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BEFORE THE OREGON WATER RESOURCES DEPARTMENT  
AND THE OREGON WATER RESOURCES COMMISSION

IN THE MATTER OF WATER RIGHT ) Agency Case R-87871  
APPLICATION OF: )  
 ) OAH Case No. 2017-OWRD-00002  
 )  
EAST VALLEY WATER DISTRICT ) **WATERWATCH OF OREGON'S**  
 ) **EXCEPTIONS TO FINAL ORDER**

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**I. INTRODUCTION**

The final order in this case would allow a new channel-spanning dam, without fish passage, in a stream providing habitat to threatened Willamette Basin steelhead (among other fish). Using the power of eminent domain, the dam would flood the land of local farmers who don't want the dam, displace a family from their long-time home, and inundate an area with evidence of human use dating back 8,000 years.

The final order would be contrary to the Commission's Integrated Water Resources Strategy, which expresses a clear policy direction away from on-channel storage; contrary to Oregon Department of Environmental Quality comments encouraging off-channel storage for the sake of water quality; and inconsistent with substantial state and nonprofit efforts and expenditures to *remove* obstructions from streams with current (and even historic) fish populations.<sup>1</sup>

The final order says the dam would not "impair or be detrimental to the public interest." For the reasons below, the Commission should modify the order to deny the application.

**II. SUMMARY OF FACTS**

Drift Creek originates in the hills near Silver Falls State Park. It flows 11 miles northwest toward Silverton and runs into the Pudding River. The Pudding runs into the Molalla River just before the Molalla River enters the Willamette River, which is near Canby, Oregon. (Exs. WW51 (Attachment 2) (map); WW8 (stream miles); WW35, pp. 29-31 (Attachment 3) (photos).)

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<sup>1</sup> As a sign of the times, Congressman Kurt Schrader recently told a gathering of farmers in Mt. Angel: "I'd say there's zero chance for new dams where there's historic fish habitat." Christena Brooks, *Congressman Kurt Schrader discusses water rights to Mid-Valley farmers*, Statesman Journal, Feb. 21, 2019.

1           Lots of fish use Drift Creek, including cutthroat trout, Coho salmon, Pacific lamprey,  
2 winter steelhead and spring chinook salmon. (Final Order, p. 37 (Finding 225).) The  
3 steelhead and chinook are listed as “threatened” under the federal Endangered Species Act.  
4 (Final Order, p. 38 (Findings 229, 230).) The steelhead are part of a population that, in 2017,  
5 numbered only about 1,000 adult fish in the entire Willamette Basin above Willamette Falls.  
6 (Final Order, p. 39 (Finding 241).) The lamprey are listed as “sensitive” species under state  
7 law and have important cultural significance to Native Americans. (Final Order, p. 38  
8 (Finding 232).) Coho have recently been seen spawning in a stream above the dam site. (Ex.  
9 R171, p. 1 (Attachment 5).)

11           Presently, fish can migrate from the Pacific Ocean to the headwaters of Drift Creek.  
12 There are no dams in the way. (Test. of Rankin, tr. 1645:10-12; Finding 132.) The upper end  
13 of Drift Creek provides the best habitat for “salmonid” (trout and salmon) fish species. (Test.  
14 of Gowell, tr. at 2532:14-25.) ODFW still considers it important habitat for steelhead and  
15 lamprey. (Test. of Murtagh, ex. A9 (Attachment 6), pp. 4-7.) Drift Creek has been degraded  
16 by past land-use practices, but it could be improved with restoration work. (Test. of Murtagh,  
17 ex. A9, p. 4; test. of Rankin, ex. R1, p. 7 ¶ 18; test. of Gowell, tr. 2536:3-11.)

19           The bottomlands of upper Drift Creek have been used by people for thousands of  
20 years. Recent investigations found human artifacts dating back 8,000 years. (Ex. R49, pp. 7-8  
21 (Attachment 9).) Today, the area is owned primarily by local farmers. One family – Alyssa  
22 Mucken, her husband Roger and their three children – has lived in the bottomlands since  
23 2003 (and Roger before then).<sup>2</sup> (Test. of Mucken, ex. R43 (Attachment 7), p. 1 ¶¶ 2, 3.)

25 \_\_\_\_\_  
26 <sup>2</sup> The applicant plans to take the property of these farmers and displace the Mucken family  
against their will by using its power of eminent domain. (Final Order, Finding 2.)

1 East Valley Water District (“EVWD” or “District”), an irrigation district, wants to put  
2 a dam across Drift Creek about six miles upstream from the mouth. The dam would create a  
3 reservoir flooding about three miles of Drift Creek and 340 acres of land. (Test. of Gramlich,  
4 tr. 426:11-15; Test. of Cuenca, tr. 2297:6-11.) The dam would not provide fish passage,  
5 meaning it would block fish from using habitat above the dam (five miles of Drift Creek plus  
6 the forks).<sup>3</sup> The dam would store up to 12,000 acre feet of water per year from November  
7 through May – water that would otherwise flow down Drift Creek and provide valuable  
8 “peak and ecological” flows. (Final Order, Findings 35, 124, 207, 208.) The dam also will  
9 prevent movement of “bedload” (sediment, gravel, etc.) and woody debris, which is  
10 important to the ecological health of a streams. (Test. of Gowell, tr. 2538:17 to 2540:18.)  
11 Depending how much water the reservoir stores each year and other factors, the dam could  
12 create water quality problems including problems with temperature and dissolved oxygen.  
13 (Ex. A1, p. 255 (ODEQ review form); Ex. EV61 at 80 (modeling report showing zero  
14 dissolved oxygen at bottom of reservoir.)) Drift Creek is already designated by ODEQ as  
15 water quality limited for temperature with concerns for dissolved oxygen. (Final Order,  
16 Findings 257, 260.)

17  
18  
19 In years of prior study, EVWD never identified Drift Creek as a preferred alternative  
20 for meeting EVWD’s perceived future water needs. (Ex. R50, p. 36-38 (1994 screening of  
21

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22 <sup>3</sup> EVWD claims not to have decided if the dam will provide fish passage or seek a waiver  
23 from fish passage requirements but documents in the record make clear that the dam will not  
24 provide fish passage because it would be impractical or impossible given the expected  
25 changing reservoir levels. (Ex. WW52, p. 2 (EVWD Board minutes discussing only plan to  
26 “mitigate” for loss of fish passage, with consultant noting, “no reservoir in the state addresses  
passage with the type of draw-down anticipated at the Drift Creek site”); Ex. WW65, p. 2  
(Attachment 4) (cover letter with application saying EVWD “intends to work with [ODFW]  
to obtain a fish passage waiver”).)

1 storage alternatives identified three sites for further consideration and did not include Drift  
2 Creek.) Drift Creek went from being off the map to the only alternative within just a few  
3 months of another plan falling through because of expected wetland mitigation costs. (Test.  
4 of Bielenberg, tr. at 1789:10 to 1799:18.) EVWD has failed to adequately consider less-  
5 damaging alternatives for its perceived future water needs, including simply buying water  
6 from existing Willamette Basin reservoirs and piping it from a diversion point on the  
7 Willamette near Canby. (WaterWatch Closing Brief, pp. 9-10.) Moreover, EVWD’s  
8 members already have water rights for most if not all of their land. (See Findings 28, 36, 44,  
9 47, 54, 60, 62, 66, 69, 70.) Their reservoir proposal is being driving primarily by speculative  
10 fear of future government regulation. (WaterWatch Closing Brief, pp. 7-9; see, e.g., Finding  
11 55.)  
12

13  
14 Despite the foregoing, the Oregon Water Resources Department (“OWRD” or  
15 “Department”) has issued a final order to approve EVWD’s reservoir application.

### 16 III. EXCEPTIONS

17 WaterWatch submits the following general exceptions to the Department’s final order  
18 dated September 13, 2019.<sup>4</sup> In addition to the narrative below, much of which is in summary  
19 form, these exceptions are supported by WaterWatch’s Closing Brief, Response to Post-  
20 Hearing Briefs (“Closing Response Brief”) and Exceptions to Proposed Order, which are  
21 attached (attachments 11, 12 and 13) and hereby incorporated by reference in these  
22 exceptions. WaterWatch’s primary exceptions are in narrative form. Other exceptions to  
23 specific passages in the Final Order and renewed exceptions to specific passages in the  
24

25 \_\_\_\_\_  
26 <sup>4</sup> An exception to a finding or conclusion in any part of the Final Order is an exception to the same or any substantially similar finding or conclusion in any other part of the Final Order.

1 Proposed Order are, in part, to protect WaterWatch’s legal rights in the event of any appeal  
2 of the Commission’s decision. An exemption to a finding and/or conclusion in any part of the  
3 Final Order (including by renewed exception to the Proposed Order) is an exception to the  
4 same or any substantially identical finding or conclusion in any other part of the Final Order.  
5

6 **A. The Final Order Incorrectly Determines<sup>5</sup> That A New In-Channel Dam  
7 Without Fish Passage on a Stream Used by Threatened Steelhead and  
8 Other Fish Won’t Impair or Be Detrimental to the Public Interest.**

8 The ultimate test for whether a new water storage permit should be granted is whether  
9 it would “impair or be detrimental to the public interest.” *See* ORS 537.153; ORS 537.170.  
10 Here, the Department concluded that the proposed EVWD dam and reservoir would not  
11 impair or be detrimental to the public interest.<sup>6</sup> (*E.g.*, Final Order, pp. 51-52.) The  
12 Commission should find otherwise.  
13

14 The factors in a public interest inquiry are, by their terms, very broad. ORS  
15 537.170(8) (listing several factors to consider, including “conserving . . . water for all  
16 purposes” and prevention of “unreasonable” use of water); *see also* OAR 690-310-  
17 0120(3)(b) (requiring consideration, for example, of “[f]ish or wildlife,” “[r]ecreation” and  
18 “[w]ater quality”). The factors reasonably include anything bearing on generally accepted  
19 ideas of what is, or isn’t, in the public interest. Certainly, they include compliance with  
20 applicable statutes and regulations, and with policies expressed in the Department’s  
21 Integrated Water Resources Strategy. *See WaterWatch v. Water Resources Commission*, 193  
22

23 \_\_\_\_\_  
24 <sup>5</sup> References to “determinations” in the Final Order are to findings and/or conclusions as  
25 appropriate.

26 <sup>6</sup> Regardless of whether a “presumption” of public interest is established, the inquiry  
ultimately leads to this question.

1 Or. App. 87, 341 (2004), *vac'd on other grounds*, 339 Or. 275 (2005) (permit “inconsistent  
2 with the statutes and rules of the commission governing water appropriation” is not in the  
3 public interest).

4 The permit EVWD seeks is not in the public interest because its detrimental effects  
5 far outweigh any positive effects. The grounds for this exception, with citations to the record,  
6 are more particularly discussed in WaterWatch’s Closing Brief (pp. 4-20) and Response to  
7 Post Hearing Briefs (“Closing Response Brief”) (pp. 4-20) before the Office of  
8 Administrative Hearings, and in WaterWatch’s Exceptions to Proposed Order before the  
9 Department (pp. 1-4), all of which are attached and incorporated by reference. In brief, the  
10 Department’s final order would allow EVWD to:

- 12 1. Flood and block passage to 7-10 miles of fish habitat used by fish including  
13 winter steelhead listed as threatened under the federal Endangered Species Act,  
14 Pacific lamprey listed as sensitive under state law, Coho salmon and cutthroat  
15 trout, (Test. of Murtagh, Ex A9, pp. 4-5);
- 16 2. Alter the hydrology and habitat of Drift Creek and downstream waters by storing  
17 water and diverting it for irrigation, by impeding movement of bedload and  
18 woody debris, and having undetermined (because specific plans aren’t  
19 determined) impacts on water quality, (Test. of Gowell; tr. at 2539:12 to 2544:5.)
- 20 3. Flood elk habitat, (Final Order, pp. 41-42);
- 21 4. Flood a potentially significant archeological site with evidence of human use  
22 dating back 8,000 years, (Ex. R49, p. 7);
- 23 5. Take property from farmers against their will (through condemnation), (Finding  
24 2); and
- 25 6. Displace a family from their longtime home against their will (through  
26 condemnation), (Test. of Alyssa Mucken, Ex. R43).

24 The Department claims the permit will have conditions that offset these impacts.  
25 However, for several reasons, the record fails to show that. First, the conditions to lessen  
26 impacts on fish are directed only at listed fish. The Department actively discouraged the



1 Oregon Department of Fish and Wildlife (“ODFW”) from providing input on other species  
2 and ODFW therefore did not provide any. (Ex. A1 at 221 (bottom), 238; Test. of Murtag, tr.  
3 at 2138:8-10.) The Department did not add any conditions based on the evidence at hearing  
4 of impacts to non-listed species. For example, there is no condition to make up for the loss of  
5 elk habitat; or for impacts to non-listed fish from inundation of the stream above the dam and  
6 alteration of flows and water quality below the dam. The conditions also fail to protect listed  
7 fish, as discussed separately below.

8 Second, the conditions generally rely on mitigation plans to be developed by EVWD  
9 in the future for review by other agencies (some in processes that do not provide for public  
10 input). (Final Order, pp. 144-46.) No mitigation plans were provided for review in this  
11 proceeding. (See, e.g., Test. of Apke, tr. at 2358:4-11; test. of French, tr. at 214:2-25; test. of  
12 Eastman, tr. at 372:25 to 373:10; test. of Stevenson, tr. at 699:15 to 700:5.) Their content and  
13 effectiveness cannot be reviewed in this agency’s public interest analysis and are purely  
14 speculative.

15 Third, some conditions clearly will not fully offset the impacts of the project. For  
16 example, the Final Order requires a permit condition that EVWD either provide fish passage  
17 at the dam or get a waiver of fish passage requirements. (Final Order, p. 145.) However, a  
18 dam with fish passage (or mitigation for the lack of passage) is not the same as a free-flowing  
19 river. Fish passage structures sometimes don’t work, and the fish passage laws won’t address  
20 the impacts on fish migration from a three-mile reservoir pool. (Test. of Apke, tr. 2350:10 to  
21 2351:7.) Also for example, the “water quality” condition only requires the project to not  
22 “detrimentally” impact water quality “to the point that those waters no longer meet existing  
23 state or federal water-quality standards *due to reduced flows.*” (Final Order, p. 145 (condition  
24 7).) Thus, it does not prevent impacts that may be detrimental but don’t break the law,<sup>7</sup> and it

25 \_\_\_\_\_  
26 <sup>7</sup> For example, a reservoir may cause water to be too cold at times, which does not break the  
law. (Test. of Gowell, tr. 2546:18-25.)

1 does not prevent impacts due to temperature and oxygen impacts from impoundment as  
2 opposed to “reduced flows.”<sup>8</sup> Moreover, depending on the quality of water in the reservoir at  
3 a particular time, EVWD may be in a Catch-22. It may be required to release water to  
4 comply with the condition requiring it to bypass live flow outside the storage season (i.e.,  
5 make outflows equal to inflows) but prohibited by its “water quality” condition from release  
6 water because the water would not meet other “requirements.”

7 Review of the conditions shows they cannot possibly make up for all expected  
8 impacts. (Final Order, pp. 144-46.) For example, no condition makes up for the inundation of  
9 Drift Creek and its tributaries (which provide habitat for coho and cutthroat as well as  
10 steelhead, lamprey and chinook) in the reservoir footprint.

11 There also is significant affirmative evidence that the impacts to listed fish cannot be  
12 mitigated even assuming hypothetical future plans. (WaterWatch Closing Brief at 15 (No. 3);  
13 test. of Gowell, tr. at 2574:18 to 2575:13 (impacts on the whole would be negative, even with  
14 mitigation).) Indeed, four months after signing ODFW’s Division 33 review recommending  
15 conditions instead of denial, Murtagh wrote to a colleague: “Based on the stream miles lost  
16 due to inundation, I remain very skeptical that they will be able to provide us with  
17 appropriate mitigation, even if they provide passage, as they are going to inundate most of  
18 the flowing stretch of stream with the 400 acre reservoir.” (Ex. R171 at 29 (Attachment 1).)

19 Allowing EVWD to build a new dam – especially one without fish passage – across a  
20 stream used by native fish, including anadromous fish listed under state and federal  
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22 <sup>8</sup> The condition also requires “that the operation of the reservoir meets water-quality  
23 requirements year-round,” but what and whose “requirements” are unclear and, here again, it  
24 does not address detrimental impacts that don’t break the law. Water quality impacts of the  
25 dam could not be fully addressed in this proceeding because EVWD elected to proceed, and  
26 the Department allowed it to proceed, without key details such as the number and location of  
outlets. (Test. of Goschie, tr. 1316:4-13.)

1 | endangered species laws, would be a be a huge step backwards in implementation of  
2 | Oregon's natural resources laws and policies.

3 |         The Commission's Integrated Water Resources Strategy recognizes:

4 |         Oregon has moved away from locating dams on significant stream and river  
5 |         channels, in large part because of effects on fish and aquatic life that must  
6 |         migrate through these streams.

6 | (Ex. EV78 at 128.) Meanwhile, the state is spending \$10 million a year to *remove*  
7 | obstructions from stream channels. (Test. of Apke, tr. at 2357:10-20.) Meanwhile also, the  
8 | state-recognized Pudding River Watershed Council, which issued a formal statement  
9 | opposing the EVWD project (Ex. R6), is working to remove obstructions from other streams  
10 | in the same watershed as Drift Creek. (Test. of Rankin, tr. 1645:24 to 1646:21.)

11 |         On the other side of the scale, benefits from the project are minimal or speculative.  
12 | Members of the District who testified all acknowledged they have water rights for most if not  
13 | all of their land of their land and have generally been able to farm all of their land. Their  
14 | reasons for wanting additional water were fears that their water rights would be reduced in  
15 | the future through further regulation, but there was little evidence that was likely, much less  
16 | inevitable. (Findings 28, 36, 44, 47, 54, 55, 60, 62, 66, 69, 70; Closing Brief, pp. 7-9.)  
17 | Moreover, the project is not financially feasible without public subsidies. Thus, even from a  
18 | strictly financial perspective (without considering all the impacts on the environment and the  
19 | community), the costs of the project exceed the benefits. (Test. of Goschie, tr. at 1313:23 to  
20 | 1314:4; Closing Response Brief, p. 16.)

23 |         Finally, the record in this case shows that EVWD focused its efforts on Drift Creek in  
24 | haste, after a prior plan fell through, and has not adequately considered less destructive,  
25 | damaging and divisive alternatives. The most obvious alternative is water from existing  
26 | Willamette Basin reservoirs, which could be piped from the Willamette River near Canby.

1 | WaterWatch’s expert (Dr. Richard Cuenca) testified that piping water from that location to  
2 | the District, given the types of land to be crossed the elevation change, did not appear to be  
3 | impractical.<sup>9</sup> The water itself would cost \$8 per acre foot instead of an estimated \$45 per acre  
4 | foot (not counting the cost of piping in either case) under the EVWD’s Drift Creek Plan.  
5 | (Test. of Cuenca, tr. at 2307:19 to 2314:10; Closing Brief, pp. 9-10.) The Department’s order  
6 | claims EVWD considered this alternative. (Finding 127.) However, as noted in  
7 | WaterWatch’s exceptions to that finding in the hearings officer’s proposed order, the cited  
8 | portions of the record refer only to vague discussion about piping from other locations.  
9 | Noteworthy is that the Bureau of Reclamation, which administers contracts for water from  
10 | the Army Corps of Engineers Willamette Basin reservoirs, has no documents at all “referring  
11 | or relating to East Valley Water District, an irrigation district in Marion County, Oregon,”  
12 | (Ex. WW 157, p. 1), which confirms that any exploration by EVWD of water from that  
13 | source was not very thorough.  
14 |  
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16 |         For the reasons stated in this exception, the Commission should revise the Final Order  
17 | to deny the application.  
18 |

19 |         **B.       The Final Order Incorrectly Determines That the Permit Will Comply**  
20 |         **with Rules for Protection of Threatened and Sensitive Fish Species.**

21 |         The Final Order concludes the permit will comply with rules for protecting fish  
22 | species listed as endangered, threatened or sensitive under state or federal law (the so-called  
23 | “Division 33 Rules”). (*E.g.*, Final Order, p. 51.) In fact, the record shows otherwise, or at  
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25 | <sup>9</sup> Further evidence of practicality is that EVWD once identified a water right from the Blue  
26 | Heron paper mill in Oregon City as a potential source of water. (Test. of Bielenberg, tr.  
1801:11 to 1802:13.)

1 | least fails to support the Department’s conclusion.<sup>10</sup> The grounds for this exception are  
2 | particularly set forth in pages 4-11 of WaterWatch’s Closing Response Brief. To summarize:

3 |         1.       The Division 33 rules presume a permit is not in the public interest if it would  
4 | be “detrimental to the protection or recovery of a threatened or endangered species and  
5 | cannot be conditioned or mitigated to avoid the detriment.” OAR 690-033-0220(1). The rules  
6 | also require “no net loss of essential habitat” of sensitive species. OAR 690-033-0330(2)(b).  
7 |

8 |         2.       The undisputed evidence is that the proposed permit would be detrimental to  
9 | the protection or recovery of at least one threatened species (Upper Willamette River  
10 | Steelhead) and result in loss of essential habitat of at least one sensitive species (Pacific  
11 | lamprey). (Test. of Murtagh, Ex. A9, pp. 6-7.) Thus, to show compliance with Division 33,  
12 | the Department and EVWD must show the proposed use is conditioned or mitigated to  
13 | “avoid the detriment” to steelhead and not result in a “net loss of essential habitat” for  
14 | lamprey.  
15 |

16 |         3.       The Department claims its Final Order imposes conditions that will satisfy  
17 | these requirements, but it does not. The Final Order does not require EVWD to do specific  
18 | things that the Department has determined will avoid the detriment to steelhead and prevent  
19 | the net loss of habitat for lamprey. Instead, the Final Order requires EVWD to work with  
20 | other agencies to develop plans in the future to address some of the impacts. (Final Order, p.  
21 | 144-45.) None of these plans could be tested at the administrative hearing because none of  
22 | them have been developed. (*See, e.g.*, Test. of Apke, tr. at 2358:4-11; test. of French, tr. at  
23 | 214:2-25; test. of Eastman, tr. at 372:25 to 373:10; test. of Stevenson, tr. at 699:15 to 700:5.)  
24 |

25 | \_\_\_\_\_  
26 | <sup>10</sup> The Department clearly has the burden of showing that the permit will comply with all  
rules of the Commission, including the Division 33 rules. (Final Order, pp. 54-55.)

1 | This fails to establish compliance with Division 33 rules for several reasons, as discussed  
2 | further below.

3 |           4.       First, there is not substantial evidence (and the burden is undisputedly on the  
4 | Department on this issue) that mitigation plans developed by EVWD with other agencies can,  
5 | or will, “avoid the detriment” to threatened steelhead and prevent a “net loss” of lamprey  
6 | habitat. No one explained how it was determined that the detriment to steelhead and loss of  
7 | habitat for lamprey could be offset by EVWD doing something else, whatever that might  
8 | ultimately be. There was some evidence that Drift Creek was not considered “Category 1”  
9 | habitat (and there is also evidence to the contrary), which is the only thing ODFW assumes  
10 | cannot be replaced with mitigation.<sup>11</sup> (Test. of Stevenson, tr. 698:1-4.) There was no  
11 | testimony about whether that policy accurately identifies habitat that can be replaced with  
12 | mitigation or on how the category determination was made for Drift Creek. Even assuming  
13 | the impacts to listed fish in Drift Creek can be offset with mitigation, there is no evidence  
14 | that the required reviews with other agencies will achieve that result; i.e., there is no evidence  
15 | that their standards and processes are effective at ensuring no detriment to threatened fish and  
16 | no net loss of habitat for sensitive fish. Indeed, the ODFW employee who will oversee the  
17 | process for approval of habitat mitigation plans has never processed one. (Test. of Stevenson,  
18 | tr. at 717:16-23.) Thus, the Department is relying on unknown future plans developed in  
19 | untested processes (or at least ones about which there was no evidence of effectiveness in  
20 | this case) to conclude that prohibited impacts on listed species will be avoided or offset. In  
21 | addition to the legal deficiencies, that is too speculative to be substantial evidence.  
22 |  
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25 | \_\_\_\_\_  
26 | <sup>11</sup> ODFW has not designated any aquatic habitat anywhere in Oregon as Category 1. (Test. of  
Stevenson, tr. at 699:6-14.)

1           5.       Reliance on future reviews of other agencies also impermissibly delegates the  
2 Department’s legal responsibility to decide whether a proposed use of water will  
3 impermissibly impact listed species. Division 33 provides that “the applicant may propose  
4 mitigation” and, if the applicant does, requires “[t]he Director” (of the Water Resources  
5 Department) to “determine if the proposed use with mitigation offsets the detriment.” OAR  
6 690-033-0220(5) (emphasis added). Here, the Department is hoping other agencies will  
7 “determine” that.<sup>12</sup> Deferring to future reviews by other agencies, without regard to the  
8 process provided in those reviews, also deprives protestants of due process and their  
9 procedural rights to have impacts on listed species addressed in the water-rights permitting  
10 process (including opportunities for notice and comment, protests and contested cases).

12           6.       The conditions do not address obvious impacts to listed species that will result  
13 from impacts to flow and water quality *below* the dam. As discussed above, the “water  
14 quality” condition does not address all water quality impacts. Also as discussed above (and  
15 below), no conditions address impacts to peak and ecological flows or movement of bedload  
16 and woody debris in the system.

18           7.       Contrary to OAR 690-033-0330 and -0340, the Final Order does not even  
19 incorporate all of the recommendations of the “interagency review team.” Specifically, it  
20 fails to include a condition to incorporate the Oregon Department of Environmental Quality  
21 (“ODEQ”) recommendation to “assess off-channel opportunities for the reservoir  
22 construction,” which also noted that “Off-Channel construction for Nov-Apr storage is a  
23 preferred alternative for protecting water quality.” (Ex. WW82, p. 2.) The Final Order also

25 \_\_\_\_\_  
26 <sup>12</sup> Division 33 also provides: “[n]othing in these rules delegates the authority of the  
Department to make final decisions on permit applications.” OAR 690-033-0340(1).

1 fails to incorporate ODFW’s advice regarding peak and ecological flows, which even the  
2 Administrative Law Judge recommended the Department do.<sup>13</sup> (Proposed Order, pp. 78-79.)  
3 Finally, the Final Order fails to include a recommended condition to address impacts to listed  
4 fish from inundation of Drift Creek and its tributaries above the dam site. (Ex. A1, p. 221.) A  
5 condition to that effect in the Proposed Final Order appears to have been lost in a rewording  
6 of the condition. (Final Order, pp. 144-45.)  
7

8 8. Even if ODFW did not recommend protection of peak and ecological flows,  
9 the Final Order should have addressed them. Peak and ecological flows are important to fish  
10 including listed fish. (*See exs.* WW29 at 2-3; EV59 at 29.) The Final Order recognizes that.  
11 (Final Order, p. 35 (Finding 207).) Thus, to protect listed fish from detriment and loss of  
12 essential habitat, the Final Order needed to make some determination of those flow needs and  
13 either protect them or explain why they do not need protection.  
14

15 9. The “interagency review team” failed to consider impacts to threatened  
16 chinook salmon even though the record shows they will be affected by the permit. (Final  
17 Order, p. 40 (Finding 251).) The Final Order suggests it was WaterWatch’s burden to  
18 demonstrate “the significance” of that omission, (Final Order, p. 68), but it was not.  
19 Prehearing rulings put that burden squarely on the Department because the Department was  
20

---

21  
22 <sup>13</sup> ODFW recommended that “[a]ny proposed use of water during October should include  
23 bypass flows to meet the instream water right and provide any peak flows necessary to  
24 maintain stream habitat and ecology.” (Ex. A1, p. 219.) As the judge noted, “[i]t is unclear  
25 whether the intent of this sentence is to require bypass flows for peak and ecological flows,  
26 and whether such flows should be required only in October or in some other months as well.”  
(Proposed Order, p. 79.) Additionally, given the purposes of peak and ecological flows, (*see*  
Final Order, p. 35 (Finding 207)), there is no reason these flows would be important in  
October but not in other months.



1 required to demonstrate that the permit would comply with all rules of the Commission.<sup>14</sup>  
2 (Final Order, pp. 54-55.)

3 For the reasons stated in this exception, the Commission should revise the Final Order  
4 to deny the application.

5  
6 **C. The Final Order Incorrectly Determines that the Permit Will Not Injure**  
7 **Existing Water Rights.**

8 EVWD’s application is not entitled to a presumption of public interest because the  
9 record shows it would “injure” at least two existing water rights. ORS 537.153(2).

10 EVWD’s planned reservoir would flood the place of appropriation and use for an  
11 existing small storage right. That water right is now owned by Bruce Jaquet, who does not  
12 want to sell his land or water right. (Findings 158, 191, 192.) The Final Order concludes this  
13 right won’t be “injured” because it will be taken by eminent domain before the reservoir is  
14 filled, with compensation provided. (Finding 212.) However, the Department provides no  
15 authority for the proposition that taking a water right by eminent domain is not “injury.” We  
16 believe it still constitutes injury under the ordinary meaning of the term.

17 The permit also would injure the instream water right in Drift Creek, which protects  
18 specified flows – in varying amounts over the course of a year – from the mouth of Drift  
19 Creek to “river mile” 11 (where Drift Creek forms from an East Fork and a West Fork). It  
20 would do this first and foremost, because the dam would be at river mile six, by inundating a  
21 portion of the protected reach. (Test. of Eastman; tr. at 366:10-13.)

22 The EVWD reservoir also would injure the same water right downstream, as well as

23 \_\_\_\_\_  
24 <sup>14</sup> The Department cannot simply assume now, after recognizing its omission, that conditions  
25 designed to protect other species will also protect spring chinook salmon. Their habitat needs  
26 may well be different. For example, juvenile chinook rearing in Drift Creek downstream  
from the dam may be more affected by loss of peak and ecological flows or by water-  
temperature impacts from the dam. Different life stages of salmonids clearly have different  
biological needs.

1 | the in-stream water rights for the Pudding and Molalla Rivers, which also are downstream,  
2 | (Exs. WW8 (Drift Creek), WW9 (Pudding River), WW5 (Molalla River), because the  
3 | proposed permit does not include measurement conditions sufficient to ensure the reservoir is  
4 | passing all “live flow” when downstream in-stream water rights are not being met, (see  
5 | exception on measurement below).

6 |         In addition, the in-stream water right for Drift Creek would be injured below the dam  
7 | because the Final Order would require measurement for protection of the right only at the  
8 | mouth of the stream, even though the right says the specified flows are to be protected  
9 | “throughout” the 11-mile reach. (Final Order, p. 146; Ex. WW8.) The problem with this  
10 | approach is that inflows from runoff and tributaries between the dam and the mouth of the  
11 | stream mean that the instream flow requirements could be met at the mouth but not upstream.  
12 | (Final Order, Finding 186.) If so, the proposed reservoir would injure the in-stream water  
13 | right by reducing flows below the instream water right requirements in the protected reaches  
14 | above the mouth because the reservoir would be required only to pass enough live flow to  
15 | meet the in-stream water right at the mouth *in combination with inflow from other sources*  
16 | *below the dam*. Thus, the instream flow requirements would not be met over some upstream  
17 | portion of the stream.

18 |         The Department claims none of these effects will “injure” the instream water right in  
19 | Drift Creek because the instream water right specifies that “flows are to be measured at the  
20 | lower end of the stream reach to protect necessary flows throughout the reach.” (Ex. WW8 ¶  
21 | 5.) The Department equates measurement at the lower end of the reach with protection only  
22 | at the lower end of the reach. However, that interpretation ignores that the flows are to be  
23 | “maintained in” and “protect[ed]” “throughout the [11-mile] reach.” (Ex. WW8 (above reach  
24 | description and ¶ 5).) A more logical interpretation, consistent with the purpose, is ensure  
25 | from measurement at the lower end that the required flows are present throughout the reach –  
26 | by requiring flows at the mouth to equal the protected flow amounts plus estimated inflows

1 | below the top of the reach, for example.

2 |         This exception is further supported by WaterWatch’s Closing Brief (pp. 3-4) and  
3 | Closing Response Brief (pp. 11-12).

4 |         For the reasons stated in this exception, the Commission should revise the Final Order  
5 | to deny the application. In the alternative, the Commission should revise the Final Order to  
6 | ensure protection of the instream water right throughout the reach below the dam by  
7 | requiring measurement immediately below the dam or measurement at the mouth that  
8 | deducts estimated inflows below the dam to determine if the reservoir is passing flows  
9 | necessary to satisfy the instream water right.

10 |                 **D.     The Final Order Incorrectly Processes EVWD’s Application Even**  
11 |                         **Though EVWD’s Plans are Too Indefinite for Public Interest Review.**

12 |         Even if, assuming for argument, the record does not show the permit *will* impair or be  
13 | detrimental to the public interest, there still is not enough information for the Department to  
14 | conclude that the permit *won’t* impair or be detrimental to the public interest<sup>15</sup> The  
15 | District claims it still has not decided such key issues as whether it will deliver the water by  
16 | pipe or stream (a critical issue for assessing fish and water quality impacts); how it plans to  
17 | mitigate for environmental impacts; how outlets in the dam will be configured (also a key  
18 | water quality issue); or how much water will be dedicated to flow augmentation. (Test. of  
19 | Crew, tr. 2193:15 to 2194:4; test. of French, tr. 214:2-25; test. of Goschie, tr. 1316:4-13.) We  
20 | also don’t know the full extent of archeological resources, (Test. of Fagan, tr. 1414:21 to  
21 | 1416:15), or ODFW’s assessment of impacts to non-listed fish and wildlife, (Ex. A at 221).

22 | \_\_\_\_\_  
23 |  
24 | <sup>15</sup> This exception assumes, as WaterWatch believes, that the Department must be able to find  
25 | affirmatively that the permit would not impair or be detrimental to the public interest. The  
26 | Department is required to do this either because the presumption of public interest was not  
established (see above) or because Protestants overcame the presumption with evidence  
related to public interest criteria under ORS 537.170(8).

1 | A recurring theme in the record is agency rank-and-file complaining about inadequate  
2 | information to evaluate the proposal. (E.g., Ex. A1 at 253 (DEQ); Ex. WW 85 (ODFW);  
3 | Test. of Ruther (former ODFW), tr. at 2497:6 to 2499:2.) In its Division 33 review, ODFW  
4 | added:

5 |           As project concepts are further refined and the applicant pursues other  
6 |           required State and Federal permits, ODFW will provide additional  
7 |           comments related to potential impacts to species and habitats not covered  
8 |           under the Division 33 review of the water right application. Such  
9 |           comments may result from potential impacts to native game fish, as well  
10 |           as game and non-game protected wildlife species, and include associated  
11 |           recommendations to avoid, minimize, or further mitigate ecosystem  
12 |           function and habitat impacts resulting from the project in its entirety.

13 | (Ex. WW87, p. 3.) All these issues are relevant to “public interest” review of a water-storage  
14 | application, not just to “other State and Federal permits” (which may or may not consider  
15 | these issues).<sup>16</sup> ORS 537.170(8)(a) (requiring consideration of “protection of commercial and  
16 | game fishing and wildlife”); OAR 690-310-0120(3)(b) (requiring consideration of “[f]ish or  
17 | wildlife”). Thus, the “project concepts” should be sufficiently “refined” for ODFW and  
18 | others to provide input on the issues.<sup>17</sup>

---

19 |  
20 | <sup>16</sup> A theme of EVWD and the Department in this process has been to defer scrutiny on  
21 | grounds some other agency in some other process will do the real work of protecting the  
22 | public interest. However, what little evidence there was on this issue referred vaguely to  
23 | other reviews that “may” be required or did not identify any standards that would provide the  
24 | broad “public interest” review that the law requires for a new storage permit or address issues  
25 | such as impacts on non-listed species. The responsibility here is the Department’s  
26 | responsibility.

<sup>17</sup> If the “project concepts” were not sufficiently “refined” for review of impacts to non-listed  
species, they were not sufficiently “refined” for a review of impacts to listed species either,  
much less the broad conclusions of the Final Order that all the impacts will be sufficiently  
mitigated.

1 In addition to making it impossible to say if the permit is in the public interest,  
2 proceeding with review of such an amorphous project deprives protestants including  
3 WaterWatch of their due process rights and rights of participation under the water laws.

4 For the reasons stated in this exception, the Commission should revise the Final Order  
5 to deny the application pending development of more specific plans by EVWD allowing a  
6 full public interest review.  
7

8 **E. The Final Order Impermissibly Delegates Public Interest Review to**  
9 **Future Review by Other Agencies.**

10 As noted with respect to Division 33 issues, the Final Order delegates the review on  
11 many public interest issues to other agencies. The issues include water quality impacts, how to  
12 address those impacts, and mitigation for loss of wetlands and riparian areas. This approach does  
13 not fulfill the Department’s responsibility to determine if a proposed permit would “impair or be  
14 detrimental to the public interest.” ORS 537.170(8) (“*the director or the commission, if*  
15 *applicable, shall make the final determination of whether the proposed use or the proposed use as*  
16 *modified in the proposed final order would impair or be detrimental to the public interest*”  
17 (emphasis added)); *see also Gould v. Deschutes County*, 216 Or. App. at 159-63 (agency can’t  
18 delegate required determination of wildlife-impact mitigation).  
19

20 For the reasons stated in this exception, the Commission should revise the Final Order  
21 to deny the application pending development of more specific plans by EVWD allowing a  
22 full public interest review.  
23

24 **F. The Measurement Condition in the Final Order Is Inadequate and Based**  
25 **on an Incorrect Interpretation of the Instream Water Right on Drift**  
26 **Creek.**

To protect downstream water rights and comply with the terms of any permit,

1 regulators and EVWD would need to determine if the reservoir is storing water at any given  
2 time (to ensure it is not storing water when downstream rights are not being met or outside its  
3 permitted storage season) and how much water it has stored over the course of a water year  
4 (to ensure it does not store more than the total authorized). The only way to do that is to  
5 measure inflow and outflow and compare the two. (Test. of French, tr. 239:3-17.) The  
6 proposed permit did not require that measurement technique. The Judge in the contested case  
7 recommended some additional measurement conditions to protect the instream water right in  
8 Drift Creek downstream from the dam. (Proposed Final Order, p. 90.) However, the Final  
9 Order rejects the Judge’s suggested measurement condition and creates a new one. (Final  
10 Order, pp. 50, 89, 129, 146.) The new condition is:

11 Before water use may begin under this permit, a stream gaging station or other  
12 preapproved measuring device must be installed to measure reservoir inflow from  
13 Drift Creek, reservoir outflow immediately below the dam, and streamflow at or  
14 near the mouth of Drift Creek.

14 (Final Order, p. 146.)

15 At least two things are wrong with this condition. First, it requires measurement of  
16 inflow only “from Drift Creek.” If the reservoir is built, it will inundate three miles of Drift  
17 Creek and receive flow from tributaries reaching the reservoir before they reach Drift Creek.  
18 (See WW Ex. 64.) If the permit is granted, the measurement conditions should be clarified to  
19 require measurement of inflow from all sources, not just Drift Creek.

20 Second, the condition should require flow measurement immediately below the dam  
21 to ensure the instream water right is not injured. The Judge recommended measurements at  
22 that point and below, recognizing that six miles of tributary inflows below the dam could  
23 meet the instream flow requirements at the mouth even if flows were insufficient  
24 immediately below the dam. The Judge also reasoned that the reference in the instream water  
25 right to measuring flows at the mouth assumed no significant impoundments or diversions  
26 above the mouth, which would change if EVWD’s reservoir is built. (Proposed Final Order,

1 pp. 64-65.) The Final Order rejects that reasoning and requires measurement only at the  
2 mouth based on an incorrect interpretation of the instream water right and instream water  
3 rights in general. (See Exception C and the following exception.) If the permit is granted, this  
4 should be changed to require measurement of compliance with the instream water right  
5 immediately below the dam.

6  
7 **G. The Final Order Incorrectly Interprets the Instream Water Right Requirements.**

8 In several places, the Final Order incorrectly interprets the instream water right for  
9 Drift Creek, and instream water rights in general, to require protection of the Drift Creek  
10 right only at the mouth. (Final Order, p. 64 n. 1.) The interpretation is based on a statement in  
11 the water right that “[t]he flows are to be measured at the lower end of the stream reach.”  
12 (Ex. WW8, ¶ 5.) However, this ignores that the water right also says the measurement is “to  
13 protect necessary flows throughout the reach,” which is from the mouth to well above the  
14 dam site, (*id.*), and also says “[t]he water right holder shall measure and report the in-stream  
15 flow along the reach of the stream or river described in the certificate as may be required by  
16 the standards for in-stream water right reporting of the Water Resources Commission,” (*id.* at  
17 ¶ 2). The right also says the specified flows are to be “maintained in” the 11-mile reach at the  
18 top of the right. These phrases show that the designated flows are meant to be protected  
19 throughout the designated reach (from the mouth to mile 11 – well above the dam site).  
20 Under the Department’s interpretation, the instream right would be satisfied even if the  
21 stream below the dam were dry, so long as the flow numbers were met at the mouth of the  
22 stream. That cannot be a reasonable interpretation of a water right meant to protect flows  
23 over an 11-mile reach of stream.

24 For the reasons stated in this exception, the Commission should revised the Final  
25 Order to deny the application based on injury to the instream water right or, in the alternative,  
26 require the instream flow amounts to be met throughout the reach below the dam (as well as

1 above the reservoir).

2

3

**H. The Final Order Incorrectly Determines that the Department Met Its Burden of Establishing a Presumption of Public Interest.**

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The Final Order incorrectly determines that the Department established a presumption, under ORS 537.153(2), that the proposed use would not impair or be detrimental to the public interest. (E.g., Final Order, p. 51 (Conclusion 1).) In fact, the presumption was not established because: (1) the application itself did not meet the criteria for the presumption; (2) the Proposed Final Order required revision and therefore did not meet those criteria; (3) the record showed the use would not comply with rules of the Commission (as discussed above with respect to Division 33 rules); and because the use will injure existing water rights (as discussed above). In support of this exception, WaterWatch relies on the points and authorities in its Closing Brief (pp. 1-4) and Closing Response Brief (11-14).

14

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**I. The Final Order Incorrectly Determines that Protestants Failed to Overcome any Presumption that Was Established.**

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The Final Order also incorrectly determines that protestants failed to overcome any presumption of public interest established by the Department. (E.g., Final Order, p. 52, Conclusion 3.) As discussed above, in WaterWatch’s closing briefs, and in WaterWatch’s exceptions to the Proposed Order, protestants overcame any presumption established by the Department because they showed the presumption was incorrectly established – for reasons including because the proposed use will injure existing water rights and does not comply with Division 33 rules – and because they showed the proposed use will impair or be detrimental to the public interest considering other factors. A new dam on a stream used by fish including threatened salmon and steelhead, and displacing existing landowners against





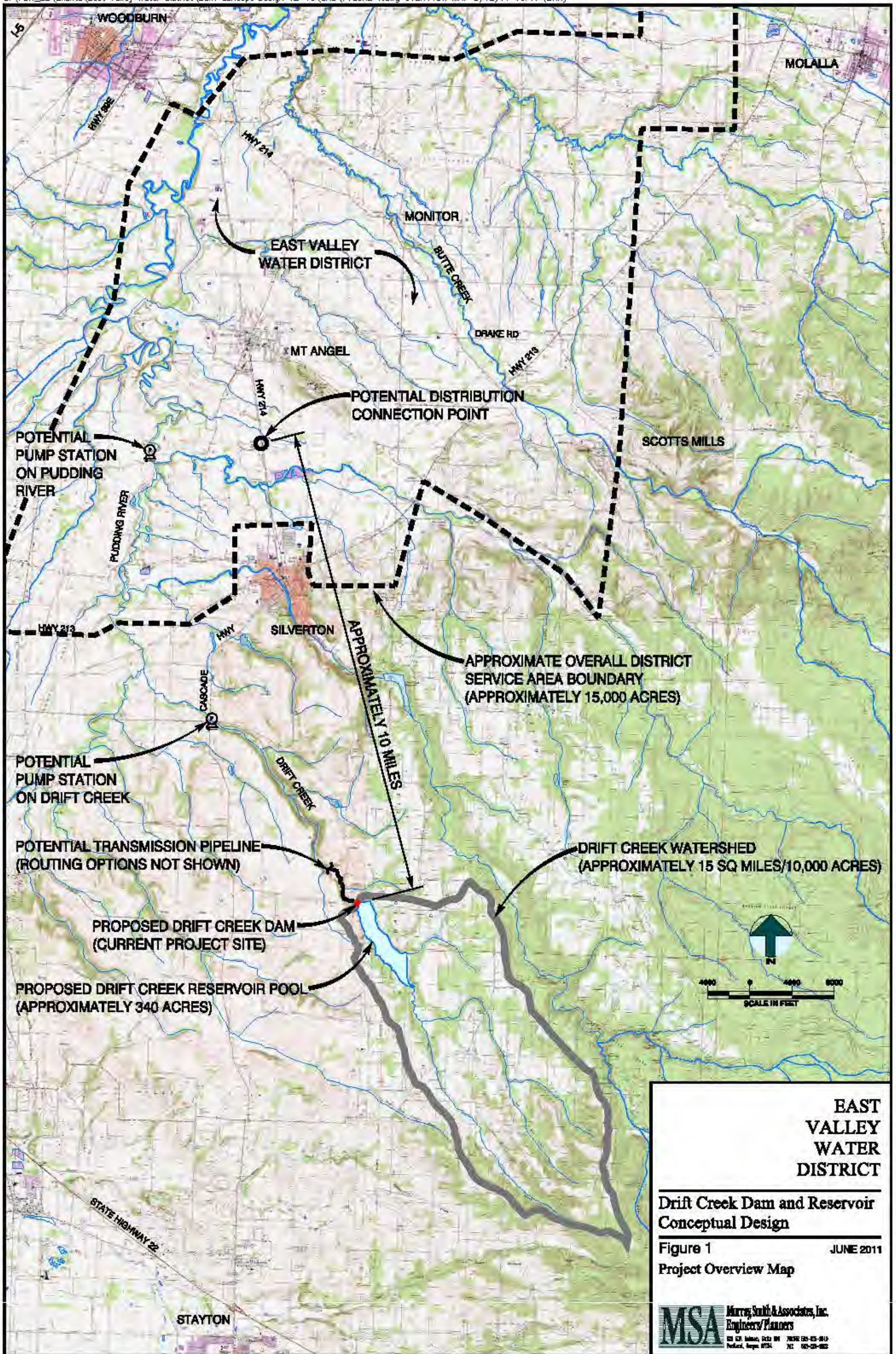
the consultants either since we submitted our Division 33 review, but did recently send a copy of our review to WaterWatch upon request. I'll let you know if I hear anything from WRD on a proposed timeline for a decision.

---

**From:** Tom Murtagh [<mailto:tom.murtagh@state.or.us>]  
**Sent:** Thursday, June 19, 2014 1:11 PM  
**To:** [ben.walczak@state.or.us](mailto:ben.walczak@state.or.us); Danette Faucera; Elizabeth J Ruther; Greg D Apke  
**Subject:** Drift Creek dam proposal

Just wondering where in the process we are for the Drift Creek reservoir proposal? I am coordinating with a consultant to conduct a fish presence survey in the Pudding this summer, including Drift Creek. I am hopeful that we can improve our perspective on this stream in terms of anadromous and fluvial trout distribution. I was down there yesterday for other "recon" reasons and from a cursory view of the stream in and near the project reach there will be a substantial area inundated with perhaps a very important stretch of stream cut off completely from anadromous and fluvial migrating fish. Based 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. Greg – can 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.

Tom Murtagh  
District Fish Biologist  
ODFW – Clackamas  
W – 971.673.6044  
C – 971.678.4871



**EAST VALLEY WATER DISTRICT**

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**Drift Creek Dam and Reservoir Conceptual Design**

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Figure 1 JUNE 2011

Project Overview Map

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**MSA** Murray Smith & Associates, Inc.  
Engineers/Planners  
225 NW Johnson, Suite 1000 Portland, Oregon 97201  
503.251.8100 FAX 503.251.8102

EVWD00103

**2009 FISH SURVEY REPORT**  
**DRIFT CREEK DAM PROJECT,**  
**MARION COUNTY, OREGON**



Prepared by:

**Ellis Ecological Services, Inc.**  
**20988 S. Springwater Rd.**  
**Estacada, Oregon 97023**

Prepared for:

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

December 2009

EVWD00773

WaterWatch Exceptions, Attachment 3



Drift Creek downstream of the reservoir footprint at RM 1.8 (Reach 0.75)



Drift Creek just below the dam site at RM 3.9 (Reach 2)

B-1

EVWD00801

WaterWatch Exceptions, Attachment 3



Drift Creek (RM 7.0) within the reservoir footprint.



East Fork Drift Creek RM 0.6 (Reach 6.5) upstream of the reservoir footprint

B-2

EVWD00802

WaterWatch Exceptions, Attachment 3



West Fork Drift Creek RM 0.7 (Reach 7.5) upstream of the reservoir footprint.

B-3

EVWD00803

WaterWatch Exceptions, Attachment 3



February 21, 2013

Tim Wallin  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301

Subject: Application for a Permit to Store Water in a Reservoir for East Valley Water District

Dear Tim:

Enclosed please find an Application for a Permit to Store Water in a Reservoir and the required attachments filed on behalf of East Valley Water District (District). Also enclosed is a check for the amount of \$13,580 for the application and recording fees. The application fee was computed as follows based on a request to store 12,000 acre-feet:

- \$ 700 - Base application fee
- \$ 500 - Fee for first 20 acre-feet at \$25/acre-foot
- \$11,980 - Fee for remaining 11,980 acre-feet at \$1/acre-foot
- \$ 400 - Permit Recording fee

The District had a pre-application conference with Oregon Water Resources Department (Department) staff on September 10, 2012. As discussed during that meeting, the District is requesting to store up to 12,000 acre-feet from Drift Creek and unnamed tributaries to Drift Creek in a reservoir for irrigation, supplemental irrigation and flow augmentation as may be required for the approval of this irrigation reservoir by the Department. The District intends to store water from October 1 to April 30 of each year. It is anticipated that the reservoir will inundate approximately 384 acres when filled.

East Valley Water District is a district formed pursuant to ORS Chapter 545 and, accordingly, is not required to submit engineering plans and specifications prior to permit issuance. As work on this reservoir project proceeds, the District will continue to work cooperatively with the Department to provide necessary information as it becomes available.

In addition, since the District is a "public corporation," the District requests that the Department issue a permit prior to the District obtaining easements or written authorization permitting access to lands affected by the reservoir project, as provided under ORS 537.211(6). The District will submit the necessary authorizations to the Department prior to filling the reservoir. The District

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1600 Western Blvd., Suite 240 Corvallis, OR 97333 P: 541.753.0745 F: 541.754.4211 Info@gsiwatersolutions.com www.gsiwatersolutions.com



will also submit the legal description for the property involved with the application at that time, as we have previously discussed with Department staff.

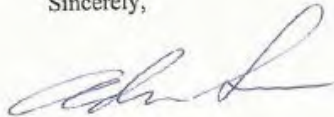
Further, the District intends to work with staff of the Oregon Department of Fish and Wildlife (ODFW) to obtain a fish passage waiver. The District will provide the Department with information regarding this effort as it proceeds.

Finally, the District is requesting ten years from permit issuance to begin and complete construction and to perfect the water right, as is allowed for districts under ORS 537.248.

GSI Water Solutions, Inc. is a representative of the District for the purposes of this water right application, and communications regarding this application should be sent to the District and to me.

Please do not hesitate to call if you have any questions or need additional information. My telephone number is 541-753-0745.

Sincerely,



Adam Sussman  
Principal Water Resources Consultant

Enclosures

Cc: Dave Bielenberg, East Valley Water District

**From:** Justin C Zweifel  
**To:** [Todd Alsbury](#); [Tom Murtagh](#)  
**Subject:** "Fox Creek" - sub trib of Pudding  
**Date:** Friday, November 30, 2012 1:16:24 PM

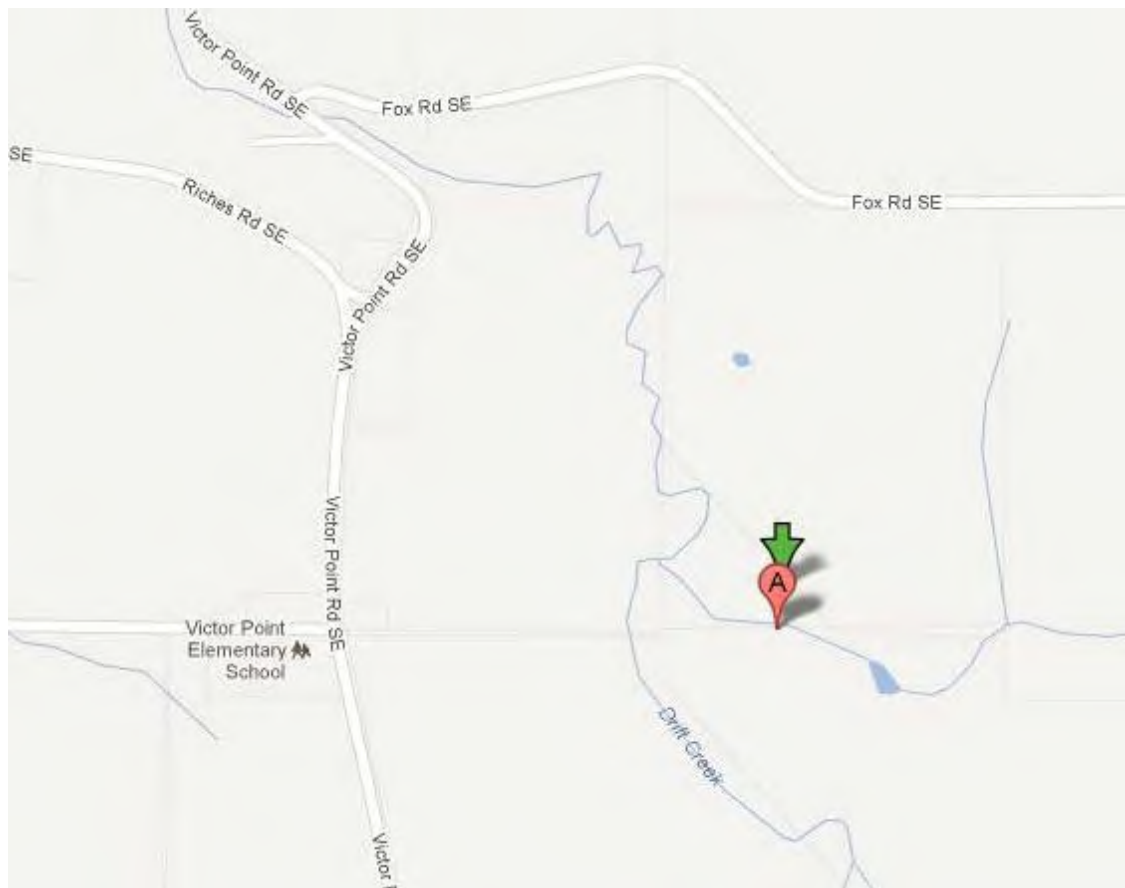
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Today I visited "Fox Creek" (an otherwise unnamed tributary of Drift Creek) in response to a call from Alyssa Mucken from OWRD. This tributary runs through a farm field (Fox property) and has an average ACW of 10-12 feet. This trib has lots of resting pools and riffles but gravel is poor-fair. It is a very sinuous creek and has a low gradient for the 1<sup>st</sup> 250 meters, then becomes steeper and narrower. 100 meters from its confluence with Drift Creek is a 42" culvert with an 18" drop. Just below this culvert, the ACW is 26' and sometimes the creek floods over the top of the culvert (happened last week).

Adult coho have been seen in this creek this year and 2010 both below the culvert and ~125m u/s of the culvert. Today we saw a spawned out wild coho in Fox Cr. moving up from the confluence toward the culvert. I did not see any redds.

The landowner, Bruce Jaquet, informed me that some Oregon State students have done some BP EFishing surveys in the past and had sampled some trout, possibly some juvenile coho, but he's not sure. I could go out again in the spring and see if there is any coho production in Fox Cr.

Anyway, just FYI. Our FANS Salmon and Steelhead layer shows unknown use in this tributary. But coho are there ☺



*Justin C. Zweifel*



Please consider the environment **before** printing this email.

**Justin Zweifel**  
*Natural Resources Specialist*  
[justin.c.zweifel@state.or.us](mailto:justin.c.zweifel@state.or.us)

cell : 971.219.1865  
office : 971.673.6043

fax : 971.673.6071

[Oregon Department of Fish & Wildlife](#)  
North Willamette Watershed District  
17330 SE Evelyn Street  
Clackamas, OR 97015

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

IN THE MATTER OF EAST VALLEY  
WATER DISTRICT, APPLICATION  
R-87871

OAH Case No. 2017-OWRD-00002  
Agency Case No. R-87871

OREGON WATER RESOURCES  
DEPARTMENT'S WRITTEN DIRECT  
TESTIMONY OF TOM MURTAGH

*Applicant,*

WATERWATCH OF OREGON

*Protestant,*

RUE, ET AL.

*Protestant.*

I, Tom Murtagh, hereby declare as follows:

I have personal knowledge of the facts set forth below and I am competent to testify to them if called as a witness.

**Background/Experience**

I have worked for the Oregon Department of Fish and Wildlife (ODFW) for 38 years. For the past 12 years, I have worked as a supervisory District Fish Biologist in the North Willamette Watershed District, which includes the Molalla/Pudding river complex, Tualatin, Yamhill, Scappoose, Clatskanie, and lower Willamette rivers. My primary duties include:

1. Managing fish populations and population health in multiple tributary streams on the west side of the North Willamette Watershed District;
2. Providing technical expertise, through multiple permitting processes, on how to minimize impacts to native fish from a variety of project types (e.g., roadway and stream crossings, urban and rural development, harbor improvements, Division 33 water right reviews, alternate reservoirs, on-site pre-evaluation of water right development proposals, municipal extensions, forest practices and timber harvest reviews, gravel mining operations in floodplains, removal and fill operations in regulated aquatic work areas, land use associated with agriculture);
3. Involvement in large regional projects like Columbia River dredging, water development projects (e.g., Henry Hagg Lake Expansion), Salmon Recovery Planning (Willamette and

- 1 Lower Columbia), reviewing and providing input on mitigation opportunities to address
- 2 damages from the Portland Harbor Superfund site;
- 3 4. Working with a variety of work groups and partnerships to improve stream and
- 4 watershed habitat function for the benefit of fish and wildlife (including four major
- 5 watershed councils and multiple "Friends of" groups, Lower Columbia Estuarine Partners
- 6 and the Columbia River Estuary Study Task Force, among others);
- 7 5. Helping develop policies and rules used in fish and fish habitat management planning;
- 8 and
- 9 6. Developing angling opportunities to meet angler interest across the district, consistent
- 10 with federal and state policy to protect weak stocks of fish.

11 Before my current position, I worked in the ODFW Fish Research group out of Corvallis  
12 for 11 years as a fish research field biologist on a team that mapped hundreds of miles of coastal  
13 stream habitat to compare habitat quality, quantity, and function with native fish population  
14 structure, abundance, and survival from fry to adult returns. I have extensive experience in  
15 understanding migratory salmonid life history, biology, and ecology in Northwest streams and  
16 rivers, and salmonid response to a variety of habitats, from degraded to highly functional.

17  
18  
19 I spent three and a half years writing Fish Management Plans, including for the Sandy  
20 and Clackamas rivers, which involved evaluating large quantities of data to support sustainable  
21 fish management objectives for multiple stock in-river fisheries.

22  
23 For four years, I was the Assistant District Fish and Wildlife Biologist in the Salem Field  
24 Office, covering fish and wildlife management activities in the Molalla/Pudding river complex,  
25 North and South Santiam, Calapooia, and Yamhill subbasins. Relevant experience in that  
26 position included monitoring fish populations and passage at fish ladders and dams in the  
27 Santiam and Calapooia rivers, and snorkeling many miles of stream to assess fish abundance and  
28 presence in the North and South Santiam and tributaries, Calapooia River, Molalla mainstem,  
29 and Pudding River tributary streams including Butte Creek, Abiqua Creek, and Silver Creek.

30  
31 I spent four years as an ODFW Liaison to the Oregon Department of Transportation to  
32 provide technical expertise on ways to minimize impacts to fish, wildlife, and habitat from large  
33 highway projects across Oregon under various state, county, and city jurisdictions.

34  
35 I also have experience understanding transitional land use effects in the context of stream  
36 function alterations and changes to habitat that affect migratory and resident fish use over time.  
37 This experience is necessary in weighing habitat restoration potential in specific watersheds as it  
38 relates to funding and how fish respond positively or negatively to the restoration.

39  
40 I have a BS in Fisheries Science from Oregon State University (1982), and have taken  
41 additional course work in fish passage, stream restoration, wetland delineation, and fish  
42 population assessments, among other topics.

43  
44 **Division 33 Review for Application R-87871**

45  
46 I am one of the ODFW employees who contributed to ODFW's "Division 33 review" of  
Application R-87871. I have contributed to approximately 50 Division 33 reviews during my  
Page 2 - OREGON WATER RESOURCES DEPARTMENT'S WRITTEN DIRECT TESTIMONY OF  
TOM MURTAGH  
RM1:jrs/#8958098

1 career. In conducting the review for Application R-87871, I worked closely with several  
2 colleagues, including Danette Faucera and Rick Kepler. As the District Fish Biologist  
3 responsible for the Pudding-Mollala at the time, I signed the Division 33 review sheet.  
4

5 I based my input on my decades of experience as a fish biologist in Oregon, including on-  
6 the-ground surveys of habitats similar to Drift Creek, including four summers spent conducting  
7 juvenile salmon snorkel surveys and winter steelhead spawning surveys in neighboring Butte,  
8 Abiqua, and Silver Creeks in the late 1990s. These subbasins are tributaries to the Pudding  
9 River, and have similarities to Drift Creek in their geomorphic, hydraulic, and habitat conditions.  
10 All four subwatersheds head from similar elevations in the old Cascades foothills underlain by  
11 ancient basalt flows and marine sediment layers, and lower down by Missoula flood and  
12 Willamette River flooding events. My input was also based on my understanding of ODFW's  
13 2011 Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and  
14 Steelhead.  
15

16 My input into ODFW's Division 33 review for this project has been confirmed by on-site  
17 evaluations in June 2014 from locations along Drift Creek that are accessible via public roads,  
18 and from Google Earth maps. Additionally, I worked closely with the Pudding River Watershed  
19 Council and Bio-Surveys LLC, which conducted a Rapid Bio-Assessment in summer 2014 (2014  
20 RBA). An RBA is a field method where significant stream miles can be foot- and snorkel-  
21 surveyed in a short period to evaluate fish distribution and summer rearing preferences. I have  
22 reviewed the resulting report, which is the most up-to-date and comprehensive review of habitat  
23 condition and fish distribution in primary Pudding River tributary streams (Butte, Abiqua, Silver,  
24 and Drift creeks).  
25

26 In its Division 33 review of Application R-87871, ODFW concluded that the proposed  
27 use will occur in an area that will affect the essential habitat of Pacific lamprey, which is listed as  
28 "sensitive" under Oregon law. ODFW also concluded that the proposed use would be  
29 detrimental to the protection or recovery of winter steelhead, which is listed as "threatened"  
30 under the federal Endangered Species Act (ESA). However, ODFW also concluded that, under  
31 our policy, certain conditions could mitigate the impact to these two species. My colleague  
32 Danette Faucera discusses these conditions in her written direct testimony. My testimony  
33 focuses on the habitat needs and limiting factors of Pacific lamprey and winter steelhead in  
34 relation to Drift Creek.  
35

### 36 **Pacific Lamprey: Habitat Needs and Limiting Factors** 37

38 Pacific lamprey tend to spawn and rear in lower-gradient (less steep) reaches than winter  
39 steelhead or resident cutthroat trout. These lower-gradient reaches are present throughout Drift  
40 Creek (2014 RBA), mostly in the lower watershed but in upper reaches to some extent, as well.  
41 Like other fish, Pacific lamprey spawn in gravel in riffles, glides (slow-moving, shallow type  
42 water habitat) and at the tailouts of pools (the shallow, flat section at the end of a pool before the  
43 water spills over into a riffle). They need up to seven years to rear as juvenile "ammocoetes" in  
44 soft sediments in low-gradient reaches of the watershed. This form of rearing habitat is also  
45 available and prevalent in lower Drift Creek and upstream of the proposed dam site (2014 RBA).  
46

1 Pacific lamprey habitat has been significantly reduced over the past 70 or more years due  
2 to dam construction in multiple upper Willamette and Pudding river tributary systems (Tualatin,  
3 North and South Santiam, Mckenzie, Middle Willamette, Coast Fork Willamette, and Long Tom  
4 rivers, as well as Silver and Abiqua creeks in the Pudding). The proposed dam would, in effect,  
5 cut off about approximately 7-10 miles of lamprey spawning and rearing habitat in a higher-  
6 gradient reach where water quality is better, particularly in summer, than in lower valley floor  
7 reaches of the Pudding system.

#### 8 9 **Pacific Lamprey Presence in Drift Creek**

10  
11 Specific surveys or studies on Pacific lamprey in Drift Creek are not available. However,  
12 based on my site visits to Drift Creek in 2014 and 2015, the 2014 RBA, and Drift Creek Habitat  
13 Surveys from 2009 and 2010 (Ellis Ecological Services, Inc.), there is some suitable spawning  
14 and rearing habitat for Pacific lamprey present in Drift Creek. ODFW has also documented  
15 Pacific lamprey presence in Butte Creek during winter steelhead spawning surveys (Pudding  
16 River Watershed Assessment 2006). In addition, Pacific lamprey have been documented in  
17 Rock Creek and Mill Creek (Pudding River Watershed Assessment 2006), tributary basins  
18 located in the lower Pudding subbasin. Based on my understanding of Pacific lamprey habitat  
19 needs, Drift Creek currently has essential, but limited, spawning and rearing habitat  
20 intermittently dispersed across roughly 7-10 miles of accessible habitat currently available  
21 upstream of the proposed dam location. Habitat restoration in the form of large wood placement  
22 and riparian planting could restore this watershed and greatly improve spawning and rearing  
23 opportunity for Pacific lamprey, while also improving water quality and quantity in the stream.  
24

#### 25 **Winter Steelhead: Habitat Needs and Limiting Factors**

26  
27 Spawning: Winter steelhead prefer higher-gradient systems, from 1% to 5%, to spawn  
28 and rear. Drift Creek in the area near and upstream of the proposed dam site, though degraded  
29 from various land use activities, continues to have habitat features needed by winter steelhead for  
30 successful spawning; gravel, gradient, and flow regimes adequate for this purpose. There are  
31 salmonid spawning areas in intermittent reaches of the lower mainstem of Drift Creek, in the  
32 East Fork, and in lower Fox Creek, a prominent tributary stream to Drift Creek in the proposed  
33 project's inundation zone (2014 RBA). The 2014 RBA also documented anadromous coho  
34 salmon juveniles dispersed throughout the Drift Creek mainstem and its tributaries. Anadromous  
35 coho salmon habitat can overlap with winter steelhead habitat and may be used for winter  
36 steelhead evaluations where steelhead observations are limited due to low numbers of fish and a  
37 lack of long-term or comprehensive surveys, as is the case for Drift Creek.  
38

39 Incubation: Land use has affected stream morphology and function in the proposed  
40 project area (2014 RBA), which has in turn affected spawning gravel deposits and integrity.  
41 Gravel is present at intermittent locations throughout the system upstream of the proposed dam  
42 site; however, soft sediments have infiltrated much of the spawning gravel available (2014  
43 RBA), a factor that can reduce egg incubation survival.  
44

45 Rearing: Once hatched, steelhead need to rear in freshwater for 1 to 3 years before  
46 outmigrating to the sea. This puts them more at risk from changing habitat conditions that

1 manifest seasonally over this period. Healthy functioning stream habitat is essential for  
2 maximizing survival of young steelhead. Riffles and pools are present throughout the reach of  
3 Drift Creek above the proposed dam site, but habitat function has been greatly affected by land  
4 use activities (2014 RBA, Pudding River Watershed Assessment 2006). Many reaches of the  
5 basin upstream of the proposed dam site are devoid of large wood. This reduces pool formation  
6 and depth, and allows substrate to move downstream, which impacts both spawning opportunity  
7 and juvenile salmonid rearing potential. It is important to note, however, that standard stream  
8 restoration techniques could be employed to significantly improve how this reach could function  
9 for salmonids and Pacific lamprey.

10  
11 Passage: All migratory fish, including ESA-listed winter steelhead and state sensitive  
12 Pacific lamprey, need unobstructed channels to move up and downstream in a watershed.  
13 Currently, Drift Creek flows under a bridge where Victor Point Road crosses, just downstream  
14 from the proposed dam site, and is not a hindrance to fish passage. There were, however, three  
15 culverts evaluated in the 2014 RBA, one in lower Fox Creek and two in upper Drift Creek, that  
16 were considered to be at least partial barriers to upstream migration. These obstructions can  
17 affect upstream migration of juvenile salmonids during certain periods, particularly summer,  
18 when juveniles need to leave lower elevation and warmer habitats to seek cool water refugia in  
19 higher-gradient hilly sections of the watershed. There are also natural rock intrusions that form  
20 small falls or hydraulic breaks in the stream. One large waterfall is located on the East Fork at  
21 RM 1.4, and is impassable by fish.

22 Beaver activity is present in the reach above the proposed dam site, but believed to be  
23 intermittent. Therefore, long-established beaver dams do not seem to be a passage issue in Drift  
24 Creek. Beaver dams in fact provide a great benefit to anadromous and resident fish, and beaver  
25 use of mountain streams is encouraged in many watersheds throughout Oregon.

26 The dam, if built without fish passage, would obstruct fish migration into approximately  
27 7-10 miles of habitat. Mitigation in the form of a fish passage facility consistent with state fish  
28 passage statutes, or mitigation that offsets this habitat loss is still forthcoming.

29  
30 Loss of spawning and rearing habitat for ESA-listed winter steelhead is a primary  
31 limiting factor for protection and recovery of the species, as discussed in the 2011 Upper  
32 Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead.

33

34

#### 35 **Winter Steelhead Presence in Drift Creek**

36

37 Surveys and studies between 2010 and 2014 have not documented any winter steelhead,  
38 adult or juvenile, in the reach of Drift Creek upstream of the proposed dam site. However, this  
39 does not mean that steelhead do not use this reach of Drift Creek—only that researchers have not  
40 observed them during recent sampling efforts.

41

42 Lack of documented presence of a specific species is not a reason for declaring non-use  
43 in a particular tributary stream, particularly one the size of Drift Creek. The Willamette winter  
44 steelhead population was listed as threatened under the ESA in 1997, and has been in steady  
45 decline since. The recent 10-year average count for adult returns above Willamette Falls (river  
46 mile 27) is just over 5,000, a very small number when considering that there are thousands of  
miles of rearing and spawning areas to disperse into among multiple watersheds on both sides of



1 the Willamette River upstream of the falls. Drift Creek is more than 40 stream miles upstream of  
2 Willamette Falls and more desirable spawning and rearing habitat exists between these locations,  
3 potentially attracting fish away from Drift Creek. If returns of Willamette winter steelhead were  
4 more robust, as is the goal of recovery efforts, it might force them to compete for desirable  
5 habitat or seek out additional habitat, like that provided in Drift Creek. The Pudding River  
6 complex is relatively small relative to other larger winter steelhead streams like the Molalla,  
7 Santiam subbasin and Calapooia rivers, creating a probability factor of attracting high numbers  
8 of steelhead into the Pudding watershed, including Drift Creek. Drift Creek is about one-half the  
9 size of each of the other Pudding basin tributary streams (Butte, Abiqua, and Silver), further  
10 diminishing the likelihood of seeing steelhead in Drift Creek, particularly during low run years.  
11 Drift Creek is also located in the uppermost reach of the Pudding subbasin, meaning that it is  
12 possible that those fish that enter the Pudding subbasin opt to turn into the lower basin tributaries  
13 instead of migrating upstream to Drift Creek.

14  
15 Moreover, whether or not winter steelhead use a particular reach of a watershed in any  
16 given year is affected by many factors. Streamflow varies significantly between years and also  
17 during the time of peak spawning in late winter and spring. Instream blockages like beaver  
18 dams, log jams, or perched culverts can periodically block fish movement at key times of the  
19 year. Standard fish sampling protocols like electrofishing for juveniles in summer, conducting  
20 spawning ground surveys in winter/spring, or doing snorkel surveys in summer can sometimes  
21 miss fish, particularly in low adult return years, as has been the case recently.

22  
23 ODFW may use the presence of other species of migratory fish as a proxy for a target  
24 species of concern, when the two species share similar life history traits (migration, stream  
25 habitat needs, extended rearing, etc.) or where their rearing habitat is known to overlap. Coho  
26 salmon and Pacific lamprey are both anadromous and known to share spawning and rearing  
27 habitat with winter steelhead. Both coho salmon and Pacific lamprey have been documented in  
28 this reach of Drift Creek. Due to the documented presence of coho and Pacific lamprey, it is  
29 likely that this reach of Drift Creek and tributaries is also used by other native migratory  
30 salmonids like winter steelhead, at least on an intermittent or between-year basis. Under future  
31 recovery scenarios, the likelihood of winter steelhead utilizing Drift Creek is greater.

### 32 33 **Conclusions**

34  
35 ODFW determined that the reach of Drift Creek that would be directly inundated or  
36 otherwise impacted by the proposed project constitutes essential habitat for Pacific lamprey.  
37 "Essential habitat" is "any habitat condition or set of habitat conditions which, if diminished in  
38 quality or quantity, would result in depletion of a fish or wildlife species." OAR 635-415-  
39 0005(3). The reach that would be impacted by the proposed project represents approximately 7-  
40 10 linear miles of spawning and rearing habitat for Pacific lamprey. If this habitat is diminished  
41 in quality or quantity, it would reduce Pacific lamprey's ability to spawn and rear, resulting in  
42 depletion of the species. ODFW therefore proposed conditions that would ensure that there is no  
43 net loss of essential habitat of Pacific lamprey. These conditions are discussed in detail in the  
44 written direct testimony of my colleague Danette Faucera.

45  
46

1 ODFW also determined that the proposed project would be detrimental to the protection  
2 or recovery of ESA-listed winter steelhead because loss of stream spawning and rearing habitat  
3 is a key limiting factor and threat to recovering this species, as discussed in the 2011 Upper  
4 Willamette River Conservation and Recovery Plan. Though the habitat in the approximately 7-  
5 10 mile reach of accessible habitat that would be affected by the proposed project is currently  
6 degraded, it historically provided higher-quality habitat features based on reference streams in  
7 neighboring basins, and instream habitat quality and function could be improved with  
8 conventional stream restoration techniques. ODFW proposed conditions that would mitigate for  
9 the detriment to the protection and recovery of winter steelhead. Again, those conditions are  
10 discussed in detail in the written direct testimony of my colleague Danette Faucera.

11  
12 **I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE**  
13 **BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE**  
14 **FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR**  
15 **PERJURY.**

16  
17 Dated this 22 day of May, 2018.

18  
19  
20  
21  
22   
23 \_\_\_\_\_  
24 TOM MURTAGH, District Fish Biologist  
25 OREGON DEPARTMENT OF FISH & WILDLIFE  
26  
27  
28  
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46

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

IN THE MATTER OF WATER RIGHT )  
APPLICATION OF ) OAH Case No. 2017-OWRD-00002  
) Agency Case R-87871  
)  
)  
EAST VALLEY WATER DISTRICT ) **DECLARATION OF ALYSSA**  
) **MUCKEN**  
)

I, ALYSSA MUCKEN, declare as follows:

1. I have personal knowledge of the facts set forth below and I am competent to testify to them if called as a witness.

2. I live at 15673 Fox Road Southeast, Silverton, with my husband Roger and our three children, who are 14, 13, and 11 years old. We rent our house from Bruce Jaquet. I have lived in this house since January of 2003, and Roger has lived here since he was 19 years old. Roger is related to Bruce by marriage. He hunted on this property growing up, starting when he was about 10 years old, and he always wanted to live here. When Bruce's previous tenant moved out, Roger asked Bruce if he could move in. This has been our home since graduating from high school and college, and throughout our entire marriage, and we have raised our three children here.

3. Our house would be completely flooded by the Drift Creek Dam Project. The dam would destroy the only house we have ever lived in as a family and the only home my children have ever known.

///

///

**PAGE 1 – DECLARATION OF ALYSSA MUCKEN**

WaterWatch Exceptions, Attachment 7

**Exhibit R43**  
**Page 1 of 6**  
**Attachment D**  
Page 43 of 300

4. We are very involved in the Victor Point community. All three of our kids go to Victor Point School. They are all involved in a variety of sports, including football, basketball, volleyball, track and field, and baseball. Our children have also been involved in school plays and have served as student council representatives.

5. My husband's income is primarily from work projects with neighbors in the Victor Point community. Roger is also the primary caretaker of our place. We raise a few cattle and goats on our property. Roger has hauled hay for Bob Qualey for 14 years, he took care of Norb and Gail Dominick's cattle and farm for nearly 5 years, and he has done landscape maintenance and special projects for several families throughout the years, including the Duersts, the Fennimores, the Roggs, the DeSantis Family, the Schulzes, the Smiths, the Taylors, and the Jaquets. Over the past 15 years, we have established strong relationships in this community, which have in turn provided us with a source of income and livelihood. Losing our home and our relationships here would certainly negatively affect our financial situation, our children, and our sense of belonging. We have worked hard to become a part of this community, and the proposed dam would force us to leave our home and our community.

6. I work at the Oregon Water Resources Department in Salem, but I do not work in the water rights section and I have not had anything to do with the review of the East Valley Water District permit application. My position is in the Director's Office and I am responsible for planning and policy work, including the Integrated Water Resources Strategy and our Environmental Justice, Drought, and Sustainability programs. This statement is my own personal testimony and is not on behalf of the Department. Because I work for the Department, I have refrained from publicly opposing or speaking out against the Drift Creek Project, but I am

totally opposed to this proposed dam that would displace me and my family and also hurt the close Victor Point community.

7. We see elk annually on our place; they pass through regularly in groups of 30 to 200. The elk annually calf on the Fox Property. We have seen up to 200 elk together. We have also seen black bears, cougars, bobcats, and deer. Today, there is evidence of beaver, with a beaver dam in place on this property for several years.

8. Our family, including our extended family, often walks along Drift Creek and nearby fire trails. We have found Native American artifacts, such as arrowheads, in several locations near the Creek. We have also found clay and porcelain pieces, wagon wheels, and other early settlement artifacts. We see bald eagles every year, and often see salmon and lamprey in Drift Creek and its tributaries. We also see waterfowl, such as divers (e.g., mergansers, wood ducks) and several years ago, had Blanchet High School students and staff construct and install wood duck boxes along Drift Creek.

9. Exhibit R44 contains several photographs taken on our property—two photos of deer, one of elk taken from our house, one picture of two of our kids helping Roger with work at the Dominick place, and three pictures of the most recent artifact we found on our property, in September of 2017, near Fox Creek. We have also taken video footage of salmon in Drift Creek, which I will provide to Bruce's attorney, Ms. Neuman.

///

///

///

10. Schacht's Place, as it's known around this community, is a very special place to our family and the generations of families that have called the Victor Point community their home.

**I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.**

DATED this 17th day of November, 2017

---

ALYSSA MUCKEN

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

DATED this 17 day of November, 2017

  
ALYSSA MUCKEN

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of DECLARATION OF ALYSSA MUCKEN on the following parties by email on November \_\_\_\_, 2017.

For East Valley Water District

For WaterWatch of Oregon

For the Oregon Water Resources  
Department

Renee Moulun

Rachel Weishaar

Oregon Department of Justice

1162 Court Street NE

Salem, OR 97301-4096

PAGI Email:

Email:

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of **DECLARATION OF ALYSSA**

**MUCKEN** on the following parties by email on November 17, 2017.

For East Valley Water District

Kirk Maag  
Stoel Rives LLP  
760 SW Ninth Avenue, Suite 3000  
Portland, OR 97205  
[kirk.maag@stoel.com](mailto:kirk.maag@stoel.com)  
copy to [crystal.chase@stoel.com](mailto:crystal.chase@stoel.com)

For WaterWatch of Oregon

Brian Posewitz  
213 SW Ash St, Ste 208  
Portland, OR 97204  
Email: [brian@waterwatch.org](mailto:brian@waterwatch.org)

For the Oregon Water Resources Department

Renee Moulun  
Rachel Weishaar  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Email: [renee.m.moulun@state.or.us](mailto:renee.m.moulun@state.or.us)  
Email: [rachel.weisshaar@state.or.us](mailto:rachel.weisshaar@state.or.us)

Patricia McCarty  
Oregon Water Resources Department  
725 Summer St NE, Ste A  
Salem, OR 97301-4096  
Email: [patricia.e.mccarty@state.or.us](mailto:patricia.e.mccarty@state.or.us)

DATED: November 17, 2017

By /s/ Janet E. Neuman  
JANET E. NEUMAN, OSB No. 813258  
Tonkon Torp LLP  
888 SW Fifth Ave., Suite 1600  
Portland, OR 97204  
Telephone: (503) 802-5722  
Email: [janet.neuman@tonkon.com](mailto:janet.neuman@tonkon.com)

Attorneys for Protestants Rue et al

037082/00001/8507194v1



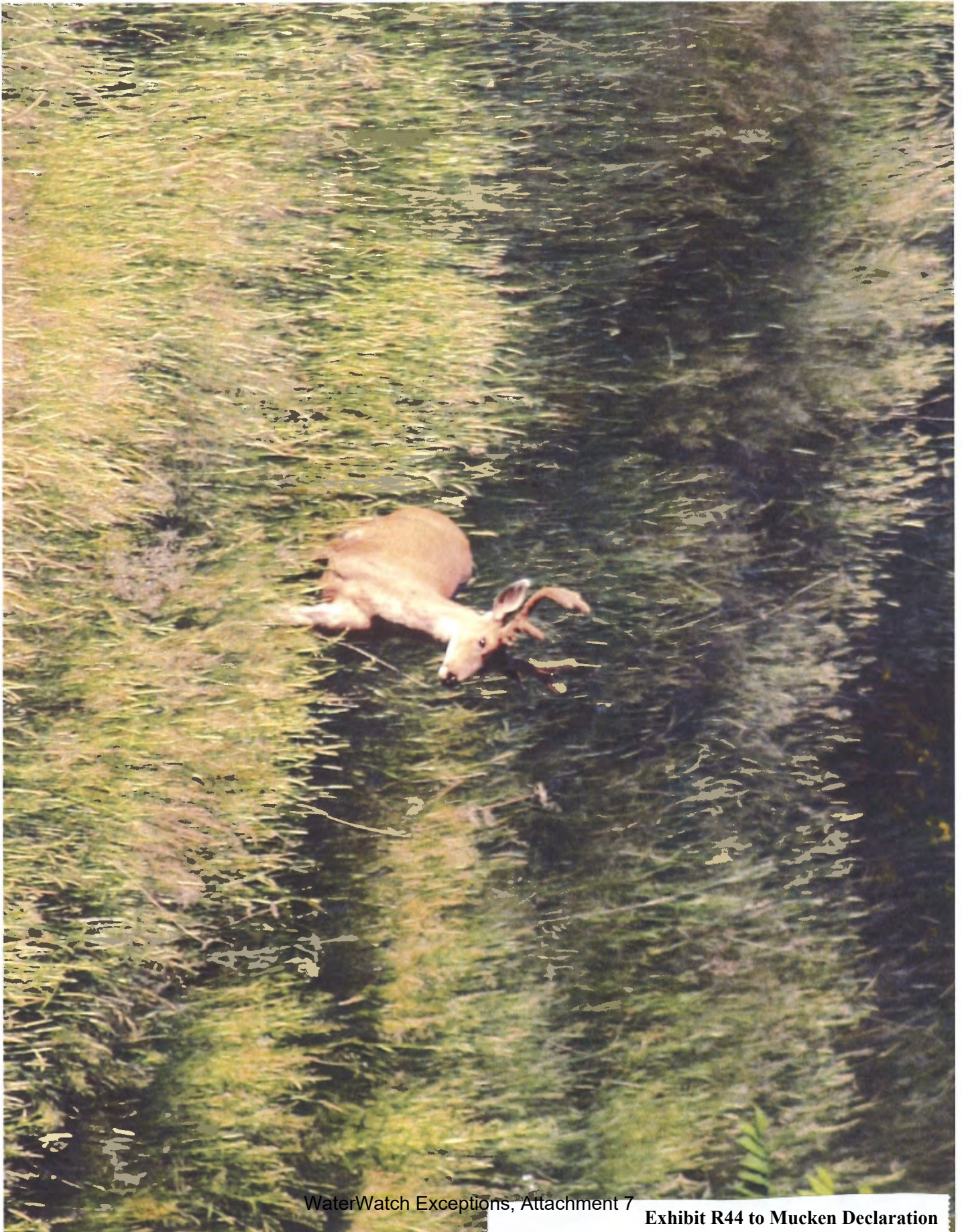


WaterWatch Exceptions, Attachment 7

Exhibit R44 to Mucken Declaration

Page 1 of 7  
Attachment D

Page 49 of 300





WaterWatch Exceptions, Attachment 7

**Exhibit R44 to Mucken Declaration**

**Page 3 of 7**  
**Attachment D**

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WaterWatch Exceptions, Attachment 7

**Exhibit R44 to Mucken Declaration**

**Page 6 of 7**  
**Attachment D**

Page 54 of 300



## Debbi Farrell

---

**From:** Elizabeth J Ruther <elizabeth.j.ruther@state.or.us>  
**Sent:** Friday, June 20, 2014 4:13 PM  
**To:** ben.walczak@state.or.us; Danette Faucera; Elizabeth J Ruther; Greg D Apke; Tom Murtagh  
**Cc:** Alan Ritchey; Rick Kepler  
**Subject:** RE: Drift Creek dam proposal

We can try, but so far only not even old growth forest is allowed a Cat 1. Only spotted owl nest circles.

Elizabeth J. Ruther  
Habitat Conservation Biologist  
North Willamette Watershed District  
18330 NW Sauvie Island Rd.  
Portland, OR 97231  
Office: 503.621.3488 x228  
Fax: 503.621.3025

---

**From:** Tom Murtagh [mailto:tom.murtagh@state.or.us]  
**Sent:** Friday, June 20, 2014 4:10 PM  
**To:** ben.walczak@state.or.us; Danette Faucera; Elizabeth J Ruther; Greg D Apke; Tom Murtagh  
**Cc:** Alan Ritchey; Rick Kepler  
**Subject:** RE: Drift Creek dam proposal

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. Keep you posted.

---

**From:** Greg D Apke [mailto:greg.d.apke@state.or.us]  
**Sent:** Friday, June 20, 2014 4:02 PM  
**To:** ben.walczak@state.or.us; Danette Faucera; Elizabeth J Ruther; Greg D Apke; Tom Murtagh  
**Cc:** Alan Ritchey; Rick Kepler  
**Subject:** RE: Drift Creek dam proposal

Unfortunately you are correct.....

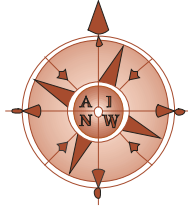
**Greg Apke**  
ODFW, Statewide Fish Passage Program Leader  
503-947-6228 (wk)  
503-931-4361 (cell)

---

**From:** Elizabeth J Ruther [mailto:elizabeth.j.ruther@state.or.us]  
**Sent:** Friday, June 20, 2014 3:31 PM  
**To:** ben.walczak@state.or.us; Danette Faucera; Elizabeth J Ruther; Greg D Apke; Tom Murtagh  
**Cc:** Alan Ritchey; Rick Kepler  
**Subject:** RE: Drift Creek dam proposal

Which is kinda funny because I'm not aware of any Category 1 habitat that has been 'approved' that addresses aquatic habitat where the fish of interest would be present.....





# Archaeological Investigations Northwest, Inc.

3510 N.E. 122<sup>nd</sup> Ave. • Portland, Oregon 97230  
Phone (503) 761-6605 • Fax (503) 761-6620

Vancouver Phone (360) 696-7473  
Email: [ainw@ainw.com](mailto:ainw@ainw.com)  
Web: [www.ainw.com](http://www.ainw.com)

## MEMO

Date: June 24, 20145  
To: Terry Buchholz  
From: John L. Fagan, Ph.D., R.P.A., President and Senior Archaeologist  
RE: Drift Creek Reservoir Status Report on Pedestrian Survey

Terry,

The archaeological study of the proposed Drift Creek Reservoir project area is being done in compliance with the provisions of Section 106 of the National Historic Preservation Act that requires federal agencies permitting such projects to take into account the effects that the permitted work will have on significant cultural resources. The present archaeological survey is the first step in the Section 106 process and is being conducted to determine if important archaeological resources are present within the project area of potential effects. The pedestrian survey is designed to discover and inventory archaeological resources within the project impact area. The study is being done to address the federal Section 106 requirements. The work is required as part of the federal permitting process of the Corps of Engineers, and the results of the study will be provided to the State Historic Preservation Office for review and concurrence.

The pedestrian archaeological survey is the first step in the archaeological resource inventory process. An archaeological survey has been conducted for those accessible parcels where landowners have given permission for access within the proposed Drift Creek Reservoir pool area. The survey work was conducted during two field sessions, one in early February, and one in the middle of May, 2015. Approximately 70% of the area within the proposed pool has been systematically examined for archaeological resources, and a few historic-period and numerous pre-contact Native American pre-contact (prehistoric) resources have been found within the survey area. Ground surface visibility was relatively poor due to thick vegetation. In spite of the poor ground surface visibility, several archaeological resources have been found within the pool area.

Artifacts observed during the field survey have included stone tools and flakes from the manufacture of flaked stone tools. Stones used for the production and manufacture of tools that have been found in the project area include basalt, chert, jasper, agate, and obsidian. The tools and flakes mark locations where people lived and hunted during ancient times. Several fragments of fire-cracked rock have been found that suggest that some of the archaeological resources are habitation sites people lived and where food was cooked in earth ovens.

Stone tools noted during the survey include projectile points, both dart points and arrow points that indicate the use of the area over the last 8,000 years for hunting. The dart points indicate that atlatls or spear throwers were used for hunting, and the arrow points indicate that bows and arrows were also used for hunting. Dart points of styles in use between 5,000 and 8,000 years ago and arrow points that have been in use over the last 2,000 years have been found in the project area and indicate that the project area has been used over the last 8,000 years.

The fire-cracked rock and other types of stone tools such as flake knives and scrapers indicate that people have lived in the area and conducted a wide range of activities that likely included the processing of hides and the manufacture wood and fiber artifacts and the preparation and cooking of plant and animal foods as part of daily life at temporary or seasonally occupied hunting and food processing camps for thousands of years.

Historic-period artifacts have also been found in the project area. Historic-period artifacts include fragments of ceramic table wares and bottle glass fragments of styles and types in common use during the late 1800s and early and mid-1900s .

So far, the first part of the Section 106 inventory task is under way, and additional survey work is needed to complete the identification of archeological resources within the proposed reservoir pool area. The next steps include completing the pedestrian survey of the pool area, and delineating and evaluating the archaeological resources. The following tasks will need to be done to complete the Section 106 process.

WaterWatch Exceptions, Attachment 9

Exhibit R049  
Page 7 of 8  
EVWD01346

- Once access is approved for the remaining parcels, they will be examined for evidence of additional archaeological resources.
- Shovel testing will need to be conducted to determine if additional resources are present in high probability landforms where ground surface visibility was poor.
- Areas where artifacts were observed on the surface will need to be shovel tested to delineate the boundaries of the sites.
- Delineated sites will need to be formally recorded on SHPO site forms.
- Recorded sites will need to be tested and evaluated for National Register of Historic Places eligibility.
- Eligible sites will need to be assessed for project-related impacts.
- Mitigation plans will need to be prepared for eligible sites that will be impacted by the project.
- Data recovery excavations will likely be required as a form of mitigating adverse effects to the significant resources.
- These tasks will need to be coordinated with the Corps of Engineer, the SHPO, and the appropriate Native American Tribes having an interest in the project area.

Completion of the inventory and assessment of the archaeological resources will provide a basis for assessing impacts to those resources that are eligible for listing on the National Register of Historic Places and are thus considered significant and worthy of protection or mitigation. Based on preliminary results of the pedestrian survey so far, it is likely that significant pre-contact and historic-period archeological resources are present within the area of potential effects for the reservoir project. It is also likely that these significant resources will require some form of documentation and archaeological recovery of a sample of the important information that they contain before they are damaged or removed during construction.

226. <sup>1</sup>ODFW concluded that the proposed use would not be detrimental to the protection or recovery of Coho Salmon, which are not listed as sensitive, threatened, or endangered in Drift Creek. (Tr. at 2138, 2157-2158, 2160; Decl. of Murtagh at 3.) For that reason, ODFW did not analyze potential impacts to Coho Salmon in its Division 33 review.

227. [Reserved.]

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

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

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

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

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

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

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

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

236. However, Drift Creek has essential, but limited, spawning and rearing<sup>33</sup> habitat for Pacific Lamprey in intermittent areas of 7-10 miles above the proposed dam location. If built


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

# Summary of Comments on 190913 Final Order (R-87871-EVWD) (with exceptions).pdf

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: ODFW did not make this determination for Coho. It did not consider them in the analysis because they were not considered part of a listed population and ODFW was directed by the Department to provide comments only as to listed fish. (Test. of Murtagh, tr. 2138:25 to 2139:3.)

272. Alternatively, the District can apply for a waiver from the fish passage requirements. To be eligible for a waiver, the District would have to develop a mitigation plan providing a net benefit to migratory, native fish greater than the benefit from fish passage. **The benefit would have to be equal to the length of fish habitat that would be lost.** (Tr. at 499, 516-517, and 2099.)

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

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

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

(Ex. A1 at 93-95.)

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

276. Shortly after providing a completed Division 33 form, DEQ submitted a revised one. In the revised Division 33 review form, DEQ recommended that EVWD consider off-channel reservoir opportunities to lessen the impact of the reservoir on riparian areas lining Drift Creek as well as on any water quality impacts from water flowing through the reservoir and its placement in the stream. (Tr. at 477 and 478.) DEQ noted that off-channel storage for waters removed from November to April is a preferred alternative for protecting water quality. (Ex. A1 at 252; Ex. A3 at 1-4; Tr. at 441-442.)

277. In late 2013, DEQ notified the Department that it would like to amend its comments to reflect that additional DEQ conditions and recommendations would likely be triggered during the project’s construction phase and/or under the DEQ 401 water quality certification process. (Ex. A1 at 251.)

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

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Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

This continues to make a legal conclusion that misstates the law and the additional citation does not help. The testimony at 2099, an opinion by a non-lawyer who does not work in the fish passage program, says the benefit would need to be relative to the linear stream miles lost, not that the mitigation would have to provide the same number of miles.

- e. Integrated Water Resources Strategy and off-channel storage policy;
- f. OAR 690-310-0040(1)(a)(G) (access rights);
- g. OAR 690-033-0220(1) and 690-033-0330(2) and (3) (peak and ecological flows);

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

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

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

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

### **1 OPINION**

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

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


### **Water Permit Application Overview**

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

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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch excepts to the opinion in its entirety on grounds it incorrectly concludes the permit will not impair or be detrimental to the public interest. WaterWatch also excepts to findings of fact and conclusions of law not designated as such.



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

Once the time for public comment expires, the Department conducts the public-interest review. ORS 537.153(1)-(2); OAR 690-310-0100 – OAR 690-310-0120. The first step in this review is the determination of whether the public-interest presumption has been established. The Department must presume that a proposed use will not impair or be detrimental to the public interest if the following four criteria are satisfied: (1) the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12); (2) water is available; (3) the proposed use will not injure other water rights; and (4) the proposed use complies with rules of the Water Resources Commission. **The Department must also presume that a proposed use will not impair or be detrimental to the public interest if the proposed use can be modified or conditioned to meet the four presumption criteria.**<sup>41</sup>

The presumption is a rebuttable one. The presumption is overcome if a preponderance of the evidence shows that one or more of the four criteria are not met. Alternatively, the presumption may be overcome if a preponderance of the evidence shows that the proposed use will impair or is detrimental to one of the seven statutory public interest factors in ORS 537.170(8). That evidence may come from information in the Department's files, information received from other agencies, or in comments submitted to the Department. ORS 537.153(2); OAR 690-310-0120 (3)(a). The Department determines whether the proposed use impairs the public interest by weighing seven factors.


The public interest factors include:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: This legal conclusion is incorrect for reasons given in WaterWatch's Closing Brief, pp. 1-2.

references the definition of “over-appropriation” in OAR 690-400-0010(11)(a)(A), which provides in relevant part:

“Over-Appropriated” means a condition of water allocation in which:

(A) The quantity of surface water available during a specified period is not sufficient to meet the expected demands from all water rights at least 80 percent of the time during that period[.]

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

the investigation of stream flow or groundwater measurement records, watermaster distribution records, flow requirements of existing water rights, stream flow modeling in ungauged basins, minimum perennial streamflows, or scenic waterway flow requirements to determine if water is available to support the proposed water use.

OAR 690-300-0010(58).

The Department used its Water Availability Reporting System (WARS) to conduct the water availability analysis. That program showed that the average annual stream flow likely to occur fifty percent of the time is sufficient to cover all existing water rights and the 12,000 annual acre feet requested by EVWD. The Department’s determination that flows in Drift Creek are available to satisfy existing water rights and the proposed storage use at least 50 percent of the time negates the possibility that water will be unavailable to satisfy existing water rights 80 percent of the time. Accordingly, the Department’s watermaster assigned to Drift Creek concluded that water will be available for EVWD to store.<sup>44</sup>


WaterWatch argues that the Department’s water availability analysis was flawed in several respects. First, WaterWatch argues that the stream flow projections are too high because the stream flow was measured at Drift Creek’s mouth, where it flows into the Pudding River. EVWD’s proposed dam site is approximately six miles above the mouth. WaterWatch claims that the flow at the mouth is higher because of water inflow from tributaries below the proposed dam. WaterWatch therefore contends that there may be insufficient water flow at the dam site to cover the existing water rights and the proposed project.

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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch did not have the burden on this issue because it is part of water availability.

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

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

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

**The Commission’s Division 310 rules, which govern the processing of water right applications, do not require that peak and ecological flows be considered, even if the flows are valuable for fish habitat. Thus, imposing such a requirement in this case would result in the Department treating EVWD’s application differently than other applications. Moreover, while raising this argument, WaterWatch offered no evidence that including these flows in the water availability analysis would result in a finding that water was not available.**




The Department concluded that the water application processing rules do not currently require consideration of peak and ecological flows in determining water availability. Because the rules do not mention either type of flow, the Department’s interpretation is reasonable and entitled to deference. *Don’t Waste OregonCom. v. Energy Facility Siting*, 320 Or 132, 142 (1994). *See also, Willamette Water Co., v. Waterwatch of Oregon, Inc.*, 288 Or App 778, 787 (2017) (“To overcome [the Water Resources Department’s] interpretation of its rule, the company must demonstrate that the interpretation is not plausible, in view of the rule’s text, context, or other applicable source of law.”)<sup>48</sup>

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

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

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

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

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-  Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: This is an incorrect interpretation of the rules as explained in WaterWatch's Closing Response Brief (pp. 13-14).
  -  Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: The rules require consideration of such flows because they require consideration of impacts of a proposed use on fish.
  -  Number: 3      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch did not have the burden of proof on water availability, which is a factor necessary to create the public interest presumption.

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

ORS 537.400(5).<sup>49</sup>

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

Water districts created under the requirements of ORS 545.025(1) may exercise eminent domain under ORS 545.239. Thus, EVWD has the authority to purchase the property of the Rue Protestants that will be inundated and otherwise impacted by the water storage project.

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

The Department's position that no injury occurs through taking a water right by acquiring the land to which it is attached by eminent domain is reasonable. Under ORS 537.400(5), the Department has the authority to approve a storage application and issue a water storage permit before the applicant owns the impacted land. Eminent domain is a legal means of acquiring property and satisfying the ownership contingency. That process is used both by public entities and water districts. If the district can meet the ownership contingency prior to filling the reservoir, the district will own the water right.<sup>50</sup>

WaterWatch also contends that the 1990 instream right will be injured by the proposed project. That instream right guarantees specified monthly instream flows, expressed in cfs, from river mile 11.0 to the mouth at river mile 0.0. The certificate states that the flows "are to be measured at the lower end of the stream reach to protect necessary flows throughout the reach." Because the certificate refers to the "lower end of the reach" as the place of measurement, the Department measures flow at the mouth of Drift Creek.<sup>51</sup>


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

<sup>50</sup> The Department has suggested that the Final Order could include a condition requiring EVWD to request that the Department cancel the Schact water storage certificate before construction may begin.

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

Exception: This incorrectly describes the requirements of the instream water right, as discussed in WaterWatch's narrative exceptions to the Final Order.



Pudding River watershed.<sup>55</sup> These streams include Silver Creek and the Pudding River main stem. The Department did not dispute that evidence. Indeed, ODFW's biologist Tom Murtagh agreed that Spring Chinook may possibly be present in Drift Creek.

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

WaterWatch also contends that the Division 33 process was flawed because the impact of EVWD's project on a non-listed fish species, Coho Salmon, was not considered. This fish, however, is not listed as STE in Drift Creek; fish listed as STE in the waterway at issue are the only species that must be considered during a Division 33 analysis. *See, e.g.*, OAR 690-033-0220 and 690-033-0330. The Department therefore is not required to consider impacts on this fish as part of a Division 33 review.

In its closing briefs and exceptions, WaterWatch asserts that it is possible that Coho Salmon in Drift Creek originated from a population below Willamette Falls that is listed as threatened. There is no evidence in the record that the Coho Salmon in Drift Creek originated from a threatened population. Contrary to WaterWatch's assertions, the ALJ did not prevent WaterWatch from introducing such evidence at the hearing; rather, the ALJ prevented WaterWatch from eliciting a speculative opinion from Mr. Murtagh regarding this possibility. WaterWatch could have sought to lay an appropriate foundation for an expert opinion on the issue, or to introduce relevant exhibits showing a possible link between the Coho Salmon in Drift Creek and a listed population below Willamette Falls, but WaterWatch chose not to do so. Even if WaterWatch had introduced evidence that the Coho Salmon in Drift Creek came from a population listed as threatened below Willamette Falls, WaterWatch failed to introduce evidence that the proposed use would impair or be detrimental to the protection or recovery of a listed population of Coho Salmon, or that the conditions that ODFW proposed to protect winter steelhead and Pacific lamprey habitat would not protect Coho Salmon habitat, as well. Thus, WaterWatch did not establish that the Department's failure to evaluate the project's effect on Coho Salmon rendered the Division 33 review inadequate.

Although the Department did not have to evaluate project effects on the non-listed fish species during its Division 33 review, non-listed fish species are, however, relevant to the Department's consideration of whether any facts exist that show that the public interest presumption is overcome. OAR 690-310-0120(3)(a) provides that when the Department determines that the presumption is established, the Department must further evaluate any available information regarding specified categories to determine whether the presumption is overcome. For example, the Department must consider STE, where applicable. OAR 690-310-

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Exception: The ALJ did prevent reasonable inquiry on this topic. Second, it was not WaterWatch's burden to show that the proposed use *would* be detrimental to recovery of listed species. Because protection of listed species is required by Commission Rules, the Department had the burden to show the proposed use *would not* detrimentally impact listed species (possibly including the Coho that use Drift Creek).

has to show that alternatives to fish passage will result in a benefit greater to fish than that provided by fish passage by or through the artificial obstruction. ORS 509.585(7)(a) and (b).

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

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


Instead of including the required items in its application, the developer submitted into the hearing record certain information regarding project impacts to fish and wildlife habitat and potential mitigation measures. The developer also submitted a letter from ODFW explaining that it had been working with the developer to develop an acceptable wildlife report and mitigation measures and stating that it was feasible for the developer to develop an acceptable program to mitigate the impacts.

Before approving the application, the county was required to find, from substantial evidence in the record, that the developer's proposed plans would completely mitigate any negative impact on fish and wildlife resources. Without requiring the developer to articulate the negative impacts and present a mitigation plan, the county relied on the promise of the developer to identify the impacts, and the commitment of ODFW to help create a suitable mitigation plan, and approved the project. *Id.*

The Court of Appeals found that the county could not effectively evaluate whether the project's impacts on fish and wildlife resources would be completely mitigated, as required by the county development code, without knowing the specifics of the mitigation measures. The Court of Appeals held that the county had therefore impermissibly approved the project

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: The Gould case is fully applicable here and dictates denial of the application without specific mitigation plans.

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

<sup>2</sup>Another case cited by WaterWatch is also inapplicable. In *Kusyk v. Water Resources Dept.*, 164 Or App 738 (2000), an individual filed an application to transfer two ground water right certificates. Under the applicable statute, ORS 540.530, the Department could grant the application only if the transfer would not injure other existing water rights. A landowner filed a protest to the Department's order granting the application. The landowner argued that the transfer might cause substantial interference with her existing water rights. *Id.* at 740.

The Department's hydrologist conducted a study, and concluded that he could not determine whether the transfers would injure the landowner's water rights. The hydrologist indicated that in order to do so, he would have to observe the new well in operation. The Department granted the transfer permit, conditioning it on the applicant ensuring that the new well did not impact the landowner's water right. *Id.* at 741.

The circuit court found that the Department abdicated its responsibility to make a "no injury" finding, and granted summary judgment, as well as attorney fees, in the landowner's favor. The case then was appealed the Court of Appeals on the issue of attorney fees. *Id.* at 740. The Court of Appeals vacated the circuit court's award of attorney fees and remanded to make an adequate record identifying the statutory ground for award of fees. The Court of Appeals expressly stated that it was assessing only whether the trial court's rulings were "in favor" of petitioners, and that it was not "comment[ing] on the correctness" of the circuit court's rulings. Thus, the *Kusyk* case does not support WaterWatch's argument.<sup>58</sup>


WaterWatch also argues that conditioning EVWD's permit on compliance with ODFW's habitat mitigation policy is inadequate because those rules, unlike the water right application processing statutes, do not provide for public comment. As a result, WaterWatch argues, it will be unable to participate in the ODFW process for approving a mitigation plan. However, an inability to participate in another agency's approval process does not provide a basis for denying

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


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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

Exceptions: The cited rule requires the Department to determine if specific mitigation will avoid the detriment, not just whether hypothetical conditions can. Necessary conditions were not included in the draft permit.

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 Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

Exception: Kusyk is applicable to this case and also requires mitigation plans for review in the permitting process. This exception is incorporated in all discussion of this case.

EVWD's application. Public participation in the mitigation plan review process is not within the scope of this contested case hearing.

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

WaterWatch's expert, John Yearsley, was able to duplicate and confirm those results by using the same computer model. Thus, WaterWatch's expert confirmed that at least one scenario would allow EVWD to release water that did not exceed the temperature standard.

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

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

WaterWatch contended that evaporation and seepage might limit a reservoir's ability to remain full. However, WaterWatch's expert conceded that evaporation likely would not make a significant difference. In addition, EVWD presented evidence that it could prevent seepage by selecting an appropriate material for the reservoir.

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

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

WaterWatch's next argument is that the record does not support ODFW's determination that it is possible for EVWD to avoid detriment to threatened Winter Steelhead and prevent a net loss of essential habitat for sensitive Pacific Lamprey. In support of that argument, WaterWatch

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**T** Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: EVWD did not present evidence of this. EVWD said the reservoir would not be lined. (Test. of Goschie, tr. 1320:3-5.) Other evidence suggested the estimated expense of lining a similar reservoir would make it cost prohibitive. (Ex. WW100, p. 4.)

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**T** Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: The condition would only require EVWD to not i4mpact water quality "detrimentally to the point that those waters no longer meet existing state or federal water-quality standards due to reduced flows." (Emphasis added.) It also refers to meeting "requirements" without description as to what those requirements are



cites an email written by ODFW fish biologist Tom Murtagh, who signed ODFW's Division 33 review recommending approval of EVWD's application with conditions.

Four months after recommending approval, Mr. Murtagh expressed doubts to ODFW colleagues about whether EVWD will be able to obtain a waiver of the fish passage laws if it requests one. Mr. Murtagh also wondered whether Pacific Lamprey or Winter Steelhead habitat in the upper portions of Drift Creek might be categorized as Category I habitat in the future. Category I habitat is considered essential and irreplaceable. ODFW does not recommend that the Department grant applications for proposed uses that impact such habitat.

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

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

However, Ms. Pakenham Stevenson testified that Drift Creek is likely Category II or III habitat. As Mr. Murtagh recognized, ODFW has not designated any portions of Drift Creek as Category I habitat. **This email speculation that portions of Drift Creek might be so designated in the future is speculative.**

WaterWatch's final argument is that the Department must show, before granting EVWD's application, that EVWD can obtain ODFW approval for a mitigation plan under OAR 690-033-0220(5). That rule, along with section (1) of the same rule, requires that a proposed water use that is detrimental to the protection or recovery of a threatened species be conditioned or mitigated to avoid the detriment. Otherwise, the proposed use must be denied as being contrary to public interest.


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

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

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

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 Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Exception: This evidence is not more speculative than whether they will be designated Category II or III.

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 Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Exception: As discussed elsewhere in exceptions and closing briefs, the conditions are not adequate and review of this application does require specific mitigation plans.

## **1. Instream Flow Protection Under OAR 690-410-0030**

WaterWatch asserts that the proposed use does not comply with OAR 690-410-0030, which states, in relevant part:

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

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

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


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

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

<sup>61</sup> OAR 690-400-0000(4).

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch excepts to this section in its entirety. The rule does apply and is not satisfied. (WaterWatch Closing Brief, pp. 17-18; WaterWatch Closing Response Brief, pp. 12-14.)

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

**U. Water Allocation Under OAR 690-410-0070**

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

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

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

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

\* \* \* \*

(c) New allocations of water for the purpose of filling storage facilities may be allowed notwithstanding subsection (a) of this section. Protection may be afforded to all water rights and instream uses by establishing storage filling seasons in basin rules, by considering the need for minimum pass-through flows on water rights, or establishing by rule other conditions consistent with the state policy on water storage as a prerequisite for allocation. In setting a storage season, consideration shall be given to avoiding periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows are needed to support public uses.<sup>71</sup>

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

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

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Exception: WaterWatch excepts to this section in its entirety. The rule does apply and is not satisfied. (WaterWatch Closing Brief, pp. 17-18; WaterWatch Closing Response Brief, pp. 12-14.) Among other reasons, the rule is not satisfied because the Final Order fails to determine appropriate peak and ecological flows and require pass-through of those flows.

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

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

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

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

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

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

WaterWatch also argues that the proposed use violates Oregon’s integrated water resource strategy, most recently issued by the Commission in 2017. One of the recommended actions in the 2017 strategy is to improve access to “built” water storage facilities. One

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

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

<sup>74</sup> The policies contained in OAR 690-410-0080 are relevant in determining whether the Protestants can show that the public interest factor in ORS 537.170(g) weighs against the proposed project.

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

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**T** Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch excepts to this section in its entirety. The rule does apply and should have been considered in the analysis. (WaterWatch Closing Brief, pp. 17-18; WaterWatch Closing Response Brief, pp. 12-14.)

**T** Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch excepts to this section on grounds it misstates WaterWatch's argument and mischaracterizes the strategy. WaterWatch did not argue that the strategy is a rule; only that it is a policy that must be considered under ORS 537.170(8)(g) and by EVWD as a public corporation. The policy clearly discourages on-channel storage due to its ecological impacts. (WaterWatch Closing Brief, p. 11; WaterWatch Closing Response Brief, pp. 18-19.)



**G. <sup>1</sup> Peak and Ecological Flows Under OAR 690-033-0220(1) and 690-033-0330(2) and (3)**

The PFO does not require any releases from the dam or bypass flow for peak and ecological flows. WaterWatch contends that Division 33 rules implicitly require that the PFO require such releases. However, none of these provisions mention, much less require, peak and ecological flows.<sup>80</sup>

<sup>2</sup>The Department has demonstrated that the proposed use does not violate any of the foregoing Commission rules. The Proponents have not shown otherwise.<sup>81</sup>

**<sup>3</sup> Issue No. 3: Public Interest Review**

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

It is true that the public interest analysis in the PFO is devoid of facts. Because Mr. Wallin did not testify at the hearing, the record does not show how he came to the conclusions in his analysis. The record shows however, that the Department considered facts contained in the District's application, the Protestants' protests, and the Division 33 reviews by ODFW and DEQ. The seemingly perfunctory nature of the public interest analysis in the PFO therefore does not establish that the Department failed to properly evaluate the public interest factors.

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

The Protestants have the burden of demonstrating that EVWD's proposed project will be detrimental to the public interest. As provided in ORS 537.153(2)(b)(A) and (B), the Protestants

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

<sup>80</sup> In its protest, WaterWatch also mentioned OAR 690-410-0030 (instream flow protection) and 690-410-0070(2) (water allocation for beneficial uses). <sup>2</sup>These two rules neither mention nor require permit conditions protecting peak and ecological flows.

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

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- T** Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: WaterWatch excepts to this section in its entirety. Peak and ecological flow protection is necessary under Division 33 to avoid detriment and loss of essential habitat to listed species and because ODFW's Division 33 comments raised this issue. There was no logical reason for ODFW to require such flows in October but not other months.
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- T** Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: The proposed use does violate Commission rules, as discussed above, in WaterWatch's narrative exceptions to the Final Order, in WaterWatch's exceptions to the Proposed Order and in WaterWatch's closing briefs.
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- T** Number: 3 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
WaterWatch excepts to this section in its entirety as incorrectly determining the proposed use will not impair or be detrimental to the public interest.
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- T** Number: 4 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Exception: The rules require protection of peak and ecological flows because they are important instream flows protecting public uses.

It is the Commission's position that maximum beneficial use of the waters of the state is achieved by issuing a permit to anyone who is willing to attempt appropriation and use of whatever unappropriated water may become available, except where a basin program identifies a need to set aside some amount of unappropriated water for particular future uses.

*Benz*, 94 Or App 73 at 80.

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

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

With regard to fish and wildlife, the record shows that Drift Creek provides limited habitat above and below the proposed dam site for Pacific Lamprey, listed as sensitive under Oregon law, Upper Willamette Winter Steelhead<sup>83</sup> and Upper Willamette Spring Chinook, ESA-listed as threatened. The creek also provides habitat for unlisted fish such as Cutthroat Trout and Coho Salmon. The proposed project area also provides habitat for Roosevelt elk. The proposed project may impact elk habitat by temporarily or permanently eliminating forage, hiding cover, and calving areas, as well as by disrupting elk movement patterns.<sup>84</sup>

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

The proposed project will impact fish habitat both above and below the dam. The project will diminish habitat for Pacific Lamprey, reducing the fish's ability to spawn and rear.

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<sup>83</sup> Upper Willamette Winter Steelhead have not been actually observed in Drift Creek, but ODFW assumed that they might be because other fish in the Salmonid family use the creek.

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Exception: ODFW did not "assume[] they might be." ODFW reasoned, based on professional expertise, that it is "likely" steelhead use Drift Creek. (Test. of Murtagh, Ex. A9, pp. 5-6.) Moreover, Conrad Gowell believed he identified a juvenile steelhead in Drift Creek even though he could not confirm it. (Test. of Gowell, tr. 2526:24 to 2527:12.)

EVWD submits the plans for the proposed dam to OWRD for approval. As such, the Protestants' argument is premature.

Further, the Department offered evidence that it inadvertently left out this requirement, but will include in the FO a requirement that when EVWD submits its dam plans, the District will address the power generation issue. The FO issued by the Department therefore complies with this statute.

### **1 Measurement and Reporting Conditions**

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

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

(Ex. A1 at 137.)

Neither the PFO nor the draft permit contains specific requirements for measuring water flow. At most, the draft permit requires EVWD to measure the reservoir level via a staff gage, which does not show whether the reservoir is capturing live flow at any specific time. Thus, the "Order" section of this Final Order contains additional language requiring water flow measurement and monitoring to ensure both that the 1990 instream water right is met, and that all live flow is passed during the non-storage season.

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

WaterWatch excepts to this section on ground discussed in its narrative exceptions; generally because the conditions will not ensure protection of the instream water right immediately below the dam.

## **1 CONSIDERATION OF EXCEPTIONS**

### **I. Narrative Consideration of Exceptions**

#### **A. WaterWatch's Exceptions**

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

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

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

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

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


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

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

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

###### **i. Specific Exception A193**

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
WaterWatch excepts to each denial of an exception by WaterWatch on grounds given in the exception, in the accompanying narrative exceptions, and on any additional grounds noted below.



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

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

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

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

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


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

#### ii. Specific Exception A195

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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Addition Exception: OAR 690-410-0070(2)(h) refers to instream "needs," "rights" and "uses" (plural), showing that instream needs not addressed in an existing instream water right may be protected under the rule.

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

### iii. Specific Exception A196

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

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

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


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

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

### iv. Specific Exception A199

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: Because water availability is necessary for a presumption of public interest, the Department had the burden on this issue.

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

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

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

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

### c. Injury

#### i. Specific Exceptions A202 – A208

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

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

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exception: Because compliance with Division 33 rules is necessary for a presumption of public interest, the Department had the burden to show that no protection of peak and ecological flows was necessary to protect listed fish. The Department did not carry that burden.

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

#### ii. Specific Exception A209

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

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

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

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

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

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exception: This definition is in rules related to transfers. The definition of injury in the context of review of a storage application is the ordinary meaning of the term.



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

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

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

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

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

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

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

**ii. Division 33 Rules**

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

**1. Specific Exception A212**

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exception: The Proposed Order and Final Order do not "avoid" the impacts prohibited by Division 33. At most, they require EVWD to attempt to address some of those impacts in the future. That does not carry the Department's burden on Division 33. This exception is further supported by WaterWatch's narrative exceptions to the Final Order, WaterWatch's exceptions to the Proposed Order and WaterWatch's closing briefs.

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

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

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

## 2. Specific Exception A214

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

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

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

## 3. Specific Exception A215

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

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

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

## 4. Specific Exception A216

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

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
WaterWatch excepts on additional grounds provided in its narrative exceptions (Section III B), including documents incorporated therein by reference.

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

### 5. Specific Exception A217

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

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

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

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

### 6. Specific Exception A218

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exception: Determining if the Department met its burden depends on consideration of all evidence, including evidence by Protestants that shows the Department failed to analyze all relevant issues. (See Ruling on Motion to Determine Burden of Proof (March 20, 2018).) Protestants showed the Department failed to consider impacts of the proposed use on threatened chinook salmon even though the Department now concedes they use the stream. For this reason, too, the Department failed to carry its burden on Division 33.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exception: WaterWatch carried its burden of showing impacts to non-listed fish. WaterWatch showed that coho salmon and cutthroat trout, at least, use Drift Creek, including areas above the dam site, and will be impacted by the dam. WaterWatch also showed that mitigation to address impacts to listed fish won't necessarily address impacts to non-listed fish. (Test. of Stevenson, tr. 700:20 to 701:12.)



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

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

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

#### 11. Specific Exception A228

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

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

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




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

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

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

The Director grants the exception that asserts that the Proposed Order inaccurately states that WaterWatch's expert, Dr. Cuenca, concluded that seepage would not make a significant difference in the amount of water available to be released from the reservoir. Dr. Cuenca concluded that the amount of water lost to seepage could be several thousand acre-feet per year. **1** The Proposed Order correctly concluded that the issue of seepage could be addressed in the design of and materials used to construct the reservoir.

**2** The Director denies the remainder of the exceptions that relate to water temperature because, if all of the water in the reservoir exceeds water quality standards, the terms of the permit will not allow EVWD to release any water. **3** The Director denies the remainder of the

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-  Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: This is purely speculative and fails to take cost into account.
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-  Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: EVWD could simultaneously be required to release water to meet permit conditions requiring that it not store water outside the storage season or that it pass flows necessary to satisfy downstream senior rights. In that situation, EVWD would be violating one permit condition or another and the permit would clearly be impairing the public interest.
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-  Number: 3      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM
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Exceptions that relate to the amount of water likely to be available for release because nothing requires EVWD to store the maximum capacity of the reservoir each year.

#### 13. Specific Exceptions A234 – A235

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

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

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

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

#### 14. Specific Exception A237

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


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

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


The Director denies exception A237 because it misinterprets OAR 690-033-0220. As explained above in the Final Order, under OAR 690-033-0220(1), if the Department determines that a proposed use of water "is detrimental to the protection or recovery of a threatened or endangered species and cannot be conditioned or mitigated to avoid the detriment," the application shall be presumed to impair or be detrimental to the public interest. OAR 690-033-022(5), the section highlighted by WaterWatch, states that if the proposed use is determined to be detrimental to the protection or recovery of a threatened or endangered species, the applicant "may propose mitigation compatible with sections (2), (3) and (4) of this rule."

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Exception: This issue is relevant to impacts of the reservoir on water quality; not whether EVWD is required to store some minimum amount of water.

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 Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: This is not a plausible interpretation of the rule. Subsection (5) clearly refers to the mitigation described in (1).

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

#### 15. Specific Exceptions A239 – A244

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

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

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

#### 16. Specific Exception A245

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

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

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

#### 17. Specific Exception A247

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

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

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

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



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

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

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

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

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


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

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


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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: This interpretation of the comment is not supported by substantial reason. There is no logical reason to protect peak and ecological flows in October but not other months. (See Test. of Murtagh, tr. 2133:22 to 2136:9.)

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 Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM



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

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

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

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

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

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

- i. Specific Exception A251**

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

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


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

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

- ii. Specific Exceptions A252 – A253**

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: The proposed use is not in the public interest for reasons given in WaterWatch's narrative exceptions and closing briefs.

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

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

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

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

### iii. Specific Exception A256

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

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

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


### iv. Specific Exception A257

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


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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exceptions: This finding/conclusion remains speculative and is not supported by any evidence in the record. Availability of public comment is an issue in terms of whether the application will receive the public review required by the water laws.

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 Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

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

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

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

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

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

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

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

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

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

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

**i. Specific Exceptions A264, A266**

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

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**T** Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Additional Exception: public benefit from publicly inaccessible fish habitat is common knowledge and/or subject to judicial notice. Moreover, there is evidence in the record about public benefit from even publicly inaccessible fish habitat. (E.g., Exs. WW83, WW84.)

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**T** Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Additional Exceptions: The Department's analysis has failed to consider downstream impacts of the project through flow alteration, reduced movement of "bedload" and woody debris, and temperature impacts (even if they don't violate water quality standards). (Test. of Gowell, tr. 2538:17 to 2552:18.)

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

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

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

#### ii. Specific Exception A265

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

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

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

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


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

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

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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: Findings 20-22 do not say the reservations establish demand for use as opposed to speculation.



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

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

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

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

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

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


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

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

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


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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

Additional Exceptions: WaterWatch incorporates prior exceptions on this issue.

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 Number: 2      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM

Additional Exceptions: WaterWatch incorporates in these continuing exceptions its narrative exceptions to the Final Order and documents cited therein.

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

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

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

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

#### 4. Evidentiary Matters

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

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

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Additional Exception: The objection to this testimony was on grounds it was speculative, not on grounds it lacked foundation (which also would have been incorrect). The discussion here misses the point WaterWatch was making: it cannot be simultaneously too speculative for Mr. Gowell to say whether impacts of the project can be mitigated and not too speculative for the state to say if they can.

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


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

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

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

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

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 Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Additional Exceptions: WaterWatch was precluded from pursuing these questions based on relevance, not based on foundation (which was clearly present given Mr. Murtagh's background and expertise). As noted in the exception and elsewhere, the issue was relevant to whether the scope of the Division 33 review was adequate.

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

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

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

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

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


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

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


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

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

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 Number: 1 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Additional Exceptions: The availability of less damaging alternatives is reasonably included in the issues to be considered under ORS 537.170(8) and OAR 690-310-0120 and OAR 690-410-0080.

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 Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM  
Additional Exceptions: This is also is relevant to public interest analysis under authorities cited in the prior additional exceptions. Approving a new in-channel dam while state policy is clearly focused a removing obstructions from fish-bearing streams further suggests it is not in the public interest.



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

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

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

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

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

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


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

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

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

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

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 Number: 1      Author: WaterWatch      Subject: Comment on Text      Date: 10/3/2019 9:43:25 AM  
Additional Exception: WaterWatch incorporates its prior exceptions and discussion on this issue.

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

#### iv. Specific Exception 102

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

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

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

#### v. Specific Exception 103

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

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

#### vi. Specific Exception 104

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

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

#### vii. Specific Exception 108

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



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

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

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

#### c. Specific Exception 91

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


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

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

#### d. Specific Exception 92

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

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Additional Exception: WaterWatch incorporates its exceptions to the discussion of *Benz* in the Proposed Order.

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

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

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

Insofar as issuance of the reservoir permit may result in the District proceeding with condemnation of their lands, the Department may not withhold the reservoir permit on that basis, as the laws governing issuance of reservoir permits allow for an applicant to provide evidence of access to submerged lands after a reservoir permit has been issued. Specifically, ORS 537.400(5) authorizes the Department to issue a reservoir permit “subject to the condition that before the reservoir may be filled, the permittee shall submit to the department evidence that the permittee owns, or has written authorization or an easement permitting access to, all lands to be inundated by the reservoir.” The Department may not deny a reservoir application because a District does not currently possess the necessary access to the inundated lands, nor can the Department deny an application on the grounds that the District may later exercise its authority to condemn lands.

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


e. **Specific Exception 93**

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

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

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

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Additional Exceptions: WaterWatch excepts to the Department's discussion on this issue and incorporates its narrative and prior exceptions, and documents cited therein, on this issue.



creek water for irrigation. They do not use the water for domestic use other than drinking water that Mr. Qualey uses from a spring that will be inundated by the reservoir. The record does not show that Drift Creek is being used for municipal water supply, power development, fire protection, mining, industrial purposes, navigation or any other beneficial use to which water may be applied and for which it may have a special value to the public. Thus, Protestants' evidence does not demonstrate that the proposed use will impair or be detrimental to the public interest.

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

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

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

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

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

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

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Exception: A preponderance of evidence clearly does show this. As discussed in WaterWatch's narrative exceptions, exceptions to the Proposed Order and closing briefs, the appropriation of storage will impact flows, water quality and habitat formation below the dam and prevent fish below the dam from reach habitat above the dam (and vice versa). Also, the reservoir will inundate substantial fish habitat including habitat used for spawning. Also as discussed in the referenced documents, the conditions will not prevent injury to the instream water right and the use is not consistent with rules of the Commission on impacts to fish habitat.

**T** Number: 2 Author: WaterWatch Subject: Comment on Text Date: 10/3/2019 9:43:25 AM

Additional Exceptions: This characterization of this public interest factor is not supported by any authority. Moreover, there clearly is at least one competing water use - instream flows that provide and create habitat for fish including fish threatened with extinction.

result in the maximum economic development of the waters involved.<sup>15</sup> In short, the factor requires a determination of whether the water is being put to maximum economic use as compared with other competing uses of water; it does not require determining the particular costs of a project to determine its economic viability.

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

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

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

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


<sup>2</sup>The evidence in the record does not support a conclusion that the impoundment will result in a net loss of fish habitat; instead, the record establishes that the proposed use is conditioned to protect the existing senior instream water right and is otherwise conditioned to protect fish habitat consistent with the recommendations of ODFW. If the District is successful in condemning Protestants’ lands, then a reservoir may replace productive farmland with a reservoir that benefits competing farmers. However, the latter is the result not of a water allocation decision, but of the District’s exercise of its condemnation authorities. The Department is not authorized to deny a water right because a District may exercise statutorily granted condemnation authority, especially if water is available for further appropriation consistent with the rules governing allocation.

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


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

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

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Additional Exception: This is incorrect. The record shows the reservoir will inundate three miles of fish habitat and block access to other habitat above the dam. It will also reduce fish habitat below dam by storing and diverting water that would otherwise flow downstream.

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

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

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


ORS 537.170(8)(e) requires the Department to assess whether a project presents an impracticable or unreasonable use of the waters involved, but this statute must be read in the context of all of the statutes governing appropriation of surface water, including ORS 537.400, which authorizes the Department to issue a primary storage permit even if certain requirements have not yet been satisfied—as long as the permit is conditioned upon satisfaction of those requirements. In addition, an applicant has 10 years after the date the permit is issued to “begin and complete and construction of diversion or storage works and to perfect the water right.” ORS 537:248(1). If the District cannot complete the project consistent with this requirement, the District risks the loss of the permit. ORS 537.410. The statutory scheme governing the appropriation, construction of works and perfection of the right governs whether a user may ultimately vest in the right to appropriate the water. The evidence presented at the hearing supports finding that the District could develop the project as proposed, and that is sufficient for the purposes of issuing a permit.

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

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

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

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Exception: These considerations reasonably fall within the terms of this factor. The Department's characterization is not based on any authority.

**1** ORDER<sup>97</sup>

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

1. When EVWD submits dam plans to the Commission for approval, the plans must meet the requirements under ORS 540.350(2) for power generation or demonstrate that the project is exempt from those requirements under ORS 540.350(3).

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

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

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

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

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WaterWatch excepts to the Order on grounds if grants the requested permit. The permit should not be granted, for reasons given in WaterWatch's narrative and other exceptions, exceptions to the Proposed Order and closing briefs. Also as explained in those documents, the conditions are not adequate to prevent the use from impairing or being detrimental to the public interest.



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

IN THE MATTER OF WATER RIGHT ) CASE NO. 2017-OWRD-00002  
APPLICATION OF: ) Agency Case R-87871  
 ) Assigned to ALJ Denise McGorrin  
 )  
EAST VALLEY WATER DISTRICT ) **WATERWATCH’S CLOSING BRIEF**

As discussed below, the application in this matter should be denied because the proposed permit would impair or be detrimental to the public interest.

**I. THE PROPOSED USE CANNOT BE PRESUMED TO BE IN THE PUBLIC INTEREST**

This case is clearly outside the statutory presumption of public interest. The presumption was incorrectly established or, if not, has been overcome by a showing that one or more of the public interests identified in ORS 537.170(8) would be “impaired or detrimentally affected.” See ORS 537.153(2).

A. The Use as Proposed in the Application Does Not Meet Presumption Criteria.

The presumption criteria need to be evaluated relative to the use as proposed in the application. See ORS 537.153(2) (“In reviewing the *application* under subsection (1) of this section . . .” (emphasis added)); compare ORS 537.170(8) (referring to evaluation, after the presumption is overcome, of “the proposed use *or* the proposed use as modified in the proposed final order” (emphasis added)). The application clearly does not meet the criteria for the presumption. (Test. of French; tr. at 156:3 to 157:24.) The application requested water in October, (Ex. A1 at 492 (section 6)), but the basin plan does not allow that, OAR 690-502-0040(4), and water is not available in October, (Ex. A1 at 528). The application proposed a use that would violate the “Division 33” “rules of the Water Resources Commission” (OAR 690-

1 033-0220, -330(2)(b)) because the use would be detrimental to protection and recovery of  
2 threatened species and result in net loss of essential habitat of a sensitive species. (Test. of  
3 Murtagh; ex. A9 at 7:1-10.) There are other reasons the application doesn't meet the presumption  
4 criteria, but the above examples are beyond dispute.

5 The Department cannot shoehorn this application into the presumption criteria by  
6 layering it with heavy conditions. If the Department needs to do that, the application obviously  
7 raises public interest issues that require a broader analysis. Interpreting the statutes and rules  
8 otherwise would make the broader public interest factors meaningless because the Department  
9 could always attempt to fit even the most controversial proposal into the presumption standard  
10 by adding enough conditions. This is especially apparent here, where the Department is  
11 attempting to address serious public interest issues with broad "conditions" that really just rely  
12 on future analysis by other agencies. If the Department can fit an application into the  
13 presumption that way, it would never need to conduct a full public interest analysis. It could just  
14 issue permits with a condition that says, "the applicant shall work with other agencies and  
15 individuals to meet criteria for the public interest presumption" and claim that does the job  
16 (which is actually not that far from what it has done here). The Legislature could not have  
17 intended the system to work that way.

18 B. The Department Admits Changes Are Required to The PFO and Draft Permit.

19 Even applying the presumption criteria to the Department-proposed permit, it is clear the  
20 presumption is not met because even the Department admits the proposed permit requires  
21 changes to incorporate ODFW comments and address a statutory hydropower/fish passage issue.  
22 (Test. of French; ex. A8 at 8-9.)

24 C. The Proposed Permit Would Fail to Meet Criteria for Water Availability, Injury  
and Compliance with Rules.

25 The proposed permit also would fail to satisfy the presumption criteria because it would  
26 not meet the criteria for water availability, injury and/or complying with rules of the commission.

1           The Department’s water availability analysis examined water availability only at the  
2 mouth of Drift Creek, (Ex. A1 at 528), without subtracting inflow in the six miles below the  
3 proposed dam site (making more water available at the mouth than at the proposed dam site).  
4 According to Tanovan’s analysis, that error could be significant. (Ex. EV13 at 160 (top)  
5 (counting inflow below dam site toward in-stream water right requirement is a “major factor[]”  
6 in “reservoir refill”). (See also Ex. WW62 at 12-13 (showing difference in releases to meet  
7 instream water right in 2011 – 40 cfs in January, for example – depending whether flows need to  
8 be met at toe of dam or only at mouth).) Moreover, the water availability analysis did not  
9 account for in-stream flow needs beyond those reflected in in-stream water rights, (Test. of  
10 Eastman, tr. at 366:3-6), even though the Department’s rules on water availability allow that,  
11 OAR 690-410-0070(2)(h); 690-400-0010(13). Multiple witnesses agreed that “peak and  
12 ecological” flows were an important part of in-stream flow needs and that they were not included  
13 in downstream in-stream water rights. (E.g., Test. of Stevenson, tr. at 738:18 to 739:19; Ex.  
14 EV22.)

15           The proposed permit does not meet the presumption criteria for no injury because it  
16 would flood the place of appropriation and use for at least one existing water right. (Test. of  
17 Eastman; tr. at 368:2-21.) The District relies on its power of eminent domain to say it will own  
18 the water right by the time it floods it, but we know of no authority that says taking a water right  
19 by eminent domain is not “injury.” The proposed permit also would injure the in-stream water  
20 rights in Drift Creek, the Pudding River and the Molalla River. It would flood a portion of the  
21 place of use for the in-stream water right in Drift Creek. (Test. of Eastman; tr. at 366:10-13.) It  
22 would injure the same water right downstream, as well as the in-stream water rights for the  
23 Pudding and Molalla Rivers, which also are downstream, (Exs. WW8 (Drift Creek), WW9  
24 (Pudding River), WW5 (Molalla River), because the proposed permit does not include  
25 measurement conditions sufficient to ensure the reservoir is passing all “live flow” when  
26 downstream in-stream water rights are not being met, (Section IIK below). In addition, several

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039

1 witnesses testified that the in-stream water right for Drift Creek would be measured only at the  
2 mouth of the stream, even though the right says the specified flows are to be protected  
3 “throughout” the reach. (Test of French, tr. at 170:16-25, 173:6 to 176:10; Ex. WW8.) If so, the  
4 proposed reservoir would injure the in-stream water right by reducing flows in the protected  
5 reaches above the mouth because the reservoir would be required only to pass enough live flow  
6 to meet the in-stream water right at the mouth in combination with inflow below the dam.  
7 Finally, the District could potentially claim precedence over the in-stream water right even  
8 though their water right is junior. ORS 537.352.

9 The proposed permit also would fail to comply with rules of the commission for at least  
10 the reasons discussed in sections IIE through IIH below.

11 D. Any Presumption is Overcome by Other Public Interest Factors.

12 Any presumption of public interest also would be overcome because a public interest  
13 identified in ORS 537.170(8) would be “impaired or detrimentally affected.” ORS 537.153(2).  
14 The specific public interests that would be impaired or detrimentally affected, and how, are  
15 discussed in Section II below. Only one such interest needs to be impaired or affected to  
16 overcome the presumption. See id. at (b)(A) & (B) (referring to “the” public interest affected).

17 **II. THE PROPOSED USE IS NOT IN THE PUBLIC INTEREST**

18 Because the presumption of public interest found by the Department has been overcome  
19 as discussed above, the Department and District must prove the proposed use will not impair or  
20 be detrimental to the public interest. For at least the following reasons, the Department and  
21 District have not done that.

22 A. The Proposed Use Would Not Conserve the Highest Use of Water.

23 ORS 537.170(8)(a) requires consideration of the public interest in:

24 Conserving the highest use of the water for all purposes, including irrigation, . . .  
25 public recreation, protection of commercial and game fishing and wildlife, . . .  
26 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.

1 This requires comparing the proposed use to alternative uses. As discussed below, granting the  
2 proposed permit would not “conserve[e] the highest use of water” because, under the facts of this  
3 case, protection and restoration of fish populations in Drift Creek (and downstream waters) is  
4 more important than the District’s need for a backup irrigation supply that could better be met  
5 with less harmful alternatives.

6  
7 1. Protection and restoration of struggling fish populations in Drift Creek and  
downstream waters is a high use.

8 Drift Creek is indisputably used by Coho salmon, cutthroat trout and Pacific lamprey.  
9 (Exs. WW84 at 46, WW35 at 6.) It also is habitat for Upper Willamette River steelhead, which  
10 are listed under federal law as a threatened species. The state considers Drift Creek habitat for  
11 these fish – habitat that must be protected under state and federal laws. (Test. of Murtagh, Ex. A9  
12 at 5:34 to 6:31.) Drift Creek also may be used for rearing of Upper Willamette River Spring  
13 Chinook, another threatened species. (Test. of Murtagh, tr. at 2096:3-24; test. of Gowell, tr. at  
14 2530:4 to 2531:12.) Although the fish habitat in Drift Creek has been degraded by human  
15 activities, it could be restored to provide even better habitat. (Test. of Murtagh, Ex. A9 at 7; Test.  
16 of Gowell, tr. at 2536:7-11.) The best habitat, at least for spawning, would be inundated and/or  
17 blocked-off by the dam the District plans to build to use the proposed water right. (Test. of  
18 Gowell, tr. at 2532:14-25.)

19 The public interest analysis requires consideration of impacts to all fish species. ORS  
20 537.170(8) requires consideration of “commercial and game fishing” and “any other beneficial  
21 use to which the water may be applied for which it may have a special value to the public.”<sup>1</sup>  
22 Department rules direct consideration of “any potential effects that the proposed use may have  
23 on . . . [f]ish or wildlife” in general. OAR 690-310-0120(3)(b)(D).

24  
25 \_\_\_\_\_  
26 <sup>1</sup> For purposes of the wildlife laws, “game fish” include all trout, steelhead and salmon, without  
regard to whether they are originally native to the stream. ORS 496.009.

1           Allowing the District to store 12,000 acre feet of water behind a dam on Drift Creek from  
2 November through May would prevent it from flowing downstream. That would prevent the  
3 water from providing “peak and ecological flows” necessary to maintain habitat, because there is  
4 no condition in the permit to project those flows. (Test. of French, tr. at 246:19 to 250:18.) It also  
5 would prevent the stream from moving sediment, bedload and large woody debris downstream  
6 (because the dam would block it), which could have a number of harmful effects on fish. (Test.  
7 of Gowell; tr. at 2539:12 to 2544:5.) It also would prevent the water simply from providing  
8 habitat because, in general, more water equals more habitat. (See Test. of Caldwell, tr. at 603:15-  
9 20.) It would also would prevent the water from being used to maintain water quality, because  
10 reduced flows, even in the winter, can harm water quality. (Ex. A1 at 255 (question 2).)

11           The proposed permit also would fail to conserve water *above* the dam site for higher use.  
12 It would fill the reservoir with water that otherwise would be flowing in the stream channels and  
13 creating the varied habitat fish need – pool, riffles, spawning gravel, etc. The former streams  
14 (about two to three miles by ODFW’s count) would fill with sediment under a pool of water.  
15 (Test. of Murtagh, Ex. at 6:35-44; Ex. R171 at 29.) The proposed permit also would fail to  
16 conserve water for a higher use above the dam site by preventing fish from getting to that water.  
17 (See *id.*) Although some District witnesses said the issue wasn’t decided, the record makes clear  
18 that the District does not plan to provide fish passage at the dam and instead plans to seek a  
19 “waiver” of fish passage requirements. (Ex. A1 at 484 (cover letter with application).)

20                   2.     The proposed use is unnecessary insurance against unrealistic risks.

21           The proposal would permit the District to take up to 12,000 acre feet of water from Drift  
22 Creek from November through April 30 each year. (Ex. A1 at 133.) That’s about half the flow at  
23 50 percent exceedance, more in lower flow years. (See Ex. A1 at 528.)<sup>2</sup> Also, there would be no  
24 limit to how much the District could store in a particular month (or on a particular day for that

25 \_\_\_\_\_  
26 <sup>2</sup> This estimate is based on converting cubic feet per second to acre feet for each month in the storage season and considering that flows are higher at the mouth than at the dam site.

1 matter). (*See* Test. of French; tr. at 167:7-22.) Thus, subject only to senior rights, it could take  
2 the entire flow of the stream at times. The water that the District would take might be released  
3 down the stream during the irrigation season; or it might be piped to the District. (Test. of  
4 Bielenberg, tr. at 1777:3-12.) Either way, it would be unavailable below the dam site at least  
5 during the months when it would be stored, and forever if it was piped to the District. The water  
6 would be used to flood 340 acres behind the dam – family farms, fish and wildlife habitat and an  
7 archaeological site up to 8,000 years old. (Ex. EV71 at 399.) It would then be used for irrigation.  
8 It could also be used for “flow augmentation,” but the proposed permit would not require any  
9 amount of water to be used for that. Given that, and the character of the District, the primary  
10 purpose should be considered irrigation.

11           The farms and crops to receive water from the proposed project for irrigation are still  
12 largely unknown, but several expected recipients of the water presented detailed information on  
13 their operations. Farmers from the District who testified – presumably those with the most  
14 compelling cases – said they have existing water rights that generally allowed them to irrigate  
15 most of not all of their farmland. (Test. of Dickman, tr. at 1075:9-16; Test. of Goschie, tr. at  
16 1294:8 to 1295:25; Test. of D. Eder, tr. at 1892:1-3.) Land in the District has significant existing  
17 water rights. (Test. of Bielenberg, tr. at 177.) WaterWatch Exhibit 141 shows existing water  
18 rights associated with land in the District, just to give a general idea of the number and amounts  
19 of existing rights. (Test. of Fraser, tr. at 1497:5 to 1504:6.)<sup>3</sup>

20           The primary reason the District wants to take 12,000 acre feet of water from Drift Creek  
21 is to ease insecurity about existing water supplies getting cut off in the future. The reasons given  
22 for this insecurity were: (1) a possible need to curtail groundwater use if aquifers in the area  
23 decline; (2) regulation of surface water sources; and (3) a possibility that the state would take

24 \_\_\_\_\_  
25 <sup>3</sup> As indicated in other testimony, property that does not show a water right may be within the  
26 place of use for a water right associated with another property in the table. (Test. of Bielenberg,  
tr. at 1817:17 to 1818:7.)

1 existing water rights away. As explained below, none of these fears justifies the negative impacts  
2 of the proposed project.

3 A possible curtailment of groundwater use in the future is entirely speculative. The only  
4 evidence of groundwater rights being curtailed was for time-limited groundwater permits. The  
5 only permits with those limitations are permits in “groundwater limited areas” (not the entire  
6 District) that were not issued as of October 4, 1991. OAR 690-502-0180(3). (Test. of Dickman;  
7 tr. at 1164:6-16.) The District offered evidence of three such permits, which provided irrigation  
8 for about 240 acres. (Exs. EV44-46.) The District offered evidence of three such permits not  
9 being renewed (two of the ones just mentioned and one additional one). (Exs. EV 1, 41, 42.) The  
10 non-renewal letters all give as a reason, in addition to groundwater levels not recovering, that the  
11 permit holder failed to pursue an aquifer storage and recovery project that would have allowed  
12 continued use of the permit. (*Id.*)

13 District members suggested their other groundwater rights could be curtailed through  
14 designation of a “critical groundwater area” or through conditions in their permits that require  
15 curtailment upon specified declines in groundwater levels or injury to other users. (Test. of  
16 Iverson, tr. 886:18 to 888:19.) However, there was no evidence that a critical groundwater  
17 designation was anywhere on the horizon. Moreover, while some recently issued groundwater  
18 permits have conditions that could require curtailment, there was no evidence of the extent to  
19 which all groundwater permits have such conditions. (Test. of Dickman, tr. at 1167:16 to 1168:3  
20 (doesn’t know if other permits have such conditions).) A former Department director could only  
21 recall the conditions going into permits after the groundwater limited areas were created (1992)  
22 and agreed that not all permits had such conditions. (Test. of Ward, tr. at 571:12 to 572:10.)  
23 There was no evidence of any District member reducing groundwater use based on such  
24 conditions. Nor was there evidence of the kind of widespread groundwater declines that could  
25 trigger a critical groundwater designation or enforcement of curtailment conditons. At least some  
26



1 aquifers in the area are in fact sufficiently stable to justify issuing new groundwater permits.  
2 (Exs. WW119 at 27, WW120 at 23, WW121 at 39; Test. of Iverson, tr. 850:14 to 851:25.)

3 The District presented some evidence that members had been told to stop using surface  
4 water rights when stream flows got too low to satisfy senior rights. However, that regulation is  
5 typical of junior water rights, temporary (until stream flows increase), and varies from year to  
6 year depending on precipitation and runoff. Moreover, members who had surface water rights  
7 regulated were generally still able to farm their land. (E.g., Test. of Dickman, tr. at 1067:1 to  
8 1068:17.)

9 Finally, the District's board president said the proposed reservoir permit was needed  
10 because the state could take away existing water rights. (Test of Bielenberg, tr. at 1725:8-17.)  
11 However, he admitted the state has never threatened that, that he doesn't know how they would  
12 do it, and that he has no specific reason to think they might. (*Id.* at 1725:18 to 1726:9, 1786:22 to  
13 1787:12). He also admitted that, if it were true that the state could do that, it could also take away  
14 the requested storage right (though not the previously stored water, he thought). (Test. of  
15 Bielenberg, tr. at 1821:21 to 1822:15.) In fact, it would be extremely difficult (and unlikely) for  
16 the state to simply take away the District members' existing water rights. *See Klamath Irrigation*  
17 *Dist. v. United States*, 348 Or. 15, 227 P.3d 1145 (2010).

18 The value of the proposed use also should consider alternatives available to meet the  
19 same need at a lower cost (financially, socially and environmentally). The record in this case  
20 shows at least that the District hasn't adequately explored that. Instead, the District picked Drift  
21 Creek, after years of rejecting it in broad surveys of alternatives, very quickly after another plan  
22 fell through. (Test. of Bielenberg, tr. at 1789:10 to 1799:18.) Drift Creek went from off-the-radar  
23 to the target of District's efforts in the course of about four months. (*Id.*) The most obvious  
24 alternative the District failed to explore is simply buying water already stored in large Army  
25 Corps of Engineers reservoirs in the Willamette Basin. The District claims that water will not be  
26 available until after a lengthy "reallocation" process, but that is not the case. Approximately

1 | 20,000 acre feet are available for contract now, at a price of about \$8.00 acre foot, (Test. of  
2 | Mucken, tr. at 1458:6 to 1460:7), compared to an estimated cost of \$150.00 per acre foot for  
3 | water from the proposed Drift Creek project, (Test. of Bielenberg, tr. at 1706:6-12). The  
4 | District’s estimate apparently includes the cost of piping, but based on estimates of dam and  
5 | piping costs, (id. at 1708:18-23, 1710:4-9), about a third of the cost (\$45 per acre foot – five  
6 | times the cost of water from Corps reservoirs) is attributable to the cost of the dam the District  
7 | wants to put on Drift Creek. Piping that water from the Willamette River east of Interstate 5  
8 | appears nearly as practical as piping it from proposed reservoir site – with no fish-blocking dam,  
9 | loss of habitat, injury to other water rights, displacement of family farmers, or flooding of  
10 | archeological sites required. (Test. of Cuenca, tr. at 2307:19 to 2314:10.)

11 | B. The Proposed Use Would Be Wasteful, Uneconomic, Impracticable and  
12 | Unreasonable.

13 | The proposed use also would be contrary to the public interest in “[t]he prevention of  
14 | wasteful, uneconomic, impracticable or unreasonable use of the waters involved.” ORS  
15 | 537.170(8)(e). The proposed use would be wasteful because it would take valuable water for fish  
16 | and store it in reservoir for a highly speculative need that could be met with less impactful  
17 | alternatives. It is uneconomic because it would be “difficult” to accomplish without public  
18 | subsidies (in addition to the \$1 million of public money already spent). (Test. of Goschie, tr.  
19 | 1313:23 to 1314:4.) That says the costs exceed the benefits (as measured by ability and  
20 | willingness to pay), even from a purely financial perspective. This is reflected also in the  
21 | district’s estimate that water from the reservoir will cost approximately \$150 an acre foot (even  
22 | with all the subsidies) compared to just \$8.00 an acre foot from Army Corps of Engineers  
23 | reservoirs. (See previous section.) Considering non-financial costs and benefits, as the District’s  
24 | economist suggests one should, (Test. of Wyse, tr. at 2686:14-20), the project is even more  
25 | uneconomic because the costs include flooding or blocking over 10 miles of fish habitat,  
26 | introducing a host of flow and water quality problems below the dam, flooding an archaeological

1 site, and taking land from existing family farmers against their will. On the credit side are just  
2 District farmers continuing to do what they would likely be able to continue doing anyway.

3 For many of these same reasons, the proposed use would be unreasonable. Despite all the  
4 environmental consequences and an Integrated Water Resources Strategy discouraging it,  
5 (Section IID below), the District wants to put a new dam in the channel of a stream with  
6 migratory fish populations including at least one state-listed sensitive species and possibly two  
7 threatened species. It wants to do that on land it doesn't own and can't buy from willing sellers,  
8 dividing a community to the point that even one of the District's board members broke down on  
9 the witness stand. (Test. of D. Eder, tr. at 1892:11 to 1893:5.) All this for a questionable need  
10 based more on speculative fear than fact and without full consideration of alternatives. As noted  
11 above, the District came up with this proposal not after long, careful and deliberate analysis, but  
12 in the span of a few months as prior plans collapsed and created a quick need for a backup plan.

13 C. The Proposed Use Does Not Protect All Vested and Inchoate Rights.

14 The proposed permit is contrary ORS 537.170(8)(f) because, as discussed above (Section  
15 IC), it would allow injury to existing water rights, including in-stream water rights.

16 D. The Proposed Permit is Inconsistent with The Oregon Water Resources Strategy.

17 Oregon has an Integrated Water Resources Strategy (IWRS) adopted by the Oregon  
18 Water Resources Commission. (Ex. EV78.) Consistency with the IWRS is relevant under several  
19 factors in ORS 537.170(8), including (a), (b), (c), (e) and (g). The IWRS encourages off-channel  
20 storage because it causes "less ecological harm." (Test. of Mucken, tr. 1448:5-10.) The IWRS  
21 explains:

22 Oregon has moved away from locating dams on significant stream and river  
23 channels, in large part because of effects on fish and aquatic life that must migrate  
24 through these streams.

25 (Ex. EV78 at 128.)  
26

1 E. The Proposed Permit Does Not Adequately Consider and Address Water Quality  
2 Impacts.

3 In-channel dams also cause water quality problems by having impacts on parameters such  
4 as temperature and dissolved oxygen. Commission rules specifically direct the Department to  
5 consider water quality in its public interest review, especially where the water bodies affected are  
6 listed as “water quality limited” or subject to a “total maximum daily load.” OAR 690-310-  
7 0120(b)(C).<sup>4</sup> In its official comments on the proposed use, ODEQ said the proposed use had a  
8 “high” potential to impact water quality in Drift Creek and the Pudding River, which are water  
9 quality limited bodies and subject to a TMDL. (Ex. A1 at 255.) Increased temperature is the  
10 primary concern, but DEQ also noted that “Dissolved Oxygen is a parameter of concern in  
11 summer months.” (*Id.*) Because of these concerns, DEQ “recommend[ed] [an] assess[ment] [of]  
12 off-channel opportunities for the reservoir construction” and that noted that “[o]ff-Channel  
13 construction for Nov-Apr storage is a preferred alternative for protecting water quality.” (Ex. A1  
14 at 253; A3 at 1.) The Department did not include those recommendations in its draft permit. (Ex.  
15 A1 at 133-37.)

16 The District submitted water quality models from Portland State University that showed  
17 the reservoir could “stratify” to create cooler water at the bottom in some months and meet water  
18 quality standards for temperature using an outlet at the bottom of the reservoir. However, that  
19 modeling depended on numerous assumptions, including: (1) that the reservoir captures and  
20 holds the full 12,000 acre feet; (2) that the District uses only 8,000 acre fee for irrigation; and (3)  
21 that the reservoir will have multiple outlets from which water can be drawn. WaterWatch’s  
22 expert noted that other outcomes could produce water even at the bottom of the reservoir that is

23 \_\_\_\_\_  
24 <sup>4</sup> Department rules (including the rules discussed below) are applicable to public interest review  
25 because: (a) the general public interest criteria in ORS 537.170(8) reasonably incorporate them  
26 through terms such as “highest use,” “unreasonable use,” etc.; and/or (b) compliance with the  
rules is a criterion for the presumption of public interest under ORS 537.153(2) and the  
Legislature could not reasonably have intended to have the rules considered there but not where  
there is no presumption or the presumption is overcome.

1 too warm to meet water quality standards, even assuming the accuracy of the PSU models and  
2 their input data. (Test. of Yearsley, tr. 2395:22 to 2401:18.) Moreover, omissions in the District’s  
3 yield analysis (failures to account for sedimentation and seepage) may have significantly  
4 overstated how much water the reservoir will store, which undermines assumptions of reservoir  
5 storage volumes in the PSU modeling. (Test. of Cuenca, tr. at 2297:16 to 2307:10.) Moreover,  
6 the PSU models acknowledge that the reservoir will cause a significant water quality problem  
7 with dissolved oxygen. (Ex. EV61 at 80.)

8 The Department’s approach to water quality issues was to include a condition in the  
9 proposed permit requiring future compliance with water quality standards without any  
10 assessment of whether or how that was going to happen. (Ex. A1 at 135.) The Department  
11 simply left it to other agencies to figure that out later. Under its own rule requiring consideration  
12 of this issue, and under its general responsibility to conduct its own public interest analysis, the  
13 Department could not do that.<sup>5</sup> OAR 690-310-0120(b)(C).

14 F. The Proposed Permit Would Violate Rules to Protected Listed Fish.

15 Rules to protect listed fish prohibit new permits (in the geographic area at issue here) if  
16 they will be “detrimental to the protection or recovery of a threatened . . . species and cannot be  
17 conditioned or mitigated to avoid the detriment.” OAR 690-033-0220(1). ODFW said the  
18 proposed use would in fact be detrimental to the protection or recovery of at least Upper  
19 Willamette River steelhead, a threatened species, because it will flood and block access to  
20 habitat. (Test. of Murtagh, Ex. A9 at 7:1-10; tr. at 2103:1-23.)

21 The rules also prohibit new permits that would result in a “net loss of essential habitat”  
22 for a state-listed “sensitive” species. OAR 690-033-0330(2)(b). ODFW said the proposed use

23 \_\_\_\_\_  
24 <sup>5</sup> The proposed condition also says: “[t]he reservoir shall not impact water quality of the source  
25 streams or downstream waters detrimentally to the point that those waters no longer meet . . .  
26 water-quality standards due to reduced flows.” This condition similarly leaves it to others to  
determine how the reservoir will impact water quality and what to do about it. It also falls short  
because: (a) it only addresses water quality problems “due to reduced flows”; and (b) it suggests  
the reservoir must be the tipping point for water quality violations (v. a contributing factor).

1 | would in fact result in the loss of essential habitat of Pacific lamprey, which is a state-listed  
2 | sensitive species. (Test. of Murtagh, Ex. A9 at 6:35-42.)

3 | ODFW and the Department propose to solve these problems with permit conditions – a  
4 | “water-quality” condition, a fish-passage condition and habitat “mitigation” conditions. (Ex. A1  
5 | at 219-21 (ODFW review), *id.* at 135-36 (draft permit).) The water-quality condition is  
6 | inadequate for the reasons noted above (Section IIE). The other proposed conditions also fail to  
7 | solve the Division 33 problems for at least the following reasons:

8 | 1. If the District in fact attempts to provide fish passage, it won’t address passage  
9 | problems created by the reservoir pool. (Test. of Apke, tr. at 2350:10-18.) Moreover, fish  
10 | passage at similar projects “has not been effective.” (Ex. WW47 at 2.) In any event, it is clear,  
11 | even though District witnesses said it was undecided, that the District will not provide fish  
12 | passage at the dam but will instead seek a “waiver” of fish passage laws. (E.g., Ex. A1 at 484  
13 | (letter with application).) That means the District will have to do something else that provides a  
14 | “net benefit” to “native migratory fish.” The District apparently intends to claim it will do that by  
15 | increasing habitat for cutthroat trout with releases from its reservoir. (Test. of Caldwell, tr. at  
16 | 602:10-14.) There are many assumptions and flaws in that analysis, as shown in cross-  
17 | examination. More importantly, the record does not contain any plans to make up for the impact  
18 | on the other species, including listed species, that would be impacted by the dam with no fish  
19 | passage. Thus, there is no way to say from the record that the fish passage condition will “avoid  
20 | the detriment” to threatened fish and prevent the “net loss of essential habitat” for sensitive fish.  
21 | The Department cannot just rely on ODFW to do that on review of a waiver application because  
22 | that would impermissibly abrogate its responsibility to make the public interest determination  
23 | and conflate the standard for a fish passage waiver with the standard for mitigation under  
24 | Division 33, which are not the same.

25 | 2. The Department and ODFW did not base their decision (that mitigation could avoid  
26 | the unpermitted impacts) based on review of any existing mitigation plan. Indeed, it was clear

1 | from the record that there are none. (E.g., French Test., tr. at 214:2-25.) The proposed permit  
2 | would leave it up to ODFW and the District to work that out later, in a process that apparently  
3 | has not been used before (at least not in the last two years) and that has no requirement for public  
4 | notice or involvement. (Test. of Stevenson, tr. at 717:15 to 718:8.) This process also  
5 | impermissibly abrogates the Department’s obligation to make public interest determinations  
6 | before issuing a permit and undermines the rights of other parties to participate in those  
7 | determinations. Division 33 provides that “the applicant may propose mitigation and, if it does,  
8 | requires “[t]he Director” (of the Department, not ODFW) to “determine if the proposed use with  
9 | mitigation offsets the detriment.” OAR 690-033-0220(5). Division 33 also provides: “[n]othing  
10 | in these rules delegates the authority of the Department to make final decisions on permit  
11 | applications.” OAR 690-033-0340(1). Simply put, the Department cannot rely on another  
12 | agency’s review of unknown future plans to make findings that the proposed use will “avoid the  
13 | detriment” to threatened species and prevent a “net loss of essential habitat” for a sensitive  
14 | species. *Gould v. Deschutes County*, 216 Or. App. 150, 159-63, 171 P.3d 1017 (2007); *see also*  
15 | *Kusyk v. Oregon Water Resources Department*, 164 Or. App. 738, 741-42, 994 P.3d 798  
16 | (2000).

17 |         3. There is no basis in the record for ODFW’s determination that impacts to listed fish  
18 | could be mitigated to meet Division 33 requirements. ODFW’s Stevenson said ODFW’s current  
19 | policy is to recommend mitigation (v. denial) whenever the habitat affected is less than  
20 | “Category 1” habitat, (Test. of Stevenson, tr. at 697:19 to 698:4), but she was not involved in the  
21 | Division 33 review for this application because she was working for ODFW at the time, (Test. of  
22 | Stevenson, tr. at 503:23 to 504:2). ODFW’s Murtagh signed ODFW’s Division 33 review on  
23 | February 18, 2014. (Ex. A1 at 221.) Yet four months later, in an internal email chain discussing  
24 | fish passage issues with the project, Murtagh wrote:

25 |             Greg – can we as an agency simply “not support” this project as planned even if  
26 |             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.

1 (Ex. R171 at 29.) A day later, in the same email chain, he wrote:

2  
3 Interestingly, the Rapid Bio Assessment proposed for this stream this summer may  
4 bear out rationale for identifying upper Drift Creek as Class I. *It will certainly be  
arguable.*

5 (Id. at 25 (emphasis added).)<sup>6</sup> Murtagh also testified that Drift Creek and its tributaries above the  
6 dam site include “cool water refugia,” (Test. of Murtagh, tr. 2095:11 to 2096:18), which  
7 Stevenson said is habitat that merits Category 1 designation, (Test. of Stevenson, tr. at 698:1-24).

8 The record also fails to show compliance with Division 33 for the following additional  
9 reasons:

10  
11 4. ODFW did not adequately consider impacts on listed species below the proposed dam  
12 site, including in the Pudding and Molalla rivers downstream. Although ODFW asked for a  
13 condition to protect the in-stream water right and water quality in Drift Creek below the dam,  
14 there is no evidence it considered impacts to “peak and ecological flows,” (discussed at Test. of  
15 Stevenson, tr. at 738:18 to 739:5), or movement of sediment, bedload and woody debris,  
16 (discussed at Test. of Gowell, tr. at 2541:19 to 2544:5), for example.

17 5. ODFW’s analysis did not include potential impacts to threatened Upper Willamette  
18 River Spring Chinook, (Ex. A1 at 219), even though they are known to use the Pudding River  
19 (which would be affected by the proposed dam on Drift Creek) and could possibly still use Drift  
20 Creek, including the “cool water refugia” above the proposed dam site. (Test. of Gowell, tr. at  
21 2521:16 to 2522:1; Test. of Murtagh, tr. at 2095:22 to 2096:24.)

22 G. The Proposed Permit Does Not Adequately Consider or Address Impacts to Non-  
23 listed Fish.

24 There is no evidence the Department considered impacts to fish and wildlife that are not

25 <sup>6</sup> Although the discussion is about fish passage, they are talking about the same definition of  
26 “Category 1” habitat. (See Ex. R171 at 26 (start of rules excerpt refers to definition in habitat  
mitigation rules.)



1 already listed as sensitive, threatened or endangered (i.e., already in trouble), even though it was  
2 required to do that at least by ORS 537.170(8)(a) (referring to “game fishing” and “other  
3 beneficial use to which the water may be applied for which it may have a special value to the  
4 public”) and OAR 690-310-0120(3)(b)(D) (requiring consideration of “[f]ish or wildlife” without  
5 restriction as to listed species). *See* Test. of French, tr. at 131:10 to 131:21.<sup>7</sup> Indeed, the  
6 Department’s French “strongly suggest[ed]” that ODFW not to comment on species other than  
7 “listed” species. (Ex. A1 at 238.) ODFW followed that suggestion. (Ex. A1 at 221 (bottom);  
8 Test. of Murtag, tr. at 2138:8-10.) As a result, the proposed mitigation conditions will not require  
9 mitigation for impacts to non-listed species, (Test. of Stevenson, tr. at 700:20 to 701:12), even  
10 though the project clearly will impact them and ODFW considers them important species. (Test.  
11 of Murtagh, tr. at 2138:11 to 2139:13, 2157:23 to 2161:18.) Perhaps most significantly, Coho  
12 salmon will no longer be able to reach spawning grounds that they clearly use. (Ex. R171 at 1.)

15 H. The Proposed Permit Also Fails Under Criteria for Storage Projects.

16 Several criteria in OAR 690-410-0080(2)(g) provide additional reasons to deny the  
17 proposed permit. The proposal fails under criterion (C) (“Social”), which requires “public  
18 support” and consideration of “cultural [and] historic” impacts, because it has divided the  
19 community, (Test. of Bielenberg, tr. at 1854:25 to 1855:2; Test. of D. Eder, tr. at 1892:11 to  
20 1893:5), and flood an archeological site with remnants of human use dating back as far as 8,000  
21 years, (Test. of Fagan, tr. 1402:3-22). The proposal fails under criterion E (“Financial”) because  
22 it is not feasible without subsidies, (Test. of Goschie, tr. 1313:23 to 1314:4), and even then will  
23

24  
25 <sup>7</sup> According to the literal transcript, French later says the Department’s review did address non-  
26 listed species, but the context suggests either a mis-transcription or a misunderstanding of the  
question. (Tr. at 218:24 to 219:4.)

1 produce water only at the extraordinarily high cost of at least \$150 per acre foot, (Test. of  
2 Bielenberg, tr. at 1706:6-12), compared to \$8 per acre foot from an Army Corps of Engineers  
3 reservoir on the Willamette River, (Exs. WW116 at 4; WW157 at 1 (Item 3)). The project fails  
4 under criterion F (“Economic”) because the costs (including social and environmental costs)  
5 exceed the benefits, as discussed above. The proposal fails under criterion G (“Land use”)  
6 because the criterion requires consideration of “ownership,” and in this case much of the  
7 proposed reservoir site is still owned by third parties who don’t want to sell. The proposal fails  
8 under criterion H (“Environmental”), which requires consideration of a broad range of  
9 environmental impacts, for reasons discussed above, including flooding and blocking access to  
10 valuable habitat for many fish species and depriving downstream waters of important winter  
11 flows. The proposal fails under criterion I (“Other”) because it allows consideration of all “direct  
12 and indirect impacts,” including taking land from people against their will (even if it is “legal”).  
13 The Department’s review also was procedurally defective for failing even to consider these rules.  
14 (Test. of French, tr. at 374:11 to 375:8.)  
15

17 I. There Is Not Enough Information to Say the Proposed Use Is in the Public  
18 Interest.

19 The permit also should be denied because there is not enough information in the record to  
20 say the project is in the public interest. The District claims it still has not decided such key issues  
21 as whether it will deliver the water by pipe or stream (a critical issue for assessing fish and water  
22 quality impacts); whether it will provide fish passage or seek a waiver; how it plans to mitigate  
23 for impacts on listed fish; how outlets in the dam will be configured (also a key water quality  
24 issue); or how much water will be dedicated to flow augmentation. We also don’t know the full  
25 extent of archeological resources, (Test. of Fagan, tr. 1414:21 to 1416:15), or ODFW’s  
26

1 assessment of impacts to non-listed fish and wildlife, (Ex. A at 221). A recurring theme in the  
2 record is agency rank-and-file complaining about inadequate information to evaluate the  
3 proposal. (E.g., Ex. A1 at 253 (DEQ); Ex. WW 85; Test. of Ruther, tr. at 2497:6 to 2499:2.)

4 J. The Permit Impermissibly Delegates Public Interest Review to Other Agencies.

5 As noted with respect to specific issues above, the permit delegates the review on many  
6 public interest issues to other agencies. The issues include water quality impacts and how to address  
7 them; whether mitigation plans avoid detriment to threatened fish and net loss of essential habitat of  
8 sensitive fish; and impacts to fish and wildlife that are not already “listed” as being in danger of  
9 serious decline or extinction. This approach does not fulfill the Department’s responsibility to  
10 determine if the proposal will “impair or be detrimental to the public interest.” ORS 537.170(8) (“*the*  
11 *director or the commission*, if applicable, shall make the final determination of whether the proposed  
12 use or the proposed use as modified in the proposed final order would impair or be detrimental to the  
13 public interest” (emphasis added)); *see also Gould v. Deschutes County*, 216 Or. App. at 159-63  
14 (agency can’t delegate required determination of wildlife-impact mitigation).  
15  
16

17 K. The Permit Does Not Have Adequate Measurement Conditions.

18 Although the proposed permit would authorize the District to store water only from  
19 November through April and would require passing in-flow necessary to satisfy downstream  
20 senior water rights, it does not include measurement conditions sufficient to ensure that will  
21 happen. As a result, the permit effectively fails to include conditions critical to addressing water  
22 quality and listed fish concerns, and to avoid “injury” to downstream senior water rights. The  
23 only measuring device the permit would require is a “a staff gage” that measures the depth of the  
24 reservoir at a particular time. (Ex. A1 at 134; Test. of French, tr. at 205:10-13.) While that can be  
25 used to determine the amount of water held in storage at a particular time, it cannot be used to  
26

1 determine if the reservoir is adding to storage (i.e., capturing live flow) at a particular time.  
2 (Test. of French at 205:14 to 206:8.) The only way too that is to measure inflow and outflow.  
3 (Test. of French at 239:10-17.) The proposed permit provides only that the Department “may”  
4 require that, (Ex. A1 at 137), and there is no way to know if it will.

5 L. The Proposed Use Cannot Comply with ORS 540.350(2).

6 ORS 540.350(2) requires the District to “demonstrate that the dam includes measures that  
7 make it readily adaptable to power generation in a manner meeting statutory requirements for the  
8 safe passage of fish.” The District has not done that, even though it is required upon “seek[ing]  
9 the written approval of the Water Resources Commission[] of the site . . . for [the] dam.”  
10 Moreover, the statute requires the District to provide “passage,” not get a waiver, and the record  
11 shows the District will not be able to do that. (Exs. WW47 at 2; WW52 at 2.)  
12

13 **III. CONCLUSION**

14 For the foregoing reasons, the Office should propose an order to deny the application.<sup>8</sup>

15 DATED: August 13, 2018.

16 WATERWATCH OF OREGON

17 s/ Brian Posewitz

18 By \_\_\_\_\_

19 BRIAN J. POSEWITZ, OSB No. 91400  
20 213 SW Ash St., Suite 213  
21 Portland, OR 97204  
22 Telephone: (503) 295-4039 x 2  
23 Email: brian@waterwatch.org  
24 Attorneys for WaterWatch

25 <sup>8</sup> Given the page limitation, WaterWatch’s closing brief does not address all possible issues and  
26 arguments. WaterWatch does not waive, and expressly reserves, all other arguments and issues  
raised in its protest, list of issues and/or at hearing.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing document on the following parties/counsel:

<p><u>East Valley Water District</u></p> <p>Kirk Maag  Stoel Rives LLP  760 SW Ninth Avenue, Ste 3000  Portland, OR 97205  Phone: 503-294-9546  Fax: 503-220-2480  Email: <a href="mailto:kirk.maag@stoel.com">kirk.maag@stoel.com</a></p> <p><i>With electronic copy to Crystal Chase:</i>  <a href="mailto:crystal.chase@stoel.com">crystal.chase@stoel.com</a></p> <p><u>Protestant Joel Rue et al.</u></p> <p>Janet Neuman  Tonkon Torp LLP  888 SW Fifth Avenue, Ste 1600  Portland, OR 97204  Phone: 503-802-5722  Fax: 503-972-7422  Email: <a href="mailto:janet.neuman@tonkon.com">janet.neuman@tonkon.com</a></p>	<p><u>Oregon Water Resources Department</u></p> <p>Rachel Weisshaar  Oregon Department of Justice  1162 Court St NE  Salem, OR 97301-4096  Phone: 503-947-4541 (M, W, Th)  Email: <a href="mailto:rachel.weisshaar@state.or.us">rachel.weisshaar@state.or.us</a></p> <p>Renee Moulun  Oregon Department of Justice  1162 Court Street NE  Salem, OR 97301-4096  Phone: 503-947-4576 (M, W, Th)  503.551.9582 (Tu, F)  Email: <a href="mailto:renee.m.moulun@state.or.us">renee.m.moulun@state.or.us</a></p> <p>Patricia McCarty  Oregon Water Resources Department  725 Summer St NE, Ste A  Salem, OR 97301-4096  Phone: 503-986-0820  Email: <a href="mailto:patricia.e.mccarty@state.or.us">patricia.e.mccarty@state.or.us</a></p>
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By electronic mail.

DATED: August 13, 2018.

WATERWATCH OF OREGON

s/ Brian Posewitz

By \_\_\_\_\_  
BRIAN J. POSEWITZ, OSB No. 914002  
213 SW Ash St. Ste. 208  
Portland, OR 97204  
Telephone: (503) 295-4039 x 2  
Email: [brian@waterwatch.org](mailto:brian@waterwatch.org)  
Attorneys for Protestant WaterWatch of Oregon

CERTIFICATE OF SERVICE

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039

WaterWatch Exceptions, Attachment 11

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

IN THE MATTER OF WATER RIGHT APPLICATION OF:  
EAST VALLEY WATER DISTRICT

) CASE NO. 2017-OWRD-00002  
)  
) Agency Case R-87871  
)  
) Assigned to ALJ Denise McGorin  
)  
) **WATERWATCH'S RESPONSE TO**  
) **POST-HEARING BRIEFS OF**  
) **OREGON WATER RESOURCES**  
) **DEPARTMENT AND EAST VALLEY**  
) **WATER DISTRICT**  
)

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## I. INTRODUCTION

The Department and District (collectively “Proponents”) generally argue that the presumption criteria are met and that protestants haven’t shown the proposed permit would otherwise impair or be detrimental to the public interest. However, as discussed below and in WaterWatch’s opening brief, the proposed permit clearly fails to meet the presumption criteria. Proponents have also failed to carry their burden to show the proposed permit would not impair or be detrimental to the public interest under the factors in ORS 537.170(8).

## II. DISCUSSION

Proponents incorrectly claim they carried their burden to establish a presumption of public interest and incorrectly claim that Protestants failed to overcome any presumption that was established. We discuss these and other issues below. In addition, because it is a prevalent theme of Proponents’ briefs, we first address the extent to which the issues in contested case are limited to the issues raised in the protests. We also address the burden of proof, because it informs the discussion on the issues.

### A. Protestants Are Not Limited to Issues Raised in Their Protests.

Proponents claim issues raised in the protests, strictly construed, are the only issues protestants can raise in contested case. While the Court<sup>1</sup> generally agreed at hearing that the protests limit the issues (although perhaps more broadly construed), we address the subject again here because, with all due respect to the Court, we believe it would be an error of law to limit issues at hearing to just those specifically raised in the protests.

Proponents rely on ORS 537.153(5). While the first sentence of this statute (the only one the Department quoted to the Court at hearing) requires protestants to “raise all reasonably ascertainable issues and submit all reasonably available arguments . . . by the close of the protest

<sup>1</sup> For simplicity we refer to the Office of Administrative Hearing and the Administrative Law Judge as “the Court.”

period,” the second sentence of the statute (which the Department did not quote to the Court at hearing) says: “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.” There are two important things about this second sentence. First, it refers to failure to raise an issue “in a protest *or in a hearing.*”<sup>2</sup> This clearly says that an issue can be raised “in a hearing,” even if it was not raised in a protest (because the conjunction is an “or,” not an “and”). Second, it specifies the consequence of not raising an issue – to preclude “judicial review.” This shows the statute is not about limiting issues at contested case. It is about preserving issues for judicial review; and it encourages, with its “or,” raising issues at hearing even if they were not raised in the protests – so the Department has a chance to address the issues first at hearing.<sup>3</sup>

The law applicable to contested cases (as opposed to judicial review) allows the judge to identify issues in addition to those in a protest. ORS 537.170(1); OAR 690-002-0075. In the interests of ensuring a complete and fair hearing, the Court should allow the parties to raise any relevant issue, subject only to unfair surprise or prejudice. The Court should keep in mind that the protests were due 45 days after the PFO was issued. ORS 537.153(5). That was more than four years ago in this case. Since then, the parties have engaged in extensive discovery and further investigation, including production of more than 50,000 pages of documents. Much of the testimony at hearing was expected, but much of it was not. Some of the evidence related to things that occurred after the protests were filed, such as review of Willamette River reservoir

<sup>2</sup> Unless otherwise noted, all emphasis is supplied.

<sup>3</sup> In response to WaterWatch’s motion to amend its issues list, the Department claimed the language allowing an issue to be raised “in a hearing” “applies to applicants who do not file a protest, but who do request a contested case hearing.” (Department response, p. 3.) However, the statute is talking only about people “submitting a protest or a request for standing [which is what you file to support a proposed order].” ORS 537.170(5). It does not even hint at the idea of a person requesting a hearing without filing a protest, which the statutory scheme as a whole does not contemplate or allow. See ORS 537.153(5)-(8). *Lentz v. State by and through its Water Resources Department*, 154 Or. App. 217, 220-23, 962 P.2d 41 (1998).

allocations and completion of an updated Integrated Water Resources Strategy. The process is bound to reveal issues and arguments not initially identified. Protestants also are entitled to respond to evidence and arguments by Proponents, such as evidence on the purported need and lack of alternatives, and on archeological remains found near the reservoir footprint. Given the potential for time, discovery and further analysis to reveal new issues, it does not make sense to limit the parties to only the issues specifically raised in protests filed four years ago under a tight time constraint. Doing that would make a substantial portion of the contested case process meaningless and put an unreasonable burden on protestants in the 45 days between issuance of a PFO and filing of a protest.

WaterWatch believes it adequately raised in its protest all issues it has raised in this contested case, including the issue the Court declined to allow WaterWatch to raise (whether the application adequately described “measures to . . . assure reasonably efficient water use,” which is required for mitigation under Division 33 rules. OAR 690-033-0220(3), (5)). However, to the extent any such issues were not, the Court should nevertheless consider them. At the very least, the Court should take a broad view of the issues raised in the protests. The Court also should permit protestants to offer evidence and argue on any issue reasonably raised by evidence from Proponents (as it generally did at hearing).

B. The Department and The District Have the Burden to Prove Any Presumption and, If It Is Overcome, The Ultimate Burden.

As stated in Judge Barber’s ruling of March 20, 2018 (p. 2, para. 1), Proponents have the burden to prove any presumption of public interest. If the presumption is 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.” (Id. at para. 3.) What the ruling doesn’t say is what happens if the presumption is not established. (We do not believe the second part of the quoted language was meant to assign a

burden other than overcoming the presumption if it was established.<sup>4</sup>) In either case, the burden should be on Proponents because, as proponents of the action, they have the ultimate burden to create a record that shows the proposed permit is supported by substantial evidence and the law. *See* ORS 537.170(6) (requiring director to make finding, which must be supported by substantial evidence).

C. Proponents Failed to Show Compliance with Division 33.

Proponents claim conditions in the proposed permit ensure compliance with the Department's Division 33 rules. However, there is not a preponderance of evidence in the record to support that claim, and there is significant evidence to the contrary. The burden on this issue is clearly with Proponents, because compliance with commission rules is a requirement for any presumption of public interest. ORS 537.153(2).

1. Proponents' evidence is not sufficient.

The undisputed evidence is that the proposed permit would be detrimental to the protection or recovery of at least one threatened species (Upper Willamette River Steelhead) and result in loss of essential habitat of at least one sensitive species (Pacific lamprey). (Test. of Murtagh, Ex. A9 at 6:35 to 7:10.) Thus, to show compliance with Division 33, Proponents must show that conditions in the permit would "avoid the detriment" to steelhead and prevent a "net loss of essential habitat" for lamprey. OAR 690-033-0220(1); OAR 690-033-0330(2), (3).

The Department and District are attempting to do that by relying on conditions that primarily require: (a) compliance with water quality standards; (b) compliance with fish passage laws (either by providing passage or obtaining a waiver, which requires doing something else that provides a "net benefit" to "native migratory fish"); and (c) "mitigation" to make up for loss of fish habitat and impacts to riparian areas.

The problem with these conditions is that they all rely entirely on unknown future plans

<sup>4</sup> To the extent the ruling was meant to make that statement, we request reconsideration on grounds it is incorrect.

and actions by the District and other agencies. There is no evidence of how the District plans to address water quality issues, including a significant problem with dissolved oxygen, (Ex. EV61 at 80), a “parameter of concern in summer months,” (Ex. A3 at 1). With respect to elimination of fish passage,<sup>5</sup> there was some evidence that mitigation might include efforts to increase rearing capacity for cutthroat trout, (Test. of Caldwell, Ex. EV94), but there is no evidence of how impacts to other native migratory fish (including coho salmon, steelhead and lamprey) would be mitigated.<sup>6</sup> The ODFW employee who would review the plans for that has not seen any. (Test. of Apke, tr. at 2358:4-11.) There was no evidence of plans to mitigate for loss of habitat and riparian areas either. Department employees who recommended approving the application have not seen any. (Test. of French, tr. at 214:2-25; test. of Eastman, tr. at 372:25 to 373:10.) The ODFW employee who would oversee preparation and approval of habitat mitigation plans does not have “any idea” what the plans would be. (Test. of Stevenson, tr. at 699:15 to 700:5.)

Without any specific plans for complying with water quality standards or mitigating for impacts to fish passage, habitat and riparian areas, there is no way to say whether conditions in the proposed permit would “avoid” the detriment to steelhead or prevent a “net loss of essential habitat” for lamprey. *Gould v. Deschutes County*, 216 Or. App. 150, 159-63, 171 P.3d 1017 (2007) (county could not find wildlife impacts from resort development would be completely mitigated based on condition requiring developer to prepare a mitigation plan to be approved

<sup>5</sup> The District claimed a decision hasn’t been made on whether the dam would provide fish passage, but it is clear from the documents that it wouldn’t. (*E.g.*, exs. WW47 at 2 (para. 2) (Crew reported to board “[t]here are no other reservoirs in Oregon that operate as proposed at the Drift Creek site, and ODFW has required fish passage at similar projects but the passage has not been effective”); WW52 at 2 (para. 5) (“Crew stressed again that no reservoir in the state addresses passage with the type of draw-down anticipated at the Drift Creek site”); A1 at 484 (cover letter with application says District will pursue a waiver of fish passage requirement, meaning no passage will be provided).

<sup>6</sup> Coho salmon are a “native migratory fish” that requires fish passage even if they are descendants of hatchery fish. OAR 635-412-0005(32); OAR 635-007-0501(36).

later by other agencies). Thus, there is not sufficient evidence in the record to show the proposed use would comply with Division 33 rules.

2. Proponents cannot rely on future reviews by other agencies.

Proponents cannot simply rely on future review by other agencies to support a finding that mitigation would make up for the impacts on listed fish. There are several reasons for this:

First, the law requires the applicant to provide mitigation plans, *and for the Department to make a determination based on those plans*, before a permit is granted. OAR 690-033-0220(5) (“the applicant may propose mitigation” and, if it does, “[t]he Director [of the Department, not ODFW] shall determine if the proposed use with mitigation offsets the detriment”). Another section makes clear that “[n]othing in these rules delegates the authority of the Department to make final decisions on permit applications.” OAR 690-033-0340(1). *See also, Kusyk v. Oregon Water Resources Department*, 164 Or. App. 738, 741-42, 994 P.3d 798 (2000) (referring to trial court finding that a condition in a water right transfer that provided for regulation if injury occurred, instead of determining whether it would occur, was “a condition which effectively abrogates [the Department’s] responsibility for making a decision”).

Second, general concepts of substantial evidence do not permit such bald reliance on future plans subject to future review and determinations by third parties. *Gould*, 216 Or. App. at 159-63. In the land-use context at least, reliance on conditions to meet an applicable standard requires at least a finding that compliance with the conditions is “likely and reasonably certain to succeed.” *Id.* at 162-63. That finding cannot be made based just on conditions requiring an applicant to get a plan approved by other agencies later. *Id.*

Third, even assuming the Department could rely entirely on other agencies to ensure its Division 33 requirements are met, it could not do that on this record because there is no evidence that the processes of the other agencies are reliable for that purpose. There was no evidence to show that water quality regulation by DEQ would prevent any impact detrimental to the recovery of threatened steelhead or loss of essential habitat of lamprey. There was no evidence that

ODFW's habitat mitigation program would do that either. The ODFW employee who would oversee the process has never processed a mitigation plan before. (Test. of Stevenson, tr. at 717:16-23.) Moreover, unlike the process for a water appropriation permit, there is no public notice or chance to comment on a proposed mitigation plan. (Test. of Stevenson, tr. at 718:21 to 719:8.) *See Gould*, 216 Or. App. at 163 (setting aside county decision that relied on future mitigation plan to be determined by future conferral with other agencies in part because it "robs interested persons of the participatory rights allowed by the county ordinance").

Fourth, the legal standards the other agencies would apply are not the same as the standards in Division 33. ODFW would review the habitat mitigation plans for "no net loss" of habitat. (Test. of Stevenson, tr. at 510:3-10.) That is consistent with the standard in Division 33 for sensitive species (no net loss of essential habitat), but it is not the same as the Division 33 standard for threatened species, which requires conditions or mitigation to "avoid the detriment," which may be from factors other than loss of habitat. Similarly, review of a fish passage waiver would require the District to provide a "net benefit" to all "native migratory fish" relative to a dam with fish passage. (Test. of Apke, tr. at 2352:15-21.) There is no evidence that applying that standard would necessarily "avoid the detriment" to threatened steelhead or eliminate the "net loss of essential habitat" for Pacific lamprey relative to no dam and no reservoir. For example, the District could provide a "net benefit" to native migratory fish collectively without avoiding all detriment to steelhead or all loss of habitat for lamprey. Indeed, the focus of mitigation for loss of fish passage has so far been on cutthroat trout. (Test. of Caldwell, Ex. EV94.) Also for example, the fish passage laws do not require the owner of a dam to address the fish passage problems created not by the dam but by the reservoir pool behind the dam, even though that could have a detrimental impact on the protection or recovery of threatened fish. (Test. of Apke, tr. at 2350:2-20.) Moreover, both the mitigation policy and fish passage rules require mitigation only for the *current* condition of the lost habitat. (Test. of Stevenson, tr. at 727:2-21; Test. of Apke, tr. at 2355:24 to 2356:10.) They write off habitat that could be added with restoration,

even though Murtagh and other witnesses noted significant opportunities for restoration on Upper Drift Creek, (test. of Murtagh, Ex. A9 at 4:21-24, 5:7-9; test. of Gowell, tr. at 2534:19 to 2536:11; test. of Rankin, Ex. R1 at 7 (para. 18)). Loss of potential habitat would be a detriment to the protection and recovery of threatened fish, but the District would not be required to mitigate for that loss. The policies and rules also fail to account for the fact that what gets done for “mitigation” may be something that would have been done anyway (as a restoration project of the watershed council, for example). (*See* Test. of Stevenson, tr. at 721:16 to 722:22.) Thus, instead of having *both* Drift Creek and a mitigation project, the public would end up with just the mitigation project. The idea that “mitigation” made up for the loss would be an illusion. (Yes, that is speculative, but so is the so-called “mitigation” under the proposed permit.)

3. Project impacts and mitigation are too speculative to evaluate.

The lack of information about both the project and the District’s plans for implementing proposed conditions make it too speculative to say the proposed conditions would “avoid the detriment” to threatened fish and prevent “net loss of essential habitat” for sensitive fish. Even the Department admits: “[u]ntil operational details and mitigation plans are resolved in other permitting processes, it is, frankly, impossible to predict the project's precise impacts on winter steelhead habitat.” (Department Brief at 19.) When WaterWatch tried to ask its expert witness at hearing if “the impacts of the proposed project in this case on listed fish can be fully mitigated,” the Department objected on grounds the question was too speculative and the Court agreed, saying “[w]e don't know exactly what the mitigation -- mitigating conditions are going to be in this case.” (Tr. at 2554:2 to 2555:8.) Similarly, when WaterWatch asked how ODFW would apply its habitat mitigation policies to a mitigation proposal submitted by the District, the District objected on grounds it was too speculative because “no application for mitigation has been submitted at this point,” and the Court said the District’s lawyer “ha[d] a good point,” noting the ODFW employee who would oversee review of the mitigation plan “hasn't dealt with mitigation during her two years there.” (Tr. at 724:8 to 725:17.) If these questions are too



speculative even for an administrative hearing, they cannot at the same time be *not* too speculative for a finding that the mitigation plans would prevent detriment to threatened fish and loss of essential habitat for sensitive fish.

4. There is no basis for ODFW's determination that conditions can fully mitigate the impacts.

The record also fails to support ODFW's determination that it is even possible to mitigate impacts of the proposed use to meet Division 33 criteria. There is no evidence of any method used, or basis, for that determination. ODFW's Stevenson said current policy, which is the same as former policy, is for ODFW to recommend approval with conditions (i.e., mitigation instead of denial) unless the habitat involved is "Category 1" habitat. (Test. of Stevenson, tr. 698:1-4.) But that is just a policy. There's no evidence the policy correctly distinguishes between impacts that can be fully mitigated and impacts that cannot. Among other things, the policy fails to distinguish among different species and the status of their populations, fails to distinguish based on the amount of habit impacted, and fails to distinguish based on types of impacts (reducing flow v. completely blocking access, for example). Also telling is that ODFW apparently has never found any aquatic habitat it considers worth saving (Category 1). (Test. of Stevenson, tr. at 699:6-14.)

On that point, there is not even any evidence on how ODFW determined that the habitat at issue in this case is *not* Category 1. Stevenson said ODFW made a determination that the habitat was not Category 1, but she didn't explain how (if she knew), and she wasn't around when it happened, (test. of Stevenson, tr. at 497:23 to 498:1; (ex. A1 at 221 (review dated 2/18/14)), making her information hearsay with limited reliability.

5. Evidence shows permit conditions won't be effective.

There also is significant affirmative evidence that the impacts to listed fish cannot be mitigated. (WaterWatch Closing Brief at 15 (No. 3); test. of Gowell, tr. at 2574:18 to 2575:13 (impacts on the whole would be negative, even with mitigation).) Indeed, four months after

signing ODFW's Division 33 review recommending conditions instead of denial, Murtagh wrote to a colleague: "Based 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." (Ex. R171 at 29.) He also said at hearing that the habitat includes "cool water refugia," (Test. of Murtagh, tr. 2095:11 to 2096:18), which Stevenson said is habitat that may merit Category 1 designation, (Test. of Stevenson, tr. at 698:1-24).

6. The proposed permit does not incorporate the advice of ODFW and DEQ.

Proponents claim the proposed permit incorporates the advice of ODFW and DEQ, as required by OAR 690-033-0340(2). In fact, it does not. The Department admits the draft permit doesn't reflect all the advice of ODFW. (Test. of French, Ex. A8 at 8:3-20.) That alone is enough to take this case outside the presumption of public interest, even though the Department apparently intends to fix the problem in its final order (because not even the PFO, much less the application) proposes a use that complies with commission rules. The draft permit also fails to include DEQ's advice to "assess off-channel opportunities for the reservoir construction" and to make "[o]ff-[c]hannel construction for Nov-Apr storage [the] preferred alternative for protecting water quality." (Ex. A1 at 252.) The Department referenced these comments in its PFO but failed to reflect them in the draft permit. The permit, not the PFO, would determine what the District does and doesn't do. Thus, the advice needs to be incorporated in the permit.

7. The permit has no conditions to protect peak and ecological flows.

As noted in WaterWatch's prior brief, the draft permit does nothing to protect "peak and ecological" flows below the dam, even though they are considered important to protecting and recovering fish populations. (WaterWatch Brief at 3:11-14, 6:1-10.) Proponents claim Division 33 does not require protecting peak and ecological flows. However, it does that by implication. It requires avoiding detrimental impacts to threatened species and net loss of essential habitat of sensitive species. OAR 690-033-0220(1); OAR 690-033-0330(2), (3). Peak and ecological flows

provide and create habitat and are therefore important to those goals. (*See exs.* WW29 at 2-3; EV59 at 29.) ODFW’s advice called for protecting such flows from any storage in October. (Ex. A1 at 219, para. b51a.) There is no logical reason, or science on peak and ecological flows, to suggest these flows only matter in October. (*See exs.* WW2; EV 59.) ODFW’s advice, and the draft permit, should have addressed peak and ecological flow needs of listed fish during the proposed storage period, but both failed to do that. This is another reason the draft permit would violate Division 33.

8. Conclusion on Division 33.

For the above reasons, contrary to the arguments of Proponents, the PFO and proposed permit do not comply with Division 33 rules. This is fatal to the application because it means the presumption of public interest is not satisfied and because there is, instead, a presumption that the application would impair or be detrimental to the public interest (at least as to threatened species). OAR 690-033-0220(1).

D. The Proposed Use Fails to Meet Other Presumption Criteria, Too

The “proposed use” fails to meet other presumption criteria, too, as explained in our first brief at pages 1-4 and the pages referenced therein.

1. The Department’s analysis of water availability is incomplete.

WaterWatch’s prior brief (at 3:1-14) explained why the water availability presumption factor is not satisfied. The Department claims WaterWatch did not raise that issue in its protest, but it did. (Ex. P1 at 35.)

2. The proposed use would injure existing water rights.

Proponents agree at least two water rights could be injured: the reservoir right (Ex. WW4) and the in-stream water right in Drift Creek (Ex. WW8). (Department Brief at 9.)

Proponents claim the first won’t be injured because the PFO requires the District to show it owns or has an easement to all land to be flooded. (*Id.*) However, the water right is now appurtenant to land owned by Bruce Jaquet, who has no intention of selling. (Test. of Jaquet, Ex.

R7 at 2 (para. 9), 5 (para. 18).) Thus, if the District gets the permit it seeks here, it would likely condemn Jaquet's land and eliminate his water right that way. Under any ordinary meaning of the term, that would be an "injury," even if it is "legal." The District claims the water right is subject to forfeiture, but until that is in fact proven, it remains a valid right. *See* ORS 540.610. (Test. of Jaquet, Ex. R7 at 2 (para. 9).)

Proponents claim the in-stream right won't be injured because the proposed permit would authorize the District to store water only when "sufficient water is available to satisfy all prior rights." (District Brief at 9-10.) However, as discussed below and in our prior brief (19:17 to 20:5), the record fails to show that this condition can or will be met. That is in part because the record fails to show how or even whether the District would be able to determine if it is storing water at a given time and how or even whether the Department could enforce the requirements to store water only at certain times. More importantly, the in-stream right would be defeated above the dam because the place of use (i.e., the stream) would be buried under 20 feet of water. The District and the Department say, "no problem," because the certificate for the in-stream water right says flows should be measured "at the lower end of the stream reach." However, the certificate also says the measurement is "to protect necessary flows throughout the reach." (Ex. WW8 (para 5).) Some interpret that to require flow numbers to be met only at the mouth, but that makes no sense if flows must be maintained "throughout the reach." A more logical interpretation is that the measurements at the "lower end" are to ensure the specified flows "throughout," taking into account such things as inflows below the upper end of the reach (i.e., requiring more than the minimums at the lower end to "protect" the minimum flows "throughout the reach"). A former Department employee said there is disagreement about which interpretation is correct. (Test. of Sussman, tr. at 1194:18 to 1195:16.)

3. The proposed use would violate other commission rules.

Issuing the proposed permit also would violate other commission rules, as explained in WaterWatch's prior brief (pp. 12-18). For example, it would violate OAR 690-310-

0120(3)(b)(D) because the Department failed to consider impacts to “unlisted” fish and wildlife and include conditions to protect those species. (WaterWatch Brief at 16:23 to 17:14.)

Proponents appear to have no explanation for that. Also for example, the proposed permit fails under several criteria in OAR 690-410-0080(2)(g) for evaluating storage projects, and the Department violated the Commission’s rules by not considering those factors. (Test. of French, tr. at 374:11 to 375:8.)

The Department claims the reservoir criteria, along with other rules in divisions 400 and 410, apply only to “high-level or strategic actions, in contrast to a more granular decision, such as whether or not to issue a particular water right permit.” By their terms, however, the rules apply to “[a]ll Water Resources Commission and Department activities, *including but not limited to*” the specified activities. OAR 690-400-0000. There is no basis for distinguishing permitting, which clearly is an “activity” of the Department. In our view, a permit to put a 70-foot dam on a stream used by threatened steelhead and to flood land owned by other people with 12,000 acre feet of water is not a “granular decision.”

The rules themselves also contradict the Department’s position in this case. For example, OAR 690-410-0070(2)(a) directs that water “shall be allocated to new out of stream uses only during months . . . when allocations will not contribute to over-appropriation.” “Allocate” is defined to include “issuing new water rights.” OAR 690-400-0010(1). Similarly, the standard for determining “over-appropriated” says it “shall apply to water availability determinations for *permit applications* submitted after July 17, 1992” *Id.* at (11)(b).

The Department’s own documents also contradict the Department’s position in this case. The Department’s manual on “Determining Surface Water Availability in Oregon” says: “[t]he water availability calculation,” which clearly is used in permitting decisions, “is based on the definition of over-appropriation for surface water found in the Department’s Water Allocation Policy (OAR 690-400-010 (11)(a)(A)).”

Even if these rules did not apply to permitting (which they clearly do), they would at least

qualify as “water resources policy formulated under ORS 536.295 to 536.350,” which is a public interest factor under 537.170(8)(g). *See* OAR 690-410-0080, statutory/other authority, statutes/other implemented (including ORS 536.300 in statutory authority/statutes implemented). For that reason, too, the Department was required to consider them. At a minimum, the Department’s failure to consider the application under all criteria in Division 310 and 410 should require rejection of the PFO for procedural reasons, a re-evaluation of the application under all applicable criteria, and a new PFO.

4. Any presumption is overcome by consideration of other public interest factors.

Even if a presumption of public interest were somehow established, it would be overcome by consideration of one or more public interest factor in ORS 537.170(8), as discussed below and in WaterWatch’s prior brief (at 4-18). The District claims (at 13): “Protestants cannot meet their burden simply by showing that a single public interest factor tips in Protestants’ favor,” but that is not correct. The statutes make clear that impairment of *any* of the specified public interests meets protestants burden to overcome the presumption of public interest claimed here. *See* ORS 537.153(2)(b)(A) & (B) (referring to “the” public interest affected).

E. Analysis Beyond the Presumption Shows the Proposed Use Would Impair or Be Detrimental to The Public Interest.

Division 33 and other issues discussed above preclude the proposed permit without further analysis. To the extent this case nevertheless moves to the broad public interest analysis under ORS 537.170(8), that analysis also shows that the proposed permit should be denied. (WaterWatch Brief, Section II.)

Proponents claim protestants ignore conditions in the permit, but we do not. As discussed above, most of the “conditions” are not conditions at all. They are requirements to come up with conditions later by working with other agencies in the future in different processes with different legal standards. Because these “conditions” are so vague, illusory, speculative and imprecise, they cannot provide a basis to say the dramatically negative effects of the proposed use – some

of which are certain despite uncertainties of the proposal, including a dam without fish passage, inundation of habitat and displacement of family farmers – would be offset with “mitigation.”

The District’s brief attempts to make the public interest inquiry sound like a narrow one, without any “ ‘balancing’ of equities and benefits,” (District Brief at 2), but its claim is contradicted by the statutes, which do in fact call for a broad inquiry based on open-ended factors such as “highest use” and “prevention of wasteful, uneconomic, impracticable or unreasonable use.” ORS 537.170(8). The inquiry becomes broader still with introduction of the factors in OAR 690-310-0120 and OAR 690-410-0080. In short, the review *does* require a broad balancing of equities and benefits.

The broad analysis shows that the costs of the proposal, including the impacts to fish, farmers and cultural resources, far outweigh the benefits, especially considering the alternatives. This is particularly true where one of the fish species involved, Upper Willamette River steelhead, is threatened and on a “declining trend,” (Test. of Murtagh, tr. 2070:17-23), and where the “mitigation,” even if it otherwise succeeds, would make up only for the loss of habitat in its present condition and eliminate opportunities for restoration. (*E.g.*, Test. of Murtagh, Ex. A9 at 4:21-23, 5:7-9, 7:4-8.)

1. The proposed use is not the “highest” use

As discussed in our prior brief (Section IIA), the proposed use is not the “highest” use of the water involved. Proponents claim the Willamette Basin Plan says otherwise by “classifying” the basin for storage from November 1 through June 30 of each year. OAR 690-502-0040(4). In fact, that provision simply says when storage can be permitted. Specific provisions classify “the tributaries of the Pudding River” for many uses from November 1 through April 30, including for “fish life, wildlife, recreation, pollution abatement, wetland enhancement and public instream uses.” OAR 690-502-0120(5). Thus, the basin plans do not say storage is the “highest” use.

2. The proposed use would not create “maximum economic development.”

The District claims the proposed use would result in “[t]he maximum economic development of the waters involved.” (District Brief at 14-15.) The district presented some evidence that the water would produce higher crop values if stored and delivered to the District than used by existing farmers. However, as their expert acknowledged, “economic development” requires consideration of costs as well as benefits. If the costs of something exceed the benefits, it does not increase economic welfare. (Test. of Wyse, tr. at 2657:25 to 2658:4.) It makes the world worse off. It can’t be called economic “development.” In this case, all the District’s expert measured was one possible benefit of the proposed use to one group of people – more revenue to particular farmers. She did not do a full cost-benefit analysis.

In fact, the project would cost at least \$60 million, (test. of Goschie, tr. at 1290:10 to 1291:15), and would be “difficult” to build without public subsidies, (*Id.* at 1313:23 to 1314:4), in addition to the roughly \$1 million in public subsidies already received, (test. of Goschie, tr. at 1313:20-22). That shows the financial costs alone are likely to exceed the benefits, because otherwise the added increment of revenue to District farmers would be sufficient to pay the costs of the project. In addition, the project would impose numerous non-financial costs, such as dividing a stream by eliminating 7-10 miles of stream habitat from the range of anadromous fish; and dividing a community by taking land from farmers against their will.

3. Water availability does not favor the proposal.

The District also claims support from consideration of “[t]he amount of waters available for appropriation for beneficial use.” ORS 537.170(8)(d). In fact, the Department’s analysis overestimates the water available and fails to consider in-stream needs besides those already protected with in-stream water rights. (WaterWatch Brief at 3:1-14.) Even accepting the Department’s estimate of water availability, the proposed use would take essentially all the water available during the season of use, (test. of Goschie, tr. 1312:12-18), leaving nothing for any



other use.

4. The proposed use would be wasteful, uneconomic, impracticable and unreasonable.

The proposed permit also would result in “wasteful, uneconomic, impracticable or unreasonable use of the waters involved.” ORS 537.170(8)(e). (WaterWatch Brief, Section IIB). The Department claims taking land from family farmers against their will is not relevant to this factor because it does not “relate to the *use* of water.” (Department Brief at 16-17 (emphasis in original).) In fact, the expected condemnation of some farmers’ land, and the displacement of a least one resident, would all be directly related to the “use” of water – the water would be “used” to flood land.

The District claims the proposed use is “practicable” under this factor, “based on the testimony of Mr. Crew . . . and various technical reports in the record.” However, the lack of detail and commitment in the District’s plans, and the numerous conditions to be worked out later, make it impossible to say that. The District still doesn’t know how the dam would be configured, how the water would be delivered, how much it would all cost, or what it would need to do to meet water quality standards, get a fish passage waiver, and mitigate for all the negative impacts on fish and wildlife. Thus, the proposed use cannot be called “practicable,” especially considering its costs (financial and otherwise) relative to an alternative the District has not adequately explored – water from existing Army Corps of Engineers reservoirs delivered in the Willamette River near Wilsonville/Canby, which is nearly as close to the District as the proposed reservoir, at a cost way below what the District expects to charge for water from this project, (WaterWatch Brief 9:25 to 10:10 and citations therein).<sup>7</sup>

5. The proposed use would violate state water resources policy.

The proposed use also fails under ORS 537.180(7)(g) – “[t]he state water resources

<sup>7</sup> The failure of the District to adequately investigate this alternative is apparent in the absence of any record by the Corps relating to the District. (Ex. WW157 at 1 (last para.))

policy formulated under ORS 536.295 to 536.350 and [groundwater statutes].” The policies and how they would be violated are discussed elsewhere and include the rules for public interest review in OAR 690-310-0120, (Section D3 above; WaterWatch Brief at 5, 12, 13 and 17), rules for protecting in-stream flows in water availability analysis, (WaterWatch Brief at 3:8-14), and the storage criteria in OAR 690-410-0080, (Section D3; WaterWatch Brief, Section IIIH).

The proposed use also would be inconsistent with the state’s Integrated Water Resources Strategy. (WaterWatch Brief, Section IID.) The Department (at 13) and District (at 6) claim the proposed use is not inconsistent with the IWRS and that it doesn’t matter anyway. In saying it is not inconsistent, they suggest the strategy only mentions “off-channel storage” as one of many options. They ignore that examples for the “Recommended Action” include investigation only for “off-channel” sites. The only reason to add that modifier was to express a policy choice against new on-channel projects. Proponents also ignore the testimony of the lead author of the strategy, who agreed that the strategy does “express a preference for off-channel storage with respect to above-ground storage project[s],” “[p]rimarily because of less ecological harm.” (Test. of Mucken, tr. at 1448:2-10.) Finally, they ignore the following passage in the section on “Improve Access to Built Storage”:

Oregon has moved away from locating dams on significant stream and river channels, in large part because of effects on fish and aquatic life that must migrate through these streams.

(Ex. EV78 at 128 (para. 7).)

Proponents claim the IWRS doesn’t matter because it’s not a “rule of the commission.” Even if it’s not a rule, it’s at least a “water resources policy formulated under ORS 536.295 to 536.350.” ORS 536.310 provides: “[i]n formulating the water resources program under ORS 536.300(2), the Water Resources Commission shall take into consideration the purposes and declarations enumerated in ORS 536.220.” The IWRS It was adopted by the commission “according to the parameters set forth in ORS 536.220.” (Ex. EV78 at 6 (para. 4).) To the extent

it's not even a "policy" under ORS 537.170(8), the IWRS at least informs the other public interest factors, such as whether the use of water is "reasonable." Proponents can't just ignore such a significant document in Oregon's water policy.

Moreover, the District claims to be a "public corporation." (District Brief at 7 n. 2.) If so, it is subject to ORS 536.360, which provides:

In the exercise of any power, duty or privilege affecting the water resources of this state, every state agency or public corporation of this state shall give due regard to the statements of the Water Resources Commission and shall conform thereto. No exercise of any such power, duty or privilege by any such state agency or public corporation which would tend to derogate from or interfere with the state water resources policy shall be lawful.

If for no other reason, the District is required under this provision to honor the IWRS, which it is not doing by continuing to pursue its destructive in-channel storage project.

F. The Proposed Permit Lacks Adequate Measurement Conditions.

Proponents claim measurement conditions are adequate because, in theory, they only authorize storage during the storage season and when downstream senior rights are satisfied (and otherwise require passing all live flow). The issue raised in WaterWatch's protest is whether those conditions can be enforced. As discussed in WaterWatch's prior brief, the proposed measurement conditions would not ensure that. (WaterWatch Brief, Section IIK.) Moreover, there is no evidence in the record, given the numerous sources of "inflow" (including tributaries and rain) that it would even be possible to determine if and when the reservoir is storing water, undermining a key assumption on several issues, including protection of in-stream water rights.

### III. CONCLUSION

In this day, when the state is spending \$10 million a year to remove fish passage barriers, (test. of Apke, tr. at 2357:10-20), it makes no sense to issue a permit for a new dam in a fish-bearing stream – particularly not when the stream is habitat for a steelhead population clinging to survival; particularly not where the reason would be just to store a backup supply of water for farmers who already have water rights and just want to ease speculative fears of regulation and

irrational fears of the government taking away their water rights; particularly not when there is a low-impact alternative; and particularly not when the applicant doesn't own the land where the reservoir would go and the people who do own that land don't want the reservoir on it.

In addition to not making sense, it would not be legal. It would not comply with the Division 33 rules because there is not sufficient evidence that mitigation can or will make up for the impacts on listed fish. It would not comply with policies of the commission because it is contrary to express statements in the IWRS discouraging in-channel dams. It also would impair or be detrimental to the public interest under the broad factors in ORS 537.170(8) because the costs vastly exceed the benefits, particularly when the District members have existing water rights and better alternatives to fulfill any unmet future needs.

For these and other reasons, the Court should recommend an order to deny the application.<sup>8</sup>

DATED: September 12, 2018.

WATERWATCH OF OREGON

s/ Brian Posewitz

By

\_\_\_\_\_  
BRIAN J. POSEWITZ, OSB No. 91400  
213 SW Ash St., Suite 213  
Portland, OR 97204  
Telephone: (503) 295-4039 x 2  
Email: brian@waterwatch.org  
Attorneys for WaterWatch

<sup>8</sup> Given the page limitation, WaterWatch's closing and closing response briefs do not address all possible issues and arguments. WaterWatch does not waive any, and expressly reserves all, other arguments and issues raised in its protest, list of issues and/or at hearing.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing document on the following parties/counsel:

<p><u>East Valley Water District</u></p> <p>Kirk Maag Stoel Rives LLP 760 SW Ninth Avenue, Ste 3000 Portland, OR 97205 Phone: 503-294-9546 Fax: 503-220-2480 Email: <a href="mailto:kirk.maag@stoel.com">kirk.maag@stoel.com</a></p> <p><i>With electronic copy to Crystal Chase:</i> <a href="mailto:crystal.chase@stoel.com">crystal.chase@stoel.com</a></p> <p><u>Protestant Joel Rue et al.</u></p> <p>Janet Neuman Tonkon Torp LLP 888 SW Fifth Avenue, Ste 1600 Portland, OR 97204 Phone: 503-802-5722 Fax: 503-972-7422 Email: <a href="mailto:janet.neuman@tonkon.com">janet.neuman@tonkon.com</a></p>	<p><u>Oregon Water Resources Department</u></p> <p>Rachel Weisshaar Oregon Department of Justice 1162 Court St NE Salem, OR 97301-4096 Phone: 503-947-4541 (M, W, Th) Email: <a href="mailto:rachel.weisshaar@state.or.us">rachel.weisshaar@state.or.us</a></p> <p>Renee Moulun Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 Phone: 503-947-4576 (M, W, Th) 503.551.9582 (Tu, F) Email: <a href="mailto:renee.m.moulun@state.or.us">renee.m.moulun@state.or.us</a></p> <p>Patricia McCarty Oregon Water Resources Department 725 Summer St NE, Ste A Salem, OR 97301-4096 Phone: 503-986-0820 Email: <a href="mailto:patricia.e.mccarty@state.or.us">patricia.e.mccarty@state.or.us</a></p>
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By electronic mail.

DATED: September 12, 2018.

WATERWATCH OF OREGON

s/ Brian Posewitz  
By \_\_\_\_\_  
BRIAN J. POSEWITZ, OSB No. 914002  
213 SW Ash St. Ste. 208  
Portland, OR 97204  
Telephone: (503) 295-4039 x 2  
Email: [brian@waterwatch.org](mailto:brian@waterwatch.org)  
Attorneys for Protestant WaterWatch of Oregon

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

IN THE MATTER OF WATER RIGHT ) Agency Case R-87871 )  
APPLICATION OF: ) OAH Case No. 2017-OWRD-00002 )  
EAST VALLEY WATER DISTRICT ) (ALJ Denise McGorrin)  
 ) **WATERWATCH’S EXCEPTIONS TO**  
 ) **PROPOSED ORDER**  
 )

WaterWatch of Oregon (“WaterWatch”) submits the following exceptions to the proposed order, dated February 25, 2019, by Administrative Law Judge Denise McGorrin.

**GENERAL EXCEPTIONS**

1. The ALJ incorrectly determined (findings and conclusions) that the proposed permit is entitled to a presumption of public interest. First, the ALJ incorrectly applied the presumption criteria to the proposed use as modified by the Oregon Water Resources Department (“Department”) in both the proposed final order (“PFO”), and even in proposed changes to the PFO. The ALJ should have evaluated the presumption criteria against the use as proposed in the application. Had she done that, the proposed use clearly would not have been entitled to a presumption of public interest. Among other reasons, the application proposed to store water outside the permitted storage season and during a month when, even according to the Department, water is not available. The use as proposed in the application also fails to satisfy rules of the Oregon Water Resources Commission (“Commission”), including the Division 33 rules to protect sensitive, threatened and endangered species. Even if the ALJ correctly evaluated the presumption criteria against the use as modified by the PFO, and as modified by additional changes proposed by the Department in the contested

1 case, the ALJ incorrectly determined that the presumption criteria were satisfied, for reasons  
2 discussed below and in WaterWatch’s closing briefs and protest. In particular, as discussed  
3 further below, the ALJ incorrectly concluded that evidence in the record is sufficient to show  
4 that the application will comply with Division 33 rules. *See also*, WaterWatch Closing Brief,  
5 pp. 1-4 (incorporated by reference).  
6

7           2.       In determining that the proposed use was entitled to a presumption of public  
8 interest, the AJL incorrectly determined (findings and conclusions) that the proposed use  
9 would comply with rules of the Water Resources Commission, including Division 33 rules.  
10 In fact, evidence in the record is not sufficient to support that determination and in fact shows  
11 the opposite. Undisputed evidence shows unequivocally that the proposed use would be  
12 “detrimental to the protection or recovery of a threatened . . . species” (Upper Willamette  
13 River Winter Steelhead) and would result in a “net loss of essential habitat” for a state-listed  
14 “sensitive” species. OAR 690-033-0220(1); 690-033-0330(2)(b). Thus, by rule, the proposed  
15 use would impair or be detrimental to the public interest unless evidence shows the impacts  
16 will be mitigated to “avoid the detriment” and avoid any “net loss of essential habitat.” *Id.*  
17 The evidence was not sufficient to make that finding because there was no evidence of any  
18 mitigation plan for impacts on listed species. There was no evidence even that the expected  
19 detriment and loss of essential habitat are things that can be avoided with mitigation. There  
20 was evidence only of a policy that assumes mitigation under OAR 635 Chapter 415 can solve  
21 Division 33 problems unless the habitat is “Category 1” habitat. But that there was no  
22 evidence that that policy in fact works. There was no evidence of any mitigation plan that  
23 was successful in avoiding Division 33 impacts. Indeed, the person at the Department of Fish  
24 and Wildlife who would oversee development and implementation of a plan has never done  
25  
26

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039

1 that before. (Test. of Stevenson, tr. at 717:16-23.) *See also* WaterWatch Closing Brief, pp. 13-16  
2 (incorporated by reference) and WaterWatch’s Response to Post-Hearing Briefs, pp. 4-11  
3 (incorporated by reference).

4           3.       The ALJ incorrectly failed to determine (findings and conclusions) that proposed  
5 use would impair or be detrimental to the public interest. The proposed permit would impair or  
6 be detrimental to the public interest because it would allow the East Valley Water District  
7 (“District”) to build a dam and reservoir in the channel of Drift Creek without fish passage. This  
8 would impair or be detrimental to the public interest for reasons including:

9  
10           a.       It would flood and block passage to approximately 11 miles of fish  
11 habitat used by fish including winter steelhead listed as threatened under the federal Endangered  
12 Species Act, Pacific lamprey listed as sensitive under state law, Coho salmon and cutthroat trout.

13           b.       It would flood a potentially significant archeological site with evidence of  
14 human use dating back 8,000 years.

15           c.       It would take property from landowners against their will (through  
16 condemnation).

17           d.       It would displace a family from their longtime home against their will  
18 (through condemnation).

19  
20 *See also*, WaterWatch Closing Brief, pp. 4-20 (incorporated by reference).

21           4.       The ALJ also should have determined (findings and conclusions) that, even if the  
22 record does not show the proposed use *would* impair or be detrimental to the public interest, there  
23 is not enough information in the record to say the proposed use would *not* impair or be  
24 detrimental to the public interest. That is because the District and its consultants claimed not to  
25 have decided such key project details as whether water from the reservoir will be delivered by  
26



1 pipe or stream channel (which will make a significant difference in ecological impacts including  
2 water quality); the location of outlook works on the dam (which also will significantly affect  
3 downstream water quality); plans for mitigating impacts to fish and wildlife habitat; plans for  
4 mitigating impacts to riparian areas; and plans for mitigating impacts from loss of fish passage.<sup>1</sup>  
5 Thus, there was not sufficient information to determine if the proposed use would impair or be  
6 detrimental to the public interest. Moreover, issuing a permit with so little information would  
7 deprive protestants of their process rights under the permitting statutes and rules – process rights  
8 that allow them to have a proposed permit denied by showing it would impair or be detrimental  
9 to the public interest. By proceeding with permitting without key project details, protestants were  
10 given worse than a moving target. They were given no target. *See also*, WaterWatch Closing  
11 Brief, pp. 18-19 (incorporated by reference).  
12

13           5.       The ALJ incorrectly determined (finding and conclusions) that the Department  
14 could rely on future reviews and determinations by other agencies to determine the proposed use  
15 meets criteria for issuing a water storage permit. For example, the proposed order would  
16 determine that Division 33 criteria are met because the proposed permit would require approval  
17 of a habitat mitigation plan by the Department of Fish and Wildlife. As discussed in  
18 WaterWatch’s closing briefs, that would amount to an abrogation of responsibility by the  
19 Department. (WaterWatch Closing Brief, p. 19; WaterWatch Response Brief, pp. 6-8.) Deferring  
20 to other agencies on key determinations also deprives protestants of their process rights under the  
21 water permitting statutes and rules because at least some of the other reviews (the habitat  
22 mitigation review by Fish and Wildlife, for example) do not provide the same opportunities for  
23 public comment, protests and contested cases.  
24

25 \_\_\_\_\_  
26 <sup>1</sup> The District also claimed to have not decided if the dam would have fish passage, but evidence  
in the record made clear the District does not plan to provide passage.

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**EXCEPTIONS TO EVIDENTIARY RULINGS**

6. The ALJ incorrectly excluded testimony from WaterWatch’s expert witness, based on an objection it was too speculative, on whether impacts of the project on listed fish could be mitigated. (Test. of Gowell, tr. 2554:2 to 2555:8.) The PFO and the proposed order both depend on a finding that impacts on listed fish can be mitigated, and the cases presented by the Department and the District asserted that they could. WaterWatch agrees that, given the lack of specificity on the proposed use and mitigation for environmental impacts, there is not sufficient evidence to say that mitigation will avoid detrimental impacts to listed steelhead and prevent a net loss of essential habitat for Pacific lamprey. However, given that the Department (in its PFO) and the ALJ (in her proposed order) decided otherwise, the ALJ could not in fairness deny WaterWatch the opportunity to present opposing evidence.

7. The ALJ incorrect precluded WaterWatch from fully exploring the origin and/or potential origin of Coho salmon using Drift Creek. (Tr. 2139-45.) The proposed order then claims WaterWatch failed to submit sufficient evidence on that issue.

**SPECIFIC AND ADDITIONAL EXCEPTIONS**

8. WaterWatch attaches a markup of the proposed order, incorporated herein by reference, to show its specific and additional exceptions to the proposed order.

**REQUESTED ADDITIONAL FINDINGS AND CONCLUSIONS**

9. WaterWatch requests additional findings and conclusions as reasonably indicated in the attached specific and additional exceptions, and as reasonably indicated above.

10. WaterWatch also requests the following additional findings:

1 a. Approximately 20,000 acre feet of water for irrigation is available in  
2 existing U.S. Army Corps of Engineers reservoirs in the Willamette Basin, at a price of about  
3 \$8.00 acre foot, without any constraints based on ESA-listed fish, and could be delivered to  
4 any point of appropriation along the mainstem Willamette River. (Test. of Mucken, tr. 1458-  
5 60.)  
6

7 b. The distance from the Willamette River just west of Canby to the town  
8 of Monitor is about 13.5 miles, which is within a few miles of the distance that the District  
9 may pipe water from the proposed reservoir to the District. (Test. of Cuenca, tr. 2308-2309;  
10 Ex. R59, p. 2.)

11 c. A pipe from the Willamette River just west of Canby to the town of  
12 Monitor would cross land similar to the land to be crossed by a pipeline from the District's  
13 proposed storage project to the District. (Test. of Cuenca, tr. 2309-13.)  
14

15 d. The degree of "lift" required to pump water through a pipeline from  
16 the Willamette River near Canby to the town of Monitor would be comparable to that  
17 encountered by pumping projects in other irrigation Districts. (Test. of Cuenca, tr. 2313.)

18 11. WaterWatch also requests a finding that the State of Oregon presently spends  
19 about \$10,000,000 per year to remove fish passage barriers from streams in Oregon. (Test. of  
20 Apke, tr. 2357.)  
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12. WaterWatch also requests a finding that areas of the District outside the groundwater limited areas, and non-basalt aquifers within the groundwater limited areas, are not closed to new permits to use groundwater. (Test. of Iverson, tr. 858.)

DATED: March 27, 2019.

WATERWATCH OF OREGON

s/ Brian Posewitz  
By \_\_\_\_\_  
BRIAN J. POSEWITZ, OSB No. 91400  
213 SW Ash St., Suite 213  
Portland, OR 97204  
Telephone: (503) 295-4039 x 2  
Email: brian@waterwatch.org  
Attorneys for WaterWatch

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served the foregoing document on the following parties/counsel:

<u>East Valley Water District</u>	<u>Oregon Water Resources Department</u>
Kirk Maag Stoel Rives LLP 760 SW Ninth Avenue, Ste 3000 Portland, OR 97205 Phone: 503-294-9546 Fax: 503-220-2480 Email: kirk.maag@stoel.com	Renee Moulun (email only) Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 Phone: 503-947-4576 (M, W, Th) 503.551.9582 (Tu, F) Email: renee.m.moulun@state.or.us
<i>With electronic copy to Crystal Chase:</i> crystal.chase@stoel.com	Patricia McCarty (email only) Oregon Water Resources Department 725 Summer St NE, Ste A Salem, OR 97301-4096 Phone: 503-986-0820 Email: patricia.e.mccarty@state.or.us
<u>Protestant Joel Rue et al.</u>  Janet Neuman Tonkon Torp LLP 888 SW Fifth Avenue, Ste 1600 Portland, OR 97204 Phone: 503-802-5722 Fax: 503-972-7422 Email: janet.neuman@tonkon.com	Dwight French (email only) Oregon Water Resources Department 725 Summer St NE, Ste A Salem, OR 97301-4096 Phone: 503-986-0820 Email: : Dwight.W.French@oregon.gov
Rachel Weisshaar Oregon Department of Justice 1162 Court St NE Salem, OR 97301-4096 Phone: 503-947-4541 (M, W, Th); 971-673-1951 (T, F) Email: rachel.weisshaar@state.or.us	

CERTIFICATE OF SERVICE

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039

WaterWatch Exceptions, Attachment 13

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By electronic mail and regular mail except as noted above.

DATED: March 27, 2019.

WATERWATCH OF OREGON

s/ Brian Posewitz

By \_\_\_\_\_

BRIAN J. POSEWITZ, OSB No. 914002

213 SW Ash St. Ste. 208

Portland, OR 97204

Telephone: (503) 295-4039 x 2

Email: brian@waterwatch.org

Attorneys for Protestant WaterWatch of Oregon

CERTIFICATE OF SERVICE

**WaterWatch of Oregon**

213 SW Ash St, Suite 213

Portland, Oregon 97204

503-295-4039

WaterWatch Exceptions, Attachment 13

Attachment D  
Page 206 of 300

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

<b>IN THE MATTER OF WATER</b>	)	<b>PROPOSED ORDER</b>
<b>RIGHT APPLICATION R-87871 IN</b>	)	
<b>THE NAME OF EAST VALLEY</b>	)	
<b>WATER DISTRICT,</b>	)	OAH No. 2017-OWRD-00002
<i>Proponent/Applicant</i>	)	Agency Case No. R-87871
	)	
<b>JOEL RUE, ET AL., AND</b>	)	
<b>WATERWATCH OF OREGON,</b>	)	
<b>INC.,</b>	)	
<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 WaterWatch of Oregon, Inc. (WaterWatch) filed protests to the PFO on September 8, 2014.<sup>1</sup>

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.

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.

<sup>1</sup> The Rue Protestants and WaterWatch are referred to jointly as “the Protestants.”

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

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

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

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

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

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

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

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

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

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



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

**Commented [A1]:** Exception: "review" should be "judicial review."

**Commented [A2]:** Exception: This is an incorrect conclusion of law. ORS 537.170 does give the ALJ authority to consider, and may require consideration of, issues not raised in the protest..

**Commented [A3]:** Exception: Raising division 33 rules generally was sufficient to raise the issue regarding conservation measures.

**Commented [A4]:** Exception: WaterWatch did not make this contention. WaterWatch contended only that the admitted need to change the proposed order was among the reasons the application does not qualify for a presumption of public interest.

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

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

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

### ISSUES

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

<sup>4</sup> 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.

**Commented [A5]:** Exception: WaterWatch also took direct testimony from David Bielenberg, Lucius Caldwell, David DeKrey, Mark Dickman, Jeana Eastman, John Fagan, Dwight French, Nancy Gramlich, Bruce Jaquet, Mike McCord, Alyssa Mucken, Tom Murtagh, Anna Rankin, Lauren Reese, Joel Rue, Anna Pakenham Stevenson and Bolyvong Tanovan. WaterWatch therefore "called" these witnesses even though, pursuant to pre-trial orders, WaterWatch's questions on direct may have come after they were questioned first by another party.

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.

**Commented [A6]:** Exception: WaterWatch objected to the document in A1 starting at p. 356. (Tr. at 39:23 to 40:12.) WaterWatch also objected to A3, pages 7-22. (Tr. 40:17-21.)

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.

**Commented [A7]:** Exception: Exhibit 29 was not admitted.

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.

**Commented [A8]:** Exception: The duplication was apparent on the face of the documents and EVWD counsel admitted that. (Tr. 46:11-13.)

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.

**Commented [A9]:** Exception: WaterWatch also objected on the same grounds to exhibits EV21 and 22. (Tr. 44:21.) The objection to EV49 was only to reports starting at pages 15 and 32, respectively. (Tr. 44:21 to 45:12.) The objection to EV 71 was only to the report starting at page 404. (Tr. 45:13-22.)

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

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

**Commented [A10]:** Exception: WaterWatch did not withdraw the exhibits. WaterWatch did not offer them.

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

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

### Excluded Written Direct Testimony

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

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

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

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

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

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

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

**Commented [A11]:** Exception: At the beginning of the hearing, WaterWatch moved to exclude the testimony of Ms. Faucera if she did not appear to testify and if the record was not held open for that purpose, which it was not. (Tr. 41:14-24.) WaterWatch did not move to exclude the written direct testimony of David Doerfler.

**Commented [A12]:** Exception: WaterWatch moved to exclude only if Ms. Faucera did not testify during scheduled or continued hearing. No party asked for a continuance to present her in-person testimony later in order to admit the written direct. (Tr. 2479:7 to 2485:2.)

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

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

### **Written Testimony Evidentiary Rulings**

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

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

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

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

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

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

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

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

## **FINDINGS OF FACT**

### **Overview**

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

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

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

### **East Valley Water District**

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

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

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

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

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

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

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

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

10. Oregon's Water Resources Commission has identified land within the District as having significant groundwater challenges. The boundaries overlie most of two Groundwater Limited Areas<sup>6</sup>: Mt. Angel and Glad Tidings.<sup>7</sup> When water levels drop to a certain level in wells in these areas, the Department imposes water use restrictions. (Tr. at 536 and 537; Decl. of Goschie at 3; Ex. A1 at 356.)

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

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

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

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

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

<sup>7</sup> 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.)

**Commented [A13]:** Exception: This sentence suggests the entire District is in a groundwater limited area. The record in fact shows that only portions of the District are in groundwater limited areas. (Tr. 2007:18-25.)

**Commented [A14]:** Exception: This suggests all permits in the groundwater limited areas have drawdown conditions. The record does not show that.

**Commented [A15]:** Exception: The citations for this sentence in fact refer to "drawdown conditions" in some groundwater permits, not to requirements of the groundwater limited designations. The sentence also suggests the Department has in fact imposed water use restrictions on wells in the groundwater limited areas. No evidence in the record supports that statement. (See also Tr. 774:20 to 775:2.) Also, Ex. A1 at 356 is not substantial evidence to support this paragraph because the face of it shows it was prepared by an unidentified person, not available for cross-examination, who was working for a District consultant.

**Commented [A16]:** Exception: The record shows this to be the case only for summer months. (Tr. 537.)

**Commented [A17]:** Exception: In the cited testimony, Mr. Ward said he did not recall the specifics as to the extent there was a need for more water to support existing agriculture as opposed to new or expanded agriculture.

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

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

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

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

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

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

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

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

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

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



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.)

**Commented [A18]:** Exception: The figure on the cited page is \$1.1 million.

### Representative EVWD Members

**Commented [A19]:** Exception: No evidence in the record established that these individuals were "Representative" of all members.

#### Dickman Farms

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

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

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

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

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

**Commented [A20]:** Exception: The record does not establish the number of acres as 600. The witness said "I'm going to guess 600." This should be reflected in the finding.

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.<sup>9</sup> Well water in that area has declined, on average, by 10 feet in the last 20 years. (Tr. at 1038 and 1041.)

**Commented [A21]:** Exception: The record does not show the groundwater permit was "conditional." Also, the record does not show that the land will not be provided water by EVWD, which witnesses said would provide water outside the district, (test. of Goshie, tr. 1262:23 to 1263:6), only that Dickman doesn't "expect" water to be delivered "that far north." The footnote also should cite to the actual permit documents, Ex. WW119, and Dickman's other testimony, (Test. of Dickman, tr. 1136:8 to 1137:0), for a specific location of the land to be irrigated (two miles northwest of Molalla). The footnote also should reflect that, in April 2018, CMS Land, LLC, an entity owned by Mark Dickman's brother's family, obtained a permit for groundwater to irrigate land about a mile west of Molalla from an existing well used by Dickman Farms. (Ex. WW 121; test. of Dickman, tr. 1137:10 to 1139:4.)

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

**Commented [A22]:** Exception: This finding should reflect that these permits were time limited only because they were issued in groundwater limited areas after the areas were so designated and that Dickman Farms had been using the water previously without permits. (Tr. 1164:6 to 1165:5.) This finding also should reflect that the permits could have been renewed if Dickman Farms implemented an aquifer storage and recovery project to a specified operational level, which Dickman Farms declined to do. (Exs. EV1, EV42; Tr. 1165:6 to 1167:6.) This finding also should note that non-renewal of the time-limited permits did not result in farmland taken out of production. (Tr. 1167:10-15.)

<sup>9</sup> 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.<sup>10</sup> However, four or five of Dickman’s surface water rights are regulated back each year. (Tr. at 1041-1042, and 1063-1066.)

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

32. 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.<sup>11</sup> (Tr. at 1032-1034.)

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

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

35. In drought years, Dickman Farms has considered a temporary transfer, which allows water rights for one acre to be used on a different acre. However, it can take months for the 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.)

**Commented [A23]:** Exception: Dickman’s testimony does not establish a basis for him to know how many water rights are on Butte Creek or how many are regulated in any given year. Although the testimony was not objected to, it does not constitute substantial evidence, without foundation, for this finding.

**Commented [A24]:** Exception: The cited testimony does not give July as the month Dickman Farms was “regulated off.”

**Commented [A25]:** Exception: The statement in the declaration at page 3 refers to “limitations on surface water and groundwater availability” generally, not specifically to the regulation of surface water. (Dickman Decl., p. 3.) This finding also should note that having water for the acreage served by those water rights would not have affected the crops planted. (Test. of Dickman, tr. 1037:5-18)

**Commented [A26]:** Exception: There is no foundation for these statements by the witness. While there was no objection, the lack of foundation means the testimony is not sufficient to support the finding.

**Commented [A27]:** Exceptions: The testimony says Dickman Farms filed for a temporary transfer in 2018 (“this year”), not only that it “considered” doing that. Also, the testimony does not support the finding that it “can take months” for approval of a temporary transfer. Also, this finding should reflect the witnesses’ statement that “if the paperwork [for a temporary transfer] is in,” the watermaster will “consider it done,” (test. of Dickman, tr. 1036:20 to 1037:4), making the time to formal approval irrelevant.

**Commented [A28]:** Exception: This mischaracterizes the witness’ testimony by attempting to state it in reverse. What he said was: “if the East Valley Water District does not come up with a new supply of water, and assuming that the Water Resources Department does not somehow start regulating off existing groundwater rights, [Dickman Farms] would . . . be able to continue farming on all of [its] farm property in the district.” Also, the testimony does not say anything about supplemental water rights. The ALJ is inferring that, which may or may not be accurate.

**Commented [A29]:** Exceptions: The cited portions of the record do not support any sentence of this finding. The statement about competition is made generally, not with respect to the Willamette Valley, and it’s just what the witness “think[s].” There is no foundation for it so it cannot be sufficient evidence. The other two sentences are simply not in the cited portions of the record.

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

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

## Goschie Farms

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

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

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

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

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

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

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

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

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

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

**Commented [A30]:** Exception: The "would" in the second sentence of this finding, and the "will" in the last, indicates Goschie Farms does not now have a reliable water supply or invest in establishing a hop crop. The cited testimony does not support that and instead indicates Goschie Farms is already making the investments and has what it considers a reliable water supply.

**Commented [A31]:** Exceptions: The cited testimony says that Goschie Farms "generally" irrigates its hops from June to August.

**Commented [A32]:** Exception: The cited testimony says Goschie Farms used to sell all of its hops "mainly" to large brewers but "went away from the larger brewers to the smaller ones" and that "[m]ost are within the state of Oregon" but "[s]ome are scattered across the country." This finding suggests Goschie sells only to craft brewer or microbrewers, which the testimony does not establish."

**Commented [A33]:** Exception: This finding should include, per the testimony, that employment averages about 50.

**Commented [A34]:** Exception: The cited testimony does not say if his groundwater rights are in a groundwater limited area and the finding inaccurately suggests that groundwater rights in groundwater limited areas (and not just the time limited permits issued after the areas were created) have been curtailed, which the record does not support.

**Commented [A35]:** Exception: This statement is not supported by the cited portion of the record.

**Commented [A36]:** Exception: The language of this finding inaccurately paraphrases the cited testimony. The cited testimony says Goschie Farms has never not been able to farm any of its farmed acreage, not just that it has been able to "continue farming," which could mean only on some of its acreage. The testimony also says Goschie Farms has "limited [itself] to crops that don't require irrigation," not that it has "been forced" to do anything. Nor does the testimony describe – as "high-value" or otherwise – the crops that could have been grown instead of irrigated crops.

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.)

**Commented [A37]:** Exception: The certification is on five of six farms. (Test. of Goschie, tr. 1300:5-12.)

**Commented [A38]:** Exception: The testimony does not identify conservation as the motive. It just says they use drip irrigation.

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.)

**Commented [A39]:** Exception: The cited testimony doesn't say anything about a "supplemental" source. It says only that a "lack of water" would "lower" "those property values."

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.)

**Commented [A40]:** Exception: Mr. Goschie said he believed District members were "concerned about the viability of their own operations because they don't have a reliable water supply in all cases." He did not refer to a "supplemental" water supply or say he thought it was "critical" for District members.

### 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.)

**Commented [A41]:** Exception: In the cited testimony, Mr. Bielenberg said he does not know if any of his land is in the Mt. Angel Groundwater Limited Area. This finding also should note that the estimates irrigating 200-300 acres. (Later says 200, tr. 1738:3.)

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.)

**Commented [A42]:** Exception: The cited testimony says he "operate[s] or manage[s]" an additional 150 acres; it doesn't say he leases it.

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.)

**Commented [A43]:** Exception: This finding should note that the five-year groundwater permit was time-limited because it was in a groundwater limited area and issued after the designation was adopted.

**Commented [A44]:** Exception: This finding suggests the Department has the referenced authority, which is not supported by any evidence in the record and is incorrect as a legal matter. This finding should at least be revised to add "that he believes the Department has" before "the authority" (and take out "of the Department").

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.)

**Commented [A45]:** Exception: He said that, "[i]f there were less water available within East Valley Water District," it would "probably invoke more nonirrigated crops, less -- less net income -- less total income, less inputs bought, fewer employees." The finding is therefore inaccurate in two respects. First, it describes a response to having "access to irrigation water" "limited," which could refer to access to water not currently available, which was not what Mr. Bielenberg was asked about. He was asked about having "less" water than the District has now. The finding should at least be revised to reflect that. Second, his entire response was preceded by "probably," which is too speculative to support this finding. In the alternative, the word "probably" should be included.

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

### Triangle Farms

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

**Commented [A46]:** Exception: This finding assumes things that are not in the testimony and suggest, contrary to the testimony, that Triangle Farms owns the 2,500 acres. It should say "He farms through an entity called Triangle Farms, which operates on about 2,500 acres."

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.)

**Commented [A47]:** Exception: This finding does not accurately reflect the testimony. The testimony was that operation employees 17 full-time employees and that it had just under 50 total employees total (presumably including part-time and/or seasons employees) in June 2018.

**Commented [A48]:** Exception: The question asked if the grass seed is "mostly" not irrigated.

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.)

**Commented [A49]:** Exception: This finding should include that the applications were filed in the early 2000s to irrigate two pieces of property, one of 40 acres and one of 100 acres, and that evidence in the record does not show whether the land is within the District or would be served by the proposed project. (Test. of Loe, tr. 1566:23 to 1568:14.) Also, the context of the finding suggests the applications were denied due to groundwater availability but that fact is not reflected in the record and it could well have been for other reasons, including potential for substantial interference with surface water.

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 been 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.)

**Commented [A50]:** Exception: This finding should reflect that Triangle Farms has not been regulated off "until the last couple years recently." (Test. of Loe, tr. 1522:3-8.)

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.)

**Commented [A51]:** Exception: This suggests they went looking each year. In the cited transcript, the question was "Do you have alternate sources of water for the water that's been shut off?" The answer was, "In some cases yes; in some no." Thus, the finding should say Triangle Farms has alternate sources for some of the water that was regulated off.

### Duane Eder

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

**Commented [A52]:** Exception: The cited testimony does not establish that the referenced regulation "restricted Triangle Farms' ability to select crop." Asked if Triangle anticipated regulation "in terms for your planting," Loe said, "[y]ou try to by planting short-season crops if you can, but it doesn't always work." That does not establish what Triangle in fact did. Also, Loe did not testify that crop yields were in fact limited. He only agreed that "shorter season crops" "can" affect yield. (Test. of Loe, tr. 1554:23 to 1555:2.)

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.)

**Commented [A53]:** Exception: None of this is supported by the cited portions of the record. The testimony does not establish that Triangle would change its crops if it had more water. It does not say "water shortages compel a shorter growing season" or that the growing season for Triangle crops have ever been shortened. It does not say Triangle's water supply is "unreliable" (a fact assumed in the last sentence) or that a different or more supply would result in a longer or more productive growing season for Triangle.

**Commented [A54]:** Transcript says two-thirds.

**Commented [A55]:** Exception: We read the transcript to say that, in some years, he waters "half" the grass seed (by acreage) and say separate that the grass seed that is watered is sometimes watered only in the fall.

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.)

**Commented [A56]:** Exception: Mischaracterizes the testimony. He said it would "shift the crops" he grows if he were "unable to irrigate," not if his water rights were "restricted."

### 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.)

**Commented [A57]:** Exception: "Majority" sounds like just over half. In fact, 530 of the 650 acres (more than 80 percent) is grass seed. (Test. of R. Eder, tr. 1911:1-13.)

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.)

**Commented [A58]:** Exception: 400-500 is the total acres irrigated, which includes acres of irrigated grass seed. This finding also is inconsistent with the above testimony that 530 of 650 acres (leaving 120 acres) is grass seed.

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.)

**Commented [A59]:** Exceptions: This finding sounds more precise than the witness indicated. Mr. Eder said his estimate was "going to be a guess" and that it "probably" was in that range. Also, "acres of Chuck Eder Farms" is imprecise. In context, this should refer to "acres farmed by" Chuck Eder Farms.

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.)

**Commented [A60]:** Exception: This finding should reflect the witness said it was "a rough guess."

### 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.)

**Commented [A61]:** Exception: This finding is incomplete. It should include that Ryan Eder cannot remember what years the regulation occurred or whether it was all in one year or more than one year. (Test. of R Eder, tr. 1932:11-14.) The finding also should reflect that the regulation did not affect Eder Farms at all because they had finished watering for the year or weren't using the regulated water right that year. (Test. of R. Eder, tr. 1917:2-11.)

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.)

**Commented [A62]:** Exception: This finding is vague and imprecise. In light of the testimony that Eder Farms was not irrigating with any of the water rights regulated at the time they were regulated, this finding should say that the acreage appurtenant to the water rights regulated was less than 10 percent of Chuck Eder Farms' farmed acres. (Test. of R. Eder, tr. 1949:6 to 1950:1.)

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

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

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

### **Individual Protestants<sup>13</sup>**

#### **Joel Rue**

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

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

78. For the last 25 years, the Rues' specialty has been grass seed. The Rues sell their grass seed to companies in the Willamette Valley which, in turn, sell the seed to retailers such as Lowe's and Home Depot.<sup>14</sup> Ultimately, the grass seed is used on golf courses, parks, athletic fields, and lawns in the United States and abroad. The Rues also grow peas, oats, wheat, sugar 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

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

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

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

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

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

**Bruce Jaquet**

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

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

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

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

88. Mr. Jaquet and Ms. Mucken's family have seen wildlife on the Schact farm. Mr. Jaquet has seen fish in Fox Creek, a tributary of Drift Creek that crosses the farm. (Decl. of Jaquet at 4.) Ms. Mucken has also seen objects that she believes to be spear points<sup>15</sup> along Drift Creek. (Mucken Decl. at 1 and 3; Tr. at 1437-1438.)<sup>16</sup>

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

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

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

**Commented [A63]:** Exception: This footnote unreasonably and inaccurately minimizes the archaeological investigation to date and the significance of its findings. AIN did a survey known as a "pedestrian survey," which is "the first step in the archaeological resource inventory process." (Ex. R49, p. 7.) The survey consisted of on-the-ground surveys over two days of approximately 70 percent of the pool area. (Id.) AIN discovered artifacts from human use dating back 8,000 years (something the footnote fails to mention). (Id.) AIN concluded: "Based on preliminary results of the pedestrian survey so far, it is likely that significant pre-contact and historic-period archeological resources are present within the area of potential effects for the reservoir project. It is also likely that these significant resources will require some form of documentation and archaeological recovery of a sample of the important information that they contain before they are damaged or removed during construction." (Id at. 9.) Therefore, it is not accurate to say "[t]he historical and archeological significance of these finding[sic] has not been assessed."



**Steven Lierman**

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

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

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

**Robert Qualey**

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

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

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

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

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

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

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

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

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

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

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

### **Zach Taylor**

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

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

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

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

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

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

### **WaterWatch**

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

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

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

### The Pudding River Watershed Council

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

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

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

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

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

### Integrated Water Resources Strategy

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

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

**Commented [A64]:** Exception: This is not an adequate representation of the Council's opposition or the reasons for that. The finding should include that the Council opposes the project on grounds including that it would block access to fish habitat on Drift Creek, that it is not good for the community or local economy to allow one group of farmers in the watershed should to take land from another group by condemnation, and that there are better alternatives for the desired backup water supply, including the Willamette River. (Decl. of Rankin ¶ 20 & Ex. R6.)

**Commented [A65]:** Exception: This is an inadequate description of the process and resources that went into creating the strategies, suggesting it came from one meeting of the agencies. (See Ex. EV78 at 5-6.) Also, the Commission adopted the strategy and then an updated strategy. It did not "issue" them (which also suggests they are two different strategies simultaneously in effect).

117. The December 2017 strategy states in part that:

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

(Ex. EV78 at page 128.)

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

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

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

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

#### Alternatives To Drift Creek Considered By EVWD

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

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

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

**Commented [A66]:** Exception: The second sentence of this quote is confusing out of context. It should be deleted, or the full section under the bolded heading should be included.

**Commented [A67]:** Exception: This suggests the terms have questionable applicability to this case, which is inconsistent with the ordinary meaning of the terms and the facts of this case. The policy obviously applies. This finding should be deleted.

**Commented [A68]:** Exception: The cited testimony says only that the IWRS, because it is not a rule, is not considered in the analysis of whether an application satisfies the criteria for the presumption of public interest. It does not say the strategy is not considered, for example, under public interest factors in ORS 537.170.

**Commented [A69]:** Exception: The cited testimony refers only to evaluation under the presumption criteria. Also, the Department’s position is an incorrect interpretation of law.

**Commented [A70]:** Exception: The \$500,000 was not a “grant.” It was a direct appropriation from the legislature. (Test. of Ward, tr. 546:25 to 547:12.) Also, there was no specification that the money be used “to conduct studies of possible sites and methods for storing water.” (Test. of Bielenberg, tr. 1717:18-21.) This finding also should reflect that the appropriation was part of a “Christmas tree bill” at the end of the legislative session and was approved without any public hearings. (Id. at 1814:17 to 1815:12.)

**Commented [A71]:** Exception: The suggestion in this part of the finding is that the referenced funds were spent studying alternative sites as opposed to attempting to justify the Drift Creek project. The record does not support that. Also, the reference in Ex. R120 is not clearly to just public money and probably includes money raised by the District from its members.

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.)

**Commented [A72]:** Exception: This part of the finding is not supported by the cited portion of the record.

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

127. The District assessed an option of obtaining water from one or more of the Army Corps of Engineers reservoirs on the Willamette River. Water was available<sup>19</sup> but the District determined that the cost of piping the water to the place of use would be too expensive, given the distance and changes in elevation from the reservoirs to District land. (Tr. at 1134; Tr. at 1528-1529.)

**Commented [A73]:** Exceptions: The record does not show that the District "assessed" this option. Mark Dickman had a "recollection" that someone looked at that option on behalf of the Pudding River Association. This finding also should reflect that the alternatives considered by the Pudding River Association considered diversion points near Stayton or Keizer. (Test. of Dickman, tr. 1135:18-22.) No evidence in the record showed any significant evaluation by the District, although some witnesses said they recalled it being discussed. Any discussion of whether the District considered this alternative also should reflect what diversion point was considered because that significantly affects the alternative. Finally, this finding should reflect that Richard Cuenca, an expert in irrigation system design, assessed the practicality of a pipeline to the District from the Willamette River east of Wilsonville and found it comparable to the pipeline the District is considering from the proposed reservoir. (Test. of Cuenca, tr. 2307:14 to 2313:17.)

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.)

**Commented [A74]:** Exception: In several earlier studies of water supply alternatives, Drift Creek was not identified as a preferred alternative. Drift Creek became identified as a preferred source only after a reservoir permit on Rock Creek fell through, after only a few months of consideration. (Test. of Loe, tr. 1564:19 to 1566:18.)

### Drift Creek's Place in the Pudding River Watershed

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

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

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

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

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

**Commented [A75]:** Exception: The cited testimony refers to "dams or other obstructions." Also, the witness said he did not know the extent of obstructions on Rock Creek.

### 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.<sup>20</sup> (Ex. A1 at 490-516.)

**Commented [A76]:** Exception: The proposed source is Drift Creek and unnamed tributaries of Drift Creek, which itself is a tributary to the Pudding River. (Ex. A1 at 490.)

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.)

**Commented [A77]:** Exception: The footnote says the precise boundaries of the proposed reservoir are unknown. In fact, the record includes detailed maps of the expected reservoir footprint. (E.g. exs WW69, WW92.)

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.)

**Commented [A78]:** Exception: This wording suggests these are different things. "[C]hannel or" should be changed to "channel; that is,"

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.)

**Commented [A79]:** Exception: Change to "The application proposes to begin construction of the project within 10 years of permit issuance."

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

**Commented [A80]:** Exception: Imprecise wording. This should say "The application says the Applicant will".

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.)

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

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

### 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.)

**Commented [A81]:** Exception: The form does ask for some of this information. For example, p. 2 (A1 at 492) asks about materials to be used to build the dam. The District chose not to answer on grounds it is an irrigation district.

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.)

**Commented [A82]:** Exception: This finding should note that witnesses were not sure if these estimates included the costs of acquiring property (by condemnation or otherwise) in the reservoir footprint and/or in the pipeline route. (Test. of Bielenberg, tr. 1290.)

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.<sup>22</sup> (Tr. at 1290-1291, 1315, 1530, 2204, and 2267.)

**Commented [A83]:** Exception: Potential delivery points range from about 10 miles to 21 miles from the proposed reservoir. (Ex. R59, p. 2.)

**Commented [A84]:** Exception: This finding should reflect the District is "leaning" toward the piping option. (Test. of Goschie, tr. 1315:4-9.)

**Commented [A85]:** Exception: This finding should note that the record was not clear on whether these estimates included the cost of purchasing land or easements in the pipeline route. (Test. of Bielenberg, tr. at 1290.)

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.)

**Commented [A86]:** Exception: Screens would prevent fish from entering diversions downstream from the reservoir as well as from the reservoir.

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

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

**Commented [A87]:** Exception: This finding should reflect that he is not sure if this estimate includes land acquisition costs for the reservoir footprint and/or the transmission pipeline. (Test. of Crew, tr. 2205:5-17.)

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

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

### Additional Required Approvals

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

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

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

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

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

### Project Impact on Rue Protestants

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

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

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

**Commented [A88]:** Exception: \$75 was not an estimate of what it would cost; it was a statement by Mark Dickman of what he was "hopeful" it would cost; a statement about what he could afford v. what he thought it would cost. Moreover, estimates of \$100 were qualified as outdated. A fair reading of the testimony is that the cost estimates are from \$150 to \$200 per acre foot. This finding also should reflect that these estimates assume public subsidies, at a level not revealed in the record. (Test. of Bielenberg, tr. 1813.)

**Commented [A89]:** Exception: This finding also should make clear that, as far as Department permitting is concerned, the storage permit would allow the District to build a 70-foot dam in the channel of Drift Creek without requiring fish passage.

**Commented [A90]:** Exception: There is a separate, expedited process for a secondary application, which may not require a PFO or allowance of protests. ORS 537.147. Also, this finding should reflect that review of the secondary water right may be limited only to public interest issue raised by use of the water, not the damming and flooding of the stream.

**Commented [A91]:** Exception: The Department's permit will give the District authority to build the dam and reservoir, even though aspects of the project may require additional permits and/or reviews. Also, the record does not specify the nature of the DSL review as a "wetlands mitigation permit" or say that USFW or NMFS "will have to approve portions of the project." The cited portions of the record say only that they "may" become involved in some unspecified way. This finding also should reflect that no evidence in the record details the specific additional approvals that would be required, their criteria or how those criteria vary from the criteria for a storage permit.

**Commented [A92]:** Exception: This finding should reflect that the dam safety review will consider only safety issues and not a public interest analysis.

**Commented [A93]:** Exception: The record does not show the Corps will approve the dam design or that it requires the 401 certification. Also, the record does not support that the 401 will "confirm[]" that EVWD can meet water quality standards." The criteria for the permit are not in the record.



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

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

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

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

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

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

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

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

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

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

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

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

### Economic Benefit from Proposed Project

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

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

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

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

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

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

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

**Commented [A94]:** Exception: This assumes that another supplemental water supply will increase farm income. The record does not establish that. The record showed District farmers have existing water supplies, farm all farm acres and have not had crop production significantly limited by lack of water. This finding also is not supported by the record because there is no evidence of a complete cost benefit analysis that includes all costs, such as costs to the natural environment. As the district’s consultant acknowledged, a community does not benefit economically unless all benefits exceed all costs. (Test. of Wyse, tr. 2657-58.)

**Commented [A95]:** Exceptions: This is not true for all crops. Moreover, it does not follow that higher yield = more profits, even if it means more revenue (which is all the cited portions of the record refer to). Changes in profit depend on the cost of the irrigation.

**Commented [A96]:** Exception: The cited portion of the record refers to access to irrigation water generally, not “a reliable, supplemental water source.”

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.)

**Commented [A97]:** Exception: This finding should also reflect that Ms. Wyse did not factor in the environmental costs of the project. (Test. of Wyse, tr. 2651.)

### 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.)

**Commented [A98]:** Exception: "Required information" is a legal conclusion. The Department reviewed for information it believed was required under its present review process.

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.)

**Commented [A99]:** Exception: The Department did not determine the application met each requirement or was complete or notify EVWD that its application "had passed the initial review." The Department notified EVWD that its storage season would be less than requested and that the Department needed additional information. (Ex. A1 at 374-77.)

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

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

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

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

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

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

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

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

(Ex. A1 at 181-184.)

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

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

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

#### **Allowance Under Basin Rules**

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

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

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

**Commented [A100]:** Exception: This is not a finding of fact and may be modified by the Drift Creek withdrawal order. The finding should be limited to what the Department determined and/or decided.

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

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

(Ex. A1 at 526.)

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

#### Availability of Water in Drift Creek

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

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

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

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

**Commented [A101]:** Exception: The Department did not determine the Drift Creek order was inaccurate for the time period covered or that it was based on water rights that no longer exist. The cited portions of the record do not show that. Moreover, the Department was not free to override the order even if it made a different water availability findings.

**Commented [A102]:** Exception: This finding should note the period of record is roughly 1960-1990. (Test. of French, tr. 140-141.)

**Commented [A103]:** Exceptions: WARS can estimate water availability at different exceedance levels. The Department uses fifty percent for most storage applications. (Cited testimony.) Also, five out of ten days is one way of thinking about it only. It could also mean water is available in a particular month five out of 10 years.

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.<sup>26</sup> The first is a water storage certificate. The certificate, numbered 36095, was issued to Louis and Alice Schacht, owners of the Schact farm, and has an August 3, 1967 priority date (Schact water right). The Schact water right allowed the Schacts to store up to 3.4 acre feet of water each year for a fish pond. (Ex. A1 at 542.)

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

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

194. The 1990 instream right was created 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

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

**Commented [A104]:** Exception: This is not correct. The Department determined the order did not prohibit the proposed permit.

**Commented [A105]:** Exception: This is not correct. The Schact water right and the instream water right were not identified as the only water rights on Drift Creek. They apparently were identified as the only ones with a place of use in the reservoir footprint. Also, contrary to statement in footnote 26, the certificates in WW3, having been admitted, are evidence of other valid water rights on Drift Creek, and the potential for these rights to be impacted can be inferred from the fact they are below the proposed storage project.

**Commented [A106]:** Exception: It was created under the Instream Water Rights Act.

**Commented [A107]:** Exception: This is a statement of law and is somewhat inaccurate and/or incomplete. The finding of fact should simply refer to the Act.

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.)<sup>27</sup>

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

197. After subtracting the amount of water required for the Schact storage right and the 1990 instream right, WARS calculated that 50 percent of the time, Drift Creek's average annual stream flow was 26,400 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.<sup>28</sup> (Ex. A1 at 215; Tr. at 145, 158, and 758-759.)

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

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

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

201. In Dr. Tanovan's last 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

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

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

**Commented [A108]:** Exception: This is an incomplete and somewhat misstated summary of the certificate. For example, the flows are not "monthly" (some are first and second half) and there are other changes. This finding should simply reference the certificate for flow amounts and changes.

**Commented [A109]:** The cited portion of the record does not make clear that the Department would always respond to a complaint from the public about an instream water right not being met. Mr. French eventually said he did not know the Department's policy on that. (Test. of French, tr. 162.) Mr. McCord was speaking only about his practices. (Tr. 780-81.) Also, the footnote should reflect that Drift Creek is measured "maybe" a couple times per summer. (Test. of McCord, tr. 780.)

**Commented [A110]:** Exceptions: The amount is acre feet, not cubic feet per second.

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.)

**Commented [A111]:** Exceptions: Tanovan's modeling did not subtract "water necessary for ecological and channel maintenance flows," nor have those flows been determined. Tanovan reports discussed a preliminary analysis by Ellis Ecological Services, but releases to maintain those flows were not assumed in Tanovan's conclusions. (Ex. EV13, pp. 183 (no. 4), 186 (no. 18).) Moreover, the Ellis recommendation for flushing flows makes no sense. It estimates a need for 630 cfs every two years but then suggests passing only flows above that amount, which would not logically produce the calculated flushing flow need. Also, the Ellis calculations were preliminary and have not been independently reviewed or approved by the Oregon Department of Fish and Wildlife. (Test. of Stevenson, tr. 742-749.)

**Commented [A112]:** Exceptions: Dr. Cuenca determined that Dr. Tanovan did not follow standard professional practices for calculating evaporation, and that a co-efficient he used had no apparent justification, thus affecting his credibility. (Test. of Cuenca, tr. at 2294-95.) Also, while Dr. Cuenca agreed evaporation does not affect water available to store, he pointed out that it affects "the water balance" of the reservoir, which affects how full or empty it will be at a given time. (Tr. 2318.)

**Commented [A113]:** Exception: He said it could be "thousands" of acre feet per year. (Tr. 2303-04.) That should be reflected in this finding.

**Commented [A114]:** Exception: Dr. Cuenca did not acknowledge this.

**Commented [A115]:** Exception: He explained that it affects the "water balance," which means the reservoir would not operate as designed if it is not storing the amount of water that was anticipated. (Tr. 2319.)

**Commented [A116]:** Exception: No evidence supports this statement. It is pure speculation by the project manager about materials in the reservoir footprint, whether they could be sealed and how much it would cost. As noted above, the District rejected one proposed alternative (the dairy site) due to estimated costs of lining the reservoir. That issue cannot simply be dismissed here.

**Commented [A117]:** Exception: This finding misunderstands the purpose of the PSU model and its assumptions. PSU was not attempting to estimate reservoir yield or water availability. It was attempting to estimate water quality parameters under a variety of assumptions based on flow and yield data from Dr. Tanovan. (WW62, pp. 3, 63; WW49.) Assumptions included an irrigation withdrawal of only 8,000 acre feet. (WW62, p. 3.) It analyzed only three flow years (1945, 1934 and 1948) with the same meteorological conditions as 2008. (WW62, pp. 9, 63.) It also randomly assumed a particular reservoir at the start of the year. (WW62, p. 46.) These fact should be included in the finding.

**Commented [A118]:** Exceptions: They are not just "extremely high" flows. They are flows "on a less frequent basis . . . that provide geomorphologic conditions that are helpful to species, and then also ecological flows that provide triggers to certain life stages. . . . They occur less often and at higher - require higher cfs." (Test. of Stevenson, tr. 739.)

**Commented [A119]:** Exception: This finding inaccurately diminished the paper and suggests it is only a good explanation of the concepts as opposed to an accepted methodology. In fact, it is "a good document for a methodology to understand peak and ecological flows." (Test. of Stevenson, tr. 742.)

**Commented [A120]:** Exception: This misleadingly suggests ODFW has adopted separate guidance different from WW29. In fact, ODFW determines peak and ecological flows only in connection with a grant program in which it works with the Water Resources Department. In that program, Water Resources has a document for calculating the flows (called "seasonally varying . . .")



## 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

**Commented [A121]:** Exception: This does not accurately describe the testimony or the rule. The clearest statement in the cited testimony is that the Department's practice is to consider "whether or not a new allocation of water would cause an older water right to not be able to be used." Any reference to the rule for transfers should just cite or quote the rule, although the testimony does not say the Department uses that definition for new applications.

**Commented [A122]:** Exception: This assumes perfect monitoring, measurement and enforcement, which the record shows is not the case. (See above re enforcement of instream water rights.) Also, there would still be an "injury" if the Department requires the instream right to be met only at the bottom of the protected reach.

**Commented [A123]:** Exception: The Department concluded the dam was required to release only the amount necessary to meet the requirement at the mouth, after credits for in-flow below the dam.

**Commented [A124]:** Exception: This is not absolutely true. The instream water right is subordinated at least to human and livestock consumption and possibly other uses.

**Commented [A125]:** Exception: This sentence is unclear and is not correct with respect to the inundated portion of the stream.

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

### Compliance with Other Water Resources Commission Rules

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

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

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

221. The review conducted by ODFW and DEQ is known as a Division 33 review.<sup>29</sup> (Decl. of French at 7.) Division 33 reviews only consider impacts on fish species that are listed as STE under federal or state law. Impacts on non-listed fish species are not considered. (Tr. at 2138.) 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.)<sup>30</sup>

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

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

<sup>30</sup> 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.)

**Commented [A126]:** Exception: The presumption factors were not satisfied, for reasons given in WaterWatch's closing briefs.

**Commented [A127]:** Exception: The Department did not form a team; it requested and received written comments.

**Commented [A128]:** Exception: In context, ODFW did this as part of its Division 33 review. The record does not show a separate riparian review.

**Commented [A129]:** Exception: The footnote mischaracterizes the referenced document. Mr. French in fact suggested to ODFW staff that it limit its comments to STE species, even with respect to impacts from the storage project. This should be included in the finding.

**Commented [A130]:** Exception: He said the other employees contributed to or worked on the review; not that they reviewed the application.

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

### Fish of Drift Creek

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

**Commented [A131]:** In addition, there are “like dace and minnows and suckers and all these other fish that people just kind of push to the side, they’re also important.” (Test. of Murtagh, tr. 1260.) This should included in the finding.

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.)

**Commented [A132]:** Exception: The definition depends on the context the testimony did not make clear if has referring to a legal definition or a working definition for conversations among biologists or something else. The definition also depends on whether it is being used for a particular area or the state in general (in which Coho were definitely present in 1805). For example, for purposes of fish passage, fish are considered “native” to an area even if they were not in that area originally. OAR 635-412-0005(32); OAR 635-007-0501(36). This is also a legal conclusion and should not be a finding of fact.

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.)

**Commented [A133]:** Exception: Same explanation as previous exception. Also, Coho are clearly classified as “native” for purposes of fish passage laws. Coho salmon are a “native migratory fish” that requires fish passage even if they are descendants of hatchery fish. OAR 635-412-0005(32); OAR 635-007-0501(36).

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.)

**Commented [A134]:** Exception: This should note that they also rear in freshwater.

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.)

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

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

**Commented [A135]:** Exception: This understates the number and variety of areas in which lamprey may spawn. (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.)

**Commented [A136]:** Exception: Should refer to "upper Drift Creek and its tributaries." (Decl. of Murtagh at 5.)

236. However, Drift Creek has essential, but limited, spawning and rearing<sup>33</sup> habitat for Pacific Lamprey in intermittent areas of 7-10 miles above the proposed dam location. If built without fish passage, the proposed project would obstruct fish migration and therefore eliminate that essential habitat,<sup>34</sup> which is in a higher-gradient reach of Drift Creek that has better water quality due to lower water temperature, especially in summer, than in lower creek reaches in the Molalla-Pudding River sub basin. Two to three miles of additional habitat would be inundated by the reservoir. (Tr. at 2102; Decl. of Murtagh at 4 and 6.)

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

**Commented [A137]:** Exception: This doesn't fairly paraphrase the declaration, which distinguishes the two types of habitat and specifically notes presence of the habitat in upper Drift Creek and above the site of the proposed dam. (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.)

**Commented [A138]:** Exception: ODFW did not propose conditions that will ensure that; it proposed conditions to try to come up with a plan later. Also, the record shows mitigation, because of its numerous weaknesses, cannot avoid the loss of essential habitat to lamprey. (WaterWatch's Response to Post-Hearing Briefs, pp. 9-10.)

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

**Commented [A139]:** Exception: Mr. Gowell testified he believes he identified one but that it could not conclusively be determined. (Tr. 2526-27.)

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

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

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

Salmon.<sup>35</sup> The presence of these other migratory Salmonid<sup>36</sup> fish suggests that Winter Steelhead may use Drift Creek on an intermittent or between-year basis. (Decl. of Murtagh at 5-6.)

**Commented [A140]:** Exception: The declaration says, "at least on an intermittent or between-year basis."

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.)

**Commented [A141]:** Exception: This is not in the declaration.

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.)

**Commented [A142]:** Exception: This finding should be specific as to habitat above the dam site. For example, Murtagh said: "standard stream restoration techniques could be employed to significantly improve how this reach could function for salmonids and Pacific lamprey." (Decl. of Murtagh at 5.)

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

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

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

**Commented [A143]:** Exception: ODFW did not propose conditions that will mitigate for the detriment. It proposed conditions to try to come up with mitigation later. Also, the record shows mitigation, because of its numerous weaknesses, cannot avoid the detriment to listed steelhead. (WaterWatch's Response to Post-Hearing Briefs, pp. 9-10.)

### Habitat for Listed Fish

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

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

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

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,

**Commented [A144]:** The evidence does not support this conclusion. The first cite is to testimony of Stevenson, who was not involved in the decision and was not even working at ODFW when the decision was made. WaterWatch had a continuing objection to her testimony on that basis. (Tr. 504, 508.) The second citation is mostly about Mr. Murtagh saying, after the Division 33 review form was submitted, that upper Drift Creek may be Category I habitat. In any event, there is no evidence on when and how ODFW determined the habitat was not Category I.

**Commented [A145]:** Exception: This finding is not supported by evidence in the record. There is no explanation of when or how it was categorized.

**Commented [A146]:** Exception: Coho are listed below Willamette Falls and the first in Drift Creek may be an expansion of that population. (Test. of Gowell, tr. 2521; test. of Murtagh, tr. 2144.)

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.)

**Commented [A147]:** Exception: The witnesses’ testimony was not clearly exhaustive. This should say “primarily because.”

**Commented [A148]:** Exception: The testimony refers to simply “lack of flow.”

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.)

**Commented [A149]:** Exception: This finding should say that dissolved oxygen is a “parameter of concerns” on Drift Creek. Also, the citation should be to Exhibit A3 (not A1).

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

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

**Commented [A150]:** Exception: This finding suggests it was typical to do a Division 33 review with so little information and that the information available made it possible for Ms. Gramlich to determine impacts. In fact, Ms. Gramlich said that, because “[d]etails on the proposed project construction are still evolving, DEQ’s “conditions and recommendations may be too preliminary and not accurately reflect the project impacts on water quality.” This should be included in the finding.

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

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

**Both Agencies Recommended Approval of EVWD’s Application with Conditions**

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

- A. Mitigation of any riparian disturbance;<sup>37</sup>

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

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

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

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;<sup>38</sup>
- B. Ensure bypass flows necessary to meet the 1990 instream water right year and provide any peak flows necessary to maintain stream habitat and ecology; and
- C. Mitigate impacts to Pacific Lamprey and Winter Steelhead habitat in wetlands.

(Ex. A1 at 219-221.)

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

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

(Ex. A3 at 3.)

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

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

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

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

**Commented [A151]:** Exception: This is only a partial summary and should be framed as such.

**Commented [A152]:** Exception: This also should be framed as a partial summary. This finding also should note that DEQ recommended “assess off-channel opportunities for the reservoir construction” and said “[o]ff-Channel construction for Nov-Apr storage is a preferred alternative for protecting water quality.” (Ex. A3, p. 1.)

**Commented [A153]:** Exception: The Department did not include all recommended conditions. For example, the Department did not include ODFW’s recommendation to protect peak flows.

**Commented [A154]:** Exception: Should be “past” the dam.

**Commented [A155]:** Exception: This is a legal conclusion and miss-states the law.

**Commented [A156]:** Exception: This is also a statement of law and is incorrect. No statute or rule precludes seeking a fish passage waiver before obtaining a water storage permit.

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



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.

**Commented [A157]:** Exceptions: That statement is not in the cited page of the record. This apparently refers to an email sent after the revised comments were submitted. (Ex. A1, p. 253.) Also, the comment expressed concern about lack of detail and said, as a result, DEQ’s “conditions and recommendations may be too preliminary and not accurately reflect the project impacts on water quality.” That should be included in the finding. Finally, this finding should note that any further DEQ comments would not likely affect the Division 33 review for the storage application because it would be considered completed.

**Commented [A158]:** Exception: The term was “assess.”

**Commented [A159]:** Exception: This finding appears to be conflating the revised comment form dated 11/21/13, Ex. A3, p. 1, and an email sent in 12/19/13, Ex. A1, p. 251.

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

\* \* \* \* \*

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

(Ex. R171 at 25 and 29.)

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

### Water Modeling

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

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

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

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

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

**Commented [A160]:** Exception: Mr. Murtagh said that. However, he gave no reasonable explanation for the inconsistency, suggesting he does not actually believe, personally and as a fish biologist, that the ODFW position on the Division 33 form was correct.

**Commented [A161]:** Exception: This finding should add, “under the same set of assumptions.”

**Commented [A162]:** Exception: This should say, “under at least one set of assumptions,”

**Commented [A163]:** Exception: This finding also should add that there may be years when the reservoir does not fill, even assuming no seepage losses. (Test. of Yearsley, tr. 2394.)

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

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

### The PFO

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

**A. Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a specific value to the public:**

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

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

**B. The maximum economic development of the waters involved.**

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

**Commented [A164]:** Exception: This wording suggests Dr. Yearsley set out to find scenarios that violated water quality standards. As explained at the cited testimony, Dr. Yearsley, “[ran] some scenarios that [PSU] had not run on the model.” He did not “attempt to model every possible combination of scenarios.” (Tr. 2395.) Also, he was determining whether the temperature at the bottom of the reservoir, the coolest part, would be too warm to meet water quality standards, not whether “Drift Creek” meet water quality standard. (Tr. 2396.) These facts should be included in the finding. Also, he should be referred to as “Dr.” Yearsley, as the proposed order does for other witnesses with a Ph D (here and in other findings).

**Commented [A165]:** Exception: This finding should reflect that the reservoir levels occurred in Dr. Tanovan’s modeling for a 12-year period and that the irrigation withdrawal rate was the initial rate assumed by PSU based on information from EVWD. (Tr. 2391, 2394-95, 2398.) This finding also should reflect that, in one scenario, Dr. Yearsley determined that water released from the bottom of the reservoir would violate water quality standards for ten days “until the reservoir ran dry, which it would do. And at that point the reservoir would be passing the water, I assume, from the stream itself -- from the denuded stream by this time. So the temperature in the stream would be not the same as the temperature in the existing stream.” (Tr. 2397.)

**Commented [A166]:** Exception: This suggests temperature control could reduce release temperatures below those estimated by Dr. Yearsley. The cited testimony does not say that. It only says he did not model those things. Instead, he modeled the temperature at a bottom outlet, (Tr. 2337), which is where the water is coldest, (Ex WW49, p. 62). Mixing water from other levels (i.e., temperature control) cannot make the water colder than that.

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

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

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

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

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

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

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

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

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

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

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

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

286. The PFO provided in relevant part:

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

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

(Ex. A1 at 124.)

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

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

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

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

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

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

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

(Ex. A1 at 125-126.)

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

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

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

(Ex. A1 at 123-132.)

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

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

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

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

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

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

(Ex. A1 at 133-137.)

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

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

(Ex. A1 at 134 and 137.)

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

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

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

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

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

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

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

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

### CONCLUSIONS OF LAW

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

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

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

**Commented [A167]:** Exception: This suggests there is a difference when there is not. All comments from DEQ are a recommendation, not conditions. (Test. of French, tr. 180.) Also, there should be a finding here that neither the PFO nor the proposed permit include a condition to incorporate the recommendation of ODFW to “bypass flows to meet . . . any peak flows necessary to maintain stream habitat and ecology.” (Ex. A1 at 219.)

**Commented [A168]:** Exception: The Department did not meet its burden of showing that the presumption criteria were met. (WaterWatch Closing Brief, pp. 1-4; WaterWatch Response to Post-hearing Briefs, pp. 3-14.)

**Commented [A169]:** Exception: The proposed use does not comply with any of the listed rules except that WaterWatch takes no position on (f). (See WaterWatch closing briefs.)



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

**Commented [A170]:** Exception: Protestants did demonstrate that the proposed use would impair or be detrimental to the public interest.

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

**Commented [A171]:** Exception: WaterWatch did demonstrate this by showing that proposed use would eliminate habitat at least for federal listed steelhead.

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

**Commented [A172]:** Exception: The PFO does not adequately address public comments. There is no analysis of the numerous public interest issues raised and the PFO proposes to approve the proposed permit.

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

**Commented [A173]:** Exception: The proposed order does not address that issue. It simply defers it.

**OPINION**

**Commented [A174]:** Exception: The opinion reaches the wrong conclusion by determining the proposed permit should be issued. WaterWatch incorporates in this exception its exceptions to all findings and conclusions.

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.

**Commented [A175]:** Exception: The permitting process and number of reviews are heavily dependent on the specific proposal. This statement attempts to justify the Department’s failure to evaluate key criteria and to instead abrogate that responsibility to other agencies. Also, there is nothing in fact or law that says the process must, or should, start with a water storage permit.

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

**Water Permit Application Overview**

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

**Commented [A176]:** Exception: This language is inconsistent with statute, which requires “the application” to meet the presumption criteria.

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

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

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

The public interest factors include:

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

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

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

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

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

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

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

**Burden of Proof**

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

\* \* \* \* \*

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

**The Shifting Burden of Proof**

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

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

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

### EVWD's Water Storage Application

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

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

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

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

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

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

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

**Commented [A177]:** Exception: Assuming the presumption is established, the burden on protestants is to overcome the presumption by showing either that the presumption was incorrectly established *or* is overcome under consideration of factors in ORS 537.170(8). ORS 537.153(2). Assuming the presumption is overcome, the burden shifts back to the agency and proponents of the permit because, ultimately, the order must be supported by substantial evidence.

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

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

\* \* \* \* \*

(3) As used in this section, “district” includes the entities set forth in ORS 198.010 and 198.180.<sup>41</sup>

(Emphasis added.)

At the time it filed its application, EVWD therefore did not need ownership of or easements to property impacted by the project. However, before EVWD enters the property to 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.

**Commented [A178]:** Exception: The extent of information required to determine if criteria for a permit are met must be determined by the criteria, not the Department’s application form.

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.

**Commented [A179]:** Exception: The record showed that EVWD will not provide fish passage at the dam. (E.g., ex. A1 at 484 (cover letter with application).)

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

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

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

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

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

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

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

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

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

**Commented [A180]:** In *Benz*, the conditions specified particular equipment and actions. That is not the case here. The conditions here simply direct the applicant to work out specifics later with other agencies, thereby avoiding decisions the Department should make and depriving protestants of an opportunity to contest the adequacy of specific measures designed to meet water permitting criteria.

**Commented [A181]:** Exception: The reservoir permit will give the District authority to complete the most impactful part of its plan – to put a 70-foot dam in the middle of a steelhead stream. Review of the secondary permit, which has a separate, expedited process, will need to focus on impacts from withdrawing water from the reservoir and delivering it to the District. The most destructive part of the plan – the dam without fish passage – will likely be built and not subject to further review.

**Commented [A182]:** Exception: The process will be different. See also prior exception regarding the likely scope of issues on an application for a secondary permit.

**Commented [A183]:** Exception: This is an overstatement of the record, which referred to a few additional permits and/or reviews – probably a water quality permit, a removal-fill permit and a fish passage waiver. Moreover, no evidence shows these processes will ask the broad question of whether the proposed use is in the public interest.

**Commented [A184]:** That is incorrect. The Department has an obligation to determine that its review criteria are met and could easily have required, in this case, specific plans such how the water would be delivered, how the dam would be configured, and mitigation for loss of fish passage and impacts on listed species. Without these specifics, the ALJ found it was too “speculative,” for example, for WaterWatch to ask ODFW how it would apply its habitat mitigation rules, (tr. 724 to 725), or for WaterWatch’s fish expert to opine on whether “mitigation” could avoid the undisputed impacts to listed fish, (tr. 2554 to 2555). The proposed order then inexplicably and inconsistently finds that it’s not too speculative to say impacts to listed fish, for example, can be fully mitigated by a condition requiring future, unspecified mitigation plans.

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.

**Commented [A185]:** Exceptions: Assuming “Protestants” should be “proponents” or “applicant,” the Department would at least be in a position to determine if the project would be in the public interest. Whether the applicant can get over other hurdles is not really relevant to that.

**Commented [A186]:** Exception: the presumption criteria are not satisfied and, even if they are, the project is not in the public interest. See WaterWatch closing briefs.

### 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.

**Commented [A187]:** Exceptions: The application needs to meet the presumption criteria and clearly did not. ORS 537.153(2). Even as modified by the PFO, the proposed use does not meet the criteria, as explained in WaterWatch’s closing briefs.

#### 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.

**Commented [A188]:** Exception: WaterWatch did not argue that the Department cannot propose modification of the request, only that doing so takes it outside the presumption if the modification was required to satisfy the presumption.

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).

**Commented [A189]:** Exceptions: The rule is inconsistent with statute, which says “[i]n reviewing the application . . . the department shall presume . . .” ORS 537.153(2). This position does not prohibit the Department from modifying a request, adding conditions, etc. It says only that the application is not then entitled to a presumption of public interest.

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.

**Commented [A190]:** Exception: This misunderstands the argument. The application could proceed; just without the benefit of the presumption.

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.

**Commented [A191]:** Exceptions: WaterWatch raised this issue in its protest only. In any event, this paragraph suggests the Department is free to ignore an administrative order if it later decides the factual premise is faulty. That is not a correct statement of law. Moreover, the record does not show the Department disagrees with the premise of the order today.

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.

**Commented [A192]:** Exception: The presumption was not established on this element because the application sought storage in October.

### B. Water Availability

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

**Commented [A193]:** Exception: OAR 690-300-0010(57) also refers to OAR 690-410-0070, which provides in part: “(h) When instream flow needs are not protected by instream water rights, new out-of-stream allocations may be limited or conditioned to protect public uses.” OAR 690-410-0070(2)(h). Public uses are defined in OAR 690-400-0010(13). The analysis here fails to consider this aspect of water availability, including whether the existing instream water right is adequate to protect all instream flow needs including peak and ecological flows.

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,

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



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

OAR 690-300-0010(58).

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

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

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

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

(Ex. A1 at 137.)

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

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

**Commented [A194]:** Exception: This is incorrect as discussed in exceptions to findings.

**Commented [A195]:** Exception: The Tanovan analysis was a yield or "water balance" analysis for the District. It was not a water availability analysis and did not comply with all standards for such in statutes and rules.

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.<sup>43</sup>

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.<sup>44</sup> More significantly, however, WaterWatch offered no evidence that a consideration of such flows would change the Department's water availability analysis. Similarly, WaterWatch offered no argument explaining the significance of these flows to EVWD's permit application, or showing that failing to provide for the flows in the PFO requires a denial of the application.

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

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

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

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

<sup>44</sup> 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.

**Commented [A196]:** Exception: This analysis again confuses the water balance analysis by Tanovan, and the PSU model which largely relied on Tanovan for flow and storage projections, with a water availability analysis. They are not the same. Among other things, the Tanovan/PSU models relied on average flows and not a 50% exceedance level. The Department's availability analysis should have deducted, along senior rights, inflows between the dam and the mouth of Drift Creek.

**Commented [A197]:** Exceptions: This discussion to some extent confuses WaterWatch's argument, primarily under OAR 690-410-0070(2)(h), that any permit should protect instream flow needs beyond the instream water right (primarily peak and ecological flow needs). In any event, bypass flows should be provided for that reason and downstream senior rights should not be required to rely on seniority and enforcement to satisfy their water rights.

**Commented [A198]:** Exception: The burden to establish the presumption is not on WaterWatch. It's on the Department and the applicant. WaterWatch can show that burden wasn't met by showing, in part, that the water availability analysis in the presumption failed to consider all instream flow needs. Moreover, contrary to the opinion here, protecting peak and ecological flows is logically required under Division 33 rules because those rules are required to protect listed fish and because peak and ecological flows are important to listed fish. (Test. of Stevenson, tr. 739.)

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

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

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

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

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

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

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

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

### C. Injury

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

**Commented [A199]:** Exception: The Department did not consider if protecting peak and ecological flows was required under Division 33 and, because they plainly area, an interpretation to the contrary is implausible. Moreover, the Department agreed it could consider them under other rules. (Test. of Eastman, tr. 366.) It just chose not to.

**Commented [A200]:** Exception: This argument is not based on the 1951 order. It is simply that the concept of “over-appropriation” considers instream needs even if they are not protected by instream water rights. (See above.) Those needs should have been considered in the water availability analysis. Also, calling the 1951 order “a historical anecdote” that is “no longer relevant” and was implied displaced by the WARS system is an incorrect statement of law.

**Commented [A201]:** Exception: This element was not met for the reasons discussed above.

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

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

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

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

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

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

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

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

**Commented [A202]:** Exception: The Schact water right (discussed above) is a water right that would be injured.

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

239 Or App at 538.

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

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

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

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

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

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

ORS 537.400(5).<sup>45</sup>

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

**Commented [A203]:** Exception: The facts show the project would injure at least two water rights: the Schact water right and the instream water right (above and below the dam).

**Commented [A204]:** Exception: Seniority cannot protect these water rights from injury above the dam because they will be inundated. Seniority cannot protect the instream right below the dam because measurement and enforcement are limited to "a couple times a summer." (Test. of McCord, tr. 780.)

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.

**Commented [A205]:** Exception: There is no legal authority on whether this would constitute injury and, under any normal sense of the word, it would, even if the taking of property is legal.

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.<sup>46</sup>

**Commented [A206]:** Exception: This is irrelevant to injury analysis, which prohibits injury to any existing water right. Even if this one is subject to forfeiture, it is not forfeited and is therefore still a water right capable of injury.

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

Nothing in the record suggests that at the time the certificate was recorded in August 1996, reflecting an October 18, 1990 priority date, there were barriers in or significant points of diversion from Drift Creek. It therefore made sense to make ensure the instream flows were being met by measuring at the mouth of Drift Creek. However, given the potential impact of placing a reservoir in the creek or diverting water into a pipeline or other conveyance, the instream right can no longer be adequately protected by mouth flow measurements. This is so

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

because by the time Drift Creek reaches the Pudding River, other tributaries have joined and added water to the creek.

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

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

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

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

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

Finally, WaterWatch contends that instream water rights on rivers below Drift Creek, including the Pudding and Molalla rivers, will be injured by the proposed project. The

**Commented [A207]:** Exception: WaterWatch appreciates this addition but suggests it require installation of a permanent stream gauge readable by remotely in real time by the Department and online by any interested member of the public. That would be the only way to truly ensure the bypass requirements and instream water right are being met.

**Commented [A208]:** Exception: The instream water right will not be met if water is no longer flowing in the stream and the stream is inundated by a reservoir pool. The water right contemplates flow, not storage.

**Commented [A209]:** Exception: The proposed permit would authorize storage for irrigation and flow augmentation. Therefore, it could arguably be called "multipurpose."

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.

**Commented [A210]:** Exception: Although protected by senior priority, these instream water rights will be injured by the proposed use due to limited enforcement of instream water rights. (Test. of French, tr. 160-61.)

## Issue No. 2: Compliance with Commission Rules

### A. Division 33 Rules

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

If the Department determines during a review of a water permit application that a proposed use will occur in an area that may affect the habitat of sensitive, threatened, or endangered (STE) fish species, the Department must form an interagency team of staff from the Department and other appropriate state natural resource agencies. OAR 690-033-0010(5) and 690-033-0330(1)(b). The purpose of the team is to determine whether conditions can be included in the permit to avoid the detriment to STE fish species. OAR 690-033-0220(1).

**Commented [A211]:** Exception: The record shows that the proposed use also would eliminate habitat for elk. (E.g., test. of Mucken, tr. 1437-38; test. of Lierman, tr. 1593; test. of Ruther, tr. 2503.) That is another impact that should be considered under the public interest factors in ORS 537.170(8) and OAR 690-310-0120(3)(b)(D), and the storage policy considerations in OAR 690-410-0080(2)(g).

The Department requested that ODFW and DEQ review EVWD’s application and advise the Department whether the proposed use might affect STE fish species. Both ODFW and DEQ answered that question affirmatively. ODFW identified the species that might be impacted by EVWD’s proposed use as Winter Steelhead (a threatened species) and Pacific Lamprey (a sensitive species).

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



### Threatened Fish

Threatened species are those that may become endangered within the foreseeable future within all or part of their ranges. OAR 690-033-0010(8) and 635-100-0001(3). Under OAR 690-033-0220,<sup>48</sup> the Department must determine whether the detriment to the protection or recovery of the threatened species, in this case Winter Steelhead, can be conditioned to avoid the detriment. 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).

**Commented [A212]:** Exception: The rule refers to conditioning and mitigation together, not as a two-step process.

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

### Sensitive Fish

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

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

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

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

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

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

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.<sup>49</sup> These streams include Silver Creek and the Pudding River main stem. The Department did not dispute that evidence. Indeed, ODFW's biologist Tom Murtagh agreed that Spring Chinook may possibly be present in Drift Creek.

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

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

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

**Commented [A213]:** Exception: This is an incomplete description of the recommendations and should be characterized accordingly and/or incorporate the final comments and follow-up recommendations. (Ex. A1, p. 217, 253; Ex. A3, p. 1.)

**Commented [A214]:** Exception: The Department did not meet its Division 33 obligations because it did not incorporate all recommended conditions in the manner recommended, including protection of peak flows. Moreover, the Department did not perform its obligation to determine if conditions and mitigation will avoid the detriment to threatened species and prevent a net loss of essential habitat because it did not require or review any specific mitigation plans. Moreover, Department did not include other conditions necessary to protect threatened and endangered species, such as requiring bypass to protect peak and ecological flows.

**Commented [A215]:** Exception: This misstates WaterWatch's arguments. WaterWatch did not argue that cutthroat needed to be considered in the Division 33 review.

**Commented [A216]:** Exception: The process was inadequate because it failed to consider the additional listed species. The Department has the burden to show the proposed use complied with Commission rules including Division 33 rules. Therefore, the Department had the burden to show spring chinook did not need to be considered or would be adequately protected by other conditions.

**Commented [A217]:** Exception: WaterWatch did not argue that cutthroat needed to be considered under Division 33. The record showed Coho salmon in Drift Creek could have originated from Willamette River tributaries below Willamette Falls, (test. of Murtagh, tr. 2144-45, test. of Gowell, tr. 24519-24), in which case they may be part of a population listed as threatened. See [https://www.westcoast.fisheries.noaa.gov/protected\\_species/salmon\\_steelhead/salmon\\_and\\_steelhead\\_listings/coho/lower\\_columbia\\_river\\_coho.html](https://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_steelhead_listings/coho/lower_columbia_river_coho.html). Here again, it was the Department's burden to show the proposed permit complied with Division 33. Thus, it was the Department's burden to fully explore this possibility. WaterWatch also excepts on this issue on grounds it was largely prevented by the ALJ from exploring this issue further. (E.g., tr. 2145.)

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.

**Commented [A218]:** Exception: Fish may be considered "native" for some purposes but not others. As noted above and in WaterWatch's closing briefs, Coho salmon quite clearly are "native migratory fish" for purposes of Oregon's fish passage laws, even if they came from hatchery fish. Moreover, ODFW's general conversational definition of "native" is not the test for whether a fish population may be part of a listed population. The suggestion here that it is misstates the law.

**Commented [A219]:** Exception: The record is replete with evidence that Coho salmon and cutthroat trout use Drift Creek above the dam site. (E.g., exs. R171, WW26.) The proposed dam and reservoir obviously would flood and block access to portions of their habitat. That will impair the public interest. The Department cannot simply assume that conditions to protect listed fish only, even if adequate to do that, also would protect unlisted fish.

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.

**Commented [A220]:** Exception: This needs to be considered in determining if conditions, including fish passage, will adequately protect listed fish.

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."

**Commented [A221]:** Exception: WaterWatch also relies on the general obligations of the Department to determine if a proposed use would impair or be detrimental to the public interest, including its obligations under Division 33 to determine if the criteria for protecting listed fish are met.

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.

**Commented [A222]:** Exception: The Department also relied on other reviews to be done later and, in general, impermissibly avoided making decisions it was required to make.

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.

**Commented [A223]:** Exception: The Department may rely on advice to inform its decision but what it has done here is delegate to later determinations. Moreover, as noted elsewhere, the Department did not incorporate all advice from the agencies.

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.

**Commented [A224]:** Exception: The record shows EVWD will not provide fish passage. Therefore, fish passage waiver plans need to be considered to determine if the proposed use will have an impermissible impact on listed species.

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.

**Commented [A225]:** Exception: The mitigation requirements in *Gould* were similar to those in Division 33.

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 injury 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.

**Commented [A226]:** Exception: The Department has deferred required determinations on other issues, similar to the injury issue in *Kusyk*.

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.

**Commented [A227]:** Exception: WaterWatch did not argue this with respect to a fish passage waiver, which generally does allow for public participation. With respect to other issues, including habitat mitigation plans, lack of public process undermines the public process provided in the water permitting statutes.

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.

**Commented [A228]:** Exception: The analysis just showed it would not exceed the temperature standard, not that it would be “cooler.”

**Commented [A229]:** Exception: This misstates WaterWatch’s argument, which is that even the coldest part of the reservoir will sometimes be too warm to meet water quality standards. Moreover, none of the proposed permit conditions would require any kind of temperature control.

**Commented [A230]:** Exception: The record showed, even under Dr. Tanovan’s analysis for a limited time series, that the reservoir sometimes will not fill and, in one case, filled to only 6,000 ace feet, even assuming it was not completely drained at the start of the storage season. Moreover, as discussed above, the District’s analysis fails to account for seepage, which could be thousands of acre feet per year.

**Commented [A231]:** Exception: WaterWatch’s expert agreed that evaporation would not likely be significant, but his preliminary seepage calculations indicated the reservoir could lose thousands of acre feet per year. (Tr. 2303-04.)

**Commented [A232]:** Exception: WaterWatch showed that, depending on assumptions about storage volumes and irrigation withdrawals, the reservoir could have an adverse effect on temperatures in Drift Creek. WaterWatch also pointed out that the reservoir will have an adverse effect on dissolved oxygen. (See WaterWatch Closing Brief, p. 12.)

**Commented [A233]:** Exception: WaterWatch makes this argument with respect to other mitigation plans, too.

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

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

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

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

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

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

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

The Commission has promulgated rules regarding statewide water management policy. These policy rules are not incorporated or mentioned in the water right application review statutes or rules. However, the policy rules are relevant to the review process, which requires that the proposed use comply with Commission rules. ORS 537.153(2).

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

**Commented [A234]:** Exception: Fish passage waiver requirements are at issue here because fish passage, lack thereof and/or mitigation for a waiver affect impacts on fish, which are clearly relevant. The habitat categorization, which is the same for fish passage waivers as for other mitigation, is at issue because it determines whether a proposal should be denied or approved with conditions. Regarding Mr. Murtagh's email after submitting the Division 33 form, WaterWatch incorporates its prior exceptions on this issue.

**Commented [A235]:** Exception: Habitat categorization is relevant to whether the application should be denied or approved with conditions. Mr. Murtagh's email goes to the weight of evidence on the implied categorization.

**Commented [A236]:** Exceptions: WaterWatch's argument is that, without specific mitigation plans in the record, compliance with Division 33, and other criteria for issuing a permit, is impossible to determine.

**Commented [A237]:** Exception: The rule applies whenever an applicant intends to rely on mitigation to comply with Division 33, as EVWD is doing here. Nothing in the rule says otherwise.

**Commented [A238]:** Exception: The Department has not shown that. See WaterWatch closing briefs and other exceptions herein.



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

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

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

#### **C. Water Appropriation Under OAR 690-410-0070**

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

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

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

The rules state that storage projects should be evaluated with a number of criteria, including benefits, public support, environmental issues, cultural and historical impacts, land use, and economic analysis. WaterWatch argues that EVWD's permit should be denied because the Department, in determining whether a *prima facie* case that the proposed use was in the public interest, did not evaluate the project under OAR 690-410-0080(2).<sup>50</sup> 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

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

**Commented [A239]:** Exception: The record showed water quality problems due in part to low flows. (Test. of Gramlich, tr. 445.) Moreover, the proposed permit lacks adequate conditions to protect peak and ecological flows.

policy \* \* \* shall be guided by the following principles.” The Department has interpreted the word “programs” to be broader activities than granting or denying individual permit applications.

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

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

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

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

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

320 Or. 132 at 142. Parallel citation omitted.

The Court of Appeals upheld the Commission’s interpretation of OAR 690-005-0035(4) and its term “pending” to mean that the application must be denied unless the company, at a minimum, had begun the process for obtaining the discretionary land use approvals. The Court of Appeals found that that this interpretation was reasonable. *See also, Staats v. Newman*, 164 Or App 18, 23-24 (1999)(deferring to agency’s plausible interpretation of its own administrative rules). As in *Willamette Water Co.* and *Staats*, the Department’s decision that the water storage criteria need not be evaluated in the permit application *prima facie* analysis is reasonable and entitled to deference.

**Commented [A240]:** Exception: WaterWatch incorporates its closing briefs on this issue.

**Commented [A241]:** Exception: WaterWatch incorporate it closing briefs on this issue.

WaterWatch also contends that the application should be denied because of the land use criteria in OAR 690-410-0080(2)(g)(G).<sup>51</sup> 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.

**Commented [A242]:** Exception: This case is unique because the record shows clearly that owners of land on the project site do not want the project or to sell their land.

WaterWatch argues that the public support criteria in OAR 690-410-0080(2)(g)(C)<sup>52</sup> 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.

**Commented [A243]:** Exception: Public opposition also came from the Pudding River Watershed Council, (ex. R6), and other members of the public, (ex. R30).

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.<sup>53</sup>

**Commented [A244]:** Exception: A "pedestrian survey" consisting of two site visits found relics dating back as far as 8,000 years. By any ordinary meaning of the term, that is significant. Dr. Fagan testified that further investigation is likely to reveal more artifacts. The fact that a further level of investigation is customary does not diminish these findings and in fact suggests not issuing the proposed permit until more is known.

### 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

<sup>51</sup> "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).

<sup>52</sup> "Social (e.g., recreational, public support, cultural, historic.)" OAR 690-410-0080(2)(g)(C).

<sup>53</sup> EVWD and the Department contend that the Protestants did not raise this issue in their protests. However, WaterWatch specifically cited OAR 690-410-0080 in its protest. (Ex. A1 at 21.)

mandating, that all water storage facilities be off-channel.<sup>54</sup> The strategy requires, at most, that off-channel sites be investigated. Here, the PFO will include DEQ's suggestion that EVWD consider an off-channel reservoir.

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

WaterWatch contends that the PFO does not comply with OAR 690-310-0040(1)(a)(G) that requires a permit application to declare legal access to property impacted by the project. 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.<sup>55</sup> However, none of these provisions mention, much less require, peak and ecological flows.<sup>55</sup>

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:

<sup>54</sup> For the same reason, WaterWatch's argument that EVWD must abandon the project because the in-channel reservoir will violate the District's obligation as a public corporation to conform to Water Commission policy is flawed. Again, the policy articulated in the Water Resources Strategy does not ban in-channel storage facilities.

<sup>55</sup> In its protest, WaterWatch also mentioned OAR 690-410-0030 (instream flow protection) and 690-410-0070(2) (water allocation for beneficial uses. These two rules neither mention nor require permit conditions protecting peak and ecological flows.

**Commented [A245]:** Exception: WaterWatch did not argue that the strategy is a rule, only that it must be considered under other rules and the public interest factors. (See WaterWatch closing briefs.) This section also understates the clear preference in the strategy for avoiding on-channel storage. See previous exceptions and quoted language.

**Commented [A246]:** Exception: WaterWatch contends the rules implicitly require such flows because they re essential to prevent impermissible impacts to listed species.

(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.<sup>56</sup> The entire sentence reads: “Any proposed use of water during October should include bypass flows to meet the instream water right and provide any peak flows necessary to maintain stream habitat and ecology.” It is unclear whether the intent of this sentence is to require bypass flows for peak and ecological flows, and whether such flows should be required only in October or in some other months as well.

As the Department acknowledged, the PFO contains no requirement to provide peak or ecological flows. Before finalizing the FO, the Department must clarify with ODFW the “peak flows” phrase in the review sheet, and ensure that the FO includes any peak and ecological flow condition recommended by ODFW.

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

### Issue No. 3: Public Policy Review

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

It is true that the public interest analysis in the PFO is devoid of facts. Because Mr. Wallin did not testify at the hearing, the record does not show how he came to the conclusions in his analysis. The record shows however, that the Department considered facts contained in the District’s application, the Protestants’ protests, and the Division 33 reviews by ODFW and DEQ. The seemingly perfunctory nature of the public interest analysis in the PFO therefore does not establish that the Department failed to properly evaluate the public interest factors.

**Commented [A247]:** Exception: This should be done in a public process as discussed above.

**Commented [A248]:** Exception: See WaterWatch closing briefs and discussions above.

**Commented [A249]:** Exception: It does show that. See WaterWatch and Rule closing briefs.

<sup>56</sup> Ex. A1 at 219.

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

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

**Commented [A250]:** Exception: Protestants burden was only to show that the presumption, if established, was overcome. The ultimate burden remained with the proponents of the action. See discussion above re burden of proof.

**A. Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.**

The first of the seven public interest factors requires that a proposed use conserve the highest use of water for all purposes. ORS 537.170(8)(a)

EVWD’s storage proposal, as modified by the Department, is expressly allowed by the Willamette River basin rules, which apply to Drift Creek. OAR 690-502-0040(4)(a). Moreover, statewide water resource management rules articulate the value of water storage projects:

Policy. Water storage options are an integral part of Oregon’s strategy to enhance the public and private benefits derived from the instream and out-of-stream uses of the state’s water resources. Storage can provide increased water management flexibility and control. Storage can be enhanced through means ranging from natural processes to engineered structures. The state shall facilitate and support project planning and development. The state shall actively pursue funding when storage is determined to be a preferred alternative to meet the water needs of instream and out-of-stream beneficial uses.

OAR 690-410-0080(1).

Stored water may be released or used at any time for any beneficial purpose, including irrigation.<sup>57</sup> OAR 690-502-0040(4)(a) and (c). The concept of “beneficial use” is integral to

<sup>57</sup> EVWD also proposes to store water for flow augmentation. That use, however, is meant only to comply with conditions that may be imposed by ODFW and DEQ. The primary purpose of the stored water is to irrigate crops.

Oregon’s water law. Not only does the concept appear in statutes and rules, its significance is underscored by the Oregon Constitution, which provides in relevant part: “use of \* \* \* water for beneficial use \* \* \* is necessary to the development and welfare of the state and is declared a public use.” Article I, Section 18. Agricultural irrigation has been specifically recognized as a “beneficial use.” OAR 690-502-0040(4)(c).

In upholding the granting of a water use permit, the Oregon Court of Appeals approvingly quoted Commission language that stated:

It is the Commission’s position that maximum beneficial use of the waters of the state is achieved by issuing a permit to anyone who is willing to attempt appropriation and use of whatever unappropriated water may become available, except where a basin program identifies a need to set aside some amount of unappropriated water for particular future uses.

*Benz*, 94 Or App 73 at 80.

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

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

With regard to fishing and wildlife, the record shows that Drift Creek provides limited habitat above and below the proposed dam site for Pacific Lamprey, listed as sensitive under Oregon law, Upper Willamette Winter Steelhead<sup>58</sup> and Upper Willamette Spring Chinook, ESA-listed as threatened. The creek also provides habitat for unlisted fish such as Cutthroat Trout and Coho Salmon.

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

<sup>58</sup> Upper Willamette Winter Steelhead have not been actually observed in Drift Creek, but ODFW assumed that they might be because other fish in the Salmonid family use the creek.

**Commented [A251]:** Exceptions: Instream flows are also recognized as a beneficial use. WaterWatch’s argument is not that instream flows should always take precedence, only that they should under the facts of this case.

**Commented [A252]:** Exceptions: This is an incomplete description of the fisheries resources and improperly characterizes them as “limited.” Moreover, it ignores the potential for restoration, which several witnesses discussed. (Eg., Declaration of Murtagh at 4.)

woody debris in the creek and planting vegetation, WaterWatch did not offer specific evidence about the impact of such measures or who would implement and pay for them.

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

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

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

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

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

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

**Commented [A253]:** Exception: The record contains significant evidence of restoration potential. (E.g. Declaration of Murtagh at 4-5, 7; Declaration of Rankin at 6-7.) Thus, Drift Creek cannot simply be dismissed based on current habitat limitations. To suggest WaterWatch had a burden to offer more specific evidence is not reasonable, especially in light of the other findings based on far skinny (or no) evidence, including the primary issue of whether mitigation can offset impacts to listed species.

**Commented [A254]:** Exceptions: As stated above and in closing briefs, the conditions cannot be determined adequate to make up for the loss and WaterWatch has demonstrated how the proposed use would impair the public interest.

**Commented [A255]:** Exception: As discussed above and in closing briefs, evidence in the record does show how conditions will not be effective, or cannot be determined to be effective, and how dams adversely impact fish habitat and the public interest.

**Commented [A256]:** Exception: This is purely speculative and there will be no public involvement in some of the processes to ensure effectiveness.

**Commented [A257]:** Exception: Photographs and evidence from fish surveys, at least, show at least some public access to Drift Creek. Moreover, the public benefits from fish habitat in Drift Creek because fish that use that habitat also go elsewhere and because many members of the public enjoy knowing of the existence of fish habitat even if they cannot access it.

**Commented [A258]:** Exception: Protestants showed that the proposed use will impair other uses, particularly instream uses, and therefore is not in the public interest. See WaterWatch closing briefs.



**B. The maximum economic development of the waters involved.**

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

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

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

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

Granting the permit will result in economic losses to the Rue Protestants. These losses are due to the loss of farmland and timber land caused by inundation of land by the reservoir. They argue that those losses should be considered in analyzing the second public interest factor.

However, the second public interest factor focuses on maximum economic development *of the waters involved*. And, the factor does not take into account land lost from a project involving the waters.

In any event, if the Rue Protestants do not sell their land voluntarily, EVWD can take the land through eminent domain. If the latter occurs, EVWD will have to fairly compensate the Rue Protestants for the land. Moreover, the economic value of the diverse crops that EVWD farmers could grow with supplemental irrigation, as well as the increased yield of irrigated crops, outweighs the loss of the crops that would be grown on the Rue Protestants’ land. Thus, the Rue Protestants did not show that leaving the water in the creek will result in greater economic development of the waters.

Accordingly, the Protestants have not demonstrated that the proposed project fails to maximize economic development of the waters is issue and is therefore detrimental to the public interest.

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

The third public interest factor looks at whether the proposed use will conflict with drainage, sanitation, and flood control. There is no evidence in the record that EVWD’s

**Commented [A259]:** Exceptions: This analysis fails to consider the economic value of public resources including fish and wildlife, which Ms. Wyse acknowledged. Also, the record contains undisputed evidence that the proposed use will require significant public subsidies. That shows the costs do not exceed the benefits, because the benefits are all private benefits to District members but apparently will not generate enough added revenue for District members to fund the project without public subsidies.

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.

**Commented [A260]:** Exception: See previous exceptions on this issue and WaterWatch closing briefs.

**Commented [A261]:** Exception: The proposed use would at least take water from instream uses, which are a beneficial use. Moreover, it would preclude future, less destructive proposals for off-channel storage.

**E. Prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.**

The fifth public interest factor considers whether the proposed use is wasteful, uneconomic, impracticable or unreasonable.

The PFO requires EVWD to not waste water while storing it. The PFO contains requirements for measuring the water in the reservoir using a staff gauge. Additionally, this Proposed Order suggests that additional water flow monitoring be imposed. The evidentiary record also shows that evaporation and seepage are not significant issues here, and that those issues can also be addressed in the design of and materials used to construct the reservoir.

**Commented [A262]:** Exception: See prior exceptions on this issue.

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.

**Commented [A263]:** Exception: As discussed in closing briefs and previous exceptions, the record showed that District farmers generally have existing water rights for all property they wish to irrigate, that regulation of surface water has not prevented them from farming their property, and that there has been no regulation or threat of regulation of their groundwater rights other than a very limited number of permits granted in groundwater limited areas after the areas were established.

Although EVWD offered no specific evidence suggesting that any of the farmers may lose additional water rights, EVWD did offer the testimony of the former director of the Department, who indicated that EVWD’s plan to develop a supplemental water source is warranted by current water conditions in the district.

With regard to impracticability, the Protestants have not shown that the District’s proposed project, despite many future hurdles, cannot succeed. Although the Protestants claim that it might be more practical for EVWD to obtain supplemental water from the Army Corps of Engineers, the application process does not require the Department to select and determine the best of all possible alternatives for obtaining supplemental water. Further, the Department cannot guarantee or even assume cooperation by the Army Corps of Engineers in satisfying EVWD’s water needs. The Department must review the use as proposed in the application, and determine whether the proposed use can be modified or conditioned to meet the public interest.

Moreover, the Protestants cite to no authority for the proposition that the District must show that its farmers are currently unable to grow crops without supplemental irrigation. Given the length of time necessary to obtain all required permits for a project of this magnitude, it would be imprudent for the District to delay locating supplemental water.

With regard to the economies of the project, it is true that the final cost of construction and conveyance is unknown. However, if EVWD is unable to secure funding, whether private, public or a combination of both, the dam and reservoir will not be built. If EVWD determines after the specifications are completed that the eventual cost of water per acre foot is prohibitive, the District likely will forego the project. The farmers within EVWD are business people. Nothing in the record suggests that they will act irrationally when making economic decisions affecting their businesses.

EVWD has shown that there is currently a demand for 4,000 annual acre feet of supplemental water. That amount of reserved water may increase, however, if the project appears to be a reality. And, although the Protestants contend that the project would only benefit a dozen or so farmers, the record shows that EVWD has 45 members.

Finally, the Protestants have not shown that the project is unreasonable. They argue that inundating productive private farmland to allow competing farmers to enhance the value of their lands is not reasonable. However, the record shows that irrigation produces higher-value crops and contributes to higher yields of other crops. Moreover, the Victor Point farmers are not making use of Drift Creek water on their land. Thus, water used by one group of farmers is not being taken away and given to competitors. Instead, under the proposed project, unappropriated water will be used for a beneficial purpose.

**Commented [A264]:** Exception: The record showed no compelling need for such a destructive storage project and also showed better alternatives, including use of stored water from existing reservoirs in the Willamette River basin. See WaterWatch closing briefs and exceptions above.

**Commented [A265]:** Exception: They have only shown subscriptions for that amount of water, which could perhaps be speculation on the part of the subscribers. The District offered little evidence, much less any quantification, of “demand.”

**Commented [A266]:** Exception: The project would be unreasonable, for reasons discussed in WaterWatch’s closing briefs and other exceptions herein.

**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:

**Commented [A267]:** Exception: This mischaracterizes water rights on the stream, as discussed in exceptions above. Moreover, the project would injure the Schact water right and the instream water right, also as discussed in exceptions above.

**Commented [A268]:** Exception: See exceptions above and WaterWatch closing briefs.

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.

**Commented [A269]:** Exception: See exceptions to previous discussions on these issues and WaterWatch closing briefs.

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.

**Commented [A270]:** Exception: The need for public subsidies shows the project is not economical and that the costs exceed the benefits. Otherwise the District members, recipients of the benefits, would be able to pay for the project without subsidies.

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.

**Commented [A271]:** Exception: This is not the only issue raised under this criteria and the public support issue is broader than characterized here. See discussion above and in WaterWatch closing briefs.

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.

**Commented [A272]:** Exception: Proponents had the burden of showing the presumption was met and failed to do so. In the alternative, protestants overcame that presumption by showing it was incorrectly established and/or was overcome by other factors. Proponents then had the burden of showing the project would not impair or be detrimental to the public interest, which they did not do. See exceptions above and WaterWatch closing briefs.

#### Issue No. 4: Federal Endangered Species Act

The Department and EVWD argue that the OAH has no jurisdiction over WaterWatch’s claims that the PFO violates the ESA. WaterWatch has offered no argument in its closing or responsive briefs supporting claims under that law.<sup>59</sup> As a result, this Proposed Order does not address the ESA or the jurisdiction issue raised by the Department and EVWD.

#### Issue No. 5: Public Comments

WaterWatch contends that the Department failed its obligation to review comments submitted during the public comment period. That argument is not persuasive.

The Department’s rules require consideration of public comments received during the public comment period. OAR 690-310-0150(1) provides: “In developing the final order, the Department shall consider all comments received under OAR 690-310-0090(4), but the proposed order need not separately address each comment received.” Additionally, OAR 690-310-0120(3)(a) requires the Department to: “[F]urther evaluate \* \* \* any comments received \* \* \* to determine whether the presumption is overcome.”

Here, the Department allowed public comments beginning October 13, 2014. The Department reviewed the comments and compiled them. Ms. Eastman incorporated into the PFO a summary of the public comments. The Department therefore met its comment-reviewing obligations. The Protestants offered no evidence that the Department failed to consider any particular public comment or that such a failure resulted in the Department ignoring information justifying the denial of EVWD’s application.

**Commented [A273]:** Exception: Public comments showed the project would impair or be detrimental to the public interests for reasons including harm to fish habitat and depriving landowners of their property against their will.

#### Issue No. 6: Power Generation Consistent With Safe Fish Passage Under ORS 540.350(2) and (3)

<sup>59</sup> WaterWatch also mentioned the CWA in its protest to the PFO. Similarly, WaterWatch raised no argument in its briefs that the PFO violates that law.

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.

**Commented [A274]:** Exception: WaterWatch does not contend only that the PFO is defective. It also contends that the record cannot support approval of the proposed use because it does not show the proposed use will comply with ORS 540.350(2). The statute requires showing that its requirements can be met when written approval is sought for "the site," which at least is being done here. Thus, the argument is not premature.

**Commented [A275]:** Exception: Yet again, the Department is deferring determination that it needs to make before issuing a storage permit.

**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

**Commented [A276]:** Exception: The proposed order should propose denying the application.

**Commented [A277]:** Exception: This issue should be addressed now. The application should be denied because no evidence in the record shows how the requirement would be met.

**Commented [A278]:** Exception: We support increased measurement but suggest that, if the project is approved, the District should be required to install a permanent stream gauge immediately below the dam that is remotely readable at all times by the Department and on line by the public.

**Commented [A279]:** Exception: This condition should require ODFW to recommend flows to be protected to meet peak and ecological flow needs. Those recommendations should be made available to all parties, the hearing should be reopened to permit examination of ODFW on the recommendations and to present other witnesses on the topic, and a revised proposed order should be issued to require incorporation of those flow protections.



## **APPEAL PROCEDURE**

### **NOTICE**

If the recommended action in the proposed order is adverse to any party or the Department, the party or Department may file exceptions and present argument to the Department. Exceptions must be in writing, clearly and concisely identify the portions of the proposed order excepted to, and cite to appropriate portions of the record or to Commission policies to which modifications are sought. Parties must file their exceptions with the Department at its Salem offices, by any method allowed in the notice of appeal rights provided in the proposed order. A party must file any exceptions within 30 days following the service of the proposed order on the parties to the contested case proceeding. Unless otherwise required by law, the Director must consider any exceptions to the proposed order and issue a final order. If the applicable law provides for the Commission to review any exceptions or issue a final order, the Commission may form a sub-committee to review the exceptions and provide a report prior to the Commission issuing a final order. OAR 690-002-0175.

**CERTIFICATE OF MAILING**

On February 25, 2019 I mailed the foregoing PROPOSED ORDER in OAH Case No. 2017-OWRD-00002.

**BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:**

<b>Name</b>	<b>Address</b>	<b>Contact</b>
East Valley Water District	PO Box 1046 Mount Angel OR 97362	
Joel D Rue	1316 Victor Point Rd SE Silverton OR 97381	
WaterWatch of Oregon, Inc.	213 SW Ash St, Ste 208 Portland OR 97204	
Bruce P Jaquet	14752 Doerfler Rd Se Silverton OR 97381	
Robert B Qualey	15256 Fox Rd SE Silverton OR 97381	
Steve Lierman	1985 Victor Point Rd SE Silverton OR 97381	
David Doerfler	Ioka Farms 13512 Doefler Rd SE Silverton OR 97381	
Zach Taylor	Taylor Farms, Inc 2538 Drift Creek Rd NE Silverton OR 97381	
Tom and Karen Fox	6 El Greco St Lake Oswego OR 97035	
John and Sharon Fox	7784 SW Ashford St Tigard OR 97224	
Rachel Weisshaar	1162 Court St NE Salem OR 97301	rachel.weisshaar@state.or.us
Patricia McCarty	725 Summer St NE, Ste A Salem OR 97301	Patricia.E.McCarty@oregon.gov
Kirk B Maag	760 SW 9th Ave, Ste 3000 Portland OR 97205	kirk.maag@stoel.com
Janet Neuman	888 SW 5th Ave, Ste 1600 Portland OR 97204	janet.neuman@tonkon.com
Brian Posewitz	213 SW Ash St, Ste 208 Portland OR 97204	brian@waterwatch.org
Renee Moulun	1162 Court St NE Salem OR 97301	renee.m.moulun@state.or.us

/s/Joanne M Call  
Hearing Coordinator

*In the Matter of East Valley Water District - OAH Case No. 2017-OWRD-00002*  
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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.

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**CERTIFICATE OF FILING AND SERVICE**

The undersigned hereby certifies that he filed the foregoing document, by first-class mail and hand delivery, with the Oregon Water Resources Department, 725 Summer Street NE, Suite A, Salem, OR 97301, and that he served the foregoing document on the following parties/counsel by electronic mail, on the date set forth below.

<p><u>East Valley Water District</u></p> <p>Kirk Maag Stoel Rives LLP 760 SW Ninth Avenue, Ste 3000 Portland, OR 97205 Phone: 503-294-9546 Fax: 503-220-2480 Email: kirk.maag@stoel.com</p> <p><i>With electronic copy to Crystal Chase: crystal.chase@stoel.com</i></p> <p><u>Protestant Joel Rue et al.</u></p> <p>Janet Neuman Tonkon Torp LLP 888 SW Fifth Avenue, Ste 1600 Portland, OR 97204 Phone: 503-802-5722 Fax: 503-972-7422 Email: janet.neuman@tonkon.com</p>	<p><u>Oregon Water Resources Department</u></p> <p>Renee Moulun (email only) Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 Phone: 503-947-4576 (M, W, Th) 503.551.9582 (Tu, F) Email: renee.m.moulun@state.or.us</p> <p>Rachel Weisshaar Oregon Department of Justice 1162 Court St NE Salem, OR 97301-4096 Phone: 503-947-4541 (M, W, Th); 971-673-1951 (T, F) Email: rachel.weisshaar@state.or.us</p> <p>Patricia McCarty (email only) Oregon Water Resources Department 725 Summer St NE, Ste A Salem, OR 97301-4096 Phone: 503-986-0820 Email: patricia.e.mccarty@state.or.us</p>
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DATED: October 3, 2019.

WATERWATCH OF OREGON

s/ Brian Posewitz

By \_\_\_\_\_

BRIAN J. POSEWITZ, OSB No. 914002  
213 SW Ash St. Ste. 208  
Portland, OR 97204  
Telephone: (503) 295-4039 x 2  
Email: brian@waterwatch.org  
Attorneys for Protestant WaterWatch of Oregon

CERTIFICATE OF SERVICE

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039