

- (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).

{ adopted 6-5-92 }

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 OAR 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.

{ adopted 6-5-92 }

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 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 042.

{adopted 6-5-92}

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.

{adopted 6-5-92}

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 OAR 690-77-042.

(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 application 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 02.

(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 02.

(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.

{adopted 6-5-92}

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.

{adopted 6-5-92}

Standards for Public Interest Review

690-77-042

(1) 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) and the factors set forth in OAR 690-77-015 to assess impairment or detriment to the public interest.

(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) 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 690-77-042, 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 not limited 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 reasonably 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.

{adopted 6-5-92}

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 of findings that sets forth the basis for the approval, reduction, conditioning or rejection.

{adopted 10-28-88; renumbered from 690-88-040 and amended 6-5-92}

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; and/or
- (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 690-77-045.

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

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.

{ adopted 10-28-88 }

Purchase, Lease or Gifts of Existing Water Rights for Conversion to Instream Rights

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 level;
- (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.

{adopted 10-28-88}

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 690 Division 15 and the following provisions.

(1) The Director shall provide notice of the proposed conversion in the Department's weekly 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; and

(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; and

(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 (6); and

(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 (c)(B) below.

(c) The proposed flow(s) is (are) consistent with 690-77-015(5), (6) and (9), 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 subsection (2) above 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 subsection (2) above 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 subsection (3) above for any negotiated instream water right transfer that satisfies all parties.

(5) If under subsection (4) above 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 subsection (2) 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 690 Division 15.

(6) Contested cases under (5)(b) shall be heard according to the provisions of OAR 690 Division 02.

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

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 newspaper.

(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 (2) above.

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

- (a) Upon making a preliminary finding that the instream water right has been abandoned the Director shall notify DEQ, DFW, Parks, and those persons and agencies on the Division 11 mailing lists of the Departments 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;

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

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

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

(2) An instream water right established under ORS 537.336 through 537.338 (OAR 690-77-020) may be cancelled 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 (1)(a) above.

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

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

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 536.700 to 536.730.

{ adopted 10-28-88 }

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.

(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; or,
- (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 (5) above.

{ adopted 10-28-88 }