Attachment 2a

Individual Written Comments

Below is a tabulation of the written and oral comments received during the public comment period. This list includes only individual comments and not those submitted as a form letter (see Attachment 2b).

Name	Stated Affiliation
Antonio Chiono	RAC Member; Confederated Tribes of the Umatilla Indian Reservation (See attachment 1)
April Snell	RAC Member; Oregon Water Resource Congress
Bryce Withers	CWRE, Water Right Services, Inc.
Chris Hall	RAC Member; Water League
Gen Hubert	RAC Member; Deschutes River Conservancy
James Fraser	RAC Member; Trout Unlimited
Jeff Stone	RAC Member; Oregon Association of Nurseries
Jeremy Austin	RAC Member, Central Oregon LandWatch
Jim Powell	City of Bend resident
Kimberley Priestley	RAC Member; WaterWatch of Oregon
Laura Schroeder	Schroeder Law Offices, submitted on behalf of Oregon Groundwater Association (represented on RAC by Greg Kupillas)
Mary Powell	League of Women Voters of Deschutes County
Michael Martin Mark Landauer Adam Denlinger Mike Buettner Jason Green	RAC Member; Lobbyist, League of OR Cities RAC Member; Lobbyist, Special Districts Association of Oregon Chair, Oregon Water Utilities Council Vice Chair, Oregon Water Utilities Counties Executive Director, Oregon Association of Water Utilities
Nunzie Gould	Deschutes County resident
Richard Smith	Groundwater Advisory Committee member; Domestic well owner
Rick Parsons	CWRE, Parson Water Consulting
Ryan Krabill	RAC Member; Oregon Farm Bureau

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February 6, 2026

Laura Hartt
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
WRD_DL_rule-coordinator@water.oregon.gov

Re: Notice of Proposed Rulemaking 2025-2026 Water Rights Rulemaking

To whom it may concern,

Central Oregon LandWatch ("LandWatch") provides these comments in response to the Oregon Water Resource Departments Notice of Proposed Rulemaking 2025-2026 Water Rights Rulemaking ("rulemaking").

LandWatch is an Oregon non-profit, public interest organization of about 1100 members. Its offices are located in Bend, Oregon. LandWatch's mission is to defend and plan for Central Oregon's livable future, and it has advocated for the preservation of natural resources in Central Oregon for 40 years.

These comments focus on the proposed rule changes for OAR Chapter 690 Divisions 310, 77, 18, & 380. Note LandWatch has previously provided comments on each of these rule divisions as part of the Rules Advisory Committee.

I. Support for Addressing Land Use Issues in this Rulemaking Process

LandWatch wants to reiterate our support of increasing coordination across state agencies on the intersection of land use and water use and appreciate Oregon Water Resource Department's ("OWRD") attention to this topic throughout the rulemaking process.

Our state land use system is unique in the country for how it prioritizes farm and forest uses in rural areas, while directing population growth inside cities' urban growth boundaries. Among others, this rulemaking provides an important opportunity for the two agencies (OWRD and DLCD) to grapple with questions related to the sequencing of water right decision-making and land use decision-making, how water permitting might better align with the goals of the land use system, and overall improving how these two areas of regulation interact.

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As a general example of an opportunity to better improve how these two areas of regulation interact, consider how land use conditions have changed in the Upper Deschutes Basin over the past 120 years since water rights were first established. In 1900, the Basin had a small population and water rights were granted for the beneficial use of irrigated agriculture. Today, while productive irrigated agriculture is still an important part of the regional economy, many of the lands first irrigated in 1900 have been converted to other land uses. Some are within urban growth boundaries. Some have been taken out of agricultural production and rezoned or developed with non-farm, often residential uses, yet still possess agricultural irrigation water rights. We encourage the Department to work with DLCD to coordinate their existing regulatory authority to ensure that our state's public water resources are allocated in line with the goals of the land use system.

We support moving forward with addressing these important issues as part of this rulemaking process.

II. OAR 690-310

OAR 690-310-0040(1)(a)(L)
The rulemaking proposes to strike from rule the language "or a receipt signed and dated by a local government official acknowledging the land use information request was received by the local planning Department." LandWatch supports this change.

Further, LandWatch generally supports the proposed process outlined by this subsection, relying on the authorities in OAR 690-005-0035 and the 1990 Water Resources Department's State Agency Coordination Land Use Planning Procedures Guide ("Guide"). Given it is over 35 years old, we suggest the Department prioritize updating the Guide to ensure it meets modern needs.

However, as we shared in our comments during the RAC process, the proposed rule language is still problematic.

The proposed rule language would amend the application requirements for a permit to appropriate water concerning the required compliance with local land use regulations required by ORS 197.180.

ORS 197.180(1) requires that "state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use: (a) In compliance with the goals, rules implementing the goals and rules implementing this section; and (b) In a manner compatible with acknowledged comprehensive plans and land use regulations."

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The proposed language does not adequately ensure the Department will "take actions" "in a manner compatible with acknowledged comprehensive plans and land use regulations" as required by ORS 197.180(1) because the proposed language, OAR 690-005-0035, and the Guide, all omit the critical language "and land use regulations."

Comprehensive plans are guiding policy documents, but their language is often vague or aspirational, often including language like "The County should do…" or "Seek opportunities to do…" or "Support efforts to do…" More regulatory local land use law is most often found in other local land use regulations, usually a local zoning code or local development code. Therefore, it is critical to add the language "local land use regulations" in addition to "acknowledged comprehensive plans[s]" in order to ensure that proposed water permits are reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1).

OAR 690-310-0270(2)(d)

LandWatch supports the proposed language. OWRD should not approve a water permit application if a LUBA appeal is ongoing. Many local land use decisions are not final until appeals are resolved. *See* ORS 197.625(1)(b) (concerning the effect of appeal on post-acknowledgment plan amendment decisions); ORS 197.845 (concerning stays of local land use decisions pending appeal at LUBA). Thus, a land use approval has not been "obtained" until the appeals process is exhausted.

Further, once a land use appeal is "complete," a water permit extension should not be granted unless the completion of the land use appeal results in the sought land use application being approved. Many appeals of land use decisions approving a proposed land use result in remand or reversal of the approval. Conversely, many appeals of land use decisions denying a proposed land use are affirmed. In those cases, OWRD should not continue reviewing a water permit application, and should deny the application under ORS 197.180(1).

Lastly, the proposed language would allow for an extension of up to one year to exhaust the administrative appeal process for a land use approval. LandWatch is fine with the proposed language but would suggest that if one year is deemed to be insufficient, a more discretionary timeline could suffice. For example, in place of the one year extension language, the rules could state something along the lines of "a reasonable period of time, as determined by Director, that allows exhaustion of any land use appeals."

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General Comments on Land Use and OAR 690-310

We want to emphasize that in order to comply with ORS 197.180(1), the proposed rule language should require a final land use decision from a local government before issuing a permit to appropriate water. This includes exhaustion of the administrative appeal process for a land use approval. We would recommend including this requirement as a criteria for approval in the PFO subsection, 690-310-0150, or other subsection that OWRD deems appropriate.

III. OAR-690-77

OAR-690-77-0010(35)

LandWatch supports the removal of the previously proposed subsection (35).

OAR-690-77-0015(4)

LandWatch recommends removing 0015(4) entirely.

ODFW is the state agency charged with managing Oregon's fish and wildlife and uniquely has the expertise to determine the flows necessary to support conservation, maintenance and enhancement of fish life, wildlife, fish and wildlife habitat or any other ecological values. As such, in place of ENAF, LandWatch recommends that OWRD rely on ODFW's requested flows as a clear, consistent and defensible basis for instream water rights applications.

There are significant concerns with relying on ENAF to protect public uses, including conservation, maintenance and enhancement of fish life, wildlife, fish and wildlife habitat and any other ecological values. Among the concerns raised during the RAC process, relying on an average fails to consider important daily and weekly fluctuations in stream flows that support fish, wildlife and other ecological values.

For example, Tumalo Creek in Central Oregon sees temporal changes in flows that can vary significantly (See figure 1 and 2 below). Here, even a daily average fails to capture the flows that are necessary to protect the full ecological value of a stream—let alone month or half month averages.

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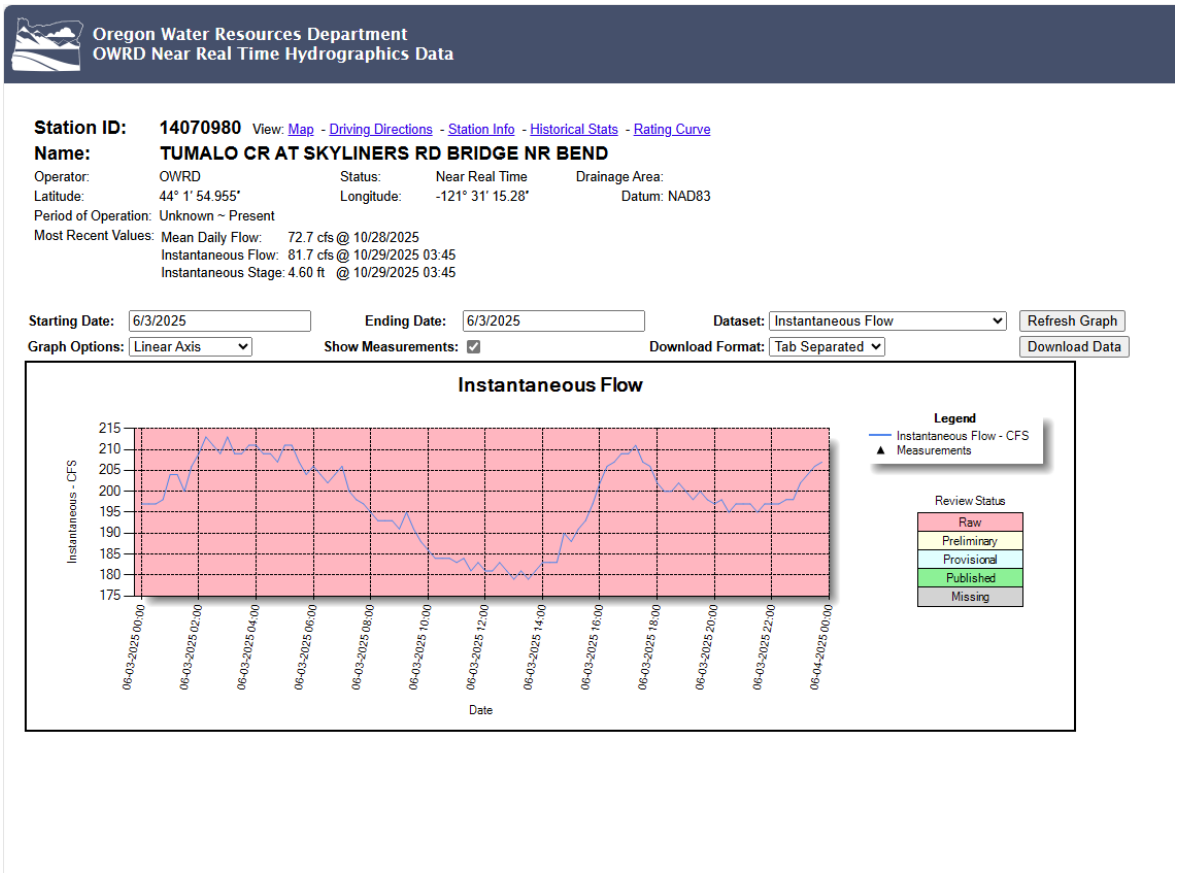

Figure 1. Tumalo Creek flow fluctuations over a 24-hour period in June 2025. Flows peaked ranged from nearly 215 cfs to below 180 cfs, a fluctuation of ~35 cfs over 24 hours. The average flow as calculated by OWRD's Near Real Time Hydrographics Data webpage for the same time period was ~198 cfs.

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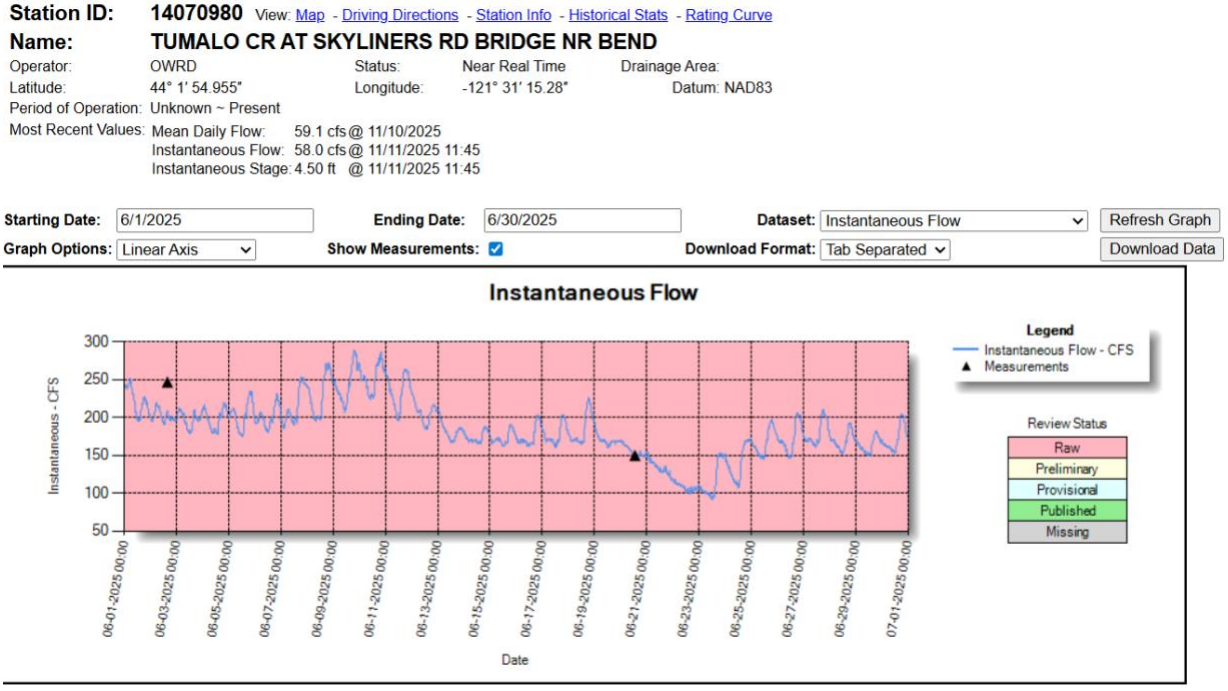

Figure 2. Tumalo Creek flow fluctuations over a 1-month period in June 2025. Flows ranged from more than 280 cfs to below 100 cfs, a fluctuation of ~ 180 cfs. The average instantaneous flow as calculated from OWRD's Near Real Time Hydrographics Data for the same time period was ~184 cfs.

OAR-690-77-0015(5)(a)-(c)

LandWatch supports the deletion of this section.

OAR-690-77-0020(3)

LandWatch strongly supports the removal of the proposed language in previous versions of the proposed rules that required special notification to the Special Districts Association of Oregon prior to ODFW filing an instream water right application.

OAR 690-077-0054

LandWatch has concerns with the language in this section and request that OWRD confirm that this section aligns with statute, especially ORS 537.346, which says that minimum perennial streamflows "shall be converted to in-stream water rights."

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OAR-690-77-0075
LandWatch requests that OWRD verify this process is consistent with out-of-stream water right application processing requirements. If it is not, either strike this section, or update Div 380 to make it consistent with the process outlined for instream transfers.

OAR-690-77-0080
LandWatch supports removing this section as it does not make sense and conflicts with other rule divisions (e.g. Division 17).

IV. OAR 690-018

General Comments on Land Use and OAR 690-018
Please see our comments on Div 310 above and incorporate into Div 018, where applicable. This includes, but is not limited to, subsections:

- **OAR-690-018-0040(22)(a)**
- **OAR-690-018-0090(2)(c)**
- **OAR-690-018-0050(3)(c)**

Comments on Groundwater Rights and ACW
We strongly support the removal of language that was proposed in previous versions of the draft rules that would have expanded the ACW program to include groundwater rights. This includes removal of previously proposed language in subsections:

- **OAR-690-018-0050(7)(c)(C)(i)**
- **OAR-690-018-0050(7)(c)(D)(ii)**
- **OAR-690-018-0065(2)(c)**
- **OAR-690-018-0065(3)(b)**

V. OAR-690-380

General Comments on Land Use and OAR 690-380

As stated in our comments on Div 310, we want to emphasize that in order to comply with ORS 197.180(1), the proposed rule language should require a final land use decision from a local government before approving a proposed transfer. This includes exhaustion of the administrative appeal process for a land use approval. We would recommend this requirement be included as a

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criteria for approval in the PFO subsection, 690-380-4010, or other subsection that OWRD deems appropriate.

OAR-690-380-3000(19)
See LandWatch's comments above on OAR 690-310-0040(1)(a)(L). The current language does not adequately ensure the Department will "take actions" "in a manner compatible with acknowledged comprehensive plans and land use regulations" as required by ORS 197.180(1) because the rule omits the critical language "and land use regulations."

Further, this rule division includes an exception to demonstrating compatibility with local land use regulations for transfers that meet four specified criteria. LandWatch questions the merits of the exceptions and ask OWRD to reconsider retaining this in rule.

The exception applies to transfers on lands zoned EFU or within irrigation districts. In our experience in the Deschutes Basin, these lands are both where the majority of water rights exist, and also where many of the most controversial and complicated land use disputes arise. Further, there is nothing in the permit amendment statute that allows for these exceptions. These factors lead us to question why these lands are excepted from the otherwise applicable requirement for land use compatibility for water right transfers.

We understand that the other three criteria mean the exception does not apply to all proposed transfers in EFU zones and irrigation districts, as some of those transfers involve a change other than in the place of use, a placement or modification of a structure, and do not involve irrigation water uses only. Still, we question how many proposed transfers, and what volume of our basin's precious water resources, are exempt from land use compatibility requirements largely because they are proposed in EFU zones or in irrigation districts.

Many lands within Deschutes Basin irrigation districts are *not* zoned EFU. Some of these lands are inside urban growth boundaries; some are zoned for rural residential use. Transfers of water between these lands should be required to demonstrate compatibility with local land use regulations. As an example, consider a proposed transfer of irrigation water historically applied to rural EFU land to an irrigation use inside an urban growth boundary. A showing of compatibility with local comprehensive plans and land use regulations is likely more important to fulfill the Departments responsibilities under ORS 197.180 in this scenario than other, non-excepted situations.

We recommend the Department require a showing of compatibility with local comprehensive plans and land use regulations for all transfers and not continue to provide an exception to this

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showing for certain lands, especially absent a rationale for why this exemption supports the State's responsibility to steward our public water resources.

OAR-690-380-7100(14)
See comments on OAR-690-380-3000(19) above.

OAR-690-380-8003(2)(d)
See comments on OAR-690-380-3000(19) above.

VI. Conclusion

Thank you for considering these comments and please do not hesitate to reach out if you have any questions.

Sincerely,

Jeremy Austin
Wild Lands & Water Program Director
Central Oregon LandWatch
2843 NW Lolo Dr St. 200
Bend, OR 97703

James Fraser
Oregon Policy Director, james.fraser@tu.org, (971) 278-8085

February 6, 2026

Oregon Water Resources Department
725 Summer St. NE A
Salem, OR 97301
Via email to laura.a.hartt@water.oregon.gov

Re: Trout Unlimited input for Rule Revision related to Water Rights, Contested Cases, and Forfeiture (Notice of Proposed Rulemaking filed 12/27/2025)

Hi Laura,

Trout Unlimited (TU) is a nonprofit dedicated to conserving cold-water fish such as trout, salmon, and steelhead, and their habitats. We work closely with water right holders, tribes, partner organizations, and agencies on instream flow restoration efforts in Oregon, including related policy.

As you know, we served on the rulemaking advisory committee (RAC) for this Oregon Water Resources Department (WRD) rulemaking. We provided verbal comments and suggestions to the Department in RAC meetings, as well as written comments dated November 7, 2025 and December 5, 2025.

We have reviewed the Notice of Proposed Rulemaking for "Updates to Water Right Transactions, Contested Cases, and Forfeiture Rules (filed 12/27/2025) and provide the following input for the Department's consideration in preparing a rule package for the Water Resources Commission's approval:

1. **TU generally supports the revisions in this rule package, but we disagree with some of the constructive edits that have been removed in the final proposed language.**

TU supports many of the clarifications and refinements in this rule package. WRD staff handled this rulemaking capably, were incredibly organized in documenting RAC input, and were responsive to feedback throughout the process. We appreciate the Deparment's attention to detail in this effort.

TU works closely with landowners on instream flow restoration projects, and we appreciate the instances where WRD have clarified language in rule divisions related to instream transfers (Division 380), the Allocation of Conserved Water program (Division 18), as well as instream leases and instream water rights (Division 77). TU's verbal and written comments have already provided specific input on numerous rule provisions, and we will not repeat those here because many have been handled in the final rule package to our satisfaction.

However, there are some areas where TU disagrees with the Department's final proposed rules. Late in the rulemaking process, the Department notified RAC members that a number of edits not directly tied to 2025 legislation would be removed from the rule revision due to some concern about the scope and scale of the rulemaking. In our view, this is unnecessary, inefficient, and inconsistent with how WRD set up the RAC and this process. Indeed, WRD's invitation to RAC service expressly stated:

> "The purpose of this rulemaking is to implement two House Bills (HB) passed during the 2025-2026 Legislative Session: HB 3342 (2025) and HB 3544 (2025). These two bills modernize and

TROUT UNLIMITED

> streamline water rights transactions (HB 3342) and contested case processes (HB 3544). The Department also will take the opportunity to make other policy and process improvements to impacted rule divisions. The agency also will continue the prior rulemaking efforts for Oregon Administrative Rules (OAR) Chapter 690, Division 77, pertaining to instream leases."[1]

Similarly, at the first RAC meeting, WRD staff were clear that the rulemaking would address 2025 legislation *and* other policy adjustments, process improvements, and other conforming edits. Meeting materials from that meeting set an expectation that the rulemaking would include "policy & process improvements for impacted rule divisions," including policy changes that are "outside the legislation."[2]

RAC members knew—from before the first RAC meeting—that the rule revision would include edits beyond conforming amendments related to the 2025 legislation. This RAC process required significant capacity and resources from WRD staff—and RAC members. In TU's view, it is appropriate and timely for WRD to make adjustments in the rules which will provide clarity and fair outcomes, even if not directly required by the 2025 bills. We wish to focus our input about this point on two provisions in Division 380 which WRD should revise for the final rule package (below).

2. **WRD should clarify two provisions regarding sub-irrigation in Division 380 which have long treated instream transfers (and water right holders interested in pursuing them) unfairly.**

Trout Unlimited respectfully requests that WRD revise OAR 690-380-0100(2)(c) and OAR 690-380-2200(2) by adding a clarification that landowners may transfer water instream *from sub-irrigated acres*. In this section, we have provided background information on the importance and on-ground implications of this issue, followed by a table showing the specific recommended edit.

TU's Oregon Flow Restoration Program works to protect instream flow in collaboration with private landowners in five basins throughout Oregon. In our experience, WRD's current definition and application of the enlargement language as stated in 690-380-0100 2(c) ("failing to keep the original place of use from receiving water from the same source") has resulted in an unfair reduction in the amount of water we can protect instream because it does not differentiate between intentional application of water and natural sub-irrigation and groundwater influences.

In practice, we see acres removed from eligibility for flow restoration transactions that are deemed by watermasters to be sub-irrigated. This means that random portions of the property or fields *are eligible to irrigate but ineligible for transfer instream.* Because of the often patchwork pattern of these areas of sub irrigation, it is impractical for the landowner to separately irrigate the acres that are ineligible for instream transfer, leaving them with underutilized acres.

For example, a landowner and TU may apply to lease water rights in stream from a 40-acre field that is usually flood irrigated. After watermaster review we may be asked to remove a 2.5 acre polygon in the NW corner of the field that is low lying in the flood plain and a 5 acre strip of land adjacent to the ditch in the SE corner of the field that is deemed to receive sub-irrigation from a leaky ditch that passes through the property. This outcome reduces the amount of water protected for public benefit by the transaction *and* proportionally reduces compensation to the participating landowner; a lose-lose for the public

[1] Email from WRD to Prospective RAC Members (August 1, 2025).
[2] Oregon Water Resources Department, Water Rights Rulemaking RAC Meeting 1 – September 17, 2025 at – 26:55 - 28:10 marks (first quote from Powerpoint slide, and second quote from Deputy Director's preliminary comments that the rulemaking will address 2025 legislation plus other policy, process, grammar, and citations) (available at: https://youtu.be/pOLmb9W3g-k?si=ej7m0GSWiybYqKPS&t=1609).

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interest and the water right holder, with no demonstrable protection or benefit to other water right holders.

The current interpretation and practice at WRD prevents full instream protection of otherwise valid water rights and discourages voluntary participation in instream flow restoration. TU respectfully recommends that WRD address this issue by making the edits documented in the following table:

Draft Rule # e.g., 690-014-0170(1)(b)	**Input / Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-380-0100(2)(c)	TU shares the concerns elaborated by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in letter dated 11/5/25 and other comments. WRD *had* subsequently revised the clause to add "under the same water right" and TU appreciated that clarification. Unfortunately this language is now removed in the proposed rule package.	Add back the new language "under the same water right" or add CTUIR's proposed "diverted and applied" language. With this edit, the language in the Notice would read (edit in **bold**): "Failing to keep the original place of use from receiving water **under the same water right (alternatively: diverted and applied)** from the same source; or"
690-380-2200(2)	TU shares the concerns elaborated by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in letter dated 11/5/25 and other comments. In this clause, WRD did not revise the language to add "under the same water right" or similar clarifying clarification (possibly as a drafting error, since provisions 0100 and 2200 should be consistent). TU commented in our December 5, 2025 letter that WRD should revise 2200 to match the Department's clarification in 0100, but we do not see that edit in the final rule package.	Add "under the same water right" or similar language to match 0100(2)(c). With this edit, the language in the Notice would read (edit in **bold**): "For water rights with an authorized place of use tied to specific acreage, including but not limited to irrigation, nursery operations, or cranberry operations, a change in place of use must involve a physical movement that alters the location of the water right from the existing authorized place of use to the proposed place of use such that, consistent with OAR 690-380-0010(2)(c), the lands from which the water right is removed do not continue to receive water **under the same water right (alternatively: diverted and applied)** from the same source."

Thank you for considering these comments, and please reach out to me if you have any questions.

Sincerely,

James Fraser
Oregon Policy Director
Trout Unlimited
james.fraser@tu.org

HARTT Laura A * WRD

From: nunzie@pacifier.com
Sent: Friday, February 6, 2026 3:58 PM
To: HARTT Laura A * WRD
Subject: public comment follow-up to OWRD publi meetingt in Bend 1/30/2026

[You don't often get email from nunzie@pacifier.com. Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

Hello Laura
I believe the end of the public comment to OWRD is today in response to the public hearing OWRD held in Bend on 1/30/2026.

I would like to reiterate that we here in the Deschutes Basin are in a mega drought. Snow and precipitation are lowest in atleast 50 years.
Whilst I understand a desire to streamline water use approvals, I wonder what protections OWRD is offering to waters in our springs, seeps and rivers especially here in the Deschutes Basin.

Yesterday hit a record 72 degrees which is 28 degrees higher than our average 30 year past daytime temperature. Evenings are warmer; our climate has changed.

I encourage OWRD to allocate water not just for people but for fish, rivers, ESA, beavers, birds and wildlife.
We cannot sustain the pumping of our aquifers and expect them to magically replentish; the ice age is over; glaciers are not growing; glaciers are disappearing here in Oregon.

I support comments made in December 2025 by Water Watch of Oregon, Trout Unlimited and Central Oregon Landwatch.

I don't believe any quasi-municipal water rights or municipal water rights should be moved to exempt wells because exempt wells have not been evaluated for groundwater connectivity or for surface water connectivity here in Deschutes; furthermore I have yet to see a water metering device on any exempt well here in Deschutes. Analysis of where waters are drawn from the ground matter and there should not be a pass to such an evaluation just because a well is 'exempt' or a city needs water to meet a city's needs or a development 'needs' water for their private gain.

We today are stewards of our precious water resources and what seems to be missing is Water Conservation in the face of drought... This isn't piping, or modernization. What I mean by water conservation is USING less water.

Further, the mitigation rules in Deschutes are woefully out of date and so is consumptive use formulas. Also Oregon is missing river gages in the Deschutes Basin to adequately measure surface flows and water quality in each river reach. So I encourage first OWRD to fund river gages in each of the REACHES of our rivers here in Deschutes before it tries to speed up issuing water permits.

Perhaps it is time for Oregon to think about where it places it municipal populations?... perhaps where there is sustainable water instead of where water resources are being depleted from the eco-system and not being replenished in the face of today's climate change.

Please add this email to your public record.
Thank you
Nunzie Gould. a resident of Deschutes County

WATER LEAGUE

Water League engages the public in water stewardship.

P.O. Box 1033
Cave Junction, OR
97523

chris@waterleague.org
(541) 415-8010

February 5, 2026

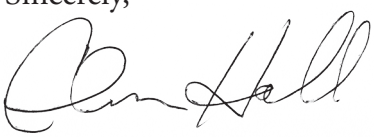
Racquel Rancier, Deputy Director
Katie Ratcliffe, Water Right Services Division Administrator
Laura Hartt, Water Policy Analyst
Lisa Jaramillo, Transfers and Conservation Section Manager

Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

Water League broadly supports the proposed rulemaking for Chapter 690 Divisions 2, 14, 17, 18, 77, 300, 305, 310, 315, 325, 340, 380, 382. We incorporate by reference our comments on these rule divisions we made during the nine Rules Advisory Committee (RAC) meetings as a RAC member of those meetings, and our written comments submitted during the rulemaking process. We wish to emphasize our strong support for OWRD's scope of rulemaking, which included updating rules that are no longer consistent with statutes, deleting and fixing bizarre rules that may never have made sense, and otherwise spring-cleaning the 13 divisions listed above.

We look forward to when OWRD can open public comment on the remaining five divisions, 52, 53, 54, 320, and 330, perhaps this summer or later this year, especially since the RAC fully reviewed and discussed those divisions already.

Sincerely,



Christopher Hall
Executive Director

DESCHUTES RIVER
CONSERVANCY

February 6, 2026

Oregon Water Resources Department
Laura Hartt – Water Policy Analyst / Rules Coordinator / Tribal Liaison
725 Summer St. NE, Suite A, Salem, OR 97301

Submitted via email to: WRD_DL_rule-coordinator@water.oregon.gov

Re: 2025-2026 Water Rights Rules Updates Final Comments on Rule versions available for Hearings on January 27th and 29th, 2026.

Ms. Hartt:

Comments for OWRD RAC Hearings – Open House

Thank you for the opportunity to participate in Water Resources Rule updates, provide comments to Rule updates, and for our seat on the Rules Advisory Committee (RAC). The hard work of the OWRD staff on this extensive rulemaking is appreciated. We are supportive of the objective to bring rules into alignment with HB 3342 and HB 3544 and the work toward updating rules so they conform with prior statute. DRC provided comments during the RAC meetings for Division 18, with written comments on October 31st, and Division 77 during the meeting, with written comments on November 11th. Additional comments for these Divisions were submitted on December 5th, 2025. We are providing supplemental comments for multiple Divisions here. The efficiencies gained with updates to these rules affecting DRC programs and DRC staff are greatly appreciated.

The balanced representation from water user groups and conservation groups in the 2025-2026 RAC sessions was also appreciated. Similar to the participation by the broad user groups often represented in WRD RAC committees, each conservation group - often working in specific regions of the state, has region specific knowledge, particular concerns, and expertise working within quite varied programs and rule sets. These voices are important to have at the table.

DRC supports OWRD in working to align rules with statewide planning goals (such as with Land Use) where statute allows. Land Use Planning and Conservation intersects with Water Rights and Water Management, but not always neatly. Improving coordination between agencies will be helpful where programs intersect.

DRC appreciates the improvements to Division 77 and Division 18. The DRC utilizes Division 77 extensively as one of the larger contributors to instream leasing across the state and in developing and completing many permanent instream transfers. The DRC works with 8 irrigation districts and up to 350 landowners annually who voluntarily lease up to 70-75 cubic feet per second back to our streams with an additional 74 cfs permanently transferred instream. The DRC and our partners also heavily utilize Division 18 and have protected up to 174 cfs in multiple streams in the Deschutes Basin with the allocation of conserved water program. Division 77 and 18 are very important rules and programs for the flow restoration achieved in the Deschutes basin by the DRC and our partners – adding protected

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CONSERVANCY

flows back to streams for public and wildlife/aquatic benefit, some of these streams had regularly been fully diverted and left dry. Improving efficiencies and streamlining where possible will be beneficial to future flow restoration actions and will improve workflow for the state staff who process these transactions.

Division 77

690-077-0000(7) – While the modifications to this text in the V3 are an improvement over earlier iterations, the Department should still recognize that cooperative legislation between states does in fact allow protection of water across state lines.

690-077-0010(35) V1&V2 – We support the deletion of this new definition relating to the Special Districts Association of Oregon.

690-077-0015(4) and related sections/subsections. State agency applications for instream water rights are not restricted to Estimated Average Natural Flow by statute and should not be limited by EANF in rule. EANF does not consider ecological needs relatable to flow for aquatic species such as anadromous fish. Water for an out of stream use can apply for the amount of water sufficient for the use, yet instream water rights can be limited by EANF which is unrelated to the ecological needs. EANF should not be a limiting factor for state agency instream water right applications.

690-077-0015(5) Strongly support the removal of the original (5), which restricted protected flows resulting from instream leases, transfers and allocations of conserved water to EANF, from the rules. Thank you for this needed update.

690-077-0075 – Processing an Instream Transfer Application. OWRD is required by statute to review instream transfers similarly to out-of-stream transfers. Division 77 Application processing rules appear much more descriptive and stringent than those for Division 380. To align the two with regards to Application processing, either the more descriptive analysis regarding return flows and losing reaches should be removed from Division 77 or added to Division 380. Rules are referred to for guidance. If the same review guidance is not noted in Division 380, then it would appear that the same stringent analysis (Division 77) would not be required. This also relates to evaluation under Division 77-0077(3).

690-077-0076(4)(a) – We would like to suggest a clarification here - that the signed lease can be submitted by the lessee as noted in 0076(2)(c) the lessee may assist with the lease application.

690-077-0076(4)(b) and (4)(h) – Strongly support this addition - the district holding the district water user forms, water right conveyance agreements and lessor documentation on file for those participating in a district lease. This is aligned with other temporary water movements associated with districts. This will greatly improve the efficiency of building district pooled leases and importantly, the Department's review and approval of district leases.

690-077-0077(11) – Thank you for the clarifying edits here. We support this change.

690-077-0080 – We support the deletion of the cancellation provision for Instream Water Right.

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690-077-0105 – Instream Lease Renewals. Appreciate rules clarifying the lease renewal process. If (1)(a) is not a statutory requirement, it should not be included in the rule. However, a 5-year limit for renewal does make sense if it is more specifically tied to an expedited watermaster review process since beneficial use would have been established by the prior lease record within the 5-year window.

Division 18

690-018-0012(2) – While this is a statutory allowance, the ability to submit an allocation of conserved (ACW) water with the plus 1 minute priority date warrants further review (of statute), especially for partially or fully publicly funded projects. If a junior water right utilizes the plus 1 minute allowance, this could result in very little water protected instream. The intent of the ACW is to provide the benefit of protected flow while improving efficiency. If a mid-priority date utilizes the plus 1 minute priority date for the conserved water, the protected water will also not have the same reliability as the diverted water. This could improve the conserver's reliability while still impacting more junior water rights (water users and instream). When conserved water is publicly funded and protected instream, it should retain the same priority date and reliability as the original water right.

690-018-0012(3) and other rules that relate to measurement – the addition of 3rd party or Department verification of the conserved water rate and volume could assure transparency of the protected water measurements, especially when publicly funded.

690-018-0040(25) Strongly support "the Director shall waive the application fee based on the percent of conserved water allocated to the state for instream use, not to exceed 50 percent of the application fee…"

690-018-0050(3)(j) Support language that assures metering, measurement and management of ACW.

690-018: DRC strongly supports the version 3 removal of rules relating to the use of the allocation of conserved water for groundwater uses. The Department cannot adequately track or protect conserved groundwater and groundwater allocations of conserved water do not meet the intent of the guiding statute for the ACW – to provide "instream" benefits. The inclusion of groundwater allocations of conserved water have potential - if appropriate measures are in place to assure the conservation does not result in further consumptive use and if measures are in place to adequately protect and track groundwater conservation (in the aquifer or at and below nearby discharge springs). The Department does not have the ability to protect the conserved groundwater, and this conservation would not provide a trackable "instream" benefit.

Division 380

690-380-0100(2) and 4010(2)(e) – review for injury and enlargement should be the same for Division 380 and Division 77. Division 077-0075 provides far more detail regarding this review. We suggest either Division 77 should be updated to the same less descriptive review as Division 380 or Division 380 should be updated to the more descriptive review under Division 77.

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The DRC provided comments on the first and second versions of rules presented in the rules advisory committee meetings and wrap up/final RAC reviews (including Division 18, Division 77, and Division 380) and is either reinforcing prior comments or providing additional comments applying to further rule modifications by the Department. Thank you for your consideration of these comments and for allowing the DRC the opportunity to participate and comment during this rulemaking process. We value having a seat at the table.

DRC appreciates the Department's work to improve state rules to better align with statute, this was a massive undertaking.

With sincere appreciation,

Genevieve Hubert
Senior Program Manager
Deschutes River Conservancy

E-mail: gen@deschutesriver.org

February 6, 2026

Laura Hartt
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

RE: OWRD 2025–26 Water Rights Rulemaking (*submitted electronically via WRD_DL_rule-coordinator@water.oregon.gov*)

Dear Ms. Hartt:

On behalf of the Oregon Farm Bureau (OFB), thank you for the opportunity to provide comment on the Oregon Water Resources Department's (OWRD) 2025-26 Water Rights Proposed Rules. OFB is the state's most inclusive agriculture organization, proudly representing over 6,500 family farms and ranches across the state that produce more than 220 agricultural commodities.

Encompassing 13 divisions of OAR Chapter 690, the proposed rule remains too ambitious. OFB participated as a member of the Rulemaking Advisory Committee (RAC) when it met nearly 10 times during the fall of 2025. From the beginning, OWRD staff has advised RAC members that this specific rulemaking effort was "huge" and the largest one in memory. This underlying sentiment was echoed by OWRD staff throughout the course of the RAC meetings and repeated in public forums. The aggressive breadth and depth of the rulemaking was acknowledged by OWRD when it elected to remove and delay the consideration of five remaining divisions until the spring of 2026. While we appreciate this modest measure of relief, we continue to believe that the size and scope of the rulemaking is so large in such a condensed timeframe that it undermines the fundamental value of the rulemaking process.

Despite the challenges associated with the excessive size and scope of the proposed rule, OFB appreciates some elements of the proposal. First, we support the emphasis on reducing backlogs and improving processing efficiency through clearer, more standardized

procedures and greater use of electronic tools, which can help provide water users with more timely decisions. Second, we appreciate steps that strengthen the consistency and defensibility of the administrative record, because predictable, enforceable processes support orderly water administration and help protect lawful water use. We also recognize the value of improved transparency and accountability in irrigation-district administration related to conserved water allocations, which can have downstream benefits to water users in the Oregon farming and ranching community.

OFB is concerned that the proposed revisions to protests and contested case procedures may, in practice, make it harder for affected water users to participate meaningfully and protect existing interests through the administrative process. OFB supports accountability in appeals, including an appeal filing fee structure that is tied to the actual costs imposed on the applicant and the agency, with reimbursement if the appeal succeeds and cost responsibility if the appeal fails. We urge OWRD to ensure that any "efficiency" changes do not function as procedural barriers that prevent legitimate protests from being heard on the merits, particularly where long-term agricultural operations may be directly affected.

We also have serious concerns with any rule changes that could make cancellation outcomes more likely through accelerated timelines, default finality, or heightened "gotcha" requirements for rebuttal. OFB supports allowing agricultural water right owners to obtain waivers of five-year cancellation for nonuse when sufficient reasons exist, and OFB supports repealing the portion of water right law that allows cancellation after five years of nonuse. While OWRD may be seeking procedural alignment and clarity, the rules should be drafted and implemented in a way that does not expand cancellation risk beyond what is necessary, especially where nonuse is temporary, documented, or tied to normal cycles, programs, or economic conditions.

OFB cautions against the Department adopting overly burdensome mapping and geospatial submission requirements—such as mandatory GPS coordinates, detailed tax lot and quarter-quarter identifiers, and any future requirements that maps include an OWRD-specified geospatial digital file (e.g., shapefile). Such reporting tools and formats should remain optional. We have concerns that such requirements could become a costly, technical "gatekeeping" hurdle for routine water-right transactions and may expand administrative requirements with a direct land and property nexus. Technical reporting requirements should not exceed commonly available tools.

Additionally, OFB believes that private property rights are among the most basic human rights and we oppose any actions that erode private property rights, and that where permits are required, processes should be simplified to reduce the time and burden to obtain them. We therefore urge OWRD to ensure mapping standards remain focused on water-right administration (not boundary enforcement), include clear, predictable, and readily available waivers and compliance pathways for small and family operations, and establish strong limits on secondary use and sharing of submitted geospatial data, consistent with

OFB's position that producer-generated data should not be accessed or shared without explicit consent and that producers must retain control over their data.

With respect to instream water rights-related process changes, OFB asks the Department to proceed carefully so that procedural reforms do not unintentionally shift costs or burdens onto existing out-of-stream users or create a *de facto* advantage through process alone. OFB believes that there should not be a fee to file appeals for instream water rights, and that when the state files for instream water rights in a basin or watershed there should be a single application. OFB therefore requests that OWRD confirm—clearly in rule text and implementation—that instream-related reforms will not rely on fee mechanisms or fragmented application approaches that conflict with this approach.

Finally, OFB is concerned about any aspect of this package that could be read to require, compel, or regulate "cooperative" or "voluntary" water management plans as a condition of retaining or exercising water rights, completing transactions, or avoiding enforcement consequences. OFB explicitly oppose mandatory or regulatory implementation of cooperative, voluntary water management plans or arrangements. If OWRD intends any coordinated-management tools to remain strictly optional, OFB asks that the rules say so plainly and include guardrails to prevent informal expectations from becoming practical mandates over time due to regulatory creep.

In closing, the Oregon Farm Bureau urges OWRD to narrow and phase this rulemaking so improvements in efficiency, consistency, and transparency do not come at the expense of meaningful participation, workable compliance expectations, or the protection of existing lawful uses. We respectfully request clear guardrails that keep mapping and data submission requirements practical and voluntary where appropriate, prevent procedural "defaults" from creating unintended cancellation risk, and ensure instream-related procedural changes do not shift burdens onto out-of-stream users. OFB remains committed to working constructively with the Department to refine these rules so they advance timely, predictable water administration while respecting private property rights, producer control of data, and the long-term viability of Oregon agriculture.

Sincerely,

Ryan J. Krabill
Oregon Farm Bureau

OREGON WATER UTILITY COUNCIL
Pacific Northwest Section, American Water Works Association

February 5, 2026

Laura Hartt
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

RE: Comments on the 2025–26 Water Rights Rulemaking

Dear Ms. Hartt:

The Oregon Water Utility Council (OWUC) is a committee of the Pacific Northwest Section of the American Water Works Association and represents the water utilities that provide approximately 90 percent of Oregon's drinking water supply. Oregon Association of Water Utilities (OAWU) is an independent association that provides technical support and advocacy for Oregon's water and wastewater utilities. The League of Oregon Cities (LOC) provides advocacy, training, and information to empower Oregon cities to build vibrant, resilient communities. The Special Districts Association of Oregon (SDAO) advocates for and supports special service districts that provide public services in Oregon, including public water supply. The ability of public water suppliers to provide a safe, reliable, and affordable water supply is critical to our communities, public health, and the economic viability of our state.

Our members appreciate the opportunity to submit the comments below regarding the changes that the Oregon Water Resources Department (OWRD) has proposed through the 2025–26 Water Rights Rulemaking process. We also want to acknowledge the hard work and responsiveness of OWRD staff throughout the rulemaking process, which involved a tremendous effort over a very compressed timeframe.

During the rulemaking, our members paid close attention to the proposed changes related to land use compatibility in Divisions 18, 310, 380, and 382. Land use issues are very complex. We appreciate OWRD's willingness to listen to the concerns of public water suppliers and to postpone any major rule changes to allow time for better coordination between OWRD and the Department of Land Conservation and Development (DLCD) and

potentially to update the Land Use Planning Procedures Guide. Taking a step back now allows more time for thoughtful consideration of these issues and a better outcome that maintains consistency with the State Agency Coordination program, the Land Use Planning Procedures Guide, and Division 5 rules. OWRD shared that it plans to work more closely with DLCD to better integrate land use and water management and that interested parties will have an opportunity to share concerns and ideas. OWUC, LOC, OAWU, and SDAO look forward to being part of these conversations.

Our members include cities and non-city water districts that provide public drinking water services to many communities around Oregon. We are disappointed that the proposed notification to special districts was removed from the final draft of the proposed rules in OAR 690-077-0020. Special districts are local governments that have locally elected officials who are accountable to the public. As such, we believe that this remains an equity and transparency issue for public water districts. We also believe that notification to special districts would have helped avoid confusion amongst our members and the potential filings of unnecessary protests.

Finally, our members would like to express concerns about the changes to the timelines for administrative holds for water right applications proposed in OAR 690-310-0270. Limiting administrative holds to 180 days unless the applicant meets one of only five highly specific exceptions is overly restrictive and not required by the legislation passed in 2025 that is prompting this rulemaking. We understand that the intention is to promote faster processing of applications, but the proposed rules unnecessarily eliminate OWRD's discretion to grant longer holds, even if it deems it reasonable to do so. In particular, we do not believe that the proposed one-year extension to complete the administrative appeal period for land use approval will be sufficient in all cases, and we recommend extending this to two years. There are undoubtedly other project-specific issues that would reasonably require a longer extension but do not appear on the list of five approved exceptions. Complex, legitimate issues have kept some municipal water right applications with unique circumstances on hold for longer timeframes, and we recommend that OWRD retain its discretion to grant longer holds on a case-by-case basis.

Thank you for your consideration of these comments.

Sincerely,

Michael Martin, League of Oregon Cities, Lobbyist
Mark Landauer, Special Districts Association of Oregon, Lobbyist
Adam Denlinger, Oregon Water Utilities Council, Chair
Mike Buettner, Oregon Water Utilities Council, Vice Chair
Jason Green, Oregon Association of Water Utilities, Executive Director

January 26, 2026

Laura Hartt (via e-mail WRD_DL_rule-coordinator@water.oregon.gov)
Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Comments on Proposed Division 18 Rules

Ms. Hartt:

I am a water rights engineer with 30+ years of experience with water resources planning and management throughout the western United States. On behalf of myself and my various clients throughout the state of Oregon, I offer the following comments regarding the proposed updates to the Division 18 rules.

The Conserved Water statute (1987 Senate Bill 24) considered the development of conservation proposals for ground water rights issued under ORS 537.630.

A number of comments from RAC members regarding the Division 18 Rulemaking allude to "new ground water rules" and "expanding conservation rules to [include] ground water". These statements are off the mark since the Conserved Water statute and subsequent adoption of the Division 18 rules explicitly contemplated and provided direction on the allocation of conserved water associated with ground water rights.

In the ongoing Rulemaking Process, the Department has simply proposed adding language to clarify its current policy related to the disposition of the state's portion of the conserved water that comes about from a conservation proposal involving a ground water right.

I encourage OWRD retain the language in the following sections of the proposed Division 18 rules (11/19/2025 v2) regarding the state's portion of conserved water.

- 690-018-0050 (7) (c) (C)
- 690-018-0065 (2) (c)

Very truly yours,

Rick Parsons, P.E. CWRE
Principal, ParsonsWater Consulting
parsonswater.com
cc: Lisa Jaramillo (lisa.j.jaramillo@water.oregon.gov)

To: Laura Hart, Rules Coordinator

RE: Public Comments on Division 18 proposals and Land Use and Water Resource interdependence 29 January 2026

From: Jim Powell, Bend, Oregon

Thank you all for the time and efforts to clarify and improve efficiency in the administrative rules and protocols of OWRD.

Included are several comments for consideration in the Division 18 Potential Changes

A. Add clarification that the ACW surface water pathway applies to only "duty" water.

1. Rule Notations include:
   - 690-018-0010(1) "any water conserved" is implied to be eligible and subject to allocation based on ORS 537.470 (3).
   - 690-018-0020(3) states that "Conservation means the reduction of the amount of water diverted to satisfy an existing beneficial use ..."; and
   - 690-018-0020(4), mentions the "maximum amount of water that can be diverted using the existing facilities" as one of the metrics in determining "Conserved Water"

2. History:
   - The concept of ACW with a 50-50 split and the potential for spreading, as well as that of making instream use a beneficial use, arose within a Bend-Deschutes County study of the Deschutes Basin in 1986. Both concepts were intended to encourage on-farm conservation and a protected improvement of surface water resources. The available technology and costs impacting districts at the time did not practically enable sustained conservation within the canal infrastructure itself.
   - In the Deschutes Basin, five district irrigation diversions included not only duty water but also a 1928-33 decreed extra diversion usufruct - a percentage (33-65%) of the duty diversion (based on a district's irrigated acreage) – specifically designated to offset "losses and obstructions in the canals" as established by the Circuit Court and State Engineer. That same decree increased the Deschutes Basin duty water from ~3.5 to ~5.45 AF/A per season, the most generous duty in the state.
   - When the 1986 OWC summarily refused to consider either concept, our Representative introduced bills supporting them in 1987. The Legislature changed the split to 25-75 and applied the concepts statewide. Diversion waters eligible for AWC provisions were based on duty water alone.

3. Current Events in The Deschutes Basin:
   - For the past several years, the Basin has been utilizing previous collaborative processes to formulate an initial Regional Basin Plan.
   - Public Funding (PL566 and state grants particularly) and new technology have placed conservation by canal piping within reach for districts. The districts all applied

for funding, completed NEPA processes, and agreed to return conserved water from piping to the public and protected instream flow.

- Most districts and the Regional Watermaster have returned non-duty water as well as ACW determined portions of duty water conserved by district piping projects to the state. One of our districts now is suggesting that the ACW provisions apply to <u>all</u> water diverted by districts, including the extra decreed water, and implying it may consider non-duty waters in the calculations of district retained water under the statute. If this were to happen, it would be the equivalent of increasing the duty on affected acres by 45% - or from 5.45 to 9.91 AF/A. Like the original decree, this additional retained water would reduce water resources available to junior right holders or instream protections.

4. Rationale:
   - All basins now effectively base the ACW on duty water. None but five districts in the Deschutes Basin have the opportunity to divert water in excess of duty water to compensate for transmission losses.
   - Clarifying ACW eligibility's being limited to duty water would continue to put all basins and districts on an equal footing – which was one of the considerations by the Legislature in assigning the 25-75 split percentage allocations of waters conserved under this act.

Thank you for the opportunity to comment and for your consideration and efforts.

Jim Powell
Bend, OR

Laura Hartt

Rules Coordinator

Laura.a.Hartt@water.oregon.gov.

2/2/2026

Ms. Hartt,

I attended the Public informational meeting and hearing in Bend on January 29, 2025.

We appreciate the time and effort of the department in reviewing and clarifying the statutes and rules with community involvement.

While perhaps outside the scope of this RAC, we want to take this opportunity to support the testimony of Central Oregon LandWatch urging collaboration between OWRD and DLCD to integrate surface and ground water availability and quality with land use decisions. Without coordination from the State, local decision makers are left with competing directives or none.

Thank you for your work and for this opportunity to comment.

Mary Powell, Water Committee, mlp504e@bendbroadband.com

20607 Coventry Cir., Bend, Oregon, 97702, 541-349-5693

Laura Hartt
Rules Coordinator
Laura.a.Hartt@water.oregon.gov.
2/2/2026

Ms. Hartt,

I attended the Public informational meeting and hearing in Bend on January 29, 2025. The informational session efficiently covered the corrections and revisions. It was also a valuable opportunity to consult with Carolyn Sufit and Angela Rinehold who were able to answer some of my questions.

I would like to take this opportunity to make some general comments from my point of view as a novice in water law and management for your consideration. They are not necessarily about RAC so feel free to put it aside.

Some of the terminology commonly used and understood by water professionals have misleading names or attached conditions that alter the meaning that are not apparent at first. Such as:

- "Natural Flow"; one would think this is the natural unimpeded flow available year to year to the river maybe even a historical flow however the Districts in Bend consider it any water not otherwise appropriated or stored in reservoirs and available to them by seniority. I don't know whether it is used otherwise in water law, rules, writings, but someone had to explain it to me. In OAR-690-018: a definition of natural flow would be helpful and if it is otherwise used I would hope it would be explained.
- "Water Rights" can be understood as a personal property right rather than a "usufruct". English (Roman) law has a "usus, fructus, and abusus" meaning and some districts in the Deschutes basin dried the river below dams and diversions seasonally agen differently?
- "Groundwater Mitigation". For a while I was under the impression that there was inherent in the act some protection or consideration to protect groundwater from being drawn down. The proposal that mitigation credits be a 2 to 1 rather than a 1 to 1 exchange might slow groundwater losses in the Deschutes Basin. The groundwater hydrology here is so complex that it is hard to determine in the "general zone" what the flow is and how it will impact surrounding wells and the river.
    - "Minimum Stream Flow" with all of its hidden limiting reductions is maybe the worst. The minimum should be the lowest acceptable flow for a healthy river and enforced. Educating the public is important, clarity is important, and teasing out this one adds confusion.

    It is likely that OWRD already has a really enlightening definition somewhere in the statutes, rules and handouts but I have not seen it anywhere and for those of us trying to plan a more flexible and equitable management of water in the Deschutes Basin it's been an adventure finding out all the hidden meanings.

OAR 690-300-0010: (5) Beneficial Use definition is excellent. Beneficial use was described to me by an ID manager in the Deschutes as “growing anything non-native”.

This letter is just a reflection of some of my questions over time. I apologize for wasting your valuable time. If there is a nice dictionary with really complete definitions and descriptions of the rules and their limitations or opportunities I would love to know where to find it. But I know you are busy and I do not expect a reply.

Thank you and the rest of the staff and the RAC members for all the hard work. And thank you so much for listening.

Sincerely yours,
Mary B. Powell
20607 Coventry Cir. Bend, Oregon, 97702
Mlp504e@bendbroadband.com/ 541-389=5693.

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

February 6, 2026

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301
Delivered via email: laura.a.hartt@water.oregon.gov

Re: Comments OAR 690-002 (Contested Cases), OAR 690-014 (CWRE), OAR 690-017 (Cancellation), OAR 690-018 (Allocations of Conserved Water), OAR 690-077 (Instream Water Rights), OAR 690-300 (Definitions), OAR 690-310 (Water Right Processing), OAR 690-315 (Extensions of Time), OAR 690-325 (Assignment of Water Right Permit Split), OAR 690-380 (Water Right Transfers), OAR 690-382 (Ground Water Registrations), OAR 690-014 (CWRE).

Dear Laura,

Thank you for the opportunity to provide comments on the hearings draft version (V3) of the rules noted in the heading. WaterWatch served on the RAC and was an active participant in all RAC meetings. We also provided detailed comments on all draft versions of all rule divisions distributed to the RAC before the final hearings draft was released, which we hereby incorporate by reference. We appreciate the hard work of the OWRD in this rulemaking, including providing multiple drafts for review and providing the RAC with guidance documents that tracked all comments and provided explanations for changes.

As the OWRD has stated since the outset, this rulemaking is focused largely on two tasks: (1) Updating rules to incorporate new directives of HB 3342 and HB 3544 which passed in the 2025 Legislative Session, and (2) updating existing rule language to ensure that rule directives conform with statute. The latter purpose was long overdue, and we appreciate the inclusion in this rulemaking. Updating rules so they conform with statute necessarily includes deleting from rule provisions that are not supported by statute.

We appreciate OWRD's efforts to address our concerns raised in our previous comments. That said, we have concerns that the hearing draft does not wholly fix problems with old rule language that is inconsistent, contrary to, or otherwise not in alignment with statute. There are also a few areas where new language is offered that is not supported by statute. We urge the OWRD to give due regard to input on these points, as the rules cannot conflict with statute.

In addition to comments provided on version one (V1) and version two (V2) of the Draft Rules, we provide the following comments to version three, which is the official hearing draft (V3).

DIV 2, CONTESTED CASES

- **Generally**: Proposed revisions to Division 2 would make multiple changes to procedural rules for contested cases, which are administrative proceedings analogous to court cases before an administrative law judge. Contested cases are used to resolve challenges to proposed agency actions, including most proposed water-right decisions. House Bill 3544 (2025) directed limited revisions to the contested case process for most water related decisions based on a belief that the current process was contributing unnecessarily to the "backlog" of unresolved cases.

  WaterWatch questions that assumption,[1] but ultimately did not oppose the bill, believing it left intact, in response to push-back from WaterWatch and other organizations, sufficient means to prepare and present a case to support a challenge ("protest") to a proposed water-right decision; i.e., "due process" for protestants. OWRD's proposed changes to Division 2 rules were justified primarily as necessary to implement HB 3544. WaterWatch supports many of the changes and appreciates modifications to some proposed changes in response to WaterWatch's comments. However, OWRD's proposed changes to Division 2 go well beyond what HB 3544 required, taking away important procedural rights that were not taken away in the balance struck by HB 3544.[2] The proposed rules also include a "default" schedule that includes unnecessary steps and, partially because of that, leaves too little time for necessary steps. We have submitted detailed comments throughout the rulemaking but focus here on our most significant comments that have not been adequately addressed.

- **OAR 690-002-0095**: Part of the contested case process is "discovery," which allows a party to obtain documents and information from other parties to the case (and sometimes from third parties). The methods of discovery, and the limitations on those methods, are already defined, and the competing interests of efficiency and due process are already balanced, in the Department of Justice's model rules for contested cases, which have generally been adopted by OWRD. OAR Chapter 137, Division 3. HB 3544 did not disturb those definitions or balance, despite suggestions from some that it do so. OWRD's proposed rules nevertheless propose to limit discovery in contested cases in several significant ways:

  - The proposed rules would completely eliminate "requests for admission," which allow one party to ask another party to admit to certain facts and/or law to avoid having to conduct further discovery, present evidence and/or write briefs on an issue. The DOJ Model Rules allow up to 20 requests for admission, OAR 137-003-0566(1), and requests for admission are allowed in both state and federal court proceeding, which shows they are generally regarded as a useful method of discovery. OWRD's basis for eliminating requests for admission as a discovery tool is based on anecdotal experience from a

[1] WaterWatch believes the backlog is attributable to other factors, including subjective standards for referring protests to contested case and allowing applicants (but not protestants) to put protested applications on hold indefinitely.
[2] OWRD currently charges $1,425 simply to file a protest, which already significantly limits the ability of a public interest organization to contest proposed decisions it believes will harm public values.

limited number of cases, which should not be used to determine the process for all caes going forward.

- The proposed rules would allow only 10 "interrogatories" (written questions to other parties), while the DOJ Model Rules allow 20. In our view, there is no justification for allowing less discovery in water related cases than the DOJ considers appropriate for challenges to agency actions generally.[3]

- Perhaps most significantly, the proposed rules would not require OWRD to respond to requests for documents, the most important form of discovery, if doing so would exceed 30 hours of staff time. A party could still seek the documents by public records request, but OWRD could then charge for its time in responding to the requests (per public records laws), which could make obtaining the requested documents prohibitively expenses, especially for nonprofits and other parties of limited means.

- The proposed rules would not allow a site visit unless all parties agreed to it. Site visits are rarely requested, but they may be of value, or even necessary, in some cases to learn facts important to a case. As such, no party should have veto power over a request for a site visit. Like other discovery or evidentiary offers, a party should be able to request one, subject to objections that could raise any issues of inconvenience, expense or undue hardship given the nature of the specific case.

- **OAR 690-002-0205**: This rule provides a default 180-day schedule, which HB 3544 directed without saying what should be included in the schedule other than discovery requests, responses to discovery requests, and motions to compel discovery. Although 180 days is an extremely tight schedule for litigating a contested case, the proposed default schedule would spend the first 28 days of valuable time on written arguments and a decision over an unnecessary "issue list," which is not required by any statute or existing rule, has no analogy in either state or federal court, and was not required by HB 3544. The issues in a case can and should be defined by the protest, just as a "complaint" defines the issues in state and federal court proceedings, especially since HB 3544 includes increased specificity requirements for protests. Requiring an "issue list" will make the protests moot and could result in legitimate issues being removed from a case before hearing. Meanwhile, for example, the proposed default schedule woud require motions to compel (i.e., to order discovery not provided in response to a request) within 14 days of the deadline for responses to discovery, which leaves too little time to review discovery responses (sometimes thousands of pages of documents) to determine if they are complete. The default schedule then spends 60 days on "motions for summary determination," which are time consuming motions seeking decisions without a hearing. In the interest of time and efficiency, we suggest eliminating those motions from the process unless all parties agree that all issues in the case are legal issues that do not require an evidentiary hearing, in which case the time

[3] In considering the types of discovery to allow in contested cases, it is important to keep in mind that a party can always object to particular discovery requests it considers unduly burdensome, irrelevant, etc. The requesting party is then entitled to the discovery only if the party files a "motion to compel" that is granted by the administrative law judge.

allocated for hearing could be used for motions for summary determination. OWRD claims to have addressed these concerns with a provision allowing the schedule to be altered in appropriate cases, but that will be a significant uphill climb for any party, given the default schedule in the rules, if another party objects.

DIV 14, CERTIFICATED WATER RIGHT EXAMINER

690-014-0080 Revocation of CWRE Certificate

- We urge the OWRD to expand this section to direct that if a CWRE makes any material misstatement of fact in a COBU, that COBU is deemed invalid. And, for any certificate that had been issued that was based on false information, it should have to go through the COBU process again and/or be cancelled.

690-014-0110 Claim of Beneficial Use

- (3) the "may" should be a "shall." If the CWRE does not meet the standards, the OWRD should refuse to accept the COBU.

DIV 17, CANCELLATION

- **OAR 690-017-0200 (1):** The rule application appears narrower than that in statute. ORS 540.660(1) directs a watermaster to file an affidavit if they have reason to believe that circumstances exist that prevent a water right from being exercised "according to the terms and conditions of the water right….". ORS 540.660(1) also provides that the affidavit shall state that there is no physical way that the water may be applied "to a beneficial use" "in accordance with the terms and conditions" of the water right certificate.

  OAR 690-017-0200(1) however, stops short of this and only directs an affidavit if the water right cannot be exercised; it does not include the terms "within the terms and conditions of the water right" or "beneficial use". While the OWRD has added this language to what must be in the affidavit in sub (2), which we support, leaving it out of the initial standard in (1) could inadvertently narrow the OWRD's determinations to only those situations where no water is used, rather than water not being used "within the terms and conditions of the water right" or for the "beneficial use" of the underlying right. To rectify this, the language "beneficial use within the terms and conditions of the water right" should be inserted into (1), as well as remaining, as proposed, in (2).

- **OAR 690-017-0040(1):** This section inserts new language that qualifies "evidence" submitted to the Department with "in the form of affidavits". ORS 540.631 does not require that the evidence be in the form of an affidavit, rather it just notes "evidence". While existing subsection (2) sets forth what must be in any affidavit, that is limited to situations "where the evidence "is in the form of affidavits". Neither the statutory directives, or the existing rule language, limit evidence submitted to the OWRD to be in the form of affidavits. Please strike "in the form of affidavits" from section (1) to align with statute.

- **OAR 690-017-0040(2)(b):** It would seem more efficient all around to require the certificate number rather than the "page number of the certificate".

- **OAR 690-017-0040(2)(g):** Again, this rule provision appears to be narrowing the scope of what is subject to cancellation. The governing statutes are clear that a water right can be cancelled not only if the water is not used, but also if the use is not for the beneficial use of the water right in accordance with the terms and conditions of the water right. So, for example, if a water right holder was using water for their beneficial use but their diversion structure only allowed diversion of half of the water granted under their water right, the unused water is subject to partial forfeiture and can be cancelled (see ORS 540.610(3)). As such, this section needs to be amended so that the required statement is that the affiant knows that the use has not been used at all or has not been used beneficially within the terms and conditions of the water right.

- **OAR 690-017-0040(5)(b):** We appreciate the new language that attempts to address concerns raised with V2.

DIV 18, ALLOCATION OF CONSERVED WATER

- **690-018-0020(9) Living Certificate:** We support the V3 removal of the term "living certificate" that was found in V2. As we noted in our V2 comments "living certificate" is not a term/concept that is found anywhere in statute, and in fact is directly contrary to the ACW's requirement that new certificates be issued. *See ORS* 537.470(6). The issuance of new certificates is important both for the underlying right and the new instream right. If a water right is reduced because ACW transaction, the water needs to be expeditiously removed from the certificate so that there is no confusion in relation to any future transfer applications, regulation of the underlying right, m/r and/or other processes. It is also needed to protect against any future statutory changes that might try to gain access to that water. It is also critically important that the instream portion be protected by a state held instream right as mandated by the Act. We appreciate the removal here and in other relevant sections of this rule (-0050, -0062, -0065).

- **690-018-0050 (7)(c)(C):** We support the V3 removal of the expansion of the conserved water provisions to groundwater. As noted in our V1 comments, we strongly opposed the expansion of conserved water projects to groundwater via rule. Unless legislation is passed to allow state protection of saved groundwater in the ground, then this new provision is simply allowing increased consumptive use (via water spreading) with no public benefit. The language of the statute is very clear that public benefits of the ACW are "instream" benefits; rules cannot expand the scope of the statute to this degree.

DIV 77, INSTREAM WATER RIGHTS

OAR 690-077-0000 Purpose

- **(7):** While the language in (7) has been modified and improved since V1 and V2, we still have concerns that this could inadvertently usurp attempts to protect flows across state borders in basins like the Walla Walla. Moreover, there are statutes in place that allow OWRD to issue water rights that reach across state borders, this could thwart agreements to lease that water instream, e.g. see ORS 537.835 which allows OWRD to issue water rights from Mill Creek to the City of Walla Walla for "beneficial use". There is nothing in this statute that limits this to municipal use, simply beneficial use. ORS 537.810-870 is ambiguous enough to raise similar

questions. This section is not needed to implement the two new bills or to align outdated rules with statute, thus we would, again, suggest deleting.

OAR 690-077-0010 Definitions

- **(19) Living Certificate**: We support the OWRD's decision in the hearing draft version (V3) to delete the new term "living certificate" that was inserted into the V2 Draft Rules (see 12/5/2025 comments for detailed explanation of our opposition to this term).

- **(35) Water-Related Entities identified by the Special Districts Association in Oregon:** We support V3's proposed deletion of this new term that was proposed in the V1/V2 Draft Rules. See comments to V1/V2.

OAR 690-077-0015 General Statements

- **(4) ENAF:** Please strike this provision **in whole** to ensure rules align with statute. There is nothing in statute that allows OWRD a blanket reduction of flows recommended by ODFW, DEQ or Parks. We disagree with the OWRD's response to comments that this change is outside of the scope of the RM. This is precisely within the stated scope of revising rules to ensure they conform with statute. Deletion is necessary to remove from rule existing directives that are not supported by the law. There is no authority for this limitation, and it is contrary to the directives of the Instream Water Rights Act. OWRD countered this request the RAC by asserting that the Director has ultimate authority to set flows under ORS 537.343; we disagree with their analysis as explained below:

  Under the ISWR Act, OWRD may only approve an instream water right for a lesser quantity of water than is applied for **in instances where the reduction is consistent with the intent of "ORS 537.332 to 537.360"** (the Instream Water Rights Act). ORS 537.343(1).

  The language of the Instream Water Rights Act very clearly directs the state to issue instream water rights in the amount necessary to protect the public use applied for by ODFW. Instream flow means the minimum quantity of water necessary to support the public use requested by an agency. ORS 537.332(2). Public use includes but is not limited to conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values. ORS 537.332(5)(b). Public uses are beneficial uses under Oregon law. ORS 537.334(1). For instream water rights for fish and/or wildlife, the request shall be for the quantity of water necessary to support those public uses as recommended by ODFW. ORS 537.336(1).

  ENAF is not representative of biological needs of fish. ENAF is simply an "average" of flow for a given month (as derived from historical records) that has no relation to any biological determination. An average is "an estimate or approximate representation of an arithmetic mean." *Webster's Third New International Dictionary* 1930 (unabridged ed. 2002). In other words, sometimes flows are above the average, sometimes they are below. By statute, instream water rights are to be set for the quantity of water necessary to support the public use applied for; whether they coincide with an "average" flow or not is of no relevance either to the biological

needs of the fish or to the statutory directive to issue water rights in the amounts necessary to support the public uses applied for.

Based on the full language of the Act, it is clear that the "intent" of the Instream Water Rights Act, as it relates to fish, is to protect those flows needed for the public purpose applied for, which includes all life stages. Flow needs for fish are developed by ODFW, the State's experts on the biological needs of fish. From a biological point of view, it is illogical and insufficient to limit an ODFW requested amount to ENAF; doing so could rob fish of the flows they need when the flows in any given river or stream are in fact above ENAF. Issuing water rights in the amount requested by ODFW does not "create" water, rather it simply protects it when it is in the river.

As the OWRD admitted in its response to comments, ODFW flow numbers are tied to the biological needs of fish. OWRD's are not. As such, tying to ENAF does not ascribe to the "intent" of the ISWR Act, which is the only way the OWRD Director can issue ISWR for less than requested by ODFW. In the Director cannot arbitrarily reduce requested flows; any reduction must be consistent with the "intent" of the ISWR Act. In sum, the rules' limiting of the instream water right to ENAF is not consistent with either the language or intent of the Instream Water Rights Act and should be deleted. Deleting this section is entirely within the scope of the RM.

- **(4) ENAF, as it relates to transfers/leases:** As noted previously, we strongly support the OWRD's proposal to remove this limitation from instream water rights that result from transfers, leases and allocations of conserved water. There is no authority in statute to limit transfers/leases/ACW to ENAF. That said, as noted above, the ENAF overlay should be removed from the rules in its entirety in order to ensure the rules conform with the ISWR Act.

- **(5)(a)-(c) Proposed deletion:** We strongly support the proposed deletion of this section. The governing statutes do not limit transfers/leases of consumptive use rights to the amount of a state applied instream water right. See ORS 537.348.

- **(8):** We support the additional language through (a).

- **(9):** Support language limiting this to state applied instream water rights to align it with statute.

- **(10):** The limiting language that ties public use to subsections (4) and (5) are not supported by statute. To comply with statute, please strike "and shall be consistent with Sections (4) and (5) of this rule". See comments for subsection (4) above for rationale.

OAR 690-077-0020 State Agency Instream Water Right Applications: Application Requirements

- **(3) SDAO pre-notice of applications:** We strongly support the removal of the language found in V1/V2 which directed pre-notice of the filing of an application to SDAO. This was not related to HB 3342 or HB 3544 and was in direct conflict with statutory directives to process instream applications in the same manner as out of stream applications. See comments on (5)(j) for further arguments.

- **(5)(j) Local Government Pre-Notice of applications:** We strongly oppose OWRD's refusal to remove this section of a long-standing rule that does not comport with statute. This section requires ODFW to send a notice of "intent to file ISWR applications to local governments. In order to align Div 77 with statute, this section needs to be struck. This is an unfair provision that gives local governments an advanced, closed-door opportunity to exert political pressure on ODFW to stall/stop submittal of applications, waste ODFW staff time, and set up instream water right applications for legal challenge and many other problems. ORS 537.349 very clearly states that processing of ISWR application shall be in accordance with processing of water right applications, except as provided under 537.343. Noting in ORS 537.343 directs or allows pre-notification of an application.

  Instream water rights are held in trust for the people of Oregon (ORS 537.332(3)) - they are the peoples' water rights - and thus establishing a process by rule (that is not supported by statute) that gives only certain water user interests and entities, who typically oppose instream water rights, unbalanced and advanced access to influence instream water right application submittal/content is inconsistent with the statutory scheme.

  OWRD response to comments on this is that this would be a significant shift from current practice. This response ignores the point of the comment; that this provision of rule is in conflict with underlying statute. That the OWRD has been requiring notice in a manner that conflicts with law does not grant it immunity from deletion in this rulemaking, of which one purpose is to conform rule with law. Please strike this provision from the rules.

  We would also note that this is yet another example of the disparate treatment given to instream as opposed to out-of-stream rights as there is no requirement that out-of-stream applicants give notice to local governments of their water right applications.

- **(5)(k):** This section should be struck for the same reasons outlined in comments on (3).

OAR 690-077-0027 to OAR 690-077-0053, relating to application processing, initial reviews, proposed final orders, protests, final orders, contested cases: We urge the OWRD to delete the detailed directives on processing an application (through final order/cc) found in sections 690-077-0027 through 690-077-0053. The Division 77 rules should simply state that instream water right applications will processed in the same manner as other water right applications. This would be consistent with the Instream Water Rights Act, which states:

> **537.349 Processing request for in-stream water right.** Except as provided in ORS 537.343, the Water Resources Department shall process a request received under ORS 537.336 for a certificate for an in-stream water right in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.252.

It is cumbersome and inefficient to have 25 pages of rules specifically on instream water rights when there are detailed rules on processing applications, and instream water rights are supposed to be treated the same as other water rights. OWRD should not be describing the same process in separate sets of

rules--among other problems, it creates too much potential for inconsistencies, inadvertent or otherwise.

OWRD response to our previous comments suggesting deletion of this section and replacing it with directives to process under Div 310 notes that this is outside the scope of the rulemaking. We disagree. One of the stated purposes of this rulemaking is to align the rules with statute. Statute requires that processing of an instream right is in accordance with ORS 537.140 to 537.252. provision diverges from the Div 310 rules. Either those rules need to be updated to include the details in the Div 77 rules, or the Div 77 rules need to be updated to delete provisions not in alignment with Div 310.

OAR 690-077-0052(2): We appreciate and support the OWRD's retention of the language "collaborative conversation" in V1 and V2. Administrative holds should not be allowed to stall processing of instream rights. We have seen this at the county level already. If interests are opposed to instream rights they should be required to go through the normal public notice/comment process (comments, protests, contested cases) not push for holds to allow for the generation of political pressure via county commissioners, legislators, etc.

OAR 690-077-0054, Conversion of Minimum Perennial Streamflows (MPS) to Instream Water Rights

We continue to have significant concerns with this section. We believe this section of rule should be cut in whole and simply replaced by the language of the statute. The old rules already contravened statute by allowing OWRD the discretion to refuse to convert and MPS on the grounds it was not in the public interest. The new rules add to the existing problems by proposing a wholly new process that includes the ability to protest an MPS conversion. Neither the old directives or the new directives are allowed by statute, and in fact directly contravenes its mandate.

The relevant section of ORS 537.346(1) states:

> All minimum perennial streamflows established on any waters of this state before June 25, 1988, shall be converted to in-stream water rights after the Water Resources Commission reviews the streamflows and the Water Resources Department issues a certificate for an in-stream water right in accordance with ORS 537.343 with the same priority date as the minimum perennial streamflow.

Notably, ORS 537.346 says unequivocally that minimum perennial streamflows "shall be converted to in-stream water rights." In other words, the OWRD does not have any discretion to "not" convert MPS to instream water rights.

While the statute states the conversion shall be done "after the Water Resources Commission reviews the streamflows," it does not provide for protests or hearings on the conversions. Instead, it requires that the conversions take place as a ministerial matter of course. Yes, the statute says a certificate shall be issued "in accordance with ORS 537.343," but that simply refers, as the statute says, to the certification, not the process in ORS 537.343 for new instream water rights. It does not make sense to subject minimum flow requirements already set by rule to the same process as new instream water rights.

The proposed new process does not align with statute and is far outside of the scope of this rulemaking. At this juncture, we would suggest the OWRD cut this section in whole and simply put the language of the statute in the rule.

OAR 690-077-0065(3) See comments on cited sections of the Div 77 rules

OAR 690-077-0075 (3)(a), (b), (c) (A)-(B) (not (C)), Processing an Instream Transfer Application: In order to adhere to statutory directives, the noted sections should be cut in whole.

ORS 537.348 (1) states in relevant part: "Except as provided in subsection (2) to (6) of this section, a person who transfers a water right by purchase, lease or gift under this subsection shall comply with the requirements for the transfer of a water right under ORS 540.505 to 540.585." Per this directive, the OWRD is required to review instream transfers in the same manner as out-of-stream transfers (Div 380 rules). Despite this, the Div 77 rules have a number of requirements that go far beyond Div 380, including analyzing return flows, losing reaches, etc. These are not found anywhere in Div 380. Instream transfers are supposed to be reviewed in the same manner as out-of-stream transfers. OWRD should either strike this whole section, or in the alternative, add all these provisions to Div 380.

To keep as is, where instream transfers are scrutinized to a much greater degree than out-of-stream transfers, and often cut back accordingly when the same transfer if not instream would not have been, is inequitable, inconsistent with statute, and goes against state policy which encourages instream protection and restoration.

OWRD response to comments states that "instream transfer processing is the same as Div 380 transfer process. Div 380 transfers do look at any loss when transferring a water right, its just that Div 77 has more of it laid out in the rule than Div 380 does, but it is being addressed." This comment misses the point, the point of the original comment is that any process needs to be the same in rule. Rules grant certainty that the same process must apply to instream and out-of-stream. Rules also provide additional legal leverage if there are disagreements. So in other words, as the Div 380 and Div 77 stand today, it is easier to challenge an instream tranfer than an out-of-stream transfer. This is very unfair and not supported by law. Again, we urge the OWRD to align processing of instream and out-of-stream water rights, transfers and leases as required by statute.

OAR 690-077-0077 Processing an Instream Lease Application

- **(3)** This section should simply state that "The Department shall evaluate the instream lease application for injury and enlargement" and cut the second sentence.
- **(3)(a)-(d):** Same comment as -0075. The "except as provided in subsection (2) to (6)" of ORS 537.348 does not absolve the OWRD from processing instream leases in the same manner as out-of-stream, but rather notes specific attributes not allowed "to a person who transfers a water right by purchase, lease or gift", which includes "lease." So again, unless these same standards are added to Div 380, they should be struck from this section. OWRD response to comments states that:

> "instream transfer processing is the same as Div 380 transfer process. Div 380 transfers do look at any loss when transferring a water right, it's just that Div 77 has more of it laid out in the rule than Div 380 does, but it is being addressed."

As with -0075, the OWRD comment misses the point. The point of the original comment is that any process needs to be the same in **rule**. Rules grant certainty that the same process must apply to instream and out-of-stream. Rules also provide additional legal leverage if there are disagreements. They need to be consistent across instream and out-of-stream. To fail to do so puts instream rights at a disadvantage, which is not supported by statute.

- **(4)** We would suggest rewording so it clearly states that there is a 21 day comment period on an instream lease, dating from the day of the public notice. And then go into the other language.

- **(11):** The V3 language is much clearer. Thank you for the edits here.

690-077-0080, Miscellaneous, Cancellation or Waiving of an Instream Water Right

- We support the continued proposed deletion of this section.

690-077-0100, Miscellaneous Provisions: Precedence of Future Uses

- We appreciate the process added here

690-077-0105, Application for Instream Lease Renewal

- **New requirement:** The applicant should have to provide evidence to the OWRD that, absent the instream lease, they are ready, willing and able to put the water to the original beneficial use.

  Without such a requirement, the proposed process would allow a water right holder to hang onto a water right indefinitely and potentially try to use the water for a new consumptive use in the future. While we support water instream, given the rules are not clear that if the original use goes away the underlying right could not be transferred to a new consumptive use we think this omission leaves open the door for future mischief. Given that, we would suggest two amendments. First, given instream leases are similar to temporary transfers, which do require, upon expiration, that the transfer revert to the original use, the rules should be clear that the use reverts to the original use (including type of use and place of use). In response to comments, OWRD noted this is what happens. There is nothing in rue that says this; if that is the case it should be in rule. We would also ask that OWRD clarify that the lease holder cannot transfer the instream lease to a new out-of-stream use at the end of the lease. That type of transfer can only take place if the water can in fact revert to the original use. Absent these changes, the rules leave open the potential for mischief

DIV 300, DEFINITIONS

Since this section has been expanded to also apply to Div 382, this section likely needs a definition of "municipality" as required by ORS 540.510(3)(b). See comment, Div 382.

DIV 310, WATER RIGHT PROCESSING

- **690-310-0040 (1) (c)(a):** We appreciate the reversion to the existing rule language here. Thank you.

- **690-310-0040(1)(L)**: Please see comments under Div. 5

- **690-310-0080(2):** As OWRD clarified in the RAC, once the application file is closed it is permanently closed and no further action can be taken on it ever. That said, we will repeat our comment in V1 and V2, that given the questions on this at the RAC which made clear some did not interpret it this way, we would request the OWRD insert the word "permanently" before the word "closed" for clarity's sake. OWRD's response to our comments was that "no further action on the application" is synonymous with "permanently closed". While that might be true, in this case we feel it is a good idea to be redundant so that it is crystal clear and there is no room for mischief in the future. This is a very small change and if the OWRD reads the existing language to mean this anyway, we see no harm in being redundant.

- **690-310-0270 (2):** As noted in previous comments, as a general matter, we support the OWRD putting time limitations on administrative holds. Administrative holds have been too often used to stall a final decision after OWRD relays a proposed denial to an applicant, which has allowed applicants to hold on to priority dates for years after a decision should have been made. We have just a few comments: (1) we support the removal of the municipal exception that emerged in V2; (2) we appreciate the OWRD's retention of the word "cooperative"; (3) we will repeat that the extension to gather groundwater data seems unreasonably long and allows a hold for what should have been done before the application was file'; and (4) now that the OWRD is proposing that "consent to injury" processing take place at the IR stage, OWRD might consider addressing the time this might add in this section.

DIV 315, EXTENSIONS OF TIME

- **690-315-0010(7)(e) and (f): Use of undeveloped portion of the permit:** Please change "chapter 690, division 9" to OAR 690-009-0040. RE: This needs to reflect the new groundwater allocation definition, not the old one for regulation that OWRD retained in the Div 9 rules. This comment was not accepted with the response being that –0040 is included in the OAR 690-009 citation. OAR 690-009-0040 pertains to Proposed Groundwater Use and therefore is the relevant definition here. OAR 690-009-0060 applies only to groundwater controls (i.e. regulation) and thus is not applicable to extensions. We think the WRD is missing an opportunity to draft clear rules by failing to cite the correct rule subsection here. WRD should draft clear rules to avoid later confusion and unneeded work by referring to the relevant rule sub-section here.

- **690-315-0020(4):** We appreciate that the OWRD has reinstated this section. However, as we noted in our V1 comments, while there is a 90-day grace period for completion, there is not a 90-day grace period for extensions. Please make this distinction clear in the final rule.

- **690-315-0040(5 new):** In our V1 comments we urged that the OWRD add a subsection that directs denial if an applicant "knowingly makes a false statement on an application". The OWRD responded that the extension application addresses this. For our V2 comments, we reviewed the extension applications forms available on the OWRD's website and found that only the applications for non-municipal/quasi-municipal applications had this language. OWRD responded that they will review and possibly update municipal/quasi-municipal applications; we would ask that they commit to do updating definatively.

But more to the point, we would urge OWRD to put language on this point in rule. The OWRD did respond to our V2 comments by explaining that if an applicant makes one or more false statements and OWRD determines there was an intent to deceive, that that is a factor they consider under good cause under OAR 690-315-4000(2)(j). If this is in fact the case, we would urge the OWRD to put this language in rule so that applicants are aware of this; and so that the OWRD has language in rule in case any decision based on this is challenged.

- **690-315-0040 (2):** In our V1/V2 comments we asked that the OWRD add two additional subsections under due diligence, based on DOJ Advice on Compliance with Permit Conditions of February 7, 2002 and also Dwight French's Guidance Memo on same topic of Oct. 15, 2002.**:**

  - Whether the permit holder has complied with all permit conditions;
  - Where there has been a failure to comply with a permit condition, whether measures are available to serve the public interest purposes that the condition was intended to address and achieve a result equivalent to what the permit required;

  We reiterate our comments on this. OWRD's response seems to confuse evaluation of due diligence (which should certainly include evaluating compliance with all permit conditions) with identifying permit conditions for which non-compliance requires denial of the extension. These are related but separate inquiries. Non-compliance with a permit condition should not ever be excluded from evaluating due diligence.

- **690-315-0040(5)(a), was (5 old):** We support the OWRD's decision to reinsert language V1 had proposed to delete.

- **690-315-0040(5)(b)** We reiterated that this should be broadened, consistent with DOJ advice, to capture any permit condition that was included on the permit to serve the public interest. Beyond fish-related conditions, this could also include wildlife-related conditions. OWRD's response does not address this issue which is that, in addition to fish-related conditions, there can also be non fish-related conditions on water permits that were added in order to address the public interest. OWRD should be clear about this in the extension rules to avoid confusion and to provide clear guidance for requirements and analysis of extension applications
  .
- **690-315-0040(6 new):** We support the additional language related to cancellation in V2 and now V3.

- **690-315-0050(3):** In V1 we suggested amendments to reflect that commenters do not need to pay a "copy fee" to receive the PFO electronically. While this is current practice, we would urge OWRD to reconsider the request to put this in rule so there is no confusion.

- **690-315-0050(4):** We support the clarification in V2 and retained in V3.

- **690-315-0050(6) checkpoints proposed deletion:** As noted in our V1 and V2 comments, we object to the proposed deletion of provisions that require checkpoints for any extension exceeding 5 years. HB 3342 still allows for extensions beyond 5 years thus checkpoints and the ability to cancel should still continue forward for the remaining extensions allowed. This does

not only apply to domestic expanded as it appears OWRD believed in their response to comments. It also applies to quasi-municipal and municipal extensions. WMPCs "greenlight" provisions are every 10 years, not 5, and do not have the same requirements/provisions of the checkpoints. Moreover, quasi-municipal water right holders that serve less than 1000 can be exempted from the WMPC requirement. Importantly, these "check-points" offer an onramp to cancellation proceedings, which is critical in ensuring against speculation.

This was a heavily negotiated provision in the original rules. Please reconsider your proposed deletion and retain this section. It will be a small subset of extensions that these rules will apply to, but it is still very important to protect against speculation. The OWRD should retain the authority to modify conditions and/or begin cancellation proceedings allowed under the current rules.

- **690-315-0070(1)(d):** Extensions are allowed for a reasonable time necessary. Given municipalities are statutorily granted 20 years to develop a permit, we continue to urge the OWRD to change the trigger from 50 to 20 years, which is consistent with what the legislature has granted by statute for development. In contrast, we are not aware of any statutory basis for utilizing or allowing a 50-year timeframe. OWRD declined to address this in V2 based on the reasoning that HB 3342 purposefully exempted municipal extensions from any changes. While we don't necessarily agree, we would point out that if the OWRD is going to use this logic here, this same logic needs to apply to the checkpoints. In other words, under this reasoning the checkpoints the OWRD is proposing to delete in –005(6) should not be deleted as that would be a change to municipal extension requirements.

DIV 325, ASSIGNMENT OF WATER RIGHT PERMIT SPLIT AND REQUEST FOR ISSUANCE OF REPLACEMENT PERMITS

OAR 690-325-0010, Purpose: Proposed language in the "purpose" section states that the applicability of OAR 690-325-0100 is subject to and governed by OAR 690. To the extent that the very broad OAR 690 rules diverge from the governing statute, this statement is basically saying the rules govern over statute. Rules cannot do this; please remove this language and or amend to say: "The applicability of OAR 690-325-0100 is governed by ORS 537.225".

OAR 690-325-0020, Applicability:

- **(1)(b):** We object to the proposed expansion of this section that allows applications for water right assignments/splits if there is an extension in play. Unless the OWRD agrees to amend the extension rules so that people cannot apply for extensions long after their "c" date has expired, expanding this section to allow splits after the original c date will only invite attempts to revive long expire water rights by setting a pathway for first an extension then a split. As such, we object to (1)(b) that extends applicability. Please delete this section. WaterWatch was involved in bill negotiations on this concept; this was never meant to revive long unused permits.

- **(3):** We object to the deletion of this section. This is a substantive change that has nothing to do with HB 3342, HB 2544 or ensuring that rule language that does not conform with statute is deleted. The existing language reflects the intent of the statute.

OAR 690-325-0110, Criteria for Approval and Replacement Water Right Permits:

(1): We oppose the new qualifier in V3 that states: "regardless of whether the time specified in the permit, or if applicable, the last approved extension of time to perfect a water right, is expired".

(2) This section retains both existing language, and also adds new language that, while nuanced, results in rules that differ significantly from statute.

As just one example, sub (3)(s) posits that an additional point of diversion is part of a "change in point of diversion." The governing statute, ORS 537.225, does not support that interpretation as the statutory language very clearly differentiates the two in stating "May not add **or** change a point of diversion or point of appropriation". To rectify this, and other discrepancies with statute, we would ask the OWRD to simply replace the rule language with the very clear and very simple statutory language which reads:

> ORS 537.225(5): If the department determines that an application under subsection (1) of this section to assign all or part of a water right permit has been properly filed, and that the issuance of replacement water right permits will not result in the enlargement of the original water right or otherwise cause injury to other water right holders, the department shall issue one or more replacement water right permits to reflect the assignment. The replacement water right permits:
> (a) Must have the same conditions as the replaced water right permit, including but not limited to priority date, source of water and type of use;
> (b) May not add or change a point of diversion or point of appropriation;
> (c) May not result in the enlargement of the water use authorized under the replaced water right permit;
> (d) Must apportion the rate, and if applicable the duty, in proportion to the amount of land to which the water right is appurtenant; and
> (e) Must identify the land to which the replacement water right permit is appurtenant and the owner of that land.

<u>DIV 380, WATER RIGHT TRANSFERS</u>

OAR 690-380-0100 Definitions

- **(2)(c):** We urge the OWRD to reinsert the qualifier "under the same water right" to the end of subparagraph 690-380-0100 2(c) that was in the V2 version.

OAR 690-380-2110, Change in Point of Diversion or Point of Appropriation:

- **(3) Conditioning:** We strongly support the newly proposed language that clarifies the OWRD can condition transfers to prevent injury and enlargement. That said, we would urge the OWRD to consider removing the qualifier "resulting from the change".

OAR 690-380-2120, Change in Point of Diversion to Reflect Historical Use:

- We appreciate and support OWRD's amendments to this section of rule that remove "point of appropriation". The statute is very clear that this avenue for change applies only to surface water and is not allowed for groundwater. See WaterWatch comments to V1.

- **(3)(E) and (4):** V3 changes the directives relating to instream water rights; removing notice to applying agencies and instead providing notice to OWRD as the agency that holds the water right in trust for the people of Oregon. Given OWRD must provide public notice of the change, and also consult with ODFW, we do not object unless ODFW registers concerns. Given instream rights are held in trust for the public, the opportunity for the public to provide comment is paramount.
- **(5)(b)**: As with other sections, we support additional language clarifying the OWRD's conditioning authority.

690-380-2260 Exchanges of Water

- **Proposed New Requirement:** In our V1 comments we recommended new rule language to make clear that: "Any water right acquired by a public agency for a public purpose shall not be eligible to participate in an exchange under this section." OWRD responded by saying that it would need to be legislated. We disagree. ORS 540.533, the statute that allows exchanges, is limited to "any person" who holds a water right. Oregon's APA defines "person" as any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character **other than an agency.** See ORS 183.310(8), emphasis added. Given that the APA specifically says an agency is not a person, to align the rules with the governing statute that limits utilization of exchanges to "any person," the rules need to be updated to ensure that a public agency that holds a water right for a public purpose is not eligible to use this tool.

690-380-2340 Specific to General Industrial Water Use

- We support the changes made to this section of rule that clarify the parameters that apply to determine the quantity used (and thus applicable limits)

690-380-2410 Municipal Water Rights

- (1): Please add the term "municipal" before "beneficial use" to make clear these exceptions only apply to ordinary municipal beneficial uses, not other water rights that might be held by a municipality.
- Please return the V2 provision making clear the change cannot injure other water rights.
- **DEFINTION OF MUNICIPALITY:** Either in this section, the Div 380 definitions, or the Div 300 rules the OWRD needs to insert a definition of "municipality". The allowances noted in OAR 690-380-2410, are governed by ORS 540.510(3)(b), which defines and limits municipality to:
    - As used in this subsection, "municipality" means a city, a port formed under ORS 777.005 (Definitions for ORS 777.005 to 777.725 and 777.915 to 777.953) to 777.725 (Borrowing money to pay bonus), 777.915 (Definitions for ORS 777.915 to 777.953) to 777.953 (Annexation) and 778.010 (District known as Port of Portland), a domestic water supply district formed under ORS chapter 264, a water supplier as defined in ORS 448.115 (Definitions for ORS 448.115 to 448.285) or a water authority formed under ORS chapter 450.

690-380-3000 Applications for Transfers

- **General**: We support additional language making it clear that an application can only include one water right per application, except in very limited circumstances (e.g. layered rights).

- **(8):** We support the retention of the additional requirements here. See V1 comments for details.
- **(12)** We support the additional changes in V3, as well as the clarification that these are not exhaustive standards, but would ask the OWRD to reconsider our comments on V1 requesting additional standards. The OWRD response was that additional standards were outside of the scope of rulemaking. We disagree, requiring more information of the applicant upfront will expedite the agency's review, which is in line with the intent of water right processing improvements.
- **(12)(A)(b)(B):** We support the addition of dated satellite imagery.
- **(12) (c):** We support the retention of this section

690-380-4000 Initial Review

- **New section to incorporate HB 3342(17)(5):** In our V2 comments we noted that this section needs to be expanded to include the new transfer denial standards in HB 3342 (17)(5) that apply to some transfer applications to change groundwater points of appropriation[4]. We did not see the change to this section, or to the PFO section, of the hearing draft rules (V3). The OWRD response to our comment was that this section needs more discussion. While it might need more discussion, the OWRD at the very least should simply insert the language of the statute into the rule so that caseworkers have all the information in one place. The noted provision is in fact the law; regardless of any potential controversy around the statutes' existence, this language needs to be in the rules.
- **(3)(d):** We strongly support the inclusion of the requirement that the applicant be ready, willing and able to put the water to full beneficial use. This is an important requirement to protect against speculation.
- **(3)(g):** As we have stated previously, this section should be replaced with the broader "any other requirements of law and rule are met" and/or simply cross out "for water right transfers". As noted in our V1 and V2comments, there are other laws that restrict what can be done under transfers. As an example, the Scenic Waterway Act states: "No dam, or reservoir, or other water impoundment facility shall be constructed on waters within scenic waterways." ORS 390.835. Any water allocation or reallocation request is subject to this mandate, transfers cannot be used as a loophole to get around this. Similarly, there are rules that restrict transfers as well, such as basin plans. Transfers cannot be used as a loophole to get around other rules and laws. To allow such would encourage all manner of gamesmanship to Oregon's water permitting and reallocation structure. By limiting legal application only to "for water right transfers", the OWRD is offering a loophole to other laws rather than protecting against them. This qualifier should be struck.

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[4] *(5) The Water Resources Department may deny a change in the point of appropriation under subsection (4) of this section if the proposed point of appropriation is for a source of ground water restricted under section 13 of this 2025 Act and the proposed use is subject to the restrictions, unless the proposed point of appropriation is:*

(a)(A) In a critical ground water area designated under ORS 537.730;

(B) *In the same aquifer as the existing point of appropriation; and*

(C) *In the same portion of the critical ground water area as the existing point of appropriation;*

(b) *In an area for which a ground water bank that is established by law or by rule mitigates the effects of the use of ground water; or*

(c) *Related to the recovery of stored ground water under an artificial recharge or aquifer storage and recovery project.*

- **(8) Consent to injury—whether to instream or consumptive use water rights—is limited to consent to injury caused by point of diversion changes only.** ORS 540.530(b) and (c) limits the ability to consent to injury to surface water "point of diversion" changes (sub (b) applies to consumptive use rights, sub (c) applies to instream water rights). Please adjust the introductory language accordingly to make clear that applicants can only request consent to injury if the injury is caused by a "point of diversion" change. Injury caused by changes in point of appropriation, changes in place of use or changes in type of use cannot be "consented" to. The rules need to be crystal clear on this point to avoid misuse of this tool.
- **(8)(b):** Please clarify that the request for consent to injury only applies to injury that is caused by proposed point of diversion changes.
- **(8)(c):** Please clarify that the request for consent to injury to instream rights applies only to injury that is caused by proposed point of diversion changes.
- **Additional comments related to consent to injury**:
    - We appreciate the changes made to the V3 version that alter the wording to clarify that transfer applicants can "request" a consent to injury but there is in fact no "approval process" as earlier iterations stated. Consent to injury is wholly discretionary; there is no mandate that the agencies must consider consenting nor are there standards that result in approval if they are met. In other words, there is no obligation to approve a consent to injury request in any instance.
    - If OWRD is going to allow a request for CTI at the IR stage, there likely needs to be adjustments to the processing clock for the agency evaluation of the request (if the agency chooses to evaluate the request). Absent that, the rules should make clear that the default for no action/response on the request is that there is not consent to injury.
    - (9) please insert "permanently" before "close application". While OWRD has note this is redundant, we feel it prudent to insert here so a user cannot come back later and argue that they want to "reopen" it because it was not permanently closed (and thereby retain their priority date).
    - **(12):** The applicant should not be able to amend the application after the IR stage. They should have to reapply. That said, if the OWRD keeps this section, we urge language that notes that if the information/amendment changes a "denial" to an "approval" the OWRD must issue a new IR, and not proceed to PFO. As is, the rules provide that if the applicant amends the application, the OWRD has discretion to reissue an IR or "or incorporate the amendments into the proposed final order". This would give the OWRD the discretion to go straight to proposed final order, at which point the only option for the public would be to protest. At the very least, if a change alters the OWRD determination from "denial" to "approval" the rules should note that it will be re-noticed.

690-380-4010 Proposed Final Order

- **(2)(c):** We strongly support the retention of the language that requires a finding that the water right has been used in the past five years and also that it is not subject to forfeiture. That said, we still think it would be clearer if they were split into two different findings.
- **(2)(d):** We strongly support the retention of the language that requires the applicant be "ready, willing and able"; however, we would suggest that the tie to "the full amount of the right'" be changed to "portion of the right to be transferred", as the "full amount of the right" might not be

subject to transfer. This mirrors language in the rest of this section. Regardless, we thank the OWRD for retaining the "ready, willing and able" language.

- **(2)(g):** As noted previously, we believe the better standard is "any other requirements set forth in applicable law and rule" and/or simply cut the language "applicable to water right transfers". While arguably the proposed standards does subject transfers to all laws not just transfer specific laws, it would be clearer to just state this so the Department's application of all applicable laws (e.g. the State Scenic Waterway Restrictions) do not invite challenge.

690-380-4200, Hearings

- **(2):** We strongly support the consolidation of forfeiture claims into the cc hearing as it creates process efficiencies.
- **(3):** We support the OWRD's determination to retain the 15-day time period. We would oppose any expansion of that timeline.

. **690-380-5000 Approval of Transfers**

- **(1)(c):** We strongly support the retention of the language that requires a finding of use in over the past 5 years and that it is not subject to forfeiture. That said, we still think it would be clearer if they were split into two different findings.
- **(1)(d):** We strongly support the requirement the applicant be "ready, willing and able"; however, we would suggest that the tie to "the full amount of the right'" be changed to "portion of the right to be transferred", as the "full amount of the right" might not be subject to transfer and/or have been cancelled as part of the transfer process.
- **(1)(f):** Again, we would urge that the OWRD make a finding that any other applicable laws/rules are met. As written, (f) is too narrow and could lead to potential litigation if the OWRD were to apply other applicable laws that are not specifically tied to transfers but apply nonetheless.

690-380-5030 Approval of Injurious Transfers

- **Consent to Injury laws only allow consent to injury caused by changes to surface water points of diversion:** ORS 540.530(b) and (c) very clearly limit the tool of "consent to injury" to surface water "point of diversion" changes. Please adjust the introductory language accordingly by striking "point of appropriation".
- **(1)** Please amend to limit the language to "point of diversion" changes.
- **(2)** Please amend to limit it to "point of diversion" changes

690-380-5050 Consent to Injury of Instream Water Rights

- **Clarification is needed throughout OAR 690-380-5050 to make it plainly apparent that the ability of the agencies to consent to injury to an instream water right only applies injury as a result of proposed "point of diversion" changes as outlined in ORS 540.530(1)(c).** Agencies cannot consent to injury for changes in point of appropriation, changes to type of use or changes to place of use.
- **(8)** We strongly support the change from "shall" to "may", as "may" explicitly tracks the governing statute. This is critically important because the statute is very clear that even if the recommending agency consents to injury, OWRD still retains the discretion to deny the consent to injury on its own volition. Consenting to injury is wholly discretionary to all agencies involved; the agencies can decline to consent for any reason.

In addition to this change, we repeat our comments of V1, which is that this section needs quite a bit of further work to ensure that it is consistent with statute and that there is a robust and transparent process related to consent to injury to an instream water right. The rules need to be reworked to make clear the following provisions of statute are clear:

- The agency requesting the instream water right has wide discretion to not consent to injury of the instream water right. The statute does not require any findings and/or explanation as to why the agency is choosing not to consent. All is required is that they tell OWRD it does not consent.
- The OWRD has a trust duty to the people of the State of Oregon for whose benefit the Department holds in trust the instream water right to maintain water instream for public use pursuant to ORS 537.332(3). The CTI rules need to include a determination (and findings) of whether the OWRD's decision fulfills its trust obligations.
- We also suggest the OWRD consider providing direction on consideration of whether a proposed change is for the purpose of implementing a restoration project; which was the original intent of the statute.
- The factors for an agency to review if they chose to go forward and consider a consent to injury should be clarified in rule (e.g. ODFW's internal guidelines should be incorporated for ODFW requested instream water rights).
- To the extent the requested transfer application is for a larger project, the agency must evaluate all related water rights/applications, transfers/applications and other relevant factors related to the project.

We have offered some initial language for consideration in Appendix A (attached to our comments if V1), but these likely need more refinement and discussion.

690-380-5100 Compatibility with Acknowledged Comprehensive Plans

- **(3)**: We support the proposed deletion.

690-380-5140 Time for completion

- **(2):** Please strike. The transfer statutes do not allow for extensions of time.

690-380-6010 Failure to Complete a Transfer as Grounds for Cancellation

- We strongly support the OWRD's V3 reversion to the original language in rule; the language changes proposed in V2 were not supported by statute.

690-380-6020 Extension of time

- We are unaware of any statutory authority for extensions of time to complete transfers. This section should be deleted. One purpose of this rulemaking is to align old rules with statute, given that there is no statutory authority for this deleting it is within the scope of the rulemaking. That said, if the OWRD allows this to remain, it should be modified so that any extension must align with the standards in OAR 690-315 (e.g. good cause, etc); absent that, transfers can be used as loopholes to extension laws that were meant to curb speculation.

690-380-6030 Proof of Use; Noncompliance

- OWRD should add language that makes clear that if a COBU prepared by a CWRE is not submitted within the time required under Div 14, the water right will be cancelled.

690-380-7000 Types of Permit Amendments

- **The statutes only allow for "change" in point of diversions, not "additional points of diversion":** The permit amendment statutes allow for "a change" in point of diversion; they do not allow for expansion of one point of diversion to allow "additional" points of diversions. A change means a substitution, not an expansion or addition. OAR 690-380-7000, read in conjunction with OAR 690-380-7010, allows "additional" points of diversion, which is not allowed by law. OWRD response to our V1 comments on this was that this request falls outside the scope of this rulemaking. We strongly disagree. The existing rules are in direct conflict with statute; thus the noted language should be removed as part of the OWRD's efforts to align rules with statute. As is, these rules allow a huge loophole to public interest permitting requirements that would otherwise apply to the multiple points of diversion a water right holder ultimately seeks.

690-380-7010, Change in Point of Diversion or Appropriation

- **(1)(c):** Please delete "or additional point(s) of diversion" as this practice is not allowed by statute. See argument in –7000 above.

690-380-7020, Change from SW diversion to GW appropriation

- **(1):** The language and intent of the governing statute is to allow a surface water right holder to change their source to groundwater, not to allow both. As such, this section needs to clarify that it is a change from POD to POA, not an addition of a POA to the existing POD. The rule language as written is not clear on this. We would suggest the words "instead of surface water" follow "appropriation of groundwater" in the first sentence. We do not believe it is redundant to state this clearly here.

690-380-7100, Permit Amendment Application Requirements

- **(14)**; There is nothing in the permit amendment statute that allows for the exceptions spelled out in (14)(a)-(d).
- **(17)**: Same comments as V1/V2: The OWRD should require a notarized oath, not just an "oath". Penalties should apply to anyone who makes false statements on an application. OWRD response to comments was that this falls outside of the scope of this rulemaking. We feel it does fall within the scope of efficiencies; OWRD wastes time and resources when applicants and/or water right holders make false statements.

690-380-7200, Notice of Permit Amendment

- Same comments as V1/V2: These rules should include the public process afforded other water right transactions (IR/comment, PFO/Protest, Protest/Petition for party status). OWRD said this is out of scope of the rulemaking, but we will note that OWRD did change the hydro rules (Div 53, 54) to allow IR/comment, PFO/protest/party status even though that is not subject to HB 3544. It seems that the same logic would apply here.

690-380-7300, Permit Amendment Final Order

- (h): As we noted in comments to V1 and V2: In addition to injury and enlargement, the rules should make clear that the permit amendment must also comply with all other applicable laws; not just those narrowly directed at permit amendments For example, OWRD could not approve

a permit amendment that would result in a dam or diversion structure being built in a Scenic Waterway (which would violate the statutory mandates of the Scenic Waterway Act).

DIV 382, GROUNDWATER REGISTRATIONS

To the extent we have commented on Div 380 on rule provisions/language that is duplicated in the Div 382 rules, our comments on Div 380 carry over here.

OAR 690-382-0400 Application for Modification of Certificate of Registration

Proof of use, please add: As noted in V1 and V2, the rules should require the applicant to include proof of use over the past five years. Absent that this rule would allow people to revive long defunct wells, which could exacerbate existing problems in already overstretched basins. It also could provide a huge loophole to the new groundwater allocation rules, in that long unused groundwater registrations could be "revived" to serve new uses without having to apply for a new right.

The OWRD has "declined" to address this concern, based on their conclusion that they don't have the authority to direct this. We disagree. The statutes give the Commission broad authority to impose approval standards in rule. The relevant portion of ORS 537.610(4) reads:

> (4) The commission shall adopt by rule the process **and standards** by which the commission will recognize changes in the place of use, type of use or point of appropriation for claims to appropriate ground water registered under this section.

Furthermore, ORS 537.610(2) provides that issuance of the certificate of registration serves as prima facie evidence that the registrant is entitled to a right to appropriate ground water **and apply it to beneficial use to the extent and in the manner disclosed in the recorded registration statement** and in the certificate of registration. Recorded registrations are required to include, among other things: **the amount of ground water pumped or otherwise taken from the well each year**. ORS 537.605(3)(k)

The groundwater registrations statutes, as a whole, contemplate "beneficial use" for a registration to be valid. Registration serves as authority to continue beneficial use, not as a loophole to the basic tenants of Oregon water law as it relates to use of water. In bill negotiations over HB 2123 (2005), OWRD made assurances to stakeholders that the rule requirements for groundwater registrations would mirror those for surface water registrations, which do include proof of use among other things. To ensure consistency with surface water registrations, and the basic tenants of western water law, proof of use should be required. Please add that here. OWRD response to our comments was that evidence of use was not applicable here. We disagree, based on the arguments above.

HB 3342 provisions need to be included in the rules: The rules need to include the new standards adopted in the 2025 session that apply to groundwater registrations. Namely:

> (5) The Water Resources Department may deny a change in the point of appropriation under subsection (4) of this section if the proposed point of appropriation is for a source of ground water restricted under ORS 536.415 and the proposed use is subject to the restrictions, unless the proposed point of appropriation is:
>
> (a)(A) In a critical ground water area designated under ORS 537.730;

(B) In the same aquifer as the existing point of appropriation; and
(C) In the same portion of the critical ground water area as the existing point of appropriation;
(b) In an area for which a ground water bank that is established by law or by rule mitigates the effects of the use of ground water; or
(c) Related to the recovery of stored ground water under an artificial recharge or aquifer storage and recovery project.

OWRD response to previous comments on this was that this section needed more discussion. To that we say the statute is the statute, and at the very least the rules need to include the statutory language so that OWRD caseworkers and the public see the restrictions in the rule.

690-382-0700 Completeness Review

- **Add (e):** The applicant put the water to beneficial use within the terms and conditions of the groundwater certification within the past five years. See comments above.
- **2(d):** We disagree with the narrowing of (d) to "applicable to groundwater registrations". The statute gives OWRD broad discretion to develop rules to set the process and standards related to groundwater registrations. The original rules contained this language. All applicable rules/laws should apply.

Conclusion: We thank the OWRD for both the opportunity to serve on the RAC and also the ability to provide multiple rounds of comments to the OWRD before the hearings draft was released (as part of the RAC work). We appreciate the hard work of the OWRD staff, as well as their time and expertise in guiding this rulemaking. We are especially grateful to the state for their work to update outdated rule sections, which has been stated goal of the OWRD and Commission for years. Ensuring rules align with statute is critical to the transparent, fair and equitable administration of Oregon's water laws.

Thank you for your consideration of our comments.

Sincerely,

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February 6, 2026

VIA ELECTRONIC MAIL ONLY

Laura Hartt
Oregon Water Resources Department
Email: *WRD_DL_rule-coordinator@water.oregon.gov*

RE: COMMENTS ON OWRD PROPOSED RULEMAKING

Dear Laura Hartt:

On behalf of the Oregon Groundwater Association and Schroeder Law Offices, P.C., we write to offer the following comments for the February 6, 2026, deadline related to the proposed rulemaking revising OAR 690-380.

Comments

I. Proposed OAR 690-380-4200(2)

Proposed OAR 690-380-4200(2) states that the Department will automatically initiate cancellation proceedings if a protest to a transfer asserts forfeiture due to nonuse.

This provision is inconsistent with Oregon's existing statutory forfeiture framework for cancellation proceedings that requires evidentiary submissions through notarized affidavits and formal notice before cancellation proceedings may be initiated. This proposed rule encourages unsupported forfeiture claims and impedes due process, leading to increased contested cases and administrative inefficiency. In addition, allowing unsubstantiated claims for forfeiture made in a protest to stop development for decades effectively eliminates water rights of use and impedes the public's use of water.

Pursuant to OAR 690-017-0400, the decision to initiate cancellation proceedings shall be based on evidence submitted to the Department in the form of notarized affidavits from two individuals. A mere assertion of forfeiture within a transfer protest does not satisfy this evidentiary requirement. Further, ORS 540.631 requires that upon initiation of forfeiture proceedings, the Department must provide written notice by registered or certified mail, return receipt requested, to the legal owner of the lands to which the water right is appurtenant and to the occupant of such lands. These notice requirements reflect the Legislature's intent that forfeiture proceedings align with full due process protections. Permitting cancellation

proceedings to begin based solely on a forfeiture claim asserted in a transfer protest bypasses required safeguards and eliminates any requirement on the protestant to provide evidentiary support for the forfeiture claim as well as the subsequent review by the Department to evaluate the forfeiture claim.

If this rule were adopted, the mere claim of forfeiture by a protestant with its $1425.00 fee will stop a development worth millions of dollars, force a continued non-beneficial use of the appropriated public use by the applicant or cancel that beneficial, appropriated use because the use cannot continue during the delay caused by the contested case procedure. All of these disastrous outcomes will only increase the Department's failure to meet its budget as stated in this report: Water Rights Transactions.

We request the withdrawal of proposed rule OAR 690-380-4200(2) and for a revised rule to be republished that requires 1) any protestant claiming forfeiture to include within their protest the required evidentiary support; 2) an evaluation of the forfeiture claim by the Department within 30 days; and 3) if the claim is unsupported, that the Department proceed with processing the transfer deeming the forfeiture claim resolved. Thus, the Department should proceed immediately to cancellation proceedings incorporated within the protest contested case hearing only if the Department finds that the evidentiary support for forfeiture made by the protestant withstands the clear and convincing standard required.

The proposed rule should further clarify that established procedures for cancellation proceedings are to be followed. This approach preserves due process and aligns with previously established Department proceedings pursuant to Oregon laws, protecting Oregon citizens' access to the continued beneficial use of the appropriated public waters and reducing an unnecessary backlog of contested cases. Additionally, we request that these comments inform that effort.

II. Proposed OAR 690-380-2330(8)

Proposed OAR 690-380-2330(8) seeks to add an additional requirement that a substitution under ORS 540.524 be terminated before any subsequent transfer or change application involving that right may be approved. This requirement adds substantive conditions that are not found in the plain meaning of ORS 540.524. This statute limits what a substitution does not authorize (changes to a water right such as additional POA, change in POU, etc.), but it does not require that a substitution that either is going through the review to final order process determining injury or that has already been approved by a final order be terminated at any time but particularly not before the water right holder seeks a transfer under ORS 540.520.

The proposed rule infers additional meaning into ORS 540.524 that is not supported by the plain statutory language, the legislative intent underlying the 1999 enactment of the statute, or existing water right transfer procedures. As proposed, OAR 690-380-2330(8) would require a water user to terminate their substituted right before proceeding with a transfer application, incorrectly inferring that transferring a substituted right constitutes an automatic injury. This interpretation is inconsistent with ORS 540.524 which already provides an established process to terminate substitutions during the substitution approval process to determine injury. Further, the

transfer process pursuant to ORS 540.520 already provides robust mechanisms to ensure that no injury occurs to existing water rights, priority dates are preserved, and proposed changes are fully evaluated by the Department through notice, protest, and contested case proceedings.

Requiring termination of a substitution before a transfer application may even be reviewed does not enhance these protections. Instead, the proposed requirement will eliminate much of the practical benefits of substitutions and increase the number of filings required by applicants. Given that the purpose of this proposed rulemaking is to make agency water right processes more clear, efficient, and consistent, this is especially concerning.

Finaly, proposed OAR 690-380-2330(8) is inconsistent with other provisions within Division 380. OAR 690-380-2330(6) states that "for the purpose of this rule, a substituted primary surface water right shall be treated as a supplemental water right and a substituted supplemental groundwater right shall be treated as a primary water right." This provision establishes how substituted rights are to be treated during review by the Department. Proposed subsection (8) conflicts with this framework by effectively prohibiting review unless the substitution is terminated, creating ambiguity and inconsistency within the rule itself.

While we honor the purpose of the proposed rulemaking (to address growing backlogs and inefficient processing rules), we are concerned that the proposed rule's inclusion of OAR 690-380-2330(8) undermines the legislative intent of Senate Bill 301 (1999) and incorrectly assumes that a transferred substituted right will automatically cause injury. This requirement does nothing to increase efficiency of the Department, nor does it protect against injury to other water rights. Instead, the proposed rule adds procedural barriers that are not required by existing statute and will increase administrative backlog and contested cases.

We request the withdrawal of the proposed rule OAR 690-380-2330(8) and for a revised rule to be republished that is consistent with the plain meaning of the statutory language of ORS 540.524 and existing transfer procedures under ORS 540.520. An alternative, consistent with existing and applicable rules, would require that where a transfer application involves a substitution that has already been approved by final order, the substitution remains effective and if pending, that the substitution application be procedurally aligned with the transfer so that both matters proceed concurrently. In other words, where a substitution has been finalized prior to the transfer, it should remain in place. If not finalized by order, then the substitution application should continue alongside the transfer process. This approach would preserve the already established statutory procedures for terminating a substitution when requested by the water right holder or by determination by the Director that the use of the ground water as the primary water right causes injury. Certainly, processing both substitution and transfer simultaneously will reduce the backlog and if required, move forward with only one contested case instead of two. Additionally, we request that these comments inform that effort. Thank you for considering our comments on the proposed rule.

Please ensure that our office receives notice of any and all matters related to proposed rule OAR 690-380 at the following address: 1915 NE Cesar E. Chavez Blvd., Portland, OR

97212. Thank you for your attention to this matter. If you have any questions, please contact our office at (503) 281-4100.

Very truly yours,
SCHROEDER LAW OFFICES, P.C.

Laura A. Schroeder

LAS:sms

cc: Client

HARTT Laura A * WRD

From: richard smith <tallgramps@msn.com>
Sent: Thursday, February 5, 2026 6:49 PM
To: WRD_DL_rule-coordinator
Subject: re: notification of water right application and water right transfer

The current and proposed notification procedure are both inadequate. By the time a property owner becomes aware that a transfer or new water right have been applied for it is almost always to late to make a public comment. All well owners within a one mile radius of the proposed POA should be notified by usps mail well in advance of the allotted time for comment.

I have personally been very negatively affected by the lack of notification and forced to drill a new well.

Richard Smith

Sent from Outlook

Oregon Water Resources Congress
795 Winter St. NE | Salem, OR 97301 | Phone: 503-363-0121 | Fax: 503-371-4926 | www.owrc.org

February 6, 2026

Laura Hartt, Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
Submitted via e-mail: WRD_DL_rule-coordinator@water.oregon.gov

RE: Comments on OWRD's 2025-26 Water Rights Rulemaking

On behalf of the Oregon Water Resources Congress, I am providing comments on the Oregon Water Resources Department's (OWRD) proposed revisions to *Water Rights Transactions, Contested Cases, and Forfeiture Rules.* OWRC served on the Rules Advisory Committee (RAC) for this rulemaking effort and appreciates the opportunity to provide formal public comment. Throughout the RAC process OWRC and other RAC members expressed concerns about the scope and pace of the proposed rulemaking. Some of our concerns were addressed in the final draft issued for public comment and others were not. We remain concerned that the scope and rushed process will lead to unintended consequences.

OWRC is a nonprofit trade association representing irrigation districts, water control districts, drainage districts, water improvement districts, and other local government entities delivering agricultural water supplies throughout Oregon. Our members are quasi-municipal local government entities charged with operating and maintaining complex water management systems, including water supply reservoirs, canals, pipelines, hydropower facilities, fish screens, and fish passage. Our members, and the farmers and they serve, rely upon several of the water rights related processes included in the current OWRD rulemaking.

Before we move into our specific comments and concerns, we want to express our appreciation to OWRD staff for their time and efforts throughout the RAC process. Staff did a great job responding to RAC feedback, providing summary documents, redline comparisons, and other helpful documents. This helped diminish the difficulty of discussing revisions to eighteen different divisions over a very short period (nine meetings between September 17 and November 21). However, most of the divisions have proposed changes that are different from the previous versions the RAC discussed and do not necessarily tie back to specific RAC feedback, which makes tracking the changes difficult.

We do also want to acknowledge and appreciate OWRD withdrawing five divisions from the final list of proposed revisions. However, the proposed revisions still include thirteen different divisions, which is still the largest rulemaking undertaken by the Department since its initial inception. We remain concerned that proposed the rule changes will lead to

unintended consequences, including missed errors, incongruent language across divisions, and additional time and cost by WRD and applicants to figure out what the new rules mean. This is counter to the rulemaking's purported purpose and grossly beyond the three legislative measures that precipitated the rulemaking.

It is also worth noting that only one of the three bills has the deadline of April 2026 for implementation, and in the absence of updated rules, the new statutory language created by the bills provides the legal construct for the Department to move forward without new rules. That being said, we are supportive of the proposed changes to allow for more electronic communications where appropriate and other similar provisions of HB 3342.

However, we will note that HB 3342 provided OWRD with the authority to accept credit card payments and pass the processing fee on to the applicant. Several of the proposed rule changes to implement this legislation include the addition of electronic document submission to various Department processes. Generally, a transaction is not processed until payment is received and deadlines for submitting are not met until payment is received. During the RAC process it was stated by OWRD staff that credit card payments are still not an available option and there is no timeframe for when this will occur. Adopting new rules that allow for electronic submission while still requiring a paper check payment is nonsensical and likely to lead to applicant confusion, missed deadlines, and an overall hinderance to efforts to increase water right processing efficiency.

Process and Scope Concerns

Throughout the RAC process, OWRC repeatedly voiced its opposition to the breathtaking scope of rules being drafted and rushed timeframe for RAC discussion. This incredibly complex RAC proceeding originally encompassed changes to eighteen divisions of agency rules in the span of a two-month period.

This condensed process was undertaken to implement three enacted bills from the 2025 session, including two of interest to OWRC: House Bill 3342 (Chapter 282, 2025 Oregon Laws) relating to water right transactions, and House Bill 3544 (Chapter 575, 2025 Oregon Laws) relating to contested case processes, the former having an April 1, 2026 legislatively imposed implementation deadline. However, the RAC process was greatly expanded beyond implementation of 2025 legislation resulting in over half the chapters addressed during the RAC process having no direct connection to implementing the bills above.

OWRC joined a November 26, 2025 letter to the Department with six other RAC members expressing grave concerns regarding the breadth, scope, and short time frame for RAC consideration and the real danger of unintended negative consequences, resulting in lost efficiency and unwanted litigation. In that letter, OWRC and the other RAC members strongly urged the Department to focus on rulemaking necessary only for the implementation of the 2025 legislation cited above and address extraneous rule revisions in a later process allowing for careful consideration of a broader set of rule divisions.

In response to those concerns, the Department narrowed the scope of the Notice of Proposed Rulemaking, reducing the number of divisions revised from eighteen to thirteen and omitting for the time being Divisions 52, 53, 54, 320, and 330. While this is a welcome

and appreciated development, the Notice of Proposed Rulemaking still greatly exceeds the scope of rulemaking necessary to implement HB 3342 and HB 3544 of concern to OWRC.

Furthermore, a one-month formal comment deadline is simply too short to adequately identify unintended consequences and issues within this broad swath of complex and interrelated rules. Given the April 1, 2026 deadline for implementing HB 3342, all other rules should have been deferred until after April 1st except those directly concerning HB 3342 and HB 3544. Regardless, OWRC looks forward to constructively participating in future RAC(s) to revise and modernize rule divisions not addressed in the current Notice of Proposed Rulemaking.

We have focused our specific comments on proposed rule changes on the divisions that are most likely to impact our members. While we are not commenting on all of the divisions we remain concerned about rulemaking as a whole, potential broader impacts to other water right holders, and how these changes will be interpreted, either because of the proposed change, lack of clarity on what the proposed change means, or confusing cross references between rule divisions.

Division 2 – Protests and Contested Cases

This division contains proposed changes related to implementing HB 3544, which made changes to procedures and timing of water rights protests and contested cases. OWRC was not directly involved in the legislation as external stakeholders who weighed in were primarily water attorneys. Our understanding is that the intent of HB 3544 is to help reduce the amount of time it takes for these cases to be resolved, which can be an improvement for both the agency and external stakeholders. The proposed changes to Division 2 seem to line up with the statutory direction in HB 3544. We are supportive of the proposed changes for this division, including limiting the number of interrogatories and placing modest limits on discovery.

Protests and contested cases are an important legal and procedural process of Oregon's water law. However, some of these cases have led to protracted delays and high costs born by OWRD, the State of Oregon, the applicants, and protestants. These cases also drain staff and financial resources that could be better used in other program areas. It is worth noting that for OWRC and our members this issue can cut both ways. In some instances, the water right transaction subject to protest may be a water right held by a district and the district supports the decision made by OWRD, and is not a protestant. Conversely, if the district disagrees with OWRD's decision, they may choose to protest that decision as the applicant. At other times, our members may be the third party protesting a OWRD decision that impacts their water right. These actions are all equally important to have as options, but not drag on for decades before a legal resolution is reached.

Division 17 – Cancellation of Perfected Water Rights

We have concerns about the addition of "aerial imagery" and "evapotranspiration data" to 690-017-400 (4). Aerial imagery is a snapshot in time, which cane be useful, but without specific time delineation it may not reflect actual water use and agricultural practices. Similarly, evapotranspiration data can be useful in some instances, but Oregon lacks the

on the ground monitoring needed to verify this data, particularly in areas with multiple types of crops. We request these additions be removed.

Division 18 – Allocation of Conserved Water

The changes proposed in Division 18 are not driven by the 2025 legislation and merit additional discussion. Additionally, there was very little time dedicated to this section during the RAC process (part of one meeting) and an acknowledgement by Department staff that there are more potential changes that could be made to improve the ACW program and associated processes. We recognize and appreciate that some proposed changes were removed from the current draft rules but feel strongly that no changes should be made to this section and instead a separate RAC be created rather than rushing partial changes through. It would be more prudent to spend the time to thoughtfully craft changes with a RAC group that has experience and interest in the ACW program rather than do partial adjustments as part of the rushed process.

Aside from the aforementioned process concerns, we do have some specific concerns:

We are not supportive of removing the definition of “living certificate” from the definitions listed in 690-018-0020. This deletion occurs in several places in this division and other rule divisions and we request that it be restored in all places. This deletion will lead to a requirement for a new certificate to be issued after each conserved water project, which will create more work for the Department, the districts, and lacks any reasoning as to why. These “living (water right) certificates are currently a useful way for the districts and the Department to track transactions over time, and if needed can be incorporated into a new water right certificate.

We also have concerns about the addition of language under 690-18-0090(c) “The proposed point of diversion would divert water from the same authorized source of water and would not constitute injury to another existing water right, including any instream water right granted pursuant to a request under ORS 537.336 or created pursuant to ORS 537.346(1) and held in trust by the Department” This seems overly broad and not clear could benefit from further definition or expansion on how potential injury to instream water rights referenced under this section in relation to standard injury review.

Division 77 – Instream Water Rights

OWRC was a member of the most recent previous RACs related to Division 77 (2015 and 2021,) which were properly structured as a single division rulemaking and allowed for more time to properly discuss proposed changes. However, neither RAC was actually completed and some of the proposed changes in the current draft were not discussed or agreed upon in the previous RAC efforts, or are not tied the 2025 legislation. While this division did have more RAC discussion than other rule divisions, it is still concerning when there are so many changes without full explanation of why.
That being said, we are supportive of several of the changes discussed in the previous RACs and other minor changes.

We are supportive of several changes that will provide clarity and reduce unnecessary steps for districts to file instream leases.

Specifically we support the proposed definition of “district,” under 690-077-0010(10), which references the specific statutes for irrigation districts and similar local governments, and is the same language proposed in the 2015 RAC. The definition of “district water user” is slightly different than previous versions and I believe has a typo.

> “(11) “District Water User” means, for the purposes of instream leases involving a district, the owner of land who is subject to the charges or assessments of a district and from whose land the appurtenant water right would be leased **upstream**.” **Upstream should be instream.** There are probably more typos.

We are supportive of language in 690-077-0076 (4) that will allow less unnecessary paperwork for districts submitting instream lease applications on behalf of the water rights they hold in trust for their patrons. We think some of the new language in (4)(b) is unnecessary (as districts are public entities already subject to public records requests) but do not have significant concerns about its inclusion.

As previously stated above, we have concerns about the proposed deletion of a “living (water right) certificate” here and throughout the operative sections of Division 77 and other divisions. Even though Department retains in the proposed rules the flexibility intended by the term we request that definition be restored.

In conclusion, we strongly recommend the Department postpone adopting proposed rule revisions to thirteen divisions and instead solely focus on what is needed to implement the 2025 legislation. Rushing to implement changes across complex water right rule divisions will only lead to more work for the Department, for districts, and various stakeholders who rely on efficient water right transactions. We appreciate your time and consideration of our comments.

Sincerely,

April Snell
OWRC Executive Director

February 6, 2026

Water Resources Commission
725 Summer St. NE Suite A
Salem, OR 97301

Ivan Gall, Director
Oregon Water Resources Department
725 Summer St. NE Suite A
Salem, OR 97301

Laura Hartt, Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
E-mail: WRD_DL_rule-coordinator@water.oregon.gov

RE: Oregon Association of Nurseries Public Comments: 2025-26 Water Right Rulemaking

Vice-Chair Smitherman, Commissioners, and Director Gall:

On behalf of the Oregon Association of Nurseries ("OAN"), I am writing to request that the Oregon Water Resources Department ("OWRD") revise its proposed rules for OAR Chapter 690, Division 18 to ensure the rules clearly recognize that groundwater rights are eligible for the Allocation of Conserved Water ("ACW") program set forth in Division 18. Specifically, OAN requests that OWRD re-insert the rule provisions OWRD proposed on October 14, 2025 in OAR 690-018-0050(5)(c)(C)(i), OAR 690-018-0050(5)(c)(D)(ii), OAR 690-018-0065(2)(c)(A), and OAR 690-018-0065(3)(b), which clarify that groundwater conserved under the ACW program will remain in its source aquifer. As explained in this letter, OWRD's proposed langauge provided important clarity on groundwater rights for a program that is uniquely positioned to benefit both water user interests and conservation interests.

OAN Rulemaking Engagement
Last fall, OAN participated in OWRD's 2025-26 Water Rights Rulemaking as a member of the rulemaking advisory committee ("RAC"). OAN appreciated the opportunity to be at the table for this important rulemaking, and it is generally supportive of OWRD's work to improve the efficiency of the agency's internal processes. As a RAC member, OAN supported OWRD's proposed revisions and insertions captured in OAR 690-018-0050(5)(c)(C)(i), OAR 690-018-0050(5)(c)(D)(ii), OAR 690-018-0065(2)(c)(A), and OAR 690-018-0065(3)(b).

OWRD's proposed changes to these provisions were clear, reasonable, and in alignment with statutory authority. As such, we were surprised to see that OWRD's December 22, 2025 version of the rules—the version of the rules OWRD released for public comment—do not feature any of

the language related to groundwater rights or preservation of water in the source aquifer that was contained in the earlier version of Division 18.

Based on OWRD's proposed rule revision document dated December 22, 2025, we understand that OWRD believes it has clear authority to process groundwater right certificates under the ACW program, but that it has replaced the proposed groundwater right provisions with general references to ORS 537.470(3) to give the agency "flexibility as it considers implementation of the statutes."

There is no question that groundwater right certificates may be processed under the ACW program. By removing reference to groundwater rights in Division 18, OWRD is missing a critical opportunity to increase clarity for OWRD staff and water right holders regarding the application of the ACW program.

Importance of the ACW Program for Conservation and Water Use Flexibility
The ACW program is a unique program that unites two important goals: conservation of water and flexible use of water. As set forth in statute and rule, a water right holder who participates in the ACW program must implement an on-farm efficiency project to reduce overall water use under the original water right, resulting in some volume of "conserved" water. An ACW program participant will be required to permanently dedicate at least 25% of the conserved water instream or to the source aquifer, and it will be allowed to use up to 75% of the conserved water on new acreage that is not authorized under the original water right. In Oregon, a water right holder may only expand its irrigated acreage under the narrow constraints of the ACW program, making the program a critical tool for operational expansion and flexibility.

The ACW process opens up new water use opportunities for a participant while yielding an overall reduction in the quantity of water used under the original water right and permanent conservation of at least 25% of the conserved water. There are few other programs that result in a true "win-win" outcome of this kind.

Statutory Authority
Since the ACW program was introduced, OWRD has processed surface water rights and groundwater rights under the program, and it recognizes that the agency has the statutory authority to do so. OWRD has specifically pointed to the legislation that established the ACW program, Senate Bill 24 (1987), which recognized that any person who holds a groundwater right certificate may participate in the ACW program. The current statutory language provides that a person or group that holds a "water use subject to transfer under ORS 540.505" may submit an application for the ACW program. *See* ORS 537.465(1). A "water use subject to transfer" may be a surface water right or a groundwater right.

Per OWRD's own analysis, there is no question as to whether groundwater right holders may participate in the ACW program. As we head into a future where opportunities to obtain new water rights are non-existent or extremely limited, the ACW program will be a crucial pathway for both surface water right holders and groundwater right holders to expand their operations and gain much needed operational flexibility while advancing conservation goals.

Requested Changes to Division 18 to Advance Conservation and Flexible Water Use
Oregon's policy on water conservation is set forth in no uncertain terms in ORS 537.460(2)(a), which provides that the state policy is to "[a]ggressively promote conservation." As noted above, there is no indication that groundwater rights should be excluded from such a critical conservation program.

In the interest of clarifying OWRD's existing authority, providing a roadmap for groundwater right holders who would like to participate in the ACW program, and adhering to the state's policy of promoting conservation, OWRD should reinsert its original proposed language in OAR 690-018-0050(5)(c)(C)(i), OAR 690-018-0050(5)(c)(D)(ii), OAR 690-018-0065(2)(c)(A), and OAR 690-018-0065(3)(b) into Division 18.

OWRD has acknowledged that it has statutory authority to process groundwater right certificates as part of the ACW program, and we believe that addressing groundwater right certificates specifically in the ACW program rules set forth in Division 18 is a commonsense action that will promote water conservation, flexible water use, and efficient administration of the Division 18 rules.

Please do not hesitate to reach out if you would like to discuss this matter further, and thank you for your time and consideration.

Sincerely,

Jeff Stone
Executive Director
Oregon Association of Nurseries

HARTT Laura A * WRD

From: Bryce Withers <brycewrs@gmail.com>
Sent: Friday, February 6, 2026 3:00 PM
To: WRD_DL_rule-coordinator
Subject: Comment on HB 3544 Rulemaking

Laura Hart,

RE: Public Comment on Proposed Rulemaking – Practical Implications for Permit Holders regarding Water Right Extensions

Thank you for your work implementing rulemaking for the recently enacted legislation and for providing the opportunity to submit comments.

My comments are offered from the perspective of my professional work as a Water Right Consultant and Certified Water Right Examiner. In this role, I regularly serve as an intermediary between water users and the Oregon Water Resources Department (OWRD). This is where the practical application of the ORS and OAR occurs—where policy intent meets real-world conditions.

In advocating for water users as they navigate permitting requirements, I frequently observe a disconnect between the apparent intent of statutes and rules and their practical effects, particularly when a project encounters delays or unforeseen complications. My comments below are intended to highlight common scenarios that arise in practice and to suggest adjustments that would better align rule implementation with both legislative intent and practical realities.

Topic 1: Permit Amendments and Extensions of Time for Well Location or Place of Use Changes

A common situation encountered in practice involves a permit holder who drills a well at the authorized location but encounters no water. The permit holder may then drill a nearby well that successfully produces water, but the new well location may be more than 150 feet from the authorized point of diversion.

In these cases, the current path forward typically requires the permit holder to apply for an Extension of Time to complete development, followed by a Permit Amendment to authorize the new well location. In practice, Permit Amendment review can take two to three years. If the proposed rules limit the allowable extension period to two years in certain circumstances, this creates a significant challenge.

Under such a framework, the permit holder would be required to:

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- Prepare and submit a Permit Amendment application
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- Await OWRD review and approval of the amendment

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- Potentially drill additional wells, or develop diversion points
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-
-
- Complete associated requirements such as meter installation or fish screening,
-

all within a two-year extension period. This timeline is often unrealistic. There is a substantial risk that the extended permit would expire while the Permit Amendment remains under agency review. Under prior rules, a permit holder could seek an additional extension if necessary; under the new statutory framework, only one extension may be allowed before cancellation.

Comment and Recommendation:

I respectfully suggest consideration of a mechanism that allows the Permit Amendment process to occur outside—or pause—the extension development window. Specifically, could the extension “clock” begin only after a Permit Amendment is approved or denied? Alternatively, could a pending Permit Amendment toll the extension period in a manner similar to how transfers toll the “use it or lose it” provisions related to beneficial use for certificates?

Water development projects are often affected by factors outside a permit holder’s control, including health issues, caregiving responsibilities, supply chain disruptions, and broader events such as global pandemics. Water users frequently have substantial financial investments and livelihoods at stake. A regulatory framework that allows reasonable flexibility in these circumstances would promote fairness while still maintaining accountability.

Topic 2: Extensions of Time for Long-Expired but Developed Permits

Another recurring issue involves permits that are long expired—often more than two years past the development deadline—but have been partially or fully developed. In many of these cases, a required permit condition was missed or completed after the original development period, even though the actual water use was developed on time.

A typical example includes a permit holder who completed water development within the permit window but took a required March static water level measurement, installed a totalizing flow meter, or began required reporting several years after the deadline. Although the water use is physically in place, the permit is not eligible for a Claim of Beneficial Use because one or more conditions were satisfied late.

Under current practice, this situation is often resolved by applying for an Extension of Time. Once approved, the previously completed actions fall within the extended development window, allowing the permit holder to proceed with the Claim of Beneficial Use and ultimately obtain a certificate.

However, if the proposed rules prohibit extensions where a permit has been expired for more than two years at the time of application, this pathway may no longer be available—even where the underlying water use was timely developed and beneficially used.

Comment and Recommendation:

I respectfully request clarification or revision to ensure that permits which have been expired for more than two years may still be eligible for an Extension of Time when appropriate. In particular, consideration should be given to allowing the extension period to run prospectively from the date of extension approval, rather than being constrained by the length of time since the original development deadline.

Providing this flexibility would allow permit holders to cure technical or procedural deficiencies and complete the Claim of Beneficial Use process, consistent with the underlying purpose of the permitting system.

Thank you for considering these comments and for your continued work to balance statutory requirements with practical implementation. I appreciate the opportunity to provide input and would welcome further discussion if helpful.

Sincerely,

Bryce Withers

--

Bryce Withers
Certified Water Right Examiner
Professional Land Surveyor

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