



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

725 Summer Street NE, Suite A

Salem, OR 97301-1271

503-986-0900

FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Acting Director

SUBJECT: Agenda Item G, October 22, 2004
Water Resources Commission Meeting

Request for Adoption of Administrative Rules Relating to District Water Right Transfers, OAR Chapter 690, Division 385

I. Issue Statement

The Commission is asked to adopt, amend, and renumber rules relating to district water right transfers (OAR Chapter 690, Division 385). The proposed rules describe the process and procedures to evaluate an application to temporarily or permanently transfer a water right for the use of water managed by a district. The rules implement permanent district transfer provisions enacted by the Legislature in 1995 and the district temporary transfer provisions of Senate Bill 644 and Senate Bill 820 passed during the 2001 and 2003 Legislative Sessions, respectively. The final proposed rules are included as Attachment 1.

II. Background

The final proposed rules in Attachment 1 implement statutory authority for temporary district water right transfers under ORS 540.570, permanent district water right transfers under ORS 540.580, and the permanent district transfers of water rights to avoid forfeiture due to nonuse under ORS 540.572 to ORS 540.578. Staff propose that the Commission adopt district water right transfer rules under a new division – OAR Chapter 690, Division 385.

The existing district water right transfer rules, which reside in OAR Chapter 690, Division 21, are out of date. The existing rules contain provisions governing district temporary transfers, and describe the process and procedures for the permanent district transfer of water rights to avoid forfeiture due to nonuse under ORS 540.572 to ORS 540.578. However, the rules have never been updated to implement the permanent district transfer provisions in ORS 540.580 enacted in 1995. In addition, Senate Bills 644 (2001 Oregon Laws) and 820 (2003 Oregon Laws) significantly modified provisions for district temporary transfers. Rather than amend Division 21 rules, staff concluded it was more effective to renumber and reorganize existing rules and adopt them as a new rule division.

In November 2003, the Department convened a rules advisory committee (RAC) to assist it in developing rules to implement the statutory provisions for district transfers. A list of RAC members is provided in Attachment 2. The RAC met five times between November 2003 and April 2004 and provided input about the organization, structure and content of renumbered and reorganized rules.

Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available on June 1, 2004. Three written comments were received and are provided in Attachment 3. In addition to the written comment period, the Department held two public rulemaking hearings; one in Salem on June 29, 2004, and another in Bend on June 30, 2004. No testimony was given at either hearing.

III. Discussion

Rule Highlights:

The proposed rules reorganize and renumber Division 21 rules. The rules are reordered to describe each step in the transfer process from application criteria through review and approval for each of the three different types of district transfers: temporary, permanent, and permanent transfer of a water right for nonuse.

District Temporary Transfer: District temporary transfers are authorized under ORS 540.570. Prior to SB 644 (2001 Oregon Laws), a district temporary transfer of a water right was limited to a change in place of use and a duration of no more than five years. Districts were required to provide the Department notice of an intended change 60 days prior to the beginning of irrigation deliveries for the season or March 1, whichever was earlier. A district temporary transfer was deemed approved if the Department failed to deny the request within 60 days of receipt of the notice.

SB 644 eliminated the requirement for advance notice and instead required a district with a manager to submit a petition or application prior to making the proposed change. The duration of a temporary transfer was reduced from a maximum of five years to one irrigation season. The ability to change the character of use of a right to store water was also included. Additional provisions were included to define the water rights subject to transfer and to institute civil penalties for enlargement of rights.

SB 820 (2003 Oregon Laws) retained the provisions of SB 644 while authorizing additional types of temporary changes that can be made on an annual basis. These types of transfers include the change in 1) a point of diversion or point of appropriation to facilitate a change in place of use; 2) a point of diversion to allow for a ground water appropriation; and 3) a primary right to a supplemental right.

The Legislature enacted these changes to give users within districts increased flexibility to adjust water use to match variable climatic and economic conditions while retaining prohibitions on enlargement and protecting other water rights from injury. Temporary transfers are revocable at any time, to the extent necessary to avoid injury, should the Department determine a transfer is causing injury to another water right.

SB 820 also established a pilot project for the purpose of allowing three irrigation districts greater flexibility to manage annual temporary transfers of place of use. Under the pilot project, the three districts may temporarily transfer the place of use without submitting an application provided they maintain records and maps and satisfy general transfer standards prohibiting enlargement and protecting other water rights from injury. The pilot project does not require development of administrative rules. However, the RAC assisted the Department in developing operating guidelines. The bill requires the Department report to the Legislature in 2007 about the operation of the pilot project.

Permanent District Transfer: Permanent district transfers are authorized under ORS 540.580. Under this authority, permanent transfers are limited to a change in place of use within the district. Prior to this rulemaking, the Department relied on the statutes for guidance in processing applications. Permanent district transfers cannot be approved if the transfer results in injury to another water right or results in enlargement of the originating water right.

Permanent District Transfer of Water Right for Nonuse: Permanent district transfers of water rights that have not been used for five consecutive years are authorized under ORS 540.572 to 540.578. These transfers are limited to a change in place of use within the district. The proposed rules remain largely unchanged from Division 21, but are reorganized and renumbered to fit the organization and structure of the new rule division.

Issues Identified in Written Comments:

A. Definitions

Comment – Protest definition (OAR 690-385-0100(13): WaterWatch suggested that it is likely that individuals will want to protest the Department’s approval or denial of a transfer application rather than the notice.

Response: WaterWatch is correct, and the final proposed rules reflect amendments to the definition to be consistent with provisions for protesting approval of a permanent district transfer application (see Attachment 1, page 6, line 1).

Comment – Definitions for Full-Time Manager (OAR 690-385-0100(5) and Manager (OAR 690-385-0100(7)): The Oregon Water Resources Congress (OWRC) requested the definition be modified to allow a district to contract managerial services rather than require the manager to be a direct employee of the district. The OWRC contends the method by which a district secures services does not affect its ability to comply with the process and procedures for managing and administering the transfer of water rights within district boundaries consistent with statute and administrative rule.

The Oregon Cattlemen’s Association (OCA) commented that the proposed rules are unclear about the distinction between “Manager” and “Full-Time Manager.” Furthermore, requiring districts to employ a Full-Time Manager will place an unnecessary financial burden on small districts. The OCA recommended deleting all references to Full-Time Manager and replace with Manager.

Response: The Department concurs with the OWRC, the rules need not narrowly define employment standards. Staff propose modifying the definition of both *Manager* and *Full-Time Manager* to clarify that a district may contract for managerial services (see Attachment 1, page 4, line 28 and page 5, line 4).

With respect to the OCA comments, ORS 540.572 requires a district to be managed by a ***Full-Time Manager*** if the district proposes to permanently transfer water rights appurtenant to lands no longer irrigated or susceptible to irrigation (District Permanent Transfers of Water Right for Nonuse). OAR Chapter 690, Division 21 previously defined *Full-Time Manager*, and the proposed rules renumber and incorporate the previous definition. As defined in OAR 690-385-0100(5), a *Full-Time Manager* is roughly equivalent to 75 percent of full time employment based on an average 40-hour workweek.

The rules specifically include two different definitions for *Manager* and *Full-Time Manager* so as not to place undue financial hardship on small districts. Small districts are not required to have a full-time manager to initiate district temporary or permanent transfers under ORS 540.570 and ORS 540.580, but the statute requires a *Full-Time Manager* if a district wants to take advantage of ORS 540.572.

Staff Modifications to Definitions: In addition to the modifications made to the definitions resulting from the comments received, staff also modified the definitions of enlargement and injury. Staff made minor modifications to OAR 690-385-0100(4) and 690-385-0100(6) (see Attachment 1, page 4, lines 18 and 35) to be consistent with the definitions of enlargement and injury recently adopted in Chapter 690, Division 380 for non-district water right transfers.

B. District Temporary Transfers

Comment – District Temporary Transfer Criteria (OAR 690-385-3000(2)): WaterWatch opposes allowing a district to commence using water under a proposed temporary transfer upon submission of the application. The Department should only allow the change upon issuance of a final order. The additional ability to not just change place of use, but temporarily change a point of diversion or change from a surface water point of diversion to a ground water appropriation increases the potential for injury to other appropriative and instream water rights.

Response: ORS 540.570(3) states a district shall submit an application prior to making the proposed change under the transfer. Senate Bill 644 (2001 Oregon Laws) significantly modified the district temporary transfer process and notice and approval timelines. The legislation removed the requirement that districts provide advance notice of a transfer to the Department of at least 60 days prior to irrigation deliveries or March 1, whichever is earlier. The legislation also removed automatic approval of the temporary transfer if the Department failed to deny the proposed transfer within 60 days of receiving notice. Instead, the legislation limited temporary transfers to one irrigation season, and relied upon a combination of civil penalties and the authorization for the Department to condition, reject,

or revoke a temporary transfer at any time to prevent enlargement and injury to other water rights.

Senate Bill 820, (2003 Oregon Laws) added the ability of districts to temporarily transfer a point of diversion/appropriation combined with a change in place of use, change a point of diversion to allow for appropriation of ground water, and change a primary right to a supplemental right. Despite having expanded upon the types of temporary changes that a district could make, the legislation did not modify provisions for submitting an application or protections afforded other water rights.

Senate Bills 644 and 820 were enacted to provide district water users the flexibility to adjust irrigation to changing hydrologic and economic conditions, while at the same time providing the Department the necessary tools to prevent enlargement and injury to other water rights. The final proposed rules are consistent with the intent of the district temporary transfer legislation.

Comment – District Temporary Transfer Criteria (OAR 690-385-3000(4)): WaterWatch recommended amending the rule to state the district and user *shall* be subject to civil penalties, rather than *may* be subject to civil penalties, for using water on lands from which water was transferred from and on lands water was transferred to during the same irrigation season.

Response: The rules reflect the statutory language in ORS 540.570(5), which states:

Use of water on lands from which the right is transferred and in the new temporary location during the same irrigation season or calendar year is prohibited and *may* subject the district and landowner to civil penalties.

Comment – Types of District Temporary Transfers (OAR 690-385-3100, 3110, 3120, 3130, and 3140): WaterWatch recommends that each section describing the types of district temporary transfers should match the hearing draft provisions in OAR 690-385-3150 that clarify the transfer will not be approved if it injures other water rights or results in enlargement of the water right.

Response: The rules describing the types of transfers for which temporary changes may be made are included to explain the nature of the change and any special requirements. The lead-in rule, OAR 690-385-3000 (Attachment 1, page 10), describes temporary transfer criteria. This rule clearly states the Department may approve a temporary transfer only if the proposed transfer will not result in injury or enlargement. Staff revised OAR 690-385-3150 and deleted the provision about injury and enlargement for consistency. Staff do not propose amending the rules as suggested by WaterWatch.

Comment – Change From Surface Water Point of Diversion to Ground Water Appropriation (OAR 690-385-3150): WaterWatch opposes limiting the injury analysis described in OAR 690-385-3150(3)(a) to the point on the stream nearest to the well. WaterWatch also recommended modifying subsection (5) of the rule to require the Department to revoke a transfer if an approved ground water appropriation results in substantial or undue

interference with an existing ground water right rather than make it subordinate to the existing right.

Response: ORS 540.570 requires a temporary change from a surface water point of diversion to a ground water appropriation satisfy the standards set forth in ORS 540.531(2). The Water Resources Commission developed transfer review standards for ORS 540.531(2) in OAR Chapter 690, Division 380 (Water Right Transfers) in 2003, and more recently revised the transfer rules to address Deschutes Basin specific issues. The proposed OAR 690-385-3150 restates the review standards established in Division 380. Thus, the standards for review of a proposed change of a surface water point of diversion to a ground water appropriation are consistent, and no less rigorous, between the two rule divisions.

The change from a surface water point of diversion to a ground water appropriation requires the change to affect the surface water source similarly. This means the ground water appropriation must have a strong hydraulic connection to the original surface water source at or near the surface water point of diversion. If the point of appropriation does not satisfy the rule standards, the district cannot make the change.

WaterWatch may have confused these rule elements with recent modifications to OAR 690-380-2130 that are specific to permanent point of diversion to ground water appropriation changes in the Deschutes Basin. Under OAR 690-380-2130(3)(d), in the Deschutes Basin only, the Department may not require that the use of the ground water diversion affect the surface water source similarly. The Deschutes Basin specific rule is not applicable to district temporary transfers.

WaterWatch also recommended the Department modify OAR 690-385-3150(5) to revoke a temporary transfer if a change from a surface water point of diversion to a ground water appropriation interferes with any existing ground water right, rather than subordinate it to the affected right. The proposed final rules reflect the standard of ORS 540.531(5), which states that if the Department finds that the transfer results in substantial interference with existing ground water rights that would not have occurred in the absence of the transfer, then the new point of diversion *shall be subordinate* to any existing right injured as a result of the transfer.

Comment – District Temporary Transfer Application Notice and Review (OAR 690-385-3400): WaterWatch suggests the timeline for publication of notice within 15 days of receipt, as described in OAR 690-385-3400(3)(b), gives priority to the processing of district temporary transfers over other transfers and instream leases. WaterWatch also opposes the provisions of subsection (c) that precludes the opportunity to formally protest a district temporary transfer.

Response: With regard to district temporary transfers, ORS 540.570(4) provides that “upon receipt of a completed petition” the Department shall publish notice of the petition in its weekly notice. ORS 540.580 requires the Department to notice a district permanent transfer within 15 days of receipt. For the sake of consistent and efficient operating procedures, OAR 690-385-3400(3)(b) merely applies the same standard to district temporary transfers so all district transfers are routinely noticed using the same procedures.

WaterWatch opposes the lack of opportunity to formally protest a district temporary transfer. However, there is no direct statutory reference regarding requests for hearing or protests of temporary transfers under ORS 540.570. This contrasts with explicit statutory reference to requests for hearing on district permanent transfers under ORS 540.576 and 540.580.

Similarly, ORS 540.523 does not refer to opportunities to request a hearing or protest a non-district temporary transfer. ORS 540.523(3) explicitly states:

Notwithstanding the notice and waiting requirements under ORS 540.520, the department shall approve by order a request for a temporary transfer under this section if the department determines that the temporary transfer will not injure any existing water right.

The fact that ORS 540.570 does not require a protest period and an opportunity for hearing is consistent with the purpose for temporary transfers. District temporary transfers are for one irrigation season in duration and an irrigation season likely would have concluded prior to any administrative action or hearing on a protest alleging injury. The Department accepts comments on temporary transfer applications and has the authority to revoke or condition a temporary transfer at any time to the extent necessary to avoid injury to other water rights.

The final proposed rules in Attachment 1 are consistent with facilitating short-term changes in use while protecting water rights from injury and preventing enlargement of water rights. The proposed rules implement: 1) a process for comment in response to notice, injury complaints, and staff review of injury to other water rights; and 2) judicial appeal or petition for reconsideration of an order of the Department consistent with the Administrative Procedures Act.

Comment – District Temporary Transfer Approval and Final Order (OAR 690-385-3500): WaterWatch suggested amending the rule to include a provision that clearly states a final order can contain any provisions appropriate to prevent injury or enlargement or to protect the public interest.

Response: Statutes relating to water right transfers state that the Department's review of a proposed transfer is limited to whether the transfer will injure other water rights or enlarge the originating right. The Department issues final orders approving transfers only if there is no injury to other water rights or enlargement of the water right subject to transfer. Final orders contain affirmative findings of no enlargement or injury to an existing water right. The Department requires applicants amend their applications as necessary to enable such findings. However, should the Department determine a district temporary transfer would injure another water right, it has the authority to condition or revoke the transfer as necessary to avoid the injury. This statutory authority is articulated in the Department's final order.

C. Proposed Deletion and Renumbering of Division 21 Rules

Comment – Proposed Deletion of OAR 690-021-0100: WaterWatch noted the rules proposed deleting OAR 690-021-0100 (1)(a) through (1)(c) that require a district send notice to a water user informing the user of four successive years of nonuse and of the district's intent to transfer the place of use of the water right. Under this rule, a district was required to inform the user that the user may transfer the water right under OAR Chapter 690, Division 385; transfer the water right to an instream water right under OAR Chapter 690, Division 077; and if the user fails to file a transfer or use water for a fifth consecutive year, the district may transfer the place of use.

Response: Staff inadvertently deleted and failed to renumber the provisions of OAR 690-021-0100. While this was an oversight on the part of staff, ORS 540.572(2) states only:

If a water user of a district has not made beneficial use of the water to which the user is entitled for a period of four successive years, the district shall advise the user and any security interest holder of record that if the user does not use the water for a fifth successive year, the district may petition the Water Resources Commission for a transfer of the water right under ORS 540.574.

The referenced subsections of OAR 690-021-0100 appear to describe different transfer options that a user can invoke prior to the fifth year of nonuse, and before a district may apply to transfer the right. The options available to a user are not limited to a regular transfer or instream transfer as listed in OAR 690-021-0100. Given this, staff have modified OAR 690-385-5100 to require the district notice inform the user of the options that are available to demonstrate beneficial use of water or demonstrate that nonuse is excused under one of the provisions of ORS 540.610 (see page 27 of Attachment 1, beginning on line 7).

IV. Summary

The final proposed rules in Attachment 1 implement the district transfer statutes. The rules amend, reorder and renumber the previously adopted Division 21 rules. The final proposed rules also implement permanent district transfer process and procedure not previously addressed by administrative rule. The rules reflect the purpose of the temporary transfer statutes to grant users increased flexibility in the use of water while preventing injury to other water rights. The final proposed rules under OAR Chapter 690, Division 385, unify district transfer processes under one rule division and systematically describe the criteria, process and procedures associated with each type of transfer.

Based on the review of the comments received, staff propose changes to the hearing draft rules as identified in the comment and response discussion of Section III. Staff also propose additional modifications to the hearing draft rules that are intended to improve the readability and understanding of the process and procedures described by the rules.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules under OAR Chapter 690, Division 385 (Attachment 1)
2. Adopt the final proposed rules with revisions.
3. Not adopt rules and request the Department further evaluate the issues.

VI. Director's Recommendation

The Director recommends that the Commission adopt the final proposed rules as provided in Attachment 1.

Attachments:

1. Final proposed rules, OAR Chapter 690, Division 385 – District Water Right Transfers
2. Members of the Rules Advisory Committee
3. Copies of Written Comments on the May 17, 2004, Hearing Draft.

Greg Nelson
(503) 986-0888