

ANNOTATED MINUTES

Tuesday, October 13, 1992 - 9:30 AM
Multnomah County Courthouse, Room 602

PLANNING ITEM

Vice-Chair Sharron Kelley convened the meeting at 9:32 a.m., with Commissioners Pauline Anderson, Rick Bauman and Gary Hansen present, and Chair Gladys McCoy excused.

P-1 SEC 6-91a
HDP 4-91a Board of Commissioners Continued Review of the June 16, 1992 Hearings Officer Decision Denying a Request to Amend SEC 6-91a and HDP 4-91a, and Permit a Culvert/Fill Driveway Crossing Over a Tributary of Balch Creek, on Property Located at 6125 NW THOMPSON ROAD. (FROM SEPTEMBER 22, 1992 HEARING).

BOARD DISCUSSION WITH STAFF, COUNTY COUNSEL AND APPLICANT'S ATTORNEY. COMMISSIONER BAUMAN MOVED AND COMMISSIONER KELLEY SECONDED, TO AFFIRM THE HEARINGS OFFICER DECISION REQUIRING REMOVAL OF THE CULVERT AND IF APPLICANT DESIRES, CONSTRUCTING A BRIDGE. COMMISSIONER HANSEN MOVED AND COMMISSIONER BAUMAN SECONDED, TO AMEND COMMISSIONER BAUMAN'S MOTION, CHANGING IT TO A MOTION TO REVERSE THE HEARINGS OFFICER DECISION, ALLOWING THE CULVERT TO STAND. COMMISSIONER HANSEN'S MOTION PASSED WITH COMMISSIONERS ANDERSON, BAUMAN AND HANSEN VOTING AYE AND COMMISSIONER KELLEY VOTING NAY. COMMISSIONER BAUMAN'S MOTION AS AMENDED FAILED, WITH COMMISSIONERS ANDERSON AND HANSEN VOTING AYE AND COMMISSIONERS BAUMAN AND KELLEY VOTING NAY. (FINAL ORDER 92-182 FILED WITH CLERK ON THURSDAY, OCTOBER 15, 1992.)

There being no further business, the planning item meeting was adjourned at 10:10 a.m.

OFFICE OF THE BOARD CLERK
for MULTNOMAH COUNTY, OREGON

By Deborah Coasta

Tuesday, October 13, 1992 - 10:00 AM
Multnomah County Courthouse, Room 602

BOARD BRIEFINGS

B-1 First Quarter Update on the Status of the Youth Employment and Empowerment Project. Presented by Lorenzo Poe and Jana McLellan.

PRESENTATION BY LOLENZO POE AND JANA McLELLAN, WITH COMMENTS BY RYAN BROWN FROM SISTERS OF PROVIDENCE, AND JEAN POLLARD OF PORTLAND YOUTH REDIRECTION.

B-2 State Office of Emergency Management Briefing. Presented by Hank Miggins and Myra Lee.

PRESENTATION BY MYRA LEE, PENNY MALMQUIST AND HANK MIGGINS CONCERNING EFFORTS TO IMPROVE COORDINATED FOUR-COUNTY EMERGENCY MANAGEMENT SYSTEM AND THE FIDUCIARY AND LEGISLATIVE RESPONSIBILITIES OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS. MS. MALMQUIST TO ADVISE BOARD MEMBERS OF NEXT TRAINING SESSION. MS. LEE INVITED BOARD TO TOUR STATE EMERGENCY MANAGEMENT FACILITY.

**Tuesday, October 13, 1992 - 11:00 AM
Multnomah County Courthouse, Room 602**

AGENDA REVIEW

B-3 Review of Agenda for Regular Meeting of October 15, 1992.

R-1 COUNTY COUNSEL AND TAX TITLE EXPLANATION.

R-2 & R-3 COMMISSIONER ANDERSON ADVISED BALLOT MEASURE ITEMS CANNOT BE SUBMITTED BY A COUNTY EMPLOYEE OR DEPARTMENT AND THAT SHE WILL BE SUBMITTING THEM FOR BOARD CONSIDERATION NEXT WEEK.

R-11 STAFF AND BOARD DISCUSSION. STAFF TO SCHEDULE BOARD BRIEFING IN NEAR FUTURE.

R-12 STAFF ADVISED COUNTY IS LOOKING AT AFFIRMATIVE ACTION FUNDING FOR FUTURE EXPENDITURES.

R-13 BOARD ASKED IF COUNTY HEALTH NURSES COULD PERFORM NUTRITION STUDY.

R-18 BOARD ASKED IF AWARDS COULD BE APPROPRIATED FROM DEPARTMENTAL BUDGET SAVINGS RATHER THAN CONTINGENCY.

BUDGET STAFF DISCUSSED SEPTEMBER SHORTFALLS, REDUCTION OF OCTOBER BEGINNING WORKING CAPITAL, CONTINGENCY REQUEST CRITERIA, EXCEPTIONS, STATUTORY REQUIREMENTS FOR PROCESSING A SUPPLEMENTAL BUDGET AND THE MERITS OF CONTINGENCY REQUESTS R-11 THROUGH R-19. COMMISSIONER BAUMAN REQUESTED THAT THE BOARD BE BRIEFED ON THE PROPERTY TAX INCREASE AND THE COUNTY'S GRANTOR PAYMENT PROCESS.

Thursday, October 15, 1992 - 9:30 AM
Multnomah County Courthouse, Room 602

REGULAR MEETING

Vice-Chair Sharron Kelley convened the meeting at 9:31 a.m., with Commissioners Pauline Anderson, Rick Bauman and Gary Hansen present, and Chair Gladys McCoy excused.

CONSENT CALENDAR

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, THE CONSENT CALENDAR (C-1) WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-1 Ratification of Intergovernmental Agreement Contract #300763 Between Multnomah County and the Oregon Department of Transportation Providing County Reimbursement for Construction of Safety Improvements to Cornelius Pass Road to a Maximum of \$548,010 by Conversion of Federal Funds to State Funds Under ODOT Fund Exchange Program

REGULAR AGENDA

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-2 RESOLUTION in the Matter of Supporting a Constitutional Amendment Which Would Grant the State Legislature the Authority to Sell Bonds for the Purpose of Restoring and Expanding Oregon's Park Systems

R-3 RESOLUTION in the Matter of Supporting Ballot Measure 26-1 Which Proposes to Authorize the Metropolitan Service District to Acquire, Develop, Operate and Maintain a Park, Open Space and Recreational System

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, THE BOARD UNANIMOUSLY APPROVED MOTION REMOVING R-2 AND R-3 FROM AGENDA. COMMISSIONER ANDERSON ADVISED SHE WILL RESUBMIT RESOLUTIONS FOR BOARD CONSIDERATION ON THURSDAY, OCTOBER 22, 1992.

R-4 Request for Approval in the Matter of a NOTICE OF INTENT to Apply for a \$27,200 Grant from the State Historic Preservation Office for Rehabilitation and Stabilization Projects at the James F. Bybee House Located in Howell Territorial Park

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, R-4 WAS UNANIMOUSLY APPROVED.

R-1 In the Matter of a Request by Gregory Shipp to Repurchase Two Parcels of Property Located in the Columbia Gorge, Tax Account Properties #R 94515-0170 and #R 94515-0180

BOARD DISCUSSION WITH COUNTY COUNSEL JOHN DuBAY, TAX TITLE STAFF LARRY BAXTER, GREGORY SHIPP AND KEITH BURNS. UPON MOTION OF COMMISSIONER BAUMAN, SECONDED BY COMMISSIONER HANSEN, IT WAS UNANIMOUSLY APPROVED THAT A HEARING BE SCHEDULED FOR 9:30 AM, THURSDAY, NOVEMBER 5, 1992, AT WHICH TIME CHAIR McCOY AND ASSISTANT COUNTY COUNSEL SANDRA DUFFY WILL BE IN ATTENDANCE. COMMISSIONER HANSEN DIRECTED THAT COUNTY COUNSEL PREPARE APPROPRIATE AMENDMENTS TO ORDINANCE 560 PRIOR TO NOVEMBER 5 HEARING.

NON-DEPARTMENTAL

R-5 PROCLAMATION in the Matter of Proclaiming the Week of October 24, 1992 Through November 1, 1992 as "RED RIBBON WEEK" in Multnomah County, Oregon

FRED NEAL READ PROCLAMATION AND RESPONDED TO BOARD QUESTIONS. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER HANSEN, PROCLAMATION 92-183 WAS UNANIMOUSLY APPROVED. COMMISSIONER HANSEN ADVISED HE WILL BE SUBMITTING A REQUEST FOR COUNTY COMMITMENT IN CONNECTION WITH FURTHERING THE GOALS OF ALCOHOL AND DRUG ABUSE PREVENTION FOR BOARD CONSIDERATION IN THE NEXT FEW WEEKS.

DEPARTMENT OF SOCIAL SERVICES

R-6 Budget Modification DSS #18 Authorizing Increase of \$16,165 from the Oregon Food Bank to the Housing and Community Services Division Pass Through Budget, to Support the Hunger Relief Task Force

UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER ANDERSON, R-6 WAS UNANIMOUSLY APPROVED.

R-7 Ratification of Intergovernmental Grant Award, Contract #103221 Between Multnomah County and Bonneville Power Administration, Providing \$150,000 Grant to Two Youth Employment and Empowerment Project Coalition Agencies to Cover Wages and Personnel Expenses for Youth Employed in Ten Job Slots at Bonneville Power Administration, for the Period November 1, 1992 through October 31, 1993

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, R-7 WAS UNANIMOUSLY APPROVED.

R-8 Budget Modification DSS #22 Requesting Authorization to Add \$150,000 Revenue from the Bonneville Power Administration to the Juvenile Justice Division Budget, to Purchase Ten Job Positions in the Youth Employment and Empowerment Project

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, R-8 WAS UNANIMOUSLY APPROVED.

JUSTICE SERVICES
SHERIFF'S OFFICE

R-9 Budget Modification MCSO #5 Requesting Authorization to Appropriate \$85,850 in Marine Board Enhancement Funds to Add Two Deputy Sheriff Positions to the Sheriff's River Patrol Unit Budget

UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER BAUMAN, R-9 WAS UNANIMOUSLY APPROVED.

PUBLIC CONTRACT REVIEW BOARD

(Recess as the Board of County Commissioners and convene as the Public Contract Review Board)

R-10 ORDER in the Matter of an Emergency Exemption to Replace Damaged Sewer Line at the Expo Center

UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER BAUMAN, ORDER 92-184 WAS UNANIMOUSLY APPROVED.

(Recess as the Public Contract Review Board and reconvene as the Board of County Commissioners)

FIRST QUARTER CONTINGENCY REQUESTS
DEPARTMENT OF SOCIAL SERVICES

R-11 Budget Modification DSS #23 Requesting the Transfer of \$100,000 from General Fund Contingency to the Mental Health, Youth and Family Services Division Budget, to Increase the County Contribution to the Partner's Project Funding Pool

DISCUSSION AND RESPONSE TO BOARD QUESTIONS WITH GARY NAKAO AND JAMES EDMUNDSON. COMMISSIONER BAUMAN MOVED TO DENY, NO SECOND. FOLLOWING DISCUSSION WITH COUNTY COUNSEL AND UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER ANDERSON, IT WAS UNANIMOUSLY APPROVED TO POSTPONE R-11 INDEFINITELY. BOARD DIRECTED STAFF TO SCHEDULE A COMPREHENSIVE PARTNER'S PROJECT BOARD BRIEFING FOR 10:15 AM, TUESDAY, NOVEMBER 10, 1992; INCLUDING INFORMATION REGARDING THE ROBERT WOOD JOHNSON GRANT AND STATE FUNDING.

R-12 Budget Modification DSS #24 Requesting the Transfer of \$7,455 from General Fund Contingency to the Juvenile Justice Division Budget, to Purchase Specialized Equipment to Assist a Visually Impaired Staff Member in the Juvenile Justice Division

COMMISSIONER ANDERSON MOVED, SECONDED BY COMMISSIONER HANSEN, APPROVAL OF R-12. COMMISSIONER BAUMAN SUGGESTED THAT ANOTHER MECHANISM BE USED TO PAY FOR FUTURE EQUIPMENT PURCHASED IN COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT. VOTE ON MOTION UNANIMOUSLY APPROVED.

R-13 Budget Modification DSS #25 Requesting the Transfer of \$9,860 from General Fund Contingency to the Juvenile Justice Division Budget, to Fund a Nutrition Study of Meals Served to Youth at the Donald E. Long Detention Facility

COMMISSIONER BAUMAN MOVED, SECONDED BY COMMISSIONER ANDERSON, APPROVAL OF R-13. BOARD DISCUSSION. VOTE ON MOTION UNANIMOUSLY APPROVED.

JUSTICE SERVICES

COMMUNITY CORRECTIONS

R-14 Budget Modification DCC #13 Requesting the Transfer of \$75,000 from General Fund Contingency to the Department of Community Corrections Administrative Services Budget, for the Installation of the State Parole and Probation Information System in Three Branch Offices

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER HANSEN, R-14 WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-15 Ratification of Intergovernmental Agreement Contract #300663 Between Multnomah County and the Metropolitan Service District, Providing Retention Scheduling Services to the Metropolitan Service District at an Hourly Rate of \$31.00, Total Amount Not to Exceed \$10,000

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER BAUMAN, R-15 WAS UNANIMOUSLY APPROVED.

R-16 Budget Modification DES #7 Requesting the Transfer of \$10,000 from General Fund Contingency to the Fleet, Records, Electronic and Distribution Services Division Budget, for Temporary Help and Supplies to Offset Personnel Utilized in Providing Record Retention Scheduling Services to the Metropolitan Service District and Reduce Backlog in Document Preparation

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER BAUMAN, R-16 WAS UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

R-17 Budget Modification NOND #13 Requesting Authorization to

Correct Two Omissions in Adopted Budget, Special Appropriations Division: Capital Outlay for Assessment and Taxation New Development Project \$29,191, and Reduced Reimbursement for General Fund Emergency Management Resulting from an Expenditure Reduction (\$1,456)

UPON MOTION OF COMMISSIONER ANDERSON, SECONDED BY COMMISSIONER BAUMAN, R-17 WAS UNANIMOUSLY APPROVED.

R-18 Budget Modification NOND #15 Requesting the Transfer of \$215 from General Fund Contingency to the Respective Employees' Organizational Budgets, for Monetary Awards in Recognition of Employee Suggestions Already Approved by the Board

COMMISSIONER HANSEN MOVED, AND COMMISSIONER ANDERSON SECONDED, APPROVAL OF R-18. BOARD AND BUDGET OFFICE STAFF DISCUSSION. VOTE ON MOTION TO APPROVE FAILED WITH COMMISSIONERS ANDERSON AND HANSEN VOTING AYE AND COMMISSIONERS BAUMAN AND KELLEY VOTING NAY. STAFF DIRECTED TO PAY EMPLOYEE AWARDS FROM ORGANIZATIONAL BUDGETS.

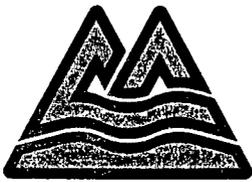
R-19 Budget Modification REVENUE #1 Requesting Authorization to Reduce the 1993 Business Income Tax Estimates and Reduce the Federal Marshal Revenue Estimates, With Offsetting Reduction in General Fund Contingency (\$2,823,969)

UPON MOTION OF COMMISSIONER BAUMAN, SECONDED BY COMMISSIONER ANDERSON, R-19 WAS UNANIMOUSLY APPROVED.

There being no further business, the meeting was adjourned at 11:00 a.m.

OFFICE OF THE BOARD CLERK
for MULTNOMAH COUNTY, OREGON

By DEBORAH L BOGASTO



MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK
SUITE 1510, PORTLAND BUILDING
1120 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204

GLADYS McCOY • CHAIR • 248-3308
PAULINE ANDERSON • DISTRICT 1 • 248-5220
GARY HANSEN • DISTRICT 2 • 248-5219
RICK BAUMAN • DISTRICT 3 • 248-5217
SHARRON KELLEY • DISTRICT 4 • 248-5213
CLERK'S OFFICE • 248-3277 • 248-5222

AGENDA

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS FOR THE WEEK OF

OCTOBER 12 - 16, 1992

- Tuesday, October 13, 1992 - 9:30 AM - Planning Item. . . .Page 2
- Tuesday, October 13, 1992 - 10:00 AM - Board Briefings . . .Page 2
- Tuesday, October 13, 1992 - 11:00 AM - Agenda Review . . .Page 2
- Thursday, October 15, 1992 - 9:30 AM - Regular Meeting . . .Page 2

Thursday Meetings of the Multnomah County Board of Commissioners are taped and can be seen at the following times:

- Thursday, 10:00 PM, Channel 11 for East and West side subscribers
- Thursday, 10:00 PM, Channel 49 for Columbia Cable (Vancouver) subscribers
- Friday, 6:00 PM, Channel 22 for Paragon Cable (Multnomah East) subscribers
- Saturday 12:00 PM, Channel 21 for East Portland and East County subscribers

INDIVIDUALS WITH DISABILITIES MAY CALL THE OFFICE OF THE BOARD CLERK AT 248-3277 OR 248-5222 OR MULTNOMAH COUNTY TDD PHONE 248-5040 FOR INFORMATION ON AVAILABLE SERVICES AND ACCESSIBILITY.

Tuesday, October 13, 1992 - 9:30 AM
Multnomah County Courthouse, Room 602

PLANNING ITEM

- P-1 SEC 6-91a
HDP 4-91a Board of Commissioners Continued Review of the June 16, 1992 Hearings Officer Decision Denying a Request to Amend SEC 6-91a and HDP 4-91a, and Permit a Culvert/Fill Driveway Crossing Over a Tributary of Balch Creek, on Property Located at 6125 NW THOMPSON ROAD. (FROM SEPTEMBER 22, 1992 HEARING).
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Tuesday, October 13, 1992 - 10:00 AM
Multnomah County Courthouse, Room 602

BOARD BRIEFINGS

- B-1 First Quarter Update on the Status of the Youth Employment and Empowerment Project. Presented by Lorenzo Poe and Jana McLellan. 10:00 AM TIME CERTAIN, 30 MINUTES REQUESTED
- B-2 State Office of Emergency Management Briefing. Presented by Hank Miggins and Myra Lee. 10:30 AM TIME CERTAIN, 30 MINUTES REQUESTED.
-

Tuesday, October 13, 1992 - 11:00 AM
Multnomah County Courthouse, Room 602

AGENDA REVIEW

- B-3 Review of Agenda for Regular Meeting of October 15, 1992.
-

Thursday, October 15, 1992 - 9:30 AM
Multnomah County Courthouse, Room 602

REGULAR MEETING

CONSENT CALENDAR

DEPARTMENT OF ENVIRONMENTAL SERVICES

- C-1 Ratification of Intergovernmental Agreement Contract #300763 Between Multnomah County and the Oregon Department of Transportation Providing County Reimbursement for Construction of Safety Improvements to Cornelius Pass Road to a Maximum of \$548,010 by Conversion of Federal Funds to State Funds Under ODOT Fund Exchange Program

REGULAR AGENDA

DEPARTMENT OF ENVIRONMENTAL SERVICES

- R-1 In the Matter of a Request by Gregory Shipp to Repurchase Two Parcels of Property Located in the Columbia Gorge, Tax Account Properties #R 94515-0170 and #R 94515-0180
- R-2 RESOLUTION in the Matter of Supporting a Constitutional Amendment Which Would Grant the State Legislature the Authority to Sell Bonds for the Purpose of Restoring and Expanding Oregon's Park Systems
- R-3 RESOLUTION in the Matter of Supporting Ballot Measure 26-1 Which Proposes to Authorize the Metropolitan Service District to Acquire, Develop, Operate and Maintain a Park, Open Space and Recreational System
- R-4 Request for Approval in the Matter of a NOTICE OF INTENT to Apply for a \$27,200 Grant from the State Historic Preservation Office for Rehabilitation and Stabilization Projects at the James F. Bybee House Located in Howell Territorial Park

NON-DEPARTMENTAL

- R-5 PROCLAMATION in the Matter of Proclaiming the Week of October 24, 1992 Through November 1, 1992 as "RED RIBBON WEEK" in Multnomah County, Oregon

DEPARTMENT OF SOCIAL SERVICES

- R-6 Budget Modification DSS #18 Authorizing Increase of \$16,165 from the Oregon Food Bank to the Housing and Community Services Division Pass Through Budget, to Support the Hunger Relief Task Force
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- R-9 Budget Modification MCSO #5 Requesting Authorization to Appropriate \$85,850 in Marine Board Enhancement Funds to Add Two Deputy Sheriff Positions to the Sheriff's River Patrol Unit Budget

PUBLIC CONTRACT REVIEW BOARD

(Recess as the Board of County Commissioners and convene as the Public Contract Review Board)

R-10 ORDER in the Matter of an Emergency Exemption to Replace Damaged Sewer Line at the Expo Center

(Recess as the Public Contract Review Board and reconvene as the Board of County Commissioners)

FIRST QUARTER CONTINGENCY REQUESTS

DEPARTMENT OF SOCIAL SERVICES

R-11 Budget Modification DSS #23 Requesting the Transfer of \$100,000 from General Fund Contingency to the Mental Health, Youth and Family Services Division Budget, to Increase the County Contribution to the Partner's Project Funding Pool

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JUSTICE SERVICES

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DEPARTMENT OF ENVIRONMENTAL SERVICES

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MULTNOMAH COUNTY OREGON

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SUPPLEMENTAL AGENDA

Thursday, October 15, 1992 - 9:30 AM

Multnomah County Courthouse, Room 602

REGULAR MEETING

**PLEASE BE ADVISED THAT PREVIOUSLY PUBLISHED
AGENDA ITEMS R-2 AND R-3 HAVE BEEN REMOVED
FROM BOARD CONSIDERATION AT THIS TIME.**

0203C/14/db



GLADYS McCOY, Multnomah County Chair

Room 1410, Portland Building
1120 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 248-3308

M E M O R A N D U M

TO: Board of County Commissioners
Office of the Board Clerk

FROM: Gladys McCoy
Multnomah County Chair

DATE: August 27, 1992

RE: Absences

I plan to be out of my office from Monday, September 21 through Friday, October 16.

GM:mrj
9325G

BOARD OF
COUNTY COMMISSIONERS
1992 SEP - 1 AM 8:44
MULTNOMAH COUNTY
OREGON

Meeting Date: October 13, 1992

Agenda No.: P-1

(Above space for Clerk's Office Use)

AGENDA PLACEMENT FORM
(For Non-Budgetary Items)

SUBJECT: Continued Hearing on SEC 6-91a/HPD 4-91a Appeal

BCC Informal _____ (date)	BCC Formal <u>October 13, 1992</u> (date)
DEPARTMENT <u>DES</u>	DIVISION <u>Planning</u>
CONTACT <u>Sharon Cowley</u>	TELEPHONE <u>2610</u>
PERSON(S) MAKING PRESENTATION _____	<u>Mark Hess</u>

ACTION REQUESTED:

INFORMATIONAL ONLY POLICY DIRECTION APPROVAL

ESTIMATED TIME NEEDED ON BOARD AGENDA: 30 Minutes

CHECK IF YOU REQUIRE OFFICIAL WRITTEN NOTICE OF ACTION TAKEN: xx

BRIEF SUMMARY (include statement of rationale for action requested, as well as personnel and fiscal/budgetary impacts, if applicable):

SEC 6-91a/HDP 4-91a The Board of County Commissioners will continue its review of the Hearings Officer Decision dated June 16, 1992, which denied a request to amend SEC 6-91a and HDP 4-91a, and permit a culvert/fill driveway crossing over a tributary of Balch Creek, on property located at 6125 NW Thompson Road.

The Board will review materials received during the open record periods, following the Board hearing of September 22, 1992.

(If space is inadequate, please use other side) *10/15/92 COPIES OF FINAL ORDER 92-182 SENT TO SHARON COWLEY, MARK HESS & PETER LIVINGSTON*

SIGNATURES:

ELECTED OFFICIAL _____

Or

DEPARTMENT MANAGER *PC [Signature]*

(All accompanying documents must have required signatures)

BOARD OF COUNTY COMMISSIONERS
MULTNOMAH COUNTY
OREGON
1992 OCT - 7 AM 8:59



MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

BOARD OF COUNTY COMMISSIONERS
GLADYS McCOY • CHAIR OF THE BOARD
PAULINE ANDERSON • DISTRICT 1 COMMISSIONER
GARY HANSEN • DISTRICT 2 COMMISSIONER
RICK BAUMAN • DISTRICT 3 COMMISSIONER
SHARRON KELLEY • DISTRICT 4 COMMISSIONER

MEMORANDUM

BOARD OF
COUNTY COMMISSIONERS
1992 OCT - 6 PM 1:29
MULTNOMAH COUNTY
OREGON

To: Board of County Commissioners
From: Mark R. Hess, Planner
Date: October 6, 1992
Subject: NEW EVIDENCE RECEIVED ON THE "McKenzie Culvert" CASE
FILE#: SEC 6-91a/HDP 4-91a

The Board of County Commissioners (Board) continued the review of the Hearings Officer Decision dated June 16, 1992 which denied a request to amend SEC 6-91a and HDP 4-91a, and permit a culvert/fill driveway crossing over a tributary of Balch Creek on property located at 6125 NW Thompson Road.

Oral arguments were heard on September 22, 1992, and the public testimony portion of the hearing was closed. The matter was continued to October 13, 1992. The record was held open for seven (7) days [until September 29, 1992] for written comment on the Stream Class issue or for rebuttal of testimony received at the 9/22/92 hearing.

A second open record period of four (4) days allowed written response to submittals in the first open record period [until October 5, 1992]. The following list details items received into the record at the 9/22/92 Board hearing, or during the two open periods:

1. ODF letter from T. Savage to M. Hess (dated 8/14/92; 1-page & exhibit)
2. ODF letter from M. Simek to D. Kearns (dated 9/16/92; 1-page)
3. Respondent's Memo from E. Sullivan (dated 9/22/92; 29-pages & 6-exhibits)
 - Exhibit 1: Affidavit of D. Kearns (9/22/92)
 - Exhibit 2: D. Michael notes Re: N. Rosenlund complaint (c. 1987)
 - Exhibit 3: ODFW fisheries data sheets on Balch Creek (1986-87)
 - Exhibit 4: Audubon Society response to 1987 Stream Class Change Notice
 - Exhibit 5: Vicinity map
 - Exhibit 6: Fishman Env. Serv. letter from J. Burcham to D. Kearns (dated 9/21/92)
4. Letter from N. Rosenlund to Commissioner Kelley (dated 8/25/92; 1-page)
5. Written testimony from N. Rosenlund (rec'd. @ 9/22/92 hearing; 2-pages)
6. Comments and photos from 'Oregon Trout' (rec'd. @ 9/22/92 hearing; 3-pages)
7. Letter from J. Bartels to Board (dated 9/25/92; 2-pages)
8. Applicant's Annotated Response to Opponents Memo (rec'd. 9/29/92; 10-pgs. & 12-exhibits)
 - Attachment 1: Page 23 of 6/1/92 hearing transcript
 - Attachment 2: 9/2/92 ODF letter to D. McKenzie
 - Attachment 3: M. Simek & D. Michael cards
 - Attachment 4: Hagen's review request letter

- Attachment 5: Mailing list from reclassification notice
 - Attachment 6: Map showing Hagen property
 - Attachment 7: Tax Lot description
 - Attachment 8: ODF letter to Hagen's (10/5/87)
 - Attachment 9: ODF letter to Kearns (9/16/87)
 - Attachment 10: ODF Forest Practices Rules, pg. 7
 - Attachment 11: ODF letter to D. McKenzie (9/25/92)
 - Attachment 12: Highlighted copy of Opponent's Memo
9. Cover Letter from M. Robinson to Board Clerk (dated 9/29/92; 1-page)
 10. Appellant Motion to Strike Portions of Respondent Memo (dated 9/29/92; 2-pages)
 11. Appellant Response to Respondent's Memo (dated 9/29/92; 13-pages & 7-exhibits)
 - Attachments repeat item #1. and item #8 exhibits detailed above.
 12. Cover Letter from D. Kearns to Board (dated 10/5/92; 1-page)
 13. Respondents Final Hearing Memo (dated 10/5/92; 11-pages & 2 exhibits)
 - Attachment 1: Fisheries research data (c. 1982-84)
 - Attachment 2: 'Oregon Trout' mission statement
 14. Portland BES Memo from J. Ochsner to Board (dated 10/5/92; 2-pages, front/back)
 15. ODFW letter from J. Massey to M. Hess (dated 10/5/92; 1-page)

The Board review and deliberation on the matter is scheduled for 9:30 a.m., October 13, 1992. Oral argument was concluded at the 9/22/92 hearing, however, Commissioners may ask questions of participants regarding materials or facts in the record.

Complete files, oversized maps, and correspondence received are available at the Clerk of the Board office for review. If you have questions on these materials, please call.



MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

BOARD OF COUNTY COMMISSIONERS
GLADYS McCOY • CHAIR OF THE BOARD
PAULINE ANDERSON • DISTRICT 1 COMMISSIONER
GARY HANSEN • DISTRICT 2 COMMISSIONER
RICK BAUMAN • DISTRICT 3 COMMISSIONER
SHARRON KELLEY • DISTRICT 4 COMMISSIONER

MEMORANDUM

To: Board of County Commissioners
From: Mark R. Hess, Planner
Date: October 6, 1992
Subject: NEW EVIDENCE RECEIVED ON THE "McKenzie Culvert" CASE
FILE#: SEC 6-91a/HDP 4-91a

1992 OCT - 6 PM 1: 26
MULTNOMAH COUNTY
OREGON
BOARD OF
COUNTY COMMISSIONERS

The Board of County Commissioners (Board) continued the review of the Hearings Officer Decision dated June 16, 1992 which denied a request to amend SEC 6-91a and HDP 4-91a, and permit a culvert/fill driveway crossing over a tributary of Balch Creek on property located at 6125 NW Thompson Road.

Oral arguments were heard on September 22, 1992, and the public testimony portion of the hearing was closed. The matter was continued to October 13, 1992. The record was held open for seven (7) days [until September 29, 1992] for written comment on the Stream Class issue or for rebuttal of testimony received at the 9/22/92 hearing.

A second open record period of four (4) days allowed written response to submittals in the first open record period [until October 5, 1992]. The following list details items received into the record at the 9/22/92 Board hearing, or during the two open periods:

1. ODF letter from T. Savage to M. Hess (dated 8/14/92; 1-page & exhibit)
2. ODF letter from M. Simek to D. Kearns (dated 9/16/92; 1-page)
3. Respondent's Memo from E. Sullivan (dated 9/22/92; 29-pages & 6-exhibits)
 - Exhibit 1: Affidavit of D. Kearns (9/22/92)
 - Exhibit 2: D. Michael notes Re: N. Rosenlund complaint (c. 1987)
 - Exhibit 3: ODFW fisheries data sheets on Balch Creek (1986-87)
 - Exhibit 4: Audubon Society response to 1987 Stream Class Change Notice
 - Exhibit 5: Vicinity map
 - Exhibit 6: Fishman Env. Serv. letter from J. Burcham to D. Kearns (dated 9/21/92)
4. Letter from N. Rosenlund to Commissioner Kelley (dated 8/25/92; 1-page)
5. Written testimony from N. Rosenlund (rec'd. @ 9/22/92 hearing; 2-pages)
6. Comments and photos from 'Oregon Trout' (rec'd. @ 9/22/92 hearing; 3-pages)
7. Letter from J. Bartels to Board (dated 9/25/92; 2-pages)
8. Applicant's Annotated Response to Opponents Memo (rec'd. 9/29/92; 10-pgs. & 12-exhibits)
 - Attachment 1: Page 23 of 6/1/92 hearing transcript
 - Attachment 2: 9/2/92 ODF letter to D. McKenzie
 - Attachment 3: M. Simek & D. Michael cards
 - Attachment 4: Hagen's review request letter

- Attachment 5: Mailing list from reclassification notice
 - Attachment 6: Map showing Hagen property
 - Attachment 7: Tax Lot description
 - Attachment 8: ODF letter to Hagen's (10/5/87)
 - Attachment 9: ODF letter to Kearns (9/16/87)
 - Attachment 10: ODF Forest Practices Rules, pg. 7
 - Attachment 11: ODF letter to D. McKenzie (9/25/92)
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August 13, 1992

RECEIVED

AUG 14 1992

Multnomah County
Zoning Division

DEPARTMENT OF
FORESTRY

FOREST GROVE DISTRICT



"STEWARDSHIP IN
FORESTRY"

Mark Hess, Planner
Multnomah Co. Planning
2115 SE Morrison
Portland, OR 97214

Mark,

I am writing you to confirm our phone conversation this afternoon, regarding our Department's stream classification in Multnomah County.

Today you received one of ODF Forest Grove District maps which have our updated Class I streams locations highlighted in blue.

I asked Kevin McKenzie to hand carry this map and a copy of our District's 7.5 minute quadrangle maps showing the Balch Canyon area. Our Forest Practices Class I stream designation is for the lower stretch of the stream below the fork where NW Thompson Rd. and NW Cornell Rd. meet. Up stream from this point both forks of the stream are Class II.

It appears that the east fork that flows close to NW Thompson Rd. is an Influential Class II stream for 1500 feet upstream from its confluence with the Class I stream.

I am including some handouts on Stream Protection afforded Class II Influential streams, and a copy of our latest updated Forest Practices rules, dated October 29, 1991.

If you have any further questions, feel free to contact this office.

Sincerely,

Thomas M Savage
Forest Practices Forester



801 Gales Creek Road
Forest Grove, OR 97116
(503) 357-2191
FAX (503) 357-4548

RECEIVED

AUG 14 1992

Multnomah County
Zoning Division



FPA Rule Changes Update

September 29, 1991

Published by the Forest Practices Section
Oregon Department of Forestry
2600 State Street • Salem, Oregon • 97310

Stream Protection

Current Stream Protection Rules

Class 1 streams generally support fish populations or provide domestic water. Other streams that have a definite stream channel or bed are called Class 2 streams.

Class 1 Stream Protection

If a forest operation is proposed near a Class 1 stream, the operator must submit a written plan to the state forester. The plan must describe the riparian management area (RMA), and outline how the operation will be conducted to protect the Class 1 stream. The Class 1 stream protection requirements are described in *Forest Practices Note #9*.

Class 2 Stream Protection

Class 2 streams, stream beds and banks are protected during forest operations using general forest practice rules. A written plan is not required when operating near a Class 2 stream.

Additional Stream Protection Rules

Class 2 streams that have a direct influence on a Class 1 stream now receive additional protection. These "influential" Class 2 streams are streams that are important to threatened, endangered, sensitive, or game fish. They are also important for water quality because they flow into a Class 1 stream.

Influential Class 2 streams receive this additional protection until the Board of Forestry adopts new stream classes and protection rules in September 1992.

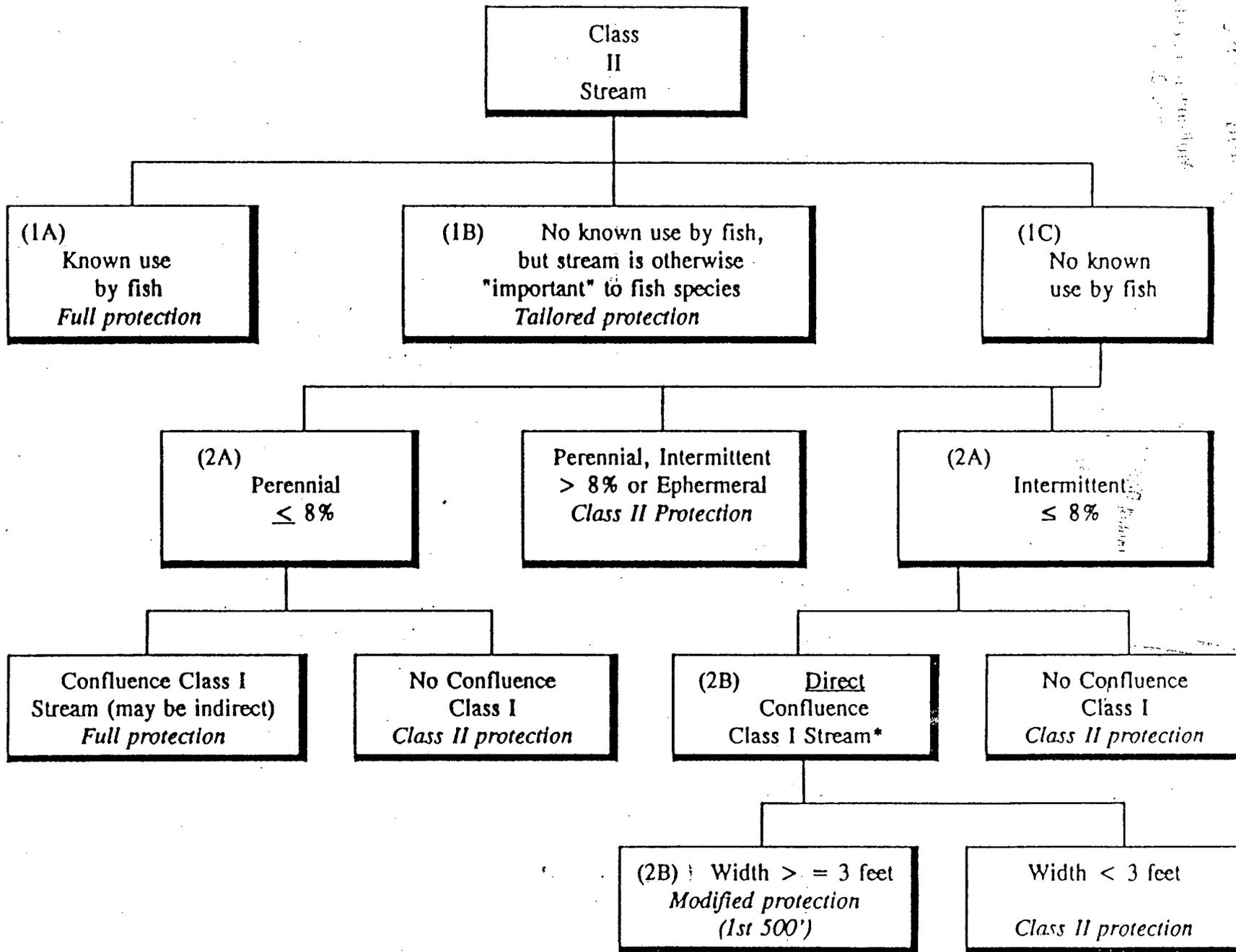
Additional protection includes:

- Leaving trees for shade and stream structure.
- Leaving vegetation for water quality.
- Suspending logs when yarding across the stream.
- Prior approval required to cross the stream.
- Prior approval required to remove merchantable trees.

(A summary of the protection requirements and specific criteria to identify influential Class 2 streams are provided on the back of this page)

Influential Class II Streams

01-15-92



* If the Class I stream is designated for domestic water use only, then Class II protection is provided.

September 16, 1992

Daniel Kearns
111 SW 5th, Suite 3200
Portland, Oregon 97204-3688

Oregon

DEPARTMENT OF
FORESTRY

Re: Balch Creek Stream Reclassification.

Dear Dan:

Columbia Unit

At your request, I am submitting this letter to summarize, with my best recollection, the events which took place regarding the Balch Creek stream reclassification and subsequent Thompson Branch downgrade.



"STEWARDSHIP IN
FORESTRY"

The process of stream reclassification was initiated through a complaint regarding an active forest operation adjacent to Balch Creek. This complaint was investigated by Dave Michael regarding the specific forest practices of the operation in question. I believe a complaint was made to the Oregon Department of Fish and Wildlife (ODF&W) also. As part of the complaint investigation, information was provided by ODF&W which indicated that a native cutthroat population existed in Balch Creek. However, I'm not sure of the basis of the recommendation and how it was provided. In any event, the original reclassification notice that Dave Michael sent out indicates that Balch Creek was to be reclassified to a Class I Stream up to Cornell then proceeding 1/2 mile plus along Thompson Road, refer to original reclass notice.

As I remember, I took over the complaint investigation upon my return from fire duty. I met with Pat Keeley of ODF&W to evaluate the operation and stream reclass. I questioned the reclassification of the stream so high into the watershed. Based on a joint decision between ODF&W and our Department, the section of stream above Cornell Road, the Thompson Branch, was changed back to a Class II. I have no written records describing the basis of this downgrade, however, I surmise that a logical break point for significant fish population was made. Again, this was a joint decision between Pat Keeley and based on criteria and information available at the time.

Therefore, our official maps currently indicate that Balch Creek is Class I up to Cornell and Thompson Road junction. The Thompson Branch is currently Class II.

The downgrade of Thompson Branch was done within the 30 day period of the original stream reclass notice. Landowners adjacent to Thompson Branch were not notified of the change from the original notice.

Sincerely,

Michael Simek



405 E Street
Columbia City, OR 97
(503) 397-2636
FAX (503) 397-6361

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF AN APPEAL OF THE) RESPONDENT'S HEARING
HEARINGS OFFICER'S DECISION) MEMORANDUM
CONCERNING SEC 6-91a AND HDP 4-91A)

Respondent, Friends of Forest Park ("FOFP"), submits this memorandum in support of the Hearings Officer's decision and in opposition to the applicant's appeal. FOFP requests that the Board of Commissioners affirm the Hearings Officer and deny the application.

FOFP offers the following in response to the three arguments raised in the applicant's appeal:

1. The Hearings Officer was correct in applying the County's SEC permit requirements¹ because the lower $\frac{1}{2}$ mile of Thompson Fork was designated by the Oregon Department of Forestry as a Class I Stream according to the Oregon Forest Practice Rules. The County's SEC permits apply only to streams designated Class I, according to the Rules. A subsequent attempt to down-grade the Thompson Fork which did not comply with the Oregon Forest Practice Rules had no effect under state law or the Multnomah County Code. The lower $\frac{1}{2}$ mile of Thompson Fork remains a Class I stream, and the SEC permit requirements still apply.¹
2. A hearing is required prior to approval of a significant modification of a previously-issued SEC permit, and applicable criteria include those set forth in MCC 11.15.6420. The Hearings Officer was correct in finding that a hearing was required because the applicant's development poses a significant change in use and amount of land involved sufficient to trigger the hearing requirement. Moreover, the SEC permit requirements continued, and will continue, to apply to the applicant's property by virtue of the previous unappealed SEC and conditional use permits granted in 1991. The applicant is also estopped to challenge the applicability

¹The classification of the affected portion of Balch Creek became a disputed issue in this case after the applicant filed his Notice of Review. The FOFP's position that the affected portion, known as the Thompson Fork, is a Class I stream is supported by a letter from State Forest Practices Act Forester Michael Simek, an affidavit of Daniel Kearns, and several other documents, all of which are attached as exhibits to this memo.

of the SEC requirements to his property by virtue of the doctrine of the law of the case.

3. The record does not contain substantial evidence sufficient to show that the culvert and fill development can meet all of the mandatory approval criteria, most notably MCC 11.15.6420 (g), (h), (k) and (p). Since the applicant could not show that all approval criteria could be met, the Hearings Officer was correct in denying the application and reversing the Director's decision. 8.
4. The Hearings Officer was justified and correct in taking official notice of The Balch Creek Watershed Protection Plan and the City of Portland's Goal 5 inventory and analysis, both of which are a part of the record in this matter and were quoted extensively by the appellants.

I. INTRODUCTION AND PROCEDURAL HISTORY:

This case involves an administrative modification of an Significant Environmental Concern ("SEC") permit which allowed Dan McKenzie, the applicant, to install a 36-foot long culvert and fill over Balch Creek, instead of the driveway bridge required in the original permit. However, the original permit was issued in conjunction with a conditional use permit ("CUP"), and the SEC conditions were specifically incorporated by reference into the CUP. In rendering the administrative decision, the Director overlooked the fact that the SEC modification also amended the previously-issued CUP, and in so doing the Director did not provide notice or an opportunity for a hearing. Normally, CUP amendments require an Action Proceeding procedure under MCC 11.15.8205, et seq, and failure to apply that procedure warrants reversal. 9.

More significantly, however, the applicant installed the culvert and fill without seeking County review or approval. Before the application was submitted, the County had already instituted an enforcement proceeding against the applicant for violating the

bridge requirement of the previously-issued SEC permit (see County file ZV 03-92). Because of the fait accompli, the Director's decision may have assumed the County was powerless to deny the requested permit modification. This assumption, however, was wrong, because the culvert and fill can be removed; the affected portion of Balch Creek and the riparian zone can be restored, and the bridge can still be constructed. The Director's decision to allow the modification was wholly unjustified.

11.

FOFP appealed the decision to the Hearings Officer, and a hearing was held on June 1, 1992. In the June 16, 1992 Hearings Officer's decision (HOD), the Hearings Officer denied the applicant's request to amend SEC 6-91a and HDP-91a, which would have legalized construction of a culvert and fill over Balch Creek. The decision also granted the FOFP's appeal, reversing the Planning Director's administrative decision. In particular, the Hearings Officer made the following findings:

12.

A. Necessity of seeking an Amendment to CU 5-91: The Hearings Officer rejected FOFP's argument that modification of the SEC permit necessitated a modification of the CUP which had incorporated the SEC conditions by reference. The Hearings Officer found that the CUP only required compliance with the SEC conditions and did not incorporate the conditions into the CUP (HOD at 5). FOFP contends that this part of the Hearings Officer's decision is incorrect.²

13.

² At the August 25, 1992 proceedings on this matter, the Assistant County Counsel advising the Board indicated that the Board's scope of review was not limited to those matters which were

14.

B. Necessity for a hearing under MCC 11.15.6414: The Hearings Officer accepted FOFP's argument that modification of the SEC permit required a full evidentiary hearing. However, the Hearings Officer found that the hearing requirement was satisfied by the appeal hearing before the Hearings Officer (HOD at 5-6).

C. Merits of the SEC permit criteria: The Hearings Officer found that several of the SEC permit criteria could not be met by the proposed culvert and fill even with the imposition of conditions of approval. In particular, the Hearings Officer found the development violated the following criteria:

Criterion (g) - significant fish and wildlife habitats shall be protected (HOD at 6-8).

Criterion (h) - The natural vegetation along rivers, lakes, wetlands and streams shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors (HOD at 8).

Criterion (k) - Areas of annual flooding, floodplains, water areas, and wetlands shall be retained in their natural state to the maximum possible extent to preserve water quality and protect water retention, overflow, and natural functions (HOD at 9).

Criterion (p) - An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of the natural vegetation, shall be retained in a natural state to the maximum extent possible (HOD at 9-10).

II. STANDING OF OPPONENTS:

raised in the notice of appeal? Assuming that decision to be correct, it follows that the Board may also consider additional grounds for upholding the Hearings Officer's decision. Before the Hearings Officer, Opponents contended that the applicant was required to seek amendment to the conditional use permit, which included the original SEC permit in its terms. Opponents renew that contention before the Board in this review proceeding. 14

FOFP is a public benefit, non-profit organization dedicated to the preservation of Forest Park and the wise management of areas surrounding Forest Park. FOFP, along with some of its members, appealed the March 31, 1992 staff decision to the Hearings Officer on April 9, 1992. A hearing was held before the Hearings Officer on June 1, 1992. FOFP and its individual members appeared orally and in writing in those proceedings. The Hearings Officer granted the appeal and denied the application in a June 16, 1992 opinion. FOFP and its participating members thus have standing in these appeal proceedings.

III. FACTUAL OVERVIEW:

In 1991, the applicant, Dan McKenzie applied with the County to construct a single family non-resource related home along Balch Creek in the County's MUF-19 (multiple use forest) zoning district with a Significant Environmental Concern overlay.³ The proposal required a variety of permits. Construction of a non-resource dwelling in the MUF-19 zone required a CUP under MCC 11.15.2172 to 11.15.2194.⁴ The application also included a bridge across Balch Creek for the driveway. Balch Creek, including the lower ½ mile of Thompson Fork, was and is designated as a Class I Stream with an

³The applicant's property is located at 6125 NW Thompson Road.

⁴Conditional use permits involve an Action Proceeding, quasi-judicial decision-making process under MCC 11.15.8205 to 11.15.8255. MCC 11.15.6414 requires that SEC permits applied for in conjunction with a CUP must be addressed at the same time by the Hearings Officer.

15.

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7

SEC overlay zone extending 100 feet either side of the Creek.⁵ The bridge was an accessory structure to the conditionally allowed non-resource dwelling under MCC 11.15.2174(D), and, because of the SEC overlay zone, an SEC permit under MCC 11.15.6400 to 11.15.6422 was also required.⁶ Finally, due to the area's slopes and inherent erosion hazards, a hillside development and erosion control permit ("HDP") was required under MCC 11.15.6700 to 11.15.6735.⁷ 19.

After a public hearing, the Planning Commission approved the CUP with conditions on April 1, 1991 (CU 5-91). The Planning Director approved the SEC with conditions on March 22, 1991 (SEC 6-91), and the HDP on May 1, 1991 (HDP 4-91). None of the approvals or their conditions were appealed.

The CUP approval referred to the SEC permit and included, among other things, the following condition:

A portion of this property (i.e., that part of the property within 100 feet of the centerline of Balch Creek) is designated Significant Environmental Concern. An SEC Permit for development of a bridge/driveway into the site was considered under a separate application (SEC 6-91); it is included in this report as a part of the Appendix. All conditions of that decision are made a

⁵The classification of Balch Creek and the Thompson Fork, that portion of the Creek affected by this development, is a disputed issue in this appeal. The classification history of the Thompson Fork and Balch Creek are examined in the first part of the Discussion section of this memo.

⁶The SEC overlay zone applies to land within 100 feet of Class 1 streams.¹ The affected section of Balch Creek is designated as a Class 1 stream. SEC permits normally involve an administrative decision-making process under MCC 11.15.6412, unless they are sought in conjunction with a conditional use, in which case, MCC 11.15.6414 requires an Action Proceeding process. 17.

⁷Hillside development and erosion control permits are reviewed administratively under MCC 11.15.6725.

part of this decision. Development of the site also requires a Hillside Development and Erosion Control Permit; Condition #4 requires the HDP permit prior to site development. (CU 5-91 at 8-99, emphasis added)

The driveway bridge across Balch Creek, an accessory structure⁷ 20. to the house, was governed by conditions contained in the SEC permit, which provided that the "driveway will cross the creek on a new bridge structure, and extend uphill to the east to a proposed house site on the property (Reference File CU 5-91)." Due to the site's steep slopes, construction of the driveway and house required certain erosion controls which were imposed as conditions of the HDP approval. Included was the requirement that "The HDP Permit plans must be substantially similar to those detailed in the SEC and CU Permit applications (Ref. CU 5-91/SEC 6-91)."

Despite the fact that a bridge was clearly required as a⁸ 21. condition of the SEC and CUP approvals, the applicant did not build a bridge. Instead, he channelized Balch Creek into a culvert 36 feet long, and filled on top of the culvert to provide a base for the driveway. The County then instituted a code enforcement proceeding because the culvert and fill violated an explicit⁹ 22. condition of approval of the permits.⁸ At the same time, Mark Hess, of the County Planning Staff, invited the Applicant to seek a modification of the conditions to remove the bridge requirement.

⁸A January 23, 1992 Notice of Zoning Violation was sent to the Applicant as part of file No. ZV 03-92. The violation⁹ was described as: 23.

Placing a creek into a culvert (instead of constructing a bridge over it) which is in violation of the conditions of approval granted by the Planning Commission at a public hearing under case number CU 05-91.

On January 24, 1992 the Applicant applied for a permit modification described as "Revise SEC 6-91 and HDP 4-91 to a culvert/fill driveway crossing, rather than a bridge crossing."

The staff decision was appealed to the Hearings Officer, who reversed the staff and denied the application. This appeal to the Board of Commissioners, brought by the applicant, followed.

IV. DISCUSSION:

A significant issue in this appeal concerns the classification of the affected portion of Balch Creek,⁹ known as the Thompson Fork, and the application of the stream classification rules under the Oregon Forest Practices Act.¹⁰

1. The Hearings Officer was correct in applying the County's SEC permit requirements because the lower $\frac{1}{2}$ mile of Thompson Fork was designated by the Oregon Department of Forestry as a Class I Stream according to the Oregon Forest Practice Rules.⁹ The County's SEC permits apply only to streams designated Class I, according to the Rules. A subsequent attempt to down-grade the Thompson Fork which did not comply with the Oregon Forest Practice Rules had no effect under state law or the Multnomah County Code.¹⁰ The lower $\frac{1}{2}$ mile of Thompson Fork remains a Class I stream, and the SEC permit requirements still apply. 24.

According to the MCC, the County's SEC permit requirements apply to, among other things,:

Any building, structure, or physical improvement within 100 feet of the normal high water level of a Class I

⁹For purposes of clarity, the stretch of Balch Creek adjacent to the applicant's property is referred to in this memo as Thompson Fork. Despite the name, this stretch is the main stem of Balch Creek and is not a tributary. 25.

¹⁰The Forest Practices Act is codified at ORS 527.610 to 527.770, with the stream classification provisions found at ORS 527.765 and 527.770. Rules implementing the stream classification provisions of the Act are found at OAR 629-24-101 to 629-24-118. 26.

stream, as defined by the State of Oregon Forest Practice Rules, [MCC 11.15.6404(C), emphasis added]

The Oregon Forest Practices Act (the Act) rules define "Class I" stream as:

any portions of streams, lakes or other waters of the state which are significant for ... spawning, rearing or migration of anadromous or game fish.
OAR 629-24-101(8)(a)

27.

At the time the applicant proposed his development, the County believed the affected portion of Balch Creek was a Class I stream. This belief was apparently based on a 1986 map/supplied by the local office of the Oregon Department of Forestry (ODF) in Forest Grove. The map shows the Class I streams in the Portland area, but includes a caveat at the bottom, stating that the map cannot be relied upon for determining the stream classification of any stream courses. The notice advises the reader to consult the regional ODF office for the official classification of all streams.) The applicant and the planning staff now assert that the affected portion of Balch Creek is Class II, not Class I as originally thought. Accordingly, the applicant and staff claim that none of the SEC permit requirements apply here.

28.

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31.

The Act Rules also specify the procedures by which streams are to be classified. See OAR 629-24-116. Among other things, this rule requires written notice to all owners of land adjacent to the affected stream describing the nature of the classification change. Specifically, OAR 629-24-116(2) provides that:

The class of waters indicated on such maps shall not be changed by the State Forester without thirty (30) days prior written notice to landowners immediately adjoining the portion of the waters to be reclassified. Notice to

the landowners shall include the reason for the change of classification and the time within which the landowner may request reconsideration of reclassification. [emphasis added]

According to OAR 629-24-116(4), the reclassification becomes effective if any of the following occur:

1. At the end of thirty (30) days from the notice, if no landowner requests review; 32.
2. Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the waters to be reclassified; or 33.
3. Upon denial of reconsideration by the State Forester.

The Forest Practices Act Forester, stationed in the local ODF office, is responsible for the interpretation and application of the Act, including the stream classification rules. In this case, in 1987, the Forest Practices Act Forester in the ODF Forest Grove office was Michael Simek. His recollection of the history of the classification is set forth in the letter attached as Exhibit 1 and the attached affidavit of Daniel Kearns.

Prior to the fall of 1987, all of Balch Creek, including the Thompson Fork was a Class II stream.¹¹ During the fall of 1987, Mr. Simek was out of the office on fire fighting duty, and David Michael was his replacement. On September 1, 1987 Mr. Michael received a complaint about a forest operation on Balch Creek from Nancy Rosenlund, a member of FOFP. Mr. Michael investigated the operation and its impact on Balch Creek and the Thompson Fork and based on the presence of a viable fish population, determined that 34:

¹¹Class II waters are defined as "any waters of the state not classified as Class I waters, which have a definite channel or bed; ..." OAR 629-24-101(10)(a).

the entire stream warranted a Class I designation. A copy of Mr. Michael's notes are attached as Exhibit 2, and a copy of the fisheries data sheets are attached as Exhibit 3.

In accordance with the procedural rules of OAR 629-24-116, Mr. Michael sent notice of the proposed reclassification of the entire Balch Creek drainage, including Thompson Fork on September 3, 1987. All of the affected property owners were identified and were mailed a copy of the notice which described the proposed reclassification as "Changed from Class 2 to Class 1 for ENTIRE STREAM (feet, miles) on that portion indicated on the attached map." The map attached to the notice indicated that the affected stream included all of Balch Creek from the Willamette River up to and including at least $\frac{1}{2}$ mile of the Thompson Fork above the Cornell Road crossing. (See notice and map attached as Exhibit 4) None of the property owners abutting Balch Creek and the affected portion of Thompson Fork requested a reconsideration, and one, the Portland Audubon Society, affirmatively waived any right to seek a reconsideration [see Exhibit 4].

The previous summer, Wayne Bowers, a fisheries biologist with the Oregon Department of Fish & Wildlife (ODF&W), had conducted a systematic survey of Balch Creek, including Thompson Fork, and had found a viable reproducing population of native cutthroat trout in the Thompson Fork approximately $\frac{1}{2}$ mile above the Cornell Road crossing [see Mr. Bowers' field data sheets attached as Exhibit 3]. Mr. Simek only knew that a population of cutthroat trout existed somewhere in Balch Creek and was unaware of Mr. Bowers' work or

that trout, in fact, were found the previous fall in Thompson Fork. The presence of a viable population of fish qualifies a stream as a Class I Water according to the definition in OAR 629-24-101(8).

When he returned to the ODF Forest Grove office, Mr. Simek resumed his duties and began by investigating the stream reclassification which Mr. Michael had instituted. However, Mr. Simek did not survey the stream course, but only reviewed the written record of the reclassification. Because his review of the file did not indicate fish in Thompson Fork, Mr. Simek decided to declassify that portion of Balch Creek, changing it from Class I to Class II, based on the apparent absence of native fish. Mr. Simek made this decision despite the fact that no property owner abutting Thompson Fork objected to the reclassification; as was the right of all affected property owners under OAR 629-24-116(3).¹²

However, in attempting to declassify Thompson Fork, Mr. Simek admits that he failed to follow any of the notice and opportunity to comment procedures required by OAR 629-24-116. The only documentation of Mr. Simek's attempted reclassification of Thompson Fork is the modified map in the Forest Grove ODF office.¹³ A copy

¹²The only comment received in response to the initial reclassification of Balch Creek and Thompson Fork was a letter from a Mr. and Mrs. Hagen, who own property on the Cornell Road branch - a tributary to Balch Creek which was not affected by any of these reclassifications. Because the Cornell Branch was not affected by the reclassification, Michael Simek did not approve or deny the request, but, instead sent an explanation the reclassification decision.

¹³In ODF's Forest Grove office, there are two sets of stream classification maps, the old set and the new set. The new set was drawn from the old set, and a copy of the old map section for Balch Creek is attached as Exhibit 5. Thomas Savage submitted a copy of

of that map is attached as Exhibit 5,⁷ and it clearly shows all of Balch Creek, including Thompson Fork, as bearing the Class I designation, but the Thompson Fork section has been cross-hatched out by pen.

49.

Thomas Savage, the present Forest Practices Act Forester in the Forest Grove ODF office, wrote a letter for the applicant interpreting the stream classification map, which was submitted by the applicant. According to Mr. Savage, only Balch Creek downstream of the Cornell Road crossing is Class I and Mr. Savage interprets the modified map⁷ to mean that the Thompson Fork is not Class I. However, Mr. Savage is also unaware of the reclassification history of the stream or whether the required procedures were followed.

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Because Mr. Simek's failed to follow any of the procedures⁷ required by OAR 629-24-116⁷, his attempt to change the Thompson Fork from Class I back to Class II is not valid or enforceable.⁷ Mr. Simek's action was without authority because the Act's Rules were not followed⁷. The only reclassification which fully complied with⁷ the required procedures was that accomplished by Mr. Michael. MCC 11.15.6404(C) requires the application of the SEC permit provisions to "Class I Streams, as defined by the State of Oregon Forest

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the new map showing Balch Creek. However, because Mr. Simek made his cross-hatched modification to the old map,⁷ the modification does not show up on the copy submitted by Mr. Savage. The old ODF stream classification map⁷ shows Balch Creek as a Class I stream from the Willamette River upstream to a point on Thompson Fork approximately $\frac{1}{2}$ mile above the Cornell Road crossing. However, Mr. Simek cross-hatched all of the Thompson Fork section above the Cornell Road crossing, reflecting Mr. Simek's intention to exclude that section of the stream from the Class I designation.

48.

Practices Rules." The only classification in this case which complied with the Rules was the one designating the lower ½ mile of Thompson Fork a Class I stream. Mr. Simek's subsequent attempt to } 55.
down-grade Thompson Fork did not comply with the Rules, and, therefore, was without legal effect under MCC 11.15.6404(C).

Additionally, the lower ½ mile of Thompson Fork actually qualifies as a Class I stream as defined by the Act Rules, because it is significant } for native cutthroat trout. Two qualified fish } 56.
experts, } Gary Kish } and Janet Burcham, both surveyed the lower ½ } 57.
mile } of Thompson Fork. A letter from Janet Burcham is attached as } 58.
Exhibit 6 and Mr. Kish submitted a letter under separate cover. They found suitable habitat throughout the section } and cutthroat trout at the lower end [within the first several hundred feet above the Cornell Road crossing]. From this they both conclude } that, when the present drought subsides, fish will return to the entire ½ mile section. Consequently, in their opinions, } the lower ½ mile } 60.
of Thompson Fork is significant } for anadromous and game fish.

Because SEC permits are required on all Class I streams "as defined by the State of Oregon Forest Practices Rules," the SEC permit applies to the lower ½ mile of Thompson Fork. } The } 64.
applicant's property is included in this Class I section } of Thompson Fork, and therefore an SEC permit is required for the applicant's culvert and fill project. The Hearings Officer was } 65.
correct in so concluding. }

2. A hearing is required prior to approval of a significant modification of a previously-issued SEC permit, and applicable criteria include those set forth in MCC 11.15.6420. The Hearings Officer was correct in finding }

that a hearing was required because the applicant's development poses a significant change in use and amount of land involved sufficient to trigger the hearing requirement. Moreover, the SEC permit requirements continued, and will continue, to apply to the applicant's property by virtue of the previous unappealed SEC and conditional use permits granted in 1991. The applicant is also estopped to challenge the applicability of the SEC requirements to his property by virtue of the doctrine of the law of the case..

66.

MCC 11.15.8205 to 11.15.8255 require notice and a full public evidentiary hearing for all CUP applications. Apparently, the underlying 1991 CUP (File 5-91) in this matter was granted pursuant to these procedures. Additionally, when a SEC permit is sought in connection with a CUP, as was the case in this matter in 1991, a public hearing before the Hearings Officer is required by MCC 11.15.6414.¹⁴ With regard to modifications of conditions of any conditional approvals, including CUPs, SECs and HDPs, MCC 11.15.8240(E) provides that:

767.

Any change or alteration of conditions attached to conditional approvals shall be processed as a new action, except that the Planning Director may approve a change or alteration which does not:

¹⁴ Specifically, 11.15.6414 requires that:

(A) A decision on an SEC permit application for a Conditional Use as specified either in the underlying district or in MCC .7105 through .7640, ..., shall be made by the Hearings Officer in conjunction with the decision on the use proposal associated therewith.

(B) Action by the Hearings Officer on an SEC permit application shall be taken pursuant to MCC .8205 through .8250.

(C) The findings and conclusions made by the Hearings Officer and the conditions or modifications of approval, if any, shall specifically address the relationships between the proposal and the criteria in MCC .6420.

- (1) Increase density;
- (2) Change boundaries;
- (3) Change any use; or
- (4) Change the location or amount of land devoted to specific land uses.

As already mentioned, the underlying CUP (CU 5-91) approved in 1991 incorporated by specific reference all of the conditions attached to the associated SEC permit (SEC 6-91) in the statement:

A portion of this property (i.e., that part of the property within 100 feet of the centerline of Balch Creek) is designated Significant Environmental Concern. An SEC Permit for development of a bridge/driveway into the site was considered under a separate application (SEC 6-91); it is included in this report as a part of the Appendix. All conditions of that decision are made a part of this decision. Development of the site also requires a Hillside Development and Erosion Control Permit; Condition #4 requires the HDP permit prior to site development. (CU 5-91 at 8-9, emphasis added)

The Hearings Officer incorrectly found that the CUP did not incorporate all of the SEC permit conditions because he focused only on Condition No. 3 of the CUP (HOD at 5).¹⁵ Regardless of what CUP Condition No. 3 says, the above language from the CUP clearly incorporates the SEC permit conditions into the CUP. Consequently, modification of the SEC necessarily modified the CUP, thus requiring a new CUP hearing procedure. The Hearings Officer erred in finding otherwise.

The SEC permit dealt exclusively with the driveway bridge spanning Balch Creek by specifying the bridge's design and

¹⁵Condition #3 of CU 5-91 merely requires the applicant to "prior to site clearing or grading, satisfy the Conditions of Approval of SEC 6-91 ..."

construction. Consequently, the bridge requirement contained in SEC 6-91 could not have been altered without also altering a condition of CU 5-91; however, neither the applicant nor the Director noted the interrelationship of the two permits. The application only requested a modification of SEC 6-91 and HDP 4-91 to eliminate the bridge requirement. The applicant proposed, instead, to culvert Balch Creek and fill the space under the driveway.

According to MCC 11.15.8240(E), this modification was supposed to be treated as entirely new SEC, CUP and HDP applications unless it qualified for one of the four exceptions in MCC 11.15.8240(E) (1) through (4). Most notably, the staff would have to find that elimination of the bridge requirement did not change the "use" prescribed in SEC 6-91a nor the "location or amount of land devoted to a specific land use." The Planning Director failed to address MCC 11.15.8240(E), or make these required findings; however the Hearings Officer stated that: "I agree that under MCC 11.15.6414 this Decision on an amendment to an SEC permit requires a hearing." (HOD at 6)

The Hearings Officer was correct, because the requested modification fundamentally changed the use specified by SEC 6-91 and the amount of land devoted to that use. The use applied for and granted in the original permit was clearly described as a bridge and not a culvert and fill at many places in the application as well as the County's decisions approving the SEC, HDP and CUP (see Appellant's Hearing Memorandum at pp 4-5, 9-10)

Replacing the bridge with a culvert and fill design fundamentally changed the use specified in⁷ SEC 6-91 and CU 5-91. The modification also changed the amount of riparian land impacted by the driveway.⁷ Before, the bridge would have spanned across the Creek, leaving the watercourse and most of the riparian area unaffected. Shoreline and stream course impacts were minimized, thereby avoiding erosion, soil slumping and damage to stream and riparian habitats. The culvert, which had already been installed, contains and channelizes the Creek for 36 feet. The fill tapers from the driveway to the ends of the culvert, leaving just short sections of the culvert exposed. All of the riparian land under the driveway has been covered. These impacts were found by the Hearings Officer to be significant and constituted a significant change in the permit.⁷ Accordingly, he determined that a full evidentiary hearing was required (HOD at 6). 71. 71.

The culvert and fill is a fundamental change from the previously authorized bridge use, and the amount of land devoted to that use was increased by virtue of the significantly increased amount of fill and riparian habitat covered by that fill. Accordingly, MCC 11.15.8240(E) requires completely new SEC, HDP and CUP applications and decision-making processes, including the notice and hearing required by MCC 11.15.8205 to 11.15.8255 for all CUP applications.¹⁶ The decision should be reversed or remanded

¹⁶The fact that no hearing was provided and that the Director's decision overlooked the implication of CU 5-91 was specifically raised before the February 3, 1992 Planning Commission hearing by Nancy Rosenlund and by FOFP in a February 10, 1992 letter.

with instructions to process the modification application as new CUP, SEC and HDP permits.

In addition to the County's statutory procedural requirements, ORS 197.763 and 215.402 to 215.416 require quasi-judicial procedures for certain land use applications. According to LUBA, notice and an opportunity for a hearing must be provided whenever the application requires the exercise of factual, legal or policy judgment on the part of the local decision-maker. Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 660-64 (1990); McKay Creek Valley Assn v. Washington County, 18 Or LUBA 71, 74-79 (1989); Kunkel v. Washington County, 16 Or LUBA 407, 411-13 (1988); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev. denied 303 Or 74 (1987). This line of cases stands for the notion that, regardless of the label applied by the local government, if the decision entails the exercise of discretion, then the quasi-judicial decision-making procedures of ORS 197.763 and 215.416 must be used.

In rendering his decision in this matter, the Director was required to address "the purposes of the SEC district and ... the [seventeen] criteria for approval specified in MCC 6420." MCC 11.15.6410. In determining whether the application meets these seventeen criteria and the purposes of the SEC district, the Director must necessarily exercise significant factual, legal and policy judgment. For these reasons, the Hearings Officer was correct in requiring a full evidentiary hearing on this modification application.

The applicant's position also overlooks the fact that the SEC 179
overlay was applied to his property in the 1991 proceedings without
objection and without appeal.) It was applied to the applicant's
property in proceedings before the Director and the Hearings
Officer without objection and without appeal. Under the doctrine
of the law of the case or waiver, the applicant cannot raise now
those matters which could have been raised previously in the same
case.¹⁷

3. The record does not contain substantial evidence) 80.
sufficient to show that the culvert and fill development
can meet all of the mandatory approval criteria, most
notably MCC 11.15.6420 (g), (h), (k) and (p). Since the
applicant could not show that all approval criteria could
be met, the Hearings Officer was correct in denying the
application and reversing the Director's decision.

The Hearings Officer correctly found that MCC 11.15.6410
requires consideration the seventeen approval criteria of MCC
11.15.6420 when evaluating a significant modification to a
previously-issued SEC permit. The Hearings Officer correctly
determined that Director's decision was deficient in this regard
because there was insufficient evidence in the record to show that

¹⁷ In Eckis v. Linn County, ___ Or. LUBA ___ (LUBA No. 91-
132, September 11, 1991), LUBA said:

"The 'law of the case' or 'waiver' doctrine means that after
a local government decision is remanded by this Board, and a
subsequent local government decision adopted in response to the
remand is appealed to this Board, only issues that could not have
been raised in the first appeal may be raised in the later appeal.
Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522,
527, 746 P2d 728 (1987); Highway 213 Coalition v. Clackamas County,
17 Or LUBA 1284, 1294 (1989); Hearne v. Baker County, 16 Or LUBA
193 (1987), aff'd 89 Or App 282, rev den 305 Or 576 (1988);
Portland Audubon v. Clackamas County, [14 Or. LUBA 433, aff'd
without opinion, 80-593 (1986)] * * * "

all of the criteria could be met. In fact, the record contains absolutely no evidence pertaining to several of the criteria.

FOFP assert that the record contains no evidence to support a finding that criteria A, D, G, H, K, M, N, P or Q are or can be met by this application. The Hearings Officer found that only criteria G, H, K and P were not met. FOFP rely on the arguments set forth in its Appellant's Hearing Memorandum, submitted to the Hearings Officer (pp. 14-21) in support of its contention that the remaining criteria, in fact, are not met by this application. FOFP provides the following discussion pertaining to the four criteria which the Hearings Officer focused upon:

Criterion G: This criterion requires that "significant fish and wildlife habitats shall be protected." The Director received many letters and comments arguing that the culvert and fill violated this criterion. Several parties, including the Oregon Department of Fish & Wildlife (ODF&W), argued that the proposed culvert must be evaluated in the context of its cumulative effect in association with other culverts on Balch Creek, and that by itself or cumulative, the culvert was more harmful than a bridge. The City of Portland commented that "Even though removal of the culvert will cause additional short term disturbance to the site, we submit that such a knowing violation of the permit should not be condoned by Multnomah County."

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In response, the Director acknowledged these objections but found that existing zoning would prevent further deterioration of Balch Creek as fish habitat, and that "substantial evidence

persuades that the change in design [from a bridge to a culvert and fill], as conditioned, does not significantly diminish fish and wildlife habitat habitat [sic]." This response ignores the mandatory language of Criterion G, which requires that habitats shall be protected.⁷ The Criterion is not limited to prohibiting only significant impacts, but all impacts. ⁷

The Hearings Officer correctly interpreted this criterion⁷ to require the protection of significant fish habitat even where the present presence of fish has not been documented (HOD at 7-8). The Hearings Officer acknowledged Portland's Goal 5 inventory and analysis document and Portland's The Balch Creek Watershed Protection Plan (HOD at 7, 9, 12 and 13) and the great importance those documents placed on the protection of Balch Creek's riparian vegetation and the stream's fish and insect habitat. Letters in the record from ODF&W fisheries biologists explain the importance of Balch Creek, particularly the Thompson Fork, as fish habitat. This conclusion is supported by the field data sheets of Wayne Bowers the ODF&W fisheries biologist who found a viable population of native cutthroat trout $\frac{1}{2}$ mile up Thompson Fork⁷ in the fall of 1986.

Criterion H: This Criterion requires that the natural vegetation along Balch Creek "shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors." (emphasis added) On its face, this Criterion is expressed in mandatory terms and does not allow the Director to avoid requiring

compliance. However, because the culvert and fill had already been installed, the Director found Criterion H met.

The fact that the culvert is already installed, does not mean that this Criterion is inapplicable. The letter from ODF&W stated that bridges generally pose less of an impact than culverts, but that, as culverts go, this one was not bad. Removal of the culvert and fill is a feasible option which would permit the restoration of the Creek as fish habitat and the reestablishment of riparian vegetation. In light of the mandatory language of Criterion H, such a result is required, and the Director's finding of compliance lacks an adequate basis and is not supported by substantial evidence in the record.

The Hearings Officer agreed with the FOFP that the mandatory language of this criterion made this a very rigorous standard. For that reason, and the fact that the record contained only evidence of a massive loss of riparian vegetation, the Hearing Officer correctly concluded that the criterion was not and could not be met.

Criterion K: This Criterion requires the preservation of wetlands, floodplains and areas subject to flooding or erosion "to the maximum possible extent to preserve water quality and protect, the water retention, overflow and natural functions." At a minimum, these requires an evaluation of the Creek's wetland potential, its flood characteristics and erosion potential. Because the criterion is expressed in mandatory terms, the culvert and fill can only be approved if it preserves these aspects of the

affected stretch of Balch Creek.

The Director based his finding of compliance on the fact that the Army Corps of Engineers approved the culvert and that an ODF&W fish biologist indicated the "culvert installation is much better than some existing culverts in the local area." However, the Director failed to address any of the "natural functions" specified in Criterion K and he failed to indicate how the culvert and fill installed by the applicant could possibly meet the requirements of these Criteria.

The Hearings Officer correctly reversed the Director because, in fact, the only evidence in the record clearly indicated there was a loss of wetlands habitat and riparian vegetation and an increase in erosion due to the culvert and fill. The Hearings Officer focused on the "extremely rigorous standard" established by Criterion K, and correctly concluded that the applicant failed to meet his burden of proving that it was met.

Criterion P: This Criterion requires that fragile or endangered plant habitat⁷, valued for specific vegetative features⁷ or which has an identified need for protection⁷ "shall be retained in a natural state to the maximum extent possible." The Criterion is expressed in mandatory terms and requires, at a minimum, requires an assessment of the existing resources and an evaluation of the culvert's impact. Both the applicant and the Director noted that the City of Portland has listed Balch Creek as a significant Goal 5 Natural Resource and has provided for its protection in the

Balch Creek Watershed Protection Plan.¹⁸

The Hearings Officer noted the mandatory language of this criterion. He also noted that Portland's Balch Creek Watershed Protection Plan and Goal 5 inventory and analysis "identified a need to protect" Balch Creek. Finally, the Hearings Officer noted that the record contained evidence that the riparian vegetation of Balch Creek had been severely damaged by the culvert and fill. From this, the Hearings Officer correctly concluded that criterion P was not and could not be met.

4. **The Hearings Officer was justified and correct in taking official notice of The Balch Creek Watershed Protection Plan and the City of Portland's Goal 5 inventory and analysis, both of which are a part of the record in this matter and were quoted extensively by the appellants.**

In his Notice of Review, the applicant objects to the Hearings Officer's consideration of the Balch Creek Watershed Protection Plan (the "Plan"), which includes the related portion of Portland's Goal 5 inventory and analysis.

In his opinion, the Hearings Officer took official notice of both disputed City of Portland documents because they had been extensively quoted by both the staff and FOFP in its appeal (HOD at 7). In fact, there are several bases upon which the Board and the Hearings Officer may take official notice of these documents.

¹⁸The County's adherence to the Balch Creek Watershed Protection Plan is consistent with and fulfills Multnomah County's intergovernmental coordination policy (Policy 4). Continued adherence to the plan should be required in this matter. In any event, the director's decision (at pp 3, 13 and 16), the Hearings Officer's decision (at pp 7, 9, 12 and 13) and the FOFP have relied heavily on this document as a statement of Balch Creek's inherent value as a natural resource.

- A. The disputed documents were quoted extensively and relied upon by the applicant, the staff and the Friends of Forest Park in its appeal of the Director's decision.

Both the March 31, 1992 staff decision granting the modification and the June 16, 1992 Hearings Officer's decision referred to the Plan and relied upon that document and Portland's Goal 5 inventory and analysis at several places (see Director's decision at pp 3, 13 and 16 and the HOD at pp 7, 9, 12 and 13). Accordingly, the Plan is already contained in the record of this matter as an applicable planning document.

- B. Both the Hearings Officer and the Board of Commissioners are entitled to take official notice of the disputed documents because they were officially adopted by Multnomah County.) 93.

On July 9, 1991, Multnomah County adopted Ordinance No. 691 (file no. C7-91, entitled "Balch Creek Watershed; Erosion Control"), thereby applying the Hillside Development and Erosion Control provisions of the County Code (MCC 11.15.6700, et seq) to the entire Balch Creek drainage. In adopting Ordinance 91-691, Multnomah County explicitly endorsed the Plan and the City of Portland taskforce's findings supporting the Plan. The Plan served as the basis for Multnomah County's present protection scheme for the entire Balch Creek drainage.

The Land Use Board of Appeals has held that it is able to take official notice of enactments, either ordinances or resolutions, of local governments. Ramsey v. City of Portland, __ Or LUBA __ (LUBA No. 91-215, slip op. at 3-5). Accordingly, if LUBA is allowed to take official notice of a document officially adopted by Multnomah County, then certainly the Multnomah County Board of Commissioners

and the County Land Use Hearings Officer are also entitled to take official notice of those documents. Accordingly, the County may take official notice of the Plan. 95.

C. The Balch Creek Watershed Protection Plan pertains directly to the classification of Balch Creek and Thompson Fork, and is therefore admissible to show the classification of the stream.

In this matter, the Board specifically opened the record to allow submission of "new evidence pertaining to the stream classification." As mentioned earlier, Class I streams are defined, among other things, as being significant for "spawning, rearing or migration of anadromous or game fish." OAR 629-24-101(8) The Plan pertains directly to the classification because it mentions the classification of Balch Creek and describes in great detail many of the characteristics which qualify the stream for Class I status. For example, the Plan states, among other things, that:

Balch Creek summer flows are low, but sufficient to support a population of 2,000 to 4,000 cutthroat trout. These trout have been isolated since the replacement of lower Balch Creek by a sewer in 1921. Balch Creek cutthroat cannot migrate to any other water body and other fish cannot enter Balch Creek through the sewer. The Oregon Fish and Wildlife Commission does not allow fishing in Balch Creek because cutthroat trout are the only fish species present, and the existence of these trout is threatened by land development. The Oregon Board of Forestry has designated Balch Creek a Class One stream ..." (Plan at 13, emphasis added)

* * *

Fish.. Balch Creek cutthroat trout must be maintained in a range at least as extensive as their range in 1987 and at a population of at least 2,000. Opportunities for stream enhancement must also be maintained. (Plan at 121)

Under the Board's own order regarding the scope of review, the Plan should be admitted into evidence because it is replete with information "pertaining to the stream classification" of Balch Creek.

97.

V. CONCLUSION:

The County's SEC permit requirements apply to this application because applicant's property abuts a stream legally designated as a Class I water by the ODF in full compliance with applicable state law and ODF rules. A subsequent attempt to change the classification from Class I back to Class II was defective and void because none of the required procedural rules were followed.

98.

99.

The decision challenged here amended not only the applicant's SEC permit but also the 1991 CUP. In amending the SEC and CUP permits, the County was required, but failed, to follow the same procedures which applied to the original CUP application. This failure warrants a remand of the Director's decision.

100.

Regardless of the lack of procedure, the decision rendered is not supported by adequate findings or substantial evidence because the proposed modification violates the mandatory approval criteria for SEC permits. Consequently, the modification is prohibited under the County's SEC permit requirements.

101.

The Hearings Officer's decision should be affirmed with regard to the SEC permit compliance issue. The decision should also be remanded for the issuance of proper notice and a full hearing required for the modification of all CUPs. The Board's order should specifically require that the Action Proceeding process be

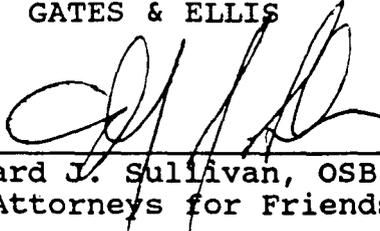
102.

103.

followed including the consideration of all CUP, SEC and HDP permit criteria.

Respectfully submitted this 22nd day of September, 1992.

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS

By: 

Edward J. Sullivan, OSB #69167
Of Attorneys for Friends of Forest Park

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF AN APPEAL OF THE) RESPONDENT'S HEARING
HEARINGS OFFICER'S DECISION) MEMORANDUM
CONCERNING SEC 6-91a AND HDP 4-91A)

Respondent, Friends of Forest Park ("FOFP"), submits this memorandum in support of the Hearings Officer's decision and in opposition to the applicant's appeal. FOFP requests that the Board of Commissioners affirm the Hearings Officer and deny the application.

FOFP offers the following in response to the three arguments raised in the applicant's appeal:

1. The Hearings Officer was correct in applying the County's SEC permit requirements because the lower $\frac{1}{2}$ mile of Thompson Fork was designated by the Oregon Department of Forestry as a Class I Stream according to the Oregon Forest Practice Rules. The County's SEC permits apply only to streams designated Class I, according to the Rules. A subsequent attempt to down-grade the Thompson Fork which did not comply with the Oregon Forest Practice Rules had no effect under state law or the Multnomah County Code. The lower $\frac{1}{2}$ mile of Thompson Fork remains a Class I stream, and the SEC permit requirements still apply.¹
2. A hearing is required prior to approval of a significant modification of a previously-issued SEC permit, and applicable criteria include those set forth in MCC 11.15.6420. The Hearings Officer was correct in finding that a hearing was required because the applicant's development poses a significant change in use and amount of land involved sufficient to trigger the hearing requirement. Moreover, the SEC permit requirements continued, and will continue, to apply to the applicant's property by virtue of the previous unappealed SEC and conditional use permits granted in 1991. The applicant is also estopped to challenge the applicability

¹The classification of the affected portion of Balch Creek became a disputed issue in this case after the applicant filed his Notice of Review. The FOFP's position that the affected portion, known as the Thompson Fork, is a Class I stream is supported by a letter from State Forest Practices Act Forester Michael Simek, an affidavit of Daniel Kearns, and several other documents, all of which are attached as exhibits to this memo.

of the SEC requirements to his property by virtue of the doctrine of the law of the case.

3. The record does not contain substantial evidence sufficient to show that the culvert and fill development can meet all of the mandatory approval criteria, most notably MCC 11.15.6420 (g), (h), (k) and (p). Since the applicant could not show that all approval criteria could be met, the Hearings Officer was correct in denying the application and reversing the Director's decision.
4. The Hearings Officer was justified and correct in taking official notice of The Balch Creek Watershed Protection Plan and the City of Portland's Goal 5 inventory and analysis, both of which are a part of the record in this matter and were quoted extensively by the appellants.

I. INTRODUCTION AND PROCEDURAL HISTORY:

This case involves an administrative modification of an Significant Environmental Concern ("SEC") permit which allowed Dan McKenzie, the applicant, to install a 36-foot long culvert and fill over Balch Creek, instead of the driveway bridge required in the original permit. However, the original permit was issued in conjunction with a conditional use permit ("CUP"), and the SEC conditions were specifically incorporated by reference into the CUP. In rendering the administrative decision, the Director overlooked the fact that the SEC modification also amended the previously-issued CUP, and in so doing the Director did not provide notice or an opportunity for a hearing. Normally, CUP amendments require an Action Proceeding procedure under MCC 11.15.8205, et seq, and failure to apply that procedure warrants reversal.

More significantly, however, the applicant installed the culvert and fill without seeking County review or approval. Before the application was submitted, the County had already instituted an enforcement proceeding against the applicant for violating the

bridge requirement of the previously-issued SEC permit (see County file ZV 03-92). Because of the fait accompli, the Director's decision may have assumed the County was powerless to deny the requested permit modification. This assumption, however, was wrong, because the culvert and fill can be removed; the affected portion of Balch Creek and the riparian zone can be restored, and the bridge can still be constructed. The Director's decision to allow the modification was wholly unjustified.

FOFP appealed the decision to the Hearings Officer, and a hearing was held on June 1, 1992. In the June 16, 1992 Hearings Officer's decision (HOD), the Hearings Officer denied the applicant's request to amend SEC 6-91a and HDP-91a, which would have legalized construction of a culvert and fill over Balch Creek. The decision also granted the FOFP's appeal, reversing the Planning Director's administrative decision. In particular, the Hearings Officer made the following findings:

A. Necessity of seeking an Amendment to CU 5-91: The Hearings Officer rejected FOFP's argument that modification of the SEC permit necessitated a modification of the CUP which had incorporated the SEC conditions by reference. The Hearings Officer found that the CUP only required compliance with the SEC conditions and did not incorporate the conditions into the CUP (HOD at 5). FOFP contends that this part of the Hearings Officer's decision is incorrect.²

² At the August 25, 1992 proceedings on this matter, the Assistant County Counsel advising the Board indicated that the Board's scope of review was not limited to those matters which were

B. Necessity for a hearing under MCC 11.15.6414: The Hearings Officer accepted FOPP's argument that modification of the SEC permit required a full evidentiary hearing. However, the Hearings Officer found that the hearing requirement was satisfied by the appeal hearing before the Hearings Officer (HOD at 5-6).

C. Merits of the SEC permit criteria: The Hearings Officer found that several of the SEC permit criteria could not be met by the proposed culvert and fill even with the imposition of conditions of approval. In particular, the Hearings Officer found the development violated the following criteria:

Criterion (g) - significant fish and wildlife habitats shall be protected (HOD at 6-8).

Criterion (h) - The natural vegetation along rivers, lakes, wetlands and streams shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors (HOD at 8).

Criterion (k) - Areas of annual flooding, floodplains, water areas, and wetlands shall be retained in their natural state to the maximum possible extent to preserve water quality and protect water retention, overflow, and natural functions (HOD at 9).

Criterion (p) - An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of the natural vegetation, shall be retained in a natural state to the maximum extent possible (HOD at 9-10).

II. STANDING OF OPPONENTS:

raised in the notice of appeal. Assuming that decision to be correct, it follows that the Board may also consider additional grounds for upholding the Hearings Officer's decision. Before the Hearings Officer, Opponents contended that the applicant was required to seek amendment to the conditional use permit, which included the original SEC permit in its terms. Opponents renew that contention before the Board in this review proceeding.

FOFP is a public benefit, non-profit organization dedicated to the preservation of Forest Park and the wise management of areas surrounding Forest Park. FOFP, along with some of its members, appealed the March 31, 1992 staff decision to the Hearings Officer on April 9, 1992. A hearing was held before the Hearings Officer on June 1, 1992. FOFP and its individual members appeared orally and in writing in those proceedings. The Hearings Officer granted the appeal and denied the application in a June 16, 1992 opinion. FOFP and its participating members thus have standing in these appeal proceedings.

III. FACTUAL OVERVIEW:

In 1991, the applicant, Dan McKenzie applied with the County to construct a single family non-resource related home along Balch Creek in the County's MUF-19 (multiple use forest) zoning district with a Significant Environmental Concern overlay.³ The proposal required a variety of permits. Construction of a non-resource dwelling in the MUF-19 zone required a CUP under MCC 11.15.2172 to 11.15.2194.⁴ The application also included a bridge across Balch Creek for the driveway. Balch Creek, including the lower ½ mile of Thompson Fork, was and is designated as a Class I Stream with an

³The applicant's property is located at 6125 NW Thompson Road.

⁴Conditional use permits involve an Action Proceeding, quasi-judicial decision-making process under MCC 11.15.8205 to 11.15.8255. MCC 11.15.6414 requires that SEC permits applied for in conjunction with a CUP must be addressed at the same time by the Hearings Officer.

SEC overlay zone extending 100 feet either side of the Creek.⁵ The bridge was an accessory structure to the conditionally allowed non-resource dwelling under MCC 11.15.2174(D), and, because of the SEC overlay zone, an SEC permit under MCC 11.15.6400 to 11.15.6422 was also required.⁶ Finally, due to the area's slopes and inherent erosion hazards, a hillside development and erosion control permit ("HDP") was required under MCC 11.15.6700 to 11.15.6735.⁷

After a public hearing, the Planning Commission approved the CUP with conditions on April 1, 1991 (CU 5-91). The Planning Director approved the SEC with conditions on March 22, 1991 (SEC 6-91), and the HDP on May 1, 1991 (HDP 4-91). None of the approvals or their conditions were appealed.

The CUP approval referred to the SEC permit and included, among other things, the following condition:

A portion of this property (i.e., that part of the property within 100 feet of the centerline of Balch Creek) is designated Significant Environmental Concern. An SEC Permit for development of a bridge/driveway into the site was considered under a separate application (SEC 6-91); it is included in this report as a part of the Appendix. All conditions of that decision are made a

⁵The classification of Balch Creek and the Thompson Fork, that portion of the Creek affected by this development, is a disputed issue in this appeal. The classification history of the Thompson Fork and Balch Creek are examined in the first part of the Discussion section of this memo.

⁶The SEC overlay zone applies to land within 100 feet of Class 1 streams. The affected section of Balch Creek is designated as a Class 1 stream. SEC permits normally involve an administrative decision-making process under MCC 11.15.6412, unless they are sought in conjunction with a conditional use, in which case, MCC 11.15.6414 requires an Action Proceeding process.

⁷Hillside development and erosion control permits are reviewed administratively under MCC 11.15.6725.

part of this decision. Development of the site also requires a Hillside Development and Erosion Control Permit; Condition #4 requires the HDP permit prior to site development. (CU 5-91 at 8-99, emphasis added)

The driveway bridge across Balch Creek, an accessory structure to the house, was governed by conditions contained in the SEC permit, which provided that the "driveway will cross the creek on a new bridge structure, and extend uphill to the east to a proposed house site on the property (Reference File CU 5-91)." Due to the site's steep slopes, construction of the driveway and house required certain erosion controls which were imposed as conditions of the HDP approval. Included was the requirement that "The HDP Permit plans must be substantially similar to those detailed in the SEC and CU Permit applications (Ref. CU 5-91/SEC 6-91)."

Despite the fact that a bridge was clearly required as a condition of the SEC and CUP approvals, the applicant did not build a bridge. Instead, he channelized Balch Creek into a culvert 36 feet long, and filled on top of the culvert to provide a base for the driveway. The County then instituted a code enforcement proceeding because the culvert and fill violated an explicit condition of approval of the permits.⁸ At the same time, Mark Hess, of the County Planning Staff, invited the Applicant to seek a modification of the conditions to remove the bridge requirement.

⁸A January 23, 1992 Notice of Zoning Violation was sent to the Applicant as part of file No. ZV 03-92. The violation was described as:

Placing a creek into a culvert (instead of constructing a bridge over it) which is in violation of the conditions of approval granted by the Planning Commission at a public hearing under case number CU 05-91.

On January 24, 1992 the Applicant applied for a permit modification described as "Revise SEC 6-91 and HDP 4-91 to a culvert/fill driveway crossing, rather than a bridge crossing."

The staff decision was appealed to the Hearings Officer, who reversed the staff and denied the application. This appeal to the Board of Commissioners, brought by the applicant, followed.

IV. DISCUSSION:

A significant issue in this appeal concerns the classification of the affected portion of Balch Creek,⁹ known as the Thompson Fork, and the application of the stream classification rules under the Oregon Forest Practices Act.¹⁰

1. The Hearings Officer was correct in applying the County's SEC permit requirements because the lower $\frac{1}{2}$ mile of Thompson Fork was designated by the Oregon Department of Forestry as a Class I Stream according to the Oregon Forest Practice Rules. The County's SEC permits apply only to streams designated Class I, according to the Rules. A subsequent attempt to down-grade the Thompson Fork which did not comply with the Oregon Forest Practice Rules had no effect under state law or the Multnomah County Code. The lower $\frac{1}{2}$ mile of Thompson Fork remains a Class I stream, and the SEC permit requirements still apply.

According to the MCC, the County's SEC permit requirements apply to, among other things,:

Any building, structure, or physical improvement within 100 feet of the normal high water level of a Class I

⁹For purposes of clarity, the stretch of Balch Creek adjacent to the applicant's property is referred to in this memo as Thompson Fork. Despite the name, this stretch is the main stem of Balch Creek and is not a tributary.

¹⁰The Forest Practices Act is codified at ORS 527.610 to 527.770, with the stream classification provisions found at ORS 527.765 and 527.770. Rules implementing the stream classification provisions of the Act are found at OAR 629-24-101 to 629-24-118.

stream, as defined by the State of Oregon Forest Practice Rules, [MCC 11.15.6404(C), emphasis added]

The Oregon Forest Practices Act (the Act) rules define "Class I" stream as:

any portions of streams, lakes or other waters of the state which are significant for ... spawning, rearing or migration of anadromous or game fish.
OAR 629-24-101(8) (a)

At the time the applicant proposed his development, the County believed the affected portion of Balch Creek was a Class I stream. This belief was apparently based on a 1986 map supplied by the local office of the Oregon Department of Forestry (ODF) in Forest Grove. The map shows the Class I streams in the Portland area, but includes a caveat at the bottom, stating that the map cannot be relied upon for determining the stream classification of any stream courses. The notice advises the reader to consult the regional ODF office for the official classification of all streams. The applicant and the planning staff now assert that the affected portion of Balch Creek is Class II, not Class I as originally thought. Accordingly, the applicant and staff claim that none of the SEC permit requirements apply here.

The Act Rules also specify the procedures by which streams are to be classified. See OAR 629-24-116. Among other things, this rule requires written notice to all owners of land adjacent to the affected stream describing the nature of the classification change. Specifically, OAR 629-24-116(2) provides that:

The class of waters indicated on such maps shall not be changed by the State Forester without thirty (30) days prior written notice to landowners immediately adjoining the portion of the waters to be reclassified. Notice to

the landowners shall include the reason for the change of classification and the time within which the landowner may request reconsideration of reclassification. [emphasis added]

According to OAR 629-24-116(4), the reclassification becomes effective if any of the following occur:

1. At the end of thirty (30) days from the notice, if no landowner requests review;
2. Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the waters to be reclassified; or
3. Upon denial of reconsideration by the State Forester.

The Forest Practices Act Forester, stationed in the local ODF office, is responsible for the interpretation and application of the Act, including the stream classification rules. In this case, in 1987, the Forest Practices Act Forester in the ODF Forest Grove office was Michael Simek. His recollection of the history of the classification is set forth in the letter attached as Exhibit 1 and the attached affidavit of Daniel Kearns.

Prior to the fall of 1987, all of Balch Creek, including the Thompson Fork was a Class II stream.¹¹ During the fall of 1987, Mr. Simek was out of the office on fire fighting duty, and David Michael was his replacement. On September 1, 1987 Mr. Michael received a complaint about a forest operation on Balch Creek from Nancy Rosenlund, a member of FOFP. Mr. Michael investigated the operation and its impact on Balch Creek and the Thompson Fork and based on the presence of a viable fish population, determined that

¹¹Class II waters are defined as "any waters of the state not classified as Class I waters, which have a definite channel or bed; ..." OAR 629-24-101(10)(a).

the entire stream warranted a Class I designation. A copy of Mr. Michael's notes are attached as Exhibit 2, and a copy of the fisheries data sheets are attached as Exhibit 3.

In accordance with the procedural rules of OAR 629-24-116, Mr. Michael sent notice of the proposed reclassification of the entire Balch Creek drainage, including Thompson Fork on September 3, 1987. All of the affected property owners were identified and were mailed a copy of the notice which described the proposed reclassification as "Changed from Class 2 to Class 1 for ENTIRE STREAM (feet, miles) on that portion indicated on the attached map." The map attached to the notice indicated that the affected stream included all of Balch Creek from the Willamette River up to and including at least $\frac{1}{2}$ mile of the Thompson Fork above the Cornell Road crossing. (See notice and map attached as Exhibit 4) None of the property owners abutting Balch Creek and the affected portion of Thompson Fork requested a reconsideration, and one, the Portland Audubon Society, affirmatively waived any right to seek a reconsideration [see Exhibit 4].

The previous summer, Wayne Bowers, a fisheries biologist with the Oregon Department of Fish & Wildlife (ODF&W), had conducted a systematic survey of Balch Creek, including Thompson Fork, and had found a viable reproducing population of native cutthroat trout in the Thompson Fork approximately $\frac{1}{4}$ mile above the Cornell Road crossing [see Mr. Bowers' field data sheets attached as Exhibit 3]. Mr. Simek only knew that a population of cutthroat trout existed somewhere in Balch Creek and was unaware of Mr. Bowers' work or

that trout, in fact, were found the previous fall in Thompson Fork. The presence of a viable population of fish qualifies a stream as a Class I Water according to the definition in OAR 629-24-101(8).

When he returned to the ODF Forest Grove office, Mr. Simek resumed his duties and began by investigating the stream reclassification which Mr. Michael had instituted. However, Mr. Simek did not survey the stream course, but only reviewed the written record of the reclassification. Because his review of the file did not indicate fish in Thompson Fork, Mr. Simek decided to declassify that portion of Balch Creek, changing it from Class I to Class II, based on the apparent absence of native fish. Mr. Simek made this decision despite the fact that no property owner abutting Thompson Fork objected to the reclassification, as was the right of all affected property owners under OAR 629-24-116(3).¹²

However, in attempting to declassify Thompson Fork, Mr. Simek admits that he failed to follow any of the notice and opportunity to comment procedures required by OAR 629-24-116. The only documentation of Mr. Simek's attempted reclassification of Thompson Fork is the modified map in the Forest Grove ODF office.¹³ A copy

¹²The only comment received in response to the initial reclassification of Balch Creek and Thompson Fork was a letter from a Mr. and Mrs. Hagen, who own property on the Cornell Road branch - a tributary to Balch Creek which was not affected by any of these reclassifications. Because the Cornell Branch was not affected by the reclassification, Michael Simek did not approve or deny the request, but, instead sent an explanation the reclassification decision.

¹³In ODF's Forest Grove office, there are two sets of stream classification maps, the old set and the new set. The new set was drawn from the old set, and a copy of the old map section for Balch Creek is attached as Exhibit 5. Thomas Savage submitted a copy of

of that map is attached as Exhibit 5, and it clearly shows all of Balch Creek, including Thompson Fork, as bearing the Class I designation, but the Thompson Fork section has been cross-hatched out by pen.

Thomas Savage, the present Forest Practices Act Forester in the Forest Grove ODF office, wrote a letter for the applicant interpreting the stream classification map, which was submitted by the applicant. According to Mr. Savage, only Balch Creek downstream of the Cornell Road crossing is Class I and Mr. Savage interprets the modified map to mean that the Thompson Fork is not Class I. However, Mr. Savage is also unaware of the reclassification history of the stream or whether the required procedures were followed.

Because Mr. Simek's failed to follow any of the procedures required by OAR 629-24-116, his attempt to change the Thompson Fork from Class I back to Class II is not valid or enforceable. Mr. Simek's action was without authority because the Act's Rules were not followed. The only reclassification which fully complied with the required procedures was that accomplished by Mr. Michael. MCC 11.15.6404(C) requires the application of the SEC permit provisions to "Class I Streams, as defined by the State of Oregon Forest

the new map showing Balch Creek. However, because Mr. Simek made his cross-hatched modification to the old map, the modification does not show up on the copy submitted by Mr. Savage. The old ODF stream classification map shows Balch Creek as a Class I stream from the Willamette River upstream to a point on Thompson Fork approximately $\frac{1}{2}$ mile above the Cornell Road crossing. However, Mr. Simek cross-hatched all of the Thompson Fork section above the Cornell Road crossing, reflecting Mr. Simek's intention to exclude that section of the stream from the Class I designation.

Practices Rules." The only classification in this case which complied with the Rules was the one designating the lower $\frac{1}{2}$ mile of Thompson Fork a Class I stream. Mr. Simek's subsequent attempt to down-grade Thompson Fork did not comply with the Rules, and, therefore, was without legal effect under MCC 11.15.6404(C).

Additionally, the lower $\frac{1}{2}$ mile of Thompson Fork actually qualifies as a Class I stream as defined by the Act Rules, because it is significant for native cutthroat trout. Two qualified fish experts, Gary Kish and Janet Burcham, both surveyed the lower $\frac{1}{2}$ mile of Thompson Fork. A letter from Janet Burcham is attached as Exhibit 6 and Mr. Kish submitted a letter under separate cover. They found suitable habitat throughout the section and cutthroat trout at the lower end [within the first several hundred feet above the Cornell Road crossing]. From this they both conclude that, when the present drought subsides, fish will return to the entire $\frac{1}{2}$ mile section. Consequently, in their opinions, the lower $\frac{1}{2}$ mile of Thompson Fork is significant for anadromous and game fish.

Because SEC permits are required on all Class I streams "as defined by the State of Oregon Forest Practices Rules," the SEC permit applies to the lower $\frac{1}{2}$ mile of Thompson Fork. The applicant's property is included in this Class I section of Thompson Fork, and therefore an SEC permit is required for the applicant's culvert and fill project. The Hearings Officer was correct in so concluding.

2. A hearing is required prior to approval of a significant modification of a previously-issued SEC permit, and applicable criteria include those set forth in MCC 11.15.6420. The Hearings Officer was correct in finding

that a hearing was required because the applicant's development poses a significant change in use and amount of land involved sufficient to trigger the hearing requirement. Moreover, the SEC permit requirements continued, and will continue, to apply to the applicant's property by virtue of the previous unappealed SEC and conditional use permits granted in 1991. The applicant is also estopped to challenge the applicability of the SEC requirements to his property by virtue of the doctrine of the law of the case..

MCC 11.15.8205 to 11.15.8255 require notice and a full public evidentiary hearing for all CUP applications. Apparently, the underlying 1991 CUP (File 5-91) in this matter was granted pursuant to these procedures. Additionally, when a SEC permit is sought in connection with a CUP, as was the case in this matter in 1991, a public hearing before the Hearings Officer is required by MCC 11.15.6414.¹⁴ With regard to modifications of conditions of any conditional approvals, including CUPs, SECs and HDPs, MCC 11.15.8240(E) provides that:

Any change or alteration of conditions attached to conditional approvals shall be processed as a new action, except that the Planning Director may approve a change or alteration which does not:

¹⁴ Specifically, 11.15.6414 requires that:

(A) A decision on an SEC permit application for a Conditional Use as specified either in the underlying district or in MCC .7105 through .7640, ..., shall be made by the Hearings Officer in conjunction with the decision on the use proposal associated therewith.

(B) Action by the Hearings Officer on an SEC permit application shall be taken pursuant to MCC .8205 through .8250.

(C) The findings and conclusions made by the Hearings Officer and the conditions or modifications of approval, if any, shall specifically address the relationships between the proposal and the criteria in MCC .6420.

- (1) Increase density;
- (2) Change boundaries;
- (3) Change any use; or
- (4) Change the location or amount of land devoted to specific land uses.

As already mentioned, the underlying CUP (CU 5-91) approved in 1991 incorporated by specific reference all of the conditions attached to the associated SEC permit (SEC 6-91) in the statement:

A portion of this property (i.e., that part of the property within 100 feet of the centerline of Balch Creek) is designated Significant Environmental Concern. An SEC Permit for development of a bridge/driveway into the site was considered under a separate application (SEC 6-91); it is included in this report as a part of the Appendix. All conditions of that decision are made a part of this decision. Development of the site also requires a Hillside Development and Erosion Control Permit; Condition #4 requires the HDP permit prior to site development. (CU 5-91 at 8-9, emphasis added)

The Hearings Officer incorrectly found that the CUP did not incorporate all of the SEC permit conditions because he focused only on Condition No. 3 of the CUP (HOD at 5).¹⁵ Regardless of what CUP Condition No. 3 says, the above language from the CUP clearly incorporates the SEC permit conditions into the CUP. Consequently, modification of the SEC necessarily modified the CUP, thus requiring a new CUP hearing procedure. The Hearings Officer erred in finding otherwise.

The SEC permit dealt exclusively with the driveway bridge spanning Balch Creek by specifying the bridge's design and

¹⁵Condition #3 of CU 5-91 merely requires the applicant to "prior to site clearing or grading, satisfy the Conditions of Approval of SEC 6-91 ..."

construction. Consequently, the bridge requirement contained in SEC 6-91 could not have been altered without also altering a condition of CU 5-91; however, neither the applicant nor the Director noted the interrelationship of the two permits. The application only requested a modification of SEC 6-91 and HDP 4-91 to eliminate the bridge requirement. The applicant proposed, instead, to culvert Balch Creek and fill the space under the driveway.

According to MCC 11.15.8240(E), this modification was supposed to be treated as entirely new SEC, CUP and HDP applications unless it qualified for one of the four exceptions in MCC 11.15.8240(E) (1) through (4). Most notably, the staff would have to find that elimination of the bridge requirement did not change the "use" prescribed in SEC 6-91a nor the "location or amount of land devoted to a specific land use." The Planning Director failed to address MCC 11.15.8240(E), or make these required findings; however the Hearings Officer stated that: "I agree that under MCC 11.15.6414 this Decision on an amendment to an SEC permit requires a hearing." (HOD at 6)

The Hearings Officer was correct, because the requested modification fundamentally changed the use specified by SEC 6-91 and the amount of land devoted to that use. The use applied for and granted in the original permit was clearly described as a bridge and not a culvert and fill at many places in the application as well as the County's decisions approving the SEC, HDP and CUP (see Appellant's Hearing Memorandum at pp 4-5, 9-10)

Replacing the bridge with a culvert and fill design fundamentally changed the use specified in SEC 6-91 and CU 5-91. The modification also changed the amount of riparian land impacted by the driveway. Before, the bridge would have spanned across the Creek, leaving the watercourse and most of the riparian area unaffected. Shoreline and stream course impacts were minimized, thereby avoiding erosion, soil slumping and damage to stream and riparian habitats. The culvert, which had already been installed, contains and channelizes the Creek for 36 feet. The fill tapers from the driveway to the ends of the culvert, leaving just short sections of the culvert exposed. All of the riparian land under the driveway has been covered. These impacts were found by the Hearings Officer to be significant and constituted a significant change in the permit. Accordingly, he determined that a full evidentiary hearing was required (HOD at 6).

The culvert and fill is a fundamental change from the previously authorized bridge use, and the amount of land devoted to that use was increased by virtue of the significantly increased amount of fill and riparian habitat covered by that fill. Accordingly, MCC 11.15.8240(E) requires completely new SEC, HDP and CUP applications and decision-making processes, including the notice and hearing required by MCC 11.15.8205 to 11.15.8255 for all CUP applications.¹⁶ The decision should be reversed or remanded

¹⁶The fact that no hearing was provided and that the Director's decision overlooked the implication of CU 5-91 was specifically raised before the February 3, 1992 Planning Commission hearing by Nancy Rosenlund and by FOFP in a February 10, 1992 letter.

with instructions to process the modification application as new CUP, SEC and HDP permits.

In addition to the County's statutory procedural requirements, ORS 197.763 and 215.402 to 215.416 require quasi-judicial procedures for certain land use applications. According to LUBA, notice and an opportunity for a hearing must be provided whenever the application requires the exercise of factual, legal or policy judgment on the part of the local decision-maker. Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 660-64 (1990); McKay Creek Valley Assn v. Washington County, 18 Or LUBA 71, 74-79 (1989); Kunkel v. Washington County, 16 Or LUBA 407, 411-13 (1988); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev. denied 303 Or 74 (1987). This line of cases stands for the notion that, regardless of the label applied by the local government, if the decision entails the exercise of discretion, then the quasi-judicial decision-making procedures of ORS 197.763 and 215.416 must be used.

In rendering his decision in this matter, the Director was required to address "the purposes of the SEC district and ... the [seventeen] criteria for approval specified in MCC 6420." MCC 11.15.6410. In determining whether the application meets these seventeen criteria and the purposes of the SEC district, the Director must necessarily exercise significant factual, legal and policy judgment. For these reasons, the Hearings Officer was correct in requiring a full evidentiary hearing on this modification application.

The applicant's position also overlooks the fact that the SEC overlay was applied to his property in the 1991 proceedings without objection and without appeal. It was applied to the applicant's property in proceedings before the Director and the Hearings Officer without objection and without appeal. Under the doctrine of the law of the case or waiver, the applicant cannot raise now those matters which could have been raised previously in the same case.¹⁷

3. The record does not contain substantial evidence sufficient to show that the culvert and fill development can meet all of the mandatory approval criteria, most notably MCC 11.15.6420 (g), (h), (k) and (p). Since the applicant could not show that all approval criteria could be met, the Hearings Officer was correct in denying the application and reversing the Director's decision.

The Hearings Officer correctly found that MCC 11.15.6410 requires consideration the seventeen approval criteria of MCC 11.15.6420 when evaluating a significant modification to a previously-issued SEC permit. The Hearings Officer correctly determined that Director's decision was deficient in this regard because there was insufficient evidence in the record to show that

¹⁷ In Eckis v. Linn County, ___ Or. LUBA ___ (LUBA No. 91-132, September 11, 1991), LUBA said:

"The 'law of the case' or 'waiver' doctrine means that after a local government decision is remanded by this Board, and a subsequent local government decision adopted in response to the remand is appealed to this Board, only issues that could not have been raised in the first appeal may be raised in the later appeal. Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522, 527, 746 P2d 728 (1987); Highway 213 Coalition v. Clackamas County, 17 Or LUBA 1284, 1294 (1989); Hearne v. Baker County, 16 Or LUBA 193 (1987), aff'd 89 Or App 282, rev den 305 Or 576 (1988); Portland Audubon v. Clackamas County, [14 Or. LUBA 433, aff'd without opinion, 80-593 (1986)] * * * "

all of the criteria could be met. In fact, the record contains absolutely no evidence pertaining to several of the criteria.

FOFP assert that the record contains no evidence to support a finding that criteria A, D, G, H, K, M, N, P or Q are or can be met by this application. The Hearings Officer found that only criteria G, H, K and P were not met. FOFP rely on the arguments set forth in its Appellant's Hearing Memorandum, submitted to the Hearings Officer (pp. 14-21) in support of its contention that the remaining criteria, in fact, are not met by this application. FOFP provides the following discussion pertaining to the four criteria which the Hearings Officer focused upon:

Criterion G: This criterion requires that "significant fish and wildlife habitats shall be protected." The Director received many letters and comments arguing that the culvert and fill violated this criterion. Several parties, including the Oregon Department of Fish & Wildlife (ODF&W), argued that the proposed culvert must be evaluated in the context of its cumulative effect in association with other culverts on Balch Creek, and that by itself or cumulative, the culvert was more harmful than a bridge. The City of Portland commented that "Even though removal of the culvert will cause additional short term disturbance to the site, we submit that such a knowing violation of the permit should not be condoned by Multnomah County."

In response, the Director acknowledged these objections but found that existing zoning would prevent further deterioration of Balch Creek as fish habitat, and that "substantial evidence

persuades that the change in design [from a bridge to a culvert and fill], as conditioned, does not significantly diminish fish and wildlife habitat habitat [sic]." This response ignores the mandatory language of Criterion G, which requires that habitats shall be protected. The Criterion is not limited to prohibiting only significant impacts, but all impacts.

The Hearings Officer correctly interpreted this criterion to require the protection of significant fish habitat even where the present presence of fish has not been documented (HOD at 7-8). The Hearings Officer acknowledged Portland's Goal 5 inventory and analysis document and Portland's The Balch Creek Watershed Protection Plan (HOD at 7, 9, 12 and 13) and the great importance those documents placed on the protection of Balch Creek's riparian vegetation and the stream's fish and insect habitat. Letters in the record from ODF&W fisheries biologists explain the importance of Balch Creek, particularly the Thompson Fork, as fish habitat. This conclusion is supported by the field data sheets of Wayne Bowers the ODF&W fisheries biologist who found a viable population of native cutthroat trout $\frac{1}{2}$ mile up Thompson Fork in the fall of 1986.

Criterion H: This Criterion requires that the natural vegetation along Balch Creek "shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors." (emphasis added) On its face, this Criterion is expressed in mandatory terms and does not allow the Director to avoid requiring

compliance. However, because the culvert and fill had already been installed, the Director found Criterion H met.

The fact that the culvert is already installed, does not mean that this Criterion is inapplicable. The letter from ODF&W stated that bridges generally pose less of an impact than culverts, but that, as culverts go, this one was not bad. Removal of the culvert and fill is a feasible option which would permit the restoration of the Creek as fish habitat and the reestablishment of riparian vegetation. In light of the mandatory language of Criterion H, such a result is required, and the Director's finding of compliance lacks an adequate basis and is not supported by substantial evidence in the record.

The Hearings Officer agreed with the FOFP that the mandatory language of this criterion made this a very rigorous standard. For that reason, and the fact that the record contained only evidence of a massive loss of riparian vegetation, the Hearing Officer correctly concluded that the criterion was not and could not be met.

Criterion K: This Criterion requires the preservation of wetlands, floodplains and areas subject to flooding or erosion "to the maximum possible extent to preserve water quality and protect the water retention, overflow and natural functions." At a minimum, these requires an evaluation of the Creek's wetland potential, its flood characteristics and erosion potential. Because the criterion is expressed in mandatory terms, the culvert and fill can only be approved if it preserves these aspects of the

affected stretch of Balch Creek.

The Director based his finding of compliance on the fact that the Army Corps of Engineers approved the culvert and that an ODF&W fish biologist indicated the "culvert installation is much better than some existing culverts in the local area." However, the Director failed to address any of the "natural functions" specified in Criterion K and he failed to indicate how the culvert and fill installed by the applicant could possibly meet the requirements of these Criteria.

The Hearings Officer correctly reversed the Director because, in fact, the only evidence in the record clearly indicated there was a loss of wetlands habitat and riparian vegetation and an increase in erosion due to the culvert and fill. The Hearings Officer focused on the "extremely rigorous standard" established by Criterion K, and correctly concluded that the applicant failed to meet his burden of proving that it was met.

Criterion P: This Criterion requires that fragile or endangered plant habitat, valued for specific vegetative features or which has an identified need for protection, "shall be retained in a natural state to the maximum extent possible." The Criterion is expressed in mandatory terms and requires, at a minimum, requires an assessment of the existing resources and an evaluation of the culvert's impact. Both the applicant and the Director noted that the City of Portland has listed Balch Creek as a significant Goal 5 Natural Resource and has provided for its protection in the

Balch Creek Watershed Protection Plan.¹⁸

The Hearings Officer noted the mandatory language of this criterion. He also noted that Portland's Balch Creek Watershed Protection Plan and Goal 5 inventory and analysis "identified a need to protect" Balch Creek. Finally, the Hearings Officer noted that the record contained evidence that the riparian vegetation of Balch Creek had been severely damaged by the culvert and fill. From this, the Hearings Officer correctly concluded that criterion P was not and could not be met.

4. The Hearings Officer was justified and correct in taking official notice of The Balch Creek Watershed Protection Plan and the City of Portland's Goal 5 inventory and analysis, both of which are a part of the record in this matter and were quoted extensively by the appellants.

In his Notice of Review, the applicant objects to the Hearings Officer's consideration of the Balch Creek Watershed Protection Plan (the "Plan"), which includes the related portion of Portland's Goal 5 inventory and analysis.

In his opinion, the Hearings Officer took official notice of both disputed City of Portland documents because they had been extensively quoted by both the staff and FOFP in its appeal (HOD at 7). In fact, there are several bases upon which the Board and the Hearings Officer may take official notice of these documents.

¹⁸The County's adherence to the Balch Creek Watershed Protection Plan is consistent with and fulfills Multnomah County's intergovernmental coordination policy (Policy 4). Continued adherence to the plan should be required in this matter. In any event, the director's decision (at pp 3, 13 and 16), the Hearings Officer's decision (at pp 7, 9, 12 and 13) and the FOFP have relied heavily on this document as a statement of Balch Creek's inherent value as a natural resource.

- A. The disputed documents were quoted extensively and relied upon by the applicant, the staff and the Friends of Forest Park in its appeal of the Director's decision.**

Both the March 31, 1992 staff decision granting the modification and the June 16, 1992 Hearings Officer's decision referred to the Plan and relied upon that document and Portland's Goal 5 inventory and analysis at several places (see Director's decision at pp 3, 13 and 16 and the HOD at pp 7, 9, 12 and 13). Accordingly, the Plan is already contained in the record of this matter as an applicable planning document.

- B. Both the Hearings Officer and the Board of Commissioners are entitled to take official notice of the disputed documents because they were officially adopted by Multnomah County.**

On July 9, 1991, Multnomah County adopted Ordinance No. 691 (file no. C7-91, entitled "Balch Creek Watershed; Erosion Control"), thereby applying the Hillside Development and Erosion Control provisions of the County Code (MCC 11.15.6700, et seq) to the entire Balch Creek drainage. In adopting Ordinance 91-691, Multnomah County explicitly endorsed the Plan and the City of Portland taskforce's findings supporting the Plan. The Plan served as the basis for Multnomah County's present protection scheme for the entire Balch Creek drainage.

The Land Use Board of Appeals has held that it is able to take official notice of enactments, either ordinances or resolutions, of local governments. Ramsey v. City of Portland, __ Or LUBA __ (LUBA No. 91-215, slip op. at 3-5). Accordingly, if LUBA is allowed to take official notice of a document officially adopted by Multnomah County, then certainly the Multnomah County Board of Commissioners

and the County Land Use Hearings Officer are also entitled to take official notice of those documents. Accordingly, the County may take official notice of the Plan.

- C. The Balch Creek Watershed Protection Plan pertains directly to the classification of Balch Creek and Thompson Fork, and is therefore admissible to show the classification of the stream.

In this matter, the Board specifically opened the record to allow submission of "new evidence pertaining to the stream classification." As mentioned earlier, Class I streams are defined, among other things, as being significant for "spawning, rearing or migration of anadromous or game fish." OAR 629-24-101(8) The Plan pertains directly to the classification because it mentions the classification of Balch Creek and describes in great detail many of the characteristics which qualify the stream for Class I status. For example, the Plan states, among other things, that:

Balch Creek summer flows are low, but sufficient to support a population of 2,000 to 4,000 cutthroat trout. These trout have been isolated since the replacement of lower Balch Creek by a sewer in 1921. Balch Creek cutthroat cannot migrate to any other water body and other fish cannot enter Balch Creek through the sewer. The Oregon Fish and Wildlife Commission does not allow fishing in Balch Creek because cutthroat trout are the only fish species present, and the existence of these trout is threatened by land development. The Oregon Board of Forestry has designated Balch Creek a Class One stream ..." (Plan at 13, emphasis added)

* * *

Fish.. Balch Creek cutthroat trout must be maintained in a range at least as extensive as their range in 1987 and at a population of at least 2,000. Opportunities for stream enhancement must also be maintained. (Plan at 121)

Under the Board's own order regarding the scope of review, the Plan should be admitted into evidence because it is replete with information "pertaining to the stream classification" of Balch Creek.

V. CONCLUSION:

The County's SEC permit requirements apply to this application because applicant's property abuts a stream legally designated as a Class I water by the ODF in full compliance with applicable state law and ODF rules. A subsequent attempt to change the classification from Class I back to Class II was defective and void because none of the required procedural rules were followed.

The decision challenged here amended not only the applicant's SEC permit but also the 1991 CUP. In amending the SEC and CUP permits, the County was required, but failed, to follow the same procedures which applied to the original CUP application. This failure warrants a remand of the Director's decision.

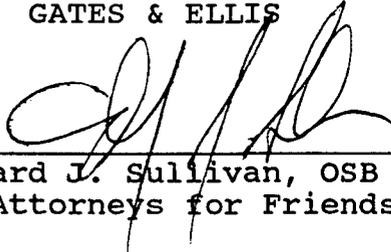
Regardless of the lack of procedure, the decision rendered is not supported by adequate findings or substantial evidence because the proposed modification violates the mandatory approval criteria for SEC permits. Consequently, the modification is prohibited under the County's SEC permit requirements.

The Hearings Officer's decision should be affirmed with regard to the SEC permit compliance issue. The decision should also be remanded for the issuance of proper notice and a full hearing required for the modification of all CUPs. The Board's order should specifically require that the Action Proceeding process be

followed including the consideration of all CUP, SEC and HDP permit criteria.

Respectfully submitted this 22nd day of September, 1992.

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS

By: 

Edward J. Sullivan, OSB #69167
Of Attorneys for Friends of Forest Park

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF AN APPEAL OF THE)
HEARINGS OFFICER'S DECISION) AFFIDAVIT OF
CONCERNING SEC 6-91a AND HDP 4-91A) DANIEL KEARNS

STATE OF OREGON)
) ss
County of Multnomah)

I, Daniel Kearns, having been first duly sworn, depose and say that:

1. I hold a BS in Biology and a MS in Zoology, with an emphasis in vertebrate ecology. I am generally familiar with salmonid biology and the ecological and habitat requirements of salmonids. I am also an attorney representing the Friends of Forest Park in this matter. I submit this affidavit in support of the Friends of Forest Park.
2. On or about August 25, 1992, I spoke with Wayne Bowers, a fisheries biologist with the Oregon Department of Fish & Wildlife ("ODF&W"). During 1986 and 1987, Mr. Bowers was stationed at the Clackamas Oregon office of ODF&W. As part of his work, Mr. Bowers conducted two electro-shock fish samples on Balch Creek in the fall of 1986 and 1987. Mr. Bowers' field data sheets are attached to Respondent's Hearing Memorandum as Exhibit 3.
3. One of Mr. Bower's 1986 samples (October 24, 1986) was on the Thompson Fork, approximately ¼ mile above the Cornell Road crossing. In that sample, Mr. Bowers collected 15 native cutthroat trout, some of them several inches in length.
4. On or about August 26, 1992, I spoke with Michael Simek, a

Forest Practices Act Forester with the Oregon Department of Forestry, about the classification status and history of Balch Creek. Mr. Simek is presently stationed in the Columbia City ODF office, but during 1987 was stationed in the Forest Grove ODF office. During our conversation, Mr. Simek explained to me the classification history of Balch Creek and particularly the section known as Thompson Fork. What Mr. Simek told me was based on his recollection and the materials in his files. Subsequently, he sent a letter to me dated September 16, 1992, which is included in the record of this matter.

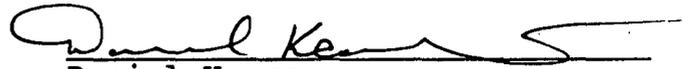
5. Mr. Simek told me that, while at the Forest Grove ODF office, he was responsible for responding to requests for stream reclassifications under the Forest Practices Act and for applying the stream classification procedures and criteria when presented with a request to reclassify a stream. It was also his responsibility to keep and maintain the files, maps and other records pertaining to stream classification for the territory over which the Forest Grove had regulatory supervision.
6. During September and October of 1987, while Mr. Simek was out of the office, the entire Balch Creek, including Thompson Fork, was reclassified by the then acting Forest Practices Act Forester, Dave Michael. In reclassifying the stream, all of the required notice and comment opportunity procedures of OAR 629-24-116 were followed. Notice of the proposed change was sent to all owners of property abutting the affected portion

of the stream on September 3, 1987. According to Mr. Simek, no objections or reconsideration requests were received by affected property owners within the 30 days following the notice.

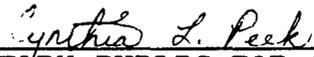
7. Mr. Simek told me that he returned to his office and resumed his duties before the expiration of the 30 comment period. Also within the 30-day period, he decided that a Class I designation for the Thompson Fork was not warranted. However, Mr. Simek told me this decision was based upon his opinion that smaller headwater streams generally do not support fish populations which would warrant Class I protection and that he was unaware of any fish populations upstream of the Cornell Road crossing. He told me that he was unaware of Wayne Bowers' 1986 and 1987 fish surveys or that fish were found $\frac{1}{4}$ mile up Thompson Fork. I sent him a copy of Mr. Bowers' field data sheets, and Mr. Simek told me this was the first time he had heard of or seen these data. Mr. Simek said that, had he known at that the time of the documented presence of native cutthroat trout in the Thompson Fork, he would not have attempted to declassify that section of Balch Creek.
8. Because he was unaware that fish were present in Thompson Fork, Mr. Simek attempted to declassify that portion of Balch Creek. Mr. Simek said he did this by merely crossing-out the Thompson Fork portion of the stream on the official ODF map in the Forest Grove Office. A xerox copy of the map that Mr. Simek modified is attached to the Respondents' Hearing

Memorandum as Exhibit 5. It clearly shows the Class I stream designation extending up Balch Creek and up the first approximately ½ mile of Thompson Fork and the cross-hatching that Mr. Simek drew onto the map. Beyond this modification of the official ODF map, Mr. Simek made no attempt to comply with the notice and opportunity to comment provisions of OAR 629-24-116.

DATED this 22nd day of September, 1992.


Daniel Kearns

SUBSCRIBED AND SWORN TO before me this 22nd day of September, 1992.


NOTARY PUBLIC FOR OREGON

MY COMMISSION EXPIRES 12-9-94



Re: Nancy Roseland Complaint of logging near Cornell Road
Phone: 297-6316

Landowner: Willard Rowland, 145 Desert Lake Dr., Palm Springs,
Ca, 92262

Operator: Forest Rim Development (Jeff Kaufman)

Location: TL 46 & 71 in NW 1/4 Sec. 31, 1N 1E

Mike Simek had been working on this prior to his dispatch to California fires. He had arranged for a field trip with Pat Keely ODF&W to view the site.

On September 1, 1987 Mrs. Roseland phoned Cliff Ebert about the status of the operation. Generally her complaint or concern is that logging in the area would cause excessive run-off during the winter and that the area is unstable with a history of slides and that the logging would accelerate the problem. She is concerned that Balch Creek would overflow, that slides, mud and water could damage her property downstream from the operation. She referred to an engineers study which supported her belief.

Balch Creek flows easterly to the Willamette. Around Thurman St. the creek enters a conduit and is underground across Northwest Portland and exits to the Willamette near the Industrial Area.

ODF&W (Wayne Bower and Pat Keely) state that Balch Creek is a class I and that there is a run of native cutthroat trout.

At this time, the operator has been told to to leave 100' along the creek until we have an opportunity to look at the site and make on the ground recommendations.

Pat Keely looked at the area on Tuesday, 9/1 and relayed to Ebert that there are some problems that need addressing. A stream crossing (culvert) may be undersized, it needs to have approaches graveled and rip-rapping installed around the inlet.

One problem is that the stream was not previously classed as Class I waters, so the new rules on stream class changes will apply. An adjacent landowner, downstream has installed a culvert even smaller that the one on the operation

Mrs. Roseland feels that we should require that the landowner/operator change from clearcut to partial cut in order to minimize run-off and soil movement.

PLANNED ACTION

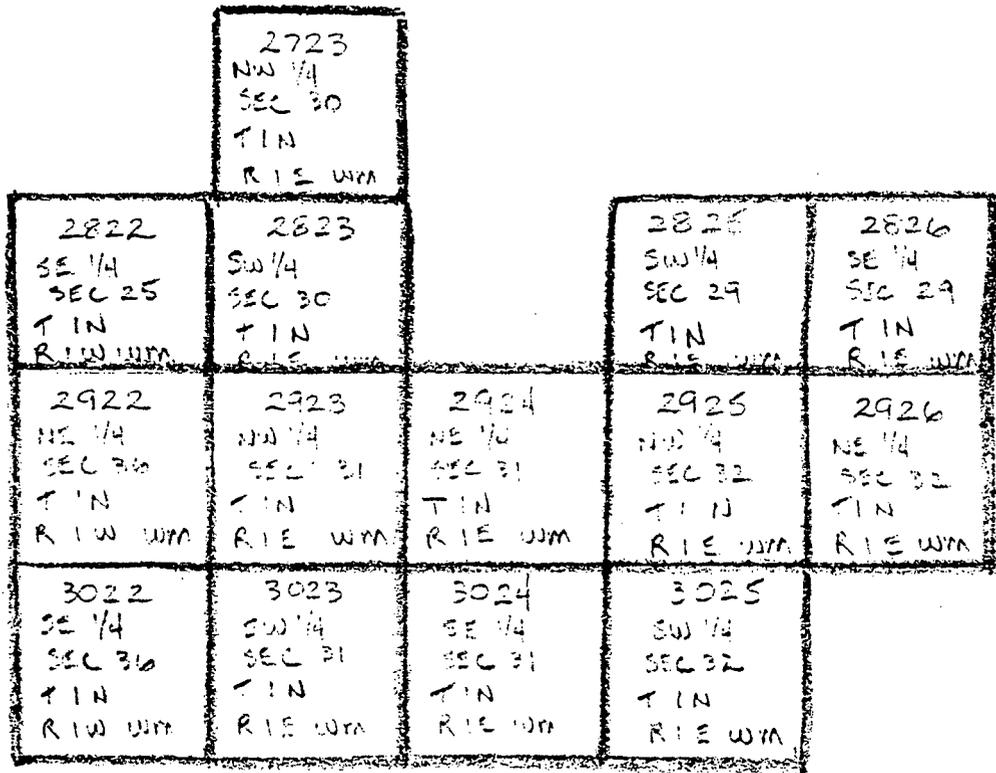
We will notify the landowner of the stream class change. This will give us 30 days with the 100' buffer unless he waives or accepts the change - then we will treat as a class I.

I suggest that Dave Michael look at the area to determine stability and it is a high risk site. If a high risk then we

Ex 2

need to get a written plan.

MAP INDICATION



ON THESE MAPS $\approx 294'$ / INCH

SECTIONS 1 - 16 & 33 - 44 are $\approx 147'$ IN LENGTH

SECTIONS 17 - 32 are $\approx 119'$ IN LENGTH



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Creek Tributary to Willamette

Date October 24, 1986 Surveyor Bowers Dumont

Location: T 1 N R 1 E WM Sec 30 RM CITY MAP 2B23 SW 1/4 SEC 30 STREAM SURVEY SECT. 1 D

Description starting point Property line 1/4 mile up Thompson Rd.

Description ending point County land 100 feet downstream from private property line.

Inventory techniques Electro shocker
400 V 60 Hz

Angler access (describe) and evidence of use
None

Section description (entire section)

Total length 100 feet
Temperature 51°F
Flow (cfs) 1/2
Velocity (fps) -
Gradient steep
Conductivity -

(OVER)

General habitat statement Streambank excessive cutbank stabilized with tree roots & brush. Bottom mostly silt and hallock. Small amount of spawning gravel. Enough for about 3 redd. Culvert on private property 150 feet upstream is a barrier. Denied access to sample the private property.

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Cover		Number of fish
				Smooth	Broken	Bank	Submerged	
A	Pool	6-2-2	Detritus	60	40	Willows	None	12
		6-2-1	Det/ballock, gravel	20	80	Brush/Air	None	Spawc retained 15

Detail Habitat Description



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Creek Tributary to Willamette

Date October 24, 1986 Surveyor Bowers, Dumont

Location: T 1 N R 1 E Sec NW 1/4 SEC 31 RM CITY MAP 2923 STREAM SURVEY SECT 1A

Description starting point Pool at Ralph Rosenlund Residence 5830 NW Cornell Rd
Description ending point 100 feet upstream

Inventory techniques Electroshocker
400 V 60 Hz

Angler access (describe) and evidence of use
None

Section description (entire section)

Total length 100 feet
Temperature 51°F
Flow (cfs) 1
Velocity (fps) —
Gradient Steep
Conductivity —

General habitat statement Steep gradient, shade 80%. Silty gravel sparse. Very little woody structure. Very little cover except for seasonally constructed pools.

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Bank	Cover		Number of fish
				Smooth	Broken		Surface	Submerged	
A	Pool	6-2-2	Detritus	60	40	Willows	None	None	12
A	Pool	10-8-2	Bedrock	100	0	Mud/fir	None	Rock	
B	Riffle	3-5	subgravel	30	70	Mud/fir	None	Rock	18

Detail Habitat Description



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Baldy Creek Tributary to Willamette

Date October 24, 1986 Surveyor Bowers, Dumont

Location: T 1 N R ~~1 E~~ Sec ~~4~~ SE 1/4 SEC 29 RM CITY MAP 2826
STREAM SURVEY SECT. 45

Description starting point Pool below
cement falls between trash racks NW Thurman St.

Description ending point Same as above

Inventory techniques Electroshocker

400 V 100 Hz

Angler access (describe) and evidence of use

None

Section description (entire section)

Total length 20 feet
 Temperature 51°
 Flow (cfs) 2
 Velocity (fps) -
 Gradient -
 Conductivity -

(OVER)

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Bank	Cover		Number of fish
				Smooth	Broken		Willows	Submerged	
A	Pool	6-2-2	Detritus	60	40	Willows	None	None	12
A	Pool	20-52	mud/cobble	100	0	Cement	None	Cement/cobble	8

Detail Habitat Description

General habitat statement Silt/cobble. No shade. Low summer flow.
Cement barrier upstream and down stream of sample area prohibits
upstream movement. Heavy beaver use.



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Creek Tributary to Willamette

Date October 24, 1986 Surveyor Bowers, Dumont

Location: T 1 N R ~~3 E~~ 1 E WM CITY MAP 2925
Sec. NW 1/4 SEC 32 RM STREAM SURVEY SECT 27

Description starting point Basalt channel about 1/2 mile above NW Thurmon St. (about 300 yds upstream of 2nd creek crossing.

Description ending point 100 ft downstream.

Inventory techniques Electroshocker

Angler access (describe) and evidence of use City Park.

Section description (entire section)

Total length 100'
Temperature 51°
Flow (cfs) 2
Velocity (fps) -
Gradient steep
Conductivity -

(OVER)

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface		Cover			Number of fish
				Smooth	Broken (%)	Bank Willows	Surface	Submerged	
A	Pool	6-2-2	Detritus	60	40	maple/bank	None	None	12
A	Pool	40-4-1	bedrock/wood	90	10	maple/bank	maple/bank	rock	15

General habitat statement 80% shade. Stable banks of maple, fir, alder, brush. Mostly bedrock channel. Heavy silt. Rearing area.

Detail Habitat Description



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Creek Tributary to Willamette

Date October 24, 1986 Surveyor Bowers, Dumont

Location: T 1N R 2E ^{1 E WM} Sec UNK ^{NE 1/4 SEC 32} ^{SE 1/4 SEC 29 RM} CITY MAP 2925 MY SECTION 44
CITY MAP 2826

Description starting point Trash rack at lower end of McCleay Park near NW Thurman St.
Description ending point 100 feet upstream

Inventory techniques Electro shocker

400 V 100 Hz

Angler access (describe) and evidence of use

City park. Some angling. Use unknown.

Section description (entire section)

Total length 100 ft
Temperature 51°
Flow (cfs) 2
Velocity (fps) -
Gradient flat
Conductivity -

(OVER)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Cover		Number of fish	
				Smooth	Broken	Bank Willows	Surface Submerged		
A	Pool	6-2-2	Detritus	60	40		None	None	12
A	Pool	100-10-2	mid/rock	100	0	dirty grass	None	Cobble	21

Detail Habitat Description

General habitat statement Large shallow pool created by heavy equipment removing trash from in front of trash rack. Upper end has cobble rubble bottom.



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Creek Tributary to Willamette

Date 9/25/87 Surveyor Bowers, Dumont

Location: T 1N R 1E Sec 32 RM _____

Description starting point 200ft upstream from

1st footbridge in lower McCleay Park

Description ending point 300 ft upstream

from the 1st footbridge

Inventory techniques Back pack electrofisher

Angler access (describe) and evidence of use

Light

Section description (entire section)

Total length 100 ft

Temperature 50

Flow (cfs) 1 cfs

Velocity (fps) —

Gradient moderate

Conductivity N/A

General habitat statement Mix of bedrock and cobble. Stable banks 80% shale. No spawning gravel. High silt load at times.

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Bank	Cover		Number of fish
				Smooth	Broken		Surface	Submerged	
A	Pool	6-2-2	Detritus	60	40	Willows	None	None	12
A	Pool	4/12	leaves mud	80	20	Gravel	algae brush	rock	13

Detail Habitat Description



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Baldy Creek Tributary to Willamette

Date 9/25/87 Surveyor Bowers, Dumont

Location: T 1N R 1E Sec 32 RM _____

Description starting point large overhanging log
~ 1/2 mi upstream from McLary Park entrance

Description ending point 100' upstream
from starting point

Inventory techniques Backpack Electrofisher

Angler access (describe) and evidence of use
light

Section description (entire section)

Total length 100'
Temperature 50
Flow (cfs) 1
Velocity (fps) —
Gradient mod
Conductivity —

General habitat statement Gravel gravel, silt, shade of stream
gravelly for cedar. Rock bottom for fish. Backpack used
little spawning gravel. Bottom heavily silted.

(example)

Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Cover			Number of fish
				Smooth	Broken	Bank	Surface	Submerged	
A	Pool	6-2-2	Detritus	60	40	Willows	None	None	12

Detail Habitat Description



OREGON DEPARTMENT OF FISH AND WILDLIFE

FISH INVENTORY DATA

Stream Balch Cr. Tributary to Willamette

Date 9/25/87 Surveyor Bowers, Dumont

Location: T 1N R 1E Sec 32 RM _____

Description starting point 100' below Cornell

Rd crossing at Audubon

Description ending point 400 Road.

Inventory techniques Backpack Electrofisher

Angler access (describe) and evidence of use
light

Section description (entire section)

Total length 100'
 Temperature 50
 Flow (cfs) 1
 Velocity (fps) 1
 Gradient 1
 Conductivity 1

(OVER)

(example)

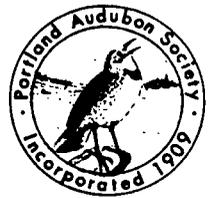
Sub-section	Type	L-W-D	Bottom type	Water Surface (%)		Cover			Number of fish
				Smooth	Broken	Bank Willows	Surface	Submerged	
A	Pool	6-2-2	Detritus	60	40		None	None	17

Detail Habitat Description

General habitat statement 80% Shady mixed conifer & deciduous.
 Audubon silt load. Some ~~logs~~ logs. 400 D. Audubon water diversion
 at culvert is temp barrier. No spawning gravel. Subbank
 on north side of stream.

Audubon Society of Portland

5151 N.W. Cornell Road
Portland, Oregon 97210
503-292-6855



District Forester
Oregon Dept. of Forestry
801 Gales Creek Road
Forest Grove, OR 97116-1199

Dear Sir:

Enclosed is a signed statement that the Portland Audubon Society has no objection to reclassification of Balch Creek from Class 2 to Class 1.

Please note, however, that the street address for the Audubon Society is:

5151 N.W. Cornell Road

not 5500 N.W. Cornell Road.

Sincerely,

Claire A. Puchy
Executive Director

Encl.
cap

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NOTICE OF STREAM CLASSIFICATION CHANGE

DATE ISSUED: SEP, 3, 1987

LANDOWNER: AUDUBON SOCIETY
Name

5500 N.W. CORNELL RD.
Street Address

PORTLAND OREGON 97210
City, State and Zip Code

Pursuant to the Oregon Forest Practices Act and Oregon Administrative Rule 629-24-116, the State Forester hereby provides written notice that the stream described below will be reclassified:

WATER BODY: BALCH CREEK TRIBUTARY TO: WILLAMETTE RIVER

LOCATION: Section 31 Township 1N Range 1E County MULTNOMAH

Changed from Class 2 to Class 1 for ENTIRE STREAM (feet, miles) on that portion indicated on the attached map.

REASON FOR RECLASSIFICATION: FLSA REARING & MIGRATION

Landowners immediately adjoining portions of waters to be reclassified may request reconsideration of this reclassification within thirty (30) days from the date of this notice.

This reclassification becomes effective:

- (a) At the end of thirty (30) days from the notice, if no landowner request review;
- (b) Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the waters to be reclassified; or
- (c) Upon denial of reconsideration by the State Forester.

No forest operation shall take place within one hundred (100) feet of a water proposed to be reclassified until the reclassification becomes effective or is rescinded upon reconsideration by the State Forester.

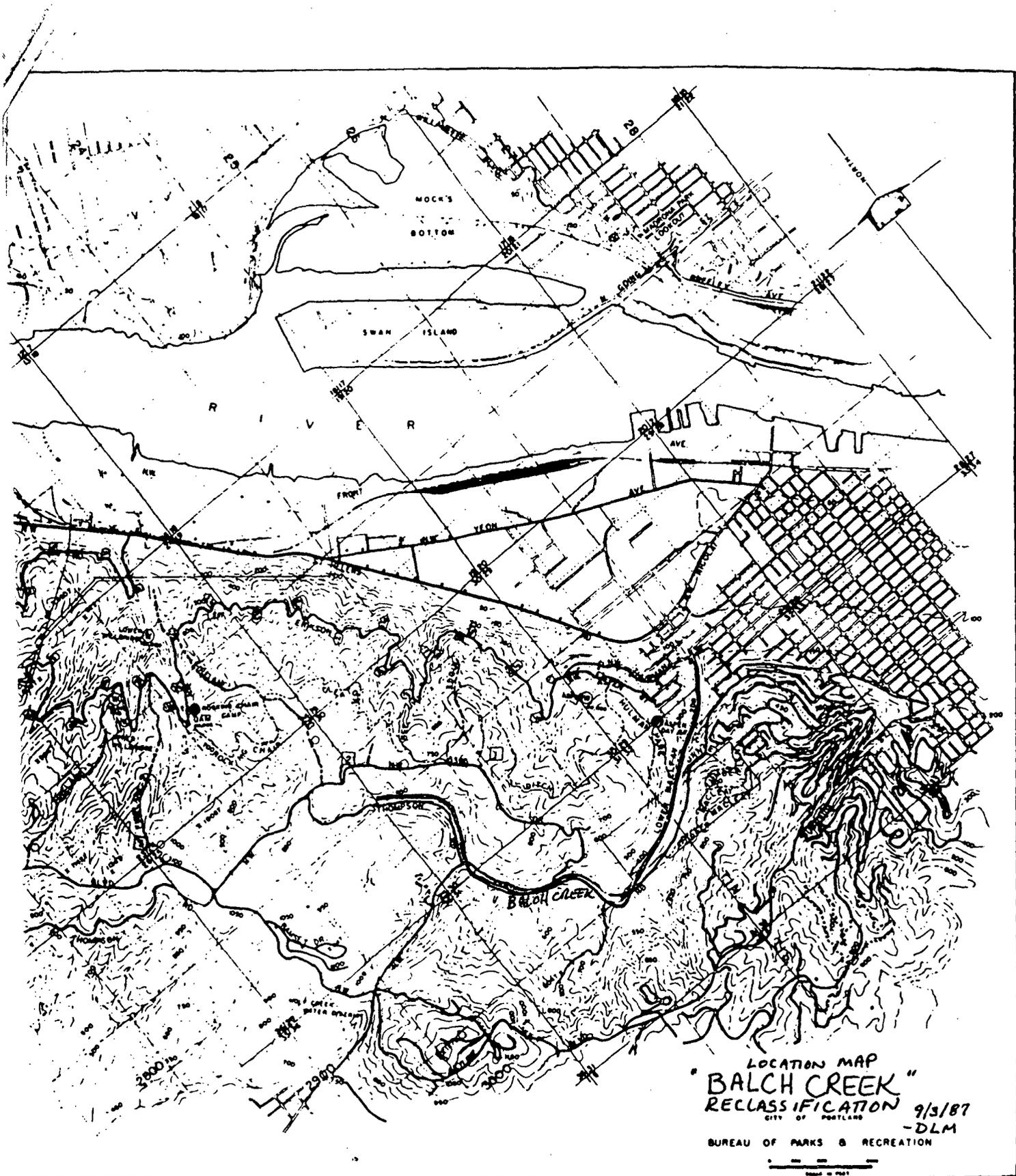
Landowner(s) may waive reconsideration of stream reclassification by providing their signature below and returning this notice.

Claire A. Bushy
Executive Director 9-8-87

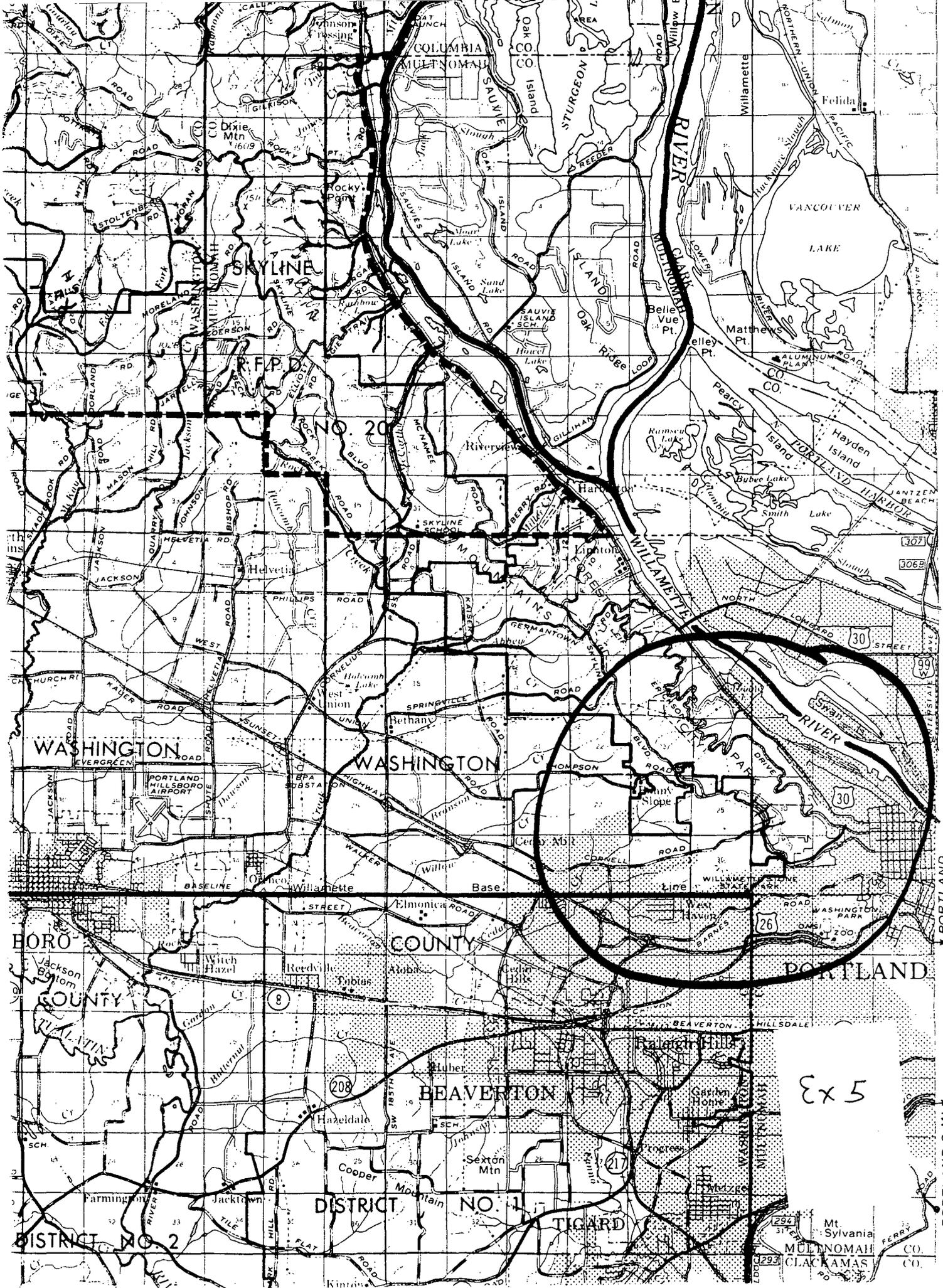
Landowner Signature & Date

District

District Forester's Signature



- As marked on original (Class I) notice dated 9/3/87
 mpx
 8/28/92



N.
T. 2 N.
T. 1 N.
T. 1 S.
PORTLAND 3 MI. ↓

Ex 5

Fishman Environmental Services

434 NW Sixth Avenue • Suite 304

Portland, OR 97209-3600

503-224-0333



September 21, 1992

Preston, Thorgrimson,
Shidler, Gates and Ellis
3200 U.S. Bancorp Tower
111 S.W. Fifth Ave.
Portland, OR 97204-3688
ATTN: Dan Kearns

Dear Dan:

At your request, Fishman Environmental Services evaluated the Thompson Fork of Balch Creek for the presence of fish and fish habitat and the potential effects to the stream upon removal of a culvert. A population of cutthroat trout is known to inhabit Balch Creek. Rainbow trout may also have been introduced into Balch Creek from stocking and their descendants may have hybridized with the cutthroat trout. The following report is based on observations made by the author on September 20, 1992, during a survey from the pool below the culvert at Cornell Road to about one-half miles upstream and includes recommendations regarding removal of a culvert. Commentary on the letter dated August 10, 1992, by staff of CH2M Hill regarding the fish habitat of a limited stretch of Thompson Fork is also provided. The following report includes professional opinions and judgments based on data collected and incidental observations. I am a fish biologist employed by Fishman Environmental Services. I have a B.S. and M.S. in Fisheries Sciences. I worked several years for the Oregon Dept. of Fish and Wildlife and the U.S. Forest Service in identifying salmonids and evaluating fish habitat. Presently, I conduct natural resource evaluations and impact assessments of aquatic and terrestrial habitats for Fishman Environmental Services.

The pool just below the culvert under Cornell Road is about 10 ft. by 4 ft. and 2 ft. deep. Two trout about 7 in. long were observed in this pool. One was obviously a cutthroat. The culvert under Cornell Road is about 3 ft. in diameter, and the lower edge of the culvert was within one foot of the pool surface. The property immediately upstream of the Cornell Road culvert that includes Thompson Fork and the original floodplain on the west bank is owned by the City of Portland. This property was an old homesite dating back to the 1930's. The stream channel was walked from the point farthest downstream that was still accessible through the blackberry bushes upstream for about 300 feet. The Thompson Fork channel appears to have been ditched and straightened during the early period (approximately 50 years ago) of the homesite. The stream is confined between rock walls about 3.5 ft. high for about 300 ft. of its length. Pools, riffles, and runs have become reestablished within the rock walled section. The channel averaged about 2.5 ft. wide throughout the site. The water level is extremely low at this time of year after several years of drought. Two trout about 4 in. long were observed in a pool upstream of Cornell Road that was approximately 8 ft. long and 8 in. deep at maximum depth. Two more trout about 2.5 in. and 4 in. long were observed in a pool further upstream that was about 12 ft. long and 5 in. deep at maximum depth. These four trout were too small and escaped to cover to quickly for me to determine whether they were cutthroat or rainbow hybrids. Other small pools alternated with riffles and runs for the entire length of stream surveyed.

E x

6

The substrate of the pools and riffles was composed of 60% gravels greater than 5 in. diameter and 40% gravels less than 5 in. diameter. More silt is deposited in the pools than on the riffles. In the riffles, about 10% of the smaller gravels were smaller than the size of a pea. Substrate of some of the runs is exposed bedrock. The size and composition of the substrate in the riffles appeared to be suitable for aquatic insects attachment although this was not evaluated.

Second growth forest consisting mainly of red alders and Douglas fir approximately 50 ft. tall is well established on the homesite and grows adjacent to the rock walls along the stream. Upstream of the rock-lined section for about 200 ft., the forest grows to the edge of bank. The shrub layer consists of Indian plum, red huckleberry, salmonberry, vine maple, and Himalayan blackberry. The dominant groundcover is stinging nettle, sword fern, fringe cup, ground ivy, and English ivy. The forest provides large and small woody debris to the stream that serves as cover for fish. In-stream cover observed during the survey included a decomposing stump, fallen limbs, smaller branches, and crevices in the rock walls lining both sides of the stream.

The stream survey conducted by CH2M Hill on August 4, 1992, was limited to the property of Mr. McKenzie and the properties of his two neighbors upstream and downstream of his property. This section of Thompson Fork has been impacted more recently by residential development and stream crossings than the old homesite property owned by the City. The author did not enter the private property to survey this section, but certain characteristics were visible from the road. Trees and shrubs have been removed and replaced with lawns to the edge of bank. Some man-made structures and debris have been placed in the channel or along the banks. Sources of large woody debris are scarce or lacking in the stretch of stream flanked by houses. The CH2M Hill letter indicated that the banks within this stretch were not very stable. It is the author's opinion that bank erosion in this stretch is contributing to the silt deposits found downstream in the lower section. The CH2M Hill letter concluded that the section of stream near the residences did not contain fish or significant fish habitat. However, that survey was conducted in August after four years of drought and cannot be relied upon as a predictor of what conditions might be at higher flows. A stream survey to more accurately assess fish presence and habitat should be conducted during periods of higher flows.

I found fish habitat and fish present in the section below the houses and upstream of Cornell Road. Culverts that are impassible at low water may be passable at higher flows, and the fish that I observed on the City property downstream may move upstream through the section flanked by houses.

SUMMARY

A total of six trout were identified in the surveyed section. Four of the trout were found upstream of Cornell Road in the Thompson Fork. It is the opinion of the author that fish habitat is present in Thompson Fork from Cornell Road upstream for a distance of at least 500 ft. or more and that fish do move up from Balch Creek through the culvert under Cornell Road to use the Thompson Fork for feeding and rearing and possibly spawning. Any activities that produce erosion in the upstream section are contributing to silt deposition in the lower section and, ultimately, to Balch Creek. This input of silt will decrease the habitat quality and quantity for the cutthroat trout and other fish species using the lower section of Thompson Fork and has a

cumulative effect on the habitat quality of Balch Creek.

The measures that should be taken to minimize additional silt from entering the stream if a culvert and fill are removed include:

- undertake the work at low flow period and coordinate the in-stream work with the Ore. Dept. of Fish and Wildlife
- place silt fencing and straw bales tightly along the banks to contain loose soil,
- revegetate all disturbed soils along the banks with groundcover and shrubs of native plant species,
- monitor the activities to ensure that erosion control measures are effective and loose material does not continue to enter the channel.

If you have any questions, please give me a call.

Sincerely,



Janet Burcham
Fish Biologist

August 25, 1992

Commissioner Sharron Kelley
1120 S. W. 5th
Portland, Oregon
97204

Dear Commissioner Kelley,

I think you were totally correct today, August 25th, in opposing the motion which would open the record to new evidence. I, along with you, fear it may well open Pandora's Box for future hearings by setting this precedent. This is especially true since the "new" evidence is based on incorrect assumptions. Mr. McKenzie referred to the Thompson section of Balch Creek as a tributary. Wrong. The ODFW clearly states this section to be the main stem of the creek, all of which carries the Class 1 classification. On the other hand the Dept. of Forestry map has only an arbitrary blue line drawn on their topography map (which has been open to the public for several years) and can offer no evidence as to why they made a determination which differs from ODFW. In fact there seems to be no documentation at all in Forest Grove concerning Balch Creek. I have repeatedly asked for it.

In the meantime, while the appeal is pending, Mr. McKenzie is continuing to build up and extend his road, install a sand filter, and violate the Hillside Erosion Control Ordinance by permitting soil to spill over practically into the creek, and is practicing no mitigation whatsoever.

Yes, we desperately need more protections for Balch Creek. And the sooner the better. Yet what is just as desperately needed is for the County Planners to implement the protections which are currently in place. Plus, we have pointed out several zoning violations, many still on-going, which aren't rectified, and no fines have been or are being assessed. This makes it seem to be a game by planner and developer alike to skirt the issues.

So it goes. At any rate we will see you in September.

Sincerely,

Nancy Rosenlund

Nancy Rosenlund
Friends of Balch Creek

cc: Commissioner McCoy
Commissioner Anderson
Commissioner Bauman
Commissioner Hansen

*Planning Division
Received 9/23/92
M. Han*

Rec'd @
BCC Hearing
9/22/92

Testimony regarding the September 22nd hearing concerning the illegal culvert in Balch Creek.

SEC 6-91a
HDP 4-91a

Commissioners:

There is a bit of history regarding the culvert that we feel you should be aware of. When Mr. Mackenzie applied for a permit on his property at 6125 NW Thompson Road his plans included a bridge to cross Balch Creek. Molly O'Reilly and I testified at the hearing that we were pleased about the bridge since a bridge was the only acceptable way to cross the creek. At recent permit hearings in the city a bridge had been among the conditions of approval, so we assumed this was also true in Mr. Mackenzie's case. We were very surprised to learn that what a person goes before the Planning Commission with, and gets approval for, is not always what he has to do, or means to do. The members of the Planning Commission seemed as surprised as we were. This is a serious flaw in the process.

At the hearing both Ms. O'Reilly and myself told Mr. Mackenzie that we would be more than happy to help him in any way we could. We surveyed the market for various methods of economical bridge building and found that most types were in the \$4000.00 arena. These methods are widely used on farms and in East County. We talked to Mr. Mackenzie several times to offer ideas and aid.

Then a couple of weeks after October 1st (which is the deadline for any "land disturbance" in the Balch Creek Watershed according to the Balch Creek Watershed Erosion Control Ordinance) a culvert appeared in the creek instead of the bridge over it. And it wasn't even a box culvert which would have left the stream bed open. Mr. Mackenzie's excuse was that the bridge was too costly and he didn't think to check into box culverts or even consult with the ODFW for their advice.

The Bureau of Environmental Services has taken over the management of the Balch Creek Watershed in conjunction with their wetland storm water control plans, and their concept also includes enhancement and preservation practices for fisheries and wildlife habitat in the entire Watershed. Their concept plans also include using bridges or box culverts exclusively. Their current Wetland Project will most likely require a box culvert replacement under Cornell Road. At present there are only two private landowners which still have culverts and the Friends of Balch Creek and the Friends of Forest Park have it on their agendas to apply for grant money to pay for their exchange.

Balch Creek is a Class 1 stream which extends up Thompson Road. This has always been considered the main stem with the

Cornell stem being one of the primary contributors. Fish have been seen up beyond the point where the stream crosses Thompson Road. An even in these severe drought conditions there are still pools of water up there. When we regain our normal rainfall patterns there will be the normal heavy flow and the fish will be able to move and thrive and multiply in the upper reaches of the stream again. We must protect their habitat.

The Friends of Balch Creek and The Friends of Forest Park are in full agreement that Mr. Mackenzie's culvert must be removed. The fact that it might make a mess for a few hours during removal is nothing compared to the long range damage it can cause. And there are other compelling reasons. The culvert is illegal! So, what is the use of having Planning Bureaus, Planning Commissions, ordinances and laws if they are allowed to be circumvented or ignored. People will just go about their business doing what they want, ordinance or no ordinance, permit or no permit, expecting nothing to happen because it is "already there!" There must be recourse and we certainly don't feel Mr. Mackenzie should be rewarded for his unwise behavior.

Nancy Rosenlund
Friends of Balch Creek
5830 NW Cornell Road
Portland, Oregon 97210

O R E G O N T R O U T
P.O. Box 19540 Portland Oregon 97219
246-7870

*Rec'd @ BCC
Hearing 9/22/92*

Multnomah County Commissioners
Multnomah County Courthouse
Portland Oregon

RE: Public commentary on Balch Creek fish habitat status. 9-22-92

Overview: Balch Creek, with its population of wild, native Cutthroat trout (*Oncorhynchus clarki*), is an uncommon and unique resource. Today it is very rare to find a functioning, native trout stream within the limits of a metro area the size of Portland.

Balch Creek has attracted considerable attention with many citizens and agencies actively engaging to protect and enhance this community asset.

Balch Creek's Cutthroat trout are the last viable population of wild, native trout within Portland.

Selected chronology:

1. Fishing regulations were enacted in 1990 closing Balch Creek to angling in order to "Protect a small, isolated, viable population of wild Cutthroat trout that are physically isolated in the stream above McCleay park." (ODFW)

"It is an isolated and sensitive fishery with high educational value." (Hooten '92, personal contact).

2. Last month, Oregon Trout in conjunction with Oregon Department of Fish & Wildlife constructed in-stream structures on Roselund's portion of stream to enhance its value to the Cutthroat trout. This project is located approximately 2000-feet downstream of the McKenzie property.

3. On September 19, 1992, I surveyed as much of the upper reaches of Balch Creek and the Thompson Fork as I could. A one-day collection permit was obtained from ODFW. This allowed me to catch, photograph and release a typical Cutthroat trout on the Roselund property. (See attached prints). My findings are as follows.

Findings:

* Confirming prior ODFW stream surveys, the Roselund stretch has a healthy population of native Cutthroat trout with all age classes present.

* The fork of Balch Creek along Thompson Road is the main-stem of this stream; it has the most water flowing through it.

* Confirming prior ODFW stream surveys, Cutthroat Trout were observed in the Thompson Road fork, on the Bureau of Environmental Services property.

* Five years of drought have greatly reduced the normal water flow, severely limiting suitable habitat.

* Water flows and pools were observed above the McKenzie property in proximity to the quarry site. Under more normal water conditions this reach would have suitable spawning and rearing habitat.

Summary in respect to Thompson Road fork of Balch Creek

The Thompson Road fork, being the main-stem of upper Balch Creek and delivering the greater quantity of water, is a primary and critical element of the Balch Creek ecosystem.

The Thompson Road fork provides clean water, nutrients, spawning gravels and potential habitat to the Balch Creek's population of Cutthroat trout.

The distribution of fish in this system will change as the annual flows vary. Cutthroat trout are spring spawners. Spawning coincides with higher water flows, allowing access to headwater reaches. Cutthroat have been observed to migrate upstream into small tributaries for spawning (Nicholas 1978). It is likely that during higher flows the trout will migrate into the uppermost reaches of the Thompson Fork beyond the McKenzie property.

The Thompson Fork contains suitable fish habitat. Even in this exceptional drought period Cutthroat can be observed in the Thompson Fork.

The Balch Creek population can be sustained only if measures are taken to protect the stream in total, including its headwater areas. The total fish-bearing mainstem is only about three miles in length and therefore has a very limited capacity to absorb and disperse negative impacts such as silt. Because Thompson Fork is the most significant water course of upper Balch Creek, degradation of this stretch, with ensuing downstream impacts, might very well eliminate these valuable, native trout from the watershed.

Oregon Board of Forestry, Administrative Rules, 629-24-101 (8)(a) defines Class I waters as "waters significant for, (B) Angling" or "(D) Spawning, rearing or migration of anadromous or game fish."

Until 1990 trout angling occurred in the Thompson Fork thus meeting above definition (B).

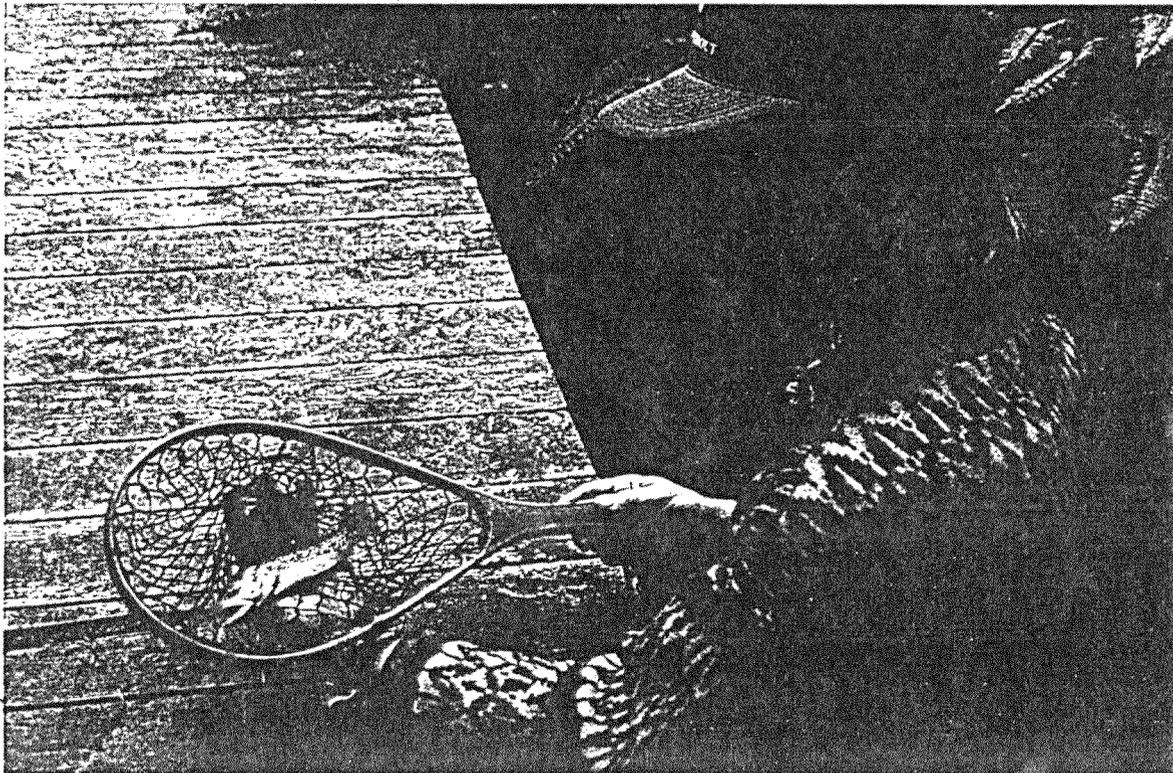
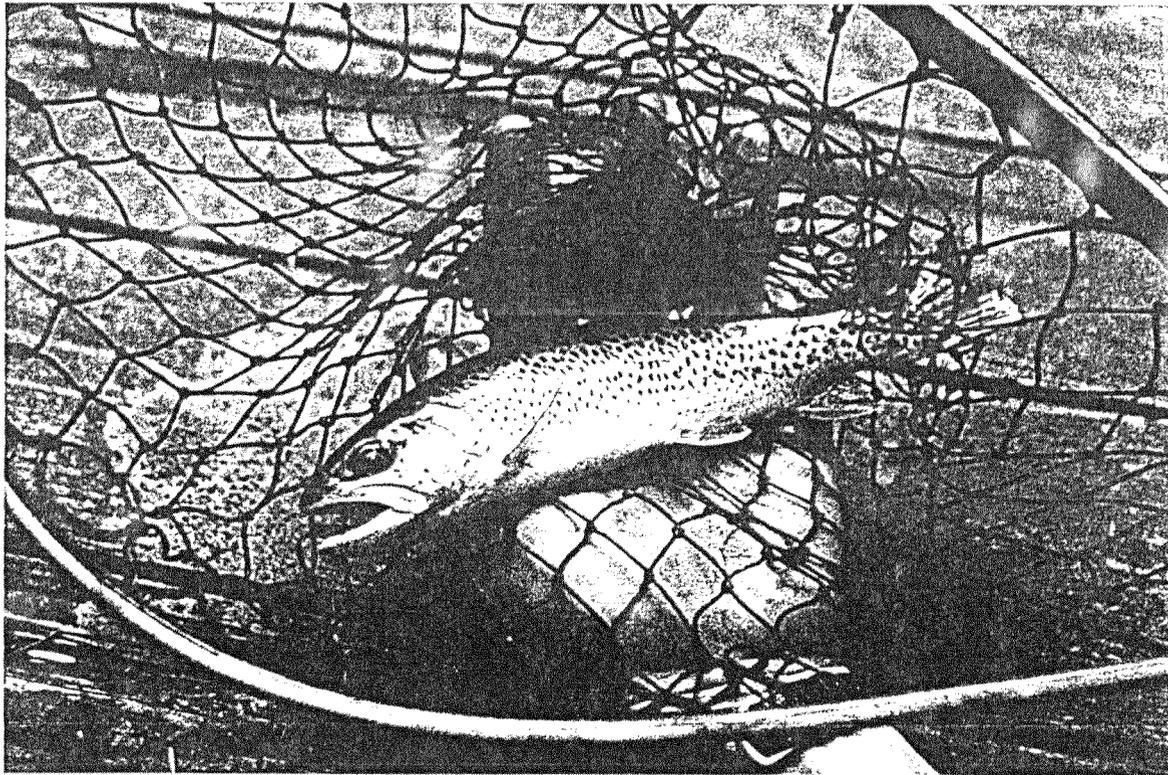
Presently, the Thompson Fork meets the above ODF definition (D) of Class I waters. Thompson Fork does contain Cutthroat trout, (a gamefish), and because the headwater reaches are essential to sustaining this unique population, Oregon Trout urges the Multnomah County Commissioners to support a Class I protective designation for this stream.


Gary Kish
Oregon Trout, 9-22-92.

OREGON TROUT
P.O. Box 19540 Portland Oregon 97219
246-7870

Two prints of a typical Balch Creek Cutthroat trout.

Caught and released on the Roselund property, September 19, 1992.



JAMES E. BARTELS
800 PACIFIC BUILDING
PORTLAND, OREGON 97204

September 25, 1992

Multnomah County Board of County
Commissioners
c/o Multnomah County Planning and Development
2115 SE Morrison
Portland, Oregon 97214

Re: Case No. ✓ SEC 6-91(a) / HDP 4-92a
File No. 10912-1

Dear Commissioners:

I live at 7144 NW Thompson Road in Multnomah County. I am writing to oppose the reclassification of a portion of the drainage for Balch Creek (in the area of NW Cornell and NW Thompson) from a Class II stream to a Class 1 stream.

I have reviewed the purported "Notice of Stream Classification Change" which is part of the record in this matter. I understand some interested persons claim this notice was sent in September 1987. We have lived at 7144 NW Thompson Road since early spring 1987. I keep track of notices which are sent to us affecting property in the area. We did not receive the September 3, 1987 notice.

The drainage area for Balch Creek¹ sought to be reclassified, as shown on the map attached to the purported September 1987 notice, does not touch our land. However, based on my observations, a significant portion of the area shown on the map north of Cornell and adjacent to Thompson Road, does not carry water year around. The only way fish could get that far up the "creek" would be if they grew legs and carried backpacks full of water. During much of the year there is

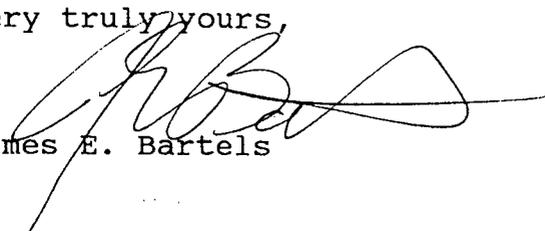
¹ It is not clear to me what the various interested parties and authorities consider to constitute Balch Creek. Sometimes one drainage is included, sometimes another, sometimes a third. None of the drainage swales on our property have water year around, and indeed most of them are dry for a longer period of the year than they are wet.

Multnomah County Board of County
September 25, 1992
Page 2

typically no flowing water in the upper area sought to be reclassified that could sustain fish.

I oppose the reclassification of the dry stream bed from a Class II to a Class I stream.

Very truly yours,



James E. Bartels

cc: Mr. Mark Hess
Multnomah County Planning

J:\CL1\JEB\10167JEB.LTR

RECEIVED
OCT - 1 1992

Multnomah County
Zoning Division

MULTNOMAH COUNTY COMMISSIONERS

APPEAL OF THE HEARINGS OFFICER) **APPLICANTS ANNOTATED**
DECISION OF SEC 6-91A AND HDP 4-91A) **RESPONSE TO OPPONENTS**
) **MEMORANDUM**

The applicant has highlighted and annotated certain parts of the Opponents Hearing Memorandum. The annotated and highlighted sections on the Opponents Memorandum are disputed by the Applicant. Comments are provided on the disputed information.

1. The hearings officer did not decide on the appropriateness of the SEC zone on the McKenzie property. SEC zones apply to areas within 100 feet of Class I streams. On page 10 of the Respondents memorandum, they state "prior to the fall of 1987, all of Balch Creek, including the Thompson Fork was a Class II stream." This is correct. The county staff observed a 1986 map which does not distinguish between Class I and Class II streams. By misreading this map, the county staff erroneously decided that the portion of the stream at the McKenzie property was Class I and therefore erroneously applied the SEC zone.

The Hearings officer did not make a determination on the applicability of the SEC zone, he merely assumes the county staff made the correct decision. On page 23 of the transcript of the 6/1/92 Hearings Office Meeting, McKenzie states; "What I question is whether that should be an SEC zone." The Hearings officer reply's "Well, that issue isn't before me." The Hearings officer clearly did not decide on the applicability of the SEC zone.

2. The lower 1/2 mile of Thompson Fork was not designated Class I stream by Oregon Department of Forestry. (See 9/2/92 letter from ODF (attachment 2) This letter states the State Forester maintains maps showing classification of waters in the state in each of the Department of Forestry field offices. The map covers the area that the field office has geographical responsibility. These maps represent the official classification of waters as they relate to forest operations regulated under the Forest Practices Act. Our maps indicate Balch Creek is Class I up stream to the Cornell and Thompson Road junction.

The "Thompson" branch of Balch Creek is Class II. This status currently applies and would have applied since October of 1987.

3. There was not a "subsequent attempt to down-grade the Thompson Fork". The Thompson tributary was never a Class I stream (see attachment 11) and therefore it could not be downgraded from Class I to Class II. It always has been Class II. A downgrade did not occur from an official classification, a downgrade was made from an inaccurate (and possibly invalid) reclassification notice.

The reclassification notice was sent by Dave Michael, Geotechnical Specialist. According to the State Forester Michael Simek, the reclassification notice was inaccurate. Also, the

Geotechnical Specialist does not have the same authority that the State Forester has, and the reclassification notice may have been invalid.

Nevertheless, an objection to the reclassification notice was submitted by an affected land owner (attachment 4). The affected landowners were Lowell and Virginia Hagen. Mr. and Mrs. Hagen received the original reclassification letter because they own property which adjoins the main stem of Balch Creek (below and above the Cornell and Thompson Road intersection). The Hagen's also own property on which the Cornell and Thompson tributary meet together. The lower portion of the Cornell and Thompson tributary and the main stem of Balch Creek below that intersection all flow through the Hagen's property. The lot is indicated as Tax Lot 23 of Lot B, Mountain View Park No. 1. Attachment 6 shows a map of this property and Attachment 7 shows the legal description for this lot, as well as the name of the property owners (Mr. and Mrs. Hagen).

The objection to reclassification letter from the Hagen's required review of the reclassification notice, for possible reconsideration of the attempted reclassification. By this time, Mike Simek returned from putting out forest fires in California, and resumed his normal duties in Oregon, including classification of state waters. In his response letter to the Hagen's, Mike Simek indicates that he reviewed the Balch Creek fisheries with Pat Keeley, Oregon Department of Fish and Wildlife's fish biologist. Mr. Simek also indicates in this letter that he discussed the October, 1986 electro shock survey (which was conducted by Wayne Bowers).

This survey indicated there was no fish on the Cornell tributary of Balch Creek. The Balch Creek Watershed Protection Plan shows the main branch of Balch Creek follows up Cornell Road and not Thompson. We will not submit the map from the Balch Creek Watershed Protection Plan since it has not been adopted by the county and it is debatable whether it is part of the record.

Oregon Department of Forestry indicate in their 9/2/92 letter to McKenzie and their 9/16/92 letter to Kearns, that the decision to maintain the Thompson Branch as Class II was done jointly between Oregon Department of Forestry and Oregon Department of Fish and Wildlife. The ODF 9/16/92 letter to Kearns indicates a logical break point for significant fish population was made.

4. The lower portion of Thompson Fork could not remain a Class I stream because it never was a Class I stream. Oregon Forest Practice Rules 629-24-116(4) states (4) the Reclassification becomes effective:
 - (a) At the end of thirty (30) days from notice if not landowner requests review;
 - (b) Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the waters to be reclassified; or
 - (c) Upon denial of reconsideration by the State Forester.

The State Forester did not deny reconsideration and all landowners did not submit written waiver of reconsideration; therefore the 9/28/87 letter from the Hagen's meriting review of the reclassification notice, validates the reconsideration of the inaccurate 9/3/87 notice of reclassification. Also, the 9/3/87 notice may have been invalid since it was not conducted by the State Forester.

The Thompson Branch has never been a Class I stream as indicated in the Oregon Department of Forestry 9/25/92 letter to McKenzie in their answer to question #1. (Attachment 11)

5. McKenzie is the applicant and the Appellant in this appeal. I don't believe the opponents are permitted to raise arguments contrary to the Hearing's Officer's Decision since they did not appeal the decision within the required ten days. In argument #2 starting at the bottom of the first page of the opponent's memorandum, the opponents are attempting to tie the SEC permit with the Conditional Use Permit, by arguing that the amended design posed a significant change in use and amount of land involved.
6. The Hearings officer did find that a hearing was required but not for the reason stated by the opponent. Refer to the bottom of page 5 and the top of page 6 of the Hearings officer's decision. A hearing was required because the SEC permit was amended and the opponents received their hearing on 6/1/92.

As the staff report stated, the use in question was access drive to lot which would have been needed for permitted or conditional use of the property. The use did not change with the amended design. Also there was no limit on the amount of land to be used with the bridge design. In fact some bridge designs could have used more land than the culvert design. Hence there was not a significant change in the amount of land involved with the amended design. The hearing was not required because of a significant change in the use or the amount of land involved in the amended design.

7. The Thompson Branch is not a Class I stream as indicated in the Oregon Department of Forestry (ODF) letters of 9/2/92, 9/16/92 and 9/25/92. See note #2.
8. We believe that the record does show that the culvert does meet all of the approval criteria.
9. The SEC permit was not issued in conjunction with the conditional use permit. See page 2 of the hearings officers decision. The SEC permit was approved in March, 1991 and the CUP became final on May 6, 1992. The SEC modification did not amend the CUP.
10. The record shows that the applicant sought out the review and approval of Multnomah County Planning Staff, United States Corps of Engineers, and Division of State lands before installing the culvert.
11. The Director is aware that the county can deny any permit application, fait accompli or not.

12. The hearings officer determined that the erosion control standards for the HDPO can be met. The HDP permit for the culvert can be issued since the SEC zone does not apply.
13. The FOFP contention is incorrect and since the HOD was not appealed by the opponents, they cannot challenge this part of the Hearings officer's decision (HOD).
14. The opponents did not appeal the HOD and therefore cannot challenge previous decisions of the HOD.
15. In their "Factual Overview", the opponents have given their incorrect interpretation of the history of this case. The opponent's version is contrary to the county staff and the hearings officer's interpretation.
16. The county staff, the applicant and the appellant agree that an SEC zone does not apply.
17. The Thompson Tributary is not now and never has been a Class I stream. See attachment 11. Therefore the SEC zone does not apply.
18. The SEC permit was not applied for in conjunction with a CUP.
19. The bridge was not an accessory structure to the conditionally allowed non-resource dwelling. The bridge was permitted as an access to the lot which was necessary for a conditional or permitted use of the property. The permitted forest or farming practices would also have required an access drive across the creek.
20. The driveway bridge was not an accessory structure to the house. See note #19.
21. The bridge was not required as a condition of approval.
22. The county staff and the applicant now assert that the SEC zone overlay does not apply and that the applicant did not violate the CUP or SEC permit. Regarding the HDP, the hearings officer had determined that all criteria can be met with the amended culvert design.
23. The opponents describe the alleged violation, as described by Nancy Rosenlund. The county staff and the hearings officer have confirmed after investigation that the CU 5-91 permit was not violated.
24. The county staff and applicant now agree that that SEC zone does not apply because the affected property is not on a Class I stream according to Oregon Forest Practice Rules. See notes 1 and 2.
25. The Thompson tributary is not now and never has been a class I stream. See notes 3 and 4 and attachment 11.
26. The official maps designate "Balch Creek" only on the portion of the stream below the Thompson and Cornell Road intersection. The Balch Creek watershed protection plan

shows the main stem of Balch Creek following up Cornell Road above Thompson Road, along the Cornell Tributary.

27. Please note the qualifying description of "significant for". This qualifier is to be determined by the State Forester.
30. The map does not show Class I streams, it shows all streams and does not distinguish between Class I and Class II streams.
31. The county did not consult with ODF for the official classification.
32. Attachment 4 shows a landowners request for review which was submitted within 30 days from the notice.
33. All landowners did not submit a written waiver and the state forester did not deny reconsideration.
34. Mr. Michael was not a state forester, his notice of reclassification was inaccurate and it was not based on the presence of a viable fish population.
35. Mr. Michael may not have followed procedural rules as he was not the State Forester.
36. Attachment 4 shows a review request from Lowell and Virginia Hagen who own land adjoining the main stem of Balch Creek, the Thompson Tributary and the Cornell Tributary.
37. There is no evidence in the record to indicate that either Mr. Michael or Mr. Simek surveyed the stream course. Mr. Simek was the State Forester at the time and Mr. Michael was not.
38. Mr. Simek's review of the stream course was more thorough and more accurate than Mr. Michael's.
39. Mr. Simek's review of the stream course included reviewing the 1986 Wayne Bowers survey with ODFW Fish Biologist Pat Keeley. The survey indicated that there was a culvert that was impassible by fish, 150 feet upstream of the most upstream survey location. This culvert is downstream of the McKenzie property.
40. Simek did not declassify the Thompson Tributary. A joint decision with ODFW determined a logical break point for significant fish population (see Attachment 9). The reclassification of Thompson Branch never became effective as it was reconsidered before the 30 day waiting period had expired.
41. Thompson Branch never was a Class I stream. (see attachment 11)
42. The reconsideration was a joint decision with ODFW based on Oregon Forest Practice Rules.

43. Attachment 4 shows adjoining property owner objection letter.
44. Thompson Branch was not declassified.
45. Opponents assertions of Mr. Simek's admissions are incorrect.
46. Mr. Simek's response letter to the Hagen's of 10/5/87 (attachment 8) document the reconsideration of the reclassification.
47. In challenging other development, the opponents have called the Cornell Branch the main stem of Balch Creek. Apparently the main stem of Balch Creek will vary depending on the target of the opponents. Balch Creek Watershed Protection Plan shows Balch Creek following up the Cornell Branch. Nevertheless, the Hagen's own property on both sides of the main stem of Balch Creek below and above the Thompson & Cornell Road intersection.
48. There is only one stream classification map called the Resource Map. It is the official map for classification of state waters. The "old map section" that the opponents refer to is actually an unofficial marked up xerox copy of the official map. The marked up version never became effective. The marked up version was sent out with the reclassification notice and was reconsidered before it became effective.
49. There is no evidence to show that Exhibit 5 of the opponents memorandum was ever an official map. It appears to be part of the inaccurate reclassification notice which never became effective.
50. According to Tom Savage, the Thompson Branch is officially registered as a Class II stream. This is according to the continually updated official resource map.
51. There is insufficient evidence to show that Mr. Simek failed to follow any of the procedures required by OAR 629-24-116. (see note #4)
52. Thompson Branch was never a Class I stream. (See attachment 11, question #1)
53. Mr. Simek's actions were not without authority.
54. Mr. Michael was not a state forester at the time of his reclassification notice and did not have the training of a state forester. His notice was inaccurate and may have been invalid.
55. See note #51.
56. The significance of the stream for fish habitat is determined by the state forester. The lack of significant fish habitat on the subject property was confirmed by the CH2M Hill survey of 8/10/92.

57. Gary Kish has admitted he is not a biologist, and neither is he a fish expert. His report cannot be considered expert testimony. His oral testimony at the hearing indicated the fish barrier downstream from my property prohibited fish passage.
58. The lower segment of the Thompson Branch studied by Janet Burcham on Sunday, 9/21/92 was a couple hundred feet downstream from the McKenzie culvert. ODFW and CH2M Hill have determined there is a barrier to fish migration between this study area and the McKenzie property. Also the creek has been dry for a couple months less than 100 yards upstream from the McKenzie property. The study found less than five fish over a stretch of 500 feet on the Thompson Tributary. The study indicated that trout may have been planted in this portion of the creek and it was not determined whether the fish found in the study were planted or native, rainbow or cutthroat trout. Janet Burcham did not comment on the barrier between the study area where fish were found, and the McKenzie property. Burcham editorializes on the effects of bank erosion on an area that she did not study. ODFW has stated in their 3/18/92 letter that the effects of the culvert installation were short term and not cumulative.
59. The conclusion does not take into account the fish barrier downstream from the McKenzie property.
60. This opinion is contrary to the joint determination of Oregon Department of Forestry and Oregon Department of Fish and Wildlife for the entire 1/2 mile section of Thompson Tributary.
64. The SEC does not apply to the lower 1/2 mile of Thompson Tributary and the applicants property is not located on a Class I stream section.
65. The hearings officer did not make a determination on the applicability of the SEC zone.
66. See notes #5 and #6.
67. See note #9.
68. The hearings officer correctly found that a proposed amendment to the SEC did not require an amendment to the CUP. This decision was not appealed by the opponents.
69. The opponents have misinterpreted MCC 11.15.8240(E). None of the four items in this code were violated. Also see notes #5 and #6.
70. A hearing was required under MCC 11.15.6414 and not under MCC 11.15.8240(E).
71. The opponents have veered away from the HOD. Also see notes #5 and #6.
76. The opponents have already received their hearing.
77. The director's decision had incorrectly required the SEC overlay. The director now asserts that the SEC zone does not apply.

79. The applicant believed in good faith the county staff's mistaken assertion that the SEC zone applied to the applicant's property. The applicant questioned the applicability of the SEC zone to his property, and the hearings officer denied further review on the applicability of the SEC zone. It was not until after the hearings officer meeting that the county staff had advised the applicant that the ODF was the official registry of stream classification. Only after this point was the applicant able to confirm that the affected property was not within 100 feet of a Class I stream; and that the SEC zone would therefore not apply.
80. The SEC zone was inaccurately applied to the applicant's property. since the SEC zone no longer applies, the SEC criteria are irrelevant. Nevertheless we would still like to respond to the opponents memorandum. We believe the record does contain substantial evidence to show that the SEC criteria can be met with the amended design.
81. The 9/16/92 letter to Kearns (Attachment 9) indicate that ODF and ODFW made a joint decision on a logical break point for significant fish population which maintained the Thompson Tributary as a Class II stream. The hearings officer's decision implies that because there is a significant population of fish in the main stem of Balch Creek below the Thompson and Cornell intersection, there must also be a significant habitat much further upstream. His decision was based on the erroneous assumption that the Thompson Tributary was a Class I stream. It also did not take into consideration the fish barrier downstream from the McKenzie property.
82. The City of Portland comment was not an official statement from the City but was the individual opinion of a city employee who has since apologized to me for relying on hearsay to make inaccurate statements which he has since retracted.
84. Criteria G requires that significant habitats shall be protected.
85. Insignificant impacts to insignificant habitat does not violate Criteria G.
86. The hearings officer incorrectly made a determination of the significance of the habitat based on the erroneous information that the affected portion of the stream was a Class I stream.
87. The Bowers survey was taken more than a couple hundred feet downstream from the McKenzie culvert and downstream from a fish barrier on property below the applicants property. ODF and ODFW took the Bowers survey into consideration when they determined the Thompson Branch would remain Class II based on significant fish population.
88. The natural vegetation had been long gone before the culvert was installed. Previous owners of the property have allowed the natural vegetation to be destroyed. The culvert and fill had covered only replanted vegetation including Dwarf Grass and Red Fescue. Pictures in the record will demonstrate that the natural vegetation was not destroyed with the amended design. The ODFW 3/18/92 letter states the impact from the culvert installation is short-term and not cumulative.

90. According to BES, culverts will preserve water quality. Also, the overflow and natural functions are protected by oversizing the culvert.
91. There are no fragile or endangered plant habitat valued for specific vegetative features that have not been protected. Under the hearings officer's interpretation, not a single blade of grass would be allowed to be destroyed for the bridge or culvert. His interpretation is incorrect.
92. The Balch Creek Watershed Protection Plan has not been adopted by the county.
93. See note #92.
94. The opponents logic here is incorrect.
97. The Balch Creek Watershed Protection Plan does not contain information relative to "stream classification" of the Thompson Branch.
98. The applicant's property does not abut a stream legally designated as a Class I water by ODF. (See notes #1 and #2)
99. Thompson Branch could not have been changed from Class I to Class II because it never was a Class I stream ever. (See notes #3 and #4)
100. The opponent is not permitted to challenge the 1991 CUP. (See notes #5 and #6)
101. The amended design modification does not violate the mandatory approval criteria. (See notes 80-92)
102. The hearings officer's decision is incorrect and should be nullified as it was based on the erroneous assumption that the Thompson Branch was a Class I stream. The planning department now agrees that the SEC zone does not apply and that an SEC permit was not required.
103. The affidavit from FOFP's attorney Daniel Kearns contradicts the evidence in the record. Refer to Notes 1-4 and 24-65. Mr. Kearns visited the Thompson Creek area for the first time on Sunday, 9/20/92.
104. The opponents supplied a letter from Janet Burcham dated 9/21/92. The letter outlines observations made of the Thompson Branch of Balch Creek on Sunday 9/20/92, two days before the Multnomah County Commissioners Hearing. The letter states:

"Rainbow trout may also have been introduced into Balch Creek from stocking."

We would like to ask what evidence the opponents have of:

1. Fish being planted into the Thompson Branch;
2. That the planted trout were rainbow or cutthroat trout; and

3. That the trout were from stocking versus relocated from another natural habitat.

Any Cutthroat Trout that have been relocated from the main stem of Balch Creek or other locations to the Thompson Tributary will impact the interpretation of future fish surveys.

ATTACHMENTS

1. Page 23 of transcript of 6/1/92 hearings office meeting.
2. 9/2/92 letter from ODF to McKenzie
3. Copy of Dave Michael's and Mike Simek's calling cards
4. Hagen's letter of review request
5. Mailing list from reclassification notice
6. Map showing Hagen property
7. Tax lot description
8. 10/5/87 ODF letter to Hagen's
9. 9/16/92 ODF letter to Kearns
10. ODF Forest Practice Rules Page 7
11. 9/25/92 ODF letter to McKenzie

MCKENZIE: The point is that if I was not told to get that extension, if I was told to get that extension it seemed to me I was getting approval from the county. Do you follow what I mean. I wouldn't have been told I needed an extension on that time frame; I was about to put it in.

GRILLO: I understand, but there is an application before me now that is on having to decide that question tonight and I have to INAUDIBLE.

MCKENZIE: Also, the appealing party states that in reference to Balch Creek where it is a Class I Stream; there is some question as to whether if a river or stream is listed as Class I, does that include all the tributaries that lead into that river? I have a copy from the Balch Creek Protection Plan that shows Balch Creek going up the Cornell Bridge. My property is over here; this is the Thompson Road over here and this is Cornell Road. It clearly shows Balch Creek going up to Cornell Bridge.

Now, there is an SEC zone for part of my property but not for all of my property. The SEC zone is within 100 feet of the creek. Where my house is going to be will not be in an SEC zone. The reason why there is an SEC zone there is because of the classification of the Class I Stream, however, the classification for a Class I Stream is that fish are to be 6-inches in length.

GRILLO: Wait a minute. The SEC zone shows up along your property....MIXED VOICES...on either side of the bridge.

MCKENZIE: Right. And my house will be outside of the SEC.

GRILLO: I understand, but the development that you are proposing to do, which has already been done, which we are viewing here, occurs within the boundaries of the SEC zone, so I'm not certain what the purpose of this is. MIXED VOICES. ...has already been established

MCKENZIE: What I question is whether that should be a SEC zone. When they're claiming...

GRILLO: Well, that issue isn't before me. Right now there is an SEC designation on your property and the wisdom of whether or not that should be there is a matter for the policy makers to make. They've already made that decision. Right now all I have

MCKENZIE: I spoke with a Jim Sjulín today and Jim was not aware that the county did not state that I violated the Conditional Use Permit. Jim thought I had violated the Conditional Use Permit, INAUDIBLE, but he was not aware that the county did not state that I violated the Conditional Use Permit. INAUDIBLE.

Mr. Rochlin had stated that cost and function are not a part of that criteria and I do believe it does state under one of the criteria that the function and cost are part of the criteria.

And the reference made to the bridge that was listed at the headwaters of Balch Creek on the Cornell Road Branch, again, I'm on the Thompson Branch over here.

Also there was comments made on a proposed wetland downstream from where I live. I have been told that they looked last year and they looked at over 60 sites for a proposed wetland and only about 7 of them had been approved. This proposed wetland has not received the zoning change it will require and has there has not been a public hearing on that proposal. So its not imminent; its not a done deal. There's still a lot that needs to happen before that wetland, that proposed wetland, can be instituted.

Oregon

DEPARTMENT OF
FORESTRY

September 2, 1992

Dan McKenzie
6125 NW Thompson Road
Portland, Oregon 97210

Columbia Unit



"STEWARDSHIP IN
FORESTRY"

Dear Mr. McKenzie:

Enclosed you will find the information you requested regarding the reclassification of Balch Creek in 1987.

The State Forester maintains maps showing classification of waters of the state in each of the Department of Forestry field offices. The map covers the area that the field office has geographic responsibility. These maps represent the official classification of waters as they relate to forest operations regulated under the Forest Practices Act. Our maps indicate Balch Creek is Class I upstream to the Cornell and Thompson Road junction. The "Thompson" branch of Balch Creek is Class II. This status currently applies and would have applied since October of 1987.

My recollection is that the original reclassification notice was not accurate and went too high into the watershed. In conjunction with the Department of Fish and Wildlife, our Department downgraded the "Thompson" branch portion to a Class II after reconsideration. This was done shortly after the first reclassification letter was sent out. Our official maps clearly indicate this downgrade. In addition, my response letter to Mr. and Mrs. Hagen, enclosed, also reflects this change. Inadvertently, this change was not presented to all adjacent landowners notified by the first reclassification notice.

Sincerely,

Michael Simek

Encl: Balch Cr. File



405 E Street
Columbia City, OR 971
(503) 397-2636
FAX (503) 397-6361

Oregon

DEPARTMENT OF
FORESTRY

Michael J. Simek
Forest Practices Forester
Forest Grove District

801 Gales Creek Road
Forest Grove, Oregon 97116
(503) 357-2191
FAX (503) 357-4548



Oregon

DEPARTMENT OF
FORESTRY

David L. Michael,
P.G., C.E.G.
Geotechnical Specialist
Northwest Oregon Area

801 Gales Creek Road
Forest Grove, Oregon 97116
(503) 357-2191
FAX (503) 357-4548
Home (503) 357-0238



Sept 28, 1987

Dear Sirs,

In regard to the letter we received on the reclassification of Balch Creek, I am very much opposed for several reasons:

1. In the summer time there is not enough water in the to sustain a number of fish.
2. The alder & maple trees grow very fast & dense, the underbrush also grows rapidly. If the surrounding area of the creek has to be left in its natural state as your letter indicates then the people living along the creek will not be able to subsist. The trees and underbrush need to be kept cut in order to get sunlight & let the soil dry out. The

creek needs tending all the time so that when the heavy rains come in the winter & early spring it does not flood its banks & cause destruction to our properties.

ation

3. With all the new development in the next few years proposed for this area I think it would be a waste of time & tax dollars. Put the fish in a creek where they will have more of a chance to survive.

Please take all of this into consideration & do not reclassifiy the creek. It is doing fine the way it is.

Thank you,
Mr & Mrs Lowell Hagen

Attachment #5

1/4/87

9/3/87

1/3/87

DL 11

VIA TELETYPE

L.A. HAGEN

6254 NW CORNELL ✓

P.O. 97210

K. McDEFT

6241 NW CORNELL ✓

P.O. 97210

Bo. CLEVINGER

NW THOMPSON ✓

97210

✓ removed 1/2/87

A. MICK

6121 NW THOMPSON ✓

DOUG RIPLEY

NW THOMPSON ✓

✓ removed 1/2/87

ALPHA House

5850 NW Cornell

97210

Mailing list from original mass mailing notice of 9/3/87

MAILED NOTICES

11-10/

9/3/87

-DLM

VIA NOTE FROM NANCY LORETTI

TS. INDIAN
5410 N.W. CORNELL RD ✓
PORTLAND, OR 97210

9/14/87
MSP

RONALD BASTRON ✓
5756 NW CORNELL RD
97210

MIDUBON SOCIETY
5500 NW CORNELL RD
PORTLAND OR
97210

VIA CERT MAIL

WILLARD KOWLAND ✓
145 DESEKI LAKE DR
PALMSPRINGS CA 92262

Mailing list from original reclassification
notice of 9/3/87

WORMAN
5410 N. W. CORNELL
ROAD
PORTLAND, OREGON
97210 ✓

RONALD BASTRON
~~5750~~ 5750 N. W.
CORNELL ROAD
PORTLAND, OREGON
97210
297-7253 ✓

AUDUBON SOCIETY
5500 NW CORNELL RD
PORTLAND, OR.

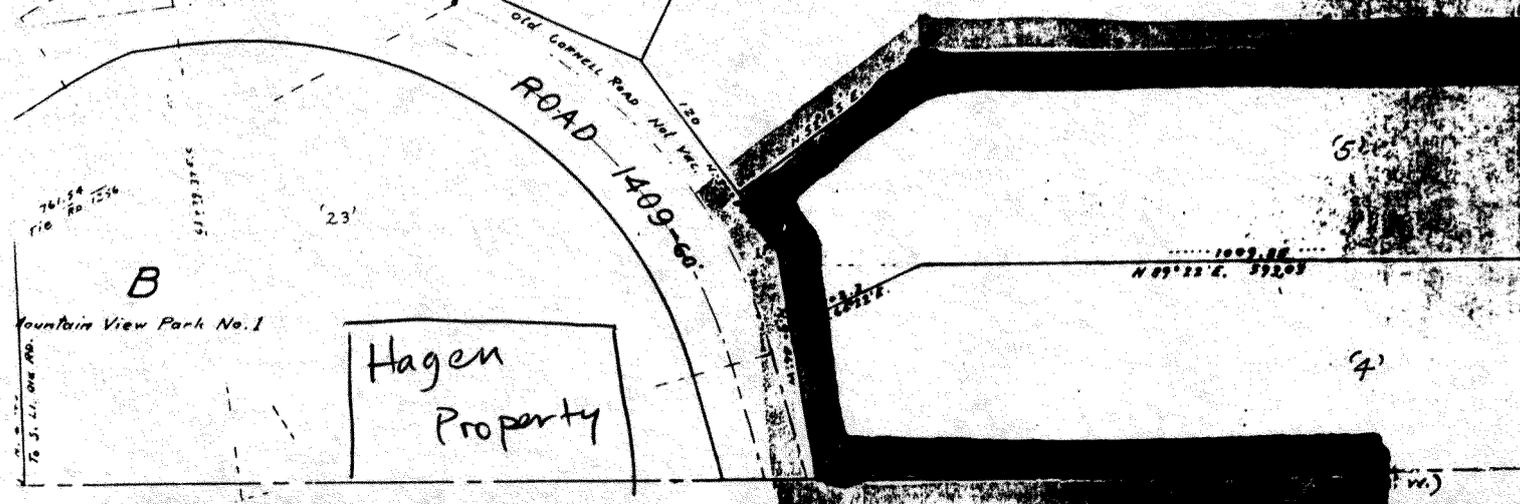
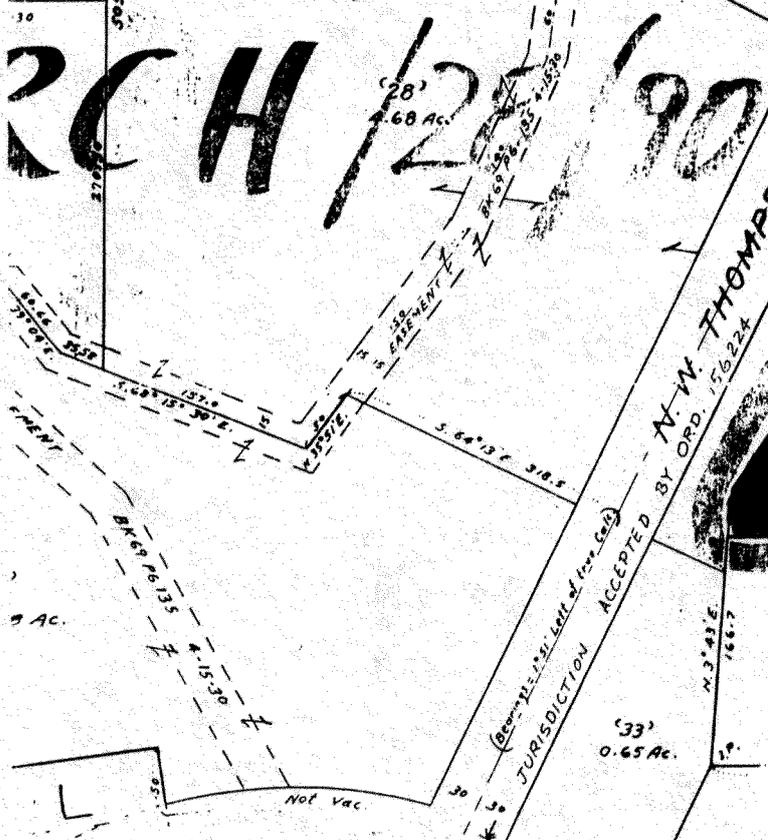
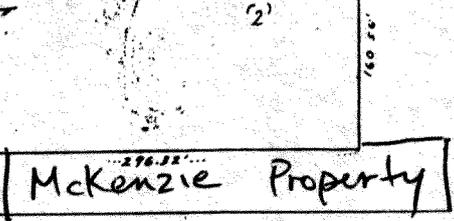
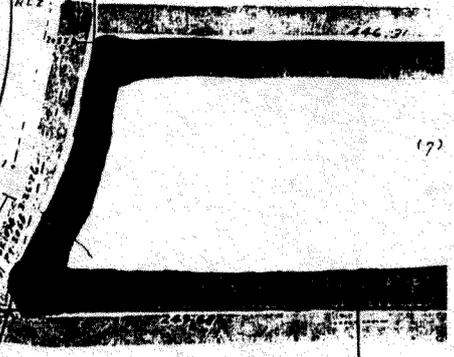
Attachment

#6

& A...

2783

DATE
MAY 25 1960



B
Mountain View Park No. 1

Hagen
Property

McKenzie Property

Hagen
Property

OF MULTNOMAH COUNTY DIVISION OF ASST *** P001-NALHOD 08/17/92 12:13 PAGE 1
ACCT. NUMBER E-59030-4160 L/C 217 REQUEST BY

NAME HAGEN,LOWELL A & VIRGINIA R PROF 6254 NW CORNELL RD
PORTLAND,OR 97210
YR-AQ 74 BK/PG 0987/1088 STATUS
MAIL 6254 NW CORNELL RD TO BE REAP FOR JAN 1,1995
PORTLAND OR 97210-1082 YR APPR 91 VCHR # ACTION
MAP 2023 CENSUS TRACT 070.00 VCHR # DIVISION
ANNEX 2733 SID

----- LEGAL DESCRIPTION -----
ADD MTN VIEW PARK & ADD 1 LOT BLOCK
TL# 23 OF B

----- LAND AND IMPROVEMENT CHARACTERISTICS ----- *** 05/20/83 ***
RATIO CODE 441 5 APPR DISTRICT AREA 3.12 A ZONING MUF19
CLASS 4 1 STY.FIN ATTIC.BSMT % IMP GOOD NEIGHBORHOOD 510
USE DWE SGL YR BUILT 1928 DDEMS 4 STORIES 1.0
LIVING AREA 2.116 ARCH CONS



Forestry Department
NORTHWEST OREGON AREA

801 GALES CREEK ROAD, FOREST GROVE, OREGON 97116-1199 PHONE 357-2191

Mr. and Mrs. Lowell Hagen
6254 N.W. Cornell Road
Portland, Oregon 97210

October 5, 1987

Dear Mr. and Mrs. Hagen

I received your letter concerning opposition to the reclassification of Balch Creek on October first. My letter is to confirm your request for reconsideration of this finding and to respond to your points of opposition. Hopefully, the phone conversation we had on October third explained the intent of the Forest Practices Act and how it applies to your concerns. Let me paraphrase your items of opposition and try to clarify each point.

Opposition statement #1 : Summer flows are too low to sustain a number of fish.

I talked with Pat Keeley regarding Balch Creek fisheries. Pat is a fish biologist with the Oregon Department of Fish and Wildlife. He reports that a electro-shock survey was done in October of 1986. The survey involved five sample areas of Balch Creek. Results from this survey indicate a fish count of 15 per 100 feet of stream. The fish population consists of native cutthroat and apparently represents a substantial population. It is true that summer flows are low, however, the stream supports spawning cutthroat during higher flows and obviously provides rearing habitat to a certain degree. The survey did reveal that fish are not present above Cornell Road at the Thompson Road junction. This portion of Balch will remain Class II.

Opposition statement #2 : Reclassification of stream will limit landowners ability to maintain property.

The rules which apply to Class I streams only apply to operations which involve forest operations. These are operations where timber is harvested for sale or involve activities which relate to forest management. The routine maintenance and development of your property, as you mention, can not be regulated under the Forest Practices Act. However, if you do conduct a forest operation, such as harvesting or selling firewood, the rules would apply.

Opposition #3 : The efforts will be a waste of time with the proposed development planned for the area.

The intent of the Forest Practices Act is to allow harvesting while protecting resources. A significant population of fish in Balch Creek is a resource which the Forest Practices Act must protect. If harvest activities are conducted they must be in compliance with the rules. Development in the area, hopefully, will be conducted in a manner which will give similar protection to this stream.

Attached is a copy of the Forest Practices Act for this region. If you have further questions regarding this matter please feel free to call.

Balch Creek will be designated Class I downstream from the point where Cornell and Thompson Roads intersect. You may appeal this reconsideration within 30 days. Please contact the District Office if an appeal is requested.

Sincerely,

Michael Simek

xc: Salem Forest Practices
Forest Grove District File

September 16, 1992

Daniel Kearns
111 SW 5th, Suite 3200
Portland, Oregon 97204-3688

Oregon

DEPARTMENT OF
FORESTRY

Re: Balch Creek Stream Reclassification.

Dear Dan:

Columbia Unit

At your request, I am submitting this letter to summarize, with my best recollection, the events which took place regarding the Balch Creek stream reclassification and subsequent Thompson Branch downgrade.



"SHWARDSHIP" IN
FORESTRY

The process of stream reclassification was initiated through a complaint regarding an active forest operation adjacent to Balch Creek. This complaint was investigated by Dave Michael regarding the specific forest practices of the operation in question. I believe a complaint was made to the Oregon Department of Fish and Wildlife (ODF&W) also. As part of the complaint investigation, information was provided by ODF&W which indicated that a native cutthroat population existed in Balch Creek. However, I'm not sure of the basis of the recommendation and how it was provided. In any event, the original reclassification notice that Dave Michael sent out indicates that Balch Creek was to be reclassified to a Class I Stream up to Cornell then proceeding 1/2 mile plus along Thompson Road, refer to original reclass notice.

As I remember, I took over the complaint investigation upon my return from fire duty. I met with Pat Keeley of ODF&W to evaluate the operation and stream reclass. I questioned the reclassification of the stream so high into the watershed. Based on a joint decision between ODF&W and our Department, the section of stream above Cornell Road, the Thompson Branch, was changed back to a Class II. I have no written records describing the basis of this downgrade, however, I surmise that a logical break point for significant fish population was made. Again, this was a joint decision between Pat Keeley and based on criteria and information available at the time.

Therefore, our official maps currently indicate that Balch Creek is Class I up to Cornell and Thompson Road junction. The Thompson Branch is currently Class II.

The downgrade of Thompson Branch was done within the 30 day period of the original stream reclass notice. Landowners adjacent to Thompson Branch were not notified of the change from the original notice.

Sincerely,

Michael Simek



405 E Street
Columbia City, OR 97
(503) 397-2636
FAX (503) 397-6361

Northwest Oregon Region Forest Practice Rules

(a) Written plans required for resource sites under subsection (1)(c) of this rule shall include a description of how the operation shall be conducted to protect the resource site.

(7) Modification of the written plan shall be required when, based on information that was not available or known at the time the original written plan was approved, the State Forester determines the approved written plan will no longer provide for compliance with applicable forest practice rules or adequately address the conflict with the resource site. Written plans with modifications required under this section shall not be subject to the provisions of ORS 527.670(10), and (11) relating to waiting periods for approval of written plans.

629-24-115 OPERATIONS ON DESIGNATED COASTAL SHORELANDS.

Because of unique and special values of the coastal shorelands, conduct operations so as to protect the diverse environmental resources of coastal shorelands and coastal waters.

(1) Obtain prior approval of the State Forester before conducting operations in the designated coastal shorelands.

(2) Written plans, when required on designated coastal shorelands, shall describe the methods that will be used to protect the diverse natural resources including major marshes, natural shorelands, riparian vegetation, significant fish and wildlife habitat, soil integrity, and water quality.

629-24-116 DESIGNATION OF WATERS; NOTICE TO LANDOWNERS; RECONSIDERATIONS.

(1) The State Forester shall maintain a map showing the classification of waters of the state in each Department of Forestry field office where notice of operations required by ORS 527.670(2) may be submitted. The map shall cover the geographic area of responsibility for that field office and shall show the classification of waters within the geographic area.

(2) The class of waters indicated on such maps shall not be changed by the State Forester without thirty (30) days' prior written notice to the landowners immediately adjoining the portion of the waters to be reclassified. Notice to the landowners shall include the reason for the change of classification and the time within which the landowner may request reconsideration of reclassification.

(3) Any landowner immediately adjoining portions of waters to be reclassified may request reconsideration of the reclassification by the State Forester within thirty (30) days of the notice of reclassification.

(4) The reclassification becomes effective:

(a) At the end of thirty (30) days from the notice, if no landowner requests review;

(b) Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the

waters to be reclassified; or

(c) Upon denial of reconsideration by the State Forester.

(5) No forest operation shall take place within one hundred (100) feet of a water proposed to be reclassified until the reclassification becomes effective or is rescinded upon reconsideration by the State Forester.

629-24-117 DETERMINING WIDTH OF RIPARIAN MANAGEMENT AREA.

The boundaries of the riparian management area need not be formed by straight lines. The width of the riparian management area may vary depending upon topography, vegetative cover, the needs of harvesting design, and the needs for aquatic and wildlife habitat. The following requirements apply to determining the width of various types of riparian management areas:

(1) Streams—The width of the riparian management area shall average three (3) times the stream width, but it shall not average less than twenty five (25) feet or average more than one hundred (100) feet. Stream width is the average of the main channel width of the stream during its high water level flow.

(2) Estuaries—The width of the riparian management area shall average one hundred (100) feet.

(3) Lakes and significant wetlands—The width of the riparian management area for lakes and significant wetlands less than one (1) acre shall average twenty five (25) feet; for lakes and significant wetlands of one (1) acre or more but less than five (5) acres, the width shall average fifty (50) feet; for lakes and significant wetlands of five (5) acres or more but less than ten (10) acres, the width shall average seventy five (75) feet; for lakes and significant wetlands of ten (10) acres or more, the width shall average one hundred (100) feet.

629-24-118 INTERIM PROCESS FOR PROTECTING SENSITIVE RESOURCE SITES REQUIRING WRITTEN PLANS.

(1) Protection practices for sites requiring written plans under OAR 629-24-113(1)(a) or (1)(d) (WRITTEN PLANS) are the same as practices applied to any operation adjoining a Class I water.

(2) Protection practices for sites requiring written plans under OAR 629-24-113(1)(b) or (1)(c) shall be determined for each site as follows:

(a) The State Forester shall notify the operator and landowner of the presence of a site requiring a written plan, and request their input into the decision making process.

(b) The State Forester shall, when practical, inspect the proposed operation with the landowner or landowner's representative, the operator, and the appropriate representative of the Oregon Department of Fish and Wildlife. The State forester shall then determine if the proposed forest practice is in conflict with the protection of the sensitive resource site.

(c) If planned forest practices are determined to conflict

Dan McKenzie
233-2401 Room 415

September 25, 1992

Dear Dan:

Below are the questions, and responses to those questions, you requested clarification on:

- 1) Was Thompson Branch ever a Class I Stream?

No, The original notice was sent out proposing Thomson Branch as a Class I stream. However, after reconsideration, and during the 30 day period for reconsideration, the Thompson Branch remained a Class II stream as originally designated.

- 2) Who had the authority to make stream classifications in 1987?

The Department of Forestry's designee and commonly the Forest Practices Forester of geographic responsibility has the authority to administer the Forest Practices Rules.

As Forest Practices Forester, I had full authority to process stream reclassifications.

- 3) What was Dave Michael's title at the time (1987)?

Dave's title was Area Geotechnical Specialist.

- 4) Does Oregon Department of Forestry require objection from a landowner abutting stream during reclassification in order to reconsider a reclassification notice.

Any affected landowner may ask for a reconsideration of a proposed stream reclassification. A response from our Department must be made to the landowner regarding the issues stated. If issues are not resolved, the landowner may appeal the proposed reclass. However, any information which indicates a reconsideration is appropriate may be taken into account.

- 5) Was the reconsideration of Thompson Branch inappropriately made by a "bureaucrat who did not have the authority to classify streams"?

DEPARTMENT OF
FORESTRY

FOREST GROVE DISTRICT



"STEWARDSHIP IN
FORESTRY"



801 Gales Creek Road
Forest Grove, OR 97116
(503) 357-2191
FAX (503) 357-4548

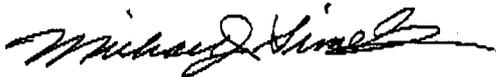
I had the full authority to process and reconsider stream classifications. This authority involved direct consultation with the Oregon Department of Fish and Wildlife (ODF&W). ODF&W are our technical advisors on stream reclass issues. ODF&W was consulted and a joint reconsideration was made.

- 6) With Class I Stream protection, are culverts allowed under The Forest Practices Act?

The Forest Practices Act requires that culverts be designed to allow for the 25 year storm event and fish passage. On some streams, culverts are appropriate and do allow for fish passage. Specific criteria must be met to assure proper design. If limitations exist which would prohibit fish passage, then other structures such as a bridge or an open bottom arch culvert might need to be used. In any event, culverts can be used on Class I streams provided the criteria for fish passage can be met.

I understand that ODF&W will be conducting a survey of Thompson Branch in October of this year. Certainly our Department will review this survey and the recommendations provided by ODF&W for the possible reclassification of Thompson Branch or portions thereof.

Sincerely,



Michael Simek

PRESTON
THORGRIMSON
SHIDLER
GATES & ELLIS

ATTORNEYS AT LAW

3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3688

Telephone: (503) 228-3200
Facsimile: (503) 248-9085

DANIEL H. KEARNS

October 5, 1992

Multnomah Board of County Commissioners
1120 SW Fifth Avenue
Room 1510
Portland, OR 97204

VIA HAND DELIVERY

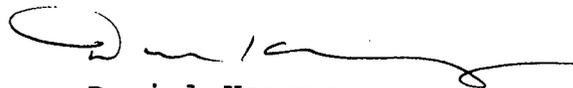
Re: Dan McKenzie appeal, SEC 6-91a, HDP 4-91a and CU 5-91a
Our file no. 30183-00001

Dear Board Clerk:

Enclosed is the final memorandum by the Friends of Forest Park to the Board of Commissioners. Please distribute the enclosed copies to the Commissioners. Thank you.

Sincerely,

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS



Daniel Kearns

Enc.

cc: Michael Robinson, Esq.
Arnold Rochlin, FOFP

1992 OCT -5 PM 2:19
CLERK OF COUNTY COMMISSIONERS
MULTNOMAH COUNTY
OREGON

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF AN APPEAL OF THE) RESPONDENT'S FINAL
HEARINGS OFFICER'S DECISION) HEARING MEMORANDUM
CONCERNING SEC 6-91a AND HDP 4-91A)

The Board of County Commissioners, at the September 22, 1992 hearing, left the record in this matter open for seven days to allow the applicant to respond to the Respondent's Hearing Memorandum ("RHM"). The Board then ordered that the Respondent, Friends of Forest Park ("FOFP"), would have four days beyond that in which to respond to the materials submitted by the applicant.

On September 29, 1992 the applicant's attorney submitted a memorandum and several exhibits ("AM") and a Motion to Strike certain portions of FOFP's hearing memorandum. FOFP has until the close of business on Monday October 5, 1992 to submit its final memorandum in addition to the materials previously submitted. This is the FOFP's final response.

As a preliminary matter, the Board must recognize that, when the applicant originally received the County permits for his residence, all of the conditions relating to environmental concerns were incorporated into the SEC permit (6-91a). Because the County believed that the SEC overlay applied, it did not incorporate into the CUP (CUP 5-91a) or the HDP permits (4-91a) any conditions designed to protect the environmental or natural resources. Therefore, if the Board rules that the SEC permit requirements do not apply to the applicant's property, the Board should also order a reconsideration of the HDP and the CUP so that proper environmental safeguards, sufficient to protect the section of

Page 1 - RESPONDENT'S FINAL HEARING MEMORANDUM

Balch Creek on the applicant's property, can be incorporated into the CUP and HDP.

As a second point, Dan McKenzie's intentions or willfulness in violating the conditions of his CUP and SEC permit, are not an issue in this appeal. Since he has raised the issue, however, the chronology of events reflected in the record better shows Mr. McKenzie's intentions than his statements before the Board. Mr. McKenzie first proposed a bridge. When that option became too expensive, he installed the culvert and then applied for Army Corps and County approval for the already-constructed culvert:

Feb. 1991	McKenzie applies for CUP and SEC permits stating he will install a bridge over Balch Creek for his driveway
March 22, 1991	SEC permit issued, requiring a bridge over Balch Creek, based on McKenzie's explicit representations
April 1, 1991	CUP issued incorporating SEC conditions as conditions of CUP
Sept. 1991	McKenzie installs the culvert
Oct. 16, 1991	Army Corps of Engineers receives McKenzie application for the culvert
Nov. 22, 1991	Army Corps of Engineers issues permit allowing culvert
Jan. 21, 1992	McKenzie applies with County for modification of his SEC permit to allow the culvert
Jan. 23, 1992	County Code Enforcement Officer notifies McKenzie that culvert violates conditions of SEC 6-91 and CUP 5-91.
March 31, 1992	Staff (Mark Hess) administratively approves the request for modification without notice to any other party or a hearing
June 16, 1992	Hearings Officer reverses staff decision finding that notice and a hearing were

required and that the modification violated the SEC criteria

Regardless of Mr. McKenzie's statements of his intent, the documents in the record clearly show that he built a culvert because that was the most cost-effective and expeditious option. The County's regulations designed to protect the environment appear to be no more than an inconvenience to Mr. McKenzie. And, only when he realizes his actions may have serious legal consequences does he attempt to alter his permit so as to sanction the culvert he installed.

The Applicant's Motion to Strike:

The applicant argues the FOFP raised an appeal issue in its hearing memorandum which was not framed in the applicant's original notice of appeal. According to the applicant, because he was the only party to file an appeal, the issues and arguments which can be raised in this proceeding are limited to those listed in the notice of appeal. The applicant is specifically referring to FOFP's argument that the Hearing Officer should have reversed the director's decision because, among other things, the decision to modify the SEC permit also amended the CUP and a full notice and hearing was required to modify the CUP [RHM at 16].

While it is true that FOFP did not appeal the Hearings Officer's decision, it is also true there was no need to appeal, given the grounds and strength of the Hearings Officer's decision. Long after the appeal period closed, however, the applicant raised the entirely new issue of whether an SEC permit was required at all. This was a new issue, never before raised in this proceeding,

and not mentioned in the notice of appeal. Nevertheless, the Board ruled that new evidence could come in to address this new issue. Most significantly, though, the new issue threatened the validity of the Hearings Officer's basis for reversing the director's decision.

At the August 25, 1992 scope of review hearing, FOFP objected to the allowance of the new evidence and issue, and that FOFP would still be limited to the issues framed in the applicant's notice of appeal and evidence in the record. FOFP argued that, had it known that the scope of review would be broadened, it too would have appealed the Hearings Officer's decision. In response, Peter Livingston, the Assistant County Counsel, told the Board that its scope of review was not limited to the issues in the Notice of Appeal. In accordance with that verbal authority, FOFP challenged as erroneous the Hearings Officer's decision that the SEC modification did not also modify the CUP. Inclusion of this argument in its hearing memorandum was proper and authorized and should not be stricken from the record.

The Applicant's Memorandum: Classification of the Stream:

The critical issue in this appeal has become the classification of the section of Balch Creek above Cornell Road. The applicant is wrong when he asserts that, because Oregon Department of Forestry ("ODF") says Thompson Fork is Class II, then the SEC permit requirements do not apply. In fact, the SEC permit requirements apply to all Class I streams "as defined by the State of Oregon Forest Practice Rules." MCC 11.15.6404(C). First, this

means the County's SEC protections apply to any stream that has been designated Class I in accordance with the Oregon Forest Practices Act rules, i.e., OAR 629-25-116. It also means the County's SEC protections apply to any stream which qualifies as a Class I stream as defined by the Rules, i.e., OAR 629-24-101(8).

Thompson Fork was classified as a Class I stream by ODF:
Thompson Fork qualifies under both interpretations of MCC 11.15.6404 because it was classified as a Class I stream and that classification has never been lawfully changed according to the Oregon Forest Practices rules, and, due to its characteristics, Thompson Fork meets the definition of Class I stream. Consequently, MCC 11.15.6404(C) requires that the SEC protections apply to Thompson Fork.

The Thompson Fork was changed in 1987 to a Class I stream in accordance with the Oregon Forest Practices Act rules. The proper notice was sent to all affected property owners, and the notice clearly showed that the Thompson Fork was being included in the Class I proposal. Under the rules, unless an affected property owner objected within 30 days, the reclassification is final. Also, the rules state that the map indicating the stream classification "shall not be changed by the State Forester without thirty (30) days prior written notice." OAR 629-24-116(2).

No property owner on the Thompson Fork objected. The only comment received within the 30 day period was from Mr. and Mrs. Hagen who were not, and are not, affected property owners, in that their property is on the Cornell Branch tributary to Balch Creek.

The Cornell Branch has never been proposed or classified as Class I. The 30 day period, therefore, closed without any objections being submitted by any affected property owner. The reclassification to Class I became final.

However, as noted in the FOFP's hearing memorandum, Mike Simek, a person in the Forest Grove ODF office, took it upon himself to remove Thompson Fork from the Class I designation. Mr. Simek did not attempt to follow any of the Oregon Forest Practice Rules, and he acted without authority. Mr. Simek's actions removing the Thompson Fork did not comply with those rules. MCC 11.15.6404 applies the SEC protections to Class I streams as defined by the Oregon Forest Practices rules. The only classification effort which complied with the rules established Thompson Fork as a Class I stream.

Letters from ODF forester Mike Simek: The applicant submits two new letters from Mike Simek with his memo. In those letters, Mr. Simek explains that Thompson Fork is a Class II stream and that, while he may not have followed all of the rules, he still removed the Thompson Fork from the reclassification within the 30 day comment period. However, Mr. Simek is the person who violated the Oregon Forest Practices rules in making this change. He has now submitted a total of four letters explaining-away his actions. In reality, Mr. Simek's actions to remove the Thompson Fork were clearly not authorized under the Oregon Forest Practices rules and are therefore invalid.

The original notice of reclassification complied with all of

the requirements of the Forest Practices Act rules. Mr. Simek lacked the authority to change that notice because only abutting property owners can object to a reclassification, and Mr. Simek was not an adjoining property owner. Moreover, as mentioned above, the stream classification "shall not be changed by the State Forester without thirty (30) days prior written notice" [OAR 629-24-116(2)]. Mr. Simek gave no notice to any party, much less the 30-day notice required by the rules. Finally, the rules do not allow the State Forester to manipulate the reclassification proposal after notice is sent out. In fact, the rule is explicit in stating that:

The reclassification becomes effective:

(a) At the end of thirty (30) days from the notice, if no landowner requests review;

(b) Immediately upon written waiver of reconsideration by all landowners immediately adjoining the portion of the waters to be reclassified; or

(c) Upon denial of reconsideration by the State Forester.

There is no allowance for manipulations by the State Forester, such as Mr. Simek's marking-out the official ODF map in the Forest Grove office. If Mr. Simek truly believed that the Thompson Fork did not qualify as a Class I stream, he was obligated to follow the Oregon Forest Practices rules to affect that change. He did not.

Thompson Fork qualifies as a Class I stream: In addition to the classification of Thompson Fork, the stream also meets the definition of Class I stream according the Oregon Forest Practice rules. According to those rules, a Class I stream is any stream which is "significant for ... spawning, rearing or migration of

anadromous or game fish" [OAR 629-24-010(8)]. Expert testimony in the record by Wayne Bowers, Janett Burcham and Gary Kish¹ clearly show that the Thompson Fork has in the past and presently supports a resident population of native cutthroat trout - a game fish. According to these fish experts, the Thompson Fork is significant for the survival of these fish, i.e., their spawning, rearing, feeding. Finally, Jay Massey, ODF&W fisheries biologist stated on the record in a February 18, 1992 letter to Mark Hess that the Thompson Fork supports a population of native cutthroat trout and is a Class I stream. Consequently, the Thompson Fork qualifies as a Class I stream as defined by the Oregon Forest Practices rules. According to MCC 11.15.6404, the County's SEC protections, therefore, apply to the Thompson Fork.

The Applicant's Memorandum: Characteristics of the Stream:

The applicant bears the burden of proving that all applicable approval criteria are met or can be met through the imposition of conditions. It is not up to the FOFPP or the County to prove that the culvert will violate the County's 17 SEC approval criteria, i.e., MCC 11.15.6420 (A) through (Q). The Hearings Officer, in addressing the SEC permit criteria, found that Mr. McKenzie failed to prove that his culvert met at least four of the 17 criteria, i.e., MCC 11.15.6420(G), (H), (K) and (P). In his response

¹The applicant disputes Mr. Kish's credentials. A summary of Mr. Kish's experience which establishes him as an expert in the identification of fish and the assessment of trout spawning, rearing and feeding habitat, is attached. The applicant does not dispute the credentials of Janett Burcham or the conclusions of her report included in the record.

memorandum, the applicant reverses the burden of proof by stating that the record does not contain substantial evidence to show that the conditions are violated. In fact, the Board should affirm the Hearings Officer unless it finds affirmative evidence that the culvert, in fact, meets all of the approval criteria.

Here the Hearings Officer found that the culvert did not protect significant fish and wildlife habitat (criterion G). There is evidence of a native cutthroat trout population in the Thompson Fork and that the stream is significant for the survival of that population. There is also evidence of the significance of the riparian vegetation to the health of Balch Creek and Thompson Fork. Finally there is evidence that the culvert has had an adverse impact on both of these natural resources. The bare, unvegetated banks around the culvert continue to contribute sediment to the Thompson Fork further degrading all down-stream portions of the stream. The sediment silts-up trout spawning habitat, insect feed sites and contributes to high velocity and erosional washes of the entire stream course during winter high flows. The applicant failed to submit evidence that the culvert somehow preserved the significant fish habitat present in this stream.

The Hearings Officer found that the culvert did not protect or enhance the natural vegetation of Thompson Fork and Balch Creek to the maximum extent practicable (criterion H). In fact, the culvert removed the riparian vegetation from both sides of a 36-foot stretch of Thompson Fork. This is sufficient evidence to affirm the Hearings Officer. The applicant failed to submit evidence that

the natural vegetation was somehow preserved to the maximum extent practicable by the installation of the culvert.

The Hearings Officer found that the culvert did not retain the Thompson Fork or Balch Creek in its natural state to the maximum possible extent, (criterion K). There is ample evidence in the record to support this finding. The applicant failed to submit evidence that the culvert would somehow retain or preserve the natural state of the Thompson Fork, much less to the maximum extent possible.

The Hearings Officer relied upon the Balch Creek Watershed Protection Plan (the "Plan") and concluded that the area was generally recognized as fragile or endangered plant habitat (criterion P). The Plan amply supports this conclusion, and as noted below, the Hearings Officer was justified in taking official notice of the Plan. The applicant failed to submit evidence that the Thompson Fork is not generally recognized as fragile or endangered plant habitat.

The Applicant's Memorandum: Balch Creek Watershed Protection Plan:

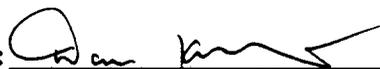
The Applicant objects to the Hearing Officer's use of the Plan for determining that the Thompson Fork, its wildlife and vegetative resources are generally recognized as fragile (HO's decision at 9-10). In fact, the Hearings Officer was justified in relying on this document for this purpose for several reasons.

First of all, nothing in the County Code precluded the Hearings Officer from taking official notice of the Plan. Second, neither the Hearings Officer nor County land use proceedings are

controlled by the Oregon Rules of Evidence, as suggested by the applicant [AM at 11]. Third, the County has already used the Plan for these purposes in applying the County's erosion control requirements to the Balch Creek watershed, as shown by County Ordinance 691, which is part of the record in this matter. Fourth, the applicant himself relied on the Plan in his SEC application materials by stating that "I would replant whenever it is appropriate with vine maple, fern, rhododendrum [sic], additional trees, grass and any other vegetation [sic] recommended in the Balch Creek Protection Plan." Fifth, the Plan is already in the Record of this matter and was relied on extensively by the planning staff and the Hearings Officer for a variety of purposes. There were no limitations on its use when the Plan was placed in the record. Finally, it is within the Hearings Officer's and the Board's discretion to rely on any document, public or private, adopted by Multnomah County or not, which evidences a "general recognition" that Balch Creek is fragile or that its natural or vegetative resources were endangered. This was a reasonable interpretation of MCC 11.15.6420(P) and should be affirmed.

Respectfully submitted this 5th day of October 1992.

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS

By: 
Daniel Kearns, OSB #89395
Of Attorneys for Friends of Forest Park

Fisheries Research and Conservation

1982-84 Member, Santiam Flycasters. This non-profit organization is noted for its on-going, original research and findings on the life history of Willamette Valley Cutthroat trout

1984-88 Member, Central Oregon Flyfishers, Board member 1987-88. During my tenure we were given a national award in recognition of our efforts in trout habitat conservation.

1986 - Present Member, Sisters Forest Planning Committee. I was invited to participate as their fish and fish habitat expert and consulted on these issues on a regular basis.

1983 - Present, Founding and present member of Oregon Trout whose mission is, *"To protect and restore native wild fish and the ecosystems which sustain them in Oregon and throughout the Northwest."* Using the best scientific data, Oregon Trout has been the principal advocate for conservation of wild native fish in Oregon. Oregon Trout, with a staff of four, relies heavily on volunteers to fulfill its mission. Volunteers and directors complete a major share of the organization's output. They work in education, on-site work projects, participation in conservation issue forums and serve as key advisors in the development and advancement of conservation policy. In January 1992 Oregon Trout adopted Cutthroat Trout Conservation as an element of its long-term strategic plan.

1984-88 Manager of Camp Sherman Fly Shop, Metolius River
During this period I was involved with numerous research and public education projects: assisting authors including Dave Hughes and Charles Meck with gathering entomological data; classroom talks and field trips for school students regarding stream ecology and fish habitat; surveying the river for fish habitat and trout populations; photographing the maturation of habitat enhancement structures and natural structures; hosting notable author/entomologist Rick Hafele's instructional sessions on the river.

1987-88 Planned and assisted with Central Oregon Flyfishers - Fall River trout spawning beds enhancement. A project designed to overcome a lack of spawning gravel; the existing stream gravels had become embedded by silt and spawning success was low - the limiting factor of an otherwise excellent trout stream.

1984-present Field assistant with Bull Trout life history research project conducted by Don Ratliff, PGE Biologist. Original research and major findings on spawning requirements, juvenile habitat preference, and life history of Bull Trout. Many days were spent surveying Metolius tributaries; identifying key habitat areas, spawning redds and surveying the fish populations.

1985 Researched and authored "Metolius River Hatches" the first categorized account of the Metolius's entomology and its distinct variations caused by stream morphology.

1985-88 Columnist, wrote "The Metolius" weekly column for Sisters Nugget newspaper, focusing on the river's fishing, understanding its entomology and conservation issues affecting the Metolius River Valley.

1984-86 Volunteer with Metolius River Habitat Project, ODFW, USFS, PGE, Trout Unlimited et al. An extensive program utilizing both base-line data research and habitat enhancement. Habitat had been identified as the major factor limiting Metolius River trout populations. A variety of habitat structures were placed and later evaluated for effectiveness.

1987-88 Instructor, developed lesson plans and taught "Understanding the Metolius River - its Ecology and Fisheries" for Central Oregon Community College - Adult Education. Major focus was on identifying various trout habitat types.

1989 Field assistant with "Metolius River Genetic Introgression Study", Dr. Rick Williams, Boise State Univ. et al.

1989 Assisted with joint Oregon Trout/US Forest Service, North Fork Clackamas River trout habitat enhancement project. As field assistant surveyed trout numbers before the structures were placed.

1990 Assisted with joint Oregon Trout/BLM project designed to protect riparian habitat of Willow/Whitehorse Creek Lahontan cutthroat trout, an endangered species.

1991 Expert witness for plaintiffs in the case of Dewey, et al vs United States Forest Service. US District Court for District of Oregon case #CV91-646-RE. A suit Filed in Federal Court seeking relief for damages to Bull Trout habitat by USFS sponsored timber activities. Case is pending.

1991-Present Surveyor for Ancient Forest Survey, National Audubon Society, Oregon Natural Resources Council et al. Ground-truthing and documentation of National Forest resources to assist policy makers and Federal resource planning. Activities include, identifying significant riparian areas, surveying and classifying streams for fish and fish habitat.

1991-Present Invited member of the USFS, Mt. Hood Forest, Clackamas Ranger District Public Focus Group. As a pre-project planning process, I advise the Forest Service on proposed activities and their potential impact on riparian areas, fisheries and fish habitat. Typical areas of concern are maintaining and enhancing fish habitat during timber management and associated activities; surveying streams in areas where timber activities are planned and then making recommendations to minimize impacts; identifying areas where trout habitat can be manipulated to increase recreational and educational opportunities.

1991 Riparian impact evaluation of Buckeroo Timber Sale coordinated with USFS fisheries biologist. Streams were surveyed in planned sale units; key riparian sites identified, and stream characteristics recorded. Results were given to Buckeroo Interdisciplinary Team and used to modify individual sale units.

1991 Organized and coordinated citizen lobby that convinced Jefferson County to abandon a road construction project that would have damaged the Metolius River and impacted fish habitat.

1991-92 Citizen participant in Wild & Scenic Rivers Planning for Metolius, McKenzie, Salmon and N.Fork of Middle Fork of Willamette. I provided commentary on identifying issues (fisheries and related habitat needs) and management alternatives (selecting only appropriate activities that have minimal if any impacts to fish populations and habitat in order to protect their identified "outstandingly remarkable values"). As a result of my, and others, input all these rivers have now have plans that provide for maintaining their native fish populations by giving maximum feasible protection to the their habitat.

1991 Citizen participant in Lower Deschutes River Management Plan planning process. My commentary supported research that indicated certain activities were negatively impacting riparian areas and fishery habitat. The final management plan substantially restricts those injurious activities.

1991-Present Contributing research member of Oregon Trout, Trout Conservation Committee. My findings will be published in a report, in preparation, entitled "Oregon Native Trout Report". This report evaluates the status, habitat needs and condition and management of Oregon's native trout stocks.

1992 Member of Public Forestry Foundation which seeks to educate the public on sustainable forestry practices.

Sept. 1992 Submitted commentary to the Oregon Board of Forestry regarding "Preliminary Draft Rules for the Water Classification and Protection Project". My analysis indicated that proposed DOF rules did not meet the stated goal of preserving fish habitat.

OREGON TROUT

MISSION Oregon Trout is dedicated to the protection and restoration of native wild fish populations and the ~~ecosystems~~ which sustain them.

ORGANIZATION Incorporated in 1983, Oregon Trout has grown to a membership of 2600 individuals in Oregon, Washington and California. The board of directors is comprised of individuals representing drainage basins throughout Oregon, as well as at large directors with expertise in law, finance and organization management.

With a staff of four, Oregon Trout is heavily reliant on volunteers for program activity throughout the state. The directors and an active volunteer corps complete a major share of the organization's annual resource output. They work in education, on-site work projects, participation in conservation issue forums, and serve as key advisors in the development and advancement of conservation policy.

PROGRAMS Based on the best scientific data, Oregon Trout has been the principal advocate for conservation of wild, native fish in Oregon. Through close association with fisheries and other scientists throughout the organization's brief history, the programs and policies of Oregon Trout have focused first on Oregon, but with deliberate emphasis on Northwest regional policy.

Columbia Basin Salmon and Steelhead Oregon Trout has been a leader in the advocacy of native salmon and steelhead conservation in the Columbia Basin. Since the passage of the Northwest Power Planning and Conservation Act of 1980, Oregon Trout has participated continuously and creatively to forge a compromise that would result in the conservation of the Columbia Basin's ancestral populations of salmon and steelhead.

Water Policy Through the dedication of directors and other volunteers, Oregon Trout has been a major participant in efforts to reform Oregon water law, particularly in areas of instream water rights and streamflow restoration.

Resident Fish Staff and a dedicated committee of volunteers have worked cooperatively with the Oregon Cattleman's Association, public lands agencies, other agricultural interests, and conservation organizations to institute stream and watershed improvement programs for resident trout, including the endangered Lahontan cutthroat, the Borax chub and other nongame native fishes.

Education and Grants Oregon Trout has been a principal organizer and founder of numerous stream and fish conservation events, including the Salmon Festival. In 1991, the family oriented event hosted over 9000 participants. Additionally, Oregon Trout has made cash and in-kind contributions to purchase important land along the Middle Fork of the John Day River (Oregon), conduct research on resident fish and support contract monitoring of a proposed capital project on the Klamath River.

O'DONNELL, RAMIS, CREW & CORRIGAN

JEFF H. BACHRACH
MARK L. BUSCH
CHARLES E. CORRIGAN*
STEPHEN F. CREW
CHARLES M. GREEFF
WILLIAM A. MONAHAN
NANCY B. MURRAY
MARK P. O'DONNELL
TIMOTHY V. RAMIS
SHEILA C. RIDGWAY*
MICHAEL C. ROBINSON**
WILLIAM J. STALNAKER

ATTORNEYS AT LAW
BALLOU & WRIGHT BUILDING
1727 N.W. Hoyt Street
Portland, Oregon 97209

TELEPHONE: (503) 222-4402
FAX: (503) 243-2944

PLEASE REPLY TO PORTLAND OFFICE

CLACKAMAS COUNTY OFFICE
181 N. Grant, Suite 202
Canby, Oregon 97013
(503) 266-1149

JAMES M. COLEMAN
KENNETH M. ELLIOTT
Special Counsel

September 29, 1992

*ALSO ADMITTED TO PRACTICE IN STATE OF WASHINGTON
**ALSO ADMITTED TO PRACTICE IN WISCONSIN

Office of the Board Clerk
Multnomah County Board of Commissioners
1120 SW 5th, Room 1510
Portland, OR 97205

Re: In the Matter of an Appeal by Dan McKenzie of the Hearings Officer's Decision in Sec. 6-91a and HDP 4-91a

Dear Sir or Madam:

Enclosed please find Mr. McKenzie's Response to the Friends of Forest Park's Hearing Memorandum. The Board granted Mr. McKenzie until 5:00 p.m. on September 29, 1992 to submit this memorandum. Also included is a Motion to Strike parts of Friends of Forest Park's Memorandum and to reject parts of this Memorandum from inclusion in the record. Please make copies available to the Commissioners.

Very truly yours,

O'DONNELL, RAMIS, CREW & CORRIGAN

Michael C. Robinson

MCR/sb
Enclosures
MCR\MCKENZIE\63032-1\HRNGCLRK.LTR

cc: Dan McKenzie
Edward J. Sullivan, Esq.

1992 SEP 29 PM 4:39
CLACKAMAS COUNTY
MULTNOMAH COUNTY
OREGON

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Multnomah County
Zoning Division

memorandum on pp. 1, 3, 16 and 17 and to specifically reject this portion of the memorandum from acceptance into the record.

RESPECTFULLY SUBMITTED this 29th day of September, 1992.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: Michael C. Robinson
Michael C. Robinson, OSB #91090
Of Attorneys for Appellant

BEFORE THE MULTNOMAH COUNTY

BOARD OF COMMISSIONERS

In the Matter of an Appeal by)
Dan McKenzie of the Hearings)
Officer's Decision Concerning) RESPONSE TO RESPONDENT'S
Sec. 6-91a and HDP 4-91a.) HEARING MEMORANDUM
_____)

INTRODUCTION

This memorandum is a response to the memorandum submitted by the Friends of Forest Park ("FOFP"). The memorandum will address two main points, after a brief discussion of the relevant facts:

- The Thompson tributary of Balch Creek is a Class II stream and not a Class I stream and, therefore, Mr. McKenzie is not required under the Multnomah County Code to obtain a Significant Environmental Concern ("SEC") permit.
- The hearings officer erred when he overturned the Planning Director's approval of Mr. McKenzie's request for an amendment to the SEC and HDP permits.

In addition to this memorandum, Mr. McKenzie will also submit a response to FOFP's memorandum.

1. Relevant Facts.

This dispute concerns the placement of a culvert in the Thompson tributary of Balch Creek by Dan McKenzie. Much of FOFP's argument is based on an assertion that Mr. McKenzie "knowingly" violated the Multnomah County Code ("MCC") by installing the culvert without the proper permits. While Mr. McKenzie

acknowledges that he did not have the proper County permits before he installed the culvert, he honestly believed that he had secured all the necessary permits to do so. This belief stems from some confusion between Multnomah County Planning Department staff and Mr. McKenzie.

When Mr. McKenzie decided to install a culvert, instead of a bridge, due to the high cost of a bridge, Mr. McKenzie first went to the County where he was told to get approval from the Army Corps of Engineers ("Corps") and the Division of State Lands ("DSL"). He obtained the necessary permits after receiving County Planning Department sign-off on the Corps and DSL permits. He either did not understand, or County Planning Department staff neglected to tell him, that the planning staff believed that an amendment to the SEC and HDP permits were still required before the culvert could be installed. Despite the misunderstanding, the Board should clearly understand that Mr. McKenzie did not knowingly and wilfully violate any County permit; in fact, at every step of the way, he has attempted to follow the rules but has found that the rules are not always clearly understood by all the parties.

A second relevant fact in this proceeding concerns the Board's decision to hear this appeal on the record, plus additional evidence concerning whether the Thompson tributary of Balch Creek is a Class I stream. Mr. McKenzie is not attempting to "sneak in" new facts after the hearings officer's decision. At the time of the hearings officer's decision, neither the Multnomah County Planning Department staff nor Mr. McKenzie had any reason to

believe that the Thompson tributary of Balch Creek was not a Class I stream. This is because the Planning Department believed the stream to be a Class I stream, based on an outdated Department of Forestry map.

Following the hearings officer hearing, Mr. McKenzie, on his own, investigated the status of the creek by reviewing Oregon Department of Forestry ("DOF") maps and determined that the Thompson tributary of Balch Creek is not a Class I stream. Even the Planning Department now agrees with this determination.

Therefore, it was crucial that the Board hear this information which came to light only after the hearings officer's decision. This evidence is the sole determining factor as to whether Mr. McKenzie was ever required to obtain an SEC permit.

Finally, the culvert itself is an issue in this proceeding. The culvert is a 5-foot diameter metal pipe. It is placed in the stream bed, so that the high water level will be approximately half way up the culvert. Sediment barriers are placed at either end of the culvert. This is not the only culvert on the Thompson tributary of Balch Creek. There are 5 culverts on the Thompson tributary and 3 more on the main stem. See Transcript ("TR") of hearings officer meeting of June 1, 1992. Neither the Multnomah County Code nor the DOF prohibit culverts from installation in streams. This culvert has been approved by the Oregon Department of Fish and Wildlife, the DSL and the Corps. In fact, Jay Massey, a fish biologist with ODFW, stated that Mr. McKenzie's culvert is acceptable on either Class I or Class II streams and that his

culvert is "much better than some existing culverts in the local area." Administrative Decision of March 31, 1992 8.

Therefore, the real issue is not that the culvert is a detriment to a Class I or Class II stream, but that FOFP seeks to impose a prohibition on culverts when no state agency or the County has instituted such a prohibition. If such a prohibition is desirable, the proper course of action is for the County to legislatively amend its code to prohibit culverts. This will give advance notice to individuals installed culverts that they are not allowed to do so.

2. The Thompson Tributary of Balch Creek is a Class II Stream and, Therefore, No SEC Permit is Required for Mr. McKenzie to Install a Culvert.

The single most important issue before the Board is whether the Thompson tributary of Balch Creek is a Class I stream. If it is, Mr. McKenzie was required to have obtained an SEC permit before installing the culvert. If it is not, no SEC permit was ever required of Mr. McKenzie.

MCC § 11.15.6404(C) provides as follows:

Any building, structure or physical improvement within 100 feet of the normal high water level of a Class I stream as defined by the State of Oregon Forest Practice Rules, shall require an SEC permit under MCC .6412, regardless of the zoning designation of the site.

Therefore, whether an SEC permit is required turns on whether the stream is designated as a Class I stream.

A Class I stream is present if DOF has determined that a stream has one or more of four characteristics. The Thompson tributary of Balch Creek would be a Class I stream if the DOF finds

it is "significant for . . . spawning, rearing or migration of anadromous or game fish." OAR 629-24-101(8)(a)(D).

DOF has determined that the Thompson tributary of Balch Creek is not a Class I stream. See attached Letters of August 13, 1992; September 2, 1992; September 16, 1992 and September 25, 1992 stating DOF's position that the Thompson tributary is a Class II stream. Multnomah County relies on the DOF maps to determine whether an SEC permit is required. The County does not make an independent analysis of the Forest Practice Rules to determine whether a stream is Class I or Class II. This is a reasonable interpretation of the MCC. 11.15.6404(c). Clark v. Jackson County, 313 Or 508, ___ P2d ___ (1992).

In 1987, DOF, upon a request from Nancy Rosenlund, attempted a reclassification of the Thompson tributary of Balch Creek. However, a landowner immediately adjacent to the Thompson tributary of Balch Creek objected to the reclassification. (See attachment.) Therefore, the attempted reclassification to Class I was never effective. (See OAR 629-24-116(4)(b)).

FOFP argues that had a DOF employee, Michael Siemek, known of a 1986 fish survey on the Thompson tributary, he would not have blocked the reclassification of Balch Creek. (See Affidavit of Daniel Kearns, attached to FOFP hearing memorandum.) In fact, Siemek knew of the 1986 study.

The DOF's position is that the Thompson tributary of Balch Creek is and has always been a Class II stream. It is irrelevant what the witnesses for FOFP think the stream's classification

should be.¹ The test is what it's current classification is. If FOFP wish to challenge either the procedure for reclassification or the current classification, they must follow the judicial review procedures for state agencies set forth in ORS Chapter 183.

Because the Thompson tributary of Balch Creek is a Class II stream and because the DOF and the Multnomah County Planning Department take this position, DOF's determination is conclusive as to whether the SEC overlay zone applies. Therefore, Mr. McKenzie was not and is not required to obtain an SEC permit. Nevertheless, in the event that the Board somehow determines that the Thompson tributary is a Class I stream, the next section of this memorandum addresses why the hearings officer erred in overturning the staff recommendation for approval of Mr. McKenzie's amendment to the SEC permit.

2. The Hearings Officer Erred in Finding that Criteria G, H, K and P were not Supported by Substantial Evidence in the Record.

A. SEC approval criteria MCC .6420(g) provides "Significant fish and wildlife habitats shall be protected." The staff decision approving Mr. McKenzie's amendment to the SEC determined that the Balch Creek Basin has not been assessed for its significance of fish and wildlife habitat. Staff Decision p. 9. Therefore, it is not possible to determine that the Thompson tributary is a significant fish and wildlife habitat. Moreover, Wayne Bowers, an ODFW employee who conducted a fish survey in 1986,

¹One witness, Gary Kish, identified himself as a Biologist. He does not have a degree in Biology.

reported that barriers existed on the Thompson tributary which would be a barrier to migrating fish. See Bowers field notes attached to FOFP hearing memorandum. "Culvert on private property 100 feet upstream is a barrier"; "Audubon water diversion at culvert is a temporary barrier." If the Thompson tributary is not a significant fish and wildlife habitat, then criteria (g) is irrelevant.

Assuming, however, that a Class I stream is prima facie evidence of a significant fish and wildlife habitat, then substantial evidence in the whole record supports the staff's determination that the criteria is met. Neither the Oregon Department of Fish and Wildlife nor the Multnomah County Code prohibit culverts in Class I streams. In fact, the staff report indicates that Jay Massey, a fish biologist for ODFW, reported:

"Our Department prefers that stream crossings be bridges or open-bottom arch-type culverts. However, properly installed round, corrugated culverts are acceptable to our Department on both Class I and Class II streams. After careful examination of Mr. McKenzie's culvert, we find it acceptable. His culvert installation is much better than some existing culverts in the local area."

Staff report at 9. This is sufficient evidence to show that a significant fish and wildlife habitat will be protected.

The hearings officer's findings, however, do not address the criteria that significant fish and wildlife habitats be protected. Instead, he makes an unsupported finding that "aquatic insects tend not to reproduce in long narrow culverts because of the lack of direct sunlight." Hearings Officer decision at 7. This finding is unsupported by substantial evidence in the record

and, in any event, does not indicate that the habitat itself is not protected.

Further, the Hearings Officer fails to make a finding that the Thompson tributary itself has a population of trout and other species of wildlife. He also found that the culvert eliminates 36 feet of the creek, thereby indicating that a significant fish and wildlife habitat will not be protected. Hearings Officer decision at 8. The evidence is contrary on this point because it indicates that the creek's habitat for fish is not adversely affected by the culvert location. No one has raised any evidence to show that the culvert eliminates a wildlife habitat. The Board should reverse the hearings officer's finding on this point and determine that substantial evidence supports the conclusion that significant fish and wildlife habitats will be protected by the culvert.

Criteria (g) should be read in terms of OAR 629-24-109(8)(a) requiring that a Class I stream be significant for spawning, rearing or migration of anadromous or game fish. If the habitat is significant for spawning, rearing or migration of such fish, then there must be fish present in that habitat. The evidence supports a finding that no fish have been documented upstream of the culvert since 1986 and that the only documented fish in the Thompson tributary are below Mr. McKenzie's culvert. Moreover, at least two barriers downstream prevent the migration of fish upstream. Gary Kish testified at the September 22 hearing before the Board that one of the culverts has a substantial drop to stream bed and would prevent migration.

B. MCC .6420(h) provides: "The natural vegetative fringe along rivers, lakes and streams shall be enhanced and protected to the maximum extent practicable to assure scenic quality, protection from erosion." The hearings officer determined that substantial evidence did not support the finding that the culvert would protect natural vegetative fringe to the maximum extent practicable. However, he did not make a finding that either natural vegetative fringe existed at this point or that the scenic value would be harmed by the culvert.

Substantial evidence in the record shows that the natural vegetative fringe has been previously removed at this site. Staff conditions requiring specific plantings along the creek to reduce the visual intrusion of the culvert are adequate to replace the natural vegetative fringe and assure scenic quality. See staff report at 10.

In addition, the hearings officer did not make a finding about whether the culvert would result in increased erosion. Hearings Officer Decision at 8. The staff condition required sedimentation barriers at the toe of the fill area to prevent erosion. Staff Report at 10. This is substantial evidence to show that this portion of the criteria is met.

Moreover, Gary Kish admitted that the construction period is when culverts cause the most erosion problems. Removal of the culvert will increase erosion; leaving the culvert in place will not cause additional erosion.

C. MCC .6420(1) provides: "Areas of annual flooding,

floodplains, water areas and wetlands shall be retained in their natural state to the maximum possible extent to preserve water quality and protect water retention, overflow and natural functions."

This criteria is not an absolute requirement, but only requires protection "to the maximum possible extent." The language of the criteria allows the County to alter areas of annual flooding, floodplains, water areas and wetlands, as long as water quality, water retention, overflow and natural functions are protected. The agencies best in a position to determine this are the DSL and the Corps. Both granted permits for installation of the culvert. This evidence is in the record and is substantial evidence that this criteria is met. Further, the hearings officer's decision does not quote any evidence indicating that the culvert would fail to meet this criteria. The hearings officer states, "Approval of the culvert by other agencies who administer different regulatory standards is likewise not relevant." Hearings Officer's decision at 9. In fact, the opposite is true because the DSL and the Corps have far greater responsibility for wetlands than does the County. Their approval of the culvert is substantial evidence that it will not interfere with these areas, as envisioned by the MCC.

D. MCC .6420(p) provides, "An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of the nature vegetation, shall be retained in a natural

state to the maximum extent possible." The hearings officer determined that this criteria was not met because Balch Creek Basin is recognized as a fragile or endangered plant habitat, due to the Balch Creek Water Shed Protection Plan adopted by the City of Portland. This is not an appropriate approval criteria, as the County has not listed it as an approval criteria. Moreover, while the County may endorse the plan, the County has not adopted this plan nor required applicants to comply with it.

The Hearings Officer takes "judicial notice" of the Balch Creek Water Shed Protection Plan in order to find that the Thompson tributary is a fragile or endangered plant habitat. Hearings Officer's Decision at 7, 9, 10. The hearings officer may not take judicial notice of the Plan to determine the fact that the Creek is a fragile, endangered plant habitat.

Oregon Rules of Evidence 201(b) provides,

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either: * * * (2) Capable of accurate and ready determination by resources whose accuracy cannot reasonably be questioned."

The record contains no evidence that the Balch Creek Water Shed Protection Plan is a document "whose accuracy cannot reasonably be questioned." In fact, the Balch Creek Water Shed Protection Plan's accuracy can be questioned because it describes the Thompson tributary as a Class I stream. The fact that the City of Portland has adopted it does not mean that it is binding in Multnomah County, nor that it is accurate.

However, even if the Balch Creek Water Shed Protection Plan can be judicially noticed, criteria (p) is not an absolute

criteria. It requires the area to be retained in a natural state "to the maximum extent possible." If it is not feasible to maintain it in its natural state, then it may be altered. In addition, conditions of approval require installation of plantings along the creek. Staff decision at 13.

Staff believed this criteria was met. The hearings officer gives no explanation of why he believes this criteria is not met, other than to say that the fact that the Balch Creek Water Shed Protection Plan includes the Thompson tributary means that the criteria is not met. He has misconstrued and misunderstood the criteria and the Board should reverse him.

CONCLUSION

The Thompson tributary of Balch Creek is a Class II, not a Class I, stream. Therefore, the SEC overlay does not apply to Mr. McKenzie. The Board should grant his appeal on this basis alone.

Moreover, the hearings officer failed to recognize substantial evidence in the record supporting a finding that criterias (g), (h), (l) and (p) are met and misconstrued the requirements for meeting each of these criteria.

The culvert is not harmful to fish in the Thompson tributary and, in fact, is better than the other culverts which prohibit

spawning, rearing or migration of fish in this stream. The Board should grant Mr. McKenzie's appeal and determine that no SEC permit is needed.

DATED this 29th day of September, 1992.

Respectfully submitted,

O'DONNELL, RAMIS, CREW & CORRIGAN

By: Michael C. Robinson
Michael C. Robinson, OSB #91090
Of Attorneys for Appellant

Oregon

August 13, 1992

Mark Hess, Planner
Multnomah Co. Planning
2115 SE Morrison
Portland, OR 97214

RECEIVED

AUG 14 1992

Multnomah County
Zoning Division

DEPARTMENT OF
FORESTRY

FOREST GROVE DISTRICT



"STEWARDSHIP IN
FORESTRY"

Mark,

I am writing you to confirm our phone conversation this afternoon, regarding our Department's stream classification in Multnomah County.

Today you received one of ODF Forest Grove District maps which have our updated Class I streams locations highlighted in blue.

I asked Kevin McKenzie to hand carry this map and a copy of our District's 7.5 minute quadrangle maps showing the Belch Canyon area. Our Forest Practices Class I stream designation is for the lower stretch of the stream below the fork where NW Thompson Rd. and NW Cornell Rd. meet. Up stream from this point both forks of the stream are Class II.

It appears that the east fork that flows close to NW Thompson Rd., is an Influential Class II stream for 1500 feet upstream from its confluence with the Class I stream.

I am including some handouts on Stream Protection afforded. Class II Influential streams, and a copy of our latest updated Forest Practices rules, dated October 29, 1991.

If you have any further questions, feel free to contact this office.

Sincerely,

Thomas M Savage
Forest Practices Forester



801 Gales Creek Road
Forest Grove, OR 97116
(503) 357-2191
FAX (503) 357-4548

EXHIBIT
1
Page 1 of 1

September 2, 1992

Dan McKenzie
6125 NW Thompson Road
Portland, Oregon 97210

Columbia Unit



"STEWARDSHIP IN
FORESTRY"

Dear Mr. McKenzie:

Enclosed you will find the information you requested regarding the reclassification of Balch Creek in 1987.

The State Forester maintains maps showing classification of waters of the state in each of the Department of Forestry field offices. The map covers the area that the field office has geographic responsibility. These maps represent the official classification of waters as they relate to forest operations regulated under the Forest Practices Act. Our maps indicate Balch Creek is Class I upstream to the Cornell and Thompson Road junction. The "Thompson" branch of Balch Creek is Class II. This status currently applies and would have applied since October of 1987.

My recollection is that the original reclassification notice was not accurate and went too high into the watershed. In conjunction with the Department of Fish and Wildlife, our Department downgraded the "Thompson" branch portion to a Class II after reconsideration. This was done shortly after the first reclassification letter was sent out. Our official maps clearly indicate this downgrade. In addition, my response letter to Mr. and Mrs. Hagen, enclosed, also reflects this change. Inadvertently, this change was not presented to all adjacent landowners notified by the first reclassification notice.

Sincerely,

A handwritten signature in cursive script that reads "Michael Simek".

Michael Simek

Encl: Balch Cr. File



September 16, 1992

Part of the record

Oregon

Daniel Kearns
111 SW 5th, Suite 3200
Portland, Oregon 97204-3688

DEPARTMENT OF
FORESTRY

Re: Balch Creek Stream Reclassification.

Dear Dan:

Columbia Unit

At your request, I am submitting this letter to summarize, with my best recollection, the events which took place regarding the Balch Creek stream reclassification and subsequent Thompson Branch downgrade.



"STEWARDSHIP IN
FORESTRY"

The process of stream reclassification was initiated through a complaint regarding an active forest operation adjacent to Balch Creek. This complaint was investigated by Dave Michael regarding the specific forest practices of the operation in question. I believe a complaint was made to the Oregon Department of Fish and Wildlife (ODF&W) also. As part of the complaint investigation, information was provided by ODF&W which indicated that a native cutthroat population existed in Balch Creek. However, I'm not sure of the basis of the recommendation and how it was provided. In any event, the original reclassification notice that Dave Michael sent out indicates that Balch Creek was to be reclassified to a Class I Stream up to Cornell then proceeding 1/2 mile plus along Thompson Road, refer to original reclass notice.

As I remember, I took over the complaint investigation upon my return from fire duty. I met with Pat Keeley of ODF&W to evaluate the operation and stream reclass. I questioned the reclassification of the stream so high into the watershed. Based on a joint decision between ODF&W and our Department, the section of stream above Cornell Road, the Thompson Branch, was changed back to a Class II. I have no written records describing the basis of this downgrade, however, I surmise that a logical break point for significant fish population was made. Again, this was a joint decision between Pat Keeley and based on criteria and information available at the time.

Therefore, our official maps currently indicate that Balch Creek is Class I up to Cornell and Thompson Road junction. The Thompson Branch is currently Class II.

The downgrade of Thompson Branch was done within the 30 day period of the original stream reclass notice. Landowners adjacent to Thompson Branch were not notified of the change from the original notice.

Sincerely,



Michael Simek



405 E Street
Columbia City, OR 971
(503) 397-2636
FAX (503) 397-6361

Dan McKenzie
233-2401 Room 415

September 25, 1992

Dear Dan:

Below are the questions, and responses to those questions, you requested clarification on:

- 1) Was Thompson Branch ever a Class I Stream?

No, The original notice was sent out proposing Thomson Branch as a Class I stream. However, after reconsideration, and during the 30 day period for reconsideration, the Thompson Branch remained a Class II stream as originally designated.

- 2) Who had the authority to make stream classifications in 1987?

The Department of Forestry's designee and commonly the Forest Practices Forester of geographic responsibility has the authority to administer the Forest Practices Rules.

As Forest Practices Forester, I had full authority to process stream reclassifications.

- 3) What was Dave Michael's title at the time (1987)?

Dave's title was Area Geotechnical Specialist.

- 4) Does Oregon Department of Forestry require objection from a landowner abutting stream during reclassification in order to reconsider a reclassification notice.

Any affected landowner may ask for a reconsideration of a proposed stream reclassification. A response from our Department must be made to the landowner regarding the issues stated. If issues are not resolved, the landowner may appeal the proposed reclass. However, any information which indicates a reconsideration is appropriate may be taken into account.

- 5) Was the reconsideration of Thompson Branch inappropriately made by a "bureaucrat who did not have the authority to classify streams"?

DEPARTMENT OF
FORESTRY

FOREST GROVE DISTRICT



"STEWARDSHIP IN
FORESTRY"



801 Gales Creek Road
Forest Grove, OR 97116
(503) 357-2191
FAX (503) 357-4548

08/20/82 12:17 305 337 4348 ODF FOREST GROVE 2002/002

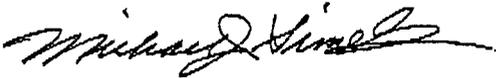
I had the full authority to process and reconsider stream classifications. This authority involved direct consultation with the Oregon Department of Fish and Wildlife (ODF&W). ODF&W are our technical advisors on stream reclass issues. ODF&W was consulted and a joint reconsideration was made.

- 6) With Class I Stream protection, are culverts allowed under The Forest Practices Act?

The Forest Practices Act requires that culverts be designed to allow for the 25 year storm event and fish passage. On some streams, culverts are appropriate and do allow for fish passage. Specific criteria must be met to assure proper design. If limitations exist which would prohibit fish passage, then other structures such as a bridge or an open bottom arch culvert might need to be used. In any event, culverts can be used on Class I streams provided the criteria for fish passage can be met.

I understand that ODF&W will be conducting a survey of Thompson Branch in October of this year. Certainly our Department will review this survey and the recommendations provided by ODF&W for the possible reclassification of Thompson Branch or portions thereof.

Sincerely,



Michael Simek

NAME HAGEN,LOWELL A & VIRGINIA R PROF 6254 NW CORNELL RD
PORTLAND,OR 97210
YR-AQ 74 BK/PG 0987/1080 ----- STATUS -----
MAIL 6254 NW CORNELL RD TO BE REAF FOR JAN 1,1992
PORTLAND OR 97210-1082 YR APPR 91 VCHR # ACTION
MAP 2023 CENSUS TRACT 070.00 VCHR # DIVISION
ANNEX 2733 SID

----- LEGAL DESCRIPTION -----
D MTN VIEW PARK & ADD 1 LOT BLOCK
TL# 23 OF B

----- LAND AND IMPROVEMENT CHARACTERISTICS ----- *** 05/20/83 ***
RATIO CODE 441 5 APPR DISTRICT AREA 3.12 A ZONING MUF19
CLASS 4 1 STY,FIN ATTIC,BSMT % IMP GOOD NEIGHBORHOOD 510
USE DWG SGL YR BUILT 1928 BDRMS 4 STORIES 1.0
LIVING AREA 2,116 ARCH CONS

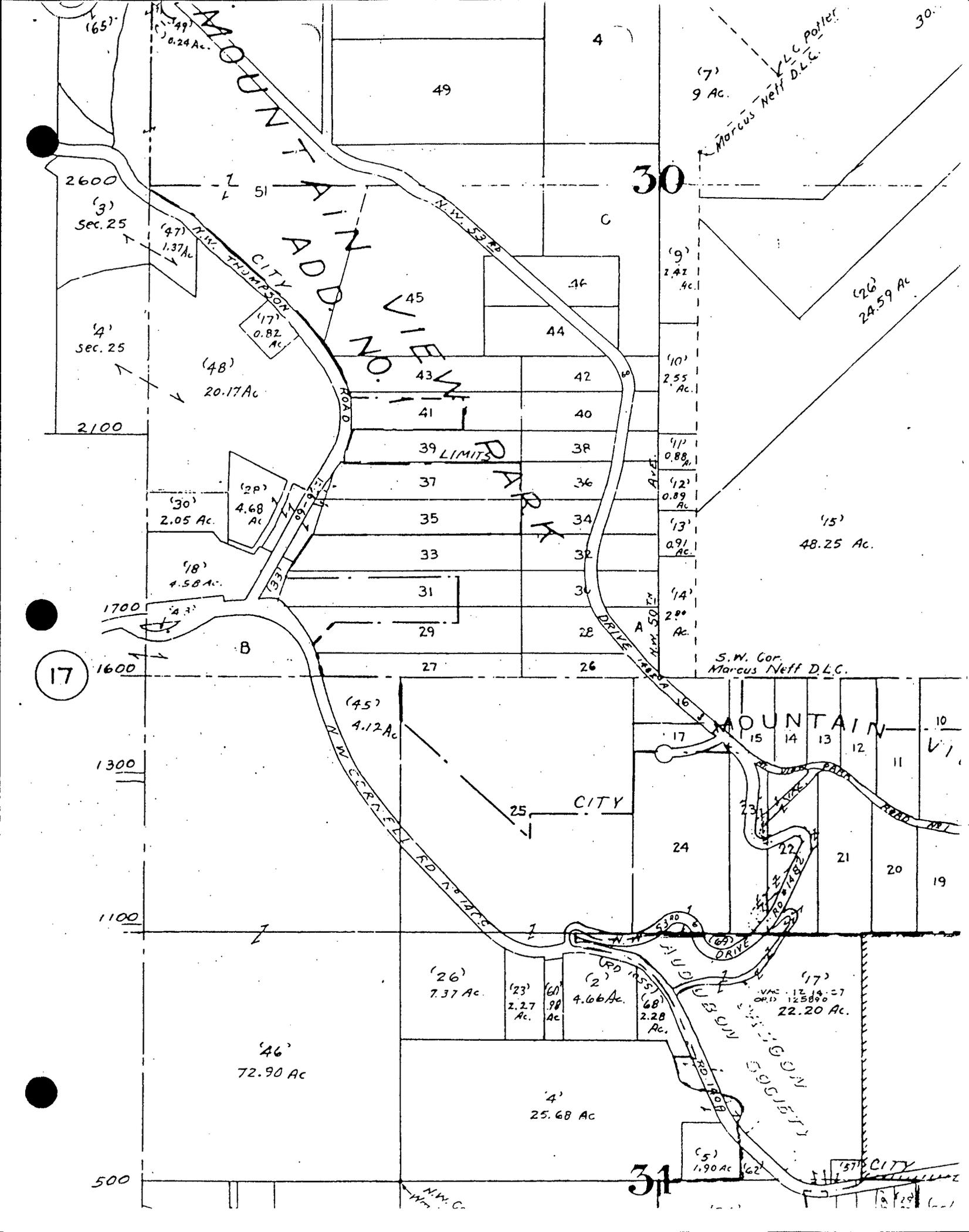
Attachment

2:50

RECEIVED

SEP 28 1992

O'DONNELL, RAMIS,
CREW & CORRIGAN



(65)

(49) 0.24 Ac.

49

4

(7) 9 Ac.

Marcus Neff D.L.C.
V.L.C. Potter

30

30

2600

51

(3) Sec. 25

(47) 1.37 Ac.

(47) 0.82 Ac.

(4) Sec. 25

(48) 20.17 Ac.

2100

(30) 2.05 Ac.

(2P) 4.68 Ac.

(18) 4.58 Ac.

1700

1600

17

1300

1100

500

VIEW ZONE
PARK DRIVE
LIMITS

(45) 4.12 Ac.

CITY

S.W. Cor. Marcus Neff D.L.C.

MOUNTAIN

10

11

12

13

14

15

16

17

18

19

20

21

22

23

(26) 7.37 Ac.

(23) 2.27 Ac.

(60) 98 Ac.

(2) 4.66 Ac.

(68) 2.28 Ac.

(17) 22.20 Ac.

(46) 72.90 Ac.

(4) 25.68 Ac.

(5) 1.90 Ac.

31

CITY

N.W. Cor.



CITY OF

PORTLAND, OREGON

BUREAU OF ENVIRONMENTAL SERVICES

Earl Blumenauer, Commissioner
Mary T. Nolan, Director
1120 S.W. 5th, Rm. 400
Portland, Oregon 97204-1972
(503) 796-7740
FAX: (503) 796-6995

MEMORANDUM

RECEIVED
OCT - 5 1992

October 5, 1992

TO: Multnomah County Board of Commissioners

Multnomah County
Zoning Division

FROM: *Jean Ochsner*
Jean Ochsner, Environmental Specialist
Project Manager - Balch Creek Stormwater Management Plan
City of Portland, Bureau of Environmental Services

SUBJECT: In the Matter of Appeal by Dan McKenzie of the Hearings Officer's
Decision Concerning Sec. 6-91a and HDP 4-91a.

This memorandum is a response to the Dan McKenzie response memorandum. The memorandum will address two points brought up by Dan McKenzie's attorney.

1) The Thompson branch of Balch Creek is a Class I stream. My question I would like to pose to Council is: Why didn't Multnomah County Planning have an updated map, if the stream classification had changed? The answer may be - probably because the stream classification had not legally changed. Personnel, even at Department of Forestry, are not allowed to change the classification of a stream without going through a formal public notice process. Department of Forestry did not go through any public notice process prior to replacing the Class I status with a Class II status. If such a notice process had occurred, then Multnomah County would have been aware of such a change.

2) As to the issue raised - "Significant fish and wildlife habitats shall be protected." For the record, I hold degrees in both Aquatic Biology and Geology. This should offer a bit of relevance for the points I would like to make. Balch Creek is one of the only streams in the Portland Metropolitan area that supports an isolated population of native cutthroat trout. This area also is part of the wildlife corridor, which supports migratory routes from the Coast Range to the Portland Metropolitan area. Both points prove that the Balch Creek Watershed is indeed a significant fish and wildlife habitat.

Dan McKenzie's culvert may not prove to be a barrier to fish migration. However, it does prove to be a barrier to fish spawning. Fish do not spawn in

corrugated pipes. The cutthroat trout need gravel to spawn. Also, the elimination of 36 feet of the creek bed is significant, especially when about half of the Thompson branch topography is flat enough to support the fisheries. Granted, there are several culverts along the Thompson branch that are barriers to fish migration, the addition of a new culvert does not make it right. The cumulative effect of placing more and more culverts in streams lessens the ability of fish to migrate, spawn and survive. We are not only reducing the fisheries spawning gravel, we are also reducing their food supply (macro-invertebrates). Through coordination with Oregon Fish & Wildlife, the older culverts which are a barrier to fish migration can be manipulated so they no longer pose as such a barrier. This is one of my objectives as part of the Balch Creek Stormwater Management Plan.

Hopefully, this will clarify some issues regarding Balch Creek. Thank you.

October 5, 1992

Mr. Mark Hess, Planner
Multnomah County Bureau of Planning
2115 S.E. Morrison Street
Portland OR 97214



DEPARTMENT OF
FISH AND
WILDLIFE

Columbia Regional Office

Dear Mr. Hess:

We have been getting several questions concerning the classification of the Thompson Fork of Balch Creek under the State Forest Practices Act. I indicated in my letter of February 18, 1992, that the Thompson Fork is a Class I stream. However, after checking our files and maps we found that we have the entire Thompson Fork classified as a Class II stream (has been Class II stream since 1986).

Our Department will be sampling the Thompson Fork again during October 1992 to determine what fish are present. Following the sampling, if we determine that the classification needs to be changed we will make a recommendation to the State Department of Forestry.

If you have questions concerning our comments, please call me at 657-2041.

Sincerely,

Jay Massey sm
Jay Massey
District Fish Biologist

jmh

lhess

c: Maben/Hasselmann
DeHart
O'Reilly
Sherman
Rosenlund
McKenzie



17330 SE Eveiyn Street
Clackamas, OR 97015-9514
(503) 657-2000
FAX (503) 657-2050

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

In the Matter of the Review of the Hearings Officer Decision which denied a Significant Environmental Concern (SEC) and Hillside Development (HD) permit for an amended design for private crossing over Balch Creek.

FINAL ORDER
DENYING SEC
6-91a, HDP4-91a
92-182

I. PROCEDURAL HISTORY

This matter arises from the installation of a stream culvert on the subject property without a Hillside Development (HD) permit and Significant Environmental Concern (SEC) permit. The County began enforcement proceedings in January, 1992. After the property owner, Dan M. McKenzie ("McKenzie"), applied for the permits, the planning director approved them on March 31, 1992. On appeal of the decision by the Friends of Forest Park ("FOFP"), the hearings officer overturned the planning director's approval and denied the permits on June 16, 1992. McKenzie appealed to the Board.

On August 25, 1992, the Board expanded the scope of review to include additional evidence and testimony on the classification of the stream running through the subject property. A hearing, including oral argument, was held September 22, 1992. The public testimony was closed. The record was held open until September 29, 1992, to allow FOFP to submit additional written argument and evidence; and until October 5, 1992, to allow McKenzie to submit

additional written argument and evidence. On October 13, 1992, the Board deliberated publicly and was unable to reach a decision either to uphold the hearings officer's decision or to reverse it.

II. CONCLUSION

The applicant has not successfully carried his burden of proof on the issues. The application for HD and SEC permits is denied.

DATED this 15th day of October, 1992.



By

Gladys McCoy
Gladys McCoy, Chair
Multnomah County, Oregon

By

Peter Livingston
Peter Livingston
Assistant County Counsel
For Multnomah County, Oregon

R:\PLFILES\110PL.ORD\mw

10/15/92:1

OCT 13 1992

Meeting Date: _____

Agenda No.: B-1

(Above space for Clerk's Office Use)

AGENDA PLACEMENT FORM
(For Non-Budgetary Items)

SUBJECT: Update on Youth Employment and Empowerment Project

BCC Informal October 13, 1992 BCC Formal _____
(date) (date)

DEPARTMENT Social Services DIVISION Juvenile Justice

CONTACT Jana McLellan TELEPHONE 248-3476

PERSON(S) MAKING PRESENTATION Lorenzo Poe and Jana McLellan

ACTION REQUESTED:

INFORMATIONAL ONLY POLICY DIRECTION APPROVAL

ESTIMATED TIME NEEDED ON BOARD AGENDA: 30 minutes

CHECK IF YOU REQUIRE OFFICIAL WRITTEN NOTICE OF ACTION TAKEN: _____

BRIEF SUMMARY (include statement of rationale for action requested, as well as personnel and fiscal/budgetary impacts, if applicable):

The Board has asked for quarterly updates on the status of the Y.E.E.P. This presentation will offer data as well as narrative on the status of the nine provider agencies, the employer placements and other relevant information through the first four months of operation.

(If space is inadequate, please use other side)

SIGNATURES:

ELECTED OFFICIAL _____

Or

DEPARTMENT MANAGER Gary Nakao (u)

(All accompanying documents must have required signatures)

MULTNOMAH COUNTY
BOARD OF
COUNTY COMMISSIONERS
1992 OCT -7 AM 8:58

**CONTRACTUAL COMPARISONS
FOR A FOUR MONTH PERIOD**

	Contract Requirements	Actual Numbers
No. referred to agency for service	52	149
No. graduated-job ready and to Screening Committee	47	123
No. of youth sent to interview	Not stated	89
No. of youth placed	Not stated	41
No. of youth remaining 60 Days	42	17
Annual no. of jobs required	243	76 committed **50 expected** (Legacy, Kaiser, PGE, Providence)

COST COMPARISONS:

1-\$3,348/month X 4 months x 41 youth = \$549,072 in County Detention

2-\$3,565/month X 4 months X 41 youth = \$584,660 in State Training School

3-Four months of operation for the Coalition has totaled \$64,364.

**YOUTH EMPLOYMENT AND EMPOWERMENT PROJECT
FOUR MONTH UPDATE
June-September 1992**

Demographics:

Total youth served	149	
Male	83	(55.7%)
Female	66	(44.3%)
Asian	1	(.7%)
African American	103	(69.1%)
Hispanic	12	(8.1%)
Native American	1	(.7%)
Caucasian	25	(16.8%)
Other	7	(4.7%)
14 Years	5	(3.4%)
15 Years	17	(11.4%)
16 Years	36	(24.2%)
17 Years	35	(23.5%)
18 Years	25	(16.8%)
19 Years	15	(10.1%)
20 Years	7	(4.7%)
21 Years	6	(4.0%)

Highest Grade Completed:

6th Grade	1	(.7%)
8th Grade	9	(6.0%)
9th Grade	28	(18.8%)
10th Grade	50	(33.6%)
11th Grade	37	(24.8%)
12th Grade	22	(14.8%)

Monthly Service Totals:

June 1992	874 Hours
July 1992	1004 Hours
August 1992	716 Hours
September 1992	697 Hours

YEEP PARTICIPATING EMPLOYERS as of October 13, 1992

Allstate
Bank of America
Bethphage Mission
BPA
Burgerville
Columbia/Pendleton-Seasonal
Columbia/Pendleton-Scouring
Costco
First Interstate Bank
Francesconi
Fred Meyer
Good Health
Hall Labs
Hilton
Irvington
Keg Restaurant
Keinows
Key Bank
Mentor Graphics
Nike
Nordstrom
Northwest Landscaping
Norwest
OHSU
Port of Portland
Rodda Paint
Safeway
Sisters of Providence
Sizzler
St. Vincent's
Syd Dorn
Transportation
U.S. Bank

bccqtr.emp

Meeting Date: OCT 13 1992

Agenda No.: B-2

(Above space for Clerk's Office Use)

AGENDA PLACEMENT FORM
(For Non-Budgetary Items)

SUBJECT: Briefing TIME CERTAIN 10:30am

BCC Informal October 13, 1992 BCC Formal _____
(date) (date)

DEPARTMENT Nondepartmental DIVISION County Chair's Office

CONTACT Hank Miggins TELEPHONE X-3308

PERSON(S) MAKING PRESENTATION Hank Miggins, Myra Lee, State Emergency Mgmt.

ACTION REQUESTED:

INFORMATIONAL ONLY POLICY DIRECTION APPROVAL

ESTIMATED TIME NEEDED ON BOARD AGENDA: 30 minutes

CHECK IF YOU REQUIRE OFFICIAL WRITTEN NOTICE OF ACTION TAKEN: _____

BRIEF SUMMARY (include statement of rationale for action requested, as well as personnel and fiscal/budgetary impacts, if applicable):

State Office of Emergency Management briefing

(If space is inadequate, please use other side)

SIGNATURES:

ELECTED OFFICIAL Gladys McCoy
Or

DEPARTMENT MANAGER _____

(All accompanying documents must have required signatures)

BOARD OF
COUNTY COMMISSIONERS
1992 OCT -2 AM 9:49
MULTNOMAH COUNTY
OREGON