

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item A, March 11, 2004
Water Resources Commission Meeting

Request for Adoption of Administrative Rules Relating to Water Right Transfers in the Deschutes Basin, OAR Chapter 690, Division 380

I. Issue Statement

The Commission is asked to create and amend rules relating to water right transfers (OAR Chapter 690, Division 380) to implement Senate Bill 820 passed during the 2003 Legislative Session. The final proposed rules are located in Attachment 1. The proposed rules provide for greater flexibility to change a point of diversion from surface water to ground water wells in the Deschutes Ground Water Study Area. The proposed rules also establish the process to make temporary changes in place of use and type of use from irrigation to municipal use in the Deschutes Basin of all or a portion of a water right, for a period not to exceed 25 years.

II. Background

Growth pressures in the Deschutes River Basin have increased demand for new water supplies, with a particular emphasis on ground water. However, the conclusions of a 2001 Water Resources Department/USGS study demonstrated a hydraulic connection between ground water in the Upper and Middle Deschutes River Basin and surface water flows in the Deschutes River and various tributaries. The study established that new uses of ground water in certain parts of the Basin could impact existing surface water rights and scenic waterway flows.

To provide a framework under which the Water Resources Department could approve new ground water uses in the study area, the Commission adopted the Deschutes Ground Water Mitigation Rules (OAR Chapter 690, Division 505) and Deschutes Basin Mitigation Bank and Mitigation Credit Rules (OAR Chapter 690, Division 521) on September 13, 2002. These administrative rules provide for mitigation of impacts to scenic waterway flows and senior water rights while allowing additional qualifying appropriations of ground water.

The rules proposed under OAR Chapter 690, Division 380, implement sections of Senate Bill (SB) 820 passed during the 2003 Legislative Session and provide additional tools for accommodating water demand while protecting the Deschutes River and existing water rights.

The proposed rules establish the process to make changes from a point of diversion from surface water to ground water wells (“POD to POA transfer”) in the Deschutes Ground Water Study Area defined in OAR Chapter 690, Division 505. The proposed rules also establish the process to make temporary changes in place of use and type of use from irrigation to municipal use in the Deschutes River Basin. SB 820 requires that the Water Resources Commission adopt rules implementing the Deschutes Basin transfer provisions by March 31, 2004.

In September 2003, the Department convened a rules advisory committee (RAC) to assist the Department in developing rules to implement the Deschutes Basin provisions of SB 820. A list of RAC members is provided in Attachment 2. The RAC met on three occasions from September through November 2003 and provided input on the changes and amendments to OAR Chapter 690, Division 380, related to SB 820.

Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available on December 1, 2003. Five written comments were received and are provided in Attachment 3. In addition to the written comment period, the Department held a public rulemaking hearing in Bend on January 9, 2004. No testimony was given at the hearing.

On January 30, 2004, the hearing draft of the proposed rules was presented to the Ground Water Advisory Committee (GWAC). Under ORS 536.090, GWAC is to advise the Commission on matters relating to rules for the development, securing, use and protection of ground water. GWAC did not have specific comments on the draft rules, but expressed general concern about the policy ramifications of legislation and rules that create tools or standards for specific geographic areas of the state.

III. Discussion

Rule Highlights:

Prior to SB 820 a water right holder could, under certain circumstances, transfer a surface water point of diversion to a ground water point of appropriation. To make such a transfer, the law required that the well appropriate ground water from an unconfined aquifer hydraulically connected to the authorized surface water source; have a similar affect on the surface water source; and not cause injury to existing water rights. Under these provisions, the Department can “unwind” the transfer and allow a return to the original point of diversion if requested within five years of the transfer.

SB 820 modified the law regarding surface water to ground water transfers in the Deschutes Ground Water Study Area and the final proposed rules implement those changes. Consistent with SB 820, the final proposed rules provide that such transfers may be approved if (a) the ground water is hydraulically connected to the authorized surface water source; (b) the transfer does not result in enlargement of the originating right or injury to existing water right holders; and (c) the proposed ground water point of appropriation affects the surface water source authorized under the originating water right.

Notice, review, and protest opportunities for these transfer applications are consistent with the criteria applied to transfer applications statewide. Similar to existing POD to POA transfers, the Department can allow a return to the last authorized point of diversion within five years of the POD to POA transfer. However under the final proposed rules and consistent with SB 820, an applicant in the Deschutes Ground Water Study Area can apply to “unwind” a POD to POA transfer after five years if the Department finds that the return to the last authorized point of diversion will not result in injury.

Prior to SB 820 a water right holder could only temporarily change the place of use and, if necessary to convey water to the new place of use, temporarily change the point of diversion for up to five years. SB 820 modified the law and provides for temporary transfers in place of use and type of use from irrigation to municipal use of a portion or all of a right in the Deschutes Basin for up to 25 years. The point of diversion may also be temporarily transferred if necessary to convey the water to the new place of use. The final proposed rules implement these provisions of SB 820. Under the final proposed rules the application requirements, notice, and review of these transfers are similar to existing rules for temporary transfers. However, consistent with SB 820, an applicant can propose to temporarily transfer only a portion of their existing right and use the remaining portion of the right on lands described within the original right.

Issues Identified in Written Comments:

1. General Comments

Comment - Protecting Streamflows in the Lower Deschutes River: ODFW requested that the Department include specific language to ensure that these transfers avoid impacts to the lower Deschutes River with respect to the amount, location, and period of project impact. ODFW also requested that transfers be restricted in a way that avoids injury to instream water rights. Measures should also be taken to protect the non-consumed portion of the transferred water right.

Response: The Department does not propose changes to the final proposed rules. The Department is required to evaluate transfer applications for injury to existing water rights, including existing instream water rights on the lower Deschutes River. The proposed rules do not in any way change the Department’s obligation to deny transfers that result in injury to existing rights or enlargement of the originating right.

2. Comments Related to Temporary Transfers in the Deschutes Basin

Comment - Application Requirements: One commenter recommended the Commission delete the lot book requirement under OAR 690-380-3000(13), and the notice to lien holder requirement under OAR 690-380-3000(14) from the temporary transfer rules. The commenter urged the Commission to initiate a rulemaking to make similar changes to the requirements for permanent transfers.

Response: The scope of this rulemaking is limited to Deschutes Basin transfers authorized by SB 820. While this issue is outside the scope of this rulemaking, the Department is considering a rulemaking to clarify the lot book requirement and address other specific technical issues related to the Division 380 transfer rules.

Comment - Lands receiving water under the transferred right: WaterWatch commented that the language prohibiting lands under a temporary transfer from receiving water was deleted.

Response: The final proposed rules maintain the requirement that lands under a normal temporary transfer receive no water during the temporary transfers (OAR 690-380-8010). In the Deschutes Basin, the final proposed rules under OAR 690-380-8004(2) consistent with SB 820 would allow use of the remaining portion of a water right that is not temporarily transferred to be used on designated lands described in the original right.

Comment - Temporary Transfers as Mitigation: ODFW requested that if these long-term transfers are allowed as mitigation for new ground water uses, that the transfer not be allowed to revert to the terms and conditions of the original use unless new mitigation is provided.

Response: These long-term temporary transfers allow the transfer from irrigation to municipal use only. A temporary transfer of this nature cannot be used as instream mitigation for new ground water uses.

3. Comments Related to Surface to Ground Water Transfers in the Deschutes Study Area

Comment - Injury to Instream Water Rights: WaterWatch expressed their concern that instream water rights could be injured as a result of a surface to ground water transfer under these rules. Ground water pumping in the Deschutes Basin impacts streamflows in the lower basin, where instream water rights are typically not met. Because the surface water no longer diverted under such a transfer is not legally protected instream, downstream out-of-stream water users whose rights were not fully satisfied could divert the surface water left instream as a result of the transfer. This reduction in addition to the impact from the ground water pumping would result in a net reduction in the water available to a downstream instream water right and would be injury. To ensure that this type of injury would not be allowed by the Department, WaterWatch provides language for amending OAR 690-380-2130 to explicitly prevent this type of injury.

Response: During legislative consideration of this bill, the Department testified that the scenario described by WaterWatch would be injurious to a downstream (unmet) instream water right. The Department reiterated this position throughout RAC discussion and development of the draft rules. Under OAR 690-380-0100(3), injury “means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled.” We believe that the definition of injury in the existing rules sufficiently addresses the scenario described by WaterWatch and do not recommend additional language describing “fact specific” injury as suggested by WaterWatch.

Comment - Department's Authority to Regulate to Prevent Injury: The City of Bend through its attorney expressed concern that the draft rules do not clarify the Department's authority to regulate junior appropriators on the Deschutes River to prevent injury to downstream instream water rights following a transfer from surface to ground water. The City suggests that the Department has broad discretionary authority in statute and rule to regulate against junior appropriators in favor of instream water rights following a transfer. Furthermore the City suggests that using this broad authority in the Deschutes Basin is appropriate given SB 820, previous legislation, and existing science recognizing the hydraulic connection between surface and ground water in the basin.

Response: The Department has been advised by its Assistant Attorney General that there is no current legal mechanisms for the Department to prevent junior out-of-stream water users from diverting water made available as a result of a surface water to ground water transfer as authorized by SB 820 and implemented by the proposed rules. Downstream out-of-stream water users whose rights were not fully satisfied could divert surface water left instream as a result of the transfer. This impact as well as the impact from pumping ground water at the new point of appropriation would result in a net reduction to the amount of water available to the downstream instream right.

As proposed by the City, the Watermaster could prevent injury to the instream right by "delivering" the water left instream as a result of the transfer to the point where the pumping of ground water under the transfer would impact the stream. However, the Department does not have the authority to regulate a junior appropriator for the purpose of protecting water to a "point of impact." While the Department cannot prevent injury to the instream water right by preventing juniors from diverting the water, the Department could work with a surface to ground water transfer applicant to modify the transfer to avoid injury so that the application can be approved.

Comment - Quantity of Water Subject to Transfer: Swalley Irrigation District expressed similar concerns to Bend and in addition expressed concern that the Department would not allow the transfer of the "paper water right" under a surface to ground water transfer due to injury to other water rights.

Response: In evaluating for injury, the Department starts with the "paper water right" and assesses whether the transfer of that quantity of water would injure another water right. Generally speaking, in an over-appropriated system with known return flows from the originating right, a change of use to a more consumptive type of use (e.g., irrigation to municipal use) would result in injury. One way to avoid injury is for the applicant to agree to the transfer of a "reduced" quantity of water as necessary to ensure that the consumptive use under the right is not increased so as not to injure other water rights.

IV. Summary

Based on the review of comments received, the Department is not proposing any changes to the hearing draft of the rules. The final proposed rules in Attachment 1 reflect the Department's statutory requirements. These rules implement sections of Senate Bill 820 passed during the 2003 Legislative Session. The final proposed rules advance the Department's co-equal goals of protecting streamflow and addressing Oregon's water supply needs. The final proposed rules under OAR Chapter 690, Division 380, would provide additional tools for accommodating water demand associated with growth while protecting the Deschutes River and existing water rights. The final proposed rules fit within staff capabilities, especially since the application and processes of these rules are consistent with existing transfer provisions, where possible. The final proposed rules provide for adaptive management since the Department is required under Senate Bill 820 to report annually to the Legislature on the implementation of the temporary transfer provisions and submit a detailed report in 2009, including recommendation for further legislation.

V. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the proposed rules under OAR Chapter 690, Division 380 (Attachment 1).
2. Adopt the proposed rules with revisions.
3. Not adopt rules and request that the Department further evaluate the issues.

VI. Director's 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. Members of the Rules Advisory Committee
3. Copies of Written Comments on the December 1, 2003, Hearing Draft

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