

CERTIFICATE AND ORDER
FOR FILING
PERMANENT
ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

RECEIVED
AUG 6 3 30 PM '90
BARBARA J. ...
SECRETARY OF STATE

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on August 3, 1990
(Date)

by the Water Resources Commission
(Department) (Division)

to become effective upon filing
(Date)

The within matter having come before the Water Resources Commission after
(Department) (Division)

all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO YES Date Published: October 15, 1990

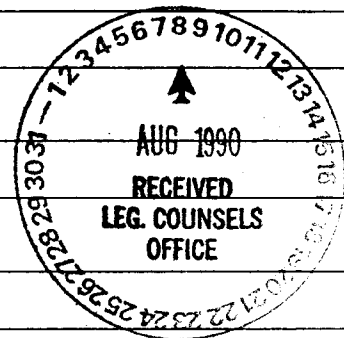
NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Adopted:
(New Total Rules)

OAR 690-410-030

Amended:
(Existing Rules)

Repealed:
(Total Rules Only)



as Administrative Rules of the Water Resources Department
(Department)

Resource Management Division
(Division)

DATED this 7th day of August, 19 90

By: John E. Baden
(Authorized Signer)

Title: Deputy Director

Statutory Authority: ORS 536.220, 536.300 or

Chapter(s) _____ Oregon Laws 19 _____ or

House Bill(s) _____, 19 _____ Legislature; or Senate Bill(s) _____, 19 _____ Legislature

Subject Matter: Instream flow protection. Maintaining and enhancing water resources for the values they naturally provide.

For Further Information Contact: Mike Mattick

(Rule Coordinator)

Phone: 378-3671

WATER RESOURCES DEPARTMENT
ADMINISTRATIVE RULES
CHAPTER 690
DIVISION 400
STATE WATER RESOURCES POLICY - AUTHORIZATION

PURPOSE AND AUTHORIZATION
690-400-000

- (1) These rules, and those contained in Division 410, establish statewide policies and principles pertaining to a wide range of water-related topics. All Water Resources Commission and Department activities, including but not limited to: (a) basin planning; (b) interagency coordination; and (c) development and adoption of rules, standards, and implementing strategies to govern Department programs and activities, shall be compatible with these rules and those contained in Division 410.
- 2) ORS 536.220 authorizes a single state agency, the Water Resources Commission, to formulate and implement an integrated, coordinated state water resources policy. The Water Resources Commission shall progressively formulate plans and programs to develop the water resources of the state and provide for the enforcement of state water policy. State water resources policy must promote the maximum beneficial use of the waters of the state. Multiplewater uses shall be preferred over single-purpose uses. Existing water rights shall be protected in accordance with relative priority dates except as they may be temporarily modified under emergency drought circumstances. The Commission shall, in adopting policies that affect the appropriation and control of water resources, design those policies to best protect and promote the general public welfare.
- (3) The Water Resources Commission is required by ORS 536.300(2) to develop a state program for managing Oregon's water. The Commission has established the Oregon Water Management Program which consists of statewide policies (OAR Chapter 690, Divisions 400 and 410), basin programs (OAR Chapter 690, Divisions 500 to 520) and non-rule program direction for implementing statewide policies and basin level actions (ORS 536.430).
- (4) In formulating the Oregon Water Management Program, the Commission shall consider declarations of policy provided in ORS 536.310. These declarations mandate the consideration of existing rights, economic development, human consumptive needs, multiple uses, groundwater quality, protection of wildlife, recreation, watershed management, and other priorities outlined by the Legislature. These rules, and those contained in Division 410, are adopted as statements for inclusion in the integrated, coordinated state water resources policy required under ORS 536.300.
- (5) The programs and plans of the Commission are to reflect all laws that relate to or affect the use and control of the water

resources of the state (ORS 536.330). The Legislature, in ORS 536.360, directs every state agency and public corporation to conform to statements of state water resources policy as adopted by the Water Resources Commission.

GROUNDWATER MANAGEMENT
690-410-010

(1) Policy

The groundwaters of the State of Oregon belong to the public. The reasonable control, protection, and use of groundwater is governed by the state on behalf of the public. Groundwater shall be managed to promote efficient and sustainable use for multiple purposes. Groundwater overdraft and contamination shall be prevented to avoid health hazards, environmental damage, and costly correction programs. Interference between groundwater uses and competing groundwater and surface water uses shall be prevented and/or controlled to protect the water resource and existing rights. The state shall pursue restoration of contaminated groundwaters to protect present and future uses. Coordinated action by federal, state and local agencies, Indian tribes, and special districts, along with public education, shall be fostered to promote the effective management, protection and beneficial use of groundwater.

(2) Principles

Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

(a) Groundwater and surface water shall be managed conjunctively where to do so will protect water resources, existing water rights, and the public interest.

(b) Rules governing well construction, maintenance, and abandonment shall provide minimum standards for protection of the public welfare, safety, and health, and the groundwaters of the state.

(c) Water well constructors, owners, and operators are responsible to construct, alter, maintain, operate, and abandon wells, and any holes through which the groundwater may be contaminated, in accordance with minimum statewide standards and shall undertake measures necessary to prevent waste, undue interference, contamination, or harm to the groundwater.

(d) Low-temperature geothermal fluids are part of the groundwater resources of the state and are subject to applicable laws and plans. These fluids are developed primarily for thermal characteristics and may require special management approaches to promote beneficial use, protect the environment and achieve other policy directives.

(e) Special-area designations (i.e., critical groundwater management areas, serious water management areas, basin plan restriction areas) may be warranted under conditions such as:

(A) past, existing or probable excessive groundwater level declines or overdraft,

(B) substantial interference between two or more wells or between groundwater and surface water uses (including public instream uses), or between groundwater appropriation and geothermal appropriation under ORS Chapter 522, and/or

(C) groundwater contamination.

(f) Special-area designations shall be invoked when site-specific standards and regulations are no longer sufficient to solve or prevent the problem(s). The invoking of special-area designations shall be accompanied by recommended monitoring, reporting, or regulating activities to prevent, correct or control existing or potential declines, overdraft, interference or contamination. Existing groundwater appropriations, which are generally protected from infringement, may be controlled if any of the conditions listed in (e) above are found to exist.

(g) Groundwater appropriation for artificial recharge is a beneficial use and can be approved if such action will not:

(A) cause significant adverse effects on the quantity or quality of the supplying and receiving water sources, or

(B) harm the public interest.

(h) Ongoing collection, analysis, and distribution of hydrogeologic information are necessary to manage groundwater for maximum beneficial use and to protect the public welfare, safety, and health.

(i) Public education programs, research, and demonstration projects are needed to increase citizen awareness of groundwater issues in this state.

(j) Adequate and safe supplies of groundwater for human and livestock consumption are given priority over other uses during times of shortage.

HYDROELECTRIC POWER DEVELOPMENT

690-410-020

(1) Policy

Development and production of hydroelectric power is a beneficial use. However, construction and operation of hydroelectric facilities have had significant adverse impacts on the State's natural resources. New hydroelectric development shall be permitted if it can be demonstrated that there will be no harm to the state's anadromous salmon and steelhead fish resource and

habitat, and no net loss of the state's other natural resources. Relicensing of existing facilities, which have adversely impacted, or may preclude the recovery of, anadromous fish resources shall include measures to restore, enhance or improve the anadromous fish resource. The relicensing of any facility shall include measures to prevent the net loss of other natural resources resulting from future operation of the facility.

(2) Principles

Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

(a) Hydroelectric power can provide valuable economic and social benefits when the natural resources of the state are protected from potential adverse impacts.

(b) Proposed or relicensed projects that can be developed consistent with Oregon's resource protection standards should be encouraged. New development shall be consistent with the provisions of the Columbia River Basin Fish and Wildlife Program as adopted by the Northwest Power Planning Council pursuant to PL 96-501.

(c) Mitigation shall be required for harm to Oregon's natural resources caused or likely to be caused by new permitted hydroelectric power development. These natural resources include but are not limited to anadromous fish, wildlife, water quality, scenic and aesthetic values, historic, cultural and archaeological sites.

(d) On relicensing of existing facilities, measures for restoration, enhancement or improvement for past harms to Oregon's anadromous and steelhead resource shall be considered and implemented.

(e) The state shall ensure that the laws of the state and the rules of the Commission concerning hydroelectric power development are satisfied at every stage of any hydroelectric power project. The state shall assert these laws and rules when participating in federal proceedings involving hydroelectric power. Participation in these proceedings by state agencies shall be fostered through the Strategic Water Management Group (SWMG).

INSTREAM FLOW PROTECTION
690-410-030

(1) Policy

Benefits are provided by water remaining where it naturally occurs. Protecting streamflows which are needed to support public uses is a high priority for the state. The long term goal of this policy

shall be to establish an instream water right on every stream, river and lake which can provide significant public benefits. Where streamflows have been depleted to the point that public uses have been impaired, methods to restore the flows are to be developed and implemented. These activities shall be consistent with the preservation of existing rights, established duties of water, and priority dates, and with the principle that all of the waters within the state belong to the public to be used beneficially without waste.

(2) Principles

Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

(a) The Commission shall consider the needs of both instream and out-of-stream uses when reviewing future appropriations and developing streamflow restoration programs.

(b) Preservation of instream flows needed to support the purposes of State Scenic Waterways is a high priority for the state.

(c) Statewide and local programs should be implemented to restore and enhance streamflow and lake levels to provide public uses. Priority of restoration shall be established by the Water Resources Commission. The Commission shall consult with the Department of Fish and Wildlife, Environmental Quality, Parks and Recreation and the public, to identify those waterways where the greater public benefit could be obtained from additional streamflow restoration.

(d) The Department shall actively encourage the purchase, lease and gift of existing water rights for transfer to instream water rights, and the construction of environmentally sound multipurpose storage projects.

(e) Streamflow restoration programs shall be designed to encourage cooperation and coordination between instream water interests and out-of-stream water users.

(f) Instream water rights are preferred, over the establishment of new minimum perennial streamflows, to protect instream public uses .

Statutory Guidance

ORS 390.010 declares it is state policy to assure adequate outdoor recreation resources for all present and future generations and visitors of Oregon. The public interest is served through the development of all recreation potentials of the river basins,

commensurate with need, which are compatible with programs of water use enunciated by the Water Resources Commission.

ORS 390.815 declares that many of the free-flowing rivers of Oregon ... and adjacent lands possess outstanding scenic, fish wildlife, geologic, historic, archaeological, and outdoor recreation values of present and future benefit to the public, and establishes an Oregon Scenic Waterways System. The policy of permitting construction of impoundment facilities on its waterways is to be complemented with a policy to preserve a free-flowing condition and protect and preserve the natural setting, water quality and fulfill other conservation purposes.

ORS 536.235 states that the establishment of minimum perennial streamflows is a high priority of the Commission and the Department.

ORS 536.310 directs the Commission to foster and encourage the maintenance of minimum perennial streamflows sufficient to support aquatic life, to minimize pollution and to maintain recreation values.

ORS 536.325 specifies a process for establishing minimum perennial streamflows.

ORS 537.110 states that all water within the state from all sources of water supply belongs to the public.

ORS 537.135 states that the Water Resources Commission shall not issue a groundwater recharge permit unless the supplying stream has a minimum perennial streamflow established for the protection of aquatic and fish life. The State Department of Fish and Wildlife may waive this prerequisite if a minimum streamflow is not required for the supplying stream.

ORS 537.332 - 537.360 define and establish instream water rights. These statutes call for conversion of minimum perennial streamflows, and establish procedures for the Departments of Fish and Wildlife and Environmental Quality and the Parks and Recreation Department to apply for instream rights. Procedures are also established for the Commission to evaluate the impacts of proposed instream water rights and to establish them in reduced amounts or with conditions if necessary to protect the public interest. A process for transferring or leasing out-of-stream water for use instream is also provided.

ORS 537.334 declares that the recognition of an instream water right ... shall not diminish the public's right in ownership and control of the waters of this state or the public trust therein.

ORS 537.352 establishes a method for proposed multipurpose storage, municipal use or municipal hydroelectric projects to gain precedence over instream water rights created at the request of one of the three state agencies.

ORS 537.356 allows any state agency to request that the Commission reserve unappropriated water for future economic development.

ORS 537.480 directs the Commission to consider the amount of conserved water necessary to satisfy identified instream needs when allocating more or less than 25 percent of conserved water to the State.

Policy Discussion

In many parts of Oregon, the appropriation of water resources has impaired or may soon impair the public benefits derived from instream flows. While most early water rights were established for irrigation and mining, important new demands have emerged during recent years. Growth and development have resulted in continually expanding needs for municipal and commercial water supplies. The importance to Oregon's economy and the quality of life of its citizens of maintaining adequate streamflows to support fish, provide recreational opportunities, and maintain water quality is becoming increasingly apparent.

Until recently, continued consumptive use of the state's water resources was limited only by the availability of supplies. In the later 1950s, the state began a systematic evaluation of available water supplies in each river basin. Through this process, the state allocated some of the remaining unappropriated water to public uses. This was done through the creation of minimum perennial streamflows for the purpose of protecting aquatic life or minimizing pollution.

Originally, minimum streamflows were not set at levels which exceeded current water availability. They were often set at the lowest levels which would support key fish species, as determined by the Department of Fish and Wildlife, or assure that projected loading levels from treated wastes and non-point source pollution would not violate water quality standards of the Department of Environmental Quality. Therefore, many streams which, due to past appropriation, no longer possessed the potential to provide public benefits received no protection or remedial attention. Additionally, the remaining streamflows which provided important fishery and recreational benefits were not protected in many areas. Due to the initial practice of establishing minimum streamflows only where gaging stations existed, opportunities to establish protective flow levels were often missed. For all of these reasons, low streamflows now limit the availability of fish habitat and recreational opportunities in many parts of the state.

The Scenic Waterways Program was established by initiative petition in 1969. This set into motion a state protection program for certain water bodies throughout Oregon. Currently, 18 water bodies contain sections designated as State Scenic Waterways. The Water Resources Department cannot permit a new appropriation of water within or above a Scenic Waterway which may, by itself or in conjunction with previously issued rights, impair the free flowing

character of these waters necessary for recreation, fish and wildlife.

The 1987 legislature, concerned about the over-appropriation of streams, passed Senate Bill 140 which created instream water rights. This legislation recognized that public uses are beneficial uses. Instream water rights are held in trust by the Water Resources Department for the benefit of the people of Oregon to maintain water instream for public use. These water rights may be initiated upon application from the Department of Fish and Wildlife, the Department of Environmental Quality or the Parks and Recreation Department. They may also be established by the conversion of minimum streamflows, or the transfer of an existing appropriation to an instream water right. Additionally, the Commission may allocate a portion of a water right, which is conserved under the provisions of ORS 537.455 to 537.500, to the state as an instream right. Instream water rights may be established at levels which exceed current water availability so long as they do not injure existing water rights or exceed a level which would provide public benefits.

The instream water rights provisions provide a tool for the Commission to protect public benefits provided by instream flows. They also can be used to focus attention on over-appropriated streams. The ability to transfer existing rights to instream rights and to support environmentally sound multipurpose storage projects will be used to restore and enhance public uses.

The Water Resources Commission has adopted administrative rules for minimum streamflows and instream water rights in OAR Chapter 690, Divisions 76 and 77, respectively.

Implementing Strategies

1. Quantify recreational flow needs necessary to protect existing uses in State Scenic Waterways. (1992)
2. Develop a statewide water availability data base to be used when evaluating the cumulative impacts of water appropriations on flows or water levels for all water bodies of the state. (March 1991)
3. Examine the need for increased monitoring of instream water rights to protect instream public uses. If necessary, seek new ways to assure that the flows are protected for the public uses listed in the water right. (Dec 1993)
4. Provide the public and other governmental agencies opportunity to review and comment on the issuance of any water use permits, reservations for future economic development and instream water rights. (Ongoing)
5. Work with the Department of Fish and Wildlife, the Department of Environmental Quality and the Parks and Recreation

Department to determine which water bodies could benefit from additional streamflow protection or augmentation. (Ongoing)

6. Focus efforts which encourage conservation and the elimination of waste on areas where public benefits are most likely to increase. (Ongoing)

7. Allocate a percentage of conserved water for public use when an application to use conserved water is received if the source could benefit from additional instream flows. (Ongoing)

8. Explore opportunities to restore and enhance instream flows through the use of transfers of existing rights, improved management of existing waters, watershed enhancement and the construction of multipurpose storage projects. (Ongoing)

9. Inform state agencies about opportunities to request a reservation of water for future economic development to be established prior to or in conjunction with the establishment of an instream water right. (Ongoing)

INTERSTATE COOPERATION

690-410-040

(1) Policy

The state will seek to cooperate with other states in planning, developing, managing, and resolving conflicts involving surface or groundwater resources. Interstate cooperation shall be actively pursued to benefit the public interest, welfare, health, economy and safety of Oregon's citizens.

(2) Principles

Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

(a) Existing laws, agreements, water rights, individual state interests and resource conditions shall guide and limit interstate cooperation in order to protect the public interest.

(b) Cooperation is preferred, but not required, over unilateral action, litigation, arbitration, or adjudication.

(c) The meaning, intent and purpose of interstate cooperation as embodied in this policy also applies to federally recognized Indian Tribes, and their governments, located wholly or partially within this state.