



MEMORANDUM

TO: Bob Baumgartner
Kathy Kihara
Eric Quaempts
Oregon Water Resource Commissioners

Cc: Thomas M. Byler, Director
Oregon Water Resources Department

FROM: Bruce Corn
Joseph Moll
Meg Reeves
Appointed Subcommittee of the Oregon Water Resources Commission

SUBJECT: Agenda Item J, November 21, 2019

Subcommittee Recommendation to the Oregon Water Resources Commission for Water Right Application R-87871 in the Name of the East Valley Water District

I. Background

On February 21, 2013, East Valley Water District (“EVWD” or the “District”) filed an application for a permit to store water from Drift Creek. On July 22, 2014, the Oregon Water Resources Department (the “Department” or “OWRD”) issued a Proposed Final Order (“PFO”) proposing to approve the application and issue EVWD a water storage permit. Individual Protestants 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 5, 2014.

On November 3, 2016, the Department requested that the Office of Administrative Hearings (“OAH”) conduct a contested case hearing regarding the PFO.

The OAH assigned Senior Administrative Law Judge (“ALJ”) Richard Barber to the matter. Senior ALJ Barber conducted prehearing conferences on January 5, 2017, September 11, 2017, and January 2, 2018. ALJ Barber subsequently presided over some of the preliminary matters in the case.

On March 20, 2018, the OAH reassigned the case from Senior ALJ Barber to ALJ Denise McGorin, who presided over the evidentiary portion of the hearing on June 18-29, 2018, in Salem, Oregon. After written closing arguments and responses were filed, the record was closed on September 12, 2018.

On February 25, 2019, ALJ McGorin issued a Proposed Order recommending that the Department's Proposed Final Order be affirmed with modifications. A 30-day period for filing exceptions ensued, with each of the parties timely filing exceptions to the ALJ's Proposed Order.

The Director reviewed the exceptions filed by the parties to the ALJ's Proposed Order and on September 13, 2019, issued a Final Order (the "Director's Final Order"). The Director's Final Order allowed some of the exceptions and denied others but essentially affirmed the ALJ's Proposed Order allowing the application with conditions.

At an Oregon Water Resources Commission ("Commission") meeting on June 13, 2019, the Commission appointed a subcommittee of commissioners to review the exceptions to the Director's Final Order.¹ The appointed subcommittee comprised Commissioners Bruce Corn, Joe Moll and Meg Reeves ("Subcommittee"). On October 3, 2019, the Rue Protestants and WaterWatch of Oregon timely filed exceptions to the Director's Final Order.

II. Recommendation of the Subcommittee

In consideration of the exceptions filed to the Director's Final Order, the Subcommittee makes the following recommendation to the Commission:

1. Adopt the Findings of Fact from the Director's Final Order without any modification;
2. Adopt Ultimate Findings of Fact as required by ORS 183.470;
3. Allow one exception as it is dispositive to this matter; and
4. Issue a modified order concluding that the record establishes that under ORS 537.170(8)(f) the proposed use will impair or be detrimental to the public interest and so the public interest presumption is overcome and the application is denied.

III. Discussion

The Subcommittee has considered the arguments in the exceptions filed to the Director's Final Order and provides the following analysis explaining why it concludes that considering the record in light of the public interest factor in ORS 537.170(8)(f), the public interest presumption is overcome. Because the proposed use will impair or be detrimental to the public interest, we recommend that the Commission deny the application.

¹ OAR 690-002-0190(2)(c) authorizes formation of a subcommittee to review the exceptions filed to the Director's final order and to provide a report to the Commission.

A. Regulatory framework

“All water within the state from all sources of water supply belongs to the public.”² “Subject to existing rights,” a person or entity seeking to appropriate public surface waters for storage must, before beginning construction, or performing any work in connection with the construction, apply to the Water Resources Department for a permit to make the appropriation.³

Two water right permits are required in order to store water in a reservoir and apply that water to a beneficial use. The “primary” permit authorizes the permittee to appropriate and store the water; the “secondary” permit authorizes the permittee to apply the stored water to a beneficial use.⁴ Primary and secondary permit applications are subject to the general statutory provisions governing appropriation of water, “except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit.”⁵ The party proposing “to apply to a beneficial use the water stored in any such reservoir shall file an application for [a] permit, to be known as the secondary permit” also in compliance with those provisions governing appropriation of water generally.⁶ To date, EVWD has only filed an application for a primary permit.

To obtain a primary permit to appropriate and store water, a person or entity must submit an application containing all required information to the Department.⁷ If the application is “complete and not defective,” and does not propose a use prohibited by ORS chapter 537, the Department must conduct a preliminary review of the application, and notify the applicant of the results of that preliminary review.⁸ If the applicant does not direct the Department to stop processing the application, the Department must complete review of the application and issue a “proposed final order” approving or denying the application or approving the application with modifications or conditions.⁹

The framework for the Department’s public interest review of an application is set out in ORS 537.153(2), which states that there is a “rebuttable presumption” that a water use proposed in a permit application is in the public interest if:

* * * the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. * * *

This presumption “shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either”:¹⁰

² ORS 537.110.
³ ORS 537.130.
⁴ ORS 537.400(1).
⁵ *Id.*
⁶ *Id.*
⁷ ORS 537.140(1)(a).
⁸ ORS 537.150; OAR 690-310-0080.
⁹ ORS 537.153(1); OAR 690-310-0120.
¹⁰ ORS 537.153(2).

(a) One or more of the criteria for establishing the presumption are not satisfied; or
(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:

(A) The specific public interest under ORS 537.170 (8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

If the Department determines that the public interest presumption is established or “that the proposed use can be modified or conditioned to meet the presumption criteria,” the Department must further evaluate the proposed use, any comments received, and any other available information to determine whether the presumption is overcome. The Department may find that the presumption is overcome if a preponderance of evidence shows that the proposed use will impair or be detrimental to the public interest as demonstrated in comments or a finding of the Department that shows the specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected and “[s]pecifically how the identified public interest would be impaired or detrimentally affected.”¹¹

Once the Department issues a PFO, interested parties may file protests and request a contested case hearing.¹² A protest may assert that one or more of the criteria for establishing the presumption are not established, or that the proposed use will impair or be detrimental to one or more of the specific public interest factors under ORS 537.170(8) and specifically “how the identified public interest would be impaired or detrimentally affected.”¹³

If the Department receives a protest “which asserts the presumption is not established or should be overcome, the Department shall evaluate the protest and supporting evidence”¹⁴ and find the presumption is overcome if a preponderance of evidence shows that one or more of the presumption criteria are not met or that the proposed use will impair or be detrimental to the public interest because a specific public interest under ORS 537.170(8) would be impaired or detrimentally affected.¹⁵ If the Department finds that the presumption is overcome, the Department must deny the application “unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of a permit will not impair or be detrimental to the public interest.”¹⁶

ORS 537.170(8) lists the factors that the Department (or Commission, if applicable) must consider if, after a protest is filed, the Department or Commission determines that the presumption is overcome but that the permit should, notwithstanding that fact, be issued because it will not impair or be detrimental to the public interest:¹⁷

¹¹ ORS 537.153(2); OAR 690-310-0120(3).

¹² ORS 537.153(5); OAR 690-310-0160.

¹³ ORS 537.153(2); OAR 690-310-0120(3); OAR 690-310-0150.

¹⁴ OAR 690-310-0120(4).

¹⁵ ORS 537.153(6); OAR 690-310-0120(4).

¹⁶ OAR 690-310-0120(5); *see also* ORS 537.170(8).

¹⁷ OAR 690-310-0120(5).

(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, and the means necessary to protect such rights.

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

If, after a protest is filed, the Department or the Commission determines that the application should be denied because the presumption is overcome, the Department or the Commission need not consider the factors in ORS 537.170(8) to determine whether the proposed use should nonetheless be allowed.¹⁸

If the Commission, in its consideration of exceptions to the Director's Final Order, determines that the public interest presumption is overcome because of a specific public interest factor under ORS 537.170(8), the Commission may allow the exception and modify the Director's Final Order to deny the application.¹⁹ In a case, such as this one where the proposed use will impair or be detrimental to the public interest because it conflicts with a vested water right and does not supply the means necessary to protect that vested right, the Subcommittee recommends that the Commission conclude that the use will impair or be detrimental to the public interest.²⁰

B. Analysis

In their exceptions to the Director's Final Order, the Protestants argue that the proposed use will not protect Certificate 72591, the in-stream water right within Drift Creek, because, they assert, the in-stream water right requires that the protected flows be maintained throughout the 11-mile reach of the in-stream water right, as opposed to only being protected at the mouth of Drift Creek.²¹ They also argue that the conditions in the Director's Final Order do not address all of the expected impacts of the proposed use because the conditions do not "make up for" the inundation of Drift Creek within the reservoir footprint.²²

¹⁸ OAR 690-310-0120(5) (If the public interest presumption is overcome, a final order shall be issued denying the application "unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of a permit will not impair or be detrimental to the public interest.").

¹⁹ ORS 537.173; OAR 690-002-0190.

²⁰ ORS 537.170(8)(f); ORS 537.173; ORS 537.120; ORS 537.160(1).

²¹ Rue Protestants' Exceptions to Agency Final Order at 7-8 (arguing that the protected flows must be maintained throughout the reach); WaterWatch's Exceptions to Final Order at 21 (arguing that flows must be protected throughout the reach).

²² WaterWatch's Exceptions to Director's Final Order at 8.

While these arguments were raised in the context of asserting “injury” to the in-stream water right, the arguments do not address the quantitative protections provided by an injury assessment.²³ Instead, the arguments address competing types of uses presented by a proposed new appropriation that inundates an in-stream water right so as to frustrate the beneficial purpose of the existing vested right. That is, the proposed appropriation presents a “conflict” with the existing in-stream water right.²⁴ Thus, while the Subcommittee recommends that the Commission confirm the treatment of “injury” in the Director’s Final Order, we also conclude that a determination that a proposed new appropriation does not “injure” existing water rights does not, in this circumstance, address whether the proposed new use “conflicts” with existing rights and if so, whether the conditions in the Director’s Final Order provide the “means necessary to protect” existing vested rights as provided in ORS 537.170(8)(f).²⁵

ORS 537.170(8)(f) requires the Commission to consider:

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.

That is, the Commission is required to consider whether a new appropriation provides the means to protect all vested rights to the use of the waters of this state. This analysis is consistent with other provisions of the Water Rights Act that allow a new appropriation only if it does not “impair” existing vested rights and prohibit the Department from allowing new uses that “conflict” with existing rights. For example, ORS 537.120 states:

Subject to existing rights * * * all waters within the state may be appropriated for beneficial use as provided in the Water Rights Act²⁶ and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.

In addition, ORS 537.160(1) states that the Department “shall approve all applications made in proper form which contemplate the application of water to a beneficial use, unless the proposed use conflicts with existing rights.”

Taken as a regulatory whole, the statutes governing review of a new appropriation prohibit the Department from allowing a new water right that impairs or conflicts with an existing water right and in assessment of a new application require the Department to examine whether the proposed appropriation presents the means necessary to protect existing water rights.²⁷ In turn, the elements of a water right that

²³ ORS 537.153(2); The Director’s Final Order defines the term “injury” to mean that an existing water right would not receive previously available water to which it is legally entitled. (Director’s Order, p. 62.).

²⁴ While a presumption of public interest may be established if a proposed use does not injure an existing water right, the Department may not approve the application if it finds that the application will “conflict” with existing water rights. ORS 537.160(1). The term “injury” and the term “conflict” do not have the same meaning, but read together, as discussed in our analysis, are consistent with the regulatory context that requires protection of existing water rights. *Dept. of Transportation v. Stallcup*, 341 Or 93, 101 (2006)(Use of different terms suggest that each was intended to have a different meaning).

²⁵ ORS 537.160(1); ORS 537.170(8)(f).

²⁶ ORS 537.120. The Water Rights Act comprises ORS 537.140 – 252 and ORS 537.400, among other provisions. ORS 537.010.

²⁷ ORS 174.010 (“In the construction of a statute...where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”); *Force v. Dept. of Rev.*, 350 Or 179, 190 (2011).

merit protection include not just the quantity of water and the priority date. A key element of a water right is the beneficial purpose to which the water will be applied.²⁸ In considering whether an order allowing a new appropriation provides conditions that protect existing vested rights, the Commission must consider whether the proposed new appropriation will protect the beneficial purpose of existing rights.

1. In-stream water rights

The Oregon Legislature has declared that public uses of water are “beneficial uses” of water²⁹ and that in-stream water rights provide a public benefit “that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.”³⁰ “In-stream” means “within the natural stream channel or lake bed or place where water naturally flows or occurs.”³¹ Among the types of public uses from which the public may derive in-stream benefit are uses of water for the “[c]onservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values.”³²

The Oregon Department of Fish and Wildlife (“ODFW”) may request the Commission “to issue water right certificates for in-stream water rights on the waters of this state in which there are public uses relating to the conservation, maintenance and enhancement of aquatic and fish life, wildlife and fish and wildlife habitat.”³³ The request “shall be for the quantity of water necessary to support those public uses as recommended by the State Department of Fish and Wildlife,”³⁴ though the Director of the Water Resources Department has the final authority to determine the amount of water necessary to protect the identified public use.³⁵

An in-stream water right, once certificated, is “held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use.”³⁶ A certificated in-stream water right has the same legal status as any other water right for which a certificate has been issued.³⁷ A certificated right is vested, and the attributes and priority date of an in-stream water right must be given the same protection as any other water right.³⁸ Thus, for the purposes of ORS 537.170(8)(f), an existing in-stream water right is a vested right to the waters of this state that must be protected.

²⁸ *Ft. Vannoy Irr. Dist. v. Water Resources Commission*, 345 Or 56, 79 – 80 (2008) citing *Tudor v. Jaca et al.*, 178 Or 126, 142 – 43 (1945) (discussing the elements of a water right).

²⁹ ORS 537.334(1).

³⁰ ORS 537.332(4) (definition of “Public benefit”).

³¹ ORS 537.332(1) (definition of “In-stream”).

³² ORS 537.332(5)(b).

³³ ORS 537.336(1).

³⁴ *Id.*

³⁵ ORS 537.343(2).

³⁶ ORS 537.332(3).

³⁷ ORS 537.350(1).

³⁸ *Teel Irr. Dist. v. Water Resources Dept.*, 323 Or 663, 668 (1996).

2. Certificate 72591

a. Beneficial purpose protected

Certificate 72591 is an existing in-stream water right on Drift Creek.³⁹ The right, which was issued by the Department in 1996, has a priority date of October 18, 1990.⁴⁰ Certificate 72591 provides for Drift Creek stream flows for cutthroat trout “migration, spawning, egg incubation, fry emergence, and juvenile rearing.” The right protects specified monthly amounts of water flowing from river mile 11, which is above the proposed dam and reservoir site, to Drift Creek’s mouth, which is below the proposed dam and reservoir site.⁴¹ The allotted protected flows vary by month in order to provide in-stream water sufficient for the life stages of cutthroat trout:⁴²

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1 ST 1/2	40.0	40.0	40.0	40.0	30.1	13.6	3.0	2.0	2.0	3.0	20.0	40.0
2 ND 1/2	40.0	40.0	40.0	40.0	30.1	5.0	3.0	2.0	2.0	5.26	40.0	40.0

By its terms, Certificate 72591 is for the beneficial purpose of “[p]roviding required stream flows” for cutthroat trout migration, spawning, egg incubation, fry emergence and juvenile rearing.⁴³ For the beneficial purpose of the water right to be accomplished, the monthly flows must be “maintained” within the reach of Drift Creek specified in the certificate.⁴⁴

b. Impacts on Certificate 72591

On February 21, 2013, EVWD filed a water storage application with the Department. The application requests a permit to build a dam and reservoir to store water from Drift Creek and unnamed tributaries of Drift Creek.⁴⁵ The application proposes to divert 12,000 acre feet of water from October 1 through April 30 for storage, to be used for “irrigation, supplemental irrigation, and flow augmentation as may be required for the approval” of the reservoir.⁴⁶ A map attached to the application indicates that the reservoir will be built on-channel: that is, within Drift Creek’s streambed.⁴⁷

The application does not contain many details about the reservoir in which water will be stored. The application does not describe the exact boundaries of the reservoir, nor the materials that will be used to construct it.⁴⁸ The application also does not indicate how much water will be released from the reservoir on a monthly or yearly basis or the method of conveyance from the proposed reservoir to the place of use within the District.⁴⁹ Instead, the application states that because the applicant is an irrigation

³⁹ Director’s Final Order, Finding of Fact (FOF) 193.
⁴⁰ FOF 193.
⁴¹ FOF 195.
⁴² Exhibit (Ex.) WW8 at 1.
⁴³ *Id.*
⁴⁴ *Id.*
⁴⁵ FOF 133.
⁴⁶ FOF 134.
⁴⁷ FOF 135.
⁴⁸ FOF 139; FN 20 to FOF 133.
⁴⁹ FOF 139.

district, it is “not required to submit engineering plans and specifications prior to permit issuance.”⁵⁰ The application also states that the district plans to seek a waiver from ODFW’s fish passage requirements.⁵¹

Cutthroat trout and coho salmon are members of the salmonid family that are present in, and live in, Drift Creek for portions of their lives.⁵² Both of these fish species spawn and rear in Drift Creek.⁵³ Although cutthroat trout and coho salmon may be impacted by the proposed use, ODFW and the Oregon Department of Environmental Quality did not consider these fish in the Division 33 reviews they conducted because neither fish is listed as sensitive, threatened, or endangered.⁵⁴

By definition, an “in-stream” water right exists “within the natural stream channel or lake bed or place where water naturally flows or occurs.”⁵⁵ The beneficial purpose of Certificate 72591 is to “provid[e] required stream flows” in river miles 0 through 11 of Drift Creek in the monthly amounts specified in the right for cutthroat trout migration, spawning, egg incubation, fry emergence, and juvenile rearing. If water is impounded within the channel of Drift Creek, the stream reach inundated will no longer possess the characteristics of a “natural stream channel,” but will instead become a pool of water.⁵⁶ As demonstrated by the varying flows protected under Certificate 72591, the variability of flow within the natural stream channel is necessary to support the different life stages of cutthroat trout. If a portion of the reach is inundated to allow storage of up to 12,000 acre feet of water, the beneficial purpose of the variable flows within the stream channel—supporting the different life stages of cutthroat trout—is frustrated, and the application for the new storage right conflicts with an existing in-stream water right.⁵⁷

3. The means necessary to protect Certificate 72591

In light of the fact that the proposed appropriation presents a conflict with an existing in-stream water right, the Commission must consider whether the Director’s Final Order provides the means necessary to protect Certificate 72591. The Subcommittee concludes that it does not.

The Director’s Final Order first discusses protection of Certificate 72591 in the context of its “injury” determination. When reviewing applications to appropriate water, the Department is tasked with determining whether a proposed use will “injure” other water rights.⁵⁸ In performing that review, the

⁵⁰ Ex. A1 at 482.

⁵¹ Ex. A1 at 484.

⁵² FOF 255.

⁵³ FOF 255.

⁵⁴ FOF 254.

⁵⁵ ORS 537.332(1).

⁵⁶ See ORS 537.332(1); FOFs 133 – 135; FOFs 207, FOF 278 See also FOFs 254 – 277 (findings about the effects of inundation on the waters of Drift Creek).

⁵⁷ See ORS 537.160(1). The word “conflict” means “to show variance, incompatibility, irreconcilability, or opposition * * *.” *Webster’s Third New International Dictionary* (3rd edition unabridged); *Portland Gen. Elec. Co. v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (words of common usage should typically be given their plain, natural, and ordinary meaning). “When the term has acquired a specialized meaning in a particular industry or profession, however, we assume that the legislature used the term consistently with that specialized meaning.” *Zimmerman v. Allstate Property and Casualty Ins.*, 354 Or 271, 280 (2014) citing *Tharp v. PSRB*, 338 Or 413, 423 (2005). In this case the interpretation of the word “conflict” should be given a specialized meaning within the context of western water law.

⁵⁸ ORS 537.153(2).

Department's practice is to construe the term "injury" to mean that there is an insufficient *quantity* of water to allocate to new uses while still satisfying existing water rights.⁵⁹ Consistent with this practice, the Director's Final Order concludes that, by conditioning the storage permit to require the monthly flows in Certificate 72591 to be released from the downstream end of the reservoir so that the certificated quantities are present at the mouth of Drift Creek, the proposed use will not "injure" the in-stream water right.⁶⁰

However, a condition that protects against injury to existing rights by prohibiting a reduction in the quantity of water present at the mouth of Drift Creek does not resolve the conflict between the proposed use and Certificate 72591 that is presented by the inundation of the stream channel itself.⁶¹ Insofar as the in-stream water right is for the purpose of providing varying flows within a natural stream channel to support specific cutthroat trout life stages, inundation defeats the beneficial purpose of the existing water right. A condition to prevent injury to the quantity of water allowed in the in-stream water right thus does not supply the means necessary to protect the beneficial purpose of the existing water right within the reservoir footprint.⁶² Absent a condition to address the incompatibility of the proposed appropriation and the existing in-stream water right, the Director's Final Order does not present the means necessary to protect Certificate 72591, in contravention of ORS 537.170(8)(f).

The Director's Final Order addresses the factor in ORS 537.170(8)(f) by noting that the in-stream water right is senior to the proposed reservoir application and that the senior in-stream water right will be protected by merit of its priority date.⁶³ The order states that, because EVWD may not store water until all senior water rights are satisfied, including the in-stream water right located on Drift Creek, the senior priority date of Certificate 72591, in and of itself, provides the means necessary to protect that right.⁶⁴

Where an existing water right and a proposed new use are both diverted out of the stream for consumptive use, a senior priority date will protect the senior water right because a junior appropriator is prohibited from diverting water unless and until senior right water rights are met. However, where a proposed reservoir will inundate a stream reach protected by an existing in-stream water right, additional scrutiny is required to determine whether issuance of the new right will present such a conflict as to preclude the beneficial purpose of the existing water right, or whether there exists the means necessary to protect the existing water right.⁶⁵

This is not to say that a conflict will exist in all instances in which an in-channel reservoir is proposed on a stream reach protected by an existing in-stream water right. In an instance in which the application presents information that details the reservoir construction, operation, and the conveyance of

⁵⁹ FOF 211 (finding that the Department construes the term "injury" to have that meaning provided in the context of transfers); OAR 690-380-0100(3) defines "Injury" or "injury to an existing water right" to mean a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled."

⁶⁰ Director's Final Order at 62 – 65.

⁶¹ The Subcommittee does not recommend that the Commission modify the Director's findings, analysis, or conclusions regarding whether the proposed use will injure existing water rights.

⁶² ORS 537.120; ORS 537.160(1); ORS 537.170(8)(f).

⁶³ Director's Final Order at 86 – 87.

⁶⁴ *Id.*

⁶⁵ ORS 537.160(1); ORS 537.170(8)(f).

water to the proposed place of use, as well as details about fish passage, it may be determined that no conflict exists or that conditions may be fashioned to protect existing in-stream water rights.

In this case, however, Application R-87871 provides scant detail about the intended construction or operation of the reservoir and no information about the conveyance of the water from the reservoir to the intended place of use. While it is clear that the reservoir would inundate a portion of the reach protected by Certificate 72591, it is not known whether the reservoir as it is ultimately developed, will preserve any of the functionality of the in-stream water right. The application, though it is complete, lacks the detail necessary for the Commission to address the conflict presented by the inundation of the in-stream reach. Finally, the record does not establish that an off-channel reservoir is either contemplated or feasible in this instance, and so it does not appear that conditioning the proposed use to require off-channel storage is consistent with the application or the request of the applicant.

IV. Conclusion

In this case, the proposed use conflicts with the beneficial purpose of Certificate 72591, an existing in-stream water right, and the Director's Final Order does not condition the proposed use to fully protect that in-stream water right. Nor does the record present the Commission with the information necessary to fashion a condition that would fully protect Certificate 72591. The proposed use, therefore, will not protect vested rights to the use of water, in contravention of ORS 537.170(8)(f), and will thus impair or be detrimental to the public interest. For the reasons discussed in this memorandum, we recommend that Application R-87871 be denied.