

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

RECEIVED

JUL 1 2 43 PM '92

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on June 5, 1992 (Date) PHIL REISLING
(Signature) SECRETARY OF STATE

by the Water Resources Commission (Department) Water Resources Department (Division)

to become effective upon filing (Date)

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

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

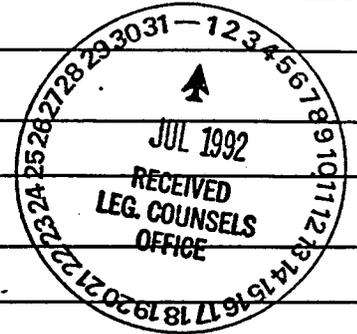
Notice of Intended Action published in Secretary of State's Bulletin: NO YES Date Published: March 1, 1992

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: see attached
(New Total Rules)

Amended: see attached
(Existing Rules)

Repealed: see attached
(Total Rules Only)



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

DATED this 15th day of July, 19 92

By: John E. Bardon, Deputy (Authorized Signer)
Title: Director

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

Chapter(s) _____ Oregon Laws 19 _____ or

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

Subject Matter: Clarifies the public involvement opportunities and public interest criteria required in Department activities related to water use applications and permits, instream water rights and reservations for future economic development. Amendments to Divisions 11 and 77 revise the process by which water use applications shall be evaluated. These Divisions also clarify the basis for Water Resources Commission and Department considerations of public interest issues associated with proposed water development. In addition, these amendments formalize a dispute resolution process and establish bounds on third party negotiations. Division 79 rules describe the process for reserving water for future economic development.

For Further Information Contact: Reed Marbut, Michael Mattick and Doug Parrow Phone: 378-8455
(Rule Coordinator)

OAR 690 - DIVISION 11
SUMMARY OF DIVISION REVISION
RULE NUMBERING

RECEIVED

JUL 1 2 45 PM '92

PHIL KEISLING
SECRETARY OF STATE

Adopting

690-11-000
690-11-150
690-11-155
690-11-160
690-11-170
690-11-175
690-11-180
690-11-183
690-11-185
690-11-190
690-11-195
690-11-197

Amending

690-11-010
690-11-020
690-11-030
690-11-040
690-11-050
690-11-060
690-11-082 renumbered 690-11-046 and amended
690-11-083 renumbered 690-11-048 and amended
690-11-085 renumbered 690-11-042 and amended
690-11-086 renumbered 690-11-044 and amended
690-11-090 renumbered 690-11-200 and amended
690-11-095 renumbered 690-11-205 and amended
690-11-100 renumbered 690-11-210
690-11-103 renumbered 690-11-215
690-11-105 renumbered 690-11-220
690-11-110 renumbered 690-11-225
690-11-120 renumbered 690-11-230 and amended
690-11-130 renumbered 690-11-235 and amended

Repealing

690-11-005
690-11-015
690-11-080

OAR 690 - DIVISION 77
SUMMARY OF DIVISION REVISION
RULE NUMBERING

Adopting

690-77-021
690-77-022
690-77-023
690-77-024
690-77-026
690-77-028
690-77-032
690-77-034
690-77-036
690-77-038
690-77-042

Amending

690-77-000
690-77-010
690-77-015
690-77-020
690-77-040 renumbered 690-77-044 and amended
690-77-050
690-77-075
690-77-080
690-77-200 and renumbered to 690-79

Repealing

690-77-025
690-77-030
690-77-035
690-77-045

Adopting

690-79-010 through 150

OREGON WATER RESOURCES DEPARTMENT
ADMINISTRATIVE RULES
CHAPTER 690
DIVISION 77
INSTREAM WATER RIGHTS

Purpose

690-77-000

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

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

(3) In 1987, the Legislature created a new type of water right called an instream water right. Instream water rights are established by certificate from the Water Resources Commission, 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 a of water conservation project governed by OAR Chapter 690 Division 18.

(4) Instream water right 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.

{ adopted 10-28-88; adopted: 6-5-92 }

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 requesting the Director's report of the technical review for 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 183.413 - 183.497 and OAR Chapter 690, Division 02.
- (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) "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.
- (16) "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.
- (17) "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 of in OAR 690-77-028(1).
- (18) "Parks" means the Parks and Recreation Department.

(19) "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) "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) "Protest" means a written statement 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 690-77-032(5).

(22) "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) "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) "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.

(25) "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.

(26) "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.

{ adopted 10-28-88; amended: 8-8-90; 6-5-92 }

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 of existing water rights, the certificate shall define the appropriate 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.

(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 (4) and (5) above.

(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 subordination 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.

{adopted 10-28-88; amended: 7-7-89; 6-5-92}

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.

{ adopted 10-28-88; amended: 8-8-90; 6-5-92 }

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.

{ adopted 6-5-92 }

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.

{ adopted 6-5-92 }

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.

{ adopted 6-5-92 }

APPLICATION PROCESSING

Public Notice and Comments

690-77-024

- (1) Upon filing of an instream water right application, the Director shall notify the following:
 - (a) Affected local, state and federal agencies, including the planning departments of affected local governments with a request that a copy of said notice be posted in a conspicuous location in the county courthouse;
 - (b) Affected Indian tribes; and
 - (c) All persons on the Department's weekly mailing list.
- (2) The notice shall include 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 OAR 690-77-024(2), 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.

{ adopted 6-5-92 }

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;