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46411 Timíne Way
Pendleton, Oregon 97801

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

October 31, 2025

To Whom It May Concern:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Department of Natural Resources, we are pleased to provide the following comments on Divisions 18, 315, and 17, which were discussed during the 2025 Water Rights Rulemaking Rules Advisory Committee meetings on October 14th, 15th, and 21st, 2025.

Division 18 – Allocation of Conserved Water

- 690-018-0040(22)(b): We ask that you remove the provision directing the applicant to provide notice to each affected local government along the instream reach. This provides an added burden and cost to those of us focused on instream restoration. We are not aware of any statutory requirement to this end, and the lack of any similar requirement for Allocation of Conserved Water (ACW) projects that dedicate a portion of the saved water to other uses creates an unfair bias against projects that dedicate all saved water instream. Finally, water flowing in a streambed should not come as a surprise to local governments. This provision gets us further, rather than closer, to the agency's goals of increased administrative efficiency and provides little actual benefit to local jurisdictions that expect water in waterways. We ask that you remove this provision.
- 690-018-0040(25): We request that you do not eliminate the mandatory fee waiver for the conservation projects specified. We find it frustrating that the out-of-stream use of water has been granted to such an extent that many of our fisheries have been severely compromised; indeed, many of our rivers and streams would have no water during the irrigation season if it were not for the

work of flow restoration practitioners like CTUIR and others. To eliminate the fee waiver for this work to try and correct Oregon's past practices and restore water back to our rivers and streams is particularly frustrating. We respectfully ask that you do not eliminate this waiver.

- OAR-690-018-0050(5)(c)(C)(i): Without a mechanism to protect the state's portion of a groundwater right, we strongly recommend that OWRD remove all proposed rules related to groundwater projects in Division 18. While we are firm advocates for water conservation, the ability to protect the public's benefit from these projects is critical. We know from experience that, in over-appropriated basins, saved surface water left instream will only be withdrawn by other water users unless it has formal, legal protection under an instream water right. Without this protection, the public will not realize the benefits intended from the ACW program. Groundwater is no different. Until legislation is passed to enable the protection of the state's portion of saved water in the aquifer, we fear that an expansion of the ACW program to groundwater via rule would merely enable water spreading without any public benefit. Finally, the statutory language of the ACW program is clear in its contemplation of "instream" benefits; if we are to expand this program to groundwater, it should be done via legislation, not this rules advisory process.
- OAR-690-018-0050(5)(c)(D)(ii): As stated above, CTUIR requests that OWRD remove this section.
- OAR-690-018-0065: While CTUIR certainly benefits from the lack of requirements that the amount of water saved from a conservation project is verified by a third party or the agency, we remain concerned that this lack of measurement requirements can create the potential for the ACW program to be abused. Because so few of our water diversions have metering in the first place, an absence of verification could lead to an applicant actually using more water after the completion of an ACW project than had been used pre-project. That defies the spirit of this program—to create a "new" water supply through conservation—and could unfairly deprive other water users of water to which they were legally entitled. Again, while we are loath to request additional administrative requirements (that we would have to follow ourselves as practitioners), the water resources of the state would be better off if there were additional attention given to the veracity of quantities claimed through the ACW program.
- OAR-690-018-0065(2)(c)(A): As stated above, CTUIR requests that OWRD remove this section.

Division 315 – Water Right Permit Extensions

- OAR-690-315-0040(5): CTUIR supports the proposed rule change, which clarifies that OWRD will deny extensions when a permit holder has used water and failed to demonstrate compliance with fish-related permit conditions that are required to be met before use began.

Division 17 – Cancellation of Perfected Water Rights

- OAR-690-017-0200: CTUIR supports the revised language and appreciates clarity provided in the proposed rule change.
- OAR-690-017-0400(4): With no current requirement to measure and report water use for more than 80% of the water rights in the state[1], remote sensing data sources play an important role in determining basin water budgets and supporting water planning. When it comes to managing our precious water resources, the agency must have the authority to utilize the best technology available to inform management. CTUIR strongly supports the proposed language in this subsection and the addition of relevant examples the agency may rely upon to initiate water right cancellation proceedings.

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

Sincerely,

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

[1] Oregon Water Resource Department. 2022. 2022 Legislative Report Water Use Measurement and Reporting. Water Resources Department : Legislatively Required Reports : Legislative and Budget : State of Oregon;

Feedback on Water Rights Rulemaking – Input (RAC 3, Oct 14, 2025)

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

Changes are in redline

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-018-0040(1)	Grammer (should be plural)	**(1) The name of the applicant(s), mailing address(es), email address(es) (if available), and telephone number(s);**
690-018-0050(1)(b)	Consistency	Division 18, 310, and 315 all have slightly different variation as written (**Div 310: unless the recipient has requested mailing, Div 315: unless the applicant has requested mailing or other sending in written form, Div 18: unless the recipient has requested that the notice be sent by regular mail**) I am proposing that the same language be used throughout all divisions.
690-018-0050(7)	Consistency	**"In addition to any other authority the Department may have"** Other references call out WRD as "Department"
690-310-0020(1)	**Specificity**	**"or any land within the proposed place of use"** specifying that the POU is only proposed.
690-310-0040(1)(a)(F)	**Specificity**	**"or any land within the proposed place of use"** specifying that the POU is only proposed.
690-310-0040(1)(a)(M)	**Specificity. I believe there should be examples of what constitutes acceptable evidence that the department will accept (screenshot of Oregon SOS business registry, etc)**	**,and evidence of signatory authority or a signed statement that such authority exists;**
690-310-0130(2)(b)	Consistency	**The Department shall presume that a…** Other references call out WRD as "Department"
690-310-0130(3)	Consistency	**(4) of this section, the ~~Water Resources Department~~ Department may…** Other references call out WRD as "Department"
690-310-0130(3)	Consistency	**appropriate groundwater in a groundwater quality management area declared…** groundwater is referenced as one word in other sections

690-310-0150(2)(b)	Consistency	**if the application is to appropriate groundwater for group domestic use expanded for a public water system located in a groundwater…** groundwater is referenced as one word in other sections

HARTT Laura A * WRD

From: RATCLIFFE Katie S * WRD
Sent: Friday, October 24, 2025 3:42 PM
To: Branden Pursinger; RANCIER Racquel R * WRD
Cc: HARTT Laura A * WRD
Subject: RE: Land Use section in RAC process

Hi Branden,
Happy Friday. I hope your week has gone well. You previously asked if the following is correct:

OWRD no longer will view a receipt from the local government having the land use information form as sufficient, OWRD wants a completed application and the local government needs to complete the document for the applicant to then submit to OWRD to consider the application for water right.

Our overarching objectives with proposing rule changes related to land use are to 1) comply with our state agency obligations under ORS 197.180; 2) streamline water right transaction processes by making sure we have the necessary information upfront to process an application; and 3) address concerns raised by the Rulemaking Advisory Committee, to the extent any further changes are consistent with the first two objectives.

The receipt does not provide us with the information we need for the first objective, so it would also undermine the second objective. The receipt only tells us that the applicant asked the county/city to fill out the form – it doesn't actually provide us any information about compatibility with the acknowledged comprehensive plan.

We fully agree that the Land Use Information Form is *not* the formal land use determination by the county or city, and intend to look at the form to see if a disclaimer is needed to make that clear to applicants. We're also open to suggestions you may have about the form, and appreciate your input.

Have a great weekend!

Katie

Katie Ratcliffe
Water Right Services Division Administrator
Oregon Water Resources Department
Phone: 971-338-8105 (work cell)
katie.s.ratcliffe@water.oregon.gov

From: RATCLIFFE Katie S * WRD <katie.s.ratcliffe@water.oregon.gov>
Sent: Friday, October 17, 2025 5:08 PM
To: Branden Pursinger <bpursinger@oregoncounties.org>; RANCIER Racquel R * WRD <Racquel.R.RANCIER@water.oregon.gov>
Subject: RE: Land Use section in RAC process

Hi Branden,
Thank you for your email. We'll put together a more thorough response, but I wanted to let you know that we received your email and have a quick answer to one of your questions. You asked how many receipts instead of completed forms come in. Our customer service representative who handles intake of new water right applications said that in the 3.5

years she's worked at OWRD, she's seen 1 or 2 a year at the very most. In other words, in recent years the circumstances where folks have submitted only a receipt have been rare. I suspect this was more common in the past.

My understanding is that if we ever allowed receipts for transfer applications (and I'm not sure if we ever did), that would have been prior to 1990.

We look forward to providing you with more information and seeing you at the RAC meeting.

Katie

Katie Ratcliffe
Water Right Services Division Administrator
Oregon Water Resources Department
Phone: 971-338-8105 (work cell)
katie.s.ratcliffe@water.oregon.gov

From: Branden Pursinger <bpursinger@oregoncounties.org>
Sent: Friday, October 17, 2025 10:08 AM
To: RANCIER Racquel R * WRD <Racquel.R.RANCIER@water.oregon.gov>; RATCLIFFE Katie S * WRD <katie.s.ratcliffe@water.oregon.gov>
Subject: Land Use section in RAC process

Racquel and Katie,

I wanted to put in writing my understanding of the intent of the land use piece in the recent division RAC conversations (and my subsequent followup after mtg. 4).

The understanding I have based on the follow up conversation is:

OWRD no longer will view a receipt from the local government having the land use information form as sufficient, OWRD wants a completed application and the local government needs to complete the document for the applicant to then submit to OWRD to consider the application for water right.

Is this correct?

The issue with the proposed language as drafted is that a Land Use Information Form should follow the same process as a Land Use Compatibility Statement. The language as drafted would likely create a land use decision and that is not the function of the form.

Assuming the statement on intent (in italics above) is the end goal, LOC and AOC will write a simple sentence or two for replacement that works for our land use offices and essentially will get at that intended language (complete the form, receipt is no longer sufficient). I am sure you know, but just in case, a land use information form, like other agency LUCs (Land Use Compatibility forms), are not appealable and are not land use decisions. Completing a LUCS is not LUBA appealable. It is simply saying that, yes the applicant's desire is compliant with our existing comp plans.

Local Government Planning Departments should not weigh in on the merits of a water right application, simply provide the information to you that you need to make said decisions.

Out of curiosity, do you know how many receipts instead of completed forms come in?

Branden
--
Branden Pursinger
Legislative Affairs Manager
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HARTT Laura A * WRD

From: Christopher Hall <chris@waterleague.org>
Sent: Thursday, October 30, 2025 5:54 PM
To: RANCIER Racquel R * WRD; RATCLIFFE Katie S * WRD; HARTT Laura A * WRD
Subject: Follow up about instream also meaning "in-ground"

Hi Racquelle, Katie, and Laura,

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 (14~~2~~), which currently states:

> "Instream" as defined in ORS 537.332, means within the natural stream channel or lake bed or place where water naturally flows or occurs.

I cited the OWRD position as it relates to the 2025 IWRS, which states on page 2, which states [**emphasis added**]:

> Instream" as defined in ORS 537.332 "means within the natural stream channel or lakebed **or place where water naturally flows or occurs.**"
>
> "Out-of-Stream" – water withdrawn or diverted from **a groundwater** or surface water source for a beneficial use.

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:

> "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)."

Water League did not reprise the point in our extensive set of comments on the 2025 IWRS draft because we concluded that OWRD staff sufficiently addressed the topic in the 2024 draft comment responses. The 2025 IWRS contains the same information as the 2024 draft regarding this matter.

In the IWRS, the OWRD interprets instream to include groundwater, and unambiguously states that Out-of-Stream" also means groundwater. Therefore, when discussing the definition of "instream" in the Division 77 rules, I am suggesting that OWRD update its definition of "instream" to include groundwater so that there is no question that groundwater is an inextricable hydrologic fact impacting and relating to much of the circumstances associated with the Division 77 rules.

Instream water rights are held in trust by the Department "for the benefit of the people of the state." Because that trust duty applies to all waters of the state, the protection of groundwater as part of instream public uses follows logically and hydrologically. Many instream purposes, such as sustaining

aquatic life, water quality, and pollution abatement, depend directly on groundwater contributions, especially base flows.

As with all administrative rules, definitions are not bound to be verbatim copies of the statute, and a clarification of the statutory definition is what these rules can do. We will continue to look into the many ways groundwater and surface water interact as one system to provide more details about how this definition may assist state agencies in their efforts to hold water and instream water rights in trust.

Thank you,

Christopher Hall
Executive Director
Water League
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Cave Junction, OR 97523
(541) 415-8010
www.waterleague.org

DESCHUTES RIVER
CONSERVANCY

October 31, 2025

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

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

Re: 2025-2026 Water Rights Rules Advisory Committee, Divisions 17, 18, 310, and 315

Ms. Hartt:

Thank you for the opportunity to participate in Rule updates and for our seat on the Rules Advisory Committee (RAC). We would like to recognize the hard work of the OWRD staff on this extensive rulemaking. We are relying on RAC meeting comments for multiple divisions and are providing additional comments here.

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

The Deschutes Basin has a long history of collaborative success with the DRC, partners and stakeholders. We completed a data-rich Upper Deschutes River Basin Study which was succeeded by the Deschutes Basin Water Collaborative, and a group of 46 stakeholders are currently working to use Basin Study information to develop a comprehensive Deschutes Basin Water Plan that prioritizes integrated implementation strategies. We believe we are on track to be a model for how we can solve water issues for rivers, aquifers and communities at the basin level through close collaboration.

We utilized the Departments feedback forms for the Water Rights Rulemaking RAC 3 and RAC 4 sessions. These forms follow and are organized by the Division number reviewed.

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

With sincere appreciation,

Genevieve Hubert
Senior Program Manager
Deschutes River Conservancy

E-mail: gen@deschutesriver.org

Feedback on Water Rights Rulemaking – Input (RAC 3, Div 18, 310, & 315 Oct 14, 2025)

RAC Member Name: Genevieve Hubert, Deschutes River Conservancy

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
DIVISION 18		
690-018-0025(1)	When the Department receives an application for allocation of conserved water, the **Director** shall: Is this something the Director does or should this be the **Department** shall?	Consider changing Director to Department if this is not a Director duty.
690-018-0040(22)(b)	Statute does not direct notifications of local governments along a reach and this is not a requirement for out of stream uses, only for instream and as such, is an inequitable additional requirement. This also time consuming for the applicants.	Propose removal of this as a *requirement* or confine to notifying only Tribal entities along a reach.
690-018-0040(25)	We oppose the change from "shall" to "may" waive the application fee (not to exceed 50%). Allocations of conserved water to instream are one of several tools to return water to streams which are significantly over-allocated. These projects serve a public benefit and rely on extensive public funding. Fees should not be a deterrent to protecting the water instream.	These projects serve a public interest and rely on extensive public funding. Retain the "shall waive." The rule already states that if the applicant puts less than 50% instream, the waiver can be less than 50%. As an alternative – the Department could use "shall" waive 50% of the fee when 50% to100% of water conserved is dedicated to instream protection and "may" waive up to 50% of the fee if less than 50% of the conserved water is dedicated instream.
690-018-0050(5)(a)(B) and 690-018-0050(5)(b)(B)	The original certificate is not always canceled. Districts with a lot of water right activity have "living certificates" with a new superseding certificate issued periodically.	Propose - … the cancelation or partial cancelation of the original water right certificate or living certificate. Not sure if living certificate would need to be added to definitions.

		This might also lead to an update in (a)(C) and in (b)(B) and (c) to recognize living certificates.
690-018-0050(5)(c)(C)(i) and (D)(i)(ii) Groundwater conservation is also mentioned in 690-018-0065(2)(c)(A) and (3)(b)	DRC strongly supports all water conservation efforts. However, this does not seem to follow the intent of Division 18. With new groundwater allocation rules and low availability of groundwater in many basins, how will it be assured that the conserved groundwater is not withdrawn/pumped by another water user or won't result in another water user pumping water that may not have been available prior to the conservation? If the groundwater conservation cannot improve aquifer conditions, it should not be included for allocations of conserved water.	Unless there is a way to protect the conserved groundwater in the aquifer, there would or may be no public benefit or improvement of the status of the aquifer. Consider removing groundwater conservation from Division 18 unless or until methods are established to protect the conserved water from further withdrawal.
690-018-0050(6)	Is certified/registered mail the only way for the applicant to receive the proposed final order? Can the applicant also receive the PFO via electronic mail service? Emails can be sent with confirmation requests.	If the PFO can be sent to applicant via postal service *and/or* electronically, add electronic mail with a read receipt, delivery receipt, or applicants' response to the Department email.
690-018-0062(1)(a)	Not all water rights are canceled with an allocation of conserved water, some are living certificates with reductions tracked and superseding certificates issued periodically	Consider revising to cancellation or partial cancellation of the original water right certificate or living certificate. A definition may be needed to describe living certificates.
690-018-0065	The Deschutes Basin benefits from extensive gaging and measurement ability. Measurement and management is important	Consider metering/measurement and verification.

	to the success of this program in the Deschutes. However, other basins may not be so fortunate. Metering, measurement and verification are key components to ensure the conserved water serves its intended purpose and does not result in enlargement. This may include third party or agency verification of the amount of water saved.	
690-018-0065 (2)(c)(A) and (3)(b)	Remove groundwater references until a method to protect the conserved groundwater is determined.	
DIVISION 310		
690-310-0040(1)(a)(L)	There was extensive discussion over Land Use and comprehensive plans during the meeting. OWRD was going to revisit this one. Statewide planning goals are sometimes in conflict. We will wait for any updated language to review.	
690-310-0040(1)(c)(a)	Concerned with the wording of" less than 9.2 acre-feet of water **or** with a dam less than 10 feet in height." Depending on location and width, a dam less than 10 feet could hold back a significant volume of water where additional info is useful.	If a dam less than 10 feet is holding back more than 9.2 acre-feet of water - width and crest width could be important safety information.
DIVISION 315		
690-315-0020(1) And additional places where Group Domestic permit extensions are addressed.	General concerns with limiting extensions of group domestic water rights while not considering how much of the group domestic service	Understanding that legislation is guiding this update, consider looking at how much of a group domestic has been developed (%) for extension eligibility/terms to reduce speculative water rights and include the ability to incorporate/consider

	area has been developed. Group domestic water rights have measurement and reporting requirements. Development may still occur on the undeveloped parcels within a group domestic service area, but that development may shift to a new well and with exempt use. Economic downturns can have a dramatic impact on development over multiple years and there is no consideration for this.	economic downturns that stall development (and building of much needed housing) into the decision.
690-315-0040(5)	Support the clarification in this rule – to demonstrate compliance with fish-related permit conditions before use of water.	
690-315-0090(1) And additional places where Quasi Municipal permits are addressed.	General concerns with quasi municipal (QM) differentiation while understanding that part of the intent here may be to limit speculative water rights. In central Oregon (and maybe in other areas of the state), some quasi-municipal water providers have contracted service areas with municipalities (Avion Water's relationship with City of Bend for example). The city and developers control permitting and buildout of service areas. This is not within control of the QM while the QM still must provide service or future service to these areas. In addition, a QM has a complicated association with the Public Utilities Commission and may not	Understanding that legislation is guiding this update, consider revisiting this. Consider some accommodating language for QM's closely linked to municipal territories and supplying long established and growing communities. Include an ability to incorporate/consider economic downturns that stall development (and building of much needed housing).

	be able to make decisions as quickly as a municipal entity. Economic downturns can also have a significant impact on how quickly an area can be built out or how long development may be stalled.	

Feedback on Water Rights Rulemaking – Input (RAC 4, Division 17, Oct 15, 2025 - AM), Division 380 input to be submitted 11/05/2025.

RAC Member Name: Genevieve Hubert, Deschutes River Conservancy

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
DIVISION 17		
690-017-0200(a)	Support updated language	
690-017-0400(4)	Support the addition of aerial imagery, evapo-transpiration data, or other relevant evidence.	
DIVISION 380		
Comments to be submitted 11/05/2025		

DESCHUTES RIVER
CONSERVANCY

November 5, 2025

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

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

Re: 2025-2026 Water Rights Rules Advisory Committee, Divisions 380 and 382

Ms. Hartt:

Thank you for the opportunity to participate in Rule updates and for our seat on the Rules Advisory Committee (RAC). We would like to recognize the hard work of the OWRD staff on this extensive rulemaking. We are relying on RAC meeting comments for multiple divisions and are providing additional comments here.

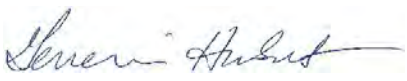
The Deschutes River Conservancy (DRC) restores streamflow and improves water quality in the Deschutes Basin using a coordinated, collaborative, and voluntary approach. Founded in 1996 as a consensus-based, multi-stakeholder organization, the DRC's Board of Directors includes diverse representation from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

The Deschutes Basin has a long history of collaborative success with the DRC, partners and stakeholders. We completed a data-rich Upper Deschutes River Basin Study which was succeeded by the Deschutes Basin Water Collaborative, and a group of 46 stakeholders are currently working to use Basin Study information to develop a comprehensive Deschutes Basin Water Plan that prioritizes integrated implementation strategies. We believe we are on track to be a model for how we can solve water issues for rivers, aquifers and communities at the basin level through close collaboration.

We utilized the Departments feedback forms for the Water Rights Rulemaking RAC 5 session. The form follows this cover letter. No comments are provided beyond any provided at the RAC meeting for Division 382. DRC may provide further comments after revisions are completed and available for review.

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

With sincere appreciation,



Genevieve Hubert
Senior Program Manager
Deschutes River Conservancy

E-mail: gen@deschutesriver.org

Feedback on Water Rights Rulemaking – Input (RAC 5, Division 380, Oct 21, 2025 - AM), Division 380 input to be submitted 11/05/2025.

RAC Member Name: Genevieve Hubert, Deschutes River Conservancy

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
DIVISION 380		
690-380-0100(2) & (3) and 690-380-4000(3)(d)&(e)	Injury and enlargement review and losses through a reach for instream transfers are very thoroughly outlined in 690-077-0075(3) but are not outlined for a change in POD for water users. Instream has more stringent measurement requirements and reach loss tracking. These should be the same for both instream and POD transfers.	Consider that injury and enlargement reviews and reach loss reviews should be consistent for transfers under Division 380 and Division 77.
690-380-2110(3) and 690-380-2120((5)(b)	Support the addition of (3) and the language clarifying OWRD's ability to condition a water right transfer to protect against injury and enlargement that may occur. As discussed in the RAC, also support removing "the potential for".	This should be evident with "that may occur".
690-380-2120(2)(c)	Support the language added that references instream water rights granted under ORS 537.336 or 537.346. Propose adding language to cover all types of instream water rights.	The language should also cover instream water from instream transfers/leases ORS 537.348 and allocations of conserved water ORS 537.470-500 which often replace a portion of a more junior state instream water right granted under 537.336 or 537.346.
690-380-2120(3)(a)(E)	This should not be limited to instream water rights created by just ORS 537.336 or 537.346. The language "upstream into or	Include all instream water rights, including those created under ORS 537.348 and 537.470-500. Propose clarifying the reach so it does not read as potentially limited to upstream

	through" could be a bit more clearly stated.	transfers. This might be achieved by flipping the language to "into a reach, through a reach, or upstream".
690-380-2120(5)(a)	Suggest the condition to comply with fish screen requirements be more clearly stated.	Reference compliance with ORS 509.585.
690-380-2200(1)	Support language added that clarifies current practices.	
690-380-2240	Support the modifications that clarify notifications regarding layered water rights.	
690-380-2330(2)		Suggest including "or injury" after enlargement per ORS 540.524(2)
690-380-3000(8) generally and (8)(b)	Support additional clarifying language.	
690-380-3000(19)	There might be a local land use development code that allows the change outright. Missed this before for Division 18, but some county land use codes (e.g. Deschutes) allow piping outright and they may allow other changes outright as described in county land use codes as well.	Add clarifying language that may include listing a local land use code identifying that the use or activity is allowed outright.
690-380-4000(3)(f)	This is very broad. Suggest restricting additional requirements as those set by applicable laws.	Any other requirements as set forth in applicable law for water right transfers are met. Or something that clarifies.
690-380-4000(8)(b), 690-380-5030 and 690-380-5050	Some instream water rights requested under 537.336 are then replaced by more senior water from transfer 537.348 or conservation 537.470-500 projects using public funds and with the expectation that the water will remain permanently instream to benefit fish and wildlife. These instream rights are held in trust by the state.	Interested in assurance that there is no grey area where consent to injury of an instream water right would/could also apply to those created under 537.348 or 537-4700-500. Clarify the authority to not consent to the injury of the instream right.

690-380-5000(1)(c)	Support addition. Should this also include rights that may be under forfeiture proceedings?	
690-380-5100(3)	Support deletion.	

CENTRAL OREGON LANDWATCH

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October 31, 2025

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

Re: 2025-2026 Water Rights Rulemaking Rules Advisory Committee - Divisions 310, 18, 315, 17 & 380 Comments

To whom it may concern,

Central Oregon LandWatch ("LandWatch") provides these initial comments in writing following the 2025-2026 Water Rights Rulemaking Rules Advisory Committee ("RAC") meetings 3, 4 & 5 on October 14th, 15th, and 21st, 2025.

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

These comments are focused on the proposed rule changes for OAR Chapter 690 Divisions 310, 18, 315, 17, & 380. LandWatch also provides overarching feedback regarding land use considerations in the draft rules.

I. Department of Land Conservation and Development Participation in the RAC Process

LandWatch supports the goal of increasing coordination across state agencies on the intersection of land use and water use and appreciate the Oregon Water Resource Department's ("OWRD") attention to this topic throughout the rulemaking process. However, we are concerned that the Department of Land Conservation and Development ("DLCD") has not been part of the RAC process.

Similar to other state agency partners that are participating in the RAC process (i.e. Office of Administrative Hearings, Department of Fish and Wildlife, and Department of Environmental Quality), DLCD should be included in RAC discussions, providing guidance and input on the proposed draft rules.

Nearly all rule divisions included in this rulemaking process have proposed rule changes related to land use. The absence of DLCD is a missed opportunity to involve the state agency charged with overseeing Oregon's statewide land use planning program. Our state land use system is unique in the country for how it prioritizes farm and forest uses in rural areas, while directing population growth inside cities' urban growth boundaries. Among others, this rulemaking provides an important opportunity for the two agencies to grapple with questions related to the sequencing of water right decision-making and land use decision-making, how water permitting might better align with the goals of the land use system, and overall improving how these two areas of regulation interact. As such, we strongly recommend that OWRD solicit DLCD's input as part of the RAC process.

II. OAR 690-310

OAR 690-310-0040(1)(a)(L)

The proposed rule language would amend the application requirements for a permit to appropriate water concerning the required compliance with local land use regulations required by ORS 197.180.

ORS 197.180(1) requires that "state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use: (a) In compliance with the goals, rules implementing the goals and rules implementing this section; and (b) In a manner compatible with acknowledged comprehensive plans and land use regulations."

Proposed OAR 690-310-0040(1)(a)(L) would amend the existing rule language to require "A Land Use Information Form completed by the affected local government with information sufficient to assess compatibility with the acknowledged comprehensive plan" as part of a water permit application.

The proposed language does not adequately ensure the Department will "take actions" "in a manner compatible with acknowledged comprehensive plans and land use regulations" as required by ORS 197.180(1) for the following two reasons.

1. The proposed amendment omits the critical language "and land use regulations." Comprehensive plans are guiding policy documents, but their language is often vague or aspirational, often including language like "The County should do…" or "Seek opportunities to do…" or "Support efforts to do…" More regulatory local land use law is

most often found in other local land use regulations, usually a local zoning code or local development code. It is critical that proposed OAR 690-310-0040(1)(a)(L) add the language "local land use regulations" in addition to "acknowledged comprehensive plans[s]" in order to ensure that proposed water permits are reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1).

2. The proposed amendment would ask Department staff to "assess compatibility with the acknowledged comprehensive plan." This is not an appropriate role for OWRD staff. Local governments have exclusive jurisdiction over determining the compliance of proposed land use actions with local comprehensive plans and land use regulations, with review jurisdiction vested in the Land Conservation and Development Commission ("LCDC") and the Land Use Board of Appeals ("LUBA"). *See* ORS 215.416 – 427 (describing local land use decisional procedures); ORS 197.610 – 627 (describing review of certain local land use decisions by LCDC); ORS 197.805 – 860 (describing review of local land use decisions by LUBA and the Courts). More practically, OWRD staff are not appropriately prepared to assess compatibility of a proposed water use with local land use regulations. Internal OWRD review procedures will not ensure the fulfillment of the substantial procedural rights afforded to participants in local land use proceedings under ORS 197.797. And OWRD staff will not be familiar with the substance and procedure of the state and local land use regulations that must be applied in order to determine whether a proposed development that requires a water permit will be compatible with those land use regulations.

Instead, and to comply with ORS 197.180(1), the proposed amendments should require a final land use decision from a local government before issuing a permit to appropriate water. If two separate land use decision processes are running concurrently, one through the local government and one through OWRD review, much confusion and the potential for conflicting determinations are likely to result. OWRD should not issue water permits until local land use review for a proposed use that requires a water permit is complete.

Alternatively, and as a middle ground, the proposed rules should require the local government to determine whether the proposed use is allowed outright by the local land use regulations, or whether the proposed use is conditionally allowed or requires some other discretionary land use review. If the use is allowed outright, then OWRD should process the water permit application. If the use is conditionally allowed or requires discretionary land use review, then OWRD should wait for a final land use decision, and for any appeals to LCDC or LUBA to be resolved, before processing the water permit application.

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OAR 690-310-0270(2)(d)
The proposed rule language would add a reason for the Director to extend the 180-day application review period for an applicant to "Complete the administrative appeal period for a land use approval that has already been obtained, and the extension does not exceed one year."

This proposed rule language is problematic for several reasons:

1. The proposed rule concerns "administrative appeal" periods, but land use appeals often include both administrative and judicial appeals. *See* ORS 197.850 (outlining procedure to appeal a decision from LUBA to the Oregon Court of Appeals).

2. Using the language "a land use approval that has already been obtained," misunderstands when a land use approval is final. Many local land use decisions are not final until appeals are resolved. *See* ORS 197.625(1)(b) (concerning the effect of appeal on post-acknowledgment plan amendment decisions); ORS 197.845 (concerning stays of local land use decisions pending appeal at LUBA). Thus, a land use approval has not been "obtained" until all appeals are resolved.

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

4. In the event a water permit review period is extended due to a land use appeals process, the review period should be extended for as long as it takes for the land use appeal to resolve. This could be longer than the proposed one year. In line with our comments on OAR 690-310-0040(1)(a)(L), above, OWRD should not process a water permit application until final land use approval, including the resolution of any appeals, is complete.

III. OAR 690-315

OAR-690-315-0040(5)

LandWatch supports the rule change proposed, making clear that OWRD will deny extensions when a permit holder has used water and failed to demonstrate compliance with fish-related permit conditions that are required to be met before use began.

IV. OAR 690-018

OAR-690-018-0040(22)(a)

See LandWatch's comments above on OAR 690-310-0040(1)(a)(L) and OAR 690-310-0270(2)(d). OWRD should add the language "local land use regulations" in addition to "acknowledge comprehensive plans" in order to ensure that the proposed allocation of conserved water is reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1). Further, if applicable, OWRD should require land use approval from local government before approving the proposed allocation of conserved water.

OAR-690-018-0040(22)(b)

LandWatch recommends that OWRD remove this section. It is not clear why this rule requirement is needed.

OAR-690-018-0050(3)(c)

See LandWatch's comments above on OAR 690-310-0040(1)(a)(L) and OAR 690-310-0270(2)(d). OWRD should add the language "local land use regulations" in addition to "acknowledge comprehensive plans" in order to ensure that the proposed allocation of conserved water is reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1). Further, if applicable, OWRD should require land use approval from local government before approving the proposed allocation of conserved water.

OAR-690-018-0050(5)(c)(C)(i)

OWRD shared during the RAC meeting that if a groundwater right goes through the ACW program, the state's portion of conserved water is just left in the aquifer without protections. Without a mechanism in place to protect the state's portion of the groundwater right, LandWatch

strongly recommends that OWRD remove all proposed rules related to groundwater projects in Div 18.

OAR-690-018-0050(5)(c)(D)(ii)

As stated above, LandWatch recommends that OWRD remove this section. Without a mechanism in place to protect the state's portion of the groundwater right, LandWatch strongly recommends that OWRD remove all proposed rules related to groundwater projects in Div 18.

OAR-690-018-0065(2)(c)(A)

As stated above in our comments on OAR 690-18-0050, LandWatch recommends that OWRD remove this section. Without a mechanism in place to protect the state's portion of the groundwater right, LandWatch strongly recommends that OWRD remove all proposed rules related to groundwater projects in Div 18.

OAR-690-018-0065(3)(b)

As stated above in our comments on OAR 690-18-0050, LandWatch recommends that OWRD remove this section. Without a mechanism in place to protect the state's portion of the groundwater right, LandWatch strongly recommends that OWRD remove all proposed rules related to groundwater projects in Div 18.

OAR-690-018-0090(2)(c)

See LandWatch's comments above on OAR 690-310-0040(1)(a)(L). OWRD should add the language "local land use regulations" in addition to "acknowledge comprehensive plans" in order to ensure that proposed water permits are reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1).

V. OAR-690-017

OAR-690-017-0200

LandWatch supports the updated language and appreciates clarity provided in the proposed rule language.

OAR-690-017-0400(4)

The Department should have the authority to utilize the best technology available to inform management. LandWatch supports the proposed draft language in this subsection and the addition of relevant examples of evidence the Department may rely on to initiate cancellation proceedings. With no current requirement to measure and report water use for more than 80% of the water rights in the state, remote sensing data sources can play an important role in determining basin water budgets and supporting water management and planning activities. [1] [2]

OAR-690-01-0600(4)
LandWatch supports the updated language in the proposed rule language.

VI. OAR-690-380

OAR-690-380-2120

LandWatch does not support including points of appropriation to reflect historic use in this rule section. While we recognize that the existing rule includes language related to point of appropriation, this language is not supported by statute. For example, ORS 540.532 does not use the term "appropriation." Further ORS 540.532(3) – ORS 540.532(6) relates to OWRD's obligation to consult with ODFW on fish screening or bypass devices on surface waters. No analogous consultation provisions related to points of appropriation or groundwater are discussed.

We recognize that this rule change is being driven in part by the Department's current practices. However, given the inconsistency with current statute, we recommend that references to point of appropriation be removed from this rule section.

OAR-690-380-3000(8)

LandWatch supports the proposed rule language requiring applications to provide information regarding fish screens and passage at the proposed point of diversion.

[1] Oregon Water Resource Department. 2022. 2022 Legislative Report Water Use Measurement and Reporting. Water Resources Department : Legislatively Required Reports : Legislative and Budget : State of Oregon;
[2] Huntington et al. 2025. Crop evapotranspiration, consumptive use, and open water evaporation for Oregon. Desert Research Institute. Pub no. 41306

OAR-690-380-3000(19)

Like draft language in other divisions the RAC has considered, this rule imposes a similar requirement for compatibility between the proposed water transfer and the local land use regulations. See LandWatch's comments above on OAR 690-310-0040(1)(a)(L) and OAR 690-310-0270(2)(d). OWRD should add the language "local land use regulations" in addition to "acknowledge comprehensive plans" in order to ensure that proposed water permits are reviewed for compliance with all relevant local land use regulations, as required by ORS 197.180(1). Further, if applicable, OWRD should require land use approval from local government before approving the proposed transfer.

This rule, however, also includes an exception to that requirement for transfers that meet four specified criteria. While LandWatch recognizes that this exception exists in the current rules, we nonetheless question its merits.

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

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

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

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

OAR-690-380-5100

LandWatch supports this provision.

OAR-690-380-3000-7100(14)

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

OAR-690-380-8003

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

VII. Conclusion

As noted in Section 1, *supra*, we strongly recommend that DLCD be included in this rulemaking to ensure proper conformance and alignment between the state's land use system and OWRD's rules. Thank you for considering these comments and please do not hesitate to reach out if you have any questions.

Sincerely,

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

Oregon Environmental Council

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Portland, OR 97239
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November 3, 2025

To: Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301

Re: 2025-26 Water Rights Rulemaking Rules Advisory Committee, Comments on Divisions 17, 18, 310

From: Karen Lewotsky
Water Program Director & Rural Partnerships Lead
Oregon Environmental Council

Oregon Environmental Council submits these comments as a member of the 2025-26 Water Rights Rulemaking Rules Advisory Committee. Founded in 1968, the Oregon Environmental Council (OEC) is a nonprofit, nonpartisan, membership-based organization. We advance innovative, collaborative and equitable solutions to Oregon's environmental challenges for today and future generations

These comments call out specific proposed language that OEC supports or opposes in the following Divisions.

Division 17

OEC supports the proposed changes to rules language as put forward by the Department in 690-017-0400(2)(i) and 690-017-044(4). These changes allow for the use of modern technology to provide evidence for the Department to use in making its determinations related to cancellation of perfected water rights. We also support proposed changes to 690-017-0600(4), which will increase efficiencies in the process.

Division 18

OEC strongly opposes proposed language in 690-018-0050-(5)(c)(C)(i) and (D)(i)(ii). Groundwater should not be included in Division 18 rules. Expanding conserved water projects to groundwater by rule without assurances provided by legislation that the state will protect saved groundwater from subsequent withdrawals is not acceptable. Until such legislation is passed, the allocation of conserved water should be applied only to surface water.

OEC recommends removing 690-018-0040(22)(b), as there is no direction in statute requiring this and no clear need has been shown for requiring it in rule.

Division 310

OEC believes that Division 310 should retain the option for the Director to, at their discretion, decide whether or not to proceed to a contested case hearing in a specific situation.

We also support the suggestion that in 690-310-0030 OWRD add "knowingly making false statements on and application" to the list of grounds for refusing to issue and/or cancel a permit.

Thank you for the opportunity to comment and to participate in the RAC process. We will be summitting further comments on other sections of the rules.

Sincerely,

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

The Confederated Tribes of the Grand Ronde Community of Oregon

Office of Ceded Lands
9615 Grand Ronde Road
Grand Ronde, OR 97347

Phone (503) 879-1315

Date: November 4, 2025
From: Keri Morin Handaly, Environmental Policy Analyst
via email: laura.a.hartt@water.oregon.gov
To: Oregon Water Resources Department
Attn: Laura Hartt, Tribal Liaison & Rules Coordinator
CC: Stacia Hernandez, Tribal Council Chief of Staff
Bryan Langley, Interim General Manager
Colby Drake, Natural Resources Department Manager
Michael Karnosh, Ceded Lands Manager
Re: 2025-2026 Water Rights Rulemaking Advisory Committee (RAC) Comments

Dear OWRD RAC Staff:

The Confederated Tribes of Grand Ronde ("Grand Ronde" or "Tribe") is a sovereign nation made up of over 30 antecedent tribes and bands with homelands comprising 14 million acres of western Oregon from northern California to southern Washington. Implicit in the Tribe's seven ratified treaties is the Reserved Rights Doctrine, which holds that rights are reserved unless expressly given up. This includes clean cold water in rivers sufficient to support fish and other wildlife as they existed in 1855.

Water, access to First Foods, and expression of cultural lifeways are sacred to the Tribe. As such this rulemaking is just one small portion of necessary changes to Oregon Water Rights Statute and Rules necessary to modernize OWRD's recordkeeping, processes, and reviews that will result in sufficient protection of instream water rights to ensure successful salmon migration, spawning, and rearing with the intent to prevent extinction.

Overall, Grand Ronde supports statute and rule changes that result in stronger environmental reviews that provide instream water rights, especially in portions of the state where water is overallocated, and in creating additional incentives to do so.

Respectfully, the Tribe submits these comments for your consideration regarding RAC meetings on Oct 14th and 15th and notes there may be variety of ways to interpret concepts, and that the Tribes interpretation may not be the same as OWRD staff.

Division 18 Allocation of Conserved Water

The Tribe supports strong recordkeeping and system modernization to ensure accurate tracking within the Allocation of Conserved Water (ACW) program both in stream and in the ground. **The Tribe notes the potential for unintentional expansion of use or abuse due to lack of measurement or audits.**

-0040 Application Requirements (22) (b)
Requiring applicants to notify affected local governments along the stream reach of the intent to allocate 100% of conserved water to an instream water right. **The Tribe disagrees with the addition of this requirement. It is overly burdensome to the applicant and is not required by statute.** OWRD has procedures for digital notifications to interested agencies or groups that are satisfactory for this purpose. (25) Changes the existing rule from "shall waive" to "may waive" fees to be consistent with the statute language. The Tribe understands the goal, but notes that **a generous fee waiver policy for creating an instream water right is important for correcting historic harms to Indigenous people from overextraction of water under Oregon's water right system despite being subsequent to Tribal Treaties and to the *Winters v. United States* Supreme Court ruling.**

-0050 Processing a Conservation Application (3) (c)
Requirement for OWRD to ensure that the local government comprehensive plan and land use classification is consistent to approve a proposed allocation of conserved water rights.
The Tribe's understanding of local comprehensive plans is that they are written to conform with the State's Land Use Goals. **We disagree that a local comprehensive plan should be able to prevent an allocation of conserved water to the State from being approved**, if this is the intent of this statement. If the goal is to ensure that the local government correct any land use classification conflicts, or that the local government becomes aware of the State's intent to enact a water right via the ACW program, then the language needs to be clarified.

-0065 Finalization of Conservation Project
The Tribe acknowledges OWRD's discussion during the RAC about ensuring that the process of finalization is clear and complete, and the original water right is officially terminated, but not before the process is complete, approved, and finalized. **This section requires additional consideration by OWRD to avoid confusion.**

Division 315 Water Right Permit Extensions

The Tribe supports the inclusion of language that delineates reasons for denying an extension request to embrace transparency in decision making and to make it clear that failure to perform and complete fish related permit conditions will not be rewarded.

Division 17 Cancellation of Perfected Water Rights

-0010 Definitions (14) Rebuttable Presumption

The Tribe supports the inclusion of a legal standard "preponderance of the evidence" for clarity in this definition.

-0020 Watermaster Affidavit of Inability to Appropriate or Beneficially Use Water

The Tribe supports the language clarifying the Watermaster's role and ability to document claims as evidence that support cancellation of a permit or certificate of a water right.

-0400 Cancellation Initiated by Department (4)

Describes the evidence types that may be used to determine cancellation standards have been met. **The Tribe supports the inclusion of the language expanding the evidence descriptions** to include modernized technology and notes that the inclusion of "or other relevant evidence covering each year of the period of alleged nonuse" appears to broadly cover and allow for future technological approaches to understanding an unused/unexercised water right.

Once again, thank you for your work on this rulemaking and for the opportunity to participate in the Rulemaking Advisory Committee.

Sincerely,
Keri Morin Handaly, Environmental Policy Analyst
Office of Ceded Lands
Confederated Tribes of Grand Ronde

HARTT Laura A * WRD

From: RANCIER Racquel R * WRD
Sent: Tuesday, October 21, 2025 1:14 PM
To: Kimberley Priestley; HARTT Laura A * WRD; RATCLIFFE Katie S * WRD
Subject: RE: petitions for party status

Thanks. We will take a look at it.

Racquel Rancier
Deputy Director, Strategy and Administration
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From: Kimberley Priestley <kjp@waterwatch.org>
Sent: Tuesday, October 21, 2025 11:53 AM
To: RANCIER Racquel R * WRD <racquel.r.rancier@water.oregon.gov>; HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>; RATCLIFFE Katie S * WRD <katie.s.ratcliffe@water.oregon.gov>
Subject: petitions for party status

Hey all,

In case my comments on the ties to Div 2(that it should tie to ORS 183 and OAR 137) weren't entirely clear, we are also suggesting that each time you say protests of and cc proceedings you add, specifically, "petitions for party status". Let me know if that does not make sense. This comes up throughout the rules, but don't want to mention each time.

Thanks! Kimberley

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Join WaterWatch to Protect and Restore Oregon's Rivers

HARTT Laura A * WRD

From: HARTT Laura A * WRD
Sent: Wednesday, October 22, 2025 9:24 AM
To: 'Kimberley Priestley'
Cc: RANCIER Racquel R * WRD; RATCLIFFE Katie S * WRD; JARAMILLO Lisa J * WRD
Subject: RE: meeting 1 summary, comments

Thanks Kim. Copying in the team, so they can see your concerns. We'll take another look and make a note of it.

From: Kimberley Priestley <kjp@waterwatch.org>
Sent: Wednesday, October 22, 2025 6:18 AM
To: HARTT Laura A * WRD <Laura.A.HARTT@water.oregon.gov>
Subject: RE: meeting 1 summary, comments

Actually, no need to wait. The section I was worried about is okay.

NOTE though, on limited licenses, I am concerned with OWRD reply that they will not fix the rule that is currently inconsistent with statute (regarding "same source"). This has real implications for water released from the Prineville Reservoir for NUID. The NUID LL is for stored water, so should be protected against live flow rights. This could also affect any LL for instream. This is a simple change, there should be no disagreement I would think since it affects both instream and out-of-stream interests (more out of stream than instream frankly).

From: HARTT Laura A * WRD <Laura.A.HARTT@water.oregon.gov>
Sent: Tuesday, October 21, 2025 12:36 PM
To: Kimberley Priestley <kjp@waterwatch.org>
Subject: Re: meeting 1 summary, comments

That's fine. Thx

From: Kimberley Priestley <kjp@waterwatch.org>
Sent: Tuesday, October 21, 2025 12:13:59 PM
To: HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>
Subject: meeting 1 summary, comments

Hey Laura,

I do have at least one comment, will get it to you today

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Join WaterWatch to Protect and Restore Oregon's Rivers

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

November 3, 2025

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

Re: Initial comments, **Draft OAR 690 Divisions 17, 18, 310 and 315**

Dear Laura,

Below are our initial comments on Div 17, 18, 310 and 315 by section.

Div 17, Cancellation of Perfected Water Rights

- **690-017-0200:** Support proposed changes. Note: the language in (2)(a) is found in ORS 540.660(1) and thus is appropriate for the rule (only noting as I believe there was some push back to this language in the meeting).
- **690-017-0400 (1)**: The proposed rule changes "would not likely be rebutted" to "would not be rebutted". This appears to cause a sequencing problem. Until cancellation proceedings commence, it is unclear how the state could determine, definitively, that it would be rebutted. We would suggest using "would not likely be rebutted". Other than this one point, we support the proposed rule changes to this section. That said, we do not support the suggestion made in the RAC meeting to change "evidence" to "preponderance of the evidence" as, while "preponderance of the evidence" will be the standard in any proceeding, by inserting it here it could potentially be used by opponents to challenge a cancellation proceeding before it even gets to the proceeding.
- **690-017-0400(2)(i)**: Strongly support the proposed rule language as presented in the 9/19/2025 version, especially the deletion of "the county tax" before "map" and addition of the language "or aerial imagery". We do not agree to the suggestion made by Ms. Rancier to insert "and" in response to user group opposition.
- **690- 017-0400(4):** Strongly support proposed language changes to this section, including but not limited to the addition of aerial imagery and evapo-transpiration data as named evidence that can be used to show non-use.
- **690-017-0400(5):** This section alters the current mandate that the OWRD "shall initiate a proceeding" to allow for either a proceeding or the closing of the matter. Notably, the OWRD can close the matter without stating any reasoning and/or providing an explanation as to why they have determined the water right was not cancelled. If the OWRD is proposing to removal language that directed a proceeding, there needs to a process to ensure that the decision is not arbitrary. This needs more discussion.

- **690-017-0600(4)**: Strongly support this new provision that provides for efficiencies in situations where cancellation is raised in a protest to a transfer.
- **690-017-0700(2)**: Giving the protestant and anyone asserting forfeiture not less than 10 days notice of a hearing is not nearly enough time. We would suggest at least 30 days.
- **690-017-0800(2):** OWRD should replace "rebuttles" with "grounds for rebuttle".

Div 18, Allocation of Conserved Water

- **690-018-0025(22)(b)**: We strongly oppose the provision directing the applicant to provide notice to each affected local government along the instream reach. This provision is inequitable in that it is only targeting ACW projects that propose to put all water instream, but not to other uses. This also seems to go against the notion of efficiency in processing. There is nothing in statute directing this, we urge you to remove this.
- **690-018-0050(1)(b):** It is unclear why the OWRD is proposing to delete "on the Department's weekly notice list". By expanding the way it has, OWRD now must determine who they think should get notice, then send notice. This is not only time consuming and burdensome but potentially opens the OWRD up for challenge if they fail to notice someone they should have.
- **690-018—public notice and comment:** While we appreciate that the rules provide notice of the application, there is no notice required in the weekly public notice of the IR and/or PFO. It appears that the only way for a non-applicant to get notice beyond the application is in section -0050(6) where a person who has notified the OWRD that they are interested in getting notice or they have commented on the application is given notice of the PFO (not the IR). While I appreciate that the statute says the OWRC "shall notify the applicant and any other person requesting notice, of the action the commission intends to take under subsection (3) of this section. Any person objecting to the proposed allocation may file a protest requesting a contested case hearing before the commission", I think there is an argument to be made that anyone who has signed up for the weekly public notice is in fact asking for notice of any and all water allocation and reallocation decisions before the agency. Moreover, the statute does not say that the OWRD can ONLY notice those who have specifically asked for notice, it just says that they have to provide it to those people. The more inclusive and transparent route would be to provide public notice and comment/protest opportunities at the IR and PFO stage. We suggest the OWRD add this.
- **690-018-0040(25)**: We oppose elimination of the mandatory fee waiver for specified conservation projects. Rules can provide more than the statute requires – OWRD has exercised discretion through existing rules to always waive fees in these circumstances and should continue to do so for specified projects serving public interests.
- **690-018-0050 (5)(c)(C)(i) and (D)(i)(ii) (groundwater):** We strongly oppose the expansion of conserved water projects to groundwater via rule. Unless legislation is passed to allow state protection of saved groundwater in the ground, then this new provision is simply allowing increased consumptive use (via water spreading) with no public benefit. The language of the

statute is very clear that public benefits of the ACW are "instream" benefits; groundwater was not contemplated at time of the law's passage.

- **690-018-0050(6):** As we have noted at every RAC meeting, all rule references to protests and contested cases should also include ORS 183 and OAR 137. And, in addition to mentioning "protests" and "contested case proceedings" the rules need to mention "petitions for party status". Again, this comment applies to nearly all rules the RAC is reviewing.
- **Accounting for conserved water**: We encourage OWRD to include language in this rule to ensure accountability, transparency and certainty that the full amount being paid for by public dollars is being returned instream, for example OWRD and/or third-party verification of the accounting of the amount of saved water.

Div 310 Water Right Application Processing

- **690-310-0030 Grounds for refusal to issue or cancellation of a permit:** We would request that the OWRD add to this list of grounds for refusing to issue and/or cancel a permit a section on "knowingly making false statements on an application". Additionally, in the application requirements the OWRD should require a sworn and notarized document to help ensure truthfulness by the applicant or any agent acting on the applicant's behalf. We are seeing increasing instances of applicants and their agents making false statements in water right/transfer applications, which not only is of great concern, but takes a lot of time and resources on the part of the state to sort through what is true and what is false and is generally unfair to all if decisions are made on false information The state should take steps, similar to what it does in this section when false statements are made as to easements, to ensure truthfulness to all aspects of an application. Furthermore, a false statement on an application should bar the applicant from reapplying and receiving a permit for that water use in the future. And finally, illegal use of water in a place of use proposed in an application and illegal use from a point of diversion or point of appropriation proposed in an application should be a bar to issuance of the permit. Illegal use should not be rewarded with permit issuance.
- **690-310-0040(1)(a)(L):** While we agree with the OWRD's intent as to purpose (stated at the meeting), which is to get the information they need to comply with ORS 197.180, the language provided does not appear to go as far as ORS 197.180. We would suggest the rule either mimic language from the statute and/or simply refer to the statutory cite. Importantly, the use must comply with land use provisions, it cannot be awaiting compliance in our read of the statute.
- **690-310-0040 (1) (c)(a) (page 5):** Strongly oppose the new language stating that if the dam is less than 10 feet or will store less that 9.2 af the applicant does not have to provide the dam width. The "or" in statute has allowed some mischief in practice, with reservoirs over 100,000 acres using preferences meant for small projects to avoid rigorous review. For the OWRD and the public to assess a project, plans should also include width and crest width.
- **690-310-0040(5):** please add "permanently" before the word "abandoned".
- **690-310-0070(2) and (4)**: it appears that there might be a sequencing issue with these two sections. It does not seem efficient to "endorse" the application if it is in an area that is

withdrawn and will have to be returned. Rather, if an area is withdrawn and the state cannot accept the application that should occur before any "endorsement". The overarching intent behind this particular statutory change was to reduce challenges to agency denials. Including an endorsement before returning the application might muddy the intent. While we appreciate the endorsement language is in statute, there is nothing prohibiting the state from doing the analysis in HB 3342 Section 14(3) before the endorsement step outlined in section 14(2). We would suggest that the order be switched so that the rules set forth a process for (1) determining completeness, (2) evaluating whether it is prohibited by HB 3342 Section 13(3) and (3) if YES it is prohibited the returning the application or if NO it is not prohibited then endorsing the application, recording it in the book and moving into the IR.

- **690-310-0070(1)**: Please return "by statute" into this section. We appreciate you want to reference the rules, but both are appropriate. There are in fact instances where a new water right would be prohibited by statute that is not captured by the rule referenced.
- **690-310-0080(2):** As discussed in the RAC, once the application file is closed it is permanently closed and no further action can be taken on it ever. We would suggest, given the questions on this at the RAC, that the OWRD insert the word "permanently" before the word "closed" for clarity's sake.
- **690-310-0100:** Please add language making clear that the OWRD must "consider comments". We have seen PFOs that do not even acknowledge that comments have been received let alone considered; it is a waste of the public's time to submit comments if the OWRD is not required to read and consider them. Discouraging comments in this way also puts the agency at a disadvantage because it may result in the agency being unaware of defects and concerns until the PFO/protest state. Additionally, urge language requiring supervisor review for comments that raise significant issues.
- **690-310-0120(7):** Please reverse the proposed deletion. As we read HB 3342, it retains the discretion of the director not to go to hearing if a protest does not raise significant disputes. By deleting this and essentially ensuring that any protest will result in a contested case (whether instream or out-of-stream), the agency is inviting frivolous protests to stall the process. This goes against the notion of "water right processing efficiencies".
- **690-310-0130(2)(b) and (3)**: Please insert the word "permanently" before "abandoned".
- **690-310-0160, proposed new subsection:** We encourage the OWRD to include language prohibiting ex parte communications after the close of the protest period; meaning that any communication (including those by elected officials) need to at least include all parties, and the ALJ if it's in contested case and referred.
- **690-310-0160(1):** As stated in the Div 2 rule comments and elsewhere, the language should incorporate ORS 183, OAR 137 and also specifically include the word "petition for party status" in all sections of rule related to protests and contested cases, including this section.
- **690-310-0160(2):** The rules should retain the Director discretion not to go to contested case hearing if substantive issues are not raised. The statute retains this discretion, so should the

rules. Absent that, the OWRD is inviting frivolous protests to stall the process (instream and out-of-stream), which is a huge waste of agency resources and time.

- **690-310-0190 (1) and (2), 690-310-0200 (1) and (2):** Again, we object to the removal of Director discretion of whether or not to go to hearing for the reasons stated previously.
- **690-310-0210:** If the OWRD modifies a PFO based on a protest without going to contested case hearing, they should re-notice the PFO. This should apply whether it is a third-party protest or an applicant protest. Applicant protests should not be granted more rights than third party protests.
- **690-310-0270 (2):** As a general matter, we support the OWRD putting time limitations on administrative holds. Administrative holds have been too often used to stall a final decision after OWRD relays a proposed denial to an applicant, which has allowed applicants to hold on to priority dates for years after a decision should have been made. That said, the extension to gather groundwater data seems unreasonably long and allows a hold for what should have been done before the application was filed. Similarly, we have questions about the land use exceptions.

Div 315 Water Right Permit Extensions. Note, these are initial comments, we do have additional comments we will provide in the near future. This section should also be cross referenced with the cancellation rules to ensure consistency.

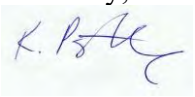
- **690-315-0010 new definition proposed "unexpired water right":** We urge the OWRD to add a definition (and substantive requirements throughout) to make crystal clear that only unexpired rights can apply for an extension. This would help ensure that permit holders do not apply for an extension of time years after expiration of existing time to develop.
- **690-315-0010 (1):** To align with DOJ advice (forwarded separately), sub (a) should read:
    - (a) For permits issued pursuant to ORS 537.248(1) after July 5, 1995, to begin actional construction, complete construction or complete perfection pursuant to ORS 537.248(2).
- **690-315-0010(7)(e) and (f): Use of undeveloped portion of the permit:** Please change "chapter 690, division 9" to OAR 690-009-0040. RE: This needs to reflect the new groundwater allocation definition, not the old one for regulation that OWRD retained in the Div 9 rules.
- **690-315-0010(7)(g) the definition of "Undeveloped portion of the permit"** should specify that it applies only to extensions specified in ORS 537.230(3)(d) and ORS 537.630(3)(d) (the first extension for a permit for municipal use that was issued prior to Nov. 2, 1998). This is important because the June 29, 2005 date is a negotiated date in the statute that is related only to these particular extensions and it would be error to inadvertently import this date to other contexts. In addition to this, we would also suggest a definition for other permits (that takes out municipal specifics). And finally, the OWRD should put the word "for beneficial use" after the word "appropriated". The previous rule language included these words; retaining this language in the rules is consistent with the overarching water code which requires that any water that is diverted be put to beneficial use. As discussed in the RAC, absent inclusion of the "beneficial use" directive a permit holder could assert that any water diverted, even if not put to beneficial use, could count as developed water.

- **690-315-0020(1):** Two comments: First, Subsection (1) does not track HB 3342 in that it does not carve out quasi-municipal uses. Under the new law, quasi-municipal permits only get one extension of time of no more than 20 years. To fix, the words "quasi-municipal" should be removed from subsection (1). Then the rules should add an (a) for quasi-municipal (20 years) and then change the current (a) for group domestic (10 years) to subsection (b). See HB 3342 subsection 26(3)(b)(A) and (B). Second, OWRD should add a sub (c) that adds the specifics of ORS 537.248 (see DOJ memo, forwarded separately).
- **690-315-0020(1)(a):** Please insert the word "unexpired" before "water use permit" to ensure that long expired permits cannot apply for extensions.
- **690-315-0020(1)(b):** The word "uses" should be replaced with "use permits". The word "unexpired" should be added before "water".
- **690-315-0020(2):** Please add "unexpired" before "permit" in the second sentence.
- **690-315-0020(3)(i):** Please add "in accordance with OAR 690-315-0020(1)" or something similar (to make sure the request is within the allowed time).
- **690-315-0020(4):** This section should be updated and strengthened in a manner that better aligns with the cancellation statutes (e.g. the cancellation statutes don't allow a 90 day grace period for extensions, only completion).
- **690-315-0030(1):** Suggest the section be reworded to read: Counties, municipalities or districts constructing new storage projects ~~pursuant to~~for permits that were issued pursuant to ORS 537.248(1) after July 5, 1995 may apply for extensions of time to begin construction pursuant to ORS 537.248(2). We are not aware of other permits where the "begin construction" deadline can be extended.
- **690-315-0040(1)(b) and (c):** These subsections should NOT be deleted as proposed.
- **690-315-0040(5 new):** As written, the structure potentially leaves open the argument that they can only deny on these two grounds. This is not accurate. Possible solution, add language that clarifies in addition to these two OWRD can deny for any consideration in (2), as well as failure to meet any permit conditions designed to protect the public interest (See DOJ memo, Feb 7, 2002). We would also urge that the OWRD add a subsection that directs denial if an applicant "knowingly makes a false statements on an application".
- **690-315-0040 (2), add two additional subsections under due diligence** (See DOJ Advice on Compliance with Permit Conditions of February 7, 2002. Also see Dwight French Guidance Memo on same topic of Oct. 15, 2002.)**:**
    - Whether the permit holder has complied with all permit conditions;
    - Where there has been a failure to comply with a permit condition, whether measures are available to serve the public interest purposes that the condition was intended to address and achieve a result equivalent to what the permit required;
- **690-315-0050(1):** add "for a valid water right" or "for an unexpired water right" after "application"
- **690-315-0040(5 old, proposed to be deleted):** This section should be retained; the cancellation pathway is important to retain in rule.

- **690-315-0050(3):** Needs to be amended to reflect that commenters do not need to pay a "copy fee" to receive the PFO electronically. If WRD needs to retain a "copy fee" approach for commenters who want to receive the PFO by mail, this should be set forth specifically.
- **690-315-0050(4):** Clarify that the "reasonable time necessary" must fall within the bounds of the new law, e.g. 20 years for quasi municipal, 10 years for domestic expanded.
- 690-315-0040(5)(ii): This should be broadened, consistent with DOJ advice, to capture any permit condition that was included on the permit to serve the public interest. Beyond fish-related conditions, this could also include wildlife-related conditions.
- **690-315-0050(6) checkpoints proposed deletion:** We strongly object to the proposed deletion of provisions that require checkpoints for any extension exceeding 5 years. HB 3342 still allows for extensions beyond 5 years thus checkpoints and the ability to cancel should still continue forward for the remaining extensions allowed. Please retain this section. It will be a small subset of extensions that these rules will apply to, but it is still important to protect against speculation.
- **690-315-0050, public notice and comment:** For consistency and efficiency's sake the same process should be allowed here as applies to other water right transactions, e.g. IR 30-day comment, PFO 45-day protest, petition for party status with 30 days of a protest. It is within the OWRD's discretion to allow this, as they are doing in the hydro conversion statutes. Commenting on applications is of limited use as there is no understanding of what the OWRD's position is.
- **690-315-0060: In specifying that contested cases are governed by Or Laws 2025, ch 575 and OAR 690-002, amend to state: "...governed by Or Laws 2025, ch 575** (HB 3342 (2025) and HB 3544 (2025); ORS 183; OAR 690-002; and OAR 137-003 to the extent not in conflict with OAR 690-002." Note: adding the bill #s will make application of the rules easier and less confusing. **690-315-0070(1)(d):** It is unclear where the 50-year trigger derives from as it is not in statute. Extensions are allowed for a reasonable time necessary. Given municipalities are granted 20 years to develop a permit, it seems that a trigger for this information should be 20 not 50 years.
- **690-315-0090(1):** We recommend amending the new language so that it is clear that quasi-municipal water use permits only get one extension of time, as set forth in HB 3342.

Thank you for this opportunity to provide initial comments. We will offer additional comments as revisions are made.

Sincerely,



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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 7, 2002

Dwight French
Water Rights Manager
Water Resources Department
158 12th St. NE
Salem, OR 97310

Re: Compliance With Permit Conditions
DOJ File No. 690-303-GN0023-98

Dear Mr. French:

Permits allowing the use of water generally include conditions on the use of that water, some of which are standard conditions on all water rights of that type and some of which are specific to the permitted use. You have asked several questions about the relationship between compliance with those conditions and the Water Resources Department's (Department) decision whether to issue a certificate for a water right use.[1] Although you raise several related sub-issues, the central question is whether the Department may issue a certificate for a water right permit in the absence of compliance with the conditions of the permit. We conclude that the Department may not issue a certificate for a permit unless the conditions of the permit have been complied with.

DISCUSSION

1. The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

The waters of the state "may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise * * *." ORS 537.120. With narrow exceptions, a person may not divert, pump or otherwise take control over surface or ground water without a permit from the Department. ORS 537.130, 537.535. The decision to issue a permit for surface water is made in the first instance following a determination by the Department that the proposed use of water will not impair and is not detrimental to the public interest factors set forth in ORS 537.153 and 537.170(8). In tandem with the public interest standard governing the decision to approve the

[1] The Department makes the decision on water right applications unless exceptions to the Department's decisions are filed with the Water Resources Commission. ORS 537.140 et seq, ORS 537.173. Our references to the Department include the Commission, as appropriate.

proposed use, the Department is granted broad authority to impose conditions to ensure that the public interest is not impaired. A final order approving a proposed use of water "may set forth any of the provisions or restrictions to be included in the permit concerning the use, control and management of the water to be appropriated for the project * * * to protect the public interest." ORS 537.170(5). The Department "may approve an application for less water than applied for, or upon terms, limitations and conditions necessary for the protection of the public interest * * *." ORS 537.190(1). Finally, the permit "shall specify the details of the authorized use and shall set forth any terms, limitations and conditions as the Department considers appropriate * * *." ORS 537.211.[2] The conditions authorized by these statutes are often central to the Department's decision that the proposed use will not impair or be detrimental to the public interest. In many cases the Department *could not make* that decision but for the conditions. It is against that background that we examine whether the Department may certificate a water use absent compliance with the permit conditions.

Once a water use has been fully developed under a permit, the permit holder must apply to the Department for a certificate of water right. The certificate constitutes "conclusive" evidence of the priority and extent of the appropriation. ORS 537.270. It represents a vested right to the use of water described in the certificate. *Green v. Wheeler*, 254 Or 424 (1969); *see also* Letter of Advice to William R. Blosser, Chairperson, Water Resources Commission from Melinda Bruce, Assistant Attorney General, March 18, 1988 (advising that the commission may not reassess whether a previously certificated right is consistent with the public interest). To obtain a water right certificate a permit holder must, under ORS 537.230(1), begin construction and continue that work with reasonable diligence to completion, which may not exceed five years. "[U]pon completion of beneficial use," the permit holder must hire a certified water right examiner ("CWRE") to survey the appropriation. ORS 537.230(3). Once the survey has been completed, the permit holder must submit a map of the survey, with a request for a water right certificate, to the Department. ORS 537.230(3).[3] The Department must decide whether or not to issue a certificate in accordance with ORS 537.250(1). That statute provides in part:

> After the [Department] has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230(3) that shows, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the department shall

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[2] Groundwater permits are issued pursuant to ORS 537.535 et.seq. Like the surface water statutes, the groundwater statutes allow for conditions and require a similar public interest review. *See e.g.* ORS 537.621, 537.620, 537.625, and 537.628.

[3] ORS 537.230(3) provides in part:

> Except as provided in ORS 537.409, upon completion of beneficial use as required under subsection (1) of this section, the permittee shall hire a water right examiner certified under ORS 537.798 to survey the appropriation. Within one year after application of water to a beneficial use or the beneficial use date allowed in the permit, the permittee shall submit a map of the survey as required by the [department], which shall accompany the request for a water right certificate submitted to the department under ORS 537.250.

issue to the applicant a certificate of the same character as that described in ORS 539.140.

Perfection of the water right under this statute clearly requires construction of the physical means of water delivery, and application of water for the use specified in the permit, before certificate issuance. *Green v. Wheeler, supra.* The statute does not, however, specifically refer to compliance with permit conditions as a requirement for certification. The question is whether compliance with all conditions of the permit is required for perfection in accordance with the Water Rights Act. We are persuaded that the Department must require that compliance before a certificate may issue.

Issuance of a permit authorizes the holder to "proceed with the construction of the necessary works," to "take all action required to apply the water to the designated beneficial use *and to perfect the proposed appropriation.*" ORS 537.211(1). That provision suggests three steps: construction of the works, initial application of water to beneficial use, and perfection of the appropriation. The statute does not define "perfection of the appropriation." But the phrase clearly means something in addition to construction of the project and initial application of water to beneficial use. *Green v. Wheeler, supra,* at 430 (application of water not sufficient to establish entitlement to certificate; fulfillment of other conditions also is required). That meaning may be found in ORS 537.250(1), which provides that the Department must issue a certificate if the final proof survey shows, "to the satisfaction of the department, that an appropriation *has been perfected in accordance with the provisions of the Water Rights Act* * * *." *Id.*

The Water Rights Act is defined under ORS 537.010 to include ORS 537.140 to 537.252. As defined, the Water Rights Act includes the statutes discussed above that require the Department to make a public interest determination for a water right application, and to impose conditions on the use to protect the public interest. The Water Rights Act also includes other development requirements, such as pursuing completion of perfection with reasonable diligence, and hiring a CWRE to conduct a final survey proof survey upon "completion of beneficial use." ORS 537.230. These requirements must be met for a water right to be considered developed. Taken together, these statutes suggest that perfection of an appropriation is intended to encompass all of the water right development requirements in the Water Rights Act including construction of any necessary works, completion of application of water to beneficial use, compliance with the conditions of the permit, prosecuting construction with reasonable diligence and submitting final proof completed by a CWRE. It follows that the Department may not issue a certificate unless it determines that the use has been developed in compliance with the conditions of the permit, because until the conditions of a permit have been met, the appropriation has not been perfected.

This conclusion is reinforced by the central role that permit conditions play in the permitting decision. The conditions placed in a permit by the Department set out the parameters for developing the water right. Conditions ensure that a proposed water use will meet the legislative standard for water use, i.e. that the use will not impair or be detrimental to the public interest. It would be anomalous for the legislature to impose a public interest standard and to authorize the Department to impose conditions to achieve that standard, only to allow the

Department to recognize a vested right to that water use, by issuing a certificate without finding compliance with the conditions. Likewise, it would be anomalous for the legislature to authorize cancellation of permits for willful violation of any permit provision and then allow for issuance of a certificate without requiring compliance with permit conditions. *See* ORS 537.720 (authorizing cancellation for willful violations). Moreover, the legislature has authorized the Department to institute cancellation proceedings if it determines that an appropriation has not been perfected because of a permit holder's failure to comply with permit conditions. ORS 537.260(1).[4] The central role of permit conditions in the water right permitting process together with the text and context of the water rights statutes, leads to the conclusion that permit conditions must be met before a certificate may issue.

Although the text and context of the Water Rights Act strongly support the conclusion that permit conditions must be met as a condition of certification, it should be noted that there is no express statutory text requiring compliance with permit conditions as a condition of certification. The lack of an express statement may be used to support an argument that the Department does not have the authority to withhold certification for failure to comply with permit conditions. The problem with this argument is that it fails to consider the specific authority to impose conditions, the central role that conditions play in the scheme of the Water Rights Act, and the discretion granted to the Director in ORS 537.250 to review a final proof survey for compliance with the provisions of the Water Rights Act. For these reasons, the better argument is that permit conditions must be satisfied before a water right certificate may issue.

2. The final proof survey must provide information about compliance with every permit condition that affects perfection of the appropriation.

Permits often impose "continuing" requirements, such as a requirement that the permit holder comply with state and federal water quality standards over the life of the water use. Permits also include "warning" conditions, such as a reminder that the water use is subject to the rights of senior water right holders. You ask whether the Department may tailor the final proof survey requirements so that the survey need not address these continuous or warning conditions.

The final proof survey is vehicle by which a permit holder demonstrates the extent of the appropriation, and by which the Department makes the required determinations about the perfection of the water right. ORS 537.250(1). Under ORS 537.230(3), the final proof survey is prepared by a CWRE hired by the permit holder. The function of the final proof survey is to detail the perfection of the appropriation. Provided that central function is met, the Department and the Commission may tailor the requirements of the final proof survey to maximize its usefulness.

To that end, the commission has adopted rules that guide preparation of final proof surveys. Under OAR 690-14-100(1), the CWRE must report on "the status of conditions and limitation in permits." The rule lists the types of conditions on which a CWRE must report and includes a catch-all for "any other conditions or limitations." This rule clearly requires the

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[4] ORS 537.260(1) authorizes cancellation if the permit holder fails to submit timely "proof of the appropriation as required ORS 537.230 and 537.250."

CWRE to report on compliance with permit conditions. That requirement is consistent with the statutory direction that the final proof survey is to demonstrate the extent of perfection of the appropriation. ORS 537.250(1). We do not believe the Department is authorized either under ORS 537.250 or OAR 690-14-100(1) to exempt from the reporting requirement conditions that affect the perfection of the appropriation. Compliance with continuous requirements at the time of the final proof survey is relevant to perfection of the appropriation, even though the requirements continue in effect after certificate issuance.

In contrast, the "warning" condition described above – the reminder that the water use is subject to the rights of senior water right holders – does not fall within the category of a condition that affects the perfection of the appropriation. It is not a condition that requires performance by the permit holder. The condition is imposed by operation of the law of prior appropriation, independently of any activity of the permit holder. Given that, there is nothing on which the CWRE would be required to report. The Department lawfully may design a final proof survey form that does not require reporting on this type of warning condition.

3. The Department may allow a permit holder to cure a failure to comply with time-sensitive permit conditions if measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.

You also have asked whether any remedy is available to a permit holder who has not complied with a time sensitive permit condition in a timely manner. Examples include permits that require particular action by the permit holder before actual diversion of water, such as installation of a water meter, and permits that require particular action by a date certain, such as submission of a water conservation and management plan within one year of permit issuance. If the permit holder begins water use without installing a water meter, or does not submit the water management plan by the date set forth in the permit, then the permit holder has not strictly complied with the permit conditions. You ask whether and in what circumstances the Department could issue a certificate for such a use, in spite of the non-compliance. In other words, may the Department allow the permit holder to "cure" the failure to comply with the permit conditions? The answer is a qualified "yes." We believe that if steps are available that allow a permit holder to cure non-compliance in a way that serves the interests the condition was designed to protect and reaches an equivalent result, the Department may allow that remedial activity as a means of compliance with permit conditions before certification.

By requiring proof "to the satisfaction of the department," ORS 537.250(1) confers on the Department discretion to determine whether and under what terms to issue a certificate. The Department must determine the extent of the appropriation, and whether the appropriation has been perfected in accordance with the Water Rights Act, including compliance with the terms and conditions of the permit. If a condition has not been met, the discretion granted to the Department in ORS 537.250(1) authorizes the Department to determine whether the appropriation can be brought into compliance with the Act, that is whether the condition can be satisfied.

Determining whether a time sensitive condition can be satisfied does not mean that the Department can waive the condition, impose an alternate condition or otherwise effect a permit

amendment. *See* ORS 537.211 (setting out the process and the extent of permissible permit amendments). The Department is not granted the authority to reassess the public interest that underlies the condition in this manner. Rather, the Department is limited to determining whether the existing condition can be satisfied, that is whether the purpose and result of the condition can be achieved. Because permit conditions arise out of public interest consideration, the determination of whether a particular condition has been, or can be met, should be guided by the public interest considerations that prompted imposition of the condition in the permit.

One example of where failure to meet a time sensitive condition could be cured at a later day is in the case of a meter installation condition that requires installation of a meter before water use begins. The purpose of this condition is to allow the Department staff to be able to know the measure of a permittee's water use at any given time. Because the meter is for a real time purpose, rather than for a cumulative measurement purpose, the interest in having a meter can be served by installation of a meter at the time the absence of one is discovered.

In sum, permit holders may be able to cure unmet time sensitive conditions at the certification stage. Whether a condition is subject to cure will depend on the purpose for which it is imposed and whether that purpose may be met.

4. If at the certificate stage the Department discovers that a condition has not been met, the permit holder may seek a permit extension to cure the un-met condition, prior to certification of the permit.

The statutes that address certification of a water right give the Department considerable discretion when reviewing a final proof survey. As discussed above, ORS 537.250 vests in the Department the discretion to determine whether a water right has been perfected in accordance with the Water Rights Act, which requires consideration of whether permit conditions have been satisfied. If permit conditions have not been met, ORS 537.260 authorizes, but does not require, the Department to cancel a permit for failure to submit proof of completion of an appropriation as required by ORS 537.230 and 537.250. Neither of these statutes mandate a result where the final proof is not in compliance with the Water Rights Act. In fact, ORS 537.260, by not requiring cancellation, implicitly recognizes that the Department may proceed in a manner other than cancellation where inadequate proof of perfection has been submitted. The question is in what manner should the Department proceed.

Assuming that the development period under the permit has expired, the answer to what process applies to curing an unmet condition may be found within the extension provision in ORS 537.230(2) and the Department's extension rules in OAR chapter 690 divisions 315 and 320. ORS 537.230(2) allows the Department, for good cause shown, to order an extension of time for the period "within which irrigation or works shall be completed or the right perfected." As discussed above in section one, perfection of the right includes satisfaction of all of the water right development requirements under the Water Rights Act, including permit conditions. Thus, the statutory framework contemplates issuance of an extension where a water right has not been fully perfected at the close of the development period. The process for obtaining an extension to complete development and satisfy an un-met condition is provided in the Department's extension rules at OAR chapter 690, divisions 315 and 320.

Based on the above statutes, the Department may allow a permittee, whose development period has ended and who has submitted final proof but has failed to comply with a permit condition, to withdraw the final proof and request for a certificate and apply instead for an extension to complete perfection of the appropriation. Where an extension is necessary and no request is made the Department may proceed to cancel the permit under ORS 537.260 for failure to submit proof of appropriation as required by ORS 537.230 and 537.250.

5. Permit conditions may be monitored and enforced through regulation and through the extension process.

Prior to the certificate stage the Department may have occasion to review compliance with permit conditions either through regulation or through the extension process. Either or both of these situations offer additional methods for monitoring and enforcing compliance with permit conditions.

The Department may enforce permit conditions through regulation by the watermaster and through imposition of civil penalties. Under ORS 540.045(1)(a), watermasters are charged with regulating the distribution of water among users "in accordance with the users' existing water rights of record in the Water Resources Department." Users' water rights of record include permits. ORS 540.045(4). Permit conditions are an integral part of the permit and describe how development and water use may occur under the permit. The watermaster is charged with insuring that water is used lawfully, which includes insuring compliance with permit conditions. In addition to regulation by the watermaster, the Department may impose civil penalties for "[v]iolations of any of the terms or condition of a permit[.]" ORS 536.900(1)(a), OAR chapter 690 division 260. In addition, for groundwater permits, willful violations of any provision of a permit subjects the permit to cancellation or suspension or imposition of conditions for future use to prevent further violations. ORS 537.720.

Another, although less direct, tool for insuring compliance with permit conditions is the permit extension process. As discussed above, a permit extension would be necessary in order to cure a failure to meet a permit condition at the certificate stage where the development period has ended. It follows from that conclusion that permit conditions do not necessarily have to be complied with to obtain a permit extension. However, under the current and future extension rules, compliance with permit conditions is a permissible factor to consider in the good cause evaluation and specifically is listed as a factor for consideration in OAR 690-315-040(3)(c).

CONCLUSION

The guidance that this advice provides for the administration of permit conditions may be summarized as follow:

- The Department may not issue a water right certificate without finding satisfaction of the permit conditions.
- The final proof survey must report on all conditions that affect perfection of the appropriation.

- The Department may allow curing of an unmet time-sensitive condition, so long as the public interest purposes of the condition are met and an equivalent result is achieved.

- Where the Department determines that one or more permit conditions have not been met at the certificate stage, the process for cure is through the permit extension process. In the permit extension proceeding, compliance with permit conditions is a factor to be evaluated in the good cause review but is not determinative of the outcome.

- In addition to reviewing permit conditions in the extension process, the Department may review compliance with and enforce permit conditions through watermaster regulation and through imposition of civil penalties.

Please note that this advice necessarily is generalized to respond to the broad questions that were asked, please feel free to contact me if you have additional questions or questions regarding a specific case.

Sincerely,

Sharyl L. Kammerzell
Assistant Attorney General
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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

CWS 1

June 26, 1997

Dick Bailey, Administrator
Water Rights Division
Water Resources Department
158 12th St. NE
Salem, OR 97310

Re: Extensions of Time to Complete a Water Right Permit
DOJ File No. 690-303-GNS0403-95

Dear Mr. Bailey:

You have asked about the Water Resources Department's (department's) authority to grant water rights permittees extensions of time to complete their water projects and put the water to beneficial use. Water rights permits authorize the use of water if a system to use the water is developed within the time specified when the permit is granted. When the specified time to complete the permit (often referred to as the "B" or "C" date[1/]) has passed, the right to put more water to beneficial use under the permit ceases, even if the full amount allowed by the permit has not been developed, unless and until the permittee has applied for and been granted an extension.

This letter provides general advice on this subject and describes a method to analyze extension requests.

The department's authority to extend the time to complete a surface water permit is found in ORS 537.230(2), which specifies:

> the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year limit established in subsection (1) of this section within which irrigation or other works shall be completed or the right perfected. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010(5).

For ground water projects, an equivalent but not identical statute provides:

[1/] The "A" date is typically referred to as the date within which construction on the permit must begin. (See analysis under Section II, following). The "B" date is the date when the permit works are completed; the "C" date refers to the date water has been applied to beneficial use.

> Actual construction of a well or other means of developing and securing the ground water shall begin not later than one year after the date of approval of the application for a permit under ORS 537.625. The construction shall be prosecuted with reasonable diligence and completed within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the application. The department, for good cause shown, shall order and allow an extension beyond the five year period, for the completion of the well or other means of developing and securing ground water or for complete application of water to beneficial use.

ORS 537.630(1).

The Water Resources Commission (commission) has adopted rules to implement these statutes, found in OAR 690-320-010. To determine whether a permittee should be granted an extension of time to complete the water right, we recommend that the department ask four questions: First, has the permittee completed the request for extension form and paid the fee; Second, did the permittee begin actual construction on the project within the time required by law; Third, can the permittee actually complete the project or put the water to beneficial use within the extension period; and Fourth, is there "good cause" to extend the time to complete the project. Each of these questions is discussed in turn below.

I. Has the extension form been properly completed and the fee paid?

An extension is not granted automatically. The department has created a form by which persons may apply for extensions of time. The statute requires the advance payment of a $100 fee. ORS 536.050(1)(L). If the applicant has not paid the fee and provided the required information, the department would be without the basis to continue its evaluation of the request to grant the extension. Thus, while a failure to complete the form may not be a *per se* basis to deny the extension request, until one is properly filed, there is nothing for the department to grant.

The permittee need not apply for the extension before the expiration of the completion period specified in the decree, permit or prior extension. *See, e.g. In Re Waters of White River*, 141 Or 504, 516 (1933) (State Engineer authorized to consider and grant an extension filed six months after expiration of completion period fixed in decree). In many cases, a person may legally develop a water system without a water right; it is the appropriation of water for a beneficial use (i.e., the use of the system) that requires the right. Work done on a permit outside the time limits does not count toward perfection of the right.

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II. Did "actual construction work" begin in the period required by statute?

A. Time within which work must begin. ORS 537.230(1) requires that, with limited exceptions, actual construction work on proposed surface water irrigation or other works must begin within one year from the date the application is approved. For projects which also require a permit from the Federal Energy Regulatory Commission (FERC), the time for beginning construction in the state permit must conform to that established in the FERC permit. ORS 537.240(4) Construction must begin on a county, municipal or district reservoir project within 10 years after the date the permit is issued, but that time can be extended. ORS 537.248(1),(2). The application of a municipal corporation for a surface water right for municipal use is not subject to any statutory requirement to begin construction within a given time. ORS 537.230(1). Actual construction work on ground water permits must begin within one year from the date the permit is granted, without exception. ORS 537.630(1).

B. What Constitutes Actual Construction Work. Both the surface water and ground water statutes require that "actual construction" work shall begin within the one year period. The amount of construction work performed in the first year must be significant. In *Morse v. Gold Beach Water Co.*, 160 Or 301, 306 (1938) the court held that the amount of work must be "substantial," and demonstrate both the present good faith of the permittee and the permittee's intention to complete the project with "reasonable diligence."

We do not believe that planning a diversion system, formulating a business plan, securing financing, letting contracts or even surveying will satisfy the "actual construction" work requirement. Nor do we believe that construction work that is merely ancillary to work required by the permit satisfies this requirement.

C. Evidence of Actual Construction Work. A permittee is not statutorily required to report to the department that actual construction was begun within the statutory time, although ORS 537.450 authorizes the Commission to require, by rule, that owners submit proofs of commencement, prosecution and completion of work, and the application of water to beneficial use as required by the permits. The rules do not now require the permittee to submit this information.[2/] Similarly, the department is not required, at the conclusion of the statutory period, to verify that a permittee has performed sufficient work to satisfy the actual

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[2/] Should the Commission adopt such rules, failure to comply with the rules would constitute prima facie evidence of a failure to meet the time deadlines and subject those permits governed by ORS 537.410 - 537.450 to cancellation. ORS 537.450.

construction requirement. (Until the Commission adopts rules requiring the permittee to submit proof of construction work, the department is entitled to presume that a permittee will comply with the terms of the permit and all relevant statutory conditions.)

Many permittees submit "A" cards, or other evidence that they have begun construction within the required time. The department is entitled to rely on those representations to determine that the requirement has been met, and need not do an independent investigation of the fact. However, the department should verify compliance if it has reason to believe that construction was not begun within the required time. If there is a credible allegation that work did not begin within one year, then the department may well be called upon to determine that this requirement has been satisfied, whether an "A" card has been filed or not.

D. Effect of Failure to Begin Work. A permittee's failure to begin actual construction work means the permit cannot be extended: once the period for beginning construction has expired, the appropriation cannot be perfected, because the permit has lapsed. While the "actual construction work" requirement is not technically part of the legal test for an extension, *per se*,[3/] (*Cf.* ORS 537.230(1) and 537.230(2)) it is a condition for perfection of a water right. The department may neither waive the requirement nor extend the time for compliance. *Morse* at 305; Letter of Advice dated July 29, 1987, to Jerry Hedrick, Foreclosure Manager, Department of Veterans' Affairs (OP-6158). The department will be unable to issue a certificate because it cannot find that the appropriation "has been perfected in accordance with the provisions of the Water Rights Act" as required by ORS 537.250(1).[4/]

[3/] Thus, the department is authorized to cancel a permit on which actual construction work was not begun at any time after the "begin construction" period passes, apart from an extension request.

[4/] We believe that if a certificate is mistakenly issued even though construction did not begin within a year, after the certificate has been issued and the appeal time has run, a water right nevertheless vests, and cannot be challenged for this reason. ORS 537.270 specifies that a water right certificate issued pursuant to ORS 537.250, after the expiration of three months from the date it is issued (with minor exceptions not relevant here) "shall be conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of the state" unless the right is lost due to forfeiture or abandonment. *See also Wilber v. Wheeler* 273 Or 855 (1975).

The reference in ORS 537.230(2) to ORS 539.010(5) reinforces this view. ORS 539.010(5) (discussed below) sets out a number of considerations for allowing additional time to complete a water right, but is restricted to situations where "actual construction work was commenced * * * within that time provided in law."

While the *Morse* case began as a request for an extension, technically, the court upheld a State Engineer's order cancelling the permit, so the court did not explain under what circumstances an extension would be warranted. Rather it determined there was not valid permit that could be extended because failure to commence actual work was "fatal" to completion of the appropriation (*Morse* at 305) and any rights under a permit "lapsed" (*Id.* at 306). Lapse means to "go out of existence," "disappear," "terminate." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1991). If a permittee has failed to begin work within the required time, the rights granted by the permit cease and the permit has no further force or effect, even if the department had previously granted extensions of time for the permit. The department may not waive the statutory requirement to begin construction, and thus is not bound by its approval of previous extension requests premised on a mistaken assumption (or even finding) that construction work had begun as required by law. *Morse* at 305.

ORS 537.410(1) similarly provides for permit cancellation:

> Whenever the owner of the permit to appropriate the public waters of Oregon fails to commence actual construction work within the time required by law, or having commenced construction work as required by law, fails or neglects to prosecute the construction work with reasonable diligence, or fails to complete the construction work within the time required by law, or as fixed in the permit, or within such further time as may be allowed by ORS 537.230, or having completed construction work, fails or neglects to apply the water to beneficial use within the time fixed in the permit, the Water Resources Commission may cancel the permit on the records of the Water Resources Department as provided in ORS 537.410 to 537.450.

This statute is independent authority to cancel permits, and has some exceptions that are not applicable to cancellations for failure to commence work arising under ORS 537.230.[5/] ORS 537.410 to 537.450 lays out a procedural mechanism for cancellations under these provisions.

[5/] Permits issued to irrigation districts for reclamation under state irrigation district laws, to municipal corporations for municipal purposes, or to public utilities operating under a site certificate issued by the Energy Facility Siting Council are not subject to cancellation under this statutory provision.

E. Permit vs. "Project" Analysis. In situations where a permittee may hold a number of permits to develop land in an area that might be characterized as a "project," the requirement to begin construction applies separately to each individual permit (even if a number of permits have been issued to a single permittee for adjacent parcels). Neither ORS 537.230(1) nor 537.630(1) directly address the relationship between individual permits and a group of permits that might be characterized as a "project." The statutes make no allowance for a "project," however, and instead refer to "the application" and "the/a permit." Nothing in the statutes suggest that an appropriator may aggregate permits for the purpose of demonstrating beginning actual construction, unless the work is directly connected to and specifically advances the completion of a particular permit. *See, e.g., Morse* (work on a project of which a permit was a part did not satisfy statutory work requirement for specific permit in question). We believe it would create an anomalous result if a permittee were entitled to apply serially for a group of permits but avoid the requirement to begin construction on any but a single permit by characterizing all the permits as a single project. Such an interpretation would also frustrate the purpose of the "actual construction work" requirement, which is to prevent hoarding of water by mandating prompt development of the water right.

III. Can the permittee actually complete the works or apply the water to beneficial use within the time allowed by the rules for the extension?

A. Purpose of the Extension. By statute, the department may allow an extension of time "within which irrigation or other works shall be completed or the right perfected" (ORS 537.230(2)) or "for the completion of the well or other means of developing and securing ground water or for complete application of water to beneficial use." (537.630(1)) (emphasis added).

The distinction between "completing the project" and "applying the water to beneficial use" recognizes that even though the project works may be complete, water may still not have been applied to beneficial use during the required time period. For example, if the works are completed past the end of the irrigation season, the permittee is not legally entitled to apply the water to beneficial use until the beginning of the next irrigation season. To qualify for a certificate perfecting the right, ORS 537.230(3) requires "completion of beneficial use," not merely the completion of the works. Neither statute nor rule, however, allows an extension of time if the permittee merely proposes to work further on, but not to complete, the works required by the permit or application of the water to beneficial use.

B. Extension Period. Neither ORS 537.230(2) nor 537.630(1) identifies how long an extension the department may grant. By administrative rule, however, the commission

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has restricted the time to five years for municipal, quasi-municipal, district, and group domestic permits. All other permits are limited to one year extensions. OAR 690-320-010(3).

C. Multiple Extensions. Because extensions can be granted for two purposes, a permittee could be granted one extension to complete the works and another to apply the water to beneficial use. The department may also grant a subsequent extension even if it had already granted an extension for the same purpose. However, the applicant's failure to complete the works during the prior extension period should be considered in evaluating the "good cause" for the extension. (See IV below).

IV. Is there "good cause" to extend the time to complete construction and/or perfect the right for the permit in question?

A. Statutory Criteria. ORS 537.230(2) and 537.630(1) allow the department to grant an extension of time "for good cause shown". For surface water rights,[6/] the department must consider at least the factors in ORS 539.010(5), which include:

> the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment.

Neither the statutes nor rules "specify or limit what particular factors the [director] may consider" to determine whether "good cause" has been shown. (OP-6158, p. 2). We conclude that "good cause" is a delegative term, meaning that the agency has wide discretion to interpret and apply it.

B. What Constitutes Good Cause. Oregon cases interpreting "good cause" uphold agency interpretations if "the agency has not exceeded the limits of its discretion or acted inconsistently with another administrative, statutory or constitutional provision." *Lechner v. Employment Dept.* 135 Or App. 181, 185 (1995). Similarly, in *Hunt v. Employment Department* 139 Or App. 440, 443 (1996) the Court of Appeals reviewed a challenge to Employment Department rule interpreting what constituted "good cause" to terminate

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[6/] While statutorily, only surface water right extension requests must consider the factors in ORS 537.010(5), by rule, these considerations are also applicable to all ground water extension requests. OAR 690-320-010.

employment. The Court held that because its review focussed on "the quintessentially delegative term 'good cause,' our review is limited to determining whether the rule is within the range of discretion allowed by the general policy of the statute." The court held that the Employment Appeals Board, and not the employee was entitled to determine from its perspective what constituted good cause.

"Good cause" should be viewed from the department's perspective, consistent with the statutory guidance and the agency's policy goals. The minimum statutory guidance is found in ORS 539.010(5), cited above. We believe the agency's analysis of whether good cause has been shown may include whether the water would be of greater value for other uses or should remain allocated to the currently permitted purpose. For example, the department could find there is not good cause to extend the limit because there was now a greater demand for the water to protect endangered fish runs, or that the water would generate more income when used for power production or other out-of-stream uses. Conversely, even if a permittee had not demonstrated significant diligence toward completion of the project, so long as the minimum requirements of I, II and III above had been met, the department could nevertheless grant the extension request, provided other good cause factors weighed in favor of granting the extension.

This discretion is not unlimited, however. If the permittee has completed the vast majority of the work under a permit, and needs only relatively minor work for completion, the permittee will probably be entitled to the extension unless other factors strongly argue otherwise. *See, e.g. In Re Waters of White River*, 141 Or at 511 (extension allowed where company had already spent $221,000 and could finish project with expenditure of another $2,000 to $5,000 to develop a storage site authorized by the right, without which the entire system would be of little value).

C. Administrative Rule Criteria. By rule, the commission has incorporated the factors of ORS 539.010 into the "good cause" analysis of both ground and surface water extension requests. OAR 690-320-010(2). The "good faith" of the appropriator listed as a factor in ORS 539.010(5) is equivalent to the reasonable diligence required of the permittee in the rules. The reasonable diligence required to complete the project during the initial permit period essentially constitutes a continuing test of whether to grant an extension. OAR 690-320-010(4) authorizes the director to determine "whether some progress has been made to complete the construction or use, but if diligence is questionable, the director may deny

the request, condition the permit or decide that no further extensions can be granted."[7] By rule the commission could establish even more specific (and exclusive) criteria by which "good cause" would be evaluated.

D. Time Period Over Which "Good Cause" is Evaluated. Neither the rules nor the statute restrict the department's consideration of "good cause" to the last extension period. The last extension period, however, provides the most relevant evidence of a permittee's diligence or good faith toward completion of the permit. There may be factors unrelated to the most recent extension that bear on the question of good faith, but the test is whether the extension should be granted now. Other factors the department must consider are entirely unrelated to the last extension period, or anything the permittee has ever done or failed to do. For example the "market for water or power to be supplied [and] the present demands therefor" (ORS 539.010(5)) are considerations outside what the permittee's control. The basic test is whether the department should grant an extension now, based on its evaluation of current circumstances.

Please feel free to call with additional questions you may have about this advice.

Sincerely,

Steve Sanders

Stephen E.A. Sanders
Assistant Attorney General
Natural Resources Section

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c: John Bagg
Denise Fjordbeck

[7] When approving an extension request, it may be improvident for the Director to determine that no further extension requests could be granted. We believe that each extension request should be evaluated on the facts and merits of the request when it is made. Because "good cause" may include an evaluation of conditions which may have changed since the grant of a former extension, a prediction of what the director would do at the next extension request undercuts the determination that the project will be completed during the granted extension, and may needlessly restrict the director's discretion should another extension request be filed.

MEMORANDUM

To: Water Resources Department Staff October 15, 2002

Dwight French, Water Rights Section Manager
Dick Bailey, Water Rights and Adjudication Division Administrator

INTERNAL GUIDANCE
Non-Compliance of Time Sensitive Permit Conditions when reviewing Claims of Beneficial Use and Extensions of Time[1]

This memo supercedes the memo of February 14, 2002, on the same subject. Changes were made regarding reference levels and annual static water level measurements. In addition, the examples that begin on page three were re-ordered.

Purpose: The purpose of this memo is to give guidance to Department staff on how to process claims of beneficial use when performance condition compliance is lacking.[2]

Problem: At present, the Department has a backlog of several thousand permits awaiting certificate issuance. The majority of this workload is in the form of final proof surveys that need to be reviewed by the Department. Many of the permits issued since 1990 contain several specific performance related permit conditions. As the Department steps up its efforts to review final proof claims and contemplates certificate issuance, we must determine what constitutes compliance and actions to take when certain performance related permit conditions have not been satisfied.

Discussion: The Attorney General's Advice on this subject[3], concluded the following:

1 The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

This memo is not intended to address claims of beneficial use submitted by permit holders themselves pursuant to ORS 537.409 (10).

2 All situations need to be handled on a case-by-case basis. There are many fact situations that have not yet been encountered. Therefore, rigid instructions are not possible nor appropriate. This memorandum will be modified and updated as the Department's position on various permit conditions is determined.

3 Dated February 7, 2002. DOJ File No. 690-303-GN0023-98. Prepared by Sharyl L. Kammerzell.

2. The final proof survey must provide information about compliance with every permit condition that affects perfection of the appropriation.
3. The Department may allow a permit holder to cure a failure to comply with time-sensitive permit conditions if measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.
4. If at the certificate stage the Department discovers that a condition has not been met, the permit holder may seek an extension to cure the un-met condition, prior to certification of the permit.
5. Permit conditions may be monitored and enforced through regulation and through the extension process.

Reviewing Final Proof Surveys and Claims of Beneficial Use (CBU):

A. Dealing with an inadequate report.

When, during the review of a CBU, it is determined that information relating to a performance[4] condition is missing the Department shall RETURN THE CBU with a letter that requests the CWRE to report on the subject condition[5]. The letter must inform the recipient that:

a certificate cannot be issued unless every performance related condition is satisfied;
2. if an extension is approved it will allow an opportunity for the permit holder to properly perfect the use if the extension is approved; and,
3. use without compliance with permit conditions is an illegal use.

If the claim was submitted:	**Return the CBU to:**
Within the past year	the CWRE with a copy to the permit holder.
Between one and two years ago	applicant and a copy to the CWRE. Keep the original in the file until or unless the applicant or CWRE requests it be returned.

[4] A performance condition is a condition which requires some type of action on the part of the permit holder. Examples include: installation of a meter; water use reporting; submittal of a Water Management and Conservation Plan; installation of a fish screen and/or bypass devices. Non-performance conditions are often called "notice" or "standard" conditions. Examples of notice conditions include: "Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit" and "The use of water shall be limited when it interferes with any prior surface or ground water rights."

As required by OAR 690-014-0100 (h).

More than two years ago	confirm the ownership of the permitted lands first and then follow directions for "between one and two years" above.

B. Deciding that a condition has not been satisfied.

For conditions that are to be satisfied before water use begins, the development is deemed satisfactory if all of the following tests are satisfied:

The condition was satisfied prior to the development deadline date.
2. Beneficial use was made after the condition was satisfied.
3. Beneficial use was made prior to the C date.

In cases where the condition was satisfied after water use begins but before the applicable development deadline date, the water use before the condition was satisfied was illegal use. If legal-beneficial use can be made before the development deadline, it is determined that proof is made to the satisfaction of the Department.

Each permit and final proof must be read individually. Before deciding that a permittee has failed to make proof, the permit condition(s) must be read with both a critical eye and the mind set of a permittee. For example, was a "totalizing flow meter" required, or just a "meter"?[6]

C. After a failure has been discovered.

If the CBU indicates that one or more conditions have not been satisfied, the following scenarios provide examples of what the result will be based on the AG's advice. One basic idea applies to all situations:

> If compliance with the condition was not obtained before the development deadline, the permit holder did not make proof and cannot get a certificate without first obtaining an extension of time.

EXAMPLES

The following examples assume that the development period has passed and are generally ordered from the most fatal to the easiest to correct.

1. **METER**: If the CBU indicates that no meter has been installed, the permit

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[6] When the use is limited to supplemental irrigation only, it is possible that proof can be made without diversion of any water. If no use of water has been made, then conditions such as installing a meter or fish screen before water use begins cannot cause a problem for the permit holder.

holder's only option to maintain the permit is to apply for an extension.[7]

If a meter was installed prior to beneficial use but is not functioning, proof has been made. A memo should be forwarded to the Field Services Division alerting them of potential illegal water use due to the broken meter. Field Services will consider whether enforcement is appropriate.

If the condition is not specific about what type of meter needs to be installed, any meter that can be used, in whole or in part, to measure water use will suffice. However, the situation should be referred to the Field Services Division who may require that a "totalizing flow meter" be installed.

If an extension can be granted, the meter can be installed and water use resumed in an effort to make proof. In this manner, the public interest purposes that the condition was intended to address can be achieved with an equivalent result.

2. **WATER USE REPORTING**: If the CBU and Department files indicate that the Department has not received at least the use reporting (showing water used each month) for the final year before the completion date, the permit holder's only option to maintain the permit is to apply for an extension.

If an extension can be granted, water use can resume and the information for at least future years can be submitted in an effort to make proof. The extension must at least cover the year in which measurements will be take. In this manner, the public interest purposes that the condition was intended to address has been achieved with an equivalent result.

3. **FISH SCREEN**: Failure to install a fish screen or fish by-pass device can not be cured unless a letter from ODFW has been received that indicates that the fish screen condition was included on the permit by mistake and that no fish screen is needed on the subject diversion point(s).

Fish may have been killed or harmed because of the failure to install a fish screen in a timely manner. The Department determined, prior to permit issuance, that there was a need for a fish screen.

If ODFW was to inspect and approve the fish screen "before water use begins," and the permittee chose not to install a fish screen or contact ODFW because they felt a fish screen was not necessary, ODFW can determine the fish screen was not necessary and thus satisfy the condition at any time. A letter or email from an

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[7] If the permit holder waters his entire acreage in year one then installs the meter prior to using water on the entire acreage in year two, the permit holder has satisfied the requirement to install the meter before use begins. The water use in year one was illegal.

ODFW staff person will be required. This will keep us from cancelling permits for failure to install a fish screen when, in ODFW's satisfaction, no fish screen was necessary.

If "self certification" of the fish screen was an option that was not exercised by the permit holder, the self certification form may be submitted at any time along with a statement by the permit holder that the fish screen was installed on before the required development deadline date (whichever is appropriate) and that beneficial use[8] occurred before the C date (and after the installation of the screen).

4. **REFERENCE SWL MEASUREMENT**[9]: If the permittee has not taken a static water level measurement in the correct month and year to establish the reference level an extension of time will need to be filed if the permit holder wishes to continue use under the permit.

If an extension is filed, the ground water section will attempt to establish a reference level for the permittee. Using whatever data are available, the ground water section will attempt to determine what the static water level would have been in the correct month and year. If this can be accomplished, the ground water section staff will staple a memo identifying the appropriate reference level to the extension review materials and recommend a condition specifying the reference level to insert the into the permit via the extension proposed and final order.

If the ground water section is not able to re-create the reference level, a memo will be stapled to the extension review materials indicating that no reference level was measured by the permittee and that no reference level can be determined by staff. The Department will propose denial of the extension for failure to comply with permit conditions.

Some permit holders who have submitted timely measurements have been regulated off because of dropping water levels. The Department may not issue a certificate for a water use absent compliance with the conditions of the permit authorizing that water use.

5. **ANNUAL SWL'S:** Failure to submit any annual static water level measurements

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8 "Beneficial Use" as used in this paragraph would need to equal the amount of use claimed in the CBU. A standard self certification form and statement should be developed to aid the permittee in collecting this information.

Special care must be take before deciding that permit holder has failed to timely submit an initial SWL measurement. There are many variations of the conditions that require an initial SWL measurement. Some conditions provide some flexibility in when the measurement can be take and/or submitted while others are very specific.

can be cured with an extension.

One static water level measurement under the terms of the permit or extension will be acceptable evidence of compliance.

When an extension is filed, the Department will review, among other things, the groundwater level changes in the area to determine if there is good cause to grant an extension. If regulation of the well would have been likely had measurements been submitted in a timely manner, the chances for obtaining an extension are poor. An extension long enough to gather one measurement will be necessary.

It is possible that the information, had it been submitted, would have resulted in regulation by the Department. The information, even when it shows that regulation is not necessary, is valuable information for the Department and the public to use when doing any groundwater supply planning.

6. **WATER CONSERVATION AND MANAGEMENT PLANS (OAR 690-86):** If the CBU and Department files indicate that a required Water Conservation and Management Plan was not submitted within the time specified in the permit, the permit holder's only option to maintain the permit is to apply for an extension. The plan does not need to be approved before the deadline identified in the condition. The Division 86 includes a process for revisions and adjustments. This allows for modifications to the plan after the deadline specified in the permit.

   Exception: The Department will honor commitments that were made by Salem Department staff, prior to January 2001, that allow additional time to submit a plan.

   This condition is routinely added to certain permits to attempt to increase the efficiency of the water use of the permit holder and to cause the water provider to do long range water supply planning.

Applications for an Extension when permit conditions have not been complied with:

If, after reviewing an applicant for an extension and the related application file it is determined that the applicant has not complied with one or more time sensitive permit conditions the Department will proceed with one of the following options:

1. Propose to deny the application for extension.

   Failure to meet a time sensitive condition contributes to a denial of extension through a negative implication regarding the "good faith of the appropriator" OAR 690-315-0040 (2)(c) and "whether the applicant has demonstrated reasonable diligence in previous performance under the permit" (2)(a).

2. Propose to issue an extension with conditions.

Condition the extension to require the condition to be satisfied before water use resumes but no later than an appropriate date certain. Condition the extension further to require evidence that the condition has been satisfied before water use resumes.

Indicate that the Department will proceed with permit cancellation in under ORS 537.410 if the condition is not satisfied before water use restarts or by a date certain. This option can be used only when measures are available to serve the public interest purposes that the condition was intended to address and achieve an equivalent result.

The Department will not issue an extension if it is known that the Department will not be able to issue the certificate after the C date has passed. Future extensions should be conditioned so the permit holder knows that the certificate will not be issued if the Department determines at a later date that all permit conditions have not been satisfied.

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

November 5, 2025

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

Re: Initial comments, Draft OAR 690 380 (transfers) and 382 (groundwater registrations)

Dear Laura,

In addition to comments made in RAC meetings, we offer the following initial comments.

Division 380, Transfers

OAR 690-380-0100, Definitions:

- **(3) Injury**: We do not agree that the statutory meaning of "injury" is as limited as the definition in this rule. The definition should also include, at least, any impairment of access to the previously available water or any impairment of the beneficial use served by a water right.

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

- **(3) Conditioning:** We strongly support the addition of language that clarifies the OWRD's ability to condition the transfer to protect against potential injury and enlargement.

OAR 690-380-2120, Change in Point of Diversion to Reflect Historical Use

- **Title:** The OWRD is proposing to expand this section to allow for changes in "point of appropriation" to reflect historical use. WaterWatch strongly opposes this suggestion. The statute governing these changes is very clearly limited to surface water diversions. See ORS 540.532. Not only is the language limited to "diversions", but the context of the entire section of law supports this point in that every request has to go to ODFW to determine whether it is equipped with a proper screening device or is on the priority list of screening projects. ORS 540.532(3) and (4). Groundwater wells do not have fish screens. As discussed in the RAC, expanding to groundwater will open a huge loophole that could encourage illegal use of groundwater. The statute allows changes absent going through the transfer statute after only 10 years, meaning someone could purposefully engage in illegal use and, if not caught during that time by the very understaffed OWRD field division, could use this rule to get around transfer statutes. The OWRD noted that the body of the existing rule already allows this; this fact does not change the fact it is very clearly not allowed by law. One purpose of this rulemaking is to ensure that existing rules are compliant and aligned with their governing statutes, we urge the OWRD to narrow the rule to provisions allowed in governing statute so that the rule applies to surface water only.
- **(1):** We request the OWRD delete "or appropriation" in the first sentence and remove the proposed addition of "/Appropriation" in the second sentence to ensure the rule is consistent with statute.

- **(2) and (2)(a):** We urge the OWRD to delete the word "or appropriation" from these sections to ensure the rule is consistent with statute.
- **(2)(b):** The rule proposes to delete the mapping requirements and instead relies on -3100, which in turn relies on Div 305. The proposed deletions reflect language specifically stated in statute, and require, among other things, "the location of the point of diversion as specified in the water right certificate or decree and the action, current point of diversion". ORS 540.532. This seems an important point to retain here, specifically.
- **(2)(c):** We support the addition of the instream right notations, as instream water rights are on equal footing with any other right so are already protected, but it is good to call out. That said, as discussed in the RAC meeting, all types of instream water rights (state applied, transfers/leases, hydro conversions, ACW) need to be included so that this language cannot be used to assert that those are not somehow covered.
- **(3)(a)(E):** We support the addition of instream water rights but urge the OWRD to take out "upstream". While rare, we have seen changes to downstream points of diversion changes that cause injury to instream rights. The statute does not limit injury considerations to upstream movement of a POD so neither should the rules. Again, all types of instream rights should be noted.
- **(3)(d):** Amend to state: "Provide notice of the application in the weekly notice published by the Department that includes the deadline and methods for submitting public comment." Instream water rights are held by OWRD in trust for the people of Oregon, thus OWRD must provide an opportunity for the public to weigh in on proposed changes to reflect historical use that will impact those instream water rights. As written, only those notified by the applicant are granted that right.
- **(5):** The rules should be clear that, if approved, the OWRD will condition to require screening and fish passage in accordance with ODFW's fish passage law (e.g. a change in permit status is considered a trigger for fish passage, and this is not a "transfer" so is not subject to that exemption).
- New section: please clarify that this section does not apply to reservoir permits so that on-channel dams (instream POD) cannot somehow use this as a loophole.

690-380-2130 Change from a Surface Water Point of Diversion to a Groundwater Appropriation

- **(2)(a):** Please add ORS 540.520 and 540.530, which is required by statute
- **(8):** It is unclear what OWRD is trying to achieve here. This seems like it could result in non-use for over 5 years between the two changes requested and then the reversion back; in which case the OWRD should proceed with cancellation proceedings.

690-380-2200 Changes in Place of Use

- **(1):** Support, this just clarifies existing law/practice
- **(2): Strongly** support. This is in fact the statutory requirement, but we have seen applications that do not ascribe to this. Making this clear in rule will save state/applicant/third party time and resources.

690-380-2240 Layered Water Rights and Certificates of Registration

- Support proposed changes related to layered rights

690-380-2260 Exchanges of Water

- **Proposed New Requirement:** "Any water right acquired by a public agency for a public purpose shall not be eligible to participate in an exchange under this section."
- **(7):** Support this language, though it raises the question of whether it should be incorporated into all other sections that allow protests to make clear what happens upon a filing of a petition for reconsideration. The OWRD should also provide notice of petitions for reconsideration, so the public is a aware that an OWRD decision is being challenged.

690-380-2330 Substitution of a Supplemental GW right for a Primary SW right

- The title here is confusing. The statute allows a holder of primary surface water right to substitute it for a supplemental groundwater right, but the title, grammatically speaking, signals the opposite.
- **(2)**: The standard should include "injury", see ORS 540.524(2).
- **(2)**: The statute is clear that the substitution only goes one way (SW to GW); given that we would suggest the rules retain the qualifier
- **(4)**: Please consider inserting an IR process; it is difficult to comment on an application absent knowing what the OWRD will be recommending.
- **(5)**: Please include "petitions for party status"
- **(8)**: WaterWatch supports the newly added language in (8)

690-380-2340 Specific to General Industrial Water Use

- **(1):** We urge OWRD to include a timing requirement to this section of the rule. The statute requires submission of the quantity used. For some industrial uses, quantity can vary by season; this should be a consideration for the OWRD to ensure against enlargement.
- We urge the OWRD to require proof that the permit was used in accordance with the terms and conditions of the water right.

690-380-2410 Municipal Water Rights

- **(1)**: add the term "municipal" before beneficial use
- **(3)**: change "prior vested water rights" to "water rights vested prior to the use of water under subsection 1(b) of this rule." This clarification tracks the transfer requirements that one can not injure uses vested prior to the change.

690-380-3000 Applications for Transfers

- Please add language making clear that an application can only include one water right per application
- **(8):** We strongly support the additional requirements here. The water user community has testified in front of the legislature that they are concerned about timely processing of applications. This information will enable ODFW to be more efficient in their review. While some RAC members asserted this was not needed because OWRD would determine this anyway, it is important to note that ODFW and OWRD review concurrently not sequentially, so this information will in fact result in more efficient processing.
- **(12) and (12)(a):**
  - **12(a):** Delete the words "such as" at the end of the paragraph and then specify what information must be filed. Consider requiring more detailed statements as to the specific times of water use

(eg months of the year, by year) and specific amounts of water use that were used. Consider requiring any metering records to be provided. In general, the rules should make clear that the applicant has to provide the OWRD with enough evidence to prove use in compliance with the terms and conditions of the right in order for the OWRD to make a determination.

- **Suggested language (12):**"Such affidavits shall state the specific grounds for the affiant's knowledge, the specific use to which the water was put (e.g., the crops grown, the nursery stock watered), and the delivery system used to apply the water and include supporting documentation including but not limited to:
- **A)** Dated satellite imagery or dated aerial photographs of the lands, with the locations of asserted water use, point(s) of diversion or appropriation, and water conveyance indicated on the image or photo;
- **B)** Other photographs with the date and location of each photograph provided by camera stamp. If providing this information by camera stamp is not feasible,
  then by otherwise by providing GPS locations or a map showing the specific location and date of each photo.
- **C)** Available copies of dated receipts from sales of irrigated crops or for expenditures relating to use of water that are clearly marked by the issuer of the receipt with information that ties the receipt to the authorized place of use and use allowed under the water right;
- **D)** Any available records such as Farm Service Agency crop reports, irrigation district records, an NRCS farm management plan, or records of other water suppliers; or
- **Additional comments: (12)** needs to be broadened to require water use information for the full forfeiture look back period (20 years) to aid OWRD in the determination it must make – see e.g. OAR 380-4000(3)(c).

- **13(a)(A):** Please remove "or appropriation" for reasons outlined earlier in these comments.
- **(19):** OWRD must comply with ORS 197.180. The language provided does not appear to go as far as ORS 197.180. We would suggest the rule either mimic language from the statute and/or simply refer to the statutory cite. Importantly, the use must comply with land use provisions, it cannot be awaiting compliance in our read of the statute.

690-380-3400 Waiver of Fees

- We oppose the proposed mandatory waiver of fees for transfers that result in instream water rights.
- **(3)**: Please add language "except when this determination is as a result of a request for consent to injury to an instream water right".

690-380-3410(1)(c) Waiver of Mapping Requirements – delete (c). We do not support waiving mapping requirements based on an ODFW net benefit determination.

690-380-4000 Initial Review

- **(4)(a):** Suggest a tie to statute/rule for definition of "water use subject to transfer". Suggest amendment so this section reads:
  - <u>The water right affected by the proposed transfer is a water use subject to transfer as defined</u> <u>in ORS 540.505(4) and OAR 690-300-0010(59) and, for a right described under 690-300-</u> <u>0010(59)(d), the proof of completion is approved under OAR 690-380-6040;</u>
- **(10):** Two comments. First, the language should be clarified so that it is clear that the applicant must make this request within the original 30-day time period, not after, and that

the additional 60 days will run from day 31 onwards. Second, the appropriate rule reference is 5(b) not 9(b).

- **(12):** If the applicant amends the application, the OWRD should issue a superseding IR and re-notice the application for comment. As presented, the only option for the public would be to protest. The OWRD should also re-endorse the application with the date all information was presented, to ensure fairness as to priority dates to other applicants and to start the timeline restrictions from the date of the new application.

690-380-4010 Proposed Final Order

- **1(a):** Please add "and other applicable rules and laws". There are other laws that restrict what can be done under transfers. As an example, the Scenic Waterway Act states: "No dam, or reservoir, or other water impoundment facility shall be constructed on waters within scenic waterways." ORS 390.835. Any water allocation or reallocation request is subject to this mandate, transfers cannot be used as a loophole to get around this. Similarly, there are rules that restrict transfers as well, for example, basin plans. Basin plans classify what uses are allowed and/or restricted. Transfers cannot be used as a loophole to get around classifications. To allow such would encourage all manner of gamesmanship to Oregon's water permitting and reallocation structure. To make this clear, we would request a provision should be added to the 380 rules to require OWRD to make a finding that the proposed use is allowed under a basin plan.
- **(2):** We urge amended language so this section reads:
  - The Department's proposed final order shall include an analysis that supports its findings and conclusions, and a conclusion of whether the application is consistent with the following approval criteria
  - **2(c) proposed deletion:** We strongly oppose the proposed deletion of "the has been used over the past five years according to the terms and conditions of the water right". This is a critical provision of statute and needs to be retained. We urge OWRD to reverse their proposed deletion, and to make this requirement crystal clear, amend the rules so it is a stand-alone section, in addition to the forfeiture language.
  - **2(d) proposed deletion:** We opposed the deletion of the existing provisions that require the applicant to show that they are ready, willing and able to use the water.

690-380-4030, Protests and Hearing

- **(1):** As noted in other rule sections, please add ORS 183 and OAR 137 as appropriate, and also insert "petitions for party status".
- **New (3)**: Please add the process for petitions for party status.

690-380-4200, Hearings

- **(2):** We strongly support the OWRD's new language here. It creates efficiencies in processing, which is aligned with the purpose of this rulemaking.
- **(3):** We oppose the suggestions made by a RAC member that the time for this be expanded to 30 days. The user community has testified in front of the legislature and the Commission about their frustration with the time it takes to process transfers, yet they secured 3 months of extra time for their requirements in statute. The rules should not follow suit and add even more time. We urge OWRD to retain the suggested 15 day.

- **(3)** The wording in this section implies that there is an "approval process" that an applicant can pursue. This does not align with statute. Under ORS 540.530, consent to injury is an entirely discretionary process. The agency that requested the instream water right at issue can opt to not to consent to injury for any reason, or no reason at all. OWRD, also, doesn't have to approve consent to injury, even if the requesting agency recommends consent. Better wording would be somewhat akin to "the applicant may file a notice that s/he will request agency consideration of consent to injury to the instream water right ". See OAR 690-380-5050 for more detail.

690-380-5000 Approval of Transfers

- **(1)(c):** We support the inclusion of this new language
- **(1)(e):** We support the inclusion of this new language
- **(1) proposed new subsection:** An additional standard of approval is needed to ensure that the underlying right to be transferred was used in accordance with the terms and conditions of use.

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

This section needs quite a bit of further work to ensure that it is consistent with statute and that there is a robust and transparent process related to consent to injury to an instream water right. The rules need to be reworked to make clear the following provisions of statute are clear:

- The agency requesting the instream water right has wide discretion to not consent to injury of the instream water right. The statute does not require any findings and/or explanation as to why the agency is choosing not to consent. All is required is that they tell OWRD they do not consent.
- The OWRD also has broad authority not to consent, even if the agency that requested the instream right recommends consent. This needs to be clear in rule. The rules as drafted currently state "shall" consent; which is directly contrary to the statutory directive that OWRD "may" consent.
- The OWRD has a trust duty to the people of the State of Oregon for whose benefit the Department holds in trust the instream water right to maintain water instream for public use pursuant to ORS 537.332(3). The CTI rules need to include a determination (and findings) of whether the OWRD's decision fulfills its trust obligations.

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

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

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

We have offered some initial language for consideration in Appendix A (attached); but these likely need more refinement and discussion.

690-380-5100 Compatibility with Acknowledged Comprehensive Plans

- **(3)**: We support the proposed deletion. See earlier comments on land use requirements.

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

- **(2):** We are unaware of any statutory authority to allow extensions of transfers, as such please strike "or within any extension of time allowed for completion".
- **(3):** We urge the OWRD to send the notice of cancellation if the COBU is not filed within the time required in the transfer.
- **(5):** Non-completion should render the water right subject to forfeiture and cancellation. It is unclear why the OWRD is proposing to delete this section. This is not cured by **(8)** which direct reversion to the original point of diversion. Between these two provisions, the rules appear to set up a pretty significant loophole to forfeiture/cancellation. Please provide statutory authority for the OWRD's proposal.
- **(8):** See comments in (5). We are unaware of any statutory authority that would direct reversion rather than moving into forfeiture/cancellation proceedings (these are not temporary transfers, which do have statutory direction to revert back to the original use). If there is statutory authority, please provide it to the RAC.

690-380-6020 Extension of time

- We are unaware of any statutory authority for extensions of time to complete transfers. This section should be deleted.

690-380-6030 Proof of Use; Noncompliance

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

690-380-6050 Waiver of Proof of Completion

- As we understand it, waiver of proof of completion can only be granted to a limited subset of transfers as outlined in 540.530(2)(b). This needs to be made clear in subsection (1) in order to align with statute and prevent mischief.

690-380-6060 Petition for Reconsiderations

- The rules limit petitions for reconsideration to landowners, we do not see this in the statute.

690-380-7000 Types of Permit Amendments

- Permit amendment statutes allow for "a change" in point of diversion; they do not allow for expansion of one point of diversion to allow "additional" points of diversions. A change means a substitution, not an expansion or addition. We urge OWRD to clarify this in these rules.

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

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

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

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

690-380-7030, Change in Place of Use

- **(1):** This section needs to make clear that the change must be changed from one place to another and that the original place of use cannot receive water under the change. In other words, as with the other sections, the statutes limit this allowance to a change, not an expansion.

690-380-7100, Permit Amendment Application Requirements

- **(11):** Again, the change in place of use needs to make clear that this is a change, not an addition of more lands to the original permit.
- **(14)**; This needs to be strengthened to ensure the changes are allowed by land use laws/regulations; see previous comments on reflecting statutory requirements related to land use. Moreover, there is nothing in the permit amendment statute that allows for the exceptions spelled out in (14)(a)-(d).
- **(14)(a)**: This section includes language "where existing and proposed water use would be located…." which appears to indicate that the OWRD is contemplating allowing water spreading under these rules. We strongly oppose this. This is not allowed by law, goes against the concept of beneficial use without waste, and sets horrible precedent.
- **(17)**: the OWRD should require a notarized oath, not just an "oath". Penalties should apply to anyone who makes false statements on an application.

690-380-7200, Notice of Permit Amendment

- These rules should include the public process afforded other water right transactions (IR/comment, PFO/Protest, Protest/Petition for party status).

690-380-7300, Permit Amendment Final Order

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

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

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

- **(11):** The map should be prepared by a CWRE.
- **(11)(b):** This needs to clarify that each certificate of registration that the applicant seeks to change must also have its own application.
- **(12):** Please see comments on land use provisions in transfers.
- **Proof of use, new proposed provision:** The rules should require the applicant to include proof of use over the past five years. Absent that this rule would allow people to revive long defunct wells. The groundwater registrations statutes, as a whole, contemplate "beneficial use" for a registration to be valid. Registration serves as authority to continue beneficial use, not as a loophole to the basic tenants of Oregon water law. In bill negotiations over HB 2123 (2005), OWRD made assurances to stakeholders that the rule requirements for groundwater rights would

mirror those for surface water, which do include proof of use among other things. Please add that here.

OAR 690-382-0550 Completeness Review

- **(3)(b):** Protection of scenic waterway flows was put into the original rules in 2006. The statute grants broad authority to OWRD as to what it requires for changes in place of use, point of appropriation or type of use. In bill negotiations in 2005, OWRD represented that its rules would place similar requirements in rules as applied to surface water registrations. The Scenic Waterway provision is a narrower application than the surface water requirements (no net loss of water downstream) but serves to protect at least a subset of instream uses. WaterWatch supports the continued inclusion of the scenic waterway provisions in these rules but would urge that this section be re-worded to match that in 690-382-0700(2)(b).

690-382-0700 Completeness Review

- **Add (e):** The applicant put the water to beneficial use within the terms and conditions of the groundwater certification within the past five years.
- **(d):** We support the continued inclusion of (d). The statute gives OWRD wide discretion as to what criteria to apply to allow changes in groundwater registrations. (d) reflects statutory intent.

690-382-0800 Notice of Proposed Final Order

- **(e):** This should be expanded to note "petitions for party status".

690-382-0900 Protests and Hearing

- **(1):** See previous comments regarding reference to ORS 183, OAR 137 and "petitions for party status".
- **New subsection:** Note 30-day process for petitions of party status.

Thank you for this opportunity to comment. We will provide additional comments as revisions are made and/or as otherwise noted in the body of these comments.

Sincerely,

Kimberley Priestley
Sr Policy Analyst

Attachment, Appendix A

APPENDIX A

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

(1) If the Department issues an initial review pursuant to OAR 690-380-4000 where all determinations are positive, excepting that the transfer will injure an instream water right, and after the applicant has provided all outstanding information requested by the Department, the applicant may notify the Department that the applicant intends to pursue consent to injury to an instream water right as outlined in OAR 690-380-4000(8)(b).
(2) If an applicant notifies the Department that it intends to pursue consent to injury to an instream water right pursuant to (1), the Department shall seek a recommendation from the agency that requested the instream water right.
(3) In requesting a recommendation for consent to injury from the agency that requested the instream water right, the Department shall provide to the appropriate agency a copy of the initial review issued under OAR 690-380-4000 and facilitate the analysis of cumulative impacts, identify any previously approved transfers injuring the same instream water right as the proposed transfer.
(4) The agency that requested the instream water right may recommend either that the Department not consent to injury or that the Department consent to injury.
(5) The agency that requested the instream right has the statutory discretion to recommend that the Department not consent to injury. There is no requirement for a recommendation not to consent to include additional information such as findings or explanation.
(6) If the agency that requested the instream water right recommends that the Department not consent to injury, the Department will proceed with the issuance of the PFO proposing denial of the transfer
(7) If the agency that requested the instream water right recommends that the Department consent to injury, the agency's recommendation shall be in writing and include:
(a) A description of the extent of the injury to the instream water right;
(b) A description of the effect of the injury on the resource, including but not limited to an analysis of the impacts on instream flows (or lake levels where applicable) and the effect of the proposed change on the ability of the waterway to support the public use(s) for which the instream water right was established;
(c) An evaluation of the net benefit that will occur as a result of the proposed water right change that includes an analysis of changes to instream flows and impacts to the public use(s) for which the instream water right was established, and an analysis of the cumulative impact of any previously approved water right changes that injured the instream water right; [Note: consider providing direction on consideration of whether a proposed change is for the purpose of implementing a restoration project].
(d) A statement that the proposed water right change will not result in the harm, impairment, or degradation of the public use(s) for which the instream water right was established
and
(e) Any proposed conditions necessary to ensure that the proposed change will be consistent with the recommendation.

(7) Within 90 days of receipt of a written request for a public meeting on the recommendation, the Department and the agency providing the recommendation shall hold a joint public meeting to review the recommendation and to accept public comments. The meeting shall be conducted in a format that

Commented [KP1]: NOTE: this section only follows the rule provisions for the IR stage. For the post CC stage, process provisions will need to be provided throughout.

allows interaction between the public and relevant staff from the Department and the agency recommending consent to injury.

(8) If no comments or requests for a public meeting to review the recommendation are received by the Department in response to the notice provided under section (4) of this rule or if, after consideration of any written comments or the discussions during the public meeting described in section (7)(6) of this rule, the recommending agency notifies the Department that it will not withdraw its recommendation to consent to injury, the Department may issue a proposed final order recommending approval of the transfer and consenting to the injury to the instream water right. [NOTE: the statute says MAY not shall as proposed in the rules. ORS 540.530(e)(A)]

The proposed final order shall, in addition to the considerations and approval criteria outlined in OAR 690-380-4010, include:
(a) A determination regarding whether consenting to injury of the instream water right and approving the transfer fulfills the Department's trust duties to the people of the State of Oregon for whose benefit the Department holds in trust the instream water right to maintain water instream for public use pursuant to ORS 537.332(3);
(b) Findings on whether consenting to injury of the instream water right and approving the transfer fulfills the Department's trust duties to the people of the State of Oregon for whose benefit the Department holds in trust the instream water right to maintain water instream for public use pursuant to ORS 537.332(3);
(c) Findings on the extent of the injury to the instream water right and the effect on the resource from the change in water use proposed in the transfer, including an analysis of regarding the ability of the resulting instream flows (or lake levels where applicable) to support the public use(s) for which the instream water right was established;
(d) Findings on whether a net benefit will occur as a result of the change to the water right that include analysis of changes to instream flows and impacts to the public use(s) for which the instream water right was established, and an analysis of the cumulative impact of any previously approved changes that injured the instream water rights; [Note: consider providing direction on consideration of whether and to what extent the proposed water right change is part of a restoration project].
(e) Findings, that the proposed water right change will result in a net benefit to the resources consistent with the purposes of the instream water right.
(f) If the proposed final order proposes to issue the transfer, any conditions necessary to ensure that the change will be consistent with the findings and will result in a continued net benefit to the resource consistent with the purposes of the instream water right.

HARTT Laura A * WRD

From: Kimberley Priestley <kjp@waterwatch.org>
Sent: Thursday, November 6, 2025 6:06 AM
To: HARTT Laura A * WRD; RANCIER Racquel R * WRD; RATCLIFFE Katie S * WRD
Subject: Div 51, Hydro projects

Hi Racquel, Laura and Katie,

I was looking at the Div 51 rules and was reminded that those too have provisions for standing statements and protests.

There are also provisions of those rules that are not aligned with statute (e.g. subordination under OAR 690-051-0380).

Given that, we would urge a rulemaking clean up on these as well.

Best, Kimberley

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Feedback on Water Rights Rulemaking – Input (RAC 3, Oct 14, 2025)

RAC Member Name: Leah Cogan

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-018-0040(9)	"applicant" is singular throughout except for one plural "applicants" here	Change "applicants" to "applicant" to match the rest of the rule
690-310-0270(2)(b)	Requiring the conversations to be "collaborative" may be hard to define and assess	Remove "collaborative"
690-018-0090(2)(c)	Don't agree with removing reference to Div. 5, but if this stays in, clarify that it's the proposed use that should be allowed under the comp. plan, not the approval itself	"The proposed use is allowed under the acknowledged comprehensive plan"
690-315-0010(3)(b)	Clarify that the second use of "application" refers to the permit application, not the extension application	"if a proposed final order was issued on the permit application prior to April 1, 2026"
690-315-0070(3)(l)	The proposed addition to the last sentence doesn't need "For" at the beginning	"Municipal water right permit extension requests for greater than 50 years must include documentation"
Combined comments on land use compatibility issues below		
690-018-0040(22)(a) 690-018-0050(3)(c) 690-310-0040(1)(a)(L) RAC 4 but same comments 690-380-3000(19) 690-380-7100(14) 690-380-8003(2)(d) 690-382-0400(12)	Please see detailed comments on concerns below.	For the provisions relating to application requirements (690-018-0040(22)(a), 690-310-0040(1)(a)(L), 690-380-3000(19), 690-380-7100(14), 690-380-8003(2)(d), and 690-382-0400(12)): "A Land Use Information Form completed by the affected local government as outlined in the Department's Land Use Planning Procedures Guide described in OAR 690-005-0035(4)." 690-018-0050(3)(c): The original rule language was sufficient to allow OWRD to comply with Division 5 and ORS 197.180. Recommend keeping the original language (could make "acknowledged comprehensive plans" lower-case).

690-382-1200(1)	This is a very useful statement tying actions on groundwater registration modifications to OAR Chapter 690, Division 5. Similar statements are not included in other divisions.	If OWRD is very concerned about compliance with ORS 197.180, this could be achieved through compliance with Division 5, and a similar statement could be added to Divisions 18, 310, 380, and any others where rule changes are proposed related to land use.

Concerns on Policy Changes Regarding Land Use Compatibility

The widespread changes regarding OWRD's land use compatibility requirements throughout this rulemaking are extremely concerning and are likely to have significant unintended impacts as proposed. While the changes are unrelated to implementing the 2025 legislation, they have been included in this rulemaking as part of the miscellaneous "process improvements" identified by OWRD.

The main proposed change of concern is the new requirement to provide evidence that all land use approvals have been obtained at the time of application submittal. The proposed language in Divisions 18 (Allocations of Conserved Water), 310 (Water Right Application Processing), 380 (Water Right Transfers), and 382 (Groundwater Registration Modifications) requires "information sufficient to assess compatibility with the acknowledged comprehensive plan," which implies that the LUIF must show definitively whether the proposed use is allowed outright or that all discretionary land use approvals have been obtained and all appeal periods exhausted, or OWRD will not consider the application to be complete. It is unclear whether obtaining a conditional use permit would be considered sufficient at this stage. Currently, applicants are able to submit applications while discretionary land use approvals are "being pursued," including when approvals have been obtained but appeal periods have not ended. It appears that the proposed changes would eliminate this option.

OWRD staff described three goals for the changes:

1. Ensure OWRD complies with its obligations under ORS 197.180
2. Improve efficiency by requiring a completed Land Use Information Form (LUIF) rather than accepting the receipt acknowledging the request for land use information
3. Remove provisions allowing OWRD to presume that a proposed water use is compatible with land use if no information to the contrary is received within 30 days

The proposed changes to meet second and third goals are understandable. Requiring a completed LUIF removes the opportunity for the LUIF to be lost or misdirected when only a receipt has been received, or for the local government to overlook the comment opportunity. The proposed changes to remove provisions allowing OWRD to presume that proposed uses are compatible with comprehensive land use plans and regulations if no information is received within 30 days is likewise understandable, and it is evident that OWRD does not have the authority to make that presumption, so no further comments are proposed on these issues.

Regarding the first goal, it appears that the rule changes are more substantial. Of particular concern, the proposed revised language in most cases removes all references to OAR Chapter 690, Division 5 (Compliance with Statewide Planning Goals, Compatibility with Comprehensive Plans, and Coordination on Land Use Matters) and OWRD's Land Use Planning Procedures Guide. These rules and the guide established as part of OWRD's required State Agency Coordination (SAC) Program are not being changed through this rulemaking and remain relevant. The Division 5 rules implement ORS 197.180 and reflect OWRD's SAC, which was approved by the Land Conservation and Development Commission. The SAC provides some discretion, reflected in Division 5, for processing applications when land use approvals are pending but are being pursued. The proposed changes in this rulemaking are inconsistent with these provisions in Division 5 and in the SAC. Removing the references to Division 5 and the Land Use Planning Procedures Guide makes it more difficult to find this information but does not address the underlying conflict or eliminate the associated requirements. Indeed, revising rules so that they conflict with the Division 5 rules creates confusion and inefficiencies.

The requirement to have all land use approvals in place prior to a water right application (whether new permit, transfer, or other transaction) is a major change with impacts on statewide policy goals. The legislature and OWRD have long acknowledged that the development of large-scale municipal water supply projects often requires longer timeframes than other projects. For example, the standard development period for a new municipal water use permit is 20 years, and longer extensions of time can be granted to municipal water right holders for development of permits. Similarly, OWRD can grant longer periods of time for transfers of municipal rights as compared to other types of water rights. This flexibility allows municipal water providers to complete the lengthy permitting, design, and construction of large infrastructure projects that provide clean, safe, and reliable drinking water to many Oregonians.

A municipality may need to obtain discretionary land use approvals for a water-related project, such as when a parcel needed for a large municipal infrastructure project is not already zoned for municipal utilities. Land use actions are part of a municipality's overall project permitting process, which usually occurs around 30 to 60% design. Before pursuing a design and construction project and reaching this phase, the municipality must obtain financing. Municipalities are required to show bonding authorities that they have a water use permit or certificate specific to their proposed project in order to get their debt approved, whether they are seeking municipal revenue bonds, federal Water Infrastructure Finance and Innovation Act loans, Special Public Works Fund financing through Business Oregon, Safe Drinking Water Act revolving loan funds, or other funding sources.

For this reason, any needed water right transaction is the first step in this process; therefore, it is critical to have a process for obtaining the necessary water right authorization while land use approvals are pending. This need has long been recognized, leading to the flexibility described in Division 5 and the SAC, such as placing conditions on a permit or other approval to preclude water use until the applicant obtains all required land use approvals, while remaining in compliance with ORS 197.180. At the very least, accepting an application as complete while land use approvals are pending is necessary to allow large water supply projects to continue moving forward. The absence of this option will severely compromise municipal water providers' ability to manage their water rights portfolios and provide the water supply needed to meet the state's housing production goals.

Feedback on Water Rights Rulemaking – Input (RAC 5-7, Oct 21 and 29, 2025)

RAC Member Name: Leah Cogan

Rule # e.g., 690-014-0170(1)(b)	**Concern**	**Proposed Rule Language/Description of Proposed Fix**
690-017-0800(3) (leftover from RAC 4)	The list of criteria for economic hardship goes from (a) through (f) but the "and" is at the end of (d) instead of (e)	Move "and" to the end of (e)
690-380-2120(5)(b)	Extra comma after "May"	Remove comma
690-380-2240(1)	Why is "certificate of registration" deleted?	Retain "certificate of registration" unless there is reason to remove
690-380-2330(2)	"Expansion" is not a defined term and is not necessary. Enlargement is already defined as "expansion of a water right" with additional examples.	Remove "or expansion"
690-380-2340(3)(d)	There is no basis for limiting industrial or any other type of water right to a five-year average of past use. Many older rights don't require a meter and water use reporting. System capacity could be used as a proxy where measurement and reporting were not required.	"Water use measurement, system capacity information, or other data acceptable to the Department regarding the maximum instantaneous rate and annual volume of the quantity of water diverted to satisfy the authorized specific use under the original water right; and"
690-380-3000(12)(a)(C)	Don't need "or" at the end of the sentence anymore since (b) is being deleted	Replace ", or" with "."
690-380-3000(19) 690-380-7100(14) 690-380-8003(2)(d)	Please see comments previously submitted regarding land use compatibility	Retain original language in 3000(19) and use similar language in 7100(14) and 8003(2)(d)
690-380-3220(3)	Does adding "or" indicate that a transfer application won't be accepted if more than one of the listed circumstances applies? They should not all need to apply, but more than one should still be acceptable.	Remove "or" from (3) and at the top (before (1)) change the last phrase from "except under the following circumstances" to "except when one or more of the following circumstances applies" or something similar.

690-380-4000(2)	Needs "or" before "fees"	"required information or fees, or that the water rights"
690-380-5000(2)	If no protest, the PFO becomes an FO, but the draft certificates don't become an FO.	"the proposed final order shall become a final order, and if applicable the draft remaining right certificate(s) shall become final, on the date"
690-380-7010(1)(b)	Reference to (3)(c) should be updated to (4)(c) because that section got renumbered	(4)(c)
690-380-7110	Missing period at the end of the last sentence	Add period
690-380-7300	Going straight from application to final order is expeditious but gives the applicant no opportunity to provide clarification to OWRD if needed or even fix a typo. Applicants need an opportunity to understand OWRD's decision (whether through an initial review or PFO) and work with the Department without having to protest a final order and go through a contested case process, especially since the permit will surely expire during that time.	Add a process for an initial review or PFO. At the very least, add a statement that OWRD will issue a final order (current language says the application shall be approved but no mention of actually issuing the order approving it).
690-382-0400(11)	Don't need a comma at the end after "criteria" since there is also a colon	Delete comma
690-382-0550(3)	"include" should be "includes"	"initial review of the application that includes an assessment"
690-077-0010	(5), (7), and (8) are missing periods at the end	Add periods
690-077-0052(2)	"collaborative" may be difficult to define and assess	Remove "collaborative"
690-077-0071(1)(e)	Slightly confusing as a run-on sentence; split up	"Identify the point(s) of diversion authorized on the water right. If the water right does not identify"
690-077-0071(1)(f)	Need "or" in the list	"stream, lake, or reservoir"
690-077-0075(3)(b)(D)	Reference to (2)(c)(B) should be updated to (3)(c)(B) because this section was renumbered	(3)(c)(B)

690-077-0100(6)	Based on the proposed rewording, “explains” should be “explain”	“incorporate findings that explain the basis for the decision”
690-077-0105(1)(a)	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?	“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)

To: Laura Hart, Rules Coordinator / Rules Advisory Committee

RE: Public Comments on Division 18 proposals and Land Use and Water Resource interdependence under discussion in RAC Meeting #3, 14 October 2025

4 November 2025

From: Jim Powell, Bend, Oregon

Thank you all for the time and efforts to clarify and improve efficiency in the administrative rules and protocols of OWRD.

Included are several comments for consideration in the Division 18 Potential Changes and the interrelationship of water and land use in other divisions, not addressed either by the October 14th RAC discussion or the annotated revisions

A. Add clarification that the ACW surface water pathway applies to only "duty" water.

1. Rule Notations include:
   - 690-018-0010(1) "any water conserved" is implied to be eligible and subject to allocation based on ORS 537.470 (3).
   - 690-018-0020(3) states that "Conservation means the reduction of the amount of water diverted to satisfy an existing beneficial use …"; and
   - 690-018-0020(4), mentions the "maximum amount of water that can be diverted using the existing facilities" as one of the metrics in determining "Conserved Water"

2. History:
   - The concept of ACW with a 50-50 split and the potential for spreading, as well as that of making instream use a beneficial use, arose within a Bend-Deschutes County study of the Deschutes Basin in 1986. Both concepts were intended to encourage on-farm conservation and a protected improvement of surface water resources. The available technology and costs impacting districts at the time did not practically enable sustained conservation within the canal infrastructure itself.
   - In the Deschutes Basin, five district irrigation diversions included not only duty water but also a 1928-33 decreed extra diversion usufruct - a percentage (33-65%) of the duty diversion (based on a district's irrigated acreage) – specifically designated to offset "losses and obstructions in the canals" as established by the Circuit Court and State Engineer. That same decree increased the Deschutes Basin duty water from ~3.5 to ~5.45 AF/A per season, the most generous duty in the state.
   - When the 1986 OWC summarily refused to consider either concept, our Representative introduced bills supporting them in 1987. The Legislature changed the split to 25-75 and applied the concepts statewide. Diversion waters eligible for AWC provisions were based on duty water alone.

3. Current Events in The Deschutes Basin:
   - For the past several years, the Basin has been utilizing previous collaborative processes to formulate an initial Regional Basin Plan.
   - Public Funding (PL566 and state grants particularly) and new technology have placed conservation by canal piping within reach for districts. The districts all applied

for funding, completed NEPA processes, and agreed to return conserved water from piping to the public and protected instream flow.

- Most districts and the Regional Watermaster have returned non-duty water as well as ACW determined portions of duty water conserved by district piping projects to the state. One of our districts now is suggesting that the ACW provisions apply to <u>all</u> water diverted by districts, including the extra decreed water, and implying it may consider non-duty waters in the calculations of district retained water under the statute. <u>If</u> this were to happen, it would be the equivalent of increasing the duty on affected acres by 45% - or from 5.45 to 9.91 AF/A. Like the original decree, this additional retained water would reduce water resources available to junior right holders or instream protections.

4. Rationale:
   - All basins now effectively base the ACW on duty water. None but five districts in the Deschutes Basin have the opportunity to divert water in excess of duty water to compensate for transmission losses.
   - Clarifying ACW eligibility's being limited to duty water would continue to put all basins and districts on an equal footing – which was one of the considerations by the Legislature in assigning the 25-75 split percentage allocations of waters conserved under this act.

B. I support the concerns expressed by Chris, Kimberley and others about the provision in 690-018-0065 (2)(c)(A) of applying the ACW to groundwater but not protecting any conserved water or having a plan beyond leaving it for the next user to access.

Lessons from the Deschutes Basin about groundwater protection and attempts to sustain the aquifer

- The interrelationship between surface and groundwater in this Basin has been well established by excellent research from Gannett, Lite and others over the past two decades. The Basin's unique geology and impermeable "base" tend to return precipitation, groundwater fed tributaries and springs, excess irrigation or canal leakage and recycled water within the catchment area into surface water flows. Other basins in the state do not enjoy this characteristic.
- An increase in Exempt well use (vide C below) and the recent increase in consumption authorized by HB3372 have renewed interest in the validity of an assumption that such wells do not significantly reduce ground water tables.
- The Mitigation Program to preserve flows at the Madras gauge for the Scenic Waterways Program has utilized the above interconnection to explore methods to compensate for groundwater extraction by transferring surface water to a protected instream status. The program has stimulated more attention to:
  - The struggle of municipalities to find new water resources to meet projected needs and comply with DLCD requirements for land use plan acknowledgments
  - Crediting the impacts of canal leakage or municipal recycling on groundwater resources. Gannett et al note a significant contribution to groundwater by both – unfortunately the contribution confluence is below (north of) the major groundwater extraction points for municipal, domestic and agricultural use.

- Much interest exists by some in using “unclaimed” winter flows pushed into faults in lower elevation areas (resulting in diminished stream flows below any diversion points) as “artificial recharge” to enhance groundwater supplies or mitigation credits. Caldwell (1995) reported on some of the variances in well recharge rates and water age within the Basin. Current wisdom suggests that major Basin recharge occurs at upper elevations in lakes, out of stream wetlands and precipitation/snowpack/glaciers – all of which have diminished in the past several decades. OWRD hydrologists may be looking at studies to supplement Caldwell’s work and provide more insightful guidance.

C. The interface of OWRD and DLCD and the importance of collaboration in land use/resource planning as manifested in Deschutes County.

My memory of the early 1980’s when the different governmental entities were starting the implementations of SB100 is punctuated by the silo approach between OWRD and DLCD as exemplified by the OWC Chairman’s response to the 1986 presentation of the concepts which became the ACW and instream use: “Thank you for your comments. We do not need any county to tell us how to manage water”. Fortunately, that has changed.

The Deschutes County Community Development Department gave considerable thought to incorporating Water Resource considerations into land use policies, encouraging, with some success, involvement of OWRD, municipalities and irrigation districts to engage and participate in evaluation and approval processes for development or changes in land usage. Like its predecessors, the county’s proposed 2040 Comprehensive Plan included water agency collaboration and water resource policies commensurate with the population, usage and climatic changes. These, however, were stripped out under the ideological bents of a majority of the county’s current Board of Commissioners. Without required review and guidelines, we have more development pressures for places like Thornberg, partitioning of irrigated lands or conversion of land into RR-10 zones with reliance on exempt wells. Like the 1870-90 Gilded Age, resource consumption and economic development seem paramount. Depending on a local land use plan adoption and acknowledgment as a de facto standard for good water management is not reliable.

Recent chairs and vice chairs of the LCD Commission have seemed more attuned to improved resource management and interaction with other agencies. My sense is Mr. Gall has the skillsets, perspectives and background to collaborate in this environment and improve inter-agency collaboration, even if this cannot be “codified” in the current RAC or OWRD rule cleanups.

Thank you for the opportunity to comment and for your consideration and efforts.

Jim Powell
Bend, OR