



State of Washington  
**REPORT OF EXAMINATION  
 FOR WATER RIGHT APPLICATION**

<b>PRIORITY DATE</b> 6/10/1993	<b>WATER RIGHT NUMBER</b> S3-29491
<b>MAILING ADDRESS</b> Washington Department of Fish & Wildlife 600 Capitol Way North Olympia, WA 98501-1091	<b>SITE ADDRESS (IF DIFFERENT)</b> Weatherly Management Area, McGilvra Springs

Quantity Authorized for Diversion		
DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)

Purpose						
PURPOSE	DIVERSION RATE			ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
	ADDITIVE	NON- ADDITIVE	UNITS	ADDITIVE	NON-ADDITIVE	

DENIED			
ADDITIVE	IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION
	NON-ADDITIVE	WATER SYSTEM ID	CONNECTIONS

Source Location							
COUNTY	WATERBODY	TRIBUTARY TO			WATER RESOURCE INVENTORY AREA		
Garfield	McGilvra Spring	Dry Gulch			35-Middle Snake		
SOURCE FACILITY/DEVICE	PARCEL	TWP	RNG	SEC	QQ Q	LATITUDE	LONGITUDE

Datum: NAD83/WGS84

**Place of Use (See Attached Map)**

PARCELS (NOT LISTED FOR SERVICE AREAS)

**LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE**

NA

**Proposed Works**

**Development Schedule**

BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
NA	NA	NA

**Findings of Facts**

Upon reviewing the investigator’s report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is not available from the source in question; that there will be a detriment to the public interest and that a new water right is not required for this project since they have an existing water right claim.

Therefore, I ORDER Denial of Application No. S3-29491.

**Your Right To Appeal**

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. “Date of receipt” is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order.

File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
<b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	<b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
<b>Pollution Control Hearings Board</b> 1111 Israel Road SW Ste 301 Tumwater, WA 98501	<b>Pollution Control Hearings Board</b> PO Box 40903 Olympia, WA 98504-0903

Signed at Spokane, Washington, this 9th day of April, 2015.



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Keith L. Stoffel, Section Manager

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www1.leg.wa.gov/CodeReviser>.

INVESTIGATOR'S REPORT

Application for Water Right – Washington Department of Fish & Wildlife (WDFW)  
Water Right Control Number S3-29491  
Dan Tolleson, Department of Ecology

**BACKGROUND**

This report serves as the written findings of fact concerning Water Right Application Number S3-29491.

**Table 1 Summary of Requested Water Right**

<b>Applicant Name:</b>	Washington Department of Fish and Wildlife (WDFW)
<b>Date of Application:</b>	6/10/1993
<b>Place of Use</b>	Portions of Section 5, Township 9 N., Range 43 E.W.M.

<b>County</b>	<b>Waterbody</b>	<b>Tributary To</b>	<b>WRIA</b>
Garfield	McGilvra Spring	Dry Gulch	35-Middle Snake

<b>Purpose</b>	<b>Rate</b>	<b>Unit</b>	<b>Ac-ft/yr</b>	<b>Begin Season</b>	<b>End Season</b>
Wildlife Habitat	0.01	CFS	3	01/01	12/31
Stockwater					

<b>Source Name</b>	<b>Parcel</b>	<b>Twp</b>	<b>Rng</b>	<b>Sec</b>	<b>QQ Q</b>	<b>Latitude</b>	<b>Longitude</b>
McGilvra Spring	70094300510000000	9 N.	43 E.	5	NE¼NE¼	46.2939	117.4433

CFS = Cubic Feet per Second; Ac-ft/yr = Acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section; WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum: NAD83/WGS84.

**Legal Requirements for Approval of Appropriation of Water**

When an application for appropriation of public waters of the state is made, it is the responsibility of the Department of Ecology, Water Resources Program to determine whether or not the application meets the four tests listed in RCW 90.03.290(3):

1. is water available for appropriation,
2. is the proposed use a beneficial use, and
3. will the appropriation as proposed in the application not impair existing rights,
4. nor be detrimental to the public welfare

*Public Notice*

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to

be stored, diverted and used. Notice of this application was published in the East Washingtonian on February 16 and 23, 1994. One protest was received regarding this application.

#### *Consultation with the Department of Fish and Wildlife*

The Department must give notice to the Department of Fish and Wildlife of applications to divert, withdraw or store water. A letter was received from WDFW on October 27, 2014 that indicated they recommend approval of this application for full quantities. The project is subject to state Hydraulic Code (Chapter 77.55 RCW) and fish screening statutes (RCW 77.57.010, RCW 77.57.040 and RCW 77.57.070). Subsequent phone conversations with Steve Boessow, have indicated that they no longer need this water right since they were informed of an existing water right claim.

#### *State Environmental Policy Act (SEPA)*

A water right application is subject to a SEPA threshold determination (i.e., an evaluation whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met.

- (a) It is a surface water right application for more than 1 cubic foot per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;
- (b) It is a groundwater right application for more than 2,250 gallons per minute;
- (c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;
- (d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g., the need to obtain other permits that are not exempt from SEPA);
- (e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

Because this application does not meet any of these conditions, it is categorically exempt from SEPA and a threshold determination is not required.

## **INVESTIGATION**

In considering the proposed application, the investigation included, but was not limited to, research and review of: (1) appropriate rules and statutes; (2) other water rights, permits, and claims; (3) USGS topographic maps and aerial photographs; (4) proposed diversion, distribution system, places of use; (5) Middle Snake, WRIA 35, ongoing Watershed Management Plan; and (6) discussions with Department of Ecology regional program staff.

A field investigation was conducted by Dan Tolleson on November 3, 2014. The site is approximately fifteen miles southeasterly of Pomeroy, Washington. The project is located within the upper reaches of Dry Gulch basin, near the old town site of Peola. This sub-basin has a few small tributaries and supports a seasonal creek which is a tributary to Asotin Creek. Asotin Creek is a tributary of the Snake River, flowing out of the Blue Mountains through the town of Asotin in southeastern Washington. The area is

semi-arid, with varied land use including rangeland, forest and cropland. Currently, Watershed Planning for this basin is at Phase 4 implementation, but this process is at a standstill due to limited funding.

The proposed point of diversion is McGilvra Springs, which is currently developed to provide water to a stock tank. This stock tank is located right on the section line under an elk fence, so it provides water to animals on both sides of the elk fence. The current water system is gravity feed and operates continuously. WDFW propose to redevelop the springs with basically the same type of system. The reason for this redevelopment is that the spring system is old and needs to be updated.

The legal description provided with the application which describes the place of use was incorrect, since it describes land nearly one mile to the southwest, and up gradient. The actual place of use is located just downhill of the proposed spring which is all located within the NE¼NE¼NE¼ Section 5, T. 9 N., R. 43 E.W.M. This location is the actual proposed place of use, which was evident during the field examination, was confirmed by WDFW.

### Other Rights Appurtenant to the Place of Use

A review of Ecology records was conducted for existing water right certificates, permits, and claims within the project and the surrounding area. The search focused primarily on Section 5 within T. 9 N., R. 43 E.W.M. The review of Ecology records shows one water right claim appurtenant to the authorized place of use.

**Water Right Claim 008478**, claims 5 gallons per minute (0.011 cubic feet per second) and 2 acre-feet per year for stockwater. The claimed place of use is all of Section 5, within T. 9 N., R. 43 E.W.M. The claimed source is McGilvera Springs, located within the northeastern portion of Section 5, T. 9 N., R. 43 E.W.M. This claim is essentially the same as the request for appropriation under this application (S3-29491). Currently, this claim is used to provide stockwater and wildlife habitat, which includes drinking water for wildlife. The claimed date of first use is 1905, which predated the water code. Old structures and improvements in the area indicate the spring was developed about the time the claim indicates. The existing diversion system is very old, but is designed to operate continuously with little maintenance. Therefore, it appears that since water was put to use under this claim prior to the water code, and has been used consistently since that time, it is valid.

*The above referenced claim(s) were filed under the Claims Registration Act, Chapter 90.14 RCW. The intent of this act was to document those uses of surface water in existence prior to the adoption of the State Surface Water Code, Chapter 90.03 RCW, which was adopted in 1917, and those uses of ground water in existence prior to the adoption of the State Ground Water Code, Chapter 90.44 RCW, which was adopted in 1945. Since each code(s) adoption, the only means of acquiring a water right within the state is by filing for, and receiving, a permit from the Department of Ecology or one of its predecessors or by establishing a right under the "domestic exemption" under the ground water code (RCW 90.44.050). The Department of Ecology recognizes that the final determination of the validity and extent associated with a claim registered in accordance with RCW 90.14 ultimately lies with the Superior Court through the general adjudication process provided for by Sections 90.03.110 through 90.03.240 RCW. The Department does, however, recognize that water use may be occurring under these claims.*

## Proposed Use and Basis of Water Demand

WDFW proposes to reconstruct the existing facility at McGilvra Springs for stockwater and wildlife habitat. The stockwater portion of the project will be primarily for range cattle from spring through fall. The Wildlife habitat portion of the project will be for year round wildlife drinking water. This area is known to support elk herds during certain times of the year.

Given the proposed design of the system and the nature of both cattle and wildlife to move as they graze, 5 gpm and 3 acre-feet per year, appears adequate for this project. A typical requirement for stockwater of a cow is 15 gallons per day, per animal. This equates to approximately 180 animals per year, with year round use ( $365 \times 15 / 325851 = 0.0168$  of an acre foot, per animal, per year).

Policy, POL-1025, allows for the conveying of stockwater away from a stream to protect water quality. Essentially surface water can be diverted from a historically used source into a tank for stockwater. The utilization of a stock tank cannot expand the historical use and must have a minimum impact to the source. This policy allows for the development of the currently proposed project from the existing springs.

WDFW submitted this application in an effort to get a formal confirmation of the historical water use of McGilvra springs, by way of having a new water right. Water use under this system is currently documented under Claim 007848, which appears to be valid. In addition, water is available for the project under Policy POL-1025. Therefore, there is no demand for water under application S3-29361.

## Beneficial Use

The proposed use of water is defined in statute as a beneficial use (RCW 90.54.020(1)). However, this application for a new water right is not needed since existing claims appear to be valid and documents sufficient water for the project. Therefore, no beneficial use of water is proposed under this application, since there is no demand.

## Public Interest Considerations

One protest was received against granting this water right permit, in response to the public notice. In addition, National Marine Fisheries Service and Department of Fish and Wildlife have made the following comments regarding the new application. They are as follows:

One protest was received from Francis Fitzgerald on March 2, 1994. Mr. Fitzgerald is concerned that this proposed project would negatively affect his water right claim (CL 129953). He requests that Ecology inspect this potential impact, before making a determination. According to RCW 90.03.390(3), Ecology must ensure that new appropriations of water do not impair existing rights. During the field examination, the area described on Mr. Fitzgerald's claim was inspected and no evidence of any recent water use was found. Since this application for a new water right is not needed and no water use is apparent under Mr. Fitzgerald's claim, no impairment analysis was conducted.

On August 19, 2014, Ecology requested National Marine Fisheries Service (NMFS) input on new water appropriations within the Snake River basin. A response was received in a letter dated October 1, 2014. They have indicated that there are several species of fish within the basin that are listed under the Endangered Species Act (ESA). The Snake River and its tributaries have limited flows that affect these ESA listed species. They have noted that many of the tributaries to the Snake River often have poor quality spawning and rearing habitat. Asotin Creek was specifically listed as a tributary of concern. Currently, NMFS has a draft plan for recovery of this basin and has indicated that new consumptive water uses should be denied, unless they have appropriate mitigation.

A letter was received on October 27, 2014 from Washington Department of Fish and Wildlife (WDFW). They initially recommended approval of this application. The following reason has been provided by WDFW: *"This [project] will not change the quantity of water used by wildlife and grazing cattle. It will provide better access to the water without degrading the spring source. The nearest fish bearing waters are nearly 10 miles downstream"*. According to WDFW, this application was intended to confirm the existing water use and does not propose a new appropriation of water. Once WDFW was aware of the existing water right claim, it has indicated that they no longer supported approval of this application but wanted a decision documenting this process.

As indicated above there is significant public concern regarding new water uses within this Snake River Basin. NMFS and WDFW have generally indicated that they recommend denial of new consumptive use applications within this basin due to habitat concerns. The proposed appropriation is not considered consumptive since water use is currently provided for under a valid appearing water right claim. This means that no new water right is required and if issued would be redundant. A request for a redundant water right essentially is the holding water in reservation for some possible future need. Such reservations of water are not allowed under the code and are speculative in nature. Therefore, issuance of this application is not in the public interest.

## Water Availability

For water to be available for appropriation, it must be both physically and legally available.

### *Physical availability*

For water to be physically available for appropriation there must be ground or surface water present in quantities and quality and on a sufficiently frequent basis to provide a reasonably reliable source for the requested beneficial use or uses. In addition, the following factors are considered:

- Volume of water represented by senior water rights, including federal or tribal reserved rights or claims;
- Water right claims registered under Chapter 90.14 RCW;
- Ground water uses established in accordance with Chapter 90.44 RCW, including those that are exempt from the requirement to obtain a permit; and
- Potential riparian water rights, including non-diversionary stock water.

- Lack of data indicating water usage can also be a consideration in determining water availability, if the department cannot ascertain the extent to which existing rights are consistently utilized and cannot affirmatively find that water is available for further appropriation.

#### *Legal availability*

To determine whether water is legally available for appropriation, the following factors are considered:

- Regional water management plans – which may specifically close certain water bodies to further appropriation.
- Existing rights – which may already appropriate physically available water.
- Fisheries and other instream uses (e.g., recreation and navigation). Instream needs, including instream and base flows set by regulation. Water is not available for out of stream uses where further reducing the flow level of surface water would be detrimental to existing fishery resources.
- The Department may deny an application for a new appropriation in a drainage where adjudicated rights exceed the average low flow supply, even if the prior rights are not presently being exercised. Water would not become available for appropriation until existing rights are relinquished for non-use by state proceedings.

The proposed source is McGilvera Springs which has been used to provide stockwater for over 100 years. This historical use is documented under Water Right Claim 008478. This existing claim appears to use most of the water physically available at the spring site, leaving essentially no water available for a new appropriation.

The proposed diversion is located within the headwaters of Dry Gulch basin, which is a tributary to Asotin Creek. The Washington Department of Fish and Wildlife (WDFW) initially submitted a recommendation for approval of this project. They indicated that this recommendation is pursuant to *RCW 77.57.020 Review of permit applications to divert or store water – Water flow policy*. They also, indicate that this proposed appropriation will not change the quantity of water historically used by wildlife and grazing cattle from the proposed source. This project proposes no new impacts to the system, therefore no negative impacts to ESA listed fish species. Once WDFW became aware of the existing water right claim for this project, they indicated that they no longer need this application, and no longer supported approval. However, they did want a decision regarding this application, which documents the process.

If this application were approved it would essentially be to confirm an existing water right claim. The validity of a water right claim can only be confirmed by Superior Court and is not under the authority of Ecology.

Water is not physically or legally available from the proposed source. This is due to the existing water right claim that utilizes all of the practically divertible water during dryer times of the year. Essentially the claim represents a senior water right, leaving nothing available to appropriate. Issuance of a water right permit under this application would in effect be confirming a water right claim which is not under Ecology's authority. In addition, WDFW initial recommendations for approval are not met because of the existing water right claim.

### Impairment Considerations

Impairment will not be considered in this report, since water is not available and there is no need for additional water under a new water right.

### RECOMMENDATIONS

Although, the type of use proposed under this application is beneficial, there is no need for additional water since WDFW has an existing water right claim for the project. Water is not available for this project and the proposed appropriation is not in the public interest. Impairment considerations were not conducted for this application since it was determined there is no need for additional water.

**It appears that existing Water Right Claim 008478 represents a valid historical water use. The validity of this claim will not be affected by the denial of Application No. S3-29491.**

### Purpose of Use and Authorized Quantities

Based on the above investigation and conclusions, I recommend that this request for a water right be **denied**.



Dan Tolleson, Report Writer



Date

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