



WATERWATCH

PROTECTING NATURAL FLOWS IN OREGON RIVERS

June 8, 2006

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

RE: Comments, Division 77 Instream Water Rights

Dear Water Resources Department,

Thank you for the opportunity to comment on the draft Division 77 rules. WaterWatch is a non-profit river conservation group dedicated to protecting and restoring natural flows to Oregon's rivers and streams for fish, wildlife, recreation and a sound economy. Our comments to specific sections of the proposed rules are outlined below.

OAR 690-077-0015 General Statements:

Subsection (1): WaterWatch urges the WRD to strike the proposed language "is established" from this sentence. In one of the early drafts of the rules that the RAC reviewed, WaterWatch raised the issue of statutory consistency with regards to when/what the instream water right protects against. At that time, we were trying to ensure that the rules were clear that it was the priority date of the of the instream water right that served as the protection date so that people could not somehow assert that the instream water right would harm future, as of yet unapplied for, consumptive water rights. This is the clear in the overall reading of the statute.¹ The final proposed language, does not capture that intent, and in our opinion will simply confuse the mandate of the statute. To correct this we suggest either that the WRD add a definition of "established" to mean the priority date of the instream water right, or in the alternative, simply strike the language.

Subsection (4): This section of the rules limits instream water rights to the estimated average natural flow, except where periodic flows that exceed this level are significant for the applied public use. We suggest that this section of the rules simply be deleted. There is nothing in the statute that allows for the carte blanche limitation on instream water rights in this manner. While the Instream Water Right Act does allow the WRD to reduce the amount applied for in an instream water right application by another state agency, this is only allowed upon a statement of findings that sets for the basis for the reduction in the specific instance. ORS 537.343(1). To set an overarching limit to all agency applied instream water rights² based on an overall "estimated average natural flow" (ENAF) makes no sense and is contrary to the intent of the Act to protect water instream for the beneficial uses of fish, wildlife, recreation and

¹ ORS 537.341 states that the instream water right shall date from the filing of the application with the Commission for new applications. ORS 537.348 states that any water right converted to an instream water right under this section (transfers and leases) shall retain the priority date of the water right purchased, leased or received as a gift.

² The WRD is also, apparently, limiting transfers to ENAF, though as we argue below there is absolutely no statutory support for this practice.

pollution abatement.³ This random ENAF flow number has nothing to do with the beneficial use that these rights are supposed to protect and simply provides a false ceiling for the purposes of application processing.

While we suggest that the entire section be deleted, at the very least the WRD should delete the word "significant." Instream water rights, by statute, are on equal footing with all other water rights. Out of stream water right applicants need only show that the water right they are applying for is for a beneficial use.⁴ The requirement should be similar for instream water right applicants.

Subsection (5): This section of the rules attempts to add more clarity to (4), with regards to instream water rights created via transfer, lease or allocation of conserved water. While this section of the rule does take a step in the right direction as far as adding clarity to (4) in some very narrow circumstances if (4) were to apply to transfers, the fact of the matter is, there is no legal authority to apply subsection (4) to transfers at all. If the WRD wants to add clarity to the transfer process that is one thing, but it needs to do it in a way that ensures that transfers are in fact processed according to statute.

As a matter of law, subsection (4) should not apply to transfers at all. The Instream Water Rights Act is very specific in its instruction as to the processing of instream transfers, as opposed to agency applied instream water rights. In a stand alone section of the Act, ORS 537.348, titled "Purchase, lease or gift of water right for conversion to in-stream water right; priority dates", describes the process by which someone can purchase, lease or gift an existing water right to an instream water right. This section specifically directs a person who wants to transfers a water right by purchase, lease or gift to comply with the requirements for the transfer of a water right under ORS 540.505 to 540.585. In looking at the transfer provisions in processing an instream water right, as mandated under Instream Water Right Act, the only limits that apply are those that apply to all transfers, namely that the water had been put to beneficial use in the past five years, that the water be transferred to a beneficial use, and that the transfer not injure other water right holders.⁵ The process mandated by statute could not be more clear.

It is unclear if the WRD is somehow relying on the section of law (ORS 537.343(1)) that allows the WRD to reduce an instream water right application in limited circumstances does not apply to transfers, to limit the amount of water that can be transferred instream. If this is the WRD's legal reference, they are in error. The provisions of ORS 537.343(1) very clearly only apply to agency applied instream water rights.⁶ The operative language is found in ORS 537.343 and ORS 537.349. These sections, when read together, make it clear that the agency applied instream water rights are to be processed under the statutes guiding new water right applications, namely ORS 537.140 to ORS 537.252, with an additional standard as laid out in ORS 537.343. In addition to regular water right processing guidelines, ORS 537.343 allows the WRD to issue a Proposed Final Order (PFO) for an instream water right to approve a final order that (a) approves the instream water right for the amount requested, (b) approves the instream water right for a lesser quantity of water, or (c) reject the requested instream water right. However, it is important to note that ORS 537.343 is specifically limited to PFOs issued under ORS 537.170(6) (PFOs for new water right applications). This means that only agency applied instream

³ ENAF is actually not an average, but a median. This means that the WRD looked at a period of years and chose the flow that fell precisely in the middle. This would identify a number that is even less than an average.

⁴ Moreover, as a practical matter, all the water that ODFW applies for is in fact "significant" for the public use that ODFW applied for. However, the WRD has misinterpreted this to mean that it must be a "significant public use", which is a very different standard altogether.

⁵ Note, per statute, instream water rights enjoy the same legal standing as all other water rights. ORS 537.350. In no other instance does the WRD even attempt to limit a transfer because of some arbitrary standard such as ENAF.

⁶ As the drafters of the 1987 Instream Water Rights Act, WaterWatch has a very clear understanding of the intent and the force of this law.

water rights can be limited via this section of the statute. This section of law does not grant to the WRD the discretion to limit the amount of the water protected instream under transfers and leases.

Despite the clear statutory directive, it has come to our attention that the WRD has been limiting the amount of water protected instream via transfers and leases to the estimated average natural flow (i.e. Trout Creek in the Deschutes Basin). We believe the Department to be in error in this regard. So, while section (5) does in fact help to clarify (4) if the WRD processes transfers under (4), to be in compliance with the Instream Water Rights Act the rules should simply state that transfers are to be processed under the transfer statutes.

Subsection (8), Measurability: Section (8) of the Division 77 rules limit the amount of water to be protected in a receiving stream to an amount that is "measurable". Here again, there is no statutory authority supporting this rule language. While the WRD is not proposing any changes to this in these draft rules, it was a topic that was discussed at length at numerous RAC meetings.

It is important to note that there is no requirement in the transfer statutes, under which instream water rights are supposed to be processed, that states that the water must be of a "measurable" amount. Water rights--whether 200 cfs or .2 cfs--can be transferred subject only to beneficial use and injury limitations. There is also no authority in the Instream Water Right Act that allows for the limitation of protection based on whether the water is measurable or not.

As we understand it, the WRD has resisted protecting small instream water rights into the receiving stream because of, as we understand it, "administrative impracticability." This is so even if the receiving stream is in dire need of instream flow. As we understand it, WRD argues that if they cannot measure the instream water right then they cannot regulate against it. We are unconvinced that this is the case. As we understand it, when regulating a stream the WRD looks at overall streamflow and when flows get to a certain level the WRD shuts off all junior users. As we understand it, this regulation is based solely on priority date, not on the "use" to which the water is promised. Thus, whether or not the WRD can measure one specific type of use is irrelevant. Unless the WRD is measuring all consumptive users, the application of such a standard to instream water rights flies in the face of the statutory mandate to treat instream water rights on the same legal footing as out-of-stream rights.⁷

Moreover, even if a stream had a different method of regulating than that mentioned above, whether or not the WRD can in fact measure a specific instream water right is, frankly, irrelevant to affording this water legal protection. As a practical matter, if the WRD feels it cannot in fact regulate a specific water right, the WRD has the ability to determine it's a "futile call". In determining a "futile call" the legal force of the water right stands, the WRD is merely saying that in this instance, at this specific time, the WRD cannot regulate in favor of this right. Thus, whether or not the WRD can measure an instream water right at the time of issuance, it is very important that the full legal protection of the water right stand. Over time measurement ability, and thus regulation, will likely improve. Thus, what might be

⁷ As an example of the disparity of WRD application of law to instream and out-of-stream transfers is a proposed transfer of a consumptive water right upstream into a reach protected by an instream water right. In this case the WRD proposed approval of a transfer of Central Oregon Irrigation District to Bend Metro Parks in the amount of .08 cfs and .11 cfs. The proposed transfer would be upstream into a reach of the Deschutes River where the instream water right is often times not met. However, despite the fact that the WRD could NOT find that the transfer would not injure the instream water right, the WRD proposed approval of the right based upon a condition that would, supposedly, halt the use of the water if flows fell below 660 cfs (instream water right amount). Application t-9605. The WRD is not requiring measurement of this transfer. Nor was there any discussion of the improbability of measuring this small amount of water in relation to streamflow levels. In the case of instream water rights the WRD has adopted a 5% measurability rule, which if applied here would mean the WRD should not approve the transfer unless it was in the amount of at least 33 cfs.

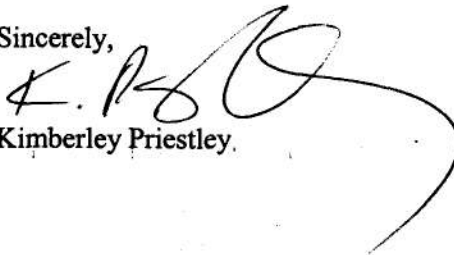
a futile call today may not be in ten years time. Moreover, as more and more water gets transferred instream, the amount of water added together on any given stream system will likely be "measurable" with even today's technology. This water should be protected instream so that when possible the WRD can in fact protect it. Moreover, while the WRD might have concerns about the administration of these rules, this concern does not stop them from approving transfers which are not necessarily measurable.

Thus, we urge the WRD and WRC to delete the section of the rule that limits the protection of water in the receiving stream to water that is a "measurable portion of the flow in the receiving stream".

Conclusion: In conclusion, we urge the WRD and WRC to use this rulemaking opportunity to bring the Division 77 rules into compliance with law. The easiest way to do this would be to simply strike the language that is not supported by the Instream Water Rights Act nor the transfer statutes, as identified in these comments.

Thank you for this opportunity to comment. If you have any questions, please do not hesitate to call.

Sincerely,


Kimberley Priestley

January 24, 2006

Water Resources Department
Summer St.
Salem, Oregon 97301-4172
Attention: Bob Rice
(via email)

Re: OAR Chapter 690 Division 77 Rule-Making

Dear Mr. Rice

Thank you for the opportunity to take part in the Rules Advisory Committee. As an Oregon not-for-profit corporation with a mission dedicated to the restoration of instream flows the Deschutes River Conservancy is extremely interested in ensuring that the continued evolution of the State regulatory and administrative framework for water rights ensures that instream water rights are treated on a par with other, out-of-stream water rights. It is in that spirit that the following comments on the draft rules are offered.

comment on the proposed rules for Instream Water Rights.

690-077-0015 (1)

(1) 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 [of] the instream water right is established.

Comment: The need for this insertion is unclear. How could an instream water right take away or impair another right prior to the date the instream right it is established?

690-077-0015 (5)

(5) For instream water rights established through instream transfers, leases, or allocations of conserved water, it is presumed that flows that exceed the estimated average natural flow or natural lake levels are significant for the applied public use, if the flow does not exceed the maximum amount of an instream water right application applied for 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 the estimated average natural flow or lake level, 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 increased flows would improve water quality.

Comment: The DRC supports this language as it increases the opportunities for successful instream flow restoration. The language here is obtuse, however, as the entire wording represents a fairly complex logical statement.

Perhaps in place of 'if the flow does not exceed the maximum amount . . .' the following phrases could be used (apart from the numbering system that needs to be employed):

'if:

(q) the flow is less than the maximum amount of an instream water right application applied for under OAR 690-077-0020 for the same reach or portion thereof, and for the same public use,

and

(x) For the specified time period that flows are requested to exceed the estimated average natural flow or lake level, the stream is in an ODFW flow restoration priority watershed;

or

(y) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increased flows would improve water quality'

in other words that flows exceeding ENAF are significant IF(AND(q,OR(x,y))

690-077-0015 (8)

When instream water rights are established through instream transfers, or leases, or allocations of conserved water of existing water rights, the order, and, where appropriate, the certificate or lease agreement shall define the appropriate point, reach or reaches to which the new instream water right shall apply. Normally, a new instream water right shall be maintained downstream to the mouth of the affected stream; however, it may be maintained farther downstream if the amount of the instream water right is a measurable portion of the flow in the receiving stream or for a point or shorter distance if needed to account for return flow or to prevent injury."

Comment: The above italicized wording is similar to that found in ORS 540-530(1)(a) and other statutes regarding instream transfers, with the basic point being that the Department is to approve transfers subject to injury. In the DRC's view the limitation on protecting an instream water right 'farther downstream' does not conform with statute, and much less with hydrologic or economic reality. It also does not address concerns that instream water rights are treated as 'second-class citizens' in this instance.

During the RAC process different alternatives were discussed including dispensing with this extra condition, through to providing specific language for conditions under which water could be protected farther downstream (repeated below). It is unfortunate that this issue was conflated with injury by some stakeholders and simply points to remaining concern and confusion regarding whether or not Oregon is a 'paper' water rights state when it comes to transfer and injury determination. The DRC would very much appreciate the Department addressing these concerns by adopting the compromise language developed during the last RAC meeting (below in italics).

OAR 690-077-0015(8): "When instream water rights are established through instream transfers, leases, or allocations of conserved water of existing water rights, the order, and where appropriate, the certificate shall define the appropriate point, reach, or reaches to which the new instream water right shall apply. Normally, a new instream water right shall be maintained downstream to the mouth of the affected stream; however, it may be protected for a shorter distance or to a point if needed to account for return flow or to prevent injury, or to be maintained farther downstream if the proposed instream transfer, lease, or allocation of conserved water:

- (a) Is a measurable portion of the flow in the receiving stream, either individually or when combined with other instream water rights established through the instream transfer, lease, or allocation of conserved water process; or*
- (b) Is in a gaged stream system where enough data is available and of sufficient accuracy that the instream right can be reliably accounted for.*

690-077-0076 (3)(h)

This clause is unnecessary and should be dropped. The Department does not track compensation information, nor should it.

690-077-0076 (4)

The Department may wish to encourage certain behavior and should be encouraged to do so on its website and in application instructions, but it is inappropriate to place a desire on the part of the Department in rule. This clause should be dropped.

We appreciate the opportunity to comment on the proposed rules and look forward to working with the Department in the future to implement them.

Sincerely yours,

Bruce Aylward
Deschutes Water Bank Manager



Oregon Water Resources Congress

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June 8, 2006

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

Subject: Comments on proposed amendments to OAR Chapter 690, Division 077
(Instream Water Rights)

The Oregon Water Resources Congress (OWRC) appreciates the opportunity to comment on the proposed amendments to OAR Chapter 690, Division 077 (Instream Water Rights).


OWRC represents irrigation districts, water supply districts, and other public and private entities that deliver non-potable water for irrigation in Oregon.

As a member of the Rulemaking Advisory Committee (RAC), thank you to the Water Resources Department staff for their efforts on the amendments, not only in the drafting work, but also helping bring RAC members to present some additional concepts and in helping the RAC understand both the Department's proposed amendments and the RAC members' proposed amendments. It was not always an easy task and staff's patience is appreciated. Staff spent several hours with OWRC members responding to questions and explaining some of the technical provision behind the rules and the proposed amendments and our members appreciate that effort. The proposed amendments accurately reflect the recommendations from the RAC. For those issues on which the RAC did not come to agreement, staff has made a commendable effort to reflect the RAC members' discussions and concerns in drafting the proposed amendments.

OWRC has one specific comment on the proposed amendments. The definition of "Water Purveyor" (690-077-1101 (33)) refers to "water right owners." We recommend this be changed to "water users" to reflect the breadth of arrangements between water purveyors and the parties served by those water purveyors. Not all parties receiving water from or through a water purveyor own water rights (i.e., customers of municipal water systems). This is consistent with language in other rules administered by the Department.

OWRC appreciates the opportunity to participate on the RAC and to provide these comments.

Sincerely,


Ahita Winkler
Executive Director

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SALEM, OREGON

The mission of the Oregon Water Resources Congress is to promote the protection and use of water rights and the wise stewardship of water resources.



Oregon

Theodore R. Kulongoski, Governor

Department of Fish and Wildlife

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June 8, 2006

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WATER RESOURCES DEPT
SALEM, OREGON

Water Resources Department
725 Summer Street NE, Suite A158 12th St. NE
Salem, OR 97301-1271
Attn: Rule Coordinator

Re: Comments on Proposed Modifications of OAR Chapter 690-77 (In-stream Water Rights)

ODFW appreciates the opportunity to comment on these proposed rules. ODFW was also a member of the rules advisory committee and appreciates the ability to work with the committee members to assist WRD in reviewing proposed changes to these rules. As the agency who is responsible for maintaining the state's fish and wildlife resources we have an interest in assuring that the state's water resources continue to be available for in-stream values. We recognize that the state's waters are put to a number of beneficial uses and are shared among a large number of users one of which is to benefit the state's fish and wildlife resources. As the state population continues to grow into the foreseeable future, pressure (demand) on the water resources of the state will only increase and it is imperative that the state balance out of stream uses with in-stream needs.

ODFW for the most part agrees with the changes proposed by WRD for OAR 690-77. The proposed changes clarify processes and requirements and generally follow the discussions, recommendations and compromises reached during the rule advisory committee process. ODFW provides the following comments on the proposed rules.

- OAR 690-077-0015 (5) ODFW believes this statement should be reworded to better convey its intent which ODFW reads it to mean, when would the Water Resources Department allow transfers, leases, or allocations of conserved water for in-stream use to exceed the Estimated Average Natural Flow (EANF) or in-stream water right. There are a number of beneficial reasons for flows to exceed EANF. The in-stream water rights applied for by ODFW are based on habitat availability for certain species of fish, different flows may be beneficial for different reasons, such as, other species not considered in the in-stream flow analysis, flows needed to clear a sand bar so migration can occur, or flushing flows to clean gravels, channel maintenance flows which need to occur at regular intervals, in some cases additional flows provide access to additional habitat which make the stream system over all more productive (this is especially the case in desert streams where productivity goes up in wet years and down in dry years). In these cases WRD should allow for the submittal of additional justification to allow WRD to make a determination on whether flows above EANF are warranted and significant for the public use.

Suggested wording would be:

(5) In-stream transfers, leases or allocations of conserved water can exceed the Estimated Average Natural Flow or natural lake levels or maximum amount of an in-stream water right application applied for under OAR 690-077-0020 if the Department finds that a significant public use exists for the additional flows as demonstrated by:

- (a) written justification submitted by the Oregon Department of Fish and Wildlife outlining the benefits associated with the increased flows; or
- (b) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increased flows would improve water quality.

ODFW would recommend not including the flow restoration priorities as part of the rules, its intent was to be used as guidance as to where flow restoration is most critically needed, but not as a guide for where flows above EANF are needed. The criteria used to create the priorities is part of what a biologist would consider in determining flow restoration need but the priorities themselves are more qualitative than quantitative and represent a level of need not necessarily the quantity of that need.

In a separate issue ODFW would like the Water Resources Commission to consider accepting water right transfers, leases or allocations of conserved water for instream use that exceed EANF if they are senior to existing instream water rights that have been transferred, leased or were allocations of conserved water. The reason for this is to increase the likelihood that transfers, leases or conserved water will provide a more reliable water flow instream. This is especially true of leases where a number of junior water rights can be leased instream which on paper provides enough water to equal EANF, but does not provide the actual water except in wet years because of their junior priority date. A senior water right is proposed for instream transfer which would provide a more reliable instream flow, but is rejected because leased water instream on paper has met EANF.

Sincerely,



Richard J. Kepler
Manager, Water Quality/Quantity