

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item E, April 18, 2003
Water Resources Commission Meeting

Request for Adoption of Administrative Rules, OAR Chapter 690, Division 380 - Water Right Transfers

I. Issue Statement

In October 2001, staff initiated amendment of the water right transfers rules (Division 15) and organized the Transfers Rules Advisory Committee to assist in revising the rules. Staff and the committee developed amended rules for public hearings that make a number of changes, including reorganizing the existing rules into a new Division 380. At the February 2003 Commission work session, staff and committee members briefed the Commission on policy issues that are not resolved in the current draft of the rules. This staff report requests Commission adoption of amendments to the transfer rules on which there was general consensus among committee members.

II. Background

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

- 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
- Bring the rules into conformity with statutory changes from the 1999 and 2001 Legislative Sessions.

Staff organized the Transfers 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. During the February 2003 Commission work session, members of the committee and staff provided a briefing on the committee's activities and the policy issues that could not be resolved during the current rulemaking.

The committee met approximately 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. The committee agreed on a restructuring of the transfer process and on rules implementing recent statutory changes. The Department conducted hearings on the rule amendments on which there was general consensus on January 29, 2003, in Salem and on January 30, 2003, in Pendleton. The written comment period closed on February 18, 2003. Staff have reviewed the comments received and are proposing minor changes in the rules in response to the issues identified.

III. Discussion

The proposed rules incorporate the statutory changes from the 1999 and 2001 Legislative Sessions and reorganize and renumber the transfer rules. The rules also modify the processing of transfer applications to conform with normal administrative procedures in which the agency issues a proposed decision that can then be protested, rather accepting protests of an application without having performed an evaluation of whether the application should be approved.

The statutory changes that would be implemented through adoption of the proposed rules are:

- 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; 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.

In most cases, staff and the committee incorporated the statutory language into the rules. This did not generally involve major policy choices in the development of the rules. However, there are some significant decisions regarding implementation of the statutes reflected in the proposed rules.

First, the statutes allow the Director the discretion to waive all or part of the application fees for a "fish friendly" transfer. These are applications for transfers to instream water rights, transfers that are necessary to complete projects funded by the Oregon Watershed Enhancement Board, and transfers that are approved by the Department of Fish and Wildlife (ODFW) as providing a net benefit to fish and wildlife habitat. Rather than taking a case-by-case approach to determining the extent to which the fee will be waived, the proposed rules would grant a uniform waiver of \$100 for any application meeting one of the three criteria. This approach is consistent with the Commission's direction to move toward more complete funding of the water right transfer program through application fees and would administratively enact that element of the legislative concept that staff discussed with the Commission at the August 2002 meeting.

The second significant issue that is addressed and resolved in the proposed rules involves the Department's procedures for evaluating applications for transfers and the interface with the process for consenting to injurious point of diversion (POD) changes. Under SB 870, if the Department determines that a change in POD would injure other water rights, the applicant is afforded an opportunity to seek the consent of the injured water right holders to the injury.

Based on the Department's historic practice, a formal written review of a transfer application would only be provided at the time of issuance of the final order approving or rejecting the application. Under the proposed rules, the Department will issue a "preliminary determination" that is generally equivalent to a proposed final order. For a POD change that the Department concludes would be injurious, the preliminary determination will indicate that the transfer will be rejected unless the applicant is successful in obtaining the consent of the injured water right holders. A subsequent final order then would be issued reflecting the ultimate disposition of the application.

Under the Department's current procedures, notice of receipt of a transfer application is published in the Department's weekly notice shortly after the application is filed. The notice opens a period in which the application can be protested. Under the statutes, the Department is obligated to initiate the contested case process on a transfer application if a protest is received. The receipt of a protest at this point in the review process places the Department on the path of initiating a contested case—without having reached a conclusion of whether or not the transfer should be allowed. If a protest is not received, staff reviews the application and formulates preliminary conclusions about whether the transfer should be allowed. At that point, if staff conclude that the transfer likely can be approved and if a newspaper notice is statutorily required, the applicant is told to arrange for publication of the notice—creating another protest period. In the absence of protests, a final order is then issued.

The proposed rules would modify the procedures for processing transfers. The initial notice of receipt of a transfer application would provide an opportunity for public *comment* on the transfer application. The Department would perform an evaluation of the application considering any comments received and prepare a preliminary determination. Notice of the preliminary determination would be published in the weekly notice and, if statutorily required, in the newspaper. This notice would trigger the opportunity for *protesting* the application and Department's decision. The proposed new procedures are more consistent with the administrative processes used when reviewing other applications and is intended to streamline the process by providing clearer decision points.

Issues Identified in Hearings Process:

1. Limitation of Fee Waivers to \$100

The Oregon Water Trust, WaterWatch, and others expressed opposition to limiting the waiver of fees for "fish friendly" transfers to \$100 as proposed by staff. They advocated for full waiver of transfer fees for these transfers. ORS 540.520(3) allows the Department, at the discretion of the Director, to waive the application fees for transfers to instream water rights necessary to

complete projects funded by OWEB and other transfers approved by ODFW as benefiting fish and wildlife habitat.

Staff are not recommending changes to the draft rules. The Department is increasingly confronted with inadequate funding to process water right transfers expeditiously. At the Commission's direction, staff have proposed fee increases to capture more of the processing costs. The proposed language makes clear the Department's intended approach in exercising discretion in waiving a portion of the fees for "fish friendly" transfers.

2. Regulation of Municipal Water Wholesaling

Existing statutory and rule language provides for limiting the wholesaling of water to other municipalities when the use of the water interferes with or impairs "prior vested water rights." There is no history of watermasters having regulated municipal diversions to protect other water rights from the effects of a municipality's wholesaling of water. However, staff have historically understood this language to protect all other water rights, senior and junior, from impacts resulting from water wholesaling and have proposed draft rule language providing this clarification. [OAR 690-380-2410(3) and 690-380-2430(4)] The municipalities disagree and suggest that the language is not intended to protect junior rights. Based on the comments and the rulemaking objective of addressing non-controversial issues, staff are recommending that this issue be deferred and that the status quo be retained and the language referring to "prior vested water rights" not be modified.

3. Surface Water to Ground Water POD Changes

The Grant Soil and Water Conservation District submitted comments proposing deletion of the following proposed new language in OAR 690-380-2130(6): "The original POD of surface water shall not be retained as an additional or supplemental POD." Water users in the John Day Basin have expressed reservations about taking advantage of surface to ground water transfer provisions because of concern that they could not continue to use their surface water POD. They assert that the objectives of the statute in addressing fish passage at push-up dams can still be achieved if the surface water diversion is used during spring high flows and the ground water diversion is used later in the season.

Legislation enacted in 1995 allows a transfer of a surface water POD to a ground water diversion. Without the legislation, the Department could not allow the change in source—surface water to ground water—despite the close hydraulic connection. In such a transfer, the ground water diversion must be from an unconfined aquifer connected with the authorized surface water source and the use of the ground water must have a similar effect on the stream. The statutes allow the water user five years after the change to confirm that the new diversion is satisfactory. If the water user applies to return to the old surface water diversion, the Department is required to approve the change.

The statutes do not explicitly prohibit the retention of the surface water diversion in a surface to ground water POD change. However, the Department understands the statute as not allowing establishment of the ground water diversion as an additional point of diversion and has not

accepted transfer applications under which the use of the surface water point of diversion was retained. This interpretation is based on the fact that the purpose of the legislation was to provide a method for eliminating push-up dams and the other fish passage and protection problems associated with the diversions. In addition, the provisions for returning to the old surface water diversion would be superfluous if the new ground water diversion could be established as an additional POD.

Based on staff's understanding of the statute, the proposed language does not limit the alternatives under surface water to ground water POD changes. Instead, the language makes clear the Department's understanding of the statutes, and in so doing eliminates any confusion among potential applicants regarding these changes. Staff recommend that the proposed language be retained.

4. Water Measurement Conditions on Transfers

WaterWatch proposes to add language requiring water use measurement and reporting for all rights modified through the transfer process.

When reviewing transfer applications, watermasters routinely request that the Department condition transfers to require installation of water measurement devices. Inclusion of the measurement condition aids in the distribution of water and ensures that other water rights will not be injured. This approach is based on a case-by-case evaluation of transfer applications and the identification of those conditions under which measurement is needed to avoid injury. The Department's approach is appropriate given the statutory authority for review of transfer applications.

Ideally, all water users would measure their water use. However, absent the funding necessary to implement and enforce such a requirement, the Department must make choices about how to best employ limited resources. Increased requirements for measurement are appropriate where they contribute to the more efficient execution of Department responsibilities and more effective resource management, which staff believe are supported by the case-by-case evaluation process.

5. Protection of Flows Absent Instream Rights

WaterWatch proposes that the Department develop within the transfer process a method for protecting streamflows where instream water rights do not exist.

The Commission does not have the statutory authority to apply public interest standards to water right transfers. The injury evaluation must be based solely on the effects on other water rights. The Department coordinates with ODFW to ensure that instream water rights are not injured, and staff continue to work on improving that coordination as well as implementing more comprehensive streamflow restoration initiatives.

6. Other Changes and Corrections

WaterWatch identified some errors and other corrections overlooked by staff in development of the hearing draft. These include clarification of the language related to approval of permit amendments [OAR 690-380-0010(2)(f)]; providing an opportunity for water right holders and others in support of the Department's preliminary determination to retain their opportunity to participate in hearings if the agency decision is protested [OAR 690-380-4030]; internal references in the surface to ground water POD change provisions [OAR 690-380-2130]; cancellation of supplemental rights [OAR 690-380-2250]; inclusion of a mediation process in review of exchanges [OAR 690-380-2260]; and information in the notice of the preliminary determination [OAR 690-380-4020]. Staff have modified the rules consistent with these suggestions.

WaterWatch's comments included several other changes that staff do not recommend. These include adding a definition of "source" [OAR 690-380-0005]; including increasing the season of use as an example of enlargement [OAR 690-380-0005 (2)]; referencing instream water right reaches specifically in identification of rights potentially affected by historic POD changes [OAR 690-380-2120]; delineation of application requirements for exchanges [OAR 690-380-2260]; the timing of notification of the formation of a water authority [OAR 690-380-2420]; requiring evidence that applicants provide evidence that rights have been used in accordance with the terms and conditions [OAR 690-380-3000]; providing an opportunity for an applicant to seek consent to injury associated with a POD change after a hearing [OAR 690-380-4200]; and modifications in provisions related to extensions in the time allowed to complete transfers [OAR 690-380-5140]. These changes represent policy issues and choices that either were or should have been discussed by the rules advisory committee. Inasmuch as the proposed rule changes were developed to represent areas of general consensus among committee members, staff are not recommending revising the proposed rules at this time to respond to these comments.

IV. Recommendation

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

Attachments:

1. Final Proposed Rules, OAR Chapter 690, Division 380 - Water Right Transfers
2. Summary of Hearing Comments
3. Written Testimony Submitted

Doug Parrow
503-378-8455, ext. 235

**Summary of Public Hearings
Water Right Transfers Rulemaking**

**January 29, 2003 – 10:00 am
Salem, Oregon**

Ed Goodman, Oregon Water Trust (OWT)

Goodman said that the draft rules are a step in the right direction. He indicated that the members of the rules advisory committee had differing viewpoints and that the draft rules were intended to be neutral on major policy issues, especially related to injury. Goodman stated that OWT's position that state water law provides a presumption that the paper right can be transferred and that the draft rules do not modify the presumption. Goodman said that a clear and efficient transfer process is needed to accommodate new uses of water.

Goodman expressed opposition to the limitation of the fee waivers proposed in the draft rules. He said that Department staff had unilaterally announced the cap on the waivers late in the process of working with the rules advisory committee. Goodman said that the legislative intent of the statute was to provide a full fee waiver for instream and other fish friendly transfers in recognition of the work carried out on behalf of the public. He said that there is no economic benefit to an instream transfer applicant such as OWT in the process and that the rule language should be modified to allow full waiver of fees.

Goodman said that the application requirements in the proposed rules relating to additional material to demonstrate that the right had not been forfeited represents a balance between obtaining the information needed for the transfer review process and avoiding an undue burden on the applicant. He said that the proposed language is appropriate, but that no additional burden should be imposed.

Goodman said that some members of the committee argued that instream transfers should be treated differently, but that the draft rules treat all transfers the same. He said that the proposed rules are consistent with legislative intent and that OWT does not support different standards.

Goodman said that the most debate in the committee had been about injury. He said that some members supported transfer of historic use and that others, including OWT, supported transfer of the paper right, except for waste and return flows. Goodman said that the proposed rules are drafted to be neutral on the issue to avoid altering existing standards pending resolution of the issue at the legislature and in the courts.

**January 30, 2003 – 7:00 pm
Pendleton, Oregon**

There were no comments on the rules offered during the hearing.