



**WaterWatch of Oregon**  
**Protecting Natural Flows In Oregon Rivers**



**OREGON  
WILD**

July 17, 2020

Regional Forester (Objection Reviewing Officer)  
Pacific Northwest Regional Office  
Attn: 1570 Objections  
1220 SW Third Avenue  
Portland, OR 97204  
[objections-pnw-regional-office@usda.gov](mailto:objections-pnw-regional-office@usda.gov)

**RE: Objection, Dog River Pipeline Replacement Project**

Dear Objection Reviewing Officer:

WaterWatch of Oregon (hereinafter “WaterWatch”) is a non-profit river conservation organization devoted to restoring and protecting natural flows in Oregon’s rivers. We have been working to protect streamflows throughout Oregon, including the Hood River Basin, for over three decades. Oregon Wild represents 20,000 members and supporters who share our mission to protect and restore Oregon’s wildlands, wildlife, and water as an enduring legacy. Oregon Wild has a long history of efforts to conserve ecosystems and public resources on the Mt Hood National Forest.

In accordance with 36 CFR § 218, WaterWatch and Oregon Wild hereby object to the Draft Decision Notice and Finding of No Significant Impact (FONSI) for the Dog River Pipeline Replacement. WaterWatch and Oregon Wild’s objections are outlined in detail below, in accordance with 36 CFR § 218, Subpart A and Subpart B.

As provided by 36 CFR § 218.11(a), WaterWatch and Oregon Wild request a meeting with the Objection Reviewing Officer prior to the issuance of the Reviewing Officer’s written response.

**Objectors:** WaterWatch of Oregon  
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Portland, OR 97204  
503-295-4039, x 3  
Contact: Kimberley Priestley, Sr. Policy Analyst  
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Oregon Wild  
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**Principal Objector:** Oregon Wild

**Name of Proposed Project:** Dog River Pipeline Replacement

**Name/Title of Responsible Official:** Richard Periman, Forest Supervisor

**Name of National Forest/Ranger Station on which proposed project will be implemented:** Mt. Hood National Forest, Barlow Ranger Station

**Describe how the objections relate to prior comments:** WaterWatch of Oregon commented on the Preliminary Assessment for this project on December 6, 2018. Oregon Wild submitted comments on the Preliminary Assessment on or about Dec 6, 2018. All issues in the objection were raised in WaterWatch's and Oregon Wild's comments to the EA. WaterWatch and Oregon Wild's comments are attached to this objection.

**Suggested remedies that would resolve the objection:** Suggested remedies are found in each section of the objection.

**A description of those aspects of the project addressed by the objection, including specific issues related to the proposed project.** Objections raise issues related to capacity of pipe and related lack of analysis of environmental effects, lack of year round minimum flow requirements, failure to analyze reasonable alternatives, failure to describe how this project meets the requirements of the LRMP and the Aquatic Conservation Strategy, and failure to condition the SUP to protect instream flow.

**1. Objections: The Forest Service (USFS) fails to analyze the full amount of the withdrawal allowed by the new pipeline therefore failing to adequately consider the full impact of the Dog River Project on Streamflows.**

A fundamental flaw with the Forest Service (USFS) Analysis is the assumption throughout that the City's diversion of water will not increase as a result of an increase in pipe capacity. The November 2018 Dog River Pre-Assessment stated that the current maximum capacity was 12.3 cfs<sup>1</sup> and that the new pipe had capacity to divert 26.3 cfs<sup>2</sup>. In other words, the new pipe will allow diversions to more than double. Despite this, the entirety of the USFS analysis in the Decision Notice (DN), Environmental Assessment (EA) and FONSI is premised on the current withdrawal capacity of 12.3 cfs. The USFS offers a number of rationales for this.

First, the USFS asserts that because the City is not proposing to increase diversions there will be no increase in diversion and therefore no adverse effect<sup>3</sup>. The FONSI states that the City would

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<sup>1</sup> Dog River Pre-Assessment, Nov. 2018 at 45. Note in other areas of the document the amount noted is 12.4 cfs rather than 12.3 cfs.

<sup>2</sup> *Id.* at 49

<sup>3</sup> Appendix A: Response to Comments for Dog River Pipeline Replacement Project, at 8.

continue to divert as they currently do.<sup>4</sup> This analysis is flawed. The City has water rights that would allow the diversion of the full 26.3 cfs that the new pipe could hold. The USFS is not proposing to condition the SUP to limit diversion to the current capacity (12.3 cfs). Nor is the City proposing to hold rates to the current diversion limitations. That the City is currently only using 12.3 cfs is no indication of future use. As such, if the USFS allows this project to go forward without a condition limiting use to 12.3 cfs, the City could in fact increase diversions up to 26.3 cfs without any further analysis by the USFS. In Sum, the USFS cannot presume a maximum diversion of 12.3 cfs unless the pipe size is limited to this or the SUP is conditioned to require this. Given this, the USFS analysis should be based on the amount allowed by the pipe, which is 26.3 cfs.

Second, the EA disregards record documentation as to increased future use. For example, EA Page 64 notes that the City's 2006 Master Water System Plan includes increased withdrawals; but the USFS discounts this by pivoting to the storage issue, asserting that there has been no formal proposal submitted to the USFS to proceed with Crow Creek Reservoir expansion. This rationale fails on two counts. First, it does not address future increases in live flow withdrawals unconnected to storage that this expansion will allow. With increased population growth (including data centers) and climate change municipal use cannot be assumed to remain static into the future. Second, as to Crow Creek Reservoir, what this rationale fails to consider is that the future USFS analysis of the expansion of the Crow Creek Reservoir will be limited to the footprint of that project on federal lands, it will not include analysis of the diversion structure or diversion capacity of the Dog River Pipeline that is at issue under this EA. Reliance on a future analysis of a different project is not an adequate substitution of an analysis of the full amount of the water allowed to be diverted under this project.

Third, the BA states that use won't increase because there is inadequate flow to take more than the City can at the current pipe capacity. WaterWatch comments submitted gauged flows to the contrary. See WaterWatch comments and appendices, attached. Long story short, there are many months when flows are over 12.3 cfs. The new pipe will allow increased diversions. Moreover, as noted in comments, given that the City holds a water right to expand storage at Crow Creek Reservoir and also is investigating Aquifer Storage and Recovery (ASR), the potential for increased diversion in the winter months is real.

In sum, the USFS failure to analyze the full amount of water that could be diverted by the new diversion under current water rights fails to fully consider the full effect of the project on streamflows and aquatic species, including ESA listed fish<sup>5</sup>.

The Decision Notice acknowledges that the USFS had concerns as to the effect of the project on Fish and fish habitat listed under the ESA. DN at 4. However, based on the fact that the USFS analysis was limited to current capacity (12.3 cfs), not the full amount allowed under the project (26.4 cfs), the USFS determined that "impacts to fish and fish habitat to be insignificant because the new pipe is unlikely to negatively affect water quality and instream flow. Also, fish habitat will not get dewatered as a result of replacing the pipe". Until and unless the USFS analyzes this project at the full build out that would be allowed (26.4 cfs) the USFS analysis is both inadequate and unsupportable as to its conclusions.

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<sup>4</sup> Dog River Pipeline Replacement Project Draft Decision Notice, FONSI, pg. 6

<sup>5</sup> Similarly, NMFS analysis that is based on a withdrawal rate of 12.3 cfs is similarly flawed.

In sum, the draft Decision Notice, FONSI and EA are all fatally flawed for their failure to analyze the effects of the full diversion amount allowed by the project on streamflows. The Biological Assessment submitted to NMFS was based on current capacity as well, that also is fatally flawed and calls into question NMFS determinations, as well as the FONSI's reliance on this<sup>6</sup>. Remedy: The USFS should either do an alternatives analysis at 26.3 cfs, or in the alternative include in the SUP a condition limiting diversion to 12.3 cfs.

We are concerned that this project poses a Catch-22 where the increased diversions in the future will also avoid NEPA scrutiny. If the City decides to increase their diversion in the future, the FS will say, "The pipeline is already built. There are not additional ground disturbing effects. The City has a water right, so we are not doing any NEPA." Failure to analyze the full effect of the larger diversion now, and likely avoiding future analysis violates the letter and spirit of NEPA. Courts disfavor such a Catch-22 that would allow the agency to avoid scrutiny of its actions affecting the environment.

**2. Objection: The Forest Service fails to include conditions of use on the SUP that would protect streamflow:**

- a. The USFS fails to include a condition of the SUP to limit the diversion to 12.3 cfs, which is the amount that the EA assumes for its analysis.** As noted above, the USFS fails to proposed a condition that would limit future withdrawals under the SUP to current capacity (12.3 cfs). Without this condition, there is no assurance the City will only use 12.3 cfs for the life of the SUP as the EA assumes. This moots any and all analysis related to streamflows under the EA which relies on the false assumption that diversions will remain static into the future. Remedy: Condition the SUP to limit diversions to 12.3 cfs.
- b. The USFS fails to include a condition of the SUP that would require minimum flows year round:** The EA Response to comments regarding increasing bypass flows both above .5 cfs and extending them year round was evasive and did not substantively respond to comments<sup>7</sup>. Instead the Response to Comments repeatedly skirts the issue by stating: The City's municipal water operations and use do not fall under any authority of the Forest Service, only State law. This completely ignores the fact that the pipeline diversion will allow diversion at double the current rate. It also ignores the real possibility of increased diversions for future storage, whether an ASR project or expanding Crow Creek Reservoir. And, more to the point, regardless of state water rights, it is certainly within the USFS purview to condition the SUP to require additional minimum flows and/or higher bypass flows. Remedy: condition the SUP to require minimum flows year round.
- c. The USFW fails to include a condition on the SUP that would require that bypass flows be protected instream:** WaterWatch comments note that the USFS is not requiring that the bypass flow be legally protected instream, and this fact should be factored into the analysis. The USFS Response to Comments on this point misses the mark, and simply states that the City has voluntarily offered .5 cfs and any necessary updates to the permit would occur prior to the operation of the new pipeline. Remedy: Condition the SUP to require the City to permanently transfer .5 cfs of their Dog River water right instream.

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<sup>6</sup> Dog River Pipeline Replacement Project Draft Decision Notice, pg. 7 (FONSI #9)

<sup>7</sup> Appendix A: Response to Comments for Dog River Pipeline Replacement Project at 6 (#23)

3. **Objection: The Forest Service decision is based on incorrect statements of fact.** The Draft Decision Rationale states that “Another consideration I took into account is that the The City does not need a larger pipeline to take more water. They could take more water with the existing old pipeline”.<sup>8</sup> The Response to Comments makes a similar statement.<sup>9</sup> This statement directly contradicts facts in the record that repeatedly state that the capacity of the existing pipeline is limited to 12.3 cfs<sup>10</sup>. The new pipeline will allow the diversion of more than double the current capacity. As such, the USFS rationale is flawed. This is not a pipe “replacement” project, it is a pipe “expansion” project, something that is ignored throughout the decision documents and is not taken into consideration in the environmental analysis of this project. Remedy: Condition the SUP so that diversion at Dog River is limited to 12.3 cfs, which is the diversion amount the EA analysis is based upon.
4. **Objection: The Forest Service analysis of the City’s water rights is flawed.** The EA is incorrect in its analysis of the City’s water rights on a number of points noted below.
- a. **Aquifer Storage and Recovery (ASR):** The USFS response to WaterWatch comments as to the increased diversion that will likely result from the City’s ASR project miss the point. Our comments pointed to the ASR project as an example of increase of diversion in the winter months that would be allowed by the Dog River Pipeline expansion. In response to comments, the USFS only notes that “storage testing and the water to be used is under the authorization and jurisdiction of the State of Oregon’s permit with the City”<sup>11</sup>. The EA does not analyze the effects of increased diversion during the winter months that would result from this project, nor does it acknowledge that despite the fact that these are state water rights, the USFS does in fact have the authority to condition use of water under the SUP. The USFS fails to condition the SUP to restrict diversions to 12.3 cfs or to ensure protection of minimum flows in the winter to protect against increased diversions. Remedy: condition the SUP to restrict diversions to 12.3 cfs and require minimum bypass flows year-round.
  - b. **Crow Creek Reservoir Storage:** The USFS response to WaterWatch comments as to the increased diversion tied to an increase in storage capacity at Crow Creek Reservoir miss the point. The Dog River project will allow a more than doubling of diversion capacity at Dog River. That the City has a state water right in hand that would allow expansion of the Crow Creek Reservoir serves as documentation that increased winter diversion at the Dog River diversion is a real consideration. Rather than do an analysis of the full amount of diversion allowed under the project, the USFS simply states “the Forest Service considers any such plans to increase the reservoir’s capacity as an unforeseeable action at this time”.<sup>12</sup> Remedy: condition the SUP to restrict diversion to 12.3 cfs.
  - c. **Instream water rights:** The EA description of the state instream water rights is inaccurate and as such affects analysis of the Dog River Pipeline diversion. The EA asserts that the flow rates apply to the reaches below the Dog River Diversion and do not apply to the reaches above the diversion (EA at 73). The EA States that the instream rights do not have

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<sup>8</sup> Dog River Pipeline Replacement Project Draft Decision Notice Page 3.

<sup>9</sup> Appendix A: Response to comments for Dog River Pipeline Replacement Project at 8.

<sup>10</sup> Dog River Pre-Assessment, Nov. 2018 at 45; Dog River Pipeline Replacement EA at 60.

<sup>11</sup> Appendix A: Response to comments for Dog River Pipeline Replacement Project, at 7

<sup>12</sup>Id.

priority over human consumption and that they are considered junior to the City's water right. *Id.*

The EA is incorrect on a number of points. While it is true the protected reach is below the Dog River Diversion Project, what the USFS fails to consider in its analysis is that the water protected in that reach is also protected against diversions upstream of that reach that are junior to the instream water right. Permit R-13105 is junior to the instream right and thus diversions under that right are subject to the instream right. As to the EA assertion that because the instream water right are conditioned to be subordinate to "human consumption" they are somehow junior to "municipal rights", that is incorrect. Under Oregon Administrative Rules, the beneficial use of "human consumption" is separate and distinct from the beneficial use of "municipal use". "Human Consumption" means the use of water for the purposes of drinking, cooking, and sanitation. OAR 690-300-0010(24). "Municipal Water Use" means the delivery and use of water through the water service system of a municipal corporation for all water uses usual and ordinary to such systems. Examples of these water uses shall include but are not limited to domestic water use, irrigation of lawns and gardens, commercial water use, industrial water use, fire protection, irrigation and other water uses in park and recreation facilities, and street washing. Such uses shall not include generation of hydroelectric power. *Id.* at 29. As such, the instream water rights are not junior to the City's reservoir right that allows diversion from Dog River (R-13105). Regardless, the point as to instream water rights is that these rights represent the needs of fish in the stream. These should serve as the basis for minimum flow requirements for the SUP.

**5. Objection: The draft DN Will Lead to Water Appropriation that Violates the Mt Hood LRMP as amended by the Aquatic Conservation Strategy, and The EA and draft DN Fail to Describe How This Project Complies With LRMP Standards & Guidelines**

Dog River is an important tributary of the South Fork Mill Creek in the East Fork Hood River 5<sup>th</sup> Field Watershed. Dog River has a mean annual discharge of 19 cfs and provides important habitat for at-risk salmonids, including chinook, coho, steelhead, and a pure strain of cutthroat trout Gregg, R. and F. W. Allendorf. 1995. Systematics of *Oncorhynchus* species in the vicinity of Mt. Hood: Preliminary Report to Oregon Department of Fish and Wildlife.

Dog River appears to be designated as a Key Watershed but that fact (and its legal implications) do not appear to be adequately addressed in the EA.

Increasing the pipeline capacity appears to violate the standards & guidelines for riparian reserves which require the Forest Service to maintain instream flows necessary to meet Aquatic Conservation Strategy objectives. Instream water rights in Dog River are currently not being met in summer and fall. Coccoli, H. 1999. Hood River Watershed Assessment. Hood River Watershed Group<sup>13</sup>.

This project will exacerbate that problem. Relevant standards & guidelines from the Mt Hood LRMP as amended by the Northwest Forest Plan state:

- LH-1 says “Identify in-stream flows needed to maintain riparian resources, channel conditions, and fish passage.”
- RA-1 says “Identify and attempt to secure in-stream flows needed to maintain riparian resources, channel conditions, and aquatic habitat.”
- LH-2 says “Tier 1 Key Watersheds: For ... surface water development proposals, require in-stream flows and habitat conditions that maintain or restore riparian resources, favorable channel conditions, and fish passage. Coordinate this process with the appropriate state agencies. ... [and, for other watersheds] ... give priority emphasis to in-stream flows and habitat conditions that maintain or restore riparian resources, favorable channel conditions, and fish passage. Coordinate this process with the appropriate state agencies.”

Table 45 in the EA purports to describe how this project complies with the LRMP standards & guidelines as amended but it does not address instream flow requirements.

The EA (p129) asserts that “Water use and operations by the City would not be expected to change substantially as a result of a new, larger pipeline. Water availability and instream flows downstream of the Dog River pipeline and Crow Creek reservoir would be maintained.” But the EA lacks analysis to support this assertion. The larger pipeline capacity makes it highly likely that there will be substantial changes to water flow. These changes must be evaluated in light of the standards listed above.

The EA admits that part of Dog River is partially dewatered by the diversion. “When the entire flow of the stream is being diverted to the pipeline in the summer and early fall, the river at the mouth flows perennially. During this low flow period, the only reach that is partially dewatered is an eighth of a mile segment just below the pipeline diversion. Instream flows are restored not far below by springs and hyporheic flow.” First, this dewatering will be exacerbated by a larger capacity pipeline. Second, the Forest Service cannot write off this 1/8 mile of dewatered river as inconsequential. It’s still part of our public land legacy and still has the protection of the LRMP as amended, and federal reserved water rights.

The proposed action contemplates that the city will provide 0.5 cfs bypass flows, but this is far less than current bypass flows and is clearly inadequate to meet legal requirements such as ACS compliance. As explained below, the NEPA analysis needs to consider a range of alternatives bypass flows to meet these legal requirements.

As explained in public comments, the EA did not carefully analyze whether the proposed action and alternatives will meet legal requirements, including ACS, and state water law regarding forfeiture. All site-specific activities must comply with the governing forest plan. National Forest Management Act, 16 U.S.C. § 1604(i) (governing FS management of national forest lands).

NEPA requires disclosure of information necessary to determine compliance with legal requirements such as the Endangered Species Act, Clean Water Act, National Forest Management Act, and applicable Forest Plan Standards & Guidelines. See 40 CFR 15087.27(b)(10) and NW Indian Cemetery Protective Association v. Peterson, 795 F2d 688 (9<sup>th</sup> Circ. 1986). In this G-O Road case, the NEPA document described water quality changes resulting from a road project in terms of 7-day average changes, whereas the applicable WQ standard was defined by daily peak changes. The court found this to be a NEPA violation.

The CEQ NEPA regulations also require an analysis of legal requirements in order to determine whether an action may cause significant impacts on the environment. 40 CFR §1508.27(b)(10) (“*Significantly*, as used in NEPA, requires considerations of both context and intensity: ... The following should be considered in evaluating intensity: ... Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” *Emphasis added.*) SAS v. Mosely 798 F.Supp. 1473 (W.D. Wash. May 1992) (“The FEIS has thus mentioned what appears to be a major consequence of the plan jeopardy to other species that live in the old growth forests without explaining the magnitude of the risk or attempting to justify a potential abandonment of conservation duties imposed by law. An EIS devoid of this information does not meet the requirements of NEPA.” *Emphasis added.*)

The USDA Office of General Counsel agrees that project level analysis must document “Project Compliance With Other Laws.”

In addition to consistency with the LRMP each project must be in compliance with NEPA, CWA, CAA and other laws. Simply being consistent with the LRMP does not fulfill the site-specific requirements of Federal law. Project level analysis is to “determine findings for NFMA, to ensure compliance with NEPA, and to meet other appropriate laws and regulations.” Forest Service Land and Resource Management Planning, FSM 1920 and Forest Service Handbook 1909.12, 5.31. 53 Fed. Reg. 26807, 26836 (July 15, 1988).

OGC, “Forest Plan and Project Level Decisionmaking— Overview of Forest Planning and Project Level Decisionmaking,”

<http://web.archive.org/web/20030111060230/http://www.fs.fed.us/forum/nepa/decisionm/p4.html>

<http://web.archive.org/web/20060829000705/http://www.fs.fed.us/emc/nfma/includes/overview.pdf>

The Forest Service NEPA Handbook also requires that Decision Notices explain complete[ly] and comprehensive[ly]” how the NEPA decision complies with applicable legal requirements including the LRMP land allocations and Standards & Guidelines.

#### FSH 1909.15 Chapter 40, 43.21 - **Format and Content**

Decision notices document the conclusions drawn and the decision(s) made based on the analysis in the EA. Decision notices should conform to the following format and content. While sections may be combined or rearranged in the interest of clarity and brevity, the information needs to be complete and comprehensive.

...

6. Findings required by other laws and regulations. Include any findings required by any other laws which apply to the decision being made. Cite the project record or environmental analysis document that contains the information being used to support the findings. Describe how the decision is consistent with applicable laws and regulations. For example, findings regarding consistency with the forest plan (allocation, and standards and guidelines), suitability for timber production, and vegetation management criteria required by the National Forest Management Act and 36 CFR part 219. (emphasis added)

[http://web.archive.org/web/20090118192937/http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15\\_40.doc](http://web.archive.org/web/20090118192937/http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_40.doc)

See also, Judge King's October 2003 Decision in ONRC Action v. U.S. Forest Service, CV. 03-613-KI (“The underlying EAs for the timber sales at issue did not properly frame the Forest Service’s survey and manage duties, they did not analyze a range of alternatives based upon these duties, they did not evaluate completed surveys, they did not demonstrate that the Forest Service had all of the proper information before it before allowing logging, and they did not provide for public influence

over the decisions. For all of these reasons, the underlying EAs are legally deficient.” *Emphasis added.*) <http://web.archive.org/web/20041105214752/http://www.onrc.org/press/ONRCv.USFS.pdf> And also Judge Hogan’s ruling in Klamath Siskiyou Wildlands Center v. Boody (D. Or. #03-3124-CO. May 18, 2004) where he held “plaintiffs have raised a serious question as to whether BLM violated NEPA in failing to disclose sufficient information in the EA to confirm compliance with ... the RMP.” (Order at page 18).

## **6. Objection: The draft DN could lead to appropriation of water that should be forfeited.**

The USFS must not approve a pipeline with a larger capacity than the existing pipeline. To authorize a larger pipeline could violate state water law and possibly federal reserved water rights. The EA fails to address significant issues related to the perfection of water rights and ACS compliance.

The EA says the new pipeline will “allow[] the City of The Dalles to fully utilize their water right.”

According to the project description in the State of Oregon’s Water Development Loan and Grant Program, the pipeline replacement will double the City’s capacity from 8 million gallons to 17 million gallons (from 12.4 to 26.3 cfs).

In comments dated Sept 21, 2018 addressed to the Oregon Water Resources Department’s SB 839 Water Development Loan and Grant Program, WaterWatch of Oregon noted:

... this project will allow revival of a portion of a water right that, by all accounts, should have been cancelled by the state years ago. While the City’s water right allows them to divert the whole of Dog River, the City’s application materials are very clear that the maximum capacity of its Dog River diversion has been limited to 12.4 cfs for the last one hundred and seven years (since 1911). The forfeiture statutes are clear that unless a water right holder’s facilities could divert the full rate and duty and the holder was otherwise ready, willing and able to use the entire amount of the water allowed under a water right, there is a presumption of forfeiture for the amount not diverted for five years or more. ORS 540.610(1). This water has not been used in over a century and the City’s diversion does not have, and has not ever had, the capacity to withdraw over 12.4 cfs. Given the facts, we would encourage the state to proceed with cancellation of the unused portion of the water right (limiting the right to 12.4 cfs) not fund a project that would grant it access to this long unused, and arguably forfeited, water.

The relevant forfeiture statute provides:

ORS 540.610 (1) beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever 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, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

<https://www.oregonlaws.org/ors/540.610>. Though municipal water rights get *some* leeway with respect to forfeiture, more than 100 years of non-use raises serious doubts about the legal validity of doubling the diversion of Dog River.

The EA says “The City’s decreed water right has a priority date of 1870 and pre-dates establishment of the Mt. Hood Nat Forest.” (EA p 129). However, the EA appears to fail to recognize that this only applies to the portion of the water right that we perfected before the National Forest was established. The portion of the flow of Dog River that has not been appropriated by the city is likely covered by a

federal reserved water right dating from the 1893 establishment of the Cascade Range Forest Reserve. Maintaining some minimum level of instream flow in Dog River is necessary to fulfill the purposes of the reservation, such as the aquatic and riparian habitat in and adjacent to the river.

The Response to Comment says “The City has a perfected water right for all of the water in Dog River above the diversion with a priority date of 1870, so OWRD interprets the City’s water right to be senior to any federally reserved water rights. In this circumstance the State does not recognize federally reserved water rights to supersede the municipal water rights.” This may not accurately describe how water rights are perfected in this state.

## **7. Objection: The EA Failed to Consider All Reasonable Alternatives.**

The [Response to Comments](#) (p 2) says “In addition to the Proposed Action, a No Action Alternative was analyzed in detail. While concerns were considered throughout the NEPA process, none were identified as issues for the purpose of formulating additional fully developed alternatives.” This fails to address public comments suggesting that the USFS has legal duty to protect instream flows necessary to “maintain or restore riparian resources, favorable channel conditions, and fish passage.” The FS failed to consider higher flows that would better meet these objectives.

As explained in public comments, the EA did not consider all reasonable alternatives, such as (1) those with greater bypass flows necessary to meet legal requirements, including ACS; (2) diversion at full built out (26.4 cfs), (3) year round minimum flows, and (4) recognizing that the City has plans to increase storage of municipal water, the FS should consider an alternative where the city fills their water storage during wet months and leaves more water instream during dry months. The municipal water storage plans should be considered connected actions and considered together with this proposal.

NEPA mandates that an agency “shall to the fullest extent possible: use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these action upon the quality of the human environment.” 40 C.F.R. § 1500.2(e). NEPA also requires the USFS to “study, develop, and describe appropriate alternatives to the recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of 40 C.F.R. § 1501.2 (c).” *Id.*

Environmental analysis documents must “[r]igorously explore and objectively evaluate all reasonable alternatives” to the project. 40 C.F.R. § 1502.14(a). The Council on Environmental Quality (CEQ), which promulgated the regulations implementing NEPA, characterizes the discussion of alternatives as “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. A decisionmaker must explore alternatives in sufficient enough detail to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” *Id.* § 1502.14. All reasonable alternatives must receive a “rigorous exploration and objective evaluation... , particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects.” *Id.* § 1500.8(a)(4). The analysis of the alternatives must be “sufficiently detailed to reveal the agency’s comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative.” *Id.*

**Conclusion:** The Forest Service’s failure to assess the effects of the full amount of the diversion allowed by the proposed pipeline is a fatal flaw. The City’s Dog River water right allows the appropriation of all the water in the stream, the new pipe will double current capacity, there are no limits

proposed on diversion in the SUP or otherwise, thus the USFS is remiss in not analyzing the impacts of the new pipeline at full capacity . Similarly, the decision documents' failure to condition the use to provide year round minimum flows for fish, especially given the twofold increase in demand capacity, fails to fulfill the requirements of the National Environmental Policy Act and the National Forest Management Act.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Priestley", with a stylized flourish at the end.

Kimberley Priestley  
Sr. Policy Analyst  
WaterWatch of Oregon

A handwritten signature in black ink, appearing to read "Doug Heiken", in a cursive style.

Doug Heiken  
Oregon Wild