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From: K. [Signature]

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Re: Comments, GW Registration Rules
DV 382/380

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June 8, 2006

Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

RE: Comments, Division 380 (Water Right Transfers) and Division 382 (Ground Water Registration Modifications)

Dear Rules Coordinator,

Thank you for the opportunity to comment on the draft rules regarding ground water registration modifications. WaterWatch is a non-profit river conservation group dedicated to protecting and restoring natural flows to Oregon's rivers and streams for fish, wildlife, recreation and a sound economy.

While we served on the rules advisory committee for the rules governing changes to groundwater registrations, we have significant concerns with the hearing draft that was developed. Most significantly, we are very concerned about the omission of a requirement that the groundwater registrant who is seeking a modification provide proof that the groundwater has actually been put to beneficial use over the past five years.

WaterWatch did not oppose HB 2123, which allows the WRD to recognize transfers of unadjudicated registrations for use of groundwater, because we understood from the WRD that they would be adopting rules that would be similar to existing rules related to amendments to surface water registrations—specifically we understood WRD to say that the groundwater registration rules would require documentation that the use hasn't been abandoned and that the WRD would review each requested modification to ensure the change would not injure other water rights holders, result in a net loss of water available to downstream users or result in the expansion of the claimed rights. *See Attachment 1, WaterWatch Testimony on HB 2123, 1/28/0 and Attachment 2, Excerpt of OAR 690-28.* Our testimony reflects what we understood to be commitments by the WRD in discussions with WaterWatch staff.

Regarding the application of water to beneficial use in the previous five years, the surface water registration rules—which govern amendments to the ownership, point of diversion, place of use or type of use in a surface water registrations—specifically call for "documentation that the water has been used over the past five years in accordance with the terms and conditions of the registration." OAR 690-28-055(1).

When the topic of proof of beneficial use was discussed in the RAC, the WRD stated that WRD a determination of the validity of the groundwater registration could only take place during the adjudication process. WRD appears to be taking the position that by evaluating whether or not the groundwater registration was put to beneficial use in the past five years, this somehow represents a determination as to the validity of the groundwater registration for adjudication purposes. WaterWatch disagrees that this is the case.

The governing statute explicitly states that a certificate of registration issued under this section may not be construed as a final determination of any matter stated in the certificate of registration. ORS 537.610(3). The changes made by HB 2123 do not alter this. Instead, HB 2123 simply allows changes to registrations and gives broad discretion to the Commission to adopt by rule the process and standards by which the Commission will recognize changes in the place of use, type of use or point of appropriation. *Id.* at (4). Read together it is clear that whatever standards the Commission adopts will simply govern whether or not the WRD will allow a change to the current registration. The standards adopted by the Commission that will result in either an approval or rejection of a proposed change in a groundwater registration will not affect the ultimate adjudication of these water rights. In other words, the rules at issue here will only govern whether or not a groundwater registrant can change his/her groundwater registration, they will not speak to the validity of the right for purposes of any future adjudication. Importantly, if the WRC adopts a standard that results in the denial of a requested change, this will not affect the groundwater registrant's claims in any future adjudication. In fact, it will not lead to anything at all. Unlike the case of a regular transfer, where a finding of non-use requires the WRD to start cancellation proceedings on the water right at issue, in this case if there is a finding of non-use and the requested change were not granted, the registrant would simply be in the same position he/she has been since the 1950's with regards to any future adjudication, the same position he/she held before HB 2123 was passed in 2005. Thus, an analysis of beneficial use for the sole purpose of deciding whether to reject or accept a proposed modification to a groundwater registration does not at all, per the governing statute, speak to the overall validity of the groundwater registration claim in any future adjudication.

In fact, a requirement for proof of beneficial use is entirely consistent with the groundwater registration statutes. Throughout the groundwater registration statutes, there is reference to applying the water to beneficial use. ORS 537.585 grants recognition to groundwater put to beneficial use before August 3, 1955 to the extent that it was actually put to beneficial use. ORS 537.595 grants recognition to ground water that is under construction, alteration or extension but only if the water is applied to beneficial use within a reasonable time after construction, alteration or extension is completed. And importantly, ORS 537.610 outlines that upon issuance of a certificate of registration the certificate serves as prima facie evidence that the registrant is entitled to a right to appropriate groundwater and apply it to beneficial use to the extent and the manner disclosed in the registration. Clearly a standard that requires documentation of beneficial use over the previous 5 years is not inconsistent with the statute governing groundwater registrations.

Without a requirement that the applicant provide proof of beneficial use over the past five years the potential to harm other water right holders and/or the groundwater and surface water resources of this state is high. There are roughly 4,000 groundwater registrations statewide. A large number of these are found in Umatilla, Lane, Marion, and Linn Counties. *See Attachment 3, WRD groundwater registrations by county*. These counties are counties that have either serious streamflow issues (i.e. the Umatilla River) and/or have either critical groundwater areas, groundwater limited areas and/or groundwater withdrawals (i.e. Stage Gulch, Butter Creek, Ordinance, Ella Butte, Parrett Mountain, Sherwood Damascus, etc). *See Attachment 4, list of groundwater control areas*. The danger of allowing a change in use without proof of actual use is that a long unused water right could use the new law as a vehicle to revive an unused right.¹

¹ The WRD's response to this argument in the RAC was that there is nothing in the statutes that prevented groundwater registrants from reviving unused registrations currently. While that might be true, it is also likely that groundwater registrants aren't using the registration currently because they either have no use of the beneficial use for which it was granted; or want to use it on other lands. Thus, in these cases, allowing the change in use would in fact be the vehicle that allowed the "revival" of these long unused registrations. Given that numerous groundwater and/or surface water restrictions have been placed on resources around the state since 1955, allowing a groundwater right to be revived without consideration of these restrictions could result in serious harm to the resource.

It became very clear during RAC discussions that there are in fact a number of groundwater registrations that have sat idle for years, if not decades, especially in the Willamette Basin. To allow changes to registrations that would enable the registrants to revive these long unused rights could seriously impact other users and/or groundwater and/or hydraulically connected surface water resources. In the 50 years since the groundwater registrations were claimed there have been a significant number of groundwater and surface water controls instituted, both for the protection of the resource and other water right holders. To allow a long unused registration to be revived via HB 2123 simply allows a loophole around these resource protections.² Moreover, it is important to note that the legal definitions of "injury" and "enlargement" would not protect existing users from the actual harm that would ensue if an unused right were revived, as the WRD would consider the amount allowed under the registration as the "legal" use of water.³ Thus, real on the ground harm will likely occur if these water rights are revived.

It is important to note that all other changes allowed to authorized water uses require documentation of beneficial use in the past five years. This is true of transfers, leases, permit amendments and surface water registrations. To allow changes in groundwater registration claims to go forward without a showing that this water has actually been used over the past 5 years (let alone 50), would basically grant groundwater registrants a "super" water right that no one else has privy to and that, importantly, could have detrimental effects on the state's groundwater and surface water resources. Given the overallocated state of Oregon's surface and groundwater resources, and increasing concerns and conflicts over water, it would be prudent to adopt a standard that is at least as protective as the protections afforded other transfers. We urge the Commission to use the discretion granted to by HB 2123 to establish standards that will protect both the resource and/or other water right holders by requiring proof of beneficial use before a change can be approved.

Specific Comments to Draft Rules:

GROUNDWATER REGISTRATION RULES, DIVISION 382

Definition of Layering (690-382-0100)—limitation to irrigation, Layered Water Rights and Certificates of Registration (690-382-0200): If the Commission adopts a standard requiring proof of beneficial use over the past 5 years for groundwater registrations, we do not object to the limitation of the layering definition and rules that applies these provisions to irrigation only. However, if the Commission does not require proof of use over the past five years, then the layering rules as currently drafted could allow revival of a long unused groundwater registrations and thus we do not support the limitation of the layering concept to irrigation only.

Under the proposed rules a groundwater registrant who has a groundwater registration for irrigation and also a water right for irrigation could not simply peel off the groundwater registration for irrigation and change it to a municipal use while at the same time continuing to use water under the irrigation water right certificate. We agree with this provision and feel it is necessary to prevent against enlargement. However, unless there is a requirement for proof of beneficial use the previous five years,

² This is directly contrary to the WRD oral testimony in front of the Legislature whereby the WRD stated that these changes would not cause injury to the water resources of the state. See *Attachment 5, Transcription of Public Hearing on HB 2123, 6/8/06*.

³ "Injury" is defined as meaning that a proposed transfer would result in another, existing water right not receiving previously available water to which it was legally entitled. In other instances, the WRD has interpreted this to mean that it is the amount of the paper water right, not the actual use, that governs the amount of water to which someone is legally entitled. Similarly, the definition of "enlargement" speaks to an expansion of the water right including using a greater rate or duty than is allowed under the right and diverting more water at the new point of diversion than is legally available to that right at the original point of diversion, among other things. Here again, the WRD looks at the actual right, not the historic use.

the proposed rules do not offer the same protection with regards for other uses. In other words, we can imagine a situation where a city annexed land 50 years ago that had underlying groundwater registration for irrigation. The city, having no use for the irrigation registration, applied for and received a municipal water right that was adequate to meet its municipal needs. Jump ahead 50 years—there are now both surface water and groundwater restrictions that apply to the water source the city wants to tap to meet future needs. Rather than apply for a regular water right and meet all the resource protection standards, under the proposed rules the city can now simply transfer the type of use of the long unused underlying groundwater registration from irrigation to municipal. And the city has new water without regard to the effects on other water right holders and/or groundwater/hydraulically connected surface water resources. To protect against such scenarios, the Commission should adopt a requirement that the registrant must show proof of beneficial use over the previous five years. If the Commission does not do this, at the very least the layering concept encapsulated in this section of the rules should be applied to all uses, not just irrigation.

Modification to Certificates of Registrations, 690-382-0300:

Again, if the WRD requires proof of use within the past five years, we do not have significant concerns with this section of the rules. However, without that proof of past beneficial use then the rules as they are currently drafted do not protect against the revival of long unused water right. Without this protection, both groundwater and hydraulically connected surface water resources are at risk. For instance, a person might be named on a certificate of registration who has no connection to the land which the registration is appurtenant and for all practical purposes abandoned the certificate 50 years ago. This person, under the rules could come in, revive the unused right without being subject to any of the more recent environmental protections and sell it to a neighboring municipality. As stated before, we do not think such a scenario is consistent with the statutes that repeatedly reference putting the water to beneficial use. However, without a provision requiring proof of use the door is open for this type of abuse. If the Commission does not add a provision that requires proof of use over the past five years, then this section should be amended so that only people that can request a modification are those that are named on the registration, or are already assigned the registration, and are owners of the land to which the registration is appurtenant.

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

This section should be amended to add the two following requirements:

A description of the current water delivery system that demonstrates that the applicant is ready, willing and able to exercise the groundwater registration and includes information on the capacity of any pumps, canals, and pipelines used to divert and convey the water to the authorized use.

Evidence that the water has been used over the past five years in accordance with the terms and conditions of the groundwater registration.

Again, the groundwater registrations statutes are clear that the registrant was to put the water to beneficial use. To be consistent with this mandate, the Commission should add a provision that requires the applicant to prove beneficial use.

Existing Documentation of Modification

Any modifications done prior to the adoption of HB 2123 were illegal. However, to the extent some entities relied on these informal modifications, we do not object to a priority in processing if they can in fact demonstrate that they have been using this water. Thus, if groundwater registrants want priority they should be required to show proof of use according to the "informal" changes.

We are a bit unclear as to what is meant by the "incorporation by reference" language. This should not be read to mean that any determinations made by field staff with regards to injury, etc. are incorporated by reference. The rules should be clear that all groundwater registration modifications must undergo the same injury and enlargement scrutiny, regardless if there was some sort of unofficial change undertaken in the past. We suggest adding language that states something to the effect that: All groundwater registration modification requests will undergo full WRD analysis outlined under these rules, regardless of documentation of past modifications.

Request for Comments, OAR 690-382-0600

We support the provisions providing for comments, as well as those providing for protests (382-0900).

Preliminary Determination, OAR 690-382-0700

Subsection(2), proposed additions regarding beneficial use: For the reasons outlined at the outset of these comments, this section should be amended to include in the Department's initial assessment of the application an assessment as to whether:

- the groundwater registration has been used over the past five years according to the terms and conditions of the groundwater registration;
- the water user is ready, willing, and able to use the full amount of water allowed under the groundwater registration.

Subsection (2)(b): We support the WRD's inclusion of the language relating to Scenic Waterway flows, however we would prefer the language found in the surface water registration—namely the change will not result in a net loss of water available to downstream users. Because of the objections of some parties during the RAC to the language of the surface water registrations, WaterWatch concurred that protection of the Scenic Waterway flows was a good compromise. However, upon further review, it occurs to us that without a requirement of proof of beneficial use the broader language is in fact necessary to protect other water right holders, including instream water rights, from the harm that could occur due to revival of old unused groundwater registrations. If the WRC includes language requiring proof of beneficial use we support the limitation to only Scenic Waterway flows, however, if the WRC does not we urge them to at least adopt the language of the surface water registration—that there can be no net loss of water available to downstream users.⁴

Subsection (2), proposed additions regarding critical groundwater areas, groundwater limited areas, and groundwater withdrawals. Given the fact that there have been numerous groundwater controls instituted in the 50 years since the groundwater registrations were claimed, any groundwater registration

⁴ Note—there were some in the RAC who asserted that this language was created only for the intent of protecting other surface water registrants. We disagree with this. This language was also found in the old transfer rules (Division 15). The old transfer rules in OAR 690-15-050 stated that a transfer application shall be approved only to the extent that the change would not result in a net loss of water available to downstream users and/or minimum flow requirements.

modification should be required to be in compliance with any groundwater controls that have been adopted in the interim. Specifically, the WRD should ensure that any proposed changes in point of appropriation will not run counter to any existing critical groundwater area controls, ground water limited controls, or ground water withdrawals. The injury and enlargement provisions do not protect against harm to the resource itself and thus are not adequate to address these concerns.

Notice of Preliminary Determination, OAR 690-382-0800

Subsection (5): The exception to the notice requirement should not apply if the change in point of appropriation is less than 1/4 mile, but that change brings it within 1/4 mile of a stream. Given the WRD's presumption of substantial interference for wells within 1/4 miles of a stream, there should be public notice and opportunity to comment on any proposed changes to groundwater registrations that would put the new well within 1/4 mile of the stream.

TRANSFER RULES, DIVISION 380:

Definition of Layering (690-380-0010(4)) and Layering Provisions (690-380-2240 Layered Water Rights and Certificates of Registrations)

See argument under Division 382 above.

Transfer Rules, Notice of Preliminary Determination OAR 690-380-4020

Subsection (5), no notice: Since the WRD is now proposing to expand all the references to "diversion" to also include "appropriation", this section regarding the 1/4 mile intervening diversions (and wells) should be expanded to ensure that this exception to the notice requirement does not apply if a well is proposed to change of point of appropriation which would now bring it within 1/4 mile of a surface water source.

Expanding this section to include well "appropriations" does in fact bring a very different fact scenario to bear. Diversion points on a river would in fact take into consideration instream water rights. However, the rules as drafted to not protect instream water rights in a scenario where someone applies to move their well appropriation within 1/4 mile of a stream. To protect stream resources, there should be a notice requirement when this in fact is the case.⁵


Conclusion: While we did not object to the legislation that allowed for modifications to groundwater registrations, we took this based upon representations by the WRD that the rules governing groundwater registration would in fact be similar to those governing surface water registration changes. To that end, we are very concerned that the WRD did not propose language requiring proof of beneficial use over the past five years. As noted above, to require this for purposes of either rejecting or approving a proposed modification in no way makes a determination as to the validity of the claim for adjudication purposes. A finding of non-use will only result in the groundwater registration not being able to change their registration, it will not affect their underlying claim. We urge the Commission to insert such a requirement. To fail to do such will give groundwater registrants a "super water right" that could in fact do much on the ground harm to our state's groundwater and hydraulically connected surface waters.

⁵ This is consistent with the review/controls applied to new groundwater right applications that fall within 1/4 mile of a stream.

Given the critical issues facing our state today regarding these resources, it would be imprudent to adopt rules which could undermine the many regulatory and/or restoration gains made over the past 50 years.

Thank you for this opportunity to comment. If you have any questions, please do not hesitate to call.

Sincerely,


Kimberley Priestley

Attachment 1



**Testimony of Doug Myers
WaterWatch of Oregon
Before the House Water Committee
On HB 2123
January 28, 2005**

Chair Jenson, members of the Committee, my name is Doug Myers appearing for WaterWatch of Oregon. Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers to sustain fish, wildlife, recreation and other public uses of Oregon's rivers, lakes and streams for all Oregonians. WaterWatch has over 900 members throughout the state.

WaterWatch appreciates the opportunity to testify on HB 2123. This bill does three basic things. Section 1 of the bill allows the Water Resources Commission to recognize transfers of unadjudicated registrations for use of ground water and requires the agency to adopt rules setting the process and standards for such recognition. Section 2 of the bill eliminates the requirement that changes in points of diversion from surface water to ground water must be from ground water in an unconfined aquifer. Finally, Sections 4 and 5 make permanent provisions that allow transfers that would injure instream rights if the change results in a net benefit to the resource.

With regard to Section 1, ground water registration claims are based upon claims of ground water use that predated the ground water permitting system established in the Ground Water Act of 1955. The uses authorized under these ground water registrations are subject to final determination by the Water Resources Department as to the extent of the right to use ground water. WaterWatch is concerned that recognizing changes in an appropriation before the claim is finally determined by the agency could result in expansion of the use under the claim possibly diminishing flows in rivers that are hydraulically connected to the ground water source and/or injuring other water users.

We understand that the Water Resources Commission and Department will adopt rules implementing Section 1 that will address these concerns by adopting rules similar to existing rules related to amendments to surface water registrations. These rules require documentation that use hasn't been forfeited or abandoned and that the Department to review each amendment to ensure the change will not injure other water rights holders, result in a net loss of water available to downstream users or result in the expansion of the claimed right. See Attachment 1: Excerpt of OAR 690-28.

For this reason, we do not oppose the concepts in this bill as presently drafted. Thank you for the opportunity to comment on this bill. WaterWatch looks forward to working with the Committee this session.

f. & cert. ef. 12-14-88;
Repealed by WRD 10-1990,
f. & cert. ef. 7-20-90]

Amendments to Registration Orders

690-28-055 (1) When any amendment in ownership, point of diversion, place of use, or type of use is necessary within a right defined by a registration statement then the amendment shall be submitted in writing to the Department. The request shall include documentation that the water has been used over the past five years in accordance with the terms and conditions of the registration. The request shall state the reasons for the change.

(2) When any change in point of diversion, place of use, or type of use is received by the Department a notice of the change shall be published in the Department's public notice of applications.

(3) The Director shall review each amendment to determine that the change will not result in injury to other water rights holders, or a net loss of water available to downstream users or an expansion of the right under the original registration.

(4) The Director may accept the amendment to the registration statement and include it as part of the records of the Department. No amendment to a registration shall be construed as final or conclusive until it is determined under an adjudication proceeding under ORS 539.010 to 539.240.

(5) When lands are sold a registration is to be assigned in whole or in part from an Indian reserved right of practicably irrigable acreage to a non-Indian, the assignment must be filed with the Department. The Director shall cancel the initial order for the federal reserved right and issue an order confirming an inchoate right for the undeveloped uses. The inchoate right shall be put to full beneficial use within five years of issuance of the order unless an extension is granted by the Director. The Director shall also issue a remaining right order for the part of the federal reserved right not assigned.

Stat. Auth.: ORS Ch. 539

Hist.: WRD 10-1990, f. & cert. ef. 7-20-90

Beginning the Adjudication Process

690-28-060 (1) Any water right holder may petition the Director to begin a general stream adjudication. The petitioner may be a registrant or the holder of a right to appropriate water from the subject stream system. The petition may be signed by more than one registrant or permitted or certificated water right owner.

(2) At the start of a general stream adjudication the Director shall send in person, or by registered or certified return receipt mail to each claimant and all holders of permitted or certificated water rights on the stream the notice required by ORS 539.030. The Director shall include a form for any party to file who wishes to be included in the adjudication solely to contest the claims of others.

Stat. Auth.: ORS Ch. 539

Hist.: WRD 10-1990, f. & cert. ef. 7-20-90

Time for Filing Claims and Documentation

690-28-065 The notice of taking of testimony issued by the Director pursuant to ORS 539.040 shall state:

(1) All claimants shall file a statement and proof of claim, including persons who have already filed a registration statement. The claim shall contain the same information as required under OAR 690-28-025, 690-28-026, or 690-28-027 as appropriate. If the claimant agreed with data collected and mapped by the

Nw	CLAT	1
NC	HOOD	1
SC	JEFF	1
SC	KLAM	1
Nw	LINC	1
NC	GILL	2
NC	MORR	2
E	BAKE	4
Sw	COOS	4
SC	LAKE	4
E	UNIO	7
E	HARN	8
NC	WASC	8
Sw	CURR	10
Nw	TILL	21
Sw	DOUG	30
Nw	COLU	34
Sw	JOSE	51
Nw	YAMH	124
Nw	MULT	157
NC	UMAT	195
Sw	JACK	208
Nw	POLK	208
Nw	WASH	248
Nw	CLAC	284
Nw	BENT	295
Nw	LANE	704
Nw	LINN	823
Nw	MARI	1072

E	19
NC	208
Nw	3972
SC	6
Sw	303

WRD document.

Attachment 4

Ground water controls:

Willamette Basin

- Sandy-Boring Ground Water Limited Area (GWLA)
- Damascus GWLA
- Glad Tidings GWLA
- Kingston GWLA
- Mt. Angel GWLA
- Sherwood-Damascus-Wilsonville GWLA
- Stayton-Sublimity GWLA
- Chehalem Mountain GWLA
- Parrett Mountain GWLA
- Eola Hills GWLA
- South Salem Hills GWLA
- Amity Hills/Walnut Hill GWLA
- Cooper Mountain-Bull Mountain Critical Ground Water Area (CGWA)
- Victor Point Ground Water Withdrawal Area (GWWA)

Umatilla Basin

- Butter Creek CGWA
- Stage Guich CGWA
- Ordnance Gravel CGWA
- Ordnance Basalt CGWA
- Ella Butte (Restrictive Ground Water Classification Area)

Hood Basin

- The Dalles CGWA
- Mosier GWWA

Goose and Summer Lakes Basin

- Fort Rock Basin (Restrictive Ground Water Classification Area)

Malheur Basin

- Cow Valley CGWA

Attachment 5

House Subcommittee on Education and Natural Resources
6/8/06
Public Hearing on HR 2123

Mr. Hughes: "This Bill would provide the Water Resources Commission the authority to develop a process for modifying the place, type of use, or point of appropriation of the GW use claimed in a certificate of registration...."

37:24

Adam Sussman: HB 2123 actually has 3 different subjects... all surrounding the opportunity to make water right transfers which provide opportunities for new water supply. In Section 2 of the Bill there is a small modification to the provisions associated with surface water to GW transfers, and in Sections 4 and 5 of the Bill it is simply removing a sunset provision that allows great opportunities to make point of diversion transfers upstream.

"The portion of the Bill, however, that's associated with package 137 is Section 1, and this provides the WRC the opportunity to develop a process to make a modification to a GW registration. These are pre-1955 GW uses, and 1955 is when the St. adopted its GW code, and similar to what we're doing down in the Klamath Basin, adjudicating pre-State code water rights, we will eventually need to get into a process in the future of doing that with pre-1955 GW uses. The problem is, under current law, there is no opportunity to make any modification to those GW registrations as they exist today, and as you can imagine, changes occur on the land, changes occur to the wells, and so this is really an opportunity to provide some economic opportunity, as well as new water supply, by providing an opportunity to modify these without causing injury to any other water users or the water resources of the St. This did pass out of the House Water Resources Committee on a unanimous vote, and we would urge your support.

40:45

Rep. Marks: "Do we have some areas of ground subsidence due to GW extraction in any of our basins or aquifers?"

Sussman: "We certainly have some areas where the GW levels are declining. I am not aware of any areas where we've actually seen land subsidence as a result of that."

Motion to move to full Budget committee w/ "do pass" recommendation.

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"The portion of the Bill, however, that's associated with package 137 is Section 1, and this provides the WRC the opportunity to develop a process to make a modification to a GW registration. These are pre-1955 GW uses, and 1955 is when the St. adopted its GW code, and similar to what we're doing down in the Klamath Basin, adjudicating pre-State code water rights, we will eventually need to get into a process in the future of doing that with pre-1955 GW uses. The problem is, under current law, there is no opportunity to make any modification to those GW registrations as they exist today, and as you can imagine, changes occur on the land, changes occur to the wells, and so this is really an opportunity to provide some economic opportunity, as well as new water supply, by providing an opportunity to modify these without causing injury to any other water users or the water resources of the St. This did pass out of the House Water Resources Committee on a unanimous vote, and we would urge your support."

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Public Hearing: House Water Committee, January 28th, 2005, re: HB 2123

Follows Pub. Hearing on HB 2083 (well ID #s and deed records elimination)

Adam Sussman, OWRD Senior Policy Analyst:

1:03:50

" This bill is really important... in terms of providing tools to help meet OR's long term water supply needs.

One of the ways to do that is to modify existing water uses.. we do that generally through water right transfers... HB 2123 actually modifies the statutes in 3 ways to facilitate the kinds of changes to water rights that are necessary and these are all facilitated through this bill w/o diminishing existing water rights in the St. of OR and existing water resources.

"In Section 1 of HB 2123, this has to do w GW registrations, and as we've talked about in the committee before, OR's GW code was not adopted until 1955, and uses of GW prior to 1955 had an opportunity to come to the department and register their use and receive a certificate of registration. I remind the committee that these certificates are not any kind of final determination of their rights (the use of the GW that's been claimed, pre-1955), which must be determined by the court through some kind of adjudication (after that...the Department would ultimately issue a water rights certificate).

[Question from Chair re: first in time and priority of pre-1955 users]

Response: "The statute actually lays out that once the certificate is ultimately issued the priority date would be the date that the well was constructed. Before that time, the way the Dept. operates w/ respect to these 'unadjudged claims' is that we don't regulate for them, but we also don't regulate against them. In some ways they have a high priority against the system. HB 2123 doesn't affect that at all.

"What 2123 does in terms of the GW registrations is simply provides the Water Resources Commission the authority to recognize and allow some modification to that claim. It would not be an understatement to say that it may be many years before the Dept. gets to adjudicating the 4,000 claims that it has in front of it, and while that time passes, things happen, development occurs, wells collapse, and under existing law right now there is absolutely no mechanism to modify those claims.

"...What this statute would do is to give the Commission that authority. The WRC has that auth. for surface water claims right now, in ORS Chpt. 539, and in fact the Commission has rules that implement that statute, and any rules that were passed to implement this Bill, similarly, would ensure that those modifications to the GW registrations protect existing water rights and don't allow expansion of the claim as it exists. So that's really in Sec. 1 of HB 2123, "GW registrations."

1: 09: 15

"In Sec. 2 of the Bill, there is under current law the opportunity to transfer a surface water right to the use of GW, and the stat. that allows that is very narrow and very prescriptive.

Unfortunately... has caused some unintended consequences, b/c that statute says that as you make this transfer from surface water to GW, the GW must come from an unconfined aquifer (sort of a gravelly aquifer with a very close connection to the surface water), and unfortunately what we have found in implementing this stat. is that we have applications that make sense, that pass the overall performance standard test, but fail the prescriptive test in terms of what kind of aquifer it's in... what we're simply proposing to do... is to simply delete the term "unconfined."

Finally.. in Sections 4 and 5: Repeal an existing law related to injury. In many cases moving water rights POD upstream would cause injury, to a private citizen or an in-stream right. "Having recognized this problem existed, several yrs. ago the leg. passed a law..that allows individuals to consent to this type of injury. If it's the WRD...we need ... a recommendation from the St. agency that requested that instream water rights, and that agency needs to tell the Dept. that this change needs to provide a net benefit... We're simply requesting that the sunset for that provision be removed..."

"We're not aware of any opposition to the Bill

Question from Chair Jensen: "In Sec. 4(1)(a), you have deleted from previous lang. "the time allowed by WRC for computation of an authorized change may not be used when computing a 5 yr. period of non-use under the provisions of 540-610(1). Does the deletion mean that then it now may be used?"

Answer: "If you flip the page and you look on line 38 of page 4, it's there, just in a different location, and kind of written in a way that I guess makes more sense for legislative council."

I see, you just changed the listing system? (Chair)
"Yes."



OREGON WATER UTILITIES COUNCIL
Pacific Northwest Section, American Water Works Association
200 South Ivy, Room 177, Medford, Oregon 97501
Ph: 541-774-2443, Fax: 541-774-2555, Cell: 541-261-3801
e-mail: Larry.Rains@ci.medford.or.us

June 9, 2006

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)

Dear Ms. Colbert:

Thank you for the opportunity to comment on the hearing draft rules for OAR Chapter 690, Division 382. These proposed rules, which implement House Bill 2123 (2005 legislative session) are a critical component to the Department's efforts to ensure an adequate long-term water supply for Oregon.

The following comments are provided on behalf of the Oregon Water Utility Council (OWUC). OWUC is a committee of the Pacific NW Section of the American Water Works Association and represents approximately 30 water utilities in Oregon that serve approximately 90% of Oregon's drinking water supply. OWUC's mission is to represent water utilities in Oregon in matters of regulatory, legislative, and legal issues facing the drinking water industry.

Several OWUC members hold certificates of ground water registration. OWUC closely followed House Bill 2123 during the legislative session and during rule development. Adam Sussman of CH2M HILL, Inc. represented OWUC members on the Rules Advisory Committee (RAC) convened by the Department. OWUC is critically concerned that the final rules adopted by the Water Resources Commission (Commission) are unambiguous, accurately represent the intent and scope of the legislation and further the Department's water supply and regulatory streamlining efforts.

Background

Pre-1955 users of ground water (uses prior to the enactment of Oregon's ground water code) were provided the opportunity to register their use and receive a certificate of ground water registration (GR). Under ORS 537.610 "the registrant is prima facie entitled to a right to appropriate the ground water and apply it to beneficial use to the extent and manner disclosed in the recorded registration statement and the certificate of registration." However, the final determination of the extent of the GR is made by the circuit court after adjudication by the Department.

Debbie Colbert / Senior Policy Coordinator
Oregon Water Resources Department
RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)
June 8, 2006

Page 2 of 5

Ideally, the over 4,000 GRs would have been timely adjudicated by the Department and final determinations made resulting in the issuance of water right certificates and making the GRs a "water use subject to transfer." Unfortunately, since the certificates of ground water registration were issued in the late 1950's the Department has only had the resources to conduct one narrow ground water adjudication and it is likely many years away from tackling the remaining ground water adjudications.

Prior to HB 2123 there was no recognized process for modifying a GR. While the Department had informally established a process for GR holders to move a point of appropriation under certain circumstance, this opportunity was not consistently disclosed or implemented and was not supported by underlying statutory authority. The result, a tangle of mis-understanding and almost 50 years of changing circumstances with no statutorily recognized means to modify a GR.

OWUC appreciates the Department's efforts to pursue HB 2123 and resolve this important issue

As stated above, several of OWUC's members currently hold GRs as part of their suite of water supply options. The utilization of these GRs may range from a primary drinking water supply source to a back-up supply that is only needed in the event of an emergency. In either case, the ability to modify these GRs as circumstances change is critical to our efforts to provide a safe, clean and reliable supply of water to our customers.

Hearing Draft Rules Overview

Department staff has done a good job balancing the input of the rules advisory committee (RAC) and in developing rules that are sensible, streamlined and consistent with the legislative intent of HB 2123. OWUC understands that RAC member WaterWatch of Oregon has advocated for an approach in the proposed rules that would evaluate the historic use of these un-adjudicated ground water uses. OWUC strongly opposes such an approach. The evaluation of the underlying factual and legal issues associated with the historic use of a GR must take place in an adjudication proceeding under ORS 537.670 to 537.695. To conduct any such inquiry in the implementation of HB 2123 exceeds the statutory authority granted to the Water Resources Commission and would be in direct conflict with the existing statutory process for adjudicating certificates of ground water registration. Understanding these constraints, Department staff have appropriately kept their eye-on-the-ball by focusing the proposed rules on an inquiry of whether the proposed GR modification would result in "injury" to an existing water right and have gone even further by evaluating "injury" to the streamflows the Water Resources Commission uses to make findings for state scenic waterways under ORS 390.835.

Specific comments by rule follow. Additions are in *italics*. Deletions are in ~~strike~~through.

Debbie Colbert / Senior Policy Coordinator
Oregon Water Resources Department
RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)
June 9, 2006

Page 3 of 5

690-382-0010(2) - Purpose

During the RAC discussions most participants felt strongly that the GR modification rules should be housed in a rule division that is separate from the Commission's water right transfer rules. Department staff has addressed this concern by proposing to create Division 382 for GR modifications.

In carrying out the intent of this separation even further, staff has proposed the language in OAR 690-382-0010(2). While OWUC appreciates the intent of OAR 690-382-0010(2), we believe it adds more confusion than clarity and recommend it be deleted. The separation of the rule divisions and the remaining "Purpose" rules in Division 382 provide a sufficient and clear distinction between modifications to a GR and a water right transfer.

690-382-0100(9) - Definitions

OWUC appreciates the Department's efforts to clarify in OAR 690-382-0100(9) the type of document(s) that might be used to convey the interest of an appurtenant GR. OWUC believes this rule should be modified to reflect that such conveyance agreements may come in many forms and such agreements are not always recorded in the county deed records. OWUC recommends the rule be modified as follows:

(9) "Water right conveyance agreement" means a purchase and sale agreement, deed, or other document that has been recorded in the deed records by the relevant county describing land to which a certificate of registration water right is appurtenant and demonstrating that the interest in that land and the interest in the appurtenant certificate of registration water right have been separately conveyed.

Alternatively, at a minimum, OWUC recommends the rule be clarified to reflect that a historic purchase and sales agreement conveying a GR is not required to have been recorded in the deed records.

Injury to Scenic Waterway Flows -- 690-382-0700(2) (b) and 690-382-1000(1) (b)

OWUC understands that in an effort to balance the input of the RAC and reach some level of consensus the provision regarding "injury" to scenic waterway flows was developed. Despite a clear commitment on the part of the bill sponsor to protect existing water rights from injury, and no legislative direction to do otherwise, RAC member WaterWatch of Oregon has insisted that modification to GRs somehow consider scenic waterway flows.

OWUC appreciates the need for negotiation and consensus in the rulemaking process; however, we are concerned about the over-reaching nature of this provision, the consideration of "streamflows" that are not water rights in the context of a water right modification evaluation process and the use of "streamflows" that were established with very little (or no) rigorous quantification.

Debbie Colbert / Senior Policy Coordinator
Oregon Water Resources Department
RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)
June 9, 2006

Page 4 of 5

From OWUC's participation on the RAC and from the staff presentation at the hearing on May 22, 2006 (Attachment 1) the record is unambiguous as to how this provision (if it remains in the rules) would be implemented. Department staff has been very clear that they would use the same processes and methodologies used in the context of an injury analysis except instead of evaluating injury to other water rights they would evaluate injury to scenic waterway flows, as if the scenic waterways flows were a water right. OWUC strongly recommends that the intended implementation of this provision be clearly stated on the record during rule adoption by the Commission.

In both rules mentioned above OWUC recommends the word Department be replaced with Commission.

OAR 690-382-1000(1) – Recognition of Modifications

The structure of this rule is inconsistent with the Preliminary Evaluation process which looks at whether something "would happen" and places an inappropriate burden on the GR modification applicant. OWUC strongly recommends this rule be modified as follows:

(1) An application for modification of a certificate of registration shall be recognized unless the Department determines that: if the Department determines that:

(a) The proposed modification would not result in enlargement as defined in OAR 690-382-0100(2);

(b) The proposed modification would not result in a state Scenic Waterway not receiving previously available water during periods in which streamflows are less than the quantiles determined by the Commission Department to be necessary to meet the requirements of ORS 390.835;

(c) The proposed modification would not result in injury as defined in OAR 690-382-0100(3); and or

(d) Any other requirements for modification of the certificate of registration are not met.

OAR 690-382-1000(4) – Recognition of Modifications

OWUC recommends that this rule be clarified to distinguish between the Department's final order on the GR modification and the final determination of the GR through the adjudication process. OWUC recommends the following modifications:

4) Issuance of the final order recognizing a modification of a certificate of registration shall be a final order for the purpose of judicial review under ORS 183.484 with respect to the subject modification. However, the modification order may not be construed as a final determination of any matter stated in the

Debbie Colbert / Senior Policy Coordinator
Oregon Water Resources Department
RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)
June 9, 2006 Page 5 of 5

certificate of registration; such a determination must occur in or conclusive until it is determined under an adjudication proceeding under ORS 537.670 to 537.695.

Again, OWUC appreciates the opportunity to comment on the proposed rules and appreciates the staff effort in developing this hearing draft.

Sincerely,



Larry Rains, Chair
Oregon Water Utility Council

Enclosures

Attachment 1 – Staff Presentation at Rulemaking Hearing May 22, 2006

Ground Water Registration Modifications and Water Right Transfers

OAR Chapter 690, Divisions 380 and 382



Bill Ferber

Doug Parrow

Field Services Division

HB 2123 (2005)

- Allows recognition of ground water registration modifications
 - requires adoption of rules and procedures
 - changes in place of use, type of use, point of appropriation
 - fee of up to \$500 for modification
- Eliminates “unconfined” aquifer requirement for surface to ground water transfers
 - retains similar effect requirements

Rulemaking Objectives

- Develop procedures for recognition of ground water modifications
- Eliminate “unconfined” requirement
- Develop other transfer rule amendments
 - clarify relationship between modifications and transfers
 - major overhaul of rules in 2002
 - need for several clarifications identified during implementation

Rules Advisory Committee

- 6 members representing range of interests
 - conservation, municipalities, agricultural, WRD
- 4 meetings starting in February
- Committee work concluded in April with general agreement on:
 - creation of new rules division
 - process that generally mirrors transfers
 - treatment of existing “notifications” of changes
 - application fees

Ground Water Modifications

Division 382

- Application requirements
 - similar to transfer applications
 - no demonstration of ready, willing, able
 - CWRE map not required
- Review process
 - public notice – opportunity to comment
 - draft preliminary determination to allow applicant to resolve problems
 - issuance of preliminary determination
 - public notice – opportunity to protest

Ground Water Modifications

Division 382

- **Review criteria**
 - enlargement
 - “injury” to Scenic Waterway flows
 - injury to water rights
 - an incrementally larger impact on other rights or Scenic Waterway flows than could occur under the existing authorized use
- **Final order recognizing modification**
 - will not confirm right
 - no final proof required
 - filed with registration for use at adjudication

Ground Water Modifications

Division 382

- Layering of irrigation rights
 - all rights changed together
 - notification and opportunity to cancel or withdraw if change to a right cannot be approved
- Partial fee refund if old well abandoned
- Preference in processing if previous “notification” on file

Water Right Transfers

Division 380

- Incorporation of ground water modification references
- Clarifications
 - layering of irrigation water rights
 - authorization to seek transfer
 - landowner
 - quit claim vs. conveyance agreement
 - lienholder notification at PD stage
- Mapping issues
- Newspaper notice

Rulemaking Schedule

- Written comments due by June 9
- Proposed rule adoption
 - Summary of hearing and written comments
 - Staff recommendations for changes
 - August 10/11 Commission meeting in Bandon



To: Cindy Smith, OWRD

Fax: 503-986-0903

From: Dave Anderson

Date: June 9, 2006

Pages: 2, including cover sheet.

Cindy-

Please find attached comments from City of The Dalles regarding the draft Division 382 Groundwater Registration rules.

Please feel free to contact me if there are any questions regarding these comments. Thank you.

Dave Anderson

fax

From the desk of...

DAVE ANDERSON

Water Quality Manager

City of The Dalles

6780 Reservoir Road

The Dalles, OR 97058

(541) 298-1242 Ext 300

Fax: (541) 298-2129

E-mail: danderson@netcnct.net



CITY OF THE DALLES
Department of Public Works
6780 Reservoir Road
The Dalles, Oregon 97058

June 9, 2006

Ms. Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, Oregon 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 382

Dear Ms Colbert:

The City of The Dalles is taking this opportunity to fully support the comments provided by the Oregon Water Utility Council (OWUC) regarding the hearing draft rules for OAR Chapter 690, Division 382. These rules are crucial to the mission of many municipal water suppliers and the state of Oregon to provide communities with adequate long-term water supplies.

The City of The Dalles has a vital interest in these rules and will be directly affected by them. The City operates a municipal water utility which holds certificates of groundwater registration and is responsible for providing a safe, adequate and reliable water supply for a growing community. The draft rules with the revisions suggested by OWUC will provide a regulatory framework wherein these groundwater registrations can be appropriately modified to meet that responsibility over time.

The City of The Dalles thanks you for this opportunity to comment on the proposed groundwater registration rules. If you have any questions regarding these comments, please feel free to contact me at (541) 298-1242 at your convenience.

Sincerely,

Dave Anderson
Water Quality Manager



June 9, 2006

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE
Salem OR 97301-1271

**SUBJECT: HEARING DRAFT RULES, OAR CHAPTER 690, DIVISION 382
(GROUND WATER REGISTRATION)**

Dear Ms. Colbert:

The City of Salem is in support of the comments contained in the letter from Larry Rains, Chair of the Oregon Water Utility Council, to the Oregon Water Resources Department regarding the hearing on draft rules for OAR Chapter 690, Division 382. As Larry states in his letter, these proposed rules are a critical component to the Department's efforts to ensure an adequate long-term water supply for Oregon.

The City of Salem is very interested in the successful outcome of these rules as we hold 12 groundwater registrations that involve 17 groundwater wells throughout the city. Nitin Joshi, the Water Resources Manager with the City of Salem's Public Works Department, has served on the Rules Advisory Committee convened by the Oregon Water Resources Department. If you have any questions regarding the City of Salem's position on the hearing draft rules, please contact Nitin at (503) 588-6211.

Sincerely,

Tim Gerling, P.E.
Public Works Director

HAB:P:\CORR2006\LETTER\TG\DIVISION 382 LETTER OF SUPPORT.WPD

Enclosure:

Draft of Letter from Larry Rains, Chair of Oregon Water Utility Council

cc: Peter Fernandez, Assistant Public Works Director, City of Salem
Paul Eckley, Operations Services Manager, City of Salem
Sophia Hobet, Water Services Manager, City of Salem
Nitin Joshi, Water Resources Manager, City of Salem
Howard Biskie, Certified Water Right Examiner, City of Salem

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❖ ADA Accommodations Will Be Provided Upon Request ❖

PUBLIC WORKS DEPARTMENT

555 Liberty St. SE / Rm. 325 • Salem, OR 97301-3503 • Phone (503) 588-6211 Fax (503) 588-6025 TTY (503) 588-6292

June 9, 2006

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street, NE
Salem, OR 97301-1271

RE: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)

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Again, OWUC appreciates the opportunity to comment on the proposed rules and appreciates the staff effort in developing this hearing draft.

Sincerely,

Larry Rains, Chair
Oregon Water Utility Council

Enclosures

Attachment 1 – Staff Presentation at Rulemaking Hearing May 22, 2006

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Oregon Water Resources Congress

1201 Court St. NE, Suite 303 | Salem, OR 97301-4188 | 503-363-0121 | Fax: 503-371-4926 | www.owrc.org

June 9, 2006

Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Subject: Comments on proposed amendments to OAR Chapter 690, Division 382
(Ground Water Registration Modifications)

The Oregon Water Resources Congress (OWRC) appreciates the opportunity to comment on the proposed amendments to OAR Chapter 690, Division 382 (Ground Water Registration Modifications).

OWRC represents irrigation districts, water supply districts, and other public and private entities that deliver non-potable water for irrigation in Oregon.

As a member of the Rulemaking Advisory Committee (RAC), thank you to the Water Resources Department staff for their efforts on the amendments, not only in the drafting work, but also in providing some basic education to help the RAC members with their work. It was not always an easy task and staff's patience is appreciated.

As a general comment, we appreciate and support the decision by the Department to keep the focus on the water rights as described in the ground water registration and not shift to using the actual use in evaluating an application to modify a ground water registration. This is in keeping with the philosophy followed in Oregon as a paper right state.

690-382-0010 (2) We recommend that subsection (2) be deleted in its entirety. We appreciate staff's responsiveness to the RAC request that the ground water registration modification rules be a separate set rules and not part of the transfer rules and suspect that this subsection was a good faith effort reflecting that request. The subsection is not needed with the establishment of a separate Division for the ground water registration modification rules.

690-382-0700 (2)(b) The specific identification of protection for Scenic Waterway Flows in this subsection is troublesome in that it goes beyond the intent of the HB 2123. Nevertheless, we recognize that this was important to some members of the RAC and in the spirit of compromise we accept its inclusion here with the understanding that this provision will be narrowly applied only in this context and not extended to other provisions or rules.

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The mission of the Oregon Water Resources Congress is to promote the protection and use of water rights and the wise stewardship of water resources.

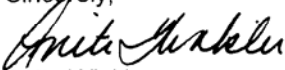
Comments on proposed amendments to OAR Chapter 690, Division 382
(Ground Water Registration Modifications)
June 9, 2006
Page 2

690-382-1000 (4) The language in the Hearing Draft might be interpreted to mean that the final order addressing the modification of a certificate of registration creates an action equal to or replacing an adjudication. It is clear from the language in the underlying legislation that this is not the case and we recommend that this section be rewritten to clarify that the final order cannot be interpreted as any kind of final determination that would otherwise occur in an adjudication proceeding. We suggest the following replacement language for this section:

"(4) Issuance of the final order recognizing a modification of a certificate of registration shall be a final order for the purpose of judicial review under ORS 183.484 with respect to the subject modification. However, the modification order may not be construed as a final determination of any matter stated in the certificate of registration; such a determination must occur in an adjudication proceeding under ORS 537.670 to 537.695."

On behalf of OWRC, I appreciate the opportunity to participate in the RAC and to provide our comments on the hearing draft for Division 382.

Sincerely,



Anita Winkler
Executive Director

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JUN 09 2006

**WATER RESOURCES DEPT
SALEM, OREGON**



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June 9, 2006

Debbie Colbert, Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St NE, Ste A
Salem, OR 97301-1271

Re: **Comments on Draft Administrative Rules Regarding Ground Water
Registration Modification – OAR Chapter 690, Division 382**

Dear Ms. Colbert:

Thank you for the opportunity to comment on the hearing draft rules for OAR Chapter 690, Division 382.

Oregon Association of Nurseries (OAN) is based in Wilsonville, Oregon. We have more than 1,500 wholesale growers, retailers, landscapers and suppliers. Oregon's nursery and greenhouse industry is the state's largest agricultural sector. Annual surveys conducted by the Oregon Agricultural Statistics Service consistently show the nursery/greenhouse industry leads all other sectors of Oregon agriculture in sales, payroll and full-time employees. Oregon trails only California and Florida in nursery production and accounts for 15 percent of all U.S. nursery crops.

Other key facts about the Oregon nursery industry:

- Oregon is the nation's largest "exporter" of nursery stock. Over \$600 million worth of nursery and greenhouse product — about three-quarters of all production — is sold outside the state.
- Wholesale sales of nursery/greenhouse material were \$844 million in 2004, and when combined with Oregon's Christmas tree sector, we generate close to \$1 billion in annual sales at the farm gate.
- Oregon's nurseries account for just slightly more than 1 percent of all agricultural land in Oregon, yet produce more than 20 percent of all agricultural sales.
- Oregon is No. 1 in the US in the production of shade trees, coniferous evergreens and Christmas trees; No. 2 among all states in the production of deciduous flowering trees and other broadleaf evergreens; and No. 3 in the production of deciduous shrubs, other ornamentals and fruit and nut plants.

Many OAN members operate multi-generational family farms. As a result, many of these individuals hold ground water registrations, evidencing their use of ground water that predates the enactment of the 1955 ground water code. Until House Bill 2123 was passed in the 2005 legislature, there was little flexibility in how these ground water registrations could be used.

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The OAN supported the passage of HB 2123 in order to provide this operational flexibility to its members by allowing them to modify a ground water registration by changing the point of appropriation, place of use, or character of use. Oregon's water resources are under pressure from a myriad of demands. It is therefore becoming increasingly important that water users have a variety of tools available to them to better use existing water rights. The ability to modify a ground water registration is just such a tool, as recognized by the 2005 legislature.

The value of the modification tool depends on the adoption of rules that accurately reflect the legislature's intent and provide Department staff with a clear and realistic path for evaluating modification applications. Because of our interest in a functional set of rules, we participated on the Department's House Bill 2123—Ground Water Registrations Rules Advisory Committee (RAC) through our representative Steve Shropshire, of Jordan Schrader PC. While the proposed rules address many of the concerns discussed during RAC meetings, the OAN still has several specific issues it wishes to bring to the Water Resources Commission's attention.

First, we very much appreciate the efforts made by Department staff to prepare the draft rules. Staff has done an admirable job of attempting to harmonize the variety of viewpoints expressed by RAC members. At the conclusion of the RAC meetings, there remained several points of disagreement among the water user community and WaterWatch of Oregon. Those issues that merit additional comment here.

One central issue to the discussions involved the water users' position that the Department is not legally authorized to examine the validity of the underlying ground water registration in the modification process. During the RAC meetings, WaterWatch argued that the registration modification process should involve an analysis of historic use of water under the registration. However, Oregon law clearly requires that such an evaluation be conducted only in the context of an adjudication proceeding under ORS 537.670 to 537.695. The draft rules accurately reflect this statutory limitation of the Commission's authority, instead focusing on whether such a modification would cause "injury" to existing rights and/or the streamflows the Commission uses to make findings for state scenic waterways under ORS 390.835.

Additional specific issues of concern to the OAN involve the rule provisions relating to the evaluation of injury to state scenic waterway flows, the burden of proof regarding recognition of a modification, and clarification of the right to appeal. We take each in turn.

Injury to Scenic Waterway Flows -- OAR 690-382-0700(2)(b) and 690-382-1000(1)(b)

The RAC engaged in significant discussion regarding WaterWatch's contention that HB 2123 requires the Commission to adopt rules that are protective of state scenic waterway flows. The OAN does not believe that the legislation required such measures be inserted in the rules. If the Commission intends to retain the proposed language regarding scenic waterways, it is critical that that the rulemaking record clearly reflect the manner by which Department staff would evaluate "injury" to such flows. In particular, we understand that the Department will use its standard ground water transfer injury analysis, focusing on the scenic waterway flow as if it were a surface right.

Burden of Proof Issue

During the RAC meetings, the OAN raised a concern that the draft rules contain an improper burden of proof with respect to the recognition of a modification. Based on the current draft of the rules, we still have those concerns. In particular, OAR 690-382-1000(1) currently requires Department staff to prove a negative—namely that the proposed modification would *not* result in injury or enlargement. This is contrary to the standard burden of proof, which lies with a party seeking to challenge an administrative decision. To

remedy this problem, we suggest that the rule be rewritten to permit the recognition of a modification unless the Department determines that injury or enlargement *will* occur. In other words—the modification is denied only if the record contains sufficient evidence to sustain a finding of injury or enlargement.

We propose the following change to the draft language in OAR 690-382-1000(1).

(1) An application for modification of a certificate of registration shall be recognized unless the Department determines that; ~~if the Department determines that~~

- (a) The proposed modification would ~~not~~ result in enlargement as defined in OAR 690-382-0100(2);**
- (b) The proposed modification would ~~not~~ result in a state Scenic Waterway not receiving previously available water during periods in which streamflows are less than the quantities determined by the Commission ~~Department~~ to be necessary to meet the requirements of ORS 390.835;**
- (c) The proposed modification would ~~not~~ result in injury as defined in OAR 690-382-0100(3); ~~and or~~**
- (d) Any other requirements for modification of the certificate of registration are not met.**

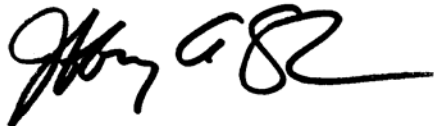
Judicial Review Rights

Currently OAR 690-382-1000(4) contains an ambiguity with respect to whether a Department decision on a modification is subject to judicial review. To clarify that the modification decision is subject to review, but the underlying validity of the registration is not, we recommend the following change to the proposed rule:

(4) Issuance of the final order recognizing a modification of a certificate of registration shall be a final order for the purpose of judicial review under ORS 183.484 with respect to the subject modification. However, the modification order may not be construed as a final determination of any matter stated in the certificate of registration; such a determination must occur in or conclusive until it is determined under an adjudication proceeding under ORS 537.670 to 537.695.

Once again, we appreciate the opportunity to participate in the RAC and to offer comments on the proposed rules. We also wish to thank the Department's staff for their diligent efforts throughout this process.

Sincerely,



Jeff Stone,
Director of Government Relations
Oregon Association of Nurseries

JS:ss



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June 9, 2006

BY HAND DELIVERY

Debbie Colbert
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Hearing Draft Rules, OAR Chapter 690, Division 382 (Ground Water Registrations)

Dear Ms. Colbert:

Thank you for the opportunity to provide comments on proposed new rules relating to the Ground Water Registration program. I have participated in the Rules Advisory Committee (RAC) process for the rules on behalf of several clients who hold ground water registration certificates, and we have appreciated the department's efforts to develop a clear and workable set of rules to implement the relevant provisions of HB 2123, enacted during the 2005 Legislation Session.

For purposes of the hearing record, I would like to offer general support for the rules, subject to the following specific comments, and suggested changes:

First, I would like to echo the comments and changes suggested in the letter submitted on behalf of the Oregon Water Utility Council (OWUC). The letter provides a thorough and thoughtful analysis of the rules, and was developed in cooperation with other RAC members representing current registration certificate holders.

Second, I would like to underscore two particular concerns relating to the legal structure and effect of the rules:

1. 690-382-0100(9): This section defines the term "Water right conveyance agreement." The OWUC letter proposes changes to the definition to clarify the department's ability to recognize valid conveyance documents that are not necessarily recorded in county deed records. This is an important change because

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not all such conveyances would, or could be recorded; nevertheless, they would constitute binding legal commitments between the parties. We certainly understand the department's need to ensure proper authority to make a change in a ground water registration; however, the wording in the hearing draft is unnecessarily restrictive, particularly in light of the fact that many such conveyances have occurred during the past 50 years, without any knowledge by the parties that failure to record the agreement could result in a limitation on their future ability to transfer the water right interest.

2. 690-382-1000(1): This section describes the criteria to be applied by the department in determining whether to recognize a proposed change, and is therefore critically important to the process. The OWUC letter recommends new wording to clarify that an applicant would not be placed in the position of proving a negative. As currently worded, the rules require the department to make findings that the proposed change(s) would *not* result in certain consequences. The OWUC wording provides a more workable approach by allowing the changes to be made unless evidence shows that the change would result in injury or non-compliance with other listed criteria.

Thank you, again, for the opportunity to comment on the proposed rules. We support adoption of the rules with changes as listed in the OWUC letter, and as further described herein.

Sincerely,

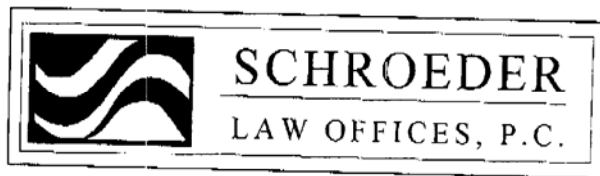


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June 9, 2006

VIA FACSIMILE

Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
ATTN: Rule Coordinator
FAX: (503) 986-0901

RE: Comments on OAR Chapter 690, Division 382 (Ground Water Registration Modifications)

Dear Rule Coordinator:

We would like to address the following proposed regulations:

OAR 690-382-0200

In the proposed modification to the rules in Chapter 690, Division 380 (Water Right Transfers), "water use subject to transfer" is defined in OAR 690-380-0100(14). Although the term is also used in the proposed Division 382 rules, it is not defined. We suggest that to avoid confusion, a definition of "water use subject to transfer" also be included in the Division 382 rules.

OAR 690-382-0700(2)(b)

We do not believe that a state Scenic Waterway should figure into any analysis of a proposed ground water registration modification. Ground water registrations reflect a water right that was perfected prior to the ground water code's enactment in 1955. Accordingly, the pre-code ground water rights predate the state's scenic waterway legislation, and such rights should not be impaired by subsequent legislation. This is particularly true when the modification does not result in an enlargement of the water right.

In addition, the analysis of whether a modification may limit "previously available" water to Scenic Waterways may place applicants in a precarious position. In the "Possible Fiscal Impacts of the Proposed Rules" section of the Notice of Comment and Rulemaking, it states that "[t]he adoption of the proposed rules in Division 382 will give holders of ground water registrations the flexibility to modify their original claims and document changes that may have happened in the past." Accordingly, the Department recognizes that the place of use, type of use, and point of appropriation might have changed over the years, but the registration holders had no administrative process to document any such change. However, under these rules, the Department must subject the modification to an analysis that includes whether the modification will "result in a state Scenic Waterway not receiving previously available water" during certain

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flow periods. This is so, even though the actual modification might have occurred prior to the Scenic Waterway designation.

Further, it is unclear what the Department means by "previously available." For example, if an applicant modified his use in 1960 (and the modification removed water from a waterway) and the waterway was designated scenic in 1990, in reality the waterway never received the "previously available" water. But, if the applicant applies for a modification in 2006 to reflect the 1960 change, will the Department conclude that the modification will deprive the Scenic Waterway of water "previously available" (because the modification was never documented), and reject it? It appears that such an application of "previously available" would defeat the intended flexibility of the rules.

Finally, if an applicant applies for a modification to reflect a change that occurred in the past, but the Department denies the change because of the criteria in OAR 690-382-0700(2)(b), would the applicant then face abandonment or forfeiture of the water right because the applicant has admitted a change in use? Such a result would punish the applicant even though there was no administrative process to reflect a modification when the modification originally occurred.

We recommend changing the proposed rules to reflect that a modification should be evaluated simply to ensure that it does not result in an enlargement of the registration certificate.

Thank you for your consideration of these comments.

Very truly yours,

SCHROEDER LAW OFFICES, P.C.



Colm Moore

CM: pmv



June 9, 2006

Water Resources Department
Attn: Rules Coordinator
725 Summer Street NE, Suite A
Salem, Oregon 97301

RE: Proposed Rules - OAR Chapter 690 Division 382

On behalf of members, Water for Life respectfully submits the following comments on the Department's proposed rules pertaining to ground water registration modifications. Although Water for Life appreciates the interest in moving forward, the proposed rules contained in the hearing draft do not efficiently and effectively accomplish the purposes they are intended to serve.

Among the purposes of the proposed rules, are the goals of establishing orderly application requirements, preventing enlargement, and preventing injury to other water right holders. The proposed rules should be streamlined to more appropriately address these issues.

Rules pertaining to ground water registration modifications should also, to the extent practicable, apply uniformly to all ground water registration modifications. Instead, the proposed rules create a dual regulatory framework that differentiates between irrigation and non-irrigation ground water registrations in a manner that is inconsistent with statute.

The authority for the proposed rules derives from provisions of House Bill 2123 (2005), codified at ORS 537.610(4), which provide in relevant part:

The commission shall adopt by rule the process and standards by which the commission will recognize changes in the place of use, type of use or point of appropriation for claims to appropriate ground water registered under this section.

The legislative delegation of authority in ORS 537.610(4) is not as broad as it initially appears. The ground water registration rules ultimately promulgated by the Commission must conform to Oregon's ground water statutes and implement the policies set forth therein. One statute having particularly significant bearing on the proposed rules is ORS 537.705, which provides:

All ground water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any ground water for any purpose may be made without compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530. However, the owner of any ground water right may, upon compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530, change the use and place of use, the point of appropriation or the use theretofore made of the ground water in all cases without losing priority of the right theretofore established. (*emphasis added*)

The term ground water, employed in ORS 537.705, plainly encompasses groundwater registrations. *See*, ORS 537.515(5). Therefore, although the commission has authority to adopt rules pertaining to the modification or transfer of ground water registrations pursuant to ORS 537.610(4), the commission is required, by ORS 537.705, to promulgate rules containing a procedure as nearly as possible like that set forth in ORS 540.520 and ORS 540.530.

The rules set forth in the hearing draft are not as "nearly as possible" like those set forth at ORS 540.520(2). The proposed rules require an applicant seeking to modify a ground water registration to provide the Department with a multitude of information beyond the information required by ORS 540.520(2). *See*, OAR 690-382-400 (hearing draft). For example, much of the information required in the proposed rules appears derived from ORS 537.615, which is a statute that applies to "wholly new rights to appropriate ground water or to enlarge upon any existing right to appropriate ground water."

ORS 537.615 and ORS 537.705 originated from the same legislative bill in 1955. If the legislature wanted applicants for a change in use or place of use to provide the information set forth in ORS 537.615 they would have done so. Instead ORS 537.705 provides “no change in use or place of use of any ground water for any purpose may be made without compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530.”

Notably, ORS 540.520(2) provides a list of application requirements. The statute does not grant the Department or the Commission rulemaking authority to require additional information. Other statutes do. *See e.g.*, ORS 540.523(1)(d); ORS 540.524(2). Therefore, the application requirements in the proposed rules should be limited to the information set forth at ORS 540.520(2), and most certainly, be limited to the information necessary to address the issues that are to be considered by the Department pursuant to ORS 540.520 and ORS 540.530.

The proposed rules are also inconsistent with ORS 537.705 because they require the Department to assess issues beyond those provided for in ORS 540.520 and ORS 540.530. The rules, in large part, seem focused on the considerations contained in ORS 540.510. To the extent the considerations set forth therein are relevant to the modification of a groundwater registration; existing rules implementing those provisions should simply be copied and set forth in the ground water registration rules. For example, the existing text of OAR 690-380-2250 could be inserted into the ground water registration rules with very minor revision. Instead, the proposed rules seek to address the considerations set forth in ORS 540.510 by interjecting a completely new term, “layered,” into administrative rule.

There does not appear to be any reason to interject a completely new term into rule when there are a multitude of established and well understood terms that would suffice. To the extent a ground water registration is a supplemental or primary water right, the existing rules pertaining to such rights, with minor

modification, could be used inserted into the groundwater registration rules. This would be more understandable than the entirely new term “layered,” and would keep the rules consistent with the statutory framework.

The term “layered” is not consistent with the statutory framework for a number of reasons; most importantly, because of the manner in which it singles out and imposes limitations upon certificates of registration issued for purposes of irrigation. Ground water registrations for municipal and other purposes are not included within the definition. The differential treatment is inconsistent with the overarching statutory framework which treats all ground water registrations similarly. *See*, ORS 537.585 (...*when any person or public agency...*); ORS 537.595 (...*when any person or public agency...*); ORS 537.606 (*Any person or public agency...*). It is also inconsistent with existing administrative rules, such as OAR 690-380-2250, which implements ORS 540.510 and does not treat the differentiate between irrigation water rights classified as supplemental and other water rights classified as supplemental.

Rules seeking to adhere as nearly as possible to the process set forth at ORS 540.520 and ORS 540.530 would not expand the injury analysis provided for therein to include consideration of whether the proposed modification would harm a State Scenic Waterway. *See*, OAR 690-382-1000. The State Scenic Waterway statutes are self-policing, contain their own protest mechanism, and there is no defensible statutory basis for rules that expand the injury inquiry associated with a ground water registration modification beyond the consideration of whether the proposed modification will result in injury to other existing water rights as provided for in ORS 540.520 and ORS 540.530. Furthermore, inserting the proposed Scenic Waterway provisions into the proposed rules may provide any member of the public with the ability to claim injury and obtain standing to protest a groundwater

registration modification even though they do not hold water rights that will be injured by the proposed modification.

In addition to the foregoing, the proposed application requirements for a ground water registration muddy the waters with respect to the issue of ownership and may result in avoidable conflicts. The rules should be clarified to indicate that the owner of the ground water registration, and person eligible to request a modification, is the person owning the land to which the ground water registration is appurtenant, unless there is evidence to the contrary (i.e. a conveyance agreement). *See*, ORS 537.705.

In summation, Water for Life believes the proposed rules are a work in progress and in need of further review. Water for Life asks that the proposed rules not be adopted at this time and requests that a rules advisory committee be convened to continue working to develop sensible rules governing the modification of ground water registrations.

Sincerely,

//s

Helen Moore,
Executive Director, Water for Life
