

is largely not feasible on their lands. Final Order at 17. Furthermore, the Protestants are direct competitors of many of the EVWD farmers—farmers in both groups grow grass seed, timber, cattle, hay, and Christmas trees, and sell them to some of the same purchasers in the same markets. See Rue Protestants' Restated Specific Exceptions #25, 32, 34, 39, 42, 54, 71.

For the most part, the EVWD farmers already have sufficient individual water rights to supply their current irrigation needs. Final Order at 11-16. The district itself does not own any irrigation infrastructure or make any water deliveries at this time, but was formed to develop a future water supply for the district members. Final Order at 8-9. The EVWD farmers want additional irrigation water because it will increase the value of their lands and increase their profits. Tr. 1044, 1109-11, 1115-16, 1267-69, 1296-97, 1307-08, 1553-54, 1836, 1852, 1942.

By organizing themselves as an irrigation district, the EVWD farmers have harnessed awesome statutory powers to help them achieve their individual economic goals. The most significant of these is the power of eminent domain. The vehement opposition of the Rue Protestants and others in the Drift Creek/Victor Point area is of no consequence to the district, since the district can condemn the land over the Protestants' objection. The Protestants can be forced to sell productive farmland and timberland that has been in their families for four to five generations to some of their competitors for the future enhancement of those competitors' own farms and families.

The project will also dam the last undammed major tributary of the Pudding River, blocking access to approximately six miles of cool water refugia in the headwaters of Drift Creek; the creek provides habitat for coho salmon, winter steelhead, cutthroat trout, and Pacific lamprey. Final Order at 37-41. The creek has been identified by the Pudding River Watershed Council as a priority for

additional restoration efforts to enhance the habitat. The Council also opposes the project. Final Order at 21-22.

OWRD maintains that the fact that this project entails condemnation of private farmers' lands by competing farmers is not pertinent to the public interest review mandated by law for EVWD's water right application. E.g., Final Order at 121-22. This position is contrary to the applicable law and to the preponderance of the evidence. The Department's narrow view of its statutory public interest mandate also led it to improperly evade the required analysis of the project's environmental impacts to Drift Creek.

The Rue Protestants ("Protestants") therefore take exception to the Final Order ("Order") of the Oregon Water Resources Department ("OWRD") dated September 13, 2019 as follows:

1. The Rue Protestants restate against the Final Order the specific exceptions they raised against the ALJ's Proposed Order as further described in Section II, III, and IV below;
2. The Rue Protestants take exception to the Final Order's determination that the water use proposed in Application R-87871 satisfies the public interest presumption under ORS 537.153(2); and
3. The Rue Protestants take exception to the Final Order's determination that the water use proposed in Application R-87871 will not impair or be detrimental to the public interest under ORS 537.153(2) and 537.170(8).

II. THE FINAL ORDER OMITTS CRUCIAL FACTS SHOWING THAT THE PROPOSED WATER USE IS DETRIMENTAL TO THE PUBLIC INTEREST.

The Rue Protestants raised a number of exceptions to the ALJ's Proposed Findings of Fact. The Final Order denied most of these exceptions with the following "categorical" response:

"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); *South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County*, 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"); *Graham v. OLCC*, 20 Or App 97, *aff'd*, 25 Or App 759 (1976)." Final Order at 130 ("Category 1" Reason for Denying Exceptions).¹

Although this response may contain an accurate statement of a general legal principle of judicial review and a fair citation of the two cited cases, the cumulative effect of denying all of these exceptions is to leave out "relevant and important facts" and to instead create a sanitized factual record to support the Department's narrow reading of the project's impacts and of what is required for a proper public interest review. By denying these exceptions, the Final Order presents an incomplete picture of the facts pertinent to determining whether this project is in the public interest, as follows:

The Final Order overstates EVWD's need for additional water, while downplaying the EVWD members' admissions that they have sufficient water rights and water for their current operations. The Final Order emphasizes the multi-generational character of EVWD's member farmers, while downplaying that the Rue Protestants are also fourth and fifth generation farmers. The findings

¹ Some of the exceptions were denied on the basis that the Director found that there is not "clear and convincing evidence" that the finding as stated is wrong, but no legal authority is presented for that standard. See Final Order at 130 (Category 2).

understate the extent to which the EVWD farmers and the Rue Protestants are market competitors. The findings de-emphasize the EVWD farmers' frank testimony that they want additional water to increase the value of their property, increase their profits, and enhance the value of their overall operations for future generations, and that for the most part they are not troubled by the fact that they will be acquiring the land for their project from unwilling sellers who are also their direct competitors. The findings overstate the proposed project benefits while understating or omitting information about the considerable project costs.

The Rue Protestants therefore restate the following specific exceptions that they raised in response to the Findings of Fact in the ALJ's Proposed Order: Exceptions 13-15, 17-20, 23-39, 41-50, 52-56, 58-71, and 73-80. The Findings of Fact in the Final Order are nearly identical to the Findings of Fact in the ALJ's Proposed Order that these exceptions addressed, therefore the previous specific exceptions are attached for reference.

III. THE DIRECTOR ERRED IN FINDING THAT THE PUBLIC INTEREST PRESUMPTION IS SATISFIED.

Beginning on page 51 of the Final Order, the Director modified and expanded the ALJ's Proposed Conclusions of Law and Opinion. The Final Order also added narrative discussion addressing the Rue Protestants' Specific Exceptions 81-118 and also addressing Protestants' arguments expressed in their General Exceptions to the that the water use proposed in Application R-87871 does not meet the presumption criteria and further impairs the public interest. Since all of these exceptions were denied, the Rue Protestants also restate these Specific Exceptions, and further take exception to pages 51-147 of the Final Order, based on the arguments in the Sections A and B below, as well as all of Section IV.

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A. The proposed use will injure the Drift Creek instream water right.

One required component of the public interest presumption is that the proposed use must not injure any other water rights. ORS 537.153(2). The Rue Protestants take exception to the Order's determination that the proposed use will not injure the instream water right on Drift Creek.

Certificate 72591 specifies that the right is "to be maintained in Drift Creek from East and West Forks Drift Creek at River Mile 11.0 . . . to the mouth at River Mile 0.0" to provide "required stream flows for cutthroat trout for migration, spawning, egg incubation, fry emergence, and juvenile rearing." *The right therefore attaches to an 11-mile stream reach to protect streamflows.* Rue Specific Exceptions #75 and 99 to the ALJ's proposed order below pointed out that OWRD's practice of using a single measurement at the mouth of Drift Creek is insufficient to protect the right throughout its reach, and that "blocking fish passage to approximately 6 miles of Drift Creek between the dam and the right's upper reaches and replacing a free-[f]lowing stream with approximately 3 miles of reservoir" would injure the right.

In fact, the ALJ found that "given the potential impact of placing a reservoir in the creek or diverting water into a pipeline or other conveyance, the instream right can no longer be adequately protected by mouth flow measurements." The ALJ at least proposed adding monthly measurement requirements at locations in addition to the mouth, though Protestants pointed out that those conditions were still insufficient to protect the right because they did nothing to address the impacts to the upper 6 miles of the stream segment protected by the instream water right but eliminated by the dam.

However, in the Final Order, "[t]he Director modified the discussion of the instream water right on Drift Creek and the ALJ's proposed measurement

conditions," saying that those 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." Order at p. 64, note 51.² That statement is erroneous. The certificate does not "require" flow to be measured at the mouth; it says that "the flows are to be measured at the lower end of the stream reach *to protect necessary flows throughout the reach.*" (Emphasis added.) Since the certificate defines the reach to be from the mouth to River Mile 11, the mere inclusion of one additional measurement location just below the dam (Final Order p. 146, Condition 10) is insufficient to protect the full reach of the instream water right. The Final Order allows blockage of the upper six miles of the protected stretch, and replacement of the "flows"—which is what the right is supposed to protect—with a three mile standing reservoir.

The Department's own testimony provided evidence that no consideration whatsoever was given to this elimination of protected streamflows in review of this application. In cross and re-cross examination by the Rue Protestants' attorney, OWRD's Dwight French conceded that no such analysis was done:

Q. And this reservoir is proposed to be placed in the segment that—where the instream right attaches. How do you determine that taking a chunk out of the instream right segment is not injury to that instream right?

A. Instream water rights are measured and regulated for at their lower end of the reach, and so the department does not consider partial inundation of a[n] upper end of the reach to constitute injury.

Q. So as I understand it, the instream right attaches to, I believe, about 11 miles up Drift Creek. So you measure it at the

² The only other response by the Director to these exceptions below is contained in the

bottom of that segment, and inundation of any portion above that the department would not consider injury?

A. No. We would not.

Q. And then going back to the point about measuring the instream right in the lower reaches even though it's an 11-mile segment of stream that attaches to . . . but how much of the stream could be inundated before you would find an injury even if there's that amount of water down at the bottom? Is there some point at which eliminating a segment that's—to which an instream right attaches is so much that it's injury even if the water could be measured at a lower point?

A. That's—that's a good question, and I don't know the answer to it. (Tr. 122-23, 234-35.)

The Department's own witness revealed the insufficiency of the Department's treatment of injury to an instream right, thus providing evidence that this element of the presumption was not established, and the Final Order did nothing to counter that testimony. As a result, the Department did not actually support its finding of no injury to the instream right—either at the hearing or in the Final Order. Instead, the Department simply stuck to its story that if a certain amount of water shows up at the mouth of Drift Creek, the right is by definition not injured. This cannot be found to satisfy the burden of persuasion to establish the presumption.

B. The proposed use does not comply with applicable rules of the Water Resources Commission.

Another component required to establish the public interest presumption is a finding that the proposed water use complies with rules of the Water Resources Commission. The Final Order does not comply with the applicable rules, as explained in Section IV.A.2 below. (Rule compliance is relevant to both the presumption criteria and the public interest analysis required by ORS 537.170(8), so the discussion is consolidated in one section.)

IV. THE DIRECTOR ERRED IN FINDING THAT THE PROPOSED USE WILL NOT IMPAIR OR BE DETRIMENTAL TO THE PUBLIC INTEREST UNDER ORS 537.170(8).³

A. The Order erroneously restricts the public interest review required by ORS 537.153(2) and 537.170(8).

The fact that irrigation districts are authorized to acquire property by condemnation is pertinent to the public interest review. Crucially, the Department takes the position that EVWD's authority to acquire the Rue Protestants' property by condemnation is irrelevant to its review of the permit application. The Order sidesteps this issue by saying "the Department cannot authorize condemnation of lands inundated by the proposed reservoir; rather, that authority belongs to the District." (Final Order at 121-22, discussing Rue Specific Exception 94.)

But that is the point. Irrigation districts are unique entities. They are not like other units of local government, who are nested within a hierarchy of federal, state, and local sovereign powers, and who are accountable as general governmental units to all citizens, taxpayers, and voters within their jurisdiction. Districts are special interest entities governed by boards of directors elected from their members, and the board is accountable only to those members.⁴ No other entity supervises or oversees districts.⁵ Although districts are nominally public entities, with significant governmental powers, they "remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners." *Ball v. James*, 451 U.S. 355

³ Additional citations in support of the Rue Protestants are supplied in our post-trial briefs, copies of which are attached here and incorporated by reference.

⁴ ORS 545.043(1); ORS 545.221. The Board is responsible to its 45 members who pay operational assessments as members of the district, and particularly to those who pay development assessments in support of the Drift Creek Project. group to whom the Board is accountable.

⁵ See TR p. 548, line 20 – p. 549, line 23.

(1981). There is no check or oversight on an irrigation district's use of its condemnation authority.

ORS 545.239 provides that irrigation districts can condemn land to build and store water in reservoirs. Without a storage permit from OWRD, EVWD has no right to build a dam or store water. Thus, OWRD's issuance of a permit to allow EVWD to store water on the Rue Protestants' land does indeed "come with condemnation authority." Order at 122.

Irrigation districts are also able to get public funding. EVWD has already received nearly a million dollars in public funding to get its project to this point, and the district intends to seek more public funding, since the project cannot be built without substantial assistance.

Thus, a robust *public interest* review by OWRD is particularly critical in the case of irrigation district applications in order to serve as a check on the considerable power of districts to advance their *private interests* with the use of public funds and governmental powers.

B. The Order's restrictive interpretation of the statutorily-mandated public interest review deprives the analysis of any meaningful substantive content.

The Order takes issue with the Rue Protestants' "continu[ing] to challenge the analysis in the PFO," claiming that because the analysis has now "been augmented by the evidentiary record produced during the 10-day contested case hearing," Protestants' only remedy at this point is to file exceptions to the Final Order. Order at 124. We agree that the PFO is no longer an operative document, but the Order misunderstands this discussion. Evidence of the Department's process at the PFO stage is pertinent because of how it affected the subsequent steps in the process.

The Department conceded at the contested case hearing that it does not have any rules, guidance, or policies to guide staff in their consideration of the public interest factors. Staff acknowledged that once they had completed their review for the presumption factors—which is done according to an extensive checklist—that they struggled with taking the next step to apply the list of factors in ORS 537.170(8). They admitted that they just "had to come up with something" and that in the PFO at issue here, several of the "findings" simply restate the statutory language as conclusions without any supporting analysis.

The Department's lack of attention to the second part of the public interest review starts the process off on the wrong foot. The Department issued a conclusory PFO containing no explanation of how the statutory public interest factors had been applied to the facts at hand, and summarily dismissing the comments that the Protestants and others had submitted to the agency. When the Protestants questioned staff and presented documents at the contested case hearing to attempt to uncover how the Department reached its determination that this project is in the public interest, it became clear that there was no analysis or content supporting the public interest "findings" in the PFO. The Department put all of its efforts into the presumption review and then considered the job done.

The Department's failure to give meaning to its public interest review thus put the Protestants in the position of trying to provide the required content. The Protestants did so, using the Department's own administrative rules, as well as principles of statutory construction and common sense.

The Department's own administrative rules provide guidance for assessing whether a proposed water use is in the public interest. OAR 690-310-0120(3)(b), OAR 690-410-0030, and OAR 690-410-0080(2) all provide substantive criteria and content for the public interest review. These rules stress that:

- protecting stream flows through instream flow rights is a high priority for the state (OAR 690-410-0030(1)); and
- water storage projects should be evaluated with a number of criteria, including benefits, public support, environmental issues, cultural and historical impacts, land use, and economic analysis (OAR 690-410-0080(2)(g)).

But the Final Order holds that the Division 400 "policy rules" do not apply to individual water right applications but only to "activities." According to the Order, the Department interprets "activities" 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." The Order further states further that this interpretation is plausible and therefore entitled to deference because the examples of activities given in the rule all involve rulemaking or high-level actions.

However, Protestants submit that this interpretation is not plausible for several reasons. First of all, the Department's central and most consequential program and activity for managing the state's water is the water rights permitting program. It is through permit decisions that the Department allocates the public's water to private uses in perpetuity. For the Department to categorically interpret "activities" as not including the permit program is unacceptably overbroad. According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("WEBSTER'S 3RD"), an "activity" is a duty or function of an organizational unit, which surely describes OWRD's key permitting function. Furthermore, the Department's interpretation is certainly not a plausible interpretation of OAR 690-410-0080(2)(g), which gives direction to OWRD in the form of specific criteria to be applied to *evaluating storage projects*. The plain language of this rule provides explicit criteria to be applied to individual permit decisions for storage projects. WEBSTER'S 3RD

defines a “criterion” as a “standard upon which a decision or judgment may be based; a yardstick; a basis for discrimination.” In other words, these criteria provide guidance for OWRD’s so-called “granular” permit decisions in its key programmatic activity of permit review. OWRD’s claimed interpretation to the contrary is not entitled to deference. *See, e.g., Nichols v. Office of Medical Assistance Programs*, 171 Or App 255, 15 P3d 578 (2000) (an interpretation is not plausible if it is inconsistent with the language of the rule itself, or fails to adequately account for variables in the rule); *see also Papas v. Oregon Liquor Control Comm’n*, 213 Or App 369, 161 P3d 948 (2007), and *Teacher Standards and Practices Comm’n v. Bergerson*, 342 Or 301, 153 P3d 84 (2007) (interpretations that were inconsistent with the plain meanings of words in the rule were not plausible).

Reading the Division 410 rules in the light of the text and context of ORS 537.170(8)(g) also requires this result. That provision directs OWRD to consider “[t]he state water resources policy formulated under ORS 536.295 to 536.350 . . .” in its public interest review. According to the citations of authority at the end of the Division 410 water storage rules, those rules were adopted under the authority of statutes within that series.

Even accepting this interpretation of “activities” for purposes of argument, the Department’s disregard of the policy rules here cannot be sustained. The Department says that the policy rules do apply to rulemaking. Division 310 of its rules governs water right application processing. Final Order at 76. OAR 690-410-0080(2)(g) was adopted by the Department in 1992, and OAR 690-310-0120 was adopted in 1996. To the extent that the later rule incorporated only some of the criteria from the “policy rule” but ignored others, OWRD did not adequately follow the guidance of the policy rule when it adopted its permit review rule. At the very least, even if OWRD does not consider the water storage rule as a binding “rule” to be followed in the water application review process, OAR 690-410-0080(2)(g)

certainly provides “non-rule program direction” that should inform the public interest review mandated by ORS 537.153(2) and 537.170(8).

The Integrated Water Resources Strategy (“IWRs”) also provides non-rule program direction for conducting the public interest review. OWRD and the District argue that because the IWRs is not an administrative rule, it is irrelevant to permit decisions. The IWRs is indisputably part of the “state water resources program” described in ORS 536.300 and 536.310 and thus represents non-rule program direction that cannot simply be ignored by the Department. As shown at the hearing, the IWRs also states a clear policy preference for off-channel storage facilities. Instead of staff struggling to “come up with something” to populate the public interest findings in a PFO, the criteria in the Division 410 rules and the principles stated in the IWRs offer precisely the sort of substantive content that the public interest review demands.

By ignoring the criteria in the policy rules, the Department avoided a fair consideration of two key issues that are relevant to the public interest. OAR 690-410-0080(2)(g)(C) provides that public support, cultural, and historic criteria should be evaluated for a storage project. But the Final Order misstates and underestimates the significance of these criteria. The Rue Protestants demonstrated significant opposition to the project from others besides the protestants, including the Pudding River Watershed Council and hundreds of people who signed a petition opposing the project. R6, R23, R30. Protestants also submitted expert testimony about significant cultural and historical resources found at the project site, including stone tools, projectile points, flakes from tools, and fire-cracked rock—evidence that the site has been occupied for 8,000 years. But the Final Order does not consider that evidence in making its public interest decision.

By deciding that its own policy rules do not apply to this water permitting decision, the Department evades consideration of specific available substantive

criteria for considering the impacts of a project, At the end of the day, then, we are right back where we started—the public interest review had no meaningful substantive content, and the Final Order's determination that the project will not impair or be detrimental to the public interest still rests on conclusory findings. That cannot be the right result.

C. The preponderance of the evidence demonstrated that proposed water use will be detrimental to the public interest under a common sense reading of the statute.

The Final Order summarily dismisses the Rue Protestants' exceptions to the discussion in the ALJ's Proposed Order of the seven listed public interest factors in ORS 537.170(8). Final Order at 124-28. In doing so, the Final Order is in error. In discussing whether the proposed use of water "conserves the highest use of water for all purposes" under ORS 537.170(8(a), the Final Order simply restates the ALJ's statement that "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." There is no discussion of the evidence, but merely a statement that "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." The Final Order takes a similar approach to "the amount of waters available for appropriation for beneficial use" (ORS 537.170(8)(d).) As developed by WaterWatch in detail in its exceptions to the Final Order, these determinations are in error because they simply shift the Department's public interest analysis to other agencies' permitting processes.

Concerning maximum economic development of the waters involved, the Final Order ignores the Rue Protestants' extensive discussion of this issue using considering the plain meaning of the statute in their exceptions to the ALJ's Proposed Order, saying only:

"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. [footnote: 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.]

This is a nonsensical statement. As the Rue Protestants pointed out, it is impossible to determine maximum economic development by looking only at estimated benefits. As the Proposed Order acknowledges, no cost-benefit analysis has been done for this proposed project. Findings 141-146 noted that OWRD's application form does not ask for information about the cost of the project or the cost of the water that will be made available by the project and therefore the Department claims that it does not need to do any such analysis. But the statute's plain language and simple logic suggest that in order to determine whether a project represents the "maximum economic development of the waters involved, as in this statutory provision," or if it is "wasteful, uneconomic, impracticable or unreasonable," as in ORS 537.170(8)(e), discussed further below, requires some consideration of the project's costs *and* benefits, and some comparison to different uses of the water. *See Norden v. State ex rel. Water Resources Dept.*, 329 Or 641, 996 P2d 958 (2000) (noting that the first level of statutory analysis to determine legislative intent is to examine the text and context of the statute, giving words of common usage their plain, natural, and ordinary meaning). If nothing else, common dictionary definitions of the terms lead to this result. Merriam-Webster defines "uneconomic" as "not economically practicable, costly, wasteful" and

"maximum" as "the greatest quantity or value attainable."⁶ "Unreasonable" can be defined as "unfair" or beyond the limits of acceptability or fairness."⁷

The testimony of economist Barbara Wyse offered by EVWD assessed estimated benefits of this project in a vacuum. She did not consider any costs of the project whatsoever. She testified that—because irrigated land is worth more per acre than non-irrigated land—if 400 acres of the Rue Protestants' non-irrigated land is inundated by the reservoir, and as a result EVWD farmers can irrigate 4000 more acres of land, there will be a net gain in agricultural production value.

Without consideration of the project costs, including the cost of additional studies and permitting, the cost of designing and building the dam and reservoir, the costs of designing and building the required conveyance pipelines and pumps, the costs of acquiring land for the dam, reservoir, and conveyance route, it is impossible to say that this project will provide maximum economic development or whether it is wasteful, economic, practicable, and reasonable. The project will cost tens of millions of dollars. *See* findings 141, 142 (estimates of 12-40 million dollars for the dam and reservoir, 45-60 million dollars for the pipeline, unknown amounts for property acquisition, losses of income to Rue Protestants, in addition to more than 2 million dollars spent so far).

Addressing the "prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved" (ORS 537.170(8)(e)), the Final Order again sidesteps the key issue in this case of whether it is reasonable for one group of farmers to be allowed to store water on their competitors' lands. The Final Order also says that "the evidence presented at the hearing supports finding that the

⁶ See <https://www.merriam-webster.com/dictionary/>.

⁷ See <https://en.oxforddictionaries.com/definition/unreasonable>;
<https://dictionary.cambridge.org/us/dictionary/english/unreasonable>.

District could develop the project as proposed, and that is sufficient for the purposes of issuing a permit." In fact, the evidence presented at the hearing showed that there are so many unknowns about this project, and it is projected to be so expensive, that it cannot be built without substantial public funding. Considering that the purpose is to enhance the private economic circumstances of one group of landowners at the expense not only of some of their competitors, but also at public expense, the project was shown to be wasteful and unreasonable.


The last public interest factor in ORS 537.170(8)(g) pertaining to the state water resources policy was discussed in Section IV.A.2 above.

V. CONCLUSION

The Rue Protestants urge the Commission to accept the Exceptions of the Rue Protestants and WaterWatch and find that the water use proposed in Application R-87871 does not comply with the public interest.

Dated this 3rd day of October, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed a true and correct copy of **PROTESTANT RUE, ET AL.'S EXCEPTIONS TO AGENCY FINAL ORDER** with the Oregon Department of Water Resources by mailing via First Class Mail, postage prepaid, at Portland, Oregon and by emailing to the following parties on October 3, 2019.

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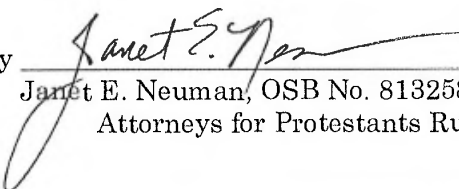
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Dated this 3rd day of October, 2019.

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PAGE 1 - CERTIFICATE OF SERVICE

STATE OF OREGON
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
WATER RESOURCES DEPARTMENT

In the Matter of Water Right	)	PROTESTANT RUE, ET AL.'S
	)	EXCEPTIONS TO
Application R-87871, in the Name of East	)	ADMINISTRATIVE LAW JUDGE'S
Valley Water District,	)	PROPOSED ORDER
)	
Applicant,)	
)	
Rue, et al.,	)	OAH Case No. 2017-OWRD-00002
)	
Protestants,	)	OWRD No.: R-87871
)	
WaterWatch of Oregon,	)	Assigned to: ALJ Denise McGorin
)	
Protestant.)	

The Rue Protestants ("Protestants") take exception to Administrative Law Judge "ALJ") Denise McGorin's Proposed Order dated February 25, 2019, as follows:

GENERAL EXCEPTIONS

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

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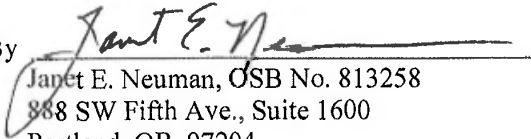
SPECIFIC EXCEPTIONS

The Rue Protestants have marked their specific exceptions on the attached copy of the ALJ's Proposed Order. These detailed exceptions are incorporated here by reference.

Dated this 27th day of March, 2019.

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SPECIFIC EXCEPTIONS OF RUE PROTESTANTS TO ALJ'S PROPOSED ORDER

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT**

IN THE MATTER OF WATER	)	PROPOSED ORDER
RIGHT APPLICATION R-87871 IN)	
THE NAME OF EAST VALLEY)	
WATER DISTRICT,	)	OAH No. 2017-OWRD-00002
<i>Proponent/Applicant</i>	)	Agency Case No. R-87871
)	
JOEL RUE, ET AL., AND)	
WATERWATCH OF OREGON,)	
INC.,)	
<i>Protestants.</i>)	

HISTORY OF THE CASE

On February 21, 2013, East Valley Water District (EVWD or the District) filed an application for a permit to store water from Drift Creek. On July 22, 2014, Oregon Water Resources Department (the Department or OWRD) issued a Proposed Final Order (PFO) granting EVWD a water storage permit. Individual Protestants Joel D. Rue, Bruce P. Jaquet, Robert B. Qualey, Steve Lierman, David Doerfler, Zach Taylor, Tom and Karen Fox, and John and Sharon Fox (collectively, the Rue Protestants) and the public interest group Water Watch of Oregon, Inc. (WaterWatch) filed protests to the PFO on September 8, 2014.¹

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

The OAH assigned Senior Administrative Law Judge (ALJ) Richard Barber to the matter. Senior ALJ Barber conducted prehearing conferences on January 5, 2017, September 11, 2017, and January 2, 2018. Assistant Attorneys General Renee Moulun and Rachel Weisshaar represented the Department. Attorneys Kirk B. Maag and Crystal S. Chase of Stoel Rives LLP represented EVWD. Attorney Janet E. Neuman of Tonkon Torp LLP represented the Rue Protestants. Brian J. Posewitz, in-house counsel, represented WaterWatch. During the prehearing conferences, the parties determined that no site visit was necessary.

¹ The Rue Protestants and WaterWatch are referred to jointly as "the Protestants."

Senior ALJ Barber agreed to allow the parties to offer written direct testimony prior to the hearing or in-person testimony at the hearing. In a January 6, 2017 pre-hearing order, Senior 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 Proposed Order reflects the burden of proof set forth in Senior ALJ Barber's ruling.

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

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

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

On June 14, 2018, ALJ McGorrin 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 McGorrin 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.]

Comment [JN1]: Protestants take exception to this statement. The parties all submitted proposed issue lists. The parties were not given any opportunity to object to the ALJ's decision to adopt EVWD's list.

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

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

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

The first was whether EVWD's application complies with OAR 690-033-0220(3), which requires permit applications seeking more than one cubic foot per second (cfs) of water to describe measures to assure reasonably efficient water use. This conservation rule is part of the Department's Division 33 administrative rules (OAR 690-033-0000 to 690-033-0340), which assist the Department in determining whether a proposed use will be detrimental to sensitive, threatened, or endangered (STE) fish species.

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

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

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

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

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

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

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

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

Comment [JN2]: The Rue Protestants also called Dwight French, Jeana Eastman, Adam Sussman, and Robert Qualey. Tr. 260, 391, 1199, 1599.

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

ISSUES

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

Comment [JN3]: It is unclear how this footnote relates to this text.

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

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.

Comment [JN7]: This sentence is correct, in contrast to the list on the previous page.

Excluded Written Direct Testimony

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

Comment [JN8]: WaterWatch did not move to exclude Mr. Doerfler's testimony. Later in the hearing, EVWD moved to exclude Mr. Doerfler's testimony. Tr. 41, 2486-88.

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

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

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

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

Comment [JN9]: EVWD, not WaterWatch, moved to exclude Mr. Doerfler's testimony, as stated in previous comment.

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

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).

EVIDENTIARY RULINGS

Admitted Exhibits

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

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

Comment [JN4]: The Rue Protestants objected to EV29 and EV 73; these exhibits were not admitted. Tr. 37-38, 47-48.

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

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

Comment [JN5]: R 174 was admitted, then withdrawn, and R174A was admitted in its place. R 175, R 176, and R 178 were admitted. R90 was withdrawn. R177 was objected to, the objection was sustained, and it was excluded. Tr. 2675-76.

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

Comment [JN6]: See previous comment re R174.

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

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

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

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

Written Testimony Evidentiary Rulings

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

Comment [JN10]: This misstates the ruling. The ALJ overruled the objections to the written testimony and allowed the witnesses to testify as to their lay observations. Tr. 54-59.

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

Comment [JN11]: This misstates the ruling. The ALJ overruled the objections to the written testimony and allowed the witnesses to testify as to their lay observations. Tr. 54-59.

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

Comment [JN12]: This overstates the ruling. Although EVWD raised an objection prior to the hearing, Ms. Mucken was allowed to testify to artifacts she had found near her home. Ms. Mucken explained that she was not testifying as an expert in archaeology, though she noted that she had some minimal coursework in the area. She was allowed to show a particular artifact that she had found. Mr. Fagan, testifying as an expert, identified the artifact as "characteristic of the earlier occupation projectile points that were used around 5-8,000 years ago." Tr. 1397-1408, 1435-37.

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

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

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

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

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

FINDINGS OF FACT

Overview

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

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

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

East Valley Water District

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

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

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

⁵ 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].)

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.

Comment [JN13]: This finding is incomplete and should further state that EVWD does not at this time have any water rights in its own name, nor does it have any irrigation infrastructure or store or deliver water to any of its members. Tr. 1073, 1178, 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.)

Comment [JN14]: This finding is incomplete and should further state that before his death, Mr. Dominick was opposed to the project and was represented by the Rue Protestants' attorney in the Marion County lawsuit whereby EVWD sought "pre-condemnation" access to Drift Creek properties for surveys and testing. The Dominick property was acquired from Mr. Dominick's daughter after his death. Tr. 1358. In order for the landowners to be paid back on their loan, they need the District to continue and to have a source of revenue into the future or alternatively, the District might need to sell the property. Tr. 1358-59, 1362-63, 1752-54, 1757-58.

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

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

Comment [JN15]: This finding is misleading. It should be corrected to state that only a portion of EVWD is within either the Mt. Angel or Glad Tidings GLA; the majority of District lands do not overlie these GLAs, as shown by Exhibit R172. The evidence also showed that only some permits issued within the GLAs contain "drawdown conditions" authorizing OWRD to curtail water use under those permits, but the Department has not done so to date. Tr. 535, 546, 570-72, 574-75, 868-72, 887-88, 1148-50.

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.)

Comment [JN16]: This finding overstates the extent of appropriation and should be corrected. The evidence showed that surface water is only fully appropriated during the summer months. Tr. 537.

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

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

Comment [JN17]: The finding overstates Mr. Ward's testimony and should be corrected. He did not testify about his own conclusions about EVWD's desires or need for additional water. He was unsure in his recollection and said only that it was his understanding that "additional water was needed to support existing agriculture, provide security of water source, and I would be surprised that when you –when you anticipate a project of this nature that you don't plan for some additional usage." (Tr. 572-73)

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

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

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

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.

Comment [JN18]: The finding is incomplete and misleading. EVWD's adopted resolution provides that EVWD would first need to decide to make water available to additional lands, and would need to petition the County to extend the District boundaries. Tr. 1262-64. Furthermore, in order to become a District member, a farmer would need to pay all of the past development assessments from 2003 forward plus interest. Tr. 1306, 1558-59, 1562-63, 1745-48, Ex. R52, R123 and R129.

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.

Comment [JN19]: This finding overstates the attendance at the annual meetings. Some of the EVWD members who testified *estimated* the number to be about 30, which sometimes includes several members of the same family or operation. Tr. 1291, 1536-39.

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

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

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

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

Comment [JN20]: This finding is incomplete. The volume of water members will be willing to reserve or buy will depend on the price of the water.

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.

Comment [JN21]: This finding is incomplete and misleading for the reasons described in Comment 18, *supra*.

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

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

Comment [JN22]: This finding is incorrect. The number at Tr. 1259 is \$1,150,946.10.

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.

Comment [JN23]: Nothing in the record established that these particular members are "representative" of all District members. This should be changed to "Selected." The record showed that the members who testified were all members who are paying development charges to the District. All but Mr. Dickman are board members. Furthermore, some of them are among the District's larger landowners. Tr. 1048-50, 1513-14, 1274, 1277-78, 1282-83, 1688-89, 1704-05, 1721-22, 1868, 1905.

Comment [JN24]: The Rue Protestants join in WaterWatch's exceptions to Findings 24-37.

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.)

Comment [JN25]: Dickman Farms sells its grass seed into the same market as the Rue Protestants and at the same price. Tr. 1095-97.

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

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

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

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

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

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

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

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

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

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

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

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

Comment [JN26]: Dickman Farms is paying a development assessment for 250 acre feet of water because they believe that is a reasonable amount of water to meet anticipated future needs as their farm continues to grow. Tr. 1026. Dickman Farms does not have any idea how much they will have to pay for the water if this project is developed, but they are hopeful that it would be less than \$75 an acre foot. Tr. 1099. Dickman Farms, along with others including Glenn Goshie and Dave Bielenberg, is one of the parties who loaned money to the District to purchase the Dominick property in 2016. Tr. 1094-95.

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

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

Goschie Farms

Comment [JN27]: The Rue Protestants join in WaterWatch's exceptions to Findings 38-50.

Comment [JN28]: Mr. Goschie has been on the board since its formation in 2002. Tr. 1252

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

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

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

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

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

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

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

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

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

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

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

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

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

David Bielenberg

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

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

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

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

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

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

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

Comment [JN29]: Mr. Goschie expects the cost of water from this project if it is built will be between 100 and 200 dollars per acre foot. His operation could bear that cost, but he cannot speak for all of the other members. Tr. 1305-06.

Comment [JN30]: The project is planned to store 12,000 acre feet because that is what is possible at the site. If the District doesn't have all of that capacity spoken for, the project may not come to fruition. Tr. 1310-13.

Comment [JN31]: The Rue Protestants join in WaterWatch's exceptions to Findings 51-57.

Comment [JN32]: This finding is incomplete and should include that Mr. Bielenberg sells into the same market as the Rue Protestants. Tr. 1738-40.

Triangle Farms

Comment [JN33]: The Rue Protestants join in WaterWatch's exceptions to Findings 58-63.

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

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

Comment [JN34]: Incomplete: add that Triangle Farms sells its grass seed into the same national and global markets as the Rue Protestants. Tr. 1552-53, 1562.

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

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

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

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

Duane Eder

Comment [JN35]: The Rue Protestants join in WaterWatch's exceptions to Findings 64-66.

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

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

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

Ryan Eder

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

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

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

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

The Rue Protestants

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

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

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

Comment [JN36]: These findings about Mr. Eder's testimony are incomplete. Mr. Eder gave emotional testimony about how this project has hurt his family's friendship with the Rues, and that the conflict has taken its toll. He considered going off the board but he was afraid that his sons would "walk" if he did that. Tr. 1874, 1890-92.

Comment [JN37]: The Rue Protestants join in WaterWatch's exceptions to Findings 67-70.

Comment [JN38]: This is incomplete and should say "several miles outside of EVWD's boundaries."

Comment [JN39]: This should say that the Protestants also raise cattle and grow hay, timber, and Christmas trees, as do some of the EVWD farmers.

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

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

Individual Protestants¹³

Joel Rue

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

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

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

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

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

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

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

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

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

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

Comment [JN40]: Footnote 13 should be deleted. The statement that "John and Sharon Fox offered no evidence" is misleading. Stephen Thomas ("Tom") Fox testified as the Manager of Fox Land Company LLC—the family company belonging to him and his brother John and their wives. Tr. 1610, Ex. R 15 at 1. The exclusion of Mr. Doerfler's testimony is covered sufficiently elsewhere.

Comment [JN41]: Revise to add that Joel Rue's sons are the fourth generation to farm here. Tr 2428.

Comment [JN42]: Add that Mr. Rue is a competitor of the EVWD farmers who also sell grass seed. Tr. 2456-57.

Comment [JN43]: Add that Mr. Rue has never used any public funding to acquire anyone else's land.

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

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

Bruce Jaquet

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

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

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

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

88. Mr. Jaquet and Ms. Mucken's family have seen wildlife on the Schact farm. Mr. Jaquet has seen fish in Fox Creek, a tributary of Drift Creek that crosses the farm. (Decl. of Jaquet at 4.) Ms. Mucken has also seen objects that she believes to be spear points¹⁵ along Drift Creek. (Mucken Decl. at 1 and 3). Tr. at 1437-1438.¹⁶

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

Comment [JN44]: This finding is incomplete. Mr. Rue would lose approximately 24 acres of tillable ground from his operation if the project is built, in addition to losing some timber and possibly losing the ability to farm on some of his steeper land due to inundation of the flatter land. Tr 2433-35, 2437. Mr. Rue is opposed to storing water on his property for other farmers' benefits and he does not believe it is right to use his property to provide a benefit to EVWD farmers, such as Mr. Eder, while imposing a detriment to him. Tr. 2450-51, 2470. Mr. Rue's wife prepared an online petition that many people in the area signed opposing the project. Tr 2444, R. 24 at 6, R30. The Oregon Seed Council retracted a letter of support for the project after learning from Mr. Rue and others that EVWD planned to acquire private farmland through condemnation. Tr 2452.

Comment [JN45]: This finding should include that Mr. Jaquet objects to the project because he does not feel that he owes any farmers in East Valley his farm so they can increase profitability on their farms. Tr 1586.

Comment [JN46]: This finding is incomplete and should state that Mr. Jaquet previously owned additional farmland in the Victor Point area, but he sold one farm to Joel Rue and other land to part of the family that operates Ioka Farms. His great-grandfather owned the farm, and built the farmhouse. His will provides that one of four other Victor Point farmers can purchase his farm upon his death. R7.

Comment [JN47]: This finding should state that Mr. Jaquet has seen lamprey and Coho (as confirmed by a field visit from ODFW) on his property. Tr 1576-77, 1580.

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

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

Steven Lierman

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

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

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

Comment [JN48]: This finding should add "including cutthroat trout and lamprey and should further add that Mr. Lierman wants to pass his property on to his children. Tr 1593-94.

Robert Qualey

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

Comment [JN49]: This finding should add that Mr. Qualey’s family has been in the area for 4 or 5 generations, and that Mr Qualey understands that approximately 45 acres of his pasture, grazing, and timber land, and a spring that provides his domestic water, would be inundated by the project. Tr 1600, 1603.

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.)

Comment [JN50]: Add that Mr. Qualey’s children still live nearby in the Victor Point area. Further add that Mr. Qualey believed the fish he say in Drift Creek were steelhead. Tr 1601.

Stephen Fox¹⁸

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

Comment [JN51]: The second sentence of this footnote should be deleted, as it makes no sense.

Comment [JN52]: Add that the Fox family has owned the Victor Point property for four generations, and that Stephen and John’s children would be the fifth generation. TR 1609.

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

Comment [JN53]: Add that the Foxes would lose approximately 60 acres of land to the project, and approximately 2800 linear feet of their property would border the reservoir. Tr 1611.

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

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

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.]

Comment [JN54]: Add that the Foxes compete with the EVWD farmers and sell grass seed to the same buyers. Tr. 1621.

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.)

Comment [JN55]: The proposed project interferes with his planning for this land because he needs to make decisions on 3-6 year cycles, and he is concerned about not receiving compensation for his lease interest. Tr. 1954. Mr. Taylor opposes this project because he does not think people should take other people's land. Tr. 1955.

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

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

Comment [JN56]: Mr. Taylor believes that EVWD members should use the water they have more efficiently before they look for more. Tr. 1956-57.

WaterWatch

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

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

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

The Pudding River Watershed Council

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

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

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

Comment [JN57]: This sentence is incorrect. Mr. Rankin's Declaration said that the bylaws authorize up to 14 members, but the board currently has 8 members. R1 (Rankin Decl. at 2-3.)

[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.)

Comment [JN58]: This finding is incomplete and inaccurate. The RBA was conducted for the Council; it assessed fisheries and habitat throughout the Pudding River Basin, including in Drift Creek, and it is used to guide the Council's activities. The Council's opposition to the project is stated in R6; it includes lack of anadromous fish passage, inadequate consideration of alternatives—in particular the Willamette Basin Project Reservoirs, the importance of habitat in the upper reaches of Drift Creek, downstream impacts to water quality and quantity, lack of mitigation plans, putting in a dam when watershed councils are trying to remove barriers, and the condemnation of private property.

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

Integrated Water Resources Strategy

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

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

117. The December 2017 strategy states in part that:

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

(Ex. EV78 at page 128.)

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

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

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

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

Alternatives To Drift Creek Considered By EVWD

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

Comment [JN59]: This statement is incorrect. The \$500,000 received by EVWD from the State of Oregon was in the form of a general fund appropriation, not a grant. These funds were used as matching funds for other OWRD grants. Ex. R 102 and Tr. 1299-1300.

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

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

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

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

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

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

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

Drift Creek's Place in the Pudding River Watershed

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

131. Over 70 percent of the Pudding River Watershed is in Marion County. The majority of the land in the watershed is privately-owned farmland, timberland, and cities, including Aurora, Gervais, Hubbard, Molalla, Monitor, Mt. Angel, Salem, Scotts Mills, Silverton, and Woodburn. The rest of the watershed land is owned by Oregon and the federal

Comment [JN60]: These findings should clarify that EVWD performed its original alternatives analysis in 1994, and that no comprehensive analyses have been done since then, though there have been some minimal updates. Tr. 2180-81, 2189-92, 1689-91, 1728.

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

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 the Pudding River.²⁰ (Ex. A1 at 490-516.)

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment [JN61]: This heading and these findings are misleading. A more appropriate heading would be "Additional Project Information Developed at the Hearing." The fact that the application form does not ask for particular information does not mean that such information is not required for the Department to perform its public interest analysis.

Comment [JN62]: The first sentence should be stricken and the second sentence should be revised to reflect that EVWD has not yet determined the details about the reservoir.

Comment [JN63]: The first sentence should be revised to say that EVWD has not yet determined this information.

Comment [JN64]: This sentence should be stricken.

Comment [JN65]: This sentence should be revised to say that EVWD has not yet decided how it will convey the water or the expense of doing so.

Comment [JN66]: This sentence is misleading. It suggests that live stream conveyance would cost more than pipeline conveyance. Live stream conveyance would include some costs that would not be required if a pipeline is used, such as fish screens for diversion structures at the terminus of the conveyance route, but overall, it would be less expensive than a pipeline. Tr. 1314, 1713-14, 2193-94.

Comment [JN67]: This sentence should be revised to say that EVWD does not yet know how the project will be financed.

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.

Comment [JN68]: This sentence should be revised to state that EVWD does not yet know how much it will charge farmers for water.

Additional Required Approvals

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

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

Comment [JN69]: This finding is incomplete. It should acknowledge that each agency has a different mandate and review process than OWRD, and not all of the other processes provide for public participation. Furthermore, the water right permit is the only permit that will allow exercise of eminent domain authority to take private land. Tr. 478-80, 2155, 2200-01.

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

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

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

Project Impact on Rue Protestants

152. If the proposed storage project moves forward, the reservoir's footprint will cover approximately 340-384 acres of land in Victor Point. The land will be inundated when the reservoir is full, and unusable mudflats when the reservoir is empty. As a result, the Rue

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

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.

Comment [JN70]: This overstates Mr. Rue's testimony, which was only that it isn't likely that losing this amount of land would "put him out of business." Tr. 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.)

Comment [JN71]: This finding understates the Protestants' opposition. They feel very strongly that it is unreasonable and unfair for competing farmers to benefit the competing farmers' families and operations, as stated in their written and oral testimony. See exceptions to findings under the individual Rue Protestants, *supra*, and R7, R15, R20, R24, R33, R37.

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

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

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

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

160. Mr. Lierman will lose access to eight acres of farmland that he leases. He will also lose six acres of his own property that extends down into the Drift Creek Canyon. Additionally, Mr. Lierman will lose 15 or more acres of timber in a steep area that can no longer be logged cost-effectively. As a result, Mr. Lierman will have to sell timber before it reaches its optimum

growth and maturity. Mature timber in that area can be worth \$85,000 per acre but Mr. Lierman believes that he will have to sell the timber for less than that amount. (Decl. of Lierman at 2.)

161. Between 30 and 40 acres of Mr. Qualey's land will be flooded by the proposed reservoir. The spring that supplies Mr. Qualey's drinking water will be inundated. Also, additional acres of his timbered property around the reservoir will be inaccessible for timber harvest because of a 100-foot reservoir setback requirement. (Decl. of Qualey at 2.)

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

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

Comment [JN72]: This finding is misleading. The land to be flooded is owned by Fox Land Company LLC, the family company owned by Stephen Thomas "Tom" and John Fox and their wives. Tr. 1610-11, 1615; R15.

Economic Benefit from Proposed Project

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

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

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

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

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

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

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

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

OWRD's Application Review

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

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

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

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

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

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

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

Comment [JN73]: This finding is incomplete and should include the fact that Ms. Eastman did not evaluate any of the comments against the statutory public interest factors, nor did she discuss them with or send them to Mr. Wallin, who was preparing the public interest findings for the PFO, or anyone else. Tr. 353-56.

relocated. One landowner stated that he would lose a house situated on land covered by the proposed reservoir.²⁴

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

(Ex. A1 at 181-184.)

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

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

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

Comment [JN74]: Ms. Eastman did not identify the issues that were outside of the scope of review, or explain why they were outside the scope. She stated incorrectly that although Division 33 comments by DEQ and ODFW were pertinent, other comments about "ecological concerns" were not. Tr. 354-55. This is incorrect as a matter of law under ORS 537.170(8) and OAR 690-310-0120(3)(a) and (b). Furthermore, Ms. Eastman's finding is also deficient because it consisted of only two conclusory sentences with no explanation of the Department's reasoning or of how it applied the law to the facts and issues raised in the comments: "The Department acknowledges receipt of the public comments and has considered them. The comments that are applicable to the Department's review of an application for a permit to store water have been addressed through conditions contained in this document; the comments not addressed are outside the scope of this review." Exhibit A1, p. 124 and p. 184. As discussed further in Comment //, infra, this finding fails the "substantial reason" test. See, e.g., *Furnish v. Montavilla Lumber Co.*, 124 Or App 622, 625, 863 P2d 524 (1993) (reviewing an agency order to determine if it is supported by substantial reason and noting that the requirement of a rational explanation is designed to facilitate meaningful scrutiny of agency activities); *Bergerson v. Salem-Keizer School Dist.*, 341 Or 401, 415, 144 P3d 918 (2006) (agencies are required to demonstrate the reasoning that leads them from the facts to their conclusions).

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

Allowance Under Basin Rules

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

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

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

(Ex. A1 at 526.)

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

Availability of Water in Drift Creek

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

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

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

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

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

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

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

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

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

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

²⁶ 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.

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

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

195. The 1990 instream right provides for Drift Creek stream flows for Cutthroat Trout migration, spawning, egg incubation, fry emergence and juvenile rearing. The right allows for specified monthly amounts of water to flow from river mile 11, which is above the proposed dam and reservoir site, to Drift Creek's mouth. The allotted monthly protected flow increases from 2 cfs in August to 40 cfs in the second half of November. (Ex. WW8 at 1.)²⁷

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

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

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

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

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

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

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

201. In Dr. Tanovan's last two reports, dated September 2012 and June 2015, Dr. Tanovan subtracted, from the projected yearly annual flows, water necessary for ecological and channel maintenance flows. He found that after subtracting water for the Schact water right, the 1990 instream water right, and the ecological and channel maintenance flows, in most years there was sufficient water left for the proposed storage project. (Decl. of Tanovan at 2 and 5.)

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

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

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

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

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

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

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

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

Injury to Water Rights

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

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

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

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

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

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

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

(Ex. A1 at 137.)

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

217. The Department does not consider inundation of any portion of the stream reach at an upper end of the reach to constitute injury. The instream water flow would still have to be met. EVWD could not store water at a rate that impeded the instream water right. Tr. at 123-124. Instream water rights are measured and regulated at the lower end of the reach, and the Department does not consider partial inundation of an upper end of the reach to constitute injury. The Department's position is not embodied in any written rule, guideline or policy. Tr. at 122-123.

Compliance with Other Water Resources Commission Rules

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

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

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

221. The review conducted by ODFW and DEQ is known as a Division 33 review.²⁹ (Decl. of French at 7.) Division 33 reviews only consider impacts on fish species that are listed as STE under federal or state law. Impacts on non-listed fish species are not considered. Tr. at

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

Comment [JN75]: The Rue Protestants take exception to these findings of no injury to the instream right as a matter of both fact and law. As discussed further below, eliminating several miles of unimpeded flow in the segment of Drift Creek covered by the instream *flow* right is by definition injury and the Department's use of a "mouth measurement" is indefensible. .

2138. In addition to considering STE fish, ODFW evaluates riparian areas associated with stream channels, which impact fish habitat. Tr. at 500.

222. The Department has limited expertise in fisheries and fish biology. Similarly, the Department has limited expertise in land use and riparian issues. Thus, the Department defers to the technical expertise of ODFW and DEQ in concluding whether STE fish species may be impacted by a proposed project, and whether the project can be conditioned to avoid the impact. Tr. at 229 and 331-332.³⁰

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

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

Comment [JN76]: The Rue Protestants join in WaterWatch's exceptions to findings 225-247.

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

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

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

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

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

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

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,³² for spawning. (Ex. R2 at 77; Decl. of Murtagh at 3.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment [JN77]: The Rue Protestants join in WaterWatch's exceptions to findings 248-260.

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. A1 at 1.) Fish need dissolved oxygen to survive. Tr. at 434. As water temperature increases, dissolved oxygen content generally decreases. Tr. at 434-435.

ODFW and DEQ Recommended Approval of the Application with Conditions

Comment [JN78]: The Rue Protestants join in WaterWatch's exceptions to findings 261-263.

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

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

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

Both Agencies Recommended Approval of EVWD's Application with Conditions

Comment [JN79]: The Rue Protestants join in WaterWatch's exceptions to findings 264-277.

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

- A. Mitigation of any riparian disturbance;³⁷
- B. Restriction of water storage if upstream or downstream water quality decreases to the point where it no longer meets state or federal water quality standards due to reduced flows;
- C. Installation of fish screening and by-pass devices.

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

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

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

(Ex. A1 at 219-221.)

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

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

(Ex. A3 at 3.)

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

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

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

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

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

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

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

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

(Ex. A1 at 93-95.)

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

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

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

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

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

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

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

* * * * *

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

(Ex. R171 at 25 and 29.)

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

Water Modeling

Comment [JN80]: The Rue Protestants join in WaterWatch's exceptions to findings 278-283.

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

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

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

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

282. Mr. Yearsley varied the assumptions used by EVWD to create other scenarios where Drift Creek did not meet DEQ's water temperature standards despite water releases from the reservoir. Tr. at 2393. When Mr. Yearsley assumed that the reservoir was not full at its 12,000 acre feet limit, but only filled to 6,000 feet, and EVWD attempted to withdraw water at the rate of 8,000 acre feet, the temperature of water released from the reservoir would exceed the temperature standards. Tr. at 2396-2397. Mr. Yearsley obtained the same result when he assumed that the reservoir contained 8,000 acre feet and the District was withdrawing at the rate of 8,000 acre feet. Tr. at 2400-2401.

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

The PFO

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

Comment [JN81]: The Rue Protestants submit that the PFO was completely deficient in its treatment of the statutory public interest factors. Although the PFO will now be replaced with a Final Order, Protestants raise these issues because they show systemic failures by the Department in conducting this analysis. Protestants' detailed exceptions are explained in the interlineated, highlighted text.

The evidence demonstrated that the Department's evaluation of the statutory public interest factors was deficient as a matter of fact and law. The PO acknowledges that "the public interest analysis in the PFO is devoid of facts." PO 79. The discussion goes on to say that "[t]he seemingly perfunctory nature of the public interest analysis in the PFO . . . does not establish that the Department failed to properly evaluate the public interest factors. . . ." and "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." *Id.* at 79-80.

Protestants did present such facts. Protestants demonstrated through Department staff's own testimony that the Department has no process or guidelines for evaluating the statutory public interest factors and that Department staff "struggle" with the analysis. Tr. 115-16, 260-61, 393-96. Mr. French acknowledged that staff simply had to "come up with something" from the file to make the required findings. Tr. 198. Mr. French also testified *incorrectly* that there are no administrative rules fleshing out the public interest review. Tr. 132. When confronted with OAR 690-310-0110(3), which directs the agency to consider, "at a minimum" seven explicitly listed items in its public interest review, he conceded that this rule was not applied in every application. He could only say that "about half" of the items were routinely reviewed, but indirectly, such as through the separate Division 33 review. Tr. 274-79. Though Mr. French has been the Administrator of OWRD's Water Rights Services Division since 2005, he was not able to state whose responsibility it is to determine whether or how the rule applies to any given application. (Exhibit A8 at 1). Tr. 279.

Given the lack of any framework or direction to staff for conducting the public interest review, it is unsurprising that the PFO does not contain any analysis of the factors, any discussion of how the factors apply, or any explanation of facts supporting or justifying the agency's decision. Nonetheless, the absence of guidance to staff does not absolve the agency from doing the required analysis and providing a reasoned and well-supported explanation for its decision. It is a basic principle of administrative law that an agency must adequately demonstrate its reasoning in coming to a decision. *See, e.g., Castro v. Board of Parole and Post-Prison Supervision*, 232 Or App 75, 85, 220 P3d 772 (2009) (stating that the court's "duty is to evaluate the [agency's] logic, not to supply it" and finding that a conclusory statement by the agency was "an announcement, not an explanation" and thus did not satisfy the requirement for the agency to demonstrate its reasoning). Furthermore, the PFO's deficiencies placed an unfair burden on Protestants to do the Department's work on the public interest analysis for it.

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.

Mr. French admitted that this portion of the PFO first simply restated that the proposed use complies with the basin program—which is part of the initial presumption review, and then restated the basic rule of law of prior appropriation. Tr. 262-63, 282-286.

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.

Mr. French conceded that this “finding” simply restated the basic statutory requirements that a proposed use of water must be for “the beneficial use of water without waste.” Tr. 286-88. See OAR 690-410-0060(1) and 0070(1) (state statutes and the prior appropriation doctrine require beneficial use of water without waste).

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.

Water availability is part of the presumption, and this finding does not add any analysis whatsoever. Tr. ///

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.

Mr. French admitted that the permit does not contain any actual conditions pertaining to waste or conservation. Tr. 288-91.

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.

Mr. French conceded that this finding simply restated the prior appropriation doctrine. Tr. 291-92.

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.)

That "finding" in the PFO simply restates the requirement, with a conclusory statement that it was fulfilled. The public interest findings in the PFO are insufficient on their face, and the testimony of the Department's witnesses at the hearing did nothing to rehabilitate them. The preponderance of the evidence demonstrated that the department abdicated its obligation to do a proper public interest analysis as required by law. Merely paraphrasing the statutory factors as conclusory findings is insufficient as both a matter of fact and law to meet the agency's obligations to perform the required public interest review. *Diack v. City of Portland and Water Resources Department*, 306 Or. 287, 301, 759 P.2d 1070 (1988) (agency must provide more than a "regurgitation of the statutory language without analysis"); *see also Martin v. Board of Parole and Post-Prison Supervision*, 327 OR 147, 155-57, 957 P2d 1210 (1998) (discussing principles of administrative law that require agencies to explain how the law applies to the facts to support a decision); *Reynolds School Dist. No. 7 v. Martin*, 30 Or App 39, 43-44, 566 P 2d 196 (1977) (an agency needs to explain the rational relationship between the law and the facts in order for a court to be able to review the decision).

Furthermore, if enforcement of priorities or meeting the presumption criteria were all that is required to protect the public interest, then the specific elements of ORS 537.170(8) would be superfluous. *See, e.g., Diack, supra*, at 297 (the court is "unwilling to deem a legislative act meaningless unless no other reasonable conclusion is available") (citations omitted); *see also* ORS 174.010 (in construing statute, court should not "omit what has been inserted" and should construe to give effect to all provisions); *State of Oregon v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232 (2015) ("as a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage") (citations omitted).

285. The Department concluded that the proposed storage project could be modified and conditioned to ensure that the project conformed to the public interest standards set forth in applicable statutes and rules. Thus, on July 22, 2014, the Department issued a PFO

recommending that EVWD's application be granted with conditions. Tr. at 152-155. (Decl. of French at 7.)

286. The PFO provided in relevant part:

The Willamette Basin Program, of which Drift Creek is a part, allows for water storage for irrigation and flow augmentation from November 1, through June 30. Water in the amount requested is available to be appropriated for storage from November 1 through April 30. Water may be appropriated when the basin program storage dates and water availability collide. As a result, EVWD may store water for irrigation from November 1 through April 30.

(Ex. A1 at 124.)

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

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

- A. As a preferred alternative, DEQ recommended that the applicant assess off-channel construction opportunities.
- B. ODFW preferred that upstream and downstream fish passage be provided at the reservoir site, but Oregon law allows for other options to address fish passage.
- C. EVWD must allow all live water to flow down the creek from May 1 through October 31.
- D. EVWD may store water only when sufficient water is available to serve all prior rights, including prior rights for maintaining instream flows.
- E. Before beginning construction, EVWD must address Oregon's fish passage law with the assistance of ODFW. EVWD must provide ODFW approved fish passage or obtain a fish passage waiver.
- F. Prior to construction, EVWD must conduct an assessment of the riparian area disturbed or inundated by the reservoir. In conjunction with ODFW, EVWD must develop a mitigation plan to restore or enhance riparian habitat. The riparian mitigation plan may be separate from any other wetland and waterway impact mitigation plan required by ODFW.

G. The water quality of the source streams or downstream waters must continue to meet state and federal water quality standards. Water quality standards must be met year round to minimize impacts to aquatic species.

H. Before initiating construction, EVWD must coordinate with ODFW to determine the existence of species protected by the ESA within the reaches of the streams impacted by the project. EVWD must develop a mitigation plan to offset impact to sensitive, threatened or endangered fish species. ODFW must approve the mitigation plan in writing.

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

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

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

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

(Ex. A1 at 125-126.)

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

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

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

Comment [JN82]: As discussed above, the Department did not do any adequate evaluation of the criteria or the evidence at the PFO stage.

(Ex. A1 at 123-132.)

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

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

291. The PFO does not discuss whether the dam will be adaptable to hydroelectric power generation in a manner allowing for safe passage of fish. Because the dam would be more than 25 feet high at a location where the average annual flow exceed two cfs, the dam must include measures making it readily adaptable to hydroelectric power generation. The Department will require in the FO that the dam will include those measures or that EVWD be required to demonstrate that it meets one of the exceptions contained in ORS 540.350(3). (Decl. of French at 8-9.)

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

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

(Ex. A1 at 133-137.)

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

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

E. Within one year after water storage, EVWD must submit a claim of beneficial use.

(Ex. A1 at 134 and 137.)

294. Although the PFO contains DEQ's recommendation that an off-channel reservoir construction options be explored, the draft permit does not do so. (Ex. A1 at 133-137.) However, as clarified by DEQ, the recommendation to consider off-channel opportunities was a recommendation but not a condition. Tr. at 81.

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

Comment [JN83]: The Rue Protestants join in WaterWatch's exceptions to Conclusions of Law 1 through 5. The Rue Protestants further take exception to specific conclusions as noted in the following comments.

- 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);

Comment [JN84]: The Rue Protestants take further exception to Conclusion 2.c and d, as explained below.

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

Comment [JN85]: The Rue Protestants take further exception to Conclusion of Law No. 3, as explained below.

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

Comment [JN86]: The Rue Protestants take further exception to Conclusion of Law No. 5, as described in Comment 76, *supra*, and as further explained below.

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

OPINION

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

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

Water Permit Application Overview

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

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

be done within 15 days of the Department's receipt of an application. ORS 537.150 (1). The Department then accepts public comments about the application for 30 days. OAR 690-310-0090 (1) and (4).

Next, the Department conducts an "initial review" of the application. OAR 690-310-0080. That review analyzes whether the proposed storage or use either (a) meets four specified criteria or (b) can be modified or conditioned to meet the four criteria. OAR 690-310-0120(2) (b) and (3). The four criteria include allowability of the proposed use in the applicable basin program, availability of water, injury by the proposed use to other water rights, and compliance with Water Resources Commission rules. If the four criteria are met, a presumption arises that the use will not impair or be detrimental to the public interest. ORS 537.153(2).

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

Comment [JN87]: As addressed above, the record shows that the Department does not in fact do any weighing, analysis, or evaluation of the statutory public interest factors.

The public interest factors include:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, or to the use of the waters of this state, and the means necessary to protect such rights.
- (g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.537.534.

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

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

If, as here, the Department concludes that the presumption has been established and not rebutted, the Department has 60 days to prepare a proposed final order (PFO) recommending issuance of the permit "subject to any appropriate modifications or conditions." ORS 537.153(g); OAR 690-310-0100 and 690-310-0120(4).

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

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

Burden of Proof

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

* * * * *

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

The Shifting Burden of Proof

When the Department approves an application and others protest that approval, the Department has the burden of proof to show that all four of the statutory criteria are met, thereby justifying the

approval. If all four criteria are present, there is a presumption that the proposed use will not impair or be detrimental to the public interest. That presumption can only be overcome by a preponderance of the evidence showing otherwise. *Lawrence v. Clackamas County*, 164 Or App 462, 468-469 (1999).

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

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

The “burden of proof” in any legal proceeding consists of two components — the burden of producing evidence (also called the “burden of production”) and the burden of convincing the trier of fact that you should prevail (also called the “burden of persuasion”). Compare OEC 305 (burden of persuasion) with OEC 307 (burden of production); see also LAIRD C. KIRKPATRICK, OREGON EVIDENCE §305.03 (6th ed., 2013). The burden of production can shift back and forth between parties during a proceeding, but the burden of persuasion ultimately rests on the proponent advocating for a particular outcome.

Comment [JN88]: The burden of *production* shifts to Protestants, but the ultimate burden of *persuasion* rests on the Department. As discussed in the interlineated text, the Department must issue a Final Order that is supported by substantial evidence showing that issuing this permit will not impair or be detrimental to the public interest.

In this proceeding, the Department proposes to issue a permit to EVWD to build a dam on Drift Creek and impound water in a reservoir on land belonging to several of the Rue Protestants. The Department is the proponent of its proposed decision to issue a water right to EVWD. See ORS 183.450(2) and *Compensation of Harris v. SAIF Corp.*, 292 Or 683, 690 (1982) (the burden of proof is on the proponent of a fact or position). The Department thus has the ultimate burden of persuasion to support the issuance of such a permit by establishing that the proposed use of water will not impair or be detrimental to the public interest. ORS 537.170(6) and (8); ORS 183.482(8).

According to ORS 537.170(6):

“If, after the contested case hearing . . . , the director determines that the proposed use . . . would otherwise impair or be detrimental to the public interest, the director shall issue a final order rejecting the application or modifying the proposed final order to conform to the public interest” [Conversely,] “[i]f, after the contested case hearing . . . , the director determines that the proposed use would not impair or be detrimental to the public interest, the director shall issue a final order approving the application or otherwise modifying the proposed final order”

EVWD's Water Storage Application

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

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

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

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

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

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

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

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

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

* * * * *

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

(Emphasis added.)

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

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

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

Comment [JN89]: The Protestants take exception to this statement because it mischaracterizes Protestants’ argument. Protestants did not argue that “all of the details regarding the project” must be finalized in order for the Department to evaluate the application. They argued that enough information must be available to perform an adequate public interest analysis.

Comment [JN90]: The Rue Protestants take exception to this statement because these 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, the full impact and cost of the project cannot be determined with enough specificity to perform a proper analysis under ORS 537.170(8).

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

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

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.

Comment [JN91]: The Rue Protestants take exception to this comparison of the *Benz* case to this case. The conditions imposed on the permit in *Benz* were quite concrete, specific, and immediate, and thus distinguishable from the vague, future conditions in this case.

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.

Comment [JN92]: These statements are misleading and superfluous. Once the storage permit is issued, the damage has been done to the Rue Protestants, as EVWD intends to use condemnation to acquire their land for the reservoir. Any public review of a secondary permit that is required for the District to withdraw the water from storage to use for irrigation will not help the Rue Protestants. Furthermore, the most significant impacts to fisheries and water quality will result upon the construction of the dam and reservoir.

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

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

Comment [JN93]: This mischaracterizes Protestants’ arguments. Protestants’ argument was that OWRD cannot avoid its own statutorily mandated public interest analysis by deferring to other agencies’ approval processes.

Thus, even if all the details of the proposed project were known at this stage, as the Protestants urge they should be, the Department could not evaluate whether the Protestants could

meet all of the necessary hurdles for this project to become a reality. And, granting EVWD's application for a water storage permit is not a guarantee that the other agencies that will weigh in on the project will ultimately approve it. The only decision made by the Department here is that the Drift Creek project meets the statutory and administrative rule requirements for a water storage permit. Because that is the case, the Department is required to approve the application.

Issue No. 1: Public Interest Presumption

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

Comment [JN94]: 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. First, those very "statutory and administrative rule requirements for a water storage permit" include the public interest analysis of ORS 537.170(8), and the record demonstrates that this project will be detrimental to the public interest. Furthermore, 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.

A. Allowability in Basin Program

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

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

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

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

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

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

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

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

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

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

B. Water Availability

Comment [JN95]: The Rue Protestants join in WaterWatch's exceptions to this section of the Opinion.

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

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

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

the investigation of stream flow or groundwater measurement records, watermaster distribution records, flow requirements of existing water rights, stream flow modeling in ungauged basins, minimum perennial streamflows, or

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

scenic waterway flow requirements to determine if water is available to support the proposed water use.

OAR 690-300-0010(58).

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

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

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

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

(Ex. A1 at 137.)

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

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

dam. WaterWatch therefore contends that there may be insufficient water flow at the dam site to cover the existing water rights and the proposed project.

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

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

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

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

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

The Department concluded that the water application processing rules do not currently require consideration of minimum pass-through flows or peak and ecological flows in determining water availability. Because the rules do not mention either type of flows, the Department's interpretation is reasonable and entitled to deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). See also, *Willamette Water Co., v. Waterwatch*

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

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

of Oregon, Inc., 288 Or App 778, 787 (2017) (“To overcome [the Water Resources Department’s] interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule’s text, context, or other applicable source of law.”)

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

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

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

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

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

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

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

C. Injury

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

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

Comment [JN96]: This statement mischaracterizes Protestants’ argument. The Rue Protestants argue that these harms to them are pertinent to the public interest analysis, not to the injury analysis.

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.]

Comment [JN97]: As stated in the previous comment, this mischaracterizes the Protestants’ argument.

[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.

Comment [JN98]: This discussion should be stricken. As stated in the two previous comments, the Rue Protestants did not argue that all of the impacts to them were part of the "no injury" analysis, but rather part of the public interest analysis. The public interest analysis here is clearly mandated by the statute and thus the *Examilotis* case is irrelevant.

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

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

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

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

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

ORS 537.400(5).⁴⁵

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

Thus, ownership of the land, with the appurtenant water right, is a contingency that must be satisfied before reservoir construction can begin.

Water districts created under the requirements of ORS 545.025(1) may exercise eminent domain under ORS 545.025(1). Thus, EVWD has the authority to purchase the property of the Rue Protestants that will be inundated and otherwise impacted by the water storage project.

After EVWD purchases the land, it can request that the Department cancel the water right. Alternatively, EVWD could transfer the right. If eminent domain proceedings are unsuccessful, the storage project will not materialize because EVWD will be unable to meet the requirements of ORS 537.400(5) that EVWD own or have legal access to the lands that will be inundated.

The Department's position that no injury occurs through taking a water right by acquiring the land to which it is attached by eminent domain is reasonable. Under ORS 537.400(5), the Department has the authority to approve a storage application and issue a water storage permit before the applicant owns the impacted land. Eminent domain is a legal means of acquiring property and satisfying the ownership contingency. That process is used both by public entities and water districts. If the district can meet the ownership contingency prior to filling the reservoir, the district will own the water right.

Here, the Department's position that the Schact water right will be uninjured is bolstered by other facts in the record. Mr. Jaquet testified that the pond was filled in with silt from a nearby farm, and has been dried out since 2005 or 2006. Although the water storage right apparently has not been cancelled, it has not been used for approximately 13 years. ORS 540.631 states that a rebuttable presumption exists that a water right owner has forfeited a water right that the owner has not used for five years. Thus, under ORS 540.631, the Department may be able to initiate proceedings to cancel the Schact water storage right. Accordingly, the water storage right will not be injured by the proposed project.⁴⁶

WaterWatch also contends that the 1990 instream right will be injured by the proposed project. That instream right guarantees specified monthly instream flows, expressed in cfs, from river mile 11.0 to the mouth at river mile 0.0. The certificate states that the flows "are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." Because the certificate refers to the "lower end of the reach" as the place of measurement, the Department measures flow at the mouth of Drift Creek.

Nothing in the record suggests that at the time the certificate was recorded in August 1996, reflecting an October 18, 1990 priority date, there were barriers in or significant points of diversion from Drift Creek. It therefore made sense to make ensure the instream flows were

⁴⁶ The Department has suggested that the Final Order could include a condition requiring EVWD to request that the Department cancel the Schact water storage certificate before construction may begin.

being met by measuring at the mouth of Drift Creek. However, given the potential impact of placing a reservoir in the creek or diverting water into a pipeline or other conveyance, the instream right can no longer be adequately protected by mouth flow measurements. This is so because by the time Drift Creek reaches the Pudding River, other tributaries have joined and added water to the creek.

Thus, measurements at the mouth will not show whether the instream minimum flows are being met above the mouth and throughout the protected reach. The reservoir could potentially limit live flow at the dam but still meet the in-stream minimum flows, when measured at the mouth of Drift Creek, by combining the release flow with tributary inflow below the dam. Nonetheless, measurement at the mouth of Drift Creek will be insufficient to determine whether live flow between the proposed dam and the closest tributary below that site is sufficient to satisfy the instream water right in that reach of Drift Creek.

The draft permit currently states that the District shall pass all live flow during the months of May 1 through October 31. The draft permit also states that the District may only store water when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows. Adding a measuring condition to the FO will ensure that these requirements are met. The FO should require monthly stream flow measurements during the storage season from November 1 to April 30, and again in May, July, and September. The measurements should be made at regular intervals, not to exceed one river mile, from the in-channel reservoir, if one is constructed, to the mouth of Drift Creek. If no in-channel reservoir is built, the measurements should be made from the point of diversion to the mouth of Drift Creek.

WaterWatch also argues that the 1990 instream water right will be injured because water will not be flowing at the dam site and reservoir. However, as indicated above, EVWD will have to pass enough water from the dam and reservoir to meet the in-stream minimum flows. Additionally, WaterWatch offered no evidence that the existence of the dam and reservoir, after fish passage or exemption requirements are met, will prevent meeting the 1990 instream water right's stated purposes for stream flows, for migration, spawning, egg incubation, fry emergence, and juvenile rearing of Cutthroat Trout.

WaterWatch contends that ORS 537.352 might allow EVWD to claim that the proposed storage right should take precedence over the 1990 instream water right. ORS 537.352 provides that multipurpose storage or municipal water uses by a municipal applicant shall take precedence over an in-stream water right when the Department reviews a proposed project in the context of a contested case hearing. However, WaterWatch has not shown that EVWD's proposed project constitutes a multipurpose storage municipal water use project.

Moreover, nothing in the PFO or draft permit states that the proposed storage project will take priority over the 1990 instream water right. Instead, the PFO specifically acknowledges the existence of other water rights and requires EVWD to refrain from injuring them: "The proposed use will not injure other water rights." The PFO also explicitly mandates that the instream water rights be satisfied: "The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows."

Comment [JN99]: The Rue Protestants agree with WaterWatch's argument. The instream water right by its terms states that the right is to be maintained in Drift Creek from River Mile 11 to the mouth. This Proposed Order acknowledges above that "the instream right can no longer be adequately protected by mouth flow measurements" because of the impacts of the dam, reservoir and water diversions. The ALJ's proposed additional measurement conditions offer some improvement over the PFO, but do not go far enough to prevent injury to the instream right. The record showed that blocking fish passage to approximately 6 miles of Drift Creek between the dam and the right's upper reaches and replacing a free-flowing stream with approximately 3 miles of reservoir will injure the instream right.

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

Comment [JN100]: The Rue Protestants join in WaterWatch's exceptions to this portion of the Proposed Order.

A. Division 33 Rules

The Department has promulgated rules designed to aid it in determining whether a proposed use will impair or be detrimental to the public interest in sensitive, threatened, or endangered fish species. These rules are known as Division 33 rules, and apply to application for water storage permits. OAR 690-033-0000(1) and (2)(d).⁴⁷

Comment [JN101]: This footnote is misleading. The Rue Protestants submitted testimony and photographic evidence of substantial numbers of elk regularly using the site that would be inundated by the reservoir. The fact that this habitat would no longer be available is part of the Department's required analysis under its administrative rules other than Division 33 and of the required public interest analysis.

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

⁴⁷ These rules also apply to STE wildlife species. Exhibit EV79 references information gathered in September 2016, after the Department issued the PFO, about elk in the proposed project vicinity. In its Initial Closing Brief, the Department states that it assumes that the ALJ's Proposed Order, as well as the Department's FO, will include findings about the potential impact of the proposed use on elk. However, the Department offered no evidence or argument about the significance of the information contained in Ex. EV79 or about any statutes or rules that set forth how that information is to be evaluated. The Department also offered no information showing that the elk observed in the vicinity of the proposed project are STE species. Moreover, the Protestants make no argument that the presence of the elk mentioned in Ex. EV79 has any impact on whether EVWD's storage permit application should be granted. As a result, this Proposed Order does not address elk.

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 690-033-0220,⁴⁸ the Department must determine whether the detriment to the protection or recovery of the threatened species, in this case Winter Steelhead, can be conditioned to avoid the detriment. If the detriment cannot be conditioned, the applicant may propose a mitigation plan. If the detriment can neither be conditioned nor mitigated, the Department must presume that the proposed use impairs the public interest, compelling denial of the application. OAR 690-033-0220(1).

Here, both ODFW and DEQ advised the Department that it could impose conditions avoiding detriment to Winter Steelhead in EVWD's permit. ODFW and DEQ both recommended therefore, that the Department approve EVWD's application with conditions.

Sensitive Fish

Sensitive species are those facing one or more threats to their populations, habitat quantity or habitat quality, or those declining in numbers such that they may become eligible for being listed as threatened or endangered under state law. OAR 690-033-0010(9), 635-100-0001(4) and 635-100-0040(2)(a) and (b). Under OAR 690-033-0330(2)(b), the Department must determine whether a proposed use's impact on sensitive fish, here Pacific Lamprey, can be conditioned to ensure no net loss of essential habitat.

"Habitat" is the physical and biological conditions within the species' range that may, over time, affect the species' welfare. OAR 635-415-0005(5). "Net loss" is the loss of habitat quantity and/or habitat quality despite mitigation measures having been taken. OAR 635-415-0005(22).

Both ODFW and DEQ advised the Department that it could impose conditions to avoid a net loss of the essential habitat of Pacific Lamprey. As a result, ODFW and DEQ recommended that the Department conditionally grant EVWD's application.

ODFW and DEQ recommended the following conditions: mitigation of any riparian disturbance, restriction of water storage if upstream or downstream water quality fails to meet state or federal water quality standards because of reduced flows, and installation of fish screening and by-pass devices.

⁴⁸ This rule, as well as OAR 690-033-0330, applies to applications filed after April 8, 1994 that impact the lower Columbia River area below the Bonneville Dam. OAR 690-033-0210. That area includes the Willamette basin, where Drift Creek is located.

Further, ODFW recommended the following additional conditions: compliance with Oregon's fish passage laws, ensuring bypass flows necessary to meet the 1990 instream water right year-round, and mitigating impacts to Winter Steelhead and Pacific Lamprey habitat.

Likewise, DEQ recommended the following additional conditions: passage of all live flow from May through October, and support of cold water fish rearing and migration from June to September, and spawning from May to October. DEQ also suggested that EVWD consider off-channel reservoir possibilities.

The Department imposed the following conditions: compliance with fish screen design, installation, operation and maintenance, adherence to state and federal water quality standards, compliance with Department-required water use measurement, recording, and reporting, and restoration of riparian areas.

By forming the interagency team, soliciting input from the team, and incorporating the suggested conditions into the PFO, the Department met its Division 33 obligations. The Department therefore has shown that it complied with the Division 33 rules.

Nonetheless, WaterWatch raises several arguments about the Division 33 process here. First, WaterWatch argues that the Division 33 analysis was flawed because it did not consider one other listed fish, and two unlisted fish. The additional listed fish is Upper Willamette Spring Chinook, a species listed as threatened. The two non-listed fish species are Cutthroat Trout and Coho Salmon.

WaterWatch's biologist, Conrad Gowell, testified that he has not observed Upper Willamette Spring Chinook in Drift Creek. However, Mr. Gowell testified that this species may use the creek for juvenile rearing because the fish have been observed in other streams in the Pudding River watershed.⁴⁹ These streams include Silver Creek and the Pudding River main stem. The Department did not dispute that evidence. Indeed, ODFW's biologist Tom Murtagh agreed that Spring Chinook may possibly be present in Drift Creek.

However, WaterWatch offered no evidence about the significance of that possibility. For example, WaterWatch offered no evidence about projected numbers of Upper Willamette Spring Chinook that might rear in Drift Creek. WaterWatch offered no evidence of where in Drift Creek the species might rear or its juvenile rearing habitat requirements. Additionally, WaterWatch offered no evidence that the conditions imposed by ODFW to protect other fish species, such as Winter Steelhead, will not protect Upper Willamette Spring Chinook. As a result, WaterWatch did not show that the Division 33 process was inadequate because ODFW did not address Upper Willamette Spring Chinook.

WaterWatch also contends that the Division 33 process was flawed because the impact of EVWD's project on two other non-listed fish species was not considered: Cutthroat Trout and Coho Salmon. These fish, however, are not listed as STE, which are the only species that must be considered during a Division 33 analysis. *See, e.g.*, OAR 690-033-0220 and 690-033-0330.

⁴⁹ Mr. Gowell testified that Upper Willamette Spring Chinook would only use Drift Creek for juvenile rearing, and not for spawning.

The Department therefore is not required to consider impacts on these fish as part of a Division 33 review.

As testified by WaterWatch's expert biologist, Mr. Gowell, and ODFW biologist Mr. Murtagh, there is a dispute about whether Coho Salmon in Drift Creek are native or non-native. ODFW does not classify Coho Salmon as native fish because they were not present in countable numbers in the Willamette River above Willamette Falls at the time of the pioneer settlement. Because ODFW categorizes the fish as non-native, they are not eligible to be listed as STE, which are designations used only for native fish. Whether or not ODFW should reconsider its classification of Coho Salmon as non-native is beyond the scope of this contested case hearing. Thus, WaterWatch did not establish that the Department's failure to evaluate the project's effect on these fish rendered the Division 33 review inadequate.

Although the Department did not have to evaluate project effects on the non-listed fish species during its Division 33 review, both fish species are, however, relevant to the Department's consideration of whether any facts exist that show that the public interest presumption is overcome. OAR 690-310-0120(3)(a) provides that when the Department determines that the presumption is established, the Department must further evaluate any available information regarding specified categories to determine whether the presumption is overcome. For example, the Department must consider STE, where applicable. OAR 690-310-0120(3)(b)(B). The Department must also evaluate information related to non-listed species, referred to as "fish and wildlife." OAR 690-310-0120(3)(b)(D). For purposes of this rule, it does not matter whether Coho Salmon are native or non-native, or listed versus non-listed. The rule simply refers to "fish."

WaterWatch, however, did not present evidence showing that the conditions for listed fish are inadequate to reduce potential impacts on Cutthroat Trout and Coho Salmon, which share the Salmonid family with Winter Steelhead, for which ODFW has proposed protecting conditions. WaterWatch therefore did not establish that the existence or possible existence of these fish species shows that the proposed use will impair the public interest.

WaterWatch claims that the Division 33 review was also defective because water quality issues were not fully considered. When determining whether the presumption is overcome, the Department must consider, but need not resolve, possible water-quality impacts. OAR 690-310-0120(3) ("the Department shall * * * consider * * * water quality"). Here, the Department and DEQ showed considered the proposed use's impact on water quality as it relates to STE fish species. Because EVWD need not develop and present dam and reservoir plans when applying for a storage permit, the specifications of the dam and reservoir are unknown. Thus, DEQ cannot assess all of the impacts to water quality during the water storage permit application process. However, DEQ will assess the impacts, and further condition the project, when DEQ determines whether EVWD is entitled to certification showing that the dam will comply with Section 301 of the CWA.

WaterWatch also argues that the Division 33 process was flawed because it did not consider fish passage issues created by the reservoir pool. Specifically, WaterWatch contends

that even if fish get around the dam, they may have trouble navigating upstream or downstream through the reservoir.

Greg Apke, ODFW's Fish Coordinator, testified, the fish passage laws only consider the impact of the dam. Whether the fish passage laws should address reservoirs is not an issue to be decided here.

WaterWatch's next argument pertains to the conditions recommended by ODFW and DEQ. WaterWatch contends that by approving EVWD's application with those conditions, the Department wrongfully delegated its duty to determine if the proposed use is in the public interest. In support of that argument, WaterWatch relies on OAR 690-033-0220(5), which provides: "[N]othing in these rules delegates the authority of the Department to make final decisions on permit applications."

Contrary to WaterWatch's argument, the Department has made a public interest determination here. Although it has not speculated about the outcome of all of the project approvals that EVWD must obtain before building the dam and reservoir, the Department has decided that *if* the District obtains the necessary permits, and demonstrates compliance with applicable local, state and federal law, the project will not impair the public interest.

By seeking and following expert fish advice from biologists at ODFW and DEQ, the Department is not abdicating its responsibility, it is fulfilling it. As the current Department Director Dwight French testified, Department staff members are not fish experts or riparian habitat experts. In order for the Department to determine whether the proposed use is in the public interest, it must rely on the expertise of ODFW and DEQ. These agencies must guide the Department not only in evaluating whether the proposed use will harm fish but also in developing appropriate and effective measures to avoid that harm.

The water application statutory framework is consistent with the Department's approach. ORS 537.211(1) expressly authorizes the Department to include in water permits "*any terms, limitations or conditions* as the Department considers appropriate * * *." (Emphasis added.)

Similarly, ORS 537.153(1) provides in relevant part that "the Department shall complete application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. (Emphasis added.) ORS 537.211(2) also allows the Department to condition a permit on an applicant obtaining legal access to land impacted by the project. Additionally, ORS 537.400(4) authorizes the Department to condition the granting a storage permit on the Commission's approval of final dam plans and specifications.

WaterWatch would require EVWD to prove here that it will successfully comply with permitting processes not at issue here. WaterWatch contends that EVWD must show here that it can comply with fish passage laws or obtain a fish passage waiver. However, EVWD has not even submitted a fish passage proposal to ODFW. Similarly, EVWD has not applied for a waiver from the fish passage requirements. The District cannot do so until it obtains a water storage permit from the Department. Thus, it makes no sense to require the Department at this

stage to attempt an analysis of whether undeveloped and unknown plans for fish passage or waiver will be approved.

The timeframe contemplated by the water right application processing statutes do not support the lengthy approval process necessitated by WaterWatch's suggested approach. Under ORS 537.150(1), the Department is supposed to conduct its completeness review of an application within 15 days of receiving it. Thirty days later, the Department must notify the applicant whether the proposed use is restricted, whether water is available, and whether any other issue precludes approval. ORS 537.150(5). Two months after that notification, the Department is supposed to issue a proposed final order. ORS 537.153(1). Under this timeframe, the Department likely would not have time to analyze whether other agencies will grant permits for which EVWD has not yet applied.

Many of these approval processes are complicated. ODFW fish passage authorization is one example of an intricate process. Fish passage laws require that before constructing an artificial obstruction across any waters of the state that are or historically were inhabited by native migratory fish, the obstruction's owner must submit a proposal for fish passage. ORS 509.585(2) and (4). Alternatively, the owner may apply for a fish passage waiver by showing alternatives to passage that would provide a net benefit to native migratory fish. Thus, the owner has to show that alternatives to fish passage will result in a benefit greater to fish than that provided by fish passage by or through the artificial obstruction. ORS 509.585(7)(a) and (b).

The statute requires ODFW to analyze at least twelve factors including the geographic area, the type and quality of habitat, the affected species, the status of native migratory fish stocks, standards for monitoring, evaluating and adaptive management, feasibility of fish passage and alternatives to fish passage, quantified baseline conditions, historic conditions, existing native migratory fish management plans, financial or other incentives and the application of incentives, data collection and evaluation, and consistency with the purpose and goals of the Oregon plan. Moreover, ODFW is required to coordinate its fish passage or waiver requirements with applicable federal law. ORS 509.585(7)(c) and (d). Simply put, the Department does not have the authority or the expertise to evaluate these factors.

WaterWatch cites to *Gould v. Deschutes County*, 216 Or App 150 (2007) for support of its argument that the Department impermissibly delegated the public interest analysis to ODFW and DEQ by approving EVWD's application with conditions. In *Gould*, a developer applied to Deschutes County for approval to build a resort with golf courses and shops. County laws required the application to include a description of wildlife resources at the proposed building site, the impact of the resort on those resources, a plan to mitigate adverse impacts, and a resource protection plan to ensure that natural features of the site were maintained. *Id.* at 154.

Instead of including the required items in its application, the developer stated that it would work with ODFW to develop them. ODFW represented to the county that it would be feasible to develop a mitigation plan addressing any impact to natural resources.

Before approving the application, the county was required to find that the developer's proposed plans would completely mitigate any negative impact on natural resources. Without

requiring the developer to articulate the negative impacts and present a mitigation plan, the county relied on the promise of the developer to identify the impacts, and the commitment of ODFW to help create a suitable mitigation plan, and approved the project. *Id.*

The Court of Appeals found that the county could not effectively evaluate impacts from the project without knowing the project impacts and the specifics of the mitigation measures. The Court of Appeals held that the county had therefore impermissibly deferred to ODFW to perform the required analysis. *Id.*

Here, there are not requirements similar to those imposed by the county in *Gould*. The Department's form application did not require EVWD to identify natural resources impacts or a plan to mitigate any identified impacts. The water right application processing statutes and rules also contain no such requirements for a water storage permit. Thus, the *Gould* case does not support WaterWatch's argument.

Comment [JN102]: The fact that the form did not require certain information does not excuse the Department from developing enough information about the project impacts to perform the evaluations required by its statutes and rules.

Another case cited by WaterWatch is also inapplicable. In *Kusyk v. Water Resources Dept.*, 164 Or App 738 (2000), an individual filed an application to transfer two ground water right certificates. Under the applicable statute, ORS 540.530, the Department could grant the application only if the transfer would not injure other existing water rights. A landowner filed a protest to the Department's proposed order granting the application. The landowner argued that the transfer might cause substantial interference with her existing water rights. *Id.* at 740.

The Department's hydrologist conducted a study, and concluded that he could not determine whether the transfers would injure the landowner's water rights. The hydrologist indicated that in order to do so, he would have to observe the new well in operation. Without scheduling a contested case hearing, the Department granted the transfer permit, conditioning it on the applicant ensuring that the new well did not impact the landowner's water right. *Id.* at 741.

The circuit court found that the Department abdicated its responsibility to make a "no injury" finding, and granted summary judgment, as well as attorney fees, in the landowner's favor. The case then was appealed the Court of Appeals on the issue of attorney fees. *Id.* at 740.

Unlike in *Kusyk*, the Department has not failed in its obligation to make the required findings under ORS 537.153(2) about injury to existing water rights from EVWD's proposed project. As explained *infra*, the Department evaluated all four required factors, including potential water right injury.

WaterWatch also argues that conditioning EVWD's permit on compliance with fish passage laws is inadequate because those laws, unlike the water right application processing statutes, do not provide for public comment. As a result, WaterWatch argues, it will be unable to participate in the ODFW process for approving fish passage or waiver plans. However, an inability to participate in another agency's approval process does not provide a basis for denying EVWD's application. Public participation in the fish passage process is not within the scope of this contested case hearing.

WaterWatch also contends that water quality modeling submitted by EVWD at the hearing shows that the EVWD cannot meet the water quality temperature standards that require maintaining Drift Creek at or below 18 degrees Celsius from May to October, and below 13 degrees Celsius from October to May. However, EVWD offered evidence that it could meet the standards if the reservoir is full at 12,000 acre feet and EVWD only withdraws 8,000 acre feet of water during the summer months. The latter is the amount that EVWD's project manager Mr. Crew estimated that the District would initially withdraw.

WaterWatch's expert, John Yearsley, was able to duplicate and confirm those results by using the same computer model. Thus, WaterWatch's expert confirmed that at least one scenario would allow EVWD to release cooler water.

WaterWatch contends that a number of factors may limit the District's ability to release cooler water. For example, reservoir water may stratify, causing layers of cool and warm water throughout the reservoir. If warm water is released from the reservoir, it could exceed water quality temperature standards. However, EVWD has offered evidence that it can construct a reservoir with multiple outlets, allowing the District to release water at a lower temperature.

WaterWatch also argued that EVWD may not be able to store 12,000 acre feet of water every year. However, as EVWD points out, nothing requires it to drain the entire reservoir each year. The District therefore would not have to add a full 12,000 acre feet to the reservoir each year to have a full reservoir.

WaterWatch contended that evaporation and seepage might limit a reservoir's ability to remain full. However, WaterWatch's expert conceded that evaporation and seepage likely would not make a significant difference.

EVWD offered evidence that it may be able to release water from a reservoir that meets the water quality temperature standards. Although WaterWatch offered other scenarios where the District did not meet the standards, WaterWatch's experts did not dispute the fact that it is possible for EVWD to release water complying with the standards. WaterWatch therefore did not prove that the project is against the public interest because the reservoir would prevent EVWD from meeting the required standards.

Moreover, one of the PFO conditions is that EVWD meet all state and federal water quality standards. Under the terms of the PFO, if the District fails to do so, the Department may cancel the storage permit and seek civil penalties against EVWD under ORS 536.900.

WaterWatch's next argument is that the record does not support ODFW's determination that a fish passage or waiver plan will avoid detriment to threatened Winter Steelhead, and prevent a net loss of essential habitat for sensitive Pacific Lamprey. In support of that argument, WaterWatch cites to the testimony of ODFW fish biologist Tom Murtagh, who signed ODFW's Division 33 review recommending approval of EVWD's application with conditions.

Four months after recommending approval, Mr. Murtagh expressed doubts to ODFW colleagues about whether EVWD will be able to obtain a waiver of the fish passage laws if it

requests one. Mr. Murtagh also wondered whether Pacific Lamprey or Winter Steelhead habitat in the upper portions of Drift Creek might be categorized as Category I habitat in the future. Category I habitat is considered essential and irreplaceable. ODFW does not recommend that the Department grant applications for proposed uses that impact such habitat.

Nonetheless, as explained above, the fish passage waiver requirements are not at issue here. The same is true of ODFW's categorization of habitat. Moreover, there is no evidence in the record that Mr. Murtagh withdrew ODFW's recommendation that EVWD's application be granted. To the contrary, Mr. Murtagh testified that he still believes that the Division 33 review is accurate. There also is no evidence in the record that upper Drift Creek has been designated as Category I habitat of Pacific Lamprey or Winter Steelhead. At present, the area is Category II or III habitat.

In a related argument, WaterWatch contends that the upper reaches of Drift Creek above the proposed dam site should be categorized as Category I. WaterWatch bases its argument on Mr. Murtagh's testimony that Drift Creek may be categorized as Category I, as well as ODFW representative Ms. Pakenham Stevenson's testimony that cool water refugia, can be Category I habitat. Mr. Murtagh testified that the upper reaches of Drift Creek above the proposed dam site contain cool water refugia areas.

However, Ms. Pakenham Stevenson was not asked, and offered no opinion about whether the upper reaches of Drift Creek have or should be categorized as Category I habitat. To the contrary, she testified that Drift Creek is Category II or III habitat. As Mr. Murtagh recognized, ODFW has not designated any portions of Drift Creek as Category I habitat. His email speculation that portions of Drift Creek might be so designated in the future is speculative. And, as indicated previously, ODFW's categorization of habitat is not at issue here.

WaterWatch's final argument is that the Department must show, before granting EVWD's application, that EVWD can obtain ODFW approval for a mitigation plan under OAR 690-033-0220(5). That rule requires that a proposed water use that is detrimental to the protection or recovery of a threatened species must be conditioned or mitigated to avoid the detriment. Otherwise, the proposed use application must be denied as being contrary to public interest.

OAR 690-033-0220(5) allows the applicant to offer a mitigation plan to offset the detriment. The Department must determine whether the proposed use with mitigation, if mitigation is proposed, offsets the detriment. Here, there is no evidence in the record that EVWD has proposed mitigation. OAR 690-033-0220(5) therefore does not apply.

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

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

The Commission has promulgated rules regarding statewide water management policy. These policy rules are not incorporated or mentioned in the water right application review

statutes or rules. However, the policy rules are relevant to the review process, which requires that the proposed use comply with Commission rules. ORS 537.153(2).

Comment [JN103]: The policy rules also provide guidelines and substantive content for the Department's public interest analysis.

The Protestants argue that the dam and reservoir conflict with the policy rule regarding instream flows. OAR 690-410-0030 states, in relevant part:

Benefits are provided by water remaining where it naturally occurs. Protecting stream flows which are needed to support public uses is a high priority for the state. The long term goal of this policy shall be to establish an instream water right on every stream, river and lake which can provide significant public benefits. Where stream flows have been depleted to the point that public uses have been impaired, methods to restore the flows are to be developed and implemented. These activities shall be consistent with the preservation of existing rights, established duties of water, and priority dates, and with the principle that all of the waters within the state belong to the public to be used beneficially without waste.

[This rule makes instream water rights a long-term priority for the Department. In particular, the goal is to establish instream water rights on bodies of water that provide significant public benefits. Additionally, the rules favor flow restoration in streams that have been so depleted that public uses have been impaired.

However, Drift Creek has a recognized instream water right in the 1990 instream water right. Although there is some evidence in the record that farming has negatively impacted Drift Creek, WaterWatch has not established that there are depleted stream flows or that public uses of the creek have been impaired. The record therefore does not support a finding that granting EVWD's application will violate OAR 690-410-0030.

Comment [JN104]: These statements sidestep the evidence. Drift Creek is the only major tributary of the Pudding River without a dam. The Creek has an established instream flow right. Damming Drift Creek and eliminating several miles of free-flowing stream is contrary to the policy of protecting instream flows.

C. Water Appropriation Under OAR 690-410-0070

WaterWatch's argument regarding this rule is discussed *supra* at page 61.

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

The Commission has promulgated statewide water resource management rules governing water storage. As stated in the explanation of the purpose for the rules: "Water storage options are an integral part of Oregon's strategy to enhance the public and private benefits derived from the instream and out-of-stream uses of the state's water resources." OAR 690-410-0080(1).

The rules state that storage projects should be evaluated with a number of criteria, including benefits, public support, environmental issues, cultural and historical impacts, land use, and economic analysis. WaterWatch argues that EVWD's permit should be denied because the Department, in determining whether a *prima facie* case that the proposed use was in the public

interest, did not evaluate the project under OAR 690-410-0080(2).⁵⁰ WaterWatch contends that several of these criteria show that the project does not comply with Oregon’s policy on water storage.

However, the relevant rule states that its criteria apply only to “programs” developed to achieve the state’s water storage policies. The rule states: “Programs to achieve the [storage policy * * * shall be guided by the following principles.” The Department has interpreted the word “programs” to be broader activities than granting or denying individual permit applications.

The language of the rule supports the Department’s conclusion. OAR 690-410-0080 makes no mention of permit applications. Similarly, the water application processing rules do not require that OAR 690-410-0080(2) criteria be evaluated. The application processing rules are very specific, detailing each step of the review process, but do not mention the water storage policy criteria.

The Department’s interpretation is therefore plausible, and not inconsistent with the statutory or regulatory scheme, or any other source of law. Accordingly, that interpretation is entitled to deference.

In *Willamette Water Co. v. Waterwatch of Oregon, Inc.*, 288 Or App 778 (2017), a company applied for a water right to divert water from the McKenzie River. The Water Resources Commission denied the application because the company’s local land use approvals had neither been granted nor were pending.

The company argued that the applicable rule could be interpreted to allow the Commission to conditionally grant the application before the company had requested local land use approval. The Court of Appeals acknowledged that the Commission could have interpreted the rule that way. However, the Court held that the analysis did not end there:

OAR 690-005-0035(4) may be susceptible to the interpretation that the company places on it. But that is not the right question. To overcome the Commission’s interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule’s text, context, or other applicable source of law. Under *Don’t Waste Oregon*, if an agency’s interpretation of its rule is plausible and ‘cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is not basis on which this court can assert that the rule has been interpreted ‘erroneously.’

320 Or. 132 at 142. Parallel citation omitted.

The Court of Appeals upheld the Commission’s interpretation of OAR 690-005-0035(4) and its term “pending” to mean that the application must be denied unless the company, at a

⁵⁰ The policies contained in OAR 690-410-0080 are relevant in determining whether the Protestants can show that the public interest factor in ORS 537.170(g) weighs against the proposed project.

minimum, had begun the process for obtaining the discretionary land use approvals. The Court of Appeals found that that this interpretation was reasonable. *See also, Staats v. Newman*, 164 Or App 18, 23-24 (1999)(deferring to agency’s plausible interpretation of its own administrative rules). As in *Willamette Water Co.* and *Staats*, the Department’s decision that the water storage criteria need not be evaluated in the permit application *prima facie* analysis is reasonable and entitled to deference.]

Comment [JN105]: The Rue Protestants take exception to this portion of the Proposed Order. The Department’s interpretation of its policy rules that allowed it to ignore those rules as a source of procedural guidance and substantive content for its statutorily-mandated public interest evaluation is not plausible, as discussed further in the interlineated text.

As previously noted, testimony by Department staff at the hearing revealed that the agency’s public interest review is completely lacking in both methodology and substantive content. While staff struggled to draft PFO findings on the public interest review, they ignored their own applicable administrative rules and other non-rule program guidance that provides substantive content for this analysis. To begin with, staff admitted that they did not even routinely apply all of the requirements of OAR 690-310-0120(3)(b), which clearly applies to individual permit applications. Moreover, OAR 690-410-0080(2)(g) contains additional substantive criteria for consideration in reviewing storage projects like this one.

The Department argued that Divisions 400 and 410 of OAR Chapter 690 are not applicable to its review of water permit applications, but rather apply only to “programs and activities.” The Department contended that it 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. The Department further argues that this interpretation is entitled to deference. However, as the Proposed Order acknowledges, an agency is only entitled to deference when its interpretation of its own rule is plausible and not inconsistent with the wording or the context of the rule itself, or with any other source of law. *Don’t Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994). The Department’s interpretation is not entitled to deference here.

First of all, the Department’s central and most consequential program and activity for managing the state’s water is the water rights permitting program. It is through permit decisions that the Department allocates the public’s water to private uses in perpetuity. For the Department to categorically interpret “activities” as not including the permit program is unacceptably overbroad. According to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) (“WEBSTER’S 3RD”), an “activity” is a duty or function of an organizational unit, which surely describes OWRD’s key permitting function. Furthermore, the Department’s interpretation is certainly not a plausible interpretation of OAR 690-410-0080(2)(g), which gives direction to OWRD in the form of specific criteria to be applied to evaluating storage projects. The plain language of this rule provides explicit criteria to be applied to individual permit decisions for storage projects. WEBSTER’S 3RD defines a “criterion” as a “standard upon which a decision or judgment may be based; a yardstick; a basis for discrimination.” In other words, these criteria provide guidance for OWRD’s so-called “granular” permit decisions in its key programmatic activity of permit review. OWRD’s claimed interpretation to the contrary is not entitled to deference. *See, e.g., Nichols v. Office of Medical Assistance Programs*, 171 Or App 255, 15 P3d 578 (2000) (an interpretation is not plausible if it is inconsistent with the language of the rule itself, or fails to adequately account for variables in the rule); *see also Papas v. Oregon Liquor Control Comm’n*, 213 Or App 369, 161 P3d 948 (2007), and *Teacher Standards and Practices Comm’n v. Bergerson*, 342 Or 301, 153 P3d 84 (2007) (interpretations that were inconsistent with the plain meanings of words in the rule were not plausible).

Reading the Division 410 rules in the light of the text and context of ORS 537.170(8)(g) also requires this result. That provision directs OWRD to consider “[t]he state water resources policy formulated under ORS 536.295 to 536.350 . . .” in its public interest review. According to the citations of authority at the end of the Division 410 water storage rules, those rules were adopted under the authority of statutes within that series.

Even accepting OWRD’s interpretation of “activities” for purposes of argument, the Department’s disregard of this rule here cannot be sustained. OWRD says that the policy rules do apply to rulemaking, and OWRD further concedes that Division 310 of its rules does “directly govern water right application processing.” OWRD Br. 9, 14. OAR 690-410-0080(2)(g) was adopted by the Department in 1992, and OAR 690-310-0120 was adopted in 1996. To the extent that the later rule incorporated only some of the criteria from the “policy rule” but ignored others, OWRD did not adequately follow the guidance of the policy rule when it adopted its permit review rule. At the very least, even if OWRD does not consider the water storage rule as a binding “rule” to be followed in the water application review process, OAR 690-410-0080(2)(g) certainly provides “non-rule program direction” that should inform the public interest review mandated by ORS 537.153(2) and 537.170(8). The Integrated Water Resources Strategy (“IWRS”) also provides non-rule program direction for conducting the public interest review. OWRD and the District argue that because the IWRS is not an administrative rule, it is irrelevant to permit decisions. The IWRS is indisputably part of the “state water resources program” described in ORS 536.300 and 536.310 and thus represents non-rule program direction that cannot simply be ignored by the Department. As shown at the hearing, the IWRS states a clear policy preference for off-channel storage facilities. WaterWatch Br. 11. Instead of staff struggling to “come up with something” to populate the public interest findings in a PFO, the criteria in the water storage rule and the principles stated in the IWRS offer precisely the sort of substantive content that the public interest review demands.

WaterWatch also contends that the application should be denied because of the land use criteria in OAR 690-410-0080(2)(g)(G).⁵¹ WaterWatch claims that because EVWD does not yet own the land that will be inundated by the dam and reservoir, the statewide storage policy militates against the proposed project. However, the policy does not state that pre-construction land ownership is a priority. If the land use criterion was interpreted that way, it would contradict ORS 537.211(6) which allows a public corporation, such as EVWD, to defer obtaining legal access until after the permit application is granted.

WaterWatch argues that the public support criteria in OAR 690-410-0080(2)(g)(C)⁵² mandates that the application be denied. WaterWatch notes that public support for the proposed project is divided between EVWD and the Rue Protestants. Consideration of these criteria therefore does not tip the balance between granting or denying the application.

Comment [JN106]: This paragraph misstates and vastly understates the public opposition to this project. The Rue Protestants submitted evidence of the Pudding River Watershed Council’s opposition, as well as that of hundreds of other people. R6, R23, R 30.

⁵¹ “Financial (e.g., project financing including site costs, cost sharing and repayment, and operating maintenance and rehabilitation costs.)” OAR 690-410-0080(2)(g)(E).

⁵² “Social (e.g., recreational, public support, cultural, historic.)” OAR 690-410-0080(2)(g)(C).

The Protestants maintain that the cultural and historical criteria in OAR 690-410-0080(2)(g)(C) compels the Department to deny the application. The argument is based on the facts that stone tools, projectile points, flakes from tools, and fire-cracked rock were found near the proposed project site. However, as John Fagan, the Rue Protestants' anthropology expert witness testified, the historical and archeological significance of the finding has not been assessed. The Protestants therefore have not shown that the Department should deny EVWD's application because these artifacts were found at the proposed site.

Comment [JN107]: The Proposed Order understates the significance of the evidence of cultural and historical resources at the site. In particular, Protestants take exception to the last two sentences of the third full paragraph. Mr. Fagan did not testify that "the historical and archaeological significance of the finding has not been assessed." He testified that he performed the first part of the inventory required by federal law—a pedestrian survey—of approximately 70% of the proposed inundation area. He found evidence that the site had been occupied for 8,000 years. He also testified that a projectile point found by Ms. Mucken on the site was "characteristic of the earlier occupation projectile points that were used around between 5 and 8,000 years ago." Finally, he testified that even though further investigation would be required of the site as part of subsequent federal permits, based on the pedestrian survey and his experience and expertise, he would expect to find more artifacts with further investigation. Tr. 1402, 1407, 1414-15; R49.

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

WaterWatch also argues that the proposed use violates Oregon's integrated water resource strategies, most recently issued by the Commission in 2017. One of the recommended actions in the 2017 strategy is to improve access to "built" water storage facilities. One suggested way to implement that action is to: "Investigate potential off-channel sites for above-ground storage projects."

WaterWatch contends that the 2017 strategy is a Commission rule favoring off-channel storage facilities. WaterWatch argues that EVWD's proposed in-channel reservoir violates that rule. That argument is not persuasive.

First, the 2017 strategy is not a rule that must be followed by the Department in acting on permit applications. The water permit application rules do not require the Department to evaluate applications to ensure consistency with the strategy.

Second, even if the rules mandated such an evaluation, the strategy does not ban off-channel storage facilities. The strategy does not mandate, or suggest the possibility of mandating, that all water storage facilities be off-channel. 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.

Comment [JN108]: The Rue Protestants join in WaterWatch's exceptions to this portion of the Proposed Order.

F. Access Rights Under OAR 690-310-0040(1)(a)(G)

WaterWatch contends that the PFO does not comply with OAR 690-310-0040(1)(a)(G) that requires a permit application to declare legal access to property impacted by the project. That argument is addressed above at page 64.

G. Peak and Ecological Flows Under OAR 690-033-0220(1) and 690-033-0330(2) and (3)

The PFO does not require any releases from the dam or bypass flow for peak and ecological flows. WaterWatch contends that Division 33 rules expressly require that the PFO require such releases.⁵³ However, none of these provisions mention, much less require, peak and ecological flows.

⁵³ 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.

OAR 690-033-0220(1) provides the following criteria for streams below the Bonneville Dam:

If the Department determines that a proposed use of water is detrimental to the protection or recovery of a threatened or endangered species and cannot be conditioned or mitigated to avoid the detriment, the applications shall be presumed to impair or be detrimental to the public interest. The Department shall review recovery plans, the Fish and Wildlife Program, and regional restoration programs applicable to threatened or endangered species in evaluating whether a proposed use is detrimental to the protection or recovery of a threatened or endangered species.

OAR 690-033-0330(2) and (3) provide:

* * * * *

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

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

(b) In all areas of the state where sensitive species are located, no net loss of essential habitat as defined in OAR 635-415-0005(4).

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

In its Division 33 application review sheet, ODFW does mention “peak flows necessary to mainstream habitat and ecology.” This phrase appears in the conditions related to the period of use or b51a on page 1 of the review sheet.⁵⁴ The entire sentence reads: “Any proposed use of water during October should include bypass flows to meet the instream water right and provide any peak flows necessary to maintain stream habitat and ecology.” It is unclear whether the intent of this sentence is to require bypass flows for peak and ecological flows, and whether such flows should be required only in October or in some other months as well.

As the Department acknowledged, the PFO contains no requirement to provide peak or ecological flows. Before finalizing the FO, the Department must clarify with ODFW the “peak

⁵⁴ Ex. A1 at 219.

flows” phrase in the review sheet, and ensure that the FO includes any peak and ecological flow condition recommended by ODFW.

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

Issue No. 3: Public Policy Review

After concluding that EVWD’s application established a *prima facie* case that the proposed project is in the public interest, Tim Wallin, the Department’s then Water Rights Program Manager, prepared a written analysis of the seven public interest factors in ORS 537.170(8)(a)-(g). He included the analysis in the PFO. The Protestants contend that the analysis is conclusory. As a result, the Protestants argue, the Department did not fulfill its statutory obligation to fully evaluate the project. The Protestants contend that the District’s application should be rejected on that basis.

Comment [JN109]: This heading is incorrect and misleading. Issue No. 3 addresses the public interest test codified in ORS 537.170(8), not public policy, and the title of this section should be corrected.

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.

Comment [JN110]: As explained earlier, the Rue Protestants take exception to these findings about the PFO.

Moreover, even if the Department’s evaluation was inadequate, and other facts exist that the Department should have considered, the Protestants’ remedy was the opportunity to present those facts in the contested case hearing. Over a ten-day period, the Protestants had the opportunity to present all evidence that they believe the Department should have considered. Additionally, before the hearing, the Protestants submitted thousands of pages of exhibits, as well as written direct testimony.

The Protestants have the burden of demonstrating that EVWD’s proposed project will be detrimental to the public interest. As provided in ORS 537.153(2)(b)(A) and (B), the Protestants must not only identify a public interest that the proposed use would impair, but must show specifically how that interest would be impaired by the proposed project: “[The rebuttable presumption] may be overcome by a preponderance of evidence * * * [that] the proposed use will impair [a] * * * specific public interest * * * [and a showing of] specifically how the identified public interest would be impaired or detrimentally affected.” The Protestants failed to meet that burden here.

Comment [JN111]: As discussed previously, the Department has the ultimate burden of persuasion to show that the project will not be detrimental to the public interest. The Rue Protestants take further exception to the determination that they did not show by a preponderance of evidence that the Drift Creek Dam and Reservoir will impair or detrimentally affect the public interest, as further explained in the interlineated text below.

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.⁵⁵ 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:

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

⁵⁵ 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.

become available, except where a basin program identifies a need to set aside some amount of unappropriated water for particular future uses.

Benz, 94 Or App 73 at 80.

There is no question that irrigation is a beneficial use, and, for purposes of ORS 537.170(8)(a), one of the enumerated highest uses of water. The Protestants claim, however, that the uses of fishing and wildlife and public recreation should be considered worthier uses of Drift Creek. They urge that a hierarchy be developed, with those uses surpassing irrigation in importance. They argue that using water for fish, wildlife, and public recreation precludes other uses such as irrigation. Despite these arguments, the Protestants cite no statute, administrative rule, or case law supporting the conclusion that the first public interest factor requires such an all-or nothing approach.

Indeed, the wording of the applicable statutes and rules suggests the opposite. The relevant statutes and rules do not require the Department, or ultimately the Commission, to choose among possible water uses, and designate one as the "highest." Instead, the factor invites an analysis of whether, when possible, the proposed use will allow water to be used for all purposes, including those specified in the rule. In other words, the analysis focuses on whether the proposed use can co-exist with other important uses of the water.

With regard to fishing and wildlife, the record shows that Drift Creek provides limited habitat above and below the proposed dam site for Pacific Lamprey, listed as sensitive under Oregon law, Upper Willamette Winter Steelhead⁵⁶ and Upper Willamette Spring Chinook, ESA-listed as threatened. The creek also provides habitat for unlisted fish such as Cutthroat Trout and Coho Salmon.

Drift Creek provides limited habitat in large part because of its current high water temperatures. Those temperatures are caused by a combination of factors, including hot air temperature, lack of vegetation to shade the creek, and reduced summer water flows. Although WaterWatch contends that these conditions could be improved by measures such as placing woody debris in the creek and planting vegetation, WaterWatch did not offer specific evidence about the impact of such measures or who would implement and pay for them.

The proposed project will impact fish habitat both above and below the dam. The project will diminish habitat for Pacific Lamprey, reducing the fish's ability to spawn and rear. Additionally, loss of spawning and rearing habitat for Upper Willamette Winter Steelhead will hinder protection and recovery of the fish.

To help protect fish habitat, both ODFW and DEQ imposed conditions, which essentially require EVWD to minimize impacts from the dam and reservoir on Drift Creek fish. It is true that habitat in the inundation area will be lost. However, WaterWatch has not demonstrated why that loss compels the conclusion that the project will impair the public interest. Moreover, evidence from fish and wildlife experts suggests that water may be stored from Drift Creek,

⁵⁶ 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.

while conserving water usage and habitat for fish and wildlife. Storing water in Drift Creek therefore does not mean sacrificing other beneficial water uses.

The Protestants contend that the conditions recommended by ODFW and DEQ will be ineffective. However, evidence in the record does not effectively counter the testimony of agency representatives. For example, WaterWatch did not offer evidence about the amounts of water that the fish require to maintain their habitat. And, although WaterWatch argues that the dam and reservoir should not be built because Drift Creek is the only remaining Pudding Creek tributary without a dam, WaterWatch did not offer evidence about the significance of that fact to fish habitat or the Molalla-Pudding sub basin.

Additionally, the specifics of the mitigation plans will be addressed in subsequent permitting processes. If EVWD does not demonstrate during those processes that mitigation plans will succeed, the project will not go forward. Again, obtaining a water storage permit from the Department does not give EVWD carte blanche to build the dam or reservoir.

With regard to public recreation and scenic uses, the Protestants did not offer evidence that the public, as opposed to landowners living along Drift Creek, use the creek for recreation or scenic use. Indeed, there is no evidence in the record that the creek is accessible by the public. However, the Rue Protestants did offer evidence that they and their families fish in and enjoy spending time along the creek. But the Rue Protestants did not offer evidence that the proposed project will prevent all opportunities for them to enjoy the creek.

The Protestants offered no evidence that the other uses listed in the first public interest factor cannot coincide with water storage. The Rue Protestants do not use creek water for irrigation. They do not use the water for domestic use other than drinking water that Mr. Qualey uses from a spring that will be inundated by the reservoir. The record does not show that Drift Creek is being used for municipal water supply, power development, fire protection, mining, industrial purposes, navigation, or any other beneficial use to which the water may be applied and for which it may have a special value to the public. Thus, the Protestants' evidence does not demonstrate that the proposed use will impair or be detrimental to the public interest.

Comment [JN112]: This statement is incomplete and misleading as it omits fish and wildlife. The preponderance of the evidence does not show that the irrigation benefits outweigh the loss of fisheries and other benefits in Drift Creek as a free-flowing stream.

B. The maximum economic development of the waters involved.

The second public interest factor focuses on the maximum economic development of the water to be used in the proposed project.

If EVWD's application is granted, 12,000 acre feet of water will be available to EVWD farmers, and potentially farmers outside of the District, to use as supplemental irrigation for crops. As the District's economic expert testified, having a reliable, supplemental irrigation supply of waters will increase the value of these farmers' property. Additionally, Marion County, the Willamette Valley, and the state of Oregon will benefit economically because the farmers will be able to grow more high-value crops, and inject money into the economy.

The Protestants did not offer their own economic expert. They contend, however, that the testimony of EVWD's expert witness should be given little weight because Ms. Wyse did not conduct a cost-benefit analysis of the project that included the cost of the project.

It is true that Ms. Wyse did not factor into her analysis the expense of building the dam or reservoir, or the cost of conveying water from Drift Creek to the District boundaries. Such an analysis is not possible at this time because EVWD has not completed the specifications and plans for the dam or reservoir.

Granting the permit will result in economic losses to the Rue Protestants. These losses are due to the loss of farmland and timber land caused by inundation of land by the reservoir. They argue that those losses should be considered in analyzing the second public interest factor.

However, the second public interest factor focuses on maximum economic development *of the waters involved*. And, the factor does not take into account land lost from a project involving the waters.

In any event, if the Rue Protestants do not sell their land voluntarily, EVWD can take the land through eminent domain. If the latter occurs, EVWD will have to fairly compensate the Rue Protestants for the land. Moreover, the economic value of the diverse crops that EVWD farmers could grow with supplemental irrigation, as well as the increased yield of irrigated crops, outweighs the loss of the crops that would be grown on the Rue Protestants' land. Thus, the Rue Protestants did not show that leaving the water in the creek will result in greater economic development of the waters.

Accordingly, the Protestants have not demonstrated that the proposed project fails to maximize economic development of the waters is issue and is therefore detrimental to the public interest.

It is impossible to determine maximum economic development by looking only at estimated benefits. As the Proposed Order acknowledges, no cost-benefit analysis has been done for this proposed project. Findings 141-146 noted that OWRD's application form does not ask for information about the cost of the project or the cost of the water that will be made available by the project and OWRD claims that it does not need to do any such analysis. But the statute's plain language and simple logic suggest that in order to determine whether a project represents the "maximum economic development of the waters involved, as in this statutory provision," or if it is "wasteful, uneconomic, impracticable or unreasonable," as discussed in Part E below, requires some consideration of the project's costs *and* benefits, and some comparison to different uses of the water. See *Norden v. State ex rel. Water Resources Dept.*, 329 Or 641, 996 P2d 958 (2000) (noting that the first level of statutory analysis to determine legislative intent is to examine the text and context of the statute, giving words of common usage their plain, natural, and ordinary meaning). If nothing else, common dictionary definitions of the terms lead to this result. Merriam-Webster defines "uneconomic" as "not economically practicable, costly, wasteful" and "maximum" as "the greatest quantity or value attainable." <https://www.merriam-webster.com/dictionary/>. "Unreasonable" can be defined as "unfair" or beyond the limits of acceptability or fairness." <https://en.oxforddictionaries.com/definition/unreasonable>, <https://dictionary.cambridge.org/us/dictionary/english/unreasonable>.

The testimony of economist Barbara Wyse offered by EVWD assessed estimated benefits of this project in a vacuum. She did not consider any costs of the project whatsoever. She testified that—because irrigated land is worth more per acre than non-irrigated land—if 400 acres of the Rue Protestants’ non-irrigated land is inundated by the reservoir, and as a result EVWD farmers can irrigate 4000 more acres of land, there will be a net gain in agricultural production value.

Without consideration of the project costs, including the cost of additional studies and permitting, the cost of designing and building the dam and reservoir, the costs of designing and building the required conveyance pipelines and pumps, the costs of acquiring land for the dam, reservoir, and conveyance route, it is impossible to say that this project will provide maximum economic development or whether it is wasteful, economic, practicable, and reasonable. The project will cost tens of millions of dollars. See findings 141, 142 (estimates of 12-40 million dollars for the dam and reservoir, 45-60 million dollars for the pipeline, unknown amounts for property acquisition, losses of income to Rue Protestants, in addition to more than 2 million dollars spent so far).

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

The third public interest factor looks at whether the proposed use will conflict with drainage, sanitation, and flood control. There is no evidence in the record that EVWD’s proposed dam or reservoir will have any impact on these issues. The Protestants made no argument that any such impact will occur. The third factor therefore does not suggest that the EVWD’s proposed project will impair the public interest.

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

The fourth public interest factor considers water availability for beneficial uses.

The Department conducted an analysis of water availability using WARS. The Department concluded that water would be available to satisfy two water rights that would be senior to EVWD’s proposed storage project. As discussed more fully above, the Department’s conclusion was reasonable.

The Protestants still maintain that this factor militates against granting the District’s storage permit application. However, they offer no evidence that withdrawing 12,000 acre feet of water per year would interfere with any other beneficial use not already discussed. WaterWatch states that the proposed use would take all the water available during the storage season, “leaving nothing for any other use.” WaterWatch Response To Post-Hearing Briefs of Oregon Water Resources Department and East Valley Water District at 16. Nonetheless, WaterWatch does not specify what that other use is or otherwise support its assertion.

Comment [JN113]: This is incorrect. 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.

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

Comment [JN114]: The discussion added to factor B above is equally pertinent here.

The fifth public interest factor considers whether the proposed use is wasteful, uneconomic, impracticable or unreasonable.

The PFO requires EVWD to not waste water while storing it. The PFO contains requirements for measuring the water in the reservoir using a staff gauge. Additionally, this Proposed Order suggests that additional water flow monitoring be imposed. The evidentiary record also shows that evaporation and seepage are not significant issues here, and that those issues can also be addressed in the design of and materials used to construct the reservoir.

Mr. Taylor testified about observing a sprinkler watering a gravel area on one of the EVWD farms. However, that anecdote does not prove that the proposed use would be wasteful. Mr. Taylor offered no details about specifically where this incident occurred, and how it relates to EVWD and decisions that entity makes.

[The Protestants argue that the project is wasteful because many of the EVWD farmers have other surface and groundwater rights, and have no immediate need for the water. However, the record shows that portions of the District land are in groundwater limited water areas, and may be unable to obtain additional groundwater rights. And, the record shows that some of the EVWD farmers have been unable to renew time-limited groundwater permits, and have had surface water rights curtailed to varying degrees in recent years. Also, much of the surface water in the area is already fully appropriated and therefore unavailable for EVWD members to use for irrigation.

Although EVWD offered no specific evidence suggesting that any of the farmers may lose additional water rights, EVWD did offer the testimony of the former director of the Department, who indicated that EVWD's plan to develop a supplemental water source is warranted by current water conditions in the district.

With regard to impracticability, the Protestants have not shown that the District's proposed project, despite many future hurdles, cannot succeed. Although the Protestants claim that it might be more practical for EVWD to obtain supplemental water from the Army Corps of Engineers, the application process does not require the Department to select and determine the best of all possible alternatives for obtaining supplemental water. Further, the Department cannot guarantee or even assume cooperation by the Army Corps of Engineers in satisfying EVWD's water needs. The Department must review the use as proposed in the application, and determine whether the proposed use can be modified or conditioned to meet the public interest.

Moreover, the Protestants cite to no authority for the proposition that the District must show that its farmers are currently unable to grow crops without supplemental irrigation. Given the length of time necessary to obtain all required permits for a project of this magnitude, it would be imprudent for the District to delay locating supplemental water.

With regard to the economies of the project, it is true that the final cost of construction and conveyance is unknown. However, if EVWD is unable to secure funding, whether private, public or a combination of both, the dam and reservoir will not be built. If EVWD determines after the specifications are completed that the eventual cost of water per acre foot is prohibitive, the District likely will forego the project. The farmers within EVWD are business people. Nothing in the record suggests that they will act irrationally when making economic decisions affecting their businesses.

A robust public interest review by OWRD is critical in the case of irrigation district applications, because of the unique nature of such districts. Irrigation districts are not like other units of local government, who are nested within a hierarchy of federal, state, and local sovereign powers, and who are accountable as general governmental units to all citizens, taxpayers, and voters within their jurisdiction. Districts are special interest entities governed by boards of directors elected from their members, and the board is accountable only to those members. No other entity supervises or oversees districts. Although districts are nominally public entities, they “remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners.” *Ball v. James*, 451 U.S. 355 (1981). The Rue Protestants submit that it is the Department’s responsibility to exercise their review of the reasonableness of this project with these special features in mind. The Department abdicates its public interest responsibilities if it does not assure that this project is fair, reasonable, necessary, and cost effective.

The Department did not evaluate the need for the project, its full costs or benefits, or the fairness of and “public interest” in issuing a water right to one group of private farmers to store water for their own economic benefit and enrichment on farmland belonging to competing private farmers. On these issues, there was no other agency for the Department to defer to other than the District itself, which is essentially what the Department is doing. The District’s witnesses testified that because Oregon law authorizes the formation of irrigation districts and grants them certain powers, including the power of condemnation, irrigation and the formation of irrigation districts are by definition in the public interest. TR p. 1161, line 5 – p. 1162, line 12; p. 1769, line 5 – p. 1772, line 21. But that argument goes too far. The Department’s refusal to address whether it is reasonable and in the public interest to invest one group of private farmers with the power of a water right that will enable them to appropriate not just water, but land belonging to some of their current competitors and former friends, essentially conceded the field to the District’s view of the public interest.

EVWD has already used nearly a million dollars in public funding to promote and pursue a project that will benefit their family farms at the expense of their competitors’ farms. Public funds have even been used for “communication” and outreach by the District farmers to convince the Protestants that they should not oppose this project. *See, e.g.*, Tr.1533, 1975, 1993, 1995, 1998, 2004-05. That is a singular example of the unfairness and unreasonableness of this project.

EVWD has shown that there is currently a demand for 4,000 annual acre feet of supplemental water. That amount of reserved water may increase, however, if the project

Comment [JN115]: The Rue Protestants presented evidence that this project will be extremely expensive, though the full price tag is unknown. Its purpose is to provide farmers who already adequately irrigate nearly all of their land with some additional security, growth potential, and profit. The project will benefit a number of family farmers who are just like Protestants except that they irrigate and have formed a district that allows them to condemn their competitors' private farmland. Protestants submit that a full cost-benefit analysis shows that this is an unreasonable, wasteful, and unfair 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.

Comment [JN116]: The Drift Creek farmers are making use of their land, which will be flooded by a reservoir for the private benefit of other farmers.

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

The sixth public interest factor ensures that vested and inchoate rights to the use of or waters of Oregon are protected.

Here, there are two water rights on Drift Creek, the Schact water right and the 1990 instream water right. The Department's WARS analysis showed that, in most years, there will be enough water to satisfy these two rights as well as the proposed annual storage of 12,000 acre feet. Moreover, these vested water rights are protected by their respective priority dates, both of which would be senior to any right granted to EVWD. Accordingly, the Schact water right and the 1990 instream water right will be protected by the prior appropriation system, pursuant to which senior water rights must be satisfied before junior water rights. Additionally, the PFO expressly states that EVWD may not store water until senior water rights, including the instream water right, are satisfied.

In *Benz*, 94 Or App 73, the protestants argued that the public interest factor protecting vested and inchoate rights militated against a surface water permit application. In that case, the water level of the creeks from which the water would be diverted varied. The Commission found that at times there would be enough water for the proposed use, but that at other times existing water rights consumed all available water. 94 Or App 73 at 80.

Despite the uncertainty, the Commission granted the application. In upholding that action, the Court of Appeals held that the law of prior appropriations would protect vested and inchoate rights when the creeks were low:

[U]nder the law of prior appropriations, a senior appropriator who applies water to a beneficial use and thereafter continues to do so holds a water right that is superior to any water right obtained by a subsequent junior appropriator. In view of that rule, the Commission did not err in concluding that knowledge of the precise quantity of water available in excess of prior appropriations is not necessary. A junior appropriator's water right cannot be exercised until the senior appropriator's right has been satisfied.

94 Or App 73 at 81; citation omitted.

As in *Benz*, all vested and inchoate rights to Drift Creek are protected here. The sixth public interest factor therefore does not establish that EVWD's proposed water storage would be detrimental to the public interest.

G. State's Water Resources policy under ORS 536.295 to 536.350 and 537.505 to 537.534.

The final public interest factor integrates broad statewide policies regarding water resources. ORS 536.505 to 536.534 apply to water rights impacting groundwater rights, and are inapplicable. ORS 536.295 to 536.350, which pertain to surface water, and Commission rules applying those statutes, apply here.

OAR 690-410-0080(2) identifies the statewide water resource management for water storage projects and provides, in relevant part:

Principles. Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

* * * * *

(g) Criteria for evaluating impacts of storage projects shall include the following factors:

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

Some of the Protestants' arguments regarding these statutes and rules have already been addressed in this order at pages 64 and 77-78. For example, WaterWatch contends that the proposed use would violate the Integrated Water Resources Strategy because the reservoir will be in-channel. However, as addressed earlier, that strategy does not prohibit in-channel

reservoirs. Similarly, WaterWatch's argument that the Department's review of STE fish species was insufficient was unpersuasive.

[The Protestants contend that the financial criteria in the rules regarding statewide management of water storage projects in OAR 690-410-0080(2)(g)(E) compel denial of the permit. That provision, cited above, requires consideration of financial matters in storage projects.

The Protestants argue that the fact that government subsidies likely will be required to pay a significant portion of the construction costs of EVWD's project compels the denial of the District's application. However, OAR 690-410-0080(2)(g)(E) does not specify any required funding methods for storage projects. Moreover, the Protestants do not cite to any statute or rule that disfavors government subsidies for such projects.

The Protestants argue that the project violates the social criteria in OAR 690-410-0080(2)(g)(C), which includes, "recreational, public support, cultural, historic." WaterWatch contends that EVWD's proposed project impairs the public interest because public support for the proposed project is divided between the Protestants, the Pudding River Watershed Council on one side and the 45 EVWD members on the other side. While true, this factor does not require that public support or opposition be one-sided.

Comment [JN117]: The Protestants have explained how these rules should be applied by the Department to evaluate this project and deny this permit.

The Protestants had the burden of showing that, based on the evidence considered by the Department, as supplemented by evidence offered at the contested case hearing, EVWD's proposed storage project impairs or is detrimental to the public interest. The Protestants failed to do so. As a result, the presumption that EVWD's proposed project is in the public interest stands. EVWD's application to store water from Drift Creek therefore should be granted with the additional conditions provided below.

Issue No. 4: Federal Endangered Species Act

The Department and EVWD argue that the OAH has no jurisdiction over WaterWatch's claims that the PFO violates the ESA. WaterWatch has offered no argument in its closing or responsive briefs supporting claims under that law.⁵⁷ As a result, this Proposed Order does not address the ESA or the jurisdiction issue raised by the Department and EVWD.

Issue No. 5: Public Comments

Comment [JN118]: The Rue Protestants' exceptions pertinent to this issue are discussed earlier.

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-

⁵⁷ 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.

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 EVWD submits the plans for the proposed dam to OWRD for approval. As such, the Protestants’ argument is premature.

Further, the Department offered evidence that it inadvertently left out this requirement, but will include in the FO a requirement that when EVWD submits its dam plans, the District will address the power generation issue. The FO to be issued by the Department therefore will comply with this statute.

ORDER

The Proposed Final Order issued by the Oregon Water Resources Department on July 22, 2014 is AFFIRMED AS MODIFIED. OWRD should issue the PFO with the following modifications:

1. Add a requirement that when EVWD submits dam plans to the Commission for approval, the plans must meet the requirements under ORS 540.350(2) for power generation or demonstrate that the project is exempt from those requirements under ORS 540.350(3).

2. To ensure the instream flow requirements of Water Right Certificate 72591, monthly stream flow measurements must be made during the storage season from November 1 to April 30, and again in May, July, and September. The measurements should be made at regular intervals, not to exceed one river mile, from the in-channel reservoir, if one is constructed, to the mouth of Drift Creek. If no in-channel reservoir is built, the measurement should be made from the point of diversion to the mouth of Drift Creek.

3. Before finalizing the FO, the Department must clarify with ODFW the "peak flows" phrase in the ODFW review sheet, and ensure that the FO includes any peak and ecological flow condition recommended by ODFW.

4. Make the following changes to the PFO, as requested by ODFW:

A. Change the title of "Endangered Species Act (ESA) mitigation condition" on page 4 of the PFO to "Inundation mitigation condition."

B. Reword the "Wetlands mitigation condition" on page 4 of the PFO to read: "Prior to commencing construction or disturbance of the site, the permittee shall coordinate with ODFW and Oregon Department of State Lands (ODSL) to fully assess results of a wetland delineation and the impacts to the habitat of sensitive, threatened, or endangered fish species from loss of wetlands associated with the development of the project. Wetland mitigation shall be coordinated with other mitigation proposals for wetland and waterway impacts. A copy of ODFW's and ODSL's written approval shall be provided to the local watermaster's office as soon as practicable after receiving the approval."

5. Delete the reference on page 3 of the PFO to the participation of ODA on the interagency review team.

/s/D. McGorin

Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE

If the recommended action in the proposed order is adverse to any party or the Department, the party or Department may file exceptions and present argument to the Department. Exceptions must be in writing, clearly and concisely identify the portions of the proposed order excepted to, and cite to appropriate portions of the record or to Commission policies to which modifications are sought. Parties must file their exceptions with the Department at its Salem offices, by any method allowed in the notice of appeal rights provided in the proposed order. A party must file any exceptions within 30 days following the service of the proposed order on the parties to the contested case proceeding. Unless otherwise required by law, the Director must consider any exceptions to the proposed order and issue a final order. If the applicable law provides for the Commission to review any exceptions or issue a final order, the Commission may form a subcommittee to review the exceptions and provide a report prior to the Commission issuing a final order. OAR 690-002-0175.

CERTIFICATE OF MAILING

On February 25, 2019 I mailed the foregoing PROPOSED ORDER in OAH Case No. 2017-OWRD-00002.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

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Robert B Qualey	15256 Fox Rd SE Silverton OR 97381	
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/s/Joanne M Call
Hearing Coordinator

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OAH Customer Satisfaction Survey

Please take a few moments to take our Customer Satisfaction Survey at <http://www.tinyurl.com/OAHSurvey>. Thank you in advance for your participation. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office at 503-947-1918.

037082/00001/10412144v1

The STATE OF OREGON
 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
 FOR THE
 WATER RESOURCES DEPARTMENT

In the Matter of Water Right)	
Application R-87871, in the Name of East	)	PROTESTANT RUE, ET AL.'S POST-
Valley Water District,	)	HEARING MEMORANDUM
)	
Applicant,	)	OAH Case No. 2017-OWRD-00002
)	
Rue, et al.,	)	OWRD No.: R-87871
)	
Protestants,	)	Assigned to: ALJ Denise McGorrin
)	
WaterWatch of Oregon,)	
)	
Protestant.)	

I. INTRODUCTION

The Oregon Water Resources Department ("OWRD") abdicated its statutory obligation to perform a public interest review of Application R-87871 submitted by the East Valley Water District ("the District"). Furthermore, OWRD improperly delegated key decisions about the use of water to other agencies and to the District itself, resulting in a Proposed Final Order ("PFO") that is deficient as a matter of fact and law. The preponderance of the evidence presented during this contested case demonstrates that it is not in the public interest for the District to build a dam and reservoir on Drift Creek in Marion County on land belonging to and farmed by the Rue Protestants ("Protestants"). The PFO should be reversed and Application R-87871 should be denied.

II. GOVERNING LAW¹

Oregon's Water Code declares that "all water within the state from all sources of water supply belongs to the public" and provides that water may be appropriated for beneficial use only by permit issued by OWRD after finding that the proposed use of water will not be detrimental

¹ Copies of all statutes and cases cited in this brief are included in Appendix A.

to the public interest. ORS 537.110 (public ownership of state's water); 537.130 (permit required for appropriation); 537.153(3)(e) (PFO must include assessment of whether use will impair public interest).

The statutes detailing the application review process mandate a two-step public interest review. First, if the proposed use meets four pre-requisites, OWRD will presume that it is in the public interest. ORS 537.153(2).² Second, OWRD is to determine if the presumption is rebutted—either by evidence that one or more of the pre-requisites is not established or by other evidence that the proposed use "will impair or be detrimental to the public interest" considering seven broad groups of factors described in the statute. ORS 537.153(2); 537.170(8). The evidence adduced at the contested case hearing soundly rebuts the public interest presumption, both by showing that not all of the pre-requisites were established and by demonstrating that the proposed use *will* impair the public interest under the broader list of statutory factors that must be considered by OWRD.³

An application submitted by an irrigation district is subject to the same requirements as any other application, including the public interest review, unless explicitly exempted from a particular provision. ORS 537.248(1) expressly states that an application for a reservoir permit by a county, municipality, or district "shall be subject to the provisions of ORS 537.140 to ORS 537.211 [inclusive of the public interest provisions in ORS 537.153 and ORS 537.170] . . ."⁴

A robust public interest review by OWRD is critical in the case of irrigation district applications, because of the unique nature of such districts. Irrigation districts are not like other units of local government, who are nested within a hierarchy of federal, state, and local sovereign powers, and who are accountable as general governmental units to all citizens, taxpayers, and

² The four requirements are that: (1) the use is allowed in the applicable basin program; (2) water is available; (3) the use will not injure other water rights; and (4) the use complies with the rules of the Water Resources Commission.

³ This brief focuses primarily on the broader public interest review under the factors listed in ORS 537.170(8), but notes where the discussion also pertains to the presumption criteria.

⁴ This provision goes on to say "except that the applicant need not submit engineering plans and specifications before the permit is issued . . ." thus exempting districts from one particular requirement of the regular process.

voters within their jurisdiction. Districts are special interest entities governed by boards of directors elected from their members, and the board is accountable only to those members.⁵ No other entity supervises or oversees districts.⁶ Although districts are nominally public entities, they "remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners." *Ball v. James*, 451 U.S. 355 (1981).

III. OWRD'S PRELIMINARY FINAL ORDER ON APPLICATION R-87871 MUST BE OVERTURNED⁷

A. OWRD's public interest review was legally and factually insufficient.

In testimony at the hearing, OWRD staff Mr. French and Ms. Eastman described a standard set of procedures and a "PFO checklist" used to determine whether the presumption criteria are established, but no process or guidance at all for conducting the broader public interest review. Hearing Transcript ("TR") p. 115, line 7 – p. 116, line 24; p. 260, line 20 – p. 261, line 3; p 393, line 18 – p 396, line 1. Ms. Eastman—the caseworker who conducted this application review—testified that she "struggled" in applying the statutory public interest criteria, not just in this case, but for all applications. TR p. 395, line 13 – p. 396, line 3. Mr. French acknowledged that staff simply had to "come up with something" from the file to make the required findings. TR p. 198, lines 6-17.

⁵ ORS 545.043(1); ORS 545.221. It is up to the landowners who own property within the District's administrative boundary to decide if they want to "opt in" to District membership, and they can make this decision on an annual basis. TR p. 1983, line 4 – p. 1983, line 18. Although the administrative boundary encompasses approximately 70-77,000 acres of land (TR p. 2184, line 17 – p. 2185, line 25), less than 50 landowners representing approximately 12,000 acres of land have opted to be members of the District. TR p. 1978, line 8 – p. 1986, line 25; Exhibit R146, pp. 35-43. This portion of Exhibit R146 contains a list of District members as of June 29, 2016. The total number of accounts is 51, but some of them list only "finance charges" and no operational or development charges. Ms. Reese, the District's Executive Secretary, testified that there are "45 or 47" members. TR p. 1978, line 8 – p. 1979, line 1. It is this group to whom the Board is accountable.

⁶ See TR p. 548, line 20 – p. 549, line 23.

⁷ Copies of all transcript excerpts are included in Appendix B. Exhibits referred to are included in Appendix C, some in full and some excerpted only.

In fact, Mr. French incorrectly testified that there were no administrative rules fleshing out the public interest review. TR p 132, lines 12-19. When confronted with OAR 690-310-0110(3), which directs the agency to consider, "at a minimum" seven explicitly listed items in its public interest review, he conceded that this rule was not applied in every application. He could only say that "about half" of the items were routinely reviewed, but indirectly, such as through the separate Division 33 review. TR p. 274, line 12 – p. 279, line 16. Though Mr. French has been the Administrator of OWRD's Water Rights Services Division since 2005, he was not able to state whose responsibility it is to determine whether or how the rule applies to any given application. Exhibit A8, p. 1, line 25 – p. 2, line 1; TR p. 279, line 4-16.

OWRD also completely ignored other administrative rules in reviewing this application. ORS 537.153(2) requires that, in order to receive a public interest presumption, a water use must comply with the rules of the Water Resources Commission. Yet, Mr. French said that "policy" rules are not considered when reviewing individual applications. TR p. 125, line 9 – p. 126, line 10. For example, he said that the Department's Division 410 rules are only considered when the Department adopts other administrative rules, and not when it reviews water rights applications. Yet no such limitation appears in Division 410. Indeed, several specific provisions explicitly require the stated policies to be applied to decisions about storage projects, water allocation, and instream flow protection.⁸

Given the lack of any clear framework or direction to staff for conducting the public interest review, perhaps it is unsurprising that the PFO does not contain any analysis of the factors, any discussion of how the factors apply, or any explanation of facts supporting or justifying the agency's decision. Exhibit A1, pp. 123-28. Nonetheless, the absence of guidance to staff does not absolve the agency from doing the required analysis and providing a reasoned and well-supported explanation for its decision. It is a basic principle of administrative law that

⁸ See, e.g., OAR 690-410-0080(g), listing criteria for evaluating the impacts of storage projects, including social (e.g., recreational, public support, cultural, historic), financial (e.g., project financing including site costs, and other factors), economic (e.g., project benefit/cost analysis), and land use (e.g., ownership, among other factors).

an agency must adequately demonstrate its reasoning in coming to a decision. *See, e.g., Castro v. Board of Parole and Post-Prison Supervision*, 232 Or App 75, 85, 220 P3d 772 (2009) (stating that the court's "duty is to evaluate the [agency's] logic, not to supply it" and finding that a conclusory statement by the agency was "an announcement, not an explanation" and thus did not satisfy the requirement for the agency to demonstrate its reasoning).

Mr. French admitted that several of the public interest "findings" contained in the PFO simply restated the presumption requirements or invoked the operation of the prior appropriation doctrine, without analysis or discussion of any kind. In the PFO's findings under the first public interest factor (ORS 537.170(8)(a): "conserving the highest use of the water for all purposes"), Mr. French conceded that the PFO first simply restated that the proposed use complies with the basin program—which is part of the initial presumption review, and then restated the basic rule of law of prior appropriation. TR p. 262, line 3 – p. 264, line 7; p. 282, line 16 – p. 286, line 4. Mr. French similarly conceded that the "finding" under the third public interest factor (ORS 537.170(8)(c): "control of the waters of this state for all beneficial purposes, including drainage, sanitation, and flood control") simply restated the basic statutory requirements that a proposed use of water must be for "the beneficial use of water without waste." TR p. 286, line 18 – p. 288, line 10. *See* OAR 690-410-0060(1) and 0070(1) (state statutes and the prior appropriation doctrine require beneficial use of water without waste).

On the fifth public interest factor (ORS 537.170(8)(e): "prevention of wasteful, uneconomic, impracticable, or unreasonable use of the waters involved"), the PFO stated that "the proposed use, as conditioned in the attached draft permit, will require conservation measures and reasonable use of the water," but Mr. French admitted that the permit does not contain any actual conditions to that effect. TR p. 288, line 24 – p. 291, line 10. As to the sixth factor (ORS 537.170(8)(f): "protection of all vested and inchoate rights to the waters of the state"), he conceded again that the finding simply restated the prior appropriation doctrine. TR p. 291, line 11 – p. 292, line 3.

Merely paraphrasing the statutory factors as conclusory findings is insufficient as both a matter of fact and law to meet the agency's obligations to perform the required public interest review. *Diack v. City of Portland and Water Resources Department*, 306 Or. 287, 301, 759 P.2d 1070 (1988) (agency must provide more than a "regurgitation of the statutory language without analysis"); *see also Martin v. Board of Parole and Post-Prison Supervision*, 327 OR 147, 155-57, 957 P2d 1210 (1998) (discussing principles of administrative law that require agencies to explain how the law applies to the facts to support a decision); *Reynolds School Dist. No. 7 v. Martin*, 30 Or App 39, 43-44, 566 P 2d 196 (1977) (an agency needs to explain the rational relationship between the law and the facts in order for a court to be able to review the decision). Furthermore, if enforcement of priorities or meeting the presumption criteria were all that is required to protect the public interest, then the specific elements of ORS 537.170(8) would be superfluous. *See, e.g., Diack, supra*, at 297 (the court is "unwilling to deem a legislative act meaningless unless no other reasonable conclusion is available") (citations omitted); *see also* ORS 174.010 (in construing statute, court should not "omit what has been inserted" and should construe to give effect to all provisions); *State of Oregon v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232 (2015) ("as a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage") (citations omitted).

ORS 537.153(2) and OAR 690-310-0120(3)(a) direct OWRD to consider comments submitted on a water rights application in determining whether the public interest presumption is overcome, but staff testimony made it clear that the agency did not do that here. Ms. Eastman testified that she prepared a comment evaluation form on the comments that were submitted on the District's application. Exhibit A1, p. 181-184;⁹ TR p. 339, lines 5-25; p. 346 line 13 – p. 347, line 13. She said that it was her responsibility to draft the portion of the PFO to respond to the comments, but that she did not consider the statutory public interest factors in doing so, nor did

⁹ Note that the first three pages of this document just paraphrase and summarize the comments. The "evaluation" and proposed finding make up the last half page, and are mostly directed to dam safety issues.

she remember sending the comments to anyone or discussing them with anyone else, including Mr. Wallin, who she said drafted the findings on the public interest factors in the PFO. TR p. 353, line 22 – p. 356, line 17.

Nonetheless, Ms. Eastman made a determination that many of the comments were "outside the scope of the Department's public interest review" and drafted a finding for the PFO to that effect. Exhibit A1, p. 184. When asked how she decided what comments were outside the scope of review, Ms. Eastman said that the comments relating to "ecological concerns"—which she identified as the comments made by DEQ and ODFW during their Division 33 review process—were pertinent, but the others were outside the scope of review. TR p. 354, line 23 – p. 355, line 23. This determination is incorrect as a matter of law. On their face, ORS 537.170(8) and OAR 690-310-0120(3)(a) and (b) make it clear that the proper scope of review is much broader than the Division 33 review and includes the full range of comments submitted by a number of commenters.¹⁰

Furthermore, the finding is also deficient because it consists of only two conclusory sentences with no explanation of the Department's reasoning or of how it applied the law to the facts and issues raised in the comments: "The Department acknowledges receipt of the public comments and has considered them. The comments that are applicable to the Department's review of an application for a permit to store water have been addressed through conditions contained in this document; the comments not addressed are outside the scope of this review." Exhibit A1, p. 124 and p. 184. As discussed above in relation to other conclusory findings in the PFO, this finding also fails the "substantial reason" test. *See, e.g., Furnish v. Montavilla Lumber Co.*, 124 Or App 622, 625, 863 P2d 524 (1993) (reviewing an agency order to determine if it is supported by substantial reason and noting that the requirement of a rational explanation is designed to facilitate meaningful scrutiny of agency activities); *Bergerson v. Salem-Keizer*

¹⁰ Comments raised issues far beyond "ecological concerns." *See* Exhibit A1, p. 181-183.

School Dist., 341 Or 401, 415, 144 P3d 918 (2006) (agencies are required to demonstrate the reasoning that leads them from the facts to their conclusions).

The public interest "findings" in the PFO are insufficient on their face, and the testimony of OWRD's witnesses at the hearing did nothing to rehabilitate them. The preponderance of the evidence demonstrated that OWRD abdicated its obligation to do a proper public interest analysis as required by law.

B. OWRD improperly delegated the public interest review to other agencies.

The contested case hearing revealed just how few components of the proposed Drift Creek Project have actually been determined or settled.¹¹ OWRD sidestepped these uncertainties by kicking the can down the road to other agencies, thereby avoiding the decision of whether the project will impair the public interest. Although OWRD imposed virtually no substantive conditions of its own on the use of water by the District in the draft permit, it proposed to "condition" the permit on a number of future decisions by other agencies. Nothing in the language of ORS 537.153 or 537.170 suggests that OWRD is excused from doing a full and proper public interest review just because a project will require other permits from other state and federal agencies. Regardless of other agencies' statutory responsibilities, OWRD is responsible for carrying out its authority to manage the state's water resources and make reasoned decisions as to whether issuing a water right is in the public interest. OWRD cannot simply pass the buck.

Despite OWRD's mandate in ORS 537.170(8)(a) to "conserve the highest use of water for all purposes, including [among other things] . . . protection of commercial and game fishing and wildlife . . . ," and its own administrative rule in OAR 690-310-0120(3)(b)(B), (D), and (E) requiring that "the Department shall, at a minimum, consider . . . any potential effects that the

¹¹ The final design and operation of the proposed dam is not yet determined, including whether it will provide fish passage, whether it will be equipped for hydropower production, how much water will be stored, and how much will be released for irrigation and for "flow augmentation," if any. TR p. 1777, line 3 – p. 1780, line 24; p. 1811, lines 18-23; p. 1837, lines 13-17; p. 1850, lines 17-22.

proposed use may have on . . . fish or wildlife . . .," OWRD delegated all of the fish and wildlife decision making about the District's proposed project to ODFW. The fish and wildlife considerations governing OWRD's decision are broader than just the Division 33 rules, which contain additional requirements for review of certain applications for impacts only to sensitive, threatened, or endangered fish species. By their explicit terms—and as conceded by Mr. French—the Division 33 rules do not replace or substitute for OWRD's broader required public interest review.¹² TR p. 297, line 18 – p. 298, line 7.

The PFO contained no actual analysis or findings concerning fish and wildlife impacts of the proposed water use, but "imposed" five conditions that simply passed the buck to future reviews by ODFW and DSL.¹³ Agency and District witnesses conceded that the ultimate outcomes of those other processes are unknown at this time. *See, e.g.*, TR p. 441, line 11 – p. 443, line 13; p. 479, line 5 – p. 482, line 8; p. 1837, lines 1-17. Agency witnesses also conceded that not all of those other review processes involve public notice and comment opportunities, and there was no evidence that the other regulatory programs are in any way legally or factually comparable to the "public interest" review that OWRD is required to do. TR p. 732, line 11 – p. 733, line 4. Indeed, Mr. French admitted that OWRD must analyze and apply the public interest factors independently of any permit reviews required by other agencies. TR p. 302, line 15 – p. 303, line 9. Yet when ODFW tried to offer comments on other fish and wildlife species, Mr.

¹² OAR 690-033-0000(3) states: "These definitions, standards, and procedures are in addition to, not in lieu of, existing rules and laws."

¹³ The "fish passage condition" requires the permittee to "address Oregon's fish passage laws with the assistance of ODFW" either by providing fish passage or getting a waiver from ODFW. The "riparian condition" says that the permittee will comply with ODFW's Fish and Wildlife Habitat Mitigation Policy, including preparing a mitigation plan if required. The "endangered species act mitigation condition" tells the permittee to coordinate with ODFW and develop any additional mitigation plan required for those species by the Fish and Wildlife Mitigation Policy. The "wetlands mitigation condition" says the permittee shall coordinate with ODFW and DSL to mitigate wetlands as required. All of the above conditions just need to be done before commencing construction. The final condition concerning "fish screening and by-pass conditions" requires that prior to diverting any water, the permittee shall install any screening or by-pass devices required by ODFW. Exhibit A1, p. 125-26.

French "suggested" to ODFW "that they stick to the Division 33 comments" and "take care of those other concerns in their other permitting processes." TR. p. 128, line 24 – p. 132, line 11.

OWRD similarly avoided any analysis or findings pertaining to water quality. Despite the statutory mandate in ORS 537.170(8)(c) to consider "the control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control," and the language in OAR 690-310-0120(3)(b)(C) directing that OWRD consider the potential effects of the proposed use on "water quality," OWRD passed the buck on water quality and wetlands to DEQ and DSL by including a "condition" on water quality that does nothing but state that the project must meet water quality requirements. Exhibit A1, p. 126.

In fact, DEQ told OWRD that there was insufficient information about the proposal for them to comment properly on the water quality impacts of the project, but OWRD proceeded ahead. TR p. 383, line 19 – p. 386, line 16. However, DEQ did clearly express a preference for an off-channel storage facility, which was handled in the PFO as follows: "The [Division 33] interagency team recommended that additional limitations or conditions of use be imposed on this application as follows: . . . [a]s a preferred alternative, DEQ recommended the applicant assess off-channel construction opportunities." Referring to this as a "limitation or condition of use" is disingenuous, as it does not actually require the District to do anything at all.

If the legislature intended the regulatory programs of ODFW, DEQ, and DSL to substitute for OWRD's public interest review, they know how to say so expressly. In the absence of any such clear expression of legislative intent, OWRD cannot delegate its statutory duties to other agencies. Furthermore, as discussed below, if OWRD had done a proper public interest review rather than trying to pass the hot potato to other agencies, it would have come to the conclusion that the proposed Drift Creek Project will be detrimental to the public interest.

C. The preponderance of the evidence shows that the Drift Creek Project is detrimental to the public interest.

OWRD is required by statute to consider "conserving the highest use of the water for all purposes," "maximum economic development of the waters involved," and "the prevention of

wasteful, uneconomic, impracticable or unreasonable use of the waters involved" in reviewing a water right application.¹⁴ ORS 537.170(8)(a),(b), and (e). Despite those directives, OWRD maintains that it is not required to conduct any cost benefit analysis of water rights applications. TR p. 199, line 21 – p. 202, line 12; p. 230, lines 1-13.

Although OWRD has not further defined the statutory terms or adopted any internal guidance about how these factors should be evaluated, that does not mean that the agency can simply do nothing. The statute's plain language and simple logic suggest that in order to determine whether a project is "wasteful, uneconomic, impracticable or unreasonable," or whether it contributes to maximum economic development requires some consideration of the project's costs and benefits, and some comparison to different uses of the water.¹⁵ See *Norden v. State ex rel. Water Resources Dept.*, 329 Or 641, 996 P2d 958 (2000) (noting that the first level of statutory analysis to determine legislative intent is to examine the text and context of the statute, giving words of common usage their plain, natural, and ordinary meaning). A proper

¹⁴ The inadequate treatment of the finding on "waste" was discussed earlier. The PFO's "finding" on maximum economic development was that "irrigation facilitates economic development of the local community and is an important economic activity in the Willamette Valley." As pointed out in the Rue Protestants' Protest, this is not responsive to the statute. First of all, the "local community" surrounding this project consists of the Protestants and the rest of the Victor Point community along Drift Creek, and this community's economy will be harmed, not helped, by this irrigation project. The Protestants are dryland farmers and growers, and irrigation is infeasible in their area. Exhibits R7, R15, R20, R25, R33, R37. This project proposes to take some of their land out of production in order to store water on it—water that will then be conveyed to a different "community" several miles away in order to facilitate economic development for their competitors. Second, the statement that "irrigation . . . is an important economic activity in the Willamette Valley" is so broad as to be nonsensical. The Willamette Valley is a very big place—much bigger than the East Valley Water District. It includes the Victor Point agricultural community where the Protestants live, many other farms—both irrigated and non-irrigated, the "Silicon Forest," and the majority of the state's urban population, with all of the concomitant economic development.

¹⁵ If nothing else, common dictionary definitions of the terms lead to this result. Merriam-Webster defines "uneconomic" as "not economically practicable, costly, wasteful" and "maximum" as "the greatest quantity or value attainable." <https://www.merriam-webster.com/dictionary/>. "Unreasonable" can be defined as "unfair" or beyond the limits of acceptability or fairness." <https://en.oxforddictionaries.com/definition/unreasonable>; <https://dictionary.cambridge.org/us/dictionary/english/unreasonable>.

evaluation of these factors also requires some assessment of the need for the project and whether the proposal is reasonable and fair. This approach is confirmed by OAR 690-410-0080(2)(g).

OWRD did not evaluate the need for the project, its full costs or benefits, or the fairness of and "public interest" in issuing a water right to one group of private farmers to store water for their own economic benefit and enrichment on farmland belonging to competing private farmers. On these issues, there was no other agency for OWRD to defer to other than the District itself, which is essentially what OWRD did. The District's witnesses testified that because Oregon law authorizes the formation of irrigation districts and grants them certain powers, including the power of condemnation, irrigation and the formation of irrigation districts are by definition in the public interest. TR p. 1161, line 5 – p. 1162, line 12; p. 1769, line 5 – p. 1772, line 21. But that argument goes too far. Although OWRD did not adopt that argument explicitly, the Department's refusal to address whether it is reasonable and in the public interest to invest one group of private farmers with the power of a water right that will enable them to appropriate not just water, but land belonging to some of their current competitors and former friends, essentially conceded the field to the District's view of the public interest.

Without any analysis or supporting facts, the PFO said "[t]he Department finds that the amount of water requested, 12,000 AF, is an acceptable amount." Exhibit A1, p. 124. But District witnesses testified that the application requested to store 12,000 acre feet (AF) of water because that is what they understand the storage capacity of the Drift Creek site to be, not because they can show demand for that amount of water. TR p. 2187, line 19 – p. 2188, line 23. The only proof of "demand" offered by the District is the fact that some District members have "reserved" a place in line for 4,000 acre feet of water from the project by paying development charges on those acres. TR p. 1985, line 5 – p. 1987, line 13.

The full costs and benefits of the proposed reservoir are substantially unknown because so much about the project is yet to be decided. According to testimony by District consultant Kevin Crew, the cost will most certainly exceed \$100 million. A four-or-five-year-old estimate for the cost of the dam itself was \$20 million. In 2011, a pipeline to convey the water 10 or more

miles from the reservoir to the District was estimated at upwards of \$40 million, while a ten-year-old estimate for the internal pipeline to distribute water to District members was at least \$24 million. These figures do not include the cost of providing fish passage, which the District at one point said would make the project cost prohibitive, or the alternative cost of obtaining a fish passage waiver. Other permitting costs, grant writing and other fundraising costs, final design and engineering costs, land acquisition costs (both for the dam and for the conveyance route), and the cost of an internal piping system to distribute the water throughout the District are all additional costs that still have not been estimated or determined. TR p. 1706, line 6 – p. 1714, line 25; p. 2199, line 3 – p. 2210, line 1.

The ultimate cost that District members will need to pay for delivery of the water is also undetermined. Mr. Dickman testified that he would be willing to pay \$75 an acre foot, while Mr. Goschie and Mr. Bielenberg testified that they thought the price might be \$100 or \$150 an acre foot. TR p. 1099, lines 9-19; 1529, line 3 – p. 1530, line 23; p. 1812, line 13 – p. 1813, line 11. To date, the development charges set by the District have been well below those numbers, and only 4,000 acre feet have been "reserved," so it is not at all clear that the District members will be able to afford the water if it finally becomes available.

It would be one thing to defer to the District's view about the costs and benefits of this project if the District farmers were actually footing all of the costs, but that is not the case. The District has been very clear about the fact that it will require substantial public funding to complete the project, on top of nearly a million dollars in public money that the District has already received. TR p. 2209, line 7 – p. 2210, line 1. Yet, though the full cost of the project is unknown, the District has had no trouble in rejecting other alternative water supplies as "too expensive," but too expensive compared to what? The evidence showed that water might be available for only \$8 an acre foot (plus delivery costs) from the Willamette Reservoir Reallocation. TR p. 1459, line 23 – p. 1460, line 7.

The District offered expert testimony from an economist as proof of the project's benefits. Ms. Wyse offered two expert opinions—that "irrigation water adds value for agricultural

production" and that "the project would result in a net gain in agricultural production value." One of Ms. Wyse's "points of evidence" for her first conclusion was the fact that the District farmers have paid approximately \$1.3 million (adjusted for inflation) in operation and development assessments to the District since 2003 and that this proved that they believed getting additional water would give them an economic return. However, she conceded that she was not aware that the members received other value for those assessments in the form of using them as required "match" for public grants to the District. TR p. 2633, line 5 – p. 2635, line 5.

In support of her second opinion, Ms. Wyse testified that she compared the average revenue from growing grass seed on the approximately 400 acres that would be inundated by the project on Drift Creek with the value of providing supplemental irrigation water to an additional 4000 acres of District land—either for growing grass seed or for growing a "more diverse mix" of crops. That comparison was the sole basis of her conclusion that the project would produce a net benefit. Ms. Wyse conceded that she was not given any information on construction costs, environmental costs, social impacts, environmental impacts, or fish impacts, and that she did not perform a full cost benefit analysis of the project, though she acknowledged that as a general principle of economics, if the cost of something exceeds the added value, then it does not increase economic welfare. TR p. 2635, lines 6-14; p. 2651, line 1– p. 2652, line 13; p. 2657, line 22 – p. 2658, line 7. Furthermore, she assumed that approximately 25% of District acres did not have a reliable water supply, amounting to 12,000 acres, and that District farmers would need supplemental water in one of every four years, but these assumptions about the need for water were based only on representations made to her by Mr. Bielenberg, Mr. Goschie, and Mr. Kraemer, and she did not independently evaluate the District's need for water. TR p. 2660, line 9 – p. 2661, line 19.

On balance, Ms. Wyse's testimony is of limited probative value. Her two conclusions may be accurate, given the assumptions and information on which they were based, but they prove nothing about the overall costs and benefits of the proposed Drift Creek Project, nor did her work verify the District's need for water. Ms. Wyse did confirm that grass seed grown with

and without irrigation is sold into a single market, thus supporting the fact that the Protestants and some of the District farmers are competitors. TR p. 2639, line 24 – p. 2640, line 10.

The evidence produced at the hearing, even from the District's own witnesses, demonstrated that what the District claims to be a "need" for water is really a "want." The District's proof of need for the Drift Creek storage project consisted of the following elements: (1) some of the lands inside the District boundary overlie either the Mt Angel or Glad Tidings groundwater limited areas where new permits for irrigation are not available;¹⁶ (2) some permits issued prior to the GLA designations were issued as "time-limited," and the permits ultimately expired and were not renewed by OWRD; (3) some members experience "calls" on certain of their surface water rights; and (4) some District members are afraid that some of their existing water rights may be curtailed or taken by the state in the future, but that water stored under a reservoir right could not be taken.

Although some of these statements are accurate in certain respects, they fall far short of proving the dire for new water that the District claims. District members hold substantial water rights already, as was conceded by District witnesses. *See* Exhibit WW141; *see, e.g.*, TR p. 1031, lines 15-22 (testimony by Mr. Dickman that he can irrigate 95% of his land). The portfolio of member water rights includes rights to groundwater outside the two designated GLAs, vested rights to groundwater that were certificated before the GLA designations, and rights to a number of surface water sources—some that may be subject to call occasionally, some that are more frequently subject to call, and some that are quite senior and protected from call. In addition to the rights already held by District members, OWRD witnesses testified that additional water rights are available for deep groundwater (found in the Columbia River basalt group aquifers) for most areas outside the designated GLAs, and for shallower groundwater (alluvial aquifers that overlie the basalts) even within the GLAs. TR p. 857, line 23 – p. 858, line 18.

¹⁶ *See* Exhibit R172.

It was impossible to get an answer from the District witnesses about how many District acres are actually "water short" by any objective measure. As noted earlier, the best figures seem to be that there are about 47 district members who pay operational assessments on approximately 12,000 acres of land, but there is no evidence as to their actual water needs. Although no District witnesses could answer how many members pay development charges, it appears from District documents that that number may be 33. See Exhibit R146, pp. 35-44. However, these charges represent current total "demand" for 4,000 AF of water from the proposed Drift Creek project, but demand does not equate to need.

The District's fear of "losing" their existing rights is irrational. None of the witnesses offered any evidence that their groundwater pumping has ever been curtailed. Water rights are considered a species of property right under Oregon law, and they cannot simply be taken away by "fiat" or whim, as some District witnesses seemed to believe. TR p. 1725, line 3 – p. 1726, line 9. On the other hand, the belief that a reservoir right is somehow more protected than other forms of water right is also misinformed. Water that has already been legally diverted into an authorized facility would likely be considered the property of the reservoir owner, but a storage right does not guarantee that water will be available for diversion into the reservoir at all times any more than any other "paper" water right guarantees a supply of wet water. In fact, the evidence revealed considerable doubt about whether the proposed reservoir will reliably provide the storage capacity that the District hopes for.

The bottom line for the District's *need* for water is that District farmers *want* a supplemental water source that they mistakenly believe will be 100% reliable, in order to maximize their cropping flexibility and their profits. Every District witness testified to this effect. See, e.g., TR p. 1110, line 16 – p. 1113, line 9. But the profits of the District farmers are not a proxy for "maximum economic development," especially when weighed against the Protestants' losses, the fishery losses, and the considerable cost of public funds to support this Project. Furthermore, the desires of the District farmers are not determinative of whether forcing a reservoir onto land belonging to some of their competitors is "reasonable" under ORS

537.170(8)(e). One definition of "unreasonable" is "unfair" and it is patently unfair for OWRD to abdicate this decision to the District, thereby allowing one group of private farmers to decide, with no check and balance, that their farms are more important than some of their competitors' farms.

Damming Drift Creek is unreasonable. The reservoir would flood approximately 400 acres of productive farm and timberland belonging to private landowners—multi-generation farm families. Even if they were to receive "fair market value" for at least some of their property in a condemnation proceeding, payment through eminent domain would not compensate for losing land that has been in their families for as much as six generations. The Mucken family would lose the home where they have raised their three children. Exhibit R43. Furthermore, no amount of money can address the unfairness of being forced to sell your farmland for a water storage facility that will benefit and enrich competing farmers. These landowners are not part of the District and have no say over District decisions. The District's claims that the Protestants would benefit from the project are illusory. The price to buy into the District makes no sense for farmers who are successful dryland farmers and who could not feasibly irrigate their lands. The District's statement that the Protestants could end up better off by selling their property—which the District emphasized was lower in value than the District farms—and investing the proceeds is dismissive at best and arrogant at worst.

Drift Creek is the last major tributary of the Pudding River that does not contain a dam. The creek contains habitat for anadromous and resident fish, including cutthroat trout, coho salmon, and steelhead, as well as for elk and other fish and wildlife. The proposed dam would block fish access to several miles of the Creek and its tributaries, including the cold water refugia in the East and West Forks of the Creek above the dam site. In fact, the reservoir would inundate several miles of stream that is protected by an instream water right. Yet OWRD found no injury to the instream water right as long as the required amount of flow could be measured at a point many miles below the inundated segment, at the very mouth of Drift Creek.

The dam and reservoir would likely exacerbate existing water quality and temperature problems, and the draft permit does not require any release of water to mitigate those impacts. The project would inundate an area that is rich with archaeological artifacts and cultural resources dating back as long as 8,000 years ago. Exhibit R49.

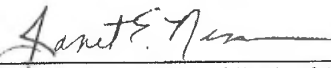
A decision with consequences like these should not be taken lightly and should only result from a thorough consideration of the public interest, as required by law. That consideration did not take place in this case.

IV. CONCLUSION

The Drift Creek Project proposes to flood productive private farm and timberland many miles outside the District's boundary. The proposed dam and reservoir will injure existing water rights and violate state water management policies. The project will inundate land that is owned and farmed by multi-generation family farmers and timber owners who are not members of the District and who are direct competitors of many of the District farmers. Furthermore, Drift Creek is the last undammed major tributary of the Pudding River. The creek provides habitat for winter steelhead, coho salmon, cutthroat trout, Pacific lamprey, elk, cougar, and other fish, amphibians, and wildlife. The Proposed Final Order ("PFO") issued by the Oregon Water Resources Department ("OWRD") proposing to approve the District's Application R-87871 to dam Drift Creek and inundate Protestants' farmland does not withstand a proper public interest analysis and should be overturned.

Dated this 13th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I filed with the Office of Administrative Hearings and served a true and correct copy of **PROTESTANTS JOEL D. RUE, ET AL.'S POST-HEARING MEMORANDUM** on the following parties and the Administrative Law Judge by email on August 13, 2018.

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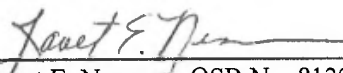
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PAGE 1 - CERTIFICATE OF SERVICE

STATE OF OREGON
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
WATER RESOURCES DEPARTMENT

In the Matter of Water Right	)	PROTESTANT RUE, ET AL.'S
	)	RESPONSIVE POST-HEARING
Application R-87871, in the Name of East	)	MEMORANDUM
Valley Water District,)	
)	
Applicant,	)	OAH Case No. 2017-OWRD-00002
)	
Rue, et al.,	)	OWRD No.: R-87871
)	
Protestants,	)	Assigned to: ALJ Denise McGorrin
)	
WaterWatch of Oregon,)	
)	
Protestant.)	

I. INTRODUCTION

The Rue Protestants ("Protestants") present this response to the post-hearing briefs filed by the Oregon Water Resources Department ("OWRD" or "the Department") and the East Valley Water District ("the District"). As with Protestants' initial post-hearing brief, this brief focuses on Issues 4 and 6 from Administrative Law Judge ("ALJ") McGorrin's June 14, 2018 letter listing the issues to be addressed at the hearing, but also discusses other issues from that list when related to Issues 4 and 6, as noted.

The fundamental question in this case is whether approval of Application R-87871 is in the public interest, and in particular whether the public interest presumption that OWRD found to be established was overcome by a preponderance of the evidence that *either* the presumption criteria were not in fact established *or* that the proposed use of water will be detrimental to the public interest considering the statutory public interest factors. The post-hearing briefs submitted by the Rue Protestants and WaterWatch demonstrate that the presumption was overcome in a number of ways, and that issuing a permit to the District for a dam and reservoir on Drift Creek is not in the public interest.

II. ARGUMENT

A. The Burden of Proof and the Allowable Scope of Protestants' Argument

1. OWRD has the burden to prove that issuing a water right to the East Valley Water District is in the public interest.

In ALJ Barber's March 20, 2018 Ruling on the Burden of Proof and Order of Presentation of Evidence, he stated that when a PFO has been protested, OWRD has the initial "burden of proof to show that all four of the statutory criteria are met, thereby justifying the approval" and that if OWRD establishes the presumption, the burden shifts to the Protestants to rebut the presumption—to show by a preponderance of the evidence that the criteria were not met or that the project would otherwise impair the public interest. P 22 at 2. The ruling acknowledged that the protesting parties—including the Rue Protestants—could undercut the Department's case on the presumption through cross examination as well as by their own evidence. *Id.* In his preliminary ruling, Judge Barber did not distinguish between the burden of production and the ultimate burden of persuasion.¹ However, that distinction is important at this stage of the proceedings.² The Department has the ultimate burden of persuasion on its proposed decision to issue a water right to the District, because at the end of the day, OWRD must issue a defensible final order in this proceeding under ORS 537.180(6).³ The ALJ's role is to "tee up" that decision for the Department with recommended findings of fact and conclusions of law, based on the

¹ He did note, however, that there would be a "complete hearing" with all parties presenting all of their evidence, and the decision would then be made on the merits—even if that decision might be that OWRD had failed to establish the presumption. *Id.*

² The "burden of proof" consists of two components — the burden of producing evidence (also called the "burden of production") and the burden of convincing the trier of fact that you should prevail (also called the "burden of persuasion").² The burden of production can shift back and forth between parties during a proceeding, but the burden of persuasion ultimately rests on the proponent advocating for a particular outcome.

³ See ORS 183.450(2) and *Compensation of Harris v. SAIF Corp.*, 292 Or 683, 690 (1982) (the burden of proof is on the proponent of a fact or position). ORS 537.170(6) is included in the appendix.

preponderance of evidence at the hearing.⁴ As discussed in Section B below, the evidence developed at the contested case hearing went well beyond rebutting the public interest presumption. The weight of the evidence supports denial of the District's proposal to dam and store the waters of Drift Creek.

2. The Rue Protestants may address any of the issues identified by the ALJ in the June 14, 2018 letter.

The District argues that the Rue Protestants are limited to addressing only Issues 4 and 6 on the June 14 issue list, and only the aspects of those issues that were specifically identified in their Protest. District Br. 3.⁵ This impermissibly narrow view of what the Rue Protestants can address is not supported by the applicable statutes, rules, or logic, and thus requires a response.

Protests must be filed within 45 days of the initial publication of the Proposed Final Order ("PFO") by OWRD. Protestants had only the PFO to rely on in drafting the Protest. At that time, Protestants did not have access to OWRD's complete application file—nor, more significantly—to any of the detailed information eventually developed through extensive discovery and testimony at the hearing.⁶ It is only logical that such additional information would give rise to further development and specification of pertinent issues.

⁴ If OWRD's final decision after the contested case is subjected to judicial review, the Court of Appeals will determine if the decision meets the requirements of ORS 183.482(8), including that the decision is consistent with statutes and rules and that any findings of fact are supported by substantial evidence in the record as a whole. *See also* ORS 183.450(5) (an order in a contested case may only "be issued upon consideration of the whole record . . . and as supported by, and in accordance with, reliable, probative and substantial evidence"). Thus, looking forward to the requirements imposed on the agency by ORS 537.170(6) and ORS 183.482(8) and 183.450(5), counsels that the Department has the ultimate burden of persuasion in this proceeding. The fact that OWRD and the District were given the opportunity to present a rebuttal case further supports this view of the burden of persuasion.

⁵ OWRD's opening post-hearing brief did not explicitly discuss this issue, but this was the position taken by the Department at the hearing. In fact, OWRD went even further and argued that since the Department is not a "party," it can raise issues for the first time at the hearing, but that the other parties could not do so. *See* TR 72:24-73:7; 78:1-79:14. Notably, OWRD quoted only a portion of the relevant statutes in its argument at the hearing and did not even acknowledge the language emphasized here pertaining to issues identified by the ALJ or raised at the hearing. TR 84:3-85:19.

⁶ *See* Exhibit A1, p. 45, footnote 1 (noting that the Rue Protestants had submitted public records requests to OWRD and the District prior to the Protest deadline, but no records had yet been produced).

The applicable statutes and rules also acknowledge this logical evolution of a contested case, and the District's and OWRD's position is inconsistent with the full statutory text and its plain meaning. ORS 537.170(1) provides that the issues to be considered in a contested case hearing are limited to "*issues identified by the administrative law judge.*" The ALJ's June 14 letter identified a number of issues to "be addressed at the upcoming administrative hearing" and did not restrict particular parties to particular issues. Furthermore, ORS 537.170(5) says "[f]ailure 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.*" (Emphasis added.) The statute is clearly intended to assure that all of the issues are raised with enough specificity no later than the contested case hearing to allow OWRD to make a proper decision on a complete record and not be surprised by having to defend against new challenges on judicial review.⁷ No language in either the statute or the rule says that a given protestant is "limited to the challenges to the PFO . . . specifically raised in their protests" as the District contends. District Br. 3.

What would be the point of discovery and a full evidentiary hearing if Protestants were limited to the four corners of a document prepared at the most preliminary stage of the dispute before reviewing relevant evidence and hearing pertinent testimony? In this case, the two Protests clearly raised the fundamental question of whether issuing a permit for a dam and reservoir on Drift Creek is in the public interest. OWRD and the District were on notice from the two complementary protests and the pre-trial proceedings that *both* the presumption criteria and the broader public interest review were fully at issue. The combined protests comprehensively raised numerous sub-issues relating to both ways of overcoming OWRD's

⁷ OWRD's administrative rule, OAR 690-002-0075, provides that "[t]he issues to be considered in a contested case hearing are limited to issues timely raised by the parties in any protests, requests for hearing[,] or requests for standing, *and as identified by the administrative law judge as allowed by applicable law.*" (Emphasis added.) Although the rule does not repeat the phrase "in a hearing," the rule cannot properly be read or interpreted to eliminate that important clause from the statute. *Cf.* ORS 174.010 (proper statutory construction does not "omit what has been inserted").

public interest presumption, including specifically all of the issues "identified by the administrative law judge" in the June 14th issue list, thereby making all of these issues and any other related issues raised at the hearing proper subjects of evidence and argument by all parties.⁸

B. Issuing a Water Right to the East Valley Water District to Dam Drift Creek and Inundate the Rue Protestants' Land is not in the Public Interest.⁹

OWRD's and the District's briefs open with two "straw men" arguments: that the public interest review is not intended to constitute a "one-stop-shop" for addressing all of a project's potential impacts and that Oregon law expressly allows issuing a permit with conditions. OWRD Br. 1-2; District Br. 2. These statements do not address Protestants' central arguments. Protestants' key arguments—and what the law requires—are: (1) that the public interest review required by ORS 537.153(2)(b) must go above and beyond the determination of whether the four presumption criteria are established under ORS 537.153(2)(a); (2) that the statutory public interest review must involve thorough analysis and substantive content; (3) that vague permit conditions delegating review to other agencies' future permit processes cannot substitute for OWRD's required public interest review; and (4) that the preponderance of the evidence shows that damming Drift Creek and impounding 12,000 acre feet of water on Protestants' land is not in the public interest.

1. The public interest review requires more than rehashing the presumption criteria.

As a matter of law, OWRD must go above and beyond simply restating the requirements for establishing the public interest presumption criteria when conducting the broader public interest review under ORS 537.153(2) and 537.170(8). Otherwise, the requirements in these two

⁸ WaterWatch focused its case on proving that the presumption criteria were not established, while addressing the broader public interest factors under ORS 537.170(8) to a somewhat lesser degree. The Rue Protestants prioritized proof related to the broader public interest test and focused on the presumption criteria to a lesser degree. With this tag-team approach, the two Protestants avoided unnecessarily duplicating each other's evidence and testimony at the hearing; however, both Protestants participated fully in addressing both ways to overcome the public interest presumption. *See, e.g.*, TR 119:14-120:5.

⁹ Issues 1(a) through (g), 2, 4, and 6.

statutory sections are read out of existence.¹⁰ Sections 4.a and 4.d below discuss the insufficiencies of the PFO in this regard.

2. The public interest review requires thorough evaluation of the proposed water use against substantive criteria, including criteria in OWRD's administrative rules and guidance from the Integrated Water Resources Strategy.

Testimony by OWRD staff at the hearing revealed that OWRD's public interest review is completely lacking in both methodology and substantive content. Rue Post-Hearing Br. 3-6. The Department filled the PFO with conclusory statements instead of evaluation or substantive analysis of the statutory public interest factors. *Id.* 3-8. Nothing in either OWRD's or the District's post-hearing briefs rehabilitated staff's admissions or justified the lack of an adequate review. In fact, the District goes so far as to say that "the Department was not required to include any specific analysis of the public interest factors in the PFO." That is an indefensible position as it is contrary to law.¹¹ While OWRD staff struggled to draft PFO findings on the public interest review, they ignored their own applicable administrative rules and other non-rule program guidance that provides substantive content for this analysis. To begin with, OWRD staff admitted that they did not even routinely apply all of the requirements of OAR 690-310-0120(3)(b),¹² though OWRD's Brief concedes that this rule applies to review of individual permit applications and requires consideration of *at least* the seven factors listed in the rule. OWRD Br. 14. Moreover, OAR 690-410-0080(2)(g) contains additional substantive criteria for consideration in reviewing storage projects like this one. OWRD and the District argue that Divisions 400 and 410 of OAR Chapter 690 are not applicable to the Department's review of

¹⁰ See, e.g., *State of Oregon v. Clemente-Perez*, 357 Or 745, 755, 349 P3d 232 (2015) (it should be assumed as a general rule that the legislature did not intend any part of its enactments to be "meaningless surplusage"); *Diack v. City of Portland and Water Resources Department*, 306 Or 287, 297, 759 P2d 1070 1988 (a legislative act should not be deemed meaningless "unless no other reasonable conclusion is available"); ORS 174.010 (proper statutory construction does not "omit what has been inserted").

¹¹ *Diack v. City of Portland and Water Resources Department*, 306 Or 287, 301, 759 P2d 1070 (1988) (agency must do more than regurgitate statutory language without analysis); see also Rue Br. 6-8 (citing administrative law cases that require agencies to support their decisions with explanations).

¹² See Rue Br. 4.

water permit applications, but rather apply only to "programs and activities." OWRD Br. 8-10; District Br. 5-6. OWRD contends that "[t]he 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" and further argues that this interpretation is entitled to deference. OWRD Br. at 9. However, as OWRD acknowledges, an agency is only entitled to deference when its interpretation of its own rule is plausible and not inconsistent with the wording or the context of the rule itself, or with any other source of law.¹³ OWRD's interpretation is not entitled to deference here.

First of all, OWRD's central and most consequential program and activity for managing the state's water is the water rights permitting program. OWRD calls individual permit decisions "granular," but it is through permit decisions that the Department allocates the public's water to private uses in perpetuity. For OWRD to categorically interpret "activities" as not including the permit program is unacceptably overbroad.¹⁴ Furthermore, the Department's interpretation is certainly not a plausible interpretation of OAR 690-410-0080(2)(g), which gives direction to OWRD in the form of specific criteria to be applied to evaluating storage projects.¹⁵ The plain language of this rule provides explicit criteria to be applied to individual permit decisions for storage projects.¹⁶ OWRD's claimed interpretation to the contrary is not entitled to deference.¹⁷

¹³ *Don't Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994).

¹⁴ According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("WEBSTER'S 3RD"), an "activity" is a duty or function of an organizational unit, which surely describes OWRD's key permitting function.

¹⁵ OAR 690-410-0080(2)(g) is in the Appendix.

¹⁶ WEBSTER'S 3RD defines a "criterion" as a "standard upon which a decision or judgment may be based; a yardstick; a basis for discrimination." In other words, these criteria provide guidance for OWRD's so-called "granular" permit decisions in its key programmatic activity of permit review.

¹⁷ See, e.g., *Nichols v. Office of Medical Assistance Programs*, 171 Or App 255, 15 P3d 578 (2000) (an interpretation is not plausible if it is inconsistent with the language of the rule itself, or fails to adequately account for variables in the rule); see also *Papas v. Oregon Liquor Control Comm'n*, 213 Or App 369, 161 P3d 948 (2007), and *Teacher Standards and Practices Comm'n v. Bergerson*, 342 Or 301,

Reading the Division 410 rules in the light of the text and context of ORS 537.170(8)(g) also requires this result. That provision directs OWRD to consider "[t]he state water resources policy formulated under ORS 536.295 to 536.350 . . ." in its public interest review. According to the citations of authority at the end of the Division 410 water storage rules, those rules were adopted under the authority of statutes within that series.

Even accepting OWRD's interpretation of "activities" for purposes of argument, the Department's disregard of this rule here cannot be sustained. OWRD says that the policy rules do apply to rulemaking, and OWRD further concedes that Division 310 of its rules does "directly govern water right application processing." OWRD Br. 9, 14. OAR 690-410-0080(2)(g) was adopted by the Department in 1992, and OAR 690-310-0120 was adopted in 1996. To the extent that the later rule incorporated only some of the criteria from the "policy rule" but ignored others, OWRD did not adequately follow the guidance of the policy rule when it adopted its permit review rule. At the very least, even if OWRD does not consider the water storage rule as a binding "rule" to be followed in the water application review process, OAR 690-410-0080(2)(g) certainly provides "non-rule program direction" that should inform the public interest review mandated by ORS 537.153(2) and 537.170(8). The Integrated Water Resources Strategy ("IWRS") also provides non-rule program direction for conducting the public interest review. OWRD and the District argue that because the IWRS is not an administrative rule, it is irrelevant to permit decisions. The IWRS is indisputably part of the "state water resources program" described in ORS 536.300 and 536.310 and thus represents non-rule program direction that cannot simply be ignored by the Department. As shown at the hearing, the IWRS states a clear policy preference for off-channel storage facilities. WaterWatch Br. 11. Instead of staff struggling to "come up with something" to populate the public interest findings in a PFO, the

153 P3d 84 (2007) (interpretations that were inconsistent with the plain meanings of words in the rule were not plausible).

criteria in the water storage rule and the principles stated in the IWRS offer precisely the sort of substantive content that the public interest review demands.¹⁸

3. Vague permit conditions delegating review to other agencies cannot substitute for OWRD's statutorily-required public interest review.

OWRD argues that it has "broad discretion to include whatever conditions it deems necessary to protect the public interest, including conditions that require the applicant to obtain other required permits." OWRD Br. 2, 7-8; *see also* District Br. 15-18. Protestants do not challenge OWRD's *authority* to condition permits, but rather challenge the *sufficiency* of the conditions in this case.¹⁹ The conditions here are open-ended and do not impose any specific requirements in and of themselves. OWRD's conditions delegated the substantive analysis of this project's impacts to other agencies, rather than fulfilling its statutory duty to evaluate the project against the statutory public interest factors.

4. The preponderance of the evidence demonstrates that the proposed use of water in Application R-87871 is detrimental to the public interest.

The District accuses Protestants of attempting "to reframe the debate into some sort of broad 'balancing' of equities or benefits." District Br. 2. In fact, this is exactly what ORS

¹⁸ OWRD's inadequate consideration of the comments received in opposition to Application R-87871 further contributed to the insufficiency of the public interest review. (Issue 6) OWRD and the District mischaracterize Protestants' argument about this issue. OWRD Br. 18-19; District Br. 18. Both briefs say that the PFO was not required to address each comment specifically, but that is not Protestants' argument. Protestants' point is that the PFO's conclusory finding that the comments were "considered" and either addressed in conditions or rejected as outside the scope of review is insufficient as a matter of administrative law, and, as discussed at pp. 6-8 of Protestants' Brief, the finding was not even factually accurate. Ms. Eastman's view of what was within the scope of review was wrong, and her testimony revealed that the comments were not part of the public interest review as required.

¹⁹ *Benz v. Water Resources Commission*, 94 Or App 73 (1988), is distinguishable from this case. There, the Commission approved a permit to appropriate water for leaching boron from the soil—the issue of whether this was a "beneficial use" was disputed. The Commission found that removing boron by applying surface water during the non-irrigation season would restore productivity to farmland that was damaged by accumulations of boron from irrigation by groundwater with high boron content, but imposed very specific conditions to address residual uncertainty about how well the leaching would work and what the optimum rate of surface water application would be, including specific measurement and soil sampling requirements. Importantly, the conditions also subordinated the use of water to other beneficial uses of water. The conditions imposed in *Benz* consisted of actual binding requirements and the significant step of making the permitted use essentially junior to all future uses. Those conditions are a far cry from the vague, procedural, and delegating conditions imposed in this case.

537.170(8) contemplates. The seven statutory public interest factors require OWRD to consider a wide range of values and issues pertaining to any proposed water use, including comparison of the proposed use to other important uses of water.²⁰ The District also states that "Protestants cannot meet their burden simply by showing that a single public interest factor tips in Protestants' favor." District Br. 13. To the extent that the District simply means to say that OWRD must consider and weigh all of the listed factors in reaching its decision, Protestants agree, but if the District means to suggest that Protestants must show that a preponderance of evidence tips in their favor on every factor, this position is not a correct statement of the law.²¹ As detailed in the following discussion, Protestants demonstrated that a preponderance of the evidence establishes several ways in which the public interest would be impaired by granting this permit.

a. The preponderance of the evidence shows that the "highest use" of Drift Creek is to support fish and wildlife, recreation, and other instream public uses.

In its analysis of ORS 537.170(8)(a), OWRD persists in conflating the presumption criteria with the broader public interest review, and the District supports them in doing so. The Department says again in its brief, as staff testified at hearing, that the public interest factor of "conserving the highest use of water for all purposes" was met by finding that the proposed use complies with the Willamette Basin Program rules. OWRD Br. 15; *see also* District Br. 13. OWRD quotes ORS 536.340(1)(a), apparently arguing that if a Basin Program "classifies" water for a particular use, that is by definition the highest and best use. As OWRD well knows, that is

²⁰ *See Benz*, 94 Or App 73, 77 (The Water Resources Commission "could not . . . grant [a] permit without going through the process of balancing the proposed use against other beneficial uses, conflicting interests[,] and concerns.") Although the *Benz* court cited ORS 537.170(5) for the list of public interest factors, the factors were the same as now listed in ORS 537.170(8).

²¹ ORS 537.153(2)(b)(A) expressly provides that the public interest presumption may be overcome by a finding of the Department that shows "[t]he *specific public interest* under ORS 537.170(8) that would be impaired or detrimentally affected." (Emphasis added.)

not how classification works.²² OWRD cannot argue that because Drift Creek is classified for irrigation, that is its highest use. Irrigation is just one *permitted* use, and Drift Creek is also classified for fish and wildlife, recreation, pollution abatement, wetland enhancement, and public instream uses. The Basin Program does not prioritize among all of the permitted uses, and there is certainly no language in the Basin rules excusing OWRD from applying the public interest review to any permit application for any classified use.²³ As a matter of law, the PFO did not satisfy ORS 537.170(8)(a) by restating that the proposed use is allowed in the Basin Program.

As a matter of fact, the preponderance of the evidence shows that conserving the highest use of the water of Drift Creek is best served by leaving the water instream and not by impounding it in a reservoir that would inundate productive farmland. Rue Br. 11. Drift Creek is the last undammed major tributary of the Pudding River. The creek provides essential habitat for Pacific lamprey, a state-listed sensitive species. WW Br. 5-6. Drift Creek also supports populations of coho salmon and cutthroat trout, and contains habitat suitable for steelhead, a federally-listed threatened species. *Id.* A dam would block access to miles of free-flowing stream and cold water refugia upstream. Elk frequent the reservoir site, and the creek and its surroundings support other wildlife such as cougars and bobcats. The District intends to apply for a waiver of the fish passage requirements, because of the prohibitive cost of providing

²² The Willamette Basin Program rule, OAR 690-502-0010(3), defines "classification" as "the allowed and preferred beneficial use(s) of a given surface or groundwater source for which future uses of water shall be permitted." OAR 690-502-0120(5) classifies the tributaries of the Pudding River for "domestic, livestock, irrigation, municipal, industrial, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement and public instream uses from November 1 through April 30."

²³ The District makes a similar argument, citing ORS 536.300. District Br. 13. This statute, too, lists recreation, wildlife, fish life, and pollution abatement as beneficial uses along with irrigation and other uses, with no prioritization or designation of the "highest" use. The District's selective quotation of a portion of Article I, Section 18 of the Oregon Constitution—which is presented without any explanation of its relevance—does not help its argument. The full clause is "provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use." The quote, in context, speaks to the public use of roads and waterways, and certainly does not say that irrigation is the highest use of the water in Drift Creek.

passage and the belief that passage would not be successful in any event. WW Br. 6. The District hopes to "mitigate" for the lack of fish passage by trying to improve the habitat downstream from the dam for cutthroat trout, while ignoring the elimination of habitat for lamprey, coho, steelhead, and upland wildlife.

OWRD is required by statute and rule to consider the impacts to fish and wildlife and their habitat in conducting its public interest review of this permit application.²⁴ This requirement is explicitly *not limited* to threatened, endangered, or sensitive species.²⁵ The Department is also required to consider the impacts of a storage project to recreation, water quality, streamflows, wetlands, and cultural and historic resources—both for the presumption and for the broader public interest analysis.²⁶ OWRD did not do that in this case, but punted to other agencies for later reviews. The record developed during the contested case hearing supports a denial of the District's application.

Building this dam and reservoir will destroy fish and wildlife habitat, according to ODFW. WW Br. 13-15. OWRD says in its brief that it did not have information in its files regarding non-STE fish and wildlife when it prepared the PFO, but that is both incorrect and disingenuous. Protestants' comments raised pertinent issues, as did ODFW—but OWRD then told ODFW to keep its comments focused on STE species and save comments about other species for its own permit reviews.

DEQ told OWRD explicitly that it could not assess the impacts on water quality because the project was still so undefined, and recommended at a minimum that the applicant assess an

²⁴ ORS 537.170(8)(a); OAR 690-310-0120(3)(b)B) and(D); OAR 690-410-0080(2)(b) and (g)(H). "Consider" means to reflect on, think about attentively, deliberate, and weigh. *See* WEBSTERS 3RD. To the extent that the rules require such consideration, they are part of satisfying the presumption.

²⁵ OAR 690-033-0000(3) (stating that the Division 33 rules for threatened, endangered, and sensitive species are "in addition to" existing laws and rules); *compare* also OAR 690-310-0120(3)(b)(B)("threatened, endangered, or sensitive species") with (D)("fish and wildlife") (both are included in the list of factors to be considered "at a minimum, . . . including any potential effects that the proposed use may have on these factors"). *See also* WW Br. 16-17.

²⁶ ORS 537.170(8)(a); OAR 690-310-0120(3)(b)(C) and (E); OAR 690-410-0080(2)(b) and (g)(C) and (H).

off-channel facility rather than in-channel dam. Rue Br. 10. In response, OWRD simply noted DEQ's recommendation, without requiring anything of the District, and recommended a vague water quality condition that essentially says only "comply with applicable law." Despite the District's inclusion of "flow augmentation" as a supposed purpose for the storage project, and its claims that release of cool water from the bottom of the dam could help water quality downstream, no such augmentation or release is required in the PFO or draft permit. Although the PFO says that the permittee is to pass all live flow between May 1 and October 31, the permit does not contain any measurement conditions to assure that result. See also WW Br. 12-13.

b. The preponderance of the evidence shows that building a dam and reservoir on Protestants' farmland for supplemental irrigation water for some District farmers will not provide maximum economic development of the waters involved.

As to the second factor, ORS 537.170(8)(b) ("maximum economic development of the waters involved"), OWRD essentially concedes in its brief that the agency did not do its job. The brief does not defend the inadequate, conclusory finding in the PFO, but says now, after the fact, that "evidence relevant to these factors includes the economic benefits of the proposed reservoir and the economic benefits of leaving the water in Drift Creek," and that "the evidentiary record developed at the hearing will inform the Department's evaluation" OWRD Br. at 15. But the statute does not say that the public interest review takes place *after* an evidentiary hearing. The "P" in PFO stands for "proposed," not "preliminary" or "placeholder." The plain meaning of the statute requires some kind of cost-benefit analysis, and pertinent evidence and issues were raised preliminarily in comments to the Department and additionally in the protests, see Ex. A1, but the Department ignored these obvious points in its review. By issuing a PFO that was legally inadequate on its face, and treating it as a placeholder, the Department pushed all of the parties, including the state, into a very time-consuming and costly contested case process. "Better late than never" is not good enough.

The District's arguments on this point, which rely on the expert testimony of Barbara Wyse, do not help the Department. Ms. Wyse did a very limited review of the economic impacts

of the District's proposal. She did not do a full cost-benefit analysis. The only thing she considered on the "cost" side of the project was her estimate of income that would be lost by taking about 400 acres of non-irrigated grass seed out of production. She compared that to her estimate of income that could be produced by providing supplemental irrigation water to an additional 4000 acres of District land producing either grass seed or a diversity of crops, all of which fetch higher profits than grass seed. Her unsurprising conclusion was that the second number is bigger than the first number. All of the parties to this case recognize that irrigated land can produce more income than non-irrigated land, especially if it is growing "high value" crops.

Ms. Wyse's calculations are simply not enough to support a finding that the District's project would provide maximum economic development of the waters of Drift Creek. The preponderance of the evidence shows that the Drift Creek Project will likely cost in excess of 100 million dollars, even before accounting for the remaining design and permitting costs, the considerable land acquisition costs required for the dam and reservoir site, costs of providing fish passage or the mitigation required for a waiver, mitigation costs for impacts to 8,000 year-old cultural resources, a ten-to-twelve mile conveyance pipeline, and an internal distribution system, on top of the substantial costs already expended. Rue Br. 12-15. The project will destroy one family's home and cause undetermined losses to the Victor Point community not accounted for in Ms. Wyse's lost income calculations. Damming Drift Creek will eliminate fish habitat for coho, lamprey, cutthroat trout, and possibly listed steelhead, and wildlife habitat for upland species,

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with associated economic losses. Neither the Department nor the District provided any cost-benefit evidence that takes these costs into account.²⁷

c. Control of the waters of the state for all beneficial purposes, including drainage, sanitation, and flood control will not be achieved by damming and impounding Drift Creek.

Similar to the PFO's findings on several of the public interest factors, the findings on this factor are off-point and inadequate. OWRD and the District continue to claim that the PFO "addresses" the third public interest factor in ORS 537.180(c) "by providing that '[t]his permit is for the beneficial use of water without waste" OWRD Br. 16; District Br. 15. "Address" means to direct efforts to and give attention to a matter.²⁸ Citing a basic principle of water law does nothing to "address" this or any other factor. The District's claim that the "draft permit is properly conditioned to prohibit waste" is simply incorrect and not supported by the record. District Br. 15. Even OWRD staff conceded that the "condition"—which says that *new* regulations (in the future) *may* require conservation measures—does not impose any actual requirements. Rue Br. 5.

Nonetheless, here, too, OWRD now carves out some wiggle room for itself by acknowledging, after the fact, that relevant evidence "may include evidence regarding the potential beneficial uses of the water (i.e., storage for irrigation and flow augmentation, or leaving the water instream), and whether those uses are necessarily competing or whether the proposed use, as conditioned, will protect all beneficial uses; any evidence that the proposed use will not unreasonably waste water; and any evidence regarding implications of the proposed use for drainage, sanitation, or flood control." Protestants agree. The point is, however, that OWRD had already received evidence of that sort in public comments and in the two formal Protests—

²⁷ The District continues to argue that no cost benefit analysis is required, without offering any way of determining "maximum economic development" without such comparative analysis. Furthermore, OWRD's concessions in its brief undercut the District's position.

²⁸ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

including evidence of mudflats left after reservoir draw down—but the Department did not address any of it.

OWRD is required to decide whether a proposed use will impair or be detrimental to the public interest by considering comments, any protest(s), or the Department's own findings, but Department staff seemed to assume that once they had examined the presumption criteria (assuming for the moment that the examination came to a correct conclusion), their work was done, and they could use conclusory boiler-plate language in a PFO as a placeholder for evidence developed at a contested case hearing—if a Protest was filed and a hearing occurred. That is not what the statute provides.²⁹.

d. OWRD must do more than restate its water availability analysis in reviewing the broader public interest.

OWRD sticks by its restatement of the presumption criteria for the fourth public interest factor as well. The Department says it "conducted a water availability analysis using WARS," thereby satisfying ORS 537.170(8)(d), but that approach impermissibly conflates the presumption with the second step of the public interest review. The District says that "Protestants failed to prove that an annual allocation of 12,000 AF to storage . . . would make water unavailable to satisfy another, competing demand for water," but that is not accurate. In fact, the evidence showed that the proposed reservoir would wipe out several miles of free-flowing creek that is subject to an instream water right. OWRD took the position at the hearing that the instream water right will still be "satisfied" as long as it can be measured at the downstream end of its reach, but the testimony showed that this approach to instream flows was not consistently followed by staff. As a simple matter of common sense, when an instream water right protects a segment of free-flowing stream, and a proposed use of water would block the stream, eliminating fish movement and changing the stream into a standing reservoir, water that is currently available to instream uses would no longer be there as a result of the project.

²⁹ The fact that OWRD does not get very many protests or many applications for large projects does not allow them to avoid the statute's requirements. TR 104:24-105:10.

e. **The District's proposed use of water represents a wasteful, uneconomic, impracticable, and unreasonable use of the waters of Drift Creek.**

The fifth factor of the public interest analysis is of critical importance to the Rue Protestants. The preponderance of the evidence demonstrates that the District's proposed use of water is uneconomic and unreasonable. Issuance of a water right to the District will store water on productive farmland for the economic benefit of some of their competitors. The Rue Protestants are entitled to a full and fair analysis of the feasibility of this project before being required to give up some of their multi-generational farmland for the purpose of assuring a secure future for other family farms.

The plain meaning of the language in ORS 537.170(8)(b) and (e) requires a comprehensive at least a rudimentary cost-benefit analysis. The evidence is undisputed that OWRD did not do any such analysis prior to issuing the PFO or after receiving the Protests, even though these concerns were raised in comments and the Protests themselves. The Department now concedes that relevant evidence "includes the expected demand for the stored water; the existence of any features that ensure the stored water is not unreasonably wasted; and the project's feasibility and anticipated cost." OWRD Br. 16. OAR 690-410-0080(2)(g) requires a project benefit/cost analysis in any event, and also requires analysis of social impacts and public support as well. *See* Ex. R6 and R30.

What was the evidence of expected demand for this stored water? There was no proof of a demand for 12,000 acre feet—that number was chosen based on the estimated capacity that could be stored at the Drift Creek site. In 2016, District patrons were paying "development charges" for 4,000 acre feet of water, but even these payments are not equivalent to actual demand for water, since those patrons are not obligated to purchase project water if and when the reservoir is built, and no one yet knows how much an acre foot of project water will even cost. As to "need" for water, the proof showed that the need is rather a desire for some District patrons to improve the reliability of their water supply—even though existing water rights already cover most of their irrigation needs. They hope to insulate themselves from occasional regulation of

surface water sources and possible future regulation of groundwater use, and thereby maximize the flexibility in their operations and maximize their profits. District patrons are well aware that their farms would succeed at the expense of the Protestants' farms and families, but they believe they are entitled to satisfy their desires because they grow high value crops and have the power of an irrigation district behind them. *See* TR 1892:11-1893:5.

As discussed in Section 4.b above, when a true cost-benefit analysis is performed, this project is likely not feasible—and only possible at all with significant public money added to what the District has already received.

OWRD says that ORS 537.170(8) "does not authorize the Department to consider the District's potential use of eminent domain to acquire the land to be inundated by the reservoir, as that issue does not relate to the *use* of water (for irrigation and flow augmentation)." (OWRD Br. at 16-17; emphasis in original.) But, as all parties understand, even if Application R-87871 is approved, that does not allow the District to use the water for irrigation and flow augmentation without a secondary permit. The use of water under review in this proceeding is for *storage*—for a dam and impoundment—and that is the use that needs to pass the test of being reasonable, practicable, economic, and not wasteful. The proposal at issue in this application is to *build a dam* across Drift Creek and *store* 12,000 acre feet of water for the District's use on property belonging to several of the Rue Protestants. Without this permit, the District cannot build this storage facility, and thus will have not authority or ability to acquire Protestants' land against their will. But with the permit in hand, eminent domain will follow. In fact, OWRD conditioned the draft permit to require that before the reservoir can be filled, the applicant must provide proof that it owns or has permission to use the land that will be inundated.³⁰ The District plans to site the dam on the parcel that it managed to buy from the Dominick estate, even though landowner Norbert Dominick had not been willing to sell his property to the District prior to his death. The permit would therefore empower the District to go as far as building the dam before forcing the

³⁰ Exhibit A1, at 135.

rest of the Protestant landowners to capitulate to the project by condemnation. That fact is part and parcel of what makes this project unreasonable. OWRD cannot turn a blind eye to that inevitable consequence of issuing this permit, and to the precedent such a decision will set for future water rights applications.

There was no proof of any controls to prevent waste of the stored water. In fact, the evidence showed that water would be lost from the reservoir through evaporation and seepage.

f. Issuance of this permit does not fully protect vested and inchoate rights to water.

OWRD and the District maintain in their briefs that the sixth factor in ORS 537.170(8)(f) ("protecting all vested and inchoate rights") was "addressed" by restating the rule of priority OWRD Br. 17; District Br. 16. However, OWRD conceded that this statement simply restates a basic principle that underlies Oregon water law. TR 286:18-288:10. The public interest analysis requires more. As discussed in Section 4.a above, the effect of issuing this permit will be to damage the fisheries in Drift Creek, to the detriment of the instream water right that is in place purportedly for the protection of those fisheries and other instream values. Regardless of whether the instream right is "injured" in the way that OWRD defines such injury, it is clear that the instream right will not be fully protected.³¹

g. Issuance of this water right is contrary to state water resources policy.

As discussed in Section 2 above, state water resources policy provides significant substantive criteria that were not considered or addressed in OWRD's review of this water rights application. OAR 690-410-0080 and the IWRS, in addition to other policy rules, direct OWRD to apply specific criteria to storage applications, and that was not done in this case. If OWRD

³¹ OWRD says that Mr. Jaquet's water right, Certificate 36095, will not be "injured" due to a sleight of hand, whereby OWRD assumes that the District will simply condemn that right along with Mr. Jaquet's property, and then cancel the right—or perhaps incorporate the right into the District right, according to the District. Regardless of whether Mr. Jaquet's right is in current use, it has not been cancelled, and this dismissal of it is troubling.

had fairly and comprehensively assessed this application against the applicable criteria, it would have been compelled to deny the application.

III. CONCLUSION

The Rue Protestants and WaterWatch demonstrated, at the hearing, and in the post-hearing written arguments, that the public interest presumption for Application R-87871 has been overcome. WaterWatch's case demonstrated a number of ways in which the presumption criteria were not in fact met. The Rue Protestants' case demonstrated that issuing a water right to the East Valley Water District to store water for their limited future benefit on Protestants' land, is a patently unfair, unreasonable, and uneconomic decision. The PFO should be modified accordingly and the application denied.

Dated this 12th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I filed with the Office of Administrative Hearings and served a true and correct copy of **PROTESTANTS JOEL D. RUE, ET AL.'S RESPONSIVE POST-HEARING MEMORANDUM** on the following parties and the Administrative Law Judge by email on September 12, 2018.

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