing land that has been in his family for four generations. (Decl. of Rue at 5.) The other Rue Protestants share these sentiments. (Ex. A1 at 39; Decl. of Jaquet at 5; Decl. of Lierman at 3; Decl. of Qualey at 2; Decl. of Stephen Fox at 2 and 4.)

156. Mr. Jaquet currently lives on separate property that is outside of the reservoir footprint. However, he will lose a total of about 136 acres to the proposed water storage project. This represents half of Mr. Jaquet's land. The land that he will lose includes 90 acres of tillable ground. The potentially inundated land also includes acreage where the Schact farmhouse, pond, and pasture sit, as well as some timber acreage. Moreover, the project will block access to an additional 35 acres of tillable land, as well as timber acreage, on Mr. Jaquet's farm. (Decl. of Jaquet at 3.)

157. Mr. Jaquet will be forced to prematurely sell timber growing on steep slopes near Drift Creek. He will lose annual income from leasing land to Taylor Farms. Mr. Jaquet will also lose his annual rental income from the Schact farmhouse unless he relocates it. (Decl. of Jaquet at 3.)

158. Mr. Jaquet believes that he should not have to give up his land and house to increase EVWD farmers' productivity. Because he has no children, his will provides that upon his death, one or more Victor Point farmers may purchase his property. (Decl. of Jaquet at 5.)

159. The entire 125 acres that Mr. Taylor leases from Mr. Jaquet will be inundated by the proposed reservoir. The lease expires in 2021. Mr. Taylor will receive no compensation for the lost farming revenue, which he calculates at \$62,500 per year. (Decl. of Taylor at 2.)

160. Mr. Lierman will lose access to eight acres of farmland that he leases. He will also lose six acres of his own property that extends down into the Drift Creek Canyon. Additionally, Mr. Lierman will lose 15 or more acres of timber in a steep area that can no longer be logged cost-effectively. As a result, Mr. Lierman will have to sell timber before it reaches its optimum growth and maturity. Mature timber in that area can be worth \$85,000 per acre but Mr. Lierman believes that he will have to sell the timber for less than that amount. (Decl. of Lierman at 2.)

161. Between 30 and 40 acres of Mr. Qualey's land will be flooded by the proposed reservoir. The spring that supplies Mr. Qualey's drinking water will be inundated. Also,

additional acres of his timbered property around the reservoir will be inaccessible for timber harvest because of a 100-foot reservoir setback requirement. (Decl. of Qualey at 2.)

162. The reservoir will flood about 65 acres of Stephen Fox's farmable land. He will also lose an unquantified amount of timber around the perimeter of the reservoir. (Decl. of Stephen Fox at 4.)

163. Although the Victor Point School will not be inundated, construction will disrupt access to the school for months. Construction will also disrupt other traffic in the area, at least temporarily. (Decl. of Rue at 5-6.)

Economic Benefit from Proposed Project

164. The Willamette Valley, Marion County, and the state of Oregon will benefit economically from the EVWD farmers having a reliable, supplemental water supply. Approximately 70-80 percent of the farmers' agricultural production value will pass to the surrounding communities through income for farm workers, farm proprietors, and workers in other businesses selling farming supplies in the community. In turn, the workers patronize local businesses such as restaurants. (Tr. at 1722-1723 and 1769; Tr. at 2615-2616.)

165. The yield of irrigated crops is higher than dryland farm crops. As a result, irrigated crops are more profitable. The higher profits will generate more money to be spent in the local economy. (Tr. at 1770, 2613-2614, 2616, and 2626-2627.)

166. Land with irrigation rights can be rented for 35 to 55 percent more than land without irrigation rights. County-assessed land with irrigation rights is also valued higher. (Tr. at 2611-2612.)

167. High-value crops such as nursery plants, berries, and vegetables, which are grown almost exclusively with irrigation, represent 15 percent of the crops harvested in Marion County, but according to a 2012 U.S. Department of Agriculture study, represent 63 percent of the county's agricultural value. (Tr. at 2613.)

168. A reliable, supplemental water source allows farmers to diversify their crops. If one or more crops fail, the farmers will have other crops to balance those losses. Crop diversification therefore results in a more resilient local farm economy. (Tr. at 2614-2615.)

169. If 400 acres of tillable, non-irrigated land used to grow grass seed is inundated by the project, and 4,000 acre-feet of supplemental water is used to water 4,000 acres, there will be a net gain in agricultural production value, despite the loss of the 400 acres. This is so because irrigated farm land produces more value per acre than non-irrigated land. (Tr. at 2619-2622.)

170. EVWD economic expert Ms. Wyse assumed that the non-irrigated land produces an annual gross market value of \$1,200 per acre or \$480,000. Higher-revenue producing crops such as vegetables and fruit can yield at least \$2,000 per acre or \$800 more per acre than grass seed grown on non-irrigated land. (Tr. at 2622-2625.)

171. Ms. Wyse did not factor in the cost of designing and building the proposed project. She did not perform a cost-benefit analysis of the project. (Tr. at 2635.)

OWRD's Application Review

172. After receiving EVWD's application on February 21, 2013, the Department began its review process. First, the Department reviewed the application to ensure that it contained all required information including the source of the water, the nature and amount of the proposed use, the location and description of the proposed diversion of the water, and proposed dates for the start and end of construction. (Decl. of French at 2.)

173. The Department determined that the District's application met each of these requirements and was therefore complete. Thus, on October 18, 2013, the Department notified EVWD that its application had passed the initial review, and would move to the next phase of the water rights application process. The Department asked EVWD to submit legal descriptions of the property from which the water would be diverted and stored. EVWD complied with that request. (Ex. A1 at 299-301 and 375.)

174. The Department reviewed the applicable basin rules to determine the allowable storage season. Drift Creek is part of the Willamette River Basin, which only allows storage of surface waters from November 1 to April 30. Thus, the Department advised EVWD that its requested storage season would be modified. (Ex. A1 at 375.)

175. On October 22, 2013, the Department gave public notice of EVWD's application. The notice invited the public to submit written comments about EVWD's application. (Ex. A1 at 124.)

176. The Department received a number of public comments about the project, which it considered during the application process. (Tr. at 345 and 347.)

177. On April 10, 2014, Jeana Eastman, the Department's water right application worker, prepared a written summary of the comments, which included the following concerns:

A. Landowners living on or near Drift Creek complained that they would lose part of their land, as well as farming and timber operation, to the reservoir. Landowners believed it unfair that competing EVWD farmers would take portions of the Victor Point landowners' land by eminent domain when EVWD farmers were not short of irrigation water. Landowners were concerned that Victor Point Road would have to be partially relocated. One landowner stated that he would lose a house situated on land covered by the proposed reservoir.²⁴

B. Others expressed concern about the lack of details available about the project, the impact of the project on ecosystems such as fish and wildlife population, disturbance

²⁴ Some of the comments were submitted by Janet Neuman, attorney for the Rue Protestants. (Ex. A1 at 269-272.)

of the aesthetics of the Drift Creek canyon, the safety of the dam in an earthquake-prone area, the resulting seasonal mud flat, possible drowning in the reservoir, and uncertainty regarding the conveyance method for transporting reservoir water to EVWD members' land. Others expressed doubts about EVWD's ability to fund the project. Others said that although EVWD purported to represent 70 farm units, there only appeared to be a small number of farmers capable of financially supporting the project.

(Ex. A1 at 181-184.)

178. While acknowledging receipt of the comments, Ms. Eastman stated in her written summary that many of the raised issues were outside of the scope of the review and/or would be addressed by other agencies. Ms. Eastman stated that the safety of the dam and impoundment would be addressed by the Department when plans were submitted. Ms. Eastman indicated that construction of the reservoir could not begin until the Department approved those engineering plans and specifications. Ms. Eastman stated that habitat for sensitive, threatened or endangered fish species and water quality were being assessed through consultation with ODFW and DEQ. Ms. Eastman also indicated that recommendations of these departments for impact mitigation would be included in the PFO. (Ex. A1 at 181-184; Tr. at 337.)

179. On February 12, 2014, EVWD sent Ms. Eastman a letter responding to some of the public comments. EVWD wrote that Marion County has agricultural production of \$617 million per year, the highest value of all Oregon counties. EVWD stated that although the project will inundate approximately 340 acres of land along Drift Creek, the stored water will be used to support 15,000 acres of high-value agricultural land in Marion and Clackamas Counties. EVWD claimed that it will fully and fairly compensate the Victor Point landowners for their land during the eminent domain process. EVWD committed to complying with all requirements of local, state, and federal agencies. (Ex. A1 at 207-211.)

180. After reviewing the form application for completeness, the Department conducted an initial review of the project. At this stage, the Department determined whether the proposed use could meet four criteria, or could be modified to do so. The criteria, set forth in ORS 537.153(2), include allowance under basin rules, water availability, absence of injury to water rights, and compliance with other Department rules. The Department understood that if the four criteria were met, a presumption would be established that the proposed project was in the public interest. (Decl. of French at 3.)

Allowance Under Basin Rules

181. The applicable Willamette River Basin rules provide for an allowable water storage season from November 1 to April 30. The Department found that EVWD's proposed project would comply with the Willamette River Basin rules if the District's proposed storage season was adjusted from October 1 through April 30 to November 1 through April 30. (Ex. A1 at 375.)

182. In assessing compatibility with basin rules, the Department also reviewed an order issued on August 8, 1951 (the 1951 Order) by Oregon's State Engineer.²⁵ Finding that there was

²⁵ The State Engineer's Office was a predecessor to the Department.

insufficient water flowing in the creek during the irrigation season to satisfy existing water rights, the order withdrew Drift Creek from appropriation for future water rights. Accordingly, the order banned further applications for water permits to divert water from Drift Creek. However, the order expressly excluded water storage and the use of stored water from its decree, which reads in part:

THEREFORE, IT IS HEREBY ORDERED that no more applications for permits to appropriate water from this stream or its tributaries be accepted, unless the applications are for storage and the appropriation of stored water.

(Ex. A1 at 526.)

183. The Department concluded that the August 8, 1951 Order did not apply because EVWD was applying for a storage permit. Moreover, the Department determined that the statement in the 1951 order that Drift Creek was over-appropriated was no longer accurate. The Department determined that the 1951 Order was based on water rights that no longer exist. Using its computerized water availability program, described below, the Department found that there was enough water to fulfill all existing water rights, as well as EVWD's proposed use. The Department concluded, therefore, that the 1951 order did not bar the storage project. (Tr. at 149-151.)

Availability of Water in Drift Creek

184. The second factor that the Department considered is whether water is available from the proposed source during the times and in the amount requested. (Decl. of French at 3.) OWRD conducted an analysis to determine whether there was sufficient water in Drift Creek and its tributaries to accommodate EVWD's request for 12,000 annual acre feet of water. (Ex. A1 at 528.)

185. The Department uses a peer-reviewed computer program to determine water availability referred to as the Water Availability Reporting System (WARS). That program calculated the average annual volume of the natural stream flow in Drift Creek. Because the volume varies depending on precipitation and other factors, WARS reviews a 30-year period of stream flow records. (Decl. of French at 6; Tr. at 139-144.)

186. The volume of the natural stream flow in Drift Creek was measured at the mouth of the creek, at the confluence with the Pudding River. There may be more water available at the mouth of the creek than at the approximate site of the reservoir because of water inflow from tributaries below the reservoir. (Tr. at 801 and 1182.)

187. WARS accounts for the variability of stream flows by using a fifty percent exceedance level. The amount of water available to be appropriated for storage is the amount of unappropriated surface water in a body of water on five of ten days. (Decl. of French at 6; Tr. at 139-144.)

188. Next, WARS subtracts the water volume necessary to satisfy existing water rights from the average stream flow volume. These rights are senior to and must be satisfied before EVWD's requested 12,000 acre feet of water can be stored. (Decl. of French at 6; Tr. at 139-144.)

189. WARS showed that 50 percent of the time during the months of November to April, the annual stream flow was 26,400 cfs in excess of water necessary to satisfy existing water rights. Based on that calculation, the Department concluded that water was available from November to April for EVWD to store 12,000 acre feet of water from Drift Creek. (Decl. of French at 6; Tr. at 139-144.)

190. In determining water availability, the Department did not consider the 1951 Order. (Ex. A1 at 526.) As indicated, the Department concluded that the 1951 Order was out of date, and did not reflect water availability as of 2013. (Tr. at 149-151.)

191. As of the date of EVWD's application, there were two existing water rights on Drift Creek.²⁶ The first is a water storage certificate. The certificate, numbered 36095, was issued to Louis and Alice Schacht, owners of the Schacht farm, and has an August 3, 1967 priority date (Schacht water right). The Schacht water right allowed the Schachts to store up to 3.4 acre feet of water each year for a fish pond. (Ex. A1 at 542.)

192. Bruce Jaquet now owns the Schacht farm and Schacht water storage right. In 2005 or 2006, the fish pond filled in with silt from a nearby farm, and dried up. Since then, Mr. Jaquet has not stored water pursuant to the Schacht water storage right. The land on which the fish pond is located will be inundated by the reservoir. (Decl. of Jaquet at 2 and 3; Tr. at 1575-1576, 1583, and 1586-1587.)

193. The second existing water right was an instream water right reflected in a certificate issued by the Department in 1996. That instream right has a priority date of October 18, 1990 (1990 instream right). (Ex. WW8.)

194. The 1990 instream right was created by the Instream Water Rights Act of 1987. Under that act, public agencies such as ODFW and DEQ may apply for water rights certificates for instream flows to benefit fish habitat, pollution abatement or scenic attraction uses. (Tr. at 159.)

195. The 1990 instream right provides for Drift Creek stream flows for Cutthroat Trout migration, spawning, egg incubation, fry emergence and juvenile rearing. The right allows for

²⁶Ex. WW3 reflects four other water storage certificates on Drift Creek: a right to store 6.0 acre feet of water with a priority date of December 15, 1951 issued to Carl Schmid, a right to store 5.8 acre feet of water with a priority date of August 3, 1962 issued to Alfred Von Flue, a right to store 12.0 acre feet of water with a priority date of February 21, 1964 issued to Ernest Campbell, and a right to store 3.1 acre feet of water with a priority date of November 25, 1966 issued to Ernest Kloppenstein. WaterWatch offered no evidence showing the validity of those four certificates as of the Department's water availability analysis in March 2013. WaterWatch also offered no evidence that these water rights may be impacted by EVWD's proposed project.

specified monthly amounts of water to flow from river mile 11, which is above the proposed dam and reservoir site, to Drift Creek's mouth. The allotted monthly protected flow increases from 2 cfs in August to 40 cfs in the second half of November. (Ex. WW8 at 1.)²⁷

196. The 1990 instream right states that flows are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach. The Department and its watermaster, Michael McCord, understood that the lower end of the stream reach means Drift Creek's mouth, at the confluence of the Pudding River. Thus, to measure whether the right is being met, the Department decided that water should be measured at Drift Creek's mouth. (Ex. WW8; (Tr. at 173-174, and 799.)

197. After subtracting the amount of water required for the Schact storage right and the 1990 instream right, WARS calculated that 50 percent of the time, Drift Creek's average annual stream flow was 26,400 cubic feet per second. That amount exceeded the 12,000 acre feet requested by EVWD and could be captured during the months of November to April.²⁸ (Ex. A1 at 215; Tr. at 145, 158, and 758-759.)

198. Accordingly, the Department's watermaster, Michael McCord, concluded that Drift Creek had available water for the proposed project. Mr. McCord therefore recommended that EVWD's permit be approved. (Ex. A1 at 215; Tr. at 145, 158, and 758-759.)

199. Reports prepared by EVWD's paid consultant, Bolyvong Tanovan, Ph.D., support the Department's conclusion of water availability. Between 2008 and 2015, Dr. Tanovan prepared a series of hydrologic reports regarding the proposed storage project. Dr. Tanovan analyzed daily stream flow data to identify the annual volume of water potentially available for storage in Drift Creek. (Decl. of Tanovan at 1 and 2.)

200. Dr. Tanovan concluded in each of his five reports that there was a reasonably good likelihood that 12,000 acre feet of water would be available for storage by EVWD. He estimated that the average yearly flows would likely be over 30,000 acre feet. (Decl. of Tanovan at 2 and 5.)

201. In Dr. Tanovan's last two reports, dated September 2012 and June 2015, Dr. Tanovan subtracted, from the projected yearly annual flows, water necessary for ecological and channel maintenance flows. He found that after subtracting water for the Schact water right, the

²⁷ As of 2018, Oregon had over 1,000 instream water rights certificates. The Department does not have the resources to monitor whether each instream water right is being met. Instead, the Department and ODFW prioritize certain instream water rights in each basin. The watermaster assigned to the basin regularly measures water levels to ensure that those rights are being met. Drift Creek is measured a couple of times per year in the summer. The Department also will investigate complaints from the public that instream water rights are not being met. If the rights are not met, the Department will investigate for illegal upstream uses. The Department may also regulate off junior upstream water rights if they are interfering with an instream water right. (Tr. at 160-161 and 780.)

²⁸ The PFO allows EVWD to store 12,000 acre feet of water over the entire November to April timeframe. The PFO does not limit how much water EVWD can store in any particular month. (Tr. at 167.)

1990 instream water right, and the ecological and channel maintenance flows, in most years there was sufficient water left for the proposed storage project. (Decl. of Tanovan at 2 and 5.)

202. Dr. Tanovan concluded that even if inflow to Drift Creek from below the dam is not considered in calculating water availability, the proposed reservoir would fill in most years. (Ex. EV 13 at 158-160.) Because of high and low flow years, there may be years where 12,000 acre feet of water is unavailable for storage by EVWD. (Tr. at 992.)

203. Dr. Cuenca, WaterWatch's engineer expert, determined that Dr. Tanovan's water availability analysis may have slightly underestimated the rate of evaporation of water from the reservoir. Dr. Cuenca acknowledged that this underestimation did not make a significant difference in Dr. Tanovan's conclusions. Dr. Cuenca also conceded that evaporation does not affect the amount of water available to store but the water available for release. (Tr. at 2318.)

204. Dr. Tanovan's analysis of water availability did not account for seepage from the reservoir, which could impact the amount of water that could be stored in the reservoir. However, Dr. Cuenca acknowledged that the reservoir may not seep water. Additionally, Dr. Cuenca conceded, again, that seepage does not affect the amount of water available to store but the water available for release. (Tr. at 2318-2319 and 2583.) Moreover, the District can prevent seepage by selecting an appropriate material for the reservoir. (Tr. at 2318-2319 and 2583.)

205. A Portland State University model analyzed the water flow difference at the dam site and the mouth. However, the model did not show that there would be insufficient water flow at the dam site to cover existing water rights and EVWD's requested 12,000 annual acre feet. Instead, the analysis showed that the reservoir might fill more slowly if there was reduced water flow. (WW62 at 46.)

206. In determining water availability, the Department did not consider instream needs beyond those protected in the 1990 instream right. The Department does not believe that a minimum pass-through flow under OAR 690-410-0070(2) had to be included in the availability calculation. A minimum pass-through flow is the minimum amount of water flow that must pass the point where the water will be diverted. (Tr. at 158 and 366.)

207. In determining water availability, the Department did not consider peak and ecological flows. These are extremely high, occasional flows that improve creek bed fish habitat by moving around gravel or transferring large woody debris into a stream. Peak and ecological flows may trigger fish activity such as spawning. (Tr. at 247, 738, and 739.)

208. A 2007 paper prepared by E. George Robison, an instream flow specialist at ODFW entitled: "Calculating Channel Maintenance/Elevated Instream Flows When Evaluating Water Right Applications For Out of Stream and Storage Water Rights" provides a good explanation of peak and ecological flows. However, the paper does not reflect ODFW guidance as of June 2018. The paper has not been implemented as ODFW policy. (Ex. WW29; Tr. at 739-742.)

209. The PFO does not require any water releases from the dam or protections for peak and ecological flows. (Tr. at 250.)

Injury to Water Rights

210. The next factor analyzed by the Department in its review of EVWD's application was injury to existing water rights. (Decl. of French at 3.)

211. The Commission has no administrative rule defining injury in the context of a new water right as opposed to a transfer of an existing right. The Department's practice is to construe injury as insufficient water to satisfy existing water rights, which is how the term is defined for a transfer. (Tr. at 145-149.)

212. According to the Department, if the current owner of land to which a water right is appurtenant has land taken from the owner by eminent domain, and the owner loses the water right as a result, no injury to the water right occurs because the owner will be compensated for both the land and the water right. Moreover, a water right attaches to the land unless it is excluded in a property sale. As a result, the new owner of the land will be able to exercise the water right. (Tr. at 148-149, 233-234, and 368-371; Decl. of French at 7.)

213. The Department concluded that EVWD's proposed use would not injure other water rights because the right would be junior to all other water rights. As a result, the other water rights must be satisfied before EVWD may store water. (Decl. of French at 7.)

214. The Department treats instream water rights the same as any other water right for the injury analysis. (Tr. at 170.)

215. The Department concluded that as long as the instream flow required by the 1990 instream right is released below the dam, the 1990 instream right will not be injured. (Tr. at 366.) If there is not enough water to satisfy the instream right, under Oregon's doctrine of prior appropriation, the right with the most senior priority date will have priority for available water. (Ex. A1 at 213-216; Tr. at 366.) The prior appropriation doctrine is reflected in the draft permit's requirement that reads:

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

(Ex. A1 at 137.)

216. The instream right is located at river mile 11.0 on Drift Creek, and runs to the mouth. To ensure the minimum stream flow, EVWD must allow all necessary live flow through the reservoir. (Tr. at 122.)

217. The Department does not consider inundation of any portion of the stream reach at an upper end of the reach to constitute injury. The instream water flow would still have to be met. EVWD could not store water at a rate that impeded the instream water right. (Tr. at 123-124.) Instream water rights are measured and regulated at the lower end of the reach, and the

Department does not consider partial inundation of an upper end of the reach to constitute injury. The Department's position is not embodied in any written rule, guideline or policy. (Tr. at 122-123.)

Compliance with Other Water Resources Commission Rules

218. The Department's next step in analyzing EVWD's application was to ensure compliance with Commission Rules. The Department reviewed the application under OAR 690-033-0000 to 690-033-0280 (additional public interest standards for new appropriations), OAR 690-310-0000 to 690-310-0280 (water right application processing), OAR 690-502-0010 to 690-502-0260 (Willamette Basin program), OAR 690-005-0010 to 690-005-0060 (land use), OAR 690-400-0000 to 690-400-0010 (state water resources policy) and OAR 690-410-0010 to 690-410-0080 (statewide water resources management rules). The Department concluded that the proposed use complied with each of these Commission rules. (Decl. of French at 3.)

219. The Department determined that because all four elements required for the presumption that the project did not harm the public interest existed, the presumption was established. (Decl. of French at 7.)

220. After concluding that the presumption was established, the Department consulted with other Oregon agencies to determine whether facts existed that overcame the presumption. To determine whether the proposed use might affect the habitat of sensitive, threatened or endangered (STE) fish, the Department formed an interagency review team consisting of ODFW and DEQ. (Decl. of French at 4.)

221. The review conducted by ODFW and DEQ is known as a Division 33 review.²⁹ (Decl. of French at 7.) Division 33 reviews only consider impacts on fish species that are listed as STE under federal or state law. Impacts on non-listed fish species are not considered. (Tr. at 2138.) In addition to considering STE fish, ODFW evaluates riparian areas associated with stream channels, which impact fish habitat. (Tr. at 500.)

222. The Department has limited expertise in fisheries and fish biology. Similarly, the Department has limited expertise in land use and riparian issues. Thus, the Department defers to the technical expertise of ODFW and DEQ in concluding whether STE fish species may be impacted by a proposed project, and whether the project can be conditioned to avoid the impact. (Tr. at 229 and 331-332.)³⁰

223. Four staff members from ODFW reviewed EVWD's permit application. (Decl. of Murtagh at 2 and 3; Tr. at 2062-2063.) One staff member from DEQ reviewed the application. (Tr. at 410.)

²⁹ Division 33 refers to the Department's rules for determining whether a proposed use will impair the public interest in STE fish species. These rules are contained in OARs 690-033-0000 to 690-033-0340.

³⁰ During the Division 33 review process, Mr. French suggested to ODFW staff that it limit its Division 33 comments to the storage application, and not include comments about issues that would be addressed in other permitting processes. (Ex. A1 at 238.)

224. After reviewing EVWD's application, ODFW and DEQ had three options. The agencies could recommend that the Department approve EVWD's application, deny it, or approve it with conditions. (Tr. at 696.) Both agencies recommended that the Department approve EVWD's application with conditions. (Ex. A1 at 219 and 255.)

Fish of Drift Creek

225. The following fish have been observed in Drift Creek or are reasonably expected to spawn or rear in the creek:³¹ Upper Willamette Winter Steelhead, Pacific Lamprey, Upper Willamette Spring Chinook, Cutthroat Trout, and Coho Salmon. (Decl. of Murtagh at 6, Tr. at 587, 2088, 2096, 2158, 2521, and 2530-2531.)

226. Upper Willamette Winter Steelhead, Pacific Lamprey, Upper Willamette Spring Chinook, and Cutthroat Trout are native fish. ODFW defines native fish as fish that were present in the Willamette River in the area above Willamette Falls at the time of the 1805 pioneer settlement. (Tr. at 2139.)

227. Because Coho Salmon were not present above Willamette Falls in countable numbers at the time of the pioneer settlement, ODFW classifies Coho Salmon as non-native. (Tr. 2138-2139.)

228. Upper Willamette Winter Steelhead, Pacific Lamprey, Upper Willamette Spring Chinook, Coho Salmon, and Steelhead Trout are anadromous fish. Anadromous fish are born in fresh water, spend most of their lives in salt water, and return to fresh water to spawn. (Tr. at 2067, 2082, and 2084-2085.)

229. ODFW concluded that the proposed use would occur in an area that might affect the essential habitat of Pacific Lamprey, listed as "sensitive" under Oregon law. (Decl. of French at 4; Decl. of Murtagh at 3.)

230. ODFW also determined that the proposed use would be detrimental to the protection or recovery of Upper Willamette Winter Steelhead, listed as "threatened" under the federal Endangered Species Act (ESA). (Ex. A1 at 219.)

231. ODFW concluded that Pacific Lamprey are present in Drift Creek. The fish's presence in Drift Creek has been periodically documented. (Decl. of Murtagh at 6.) Moreover, the Department surmised that Pacific Lamprey are present in Drift Creek because they have been located in nearby creeks in the Molalla-Pudding River sub basin. (Ex. A2 at 77.)

232. Pacific Lamprey have cultural significance. Native Americans harvested the fish at Willamette Falls for centuries. (Tr. at 2104-2105 and 2119.)

³¹ Lack of documented presence of a specific species in a particular tributary stream does not show non-use by that species in the stream when the species is found in nearby streams. (Decl. of Murtagh at 5.)

233. Pacific Lamprey return to fresh water to spawn as early as February. Their peak spawning season is May and June. They select gravel substrate areas, usually near pools,³² for spawning. (Ex. R2 at 77; Decl. of Murtagh at 3.)

234. Habitat for Pacific Lamprey has been significantly reduced during the last 70 or more years. Dam construction in many upper Willamette and Pudding River tributary systems including the rivers of the Tualatin, North and South Santiam, McKenzie, Middle Willamette, coast Fork Willamette, and Long Tom, as well as the Silver and Abiqua creeks in the Pudding River, has caused the habitat reduction. (Decl. of Murtagh at 4.)

235. There are a couple of culverts on upper Drift Creek that are at least partial barriers to upstream migration. In Drift Creek, there are also natural rock intrusions and a waterfall that limit fish passage. (Decl. of Murtagh at 5.)

236. However, Drift Creek has essential, but limited, spawning and rearing³³ habitat for Pacific Lamprey in intermittent areas of 7-10 miles above the proposed dam location. If built without fish passage, the proposed project would obstruct fish migration and therefore eliminate that essential habitat,³⁴ which is in a higher-gradient reach of Drift Creek that has better water quality due to lower water temperature, especially in summer, than in lower creek reaches in the Molalla-Pudding River sub basin. Two to three miles of additional habitat would be inundated by the reservoir. (Tr. at 2102; Decl. of Murtagh at 4 and 6.)

237. Drift Creek also has spawning and rearing habitat for Pacific Lamprey below the proposed project site. Pacific Lamprey need up to seven years to rear as juvenile fish in soft sediments in low-gradient reaches of the watershed. Most of these low-gradient reaches are downstream from the proposed dam location. (Decl. of Murtagh at 3.)

238. The 7-10 mile habitat diminishment will reduce Pacific Lamprey's ability to spawn and rear, resulting in depletion of the species. As a result, ODFW proposed conditions that would ensure that there is no net loss of essential habitat of Pacific Lamprey. (Decl. of Murtagh at 6.)

239. Surveys conducted between 2010 and 2014 have not shown any Winter Steelhead, juvenile or adult, in Drift Creek's reach upstream of the proposed dam site. However, the Department assumed that Winter Steelhead may be present because other fish that commonly share habitat with Winter Steelhead have been found, including Pacific Lamprey and Coho

³² A pool is a scoured-out area of a creek bed with depressions that hold water. (Tr. at 2076-2077.)

³³ Rearing is the development of fish from an egg to a juvenile fish. (Tr. at 587.)

³⁴ Mr. Murtagh is using the phrase "essential habitat" as it is defined in OAR 635-415-0005(3) as "any habitat condition or set of habitat conditions which, if diminished in quality or quantity, would result in depletion of a fish or wildlife species." (Decl. of Murtagh at 6.)

Salmon.³⁵ The presence of these other migratory Salmonid³⁶ fish suggests that Winter Steelhead may use Drift Creek on an intermittent or between-year basis. (Decl. of Murtagh at 5-6.)

240. If Winter Steelhead exist in Drift Creek, their numbers are small because of the size and location of the creek. (Decl. of Murtagh at 3 and 5-6.)

241. The Winter Steelhead population has been declining since its designation as threatened in 1997 under the ESA. A recent 10-year average annual count for adult Winter Steelhead returning to the Willamette River was about 5,000, which is a small number given the thousands of miles of habitat for rearing and spawning on that river and its tributaries. (Decl. of Murtagh at 5-6.) In 2017, only 1,000 Winter Steelhead returned to the Willamette River and its tributaries to spawn. (Tr. at 2102.)

242. Drift Creek has relatively higher-gradient reaches near and upstream of the proposed dam site that Winter Steelhead might use to spawn and rear. These reaches contain gravel and flows that fish can use for those purposes. (Decl. of Murtagh at 4.)

243. Agricultural use of land near Drift Creek has degraded stream function in some of the proposed project area. Upstream of the dam, soft sediments have infiltrated spawning gravel, limiting its ability to support egg incubation. (Decl. of Murtagh at 4.)

244. Habitat restoration such as placement of large wood in the creek and riparian planting could restore the watershed, and improve opportunities for fish to spawn and rear in Drift Creek. (Decl. of Murtagh at 4.)

245. After hatching, Winter Steelhead rear in fresh water for one to three years before migrating to salt water. (Decl. of Murtagh at 5.)

246. Migratory fish such as Pacific Lamprey and Winter Steelhead need unobstructed channels to move up and downstream. Juvenile fish migrate upstream from warmer downstream habitats during summer to seek cool water refugia upstream. Cool water refugia help fish maintain their thermal tolerances. (Decl. of Murtagh at 5; Tr. at 698 and 2095-2096.)

247. Loss of spawning and rearing habitat for Winter Steelhead is a primary hindrance of protection and recovery of the fish. Accordingly, ODFW proposed conditions that will mitigate for the detriment to the protection and recovery of these fish. (Decl. of Murtagh at 5.)

Habitat for Listed Fish

248. ODFW considers Habitat Category [or class] I as essential and irreplaceable habitat. ODFW will not recommend any conditions or mitigation for impacts from a proposed use on Habitat Category I. If a proposed use impacts Habitat Category I, ODFW will recommend that

³⁵ Lack of documentation of the fish may mean that researchers did not observe them during sampling efforts, but the fish may have been present. (Decl. of Murtagh at 5.)

³⁶ Salmonid is a family of fish belonging to the salmon group. (Tr. at 2088.)

the proposed use be denied. ODFW concluded that neither Pacific Lamprey nor Winter Steelhead had habitat included in Habitat Category I. (Tr. at 511 and 2127.)

249. Above the proposed dam site, Drift Creek contains areas of cool water refugia. (Decl. of Murtagh at 5; Tr. at 698 and 2095-2096.)

250. Cool water refugia can be categorized as Habitat Category I. (Tr. at 698.) However, ODFW has not designated any portions of Drift Creek as Habitat Category I. (Tr. at 2124.) Drift Creek likely is a Habitat Category II or III. (Tr. at 716.)

251. One additional listed fish species believed to use Drift Creek, Upper Willamette Spring Chinook, was not considered by ODFW or DEQ in their Division 33 reviews. (Ex. A1 at 219-221; Tr. at 2521-2522 and 2531.)

252. Upper Willamette Spring Chinook is a species listed as threatened under the ESA. WaterWatch's consulting biologist, Conrad Gowell, has not observed Upper Willamette Spring Chinook in Drift Creek. However, the fish have been observed in other streams in the Pudding River watershed, such as Silver Creek and the Pudding River main stem. Additionally, there is no current impediment to the fish accessing Drift Creek. Moreover, other Salmonid fish such as juvenile Coho Salmon have been observed in Drift Creek. (Tr. at 2096, 2521, and 2530-2531.)

253. Upper Willamette Spring Chinook would use Drift Creek only for juvenile rearing. The fish typically do not spawn in tributaries such as Drift Creek. (Tr. at 2530 and 2096.)

254. There are at least two non-listed fish present in Drift Creek. These include Cutthroat Trout and Coho Salmon. These two species may be impacted by the proposed use. ODFW and DEQ did not consider these fish in the Division 33 reviews because they are not listed as STE fish. (Tr. at 2099, 2158, and 2516-2518.)

255. Cutthroat Trout and Coho Salmon are members of the Salmonid family that live in Drift Creek for portions of their lives. (Ex. EV15.) Cutthroat Trout and Coho Salmon spawn and rear in Drift Creek. (Tr. at 587, 2088, and 2158.)

256. Coho Salmon are important fish because they are a state game fish, providing recreational opportunities. Coho Salmon are also commercial fish, providing economic value. Additionally, Coho Salmon have ecological value to the stream system. (Tr. at 2138.)

257. Drift Creek does not meet water quality temperature standards under the CWA. The creek's temperature from mid-June to September is too warm for salmon and trout rearing and migration. (Tr. at 413-414; Ex. A3 at 27.) As a result, Drift Creek was identified as a CWA water quality limited water body, requiring DEQ to develop a plan for reducing the water temperature. (Tr. at 412-413.)

258. Part of the process for restoring a water body that does not meet water quality standards is to set a total maximum daily load (TMDL). In this case, DEQ set goals of a maximum water temperature of 18 degrees Celsius for salmon and trout rearing and migration,

and a maximum water temperature of 13 degrees Celsius or below for spawning. (Tr. at 411-413, 418, and 453.)

259. Drift Creek's water temperature is too warm because of hot weather, reduced summer water flow, and a lack of trees and other vegetation to shade the creek water. (Tr. at 445.)

260. In addition to having a high summer temperature, Drift Creek's water quality is impacted by a low content of dissolved oxygen. (Ex. A1 at 1.) Fish need dissolved oxygen to survive. (Tr. at 434.) As water temperature increases, dissolved oxygen content generally decreases. (Tr. at 434-435.)

ODFW and DEQ Recommended Approval of the Application with Conditions

261. Nancy Gramlich conducted the Division 33 review on behalf of DEQ. Because the specifications of the dam and reservoir were unknown, Ms. Gramlich's Division 33 review consisted of determining whether storing water will impact fish, and if so, whether the use can be conditioned or mitigated to avoid the impact. Whether EVWD will be able to meet required state and federal water quality standards, given the ultimate configuration of the dam and reservoir, will be determined during DEQ's own water quality certification process. (Tr. at 469:1-10 and 481:22-25.)

262. DEQ concluded that EVWD's proposed project would likely result in diminution of water quality for STE fish species because of the project's potential to further warm the water temperature and reduce the dissolved oxygen content. The possible impact might be caused by the reservoir passing all live stream flow of an unknown temperature through the reservoir during the summer months. (Tr. at 426-427 and 433; Ex. A1 at 255.)

263. Secondly, during the storage months, the District will be storing water that otherwise would have flowed down Drift Creek and into the Pudding River. The reduction of flowing water could affect downstream water quality. For example, any pollutants would be concentrated in a lesser quantity of water instead of being flushed down the streams in larger water quantities. (Tr. at 429; Ex. A1 at 255.)

Both Agencies Recommended Approval of EVWD's Application with Conditions

264. After reviewing the District's storage permit application, ODFW recommended that the Department approve it with conditions. (Ex. A1 at 219-221.) DEQ also recommended that the application be approved with conditions. Both agencies recommended the following conditions to be included in the permit:

A. Mitigation of any riparian disturbance;³⁷

³⁷ EVWD will have to present ODFW with an acceptable riparian mitigation proposal to meet this condition. (Tr. at 699-700.)

- B. Restriction of water storage if upstream or downstream water quality decreases to the point where it no longer meets state or federal water quality standards due to reduced flows;
- C. Installation of fish screening and by-pass devices.

(Ex. A1 at 219-221 and 253-256.)

265. ODFW recommended the following additional conditions to lessen the impact of the proposed project on STE fish species:

- A. Comply with Oregon's fish passage laws;³⁸
- B. Ensure bypass flows necessary to meet the 1990 instream water right year and provide any peak flows necessary to maintain stream habitat and ecology; and
- C. Mitigate impacts to Pacific Lamprey and Winter Steelhead habitat in wetlands.

(Ex. A1 at 219-221.)

266. DEQ recommended the following additional conditions to offset the impact of the proposed use on STE fish species:

- A. Passing all live flow through the reservoir from May through October
- B. Supporting cold water fish rearing and migration from June to September, and spawning from May to October.

(Ex. A3 at 3.)

267. The Department included DEQ's and ODFW's recommended conditions in the PFO. (Ex. A1 at 124-126.)

268. ODFW's fish passage laws require the District to provide passage to native, migratory fish to migrate above the dam. (Tr. at 499 and 516-517.)

269. Alternatively, the District can apply for a waiver from the fish passage requirements. To be eligible for a waiver, the District would have to develop a mitigation plan providing a net benefit to migratory, native fish greater than the benefit from fish passage. The benefit would have to be equal to the length of fish habitat that would be lost. (Tr. at 499 and 516-517.)

270. When EVWD filed its water storage permit application, it had not applied for a waiver from the fish passage requirements. Before applying for a fish passage waiver, EVWD must first secure a water storage permit from the Department. (Ex. A1 at 235.)

³⁸ Reservoirs can be an impediment to fish migrating upstream and downstream. However, under its fish passage rules, ODFW only considered the dam, and not the reservoir, as an impediment. (Tr. at 2350.)

271. After the Department issued the PFO, ODFW requested that the wording of some of the conditions be changed. These included:

A. Change the title of “Endangered Species Act (ESA) mitigation condition” on page 4 of the PFO to “Inundation mitigation condition.” B. Reword the “Wetlands mitigation condition” on page 4 of the PFO to read: “Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and Oregon Department of State Lands (ODSL) to fully assess results of a wetland delineation and the impacts to the habitat of sensitive, threatened, or endangered fish species from loss of wetlands associated with the development of the project. Wetland mitigation shall be coordinated with other mitigation proposals for wetland and waterway impacts. A copy of ODFW’s and ODSL’s written approval shall be provided to the local watermaster’s office as soon as practicable after receiving the approval,” and C. Delete the phrase “If the reservoir is constructed off-channel” on page 4 of the PFO under the heading “Fish screening and by-pass condition.”

(Ex. A1 at 93-95.)

272. However, the Department responded that it will make those changes in the FO. (Ex. A1 at 89.)

273. Shortly after providing a completed Division 33 form, DEQ submitted a revised one. The revised one stated that when details on the dam construction were known, DEQ may provide additional conditions. (Ex. A3 at 1.)

274. Additionally, DEQ recommended that EVWD consider off-channel reservoir opportunities to lessen the impact of the reservoir on riparian areas lining Drift Creek as well as on any water quality impacts from water flowing through the reservoir and its placement in the stream. (Tr. at 477 and 478.)

275. In late 2013, DEQ notified the Department that it would like to amend its comments to reflect that additional DEQ conditions and recommendations would likely be triggered during the project’s construction phase and/or the DEQ 401 water quality certification process. (Ex. A1 at 251.) DEQ also recommended that EVWD assess off-channel locations for the reservoir construction. DEQ noted that off-channel storage for waters removed from November to April is a preferred alternative for protecting water quality. (Ex. A1 at 242; Ex. A3 at 1-4; Tr. at 441-442.)

276. Four months after recommending to the Department that it approve EVWD’s application with conditions, Mr. Murtagh made the following comments in an email message to a colleague at ODFW:

...[B]ased on the stream miles lost due to inundation, I remain very skeptical that they will be able to provide us with appropriate mitigation even if they provide passage as they are going to inundate most of the flowing stretch of stream with the 400-acre reservoir.

...[C]an we as an agency simply 'not support' this project as planned even if they provide mitigation through the waiver process? I think we really stand to lose too much here in terms of function, connectivity, fish and wildlife values etc.

* * * * *

...Interestingly, the Rapid Bio Assessment proposed for this stream this summer may bear out rationale for identifying upper Drift Creek as Class I. It will certainly be arguable.

(Ex. R171 at 25 and 29.)

277. Mr. Murtagh never withdrew ODFW's recommendation that the Department grant EVWD's application with conditions. As of June 2014, when Mr. Murtagh sent the email expressing doubts about the project, he still believed that his Division 33 review conclusions were accurate. Mr. Murtagh did not believe that any revisions or amendments to his conclusions were necessary. (Tr. at 2129.)

Water Modeling

278. At the contested case hearing, EVWD offered evidence that Drift Creek may meet the DEQ's water temperature standards by releasing cool water from the reservoir when it is full at 12,000 acre feet. Under that scenario, EVWD would only be withdrawing 8,000 acre feet of water for irrigation during the summer months. (Ex. EV14 and Ex. EV 71.) The latter is the amount of water that EVWD's project manager Mr. Crew estimated that the District would initially withdraw. (Tr. at 2272.)

279. WaterWatch's expert environmental scientist, John Yearsley, was able to duplicate and confirm those results by using the same computer model. Thus, WaterWatch's expert confirmed that at least one scenario would allow EVWD to meet water quality temperatures. (Tr. at 2393.)

280. Various factors may limit the District's ability to release cool water. For example, reservoir water may stratify, causing layers of cool and warm water at different depths of the reservoir. (Tr. at 428.) However, EVWD can construct a reservoir with multiple outlets, allowing the District to release lower temperature water. (Tr. at 2262-2263; Ex. A1 at 430.)

281. Additionally, the amount of water available for storage may vary each year. There likely will be some years when 12,000 acre feet of water is unavailable to store. (Decl. of Tanovan at 2 and 5.) However, EVWD need not drain the entire reservoir each year. The District therefore would not have to add a full 12,000 acre feet to the reservoir each year. (Tr. 2272.)

282. Mr. Yearsley varied the assumptions used by EVWD to create other scenarios where Drift Creek did not meet DEQ's water temperature standards despite water releases from

the reservoir. (Tr. at 2393.) When Mr. Yearsley assumed that the reservoir was not full at its 12,000 acre feet limit, but only filled to 6,000 feet, and EVWD attempted to withdraw water at the rate of 8,000 acre feet, the temperature of water released from the reservoir would exceed the temperature standards. (Tr. at 2396-2397.) Mr. Yearsley obtained the same result when he assumed that the reservoir contained 8,000 acre feet and the District was withdrawing at the rate of 8,000 acre feet. (Tr. at 2400-2401.)

283. However, Mr. Yearsley's analysis did not account for devices and other techniques that might allow EVWD to monitor and adjust water temperature in the reservoir. Moreover, Mr. Yearsley conceded that increasing summer flows in Drift Creek also might reduce, not increase, water temperature. Additionally, Mr. Yearsley agreed that there may be design options that could improve a reservoir's ability to release cooler water during warm summer months. (Tr. at 2415.)

The PFO

284. When EVWD filed its storage permit application, Tim Wallin was the Department's Water Rights Program Manager. After receiving the Division 33 recommendations from ODFW and DEQ, Mr. Wallin drafted the Department's written analysis of eight statutory public interest factors that determine whether a proposed project will impair or be detrimental to the public interest. (Tr. at 342-343.) Mr. Wallin's analysis, which he included in the Proposed Final Order (PFO) stated that the public interest presumption had not been overcome by these factors. Mr. Wallin responded to each of the public interest factors in ORS 537.170(8) as follows:

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 specific value to the public:

The proposed use is storage for irrigation and flow augmentation, both of which are beneficial uses and allowed by the Willamette Basin Program.

If a permit is issued, it would be junior in priority to existing water rights, including instream uses. As a result, the proposed use of water would conserve water for other uses, and allow the highest use of the water when it is available based on the relative priority of the water rights.

B. The maximum economic development of the waters involved.

Irrigation use facilitates economic development of the local community, and is an important economic activity in the Willamette Valley.

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

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

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

Water is available for storage for the proposed uses November 1 through June 30.

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

The draft permit is conditioned such that wasteful, uneconomic, impracticable or unreasonable use of the waters involved is prevented. The proposed use, as conditioned in the attached draft permit, will require conservation measures and reasonable use of the water. In addition, the attach draft permit requires the applicant to measure and report the volume of water stored.

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

All vested water rights are protected by their respective priority dates, the prior appropriation system, and the Department's regulatory procedures.

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

The proposed use is consistent with state water resources policy formulated under ORS 536.295 to 536.350, which govern classification of the waters in the state's basins. ORS 537.505 to 537.534 govern the appropriation of ground water and are not applicable to this application.

(Ex. A1 at 127-128; bold in the original.)

285. The Department concluded that the proposed storage project could be modified and conditioned to ensure that the project conformed to the public interest standards set forth in applicable statutes and rules. Thus, on July 22, 2014, the Department issued a PFO recommending that EVWD's application be granted with conditions. (Tr. at 152-155; Decl. of French at 7.)

286. The PFO provided in relevant part:

The Willamette Basin Program, of which Drift Creek is a part, allows for water storage for irrigation and flow augmentation from November 1,

through June 30. Water in the amount requested is available to be appropriated for storage from November 1 through April 30. Water may be appropriated when the basin program storage dates and water availability collide. As a result, EVWD may store water for irrigation from November 1 through April 30.

(Ex. A1 at 124.)

287. The PFO noted that the local watermaster, Mr. McCord had not recommended any additional conditions. (Ex. A1 at 125.)

288. The PFO noted that the Department had assembled an interagency team to discuss potential adverse impacts on STE fish populations. This team recommended the following conditions on the proposed use:

- A. As a preferred alternative, DEQ recommended that the applicant assess off-channel construction opportunities.
- B. ODFW preferred that upstream and downstream fish passage be provided at the reservoir site, but Oregon law allows for other options to address fish passage.
- C. EVWD must allow all live water to flow down the creek from May 1 through October 31.
- D. EVWD may store water only when sufficient water is available to serve all prior rights, including prior rights for maintaining instream flows.
- E. Before beginning construction, EVWD must address Oregon's fish passage law with the assistance of ODFW. EVWD must provide ODFW approved fish passage or obtain a fish passage waiver.
- F. Prior to construction, EVWD must conduct an assessment of the riparian area disturbed or inundated by the reservoir. In conjunction with ODFW, EVWD must develop a mitigation plan to restore or enhance riparian habitat. The riparian mitigation plan may be separate from any other wetland and waterway impact mitigation plan required by ODFW.
- G. The water quality of the source streams or downstream waters must continue to meet state and federal water quality standards. Water quality standards must be met year round to minimize impacts to aquatic species.
- H. Before initiating construction, EVWD must coordinate with ODFW to determine the existence of species protected by the ESA within the reaches of the streams impacted by the project. EVWD must develop a mitigation plan to offset impact to sensitive, threatened or endangered fish species. ODFW must approve the mitigation plan in writing.

I. Prior to construction, EVWD must coordinate with ODFW and ODSL to assess results of a wetland delineation and the impact to the habitat of fish species listed under the ESA from loss of wetlands associated with the project. ODFW and ODSL must approve a mitigation plan to address wetland and waterway impacts.

J. If the reservoir is constructed off-channel, EVWD must install fish screening and bypass devices before diverting water. ODFW must approve this equipment in writing.

K. The safety of the dam and impoundment must be assessed by the Department's Dam Safety Engineer. EVWD may not begin construction of the dam until the Department approves the engineering plans and specifications.³⁹

L. EVWD may not fill the reservoir until it demonstrates to the Department that EVWD owns or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.

(Ex. A1 at 125-126.)

289. The Department made the following conclusions of law in the PFO:

A. All criteria for establishing the presumption that the proposed use is in the public interest have been satisfied. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest. The Department therefore concludes that the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

B. The draft permit contains limitations and conditions as allowed by ORS 537.211(1).

(Ex. A1 at 123-132.)

290. The Department's PFO mistakenly included the ODA as a member of the interagency review team. ODA did not participate in reviewing EVWD's application. (Decl. of French at 8.)

291. The PFO does not discuss whether the dam will be adaptable to hydroelectric power generation in a manner allowing for safe passage of fish. Because the dam would be more than 25 feet high at a location where the average annual flow exceed two cfs, the dam must include measures making it readily adaptable to hydroelectric power generation. The Department will require in the FO that the dam will include those measures or that EVWD be required to

³⁹ For larger dams such as the proposed one here, the applicant has to provide engineering plans and specifications to a state engineer for approval. (Tr. at 300).

demonstrate that it meets one of the exceptions contained in ORS 540.350(3). (Decl. of French at 8-9.)

292. Attached to the PFO was a draft permit containing the use, limitations and conditions of the PFO. (Ex. A1 at 133-137.) The draft permit contains the following additional water measuring and reporting requirements:

- A. Before water use may begin, a staff gage that measure the entire range and stage between full reservoir level and dead-pool storage must be installed in the reservoir. If there is not dead-pool, the gage must measure the full depth of the reservoir. The permittee shall maintain the device in good working order.
- B. The permittee shall allow the watermaster access to the device.
- C. The permittee shall keep a complete record of the volume of water stored each month, and shall annually submit a report which includes water storage measurements. The Department may require the permittee to submit general water use information, including the place and nature of use of water under the permit.

(Ex. A1 at 133-137.)

293. The draft permit contained the following conditions, which it referred to as standard:

- A. Failure to comply with any of the provisions of the permit may result in restrictions on its use, civil penalties or cancellation of the permit.
- B. The permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.
- C. The land use associated with the water use must comply with statewide land use goals and any local land use plan.
- D. Construction must be completed and the permitted volume of water must be stored within ten years of the date of permit issuance.
- E. Within one year after water storage, EVWD must submit a claim of beneficial use.

(Ex. A1 at 134 and 137.)

294. Although the PFO contains DEQ's recommendation that an off-channel reservoir construction options be explored, the draft permit does not do so. (Ex. A1 at 133-137.)

However, as clarified by DEQ, the recommendation to consider off-channel opportunities was a recommendation but not a condition. (Tr. at 81.)

295. On August 18, 2014, ODFW advised the Department, via letter, that the PFO did not accurately reflect or incorporate issues raised by ODFW during the Division 33 consultation process. (Ex. A1 at 75.)

296. The first deficiency was to refer to Oregon sensitive species under a discussion with the heading of “Endangered Species Act (ESA) mitigation condition.” ODFW advised the Department that State sensitive species are not covered by the ESA. ODFW requested that the title of the discussion be changed to “Inundation Mitigation Condition.” The discussion under that heading would remain the same. (Ex. A1 at 77.)

297. The second deficiency was that the PFO excluded Pacific Lamprey by referring only to fish listed under the ESA, which does not include State sensitive species. ODFW requested that the Department change the language from “fish species under the ESA” to “sensitive, threatened or endangered fish species.” (Ex. A1 at 77.)

298. The third deficiency was to state that fish screening and by-pass devices are only required if the reservoir is constructed off-channel. ODFW advised the Department that screening and bypass devices are required when any new water right is issued. The purpose of the requirement is to ensure protection for fish at the water diversion, regardless of whether the reservoir is off or on channel. (Ex. A1 at 77.)

299. The Department responded that each of these deficiencies will be correct in the FO. (Ex. A1 at 81 and 89.)

300. On September 5, 2014, the Protestants filed their protests against the PFO and draft permit with the Department. (Ex. A1 at 15-59.)

CONCLUSIONS OF LAW

1. The Department showed that a presumption was established under ORS 537.153(2) that the proposed use will not impair or be detrimental to the public interest;

2. The proposed use complies with the rules of the Water Resources Commission, including:

- a. OAR 690-033-0000 to 690-033-0340 (STE species)
- b. OAR 690-410-0030 (instream flow protection);
- c. OAR 690-410-0070(2)(a) (water appropriation);
- d. OAR 690-410-0080 (impacts of water storage projects);
- e. Integrated Water Resources Strategy and off-channel storage policy;
- f. OAR 690-310-0040(1)(a)(G) (access rights);
- g. OAR 690-033-0220(1) and 690-033-0330(2) and (3) (peak and ecological flows);

3. The Protestants did not demonstrate under ORS 537.170(8) that the proposed use will impair or be detrimental to the public interest.

4. WaterWatch did not demonstrate that the PFO failed to adequately consider endangered species under the federal Endangered Species Act, 16 USC Sections 1531 *et. seq*;

5. The PFO adequately acknowledges and addresses public comments opposing EVWD's storage application; and

6. The PFO, as modified by this Proposed Order, addresses power generation consistent with safe fish passage under ORS 540.350(2) and (3).

OPINION

Obtaining legal authority to store and use surface water in Oregon for agricultural irrigation is a multi-step process requiring approval from multiple local, state, and federal agencies. This case involves the initial step in that process, acquiring a permit from the Department to store water.

Under Oregon law, the public owns all water within the state. ORS 537.110 states: "All water within the state from all sources of water supply belongs to the public." Water may be appropriated for beneficial use, defined as: "the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state." OAR 690-300-0010(5).

Water Permit Application Overview

To store or use water, an individual or entity must obtain a permit from the Department.⁴⁰ The Department must approve all permit applications for water storage and beneficial uses that will not impair or be detrimental to the public interest. ORS 537.153 (2); ORS 537.160(1); *Willamette Water Co. v. WaterWatch of OR, Inc.*, 288 Or App 778 at 781-782 (2017). In determining whether that standard is met, the Department first reviews each application to confirm that all statutorily-mandated information is included. That "completeness review" must be done within 15 days of the Department's receipt of an application. ORS 537.150 (1). The Department then accepts public comments about the application for 30 days. OAR 690-310-0090 (1) and (4).

Next, the Department conducts an "initial review" of the application. OAR 690-310-0080. That review analyzes whether the proposed storage or use either (a) meets four specified criteria or (b) can be modified or conditioned to meet the four criteria. OAR 690-310-0120(2) (b) and (3). The four criteria include allowability of the proposed use in the applicable basin program, availability of water, injury by the proposed use to other water rights, and compliance

⁴⁰ Certain uses are exempted from the permitting requirements. For example, no permit is required to use water to irrigate non-commercial gardens of an acre and a half or less. ORS 537.545(1)(b). Livestock watering is also exempt under certain circumstances. ORS 537.545(1)(f).

with Water Resources Commission rules. If the four criteria are met, a presumption arises that the use will not impair or be detrimental to the public interest. ORS 537.153(2).

The presumption is a rebuttable one. The presumption is overcome if a preponderance of the evidence shows that one or more of the four criteria are not met. Alternatively, the presumption may be overcome if a preponderance of the evidence shows that the proposed use will impair or is detrimental to the public interest. That evidence may come from information in the Department's files, information received from other agencies, or in comments submitted to the Department. ORS 537.153(2); OAR 690-310-0120 (3)(a). The Department determines whether the proposed use impairs the public interest by weighing seven factors.

The public interest 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 to the use of the waters of this state, or to 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 537.537.534.

ORS 537.170(8)(a)-(g).

In evaluating those factors, the Department may consult with other governmental agencies, and consider any potential effects of the project on water use efficiency, threatened, endangered or sensitive species, water quality, fish or wildlife, recreation, economic development, and local comprehensive plans. OAR 690-310-0120(3)(a).

If, as here, the Department concludes that the presumption has been established and not rebutted, the Department has 60 days to prepare a proposed final order (PFO) recommending

issuance of the permit "subject to any appropriate modifications or conditions." ORS 537.153(g); OAR 690-310-0100 and 690-310-0120(4).

After the Department publishes notice of the PFO, objecting parties have 45 days to submit written protests. OAR 690-310-0160(6). After the protest period closes, the Department's Director may issue a final order or schedule a contested case hearing if protests have been submitted and/or significant disputes exist regarding the proposed project. OAR 690-310-0170(1).

The record developed at the hearing provides a basis for the Department to issue a final order approving the application, with or without modifications to the PFO. Alternatively, the Department may deny the application. ORS 537.170(6). Within 20 days of issuance of the final order, any party may file exceptions to the order with the Water Resources Commission (the Commission). The Commission will consider the exceptions, and, if appropriate, issue a modified order. Alternatively, the Commission may deny the exceptions, and implement the Department's final order. ORS 537.173 (1) and (2).

Burden of Proof

In his March 20, 2018 order, ALJ Barber set for the burden of proof for the case. He ruled in relevant part as follows:

* * * * *

The Department must presume that the proposed use will not impair or be detrimental to the public interest if: 1) the use is allowed in the applicable basin program; 2) water is available; 3) other water rights will not be injured, and 4) the proposed use complies with the Water Resource Commission's rules. If all four criteria are met, then the Department will issue a PFO approving the application. Having issued a PFO in this case, the Department has the burden of proof initially.

The Shifting Burden of Proof

When the Department approves an application and others protest that approval, the Department has the burden of proof to show that all four of the statutory criteria are met, thereby justifying the approval. If all four criteria are present, there is a presumption that the proposed use will not impair or be detrimental to the public interest. That presumption can only be overcome by a preponderance of the evidence showing otherwise. *Lawrence v. Clackamas County*, 164 Or App 462, 468-469 (1999).

EVWD, as the applicant for the water right, will likewise present evidence in support of the approved application. It is entitled to rely upon the presumption created by the statutory showing, and may buttress that showing with evidence of its own.

If the statutory criteria are presented and the presumption established, the burden of proof shifts to Protestants to establish, by a preponderance of the evidence, that the criteria have not been met and that the proposed project will impair or be detrimental to the public interest.

EVWD's Water Storage Application

An application for a water permit must be made on a form prescribed by the Department, and contain information such as the nature and amount of the proposed use, the source of the water supply, a statement regarding authorization to access non-owned land, and the dates for beginning and ending construction. ORS 537.140(A)-(I); OAR 690-310-0040(1)(a)(G).

Here, EVWD submitted a form application created by the Department for water storage permits. The application describes the proposed use: storage of 12,000 annual acre feet of water from Drift Creek for irrigation, and flow augmentation to meet conditions imposed by the Department. The application contains all of the information requested on the Department's form application.

WaterWatch argues that the application is incomplete because EVWD does not own or have legal access to the land from which the storage water will be diverted and transported. Pursuant to ORS 537.211(6), however, when a water right applicant is a public corporation, the Department may approve the application before the applicant has legal access to non-owned lands impacted by the project. That provision states, in relevant part:

[F]or an application made by or on behalf of a public corporation, the department may issue a permit approving the application without requiring the applicant to obtain prior written authorization or an easement permitting access to non-owned lands affected by the proposed project. However, nothing in this subsection shall be construed to allow any person to trespass on the lands of another person.

EVWD was organized as a water district under ORS Chapter 545. ORS 545.025(1) provides in relevant part:

When owners of land that is irrigated or susceptible to irrigation desire to provide for the construction of works irrigation of their land * * * they may propose the organization of an irrigation district under the Irrigation District Law by signing a petitioner and filing it with the county court of the principal county... The petitioner must be signed by a majority of the owners of land or 50 owners of land within the exterior boundaries of the proposed district.

As a chapter 545 water district, EVWD is a public corporation. See, e.g., *Shasta View Irrigation District v. Amoco Chemicals Corp.*, 329 Or 151, 157 (199)(An irrigation district formed under ORS chapter 545 is a public corporation.)

Moreover, ORS 537.248 identifies requirements to be included in a reservoir permit and provides in relevant part that a district need not submit engineering plans before a storage permit is granted:

(1) When the Water Resources Department issues a reservoir permit for a new storage project to a county, municipality, *or district*, the department shall include in the permit a date, not more than 10 years after the date the permit is issued, to begin and complete construction of diversion or storage works and to perfect the water right. An application for a reservoir permit under this section shall be subject to the provisions of ORS 537.140 to 537.211, except that *the applicant need not submit engineering plans and specifications before the permit is issued*. However, the applicant may not begin construction of the reservoir until the department approves the engineering plans and specifications.

* * * * *

(3) As used in this section, “district” includes the entities set forth in ORS 198.010 and 198.180.⁴¹

(Emphasis added.)

At the time it filed its application, EVWD therefore did not need ownership of or easements to property impacted by the project. However, before EVWD enters the property to build the dam and reservoir, it must have legal access to the property. As provided in ORS 537.211(6), cited above, the District may not trespass on unowned land.

Thus, EVWD’s application contained all of the information required by the Department’s form application. Despite that fact, the Protestants contend that key information about the proposed project is unknown, making it impossible for the Department to make an informed decision about whether to grant or deny the application. The Protestants claim that EVWD should be required to finalize all of the details regarding the project before the Department evaluates the application.

The Protestants are correct that many of the specific details about the project are not finalized. For example, plans and specifications for the dam have not been completed. The size and shape of the reservoir and its footprint are unclear. EVWD has not selected a water conveyance method to transfer the water to District property or to the ultimate place of use. Additionally, EVWD has not decided whether it will provide fish passage or seek a waiver.

However, as set forth in ORS 537.248(1) above, an irrigation district, such as EVWD, need not submit engineering plans and specifications before the permit is issued. Further, the statutory framework for processing water permit applications expressly gives the Department authority to include in PFOs conditions that ensure the proposed project, when finalized, will

⁴¹ Similarly, ORS 198.010(15) defines “district” as “[a]n irrigation district organized under ORS chapter 545.” Likewise, ORS 198.180(3) includes the definition of district “[a] corporation for irrigation, drainage, water supply or flood control organized under ORS chapter 545.

comply with the law. As stated in ORS 537.211(1), The Department's permits "[s]hall specify the details of the authorized use and shall set forth any *terms, limitations and conditions* as the department considers appropriate." ORS 537.211(1) (Emphasis added.)

In *Benz v. Water Resources Comm.*, 94 Or App 73 (1988), irrigation groundwater used by a rose grower contained a high boron content, which is lethal to roses. The grower applied for a water permit to divert water from several creeks and store the water in a reservoir. The grower planned to use the water to leach boron from the soil. The Court of Appeals upheld a Commission order approving the water permit.

Senior water right holders (the petitioners) claimed that the rose grower had previously interfered with their water rights by illegally diverting water from a creek. Because the Commission found that the watermaster did not have the resources to monitor water use in that creek, the petitioners contended that the Commission had to deny the rose grower's application because the grower might encroach on the petitioners' water rights in the future. The Court of Appeals held, however, that the application could be granted if there were sufficient conditions to ensure that the petitioners' senior water rights would be enforced. The Court of Appeals upheld the Commission's PFO, which required the construction and installation of recording and measuring devices at each point of diversion that was upstream from the petitioners' diversion point. *Benz*, 94 Or App at 77.

As in *Benz*, the Department has conditioned the granting of EVWD's water storage permit on it designing a dam, reservoir, and water conveyance system that complies with all applicable law. Moreover, the PFO at issue here only deals with a water storage permit. That permit will give the District the authority to store water, and nothing more. EVWD will need a secondary water permit before the District can divert water from the reservoir, convey it to District land or use it to irrigate crops.

Thus, EVWD will have to file a second application for a water right with the Department. That application for a secondary permit will go through the same process, with all of the same safeguards and requirements, as did the application for the water storage permit. There will be an opportunity for public comment, and the Department will have to determine whether the proposed use is in the public interest. ORS 537.147.

Moreover, before EVWD begins construction of the dam and reservoir, it will have to provide specific facts and details entitling it to permits, licenses and approvals from a myriad of other local, state and federal agencies. The Department's Dam Safety Office will have to approve the dam specifications. OWRD will have to approve either a fish passage plan or grant a waiver to the fish passage requirements.

The Protestants argue that by conditioning EVWD's water storage permit on these various approvals, the Department is "kicking the can down the road" and not properly assessing EVWD's proposed project. That is not the case. Simply put, the Department has neither the expertise nor the authority to determine whether EVWD can or will meet the requirements of other agencies.

Thus, even if all the details of the proposed project were known at this stage, as the Protestants urge they should be, the Department could not evaluate whether the Protestants could meet all of the necessary hurdles for this project to become a reality. And, granting EVWD's application for a water storage permit is not a guarantee that the other agencies that will weigh in on the project will ultimately approve it. The only decision made by the Department here is that the Drift Creek project meets the statutory and administrative rule requirements for a water storage permit. Because that is the case, the Department is required to approve the application.

Issue No. 1: Public Interest Presumption

The Department and EVWD showed that with modifications of and conditions to the proposed project, storage is allowed in the applicable storage basin program, water is available for appropriation, the proposed storage will not injure other water rights, and the storage project complies with Water Resources Commission rules. A *prima facie* case that the proposed storage will not impair or be detrimental to the public interest therefore was established.

A. Allowability in Basin Program

The first factor for establishing a *prima facie* case is whether the proposed use is allowed by the applicable basin program. Drift Creek is part of the Molalla-Pudding sub basin of the Willamette River Basin. OAR 690-502-0120(1)(b). Administrative rules applicable to the Willamette River Basin provide that water from Drift Creek and other basin surface waters may be stored each year from November 1 to June 30. OAR 690-502-0040(4)(a).

In EVWD's application, it requests to store water from October 1 to April 30. Thus, the application seeks water storage during October, a month excluded from storage in the Willamette River Basin. (Ex. A1 at 492.)

In the PFO, the Department conformed the proposed storage to the rule by stating that EVWD can store water from Drift Creek from November 1 through April 30.

WaterWatch argues that the Department cannot modify EVWD's requested storage period to comply with the Willamette River Basin rule. As a result, WaterWatch contends, the Department did not show that the first *prima facie* element is satisfied because the requested storage period is disallowed in the Willamette River Basin. That argument is unpersuasive.

In its rules, the Commission has recognized that it has the authority to modify a proposed use or storage in a permit application "[t]o meet the presumption criteria." OAR 690-310-0120(3). That rule is consistent with the statutory scheme, which recognizes that a PFO does not have to mirror a water permit application but may contain appropriate modifications to ensure that the use will serve the public interest. Water permits issued by the Department "[s]hall specify the details of the authorized use" and "[s]hall set forth any terms, limitations and conditions." ORS 537.211(1).

The Department therefore had a legal basis for limiting the proposed storage use from November 1 to April 30. A contrary finding would mean that EVWD would have to file another

water storage application, requiring the Department to process the application a second time. Given the Department's explicit authority to employ conditions in PFOs, the processing of a second application would be an unnecessary exercise.

WaterWatch's second argument is that the storage project is not allowed in the Willamette Basin because of an order issued on August 8, 1951 by Oregon's State Engineer. That order withdrew Drift Creek from appropriation for future water rights, finding that there was insufficient water flowing in the creek during the irrigation season to satisfy existing water rights. Accordingly, the order banned further applications for water permits to remove water from Drift Creek. However, the order expressly excluded water storage and the use of stored water from its ban.

Moreover, as of the Department's review of EVWD's application, the 1951 order was based on out-of-date information. Specifically, the 1951 order was based on water rights that no longer exist. Accordingly, the State Engineer's calculation of the amount of Drift Creek flows subject to appropriation by existing water rights is no longer applicable. Based on currently existing water rights, OWRD determined that Drift Creek is not over-appropriated. When EVWD filed its water storage application, there was enough water to fulfill all existing water rights, as well as EVWD's proposed use. The 1951 order therefore does not bar the storage project.

Accordingly, the first element of the *prima facie* case is established here. Storage of water from Drift Creek is allowed in the Willamette Basin from November 1 to April 30.

B. Water Availability

The second element of the *prima facie* case is whether there is water available for EVWD to store. ORS 537.153(2). OAR 690-300-0010(57) defines the phrase "water is available." That rule states that water is available when the source is "not over-appropriated for any portion of the period of use proposed in the new application."⁴² OAR 690-300-0010(57) references the definition of "over-appropriation" in OAR 690-400-0010(11)(a)(A), which provides in relevant part:

Over-Appropriated means a condition of water allocation in which:
(A) The quantity of surface water available during a specified period is not sufficient to meet the expected demands from all water rights at least 80 percent of the time during that period;

In determining availability, the Department conducted a water availability analysis, which is defined as:

the investigation of stream flow or groundwater measurement records, watermaster distribution records, flow requirements of existing water rights,

⁴² OAR 690-300-0010(57) also discusses the situation, not applicable here, where the water source is over-appropriated for a portion of the proposed use.

stream flow modeling in ungauged basins, minimum perennial streamflows, or scenic waterway flow requirements to determine if water is available to support the proposed water use.

OAR 690-300-0010(58).

The Department used WARS to conduct the water availability analysis. That program showed that the average annual stream flow likely to occur fifty percent of the time is sufficient to cover two existing water rights and the 12,000 annual acre feet requested by EVWD. The two existing water rights include the Schact water right and the 1990 instream right. The Schact water right allows for storage of up to 3.4 acre feet of water each year for a fish pond. The 1990 instream right provides for specified monthly creek flows to benefit Cutthroat Trout. The Department's determination that flows in Drift Creek are available to satisfy existing water rights and the proposed storage use at least 50 percent of the time negates the possibility that water will be unavailable to satisfy existing water rights 80 percent of the time.

Accordingly, the Department's watermaster assigned to Drift Creek concluded that water will be available for EVWD to store. Five reports prepared by EVWD's consultant between 2008 and 2015 support that conclusion.

WaterWatch contends that the PFO does not contain adequate measurement conditions to ensure that all live flow in Drift Creek will be bypassed through the reservoir during the non-storage season from May 1 to October 31. The draft permit states: "The permittee shall pass all live flow during May 1 through October 31." With regard to measurement, the draft permit states:

The Director may require the user to measure inflow and outflow, above and below the reservoir respectively, to ensure that live flow is not impeded outside the storage season. Measurement devices and their implementation must be acceptable to the Director, and the Director may require that data be recorded on a specified periodic basis and reported to the Department annually or more frequently.

(Ex. A1 at 137.)

Neither the PFO nor the draft permit contains specific requirements for measuring water flow. At most, the draft permit requires EVWD to measure the reservoir level via a staff gauge, which does not show whether the reservoir is capturing live flow at any specific time. Thus, the FO should require water flow monitoring to ensure both that the 1990 instream water right minimum flows are met, and that all live flow is passed during the non-storage season. Language requiring monitoring is contained in the order section of this Proposed Order.

WaterWatch argues that the Department's water availability analysis was flawed in several respects. First, WaterWatch argues that the stream flow projections are too high because the stream flow was measured at Drift Creek's mouth, where it flows into the Pudding River. EVWD's proposed dam site is approximately six miles above the mouth. WaterWatch claims

that the flow at the mouth is higher because of water inflow from tributaries below the proposed dam. WaterWatch therefore contends that there may be insufficient water flow at the dam site to cover the existing water rights and the proposed project.

WaterWatch cites a Portland State University study on the water flow difference at the dam site and the mouth. However, the study did not show that there would be insufficient water flow at the dam site to cover existing water rights and EVWD's requested 12,000 annual acre feet. Instead, the analysis showed only that the reservoir might fill more slowly if there was reduced water flow. Thus, WaterWatch did not show that the flow difference would result in inadequate water to cover the existing water rights and the 12,000 annual acre feet requested by EVWD.⁴³

WaterWatch's second argument is that the Department should have offset the annual stream flow with minimum pass-through flows for existing water rights. Such flows are the minimum amounts of water that must pass the point where water will be diverted. OAR 690-410-0070(1)(c), one of the Department's statewide water resource management rules, states that the need for these flows may be considered in connection with water storage facilities.

The Commission's rules for processing water right applications contain no requirement that minimum pass-through flows be considered.⁴⁴ More significantly, however, WaterWatch offered no evidence that a consideration of such flows would change the Department's water availability analysis. Similarly, WaterWatch offered no argument explaining the significance of these flows to EVWD's permit application, or showing that failing to provide for the flows in the PFO requires a denial of the application.

WaterWatch's also argues that the Department should have considered peak and ecological flows in evaluating water availability. These are very high, occasional flows that clean out creek beds and may trigger fish to swim up creeks and spawn.

Again, the Commission's rules for processing water right applications do not require that peak and ecological flows be considered, even if the flows are valuable for fish habitat. Thus, imposing such a requirement in this case would result in the Department treating EVWD's application differently than other applications. Moreover, while raising this argument, WaterWatch offered no evidence that including these flows in the water availability analysis would result in a finding of insufficient water.

The Department concluded that the water application processing rules do not currently require consideration of minimum pass-through flows or peak and ecological flows in determining water availability. Because the rules do not mention either type of flows, the Department's interpretation is reasonable and entitled to deference. *Don't Waste OregonCom. v.*

⁴³ EVWD's expert, Dr. Tanovan, concluded that even if inflow from below the dam is not considered, the reservoir will fill in most years.

⁴⁴ The water right application rules are known as the Division 310 rules, and are found at OAR 690-310-0000 to 690-310-0280. Division 310 rules, as well as Division 33 rules, cover the Department's water right application process.

Energy Facility Siting, 320 Or 132, 142 (1994). See also, *Willamette Water Co., v. Waterwatch of Oregon, Inc.*, 288 Or App 778, 787 (2017) (“To overcome [the Water Resources Department’s] interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule’s text, context, or other applicable source of law.”)

As a separate argument related to water availability, WaterWatch contends that the proposed use violates the state-wide policy against over-appropriation of water sources. OAR 690-410-0072(2)(a) provides:

The surface waters of the state shall be allocated to new out-of-stream uses only during months or half-month periods when the allocations will not contribute to over-appropriation. However, when a stream is over-appropriated, some additional uses may be allowed where public interest in those uses is high and uses are conditioned to protect instream values;

As discussed above, there is no evidence in the record that Drift Creek is over-appropriated. The 1951 State Engineer’s Order is a historical anecdote, and, with the passage of time and advent of WARS, no longer relevant. Moreover, that order expressly exempts storage in its ban on new water allocations.

Moreover, the PFO only allows EVWD to store water during months when it is available. The District must pass all flow in the other months. The two existing water rights must be satisfied before EVWD stores any water. As a result, the record does not show that the proposed storage will contribute to over-appropriation.

Finally OAR 690-410-0070(2)(c) provides that despite the policy against over-appropriation, water storage is allowed. That provision provides:

New allocations of water for the purpose of filling storage facilities may be allowed notwithstanding subsection (a) of this section. Protection may be afforded to all water rights and instream uses by establishing storage filling seasons in basin rules, by considering the need for minimum pass-through flows on water rights, or establishing by rule other conditions consistent with the state policy on water storage as a prerequisite for allocation. In setting a storage season, consideration shall be given to avoiding periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows are needed to support public uses;

The second *prima facie* element is therefore met. Water is available for EVWD’s proposed storage project.

C. Injury

The third element of the *prima facie* case is whether the proposed use will injure other water rights. ORS 537.153(2). The statutes and rules governing water right applications do not define the terms “injure” or “rights.”

The Rue Protestants contend that those terms should be construed broadly here. They argue that the concept of injury should be defined to include harm to rights other than water rights. They claim that the word “rights” includes their ownership of land, timber and farmhouses, as well as their ability to farm and enjoy their land for recreational purposes.

However, the statute does not merely ask if the proposed use will cause injury to rights. The statute asks whether the use will injure “*other water rights*.” The statute modifies and limits the word “rights” with the term “water.” As a result, the Department may only consider injury to water rights.

Moreover, the Commission defines the phrase “injury to other water rights” in the context of the Commission’s water right transfer rules. In those rules, injury to other water rights means that the owner of an existing water right does not receive previously available water to which it is legally entitled. OAR 690-380-0010(3).

The Department’s decision to apply the water transfer definition here is a reasonable one. Although the water permit application statutes and rules do not define injury or rights, the rules expressly states that the proposed use must not injure other *water* rights. Had the legislature intended to require a more expansive review of impacts from a proposed use, it would have eliminated the modifier “water” and/or provided a broader definition of “injury” in the water permit application statutes.

The Rue Protestants’ angst about their potential losses is both real and understandable. However, given the statutory language, these losses are not injuries to water rights. As a result, the Department properly did not consider the losses when assessing whether EVWD’s proposed storage use would injure other water rights.

Indeed, the Department lacked the authority to deny EVWD’s application based on those losses. In *Examilotis v. Dept. of State Lands*, 239 Or App 522 (2010), property owners contested the granting of a fill and removal permit application by the Oregon Department of State Lands (DSL). The permit was one of several necessary steps to move a fish hatchery to a new location.

The applicable statute set forth criteria for considering the fill and removal application. Those criteria were limited to impact of the removal of dirt. However, DSL had previously promulgated administrative rules allowing for consideration of impacts of the entire project or the fishery move. Based on the rules, the property owners urged DSL to consider public health and safety impacts such as odor and traffic, which the fish hatchery move would cause. DSL declined to consider those issues, and granted the permit. 239 Or App at 536-537.

The Court of Appeals found that the applicable statutes confined approval criteria for the permit to the effects of the proposed fill or removal, and not the overall project of the fish hatchery move. Citing to the Oregon Supreme Court’s decision in *SAIF v. Shipley*, 326 Or 557, 561 (1998), the Court recognized that ‘an agency has only those powers that the legislature grants and cannot exercise authority that it does not have.’ 239 Or App at 533. In upholding DSL’s review process, the Court of Appeals held:

We conclude that the regulatory standard [in the administrative rules] exceeded the agency's authority because it required DSL to review an application more broadly than would otherwise be required by statute. Therefore, because the public health and safety issues identified by petitioners -- the fecal matter, odor, and traffic impacts associated with the proposal to move the fish hatchery -- fall outside the confines of the director's review under ORS 196.825(3)(e), the director did not err in failing to consider those issues.

239 Or App at 538.

The Department's analysis under ORS 537.153(2) therefore was properly confined to whether the proposed storage project would injure any existing water rights. The facts in the record show no such injury.

As previously discussed, there are two legally recognized water rights on Drift Creek. These include the 1990 instream water right and the Schact water right. The Department concluded that neither of these rights will be injured by the proposed use because there will be water available to satisfy both rights. If there is insufficient water, Oregon's doctrine of prior appropriation mandates that the water rights with the most senior priority dates have priority for available water. Both the 1990 instream water right and the Schact water right will have priority over EVWD's water storage right. The prior appropriation doctrine is reflected in the draft permit's requirement that:

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

Nevertheless, WaterWatch contends that the Schact water right will be injured by the proposed project. According to WaterWatch, the water right will be injured because the land on which the fish pond is located will be inundated by the proposed reservoir footprint. As a result, the fish pond will be submerged when the reservoir is full and a mudflat when the reservoir is empty. The fish pond therefore will no longer be available to store water for fish.

However, the inundated land, including the fish pond land, must be owned by EVWD before the reservoir is built. Under ORS 537.400, EVWD must own or have legal access to land directly impacted by the reservoir. The statute provides in relevant part:

[T]he Department may approve an application for a reservoir permit * * * and issue a permit, subject to the condition that before the reservoir may be filled, the permittee shall submit to the department evidence that the permittee owns, or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.

ORS 537.400(5).⁴⁵

⁴⁵ The draft permit explicitly requires that the land be owned by the District before construction.

Thus, ownership of the land, with the appurtenant water right, is a contingency that must be satisfied before reservoir construction can begin.

Water districts created under the requirements of ORS 545.025(1) may exercise eminent domain under ORS 545.025(1). Thus, EVWD has the authority to purchase the property of the Rue Protestants that will be inundated and otherwise impacted by the water storage project.

After EVWD purchases the land, it can request that the Department cancel the water right. Alternatively, EVWD could transfer the right. If eminent domain proceedings are unsuccessful, the storage project will not materialize because EVWD will be unable to meet the requirements of ORS 537.400(5) that EVWD own or have legal access to the lands that will be inundated.

The Department's position that no injury occurs through taking a water right by acquiring the land to which it is attached by eminent domain is reasonable. Under ORS 537.400(5), the Department has the authority to approve a storage application and issue a water storage permit before the applicant owns the impacted land. Eminent domain is a legal means of acquiring property and satisfying the ownership contingency. That process is used both by public entities and water districts. If the district can meet the ownership contingency prior to filling the reservoir, the district will own the water right.

Here, the Department's position that the Schact water right will be uninjured is bolstered by other facts in the record. Mr. Jaquet testified that the pond was filled in with silt from a nearby farm, and has been dried out since 2005 or 2006. Although the water storage right apparently has not been cancelled, it has not been used for approximately 13 years. ORS 540.631 states that a rebuttable presumption exists that a water right owner has forfeited a water right that the owner has not used for five years. Thus, under ORS 540.631, the Department may be able to initiate proceedings to cancel the Schact water storage right. Accordingly, the water storage right will not be injured by the proposed project.⁴⁶

WaterWatch also contends that the 1990 instream right will be injured by the proposed project. That instream right guarantees specified monthly instream flows, expressed in cfs, from river mile 11.0 to the mouth at river mile 0.0. The certificate states that the flows "are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." Because the certificate refers to the "lower end of the reach" as the place of measurement, the Department measures flow at the mouth of Drift Creek.

Nothing in the record suggests that at the time the certificate was recorded in August 1996, reflecting an October 18, 1990 priority date, there were barriers in or significant points of diversion from Drift Creek. It therefore made sense to make ensure the instream flows were being met by measuring at the mouth of Drift Creek. However, given the potential impact of placing a reservoir in the creek or diverting water into a pipeline or other conveyance, the instream right can no longer be adequately protected by mouth flow measurements. This is so

⁴⁶ The Department has suggested that the Final Order could include a condition requiring EVWD to request that the Department cancel the Schact water storage certificate before construction may begin.

because by the time Drift Creek reaches the Pudding River, other tributaries have joined and added water to the creek.

Thus, measurements at the mouth will not show whether the instream minimum flows are being met above the mouth and throughout the protected reach. The reservoir could potentially limit live flow at the dam but still meet the in-stream minimum flows, when measured at the mouth of Drift Creek, by combining the release flow with tributary inflow below the dam. Nonetheless, measurement at the mouth of Drift Creek will be insufficient to determine whether live flow between the proposed dam and the closest tributary below that site is sufficient to satisfy the instream water right in that reach of Drift Creek.

The draft permit currently states that the District shall pass all live flow during the months of May 1 through October 31. The draft permit also states that the District may only store water when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows. Adding a measuring condition to the FO will ensure that these requirements are met. The FO should require monthly stream flow measurements during the storage season from November 1 to April 30, and again in May, July, and September. The measurements should be made at regular intervals, not to exceed one river mile, from the in-channel reservoir, if one is constructed, to the mouth of Drift Creek. If no in-channel reservoir is built, the measurements should be made from the point of diversion to the mouth of Drift Creek.

WaterWatch also argues that the 1990 instream water right will be injured because water will not be flowing at the dam site and reservoir. However, as indicated above, EVWD will have to pass enough water from the dam and reservoir to meet the in-stream minimum flows. Additionally, WaterWatch offered no evidence that the existence of the dam and reservoir, after fish passage or exemption requirements are met, will prevent meeting the 1990 instream water right's stated purposes for stream flows, for migration, spawning, egg incubation, fry emergence, and juvenile rearing of Cutthroat Trout.

WaterWatch contends that ORS 537.352 might allow EVWD to claim that the proposed storage right should take precedence over the 1990 instream water right. ORS 537.352 provides that multipurpose storage or municipal water uses by a municipal applicant shall take precedence over an in-stream water right when the Department reviews a proposed project in the context of a contested case hearing. However, WaterWatch has not shown that EVWD's proposed project constitutes a multipurpose storage municipal water use project.

Moreover, nothing in the PFO or draft permit states that the proposed storage project will take priority over the 1990 instream water right. Instead, the PFO specifically acknowledges the existence of other water rights and requires EVWD to refrain from injuring them: "The proposed use will not injure other water rights." The PFO also explicitly mandates that the instream water rights be satisfied: "The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows."

Finally, WaterWatch contends that instream water rights on rivers below Drift Creek, including the Pudding and Molalla rivers, will be injured by the proposed project. The

Department contends that this issue is waived because it was not raised in WaterWatch's protest. However, both WaterWatch and the Rue Protestants claimed in their protests that the proposed use would injure other water rights. Although they did not expressly mention the Pudding and Molalla rivers, they raised the issue in sufficient specificity for it to be addressed in the contested case hearing.

Here, the Department's watermasters periodically measure instream water rights on rivers including the Pudding and Molalla rivers. If the rights are being impacted by junior water users upstream, the Department's watermasters will require junior users to curtail their water use until the instream water rights are met. The Department therefore validly concluded that the proposed project will not injure instream water rights on the Pudding and Molalla rivers. WaterWatch did not prove to the contrary.

Issue No. 2: Compliance with Commission Rules

A. Division 33 Rules

The Department has promulgated rules designed to aid it in determining whether a proposed use will impair or be detrimental to the public interest in sensitive, threatened, or endangered fish species. These rules are known as Division 33 rules, and apply to application for water storage permits. OAR 690-033-0000(1) and (2)(d).⁴⁷

If the Department determines during a review of a water permit application that a proposed use will occur in an area that may affect the habitat of sensitive, threatened, or endangered (STE) fish species, the Department must form an interagency team of staff from the Department and other appropriate state natural resource agencies. OAR 690-033-0010(5) and 690-033-0330(1)(b). The purpose of the team is to determine whether conditions can be included in the permit to avoid the detriment to STE fish species. OAR 690-033-0220(1).

The Department requested that ODFW and DEQ review EVWD's application and advise the Department whether the proposed use might affect STE fish species. Both ODFW and DEQ answered that question affirmatively. ODFW identified the species that might be impacted by EVWD's proposed use as Winter Steelhead (a threatened species) and Pacific Lamprey (a sensitive species).

⁴⁷ These rules also apply to STE wildlife species. Exhibit EV79 references information gathered in September 2016, after the Department issued the PFO, about elk in the proposed project vicinity. In its Initial Closing Brief, the Department states that it assumes that the ALJ's Proposed Order, as well as the Department's FO, will include findings about the potential impact of the proposed use on elk. However, the Department offered no evidence or argument about the significance of the information contained in Ex. EV79 or about any statutes or rules that set forth how that information is to be evaluated. The Department also offered no information showing that the elk observed in the vicinity of the proposed project are STE species. Moreover, the Protestants make no argument that the presence of the elk mentioned in Ex. EV79 has any impact on whether EVWD's storage permit application should be granted. As a result, this Proposed Order does not address elk.

Threatened Fish

Threatened species are those that may become endangered within the foreseeable future within all or part of their ranges. OAR 690-033-0010(8) and 635-100-0001(3). Under OAR 690-033-0220,⁴⁸ the Department must determine whether the detriment to the protection or recovery of the threatened species, in this case Winter Steelhead, can be conditioned to avoid the detriment. If the detriment cannot be conditioned, the applicant may propose a mitigation plan. If the detriment can neither be conditioned nor mitigated, the Department must presume that the proposed use impairs the public interest, compelling denial of the application. OAR 690-033-0220(1).

Here, both ODFW and DEQ advised the Department that it could impose conditions avoiding detriment to Winter Steelhead in EVWD's permit. ODFW and DEQ both recommended therefore, that the Department approve EVWD's application with conditions.

Sensitive Fish

Sensitive species are those facing one or more threats to their populations, habitat quantity or habitat quality, or those declining in numbers such that they may become eligible for being listed as threatened or endangered under state law. OAR 690-033-0010(9), 635-100-0001(4) and 635-100-0040(2)(a) and (b). Under OAR 690-033-0330(2)(b), the Department must determine whether a proposed use's impact on sensitive fish, here Pacific Lamprey, can be conditioned to ensure no net loss of essential habitat.

"Habitat" is the physical and biological conditions within the species' range that may, over time, affect the species' welfare. OAR 635-415-0005(5). "Net loss" is the loss of habitat quantity and/or habitat quality despite mitigation measures having been taken. OAR 635-415-0005(22).

Both ODFW and DEQ advised the Department that it could impose conditions to avoid a net loss of the essential habitat of Pacific Lamprey. As a result, ODFW and DEQ recommended that the Department conditionally grant EVWD's application.

ODFW and DEQ recommended the following conditions: mitigation of any riparian disturbance, restriction of water storage if upstream or downstream water quality fails to meet state or federal water quality standards because of reduced flows, and installation of fish screening and by-pass devices.

Further, ODFW recommended the following additional conditions: compliance with Oregon's fish passage laws, ensuring bypass flows necessary to meet the 1990 instream water right year-round, and mitigating impacts to Winter Steelhead and Pacific Lamprey habitat.

⁴⁸ This rule, as well as OAR 690-033-0330, applies to applications filed after April 8, 1994 that impact the lower Columbia River area below the Bonneville Dam. OAR 690-033-0210. That area includes the Willamette basin, where Drift Creek is located.

Likewise, DEQ recommended the following additional conditions: passage of all live flow from May through October, and support of cold water fish rearing and migration from June to September, and spawning from May to October. DEQ also suggested that EVWD consider off-channel reservoir possibilities.

The Department imposed the following conditions: compliance with fish screen design, installation, operation and maintenance, adherence to state and federal water quality standards, compliance with Department-required water use measurement, recording, and reporting, and restoration of riparian areas.

By forming the interagency team, soliciting input from the team, and incorporating the suggested conditions into the PFO, the Department met its Division 33 obligations. The Department therefore has shown that it complied with the Division 33 rules.

Nonetheless, WaterWatch raises several arguments about the Division 33 process here. First, WaterWatch argues that the Division 33 analysis was flawed because it did not consider one other listed fish, and two unlisted fish. The additional listed fish is Upper Willamette Spring Chinook, a species listed as threatened. The two non-listed fish species are Cutthroat Trout and Coho Salmon.

WaterWatch's biologist, Conrad Gowell, testified that he has not observed Upper Willamette Spring Chinook in Drift Creek. However, Mr. Gowell testified that this species may use the creek for juvenile rearing because the fish have been observed in other streams in the Pudding River watershed.⁴⁹ These streams include Silver Creek and the Pudding River main stem. The Department did not dispute that evidence. Indeed, ODFW's biologist Tom Murtagh agreed that Spring Chinook may possibly be present in Drift Creek.

However, WaterWatch offered no evidence about the significance of that possibility. For example, WaterWatch offered no evidence about projected numbers of Upper Willamette Spring Chinook that might rear in Drift Creek. WaterWatch offered no evidence of where in Drift Creek the species might rear or its juvenile rearing habitat requirements. Additionally, WaterWatch offered no evidence that the conditions imposed by ODFW to protect other fish species, such as Winter Steelhead, will not protect Upper Willamette Spring Chinook. As a result, WaterWatch did not show that the Division 33 process was inadequate because ODFW did not address Upper Willamette Spring Chinook.

WaterWatch also contends that the Division 33 process was flawed because the impact of EVWD's project on two other non-listed fish species was not considered: Cutthroat Trout and Coho Salmon. These fish, however, are not listed as STE, which are the only species that must be considered during a Division 33 analysis. *See, e.g.,* OAR 690-033-0220 and 690-033-0330. The Department therefore is not required to consider impacts on these fish as part of a Division 33 review.

⁴⁹ Mr. Gowell testified that Upper Willamette Spring Chinook would only use Drift Creek for juvenile rearing, and not for spawning.

As testified by WaterWatch's expert biologist, Mr. Gowell, and ODFW biologist Mr. Murtagh, there is a dispute about whether Coho Salmon in Drift Creek are native or non-native. ODFW does not classify Coho Salmon as native fish because they were not present in countable numbers in the Willamette River above Willamette Falls at the time of the pioneer settlement. Because ODFW categorizes the fish as non-native, they are not eligible to be listed as STE, which are designations used only for native fish. Whether or not ODFW should reconsider its classification of Coho Salmon as non-native is beyond the scope of this contested case hearing. Thus, WaterWatch did not establish that the Department's failure to evaluate the project's effect on these fish rendered the Division 33 review inadequate.

Although the Department did not have to evaluate project effects on the non-listed fish species during its Division 33 review, both fish species are, however, relevant to the Department's consideration of whether any facts exist that show that the public interest presumption is overcome. OAR 690-310-0120(3)(a) provides that when the Department determines that the presumption is established, the Department must further evaluate any available information regarding specified categories to determine whether the presumption is overcome. For example, the Department must consider STE, where applicable. OAR 690-310-0120(3)(b)(B). The Department must also evaluate information related to non-listed species, referred to as "fish and wildlife." OAR 690-310-0120(3)(b)(D). For purposes of this rule, it does not matter whether Coho Salmon are native or non-native, or listed versus non-listed. The rule simply refers to "fish."

WaterWatch, however, did not present evidence showing that the conditions for listed fish are inadequate to reduce potential impacts on Cutthroat Trout and Coho Salmon, which share the Salmonid family with Winter Steelhead, for which ODFW has proposed protecting conditions. WaterWatch therefore did not establish that the existence or possible existence of these fish species shows that the proposed use will impair the public interest.

WaterWatch claims that the Division 33 review was also defective because water quality issues were not fully considered. When determining whether the presumption is overcome, the Department must consider, but need not resolve, possible water-quality impacts. OAR 690-310-0120(3) ("the Department shall * * * consider * * * water quality"). Here, the Department and DEQ showed considered the proposed use's impact on water quality as it relates to STE fish species. Because EVWD need not develop and present dam and reservoir plans when applying for a storage permit, the specifications of the dam and reservoir are unknown. Thus, DEQ cannot assess all of the impacts to water quality during the water storage permit application process. However, DEQ will assess the impacts, and further condition the project, when DEQ determines whether EVWD is entitled to certification showing that the dam will comply with Section 301 of the CWA.

WaterWatch also argues that the Division 33 process was flawed because it did not consider fish passage issues created by the reservoir pool. Specifically, WaterWatch contends that even if fish get around the dam, they may have trouble navigating upstream or downstream through the reservoir.

Greg Apke, ODFW's Fish Coordinator, testified, the fish passage laws only consider the impact of the dam. Whether the fish passage laws should address reservoirs is not an issue to be decided here.

WaterWatch's next argument pertains to the conditions recommended by ODFW and DEQ. WaterWatch contends that by approving EVWD's application with those conditions, the Department wrongfully delegated its duty to determine if the proposed use is in the public interest. In support of that argument, WaterWatch relies on OAR 690-033-0220(5), which provides: "[N]othing in these rules delegates the authority of the Department to make final decisions on permit applications."

Contrary to WaterWatch's argument, the Department has made a public interest determination here. Although it has not speculated about the outcome of all of the project approvals that EVWD must obtain before building the dam and reservoir, the Department has decided that *if* the District obtains the necessary permits, and demonstrates compliance with applicable local, state and federal law, the project will not impair the public interest.

By seeking and following expert fish advice from biologists at ODFW and DEQ, the Department is not abdicating its responsibility, it is fulfilling it. As the current Department Director Dwight French testified, Department staff members are not fish experts or riparian habitat experts. In order for the Department to determine whether the proposed use is in the public interest, it must rely on the expertise of ODFW and DEQ. These agencies must guide the Department not only in evaluating whether the proposed use will harm fish but also in developing appropriate and effective measures to avoid that harm.

The water application statutory framework is consistent with the Department's approach. ORS 537.211(1) expressly authorizes the Department to include in water permits "*any terms, limitations or conditions* as the Department considers appropriate * * *." (Emphasis added.)

Similarly, ORS 537.153(1) provides in relevant part that "the Department shall complete application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. (Emphasis added.) ORS 537.211(2) also allows the Department to condition a permit on an applicant obtaining legal access to land impacted by the project. Additionally, ORS 537.400(4) authorizes the Department to condition the granting a storage permit on the Commission's approval of final dam plans and specifications.

WaterWatch would require EVWD to prove here that it will successfully comply with permitting processes not at issue here. WaterWatch contends that EVWD must show here that it can comply with fish passage laws or obtain a fish passage waiver. However, EVWD has not even submitted a fish passage proposal to ODFW. Similarly, EVWD has not applied for a waiver from the fish passage requirements. The District cannot do so until it obtains a water storage permit from the Department. Thus, it makes no sense to require the Department at this stage to attempt an analysis of whether undeveloped and unknown plans for fish passage or waiver will be approved.

The timeframe contemplated by the water right application processing statutes do not support the lengthy approval process necessitated by WaterWatch's suggested approach. Under ORS 537.150(1), the Department is supposed to conduct its completeness review of an application within 15 days of receiving it. Thirty days later, the Department must notify the applicant whether the proposed use is restricted, whether water is available, and whether any other issue precludes approval. ORS 537.150(5). Two months after that notification, the Department is supposed to issue a proposed final order. ORS 537.153(1). Under this timeframe, the Department likely would not have time to analyze whether other agencies will grant permits for which EVWD has not yet applied.

Many of these approval processes are complicated. ODFW fish passage authorization is one example of an intricate process. Fish passage laws require that before constructing an artificial obstruction across any waters of the state that are or historically were inhabited by native migratory fish, the obstruction's owner must submit a proposal for fish passage. ORS 509.585(2) and (4). Alternatively, the owner may apply for a fish passage waiver by showing alternatives to passage that would provide a net benefit to native migratory fish. Thus, the owner has to show that alternatives to fish passage will result in a benefit greater to fish than that provided by fish passage by or through the artificial obstruction. ORS 509.585(7)(a) and (b).

The statute requires ODFW to analyze at least twelve factors including the geographic area, the type and quality of habitat, the affected species, the status of native migratory fish stocks, standards for monitoring, evaluating and adaptive management, feasibility of fish passage and alternatives to fish passage, quantified baseline conditions, historic conditions, existing native migratory fish management plans, financial or other incentives and the application of incentives, data collection and evaluation, and consistency with the purpose and goals of the Oregon plan. Moreover, ODFW is required to coordinate its fish passage or waiver requirements with applicable federal law. ORS 509.585(7)(c) and (d). Simply put, the Department does not have the authority or the expertise to evaluate these factors.

WaterWatch cites to *Gould v. Deschutes County*, 216 Or App 150 (2007) for support of its argument that the Department impermissibly delegated the public interest analysis to ODFW and DEQ by approving EVWD's application with conditions. In *Gould*, a developer applied to Deschutes County for approval to build a resort with golf courses and shops. County laws required the application to include a description of wildlife resources at the proposed building site, the impact of the resort on those resources, a plan to mitigate adverse impacts, and a resource protection plan to ensure that natural features of the site were maintained. *Id.* at 154.

Instead of including the required items in its application, the developer stated that it would work with ODFW to develop them. ODFW represented to the county that it would be feasible to develop a mitigation plan addressing any impact to natural resources.

Before approving the application, the county was required to find that the developer's proposed plans would completely mitigate any negative impact on natural resources. Without requiring the developer to articulate the negative impacts and present a mitigation plan, the county relied on the promise of the developer to identify the impacts, and the commitment of ODFW to help create a suitable mitigation plan, and approved the project. *Id.*

The Court of Appeals found that the county could not effectively evaluate impacts from the project without knowing the project impacts and the specifics of the mitigation measures. The Court of Appeals held that the county had therefore impermissibly deferred to ODFW to perform the required analysis. *Id.*

Here, there are not requirements similar to those imposed by the county in *Gould*. The Department's form application did not require EVWD to identify natural resources impacts or a plan to mitigate any identified impacts. The water right application processing statutes and rules also contain no such requirements for a water storage permit. Thus, the *Gould* case does not support WaterWatch's argument.

Another case cited by WaterWatch is also inapplicable. In *Kusyk v. Water Resources Dept.*, 164 Or App 738 (2000), an individual filed an application to transfer two ground water right certificates. Under the applicable statute, ORS 540.530, the Department could grant the application only if the transfer would not injure other existing water rights. A landowner filed a protest to the Department's proposed order granting the application. The landowner argued that the transfer might cause substantial interference with her existing water rights. *Id.* at 740.

The Department's hydrologist conducted a study, and concluded that he could not determine whether the transfers would injure the landowner's water rights. The hydrologist indicated that in order to do so, he would have to observe the new well in operation. Without scheduling a contested case hearing, the Department granted the transfer permit, conditioning it on the applicant ensuring that the new well did not impact the landowner's water right. *Id.* at 741.

The circuit court found that the Department abdicated its responsibility to make a "no injury" finding, and granted summary judgment, as well as attorney fees, in the landowner's favor. The case then was appealed the Court of Appeals on the issue of attorney fees. *Id.* at 740.

Unlike in *Kusyk*, the Department has not failed in its obligation to make the required findings under ORS 537.153(2) about injury to existing water rights from EVWD's proposed project. As explained *infra*, the Department evaluated all four required factors, including potential water right injury.

WaterWatch also argues that conditioning EVWD's permit on compliance with fish passage laws is inadequate because those laws, unlike the water right application processing statutes, do not provide for public comment. As a result, WaterWatch argues, it will be unable to participate in the ODFW process for approving fish passage or waiver plans. However, an inability to participate in another agency's approval process does not provide a basis for denying EVWD's application. Public participation in the fish passage process is not within the scope of this contested case hearing.

WaterWatch also contends that water quality modeling submitted by EVWD at the hearing shows that the EVWD cannot meet the water quality temperature standards that require maintaining Drift Creek at or below 18 degrees Celsius from May to October, and below 13 degrees Celsius from October to May. However, EVWD offered evidence that it could meet the

standards if the reservoir is full at 12,000 acre feet and EVWD only withdraws 8,000 acre feet of water during the summer months. The latter is the amount that EVWD's project manager Mr. Crew estimated that the District would initially withdraw.

WaterWatch's expert, John Yearsley, was able to duplicate and confirm those results by using the same computer model. Thus, WaterWatch's expert confirmed that at least one scenario would allow EVWD to release cooler water.

WaterWatch contends that a number of factors may limit the District's ability to release cooler water. For example, reservoir water may stratify, causing layers of cool and warm water throughout the reservoir. If warm water is released from the reservoir, it could exceed water quality temperature standards. However, EVWD has offered evidence that it can construct a reservoir with multiple outlets, allowing the District to release water at a lower temperature.

WaterWatch also argued that EVWD may not be able to store 12,000 acre feet of water every year. However, as EVWD points out, nothing requires it to drain the entire reservoir each year. The District therefore would not have to add a full 12,000 acre feet to the reservoir each year to have a full reservoir.

WaterWatch contended that evaporation and seepage might limit a reservoir's ability to remain full. However, WaterWatch's expert conceded that evaporation and seepage likely would not make a significant difference.

EVWD offered evidence that it may be able to release water from a reservoir that meets the water quality temperature standards. Although WaterWatch offered other scenarios where the District did not meet the standards, WaterWatch's experts did not dispute the fact that it is possible for EVWD to release water complying with the standards. WaterWatch therefore did not prove that the project is against the public interest because the reservoir would prevent EVWD from meeting the required standards.

Moreover, one of the PFO conditions is that EVWD meet all state and federal water quality standards. Under the terms of the PFO, if the District fails to do so, the Department may cancel the storage permit and seek civil penalties against EVWD under ORS 536.900.

WaterWatch's next argument is that the record does not support ODFW's determination that a fish passage or waiver plan will avoid detriment to threatened Winter Steelhead, and prevent a net loss of essential habitat for sensitive Pacific Lamprey. In support of that argument, WaterWatch cites to the testimony of ODFW fish biologist Tom Murtagh, who signed ODFW's Division 33 review recommending approval of EVWD's application with conditions.

Four months after recommending approval, Mr. Murtagh expressed doubts to ODFW colleagues about whether EVWD will be able to obtain a waiver of the fish passage laws if it requests one. Mr. Murtagh also wondered whether Pacific Lamprey or Winter Steelhead habitat in the upper portions of Drift Creek might be categorized as Category I habitat in the future. Category I habitat is considered essential and irreplaceable. ODFW does not recommend that the Department grant applications for proposed uses that impact such habitat.

Nonetheless, as explained above, the fish passage waiver requirements are not at issue here. The same is true of ODFW's categorization of habitat. Moreover, there is no evidence in the record that Mr. Murtagh withdrew ODFW's recommendation that EVWD's application be granted. To the contrary, Mr. Murtagh testified that he still believes that the Division 33 review is accurate. There also is no evidence in the record that upper Drift Creek has been designated as Category I habitat of Pacific Lamprey or Winter Steelhead. At present, the area is Category II or III habitat.

In a related argument, WaterWatch contends that the upper reaches of Drift Creek above the proposed dam site should be categorized as Category I. WaterWatch bases its argument on Mr. Murtagh's testimony that Drift Creek may be categorized as Category I, as well as ODFW representative Ms. Pakenham Stevenson's testimony that cool water refugia, can be Category I habitat. Mr. Murtagh testified that the upper reaches of Drift Creek above the proposed dam site contain cool water refugia areas.

However, Ms. Pakenham Stevenson was not asked, and offered no opinion about whether the upper reaches of Drift Creek have or should be categorized as Category I habitat. To the contrary, she testified that Drift Creek is Category II or III habitat. As Mr. Murtagh recognized, ODFW has not designated any portions of Drift Creek as Category I habitat. His email speculation that portions of Drift Creek might be so designated in the future is speculative. And, as indicated previously, ODFW's categorization of habitat is not at issue here.

WaterWatch's final argument is that the Department must show, before granting EVWD's application, that EVWD can obtain ODFW approval for a mitigation plan under OAR 690-033-0220(5). That rule requires that a proposed water use that is detrimental to the protection or recovery of a threatened species must be conditioned or mitigated to avoid the detriment. Otherwise, the proposed use application must be denied as being contrary to public interest.

OAR 690-033-0220(5) allows the applicant to offer a mitigation plan to offset the detriment. The Department must determine whether the proposed use with mitigation, if mitigation is proposed, offsets the detriment. Here, there is no evidence in the record that EVWD has proposed mitigation. OAR 690-033-0220(5) therefore does not apply.

For all of these reasons, the Department has shown that it complied with the Division 33 rules when evaluating the District's application.

B. Instream Flow Protection Under OAR 690-410-0030

The Commission has promulgated rules regarding statewide water management policy. These policy rules are not incorporated or mentioned in the water right application review statutes or rules. However, the policy rules are relevant to the review process, which requires that the proposed use comply with Commission rules. ORS 537.153(2).

The Protestants argue that the dam and reservoir conflict with the policy rule regarding instream flows. OAR 690-410-0030 states, in relevant part:

Benefits are provided by water remaining where it naturally occurs. Protecting stream flows which are needed to support public uses is a high priority for the state. The long term goal of this policy shall be to establish an instream water right on every stream, river and lake which can provide significant public benefits. Where stream flows have been depleted to the point that public uses have been impaired, methods to restore the flows are to be developed and implemented. These activities shall be consistent with the preservation of existing rights, established duties of water, and priority dates, and with the principle that all of the waters within the state belong to the public to be used beneficially without waste.

This rule makes instream water rights a long-term priority for the Department. In particular, the goal is to establish instream water rights on bodies of water that provide significant public benefits. Additionally, the rules favor flow restoration in streams that have been so depleted that public uses have been impaired.

However, Drift Creek has a recognized instream water right in the 1990 instream water right. Although there is some evidence in the record that farming has negatively impacted Drift Creek, WaterWatch has not established that there are depleted stream flows or that public uses of the creek have been impaired. The record therefore does not support a finding that granting EVWD's application will violate OAR 690-410-0030.

C. Water Appropriation Under OAR 690-410-0070

WaterWatch's argument regarding this rule is discussed *supra* at page 61.

D. Impacts of Water Storage Projects Under OAR 690-410-0080

The Commission has promulgated statewide water resource management rules governing water storage. As stated in the explanation of the purpose for the rules: "Water storage options are an integral part of Oregon's strategy to enhance the public and private benefits derived from the instream and out-of-stream uses of the state's water resources." OAR 690-410-0080(1).

The rules state that storage projects should be evaluated with a number of criteria, including benefits, public support, environmental issues, cultural and historical impacts, land use, and economic analysis. WaterWatch argues that EVWD's permit should be denied because the Department, in determining whether a *prima facie* case that the proposed use was in the public interest, did not evaluate the project under OAR 690-410-0080(2).⁵⁰ WaterWatch contends that several of these criteria show that the project does not comply with Oregon's policy on water storage.

However, the relevant rule states that its criteria apply only to "programs" developed to achieve the state's water storage policies. The rule states: "Programs to achieve the [storage

⁵⁰ The policies contained in OAR 690-410-0080 are relevant in determining whether the Protestants can show that the public interest factor in ORS 537.170(g) weighs against the proposed project.

policy * * * shall be guided by the following principles.” The Department has interpreted the word “programs” to be broader activities than granting or denying individual permit applications.

The language of the rule supports the Department’s conclusion. OAR 690-410-0080 makes no mention of permit applications. Similarly, the water application processing rules do not require that OAR 690-410-0080(2) criteria be evaluated. The application processing rules are very specific, detailing each step of the review process, but do not mention the water storage policy criteria.

The Department’s interpretation is therefore plausible, and not inconsistent with the statutory or regulatory scheme, or any other source of law. Accordingly, that interpretation is entitled to deference.

In *Willamette Water Co. v. Waterwatch of Oregon, Inc.*, 288 Or App 778 (2017), a company applied for a water right to divert water from the McKenzie River. The Water Resources Commission denied the application because the company’s local land use approvals had neither been granted nor were pending.

The company argued that the applicable rule could be interpreted to allow the Commission to conditionally grant the application before the company had requested local land use approval. The Court of Appeals acknowledged that the Commission could have interpreted the rule that way. However, the Court held that the analysis did not end there:

OAR 690-005-0035(4) may be susceptible to the interpretation that the company places on it. But that is not the right question. To overcome the Commission’s interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule’s text, context, or other applicable source of law. Under *Don’t Waste Oregon*, if an agency’s interpretation of its rule is plausible and ‘cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is not basis on which this court can assert that the rule has been interpreted ‘erroneously.’

320 Or. 132 at 142. Parallel citation omitted.

The Court of Appeals upheld the Commission’s interpretation of OAR 690-005-0035(4) and its term “pending” to mean that the application must be denied unless the company, at a minimum, had begun the process for obtaining the discretionary land use approvals. The Court of Appeals found that that this interpretation was reasonable. *See also, Staats v. Newman*, 164 Or App 18, 23-24 (1999)(deferring to agency’s plausible interpretation of its own administrative rules). As in *Willamette Water Co.* and *Staats*, the Department’s decision that the water storage criteria need not be evaluated in the permit application *prima facie* analysis is reasonable and entitled to deference.

WaterWatch also contends that the application should be denied because of the land use criteria in OAR 690-410-0080(2)(g)(G).⁵¹ WaterWatch claims that because EVWD does not yet own the land that will be inundated by the dam and reservoir, the statewide storage policy militates against the proposed project. However, the policy does not state that pre-construction land ownership is a priority. If the land use criterion was interpreted that way, it would contradict ORS 537.211(6) which allows a public corporation, such as EVWD, to defer obtaining legal access until after the permit application is granted.

WaterWatch argues that the public support criteria in OAR 690-410-0080(2)(g)(C)⁵² mandates that the application be denied. WaterWatch notes that public support for the proposed project is divided between EVWD and the Rue Protestants. Consideration of these criteria therefore does not tip the balance between granting or denying the application.

The Protestants maintain that the cultural and historical criteria in OAR 690-410-0080(2)(g)(C) compels the Department to deny the application. The argument is based on the facts that stone tools, projectile points, flakes from tools, and fire-cracked rock were found near the proposed project site. However, as John Fagan, the Rue Protestants' anthropology expert witness testified, the historical and archeological significance of the finding has not been assessed. The Protestants therefore have not shown that the Department should deny EVWD's application because these artifacts were found at the proposed site.⁵³

E. Integrated Water Resources Strategy and Off-Channel Storage Policy

WaterWatch also argues that the proposed use violates Oregon's integrated water resource strategies, most recently issued by the Commission in 2017. One of the recommended actions in the 2017 strategy is to improve access to "built" water storage facilities. One suggested way to implement that action is to: "Investigate potential off-channel sites for above-ground storage projects."

WaterWatch contends that the 2017 strategy is a Commission rule favoring off-channel storage facilities. WaterWatch argues that EVWD's proposed in-channel reservoir violates that rule. That argument is not persuasive.

First, the 2017 strategy is not a rule that must be followed by the Department in acting on permit applications. The water permit application rules do not require the Department to evaluate applications to ensure consistency with the strategy.

Second, even if the rules mandated such an evaluation, the strategy does not ban off-channel storage facilities. The strategy does not mandate, or suggest the possibility of

⁵¹ "Financial (e.g., project financing including site costs, cost sharing and repayment, and operating maintenance and rehabilitation costs.)" OAR 690-410-0080(2)(g)(E).

⁵² "Social (e.g., recreational, public support, cultural, historic.)" OAR 690-410-0080(2)(g)(C).

⁵³ EVWD and the Department contend that the Protestants did not raise this issue in their protests. However, WaterWatch specifically cited OAR 690-410-0080 in its protest. (Ex. A1 at 21.)

mandating, that all water storage facilities be off-channel.⁵⁴ The strategy requires, at most, that off-channel sites be investigated. Here, the PFO will include DEQ's suggestion that EVWD consider an off-channel reservoir.

F. Access Rights Under OAR 690-310-0040(1)(a)(G)

WaterWatch contends that the PFO does not comply with OAR 690-310-0040(1)(a)(G) that requires a permit application to declare legal access to property impacted by the project. That argument is addressed above at page 64.

G. Peak and Ecological Flows Under OAR 690-033-0220(1) and 690-033-0330(2) and (3)

The PFO does not require any releases from the dam or bypass flow for peak and ecological flows. WaterWatch contends that Division 33 rules expressly require that the PFO require such releases. However, none of these provisions mention, much less require, peak and ecological flows.⁵⁵

OAR 690-033-0220(1) provides the following criteria for streams below the Bonneville Dam:

If the Department determines that a proposed use of water is detrimental to the protection or recovery of a threatened or endangered species and cannot be conditioned or mitigated to avoid the detriment, the applications shall be presumed to impair or be detrimental to the public interest. The Department shall review recovery plans, the Fish and Wildlife Program, and regional restoration programs applicable to threatened or endangered species in evaluating whether a proposed use is detrimental to the protection or recovery of a threatened or endangered species.

OAR 690-033-0330(2) and (3) provide:

* * * * *

(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:

⁵⁴ For the same reason, WaterWatch's argument that EVWD must abandon the project because the in-channel reservoir will violate the District's obligation as a public corporation to conform to Water Commission policy is flawed. Again, the policy articulated in the Water Resources Strategy does not ban in-channel storage facilities.

⁵⁵ In its protest, WaterWatch also mentioned OAR 690-410-0030 (instream flow protection) and 690-410-0070(2) (water allocation for beneficial uses. These two rules neither mention nor require permit conditions protecting peak and ecological flows.

(a) 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).

(b) In all areas of the state where sensitive species are located, no net 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 690-033-0330(2)(a) and (b).

In its Division 33 application review sheet, ODFW does mention “peak flows necessary to mainstream habitat and ecology.” This phrase appears in the conditions related to the period of use or b51a on page 1 of the review sheet.⁵⁶ The entire sentence reads: “Any proposed use of water during October should include bypass flows to meet the instream water right and provide any peak flows necessary to maintain stream habitat and ecology.” It is unclear whether the intent of this sentence is to require bypass flows for peak and ecological flows, and whether such flows should be required only in October or in some other months as well.

As the Department acknowledged, the PFO contains no requirement to provide peak or ecological flows. Before finalizing the FO, the Department must clarify with ODFW the “peak flows” phrase in the review sheet, and ensure that the FO includes any peak and ecological flow condition recommended by ODFW.

The Department has demonstrated that the proposed use does not violate any of the foregoing Commission rules. The Proponents have not shown otherwise.

Issue No. 3: Public Policy Review

After concluding that EVWD’s application established a *prima facie* case that the proposed project is in the public interest, Tim Wallin, the Department’s then Water Rights Program Manager, prepared a written analysis of the seven public interest factors in ORS 537.170(8)(a)-(g). He included the analysis in the PFO. The Protestants contend that the analysis is conclusory. As a result, the Protestants argue, the Department did not fulfill its statutory obligation to fully evaluate the project. The Protestants contend that the District’s application should be rejected on that basis.

It is true that the public interest analysis in the PFO is devoid of facts. Because Mr. Wallin did not testify at the hearing, the record does not show how he came to the conclusions in his analysis. The record shows however, that the Department considered facts contained in the District’s application, the Protestants’ protests, and the Division 33 reviews by ODFW and DEQ. The seemingly perfunctory nature of the public interest analysis in the PFO therefore does not establish that the Department failed to properly evaluate the public interest factors.

⁵⁶ Ex. A1 at 219.

Moreover, even if the Department's evaluation was inadequate, and other facts exist that the Department should have considered, the Protestants' remedy was the opportunity to present those facts in the contested case hearing. Over a ten-day period, the Protestants had the opportunity to present all evidence that they believe the Department should have considered. Additionally, before the hearing, the Protestants submitted thousands of pages of exhibits, as well as written direct testimony.

The Protestants have the burden of demonstrating that EVWD's proposed project will be detrimental to the public interest. As provided in ORS 537.153(2)(b)(A) and (B), the Protestants must not only identify a public interest that the proposed use would impair, but must show specifically how that interest would be impaired by the proposed project: "[The rebuttable presumption] may be overcome by a preponderance of evidence * * * [that] the proposed use will impair [a] * * * specific public interest * * * [and a showing of] specifically how the identified public interest would be impaired or detrimentally affected." The Protestants failed to meet that burden here.

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.

The first of the seven public interest factors requires that a proposed use conserve the highest use of water for all purposes. ORS 537.170(8)(a)

EVWD's storage proposal, as modified by the Department, is expressly allowed by the Willamette River basin rules, which apply to Drift Creek. OAR 690-502-0040(4)(a). Moreover, statewide water resource management rules articulate the value of water storage projects:

Policy. Water storage options are an integral part of Oregon's strategy to enhance the public and private benefits derived from the instream and out-of-stream uses of the state's water resources. Storage can provide increased water management flexibility and control. Storage can be enhanced through means ranging from natural processes to engineered structures. The state shall facilitate and support project planning and development. The state shall actively pursue funding when storage is determined to be a preferred alternative to meet the water needs of instream and out-of-stream beneficial uses.

OAR 690-410-0080(1).

Stored water may be released or used at any time for any beneficial purpose, including irrigation.⁵⁷ OAR 690-502-0040(4)(a) and (c). The concept of "beneficial use" is integral to

⁵⁷ EVWD also proposes to store water for flow augmentation. That use, however, is meant only to comply with conditions that may be imposed by ODFW and DEQ. The primary purpose of the stored water is to irrigate crops.

Oregon's water law. Not only does the concept appear in statutes and rules, its significance is underscored by the Oregon Constitution, which provides in relevant part: "use of * * * water for beneficial use * * * is necessary to the development and welfare of the state and is declared a public use." Article I, Section 18.

Agricultural irrigation has been specifically recognized as a "beneficial use." OAR 690-502-0040(4)(c).

In upholding the granting of a water use permit, the Oregon Court of Appeals approvingly quoted Commission language that stated:

It is the Commission's position that maximum beneficial use of the waters of the state is achieved by issuing a permit to anyone who is willing to attempt appropriation and use of whatever unappropriated water may become available, except where a basin program identifies a need to set aside some amount of unappropriated water for particular future uses.

Benz, 94 Or App 73 at 80.

There is no question that irrigation is a beneficial use, and, for purposes of ORS 537.170(8)(a), one of the enumerated highest uses of water. The Protestants claim, however, that the uses of fishing and wildlife and public recreation should be considered worthier uses of Drift Creek. They urge that a hierarchy be developed, with those uses surpassing irrigation in importance. They argue that using water for fish, wildlife, and public recreation precludes other uses such as irrigation. Despite these arguments, the Protestants cite no statute, administrative rule, or case law supporting the conclusion that the first public interest factor requires such an all-or nothing approach.

Indeed, the wording of the applicable statutes and rules suggests the opposite. The relevant statutes and rules do not require the Department, or ultimately the Commission, to choose among possible water uses, and designate one as the "highest." Instead, the factor invites an analysis of whether, when possible, the proposed use will allow water to be used for all purposes, including those specified in the rule. In other words, the analysis focuses on whether the proposed use can co-exist with other important uses of the water.

With regard to fishing and wildlife, the record shows that Drift Creek provides limited habitat above and below the proposed dam site for Pacific Lamprey, listed as sensitive under Oregon law, Upper Willamette Winter Steelhead⁵⁸ and Upper Willamette Spring Chinook, ESA-listed as threatened. The creek also provides habitat for unlisted fish such as Cutthroat Trout and Coho Salmon.

Drift Creek provides limited habitat in large part because of its current high water temperatures. Those temperatures are caused by a combination of factors, including hot air temperature, lack of vegetation to shade the creek, and reduced summer water flows. Although WaterWatch contends that these conditions could be improved by measures such as placing

⁵⁸ Upper Willamette Winter Steelhead have not been actually observed in Drift Creek, but ODFW assumed that they might be because other fish in the Salmonid family use the creek.

woody debris in the creek and planting vegetation, WaterWatch did not offer specific evidence about the impact of such measures or who would implement and pay for them.

The proposed project will impact fish habitat both above and below the dam. The project will diminish habitat for Pacific Lamprey, reducing the fish's ability to spawn and rear. Additionally, loss of spawning and rearing habitat for Upper Willamette Winter Steelhead will hinder protection and recovery of the fish.

To help protect fish habitat, both ODFW and DEQ imposed conditions, which essentially require EVWD to minimize impacts from the dam and reservoir on Drift Creek fish. It is true that habitat in the inundation area will be lost. However, WaterWatch has not demonstrated why that loss compels the conclusion that the project will impair the public interest. Moreover, evidence from fish and wildlife experts suggests that water may be stored from Drift Creek, while conserving water usage and habitat for fish and wildlife. Storing water in Drift Creek therefore does not mean sacrificing other beneficial water uses.

The Protestants contend that the conditions recommended by ODFW and DEQ will be ineffective. However, evidence in the record does not effectively counter the testimony of agency representatives. For example, WaterWatch did not offer evidence about the amounts of water that the fish require to maintain their habitat. And, although WaterWatch argues that the dam and reservoir should not be built because Drift Creek is the only remaining Pudding Creek tributary without a dam, WaterWatch did not offer evidence about the significance of that fact to fish habitat or the Molalla-Pudding sub basin.

Additionally, the specifics of the mitigation plans will be addressed in subsequent permitting processes. If EVWD does not demonstrate during those processes that mitigation plans will succeed, the project will not go forward. Again, obtaining a water storage permit from the Department does not give EVWD carte blanche to build the dam or reservoir.

With regard to public recreation and scenic uses, the Protestants did not offer evidence that the public, as opposed to landowners living along Drift Creek, use the creek for recreation or scenic use. Indeed, there is no evidence in the record that the creek is accessible by the public. However, the Rue Protestants did offer evidence that they and their families fish in and enjoy spending time along the creek. But the Rue Protestants did not offer evidence that the proposed project will prevent all opportunities for them to enjoy the creek.

The Protestants offered no evidence that the other uses listed in the first public interest factor cannot coincide with water storage. The Rue Protestants do not use creek water for irrigation. They do not use the water for domestic use other than drinking water that Mr. Qualey uses from a spring that will be inundated by the reservoir. The record does not show that Drift Creek is being used for municipal water supply, power development, fire protection, mining, industrial purposes, navigation, or any other beneficial use to which the water may be applied and for which it may have a special value to the public. Thus, the Protestants' evidence does not demonstrate that the proposed use will impair or be detrimental to the public interest.

B. The maximum economic development of the waters involved.

The second public interest factor focuses on the maximum economic development of the water to be used in the proposed project.

If EVWD's application is granted, 12,000 acre feet of water will be available to EVWD farmers, and potentially farmers outside of the District, to use as supplemental irrigation for crops. As the District's economic expert testified, having a reliable, supplemental irrigation supply of waters will increase the value of these farmers' property. Additionally, Marion County, the Willamette Valley, and the state of Oregon will benefit economically because the farmers will be able to grow more high-value crops, and inject money into the economy.

The Protestants did not offer their own economic expert. They contend, however, that the testimony of EVWD's expert witness should be given little weight because Ms. Wyse did not conduct a cost-benefit analysis of the project that included the cost of the project.

It is true that Ms. Wyse did not factor into her analysis the expense of building the dam or reservoir, or the cost of conveying water from Drift Creek to the District boundaries. Such an analysis is not possible at this time because EVWD has not completed the specifications and plans for the dam or reservoir.

Granting the permit will result in economic losses to the Rue Protestants. These losses are due to the loss of farmland and timber land caused by inundation of land by the reservoir. They argue that those losses should be considered in analyzing the second public interest factor.

However, the second public interest factor focuses on maximum economic development *of the waters involved*. And, the factor does not take into account land lost from a project involving the waters.

In any event, if the Rue Protestants do not sell their land voluntarily, EVWD can take the land through eminent domain. If the latter occurs, EVWD will have to fairly compensate the Rue Protestants for the land. Moreover, the economic value of the diverse crops that EVWD farmers could grow with supplemental irrigation, as well as the increased yield of irrigated crops, outweighs the loss of the crops that would be grown on the Rue Protestants' land. Thus, the Rue Protestants did not show that leaving the water in the creek will result in greater economic development of the waters.

Accordingly, the Protestants have not demonstrated that the proposed project fails to maximize economic development of the waters is issue and is therefore detrimental to the public interest.

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

The third public interest factor looks at whether the proposed use will conflict with drainage, sanitation, and flood control. There is no evidence in the record that EVWD's

proposed dam or reservoir will have any impact on these issues. The Protestants made no argument that any such impact will occur. The third factor therefore does not suggest that the EVWD's proposed project will impair the public interest.

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

The fourth public interest factor considers water availability for beneficial uses.

The Department conducted an analysis of water availability using WARS. The Department concluded that water would be available to satisfy two water rights that would be senior to EVWD's proposed storage project. As discussed more fully above, the Department's conclusion was reasonable.

The Protestants still maintain that this factor militates against granting the District's storage permit application. However, they offer no evidence that withdrawing 12,000 acre feet of water per year would interfere with any other beneficial use not already discussed. WaterWatch states that the proposed use would take all the water available during the storage season, "leaving nothing for any other use." WaterWatch Response To Post-Hearing Briefs of Oregon Water Resources Department and East Valley Water District at 16. Nonetheless, WaterWatch does not specify what that other use is or otherwise support its assertion.

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

The fifth public interest factor considers whether the proposed use is wasteful, uneconomic, impracticable or unreasonable.

The PFO requires EVWD to not waste water while storing it. The PFO contains requirements for measuring the water in the reservoir using a staff gauge. Additionally, this Proposed Order suggests that additional water flow monitoring be imposed. The evidentiary record also shows that evaporation and seepage are not significant issues here, and that those issues can also be addressed in the design of and materials used to construct the reservoir.

Mr. Taylor testified about observing a sprinkler watering a gravel area on one of the EVWD farms. However, that anecdote does not prove that the proposed use would be wasteful. Mr. Taylor offered no details about specifically where this incident occurred, and how it relates to EVWD and decisions that entity makes.

The Protestants argue that the project is wasteful because many of the EVWD farmers have other surface and groundwater rights, and have no immediate need for the water. However, the record shows that portions of the District land are in groundwater limited water areas, and may be unable to obtain additional groundwater rights. And, the record shows that some of the EVWD farmers have been unable to renew time-limited groundwater permits, and have had surface water rights curtailed to varying degrees in recent years. Also, much of the surface water in the area is already fully appropriated and therefore unavailable for EVWD members to use for irrigation.

Although EVWD offered no specific evidence suggesting that any of the farmers may lose additional water rights, EVWD did offer the testimony of the former director of the Department, who indicated that EVWD's plan to develop a supplemental water source is warranted by current water conditions in the district.

With regard to impracticability, the Protestants have not shown that the District's proposed project, despite many future hurdles, cannot succeed. Although the Protestants claim that it might be more practical for EVWD to obtain supplemental water from the Army Corps of Engineers, the application process does not require the Department to select and determine the best of all possible alternatives for obtaining supplemental water. Further, the Department cannot guarantee or even assume cooperation by the Army Corps of Engineers in satisfying EVWD's water needs. The Department must review the use as proposed in the application, and determine whether the proposed use can be modified or conditioned to meet the public interest.

Moreover, the Protestants cite to no authority for the proposition that the District must show that its farmers are currently unable to grow crops without supplemental irrigation. Given the length of time necessary to obtain all required permits for a project of this magnitude, it would be imprudent for the District to delay locating supplemental water.

With regard to the economies of the project, it is true that the final cost of construction and conveyance is unknown. However, if EVWD is unable to secure funding, whether private, public or a combination of both, the dam and reservoir will not be built. If EVWD determines after the specifications are completed that the eventual cost of water per acre foot is prohibitive, the District likely will forego the project. The farmers within EVWD are business people. Nothing in the record suggests that they will act irrationally when making economic decisions affecting their businesses.

EVWD has shown that there is currently a demand for 4,000 annual acre feet of supplemental water. That amount of reserved water may increase, however, if the project appears to be a reality. And, although the Protestants contend that the project would only benefit a dozen or so farmers, the record shows that EVWD has 45 members.

Finally, the Protestants have not shown that the project is unreasonable. They argue that inundating productive private farmland to allow competing farmers to enhance the value of their lands is not reasonable. However, the record shows that irrigation produces higher-value crops and contributes to higher yields of other crops. Moreover, the Victor Point farmers are not making use of Drift Creek water on their land. Thus, water used by one group of farmers is not being taken away and given to competitors. Instead, under the proposed project, unappropriated water will be used for a beneficial purpose.

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

The sixth public interest factor ensures that vested and inchoate rights to the use of or waters of Oregon are protected.

Here, there are two water rights on Drift Creek, the Schact water right and the 1990 instream water right. The Department's WARS analysis showed that, in most years, there will be enough water to satisfy these two rights as well as the proposed annual storage of 12,000 acre feet. Moreover, these vested water rights are protected by their respective priority dates, both of which would be senior to any right granted to EVWD. Accordingly, the Schact water right and the 1990 instream water right will be protected by the prior appropriation system, pursuant to which senior water rights must be satisfied before junior water rights. Additionally, the PFO expressly states that EVWD may not store water until senior water rights, including the instream water right, are satisfied.

In *Benz*, 94 Or App 73, the protestants argued that the public interest factor protecting vested and inchoate rights militated against a surface water permit application. In that case, the water level of the creeks from which the water would be diverted varied. The Commission found that at times there would be enough water for the proposed use, but that at other times existing water rights consumed all available water. 94 Or App 73 at 80.

Despite the uncertainty, the Commission granted the application. In upholding that action, the Court of Appeals held that the law of prior appropriations would protect vested and inchoate rights when the creeks were low:

[U]nder the law of prior appropriations, a senior appropriator who applies water to a beneficial use and thereafter continues to do so holds a water right that is superior to any water right obtained by a subsequent junior appropriator. In view of that rule, the Commission did not err in concluding that knowledge of the precise quantity of water available in excess of prior appropriations is not necessary. A junior appropriator's water right cannot be exercised until the senior appropriator's right has been satisfied.

94 Or App 73 at 81; citation omitted.

As in *Benz*, all vested and inchoate rights to Drift Creek are protected here. The sixth public interest factor therefore does not establish that EVWD's proposed water storage would be detrimental to the public interest.

G. State's Water Resources policy under ORS 536.295 to 536.350 and 537.505 to 537.534.

The final public interest factor integrates broad statewide policies regarding water resources. ORS 536.505 to 536.534 apply to water rights impacting groundwater rights, and are inapplicable. ORS 536.295 to 536.350, which pertain to surface water, and Commission rules applying those statutes, apply here.

OAR 690-410-0080(2) identifies the statewide water resource management for water storage projects and provides, in relevant part:

Principles. Programs to achieve the policy in section (1) of this rule shall be guides by the following principles:

* * * * *

- (g) Criteria for evaluating impacts of storage projects shall include the following factors:
 - (A) Purpose (e.g., type, location and extent of use, benefits);
 - (B) Legal (e.g., state, federal and local legal requirements);
 - (C) Social (e.g., recreational, public support, cultural, historic);
 - (D) Technical (e.g., siting issues, public safety and structural integrity);
 - (E) Financial (e.g., project financing including site costs, cost sharing and repayment, and operating, maintenance and rehabilitation costs);
 - (F) Economic (e.g., project benefit/cost analysis);
 - (G) Land use (e.g., ownership, comprehensive plans, coordination);
 - (H) Environmental (e.g., impacts on streamflows, fisheries, wildlife, wetlands, habitat, biological diversity, water quality and opportunities for mitigation);
 - (I) Other (e.g., direct and indirect impacts).

Some of the Protestants' arguments regarding these statutes and rules have already been addressed in this order at pages 64 and 77-78. For example, WaterWatch contends that the proposed use would violate the Integrated Water Resources Strategy because the reservoir will be in-channel. However, as addressed earlier, that strategy does not prohibit in-channel reservoirs. Similarly, WaterWatch's argument that the Department's review of STE fish species was insufficient was unpersuasive.

The Protestants contend that the financial criteria in the rules regarding statewide management of water storage projects in OAR 690-410-0080(2)(g)(E) compel denial of the permit. That provision, cited above, requires consideration of financial matters in storage projects.

The Protestants argue that the fact that government subsidies likely will be required to pay a significant portion of the construction costs of EVWD's project compels the denial of the District's application. However, OAR 690-410-0080(2)(g)(E) does not specify any required funding methods for storage projects. Moreover, the Protestants do not cite to any statute or rule that disfavors government subsidies for such projects.

The Protestants argue that the project violates the social criteria in OAR 690-410-0080(2)(g)(C), which includes, “recreational, public support, cultural, historic.” WaterWatch contends that EVWD’s proposed project impairs the public interest because public support for the proposed project is divided between the Protestants, the Pudding River Watershed Council on one side and the 45 EVWD members on the other side. While true, this factor does not require that public support or opposition be one-sided.

The Protestants had the burden of showing that, based on the evidence considered by the Department, as supplemented by evidence offered at the contested case hearing, EVWD’s proposed storage project impairs or is detrimental to the public interest. The Protestants failed to do so. As a result, the presumption that EVWD’s proposed project is in the public interest stands. EVWD’s application to store water from Drift Creek therefore should be granted with the additional conditions provided below.

Issue No. 4: Federal Endangered Species Act

The Department and EVWD argue that the OAH has no jurisdiction over WaterWatch’s claims that the PFO violates the ESA. WaterWatch has offered no argument in its closing or responsive briefs supporting claims under that law.⁵⁹ As a result, this Proposed Order does not address the ESA or the jurisdiction issue raised by the Department and EVWD.

Issue No. 5: Public Comments

WaterWatch contends that the Department failed its obligation to review comments submitted during the public comment period. That argument is not persuasive.

The Department’s rules require consideration of public comments received during the public comment period. OAR 690-310-0150(1) provides: “In developing the final order, the Department shall consider all comments received under OAR 690-310-0090(4), but the proposed order need not separately address each comment received.” Additionally, OAR 690-310-0120(3)(a) requires the Department to: “[F]urther evaluate * * * any comments received * * * to determine whether the presumption is overcome.”

Here, the Department allowed public comments beginning October 13, 2014. The Department reviewed the comments and compiled them. Ms. Eastman incorporated into the PFO a summary of the public comments. The Department therefore met its comment-reviewing obligations. The Protestants offered no evidence that the Department failed to consider any particular public comment or that such a failure resulted in the Department ignoring information justifying the denial of EVWD’s application.

Issue No. 6: Power Generation Consistent With Safe Fish Passage Under ORS 540.350(2) and (3)

⁵⁹ WaterWatch also mentioned the CWA in its protest to the PFO. Similarly, WaterWatch raised no argument in its briefs that the PFO violates that law.

ORS 540.350(2) requires that when an applicant seeks approval of dam plans by the Commission, the applicant must demonstrate that a dam higher than 25 feet with an average annual flow exceeding two cfs be readily adaptable to power generation in a manner allowing for safe fish passage. ORS 540.350(3) provides exemptions to that requirement.

The Protestants contend that the PFO is defective because it does not impose the power generation requirement. However, the statutory language above does not require an applicant to demonstrate the dam will be readily adaptable to power generation until the applicant seeks approval of the proposed dam plans. As discussed above, EVWD was not required to submit plans for the proposed dam at the application stage. Therefore, the PFO is not defective under ORS 540.350(2). The statutory provisions cited by Protestants will not become applicable until EVWD submits the plans for the proposed dam to OWRD for approval. As such, the Protestants' argument is premature.

Further, the Department offered evidence that it inadvertently left out this requirement, but will include in the FO a requirement that when EVWD submits its dam plans, the District will address the power generation issue. The FO to be issued by the Department therefore will comply with this statute.

ORDER

The Proposed Final Order issued by the Oregon Water Resources Department on July 22, 2014 is **AFFIRMED AS MODIFIED**. OWRD should issue the PFO with the following modifications:

1. Add a requirement that when EVWD submits dam plans to the Commission for approval, the plans must meet the requirements under ORS 540.350(2) for power generation or demonstrate that the project is exempt from those requirements under ORS 540.350(3).

2. To ensure the instream flow requirements of Water Right Certificate 72591, monthly stream flow measurements must be made during the storage season from November 1 to April 30, and again in May, July, and September. The measurements should be made at regular intervals, not to exceed one river mile, from the in-channel reservoir, if one is constructed, to the mouth of Drift Creek. If no in-channel reservoir is built, the measurement should be made from the point of diversion to the mouth of Drift Creek.

3. Before finalizing the FO, the Department must clarify with ODFW the “peak flows” phrase in the ODFW review sheet, and ensure that the FO includes any peak and ecological flow condition recommended by ODFW.

4. Make the following changes to the PFO, as requested by ODFW:

A. Change the title of “Endangered Species Act (ESA) mitigation condition” on page 4 of the PFO to “Inundation mitigation condition.”

B. Reword the “Wetlands mitigation condition” on page 4 of the PFO to read: “Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and Oregon Department of State Lands (ODSL) to fully assess results of a wetland delineation and the impacts to the habitat of sensitive, threatened, or endangered fish species from loss of wetlands associated with the development of the project. Wetland mitigation shall be coordinated with other mitigation proposals for wetland and waterway impacts. A copy of ODFW’s and ODSL’s written approval shall be provided to the local watermaster’s office as soon as practicable after receiving the approval.”

5. Delete the reference on page 3 of the PFO to the participation of ODA on the interagency review team.

/s/D. McGorin

Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE

If the recommended action in the proposed order is adverse to any party or the Department, the party or Department may file exceptions and present argument to the Department. Exceptions must be in writing, clearly and concisely identify the portions of the proposed order excepted to, and cite to appropriate portions of the record or to Commission policies to which modifications are sought. Parties must file their exceptions with the Department at its Salem offices, by any method allowed in the notice of appeal rights provided in the proposed order. A party must file any exceptions within 30 days following the service of the proposed order on the parties to the contested case proceeding. Unless otherwise required by law, the Director must consider any exceptions to the proposed order and issue a final order. If the applicable law provides for the Commission to review any exceptions or issue a final order, the Commission may form a sub-committee to review the exceptions and provide a report prior to the Commission issuing a final order. OAR 690-002-0175.

CERTIFICATE OF MAILING

On February 25, 2019 I mailed the foregoing PROPOSED ORDER in OAH Case No. 2017-OWRD-00002.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

Name	Address	Contact
East Valley Water District	PO Box 1046 Mount Angel OR 97362	
Joel D Rue	1316 Victor Point Rd SE Silverton OR 97381	
WaterWatch of Oregon, Inc.	213 SW Ash St, Ste 208 Portland OR 97204	
Bruce P Jaquet	14752 Doerfler Rd Se Silverton OR 97381	
Robert B Qualey	15256 Fox Rd SE Silverton OR 97381	
Steve Lierman	1985 Victor Point Rd SE Silverton OR 97381	
David Doerfler	Ioka Farms 13512 Doefler Rd SE Silverton OR 97381	
Zach Taylor	Taylor Farms, Inc 2538 Drift Creek Rd NE Silverton OR 97381	
Tom and Karen Fox	6 El Greco St Lake Oswego OR 97035	
John and Sharon Fox	7784 SW Ashford St Tigard OR 97224	
Rachel Weisshaar	1162 Court St NE Salem OR 97301	rachel.weisshaar@state.or.us
Patricia McCarty	725 Summer St NE, Ste A Salem OR 97301	Patricia.E.McCarty@oregon.gov
Kirk B Maag	760 SW 9th Ave, Ste 3000 Portland OR 97205	kirk.maag@stoel.com
Janet Neuman	888 SW 5th Ave, Ste 1600 Portland OR 97204	janet.neuman@tonkon.com
Brian Posewitz	213 SW Ash St, Ste 208 Portland OR 97204	brian@waterwatch.org
Renee Moulun	1162 Court St NE Salem OR 97301	renee.m.moulun@state.or.us

/s/Joanne M Call
Hearing Coordinator

OAH Customer Satisfaction Survey

Please take a few moments to take our Customer Satisfaction Survey at <http://www.tinyurl.com/OAHSurvey>. Thank you in advance for your participation. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office at 503-947-1918.

