

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 February 10, 1995 (Date)

by the Water Resources Commission (Department)

to become effective When filed (Date)

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

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 [X] Date Published: January, 1995

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: (New Total Rules) OAR 690-77-077 to OAR 690-77-078

Amended: (Existing Rules) OAR 690-77-000 to OAR 690-77-015 and OAR 690-77-070 to OAR 690-77-075

Repealed: (Total Rules Only)

as Administrative Rules of the Water Resources Department (Department)

DATED this 14 day of February, 1995 (Division)

By: [Signature] (Authorized Signer)

Title: Director

FEB 1995 RECEIVED LEGISLATIVE OFFICE

Statutory Authority: ORS 536-027 and 537.332 - 539.360, especially 537.348(2)

Chapter(s) _____ Oregon Laws 19 _____ or

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

Subject Matter: Short term leases of water rights for Instream Use

For Further Information Contact: Beth Patrino (Rule Coordinator)

Phone: 378-8455 ext 29

August 4, 1995

TEMPORARY ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
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. In July 1995, this division was significantly amended by the adoption of temporary rules intended to conform the division with the provisions of SB 674 (1995 Legislative Session) and remove any rule language in conflict with new law. Where this division does not fully describe the new application process established in SB 674, applicants and others should refer to and rely upon the provisions of SB 674. New permanent application processing rules are expected to be adopted in January 1996.

(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.

~~[(6) These rules apply to all applications on which no certificate has been granted, application rejected, or on which no contested case has been ordered, on or before June 5, 1992.]~~

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

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92; WRD -1995, f. & cert. ef. 2-14-95

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) "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.

(3) "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.

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

(5) "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 537, ORS 183.413 - 183.497 and OAR Chapter 690, Division 2.

(6) "DFW" means the State Department of Fish and Wildlife.

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

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

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

(10) "EDD" means the Economic Development 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 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.

(15) "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.

(16) "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.

(17) "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.

~~(18) "Objection" means a written statement identifying a particular instream water right application and identifying defects in the Director's report of the technical review, or identifying the elements of the application which, in the opinion of the objector, would conflict with an existing water right or would impair or be detrimental to the public interest. Objections shall meet the requirements in OAR 690-77-028(1).~~

(18) [(19)] "Park" means the Parks and Recreation Department.

(19) [(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.

~~(20)~~ [(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.

~~(21)~~ [(22)] "Protest" means a written statement expressing disagreement with a proposed final order filed by an objector identifying errors of law or fact in the Director's denial of an objection. Protests shall comply with the requirements of OAR 690-11-175(5). in the manner, and having the content, described in ORS 537.145 to 537.240.

~~(22)~~ [(23)] "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.

~~(23)~~ [(24)] "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.

~~(24)~~ [(25)] "Water Purveyor" means any entity formed for the purpose of delivering water supply to water right owners.

~~(25)~~ [(26)] "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.

~~(26)~~ [(27)] "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.

~~(27)~~ [(28)] "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.

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

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

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 use 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.

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

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

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Agency Applications for New Instream Water Rights

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) Agency(ies) applying;
(b) Public uses to be supported;
(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) 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.

(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.

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

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 12-1990, f. & cert. ef. 8-8-90; WRD 9-1992, f. & cert. ef. 7-1-92

Application Filing

~~— 690-77-021 (1) Before receipt of an instream water right application for filing, the Department shall determine if the documents contain the information described in OAR 690-77-020.~~

~~— (2) If the application does not contain the information described in OAR 690-77-020, the application shall not be received for filing and shall be returned to the applicant. Nothing in this section prohibits an applicant from resubmitting a completed or corrected application.~~

~~— (3) If the application contains the information described in OAR 690-77-020, the Department shall assess the status of the body(ies) of water designated in the application as the water source(s). If the water source(s) has been withdrawn or classified so as to completely prohibit the proposed use of water by previous action of the Commission or the Legislature, the application shall not be received for filing and shall be returned to the applicant.~~

- ~~—(4) The Department shall receive an application for filing and thereby establish a tentative priority date to appropriate the waters of the State of Oregon if:~~
~~—(a) The application contains the required minimum information described in OAR 690-77-020; and~~
~~—(b) The proposed water source(s) has not been withdrawn from appropriation or classified so as to prohibit the proposed use.~~
~~—(5) The tentative priority date shall be the date the application was received for filing by the Department.~~

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

~~—Hist.: WRD9-1992, f. & cert. ef. 7-1-92~~

Incomplete Applications

~~—690-77-022 (1) If at any time during the processing of an application that has been received for filing, the Department determines that the application is defective or does not fulfill the requirements of OAR 690-77-020, the Department shall return the application to the applicant for the curing of defects or resubmittal with the required information.~~

~~—(2) The Department's correspondence shall state a time within which the application and required information must be returned to the Department. The time allowed shall be at least 30 days but not more than one year from the date the application is returned to the applicant. If the applicant fails to return a complete application to the Department within the time specified, the tentative priority date is forfeited and the application shall be rejected.~~

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

~~—Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

Replacing or Amending Applications; Tentative Priority Date

~~—690-77-023 Applications may be replaced or amended without loss of the tentative priority date so long as the requested source of water and the nature of use are the same as was described in the original application and the requested quantity is not increased. If the replacement or amendment proposes different or additional sources or uses, or increases the amount of water requested, the original proposal shall retain the original tentative priority date and the additions or increases shall be assigned a new tentative priority date, as of the date the amendment is received by the Department.~~

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

~~—Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

Application Processing

Public Notice and Comments

~~690-77-024 (1) [Upon filing of an instream water right application, t] As prescribed in ORS Chapter 537, the Director shall notify the following of the status of pending applications:~~

- ~~(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) As prescribed in ORS Chapter 537, the initial notice of the Department's decision to proceed with processing an application shall include: ~~The notice shall include but is not limited to the following information:]~~

- (a) 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) In addition to the information required in section (2) of this rule, a notice shall include a tear-off comment tab to facilitate participation by interested and affected parties.

(4) A 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. The notice shall state the date by which comments must be received by the Department.

(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 and the proposed instream water right is not opposed by any person or entity and may act on the application pursuant to applicable statutes and rules.

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

Hist.: WRD 9-1992, f. & cert. ef. 7-1-92

[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 (1) After an application is accepted for filing by the Department, the Director shall undertake a technical review of such application and prepare a report. A technical review shall include an analysis of an instream water right application by the Department which shall include, but is not limited to:~~

- ~~(a) Identifying defects in the application and supporting data;~~
- ~~(b) Assessing whether the proposed instream water right is restricted or prohibited by statute;~~
- ~~(c) Assessing the proposed instream water right with respect to conditions previously imposed on other instream water rights granted for use of water from the same source;~~

~~—(d) Assessing the proposed instream water right with respect to other Commission administrative rules, including but not limited to the applicable basin program;~~

~~—(e) Evaluating the potential conflict with existing water rights;~~

~~—(f) Evaluating the information received from local government(s) regarding the compatibility of the proposed instream water use with land use plans and regulations;~~

~~—(g) Evaluating the estimated average natural flow available from the proposed source during the time(s) and in the amounts requested in the application; and~~

~~—(h) Evaluating whether the level of instream flow requested is based on the methods for determination of instream flow needs as directed by statute and approved by the administrative rules of the applicant agency.~~

~~—(2) If the technical review indicates that water is available on a limited basis, or if the proposed instream water right can be restricted so as to avoid causing conflict with existing water rights and cause the use to be permitted within the programs or policies of the Commission, the Director shall propose permit conditions to reflect such limits or restrictions.~~

~~—(3) Upon entry of the report of the technical review, an evaluation of the application shall be initiated to determine whether the proposed instream water right may impair or be detrimental to the public interest pursuant to the procedure set forth in OAR 690-77-036.~~

~~—(4) The report of the technical review shall be distributed to the applicant and all individuals, including all governmental agencies, who have filed timely comments with the Department. In addition, any person may request a copy of the report of the technical review.~~

~~—(5) The report of the technical review shall state the date by which objection(s) must be received by the Department. (See OAR 690-77-028.)~~

~~—(6) In the event the proposed instream water right described in an application is alleged by an affected local government to be incompatible with a comprehensive land use plan, or is otherwise the subject of a land use dispute as defined in OAR 690-05-015, the Commission or Director shall follow procedures set forth in OAR 690-05-040 (Resolution of Land Use Disputes).~~

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

~~—Hist.: WRD 9 1992, f. & cert. ef. 7-1-92~~

Objections

~~—690-77-028 (1) A 60-day objection period shall commence on the day the Department deposits the report of technical review in the mail of the United States Postal Service for delivery to the applicant. Objection(s) must be received by the Department within said 60-day objection period. If the objector alleges that the Director's technical review is defective, the objection must set forth facts which support the allegation. If the objector alleges that the proposed instream water right may impair or be detrimental to the public interest, the objection must specify the particular public interest standard(s) identified in ORS 537.170, OAR 690-77-015, and 690-77-042 that the objector believes would prohibit the proposed instream water right. The objector must state facts to support the allegation that the proposed instream water right is not permitted by the specified standards. Objectors are encouraged to indicate if they would be interested in participating in settlement of their concerns through alternative dispute resolution or if the issues raised should be considered as a part of a contested case hearing.~~

~~— (2) If no objection is received by the Department on or before the date stated in the report of the technical review, the Commission and Director may presume the application is not opposed by any person or entity.~~

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

~~— Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

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]

Evaluation of Objections and Filing of Protests

~~— 690-77-032 (1) If objection(s) are filed with the Department within the time limits prescribed in OAR 690-77-028(1), the Director shall transmit copies of such objection(s) to the applicant(s), all objectors and all commenters who indicated they would not oppose the permit if it was issued with the conditions recommended in the technical review. The Director shall assess such objection(s) to determine if the matters raised by the objector(s) demonstrate that the Director's technical review was defective or that the proposed instream water right may impair or be detrimental to the public interest.~~

~~— (2) If the Director determines that the objection(s) contains facts that establish that the Director's technical review was defective or identifies elements of the proposed instream water right that may impair or be detrimental to the public interest, the Director shall advise the objector(s), the applicant and all commenters who indicated they would not oppose the permit if it was issued with the conditions recommended in the technical review that the parties may engage in discussions to attempt to resolve the technical review or public interest issues described in the objection.~~

~~— (3) If the parties elect to engage in formal discussions to attempt to resolve the technical review or public interest issues, such discussions shall be conducted as prescribed in OAR 690-77-034.~~

~~— (4) If the Director determines that the objection(s) does not contain facts that establish that the Director's technical review was defective or does not identify elements of the proposed instream water right that may impair or be detrimental to the public interest, the Director shall deny the objection and shall transmit notice of the denial to the applicant and objector(s) by mail.~~

~~— (5) The objector(s) shall be allowed 30 days from the date of mailing of the denial of their objection(s) to protest the denial of their objection(s). The form and content of the protest along with the filing and service procedure must be in accordance with the standards set forth in OAR 690-02-030 through 690-02-080.~~

~~— (6) If a protest(s) is timely filed, the Director shall refer the application with accompanying objection(s) and protest(s) to the Commission for review.~~

~~— (7) If the objection(s) is denied and no protests are filed, the Director shall review the application to determine if the proposed instream water right may impair or be detrimental to the public interest pursuant to OAR 690-77-036 and 690-77-042.~~

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

~~— Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

Alternative Dispute Resolution

~~— 690-77-034 (1) If objection(s) is timely filed and is not denied, and if the applicant and objector(s) elect to engage in discussions, the applicant and objector(s) shall:~~

~~— (a) Inform the Director within 30 days of receipt of the copies of the objections mailed under OAR 690-77-032(1) of their election to enter into discussions;~~

~~— (b) Notify the Director of the date, time and location of all discussion sessions not less than ten days before each session;~~

~~— (c) Agree that the Director or the Director's designee may attend all discussion sessions;~~

~~— (d) Submit a written report to the Director within 30 days of notice of their election to enter discussions (the written report shall include an estimated completion date for the discussions which shall not exceed 180 days from the date of notice of election);~~

~~— (e) Submit monthly reports to the Director identifying the place, time and attendance of all discussion sessions and a summary of the matters discussed at each session;~~

~~— (f) Agree to identify the issues to be addressed in the discussions before discussions are initiated;~~

~~— (g) Acknowledge that no agreement of the applicant and objector(s) is binding on the State of Oregon until approved by the Director or the Commission;~~

~~— (h) Agree to support their agreement for resolution of the matters under discussion if such agreement is presented to, and approved by, the Director or the Commission;~~

~~— (i) Agree to hold the Director, the Department, and the Commission harmless for any act, omission or event resulting from, or related to, the discussions or any agreement resulting therefrom; and~~

~~— (j) Agree that evidence of conduct or statements made during discussions or negotiations which are not included as a part of a settlement are not admissible in any subsequent hearing or action on the application, unless the applicant and objector(s) stipulate otherwise. This prohibition of admissibility does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of discussions or negotiations.~~

~~— (2) If the applicant or objector(s) fail to submit timely reports, fail to show progress toward resolution of the identified issues or fail to adhere to their schedule or the requirements set forth in this section, the Director shall terminate the discussions and refer the application to the Commission for review or schedule a contested case hearing. The Director may allow an extension of the completion date for good cause.~~

~~— (3) The applicant or objector(s) may request that the Director, or the Director's designee, facilitate the discussions.~~

~~— (4) If the applicant and objector(s) are able to resolve the issues raised by the objector(s), the applicant and objector(s) shall execute a settlement agreement setting forth such resolution and submit said settlement agreement to the Director for review.~~

~~— (5) Upon receipt of a settlement agreement, the Director shall refer the application along with the settlement agreement to the Commission. The Commission shall review the application to determine if the proposed instream water right may impair or be detrimental to the public interest pursuant to OAR 690-77-036 and 690-77-042.~~

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

~~— Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

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 (1) Each instream water right application shall be evaluated to determine whether the proposed instream water right may impair or be detrimental to the public interest according to the standards set forth in ORS 537.170, OAR 690-77-015 and 690-77-042.

(2) In reviewing the application under subsection (1) of this section, the Department shall presume that a proposed 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 rules of the Water Resources Commission.

(3) The presumption described in subsection (2) of this section shall be 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 presumption are not satisfied; or

(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest or in 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.

(4) The proposed order issued by the Department shall include findings indicating whether the criteria for establishing the presumption are met and whether the presumption has been rebutted by a preponderance of evidence, pursuant to subsection (3)(b) of this section.

~~[(2) If a protest has been timely filed, the application shall be submitted to the Commission for determination as to whether the proposed instream water right may impair or be detrimental to the public interest. All other applications shall be submitted to the Director for determination as to whether the proposed instream water right may impair or be detrimental to the public interest.~~

~~(3) In determining whether the proposed instream water right may impair or be detrimental to the public interest under the standards set out in ORS 537.170(5), OAR 690-77-015 and 690-77-042, the Commission in cases in which a protest has been timely filed, or the Director shall consider the facts set forth in the following documents:~~

~~(a) The application and supporting data;~~

~~(b) The Director's report of technical review;~~

- ~~— (c) Objection(s) that meet the requirements of OAR 690-77-028(1); and~~
- ~~— (d) Protest(s) filed pursuant to OAR 690-77-032(5) and (6).~~
- ~~— (4) If a protest has been timely filed, the Commission may, but is not required to, hear public testimony during its review of the proposed instream water right.~~
- ~~— (5) If the Commission, in cases in which a protest has been timely filed, or the Director determines that the proposed instream water right described in the application may impair or be detrimental to the public interest, the Commission or Director shall schedule a contested case hearing. Such hearing shall be conducted according to the provisions for a contested case hearing under ORS 183.413 to 183.497 and OAR Chapter 690, Division 2.~~
- ~~— (6) If the Commission, in cases in which a protest has been timely filed, or the Director determines that the proposed instream water right described in the application will impair or be detrimental to the public interest, the Commission or Director shall propose rejection and schedule a contested case hearing. Such hearing shall be conducted according to the provisions for a contested case hearing under ORS 183.413 to 183.497 and OAR Chapter 690, Division 2.~~
- ~~— (7) If the Commission, in cases in which a protest has been timely filed, or Director finds that the proposed instream water right will not impair or be detrimental to the public interest, an instream water right shall be issued.~~

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

~~— Hist.: WRD 9-1992, f. & cert. ef. 7-1-92~~

Contested Case Public Interest Review

~~— 690-77-038 In any contested case hearing held for the purpose of determining whether the proposed instream water right would impair or be detrimental to the public interest, the Commission, in cases in which a protest has been timely filed, or the Director shall apply the standards set forth in ORS 537.170(5), OAR 690-77-015 and 690-77-042 to the facts found on the record made at the hearing. The parties to the hearing shall include the applicant and any person who qualifies for party status under OAR 137-03-005. The Commission or the Director may issue an order that either approves or rejects the application or imposes conditions to ensure that the proposed instream water right consistent with the public interest.]~~

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

Hist.: WRD 9-1992, f. & cert. ef. 7-1-92

690-77-040 [Renumbered to 690-77-044]

Standards for Public Interest Review

690-77-042 (1) When a proposed use is not entitled to the presumption under OAR 690-77-036(2), or when the presumption is rebutted pursuant to OAR 690-77-036(3). ~~[In determining whether a proposed instream water right will impair or be detrimental to the public interest, the Commission, in cases in which a protest has been timely filed, or]~~ the Director shall weigh the effect of the proposed instream water right on each of the standards set forth in ORS 537.170(5)(~~8~~) and the factors set forth in OAR 690-77-015 to assess impairment or detriment to the public interest, as provided in this section.

(2) The ~~[Commission, in cases in which a protest has been timely filed, or the Director]~~, ~~[in cases in which no protest has been filed,]~~ shall conclude that a proposed instream water right will impair or be detrimental to the public interest under ORS 537.170(5)(~~8~~) if ~~[the technical review conducted under OAR 690-77-026 reveals that]:~~

(a) The proposed instream water right is prohibited by statute or the applicable basin program;

(b) The proposed instream water right would conflict with an existing water right; or

(c) The proposed instream water right exceeds the level of flow necessary to protect the public use.

~~[(3) In applying the standards set forth in ORS 537.170(5), OAR 690-77-015 and this rule, the Commission, in cases in which a protest has been timely filed, or the Director, in cases in which no protest has been filed, shall evaluate the proposed instream water right in light of current uses, planned uses, and reasonably anticipated future demands for water from the source as established in the record. The evaluation shall recognize all known beneficial uses of water, including but not limited to the following categories:~~

~~—(a) Population growth demands for domestic and municipal uses;~~

~~—(b) Economic development for agriculture, navigation, manufacturing, industry, power generation, commercial fishing, forestry, tourism and mining;~~

~~—(c) Health and safety requirements for sanitation, drainage, flood control, and fire protection; and~~

~~—(d) Public values and uses for recreation, fish and wildlife resources, and scenic waterway protection.~~

~~(4) The public interest determination shall be based on evidence which may include, but is no limit to, the following:~~

~~—(a) Existing claims to water from the same source, including but not limited to:~~

~~—(A) Existing decreed rights;~~

~~—(B) Existing certified rights;~~

~~—(C) Existing permits;~~

~~—(D) Pending applications;~~

~~—(E) Existing vested or inchoate rights of record;~~

~~—(F) Existing exempt uses;~~

~~—(G) Indian reserved rights or claims; and~~

~~—(H) Federal reserved rights or claims.~~

~~(b) Land use goals, comprehensive plans, or other land use matters. Public interest determinations relating to land use may be based on, but not necessarily limited to:~~

~~—(A) Statewide Planning Goals;~~

~~—(B) Comprehensive Land Use Plans, including plan assumptions and policies;~~

~~—(C) Public Facilities Plans;~~

~~—(D) Current, planned, or reasonable anticipated uses for land;~~

~~—(E) Local government administrative provisions, regulations, or approvals including zoning designations, filed land division plans or plats, or issued building permits;~~

~~—(F) Projected changes in population, industrial or manufacturing bases, or economic trends; or~~

~~—(G) Land management plans prepared by federal or state agencies.~~

~~(c) Identified environmental concerns, including but not limited to:~~

~~—(A) Water quality;~~

~~—(B) Air pollution;~~

~~—(C) Proximity of urban or transportation congestion; and~~

~~—(D) Soil contamination.~~

~~(d) Character and extent of other natural resources which are present in the water source basin, including but not limited to:~~

~~—(A) Fish and other aquatic species and population;~~

~~—(B) Wildlife species and population;~~

~~—(C) Timber and other woody plant cover;~~

- ~~—(D) Grasses and forbs;~~
- ~~—(E) Minerals; and~~
- ~~—(F) Geothermal energy.~~
- ~~—(e) Riparian and aquatic fauna and flora characteristics;~~
- ~~—(f) Recreational use and potential of the water source and its basin area;~~
- ~~—(g) Agricultural potential of the area, including but not limited to an assessment of the following:~~
 - ~~—(A) Crop or livestock production potential including dairy operation;~~
 - ~~—(B) Soil, topographic, and climatic characteristics;~~
 - ~~—(C) Transportation and market access; and~~
 - ~~—(D) Community and support facilities of the area.~~
- ~~—(h) Designated historic, cultural, or natural resource protection areas; and~~
- ~~—(i) Identified health or safety requirements.~~

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

~~—Hist.: WRD 9 1992, f. & cert. ef. 7-1-92]~~

Requirement of Statement of Findings

690-77-044 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.

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

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD9-1992, f. & cert. ef. 7-1-92; Renumbered from 690-77-044

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]

Conversion of Minimum Perennial Streamflows to Instream Water Rights

690-77-050 (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.

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

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92

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.

Stat. Auth.: ORS Ch. 536 & 537

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

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]~~ **Director** 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.

Stat. Auth.: ORS Ch. 536 & 537

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD -1995, f. & cert. ef. 2-14-95

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.

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

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

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.

Stat. Auth.: 536.027 and 537.332 - 539.360
Hist.: WRD -1995, f. & cert. ef. 2-14-95

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 .

Stat. Auth.: 536.027 and 537.332 - 539.360
Hist.: WRD -1995, f. & cert. ef. 2-14-95

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.

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

Hist.: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92

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.

Stat. Auth.: ORS Ch. 536 & 537
Hist.: WRD 20-1988, f. & cert. ef. 11-4-88

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.