

## **Water Rights and ODFW**

**1. WRD is regulatory agency**

**2. ODFW is part of reviewing process**

**3. Prior appropriation is the doctrine that underlies water law**

**A. First in time (putting water to use), first in right (to use water)**

**B. Junior users (later water right date) will be shut off to supply senior users (earlier water right date)**

**4. More recent water law considers water availability**

**A. Estimated natural flow subtracting existing water rights = water availability**

**B. Water must be available on an 80% exceedance basis (4 out of 5 years) to receive new surface water right**

**C. For storage right generally water should be available 50% of time (half of the time, though not in law)**

**5. ODFW Roles and Responsibilities**

**1. Laws allow opportunity for mitigation for impacts as well as preventing harmful projects from going forward in the manner proposed.**

**2. Division 33 (new water rights)**

1) Requires ODFW review of impacts to sensitive, threatened or endangered species

2) Regardless of whether an instream water right is present.

3) ODFW must provide review when asked.

**3. Transfer Statutes**

1) Require ODFW review for fish screens, required if fish present

- 2) Consent to injury of an instream water right for transferred water rights, where ISWR exist.
- 3) ODFW must provide review when asked.
- 4) More surface water rights being transferred than applications for new ones

## **6. *Water right review***

### **A. Comments – provided to WRD when requested or when needed**

- 1) Div. 33 request (field, copy to Headquarters if negative), new water right
- 2) Transfer resulting in injury to ISWR (headquarters and field together)
- 3) Transfer resulting in injury to ODFW regular water right (field and headquarters together)
- 4) Municipal (or other) extensions of permits

## **B. Request for Standing**

- 1) Headquarters decision with field input
- 2) Allows involvement but can't challenge water right application or transfer, unless change is made from original WRD draft determination.
- 3) Can become a protest or dropped, depending on circumstances.

## **C. Request to become a party to the proceeding (protest)**

- 1) Headquarters decision (usually Division Administrator or higher) with field input
- 2) Allows involvement into how water right is conditioned to protect fish and wildlife or other ODFW interests, such as hatchery and wildlife area water rights.

## ***7. Fish and Wildlife Protections in water law***

### **A. Division 33 (OAR 690-033)**

- 1) The proposed use complies with screen design, installation, operation specifications and passage requirements as listed ORS 498.248 through 498.268 and ORS 509.600 through 509.630. (OAR 690-033-0120(2)(c) and 690-033-0220(2)(a))
- 2) For purposes of mitigation, ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415-0030 adopted November 13, 1991 shall be followed. (OAR 690-033-0120(4) and 690-033-0220(5))
- 3) WRD must consult with affected fish and wildlife agencies and appropriate Indian tribes related to resolving flow management conflicts (multiple species flow needs). (OAR 690-033-230)
- 4) For determining presence of sensitive, threatened or endangered species, WRD may rely primarily on information provided by ODFW, U.S. Fish and Wildlife Service, National Marine Fisheries Service or appropriate Indian tribes. (OAR 690-033-0310(3))

5) Interagency Review Team (OAR 690-033-0330)

- i. If WRD concludes proposed water use may affect habitat of sensitive, threatened or endangered fish species, WRD must:
  - (a) Notify applicant of such and that application may be conditioned or denied.
  - (b) Notify interagency review team that application was received in area that may affect habitat of sensitive, threatened or endangered fish species.
- ii. Interagency review team reviews applications that WRD determines may affect sensitive, threatened or endangered fish species.
- iii. Agencies may request interagency review of specific applications.
- iv. When reviewing applications, the interagency review team must apply the following standards:
  - (a) In areas of state outside of Columbia Basin where threatened and endangered fish species are located, no loss of essential habitat as defined in OAR 635-415-0005(4).
  - (b) In all areas of the state where sensitive species are located, no net loss of essential habitat as defined in OAR 635-415-0005(4).

- v. The interagency review team, if possible, will recommend conditions to the application necessary to achieve standards listed in 690-033-0330(2)(a) and (b).
- vi. If the interagency review team cannot identify conditions that meet the standards listed in 690-033-0330(2) (a) and (b), the interagency review team must recommend denial of application unless it concludes that the proposed use would not harm the species.

**B. Transfer Statutes (ORS 540.510 - ORS 540.532) and Rules (OAR 690-380)**

- 1) **Summary ORS 540.525** (transfers) **and ORS 540.532** (for transfer to historical point of diversion is very similar to ORS 540.525) Installation of fish screening or by-pass device as prerequisite for transfer of point of diversion. (1) Upon receipt of an application for a change in the point of diversion under ORS 540.520, [WRD] shall consult with [ODFW] to determine whether the diversion is:
  - a. Equipped with an appropriate fish screening or by-pass device; or
  - b. Included on the priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989.
- 2) If the original point of diversion is included in priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989, [WRD], after consulting with [ODFW], may require the installation of an appropriate fish screening or by-pass device at the new point of diversion.
- 3) When consulting with [ODFW], [WRD] shall determine whether the installation of an appropriate fish screening or by-pass device is necessary to prevent fish from leaving the body of water and entering the diversion.
- 4) Any individual required to install a fish screening or by-pass device under this section at a point of diversion for a diversion of under 30 cubic feet per second may participate in the State

Department of Fish and Wildlife's cost sharing program for the installation of screening or by-pass devices. [1995 c.274 §6a]

- 5) **OAR 690-380-5050 Consent to Injury of Instream Water Rights** (1) If the applicant notifies [WRD] that applicant intends to pursue consent to injury to an instream water right, [WRD] shall seek a recommendation from the agency that requested the instream water right.
- 6) In requesting a recommendation, [WRD] shall provide to appropriate agency a copy of the preliminary determination issued under OAR 690-380-4010 or proposed order issued after hearing and, to facilitate the analysis of cumulative impacts, identify any previously approved transfers injuring the same instream water right as the proposed transfer.
- 7) If the agency that requested the instream water right recommends that [WRD] consent to injury, the agency's recommendation shall be in writing and include:
  - (a) A description of the extent of the injury to the instream water right;
  - (b) A description of the effect of the injury on the resource;
  - (c) An evaluation of the net benefit that will occur as a result of the proposed change that includes an analysis of the cumulative impact of any previously approved changes that injured the instream water right; and
  - (d) Any proposed conditions necessary to ensure that the proposed change will be consistent with the recommendation.
- 8) On receipt of a recommendation to consent to injury that complies with section (3) of this rule, [WRD] shall provide notice of the opportunity to comment on the recommendation:
  - (a) To the applicant, any protestants or persons who filed comments under OAR 690-380-4030, and affected Indian Tribes;
  - and (b) By publication in the Department's weekly notice.

- 9) WRD allows 30 days for public comments on the recommendation or a written request for a public meeting to review the recommendation.
- 10) ODFW will get to see any comments and will participate in any requested public meeting on the recommendation.
- 11) If no comments are received or ODFW does not withdraw its recommendation to consent to injury, WRD will issue an order approving the transfer.
- 12) The order must include findings: (a) on the extent of the injury to the instream water right and the effect on the resource; (b) on the net benefit that will occur as a result of the change that reflect an analysis of the cumulative impact of any previously approved changes that injured the instream water right; and (c) any conditions necessary to ensure that the change will be consistent with the findings and will result in a continued net benefit to the resource consistent with the purposes of the instream water right.
- 13) **690-380-5060 Fish Screening and By-Pass Devices**
  - a. When an application for a change in point of diversion is received, [WRD] must consult with ODFW to determine whether a fish screening or by-pass device is necessary to prevent fish from leaving the body of water and entering the diversion.
  - b. The Department's consultation with ODFW shall determine whether the diversion is: (a) Equipped with an appropriate fish screen or by-pass device; or (b) Included in the list of priority screening projects established under section 8, chapter 933, Oregon Laws 1989.
  - c. If the original point of diversion is included in the priority list referenced in subsection (2)(b) of this rule, [WRD], after consulting with ODFW, may require the installation of an appropriate fish screening or by-pass device at the new point of diversion.

- d. If requested by ODFW, a condition requiring a proper fish screen at the new point of diversion shall be attached to any transfer approval order for a change in point of diversion.
- e. Any individual required to install a fish screening or by-pass device under this section at a point of diversion for a diversion of under 30 cubic feet per second may participate in ODFW's cost sharing program for the installation of screening and by-pass devices.

All water basins in Oregon are classified for water uses for “recreation, wildlife, and fish life uses”. This allows ODFW to apply for ISWR in all basins and classifies these as beneficial uses of water.

## **Instream water rights (ISWR)**

***Certified water rights held by the state of instream uses.***

***ODFW is applicant, WRD is processor and holds in trust for people of Oregon***

- Instream water rights (ISWR) are certificated water rights that are intended to maintain flows in-stream for aquatic and fish life, wildlife and their habitats, recreation, and water quality.
  - The Instream Water Right Act allowed conversion of minimum perennial streamflows to ISWR by the Water Resources Commission (WRC) and application by ODFW, DEQ and Oregon Parks and Recreation Department (OPRD) for new ISWR.
    - WRC converted around 600 minimum perennial streamflows to certificated ISWR.
    - FWC adopted rules on applying for ISWR (OAR 635-400-0000 – 0040, 10/89) and ODFW applied for around 900 ISWR between 1988 and 1993.
    - Individuals or entities that feel their water rights or interests are threatened by an ISWR application can formally protest the application. Of the ISWR applied for by ODFW, around 140 were

protested by nearby landowners, counties, irrigation districts or other interests.

- WRD has resolved about 40 of these protests through negotiation.
- ODFW & WRD resolved another 20 protested ISWR applications; the remainder (77) have yet to be resolved.

## **Water Storage Projects**

### ***Reservoirs and “alternate” reservoirs, on- and off-stream***

#### **Large reservoirs**

- Construction, enlargement, repair, or alteration of all dams which are, or will be, 10 feet or more in height and will impound 3,000,000 gallons (9.2 acre-feet) or more.
- Most need a team approach – interagency (feds & state), intra-agency; issues include fish, wildlife, habitat, fish passage, instream flows, wetlands, inundation of habitats, creation of habitats, nongame, waterfowl, big game winter range, etc.
- Most involve multiple state and federal permits or review processes – Removal/fill/404; 401; ESA consultations; land use, etc.

#### **Small reservoirs**

- Small earthfill dams less than ten feet in height or impounding less than 3,000,000 gallons (9.2 acre feet).
- Can be water right application or water use registration.
- Still may need other state and federal permits, but often fit into regional authorizations.
- Water Use Registrations for Wetland, Stream or Riparian Area Enhancement or Storm Water Management. OAR 690-340-0050
  - Often are small reservoirs used to retain flood flows across fields, create wetlands (use of groundwater only), or protect and enhance riparian or stream habitats (livestock watering off-stream)
  - ODFW often consulted on value, especially for numerous small reservoirs on one property.

## **Processing water rights: Public Interest Review - Surface Water (OAR 690-310-0120) and Groundwater (OAR 690-310-0140)**

- ODFW has a role in WRD’s processing of surface water and groundwater rights by providing information on the specific “public interest” in fish and wildlife.

- Especially if the specific public interest under ORS 537.170(8) would be impaired or detrimentally affected; and
- Specifically how the identified public interest would be impaired or detrimentally affected.
- WRD makes this determination by, at a minimum, considering the factors listed below, including any potential effects that the proposed use may have on these factors, where applicable:
  - (A) Water use efficiency and the avoidance of waste;
  - (B) Threatened, endangered or sensitive species;
  - (C) Water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set under section 303 (d) of the federal Clean Water Act and sources which the Environmental Quality Commission has classified as outstanding resource waters as defined in OAR 340-041-0006(42) ;
  - (D) Fish or wildlife;
  - (E) Recreation;
  - (F) Economic development; and
  - (G) Local comprehensive plans, including supporting provisions such as public facilities plans.
- In making the determination mentioned above, WRD may consult and communicate with state and federal agencies and local governments, as appropriate.

## **Municipal Extensions**