

BEFORE THE WATER RESOURCES COMMISSION OF OREGON

IN THE MATTER OF THE CONVERSION OF)
TWO MINIMUM STREAMFLOWS TO INSTREAM)
WATER RIGHTS, SILETZ RIVER)

FINAL ORDER

STATEMENT

Pursuant to ORS 537.346, the Water Resources Commission (Commission) was directed to convert all existing minimum streamflows to instream water rights. Where a change in any element of a minimum streamflow is contemplated on conversion, including placing any conditions on the instream right, a contested case hearing must be held to determine if the proposed modification would impair other rights, if the flows exceed those needed for the public use, or if the conversion is not in the public interest.

In response to a request filed by the City of Toledo, the Commission directed that a contested case hearing be held on the proposed conversion of these minimum streamflows. Pursuant to Notice of Hearing dated May 11, 1990, the matter was set for hearing on August 16, 1990, and opportunity provided for interested entities to petition for party status.

On petitions timely filed, the City of Newport, City of Siletz, Seal Rock Water District (Seal Rock), Oregon Trout, WaterWatch of Oregon, the Confederated Tribes of Siletz Indians (Tribes) and Georgia-Pacific Corporation were admitted as parties. The Oregon Department of Fish and Wildlife (ODFW) was admitted as an interested agency by order entered July 12, 1990. The filing schedule for written direct testimony was also set by that Order. Parties were directed to address 3 issues in their direct testimony, in addition to other issues they wished to present:

1. Would the conversion take away or impair existing water rights;
2. Would the conversion impair or be detrimental to the public interest; and
3. Would it be in the public interest to condition the converted instream water rights to meet municipal water supply needs over the short term, and if so, what conditions should be considered?

By orders issued on July 3, 1990, July 19, 1990 and May 9, 1991, the hearing was postponed and rescheduled and the filing schedule amended several times at the request of the parties in order to allow them an opportunity to enter into settlement discussions.

No settlement having been reached and it appearing that allowing further time for negotiations would not be fruitful, the hearing was reset for August 9, 1991, and subsequently rescheduled twice more on request of ODFW and the Tribes.

While the Department originally proposed to convert these minimum streamflows without condition, that proposal was subsequently modified to include a condition which would allow some subordination of the instream water right to Seal Rock's junior right, as follows:

"The use of water by the Seal Rock Water District under permit number 40277 shall not be affected by regulation for this instream water right if:

1. The District limits the number of active service connections to the number in existence on (date of order).
2. The District, by May 31, 1992, adopts the standby water use curtailment procedures as submitted in its Post-Hearing Memorandum and attached hereto and made a part of this Order.
3. The District activates and diligently enforces its adopted water use curtailment procedures whenever notified by the watermaster that streamflows in the Siletz River are inadequate to meet the levels prescribed in this instream water right and continues such enforcement until notified by the watermaster that adequate streamflows are available to meet this instream water right.

The municipal parties sought more generous conditions which would require subordination of the instream right to more extensive use under junior rights for at least 20 years, while they made their best efforts toward creating a water supply authority and developing storage. The Tribes, ODFW and WaterWatch sought conversion without any conditions.

The hearing was ultimately held on October 25, 1991 in Newport, Oregon, with all parties but Newport participating. Present or represented by counsel were:

WaterWatch of Oregon and Oregon Trout, by Karen Russell
ODFW by Shelly McIntyre, Department of Justice
City of Siletz by Robert Connell
City of Toledo by Jim Ruggeri
Seal Rock Water District by Eugene Richardson
Confederated Tribes by Craig Dorsay
Georgia-Pacific Corp. by Melinda Eden

Douglas Parrow appeared as a witness with testimony on the condition proposed by the Department to be placed on the instream water right.

All written direct testimony received was offered and accepted into the record.

Following the hearing, post-hearing memoranda were filed by WaterWatch of Oregon, ODFW, City of Siletz, Seal Rock, the Tribes, and Georgia-Pacific. Seal Rock withdrew its previously proposed condition and submitted a modified version of that condition proposed by the Department:

"The use of water by the Seal Rock Water District under permit number 40277 shall not be affected by regulation for this instream water right [if:] so long as the municipal water usage by the City of Newport, City of Toledo, City of Siletz and the Seal Rock Water District does not exceed 12 cfs. If the total municipal usage reaches 12 cfs, the water use by the Seal Rock Water District under Permit No. 40277 shall not be affected by regulation for this instream water right if:....."

Based on the record, a Proposed Order was served on the parties on January 3, 1992. That Proposed Order directed the conversion of these minimum streamflows to instream rights and allowed use by the Seal Rock Water District of up to 0.7 cfs of its junior right, permit 40277, in subordination of the instream water rights and without regulation therefore, under the following conditions:

1. The District limits the number of active service connections to the number in existence on January 1, 1992;
2. The District, by May 31, 1992, adopts the standby water use curtailment procedures as submitted in its Post-Hearing Memorandum; and
3. The District activates and diligently enforces its adopted water use curtailment procedures whenever notified by the watermaster that streamflows in the Siletz River are inadequate to meet the levels prescribed in this instream water right and continues such enforcement until notified by the watermaster that adequate streamflows are available to meet this instream water right.

This condition shall remain in effect for a period of not to exceed seven (7) years or on its entry into a Regional Water Supply Authority, which ever comes first."

The SRWD timely filed exceptions to the Proposed Order on January 3, 1992. In keeping with the Referee's determination that the body of the exceptions sought to introduce new evidence, rather than pointing to legal or factual errors in the Proposed Order as demonstrated by the record, the SRWD moved to reopen the hearing record on February 13, 1992. The Tribes and WaterWatch opposed the reopening. By Order issued February 28, the was hearing reconvened and the record reopened for the purpose of receiving further testimony and evidence on the factual issue of SRWD residents and/or property owners who stood to be affected by the active hookup limitation contained in the Proposed Order, and the extent of the impact, if any, on those potential water users.

The hearing was reconvened and the record reopened on March 18, 1992 at the offices of the Water Resources Department in Salem, Oregon. Counsel for SRWD, ODFW, WaterWatch, Georgia-Pacific and the City of Toledo were present. Representatives of the Tribes and the City of Siletz were present but did not participate in the hearing. The City of Newport did not appear.

The SRWD offered the testimony of three witnesses, being Ed Todd, Lincoln County Assessor, Matt Spangler, Lincoln County Planner, and Virginia Leichleiter, office manager for the SRWD. Testimony was taken regarding the number of undeveloped lots, the number of building permits issued by the county prior to issuance of the proposed order, the number of service connections paid for, but not installed, prior to receipt of the Proposed Order, and the extent of construction on lots with valid building permits. Following the conclusion of testimony, the hearing was adjourned and the record left open until March 27 for submission of post-hearing memoranda.

Post-hearing memoranda were submitted by SRWD, ODFW, WaterWatch and the City of Toledo. WaterWatch argued against allowing any further hookups in the District. ODFW suggests allowing the connection of the six residences to be served by the SRWD on which construction had begun prior to January 1, 1992.

Toledo noted that many of the residences in the SRWD are vacation homes not using water year-round, and recommended that those 9 individuals who had purchased a water hookup but had not obtained a building permit, the two who had both a building permit and a paid-for water connection, the three who had begun construction but had not purchased a water connection and 20 additional new hookups a year be allowed with the condition that SRWD must stay within the 0.7 cfs limitation proposed in the earlier Proposed Order.

SRWD offered similar numbers for inclusion but further suggested that it be allowed to use up to 1 cfs of its junior right for one year or until Newport developed its 6 cfs senior right, whichever came first. It is unclear whether SRWD was also asking to be allowed to connect 1,367 undeveloped lots in approved subdivisions. SRWD asserted that it was actively engaged in establishing a water supply authority with Toledo but the time required for finalizing that authority and completing the transfer process would run into the time when the District historically used greater than 0.7 cfs. Concerns about the implications of the 0.7 cfs restrictions for water potentially needed for fire protection were also raised, but no evidence was offered as to the quantity of water which might be required for fire emergencies.

Based on the entire record, a Revised Proposed Order was served on April 15, 1992. The Confederated Tribes of the Siletz Indians filed exceptions to the revised Proposed Order on April 30. The Tribes asserted that the temporary conditional subordination of the instream water rights violated the Agreement between the Tribes, the State and the United States defining the Tribes' fishing and hunting rights. The Commission considered the Tribes' exceptions to the revised Proposed Order at its June 5, 1992 meeting and determined that the record did not support the Tribes' exceptions.

Now, therefore, based on the entirety of the record, this FINAL ORDER is now issued by the Water Resources Commission.

FINDINGS OF FACT

1. The minimum streamflows to be converted, listed in Table I of the Mid-Coast Basin Program, were adopted and established by the Commission to support aquatic life and recreation. They protect streamflows in the Siletz River from USGS Gage 14-3055 at stream mile 42.6 (SW¼ Section 11, Township 10 South, Range 10 West) to the mouth of the Siletz River. The minimum streamflows are:

<u>Oct. 1-15</u>	<u>Oct. 15-31</u>	<u>Nov-Dec</u>	<u>Jan-May</u>	<u>June</u>	<u>July-Sept</u>	<u>Priority Date</u>
150	200	200	200	135	100	1966
150	220	220	200	135	100	1974

2. During low flow months (August - October), actual flows are often inadequate to meet minimum streamflow requirements. During August and September, depending on the year, the minimum streamflow levels are frequently not met for a period of two to three weeks. During the period of operation of USGS Gage 14-3055, minimum streamflows have not been met at least 30% of the time in August and at least 40% of the time in September.

3. Toledo, Siletz and Newport hold permitted or certificated rights from the Siletz River and its tributaries which are senior to the minimum streamflow to be converted. With the exception of the rights held by the City of Siletz and the 1.75 cubic foot per second (cfs) right held by Toledo, these senior rights have not been developed or utilized:

P. 9770	Toledo	4.0 cfs	10/24/29	
C. 14396	Toledo	1.75 cfs	2/12/39	
C. 27681	Siletz	0.25 cfs	8/6/53	
C. 41548	Siletz	0.44 cfs	11/12/64	(Tangerman Creek)
P. 29213	Newport	6.0 cfs	9/24/63	

4. Seal Rock Water District holds a right junior to the 1966 minimum streamflow but senior to the additional 20 cfs for October 15 through December adopted in 1974:

P. 40277	Seal Rock	2.6 cfs	2/28/73
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5. Toledo and Siletz also hold permitted rights from the Siletz River which are junior to the 1974 minimum streamflow to be converted:

P. 44083	Toledo	4.0 cfs	3/23/79
P. 49649	Siletz	1.0 cfs	12/20/85

6. Seal Rock, Newport and Toledo also hold water rights to streams outside the Siletz River basin.

7. Newport has taken steps to develop its senior right of 6.0 cfs, with a target date for completion of 1993.

8. Diversion and use of any portion of the senior rights not previously used will directly affect use under rights junior to the instream water right, by reducing the amount of water available to meet the instream water right, thus causing those junior diversions to be reduced or shut off at some point earlier than occurred without diversion under the previously undeveloped senior rights.

9. Rights junior to the minimum streamflow are subject to regulation, either by reducing the amount diverted or shutting off the diversion entirely, when the minimum flow/ instream water rights are not being satisfied.

10. Regulation of the rights on the Siletz River, in the event of conversion without some condition, has a high probability of leaving the customers of the Seal Rock Water District without water for several weeks each summer.

11. In the period of July-September when demand is high and flows in the river are low, the City of Siletz frequently diverts in excess of its 0.25 cfs senior right.

12. None of the municipal parties have adopted or imposed curtailment measures on their users during times when flows are insufficient to meet the minimum streamflows.

13. Toledo diverts, processes and delivers treated water for Seal Rock from Seal Rock's junior right through a pipeline connecting Seal Rock and Toledo.

14. In calendar year 1988, the average daily amount delivered to Seal Rock was 258,508.9 gallons. Peak use was in August, averaging 0.54 cfs. At a population of 3,927, this represents daily use per capita in August of 90 gallons. The highest reported daily use was 1.05 cfs, or 173 gallons per capita.

15. In calendar year 1990, the average daily amount delivered to Seal Rock was 348,986.9 gallons (0.54 cfs). Peak use was in June of 1990, averaging 0.94 cfs. At the current population of 4,312, this represents a per capita use during June of 141 gallons per day (gpd).

16. In 1987, reported water use by three of the four municipal parties ranged from a weighted average of 229 gpd in the summer to 149 gpd in the winter. Consumption was highest by Newport users both in summer and winter (294 gpd/183 gpd). Siletz reported the lowest per capita consumption, 104 gpd in summer, 67 in winter, with a total of 1,360 individuals served. Seal Rock's 4,312 customers had a reported summer/winter consumption of 131 gpd/104 gpd.

17. The higher amount used in Newport per capita is likely due to the larger number of tourist and commercial/industrial facilities served by Newport.

18. Summer use includes lawn and garden watering, car-washing and tourist demands not generally occurring in winter.

19. Winter use is a more accurate guide for determining the amount necessary for basic human consumption, health and hygiene.

20. 105 gpd per capita is sufficient to meet basic human needs.

21. The City of Siletz serves a population of approximately 1,360 individuals, including tribal housing and government facilities, the Camp 12 area and 5 residents contiguous to the city limits. At a basic human needs rate of 105 gpd, this population would require a daily diversion of 0.22 cfs, less than the amount allowed to be diverted under its senior right.

22. Toledo and Seal Rock each serves approximately 4,312 individuals. At a basic human needs rate of 105 gpd, these two service populations combined would require a daily diversion of 1.40 cfs, less than the amount allowed to be diverted under Toledo's developed senior right for 1.75 cfs.

23. Lincoln County issued building permits for lots in the SRWD up through December, 1991. A building permit is required before construction may legally commence. Many of the residences undergoing construction pursuant to valid building permits are owner-built homes and may take several years to complete. If construction has not begun within 180 days (6 months) of permit issuance, the permit expires and a new building permit must be obtained before any construction may occur.

24. It is common practice to wait until construction is nearing completion before obtaining a water-service connection and actually hooking up to the delivery system.

25. Potential water supply restrictions prompted the County to refuse approval of any further subdivision requests since sometime in mid-summer of 1991.

26. The SRWD issued water service connection applications and accepted applications and payment for water service connections until the day the Proposed Order was received. Requests for applications and completed applications with service connection fees received after issuance of the Proposed Order were not accepted or processed.

27. There are two lots within the SRWD for which building permits had been obtained and water service connections paid for prior to issuance of the Proposed Order. These are identified by tax map page and lot number as 12-11-7BD TL301 (Rod Street) and 13-12-24AD TL7500 (Bullington).

28. There are 17 lots within the SRWD for which building permits for single-family dwellings had been obtained but no water service connection paid for prior to issuance of the Proposed Order. Of

these 17 permits, it appears from testimony taken at the March 18 reconvened hearing that construction has occurred under only six. The lots are identified by tax map page and lot number on SRWD Ex. 2-D as 13-12-13DA TL 13100 (Timberwolf Construction), 13-12-13DD TL8900 (Stricklin), 12-11-18CA TL400 (Carlson), 12-11-118DB TL11500 (Opel), and 13-11-6 TL401 and TL402 (Attebury). Stages of completion for the single-family dwellings constructed under these building permits range from foundation only to completed construction.

29. Water service connections have been purchased for six lots for which no building permit has been issued and on which no construction has occurred. SRWD Ex. A. Purchasers are identified as Mart & Hammock, Doris Brenaman, Hal Smith, J.F. Ouderkirk, Ray Attebury and Virginia Leichleiter. No building permits having been issued for these six lots, there are consequently no residences or other structures existing at this time to which the service connection may be attached or otherwise exercised.

30. Three individuals (Lonsdale, LaFond, Whitaker) requested an application for water service but had no building permit and did not complete their application and pay the service connection charge prior to issuance of the Proposed Order. SRWD Ex. A, 2-D. Another two recent purchasers of lots in approved subdivisions (Fisher, Tryon) made inquiries about obtaining a water service connection but no application was sent to them.

31. At least four building permits were requested but denied after issuance of the Proposed Order.

32. Approximately 360 people contacted the SRWD following issuance of the Proposed Order inquiring about obtaining a water connection. It does not appear that any of these individuals have a building permit.

33. An intertie pipeline connects Newport and Seal Rock under an agreement between the Seal Rock Board of Commissioners and the Newport City Council. It has been used several times on an emergency basis.

34. The Seal Rock-Toledo pipeline and the Seal Rock-Newport pipeline could serve as a portion of the regional interlocking transmission system contemplated under the Lincoln County Comprehensive Water Development Plan.

35. There is sufficient water available under the municipal parties' senior rights, if shared, to satisfy both the needs and demands of a substantially larger population well into the next century.

36. Creation of a regional water supply authority would allow transfer of senior municipal permitted and undeveloped rights with distant authorized points of diversion to the water supply authority, with a corresponding change in point of diversion, which

would allow development at lower cost and ensure a more-than-adequate regional supply of water for all municipal uses.

37. The Siletz River supports populations of spring and fall chinook, coho salmon, chum salmon, winter and summer steelhead trout, and sea-run cutthroat trout.

38. The steelhead and coho populations are supplemented by hatchery production; adult spawners are caught, eggs taken and fertilized, and the resulting smolts subsequently released for downstream migration.

39. Low streamflows and high water temperatures can severely impact or limit spawning and rearing and increase the likelihood of disease, stress and death. Migrating and spawning adult chinook and coho are present in the Siletz during the low-flow period from mid-summer through September. Summer steelhead juveniles are rearing, and migrating spawners holding, in the minimum streamflow reach during July-October.

40. Declines in the number of returning adults and juveniles produced have been observed in these anadromous fish populations.

41. The chum salmon population in the Siletz River is listed by ODFW as a sensitive species which is declining and in danger of further deterioration.

42. Juvenile chum move out of the river system prior to July and thus are not affected by the low flow period.

43. Using the Oregon Method, ODFW calculated and recommended adoption of minimum flows of 134 cfs in July and August, 134/220 cfs in September and 220 cfs through October 15th as necessary to adequately support and maintain aquatic life. These flows are higher than those adopted by the Commission.

44. The Tribes have a right established by a 1980 consent decree to take up to 200 salmon by gaff hook, dip net or spear at 3 sites on tributaries to the Siletz River. In 1988, 1989 and 1990 the total take under this right was 34, 25 and 9 fish, respectively.

45. ODFW's historical practice of taking hatchery brood stock from the earliest returning spawners has shifted the timing of the runs, which naturally extended through February and March, but which are now completed by mid-December, and has contributed to the presence of migrating spawners in the river during the low flow period, a time when they would not normally be present.

46. This practice has recently been modified so that brood stock are taken throughout the runs. While runs can be eventually returned to their later timing, when flows in the river are higher, no significant shift has been observed at this time.

47. Other contributing factors to the decline of the fish populations include environmental degradation from logging and clearcutting and lack of curtailment of junior rights during periods of low flow.

48. The level of flows to be left instream on conversion are at or below the minimum levels required to maintain and support the anadromous fish populations in the Siletz River.

49. There are no other planned uses with a reasonable chance of development and which would provide a greater benefit to the public from use of the instream flows to be converted which would be precluded by conversion.

50. The instream water right will not take away or impair any senior permitted, certificated or decreed rights.

CONCLUSIONS OF LAW

On conversion to instream water rights, any conditions or modifications to the minimum streamflows must be consistent with the intent of the Instream Water Rights Act of 1987, which is to determine necessary level of instream flows and to protect those instream flows and instream values for the benefit of the public.

Conversion these minimum streamflows to instream water rights for the maintenance of the anadromous fish populations in the Siletz River is a public benefit and in the public interest.

While the physical capability to share water supplies exists between Toledo, Seal Rock Water District and Newport exist, there is no legal requirement to do so under existing law, with the possible exception of the treatment and supply contract between Seal Rock and Toledo.

It would not be in the public interest to allow full use of Seal Rock Water District's permit 40277 for 2.6 cfs on a basis superior to the instream water right.

It would not be in the public interest to allow use up to the limit of Seal Rock Water District's permit 40277 for an indefinite period of time on a basis superior to the instream water right.

It would not be in the public interest to leave a community completely without water for human consumption.

It would be in the public interest to condition the instream water rights to allow for minimal use under Seal Rock Water District's permit 40277, for a limited period and with certain other limitations, at times when flows are insufficient to satisfy the instream water right.

Use of a portion of permit 40277 for a limited period of time to provide water for human consumption would provide a greater public benefit than would be provided by converting these minimum streamflows without such a condition.

OPINION

Conversion of these two minimum streamflows to instream water rights involves two important and apparently competing public interests: preservation and management of flows in the Siletz River to provide an adequate supply of water for, at least, the basic life-support needs of municipal residents, and preservation and management of flows in the Siletz River to provide sufficient water to support the (reduced) anadromous fish runs, on which the Tribes have a reserved harvest right of undetermined date.

The municipal parties seek to have the instream right subordinated to use of junior priority rights for an indefinite period of time, in order to allow time to create a regional water supply authority. This position fails to consider three significant factors: first, that there are substantial undeveloped rights senior to the instream water right which could satisfy both need and demand for many generations to come; second, that developed senior rights are sufficient to satisfy present and future municipal demands, particularly with the imposition of curtailment measures at critical times; and third, that a distinction must be made between need and demand, and responsible self-regulatory action be taken accordingly.

The City of Siletz asserts that if it is to fulfill its projected growth potential, the City has need of (and currently diverts) more water than it is allowed to take under its senior right. Even now, in the period of July-September when demand is high and flows in the river are low, the City of Siletz frequently diverts in excess of that senior right. Further, it argues, conversion without conditions would result in strict regulation of junior rights in favor of the instream water right, impacting the City's present and future diversion.

The City of Siletz serves a population of approximately 1,360 individuals, including tribal housing and government facilities, the Camp 12 area, and 5 residents contiguous to the city limits.

The City of Siletz has a senior right for 0.44 cfs from Tangerman Creek, a tributary to the Siletz River, which is apparently unusable during the summer months due to water supply and quality problems. At those times when use from Tangerman Creek is discontinued, the City of Siletz turns to its senior right for 0.25 cfs from the Siletz River, diverting the full amount, and taking additional water under its junior right of 1.0 cfs.

It is unclear why the City of Siletz finds it must turn to its junior water right in the summer. If the summer use figures and population figures provided by the City are accurate, then even without curtailment, summer use only reaches 0.21 cfs daily.

Two other municipal parties, Toledo and Newport, have undeveloped permitted rights out of the Siletz River which are senior to the minimum streamflows totalling 10 cfs. These currently undeveloped rights are available for use on a basis senior to the minimum streamflow.

Via contract entered into in 1976, Toledo agrees to provide up to 1 million gpd (1.54 cfs) of treated water for Seal Rock from Seal Rock's 2.6 cfs junior right. If it becomes impossible for either party to obtain water under its permit and a "state of emergency" is declared, Toledo will sell Seal Rock up to 1 million gpd of "surplus water," surplus being defined as any water not needed by Toledo to serve its domestic users and diverted under Toledo's senior rights.

In 1990, the average daily amount delivered to Seal Rock was substantially below the amount available under contract. Toledo's agreement to sell "surplus" from its own right suggests a willingness, if not also the capacity, to satisfy both Toledo's and Seal Rock's needs from Toledo's 1.75 cfs right.

Toledo processes and delivers a like amount to its own residents/customers. Although the average daily use by Seal Rock was only 0.54 cfs in 1990, Toledo asserts that its existing developed senior right (1.75 cfs) and developable senior right (4 cfs) will not be sufficient to serve both Toledo and Seal Rock if the instream water right is not subordinated to junior rights. Given the use figures discussed earlier, Toledo's 1.75 cfs right alone would appear to be more than sufficient, particularly if some curtailment measures were enforced.

We are sympathetic with those municipal parties who have, for whatever reason, been relying to one extent or another on their junior rights, and who now face substantial restrictions on their diversions and ability to supply customers, even to the point of being shut off completely.

However, the status of these junior rights is no different under the instream water right than it was under the minimum streamflow. Regardless of what the amount of water to be protected instream is termed, its status is still superior, by way of seniority and the prior appropriation doctrine, to those junior users, which have always been subject to regulation in favor of the senior rights. Moreover, human users have some capability to restrict their use and to obtain alternate supplies. As ODFW said, the fish do not have a similar capability.

All municipal uses, in terms of both needs and demands, could be satisfied several times over if the parties would join together to

create a regional water supply authority. A cooperative approach to meeting regional municipal water needs apparently was contemplated in the Lincoln County Water Supply Plan.

Creation of a water supply authority would allow transfer of these rights, some with authorized points of diversion at such distances from the place of use as to make development exceedingly costly, to that water supply authority, which could then move the point of diversion to a more economical and reasonable location and develop an interconnected delivery system to serve all the municipal parties. A portion of that delivery system is already in place.

A water supply authority also would facilitate construction of a reservoir which would serve all municipal uses in the area, as well as potentially supplementing flows at critical times for anadromous fish, and providing recreation opportunities. A storage facility need not be of the size contemplated in the Bureau study; a reservoir of a size sufficient to store flows for release during a 2-4 week period in the low-flow period would generally be enough.

While the cost of implementing such a regional water supply authority would not be small, it would likely be less than the storage project investigated by the BOR, and would be less, in the long run, than the cost of prohibiting further growth or completely shutting off the junior rights when regulating for the instream water right.

For such close neighbors as these municipalities to now refuse to enter into such a mutually beneficial endeavor, when these senior rights have gone undeveloped until now, and when at least some of the parties currently exceed allowable appropriations under their senior rights, and who are certainly in the position to have their uses of junior rights regulated to the point of closure, would not be in the best interests of the public or the individual parties.

The third consideration omitted in the arguments of the municipal parties is that need is not synonymous with demand and that the desire to grow to the full extent of available potential should not be considered when looking at need.

The water use figures in evidence are based on water consumption records from municipalities which have yet to adopt, approve or implement any conservation measures or curtailment plans. While several of the parties complained of needing to appropriate amounts of water in excess of the amounts allowed under their senior or junior rights, there was a singular lack of testimony about efforts taken to reduce the amounts diverted or supplied by restricting users to the amounts necessary to satisfy basic human consumption and hygiene needs, and no offering by the parties on what their customers might need, as opposed to what they were demanding.

Reported water use in 1988 from three of the four municipal parties ranged from a weighted average of 229 gpd in the summer to 149 gpd in the winter. Reported consumption was highest both in summer and

winter by Newport (294 gpd/183 gpd). Siletz reported the lowest per capita consumption, 104 gpd in summer, 67 in winter, with a total of 1,360 individuals served. Seal Rock serves approximately 4,312 individuals at a reported summer/winter consumption of 131 gpd/ 104 gpd. Toledo serves approximately the same number. No explanation of the difference in amount consumed per capita was offered, although the larger number of tourist and commercial/ industrial facilities in Newport may provide some explanation. The point is that the reported figures, particularly the summer use figures, are more indicative of uncurtailed demand than of need.

ODFW proposes that the 131 gpd summer high use figure from Seal Rock be the limit of any condition allowing use under a junior right and subordinating the instream water right. At a population of 4,312, this would allow use of 0.87 cfs of junior rights. Assuming the winter lows of Seal Rock (104 gpd) and Siletz (67 gpd) are a fair representation of the amount of water needed to meet basic human needs, exclusive of lawn watering, car washing and the like, 131 gpd is more than sufficient. Considering the combined populations of Toledo (4,312), Seal Rock (4,312) and Siletz (1,360), per capita use of 105 gpd amounts to 1.62 cfs. Population figures for the entire area are near 18,000. At 105 gpd per capita, these area-wide population figures represent a total diversion of 2.92 cfs per day.

Even assuming a higher area population, at a rate of 105 gpd per person, total demand on the system would be nowhere near the total amount available for appropriation under senior rights, which total 12.44 cfs.

Within the SRWD, there are two single-family residences (Street and Bullington) which have both building permits and paid-for water hookups, and six which have building permits with the residence at some stage of construction, but no water service connection at this time. Assuming two individuals residing in each of these eight single-family residences on which construction has begun and, in some cases, is nearly complete, at 105 gpd per person, additional demand for water from the SRWD would be 1,680 gpd, or .0025 cfs.

Six people have purchased water connections without also having obtained a building permit, apparently hoping to secure some right to receive water when their residence is eventually constructed. At first blush, it would seem pointless to include these individuals in any conditional use allowed the SRWD, given as there is no residence to which water would be delivered at this time. Viewed from a different perspective, however, any additional demand on the SRWD water supply is not likely to be immediate, and given the minute quantities of water represented by these 6 connections (12 @ 105 gpd=1,260 gpd/.0019 cfs), there is no reason to prohibit them from eventually receiving water from the SRWD through their already-purchased connection.

Similarly, those 11 building permits issued in 1991 which did not obtain water hookups may or may not be valid 6 months after permit

issuance if no construction has occurred. To the extent that any of those building permits have not expired, it will be some time before the homes are inhabitable and water service is required. Even if all 11 residences were ultimately built, use by 22 individuals limited to 105 gpd would total only 2,310 gpd/.003 cfs.

Even if all 30 single family residences described in findings 27-30 had active service connections and were brought on line, assuming 2 people per household, total additional allowed use at 105 gpd per person represents only 6,300 gpd, or .009 cfs. Given the small amount of water represented by these 30 future hookups and the time it will take to complete construction of most of these residences, the additional demand on the source will not be immediately noticed, particularly if the municipalities move promptly towards the most beneficial resolution of this matter by creation of a water supply authority.

The municipalities have an obligation to secure a reliable source of water for their residents. To the extent that the senior rights were obtained, they have met that obligation. To the extent that those permitted rights have not been developed, and reliance has been placed instead on lesser-quantity rights with priorities junior to the minimum streamflow, that obligation has not been met.

In meeting its responsibility to protect waters for adequate supplies for human consumption, the Commission need not go so far as to shoulder the obligations that the municipalities themselves have failed to meet, by allowing subrogation of the instream water right beyond that necessary to meet basic human needs, and to the cost of the anadromous fish populations and the public interest.

FINAL ORDER

NOW, THEREFORE, it is ORDERED that the 1974 minimum streamflow on the Siletz River as described above is converted to an instream water right with those conditions imposed by OAR 690-518-003 of the Mid-Coast Basin Program.

It is FURTHER ORDERED that the 1966 minimum streamflow on the Siletz River as described above is converted to an instream water right with those conditions imposed by OAR 690-518-003 of the Mid-Coast Basin Program, and with the following additional condition:

The use of up to 0.71 cfs of water by the Seal Rock Water District under permit number 40277 shall not be affected by regulation for this instream water right if:

1. The District limits the number of active service connections to the number in existence on January 1, 1992 with the addition only of those 30 connections described in Findings of Fact 27-30;

issuance if no construction has occurred. To the extent that any of those building permits have not expired, it will be some time before the homes are inhabitable and water service is required. Even if all 11 residences were ultimately built, use by 22 individuals limited to 105 gpd would total only 2,310 gpd/.003 cfs.

Even if all 30 single family residences described in findings 27-30 had active service connections and were brought on line, assuming 2 people per household, total additional allowed use at 105 gpd per person represents only 6,300 gpd, or .009 cfs. Given the small amount of water represented by these 30 future hookups and the time it will take to complete construction of most of these residences, the additional demand on the source will not be immediately noticed, particularly if the municipalities move promptly towards the most beneficial resolution of this matter by creation of a water supply authority.

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In meeting its responsibility to protect waters for adequate supplies for human consumption, the Commission need not go so far as to shoulder the obligations that the municipalities themselves have failed to meet, by allowing subrogation of the instream water right beyond that necessary to meet basic human needs, and to the cost of the anadromous fish populations and the public interest.

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The use of up to 0.71 cfs of water by the Seal Rock Water District under permit number 40277 shall not be affected by regulation for this instream water right if:

1. The District limits the number of active service connections to the number in existence on January 1, 1992 with the addition only of those 30 connections described in Findings of Fact 27-30;

2. The District, by May 31, 1992, adopts the standby water use curtailment procedures as submitted in its Post-Hearing Memorandum; and
3. The District activates and diligently enforces its adopted water use curtailment procedures whenever notified by the watermaster that streamflows in the Siletz River are inadequate to meet the levels prescribed in this instream water right and continues such enforcement until notified by the watermaster that adequate streamflows are available to meet this instream water right.

This condition shall remain in effect for a period of not to exceed seven (7) years or on its entry into a Regional Water Supply Authority, which ever comes first.

It is FURTHER ORDERED that certificates be issued for said instream water rights, with priority dates of July 12, 1966 and March 26, 1974.

SIGNED this 9th day of June, 1992.



LORNA STICKEL, CHAIR
Water Resources Commission

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.