



ALJ Barber stated that the parties could cross examine witnesses offering either form of testimony at the hearing. On May 31, 2018, WaterWatch filed a written notice of its intention to cross examine all witnesses that submitted written direct testimony. The Rue Protestants, the Department, and EVWD filed similar notices on June 1, 2018.

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 Final 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.<sup>3</sup> 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.<sup>4</sup> 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.

---

<sup>3</sup> 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.

<sup>4</sup> David Doerfler's written direct testimony was excluded because he declined to appear at the hearing, and therefore was not available for cross examination.

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 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 arguments 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 Final 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 from the PFO means that the public interest presumption was not satisfied. 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 Final 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, Dwight French, Jeana Eastman, Alyssa Mucken, Kevin Loe, Bruce Jaquet, Steven Lierman, Stephen Fox, Anna Rankin, Adam Sussman, Phil Ward, 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, Conrad Gowell, David Bielenberg, Lucius Caldwell, David DeKrey, Mark Dickman, Jeana Eastman, John Fagan, Dwight French, Nancy Gramlich, Bruce Jaquet, Mike McCord, Alyssa Mucken, Tom Murtagh, Anna Rankin, Lauren Reese, Joel Rue, Anna Pakenham Stevenson, and Bolyvong Tanovan.

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.*;

5. Whether the PFO adequately acknowledges and addresses public comments opposing EVWD's storage application under OAR 690-310-0150(1); and

6. Whether the PFO addresses power generation consistent with safe fish passage under ORS 540.350(2) and (3).<sup>5</sup>

## EVIDENTIARY RULINGS

### Admitted Exhibits

Exhibits A2 and A4 to A9, offered by the Department, were admitted into the record without objection. WaterWatch's objections to Exhibits A1 and A3 were overruled. 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, EV23-28, EV30-42, EV44-48, EV50-54, EV56-58, EV60, EV62, EV64-70, and EV72-100 were admitted without objection. EVWD withdrew Exhibit EV43. Due to authentication objections, Exhibit EV29 was not admitted. EVWD had the burden of reoffering Exhibit EV29 during witness testimony, but did not do so.

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 EV21, EV22, EV49 (reports starting on pages 15 and 32), EV59, EV61, EV63, and EV71 (report starting on page 404) 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 were admitted. R174 was admitted, then withdrawn, and R174A was admitted in its place. R175, R176 and R178 were admitted without objection. The Rue Protestants withdrew Exhibits R41, R42, R90, R100, R118, R125, R140, R149, R160 and R174. Exhibit R177 was objected to, the objection sustained, and the exhibit excluded. 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.

---

<sup>5</sup> This Final Order addresses the issues listed in EVWD's issues statement as well as the power generation issue raised in Mr. French's written testimony.

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. No Exhibit WW124 was offered. Due to authentication objections, Exhibits WW53, WW69, WW137-139, and WW114 were not admitted. WaterWatch had the burden of reoffering those exhibits during witness testimony, but did not do so.

EVWD's objection to WW113, WW115, WW116, and WW118 on relevance grounds was overruled. These exhibits, which relate to alternative 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.

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 EVWD moved to exclude the written direct testimony of 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 v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 581 (2004) (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 clarified that the testimony was not being offered as expert testimony but rather that the witnesses were testifying as fact witnesses testifying about their personal observations on the property. Accordingly, EVWD's objection was overruled. Although the Rue Protestants' testimony that they observed fish was admitted, testimony that may require expertise about the type of species of the fish observed was excluded.

EVWD objected to testimony of the Rue Protestants describing potential impacts to wildlife habitat from the proposed project. The Rue Protestants clarified that the testimony was not being offered as expert testimony but rather that their witnesses were testifying from their personal observations on the property using terms such as "ecosystem" in a lay context. EVWD's objection therefore was overruled, but insofar as testimony from the Rue Protestants made observations as would be appropriately attributed to an expert, about such impacts, that testimony 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 clarified that the testimony was not being offered as expert testimony but rather that Ms. Mucken was testifying about her personal observations on the property. EVWD's objection was overruled and testimony from Ms. Mucken characterizing objects that she found was allowed to the extent that she did not offer expert opinion.

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.)<sup>6</sup>

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

---

<sup>6</sup>Testimony 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].)



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 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 Areas<sup>7</sup>: Mt. Angel and Glad Tidings.<sup>8</sup> When water levels drop to a certain level in wells in these areas, drawdown conditions in permits that postdate the Groundwater Limited Area designations may require curtailment of water use. (Tr. at 536 and 537; Decl. of Goschie at 3; Ex. A1 at 356; Ex. EV44-EV46.)

---

<sup>7</sup> 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.)

<sup>8</sup> The Department is currently not issuing new water rights for these areas. Water users with existing rights that postdate the designation of Groundwater Limited Areas 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.)

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 during the summer months. 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 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.<sup>9</sup> (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.)

23. As of June 11, 2018, EVWD members have contributed a total of approximately \$1.1 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

---

<sup>9</sup> As discussed below, the total annual acre feet requested by EVWD in its Drift Creek storage application is 12,000. (Ex. A1 at 494.)

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 Mr. Dickman estimated 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.<sup>10</sup> 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 not had its current groundwater permits regulated back.<sup>11</sup> 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. As of 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.<sup>12</sup> (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

---

<sup>10</sup> In January 2018, the Department granted Dickman Farms a conditional permit for groundwater which will be used to irrigate crops on land that Mr. Dickman does not expect will be provided water by EVWD. (Tr. at 1136-1137, 1144, and 1145; Ex. WW119.)

<sup>11</sup> 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.)

<sup>12</sup> Supplemental water rights are a secondary source of water for farmland. (Tr. at 1033-1034.)

Department to grant a temporary transfer application. If a temporary transfer application has been filed, the watermaster will act as if it has been approved. (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 does not start regulating off the farm's existing groundwater rights in the future, and if the District does not secure a new supply of water, Dickman Farms would be able to continue farming on all of its property. (Tr. at 1131.)

37. As population increases in the Willamette Valley, Mr. Dickman believes that 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 water is necessary for the farm's survival. (Decl. of Dickman at 2; Tr. at 1039-1040 and 1044-1045.)

### **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 enables 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 would not invest in the supplies and labor necessary for establishing a hop crop. (Tr. at 1273-1274.)

40. Goschie Farms irrigates its hops, generally 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. It averages 50 employees. 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 and 1299.)

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 on all of its acreage, 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 on five of its six farms. 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 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 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 operates or manages 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 time-limited 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 because he believes that the Department has authority 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 probably 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 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 mostly 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 does not have alternative water sources for all of the water rights that have been regulated off. 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. Two-thirds 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 half of it. Some years, he waters grass seed only in the fall, to establish fall fescue. 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 he were unable to irrigate, 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 land. (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.<sup>13</sup> (Decl. of Jaquet at 2.)

### **Individual Protestants**

#### **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.<sup>14</sup> 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

---

<sup>13</sup> This right, held by Rue Protestant Bruce Jaquet, is discussed in more detail below, where it is referred to as the Schact water right.

<sup>14</sup> 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.)

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 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 points<sup>15</sup> along Drift Creek. (Mucken Decl. at 1 and 3; Tr. at 1437-1438.)<sup>16</sup>

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

#### **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.<sup>17</sup> 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.)

---

<sup>15</sup> 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 findings has not been assessed. Additional studies would have to be done before that assessment could be made. (Tr. at 1402-1404 and 1416.)

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

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

**Stephen Fox<sup>18</sup>**

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.). The Foxs would lose approximately 60 acres of land to the project.

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.)

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.). Mr. Taylor opposes the project because he does not think people should take other people's land.

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

---

<sup>18</sup> Stephen Thomas Fox is also known as Rue Protestant Tom Fox.

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.) Mr. Taylor believes that EVWD members should use the water they have more efficiently before they look for more.

#### **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 eight 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.) The Council also opposes the project because it believes that EVWD has options for obtaining additional water for irrigation that would cause less environmental impact than the Drift Creek project. (Ex. R6.)

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 adopted 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 allotment from the State of Oregon to conduct studies of possible sites and methods for storing water. (Ex. R102.) 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 available<sup>19</sup> 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.)

---

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

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 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 Drift Creek.<sup>20</sup> (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; that is, in Drift Creek's streambed. (Ex. A1 at 504.)

---

<sup>20</sup> 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.)



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.)<sup>21</sup>

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.)

#### **Information Not Requested By the Form Application**

139. The Department's form storage permit application does not ask many 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

---

<sup>21</sup> 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.)

conveyance ranges from \$40 to 60 million. The live stream conveyance method would carry costs such as those for fish screen installation.<sup>22</sup> (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.)

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. (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 may 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 will have to be approved by the federal Army Corps of Engineers. That federal agency requires a 401<sup>23</sup> certification issued from DEQ, confirming that EVWD can meet water quality standards. (Tr. at 442, 465, 469, and 479; Ex. A1 at 251.)

---

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

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 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.)

---

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

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 the Fox Land Company'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 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. Access to reliable irrigation 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, or environmental costs. 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, the Department undertook an initial review of the application and made a preliminary determination of the extent to which water was available from the proposed source during the times and in the amounts requested, and any other issue that may preclude approval of or restrict the proposed use. On October 18, 2013, the Department notified EVWD of the determinations that the Department had made during the initial review, and informed EVWD that the application 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; Ex. A8 at 2-3.)

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.<sup>24</sup>

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 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

---

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

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.<sup>25</sup> Finding that there was 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, which is exempted from the order. The Department concluded, therefore, that the 1951 Order did not bar the storage project. (Tr. at 120, 149-151, and 241.)

#### **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

---

<sup>25</sup> The State Engineer's Office was a predecessor to the Department.

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. For storage applications, 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.) The 1951 Order has been incorporated into OAR 690-502-0120(1)(b), and the Department considered the order in the course of ensuring that the proposed use was consistent with Commission rules. (Tr. at 149-151 and 241.)

191. As of the date of EVWD's application, there were two existing water rights on Drift Creek in the projected footprint of the reservoir.<sup>26</sup> The first is a water storage certificate. The certificate, numbered 36095, was issued to Louis and Alice Schacht, owners of the Schacht farm,

---

<sup>26</sup>Ex. 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.



and has an August 3, 1967 priority date (Schact water right). The Schact water right allowed the Schacts 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 Schact farm and Schact 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 Schact 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 pursuant to 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 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 protected flow increases from 2 cfs in August to 40 cfs in the second half of November. (Ex. WW8 at 1.)<sup>27</sup>

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 acre-feet. That amount exceeded the 12,000 acre feet requested by

---

<sup>27</sup> 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.)

EVWD and could be captured during the months of November to April.<sup>28</sup> (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 three reports, dated February 2011, September 2012 and June 2015, Dr. Tanovan subtracted, from the projected yearly annual flows, water necessary for ecological and channel maintenance flows. Dr. Tanovan used estimates of ecological and channel maintenance flows provided by Ellis Ecological Services. He found that after subtracting water for the Schact water right, the 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. 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.)

---

<sup>28</sup> 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.)

205. A Portland State University model whose purpose was to evaluate the water quality impact of various dam operational strategies also 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.<sup>29</sup> (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.) As part of considering impacts on STE fish, ODFW evaluates whether there is an instream water right or other biological flow information; whether the use implicates fish screening or passage; and whether the use impacts other ecological functions, such as 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.)<sup>30</sup>

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.)

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:<sup>31</sup> 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.)

---

<sup>29</sup> 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.

<sup>30</sup> Mr. French suggested to ODFW staff that it limit its comments to impacts on STE fish species, and not include comments about issues that would be addressed in other permitting processes. (Ex. A1 at 238.)

<sup>31</sup> 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.)

226. ODFW concluded that the proposed use would not be detrimental to the protection or recovery of Coho Salmon, which are not listed as sensitive, threatened, or endangered in Drift Creek. (Tr. at 2138, 2157-2158, 2160; Decl. of Murtagh at 3.) For that reason, ODFW did not analyze potential impacts to Coho Salmon in its Division 33 review.

227. [Reserved.]

228. Upper Willamette Winter Steelhead, Pacific Lamprey, Upper Willamette Spring Chinook, Coho Salmon, and Steelhead Trout are anadromous fish. Anadromous fish are born and rear 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.)

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,<sup>32</sup> 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 rearing<sup>33</sup> habitat for Pacific Lamprey in intermittent areas of 7-10 miles above the proposed dam location. If built

---

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

without fish passage, the proposed project would obstruct fish migration and therefore eliminate that essential habitat,<sup>34</sup> 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 Salmon.<sup>35</sup> The presence of these other migratory Salmonid<sup>36</sup> 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.)

---

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

<sup>34</sup> 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.)

<sup>35</sup> 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.)

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

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. Above the dam site, 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 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. A3 at 1.) Fish need dissolved oxygen to survive. (Tr. at 434.) As water temperature increases, dissolved oxygen content generally decreases. (Tr. at 434-435.)

#### **Elk Habitat**

261. The proposed project is located in ODFW's Santiam Wildlife Management Unit, within the range of the Roosevelt elk. (Ex. EV79 at 2-4.)

262. David DeKrey of Stillwater Sciences and Don VandeBergh, ODFW District Wildlife Biologist, conducted a site visit at the proposed reservoir site on June 24, 2015. They observed fresh elk tracks, along with evidence of game trails through agricultural fields. Landowner Bruce Jaquet was present during the site visit, and he stated that elk are common

within the proposed reservoir footprint and that he has seen herds of up to 160 elk. Mr. VandeBergh stated that the proposed reservoir site was ideal for elk, with north- and south-facing slopes, open grassland, and access to water. (Ex. EV79 at 6.)

263. With respect to potential project impacts, Mr. VandeBergh stated, “Impacts to elk in the area of the proposed Drift Creek reservoir will likely occur, whether they are temporary or permanent loss of forage and hiding cover, loss of calving areas, or changes in movement patterns that make them more vulnerable to harvest, predation, or motor vehicle accidents. Changes in damage to private landowners’ property may also occur. The dam construction and subsequent inundation of the area will disrupt elk movement patterns and concentrate elk damage to those lands more easily accessible, displacing elk that typically use the area onto adjacent lands previously not damaged by elk, or it may attract elk into the area during low-water periods of the year.” (Ex. EV79 at 6.)

#### **ODFW and DEQ Recommended Approval of the Application with Conditions**

264. 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.)

265. 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.)

266. 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**

267. 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;<sup>37</sup>**

<sup>37</sup> 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.)

268. 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;<sup>38</sup>
- B. Bypass flows necessary to meet the 1990 instream water right year-round;
- C. Any approved storage 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; and
- D. Mitigate impacts to Pacific Lamprey and Winter Steelhead habitat in wetlands and in the inundated reach of Drift Creek.

ODFW also provided the following comment: "As project concepts are further refined and the applicant pursues other required State and Federal permits, ODFW will provide additional comments related to potential impacts to species and habitats not covered under the Division 33 review of water right applications. Such comments may result from potential impacts to native and game fish, as well as game and non-game protected wildlife species, and include associated recommendations to avoid, minimize, or further mitigate ecosystem function and habitat impacts resulting from the project in its entirety."

(Ex. A1 at 219-221.)

269. 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 during May and October.

(Ex. A3 at 3.)

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

271. 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.)

---

<sup>38</sup> 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.)

272. 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, 516-517, and 2099.)

273. 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.)

274. 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.)

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

276. Shortly after providing a completed Division 33 form, DEQ submitted a revised one. In the revised Division 33 review form, 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.) DEQ noted that off-channel storage for waters removed from November to April is a preferred alternative for protecting water quality. (Ex. A1 at 252; Ex. A3 at 1-4; Tr. at 441-442.)

277. 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 under the DEQ 401 water quality certification process. (Ex. A1 at 251.)

278. 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.)

279. 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

280. 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.)

281. 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.)

282. 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.)

283. 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.)

284. Dr. Yearsley varied the assumptions used by EVWD to create other scenarios where water released from the bottom of the reservoir did not meet DEQ's water temperature standards. (Tr. at 2393 and 2396.) When Dr. 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.) Dr. 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.)

285. However, Dr. 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, Dr. Yearsley conceded that increasing summer flows in Drift Creek also might reduce, not increase, water temperature. Additionally, Dr. 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**

286. 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.)

287. 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.)

288. 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.)

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

290. 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.<sup>39</sup>

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.)

291. 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.)

292. 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.)

---

<sup>39</sup> 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).

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

294. 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.)

295. 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.)

296. 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 481.)

297. 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.)

298. 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.)

299. 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.)

300. 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.)

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

302. 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 Final 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.<sup>40</sup> 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).

Next, the Department conducts an "initial review" of the application. OAR 690-310-0080. That review analyzes whether the proposed use is restricted or limited by statute or rule; the extent to which water is available from the proposed source during the times and in the

<sup>40</sup> 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).

amounts requested; and any other issue the Department identifies that may preclude approval of or restrict the proposed use. ORS 537.150(4); OAR 690-310-0080. The Department sends the applicant the results of its initial review and gives the applicant the opportunity to withdraw the application. ORS 537.150(5). If the applicant wishes to proceed with the application, the Department issues public notice of the application and requests comments for 30 days. ORS 537.150(6)-(7); OAR 690-310-0090.

Once the time for public comment expires, the Department conducts the public-interest review. ORS 537.153(1)-(2); OAR 690-310-0100 – OAR 690-310-0120. The first step in this review is the determination of whether the public-interest presumption has been established. The Department must presume that a proposed use will not impair or be detrimental to the public interest if the following four criteria are satisfied: (1) 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); (2) water is available; (3) the proposed use will not injure other water rights; and (4) the proposed use complies with rules of the Water Resources Commission. The Department must also presume that a proposed use will not impair or be detrimental to the public interest if the proposed use can be modified or conditioned to meet the four presumption criteria.<sup>41</sup>

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 one of the seven statutory public interest factors in ORS 537.170(8). 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.

---

<sup>41</sup> Director's Explanation: The Director modified the description of the water right application process to more accurately reflect the relevant statutes and rules.

(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 after the Department proceeds with the application under OAR 690-310-0080(2) 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 adopt the Department's final order. ORS 537.173 (1) and (2).

#### **Burden of Proof**

In his March 20, 2018 order, ALJ Barber set 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 (1999) (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.<sup>42</sup>

(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

<sup>42</sup> 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.



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 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 be publicly noticed, and there will be an opportunity for public comment. If the Department determines that the public comments raise public interest issues under ORS 537.170(8), the Department must treat the secondary application as an application under ORS 537.150 and perform the public interest review required by ORS 537.153(2). 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. ODFW 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 EVWD 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 presumption 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 the public interest presumption 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 presumption 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.

Accordingly, the first element of the public interest presumption 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 public interest presumption 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."<sup>43</sup> OAR 690-300-0010(57)

<sup>43</sup> 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.

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, 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 its Water Availability Reporting System (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 all existing water rights and the 12,000 annual acre feet requested by EVWD. 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.<sup>44</sup>

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

---

<sup>44</sup> Director’s Explanation: The Director moved a discussion of water measurement conditions to a separate section in this Final Order. Measurement conditions are not relevant to the issue of whether water is available.

inadequate water to cover the existing water rights and the 12,000 annual acre feet requested by EVWD.<sup>4546</sup>

WaterWatch also argues that OAR 690-410-0070(2)(h) and OAR 690-400-0010(13) allow the Department to consider peak and ecological flows in evaluating water availability. Peak and ecological flows are very high, occasional flows that clean out creek beds and may trigger fish to swim up creeks and spawn.

The two cited rules do not require the Department to consider peak and ecological flows in evaluating water availability. OAR 690-410-0070(2)(h) states that programs to achieve the water allocation policy expressed in OAR 690-410-0070(1) shall be guided by, among other principles, the following principle: “When instream flow needs are not protected by instream water rights, new out-of-stream allocations may be limited or conditioned to protect public uses.” “Public uses” means “an instream use of water that is available to the public at large,” including but not limited to “[p]rotection and enhancement of fish life, wildlife, fish and wildlife habitat and any other ecological values.” OAR 690-400-0010(13). As discussed at length in the section of this Final Order addressing whether the proposed use complies with rules of the Commission, the rules in Divisions 400 and 410 are not intended to apply directly to individual water right applications; rather, they contain overarching policies and principles that are intended to guide the Commission’s adoption of other rules, among other things.<sup>47</sup>

The Commission’s Division 310 rules, which govern the processing of 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 that water was not available.

The Department concluded that the water application processing rules do not currently require consideration of peak and ecological flows in determining water availability. Because the rules do not mention either type of flow, the Department’s interpretation is reasonable and entitled to deference. *Don’t Waste OregonCom. v. 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.”)<sup>48</sup>

<sup>45</sup> EVWD’s expert, Dr. Tanovan, concluded that even if inflow from below the dam is not considered, the reservoir will fill in most years.

<sup>46</sup> Director’s Explanation: The Director deleted a discussion of OAR 690-410-0070(1)(c) because that rule is discussed at length in the section of the Final Order addressing whether the proposed use complies with rules of the Water Resources Commission. The Director also deleted a discussion of minimum pass-through flows because WaterWatch did not make such an argument in its closing briefs.

<sup>47</sup> Director’s Explanation: The Director has revised this discussion to more accurately reflect the arguments that WaterWatch made in its closing briefs regarding water availability.

<sup>48</sup> Director’s Explanation: The Director deleted a redundant discussion of OAR 690-410-0070. That rule is discussed at length in the section of this Final Order addressing whether the proposed use complies with rules of the Commission.

The second element of the public interest presumption is therefore met. Water is available for EVWD's proposed storage project.

### C. Injury

The third element of the public interest presumption 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 within the proposed footprint of the reservoir. 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. 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).<sup>49</sup>

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 545.239. 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.<sup>50</sup>

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.<sup>51</sup>

<sup>49</sup> The draft permit explicitly requires that the land be owned by the District before construction.

<sup>50</sup> 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.

<sup>51</sup> Director's Explanation: The Director modified the discussion of the instream water right on Drift Creek and the ALJ's proposed measurement conditions. The ALJ's proposed measurement conditions were not consistent with the text of the instream water right certificate, which requires flows to be measured at the mouth of Drift Creek. The Director has replaced the ALJ's proposed measurement conditions with conditions that will protect the instream water right and ensure that all live flow is passed outside of the storage season (see "Order").



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 or 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 applications for water storage permits. OAR 690-033-0000(1) and (2)(d).<sup>52</sup>

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).

#### **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,<sup>53</sup> 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. Alternatively, the applicant may propose a mitigation plan to offset the detriment. 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.

<sup>52</sup> Director's Explanation: The Director deleted a footnote in the Proposed Order that incorrectly stated that the Division 33 rules apply to sensitive, threatened, or endangered wildlife species.

<sup>53</sup> 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.

“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, requiring any approved storage of water during October to include bypass flows to meet the instream water right and provide peak flows necessary to maintain stream habitat and ecology, and mitigating impacts to Winter Steelhead and Pacific Lamprey habitat in wetlands and in the inundated reach of Drift Creek.

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 during May and October. DEQ also suggested that EVWD consider off-channel reservoir possibilities.<sup>54</sup>

The Department also 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 one unlisted fish. The additional listed fish is Upper Willamette Spring Chinook, a species listed as threatened. The non-listed fish species is 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

---

<sup>54</sup> Director’s Explanation: The Director modified this discussion of the conditions that ODFW and DEQ recommended to be consistent with the modified findings of fact on the same topic.

Pudding River watershed.<sup>55</sup> 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 a non-listed fish species, Coho Salmon, was not considered. This fish, however, is not listed as STE in Drift Creek; fish listed as STE in the waterway at issue 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 this fish as part of a Division 33 review.

In its closing briefs and exceptions, WaterWatch asserts that it is possible that Coho Salmon in Drift Creek originated from a population below Willamette Falls that is listed as threatened. There is no evidence in the record that the Coho Salmon in Drift Creek originated from a threatened population. Contrary to WaterWatch's assertions, the ALJ did not prevent WaterWatch from introducing such evidence at the hearing; rather, the ALJ prevented WaterWatch from eliciting a speculative opinion from Mr. Murtagh regarding this possibility. WaterWatch could have sought to lay an appropriate foundation for an expert opinion on the issue, or to introduce relevant exhibits showing a possible link between the Coho Salmon in Drift Creek and a listed population below Willamette Falls, but WaterWatch chose not to do so. Even if WaterWatch had introduced evidence that the Coho Salmon in Drift Creek came from a population listed as threatened below Willamette Falls, WaterWatch failed to introduce evidence that the proposed use would impair or be detrimental to the protection or recovery of a listed population of Coho Salmon, or that the conditions that ODFW proposed to protect winter steelhead and Pacific lamprey habitat would not protect Coho Salmon habitat, as well. Thus, WaterWatch did not establish that the Department's failure to evaluate the project's effect on Coho Salmon 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, non-listed 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-

---

<sup>55</sup> Mr. Gowell testified that Upper Willamette Spring Chinook would only use Drift Creek for juvenile rearing, and not for spawning.

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).<sup>56</sup>

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 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 a certification under Section 401 of the CWA showing that the project will comply with the CWA and Oregon water quality standards.

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 that 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.

---

<sup>56</sup> Director’s Explanation: The Director modified the discussion of Upper Willamette Spring Chinook, Coho Salmon, and Cutthroat Trout to accurately reflect the basis for not including those in the Division 33 review and to eliminate an unnecessary and inaccurate discussion of native versus non-native fish populations.

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 Water Rights Administrator 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 of 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 does 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 submitted into the hearing record certain information regarding project impacts to fish and wildlife habitat and potential mitigation measures. The developer also submitted a letter from ODFW explaining that it had been working with the developer to develop an acceptable wildlife report and mitigation measures and stating that it was feasible for the developer to develop an acceptable program to mitigate the impacts.

Before approving the application, the county was required to find, from substantial evidence in the record, that the developer's proposed plans would completely mitigate any negative impact on fish and wildlife 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 whether the project's impacts on fish and wildlife resources would be completely mitigated, as required by the county development code, without knowing the specifics of the mitigation measures. The Court of Appeals held that the county had therefore impermissibly approved the project.

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 provide 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.

ORS 537.153(2) requires the Department to evaluate whether the proposed use complies with rules of the Water Resources Commission. One of those rules, OAR 690-033-0220, requires the Department to determine that, if a proposed use is detrimental to the protection or recovery of a threatened or endangered species, that the proposed use can be conditioned or mitigated to avoid the detriment. The Department concluded that the proposed use could be conditioned to avoid the detriment, and included the necessary conditions in the PFO and draft permit. Thus, a separate, detailed mitigation plan was not required at this stage of permitting. Similarly, the Department included conditions in the PFO and draft permit to ensure that the proposed use would comply with OAR 690-033-0330, which requires no net loss of habitat for sensitive species. The Department's authority to require conditions that are necessary to protect the public interest is well-established. ORS 537.153(1); ORS 537.211(1); *Willamette Water Co. v. WaterWatch of Oregon, Inc.*, 288 Or App 778, 783 (2017); *Noble v. Oregon Water Resources Dept.*, 264 Or App 110, 125 (2014); *Benz v. Water Resources Comm'n*, 94 Or App 73, 77-78 (1988). Thus, the *Gould* case does not support WaterWatch's argument.<sup>57</sup>

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 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. 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. The Court of Appeals vacated the circuit court's award of attorney fees and remanded to make an adequate record identifying the statutory ground for award of fees. The Court of Appeals expressly stated that it was assessing only whether the trial court's rulings were "in favor" of petitioners, and that it was not "comment[ing] on the correctness" of the circuit court's rulings. Thus, the *Kusyk* case does not support WaterWatch's argument.<sup>58</sup>

WaterWatch also argues that conditioning EVWD's permit on compliance with ODFW's habitat mitigation policy is inadequate because those rules, 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 a mitigation plan. However, an inability to participate in another agency's approval process does not provide a basis for denying

---

<sup>57</sup> Director's Explanation: The Director modified the discussion of *Gould* to more clearly distinguish it from the circumstances in this matter.

<sup>58</sup> Director's Explanation: The Director modified the discussion of *Kusyk* to more precisely reflect the holding of that case.



EVWD's application. Public participation in the mitigation plan review 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 water that did not exceed the temperature standard.

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 likely would not make a significant difference. In addition, EVWD presented evidence that it could prevent seepage by selecting an appropriate material for the reservoir.

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 it is possible for EVWD to 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 an email written by 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. 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 likely 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 testified that Drift Creek is likely 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.

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, along with section (1) of the same rule, requires that a proposed water use that is detrimental to the protection or recovery of a threatened species be conditioned or mitigated to avoid the detriment. Otherwise, the proposed use must be denied as being contrary to public interest.

Here, pursuant to OAR 690-033-0220(1), the Department imposed conditions that were adequate to avoid the detriment to the protection or recovery of a threatened species. Consequently, it was not necessary for EVWD to propose, or for the Department to evaluate, a separate mitigation plan under OAR 690-033-0220(5).<sup>59</sup>

For all of these reasons, the Department has shown that it complied with the Division 33 rules when evaluating the District's application.

---

<sup>59</sup> Director's Explanation: The Director revised the discussion of OAR 690-033-0220(1) and (5) to more accurately describe the operation of those sections in this context.

## B. Instream Flow Protection Under OAR 690-410-0030

WaterWatch asserts that the proposed use does not comply with OAR 690-410-0030, which 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.

As explained in greater detail below, OAR 690-410-0030 does not directly govern the processing of an individual water right application. Even if this rule did directly apply to individual water right applications, the proposed use, as conditioned by the Department, is consistent with OAR 690-410-0030.

Divisions 400 and 410 must be understood in context. ORS 536.300(2) directs the Water Resources Commission, the Department's governing body, to "formulate an integrated, coordinated program for the use and control of all the water resources of this state and issue statements thereof." Pursuant to that mandate, the Commission "established the Oregon Water Management Program which consists of statewide policies (OAR 690, divisions 400 and 410), basin programs (OAR 690, divisions 500 to 520) and non-rule program direction for implementing statewide policies and basin level actions (ORS 536.430)."<sup>60</sup> Divisions 400 and 410 were "adopted as statements for inclusion in the integrated, coordinated state water resources policy required under ORS 536.300."<sup>61</sup> Divisions 400 and 410 contain overarching policies and principles that are intended to guide the Commission's and the Department's activities:

- (1) These rules [Division 400], and those contained in division 410, establish statewide policies and principles pertaining to a wide range of water-related topics. All Water Resources Commission and Department *activities*, including but not limited to:
  - (a) Basin planning;
  - (b) Interagency coordination; and
  - (c) Development and adoption of rules, standards and implementing strategies to govern Department programs and activities, shall be compatible with these rules and those contained in division 410.<sup>62</sup>

---

<sup>60</sup> OAR 690-400-0000(3).

<sup>61</sup> OAR 609-400-0000(4).

<sup>62</sup> OAR 690-400-0000(1) (emphasis added).

The Department interprets “activities,” as used in OAR 690-400-0000(1), as encompassing rulemaking and other high-level or strategic actions, in contrast to a more granular decision, such as whether or not to issue a particular water right permit. This interpretation, which is entitled to deference because it is plausible and not inconsistent with the wording of the rules or any other source of law,<sup>63</sup> is based on the text of OAR 690-400-0000(1), which lists “basin planning,” “interagency coordination,” and “development and adoption of rules, standards and implementing strategies” as examples of “activities” that must be compatible with Divisions 400 and 410. “Basin planning” involves the adoption of the basin plan rules.<sup>64</sup> “Interagency coordination” encompasses Division 5 (coordination with the Department of Land Conservation and Development) and Division 33 (coordination with ODFW and DEQ), as well as informal interagency collaboration. Developing and adopting “rules, standards, and implementing strategies” involves developing criteria (e.g., the Division 310 rules) according to which the Department will manage its programs and activities. Thus, all three examples of “activities” describe rulemaking and other high-level or strategic actions. It is those types of activities that must be “compatible”<sup>65</sup> with Divisions 400 and 410.

The Department’s interpretation is plausible, and not inconsistent with the statutory or regulatory scheme, or any other source of law. Accordingly, that interpretation is entitled to deference. *Don’t Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 142-43 (1994); *Willamette Water Co. v. Waterwatch of Oregon, Inc.*, 288 Or App 778, 787-88 (2017) (deferring to the Department’s plausible interpretation of its own administrative rule); *Staats v. Newman*, 164 Or App 18, 23-24 (1999) (deferring to the Department’s plausible interpretation of its own administrative rules). The Department’s decision that the water storage criteria need not be evaluated in the public-interest presumption analysis is reasonable and entitled to deference.

Because the Department’s processing of a particular water right application is not an “activity” under of OAR 690-400-0000(1), it need not comply with each provision of Divisions 400 and 410. When the Department processes a water right application in accordance with Division 310, that ensures that the Department’s action is also consistent with Divisions 400 and 410, because all rules, including Division 310, must be compatible with Divisions 400 and 410.<sup>66</sup>

Even if OAR 690-410-0030 did directly govern the processing of individual water right applications, the proposed use is consistent with that rule. OAR 690-410-0030(1) establishes a general policy of protecting instream flows.<sup>67</sup> The Final Order states, “The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights,

<sup>63</sup> *Don’t Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

<sup>64</sup> OAR chapter 690, divisions 500 – 520.

<sup>65</sup> OAR 690-400-0000(1)(c).

<sup>66</sup> OAR 690-400-0000(1) (rules “shall be compatible with these rules and those contained in division 410”).

<sup>67</sup> OAR 690-410-0030(1) provides, in part, “Benefits are provided by water remaining naturally where it occurs. Protecting streamflows 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.”

including prior rights for maintaining instream flows.”<sup>68</sup> By protecting existing instream flows, the Final Order is consistent with OAR 690-410-0030.<sup>69</sup>

### C. Water Allocation Under OAR 690-410-0070

WaterWatch contends that the proposed use does not comply with OAR 690-410-0070. For the same reasons discussed in the preceding section with respect to OAR 690-410-0030, OAR 690-410-0070 does not directly govern the processing of individual water right applications.

Even if OAR 690-410-0070 did directly govern the processing of individual water right applications, that rule would still not apply to this proposed use, for two reasons. First, the proposed use falls within the storage exception in subsection (2)(c). Second, even if the proposed use did not fall within the storage exception, the proposed use is consistent with the principles articulated in subsections (2)(a) and (2)(c).

OAR 690-410-0070(1) articulates a general policy regarding water allocation, stating that water shall be allocated among a broad range of beneficial uses and protected from over-appropriation.<sup>70</sup> Section (2) of that rule states that programs to achieve the policy in section (1) shall be guided by guided by several principles, including the following:

(a) 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[.]

\* \* \* \*

(c) 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.<sup>71</sup>

---

<sup>68</sup> Ex. A1, p. 137.

<sup>69</sup> Director’s Explanation: The Director has revised the discussion of OAR 690-410-0030 to reflect the fact that this rule does not govern the processing of individual water right applications.

<sup>70</sup> OAR 690-410-0070(1) provides: “Policy. The waters of the state shall be allocated within the capacity of the resource and consistent with the principle that water belongs to the public to be used beneficially without waste. Water shall be allocated among a broad range of beneficial uses to provide environmental, economic, and social benefits. The waters of the state shall be protected from over-appropriation by new out-of-stream uses of surface water or new uses of groundwater.”

<sup>71</sup> OAR 690-410-0070(2).

In this case, the proposed use is exempted from OAR 690-410-0070(2)(a) by subsection (2)(c), which states that “[n]ew allocations of water for the purpose of filling storage facilities may be allowed notwithstanding subsection (a) of this section.”

Even if the storage exception did not apply, the proposed use is consistent with the substantive principles articulated in OAR 690-410-0070(2)(a) and (2)(c). The Final Order allows the District to store water only during those months when water is available; thus, the proposed use will not contribute to over-appropriation, consistent with subsection (2)(a). The proposed use is consistent with OAR 690-410-0070(2)(c) because it protects all senior water rights, including instream rights, by following the storage season established in OAR 690-502-0040(4); requiring that all prior water rights be satisfied before any water may be stored; and requiring the District to pass all live flow May through October.<sup>72</sup> In addition, the 50% exceedance level that the Department uses to analyze whether water is available for storage is consistent with OAR 690-410-0070(2)(c)’s principle of “avoiding periods of the year when flows are low and seldom exceed the needs of water rights.”<sup>73</sup>

#### **D. Impacts of Water Storage Projects Under OAR 690-410-0080**

The Commission has promulgated a statewide water resource management rule governing water storage. WaterWatch argues that EVWD’s permit application should be denied because the Department, in determining whether a presumption was established that the proposed use was in the public interest, did not evaluate the project under OAR 690-410-0080(2)(g).<sup>74</sup> WaterWatch contends that the proposed use fails to satisfy several of these criteria (e.g., environmental, economic, social).

For the same reasons discussed in the preceding two sections with respect to OAR 690-410-0030 and OAR 690-410-0070, OAR 690-410-0080 does not directly govern the processing of individual water right applications. Thus, the Department was not required to analyze the criteria in OAR 690-410-0080(2)(g) in the course of evaluating whether the public interest presumption was established.<sup>75</sup>

#### **E. Integrated Water Resources Strategy and Off-Channel Storage Policy**

WaterWatch also argues that the proposed use violates Oregon’s integrated water resource strategy, 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

---

<sup>72</sup> Ex. A1, p. 123-125

<sup>73</sup> Director’s Explanation: The Director has revised the discussion of OAR 690-410-0070 to reflect the fact that this rule does not govern the processing of individual water right applications. Even if this rule did govern the processing of individual water right applications, it would still not apply to the proposed use at issue in this case.

<sup>74</sup> 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.

<sup>75</sup> Director’s Explanation: The Director has revised the discussion of OAR 690-410-0080 to reflect the fact that this rule does not govern the processing of individual water right applications.

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 mandating, that all water storage facilities be off-channel.<sup>76</sup> 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.

The proposed use does, in fact, comply with OAR 690-310-0040(1)(a)(g). The rule does not say that an applicant must possess written authorization or an easement at the time the application is submitted—only that the applicant must state whether or not such authorization exists. On Application R-87871, the box that states, “I do not currently have written authorization or an easement permitting access” is checked.<sup>77</sup> That satisfies OAR 690-310-0040(1)(a)(G). Moreover, WaterWatch’s reading of this rule conflicts with ORS 537.211(2), which expressly contemplates that some applicants will “not have written authorization or an easement permitting access to nonowned land” and authorizes the Department to issue a final order approving such an application under certain circumstances.<sup>7879</sup>

---

<sup>76</sup> 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.

<sup>77</sup> Ex. A1, p. 494.

<sup>78</sup> If an applicant indicates that it does not have written authorization or an easement permitting access to nonowned lands, the Department may issue a final order approving the application, conditioned on the applicant obtaining such written authorization, or easement or ownership of such land, and providing the Department a copy thereof. ORS 537.211(2). If the applicant is a public corporation, the Department may issue a final order approving the application without the condition described in ORS 537.211(2), but “nothing in this subsection shall be construed to allow any person to trespass on the lands of another person.” ORS 537.211(6). *See also* ORS 537.400(5) (“Notwithstanding the provisions of ORS 537.211(2), the department may approve an application for a reservoir permit for which a dam safety review is required under ORS 540.350 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.”).

### **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 implicitly require that the PFO require such releases. However, none of these provisions mention, much less require, peak and ecological flows.<sup>80</sup>

The Department has demonstrated that the proposed use does not violate any of the foregoing Commission rules. The Proponents have not shown otherwise.<sup>81</sup>

#### **Issue No. 3: Public Interest Review**

After concluding that EVWD's application established a presumption 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.

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

---

<sup>79</sup> Director's Explanation: The Director has expanded this discussion to explain more fully why the proposed use complies with OAR 690-310-0040(1)(a)(G).

<sup>80</sup> 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.

<sup>81</sup> Director's Explanation: The Director has revised this discussion to remove an unnecessary block quotation of OAR 690-033-0220 and OAR 690-033-0330. The Director has also removed statements indicating that ODFW's Division 33 recommendations were ambiguous, because they were not. That modification is more fully explained in the Director's response to WaterWatch Specific Exception A247.



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.<sup>82</sup> OAR 690-502-0040(4)(a) and (c). The concept of “beneficial use” is integral to 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:

---

<sup>82</sup> 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.

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 fish 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 Steelhead<sup>83</sup> and Upper Willamette Spring Chinook, ESA-listed as threatened. The creek also provides habitat for unlisted fish such as Cutthroat Trout and Coho Salmon. The proposed project area also provides habitat for Roosevelt elk. The proposed project may impact elk habitat by temporarily or permanently eliminating forage, hiding cover, and calving areas, as well as by disrupting elk movement patterns.<sup>84</sup>

Drift Creek provides limited fish 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 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.

---

<sup>83</sup> 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.

<sup>84</sup> Director's Explanation: The Director has added a brief discussion of the proposed use's possible impact on elk habitat. OAR 690-310-0120(3)(b)(D).

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 require EVWD to mitigate 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 are likely to 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 irrigation for crops. As the District's economic expert testified, having a reliable supply of irrigation water 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 at 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 all 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 gage. Additionally, this Final Order requires additional water flow monitoring. The evidentiary record also shows that evaporation is not a significant issue here, and that seepage can 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. That argument is inapposite because, in this context, "wasteful" refers to more water being diverted than is needed for the authorized purpose, not there are other, more important uses for the water. A preponderance of evidence showed that there is demand for the water that would be stored in the proposed reservoir; in addition, the PFO and draft permit expressly require the stored water to be used for beneficial use without waste. For those reasons, the Protestants have not shown that the proposed use would be wasteful.<sup>85</sup>

---

<sup>85</sup> Director's Explanation: The Director has revised the discussion of whether the proposed use would be "wasteful" so that it analyzes whether more water would be diverted than is needed for the authorized purpose.

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 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 additional irrigation 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 additional irrigation water. 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 additional 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 additional irrigation 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.

The PFO addresses this factor by expressly stating that EVWD may not store water until all senior water rights, including the instream water right located on Drift Creek, are satisfied.<sup>86</sup>

---

<sup>86</sup> Director's Explanation: The Director deleted an inaccurate discussion of existing storage water rights on Drift Creek.

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 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 certain Commission rules implementing those statutes, apply here. ORS 536.300(2) directs the Commission to "formulate an integrated, coordinated program for the use and control of all the water resources of this state and issue statements thereof." Pursuant to that mandate, the Commission "established the Oregon Water Management Program which consists of statewide policies (OAR 690, divisions 400 and 410), basin programs (OAR 690, divisions 500 to 520 and non-rule program direction for implementing statewide policies and basin level actions (ORS 536.430)." OAR 690-400-0000(3). Divisions 400 and 410 are implemented via other rules of the Commission that directly govern water right application processing, such as Divisions 5, 33 and 310. The proposed use is consistent with those rules, as well as with Division 502, the relevant basin program.<sup>87</sup>

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 one of the public interest factors in ORS

---

<sup>87</sup> Director's Explanation: The Director has revised the discussion of the State Water Resources Policy to reflect the fact that that policy is implemented via rules of the Commission that directly govern water right application processing, and that the proposed use is consistent with those rules.

537.170(8). 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.<sup>88</sup> As a result, this Final 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)**

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

---

<sup>88</sup> 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.



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 issued by the Department therefore complies with this statute.

### **Measurement and Reporting Conditions**

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 gage, which does not show whether the reservoir is capturing live flow at any specific time. Thus, the "Order" section of this Final Order contains additional language requiring water flow measurement and monitoring to ensure both that the 1990 instream water right is met, and that all live flow is passed during the non-storage season.

## CONSIDERATION OF EXCEPTIONS

### I. Narrative Consideration of Exceptions

#### A. WaterWatch's Exceptions

##### 1. Establishment of the Public Interest Presumption

- a. **General Exception #1: The Proposed Order should have evaluated the public-interest presumption criteria against the proposed use exactly as proposed in the application.**

WaterWatch argues that the Proposed Order erred in evaluating the public-interest presumption against the use as modified by the Department in the PFO and in changes that the Department indicated it plans to make to the PFO in the Final Order. WaterWatch argues that the Proposed Order should have evaluated the public-interest presumption criteria against the use as proposed in the application because ORS 537.153(2) refers to the Department's review of "the application."

**Response and Disposition:** This exception is denied.

In its exceptions and closing briefs, WaterWatch argues that the use of the word "application" in ORS 537.153(2) indicates that the public-interest presumption must be applied to the proposed use exactly as set forth in the application. WaterWatch's argument is not supported by the statutory text for reviewing completed applications and so the exception is denied.

Subsection (1) of ORS 537.153 describes the phase of the Department's review that begins after the Department has issued the initial review pursuant to ORS 537.150(5) and concludes with the Department "issu[ing] a proposed final order approving or denying the application or approving the application with modifications or conditions." ORS 537.153(2) states that "in reviewing the application under subsection (1) of this section" the Department shall presume the "proposed use will not impair or be detrimental to the public interest" if the four presumption criteria are established. By referencing the application review in ORS 537.153(1), ORS 537.153(2) contemplates that the Department may evaluate the four public-interest presumption criteria against the proposed use as modified or conditioned by the Department.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of WaterWatch's General Exception #1: A168, A176, A186-A190

#### b. Water Availability

##### i. Specific Exception A193

Pages 58 – 61 of the Proposed Order discuss water availability, the third factor that the Department must consider in determining whether the public interest presumption is established. Page 58 of the Proposed Order acknowledges that a determination of water availability includes a determination of whether the proposed source is over-appropriated, as that term is defined in OAR 690-400-0010(11)(a)(A).

WaterWatch asserts that, in making the determination that “water is available,” the ALJ failed to consider OAR 690-410-0070(2)(h), which is referred to in the definition of “water is available” and which states that “[w]hen instream flow needs are not protected by instream water rights, new out-of-stream allocations may be limited or conditioned to protect public uses.” WaterWatch argues that the analysis did not sufficiently determine whether water is available because it “did not consider whether the existing instream water right is adequate to protect all instream flows needs including peak and ecological flows.”

**Response and Disposition:** This exception is denied.

ORS 537.153(2) requires the Department to consider whether “water is available” in determining whether the public interest presumption may be established. The relevant provisions of the definition of “water is available” state:

“Water is Available,” when used in OAR 690-310-0080, 690-310-0110 and 690-310-0130, means:  
(a) The requested source is not over-appropriated under OAR 690-400-0010 and 690-410-0070 during any period of the proposed use[.]

In this case, the water availability analysis correctly made a determination of whether the requested source is over-appropriated (as that term is defined in OAR 690-400-0010) but did not analyze OAR 690-410-0070(2)(h) because of the presence of an instream water right on Drift Creek. Because instream flow needs are protected by an instream water right, OAR 690-410-0070(2)(h) is inapplicable. Although WaterWatch may dispute the adequacy of the flows protected under the instream water right as to peak and ecological flows, the instream water right is a certificated right that may not be opened and reassessed in this proceeding.

#### ii. Specific Exception A195

WaterWatch takes exception to the following sentence in the Proposed Order: “Accordingly, the Department’s watermaster assigned to Drift Creek concluded that water will be available for EVWD to store. Five reports prepared EVWD’s consultant between 2008 and 2015 support that conclusion.” WaterWatch argues that the Tanovan analysis was a yield or “water balance” analysis and did not comply with all standards for determining water availability in the statutes and rules.

**Response and Disposition:** This exception is denied.

The Department's water availability analysis shows that at a 50% exceedance level, the amount of water requested by EVWD will be present at the most downstream point in the water availability basin (WAB) in which the Drift Creek dam site is located. The Tanovan reports show that, notwithstanding the 50% exceedance determination, water is likely to be present in the particular reach where the dam site is located on an annual basis. The Tanovan reports do not establish that "water is available" as that term is defined in OAR 690-300-0010(57); rather, the reports show that the project is feasible because it will likely fill every year. Because the Tanovan reports do not establish that "water is available," they need not conform to the definition of "water availability analysis" contained in OAR 690-300-0010(58).

### **iii. Specific Exception A196**

WaterWatch excepts to the Proposed Order's discussion (page 60) of a Portland State University study comparing water flow at the dam site and the mouth of Drift Creek. WaterWatch asserts that the Proposed Order confuses the PSU study, and the Tanovan reports on which the PSU study is based, with the Department's water availability analysis. WaterWatch also argues that the Department's water availability analysis should have deducted, along with senior water rights, inflows between the dam and the mouth of Drift Creek.

**Response and Disposition:** This exception is denied.

Contrary to what WaterWatch argues in its exception, the portion of the Proposed Order to which this exception objects does not discuss water availability. Rather, that portion of the Proposed Order is discussing water balance, or a water budget that describes the average flows at a specific point in the stream. As discussed in response to Specific Exception A195, the Tanovan reports are not a "water availability analysis."

With regard to WaterWatch's argument that the Department's water availability analysis "should have" deducted inflows between the dam and the mouth of Drift Creek in addition to deducting senior water rights, this exception is also denied. The Department's water availability model determines that there is water available at points upstream of the most downstream portion of a WAB if water is available at the most downstream point in the WAB, which in this case is the mouth of Drift Creek as it empties into the Pudding River. (Ex. A1 at 528.) The most downstream point in the WAB accounts for all inflows of water at points upstream, but it does not calculate the presence of water at all points upstream from the "bottom" of the WAB.

Finally, WaterWatch presented no evidence that deducting inflows between the dam and the mouth of Drift Creek would mean that water was not available.

### **iv. Specific Exception A199**

WaterWatch excepts to the Proposed Order's conclusion (pages 60-61) that the Department's interpretation of the Division 310 rules as not requiring consideration of peak and ecological flows is reasonable and entitled to deference. WaterWatch argues that the Division 33 rules require protection of peak and ecological flows, and that an interpretation to the contrary is

implausible. WaterWatch also argues that the Department agreed that it could consider peak and ecological flows under “other rules,” but simply chose not to.

**Response and Disposition:** This exception is denied.

The Director denies this exception because, as the Proposed Order correctly concluded (page 78), the Division 33 rules neither mention nor require consideration of peak or ecological flows. In the course of their Division 33 reviews, ODFW and DEQ recommended numerous conditions to protect STE species, and the Department incorporated all of those conditions into the PFO and draft permit. At the hearing, WaterWatch introduced no evidence that any particular volumes of peak or ecological flows are necessary to protect STE species.

The portion of the transcript that WaterWatch cites for the proposition that the Department has acknowledged that it could consider peak and ecological flows under unspecified “other rules” does not support that proposition, as it does not relate to peak or ecological flows.

### c. Injury

#### i. Specific Exceptions A202 – A208

WaterWatch takes exception (A202 – A208) to a number of statements in the Proposed Order’s discussion of the third public-interest presumption factor, injury to other water rights. WaterWatch argues that the Proposed Order should have concluded that the proposed use will injure the Schact water right because it will inundate the Schact water right. WaterWatch also argues that the Proposed Order should have concluded that the proposed use will injure the 1990 instream water right on Drift Creek because water will no longer be flowing in the segment of the stream within the reservoir footprint.

**Response and Disposition:** These exceptions are denied.

With respect to the Schact water right, the statutory scheme and the permit conditions prevent injury. ORS 537.400(5) requires the District to obtain ownership of, or access to, the lands to be inundated by the reservoir before commencing construction. The draft permit contains conditions requiring the District to comply with ORS 537.400(5). By obtaining ownership of the lands to be inundated, the District will necessarily obtain ownership of water rights appurtenant to those lands, including the Schact water right. In order to avoid injuring the Schact water right, the District will need to cancel it prior to commencing construction of the reservoir. The Director has added a condition to the draft permit requiring the Schact water right to be cancelled before water may be stored. For those reasons, the proposed use will not injure the Schact water right.

With respect to the 1990 instream water right on Drift Creek, the Director denies WaterWatch’s exceptions because the water right certificate specifically requires the Department to measure the flows at the lower end of the reach protected by the instream water right. This is logical, because the amount of flow protected by the instream water right was specifically

calculated for the lower end of the reach. Thus, the proposed use will not injure the Drift Creek instream water right.

**ii. Specific Exception A209**

WaterWatch excepts to the Proposed Order's discussion (page 65) of ORS 537.352, which states that a multipurpose storage project shall take precedence over an instream water right when the Department conducts a review of the proposed project under ORS 537.170. WaterWatch asserts that the proposed use could arguably be considered "multipurpose" under that statute, and implies that the statute would therefore authorize injury to the instream water right on Drift Creek.

**Response and Disposition:** This exception is denied.

The Director denies this exception because it is premised on a misinterpretation of ORS 537.352. That statute provides:

Notwithstanding any provision of ORS 537.332 to 537.343 and 537.350, the right to the use of the waters of this state for a project for multipurpose storage or municipal uses or by a municipal applicant, as defined in ORS 537.282, for a hydroelectric project, shall take precedence over an in-stream water right when the Water Resources Department conducts a review of the proposed project in accordance with ORS 537.170. The precedence given under this section shall not apply if the in-stream water right was established pursuant to ORS 537.346 or 537.348.

The provision states that a multipurpose storage has precedence over an instream water right in the application process. Here, that precedence has not been applied, because water was available for both the instream water right and the proposed use. It is important to note that ORS 537.352 does not establish a precedence for multipurpose storage in the context of regulation of water rights; thus, it would not allow the proposed use to receive water before the instream water right was satisfied.

Even if this statute were construed as applying in the context of regulation of water rights, it could not result in injury to an instream water right because injury means that a senior water right does not receive water to which it is legally entitled. If ORS 537.352 operated to give a multipurpose storage project a preference over an instream water right during regulation, then the instream water right would not have been legally entitled to receive that water in the first place, and thus, there would be no injury to the instream water right. The exercise of a preference that is authorized by statute is not injury, because the preference is prescribed in statute and, therefore, lawful.

**d. Compliance with Rules of the Water Resources Commission**

**i. General Exception #2: The Proposed Order incorrectly determined that the public-interest presumption was established.**

WaterWatch argues that the Proposed Order incorrectly determined that the public-interest presumption in ORS 537.153(2) was established. WaterWatch argues that there is not sufficient evidence in the record to support the Proposed Order's determination that the proposed use would comply with rules of the Water Resources Commission—in particular, OAR Chapter 690, Division 33 (regarding impacts to sensitive, threatened, or endangered fish species). WaterWatch further argues that the evidence in the record in fact shows that the proposed use will not comply with the Division 33 rules.

**Response and Disposition:** This exception is denied.

WaterWatch asserts that the record shows that the proposed use would be detrimental to the protection or recovery of a threatened species (Upper Willamette River winter steelhead) and would result in a net loss of essential habitat for a state-listed sensitive species (Pacific lamprey), and that no evidence shows that the impacts will be mitigated or conditioned to avoid the detriment to winter steelhead and avoid net loss of essential habitat for Pacific lamprey.

The Director denies this exception because it is premised on a misstatement of the burdens of proof and persuasion in ORS 537.153.<sup>89</sup> The ALJ determined that the Department met its initial burden of showing that the public-interest presumption was established—including compliance with the Division 33 rules. The Proposed Order avoids a net loss of Pacific lamprey habitat and avoids detriment to winter steelhead by incorporating the conditions recommended by DEQ and ODFW, as well as the conditions required by OAR 690-033-0220.

Protestants had the burden to demonstrate, by a preponderance of the evidence, that the conditions ensuring compliance with Division 33 that the Department included in the PFO and draft permit were insufficient. As the ALJ correctly determined, Protestants did not do so.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of WaterWatch's General Exception #2: A168, A169, A272

**ii. Division 33 Rules**

This section discusses WaterWatch's exceptions to the Proposed Order's discussion of the Division 33 rules.

**1. Specific Exception A212**

On page 67 of the Proposed Order, WaterWatch excepts (#212) to the Proposed Order's characterization of OAR 690-033-0220. WaterWatch asserts that the rule refers to conditioning

---

<sup>89</sup> The Director incorporates into this discussion of WaterWatch General Exception #2 the discussion of the burden of proof and the discussion of the piecemeal process of reservoir development in the Director's consideration of the Rue exceptions.

and mitigation together, not as a two-step process, which is how the Proposed Order characterizes conditioning and mitigation.

**Response and Disposition:** This exception is granted.

The Director grants this exception because OAR 690-033-0220 offers two options if the Department determines that a proposed use of water is detrimental to the protection or recovery of a threatened or endangered fish species: including conditions that will avoid the detriment, or having the application propose mitigation that will offset the detriment. The rule does not state that the conditions pathway must be pursued first, before an applicant is allowed to propose a mitigation plan.

## **2. Specific Exception A214**

WaterWatch excepts to the Proposed Order's statement (page 68) that the Department met its Division 33 obligations.

**Response and Disposition:** This exception is denied.

The Director denies this exception because, contrary to WaterWatch's suggestion, the Department did incorporate all recommended conditions into the Proposed Final Order, and the Department also agreed to incorporate ODFW's suggested edits to the PFO into the Final Order. As discussed elsewhere at length in this Final Order, the Department's use of conditions to protect threatened and endangered species habitat is consistent with statutes, rules, and case law.

## **3. Specific Exception A215**

WaterWatch excepts to the Proposed Order's characterization (page 68) of WaterWatch's arguments regarding cutthroat trout. WaterWatch asserts that it did not argue that cutthroat trout needed to be considered in the Division 33 review.

**Response and Disposition:** This exception is granted.

The Director grants this exception because WaterWatch did not argue that cutthroat trout needed to be considered in the Division 33 review.

## **4. Specific Exception A216**

WaterWatch excepts to the Proposed Order's statement (page 68) that WaterWatch failed to show that, because Upper Willamette Spring Chinook were not included in the Division 33 review, the review was flawed.

**Response and Disposition:** This exception is denied.

The Director denies this exception because, as the ALJ correctly concluded, the Department met its initial burden of showing that the public-interest presumption was



established—including compliance with the Division 33 rules. Thus, Protestants had the burden to demonstrate, by a preponderance of the evidence, that the conditions ensuring compliance with Division 33 that the Department included in the PFO and draft permit were insufficient. Protestants introduced evidence that Spring Chinook could possibly use Drift Creek, but failed to introduce evidence of where in Drift Creek the species might rear, its juvenile rearing habitat requirements, and whether or how the proposed use could affect the species. Protestants also offered no evidence that the conditions to protect other listed fish species would not protect Spring Chinook. Thus, the ALJ properly concluded that Protestants failed to meet their burden to show, by a preponderance of the evidence, that the conditions ensuring compliance with Division 33 were inadequate.

#### **5. Specific Exception A217**

WaterWatch excepts to the Proposed Order's characterization (page 68) of its argument regarding cutthroat trout. WaterWatch argues that the Proposed Order incorrectly states that WaterWatch argued that the Division 33 analysis was flawed because it failed to consider impacts to cutthroat trout. WaterWatch further argues that evidence in the record shows that Coho salmon in Drift Creek could have originated from Willamette River tributaries below Willamette Falls, in which case they could be part of a population listed as threatened. Finally, WaterWatch excepts on the grounds that the ALJ prevented WaterWatch from fully exploring this issue at the hearing.

**Response and Disposition:** This exception is granted in part and denied in part.

The Director grants the portion of this exception that asserts that the Proposed Order mischaracterizes WaterWatch's argument. WaterWatch did not argue that cutthroat trout needed to be considered as part of the Division 33 analysis.

The Director denies the remaining portions of this exception. WaterWatch's argument regarding whether the Coho Salmon in Drift Creek could have originated from a listed population below Willamette Falls is addressed in the response to WaterWatch's evidentiary exception on this same issue. WaterWatch's argument regarding the Department's burden to show that it complied with the Division 33 rules is addressed in the response to WaterWatch General Exception #2 and Rue General Exception #3.

#### **6. Specific Exception A218**

WaterWatch excepts to the Proposed Order's statement (page 69) that Coho Salmon in Drift Creek are considered non-native. WaterWatch asserts that Coho Salmon are "native migratory fish" for purposes of Oregon's fish passage laws. WaterWatch further asserts that ODFW's conversational definition of "native" is not the test for whether a fish population is part of a listed population.

**Response and Disposition:** This exception is granted in part and has become moot in part by the Director's revisions to the Proposed Order.

The Director grants the portion of this exception that asserts that the Proposed Order is incorrect in stating that Coho salmon are considered non-native for all purposes. The Director has revised the Proposed Order so that it no longer states that ODFW considers Coho salmon non-native for all purposes.

#### **7. Specific Exception A219**

WaterWatch excepts to the Proposed Order's statement (page 69) that WaterWatch did not establish that the conditions for winter steelhead and Pacific lamprey are inadequate to protect non-listed fish such as cutthroat trout and Coho salmon. WaterWatch asserts that the Department may not assume that conditions to protect listed fish will also protect non-listed fish.

**Response and Disposition:** This exception is denied.

As the ALJ correctly concluded, the Department met its burden to establish the public interest presumption—including that the Department complied with the Division 33 rules. To rebut that presumption, WaterWatch had to introduce a preponderance of evidence showing that the conditions to protect listed fish are not adequate to protect non-listed fish. It failed to do so.

#### **8. Specific Exception A220**

WaterWatch excepts to the Proposed Order's statement (page 70) that whether the fish passage laws should address reservoirs is not an issue in this case. WaterWatch asserts that "[t]his needs to be considered in determining if conditions, including fish passage, will adequately protect listed fish."

**Response and Disposition:** This exception is denied.

The Director denies this exception because whether the fish passage laws should address reservoirs is indeed beyond the scope of this case. As explained elsewhere in this Final Order, ODFW and DEQ recommended conditions that they believe are adequate to protect listed fish under the Division 33 rules, and the Department adopted those conditions.

#### **9. Specific Exception A221**

WaterWatch excepts to the Proposed Order's characterization of its argument that the Department has impermissibly delegated its duty to determine whether the proposed use will impair or be detrimental to the public interest. WaterWatch argues that its argument is based not only on OAR 690-033-0220(5), but also on the Department's general obligation to determine whether a proposed use will impair or be detrimental to the public interest.

**Response and Disposition:** This exception is denied.

The Director denies this exception because the Proposed Order does not suggest that WaterWatch is relying exclusively on OAR 690-033-0220(5). In fact, page 70 of the Proposed Order clearly analyzes WaterWatch's argument in light of the Department's general obligation to determine whether the proposed use impairs or is detrimental to the public interest.

#### **10. Specific Exception A227**

WaterWatch excepts to the Proposed Order's characterization of its argument (page 72) that conditioning the water right permit on compliance with fish passage and other laws is inadequate because those laws do not provide for public comment. WaterWatch notes that the fish passage waiver process generally allows public comment, but that the habitat mitigation process does not, and that inclusion of habitat mitigation as a condition in a water right permit therefore undermines the public process provided by the water permitting statutes.

**Response and Disposition:** This exception is granted in part and denied in part.

The Director grants the portion of this exception that states that the fish passage waiver process generally allows public participation, because it is accurate. *See* OAR 635-412-0025(12)-(13). The Director denies the remaining portions of this exception because the extent of public participation in ODFW's habitat mitigation process is not within the scope of this proceeding.

#### 11. Specific Exception A228

WaterWatch excepts to the Proposed Order's statement that "WaterWatch's expert confirmed that at least one scenario would allow EVWD to release cooler water." WaterWatch asserts that the analysis showed that the water would not exceed the temperature standard, not that it would be "cooler."

**Response and Disposition:** This exception is granted.

The Director grants this exception because it more precisely states the factual finding contained in Finding of Fact 279.

#### 12. Specific Exceptions A229 – A232, A262

WaterWatch excepts to various statements in the Proposed Order (page 73) regarding reservoir water temperature modeling and modeling of the volume of water likely to be stored in the reservoir. WaterWatch argues that, under certain assumptions, even the coldest water in the reservoir will exceed water quality standards. WaterWatch further argues that, under certain assumptions, the reservoir would not fill completely each year, and that non-negligible amounts of water would be lost via seepage.

**Response and Disposition:** These exceptions are granted in part and denied in part.

The Director grants the exception that asserts that the Proposed Order inaccurately states that WaterWatch's expert, Dr. Cuenca, concluded that seepage would not make a significant difference in the amount of water available to be released from the reservoir. Dr. Cuenca concluded that the amount of water lost to seepage could be several thousand acre-feet per year. The Proposed Order correctly concluded that the issue of seepage could be addressed in the design of and materials used to construct the reservoir.

The Director denies the remainder of the exceptions that relate to water temperature because, if all of the water in the reservoir exceeds water quality standards, the terms of the permit will not allow EVWD to release any water. The Director denies the remainder of the

exceptions that relate to the amount of water likely to be available for release because nothing requires EVWD to store the maximum capacity of the reservoir each year.

### 13. Specific Exceptions A234 – A235

WaterWatch excepts to the Proposed Order's statements (page 74) that the fish passage waiver requirements and ODFW's categorization of habitat are not at issue in this case.

**Response and Disposition:** These exceptions are granted in part and denied in part.

The Director grants the portions of these exceptions that assert that ODFW's habitat categorization is not at issue in this case. ODFW's habitat categorization is relevant to ODFW's Division 33 recommendations because, if ODFW had concluded that Drift Creek constituted Habitat Category 1 for Pacific Lamprey or Winter Steelhead, then, according to its own rules, it would have recommended denying the permit application or finding an alternative to the proposed development action. OAR 635-415-0025(1). While the Department retains the authority and duty to make the ultimate decision on whether or not to issue a water right permit, it gives considerable weight to the expert recommendations of sister state agencies like ODFW.

The Director denies the remaining portions of these exceptions because the fish passage waiver requirements are not at issue here. The draft permit attached to this Final Order requires EVWD to satisfy the standards in OAR 690-033-0220 (for Winter Steelhead) and OAR 690-033-0330 (for Pacific Lamprey), regardless of whether EVWD subsequently decides to provide fish passage or seek a fish passage waiver.

### 14. Specific Exception A237

WaterWatch excepts to the Proposed Order's statement (page 74) that OAR 690-033-0220(5) does not apply in this case. WaterWatch asserts that the rule applies whenever an applicant intends to rely on mitigation to comply with Division 33.

WaterWatch excepts to the Proposed Order's conclusion (page 74) that the Department has shown that it complied with the Division 33 rules when evaluating EVWD's application. WaterWatch simply incorporates its closing briefs and other exceptions.

**Response and Disposition:** These exceptions are denied.

The Director denies exception A237 because it misinterprets OAR 690-033-0220. As explained above in the Final Order, under OAR 690-033-0220(1), 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 application shall be presumed to impair or be detrimental to the public interest. OAR 690-033-022(5), the section highlighted by WaterWatch, states that if the proposed use is determined to be detrimental to the protection or recovery of a threatened or endangered species, the applicant "may propose mitigation compatible with sections (2), (3) and (4) of this rule."

Here, pursuant to OAR 690-033-0220(1), the Department imposed conditions that were adequate to avoid the detriment to the protection or recovery of a threatened species. Several of these conditions require EVWD to implement mitigation plans (e.g., for riparian areas, wetlands,

and habitat for endangered, threatened, or sensitive fish species). Consequently, EVWD was not required to propose, and the Department was not required to evaluate, a separate mitigation plan under OAR 690-033-0220(5).

**15. Specific Exceptions A239 – A244**

WaterWatch excepts to the Proposed Order’s discussion (pages 75 – 77) of OAR 690-410-0030 and OAR 690-410-0080.

**Response and Disposition:** These exceptions are denied.

The Director denies these exceptions because, as explained in greater depth above in the Final Order, OAR 690-410-0030 and OAR 690-410-0080 do not apply to individual water right applications.

**16. Specific Exception A245**

WaterWatch excepts to the Proposed Order’s characterization (page 78) of its argument regarding the Integrated Water Resources Strategy. According to WaterWatch, it did not argue that the Strategy is a rule, but, rather, that it must be considered under other rules and public interest factors. WaterWatch also asserts that the Proposed Order understates the Strategy’s “clear preference for avoiding on-channel storage.”

**Response and Disposition:** This exception is denied.

The Director denies this exception because, at times—most notably in its protest—WaterWatch has characterized the Integrated Water Resources Strategy as a rule that the Department must evaluate when considering whether the public interest presumption has been established. The Department also denies this exception because the Proposed Order accurately characterizes the Strategy. The Strategy explains that it “contains 51 recommended actions, each one supported with a set of bulleted items about how one *might* implement that action.”<sup>90</sup> The statement that WaterWatch characterizes as an “off-channel storage policy”—“Investigate potential off-channel sites for above-ground storage projects”—is identified as one of several “examples” of how one might implement “Recommended Action 10.B: Improve Access to Built Storage.”<sup>91</sup> That example is illustrative, not prescriptive; does not identify the Department as the appropriate party to undertake it; and does not prevent the Department from approving an application for on-channel storage.<sup>92</sup>

**17. Specific Exception A247**

WaterWatch excepts to the portion of the Proposed Order (page 79) that directs the Department to consult with ODFW to clarify the “peak flows” phrase in ODFW’s Division 33 review sheet, and to ensure that the Final Order includes any peak and ecological flow condition

<sup>90</sup> Ex. EV78, p. 13 (emphasis added).

<sup>91</sup> Ex. EV78, p. 129.

<sup>92</sup> Ex. EV78, p. 13; Ex. EV78, p. 12 (“The 2017 Strategy once again spells out ‘what’ generally needs to happen, but not the finer details of implementation...[T]he 2017 Integrated Water Resources Strategy does not remove or jeopardize existing water rights or other local, state, tribal, and federal authorizations. The Strategy does not relinquish any existing authorities.”).

recommended by ODFW. WaterWatch asserts that this consultation should occur in a public process.

**Response and Disposition:** This exception is denied.

The Director denies this exception because the Director has revised the Proposed Order to remove the requirement that the Department consult with ODFW regarding the meaning of the “peak flows” phrase that it used in its Division 33 review sheet. The Director has removed that requirement because that phrase, when read in the context of the sentence in which it appears, is perfectly clear. The sentence states, “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.” Thus, ODFW recommended that any use of water during October should include bypass flows and peak flows. Because the Department did not allow the use of water during October, that recommendation became moot.

## 2. Evaluation of ORS 537.170(8) Factors

### a. **General Exception #3: The Proposed Order should have determined that the proposed use would impair or be detrimental to the public interest.**

WaterWatch argues that the proposed use would impair or be detrimental to the public interest in a number of ways, and that the Proposed Order erred in concluding otherwise.

**Response and Disposition:** This exception is denied.

The Department is not authorized to define “public interest” in any manner it desires. Rather, ORS 537.170(8) lists the public interest factors that the Department must consider in determining whether it may allocate water to a proposed use. Several of the alleged impairments identified by WaterWatch in this exception (for instance, concerns regarding archeological impacts and condemnation) do not relate to determining whether the proposed use will represent the best use of the water resources proposed for use and do not fall within any of the statutory factors in ORS 537.170(8).

WaterWatch also asserts that the proposed use would impair or be detrimental to the public interest by flooding and blocking passage to approximately 11 miles of fish habitat. The Proposed Order requires the District to either provide fish passage or obtain a waiver from the Fish & Wildlife Commission. Those options are both available as long as the appropriate criteria are satisfied. As discussed in the Department’s consideration of General Exception #2, the Proposed Order requires the District to obtain ODFW’s approval of a plan to mitigate impacts to Pacific lamprey and winter steelhead habitat, in accordance with the Department’s Division 33 rules and ODFW’s Division 415 habitat mitigation rules. As the ALJ determined, the Protestants did not present evidence that the PFO’s conditions relating to impacts on Pacific lamprey and winter steelhead are inadequate to reduce potential impacts on non-listed fish such as coho salmon and cutthroat trout.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of WaterWatch's General Exception #3: A170, A258

- b. General Exception #4: The Proposed Order should have determined that, even if the record does not show that the proposed use would impair or be detrimental to the public interest, there is not enough information in the record to conclude that the proposed use would not impair or be detrimental to the public interest.**

**Response and Disposition:** This exception is denied.

This exception is addressed by the discussion of WaterWatch General Exception #2 and Rue General Exception #3.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of WaterWatch's General Exception #3: A178, A236

- c. ORS 537.170(8)(a): Conserving the Highest Use of the Water for All Purposes**

- i. Specific Exception A251**

WaterWatch excepts to the Proposed Order's description (page 81) of the various potential beneficial uses of Drift Creek. WaterWatch asserts that instream uses are also recognized as beneficial uses. WaterWatch also seeks to clarify that its position is "not that instream flows should always take precedence, only that they should under the facts of this case."

**Response and Disposition:** This exception is granted in part and denied in part.

The Director grants the portion of this exception that asserts that instream uses are beneficial uses, because that is a correct statement of the law. As an example, OAR 690-502-0040(4)(c), which pertains to storage in the Willamette Basin, states that "public instream uses" are one type of beneficial purpose for which stored water may be released.

The Director denies the remainder of this exception. The Proposed Order's characterization of WaterWatch's argument is consistent with WaterWatch's own characterization of its argument—that, in this instance, WaterWatch believes that non-consumptive uses should take precedence over consumptive uses like irrigation.

- ii. Specific Exceptions A252 – A253**

WaterWatch excepts to the Proposed Order's description (page 81) of Drift Creek's present fish habitat value. WaterWatch asserts that the description improperly characterizes the habitat value as "limited" and ignores the potential for restoration. WaterWatch also excepts to

the Proposed Order's conclusion (page 82) that WaterWatch failed to offer specific evidence about the impact of potential habitat restoration measures. WaterWatch asserts that it is not obligated to offer such evidence.

**Response and Disposition:** These exceptions are denied.

The Director denies Specific Exception A252 because the Proposed Order accurately states that Drift Creek has restoration potential, but that restoration activities are not presently underway, or planned.

The Director denies Specific Exception A253 because, in evaluating whether a proposed use would impair the public interest in conserving the highest use of the water for all purposes, it is reasonable to consider the current condition of the waterway, rather than a theoretical future condition.

#### **iii. Specific Exception A256**

WaterWatch excepts to the Proposed Order's statement (page 82) that, if EVWD does not demonstrate during future permitting processes and mitigation plan approval processes that mitigation plans will succeed, the project will not go forward. WaterWatch asserts that this is speculative, and that there will be no public involvement in some of the processes to ensure effectiveness.

**Response and Disposition:** This exception is granted in part and denied in part.

The Director grants the portion of Specific Exception A256 that argues that it is speculative whether the project will be halted if EVWD cannot demonstrate that required mitigation plans will succeed. The Director revises the sentence at issue so that it reads, "If EVWD does not demonstrate during those processes that mitigation plans are likely to succeed, the project will not go forward." The remainder of the exception is denied, because the availability of public comment in other agencies' processes is not at issue in this case.

#### **iv. Specific Exception A257**

WaterWatch excepts to the Proposed Order's statement (page 82) that there is no evidence in the record that the creek is accessible to the public. WaterWatch asserts that photographs and evidence from fish surveys show at least some public access to Drift Creek. WaterWatch further argues that public access to Drift Creek is not important because the public benefits from fish habitat in Drift Creek when those fish travel elsewhere, and because members of the public enjoy knowing that fish habitat exists, even if they cannot access it.

**Response and Disposition:** This exception is denied.

The Director denies this exception because the fish surveys in the record do not indicate the existence of public access to Drift Creek. In addition, the Director denies this exception because the portions of the Proposed Order being excepted to discuss public recreation and scenic uses, not fish and wildlife uses (which are discussed elsewhere in the Proposed Order),



and because there is not evidence in the record to support WaterWatch's contentions regarding the public benefit from publicly inaccessible fish habitat.

**d. Specific Exception A259: ORS 537.170(8)(b), Maximum Economic Development of the Waters Involved**

WaterWatch excepts to the Proposed Order's analysis (page 83) of the maximum economic development of the waters involved. WaterWatch asserts that the Proposed Order fails to consider the economic value of public resources like fish and wildlife. WaterWatch also asserts that the record contains evidence that the proposed use will require public subsidies, which shows that the costs of the project do not exceed the benefits, "because the benefits are all private benefits to District members but apparently will not generate enough added revenue for District members to fund the project without public subsidies."

**Response and Disposition:** This exception is denied.

The Director denies this exception based on the reasons outlined in the discussion of the Rue Protestants' exceptions to this same section of the Proposed Order.

**e. Specific Exception A261: ORS 537.170(8)(d), Amount of Waters Available for Appropriation for Beneficial Use**

WaterWatch excepts to the Proposed Order's statement (page 84) that the Protestants offered no evidence that withdrawing 12,000 acre feet of water per year would interfere with any other beneficial use. WaterWatch asserts that the proposed use would take water from instream uses and would preclude "future, less destructive proposals for off-channel storage."

**Response and Disposition:** This exception is denied.

The Director denies this exception because, as discussed elsewhere in the Proposed Order, the proposed use is conditioned to protect the instream water right, and to require mitigation for loss of Winter steelhead and Pacific lamprey habitat. With respect to future off-channel storage, there is no evidence that any off-channel storage has been proposed on Drift Creek; even if such evidence existed, there is also no evidence that the proposed use would prevent such an off-channel storage proposal.

**f. ORS 537.170(8)(e): Prevention of Wasteful, Uneconomic, Impracticable or Unreasonable Use of the Waters Involved**

**i. Specific Exceptions A264, A266**

WaterWatch excepts to the Proposed Order's discussion (page 85) of whether the proposed use is wasteful, uneconomic, impracticable, or unreasonable. In Specific Exception A264, WaterWatch asserts that the record does not show a compelling need for the District's proposed project, and that better alternatives are available. In Specific Exception A266,

WaterWatch references the arguments in its closing briefs and other exceptions that the project is unreasonable.

**Response and Disposition:** These exceptions are denied.

The Director denies these exceptions because nothing in ORS 537.170(8)(e) or any other relevant statute authorizes the Department to analyze whether there is a compelling need for the proposed use, or whether there are other ways to accomplish the desired goal. Rather, ORS 537.170(8)(e) requires the Department to consider whether the proposed use would use water unreasonably.

**ii. Specific Exception A265**

WaterWatch excepts to the Proposed Order's statement (page 85) that the District has demonstrated that there is currently an annual demand for 4,000 additional acre feet of irrigation water. According to WaterWatch, the fact that members have paid to reserve approximately 4,000 acre feet of water from the reservoir could represent speculation.

**Response and Disposition:** This exception is denied.

The Director denies this exception because it is reasonable to infer, from the fact that District members have paid to reserve approximately 4,000 acre feet of water, that there is a demand for that amount of water. In addition, WaterWatch did not except to the underlying factual findings (Findings of Fact #20 – 22) upon which this statement in the Proposed Order is based.

**g. Specific Exception A211: Elk Habitat**

WaterWatch argues that the Proposed Order should have considered the proposed use's potential impact to elk habitat under ORS 537.170(8), OAR 690-310-0120(3)(b)(D), and OAR 690-410-0080(2)(g).

**Response & Disposition:** This exception is granted in part and denied in part.

If the Department determines that the public interest presumption is established, it must further evaluate the proposed use to determine whether the presumption is overcome. In making that determination, the Department must consider, among other things, "any potential effects that the proposed use may have on...[f]ish or wildlife[.]" OAR 690-310-0120(3)(b)(D).

Several years after the Department issued the PFO, the District commissioned technical memoranda from its environmental consultants regarding the proposed use's potential impact to elk habitat. (Ex. EV79-EV80). The District submitted these memoranda as evidence at the hearing. The Director has added findings of fact and associated discussion of the proposed use's potential impact on elk habitat.

As explained more fully in the discussion of Rue General Exception #2, the Division 400 and 410 rules govern the establishment of “statewide policies and principles pertaining to \* \* \* basin planning, [i]nteragency coordination; and [d]evelopment and *adoption of rules, standards and implementing strategies to govern Department programs and activities.*” OAR 690-400-0000(1) (emphasis added). Thus, they do not apply to individual Department decisions such as processing a permit application. For that reason, the Director denies that portion of WaterWatch’s exception.

### 3. Inclusion of Conditions in Draft Permit; Role of Other Agencies

#### a. General Exception #5: The Proposed Order incorrectly determined that the Department could rely on conditions in the permit to protect the public interest.

WaterWatch asserts that the Proposed Order incorrectly determined that the Department could rely on future reviews and determinations by other agencies to determine that the proposed use meets criteria for issuing a water storage permit.

**Response and Disposition:** This exception is denied.

This exception is contradicted by statutory text, administrative rules, and case law, as set forth at length in the Department’s closing briefs.<sup>93</sup> Oregon law explicitly authorizes the Department to “issue a proposed final order approving or denying the application or approving the application with modifications or conditions,” ORS 537.153(1), and to issue a permit that includes “any terms, limitations and conditions as the department considers appropriate.” ORS 537.211(1). The rules governing water right applications also authorize the Department to issue a PFO that includes “any appropriate modifications or conditions.” OAR 690-310-0120(4).

The Department routinely includes conditions in water right permits to protect the public interest, and the courts have repeatedly affirmed the Department’s ability to do so. *Willamette Water Co. v. WaterWatch of Oregon, Inc.*, 288 Or App 778, 783 (2017); *Noble v. Oregon Water Resources Dept.*, 264 Or App 110, 125 (2014); *Benz v. Water Resources Comm’n*, 94 Or App 73, 77-78 (1988). In the context of a primary reservoir permit, which, by its nature, leaves many details unresolved until later stages of permitting, it is especially appropriate to include conditions to protect the public interest.

WaterWatch asserts that issuing a permit with numerous details left unresolved deprives Protestants of their process rights under the permitting statutes and rules. The process afforded to protestants under ORS chapter 537 must be construed consistent with other statutes, like ORS 537.400, which allows a primary reservoir permit to be issued before a secondary permit, and ORS 537.248, which allows entities like the District to submit engineering plans and specifications after a primary reservoir permit is issued (but before construction begins).<sup>94</sup>

<sup>93</sup> The Director also incorporates the discussions of the burden of proof, the multistep process of reservoir development, and *Benz* in the Director’s consideration of the Rue Protestants’ exceptions.

<sup>94</sup> The Director incorporates the Department’s discussion of this issue in Section II of its Responsive Closing Brief.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of WaterWatch's General Exception #5: A138, A143, A173, A180, A181, A224, A225, A226, A254, A255, A275

**b. Specific Exceptions A175, A184**

WaterWatch takes exception (A175) to the first paragraph under "Opinion" on page 51 of the Proposed Order. That paragraph states that obtaining a water storage permit from the Department is the initial step in the multi-step process of obtaining legal authority to store and use surface water for irrigation. WaterWatch asserts that the paragraph "attempts to justify the Department's failure to evaluate key criteria and to instead abrogate that responsibility to other agencies." WaterWatch also takes exception to the statement that obtaining a water storage permit is the first step in the permitting process.

WaterWatch takes exception (A184) to the last sentence on page 56 of the Proposed Order, arguing that the Department could and should have required more specifics from the District, rather than ensuring that certain requirements will be satisfied by including conditions in the PFO and draft permit.

**Response and Disposition:** These exceptions are denied.

The Director denies these exceptions because, as the Department argued in its closing briefs, and as the Proposed Order concludes on pp. 56-57, the Department is not improperly delegating its authority to other agencies. Rather, it is making the findings and conclusions that are within its statutory authority and expertise. The Department properly declined WaterWatch's invitation to act *ultra vires* by encroaching on matters that the Oregon Legislature has determined are the purview of other agencies. *SAIF Corp. v. Shipley*, 326 Or 557, 561 (1998).

The following WaterWatch specific exceptions are also denied and addressed by the above discussion: A185

**c. Specific Exception A188**

WaterWatch takes exception to the discussion of *Benz v. Water Resources Commission*, 94 Or App 73 (1988) on page 67 of the Proposed Order. WaterWatch argues that *Benz* is inapposite because the conditions in *Benz* were more specific than those in the draft permit in this case.

**Response and Disposition:** This exception is denied.

Although the conditions in *Benz* differ from those included in the draft permit in this case, *Benz* affirmed the Department's authority in ORS 537.211(1) to include "any terms, limitations and conditions as the department considers appropriate."

**d. Specific Exceptions A274, A277**

WaterWatch excepts to the Proposed Order's conclusion (pages 89-90) that the proposed use is conditioned in such a manner that it will comply with ORS 540.350(2)-(3), which require certain dams to demonstrate that they include measures that make them readily adaptable to power generation in a manner meeting statutory requirements for safe passage of fish, or to demonstrate that they are exempt from the requirement. According to WaterWatch, no evidence in the record shows that the dam will comply with the requirements in ORS 540.350(2)-(3). WaterWatch further argues that ORS 540.350(2) requires a dam to comply with its requirements at the time when written approval is sought for "the site," which, in WaterWatch's view, has already occurred here.

**Response and Disposition:** These exceptions are denied.

The Director denies these exceptions. As explained in the Director's discussion of WaterWatch General Exception #5, the Department is authorized to "issue a proposed final order approving or denying the application or approving the application with modifications or conditions," ORS 537.153(1), and to issue a permit that includes "any terms, limitations and conditions as the department considers appropriate." ORS 537.211(1). A condition requiring the District to comply with ORS 540.350(2)-(3) when it submits dam plans to the Water Resources Commission for approval is appropriate, and means that the District need not demonstrate, at this stage, how it will comply with this statutory requirement.

Moreover, WaterWatch's exceptions are based on an incorrect interpretation of ORS 540.350(2)-(3). The event that triggers compliance with that statute is when "a person, firm or private or municipal corporation seeks the written approval of the Water Resources commission, of the site, plans, specifications and features for a dam more than 25 feet high at a site where there is an average annual flow exceeding two cubic feet a second." ORS 540.350(2). The Commission's role in examining and approving dam plans and specifications is also referenced in ORS 540.350(1), which provides, "No person, firm or private or municipal corporation shall construct any dam, dike, or other hydraulic structure or works, the failure of which the Water Resources Commission finds would result in damage to life or property, unless the commission has made an examination of the site and of the plans and specifications and other features involved in the construction of such works, and has approved them in writing." The District has not yet sought the Commission's approval of dam plans and specifications; when it does, it will need to satisfy the requirements on ORS 540.350(2)-(3).

#### **4. Evidentiary Matters**

- a. Exception to Evidentiary Ruling: The ALJ incorrectly excluded, as speculative, testimony from WaterWatch's expert witness on whether impacts of the project on listed fish could be mitigated.**

WaterWatch excepts to an evidentiary ruling concerning the testimony of Conrad Gowell, who is the Fellowship Director with the Native Fish Society. After establishing that Mr. Gowell had helped design mitigation projects for fish habitat and had "commented on" habitat mitigation

programs by state and federal agencies, WaterWatch asked Mr. Gowell, “Based on your experience with fisheries, restoration work, and mitigation, do you believe the impacts of the proposed project in this case on listed fish can be fully mitigated?” (Tr. at 2554.) The Department objected on the grounds that the question called for speculation, and the ALJ sustained the objection. WaterWatch excepts to that ruling, asserting that, because the PFO and Proposed Order both depend on a conclusion that impacts to listed fish can be mitigated—a conclusion that WaterWatch believes is not supported by sufficient evidence—WaterWatch should have been allowed to present evidence that impacts to listed fish cannot be mitigated.

**Response and Disposition:** This exception is denied.

ORS 537.170(3) provides that, when the Department holds a contested case hearing on a proposed final order, the contested case proceeding “shall be conducted in accordance with the applicable provisions of ORS chapter 183.” ORS 183.450 governs evidence in contested case proceedings and provides, in pertinent part:

Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.

Although the Oregon Rules of Evidence do not apply in administrative proceedings, they can assist the ALJ in evaluating whether particular evidence is “of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.” ORS 183.450(1); *see Gaylord v. Driver & Motor Vehicle Servs. Div. (DMV), a Div. of Dep't of Transportation*, 283 Or App 811, 819 (2017); *Osuno-Bonilla v. Teacher Standards and Practices Commission*, 282 Or App 260, 273-275 (2016). Here, Rule 703, which specifies the permissible bases for an expert’s opinion testimony, supports the ALJ’s decision to sustain the Department’s objection to WaterWatch’s question, because under Rule 703, there was no reliable basis upon which Mr. Gowell could have answered WaterWatch’s question, and, therefore, Mr. Gowell’s opinion would not have constituted “evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.”

Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under Rule 703, there was no permissible basis upon which Mr. Gowell could have based an expert opinion. As was clearly established at the hearing, the District has not yet proposed any specific mitigation plans for the proposed project. Thus, the basis for Mr. Gowell’s opinion could not have been facts or data perceived by or made known to him at or

before the hearing—because those facts do not yet exist. Although an expert may be asked a hypothetical question, the elements of the question must be consistent with the actual evidence in the case. *State v. Ollila*, 82 Or App 491, 492 (holding that Rule 703 “does not authorize the introduction of an expert opinion which is based on facts that may or may not be perceived by the jury or the expert”). Because the District has not yet submitted specific mitigation plans, there are no facts upon which to pose, or answer, a hypothetical question regarding the efficacy of a particular mitigation strategy.

WaterWatch established that Mr. Gowell had some experience designing and evaluating fish habitat mitigation plans. However, Mr. Gowell had not reviewed final design specifications for the dam, final specifications for operation of the reservoir, habitat mitigation plans, or a fish passage plan. Consequently, any opinion he might have expressed regarding the efficacy of an unknown mitigation plan would have lacked foundation and would have been impermissibly speculative. *Kingsbury v. Hickey*, 56 Or App 492, 496 (1982) (“Expert evidence offered without sufficient foundation is too speculative and therefore not admissible.”). A speculative opinion that lacks foundation does not constitute “evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.” ORS 183.450(1). Thus, the ALJ did not err in sustaining the Department’s objection.

**b. Exception to Evidentiary Ruling: The ALJ incorrectly precluded WaterWatch from fully exploring the potential origin of Coho salmon using Drift Creek.**

WaterWatch excepts to evidentiary rulings concerning the testimony of Tom Murtagh, ODFW District Fish Biologist. Mr. Murtagh explained that Coho Salmon were not addressed in ODFW’s Division 33 review for the District’s proposed project because the Coho Salmon population above Willamette Falls (which includes the population in Drift Creek) is not listed as sensitive, threatened, or endangered. (Tr. at 2138-2139.) Mr. Murtagh went on to explain that historically, prior to the construction of fish ladders at Willamette Falls, Coho Salmon were not present in the area above Willamette Falls. (Tr. at 2139-2144.) WaterWatch asked, “Are coho salmon believed to be derived from a hatchery stock?” (Tr. at 2139.) The Department objected that Mr. Murtagh had already answered the question of why Coho Salmon were not included in ODFW’s Division 33 review. WaterWatch responded that it was attempting to explore whether there is a possibility that the Coho Salmon in Drift Creek are from a listed population below Willamette Falls. The Department asserted that it was not appropriate for WaterWatch to attempt to use Mr. Murtagh’s testimony to make a legal argument regarding whether the Division 33 rules are sufficiently broad in scope. (Tr. at 2143.)

The ALJ sustained the Department’s objection, but WaterWatch continued asking Mr. Murtagh about the possible origin of Coho Salmon in Drift Creek. Specifically, WaterWatch asked, “Is it possible that the coho that use Drift Creek came from a wild population below the falls?” (Tr. at 2144.) The District objected on the grounds that the question called for speculation, and the ALJ sustained the objection. WaterWatch excepts to those two rulings and argues that the Proposed Order unfairly concludes that WaterWatch failed to submit sufficient evidence regarding the possible origin of the Coho Salmon present in Drift Creek.

**Response and Disposition:** This exception is denied.

The ALJ properly sustained the objections to WaterWatch's line of questioning regarding the potential origin of Coho Salmon in Drift Creek. To the extent that WaterWatch was asking Mr. Murtagh to express an opinion as to whether the Division 33 rules should be broader in scope, that is beyond the scope of this hearing and is a legal argument that is not the appropriate subject of witness testimony. As the ALJ correctly noted, "I don't really see the point of arguing with this witness about statutes and rules that he wasn't involved in enacting." (Tr. at 2142.)

To the extent that Mr. Murtagh was testifying as an expert witness, WaterWatch failed to lay a foundation that would have given Mr. Murtagh a permissible basis under Rule 703 for opining regarding the origin of Coho Salmon in Drift Creek. WaterWatch did not introduce any scientific literature or data that suggested a link the Coho Salmon population in Drift Creek to a listed Coho population below Willamette Falls. Nor did WaterWatch, before asking Mr. Murtagh whether the Coho in Drift Creek came from a wild population below Willamette Falls, elicit any facts or data from Mr. Murtagh that would have provided a basis for an expert opinion on that question.

#### **5. WaterWatch's Requested Additional Findings of Fact**

WaterWatch requests six additional findings of fact (in addition to the findings of fact requested in its specific exceptions).

The first four findings that WaterWatch requests would add findings regarding the availability of water from existing U.S. Army Corps of Engineers reservoirs in the Willamette Basin and the practicability of pumping such water through a pipeline to the District. The Director denies this request because these findings are not relevant to any of the issues in this contested case. The Department's evaluation of an application for a permit to store surface water does not include an evaluation of whether the proposed project is the most desirable means of accomplishing the applicant's overall goal.

The fifth additional finding requested by WaterWatch is that the State of Oregon spends approximately \$10 million per year to remove fish passage barriers from streams in Oregon. The Director denies this request because this finding is not relevant to any of the issues in this contested case. This case is about whether the Department should issue a water storage permit; it not a referendum on the Oregon Department of Fish and Wildlife's fish passage program or priorities.

The sixth additional finding requested by WaterWatch is that areas of the District outside the groundwater limited areas, and non-basalt aquifers within the groundwater limited areas, are not closed to new permits to use groundwater. The Director grants this request and adds the requested finding to the Final Order. The additional finding provides context for the Final Order's discussion of water needs and usage in the District. The additional finding is supported by substantial evidence in the record.

#### **6. Specific Exception A171: Endangered Species Act**



In Specific Exception A171, WaterWatch excepts to the Proposed Order's Conclusion of Law #4, which states, "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.*" (Proposed Order at 51.) WaterWatch argues that it demonstrated that the PFO failed to adequately consider endangered species issues under the ESA because it showed that the proposed use would eliminate habitat for ESA-listed steelhead.

**Response and Disposition:** This exception is denied.

The Director denies this exception because, as the Proposed Order notes (page 88), the Department and the District argued that the OAH lacks jurisdiction over claims under the Endangered Species Act, and WaterWatch offered no argument to the contrary.

## **B. Rue Protestants' Exceptions**

### **1. Establishment of the Public Interest Presumption**

- a. General Exception #1: The ALJ incorrectly found that the Department established a presumption under ORS 537.153(2) that the proposed use will not impair or be detrimental to the public interest.**

ORS 537.153(2) directs the Department, in reviewing an application, to "presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission." This rebuttable presumption may be overcome by a preponderance of evidence showing that one or more of the criteria for establishing the presumption are not satisfied, or by a preponderance of evidence showing that a specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected.

The Rue Protestants assert that several of the criteria for establishing the public interest presumption are not satisfied.<sup>95</sup>

#### **b. Water Availability**

The Rue Protestants join WaterWatch's exceptions to the discussion in the Opinion section of the Proposed Order regarding water availability. The Rue Protestants' exception (Specific Exception 95) is addressed in the response to WaterWatch's exceptions (Specific Exceptions A193 – A200) on this issue.

---

<sup>95</sup> The Rue Protestants also argue that one or more specific public interest factors under ORS 537.170(8) would be impaired or detrimentally affected by the proposed use. Those arguments are addressed separately.

**c. Injury**

**i. Specific Exceptions 96 – 98: Injury to Rue Protestants**

The Rue Protestants take exception to the analysis in the Proposed Order and assert that the Proposed Order mischaracterized the Rue Protestants' concerns about "injury." They assert that the harms they have identified are pertinent to the public interest analysis pursuant to ORS 537.170(8), rather than to the Department's consideration of injury to other water rights in establishing the public interest presumption under ORS 537.153(2). They then argue that the Proposed Order's discussion about *Examilotis v. Department of State Lands*, 239 Or App 522 (2010), should be stricken because it is "irrelevant."

**Response and Disposition:** These exceptions are denied.

The third factor the Department considers when establishing the public interest presumption is whether the proposed use will injure other water rights. ORS 537.153(2). The statutes and the rules do not define "injure," but the Proposed Order concluded that the Department's reliance on the definition of "injury" as provided in the transfer rules, OAR 690-380-0010(3), is reasonable. The Proposed Order characterizes the Rue Protestants' arguments as contending that the term "injure" should be construed broadly to "include harm to rights other than water rights" and to include the Protestants' "ownership of land, timber and farmhouses, as well as their ability to farm and enjoy their land for recreational purposes." (Proposed Order at 62.) The Proposed Order determined that, though the assertions of injury made by the Rue Protestants are "both real and understandable," the concerns not associated with injury to a water right are not properly considered by the Department in the injury analysis. Though the text of ORS 537.153(2) makes clear that the injury considered by the Department is restricted to injury of "other water rights," the Proposed Order also cited to *Examilotis v. Department of State Lands*, 239 Or App 522 (2010) for the proposition that an agency may not consider factors that are beyond the agency's authority to address.

The Rue Protestants have made arguments about "injury" in this proceeding that may be interpreted as relating to whether the public interest presumption is correctly established under ORS 537.153(2), as well as whether the "injury" or harm to Rue Protestants' interests establishes that the proposed use will not protect the public interest under ORS 537.170(8). It is appropriate, given the number and complexity of the arguments made by Protestants, to address the injury question as it pertains to a determination of "injury" in reviewing whether the public interest presumption may be established as well as a determination of the injury sustained by the Rue Protestants in the context of the public interest review in ORS 537.170(8). The reference to *Examilotis* is relevant to either analysis, as the Department is constrained in determining injury to Rue Protestants only as consistent with its authorities to make water allocation decisions.

**ii. Specific Exception 99: Injury to the Instream Water Right**

The Rue Protestants join WaterWatch in taking exception to the Proposed Order's discussion of whether the proposed use will injure the existing instream water right on Drift

Creek. The Rue Protestants' exception (Specific Exception 99) is addressed in the response to WaterWatch's exception (Specific Exception A208) on this issue.

**d. Compliance with Rules of the Water Resources Commission**

- i. General Exception #2: The ALJ incorrectly found that the proposed use complies with the rules and policies of the Water Resources Commission, including particularly OAR 690-410-0070(2)(a), OAR 690-410-0080, and OAR 690-310-0040.**

The Rue Protestants except to the Proposed Order's conclusion that the proposed use complies with the rules and policies of the Water Resources Commission. In their General Exception #2, the Rue Protestants identify three rules with which, in their view, the proposed use is inconsistent. The Rue Protestants offer no argument or explanation of their exception with respect to one of those rules, OAR 690-410-0080(2)(a). Thus, the Director construes the Rue Protestants as joining WaterWatch's exceptions regarding that rule and addresses that contention in its treatment of WaterWatch's exception.

**1. Specific Exception 95: Application of OAR 690-410-0070(2)(a)**

The Rue Protestants join WaterWatch in making exceptions to the Proposed Order's treatment of "water availability" and, specifically, to the application of OAR 690-410-0070(2)(a). This exception (Specific Exception 95) is addressed in the discussion of WaterWatch's exceptions (Specific Exceptions A193 – A201).

**2. Specific Exceptions 105 – 107: Application of OAR 690-410-0080**

The Rue Protestants take exception to the Proposed Order's analysis under the heading titled "Impacts of Water Storage Projects Under OAR 690-410-0080" (pages 75 – 77) and assert that the Department's interpretation of its policy rules allowed it to ignore those rules as a source of procedural guidance and substantive content for its statutorily mandated public interest review. They argue that the Department's interpretation of its rules is not plausible because the Department's interpretation of words such as "programs" and "activities" is not consistent with the text and context of the rule. Specifically, the Rue Protestants assert that the word "activities" as it is used in OAR 690-410-0080 cannot be read so broadly as to exclude the Department's permitting activities. Finally, the Rue Protestants take exception to the Proposed Order's discussion (page 77) of cultural and archeological resources at the proposed project site, asserting that it understates the site's historic significance.

**Response and Disposition:** These exceptions are denied.

As provided in the Department's closing briefs, the text of ORS 536.300(2) directs the Water Resources Commission to "formulate an integrated coordinated program for the use and

control of the all the water resources of this state,” whose programs are termed “basin program plans.” ORS 536.300 – 536.310. Chapter 690, divisions 400 and 410, in turn govern the establishment of “statewide policies and principles pertaining to...basin planning, [i]nteragency coordination; and [d]evelopment and *adoption of rules, standards and implementing strategies to govern Department programs and activities.*” OAR 690-400-0000(1) (emphasis added). That is, the use of the terms “programs and activities” in ORS 536.300 refers to the Commission’s rulemaking efforts to establish statewide policies for water right application processing (as contained in OAR chapter 690, division 310) and basin program plans for each of the state’s major drainage basins. OAR 690-500-0010(1) (referring to “administrative rules which establish water management policies and objectives and which govern the appropriation and use of surface and ground water within each of the respective basins”); OAR chapter 690, division 502 (Willamette Basin program rules). These rules, in turn, govern the Department’s processing of individual permit applications and by their terms, the Department is not directed to apply each of the criteria used in the development of the programmatic rules to each water right application.

The Rue Protestants argue, in the alternative, that OAR 690-410-0080 should apply as “non-rule program direction” that should inform the Department’s evaluations under ORS 537.153(2) and ORS 537.170(8), as should the Integrated Water Resources Strategy. The statutes and rules governing review of applications, however, do not support this argument. Rather, ORS 537.153(2) and its implementing rules direct the Department to review an application to determine whether the proposed use “is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340.” Nor does ORS 537.170(8) require any evaluation of “non-rule program direction.” Because the Department properly considered the application in the context of the rules of the Water Resources Commission, including OAR chapter 690, divisions 310 and 502, this exception is denied.

With respect to the Protestants’ exception regarding the discussion of cultural and archeological resources at the proposed project site, the Director has revised the Proposed Order in such a manner as to remove the discussion of the site’s cultural and historic significance because, as discussed above, OAR 690-410-0080 does not apply to individual water right permit applications.

#### **ii. Specific Exception 100**

Rue Protestants join in WaterWatch’s exceptions to the section of the Proposed Order addressing the application of the rules of the Water Resources Commission to the application. This exception (Specific Exception 100) is addressed in the discussion addressing WaterWatch’s exceptions.

#### **iii. Specific Exception 101**

The Rue Protestants except to footnote 47 in the Proposed Order, which states that the Proposed Order will not address the project’s potential impact to elk habitat.

**Response and Disposition:** This exception is granted in part and denied in part.

If the Department determines that the public interest presumption is established, it must further evaluate the proposed use to determine whether the presumption is overcome. In making that determination, the Department must consider, among other things, “any potential effects that the proposed use may have on...[f]ish or wildlife[.]” OAR 690-310-0120(3)(b)(D). As explained more fully in the discussion of WaterWatch Specific Exception A211, the Director has added findings of fact and associated discussion of the proposed use’s potential impact on elk habitat to this Final Order.

#### iv. Specific Exception 102

The Rue Protestants take exception with the Proposed Order’s discussion of the applicability of *Gould v. Deschutes County*, 216 Or App 150 (2007). They assert that the fact the Department’s form for the application differed from the one in *Gould* did not “excuse the Department from developing enough information about the project impacts to perform the evaluation required by its statutes and rules.”

**Response and Disposition:** This exception is denied.

*Gould* is inapposite to this case because the statutory underpinnings are not comparable. In this case, as discussed at length in this Narrative Consideration of Exceptions, the statutes governing reservoir applications preclude a final assessment of the project’s impact and require the Department to prospectively condition a proposed use such that whatever the ultimate configuration of the reservoir project may be, it must protect the public interest.

#### v. Specific Exception 103

The Rue Protestants take exception to the Proposed Order’s discussion of instream flow protection under OAR 690-410-0030 and argue that the policy rules provide more context than addressed by the ALJ.

**Response and Disposition:** This exception is denied, as described in the discussion of the Rue Protestants’ arguments regarding the Division 410 rules.

#### vi. Specific Exception 104

The Rue Protestants make further argument about the applicability of OAR 690-410-0030 to the District’s application.

**Response and Disposition:** This exception is denied, as described in the discussion of the Rue Protestants’ arguments regarding the Division 410 rules.

#### vii. Specific Exception 108

The Rue Protestants (Specific Exception 108) join in WaterWatch’s exception to the portion of the Proposed Order addressing the Integrated Water Resources Strategy and off-channel storage policy. WaterWatch’s exception (Specific Exception A245) is addressed above.

## **2. Specific Exceptions Regarding Storage and the Application of OAR 690-310-0040**

The Rue Protestants make several exceptions to the section of the Proposed Order entitled "EVWD's Water Storage Application" (pages 54 – 57).

### **a. Specific Exception 89**

The Rue Protestants except to the following statement on page 55 of the Proposed Order:

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 Rue Protestants take exception to this statement because, they assert, it mischaracterizes their argument. Protestants assert that they did not argue that "all of the details regarding the project" must be finalized in order for the Department to evaluate the application, but, instead, that enough information must be available to perform an adequate public interest analysis.

**Response and Disposition:** This exception is denied.

The Proposed Order states that "EVWD's application contained all of the information required by the Department's form application" but that despite this 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 Proposed Order then notes that "Protestants claim that the EVWD should be required to finalize all of the details regarding the project before the Department evaluates the application." (Proposed Order at 55.) In the context of the full paragraph, the Proposed Order equates "key" details with "all" of the details necessary to evaluate the application. The Proposed Order does not mischaracterize Protestants' arguments.

### **b. Specific Exception 90**

The Rue Protestants except to the following statement on page 55 of the Proposed Order:

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.

The Rue Protestants take exception to this statement because they assert that “aspects of the project are not ‘details’ but significant elements that will determine the project’s impacts on the Rue Protestants and other private property owners along the conveyance route, on fisheries, on instream flows, and on water quality.” With so many unknowns, they argue, the full impact and cost of the project cannot be determined with enough specificity to perform a proper analysis under ORS 537.170(8).

**Response and Disposition:** This exception is denied.

The Protestants take one word out of context to argue that the Proposed Order minimized the import of the issues that Protestants raised. The lengthy, detailed Proposed Order belies the Rue Protestants’ argument that the ALJ minimized the significance of the issues raised by the Rue Protestants. It is accurate to describe certain aspects of the overall project as “details.” Doing so does not minimize their importance.

**c. Specific Exception 91**

On pages 59 – 60, the Proposed Order discusses *Benz v. Water Resources Commission*, 94 Or App 73 (1988), which illustrates the Commission’s ability to condition a permit so that the proposed use will protect the public interest. The Protestants take exception to this analysis because they assert that the conditions in *Benz* were concrete, specific and immediate and thus “distinguishable from the vague, future conditions in this case.” Additionally, Protestants disagree with the Proposed Order’s characterization of their arguments.

**Response and Disposition:** This exception is denied.

The Proposed Order relied on the reasoning in *Benz* to support its conclusion that the Director is authorized to condition a proposed use so that it will protect the public interest. The analysis is apt. Additionally, the characterization of this issue in the context of the rest of the Proposed Order does not mischaracterize Protestants’ arguments. The Director affirms the Proposed Order’s conclusions that the Department has sufficient information before it to determine whether it may approve the application and issue a final order which may “set forth any provisions or restrictions to be included in the permit concerning the use, control and management of the water to be appropriated for the project.” ORS 537.170(6). Additionally, the text of ORS 537.400 (governing appropriation of water for a primary reservoir permit) confirms the legislative intent that not all permissions need be obtained before a permit may be issued for a reservoir, as illustrated by ORS 537.400(5), which allows issuance of a permit before the reservoir permittee has obtained necessary authorizations or easements for inundated land.

**d. Specific Exception 92**

Following the paragraph referring to *Benz*, as discussed above, is the following paragraph:

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.

The Rue Protestants assert that this paragraph is “misleading and superfluous” because once a storage permit is issued, the damage has been done to the Rue Protestants, because EVWD intends to use condemnation to acquire their land for the reservoir and any public interest review of the secondary water right will not address this concern or the concerns regarding the effect of building the reservoir on fisheries and water quality.

**Response and Disposition:** This exception is granted in part and denied in part.

Insofar as issuance of the reservoir permit may result in the District proceeding with condemnation of their lands, the Department may not withhold the reservoir permit on that basis, as the laws governing issuance of reservoir permits allow for an applicant to provide evidence of access to submerged lands after a reservoir permit has been issued. Specifically, ORS 537.400(5) authorizes the Department to issue a reservoir 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.” The Department may not deny a reservoir application because a District does not currently possess the necessary access to the inundated lands, nor can the Department deny an application on the grounds that the District may later exercise its authority to condemn lands.

The Director has revised the excerpted paragraph to clarify that, if the Department determines that the public comments on the application for a secondary permit raise public interest issues under ORS 537.170(8), the Department must perform a public interest review under ORS 537.153(2).

**e. Specific Exception 93**

The Rue Protestants assert that the Proposed Order’s characterization of the Protestants’ arguments as asserting that the Department is “kicking the can down the road” are a mischaracterization and that a better characterization would be “that OWRD cannot avoid its own statutorily mandated public interest analysis by deferring to other agencies’ approval processes.”

**Response and Disposition:** This exception is denied.

The Rue Protestants’ arguments about the application of ORS 537.170(8) are discussed in other portions of this discussion. With regard to the Rue Protestants’ arguments that the Department impermissibly defers to other agencies’ approval processes, the Rue Protestants ignore the legislative policies governing storage, which allow approval of a reservoir permit even



though all conditions necessary for making use of the reservoir are not yet satisfied. Aside from allowing approval of a reservoir permit even absent evidence of access to lands inundated by the reservoir, the statutes governing storage also allow approval of a reservoir permit on the basis of “preliminary plans, specifications and supporting information if the approval includes a condition requiring the commission’s approval of final plans, specifications and supporting information.” ORS 537.400(4). *See also* ORS 537.248 (stating that an applicant “need not submit engineering plans and specifications before the permit is issued”). That is, the statutes direct the Department to approve a reservoir permit *before* the final plans and specifications of the reservoir are developed and the ultimate characteristics of the reservoir are known. Any conditions placed on a reservoir permit must thus operate prospectively to address future contingencies; provided, however, that the public interest is protected.

For example, even though the final plans and specifications of the proposed reservoir are unknown at this point, the proposed permit is conditioned to require that any reservoir that may be constructed must be constructed in conformity with Oregon statutes and rules governing fish passage and fish screening, and must be constructed to ensure that the laws governing water quality are not violated (among other conditions). In so conditioning the proposed permit, the Department has not impermissibly deferred the public interest determination, it has followed the statutory directive to approve reservoir applications and issue permits at the most preliminary stages of project development while assuring that that water is allocated in a manner that protects the public interest. In this case, the Department has protected the public interest by conditioning reservoir development to require certain outcomes, even absent knowledge of the final plans and specifications of the reservoir itself.

#### f. Specific Exception 94

The Rue Protestants except to the following discussion on pages 59 – 60 of the Proposed Order:

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

Protestants argue that the statement that “the only decision” being made here is that the Drift Creek Project meets the requirements for a water storage permit “understates the significance of granting this permit.” They argue first that the public interest analysis required by ORS 537.170(8) illustrates that the project will be detrimental to the public interest. They also argue that “issuing a water storage permit is a significant decision because this is the *only* agency permit that comes with condemnation authority to forcibly acquire private land.”

**Response and Disposition:** This exception is denied.

The Proposed Order does not understate the significance of this water allocation decision, as illustrated by the ALJ's detailed findings of fact and opinion. The record supports finding that the proposed use is consistent with the public interest as provided in ORS 537.170(8). In addition, the Department cannot authorize condemnation of lands inundated by the proposed reservoir; rather, that authority belongs to the District. Issuance of a storage permit does not "come with condemnation authority," as Protestants assert.

### **3. ORS 537.170(8) Factors**

The Rue Protestants take exception to the Proposed Order's evaluation of the public interest factors under ORS 537.170(8).

- a. General Exception #3: The ALJ incorrectly found that the Protestants did not demonstrate under ORS 537.170(8) that the proposed use will impair or be detrimental to the public interest.**

Rue General Exception #3 is addressed in the discussion of Rue Specific Exception 111, below.

- b. Specific Exceptions 88 and 111: Burden of Proof and Public Interest Review**

The Rue Protestants take exception to the statement in the Proposed Order (page 80) that states that the "Protestants have the burden of demonstrating that EVWD's proposed project will be detrimental to the public interest." Protestants assert that the Department has the "ultimate burden of persuasion to show that the project will not be detrimental to the public interest." The Director does not disagree with this assertion, but notes that the Proposed Order reflects that the Department met both the burden of production and persuasion and that the presumption was established and is not overcome.

The Rue Protestants take further exception to the Proposed Order's determination that they did not show by a preponderance of the evidence that the Drift Creek dam and reservoir will impair or detrimentally affect the public interest. The Rue Protestants' exceptions to the underlying findings of fact are evaluated in the consideration of the Rue Protestants' specific exceptions. As discussed, the findings are supported by substantial evidence and the Proposed Order's analysis and conclusions by substantial reason. The Rue Protestants' arguments regarding the Proposed Order's conclusion that they did not show by a preponderance of the evidence that the proposed use will impair or detrimentally affect the public interest are further discussed in the Rue Protestants' specific exceptions to pages 79 – 99 of the Proposed Order.

**Response and Disposition:** This exception is denied.

As discussed in the Proposed Order, ORS 537.153(2) sets forth the framework for the Department's review of a new application for a water use permit. ORS 537.153(2) provides 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 the rules of the Water Resources Commission. This presumption shall be rebuttable.

The statute then specifies how the presumption may be rebutted, providing that the presumption "may be overcome by a preponderance of evidence that either (a) One or more 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 or in a finding that shows the specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and specifically how the identified public interest would be impaired or detrimentally affected." ORS 537.153(2).

If the Department determines that the presumption has been established, then it must include that determination in its proposed final order on the permit application. ORS 537.153(3)(g); *Willamette Water Co. v. WaterWatch of Oregon, Inc.*, 288 Or App 778, 782 (2017). "If the presumption is rebutted, the director of the department or, when appropriate, the commission, must evaluate whether the proposed use is consistent with the public interest before issuing a final order on the application." ORS 537.170(8); *id.* That evaluation requires the Director or the Commission to consider the factors in ORS 537.170(8) to make that determination.

In this case, the ALJ determined that the Department met its initial burden of showing that the public interest presumption was established. The ALJ also determined that, consistent with ORS 537.153(3), the Department provided in the PFO "an assessment of whether the proposed use would impair or be detrimental to the public interest as provided in ORS 537.170."

Consistent with ORS 537.153, Protestants' burden of proof and persuasion was to show by a preponderance of the evidence that "one or more of the criteria for establishing the presumption are not satisfied" or that the proposed use will impair or be detrimental to the public interest as demonstrated in a protest and in any subsequent contested case hearing. The ALJ found that the Protestants did not establish that one or more of the criteria for establishing the presumption are not satisfied; nor did the ALJ find that the Protestants met their burden of showing by a preponderance of evidence the specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected.

Because the presumption is not rebutted, the Director or the Commission need not evaluate the factors in ORS 537.170(8) to make a final determination of whether the proposed use as modified would impair or be detrimental to the public interest. ORS 537.170(8). Nonetheless, the evidence presented by Protestants in the contested case still required evaluation by the ALJ to determine whether the Department's analysis of the factors in ORS 537.170(8) was rebutted by a preponderance of evidence that a specific public interest under ORS 537.170(8) would be impaired or detrimentally affected. The Proposed Order provides this

analysis on pages 79 – 88, analyzing the factors in ORS 537.170(8) in light of the evidence presented at hearing. The ALJ concluded that the Rue Protestants did not meet their burden to show by a preponderance of the evidence that the proposed use will impair or be detrimental to the public interest as demonstrated by a specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected. ORS 537.153(2). In short, the ALJ found that the rebuttable presumption had been established and was not overcome. The Department therefore met its burden of production and persuasion.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of Rue General Exception #3 and Rue Specific Exceptions 88 and 111: A249, A250, A272

**c. Specific Exception 109**

The Rue Protestants take exception to the heading titled “Issue No. 3: Public Policy Review” and assert the heading should be titled to reflect that it is the public interest test, as codified under ORS 537.170(8), that is the subject of the discussion.

**Response and Disposition:** This exception is granted; the Director has revised the heading to reflect that it is the public interest test that is being considered.

**d. Specific Exceptions 81, 82, 87, and 110**

The Rue Protestants take exception to the Proposed Order’s discussion of the PFO’s public interest analysis, asserting that the PFO’s analysis of the public interest factors in ORS 537.170(8) was deficient.

**Response and Disposition:** These exceptions are denied.

These exceptions continue to object to the public interest analysis in the PFO, even as they acknowledge that the PFO is being superseded by a Final Order. The Final Order’s analysis of the public interest factors under ORS 537.170(8) has been augmented by the evidentiary record produced during the 10-day contested case hearing in this matter. To the extent that the Rue Protestants disagree with the Final Order’s analysis of the ORS 537.170(8) factors or believe that it is inadequate, their remedy is to file exceptions to it, not to continue to challenge the analysis in the PFO.

**e. Specific Exception 112: Conserving the Highest Use of the Water for All Purposes**

With regard to the factor in ORS 537.170(8)(a), conserving the highest use of the water for all purposes, the Rue Protestants take exception to the fourth sentence in the following statement in the Proposed Order (page 82):

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 water may be applied and for which it may have a special value to the public. Thus, Protestants' evidence does not demonstrate that the proposed use will impair or be detrimental to the public interest.

**Response and Disposition:** This exception is denied.

The Rue Protestants assert that the statement is incomplete and misleading as it omits fish and wildlife, and also that the preponderance of evidence does not show that the irrigation benefits outweigh the loss of fisheries and other benefits in Drift Creek. While it is accurate to characterize fish and wildlife uses of Drift Creek as other beneficial uses that have a special value to the public, the Proposed Order's discussion of ORS 537.170(8)(a) does, in fact, discuss those beneficial uses. As the Proposed Order correctly concluded, a preponderance of evidence does not show that the appropriation for storage will result in a loss of fisheries and other benefits in Drift Creek. The use is conditioned to prevent injury to existing instream water rights, and is consistent with the rules of the Commission that require consideration of the impact of the proposed use on fish habitat.

#### **f. Maximum Economic Development of the Waters Involved**

The Proposed Order (pages 83 – 84) analyzes the public interest factor in ORS 537.170(8)(b), the maximum economic development of the waters involved, and concludes that "Protestants have not demonstrated that the proposed project fails to maximize economic development of the waters [at] issue and is therefore detrimental to the public interest." The Rue Protestants argue that "[i]t is impossible to determine maximum economic development by looking only at estimate benefits" and argue that, absent an analysis of the costs of the project as compared with the benefits of the project, the Department cannot truly gauge whether the project constitutes the maximum economic development of the waters involved. Protestants then assert that costs not considered include the "cost of additional studies and permitting, the cost of designing and building the reservoir," dam building costs, land acquisition costs, and the costs of conveyances and pipelines.

**Response and Disposition.** This exception is denied.

This public interest factor directs the Department to consider the maximum economic development of the waters involved—in other words, whether allocating the water to the purpose described in the application results in the maximum economic development of the public's water. The analysis must compare other economic uses that may be made of the water to determine the maximum economic development of the waters to be appropriated; it need not estimate the total costs of the proposed project to determine whether it is a "good" investment. In this case, there are no competing water uses of Drift Creek that would require choosing which water use would

result in the maximum economic development of the waters involved.<sup>96</sup> In short, the factor requires a determination of whether the water is being put to maximum economic use as compared with other competing uses of water; it does not require determining the particular costs of a project to determine its economic viability.

The following specific exceptions raised by WaterWatch are denied and addressed by this discussion: A259

**g. Specific Exception 113: The Amount of Waters Available for Appropriation for Beneficial Use**

ORS 537.170(8)(d) requires the consideration of “[t]he amount of waters available for appropriation for beneficial use.” The Proposed Order analyzes this factor in light of the evidence presented in the contested case. The Proposed Order notes (page 84) that, although the Department’s modeling shows that sufficient unappropriated water is available for the proposed storage appropriation, “the Protestants still maintain that this factor militates against granting the District’s storage permit application” and yet Protestants “offer no evidence that withdrawing 12,000 acre feet of water per year would interfere with any other beneficial use not already discussed.” The Rue Protestants take issue with this statement and assert that it is incorrect because the Protestants “demonstrated that impounding and withdrawing water from Drift Creek will eliminate fish habitat and will replace productive farmland with a reservoir for the private benefit of competing farmers.”

**Response and Disposition:** This exception is denied.

The evidence in the record does not support a conclusion that the impoundment will result in a net loss of fish habitat; instead, the record establishes that the proposed use is conditioned to protect the existing senior instream water right and is otherwise conditioned to protect fish habitat consistent with the recommendations of ODFW. If the District is successful in condemning Protestants’ lands, then a reservoir may replace productive farmland with a reservoir that benefits competing farmers. However, the latter is the result not of a water allocation decision, but of the District’s exercise of its condemnation authorities. The Department is not authorized to deny a water right because a District may exercise statutorily granted condemnation authority, especially if water is available for further appropriation consistent with the rules governing allocation.

**h. Specific Exceptions 114 – 116: Prevention of Wasteful, Uneconomic, Impracticable or Unreasonable Use of the Waters Involved**

The fifth public interest factor is “[t]he prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.” ORS 537.170(8)(e). The Rue Protestants take exception (Specific Exceptions 114 – 116 and interlineated, highlighted text) to the Proposed Order’s analysis of this factor to assert that irrigation districts are “essentially

<sup>96</sup> The waters of Drift Creek are also used for fish habitat, but the proposed use is conditioned so that it does not injure the instream water right and so that impacts to STE fish habitat are mitigated.

business enterprises, created by and chiefly benefiting a specific group of landowners,” and as a result, the Department ought to exercise oversight over the District’s actions by reviewing whether the proposed project is “fair, reasonable, necessary, and cost effective.”

**Response and Disposition:** These exceptions are denied.

The Director denies these exceptions because they are based on a misreading of ORS 537.170(8)(e). That statute requires the Department to consider whether the proposed use would use *water* in a wasteful, uneconomic, impracticable, or unreasonable manner. It does not authorize the Department to evaluate whether the overall project proposed by the District is “fair, reasonable, necessary, and cost effective,” as the Rue Protestants suggest.

ORS 537.170(8)(e) requires the Department to assess whether a project presents an impracticable or unreasonable use of the waters involved, but this statute must be read in the context of all of the statutes governing appropriation of surface water, including ORS 537.400, which authorizes the Department to issue a primary storage permit even if certain requirements have not yet been satisfied—as long as the permit is conditioned upon satisfaction of those requirements. In addition, an applicant has 10 years after the date the permit is issued to “begin and complete and construction of diversion or storage works and to perfect the water right.” ORS 537.248(1). If the District cannot complete the project consistent with this requirement, the District risks the loss of the permit. ORS 537.410. The statutory scheme governing the appropriation, construction of works and perfection of the right governs whether a user may ultimately vest in the right to appropriate the water. The evidence presented at the hearing supports finding that the District could develop the project as proposed, and that is sufficient for the purposes of issuing a permit.

The Rue Protestants further take exception to the Proposed Order’s statement (page 85) that the Victor Point farmers are not making use of Drift Creek water on their land and “[t]hus, water used by one group of farmers is not being taken away and given to competitors.” The Rue Protestants argue that the Drift Creek farmers are making use of their land, which will be flooded by a reservoir for the private benefit of other farmers. The dilemma presented by the possible condemnation by the District of some of the Rue Protestants’ land is a formidable one, but the Department is not authorized to deny a permit if it disagrees with the lawful methods an applicant uses to acquire necessary access. The Oregon Legislature has instructed the Department to issue a permit, notwithstanding an applicant’s current lack of access to the lands to be inundated.

Insofar as the Rue Protestants and the District compete for the same water resources, the Department must assess those competing interests consistent with ORS 537.153, ORS 537.170, and the Commission’s rules. In this case, the Rue Protestants are dryland farmers. The appropriation of this water for storage will not affect their ability to continue to dryland farm on the lands that remain to them.

**i. Specific Exception 117: The State Water Resources Policy Formulated under ORS 536.295 to 536.350 and 537.505 to 537.534**

The Proposed Order concludes (page 86) that the proposed use is consistent with the “broad statewide policies regarding water resources” and the factors in OAR 690-410-0080(2). The Rue Protestants assert that they have “explained how these [Division 410] rules should be applied by the Department to evaluate this project and deny this permit.”

**Response and Disposition:** This exception is denied.

This portion of the Proposed Order inaccurately applies the Division 410 rules, and the Director has revised it accordingly in the Final Order. As explained in the Director’s consideration of exceptions and in the Department’s closing briefs, the Division 410 rules properly guide the Commission in its programmatic activities, but should not be applied on a case-by-case basis to each application.

#### 4. Consideration of Public Comments

- a. **General Exception #4: The ALJ incorrectly found that the PFO adequately acknowledges and addresses public comments opposing EVWD’s storage application under OAR 690-310-0150(1).**

Rue General Exception #4 is addressed in the discussion of Rue Specific Exception 74, below.

- b. **Specific Exception 74**

Protestants Rue et al. take exception to Finding of Fact #178 to argue that Ms. Eastman “did not identify the issues that were outside the scope of review, or explain why they were outside the scope.” They also assert that Ms. Eastman’s conclusions that certain comments were outside the scope of review were incorrect as a matter of law.

**Response and Disposition:** This exception is denied.

With regard to Protestant’s assertion that Finding of Fact #178 is insufficient as an evidentiary matter, this exception is denied. As noted in the Proposed Order, 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.” (Proposed Order at 88.) With regard to Protestants’ assertion that Ms. Eastman’s conclusions that certain comments were outside the scope of review is incorrect as a matter of law,” as provided in the Proposed Order, Protestants had an opportunity to show which comments they believed were not outside the scope of review; they failed to meet their burden and cannot now argue that facts which they have not established are impermissible as a matter of law. In addition, as noted by the ALJ in her application of *Examolitis*, the Department is only authorized to address issues that are within its authority to address. The record supports finding that Ms. Eastman addressed comments as they were consistent with the Department’s authority to make water allocation decisions.



The following specific exceptions raised by WaterWatch are denied and addressed by this discussion of Rue’s General Exception #4: A172, A273

**C. EVWD**

The District excepts to the measurement condition on page 90 of the Proposed Order and the associated discussion on pages 59 and 64 – 65 of the Proposed Order. The District argues that no measurement condition is required to protect against injury to the instream water right, because under the prior appropriation system, the instream water right will be senior to any storage right obtained by the District. The District also argues that no measurement condition should be imposed during the non-storage season, because the requirement that the District pass all live flow during the non-storage season is sufficient to ensure that District is not diverting water for storage during that period. The District proposes wording for a measurement condition, should the Director be inclined to adopt one.

**Response and Disposition:** The District’s exception has been rendered moot by the Director’s revisions to the Proposed Order.

The Director has revised the measurement condition proposed in the Proposed Order, as well as the associated discussion to which the District excepted. Thus, the District’s exception is now moot.

**II. Consideration of Specific Exceptions**

WaterWatch and the Rue Protestants each filed exceptions that they labeled “specific exceptions.” This section describes why the Director grants or denies each specific exception. The specific exceptions are listed in two tables below, with the disposition of each exception indicated in the “Disposition” column. Some specific exceptions list more than one category in the “Disposition” column because they were granted or denied for multiple reasons.

Some specific exceptions contain multiple parts. For those exceptions, the notation “A100/S1” is used, with “A100” denoting the number of the exception and “S1” denoting the relevant sentence (or clause, if necessary) in the exception.

As indicated in the tables, many specific exceptions are addressed in the Director’s Narrative Consideration of Exceptions.

**A. Key: Reasons for Granting Exceptions**

Category	Description
101	The exception asserts that a finding of fact or recounting of an evidentiary matter is incorrect or incomplete. The Director grants the exception because (if it is a finding of historic fact) there is clear and convincing evidence in the record that the finding is wrong, and because there is substantial evidence in the record that supports the revised finding.

102	The exception asserts that the Proposed Order inaccurately describes the water right application process set forth in ORS chapter 537 and related administrative rules. The Director grants the exception because the Proposed Order inaccurately describes the water right application process set forth in ORS chapter 537 and related administrative rules.
103	The exception asserts that the Proposed Order should contain an additional finding of fact. The Director grants the exception because the additional finding of fact is relevant to the issues addressed in the Proposed Order, and because there is substantial evidence in the record to support the additional finding of fact.
104	The exception asserts that the Proposed Order cites to the wrong portion of the record. The Director grants the exception because the Proposed Order cites to the wrong portion of the record (e.g., there is a typo).
105	The exception asserts that the Proposed Order mischaracterizes a party's argument. The Director grants the exception because the Proposed Order mischaracterizes the argument set forth in the party's briefs and at hearing.
106	The exception asserts that it is unclear how a footnote relates to the text. The Director grants the exception and has moved the footnote to a more logical location.

#### B. Key: Reasons for Denying Exceptions

Category	Description
1	The exception asserts that a finding of fact is incomplete, or incomplete and misleading, or does not contain other evidence that the Protestants consider relevant. The Director denies the exception because the finding of fact is adequate. Findings of fact do not summarize or recite all of the evidence offered; rather, findings of fact are concise statements of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the agency's order. ORS 183.470(2); <i>South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County</i> , 280 Or 3, 21 (1977) ("What is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based"); <i>Graham v. OLCC</i> , 20 Or App 97, <i>aff'd</i> , 25 Or App 759 (1976).
2	The exception asserts that a finding of fact is incorrect or misleading. The Director denies the exception because substantial evidence in the record supports the finding, and (if it is a finding of historic fact) there is not clear and convincing evidence in the record that the finding is wrong.
3	The exception is cumulative of other exceptions raised by the same party. The Department has responded to those other exceptions.
4	The exception asserts that a finding of fact should be revised, but the exception misinterprets the finding of fact, or makes an unwarranted inference from the finding of fact. Even accepting as true the argument made in the exception, the finding of fact would not need to be revised.
5	The exception asserts that the evidence cited in support of the finding of fact does not constitute substantial evidence. The Director denies the exception because the cited evidence does constitute substantial evidence, and because (if it is a finding of

	historic fact) there is not clear and convincing evidence in the record that the finding is wrong.
6	The exception asserts that the Proposed Order inaccurately describes the water right application process set forth in ORS chapter 537 and related administrative rules. The Director denies the exception because the Proposed Order accurately describes the water right application process set forth in ORS chapter 537 and related administrative rules.
7	The exception asserts that an issue should have been considered because it was raised in the protest. The Director denies the exception because the issue was not raised in the protest.
8	The exception asserts that the Proposed Order mischaracterizes a party's argument or objection or inaccurately recounts an evidentiary matter. The Director denies the exception because substantial evidence in the record supports the Proposed Order's characterization of the party's argument or objection.
9	The exception has become moot as a result of revisions that the Director has made to the Proposed Order.
10	The exception asserts that a finding of fact is incomplete. The Director denies the exception because the facts that the protestant asserts are missing are, in fact, included in the Proposed Order.

**C. Consideration of WaterWatch's Specific Exceptions**

Exception	Portion of Proposed Order Excepted To	Disposition
A1	History of the Case (p. 3)	Category #6
A2	History of the Case (p. 3)	Category #6
A3	History of the Case (p. 3)	Category #7
A4	History of the Case (p. 3)	Category #105
A5	History of the Case (p. 4)	Category #101
A6	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
A7	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
A8	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #8
A9	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
A10	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
A11	Evidentiary Rulings, Excluded Written Direct Testimony (p. 6)	Category #101
A12	Evidentiary Rulings, Excluded Written Direct Testimony (p. 6)	Category #8
A13	Finding of Fact #10 (p. 9)	Category #4
A14	Finding of Fact #10, fn 7 (p. 9)	Category #101
A15/S1-S3	Finding of Fact #10 (p. 9)	Category #101

A15/S4	Finding of Fact #10 (p. 9)	Category #5
A16	Finding of Fact #12 (p. 9)	Category #101
A17	Finding of Fact #13 (p. 10)	Category #2
A18	Finding of Fact #23 (p. 10)	Category #101
A19	Findings of Fact, Representative EVWD Members (p. 11)	Category #2
A20	Finding of Fact #29 (p. 11)	Category #101
A21/S1	Finding of Fact #29, fn 9 (p. 11)	Category #2
A21/S2-S3	Finding of Fact #29, fn 9 (p. 11)	Category #101
A21/S4	Finding of Fact #29, fn 9 (p. 11)	Category #1
A22	Finding of Fact #30 (pp. 11-12)	Category #1
A23	Finding of Fact #31 (p. 12)	Category #5
A24	Finding of Fact #32 (p. 12)	Category #101
A25/S1	Finding of Fact #33 (p. 12)	Category #2
A25/S2	Finding of Fact #33 (p. 12)	Category #10
A26	Finding of Fact #34 (p. 12)	Category #5
A27/S1, S3	Finding of Fact #35 (p. 12)	Category #101
A27/S2	Finding of Fact #35 (p. 12)	Category #2
A28	Finding of Fact #36 (p. 12)	Category #101
A29/S1, S2 (first clause), S3, S4	Finding of Fact #37 (p. 12)	Category #2 & Category #5
A29/S2 (final clause)	Finding of Fact #37 (p. 12)	Category #101
A30	Finding of Fact #39 (p. 13)	Category #101
A31	Finding of Fact #40 (p. 13)	Category #101
A32	Finding of Fact #42 (p. 13)	Category #2
A33	Finding of Fact #43 (p. 13)	Category #103
A34	Finding of Fact #45 (p. 13)	Category #2
A35	Finding of Fact #46 (p. 13)	Category #2 & Category #5
A36/S1-S2	Finding of Fact #47 (p. 13)	Category #101
A36/S3	Finding of Fact #47 (p. 13)	Category #4
A36/S4	Finding of Fact #47 (p. 13)	Category #2
A37	Finding of Fact #48 (p. 14)	Category #101
A38	Finding of Fact #48 (p. 14)	Category #4
A39	Finding of Fact #49 (p. 14)	Category #2
A40	Finding of Fact #50 (p. 14)	Category #2
A41	Finding of Fact #52 (p. 14)	Category #2
A42	Finding of Fact #52 (p. 14)	Category #101
A43	Finding of Fact #55 (p. 14)	Category #101
A44	Finding of Fact #55 (p. 14)	Category #101
A45/S7	Finding of Fact #56 (p. 14)	Category #101
A46	Finding of Fact #58 (p. 15)	Category #2

A47	Finding of Fact #58 (p. 15)	Category #2
A48	Finding of Fact #59 (p. 14)	Category #101
A49	Finding of Fact #61 (p. 15)	Category #2
A50	Finding of Fact #62 (p. 15)	Category #2
A51	Finding of Fact #62 (p. 15)	Category #101
A52	Finding of Fact #62 (p. 15)	Category #2
A53	Finding of Fact #63 (p. 15)	Category #2
A54	Finding of Fact #64 (p. 15)	Category #101
A55	Finding of Fact #65 (p. 15)	Category #101
A56	Finding of Fact #66 (p. 16)	Category #101
A57	Finding of Fact #67 (p. 16)	Category #4
A58/S1	Finding of Fact #68 (p. 16)	Category #101
A58/S2	Finding of Fact #68 (p. 16)	Category #2
A59	Finding of Fact #69 (p. 16)	Category #2 & Category #4
A60	Finding of Fact #69 (p. 16)	Category #2 & Category #4
A61	Finding of Fact #70 (p. 16)	Category #1 & Category #2
A62	Finding of Fact #70 (p. 16)	Category #2
A63	Finding of Fact #88, fn 15 (p. 18)	Category #2
A64/S1	Finding of Fact #113 (p. 21)	Category #2
A64/S2	Finding of Fact #113 (p. 21)	Category #1
A65/S1	Finding of Fact #115 (p. 21)	Category #1
A65/S2	Finding of Fact #115 (p. 21)	Category #101
A66	Finding of Fact #117 (p. 22)	Category #2 & Category #4
A67	Finding of Fact #118 (p. 22)	Category #2
A68	Finding of Fact #120 (p. 22)	Category #2
A69/S1	Finding of Fact #121 (p. 22)	Category #2
A69/S2	Finding of Fact #121 (p. 22)	Category #6
A70	Finding of Fact #122 (p. 22)	Category #2
A71	Finding of Fact #122 (p. 22)	Category #2
A72	Finding of Fact #125 (p. 23)	Category #2
A73/S1, S2, S4, S5	Finding of Fact #127 (p. 23)	Category #2
A73/S3, S6	Finding of Fact #127 (p. 23)	Category #1
A74	Finding of Fact #129 (p. 23)	Category #1 & Category #2
A75	Finding of Fact #132 (p. 24)	Category #2
A76	Finding of Fact #133 (p. 24)	Category #101
A77	Finding of Fact #133 (p. 24)	Category #2
A78	Finding of Fact #135 (p. 24)	Category #101
A79	Finding of Fact #136 (p. 24)	Category #2
A80	Finding of Fact #137 (p. 24)	Category #2
A81	Finding of Fact #139 (p. 25)	Category #2 & Category #4
A82	Finding of Fact #141 (p. 25)	Category #1
A83	Finding of Fact #142 (p. 25)	Category #2
A84	Finding of Fact #142 (p. 25)	Category #2
A85	Finding of Fact #142 (p. 25)	Category #1

A86	Finding of Fact #142, fn 22 (p. 25)	Category #2
A87	Finding of Fact #145 (p. 25)	Category #1
A88/S1-S3	Finding of Fact #146 (p. 26)	Category #2 & Category #4
A88/S4	Finding of Fact #146 (p. 26)	Category #1
A89	Finding of Fact #147 (p. 26)	Category #1
A90	Finding of Fact #147 (p. 26)	Category #102
A91	Finding of Fact #148 (p. 26)	Category #1 & Category #5
A92	Finding of Fact #149 (p. 26)	Category #1 & Category #2
A93/S1 (first clause)	Finding of Fact #150 (p. 26)	Category #101
A93/S1 (second clause), S2, S3	Finding of Fact #150 (p. 26)	Category #2
A94	Finding of Fact #164 (p. 28)	Category #2 & Category #4
A95	Finding of Fact #165 (p. 28)	Category #2
A96	Finding of Fact #168 (p. 28)	Category #101
A97	Finding of Fact #171 (p. 29)	Category #103
A98	Finding of Fact #172 (p. 29)	Category #4
A99	Finding of Fact #173 (p. 29)	Category #101
A100	Finding of Fact #181 (p. 30)	Category #6
A101	Finding of Fact #183 (p. 31)	Category #101
A102	Finding of Fact #185 (p. 31)	Category #1
A103	Finding of Fact #187 (p. 31)	Category #101
A104	Finding of Fact #190 (p. 32)	Category #101
A105/S1-S3	Finding of Fact #191 (p. 32)	Category #101
A105/S4	Finding of Fact #191 (p. 32)	Category #2
A106	Finding of Fact #194 (p. 32)	Category #102
A107	Finding of Fact #194 (p. 32)	Category #6
A108	Finding of Fact #195 (p. 33)	Category #101
A109	Finding of Fact #195, fn 27 (p. 33)	Category #2 & Category #4
A110	Finding of Fact #197 (p. 33)	Category #101
A111/S1-S4	Finding of Fact #201 (pp. 33-24)	Category #2
A111/S5	Finding of Fact #201 (pp. 33-34)	Category #1
A112	Finding of Fact #203 (p. 34)	Category #1
A113	Finding of Fact #204 (p. 34)	Category #2
A114	Finding of Fact #204 (p. 34)	Category #101
A115	Finding of Fact #204 (p. 34)	Category #1 & Category #4
A116	Finding of Fact #204 (p. 34)	Category #2 & Category #5
A117/S1- S2, S3 (through "parameters ")	Finding of Fact #205 (p. 34)	Category #101
A117/S3	Finding of Fact #205 (p. 34)	Category #1

(starting with "under"), S4-S7		
A118	Finding of Fact #207 (p. 34)	Category #1 & Category #4
A119	Finding of Fact #208 (p. 34)	Category #1
A120	Finding of Fact #208 (p. 34)	Category #1
A121	Finding of Fact #211 (p. 35)	Category #2
A122	Finding of Fact #213 (p. 35)	Category #2
A123	Finding of Fact #215 (p. 35)	Category #2
A124	Finding of Fact #215 (p. 35)	Category #1 & Category #2
A125	Finding of Fact #217 (p. 35)	Category #2
A126	Finding of Fact #219 (p. 36)	Category #2
A127	Finding of Fact #220 (p. 36)	Category #2
A128	Finding of Fact #221 (p. 36)	Category #101
A129	Finding of Fact #223 (p. 36)	Category #101
A130	Finding of Fact #223 (p. 36)	Category #2
A131	Finding of Fact #225 (p. 37)	Category #1
A132	Finding of Fact #226 (p. 37)	Category #9
A133	Finding of Fact #227 (p. 37)	Category #9
A134	Finding of Fact #228 (p. 37)	Category #103
A135	Finding of Fact #233 (p. 38)	Category #2
A136	Finding of Fact #235 (p. 38)	Category #2
A137	Finding of Fact #237 (p. 38)	Category #4
A138	Finding of Fact #238 (p. 38)	See response to WaterWatch General Exception #5
A139	Finding of Fact #239 (p. 38)	Category #2
A140	Finding of Fact #239 (pp. 38-39)	Category #4
A141	Finding of Fact #240 (p. 39)	Category #2
A142	Finding of Fact #244 (p. 39)	Category #101
A143	Finding of Fact #247 (p. 39)	See response to WaterWatch General Exception #5
A144/S1-S2	Finding of Fact #248 (p. 40)	Category #5
A144/S3-S4	Finding of Fact #248 (p. 40)	Category #2
A145	Finding of Fact #250 (p. 40)	Category #5
A146	Finding of Fact #254 (p. 40)	Category #2 & Category #4
A147	Finding of Fact #259 (p. 41)	Category #2
A148	Finding of Fact #259 (p. 41)	Category #2
A149/S1	Finding of Fact #260 (p. 41)	Category #2 & Category #4
A149/S2	Finding of Fact #260 (p. 41)	Category #104
A150/S1	Finding of Fact #261 (p. 41)	Category #4
A150/S2-S3	Finding of Fact #261 (p. 41)	Category #1
A151	Finding of Fact #265 (p. 42)	Category #103
A152	Finding of Fact #266 (p. 42)	Category #10
A153	Finding of Fact #267 (p. 42)	Category #2

A154	Finding of Fact #268 (p. 42)	Category #2
A155	Finding of Fact #269 (p. 42)	Category #2
A156	Finding of Fact #270 (p. 42)	Category #2
A157/S1-S2	Finding of Fact #273 (p. 43)	Category #101
A157/S3-S5	Finding of Fact #273 (p. 43)	Category #1
A158	Finding of Fact #274 (p. 43)	Category #2
A159	Finding of Fact #275 (p. 43)	Category #101
A160	Finding of Fact #277 (p. 44)	Category #2
A161	Finding of Fact #279 (p. 44)	Category #10
A162	Finding of Fact #279 (p. 44)	Category #10
A163	Finding of Fact #281 (p. 44)	Category #10
A164/S1-S3	Finding of Fact #282 (pp. 44-45)	Category #4
A164/S4-S5	Finding of Fact #282 (pp. 44-45)	Category #101
A165	Finding of Fact #282 (p. 45)	Category #1
A166	Finding of Fact #283 (p. 45)	Category #2
A167	Finding of Fact #294 (p. 50)	Category #2
A168	Conclusion of Law #1 (p. 50)	See response to WaterWatch General Exceptions #1 and #2
A169	Conclusion of Law #2 (p. 50)	See response to WaterWatch General Exception #5 and Rue General Exception #2
A170	Conclusion of Law #3 (p. 51)	See response to WaterWatch General Exception #3 and Rue General Exception #3
A171	Conclusion of Law #4 (p. 51)	See Narrative Consideration of Exceptions
A172	Conclusion of Law #5 (p. 51)	See response to Rue General Exception #4
A173	Conclusion of Law #6 (p. 51)	See response to WaterWatch General Exception #5
A174	Opinion (p. 51)	Category #3
A175	Opinion (p. 51)	See Narrative Consideration of Exceptions
A176	Opinion (p. 51)	See response to WaterWatch General Exception #1
A177	Opinion (p. 54)	See response to WaterWatch General Exception #2 and Rue General Exception #3
A178	Opinion (p. 55)	See response to WaterWatch General Exception #4
A179	Opinion (p. 55)	Category #2
A180	Opinion (p. 56)	See response to WaterWatch General Exception #5
A181	Opinion (p. 56)	See response to WaterWatch General Exception #5



A182	Opinion (p. 56)	Category #3
A183	Opinion (p. 56)	Category #2
A184	Opinion (p. 56)	See Narrative Consideration of Exceptions
A185	Opinion (p. 57)	See Narrative Consideration of Exceptions
A186	Opinion (p. 57)	See response to WaterWatch General Exception #1
A187	Opinion (p. 57)	See response to WaterWatch General Exception #1
A188	Opinion (p. 57)	See response to WaterWatch General Exception #1
A189	Opinion (p. 57)	See response to WaterWatch General Exception #1
A190	Opinion (pp. 57-58)	See response to WaterWatch General Exception #1
A191	Opinion (p. 58)	Category #3
A192	Opinion (p. 58)	See response to WaterWatch General Exception #1
A193	Opinion (p. 58)	See Narrative Consideration of Exceptions
A194	Opinion (p. 59)	Category #101
A195	Opinion (p. 59)	See Narrative Consideration of Exceptions
A196	Opinion (p. 60)	See Narrative Consideration of Exceptions
A197	Opinion (p. 60)	Category #9
A198	Opinion (p. 60)	Category #9
A199	Opinion (p. 61)	See Narrative Consideration of Exceptions
A200	Opinion (p. 61)	Category #9
A201	Opinion (p. 61)	Category #3
A202	Opinion (p. 62)	See Narrative Consideration of Exceptions
A203	Opinion (p. 63)	See Narrative Consideration of Exceptions
A204	Opinion (p. 63)	See Narrative Consideration of Exceptions
A205	Opinion (p. 64)	See Narrative Consideration of Exceptions
A206	Opinion (p. 64)	Category #3
A207	Opinion (p. 65)	Category #3
A208	Opinion (p. 65)	See Narrative Consideration of Exceptions
A209	Opinion (p. 65)	See Narrative Consideration of

		Exceptions
A210	Opinion (p. 66)	Category #3
A211	Opinion (p. 66)	See Narrative Consideration of Exceptions
A212	Opinion (p. 67)	See Narrative Consideration of Exceptions
A213	Opinion (pp. 67-68)	Category #3
A214	Opinion (p. 68)	See Narrative Consideration of Exceptions
A215	Opinion (p. 68)	See Narrative Consideration of Exceptions
A216	Opinion (p. 68)	See Narrative Consideration of Exceptions
A217	Opinion (p. 68)	See Narrative Consideration of Exceptions
A218	Opinion (p. 69)	See Narrative Consideration of Exceptions
A219	Opinion (p. 69)	See Narrative Consideration of Exceptions
A220	Opinion (p. 70)	See Narrative Consideration of Exceptions
A221	Opinion (p. 70)	See Narrative Consideration of Exceptions
A222	Opinion (p. 70)	See response to WaterWatch General Exception #5
A223	Opinion (p. 70)	See response to WaterWatch General Exception #5
A224	Opinion (p. 70)	See response to WaterWatch General Exception #5
A225	Opinion (p. 72)	See response to WaterWatch General Exception #5
A226	Opinion (p. 72)	See response to WaterWatch General Exception #5
A227	Opinion (p. 72)	See Narrative Consideration of Exceptions
A228	Opinion (p. 73)	See Narrative Consideration of Exceptions
A229	Opinion (p. 73)	See Narrative Consideration of Exceptions
A230	Opinion (p. 73)	See Narrative Consideration of Exceptions
A231	Opinion (p. 73)	See Narrative Consideration of Exceptions
A232	Opinion (p. 73)	See Narrative Consideration of Exceptions
A233	Opinion (p. 73)	Category #105

A234	Opinion (p. 74)	See Narrative Consideration of Exceptions
A235	Opinion (p. 74)	See Narrative Consideration of Exceptions
A236	Opinion (p. 74)	See response to WaterWatch General Exception #4
A237	Opinion (p. 74)	See Narrative Consideration of Exceptions
A238	Opinion (p. 74)	Category #3
A239	Opinion (p. 75)	See Narrative Consideration of Exceptions
A240	Opinion (p. 76)	See Narrative Consideration of Exceptions
A241	Opinion (p. 76)	See Narrative Consideration of Exceptions
A242	Opinion (p. 77)	See Narrative Consideration of Exceptions
A243	Opinion (p. 77)	See Narrative Consideration of Exceptions
A244	Opinion (p. 77)	See Narrative Consideration of Exceptions
A245	Opinion (p. 78)	See Narrative Consideration of Exceptions
A246	Opinion (p. 78)	Category #105
A247	Opinion (p. 79)	See Narrative Consideration of Exceptions
A248	Opinion (p. 79)	Category #3
A249	Opinion (p. 79)	See response to Rue General Exception #3
A250	Opinion (p. 80)	See response to Rue General Exception #3
A251	Opinion (p. 81)	See Narrative Consideration of Exceptions
A252	Opinion (p. 81)	See Narrative Consideration of Exceptions
A253	Opinion (p. 82)	See Narrative Consideration of Exceptions
A254	Opinion (p. 82)	See response to WaterWatch General Exception #5
A255	Opinion (p. 82)	See response to WaterWatch General Exception #5
A256	Opinion (p. 82)	See Narrative Consideration of Exceptions
A257	Opinion (p. 82)	See Narrative Consideration of Exceptions
A258	Opinion (p. 82)	See response to WaterWatch General

		Exception #3
A259	Opinion (p. 83)	See Narrative Consideration of Exceptions
A260	Opinion (p. 84)	See Narrative Consideration of Exceptions
A261	Opinion (p. 84)	See Narrative Consideration of Exceptions
A262	Opinion (p. 84)	See Narrative Consideration of Exceptions
A263	Opinion (p. 84)	Category #9
A264	Opinion (p. 85)	See Narrative Consideration of Exceptions
A265	Opinion (p. 85)	See Narrative Consideration of Exceptions
A266	Opinion (p. 85)	See Narrative Consideration of Exceptions
A267	Opinion (p. 86)	Category #9
A268	Opinion (p. 86)	Category #3
A269	Opinion (p. 87)	Category #9
A270	Opinion (p. 87)	Category #9
A271	Opinion (p. 88)	Category #9
A272	Opinion (p. 88)	See response to WaterWatch General Exception #2, Rue General Exception #3
A273	Opinion (p. 88)	See response to Rue General Exception #4
A274	Opinion (p. 89)	See Narrative Consideration of Exceptions
A275	Opinion (p. 89)	See response to WaterWatch General Exception #5
A276	Order (p. 90)	Category #3
A277	Order (p. 90)	See Narrative Consideration of Exceptions
A278	Order (p. 90)	Category #9
A279	Order (p. 90)	Category #9

**D. Consideration of Rue et al.'s Specific Exceptions**

Exception	Portion of Proposed Order Excepted To	Disposition
1	History of the Case (p. 2)	Category #8
2	History of the Case (p. 4)	Category #101
3	Issues (p. 4)	Category #106
4	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101

5	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
6	Evidentiary Rulings, Admitted Exhibits (p. 5)	Category #101
7	Evidentiary Rulings, Admitted Exhibits (p. 6)	Not an exception
8	Evidentiary Rulings, Excluded Written Direct Testimony (p. 6)	Category #101
9	Evidentiary Rulings, Excluded Written Direct Testimony (p. 6)	Category #101
10	Evidentiary Rulings, Written Testimony Evidentiary Rulings (p. 7)	Category #101
11	Evidentiary Rulings, Written Testimony Evidentiary Rulings (p. 7)	Category #101
12	Evidentiary Rulings, Written Testimony Evidentiary Rulings (p. 7)	Category #101
13	Finding of Fact #7 (p. 9)	Category #1
14	Finding of Fact #8 (p. 9)	Category #1
15	Finding of Fact #10 (p. 9)	Category #1
16	Finding of Fact #12 (p. 9)	Category #101
17	Finding of Fact #13 (p. 9)	Category #2
18	Finding of Fact #15 (p. 10)	Category #2
19	Finding of Fact #17 (p. 10)	Category #2
20	Finding of Fact #21 (p. 10)	Category #1
21	Finding of Fact #22 (p. 10)	Category #1
22	Finding of Fact #23 (p. 11)	Category #101
23	Findings of Fact, Representative EVWD Members (p. 11)	Category #1
24	Findings of Fact #24 – #37 (pp. 11-12)	See Consideration of WaterWatch's Specific Exceptions
25	Finding of Fact #27 (p. 11)	Category #1
26	Finding of Fact #36 (p. 12)	Category #1
27	Findings of Fact #38 – #50 (pp. 13-14)	See Consideration of WaterWatch's Specific Exceptions
28	Finding of Fact #36 (p. 13)	Category #1
29	Finding of Fact #49 (p. 14)	Category #1
30	Finding of Fact #50 (p. 14)	Category #1
31	Findings of Fact #51 – #57 (p. 14)	See Consideration of WaterWatch's Specific Exceptions
32	Finding of Fact #53 (p. 14)	Category #1
33	Findings of Fact #58 – #63 (p. 15)	See Consideration of WaterWatch's Specific Exceptions
34	Finding of Fact #59 (p. 15)	Category #1
35	Findings of Fact #64 – #66 (pp. 15-16)	See Consideration of WaterWatch's Specific Exceptions

36	Finding of Fact #66 (p. 16)	Category #1
37	Findings of Fact #67 – #70 (p. 16)	See Consideration of WaterWatch's Specific Exceptions
38	Finding of Fact #71 (p. 16)	Category #1
39	Finding of Fact #72 (p. 16)	Category #1
40	Findings of Fact, Individual Protestants, fn 13 (p. 17)	Category #101
41	Finding of Fact #76 (p. 17)	Category #1
42	Finding of Fact #78 (p. 17)	Category #1, Category #10
43	Finding of Fact #81 (p. 17)	Category #1
44	Finding of Fact #82 (pp. 17-18)	Category #1
45	Finding of Fact #84 (p. 18)	Category #1
46	Finding of Fact #85 (p. 18)	Category #1
47	Finding of Fact #88 (p. 18)	Category #1
48	Finding of Fact #92 (p. 19)	Category #1
49	Finding of Fact #93 (p. 19)	Category #1
50	Finding of Fact #95 (p. 19)	Category #1
51	Findings of Fact, Individual Protestants, Stephen Fox, fn 18 (p. 19)	Category #101
52	Finding of Fact #96 (p. 19)	Category #1
53	Finding of Fact #96 (p. 19)	Category #103
54	Finding of Fact #97 (p. 19)	Category #1
55	Finding of Fact #104 (p. 20)	Category #103
56	Finding of Fact #106 (p. 20)	Category #103
57	Finding of Fact #112 (p. 21)	Category #101
58	Finding of Fact #113 (p. 21)	Category #103
59	Finding of Fact #122 (p. 22)	Category #101
60	Finding of Fact #129 (p. 23)	Category #1
61	Findings of Fact, Information Not Requested By the Form Application (p. 25)	Category #2
62	Finding of Fact #139 (p. 25)	Category #2
63	Finding of Fact #140 (p. 25)	Category #2
64	Finding of Fact #141 (p. 25)	Category #2
65	Finding of Fact #142 (p. 25)	Category #2
66	Finding of Fact #142 (p. 25)	Category #2
67	Finding of Fact #143 (p. 25)	Category #2
68	Finding of Fact #146 (p. 26)	Category #1
69	Finding of Fact #148 (p. 26)	Category #1, Category #2
70	Finding of Fact #153 (pp. 26-27)	Category #2
71	Finding of Fact #155 (p. 27)	Category #1
72	Finding of Fact #162 (p. 28)	Category #101
73	Finding of Fact #177 (p. 29)	Category #1
74	Finding of Fact #178 (p. 30)	Category #4
75	Findings of Fact #215 – #217 (pp. 35-	Category #4

	36)	
76 – 80	Findings of Fact #225 – #283 (pp. 37-46)	See Consideration of WaterWatch’s Specific Exceptions
81	Finding of Fact #284 (p. 46)	Category #2, Category #4; see Narrative Consideration of Exceptions
82	Finding of Fact #289 (p. 47)	Category #2, Category #4; see Narrative Consideration of Exceptions
83 – 118	Conclusions of Law, Opinion (pp. 50-88)	See Narrative Consideration of Exceptions, Consideration of WaterWatch’s Specific Exceptions

## ORDER<sup>97</sup>

The Proposed Final Order issued by the Oregon Water Resources Department on July 22, 2014 is AFFIRMED AS MODIFIED. Any permit issued by OWRD shall include the following conditions:

1. 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. Inundation 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 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.

3. Wetlands mitigation condition: Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and the Oregon Department of State Lands (DSL) to fully assess the 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 DSL's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval.

4. Fish screening and bypass condition: Prior to the diversion of water, the permittee shall install fish screening and bypass devices consistent with current ODFW standards, and shall obtain written approval from ODFW that the fish screening and bypass 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 bypass devices shall be operated and maintained consistent with ODFW standards. The permittee may submit evidence in writing that ODFW has determined that screens and/or bypass devices are not necessary.

---

<sup>97</sup> Director's Explanation: The Director has modified the "Order" section to incorporate all conditions that are being carried through from the Proposed Final Order. This Order also incorporates the revisions that ODFW requested to the PFO conditions. This Order adds a condition requiring compliance with ORS 540.350. This Order adds a measurement condition that will ensure both that the 1990 instream water right is met, and that all live flow is passed during the non-storage season. This Order adds a condition requiring that Certificate 36095 be cancelled before water may be stored.



5. 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 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. 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 must contact the ODFW Fish Passage Coordinator before beginning construction of any in-channel obstruction.

6. 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.

7. 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.

8. Engineering plans and specifications condition: Consistent with ORS 537.248(1), the permittee may not begin construction of the reservoir until the Department approves the engineering plans and specifications.

9. Inundated lands condition: Consistent with ORS 537.400(5), the permittee may not fill the reservoir until evidence has been submitted to the Department demonstrating that the permittee owns, or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.

10. Measurement condition: Before water use may begin under this permit, a stream gaging station or other preapproved measuring device must be installed to measure reservoir inflow from Drift Creek, reservoir outflow immediately below the dam, and streamflow at or near the mouth of Drift Creek. These measuring devices are required to ensure all live flow is passed outside of the storage season and the Drift Creek instream right is monitored. The permittee/certificate owner shall maintain the gaging stations or measuring devices in good working order. Gaging stations shall be operated consistent with United States Geological Survey protocol for both stream flow measurement and station record processing. Gaging stations are required to provide near real-time data by telemetry. Any alternative measuring device must be approved by the Director.

11. 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.

12. Cancellation condition: Before water may be stored under this permit, Certificate 36095 must be cancelled.

  
\_\_\_\_\_  
Tom Byler  
Director, Oregon Water Resources Department

9/13/19  
Date

### NOTICE OF APPEAL RIGHTS

Any party to a contested case hearing held pursuant to ORS 537.170 may file exceptions to a final order. Parties must file any exceptions within 20 days following the date of service of this Final Order (*i.e.*, the date on which this Final Order was mailed). Parties must mail or hand-deliver a hard copy of their exceptions to the Department at its Salem offices and must also email an electronic copy to all of the email addresses listed on the Certificate of Service. Exceptions must be in writing, clearly and concisely identify the portions of the Final Order excepted to, and cite to appropriate portions of the record.

If a party files an exception to this Final Order, the Department must refer the exception to the Water Resources Commission. The Commission must consider the party's arguments contained in its exceptions and may allow and consider oral arguments by all parties to the contested case hearing, prior to issuing a Final Order on the exceptions. The Commission may form a subcommittee to review the exceptions and provide a report to the Commission prior to the Commission issuing a final order. OAR 690-002-0175.

**CERTIFICATE OF SERVICE**

On September 13, 2019 I mailed the foregoing FINAL ORDER in OAH Case No. 2017-OWRD-00002 (R-87871) by First Class mail, where listed, and by electronic mail, where listed:

Name	Address	Email
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 Doeffer 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		Patricia.E.McCarty@oregon.gov
Crystal Chase	760 SW 9th Ave, Ste 3000 Portland OR 97205	crystal.chase@stoel.com
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

*Tonya L. Miller* 9/13/2019  
 Tonya Miller, Oregon Water Resources Department