DEPARTMENT OF ECOLOGY
State of Washington

State of Washington
REPORT OF EXAMINATION
FOR WATER RIGHT APPLICATION

---DENIED---

PRIORITY DATE
March 14, 2014

WATER RIGHT NUMBER
S3-30707

NAME & ADDRESS

Matt Rogers
PO Box 54
Curlew, WA 99118

Jesse Rogers
PO Box 311
Curlew, WA 99118

Quantity Authorized for Withdrawal

DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
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Purpose

	DIVERSION RATE		ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
PURPOSE	ADDITIVE	UNITS	ADDITIVE	NON-ADDITIVE	
Irrigation of 20 acres, stockwater & hydropower	---	---	---	---	

Source Limitations

SOURCE FACILITY/DEVICE	DIVERSION RATE	ANNUAL QUANTITY (AF/YR)	PERIOD OF USE (mm/dd)
Cottonwood Creek	---	---	---

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
FERRY	COTTONWOOD CREEK	KETTLE RIVER	60 – KETTLE RIVER

SOURCE FACILITY/DEVICE	PARCEL	TWP	RNG	SEC	QQ	LATITUDE	LONGITUDE
COTTONWOOD CREEK		40 N.	33 E.	33	NE¼SE¼		

Place of Use (See Attached Map)

PARCELS (NOT LISTED FOR SERVICE AREAS)

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

N/A

Proposed Works

N/A

Development Schedule

BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
N/A	N/A	N/A

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 impairment of existing rights; and that there will be detriment to the public interest.

Therefore, I ORDER Surface Water Application No. S3-30707 be **DENIED**.

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
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503 **Pollution Control Hearings Board** 1111 Israel Road SW Suite 301 Tumwater, WA 98501	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608 **Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Signed at Spokane, Washington, this 20th day of January, 2016.

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 -- Rogers
Water Right Control Number S3-30707
Gene Drury, Department of Ecology

BACKGROUND

This report serves as the written findings of fact concerning Water Right Application Number S3-30707.

An application to appropriate public surface water was submitted by brothers Matt and Jesse Rogers to the Department of Ecology on March 14, 2014. The application was accepted and assigned Surface Water Application No. S3-30707. The applicants propose to divert water from Cottonwood Creek, a tributary of the Kettle River in the amount of 0.50 cubic feet per second, for seasonal irrigation of 20 acres, and continuously, for stockwater supply and hydropower generation. The two proposed points of diversion are to be located within the NE¼SE¼ of Section 33, T. 40 N., R. 33 E.W.M. The applicants have also filed for a permit to withdraw ground water under Application No. G3-30706.

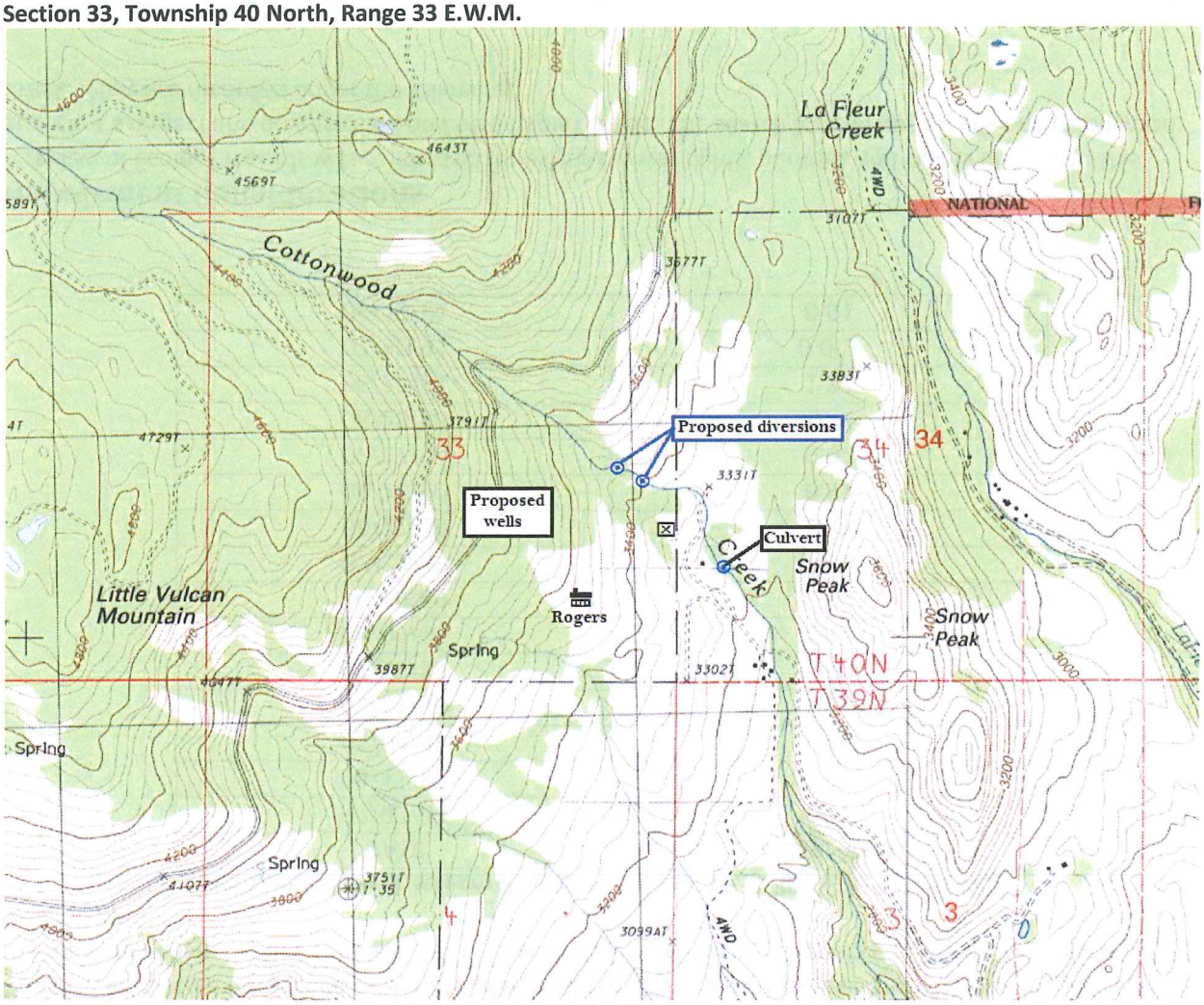
A notice of application was duly published in accordance with RCW 90.03.280 in the Ferry County View Newspaper on July 2 and 9, 2014. Two protests against this application were received.

INVESTIGATION

A site visit was conducted by Gene Drury on April 28, 2015. The project site is located approximately 4 miles north of Curlew, Washington. The property is located within the Cottonwood Creek drainage, between Little Vulcan Mountain and Snow Peak.

PROJECT LOCATION

Section 33, Township 40 North, Range 33 E.W.M.



USGS 7.5 Minute (Topographic Map) - "Vulcan Mtn/Curlew"

PROJECT DESCRIPTION

The application proposed constructing a pond to supply water for the irrigation of 20 acres and stockwater supply for 80 head of cattle. Water is also proposed to be piped from a head gate approximately 600 feet to a pelton wheel to power home, shop and outbuildings. A small home has been constructed along with an RV trailer located on the property. At the time of site visit the applicants were not home but Matt Rogers was contacted later by phone. The proposed points of diversion are to be from Cottonwood Creek located on the applicant's property within the NE¼SE¼ of Section 33, T. 40 N., R. 33 E.W.M. The proposal for hydropower was discussed with the Mr. Rogers, however due to the conditions and recommendations by WDFW, no diversion bypass can be allowed. Therefore, the proposed system will not be permitted.

Water Availability

An analysis of water availability must take into account not only the physical limitations on the source of supply, but the legal availability as well.

The applicants' property is adjacent to Cottonwood Creek, a small tributary (drainage area = 3.4 square miles) of the Kettle River. Cottonwood Creek is an ephemeral creek that often goes dry in the summer months (at least at the location where Ecology staff have historically measured the flow, about 2.5 miles downstream from where Cottonwood Creek crosses the applicants' property).

Sandy Dotts, a Habitat Biologist with Washington Department of Fish and Wildlife (WDFW) has investigated complaints on Cottonwood Creek for the past two years. She has viewed the creek conditions in the summer and is familiar with the area. The creek normally goes dry in the summer but did flow year round in 2013 and 2014 according to WDFW. During the WDFW investigations, it was noted that fish were present in Cottonwood Creek. Rainbow and Eastern Brook trout were both found in an electrofishing survey conducted by WDFW on May 30, 2014.

On the day of the 2015 Ecology site visit to Cottonwood Creek, the creek was flowing but only an estimated 0.50 cubic foot per second or less at the applicant's culvert/driveway crossing. 0.50 cubic foot per second is the amount which was requested under this application. It does not appear that water would be available for this appropriation amount.

Miscellaneous streamflow measurements were made by Ecology on the lower end of Cottonwood Creek at the road crossing in the S½S½ of Sec. 10, T. 39 N., R.33 E.W.M. in the summers of 1987 to 1991. That data is as follows:

Cottonwood Creek stream flow (S½¼S½ Sec. 10, T. 39 N., R. 33 E.W.M.)

DATE	FLOW (CFS)
07/07/87	DRY
08/11/87	DRY
06/04/88	DRY
06/21/88	DRY
07/19/88	DRY
08/09/88	DRY
06/20/89	0.09
07/19/89	DRY
08/22/89	DRY
06/28/90	0.92
07/17/90	0.07
08/28/90	DRY
06/27/91	1.33
07/30/91	0.006
08/29/91	0.01

Impairment Considerations

A review of Ecology records was conducted for existing water rights, permits, and claims on or near the applicant's project and downstream on Cottonwood Creek. The search found two records on Cottonwood Creek. They are recorded under the following:

- **Surface Water Certificate No. S3-26790C** (Beener/Mathews), priority date of January 27, 1981. 0.04 cubic foot per second, 6.3 acre-feet per year for domestic supply, stockwater and irrigation of 2 acres. Point of diversion within the SW¼NE¼, Sec. 10, T. 39 N., R. 33 E.W.M.

- **Surface Water Claim No. 129445** (Utter), claimed priority date of 1910. 50 gallons per minute (0.11 cubic foot per second) for domestic and stockwater. Claimed point of diversion within S½NE¼ and N½SE¼, Sec. 3, T. 39 N. R. 33 E.W.M.

Public Interest Considerations

Comments were received from Steve Boessow, Biologist with the Washington State Department of Fish and Wildlife (WDFW) regarding this proposal. WDFW recommended denial of the application, based on impacts to fish and wildlife and habitat they rely on, and pursuant to Chapter 77.57.020 RCW stating that there is insufficient water in Cottonwood Creek to provide for any out of stream uses while still maintaining aquatic habitat functions.

Two protests against this application were also received. The protestants were concerned about the impacts to the flows of Cottonwood Creek and downstream water users.

Consideration of Protests and Comments

The two protests against this application were as follows:

Craig Beener and Marjean Mathews of Curlew, WA (letter received July 18, 2014)
This protest stated that the requested amounts were unrealistic for the area and that the seasonally flowing Cottonwood Creek could not support such a significant withdrawal of water. It stated that WDFW has determined that there are fish in the lower portions of Cottonwood Creek and potentially upstream. The protestants were concerned that the withdrawals could potentially affect these fish populations. The protestants were also concerned how the proposed withdrawal of so much water would impact the local ground water aquifers. Mr. Beener does hold a water right from Cottonwood Creek and an Unnamed Spring under Surface Water Certificate No. S3-26790C (see above).

John Magoteaux of Curlew, WA. (letter received July 28, 2014)
This protest did not object to domestic or stockwater supply but strongly objected to the requested amounts for irrigation use. The protestant stated that Cottonwood Creek is a fragile system that goes sub surface in late summer. This underground water recharges the mid to lower sections of Cottonwood Creek which provide habitat for native trout and other animals in the drainage. The proposed appropriation would seriously harm Cottonwood Creek and have negative effects on downstream water users.

Conclusions

Under Chapter 90.03.290 RCW, an application for permit may only be approved if water is available for appropriation, and the proposed use would be a beneficial use, would not impair existing water rights, and would not be detrimental to the public welfare.

It is the conclusion of this examiner that although the proposed uses are beneficial, water is not legally and physically available for further appropriation. The proposed new appropriation within this area will cause impairment to existing rights. This appropriation would be detrimental to the public welfare.

RECOMMENDATIONS

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

1-20-2016

Gene Drury, Report Writer *Date*

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