

MEMORANDUM

TO: Water Resources Commission

FROM: Adam Sussman, Senior Policy Coordinator

SUBJECT: April 11, 2002
Water Resources Commission Meeting - Work Session

Briefing on Proposed Legislative Concepts for the 2003 Legislative Session

I. Issue Statement

This report continues the discussion between Commission members and Department staff regarding the substance and policy implications of legislative concepts developed for the 2003 legislative session. Staff will use Commission guidance to further develop and refine the ideas contained in the concepts.

II. Background

The process to develop concepts for the 2003 legislative session began early this winter. In December and January staff collected internal suggestions concerning agency issues and needs requiring legislative consideration. Region Managers and the Department's Agency Coordination Team (ACT) refined those ideas. Staff shared the list of ideas generated from these discussions at the Commission's February 7, 2002, meeting. On March 26, 2002, Department staff met with stakeholders to seek feedback on Department legislative ideas and to discuss issues that may need to be addressed in the 2003 session. Based on continued internal refining, staff propose to submit seven preliminary legislative concepts to the Department of Administrative Services (DAS) on April 15, 2002. A list of the concepts is contained in Attachment 1.

Upon submittal, the legislative concepts will be reviewed by DAS and the Governor's Office. Concepts approved by DAS and the Governor's Office will be submitted to Legislative Counsel by May 31, 2002. The deadline for submitting detailed concepts to Legislative Counsel for final drafting is July 15, 2002. The Governor must pre-session file agency bills by December 16, 2002. Several Commission discussions about the concepts (and ultimately the bill language) will occur prior to the December 2002 filing date. The key dates for legislative concept development are shown in Attachment 2.

III. Discussion

The Commission has a key role in setting the policy directions reflected by the legislative concepts submitted to the Legislature. At this Commission meeting and future meetings through the end of the year, Department staff will present issues, concepts, and draft language for discussion. Staff will brief the Commission at each meeting, seek guidance on how to further develop the concepts, and ultimately request approval of concepts for pre-session filing.

Several of the legislative concepts are “placeholders” for legislative ideas that will be developed over the next few months. Staff will provide detail on these concepts as it becomes available. For example, concepts 03 and 07 require additional input from legislatively-created task forces. LC 03 requires input from the Joint Task Force on Water Supply and Conservation (Senate Bill 93 Task Force); and LC 07 requires input from the Senate Bill 710 work group, which is evaluating the concept of trading water rights. Concept 05 requires further discussion with the well drilling community; and concept 06 requires additional discussion with the Transfer Rules Advisory Committee.

Summaries of the seven legislative concepts developed to date are provided in Attachments 3-9.

IV. Recommendation

This report is for informational purposes only.

Attachments:

1. List of Proposed Legislative Concepts
2. 2003 Legislative Concept Development Schedule - Key Dates
3. Summary of Legislative Concept 01
4. Summary of Legislative Concept 02
5. Summary of Legislative Concept 03
6. Summary of Legislative Concept 04
7. Summary of Legislative Concept 05
8. Summary of Legislative Concept 06
9. Summary of Legislative Concept 07

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2003 LEGISLATIVE CONCEPTS
Oregon Water Resources Department

Staff Concepts
<p>LC- 01 Fees:</p> <ul style="list-style-type: none"> a. Adjust statutorily established fees to compensate for inflation and program enhancements. b. Capture fees for transactions that are currently exempt from fees.
<p>LC- 02 Forfeiture/Cancellation:</p> <ul style="list-style-type: none"> a. Add wetland reserve program to the list of excused non-use provisions. b. Clarify the ability to cancel or diminish a primary water right and transfer the supplemental water right to a primary right.
<p>LC- 03 Place-holder for Senate Bill 93 Task Force:</p> <ul style="list-style-type: none"> a. Provide the state the authority to “broker” stored water released under contract with the Corps of Engineers or Bureau of Reclamation. b. Make permanent or continue certain statutory provisions under conserved water statutes (ORS 537.455 to 537.500) that sunset July 2003. c. Interstate water banking - provides for reciprocal recognition of instream water rights among Columbia Basin states. d. Modify the water right development time-lines for community water suppliers. e. Other substantive legislation developed by task force.
<p>LC- 04 ORS Chapter 555: Repeal relic parts of ORS 555 related to Carey Act and other similarly outdated Tumalo Project statutes.</p>
<p>LC- 05 Wells and Well Construction: Raise the amount of bond required for well constructors.</p>
<p>LC- 06 Water Right Transfers: Place-holder for transfer rules advisory committee.</p> <ul style="list-style-type: none"> a. Process and other potential substantive modifications. b. Modify definition of “water use subject to transfer” to include water uses confirmed in an Order of Determination under ORS 539.130.
<p>LC- 07 Place-holder for Senate Bill 710 Work Group: Potential statutory modifications to facilitate water trading.</p>

**WRD Legislative Concepts
2003 Legislative Concept Development Schedule - Key Dates**

January/February 2002	Develop concepts through internal meetings.
February 7, 2002	WRC Meeting — overview of legislative concepts.
March 26, 2002	Stakeholder meeting to get feedback on legislative concepts.
April 11, 2002	WRC Meeting — Commission review and input on legislative concepts.
April 15, 2002	<i>Deadline to submit legislative proposals to DAS.</i>
July 15, 2002	<i>Deadline for agencies to submit additional substantive or administrative detail to Legislative Counsel.</i>
July 15 to December 2, 2002	Agencies continue working with Legislative Counsel to finish bill drafting. Legislative Counsel allows only one revision after its first draft.
November 1, 2002, or 10 days after agency receives bill draft, whichever is later	Request for bill draft revision due from agency to Legislative Counsel.
December 2002	- Legislative Counsel stops all agency drafting - Draft legislation and updated fiscal estimates due. - Governor pre-session files approved bills
December 16, 2002	Deadline for Governor to pre-session file agency bills for 2003 Legislative Session.
January 6, 2003	2003 Legislative Session begins.

Summary of LC 01 - Fee Adjustments

Description of the concept

LC 01 proposes to adjust certain statutorily established fees and to capture fees for transactions that are currently exempt from fees.

Purpose of the concept

The purpose of this concept is to ensure adequate resources to handle existing workloads and increasing demands. This concept is a continuation of the effort initiated under HB 2135 (1997), a bill that was only partially successful in achieving fee increases for water right permit applications and transfer applications. HB 2135 was the result of many discussions with Commissioners, staff and stakeholders. That bill and this concept are premised on the fact that, over recent years, costs for water right related transactions have increased and revenue projections have decreased. At the same time, competition for the use of state General Fund dollars has increased and there has been a growing need to derive a greater portion of program funding from fees. The fees originally proposed in HB 2135 were substantially reduced by the Legislature.

LC 01 would propose fee increases for many water right related transactions including water right transfers, water right permits, applications for small ponds, limited licenses, water right permit extensions, and certain protests. The concept would also propose to capture fees from instream leases, an activity currently exempt from fees.

LC 01 would also propose to increase other statutorily established fees that have not kept pace with inflation. These fees include the well construction start card fee, the well constructor license examination fee, and fees charged for copies.

Development of LC 01 requires an analysis of the resources needed to address the current and expected workload, the costs involved for staff to provide the necessary services, respond to protests, and conduct other business. Once staff have completed the cost analyses, specific fee adjustments will be developed for consideration by Commission members.

Historically, a large portion of agency costs have been supported through General Fund dollars, rather than fees. A significant policy consideration for Commissioners involves determining what percentage of the Department application processing costs should be supported by fees and what portion should be supported by the public through the General Fund. For example, currently, approximately 25% of the water right application processing costs are covered by fees.

Fiscal impacts

Fiscal impacts are unknown at this time.

Summary of LC 02 - Forfeiture and Cancellation

Description of the concept

LC 02 proposes to add participation in the Federal Wetland Reserve Program to the list of excused non-use provisions under ORS 540.610. The concept also proposes to clarify the ability to voluntarily cancel or diminish a primary water right and transfer the supplemental water right to a primary right.

Purpose of the concept

A. Federal Wetland Reserve Program

Under ORS 540.610 failure to use all or part of a water right for five successive years establishes a rebuttable presumption of forfeiture. The statute provides several bases to rebut a presumption of forfeiture — to demonstrate “excused non-use.” One of the excused non-use provisions is participation in a Federal Conservation Reserve Program. However, as currently drafted, the statute does not consider participation in the Federal Wetland Reserve Program as excused non-use. In order to protect the water rights of land owners participating in a such a program, LC 02 would propose to amend ORS 540.610(2)(e) to include participation in the Federal Wetland Reserve Program (16 U.S.3837) as an excluded non-use.

B. Voluntary Cancellation

In many cases water right holders rely on two water rights - a primary water right and a supplemental water right. The supplemental right is used to make up a deficiency in supply from the existing (primary) water right. Under ORS 540.670, where a primary right is canceled through a forfeiture proceeding, the water right holder may, under certain circumstances, transfer the underlying supplemental right to primary status. In some cases, where the primary right becomes unavailable or unreliable, a water right holder may want to *voluntarily* cancel the primary right and transfer the status of the underlying supplemental right to primary. Allowing such a voluntary change would clarify Department records, prevent unnecessary regulatory activity, and in some cases provide substantial benefits to the resource. LC 02 would propose to amend ORS 540.670 to allow transfer of a supplemental right to a primary right upon the voluntary cancellation of the original primary right.

Fiscal impacts

No fiscal impacts are anticipated to result from this concept.

**Summary of LC 03 - Joint Task Force on Water Supply and Conservation
Senate Bill 93 Task Force (place-holder)**

Description of the concept

In 1999, the 70th Oregon Legislative Assembly passed Senate Bill 93, creating the Joint Task Force on Water Supply and Conservation. The charge of the task force is to address statewide water supply and conservation issues and to make recommendations regarding these issues to the 2001 and 2003 Legislatures. It is likely that some of the Task Force recommendations to the 2003 Legislature will include proposed legislation. This place-holder is offered as a vehicle to pre-session file proposed legislation. No specific legislative concepts have been developed; however, Department staff intend to work with the Task Force to consider the following:

- a. Provide state authority to “broker” stored water released under contract with the Corps of Engineers or Bureau of Reclamation;
- b. Make permanent or continue certain statutory provisions under conserved water statutes (ORS 537.455 to 537.500) that sunset July 2003;
- c. Provide state authority, reciprocal with other states, to protect instream water added to the system by another state; and
- d. Modify the water right development time-lines for community water suppliers;

Fiscal impacts

Fiscal impacts are unknown at this time.

Summary of LC 04 - ORS Chapter 555

Description of the concept

LC 04 proposes to repeal relic parts of ORS Chapter 555 related to the Carey Act and other similarly outdated Tumalo Project statutes.

Purpose of the concept

Under the Carey Act of 1894, the federal government entered into contracts with State governments for the irrigation and reclamation of desert lands. In 1901, Oregon officially accepted the conditions of the Act. The 1901 Carey Act acceptance and implementing statutes were repealed in their entirety in 1909 with reenactment of a revised State Carey Act program. Those 1909 Carey Act statutes were incorporated in Oregon Revised Statutes, ORS 555.010 through 555.190, and remain essentially unchanged today. The State was authorized by statute to contract for construction of irrigation projects to reclaim desert lands granted by the federal government, and to attach a lien to lands benefitted by the reclamation projects. Once an irrigation project could ensure a reliable water supply, the law allowed entry by settlers on the reclaimed lands. The title was conveyed to the settlers following settlement and cultivation, and upon payment of the reclamation lien. The law originally provided that applications be submitted to the irrigation project construction company for entry onto the lands which were included within the project boundary. Responsibility for processing applications was later transferred to the irrigation district successor of the construction company.

Currently, final approval for entry on land in a Carey Act project rests with the Water Resources Commission. Water Resource Commission approval of entry and acquisition must be based on a finding that the proposed entry is in the best interest of the State, the irrigation district, and the public. In considering the interests of the State and the irrigation district, the Commission must find that a water right has been or will be obtained from the district for the lands to be entered.

Prior to 1920, the State petitioned the federal government for 39 segregations of land totaling about 862,000 acres for 39 proposed projects. Of those 39, only five projects were completed with patents received and deeds issued. Lands reclaimed under the Act includes: 49,500 acres of the Central Oregon Irrigation District; 7,000 acres of the Tumalo Irrigation District; 3,700 acres of the Jordan Valley Irrigation District; 1,280 acres of the Deschutes Reclamation Irrigation District; and 240 acres in Brownell.

The purpose of this concept is to provide for the repeal of statutes that enacted the Carey Act in Oregon and those statutes related to the State administration of the Tumalo Project. Repeal would remove these program-specific statutes that are fulfilled and would remove any uncertainty and doubt about the status of the Carey Act in Oregon. It would formally recognize

the purpose of the Carey Act Districts in the State has been met and is no longer in the public interest. It would direct the Department to conduct a final inventory of all projects and make a

final disposition of lands where title may remain unresolved. The concept would allow the Department to utilize proceeds of sale of lands to fund expenses related to the final accounting and disposition of lands and would provide for a final report to the next regular legislative session or interim committee.

Fiscal impact

Other Funds \$300,000

FTE: 1.0 (Limited Duration NRS 4)

Summary of LC 05 - Wells and Well Construction**Description of the concept**

LC 05 proposes to change the level of the bond required for licensed well constructors (from \$4,000 to \$10,000) and landowners constructing their own wells (from \$2,000 to \$5,000) under permits from the Department in order to more accurately reflect the costs involved in the repair and abandonment of wells.

Purpose of the concept

LC 05 would amend ORS 537.753 to increase the bonding level of a licensed constructor from \$4,000 to \$10,000, and increase the bonding level of a permitted landowner from \$2,000 to \$5,000. With the current cost of well construction, the \$4,000 bond required of licensed well constructors would not cover the repair or abandonment of even one well in most cases. In the past several years, the Department has documented several instances where the bond amount was insufficient to cover the full cost of repair or abandonment. In addition, when more than one well is involved, the bond is generally completely used by the first person to make a claim against it, leaving others to make the needed modifications without monetary assistance. A raise in the constructor bond amount to \$10,000 would provide greater resource protection and provide well owners with greater assurance that the bond would pay the full costs of repair or abandonment of up to two wells. The estimated cost of obtaining a \$10,000 bond is \$120 to \$300. By comparison, the premium for a \$4,000 bond, as required under current law, is approximately \$120. The landowner bond would be raised to \$5,000 per well, also reflecting the need for greater resource protection and protection for affected parties should the well be deficient. A landowner bond increase to \$5,000 per well would increase the cost of obtaining the bond from approximately \$100 to \$150.

Fiscal impacts

No fiscal impacts are anticipated to result from this concept.

Summary of LC 06 - Water Right Transfers (place-holder)

Description of the concept

Since October 2001, the Department and a Rules Advisory Committee have been evaluating and considering modifications to the Commission's water right transfer rules, OAR Chapter 690, Divisions 15 and 21. Current statutes are being evaluated as a result of this rulemaking effort, which is scheduled for completion this spring, and legislative concepts for the 2003 session will likely emerge. This place-holder is offered as a vehicle to move forward legislation developed through a comprehensive review of the transfer program. No specific legislative concepts have been developed to date. Potential concepts include:

- a. Process and other potential substantive modifications; and
- b. Modification of the definition of "water use subject to transfer" to include water uses for which an Order of Determination has been entered under ORS 537.130

Fiscal impacts

Fiscal impacts are unknown at this time.

Summary of LC 07 - Senate Bill 710 Work Group (place-holder)

Description of the concept

In 2001, the 71st Oregon Legislative Assembly passed Senate Bill 710, creating a Department chaired work group. The charge of the work group is to study the issues related to the trading of water rights between municipalities and other non-municipal ground water users. It is possible that work group recommendations to the 2003 Legislature may include proposed legislation. This place-holder is offered as a vehicle to pre-session file proposed legislation. No specific legislative concepts have been developed to date.

Fiscal impacts

Fiscal impacts are unknown at this time.