

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 (2) through 4 and (3) below.

(2) The Commission shall meet the requirements established in OAR 690-60-045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans) in evaluating, and taking action on, instream water right applications.

(3) The Commission shall only modify or condition the proposed instream water right if it is found to be necessary to satisfy the standard established in subsection (2) above, or to make the right conform with the general provisions in OAR 690-77-015 or ORS 537.170 as indicated by the following standards:

(a) The instream water right shall not take away or impair any permitted, certificated, or decreed right to any waters or to the use of any vested waters by altering the availability and timing of water to a user with an earlier priority date;

(b) An instream water right shall not preclude planned uses with a reasonable chance of being developed that would provide a greater benefit to the public from the use of the unappropriated water available;

(c) The cumulative total of instream water rights shall not exceed the amount needed to support public uses when the unappropriated water available could otherwise satisfy both the public uses and additional out of stream uses;

(d) An instream water right may be conditioned or modified to conserve water for a higher public purpose if the other purpose is expected to provide greater benefits to the public; and,

(e) An instream water right shall not exceed the estimated average natural flow or level if the source is from a natural streamflow or natural lake unless the higher amount is justified under OAR 690-77-015 (4).

(4) The Commission shall only reject a proposed instream water right if it finds:

- (a) The instream water right is precluded by law; or,
- (b) No significant public benefit can be gained for the intended public use; or,
- (c) A greater benefit to the public will be gained by dedicating all of the unappropriated water to another use as determined pursuant to OAR 690-60-045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans) or by other means; or
- (d) No amount of instream water right, even with conditions, would be in the public interest.

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.

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.

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.

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 weekly mailing list established under OAR Chapter 690 Division 11, 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 1 and 75.

CANCELLATION OR WAIVING OF AN INSTREAM WATER RIGHT

690-77-080

(1) An instream water right, or portion thereof, that has not been put to a public use for five successive years in which water was available shall be conclusively presumed to be abandoned and shall be processed as follows:

(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 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;

(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.

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.

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.

RESERVATIONS OF WATER FOR FUTURE ECONOMIC DEVELOPMENT

(1) Any state agency may request that the Commission establish a reservation of unappropriated water for future economic development. Reservations of water shall be established as a classification in a basin program and its priority shall be the date of amendment of the basin program by the Commission. The reservation shall set aside a quantity of water for specified uses which shall, when developed, have preference over all other water rights, including instream water rights, from the same source that are issued subsequent to the date the reservation is established.

(2) The Commission may approve the reservation of water for up to 20 years. The expiration date shall be specified in the amended basin program. Prior to the termination of the approved term of reservation, the applicant may apply for a time extension of up to 20 years. The proposed time extension shall be subject to all rule requirements and standards governing review of initial reservations. An approved time extension shall retain the priority date of the original reservation and be codified as an amendment to the appropriate basin program.

(3) The Commission may require review of a reservation at specified time intervals during the approved reservation time period. The Commission may require the applicant to provide evidence that the purpose, intent, and amount of the reservation still meet Division 11 public interest standards.

(4) Requests for reservations of water for future economic development shall specify or provide:

(a) Agency name and address;

(b) Purpose of the reservation;

(c) Amount of water proposed to be reserved;

(d) Source(s) of water to supply the reservation;

(e) Whether use of the reserved water will claim natural flow or stored supplies;

(f) If the proposal is to reserve stored water, evidence that storage facilities exist and water is available, or storage facilities are authorized for funding, funded, or under construction;

(g) Approximate season(s) of use;

(h) Approximate location(s) of use;

(i) Evidence that the proposal is compatible with overall basin program goals and policies;

(j) A completed land use coordination statement as provided in the Department's Land Use Planning Procedures Guide. At a minimum, the statement shall:

(A) Identify affected local governments pursuant to OAR 690-77-010;

(B) Explain the purpose of reservation;

(C) Request planning directors to identify and provide policies or provisions in comprehensive plans relating to economic development or other uses of the waters under consideration; and

(D) Offer an opportunity for local government officials to discuss the proposed reservation with the applicant(s) and the Department.

(k) Intended types of user(s) of the reserved water;

(l) Expected duration of the reservation prior to application for use of the water;

(m) Economic benefits provided;

(n) Water sources alternatives;

(o) Evidence that the proposed reservation and water use(s) will promote the maximum beneficial use of the water without waste; and

(p) Potential adverse impacts on water resources.

(5) Within 30 days of receiving a request, the Director shall notify DFW, DEQ and Parks, EDD, and the planning department(s) of affected local governments. The Director may presume the proposed use is allowed by and compatible with the laws and regulations of any agency that does not respond within 30 days of the date shown on the notice. The Director will also mail the land use coordination statement referenced in 690-77-200(j) to the planning department's of affected local governments. In the event of a land use dispute as defined in OAR 690-60-015 (Definitions), the Director or Commission shall follow procedures as provided in OAR 690-60-040 (Resolution of Land Use Disputes) shall be notified within one month of the Departments receipt of the request. A member of the Commission shall conduct a public hearing on the proposed reservation in accordance with ORS 537.170 within six months of receipt of the request. The hearing shall be conducted in the basin of the proposed reservation.

(6) A member of the Commission shall conduct a public hearing on the proposed reservation in accordance with ORS 537.170 within 180 days of receipt of the request. The hearing shall be conducted in the basin of the proposed reservation.

(7) The Director shall review the hearing record based on the standards for making a public interest determination in OAR 690 Division 11. The Director shall prepare findings and a recommendation to the Commission on the proposed reservation. The recommendation may be to:

(a) Approve the proposed reservation through amendment of the basin program classification; or

(b) Approve a reservation through amendment of a basin program classification for a lesser amount than requested because the proposed reservation would impair or be detrimental to the public interest; or

(c) Reject the proposed reservation because it would impair or be detrimental to the public interest.

(8) The Commission shall make the final determination on proposed reservations. The Commission may include any conditions deemed necessary to protect and promote the public interest.

(9) Applications for the use of reserved water shall include all information required in Division 11 to accompany the submittal of permit applications to the Department. The use of reserved water shall be reviewed to determine whether such use would adversely affect the public interest under provisions of ORS 537.170. as provided in OAR 690 Division 11, and The Commission's decision shall be based on the standards for determining public interest and issuing permits provided in Division 11 in those rules and along with those in OAR 690-77-045. In addition, the review shall consider the land use plans or policies of local jurisdictions and, if the reservation contemplates future development that is not foreseen in the plans, the Commission shall

seek concurrence of the affected local jurisdiction(s) before making the reservation.

(10) The Commission shall meet requirements established in OAR 690-60-045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans) in evaluating, and taking action on requests for reservations.

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