

MEMORANDUM

TO: Water Resources Commission

FROM: Tom Paul, Administrator
Field Services Division

SUBJECT: Agenda Item 1, February 13, 2003
Water Resources Commission Work Session

Water Right Transfer Policy Issues

I. Issue Statement

In October 2001 staff initiated amendment of the water right transfer rules (OAR Chapter 690, Division 15) and organized the Transfer Rules Advisory Committee to assist in the effort. Staff and the committee developed amended rules for public hearings that propose a number of changes. However, several policy issues remain, and committee members have requested an opportunity to brief the Commission on those issues. *This is an informational report only; no Commission action is required.*

II. Background

The Water Resources Department initiated amendment of the water right transfer rules with two major objectives:

1. Develop criteria to be used during the transfer application review process to clarify what constitutes injury to other water rights and to improve the consistency of the Department's injury evaluations; and
2. Bring the rules into conformity with statutory changes from the 1999 and 2001 legislative sessions. These changes include:
 - SB 301 (1999) allowing transfer of a surface water right to ground water and substitution of a supplemental right for a primary right;
 - HB 3356 (1999) allowing the Department to waive transfer fees and to assist in satisfying survey or final proof requirements for fish-friendly transfers;
 - SB 644 (2001) allowing an expedited notice and waiting period for substitution of a supplemental ground water right for a primary water right during droughts and modifying procedures for irrigation district temporary transfers; and

- SB 870 (2001) allowing water right holders to consent to injury and establishing procedures and requirements for the Department to consent to injury to instream water rights.

Staff organized the Transfer Rules Advisory Committee to assist in the development of amended rules. Committee members were selected through a solicitation for recommendations sent to a variety of agricultural, municipal, environmental, and other interested organizations. Attachment 1 is a list of the members of the Transfers Rules Advisory Committee.

The committee generally met monthly beginning in October 2001. The initial meetings focused on an overview of the water right transfer process and the issue of what constitutes injury to another water right in a transfer. Ultimately, the group agreed to move forward with revisions to the rules where there was general consensus. These changes include a restructuring of the transfer process and rules implementing the 1999 and 2001 statutory changes. The Department held public hearings on the “consensus” rule amendments on January 29 in Salem and on January 30 in Pendleton. Attachment 2 is a copy of the hearing notice. Staff anticipate recommending adoption of amended rules at the April Commission meeting.

The committee was not able to reach agreement on three major issues:

1. What constitutes injury to other water rights and how will the Department determine whether a proposed transfer will be injurious?
2. What constitutes enlargement of a water right?
3. To what extent should opponents of a proposed transfer be able to seek cancellation of the water right involved in the transfer outside of the transfer process through submittal of affidavits of non-use?

To aid discussion of these issues, staff have developed definitions of the terms commonly used in discussions about injury resulting from transfers and the amount of water that may be transferred. These definitions are provided in Attachment 3.

Several of the groups represented on the Transfer Rules Advisory Committee are working together to secure establishment of a legislative task force or other forum to address transfer-related issues. Staff anticipate continuing to work with the members of the committee and others to address the remaining issues and to find additional ways to improve and streamline the transfer process, either through continuation of the committee after the legislative session or through a legislatively-created task force.

III. Discussion

Changes in the place of use, point of diversion, and character of use of water rights are allowable under Oregon’s water code. Oregon case law dating back to the early 1900s describes the ability under the prior appropriations doctrine for water right holders to transfer their water rights. However, beginning with the earliest cases, the changes have consistently been limited to those

that do not impair the rights of others. Attachment 4 is a summary of various Oregon court cases related to transfers and injury prepared by staff to aid the Transfer Rules Advisory Committee.

In addition to injury limitations on transfers, the water user must be ready, willing, and able to exercise the right under the existing authorization; the right must be subject to transfer; and the right may not be enlarged through the transfer. The Department is responsible for evaluating proposed transfers to determine if these criteria are met and, in approving a transfer, must make an affirmative finding of no injury to existing water rights.

The Department's practice has been to allow the transfer of the full face value of a water right if such a transfer could be affected without injury and met the criteria described above. However, this approach has been used during a period in which most water right transfers involved moving the place of use or point of diversion for an irrigation water right to another relatively close location. The Department has processed transfers that involved a change in character of use (e.g., irrigation to municipal use); however, until recently, the number of applications for these types of transfers was small. As opportunities for new appropriations of water have become increasingly limited and interest in flow restoration has increased, more attention is being given to re-allocating water through voluntary transfers. This frequently involves changes in character of use, moving the water over larger distances, and moving the water from out-of-stream use to instream use. As a result, and because we are working in a largely-fully appropriated system, the Department is facing a set of difficult policy issues. The Transfer Rules Advisory Committee discussed, but did not reach consensus, on these issues.

Staff and members of the Transfer Rules Advisory Committee have outlined these policy issues for discussion with the Commission:

1. How much water are junior water users "legally entitled" to when considering potential injury associated with a transfer?

Senior water rights normally retain a call against a transferred junior right. As a result, there is generally little potential for a transfer to injure a senior right. However, changes in water uses can potentially result in reductions in the amount of water to which junior rights have access after a transfer. The amount of water to which junior users are entitled could be quantified as:

- a. The return flows that would normally be expected after the exercise of the right to be transferred;
 - b. None of the water that *could have been* diverted by the senior right; or
 - c. Sufficient quantities to continue the historic pattern of use of the junior right.
2. What quantity of water is available for transfer?

Several approaches for quantifying the amount of water available for transfer have been identified. There are limitations associated with each approach. For example, assuming that junior users are entitled to some amount of return flows, none of these approaches ensure

outright that these junior water users will not be injured. In addition, the costs of data collection and analyses needed to quantify the impacts on other users may exceed the Department's and most applicants' capabilities. The identified approaches for establishing the quantity of water that can be transferred include:

- a. Allowing transfer of the full face value;
- b. Limiting the transfer to the quantity of water historically diverted; or
- c. Limiting the transfer to the quantity of water consumed (average or maximum).

3. What constitutes enlargement?

A water right may not be enlarged through the transfer process. Generally, the enlargement of a right would also result in injury to another right. However, even in those cases where the enlargement would not work to the disadvantage of another water right holder, the Department will not allow the transfer if the right would be enlarged. Most people agree that increasing the amount (rate or volume) of water diverted is enlargement. Examples of possible enlargement where there was not consensus of the committee members include:

- a. Inability to keep water from the authorized source off of the "from" lands;
- b. A change from seasonal use to year-round use; and
- c. A change in the allowable or historic pattern of use.

4. How should claims of forfeiture through nonuse of a water right proposed for transfer be addressed?

The transfer of a water right generally restarts the "forfeiture clock" and precludes assertion of forfeiture of the originating right. Currently, the Department's practice is to place a hold on processing a transfer if affidavits asserting non-use are filed. The hearing draft of the transfer rules developed by the Transfer Rules Advisory Committee considers the validity of the right in the transfer process if forfeiture issues are raised by staff or in a protest. However, the draft rules would not prevent filing of affidavits of forfeiture outside the transfer process. If the Department receives two complete affidavits asserting that a water right has been forfeited, the Department is obligated under OAR Chapter 690, Division 17, to initiate a forfeiture proceeding. Options for addressing forfeiture issues are to:

- a. Consider the validity of the right in the transfers process, but without precluding other avenues, as proposed in the draft amendments to the rules;
- b. Limit the opportunity for asserting forfeiture of water rights involved in transfers to the comment and protest periods of the transfer process; or
- c. Continue the existing process of placing a hold on processing a transfer if forfeiture issues are raised, regardless of when the forfeiture issues are raised during the process.

IV. Recommendation

This is an informational report only. No Commission action is required or requested. However, the Commission may wish to designate a member to participate in future committee or task force discussions of these transfer policy issues after work is completed on the non-controversial amendments to the transfer rules.

Attachments:

1. Transfer Rules Advisory Committee
2. Notice of Open Comment Period and Rulemaking
3. Staff Discussion Definitions
4. Summary of Oregon Supreme Court Cases Involving Transfers and Injury Issues

Doug Parrow
Natural Resources Specialist
503-378-8455, ext. 235

Transfers Rules Advisory Committee

<u>Name</u>	<u>Organization</u>
Gail Achterman	Deschutes Resources Conservancy
Peggy Crane	Associated Oregon Industries
Ed Goodman	Oregon Water Trust
Herbert Farber	Professional Land Surveyors of Oregon
Brad Harper	Water for Life
Rick Kepler	Oregon Department of Fish and Wildlife
John Killin	Special Districts Association of Oregon
Jan Lee	Oregon Water Resources Congress
Ruth Page	Bureau of Reclamation
Ted Pulliam	Oregon Ground Water Association
Aubrey Russell	Oregon Trout
Karen Russell	WaterWatch of Oregon
Mark Snyder	Oregon Association of Water Utilities
Glen Stonebrink	Oregon Cattlemen's Association
Gene Thomas	League of Oregon Cities
Jean Underhill Wilkinson	Oregon Farm Bureau



State of Oregon
Water Resources Department
 158 12th Street NE, Salem, OR 97301
 (503) 378-8455

Invitation to provide **COMMENT**

Notice of Open Comment Period And Rulemaking Hearing

PROPOSED ADOPTION OF WATER RIGHT TRANSFER RULES OAR CHAPTER 690, DIVISION 380

SUBJECT: The Oregon Water Resources Department is seeking comment on water right transfer rules proposed for adoption in OAR Chapter 690, Division 380. The existing transfer rules in OAR 690, Division 15 would be amended and renumbered to the new Division 380.

For copies of the proposed rules or additional information on the public hearings, contact Doug Parrow at (503) 378-8455, ext. 235. You may also obtain a copy of the proposed rules on the Department's web page at http://www.wrd.state.or.us/cgi-bin/notices.pl?oar_notices.

HOW TO COMMENT: You may submit oral and/or written testimony at either of the two following public hearings:

Wednesday, January 29, 2003, 10:00 am
 Water Resources Department
 Conference Room C
 158 12th Street NE
 Salem, OR 97301

Thursday, January 30, 2003, 7:00 pm
 Pendleton Convention Center
 Conference Room West-1
 1601 Westgate
 Pendleton, OR 97801

In addition, you may send letters, marked up copies of the draft rules, or other materials expressing your opinion to the following address:

Water Resources Department
 158 12th Street NE
 Salem, OR 97301-4172
 ATTN: Doug Parrow
 or by fax at: (503) 378-8130, ATTN: Doug Parrow

Letters need not be typed, but should be legible, as should any other materials you send.

The written comment period closes at 5:00 pm, Monday, February 17, 2003.*

BACKGROUND: Under ORS 540.510, most changes in the place of use, point of diversion, or character of use of a water right may only be made after approval of the proposed change by the Water Resources Department. In determining whether to approve a proposed change, the Department must evaluate the effects of the change on other water rights and may not allow the change if it would result in injury to another water right. The Department is proposing that the Water Resources Commission adopt water right transfer rules under a new OAR Chapter 690, Division 380. The existing water right transfer rules are in OAR Chapter 690, Division 15. The Department has worked with a Rules Advisory Committee in developing these proposed rules that reorganize the existing rules, clarify and streamline transfer application processing, and incorporate statutory changes enacted in 1999 and 2001 into the rules.

* The Commission may choose to receive additional public oral comment on the proposed rules as part of an agenda item at any future Commission meeting.

Under the proposed rules, processing of water right transfer applications would be changed. Currently, the Department provides opportunity to protest transfer applications prior to evaluating the proposal to determine if the transfer would be injurious to other rights. The draft rules would modify the process to provide for a comment period on receipt of a transfer application. The Department would consider any comments received in making a preliminary determination of whether the application should be approved and would then provide a notice of the opportunity to protest the application and the Department's determination. Under the statutes and rules, the Department is required to initiate a contested case if a protest is filed.

The draft rules also incorporate water right cancellation proceedings into the transfer review process if protestants or the Department identify forfeiture by non-use as an issue. Currently, the Department places a hold on transfer processing and initiates a separate cancellation proceeding if issues are raised through the Department's evaluation or through protests regarding the validity of a water right proposed for transfer. The proposed rules would combine the transfer and cancellation proceedings. However, the draft rules would not preclude individuals from filing affidavits alleging non-use and cancellation of a water right proposed for transfer outside of the protest period.

The proposed rules also implement statutory changes from the 1999 and 2001 Legislative sessions. These changes include:

- SB 301 (1999) allowing transfer of a surface water right to ground water and substitution of a supplemental right for a primary right.
- HB 3356 (1999) allowing the Department to waive transfer fees and to assist in satisfying survey or final proof requirements for fish-friendly transfers.
- SB 644 (2001) allowing an expedited notice and waiting period for substitution of supplemental ground water right for primary water right during droughts and modifying procedures for irrigation district temporary transfers.
- SB 870 (2001) allowing water right holders to consent to injury and establishing procedures and requirements for the Department to consent to injury to instream water rights.

THE REVIEW PROCESS: Please present your comments by speaking at one of the public hearings listed above, or by sending your written comments by mail or fax to the Water Resources Department at the address listed above. Written comments must be received no later than 5:00 pm on Monday, February 17, 2003. It will be your responsibility to verify that faxed comments are received.

The Department will review the oral and written comments received and consider whether to recommend modifications in the proposed rules prior to consideration by the Water Resources Commission. The Commission is likely to consider adoption of the proposed rules at its meeting on April 18, 2003. The Commission may choose to receive additional oral public comment on the proposed rules as part of an agenda item at any future Commission meeting.

***Note:** The services, programs and activities of the Water Resources Department are covered by the Americans with Disabilities Act (ADA). The ADA prohibits discrimination against persons with disabilities. The Department intends to comply with the ADA. If you are interested and need special accommodations to participate in the public hearings, please contact the Department at (503) 378-8455, at least 48 hours prior to the hearings.*

Staff Discussion Definitions

Face Value: The maximum quantity of water that can be diverted under a water right considering only the specified rate, duty and seasonal limitations on the right.

Historic Use: The quantity of water that has been diverted under a water right during specified previous periods.

Consumptive Use: The quantity of water diverted under a water right that is evaporated, transpired, incorporated into products or crops, consumed by humans or livestock, or otherwise removed from the watershed. Three types of consumptive use are:

Historic Consumptive Use: The quantity of water depleted from a watershed through exercise of a water right given the actual beneficial uses of the right during specified previous periods.

Average Consumptive Use: The mean quantity of water depleted from a watershed through the exercise of water rights of a similar type (e.g., irrigation).

Maximum Consumptive Use: The quantity of water that that would be removed from the watershed if water was applied to the most water consumptive crop or other use allowed under a water right that reasonably could be expected in the watershed.

Return Flow: The quantity of water diverted under a water right that returns to public waters and becomes available for use under other water rights.

Source: The stream, reservoir, or aquifer from which water is taken under a water right and any downstream receiving stream or system to which the source would naturally contribute.

Summary of Oregon Supreme Court Cases Involving Transfers and Injury Issues

Hough v. Porter, 51 Or. 318 (1909)

The case primarily involves the adjudication of the water rights on Silver Creek. The suit was initiated by Marion Conley and Annie C. Hough against Stephen A. C. Porter, to restrain him from interfering with the flow of the stream to their premises. In order to perform a complete adjudication of the rights to the waters of Silver Creek, the trial court ordered all parties interested in rights to the creek be included in the litigation. Based on the dates on which water use had been initiated by each of the parties and the acreages of the lands to be irrigated, the court established the relative priorities and quantities of water to which each party was entitled.

Some parties had moved their points of diversions and places of use between the time they had initiated the use of water and the time when the court issued its decree. With respect to the movement of a point of diversion, the court ruled that an “allowance must be made for evaporation and loss by the different methods of diversions and distribution, together with the added distance which the water may have to flow in order to reach their premises...”

With respect to changes in place of use, the court observed, “While well settled that a change of use and place of use of water by an appropriator may in some instances be permitted, such right is always limited to changes that do not impair the rights of others interested in the water of the stream.” Additionally, the court ruled that:

“The parties hereto are each limited, in the application of the water adjudged to them, to the specific tracts upon which it has heretofore been applied, except in such instances as where it may be practicable to change the place of use without substantial injury to others whose rights are here determined; that is to say, if by changing the place of use, when the water is needed by others, the quantity returning to the stream after changing the place of use as compared to its previous application is substantially diminished, or if, by reason of such change, the ‘run off’ reverts to the stream or channel below the point diverted by another, thereby reducing the supply at such point, it must necessarily operate to the injury of the rights of such other party and the change must not be permitted.”

Whited v. Cavin, 55 Or. 98 (1909)

Whited started construction of the Wham-Whited ditch in 1881 to divert water from the South Fork Burnt River for irrigation of his lands. He completed about 300 feet of the ditch during the first year. In 1882, Whited extended the ditch at a reduced size and irrigated “a small crop then in cultivation on this premises.” Other of the plaintiffs entered into an agreement with Whited to enlarge the ditch to cover their lands in 1883. The total amount of land that could be served by the ditch was not more than 480 acres.

In 1887, the plaintiffs began construction of a lower portion of the Wham-Whited ditch that was “contemplated by the enlargement of the upper ditch.” Between 1887 and 1909, the capacity of

the upper ditch was increased by about 30 percent. Whited also was involved in the construction of the Tiger ditch taking water from the South Fork Burnt River. Work started on that ditch in 1895. He and the other plaintiffs argued that the construction of the Tiger ditch constituted a change in point of diversion and, therefore, the priority date for the lands served was the same as for those served by the Wham-Whited ditch.

Cavin and the other defendants started construction of the Cavin ditch taking water from the South Fork Burnt River above the Wham-Whited and Tiger ditches in 1886. Water from the Cavin ditch was first extensively used in 1889.

The Wham-Whited and Tiger ditch users asserted the water rights for all lands served by their ditches were prior to those served by the Cavin ditch. The Cavin ditch users conceded that they were junior to the rights for the lands initially served by Whited's ditch, but that they were senior to all other rights.

The court ruled that Whited and the other users from the Wham-Whited ditch held the most senior rights for the lands irrigated by the ditch prior to the 30 percent increase in capacity. That included the lands contemplated in the 1883 agreement to enlarge the ditch, but not those served by the construction of the lower portion of the ditch. In addition, the court ruled that, given there was no intent to abandon any land irrigated through the Wham-Whited ditch, the diversion through the Tiger ditch was a new appropriation. As such, the rights established through construction of the lower portion of the Wham-Whited and the Tiger ditches were subsequent to those on the Cavin ditch.

In reaching its conclusions, the court observed that:

“beneficial use and the needs of the appropriators, and not the capacity of the ditches, or quantity first run through them, is the measure and limit of the right of the appropriators.

“While the quantity to which the appropriators may be entitled does not necessarily equal the carrying capacity of the ditch, the capacity thereof is essentially the utmost limit of such right.”

In Re North Powder River, 75 Or. 83 (1915)

The North Powder Milling and Mercantile Company allegedly sold a portion of its water right for use during July and August of each year to several irrigation water users higher up the stream. Several other water users challenged the sale asserting that it was a change in the character and place of use. The record before the court was unclear as to whether a sale had occurred. Several witnesses had testified that they had heard about an agreement having been adopted by a resolution of the officers of the milling company, but that a fire at the mill had destroyed its books. However, the mill had not used water between about July 10 to September 1 for a number of years.

In discussing whether a transfer of the mill's rights could be allowed, the court quoted *Kinney on Irrigation* as follows:

“water appropriated for milling purposes only cannot as against an appropriator below be used for irrigation; and the same rule would apply to a change in point of diversion of water used for power purposes to a point higher up the stream to be used for irrigation. There are two uses to which the water may be put: One in which none of the water is consumed, as for power purposes

only, and one in which all or nearly all of it is consumed, as in the case of irrigation; and, if the changed use be from one in which the water is not consumed to one in which it is, such diversion is more apt to injuriously affect others.”

Without regard to whether there had been an agreement to sell the water, the court indicated that:

“if the milling company does not need all its appropriation during July and August, it cannot sell the surplus, which should go to the appropriator next in priority. It has a right only to the amount that was necessary for its use.”

Finally, the court concluded that since the milling company had not used or needed water during July and August, it was not entitled to use water during that period and the water could not be transferred to the upstream appropriators for use under the priority date of the mill’s. The attempt to change the point of diversion and character of use was in violation of the rights of others.

Haney v. Neace-Stark Co., 109 Or. 93 (1923)

Haney and Astner obtained and developed irrigation water rights of 4.37 cfs with a priority of April 19, 1910. They argued that Neace-Stark maintained dams to flood fields for irrigation at locations above Haney and Astner for more than 40 years prior to 1913. The dams were removed when the hay was ready to cut and the water released became available to Haney and Astner. Haney and Astner asserted that the State Engineer had since allowed the diversion and use of water by Neace-Stark on lands that were brought under cultivation since 1910. In particular, the place of use and point of diversion for a right originally developed by Joseph Borton for 80 acres of irrigation under a priority of 1901 were moved downstream under a transfer without notice to the plaintiffs and that the transfer was injurious to Haney and Astner. Haney and Astner later added the assertion that case law and legislation restrict water rights inseparably to the original place of use. Neace-Stark indicated that their predecessors held storage and irrigation rights for dams constructed in 1911 and irrigated lands using the stored water.

The circuit court ruled that the Haney and Astner have water rights of 4.37 cfs for irrigation of specified lands. Those rights are subsequent to the Neace-Stark rights, including the right originally developed by Borton. The Borton right, as conditioned through the transfer, allowed the use of:

“such quantity available under said right, at the original point of diversion as will reach defendant’s point of diversion at the aforementioned retention dam; i.e., the said original quantity, less the quantity lost by seepage and evaporation...”

Finally, the circuit court concluded that water could be stored when not needed by Haney, Astner, and other senior users, and that once stored the water could be used on Neace-Stark lands without regard to priority dates.

The State Supreme Court rejected the assertion that water rights could not be transferred and concluded that the Borton right was a valid property right that might be sold and transferred. The court cites *Johnston v. Littlehorse Cr. Irr.Co.* 13 Wyo. 208 as providing a concise statement of the law:

“The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authorities, is that it

shall not injuriously affect the rights of other appropriators. In other words, the burden upon the use must not be enlarged beyond that which rested upon it under the original appropriation, and while in the hands of the original appropriator, as he was entitled to and did use it.”

The court ended the discussion of the issues associated with the water right transfer by concluding that:

“The transfer of the water right in question was made in accordance with the mode prescribed by statute, and the rights of all were safeguarded by the decree of the court, by reason of the diminution in volume, if any, on account of the additional distance which the water flows to the new point of diversion.”

Broughton v. Stricklin, 146 Or. 259 (1934)

Cline Falls Power Company held the earliest right of importance on the Deschutes River. The right had a priority date of 1892 and allowed the use of water to irrigate 800 acres of land, 90 cfs to pump the irrigation water, and 90 cfs for the generation of electric power. Next in priority were several irrigation districts with diversions in and near Bend located approximately 20 miles upstream of Cline Falls. These included the Deschutes Reclamation & Irrigation Company (1899), Central Oregon Irrigation District (1900), Crook County Improvement District No. 1 (1900), and Arnold Ditch Company (1905). The Odin Falls Land Company held a right with a priority date of 1909 for irrigation and power purposes and diverted water from the Deschutes River about 4 miles below Cline Falls.

In 1931, the Cline Falls Finance Company, the successor of the Cline Falls Power Company, contracted with Central Oregon Irrigation District for the sale of the 800 acres of land and the power rights, subject to a fifty-year lease of power rights to the Pacific Power and Light Company. Under the contract, the district could request that the Cline Falls right be used in rotation with the district’s right during the period in which payment was being made and, in return, would pay \$200 per day for each day of rotation with the payment to be credited toward the purchase price.

Broughton, as the successor of the Odin Falls Land Company, asserted that the contract resulted in the disposition of the water to the injury of her rights and that, in the absence of the use of water at Cline Falls, the water reverted to the stream for appropriation by others, regardless of the reason for the non-use. The Cline Falls Finance Company asserted that the issue related to “the question as to where and to whom the waters of the Deschutes river should be diverted in case a prior appropriator does not make use of the waters to which it is entitled.” The Central Oregon Irrigation District argued that the Cline Falls Finance Company had merely failed to use water not necessary for the irrigation of its lands and that the districts, as the users with the next priority, could take the water.

However, the court noted the existence of the contract and observed that it could not be carried out unless the water “is changed from the use for which it was awarded by the adjudication decree to another use for irrigation up the river about twenty-two miles. Thus the court addressed the issue as whether a water user could, by contract or any other agreement, authorize upper water users to divert water originally awarded for power purposes and thereby deprive the

downstream junior user of the use of the water. The court concluded that the contract resulted in a transfer for which the approval of the state engineer had not been obtained.

Hutchinson v. Stricklin, 146 Or. 285 (1934)

North Powder Milling & Mercantile held a decreed right for 25 cfs with a priority of 1870 for power purposes during all months of the year except July and August. The mill had historically used the water during the months for which it had a right, particularly during March, April, May, June, September, October and November and, when milling, had never used less than 3.09 cfs. Other users above the diversion to the millrace held water rights with various dates ranging from 1862 to 1928 for irrigation of approximately 18,000 acres. The priority dates of most of these water rights were subsequent to 1870, but prior to 1928.

Gerald Peterson held a certificated water right for 3.09 cfs of “water from the North Powder Milling & Mercantile Company’s tailrace which has been returned to the North Powder river, tributary of Powder river.” The right had a priority date of September 21, 1928. The certificate contained the following: “Nothing herein contained shall be so construed as to require the North Powder Milling & Mercantile Company to operate its mill or canal.”

In 1931, the mill did not use any water between June 6 and December and, as a result of the mill not making a call for the water, the upstream appropriators were able to use it and Gerald Peterson was not able to irrigate his lands. The mill’s discontinuation of the use of water was based on agreement under which the upstream appropriators paid the mill not to make a call for the water between May 15 and November 1. In 1932, the mill again did not call for water between July 2 and October 15.

Hutchinson asserted that the suit does not involve a change in use or place of use of the water, nor a transfer of any of the water from on tract of land to another or from one use to another and asked,

“What are the rights of the parties hereto in the event the said North Powder Milling & Mercantile Company should see fit to abandon its water right, in whole or in part, and to discontinue the use of said waters, in whole or in part, and particularly over the period May 15th to November 1st, inclusive of each year hereafter?”

Peterson asserted that the waters used by the milling company have a priority of 1870 for 25 cfs and that Peterson,

“having filed upon the water below the mouth of the canal of the milling company, the water so returned to the river constitutes a new stream out of which Gerald Peterson is the earliest and only appropriator...”

Peterson also asserted that the agreement by the mill not to call for water constituted a proposed change in the use and place of use of the water as contemplated by the transfer statutes.

The court concluded that the agreement between the mill and the upstream appropriators was “practically a sale” and that it was plain that the agreement would result in a change of the place of use of the milling company’s 25 cfs and a change of the character of use. While the mill was not required to always call for the water and that the State Engineer could intermittently allow

the upstream use of the water in the absence of a call by the mill, the change established under the agreement had not been made in compliance with the transfer statutes. In addition, the mill could not abandon its rights to use water during the period April 15 to October 1 in return for any form of consideration.

The court also indicated that, when the waters are returned to the river from the tailrace, they become a part of the waters of the river and quoted *Weil on Water Rights* that “waste water returned to the natural stream from which belongs to the appropriators thereon, whether it comes by percolation, surface or subterranean flow” and observed that:

“The system adopted by the lawmakers of this state, in the water code and its amendments, when the water rights of the several parties on a stream and its tributaries have been adjudicated, may be likened to a network, all the different parts of which form a complete whole. To a certain extent, one right depend upon another, and if a part of the network is displaced it will disarrange and prejudice the other parties...”

Jones v. Warm Springs Irrigation District, 162 Or. 186 (1939)

The Warm Springs Irrigation District constructed a reservoir on the Middle Fork Malheur River in 1920 and delivered stored water to lands within the district. For eight years, district patrons diverted the stored water onto their lands. During that time, the lands became waterlogged and alkali deposits started to occur on the land surface. In 1926, the district entered into a contract with the Bureau of Reclamation to construct a drainage system for the lands. The drains accelerated the return flow of seepage from the lands to the river.

The district asserted the right to deliver the water that had been returned to the Malheur River to other district lands as stored water. If the seepage water returned to the river were to be treated as stored water then Jones and the other plaintiffs with rights on the North Fork Malheur River would be subject to regulation so that natural flow could be delivered to other district lands under 1881 rights senior to the plaintiffs’ rights. If the seepage water returned to the river were to be treated as natural flow, then that flow would be available to the 1881 rights and the upstream rights held the plaintiffs would not be regulated.

The Supreme Court ruled that the water returned to the river via the drains was natural flow. The court quoted *Kinney on Irrigation and Water Rights* in describing the law in regard to the issue as follows:

“Where, after use by a prior appropriator, water is discharged into a stream for the purpose of drainage or as a convenient method of disposing of it, and without any intent upon the part of the owner of the right to reserve or recapture it, it works an abandonment of such water, and the water thus discharged becomes a part of the natural stream ...”

The Court concluded that the Warm Springs Irrigation District had not demonstrated an intent to reserve or recapture the water during the period between construction of the reservoir and construction of the drains. Therefore, the water was natural flow to be used to satisfy the 1881 rights rather than other district rights to the use of stored water. With the 1881 rights met by the discharge from the drains, the plaintiffs’ rights were not subject to regulation.

Dry Gulch Ditch Co. v. Hutton, 170 Or. 656 (1943)

The Hogum and Sparta Ditches were constructed by the Sparta Irrigation Company during the period 1863 to 1870 to take water from West Eagle Creek. During the adjudication of the rights, Eagle Creek water users stipulated that the Sparta Irrigation Company would be entitled to all the water of West Eagle Creek as the first appropriator and that the Dry Gulch Ditch Company would be entitled to the waters of Eagle Creek under an 1894 right. The diversion for the Dry Gulch Ditch Company water was located about 20 miles downstream of the Sparta Ditch on the mainstem of Eagle Creek.

Hutton and the other Hogum Ditch owners held adjudicated water rights from the Powder River and Balm and Goose Creeks, tributary to the Powder River. The priority dates of the rights ranged from 1872 to 1909. In 1917, the ditch owners applied for and obtained permits to increase storage in four natural lakes in the upper Eagle Creek watershed and to use the stored water on lands in the Goose Creek watershed. Additional lands were added under a 1933 application for supplemental rights. In conjunction with the acquisition of these rights, the Hogum Ditch owners entered into an agreement with the Sparta Irrigation Company under which they would take the waters of West Eagle Creek and, in exchange, provide the Sparta Irrigation Company with the stored water.

By 1927, the Sparta Irrigation Company had ceased use of the ditch and the stored water provided under the agreement with the Hogum Ditch owners. In 1928, insufficient water was available from Eagle Creek at the Dry Gulch Ditch diversion and ditch company asked the Hogum Ditch owners to turn down additional water. They were informed that additional water would be turned down as an accommodation. The ditch company refused to accept the water merely as a matter of accommodation and retained counsel to institute proceedings to enjoin the Hogum Ditch owners from diverting the water of West Eagle Creek. However, according to an assertion of the Dry Gulch Ditch Company that the court found to be persuasive, legal action was delayed based on a telephone conversation in which F.A. Phillips, one of the Hogum Ditch owners, agreed to provide to the plaintiffs “an amount of impounded water equal to the normal flow of West Eagle Creek.”

In 1935, the assistant watermaster had set the boards to release impounded water past the head of Hogum Ditch and, in revisiting the head of the ditch a couple days later, discovered that the boards had been moved. The Dry Gulch Ditch Company subsequently sought to enjoin the defendants from using West Eagle Creek waters. In responding to the action, the Hogum Ditch owners argued that their right to West Eagle Creek was junior only to that of Sparta Irrigation Company, that they had obtained a right to the water by adverse possession, and that they were entitled to the water under the exchange with Sparta Irrigation Company.

The court concluded that the exchange provided the Hogum Ditch owners the opportunity to divert West Eagle Creek waters only so long as the Sparta Irrigation Company continued its operations and that an exchange:

“cannot be given the effect of changing priority rights to the extent that one holding an older priority before such exchange thereafter should be deemed no longer the owner of a senior priority but only that of a priority junior to the other party to such an exchange.”

Additionally, despite the fact that the Hogum Ditch owners, junior to Dry Gulch Ditch Company, had been taking water that would have otherwise been available to Dry Gulch Company, the release of stored water to Sparta Irrigation Company had the effect of providing Dry Gulch with the water to which it was entitled. As a result, Dry Gulch would have had no right of action for infringement on their right and the Hogum Ditch owners could not have acquired the right by prescription. In reaching that conclusion, the court cited case law establishing that:

“A subsequent appropriator may assert the right to take the waters of the stream from which the prior appropriation has been made and give the prior appropriator in return therefore other water from a different source, but of like quantity and quality delivered at such a place that the prior appropriator can make full use thereof without being injured in any way.”

Oliver v. Skinner, 190 Or. 423 (1951)

Oliver brought suit against Skinner and Lodge to enjoin them from diverting water from Upper Cow Creek Lake. Lodge held adjudicated water rights to several tributaries of the lake that, historically, had been exercised through use of a number of small dams on the tributaries that pushed the water out onto the lands and from a canal leading from the lake. However, the streams dried up on about July 1 of each year and the dams were normally removed at about that time to allow harvesting of the first cutting of hay. Lodge asserted that, after July 1, the waters of the lake subirrigated his lands. Oliver held junior rights to the water in the lake and took the water through a canal leading from the lake to irrigate his lands.

In 1939, without having applied to the State Engineer for a change in point of diversion, Lodge started making improvements in his irrigation system by replacing the dams with a pump at the lake and by lowering the bottom of his canal leading from the lake by 18 inches to match the elevation of the bottom of Oliver’s canal. Oliver asserted that Lodge’s improvements deprived him of water to which he had a right. By making the improvements, Lodge was able to continue irrigating his land after the tributary streams dried up. Oliver asserted that the effect of Lodge’s pumping was that the lake level dropped to a point that Oliver was unable to exercise his irrigation right.

The Supreme Court agreed with Oliver and enjoined Lodge from using irrigation water from the lake and from using irrigation water after July 1 of each year. The court concluded that the changes that Lodge had made were not contemplated under the appropriation made by his predecessor on the land and that Oliver had “acquired a vested right to insist that the conditions of the measure of the prior appropriation [Lodge’s] should not thereafter be changed to his detriment.” In addition, the court concluded that, notwithstanding the adjudication decree, Lodge’s right was junior to Oliver’s for the remainder of the irrigation season after approximately July 1 based on the principle that:

“A prior appropriation of a definite amount of water may be made, limited to use during a definite period of time, and a subsequent appropriator may appropriate a like quantity of water from the same source, for use during another period.”

Cleaver v. Judd, 238 Or. 266 (1964)

The Payette Oregon Slope Irrigation District, a part of the Owyhee Federal Reclamation Project, had allowed waste and seepage waters to flow to a draw that ran through a part of the district.

Judd and the other plaintiffs applied for and were granted rights to use water from the draw for irrigation. After expansion of the district, the amount of water in the drain began to create a problem and a drain was constructed to alleviate the problem. After construction of the drain, the plaintiffs took their water from the drain structure.

In 1956 the project started construction of a ditch to recover for re-use in the district some of the waste water flowing in the draw. Later that same year, the plaintiffs obtained a water right for the irrigation of additional lands using water from the draw. After the district started taking water from the draw for re-use, the plaintiffs brought suit to enjoin the diversion of water.

The trial court concluded that the issuance of the water rights to the plaintiffs was conclusive and had established a priority right to the use of the waters in the draw. However, the Supreme Court reversed the decision based on the principle that a landowner may recapture waste and seepage water before it leaves his land and may reuse the water. In reaching its decision, the court concluded that the draw was not a natural stream and that the irrigation district, being a municipal corporation, was the owner of the lands for purposes of applying the principle. Thus, the district had not lost control of the water and was free to recapture and re-use the waste and seepage in the draw to the disadvantage of the plaintiffs.

Rencken v. Young, 300 Or. 352 (1985)

Rudolph Rencken held a water right allowing diversion of water from the East Branch of Mud Creek for irrigation of 10 acres. Except for irrigation of a 0.1 acre garden, he did not use the water from the stream during the period 1979 through 1982, a period of four consecutive years. In 1983, he irrigated the lands from groundwater during the proscribed season. However, beginning late in the irrigation season, he initiated installation of a pump needed to take water from the East Branch of Mud Creek and, after the end of the season, did apply water from the creek on his lands.

In response to affidavits from two neighboring orchard owners, the Department initiated cancellation proceedings for failure to use the water for five consecutive years. After a contested case, the Department cancelled 9.9 acres of the right. The Supreme Court concluded that Oregon is a forfeiture state and not an abandonment state. Despite the intent (an important element of abandonment) of Rencken to maintain the right through the installation of the pump, he had not used the water for five consecutive years and therefore, under the statutes, it was conclusively presumed to have been abandoned and to have reverted to the public for appropriation.

The court did remand the proceeding to the Water Resources Department because the agency's order indicated that the burden of proof had shifted from the proponents of cancellation to Rencken when the proponent showed that the nonuse had occurred for five successive years. The court said that the burden of proof does not shift. Under ORS 183.450 (2) "the burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." The court concluded that the proponents of cancellation had the burden "to prove by reliable, probative and substantial evidence" that Rencken had failed to use water for five successive years and that there was no affirmative defense in the proceeding.