

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

RECEIVED

APR 26 10 40 AM '91

I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on April 19, 1991

Water Resources Department Resource Management Division

upon filing

The within matter having come before the Water Resources Commission after

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, 1991

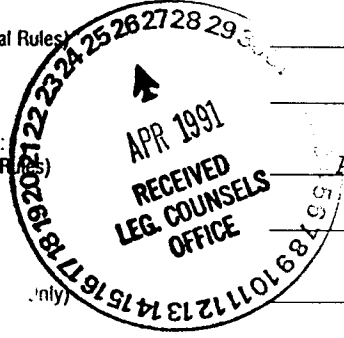
NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Total Rules

Administrative Rules Chapter 690, Divisions -01-041(1),

11-080(1), 15-080(1) & (2), 18-050(3), 76-020(2),

77-025(4) & 030(1)(b), and 82-040.



Administrative Rules of the Water Resources Department Resource Management Division

DATED this 26th day of April, 1991

By: William H. Young (Authorized Signer)

Title: Director

Statutory Authority: ORS 536.025, 536.027

Order(s) Oregon Laws 19

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

Subject Matter: Filing periods for exceptions to contested cases and for public commentary on water use applications.

Further Information Contact: Weisha Mize or Mike Mattick (Rule Coordinator) Phone: 378-3739

OREGON ADMINISTRATIVE RULES

CHAPTER 690, DIVISION 77

INSTREAM WATER RIGHTS

PURPOSE

690-77-000

(1) These rules set the policy, procedures, criteria, standards and definitions for establishing instream water rights. Instream water rights provide for protection of public uses including, but not limited to recreation, scenic attraction, aquatic and fish life, wildlife habitat and ecological values, pollution abatement and navigation. The rules provide for conversion of existing minimum streamflows to instream water rights; for specified agencies to apply for new instream water rights; for purchase, gift or lease of existing water rights for use as instream water rights; and for enforcement of instream water rights which are held in trust by the Water Resources Department to protect the public uses. The rules also provide a procedure for state agencies to apply for reservations of water for future economic development.

(2) 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. They may also be established as a result a of water conservation project governed by OAR 690 Division 18. The instream water right differs from other water rights because it does not require any control or diversion of the water. It is held in trust by the Water Resources Department but is regulated and enforced like all other water rights. 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.

DEFINITIONS

690-77-010

As used in these rules:

(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) "Commission" means the Water Resources Commission.

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

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

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

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

(7) "EDD" means the Economic Development Department.

(8) "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.

(9) "Instream," as defined in ORS 537.332, means within the natural stream channel or lake bed or place where water naturally flows or occurs.

(10) "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.

(11) "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.

(12) "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.

(13) "Parks" means the Parks and Recreation Division of the Department of Transportation.

(14) "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 private sector.

(15) "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 comprehensive plans.

(16) "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.

(17) "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.

(18) "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.

(19) "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.

(20) "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.

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 waters 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 needed to satisfy 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.

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 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) 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.

PROCESSING INSTREAM WATER RIGHT APPLICATIONS

690-77-025

(1) The Department shall establish a tentative date of priority for the instream water right as of the date the application is received at the Department.

(2) Applications which do not fulfill the requirements of OAR 690-77-020 shall be returned to the applicant to correct the deficiencies. The Department shall state a time within which the applicant must complete the application. The time allowed shall be at least thirty 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 may be rejected.

(3) The Director shall provide notice of each application received to the water rights public notice list created under OAR 690 Division 11 and to affected Indian tribes and cities and to the planning department of each affected local

government. The notice will:

- (A) Identify applicant agency(ies);
- (B) Describe the characteristics and the purpose of the proposed instream water right;
- (C) Invite local planning officials to identify and provide policies or provisions in comprehensive plans relating to instream flow protection or other uses of the waters under consideration; and
- (D) Offer an opportunity for local government officials to discuss the proposed instream water right with the applicant(s) and Department.

(4) The notice shall state that the Director may presume the proposed use is allowed by and compatible with, and not precluded by, the laws and regulations of any agency or tribe that does not respond within 60 days of the date shown on the notice. In the event of a land use dispute, as defined in OAR 690-05-015 (Definitions), the Commission shall follow procedures provided in OAR 690-05-040 (Resolution of Land Use Disputes).

DIRECTOR REVIEW OF APPLICATIONS

690-77-030

(1) The Director shall review all completed applications and determine whether the proposed instream water right:

- (a) Satisfies the provisions of Section 690-77-015; or,
- (b) Is the subject of a request for review by a public agency or person within 60 days of notice.
- (c) Does not raise any other issues that indicate that the issuance of a certificate for an instream water right may impair or be detrimental to the public interest.

(2) If (1)(a) and (c) is satisfied and if no timely petition for review under (b) above has been filed, the Director shall conclude that the application is in the public interest and shall issue the certificate.

(3) If (1)(a) or (c) is not satisfied or (b) applies the Director may work with the applicant and any person or agency who has filed a request for review to determine whether the issues can be resolved through mutually agreeable modifications or conditions, consistent with ORS 537.332 to 537.360 and OAR 690-77-015 and 045. If as a result of negotiation, the Director determines:

(a) The issues indicating that the application may impair or be detrimental to the public interest or may take away or impair any permitted, certificated or decreed right cannot be resolved through negotiation, the Director shall refer the application to the Commission with a recommendation to conduct a hearing under ORS 537.170.

(b) The negotiations have resulted in a mutually acceptable resolution of the issues, the Director may issue the certificate with appropriate conditions or modifications, or may submit the proposed certificate to the Commission for review prior

to issuing the certificate.

COMMISSION ACTIONS

690-77-035

(1) When the Commission receives for review an application for a proposed certificate, it may:

(a) Without hearing, find that the use would not impair or be detrimental to the public interest or take away or impair any permitted, certificated or decreed right and instruct the Director to issue a certificate; or

(b) Without hearing, find that the use, appropriately conditioned in accordance with ORS 537.332 to 537.360 and OAR 690-77-015 and 030(3)(b), would not impair or be detrimental to the public interest and would not take away or impair any permitted, certificated or decreed right, and instruct the Director to issue a certificate with the appropriate conditions; or

(c) Find that the use may impair or be detrimental to the public interest or may take away or impair any permitted, certificated or decreed right and require a hearing under ORS 537.170.

(2) After the public hearing held under (1)(c) above, the Commission's final action shall be an order:

(a) To approve an instream right for the amount requested; or

(b) To approve an instream water right for a lesser quantity of water than requested and/or with conditions needed to protect the public interest or avoid taking away or impairing any permitted, certificated or decreed right; or

(c) To reject the instream water right if it would impair or be detrimental to the public interest or would take away or impair any permitted, certificated or decreed right.

REQUIREMENT OF STATEMENT OF FINDINGS

690-77-040

Any order or proposed order by the Director or Commission which reduces, conditions or rejects an instream water right shall include a statement of findings that sets forth the basis for the reduction, conditioning or rejection.

STANDARDS FOR REVIEW OF PROPOSED INSTREAM WATER RIGHTS

690-77-045

(1) When reviewing a proposed certificate the Director and the Commission shall issue the certificate as requested except as provided in (3) and (4) below.

(2) The Commission shall meet the requirements