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IN THE CIRCUIT COURT FOR THE STATE OF OREGON  
FOR THE COUNTY OF CROOK

UPPER CROOKED RIVER  
CONSERVATIONISTS, an Oregon  
nonprofit corporation; and SHOTGUN  
RANCH, L.L.C., an Oregon limited liability  
company,

Plaintiffs/Petitioners,

v.

WATER RESOURCES DEPARTMENT of  
the State of Oregon and WATER  
RESOURCES COMMISSION of the State of  
Oregon,

Defendants/Respondents,

and

WATERWATCH OF OREGON,

Intervenor-Respondent.

Case No. 23CV46779  
Honorable Judge Annette Hillman

**WATERWATCH OF OREGON'S  
OPPOSITION TO PETITIONERS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY  
JUDGMENT**

*[Case involves water rights]*

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1 **UTCR MATTERS**

2 Oral argument on this motion is set for 9:00 a.m. on December 9, 2024.

3 **MOTION**

4 Pursuant to ORCP 47 B, Intervenor-Respondent WaterWatch of Oregon  
5 (“WaterWatch”) hereby moves this Court to enter summary judgment in WaterWatch’s favor  
6 on both of Petitioners’ Claims for Relief. WaterWatch also opposes Petitioners’ motion for  
7 partial summary judgment on their First Claim for Relief. WaterWatch’s motion and  
8 opposition to Petitioners’ motion is supported by the following memorandum of points and  
9 authorities, the declaration of Andrew R. Missel, and the exhibits attached thereto.

10 **POINTS AND AUTHORITIES**

11 **I. Introduction.**

12 Petitioners have moved for partial summary judgment on their First Claim for Relief  
13 (“Claim 1”). As WaterWatch explained in its motion to dismiss, and as explained further  
14 below, that claim is legally defective. *See* WW Mot. Dismiss at 2–5; WW Reply Supp. Mot.  
15 Dismiss at 1–7. Simply put, Respondent Oregon Water Resources Department (“OWRD”)   
16 did not violate the law when it granted an ordinary secondary water right to the U.S. Bureau  
17 of Reclamation (“Reclamation”) to use water released from storage in Prineville Reservoir  
18 for downstream fish and wildlife purposes.<sup>1</sup> Thus, Petitioners are not entitled to summary  
19 judgment on Claim 1, and judgment should be granted for WaterWatch on that claim.

20 Summary judgment should also be granted in favor of WaterWatch on Petitioners’  
21 Second Claim for Relief (“Claim 2”). OWRD did not err in determining that no public  
22 interest issues were identified in relation to Reclamation’s application for a secondary water  
23 right, and thus OWRD correctly processed Reclamation’s application using the expedited  
24 procedure set out in ORS 537.147.

25 \_\_\_\_\_  
26 <sup>1</sup> This motion uses the phrase “ordinary secondary water right” or “ordinary water right” to refer to a water right *not* granted through the Instream Water Rights Act.

1           **II.     Legal Background.**

2           In the interest of avoiding redundancy, WaterWatch hereby adopts the “Substantive  
3 Legal Framework” (B.1) and “Legal Standards and Standards of Review” (C) sections of the  
4 summary judgment motion filed by Respondents OWRD and Oregon Water Resources  
5 Commission (“OWRC”). *See* Resp’ts’ Summ. J. Mot. at 2–4, 5–6.<sup>2</sup>

6           **III.    Factual Background.**

7           In the interest of avoiding redundancy, WaterWatch hereby adopts the “Undisputed  
8 Material Facts” (B.2) section of Respondents’ summary judgment motion. *See* Resp’ts’  
9 Summ. J. Mot. at 4–5. In addition to the undisputed facts set out in Respondents’ motion,  
10 there are two background facts that provide important context for this case.

11           First, it is important to remember *why* Reclamation applied for the water right at issue  
12 in this case: to implement the Crooked River Collaborative Water Security and Jobs Act of  
13 2014 (“Crooked River Act”), Pub. L. No. 113-244 (2014). The Crooked River Act requires  
14 Reclamation to take steps to provide instream flows for fish and wildlife from Prineville  
15 Reservoir downstream to Lake Billy Chinook. *Id.* § 4. In the application at issue in this case,  
16 Reclamation cited the Crooked River Act several times, noting that the Act “gives ...  
17 Reclamation authority to use this water to benefit fish and wildlife.” Liljefelt Decl. Ex. 1 at  
18 8–11. Ultimately, it is the United States (acting through Reclamation) that holds the right to  
19 store water in Prineville Reservoir, and Congress has decided that much of that water should  
20 be used to benefit fish and wildlife in the lower Crooked River. In applying for the water  
21 right at issue in this case, Reclamation was carrying out Congress’s wishes.

22 \_\_\_\_\_  
23 <sup>2</sup> The Oregon Rules of Appellate Procedure include a rule concerning “joint and adopted  
24 briefs.” ORAP 5.77. That rule provides that, “[i]n a case involving more than one party on  
25 the same side, ... the court discourages the filing of briefs that duplicate arguments made in  
26 another brief in the same case and encourages parties to file joint briefs or to adopt to the  
extent practicable a brief filed by another party in the same case.” ORAP 5.77(1). Although  
this rule applies only to cases in the Court of Appeals and Supreme Court, the concern for  
judicial economy underlying the rule is implicated here.

1 Second, by the time Reclamation submitted the water-rights application at issue in  
2 this case, it had already successfully transferred a portion of its right to store water in  
3 Prineville Reservoir for later irrigation use to a right to store water in the reservoir for later  
4 fish and wildlife use. Amended Pet. ¶¶ 10–11; *see also* Ratcliffe Decl. Ex. 8 at 39–41  
5 (amended storage certificate). The storage certificate, as amended, allows “storage for  
6 downstream fish life and wildlife use.” Ratcliffe Decl. Ex. 8 at 39. Petitioners do not  
7 challenge that storage certificate.

#### 8 IV. Argument.

9 Petitioners’ Claim 1 rests on the mistaken legal premise that “the Instream Water  
10 Rights Act creates the *only* program under which [OWRD] may issue water rights for  
11 instream, public uses of water that provide public benefits.” Pet’rs’ Summ. J. Mot. at 6  
12 (emphasis added). Once that premise is disproved, Claim 1 falls apart. OWRD did not grant  
13 Reclamation an “instream water right” under the Instream Water Rights Act, but rather an  
14 ordinary secondary water right to use stored water downstream of Prineville Reservoir for a  
15 purpose set out in Reclamation’s storage certificate. OWRD was well within its authority to  
16 grant that right, so Claim 1 fails as a matter of law.

17 As for Petitioners’ Claim 2, WaterWatch agrees with Respondents that OWRD did  
18 not abuse its discretion in determining that no public interest issues were raised in connection  
19 with Reclamation’s application for a secondary water right, and that OWRD thus correctly  
20 processed Reclamation’s application using the expedited procedure of ORS 537.147. *See*  
21 Resp’ts’ Summ. J. Mot. at 13–14. As WaterWatch explained in its motion to dismiss, and as  
22 OWRD and OWRC argue in their motion for summary judgment, the concerns raised by  
23 Petitioners all related to Reclamation’s *storage* of water, which was not at issue in this  
24 permitting process. WW Mot. Dismiss at 5–8; WW Reply Supp. Mot. Dismiss at 7–9;  
25 Resp’ts’ Summ. J. Mot. at 14.

1                   **A.     Petitioners Are Incorrect that the Instream Water Rights Act Is**  
2                   **the Exclusive Source of Water Rights for Instream Uses of Water**  
3                   **that Provide Public Benefits.**

4                   Petitioners’ argument on Claim 1 goes as follows: (1) “the Instream Water Rights Act  
5 creates the only program under which [OWRD] may issue water rights for instream, public  
6 uses of water that provide public benefits,” Pet’rs’ Summ. J. Mot. at 6; (2) Reclamation  
7 sought “an instream, public water right,” and thus necessarily sought an “instream water  
8 right” under the Instream Water Rights Act, *id.* at 12; (3) Reclamation is not allowed to apply  
9 for or hold an “instream water right” under the Instream Water Rights Act, *id.* at 11–12; (4)  
10 therefore, OWRD erred by granting Reclamation’s application, *id.* at 12. This argument  
11 falters at the first step: the Instream Water Rights Act is *not* the exclusive mechanism for  
12 OWRD to grant a water right for the “instream, public use[] of water that provide[s] public  
13 benefits.” When water is held in storage for later instream use, an ordinary secondary water  
14 right may be granted that allows water to be used instream after release from storage. Such a  
15 water right is not an “instream water right” within the meaning of the Instream Water Rights  
16 Act, so it may be held by an entity other than OWRD. And it does not matter whether the use  
17 “provide[s] public benefits” or not; all that matters is that the use is a “beneficial use.”

18                   1.       *Certain Instream Uses Have Been Recognized as “Beneficial*  
19                   *Uses” Since Long Before the Instream Water Rights Act.*

20                   “Beneficial use [is] the basis, the measure and the limit of all rights to the use of  
21 water in this state.” ORS 540.610(1). Under the doctrine of prior appropriation in effect in  
22 Oregon, “the successful application [of water] to the beneficial use designed” is “[t]he true  
23 test of appropriation of water.” *McCall v. Porter*, 42 Or 49, 55–56, 70 P 280 (1902) (quoting  
24 *Thomas v. Guiraud*, 6 Colo 530, 533 (1883)), *reh’g den*, 42 Or 49, 71 P 976 (1903).  
25 “Although ‘beneficial use’ is not defined in the statutes, certain enumerated uses are  
26 considered to be beneficial,” such as irrigation and domestic uses. *Benz v. Water Res.*  
*Comm’n*, 94 Or App 73, 76, 764 P2d 594 (1988).



1 In 1955, the legislature enacted a major overhaul of Oregon water law that included  
2 an explicit recognition of certain uses that do not require out-of-stream diversion (*i.e.*,  
3 “instream uses”) as “beneficial uses.” *See* Or Laws 1955, ch 707, § 10(1) (declaring  
4 “recreation, wildlife, and fish life” to be beneficial uses), *codified as modified at* ORS  
5 536.300(1); *see also* Janet Neuman et al., *Sometimes a Great Notion: Oregon’s Instream*  
6 *Flow Experiments*, 36 *Env’t L.* 1125, 1139–45 (2006) (discussing the 1955 revisions to  
7 Oregon water law). “The legislature’s listing of instream uses as beneficial uses on par with  
8 traditional diversionary water uses, together with the mandate to foster and encourage  
9 maintenance of adequate minimum streamflows, represented significant improvements on the  
10 consumptive focus of the prior appropriation doctrine and were quite revolutionary for their  
11 time.” Neuman, *Sometimes a Great Notion, supra*, at 1144.

12 Thus, Petitioners are incorrect that Oregon law recognized only “out-of-stream  
13 beneficial use[s]” prior to the enactment of the Instream Water Rights Act in 1987. Pet’rs’  
14 *Summ. J. Mot.* at 9. On the contrary, since at least 1955, Oregon law has explicitly  
15 recognized certain “beneficial uses” that do not require out-of-stream diversion of water.<sup>3</sup>  
16 And, even before 1955, ordinary water rights were granted for uses that did not contemplate  
17 out-of-stream diversion. For instance, in the 1920s, the U.S. Department of Agriculture  
18 Bureau of Biological Survey applied for and was granted an appropriative right to use the  
19 flow from a spring for the “[m]aintenance of Malheur Lake Bird Reserve,” which required “a  
20 regular flow of fresh water ... for the feeding and nesting of migratory birds.” *Missel Decl.*  
21 *Ex. 1.*<sup>4</sup>

22  
23 <sup>3</sup> To be clear, water can be used out-of-stream for fish life and wildlife, as when water is  
24 diverted out-of-stream to fill an artificial pond stocked with fish. But, unlike irrigation and  
25 many other beneficial uses, the use of water for “fish life” and “wildlife” does not *require*  
26 out-of-stream diversion.

<sup>4</sup> The U.S. Fish and Wildlife Service, which inherited many of the functions of the Bureau of  
Biological Survey, now holds this water right. *See Missel Decl. Ex. 1* at 6.



1 and was granted an ordinary water right to maintain Chickahominy Reservoir for “public  
2 fishing and other recreational uses.” Missel Decl. Ex. 4.<sup>5</sup>

3 As a historical matter, many ordinary water rights have involved the “private” use of  
4 water, in the sense that water has been used to benefit a person, a small set of persons, or a  
5 corporation. But there has never been a *legal* requirement that an ordinary water right must  
6 be used for “private” purposes, and the above examples illustrate some of the situations  
7 (recreation, fishing) in which ordinary water rights have regularly been used to benefit the  
8 general public. Again, what matters is that water is put to a “beneficial use,” whether that use  
9 is “private” or “public.” Uses such as “recreation, wildlife, and fish life”—all of which have  
10 been “beneficial uses” since at least 1955, Or Laws 1955, ch 707, § 10(1)—lend themselves  
11 to applications that benefit the general public.<sup>6</sup> The water right at issue here allows water to  
12 be used for wildlife and fish life. Liljefelt Decl. Ex. 4 at 1. Those are beneficial uses under  
13 Oregon law; it does not matter whether they are “public” or “private.”

14 3. *Physical Control Is Not Needed to Establish an Ordinary*  
15 *Water Right, but, in any Event, Impoundment of Water Behind*  
16 *a Dam and Subsequent Release of Water Is Sufficient.*

17 Petitioners suggest that an ordinary water right requires some degree of physical  
18 control over water. *See, e.g.,* Pet’rs’ Summ. J. Mot. at 2 (“Historically, the only allowable  
19 water uses recognized by Oregon law were those where permittees actually appropriated the  
20 water, that is, diverted or otherwise took control of the water ....”). Petitioners then suggest  
21 that this requirement is not met here because Reclamation only exercises physical control  
22 over water before it is released from Prineville Reservoir. *See id.* at 9–10. Petitioners are  
23 doubly wrong: an ordinary water right does *not* require physical control over water, and, in

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24 <sup>5</sup> There are many more instances of ordinary water rights that benefit the general public;  
25 these are just illustrative examples.

26 <sup>6</sup> It is worth noting that, under Oregon law, “[a]ll water within the state from all sources of  
water supply belongs to the public.” ORS 537.110.

1 any event, any “physical control” requirement is met here, because Reclamation impounds  
2 water behind a dam and then releases it.

3 The touchstone of the prior appropriation doctrine is beneficial use, so, if water can  
4 be put to beneficial use without physical control, physical control is not required. *See Town*  
5 *of Genoa v. Westfall*, 141 Colo 533, 546–47, 349 P2d 370 (1960) (“It is not necessary in  
6 every case for an appropriator of water to construct ditches or artificial ways through which  
7 the water might be taken from the stream in order that a valid appropriation be made. The  
8 only indispensable requirements are that the appropriator intends to use the waters for a  
9 beneficial purpose and actually applies them to that use.”); *see also In re Missouri River*  
10 *Drainage Area*, 311 Mont 327, 341, 55 P3d 396 (2002) (collecting cases from several  
11 Western states reflecting the principle that “the [prior appropriation] doctrine should not  
12 rigidly demand a diversion where unnecessary to achieve the intended beneficial use”). Thus,  
13 traditionally, an irrigator could effectuate a proper appropriation by “accept[ing] the gift of  
14 nature and indicat[ing] his intention to reap the benefits of natural irrigation,” with no need  
15 for “artificial works for irrigation.” *Masterson v. Pac. Live Stock Co.*, 144 Or 396, 408, 24  
16 P2d 1046 (1933).

17 But, even assuming that some degree of physical control is necessary to establish an  
18 ordinary water right, the impoundment of water behind a dam and subsequent release of  
19 water constitutes such control. *See McCall*, 42 Or at 55–56 (“The true test of appropriation of  
20 water is the successful application thereof to the beneficial use designed, and the method of  
21 diverting or carrying the same, or making such application, is immaterial.”) (quoting  
22 *Guiraud*, 6 Colo at 533). Petitioners appear to resist this conclusion by distinguishing  
23 between physical control of stored water and physical control over water following its release  
24 from storage. *See Pet’rs’ Summ. J. Mot.* at 9–10. This ignores that, when water is stored for  
25 later use, the storage and use “together create the appropriation and the beneficial use.”  
26 *Bridge Creek Ranch, LLC v. Or. Water Res. Dep’t*, 329 Or App 568, 583, 541 P3d 920

1 (2023) (emphasis added). Even accepting that a valid appropriation of water requires  
2 physical control over water—which, to be clear, is not correct—the impoundment and release  
3 of water constitutes such control; there is no need for physical control to be exerted *again*  
4 following release from storage.

5 Notably, before it ever applied for the water right at issue in this case, Reclamation  
6 applied for and was granted an ordinary secondary water right to use water released from  
7 storage in Prineville Reservoir for “flow augmentation for wildlife and fish life.” Missel  
8 Decl. Ex. 5. That right contemplates that water will be used instream. *See id.* at 5 (listing the  
9 place of use as “in the Crooked River”). The water right also serves to “establish mitigation  
10 credits under the Deschutes Ground Water Mitigation Program for the City of Prineville.” *Id.*  
11 Like the water right at issue here, that water right is a valid ordinary secondary water right—  
12 indeed, the two rights are secondary to the same primary storage right. *Compare id.* (listing  
13 the source of water for the Prineville ground water mitigation right), *with* Liljefelt Decl. Ex. 4  
14 at 1 (listing the source of water for the right at issue in this case). Even assuming that its  
15 validity depends on Reclamation exerting physical control over water, that requirement is  
16 met by Reclamation’s impoundment and release of water from Prineville Reservoir.

17  
18 4. *SB 839 (2013) Confirms that the Instream Water Rights Act Is  
Not the Exclusive Source of Water Rights to Protect Flows.*

19 Further undermining Petitioners’ argument is Senate Bill 839 (2013), which mandates  
20 that certain water supply development projects dedicate water to instream use. SB 839, which  
21 is codified at ORS 541.651 *et seq.*, establishes “a means for [the State of Oregon] to support  
22 the development of water resource projects having economic, environmental and community  
23 benefits.” ORS 541.653(1). One part of SB 839 requires recipients of state grants “for the  
24 development of [certain] new or expanded above-ground storage facilit[ies]” to agree that  
25 “[t]wenty-five percent of the newly developed water ... be dedicated to in-stream use.” ORS  
26 541.681(1)–(2). Another portion of SB 839 clarifies that “[d]edicated water from projects

1 may come from newly developed water or from other sources and may be put in-stream at  
2 other locations in the tributary” if certain conditions are met. ORS 541.686.

3 SB 839 requires a grant recipient to “dedicate” water to “in-stream use,” but it does  
4 not mandate that this result be achieved through any specific means. Notably, SB 839 does  
5 not require a grant recipient to obtain an “instream water right” under the Instream Water  
6 Rights Act. Nor does SB 839 require the grant recipient to arrange for OWRD to obtain an  
7 “instream water right.” SB 839 simply directs the grant recipient to “dedicate” water to “in-  
8 stream use,” which assumes that some mechanism will be available to the grant recipient to  
9 achieve legal protections for instream flows.

10 As the regulations implementing SB 839 make clear, one such mechanism is an  
11 ordinary secondary water right to use stored water for instream purposes. The regulations  
12 provide that, to meet the “dedication” requirement, a grant recipient may release water that is  
13 “protected under a separate secondary water right.” OAR 690-093-0110(4)(a). The  
14 regulations also distinguish between “water released from a[] reservoir and protected under a  
15 secondary water right for instream use” on the one hand and “a water right transferred  
16 instream under” the regulations implementing the Instream Water Rights Act on the other.  
17 OAR 690-093-0110(3)(a). In other words, the regulations explicitly recognize that the  
18 Instream Water Rights Act is not the exclusive mechanism for protecting flows instream, and  
19 that an ordinary secondary water right can be used to protect water instream after it is  
20 released from storage.

21 Not surprisingly, SB 839 grant recipients have met the “dedication” requirement by  
22 obtaining ordinary secondary water rights to use stored water for instream purposes. In 2020,  
23 Bridge Creek Ranch, LLC obtained a secondary water right to protect water instream for  
24 “fish life” in Bridge Creek and Bear Creek, tributaries of the John Day River. Missel Decl.  
25 Ex. 6. In 2021, Farmers Irrigation District obtained a secondary water right for “flow  
26 augmentation” in Ditch Creek, a tributary of the Hood River. Missel Decl. Ex. 7. Neither of

1 these rights is an “instream water right.” Rather, just like the right issued to Reclamation in  
2 this case, they are ordinary secondary water rights that allow water to be protected instream  
3 after being released from storage.

4  
5 **B. The Water Right at Issue Here Is Not an “Instream Water Right,”  
6 but Rather an Ordinary Secondary Water Right.**

7 Petitioners’ argument largely depends on the incorrect legal premise that an “instream  
8 water right” under the Instream Water Rights Act is the *only* type of water right that allows  
9 “instream, public uses of water that provide public benefits.” That premise is wrong, as  
10 explained above. With that premise disproved, it is clear from the record that Reclamation  
11 did not apply for an “instream water right” under the Instream Water Rights Act, and that  
12 OWRD did not grant any such right. Rather, Reclamation sought, and OWRD granted, an  
13 ordinary secondary water right allowing Reclamation to use water stored in Prineville  
14 Reservoir for downstream fish and wildlife. This is explained in Respondents’ summary  
15 judgment motion and in WaterWatch’s motion to dismiss, and there is no need to repeat that  
16 discussion here. *See* Resp’ts’ Summ. J. Mot. at 7–13; WW Mot. Dismiss at 3–5; WW Reply  
17 Supp. Mot. Dismiss at 2–7.

18 The short of it is this: in the Crooked River Act, Congress instructed Reclamation to  
19 take steps to provide flows for fish and wildlife downstream of Prineville Reservoir; in  
20 response, Reclamation successfully changed its storage right to allow it to store water in  
21 Prineville Reservoir for “downstream fish and wildlife use,” Ratcliffe Decl. Ex. 8 at 39; it  
22 then applied for a secondary permit to use that water for that purpose; and OWRD correctly  
23 granted Reclamation’s application. Petitioners’ contention that this cannot be what actually  
24 happened is premised on a mistaken view of the law. Thus, Petitioners’ Claim 1 fails as a  
25 matter of law, and the Court should deny Petitioners’ motion for partial summary judgment  
26 and grant WaterWatch’s motion for summary judgment as to Claim 1.

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**C. Petitioners’ Claim 2 Also Fails, for the Reasons Stated in Respondents’ Summary Judgment Motion and in WaterWatch’s Motion to Dismiss.**

In the interest of avoiding redundancy, WaterWatch hereby adopts Respondents’ argument concerning Claim 2 from their summary judgment motion. *See* Resp’ts’ Summ. J. Mot. at 13–14. WaterWatch also refers the Court to the relevant portions of WaterWatch’s motion to dismiss and reply in support of that motion. *See* WW Mot. Dismiss at 5–8; WW Reply Supp. Mot. Dismiss at 7–9. For the reasons given there, the Court should grant WaterWatch’s motion for summary judgment as to Claim 2.

**CONCLUSION**

For the foregoing reasons, the court should deny Petitioners’ motion for partial summary judgment and grant WaterWatch’s motion for summary judgment.

Dated: September 20, 2024

Respectfully submitted,

*/s/ Andrew R. Missel*  
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**CERTIFICATE OF SERVICE**

I certify that on September 20, 2024, I served the foregoing motion for summary judgment and opposition to Petitioners’ motion for partial summary judgment upon the parties to this case by email. Service was accomplished at the following email addresses:

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