

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

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I hereby certify that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on January 26, 1996 by the Water Resources Commission to become effective upon filing.

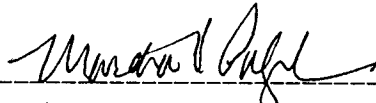
The matter having come before the Water Resources Commission after all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in the Secretary of State's Bulletin: \_\_\_ No     X Yes  
Date Published: November 1, 1995

NOW, THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List INDIVIDUAL Rule Number(s) on the appropriate line below).

ADOPTED: (see attached)  
AMENDED: (see attached)  
REPEALED: (see attached)  
RENUM. TO.: (see attached)  
AMENDED AND RENUMB. To: (see attached)

as the Administrative Rules of the Water Resources Commission  
Dated this 31st day of January, 1996.

By:   
Title: Director

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STATUTORY AUTHORITY: ORS 536.027  
OTHER AUTHORITY:  
STATUTES BEING IMPLEMENTED: ORS Chapters 183, 390, 536, 537,  
SUMMARY:

The rules are permanent water right application processing rules that reflect changes made by the 68th Legislative Assembly through SB 510, SB 674, SB 1032, SB 1033, and HB 2184. In addition, the rules include new divisions to better organize the department's rules by subject matter in OAR Chapter 690.

For further information, contact  
RULES COORDINATOR: Beth Patrino     Phone: 378-8455, ext. 299

**Adopted**

690-02-025; 02-035; 02-105; 02-175

690-77-019; 77-027; 77-029; 77-033; 77-037; 77-039; 77-043; 77-046; 77-047; 77-048;  
77-051; 77-052; 77-053

690-310-005; 310-010; 310-020; 310-030; 310-070; 310-080; 310-100; 310-110;  
310-120; 310-130; 310-140; 310-150; 310-160; 310-170; 310-180; 310-190; 310-200;  
310-210; 310-220; 310-230; 310-240; 310-250; 310-260; 310-270; 310-275; 310-280

**Amended**

690-02-010; 02-030; 02-040; 02-050; 02-090; 02-100; 02-120; 02-130; 02-150; 02-170

690-05-040; 05-050

690-77-000; 77-010; 77-015; 77-020; 77-070;

**Repealed**

690-02-070

690-77-021; 77-022; 77-023; 77-026; 77-028; 77-032; 77-034; 77-036; 77-038; 77-042;

690-11-025; 11-030; 11-040; 11-050; 11-060; 11-150; 11-160; 11-170; 11-175; 11-180;  
11-18311-185; 11-190; 11-195; 11-197;

**Renumb. to**

690-77-044 to 77-049; 77-050 to 77-054

**Amended and Renumb. to**

690-11-010 to 690-300-010

690-11-000 to 690-310-000; 690-11-020 to 690-310-040; 690-11-070 to 690-310-050;  
690-11-048 to 690-310-060; 690-11-155 to 690-310-090; 690-11-196 to 690-310-260

690-11-200(3) to 690-320-070; 690-11-200(6) to 690-320-050; 690-11-200(7) to 690-  
320-060; 690-11-205 to 690-320-010; 690-11-210 to 690-320-020; 690-11-235 to 690-  
320-040; 690-11-215 to 690-320-030

690-11-225 to 690-330-010; 690-11-230 to 690-330-020; 690-11-200(6) to 690-330-  
030; 690-11-200(3) - (5) to 690-330-040

690-11-014 to 690-340-010; 690-11-041 to 690-340-020; 690-11-046 to 690-340-030;  
690-11-047 to 690-340-040; 690-11-049 to 690-340-050

690-77-024 to 690-77-031 ✓

**CHAPTER 690, DIVISION 77**  
**INSTREAM WATER RIGHTS**  
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**WATER RESOURCES DEPARTMENT  
OAR CHAPTER 690, DIVISION 77  
INSTREAM WATER RIGHTS**

**Purpose**

690-77-000 (1) The purpose of this division is to establish the policy, procedures, criteria, standards and definitions which shall be applied by the department and Commission in the evaluation of applications for establishing instream water rights.

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

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

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

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

Statutory Authority: ORS 536.025, 536.027, 536.220, 536.300, 536.310, 537.338 & 537.356-358.

Stats. Implemented: ORS 537.332 to 537.360

**Definitions**

690-77-010 As used in this Division:

(1) "Affected Local Government" means any local government, as defined in OAR 690-05-015, within whose jurisdiction the diversion, conveyance, instream or out-of-stream use, or reservation of water is proposed or established.

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

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

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

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

(6) "Contested Case" means a hearing before the department or Commission as defined in ORS 183.310(2) and conducted according to the procedures described in ORS Chapter 537, ORS 183.413 - 183.497 and OAR Chapter 690, Division 2.

- (7) "DFW" means the State Department of Fish and Wildlife.
- (8) "DEQ" means the Department of Environmental Quality.
- (9) "Department" means the Water Resources Department.
- (10) "Director" means the director of the Water Resources Department.
- (11) "Estimated Average Natural Flow" means average natural flow estimates derived from watermaster distribution records, department measurement records and application of appropriate available scientific and hydrological technology.
- (12) "Held in Trust by the Water Resources Department" means that the water right must be enforced and protected for the public uses listed in the water right. Actions by the department affecting instream water rights are limited by public trust obligations.
- (13) "Instream," as defined in ORS 537.332, means within the natural stream channel or lake bed or place where water naturally flows or occurs.
- (14) "Instream flow" means the minimum quantity of water necessary to support the public use requested by an agency.
- (15) "Instream Water Right," as defined in ORS 537.332, means a water right held in trust by the Water Resources Department for the benefit of the people of the state of Oregon to maintain water instream for public use. An instream water right does not require a diversion or any other means of physical control over the water.
- (16) "Lease Agreement," means an order, executing a lease, signed by the director and all other required parties temporarily establishing an instream water right pursuant to ORS 537.348 (2) from an existing water right under provisions of OAR 690-77-077.
- (17) "Minimum Streamflow," also "minimum perennial streamflow," means an administrative rule provision adopted in a basin program by the Water Resources Commission or its predecessors to implement ORS 536.235, 536.310(7) and 536.325 and support aquatic life, maintain recreation or minimize pollution.
- (18) "Multipurpose Storage Project" means any storage project which is designed and operated to provide significant public benefits and provides for more than two beneficial uses and/or purposes.
- (19) "Parks" means the Parks and Recreation Department.
- (20) "Planned" means a determination has been made for a specific course of action either by legislative, administrative or budgetary action of a public body, or by engineering, design work, or other investment toward approved construction by the public or private sector.
- (21) "Planned Uses" means the use or uses of water or land which has/have been planned as defined in this section. Such uses include but are not limited to the policies, provisions, and maps contained in acknowledged city or county comprehensive plans and land use regulations.
- (22) "Pollution Abatement" means the use of water to dilute, transport or prevent pollution.
- (23) "Protest" means a written statement expressing disagreement with a proposed final order filed in the manner, and having the content, described in ORS 537.145 to 537.240.

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

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

(a) Recreation;

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

(c) Pollution abatement; or

(d) Navigation.

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

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

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

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

Statutory Authority: ORS Ch. 197, 536.025, 536.027, 536.220, 536.310, 536.332, 537.338 & 537.356 - 537.358

Stats. Implemented: ORS 537.332 to 537.360

### **General Provisions**

690-77-015 (1) Instream water rights shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any rights vested prior to the date of the instream water right.

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

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

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

(5) If the source of water for an instream water right is other than natural flow such as storage releases or inter-basin transfer, the source shall be developed or a permit



for development approved prior to or coincident in priority with the instream water right. The development of environmentally sound multipurpose storage projects that will provide instream water use along with other beneficial uses shall be supported.

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

(7) When instream water rights are established through transfers or leases of existing water rights, the certificate or lease agreement shall define the appropriate point, reach or reaches to which the new instream water right shall apply. Normally, a new instream water right shall be maintained downstream to the mouth of the affected stream; however, it may be maintained farther downstream if the amount of the instream water right is a measurable portion of the flow in the receiving stream or for a point or shorter distance if needed to account for return flow or to prevent injury.

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

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

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

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

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

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

Statutory Authority: ORS 536.025, 536.027, 536.220, 536.300, 536.310, 537.338 & 537.356 - 537.358

Stats. Implemented: ORS 537.332 to 537.360

### **Process for Instream Water Right Certificate Requests**

690-77-019 (1) Except as provided in ORS 537.343, the Department shall process a request received under ORS 537.336 for a certificate for an instream water right in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.250, and the policies under ORS 537.332 to 537.360.

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

(3) Pursuant to section 46, chapter 416, Oregon Laws 1995, for each application described under OAR 690-77-000 that was pending or filed with the Commission or the Department on June 30, 1995, the Department shall determine an appropriate step in the process established in chapter 416, Oregon Laws 1995 and this division at which to continue the application process for the application. The definitions and provisions of this division shall be applied as appropriate, to reflect the step determined by the Department.

Statutory Authority: ORS 536.025, 536.027, 537.140 to 537.250 & 537.332 to 537.360

Stats. Implemented: ORS 537.332 to 537.360

### **Application Requirements, Completion of Application Review and Additional Information**

**690-77-020** (1) Only DFW, DEQ and Parks are authorized to submit applications to the department to establish instream water rights. Applications may be submitted at any time.

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

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

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

- (a) The name(s) and address(es) of the agency(ies) applying;
- (b) The public uses to be served by the requested instream water right and the flows necessary to support the public uses;
- (c) Stream or lake name;
- (d) If a stream, the reach delineated by river mile and stream to which it is tributary;
- (e) The appropriate section of a department basin map with the applicable lake or stream reach identified;
- (f) The instream flow requested by month and year in cubic feet per second or acre-feet or lake elevation;
- (g) A description of the technical data and methods used to determine the requested amounts;
- (h) Evidence of notification of other qualified applicant agencies;
- (i) If a multi-agency request, the amounts and times requested for each category of public use;
- (j) Identification of affected local governments (pursuant to OAR 690-77-010) and copies of letters notifying each affected local government of the intent to file the instream water right application;

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

(5) The applicant is encouraged to propose:

(a) A means and location for measuring the instream water right;

(b) The strategy and responsibility for monitoring flows for the instream right;

and

(c) Any provisions needed for managing the water right to protect the public uses.

(6) Any request for an instream water right to be supplied from stored water shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the request.

(7) Within 60 days after the Department proceeds with the application under OAR 690-77-031, the department shall complete the application review and issue a proposed final order approving or denying the application or approving the application with modifications or conditions. Within the 60-day period, the department may request the applicant to provide additional information needed to complete the review. If the department requests additional information, the request shall be specific and shall be sent to the applicant by registered mail. The department shall specify a date by which the information must be returned, which shall be not less than 10 days after the department mails the request to the applicant. If the department does not receive the information or a request for a time extension under OAR 690-77-051(2) by the date specified in the request, the department may reject the application. The time period specified by the department in a request for additional information shall allow the department to comply with the 60-day time limit established by this subsection.

Statutory Authority: ORS Ch. 197, 536.025, 536.027, 537.153, 536.220, 536.300, 536.310, 537.336, 537.338 & 537.356 - 537.358

Stats. Implemented: ORS 537.332 to 537.360

#### **Application Filing**

690-77-021 [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-96]

#### **Incomplete Applications**

690-77-022 [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-96]

#### **Replacing or Amending Applications; Tentative Priority Date**

690-77-023 [WRD 9-1992,

f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-96]

### **Processing Instream Water Right Applications**

690-77-025 [WRD 20-1988,  
f. & cert. ef. 11-4-88;  
WRD 12-1990, f. & cert. ef. 8-8-90;  
WRD 5-1991, f. & cert. ef. 4-26-91;  
Repealed by WRD 8-1992,  
f. & cert. ef. 7-1-92]

### **Technical Review**

690-77-026 [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-96]

### **Completeness Review**

690-77-027(1) Within 15 days after receiving an application, the Department shall determine whether the application contains the information required under OAR 690-77-020(4) and is complete and not defective. If the department determines that the application is incomplete or defective, the Department shall return the application.

(2) Upon determining that an application contains the information listed under OAR 690-77-020(4) and is complete and not defective, the department shall indorse on the application the date upon which the application was received for filing at the department, which shall be the priority date for any water right issued in response to the application. All applications that comply with the provisions of law shall be recorded in a suitable book kept for that purpose.

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

Statutory Authority: ORS 537.150 & Ch. 538  
Stats. Implemented: ORS 537.332 to 537.360

### **Objections**

690-77-028 [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-1996]

### **Initial Review**

690-77-029(1) If the proposed use is not prohibited by statute, the department shall undertake an initial review of the application and make a preliminary determination of:

- (a) Whether the proposed use is restricted or limited by statute or rule;
- (b) The extent to which water is available from the proposed source during the times and in the amounts requested; and
- (c) Any other issue the department identifies as a result of the initial review that may preclude approval of or restrict the proposed use.

(2) Upon completion of the initial review and no later than 30 days after determining an application to be complete and not defective as described in OAR 690-77-027, the department shall mail to the applicant an initial review report setting forth the Department's preliminary determinations and allow the applicant 14 days from the date the department mails the initial review report within which to notify the department to stop processing the application or to proceed with the application. If the applicant notifies the department to stop processing the application, the department shall return the application. If the department receives no timely response from the applicant, the department shall proceed with the review of the application.

Statutory Authority: ORS 536.025, 536.027, 537.150 & 537.338  
Stats. Implemented: ORS 537.332 to 537.360

### **Director Review of Applications**

690-77-030 [WRD 20-1988,  
f. & cert. ef. 11-4-88;  
WRD 5-1991, f. & cert. ef. 4-26-91;  
Repealed by WRD 8-1992,  
f. & cert. ef. 7-1-92]

### **Public Notice and Comments**

690-77-031(1) Within seven days after proceeding with the application under OAR 690-77-029(2), the department shall give public notice of the application in the weekly notice published by the department. The weekly notice shall be transmitted to the following:

- (a) Affected local, state and federal agencies, including the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse;
- (b) Affected Indian tribes; and
- (c) All persons on the Department's weekly mailing list.

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

- (a) The name(s) and address(es) of the applicant agency(ies);
- (b) County(ies) of water use;

- (c) Application file number;
  - (d) Description of the characteristics and the purpose of the proposed instream water right;
  - (e) Amount of proposed instream water right by month or half month in cubic feet per second (cfs), acre feet (af), or lake elevation;
  - (f) Common name of surface water source(s); and
  - (g) The stream reach by mile or geographic location.
- (3) The notice shall be transmitted by regular United States mail, or, at the request of the recipient, transmitted electronically.
- (4) Within 30 days after the public notice under subsection (1) of this section, any person interested in the application shall submit written comments to the department. Any person who asks to receive a copy of the department's proposed final order shall submit to the department the fee required under ORS 536.050 (1). The 30-day comment period shall commence on the day the department deposits the notice in the mail of the United States Postal Service. All comments must be received by the department on or before the end of the 30-day comment period.
- (5) If no comments or land use information is received by the department within the 30-day comment period, the Commission and Director may presume the proposed instream water right is compatible with the comprehensive land use plans and land use regulations of affected local governments.

Statutory Authority: ORS 536.025, 536.027, 536.220, 537.140 & 537.338  
 Stats. Implemented: ORS 537.332 to 537.360

**Evaluation of Objections and Filing of Protests**

690-77-032 [WRD 9-1992,  
 f. & cert. ef. 7-1-92;  
 Repealed by WRD 1-1996,  
 f. & cert. ef. 1-30-1996]

**Public Interest Presumption**

690-77-033(1) The Department shall presume that a proposed water use will not impair or be detrimental to the public interest if:

- (a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12);
- (b) Water is available;
- (c) The proposed use will not injure other water rights; and
- (d) The proposed use complies with the rules of the Commission.

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

- (a) One or more of the criteria for establishing the public interest presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, protests or a finding of the Department that shows:

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

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

Statutory Authority: ORS 536.025, 536.027, 537.153 & 537.338

Stats. Implemented: ORS 537.332 to 537.360

#### **Alternative Dispute Resolution**

**690-77-034** [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-30-96]

#### **Commission Actions**

**690-77-035** [WRD 20-1988,  
f. & cert. ef. 11-4-88;  
Repealed by WRD 8-1992,  
f. & cert. ef. 7-1-92]

#### **Public Interest Review**

**690-77-036** [WRD 9-1992,  
f. & cert. ef. 7-1-92;  
Repealed by WRD 1-1996,  
f. & cert. ef. 1-10-96]

#### **Public Interest Review**

**690-77-037** (1) Unless the applicant requests withdrawal of an application following the initial review described in OAR 690-77-029, before issuing a proposed final order, the Department shall determine whether the public interest presumption is established for the proposed water use, as described in OAR 690-77-033.

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

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

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

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

(a) The department shall further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies