



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Acting Director

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

### **Request for Adoption of Administrative Rules Relating to Water Right Transfers, OAR Chapter 690, Division 380**

#### **I. Issue Statement**

The Commission is asked to amend rules relating to water right transfers (OAR Chapter 690, Division 380) to streamline its transfer application requirements and potentially reduce the cost associated with a water right transfer. The final proposed rules also clarify that an electronically generated seal is acceptable on certified water right examiner maps, clarify other aspects of the mapping requirements for transfer applications, and make minor formatting changes. The final proposed rules are located in Attachment 1.

#### **II. Background**

Under the existing transfer rules, a transfer application must include a "lot book report for the land to which the water right is appurtenant prepared by a title company." OAR 690-380-3000 (13). The lot book requirement was added by rule to the list of application requirements in May 2003. An underlying purpose of the lot book requirement is to assist the Department in verifying ownership of the affected land and to verify that the applicant is the landowner or submitting the application with landowner consent.

Since its addition to the transfer rules, the Department has received several comments internally and externally on the lot book requirement. Issues raised include 1) the cost associated with obtaining a lot book report from a title company, 2) the ambiguity in the minimum information required in a lot book report, and 3) the necessity of a lot book report for permanent versus temporary transfer applications.

In response to this input, the Department evaluated the need for lot book reports in terms of the value added to the transfer application review process and developed a hearing draft of the rules for public input. Notice of the public rulemaking was published in the *Oregon Bulletin* and a hearing draft of the proposed rules was made available on August 1, 2004. In addition to the

opportunity to provide written comment, the Department held two public rulemaking hearings in Salem on August 19, 2004. No testimony was provided at the public rulemaking hearings.

Written public comments on the hearing draft of the proposed rules were provided by the Oregon Agricultural Alliance, Pacific Hydro-Geology Inc., and Deschutes Resources Conservancy. Copies of the written comments are provided in Attachment 2.

### **III. Discussion**

The hearing draft of the rules proposed to make the following changes to the transfer application requirements:

- 1) *Eliminate the lot book report requirement for temporary transfers* – The hearing draft of the proposed rules require a lot book report only for permanent transfers and not temporary transfers. When making permanent changes to a water right, the Department requires a higher degree of certainty that the applicant is the landowner or submitting the application with the landowner’s consent. However, temporary transfers revert to the terms and conditions of the original right at the end of a temporary transfer period. Because temporary transfers “unwind,” the Department can rely on a copy of the recorded deed of the subject lands and a signed landowner statement consenting to the temporary change.
- 2) *Require the lot book report after a draft preliminary determination* – The current transfer rules require the applicant to submit a lot book report at the time they submit their transfer application. The proposed rules require the submittal of a lot book report at the time the Department sends the draft preliminary determination to the applicant, rather than at the time of application. Changing the timing of the lot book report submittal will provide the Department with more timely and reliable land ownership information. Requiring the lot book after the applicant receives the draft preliminary review, rather than at the time of application, will also help the applicant decide whether to make the investment in a lot book report based on the draft preliminary review.
- 3) *Clarify the minimum information required in a lot book report* – The proposed rules define the minimum information necessary for a lot book report. By rule, a lot book report would contain current land ownership, a legal description of the lands, and identification of lien holders. This clarification will help applicants avoid paying for more costly reports from title companies.
- 4) *Clarify mapping requirements* – The proposed rules clarify that an electronically generated seal is acceptable on certified water right examiner maps and clarify other aspects of the mapping requirements for transfer applications.

***Issues Identified in Written Comments:***

*Comment – Need for Lot Book to Verify Land Ownership:* The Oregon Agricultural Alliance commented that the lot book report is an unnecessary expense for verifying land ownership and consent from the landowner of the affected land. Instead, the Department should use the same standard for verifying ownership and landowner consent as the Department uses in a water right permit application – a copy of the deed with a legal description of the lands. The Alliance recommended language that would require a deed and legal description of the lands for all transfers at the time the Department issues a draft preliminary determination, not at the time of application.

*Response:* In contrast to temporary transfers and new water right permits, permanent water right transfers have the potential to make changes to an existing water right that cannot be “unwound” once the Department finalizes the approval. For this reason, the Department places greater emphasis on verifying that an applicant for a permanent transfer is the owner of the land to which the right is appurtenant or has the consent of the landowner.

A report from a title company identifying the current landowner and providing a legal description of the lands is a more reliable means of identifying this information than a copy of the deed, since the Department cannot verify that the deed is the most current one available for the subject lands. The greater certainty provided by a report prepared by a title company comes at an additional cost to the applicant but is intended to prevent the Department from taking a permanent action on a water right without the consent of the landowner to which that right is appurtenant. Staff do not propose changing the rules in response to this comment.

*Comment – Replace term “Lot Book Report” with a Descriptive Phrase:* Pacific Hydro-Geology Inc. requested that the Department use a descriptive phrase, such as “report of ownership and lien information,” in lieu of the term “lot book report.” This approach would help prevent applicants from paying for more information from a title company than necessary but would still provide the necessary information.

*Response:* As the commenter points out, the term “lot book report” is interpreted differently among title companies and using this term may add confusion to the transfer application requirements. In response to this comment, the term “lot book report” is replaced with “report of ownership and lien information” in the final proposed rules.

*Comment – Inconsistencies with Transfer Application:* Pacific Hydro-Geology Inc. noted that the current transfer application form is not clear with respect to which types of transfers require the submittal of a lot book report. The Department should also clarify whether lien holder information is required for all transfers.

*Response:* The existing transfer rules require a lot book report, including lien holder information, for all types of transfers. The final proposed rules would require a lot book report (“report of ownership and lien information”) for all permanent transfers. Staff will revise the

transfer application form to reflect and clarify the requirements of the rules following the Commission's action on the final proposed rules.

*Comment – Signed Landowner Statement:* The Deschutes Resources Conservancy suggested that quitclaim deeds be accepted in lieu of signed landowner statements since quitclaim deeds require the landowner's signature and are recorded and notarized at the County Clerk's office.

*Response:* The hearing draft of the proposed rules required that the applicant for a transfer either 1) be the landowner to which the water right is appurtenant or 2) provide a signed statement from the landowner consenting to the transfer. A quitclaim deed is a tool used to transfer interest in a water right from the landowner to another party. This approach is increasingly used across the state. From an application streamlining perspective, it makes sense to accept these documents in lieu of a signed statement of the landowner consenting to the transfer. In response to this comment, the rules were modified so that, at the time the Department issues the draft preliminary determination, the applicant must provide a statement consenting to the transfer from either the landowner or the entity to whom the interest in the water right has been quit claimed. The final proposed rules also define "quitclaim deed" as a document recorded with the county and including a description of the subject lands.

#### **IV. Summary**

The final proposed rules in Attachment 1 (Water Right Transfers, OAR Chapter 690, Division 380) streamline the transfer application requirements and potentially reduce the cost associated with a water right transfer. Based on review of public comments received, staff propose modifications to the hearing draft of the rules issued August 1, 2004. The final proposed rules are consistent with the State's goal of regulatory streamlining and reducing the fiscal impact of regulations.

#### **V. Alternatives**

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1.
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

#### **VI. Recommendation**

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

Attachments:

1. Final Proposed Rules – Water Right Transfers (OAR Chapter 690, Division 380).
2. Written Public Comment.

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