

BEFORE THE WATER RESOURCES COMMISSION  
OF THE STATE OF OREGON

In the Matter of Applications )  
R-69128 and 69063 in the )  
name of Dwight Hammond )  
dba Hammond Ranches, Inc., )  
for Permits to Store and Use )  
the Waters of Krumbo Creek )  
for Irrigation Purposes )

and )

In the Matter of the Proposed )  
Cancellation of Certificates )  
33824 and 33825, and Partial )  
Cancellation of Certificate )  
28524, all in name the )  
U.S. Fish and Wildlife Service )  
(PC 88-1 and PC 88-9) )

and )

ORDER

In the Matter of Applications )  
R-69815 and 69816 in the name of )  
the U.S. Fish and Wildlife )  
Service, for Permits to Store )  
and Use Water for Fish, Wildlife )  
and Recreation Purposes )

and )

In the Matter of Applications )  
70073 and 70074 filed by the )  
Oregon Department of Fish and )  
Wildlife, for Instream Water )  
Rights )

FINDINGS OF FACT

1. Dwight Hammond, dba Hammond Ranches, Inc., proposes to divert water from Krumbo Springs for storage in Kern Reservoir.

2. The Hammond applications were filed on April 20, 1987, (69063) and June 9, 1987, (R-69128).

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3. Protests to the Hammond application were filed by the Oregon Department of Fish and Wildlife (ODFW), the United States Fish and Wildlife Service (USFWS), WaterWatch, Inc., Oregon Trout and Oregon Council of Trout Unlimited.

4. In addition, Dwight Hammond alleged that the USFWS had forfeited certain of its water rights to the use of water from Krumbo Springs on the Malheur Wildlife Refuge for nonuse.

5. The Water Resources Commission (WRC) set these matters for hearing.

6. In November and December of 1988, the hearing officer held a portion of the hearings. The hearings were continued to allow the parties to negotiate a settlement.

7. On January 26, 1989, USFWS applied for a storage right for fish, wildlife and recreation purposes within the Krumbo Reservoir, to supplement existing storage rights and allow additional storage of 830 AF (R-69815). The total capacity of Krumbo Reservoir is 2498 AF. USFWS also applied for a right to use the stored water in the reservoir. (69816)

8. On September 20, 1989, ODFW filed for an instream water right 70073 of 2.5 cfs on the West Fork of Krumbo Creek, and application 70074 for 3.3 cfs below the confluence of the West Fork and the mainstem of Krumbo Creek.

9. A negotiated partial settlement was reached, which is attached as Exhibit A. None of the parties and no member of the public have asserted that the issuance of these permits will be detrimental to the public interest, but WaterWatch asserts that WRC

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cannot determine the public interest until it adopts certain plans and engages in rulemaking. WaterWatch reserves its right to contest the order for the alleged failure to adopt a comprehensive state plan, a basin plan and failure to engage in rulemaking or further define "maximum economic development of the water involved" prior to resolving this matter.

10. Although it has not been completed, WRC is in the process of progressively formulating an integrated coordinated program for the use and control of all water resources.

11. Although a basin study was performed in 1967, no basin program was adopted for this basin because of the small amount of water available for future appropriation.

#### CONCLUSIONS OF LAW

1. The permit application and the forfeiture claims are integrally related. The parties have resolved all of these matters as part of one agreement. Therefore these matter are consolidated.

2. Granting the permits will allow a limited amount of water to be used for a number of beneficial purposes including irrigation, fish and wildlife and recreation. ODFW's instream water rights will be reused in Krumbo Reservoir pursuant to USFWS's right for fish, wildlife and recreation purposes. The water will be used again downstream of the Reservoir for refuge and other purposes. The Hammonds' right is for storage for irrigation, which is a beneficial use. WRC recognizes that these uses are of benefit to the public and will promote economic development. This agreement will allocate the water from this source in a way which will accommodate and

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promote multiple uses of the water. WRC finds that issuance of the permits in question will not impair or be detrimental to the public interest. The only unresolved issues are whether WRC must adopt a statewide water plan, a basin plan and engage in rulemaking before issuing these permits.

3. It is not necessary for the WRC to adopt a completed integrated, coordinated program for the use and control of all the water resources of the state prior to awarding these individual permits and certificates or resolving these forfeiture claims.

4. A basin program is not a prerequisite to resolving these permit and certificate applications or forfeiture claims.

5. WRC is not required to further explain through rulemaking the phrase "maximum economic development of the waters involved," but may interpret the statutory phrase if necessary as part of a contested case. Because the parties have resolved all of the factual issues involved in these water rights, it is not necessary or appropriate to define this phrase in this case.

6. The parties have not demonstrated that the permits at issue in PC88-1 and PC88-9 have been forfeited.

7. Because of WRC's resolution of these matters, it is unnecessary to rule on pending motions.

#### ORDER

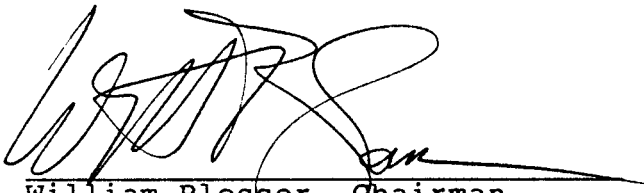
1. The proceedings PC88-1 and PC88-9 are dismissed with prejudice.

2. The Director of the Water Resources Department shall issue permits R-69128, 69063 and R-69815, 69816 subject to the conditions

set forth in the agreement and subject to other appropriate conditions not inconsistent with the agreement.

3. The Director shall take appropriate steps to process the ODFW applications, 70073 and 70074, and shall issue the certificates as requested unless he finds that issuance would impair or be detrimental to the public interest.

4. The agreement of the parties shall be incorporated into the above permits and certificates.



William Blosser, Chairman  
Water Resources Commission

WP111:tmt/0735H

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STIPULATED AGREEMENT

In the Matter of Application )  
R-69815 and 69816 in the name of )  
the U.S. Fish and Wildlife )  
Service, for Permits to Store )  
and Use Water for Fish, Wildlife )  
and Recreation Purposes )

and )

In the Matter of Application )  
70073 filed by the Oregon )  
Fish and Wildlife Department, )  
for an Instream Water Right )

The parties stipulate to the following agreement for  
termination of this proceeding upon the condition that the Oregon  
Water Resources Department (WRD) Director and the Oregon Water  
Resources Commission (Commission) will issue the rights herein  
described:

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1 - STIPULATED AGREEMENT

1. The Hammonds will support the United States Fish and Wildlife Service (USFWS) application, and the Commission will issue a new year-round storage right for fish, wildlife, and recreation purposes within the Krumbo Reservoir to supplement existing storage rights in Krumbo Reservoir that will allow a total storage of 2498 AF. This new storage right will have a priority date as of the application.

2. The Hammonds will support and the Commission will issue an instream water right, upon application by the Oregon Department of Fish and Wildlife (ODFW), in the main stem of Krumbo Creek to the extent of 3.3 cfs measured immediately below the confluence of the west fork with the main stem of Krumbo Creek for fish and wildlife purposes.

3. The proceedings PC88-1 and PC88-9 be dismissed with prejudice.

4. The applications R-69128 and 69063 of Hammond with a priority of June 9, 1987, and April 20, 1987, respectively, be granted to the following extent: Hammonds may divert water direct from the Springs which are described in these applications, and associated watershed, to Kern Reservoir from October 1 through April 30, when there are remaining flows of 2.5 cfs in the west fork of Krumbo Creek immediately above its confluence with the middle and north forks, and 3.3 cfs in the main stem of Krumbo Creek immediately below the confluence of the west fork and the main stem,

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both confluences being on federal land. At their expense, Hammonds will install weirs at both points which will indicate the respective flows before diverting water.

5. More than 72 hours prior to commencement of diverting, Hammonds will notify the Manager of the Malheur National Refuge.

6. The USFWS agrees to satisfy its water needs and rights below Krumbo Reservoir without calling on the natural flows of Krumbo Creek prior to drawing down the water levels of Krumbo Reservoir until it reaches a water surface level - elevation of 4198 feet MSL (1340 AF remaining) before calling junior rights; provided, that such a call will not be made if the reduction in storage elevation is due to management actions of USFWS such as dewatering due to repairs, reconstruction, or treatment of fish populations.

7. The ODFW may observe the fishery in the reach of Krumbo Creek to the Springs at all reasonable times. Plans for diversion works will be of a design mutually satisfactory to the Hammonds, ODFW and USFWS.

8. If the weir to be installed above the confluence of the west fork of the main stem of Krumbo Creek is upon the land of Applicant instead of federal land, it may be examined at all reasonable times by representatives of ODFW or USFWS.

9. Applicant will install and maintain an automatic water level recorder at the measuring weir on the main stem of Krumbo Creek to the specifications of the WRD and will provide periodic records from the recorder to ODFW and Watermaster.

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10. In the event USFWS petitions the Circuit Court for an amendment of the Duffy Decree, the Applicant will not oppose the filing to correct the decree as it pertains to Certificate 28524, Vol. 20, State Records of Water Right Certificates. The correction pertains to 78.9 acres.

11. The Hammonds will support and the Commission will issue an instream water right, upon application of ODFW, in the west fork of Krumbo Creek to the extent of 2.5 cfs measured immediately above the confluence of the west fork with the main stem of Krumbo Creek for fish and wildlife purposes, provided that such right shall never permit access upon the private lands of Applicant and the right shall be junior to the Application of Hammonds herein.

12. This is a nonseparable agreement.

13. The applicant shall be permitted to divert, from all sources described in the application, a total of up to 4.5 cfs as measured only at the terminus of the pipeline at the open ditch leading to Kern Reservoir in section 33, T 31S, T 32 3/4 E, SE 1/4, SW 1/4.

The applicant's diversion rate from any and all sources is subject to the minimum flows prescribed by paragraph 4. Notwithstanding the application as to the permitted diversion rates at the described points of diversion, all diversions shall be in a collection and measured at only one point as described above.

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The measurement device shall consist of a pipe plug permanently installed in the pipe end that will permit an outflow of up to 4.5 cfs.

14. Only the following three issues are preserved for appeal by WaterWatch:

1. Whether the Department can issue a permit based on a public interest determination required by ORS 537.170 in the absence of a comprehensive statewide program as required under ORS 536.300(2);

2. Whether the Department may approve this permit prior to having a basin program in place;

3. Whether the Department can issue a permit based on public interest determination required by ORS 537.170 without further defining the term "maximum economic development of the waters involved." ORS 537.170(5)(b).

Subject to the above issues preserved for appeal, all parties waive their right to appeal the order.

Findings of Fact

1. The Commission finds that the stipulated agreement and the water rights issued pursuant to it are in the public interest;
2. There exists no comprehensive statewide program as described by ORS 536.300(2);
3. There exists no basin program for this basin;

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15. Unless a reviewing court affirms the order of the Commission which finds this agreement and all applications therein described to be in the public interest in the event of an appeal, the agreement in whole is null and void, and any permits issued pursuant to the agreement are null and void.

/s/ Stephen E.A. Sanders, for ODFW

/s/ C. Fred Zeillemaker, for USFWS

/s/ Audrey Jackson Simmons, for WaterWatch

/s/ Jim Myron, for Oregon Trout

/s/ William Schroeder, for Hammond Ranches

/s/ David Nolte, for Trout Unlimited

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