CENTRAL OREGON LANDWATCH

2843 NW Lolo Drive., Ste. 200 | Bend, OR 97703
Phone (541) 647-2930
www.colw.org

December 4, 2025

Oregon Water Resources Department
725 Summer St. NE, Salem, OR 97301

Re: 2025-2026 Water Rights Rulemaking Rules Advisory Committee Comments

To whom it may concern,

Central Oregon LandWatch ("LandWatch") provides these comments in writing following the 2025-2026 Water Rights Rulemaking Rules Advisory Committee ("RAC") meetings.

LandWatch is an Oregon non-profit, public interest organization of about 950 members. Its offices are located in Bend, Oregon. LandWatch's mission is to defend and plan for Central Oregon's livable future, and it has advocated for the preservation of natural resources in Central Oregon for over 35 years.

These comments focus on the proposed rule changes for OAR Chapter 690 Divisions 310, 77, 18, & 380. Note LandWatch has previously provided comments on each of these rule divisions. Importantly, the v2 draft rules for Div 77 did not incorporate any of the comments we provided to the Department in our Nov 11th letter. For that reason, we are resubmitting our comments on Div 77 in their entirety, and ask that OWRD please consider in detail the concerns and comments we raise.

Lastly, LandWatch also provides overarching feedback regarding land use considerations in the draft rules, building on previous comments we submitted during the RAC process.

I. Support for Addressing Land Use Issues in this Rulemaking Process

LandWatch once again wants to reiterate our support of increasing coordination across state agencies on the intersection of land use and water use and appreciate Oregon Water Resource Department's ("OWRD") attention to this topic throughout the rulemaking process. We previously expressed concern that the Department of Land Conservation and Development ("DLCD") had not been part of the RAC process, and very much appreciate that OWRD has since engaged DLCD and solicited their input on the proposed rule language.

Our state land use system is unique in the country for how it prioritizes farm and forest uses in rural areas, while directing population growth inside cities' urban growth boundaries. Among

others, this rulemaking provides an important opportunity for the two agencies to grapple with questions related to the sequencing of water right decision-making and land use decision-making, how water permitting might better align with the goals of the land use system, and overall improving how these two areas of regulation interact.

We support moving forward with addressing these important issues as part of this rulemaking process.

II. OAR 690-310

OAR 690-310-0040(1)(a)(L)
OWRD shared with RAC members on Nov 24th new revised draft rule language for 0040(1)(a)(L):

> (L) As described in OAR 690-005-0035(3)(b), (4)(a), and (4)(b)(B) and (C), a Land Use Information Form completed by the affected local government showing that the land use that corresponds with the water use(s) is allowed outright, does not require discretionary land use approval under the applicable acknowledged comprehensive plan and implementing ordinances, all discretionary land use approvals as defined in OAR 690-005-0015(5) have been granted, or that all discretionary land use approvals have been granted but the Land Use Board of Appeals process has not been exhausted. For municipal water use applications, a Land Use Information Form completed by the affected local government showing that all necessary land use approvals are pending is sufficient for the completeness review under OAR 690-310-0070(1) pertaining to land use information.

LandWatch appreciates the updated language, which requires greater specificity in an application about whether the proposed land use that corresponds with the water use is allowed by the local land use regulations. Importantly, the revised language adds the phrase “and implementing ordinances” to ensure that other land use regulations in addition to the comprehensive plan are considered, and it requires acknowledgement of an ongoing LUBA appeals process.

We do have questions about the revised language “For municipal water use applications, a Land Use Information Form completed by the affected local government showing that all necessary land use approvals are pending is sufficient for the completeness review under OAR 690-310-0070(1) pertaining to land use information.”

It's not clear why this exception is needed or what "municipal water use" encompasses. We do not recall any robust discussion about this topic during the RAC process. At a minimum, we suggest providing more specificity about the type of water use a municipal water use application may be serving. For example, the rules could state something along the lines of "municipal water use applications that serve a municipality (e.g. city, residential area)."

OAR 690-310-0270(2)(d)

OWRD shared on Nov 24th a proposal to include revised draft rule language: "Exhaust the administrative appeal process for a land use approval, and the extension does not exceed one year."

OWRD provided further context for this language, stating that:

> If the LUBA administrative appeal period has not been exhausted within the time allowable for a processing hold, OWRD could issue a Proposed Final Order recommending denial of the requested water right permit. This would avoid the applicant, for an extended time, maintaining a tentative priority date that is senior to other applicants who have all the information and approvals needed to proceed. This would also reduce concerns related to applicants trying to "hold space" within "caps" – such as the Deschutes Groundwater Study Area mitigation cap or the Water Availability Reporting System – as the amount of remaining water to allocate decreases.

LandWatch supports this approach. OWRD should not approve a water permit application if a LUBA appeal is ongoing. As we described in our October 31 comments, many local land use decisions are not final until appeals are resolved. *See* ORS 197.625(1)(b) (concerning the effect of appeal on post-acknowledgment plan amendment decisions); ORS 197.845 (concerning stays of local land use decisions pending appeal at LUBA). Thus, a land use approval has not been "obtained" until all appeals are resolved.

Further, once a land use appeal is "complete," a water permit extension should not be granted unless the completion of the land use appeal results in the sought land use application being approved. Many appeals of land use decisions approving a proposed land use result in remand or reversal of the approval. Conversely, many appeals of land use decisions denying a proposed land use are affirmed. In those cases, OWRD should not continue reviewing a water permit application, and should deny the application under ORS 197.180(1).

OWRD asked for feedback on the length of time for extensions. LandWatch supports retaining the current proposed language of one year, in part, due to the concern pointed out by OWRD of applicants trying to "hold space" within "caps."

General Comments on Land Use and OAR 690-310
We want to emphasize that in order to comply with ORS 197.180(1), the proposed rule language should require a final land use decision from a local government before issuing a permit to appropriate water. This includes exhaustion of the administrative appeal process for a land use approval. We would recommend including this requirement as a criteria for approval in the PFO subsection, 690-310-0150, or other subsection that OWRD deems appropriate.

III. OAR-690-77

As stated above, LandWatch incorporates our Nov 11 comments on Div 77 in full, as no changes were made to the draft rules to address our comments.

OAR-690-77-0010(36)
LandWatch recommends removing this new definition entirely. See comments below on OAR-690-77-0020.

OAR-690-77-0015(4)
As discussed during the RAC meeting, LandWatch recommends removing 0015(4) entirely.

ODFW is the state agency charged with managing Oregon's fish and wildlife and uniquely has the expertise to determine the flows necessary to support conservation, maintenance and enhancement of fish life, wildlife, fish and wildlife habitat or any other ecological values. As such, in place of ENAF, LandWatch recommends that OWRD rely on ODFW's requested flows as a clear, consistent and defensible basis for instream water rights applications.

During the Oct 29th RAC meeting, there was a robust discussion on the concerns of relying on ENAF to protect public uses, including conservation, maintenance and enhancement of fish life, wildlife, fish and wildlife habitat and any other ecological values. Among other concerns raised, relying on an average fails to consider important daily and weekly fluctuations in stream flows that support fish, wildlife and other ecological values.

For example, Tumalo Creek in Central Oregon sees temporal changes in flows that can vary significantly (See figure 1 and 2 below). Here, even a daily average fails to capture the flows that are necessary to protect the full ecological value of a stream—let alone month or half month averages.

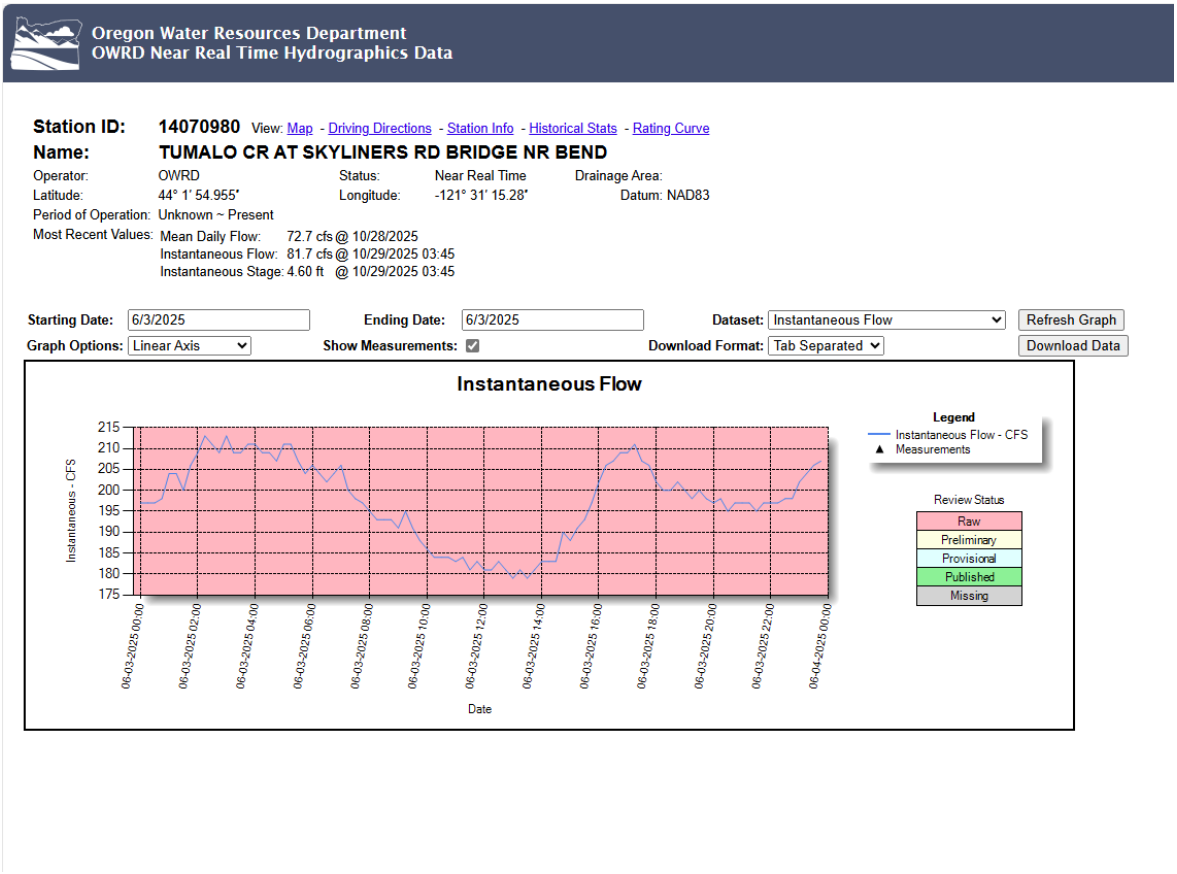

Figure 1. Tumalo Creek flow fluctuations over a 24-hour period in June 2025. Flows peaked ranged from nearly 215 cfs to below 180 cfs, a fluctuation of ~35 cfs over 24 hours. The average flow as calculated by OWRD's Near Real Time Hydrographics Data webpage for the same time period was ~198 cfs.

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Phone (541) 647-2930
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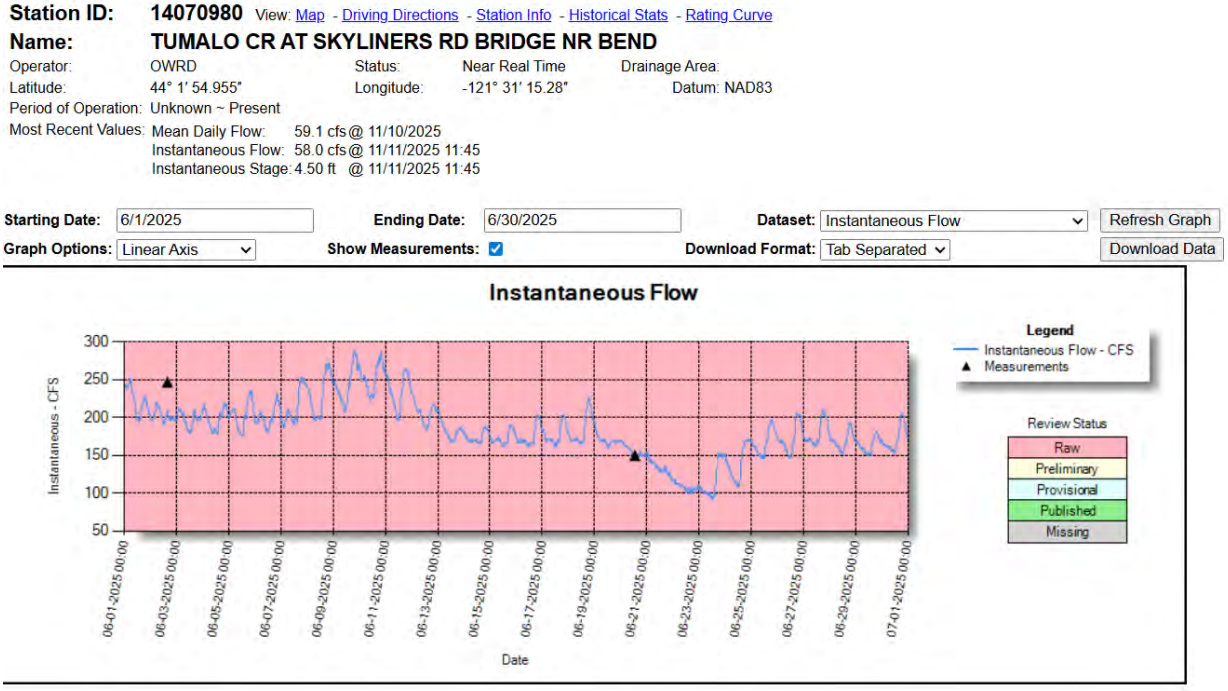


Figure 2. Tumalo Creek flow fluctuations over a 1-month period in June 2025. Flows ranged from more than 280 cfs to below 100 cfs, a fluctuation of ~ 180 cfs. The average instantaneous flow as calculated from OWRD's Near Real Time Hydrographics Data for the same time period was ~184 cfs.

OAR-690-77-0020(3)

LandWatch recommends OWRD remove this entire subsection. It's unclear why the Special Districts Association of Oregon, or any other non-profit, would receive special notification prior to ODFW filing an instream water right application. Further, during RAC discussion it was apparent that this requirement would place new burdens on ODFW staff, would likely increase confusion, and would be unlikely to reduce protests of instream water right applications.

If OWRD includes the Special District Association of Oregon anywhere in rule, LandWatch recommends adding them to OAR-690-77-0031(1), which provides a list of entities the weekly public notice shall be sent to, including affected local, state and federal agencies and Indian Tribes.

OAR-690-77-0075
LandWatch requests that OWRD verify this process is consistent with out-of-stream water right application processing requirements.

OAR-690-77-0080
LandWatch supports removing this section as it does not make sense and conflicts with other rule divisions (e.g. Division 17).

IV. OAR 690-018

General Comments on Land Use and OAR 690-018
OWRD's November Nov 24th email that included potential revised draft rule language related to Div 310, did not include other divisions where similar land use language exists. We strongly recommend the revised language discussed above under Div 310 be incorporated into Div 018, where applicable. This includes, but is not limited to, subsections:

- **OAR-690-018-0040(22)(a)**
- **OAR-690-018-0090(2)(c)**
- **OAR-690-018-0050(3)(c)**

Comments on Groundwater Rights and ACW
We remain concerned that if a groundwater right goes through the ACW program, the state's portion of conserved water is just left in the aquifer without protections. The Department has not proposed any new language to address this issue. As such, we resubmit the comments we provided to the Department on Oct 31st, requesting that without a mechanism in place to protect the state's portion of the groundwater right, that OWRD remove all proposed rules related to groundwater projects in Div 18. This includes, but is not limited to subsections:

- **OAR-690-018-0050(7)(c)(C)(i)**
- **OAR-690-018-0050(7)(c)(D)(ii)**
- **OAR-690-018-0065(2)(c)**
- **OAR-690-018-0065(3)(b)**

V. OAR-690-380

General Comments on Land Use and OAR 690-380
OWRD's November Nov 24th email that included potential revised draft rule language related to Div 310, did not include other divisions where similar land use language exists. We strongly

recommend the revised language discussed above under Div 310 be incorporated into Div 380, where applicable.

As stated in our comments on Div 310, we want to emphasize that in order to comply with ORS 197.180(1), the proposed rule language should require a final land use decision from a local government before approving a proposed transfer. This includes exhaustion of the administrative appeal process for a land use approval. We would recommend this requirement be included as a criteria for approval in the PFO subsection, 690-380-4010, or other subsection that OWRD deems appropriate.

OAR-690-380-3000(19)
Like draft language in other divisions the RAC has considered, this rule imposes a similar requirement for compatibility between the proposed water transfer and the local land use regulations. See LandWatch's comments above on OAR 690-310-0040(1)(a)(L) and OAR 690-310-0270(2)(d). OWRD should incorporate similar language here to what has been proposed for Div 310, and that was shared with the RAC on Nov 24th.

Further, and as stated above, the rule language should require a final land use decision from a local government before OWRD can approve a proposed transfer. This includes exhaustion of the administrative appeal process for a land use approval.

In addition, as we commented on in our October 31 letter, this rule division also includes an exception to the Land Use Information Form requirement for transfers that meet four specified criteria. While LandWatch recognizes that this exception exists in the current rules, we nonetheless question its merits and ask OWRD to reconsider retaining this in rule.

The exception applies to transfers on lands zoned EFU or within irrigation districts. In our experience in the Deschutes Basin, these lands are both where the majority of water rights exist, and also where the most controversial and complicated land use disputes arise. Those factors lead us to question why these lands are excepted from the otherwise applicable requirement for land use compatibility for water right transfers.

We understand that the other three criteria mean the exception does not apply to all proposed transfers in EFU zones and irrigation districts, as some of those transfers involve a change other than in the place of use, a placement or modification of a structure, and do not involve irrigation water uses only. Still, we question how many proposed transfers, and what volume of our basin's precious water resources, are exempt from land use compatibility requirements largely because they are proposed in EFU zones or in irrigation districts.

Many lands within Deschutes Basin irrigation districts are *not* zoned EFU. Some of these lands are inside urban growth boundaries; some are zoned for rural residential use. Transfers of water between these lands should be required to demonstrate compatibility with local land use regulations. As an example, consider a proposed transfer of irrigation water historically applied to rural EFU land to an irrigation use inside an urban growth boundary. A showing of compatibility with local comprehensive plans and land use regulations is likely more important to fulfill the Departments responsibilities under ORS 197.180 in this scenario than other, non-excepted situations.

We recommend the Department require a showing of compatibility with local comprehensive plans and land use regulations for all transfers and not continue to provide an exception to this showing for certain lands.

OAR-690-380-3000-7100(14)
See comments on OAR-690-380-3000(19) above.

OAR-690-380-8003(2)(d)
See comments on OAR-690-380-3000(19) above.

VI. Conclusion

Thank you for considering these comments and please do not hesitate to reach out if you have any questions.

Sincerely,

Jeremy Austin
Wild Lands & Water Program Director
Central Oregon LandWatch
2843 NW Lolo Dr St. 200
Bend, OR 97703

(541) 429-7268
antonchiono@ctuir.org
ctuir.org
46411 Timíne Way
Pendleton, Oregon 97801

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Salem, OR 97301

December 5, 2025

Re: Final Comments on Draft 77, 380, and 18 Rules

Dear Laura,

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Department of Natural Resources, we are pleased to provide our final comments as a Rules Advisory Committee member on the draft Division 77, 380, and 18 rules:

Division 77 – Instream Water Rights

- 690-077-000(7) Purpose: We ask that you revise the new proposed language under paragraph (7), which states:

  (7) Instream water rights, instream leases, instream transfers, and instream water rights resulting from an allocation of conserved water can only be established to protect water instream within the State's borders.

  As we indicated in our earlier comments, this language is problematic with statutorily authorized work being done in the Walla Walla basin, which spans both Oregon and Washington. We of course recognize that the State of Oregon cannot protect a water right in another state. It is, however, an Oregon water right that Washington is protecting within its borders though their Walla Walla statutory

authorities, and it is this fact that makes the language proposed in 690-077-000(7) problematic. Given that, we suggest the following revision:

(7) Instream water rights, instream leases, instream transfers, and instream water rights resulting from an allocation of conserved water can only be ~~established to protect water~~ protected by the State of Oregon instream within the State's borders.

- 690-077-0010(12) Definitions: We ask that you delete paragraph (12), which states:

  (12) "Estimated Average Natural Flow" means average natural flow estimates, by month of half month, computed by the Department and derived from watermaster distribution records, Department measurement records, or application of appropriate scientific and hydrologic technology.

  Instream water rights should not be constrained by this arbitrary criterion; the agencies authorized to apply for instream water rights should be free to apply for water rights based on the scientific data that support the need. Constraining instream water rights to a "estimated average natural flow" (EANF) is not provided for in statute and this provision should be eliminated in OAR 690-077.

- 690-077-0010(35) Definitions: As indicated in our earlier comments, it is inappropriate to include notification requirements for a specific non-profit entity in rule and we ask that paragraph (35) be removed entirely. Our state agencies have multiple formal public notice requirements and interested members of the public, including non-profit organizations, have ample opportunity to receive notification through these existing means. This added notification requirement is neither directed in the 2025 legislation nor is in the interest of clarifying the existing rules and is therefore not appropriate for inclusion here. Rather, it creates additional process requirements to further increase the difficulty of creating critical instream water rights to help protect what flows we have left in our rivers and streams. It also would create a problematic precedent; if this non-profit organization should receive special notice, why not others? There is no clear or fair answer to this question, and, as such, we urge you to remove this language.

- 690-077-0015(4) General Statements: Consistent with our comments above, we again emphasize that artificially handcuffing agencies by limiting instream water right applications to EANF is not consistent with statute or data. We ask that agency experts are afforded the ability to set instream water rights at levels that are legally and scientifically defensible. Please remove this section and all language in Division 77 that limits agency instream water right applications to EANF. The plight of instream flows across the state is only worsening with climate change; arbitrarily limiting our ability to utilize the best science available is not a responsible course of action.

- 690-077-0020(3) State Agency Instream Water Right Applications: Application Requirements: Consistent with our comments above, the additional notification requirements in paragraph (3) are not directed by the 2025 legislation and do not improve the clarity of the existing rules and are therefore not appropriate here. Please remove paragraph (3).

Division 380 – Water Right Transfers

- 690-380-0100 Definitions: Under the definition of “Enlargement”, we thank you for being responsive to our earlier comments and inserting the proposed addition (underlined) to (2)(c), such that it reads:

  (c) Failing to keep the original place of use from receiving water from the same source <u>under the same water right</u>;

  The ambiguity in the original rule, which lacked the underlined language above, has created issues for watermasters, who have been unclear as to which acres are eligible for transfer.

  In some basins, this has been interpreted as disqualifying any place of use (POU) transfer if a field is within the same floodplain as its surface water source stream. The rationale has been that these fields continue to receive shallow groundwater that sub-irrigates the place of use, and that this shallow groundwater is the same “source” as the surface water diverted to irrigate those fields, thereby precluding them from transfer eligibility.

  However, the water right holder obviously has been diverting and applying water to this POU—otherwise they would not have needed a water right in the first place! As such, when the water right holder stops diverting and applying their

water right to the POU, the full water right should be eligible for transfer regardless of whether or not groundwater sub-irrigates the POU.

We think the more likely actual intent of the original rule language was to prevent the enlargement of a water right that would arise from the same source water being diverted and applied under the same water right to both the original POU and the new POU to which the right is being transferred. Such a practice would indeed result in more water being diverted from the stream than the water right holder is legally entitled to, thereby enlarging the right and depriving others of water to which they are legally entitled.

Specifying that a POU may not be transferred if it continues receiving water from the same source *and under the same water right* should alleviate this ambiguity. We thank you for adding this clarification, which should resolve the issue going forward.

- 690-380-2120 Change in Point of Diversion to Reflect Historical Use: We are concerned with the proposal to expand this section to groundwater via this Rules Advisory Committee. The statute enabling a point of diversion (POD) change under ORS 540.532 appears to very specifically apply only to surface water rights. If it is the will of the Legislature to extend this authority to groundwater rights, we believe the change should be made in the enabling statute via legislation, not here in the rulemaking process. We continue to see excessive groundwater use deplete aquifers and the springs and surface waters that depend on them; we should not create a loophole that encourages illegal groundwater use and risks exacerbating this problem. As such, we ask that you remove the language pertaining to groundwater and historic points of appropriation throughout this section.

- 690-380-2200 Changes in Place of Use: This provision still needs to be revised to align with the clarification made to the definition of enlargement under 690-380-0100(2)(c). Please add the underlined portion below to the new language in paragraph (2) so that it is consistent with the changes the agency has made under 690-380-0100(2)(c).

  (2) For water rights with an authorized place of use tied to specific acreage, including but not limited to irrigation, nursery operations, or cranberry operations, a change in place of use must involve a physical movement that alters the location of

the water right from the existing authorized place of use to the proposed place of use such that, consistent with OAR 690-380 0010(2)(c), the lands from which the water right is removed do not continue to receive water from the same source under the same water right.

- 690-380-3400 Waiver of Fees: Consistent with our earlier comments on Division 18, we oppose removing language that requires the mandatory waiver of fees for transfers that either establish an instream right, are necessary to create a project funded by Oregon Watershed Enhancement Board, or are endorsed in writing by Oregon Department of Fish & Wildlife. These transfers are to restore a public good that has been degraded by the overallocation of our state's public water resources, not facilitate the further development of our public water supplies for private gain. As such, we strongly oppose the removal of this mandatory fee waiver.

Division 18 – Allocation of Conserved Water

- 690-018-0040(22)(b): We ask that you remove the provision directing the applicant to provide notice to each affected local government along the instream reach. This provides an added burden and cost to those of us focused on instream restoration. We are not aware of any statutory requirement to this end, and the lack of any similar requirement for Allocation of Conserved Water (ACW) projects that dedicate a portion of the saved water to other uses creates an unfair bias against projects that dedicate all saved water instream. Finally, water flowing in a streambed should not come as a surprise to local governments. This provision gets us further, rather than closer, to the agency's goals of increased administrative efficiency and provides little actual benefit to local jurisdictions that expect water in waterways. We ask that you remove this provision.

- 690-018-0040(25): We request that you do not eliminate the mandatory fee waiver for the conservation projects specified. We find it frustrating that the out-of-stream use of water has been granted to such an extent that many of our fisheries have been severely compromised; indeed, many of our rivers and streams would have no water during the irrigation season if it were not for the work of flow restoration practitioners like CTUIR and others. To eliminate the fee waiver for this work to try and correct Oregon's past practices and restore water

back to our rivers and streams is particularly frustrating. We respectfully ask that you do not eliminate this waiver.

- OAR-690-018-0050(5)(c)(C)(i): Without a mechanism to protect the state's portion of a groundwater right, we strongly recommend that OWRD remove all proposed rules related to groundwater projects in Division 18. While we are firm advocates for water conservation, the ability to protect the public's benefit from these projects is critical. We know from experience that, in over-appropriated basins, saved surface water left instream will only be withdrawn by other water users unless it has formal, legal protection under an instream water right. Without this protection, the public will not realize the benefits intended from the ACW program. Groundwater is no different. Until legislation is passed to enable the protection of the state's portion of saved water in the aquifer, we fear that an expansion of the ACW program to groundwater via rule would merely enable water spreading without any public benefit. Finally, the statutory language of the ACW program is clear in its contemplation of "instream" benefits; if we are to expand this program to groundwater, it should be done via legislation, not this rules advisory process.

- OAR-690-018-0050(5)(c)(D)(ii): As stated above, CTUIR requests that OWRD remove this section.

- OAR-690-018-0065(2)(c)(A): As stated above, CTUIR requests that OWRD remove this section.

We thank you for the opportunity to participate as a member of this Rules Advisory Committee and appreciate your consideration of these comments.

Sincerely,

Anton Chiono
Habitat Conservation Project Leader
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

Feedback on Water Rights Rulemaking – Input (RAC 9, November 21, 2025)

RAC Member Name:

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-310-0270(2)	Only five specific scenarios are proposed under which OWRD can grant an administrative hold. While these may be the most common reasons for needing a hold, there are surely other reasonable and necessary circumstances that would now be excluded from consideration if OWRD gives up its discretion. Recommend retaining some discretion to avoid OWRD painting itself into a corner.	Add an "(f)" with broader exceptions, such as "Complete other actions deemed reasonable and necessary by the Director."
Rules relating to land use compatibility 690-018-0040(22)(a) 690-018-0050(3)(c) 690-310-0040(1)(a)(L) 690-380-3000(19) 690-380-7100(14) 690-380-8003(2)(d) 690-382-0400(12)	Please see detailed comments on concerns below.	Retain original language at this time. For permit amendments, include language similar to the original language for transfers.

Concerns on Rule Changes Regarding Land Use Compatibility

OWRD has proposed numerous changes to land use compatibility language sprinkled throughout the rule divisions being updated during this rulemaking. The stated goal is to ensure that OWRD complies with its obligations under ORS 197.180. While this is an important goal, OWRD lacks clear authority to make the proposed changes, which appear inconsistent with other rule divisions and policies, leaving the changes open to legal challenges.

ORS 197.180 requires, among other provisions, that each state agency prepare a State Agency Coordination (SAC) program outlining how its rules and activities affecting land use comply with statewide planning goals and are compatible with comprehensive plans and land use regulations. Developing the SAC required extensive coordination with the Department of Land Conservation and Development (DLCD). OWRD's SAC, including the Land Use Planning Procedures Guide, was

approved and certified by the Land Conservation and Development Commission (LCDC) as being compliant with ORS 197.180, and there is no question that OWRD must implement its programs consistent with the SAC to remain in compliance. This is done by following the procedures outlined in the Land Use Planning Procedures Guide and complying with the Chapter 690, Division 5 rules, which are based on the SAC and describe how OWRD coordinates on land use matters and complies with ORS 197.180.

While it is understandable that OWRD wants to streamline water right transaction processes and improve processing timelines, there is no statutory authority to deviate from the approved SAC (already certified as compliant with ORS 197.180) or create inconsistencies between Division 5 and other rule divisions. The current language about land use in the rule divisions involved in this rulemaking (Div. 310 for new permits, Div. 18 for allocations of conserved water, Div. 380 for transfers, and Div. 382 for groundwater registration modifications) is consistent with Division 5 and the SAC, and it should remain the same until those overarching requirements are changed, such as when an updated SAC is approved.

OWRD's most recent proposed revision for Division 310 would require, at the time of application for a new permit, a Land Use Information Form showing that the land use that corresponds with the proposed water use is allowed outright, does not require discretionary land use approvals, all discretionary land use approval have been granted, or approvals have been granted but the Land Use Board of Appeals process has not been exhausted. For municipal water use applications, showing that all necessary land use approvals are pending would be sufficient for the completeness review to accept the new application for processing. At the proposed final order stage, for municipal water use applications only, OWRD could apply OAR 690-005-0035(4)(c), which allows OWRD to issue a permit with conditions requiring land use approvals before water use can begin, among other provisions.

While this municipal "exemption" appears helpful for municipal applicants and we appreciate that it addresses the sequencing issue described in previous comments (water right → financing → 30-60% design → land use permitting → 90%-final design → construction), this is not what the SAC says, nor is it consistent with all of Division 5. OWRD has refined the language to avoid the most direct conflicts, but it is still not fully consistent. There is no municipal exemption in the SAC, Division 5, or the underlying statutes, creating confusion and leaving the proposed language open to legal challenges. In addition, not all public water suppliers are municipalities that would be applying for municipal water use permits. Many communities in Oregon are served by water districts that hold quasi-municipal or group domestic rights yet face the same sequencing constraints in potentially needing water right transactions to be completed before land use approvals are final. In addition, assuming that language similar to that proposed for Division 310 would be proposed for transfers and other rule divisions, the municipal exemption would not necessarily address the issue of municipalities themselves needing to make changes to quasi-municipal or group domestic water rights that may be part of their water rights portfolios.

It is apparent that OWRD no longer considers the SAC adequate to meet its obligations around land use compatibility. The place to fix these issues is not here. The SAC has not been updated since 1990, and it could certainly benefit from thoughtful revision. OWRD has stated a laudable intention to work more closely with DLCD and better integrate management of land and water resources. An

update of the SAC and certification by LCDC that it is in compliance with ORS 197.180 is a clear first step. OWRD's efforts during the current rulemaking to think through these issues will not be wasted; rather, OWRD is now well prepared for these important conversations with DLCD.

The update of the SAC will trigger another rulemaking to update Division 5, along with all of the provisions sprinkled throughout the divisions addressed in the current rulemaking. Since those provisions will all need to be changed again anyway to be consistent with whatever comes out of the SAC update, changing them now (in ways not consistent with the current SAC) is not a process improvement or a gain in efficiency. Instead, it is likely to lead to OWRD being bogged down in litigation and spending its limited budget on DOJ representation rather than actually improving water right transaction processing. Rather than changing these rules twice, it will be more efficient to update them once, at the appropriate time.

Therefore, because the SAC has not been updated and there is no authority to forgo compliance with the SAC, we strongly recommend not making any changes related to land use compatibility language in the current rulemaking.

James Fraser
Oregon Policy Director, james.fraser@tu.org, (971) 278-8085

December 5, 2025

Oregon Water Resources Department
725 Summer St. NE A
Salem, OR 97301
Via email to laura.a.hartt@water.oregon.gov

Re: Trout Unlimited comments on proposed revisions to Administrative Rules (various Divisions)

Hi Laura,

Trout Unlimited (TU) is a non-profit dedicated to conserving cold-water fish such as trout, salmon, and steelhead, and their habitats. We work closely with water right holders, tribes, partner organizations, and agencies on instream flow restoration efforts in Oregon, including related policy.

As you know, we are also on the rulemaking advisory committee (RAC) for the Oregon Water Resources Department (OWRD) rulemaking that's underway for seventeen administrative rule divisions. We have provided verbal comments and suggestions to the Department in all RAC meetings to date, and understand that OWRD is considering that input as the agency further revises and adjusts the proposed rules.

We are providing written comments on various rule division edits below, per your request to provide comprehensive remaining comments by December 5th, using the template provided by the Department:

Draft Rule # e.g., 690-014-0170(1)(b)	**Input / Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-380-0100(2)(c)	TU shares the concerns elaborated in the letter submitted by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) dated 11/5/25. We see that WRD subsequently revised the clause to add "under the same water right" and TU appreciates that clarification.	Keep the new language "under the same water right" or add CTUIR's proposed "diverted and applied" language.
690-380-2200(2)	TU shares the concerns elaborated in the letter submitted by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) dated 11/5/25. In this clause, WRD has *not* subsequently revised the clause to add "under the same water right" or similar clarifying language.	Add "under the same water right" or similar language mirroring edit in 0100(2)(c).
690-380-3400	TU shares the concerns elaborated in the letter submitted by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) dated 11/5/25.	Revert the edits to the introductory language in this rule provision, so that Director shall waive $100 or 50% of the application fee, whichever is greater.
690-018-0050(7)(c)(C) & (D)(ii)	TU raised our concerns about using the Allocation of Conserved Water program for groundwater in verbal comments	Delete these provisions and do not include specifics in the administrative rule on using the

	during RAC meetings # 3 and 9. We renew those here. WRD staff confirmed in RAC meetings that, in the groundwater context, the State's portion of conserved water is simply available to other users for appropriation and there is no legal mechanism for protecting it *in situ* (and therefore, no perceptible public benefit served by the state's portion).	Allocation of Conserved Water program for groundwater.
690-018-0065(2)(c) & (3)(b)	TU raised our concerns about using the Allocation of Conserved Water program for groundwater in verbal comments during RAC meetings # 3 and 9. We renew those here. WRD staff confirmed in RAC meetings that, in the groundwater context, the State's portion of conserved water is simply available to other users for appropriation and there is no legal mechanism for protecting it *in situ* (and therefore, no perceptible public benefit served by the state's portion).	Delete these provisions and do not include specifics in the administrative rule on using the Allocation of Conserved Water program for groundwater.
Division 77	TU and other RAC members raised numerous concerns about the Division 77 revisions in RAC meetings and written comments (including TU's letter dated 11/7/25). The Division 77 revisions that WRD shared with the RAC (dated 11/20/25 and circulated same day) still included many of the edits that we objected to. TU renews all of its previous written comments on Division 77 (available in Attachment A), especially including but not limited to, concerns about the edits related to the Special Districts Association of Oregon (SDAO).	See Attachment A (note: these previous TU comments reference citations and rule provision numbering from the 1st version of Division 77 revisions).

Thank you for considering these comments, and please reach out to me if you have any questions.

Sincerely,

James Fraser
Oregon Policy Director
Trout Unlimited
james.fraser@tu.org

ATTACHMENT A

[*See following pages.*]

James Fraser
Oregon Policy Director, james.fraser@tu.org, (971) 278-8085

November 7, 2025

Oregon Water Resources Department
725 Summer St. NE A
Salem, OR 97301
Via email to laura.a.hartt@water.oregon.gov

Re: Trout Unlimited comments on proposed revisions to Division 77 Administrative Rules (Instream Water Rights)

Hi Laura,

Trout Unlimited (TU) is a non-profit dedicated to conserving cold-water fish such as trout, salmon, and steelhead, and their habitats. We work closely with water right holders, tribes, partner organizations, and agencies on instream flow restoration efforts in Oregon. TU often engages in the instream leasing program, and we closely track policy related to instream water rights.

As you know, we are also on the rulemaking advisory committee (RAC) for the Oregon Water Resources Department (OWRD) rulemaking that's underway for seventeen administrative rule divisions. We have provided verbal comments and suggestions to the Department in all RAC meetings to date, and understand that OWRD is considering that input as the agency further revises and adjusts the proposed rules.

Given the frequency with which TU engages with OWRD on instream issues—and the extent to which we use and refer to the Division 77 rules—we are providing additional written comments on the draft Division 77 rules below, using the template provided by the Department:

Draft Rule # e.g., 690-014-0170(1)(b)	**Input / Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-077-0000(7)	This new statement could cause problems for instream flow restoration efforts in places like the Walla Walla River basin, where efforts are underway to protect water instream within Oregon *and* then have the State of Washington legally protect that water further downstream. OWRD's proposed language appears broader than stating that the Department will only protect water instream within Oregon's borders (which is our understanding of its purpose). OWRD's language is written in passive voice without a specified actor, and we recommend adjusting that to active voice which specifies this language is about what OWRD can or cannot do.	Adjust the language to the following or similar: "The Department will only legally protect water instream under instream water rights, instream leases, instream transfers and instream water rights resulting from an allocation of conserved water within the State's borders."
690-077-0010(12)	Limiting state agency instream water right applications to "estimated average	Delete (12).

	natural flow" (EANF) is not provided for in statute. As commented below, TU recommends removing this limitation from the rules.	
690-077-0010(35)	Adding language about Special Districts Association of Oregon (SDAO) here and further below is neither directed by 2025 legislation nor a clean-up, and is therefore outside the scope of this rulemaking. See related comments below.	Delete (35) entirely.
690-077-0015(4)	Limiting state agency instream water right applications to "estimated average natural flow" (EANF) is not provided for in statute. TU agrees with the comments and reasoning provided by multiple RAC members during the Oct. 29th meeting. ODFW is the state's expert on what native aquatic species need for instream flow, and therefore, the state's requested amounts are scientifically and legally defensible (even if not always or typically capped at EANF).	Delete language in Division 77 that limits state agency requested instream water rights to EANF.
690-077-0020(3)	Proposed revisions about SDAO are neither provided for in 2025 legislation nor a clean-up. Accordingly, these revisions should not be included in this rulemaking. Further, as TU commented during the Oct. 29th RAC meeting, it is not appropriate to add special notifications and communications from a state agency to a non-profit organization (i.e., SDAO) above and beyond what's provided for the public generally in statute, <u>with</u> related obligations, workload, and procedural pitfalls for an agency. Oregon Dept. of Fish and Wildlife (ODFW) is already providing this information to SDAO and related parties and holding public meetings on new instream water right application filings beyond what's required in existing law. This new provision is unnecessary and adds procedural steps that, if not strictly followed, could increase the exposure of state agencies to legal challenges.	Delete SDAO notification and communication provisions. At a bare minimum, delete the word "only" from this provision, as it creates a trap of sorts whereby ODFW could violate the new requirement if they happen to notify more than just "those potentially affected water-related entities..."
690-077-0054	Deleting the existing sub (1) of this rule provision also deletes the context for the remaining language and additions.	Revise new sub (1) to provide context on what the referenced "conversions" are. For instance:

		"When the Commission intends to convert a minimum perennial streamflow to an instream water right, any person . . . "
690-077-0071(1)(f)	The requirement to map "the proposed instream reach" is burdensome and difficult, with little corresponding benefit. This new requirement complicates the mapping requirement significantly because the detail applicants would need to show about the place of use and property is best shown with a large-scale map (small area, high level of detail) but the protected reach would best be captured on a small-scale map (large area, less detail). It would not be an issue in cases where the protected reach is short and adjacent to the places of use, but applicants sometimes request reaches that are many miles long. It is sometimes not possible to clearly display all the requested detail on one map; in most cases applicants would have to make and submit 2 maps.	Delete (f). Alternatively, replace it with a requirement that the submitted map include a statement on it of the proposed instream reach or point.
690-077-0071(1)(h)	This new requirement that maps include "any other information the Department requests and considers necessary" is vague and open-ended. It introduces uncertainty and room for disagreement in the rule. If there is additional information that OWRD needs, the rule should specify it.	Delete (h).
690-077-0075(3)(c)(B)	TU questions the need to adjust the rule language if the purpose of the clause and specifics it provides are not changing. As we commented during the Oct. 29th RAC meeting, it's difficult to turn this adjusted narrative into an equation. The existing language about "prorating" seems more straightforward than "subtracting" the losses proportionately.	Leave the provision as-is, or add an equation as an example so that practitioners (and judges, if needed at some point) can consistently and unambiguously apply this language mathematically.

Thank you for considering these comments, and please reach out to me if you have any questions.

Sincerely,

James Fraser
Oregon Policy Director
Trout Unlimited
james.fraser@tu.org

DESCHUTES RIVER
CONSERVANCY

December 5, 2025

Oregon Water Resources Department
Laura Hartt – Water Policy Analyst / Rules Coordinator / Tribal Liaison
725 Summer St. NE, Suite A, Salem, OR 97301

Submitted via email to: Laura.A.Hartt@water.oregon.gov

Re: 2025-2026 Water Rights Rules Advisory Committee, Additional Comments for Division 18, Division 315 and Division 77

Ms. Hartt:

Thank you for the opportunity to participate in Rule updates and for our seat on the Rules Advisory Committee (RAC). The hard work of the OWRD staff on this extensive rulemaking is so appreciated. DRC provided comments during the RAC meetings for Division 18, with written comments on October 31st, and Division 77 during the meeting, with written comments on November 11th. We are providing additional comments for both Divisions here.

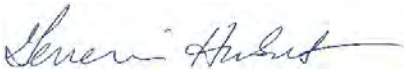
The Deschutes River Conservancy (DRC) restores streamflow and improves water quality in the Deschutes Basin using a coordinated, collaborative, and voluntary approach. Founded in 1996 as a consensus-based, multi-stakeholder organization, the DRC's Board of Directors includes diverse representation from tribal, environmental, irrigated agriculture, and hydropower interests as well as federal, state and local government. Together with our partners we have restored well over 300 cubic feet per second of flows to our basin's rivers while increasing the reliability of agricultural water rights and operations, and water supply for our growing communities.

The DRC utilizes Division 77 extensively as one of the larger contributors to instream leasing across the state and in developing and completing many permanent instream transfers. The DRC works with 8 irrigation districts and up to 350 landowners annually who voluntarily lease up to 70-75 cubic feet per second back to our streams with an additional 74 cfs permanently transferred instream. The DRC and our partners also heavily utilize Division 18 and have protected up to 174 cfs in multiple streams in the Deschutes Basin with the allocation of conserved water program. Division 77 and 18 are very important rules and programs for the flow restoration achieved in the Deschutes basin by the DRC and our partners – adding protected flows back to streams, some of which had once been fully diverted and left dry. Improving efficiencies and streamlining where possible will be beneficial to future flow restoration actions and will improve workflow for the state staff who process these transactions.

We provided verbal and written comments during the Water Rights Rulemakings for multiple Divisions since the start of this process. Additional comments on the second versions of the proposed rules updates follow this cover letter.

Thank you for your consideration of these comments and for allowing the DRC the opportunity to participate and comment during this rulemaking process.

With sincere appreciation,



Genevieve Hubert
Senior Program Manager
Deschutes River Conservancy

E-mail: gen@deschutesriver.org

Additional Feedback (12/05/2025) on Water Rights Rulemaking – Input (RAC 3, Div 18 and Div 315, Oct 14, 2025 and revisions resulting from the RAC as presented in V2's)

RAC Member Name: Deschutes River Conservancy, Genevieve Hubert, Sr Program Manager

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
DIVISION 18		
690-018-0020(9), -0050(7)(a)(B), -0050(7)(b)(B), -0050(7)(c) There appear to be some number sequencing issues in -690-018-0050 with a 4,5,6,7,6,7,8 The comments here relate to the first (7). 690-018-0065(2)(b)	Thank you for the clarification that a portion of a certificate may be cancelled and there may be a "living certificate". While these are modified and tracked by OWRD, the remaining rate and volume are not always easy to find. DRC suggests if a project reduces the rate or volume from a "living certificate" that the new reduced rate and volume be readily available on the OWRD Water Right Information System (as the reduced rate and duty would be easy to find when a certificate is cancelled and a new certificate issued with reduced rate and duty).	
690-018-0040(22)(b)	Statute does not direct notifications of local governments along a reach for instream uses. This is also time consuming for the applicants.	Propose removal of this as a *requirement* or confine to notifying only Tribal entities along a reach, especially if they have flow related treaty rights.
690-018-0050(7)(c)(C) and (D)(ii) There appear to be some number sequencing issues in -690-018-0050 with a 4,5,6,7,6,7,8 The comments here relate to the first (7).	DRC strongly supports all water conservation efforts. However, this does not seem to follow the intent of Division 18. With new groundwater allocation rules and low availability of groundwater in many basins, how will it be assured that the conserved groundwater is not	Unless there is a way to protect the conserved groundwater in the aquifer, there would or may be no public benefit or improvement of the status of the aquifer. Consider removing groundwater conservation from Division 18 unless or until methods are established to protect the conserved water from further withdrawal.

Groundwater conservation is also mentioned in 690-018-0065(2)(c) and (3)(b)	withdrawn/pumped by another water user or won't result in another water user pumping water that may not have been available prior to the conservation? If the groundwater conservation cannot improve aquifer conditions, it should not be included for allocations of conserved water.	
690-018-0050(3)(j)	Support added language to assure measurement and management of conserved water. Metering, measurement and verification are key components to ensure the conserved water serves its intended purpose and does not result in enlargement. This may include third party or agency verification of the amount of water saved.	Consider metering/measurement <u>and</u> verification.
690-018-0065 (2)(c)(A) and (3)(b)	Remove groundwater references until a method to protect the conserved groundwater is determined or until using allocation of conserved water for groundwater can be guided by statute.	
DIVISION 315		
690-315-0020(1) And additional places where Group Domestic permit extensions are addressed.	General concerns with limiting extensions of group domestic water rights while not considering how much of the group domestic service area has been developed and the potential shift to exempt domestic use. Group domestic water rights have measurement	**Understanding that legislation is guiding this update,** consider looking at how much of a group domestic has been developed (%) for extension eligibility/terms to reduce speculative water rights and include the ability to incorporate/consider economic downturns that stall development (and building of much needed housing) into the decision.

	and reporting requirements. Development may still occur on the undeveloped parcels within a group domestic service area, but that development may shift to a new well and with exempt use. Economic downturns can have a dramatic impact on development over multiple years and there is no consideration for this. Does 690-315-0040(2) "good cause" allow some leeway with a group domestic extension or does this only relate to qualifying under the term limits imposed by legislation and the rule updates?	
690-315-0090(1) And additional places where Quasi Municipal permits are addressed.	General concerns with quasi municipal (QM) differentiation while understanding that part of the intent here may be to limit speculative water rights. In central Oregon (and maybe in other areas of the state), some quasi-municipal water providers have contracted service areas with municipalities (Avion Water's relationship with City of Bend for example). The city and developers control permitting and buildout of service areas. This is not within control of the QM while the QM still must provide service or future service to these areas. In addition, a QM has a complicated association with the Public Utilities	**Understanding that legislation is guiding this update,** consider revisiting this. Consider some accommodating language for QM's closely linked to municipal territories and supplying long established and growing communities. Include an ability to incorporate/consider economic downturns that stall development (and building of much needed housing).

	Commission and may not be able to make decisions as quickly as a municipal entity. Economic downturns can also have a significant impact on how quickly an area can be built out or how long development may be stalled. Does 690-315-0080(5) provide some leeway and if it does, can it be clarified in the rules?	

Additional Feedback (12/05/2025) on Water Rights Rulemaking – Input (Division 380, RAC 5 Oct 21, 2025 and Division 77, RAC 6 and 7, Oct 29, 2025 and revisions resulting from the RAC and presented in V2's)

RAC Member Name: Deschutes River Conservancy, Genevieve Hubert, Sr Program Manager

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
Division 690-380		
690-380-2200(2) As it relates to 690-380-0100(2)(c)	The Department has revised the clause in -0100(2)(c) to add "under the same water right" which we support but should correspondingly update -2200(2) to add "under the same water right".	Add clause to -2200(2) for consistency with -0100((2)(c)
Division 690-077		
690-077-0000(7)	Consider clarifying language that acknowledges protection across state borders via mutual agreement/laws such as Oregon SB 1567 (2024) and Washington HB 1322 (2023) which allow for interstate protection in the Walla Walla basin. Interstate agreements involving Oregon, Washington, Tribes, and similar agreements which may come about for other basins in the future should be acknowledged.	Add clarifying language that leaves this open and acknowledges protection across state borders if supported by both states via interstate agreement or multi-state legislative actions.
690-077-0010(12)	Estimated Average Natural Flow	Please see comments for 690-077-0015(4)
690-077-0015(4)	Estimated Average Natural Flow should be removed as a restriction for instream water right applications; it is not guided by statute and should rely on science and the ecological needs determined by ODFW or by	Please remove EANF from the rules as it is not supported by statute. If not removing, then please cite the statutory requirement for EANF for new instream water rights. If this is not a statutory requirement, then clarify how EANF flows are determined for instream and whether they sufficient to

	the agency requesting the instream water right. Parameters may/should include habitat needs and temperature needs necessary for key aquatic species to survive and thrive. In the Deschutes Basin, some state instream water rights, restricted by EANF are lower than what was requested by ODFW and are not sufficient to meet temperature standards for anadromous fish and resident redband trout (Whychus Creek). If the intent of the water right request is to sustain a fishery that should be a consideration rather than just relying on EANF.	meet ecological flows, fish/wildlife needs, and water quality.
690-077-0020(3)	This is not referenced in statute nor is it a new requirement directed by 2025 legislation. If this is not a legal requirement, but a suggested practice that is optional we strongly suggest removal of (3). ODFW can choose to contact SDAO and can maintain this as a practice if they wish to do so but if it is not guided by statute or recent legislation, this should be removed.	Suggest removal of (3).
690-077-0054(struck 1)	Consider keeping some of the language in (1) for context as there may be some minimum perennial streamflows that have not yet been converted.	
690-077-0065(5)	DRC strongly supports this modification that strikes reference to EANF.	

690-077-0070(4)(e)	DRC strongly supports the modification that strikes the original (e).	
690-077-0071(1)(h)	The requirement to include "any other information the Departments requests and considers necessary" is too vague, thank you deleting this.	
690-077-0071(2)	Strongly support not requiring a CWRE stamped map for instream leases and instream transfers.	
690-077-0075(4)(a)(A)	Thank you for the clarification that a portion of a certificate may be cancelled and there may be a "living certificate". While these are modified and tracked by OWRD, the remaining rate and volume are not always easy to find. DRC suggests if a project reduces the rate or volume from a "living certificate" that the new reduced rate and volume be readily available on the OWRD Water Right Information System (as the reduced rate and duty would be easy to find when a certificate is cancelled and a new certificate issued with reduced rate and duty).	
690-077-0076(4)(b) And 690-077-0076(4)(h) and (4)(h)(B)	(b) DRC very strongly supports the added language that allows a district to hold landowner paperwork (lessors, co-lessors) on file. This is consistent with other temporary transfers allowed for districts (water user to water user, temporary movements of water). (h) and (h)(B) DRC	

	supports the clarifying language that allows districts to hold quitclaim deeds/water conveyance agreements on file. These updates improve the leasing process and efficiencies for irrigation districts, partnering organizations (DRC and others) and for the state staff who process lease applications.	
690-077-0076(5)(f)(A)	Support the added language here **"or** copies of contracts or agreements for the use of a reservoir owned by a federal government; or"	
690-077-0077(3)	For consistency, injury and enlargement and return flow considerations or reviews should be equally specific in 690-380-4000 reviews or less specific here. They should be treated equally.	
690-077-0077(11)	Support the added language to include conditions to identify the amount and timing of releases of stored water.	

HARTT Laura A * WRD

From: HARTT Laura A * WRD
Sent: Tuesday, November 25, 2025 7:31 PM
To: phggek at bctonline.com
Cc: JARAMILLO Lisa J * WRD; DAVIDSON Will D * WRD
Subject: RE: Current and proposed OAR 690-380-4200(2)

Hi again, I was following up internally and realized that I sent you the wrong tracker. You need the link for the Div 380:
https://www.oregon.gov/owrd/programs/policylawandrules/OARS/Documents/Div%20380_Rule%20Revision%20Tracker%20(112025).pdf

Still pages 39-40.

Sorry about that!

From: HARTT Laura A * WRD
Sent: Monday, November 24, 2025 5:25 PM
To: 'phggek at bctonline.com' <phggek@bctonline.com>
Cc: JARAMILLO Lisa J * WRD <Lisa.J.JARAMILLO@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Subject: RE: Current and proposed OAR 690-380-4200(2)

Hi Greg,

If you review our latest Rule Revision Tracker for Div 380 (pages 39-40), you'll note that the interface between forfeiture and transfer protest proceedings remains one we are still grappling with:

https://www.oregon.gov/owrd/programs/policylawandrules/OARS/Documents/Div%20382_Rule%20Revision%20Tracker%20(112025).pdf

With respect to your question, before getting back to you, I'm going to check in with other staff more familiar with the water rights transaction process after the holiday break.

In meantime, I can offer this….based on my own understanding/interpretation. I believe the authority really lies with the Admin Law Judge, who has the authority to resolve issues that come before the ALJ during these transfer protest proceedings. Forfeiture/nonuse is often alleged during the proceedings, so the ALJ has discretion to adjudicate the issue and will do so. While someone may assert forfeiture during the ALJ proceedings, ultimately that party still will have to meet the evidentiary standards required by the ALJ. Our rules are designed to be efficient and not require multiple hearings on the issue of forfeiture in the context of transfer protest proceedings.

Thank you for your question, and I'll check back in next week. I hope you and Malia have a wonderful holiday. Warm wishes to you both! Laura

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From: phggek at bctonline.com <phggek@bctonline.com>
Sent: Monday, November 24, 2025 3:40 PM
To: HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>
Cc: JARAMILLO Lisa J * WRD <Lisa.J.JARAMILLO@water.oregon.gov>
Subject: Current and proposed OAR 690-380-4200(2)

Laura,

Considering OAR 690-380-4200(2) (both current and as proposed), I'm trying to figure out what specific statute gives the Department the authority to begin cancellation proceedings on a water right simply based on an assertion of forfeiture made in a protest of a transfer application. I have reviewed the statutory authority listed at the end of the rule section, but I just don't see where action on a simple assertion of forfeiture is mentioned.

Can you give me some clarification on the relevant statutes for these rules?

Regards,

Greg Kupillas

Oregon Ground Water Association
2755 Commercial St SE, Ste 101-333
Salem, OR 97302
(503) 390-7080 Fax (614) 898-7786
www.ogwa.org

December 5, 2025

Ms. Laura Hartt
Water Policy Analyst/Rules Coordinator, Policy Section
Oregon Water Resources Department
725 Summer St. N.E. Ste. A
Salem, Oregon 97301

RE: Comments on Proposed Water Right Rules

Dear Ms. Hartt:

On behalf of the Oregon Ground Water Association, I am providing the following comments in response to the proposed draft water right rules.

Overall, we believe the OWRD has done a good job developing proposed rules that reflect the spirit and intent of the related legislation. In addition, in your efforts to make changes to the rules that will promote process improvements and provide better consistency with the statutes, we believe the Department has, for the most part, done well to accomplish these goals.

One of the rule changes we wish to comment on is OAR 690-305-0010(3)(h)(B), which will require identifying the locations of proposed or existing diversion points, wells, or dams by latitude and longitude as established by GPS, accurate within ten feet. We believe it is important that this proposed rule also requires reporting the datum used (i.e., WGS 84, NAD 83, or NAD 27) and the accuracy given by the GPS device at the time of measurement.

Reporting the datum used is important because not all devices are set to the same datum; therefore, a difference between the datum used by the GPS device and the datum used by the OWRD could result in a significant error in the location of the point being located. The accuracy of the GPS reading is also important because it can vary depending on the type of GPS device used, the number of GPS satellites that are overhead at the time of the measurement, and other factors such as terrain and tree canopy. Measurements taken with simple, inexpensive GPS devices during times when there are fewer satellites overhead or under other confounding circumstances may not be accurate with 10 feet as required by the rules. Therefore, the rules should require reporting of the accuracy of the measurement as given by the GPS device at the time of measurement in order to ensure that the accuracy requirement has been met.

There are a couple of other concerns we have that we think will require some legal interpretation that we hope to pursue, so we may be submitting additional written comments in the near future.

Respectfully,

Gregory E. Kupillas, R.G., C.W.R.E.
Co-Chair, Government Affairs Committee
Oregon Ground Water Association

HARTT Laura A * WRD

From: Jan Lee <jlee@conservationdistrict.org>
Sent: Friday, November 21, 2025 2:43 PM
To: HARTT Laura A * WRD
Subject: Re: Rulemaking tracker

Thank you, Laura. This table is great! I have followed water issues for 30 years and like hearing details and feel more prepared as a commissioner if I can listen to some of the work group conversations and what their issues are.
I assume that is not a conflict until such time as public comments close. Some good discussion today. I was particularly watching today as I am on the board of a conservation district (SWCD) and the state chair of the association and was watching to see how provisions of the rules would change anything for us.

The one thing I noted was the municipal exception in regard to land use when the project was for "municipal" use. Under some statutes conservation districts have municipal authorities and under some others not. We do water infrastructure projects, especially in regard to flood rehabilitation with NRCS and the USACE, as well as small offstream reservoirs, watershed restoration with some construction, etc. I need to do more research to see where we fall under various municipal authorizations to see how the new language of the exceptions would apply to us as most of our work would not be considered "municipal." I have also asked SDAO to let me know what they think as if the exception is limited to municipal projects and how that would affect our SWCDs. Jan

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From: HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>
Sent: Friday, November 21, 2025 12:14 PM
To: Jan Lee <jlee@conservationdistrict.org>
Subject: RE: Rulemaking tracker

Hi Jan,

The Trackers are online, beginning with RAC 6 when we started revisited Draft rule language. We have created a Table (which I will be posting online this afternoon, but have attached here), that will hopefully make it easier to find things.

Please let me know if you want to set up a call for me to walk you through how to use it, or let me know if you interest in a specific Division, and I can just send you an email with the right attachments.

Thank you for joining us today as well! Laura

From: Jan Lee <jlee@conservationdistrict.org>
Sent: Friday, November 21, 2025 10:56 AM
To: HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>
Subject: Rulemaking tracker

Laura, I have been following some of the RAC meetings on the process changes on behalf of conservation districts but I don't see on the rulemaking website section the tracker that is shown in the meetings. How can I get a copy of that? Or will it be posted after today's meeting? Jan

Oregon Environmental Council

oeconline.org | 503-222-1963 | @oeconline

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Salem, OR 97301

November 21, 2025

Re: Comments on Draft OAR 690-007 Rules

Dear Laura,

OEC is grateful for the opportunity to participate in the 2025-2026 Water Rights Rules Advisory Committee. Below are our comments on the proposed changes to the Division 077 rules.

We are also grateful for the hard work, diligence and commitment of OWRD in moving this RAC process forward.

Sincerely,

Karen Lewotsky, PhD, JD
Water Program Director & Rural Partnerships Lead
Oregon Environmental Council

Oregon Environmental Council Feedback on Water Rights Rulemaking – Input on proposed revisions to Division 77 Administrative Rules (Instream Water Rights)

RAC Member Name: Karen Lewotsky, Water Program Director & Rural Partnerships Lead, Oregon Environmental Council

Draft Rule #	Concern/Input	Proposed Rule Language/Description of Proposed Fix
690-077-0000(7) Purpose	This language could interfere with collaborative work Oregon is doing with other states to protect instream water rights, e.g., with Washington state in the WallaWalla basin. We assume this is not the intent of this section.	Delete proposed language/new section (7)
690-077-0010(12) Definitions	Limiting instream water rights applications to an "estimated average natural flow" is not provided for in the statute. Applicants for instream water rights must be allowed to apply for sufficient instream water rights to support the need based on scientific data provided.	Delete (12) entirely, as well as all other language that limits instream water rights applications to EANF, including 690-077-0015(4) (see below)
690-077-0010(35) Definitions	Providing for special notifications to be provided to a particular NGO above and beyond what is provided to the public-at-large is discriminatory. This is not provided for in the statute, nor is it "clean-up" language.	Delete (35) entirely
690-077-0015(4) General Statements	Nothing in statute allows OWRD to make wholesale reductions of flows recommended by ODFW, DEQ or other agencies. Reductions by OWRD must be limited to only those consistent with the Instream Water Rights Act, as state expertise (ODFW) is considered both legally and scientifically based.	Delete language in (4) that limits instream water rights applications to ENAF
690-077-0020(3) State Agency Instream Water Rights Applications: Application Requirements	Any proposed revisions to rule concerning prior notice/prenotice exclusively to SDAOs are not required by the 2025 legislation nor are they "clean-up." Unless specified by the 2025 legislation, prior notice should not be provided to any entity.	Delete (3), removing all notification and communication requirements specific to SDAOs.

Draft Rule #	Concern/Input	Proposed Rule Language/Description of Proposed Fix
690-077-0054 (1) Conversion of Minimum Streamflows	Deleting this language will remove the statutory direction to convert any remaining Minimum Perennial Streamflows to instream rights. Until all MPS have been fully converted, this language provides direction and context.	Rewrite (1) to provide updated context for "conversions" referenced in the following sections of 690-077-0054. Do not delete (1)
690-077-0065(5) Instream Leases and Transfers		Remove references to EANF, see comments above

Feedback on Water Rights Rulemaking – Input (RAC 5, Oct 21, 2025)

RAC Member Name: Austin Patch – Summit Water Resources, LLC

Proposed language changes are redlined

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-380-2110(3) 690-380-2120 (various occurrences)	Proposed change to the rule is not consistent with statute. The proposed rule changes are extending the enlargement concept to other parts of the transfer process that what is stated statute.	Enlargement is stated as a criteria in statutes relating to only certain aspects of transfers; specifically, "enlargement" is specified in the following statutes • ORS 540.510 (transfer of supplemental water right), • ORS 540.523 (temporary transfer of supplemental water right), • ORS 540.524 (substitution of supplemental GW for primary SW), • ORS 540.531 (SW POA to GW POD change), and • ORS 540.570 (temporary transfers within districts) "Enlargement", however, is **not** stated in ORS 540.520 as a criteria for change in use, place of use, or point of diversion; nor is it stated in ORS 540.530 regarding issuance of an order approving a change of use, place of use, or point of diversion; nor is it stated in ORS 540.532 for a change in point of diversion to reflect historic use. Inclusion of "enlargement" in the transfer rules should follow the statute and be applied to only the specific transfer process where "enlargement" is referenced.
690-380-220(2)	Proposed changes to place of use changes will complicate transfer applications and result in unnecessary subdivision of water rights.	In some instances, water rights have complex place of use geometries making detailed tracking of FROM and TO lands acre-by-acre in the context of a transfer cumbersome. **Example 1**. Center pivots are adjusted slightly result in fractional acres that need to be moved to accurately align POUs with the center pivot circles. For water rights involving 40+ circles, it makes for a

		simplified transfer to pick up the misplaced circles and to put them back down in the correct location, versus listing 40+ rows of fractional acres of FROM and TO lands in the transfer application and mapping the multiple thin slivers of FROM and TO lands on the transfer map. **Example 2.** For some nursery use permits, the place of use is complex, with nursery use covering some buildings and loading areas, in addition to container yards and in-ground irrigation area. When certain nursery areas are reworked/renovated, numerous small changes in the POU may occur. Attempting to isolate and move small variations in the POU acres can be time consuming, makes the POU table listing in the transfer application excessively lengthy, makes mapping more difficult, requires tracking of fractional acreages, and creates more opportunity for scrivener errors in the POU listings/maps. Allowing certain blocks of POU to be picked up, and placed back down in the modified geometry makes the transfer application tables and maps less complex. **Example 3**. For some water rights, multiple small adjustments to the POU may be required over time, and rather than generating confirming and remaining certificates for each POU change over time (resulting in the subdivision of 1 certificate into many), the applicant may prefer to keep the water right together and include the entire POU so that 1 confirming certificate results from the transfer. Recommend **not** adding the proposed language.
690-380-3000(12)(a)(A)	Vague wording, no direction on how to comply	Is the situs address on a receipt sufficient to comply with the connection of a receipt to an authorized POU? It would be helpful to provide examples on what evidence related receipts would look like to achieve compliance

690-380-3000(12)(b)	Transparency on affidavit form	I understand this has been stricken from rule for duplicity. Please retain this language on the OWRD affidavit form for transparency of options for those applicable
690-380-3100(2)(a)	Consistency	The certified water rights examiner's stamp and signature, if applicable. An electronically generated stamp, seal, or signature is acceptable
690-380-5060(1)	Grammar	Pursuant to ORS 540.525, when an application for a change in point of diversion is received, the Department shall consult with ~~the~~ ODFW to determine whether a fish screening or by-pass device is necessary to prevent fish from leaving the body of water and entering the diversion
690-380-5060(2)	Consistency	If requested by ODFW, a condition requiring ~~a proper~~ an appropriate fish screen at the new point of diversion shall be attached to any transfer approval order for a change in point of diversion
690-380-7100(1)	Consistency	Applicant's name, mailing address, email address if available, and telephone number
690-380-7100(20)	Specificity	The Department may require the applicant to provide any additional information ~~it deems necessary in determining whether~~ related to the proposed permit amendment to approve the application
690-380-7110	Consistency	For an application made by or on behalf of a public corporation, the Department
690-380-7300(1)	Proposed new rules are not consistent with statute.	The proposed rules include some criteria for approval of a permit amendment that are **not** consistent with ORS 537.221. Proposed rule criteria (1)(d), (e), (f), and (g) are consistent with the statute, being ORS 537.221(4)(a), (c), (d), and (e), respectively. Propose rule criteria (1)(c) is **not** consistent with the requirements for approval of a permit amendment per ORS 537.211. **This proposed rule criteria should be removed.**

		Proposed rule criteria (1)(h) is **not** consistent with the requirements for approval of a permit amendment per ORS 537.211. The only "other" requirement stated in ORS 537.211 for approval of a permit amendment is "Diversion is provided with a proper fish screen, if requested by the state Department of Fish and Wildlife" [ORS 537.211(4)(h)]. **Proposed rule criteria (1)(h) should be revised to be consistent with the statute.**

Feedback on Water Rights Rulemaking – Input (RAC 6, Oct 29, 2025 – AM, RAC 7, Oct 29, 2025 - PM)

RAC Member Name: Austin Patch, Summit Water Resources, LLC

All Proposed changes are redlined in this document

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-382-0400(8-10)	As proposed, the language does not reflect registrations that have been previously modified, and are exclusive of "previously recognized" changes of registrations that have already been modified.	**The existing registered and/or previously recognized…**
690-077-0020(45)	Ordering is incorrect	This subsection should like 690-077-0020(5)
690-077-0020(5)(e)(B)	Establishing downstream and upstream points of an instream reach using a gps involves safety concerns considering how remote and challenging some locations may be	**(B) The upstream and downstream points identified by latitude and longitude as established by a global positioning system, GIS or other acceptable surveying techniques;**
690-077-0029(2)	Batch applications can be addressed via a single communication seems to only be sufficient for **continuing processing**. There should be specificity that single communication can also be sufficient for stopping processing as well.	**Given that state-agency instream water right applications may be submitted in batches, a single communication can suffice for more than one application in the batch if the communication specifies which applications the applicant would like the Department to continue or stop processing.**
690-077-0071(1)(c)	**Consistency. Division 380 mentions water rights tied to an acreage are written as "For water rights with an authorized place of use tied to specific acreage, including but not limited to irrigation, nursery**	**When referencing water rights that are tied to an acreage, please revise all division mention to "irrigation right or other similar use" or similar alternative to achieve consistency.**

	operations, or cranberry operations”	

Feedback on Water Rights Rulemaking – Input (RAC 8, November 12, 2025)

RAC Member Name: Austin Patch – Summit Water Resources, LLC

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-305-0010(1)(c)	**Clarity**	**"In addition to the map, a digital file containing the features of the map (~~geospatial digital file~~ geodatabase or shape file that identifies the coordinate system) may be submitted to the Department."** **<u>Proposed language</u>** **"In addition to the map, a geospatial data file containing the coordinate reference system of the digital map may be provided"**
690-305-0010(1)(d)	**Clarity and potential equity problem**	**As proposed, the language is unclear what is to be provided. In a typical GIS map, there is a project file that contains many separate shapefiles or geodatabases for each feature of the map (i.e. a separate shapefile for roads, tax lots, POD's or POU's). Asking for the base project file will include all of the data contained in a map.** **<u>Proposed language</u>** **For any map that OAR Chapter 690 requires be prepared by a Certified Water Right Examiner, the digital project file containing the geospatial features of the map shall be submitted along with the map, unless the Department provides a waiver** **There is also a concern as not all CWRE's prepare maps using GIS software. Requiring digital GIS data would force some CWRE's to change their survey methodology.**
690-305-0010(2)(a),(c)	**Missing word**	**These two sections should read "…be equal to or greater than 1320 feet…"**

690-305-0010(3)(i)(D)	**Redundancy**	**"Where more than one point of diversion or well is included, the map must clearly identify the place of use served by each point of diversion or well."** **It is common that all wells are connected in typical irrigation systems. If all wells can irrigate the entire place of use. It should be assumed that POD's/POA's can irrigate the entire place of use, unless it is specified that they are not.** **<u>Proposed Language</u>** **Where more than one point of diversion or well is included and serves different portions of the place of use, the map must clearly identify the place of use served by each point of diversion or well.**

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Further Comments on Proposed Changes to Division 2 Rules

Dear Laura,

Thank you for considering WaterWatch of Oregon's comments to date on proposed changes to the Division 2 rules. We have reviewed the latest draft of the proposed rule changes and the "rule revision tracker" and have the following additional comments. We also incorporate in these comments our previous comments to the extent they have not been reflected in the proposed rule changes, including our initial written comments, the comments in our markup of the previous draft submitted by email on November 11, 2025, and our oral comments during meetings of the rules advisory committee.

General Comments

- WaterWatch appreciates changes to the proposed rules based on its previous comments, including: clarification that ORS Chapter 183 (the Oregon APA) and OAR Chapter 137 (Attorney General model rules) continue to apply except to the extent the Department has expressly deviated by rule and has authority to do so; clarifying language regarding what constitutes "electronic filing"; elimination of ambiguous language regarding determinations by the ALJ of issues for hearing; what constitutes "filing" of exceptions to proposed orders; and altering the default contested-case schedule to some extent.

- WaterWatch opposes proposed rule changes that would limit the scope of discovery allowed under the Oregon APA and Attorney General model rules for contested cases. There was no directive in HB 3544 to do that, there is no directive for that otherwise in statute, and the proposed changes may deprive parties of the process they need to fairly present a case on significant water resource matters. Indeed, limits on discovery were discussed in the process that led to passage of HB 3544 and were specifically and deliberately not included in the bill. While there may be an "expectation" that the Department "make progress on [a] contested case backlog," there has been no directive from the legislature or governor (as far as we know) to do that by limiting discovery in the contested case process beyond the limits already provided for contested cases

generally. Moreover, while the model rules invite different limits on discovery in "specified program or category of cases" based on specified findings, the proposed rules would do that for all programs and cases based only on an apparent perception that it might speed up the process, without balancing that perception against the rights of stakeholders to fairly present their cases or the decision of the legislature to address the "backlog" in other ways.

- WaterWatch opposes proposed rule changes that would allow the Department to charge for providing discovery. Charging for discovery could make meaningful participation cost prohibitive for parties with fewer resources, contrary to the state's interest in promoting equity and good government. To the extent discovery requests are unreasonably burdensome relative to the nature of the proceeding, that can be addressed through objections to the requests, subject to rulings by the ALJ in disputed instances.

690-002-0005

- Again, we believe the rules should be made applicable to all agency orders for consistency and to avoid confusion, including hydro conversions under ORS Chapter 543A. Even if HB 3544 does not *require* that, it does not preclude the Department from using its general rulemaking authority, as it did for hydro conversions generally, for which no rulemaking or protest procedure at all is directed by statute.

690-002-0025

- We support electronic filing and payment. In addition to exploring electronic payment options, which we urge the Department to prioritize to make electronic filing meaningful, please expressly allow payment by deduction from a filer's user account with the Department. We see no reason not to allow that as an alternative method of payment.

690-002-0090

- This section continues to allow the Department to consolidate cases unilaterally. While proposed new language would allow another party to file a motion to consolidate or bifurcate, that misses, at least in part, the point of our prior comments. The Department, as just one party to the case, should not be able to unilaterally consolidate cases, in advance of referral or otherwise. Doing so may significantly impact a party's right to a fair hearing. The rule should be revised to allow consolidation before referral only if all parties agree; and otherwise only on a motion to be decided by the ALJ subject to arguments against consolidation by any party.

690-002-0095

- We continue to oppose elimination of requests for admission as a discovery method. The Department's view that they are not useful is inconsistent with the view of both state and federal courts and the DOJ for contested cases generally.

- We continue to oppose limits on interrogatories beyond those in the model rules. There has been no legitimate policy directive to do that.

- As noted above, we strongly oppose the Department charging for responses to discovery requests, even if the free time threshold is extended to 30 hours, the estimates for which would be subjective and difficult to test. The Department can object to discovery requests it considers unduly burdensome, overbroad, etc. Parties will already have an incentive to use the public records process in advance given the new time limit for completing contested cases and the default schedule.

- The subsection on subpoenas (5) is still not clear regarding whether it refers to discovery subpoenas, hearing subpoenas or both. We presume the intent is to refer to discovery subpoenas and suggest making that clear.

- The revised draft rules and tracker do not appear to acknowledge our comments regarding site visits. Like any request for discovery, information or hearing procedure, they should not be limited to only those cases in which all parties agree. Any party should be able to request one, for discovery or hearing, and any party should be able to object and get a ruling from the ALJ. The ALJ can adequately take into account whether the burdens would exceed the benefits.

- Our comments regarding (6) have not been addressed. Whether a public records request is a basis for extension of a hearing schedule should be decided case by case and it should not depend on who the request is to. Moreover, saying when it is not a basis for extension suggests that it is a basis in other instances. We suggest striking this subsection entirely.

690-002-0175

- This rule addresses exceptions to agency final orders (subsection 5) as well as exceptions to ALJ proposed orders. The title should reflect that.

- The rule should provide additional requirements for advising a party on how it may present arguments on exceptions. *See* OAR 137-003-0645(5), -0650(5). In particular, the rule should require this for exceptions filed with the commission, on which there has been some ambiguity and confusion regarding presentation of argument. The rules should require the Department to advise all parties, either in the final order or by written notice to each party at least 14 days before the exceptions are to be considered by the commission, of whether, when and how the party may present oral argument on its exceptions, and how much time each party will have for doing so.

690-002-0205

- We continue to believe that creation of an "issue list" and proceedings on that, including briefing, are unnecessary and unfair and add significant work, time and expense to the process, contrary to the stated goals of this rulemaking. The protest is sufficient to define the issues. Any argument that an issue is not sufficiently raised or is otherwise invalid should be addressed by dispositive motion or at hearing (preferably the later). There is no statutory directive to create an "issue list," and there is no analogy to an "issue list" in civil proceedings in state or federal court, where a complaint filed by a plaintiff, which is analogous to a protest, is deemed sufficient to define the issues. Contested cases on a 180-day schedule should not add process steps that are seen as unnecessary in other civil proceedings. Moreover, creation of an "issue list" to define the scope of proceedings is unfair to protestants because it leads to removal of issues without adequate process and because it prevents reference to the protest, on which protestants are being required to provide increasing levels of detail.

- The default schedule leaves too little time between discovery responses and motions to compel. There needs to be time to review the responses and confer before a party can determine if a motion to compel is necessary.

- Motions for summary determination should not be part of the default schedule. Having them in the schedule will tend to encourage them and, in our experience, they add significant work, time and expense to the process. We recognize a party may be entitled to file them – though the Department may have rulemaking authority to say otherwise for its cases – but suggest discouraging them and adding them to the schedule at the prehearing conference only if a party will not agree to not file them.

690-002-0210

- The revised rule draft still does not adequately describe the preference for oral testimony (procedurally v. substantively). Something appears to be inadvertently deleted. Again, our suggestion (slightly modified) is: “An administrative law judge shall, to the extent practicable, give preference for testimony to be provided orally rather than in writing, without requiring testimony in writing. If written testimony is submitted, it must be subject to oral cross-examination at hearing."

Thank you for considering our further comments.

Sincerely,

Brian Posewitz
Staff Attorney

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Comments, V2, Draft OAR 690-17 (cancellations)

Dear Laura,

With regard to V2 of the Div 17 rules, we have one outstanding comment:

690-017-0400(5): This section alters the current mandate that the OWRD "shall initiate a proceeding" to now allow the OWRD to either initiate proceedings to cancel a water right or close the matter. Notably, as written, the OWRD can close the matter without stating - or having - any reasoning and/or providing an explanation.

In our response to our V1 comments opposing this change, the OWRD noted that the agency has broad authority to exercise discretion on whether or not to initiate cancellation proceedings. In the RAC meeting, the DOJ attorney noted that OWRD's discretion was broad enough to allow the OWRD to close the matter for any reason. We disagree. The governing statute reads:

> "whenever it appears to the satisfaction of the Water Resources Commission upon the commission's own determination or upon evidence submitted to the commission by any person that a perfected and developed water right has been forfeited as provided in ORS 540.610(1), and would not be rebutted under ORS 540.610(2), the commission shall initiate proceedings for the cancellation of such water right by causing written notice of such initiate to proceedings..." ORS 540.631.

At most, the statute requires that when presented with evidence by any person (via affidavit), the Commission must review the evidence in order to determine whether it appears, to its satisfaction, that the perfected right has been forfeited and that the evidence would not be rebutted. If yes, then the statute demands that they **"shall"** initiate proceedings. Another interpretation is that "appears to the satisfaction of the Water Resources Commission" only applies to the "commission's own determination", while submission of evidence via conforming affidavit triggers a cancellation proceeding so long as the Commission does not determine that forfeiture would be rebutted.

In any case, the only instance in which the Commission could not initiate cancellation proceeding would be if, in their determination, the affidavits did not meet requirements, or that forfeiture would be rebutted. In other words, the Commission cannot simply choose not to proceed with initiating cancellation proceedings for political reasons, for resource reasons (noted at RAC meeting) or for no reason at all. Failing to act on affidavits of non-use would also be inconsistent with the very specific

requirements for filing such affidavits because the implication of those requirements is that conforming affidavits will either trigger action by the Commission, or a determination and notice by the Commission that the affidavits do not meet standards. The wide discretion claimed by the OWRD to simply not act at all is not granted by and conflicts with this statute and the broader statutory scheme. Other statutes corroborate our view, including ORS 536.340(1)(b), which directs that the Commission "Shall diligently enforce laws concerning cancellation, release and discharge of excessive unused claims to waters of this state to the end that such excessive and unused amounts may be made available for appropriation and beneficial use by the public." Given that the rules are not supported by statute, we again ask the OWRD to delete their proposed language.

Thank you for this opportunity to comment. We appreciate all the hard work the OWRD has done in this rulemaking, including producing charts to document changes to help the RAC review changes.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Comments, V2, Draft OAR 690-18 Allocation of Conserved Water

Dear Laura,

Below are our comments on the draft V2 Div 18 rules. As a general matter we have significant concerns as to the number of new provisions that, in our view, fall outside of the scope of this rulemaking. As noted below, these new provisions are not found in HB 3342, 3544 or existing statutes. They do not align rules with statute but rather advance requests of water users that have no legal backing, and, importantly, seem aimed at compromising the instream benefits of ACW projects. Please see detailed comments below.

- **690-018-0020(9) Living Certificate:** The V2 rules insert a new definition of "living certificate". This is a new term/concept that is not found anywhere in statute, and in fact is directly contrary to the ACW's requirement that new certificates be issued. *See ORS* 537.470(6). The issuance of new certificates is important both for the underlying right and the new instream right. If a water right is reduced because of an ACW transaction, the water needs to be expeditiously removed from the certificate so that there is no confusion in relation to any future transfer applications, regulation of the underlying right, m/r and/or other processes. It is also needed to protect against any future statutory changes that might try to regain access to that water. It is also critically important that the instream portion be protected by a state-held instream right as mandated by the Act. As read in conjunction with OAR 690-018-0050, a "living certificate" means the instream portion of the ACW could be held by the district rather than the state. This puts the instream portion at risk and is directly contrary to the intent and language of the statute. All provisions allowing for "living certificate" need to be removed from these rules. This wholly new concept is significantly outside the scope of this rulemaking.

- **690-018-0040(22)(a)(B) and (b)**: We continue to oppose any provision to provide advance notice to local governments of the intent to create an instream right for instream purposes under the ACW. There is nothing in statute that requires this. This language is not needed to comply with ORS 197.180, as land use regulations to not curb the creation of instream water rights through the ACW or otherwise. Authority for this is not provided for in HB 3342, HB 3544 or the ACW statutes. This is a new concept that is wholly outside the scope of this rulemaking and will only serve to compromise instream projects. This language should be struck.

- **690-018-0050(3)(c):** For out of stream uses please see our comments regarding land use in Div 310.

- **690-018-0050(7)(a)(B), (7)(b)(A) and (B), (7)(c)**: Please delete "living certificate" from all of these sections. As noted previously, the concept of a living certificate is not supported by statute, is not in HB 3342 or HB 3544, is a wholly new concept and is unrelated to aligning rule to statute. Keeping the certificate "live" puts the instream portion at risk as it will continue to be held by the district and not the state. This could invite future legislation and/or other changes that could move water that is supposed to be permanently instream to other uses. Long story short, insertion here is vastly outside the scope of the rulemaking and should be struck.

- **690-018-0062(1)(a):** Please remove reference to a living certificate for reasons outlined previously.

Thank you for this opportunity to comment. We appreciate all the hard work the OWRD has done in this rulemaking, including producing charts to document changes to help the RAC review changes.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301
Delivered via email: laura.a.hartt@water.oregon.gov

Re: V2 Comments, **Draft OAR 690-077**

Dear Laura,

Thank you for the opportunity to provide comments on the Div 77 V.2 version. As the OWRD has stated since the outset, this rulemaking is focused largely on two things: (1) Updating rules to bring into alignment with HB 3342 and HB 3544, and (2) updating rules so they conform with statute. Updating rules so they conform with statute necessarily includes deleting from rule provisions that are not supported by statute. Most of our comments pertain to the latter point. We pointed this out in our initial comments, but these comments were largely dismissed, so we will re-state here, with additional explanations. We also offer new comments on new provisions inserted in V2.

690-077-0000 Purpose

- **(7):** We suggest deleting this new section as it could inadvertently cut against work that Oregon and neighboring states are working towards to try to protect water instream (e.g. Walla Walla, Columbia, Klamath, etc.). This was not directed by HB 3342/HB 3544, nor is it outlined in statute. This is new language that is outside the scope of this rulemaking.

690-077-0010 Definitions

- **(12) Estimated Average Natural Flow**: Please delete this section for reasons outlined in comments to OAR 690-077-0015(4).
- **(10) and (11) relating to districts**: Is it unclear why these are defined here rather than Div 300. If these definitions are different than used in other rules, the RAC should be given an explanation as to why so we can better assess the rationale.
- **(19) Living Certificate**: The V2 rules insert a new definition of "living certificate". This is a new term/concept that is not found anywhere in statute. The issuance of new certificates when it comes to instream transfers is important both for the underlying right and the new instream right. If a water right is reduced because of a transfer, the water needs to be expeditiously removed from the certificate so that there is no confusion in relation to any future transfer applications, regulation of the underlying right, m/r and/or other processes. It is also needed to protect against any future statutory changes that might try to regain access to that water. It is also critically important that the instream portion be protected by a state held instream right as mandated by the Act. All provisions allowing for "living certificate" need to be removed from these rules. This wholly new concept is significantly outside the scope of this rulemaking.

- **(35) Water-Related Entities identified by the Special Districts Association in Oregon:** Please delete for reasons outlined below in OAR 690-007-0020(3).

690-077-0015 General Statements

- **(4) ENAF:** Please strike this provision **in whole** to ensure rules align with statute. There is nothing in statute that allows OWRD a blanket reduction of flows recommended by ODFW, DEQ or Parks. We disagree with the OWRD's response to comments that this change is outside of the scope of the RM. This is precisely within the stated scope of revising rules to ensure they conform with statute. Deletion is necessary to remove from rule existing directives that are not supported by the law. There is no authority for this limitation, and it is contrary to the directives of the Act. OWRD countered this request the RAC by asserting that the Director has ultimate authority to set flows under ORS 537.343; we disagree with their analysis as explained below:

  Under the ISWR Act, OWRD may only approve an instream water right for a lesser quantity of water than is applied for **in instances where the reduction is consistent with the intent of "ORS 537.332 to 537.360"** (the Instream Water Rights Act). ORS 537.343(1).

  The language of the Instream Water Rights Act very clearly directs the state to issue instream water rights in the amount necessary to protect the public use applied for by ODFW. Instream flow means the minimum quantity of water necessary to support the public use requested by an agency. ORS 537.332(2). Public use includes but is not limited to conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values. ORS 537.332(5)(b). Public uses are beneficial uses under Oregon law. ORS 537.334(1). For instream water rights for fish and/or wildlife, the request shall be for the quantity of water necessary to support those public uses as recommended by ODFW. ORS 537.336(1).

  ENAF is not representative of biological needs of fish. ENAF is simply an "average" of flow for a given month (as derived from historical records) that has no relation to any biological determination. An average is "an estimate or approximate representation of an arithmetic mean." *Webster's Third New International Dictionary* 1930 (unabridged ed. 2002). In other words, sometimes flows are above the average, sometimes they are below. By statute, instream water rights are to be set for the quantity of water necessary to support the public use applied for; whether they coincide with an "average" flow or not is of no relevance either to the biological needs of the fish or to the statutory directive to issue water rights in the amounts necessary to support the public uses applied for.

  Based on the full language of the Act, it is clear that the "intent" of the Instream Water Rights Act, as it relates to fish, is to protect those flows needed for the public purpose applied for, which includes all life stages. Flow needs for fish are developed by ODFW, the State's experts on the biological needs of fish. From a biological point of view, it is illogical and insufficient to limit an ODFW requested amount to ENAF; doing so could rob fish of the flows they need when the flows in any given river or stream are in fact above ENAF. Issuing water rights in the amount requested by ODFW does not "create" water, rather it protects it when it is in the river. As the OWRD admitted in its response to comments, ODFW flow numbers are tied to the biological needs of fish. OWRD's are not. As such, tying to ENAF does not ascribe to the "intent" of the

ISWR Act, which is the only way the OWRD Director can issue ISWR for less than requested by ODFW. In other words, A Director cannot arbitrarily reduce requested flows; any reduction must be consistent with the "intent" of the ISWR Act. In sum, the rules' limiting of the instream water right to ENAF is not consistent with either the language or intent of the Instream Water Rights Act and should be deleted. Deleting this section is entirely within the scope of the RM.

- **(4) ENAF, as it relates to transfers/leases:** As noted previously, we strongly support the OWRD's proposal to remove this limitation from instream water rights that result from transfers, leases and allocations of conserved water. There is no authority in statute to limit transfers/leases/ACW to ENAF. That said, as noted above, this section should be removed from the rules in its entirety in order to ensure the rules conform with the ISWR Act.

- **(5) Proposed deletion:** We strongly support the proposed deletion of this section. The governing statutes do not limit transfers/leases of consumptive use rights to the amount of a state applied instream water right. See ORS 537.348.

- **(8):**We support the additional language through (a) but believe more discussion is needed for (b).

- **(9):** Support language limiting this to state applied instream water rights to align it with statute.

- **(10):** The limiting language that ties public use to subsections (4) and (5) are not supported by statute. To comply with statute, please strike "and shall be consistent with Sections (4) and (5) of this rule". See comments for subsection (4) above).

- **(11):** Please clarify that the priority date referenced is the "date of the minimum perennial streamflow". See ORS 537.346. The OWRD response says "under review". This is directed by statute; no additional review is needed. The statute is the statute; OWRD does not have discretion here.

OAR 690-077-0020 State Agency Instream Water Right Applications: Application Requirements

- **(3) SDAO pre-notice:** We strongly oppose the inclusion of a prenotice of the filing of an application to SDAO (or anyone). This is a new provision that is outside of the scope of this rulemaking. This is not related to HB 3342 or HB 3544, nor is it something that is needed to align the rule with the ISWR Act. This is a wholly new section that arose only from conversations between SDAO and agencies outside the RAC. It is in direct conflict with statute and is not within the scope of this rulemaking.

  This is an unbalanced, unfair provision that will give water users an advanced, closed-door opportunity to exert political pressure on ODFW to stall/stop submittal of applications, waste ODFW staff time by requiring them to provide notice to the full list that SDAO provides, set up instream water right applications for legal challenge and many other problems. ORS 537.349 very clearly states that processing of ISWR shall be in accordance with processing of water right applications, except as provided under 537.343. Nothing in 537.343 directs or allows "pre-notification" of an application. This section, as well as section (5)(j) relating pre-notice of an application to local governments and(5)(k) again relating to SDAO, needs to be struck.

Instream water rights are held in trust for the people of Oregon (ORS 537.332(3)) - they are the peoples' water rights - and thus establishing a process by rule (that is not supported by statute) that gives only certain water user interests and entities, who typically oppose instream water rights, unbalanced and advanced access to influence instream water right application submittal/content is inconsistent with the statutory scheme.

Again, this is outside the scope of this rulemaking. It conflicts with statutory directives to process instream rights in the same manner as out-of-stream rights, does not conform rule with statute, and has nothing to do with implementing HB 3342 and 3354. This is a special interest favor that has nothing to do with the law these rules are meant to implement.

- **(5)(j):** This section should be struck. There is nothing in statute that supports rule language that requires ODFW to send a notice of "intent to file" iswr applications to local governments. As noted in relation to subsection (3), this is an unfair provision that will give local governments an advanced, closed door opportunity to exert political pressure on ODFW to stall/stop submittal of applications, waste ODFW staff time, and set up instream water right applications for legal challenge and many other problems. ORS 537.349 very clearly states that processing of ISWR shall be in accordance with processing of water right applications, except as provided under 537.343. Instream water rights are held in trust for the people of Oregon (ORS 537.332(3)) - they are the peoples' water rights - and thus establishing a process by rule (that is not supported by statute) that gives only certain water user interests and entities, who typically oppose instream water rights, unbalanced and advanced access to influence instream water right application submittal/content is inconsistent with the statutory scheme.

  OWRD response to comments on this is that this would be a significant shift from current practice. This response ignores the point of the comment; that this provision of rule is in conflict with underlying statute. That the OWRD has been requiring notice in a manner that conflicts with law does not grant it immunity from deletion in this rulemaking, of which one purpose is to conform rule with law. Please strike this provision from the rules.

- **(5)(k):** This section should be struck for the same reasons outline in comments on (3). OWRD response to comments

690-077-0027 to -0053 (sections relating to application processing, IR, protests, contested cases)
We urge the OWRD to delete the detailed directives on processing an application (through final order) found in sections 690-077-0027 through 690-077-0053. The Division 77 rules should simply state that instream water right applications will processed in the same manner as other water right applications. This would be consistent with the Instream Water Rights Act, which states:

> **537.349 Processing request for in-stream water right.** Except as provided in ORS 537.343, the Water Resources Department shall process a request received under ORS 537.336 for a certificate for an in-stream water right in accordance with the provisions for obtaining a permit to appropriate water under ORS 537.140 to 537.252.

It is cumbersome and inefficient to have 45 pages of rules specifically on instream water rights when there are detailed rules on processing applications, and instream water rights are supposed to be treated the same as other water rights. OWRD should not be describing the same process in separate sets of rules--among other problems, it creates too much potential for inconsistencies, inadvertent or otherwise.

OWRD response to comments on -0053 (to delete the detailed directives) notes that this is outside the scope of the rulemaking. We disagree. One of the stated purposes of this rule is to align the rules with statute. Statute requires that processing of an instream right is in accordance with ORS 537.140 to 537. This provision diverges from the Div 310 rules. Either those rules need to be updated to include the details in the Div 77 rules, or the Div 77 rules need to be updated to delete provisions not in alignment with Div 310.

690-077-0052(2): We oppose the RAC member suggestion that the term "collaborative conversation" be removed. Administrative holds should not be allowed to stall processing of instream rights. We have seen this at the county level already. If interests are opposed to instream rights they should be required to go through the normal public notice/comment process (comments, protests, contested cases) not push for holds to allow for the generation of political pressure via county commissioners, legislators, etc. In fact, in addition to the language proposed, we would propose that OWRD add language that during any administrative hold the agency cannot take comment and/or discuss the application from anyone who has not formally engaged in the protest process.

690-077-0054 Conversion of Minimum Streamflows

This rule should be deleted or substantially rewritten because it provides for process that is not contemplated by statute. We are reiterating comments here as it appears that these were not captured in the comment tracker.

ORS 537.346 says minimum perennial streamflows "shall be converted to in-stream water rights." While it says this shall be done "after the Water Resources Commission reviews the streamflows," it does not provide for protests or hearings on the conversions. Instead, it requires that the conversions take place as a ministerial matter of course. While the statute says a certificate shall be issued "in accordance with ORS 537.343," that simply refers, as the statute says, to the certification, not the process in ORS 537.343 for new instream water rights. It does not make sense to subject minimum flow requirements already set by rule to the same process as new instream water rights.

To the extent there was any right to a hearing on conversion of a minimum perennial streamflow, that right has long expired, as described in the existing rule, for any conversion proposed in the Secretary of State's bulletin if no hearing was requested within 60 days of publication.

The proposed new process does not align with statute and is outside of the scope of this rulemaking.

(1)(a) and (b) proposed deletion: While we understand this language is dated, there are in fact MPS which have not yet been converted to instream rights. There needs to be some retention of the statutory direction to covert the remaining MPS to instream water rights, regardless of the fact the state has not yet met all requirements.

690-077-0054 Map Requirements for instream leases/transfers
(1)(h) proposed deletion: V2 proposes to delete the language "Any other information that the Department requests and considers necessary to evaluate the application". WaterWatch opposes the deletion. OWRD should retain discretion to request information necessary to fully evaluate an application. Every application is different; some are simple, some are complex. We do not believe that allowing OWRD the ability to ask for more information adds "uncertainty".

690-077-0075 Processing an Instream Transfer Application

- **(3) (previously (2)):** ORS 537.348 (1) states in relevant part: "Except as provided in subsection (2) to (6) of this section, a person who transfers a water right by purchase, lease or gift under this subsection shall comply with the requirements for the transfer of a water right under ORS 540.505 to 540.585." Per this directive, the OWRD is required to review instream transfers in the same manner as out-of-stream transfers. Despite this, the Div 77 rules have a number of requirements that are in addition to this, including analyzing return flows, losing reaches, etc. These are not found in Div 380. Instream transfers are supposed to be reviewed in the same manner as out-of-stream transfers. OWRD should either strike this whole section, or in the alternative, add this section to Div 380. This may provide benefits in the processing of non-instream transfers. To keep as is, where instream transfers are scrutinized to a much greater degree than out-of-stream transfers, and often cut back accordingly when the same transfer if not instream would not have been, is inequitable, inconsistent with statute, and goes against state policy which encourages instream protection and restoration.

  OWRD response to comments states that "instream transfer processing is the same as Div 380 transfer process. Div 380 transfers do look at any loss when transferring a water right, its just that Div 77 has more of it laid out in the rule than Div 380 does, butit is being addressed." This comment misses the point, the point of the original comment is that any process needs to be the same in rule. Rules grant certainty that the same process must apply to instream and out-of-stream. Rules also provide additional legal leverage if there are disagreements. Again, we urge the OWRD to align processing of instream and out-of-stream water rights, transfers and leases as required by statute.

690-077-0075(4)(a): As noted in comments section "living certificate" is not a term found anywhere in statute, is a wholly new concept and is outside the scope of this rulemaking. Any portion of a water right that is permanently transferred instream should be cancelled in accordance with existing law upon completion of the transfer. This should be struck.

690-077-0077 Processing an Instream Lease Application

- **(3)(b) &(c):** Same comment as -0075. The "except as provided in subsection (2) to (6)" of ORS 537.348 does not absolve the OWRD from processing instream leases in the same manner as out-of-stream, but rather notes specific attributes not allowed "to a person who transfers a water right by purchase, lease or gift", which includes "lease." So again, unless these same standards are added to Div 380, they should be struck from this section. OWRD response to comments states that "instream transfer processing is the same as Div 380 transfer process. Div 380 transfers do look at any loss when transferring a water right, its just that Div 77 has more of it laid out in the rule than Div 380 does, but it is being addressed." The OWRD comment misses the point. The point of the original comment is that any process needs to be the same in **rule**. Rules grant

certainty that the same process must apply to instream and out-of-stream. Rules also provide additional legal leverage if there are disagreements. They need to be consistent across instream and out-of-stream. To fail to do so puts instream rights at a disadvantage, which is not supported by statute.

- **(11):** This needs further refinement. As discussed in the RAC, there are instances where the storage right would be used in tandem with a secondary right to shape storage releases for instream uses. In V2, the OWRD attempts to address, but "depending on the reservoir" doesn't seem to get at the issue. There are two types of instream leases of storage, it might be simpler to just set forth both options.

690-077-0079, Split Season Use Instream Leasing

- **(2):** support the change in V2
- **(3)(d)**: support the change in V2

690-077-0080, Miscellaneous, Cancellation or Waiving of an Instream Water Right

- We support the continued proposed deletion of this section in V2.

690-077-0100, Miscellaneous Provisions: Precedence of Future Uses

- We appreciate the process added here

690-077-0105, Application for Instream Lease Renewal

- **New requirement:** The applicant should have to provide evidence to the OWRD that, absent the instream lease, they are ready, willing and able to put the water to the original beneficial use. Without such a requirement, the proposed process would allow a water right holder to hang onto a water right indefinitely and/or allow them use it to fuel a new use absent having to utilize the water right process (including modern day public interest review). Instream leases are similar to temporary transfers, which do require, upon expiration, that the transfer revert to the original use (the implication being the water right holder is ready, willing and able to put that water to use upon reversion, or start the forfeiture clock). OWRD response to our V! comments notes that this is under review; we urge further consideration so as to not inadvertently set up a loophole that will allow leases to supplant what should be permanent instream transfers.

Thank you for this opportunity to comment.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Comments, V2, Draft OAR 690-310, 690-320 and 690-340

Dear Laura,

Below please find WaterWatch's comments on V2 of the draft OAR 690-310, 690-320 rules.

Div 310 Water Right Application Processing

- **690-310-0040(1)(a)(L):** We appreciate that OWRD has entered discussions with DLCD on the land use provisions. As to language in V2, aside from the municipal exception, the language appears to be going in the right direction. That said, we would urge OWRD to reconsider the language in COLW's V1 comments (option 1) and adjust to that proposal. As to the new language proposing an exception for municipalities, we urge deletion of that. That is a wholly new concept that was developed outside the RAC in conversations between OWRD and the counties/cities. No real detail was provided to the RAC as to why the cities were seeking this exception. Unless there is a statute directing such an exception (which we could not find), it appears far outside the rulemaking and should be struck.

- **690-310-0040 (1) (c)(a) (page 5):** As noted in our V1 comments, we strongly oppose the new language stating that if the dam is less than 10 feet or will store less than 9.2 af the applicant does not have to provide the dam width. The "or" in statute has allowed some mischief in practice, with reservoirs over 100,000 acre feet using preferences meant for small projects to avoid rigorous review. Moreover, not all dams that store less than 9.2 af or are less than 10 feet in height use the alternative reservoir process (which is part of the OWRD's rationale for including this language). Even for alternative reservoirs, the width is important to know as it can affect ecological values downstream. Long story short, for the OWRD, ODFW and the public to assess a project, plans should also include width and crest width. This is simply information to be able to better assess the project, not a standard of review. It is unclear why OWRD would not want all information available.

- **690-310-0080(2):** As OWRD clarified in the RAC, once the application file is closed it is permanently closed and no further action can be taken on it ever. That said, we will repeat our comment in V1, that given the questions on this at the RAC which made clear some did not interpret it this way, we would request the OWRD insert the word "permanently" before the word "closed" for clarity's sake. OWRD's response to our comments in V1 was that "no further action on the application" is synonymous with "permanently closed". While that might be true, in this case we feel it is a good idea to be redundant so that it is crystal clear and there is no room for mischief in the future.

- **690-310-0270 (2):** As a general matter, we support the OWRD putting time limitations on administrative holds. Administrative holds have been too often used to stall a final decision after OWRD relays a proposed denial to an applicant, which has allowed applicants to hold on to priority dates for years after a decision should have been made. That said, we have a few concerns:
    - The extension to gather groundwater data seems unreasonably long and allows a hold for what should have been done before the application was filed.
    - We are still evaluating the land use exceptions, but will flag we have some questions.
    - We agree with OWRD that the language in (b) should retain the word "collaborative" for the reasons stated by OWRD, as well as others (both here and in Div 77).

OAR 690-320 (renumbered -330), Miscellaneous Water Right Provisions

690-330-0020: The new language changes a directive that the OWRD "shall" mail and letter of intent to cancel and that if no response is received, they "shall" cancel the permit, to a permissive "The Department may initiate cancellation of a permit pursuant to ORS 537.260 or ORS 537.210". It is unclear why the OWRD is removing this provision of rule. We would urge OWRD to retain the original language.

OAR 690-340 Water Use Authorizations

690-340-0030(7): We appreciate the changes made to the limited license provisions, but would ask that the OWRD consider further rulemaking on limited licenses in general.

Thank you for this opportunity to comment. We appreciate all the hard work the OWRD has done in this rulemaking, including producing charts to document changes to help the RAC review changes.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Comments, V2 Division 315, Water Right Extensions of Time

Dear Laura,

Below please find WaterWatch's comments on V2 Division 315.

- **690-315-0010 new definition proposed "unexpired water right":** In our V1 comments, we urged the OWRD to add a definition (and substantive requirements throughout) to make crystal clear that only unexpired rights can apply for an extension.

  The OWRD responded that this would be a substantial change and declined to address it. We, again, would urge inclusion. We disagree that it is a substantial change. Including this term would simply align rules with the statutory structure governing extensions, cancellations and the basic tenets of western water law. It is an important addition to ensure against the gamesmanship we have seen with regards to extension requests. It would also help avoid the difficult situation where a water permit holder has used significant amounts of water and made infrastructure investments long after the permit expired, without realizing the implications, and where an extension may not be allowable or warranted. Requiring timely extension applications is basic water permit management and accountability. In addition to including a new definition, the term "unexpired" should be inserted into **690-315-0020(1)(a) &(b), 690-315-0020 (2),** and **690-315-0050(1).**

- **690-315-0010(7)(e) and (f): Use of undeveloped portion of the permit:** We repeat our comment to please change "chapter 690, division 9" to OAR 690-009-0040. RE: This needs to reflect the new groundwater allocation definition, not the old one for regulation that OWRD retained in the Div 9 rules.

  This comment was not accepted with the response being that –0040 is included in the OAR 690-009 citation. OAR 690-009-0040 pertains to Proposed Groundwater Use and therefore is the relevant definition here. OAR 690-009-0060 applies only to groundwater controls (i.e. regulation) and thus is not applicable to extensions. We think the WRD is missing an opportunity to draft clear rules by failing to cite the correct rule subsection here. WRD should draft clear rules to avoid later confusion and unneeded work by referring to the relevant rule sub-section here.

- **690-315-0020(4):** In our V1 comments we noted that this section should be strengthened. In response, the OWRD cut the original language in full. In other words, OWRD staff weakened the existing rule by removing it. OWRD's rationale was that the cancellation statutes speak themselves to when the OWRD may initiate cancellation proceedings and removing the language from the rules makes it less likely to cause confusion. We strongly disagree. Removing the language from rule removes a very clear directive to OWRD to begin cancellation proceedings when this trigger was met. The existing language is supported by ORS 537.260 and ORS 537.410. Removing existing language is a "substantial" change that was not discussed with the RAC and is directly contrary to the one RAC comment on this which simply asked OWRD to strengthen it.

- **690-315-0040(5 new):** In our V1 comments we urged the OWRD add a subsection that directs denial if an applicant "knowingly makes a false statement on an application".

  The OWRD responded that the application addresses this. We reviewed the extension applications forms available on the OWRD's website. Our review of the applications shows that only the application for extensions of non-municipal/non-quasi-municipal permit holder contain the information quoted in WRD's response, while the application for extension of time for municipal and quasi-municipal permits states only: "I am the permittee, or have written authorization from the permittee, to apply for an extension of time under this permit. I certify that the information I have provided in this application is true and correct to the best of my knowledge." The municipal/quasi-municipal application needs to be updated to conform to OWRD's response and for consistency. Further, the language quoted in OWRD's response does not direct OWRD to deny the extension if false statements are made, but rather provides OWRD with discretion to do so. While we are pleased to see that at least the non-muni/qm applications contains language addressing this issue, in any case**,** we would counter that if the application lays out the pathway the OWRD could take if false statements are made, it would be prudent to put that same language in rule for the sake of transparency and to document OWRD's authority and intention when/if a false statement is made.

- **690-315-0040 (2), we again ask OWRD to add two additional subsections under due diligence** (See DOJ Advice on Compliance with Permit Conditions of February 7, 2002. Also see Dwight French Guidance Memo on same topic of Oct. 15, 2002.)**:**
  - Whether the permit holder has complied with all permit conditions;
  - Where there has been a failure to comply with a permit condition, whether measures are available to serve the public interest purposes that the condition was intended to address and achieve a result equivalent to what the permit required;

  OWRD's response to our V1 comments seems to confuse evaluation of due diligence (which should certainly include evaluating compliance with all permit conditions) with identifying permit conditions for which non-compliance requires denial of the extension. These are related but separate inquiries. Non-compliance with a permit condition should not ever be excluded from evaluating due diligence.

- **690-315-0040(5 old):** We support the OWRD's decision to reinsert language V1 had proposed to delete.

- **690-315-0040(5)(b)** We reiterated our V1 comment that this should be broadened, consistent with DOJ advice, to capture any permit condition that was included on the permit to serve the public interest. Beyond fish-related conditions, this could also include wildlife-related conditions. OWRD's response does not address this issue which is that, in addition to fish-related conditions, there can also be non fish-related conditions on water permits that were added in order to address the public interest. OWRD should be clear about this in the extension rules to avoid confusion and to provide clear guidance for requirements and analysis of extension applications.

Thank you for this opportunity to comment. We appreciate all the hard work the OWRD has done in this rulemaking, including producing charts to document changes to help the RAC review changes.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

December 5, 2025

Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Re: Comments, V2, Draft OAR 690 380 (transfers) and 382 (groundwater registrations)

Dear Laura,

Below please find WaterWatch's comments relating to Version 2 of the Div 380 and 382 rules.

Division 380, Transfers

Land use compatibility: Please see comments in Div 310.

OAR 690-380-2110, Change in Point of Diversion or Point of Appropriation:

- **(3) Conditioning:** We strongly support the addition of language that clarifies the OWRD's ability to condition the transfer. That said, as to the proposed change in V2, we urge the OWRD to retain "the potential for injury" rather than "likely" injury. The word "likely" could be asserted by some to raise the level of proof needed if any condition is challenged. For example, OWRD routinely conditions transfers with measurement and reporting conditions to ensure a water right is used within its rate/duty so as to protect against injury. Whether absent those conditions, injury would be "likely" is an unnecessary analysis that is not required by statute. The language should be whether there would be the potential for injury.

OAR 690-380-2120, Change in Point of Diversion to Reflect Historical Use: We appreciate and support OWRD's V2's amendments to this section of rule.

690-380-2260 Exchanges of Water

- **Proposed New Requirement:** In our V1 comments we recommended new rule language that make clear that: "Any water right acquired by a public agency for a public purpose shall not be eligible to participate in an exchange under this section." OWRD responded by saying that it would need to be legislated. We disagree. ORS 540.533 is limited to "any person" who holds a water right. Our suggestion would bring the rules into alignment with Oregon's APA, which defines "person" as any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character **other than an agency.** See ORS 183.310(8), emphasis added.

690-380-2340 Specific to General Industrial Water Use

- We support the changes made in V2.

690-380-2410 Municipal Water Rights

- (1): Please add the term "municipal" before "beneficial use" to ensure these exceptions only apply to ordinary municipal beneficial uses, not other water rights that might be held by a municipality. We made this point in our V1 comments but did not see a response.

690-380-3000 Applications for Transfers

- **General**: We support additional language in V2 making it clear that an application can only include one water right per application, except in very limited circumstances (e.g. layered rights).
- **(8):** We support the retention of the additional requirements here. See V1 comments for details.
- **(12) and (12)(a):** We support the few changes made in V2 but would ask the OWRD to reconsider our comments on V1 requesting additional standards. The OWRD response was that additional standards were outside of the scope of rulemaking. We disagree, requiring more information of the applicant upfront will expedite the agency's review, which is in line with the intent of water right processing improvements.
- **(12)** needs to be broadened to require water use information for the full forfeiture look back period (20 years) to aid OWRD in the determination it must make – see e.g. OAR 380-4000(3)(c).
- **(19):** See comments to Div 310 related to land use compliance.

690-380-4000 Initial Review

- **(3) New section to incorporate HB 3342(17)(5):** This section needs to be expanded to include the new transfer denial standards in HB 3342 (17)(5) that apply to some transfer applications to change groundwater points of appropriation.
- **(3)(f):** This section should be replaced with the broader "any other requirements of law and rule are met." As noted in our V1 comments, there are other laws that restrict what can be done under transfers. As an example, the Scenic Waterway Act states: "No dam, or reservoir, or other water impoundment facility shall be constructed on waters within scenic waterways." ORS 390.835. Any water allocation or reallocation request is subject to this mandate; transfers cannot be used as a loophole to get around this. Similarly, there are rules that restrict transfers as well, such as basin plans. Transfers cannot be used as a loophole to get around other rules and laws. To allow such would encourage all manner of gamesmanship to Oregon's water permitting and reallocation structure.
- **(8) Consent to injury:** This is a new section that allows the consent to injury process to begin at the IR stage. This relates directly to the consent to injury provisions found in 690-380-5050. In our V1 comments to –5050, WaterWatch suggested a robust and transparent process for consent to injury. We also made the point that the rules need to make crystal clear that consent to injury is an entirely discretionary process, meaning ODFW does not have to consider, let alone approve, a consent to injury request. OWRD also has the discretion, per statute, to deny a request even if ODFW approves.

  OWRD's response to our comments was that they appreciated the comments, but that the topic requires a broader discussion and is outside of the scope of the rulemaking. If that is the agency's decision, then **any** changes to consent to injury should be put on hold until that broader discussion is held, including this new section that would insert the process at the IR stage. As such, we would suggest deleting this in whole.

If the OWRD denies our suggested edit, then this section needs to be amended significantly to reflect the statutory language. For example, the wording in this section implies that there is an "approval process" that an applicant can pursue. This does not align with statute. Under ORS 540.530, consent to injury is an entirely discretionary process. The agency that requested the instream water right at issue can opt to not to consent to injury for any reason. OWRD, also, doesn't have to approve consent to injury, even if the requesting agency recommends consent. Better wording would be somewhat akin to:

> "the applicant may file a notice that s/he will request agency consideration of consent to injury to the instream water right".

See our comments to V1 related to OAR 690-380-5050 for more detail. Moreover, any request would need to address timelines. But again, we would urge that, if the OWRD is not going to consider broader consent to injury changes, that this section be struck. This is a wholly new section that was not mandated by HB 3342, is not outlined in the existing statute and is not within the scope of the rulemaking.

- **(12):** We support the new language in V2 that provides that if the applicant amends the application, the OWRD will re-issue a superseding IR and re-notice the application for comment. That said, we are still concerned with the rule language that states "or incorporate the amendments into the proposed final order". This would give OWRD the discretion to go straight to proposed final order, at which point the only option for the public would be to protest. It might be cleaner to split into two sections, one to address a revised application, and another to address additional information. The concern is that an application that the OWRD IR initially determines would result in a "denial" could turn into an "approval", which is a huge change that should be noted in an IR so the public can weigh in via comments.

690-380-4010 Proposed Final Order

- **1(f):** Please rephrase so that the directive is that "other applicable rules and laws are met". See comment on –0400(3)(f) above.
- **2(c):** We support the V2 changes. This is the language in statute. That said, it would be clearer to all if the two requirements were split into two stand-alone sections.
- **2(d) proposed deletion:** We continue to oppose the deletion of the existing provisions that require the applicant to show that they are ready, willing, and able to use the water. This is a critical piece of information for determining what amount can be transferred and what should be cancelled. The OWRD response to comments notes that the agency thinks this is covered under OAR 690-4010(2)(c) and that this would be redundant. We disagree; in this particular case we do not think it is redundant. This is a point that causes a lot of confusion; it is better to be clear than silent.
- **(2)(f) (old g):** Again, we believe the better standard is "any other requirements set forth in applicable law and rule". The new V2 language does not address our concerns about general laws/rules that do apply but are not specific to transfers. The language presented here is too narrow and could lead to litigation if the OWRD applies other applicable laws outside the transfer statutes.
-

690-380-4200, Hearings

- **(2):** We strongly support the consolidation of forfeiture claims into the cc hearing as it creates process efficiencies; that said the response to comment noted no changes have been made but V2 does have changes.
- **(3):** We support the OWRD's determination to retain the 15-day time period.

. **690-380-5000 Approval of Transfers**

- **(1)(c):** We support the inclusion of this new language in V2.
- **(1)(f):** Again, we would urge that the OWRD make a finding that any other applicable laws/rules are met. As written, (f) is too narrow and could lead to potential litigation if the OWRD were to apply other applicable laws that are not specific to transfers.

690-380-5050 Consent to Injury of Instream Water Rights

The OWRD has stated that our broader comments are outside the scope of the rulemaking. We disagree because our comments would provide rules for OWRD to follow in order to comply with relevant statutes.

However, at a bare minimum, OWRD needs to at least make the following change which is needed to amend existing rule language that is directly out of compliance with the statute. This is clearly within the scope of the rulemaking and warranted.

- **(8)** The existing "shall" needs to be changed to a "may". The statute explicitly states that if the agency that requested the instream water right "does not withdraw its recommendation to consent to the change, **the department may approve** the change consistent with the paragraphs (b) and (c) of this subsection." ORS 540.530(1)(e)(A) (emphasis added.). Thus, it is very clear that even if the recommending agency recommends consenting to injury, the OWRD retains the discretion to deny the consent to injury. OWRD may not waive away the authority, discretion and responsibility that the legislature entrusted to it by promulgating rules that ignore the statute. The current rule is in conflict with statute and needs to be fixed. This is within the scope of this rulemaking.

In addition to this change, we repeat our comments of V1, which is that this section needs quite a bit of further work to ensure that it is consistent with statute and that there is a robust and transparent process related to consent to injury to an instream water right. The rules need to be reworked to make clear the following provisions of statute are clear:

- The agency requesting the instream water right has wide discretion to not consent to injury of the instream water right. The statute does not require any findings and/or explanation as to why the agency is choosing not to consent. All is required is that they tell OWRD it does not consent.
- Remove statutorily incorrect rule language stating that OWRD "shall" consent if the agency requesting the instream water right recommends consent, which is directly contrary to the statutory directive that OWRD "may" consent (see above).
- The OWRD has a trust duty to the people of the State of Oregon for whose benefit the Department holds in trust the instream water right to maintain water instream for public use pursuant to ORS 537.332(3). The CTI rules need to include a determination (and findings) of whether the OWRD's decision fulfills its trust obligations.

We also suggest the OWRD consider providing direction on consideration of whether a proposed change is for the purpose of implementing a restoration project.

Moreover, if the OWRD is now going to allow a CTI request at the IR stage, the rules need to make clear that (1) the processing clock is tolled and (2) the applicant cannot then also request a CTI after a contested case hearing. There also should be two process sections, one for each on-ramp point.

And finally, the factors for an agency to review if they chose to go forward and consider a consent to injury should be clarified in rule (e.g. ODFW's internal guidelines should be incorporated for ODFW requested instream water rights). And, to the extent the requested transfer application is for a larger project, the agency must evaluate all related water rights/applications, transfers/applications and other relevant factors related to the project.

We have offered some initial language for consideration in Appendix A attached to our comments to V1, but these likely need more refinement and discussion.

690-380-5100 Compatibility with Acknowledged Comprehensive Plans

- **(3)**: We support the proposed deletion.

690-380-6010 Failure to Complete a Transfer as Grounds for Cancellation

- **(2):** We are unaware of any statutory authority to allow extensions of transfers, as such please strike "or within any extension of time allowed for completion". OWRD response to our V1 comment on this was that it was outside the scope of this rulemaking. We disagree. One of the purposes of this rulemaking was to clean up rules that are not aligned with statute; this is not authorized by statute and should be removed. Transfers should not allow loopholes to the newly passed laws that limit extensions significantly.
- **(3):** As noted in V1, we urge the OWRD to send the notice of cancellation if the COBU is not filed within the time required in the transfer. We see no one year grace period in the governing statute.
- **(5):** Non-completion should render the water right subject to forfeiture and cancellation. It is unclear why the OWRD is proposing to delete this section. This is not cured by now **(7)** which directs reversion to the original point of diversion. Between these two provisions, the rules appear to set up a pretty significant loophole to forfeiture/cancellation. Please provide statutory authority for the OWRD's proposal.
- **(7):** See comments in (5). We are unaware of any statutory authority that would direct reversion rather than moving into forfeiture/cancellation proceedings (these are not temporary transfers, which do have statutory direction to revert back to the original use). If there is statutory authority, please provide it to the RAC.

690-380-6020 Extension of time

- We are unaware of any statutory authority for extensions of time to complete transfers. This section should be deleted. One purpose of this rulemaking is to align old rules with statute, given that there is no statutory authority for this deleting it is within the scope of the rulemaking.

690-380-6030 Proof of Use; Noncompliance

- OWRD should add language that makes clear that if a COBU prepared by a CWRE is not submitted within the time required under Div 14, the water right will be cancelled.

690-380-6060 Petition for Reconsiderations

- The rules limit petitions for reconsideration to landowners, we do not see this in the statute. Aligning rule with statute is within the scope of this rulemaking as we understand it.

690-380-7000 Types of Permit Amendments

- Permit amendment statutes allow for "a change" in point of diversion; they do not allow for expansion of one point of diversion to allow "additional" points of diversions. A change means a substitution, not an expansion or addition. OWRD response to our V1 comments on this was that this request falls outside the scope of this rulemaking. We disagree. These rules are in direct conflict with statute; thus the noted language should be removed as part of the OWRD's efforts to align rules with statute. As is, these rules allow a huge loophole to public interest permitting requirements that would otherwise apply to the multiple points of diversion a water right holder ultimately seeks.

690-380-7010, Change in Point of Diversion or Appropriation

- **(1)(c):** Please delete "or additional point(s) of diversion" as this practice is not allowed by statute. See argument in –7000.

690-380-7020, Change from SW POD to GW appropriation

- **(1):** This section needs to clarify that it is a change from POD to POA, not an addition of a POA to the existing POD. The language as written is not clear on this. We do not believe it is redundant to state this clearly here.

690-380-7030, Change in Place of Use

- **(1):** We appreciate the amendments to this section in V2 that utilization of this rule section cannot result in an expansion of acreage.

690-380-7100, Permit Amendment Application Requirements

- **(14)**; Same comments as V1. This needs to be strengthened to ensure the changes are allowed by land use laws/regulations; see previous comments on reflecting statutory requirements related to land use. Moreover, there is nothing in the permit amendment statute that allows for the exceptions spelled out in (14)(a)-(d).
- **(17)**: Same comments as V1. the OWRD should require a notarized oath, not just an "oath". Penalties should apply to anyone who makes false statements on an application. OWRD response to comments was that this falls outside of the scope of this rulemaking. We feel it does fall within the scope of efficiencies; OWRD wastes time and resources when applicants and/or water right holders make false statements.

690-380-7200, Notice of Permit Amendment

- Same comments as V1. These rules should include the public process afforded other water right transactions (IR/comment, PFO/Protest, Protest/Petition for party status). OWRD said this is out of scope, but we will note that OWRD did change the hydro rules to allow IR/comment, PFO/protest/party status even though that is not subject to HB 3544. It seems that the same logic would apply here.

690-380-7300, Permit Amendment Final Order

- Same comment as V1: In addition to injury and enlargement, the rules should make clear that the permit amendment must also comply with other laws. For example, OWRD could not approve a permit amendment that would result in a dam or diversion structure being built in a Scenic Waterway.

Division 382, Groundwater Registrations: To the extent we have commented on Div 380 on rule provisions/language that is duplicated in the Div 382 rules, our comments on Div 380 carry over here.

OAR 690-382-0400 Application for Modification of Certificate of Registration

- **Proof of use, new proposed provision:** As noted in V1, the rules should require the applicant to include proof of use over the past five years. Absent that this rule would allow people to revive long defunct wells. This could exacerbate existing problems in already overstretched basins. It also could provide a huge loophole to the new groundwater allocation rules, in that long unused groundwater registrations could be "revived" to serve new uses without having to apply for a new right.

  The groundwater registrations statutes, as a whole, contemplate "beneficial use" for a registration to be valid. Registration serves as authority to continue beneficial use, not as a loophole to the basic tenants of Oregon water law as it relates to use of water. In bill negotiations over HB 2123 (2005), OWRD made assurances to stakeholders that the rule requirements for groundwater registrations would mirror those for surface water registrations, which do include proof of use among other things. To ensure consistency with surface water registrations, and the basic tenants of western water law, proof of use should be required. Please add that here. OWRD response to our comments was that evidence of use was not applicable here. We disagree, based on the arguments above.

690-382-0700 Completeness Review

- **Add (e):** The applicant put the water to beneficial use within the terms and conditions of the groundwater certification within the past five years. See comments in –0400.
- **2(d):** We disagree with the narrowing of (d) to "applicable to groundwater registrations". The statute gives OWRD broad discretion; the original rules contained that. All applicable rules/laws should apply.

Thank you for this opportunity to comment. We appreciate all the hard work the OWRD has done in this rulemaking, including producing charts to document changes to help the RAC review changes.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

HARTT Laura A * WRD

From: April Snell <aprils@owrc.org>
Sent: Friday, December 5, 2025 5:01 PM
To: HARTT Laura A * WRD
Subject: RAC comments

Hi Laura,

Sorry these are a bit rushed. I am providing the following comments as a member of the Rules Advisory Committee (RAC) and on behalf of the Oregon Water Resources Congress

First, I want to appreciate and awknowledge WRD staff time and efforts throughout this complex rulemaking process. While I have significant concerns about the rulemaking, WRD staff, particularly Laura Hartt, have been very helpful in providing information and materials as part of the process. That being said, the sheer volume of proposed changes in 18 different rule divisions is setting Oregon up for more problems with water management instead of improved processes. There has not been adequate time to review and weigh in on the substance of these rules. Moreover, the concerns raised by myself and other RAC members about lack of time and process have been dismissed by other Department staff or deflected by saying this is needed. The Department was under no obligation to undertake all of these revisions, this effort is outside of legislative direction, and lacks prioritization within other Department efforts (including other rules that need updated) to ensure that resources are being used where they will be most effective and needed.
Bluntly I have not had the time to fully review and provide constructive comments on all the divisions by the December 5 deadline. As a result, we will provide more comments during the formal comment period.
However, I will provide a few comments on the draft "Fiscal and Economic Impact Statement." The 18 different rules impacted by this rulemaking have potential impacts to numerous industries, including potential negative economic impacts. The current statement is misleading as it proports it will lead to increased efficiency for water dependent businesses. This would be accurate if the rulemaking was properly focused on implementing only the required provisions 2025 Legislation. The RAC has been rushed to provide feedback and even under the most optimistic view it is highly likely there are going to be errors, unclear or conflicting rule language, and unintended consequences for both the Department and all of the water interests who rely on timely and efficient transactions.

Overall, we feel the rushed process for this rulemaking will inevitably lead to unintended impacts and higher fiscal burden to a range of stakeholders. We are particularly concerned about impacts to water users, municipal and agricultural water suppliers, and other entities. It is likely there be increased expenses from hiring consultants or attorneys to determine what some of these proposed rule changes mean. We are also concerned that it will be difficult for WRD to implement some of the proposed changes, leading to further delays in transaction processing rather than increased efficiency and improved timing.
We urge the Department to reconsider its approach and focus its limited resources on the required rulemaking and postpone the remaining rule revisions to other time where there can be more thoughtful conversation and efforts to avoid unintended consequences, which will impact all water interest, instream and out of stream.
Thanks!

April Snell
Executive Director
Oregon Water Resources Congress (OWRC)
795 Winter St. NE
Salem, OR 97301
www.owrc.org
(503) 363-0121

December 5, 2025

Laura Hartt, Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301
E-mail: laura.a.hartt@water.oregon.gov

RE: Oregon Association of Nurseries Comments: 2025-26 Water Rights Rulemaking

Laura:

The purpose of this letter is to identify comments on various rule changes that the Oregon Water Resources Department ("OWRD") has proposed as part of its 2025-26 rulemaking. These comments are in addition to the comments that the Oregon Association of Nurseries ("OAN") has made verbally throughout the course of the rulemaking process.

OAN appreciates the opportunity to participate in this important rulemaking. We also appreciate OWRD's focus on increasing the efficiency of its internal processes, and we always welcome the opportunity to work with OWRD staff and leadership to advance this goal. OAN also recognizes the incredible complexity of Oregon water laws, including those that inform the various water right transaction processes that OWRD administers. While this letter contains specific comments on various proposed rule changes, as a foundational comment, OAN urges OWRD to modify the scope of the current rules process to focus only on rules that are necessary for implementation of the 2025 legislation (HB 3342 and HB 3544) and postpone any rule revisions that do not implement this legislation. This request is set forth in greater detail in the November 25, 2025 letter sent to Director Gall by OAN and other municipal and agricultural representatives.

We recognize that OWRD, along with the many rulemaking advisory committee ("RAC") members, including OAN, have dedicated countless hours to this rulemaking process. OAN is not asking OWRD to scrap its effort; it is simply asking that the scope of this rulemaking process be narrowed to focus only on implementing the necessary 2025 legislation components to allow further discussion and rulemaking process on the remaining proposed rule changes, many of which are substantive and could impact agricultural operations across the state, including OAN's members.

Like many RAC members, OAN participated in the RAC meeting 9 discussion regarding OWRD's various suggested updates to the land use compatibility language across the divisions at issue in this rulemaking, including Division 310. Oregon land use law, like Oregon water law, is incredibly complex. During this meeting, Director Gall discussed the upcoming plan for a joint

meeting of the Oregon Water Resources Commission and the Department of Land Conservation and Development that will allow interested parties to share their thoughts and concerns about issues at the intersection of water and land use. Director Gall also stated that the conversation about this intersection is "just getting started" and that there is "much more work to do." In light of these comments, OAN does not believe that now is the appropriate time for OWRD to introduce updates to OWRD's land use compatibility requirements, particularly given the massive scope of the rulemaking. OAN is eager to work with OWRD and other stakeholders to address land and water issues in a thoughtful and comprehensive manner. This rulemaking process has simply not allowed enough time for RAC members to adequately discuss OWRD's proposed changes to various land use-related provisions, and we urge OWRD to refrain from making any of these changes until it can hold a more focused rulemaking process to properly address such changes.

Generally speaking, OAN is concerned that due to the incredible breadth and scope of this rulemaking process, OWRD's proposed changes will have unintended consequences. The pace of the rulemaking process has made it very difficult to conduct a wholistic review of the proposed changes, increasing the risk that some of the changes may be "missing the forest for the trees." OWRD's rule divisions tie together in various and important ways, and drafting comments for one division often requires a review and understanding of potential related changes in another division. However, given the limited review times for each division and the constantly changing language in the rule divisions, it has been difficult to engage in this bigger picture evaluation. OAN is also concerned that various specific changes that OWRD has proposed will increase the burden on water right transaction applicants and introduce new standards beyond those authorized or contemplated in the 2025 legislation. We have identified a set of specific rules of concern in the following paragraphs to supplement comments made during the various RAC meeting.

<u>Division 2</u>
OAN recognizes that HB 3544 introduced changes to the contested case process, and therefore it is appropriate to revise Division 2 to reflect the changes set forth in this legislation. OAN has identified additional changes that should be made, set forth below.

- OAR 690-002-0025(3). OAN appreciates the addition of language clarifying the jurisdictional deadline for submitting a payment accompanying a protest, but we encourage OWRD to work as quickly as possible to implement a system that can accept electronic payments for protests and other water right transactions. We also request that OWRD add language that clarifies that once an electronic payment system is implemented, payments will be considered received on the day they are made in the electronic system.

- OAR 690-002-0095(2). We appreciate that OWRD has increased the number of interrogatories that are available to a party. We request that OWRD develop a clear standard that it will apply to determine whether it will consent to additional interrogatories so parties can better assess whether additional interrogatories may be available to them based on the particular nature or scope of the contested case at issue.

- OAR 690-002-0095(3). OWRD's proposed language identifies circumstances in which an applicant may be required to file a public records request instead of a request for production based on anticipated OWRD staff time. This proposal is incongruous with the goals of due process and fundamental fairness, and OAN requests that OWRD remove

the requirement for parties to shift to a public records request after threshold set forth in the proposed rule.

- OAR 690-002-0205. OAN understands that HB 3544 mandates that OWRD identify a specific contested case schedule to fit within 180 days, and we appreciate that OWRD has added additional language allowing parties to alter the timeline by agreement.

- OAR 690-002-0220. This rule should include language similar to the language that OWRD added to OAR 690-002-0005(3) regarding electronic payments. As written, the rule provides for filing via email but also retains the language that a filing should "include any required fees" without addressing the electronic payment issue.

Division 17

Generally speaking, a majority of OWRD's proposed changes to this division are not required by the 2025 legislation, and we encourage OWRD to move forward only with the changes that are specifically required by the legislation to enable further discussion of additional changes in a future rulemaking. The rules in Division 17 dictate the process by which vested property rights can be cancelled, and it is crucial that OWRD and stakeholders have adequate time to discuss any substantive changes to these rules. OAN has identified various specific changes that should be made, set forth below.

- OAR 690-017-0400(2)(g). This current rule requires that an affidavit of forfeiture include a statement that the affiant knows with certainty that no water from the allowed source has been used for the authorized use on the lands. OWRD is proposing to strike "with certainty," which is a substantive change.

  A party who files an affidavit is making a serious claim against a water right holder, and such a party should be certain of past water use before filing an affidavit. We understand that OWRD originally struck this language in an attempt to align with the "preponderance of evidence" standard that it has clarified across Division 17. However, OWRD's recent language tracker document contains a "correction" which states that affidavits of the public are not subject to the preponderance of evidence standard. We request that OWRD retain the original language requiring an affiant to know with certainty that no water use has occurred when it files an affidavit.

- OAR 690-017-0400(3). This rule addresses the timeline for providing notice to a district or to the Bureau of Reclamation when an affidavit addresses water rights within the boundaries of district or federal project. The current language provides for notice of at least 90 days before OWRD initiates a cancellation proceeding, but OWRD proposes to reduce the notice timeline to 60 days. This is a substantive change not required by the 2025 legislation.

  Federal agencies, including the Bureau of Reclamation, often take some time to review and respond to materials that have been submitted to the agency. Additionally, the recent government shutdown is an example of a circumstance that could affect the ability of the Bureau of Reclamation to address the affidavit and identify its position and next steps within a more limited timeframe. OWRD should retain the existing language that provides for at least 90 days' notice.

- OAR 690-017-0400(4). OWRD's proposed language for this rule provides that OWRD may "rely on stream or canal gaging records, water or electric meter readings, static

level measurements, system capacity calculations, a summary of field investigates, photos, aerial imagery, maps, evapo-transpiration data, or other relevant evidence covering each year of the period of allege non-use." We request that OWRD revise its proposed language to replace the term "rely on" with "refer to" or "examine."

We understand that each of these information types can be useful to assess whether a water right has been used, but we are concerned that if OWRD can simply "rely" upon any single one of the data sources listed in OAR 690-017-0400(4) to initiate cancellation proceedings, OWRD risks coming to an erroneous conclusion about use.

- OAR 690-017-0700(2). OAN appreciates that OWRD has increased the notice of cancellation hearing timeline from the original proposed 10 days to 30 days.

Division 18

The Allocation of Conserved Water ("ACW") process is a critical tool to encourage conservation and increase flexibility for water users. As we move into a future where new water rights are not available, this program will become increasingly valuable. OWRD should ensure that any new proposed language does not disincentivize willing ACW applicants by creating new burdensome processes or requirements. OAN has identified various specific comments and changes that should be made, set forth below.

- OAR 690-018-0040(15). OWRD's proposed rule language provides that applicants would be required to provide a description of the intended use and boundaries of the expected area within which the diversion structures and places of use of the applicants' portion of conserved water right would be located and used for beneficial out-of-stream uses. The underlined language is an unnecessary addition. An applicant who is undergoing the ACW process is modifying an existing water right certificate that was authorized for beneficial use. Once the ACW process is complete and finalized, the applicant will continue to be subject to the existing and well-established Oregon requirement of beneficial use of water. By adding the proposed language underlined here, the rule appears to be establishing a special standard for the ACW process beyond what is already required by Oregon water law.

- OAR 690-018-0040(22)(a)(B). OWRD's proposed rule language adds a new requirement for applicants to provide "[d]ocumentation demonstrating that, for the portion of the conserved water being dedicated to an instream water right for instream purposes, the applicant provided notice of the intent to create an instream water right under an allocation of conserved water to each affected local government along the proposed instream reach."

  This obligation is onerous and potentially impracticable for irrigation and nursery use water right holders who would like to undertake the ACW process. It is not realistic to assume that the applicant can identify the "affected local governments" that will be impacted by a new instream water right for the portion of the applicant's conserved water. The ACW program is a critical conservation tool, and water users should not be disincentivized from participating as a result of additional application requirements not required by the authorizing statute.

- OAR 690-018-0050(7)(c)(C). We appreciate that OWRD has added language that formally addresses the protection of groundwater for groundwater rights that are subject to the ACW process. As you know, OWRD has previously processed groundwater rights

under the ACW program. The ACW program is a crucial tool to encourage conservation and on-farm efficiency, and we encourage OWRD to retain this language to ensure groundwater rights are clearly included in Division 18.

Division 77

There are multiple sections still listed as "under review" for this particular division, and RAC members have not had the chance to review OWRD's newest set of changes in response to multiple comments already made. RAC members should have an additional opportunity to comment once OWRD makes changes before the public comment process begins. A majority of the changes proposed in Division 77 are not related to the 2025 legislation, and we encourage OWRD not to move forward with any changes that are not directly required by the legislation to allow additional future dialogue between OWRD and stakeholders on this important section.

If OWRD moves forward with the proposed changes to the Division 77 rules, OAN encourages it to retain language in the proposed OAR 690-077-0020(3). This language provides a commonsense approach to ensure that relevant special districts will have advance notice of ODFW's intent to file instream water rights that could impact the districts' operations. This language provides a solution to a known problem, and we encourage OWRD to retain it.

Division 315

HB 3342 requires implementation of new extension standards by April 1, 2026, so OWRD's changes to Division 315 are appropriate for this rulemaking.

HB 3342 provides limited opportunities for some non-domestic and municipal water right permits to obtain one two-year extension if OWRD determines that "[f]ish-related conditions have been satisfied" and that "[g]ood cause for the extension has been shown." This language provides a critical path forward for a small subset of permits to obtain an extension.

OWRD's rules already provide a framework to assess whether or not good cause has been shown, and OWRD's addition of OAR 690-315-0040(5) confuses this clear framework to assess "good cause." As written, OAR 690-315-0040(5) provides in relevant part that "the Department shall find good cause has not been shown and deny the extension if:…(c) The Department's evaluation under (2) otherwise finds that good cause has not been shown." This is circular. OWRD should remove OAR 690-315-0040(5)(a), as the existing framework to assess "good cause" is already set forth in OAR 690-315-0040(2).

With regard to OAR 690-315-0040(5)(b), OWRD should modify the language to better align with the language in HB 3342. OWRD's proposed language provides: "The permit holder has used water and has failed to demonstrate compliance with fish-related permit conditions that are required to be met before water use began." To better reflect the language from HB 3342, we request that OWRD revise this language to provide: "The permit holder has not satisfied fish-related permit conditions that are required to be met before water use began."

Division 380 and Division 382

The changes that OWRD is proposing to Division 380 and 382 go beyond the scope of the 2025 legislation mandates, and OAN encourages OWRD to limit the changes it implements to those required by the 2025 legislation. Transfers are a crucial water management tool that enable agricultural water right holders to efficiently and sustainably manage water. OAN is concerned that based on the breadth of proposed changes to the transfer process, the permit amendment process, and the groundwater registration modification process, stakeholders have not had adequate time to fully review and assess the potential impacts of the proposed changes.

Below are examples of some, but not all, of the substantive changes that OWRD is proposing that is outside the scope of the 2025 legislation.

- OAR 690-380-2110(3). The proposed language provides that OWRD may condition a transfer to protect against the potential for likely injury or enlargement that may occur as a result of the change. The term "likely injury" is not defined in statute or rule, and it is not clear how the addition of this phrase will increase the processing efficiency, as it appears to add additional ambiguity.

- OAR 690-380-2120. OWRD indicated that it removed references to "point of division or appropriation" to reflect a new belief that the rule only applies to historic surface water point of diversion changes. It is not clear whether OWRD conducted a legislative history analysis to determine the legislative intent of the implementing statute. This language should not be changed until OWRD has clarity on such history.

- OAR 690-380-3000(12)(b)(A). OWRD's rule proposes to update requirements for dated receipts for use of water or sales of irrigated crops. The new language provides that such receipts must be marked by the issuer of the receipt with information that ties the receipt to the authorized place of use of the water right. It is unlikely that crop sales receipts or receipts for use of water (i.e. power bills) will mark the specific location of the place where crops were grown or water was used, and OAN requests that OWRD remove this proposed language.

- OAR 690-380-7300. OAN appreciates that OWRD is formalizing some longstanding components of the permit amendment process in rule. However, permit amendments are authorized under a single statute, ORS 537.211, that is different from the statutes that apply to the transfer process. Notably, ORS 537.211 does not mention the enlargement standard. OWRD should revise this section, including removing the reference to enlargement, to ensure that the applicable standards align with the provisions of ORS 537.211.

We appreciate your time and consideration of our comments. Please do not hesitate to reach out with any questions.

Sincerely,

Jeff Stone
Executive Director
Oregon Association of Nurseries

November 26, 2025

Oregon Water Resources Department
Ivan Gall, Director
Laura Hartt, Rules Coordinator
Raquel Rancier, Deputy Director

RE: 2025-26 Water Rights Rulemaking

We are writing to express concern about the scope of the Water Rights Rulemaking being conducted by the Oregon Water Resources Department (the Department). All of our organizations serve on the Rules Advisory Committee (RAC) and we are gravely concerned that the overly broad scope of the rulemaking under an extremely short timeframe will lead to negative outcomes rather than greater efficiencies. As clearly stated by Department staff when the RAC was convened in September, this rulemaking process represents the most extensive rulemaking ever undertaken by the Department, currently covering eighteen different divisions. Likewise, the principal, stated purpose of the current rulemaking process is to address necessary administrative rules implementing provisions contained in House Bill 3342 and House Bill 3544 enacted during the state's 2025 legislative session. However, there are only a few rule divisions directly related to legislative implementation, and more than half of the chapters currently under debate have no connection to either bill.

Considering the extensive nature of the proposed rules, we urge the Department to segregate proposed rules deemed necessary for the clear implementation of the noted 2025 legislative measures from all other proposed rules. We strongly believe proposed rules outside the scope of the provisions associated with the two measures previously identified should be addressed in a separate rulemaking process, or be placed on a list of recommended updates to be taken on by the Commission when/if resources and priorities warrant.

Without question, the volume of materials presented to the RAC over the course of three months has been immense. Members of the RAC have been requested to provide input as the proposed changes are being drafted, with some interconnected divisions being revised at the same time. We do not believe this process provides the opportunity to closely and adequately review all details of the proposed rules and implications resulting from such rules, which will undoubtedly lead to unintended consequences, including confusion and less efficient processes. Many of these unintended consequences are legal in nature, therefore leading to clarification by the courts at the expense of both private & public projects on the ground and to the state's legal budget. There are many rules that could use a language clean-up; however, it is important to strategically focus limited state resources on rulemaking that is required or will clearly lead to improved outcomes.

It is also worth noting that statutory language remains the source of Department authority and we are not aware of any statutory conflicts compelling this broad of a rulemaking effort. Lastly, the law is the law and the provisions of the bill will come into effect in April 2026 regardless if this rulemaking is completed or not. We, collectively, believe the rulemaking was designed to better clarify the legislation, but do not collectively agree that the rulemaking deadline of April 2026, is necessary for the substantive provisions of the above referenced legislation to become law.

As a result, we request the Department modify the scope of the current rules process, focusing on rules necessary for the implementation of the 2025 legislation and postpone rule revisions that merit additional conversations or require more resources to implement. Additional issues would be more appropriately addressed in future rulemaking undertakings. We appreciate your consideration of our request.

Sincerely,
Glenn Barrett, Water for Life
J.R. Cook, Northeast Oregon Water Association
Ryan Krabill, Oregon Farm Bureau
Mark Landauer, Special Districts Association of Oregon
Michael Martin, League of Oregon Cities
April Snell, Oregon Water Resources Congress
Jeff Stone, Oregon Association of Nurseries