



WATERWATCH
Protecting Natural Flows in Oregon Rivers

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Oregon Supreme Court Upholds Key Ruling for Drift Creek Instream Water Right

The state's highest court affirmed most of a lower court's ruling protecting a tributary to the Pudding River from a proposed 70-foot dam and reservoir that would block migratory fish and drown family farms.

Salem, Oregon — In a victory for WaterWatch of Oregon and instream water rights, the Oregon Supreme Court on Thursday upheld most of a 2023 Court of Appeals decision that affirmed an Oregon Water Resources Commission decision to deny a permit for the East Valley Water District (EVWD) to build a proposed dam and reservoir on Drift Creek, a tributary of the Pudding River that runs from Silver Falls State Park to its mouth south of Silverton in Marion County.

The EVWD first applied to the Oregon Water Resources Department in 2013 for a permit to build the dam about halfway between the mouth of Drift Creek and its headwaters. If approved, the permit would allow a 70-foot high dam and 12,000 acre-foot reservoir covering about 380 acres. In addition to inundating several family farms, the dam and reservoir would undermine an existing instream water right from 1996 that requires specified flows in an 11-mile reach of Drift Creek for the benefit of cutthroat trout migration, spawning, egg incubation, fry emergence, and juvenile rearing. Drift Creek is also used by coho and chinook salmon, Pacific lamprey, and winter steelhead.

In its decision, the Oregon Supreme Court agreed with the Court of Appeals that the instream water right on Drift Creek protects the purpose of that right (i.e., supporting cutthroat trout), not just a specific amount of water at a specific place, and that the proposed dam and reservoir would conflict with that purpose. The EVWD contended the instream right would be satisfied as long as the required flows were present at the mouth of the stream. The Supreme Court sent the case back to the Water Resources Commission for express consideration of other public interest factors, which WaterWatch

believes were implicitly considered in the Commission's decision, as described in a dissenting opinion by Justice Bushong.

"We wish the Supreme Court had affirmed the Court of Appeals entirely and put a complete stop on this destructive proposal, but the Court's decision on the nature of instream water rights is a major victory for WaterWatch and protection of the public values that benefit from preserving flows in Oregon's rivers and streams," said Brian Posewitz, a WaterWatch staff attorney who worked on the case with appellate specialist Tom Christ of the Sussman Shank law firm.

WaterWatch of Oregon executive director Neil Brandt also weighed in. "Today's ruling from the Oregon Supreme Court is a win for steelhead, salmon, and the many other important species that rely on Drift Creek for their habitat," said Brandt.

Crafted in large part by WaterWatch during its first years of advocacy, the state's landmark 1987 Instream Water Rights Act enables a process by which regulatory agencies can apply to protect stretches of waterways with instream water flows to preserve the integrity of water naturally flowing in the channel of a stream, river, or other designated waterway, as well as the use of that water.

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For 40 years, WaterWatch of Oregon has been committed to a single, clear mission: To protect and restore flows in Oregon rivers and waterways to sustain native fish, wildlife, and the people that depend on healthy rivers. WaterWatch of Oregon was the first organization in the west to seek structural reform of antiquated water laws to protect and restore our rivers, and facilitated passage of Oregon's landmark Instream Water Rights Act in 1987.