

2/27/26

Proposed Rule Revision Tracker
Division 77 – Instream Water Rights

Rule language changes made after the close of the public comment period February 5, 2026.

Rule(s)	Commenter/Comment	Response	Changed?
Applicability outside OR			
Purpose; state borders -0000(7)	Gen Hubert (RAC; DRC) - While the modifications to this text in the V3 are an improvement over earlier iterations, the Department should still recognize that cooperative legislation between states does in fact allow protection of water across state lines.	The protection of water instream out-of-state would be by the state in which the water is being protected, not by OWRD.	No change made..
Purpose; state borders -0000(7)	Kimberley Priestley (RAC; WW) - While the language in (7) has been modified and improved since V1 and V2, we still have concerns that this could inadvertently usurp attempts to protect flows across state borders in basins like the Walla Walla. Moreover, there are statutes in place that allow OWRD to issue water rights that reach across state borders, this could thwart agreements to lease that water instream, e.g. see ORS 537.835 which allows OWRD to issue water rights from Mill Creek to the City of Walla Walla for “beneficial use”. There is nothing in this statute that limits this to municipal use, simply beneficial use. ORS 537.810-870 is ambiguous enough to raise similar questions. This section is not needed to implement the two new bills or to align outdated rules with statute, thus we would, again, suggest deleting.	The point of diversion is within Oregon in the example provided (City of Walla Walla). OWRD does not have authority to issue a water right to the City of Walla Walla for a POD in Washington, that would be under the jurisdiction of Washington. The protection of water instream out-of-state would be by the state where the water is being protected, not by OWRD. Where OWRD instream water rights are protected in Washington, it is by the state of Washington, not OWRD. OWRD’s jurisdiction is to the border. OWRD issues the rights in Oregon, and the other state may protect it once it gets to the border.	No change made.
Definitions			
-0010(10)	April Snell (RAC; OWRC) - Specifically we support the proposed definition of “district,” under 690-077-0010(10), which references the specific statutes for irrigation districts and similar local governments, and is the same language proposed in the 2015 RAC	Comment in support	No change made.
Living certificate -0010(19)	Kimberley Priestley (RAC; WW) - We support the OWRD’s decision in the hearing draft version (V3) to delete the new term “living certificate” that was inserted into the	Comment in support. Note that OWRD deleted the definition because it was not used in division 77. Living certificates can be issued for division 77. They cannot for Division 18.	No change made.

	V2 Draft Rules (see 12/5/2025 comments for detailed explanation of our opposition to this term).		
SDAO -0010(35)	<p>Jeremy Austin (RAC; COLW) - LandWatch supports the removal of the previously proposed subsection (35).</p> <p>Gen Hubert (RAC; DRC) - We support the deletion of this new definition relating to the Special Districts Association of Oregon.</p> <p>Kimberley Priestley (RAC; WW) - We support V3's proposed deletion of this new term that was proposed in the V1/V2 Draft Rules. See comments to V1/V2.</p>	Comment in support.	No change made.
EANF			
EANF -0015(4)	<p>Jeremy Austin (RAC; COLW) - LandWatch recommends removing 0015(4) entirely.</p> <p>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>There are significant concerns with 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 the concerns raised during the RAC process, 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>For example, Tumalo Creek in Central Oregon sees temporal changes in flows that can vary significantly (See figure 1 and 2 below). Here, even a daily average fails to capture the flows that are necessary to protect the full</p>	<p>As noted, OWRD continues to believe that limiting agency requested instream water rights to Estimated Average Natural Flow is consistent with the authority provided under ORS 537.343(2). As noted, 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> <p>Further evaluation, research, and discussion of changing this practice would be needed and is outside of the scope of this rulemaking.</p>	No change made.

	ecological value of a stream—let alone month or half month averages. (see Comment letter for Figures).		
EANF (general) -0015(4)	<p>Kimberley Priestley (RAC; WW) - Please strike this provision in whole to ensure rules align with statute. There is nothing in statute that allows OWRD a blanket reduction of flows recommended by ODFW, DEQ or Parks. We disagree with the OWRD’s response to comments that this change is outside of the scope of the RM. This is precisely within the stated scope of revising rules to ensure they conform with statute. Deletion is necessary to remove from rule existing directives that are not supported by the law. There is no authority for this limitation, and it is contrary to the directives of the Instream Water Rights 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:</p> <p>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).</p> <p>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).</p>	Please see response above to Jeremy Austin -0015(4).	No change made.

	<p>ENAF is not representative of biological needs of fish. ENAF is simply an “average” of flow for a given month (as derived from historical records) that has no relation to any biological determination. An average is “an estimate or approximate representation of an arithmetic mean.” Webster’s Third New International Dictionary 1930 (unabridged ed. 2002). In other words, sometimes flows are above the average, sometimes they are below. By statute, instream water rights are to be set for the quantity of water necessary to support the public use applied for; whether they coincide with an “average” flow or not is of no relevance either to the biological needs of the fish or to the statutory directive to issue water rights in the amounts necessary to support the public uses applied for. Based on the full language of the Act, it is clear that the “intent” of the Instream Water Rights Act, as it relates to fish, is to protect those flows needed for the public purpose applied for, which includes all life stages. Flow needs for fish are developed by ODFW, the State’s experts on the biological needs of fish. From a biological point of view, it is illogical and insufficient to limit an ODFW requested amount to ENAF; doing so could rob fish of the flows they need when the flows in any given river or stream are in fact above ENAF. Issuing water rights in the amount requested by ODFW does not “create” water, rather it simply protects it when it is in the river. As the OWRD admitted in its response to comments, ODFW flow numbers are tied to the biological needs of fish. OWRD’s are not. As such, tying to ENAF does not ascribe to the “intent” of the ISWR Act, which is the only way the OWRD Director can issue ISWR for less than requested by ODFW. In the Director cannot arbitrarily reduce requested flows; any reduction must be consistent with the “intent” of the ISWR Act. In sum, the rules’ limiting of the instream water right to ENAF is not consistent with either the language or intent of the Instream Water Rights</p>		
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	Act and should be deleted. Deleting this section is entirely within the scope of the RM.		
EANF (leases) -0015(4)	Kimberley Priestley (RAC; WW) - 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, the ENAF overlay should be removed from the rules in its entirety in order to ensure the rules conform with the ISWR Act.	Comment partially in support; see also response above	No change made..
EANF -0015(4) and related sections/ subsections	Gen Hubert (RAC; DRC) - State agency applications for instream water rights are not restricted to Estimated Average Natural Flow by statute and should not be limited by EANF in rule. EANF does not consider ecological needs relatable to flow for aquatic species such as anadromous fish. Water for an out of stream use can apply for the amount of water sufficient for the use, yet instream water rights can be limited by EANF which is unrelated to the ecological needs. EANF should not be a limiting factor for state agency instream water right applications.	Please see response above to Jeremy Austin -0015(4).	No change made.
EANF -0015(5)	Gen Hubert (RAC; DRC) - Strongly support the removal of the original (5), which restricted protected flows resulting from instream leases, transfers and allocations of conserved water to EANF, from the rules.	Comment in support	No change made..
EANF -0015(5)(a)-(c)	Jeremy Austin (RAC; COLW) - LandWatch supports the deletion of this section. Kimberley Priestley (RAC; WW) - 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.	Comment in support	No change made.
-0015(8)	Kimberley Priestley (RAC; WW) - We support the additional language through (a).	Comment in support	No change made.

-0015(9)	Kimberley Priestley (RAC; WW) - Support language limiting this to state applied instream water rights to align it with statute.	Comment in support	No change made.
-0015(10)	Kimberley Priestley (RAC; WW) - 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 for rationale.	Please see response above to Jeremy Austin -0015(4).	No change made.
SDAO Notification			
SDAO notification -0020	Submitted by Leah Cogan (RAC; GSI) on behalf of Michael Martin (RAC; League of OR Cities); Mark Landauer (RAC; Special Districts Association of OR); Adam Denlinger (OR Water Utilities Council); Mike Buettner (OR Water Utilities Council); Jason Green (OR Assoc. of Water Utilities) - Our members include cities and non-city water districts that provide public drinking water services to many communities around Oregon. We are disappointed that the proposed notification to special districts was removed from the final draft of the proposed rules in OAR 690-077-0020. Special districts are local governments that have locally elected officials who are accountable to the public. As such, we believe that this remains an equity and transparency issue for public water districts. We also believe that notification to special districts would have helped avoid confusion amongst our members and the potential filings of unnecessary protests	OWRD recognizes that there can be value in coordination and also recognizes that advance notice before application poses concerns in terms of the priority date system. If such notification will avoid confusion and protests, ODFW may continue to voluntarily provide information, which is its current practice.	No change made.
SDAO notification -0020(3)	Jeremy Austin (RAC; COLW) - LandWatch strongly supports the removal of the proposed language in previous versions of the proposed rules that required special notification to the Special Districts Association of Oregon prior to ODFW filing an instream water right application. Kimberley Priestley (RAC; WW) - We strongly support the removal of the language found in V1/V2 which directed pre-notice of the filing of an application to SDAO. This was	Comment in support. See also response above.	No change made.

	not related to HB 3342 or HB 3544 and was in direct conflict with statutory directives to process instream applications in the same manner as out of stream applications. See comments on (5)(j) for further arguments.		
State Agency Applications			
-0020(5)(j)	<p>Kimberley Priestley (RAC; WW) - We strongly oppose OWRD's refusal to remove this section of a long-standing rule that does not comport with statute. This section requires ODFW to send a notice of "intent to file ISWR applications to local governments. In order to align Div 77 with statute, this section needs to be struck. This is an unfair provision that gives 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 application shall be in accordance with processing of water right applications, except as provided under 537.343. Noting in ORS 537.343 directs or allows pre-notification of an application.</p> <p>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.</p> <p>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.</p>	<p>OWRD assumes the comment pertains to (4)(j).</p> <p>This rule is part of OWRD's compliance with its Land Use State Agency Coordination program. OAR 690-005-0025(7) states division 77 is a land use program. OAR 690-005-0035(2) states how OWRD can comply, including provisions in the rules (in division 77) or by applying procedures in the Department's land use procedures guide. Page 55 of the Land Use Procedures Guide spells out actions to be taken, which include notification. This topic should be addressed as part of discussions around updates to OWRD's State Agency Coordination program. Regarding comment that out-of-stream applications are being treated differently; they are required to have a land use form.</p>	No change made.

	<p>of which one purpose is to conform rule with law. Please strike this provision from the rules.</p> <p>We would also note that this is yet another example of the disparate treatment given to instream as opposed to out-of-stream rights as there is no requirement that out-of-stream applicants give notice to local governments of their water right applications.</p>		
-0020(5)(k)	Kimberley Priestley (RAC; WW) - This section should be struck for the same reasons outlined in comments on [-0020(3)].	-0020(5)(k) does not exist in current rule and was removed prior to filing. The provision under 0020(3) related to Special Districts Association of Oregon notifications, was removed prior to filing.	No change made
<p>Application processing; initial reviews; PFOs, protests, FOs, contested cases -0027 through – 0053</p> <p>NOTE: -0033, -0048, -0053 out of scope</p>	<p>Kimberley Priestley (RAC; WW) - We urge the OWRD to delete the detailed directives on processing an application (through final order/cc) 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 25 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> <p>OWRD response to our previous comments suggesting deletion of this section and replacing it with directives to process under Div 310 notes that this is outside the scope</p>	This proposal is outside the scope of this rulemaking and the notice; alignment or merging of the rules would require much more analysis and discussion. Such a revision would be a substantial undertaking that is beyond the time and scope of this rulemaking. Several of the rule divisions were not included in the notice and OWRD cannot make changes to those rules.	No change made

	of the rulemaking. We disagree. One of the stated purposes of this rulemaking is to align the rules with statute. Statute requires that processing of an instream right is in accordance with ORS 537.140 to 537.252. 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.		
Collaborative conversation -0052(2)	Kimberley Priestley (RAC; WW) - We appreciate and support the OWRD’s retention of the language “collaborative conversation” in V1 and V2. 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.	Comment in support.	No change made.
MPSF Conversion			
MPSF conversion -0054	Jeremy Austin (RAC; COLW) - LandWatch has concerns with the language in this section and request that OWRD confirm that this section aligns with statute, especially ORS 537.346, which says that minimum perennial streamflows “shall be converted to in-stream water rights.”	See response below to Kimberley Priestely on -0054.	No change made.
MPSF conversion -0054	Kimberley Priestley (RAC; WW) - We continue to have significant concerns with this section. We believe this section of rule should be cut in whole and simply replaced by the language of the statute. The old rules already contravened statute by allowing OWRD the discretion to refuse to convert and MPS on the grounds it was not in the public interest. The new rules add to the existing problems by proposing a wholly new process that includes the ability to protest an MPS conversion. Neither the old directives or the new directives are allowed by statute, and in fact directly contravenes its mandate.	The proposed rules are consistent with ORS 537.346. As noted by the commenter, ORS 537.346(1) requires that the instream water right certificate be issued “in accordance with ORS 537.343 with the same priority date as the minimum perennial streamflow.” ORS 537.343(3) describes the process for issuing an instream water right certificate and provides that it must be issued “according to the provisions of ORS 537.341.” ORS 537.341, in turn, states that the Department shall issue instream water right certificates “subject to the provisions of ORS 537.343.” ORS 537.343, in its entirety, requires the issuance of a proposed final order, which may approve,	No change made.

	<p>The relevant section of ORS 537.346(1) states: All minimum perennial streamflows established on any waters of this state before June 25, 1988, shall be converted to in-stream water rights after the Water Resources Commission reviews the streamflows and the Water Resources Department issues a certificate for an in-stream water right in accordance with ORS 537.343 with the same priority date as the minimum perennial streamflow.</p> <p>Notably, ORS 537.346 says unequivocally that minimum perennial streamflows “shall be converted to in-stream water rights.” In other words, the OWRD does not have any discretion to “not” convert MPS to instream water rights. While the statute states the conversion 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. Yes, the statute says a certificate shall be issued “in accordance with ORS 537.343,” but 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>The proposed new process does not align with statute and is far outside of the scope of this rulemaking. At this juncture, we would suggest the OWRD cut this section in whole and simply put the language of the statute in the rule.</p>	<p>approve for a lesser amount, or reject the requested instream amount. Had the legislature intended to exempt minimum perennial streamflow conversions from the proposed final order process described in ORS 537.343, ORS 537.346(1) would have needed to state that the certificate must be issued <i>notwithstanding</i> ORS 537.343, but otherwise in accordance with ORS 537.341. Further, the statute requires the Commission to “review” not just convert.</p>	
Instream Transfers			
Instream Transfers -0075	Jeremy Austin (RAC; COLW) - LandWatch requests that OWRD verify this process is consistent with out-of-stream water right application processing requirements. If it is not, either strike this section, or update Div 380 to make it	<p>Since the same details are considered as part of OWRD’s injury and enlargement evaluation regardless of whether an application for a Div. 380 permanent transfer or a Div. 77 instream transfer is being reviewed, OWRD agrees that consistent criteria between the two rule divisions makes</p>	<p>No change made.</p>

	consistent with the process outlined for instream transfers.	sense. OWRD does not want to remove the detailed review criteria in Div. 77 as it articulates what the department does (both for 77 and 380). The ideal situation would be to add it to 380 so that 380 is more transparent about what we already do. OWRD is concerned that this matter may be outside of the scope of the notice for Div. 380 as it adds review criteria to the rule that was not included in the notice. Therefore, while we think it would be ideal to have consistent language, we believe it to be outside of the scope of the rule notice.	
Instream Transfers -0075 -0077(3)	Gen Hubert (RAC; DRC) -- Processing an Instream Transfer Application. OWRD is required by statute to review instream transfers similarly to out-of-stream transfers. Division 77 Application processing rules appear much more descriptive and stringent than those for Division 380. To align the two with regards to Application processing, either the more descriptive analysis regarding return flows and losing reaches should be removed from Division 77 or added to Division 380. Rules are referred to for guidance. If the same review guidance is not noted in Division 380, then it would appear that the same stringent analysis (Division 77) would not be required. This also relates to evaluation under Division 77-0077(3).	See response above to Jeremy Austin on -0075.	No change made.
Processing IS transfer application -0075(3)(a), (b), (c)(A), (c)(B)	Kimberley Priestley (RAC; WW) - In order to adhere to statutory directives, the noted sections should be cut in whole. 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 (Div 380 rules). Despite this, the Div 77 rules have a number of requirements that go far beyond Div 380, including analyzing return flows, losing reaches, etc. These are not found anywhere in Div 380. Instream	See response above to Jeremy Austin on -0075.	No change made.

	<p>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 all these provisions to Div 380.</p> <p>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.</p> <p>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 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. So in other words, as the Div 380 and Div 77 stand today, it is easier to challenge an instream tran[s]fer than an out-of-stream transfer. This is very unfair and not supported by law. Again, we urge the OWRD to align processing of instream and out-of stream water rights, transfers and leases as required by statute.</p>		
Instream Leases			
<p>-0076(4), (4)(b)</p>	<p>April Snell (RAC; OWRC) - We are supportive of language in 690-077-0076 (4) that will allow less unnecessary paperwork for districts submitting instream lease applications on behalf of the water rights they hold in trust for their patrons. We think some of the new language in (4)(b) is unnecessary (as districts are public entities already subject to public records requests) but do not have significant concerns about its inclusion.</p>	<p>Comment mostly in support</p>	<p>No change made</p>

<p>-0076(4)(a) -0076(2)(c)</p>	<p>Gen Hubert (RAC; DRC) - We would like to suggest a clarification here - that the signed lease can be submitted by the lessee as noted in 0076(2)(c) the lessee may assist with the lease application.</p>	<p>OWRD agrees with clarification is needed here. Changed - 0076(4)(a) to add, "In the case where the lessee is other than the Department, the lease application shall be submitted by the individual or organization and signed by the individual or an authorized representative of the organization, as applicable"</p>	<p>Change made.</p>
<p>-0076(4)(b), (h)</p>	<p>Gen Hubert (RAC; DRC) - Strongly support this addition - the district holding the district water user forms, water right conveyance agreements and lessor documentation on file for those participating in a district lease. This is aligned with other temporary water movements associated with districts. This will greatly improve the efficiency of building district pooled leases and importantly, the Department's review and approval of district leases.</p>	<p>Comment in support</p>	<p>No change made</p>
<p>Processing IS lease application -0077(3)</p>	<p>Kimberley Priestley (RAC; WW) - This section should simply state that "The Department shall evaluate the instream lease application for injury and enlargement" and cut the second sentence.</p>	<p>See response above to Jeremy Austin on -0075.</p>	<p>No change made</p>
<p>Processing IS lease application -0077(3)(a)-(d)</p>	<p>Kimberley Priestley (RAC; WW) - 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, it's just that Div 77 has more of it laid out in the rule than Div 380 does, but it is being addressed." As with -0075, 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</p>	<p>See response above to Jeremy Austin on -0075.</p>	<p>No change made.</p>

	instream and out-of-stream. To fail to do so puts instream rights at a disadvantage, which is not supported by statute.		
-0077(4)	Kimberley Priestley (RAC; WW) - We would suggest rewording so it clearly states that there is a 21 day comment period on an instream lease, dating from the day of the public notice. And then go into the other language.	OWRD revised both 690-077-0077(1) & (4), as follows:- 0077(1) is amended to read, "On receipt of a complete instream lease application, the Department shall give notice of the application in its weekly public notice and accept written public comments for 21 days." -0077(4) is amended to read, "If any comments are received in response to the notice under section (1) of this rule that allege injury to other existing water rights or enlargement of the existing water right proposed for instream lease, the Department shall provide the comments to the parties, and the Department shall review the comments prior to issuance of an order approving or denying the lease application."	Change made.
-0077(11)	Gen Hubert (RAC; DRC) - Thank you for the clarifying edits here. We support this change, Kimberley Priestley (RAC; WW) - The V3 language is much clearer. Thank you for the edits here.	Comment in support	No change made
Other			
-0065(3)	Kimberley Priestley (RAC; WW) - See comments on cited sections of the Div 77 rules	OWRD is unclear on this request.	No change made.
-0080	Jeremy Austin (RAC; COLW) - LandWatch supports removing this section as it does not make sense and conflicts with other rule divisions (e.g. Division 17). Gen Hubert (RAC; DRC) - We support the deletion of the cancellation provision for Instream Water Right. Kimberley Priestley (RAC; WW) - We support the continued proposed deletion of this section.	Comment in support	No change made.
-0100	Kimberley Priestley (RAC; WW) - We appreciate the process added here.	Comment in support	No change made.
Instream lease renewals	Gen Hubert (RAC; DRC) - Appreciate rules clarifying the lease renewal process. If (1)(a) is not a statutory	OWRD's intent with this rule is to allow for an expedited watermaster review process. That said, while this is aimed at	No change made.

<p>-0105</p>	<p>requirement, it should not be included in the rule. However, a 5-year limit for renewal does make sense if it is more specifically tied to an expedited watermaster review process since beneficial use would have been established by the prior lease record within the 5-year window.</p>	<p>streamlining the process, OWRD is still statutorily required under ORS 537.348(4) to publish notice of instream lease applications (including renewals) and accept written comments for 21 days.</p>	
<p>Instream lease renewals -0105</p>	<p>OWRD Staff Proposed Change – Clarity in this rule title is needed to more clearly convey that the intent of this rule to allow for an expedited watermaster review process if an instream lease renewal application is submitted within 5 years from the date of expiration specified in the last final order approving the instream lease.</p>	<p>OWRD modified the title for OAR 690-077-0105 to read as, “Application for Expedited Instream Lease Renewal.”</p>	<p>Change made.</p>
<p>-0105</p>	<p>Kimberley Priestley (RAC; WW) - New requirement: The applicant should have to provide evidence to the OWRD that, absent the instream lease, they are ready, willing and able to put the water to the original beneficial use. Without such a requirement, the proposed process would allow a water right holder to hang onto a water right indefinitely and potentially try to use the water for a new consumptive use in the future. While we support water instream, given the rules are not clear that if the original use goes away the underlying right could not be transferred to a new consumptive use we think this omission leaves open the door for future mischief. Given that, we would suggest two amendments. First, given instream leases are similar to temporary transfers, which do require, upon expiration, that the transfer revert to the original use, the rules should be clear that the use reverts to the original use (including type of use and place of use). In response to comments, OWRD noted this is what happens. There is nothing in rule that says this; if that is the case it should be in rule. We would also ask that OWRD clarify that the lease holder cannot transfer the instream lease to a new out-of-stream use at the end of the lease. That type of transfer can only take place if the water can in fact revert to the original use. Absent these changes, the rules leave open the potential for mischief.</p>	<p>The law is clear that leasing water instream is a beneficial use of water. For an instream lease, the water right must have been beneficially used within the past 5 years or, if not used, demonstrated that the water use is not subject to forfeiture. Because an instream lease renewal application must be submitted within 5 years from the date of expiration specified in the last final order approving the instream lease, beneficial use under the water right for an instream purpose has clearly occurred.</p> <p>OWRD does not interpret the law to mean that use must begin under the original water right before a transfer can occur, following an instream lease. As stated above, use of water instream through an authorized lease or transfer is a beneficial use.</p> <p>The comments pertaining to the reversion of the water right, upon expiration of the instream lease, back to the existing authorized use and place of use are appreciated, and it reflects OWRD’s existing practices. OWRD will continue to include this language in approvals. That said, we think this comment applies throughout several areas of Div. 77, not just temporary transfer renewals, and should apply more holistically than in just this rule. While we think this could be a good addition to the rules, OWRD is concerned that needed changes are outside of the scope of the rule notice.</p>	<p>No change made.</p>

General			
General Living certificate	April Snell (RAC; OWRC) - As previously stated above, we have concerns about the proposed deletion of a “living (water right) certificate” here and throughout the operative sections of Division 77 and other divisions. Even though Department retains in the proposed rules the flexibility intended by the term we request that definition be restored.	Living certificate was not used in the rules, which is why it was deleted. Terms should not be defined unless they are used in the rule. OWRD agrees that living certificates are important tools for efficiency purposes and intends to continue to utilize them in the context of this division despite the lack of definition.	No change made.
General Div 18, 77, 380	James Fraser (RAC; TU) TU works closely with landowners on instream flow restoration projects, and we appreciate the instances where WRD have clarified language in rule divisions related to instream transfers (Division 380), the Allocation of Conserved Water program (Division 18), as well as instream leases and instream water rights (Division 77). TU's verbal and written comments have already provided specific input on numerous rule provisions, and we will not repeat those here because many have been handled in the final rule package to our satisfaction.	Comment in support	No change made.
Deschutes Basin Div 18, 77	Kate Fitzpatrick (RAC; DRC; Bend Hearing; summarized from transcript) - And we specifically today just want to comment on appreciation for the improvements to Division 77 and Division 18 we made in stream leasing and permanent in stream transfers and the allocation of conserved water statutes. Related to Division 77, DRC works with 80 irrigation districts and about 350 landowners annually to in stream lease up to 75 cubic feet per second back to our streams alongside an additional 74 CFS that have been permanently transferred in stream. And we also utilize Division 18, which has protected 174 cubic feet per second in partnership with irrigation districts to our streams through the allocation of conserved water program.	Comment in support	No change made.

	<p>These are very important programs and rules for flow restoration in the Deschutes Basin and reaches that had once been fully diverted.</p> <p>And we just wanted to comment that the improved efficiencies proposed in the rules will be beneficial to the resource and will improve the workflow for practitioners like the DRC and irrigation partners who use these programs and state staff who process these transactions.</p>		
Fees	<p>Ryan Krabill (RAC; OFB) - With respect to instream water rights-related process changes, OFB asks the Department to proceed carefully so that procedural reforms do not unintentionally shift costs or burdens onto existing out-of-stream users or create a de facto advantage through process alone. OFB believes that there should not be a fee to file appeals for instream water rights, and that when the state files for instream water rights in a basin or watershed there should be a single application. OFB therefore requests that OWRD confirm—clearly in rule text and implementation—that instream-related reforms will not rely on fee mechanisms or fragmented application approaches that conflict with this approach.</p> <p>We respectfully request clear guardrails that ...ensure instream-related procedural changes do not shift burdens onto out-of-stream users</p>	<p>Most agency fees, including protest fees, are set in statute and further discussion of these fees is not within the scope of this rulemaking. Further, requiring one instream water right application for an entire basin would be a significant change and is beyond the scope of what is contemplated in this rulemaking and beyond the scope of notice.</p>	<p>No change made.</p>
Scope	<p>April Snell (RAC; OWRC) - OWRC was a member of the most recent previous RACs related to Division 77 (2015 and 2021,) which were properly structured as a single division rulemaking and allowed for more time to properly discuss proposed changes. However, neither RAC was actually completed and some of the proposed changes in the current draft were not discussed or agreed upon in the previous RAC efforts, or are not tied the 2025 legislation. While this division did have more RAC discussion than other rule</p>	<p>Comment partially in support and partially about process. OWRD acknowledges that this was an ambitious effort and staff did their best to provide clarity on changes throughout the process and document reasons in detail for proposed changes as shown and posted on the rulemaking page. We appreciate the feedback.</p>	<p>No change made.</p>

	<p>divisions, it is still concerning when there are so many changes without full explanation of why.</p> <p>That being said, we are supportive of several of the changes discussed in the previous RACs and other minor changes.</p> <p>We are supportive of several changes that will provide clarity and reduce unnecessary steps for districts to file instream leases.</p>		
Minor			
Grammar/typo -0010(11)	<p>April Snell (RAC; OWRC) - The definition of “district water user” is slightly different than previous versions and I believe has a typo.</p> <p>“(11) “District Water User” means, for the purposes of instream leases involving a district, the owner of land who is subject to the charges or assessments of a district and from whose land the appurtenant water right would be leased upstream.” Upstream should be instream. There are probably more typos.</p>	OWRD agrees - 0010(11) has been corrected to say “instream” not “upstream”	Change made.
Statutory Authority/ Implementation -0065	OWRD Staff Proposed Change – Correct typo 539.360 to 537.360. Remove 536.027 from statute implemented. It is statutory authority for rulemaking only.	corrected	Change made.
-0010(30) & (31)	OWRD Staff proposed change – Removed the word “existing” from in front of “water right” because it is unnecessary.	Deleted the word “existing” from in front of “water right.”	Change made.
-0015(8)	OWRD Staff proposed change – missing colon	corrected	Change made.
-0020	OWRD Staff proposed change – Last word in subsection 7 is unnecessarily capitalized	Change to lowercase s in “Section”	Change made.