

# Enrolled House Bill 2123

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Governor Theodore R. Kulongoski for Water Resources Department)

CHAPTER .....

AN ACT

Relating to water appropriation transfers; creating new provisions; amending ORS 537.610, 540.530 and 540.531; repealing section 4, chapter 299, Oregon Laws 2001; and declaring an emergency.

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

**SECTION 1.** ORS 537.610 is amended to read:

537.610. (1) The Water Resources Commission shall accept all registration statements referred to in ORS 537.605 completed and returned to the commission in proper form, [*indorse*] **endorse** on the registration statement the date of the return and record each statement [*in a book kept for that purpose*]. Upon [*such*] recording **the statement**, the commission shall issue to the registrant a certificate as evidence that the registration is completed.

(2) [*Upon*] **The** issuance of the certificate of registration [*the registrant is*] **serves as prima facie evidence that the registrant is** entitled to a right to appropriate [*the*] ground water and apply it to beneficial use to the extent and in the manner disclosed in the recorded registration statement and **in** the certificate of registration.

(3) [*No*] **A** certificate of registration issued under this section [*shall*] **may not** be construed as a final determination of any matter stated [*therein*] **in the certificate of registration**. The right of the registrant to appropriate ground water under a certificate of registration is subject to determination under ORS 537.670 to 537.695, and is not final or conclusive until so determined and a ground water right certificate issued. A right to appropriate ground water under a certificate of registration has a tentative priority from the date when the construction of the well was begun.

(4) **The commission shall adopt by rule the process and standards by which the commission will recognize changes in the place of use, type of use or point of appropriation for claims to appropriate ground water registered under this section. The commission shall adopt fees not to exceed \$500 for actions taken to modify a certificate of registration.**

**SECTION 2.** ORS 540.531 is amended to read:

540.531. (1) Notwithstanding ORS 537.515 and 537.535, an owner of a surface water use subject to transfer may apply for a transfer of the point of diversion to allow the appropriation of ground water if the proposed transfer complies with the requirements of subsection (2) or (3) of this section and with the requirements for a transfer in point of diversion specified in ORS 540.520 and 540.530.

(2) The Water Resources Department may allow a transfer of the point of diversion under subsection (1) of this section if:

(a)(A) The new point of diversion appropriates ground water from an [*unconfined*] aquifer that is hydraulically connected to the authorized surface water source;

(B) The proposed change in point of diversion will not result in enlargement of the original water right or in injury to other water right holders;

(C) The use of the new point of diversion will affect the surface water source similarly to the authorized point of diversion specified in the water use subject to transfer; and

(D) The withdrawal of ground water at the new point of diversion is located within 500 feet of the surface water source and, when the surface water source is a stream, is also located within 1,000 feet upstream or downstream of the original point of diversion as specified in the water use subject to transfer; or

(b) The new point of diversion is not located within the distance requirements set forth in paragraph (a)(D) of this subsection, the holder of the water use subject to transfer submits to the department evidence prepared by a licensed geologist that demonstrates that the use of the ground water at the new point of diversion will meet the criteria set forth in paragraph (a)(A) to (C) of this subsection.

(3) Notwithstanding subsection (2) of this section, the department shall allow a transfer of the point of diversion under subsection (1) of this section in the Deschutes basin ground water study area if:

(a) The new point of diversion appropriates ground water from an aquifer that is hydraulically connected to the authorized surface water source;

(b) The proposed change in the point of diversion will not result in enlargement of the original water right or in injury to other water right holders; and

(c) The use of the new point of diversion will affect the surface water source hydraulically connected to the authorized point of diversion specified in the water use subject to transfer. The department may not require that the use of the new point of diversion affect the surface water source similarly to the authorized point of diversion specified in the water use subject to transfer under this subsection.

(4) All applicable restrictions that existed at the original point of diversion shall apply at the new point of diversion allowed under [subsections (1) to (8) of] this section.

(5) The new point of diversion shall retain the original date of priority. However, if within five years after approving the transfer, the department finds that the transfer results in substantial interference with existing ground water rights that would not have occurred in the absence of the transfer, the new point of diversion shall be subordinate to any existing right injured by the transferred water right or permit.

(6)(a) The department shall approve an application to return to the last authorized surface water point of diversion if a holder of a water use subject to transfer submits an application to the department within five years after the department approves a transfer under [subsections (1) to (8) of] this section.

(b) The department shall approve an application to return to the last authorized surface water point of diversion after five years of the date the department allows a transfer under subsection (3) of this section if a holder of a water use subject to transfer submits an application to the department, and the return will not result in injury to an existing water right.

(7) For transfers allowed under [subsections (1) to (8) of] this section, the department shall require mitigation measures to prevent depletion from any surface water source not specified in the permit or certificated or decreed water right, except that the department may not require mitigation measures if the transfer complies with subsection (3) of this section.

[ (8) As used in subsections (1) to (8) of this section: ]

[ (a) "Deschutes basin ground water study area" means the part of the Deschutes River Basin that is designated by the Water Resources Commission by rule. ]

[ (b) "Similarly" means that the use of ground water at the new point of diversion affects the surface water source specified in the permit or certificated or decreed water right and would result in stream depletion of at least 50 percent of the rate of appropriation within 10 days of continuous pumping. ]

[ (c) "Unconfined aquifer" means an aquifer in which the pressure at the upper surface of saturation is equal to atmospheric pressure. ]

[9] (8) The Water Resources Commission shall adopt rules that prescribe:

(a) The process for reviewing applications submitted under [subsections (1) to (8) of] this section;

(b) The persons to whom the department shall provide notice of the receipt of an application submitted under [subsections (1) to (8) of] this section; and

(c) The persons who may participate in the process of reviewing applications submitted under [subsections (1) to (8) of] this section.

**(9) As used in this section:**

(a) **“Deschutes basin ground water study area” means the part of the Deschutes River Basin that is designated by the Water Resources Commission by rule.**

(b) **“Similarly” means that the use of ground water at the new point of diversion affects the surface water source specified in the permit or certificated or decreed water right and would result in stream depletion of at least 50 percent of the rate of appropriation within 10 days of continuous pumping.**

**SECTION 3. ORS 540.531 (8) is added to and made a part of ORS 540.505 to 540.585.**

**SECTION 4.** ORS 540.530, as amended by section 2, chapter 299, Oregon Laws 2001, is amended to read:

540.530. [(1)] (1)(a) If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed. [*The time allowed by the Water Resources Commission for completion of an authorized change may not be used when computing a five-year period of nonuse under the provisions of ORS 540.610 (1).*]

(b) **If, after hearing or examination, the commission finds that a proposed change in point of diversion cannot be effected without injury to existing water rights, upon receipt by the commission of an affidavit consenting to the change from every holder of an affected water right, the commission may make an order approving the transfer and fixing a time limit within which the approved changes may be completed.**

(c) **If, after hearing or examination, the commission finds that a proposed change in point of diversion cannot be effected without injury to an in-stream water right granted pursuant to a request under ORS 537.336 or an in-stream water right created pursuant to ORS 537.346 (1), the Water Resources Department may consent to the change only upon a recommendation that the department do so from the agency that requested the in-stream water right. The agency that requested the in-stream water right may recommend that the department consent to the change only if the change will result in a net benefit to the resource consistent with the purposes of the in-stream water right.**

(d)(A) **If an in-stream water right would be injured by a proposed change under paragraph (c) of this subsection, the department shall obtain a recommendation from the agency that requested the in-stream water right. If the recommendation of the agency is to consent to the change, the department shall provide public notice of the recommendation and, consistent with state laws regarding cooperation with Indian tribes in the development and implementation of state agency programs that affect tribes or rights and privileges of tribes, the department shall consult with affected Indian tribes.**

(B) **The recommendation of an agency under this paragraph must be in writing and, if the recommendation is to consent to the change, must describe the extent of the injury to the in-stream water right, the effect on the resource and the net benefit that will occur as a result of the proposed change. The recommendation may include any proposed conditions that are necessary to ensure that the proposed change will be consistent with the recommendation.**

(C) **In determining whether a net benefit will result from the proposed change, the recommendation of an agency must include an analysis of the cumulative impact of any previous changes under paragraphs (b) and (c) of this subsection that allow injury to the affected in-stream water right.**

(D) A person may comment on the recommendation of an agency. The comment must be in writing and must be received by the department within 30 days after publication of notice under this paragraph. If a written comment received by the department requests a meeting on the proposed change, the department and the agency that requested the in-stream water right shall hold a joint public meeting within 90 days of the receipt of the comment requesting a meeting.

(e)(A) If, after review of public comments and consultation with the agency that requested the in-stream water right, the agency that requested the in-stream water right does not withdraw its recommendation to consent to the change, the department may approve the change consistent with the requirements of paragraphs (b) and (c) of this subsection.

(B) An order approving a change under paragraph (c) of this subsection shall include written findings on the extent of the injury to the in-stream water right, the effect on the resource and the net benefit that will occur as a result of the change. The order shall include any conditions necessary to ensure that the change will be consistent with the findings and ensure that the change will result in a continued net benefit to the resource consistent with the purposes of the in-stream water right.

(C) In determining whether a net benefit will result from the change, the order of the department must include an analysis of the cumulative impact of any previous changes approved under paragraphs (b) and (c) of this subsection that allow injury to the affected in-stream water right.

(f) The time allowed by the commission for completion of an authorized change under paragraphs (a) to (e) of this subsection may not be used when computing a five-year period of nonuse under the provisions of ORS 540.610 (1).

(2)(a) If a certificate covering the water right has been previously issued, the commission shall cancel the previous certificate or, if for an irrigation district, the commission may modify the previous certificate and, when proper proof of completion of the authorized changes has been filed with the commission, issue a new certificate or, if for an irrigation district, modify the previous certificate, preserving the previously established priority of rights and covering the authorized changes. If only a portion of the water right covered by the previous certificate is affected by the changes, a separate new certificate may be issued to cover the unaffected portion of the water right.

(b) If the change authorized under subsection (1) of this section is necessary to allow a change in a water right pursuant to ORS 537.348, is necessary to complete a project funded under ORS 541.375, or is approved by the State Department of Fish and Wildlife as a change that will result in a net benefit to fish and wildlife habitat, the Water Resources Department, at the discretion of the Water Resources Director, may waive or assist the applicant in satisfying any of the proof of completion requirements of paragraph (a) of this subsection. The assistance provided by the department may include, but need not be limited to, development of a final proof survey map and claim of beneficial use.

(3) Upon receiving notification of the merger or consolidation of municipal water supply entities, or the formation of a water authority under ORS chapter 450, the commission shall cancel the previous certificates of the entities replaced by the merger, consolidation or formation and issue a new certificate to the newly formed municipality or water authority. The new certificate shall preserve the previously established priority of rights of the replaced entities and shall allow beneficial use of the water on any lands acquired in the merger, consolidation or formation.

**SECTION 5. Section 4, chapter 299, Oregon Laws 2001, is repealed.**

**SECTION 6. This 2005 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect on its passage.**

**Passed by House June 17, 2005**

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Chief Clerk of House

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Speaker of House

**Passed by Senate July 7, 2005**

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President of Senate

**Received by Governor:**

.....M,....., 2005

**Approved:**

.....M,....., 2005

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Governor

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

.....M,....., 2005

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Secretary of State