

**Filed: May 15, 2014**

IN THE SUPREME COURT OF THE STATE OF OREGON

CHARLES NOBLE and DEBORAH NOBLE,

Petitioners on Review,

v.

DEPARTMENT OF FISH AND WILDLIFE,

Respondent on Review,

and

ROBERT LYTTLE and GALENA STOYAN,

Respondents below.

(ODFW 700142; CA A140936; SC S060518)

En Banc

On review from the Court of Appeals.\*

Argued and submitted May 2, 2013, at Oregon State University, Corvallis.

Thomas M. Christ, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief was Brian Posewitz, Portland.

Denise G. Fjordbeck, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Christopher G. Winter, Crag Law Center, Portland, and Peter M.K. Frost, Western Environmental Law Center, Eugene, filed the brief for *amici curiae* WaterWatch, Native Fish Society, Oregon Wild, Association of Northwest Steelheaders, and Northwest Environmental Defense Center.

BALDWIN, J.

The decision of the Court of Appeals and the Final Order on Reconsideration of the Oregon Department of Fish and Wildlife are reversed, and the case is remanded to the Oregon Department of Fish and Wildlife for further action.

\*On judicial review of a Final Order of the Department of Fish and Wildlife dated November 3, 2008. 250 Or App 252, 279 P3d 345 (2012).

1 BALDWIN, J.

2 In a judicial review of an order of the Oregon Department of Fish and  
3 Wildlife (ODFW), the Court of Appeals rejected petitioners' contention that ODFW's  
4 approval of "channel-spanning fishways" associated with two small, privately maintained  
5 dams downstream from their property violated state law, including ODFW's own rules,  
6 pertaining to fish passage for native migratory fish. Petitioners had argued that the  
7 approvals were inconsistent with administrative rules and statutes that, in their view,  
8 require that fish passage be provided whenever water is flowing past the dams, whether  
9 over the tops of the dams or through outlet pipes required by the state Water Resources  
10 Department (WRD). The Court of Appeals rejected that argument, holding that ODFW  
11 had plausibly construed its own rules as requiring passage only when water is flowing  
12 over the dams, and that the rules, as interpreted, were not inconsistent with the  
13 controlling statutes. *Noble v. Dept. of Fish and Wildlife*, 250 Or App 252, 264, 279 P3d  
14 345 (2012). Petitioners sought review and we allowed their petition. We conclude that  
15 ODFW's interpretation of the rules is implausible, and we remand to that agency for  
16 further action under a correct interpretation.

17 Petitioners own a parcel of land through which a small, unnamed stream  
18 flows. The stream historically supported cutthroat trout and other native migratory fish.  
19 Petitioners would like those fish to return to their property, and they have invested a  
20 significant amount of money and effort in improving fish habitat in their portion of the  
21 stream. Petitioners' objective is for fish to have adequate passage upstream from nearby  
22 Beaver Creek, where the fish are present.

1           When the stream leaves petitioners' property, it flows downstream through  
2 properties owned by Wacker, Olson, Lytle, Stoyan, and Hillison, respectively, and  
3 thereafter into Beaver Creek. Small artificial dams have been erected on several of the  
4 downstream properties, creating ponds. The two dams at issue in this case -- those on the  
5 Lytle and Stoyan properties -- were erected long ago without any water rights or permits.  
6 Although petitioners sought to have the dams removed as illegal, the property owners  
7 were able to obtain permits to maintain them from the WRD.<sup>1</sup> The Lytle permit allows  
8 the storage of up to one acre-foot of water between November 1 and March 31 of each  
9 year. The Stoyan permit allows the storage of up to one acre-foot of water between  
10 November 1 and June 30 of each year. Both permits require the dam owners to "pass all  
11 live flow outside the storage season described," and prohibit appropriation of water "for  
12 any out of reservoir uses, the maintenance of the water level or maintaining a suitable  
13 fresh water condition." The permits also require the dam owners to install outlet pipes or  
14 provide other means to evacuate water to satisfy prior downstream water rights. Finally,  
15 and most significant to the present controversy, the permits require the owners to provide

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<sup>1</sup> Because the Lytle and Stoyan dams existed before January 1, 1995, store less than 9.2 acre-feet of water, and are less than 10 feet in height, the owners could have notified WRD of their existence on or before January 31, 1997, as provided in ORS 537.405, and obtained more or less automatic recognition that the dams and associated ponds were a beneficial use and exempt from most regulation by WRD. Having failed to do so before the statutory deadline, the owners of the Lytle and Stoyan ponds proceeded under an alternative water right permit process, set out in ORS 537.409, for existing reservoirs with a capacity of less than 9.2 acre-feet or dams less than 10 feet in height. Under ORS 537.409, if an applicant can demonstrate to WRD, after an expedited public interest review process, that the reservoir does not injure any existing water right and does not pose a significant detrimental impact to existing fishery resources, the WRD may grant a water right permit.

1 adequate fish passage, as determined to be necessary by ODFW.<sup>2</sup>

2           When ODFW was contacted about the fish passage conditions, it  
3 determined that fish passage was required at each of the two dams because the dams  
4 obstructed a stream in which native migratory fish historically had been present.  
5 Thereafter, each of the two dam owners developed a proposal for a fishway, installed the  
6 fishway, and sought ODFW's official approval.<sup>3</sup>

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<sup>2</sup>       The Stoyan permit expresses the condition in the following provision:

"The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish. The applicant is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator before beginning construction of any in-channel obstruction."

The Lytle permit expressed the condition in somewhat different terms:

"The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion while by-pass devices provide adequate upstream and downstream passage for fish. \* \* \* Permittee shall obtain written approval from ODFW that the installation of the required screen and bypass devices meets the state's criteria or the permittee shall submit documentation that ODFW has determined screens and/or by-pass devices are not necessary."

<sup>3</sup>       Because WRD had issued the permits for dams that already were in place, the sequence of events here differed somewhat from the sequence that is contemplated by ORS 509.585(4), which provides:

"A person owning or operating an artificial obstruction [that prevents migration of native fish] shall, prior to construction, fundamental change in permit status or abandonment of the artificial obstruction in any waters of this state, obtain a determination from [ODFW] as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have

1           The Lytle and Stoyan fishways involve alterations to the streambed on the  
2 downstream side of the relevant dam, creating a gradual slope from the top of the dam  
3 where a vertical drop previously had existed. The Lytle fishway "consists of various  
4 sized rocks leading in a ramp configuration up to the top of the Lytle dam, where a  
5 channel with a flat bottom and vertical sides \* \* \* crosses the top of the Lytle dam to the  
6 Lytle pond." The Stoyan fishway "consists of a series of weirs [*i.e.*, v-shaped, step-like  
7 structures on the streambed] with pools below each weir, leading in steps from the base  
8 of the Stoyan dam up to the top of the Stoyan dam." Unlike the Lytle dam, the Stoyan  
9 dam has no engineered "channel" over the dam. ODFW personnel refer to both styles of  
10 fishways as "channel-spanning fishways."<sup>4</sup> Such channel-spanning fishways provide fish  
11 passage only when water is moving over the top of the associated dam; for all intents and  
12 purposes, the top of the dam *is* the fishway.

13           In November 2006, ODFW issued letters approving the Lytle and Stoyan  
14 fishways. Each letter of approval described the pertinent fishway, noted that ODFW had

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been present in the waters, the person owning or operating the artificial obstruction shall either submit a proposal for fish passage to the department or apply for a waiver pursuant to subsection (7) of this section. *Approval of the proposed fish passage facility or of the alternatives to fish passage must be obtained from [ODFW] prior to construction, permit modification or abandonment of the artificial obstruction.*"

(Emphasis supplied.)

<sup>4</sup> The term "channel-spanning fishway" is not defined in ODFW's rules; neither is it used, as such, in the rules. One rule, OAR 635-412-0035(2)(k)(C), purports to set out specific standards for "stream channel-spanning weirs, roughened channels and hybrid fishways."

1 determined that it was functioning properly, and stated that the owner was responsible for  
2 maintaining it as approved. Petitioners sought reconsideration of ODFW's approvals, and  
3 requested and obtained a contested case hearing.

4           At the hearing, conducted by an administrative law judge from the Office  
5 of Administrative Hearings, petitioners argued that ODFW's approvals of the Lytle and  
6 Stoyan fishways were improper because the fishways did not provide fish passage at all  
7 times when passage is required under the relevant statutes and administrative rules.  
8 Petitioners relied in part on ORS 509.585(2), which prohibits "construct[ing] or  
9 maintain[ing] any artificial obstruction across any waters of this state that are inhabited,  
10 or historically inhabited, by native migratory fish without providing passage" for such  
11 fish. Petitioners' primary focus, however, was an administrative rule, OAR 635-412-  
12 0035(2)(a), which requires fishways at artificial obstructions that provide fish passage at  
13 all flows within the design streamflow range -- that is, the entire range of flows within the  
14 obstructed stream, excepting the highest and lowest five percent. OAR 635-412-  
15 0005(13), (26), (30). Petitioners argued that the rule contemplates that ODFW will  
16 measure the flows within a stream, calculate a "design flow range," and ensure that any  
17 fishway under consideration provide fish passage whenever the streamflow is within that  
18 range -- at least during times when ODFW has determined, based on the life cycles of the  
19 fish in question, that passage is required. At the hearing, petitioners established, through  
20 the testimony of ODFW employees, that ODFW had not calculated and applied the  
21 affected stream's "design flow range" or determined when the fish in question required  
22 passage before approving the Lytle and Stoyan fishways. Having done so, petitioners

1 argued that the agency had violated its own rule.

2 ODFW's position at the hearing, articulated in the testimony of the agency's  
3 fish passage coordinator, Stahl, was that calculation of the design flow range as  
4 contemplated by OAR 635-412-0035(2)(a) was unnecessary for "channel-spanning"  
5 fishways like those approved for the Lytle and Stoyan dams. Stahl explained that, by its  
6 very nature, a channel spanning fishway uses the entire flow of a stream, and that  
7 determining the "design streamflow range" when fish passage will be required is not  
8 necessary for such fishways, because they provide fish passage whenever water is  
9 flowing past the dam.

10 Petitioners argued, however, that OAR 635-412-0035(2)(a) applies to all  
11 the water in a stream system, and that ODFW's notion of "streamflow" did not account  
12 for water leaving the Lytle and Stoyan ponds through evaporation, seepage, and, most  
13 importantly, the outlet pipes that were required under the WRD permits. Petitioners  
14 observed, in that regard, that the Lytle and Stoyan permits required the installation of  
15 outlet pipes (or some other mechanism) to facilitate the evacuation of water to  
16 downstream permit holders with priority, required the passage of all "live" flows outside  
17 the storage season, and prohibited appropriation of any additional water outside of the  
18 storage season to maintain water levels.

19 ODFW's contrary view of OAR 635-412-0035(2)(a) was conveyed in the  
20 testimony of coordinator Stahl. Stahl acknowledged that, at times, water might not be  
21 flowing through the Lytle and Stoyan fishways even when water is flowing from various  
22 sources into the subject ponds, at least in part because water is sometimes discharged

1 through the outlet pipes to satisfy the prior rights of downstream users. Stahl testified,  
2 however, that any water released downstream through outlet pipes in response to a  
3 downstream water right holder's "call" would not be considered by ODFW to be live  
4 streamflow. According to Stahl, "[i]f it's not going over the fishway [*i.e.*, over the top of  
5 the dam], it's not in the stream." Stahl also suggested that, because OAR 635-412-  
6 0035(2)(a) was adopted at a time when channel-spanning fishways were uncommon, the  
7 rule reflected concerns more relevant to traditional fish ladder-type fishways, which  
8 divert a part of a stream for fish passage during the times that, in ODFW's estimation, the  
9 native fish would require passage.

10           After the hearing, the administrative law judge issued a proposed final  
11 order concluding that ODFW had complied with the applicable statutes and rules in  
12 approving the Lytle and Stoyan fishways. ODFW affirmed that conclusion. In its final  
13 order, ODFW announced that it had determined that fish passage is required "year-round"  
14 for the fishways in question, but only when there is adequate flow to allow migration  
15 through the fishways. ODFW explained that channel-spanning fishways like the ones at  
16 issue provide fish passage "as a matter of law" whenever sufficient streamflow exists for  
17 fish to migrate, and that, as such, ODFW could determine, without precise calculation of  
18 the design streamflow range, that the fishways provided fish passage at all flows within  
19 the design streamflow range. For purposes of that analysis, ODFW rejected petitioners'  
20 interpretation of "streamflow," concluding that "streamflow" is the water that actually  
21 moves through the system and over the dams, and does not include water that is stored  
22 and then later released through outlet pipes or lost to evaporation or seepage.

1           Petitioners sought judicial review of ODFW's final order, arguing, among  
2 other things, that (1) the rules do not allow ODFW to insert a flow requirement into the  
3 concept of "year-round fish passage"; (2) ODFW's construction of the term "streamflow"  
4 in OAR 635-412-0035(2)(a) as referring, in the particular context of dams with so-called  
5 channel-spanning fishways, only to water actually moving over the dam and through the  
6 fishway, is implausible and erroneous; (3) the factual assumptions underpinning ODFW's  
7 position that it was unnecessary to calculate and apply the stream's "design streamflow  
8 range" for channel-spanning fishways at the dams are not supported by substantial  
9 evidence; and (4) if ODFW's construction of the rule is correct, the rule is inconsistent  
10 with ORS 509.585(2), which provides that a person may not construct or maintain an  
11 artificial obstruction in waters that historically have been inhabited by native migratory  
12 fish without providing fish passage.

13           The Court of Appeals affirmed ODFW's order. It concluded that ODFW's  
14 construction of the term "streamflow" in OAR 635-412-0035(2)(a) is plausible. *Noble*,  
15 250 Or App at 261-64. It also held that ODFW had plausibly interpreted the term "year-  
16 round fish passage" in a related rule, OAR 635-412-035(1)(a), as incorporating a "caveat"  
17 -- that, for channel-spanning fishways, "year-round fish passage" means passage at all  
18 times when water is flowing through the channel-spanning fishway itself. *Id.* at 265-266.  
19 Finally, the court rejected petitioner's contention that ODFW's interpretations are  
20 inconsistent with ORS 509.585(2), requiring that owners and operators of artificial  
21 obstruction provide passage for native migratory fish. *Id.* at 267-68. We allowed  
22 petitioners' petition for review to consider whether ODFW correctly interpreted and

1 applied its own rules.

2           We first set out the relevant statutes and rules to provide the necessary  
3 background. The controlling statutes, which are codified at ORS 509.580 to ORS  
4 509.645, were enacted in 2001. ORS 509.585(1) announces the state's policy of  
5 providing fish passage for native migratory fish in order to enhance and restore the state's  
6 "native salmonid populations." The statute then sets out the basic mandate through which  
7 that policy is to be carried out:

8           "(2) Except as otherwise provided by this section or ORS 509.645, a  
9 person owning or operating an artificial obstruction may not construct or  
10 maintain any artificial obstruction across any waters of this state that are  
11 inhabited, or historically inhabited, by native migratory fish without  
12 providing passage for native migratory fish."

13 OAR 509.585(2). The statute further requires ODFW to enforce the fish passage  
14 requirement by directly ordering construction of fish passage at existing priority sites, to  
15 be determined based on a statewide inventory to be completed by ODFW, ORS  
16 509.585(3), or by exercising approval authority over fish passage proposals that owners  
17 and operators must submit before an obstruction is constructed or altered, as provided in  
18 ORS 509.585(4).<sup>5</sup> The statute allows the State Fish and Wildlife Commission to waive

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<sup>5</sup> ORS 509.585(4) provides:

"A person owning or operating an artificial obstruction shall, prior to construction, fundamental change in permit status or abandonment of the artificial obstruction in any waters of this state, obtain a determination from [ODFW] as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have been present in the waters, the person owning or operating the artificial obstruction shall either submit a proposal for fish passage to [ODFW] or apply for a waiver pursuant to subsection (7) of this

1 the fish passage requirement in favor of any alternative that it determines will provide a  
2 net benefit to native migratory fish, and directs ODFW to negotiate with dam operators  
3 over the terms and conditions of fish passage. ORS 509.585(5), (6).<sup>6</sup> Finally, the statute

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section. Approval of the proposed fish passage \* \* \* must be obtained from [ODFW] prior to construction, permit modification, or abandonment of the artificial obstruction "

<sup>6</sup> ORS 509.585(5) through (7) provide:

"(5) Consistent with the purpose and goals of the Oregon Plan, [ODFW] shall seek cooperative partnerships to remedy fish passage problems and to ensure that problems are corrected as soon as possible. [ODFW] and the person owning or operating the artificial obstruction are encouraged to negotiate the terms and conditions of fish passage or alternatives to fish passage, including appropriate cost sharing. The negotiations may include, but are not limited to, consideration of equitable factors.

"(6) [ODFW] shall submit a proposed determination of the required fish passage or alternatives to fish passage to the [State Fish and Wildlife Commission] for approval. The determination may be the result of the negotiations described in subsection (5) of this section or, if no agreement was reached in the negotiations, a determination proposed by [ODFW]. If a protest is not filed within the time period specified in ORS 509.645, the proposed determination shall become a final order.

"(7)(a) The [State Fish and Wildlife Commission] shall waive the requirement for fish passage if the commission determines that the alternatives to fish passage proposed by the person owning or operating the artificial obstruction provide a net benefit to native migratory fish.

"(b) Net benefit to native migratory fish is determined under this subsection by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed alternatives to fish passage. Alternatives to fish passage must result in a benefit to fish greater than that provided by the artificial obstruction with fish passage. The net benefit to fish shall be determined based upon conditions that exist at the time of comparison."

1 directs ODFW to "develop rules establishing general criteria for determining the  
2 adequacy of fish passage and of alternatives to fish passage," and specifies that the  
3 general criteria shall include, among other things, "the type and quality of habitat," "the  
4 species affected," "the status of the native migratory fish stocks," and "the feasibility of  
5 fish passage and alternatives to fish passage." ORS 509.585(7)(c).

6 ODFW has promulgated rules relating to its duties under the above statutes.  
7 One notable rule reiterates the basic prohibition expressed in ORS 509.585(2) and  
8 appears to express the overriding principle guiding ODFW's fish passage decisions:

9 "No person shall construct or maintain any artificial obstruction across any  
10 waters of this state that are inhabited, or were historically inhabited, by  
11 native migratory fish without providing passage for native migratory fish."

12 OAR 635-412-0020(1). For purposes of that rule and related rules, ODFW has defined  
13 "fish passage" as

14 "the ability, by the weakest native migratory fish and life history stages  
15 *determined by [ODFW] to require passage at the site*, to move volitionally,  
16 with minimal stress, and without physical or physiological injury upstream  
17 and downstream of an artificial obstruction."

18 OAR 635-412-0005(18) (emphasis added). Insofar as OAR 635-412-0020(1)  
19 incorporates that definition of the term "fish passage," it is apparent that ODFW intends  
20 that its own "determinations" about which fish and which life history stages "require  
21 passage at the site" be at the forefront of every decision pertaining to fish passage.

22 ODFW's specific criteria for fish passage are set out in another rule, OAR  
23 635-412-0035. Consistent with the definition of "fish passage" quoted above, that rule  
24 identifies a number of scientific "determinations" that ODFW must make when assessing

1 a dam operator's fish passage plan: whether native migratory fish currently are or  
2 historically were present at the site; what life history stages of such fish require fish  
3 passage; and what dates of the year and conditions the dam operator must provide  
4 passage for fish. OAR 635-412-0035(1)(a)(A) to (C). ODFW is excused from making  
5 those determinations when "the owner or operator of an artificial obstruction chooses to  
6 provide year-round fish passage for all native migratory fish and life history stages." *Id.*<sup>7</sup>

7 That rule also sets out various general requirements for fish passage at sites  
8 involving a discontinuity between upstream and downstream surface and streambed  
9 elevations. The most important of those requirements, for purposes of our present  
10 analysis, is set out in subsection (2)(a): "Fishways shall provide fish passage at all flows  
11 within the design streamflow range." OAR 635-412-0035(2)(a). For purposes of that  
12 rule and related rules, the "design streamflow range" is "the range of flows within a  
13 stream, bracketed by the Low Fish Passage Design Flow and the High Fish Passage  
14 Design Flow, for which a fishway shall provide passage." OAR 635-412-0005(13). The  
15 "Low Fish Passage Design Flow," in turn, is "the mean daily average stream discharge

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<sup>7</sup> In its entirety, OAR 635-412-0035(1)(a) provides:

"(a) Unless the owner or operator of an artificial obstruction chooses to provide year-round fish passage for all native migratory fish and life history stages, [ODFW] shall determine:

"(A) Native migratory fish currently or historically present at the site which require fish passage;

"(B) Life history stages which require fish passage: and

"(C) Dates of the year and/or conditions when passage shall be provided for the life history stages and native migratory fish."

1 that is exceeded 95 percent of the time, excluding days with no flow, during the period  
2 when [ODFW] determines that native migratory fish require fish passage," while the  
3 "High Fish Passage Design Flow" is "the mean daily average stream discharge that is  
4 exceeded 5 percent of the time, excluding days with no flow, during the period when  
5 [ODFW] determines that native migratory fish require fish passage." OAR 635-412-  
6 0005(30), (26). If those definitions are read into OAR 635-412-0035(2)(a), the result is a  
7 requirement that "fishways"<sup>8</sup> provide fish passage at all flows "within [the] stream" --  
8 except the lowest and highest five percent of average flow -- during the period when  
9 ODFW "determines that native migratory fish require fish passage."

10 Finally, a subsection of OAR 635-412-0035(2) that addresses  
11 "requirements for specific types of fishways" contains a rule that appears to specifically  
12 address channel-spanning fishways:

13 "Fish passage plans for stream channel-spanning weirs, roughened channels  
14 \* \* \* and hybrid fishways \* \* \* which may combine criteria elements of  
15 natural streams and/or established fishway types \* \* \* shall clearly  
16 demonstrate how water depths, water velocities, water drops, jump pools,  
17 structure sizing and fish injury precautions shall provide fish passage."

18 OAR 635-412-0035(2)(k)(C).

19 With that regulatory framework in mind, we return to the parties'  
20 arguments. The parties appear to agree that, insofar as ODFW did not make the

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<sup>8</sup> A "fishway" means "the set of human-built and/or operated facilities, structures, devices, and measures that together constitute, are critical to the success of, and were created for the sole purpose of providing upstream fish passage at artificial or natural obstructions which create a discontinuity between upstream and downstream water or bed surface elevations." OAR 635-412-0005(20).

1 determinations described in OAR 635-412-0035(1)(a)(A) to (C) for the Lytle and Stoyan  
2 sites, the owners must "provide year-round fish passage for all native migratory fish and  
3 life history stages." OAR 635-412-0035(1)(a). The parties differ, however, as to what  
4 that "year-round" commitment actually entails. ODFW argues that, in the context of  
5 channel-spanning fishways, "year-round fish passage" simply means that the structure is  
6 always on and available any time water is flowing over the dam (and thus through the  
7 fishway).<sup>9</sup> ODFW therefore argues that, for channel-spanning fishways, "year-round fish  
8 passage" incorporates a caveat -- *i.e.*, year-round passage as long as water is flowing  
9 through the fishway itself.

10           Petitioners argue that the year-round fish passage alternative cannot be read  
11 as incorporating that particular limitation. Rather, petitioners argue, the vagaries of  
12 natural streamflow are the subject of the requirement in OAR 635-412-0035(2)(a) that  
13 fish passage be provided at all flows in the stream -- not the fishway -- within the design  
14 streamflow range. And although OAR 635-412-0035(2)(a) does limit the flow  
15 requirement, through the definitions of Low and High Fish Passage Design Flow, to "the  
16 period when [ODFW] determines that native migratory fish require passage," that  
17 limitation does not apply when the dam operator has opted to provide year-round  
18 passage. Thus, petitioners argue, dam operators who have chosen to provide year-round  
19 fish passage are required, under OAR 635-412-0035(2)(a), to provide fish passage

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<sup>9</sup> ODFW contrasts that arrangement with "traditional" fish ladders at large dams that use a small part of the total stream flow and only during the times that anadromous fish actually are migrating.

1 throughout the year, whenever the flow in the surrounding stream is within the design  
2 streamflow range.

3 Another area of disagreement between the parties is the proper application  
4 of OAR 635-412-0035(2)(a) to "channel-spanning fishways" like those at the Lytle and  
5 Stoyan fishways. In the proceedings below, ODFW sometimes appeared to suggest that  
6 OAR 635-412-0035(2)(a) simply does not apply to channel-spanning fishways.

7 However, ODFW explained in its final order on reconsideration that the rule does apply  
8 to channel-spanning fishways, but that such fishways comply by their very nature and as  
9 a matter of law, because they provide passage whenever there is any "streamflow"  
10 passing the dams. ODFW reiterates that explanation before this court, adding that, for  
11 the particular purposes of the channel-spanning fishways at the subject dams, the design  
12 streamflow range is "all water that passes over each of these dams and hence passes into  
13 the fishways."

14 Notably, the parties do not appear to disagree about the logic behind  
15 ODFW's explanation as to why it is excused from calculating design streamflow ranges  
16 for channel-spanning fishways -- that, because such fishways provide fish passage at all  
17 times when water is flowing through them, and, because such fishways utilize all of a  
18 stream's flow, they necessarily provide passage through the "design streamflow range."  
19 What the parties do dispute is the validity of the assumption that underpins that  
20 explanation -- that channel-spanning fishways utilize all of a stream's flow, as the terms  
21 "flow" and "streamflow" are used in OAR 635-412-0035(2)(a). At its core, their dispute  
22 is about the meaning of those terms in the context of that rule. ODFW interprets those

1 terms, at least in the context of channel-spanning fishways, as referring to water that  
2 flows over a dam. Petitioners contend that "streamflow" should include all water flowing  
3 into the reservoir that is associated with a dam or, at the very least, all of the water  
4 flowing past the dam, whether over the spillway or through outlet pipes.

5 We begin our analysis by interpreting the primary administrative rule in  
6 controversy, OAR 635-412-0035(2)(a). When interpreting an administrative rule, we  
7 seek to divine the intent of the rule's drafters, employing essentially the same framework  
8 that we employ when interpreting a statute. *State v. Hogevoll*, 348 Or 104, 109, 228 P3d  
9 569 (2010). Under that analytical framework, we consider the text of the rule in its  
10 regulatory and statutory context. *Id.* When, as here, an agency's interpretation of its own  
11 rule is challenged, we accord significant deference to that interpretation. We are required  
12 to affirm that interpretation if it is "plausible," that is, if it is not "inconsistent with the  
13 wording of the rule itself, or with the rule's context, or with any other source of law."  
14 *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119  
15 (1994).

16 OAR 635-412-0035(2)(a) provides that "fishways shall provide fish  
17 passage at all flows within the design streamflow range." As described above, \_\_\_ Or at  
18 \_\_\_ (slip op at 13, lines 5-8), if ODFW's definition of "design streamflow range" is read  
19 into the rule, it appears to require fishways to provide passage at all streamflows except  
20 the lowest and highest five percent of average flow, during the period when ODFW  
21 "*determines that native migratory fish require fish passage.*" (Emphasis added.)

22 In its final order, ODFW focused on the emphasized condition, stating:

1 "Petitioner's argument [that the department must determine the design  
2 streamflow range at the two dam sites] ignores the incorporated elements of  
3 the definition of 'design streamflow range' which limit calculation of  
4 streamflows to 'the period when [ODFW] determines that native migratory  
5 fish require fish passage.' See OAR 635-412-0005(26) and (30),  
6 incorporated by reference in OAR 635-412-0005(13). [ODFW] finds that  
7 fish only require passage at these facilities when there is enough water  
8 flowing through the rest of this stream system to permit fish migration.  
9 \* \* \* In other words, when sufficient streamflow exists for fish to migrate,  
10 [ODFW] determined fish can move through the fishways, if properly  
11 constructed, maintained, and operated. Given this condition, no precise  
12 upper and lower flows establish the 'design streamflow' range for a properly  
13 designed and constructed stream channel-spanning passage system like  
14 [this]."

15 (Emphasis added). Petitioners argued, however, that ODFW misapplied the condition,  
16 treating it as a grant of discretion when, in fact, the referenced "determination" was not  
17 within ODFW's discretion and was not relevant to the Stoyan and Lytle dams because the  
18 operators of those dams had chosen to provide year-round fish passage.

19 Although the Court of Appeals reinterpreted ODFW's position in that  
20 regard<sup>10</sup> and ODFW has not repeated the same argument in this court, it is an argument  
21 that must be addressed. It is clear from context -- particularly, the use of the words  
22 "determine" and "require" -- that the condition that is incorporated by reference into OAR  
23 635-412-0035(2)(a) derives from OAR 635-412-0035(1)(a), and contemplates that  
24 ODFW will make its "determination" in accordance with that rule. By the clear terms of

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<sup>10</sup> As discussed below, \_\_\_ Or at \_\_\_, (slip op at 18, lines 10-25), the Court of Appeals interpreted the above-quoted paragraph in ODFW's final order as relying on "a practical assessment of year-found fish passage that is consistent with the nature of a channel-spanning fishway," rather than "a determination of a time period that would trigger the specific fish-type, life history, and time period determinations required by OAR 635-412-0035(1)(a)(A)-(C)." *Noble*, 250 Or App at 266.

1 the latter rule, such determinations must be based on preliminary, science-based  
2 "determinations" about which fish are or historically were present and the life history  
3 stages for such fish that require passage. OAR 635-412-0035(1)(a)(A)-(C). Under that  
4 rule, if ODFW declines to make any of the preliminary determinations about the  
5 historical presence of fish and fish life cycles at a given site, it cannot "determine" when  
6 native migratory fish "require" passage at the site (and the applicant for approval  
7 presumably is left to provide "year-round fish passage"). Conversely, if the applicant  
8 chooses to provide "year-round fish passage for all native migratory fish and life history  
9 stages," any "determination" by ODFW as to when fish "require" passage is irrelevant.

10 ODFW suggests that "year-round fish passage" incorporates a practical  
11 element that has no bearing on the "determination" described in OAR 635-412-  
12 0035(2)(a)(A)-(C). It argues that, for the particular purposes of channel-spanning  
13 fishways, which are designed to operate whenever water is flowing over the dam that  
14 they traverse, "year-round fish passage" means fish passage year-round, but only when  
15 water is flowing through the channel-spanning fishway. The Court of Appeals endorsed  
16 that interpretation as a "practical assessment of year-round fish passage that is consistent  
17 with the nature of a channel-spanning fishway":

18 "ODFW's interpretation of year-round fish migration at a channel-spanning  
19 fishway properly takes into account the difference between channel-  
20 spanning fishways, where either there is water or there is not, and the kinds  
21 of fishways that divert some water behind the dam for the fishway.  
22 Therefore, we conclude that ODFW plausibly construes year-round fish  
23 passage in OAR 635-412-0035(1), *as applied to a channel-spanning*  
24 *fishway*, to mean passage at all times when water is flowing through the  
25 fishway."

1 250 Or App at 266 (emphasis added).

2 ODFW explains the theory behind that interpretation in the following way:

3 "ODFW construes 'year round fish passage' to mean that the structure is  
4 such that it is permanent and always 'on' and therefore is available any time  
5 that water is present in the stream. The stream is defined for this purpose as  
6 the water that flows over the dam and into the fishway. These structures  
7 contrast with, for example, the 'traditional' fish ladders at large dams that  
8 use a small part of the stream flow and only during the times that  
9 anadromous fish are actually migrating. Most fish passage facilities were  
10 of that type at the time the rules were drafted."

11 (Citation omitted.) Thus, ODFW views its proposed interpretation as applying in the  
12 context of channel-spanning fishways only, and contends that, for more traditional  
13 fishways, "year-round fish passage" would *not* be limited to times when water is present  
14 in the fishway itself.

15 Therein lies the problem. Given that, as ODFW acknowledges, the rule  
16 was adopted with traditional diversion-style fishways in mind, the term must have a  
17 meaning that is plausible in that context. But it would be circular to interpret "year-round  
18 fish passage" to mean that the fishway always is on and available for passage whenever  
19 water is present in the fishway, when the fishway under consideration is a traditional one  
20 that operates by purposeful, and only occasional, diversion of water into the fishway. It  
21 follows that, when ODFW adopted the rule, it clearly intended "year-round fish passage"  
22 in the sense that petitioners advocate -- fish passage throughout the year, whenever the  
23 flow "within the stream" falls within the "design streamflow range."

24 Of course, ODFW is free to rescind the timing requirement of OAR 635-  
25 412-0035(1)(a) for channel-spanning fishways and other fishways designs that it did not

1 have in mind when that rule was adopted. But, insofar as such a rescission would  
2 constitute an amendment of a prior rule, ODFW can only do so through proper  
3 rulemaking procedures under the Oregon Administrative Procedures Act (APA), ORS  
4 chapter 183. Until it does so, ODFW is bound by the rule and the clear meaning that it  
5 conveys -- that, in the absence of determinations under OAR 635-412-0035(1)(a)(A) to  
6 (C) as to which fish require passage and when, a dam operator must provide fish passage  
7 throughout the year at all flows within the design streamflow range. *See Burke v.*  
8 *Children's Services Division*, 288 Or 533, 538, 607 P2d 141 (1980) (administrative rule  
9 remains effective statement of existing policy until repealed through proper Oregon APA  
10 procedures).

11 We thus return to the broader question posed in this review with the  
12 understanding that, even for channel-spanning fishways, a dam operator's choice to  
13 provide "year-round fish passage" under OAR 635-412-0035(1)(a) means that, under  
14 OAR 635-412-0035(2)(a), the operator must provide passage throughout the year at all  
15 streamflows that are "within the design streamflow range." The meaning of the term  
16 "streamflow" in that requirement is at the center of the parties' second major interpretive  
17 dispute. As noted above, \_\_\_ Or at \_\_\_ (slip op at 19, lines 5-6), ODFW contends that,  
18 when a channel-spanning fishway is at issue, the "stream" is whatever water flows over  
19 the dam and, thus, through the channel-spanning fishway itself. That interpretation is  
20 essential to ODFW's theory that channel-spanning fishways comply with OAR 635-412-  
21 0035(2)(a) without any numerical calculation of the lowest and highest flows in the  
22 affected stream. According to that theory, a channel-spanning fishway necessarily

1 provides passage within the range of streamflows that constitute the "design streamflow  
2 range," because it utilizes all of the "stream's" flow. But if "streamflow" refers to water  
3 flowing in the stream above the dam associated with the fishway, or includes water  
4 passing through outlet pipes at the base of the dam, there is no basis for claiming that the  
5 fishway necessarily provides passage at all flows within the design streamflow range, and  
6 ODFW's theory loses its logical force.

7 ODFW has not promulgated a definition of the term "streamflow" for  
8 purposes of OAR 635-412-0035(2)(a) and the surrounding rules. It has, however,  
9 provided other pertinent definitions. Its rules define "stream" as "a body of running  
10 waters of this state moving over the surface of the land in a channel or bed, including  
11 stream types classified as perennial or intermittent and channelized or relocated streams."  
12 OAR 635-412-0005(39). The rules also define the term "channel," which is used in the  
13 quoted definition of "stream," as a "waterway that periodically or continuously contains  
14 waters of this state and has a definite bed and banks that serve to confine the water."  
15 OAR 635-412-0005(7).

16 ODFW contends that, when read in combination, those definitions support  
17 its contention that "streamflow" in OAR 635-412-0035(2)(a) refers only to water flowing  
18 over the top of a dam and does not include water that initially is stored behind the dam  
19 and that later evaporates, or water that is released downstream through outlet pipes. That  
20 is so, in ODFW's view, because such water is not "moving" in a "defined bed." Although

1 many questions arise with respect to that explanation,<sup>11</sup> we cannot say that it is wholly  
2 implausible on a purely textual level.<sup>12</sup>

3           However, the "plausibility" standard that applies to our review here does  
4 not require that we consider the targeted text in a vacuum. Under *Don't Waste Oregon*,  
5 we also consider whether the agency's interpretation of the rule is inconsistent with the  
6 rule's context or with any other source of law. 320 Or at 142; *see also Gafur v. Legacy*  
7 *Good Samaritan Hospital*, 344 Or 525, 537, 185 P3d 446 (2008) (citing *Don't Waste*

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<sup>11</sup> For example, one might ask why water flowing over a dam is any more confined to a "defined bed" than water flowing under the dam through outlet pipes. Similarly, one might ask why it is necessary to assess whether the water is "moving" and in a "defined bed" at the point of the obstruction, and not upstream or downstream from that point.

<sup>12</sup> Below, ODFW also argued, and the Court of Appeals agreed, that the mere existence of OAR 635-412-00035(2)(k)(C), quoted above at \_\_ Or at \_\_ (slip op at 13, line 13-17), compels the interpretation that "streamflow" excludes water flowing under or through a dam through outlet pipes. The court explained the argument as follows:

"If water flowing through outlet pipes is to be considered in the design streamflow, then, by definition, there could be no channel-spanning weirs or other channel-spanning fishways because *all* of the stream would not be spanning the fishway; rather, some of the streamflow would pass through the outlet pipe. And because WRD requires every dam to have an outlet pipe, OAR 690-020-0025, any rule providing criteria for channel-spanning fishways would be superfluous."

*Noble*, 250 Or App at 263-64 (emphasis in original). We agree with petitioners, however, that treating water traversing a dam through an outlet pipe as part of the "streamflow" would not render OAR 635-412-00035(2)(k)(C) superfluous. In fact, not every dam has, or is even required to have, an outlet pipe. WRD is allowed to waive the pipe requirement if it determines that a pipe is unnecessary or that an alternative for passing flows exists. OAR 690-020-0025. However, while we reject ODFW's argument that OAR 635-412-00035(2)(k) compels the interpretation it advocates for, that conclusion does not resolve the question before us -- whether ODFW's interpretation is plausible within the meaning of *Don't Waste Oregon*.

1 *Oregon* rule and holding that Bureau of Labor and Industries interpretation of its own  
2 rule was inconsistent with the rule's context and, therefore, was erroneous). Part of the  
3 context of OAR 635-412-0035(2)(a) is the basic mandate that animates the entire subset  
4 of ODFW rules pertaining to fish passage: "No person shall construct or maintain any  
5 artificial obstruction across any waters of this state that are inhabited, or were historically  
6 inhabited, by native migratory fish without providing passage for native migratory fish."  
7 OAR 635-412-0020(1). As noted above, \_\_\_ Or at \_\_\_ (slip op at 11, lines 6-12), that rule  
8 is, in part, a restatement of the statutory prohibition on constructing or maintaining any  
9 artificial obstruction on waters historically inhabited by native migratory fish without  
10 providing fish passage. ORS 509.585(2). However, ODFW has made the prohibition its  
11 own by, among other things, providing a definition of "fish passage" that applies to that  
12 and other related rules:

13       "*Fish passage*' means the ability, *by the weakest native migratory fish and*  
14       *life history stage determined by [ODFW] to require passage at the site, to*  
15       move volitionally, with minimal stress, and without physical or  
16       physiological injury upstream and downstream of an artificial  
17       obstruction."  
18

19 OAR 635-412-0005(18) (emphasis added). The emphasized wording in that definition  
20 clearly refers to the determinations that ODFW must make under OAR 635-412-  
21 0035(1)(a)(A) to (C) about the historical presence of and life cycle requirements of native  
22 migratory fish. Reading OAR 635-412-0020(1) in the context of OAR 635-412-0005(18)  
23 and OAR 635-412-0035(1)(a)(A) to (C), it is apparent that the rule is not flexible and  
24 aspirational but, instead, embodies a basic standard: the "fish passage" that dam  
25 operators are required to provide under OAR 635-412-0020(1) is passage that meets the

1 biological/life cycle needs of the native migratory fish that historically were present, as  
2 determined by ODFW.

3           Returning to the issue before us, it would seem that there is no way to give  
4 general application to the interpretation of the term "streamflow" in OAR 635-412-  
5 0035(2)(a) that ODFW now proposes in a manner that would comport with the standard  
6 expressed in OAR 635-412-0020(1). If the "streamflows" at which dam operators must  
7 provide passage only take into account the water that flows over the top of the dam, then  
8 the necessity for providing fish passage is determined by the planned or existing height of  
9 the dam and configuration of outlet pipes, and not by the biological needs of the fish.

10 Taking the most extreme example, a very high dam that passes all of the outflow from the  
11 associated reservoir through outlet pipes, and none over the top of the dam, would pass  
12 muster under OAR 635-412-0035(2)(a), even if the dam's fishway never provides  
13 passage for fish. That is so because the rule requires fish passage only at flows within the  
14 design streamflow range, and such a dam would have no "streamflow" or "design  
15 streamflow range" within the asserted meaning of those terms. Under ODFW's  
16 interpretation, the availability and timing of fish passage always would be dictated by the  
17 planned or existing configuration of the dam -- and some configurations that provide fish  
18 passage at all "streamflows" within the design streamflow range would utterly fail to  
19 conform to the basic fish passage requirement set out in OAR 635-412-0020(1).<sup>13</sup>

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<sup>13</sup> ODFW might be inclined to point out that even petitioners' interpretation of "streamflow" could result in the same inconsistency, based entirely on the very circumstance at which OAR 635-412-0035(2)(a) appears to be directed -- natural fluctuations in the streamflow: In the absence of flow from upstream, the fishway could

1 ODFW might argue that we need not be concerned with how its present  
2 interpretation of OAR 635-412-0035(2)(a) would apply to other dam configurations,  
3 because it approaches the "design streamflow range" requirement differently at large  
4 dams with fish ladders and other more traditional fish passage devices. But our answer to  
5 that argument would be the same as our response to ODFW's proposal that the meaning  
6 of the term "year-long fish passage" in OAR 635-412-0035(1)(a) varies depending on the  
7 type of fishway involved. \_\_ Or at \_\_ (slip op at 19, line 15-23). ODFW is free to make  
8 different rules for different categories of dams and fishways, but until it does so, using  
9 proper rulemaking procedures under the Oregon APA, it is bound by the rules as  
10 promulgated. OAR 635-412-0035(2)(a), as promulgated, applies to all dams and  
11 fishways, and the plausibility of the meaning with that ODFW argues for must be  
12 assessed accordingly. As we have discussed above, ODFW's interpretation is implausible  
13 because, when uniformly applied, it conflicts with the basic requirement expressed in  
14 OAR 635-412-0035(1) that dam operators provide passage that meets the biological and  
15 life cycle needs of fish.

16 Before we conclude our analysis, we consider two final arguments raised  
17 by ODFW in favor of its interpretation of "streamflow" in the context of OAR 635-412-

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pass muster under OAR 635-412-0035(2)(a), even while the life cycle needs of the relevant fish are not met, as OAR 635-412-0020(1) requires. But, in our view, OAR 635-412-0035(2)(a) is perfectly consistent with OAR 635-412-0020(1): It makes a necessary and inevitable accommodation for the reality of naturally variable streamflows. ODFW's particular interpretation of OAR 635-412-0035(2)(a), on the other hand, makes the arbitrary fact of a dam's design paramount over the needs of fish. That interpretation cannot be squared with the fish-need based standard set out in OAR 635-412-0020(1).

1 0035(2)(a). ODFW first suggests that its interpretation is the necessary consequence of  
2 its obligation to balance conflicting policies expressed in the controlling fish passage  
3 statute, ORS 509.585, and two other statutes pertaining to small dams and ponds like  
4 those at issue in this case, ORS 537.405 and ORS 537.409. ODFW describes the former  
5 statute as expressing a "preference" that passage be provided for native migratory fish  
6 that historically were present at a given site, and the latter two statutes as expressing a  
7 policy of "protecting the right of property owners to maintain small ponds existing on  
8 their property, even where those ponds are created by dams which potentially interfere  
9 with fish passage." ODFW contends that those two policy choices are in some respects  
10 inconsistent, and that it had to find some balance between them. ODFW contends that  
11 its interpretation of "streamflow" in OAR 635-412-0035(2)(a), in fact, strikes a  
12 reasonable balance between the two policies by "assum[ing] the existence of artificial  
13 obstructions and provid[ing] for the means by which passage can nonetheless be  
14 accomplished when there is water available for that purpose."

15           But, assuming that ORS 537.405 and ORS 537.409 have any relevance in  
16 this context, they do not justify the "balancing" that ODFW purports to accomplish by  
17 interpreting "streamflow" in OAR 635-412-0035(2)(a) in the manner that it does. In  
18 essence, those two statutes express a policy that small reservoirs, and the dams that create  
19 them, are permitted to exist without regard to ordinary water right requirements, as long  
20 as they do not injure other water rights or existing fish resources.<sup>14</sup> That policy in no way

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<sup>14</sup> By enacting ORS 537.405, the legislature granted an amnesty for reservoirs in existence before January 1, 1995, that store less than 9.2 acre-feet of water behind a

1 conflicts with the policy expressed in ORS 509.585 that artificial obstruction must  
2 provide passage for native migratory fish that historically have been present.<sup>15</sup> And while  
3 ORS 537.405 and ORS 537.409 expressly exempt small reservoirs that are not  
4 detrimental to existing fish resources from the ordinary procedures involved in obtaining  
5 a water right and from "regulation by the Water Resources Commission and the Water  
6 Resources Department," ORS 537.405(1), the statutes do not purport to exempt that  
7 category of reservoirs from regulation by ODFW. The policies expressed in ORS

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dam that is less than ten feet in height. ORS 537.405(1). The statute declared such reservoirs to be exempt from the ordinary procedures for obtaining a water right and from regulation by the Water Resources Commission and WRD, as long as the owner provided written notice of the reservoir's existence to WRD before the end of January 1997. *Id.* However, if WRD determined that the reservoir posed a "significant detriment to existing fishery resources" or resulted in injury to an existing water right, it could require the reservoir owner to mitigate those problems. ORS 537.405(4)(a)-(b), (7). By enacting ORS 537.409, the legislature provided an alternative process for small reservoir owners who have failed to take action during the amnesty period provided in ORS 537.405. For any dam and reservoir within the 10 foot, 9.2 acre-feet size limitations, the owner may obtain a right to maintain the reservoir on a lesser showing than ordinarily would be required, unless the reservoir detrimentally affects an existing water right or an existing fishery resource. ORS 537.409(1).

<sup>15</sup> ODFW argues that, insofar as ORS 509.585(7)(c) directs ODFW to establish criteria for determining the "adequacy" of fish passage, the statute merely expresses a policy "preference" for fish passage. We do not agree with ODFW that the "adequacy" directive transforms what evidently is a requirement of fish passage to a mere "preference." *See* ORS 509.585(1) ("[e]xcept as provided in ORS chapter 509, fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present"); ORS 509.585(2) ("a person \* \* \* may not construct or maintain any artificial obstruction \* \* \* without providing passage for native migratory fish.") Rather, that "adequacy" wording authorizes ODFW to determine what, exactly, the fish passage requirement entails. As discussed above, \_\_ Or at \_\_ (slip op at 23-24, line 22-25, 1-2), ODFW appears to have determined that the requirement means passage that meets the biological/life cycle needs of native migratory fish that historically were present.

1 509.585, on the one hand, and ORS 537.405 and ORS 537.409, on the other, are  
2 compatible, and each can and should be implemented.<sup>16</sup> There is no basis for ODFW to  
3 balance one policy against the other in its rules. And, as discussed, the interpretation of  
4 OAR 635-412-0035(2)(a) the ODFW claims is the product of such balancing is  
5 implausible in the context of other related rules.

6 ODFW also contends that its interpretation of OAR 635-412-0035(2)(a) is  
7 compelled by the fact that it has no control over the existence and design of the dams for  
8 which fish passage must be provided. ODFW notes, in that regard, that the legal  
9 authority for permitting dams and issuing and regulating associated water rights has been  
10 delegated to WRD. It follows, ODFW argues, that it must accept the existence and  
11 configuration of any WRD-permitted dam and base its fish passage requirements on the  
12 "streamflow" that actually passes over the dam, rather than the flow that would exist  
13 without the dam. For that reason, ODFW argues that it must exclude impounded water  
14 that is lost to evaporation and seepage, as well as water passing through the dam's outlet  
15 pipes, from its definition of "streamflow." As to the latter point, ODFW observes that  
16 outlet pipes are required by WRD as conditions of dam operators' water rights, and that  
17 the flows through such pipes are under the control of WRD.<sup>17</sup> It contends that, because

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<sup>16</sup> ODFW's authority to promulgate rules that implement ORS 537.405 and ORS 537.409 is doubtful, given that those statutes pertain primarily to water appropriation, not fish resources.

<sup>17</sup> ODFW cites ORS 540.340, which provides:

"Whenever it may be necessary for the protection of other water users, the Water Resources Commission shall require every owner or

1 ODFW has no authority to regulate when water flows through such outlet pipes, it must  
2 consider that water unavailable for fish passage and exclude it from its definition of  
3 "streamflow."

4           While it may be true that WRD's authority over dam configuration and  
5 outlet pipes puts many components of a stream's flow beyond ODFW's control, we  
6 cannot see how that fact translates into a necessity that those components be ignored for  
7 purposes of fish passage. In fact, if ODFW were limited in its fish passage efforts to  
8 considering aspects of streamflow that are under its control, it would be precluded from  
9 imposing a streamflow range requirement altogether: The reality is that ODFW has no  
10 control over any aspect of streamflow, yet it still requires dam owners to provide fish  
11 passage within the "design streamflow range." We are not persuaded by ODFW's  
12 argument that it is required to interpret OAR 635-412-0035(2)(a) in a way that excludes  
13 from the meaning of "streamflow" those components of streamflow that are outside its  
14 control.<sup>18</sup>

15           We conclude that ODFW's proffered interpretation of OAR 635-412-  
16 0035(2)(a) is implausible because its uniform application would conflict with the basic

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manager of a reservoir or diversion dam, located across or upon the bed of a natural stream, to construct and maintain a suitable outlet in the reservoir or diversion dam which will allow the free passage of the natural flow of the stream."

<sup>18</sup> In the absence of any argument to that effect by ODFW, we do not consider whether petitioner's construction of the term "streamflow" in OAR 635-412-0035(2)(a) as including those components conflicts in any way with WRD's statutory authority to regulate the appropriation of water.

1 regulatory requirement at OAR 635-412-0020(1) -- that dams must provide passage for  
2 native migratory fish at the times and under the conditions that are required by their life  
3 cycles. That interpretation was indispensable to ODFW's decisions approving the Lytle  
4 and Stoyan fishways. ODFW reasoned that, because channel-spanning fishways like the  
5 Lytle and Stoyan fishways utilize all of a stream's "streamflow," as that term is used in  
6 OAR 635-412-0035(2)(a), they necessarily provide passage at all streamflows within the  
7 design streamflow range, and can be deemed to comply with OAR 635-412-0035(2)(a)  
8 without any measurement of flows. Because ODFW's interpretation of OAR 635-412-  
9 0035(2)(a) is implausible, its basis for not making an actual determination of the design  
10 streamflow range, which the rule requires, is erroneous. We therefore remand to ODFW  
11 to apply OAR 635-412-0035(2)(a) to the two fishways -- that is, to determine, at each  
12 site, the design streamflow range and whether the fishway provides passage at all flows  
13 within the design streamflow range during the period that ODFW determines fish require  
14 passage.<sup>19</sup> Although the parties have suggested different places in the stream where  
15 streamflow might be measured (above the reservoir as opposed to below the dam) we  
16 find that the record and the parties' arguments on that issue are insufficiently developed

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<sup>19</sup> We make this disposition pursuant to ORS 183.482(8)(a)(B), which states:

"The court may affirm, reverse or remand the order if the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, the court shall

"\* \* \* \* \*

"(B) Remand the case to the agency for further action under a correct interpretation of the provision of law."

1 to allow us to resolve that issue. ODFW should decide that issue in the first instance and  
2 petitioners may contest ODFW's decision if they disagree.<sup>20</sup>

3           The decision of the Court of Appeals and the Final Order on  
4 Reconsideration of the Oregon Department of Fish and Wildlife are reversed, and the  
5 case is remanded to the Oregon Department of Fish and Wildlife for further action.

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<sup>20</sup> Nothing in this opinion should be interpreted as precluding ODFW from amending its rules to except channel-spanning fishways from OAR 635-412-0035(2)(a) or to otherwise accommodate the policy choices for which it advocates in this review, assuming that any such amendments are consistent with the governing statutes.