

CERTIFICATE AND ORDER
FOR FILING
PERMANENT
ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on December 16, 1994
(Date)

by the Water Resources Commission
(Department) (Division)

to become effective on filing
(Date)

The within matter having come before the Water Resources Commission
(Department) (Division) after

all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO YES Date Published: October 1, 1994

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Adopted: OAR 690-18-012, 690-18-014, 690-18-062
(New Total Rules)

Amended: OAR 690-18-010, 690-18-020, 690-18-040, 690-18-050, 690-18-080
(Existing Rules) 690-18-090

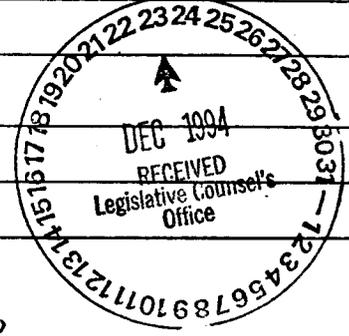
Repealed: OAR 690-18-030, 690-18-060, 690-18-070
(Total Rules Only)

as Administrative Rules of the Water Resources Department
(Department) (Division)

DATED this 23rd day of December, 19 94

By: Rebecca Q. Keagy
(Authorized Signer)

Title: Administrator



Statutory Authority: ORS 537.455 to 537.500 and 540.510 or

Chapter(s) _____, Oregon Laws 19 _____ or

House Bill(s) _____, 19 _____ Legislature; or Senate Bill(s) _____, 19 _____ Legislature

Subject Matter: The rules amend OAR 690, Division 18, Allocation of Conserved Water, to implement provisions of HB 2155 (1993). HB 2155 changed the process and criteria under which applications for allocation of conserved water are considered. The rules streamline the review process and provide new criteria for allocation of conserved water.

For Information Contact: Beth Patrino Phone: (503)378-8455 x299
(Rule Coordinator)

OREGON ADMINISTRATIVE RULES
CHAPTER 690, DIVISION 18 — WATER RESOURCES DEPARTMENT

DIVISION 18

ALLOCATION OF CONSERVED WATER

Purpose

690-18-010 (1) These rules describe the voluntary program under which a water right holder may benefit from implementation of conservation measures. Under the program, a portion of any water conserved may be used on additional lands, be put to a different use, or be leased or sold to another user.

(2) This program is intended to promote the conservation of water, maximize beneficial use and enhance streamflows pursuant to the statutory authority in ORS 537.455 to 537.500 and 540.510 (2) and (3).

(3) These rules establish a new process to review and evaluate the merits and impacts of applications for allocation of conserved water. After a sufficient number of applications are submitted, these rules shall be reviewed and revised, as necessary, to further promote the allocation of conserved water and to provide criteria for determining requirements for mitigation and the establishment of instream water rights.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 536, 537 & 540
Hist.: WRD 19-1988, f. & cert. ef. 11-4-88; WRD 15-1994, f. & cert. ef. 12-23-94

Allocation Formula and Process

690-18-012 (1) Pursuant to ORS 537.470(3), after determining the quantity of conserved water, if any, required to mitigate the effects on other water rights, the Commission shall allocate 25 percent of the remaining conserved water to the state and 75 percent to the applicant, unless the applicant proposes a higher allocation to the state or more than 25 percent of the funds used to finance the conservation measures comes from federal or state public sources. If more than 25 percent of the funds used to finance the conservation measures comes from federal or state public sources and is not subject to repayment, the Commission shall allocate to the state a percentage equal to the percentage of public funds used to finance the conservation measures and allocate to the applicant a percentage equal to the percentage of other funds used to finance the conservation measures. In no event, however, shall the applicant receive less than 25 percent of the remaining conserved water unless the applicant proposes a higher allocation to the state.

(2) A water right affected by an allocation of conserved water under this program shall retain its original priority date. The priority date of the conserved water rights shall be one minute after that of the original right.

(3) Many water users have expressed concern about the effects of an allocation of conserved water on the continued use of water under the original water right. These rules allow for a period of up to five years after implementation of a conservation project to confirm that the project is performing as expected. This will allow water right holders to better determine the adequacy of the quantity of water allocated to the original right. However, no out-of-stream uses may be made of the conserved

water until after final completion of the project and issuance of the new certificates.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 537 & 540
Hist.: WRD 15-1994, f. & cert. ef. 12-23-94

Timing of applications

690-18-014 (1) Applications for allocation of conserved water should be submitted prior to implementation of conservation measures. Project sponsors are encouraged to consult with the Department and other natural resource agencies and to submit applications early in the process of project development. The Department will work with applicants to identify and resolve any concerns of local water right holders, governmental entities, or other organizations.

(2) Notwithstanding section (1) of this rule, applications for allocation of conserved water may be submitted for projects in which all or a significant portion of the project costs have already been incurred. However, these project sponsors must consult with other water right holders in the area, governmental entities, and other organizations who have asked to be consulted prior to submittal of an application to identify and resolve any concerns regarding the application. Conserved water shall not be allocated for projects constructed before November 4, 1993.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 537 & 540
Hist.: WRD 15-1994, f. & cert. ef. 12-23-94

Definitions

690-18-020 The following definitions apply in OAR Chapter 690, Division 18 and to any applications submitted or certificates issued under these rules.

(1) "Affected local government" means any local government, as defined in OAR 690-05-015, within whose jurisdiction water is or would be diverted, conveyed, or used under a proposed or approved order allocating conserved water.

(2) "Commission" means the Water Resources Commission.

(3) "Conservation" means the reduction of the amount of water diverted to satisfy an existing beneficial use achieved either by improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other approved conservation measures.

(4) "Conserved Water" means that amount of water that results from conservation measures, measured as the difference between:

(a) The smaller of the amount stated on the water right or the maximum amount of water that can be diverted using the existing facilities; and

(b) The amount of water needed after implementation of conservation measures to meet the beneficial use under the water right certificate.

(5) "Conserved Water Right" means any water right established by allocation of a quantity of water, which results from the savings of a conservation measure pursuant to OAR 690-18-010 to 690-18-090.

(6) "Department" means the Water Resources Department.

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(7) "Director" means the Water Resources Director.

(8) "Instream Water Right" means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water instream for public use.

(9) "Project costs" means the estimated total projected expenditures and in-kind contributions for a conservation project including but not limited to the costs of engineering, constructing, and monitoring the project and the present value of the incremental change in costs for up to 20 years of operations and maintenance which would not be incurred or realized in the absence of the project.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 197, 536, 537 & 540
Hist.: WRD 19-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 15-1994, f. & cert. ef. 12-23-94

Policy

690-18-030 [WRD 19-1988, f. & cert. ef. 11-4-88; Repealed by WRD 15-1994; f. & cert. ef. 12-23-94]

Application

690-18-040 Applicants for allocation of conserved water shall provide to the Department the information described in this rule in substantially the same order as listed. The information shall include:

(1) The name of the applicant(s), mailing address(es) and telephone number(s);

(2) The certificate numbers of any water rights held by the applicants which will be affected by the proposed conservation project and the names appearing on the certificates;

(3) The date of priority and source of water for each water right identified in section (2) of this rule;

(4) The amount of water which may be used under the original rights expressed as the lesser of:

(a) The maximum rate and annual volume (duty) of water which may be diverted as stated on the water rights; or

(b) The maximum amount of water that can be diverted using the existing facilities stated as a rate of diversion;

(5) A description of the present system including diversion structures, pumps, conveyance facilities, and application methods which will be affected by the proposed project in sufficient detail for the Department to confirm the calculation of the capacity of the system.

(6) A description of the proposed changes to be made in the physical system and operations that will result in the conservation of water.

(7) The amount of water the applicants will need after implementation of the conservation measures described as a maximum rate of flow and seasonal volume (duty) of water;

(8) The proposed percentages and quantities of conserved water to be allocated to the applicants and to the state and the proposed use of any conserved water allocated to the applicant;

(9) A schedule which identifies when the applicants intend to:

(a) Begin construction of the conservation project;

(b) Complete construction and file notice of project completion pursuant to OAR 690-18-062(1); and

(c) Request that the allocation be finalized pursuant to OAR 690-18-062(3).

(10) A description of any expected effects of the proposed allocation of conserved water on other appropriators which identifies what presently happens to the water which the applicant is proposing to conserve;

(11) A description of any mitigation or other measures planned to avoid harm to other water rights;

(12) A description of the boundaries of the expected area within which the diversion structures and places of use of the applicants' conserved water right would be located;

(13) To the extent possible, identification of the stream reach for which the conserved water should be managed under an instream water right and any reservations or dedications of the water to instream use;

(14) A map with sufficient detail to locate and describe the facilities and areas affected by the conservation measures;

(15) Identification of any federal or state public sources of project funds and, if federal or state public funds which are not subject to repayment will be used in the project, information showing the estimated project costs and anticipated sources of funds for the project including:

(a) The total cost for project engineering and construction;

(b) The present value of any incremental changes in the costs of operations and maintenance which are directly attributable to the project which would not be incurred or realized in the absence of the project;

(c) The amount of funding and the value of any in-kind contributions for project engineering and construction and for any incremental changes in the costs of operations and maintenance to be provided from federal or state public funds which are not subject to repayment; and

(d) The amount of funding and the value of any in-kind contributions for project engineering and construction and for any incremental change since costs of operations and maintenance to be provided from other funds.

(16) If construction of the project has begun or been completed and if more than 25 percent of the project costs have been expended before applying for allocation of conserved water, evidence that the applicant has attempted to identify and resolve the concerns of water right holders in the area, governmental entities, or other organizations who have asked to be consulted regarding the allocation of conserved water;

(17) A letter showing irrigation district or water control district approval if the conservation project is within the boundaries of the district;

(18) Land use information outlined in the Department's Land Use Planning Procedures Guide; and

(19) Other information the Department or Commission deems necessary and appropriate to aid in the evaluation of the application.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 197, 536, 537 & 540

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Hist.: WRD 19-1988, f. & cert. ef. 11-4-88; WRD 3-1990, f. & cert. ef. 2-28-90; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 15-1994, f. & cert. ef. 12-23-94

Processing a Conservation Application

690-18-050 (1) When the Department receives an application for allocation of conserved water, the Director shall provide public notice of the application through:

(a) Publication in a newspaper having general circulation in the area in which the water rights addressed in the application are located, for a period of at least three weeks and not less than one publication each week; and

(b) Concurrent with the date of first publication pursuant to subsection (a) of this section, mailing to individuals, organizations and agencies including the Indian tribes and local government planning departments on the Department's weekly mailing list, irrigation districts in the area, and any other parties which the Director determines should be notified.

(2) Any person may review and comment on the application for allocation of conserved water by the deadline specified in the notice. The deadline specified in the notice shall provide at least 20 days after the date of last publication pursuant to subsection (1)(a) of this rule for the submittal of comments.

(3) The Department shall review the application and consider any comments received under section (2) of this rule to determine:

(a) If the proposed allocation of conserved water will result in a reduced diversion for the uses allowed under the original water rights;

(b) If the proposed allocation of conserved water will harm existing water rights;

(c) If the application is consistent with the requirements established in OAR 690-05-045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans);

(d) The quantity of conserved water needed to mitigate for harm to existing water rights and the quantity of conserved water which may be allocated;

(e) The new rate and duty for the existing water rights held by the applicant and for any out-of-stream use of the conserved water rights;

(f) In consultation with the Departments of Fish and Wildlife, Environmental Quality and Parks and Recreation, if conserved water is needed to support instream uses;

(g) The amounts of water to be allocated to the applicant and, if needed, to the state for an instream water right based on the project costs and the amount of non-reimbursable public funds to be used for the project consistent with ORS 537.470(3);

(h) The areas within which the conserved water may be used for out-of-stream purposes and the stream reaches to which the conserved water may be dedicated for instream purposes;

(i) The periods to be allowed for the applicants to file a notice of completion of the conservation measures and to request that the allocation be finalized pursuant to OAR 690-18-062. The time allowed between filing the notice of completion of the conservation measures and requesting that the allocation be finalized shall not exceed five years; and

(j) Any other conditions or limitations to be included in the new water rights, including conditions or limitations to prevent or mitigate for harm to existing water rights.

(4) The Department shall provide notice of the determination under section (3) of this rule to the applicant and to each person who commented on the application for allocation of conserved water in response to the public notice under section (2) of this rule.

(5) If a protest to the proposed allocation of conserved water is received by the Department within 60 days of the mailing of the determination provided pursuant to section (4) of this rule, the Director may work with the applicant and any protestant to determine whether the issues can be resolved through mutually agreeable conditions, or by modifying the application

(6) If no protests are received or if the protests are resolved pursuant to section (5) of this rule, the Director shall issue an order consistent with the determination and including any agreed-upon conditions. An order approving an application shall provide for issuance of a certificate superseding the original certificate at the reduced rate and duty and for allocation of the conserved water, contingent upon completion of the proposed project and satisfactory proof of use of the conserved water pursuant to OAR 690-18-062.

(7) If protests are received raising issues which cannot be resolved pursuant to section (5) of this rule, the Director shall present the application, all protests and a recommendation for action to the Commission for review and action.

(8) The Commission shall examine the application, the protests and the Director's recommendation. If the Commission finds the allocation of conserved water is likely to injure existing water rights or is otherwise inconsistent with these rules, the Commission may direct the Department to hold a contested case hearing on the application pursuant to ORS 183.413 and OAR 690, Divisions 1 and 2 or to resume attempts to resolve the disputed issues. If the Commission finds the allocation of conserved water is not likely to injure existing rights and is otherwise consistent with these rules, the Commission may authorize the Director to issue an order approving the application.

(9) In the event of a land use dispute, as defined in OAR 690-05-015 (Definitions), the Director shall follow resolution procedures provided in OAR 690-05-040 (Resolution of Land Use Disputes).

Stat. Auth.: ORS 537.455 to 537.500 & 540.510

Stats. Implemented: ORS Ch. 197, 536.025, 536.027, 537 & 540

Hist.: WRD 19-1988, f. & cert. ef. 11-4-88; WRD 3-1990, f. & cert. ef. 2-28-90; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 5-1991, f. & cert. ef. 4-26-91; WRD 15-1994, f. & cert. ef. 12-23-94

Appeal

690-18-060 [WRD 19-1988, f. & cert. ef. 11-4-88; WRD 3-1990, f. & cert. ef. 2-28-90; Repealed by WRD 15-1994, f. & cert. ef. 12-23-94]

Completion of Conservation Project

690-18-062 (1) If the order approving the application for allocation of conserved water allows

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a time period for finalizing the allocations water prior to certification, upon notice from the applicant that the project has been completed, the Director shall issue an order:

(a) Canceling the water right held by the applicants which are modified by the allocation of conserved water;

(b) Allowing the continued use of water for the purposes and at the locations described in the original water right certificates at the rate and duty prescribed under OAR 690-18-050(3)(e); and

(c) Allowing the use and management of the conserved water as a dedication of the water instream.

(2) Consistent with the order approving the allocation of conserved water and at the request of the applicants within the period allowed under the order under OAR 690-18-050(3)(i), the Director may increase the amount of water to be used pursuant to subsection (1)(b) of this rule and decrease by a like amount the conserved water to be allocated pursuant to OAR 690-18-050(3)(d) if the Director finds that the changes are necessary because the conservation project has not performed as expected and that the applicants' use of additional water would not be wasteful. A request for additional water submitted under this section shall include sufficient information to demonstrate that:

(a) The project is less effective than was expected when the order approving the allocation of conserved water was issued;

(b) The lack of performance is not caused by the applicants' failure to maintain the project; and

(c) The amount of water remaining for use under the original water rights is insufficient to satisfy the beneficial uses.

(3) Prior to the expiration of the time allowed under OAR 690-18-050(3)(i), the applicant may request that an allocation of conserved water be finalized. The request shall include:

(a) If all or part of the applicants' portion of the conserved water is to be used for an out-of-stream use at an identified location, the following information:

(A) The name and address of the person using the water;

(B) A description of the type of beneficial use of the water;

(C) A legal description of the place of use; and

(D) A map that meets the standards in OAR 690-11-070; and

(b) If all or part of the applicants' portion of the conserved water is to be leased, dedicated or temporarily reserved instream, a statement identifying the quantity of water to be managed as an instream water right.

(4) Upon receipt of a request that an allocation of conserved water be finalized or upon the expiration of the time allowed under OAR 690-18-050(3)(i), the Director shall issue:

(a) A superseding certificate as provided for in the order approving the allocation of conserved water;

(b) A certificate for an instream water right for the state's portion of the conserved water if required under OAR 690-18-050(3)(g); and

(c) An order allowing:

(A) The use of any portion of the conserved water allocated to the applicants, at the location and for the type of use identified pursuant to

subsection (3)(a) of this rule;

(B) The use and management as an instream water right of any conserved water which is being leased, dedicated or temporarily reserved instream.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510

Stats. Implemented: ORS Ch. 537 & 540

Hist.: WRD 15-1994, f. & cert. ef. 12-23-94

Allocation of a Quantity of Conserved Water

690-18-070 [WRD 19-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; Repealed by WRD 15-1994, f. & cert. ef. 12-23-94]

Management of Conserved Water

690-18-080 (1) The Department shall manage any conserved water allocated to instream use under the rules established to implement ORS 537.332 to 537.360 pertaining to instream water rights.

(2) A conserved water right reserved instream for future out of stream use shall be managed to carry the water through the stream reach described in the order issued pursuant to OAR 690-18-050. Any conserved water reserved instream shall maintain its priority date and will not be subject to abandonment under ORS 540.610 to 540.670.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510

Stats. Implemented: ORS Ch. 193, 536, 537 & 540

Hist.: WRD 19-1988, f. & cert. ef. 11-4-88

Change in Use of Conserved Water

690-18-090 (1) Any person or agency entitled to the use of conserved water shall notify the Director of any change in the type of use, place of use or point of diversion. The notice must be submitted 60 days before the actual change and must include the information requested in OAR 690-18-062(3)(a).

(2) The Director shall approve a change in the type of use, place of use, or point of diversion for conserved water if:

(a) The proposed new use is within the area described under OAR 690-18-050(3)(h);

(b) The proposed change would not constitute an expansion of the right; and

(c) The approval is consistent with OAR 690-05-045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans).

(3) A change in the dispensation of the use of a conserved water right may be initiated 60 days after the notice prescribed in section (1) of this rule if the Director takes no action within that period.

(4) When a right to the use of conserved water is sold or given to an agency or political subdivision of the state or to a person:

(a) The right shall become appurtenant to the premises upon which use is made;

(b) A certificate of water right shall be issued upon satisfactory proof of use; and

(c) Unless dedicated to instream use, the right shall be subject to the provisions of ORS 540.510 to 540.539, 540.572 to 540.578, and 540.610 to 540.670.

(5) Upon approval of a change in the use or point of diversion proposed under this rule, the Director shall issue a new order to allow the new use of the conserved water.

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(6) Any changes in the type of use, place of use, or point of diversion which are not provided for under this rule shall only be made after compliance with the transfer rules in OAR 690, Division 15.

Stat. Auth.: ORS 537.455 to 537.500 & 540.510
Stats. Implemented: ORS Ch. 193, 536, 537 & 540
Hist.: WRD 19-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 15-1994, f. & cert. ef. 12-23-94