



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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### MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item P, November 21, 2014  
Water Resources Commission Meeting

**Request for Adoption of Rules – OAR Chapter 690, Division 325,  
Assignment of a Water Right Permit and Request for Issuance of  
Replacement Permits (SB 200, 2013 Session)**

#### I. Introduction

The Water Resources Department requests the Water Resources Commission consider adoption of rules under OAR Chapter 690, Division 325, pertaining to assignment of a water right permit and request for issuance of replacement permits. The final proposed rules are included in Attachment 1.

#### II. Background

Prior to the adoption of SB 200 (2013 regular session, assigned Chapters 537.225 and 537.227), the Department did not have the authority to split a water right permit amongst potential assignees and issue replacement permits. Senate Bill 200 established requirements and procedures for the Department to evaluate an application by a landowner for the assignment of all or part of the water right permit and the issuance of a replacement permit to reflect an assignment from the current permit holder to one or more additional permit holders. To qualify, the person must be a landowner of record holding a water right permit for irrigation, nursery, temperature control, stock watering or agricultural water use. During the negotiations of SB 200, it was generally agreed that the Department would need to develop rules to properly implement the bill.

The Department consulted a Rules Advisory Committee (RAC) and received feedback on the proposed draft rules. Members of the RAC included Katie Fast, Oregon Farm Bureau; April Snell, Oregon Water Resources Congress, Kimberley Priestley, WaterWatch of Oregon, Steve Shropshire, Jordan Schrader Ramis, and Greg Kupillas, Pacific Hydro-Geology, Inc. The Department worked with the RAC members to modify the draft rules to strengthen the language, ensure that the rules complied with statute, and clarify permit holder verification of permit condition compliance.

Notice of the rulemaking appeared in the *Oregon Bulletin* on August 1, 2014. The public comment period was open through August 29, and a public hearing was held on August 28. Department staff reviewed and considered all public comments that were received by the close of the public comment period. Written comments were received from WaterWatch and Shonee Langford. Greg Kupillas was the only person who attended and testified at the August 28, 2014 public hearing. The comments and testimony are contained in Attachment 2.

During the comment period, an error was found in the version of the proposed rules that were noticed. The first public hearing draft required the applicant to ascertain whether all other persons using water under the permit were also using water consistently with the terms of the permit. This was not the intention of the Department. The proposed rules were modified to correct the error and to incorporate several suggestions made by Shonee Langford.

A notice of a second public hearing for the modified rules was published in the *Oregon Bulletin* on October 1, 2014. The second public comment period was open through October 23, and a public hearing was held October 22. Written comments were received from WaterWatch. Greg Kupillas was the only person to testify at the October 22 public hearing. The comments and testimony in response to the second notice are contained in Attachment 3.

The Department's analysis of the comments suggesting changes to the proposed rules from both rulemaking notices are contained in Attachment 4.

Attachment 5 shows the changes that were made between the first hearing draft of the rules published August 1 and the second hearing draft of the rules published October 1.

Attachment 6 shows the changes that were made between the second hearing draft of the rules and the final proposed rules.

### **III. Discussion**

Prior to passage of SB 200 (Attachment 7), certification of the whole permit could be delayed when one appurtenant landowner needed to extend the time for developing the permit on their land, even if all other water users permitted to use water under the permit had completed development of the right on their lands. Under the bill and the proposed rules, the landowner that is ready to move on to certification, could request for the permit to be split and replacement permits issued. This would result in the landowner having sole possession of the portion of the water right permit that is appurtenant to the landowner's land, and would prevent the issues that can arise when two or more landowners who share a permit have different schedules for developing the permit, extending the completion date, or filing a claim of beneficial use and obtaining a certificate. The decision to seek an assignment and replacement permits is voluntary.

One issue discussed by the RAC was the information that must be provided by an applicant seeking an assignment pursuant to ORS 537.225. ORS 537.225(1)(d) requires, among other things, "[a] statement by the applicant that the most recent water use under the permit, if any, has been exercised within relevant terms and conditions of the permit." The RAC discussed how to interpret

this provision of law which is addressed in the proposed rule under OAR 690-325-0040(i). The rule, as drafted in the final proposed rules, would require “[a] statement by the applicant that the most recent water use under the *applicant’s portion of the water right permit*, if any, has been exercised within relevant terms and conditions of the permit” (emphasis added).

The RAC’s discussion centered on the duty of the applicant to research the water use of other appurtenant water users exercising the right to use water under the permit that an applicant may seek to assign. In some instances, the permit holder seeking the split may not know if their neighboring landowner who also uses water under the permit is using water within the terms and conditions of the permit. The Department and the majority of the RAC agreed that an applicant was responsible for knowing only whether the water on their own land was being used consistently with the terms of the permit and not required to ascertain whether all other persons using water under the permit were also using water consistently with the terms of the permit. The wording proposed at OAR 690-325-0040(i) reflects this agreement.

During the public comment period, the Department received comments objecting to this interpretation. The Department’s responses to comments suggesting changes are included in Attachment 4.

The Department consulted with the Attorney General’s office to ascertain if the language proposed by the Department is consistent with the statute. The AG’s office advised that the Department’s interpretation as provided in the rule is consistent with the text, context, and legislative history of ORS 537.225.

Shonee Langford submitted comments in response to the Department’s August 1 notice. The Department incorporated most of his suggestions before re-noticing the rules on October 1. One suggestion that was not initially incorporated was in regards to the requirement to file applications to split a permit at least 210 days prior to the completion date deadline for the permit at issue. This particular issue was discussed by the RAC, who felt that it was important for all permit holders to know what parts of a permit they owned prior to the end of the completion deadline. However, in preparing the final materials for the Commission, staff asked the AG’s office for input. The AG’s office concluded that the text of the ORS 537.225(1) would not authorize the Department to reject an application filed fewer than 210 days prior to the completion date in the permit. The Department, therefore, amended the final proposed rules to delete the requirement.

#### **IV. Action Item**

The Commission is asked to consider adoption of OAR 690, Division 325 rules, which establish requirements and procedures to evaluate an application by a landowner of record, holding a water right permit for irrigation, nursery, temperature control, stock watering or agricultural water use, to assign all or part of the water right permit and issue replacement permits to reflect an assignment from the current permit holder to one or more additional permit holders.

## **V. Alternatives**

The Commission may consider the following alternatives:

1. Adopt the final proposed rules, OAR 690, Division 325 contained in Attachment 1.
2. Modify and adopt the final proposed rules.
3. Not adopt rules and request the Department to further evaluate the issues.

## **VI. Recommendation**

The Director recommends Alternative 1, to adopt the final proposed rules, OAR 690, Division 325 contained in Attachment 1.

Dwight French  
503-986-0819

### **Attachments**

- Attachment 1: Proposed Final Rules OAR 690-033-0120
- Attachment 2: Copies of Comments Received to the Department's August 1, 2014 Notice of Rulemaking (WaterWatch, Shonee Langford, Greg Kupillas)
- Attachment 3: Copies of Comments Received to the Department's October 1, 2014 Notice of Rulemaking (WaterWatch, Greg Kupillas)
- Attachment 4: Department's responses to comments submitted by Shonee Langford and WaterWatch
- Attachment 5: Second hearing draft with changes identified from First hearing draft
- Attachment 6: Proposed Final Rules with changes identified from Second hearing draft
- Attachment 7: Senate Bill 200 (2013)

**CHAPTER 690  
DIVISION 325  
ASSIGNMENT OF A WATER RIGHT PERMIT AND REQUEST FOR ISSUANCE OF  
REPLACEMENT PERMITS**

**690-325-0010**

**Purpose**

The rules in OAR chapter 690, division 325 establish requirements and procedures that shall be used by the Department to evaluate an application by a landowner of record holding a water right permit for irrigation, nursery, temperature control, stock watering or agricultural water use, to assign all or part of the water right permit and to issue a replacement permit to reflect an assignment from the current permit holder to one or more additional permit holders. These rules do not replace OAR chapter 690-320-0060.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0020**

**Applicability**

- (1) The Department may only accept an application for assignment and request for issuance of replacement permits to reflect the assignment where the original water right is for irrigation, nursery, temperature control, stock watering or agricultural water use.
- (2) The Department may not accept an application for assignment and request for issuance of replacement permits under the rules in OAR chapter 690, division 325 for municipal permits, quasi-municipal permits, or water right permits held by a unit of local government, including but not limited to water right permits held by a port, water authority, or a district.
- (3) Any water right permit for the use(s) of irrigation, nursery, temperature control, stock watering, or agricultural purposes, with a completion date that has expired may not be assigned pursuant to ORS 537.225 or by the rules in OAR Chapter 690, division 325.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

## **690-325-0030**

### **Definitions**

The definitions in this rule, along with the definitions in OAR 690-300-0010 (Definitions) and OAR 690-380-0100 (Water Right Transfers), apply to the rules in OAR chapter 690, division 325. Where a term is defined in more than one rule, the definition in this rule applies.

- (1) **“Enlargement”** means an expansion of a water right permit and includes, but is not limited to:
  - (a) Using a greater rate or duty of water per acre than currently allowed under a permit;
  - (b) Increasing the acreage irrigated under a permit;
- (2) **“District”** means an irrigation district formed under ORS Chapter 545, a drainage district formed under Chapter 547, a water improvement district formed under Chapter 552, a water control district formed under Chapter 553 or a corporation organized under Chapter 554.
- (3) **“Injury”** or **“Injury to an existing water right”** means a water right transaction that would result in another, existing water right not receiving previously available water to which it is legally entitled.
- (4) **“Unit of local government”** includes a county, city, district or other public corporation, commission, authority or entity organized and existing under statute or city or county charter.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

## **690-325-0040**

### **Application Requirements**

- (1) Each application shall be prepared in ink or typewritten on forms provided by the Department.
- (2) The application shall contain the following information concerning the subject water right permit and assignment:
  - (a) The name, mailing address, e-mail address (if it exists), and telephone number of each applicant. Each applicant’s name shall have an assigned alphabet letter or number that corresponds with the application map as required under OAR 690-325-0050(2)(e).
  - (b) Name(s) appearing on the water right permit.
  - (c) Water Right Permit number.

- (d) **Water Right Permit use. Must be one or more of the following uses approved for assignment under OAR 690-325-0010: irrigation, nursery, temperature control, stock watering or agricultural water use.**
- (e) **A map meeting the criteria set forth in OAR 690-325-0050.**
- (f) **A copy of the recorded deed showing the applicant is an owner of the land to which the water right permit is appurtenant.**
- (g) **An affidavit certifying that the water right permit has not been conveyed or withheld, and remains appurtenant to the applicant's land and also certifying that the applicant has read the permit.**
- (h) **A statement by the applicant that the most recent water use under the applicant's portion of the water right permit, if any, has been exercised within relevant terms and conditions of the permit.**
- (i) **Agreements to the assignment and to the request of replacement water right permits submitted jointly or individually by all owners of the land to which the water right is appurtenant; or an assignment of interest and request for the issuance of replacement water right permits by one or more of the owners of land to which the water right permit is appurtenant and information identifying other landowners not participating in the assignment and request for issuance of replacement water right permit. Such information shall include:**
  - (A) **Landowner(s) name;**
  - (B) **Address;**
  - (C) **Description of the properties by public land survey and tax lot number.**
  - (D) **Number of acres and permit rate held by each landowner.**
- (k) **A listing of the names and mailing addresses of any district within which the water right permit is located.**
- (l) **The Department may require the applicant to provide any additional information the department deems appropriate in determining whether or not to approve the application.**

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist:*

**690-325-0050**

### **Map Requirements**

- (1) **A map shall be included with the application required under OAR 690-325-0040. The map shall meet the following criteria:**
  - (a) **The map shall be prepared by a certified water right examiner.**

- (b) The map shall be based upon the original water right application map or permit amendment map.**
  - (c) The map shall not include:**
    - (A) Any unauthorized change to the location of the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.**
    - (B) Any unauthorized change to the location of the point(s) of diversion/appropriation as exhibited on the original water right application map or approved permit amendment application map.**
  - (d) The map shall be of permanent quality and shall be printed with dark ink on a good quality paper that is easily reproduced on a standard copy machine. Color copies that cannot be easily interpreted when copied to black and white will not be accepted.**
  - (e) The preferred map size is 8-1/2" x 11" (letter). If a larger map is required to provide sufficient detail, a size of 8-1/2" x 14" (legal) or 11" x 17" (oversized) may be used.**
  - (f) Notwithstanding subsection (1)(c) of this rule, a map size of up to 30" x 30" may be used if one additional copy is submitted.**
  - (g) The map scale shall be:**
    - (A) 1" = 400';**
    - (B) 1" = 1,320';**
    - (C) The scale of the county assessor map if the scale is not smaller than 1" = 1,320'; or**
    - (D) Another standard engineering scale if the Department grants advance written or e-mail approval of the use of the scale.**
  - (h) Horizontal field accuracy shall be consistent with standard surveying practices for the purpose of locating and quantifying water rights.**
  - (i) The map shall be plotted to the accuracy consistent with the map scale.**
  - (j) The locations of points of diversion or appropriation and places of use shall be described by distance and bearing or coordinates (distance north or south and east or west) from a recognized survey corner or by latitude-longitude coordinates. Latitude-longitude coordinates shall be expressed as either:**
    - (A) Degrees-minutes-seconds with at least one digit after the decimal in the seconds portion (e.g., 42¼ 32' 15.5"); or**
    - (B) Degrees-decimal with five or more digits after the decimal (e.g., 42.53764°).**
- (2) The map shall include the following information:**
- (a) A north arrow, the scale, and a clear legend.**



- (b) **The certified water rights examiner's stamp and signature. An electronically generated stamp or seal is acceptable, provided the signature is original.**
- (c) **The place of use of each applicant's portion of the water right permit shall be clearly defined by outline and shaded or hachured and shall show the number of acres for each portion in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the water right permit has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.**
- (d) **The place of use of any part of the water right permit not being assigned shall be clearly defined by outline and shaded or hachured and shall show the number of acres in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the portion of the water right permit not being assigned has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.**
- (e) **Each applicant's portion of the water right permit shall be referenced, by either alphabet letter or number, to each assignee's listed in the application form under OAR 690-325-0040(2).**
- (f) **The rate and any applicable acre-feet allowance of water use under the water right permit for each applicant's portion of the permit shall be clearly labeled on the map.**
- (g) **The location of each authorized point of diversion or appropriation.**
- (h) **The location of tax lot lines for all properties upon which the water right permit is located.**
- (i) **The location of township, range, section, quarter-quarter section, donation land claim, and other recognized public land survey lines.**
- (j) **Notwithstanding the requirements of subsection (1)(i), the general location of main canals, ditches, flumes, pipelines, pumps, or other water delivery features.**
- (k) **Notwithstanding the requirements of subsection (1)(i), the general location of physical features sufficient to assist in defining the location of the place of use of the water right permit. These features may include, but are not limited to, rivers, creeks, lakes, reservoirs, ponds, roads, railroads, fences, and direction of flow, if appropriate.**

*Stat. Auth:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0060**

**Receipt of Application; Fees**

- (1) The applicant is required to pay the Water Resources Department the full cost to the Department of processing the application.**
- (2) Within 15 days upon receipt of an application containing all the requirements described under OARs 690-325-0040 and 690-325-0050, the Department shall estimate the actual cost of work involved in processing the application.**
- (3) The Department shall notify the applicant of the estimate of the actual cost of work and provide a time period of:**
  - (a) 30 days for the applicant to submit the appropriate fees covering the estimated actual cost of work, or**
  - (b) Upon a written or e-mailed request from the applicant, a reasonable time period greater than 30 days to submit the appropriate fees.**
- (4) If the Department does not receive the appropriate fees after the expiration of the appropriate time period described in OAR 690-325-0060(3), the Department will send notice to the applicant that if the fees are not received by the Department within 10 days of the mailing of this notice, the Department will consider the application incomplete and will notify the applicant that the application is not properly filed and that the application will be of no further force or effect.**
- (5) All required fees must be received before the final assignment is made and replacement water right permits reflecting the assignment are issued. Excess fees will be returned after the final order is issued.**

*Stat. Auth:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0070**

**Technical Review and Issuance of Draft Documents**

- (1) The Department's technical review of the application shall includes:**
  - (a) Verification of the mailing address of each owner of the authorized place of use identified on the map contained in the application.**
  - (b) Verification that the deed(s) supplied with the application matches the properties proposed for the assignments.**
  - (c) Verification that the most recent water use under the permit, if any, has been exercised within relevant terms and conditions of the water right permit.**
  - (d) Assessment of the application for enlargement of the original water right permit and injury to other water right holders.**
- (2) Once the technical review described in OAR 690-325-0070(1) has been completed, the Department shall:**

- (a) Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in the enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised by the applicant in compliance within the terms and conditions of the water right permit, or
  - (b) Prepare a draft proposed final order to deny the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in the enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised by the applicant in compliance within its terms and conditions.
  - (c) Prepare drafts of the replacement water right permits if a draft proposed final order to approve the application under OAR 690-325-0070(2)(a) is prepared.
- (3) Within 30 days after the appropriate fees have been received, the Department shall mail, or with consent of the applicant, send by electronic means, copies of the application, map, existing water right permit, draft proposed final order, and, if the requirement under OAR 690-325-0070(2)(a) is satisfied, draft replacement water right permits, to each owner of land upon which the water right permit is appurtenant.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0080**

**Public Notice and Request for Comments**

- (1) Within ten days of proceeding with the application under OAR 690-325-0070(3), the Department shall give notice of the application in the weekly notice published by the Department. The notice shall include a request for comments on the application, the date by which the comments must be received by the Department, information about how an interested person may view or obtain future notices about the application and a copy of the proposed final order and information about how an interested person may review the application or obtain a copy of the application.
- (2) The notice shall include the following information about the application:
  - (a) County of water use.
  - (b) Permit number.
  - (c) Authorized use and associated rate and/or duty.
  - (d) Permit Completion Date.
  - (e) Applicant name(s).

- (f) **Number of acres, rate (or applicable acre-feet allowances), allowed under the existing water right permit.**
  - (g) **Source(s).**
  - (h) **Location of the point(s) of diversion/appropriation by quarter-quarter, section, township and range.**
- (3) **Within 30 days after the public notice under OAR 690-325-0080(1), any record landowner, applicant, assignee, affected water right permit holder, or other person interested in the application may submit written comments or request copies of the documents described in OAR 690-325-0070(3). All comments and requests for copies must be received by the Department on or before 5 p.m. on the last day of the 30-day comment period.**

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

#### **690-325-0090**

##### **Proposed Final Order; Public Notice**

- (1) **Within 30 days after the comment period closes under OAR 690-325-0080(3), the Department shall issue a proposed final order either approving or denying the application, taking into account comments received in response to the notice under OAR 690-325-0080.**
- (2) **The Department shall send copies of the proposed final order to each owner of land described in OAR 690-325-0070(3) by mail, or, with the consent of the applicant, send by electronic means, and to each person who submitted comments under OAR 690-325-0080(3).**
- (3) **Within seven days of issuance of the proposed final order, the Department shall publish notice of the proposed final order by publication in the weekly notice published by the Department. The notice shall give the date that protests must be received by the Department, no later than 45 days after the date the notice is published.**

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

#### **690-325-0100**

##### **Protests**

- (1) **A record landowner, an applicant, an assignee, an affected water right permit holder or other interested person may protest a Water Resources Department proposed final order for a water right permit assignment under ORS 537.225. The protest must be in writing and received by the Department within the time provided under OAR 690-**

- 325-0090(3).** The protest must be accompanied by the protest fee required under ORS 536.050 and include:
- (a) The name, address, and telephone number of the person filing the protest; and
  - (b) A detailed explanation of why the proposed order does not conform with the criteria for a water right permit assignment and a description of the changes to the order that are necessary to correct the nonconformity.
- (2) A protest must identify all issues the person wishes to raise that are reasonably ascertainable at the time the protest is filed. The issues must directly pertain to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225.
- (3) If a protest is properly filed, the Department may work with the applicant and the person filing the protest to determine whether the issues raised by the protest can be resolved informally. The Department may:
- (a) Reissue a proposed final order;
  - (b) Issue a final order; or
  - (c) Refer the matter for a contested case hearing.
- (4) If the Department is unable to resolve the issues informally and refers the matter for a contested case hearing, the issues properly before the administrative law judge are limited to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225. Any unraised issue that was reasonably ascertainable at the time the protest was filed and any argument not raised in the protest with sufficient specificity to afford the Department an opportunity for response is not subject to review at the contested case hearing.
- (5) Notwithstanding ORS 183.310, the parties to a contested case hearing held under this section are limited to:
- (a) The applicant for the water right permit assignment; and
  - (b) Persons that timely filed a protest against the proposed order under (OAR 690-325-0090(3)).

*Stat. Auth.:*

*Stats. Implemented: ORS 537.227*

*Hist.:*

#### **690-325-0110**

#### **Final Order and Replacement Water Right Permits**

- (1) Within 30 days of the end of the protest period described in OAR 690-325-0090(3) and if no protests were received, an application for assignments and issuance of replacement water right permits shall be approved by final order of the Department. The final order approving the assignment shall contain:
- (a) Findings that the assignment and issuance of replacement water right permits do not enlarge the permit as defined in OAR 690-325-0030(1);

- (b) Findings that the assignment and issuance of replacement water right permits do not injure other water rights as defined in OAR 690-325-0030(3).
  - (c) Findings that all other requirements for assignments and issuance of replacement water right permits are met, including, but not limited to the completion date of the water right permit.
- (2) The replacement water right permits shall:
- (a) Include the same conditions as the replaced water right permit, including, but not limited to priority date, source of water, and type of use;
  - (b) Identify the land to which the replacement water right permit is appurtenant and the owner(s) of that land;
  - (c) Apportion the rate and, if applicable, the duty, or, if applicable, the acre-foot allowance in proportion to the amount of land to which the replacement water right permits are appurtenant.
- (3) The replacement water right permits shall not:
- (a) Authorize any change to the authorized point(s) of diversion or appropriation, including the addition of a point of diversion or appropriation, and
  - (b) Authorize any change to the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

## SPANSAIL Joshua A

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**To:** SPANSAIL Joshua A  
**Subject:** FW: Comments on Draft Rules (Proposed OAR 690-325)

**From:** Langford, Shonee D. [mailto:SLangford@SCHWABE.com]  
**Sent:** Thursday, August 07, 2014 2:58 PM  
**To:** 'STARNES Kelly'  
**Subject:** Comments on Draft Rules (Proposed OAR 690-325)

Dear Kelly,

I am writing to provide comments on the above-referenced draft rules, as I will most likely have clients who are interested in filing applications under the new process.

1. 690-325-0020(2). The Department proposes to accept applications only if they are filed more than 210 days in advance of the permit completion date. This is inconsistent with the wording of ORS 537.225(1), which allows a landowner to file an application for any permit "that has a subsequent completion date." In other words, the statute allows an applicant to file this type of application any time prior to the completion date. The Department is not authorized to reject applications that meet statutory requirements. Additionally, ORS 537.225(5) provides that if the Department determines that an application under subsection (1) has been properly filed (i.e. the application involves a permit with a "subsequent completion date"), and also determines that issuance of replacement permits will not result in enlargement or injury, then the Department "shall issue" the replacement permits. The proposed 210-day eligibility requirement is inconsistent with that statutory provision.
2. 690-325-0040(2)(a). The cross-reference to OAR 690-325-0050(2)(d) is incorrect. It should be (2)(e).
3. 690-325-0050(1)(b). I suggest adding underlined wording as follows: "The map shall be based upon the original water right application map or permit amendment map."
4. 690-325-0060(5). I suggest insert the word "permits" after the words "replacement water right" and before the word "reflecting."
5. 690-325-0080(1). This proposed provision requires the Department to publish notice "within seven days" of mailing documents to the applicant and other landowners, while the authorizing statute at ORS 537.225(3)(d) requires the Department to mail the documents to owners *at least 7 days* in advance of publishing notice. Given the wording in the draft rule, the Department could comply with both the statute and the proposed rule only by publishing notice exactly 7 days after mailing copies of documents. I suggest building in a little more time for the Department to publish notice (10 or 14 days).
6. 690-325-0100(3). For clarity I suggest the following deletion: "If a protest is properly filed, the Department may work with the applicant ~~for the water right assignment~~ and the person filing the protest to determine whether the issues raised by the protest can be resolved informally."
7. 690-325-0110(2)(c). Insert the words "to which" after the words "amount of land". Also change the words "replacement water right permit is appurtenant" to "replacement water right permits are appurtenant" to be consistent with the use of the plural throughout the draft rules.

Thank you for the opportunity to submit comments.

Sincerely,

Shonee

**Shonee D. Langford | Attorney**

**Schwabe, Williamson & Wyatt**

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August 28, 2014

Dwight French  
Water Resources Department  
725 Summer St NE, Ste A  
Salem, OR 97301-1271

RE: Comments, Chapter 690 Division 325 rulemaking

Dear Dwight,

Thank you for this opportunity to comment on the draft rules, OAR 690-325, to implement SB 200 (ORS 537.225). As you know, WaterWatch was one of the two interests who negotiated bill language and intent with the WRD. We also served on the Rules Advisory Committee, a group made up of the two interests who negotiated the bill with the WRD as well as a number of user interests who did not weigh in on the bill in an substantive manner during the 2013 legislative session.

We appreciate the hard work the WRD has put into drafting these rules, however, we still have one overarching concern with the draft as proposed. Specifically, sections OAR 690-325-0070(1)(c), OAR 690-325-0070(2)(a) and (b) do not conform to the statutory directive and intent that use of water under the underlying permit is in compliance with all permit conditions. Rather, the WRD is only requiring that the applicant's use of his/her portion of the underlying permit be in compliance with all permit conditions.

From the outset, one of WaterWatch's main concerns with this bill was that it would allow users to revive unused and/or defunct permits for new uses without having to go through modern day environmental reviews and/or be subject to modern day public interest conditions (i.e. mitigation requirements in the Deschutes Basin). We discussed this at length with the WRD after the Legislative Concept for SB 200 was published. To address these concerns, the WRD inserted language into the bill that (1) limited eligible permits to those with a "c" date in front of it and (2) required applicants to show that the most recent water use under the permit has been exercised within relevant terms and conditions of the permit. Based on this language and a corresponding commitment as to intent, as well as other negotiated changes to the LC, WaterWatch withdrew its opposition to the bill.

During the RAC, user interests sought to limit the breath of permit compliance to the water use by the applicant seeking assignment rather than ensuring that all use under the permit was in compliance with permit conditions. WaterWatch opposed this. User groups argued that the applicant may not necessarily be able to ascertain whether the other portion of the water right was being used in accordance with permit conditions. WaterWatch offered a compromise,

namely that in the instances where the applicant could not attest to the whole of the use under the permit, the WRD would verify that the whole of the use under the permit was in compliance with the permit condition. Given that the WRD is statutorily required to ensure that water use is in fact used in accordance with permit conditions, this seemed a reasonable path forward.

The WRD has rejected this offer. Instead, the draft rules only require the WRD to verify that the most recent water use “by the applicant” has been exercised within the terms and conditions of the water rights. See sections OAR 690-325- 0070(1)(c), (2)(a), and (2)(b).

Interestingly, the WRD did retain the statutory language that requires a statement by the applicant that the most recent use of water under the permit (as a whole) has been exercised in compliance with permit conditions. See OAR 690-325-0040(i). This was contested during the rulemaking, with some parties seeking limit existing statutory language on this to only the applicant’s use. WaterWatch did not believe the WRD could limit the statutory language, thus we are pleased that the WRD is including the actual language of the statute. That said, we find it interesting that the WRD did not then extend this requirement to WRD review and/or findings. As a result, the practical effect of applying OAR 690-325-0040(i) and OAR 690-325-0070(1)(c), (2)(a) and (2)(b) is that the user must provide a statement that the most recent water use (as a whole, not just by the applicant) is in compliance with permit conditions (which is required by statute) but the WRD does not need to verify this or make findings to this end, but rather only has to find that the applicant’s use is in compliance with permit conditions. This doesn’t make a lot of sense in our minds.

We urge the Commission to direct the WRD to amend the draft rules so that section 0070 is consistent with both section 0040 and also the statute itself. Specifically, we urge the following amendments to section 0070:

- OAR 690-325-0070(1)(b): Verification that the most recent water use ~~by the applicant~~ under the permit has been exercised within the relevant terms and conditions of the water right permit.
- OAR 690-325-0070(2)(a): Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised ~~by the applicant~~ in compliance ~~with~~ the terms and conditions of the water right permit.
- OAR 690-325-0070(2)(b): Prepare a draft proposed final order to deny the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in the enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised ~~by the applicant~~ in compliance ~~with~~ its terms and conditions.

Such an amendment would make dueling sections of the rules consistent, ensure the rules are consistent with statutory authority and intent, ensure that this statute cannot be used as tool to allow new use of water under old rights that are not in compliance with their permit conditions, and honor commitments made to WaterWatch during bill negotiations to get us to neutral.

If you have any questions, please do not hesitate to contact me.

Thank you,

A handwritten signature in black ink, appearing to read "K. Priestley". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kimberley Priestley  
Sr. Policy Analyst  
WaterWatch of Oregon  
213 SW Ash, Ste 208  
Portland, OR 97217  
503-295-4039 x 3  
[kjp@waterwatch.org](mailto:kjp@waterwatch.org)

## **Comments from Greg Kupillas at 1<sup>st</sup> Public Hearing – 8/28/14**

I appreciate the opportunity to comment on these rules today. My name is Greg Kupillas, and I'm with Pacific Hydro-Geology out of Mulino, Oregon. I'm also a certified water rights examiner in Oregon, and I feel like I'm well qualified to comment on these rules. I've been involved with the poster child case that led to the formulation of these rules, and I also served on the Rules Advisory Committee for these rules.

About 10 years ago I was working with a client of mine who had a groundwater permit and he sold parts of it to two other individuals. I could kind of see the trainwreck coming down the road. The two new owners were anxious to move ahead and develop their use and move towards certification while the original owner was dragging his feet. I could tell that this was going to cause a problem and cause a delay in certification for everyone concerned. I was serving on GWAC at the time, and I brought up the issue at the time. It wasn't considered a problem at the time so it was sort of dropped.

Now, come eight years or so later and one of those two new owners, together with his attorney, I think were the inspiration for what ultimately led to the formulation of Senate Bill 200 and the need to develop these rules. So, I think I understand very well the intent and the substantive goals of these rules. I was going to comment on some specific language that I was concerned about under OAR 690-325-0040(2)(i). In the notice draft of the rules the language I felt didn't meet the substantive goals of the rules, but I understand that that specific language was entered in error. This particular part of the rules refers to the statement that's supposed to be made by the applicant about the most recent use that they've made under the water right permit to the extent that it has been exercised under the terms and conditions of the permit. I guess the actual language that is going to be proposed in the rules will be the following: "a statement by the applicant that states that the most recent use of the applicant's portion of the water right permit, if any, has been exercised within relevant terms and conditions of the permit." That satisfies my concerns about the original language that was posted, so without considering any other specific issues, I believe that my concerns about the language are satisfied.

We've been asked to comment on whether other options should be considered for achieving the rules substantive goals, and I would say at this point that I have no other recommendations for other options. I am fully in favor of these rules. I believe that they are needed. They will provide the opportunity for certain permit holders to move ahead, certify their water rights, when otherwise they would be delayed for many, many rules and face a lot of challenges. I'm fully in favor of the rules as they will be proposed.



October 21, 2014

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

Re: Comments, Division 325 Rulemaking, Permit Splitting

Dear Rules Coordinator,

WaterWatch is a river conservation group dedicated to restoring and protecting streamflows statewide. We appreciate the opportunity to provide comments on the proposed Division 325 rules, which are to implement SB 200 (2013). WaterWatch was one of two interests who negotiated bill language and intent with the WRD. WaterWatch also served on the Rules Advisory Committee (RAC), a group made up of the two interests who negotiated the bill with WRD as well as a number of consumptive user interests who did not weigh in on the bill in a substantive manner during the 2013 legislative session.

On August 28, 2014 WaterWatch submitted comments on the proposed draft rules. As noted in those comments, WaterWatch has one overarching concern with the rules and that has to do with the fact that Sections OAR 690-325-0070(1)(c), OAR 690-325-0070(2)(a) and (b) do not conform to the statutory directive and intent that the use of water under the underlying permit be in compliance with all permit conditions at the time of the application under these rules. Rather, the WRD is only requiring that the applicant's use of his/her portion of the underlying permit be in compliance with all the permit conditions. After the close of the public comment period the WRD amended the rules, and re-noticed the rules in whole. In the updated draft rules that are the subject of this comment period, the WRD is not only retaining the original language of concern but is now expanding its application to Section OAR 690-325-0040(2)(i) as well. WaterWatch has the same policy concerns as noted our original comments, which we will state again here so the record is clear.

From the outset, one of WaterWatch's main concerns with the concept of permit splitting was that it would allow users to revive unused and/or defunct permits for new uses without having to go through modern day environmental reviews and/or be subject to modern day public interest conditions (i.e. mitigation requirements in the Deschutes Basin). We discussed this at length with the WRD during bill drafting and negotiations. To address this specific concern, WRD

amended the original legislative concept (LC 662) to include language in the final bill (SB 200) that (1) limited eligible permits to those with a “c” date in front of it and (2) required applicants to show that the most recent water use under the permit has been exercised within the relevant terms and conditions of the permit. Based on this language and a corresponding commitment as to intent (i.e. for example see Testimony of Tom Paul to the Senate Environment and Natural Resources Committee, 2/11/13 attached), as well as other negotiated changes to the LC, WaterWatch withdrew its opposition to the bill.

During the RAC, user interests sought to narrow the breath of the statutorily required permit compliance to the narrow instance of water use made by the applicant seeking assignment rather than ensuring that all water use under the permit was in compliance with permit conditions. WaterWatch opposed this as the proposed rule language conflicts directly with the statutory language of SB 200 (see attached highlighted section of SB 200).

User groups argued for this change under the supposition that the applicant may not necessarily be able to ascertain whether the non-applicant portion of the water right was being used in accordance with permit conditions. To address this concern, WaterWatch offered a compromise, namely that the instances where the applicant could not attest to the whole of the use under the permit, the WRD would verify that the whole of the use under the permit was in compliance with the permit condition. Given that the WRD is statutorily required to ensure that water use is in fact used in accordance with permit conditions, this seems a reasonable path forward.

The user groups (and ultimately WRD) rejected this offer. Instead the draft rules only require the applicant to submit, and the WRD to verify, that the most recent use “by the applicant” has been exercised within the terms and conditions of the water rights. See sections OAR 690-325-0040(2)(i) and OAR 690-325-0070(1)(c), (2)(a) and (2)(b). Again, this is direct conflict with the statute which very clearly states that the applicant must submit a “statement by the applicant that the most recent water use under the permit, if any, has been exercised within the relevant terms and conditions of the permit” (emphasis added).

To be consistent with both the clear language of the statute and the intent behind the inclusion of this language in the bill, we urge the Commission to direct the WRD to amend the draft rules so that sections 0040 and 0070 are consistent with the statute. Specifically we urge the following amendments:

- 690-325-0040(2)(i): A statement by the applicant that the most recent water use under the ~~applicant's portion of the~~ water right permit, if any, has been exercised within the relevant terms and conditions of the permit.
- 690-325-0070(1)(b): Verification that the most recent water use ~~by the applicant~~ under the permit has been exercised within the relevant terms and conditions of the water right permit.
- 690-325-0070(2)(a): Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised ~~by the applicant~~ in compliance with the terms and conditions of the permit.

- 690-325-0070(2)(b): Prepare a draft proposed final order to deny the applications. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised ~~by the applicant~~ in compliance with its terms and conditions.

WaterWatch's proposed amendments would ensure that the rules are consistent with statutory authority, ensure that this statute cannot be used as a tool to allow new water use of water under old rights that are not in compliance with their permit conditions, and honor commitments made to WaterWatch during bill negotiations to get us to neutral.

Sincerely,



Kimberley Priestley  
Sr. Policy Analyst  
WaterWatch of Oregon  
213 SW Ash, Suite 208  
Portland, OR 97204

Enclosures



# Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department  
North Mall Office Building  
725 Summer Street NE, Suite A  
Salem, OR 97301-1266  
503-986-0900  
FAX 503-986-0904

Before the  
Senate Environment and Natural Resources Committee  
Senator Jackie Dingfelder, Chair

## Testimony on Senate Bill 200 "Splitting a Permit"

Presented by:  
Oregon Water Resources Department  
February 11, 2013

Thank you for the opportunity to present testimony on Senate Bill 200, a Department bill that would authorize the Water Resources Department to split a water right permit, retaining all conditions to the original permit.

### Background

Generally, a water right is attached to the land that is described in the right, as long as the water is used beneficially. This attachment to the land is called "appurtenancy." If the land is sold, the water right goes with the land to the new owner.

Over the years, as properties are divided and sold, the water right appurtenant to the land is also affected. It is not unusual to have one or more water right holders ready to "prove up," or "certificate," their portion of a water right, while the rest are not yet ready. The ability to certificate a water right is very important, as it provides greater management flexibility for a water user. By the same token, the inability to certificate a water right can stand as an obstacle to economic development.

The Department is aware of a number of cases in which an irrigator is unable to certificate a water right, because of the inability of a neighbor to develop water on adjoining land that shares that same water right.

### Proposal

This bill would amend the water use permit process, allowing permit holders to certificate their portion of the original water user permit as they become eligible.

The request focuses on a rather narrow circumstance—the need to split permits issues for agricultural purposes such as irrigation and nursery operations. Amendments proposed to Senate Bill 200 specify in Section 2 that this request pertains to a water right permit for "irrigation, nursery, temperature control, stock water use, and agricultural water use that has a subsequent



completion date.” The proposed amendments specifically exclude municipal permits, because municipal water users already have access to a tool called “partial perfection.”

### **Development of the Bill**

During 2012 and 2013, the Department worked closely with agricultural users and the conservation community to craft the bill in a way that guards against: (1) injury to existing water rights; (2) enlargement of the water right; and (3) modified permit conditions. To be clear, this bill would not release water right holders from the obligations that existed under the original permit; the bill would carry forward any terms and conditions from the original permit.

Senate Bill 200 and its proposed amendments require specific documentation in order to process this application. This includes: an accurate map, a copy of the property deed, an affidavit certifying that the water right has not been conveyed or withheld, a statement confirming that the most recent water use has been exercised within the terms of the water use permit, and agreements signed by all the owners of the land to which the water right is appurtenant.

The Department then has the responsibility to verify the information submitted by the applicant, as well as to communicate its findings to each owner of the land to which the existing water right is appurtenant, to provide public notice, and to allow for comment and properly filed protests.

If the Department determines that the application has been properly filed, and that the issuance of replacement water right permits will not enlarge upon the water right or otherwise cause injury to water right holders, the Department shall issue one or more replacement water right permits.

The replacement water right permits:

- Must have the same conditions as the replaced water right permit;
- May not add or change a place of diversion or point of appropriation;
- May not result in an enlargement of the authorized water use;
- Must apportion the water in proportion to the amount of land to which the water right is appurtenant; and
- Must identify the owner and the land to which the replacement water right is appurtenant.

The Department may collect, from the applicant, processing fees that reflect the actual cost of the work.

### **Conclusion**

Senate Bill 200 and its proposed amendments would modify ORS 536.050, authorizing the Department to split a water right permit, according to the conditions described above.

There is a minimal fiscal impact for this bill, as it would allow the Department to charge the applicant a fee to cover the costs of processing such a request.

**Enrolled  
Senate Bill 200**

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor John A. Kitzhaber, M.D., for Water Resources Department)

CHAPTER .....

AN ACT

Relating to water right assignments; creating new provisions; and amending ORS 536.050.

Be It Enacted by the People of the State of Oregon:

**SECTION 1.** Sections 2 and 3 of this 2013 Act are added to and made a part of ORS chapter 537.

**SECTION 2.** (1) Notwithstanding ORS 537.220 and 537.635, except as provided in subsection (6) of this section, a record landowner holding a water right permit for an irrigation, nursery, temperature control, stock watering or agricultural water use that has a subsequent completion date may apply for assignment of all or part of the water right permit and for the issuance of a replacement water right permit that reflects that assignment. To obtain the assignment and replacement water right permits, the applicant shall submit an application to the Water Resources Department that includes, at a minimum:

(a) A map prepared by a certified water right examiner and meeting department mapping standards that identifies the authorized place of use, rate of use, any applicable acre-feet allowances, tax lots and points of diversion or appropriation;

(b) A copy of the deed showing that the applicant is an owner of the land;

(c) An affidavit certifying that the water right has not been conveyed or withheld;

(d) A statement by the applicant that the most recent water use under the permit, if any, has been exercised within relevant terms and conditions of the permit; and

(e)(A) Agreements to the assignment and to the request for the issuance of replacement water right permits submitted jointly or individually by all owners of the land to which the water right is appurtenant; or

(B) An assignment of interest and request for the issuance of replacement water right permits submitted by one or more of the owners of land to which the water right is appurtenant and information identifying the names, addresses and proportionate interests for those owners not submitting the assignment and request.

(2) In addition to the application contents described in subsection (1) of this section, the department may require that the applicant provide any additional information the department deems appropriate to determining whether to approve the application.

(3) Upon receiving an application under subsection (1) of this section, the department shall determine and notify the applicant of the fees payable under ORS 536.050 for processing the application. Upon receipt of the appropriate processing fees, the department shall:



August 28, 2014

Dwight French  
Water Resources Department  
725 Summer St NE, Ste A  
Salem, OR 97301-1271

RE: Comments, Chapter 690 Division 325 rulemaking

Dear Dwight,

Thank you for this opportunity to comment on the draft rules, OAR 690-325, to implement SB 200 (ORS 537.225). As you know, WaterWatch was one of the two interests who negotiated bill language and intent with the WRD. We also served on the Rules Advisory Committee, a group made up of the two interests who negotiated the bill with the WRD as well as a number of user interests who did not weigh in on the bill in an substantive manner during the 2013 legislative session.

We appreciate the hard work the WRD has put into drafting these rules, however, we still have one overarching concern with the draft as proposed. Specifically, sections OAR 690-325-0070(1)(c), OAR 690-325-0070(2)(a) and (b) do not conform to the statutory directive and intent that use of water under the underlying permit is in compliance with all permit conditions. Rather, the WRD is only requiring that the applicant's use of his/her portion of the underlying permit be in compliance with all permit conditions.

From the outset, one of WaterWatch's main concerns with this bill was that it would allow users to revive unused and/or defunct permits for new uses without having to go through modern day environmental reviews and/or be subject to modern day public interest conditions (i.e. mitigation requirements in the Deschutes Basin). We discussed this at length with the WRD after the Legislative Concept for SB 200 was published. To address these concerns, the WRD inserted language into the bill that (1) limited eligible permits to those with a "c" date in front of it and (2) required applicants to show that the most recent water use under the permit has been exercised within relevant terms and conditions of the permit. Based on this language and a corresponding commitment as to intent, as well as other negotiated changes to the LC, WaterWatch withdrew its opposition to the bill.

During the RAC, user interests sought to limit the breath of permit compliance to the water use by the applicant seeking assignment rather than ensuring that all use under the permit was in compliance with permit conditions. WaterWatch opposed this. User groups argued that the applicant may not necessarily be able to ascertain whether the other portion of the water right was being used in accordance with permit conditions. WaterWatch offered a compromise,

namely that in the instances where the applicant could not attest to the whole of the use under the permit, the WRD would verify that the whole of the use under the permit was in compliance with the permit condition. Given that the WRD is statutorily required to ensure that water use is in fact used in accordance with permit conditions, this seemed a reasonable path forward.

The WRD has rejected this offer. Instead, the draft rules only require the WRD to verify that the most recent water use "by the applicant" has been exercised within the terms and conditions of the water rights. See sections OAR 690-325-0070(1)(c), (2)(a), and (2)(b).

Interestingly, the WRD did retain the statutory language that requires a statement by the applicant that the most recent use of water under the permit (as a whole) has been exercised in compliance with permit conditions. See OAR 690-325-0040(i). This was contested during the rulemaking, with some parties seeking limit existing statutory language on this to only the applicant's use. WaterWatch did not believe the WRD could limit the statutory language, thus we are pleased that the WRD is including the actual language of the statute. That said, we find it interesting that the WRD did not then extend this requirement to WRD review and/or findings. As a result, the practical effect of applying OAR 690-325-0040(i) and OAR 690-325-0070(1)(c), (2)(a) and (2)(b) is that the user must provide a statement that the most recent water use (as a whole, not just by the applicant) is in compliance with permit conditions (which is required by statute) but the WRD does not need to verify this or make findings to this end, but rather only has to find that the applicant's use is in compliance with permit conditions. This doesn't make a lot of sense in our minds.

We urge the Commission to direct the WRD to amend the draft rules so that section 0070 is consistent with both section 0040 and also the statute itself. Specifically, we urge the following amendments to section 0070:

- OAR 690-325-0070(1)(b): Verification that the most recent water use ~~by the applicant~~ under the permit has been exercised within the relevant terms and conditions of the water right permit.
- OAR 690-325-0070(2)(a): Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised ~~by the applicant~~ in compliance with the terms and conditions of the water right permit.
- OAR 690-325-0070(2)(b): Prepare a draft proposed final order to deny the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in the enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised ~~by the applicant~~ in compliance with its terms and conditions.

Such an amendment would make dueling sections of the rules consistent, ensure the rules are consistent with statutory authority and intent, ensure that this statute cannot be used as tool to allow new use of water under old rights that are not in compliance with their permit conditions, and honor commitments made to WaterWatch during bill negotiations to get us to neutral.

If you have any questions, please do not hesitate to contact me.

Thank you,

A handwritten signature in black ink, appearing to read "K. Priestley". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Kimberley Priestley  
Sr. Policy Analyst  
WaterWatch of Oregon  
213 SW Ash, Ste 208  
Portland, OR 97217  
503-295-4039 x 3  
[kjp@waterwatch.org](mailto:kjp@waterwatch.org)

## **October 22, 2014 Public Hearing**

I'm Greg Kupillas and I'm with Pacific Hydro-Geology out of Mulino, Oregon. I'm also a Certified Water Rights Examiner and I feel that I'm well qualified to comment on these rules. I'm here in support of the Division 325 rules. I was one of the RAC members, and I believe these rules get at the intent of Senate Bill 200 that was passed by the legislature in 2013. I've been involved with the sort of poster child case that led to these rules. Maybe ten years ago I was working with a client of mine who had a groundwater permit and he split it up and sold it to two other individuals. I could kind of see the train wreck coming down the road. The two new owners were anxious to move ahead, develop their use, and move towards certification while the original owner was dragging his feet, so I could see that this was going to cause a problem and delay things for everyone. Eight years down the road, one of those new owners and his attorney were the driving force behind SB 200 and the need for these rules. Given this, I think I understand very well the intent and substantive goals of these rules.

These rules allow a landowner who is sharing a permit to split the permit if he is ready to move ahead and the other people on the permit aren't. Before these rules a person would have to wait until everyone on the permit had satisfied all the terms and conditions of the permit before they were able to develop their portion of the permit even if they could have satisfied the conditions themselves years beforehand.

I was able to look at WaterWatch's comments on this rulemaking, and I disagree with them. During the RAC meetings they were the only member that had this dissenting opinion. In my opinion, if WaterWatch had their way they would completely gut the rules. Their problem seems to be with 690-325-0070(2)(i), I believe. If you take out the portion referring to the most recent water use under the applicant's portion of the permit you would have the situation where you would have to prove the water use of the individual on the permit that was the one dragging their feet in the first place. Proving the most recent water use on the permit as a whole would be impossible because not everyone on the permit had put water to beneficial use yet. The whole intent behind SB 200 and these rules is to allow an individual applicant to split away from others on the permit once they can prove they are complying with all the terms and conditions of the permit, even if the others aren't. WaterWatch's version of the rules doesn't get at the intent of SB 200 and would make these rules virtually useless. Their version would make it very hard on the applicant to split a permit, and the whole point of SB 200 was to make it easy on an applicant to split away from others.

I am fully in favor of these rules. I think they're needed and will provide an opportunity for certain permit holders to move ahead and certify their portion of water rights when otherwise they would be delayed for many years and face a lot of challenges. Thank you.

**Comments from Shonee Langford**

1. 690-325-0020(2). The Department proposes to accept applications only if they are filed more than 210 days in advance of the permit completion date. This is inconsistent with the wording of ORS 537.225(1), which allows a landowner to file an application for any permit “that has a subsequent completion date.” In other words, the statute allows an applicant to file this type of application any time prior to the completion date. The Department is not authorized to reject applications that meet statutory requirements. Additionally, ORS 537.225(5) provides that if the Department determines that an application under subsection (1) has been properly filed (i.e. the application involves a permit with a “subsequent completion date”), and also determines that issuance of replacement permits will not result in enlargement or injury, then the Department “shall issue” the replacement permits. The proposed 210-day eligibility requirement is inconsistent with that statutory provision.

*Department’s Response: The Department proposed the following rule language “The Department can only accept an application for assignment and request for issuance of replacement permits to reflect the assignment for a water right that has a completion date greater than 210 days into the future.” The Department consulted with the Oregon Attorney General’s office about the proposed rule language, and subsequently it was found that the proposed rule language in 690-325-0020(2), 690-325-0020(4), and 690-325-0040(2)(e) is inconsistent with ORS 537.225(1). The final proposed rules have eliminated this filing requirement.*

2. 690-325-0040(2)(a). The cross-reference to OAR 690-325-0050(2)(d) is incorrect. It should be (2)(e).

3. 690-325-0050(1)(b). I suggest adding underlined wording as follows: “The map shall be based upon the original water right application map or permit amendment map.”

4. 690-325-0060(5). I suggest the Department insert the word “permits” after the words “replacement water right” and before the word “reflecting.”

5. 690-325-0080(1). This proposed provision requires the Department to public notice “within seven days” of mailing documents to the applicant and other landowners, while the authorizing statute at ORS 537.225(3)(d) requires the Department to mail the document to owners at least 7 days in advance of publishing notice. Given the wording in the draft rule, the Department could comply with both the statute and the proposed rule only by publishing notice exactly 7 days after mailing copies of documents. I suggest building in a little more time for the Department to publish (10 or 14 days).

6. 690-325-0100(3). For clarity I suggest the following deletion: “If a protest is properly filed, the Department may work with the applicant ~~for the water right assignment~~ and the person filing the protest to determine whether the issues raised by the protest can be resolved informally.”

7. 690-325-0110(2)(c). Insert the words “to which” after the words “amount of land”. Also, change the words “replacement water right permit is appurtenant” to “replacement water right permits are appurtenant” to be consistent with the use of the plural throughout the draft rules.

*Department’s Response: The Department agreed with the comments received by Shonee Langford (numbered 2-7) and incorporated the changes into the 2<sup>nd</sup> hearing draft.*

### **Comments from WaterWatch of Oregon**

1. WaterWatch has one overarching concern with the rules and that has to do with the fact that Sections OAR 690-325-0070(1)(c), OAR 690-325-0070(2)(a) and (b) do not conform to the statutory directive and intent that the use of water under the underlying permit be in compliance with all permit conditions at the time of the application under these rules. Rather, the WRD is only requiring that the applicant’s use of his/her portion of the underlying permit be in compliance with all the permit conditions.

*Department’s Response: The Department consulted with the Attorney General’s office to ascertain if the language proposed by the Department is consistent with the statute. The AG’s office advised that the Department’s interpretation as provided in the 2<sup>nd</sup> hearing notice and final rule rule is consistent with the text, context, and legislative history of ORS 537.225.*

2. Proposed after the close of the public comment period, the WRD amended the rules and re-noticed the rules in whole. In the updated draft rules that are the subject of this comment period, the WRD is not only retaining the original language of concern but is now expanding its application to OAR 690-325-0040(2)(i) as well.

*Department’s Response: The Department consulted with the Attorney General’s office to ascertain if the language proposed by the Department is consistent with the statute. The AG’s office advised that the Department’s interpretation as provided in the final proposed rules notice and final rule is consistent with the text, context, and legislative history of ORS 537.225.*

3. One of WaterWatch’s main concerns with the concept of permit splitting was that it would allow users to revive unused and/or defunct permits for new uses without having to go through modern day environmental reviews and/or be subject to modern day public interest conditions (i.e. mitigation requirements in the Deschutes Basin). The draft rules only require the applicant to submit, and the WRD to verify, that the most recent use “by the applicant” has been exercised within the terms and conditions of the water rights. See sections OAR 690-325-0040(2)(i) and OAR 690-325-070(1)(c), (2)(a), and (2)(b). This is in direct conflict with the statute which very clearly states that the applicant must submit a “statement by the applicant that the most recent water use under the permit, if any, has been exercised within the relevant terms and conditions of the permit.”



*Department's Response: The Department consulted with the Attorney General's office to ascertain if the language proposed by the Department is consistent with the statute. The AG's office advised that the Department's interpretation as provided in the final proposed rules notice and final rule is consistent with the text, context, and legislative history of ORS 537.225.*

4. To be consistent with both the clear language of the statute and the intent behind the inclusion of this language in the bill, we urge the Commission to direct the WRD to amend the draft rules so that sections 0400 and 0070 are consistent with the statute. Specifically, we urge the following amendments:

- 690-325-0040(2)(i): A statement by the applicant that the most recent water use under the ~~applicant's portion of the~~ water right permit, if any, has been exercised within the relevant terms and conditions of the permit.
- 690-325-0070(1)(b): Verification that the most recent water use ~~by the applicant~~ under the permit has been exercised within the relevant terms and conditions of the water right permit.
- 690-325-0070(2)(a): Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised ~~by the applicant~~ in compliance with ~~in~~ the terms and conditions of the permit.
- 690-325-0070(2)(b): Prepare a draft proposed final order to deny the applications. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised ~~by the applicant~~ in compliance with ~~in~~ its terms and conditions.

*Department's Response: The Department consulted with the Attorney General's office to ascertain if the language proposed by the Department is consistent with the statute. The AG's office advised that the Department's interpretation as provided in the final proposed rules notice and final rule is consistent with the text, context, and legislative history of ORS 537.225.*

Comments from Greg Kapillas at 10/23/14 public hearing

1. I support the Division 325 rules. I was one of the RAC members, and I believe these rules get at the intent of Senate Bill 200 that was passed by the legislature in 2013. I've been involved with the sort of poster child case that led to these rules. These rules allow a landowner who is sharing a permit to split the permit if he is ready to move ahead and the other people on the permit aren't. Before these rules a person would have to wait until everyone on the permit had satisfied all the terms and conditions of the permit before they were able to develop their portion of the permit even if they could have satisfied the conditions themselves years beforehand.

I was able to look at WaterWatch's comments on this rulemaking, and I disagree with them. During the RAC meetings they were the only member that had this dissenting opinion. In my opinion, if WaterWatch had their way they would completely gut the rules. Their problem seems to be with 690-325-0070(2)(i), I believe. If you take out the portion referring to the most recent water use under the applicant's portion of the permit you would have the situation where you would have to prove the water use of the individual on the permit that was the one dragging their feet in the first place. Proving the most recent water use on the permit as a whole would be impossible because not everyone on the permit had put water to beneficial use yet. The whole intent behind SB 200 and these rules is to allow an individual applicant to split away from others on the permit once they can prove they are complying with all the terms and conditions of the permit, even if the others aren't. WaterWatch's version of the rules doesn't get at the intent of SB 200 and would make these rules virtually useless.

I am fully in favor of these rules. I think they're needed and will provide an opportunity for certain permit holders to move ahead and certify their portion of water rights when otherwise they would be delayed for many years and face a lot of challenges.

*Department's Response: These comments do not suggest changes to the hearing draft of the rules.*

*This attachment shows the second public hearing draft of the rules (October 1 public comment draft) with the changes that were made to the first public hearing draft (August 1 public comment draft)*

**CHAPTER 690  
DIVISION 325  
ASSIGNMENT OF A WATER RIGHT PERMIT AND REQUEST FOR ISSUANCE OF  
REPLACEMENT PERMITS**

**690-325-0010**

**Purpose**

The rules in OAR chapter 690, division 325 establish requirements and procedures that shall be used by the Department to evaluate an application by a landowner of record holding a water right permit for irrigation, nursery, temperature control, stock watering or agricultural water use, to assign all or part of the water right permit and to issue a replacement permit to reflect an assignment from the current permit holder to one or more additional permit holders. These rules do not replace OAR chapter 690-320-0060.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0020**

**Applicability**

- (1) The Department can only accept an application for assignment and request for issuance of replacement permits to reflect the assignment where the original water right is for irrigation, nursery, temperature control, stock watering or agricultural water use.
- (2) The Department can **only** accept an application for assignment and request for issuance of replacement permits to reflect the assignment for a water right that has a completion date greater than 210 days into the future.
- (3) The Department cannot accept an application for assignment and request for issuance of replacement permits under the rules in OAR chapter 690, division 325 for municipal permits, quasi-municipal permits, or water right permits held by a unit of local government, including but not limited to water right permits held by a port, water authority, or a district.
- (4) Any water right permit for the use(s) of irrigation, nursery, temperature control, stock watering, or agricultural purposes, with a completion date that has expired or a completion date that will expire within less than 210 days of receipt of an

application by OWRD cannot be assigned by the rules in OAR Chapter 690, division 325.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0030**

**Definitions**

The definitions in this rule, along with the definitions in OAR 690-300-0010 (Definitions) and OAR 690-380-0100 (Water Right Transfers), apply to the rules in OAR chapter 690, division 325. Where a term is defined in more than one rule, the definition in this rule applies.

- (1) “Enlargement” means an expansion of a water right permit and includes, but is not limited to:
  - (a) Using a greater rate or duty of water per acre than currently allowed under a permit;
  - (b) Increasing the acreage irrigated under a permit;
- (2) “District” means an irrigation district formed under ORS Chapter 545, a drainage district formed under Chapter 547, a water improvement district formed under Chapter 552, a water control district formed under Chapter 553 or a corporation organized under Chapter 554.
- (3) “Injury” or “Injury to an existing water right” means a water right transaction that would result in another, existing water right not receiving previously available water to which it is legally entitled.
- (4) “Unit of local government” includes a county, city, district or other public corporation, commission, authority or entity organized and existing under statute or city or county charter.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0040**

**Application Requirements**

- (1) Each application shall be prepared in ink or typewritten on forms provided by the Department.
- (2) The application shall contain the following information concerning the subject water right permit and assignment:
  - (a) The name, mailing address, e-mail address (if it exists), and telephone number of each applicant. Each applicant’s name shall have an assigned alphabet letter or

number that corresponds with the application map as required under OAR 690-325-0050(2)(~~de~~).

- (b) Name(s) appearing on the water right permit.
- (c) Water Right Permit number.
- (d) Water Right Permit use. Must be one or more of the following uses approved for assignment under OAR 690-325-0010: irrigation, nursery, temperature control, stock watering or agricultural water use.
- (e) Completion date of the permit. If the completion date has expired or if the expiration date will expire within 210 days or less from the date of receipt of the application by the Department, the application will not be accepted.
- (f) A map meeting the criteria set forth in OAR 690-325-0050.
- (g) A copy of the recorded deed showing the applicant is an owner of the land to which the water right permit is appurtenant.
- (h) An affidavit certifying that the water right permit has not been conveyed or withheld, and remains appurtenant to the applicant's land and also certifying that the applicant has read the permit.
- (i) A statement by the applicant that ~~states that~~ the most recent water use under the applicant's portion of the water right permit, if any, has been exercised within relevant terms and conditions of the permit.
- (j) Agreements to the assignment and to the request of replacement water right permits submitted jointly or individually by all owners of the land to which the water right is appurtenant; or an assignment of interest and request for the issuance of replacement water right permits by one or more of the owners of land to which the water right permit is appurtenant and information identifying other landowners not participating in the assignment and request for issuance of replacement water right permit. Such information shall include:
  - (a) Landowner(s) name;
  - (b) Address;
  - (c) Description of the ~~property(s)~~properties by public land survey and tax lot number.
  - (d) Number of acres and permit rate held by each landowner.
- (k) A listing of the names and mailing addresses of any district within which the water right permit is located.
- (l) The Department may require the applicant to provide any additional information the department deems appropriate in determining whether or not to approve the application.
- (m) Any administrative hold that is proposed during the processing of an application must take into account the time period left before the completion date of the permit expires. Administrative holds will not be granted if the requested hold would result in the processing of the application would take place for a permit for which the

completion date has expired or the completion date will expire within ~~less than~~ 210 days or less of receipt of being removed from the administrative hold.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist:*

690-325-0050

#### Map Requirements

- (1) A map shall be included with the application required under OAR 690-325-0040. The map shall meet the following criteria:
  - (a) The map shall be prepared by a certified water right examiner.
  - (b) The map shall be based upon the original water right application map or permit amendment map.
  - (c) The map shall not include:
    - (A) Any unauthorized change to the location of the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.
    - (B) Any unauthorized change to the location of the point(s) of diversion/appropriation as exhibited on the original water right application map or approved permit amendment application map.
  - (c) The map shall be of permanent quality and shall be printed with dark ink on a good quality paper that is easily reproduced on a standard copy machine. Color copies that cannot be easily interpreted when copied to black and white will not be accepted.
  - (d) The preferred map size is 8-1/2" x 11" (letter) ~~at the scale of the final proof or adjudication map for the existing right of record, with supplemental detail maps as needed.~~ If a larger map is required to provide sufficient detail, a size of 8-1/2" x 14" (legal) or 11" x 17" (oversized) may be used.
  - (e) Notwithstanding subsection (1)(c) of this rule, a map size of up to 30" x 30" may be used if one additional copy is submitted.
  - (f) The map scale shall be:
    - (A) 1" = 400';
    - (B) 1" = 1,320';
    - (C) The scale of the county assessor map if the scale is not smaller than 1" = 1,320'; or
    - (D) Another standard engineering scale if the Department grants advance written or e-mail approval of the use of the scale.

- (g) Horizontal field accuracy shall be consistent with standard surveying practices for the purpose of locating and quantifying water rights.
  - (h) The map shall be plotted to the accuracy consistent with the map scale.
  - (i) The locations of points of diversion or appropriation and places of use shall be described by distance and bearing or coordinates (distance north or south and east or west) from a recognized survey corner or by latitude-longitude coordinates. Latitude-longitude coordinates shall be expressed as either:
    - (A) Degrees-minutes-seconds with at least one digit after the decimal in the seconds portion (e.g., 42¼ 32' 15.5"); or
    - (B) Degrees-decimal with five or more digits after the decimal (e.g., 42.53764°).
- (2) The map shall include the following information:
- (a) A north arrow, the scale, and a clear legend.
  - (b) The certified water rights examiner's stamp and signature. An electronically generated stamp or seal is acceptable, provided the signature is original.
  - (c) The place of use of each applicant's portion of the water right permit shall be clearly defined by outline and shaded or hachured and shall show the number of acres for each portion in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the water right permit has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.
  - (d) The place of use of any part of the water right permit not being assigned shall be clearly defined by outline and shaded or hachured and shall show the number of acres in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the portion of the water right permit not being assigned has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.
  - (e) Each applicant's portion of the water right permit shall be referenced, by either alphabet letter or ~~numeral~~**number**, to each assignee's listed in the application form under OAR 690-325-0040(1).
  - (f) The rate and any applicable acre-feet allowance of water use under the water right permit for each applicant's portion of the permit shall be clearly labeled on the map.
  - (g) The location of each authorized point of diversion or appropriation.

- (h) The location of tax lot lines for all properties upon which the water right permit is located.
- (i) The location of township, range, section, quarter-quarter section, donation land claim, and other recognized public land survey lines.
- (j) Notwithstanding the requirements of subsection (1)(h), the general location of main canals, ditches, flumes, pipelines, pumps, or other water delivery features.
- (k) Notwithstanding the requirements of subsection (1)(h), the general location of physical features sufficient to assist in defining the location of the place of use of the water right permit. These features may include, but are not limited to, rivers, creeks, lakes, reservoirs, ponds, roads, railroads, fences, and direction of flow, if appropriate.

*Stat. Auth:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

690-325-0060

Receipt of Application; Fees

- (1) The applicant is required to pay the Water Resources Department the full cost to the Department of processing the application.
- (2) Within 15 days upon receipt of an application containing all the requirements described under OARs 690-325-0040 and 690-325-0050, the Department shall estimate the actual cost of work involved in processing the application.
- (3) The Department shall notify the applicant of the estimate of the actual cost of work and provide a time period of:
  - (a) 30 days for the applicant to submit the appropriate fees covering the estimated actual cost of work, or
  - (b) Upon a written or e-mailed request from the applicant, a reasonable time period greater than 30 days to submit the appropriate fees.
- (4) If the Department does not receive the appropriate fees after the expiration of the appropriate time period described in OAR 690-325-0060(2), the Department will send notice to the applicant that if the fees are not received by the Department within 510 days of the mailing of this notice, the Department will consider the application incomplete and will notify the applicant that the application is incomplete and that the application will be of no further force or effect.
- ~~(5) In the event that the actual cost of work is greater than the required estimate in OAR 690-325-0060(2). All required fees must be received before the final assignment is made and replacement water right permits reflecting the assignment isare issued.~~
- ~~(6)(5) In the event that the actual cost of work is less than the required estimate in OAR 690-325-0060(2). All unearned Excess fees will be refundedreturned after the final order is issued.~~

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*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0070**

**Technical Review and Issuance of Draft Documents**

- (1) The Department will undertake a technical review of the application that includes:
  - (a) Verification of the mailing address of each owner of the authorized place of use identified on the map contained in the application.
  - (b) Verification that the deed(s) supplied with the application matches the ~~property(s)~~ **properties** proposed for the assignments.
  - (c) Verification that the most recent water use ~~by the applicant~~ under the permit, if any, has been exercised within relevant terms and conditions of the water right permit.
  - (d) ~~Assessing~~ **Assessment of** the application for enlargement of the original water right permit and injury to other water right holders.
- (2) Once the technical review described in OAR 690-325-0070(1) has been completed, the Department shall:
  - (a) Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in the enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised by the applicant in compliance within the terms and conditions of the water right permit, or
  - (b) Prepare a draft proposed final order to deny the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in the enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised by the applicant in compliance within its terms and conditions.
  - (c) Prepare drafts of the replacement water right permits if a draft proposed final order to approve the application under OAR 690-325-0070(2)(a) is prepared.
- (3) Within 30 days after the appropriate fees have been received, the Department shall mail, or with consent of the applicant, send by electronic means, copies of the application, map, existing water right permit, draft proposed final order, and, if the requirement under OAR 690-325-0070(c) is satisfied, draft replacement water right permits, to each owner of land upon which the water right permit is appurtenant.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0080**

**Public Notice and Request for Comments**

- (1) Within ~~seventen~~ days of proceeding with the application under OAR 690-325-0070(3), the Department shall give notice of the application in the weekly notice published by the Department. The notice shall include a request for comments on the application, the date by which the comments must be received by the Department, information about how an interested person may view or obtain future notices about the application and a copy of the proposed final order and information about how an interested person may review the application or obtain a copy of the application.
- (2) The notice shall include the following information about the application:
  - (a) County of water use.
  - (b) Permit number.
  - (c) Authorized use and associated rate and/or duty.
  - (d) Permit Completion Date.
  - (e) Applicant name(s).
  - (f) Number of acres, rate (or applicable acre-feet allowances), allowed under the existing water right permit.
  - (g) Source(s).
  - (h) Location of the point(s) of diversion/appropriation by quarter-quarter, section, township and range.
- (3) Within 30 days after the public notice under OAR 690-325-0080(1), any record landowner, applicant, assignee, affected water right permit holder, or other person interested in the application may submit written comments or request copies of the documents described in OAR 690-325-0070(3). All comments and requests for copies must be received by the Department on or before 5 p.m. on the last day of the 30-day comment period.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0090**

**Proposed Final Order; Public Notice**

- (1) Within 30 days after the comment period closes under OAR 690-325-0080(3), the Department shall issue a proposed final order either approving or denying the application, taking into account comments received in response to the notice under OAR 690-325-0080.

- (2) The Department shall send copies of the proposed final order to each owner of land described in OAR 690-325-0070(3) by mail, or, with the consent of the applicant, send by electronic means, and to each person who submitted comments under OAR 690-325-0080(3).
- (3) Within seven days of issuance of the proposed final order, the Department shall publish notice of the proposed final order by publication in the weekly notice published by the Department. The notice shall give the date that protests must be received by the Department, no later than 45 days after the date the notice is published.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist:*

690-325-0100

Protests

- (1) A record landowner, an applicant, an assignee, an affected water right permit holder or other interested person may protest a Water Resources Department proposed final order for a water right **permit** assignment under ORS 537.225. The protest must be in writing and received by the Department within the time provided under OAR 690-325-0090(3). The protest must be accompanied by the protest fee required under ORS 536.050 and include:
  - (a) The name, address, and telephone number of the person filing the protest; and
  - (b) A detailed explanation of why the proposed order does not conform with the criteria for a water right permit assignment and a description of the changes to the order that are necessary to correct the nonconformity.
- (2) A protest must identify all issues the person wishes to raise that are reasonably ascertainable at the time the protest is filed. The issues must directly pertain to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225.
- (3) If a protest is properly filed, the Department may work with the applicant ~~for the water right assignment~~ and the person filing the protest to determine whether the issues raised by the protest can be resolved informally. The Department may:
  - (a) Reissue a proposed final order;
  - (b) Issue a final order; or
  - (c) Refer the matter for a contested case hearing.

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- (4) If the Department is unable to resolve the issues informally and refers the matter for a contested case hearing, the issues properly before the administrative law judge are limited to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225. Any unraised issue that was reasonably ascertainable at the time the protest was filed and any argument not raised in the protest with sufficient specificity to afford the Department an opportunity for response is not subject to review at the contested case hearing.
- (5) Notwithstanding ORS 183.310, the parties to a contested case hearing held under this section are limited to:
  - (a) The applicant for the water right **permit** assignment; and
  - (b) Persons that timely filed a protest against the proposed order under (OAR 690-325-0090(3).

*Stat. Auth.:*

*Stats. Implemented: ORS 537.227*

*Hist.:*

**690-325-0110**

**Final Order and Replacement Water Right Permits**

- (1) Within 30 days of the end of the protest period described in OAR 690-325-0090(3) and if no protests were received, an application for assignments and issuance of replacement water right permits shall be approved by final order of the Department. The final order approving the assignment shall contain:
  - (a) Findings that the assignment and issuance of replacement water right permits do not enlarge the permit as defined in OAR 690-325-0030(1);
  - (b) Findings that the assignment and issuance of replacement water right permits do not injure other water rights as defined in OAR 690-325-0030(3).
  - (c) Findings that all other requirements for assignments and issuance of replacement water right permits are met, including, but not limited to **the** completion date of the water right permit.
- (2) The replacement water right permits shall:
  - (a) Include the same conditions as the replaced water right permit, including, but not limited to priority date, source of water, and type of use;
  - (b) Identify the land to which the replacement water right permit is appurtenant and the owner(s) of that land;
  - (c) Apportion the rate and, if applicable, the duty, or, if applicable, the acre-foot allowance in proportion to the amount of land **to which** the replacement water right ~~permit is~~**permits are** appurtenant.

**(3) The replacement water right permits shall not:**

- (a) Authorize any change to the authorized point(s) of diversion or appropriation, including the addition of a point of diversion or appropriation, and**
- (b) Authorize any change to the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.**

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

*This attachment shows the final proposed rules with the changes that were made to the second public hearing draft (October 1 public comment draft)*

**CHAPTER 690  
DIVISION 325  
ASSIGNMENT OF A WATER RIGHT PERMIT AND REQUEST FOR ISSUANCE OF  
REPLACEMENT PERMITS**

**690-325-0010**

**Purpose**

The rules in OAR chapter 690, division 325 establish requirements and procedures that shall be used by the Department to evaluate an application by a landowner of record holding a water right permit for irrigation, nursery, temperature control, stock watering or agricultural water use, to assign all or part of the water right permit and to issue a replacement permit to reflect an assignment from the current permit holder to one or more additional permit holders. These rules do not replace OAR chapter 690-320-0060.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0020**

**Applicability**

- (1) The Department ~~can~~may only accept an application for assignment and request for issuance of replacement permits to reflect the assignment where the original water right is for irrigation, nursery, temperature control, stock watering or agricultural water use.
- ~~(2) The Department can~~may only accept an application for assignment and request for issuance of replacement permits to reflect the assignment for a water right that has a completion date greater than 210 days into the future.
- ~~(3)~~(2) The Department ~~can~~may not accept an application for assignment and request for issuance of replacement permits under the rules in OAR chapter 690, division 325 for municipal permits, quasi-municipal permits, or water right permits held by a unit of local government, including but not limited to water right permits held by a port, water authority, or a district.
- ~~(4)~~(3) Any water right permit for the use(s) of irrigation, nursery, temperature control, stock watering, or agricultural purposes, with a completion date that has expired ~~or a completion date that will expire within less than 210 days of receipt of an application by OWRD~~ can may not be assigned pursuant to ORS 537.225 or by the rules in OAR Chapter 690, division 325.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

## **690-325-0030**

### **Definitions**

The definitions in this rule, along with the definitions in OAR 690-300-0010 (Definitions) and OAR 690-380-0100 (Water Right Transfers), apply to the rules in OAR chapter 690, division 325. Where a term is defined in more than one rule, the definition in this rule applies.

- (1) “Enlargement” means an expansion of a water right permit and includes, but is not limited to:
  - (a) Using a greater rate or duty of water per acre than currently allowed under a permit;
  - (b) Increasing the acreage irrigated under a permit;
- (2) “District” means an irrigation district formed under ORS Chapter 545, a drainage district formed under Chapter 547, a water improvement district formed under Chapter 552, a water control district formed under Chapter 553 or a corporation organized under Chapter 554.
- (3) “Injury” or “Injury to an existing water right” means a water right transaction that would result in another, existing water right not receiving previously available water to which it is legally entitled.
- (4) “Unit of local government” includes a county, city, district or other public corporation, commission, authority or entity organized and existing under statute or city or county charter.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

## **690-325-0040**

### **Application Requirements**

- (1) Each application shall be prepared in ink or typewritten on forms provided by the Department.
- (2) The application shall contain the following information concerning the subject water right permit and assignment:
  - (a) The name, mailing address, e-mail address (if it exists), and telephone number of each applicant. Each applicant’s name shall have an assigned alphabet letter or number that corresponds with the application map as required under OAR 690-325-0050(2)(e).
  - (b) Name(s) appearing on the water right permit.
  - (c) Water Right Permit number.
  - (d) Water Right Permit use. Must be one or more of the following uses approved for assignment under OAR 690-325-0010: irrigation, nursery, temperature control, stock watering or agricultural water use.

~~(e) Completion date of the permit. If the completion date has expired or if the expiration date will expire within 210 days or less from the date of receipt of the application by the Department, the application will not be accepted.~~

~~(f)~~(e) A map meeting the criteria set forth in OAR 690-325-0050.

~~(g)~~(f) A copy of the recorded deed showing the applicant is an owner of the land to which the water right permit is appurtenant.

~~(h)~~(g) An affidavit certifying that the water right permit has not been conveyed or withheld, and remains appurtenant to the applicant's land and also certifying that the applicant has read the permit.

~~(i)~~(h) A statement by the applicant that the most recent water use under the applicant's portion of the water right permit, if any, has been exercised within relevant terms and conditions of the permit.

~~(j)~~(i) Agreements to the assignment and to the request of replacement water right permits submitted jointly or individually by all owners of the land to which the water right is appurtenant; or an assignment of interest and request for the issuance of replacement water right permits by one or more of the owners of land to which the water right permit is appurtenant and information identifying other landowners not participating in the assignment and request for issuance of replacement water right permit. Such information shall include:

(A) Landowner(s) name;

(B) Address;

(C) Description of the properties by public land survey and tax lot number.

(D) Number of acres and permit rate held by each landowner.

~~(k)~~(j) A listing of the names and mailing addresses of any district within which the water right permit is located.

~~(l)~~(k) The Department may require the applicant to provide any additional information the department deems appropriate in determining whether or not to approve the application.

~~(m) Any administrative hold that is proposed during the processing of an application must take into account the time period left before the completion date of the permit expires. Administrative holds will not be granted if the requested hold would result in the processing of the application would take place for a permit for which the completion date has expired or the completion date will expire within 210 days or less of receipt of being removed from the administrative hold.~~

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist:*



**690-325-0050**

**Map Requirements**

- (1) A map shall be included with the application required under OAR 690-325-0040. The map shall meet the following criteria:**
  - (a) The map shall be prepared by a certified water right examiner.**
  - (b) The map shall be based upon the original water right application map or permit amendment map.**
  - (c) The map shall not include:**
    - (A) Any unauthorized change to the location of the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.**
    - (B) Any unauthorized change to the location of the point(s) of diversion/appropriation as exhibited on the original water right application map or approved permit amendment application map.**
  - (d) The map shall be of permanent quality and shall be printed with dark ink on a good quality paper that is easily reproduced on a standard copy machine. Color copies that cannot be easily interpreted when copied to black and white will not be accepted.**
  - (e) The preferred map size is 8-1/2" x 11" (letter). If a larger map is required to provide sufficient detail, a size of 8-1/2" x 14" (legal) or 11" x 17" (oversized) may be used.**
  - (f) Notwithstanding subsection (1)(c) of this rule, a map size of up to 30" x 30" may be used if one additional copy is submitted.**
  - (g) The map scale shall be:**
    - (A) 1" = 400';**
    - (B) 1" = 1,320';**
    - (C) The scale of the county assessor map if the scale is not smaller than 1" = 1,320'; or**
    - (D) Another standard engineering scale if the Department grants advance written or e-mail approval of the use of the scale.**
  - (h) Horizontal field accuracy shall be consistent with standard surveying practices for the purpose of locating and quantifying water rights.**
  - (i) The map shall be plotted to the accuracy consistent with the map scale.**
  - (j) The locations of points of diversion or appropriation and places of use shall be described by distance and bearing or coordinates (distance north or south and east or west) from a recognized survey corner or by latitude-longitude coordinates. Latitude-longitude coordinates shall be expressed as either:**
    - (A) Degrees-minutes-seconds with at least one digit after the decimal in the seconds portion (e.g., 42¼ 32' 15.5"); or**
    - (B) Degrees-decimal with five or more digits after the decimal (e.g., 42.53764°).**

- (2) The map shall include the following information:
- (a) A north arrow, the scale, and a clear legend.
  - (b) The certified water rights examiner's stamp and signature. An electronically generated stamp or seal is acceptable, provided the signature is original.
  - (c) The place of use of each applicant's portion of the water right permit shall be clearly defined by outline and shaded or hachured and shall show the number of acres for each portion in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the water right permit has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.
  - (d) The place of use of any part of the water right permit not being assigned shall be clearly defined by outline and shaded or hachured and shall show the number of acres in each quarter-quarter section, government lot, or quarter-quarter section as projected within government lots, donation land claims, or other recognized public land survey subdivisions. If the portion of the water right permit not being assigned has multiple priority dates or uses, the lands to be served by each priority date and on which each use is authorized, must be separately identified.
  - (e) Each applicant's portion of the water right permit shall be referenced, by either alphabet letter or number, to each assignee's listed in the application form under OAR 690-325-0040(2).
  - (f) The rate and any applicable acre-feet allowance of water use under the water right permit for each applicant's portion of the permit shall be clearly labeled on the map.
  - (g) The location of each authorized point of diversion or appropriation.
  - (h) The location of tax lot lines for all properties upon which the water right permit is located.
  - (i) The location of township, range, section, quarter-quarter section, donation land claim, and other recognized public land survey lines.
  - (j) Notwithstanding the requirements of subsection (1)(i), the general location of main canals, ditches, flumes, pipelines, pumps, or other water delivery features.
  - (k) Notwithstanding the requirements of subsection (1)(i), the general location of physical features sufficient to assist in defining the location of the place of use of the water right permit. These features may include, but are not limited to, rivers, creeks, lakes, reservoirs, ponds, roads, railroads, fences, and direction of flow, if appropriate.

*Stat. Auth:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0060**

**Receipt of Application; Fees**

- (1) The applicant is required to pay the Water Resources Department the full cost to the Department of processing the application.
- (2) Within 15 days upon receipt of an application containing all the requirements described under OARs 690-325-0040 and 690-325-0050, the Department shall estimate the actual cost of work involved in processing the application.
- (3) The Department shall notify the applicant of the estimate of the actual cost of work and provide a time period of:
  - (a) 30 days for the applicant to submit the appropriate fees covering the estimated actual cost of work, or
  - (b) Upon a written or e-mailed request from the applicant, a reasonable time period greater than 30 days to submit the appropriate fees.
- (4) If the Department does not receive the appropriate fees after the expiration of the appropriate time period described in OAR 690-325-0060(3), the Department will send notice to the applicant that if the fees are not received by the Department within 10 days of the mailing of this notice, the Department will consider the application incomplete and will notify the applicant that the application is **not properly filed incomplete** and that the application will be of no further force or effect.
- (5) All required fees must be received before the final assignment is made and replacement water right permits reflecting the assignment are issued. Excess fees will be returned after the final order is issued.

*Stat. Auth:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0070**

**Technical Review and Issuance of Draft Documents**

- (1) The Department ~~'s will undertake a~~ technical review of the application shall that includes:
  - (a) Verification of the mailing address of each owner of the authorized place of use identified on the map contained in the application.
  - (b) Verification that the deed(s) supplied with the application matches the properties proposed for the assignments.
  - (c) Verification that the most recent water use under the permit, if any, has been exercised within relevant terms and conditions of the water right permit.
  - (d) Assessment of the application for enlargement of the original water right permit and injury to other water right holders.
- (2) Once the technical review described in OAR 690-325-0070(1) has been completed, the Department shall:

- (a) Prepare a draft proposed final order to approve the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will not result in the enlargement of the original water right permit nor injury to other water right holders and that the water right permit has been exercised by the applicant in compliance within the terms and conditions of the water right permit, or
  - (b) Prepare a draft proposed final order to deny the application. The draft proposed final order shall include finding(s) that the Department has found that the proposed replacement water right permits will result in the enlargement of the original permit and/or injury to other water right holders and/or that the water right permit has not been exercised by the applicant in compliance within its terms and conditions.
  - (c) Prepare drafts of the replacement water right permits if a draft proposed final order to approve the application under OAR 690-325-0070(2)(a) is prepared.
- (3) Within 30 days after the appropriate fees have been received, the Department shall mail, or with consent of the applicant, send by electronic means, copies of the application, map, existing water right permit, draft proposed final order, and, if the requirement under OAR 690-325-0070(2)(a) is satisfied, draft replacement water right permits, to each owner of land upon which the water right permit is appurtenant.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0080**

**Public Notice and Request for Comments**

- (1) Within ten days of proceeding with the application under OAR 690-325-0070(3), the Department shall give notice of the application in the weekly notice published by the Department. The notice shall include a request for comments on the application, the date by which the comments must be received by the Department, information about how an interested person may view or obtain future notices about the application and a copy of the proposed final order and information about how an interested person may review the application or obtain a copy of the application.
- (2) The notice shall include the following information about the application:
  - (a) County of water use.
  - (b) Permit number.
  - (c) Authorized use and associated rate and/or duty.
  - (d) Permit Completion Date.
  - (e) Applicant name(s).
  - (f) Number of acres, rate (or applicable acre-feet allowances), allowed under the existing water right permit.
  - (g) Source(s).

- (h) Location of the point(s) of diversion/appropriation by quarter-quarter, section, township and range.
- (3) Within 30 days after the public notice under OAR 690-325-0080(1), any record landowner, applicant, assignee, affected water right permit holder, or other person interested in the application may submit written comments or request copies of the documents described in OAR 690-325-0070(3). All comments and requests for copies must be received by the Department on or before 5 p.m. on the last day of the 30-day comment period.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0090**

**Proposed Final Order; Public Notice**

- (1) Within 30 days after the comment period closes under OAR 690-325-0080(3), the Department shall issue a proposed final order either approving or denying the application, taking into account comments received in response to the notice under OAR 690-325-0080.
- (2) The Department shall send copies of the proposed final order to each owner of land described in OAR 690-325-0070(3) by mail, or, with the consent of the applicant, send by electronic means, and to each person who submitted comments under OAR 690-325-0080(3).
- (3) Within seven days of issuance of the proposed final order, the Department shall publish notice of the proposed final order by publication in the weekly notice published by the Department. The notice shall give the date that protests must be received by the Department, no later than 45 days after the date the notice is published.

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

**690-325-0100**

**Protests**

- (1) A record landowner, an applicant, an assignee, an affected water right permit holder or other interested person may protest a Water Resources Department proposed final order for a water right permit assignment under ORS 537.225. The protest must be in writing and received by the Department within the time provided under OAR 690-325-0090(3). The protest must be accompanied by the protest fee required under ORS 536.050 and include:
- (a) The name, address, and telephone number of the person filing the protest; and

- (b) A detailed explanation of why the proposed order does not conform with the criteria for a water right permit assignment and a description of the changes to the order that are necessary to correct the nonconformity.
- (2) A protest must identify all issues the person wishes to raise that are reasonably ascertainable at the time the protest is filed. The issues must directly pertain to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225.
- (3) If a protest is properly filed, the Department may work with the applicant and the person filing the protest to determine whether the issues raised by the protest can be resolved informally. The Department may:
  - (a) Reissue a proposed final order;
  - (b) Issue a final order; or
  - (c) Refer the matter for a contested case hearing.
- (4) If the Department is unable to resolve the issues informally and refers the matter for a contested case hearing, the issues properly before the administrative law judge are limited to whether the proposed replacement water right permits are authorized under and in conformance with ORS 537.225. Any unraised issue that was reasonably ascertainable at the time the protest was filed and any argument not raised in the protest with sufficient specificity to afford the Department an opportunity for response is not subject to review at the contested case hearing.
- (5) Notwithstanding ORS 183.310, the parties to a contested case hearing held under this section are limited to:
  - (a) The applicant for the water right permit assignment; and
  - (b) Persons that timely filed a protest against the proposed order under (OAR 690-325-0090(3)).

*Stat. Auth.:*

*Stats. Implemented: ORS 537.227*

*Hist.:*

**690-325-0110**

**Final Order and Replacement Water Right Permits**

- (1) Within 30 days of the end of the protest period described in OAR 690-325-0090(3) and if no protests were received, an application for assignments and issuance of replacement water right permits shall be approved by final order of the Department. The final order approving the assignment shall contain:
  - (a) Findings that the assignment and issuance of replacement water right permits do not enlarge the permit as defined in OAR 690-325-0030(1);
  - (b) Findings that the assignment and issuance of replacement water right permits do not injure other water rights as defined in OAR 690-325-0030(3).
  - (c) Findings that all other requirements for assignments and issuance of replacement water right permits are met, including, but not limited to the completion date of the water right permit.

- (2) The replacement water right permits shall:**
- (a) Include the same conditions as the replaced water right permit, including, but not limited to priority date, source of water, and type of use;**
  - (b) Identify the land to which the replacement water right permit is appurtenant and the owner(s) of that land;**
  - (c) Apportion the rate and, if applicable, the duty, or, if applicable, the acre-foot allowance in proportion to the amount of land to which the replacement water right permits are appurtenant.**
- (3) The replacement water right permits shall not:**
- (a) Authorize any change to the authorized point(s) of diversion or appropriation, including the addition of a point of diversion or appropriation, and**
  - (b) Authorize any change to the authorized place of use outside of its original perimeters as exhibited on the original water right application map or approved permit amendment application map.**

*Stat. Auth.:*

*Stats. Implemented: ORS 537.225*

*Hist.:*

# Enrolled Senate Bill 200

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor John A. Kitzhaber, M.D., for Water Resources Department)

CHAPTER .....

AN ACT

Relating to water right assignments; creating new provisions; and amending ORS 536.050.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. Sections 2 and 3 of this 2013 Act are added to and made a part of ORS chapter 537.**

**SECTION 2. (1) Notwithstanding ORS 537.220 and 537.635, except as provided in subsection (6) of this section, a record landowner holding a water right permit for an irrigation, nursery, temperature control, stock watering or agricultural water use that has a subsequent completion date may apply for assignment of all or part of the water right permit and for the issuance of a replacement water right permit that reflects that assignment. To obtain the assignment and replacement water right permits, the applicant shall submit an application to the Water Resources Department that includes, at a minimum:**

- (a) A map prepared by a certified water right examiner and meeting department mapping standards that identifies the authorized place of use, rate of use, any applicable acre-foot allowances, tax lots and points of diversion or appropriation;**
- (b) A copy of the deed showing that the applicant is an owner of the land;**
- (c) An affidavit certifying that the water right has not been conveyed or withheld;**
- (d) A statement by the applicant that the most recent water use under the permit, if any, has been exercised within relevant terms and conditions of the permit; and**
- (e)(A) Agreements to the assignment and to the request for the issuance of replacement water right permits submitted jointly or individually by all owners of the land to which the water right is appurtenant; or**
- (B) An assignment of interest and request for the issuance of replacement water right permits submitted by one or more of the owners of land to which the water right is appurtenant and information identifying the names, addresses and proportionate interests for those owners not submitting the assignment and request.**

**(2) In addition to the application contents described in subsection (1) of this section, the department may require that the applicant provide any additional information the department deems appropriate to determining whether to approve the application.**

**(3) Upon receiving an application under subsection (1) of this section, the department shall determine and notify the applicant of the fees payable under ORS 536.050 for processing the application. Upon receipt of the appropriate processing fees, the department shall:**



(a) Verify the address of each owner of the lands identified on the map contained in the application;

(b) Verify that the deed supplied with the application matches the property proposed for assignment;

(c) Prepare a statement that the proposed replacement water right permits will not result in the enlargement of the original water right, a proposed final order and drafts of replacement water right permits;

(d) No later than one week prior to the date of the weekly notice described in paragraph (e) of this subsection, mail copies of the application, the map, the existing water right permit, the proposed final order and the draft replacement water right permits to each owner of land to which the existing water right is appurtenant; and

(e) Provide public notice of the application in the weekly notice published by the department.

(4) The department shall allow comment on the application for 30 days following public notice of the application in the weekly notice published by the department. Any protest against the proposed final order must be submitted no later than 45 days after the date of the weekly notice published by the department. A protest must be filed in the manner provided in section 3 of this 2013 Act.

(5) If the department determines that an application under subsection (1) of this section to assign all or part of a water right permit has been properly filed, and that the issuance of replacement water right permits will not result in the enlargement of the original water right or otherwise cause injury to other water right holders, the department shall issue one or more replacement water right permits to reflect the assignment. The replacement water right permits:

(a) Must have the same conditions as the replaced water right permit, including but not limited to priority date, source of water and type of use;

(b) May not add or change a point of diversion or point of appropriation;

(c) May not result in the enlargement of the water use authorized under the replaced water right permit;

(d) Must apportion the rate, and if applicable the duty, in proportion to the amount of land to which the water right is appurtenant; and

(e) Must identify the land to which the replacement water right permit is appurtenant and the owner of that land.

(6) This section does not apply to municipal or quasi-municipal permits or to permits held by a unit of local government, including but not limited to permits held by a port or water authority or a district. As used in this subsection, "unit of local government" has the meaning given that term in ORS 190.003 and "district" has the meaning given that term in ORS 540.505.

**SECTION 3.** (1) A record landowner, an assignee, an affected water right permit holder or other interested person may protest a Water Resources Department proposed final order for a water right assignment under section 2 of this 2013 Act. The protest must be in writing and received by the department within the time provided under section 2 (4) of this 2013 Act. The protest must be accompanied by the protest fee required under ORS 536.050 and include:

(a) The name, address and telephone number of the person filing the protest; and

(b) A detailed explanation of why the proposed order does not conform with the criteria for a water right permit assignment and a description of the changes to the order that are necessary to correct the nonconformity.

(2) A protest must identify all issues the person wishes to raise that are reasonably ascertainable at the time the protest is filed. The issues must directly pertain to whether the proposed replacement water right permits are authorized under and in conformance with section 2 of this 2013 Act.

**(3) If a protest is properly filed, the department may work with the applicant for the water right assignment and the person filing the protest to determine whether the issues raised by the protest can be resolved informally. The department may:**

- (a) Reissue a proposed final order;**
- (b) Issue a final order; or**
- (c) Refer the matter for a contested case hearing.**

**(4) If the department is unable to resolve the issues informally and refers the matter for a contested case hearing, the issues properly before the administrative law judge are limited to whether the proposed replacement water right permits are authorized under and in conformance with section 2 of this 2013 Act. Any unraised issue that was reasonably ascertainable at the time the protest was filed and any argument not raised in the protest with sufficient specificity to afford the department an opportunity for response is not subject to review at the contested case hearing.**

**(5) Notwithstanding ORS 183.310, the parties to a contested case hearing held under this section are limited to:**

- (a) The applicant for the water right assignment; and**
- (b) Persons that timely filed a protest against the proposed order under section 2 (4) of this 2013 Act.**

**SECTION 4.** ORS 536.050 is amended to read:

**536.050. (1)** The Water Resources Department may collect the following fees in advance:

- (a) For examining an application for a permit:**
  - (A) To appropriate water, except as provided under ORS 543.280 for an application for a hydroelectric project:**
    - (i) A base fee of \$700 for an appropriation of water through a single use, point of diversion or point of appropriation;**
    - (ii) \$250 for the first second-foot or fraction thereof appropriated under the permit;**
    - (iii) \$250 for each additional second-foot or fraction thereof appropriated under the permit;**
    - (iv) \$250 for each additional use, point of diversion or point of appropriation included in the application;**
    - (v) If appropriating stored water, \$25 for the first acre-foot or fraction thereof up to 20 acre-feet, plus \$1 for each additional acre-foot or fraction thereof; and**
    - (vi) If appropriating ground water, in addition to any other fees, \$300 for each application filed.**
  - (B) To store water under ORS 537.400 or 537.534 (4):**
    - (i) A base fee of \$700;**
    - (ii) \$25 for the first acre-foot or fraction thereof up to 20 acre-feet, plus \$1 for each additional acre-foot or fraction thereof; and**
    - (iii) \$100 for each additional storage location.**
  - (C) To exclusively appropriate stored water:**
    - (i) A base fee of \$400; and**
    - (ii) \$25 for the first acre-foot or fraction thereof up to 20 acre-feet, plus \$1 for each additional acre-foot or fraction thereof.**
- (b) For a permit issued under ORS 537.147, 537.211, 537.409 or 537.625 to appropriate or store water:**
  - (A) A base fee of \$400 for recording the permit; and**
  - (B) An additional fee of \$500 if the permit is issued pursuant to a final order that contains provisions requested by the applicant for mitigating impacts to the proposed water source.**
  - (c) For filing and recording the assignment or partial assignment of a water right application, permit or license under ORS 537.220 or 537.635, \$75.**
  - (d) For copying records in the department, \$2 for the first page and 50 cents for each additional page.**
  - (e) For certifying copies, documents, records or maps, \$10 for each certificate.**
  - (f) For a blueprint copy of any map or drawing, the actual cost of the work.**

- (g) For a computer-generated map, the actual cost of the work.
- (h) For examining an application for approval of a change to an existing water right or permit:
  - (A) A base fee of \$900 for a change to a single water right or permit;
  - (B) \$700 for each additional type of change requested;
  - (C) For a request for a change in place of use or type of use or for a water exchange under ORS 540.533, \$250 for each second-foot or fraction thereof requested beyond the first second-foot;
  - (D) \$400 for each additional water right or permit included in the application; and
  - (E) An additional fee of \$300 per application, if the application is for an additional point of appropriation, a change in a point of appropriation or a change from surface water to ground water or for substitution as described in ORS 540.524.
- (i) For examining an application for a temporary change in place of use under ORS 540.523, for a temporary transfer under ORS 540.585 or for a temporary change in place of use, a change in the point of diversion to allow for the appropriation of ground water or a change of a primary right to a supplemental right under ORS 540.570, a base fee of \$600 for the first water right or permit, plus \$200 for each additional water right or permit included in the application and:
  - (A) For nonirrigation uses, \$150 for each second-foot or fraction thereof requested beyond the first second-foot; or
  - (B) For irrigation uses, \$2 per acre of land irrigated or, if the application and required map are submitted to the department in a department-approved digital format, 50 cents per acre of land irrigated.
- (j) For submitting a protest to the department:
  - (A) \$600 if the protest is by a nonapplicant; and
  - (B) \$300 if the protest is by an applicant.
- (k) For filing an application for extension of time within which irrigation or other works shall be completed or a water right perfected, \$500.
- (L) For a limited license under ORS 537.143 or 537.534 (2), the fee established by rule by the Water Resources Commission.
- (m) For filing, examining and certifying a petition under ORS 541.329, \$300 plus 10 cents per acre of water involved in the application. For purposes of computing this fee, when any acreage within a quarter quarter of a section is involved, the 10 cents per acre shall apply to all acres in that quarter quarter of a section. Notwithstanding the fee amount established in this paragraph, a district notifying the department under ORS 541.327 (4) shall pay the actual cost of filing, examining and certifying the petition.
- (n) For requesting standing under ORS 537.153, 537.621 or 543A.120, \$150.
- (o) For participating in a contested case proceeding under ORS 537.170, 537.622 or 543A.130, \$350.
- (p) Except for an applicant, for obtaining a copy of both a proposed final order and a final order for a water right application under ORS 537.140 to 537.252, 537.505 to 537.795 or 543A.005 to 543A.300 or an extension issued under ORS 537.230, 537.248 or 537.630, \$20.
- (q) For examining an application to store water under ORS 537.409:
  - (A) A base fee of \$300; and
  - (B) \$25 for each acre-foot or fraction thereof.
- (r) For submitting a notice of intent under ORS 543A.030 or 543A.075, the amount established by the Water Resources Director under ORS 543A.410.
- (s) For examining an application for a substitution made under ORS 540.524:
  - (A) A base fee of \$630 for the first well substitution; and
  - (B) A fee of \$300 for each additional well substitution.
- (t) For examining an application for an allocation of conserved water under ORS 537.455 to 537.500:
  - (A) A base fee of \$850 for the first water right that is part of the allocation; and
  - (B) An additional fee of \$300 for each water right that is part of the allocation beyond the first water right.

(u) For submitting a water management and conservation plan pursuant to rules of the commission:

(A) \$400, if the plan is submitted by an agricultural water supplier;

(B) \$800, if the plan is submitted by a municipal water supplier serving a population of 1,000 or fewer persons; or

(C) \$1,600, if the plan is submitted by a municipal water supplier serving a population of more than 1,000 persons.

(v) For examining a new application for an in-stream water right lease under ORS 537.348:

(A) \$400 for an application for a lease with four or more landowners or four or more water rights; or

(B) \$250 for all other applications.

(w) For examining an application for an in-stream water right lease renewal, \$100.

(x) For submitting a claim of beneficial use under a permit having a priority date of July 9, 1987, or later, \$150.

(y) For submitting a request no later than 60 days after cancellation of a permit under ORS 537.260 to reinstate the permit, \$400.

(z) For submitting a request for a basin program exception under ORS 536.295, \$500.

**(aa) For processing an application under section 2 of this 2013 Act for an assignment of water right to one or more landowners and issuance of replacement water right permits, the actual cost of the work.**

(2)(a) The department may charge a dam owner an annual fee based upon the dam's hazard rating as determined by the department. The fees the department may charge the dam owner are:

(A) \$75 for a dam with a low hazard rating.

(B) \$150 for a dam with a significant hazard rating.

(C) \$500 for a dam with a high hazard rating.

(D) If the dam owner fails to pay an annual fee on or before six months after the billing date, a late fee of \$100.

(b) If a dam owner fails to pay an annual fee or a late fee charged by the department, the department may, after giving the dam owner notice by certified mail, place a lien on the real property where the dam is located for the fees owed by the dam owner.

(3) Notwithstanding the fees established under subsection (1) of this section, the commission may establish lower examination and permit fees by rule for:

(a) The right to appropriate water for a storage project of five acre-feet or less; or

(b) The right to appropriate water for the purpose of allowing the applicant to water livestock outside of a riparian area, as that term is defined in ORS 541.890.

(4)(a) The director may refund all or part of a fee paid to the department under this section if the director determines that a refund of the fee is appropriate in the interests of fairness to the public or necessary to correct an error of the department.

(b) The director may refund all or part of the protest fee described in subsection (1)(j) of this section to the legal owner or occupant who filed a protest under ORS 540.641 if an order of the Water Resources Commission establishes that all or part of a water right has not been canceled or modified under ORS 540.610 to 540.650.

(5) The director may waive all or part of a fee for a change to a water right permit under ORS 537.211 (4), a change to a water right subject to transfer under ORS 540.520 or 540.523 or an allocation of conserved water under ORS 537.470, if the change or allocation of conserved water is:

(a) Made pursuant to ORS 537.348;

(b) Necessary to complete a project funded under ORS 541.932; or

(c) Approved by the State Department of Fish and Wildlife as a change or allocation of conserved water that will result in a net benefit to fish and wildlife habitat.

(6) Notwithstanding the fees established pursuant to this section, the commission may adopt by rule reduced fees for persons submitting materials to the department in a digital format approved by the department.

(7) All moneys received under this section, less any amounts refunded under subsection (4) of this section, shall be deposited in the Water Resources Department Water Right Operating Fund.

(8) Notwithstanding subsection (7) of this section, all fees received by the department for power purposes under ORS 543.280 shall be deposited in the Water Resources Department Hydroelectric Fund established by ORS 536.015.

**SECTION 5.** ORS 536.050, as amended by section 12, chapter 819, Oregon Laws 2009, is amended to read:

536.050. (1) The Water Resources Department may collect the following fees in advance:

(a) For examining an application for a permit:

(A) To appropriate water, except as provided under ORS 543.280 for an application for a hydroelectric project:

(i) A base fee of \$500 for an appropriation of water through a single use, point of diversion or point of appropriation;

(ii) \$200 for the first second-foot or fraction thereof appropriated under the permit;

(iii) \$100 for each additional second-foot or fraction thereof appropriated under the permit;

(iv) \$200 for each additional use, point of diversion or point of appropriation included in the application; and

(v) If appropriating stored water, \$20 for the first acre-foot or fraction thereof up to 20 acre-feet, plus \$1 for each additional acre-foot or fraction thereof.

(B) To store water under ORS 537.400 or 537.534 (4):

(i) A base fee of \$500; and

(ii) \$20 for the first acre-foot or fraction thereof up to 20 acre-feet, plus \$1 for each additional acre-foot or fraction thereof.

(C) To exclusively appropriate stored water:

(i) A base fee of \$250; and

(ii) \$15 for the first acre-foot or fraction thereof up to 10 acre-feet, plus \$1 for each additional acre-foot or fraction thereof.

(b) For recording a permit to appropriate or store water, \$300.

(c) For filing and recording the assignment or partial assignment of a water right application, permit or license under ORS 537.220 or 537.635, \$50.

(d) For copying records in the department, \$2 for the first page and 50 cents for each additional page.

(e) For certifying copies, documents, records or maps, \$10 for each certificate.

(f) For a blueprint copy of any map or drawing, the actual cost of the work.

(g) For a computer-generated map, the actual cost of the work.

(h) For examining an application for approval of a change to an existing water right or permit:

(A) A base fee of \$400 for a change to a single water right or permit;

(B) \$400 for each additional type of change requested;

(C) For a request for a change in place of use or type of use or for a water exchange under ORS 540.533, \$200 for each second-foot or fraction thereof requested beyond the first second-foot; and

(D) \$200 for each additional water right or permit included in the application.

(i) For examining an application for a temporary change in place of use under ORS 540.523, for a temporary transfer under ORS 540.585 or for a temporary change in place of use, a change in the point of diversion to allow for the appropriation of ground water or a change of a primary right to a supplemental right under ORS 540.570, a base fee of \$200 for the first water right or permit, plus \$50 for each additional water right or permit included in the application and:

(A) For nonirrigation uses, \$80 for each second-foot or fraction thereof requested beyond the first second-foot; or

(B) For irrigation uses, \$1 per acre of land irrigated or, if the application and required map are submitted to the department in a department-approved digital format, 25 cents per acre of land irrigated.

(j) For submitting a protest to the department, \$350.

(k) For filing an application for extension of time within which irrigation or other works shall be completed or a water right perfected, \$350.

(L) For a limited license under ORS 537.143 or 537.534 (2), the fee established by rule by the Water Resources Commission.

(m) For filing, examining and certifying a petition under ORS 541.329, \$250 plus 10 cents per acre of water involved in the application. For purposes of computing this fee, when any acreage within a quarter quarter of a section is involved, the 10 cents per acre shall apply to all acres in that quarter quarter of a section. Notwithstanding the fee amount established in this paragraph, a district notifying the department under ORS 541.327 (4) shall pay the actual cost of filing, examining and certifying the petition.

(n) For requesting standing under ORS 537.153, 537.621 or 543A.120, \$100.

(o) For participating in a contested case proceeding under ORS 537.170, 537.622 or 543A.130, \$250.

(p) Except for an applicant, for obtaining a copy of both a proposed final order and a final order for a water right application under ORS 537.140 to 537.252, 537.505 to 537.795 or 543A.005 to 543A.300 or an extension issued under ORS 537.230, 537.248 or 537.630, \$10.

(q) For examining an application to store water under ORS 537.409:

(A) A base fee of \$80; and

(B) \$20 for each acre-foot or fraction thereof.

(r) For submitting a notice of intent under ORS 543A.030 or 543A.075, the amount established by the Water Resources Director under ORS 543A.410.

(s) For examining an application for a substitution made under ORS 540.524, \$280.

(t) For examining an application for an allocation of conserved water under ORS 537.455 to 537.500, \$700.

(u) For submitting a water management and conservation plan pursuant to rules of the commission:

(A) \$250, if the plan is submitted by an agricultural water supplier;

(B) \$500, if the plan is submitted by a municipal water supplier serving a population of 1,000 or fewer persons; or

(C) \$1,000, if the plan is submitted by a municipal water supplier serving a population of more than 1,000 persons.

(v) For examining a new application for an in-stream water right lease under ORS 537.348:

(A) \$200 for an application for a lease with four or more landowners or four or more water rights; or

(B) \$100 for all other applications.

(w) For examining an application for an in-stream water right lease renewal, \$50.

**(x) For processing an application under section 2 of this 2013 Act for an assignment of water right to one or more landowners and issuance of replacement water right permits, the actual cost of the work.**

(2) Notwithstanding the fees established under subsection (1) of this section, the commission may establish lower examination and permit fees by rule for:

(a) The right to appropriate water for a storage project of five acre-feet or less; or

(b) The right to appropriate water for the purpose of allowing the applicant to water livestock outside of a riparian area, as that term is defined in ORS 541.890.

(3)(a) The director may refund all or part of a fee paid to the department under this section if the director determines that a refund of the fee is appropriate in the interests of fairness to the public or necessary to correct an error of the department.

(b) The director may refund all or part of the protest fee described in subsection (1)(j) of this section to the legal owner or occupant who filed a protest under ORS 540.641 if an order of the Water Resources Commission establishes that all or part of a water right has not been canceled or modified under ORS 540.610 to 540.650.

(4) The director may waive all or part of a fee for a change to a water right permit under ORS 537.211 (4), a change to a water right subject to transfer under ORS 540.520 or 540.523 or an allocation of conserved water under ORS 537.470, if the change or allocation of conserved water is:

(a) Made pursuant to ORS 537.348;

(b) Necessary to complete a project funded under ORS 541.932; or

(c) Approved by the State Department of Fish and Wildlife as a change or allocation of conserved water that will result in a net benefit to fish and wildlife habitat.

(5) Notwithstanding the fees established pursuant to this section, the commission may adopt by rule reduced fees for persons submitting materials to the department in a digital format approved by the department.

(6) All moneys received under this section, less any amounts refunded under subsection (3) of this section, shall be deposited in the Water Resources Department Water Right Operating Fund.

(7) Notwithstanding subsection (6) of this section, all fees received by the department for power purposes under ORS 543.280 shall be deposited in the Water Resources Department Hydroelectric Fund established by ORS 536.015.

**Passed by Senate February 26, 2013**

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

**Passed by House May 13, 2013**

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Tina Kotek, Speaker of House

**Received by Governor:**

.....M.,....., 2013

**Approved:**

.....M.,....., 2013

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John Kitzhaber, Governor

**Filed in Office of Secretary of State:**

.....M.,....., 2013

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Kate Brown, Secretary of State