

Instream Water Rights in Oregon



FREQUENTLY ASKED QUESTIONS

April 2024

Freshwater habitats cover a tiny fraction of the Earth's surface (<1%), yet the benefits they provide greatly enhance our quality of life, including supporting fish and wildlife, water quality, and recreational opportunities. However, these habitats and the fish and wildlife that depend on them are at risk globally – including in Oregon. Instream water rights are a key mechanism to protect and ensure equitable allocation of Oregon's valuable water resources for public uses to benefit present and future generations of Oregonians.

What are instream water rights?

All water in Oregon belongs to the public. A **water right** is the legal authorization given by the state to a party to use public water in a specific way for a specific purpose. An **Instream Water Right** is a water right held in trust by the Oregon Water Resources Department (OWRD) for the benefit of the people of the state of Oregon to maintain water instream (e.g., within a stream channel or lake bed) for public uses such as fish and wildlife, water quality, and recreation (adapted from ORS 537.332). Instream water rights are the state's mechanism to provide water for fish needs and healthy ecosystems that support multiple public uses by protecting the full suite of flows for fish and wildlife, water quality, recreation, and scenic attraction, as well as supporting cultural values and healthy economies.

Why are instream water rights needed?

Oregon's Water Code, established in 1909, formalized a system of water allocation that did not consider water for instream uses, which led to degradation of Oregon's freshwater habitats.

Over time, it became clear that the legal system also needed to protect flows to support aquatic life and minimize pollution. Although the 1955 Minimum Perennial Streamflows Act established monthly minimum flows for fish and water quality through administrative rule, these flow recommendations were not legally

Instream Needs

Freshwater habitats in Oregon include streams, lakes, and wetlands. Healthy streams are dynamic and exhibit natural variability (in flow amount and timing) to which native species are adapted. Habitat preferences (like depth, velocity, and even streambed composition) vary for different species of fish and for each of their life stages. When too much water is removed from a river for other uses, there is not enough water of sufficient quality to meet and maintain species' habitat needs. This can be especially problematic during summer low flows if there are not cold-water refuges available, because water temperatures can rise to lethal levels in many parts of a stream. In some cases, streams can dry up completely.

Instream water rights may be established by:

1) Request by state agencies:

Three state agencies – the Oregon Department of Environmental Quality, Oregon Parks and Recreation Department, and the Oregon Department of Fish and Wildlife – are authorized to request instream water rights in the amount needed to support recommended public uses (ORS 537.336)

2) Conversion of minimum perennial streamflows to instream water rights (ORS 537.346)

3) Temporary lease, time-limited transfer, or permanent transfer of water rights established for other uses (ORS 537.348)

protected and could be disregarded during times of shortage. In response to these shortcomings, the 1987 Instream Water Rights Act officially recognized instream flows as a beneficial use that could be protected by a water right, giving them the same legal status as consumptive water rights (ORS 537.350).

Instream water rights also help achieve the directives of Oregon's Integrated Water Resources Strategy (adopted 2012, updated 2017). The Strategy provides a blueprint for meeting the state's instream and out-of-stream water needs now and into the future, when water availability and use will be impacted by climate change. The Strategy directs ODFW to determine flows needed to support instream needs, and to establish additional instream water rights where needed to conserve, maintain, and enhance aquatic and fish life, wildlife, and habitat.

How does an instream water right affect an existing water right?

By law, instream water rights cannot take away or impair any existing water right with an earlier priority date (ORS 537.334). Like all other water rights, instream water rights are based on the doctrine of prior appropriation, which protects water on a "first in time, first in right" basis in times of water shortage. During times of shortage, junior (more recent priority dates) water rights can be curtailed so that senior (older priority dates) water rights receive their full share. The priority date for a new water right, including those for instream purposes, is the date that the application is submitted to the Water Resources Department (ORS 537.341). Because the Instream Water Right Act was not enacted until 1987, most instream water rights are quite junior compared to existing out-of-stream water rights, some of which date back to the 1800s.

Some instream water rights with more senior priority dates were established through conversion, purchase, lease, or gift of an existing water right and retain the original priority date associated with the water right that is transferred instream (ORS 537.346 and ORS 537.348). Converted minimum perennial streamflows have priority dates from the late 1950s to late 1980s. Instream water rights requested by state agencies have priority dates post-1987 when the Instream Water Rights Act was passed.

Why are instream water rights sometimes approved for flow amounts greater than what OWRD estimates is available?

The amount of water already appropriated to out-of-stream uses is not a factor in determining the amount requested for an instream water right (OAR 690-077-0015). Instream allocations are based on *natural*

streamflow – the amount of water that would be expected if no water was withdrawn for out-of-stream uses – and reflect flows needed to support fish and aquatic life.

Even in an over-allocated river basin – where requested flows are unlikely to be met in many years – instream water rights are important because they provide a starting point to inform voluntary flow restoration efforts that support identified public uses.

Why does ODFW apply for new instream water rights on portions of streams that already have them?

As ODFW is applying for new instream water rights as directed in the Integrated Water Resources Strategy, new data and updated analyses indicate that some existing instream water rights are not sufficiently protective of the intended public uses (conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat). Therefore, ODFW has adjusted flow needs when necessary by submitting new applications.

How does ODFW determine flow amounts and reach length when applying for ISWRs?

It is ODFW’s policy to apply for ISWRs on waterways exhibiting fish and wildlife values (OAR 635-400-0005). ODFW’s ISWR rules dictate the methods that can be used to apply for an ISWR (OAR 635-400-0015).

Instream flow recommendations used in ISWR applications must be derived from field-based studies, augmented with measured or modeled estimates of natural flow.

Flows must be based on habitat criteria. Habitat preferences vary for different species of fish and for each of their life stages. To estimate fish habitat, hydrologic and habitat data are collected over a range of flows (e.g., low, medium, and high). Species-specific flow targets are then placed within a framework of naturally occurring flows based on long-term hydrologic records to determine the requested flow amount.

Instream flow targets and resulting ISWRs are applicable over lengths of stream with relatively uniform biological and hydrologic conditions. Significant changes in hydrologic (e.g., tributary inputs) or biologic (i.e., species distribution changes) conditions upstream and downstream from the instream flow study reach define reach breaks.

Are water right changes (also called “transfers”) allowed on streams with existing instream water rights?

Yes, though proposed changes to a water right cannot injure other existing water rights, whether instream or out-of-stream (ORS 540.530). If OWRD determines that a proposed change in point of diversion would injure an instream water right, they may only consent to the change upon a recommendation from the agency (e.g., ODFW) that requested the instream water right. Only changes that will result in a net benefit to the resource consistent with the purposes of the instream water right are allowed. If the recommendation of the requesting agency is to consent to the proposed change, the recommendation may include any proposed conditions necessary to ensure that the change will be consistent with the recommendation. For instream water rights that ODFW applied for, we may offer advice to landowners upon request to ensure the change results in a net benefit to the resource. To date, OWRD has referred very few transfer applications to ODFW for a consent to injury recommendation.

Email Instream.Water@odfw.oregon.gov for more information

