

Water Rights And Summer Stream Conditions

Background

Instream Water Rights¹

When most Oregonians talk about water rights they usually mean rights to **remove water from a river or lake for home, industrial or agricultural use**. In 1987, these discussions expanded when a new law created a different kind of water right, one that would **leave water in streams and lakes for beneficial public uses**.

Like most western states, Oregon water law is based upon the prior appropriation doctrine, which allows water withdrawal from streams and lakes for beneficial purposes. These rights obtain seniority based on the date they were acquired, a system often described as first in time, first in right.

In the early 1960's, the Oregon State Game Commission (a predecessor to the Oregon Department of Fish and Wildlife) studied and recommended instream flow levels needed to support native fishes in major streams. These recommendations were subsequently used by the Oregon Water Resources Board to set minimum perennial stream flows throughout Oregon by administrative rule.

Over time, the Act and the administratively set minimum perennial stream flows proved to be inadequate. Because most of the 547 minimum perennial stream flows adopted under the Act were established on major rivers and larger streams, smaller streams were generally left with little or no flow protection. In addition, many of the flows adopted by the Oregon Water Resources Board were set at levels well below those recommended by the Game Commission Reports, especially during summer months when out-of-stream demands for water are at their highest and flows are most critical for fish.

In 1987, the Oregon Legislature supplemented the perennial flow law with SB 140 (the Instream Water Right Act). Legislators sought to maintain water levels that support public uses within natural streams or lakes. The State Water Resources Department holds these instream water rights in trust to support public uses such as recreation, pollution abatement, navigation, and maintenance and enhancement of fish and wildlife and their habitats.

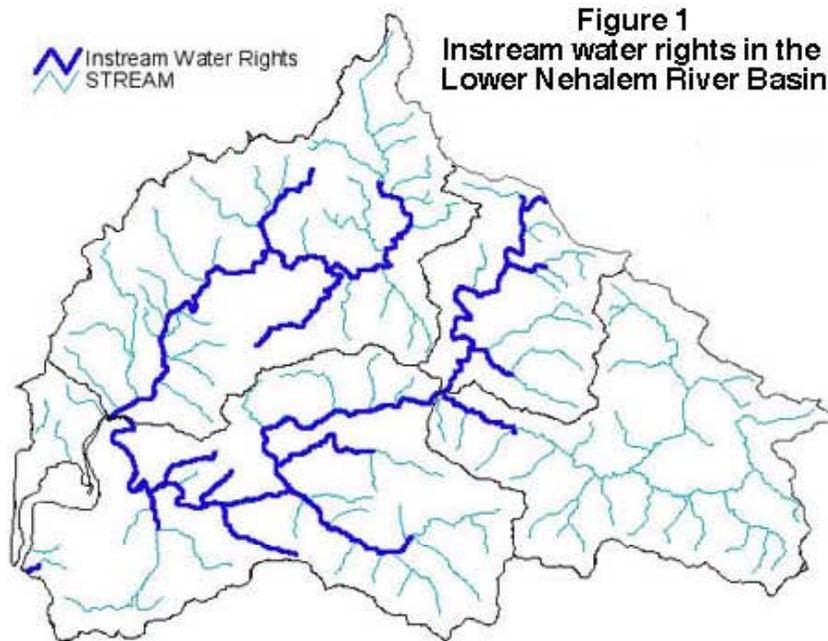
Instream allocations may be assigned in three ways: The Legislature directed Water Resources to convert most of the minimum perennial stream flows to instream rights. These converted allocations assumed the same priority date as the original minimum flow. Three state agencies may apply for instream water:

The Department of Environmental Quality,
The Parks and Recreation Department, and

¹ Adapted from Water Rights background, Oregon Department of fish and wildlife, <http://www.dfw.state.or.us/ODFWhtml/Research.html>

The Department of Fish and Wildlife. The Department of Fish and Wildlife applies for instream flows based on the water needed each month for fish; The Department seeks stream flows above what is currently needed to keep small, remnant fish populations surviving.

Water rights established for other uses, such as irrigation, may be temporarily leased or permanently transferred to instream use on a voluntary basis.



Allocations for instream water cannot take away or impair any legally established water right having an earlier priority date. As with all other water rights, the application date becomes the tentative priority date for the right.

Water Resources may approve new out-of-stream water uses only when there is more water in the stream than is already allocated to existing water rights (both out-of-stream and instream).

The Water Resources Commission may allow other water right requests, such as:

- Multi-purpose storage projects and
- Municipal or hydroelectric uses

to take precedence over an existing instream right.

The Act also allows any state agency to request water reservation for future economic development.

Priority Areas for Streamflow Restoration²

In early October 1997, the Department of Water Resources provided ODFW maps and data files showing the estimated consumptive use by water availability sub-basin for the coastal and southwestern Oregon basins. ODFW staff have compiled information on fish populations and habitat conditions for each of the water availability sub-basins and identified those basins where streamflow restoration is most needed.

In conjunction with this assessment, Department of Water Resources field staff completed an initial ranking of water availability sub-basins based on a number of criteria for flow enhancement goals. Staff ranked each sub-basin based on whether meaningful streamflow restoration could be achieved considering the nature of the uses present, the types of restoration measures available, and other factors which could impact flow restoration efforts.

In February of 1998, Northwest and Southwest Region staff from WRD and ODFW met to review the stream flow restoration priorities. Region managers, district biologists, watermasters and other field staff discussed methods for determining priority areas for stream flow restoration activities. The participants also began to discuss ways to provide information to and solicit input from the watershed councils.

Since that joint meeting, watermasters and district biologists have met individually to complete an initial draft of the priority areas for stream flow restoration. Most of the alternatives for restoring stream flows rely on voluntary actions by water users and the acceptance of the measures by local citizens. Therefore, the support and cooperation of watershed councils will be essential to the pursuit of these alternatives. Staff are developing plans to review the priorities with the councils and to address and resolve the issues which they identify. In addition, staff will work with the councils to cooperatively develop the flow restoration schedule required under the Oregon law

Restoration Strategies³

The Department of Water Resources identified the following strategies for increasing summer stream flow.

Instream leases and transfers - Temporary or permanent acquisitions of water for instream purposes

Cancel unused water rights - Canceling forfeited rights prevents resumption of use

Enforcement & monitoring - Increased compliance protects both instream and out-of- stream water rights.

Diversion methods - Alternative diversion sites and methods can affect stream flows as well as

² Department of Water Resources, Process Overview Discussion

³ Determining the Likelihood of Streamflow Enhancement by Doug Parrow, Oregon Water Resources Department

fish passage.

Stream inventories - Monitoring for illegal and improper diversions can improve enforcement and compliance.

Conservation Planning - Agricultural and municipal conservation plans focus on conservation as a supply alternative to natural sources.

Improved efficiency - Efficiency goals provide incentives and guidance for water users.

Measurement and reporting - Water use measurement assists conservation planning efforts and helps water management.

Lower Nehalem River Basin

Conditions in 1971⁴

In 1971 water rights for the Lower Nehalem were allocated as follows:

	Cubic feet Per second
Consumptive	62.5
Domestic	8.1
Municipal	13.5
Irrigation	24.6
Industrial	16.3
Nonconsumptive	32.5
Power	3.1
Recreation	0.8
Wildlife	0.2
Fish	28.4
Total	95.0

Low summer flows in the Lower Nehalem basin average about 100 cubic feet per second. Therefore in low flow years consumptive rights based on all legal claims and on established minimum flow for aquatic life, can exceed available flows. Resultant pollution concentrations can cause serious problems.

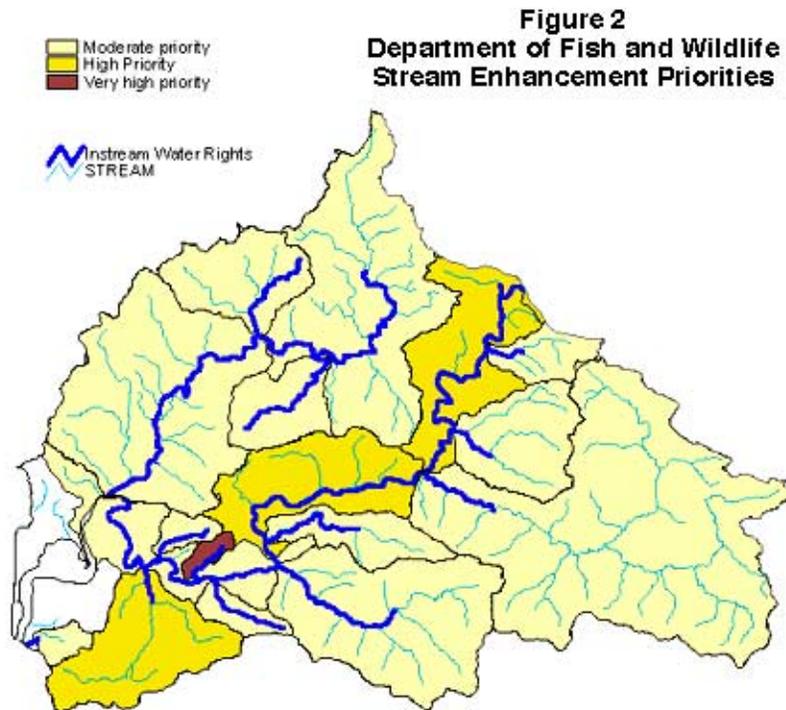
Current Conditions

The locations of the instream water rights currently in place for the Lower Nehalem are shown in Figure 1. These water rights are primarily in the larger rivers and tributaries in the Nehalem River Basin. In general it is believed that the needed streamflow in these areas can only be achieved by stopping or severely restricting new water rights in the entire region. This is the

⁴ Nehalem Wetlands Review U.S. Army Engineer District, Portland, 1977 pp C-40

approach currently employed by the Department of Water Resources.

The Department of Fish and Wildlife identified Peterson Creek as having "highest need" for flow restoration, the Foley Creek area and the main stem and associated areas above Cook Creek as having a "high need" for flow restoration (see Figure 2). Most of the rest of the lower Nehalem watershed was identified as having a moderate need.



The Department of Water Resources "Restoration Optimism" for the highest need and high need areas was "Fair". The "Combined Summer Priority" (see Figure 3) supported the restoration priorities established by Fish and Wildlife.

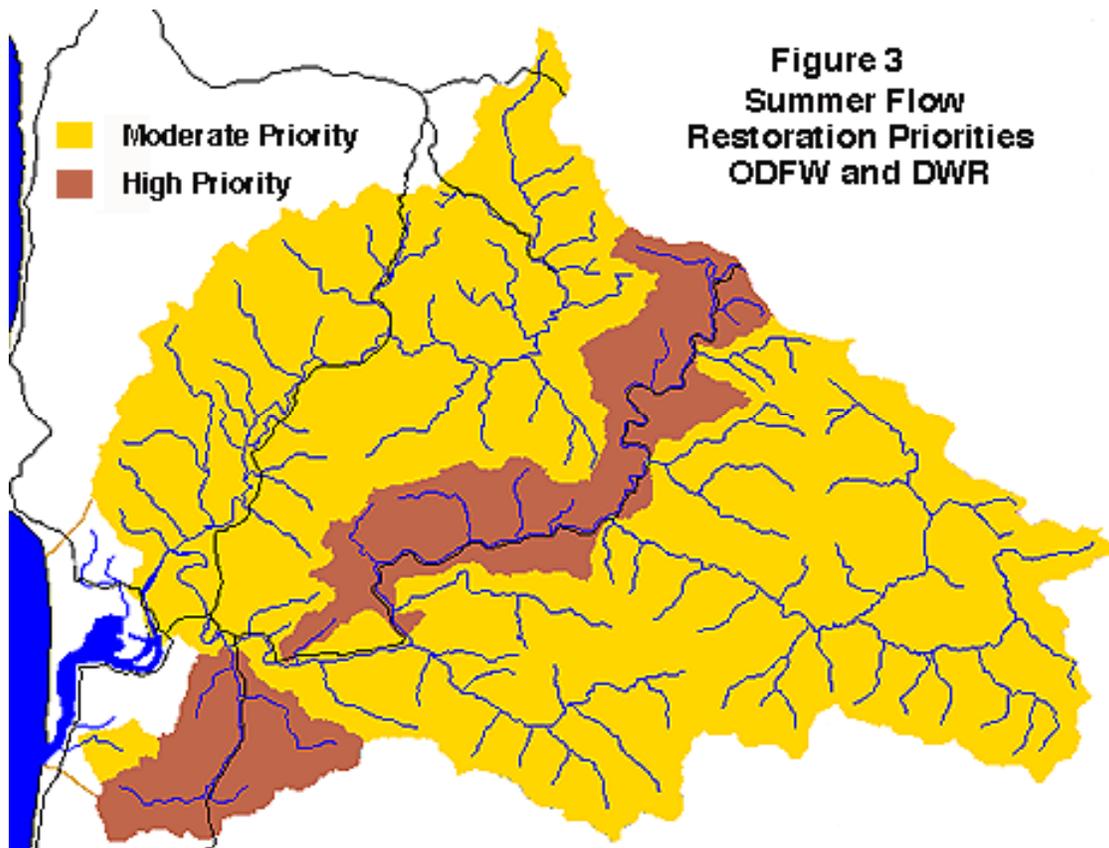
It is unclear why Peterson Creek is given a "highest need" for stream flow restoration. A culvert that needs to be replaced currently blocks passage of salmon up this stream. Land above this culvert is managed by the Department of Forestry.

The Foley Creek area has a substantial number of water rights allocated.

The City of Nehalem has water rights in the head waters of Coal Creek. It is their desire to utilize this water to support an increased Nehalem population. This water right predates the instream water rights of Fish and Wildlife in the North Fork and hence the City of Nehalem has priority for the water in Coal Creek. Since the Department of Fish and Wildlife has not established an instream water right for Coal Creek it is not now possible to determine how taking water from the creek would affect fish usage of this stream.

The cities of Wheeler and Manzanita are in the process of developing a well site along the main stem of the Nehalem River. Concern has been expressed that there may be a hydrological

connection between the river and the water to be pumped from the well. Since an instream water right exists on this section of the river the instream water right would take priority over any water removed from the river by the well.



Current Restoration Plans

Greg Beaman, Watermaster for Tillamook and Clatsop counties, has developed a stream flow Restoration Plan for the Lower Nehalem Basin (see appendix A). This plan includes the following:

Foley Cr. -

Enforce against unauthorized or wasteful water uses. Distribute water to benefit instream water rights, as appropriate.

Brief watershed councils on stream flow restoration activities.

Work with Watershed Council to secure funding for installation of new stream flow gages.

Pederson Cr. -

There is only one major user on Pederson Cr. He is a mining operator and if he were to transfer the Point Of Diversion (POD) to the main stem there could be a significant increase to Pederson Creek stream flow.

Nehalem River at 14301000 -

Secure permission to access the properties. Evaluate diversion inventories to identify unauthorized water uses. If unauthorized uses are long-time domestic uses, explore alternative sources.

Assist holders of unused rights to voluntary transfer or lease their right to instream use. If rights not forfeited initiate cancellation of their water rights.

Nehalem River at Salmonberry -

Measure stream flows to monitor sufficiency to meet instream water rights.

Secure permission to access the properties and evaluate diversion inventories to identify unauthorized water uses.

Assist holders of unused rights in voluntary cancellation of the rights. Assist holders of unused rights to transfer or lease their right for instream use. If there rights are not forfeited initiate cancellation of water rights.

