

## Division 77 - Revision Tracker

Section / Version comment	Issue	Response/Modified Language	Status / Version change made in
-0000(7)	<p>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”.</p> <p>RACM - We ask that you remove the new proposed language under paragraph (7).</p> <p>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.</p>	<p>One potential interstate agreement that may have implications for managing water rights is the Walla Walla Water 2050 Plan, involving Oregon, Washington, Tribes, and the U.S. The Department will review and follow up with its North Central regional staff and the Confederated Tribes of the Umatilla Indian Reservation.</p>	Under Review

	<p>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, etc).</p> <p>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.</p> <p><b>RACM RECOMMENDATION -</b> Add clarifying language that leaves this open and acknowledges protection across state borders if supported by both states.</p> <p>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</p>		
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	<p>language is about what <u>OWRD</u> can or cannot do.</p> <p>RACM RECOMMENDATION - Adjust the language to the following or similar:</p> <p>"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."</p>		
-0010(5), (7), (8)	RACM - (5), (7), and (8) are missing periods at the end.	The Department made this correction.	Complete. Change made. V2 draft.
-0010(12)	<p>RACM - We ask that you delete paragraph (12) (Estimated Average Natural Flow).</p> <p>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.</p> <p>RACM - Please delete for reasons outlined in comments to OAR 690-077-0015(4).</p> <p>However, if retained, we suggest edits so it reads: "Estimated Average Natural Flow" means average natural flow estimates, by month or half month, computed by the Department from sources including watermaster distribution records, Department measurement records, and application of appropriate</p>	<p>OWRD appreciates the comments provided on the definition of Estimated Average Natural Flow. However, this is out of scope for this rulemaking.</p> <p>OWRD appreciates this comment and has implemented this change.</p>	Complete. Some changes made. V2 draft.

	<p>available scientific and hydrologic technology.</p> <p>RACM - Please see comments for 690-077-0015(4).</p> <p>RACM - Limiting state agency instream water right applications to "estimated average natural flow" (EANF) is not provided for in statute. As commented below, TU recommends removing this limitation from the rules.</p> <p>RACM RECOMMENDATION – Delete (12).</p>		
-0010(14), (15)	<p>One RAC member asked if the definition of “instream,” which refers to “place where water naturally flows or occurs” includes groundwater. He similarly noted that the definition for “instream flow” was not limited to surface water. He asked if the “inground” or “out of ground” should be considered, noted that the topic came up during the public process involving recent updates to the Integrated Water Resources Strategy (IWRS).</p> <p>RACM – Yesterday, during the Water Rights RAC, we discussed 690-077-0010 Definitions, and I suggested that the term and meaning of "in-ground" is inherent, and therefore, should be included, in the definition for subsection (142), which currently states:</p> <p>"Instream" as defined in ORS 537.332, means within the natural stream channel or lake bed or place where water naturally flows or occurs.</p>	<p>The definition in (14) matches the definition provided at ORS 537.332(1). Modification of the definition is out of scope for this rulemaking.</p> <p>The Department’s current interpretation is that instream water rights administration is for surface water only, and the Department’s practice has been consistent with that interpretation. There are some nuances for allocation of conserved water. The information provided in the IWRS was in error regarding its citation to 537.332(1). In the context of the IWRS, the appropriate citation is 536.220 which references instream and out-of-stream water needs – and expands those to include “underground water”. Further use of the terms in the IWRS has been more of a communications terms of art than a legal term.</p>	<p>Complete. No changes made.</p> <p><b>Will include for discussion at RAC mtg</b></p>

	<p>I cited the OWRD position as it relates to the 2025 IWRS, which states on page 2, which states [emphasis added]:</p> <p>Instream” as defined in ORS 537.332 “means within the natural stream channel or lakebed or place where water naturally flows or occurs.”</p> <p>"Out-of-Stream" – water withdrawn or diverted from a groundwater or surface water source for a beneficial use.</p> <p>You asked me to share where OWRD responded in writing to this question to comments submitted related to the IWRS: here is the link to the first draft comments and OWRD response to the 2024 IWRS -- see page six (6) with this OWRD staff response:</p> <p>"ORS 537.332 defines "instream" as "the natural stream channel or lake bed or place where water naturally flows or occurs," which would include groundwater. The 2024 IWRS includes groundwater in the "instream use" definition (p 3)."</p>		
-0010(29)	<p>RACM - We suggest the following changes: “Secondary Water Right” means a water right to put <del>stored</del> water <del>stored</del> <u>under a reservoir right</u> to an out-of-reservoir beneficial use</p>	<p>The Department made changes similar to those requested by the RACM.</p>	<p>Complete. Changes made. V2 draft.</p>
-0010(35)	<p>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</p>	<p>This section only lays out the definition. The actual process and provisions are later in the rules and will be discussed later. The Department noted that it had worked with ODFW but would review.</p>	<p>Under Review.</p>

	<p>including an NGO (i.e., Special Districts Association of Oregon). One RAC member noted that expanding notice requirements in this manner was potentially inequitable.</p> <p>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.</p> <p>RACM - Please delete for reasons outlined below in OAR 690-007-0020(3).</p> <p>RACM - LandWatch recommends removing this new definition entirely. See comments below on OAR690-77-0020.</p> <p>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.</p> <p><b>RACM RECOMMENDATION – Delete (35) entirely.</b></p>		
-0015(4)	Some RAC members agreed with reasoning that there was no authority for the Department to apply Estimated Average Natural Flows (EANF) for leases	OWRD appreciates the comments provided on utilizing Estimated Average Natural Flow when assessing state agency instream water right applications, and believes this is	Complete. No change made.

	<p>and transfers. However, these RAC members did not agree that the Department has authority with respect to new water right applications. In practice, the Department has been limiting applications to EANF, but ODFW are the experts on flows required for fish and wildlife.-</p> <p>One RAC member noted that ORS 537.343 gives the Director authority to determine the quantity for instream protection and asked why the Department could not just reference the statute rather than rely on rule OAR 690-077-0015(4).</p> <p>One RAC member asked why ODFW and OWRD using different models to calculate flows.</p> <p>RACM - Consistent with our comments above, 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.</p> <p>RACM - Please strike this provision to ensure rules align with statute. There is nothing in</p>	<p>within the authority provided under ORS 537.343(2), as explained in the existing rule summary.</p> <p>Proposed final orders on state agency instream water right applications are often protested; the rule provides clarity regarding the Department's methodology and approach.</p> <p>The ODFW model optimizes for fish and wildlife habitat needs. The EANF model is hydrological, representing pre-historic streamflows, i.e., predating human consumptive use and impediments (i.e., dams). The existing rules provide for an exceedance of EANF where periodic flows that exceed the natural streamflow or natural lake level are significant for the applied public use.</p>	
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	<p>statute that allows OWRD a blanket reduction of flows recommended by ODFW, DEQ or Parks. 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).</p> <p>RACM – As it related to transfers/leases: 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 ENA.</p> <p>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.</p> <p>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</p>		
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	<p>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.</p> <p>RACM - If Estimated Average Natural Flow is to remain as a restriction for instream water right applications, it should reference the guiding statute and rely on science and the ecological needs determined by ODFW. This may include habitat needs, but also temperature needs necessary for key aquatic species to survive and thrive.</p> <p><b>RACM RECOMMENDATION -</b> Please cite statutory requirement for EANF requirement 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 meet ecological flows, fish/wildlife needs, and water quality. In the Deschutes Basin, some state instream water rights, restricted by EANF and lower than what was requested by ODFW, are not sufficient to meet temperature standards for anadromous fish and resident redband trout (Whychus Creek).</p> <p>RACM - 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. 29<sup>th</sup> meeting. ODFW is the</p>		
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	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). RACM RECOMMENDATION - Delete language in Division 77 that limits state agency requested instream water rights to EANF.		
-0015(5)	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.
-0015(8)(b)	RACM - : Close attention needs to be paid to whether the withdrawals for municipal use prohibited “appropriation” or “use”. Withdrawals that prohibited further appropriations would not apply to instream rights, as the water is not diverted from the stream. More discussion is needed here, but at this point we recommend deleting (b).	OWRD appreciates this comment. If water is for the exclusive use of a municipality, in order for the water to be available for that use, it would not be available for appropriation in-stream through an instream water right.	Complete. No change made.
-0015(9)	RACM - : Support language limiting this to state applied instream water rights to align it with statute.	Noted.	Complete. No change made.
-0015(10)	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”.	Thank you for the comment. Edits to this subsection were to clarify that this limit applies to state agency requested instream water rights and removed reference to instream transfers, leases, or allocations of conserved water rights. OWRD believes that the language as drafted reflects the intention of this provision. The suggested edits are out of scope for this rulemaking.	Complete. No change made.
-0015(11)	RACM - Please clarify that the priority date referenced is the	Under review.	Under review.

	“date of the minimum perennial streamflow”. See ORS 537.346		
-0020(3)	<p>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.</p> <p>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.</p> <p>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.</p> <p>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).</p>	Under review.	Under review.

	<p>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, except 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</p>		
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	<p>governments as that also is not directed by statute (see comments to (5)(k)). Both should be removed.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>		
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	<p>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. 29<sup>th</sup> 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.</p> <p>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..."</p>		
- 0020(5)(e)(C)	<p>RACM - As discussed in the RAC, the mapping provisions for instream water right applications do not seem aligned with providing the public with information that makes clear to the public what reach of a river is protected but</p>	<p>OWRD inserts quarter quarters for all requested reaches in the Water Rights Information System (WRIS) to facilitate processing. Having agencies provide the quarter quarters for the upstream and downstream points of the requested reach would ensure consistency between the</p>	<p>Complete. Changes made. V2 draft.</p>

	instead, for instance in (5)(c)(C), seem to place an onerous task on ODFW for no real benefit. We urge OWRD to work with ODFW on language here.	application and OWRD's processing while minimizing additional burden on the agencies as well as streamline processing for OWRD. OWRD modified the draft rule language to limit the need for quarter quarters to just the upstream and downstream points rather than for the entire reach.	
- 0020(5)(e)(B), (C)	<p>Some RAC members noted that GPS and other mapping tools should include quality standards to assure accuracy. RAC members noted that GPS is not always accurate in pinpointing latitude and longitude locations and suggested broadening the language to include standard land surveying practices".</p> <p>Some RAC members noted that the mapping requirements seem more rigorous than those in Division 305 and may pose challenges for long reaches where quarter-quarter measurements are required.</p>	<p>OWRD acknowledges this comment and appreciates the efforts to make sure the provided information is interpretable and informative. Language has been added to allow for the use of a desktop GIS software for establishing latitude and longitude, as is currently the practice.</p> <p>ODFW noted that they already use GIS for creating maps for instream rights.</p> <p>Please see the response in the row above about modifications to the rule language OWRD proposes to address the point about quarter quarters.</p>	Complete. Changes made. V2 draft
- 0020(5)(e)(B)	<p>RACM - Suggest additional detail for GPS coordinates for accuracy.</p> <p>RACM RECOMMENDATION - GPS coordinates can vary greatly. It could be helpful to note the datum source used and the accuracy of the point at the time of identification.</p>	OWRD acknowledges this comment and appreciates the efforts to make sure the provided information is interpretable and informative. Language has been added to allow for the use of a desktop GIS software for establishing latitude and longitude, as is currently the practice.	Complete. Changes made. V2 draft
- 0020(5)(e)(C)	<p>RACM - A map showing quarter-quarters to cover the requested reach may be excessive.</p> <p>Mapping the reach using the</p>	OWRD inserts quarter quarters for all requested reaches in the Water Rights Information System (WRIS) to facilitate processing. Having	Complete. Changes made. V2 draft.

	<p>standardized mapping for water rights (Division 305) may be excessive and may not be accurate over time for instream water rights. If you have a reach that is 100 miles long, that could be 400 or more quarter-quarters for a meandering stream. The stream may also shift out of certain quarter-quarters over time.</p> <p>RACM RECOMMENDATION - The state's Web Mapping highlights ISWR reaches and the ISWR certificates identify upstream and downstream extents which are key identifiers. Reconsider this as a requirement.</p>	<p>agencies provide the quarter quarters for the upstream and downstream points of the requested reach would ensure consistency between the application and OWRD's processing while minimizing additional burden on the agencies as well as streamline processing for OWRD. OWRD modified the draft rule language to limit the need for quarter quarters to just the upstream and downstream points rather than for the entire reach.</p> <p>The information at the time of application is relied upon in processing the application. Further consideration related to how the Department should treat shifting streams is out of scope for this rulemaking.</p>	
-0020(5)(j)	<p>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 governments. This section should be struck in order to align rule with statute, and also to ascribe to the goal of efficient processing.</p>	<p>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 a significant shift from current practice.</p>	Complete. No changes made.
-0020(5)(k)	<p>RACM - This section should be struck for the same reasons outline in comments on - 0020(3).</p>	Under review.	Under review.
-0043(2)	<p>RACM RECOMMENDATION – Additional clarification suggestion:</p> <p>"if a protest was timely submitted <b>and meets the requirements</b> for protest (reference protest Divisions 690-002 &amp; 310), the Department shall."</p>	<p>Division 2 states what must be in a protest. Division 2 is the appropriate venue for protest requirements. This language is from statute. No change.</p>	Complete. No Change made.
-0047(6)	<p>RACM RECOMMENDATION – Consider wordsmithing for added clarity:</p>	<p>This recommendation aligns with language included in Or Laws 2025, Chapters 282 and 575 and changes have been made accordingly.</p>	Complete. Changes made. V2 draft.



	“Upon issuing a final order, or upon a proposed final order becoming a final <b>order</b> by default...”	Additionally made aligning changes in -0043(1) and -0054(2).	
-0027 - - 0053	<p>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 instream water right applications will [be] processed in the same manner as other water right applications. This would be consistent with the Instream Water Rights Act, which states:</p> <p>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.</p> <p>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.</p>	OWRD appreciates this comment. However, it is out of scope for this rulemaking.	Complete. No change made.
-0029(2)	A RAC member noted that in addition to allowing the rules also should allow both confirmation to move	As currently written, agencies would have two opportunities to have processing of an application stop: 1) they could not include an affirmative	Complete. No change made.

	applications forward as well as confirmation to stop the application process to occur in one email.	statement on continued processing in 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.	
-0031(1)(a) and (5)	N/A	The Department acknowledged that compatibility with comprehensive plans and posting of notices by local governments is under review.	This is ongoing and being addressed under other comments received. The posting requirement - 0031(1)(a) is being considered under 310 draft rules.
-0043(1)	<p>One RAC member noted her reoccurring concern regarding requests for standing and party status.</p> <p>The RAC member also suggested adding "and meets requirements for a protest" after "...if a protest was timely submitted."</p>	<p>OWRD staff. Added requests for party status consistent with other division changes. Changed in both 690-077-0043 and 690-077-0054</p> <p>Division 2 states what must be in a protest. This language is from statute. Division 2 is the appropriate venue for protest requirements. No change.</p>	Complete. Partial change made in v2.
-0052(2)	<p>One RAC member noted that a "collaborative conversation" is subjective, could mean different things to different parties and should be refined for clarity.</p> <p>RACM - "collaborative" may be difficult to define and assess.</p>	This language currently mirrors language in Division 310. The Department will review.	Being considered under 310 draft rules and should align with the decision made there.
-0054 General	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	Under review.	Under Review.

	<p>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.)</p> <p>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.</p>		
-0054(1) (proposed for deletion)	<p>A RAC member noted that the original rules reference both the Commission and the Department; she asked for clarification on authority.</p> <p>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.</p> <p>RACM - (1)(a) and (b) proposed deletion: While we understand this language is dated, there are in fact MPS which have not yet</p>	<p>The Department is still reviewing this however, at this time, we do believe that a PFO is appropriate.</p> <p>The Department agrees that the language remaining is unclear and needs to reference the proposed final order.</p> <p>“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.”</p> <p>OWRD is evaluating whether any language from (1) is needed.</p>	Under Review – some changes made.

	<p>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.</p> <p>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.</p> <p>RACM - Deleting the existing sub (1) of this rule provision also deletes the context for the remaining language and additions.</p> <p>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 . . . "</p>		
690-077-0054	OWRD staff: Missing "order" for final	Change made	Complete. Change made in v2 draft.
-0065(3)	RACM - please change "if possible" to "if needed"	Change made in 690-077-0065(3).	Complete. Change made. V2 draft.
-0065(4)	One RAC member notes that "year around" should say "year-round."	Change made in 690-077-0065(3).	Complete. Change made. V2 draft.
-0065(4)	<p>One RAC member asked for clarification if "lessor(s) and lessee" applies to Districts.</p> <p>One RAC member asked where ORS 537.343(2), as mentioned in the Rule Summary, does apply.</p>	<p>The Department responded that it should.</p> <p>The Department responded that it only applies to proposed final orders [for state agency-requested instream water]. ORS 537.343(2) applies to state agency-requested instream water right applications.</p>	No changes made.

-0065(5)	RACM - Strongly support modification that strikes reference to EANF.	Noted.	No changes made.
-0070(2)	<p>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.</p> <p>Another RAC member responded that there are several stored water projects authorized by Division 18 that add flows located in the Crescent Lake area.</p>	<p>The Department responded that flow augmentation requires a secondary water right. The Department needs to review this language.</p> <p>Under Review – further discussion needed.</p>	Under Review.
-0070(4)(e)	RACM - Support the modification that strikes the original (e).	Noted.	No changes
-0071(1)	<p>A RAC member noted that the mapping requirements were complicated and suggested that they should be prepared by certified water rights examiners (CWRE) to ensure accuracy and wondered if the Department was concerned it would disincentivize instream transfer and lease applications.</p> <p>One RAC member responded affirmatively based on her experience in the Deschutes Basin where nearly half of these types of transactions occur within the state, noting that CWRE maps exceed requirements for other transfers.</p>	<p>The Department noted that since instream lease changes are not permanent it does not make sense to require CWRE maps; the Department also shared concerns about the cost of requiring CWRE maps.</p> <p>A review of past Instream Transfers that have been filed revealed that approximately 99 percent of them used the ORS 540.420(3) waiver and received assistance from Watermasters for the mapping requirements and did not use a CWRE.</p>	No changes made.
-0071(1)(b)	One RAC member noted that if required to include tax lot numbers on maps, that given how many tax lots are involved, the numbers would be nearly impossible to read.	<p>The Department noted that rule language includes “if appropriate” but will review.</p> <p>OWRD POST RAC: The inclusion of tax lots is helpful when reviewing District maps, some certificates identify acres with tax lots, and this</p>	No changes made.

		requirement is only “if appropriate.” Would not always be required.	
-0071(1)(c)	One RAC member asked if “other similar use” could reference nurseries as similar language in Division 305 does.	The Department will review.  OWRD POST RAC: OWRD made the change made.	Complete. Change made. V2 draft.
-0071(1)(e)	<p>RACM - Slightly confusing as a run on sentence; split up.</p> <p>RACM RECOMMENDATION – “Identify the point(s) of diversion authorized on the water right. <b>If</b> the water right does not identify...”</p> <p>RACM - POD’s are identified on the applications. If required on a map, this may mean additional maps, especially when Irrigation Districts are involved. This has not been a requirement for leases. Please restrict this to transfers.</p> <p>RACM RECOMMENDATION - Please restrict this to transfers. If requiring for instream leases, allow a single map to be used repeatedly for district leases.</p>	<p>The Department will review and revises for clarity.</p> <p>OWRD made changes to address these comments.</p>	Complete. Change made. V2 draft.
-0071(1)(f)	<p>RACM - Need “or” in the list.</p> <p>RACM RECOMMENDATION – stream, lake, <b>or</b> reservoir”</p> <p>RACM - 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</p>	<p>The Department will make this correction.</p> <p>OWRD agrees, changes made.</p>	Complete. Change made. V2 draft.

	<p>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.</p> <p>RACM RECOMMENDATION - Delete (f). Alternatively, replace it with a requirement that the submitted map include a statement on it of the proposed instream reach or point.</p>		
-0071(1)(h)	<p>RACM - The requirement to include "any other information the Departments requests and considers necessary" is too vague.</p> <p>RACM RECOMMENDATION – delete (h)</p> <p>RACM - 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.</p> <p>RACM RECOMMENDATION - Delete</p>	OWRD made the change.	Complete. Change made. V2 draft.
-0071(2)	RACM - Strongly support not requiring a CWRE stamped map for instream leases and transfers.	Noted.	No change made.
-0075 (including 3)	A RAC member stated that the processing of instream transfer applications should be the same as for out of stream transfer applications. She also noted that users should be allowed to transfer the full amount and not less than due to efficiency.	<p>The Department responded it will review language as well as Division 380, but they are generally the same.</p> <p>Instream transfer processing is the same as Div. 380 transfer process. Div. 380 transfers do look at any loss when transferring a water right, it's</p>	No changes made.

	<p>One RAC member asked if return flows are accounted for and noted issues with the efficiency of some irrigation ditches and potential impacts on downstream users. A RAC member responded that the Districts are careful when leasing involves inefficient ditches.</p> <p>RACM - LandWatch requests that OWRD verify this process is consistent with out-of-stream water right application processing requirements</p>	<p>just that Div. 77 has it more laid out in the rule than Div. 380 does, but it is being addressed. There have been regular transfers that have had loss addressed and the full value of water right was not able to be transferred.</p> <p>The Department accounts for any known areas of stream flow losses to the stream bed and the loss of any known areas of return flow. Those losses are subtracted from the full amount that can be transferred.</p>	
-0075(3) (previously (2))	<p>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</p>	<p>Instream transfer processing is the same as Div. 380 transfer process. Div. 380 transfers do look at any loss when transferring a water right, it's just that Div. 77 has it more laid out in the rule than Div. 380 does, but it is being addressed. There have been regular transfers that have had loss addressed and the full value of water right was not able to be transferred.</p> <p>The Department accounts for any known areas of stream flow losses to the stream bed and the loss of any known areas of return flow. Those losses are subtracted from the full amount that can be transferred.</p>	No changes made.



	<p>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.</p> <p>RACM - Much of this language for reach losses is practice, but losses should not be a specific percent identified in the final order unless actually measured and a methodology identified. If this is a requirement for instream transfers, this should also be identified for a POD transfer down a reach (690-380), otherwise this is a more stringent requirement for instream.</p> <p>RACM RECOMMENDATION - If this language remains, suggest clarification that allows for better measurement in the future and adjustment of losses and include similar language for Division 380.</p>		
- 0075(3)(b)(D)	<p>One RAC member noted the paragraph reference should be “3(c)(B)” instead of “(2)(c)(B).</p> <p>RACM - Reference to (2)(c)(B) should be updated to (3)(c)(B) because this section was renumbered.</p>	<p>The Department will make this correction.</p> <p>Agreed. OWRD made the change.</p>	Complete. Change made. V2 draft.
-0075(3)(c)	<p>One RAC member asked how the newly added language changes the calculation for transferring water instream.</p>	<p>The Department responded there is no change in the calculation; the intent of the rule language is to clarify how the Department performs the calculation.</p> <p>Please note, however, that OWRD has restored the original language for OAR 690-077-0075(3)(c)(B) found in the existing rules.</p>	Complete. Changes made. V2 draft.
- 0075(3)(c)(B)	<p>RACM - TU questions the need to adjust the rule language if the purpose of the clause and specifics it provides are not</p>	<p>OWRD restored the original language for OAR 690-077-0075(3)(c)(B) found in the existing rules.</p>	Complete. Changes made. V2 draft.

	<p>changing. As we commented during the Oct. 29<sup>th</sup> 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.</p> <p>RACM RECOMMENDATION - 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.</p>		
- 0075(4)(a)(A)	<p>One RAC member asked if the Department should insert "a portion of" prior to "existing water right(s)," suggesting the current language does not refer to living certificates.</p> <p>RACM - requirement for instream. If this language remains, suggest clarification that allows for better measurement in the future and adjustment of losses and include similar language for Division 380. 690-077-0075(4)(a)(A) Suggest clarifying that a portion of a certificate may be cancelled and there may be a "living certificate."</p> <p>RACM RECOMMENDATION - Cancel the existing water right(s), <b>or portion of a water right</b>, affected by the instream transfer application, or update the "living certificate". May need to add a definition for living certificate. .</p>	OWRD agrees, change made. Also made a new definition in 690-077-0010(19) for "Living Certificate".	<p>Complete. Change made. V2 draft.</p> <p><b>Will include for discussion at the RAC Mtg.</b></p> <p>- see new definition of "Living Certificate" in OAR 690-077-0010(19)</p>
-0076 (2)(c)	<p>One RAC member asked who would provide compensation, i.e., can third parties do this—pay someone to put water instream? Another RAC member responded that this</p>	<p>Yes, third parties can do that.</p> <p>OWRD agrees, change made.</p>	<p>Complete. Change made. V2 draft.</p>

	<p>was something her organization did frequently, in partnership with others.</p> <p>RACM - A small clarification here as the lessee is sometimes an organization acting as an agent in the lease and does not always compensate the lessor. RACM RECOMMENDATION - but not limited to, individuals or organizations <b>who may assist with the lease application</b>, or who may provide compensation to the lessor(s)...</p>		
-0076 (4)(b)	<p>One RAC member asked if this rule section also includes water conveyance agreements.</p> <p>RACM - Very strongly support 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). Add clarifying language to include districts can hold quitclaim deeds/water conveyance agreements on file. Some of the paperwork required for instream leases can be a deterrent to leasing. This rule update will improve the leasing process and efficiencies for irrigation districts, partnering organizations (DRC and others) and for the state staff who process lease applications. RACM RECOMMENDATION - 690-077-0076(4)(h) lists other documentation (A &amp; C) and (B) lists water conveyance agreements. It should be clarified that these are included in what the district can hold on file for (4)(b).</p>	<p>The Department indicated that was the intent, but the current language does not appear to include it; the Department will review.</p> <p>OWRD POST RAC: OWRD agrees, change made - see 690-077-0076(4)(h).</p>	<p>Complete. Change made. V2 draft.</p>

- 0076(5)(f)(A)	RACM - Suggest a modification here regarding “and a copy of the recorded deed;” as a recorded deed is not always available if the landowner is the federal government (such as Wickiup Reservoir), but agreements or contracts might be available. RACM RECOMMENDATION - Suggest an exception to “and” if the landowner is the federal government.	OWRD POST RAC: OWRD agrees, change made in OAR 690-077-0076(5)(f)(A).	Complete. Change made. V2 draft.
-0077(3)	RACM - 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.	Instream transfer processing is the same as Div. 380 transfer process. Div. 380 transfers do look at any loss when transferring a water right, it’s just that Div. 77 has it more laid out in the rule than Div. 380 does, but it is being addressed. There have been regular transfers that have had loss addressed and full value of water right was not able to be transferred.	No changes made.
-0077(3)(b), (c)	RACM - Same comment as above (see -0075(3)). 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 outof-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.	Instream transfer processing is the same as Div. 380 transfer process. Div. 380 transfers do look at any loss when transferring a water right, it’s just that Div. 77 has it more laid out in the rule than Div. 380 does, but it is being addressed. There have been regular transfers that have had loss addressed and full value of water right was not able to be transferred.	No changes made.
-0077(11)	RACM - Please strike this section. 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.	Changes made. The language has been adjusted to identify the different circumstances under which reservoir rights may be leased instream, including in tandem with secondary water rights.	Complete. Change made. V2 draft.  <b>Will include for discussion at RAC Mtg.</b>
-0079(2), (4)	A RAC member noted that although “reporting” is	The Department will review.	

	<p>referenced in (2), there do not seem to be any reporting requirements outlined in (3) or (4)).</p> <p>RACM - We urge the use of the term “Department” rather than “water master”. There needs to be some uniformity of measurement/reporting, and while the watermaster can help determine proper requirements, ultimately, they must meet statutory standards in a manner consistent with all split season leases.</p>	<p>OWRD POST RAC: OWRD agrees. Changes made in 690-077-0079(4) to add reporting.</p> <p>OWRD agrees, the statute states “Department.” Changes made in 690-077-0079(2).</p>	Complete. Change made. V2 draft.
-0079(3)d)	RACM - Please add reporting requirements. Both measurement and reporting are required by statute.	OWRD agrees. Changes made in OAR 690-077–0079(4) to add reporting.	Complete. Change made. V2 draft.
-0080 (proposed for deletion)	<p>One RAC member asked why this rule existed in the first place.</p> <p>RACM - We support the proposed deletion of this section.</p> <p>RACM - LandWatch supports removing this section as it does not make sense and conflicts with other rule divisions (e.g. Division 17)</p>	<p>The Department has not had time to dig into the history, however, the v1 draft proposed rules recognize that these current rules do not work under existing authorities.</p> <p>Comments in support of this change are noted.</p>	Complete. No change made.
-0100	<p>A RAC member asked what the Department meant by “petition,” given that it has a specific meaning under the Administrative Procedures Act.</p> <p>RACM - This section does not appear to track statute and needs further work</p>	<p>The Department reviewed ORS 537.352 and did not see use of the term “petition.” In general, the Department means “a formal written request”; the Department will review and consider revising the term.</p> <p>This change has been made in relevant subsections.</p>	Complete. Changes made. V2 draft
-0100(1) – (4)	RACM - Consider changing word “petition” to “formally request”. The word petition may have a more specific legal context. If that is what is intended, then retain the current language.	The Department reviewed ORS 537.352 and did not see use of the term “petition.” In general, the Department means “a formal written request”; the Department will review and consider revising the term.	Complete. Changes made. V2 draft

		This change has been made in relevant subsections.	
-0100(6)	<p>RACM - Based on the proposed rewording, “explains” should be “explain.”</p> <p>RACM RECOMMENDATION - “incorporate findings that <b>explain</b> the basis for the decision”</p>	Noted. Change made.	Complete. Changes made. V2 draft
-0105 Generally	<p>A RAC member asked if this new rule section is in line with statute.</p> <p>A RAC member gave an example of hydroelectric rights where the infrastructure for putting the water right to hydroelectric use no longer exists and that rights where the original use could no longer occur should not be allowed to be leased. Another RAC member responded that there is no real incentive to lease water instream if the option to resume use is taken off the table.</p>	<p>The Department responded that ORS 537.348 is vague, allowing for discretion.</p> <p>OWRD noted that hydro is a separate matter and asked RAC member to consider whether this was the only example. This topic is outside the scope of this rulemaking.</p>	No changes made.
-0105(1)	A RAC member asked if “any prior final order” also means “preliminary final orders” that can become final orders.	The Department responded “no” because for leases there is no PFO. Any “prior final order” relates to a final order, not a proposed final order.	No changes made.
-0105 General	<p>RACM - Applications for a renewal of an instream lease should be required to be submitted before the instream lease has expired.</p> <p>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</p>	Under Review.	Under Review

	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).		
-0105(1)(a)	<p>RACM - Renewing 6 years from the date of the previous FO means one year after a 5-year lease expires, which seems like it was the intention. However, it also now sounds like you could also renew a 2-year lease four years later, for example. Was that the intention (any combination of lease length and time after up to 6 years)? If not, maybe clarify it means one year after the previous lease expires?</p> <p>RACM RECOMMENDATION - "The instream lease renewal application is submitted no more than one year from the date that the prior approved instream lease expires" (unless the intention is to give applicants with shorter leases more time to submit a renewal application).</p>	OWRD POST RAC: OWRD agrees, change made to the language to better identify when the renewal can be submitted.	<p>Complete. Change made. V2 draft.</p> <p><b>Will include for discussion at RAC Mtg.</b></p>