

and any other available information to determine whether the public interest presumption is overcome. The department may find that the presumption is overcome if a preponderance of evidence shows that the proposed use will impair or be detrimental to the public interest as demonstrated in comments or a finding of the department that shows:

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

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

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

(A) Threatened, endangered or sensitive species;

(B) Water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set under section 303(d) of the federal Clean Water Act and sources which the Environmental Quality Commission has classified as outstanding resource waters as defined in OAR 340-41-006(42);

(C) Fish or wildlife;

(D) Recreation;

(E) Economic development; and

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

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

(4) If the department determines that the presumption is established and not overcome under the provisions of section (3) of this rule, the department shall issue a proposed final order recommending issuance of the certificate subject to any appropriate modifications or conditions. If the department then receives a protest filed pursuant to OAR 690-77-043, which asserts the presumption is not established or should be overcome, the department shall evaluate the protest and supporting evidence in accordance with this section and sections (5) - (7) of this rule. The department shall find that the public interest presumption is overcome if a preponderance of evidence shows that:

(a) One or more of the four public interest presumption criteria listed in OAR 690-77-033 (1) (a) - (d) are not met;

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

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

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

(5) If the department finds that under section (4) of this rule the presumption is overcome, the department shall issue a final order in accordance with OAR 690-77-047 denying the application unless the department makes specific findings to demonstrate

that considering all of the public interest factors listed in ORS 537.170(8) the issuance of an instream water right certificate will not impair or be detrimental to the public interest.

(6) If the department finds that under section (4) of this rule the presumption is not overcome, the department shall issue a final order in accordance with OAR 690-77-047 approving the application with any appropriate modifications or conditions.

(7) If the director finds that a significant dispute about the proposed water use related to the public interest exists and a protest has been filed under 690-77-043, the director shall schedule a contested case hearing.

Statutory Authority: ORS 536.025, 536.027, 537.153 & 537.338

Stats. Implemented: ORS 537.332 to 537.360

Contested Case Public Interest Review

690-77-038 [WRD 9-1992,
f. & cert. ef. 7-1-92;
Repealed by WRD 1-1996,
f. & cert. ef. 1-30-96]

Proposed Final Order

690-77-039 (1) In developing the proposed final order, the department shall consider all comments received under OAR 690-77-031 and all findings of the department, but the proposed final order need not separately address each comment received.

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

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

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

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

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

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

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

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

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

(3) The department shall mail copies of the proposed final order to the applicant and to persons who have requested copies and paid the fee required under ORS 536.050 (1)(r).

(4) Within seven days after issuing the proposed final order, the department shall publish notice of the proposed final order by publication in the weekly notice published by the department. In addition to the information required to be published for an application under OAR 690-77-031, the notice of the proposed final order also shall include a brief explanation of the requirement to raise all issues under OAR 690-77-043(4).

Statutory Authority: ORS 536.025, 536.027, 537.153 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Standards for Public Interest Review

690-77-042 [WRD 9-1992,
f. & cert. ef. 7-1-92;
Repealed by WRD 1-1996,
f. & cert. ef. 1-30-96]

Protests and Standing to Participate in Further Proceedings

690-77-043 (1) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:

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

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

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

- (a) The requester's name, mailing address and telephone number;
- (b) If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- (c) A statement that the requester supports the proposed final order as issued;
- (d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and
- (e) The fee established under ORS 536.050(1)(p).

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

(5) Any person who has filed a timely request for standing may later file a petition for intervention in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 690-02-105.

(6) Requests for standing and protests on the proposed final order shall be submitted within 45 days after publication of the notice of the proposed final order in the weekly notice published by the department. Any person who asks to receive a copy of the department's final order shall submit to the department the fee required under ORS 536.050 (1)(r), unless the person has previously paid the fee.

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

Statutory Authority: ORS 536.025, 536.027, 537.153 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Standards for Review of Proposed Instream Water Rights

690-77-045 [WRD 20-1988,
f. & cert. ef. 11-4-88;
WRD 12-1990, f. & cert. ef. 8-8-90;
Repealed by WRD 8-1992,
f. & cert. ef. 7-1-92]

Determination of Director to Issue Final Order or to Refer Application for Contested Case Hearing; Conduct of Contested Case ; Exceptions

690-77-046(1) Within 60 days after the close of the period for receiving protests, the Director shall determine whether to:

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

(2) The director:

(a) May schedule a contested case hearing if:

(A) A protest has been submitted; and

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

(b) Shall schedule a contested case hearing, if within 30 days after the close of the period for submitting protests, the applicant submits the information required for a protest under OAR 690-77-043 and requests a contested case hearing.

(3) As soon as possible after making a determination under subsection (1) of this rule to refer an application to a contested case hearing, the director shall advise the

applicant, the protestant and any person requesting standing that the matter is being referred to contested case hearing and describe the procedures each must follow to participate in the contested case hearing. Such notification to the participants shall not be considered the scheduling of the contested case hearing for purposes of the running of the 45-day time period under subsection (4) of this rule.

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

(5) Notwithstanding the provisions of ORS 183.310 to 183.550 pertaining to contested case proceedings, the parties to any contested case hearing initiated under this section shall be limited to:

(a) The applicant;
(b) Any person who timely filed a protest; and
(c) Any person who timely filed a request for standing under OAR 690-77-043 and who requests to intervene in the contested case hearing prior to the start of the proceeding.

(6) The contested case proceeding shall be conducted in accordance with the applicable provisions of ORS 183.310 to 183.550 except:

(a) As provided in subsections (4) and (5) of this section; and
(b) An interlocutory appeal under ORS 183.480 (3) shall not be allowed.
(6) After the conclusion of a contested case hearing, any party may file exceptions to the hearing officer's proposed order in the manner described in 690-02-175.

Statutory Authority: ORS 536.025, 536.027, 537.153, 537.170 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Final Orders, Notice of Final Orders

690-77-047 (1) In developing the final order, the department shall consider all comments and protests received and all findings of the department, but the final order need not separately address each comment and protest received.

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

(3) A final order issued under subsection (1) for an instream water right certificate may include any condition the Director considers necessary, but which is consistent with the intent of ORS 537.332 to 537.360. The final order may:

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

(4) If the director reduces or rejects the instream water right as requested, or conditions the instream water right, the director shall include a statement of findings that sets forth the basis for the reduction, rejection or conditions.

(5) Upon issuing a final order, the director shall notify the applicant and each person who submitted written comments or protests or otherwise requested notice of the final order and send a copy of the final order to any person who requested a copy and paid the fee required under ORS 536.050 (1)(r). Within seven days after issuing the final order, the Department shall also publish notice of the final order by publication in the weekly notice published by the Department.

Statutory Authority: ORS 536.025, 536.027, 537.170, 537.343 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Final Determination of Whether Proposed Use Would Impair or be Detrimental to the Public Interest

690-77-048 (1) If the presumption of public interest under 690-77-033 is overcome in the manner described in 690-77-037, then before issuing a final order, the director or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified or conditioned in the proposed final order would impair or be detrimental to the public interest by considering the factors set forth in ORS 537.170(8).

Statutory Authority: ORS 536.025, 536.027, 537.170 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Requirement of Statement of Findings

690-77-049 Any order or proposed order by the Director or Commission that approves, reduces, conditions or rejects an instream water right shall include a statement or findings that sets forth the basis for the approval, reduction, conditioning or rejection.

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

Contested Case Hearing on Final Order

690-77-051 If a contested case hearing is not held prior to the issuance of the final order:

(1) Where the final order modifies or conditions the proposed final order, the applicant may request and the department shall schedule a contested case hearing as provided under OAR 690-77-046 by submitting the information required for a protest under OAR 690-77-043 within 14 days after the director issues the final order. The issues on which a contested case hearing may be requested and conducted under this

paragraph shall be limited to issues based on the modifications or conditions to the proposed final order.

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

Statutory Authority: ORS 536.025, 536.027, 537.170 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Time Requirements

690-77-052 (1) Except as provided in subsection (2) of this section, the department shall issue a final order or schedule a contested case hearing on an application for a water right referred to in ORS 537.140 or 537.400 within 180 days after the department proceeds with the application under ORS 537.150 (5).

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

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

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

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

(4) If the applicant does not request an extension under subsection (2) of this section and the department fails to issue a proposed final order or schedule a contested case hearing on an application for a water right within 180 days after the department proceeds with the application under OAR 690-77-029(2), the applicant may apply in the Circuit Court for Marion County for a writ of mandamus to compel the department to issue a final order or schedule a contested case hearing on an application for a water right.

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

Statutory Authority: ORS 536.025, 536.027, 537.175 & 537.338
Stats. Implemented: ORS 537.332 to 537.360

Issuance of Instream Water Right Certificate

690-77-053 After the director issues a final order approving an instream water right, the department shall issue a certificate for an in-stream water right according to the provisions of ORS 537.341. The instream water right shall date from the filing of the application with the commission. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon and shall be issued by the commission according to the procedures established under ORS 537.338. The commission shall forward a copy of each certificate issued under this section to the state agency requesting the in-stream water right. A certificate for an in-stream water right

supplied by stored water shall refer to the reservoir described in the request filed under ORS 537.336.

Statutory Authority: ORS 536.025, 536.027, 537.338 & 537.341
Stats. Implemented: ORS 537.332 to 537.360

Conversion of Minimum Perennial Streamflows to Instream Water Rights

690-77-054 (1) Within 21 days of the adoption of these rules, the commission shall request publication in the Secretary of State's bulletin and shall mail to the appropriate department mailing lists notice of proposed conversion, and a list of all existing minimum perennial streamflows established on any waters of this state prior to September 27, 1987 separated as follows:

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

(b) Those flows the Commission intends to condition with OAR 690-77-015(11) and schedule a hearing before converting to instream water rights.

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

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

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

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

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

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

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

(a) To approve the conversion; or

(b) To conduct a hearing under ORS 537.170.

(6) The Commission shall act on the Director's recommendation in accordance with OAR 690-77-045.

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

Disposition of Minimum Perennial Streamflows

690-77-055 Following the conversion of a minimum streamflow, the Commission shall retain the original minimum streamflow until it determines through basin program amendment that no public benefit is derived by maintaining both an instream water right and a minimum streamflow.

Statutory Authority: ORS Ch. 536 & 537

Stats. Implemented: ORS 537.332 to 537.360

Purchase, Lease or Gifts of Existing Water Rights for Conversion to Instream Rights under ORS 537.348(1)

690-77-070 (1) Any person may apply to the Commission to convert to an instream water right an existing right or a portion of a right which the applicant would acquire or has acquired through purchase, lease or gift.

(2) An application for conversion shall include the following information:

- (a) Name of person requesting change, mailing address and phone number;
- (b) Public use(s) for which the instream right is desired;
- (c) Source of water for the existing water right including stream or lake name and county;
- (d) Name of record on the certificate, decree or proof of appropriation;
- (e) Name and page of decree and certificate number, if applicable;
- (f) Permit number and certificate number, if applicable;
- (g) Date of priority;
- (h) The authorized existing use of water;
- (i) Place of use, by location in the public land survey and by tax lot or by block, lot and tax lot (if applicable) in a platted subdivision;
- (j) Name of deeded land owner/certificate owner and a notarized statement authorizing the transfer if the owner is not the applicant;
- (k) Copy of the current recorded deed;
- (l) If any encumbrances exist against the property to which the existing right is appurtenant, a notarized statement of no objection from each holder of an encumbrance;
- (m) Description of the quantity of water to be transferred and map delineating the present point of diversion, the lands which are the subject of the transfer and lands if any, from the existing right that would not be subject to transfer;
- (n) Recommendations, if any, for conditions on the instream water right that would avoid taking away or impairing existing permitted, certificated or decreed rights. Such conditions may include, but are not limited to the instream flow levels in cfs per month or total acre feet, the effective reach(es) or lake levels of the instream flow, measuring locations and the strategy for monitoring the instream flow or lake levels;
- (o) If the water right is acquired through lease, the specified period for the lease and the method of verifying that the original water right is not being used during the period of the lease;
- (p) If an instream water right exists on the same reach(es) or lake, or on portions thereof, a statement of whether the proposed conversion is intended to add to the

amounts of the existing instream water rights or to replace a later priority instream right, or portion thereof, with an earlier priority right.

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

Statutory Authority: ORS Ch. 536 & 537

Stats. Implemented: ORS 537.332 to 537.360

Processing a Transfer

690-77-075 Processing of the proposed transfer of a water right to an instream water right shall be pursuant to the water rights transfer rules in OAR Chapter 690, Division 15 and the following provisions:

(1) The Director shall provide notice of the proposed conversion in the Department's weekly public notice mailing list, and to affected Indian tribes and cities, and to the planning department of each affected local government. Additional notice shall be provided in accordance with OAR Chapter 690, Division 15.

(2) The Director shall review all applications to determine whether:

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

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

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

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

(C) The location of confluences with other streams downstream of the point of diversion, which shall be considered in accordance with OAR 690-77-015(7);

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

(c) The proposed flow(s) is (are) consistent with OAR 690-77-015(5), (6), (7) and (10), shall provide a public benefit for an instream use, and be appropriate considering:

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

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

(3) If the Director's findings under section (2) of this rule are affirmative and if no protests to the transfer are filed within 20 days of the last notice in the newspaper, the Director shall approve the transfer and issue a permanent certificate or a certificate with a specific date of expiration for the instream water right. A copy of the certificate shall be mailed to the applicant and to DFW, DEQ and Parks as appropriate.

The Director shall also issue a new certificate for any remaining right for the existing use. If the instream water right is time-dated, the Director shall enter an order suspending the use of the original water right during the effective period of the instream water right.

(4) If any of the Director's findings under section (2) of this rule are negative or if a protest has been filed, the applicant, Director and protestants, if any may negotiate to develop a proposed instream water right that would be satisfactory to all. The Director shall issue a certificate in the manner provided in section (3) of this rule for any negotiated instream water right transfer that satisfies all parties.

(5) If under section (4) of this rule the applicant or protestant choose not to negotiate, or the parties fail to reach agreement, the Director shall submit the proposed transfer to the Commission with the Director's findings under section (2) of this rule and a copy of any protests. The Commission shall decide:

(a) To issue the certificate with conditions as needed to prevent harm to other water right holders; or

(b) To conduct a contested case hearing to determine whether the proposed instream water right should be denied, modified or conditioned to meet the legal requirements for transferring a water right under OAR Chapter 690, Division 15.

(6) Contested cases under subsection (5)(b) of this rule shall be heard according to the provisions of OAR Chapter 690, Division 2.

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

Stats. Implemented: ORS 537.332 to 537.360

Lease Agreements for Converting Water Rights to Instream Water Rights for a Specified Time Period Under ORS 537.348 (2)

690-77-077 (1) The owner of any of the following types of water rights may enter into a lease agreement to convert a water right or a portion of a water right to an instream water right for a specified time period not to exceed 2 years :

(a) Surface water rights for beneficial use or storage established by certificate or court decree; or

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

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

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

(a) The owner(s) of land to which the subject water right(s) is (are) appurtenant as the lessor(s);

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

(c) The Director, for the department as the holder of the instream water right;

and
(d) The lessee, if different than the department.

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

- (a) Names and signatures of the parties;
 - (b) A description of the water right(s) to be leased. If only a portion of a water right will be leased, a clear description, including maps if necessary, of the portion to be leased;
 - (c) Rate, total volume, timing and location of the instream right, including any necessary conditions to avoid enlargement of the original right or potential injury to other water right holders;
 - (d) A description of how the lease will serve a public use or uses;
 - (e) Provision insuring the original use will be suspended;
 - (f) The term of the lease;
 - (g) A general description of the compensation involved in the lease transaction;
 - (h) Signature of the watermaster, attesting that the agreement meets the requirements of these rules to suspend the original use and avoid injury;
 - (i) A statement by the lessors verifying that the water rights described in (3) (b) have been used under the terms and conditions of the rights during the last five years or as an instream water right. As an alternative, an irrigation district or other water purveyor may provide evidence for owners, verifying delivery of water for the lands appurtenant to the rights to be leased;
 - (j) The name and address of any water purveyor that conveys water to the water right(s) described in (3) (b).
- (4) Irrigation Districts and other water purveyors are encouraged to develop single lease agreements that pool individual water rights and ownerships that are to be leased during the same term.
- (5) Lease agreements shall conform with applicable provisions of 690-77-015.
- (6) Upon receipt by the Director of a proposed lease agreement, the department shall include notice of the proposed lease agreement in its weekly public notice mailing list, mail notice to any water purveyor that is listed in the proposed agreement and post it in the applicable watermaster office.
- (7) When the department initially reviews a lease proposal, particular attention shall be given to potential sources of enlargement or injury. Examples include but are not limited to: issues related to rate and duty, or total volume being changed; the allotment of stored water available to the owner of a storage right in the year leased; the role of return flows; potential issues related to junior users, especially, downstream of the original point of diversion; potential issues related to the priority date of instream water rights; whether a proposal to lease a permit for stored water would result in converting undeveloped rights; and issues potentially arising from water users that share a conveyance system. Any allegations of injury to existing water rights or enlargement of the original water right that are received within 21 days of the date of mailing of the weekly public notice shall be reviewed by the parties to the lease before final execution of the lease agreement. If no comments are received the Director may presume that no injury or enlargement will result from the proposed lease agreement.
- (8) If the department determines that the proposed lease agreement may cause injury to existing water rights or enlargement of the original right, considering issues raised under section (7) the lease agreement shall be modified to mitigate or prevent the impact prior to execution. If injury cannot be mitigated or prevented the department shall not execute the agreement.

(9) If a lease is for more than one year the parties shall review any allegations of injury that are received through January 1 of the second calendar year of the lease, to determine whether modifications of the lease agreement are warranted for the remainder of the term of the lease. If injury claims are valid and cannot be mitigated or prevented the department shall terminate the agreement.

(10) In the event that the department receives a claim of injury after the execution of a lease the department shall notify the parties. If the department determines the claim is valid, it shall not distribute water in a way that would cause the injury to continue.

(11) The description of the reach or point of an instream water right provided in response to OAR 690-77-077(3)(c) shall conform to the provisions of OAR 690-77-015 (6) and (7) and 690-77-075 (2).

(12) A lease agreement involving a water right that is limited to a season of use or a duty of water for a season or year shall only allow the use of the original water right or the instream right, not both, during any one season unless the source is from stored water.

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

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

(15) The Commission shall review the lease program no later than the year 2000 to determine whether changes that are more appropriately completed through the process defined in OAR 690-77-075 are using the lease agreement because there is no limit on renewability.

(16) Water rights subject to lease agreements under OAR 690-77-077 are considered to be beneficially used for each year that the lease establishes an instream water right.

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

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

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

(20) Except as provided in subsection (9), lease agreements shall only be terminated by a superceding agreement of all parties or by specific provision of the lease agreement.

Statutory Authority: ORS Ch. 536

Stats. Implemented: ORS 537.332 to 537.360

Instructions for a Departmental Instream Water Right Transfer and Lease Agreement Program

690-77-078 (1) The department shall promote and facilitate potential transfers and lease agreements under ORS 537.348 that would provide benefits for public uses.

(2) Department personnel shall review any proposed transfer or lease to assure that it complies with these rules and, if possible, to develop conditions to prevent enlargement of the original right or injury to other water right owners.

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

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

Statutory Authority: ORS 536.027 & 537.332 to 537.360

Stats. Implemented: ORS 537.332 to 537.360

Cancellation or Waiving of an Instream Water Right

690-77-080 (1) There is a rebuttable presumption that an instream water right, or a portion thereof, that has not been put to a public use for five successive years in which water was available is forfeited.

(2) Upon making a preliminary finding that the instream water right has been forfeited the Director shall notify DEQ, DFW, Parks, and those persons and agencies on the department's weekly mailing list of the department's findings and of its intent to cancel the instream water right. The department shall also publish the notice in the Secretary of State's bulletin once, and in a local newspaper one day a week for two weeks.

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

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

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

(6) An instream water right established under ORS 537.336 through 537.338 (OAR 690-77-020) may be canceled pursuant to ORS 540.621 only upon the written certification from the original applicant agency(ies) that the instream water right has been

abandoned. Proper notification of the public shall proceed as outlined in section (2) of this rule.

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

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

Drought Emergency Provisions

690-77-090 An instream water right established under the provisions of ORS 537.332 to 537.360 shall be subject to the provisions of ORS 536.730.

Statutory Authority: ORS Ch. 536 & 537

Stats. Implemented: ORS 537.332 to 537.360

Precedence of Future Uses

690-77-100 (1) The applicants for a proposed multipurpose storage project may petition the Commission to establish precedence over an instream water right created through OAR 690-77-020.

(2) An applicant for a right to use water for municipal purposes may petition the Commission to establish precedence over an instream water right created through OAR 690-77-020.

(3) A municipal applicant, as defined in ORS 537.282, for a hydroelectric project, may petition the Commission to establish precedence over an instream water right created through OAR 690-77-020.

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

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

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

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

Statutory Authority: ORS Ch. 536 & 537

Stats. Implemented: ORS 537.332 to 537.360

690-11-200 [Renumbered to 690-79-030, 690-79-040, 690-77-050, 690-79-060, 690-79-070, 690-79-090, 690-79-130, 690-79-140 and 690-79-150]