

## **Instream Flow Advisory Group Meeting #2 Notes**

**OWRB, 3800 N. Classen Blvd., Oklahoma City**

**May 16, 2013, 1:00 p.m.**

### **ATTENDEES:**

**Tom Elkins, Cherokee Nation**

**Doug Hawthorne, OTRD/State Parks**

Buck Ray, ODWC

**Kevin Stubbs, USFWS**

**David Ocamb, Sierra Club**

**Jim Reese, OK Dept. of Agriculture**

Kim Elkins, TNC

**Mike Mathis, Chesapeake**

**James Allard, Reclamation**

**Brooks Trammell, OK Conservation Comm.**

**Mark Derichsweiler, ODEQ**

Bryan Taylor, USACE

**Charlette Hearne, OWRP**

**Mike Fuhr, TNC**

Jeff Converse, Canton Lake Assn.

Anna Childers, CH2M Hill

**Shannon Brewer, USGS**

**Jim Barnett, EFO**

**Angie Burckhalter, Devon**

**Barry Bolton, ODWC**

**Brian Woodard, OIPA**

Rick Wicker, OWRB

Bryan Mitchell, CH2M Hill

Derek Smithee, OWRB

Tinecia Hearne, ORWR

Brian Vance, OWRB

Owen Mills, OWRB

Jason Childress, OWRB

Tom Adams, Canton Lake Assn.

Rupert Nowlin, Canton Lake Assn.

Phil Moershel, OWRB

Jerry Barnett, OWRB

Terri Sparks, OWRB

Christine Akly, CH2M Hill

**Marsha Slaughter, OKC**

**Marla Peek, OK Farm Bureau**

John Rehring, Carollo

J.D. Strong, OWRB

[**bold font** indicates Advisory Group members or their delegates for this meeting]

### **Welcome, Goals and Updates**

OWRB Executive Director J.D. Strong made opening remarks and asked participants to introduce themselves. He stated that the goal for today's Instream Flow (ISF) Advisory Group meeting was to further the dialogue on the issues and goals of a potential ISF program in Oklahoma, report back on some of the questions the group has brought forward, and further discuss the process of assessing potential ISF program options.

John Rehring, Carollo Engineers and ISF meeting facilitator, gave an update of activities since the last meeting. He noted that OWRB's Instream Flow (ISF) website is up and running, providing the group with easy access to meeting notes and other information that might be of interest. The group was urged to provide feedback/suggestions for the web site, and to continue to monitor it for new information.

## Legal Questions

Mr. Rehring noted that he had distributed a synopsis of the issues identified by the group, reiterating that the summary was not meant to replace the detailed input provided by members, nor was it meant to prioritize or otherwise indicate consensus of the issues. He had also provided the group with copies of responses to his request for more detailed information on legal and policy concerns. Several of the responses that appeared predominant were chosen to facilitate group discussion:

- 1) Existing water rights--should they be protected? Should that be a major goal? While the group generally agreed that existing water rights should be protected, there continued to be concern that future water rights would bear the burden of protecting instream flows if a program were implemented. John noted that such issues were important, and that is why we asked that legal questions and concerns be fully identified; so we can assess valid concerns and seek ways to avoid conflict as the potential for an instream flow program is considered.
- 2) Authority already exists for ISF program -- One member suggested that it is already possible to apply for instream water rights; OWRB has already issued a consumptive water right for a fish hatchery in Durant, setting a precedent that can be applied in other situations.
- 3) What lessons have been learned from the Baron Fork? Have the impacts of ISF provisions on the Baron Fork River been monitored? Mr. Jim Barnett, EFO, suggested that it would be more agreeable to look at implementation of ISF on a designated scenic river where there is clear legal authority; obviously, the OWRB thought the Scenic Rivers Act provided clear authority at the time a minimum streamflow was set on the Baron Fork.

It was agreed that the consultants and OWRB would provide additional information on the status of the ISF program on the Baron Fork and on permitting protocol for the Durant fishery at the next meeting. Mr. Strong emphasized that the OWRB would like to hear and understand all concerns; some we can hopefully address now, but some we cannot—hopefully today's presentations will help answer some of the pressing questions. Mr. Rehring noted that the problem is that many of the questions and answers are necessarily abstract until we can look at an actual watershed situation.

## Presentations/Discussion Topics

Rick Wicker, OWRB Permitting Section, gave a presentation on permitting protocol for stream water permits, including policies on domestic use set aside and permitting guidelines on scenic rivers. Some of the questions and answers pursuant to the presentation are summarized below:

Q: Has the OWRB ever turned down a permit?

A: Yes, but staff tries to work with an applicant so that they get at least a portion of the amount of water they are requesting.

Q: Is available water based on average annual flow?

A: Yes, it is based on mean (or average) annual flow.

Q: Please give more details on the model used to determine water availability.

A: The model is based on USGS's national study on runoff using a digital elevation model with a resolution of 60x60 meters. The runoff data is based on stream gage data from the years 1951 to 1980.

This period includes several exceptional drought periods, including the drought of record of the mid-1950s.

Q: How is groundwater/stream water interaction determined?

A: Under current law, conjunctive use is not considered in permitting actions, except in the Arbuckle Simpson aquifer. Specific legislation was passed designating the Arbuckle Simpson as a sole source aquifer and requiring special permitting considerations, including groundwater/stream water interactions.

Q: Does calculation take storage of farm ponds into account?

A: It does not consider many of the small private ponds for which the OWRB has no information, but it does take into account yields of major reservoirs and estimated storage of NRCS sites.

Q: If a permit is denied, could an applicant get water anyway upon appeal?

A: They could appeal the determination. However, OWRB staff tries to work with an applicant so that they get at least a portion of the amount of water they are requesting. [The applicant often has the opportunity to take a lesser amount of water, apply for a groundwater permit, or change to a seasonal or term permit.]

Q: Is domestic use metered or does OWRB assume that domestic use is within the allowable amount?

A: Domestic use is not metered, so staff assumes full use of the set-aside quantities as described in the presentation.

Q: What if streamflow has changed from the period used to determine permit availability, i.e. 1951-1980s?

A: It is important that staff uses the same criteria in calculating permits in order to be fair to all applicants. However, staff is in the process of updating our models which will hopefully be completed over the next ten years.

Q: How do applicants even know how much water they are using? Do they estimate?

A: Yes, unless they have meters. [A short discussion on some of the issues involving metering of water use followed, including that some entities report more than they use due to "use it or lose it" statutory requirements, and statutes actually prohibit metering unless a majority of landowners request it.]

Mr. John Rehring then made a presentation on the calculations used to determine excess and surplus water for purposes of the *2012 Oklahoma Comprehensive Water Plan Update (2012 OCWP Update)*. Some of the questions/discussion following that presentation included:

Q: Why is it important for this group to understand excess and surplus water?

A: Several Advisory Group members requested this information. If instream flows were adopted, it could reduce the amount of surplus water available for use outside a basin. Conversely, understanding the volumes of water protected from allocation to sustain domestic uses, reservoir yields,

downstream uses, and interstate compact obligations suggests that some amount of instream flow protection exists already.

Q: Even though a basin is shown to have excess or surplus water, this does not guarantee water will be available at all times, does it (since it is calculated on average annual flow)? (i.e., the water might not be there when conditions are drier than average.)

A: That is correct. Calculations based on average annual streamflow are in accordance with law and policy; applicants know when they get a permit that there is also priority between users and never a guarantee that water will be available.

Q: In basins where there is no green shown on the graph [no excess/surplus water], does that also indicate that there is no water available for designated instream flow?

A: No, not necessarily.

Q: In basins designated as hot spots, does that indicate water would not be available for instream flows?

A: Not necessarily; also, some basins were hot spots for groundwater and/or water quality reasons, rather than stream water.

Anna Childers, CH2M Hill, then gave a presentation on how other states with instream flow provisions addressed some of the concerns/issues voiced by the ISF Advisory Group members. Some of the issues/questions raised relative to the presentation are as follows:

Q: In Colorado, are provisions for loaning of water rights for instream flow purposes on a voluntary basis?

A: Yes, rights can voluntarily be loaned on a temporary basis.

Q: Did any of the states have a process to review ISFs once a number was set? How do you review the number over time? Should it be higher? Lower?

A: Yes, some states had some type of provisions, but we will have to research the specifics; this is a good action item for us to review and revisit at a future meeting.

Q: Are permit holders subject to losing water rights under Oklahoma law?

A: Yes, definitely. The seven-year "use it or lose it" aspects were explained, along with the role of submitting a schedule of use for OWRB approval for entities that need extended time periods to perfect water rights.

Q: Has Texas begun implementing an instream flow program?

A: Yes.

Q: Do other states have provisions for extreme climatic conditions, such as extended droughts, that allow human consumption to trump over maintaining instream flows when set?

A: California did not remove instream flows, but did decrease base flow protections; Texas puts a call on river flow for municipal and agricultural priority; some states allow municipal use to take priority if a shortage is proven.

Q: Did other states demonstrate adverse economic impacts resulting from ISF programs?

A: Most states show benefits; also, senior water rights were protected. Measuring economic impacts – positive or negative – is difficult.

Q: Do you have a sense for when ISF programs became initiated? Can you provide dates?

A: Colorado in 1973, Kansas in 1984; we will provide dates for other states.

Q: Was the designation for the Baron Fork done through the Scenic Rivers Act?

A: Yes. [It was suggested that the 50 cfs designation be looked at. Is it overprotective? Is it adequate? Has anyone been stopped from using water if the flow went below 50 cfs?]

## **Next Steps and Summary**

Mr. Rehring suggested that that the group reviews the summary of legal issues and other questions and determine some priorities to address. He noted that we have talked about what flow or water may be available via existing programs (e.g., domestic use set-aside), but not about what flows might be needed. He further indicated that thus far we have been asking abstract questions, but cannot answer them in the abstract. For example, flow goals would not be the same for all streams. Thus, the group might give consideration to analyzing the Baron Fork program and other watershed-specific areas.

One group member asked that we look at case law in other states to see what happens when a lawsuit is filed in response to, or in advance of, an instream flow designation, i.e., people go to court when they have a problem; there is interest in seeing what kind of problems have been encountered elsewhere with instream flows. That point was countered with the need to also look at what might happen if you do not consider instream flow needs. Another request was to look at the costs that other states have associated with instream flow programs, such as staff, flow monitoring, etc.

Mr. Strong suggested that maybe it is time to look at some specific watersheds and try to better define what is needed for instream flow, as well as to see if the domestic use set-aside is adequate. We may find that some concerns may be invalid; we may also find new concerns that were not anticipated—we will never know unless we run the numbers.

A suggestion from one member was to lay out what streams could be taken off the table based on 2012 OCWP Update information—i.e., streams that are fully appropriated, basins that have no excess or surplus water, hot spot basins, etc. However, it was pointed out that—absent specific information on the type of instream flow program being considered—even those basins might not necessarily be excluded from consideration. For example, even intermittent streams depend on seasonal flow levels for fish propagation.

To sum up actions to be taken for the next meeting, staff will look at:

- 1) History of instream flow designation on the Baron Fork (basis of authority, effects observed since implementation, etc.).
- 2) Dates when western states' instream flow programs were implemented and methods adopted for program review.
- 3) Permitting protocol for recreation fish and wildlife (including Durant Fish Hatchery)
- 4) Review of Case Law involving instream flow issues.
- 5) Consideration of area(s) in which preliminary assessments could be used to compare existing flows and programs to a defined need or goal.