March 6, 2014

VIA E-MAIL (objections-pnw-regional-office@fs.fed.us)

Mr. Kent Connaughton
Regional Forester
Pacific Northwest Region USDA Forest Service
Attn: 1570 APPEALS and OBJECTIONS
1220 SW 3rd Avenue
PO Box 3623
Portland, OR 97208

Re: Comments and Qualified Objection Regarding the Environmental Assessment and Draft Decision Notice and Finding of No Significant Impact for the Ryan Ranch Restoration Project

Dear Mr. Connaughton:

In January 2014, Kevin W. Larkin, the District Ranger for the Bend/Ft. Rock Ranger District, Deschutes National Forest (hereinafter, the “Forest Service”), released the Environmental Assessment: Ryan Ranch Restoration Project (the “Final EA”) and Draft Decision Notice and Finding of No Significant Impact: Ryan Ranch Restoration Environmental Assessment (the “Draft Decision”). The Forest Service published notice of the Final EA and Draft Decision in The Bulletin on January 22, 2014 and provided a 45-day period in which to submit objections. This objection is timely submitted.

We represent and submit this comment and qualified objection letter (the “Objection”) on behalf of the Deschutes Basin Board of Control (the “DBBC”), which includes the following member districts: Arnold Irrigation District, Central Oregon Irrigation District, North Unit Irrigation District, Ochoco Irrigation District, Swalley Irrigation District, Three Sisters Irrigation District, and Tumalo Irrigation District. 1 On October 8, 2010, the DBBC submitted a comment letter (the

1 Correspondence regarding this Objection should be mailed to David E. Filippi, 900 SW Fifth Avenue, Suite 2600, Portland, OR 97204. However, to comply with 36 C.F.R § 218.8(d)(1), the DBBC’s address is PO Box 919, Madras, OR 97741 and its telephone number is (541) 475-3625.

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“2010 Comment Letter”) regarding the September 2010 draft environmental assessment that preceded the Final EA (the “Draft EA”). The 2010 Comment Letter was also signed by Arnold Irrigation District, North Unit Irrigation District, and Tumalo Irrigation District. The DBBC is entitled to object to the Final EA and Draft Decision because it submitted timely, specific written comments on the Draft EA. See 36 C.F.R. § 218.5(a). The Objection relates to specific issues that were previously raised in the 2010 Comment Letter, except where the Objection is specifically commenting on Alternative 4 of the Final EA, which was not presented in the Draft EA. See id. § 218.8(d)(6).

The 2010 Comment Letter strongly opposed the Ryan Ranch restoration project, as presented in the Draft EA. The 2010 Comment Letter objected to the proposed restoration project because of the project’s potential to injure existing water rights and concerns regarding whether the project would comply with Oregon water law. The 2010 Comment Letter also objected to the proposed restoration project because the Draft EA failed to adequately address or resolve ownership of the levee (referred to in the Final EA as a “berm”) that currently prevents Deschutes River water from entering Ryan Ranch.

The DBBC appreciates the significant efforts made by the Forest Service to address concerns raised by the DBBC in the 2010 Comment Letter. Based on the comments submitted regarding the Draft EA, the Forest Service developed a new alternative—Alternative 4—to the restoration action initially proposed by the Forest Service. Alternative 4 includes a pilot phase that allows the Forest Service to determine the potential loss of surface water diverted into Ryan Ranch and to ensure that existing water rights will not be injured by the project. The Draft Decision would approve the Ryan Ranch restoration project under Alternative 4.

The DBBC supports Alternative 4 as a reasonable alternative to the restoration project originally proposed by the Forest Service. Alternative 4 is designed to ensure that any restoration activities associated with Ryan Ranch would not injure existing water rights, which represent legally protected property interests. See Sayler v. Water Res. Dep’t, 788 P.2d 494, 495 (Or. Ct. App. 1990). Under Alternative 4, all water diverted into Ryan Ranch would be diverted pursuant to a limited license applied for and held by the DBBC. As the Forest Service acknowledges in the Draft Decision, the DBBC’s participation is necessary to Alternative 4. That is, the Forest Service’s ability to implement Alternative 4 depends on the DBBC applying for and securing from the Oregon Water Resources Department (“OWRD”) an authorization to divert water into Ryan Ranch.

The DBBC also supports the overall purposes of the Ryan Ranch restoration project. As explained in the Final EA, one primary purpose of the Ryan Ranch Restoration project is “to
restore the deteriorating banks of the Deschutes River.” Final EA at 6. Restoring the riverbank is necessary to protect the Deschutes River Trail—a major recreation feature—and to ensure uninterrupted delivery of water to water right holders. The second primary purpose of the restoration project is to inundate Ryan Ranch and create wetlands. See id. As Alternative 4 recognizes, however, preventing injury to existing water rights is a necessary precondition to this second purpose.

Despite the DBBC’s general support for Alternative 4 and the overall purposes of the Ryan Ranch restoration project, the DBBC recognizes that the details of key agreements related to the DBBC’s participation in Alternative 4 have yet to be resolved. The DBBC’s support for and participation in Alternative 4 depend on the resolution of these remaining details. The four issues described below must be resolved before the DBBC will participate in Alternative 4. The Forest Service’s ability to implement Alternative 4, as presented in the Final EA and Draft Decision, depends on the participation of the DBBC.

1. The Forest Service and the DBBC must agree to the terms and conditions under which the DBBC will supply water to be diverted into Ryan Ranch. Such an agreement would describe the rights and obligations of both the Forest Service and the DBBC. The DBBC supports the concept presented in Alternative 4 under which the DBBC would apply for and hold a limited license under which the Forest Service would divert water into Ryan Ranch. But the DBBC cannot commit to participating in Alternative 4 unless and until the details of a water supply agreement are finalized. Alternative 4 cannot move forward without the DBBC’s participation. As explained in the 2010 Comment Letter, a water right (or similar water use authorization from OWRD) is legally required to divert water into Ryan Ranch under any of the alternatives discussed in the Final EA. Alternative 4 addresses this issue by specifying that water must be diverted pursuant to a limited license applied for and held by the DBBC. In addition, the DBBC understands that such an agreement would also address the other primary purpose of the project, namely, the maintenance and restoration of the deteriorating banks of the Deschutes River. In particular, the agreement would help to facilitate efforts by the DBBC and its member districts to maintain the system of levees (or berms) that help to ensure the delivery of water to water users throughout the basin. On March 5, 2014, the DBBC provided the Forest Service with a draft list of key terms and conditions that would be included in an agreement between the DBBC and Forest Service, and the DBBC looks forward to reaching agreement with the Forest Service on these key terms and conditions soon.

2. The Forest Service, the DBBC, and regulatory agencies with jurisdiction regarding the use of water for the project (e.g., OWRD and the U.S. Bureau of Reclamation) must
reach agreement regarding the source of water to be supplied under the limited license agreement (i.e., natural flow versus stored water) and the beneficial use that will occur after the water is diverted into Ryan Ranch. The DBBC understands that Reclamation has taken the position that, based on existing contracts between Reclamation and DBBC member districts, stored water cannot be the source of water under the limited license. The Draft Decision is consistent with this understanding and explains that “Alternative 4 . . . includ[es] the use of natural flow waters to inundate [Ryan Ranch].” Draft Decision at 7 (emphasis added). As such, the limited license must be limited to the use of natural flow, which will be further limited to when such natural flow is available given existing water rights. On March 5, 2014, the DBBC provided the Forest Service with its understanding as to what would be included in the DBBC’s limited license application for the pilot project, and the DBBC looks forward to reaching agreement with the Forest Service on the components of the application.

3. The DBBC must receive credit or recognition under the Upper Deschutes Basin Multi-species Habitat Conservation Plan (the “Upper Deschutes HCP”) for steps taken to conserve the Oregon spotted frog through its participation in the Ryan Ranch restoration project. The Upper Deschutes HCP is being developed by the DBBC and other entities. The Oregon spotted frog, which has been proposed for listing under the Endangered Species Act (“ESA”), is one of the species that will be covered under the Upper Deschutes HCP. We understand that the Forest Service believes that Ryan Ranch historically supported a population of Oregon spotted frogs. Final EA at 85. Under Alternative 4, Ryan Ranch would once again provide habitat for the species. Id. at 14. One significant benefit of developing Ryan Ranch as potential habitat for Oregon spotted frogs is that Ryan Ranch does not contain many of the threats to the species that exist elsewhere (e.g., no known bullfrog populations exist in the immediate area surrounding Ryan Ranch). Id. at 85.

An HCP must describe measures the applicant will undertake to monitor, minimize, and mitigate its potential impact to the species covered by the HCP. 50 C.F.R § 222.307(b)(5). The DBBC and the U.S. Fish and Wildlife Service (“USFWS”) have been engaged in conversations regarding the method through which the DBBC will receive credit or recognition for mitigation actions taken before the Upper Deschutes HCP is final, such as facilitating the restoration of Ryan Ranch. However, USFWS has not yet provided written assurance that the DBBC will in fact be awarded such credit or recognition, and if so, how such credit or recognition will be measured or “valued.” Given the significant conservation benefit to Oregon spotted frogs that could result from
the Ryan Ranch restoration project, the DBBC must receive appropriate credit or recognition under the Upper Deschutes HCP for its early, voluntary participation in Alternative 4. The DBBC looks forward to receiving a draft of the written assurance from USFWS soon.

4. The DBBC must receive adequate assurances from USFWS that implementation of Alternative 4 will not expose the DBBC or its member districts to liability under the ESA. The Final EA states that implementing Option B or C of the Final EA “may affect and will likely adversely affect Oregon spotted frogs.” Final EA at 94-95. Similarly, the Final EA states that implementing Option B or C “may affect and will likely adversely affect critical habitat” for the Oregon spotted frog.” Id. The Final EA probably overstates the risk to Oregon spotted frogs during the pilot phase because, as the Final EA acknowledges, the likelihood of the species occupying Ryan Ranch during the pilot phase is “low.” Id. at 94. Nevertheless, the DBBC’s voluntary participation in Alternative 4, which could lead to the development of habitat for the Oregon spotted frog, must not expose the DBBC or its member districts to potential liability under the ESA.

The Final EA explains that USFWS “will issue a Biological Opinion (BO) to the [Forest Service] that authorizes take of Oregon spotted frogs if either Option B or C is implemented.” Id. at 97. The DBBC should receive at least the same if not greater protections afforded to the Forest Service. In particular, the DBBC needs protection in the event that the project does not move beyond the pilot phase, or if the DBBC chooses not to supply water (or if due to the lack of available natural flow water cannot supply water) to the project, whether during the initial limited license period or at some future phase of the project. The DBBC was provided with a draft BO only yesterday, March 5, and the DBBC is currently reviewing this document. The DBBC looks forward to further discussion to ensure that the full scope of the DBBC’s efforts as part of the pilot phase are included within the incidental take coverage for the project. In short, the DBBC must have the ability to terminate its participation in the project and prevent future water deliveries to the project, without any ESA-related obligations or liabilities.

The DBBC is optimistic that it will be able to reach agreement with the Forest Service and other relevant agencies regarding the four issues described above. Once such agreement is reached, the DBBC will fully support the Forest Service in moving forward with the restoration of Ryan Ranch under Alternative 4. Absent such agreement, however, our objections raised in the 2010 Comment Letter remain relevant. That is, Alternative 4 addressed the DBBC’s concerns
regarding injury to existing water rights and compliance with Oregon water law, but Alternative 4 depends on water supplied by the DBBC under a limited license.

As explained in the 2010 Comment Letter, the DBBC opposes the use of water to inundate Ryan Ranch, unless water is diverted under a water right (or similar water use authorization from OWRD). See 2010 Comment Letter at 4-5. Oregon law is clear that a water right is required when water is put to beneficial use. As relevant here, a water right is required when water is used for wetland restoration purposes if water is not currently used for that purpose. See Final EA at 14 ("[OWRD] has officially notified the Forest Service that the Ryan Ranch project would require a water right due to the potential for harm to the water rights of downstream users."). The Final EA acknowledges that a levee (or berm) has prevented Deschutes River water from accessing Ryan Ranch since at least the 1920s. See id. at 6.

The necessity of diverting water under a water right will not disappear at the end of the pilot phase. Although the Draft Decision could be clearer on this point, the Draft Decision notes that the Forest Service will work with OWRD and the DBBC to secure a "long term commitment of water to the Ryan Ranch floodplain." Draft Decision at 16 (Option A), 18 (Option B). The DBBC understands this statement to mean that future water used to inundate Ryan Ranch will be diverted under a valid water right. Any other approach would be inconsistent with Oregon law.

The 2010 Comment Letter also noted that use of water without a water right would constitute a material interference with, and a frustration of the purpose of, the repayment contract between Reclamation and the North Unit Irrigation District. See 2010 Comment Letter at 3. Use of available natural flow water under a limited license would address this concern.

The Draft Decision acknowledges that the Forest Service designed Alternative 4 in response to concerns raised by the DBBC regarding the potential injury to existing water rights. See Draft Decision at 7-8; see also 2010 Comment Letter at 3-4 (arguing that the Draft EA inadequately addressed impacts to junior water right holders). So long as the Forest Service follows through on its commitment to use only natural flow water under a limited license held by the DBBC or one of its member districts, Alternative 4 sufficiently addresses the DBBC’s concerns regarding potential injury to existing water rights.

Technical Comments

In addition to the broader comments outlined above, the DBBC also offers the following comments on specific statements made throughout the Final EA:
Page 64: Under the heading “Water Rights,” the Final EA states: “The discussion of water rights is a policy issue not included in the analysis of Environmental Consequences. A complete discussion on water rights associated with this project is included in Appendix A of this document.” (Emphasis added.)

Comment: Whether water rights are discussed in the body of the Final EA or in an appendix to that document is not an issue for the DBBC. However, the description of water rights as a “policy issue” is inaccurate. In Oregon, “[t]he right to use water is a vested property interest entitled to judicial protection.” Sayler, 788 P.2d at 495 (emphasis added). Thus, the discussion of water rights is a legal issue, not merely a policy issue. The Forest Service is not authorized to ignore Oregon law to implement the Ryan Ranch restoration project, or any other restoration project for that matter. See Letter from Kyle Gorman, Region Manager - South Central Region, Oregon Water Resources Department, to Shane Jeffries, Deschutes National Forest, Jan. 5, 2011. Moreover, the Final EA must address any impacts to existing water right holders that would result from the proposed action and alternatives analyzed in the Final EA.

Pages 103-04: Table 11 is intended to summarize the effects to management indicator species, focal bird species, birds of conservation concern, and high priority shorebirds. These effects are discussed in greater detail on pages 104 through 127 of the Final EA.

Comment: Table 11 does not accurately summarize the discussion of effects from pages 104 through 127 of the Final EA. For example, the Final EA states: “Alternatives 2, 3, and Options A, and B of Alternative 4 may negatively impact elk due to altering existing meadow habitat (flooding) and by potentially increasing the amount [of] disturbance (recreation proposals) in the Ryan Ranch KEA but would not lead to a trend towards Federal listing.” Final EA at 108. Table 11, however, shows that Alternatives 2, 3, and Options A and B of Alternative 4 may benefit elk. Id. at 104. Similar discrepancies between the table and the underlying analysis exist for multiple other species (e.g., Northern Goshawk, Cooper’s Hawk, Sharp-shinned Hawk, Osprey, etc.).

Pages 142-43: The Forest Service concludes in the Final EA that it need not obtain a water right to inundate Ryan Ranch with Deschutes River water.

Comment: The Forest Service misinterprets Oregon law and, as a result, reaches the wrong conclusion regarding whether a water right is required. Consistent with the Draft EA, the Forest Service continues to take the position that no water right is necessary because “the project would not utilize a man-made diversion structure.” Final EA at 142. But during the pilot phase of Alternative 4, water would enter Ryan Ranch “through up to three temporary culverts.” Id. at 143 (emphasis added). Culverts are clearly man-made diversion structures.
After the pilot phase, the Forest Service would implement one of three adaptive management options. Under Option C, no further water would be diverted into Ryan Ranch. Under Options A and B, the Forest Service would “re-locate” the existing levee, remove the temporary culverts, and construct “open inlet/outlet channels with a gently graded cross section.” Id. at 23. Like the temporary culverts, the inlet/outlet channels with gently graded cross-section, which are located in a relocated levee, are man-made diversion structures. See 2010 Comment Letter at 4. But even if the channels were not man-made diversion structures, OWRD acknowledged in the Findings of Fact and Order of Determination for the Klamath River Basin General Stream Adjudication that, under certain circumstances, “natural overflow” can be a “method of diversion.” Therefore, the Forest Service’s conclusion that a water right is not required unless water passes through a man-made diversion structure is based on a cramped interpretation of Oregon law, which is inconsistent with OWRD’s interpretation of the law.

Conclusion

The DBBC commends the Forest Service for its genuine efforts to address the DBBC’s concerns regarding the Draft EA. Alternative 4 represents a creative means of seeking to resolve those concerns. Given the progress that has been made, the DBBC generally supports Alternative 4 and the overall purposes of the Ryan Ranch restoration project.

The DBBC’s support is qualified, however, because of the four unresolved issues identified in this letter. The DBBC objects to the Forest Service’s implementation of Alternative 4 (and Alternatives 2 and 3) without resolving these issues on the grounds that such action would injure existing water right holders and violate Oregon water law. The DBBC remains optimistic that all of these issues can be resolved in a timely manner through cooperation between the Forest Service, the DBBC, OWRD, Reclamation, and USFWS. Once resolved, the DBBC will enthusiastically support the Forest Service’s implementation of Alternative 4.

Very truly yours,

David E. Filippi

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