



Oregon

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Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item D, May 12, 2011
Water Resources Commission Meeting

Providing Notice of the Issuance of Certificates of Water Rights

I. Issue Statement

This is an action item where the Department is seeking input on a recommended process to provide notice of water right certificate issuance. The Department issues water right certificates as the final step of acquiring a perfected, vested water right. The Department does not currently provide a notice to the public when it issues water right certificates.

II. Background

On November 10, 2010, the Commission received a Petition for Rulemaking from WaterWatch of Oregon to adopt an Administrative Rule. The rule would require public notice of water right certificate issuance within seven days. The Commission denied the petition on January 27, 2011. However, the Commission also directed staff to return with a process to provide notice of certificate issuance. Department staff consulted with Assistant Attorney General Renee Moulun in considering this issue.

III. Discussion

To acquire a water right, a user must first file a water right application. The Water Resources Department reviews the application to consider whether water is available for the proposed use and to consider other criteria that allow the Department to determine whether the proposed use of water is in the public interest. If these conditions are met, the Department issues a proposed final order. Any person may protest the issuance of a water right permit. Once issued, the water right permit contains the date by which beneficial use must be performed. Upon completion of beneficial use, the owner of the permit is to submit notice of completion and a final proof survey to the Water Resources Department. The Department issues a certificate to the permit holder upon a finding that water was beneficially used consistent with the conditions and limitations contained in the permit.

Oregon Revised Statute (ORS) 537.260 provides that any person owning a water right application, permit, or certificate subsequent in priority to a newly issued water right certificate may contest the issuance of the new certificate within three months of issuance. Additionally, a water right certificate is subject to judicial review.

The text of ORS 537.260 does not expressly state whether the Department is required to inform persons who may contest that the Department has issued a certificate. The statute does instruct the Department to hold a hearing if a contest is brought. Notwithstanding the lack of explicit direction to provide notice of certificate issuance to persons who may contest the certificate, legal counsel has advised that the Department has implied authority to provide such notice, and may do so without conducting a rulemaking first. The Department has the authority to determine the content of such a notice without adopting an administrative rule as well.

The Department proposes to provide notice of certificate issuance in its weekly notice. The notice will contain information sufficient to provide persons owning an application, permit, or water right certificate subsequent in priority to the issuing certificate an opportunity to contest issuance of the certificate pursuant to ORS 537.260. For example, the notice may include information such as: name, permit number, certificate number, county, source of water, and authorized use. Water right certificates are sequentially numbered. Staff will conduct audits to ensure that notice is provided consistent with this proposal.

IV. Summary

This is an action item where the Department is seeking Commission concurrence with the proposed process to provide notice of water right certificate issuance. The notice will include sufficient information for those who are interested to access the actual certificate document. Staff will conduct audits to ensure that notice of certificate issuance is provided consistent with this proposal.

V. Alternatives

1. Concur with the proposed water right certificate notice process;
2. Direct the Department to initiate rulemaking to establish the water right certificate notice by Administrative rule; or
3. Direct the Department to continue under the current process, and not provide notice of certificate issuance.

VI. Recommendation

The Director recommends Alternative 1, to concur with the proposed water right certificate notice process.

Attachments:

1. Sample notice

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