12/22/25 v3
Division 77 - Revision Tracker

Changes made between v2 and v3 RAC version. Changes are highlighted in the v3 RAC version of the rules for RAC member convenience. V3 is the same as the public comment draft except no highlights.

Section / Version comment	Issue	Response/Modified Language	Status / Version change made in
-0000(7)	Two RAC members noted that the language may need to be revised. There is work ongoing in the Walla Walla to protect water over state lines and they wanted to make sure that the rules do not preempt that work. There was also a suggestion to restructure the language to read "OWRD can only protect rights in Oregon". RACM - We ask that you remove the new proposed language under paragraph (7). This proposed language is in fact inaccurate given reciprocal legislation that has been passed in both Oregon (Senate Bill 1567 [2024]) and Washington (Second Substitute House Bill 1322 [2023]) with respect to the Walla Walla basin. These reciprocal laws allow the State of Oregon to convey an instream lease, instream transfer, or the State's portion of saved water from an Allocation of Conserved Water (ACW) project to the Washington Department of Ecology for protection instream under Washington State's Trust Water Rights program. These reciprocal laws allowed 8 cfs to be protected in Washington under an Oregon water right in 2024 and will enable roughly 22 cfs to be protected in Washington under an Oregon water right in 2025, including 1.138 cfs of permanent instream water from the State's portion of an ACW project. RACM - We suggest deleting this new section as it could inadvertently cut against work that Oregon and	OWRD has revised in consultation with OWRD and CTUIR staff to ensure no unintended consequences to the Walla Walla effort: The Department may only issue instream water rights, instream leases, instream transfers, and instream water rights resulting from an allocation of conserved water within the State's borders.	Complete. Change made in v3.

	neighboring states are working towards to try to protect water instream (e.g. Walla Walla, Columbia, etc). RACM - 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 cross border protection in the Walla Walla basin. Similar agreements may come about for other basins in the future. RACM RECOMMENDATION - Add clarifying language that leaves this open and acknowledges protection across state borders if supported by both states. RACM - 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 <u>OWRD</u> can or cannot do. RACM RECOMMENDATION - 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."		

Special Districts Portions of Rules -0010(35) -0020	One RAC member noted that ODFW does not require notification for anyone other than cities or counties and that when special districts are formed, notification requirements should be the same for them. Some RAC members took issue with including an NGO (i.e., Special Districts Association of Oregon). One RAC member noted that expanding notice requirements in this manner was potentially inequitable. RACM - 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). RACM RECOMMENDATION - See Attachment A (note: these previous TU comments reference citations and rule provision numbering from the 1st version of Division 77 revisions). RACM - It is inappropriate to include this notification requirement and we ask that paragraph (35) be removed entirely. The agencies have multiple formal public notice requirements and interested members of the public 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. RACM - Please delete for reasons outlined below in OAR 690-007-0020(3). RACM - LandWatch recommends removing this new definition entirely. See comments below on OAR690-77-0020.	The Department considered extensive comments from the RAC pertaining to pre-application notifications to SDAO, and has removed that language from the draft rules at OAR 690-077-0020. In addition, the new definition for "Water-related entities identified by the Special Districts Association of Oregon" has been removed from OAR 690-077-0010. ODFW has indicated that it will continue to notice special districts voluntarily as it already does. See local government notice as well.	Complete. Changes made. V3 draft.

	RACM - 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. RACM RECOMMENDATION – Delete (35) entirely. RACM - 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, 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. RACM - Is this in statute or a new requirement directed by 2025 legislation? If this is not a legal requirement, should it be in rule? Suggest removal of (3) if not a statutory requirement. ODFW can choose to contact SDAO. RACM RECOMMENDATION - Suggest removal of (3), but if (3) is not removed "shall" should be changed to "may" provide? Also suggest removal of the word "only" from this same sentence. RACM - 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, with 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. RACM RECOMMENDATION - 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..." Some RAC members repeated earlier concerns over including one NGO (i.e., Special Districts Association of Oregon) and allowing it to determine potentially who potentially affected water-related entities might be. These members stated the proposed rules are inequitable and outside the scope of new legislation. One RAC member commented that "only" in ".... notify only those potentially affected water-related entities..." should be removed. One RAC member noted that ODFW has routinely notified governmental organizations and leaving out Special Districts is not fair, they want to be treated the same.		

	RACM - : 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). RACM - We strongly oppose the inclusion of a prenotice to SDAO. There is nothing in statute that requires this. 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, expect as provided under 537.343. Nothing in 537.343 directs or allows "pre-notification". This section, as well as section (5)(j) relating prenotice 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 applications is inconsistent with the statutory scheme. We will also note, as a general matter, requiring agencies to take steps not required by statute goes against the whole premise of this rulemaking, which is to provide "efficiencies" in processing. Note: we		

	also object to the existing prenotice to local governments as that also is not directed by statute (see comments to (5)(k)). Both should be removed. RACM - This section should be struck for the same reasons outline in comments on -0020(3). RACM -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.		
-0015(11)	RACM - Please clarify that the priority date referenced is the "date of the minimum perennial streamflow". See ORS 537.346	OWRD included sentence referencing statute instead of repeating (1) and (2) of statute.	Complete. Rule changed in v3.
Local Government Notice -0020(3)	A RAC member noted that processing of instream water rights applications should align with processing of other water right applications, per ORS 537.349 and Division 310. She also noted that nothing in statute suggests that Special Districts and municipalities are entitled to special notification not afforded other parties. Note: see general section as well, where some comments said see our previous comments. Some of those contained comments on government notice which were also considered.	See Special Districts Section as well. Regarding the existing rules requiring that state agency ISWR applicants provide a copy of notification to each affected local government of the intent to file the instream water right application, OWRD maintains the existing language with only slight modification. This is a component of our land use programs and is maintained for compliance with the State Agency Coordination Plan. Due to the high interest in land use amongst the RAC, complexity of the topic, and need to address this in tandem with updates to Division 5, in other divisions the Department has reverted to some of the existing land use-related language rather than make changes at this time.	Complete. Changes made in v3 draft.
-0031(1)(a) and (5)	N/A OWRD Staff based on land use discussions	The Department's weekly public notice is already freely available to anyone who is interested. The posting language in the	Complete. Changes made in v3 draft.

		existing rules is already a request and not a requirement. OAR 690-077-0031(5), which was previously deleted, has been reverted to existing language. Unlike other types of water right transactions, the 1990 Water Resources Department State Agency Coordination Land Use Planning Procedures Guide provides that the compatibility strategy for instream water rights (and minimum perennial streamflows) is to "rely on local government response to notification of pending action, or "Deeming. [sic]. WRD will presume compatibility if no response is received."	
-0052(2)	One RAC member noted that a "collaborative conversation" is subjective, could mean different things to different parties and should be refined for clarity. RACM - "collaborative" may be difficult to define and assess.	This language currently mirrors language in Division 310. The definition of collaborative is "two or more parties working together." Maintaining collaborative requires that the conversation includes the applicant and at least one other interested party. This would prevent an applicant from requesting an administrative hold without buy-in from an interested party that provided comment.	Complete. No changes made.
-0054(1) (proposed for deletion)	A RAC member noted that the original rules reference both the Commission and the Department; she asked for clarification on authority. Another RAC member stated that the deleted language provides important context regarding conversion of minimum perennial streamflows. A RAC member asked if this new language removed the process for those who want to engage or protest regarding those outstanding conversions. RACM - (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	OWRD believes that a PFO is appropriate. OWRD previously included language in response to concerns: "When the Department proposes to convert a minimum perennial streamflow to an in-stream water right under ORS 537.346, the Department shall issue a Proposed Final Order reflecting the proposed conversion." OWRD does not believe that deleted language in subsection 1 is relevant as the legislature made updates to the statute throughout the 1990s, one of which allowed minimum perennial streamflows established later than the original date in statute to be considered for conversion. OWRD included new language for context.	Complete. Rule changed in v3.

	rights, regardless of the fact the state has not yet met all requirements. RACM - Consider keeping some of the language in (1) for context as there may be some minimum perennial streamflows that have not yet been converted. RACM - Deleting the existing sub (1) of this rule provision also deletes the context for the remaining language and additions. RACM RECOMMENDATION - 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 . . . " RACM - This rule should be deleted or substantially rewritten because it provides for process that is not contemplated by statute. ORS 537.346 says minimum perennial streamflows "shall be converted to instream 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.		
-0070(2)	A RAC member asked if a holder of a water use subject to transfer that is for "use of stored surface water" means "flow augmentation." She also asked if this use would be characterized as changing the character of use.	The Department responded that flow augmentation requires a secondary water right. The holder of a secondary right for use of stored water may transfer that use instream under -0070. This is not "flow augmentation." Flow augmentation is a type of beneficial use that can be obtained by applying for a secondary right for use of water from storage. Under -0070, the holder may apply for an instream lease to change all or a portion of a secondary right.	Complete. No change made.
-0105 General	RACM - Applications for a renewal of an instream lease should be required to be submitted before the instream lease has expired. 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).	It is not clear to OWRD what the benefit would be to requiring an active approved instream lease to be renewed before the term of the lease expires. It is not an issue related to forfeiture as, consistent with ORS 537.348(2), the use of the water right as an in-stream water right is considered a beneficial use during the term of the lease. Additionally, water users and flow restoration groups alike, may not be able to forecast whether they wish to seek a renewal until closer to the start of the next irrigation season. As this is a voluntary program, OWRD would like to maintain some flexibility by not limiting instream lease renewals in such a manner. Pertaining to the comment related to evidence of use and ready, willing, and able.... With the instream lease renewal, the water right still has to be valid; the renewal form has a box that the applicant must check when submitting the form, indicating either: the water right(s) to be leased have been used under the terms and conditions of the right(s) during the last five years or have been leased instream (being leased	Complete. No changes made.

		instream is considered beneficial use); or they must provide documentation describing why the water right is not subject to forfeiture. All water rights revert to their original use when the instream lease expires. The water rights must also all be valid and ready, willing and able just like any other water right being put instream.	
690-077 General 12/6	RACM - 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. RACM - 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. RACM - 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. RACM - A few RAC members noted that several suggested changes to these rules have not been made. There	We understand the challenges with this rigorous schedule. Many of the changes in this rulemaking division were discussed with a prior RAC during a prior rulemaking effort. RAC members also had the opportunity to provide additional review and input on the draft following the RAC meeting and there was no request for an additional meeting. OWRD is diligently reviewing and documenting changes made and reasons and the RAC members will have another opportunity to comment on the public comment version. We appreciate RAC members continued engagement. OWRD has considered all comments and suggested changes shared verbally by RAC members during the RAC meeting as well as in the form of written comments, and many have been incorporated into modifications in the proposed rules. Some are beyond the scope of this rulemaking effort and would require further research and discussion.	Complete. Some changes have been made in the v2 & v3 drafts, while some have not.

	are many areas that do not align with statute, including notice to local governments. RACM - Another RAC member noted that Division 77 has been largely discussed in previous rulemaking efforts but some issues that have been added that were not part of past RACs should be reconsidered for inclusion. RACM - With 15 minutes left to review the Division, one RAC member expressed concern that not enough time was allotted to cover the revisions made in response to RAC input.		
690-077-0000(7) 12/6	RACM - We ask that you revise the new proposed language under paragraph (7)…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.	OWRD has revised in consultation with OWRD and CTUIR staff to ensure no unintended consequences to the Walla Walla effort: The Department may only issue instream water rights, instream leases, instream transfers, and instream water rights resulting from an allocation of conserved water within the State's borders.	Complete. Rule changed in v3.

	RACM - 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. RACM - 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 Walla Walla basin. We assume this is not the intent of this section. RACM RECOMMENDATION - Delete proposed language/new section (7). RACM - One RAC member noted that water rights not being protected across state lines could be problematic for work with Washington and Tribes in the Walla Walla Basin. RACM - Another RAC member suggested including references to interstate compacts to provide clarity.		
690-077-0010(10), (11) 12/6	RACM - 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	These were included here to define what we mean by District and District Water User in the instream lease and instream transfer area of the Div. 77 rules. Number 10 is defined in Div. 385 as well, neither is defined in Div. 300, as they pertain to processes in these divisions. Also, aligning all definitions across rules is a goal, but not all definitions could be addressed within the time constraints of this rulemaking – each time we move a definition we have to assess whether there are unintended consequences of doing so. This research time could only be accomplished for a few definitions during this rulemaking.	No changes made
690-077-0010(12)	RACM - We ask that you delete paragraph (12), which states:	OWRD appreciates the comments provided on the definition pertains to provisions included at 690-077-0015	Complete. No change made.

12/6	(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. RACM - Please delete this section for reasons outlined in comments to OAR 690-077-0015(4). RACM - 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. RACM RECOMMENDATION - Delete (12) entirely, as well as all other language that limits instream water rights applications to EANF, including 690-077-0015(4) (see below).	related to Estimated Average Natural Flow. Broader consideration of changes to this aspect of the rules is necessary and outside of the scope of this rulemaking, and as such, removal of this definition is out of scope for this rulemaking.	
690-077-0010(19) 12/6	RACM - 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	This has been included in these rules to identify what a living certificate is and that we do not cancel a district water right until the Department and the District agree a new certificate is needed. This only applies to a District water right that has several modifications within the year. If we were to cancel the district water right, instead of modify/track changes, we would be issuing a new	Changes made in v3.

	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	superseding certificate every couple months throughout the year, it would slow the processing down almost completely because of the time it takes to process a new superseding certificate for a district right that has thousands of acres associated with it. See ORS 540.530((2)(a) and 690-385-7600 for more info. OWRD has removed the definition.	
Special Districts 690-077-0010(35) 12/6	RACM - 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 nonprofit 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. RACM - : Please delete for reasons outlined below in OAR 690-007-0020(3). RACM - Providing for special notifications to be provided to a	See response elsewhere in this document related to Special Districts.	Complete. Changes made. V3 draft.

	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. RACM RECOMMENDATION - Delete (35) entirely RACM - LandWatch recommends removing this new definition entirely. See comments below on OAR690-77-0020.		
690-077-0015(10) 12/6	RACM - 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).	This comment is noted, and OWRD believes that removing this requirement is a shift from current rules that is beyond the scope of this rulemaking similar to responses to comments on the related section.	Complete. No change made.
690-077-0015(11) 12/6	RACM - 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	OWRD included sentence referencing statute instead of repeating (1) and (2) of statute.	Complete. Change made in v3.
690-077-0015(4) 12/6	RACM - 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. RACM - Please strike this provision in whole to ensure rules align with statute. There is nothing in statute that allows OWRD a blanket reduction of	OWRD appreciates the comments provided on utilizing Estimated Average Natural Flow when assessing state agency instream water right applications. Consideration of whether to remove Estimated Average Natural Flow as a component of evaluating state agency instream water right applications is beyond the scope of the current rulemaking.	Complete. No change made.

	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). RACM - 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.		
690-077-0015(4) 12/6	RACM - 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. RACM - 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)	OWRD appreciates the comments provided on utilizing Estimated Average Natural Flow when assessing state agency instream water right applications. Consideration of whether to remove Estimated Average Natural Flow as a component of evaluating state agency instream water right applications is beyond the scope of the current rulemaking.	Complete. No change made.

	is considered both legally and scientifically based. RACM RECOMMENDATION - Delete language in (4) that limits instream water rights applications to ENAF		
690-077-0015(5) 12/6	RACM - 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.	This comment has been noted.	Complete. No change made.
690-077-0015(8) 12/6	RACM - We support the additional language through (a) but believe more discussion is needed for (b).	Both (a) and (b) were discussed at the October 29th RAC meeting. It is unclear if the commenter has specific concerns about (b).	Complete. No change made.
690-077-0015(9) 12/6	RACM - Support language limiting this to state applied instream water rights to align it with statute.	This comment has been noted.	Complete. No change made.
Special Districts Local Government 690-077-0020(3) 12/6	RACM - 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). RACM - 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	See response on Special Districts. See response on Local Government	Complete. Changes made in v3 draft.

	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 "prenotification" 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. ODFW - ODFW recommends the notification requirement also include DEQ and Parks, as all 3 agencies can apply and may someday in the future. Including the other agencies now while the rule is open may alleviate issues in the future. ODFW recommends changing the "and" to "or", as identified below.		

	We also recommend clarifying what happens if SDAO does not notify us within 14 days. Recommended language also below. (3) Prior to filing an instream water right application or batch of instream water right applications with the Department, ODFW shall provide the Special Districts Association of Oregon a list of administrative basins ~~and~~ or counties in which the proposed instream water right(s) is located and request a list of water-related entities identified by the Special Districts Association of Oregon, their points of contact, and an email address for each point of contact. Upon receipt of the request, the Special Districts Association of Oregon shall have 14 days to provide the requested information to ODFW. If the requested information is received by ODFW within the 14 day window, only then shall ODFW ~~shall then~~ coordinate with the Special Districts Association of Oregon to identify entities on the list that may be affected and notify ~~only~~ those potentially affected water-related entities of the intent to file the instream water right application(s) prior to filing the application(s) with the Department. RACM - 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. RACM - 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. RACM RECOMMENDATION - Delete (3), removing all notification and communication requirements specific to SDAOs		
690-077-0020(5)(e)(B) 12/6 Submitted late for 10/27 version	RACM - Establishing downstream and upstream points of an instream reach using a gps involves safety concerns considering how remote and challenging some locations may be. RACM RECOMMENDATION - (B) The upstream and downstream points identified by latitude and longitude as established by a global positioning system, **GIS or other acceptable surveying techniques.**	Changes to an earlier draft incorporated "or within a geographic information system" as an alternative means of identifying the latitude and longitude for upstream and downstream points. OWRD understands this to be the current practice.	Complete. No change made.
690-077-0020(5)(e)(C) 12/6	RACM - ODFW requests further discussion on the map requirements. Including the entire TRS(s) covered may complicate the map, so we would like clarification on whether this could also be just the upstream and downstream points. (C) The township(s), range(s), and section(s) ~~that cover the requested reach, along with~~ and the quarter quarters for the upstream and downstream points of the requested reach	Including the township, range, and section information on the proposed reach maps would keep them in closer alignment with the requirements for other applicants, which facilitates processing from a consistency standpoint. In addition, the way this is written, we are not requiring quarter quarter information for the entire reach, which should ameliorate concerns with maps being overly busy.	Complete. No further changes made.
Local Government 690-077-0020(5)(j)	RACM - 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	This requirement was only slightly modified in version 1 of the draft rules to remove the possible interpretation that "letters" are required to be paper-based, and removing the rule entirely would be	Complete. No change made.

12/6	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.	a significant shift from current practice and is outside the scope of the current rulemaking. See further discussion on Local Government in this document.	
690-077-0020(5)(k) 12/6	RACM - This section should be struck for the same reasons outline in comments on (3).	See response on Special Districts in this document.	Complete. Change made in v3 draft.
690-077-0027 through -0053 Sections re: application	RACM - 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	OWRD appreciates this comment, but consideration of removing these sections would be a significant departure from current practice, would require significantly more research,	Complete. No change made.

processing, IR, protests, contested cases 12/6	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.	discussion and review, and is beyond the scope of the current rulemaking.	
690-077-0029(2)	RACM - Batch applications can be addressed via a single communication seems to only be sufficient for **continuing processing**. There should be specificity that single	As currently written, agencies would have two opportunities to have processing of an application stop: 1) they could not include an affirmative statement on continued processing in	Complete. No change made.

Submitted late for 10/27 version	communication can also be sufficient for stopping processing as well. RACM RECOMMENDATION - 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.	the communication or 2) they could send a second request to stop processing specified applications. OWRD believes that requiring two separate communications would add minimal burden and ensure clarity on the applicant's intentions.	
690-077-0052(2) 12/6	RACM - 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.	OWRD notes this comment and has maintained the phrase "collaborative conversations" in the proposed rule. Further changes to this part of -0052(2) to prohibit communication with other parties would potentially limit OWRD from undertaking necessary activities and OWRD is not proposing to add the requested additional language.	Complete. No change made.
690-077-0054 12/6	RACM - 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	OWRD believes that a PFO is appropriate. OWRD previously included language in response to concerns: "When the Department proposes to convert a minimum perennial streamflow to an in-stream water right under ORS 537.346, the Department shall issue a Proposed Final Order reflecting the proposed conversion." OWRD does not believe that deleted language in subsection 1 is relevant as the legislature made updates to the statute throughout the 1990s, one of which allowed minimum perennial	Complete. Change made in v3.

	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.	streamflows established later than the original date in statute to be considered for conversion. OWRD included new language for context.	
690-077-0054(1) 12/6	RACM - 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. RACM RECOMMENDATION - Rewrite (1) to provide updated context for "conversions" referenced in the following sections of 690-077-0054. Do not delete (1) RACM - 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.	OWRD believes that a PFO is appropriate. OWRD previously included language in response to concerns: "When the Department proposes to convert a minimum perennial streamflow to an in-stream water right under ORS 537.346, the Department shall issue a Proposed Final Order reflecting the proposed conversion." OWRD does not believe that deleted language in subsection 1 is relevant as the legislature made updates to the statute throughout the 1990s, one of which allowed minimum perennial streamflows established later than the original date in statute to be considered for conversion. OWRD included new language for context.	Complete. Change made in v3.
690-077-0054(1)(h) 12/6	RACM - V2 proposes to delete the language "Any other information that the Department requests and considers necessary to evaluate the	In a prior version of the Div. 77 0071(1)(h), the Department had the condition "Any other information the	Complete. Changes were made in prior version of the

Proposed for deletion	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".	Department requests and considers necessary to evaluate the application." This condition was previously deleted and is no longer in the rules. The Department agreed that it needed to be omitted. This was for the mapping requirements; we believe that all other requirements in the processing area of the rules were sufficient.	rules. This is complete. No changes needed in this version.
690-077-0065(5) 12/6	RACM - Remove references to EANF, see comments above.	The v1 and v2 draft proposed rules both included deletion of the following language in OAR 690-077-0065(5) related to EANF: "*…determining whether a proposed instream water right would support a public use*." No further changes are necessary, as this comment has already been addressed.	Complete. Changes already made in v1 & v2 draft proposed rules.
690-077-0071(1)(c) 12/6 Submitted late for 10/27 version	RACM – Isse re: 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. RACM RECOMMENDATION - 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	OWRD addressed this comment by making changes in OAR 690-077-0071(1)(c) to restore the language, "*…other similar uses…*" stricken in the v2 draft proposed rules. As updated, the v3 draft proposed rules now state, "*If an irrigation right, nursery use, or other similar uses…*".	Complete. Changes made. v3 draft.

690-077-0075 12/6	RACM - LandWatch requests that OWRD verify this process is consistent with out-of-stream water right application processing requirements RACM - 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, but it is being addressed." This comment misses the point, the point of the original comment is that any process	While the Div. 77 rules provide more detail related to the analysis for evaluating injury and enlargement for permanent instream transfers, OWRD performs the same injury/enlargement analysis for Div. 380 permanent transfers and agree that it would be good to make that clear. OWRD believes that consistent rule language related to injury and enlargement analysis across the rule divisions would be a good item for a future rulemaking. Due to the limited time on this rulemaking, however, we're unable to address it at this time. .	Complete. No change made.

	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) 12/6	RACM - 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.	OWRD made changes to remove the term "living certificate" from the v3 draft proposed rules in OAR 690-077-0010 and in OAR 690-077-0075(4)(a)(A). See response however elsewhere in this document related to Living Certificate.	Complete. Changes made. v3 draft.
690-077-0077(3)(b), (c) 12/6	RACM - 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.	While the Div. 77 rules provide more detail related to the analysis for evaluating injury and enlargement for permanent instream transfers, OWRD performs the same injury/enlargement analysis for Div. 380 permanent transfers and agree that it would be good to make that clear. OWRD believes that consistent rule language related to injury and enlargement analysis across the rule divisions would be a good item for a future rulemaking. Due to the limited time on this rulemaking, however, we're unable to address it at this time.	Complete. No changes made.

690-077-0080 12/6	RACM - We support the continued proposed deletion of this section in V2. RACM - LandWatch supports removing this section as it does not make sense and conflicts with other rule divisions (e.g. Division 17).	Noted.	Complete. No changes made.
690-077-0100 12/6	RACM - We appreciate the process added here.	Noted.	Complete. No changes made.
690-077-0105 (new requirement) 12/6	RACM - 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.	With the instream lease renewal, the water right still has to be valid; the renewal form has a box that the applicant must check when submitting the form, indicating either: the water right(s) to be leased have been used under the terms and conditions of the right(s) during the last five years or have been leased instream (being leased instream is considered beneficial use); or they must provide documentation describing why the water right is not subject to forfeiture. All water rights revert to their original use when the instream lease expires. The water rights must also all be valid and ready, willing and able just like any other water right being put instream.	Complete. No changes made.
690-077-077(11) 12/6	RACM - 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	Language further modified for clarity.	Complete. Change made in v3 draft.

	might be simpler to just set forth both options.		
690-077-077(2), (3)(d) 12/6	RACM - support the change in V2	Noted.	Complete. No changes made.