BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Rights Transfer Application T-11108; Oregon Department of Fish and Wildlife	)))	PROTEST TO PRELIMINARY DETERMINATION

Bark and Food & Water Watch ("Protestants") hereby protest the Preliminary Determination of the Water Resources Department ("Department" or "WRD") for application T-11108 on Little Herman Creek in the Columbia River Basin, pursuant to OAR 690-380-4030 and OAR 690-002-0030.

I. Name, address, telephone number of protestant(s):

Bark
PO Box 12065
Portland, OR 97212
(503) 331-0374

Food & Water Watch
917 SW Oak Street, Suite 404
Portland, OR 97205
(971) 266-4528

II. Interests of Protestants

A. Bark's Interests

Bark is representing the general public interest in the water resources of Oregon and Mount Hood, as well as the specific interest of Bark's members and the organization itself. Bark has invested time and money in protecting and restoring streams in the Mount Hood National Forest. Bark also has invested time and money in improving land management practices in the recharge zones for freshwater springs. Bark has members who regularly use and enjoy surface waters that could potentially be affected by the proposed transfer.

B. Food & Water Watch's Interests

Food & Water Watch is representing the general public interest in access to clean, safe, and affordable drinking water, as well as the specific interest of Food & Water Watch's members and the organization itself. Food & Water Watch advocates for common sense policies that will result in healthy shared resources like clean water. Food & Water Watch has invested time and money in protecting natural water resources nationally and in Oregon, including in the area that would be affected by the proposed transfer.

C. Injury to Bark and Food & Water Watch's Interests

The interests represented by Bark and Food & Water Watch and their members are multifaceted and include, but are not limited to: (1) an interest in ensuring enforcement of Oregon's water laws; (2) an interest in the development and promotion of water policies that protect instream values, including fish, water quality, and recreation; (3) an interest in the long term implications that the Water Resources Department's decision on this transfer application will have on other transfer requests throughout the state; and (4) an interest in supporting local communities' social, cultural, and economic investment in the restoration and preservation of the federal forest lands that serve as the recharge zone for Oxbow Springs. For all of these reasons, Bark and Food & Water Watch and their members will be affected, adversely affected and aggrieved, and practically affected by the preliminary determination on this transfer application.

III. The Requested Transfer

Oregon Department of Fish and Wildlife ("ODFW") holds a surface water right for 10.0 cfs from Little Herman Creek (Certificate 24625) for fish hatchery operations. ODFW is proposing a transfer to add two additional points of diversion ("PODs") called "East Spring" and "Middle Spring."

ODFW's application T-11108 requests a transfer of POD for the entire rate (10.0 cfs) of its right. Subsequently, ODFW filed a second application (T-11249) for 9.5 cfs and requested that the original application be amended to 0.5 cfs, splitting the total rate into two separate applications. The Department has issued preliminary determinations approving transfer applications for 9.5 cfs and 0.5 cfs for ODFW. Bark and Food & Water Watch have separately protested the Preliminary Determination on T-11249.

The purpose of splitting the 10.0 cfs rate into two separate transfer applications is to facilitate Nestlé Waters North America's proposed water bottling plant at Cascade Locks. A Water Resources Department memo dated January 24, 2011, states "East Spring is being considered as a possible source for the Nestle Water Bottling." WRD Memo to File T-11108, Oxbow Hatchery, from Marc Norton, Groundwater Section at 7 (1/24/2011). The memo further notes that during discussions with ODFW "concerning a possible exchange of water with the City of Cascade Locks to allow Nestle Water to divert water from one of the springs for bottling water, it became apparent that *a transfer was needed to add the springs* as historic PODs." *Id.* at 3 (emphasis added).

The Department currently has before it an application for water right exchange for 0.5 cfs between ODFW and the City of Cascade Locks. Exchange Application T-11109 (filed 8/27/2010). That application includes a letter from the City of Cascade Locks referencing an intergovernmental agreement between ODFW and the City, and states that the exchange will allow the City to "attract a new large commercial customer." T-11109 Application Attachment, Letter from City of Cascade Locks to WRD (6/10/2010). The City's letter shows that Dave Palais, the Natural Resource Manager for Nestlé Waters North America, received a copy of this letter, indicating that Nestlé is the "new large commercial customer" the City seeks to attract. *Id.*

The referenced intergovernmental agreement provides further information regarding the proposed use by the City:

> [T]he City's potential customer must have a reliable long-term spring water supply that meets the Food and Drug Administration ("FDA") definition of "spring water." . . . The City wishes to exchange some of its well water ("Well Water") for some of ODFW's spring water from the Oxbow Springs ("Spring Water") in order to make available the required Spring Water supply to meet the potential customer's needs.

Intergovernmental Agreement for Water Rights Exchange Evaluation, 1 (June 22, 2009).

Other Department correspondence indicates that "this transfer involves the portion of the right that will be involved in the exchange to facilitate development of the Nestle bottling plant." Email from Greg Kupillas to Joan Smith, WRD (10/20/2011). At the Water Resources Commission meeting on January 27, 2012, David Palais asked for Commission support for Nestlé. Furthermore, the Department acknowledges that T-11109 cannot be processed unless and until T-11108 is approved, making this application a key part of the water right exchange. Preliminary Determination at 3 ¶12. In sum, the record is clear that this transfer, together with T-11249, are inextricably linked to the proposed water right exchange T-11109 to facilitate the Nestlé bottling plant.

For the reasons outlined in this protest, this transfer should be denied. In the alternative, the decision should be amended to include additional conditions in order to ensure no enlargement of the water right and no injury to other water users.

IV. Deficiencies in the Preliminary Determination Supporting the Requested Relief.

As required by OAR 690-380-4030 and OAR 690-002-0030, the following facts demonstrate that the Protestants are entitled to the relief and action requested.

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A. The Requested Transfer May Injure Other Uses.

The Department failed to adequately evaluate the statutory criteria for approving a water right transfer application. OAR 690-380-4010(d) & -5000(d) require that the Department approve a transfer application only where "the proposed transfer would not result in injury" to other water rights. The Department concluded that because the transfer is for the same use (fish hatchery operations) currently allowed, there will be no injury to other water rights. Preliminary Determination at 4 ¶21. This finding fails to account for the relationship between this transfer and T-11109, which if approved will result in a change of use to a consumptive use by Nestlé to bottle water. The Department's failure to consider this application in the context of the proposed water right exchange allowed it to circumvent the issue. Thus, by viewing T-11108 alone the Department superficially concluded that because the use of the transfer water right would remain the same (at least for now) there would be no injury to other water rights. Further, the Department in a single sentence concluded that because the water right is not enlarged, the transfer would not interfere with other water rights. *Id.* at 4 ¶22.

The Department failed to identify other water rights that might be harmed by the transfer. For example, the Department completely ignored any potential impact to downstream water including any tribal water and fishing rights. All tribes with trust status reservations within the Columbia River basin and its tributaries potentially have reserved water right claims that cannot be infringed upon.[1] National Academy of Sciences, *Managing the Columbia River: Instream Flows, Water Withdrawals, and Salmon Survival* 119 (2004).[2]

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[1] Further, ORS 182.164 requires state agencies to develop and implement policies to include tribes when a state agency makes a decision that may affect tribal interests.

[2] For example, the Treaty of 1855 Article 1 reserves exclusive access to waterways for fishing rights for the Confederated Tribes of the Warm Springs Indians. ("Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the

In any event, the Department's decision explicitly relies on the absence of a change in use pursuant to this transfer to conclude there will be no injury to other water rights. This conclusion will be invalidated after the water right exchange currently before the Department (Application T-11109) is approved and the City of Cascade Locks sells the water to Nestlé for bottling. The water use will have changed, not only from the fish hatchery use to a bottling plant but also from a relatively non-consumptive use[3] to a consumptive use. As a result, the Department should have considered the future change in use associated with the transfer application before concluding that no other rights will be injured by the transfer.

If the Department ultimately approves the transfer, the final order must reconcile the Department's underlying assumptions with the conclusion that the transfer will not injure other water rights. The Department can ensure that these assumptions are true by adding the following condition of approval:

> *The water right transferred shall not be subject to future change in use or water right exchange.*

Without this condition, the transfer may result in injury to other water users in violation of OAR 690-380-4010(d) & -5000(d).

B. The Preliminary Determination Violates the Public Trust Doctrine and the Department's Mission to Restore and Protect Streamflows and Watersheds to Ensure Long-Term Sustainability.

The Department's mission is to "restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon's ecosystems, economy, and quality of life." Oregon Water Resources Department, *About Us*, http://www.oregon.gov/OWRD/about_us.shtml (May, 2007)(last visited March 23, 2012). Further, water resources are held by the state in trust

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same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.")

[3] The Department's assumption that the hatchery's use is non-consumptive should also be confirmed.

for its citizens. "The state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters [for navigation, fishing and recreation]." *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Comm'n,* 62 Or App 481, 493, 662 P2d 356 (1983).

As part of its mission and public trust duty, the Department must act to protect water resources for future generations of Oregonians. In light of the threats to water resources posed by population growth, increased usage and demand, upstream pollution, urbanization, drought and climate effects, and over-utilization of groundwater and surface waters, the Department should be vigilant in acting to protect continued access to potable water. The Department has acknowledged that management of water resources in Oregon is facing a number of significant challenges. *See* WRD, *Integrated Water Resources Strategy Discussion Draft* 8 (Dec 2011). Surface water is nearly fully allocated during summer months and groundwater is showing decline in many areas. *Id.* at 19. Almost 15,000 stream miles in Oregon do not meet the state's water quality standards for one or more pollutants. *Id.* at 22.

Sources like the springs at Oxbow Springs are likely to play a key role in Oregon's water security. For example, if groundwater used by the City of Cascade Locks were to be contaminated with water intrusion from the Columbia River, the springs then become more valuable to the public as a safe water source. The Department's decision to approve this transfer is inconsistent with its mandate to protect water resources for Oregonians, and its more specific assignment to develop a statewide Integrated Water Resources Strategy to help Oregon meet its future water needs.

This water transfer T-11108, in concert with a water rights exchange, will allow the City of Cascade Locks to sell Oxbow Springs water to Nestlé Waters North America for a water-

bottling plant. The Department has recognized the role this transfer plays in the Nestlé project: "concerning a possible exchange of water with the City of Cascade Locks to allow Nestle Water to divert water from one of the springs for bottling water . . . a transfer was needed to add the springs as historic PODs." WRD Memo to File T-11108, Oxbow Hatchery, from Marc Norton, Groundwater Section at 3 (1/24/2011). If the Department approves the amended POD transfer T-11108, T-11249, and the water exchange application it will be facilitating the bottling of Oregon's water. The Department failed to consider this as pertinent information when making its decision with regard to this application and T-11249.

In addition, the exchange may ultimately harm the ability of the City of Cascade Locks to provide water for its citizens. Without knowing the effects of increased withdrawals and possible effects including intrusion of Columbia River water, the Department cannot ensure the protection of the resource. The exchange would allow Nestlé Waters to use water from the proposed source for 40 years. Based on the information available, the Department cannot conclude that there will be a sufficient quantity of water available to sustain the population of Cascade Locks. As discussed below, the transfer also raises the question of protecting ODFW's fish hatchery use during water shortages. By transferring a public resource—water—to a private entity, the Department violates its duty as trustee for the people of Oregon and its mission to "restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon's ecosystems, economy, and quality of life." Oregon Water Resources Department, *About Us*, http://www.oregon.gov/OWRD/about_us.shtml (May, 2007) (last visited March 23, 2012). As a result, the Department should reconsider the application using the full extent of the information available to it and deny the application.

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C. The Requested Transfer Seeks a Change in Source And Is Not Permitted Under the Transfer Statute.

OAR 690-380-2110(2) limits a change in point of diversion "to the same source of surface water."[4] The transfer application seeks to add two springs as additional points of diversion to the water right Certificate 24625, in addition to the authorized POD in Little Herman Creek. The application states that "[i]n addition to the authorized Point of Diversion (POD), Oregon Department of Fish and Wildlife (ODFW) has also consistently used the middle and east springs as the POD for Certificate #24625." Application T-11108 at 3.

Little Herman Creek receives water from at least three sources. ODFW's transfer application describes the three water sources: "Water capture and piping structures are located at the middle and east springs. The west spring is undeveloped and its water flows to the reservoir in the old Little Herman Creek channel." Application T-11249 at 5. Further, the original Oxbow Springs water appropriation application (Permit 20629) filed in 1951, which was the basis for Certificate 24625, shows that Little Herman Creek is fed by at least three springs or headwater

[4] The only exception applies where an applicant seeks to change from a surface water point of diversion to a ground water appropriation. Here the Department determined that the application does not seek a change from surface water to ground water. The Department concluded that the East Spring and Middle Spring are surface waters based on the definition of "well" as "any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which groundwater flows under natural pressure, or is artificially withdrawn or injected." OAR 690-200-0050(118). The Department concluded that East Spring and Middle Spring had not been altered when developed and therefore the springs remain surface waters. WRD Memo to File T-11108, Oxbow Hatchery, from Marc Norton, Groundwater Section at 6 (1/24/2011). However, the Department also has information that "[a]s part of this transfer the department plans improvements to the springs." Letter from William Otto, ODFW to WRD (12/14/2011). Nestlé has indicated that it cannot draw the water out of the spring after it percolates out of the ground because it would be surface water at that point and could become contaminated by the soil. Without more information about the proposed improvements, the Department could not accurately determine whether the application proposes a change from surface water to ground water source. If the additional points of diversion are "ground water," the Department may not approve the application because ODFW seeks to retain the original surface point of diversion on Little Herman Creek. OAR 690-380-2130(7) states that the "original point of diversion of surface water shall not be retained as an additional or supplemental point of diversion." Therefore, under the transfer rules for changing from a surface water point of diversion to a ground water point of appropriation, this application must be denied because it seeks to retain the original point of diversion. If the Department correctly determined that the additional points of diversion ODFW seeks are "surface water," then the exception to OAR 690-380-2110(2) does not apply here and the transfer must be for the same surface water source.

sources. Oxbow Springs Water Appropriation Application No. 26283 (Permit No. 20629) tax lot illustration (9/5/1951).[5]

The springs are separate sources of water, distinct from Little Herman Creek, just as the Willamette and Snake Rivers are separate sources of water, distinct from the Columbia River. And similar to a larger watershed, the springs that feed Little Herman Creek are unique in their placement on the land and their respective water flows. However, no information is provided regarding the relative flows contributed by each spring source. ODFW has indicated that the flow from the springs varies depending on the water year. Letter from William Otto, ODFW to WRD (12/14/2011). This indicates that the source of water in Little Herman Creek may change from year to year depending on the water from each spring source.

In addition, the East Spring is not within the description of the water source authorized in Certificate 24625. Certificate 24625 lists the authorized POD as "Little Herman Creek . . . The point of diversion is located in the NE¼ NE¼, Section 7, Township 2 North, Range 8 East, W.M." The two additional points of appropriation sought in this transfer application are "Middle Spring" located in NE¼ NE¼, Section 7, Township 2 North, Range 8 East, Willamette Meridian, and "East Spring" located in NW¼ NW¼, Section 8, Township 2 North, Range 8 East, Willamette Meridian. In other words, the locations of Middle Spring and East Springs are different than the authorized POD. Further, Middle Spring and the authorized POD on Little Herman Creek are located in Section 7, while East Spring is in Section 8. According to the transfer application and transfer application map, East Spring is not located within the same section and location as the POD authorized in Certificate 24625. Therefore, Middle Spring and East Spring are not the source of water authorized in the water right certificate.

[5] This image indicates that Middle Spring is not just one spring but two, for a total of four springs. It is unclear whether ODFW is appropriating water from both of the Middle Springs or whether both springs feed Little Herman Creek.

Finally, the application demonstrates that ODFW has been appropriating water directly from East Spring and Middle Spring via a piping structure that bypasses Little Herman Creek altogether. Application T-11249 at 5. *See also* WRD Memo to File T-11108, Oxbow Hatchery, from Marc Norton, Groundwater Section at 3–4 (1/24/2011). These piping structures indicate that the springs are a separate source of water and remain separate from the authorized source in Little Herman Creek.

Oregon water law does not permit a change in water source to be accomplished through a transfer application. Certificate 24625 does not authorize water appropriation from Middle Spring or East Spring. Because this application proposes a change in source, the application must be denied.

D. The Requested Transfer May Result in an Enlargement of the Underlying Water Right.

A transfer application must be denied where the transfer would result in an enlargement of the water right. OAR 690-380-5000(c). "Enlargement" means an expansion of a water right and includes, but is not limited to: using a greater rate or duty of water per acre than currently allowed under a right; failing to keep the original place of use from receiving water from the same source; or diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation. OAR 690-380-0100(2)(a),(c),(d).

There is insufficient data regarding flows at Little Herman Creek and each of the springs to conclude that there will be no enlargement of the water right as a result of this transfer. ODFW has indicated that the flow from the springs varies depending on the water year. Letter from William Otto, ODFW to WRD (12/14/2011). It is unclear from the documentation whether there is more water available at the new points of diversion than what is currently being used by

ODFW during the summer months. If there is more water available at the new PODs, then this transfer will result in an unauthorized enlargement of the water right and the permit must be denied.

Furthermore, if any of this water is later exchanged with the City of Cascade Locks under T-11109 or a new exchange application, ODFW will be able to use more water at the new source than what is legally available and naturally available from the current authorized POD in Little Herman Creek. ODFW states that a driving reason for the proposed exchange is "to provide an increase in water amounts during those [summer] months, allowing increased production." ODFW, Application for Water Right Exchange T-11109 at 5 (August 27, 2010). However, an increase in water use is an enlargement of ODFW's water right and is prohibited under Oregon water law.

The Preliminary Determination concludes that the original water right will not be enlarged "because the use of water at the proposed additional points of diversion can be conditioned to limit the quantity of water diverted." Preliminary Determination at 4 ¶17. However, the relevant condition of approval states only that the Department "*may* require the water user to install a totalizing flow meter or other suitable measuring devices at each point of diversion." *Id.* at 5 ¶5 (emphasis added). In order to support the Department's reliance on conditions to limit the quantity of water diverted, if the transfer is approved it should include the following condition:

a. ***Before water use may begin*** *under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion/appropriation.*
b. *The water user shall maintain the meters or measuring devices in good working order.*
c. *The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring*

devices are located within a private structure, the Watermaster shall request access upon reasonable notice.

Without this condition, the transfer may result in an enlargement of the water right in violation of OAR 690-380-5000(c).

E. The Water Right Is Subject to Forfeiture.

The Department may not approve a transfer application if the water right at issue is subject to forfeiture under ORS 540.610. OAR 690-380-4010(2)(a). A water right is subject to forfeiture if the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years. ORS 540.610. The application here demonstrates that ODFW has been using water from not only Little Herman Creek, but also Middle Spring and East Spring via structures of six and eight inch pipes directed to the hatchery building "for more than ten (10) years." Application T-11108 at 3, 5. [6]

Little Herman Creek receives water from at least three different sources. ODFW's transfer application describes the three water sources: "Water capture and piping structures are located at the middle and east springs. The west spring is undeveloped and its water flows to the reservoir in the old Little Herman Creek channel." Application T-11249 at 5. Further, according to the transfer application and transfer application map, East Spring is not located within the same section and location as the POD authorized in Certificate 24625.

Middle Spring and East Spring are not the authorized source of the water in Certificate 24625. By withdrawing water directly from the springs, bypassing the authorized POD in Little Herman Creek, ODFW has failed to use the full rate from the authorized source. Because ODFW has not been using the full amount authorized from the authorized source for at least ten

[6] Protestants are also aware that renovations occurred at the hatchery around the time of 2007–2008. If the hatchery ceased operations for a period of five years related to this or any other construction work, that failure to use water for the authorized use would also be a basis for forfeiture.

years, the water right is subject to forfeiture. The water right in Certificate 24625 should be reduced to the amount actually appropriated from the authorized source. Because the water right is subject to forfeiture, the Department must deny the transfer application. *See* Affidavits Asserting Non-Use (attached).

F. The Water Resources Department's Decision Fails to Address how Water will be Allocated to the Two New Certificates in Times of Shortage.

Pursuant to the decision document and the Department's rules, when the transfer application is approved Certificate 24625 will be cancelled. Once ODFW has proved up the beneficial use, new certificates will be issued, each retaining the original priority date of August 9, 1951. The Department's decision fails to explain which of these two newly created certificates will take priority in times of water shortage. If the rights in conflict have the same date of priority, domestic use takes priority over all other uses and livestock watering have preference over manufacturing uses. ORS 540.140. As between non-consumptive beneficial uses such as fish hatchery operations and consumptive uses, the Department's rules and Oregon statutes do not dictate a particular order of priority. As a result, questions of priority usage during shortages put significant pressure on the resources of the Department. This transfer will create an administrative challenge for the Department.

This issue is particularly important given that the water right subject to T-11108 will likely be the subject of the water rights exchange between ODFW and the City of Cascade Locks which will result in the bottling of this spring water by Nestlé. If any water shortage arises, the Department will have put itself in the difficult position of determining priority as between a municipal customer's commercial, consumptive use, and the relatively non-consumptive fish hatchery use.

G. The Transfer Application is Invalid.

As stated above, ODFW originally applied for a transfer of POD for its entire water right rate of 10.0 cfs. According to the Preliminary Determination document, ODFW subsequently requested that the application be revised, reducing the rate subject to transfer to 0.5 cfs. ODFW did not amend its application. The transfer application for T-11108 available to the public seeks a POD transfer for 10.0 cfs, which is the full quantity of ODFW's certificated water right. ODFW also submitted a separate transfer application for 9.5 cfs (T-11249). Without an amended transfer application, the two applications together appear to seek POD transfers for a total rate of 19.5 cfs—almost twice the quantity of ODFW's water right. ODFW cannot transfer more water than its current right allows. In addition, the Department should not proceed with a proposed decision when it has not accepted comments on the amended transfer application T-11108.

Further, a requirement of a transfer application is land use information. OAR 690-380-3000(19). This information is required in order to determine compliance with Statewide Planning Goals and acknowledged comprehensive plans. OAR 690-005-0010 to -0060. The land use information form that ODFW provided with its application states that "[n]o actual change in use, and no construction or improvements will be involved." Land Use Information Form, Applicant: ODFW (filed 8/27/2010). However, in reviewing the Draft Preliminary Determination, ODFW's agent requested a change to the date for perfecting the use because "[a]s part of this transfer the department plans improvements to the springs." Letter from William Otto, ODFW to WRD (12/14/2011). The application materials are inconsistent with other information provided by the applicant, and the Department should have requested additional information from ODFW to reconcile this discrepancy and address land use requirements. Based on the information available to the Department, it appears that the

information contained in the application is not accurate, invalidating the application. OAR 690-380-3050(22).

H. The Department Failed to Determine Compliance with Statewide Planning Goals.

A water right transfer application must meet all requirements for a transfer. OAR 690-380-5000(e). Water right transfers, with certain exceptions not applicable here, must comply with statewide planning goals. OAR 690-005-0030(1). The applicant plans to make improvements to the springs as part of the transfer. Letter from William Otto, ODFW to WRD (12/14/2011). The Land Use Information Form did not include details of the proposed improvements.

Statewide Planning Goal 5: Open Spaces, Scenic and Historic Areas, and Natural Resources, requires that conflicting land uses be managed to protect important resources. Goal 5 (OAR 660-015-0000(5)). Water is one of the State's most precious resources. WRD, *Integrated Water Resources Strategy Discussion Draft* 8 (Dec 2011). The Department acknowledges that "[p]rotecting the public interest may require addressing water allocation or other problems not identified in comprehensive plans." WRD, *Land Use Planning Procedures Guide* 46 (1990).

Statewide Planning Goal 6: Air, Water and Land Resources Quality, serves to "maintain and improve the quality of the air, water and land resources of the state." Goal 6 (OAR 660-015-0000(6)). Pursuant to Goal 6, discharges from future development shall not threaten to violate or violate applicable state or federal environmental quality statutes, rules and standards. *Id.* In this case, the Department has recognized that plans to make improvements at the springs will result in "short-term water quality issues during construction." *See* Note to File T-11108 (Wed. Jan 19 – Oxbow 10:00). By failing to analyze the water quality impacts associated with spring improvements planned as part of the transfer, the Department could not determine that the

transfer will comply with Statewide Planning Goals as required by OAR 690-005-0030(1). Without this analysis, the transfer cannot be approved.

V. Relief Requested

The transfer application should be denied. In the alternative, the preliminary determination should be amended to include additional conditions to ensure the water right is not enlarged by the transfer, for analysis regarding injury to other water users, and to prohibit a water right exchange resulting in consumptive use of water. Pursuant to ORS 540.631, the Department should initiate a cancellation proceeding for Certificate 24625. Protestants request a contested case hearing.

VI. Citation of Legal Authority

ORS 537.170; OAR 690-002-0025 to -0030; OAR 690-380-4010 & -5000. Citation of additional legal authority is provided above.

VII. Protest Fee

The required fee of $600 is included with this protest.

VIII. Conclusion

For all of the above stated reasons, the transfer application should be denied. The Department should not approve a transfer that will facilitate privatization of Oregon's water, a trust resource. At a minimum, the Department must ensure compliance with all transfer criteria and condition the transfer to ensure that the water right transferred will not result in a change in use, enlargement of the water right, or injury to other water users. Protestants request a contested case hearing to resolve the deficiencies outlined in this protest.

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DATED this 29th day of March, 2012.

Respectfully submitted,

Courtney Johnson, OSB No. 077221
Christopher Winter, OSB No. 984355
Crag Law Center
917 SW Oak Street, Suite 417
Portland, Oregon 97205
(503) 525-2728

Of Attorneys for Protestants
Bark and Food & Water Watch

CERTIFICATE OF SERVICE

I certify that on March 29, 2012 I filed this Protest and a $600 check by courier hand delivery to the Water Resources Department at the address set forth below.

Dorothy Pederson
Water Right Section, Transfers
Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

I further certify that I served a copy of the said protest to the applicant below by mailing said copies to the address set forth below, first-class mail, postage pre-paid, in the United States Mail from Portland, Oregon on March 29, 2012:

Oregon Department of Fish and Wildlife
3406 Cherry Avenue NE
Salem, Oregon 97303

Signed this 29th day of March, 2012,

Courtney Johnson

BEFORE THE WATER RESOURCES DEPARTMENT

State of Oregon)
) AFFIDAVIT ASSERTING
) NON-USE OF WATER RIGHT
County of Hood River)

1. I, Alex P. Brown, of PO Box 12065, Portland, OR 97212, Phone (503) 331-0374, say that:

2. Water Right Certificate number 24625 issued to the Oregon State Fish Commission authorizes use or water from Little Herman Creek for operation of salmon hatchery, under a priority date of August 9, 1951.

3. The total amount of water authorized in the certificate is 10.0 cfs.

4. The authorized point of diversion is located in the NE ¼ NE ¼, Section 7, Township 2 North, Range 8 East, Willamette Meridian. The place of use described in the certificate is in the NW ¼ NW ¼, Section 8, Township 2 North, Range 8 East, Willamette Meridian.

5. I am familiar with these lands and I am aware of the non-use of this water right because I have personally reviewed the transfer application for this water right by the water right holder, Oregon Department of Fish and Wildlife, T-11108. The application states that in addition to the authorized source of water Little Herman Creek, the water right holder "has also consistently used the middle and east springs as the POD for Certificate #24625. Such POD has been used for more than ten (10) years..." (Transfer Application T-11108, filed 8/27/2010). According to the application, the water right holder draws water directly from Middle and East Springs to its hatchery operations via pipe structures. Middle and East Springs are not the authorized source of water described in Certificate number 24625. Therefore, during the period of use, some portion of the water right for Little Herman Creek has not been used when instead the water right holder was using water from East Spring and Middle Spring.

6. I have attached here the tax lot map showing the location of the lands to which this water right is appurtenant.

7. The subject water right is not within the boundaries of an irrigation district or federal reclamation project.

8. I have read the provisions of Oregon Revised Statutes 540.610(2) and Oregon Administrative Rules Chapter 690, Division 17 and believe the presumption of forfeiture for five or more consecutive years of non-use may not be rebutted by the holder(s) of this water right. APB (initial to indicate you have read these laws)

9. I am willing to testify in a Contested Case Hearing to all allegations contained in this affidavit. I understand that as the proponent, I have the burden of proof on the alleged non-use issue. AOB (initial to indicate you have read this statement and understand your responsibilities).

Under penalty of perjury, I do solemnly swear or affirm that the foregoing is a true statement of the facts as I know them to be from my personal knowledge.

(*Signature of Affiant*)

Sworn to and subscribed before me this 28 day of March, 2012.

(*Notary Public of Oregon*)

My Commission Expires 01/05/2015

(*SEAL*)

OFFICIAL SEAL
MELANIE H MIERS
NOTARY PUBLIC - OREGON
COMMISSION NO. A455003
MY COMMISSION EXPIRES JANUARY 05, 2015

SECTIONS 12 & 13, TWP.2 N. RANGE 7 E. AND SECTIONS 5, 6, 7 & 8, TWP.2 N., RANGE 8 E., W.M.
CITY OF CASCADE LOCKS
HOOD RIVER COUNTY, OREGON

TRANSFER No. _____

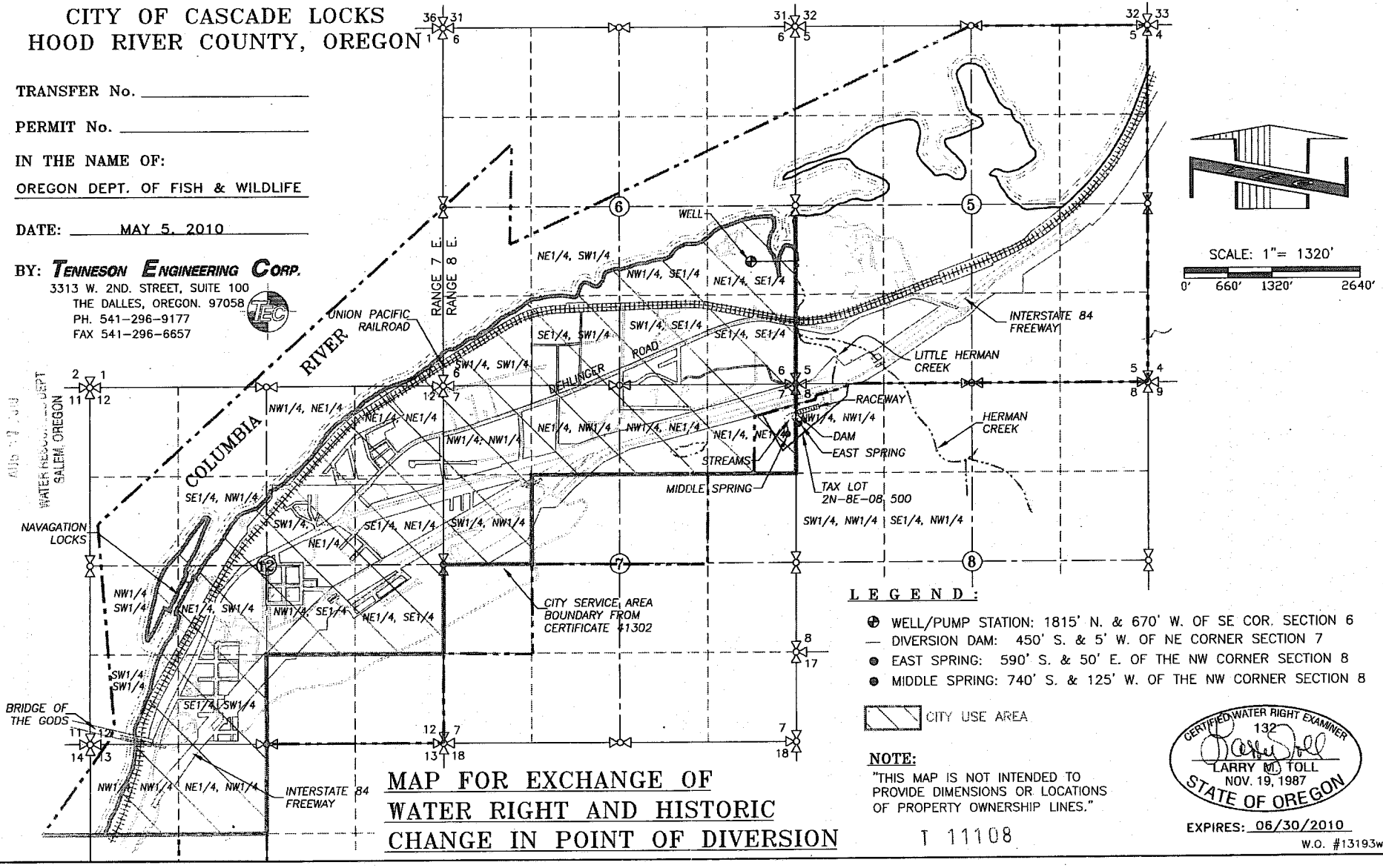
PERMIT No. _____

IN THE NAME OF:

OREGON DEPT. OF FISH & WILDLIFE

DATE: MAY 5, 2010

BY: TENNESON ENGINEERING CORP.
3313 W. 2ND. STREET, SUITE 100
THE DALLES, OREGON. 97058
PH. 541-296-9177
FAX 541-296-6657



SCALE: 1"= 1320'
0' 660' 1320' 2640'

LEGEND:

- WELL/PUMP STATION: 1815' N. & 670' W. OF SE COR. SECTION 6
- DIVERSION DAM: 450' S. & 5' W. OF NE CORNER SECTION 7
- EAST SPRING: 590' S. & 50' E. OF THE NW CORNER SECTION 8
- MIDDLE SPRING: 740' S. & 125' W. OF THE NW CORNER SECTION 8

CITY USE AREA

NOTE:
"THIS MAP IS NOT INTENDED TO PROVIDE DIMENSIONS OR LOCATIONS OF PROPERTY OWNERSHIP LINES."

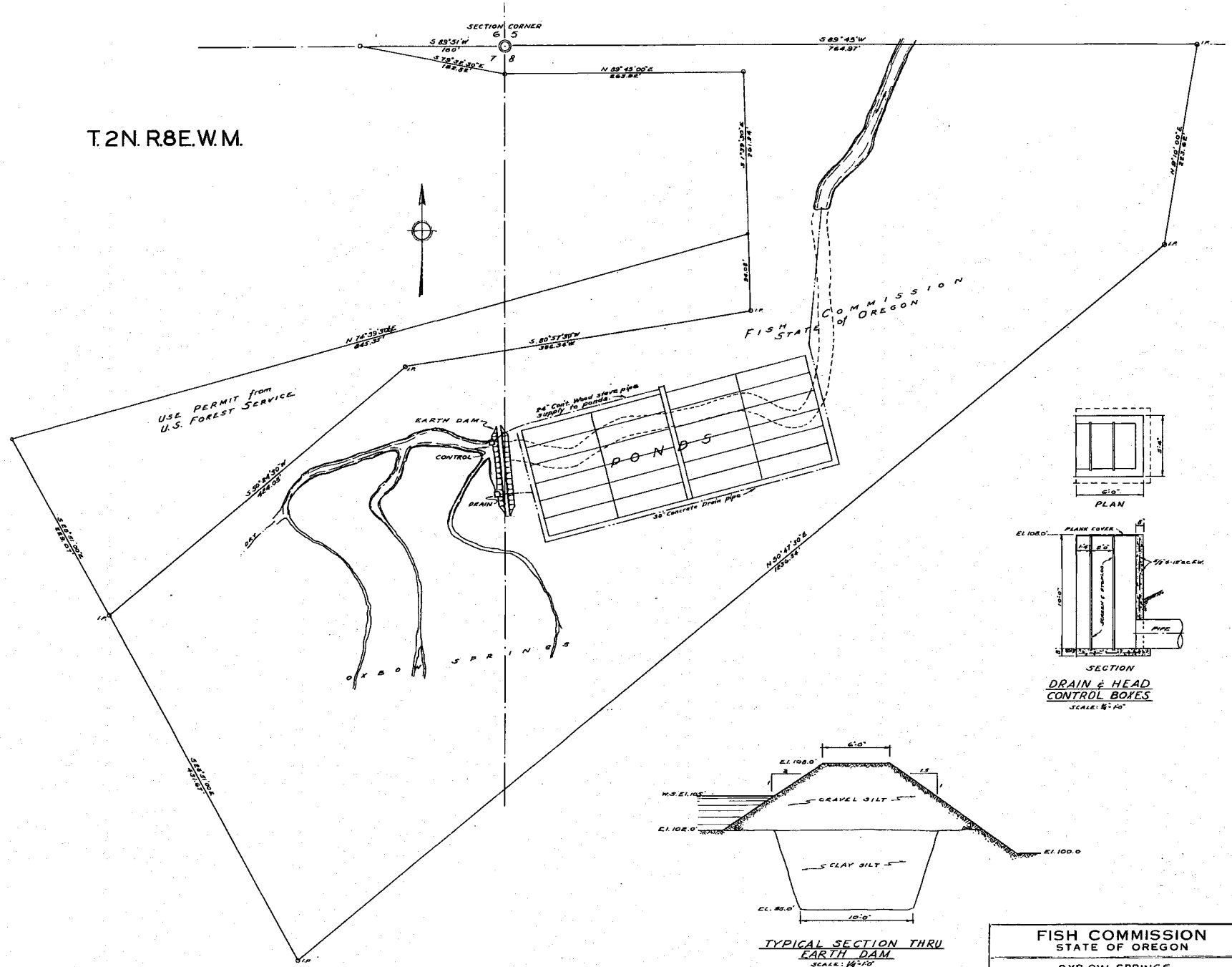
CERTIFIED WATER RIGHT EXAMINER
132
LARRY M. TOLL
NOV. 19, 1987
STATE OF OREGON

EXPIRES: 06/30/2010

W.O. #13193wr

MAP FOR EXCHANGE OF WATER RIGHT AND HISTORIC CHANGE IN POINT OF DIVERSION

T 11108



FISH COMMISSION
STATE OF OREGON

OXBOW SPRINGS
WATER APPROPERATION
APPLICATION No. 26283
PERMIT NO. 20629

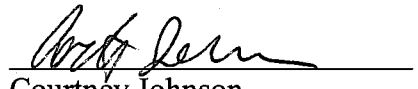
DRAWN BY EWG	DATE 9-5-51	PLAN NO.
CHECKED BY W.E.B	SCALE SHOWN	SHEET 1 OF 1
APP'VD STATE		
APP'VD FED.		

CERTIFICATE OF SERVICE
AFFIDAVIT ASSERTING NON USE

OAR 690-017-0400 requires that an affiant provide proof that the affidavit asserting non-use has been served upon the legal land owner and occupant of the lands to which the water right is appurtenant.

I certify that on March 29, 2012, I served the attached Affidavit Asserting Non Use of Water Right by mailing in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

Oregon Department of Fish & Wildlife
3406 Cherry Avenue NE
Salem, Oregon 97303



Courtney Johnson
Crag Law Center
917 SW Oak St., Suite 417
Portland, Oregon 97205

BEFORE THE WATER RESOURCES DEPARTMENT

State of Oregon	)	AFFIDAVIT ASSERTING
	)	NON-USE OF WATER RIGHT
County of Hood River	)	

1. I, Julia B. DeGraw, of 917 SW Oak St. Ste. 404, Portland, OR 97205, Phone (503) 347-3599, say that:

2. Water Right Certificate number 24625 issued to the Oregon State Fish Commission authorizes use or water from Little Herman Creek for operation of salmon hatchery, under a priority date of August 9, 1951.

3. The total amount of water authorized in the certificate is 10.0 cfs.

4. The authorized point of diversion is located in the NE ¼ NE ¼, Section 7, Township 2 North, Range 8 East, Willamette Meridian. The place of use described in the certificate is in the NW ¼ NW ¼, Section 8, Township 2 North, Range 8 East, Willamette Meridian.

5. I am familiar with these lands and I am aware of the non-use of this water right because I have personally reviewed the transfer application for this water right by the water right holder, Oregon Department of Fish and Wildlife, T-11108. The application states that in addition to the authorized source of water Little Herman Creek, the water right holder "has also consistently used the middle and east springs as the POD for Certificate #24625. Such POD has been used for more than ten (10) years..." (Transfer Application T-11108, filed 8/27/2010). According to the application, the water right holder draws water directly from Middle and East Springs to its hatchery operations via pipe structures. Middle and East Springs are not the authorized source of water described in Certificate number 24625. Therefore, during the period of use, some portion of the water right for Little Herman Creek has not been used when instead the water right holder was using water from East Spring and Middle Spring.

6. I have attached here the tax lot map showing the location of the lands to which this water right is appurtenant.

7. The subject water right is not within the boundaries of an irrigation district or federal reclamation project.

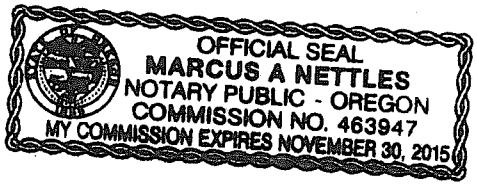
8. I have read the provisions of Oregon Revised Statutes 540.610(2) and Oregon Administrative Rules Chapter 690, Division 17 and believe the presumption of forfeiture for five or more consecutive years of non-use may not be rebutted by the holder(s) of this water right. JBD (initial to indicate you have read these laws)

9. I am willing to testify in a Contested Case Hearing to all allegations contained in this affidavit. I understand that as the proponent, I have the burden of proof on the alleged non-use issue. JBD (initial to indicate you have read this statement and understand your responsibilities)

Under penalty of perjury, I do solemnly swear or affirm that the foregoing is a true statement of the facts as I know them to be from my personal knowledge.

Julie B. Daly
(*Signature of Affiant*)

Sworn to and subscribed before me this 28th day of March, 2012.



(*SEAL*)

Marcus A Nettles
(*Notary Public of Oregon*)

My Commission Expires 11-30-2015

SECTIONS 12 & 13, TWP.2 N. RANGE 7 E. AND SECTIONS 5, 6, 7 & 8, TWP.2 N., RANGE 8 E., W.M.
CITY OF CASCADE LOCKS
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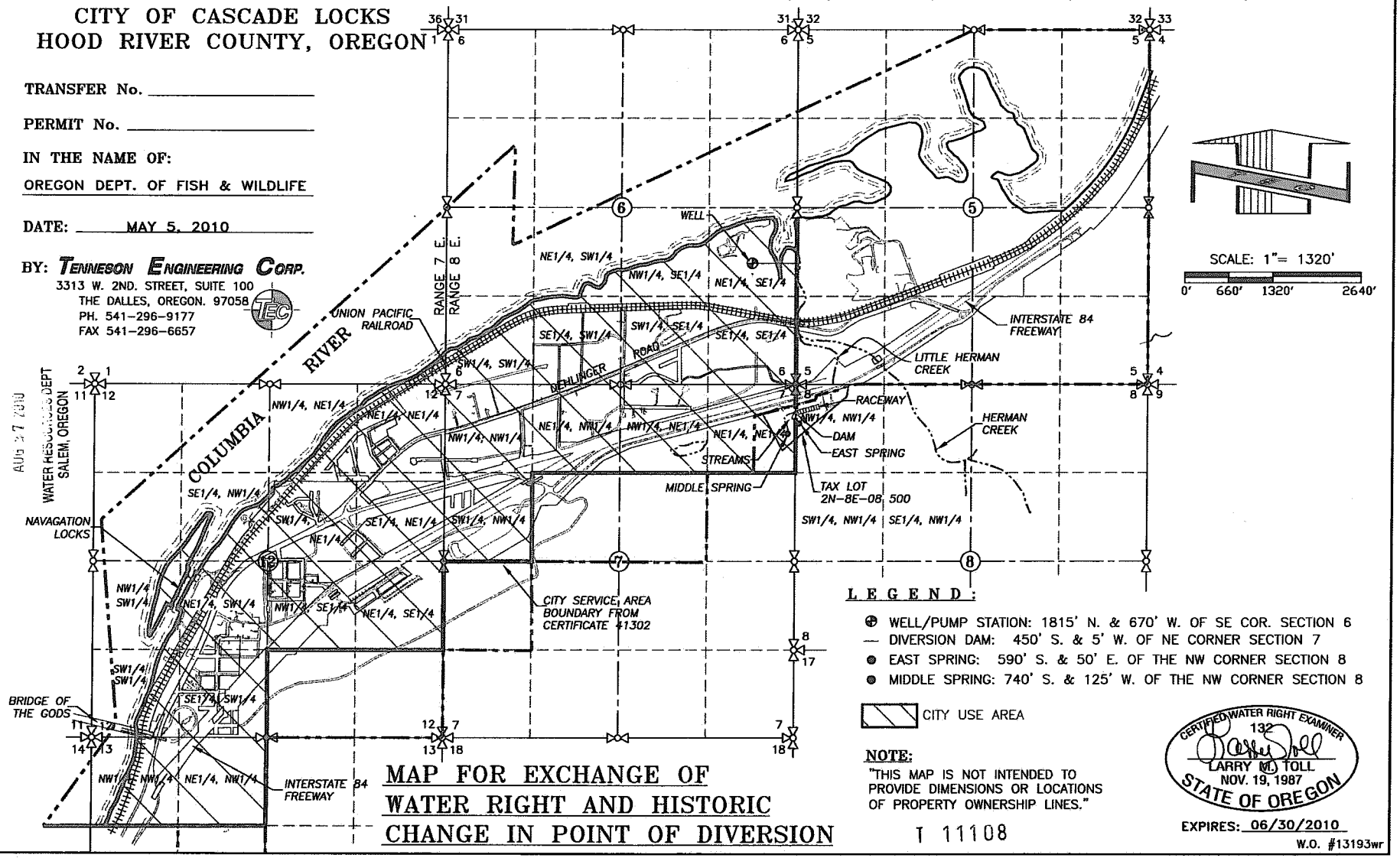

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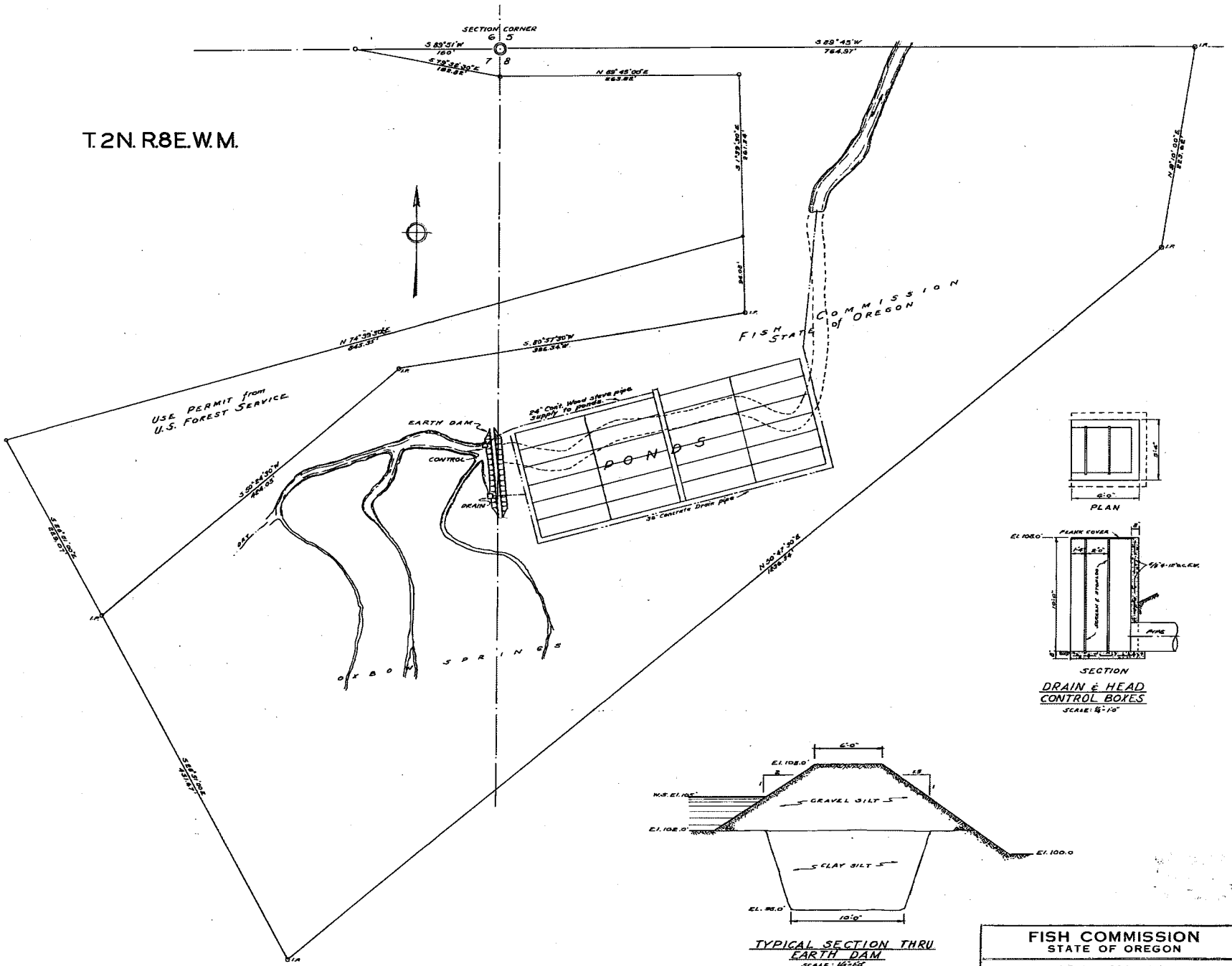

FISH COMMISSION
STATE OF OREGON

OXBOW SPRINGS
WATER APPROPERATION
APPLICATION NO. 26283
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DRAWN BY EAT	DATE 8-5-51	PLAN NO.
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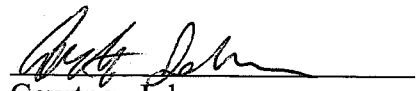

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