



Oregon

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May 31, 2006

Oregon Water Resources Department
ATTN: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

RE: Proposed revisions to OAR Chapter 690, Division 77 (Instream Water Rights)

Dear Rule Coordinator:

The Oregon Parks and Recreation Department has reviewed the proposed revisions and believe that they are consistent with the Settlement Agreement for instream applications 84562 and 84563.

Additional rule change proposals clarify and stream line processes, provide general housekeeping and allow split season instream leases for a limited time period. These proposals are consistent with providing and protecting water instream.

Thank you for the opportunity to comment on the proposed rule changes.

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Water Recreation Program Coordinator

/jeh



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June 8, 2006

VIA FACSIMILE ONLY

Water Resources Department
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Salem, OR 97301-1271
ATTN: Rule Coordinator
Fax: 503-986-0903

**RE: Comments on OAR Chapter 690
Division 77 (Instream Water Rights)**

Dear Rule Coordinator:

We would like to address the following proposed regulations:

OAR 690-077-0015 (5)

The intent of this subsection is extremely difficult to comprehend as written. Further, the import of the terms "significant" and "conserved water" are not defined within Division 77.

OAR 690-077-0076 (1) (c)

At least in circumstances where the secondary water rights are supplemental in character, the ability to split off a secondary water right for instream purposes would appear to result in an automatic enlargement of the water right. The right to use a supplemental right is limited to those circumstances in which the primary right is insufficient to meet the needs of the water right holder. If the primary right is sufficient to satisfy the right, then no use of the supplemental secondary right may be had.

Very truly yours,

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1. Background

Oregon Water Trust (OWT) is a private, non-profit organization that restores surface water flows for healthier streams in Oregon by using cooperative, free-market solutions. OWT was founded in 1993 by a group of individuals with diverse interests in water issues who wished to implement the transaction sections of the state's newly created Instream Water Rights Act (ORS 537.348). Since then, OWT has pioneered many of the state's flow restoration tools, including permanent instream transfers, short-term leases, allocations of conserved water, acquiring stored water contracts to enhance flows, moving point of diversions downstream for instream benefits, and voluntary water right diminishment or cancellations to leave water instream during critical periods. In 2005, OWT worked with over 200 landowners on 96 projects, restoring 150 cubic feet per second of streamflow in nine different river basins in the state. The result: cooperative solutions for healthy watersheds across Oregon.

Oregon Water Resources Department ("the Department"), invited OWT to participate in the Chapter 690, Division 077 Rule Advisory Committee (the "RAC"). The RAC was organized to consider clarifying and modifying certain sections of the administrative rules that set forth standards for reviewing and approving instream water rights transfers, instream leases, conversion of minimum perennial streamflows, and instream leases and transfers. The RAC was composed of variety of interested stakeholders from the agricultural, municipal, tribal, and environmental communities.

OWT focuses its comments on the proposed amendments regarding: (1) flow restoration activities that exceed the estimated average natural flow ("EANF") (OAR 690-077-0015(5)) and (2) Split Season Use Instream Leases OAR 690-077-0079) as discussed below.

2. OWT Supports the Proposed Amendments to the EANF Rules

A. *Current Rule Needs Clarification*

Under the General Statements of the current rules, OAR 690-077-015(4) limits instream water rights to the "estimated average natural flow or [lake] level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant" for the applied public use. Only one example is cited for this exception where "high flow events ... allow for fish passage or migration over obstacles." Since the example is not an exclusive one, other exceptions implicitly exist. However, without more guidance, the rule is vague and causes problems with implementation.

OWT is aware of two instances where the Department was confronted with a proposed purchase or lease of water rights for instream purposes that exceeded EANF.

For example, on **Trout Creek** in the Deschutes Basin, OWT acquired several water rights with an aggregate maximum rate of 2.59 cfs from the owner of Trout Creek Ranch and applied to permanently transfer all of the water rights for instream use. In August and September, however, the EANF for Trout Creek is 1.94 cfs. We contacted the Department about the issue and sought assistance from ODFW to document under OAR 690-077-0015(4) that protecting periodic summer flows that exceeded 1.94 cfs in Trout Creek would be significant for the applied for public use. ODFW responded with a letter signed and dated January 10, 2005 by Mid Columbia River District Fish Biologist Rod French. Mr. French stated that threatened steelhead spawn in the affected reach, that emerging and rearing juveniles are frequently negatively impacted” by “extremely low flow conditions,” which often include “no active flow” at all, and as a result juvenile fish are either forced to migrate to small pools where “competition and predation is increased,” or “perish due to the extreme temperatures.” Mr. French concluded that:

Based on the fact that Trout Creek typically has no active flow during a critical life stage for ESA listed steelhead, it would appear the significant public benefit would occur if EANF flows were increased and IWR was treated as additive with this proposed application.

In short, the letter implied that more water above EANF would be beneficial for a threatened species.

Clair Kunkel, ODFW Manager for the Deschutes Watershed District prepared a follow up letter at our request, but it apparently was not considered by the Department due to timeliness. Nevertheless, Mr. Kunkel stated similar concerns about the low flow conditions on Trout Creek. He added that steelhead redd surveys are conducted in that reach and that while numerous steelhead redds are observed there that it is “common for this reach to become intermittent, or dry with no active flow from later summer through early fall” thus leaving redds exposed to the harsh elements. He elaborated further that ODFW originally requested an instream water right of 25 cfs for August and September but only received 1.94 cfs based on the EANF. He reached a similar conclusion as Mr. French:

If the water right transfer proposed by OWT were to result in improved stream flows in the affected reach during later fall and early summer, ODFW believes substantial public value would occur.

After reviewing Mr. French’s letter, the Department determined that it did not meet the standard set in the current rule. While the letter did not specifically state how additional water above EANF would benefit the imperiled steelhead, we felt it implicitly

supported our efforts to transfer the entire water right instream for that time period and that we followed the correct steps by seeking documentation from ODFW. Based on the concerns of the Department, however, OWT consented to the amendment of the transfer application and in 2005 it was finally approved for 1.94 cfs during August and September and for 2.59 cfs during the other months. Dealing with the EANF issue took a considerable amount of our time for us and I can imagine that it did so for the Department too. Ultimately, the process left us confused and looking for answers to how to address similar issues in the future.

It is my understanding that a similar circumstance occurred in 2005 on an instream lease of **Fifteen Mile Creek** waters in the Hood Basin. The ISWR and EANF for September is 4.15 cfs and 4 cfs of instream leases or transfers were in place. The bulk of these instream water rights were acquired by OWT. However, a landowner participating in the Conservation Reserve Enhancement Program (CREP) requested that one additional cubic foot per second of water rights be leased instream. This would have kicked the instream water right total to 5 cfs, thus going above EANF. After reviewing the matter and without further documentation to support an exception under OAR 690-077-0015(4), the Department decided to allow the additional water right, but not at any time in the aggregate could it exceed EANF.

Since CREP contracts are generally for 15 years, water rights associated with these lands are often leased instream for three successive five-year periods. Landowners enrolling irrigated lands into CREP receive a higher payment per acre than non-irrigated lands. As a condition of receiving this “irrigated rental rate” a landowner must lease the subject water rights instream. As more instream leases are completed on Fifteen Mile Creek through CREP and via OWT’s efforts, the total of acquired instream water rights will likely rise above EANF. Restricting the maximum flow at EANF will potentially restrict CREP landowners from leasing all their eligible water rights instream and thus potentially deny them full payment under the CREP program.

The issues raised in the Trout Creek and Fifteen Mile Creek matters will undoubtedly reappear on new transactions on other streams. To promote clarity and efficiency we see that it is important to amend the rule.

C. Beneficial Use is the Basis for All Water Rights

It is clear that beneficial use without waste “shall be the basis, the measure, and the limit of all rights to the use of water in this state.” ORS 540.610(1). But how does one define “beneficial use” of water naturally left in a stream channel? The people of Oregon have set clear parameters on this subject. Instream water rights are water rights held in trust by the Department “for the benefit of the people of the State of Oregon to maintain water in-stream for public use.” ORS 537.332(3). “Public use” includes but is not limited to:

- (a) Recreation,
- (b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values;
- (c) Pollution abatement; or
- (d) Navigation

The people of the State of Oregon further found and declared that “[p]ublic uses are beneficial uses.” ORS 537.334. Hence, existing water rights may be converted into instream water rights for the above enumerated purposes.

But what quantity of water for each type of public use constitutes a beneficial use? The intention of the existing rule regarding EANF appears to put some sideboards on how much water can be applied to beneficial use as an instream water right, setting a maximum at the EANF unless “significant” reasons for exceeding this amount exist. But based on the statutory analysis, the concept of EANF might not be applicable in the context of converted instream water rights under ORS 537.348.

One could argue that the basis for the EANF rule derives from the term “in-stream flow” which the legislature defined in 1995 as “the minimum quantity of water necessary to support the public use **requested by the agency.**” ORS 537.332(2) (emphasis added). The language was incorporated in SB 674 which largely dealt with streamlining and improving the water right application process. The Department did not oppose the inclusion of the language in SB 674 “so long as the definition is interpreted to mean the minimum necessary to support a *specified* public use.” (Supplemental Testimony on SB 674-A, Martha Pagel, Director of OWRD, Dated May 11, 1995, page 2). In other words, the instream flow quantity needed to serve a public use may vary, depending on the type of public use requested by an agency. For example, “the minimum flow necessary to support enhancement of a declining or threatened fishery might be different from the amount needed for maintenance of a healthy fishery.” (Pagel testimony, page 2).

On a plain reading, the statute specifically refers only to the quantity of water **requested by an agency.** Thus, it appears this provision does not relate to instream water rights created through transfers, leases, or allocations of conserved water under ORS 537.348 and 537.470, which are the statutes OWT primarily uses to implement its cooperative free-market approach. Under ORS 537.348, any person may purchase, lease, or accept a gift of all or a portion of an existing water right for conversion into an instream water right. This statute does not place a cap on how much water can be leased or transferred for instream purposes. Nor is “instream flow” mentioned in ORS 537.348.

Furthermore, instream water rights shall have the same legal status as any other water right for which a certificate has been issued. ORS 537.350(1). A person who transfers a water right by purchase, lease or gift under this subsection shall comply with the requirements for transfer that other water rights must abide by. ORS 537.348(1). Reading these two statutes together indicates that when converting water rights into instream water rights under ORS 537.348, instream transfers or leases should be treated similarly as out-of-stream transfers or leases. Meaning, if an agricultural irrigator can

transfer a certificated water right to a new place of use for agricultural purposes, the landowner shall be able to transfer that same water right for instream purposes with no limitation, except for the standard considerations of injury, prior non-use, and channel losses. This is further supported by the market-based, private-property rights approach embodied in ORS 537.348 that grants a landowner the freedom to sell, lease, or donate his water right, a property interest associated with the land, for instream purposes.

This gets back to the question of how much water is beneficial for public uses. Since applying the venerable concept of “beneficial” use, which historically pertained to out-of-stream uses, to instream water rights is a new and emerging doctrine, there is no clear cut answer to this question. This is one reason probably why the RAC could not reach consensus on this particular issue. One could argue it should be what ever could naturally flow in that stream – as high, medium, and low events are all part of the hydrologic cycle that support aquatic dependant species in the watershed. On the other side of the debate, people supporting the “minimum quantity necessary” argument probably feel that it is unreasonable to consider every drop of water left in stream as a beneficial use.

OWT is taking a more pragmatic approach in this debate. In the spirit of compromise and reasonableness, the Department’s proposed amendment clarifies the existing rule, provides incremental change for the good, while at the same time keeps some sideboards on what quantity of water constitutes a beneficial instream use.

D. Proposed Rule, OAR 690-077-015(5), is a Workable Solution for OWT

The existing rule, OAR 690-077-0015(4), will remain essentially the same and will continue to apply to state agency requested water rights and generally to instream water rights created through transactions. The EANF general limitation applies, “except where periodic flows that exceed the natural flow or [lake] level are significant” for the applied public use. But specifically for instream water rights established through instream transfers, leases, or allocations of conserved water, the proposed rule clarifies the general rule by presuming flows that exceed EANF are “significant” for the applied public use, if:

It does not exceed the “maximum amount of the instream water right application applied for by a state agency under OAR 690-077-0020 for the same reach or portion thereof, and for the same public use”, and

- (a) For the specified time period that flows are requested to exceed EANF, the stream is in an ODFW flow restoration priority watershed; or
- (b) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increase flows would improve water quality.

This rule as presented by the Department is a hybrid that evolved out of a proposal offered by OWT at the March 14th RAC meeting. There was no consensus on that proposal. The Department modified the language into a version that has logical underpinnings and sets a workable standard, which OWT supports. The proposed rules are more supportive of restoration activities for salmon and water quality limited streams; therefore not all potential issues are addressed such as aesthetic flows, navigation, or flows for non-anadromous fish needs. Despite this, a vast majority of water and fish needs are met through the proposed rule, which should suit the needs of most parties involved.

The amendment sets a presumptive upper limit on an instream stream water right at the amount applied for by the state agency. This provision reflects the “requested by the agency” language in the definition of “in-stream flow” in ORS 537.332(2). Indicated further in the rule are ODFW and DEQ, which are the two agencies that can apply for instream water rights for the public uses of fisheries conservation and pollution abatement, respectively. In the case of fisheries conservation, it seems that ODWF is the best qualified governmental entity to determine the water needs for aquatic species in Oregon. It is my understanding that ODWF used the “Oregon Method” to study streamflow needs for fisheries. Based on this data and the experience, it seems logical that if ODWF has requested a certain level of flow instream for fisheries that this amount should be “presumed” to be significant for the applied public use and hence constitute a quantity that equates to “beneficial use.” For DEQ, a similar argument holds true for pollution abatement on water quality limited streams.

Using the “ODFW flow restoration priority watersheds” creates a workable framework for where instream water rights formed through transfer, lease and allocation of conserved water can exceed EANF. These are geographic areas where there is demonstrated need for flow restoration during a specified season to support fish recovery under the Oregon Plan for Salmon and Watersheds. The accompanying maps in Figures 1-18 provide an easy reference for when and where converted instream water rights may exceed EANF. By defining geographic areas via these maps, more clarity and certainty in the application process will exist, thus providing for efficient implementation by both the Department and the applicants. Since OWT’s priority watersheds are included in all these geographic areas and most of these watersheds contain agency requested instream water rights, the amendment addresses most of our concerns regarding EANF. For example, the problem that arose in the Trout Creek example above would be remedied in the future by the proposed rule.

Since OAR 690-077-0015(5) merely provides a presumption, if circumstances exist to justify a lease or transfer of water rights at a rate above both the agency requested amount and EANF, a person could still seek to demonstrate under the current rule that “periodic flows that exceed the natural flow or [lake] level are significant” for the applied public use. Likewise, the same would hold true for leases or transfers on streams where there is no state agency requested instream water right.

Because historically most instream water rights transactions have not addressed “recreation” and “navigation” needs, at this time it seems appropriate not to create a presumption as to “significance” for those types of public uses.

3. OWT Supports Proposed Amendments to Split Season Use Leasing Rules

In 2000, OWT helped pioneer the split season instream leasing legislation embodied in ORS 537.348(3). This important streamflow restoration tool allows a landowner to traditionally use his water right for out-of-stream purposes early in the irrigation season, while giving that person the opportunity to dedicate the water right for fisheries conservation in the later part of the season when fish often need the water most for spawning and rearing. While only a few split season instream leases have been completed, OWT sees much potential with this tool.

The current year-to-year limitation in the rules has been a deterrent to OWT entering longer lease agreements with landowners. Some landowners have expressed interest in having the ability to enter multiple year leases as they provide more certainty than a year-to-year arrangement. Seeking funding on an annual basis for split season leases is also inefficient. The same problems existed when standard instream leases were allowed for only 2 years. Providing landowners the opportunity to conduct split season leases for “a specified period not to exceed five years,” should encourage more people to use this innovative flow restoration tool. As such, OWT supports the proposed rule change.

While OWT wised to eliminate the sunset provision for the split season use legislation, which currently expires 1/2/2008, in the spirit of compromise, OWT is agreeable with extending the review period to 2014 as proposed.

4. Ancillary Issues

In OAR 690-077-0075(2)(c), the reference to “consistent with OAR 690-077-0015 (6), (7), (8), and (11)” might be redundant with regard to **section (6)** because this is already incorporated in section (11) of that rule (as proposed), which states:

The combination of instream water rights for the same reach or lake shall not exceed the amount needed to provide increased public benefits and shall be consistent with sections (4), (5), and (6) of this rule.

Consequently, the first part of OAR 690-077-0075(2) (c) could read: The proposed flow(s) is (are) consistent with OAR 690-077-015(7), (8), and (11), shall provide a public benefit for an instream use, and be appropriate”

OAR 690-077-0015(1) mirrors a section of the language in ORS 537.334(2), but excludes the ending phrase “pursuant to ORS 537.332 to ORS 537.360.” Without that language, the rule is ambiguous as to what “established” means. For clarity and consistency, the rule would be better stated if it read:

Instream water rights shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any rights vested prior to the date the instream water right is established pursuant to ORS 537.332 to ORS 537.360.

The other general housekeeping changes to the rules make sense and OWT supports these amendments.

5. Conclusion

OWT supports the proposed changes to the Division 77 rules as noted above. It was a pleasure to participate in the RAC process and I thank the Department for taking on the issues addressed.