

**OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 077
INSTREAM WATER RIGHTS**

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Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

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General Provisions

690-077-0000

Purpose

(1) The purpose of this Division is to establish the policy, procedures, criteria, standards and definitions which shall be applied by the Department and Commission in the evaluation of applications for establishing instream water rights.

(2) This Division also provides for the conversion of existing minimum streamflows to instream water rights; for the instream transfer or lease of existing water rights for use as instream water rights; and for the enforcement of instream water rights which are held in trust by the Water Resources Department to protect the public uses.

(3) In 1987, the Legislature created a new type of water right called an instream water right. Instream water rights are established by certificate from the Water Resources Commission or by an order approving a time-limited instream transfer or lease, pursuant to ORS 537.332 to 537.360, to maintain and support public uses within natural streams and lakes. These public uses include, but are not limited to, recreation, scenic attraction, aquatic and fish life, wildlife habitat and ecological values, pollution abatement and navigation. Instream water rights may also be established as a result of the allocation of conserved water under ORS 537.455 to 537.500 and 540.510 (OAR Chapter 690, Division 18).

(4) In 2001, the Legislature authorized the split season use leasing of water rights for instream purposes. Under ORS 537.348(3), all or a portion of an existing water right may be used for the existing use and for instream use during the same year, provided that the uses are not concurrent and that the holders of the water rights measure and report to the Water Resources Department the use of the existing water right and the instream water right.

(5) Instream water rights differ from other water rights because control or diversion of the water is not required. Instream water rights are held in trust by the Water Resources Department but are regulated and enforced like all other water rights.

(6) Instream water rights do not take away or impair any legally established right to the use of water having an earlier priority date than the instream right.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358.

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 20-1988, f & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

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690-077-0010

Definitions

As used in this Division:

(1) "Affected Local Government" means any local government, as defined in OAR 690-005-0015, within whose jurisdiction the diversion, conveyance, instream or out-of-stream use, or reservation of water is proposed or established.

(2) "Agency" means ODFW, DEQ and Parks.

(3) "Beneficial Use" means the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state.

(4) "Comment" means a written statement concerning a particular application. The comment may identify elements of the application which, in the opinion of the commenter, would conflict with an existing water right or would impair or be detrimental to the public interest.

(5) "Commission" means the Water Resources Commission

(6) "Contested Case" means a hearing as defined in ORS 183.310(2) and conducted according to the procedures described in ORS Chapter 537, ORS 183.413 to 183.470 and OAR Chapter 690, Division 2.

(7) "DEQ" means the Department of Environmental Quality

(8) "Department" means the Water Resources Department

(9) "Director" means the director of the Water Resources Department.

(10) "Estimated Average Natural Flow" means average natural flow estimates derived from watermaster distribution records, Department measurement records and application of appropriate available scientific and hydrologic technology.

(11) "Held in Trust by the Water Resources Department" means that the water right must be enforced and protected for the public uses listed in the water right. Actions by the Department affecting instream water rights are limited by public trust obligations.

(12) "Instream" as defined in ORS 537.332, means within the natural stream channel or lake bed or place where water naturally flows or occurs.

(13) "Instream flow" means the minimum quantity of water necessary to support the public use requested by an agency.

(14) "Instream lease" means the conversion of all or a portion of an existing water use subject to transfer to an instream water right for a specified time-period as authorized by ORS 537.348(2).

(15) "Instream transfer" means the conversion of all or a portion of an existing water use subject to transfer to an instream water right as authorized by ORS 537.348(1).

(16) "Instream Water Right" as defined in ORS 537.332, means a water right held in trust by the Water Resources Department for the benefit of the people of the state of Oregon to maintain water instream for public use. An instream water right does not require a diversion or any other means of physical control over the water.

(17) "Minimum Streamflow" also "minimum perennial streamflow," means an administrative rule provision adopted in a basin program by the Water Resources Commission or its predecessors to implement ORS 536.235, 536.310(7) and 536.325 and support aquatic life, maintain recreation or minimize pollution.

(18) "Multipurpose Storage Project" means any storage project which is designed and operated to provide significant public benefits and provides for more than two beneficial uses and/or purposes.

(19) "ODFW" means the Oregon Department of Fish and Wildlife.

(20) "ODFW flow restoration priority watershed" means a geographic area identified by ODFW where there is a need for flow restoration during a specified season(s) to support fish

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recovery under the Oregon Plan for Salmon and Watersheds. The ODFW flow restoration priority watersheds are identified in Figures 1 to 18.

(21) "Parks" means the Oregon Parks and Recreation Department.

(22) "Planned" means a determination has been made for a specific course of action either by legislative, administrative or budgetary action of a public body, or by engineering, design work, or other investment toward approved construction by the public or private sector.

(23) "Planned Uses" means the use or uses of water or land which has/have been planned as defined in this rule. Such uses include but are not limited to the policies, provisions, and maps contained in acknowledged city or county comprehensive plans and land use regulations.

(24) "Pollution Abatement" means the use of water to dilute, transport or prevent pollution.

(25) "Protest" means a written statement, filed in accordance with OAR Chapter 690, Division 2, and the applicable provisions of this Division or Division 380, expressing disagreement with an action or proposed action by the Department that, under applicable law, may entitle the person filing the protest to become a party to a contested case hearing.

(26) "Public Benefit," as defined in ORS 537.332, means a benefit that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.

(27) "Public Use," as defined in ORS 537.332, includes but is not limited to:

(a) Recreation;

(b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values;

(c) Pollution abatement; or

(d) Navigation.

(28) "Recreation" as a public use of water means any form of play relaxation, or amusement, mostly done during leisure, that occurs in or in conjunction with streams, lakes and reservoirs, including but not limited to boating, fishing, swimming, wading, and viewing scenic attractions.

(29) "Scenic Attraction" means a picturesque natural feature or setting of a lake or stream, including but not limited to waterfalls, rapids, pools, springs, wetlands and islands that create viewer interest, fascination, admiration or attention.

(30) "Split Season Use" means the exercise of a water right in the same season defined by the water right in the same calendar year for both the existing purpose of the water right and for an instream purpose, provided that water is not used for the existing purpose during the period in which the water is to be protected instream.

(31) "Time-Limited Instream Transfer," means an instream transfer authorized under ORS 537.348(1) that is not permanent and under which the water right will revert back to its original use:

(a) Without further action by the Department at the end of the period of time specified in the final order approving the instream transfer; or

(b) On a determination by the Department that other conditions, specified in the final order approving the instream transfer, for termination have been met.

(32) "Unappropriated Water Available" means water that exceeds the quantities required to meet existing water rights of record, minimum streamflows and instream water rights and for known and yet to be quantified Native American treaty rights.

(33) "Water Purveyor" means any entity formed for the purpose of delivering water supply to water right holders.

(34) "Water quality limited" has the meaning provided in the OAR 340-041.

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Stat. Auth.: ORS 197, ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.310, ORS 536.332, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0015

General Statements

(1) Instream water rights shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any rights vested prior to the date of the instream water right.

(2) The implementation of the instream water rights law is a means of achieving an equitable allocation of water between instream public uses and other water uses. When instream water rights are set at levels that exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses.

(3) The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right.

(4) If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant for the applied public use. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.

(5) Unless the Director determines otherwise, for instream water rights established through instream transfers, leases, or allocations of conserved water, it is presumed that flows that exceed the estimated average natural flow or natural lake levels are significant for the applied public use, if the criteria in Subsection (5)(a) and (b), or in Subsection (5)(a) and (c) are met:

(a) The flow does not exceed the maximum amount of any instream water right application applied for under OAR 690-077-0020 for the same reach or portion thereof, and for the same public use.

(b) For the specified time period that flows are requested to exceed the estimated average natural flow or lake level, the stream is in an ODFW flow restoration priority watershed.

(c) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increased flows would improve water quality.

(6) If the source of water for an instream water right is other than natural flow such as storage releases or inter-basin transfer, the source shall be developed or a permit for development approved prior to or coincident in priority with the instream water right. The development of environmentally sound multipurpose storage projects that will provide instream water use along with other beneficial uses shall be supported.

(7) Instream water rights in rivers and streams shall, insofar as practical, be defined by reaches of the river rather than points on the river.

(8) When instream water rights are established through instream transfers, leases, or allocations of conserved water of existing water rights, the order, and, where appropriate, the certificate shall define the appropriate point, reach or reaches to which the new instream water right shall apply. Normally, a new instream water right shall be maintained downstream to the mouth of the affected stream; however, it may be maintained farther downstream if the amount

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of the instream water right is a measurable portion of the flow in the receiving stream or for a point or shorter distance if needed to account for return flow or to prevent injury.

(9) Instream water rights shall conform with state statutes and basin programs. All natural lakes and streams in the state shall be considered classified to allow all instream public uses unless specifically withdrawn from appropriation for such use.

(10) Instream water rights shall be approved only if the amount, timing and location serve a public use or uses.

(11) The combination of instream water rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits and shall be consistent with Sections (4), (5), and (6) of this rule.

(12) An instream water right created through the conversion of a minimum perennial streamflow shall not take precedence over any rights having an earlier priority date, including storage rights except where an individual permit or water right specifies that it shall be subordinate to future uses or appropriations.

(13) An instream water right created through the conversion of a minimum perennial streamflow, which consists in whole or part of waters released from storage, is enforceable only as to the waters released to satisfy the instream water right.

(14) Instream water rights created through the conversion of minimum perennial streamflows shall carry with them any and all conditions, exceptions or exemptions attached to the minimum perennial streamflow, unless modified through hearing.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338, ORS 537.356 & ORS 537.358

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 1-1989(Temp), f. & cert. ef. 1-24-89; WRD 4-1989, f. & cert. ef. 7-11-89; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 8-2006, f. & cert. ef. 10-2-06

State Agency Instream Water Right Applications

690-077-0019

Process for Instream Water Right Certificate Requests

(1) Except as provided in ORS 537.343, the Department shall process a request received under ORS 537.336 for a certificate for an instream water right in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.250, and the policies under ORS 537.332 to 537.360.

(2) Nothing in ORS 183.310 to 183.550 shall be construed to allow additional persons to participate in the process. To the extent that any provision in 183.310 to 183.550 conflicts with a provision in ORS 537.120 to 537.360, the provisions in ORS 537.120 to 537.360 shall control.

(3) Pursuant to Section 46, Chapter 416, Oregon Laws 1995, for each application described under OAR 690-077-0000 that was pending or filed with the Commission or the Department on June 30, 1995, the Department shall determine an appropriate step in the process established in Chapter 416, Oregon Laws 1995 and this division at which to continue the application process for the application. The definitions and provisions of this division shall be applied as appropriate, to reflect the step determined by the Department.

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Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.140 - ORS 537.250 & ORS 537.332 - ORS 537.360

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0020

Application Requirements

(1) Only ODFW, DEQ and Parks are authorized to submit applications to the Department to establish instream water rights. Applications may be submitted at any time.

(2) To promote coordination, ODFW, DEQ and Parks shall notify each other of the proposed applications prior to submittal to the Department. The applying agency should notify the other agencies of its intent to develop an instream water right application on a specified stream or lake. Notice should be given as early as possible and the other agencies should respond as soon as possible if they would like to incorporate the public uses each is responsible for into the application.

(3) After October 28, 1989, all applications for instream water rights shall be based on methods of determining instream flow needs that have been approved by administrative rule of the agencies submitting the applications.

(4) Applications to establish instream water rights shall be submitted in writing and shall include the following:

- (a) The name(s) and address(es) of the agency(ies) applying;
- (b) The public uses to be served by the requested instream water right and the flows necessary to support the public uses;
- (c) Stream or lake name;
- (d) If a stream, the reach delineated by river mile and stream to which it is tributary;
- (e) The appropriate section of a Department basin map with the applicable lake or stream reach identified;
- (f) The instream flow requested by month and year in cubic feet per second or acre-feet or lake elevation;
- (g) A description of the technical data and methods used to determine the requested amounts;
- (h) Evidence of notification of other qualified applicant agencies;
- (i) If a multi-agency request, the amounts and times requested for each category of public use;
- (j) Identification of affected local governments (pursuant to OAR 690-077-0010) and copies of letters notifying each affected local government of the intent to file the instream water right application;
- (k) Written documentation of how the agency applying for an instream water right has complied with the requirements contained in its own administrative rules for instream water rights, including application of the required methods to determine the requested flows.

(l) Any other information required in the application form that is necessary to evaluate the application in accordance with applicable statutory requirements.

(5) The applicant is encouraged to propose:

- (a) A means and location for measuring the instream water right;
- (b) The strategy and responsibility for monitoring flows for the instream right; and
- (c) Any provisions needed for managing the water right to protect the public uses.

(6) Any request for an instream water right to be supplied from stored water shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has

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been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the request.

(7) Within 60 days after the Department proceeds with the application under OAR 690-077-0031, the Department shall complete the application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. Within the 60-day period, the Department may request the applicant to provide additional information needed to complete the review. If the Department requests additional information, the request shall be specific and shall be sent to the applicant by registered mail. The Department shall specify a date by which the information must be returned, which shall be not less than 10 days after the Department mails the request to the applicant. If the Department does not receive the information or a request for a time extension under OAR 690-077-0052(2) by the date specified in the request, the Department may reject the application. The time period specified by the Department in a request for additional information shall allow the Department to comply with the 60-day time limit established by this Section.

Stat. Auth.: ORS 197, ORS 536.025, ORS 536.027, ORS 537.153, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.336, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0027

Completeness Review

(1) Within 15 days after receiving an application, the Department shall determine whether the application contains the information required under OAR 690-077-0020(4) and is complete and not defective. If the Department determines that the application is incomplete or defective, the Department shall return the application.

(2) Upon determining that an application contains the information listed under OAR 690-077-0020(4) and is complete and not defective, the Department shall endorse on the application the date upon which the application was received for filing at the Department, which shall be the priority date for any water right issued in response to the application. All applications that comply with the provisions of law shall be recorded in a suitable book kept for that purpose.

(3) If an application is complete and not defective, the Department shall determine whether the proposed use is prohibited by ORS Chapter 538. If the proposed use is prohibited by ORS Chapter 538, the Department shall reject the application and return the application with an explanation of the statutory prohibition.

Stat. Auth.: ORS 537.150 & ORS 538

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0029

Initial Review

(1) If the proposed use is not prohibited by statute, the Department shall undertake an initial review of the application and make a preliminary determination of:

(a) Whether the proposed use is restricted or limited by statute or rule;

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(b) The extent to which water is available from the proposed source during the times and in the amounts requested; and

(c) Any other issue the Department identifies as a result of the initial review that may preclude approval of or restrict the proposed use.

(2) Upon completion of the initial review and no later than 30 days after determining an application to be complete and not defective as described in OAR 690-077-0027, the Department shall send by regular mail, or with the consent of the recipient, by electronic means to the applicant an initial review report setting forth the Department's preliminary determinations and allow the applicant 14 days from the date the Department sends the initial review report within which to notify the Department to stop processing the application or to proceed with the application. If the applicant notifies the Department to stop processing the application, the Department shall return the application. If the Department receives no timely response from the applicant, the Department shall proceed with the review of the application.

Stat. Auth.: ORS 536.025, 536.027, 537.150 & 537.338

Stats. Implemented: ORS 537.332 - 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 1-2012, f. & cert. ef. 2-1-2012

690-077-0031

Public Notice and Comments

(1) Within seven days after proceeding with the application under OAR 690-077-0029(2), the Department shall give public notice of the application in the weekly notice published by the Department. The weekly notice shall be sent to the following:

(a) Affected local, state and federal agencies, including the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse;

(b) Affected Indian tribes; and

(c) All persons on the Department's weekly mailing list.

(2) The notice shall include a request for comments on the application, the date by which comments must be received by the Department, and information about how an interested person may obtain future notices about the application and a copy of the proposed final order. The notice also shall include the following information about the application:

(a) The name(s) and address(es) of the applicant agency(ies);

(b) County(ies) of water use;

(c) Application file number;

(d) Description of the characteristics and the purpose of the proposed instream water right;

(e) Amount of proposed instream water right by month or half month in cubic feet per second (cfs), acre feet (af), or lake elevation;

(f) Common name of surface water source(s); and

(g) The stream reach by mile or geographic location.

(3) The notice shall be sent by regular United States mail, or with the consent of the recipient, by electronic means.

(4) Within 30 days after the public notice under Section (1) of this rule, any person interested in the application shall submit written comments to the Department. Any person who asks to receive a copy of the Department's proposed final order shall submit to the Department the fee required under ORS 536.050. The 30-day comment period shall commence on the day the

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Department sends the notice. All comments must be received by the Department on or before the end of the 30-day comment period.

(5) If no comments or land use information is received by the Department within the 30-day comment period, the Commission and Director may presume the proposed instream water right is compatible with the comprehensive land use plans and land use regulations of affected local governments.

Stat. Auth.: ORS 536.025, 536.027, 536.220, 537.140 & 537.338

Stats. Implemented: ORS 537.332 - 537.360

Hist.: WRD 9-1992, f. & cert. ef. 7-1-92; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from 690-077-0024; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 4-2006, f. & cert .ef. 10-2-06; WRD 1-2012, f. & cert. ef. 2-1-2012

690-077-0033

Public Interest Presumption

(1) The Department shall presume that a proposed water use will not impair or be detrimental to the public interest if:

(a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12);

(b) Water is available;

(c) The proposed use will not injure other water rights; and

(d) The proposed use complies with the rules of the Commission.

(2) The public interest presumption described in Section (1) of this rule is a rebuttable presumption and may be overcome by a preponderance of the evidence that either:

(a) One or more of the criteria for establishing the public interest presumption are not satisfied; or

(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, protests or a finding of the Department that shows:

(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.153 & ORS 537.338

Stats. Implemented: ORS 537.332 to ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0037

Public Interest Review

(1) Unless the applicant requests withdrawal of an application following the initial review described in OAR 690-077-0029, before issuing a proposed final order, the Department shall determine whether the public interest presumption is established for the proposed water use, as described in OAR 690-077-0033.

(2) If the Department determines that the public interest presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) and may either:

(a) Propose denial of the application upon a finding that the use will impair or be detrimental to the public interest; or

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(b) Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest and propose approval of the application with appropriate modifications or conditions.

(3) If the Department determines that the public interest presumption is established or that the proposed instream use can be modified or conditioned to meet the public interest presumption criteria:

(a) The Department shall further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the public interest presumption is overcome. The Department may find that the presumption is overcome if a preponderance of evidence shows that the proposed use will impair or be detrimental to the public interest as demonstrated in comments or a finding of the Department that shows:

(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

(b) In making any determination or finding in (3)(a) of this rule, the Department shall, at a minimum, consider the factors listed below, including any potential effects that the proposed use may have on these factors, where applicable:

(A) Threatened, endangered or sensitive species;

(B) Water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set under Section 303(d) of the federal Clean Water Act and sources which the Environmental Quality Commission has classified as outstanding resource waters as defined in OAR 340-041-0002(42);

(C) Fish or wildlife;

(D) Recreation;

(E) Economic development; and

(F) Local comprehensive plans, including supporting provisions such as public facilities plans.

(c) In making any determination or finding in (3)(a) of this rule, the Department may consult and communicate with state and federal agencies and local governments as appropriate.

(4) If the Department determines that the presumption is established and not overcome under the provisions of Section (3) of this rule, the Department shall issue a proposed final order recommending issuance of the certificate subject to any appropriate modifications or conditions. If the Department then receives a protest filed pursuant to OAR 690-077-0043, which asserts the presumption is not established or should be overcome, the Department shall evaluate the protest and supporting evidence in accordance with this Section and Sections (5)-(7) of this rule. The Department shall find that the public interest presumption is overcome if a preponderance of evidence shows that:

(a) One or more of the four public interest presumption criteria listed in OAR 690-077-0033(1)(a)-(d) are not met;

(b) The proposed use may impair or be detrimental to the public interest according to standards described in ORS 537.170(8), including:

(A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

(5) If the Department finds that under Section (4) of this rule the presumption is overcome, the Department shall issue a final order in accordance with OAR 690-077-0047 denying the application unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of an instream water right certificate will not impair or be detrimental to the public interest.

(6) If the Department finds that under Section (4) of this rule the presumption is not overcome, the Department shall issue a final order in accordance with OAR 690-077-0047 approving the application with any appropriate modifications or conditions.

(7) If the Director finds that a significant dispute about the proposed water use related to the public interest exists and a protest has been filed under OAR 690-077-0043, the Director shall schedule a contested case hearing.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.153 & ORS 537.338

Stats. Implemented: ORS 537.332 - ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0039

Proposed Final Order

(1) In developing the proposed final order, the Department shall consider all comments received under OAR 690-077-0031 and all findings of the Department, but the proposed final order need not separately address each comment received.

(2) The proposed final order shall cite findings of fact and conclusions of law and shall include but need not be limited to:

(a) Confirmation or modification of the preliminary determinations made in the initial review;

(b) A brief statement that explains the criteria considered relevant to the decision, including the applicable basin program and the compatibility of the proposed use with applicable land use plans;

(c) An assessment of water availability and the amount of water necessary for the proposed use;

(d) An assessment of whether the proposed use would result in injury to existing water rights;

(e) An assessment of whether the proposed use would impair or be detrimental to the public interest as provided in ORS 537.170;

(f) A draft certificate, including any proposed modifications, conditions, or a recommendation to deny the application;

(g) Whether the rebuttable presumption that the proposed use will not impair or be detrimental to the public interest has been established; and

(h) The date by which protests to the proposed final order must be received by the Department.

(3) The Department shall send copies of the proposed final order to the applicant by regular mail, or with the consent of the recipient, by electronic means. The Department shall send copies of the proposed final order by regular mail to persons other than the applicant who have requested copies and paid the fee required under ORS 536.050.

(4) Within seven days after issuing the proposed final order, the Department shall publish notice of the proposed final order by publication in the weekly notice published by the Department. In addition to the information required to be published for an application under

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OAR 690-077-0031, the notice of the proposed final order also shall include a brief explanation of the requirement to raise all issues under OAR 690-077-0043(4).

Stat. Auth.: ORS 536.025, 536.027, 537.153 & 537.338

Stats. Implemented: ORS 537.332 - 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 4-2006, f. & cert. ef. 10-2-06; WRD 1-2012, f. & cert. ef. 2-1-2012

690-077-0043

Protests and Standing

(1) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:

- (a) The name, address and telephone number of the protestant;
- (b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;
- (c) A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest;
- (d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
- (e) Any citation of legal authority supporting the protest, if known; and
- (f) For persons other than the applicant, the protest fee required under ORS 536.050.

(2) Any person who supports a proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order, whether issued following a contested case hearing or where no contested case hearing is held.

(3) The request for standing must be in writing, signed by the requester, and include the following:

- (a) The requester's name, mailing address and telephone number;
- (b) If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- (c) A statement that the requester supports the proposed final order as issued;
- (d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and
- (e) The fee established under ORS 536.050.

(4) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or in a hearing, or failure to provide sufficient specificity to afford the Department an opportunity to respond to the issue, precludes judicial review based on that issue.

(5) Any person who has filed a timely request for standing may later file a petition for participation as a party or limited party in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 690-002-0105.

(6) Requests for standing and protests on the proposed final order shall be submitted within 45 days after publication of the notice of the proposed final order in the weekly notice published by the Department. Any person who asks to receive a copy of the Department's final order shall submit to the Department the fee required under ORS 536.050, unless the person has previously paid the fee.

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(7) Within 10 days after the close of the filing period established under Section (6) of this rule, the Department shall send a copy of all protests and requests for standing received to the applicant, the protestant(s), if any, and to each person who requested standing.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.153 & ORS 537.338

Stats. Implemented: ORS 537.332 - ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0046

Determination to Hold a Contested Case Hearing

(1) Within 60 days after the close of the period for receiving protests, the Director shall determine whether to:

- (a) Issue a final order as provided under ORS 537.170(6); or
- (b) Schedule a contested case hearing.

(2) The Director:

(a) May schedule a contested case hearing if:

(A) A protest has been submitted; and

(B) Upon review of the issues, the Director finds that there are significant disputes related to the proposed use of water.

(b) Shall schedule a contested case hearing, if within 30 days after the close of the period for submitting protests, the applicant submits the information required for a protest under OAR 690-077-0043 and requests a contested case hearing.

(3) As soon as possible after making a determination under Section (1) of this rule to refer an application to a contested case hearing, the Director shall advise the applicant, the protestant and any person requesting standing that the matter is being referred to contested case hearing, and describe the procedures each must follow to participate in the contested case hearing. Such notification to the participants shall not be considered the scheduling of the contested case hearing for purposes of the running of the 45-day time period under Section (4) of this rule.

(4) Within 45 days after the Director schedules a contested case hearing under ORS 537.153(8), the Department shall hold the contested case hearing, which shall be conducted in accordance with the provisions of ORS 183.413 to 183.470 and OAR Chapter 690, Division 02. The issues to be considered in the contested case hearing shall be limited to issues identified by the hearings officer.

(5) Notwithstanding the provisions of ORS 183.413 to 183.470 pertaining to contested case proceedings, the parties to any contested case hearing initiated under this rule shall be limited to:

(a) The applicant;

(b) Any person who timely filed a protest; and

(c) Any person who timely filed a request for standing under OAR 690-077-0043 and who requests to participate as a party or limited party in the contested case hearing prior to the start of the proceeding.

(6) The contested case proceeding shall be conducted in accordance with the applicable provisions of ORS 183.413 to 183.470 except:

(a) As provided in Sections (4) and (5) of this rule; and

(b) An interlocutory appeal under ORS 183.480(3) shall not be allowed.

(6) After the conclusion of a contested case hearing, any party may file exceptions to the hearing officer's proposed order in the manner described in OAR 690-002-0175.

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Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.153, ORS 537.170 & ORS 537.338
Stats. Implemented: ORS 537.332 - ORS 537.360
Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0047

Final Order

(1) In developing the final order, the Department shall consider all comments and protests received and all findings of the Department, but the final order need not separately address each comment and protest received.

(2) If, after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the Director determines that the proposed use does not comply with the standards set forth in ORS 543.017 or rules adopted by the Water Resources Commission under ORS 543.017 or would otherwise impair or be detrimental to the public interest, the Director shall issue a final order rejecting the application or modifying or conditioning the proposed final order to conform to the public interest. If, after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the Director determines that the proposed use would not impair or be detrimental to the public interest, the Director shall issue a final order approving the application or otherwise modifying or conditioning the proposed final order.

(3) A final order issued under Section (2) of this rule for an instream water right certificate may include any condition the Director considers necessary, but which is consistent with the intent of ORS 537.332 to 537.360. The final order may:

- (a) Approve the instream water right application for the quantity of water requested;
- (b) Approve the instream water right application for a lesser quantity of water; or
- (c) Deny the instream water right application.

(4) If the Director reduces the quantity of water requested, denies the instream water right application, or conditions the instream water right, the Director shall include a statement of findings that sets forth the basis for the reduction, denial or conditions.

(5) Upon issuing a final order, the Director shall notify the applicant and each person who submitted written comments or protests or otherwise requested notice of the final order and send a copy of the final order to any person who requested a copy and paid the fee required under ORS 536.050. Within seven days after issuing the final order, the Department shall also publish notice of the final order by publication in the weekly notice published by the Department.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.170, ORS 537.343 & ORS 537.338
Stats. Implemented: ORS 537.332 - ORS 537.360
Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0048

Final Public Interest Determination

If the presumption of public interest under OAR 690-077-0033 is overcome in the manner described in OAR 690-077-0037, then before issuing a final order, the Director or the Commission, if applicable, shall make the final determination of whether the proposed use, or the proposed use as modified or conditioned in the proposed final order, would impair or be detrimental to the public interest by considering the factors set forth in ORS 537.170(8).

Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.170 & ORS 537.338
Stats. Implemented: ORS 537.332 - ORS 537.360
Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0049

Statement of Findings

Any order or proposed order by the Director or Commission that approves, reduces, conditions or denies an instream water right application shall include a statement or findings that sets forth the basis for the approval, reduction, conditioning or denial.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358
Stats. Implemented: ORS 537.332 - ORS 537.360
Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92, Renumbered from OAR 690-077-0040; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from OAR 690-077-0044; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0051

Contested Case Hearing on Final Order

If a contested case hearing is not held prior to the issuance of the final order:

(1) Where the final order modifies or conditions the proposed final order, the applicant may request and the Director shall schedule a contested case hearing as provided under OAR 690-077-0046 by submitting the information required for a protest under OAR 690-077-0043 within 14 days after the Director issues the final order. The issues on which a contested case hearing may be requested and conducted under this paragraph shall be limited to issues based on the modifications or conditions to the proposed final order.

(2) Only the applicant or a protestant may appeal the provisions of the final order in the manner established in ORS 183.310 to 183.550 for appeal of order other than contested cases.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.170 & ORS 537.338
Stats. Implemented: ORS 537.332 - ORS 537.360
Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0052

Time Requirements

(1) Except as provided in Section (2) of this rule, the Department shall issue a final order or schedule a contested case hearing on an application for a water right referred to in ORS 537.336 within 180 days after the Department proceeds with the application under OAR 690-077-0029(2).

(2) At the request of the applicant, the Department may extend the 180-day period set forth in Section (1) of this rule for a reasonable period of time. The extension shall not exceed 180 days except upon a finding by the Director that a longer extension is reasonable and necessary.

(3) If a contested case hearing is held, the Director shall issue a final order:

(a) Within 270 days after scheduling the hearing for a contested case proceeding that involves three or more parties not including the Department; and

(b) Within 180 days after scheduling the hearing for all other contested case proceedings.

Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

(4) If the applicant does not request an extension under Section (2) of this rule and the Department fails to issue a proposed final order or schedule a contested case hearing on an application for a water right within 180 days after the Department proceeds with the application under OAR 690-077-0029(2), the applicant may apply in the Circuit Court for Marion County for a writ of mandamus to compel the Director to issue a final order or schedule a contested case hearing on an application for a water right.

(5) The mandatory timelines set forth in Division 77 for the Department to process applications shall not apply to applications filed before October 31, 1996.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.175 & ORS 537.338

Stats. Implemented: ORS 537.332 - ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0053

Issuance of Instream Water Right Certificate

After the Director issues a final order approving an instream water right, the Department shall issue a certificate for an instream water right according to the provisions of ORS 537.341. The instream water right shall date from the filing of the application with the Commission. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon and shall be issued by the Commission according to the procedures established under ORS 537.338. The Commission shall forward a copy of each certificate issued under this rule to the state agency requesting the instream water right. A certificate for an instream water right supplied by stored water shall refer to the reservoir described in the request filed under ORS 537.336.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 537.338 & ORS 537.341

Stats. Implemented: ORS 537.332- ORS 537.360

Hist.: WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

Minimum Perennial Streamflows

690-077-0054

Conversion of Minimum Perennial Streamflows to Instream Water Rights

(1) Within 21 days of the adoption of these rules, the Commission shall request publication in the Secretary of State's bulletin and shall mail to the appropriate Department mailing lists notice of proposed conversion, and a list of all existing minimum perennial streamflows established on any waters of this state prior to June 25, 1988 separated as follows:

(a) Those flows the Commission intends to convert without change to instream water rights;

(b) Those flows the Commission intends to condition with OAR 690-077-0015(12) and schedule a hearing before converting to instream water rights.

(2) Any person or agency, including the Department, may request a hearing on any of the conversions proposed within 60 days of publication in the Secretary of State's bulletin or the mailing of notice.

(3) Requests for hearings shall be filed individually for specific minimum perennial streamflows and shall be substantiated by evidence that:

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(a) The conversion will take away or impair permitted, certificated or decreed water rights to the same source of water and a statement of what conditions, if any, could be attached to the conversion to avoid the problems identified, or what clarifications are necessary;

(b) The existing minimum perennial streamflow is not for a public use or exceeds the amounts necessary for the public use; and/or

(c) The conversion from a minimum streamflow to an instream water right would not be in the public interest.

(4) The Director shall issue an instream water right certificate for all minimum streamflows where no complete request for hearing was received. These instream water rights shall contain the priority date of the minimum streamflow from which they were created.

(5) The Director shall review all requests for hearings. The person making the request shall bear the burden of establishing the need for a hearing. After completing this review, the Director shall recommend to the Commission:

(a) To approve the conversion; or

(b) To conduct a hearing under ORS 537.170.

(6) The Commission shall act on the Director's recommendation in accordance with OAR 690-077-0046.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 537.332 - ORS 537.360

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1996, f. & cert. ef. 1-31-96, Renumbered from OAR 690-077-0050; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0055

Disposition of Minimum Perennial Streamflows

Following the conversion of a minimum streamflow, the Commission shall retain the original minimum streamflow until it determines through basin program amendment that no public benefit is derived by maintaining both an instream water right and a minimum streamflow.

Stat. Auth.: ORS 536 & ORS 537

Stats. Implemented: ORS 536 & ORS 537

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88

Instream Transfers and Leases

690-077-0065

General Provisions

(1) The Department shall promote and facilitate potential instream transfers and leases under ORS 537.348 that would provide benefits for public uses.

(2) The Department encourages irrigation districts and other water purveyors to develop single lease applications that pool individual water rights and ownerships that are to be leased during the same term.

(3) Department personnel shall review all instream transfer or lease applications pursuant to OAR 690-077-0070 through OAR 690-077-0079 to assure that they comply with these rules and, if possible, to develop conditions to prevent enlargement of the original right or injury to other water right owners.

Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

(4) Completed lease applications submitted pursuant to OAR 690-077-0076, including signatures of lessor and lessee (if applicable), and all necessary attachments or exhibits, must be received by the Department's Salem office prior to July 1, or for year around uses, must be received prior to October 1. Completed lease applications received after this date shall be returned or, at the request of the applicant, be processed to be effective for the next calendar year. At the discretion of the Director, an application may be received and processed after this date during the current year.

(5) The Department may compile descriptive information to assist all parties in addressing technical issues related to instream transfers and leases, including but not limited to describing injury and enlargement issues, determining whether a proposed instream water right would support a public use, setting the location of a proposed instream water right and making agreements for measuring and monitoring the instream water right. The descriptive information shall not restrict new leases, but shall offer options that have been used in earlier leases to ensure compliance with OAR Chapter 690, Division 77.

(6) The Department may prepare lease application forms that include the requirements listed in OAR 690-077-0076(3) and any additional information the Department deems necessary to comply with the policies of OAR Chapter 690, Division 77 and to reflect the nature of the water rights subject to being leased instream. For example, a special form could be prepared for an irrigation district to sponsor a single lease application that involved multiple water right owners.

Stat. Auth.: ORS 536.027 & ORS 537.332 - ORS 539.360

Stats. Implemented:

Hist.: WRD 1-1995, f. & cert. ef. 2-14-95; WRD 8-2001, f. & cert. ef. 12-14-01,

Renumbered from OAR 690-077-0078; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0070

Application for Instream Transfer

(1) As provided in ORS 537.348(1), any person may apply for an instream transfer, including a time-limited instream transfer.

(2) In addition to the transfer application requirements described in OAR 690-380-3000, an instream transfer application shall include the following information:

(a) Public use(s) for which the instream right is desired;

(b) Description of the time periods of the instream use and quantity of water to be transferred to instream use;

(c) The location of the proposed instream use. If a reach or lake level is requested, identify the upstream and downstream extent of the reach or the appropriate lake level;

(d) Recommendations, if any, for conditions on the instream water right that would avoid taking away or impairing existing permitted, certificated or decreed rights. Such conditions may include, but are not limited to the instream flow levels in cfs per month or total acre feet, the effective reach(es) or lake levels of the instream flow, measuring locations and the strategy for monitoring the instream flow or lake levels;

(e) If an instream water right exists on the same reach(es) or lake, or on portions thereof, a statement of whether the proposed conversion is intended to add to the amounts of the existing instream water rights or to replace a later priority instream right, or portion thereof, with an earlier priority right;

(f) For a time-limited instream transfer, the duration or number of years for which the time-limited instream transfer is being requested.

Note: These rules were filed with the Office of the Secretary of State and took effect on February 1, 2012. The rules are subject to non-substantive modifications such as renumbering and correction of typographical errors pursuant to ORS 183.360(2)(a) when published by the Secretary of State.

(3) The Department may require additional information needed to complete the evaluation of the proposed conversion.

Stat. Auth.: ORS 536 & ORS 537

Stats. Implemented: ORS 536 & ORS 537

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0075

Processing an Instream Transfer Application

A proposed instream transfer, including a time-limited instream transfer, of a water use subject to transfer to an instream water right shall be processed pursuant to the water rights transfer rules in OAR Chapter 690, Division 380 and the following provisions:

(1) The Department shall provide notice of the proposed instream transfer pursuant to OAR 690-380-4000, and to affected Indian tribes.

(2) In addition to the assessment described in OAR 690-380-4010, the Department's preliminary determination shall include an assessment of whether:

(a) The amount and timing of the proposed instream flow is allowable within the limits and use, including return flows, of the original water right; and

(b) The proposed reach(es) is (are) appropriate considering:

(A) Instream water rights shall begin at the recorded point of diversion;

(B) Locations of return flow. Where return flows occur at a definite point, a substantial distance below the point of diversion, an instream water right may be defined by more than one reach, for example one reach from the point of diversion to the location of the return flow and another from this point to the mouth of the stream;

(C) The location of confluences with other streams downstream of the point of diversion, which shall be considered in accordance with OAR 690-077-0015(8);

(D) Any known areas of natural loss of streamflow to the river bed. Where an instream water right passes through an area of known natural loss several reaches may be required to incorporate the reduced flows available, in accordance with paragraph (2)(c)(B) of this rule.

(c) The proposed flow(s) is (are) consistent with OAR 690-077-0015(7), (8) and (11), shall provide a public benefit for an instream use, and be appropriate considering:

(A) Return flows which shall be subtracted from the instream water right at the old point of diversion, unless the return flows occur at a definite point a substantial distance below the old point of diversion, in which case up to the entire amount of the diversion may be allowed between the point of diversion and the point(s) of return flow; and

(B) Where an instream water right passes through an area of known natural losses these losses shall be prorated between the instream water right and the balance of the available flow.

(3) An instream transfer shall be approved if the Department determines that the transfer is consistent with OAR 690-380-5000, and Section (2) of this rule.

(4) The Department shall issue a final order consistent with the preliminary determination described in OAR 690-380-4010 and Section (2) of this rule if no protests are received under OAR 690-380-4030.

(5) Upon approval of an instream transfer, the Department shall issue a permanent instream water right certificate. However, upon approval of a time-limited instream transfer, the Department shall issue a final order with a specific date of expiration or other conditions for termination for the instream water right and suspend the use of the original right during the effective period of the instream water right. A copy of the certificate or final order shall be

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mailed to the applicant and as appropriate to affected Indian tribes, ODFW, DEQ and Parks. The Director shall also issue a new certificate for any remaining right for the existing use as appropriate.

Stat. Auth.: ORS 197, ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 197, ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338, ORS 537.356 & ORS 537.358

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0076

Application for an Instream Lease

(1) A holder of any of the following types of water rights may enter into a lease to convert all or a portion of a water right to an instream water right for a specified time period not to exceed five years:

(a) Surface water rights for beneficial use or storage established by a water right certificate or an adjudication under ORS Chapter 539 as evidenced by court decree; or

(b) A surface water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Director under ORS 537.250, or transfer application for which an order has been issued under ORS 540.530 approving the change and for which proper proof of completion of the change has been filed with the Commission;

(c) Secondary water rights for the use of stored water established by permit, certificate or court decree; or

(d) The conserver's portion of conserved water allocated under ORS 537.445 to 537.500.

(2) The parties to the lease application shall include but are not limited to:

(a) The holder(s) of the subject water right(s) as the lessor(s);

(b) Any irrigation district or similar organization as defined in ORS Chapters 545, 547, 552, 553, or 554 which conveys water to the subject water right and the owner of any storage facility which is the source of the water, as co-lessor, if applicable; and

(c) The lessee, if different than the Department.

(3) At a minimum, the lease application shall include:

(a) Names and signatures of the parties;

(b) A description of the water right(s) to be leased. If only a portion of a water right will be leased, a clear description, including maps if necessary, of the portion to be leased;

(c) Rate, total volume, timing and location of the instream right, including any necessary conditions to avoid enlargement of the original right or potential injury to other water right holders;

(d) A description of how the lease will serve a public use or uses;

(e) If an instream water right exists on the same reach(es) or lake, or on portions thereof, a statement of whether the proposed lease is intended to add to the amounts of the existing instream water rights or to replace a later priority instream right, or portion thereof, with an earlier priority right.

(f) Provision insuring the original use will be suspended;

(g) The term of the lease;

(h) A statement by the lessors verifying that the water rights described in Subsection (3)(b) of this rule have been used under the terms and conditions of the rights during the last five years, or

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as an instream water right, or an explanation why the water right is not subject to forfeiture under ORS 540.610. As an alternative, an irrigation district or other water purveyor may provide evidence for owners, verifying delivery of water for the lands appurtenant to the rights to be leased;

(i) If the lessor(s), as identified in Subsection (2)(a) of this rule, is not the deeded landowner to which the water right is appurtenant, sufficient documentation to demonstrate that the lessor(s) is authorized to pursue the instream lease. Such documentation shall include:

(A) A notarized statement from the landowner consenting to the lease and a copy of the recorded deed;

(B) A water right conveyance agreement(s) as defined in OAR Chapter 690, Division 380 and a copy of the recorded deed for the landowner at the time the water right was conveyed; or

(C) Other documentation that demonstrates to the Department's satisfaction that the lessor(s) is authorized to pursue the lease in the absence of the consent of the landowner.

(j) The name and address of any water purveyor that conveys water to the water right(s) described in Subsection (3)(b) of this rule.

(4) Lease applications shall conform with applicable provisions of OAR 690-077-0015.

Stat. Auth.: ORS 536.025 & ORS 536.027

Stats. Implemented: ORS 537.332 – 537.360; ORS 537.455 – 537.500

Hist.: WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0077

Processing an Instream Lease Application

(1) On receipt of a lease application, the Department shall include notice of the application in its weekly public notice mailing list and post it in the applicable watermaster office.

(2) A written assessment shall be prepared by the watermaster or other Department field staff of whether the lease application meets the requirements of these rules to suspend the original water use and avoid injury or enlargement;

(3) When the Department initially reviews a lease application, particular attention shall be given to potential sources of enlargement or injury. Examples include but are not limited to: issues related to rate and duty, or total volume being changed; the allotment of stored water available to the owner of a storage right in the year leased; the role of return flows; conveyance losses downstream of the original point of diversion; potential issues related to junior users, especially, downstream of the original point of diversion; potential issues related to the priority date of instream water rights; whether a proposal to lease a permit for stored water would result in converting undeveloped rights; and issues potentially arising from water users that share a conveyance system. Any allegations of injury to existing water rights or enlargement of the original water right that are received within 21 days of the date of mailing of the weekly public notice shall be reviewed by the parties to the lease before the Department issues an order approving or denying the lease application. If no comments are received the Department may presume that no injury or enlargement will result from the proposed lease.

(4) If the Department determines that the proposed lease may cause injury to existing water rights or enlargement of the original right, considering issues raised under Section (3) of this rule, the order approving the lease application shall be conditioned to prevent the injury or enlargement. If injury or enlargement cannot be prevented the Department shall deny the lease application. However, if an order approving the lease application has already been issued, and the Department later finds injury or enlargement, the Department shall issue an order modifying or terminating the lease.

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(5) If a lease is for more than one year the parties shall review any allegations of injury or enlargement that are received through December 31 of the preceding calendar year of the lease, to determine whether modifications of the lease order are warranted for the remainder of the term of the lease. If injury or enlargement claims are valid and cannot be prevented the Department shall issue an order terminating the lease.

(6) In the event that the Department receives a claim of injury or enlargement after issuing an order approving a lease, the Department shall notify the parties. If the Department determines the claim is valid, it shall not distribute water in a way that would cause the injury or enlargement to continue.

(7) The description of the reach or point of an instream water right provided in response to OAR 690-077-0076(3)(c) shall conform to the provisions of 690-077-0015(7) and (8) and 690-077-0075(2).

(8) Except as provided in OAR 690-077-0079, a lease involving a water right that is limited to a season of use or a duty of water for a season or year shall only allow the use of the original water right or the instream right, not both, during any one season unless the source is from stored water.

(9) If the water right being leased has an associated primary or supplemental water right, the lessor(s) shall assure that neither right is being exercised under the original right during the term of the lease unless the lease is for the use of water legally stored under a supplemental water right. In the case of supplemental stored water, an order approving a lease may be issued that does not restrict the use of the primary source.

(10) Nothing in these rules shall be interpreted to prevent the renewal of a lease application or to prevent outside agreements for longer terms that will be activated by an order approving a lease when needed to establish an instream water right in a particular season or at a particular time. A renewal shall be subject to the provisions of this rule.

(11) Water rights for which an order has been issued approving a lease application under OAR 690-077-0077 are considered to be beneficially used for each year that the lease establishes an instream water right.

(12) A lessee has the same standing as the lessor for all purposes regarding management and enforcement of the instream water right.

(13) Copies of orders approving a lease application shall be distributed to all parties, filed with the appropriate watermaster, and tracked on the Department's water rights information system.

(14) Leases that are executed under the provisions of ORS 536.720 to 536.780 "Emergency Water Shortage Powers" shall not be subject to provisions of these rules. Those leases are covered by OAR chapter 690 division 19.

(15) Except as provided in Sections (4) and (5) of this rule, orders approving lease applications shall only be terminated by a superseding order or by specific provision of the originating order approving the lease application.

Stat. Auth.: ORS 536.027 & 537.332 - 539.360

Stats. Implemented:

Hist.: WRD 1-1995, f. & cert. ef. 2-14-95; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 4-2006, f. & cert. ef. 10-2-06; WRD 1-2012, f. & cert. ef. 2-1-2012

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690-077-0079

Split Season Use Instream Leasing

(1) An applicant for a split season use lease of water shall provide the information and follow the lease process described under OAR 690-077-0076 and OAR 690-077-0077.

(2) In addition to the application requirements described in OAR 690-077-0076, split season use leases applications shall:

(a) Be submitted to the Department two weeks prior to water being used either for the existing purpose or for the proposed instream purpose.

(b) Describe when the water will be used for the existing purpose and when the water will be used for the instream purpose.

(A) The existing water use and the instream use shall not be concurrent. However, a portion of a water right appurtenant to one piece of land may undergo split season use, while another portion appurtenant to a different piece of land may undergo only one type of use, or a different time period for split season use.

(B) The type of use under a split season use may be changed only once during a calendar year, except for full-year uses which may have a single instream use period and two existing use periods.

(3) The holders of the water rights shall measure and report the use of the existing water right and instream water right to the satisfaction of the Department, or provide for third party measurement and reporting to the satisfaction of the Department. Pursuant to ORS 537.332(3), the Department holds instream water rights in trust for the benefit of the people of the State of Oregon.

(4) The water right lessor or lessee shall contact the watermaster or other Department field staff to determine the necessary measurement and reporting requirements associated with leasing a water right. The complete lease application shall include:

(a) Location(s) and type(s) of measuring device(s);

(b) Frequency of measurement;

(c) Parties responsible for the respective measurements; and

(d) Amount of water proposed to be used, listed by rate and duty for the existing purpose and the instream purpose, including monthly or partial season rate or duty limitations, if appropriate.

(5) The Commission shall review the split season use leasing program no later than the year 2014 to determine if any changes should be made in the program. [Note: ORS 537.348(3) sunsets on January 2, 2008.]

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 537.332 -- ORS 537.360

Hist.: WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

Miscellaneous Provisions

690-077-0080

Cancellation or Waiving of an Instream Water Right

(1) There is a rebuttable presumption that an instream water right, or a portion thereof, that has not been put to a public use for five successive years in which water was available is forfeited.

(2) Upon making a preliminary finding that the instream water right has been forfeited the Director shall notify DEQ, ODFW, Parks, and those persons and agencies on the Department's

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weekly mailing list of the Department's findings and of its intent to cancel the instream water right. The Department shall also publish the notice in the Secretary of State's bulletin once, and in a local newspaper one day a week for two weeks.

(3) Any person may file a protest within 60 days of publication in the Secretary of State's bulletin or the local news paper.

(4) If no protest is filed in the 60 day period, the Commission shall proceed with the process outlined in ORS 540.641(1).

(5) If a protest is filed in the 60 day period, the Commission shall proceed with the process outlined in ORS 540.641(2).

(6) An instream water right established under ORS 537.336 through 537.338 (OAR 690-077-0020) may be canceled pursuant to ORS 540.621 only upon the written certification from the original applicant agency(ies) that the instream water right has been abandoned. Proper notification of the public shall proceed as outlined in Section (2) of this rule.

(7) An instream water right shall not be subject to forfeiture due to non-use when water was not available.

Stat. Auth.: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338 & ORS 537.356 - ORS 537.358

Stats. Implemented: ORS 536.025, ORS 536.027, ORS 536.220, ORS 536.300, ORS 536.310, ORS 537.338, ORS 537.356 & ORS 537.358

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

690-077-0090

Drought Emergency Provisions

An instream water right established under the provisions of ORS 537.332 to 537.360 shall be subject to the provisions of ORS 536.730.

Stat. Auth.: ORS 536 & ORS 537

Stats. Implemented: ORS 536 & 537

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88

690-077-0100

Precedence of Future Uses

(1) The applicants for a proposed multipurpose storage project may petition the Commission to establish precedence over an instream water right created through OAR 690-077-0020.

(2) An applicant for a right to use water for municipal purposes may petition the Commission to establish precedence over an instream water right created through OAR 690-077-0020.

(3) A municipal applicant, as defined in ORS 537.282, for a hydroelectric project, may petition the Commission to establish precedence over an instream water right created through OAR 690-077-0020.

(4) Within six months of the receipt of the petition the Department shall conduct a public hearing in accordance with ORS 537.170. The hearing and decision on precedence may occur before the final decision on the permit.

(5) After the public hearing the Commission shall enter an order to:

- (a) Approve the requested precedence;
- (b) Approve the requested precedence conditionally; or
- (c) Deny the requested precedence.

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(6) The Department shall also publish a statement of findings that explains the basis for the decision made in Section (5) of this rule.

Stat. Auth.: ORS 536 & ORS 537

Stats. Implemented: ORS 536 & ORS 537

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 8-2006, f. & cert. ef. 10-2-06

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