

Testimony
Senate Environment and Natural Resources Committee Hearing
3:00 P.M., April 2, 2009
Senate Bill 788

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Chair Dingfelder, Vice-Chair Atkinson, members of the Committee:

I am David Filippi, a partner with the law firm of Stoel Rives LLP, in Portland, Oregon. My practice centers on water rights and project permitting, and over the past 12 and 1/2 years, I have represented, and continue to represent, various irrigation districts and water users throughout the state of Oregon. I have also been a long-time board member for the Oregon Water Resources Congress. I am not being compensated for my appearance today.

I am opposed to Senate Bill 788 as currently drafted for three primary reasons. First, Senate Bill 788 runs counter to the careful balancing of interests embodied in Oregon's current water rights statutes and Department policy. Second, Senate Bill 788 lacks proper scientific foundation. And third, Senate Bill 788 is a proposal in search of a problem. I elaborate on these three points below.

Senate Bill 788 runs counter to the careful balancing of interests embodied in Oregon's current water rights statutes and Department policy.

Currently, the issuance of new water rights involves a careful balancing of various competing interests and needs through a public process. Past legislatures have noted the competing needs for water and have declared such balancing to be Oregon's approach. See, e.g., ORS 536.220 (Policy on water resources generally), 536.238 (Policy on water storage facilities), 536.241 (Policy on water supply), 536.300 (formulation of state water resources program), and 536.310 (policies to be considered in formulating state water resources program). And I believe the Oregon Water Resources Department does a pretty good job of attempting to look at each proposal for new water use, and balance competing interests and needs, consistent with state statutes and administrative rules.

The concern with Senate Bill 788 is that it elevates a particular interest (the asserted benefit of peak and ecological flows) and removes this interest from the balancing process. At least with the current process for protecting instream flows, ODFW must go through a permitting process (and it is the same process that every other applicant must go through) whereby ODFW must apply for and then justify each particular instream water right application as part of a public permitting process. The burden is on ODFW (or the environmental groups who might urge ODFW along) to prove what level of flow for the instream water right is justified particularly in

light of other potential future uses, and then other water users have the opportunity to protest, etc.

The fundamental policy flaw with Senate Bill 788 is that it reverses the presumption and presumptively protects peak and ecological flows from all other uses that would have otherwise been approved through the normal balancing and permitting process.

Stated another way, I am sure that a case could be made that every drop of water currently flowing instream has some intrinsic ecological value and should be “protected” from appropriation out-of-stream for some other beneficial use. And Senate Bill 788 seeks to do just that. The policy concern is that even if there were some ecological value to preserving all peak and ecological flows, there very well may be other and greater overall benefits to the people of Oregon if some or all of these flows were diverted and used for other purposes. As a textbook example of this concern, one project that some of my clients very much support involves the potential development of a storage reservoir that would store water in winter and release water in summer, with the summer releases dedicated to supporting listed fish species. A fair policy question might be to weigh the costs and benefits of less flow in winter in exchange for more flow in summer (and in this particular basin, my opinion is that the fish need the water more in summer than in winter). However, the current bill has the potential of ending the discussion about this project before it even gets started, because the bill prematurely elevates the value of winter flows over the value of providing such flows in summer.

On the other hand, the current permitting process promotes balancing. Senate Bill 788 turns that process on its head by declaring up front that water allocations for human use shall be balanced separately from protecting peak and ecological flows. And that’s in Section 1(1) of the bill.

Senate Bill 788 lacks proper scientific foundation.

In September 2007, ODFW published a guidance document entitled “Calculating channel maintenance/elevated In-Stream Flows when evaluating Water Right Applications for out of stream and storage water rights.” (Robinson 2007). Presumably, this is the basis for the definition of “peak and ecological flows” in Section 2(1) of the bill, and the “basis of information” for peak and ecological flows referenced in Section 3(1) of the bill.

This guidance document was never intended to result in a statute that would elevate peak and ecological flows over all other potential uses or otherwise give these flows primacy. While I will let others speaking today address the scientific inadequacies of the report, my view is that this report and Senate Bill 788 provide an over-simplified approach to these flows. Determining the functional contribution of peak flows in a given stream reach or the optimal prescriptions for protecting such flows will be based on factors that will widely vary between stream reaches, watersheds, and regions of our state. Again, Senate Bill 788 does not attempt to speak to functional contribution or optimal prescriptions, but rather provides an across-the-board swipe at protecting any increment or duration of flow that might have some ecological value.

Senate Bill 788 is a proposal in search of a problem.

Senate Bill 788 does not put any water back instream. Rather, it attempts to awkwardly protect from future appropriation any “high flows in a stream or river that create and maintain stream morphology and habitat and that provide the ecological triggering flows and other flows that native fish populations and aquatic insects and organisms need to fulfill their life cycles.” This language is vague, it lacks scientific consensus, and is sure to lead to disputes over what flows are needed to “create and maintain stream morphology and habitat.”

At the same time, ODFW already has the authority to pursue an instream water right (see, e.g., OAR 690-077-0015(4)) to protect flows, and already has the authority to provide comments to OWRD on peak and ecological flows with respect the water use applications of others, pursuant OWRD’s Division 33 public interest review process.

In sum, Senate Bill 788 will seriously delay or preclude future economic development projects, including projects where the primary purpose is summer stream enhancement. The studies required by the bill will be costly and lengthy. In the end, the bill will eliminate options for addressing Oregon’s water supply challenges when Oregon needs all options on the table.