



Oregon

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WATER RIGHT TRANSFERS AND REAL PROPERTY TRANSACTIONS

Disclaimer

This document is intended to provide guidance related to the transfer of water rights and real property transactions. However, it is not intended to serve as legal advice and all parties contemplating a transaction involving real property with appurtenant water rights are advised to seek advice of their legal counsel.

Introduction

In Oregon, water rights are “appurtenant” (attached) to the specific property where the water use is authorized. Unless the Department approves an application to transfer the water right to a different parcel of land or approves an instream lease, the water right may be exercised only on the specific land identified in the water right certificate. As a general matter, when a landowner sells or conveys his or her land, the water rights associated with that land are also conveyed to the new owner unless the Purchase and Sale Agreement or deed includes a specific exclusion of the water rights or the new owner otherwise receives notice that the appurtenant water rights have been conveyed to another party.

In order to transfer a water right to a different parcel of land, a water user must obtain the approval of the Department. The process for reviewing applications to transfer water rights requires public notice and staff evaluation of the proposed changes, including the potential impacts of the proposed transfer on other water rights. If the Department determines that the proposed transfer would injure other water rights or does not meet other criteria for approval, the application may be rejected or the proposed use of water may be limited in a manner that does not meet the objectives of the applicant. The standards and procedures for the Department’s review of water right transfer applications are in ORS 540.505 to 540.580 and OAR Chapter 690, Divisions 380 and 385.

Transactions involving water rights located within irrigation districts and other water supply organizations can involve additional issues. In certain circumstances, districts have additional flexibility in securing authorization for changes in the location at which a water right is exercised. Early contact with the district can alert the landowner or water right interest holder to potential opportunities or problems in changing the use of the water subsequent to a property transaction.

Because of the large number of transfer applications that have been filed during recent years, it can take as long as two to three years before the Department is able to review an application for

transfer and issue an order approving or rejecting the application. Final action on a transfer application can be further delayed if the Department's decision is appealed.

The meaning of the terms "transfer" and "convey" are frequently used interchangeably and, as a result, can be confusing when used in the context of transactions involving real property and water rights. Within this document, the terms are used as follows:

- "Convey" means to change the ownership interest in real property and/or water rights through a Purchase and Sale Agreement, Water Right Conveyance Agreement, or other legal instrument.
- "Transfer" means to secure authorization from the Department to change the place of use, point of diversion, and/or character of use of a water right pursuant to ORS 540.505 to 540.580 and OAR Chapter 690, Divisions 380 and 385.

Effect of Conveyance of Ownership of Real Property Before Water Right Transfer is Approved

From time to time, the land associated with the original water right is sold or otherwise conveyed to a new owner while a water right transfer application is pending review by the Department. This can occur, for example, when the owner of the real property files a transfer application and then later conveys the land to another party, or when the landowner/applicant dies, and the property is conveyed to a new party by will or intestate succession.

There has been some confusion regarding how to complete a water right transfer when the ownership of the land has changed before the transfer application has been approved by the Department. Pursuant to OAR 690-380-4010 (5), the applicant must show, as of the time the application is to be approved (not as of the original application date) that:

1. The applicant is the current owner of the lands to which the water right is appurtenant,
2. The current landowner has consented to the transfer, or
3. The applicant holds a sufficient interest the water right to pursue the transfer in the absence of the consent of the current landowner.

Water Right Conveyance Agreements provide a method for a water right transfer applicant to demonstrate that the applicant holds a sufficient interest in a water right to pursue the transfer. The critical elements of these agreements are: (1) a specific conveyance of the interest in the land and the water rights separately, and (2) recordation of the document in the deed records of the relevant county. A variety of legal documents that are typically used in real estate transactions including Purchase and Sale Agreements, other property conveyance documents, and deeds qualify as Water Right Conveyance Agreements under OAR 690-380-0100 (13). If the interest in a water right is not being conveyed in a real estate transaction, the Department recommends that an agreement that qualifies as a Water Right Conveyance Agreement be executed by the parties

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to the transaction regardless of whether a water right transfer application is pending or the seller intends to file an application to transfer the water rights at a later date.

The Department may accept other documents as evidence that an individual other than the current landowner holds a sufficient interest in a water right to proceed with a water right transfer. Lease agreements, quit claim deeds, other sales agreements can be used to establish that an applicant is authorized to pursue a water right transfer. However, these documents, if not recorded in the deed records of the relevant county, may not be sufficient to establish that a subsequent landowner who is not a party to the agreements received the necessary notice that the water right was not conveyed when the landowner acquired the real property.

It is important to note that even if a Water Right Conveyance Agreement has been executed, the water rights remain appurtenant to those lands until the Department approves a water right transfer. Under state water law, a water right may be considered forfeited and subject to cancellation if the right is not exercised for five consecutive years. Filing a transfer application “stops the clock” in the calculation of the five years of non-use. Depending on when a water right was last used, the right may become subject to forfeiture if the transfer application is not filed in a timely manner and the current owner of the lands to which the right is appurtenant does not exercise the right after the sale or other transaction. If the transfer application is ultimately denied by the Department, then the “clock” is restarted at the point that it was stopped and the water right may again become subject to forfeiture for non-use unless the current landowner exercises the right. Leasing the water right instream constitutes use of the right and can provide an alternative means of avoiding forfeiture. Approval by the Department of an instream lease has the effect of resetting the “clock.”

Water Rights in Irrigation Districts or Other Water Conveyance Districts or Corporations

Transferring water rights that are located within an irrigation, water control, water improvement, or drainage district, or a corporation established for the use and control of water can involve a number of issues. In certain circumstances, districts have additional flexibility in securing authorization for changes in the location at which a water right is exercised. If the water right is served by such a district, the landowner should contact the district to determine if there are any impediments to a subsequent water right transfer prior to attempting to sever the interest in the water rights from that in the real property. Early contact with the district can alert the landowner or water right interest holder to potential opportunities or problems in changing the use of the water subsequent to the property transaction.

Potential problems associated with transferring water rights in districts can include, but are not limited to:

- Relinquishing a landowner’s interest in appurtenant water rights may **not** release the landowner from assessment, repayment or other obligations owed to the districts or the federal government based on those water rights. In some cases, districts have incurred

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long-term debt that must be repaid from assessments on the land, whether or not the water right associated with that land is thereafter relinquished or conveyed to another party.

- As the entity responsible for diverting and delivering water under the right, the district must be aware of the changes that the holder of a water right anticipates making, particularly if the changes involve modifications in the district's water diversions or deliveries. In certain circumstances, a district's delivery system may not have the necessary capacity or infrastructure necessary to serve a proposed new place of use.
- A district's right to store water or its contract with the Bureau of Reclamation may not allow the use of water at the location or in the manner contemplated by the water right holder. For example, many storage rights and contracts limit the use of the water to irrigation within the district boundaries. In addition, some districts may have water delivery contracts with their patrons that govern transfers or sale of water rights.
- Legal disputes regarding the landowner's ability to unilaterally convey and/or transfer a right to use water may arise. In many districts, the water right certificates have been issued in the name of the district. The Department has approved transfers involving rights that were issued in the name of a district without the district's concurrence. However, a recent approval of such a transfer is pending review by the state Court of Appeals.

Failure to adequately address these issues can result in a loss of the water right. After a water right transfer is approved authorizing a change in place of use or character of use, the water may only be used in the manner described in the transfer order. If a water right served by a district is transferred to a location or to a use that cannot be accommodated, then the transfer cannot be completed and the right cannot be returned to the original lands and, therefore, is subsequently lost.

Critical Elements of Transactions Involving Water Rights

1. Description of Subject Property

The Water Right Conveyance Agreement or other agreement in which interest in water rights is retained or conveyed should describe the **lands to which the water rights are appurtenant** sufficient to satisfy the purpose of the seller and purchaser, and in a manner consistent with typical procedures for real property transactions. However, for the reasons described below, the Department advises that there are risks in such agreements or deeds purporting to definitively describe the number of acres of water rights on the identified parcel of property.

The number of acres of water right that are available to transfer from a parcel may not be definitely established until the Department processes an application to transfer the water rights. Determining the number of acres for a water right that was issued recently for a specified parcel generally is straightforward. However, it is much more difficult to precisely determine the number of acres of water rights involved in many other situations. For example, if the water right maps are of poor quality and the lands to which right is appurtenant have subsequently been

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divided, the manner in which the water right overlies the property lots may be unclear. If only a portion of the rights appurtenant to a land parcel are involved, or the water rights encompass several property lots, then the Department will have to determine the precise number of acres of water rights on the affected property lots when processing the water right transfer.

In any event, the Water Right Conveyance Agreement or other agreement in which interest in water rights is retained or conveyed must clearly describe the lands to which the right is appurtenant. For the purposes of the Department processing water right transfer applications, the following types of legal descriptions are acceptable. However, it should be noted that such legal descriptions may not be sufficient for other purposes. **The department strongly advises that competent legal counsel be consulted to insure that the legal descriptions are sufficient for other purposes as well.**

If the lands constitute the entirety of a tax lot, then a description of the lands as illustrated in Example A may be appropriate.

Example A:

Legal Description (according to Public Land Survey System)

X acres located in Tax Lot _____, Township 14 South, Range 14 East, Section 28, NW $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$.

If an entire tax, partition or subdivision lot is not involved, or if the lot was not created by partition or subdivision, then a metes and bounds description as shown in Example B, or an equivalent, should be used.

Example B:

Parcel Description (as may appear on a property deed or title report)

A parcel of land located in the North half of the Northwest quarter of Section 28, Township 14 South, Range 14 East of the Willamette Meridian, Crook County, Oregon, being more particularly described as follows: Beginning at a two inch brass cap marking the Northwest corner of said Section 28; thence along the West boundary of said Section 28 South 701.92 feet to a five eighths inch iron rod on the northerly right of way of the City of Prineville Railway; thence along said northerly right of way North 75°50'37" West 1701.95 feet to a one half inch iron pipe on the westerly boundary of that parcel described in said MF# 136838 thence along said westerly boundary North 00°00'19" West 322.37 feet to a five eighths inch iron rod on the North boundary of said Section 28; thence along said North boundary South 88°43'34" West 1650.64 feet to the point of beginning and terminus of this description.

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2. List of Water Rights in Which Interest is Retained or Conveyed

A Water Right Conveyance Agreement or other agreement in which interest in water rights is retained or conveyed should list and describe those rights with particularity. At a minimum, the description of the appurtenant water rights should identify, and include appropriate information appearing on the affected water right certificates or water use permits.

The Department recommends that the documents also retain or convey the interest in any other water rights that may be later determined to be appurtenant to the subject lands. Water rights, typically supplemental rights, that are overlain on an area of land generally cannot be separated and moved independently. Supplemental rights must be either included in the transfer of the primary water right or be cancelled. Without a statement clearly establishing that all of the water rights appurtenant to the subject land are conveyed, the subsequent identification of another, unlisted water right as being appurtenant to the lands may raise issues related to the transfer applicants' authority to transfer or agree to cancellation of the unlisted right delaying or jeopardizing the transfer.

An example for displaying water right information is below.

Example:

The parties to this transaction understand the water rights appurtenant to the subject lands to be as follows:

Water Right Certificate:	50000, issued in the name of John Doe
Use:	Irrigation of 11.62 acres
Priority Date:	November 16, 1976
Place of Use:	T2N, R2W, Section 12, NW SE, 9.0 acres T2N, R2W, Section 12, SW SE, 2.62 acres
Water Use Permit:	48500, issued in the name of John Doe
Use:	Supplemental Irrigation of 11.62 acres
Priority Date:	October 12, 1984
Place of Use:	T2N, R2W, Section 12, NW SE, 9.0 acres T2N, R2W, Section 12, SW SE, 2.62 acres

In addition to the rights as described herein, all interest in these and any other water rights that may be later determined as being appurtenant to the subject lands is included in this transaction.

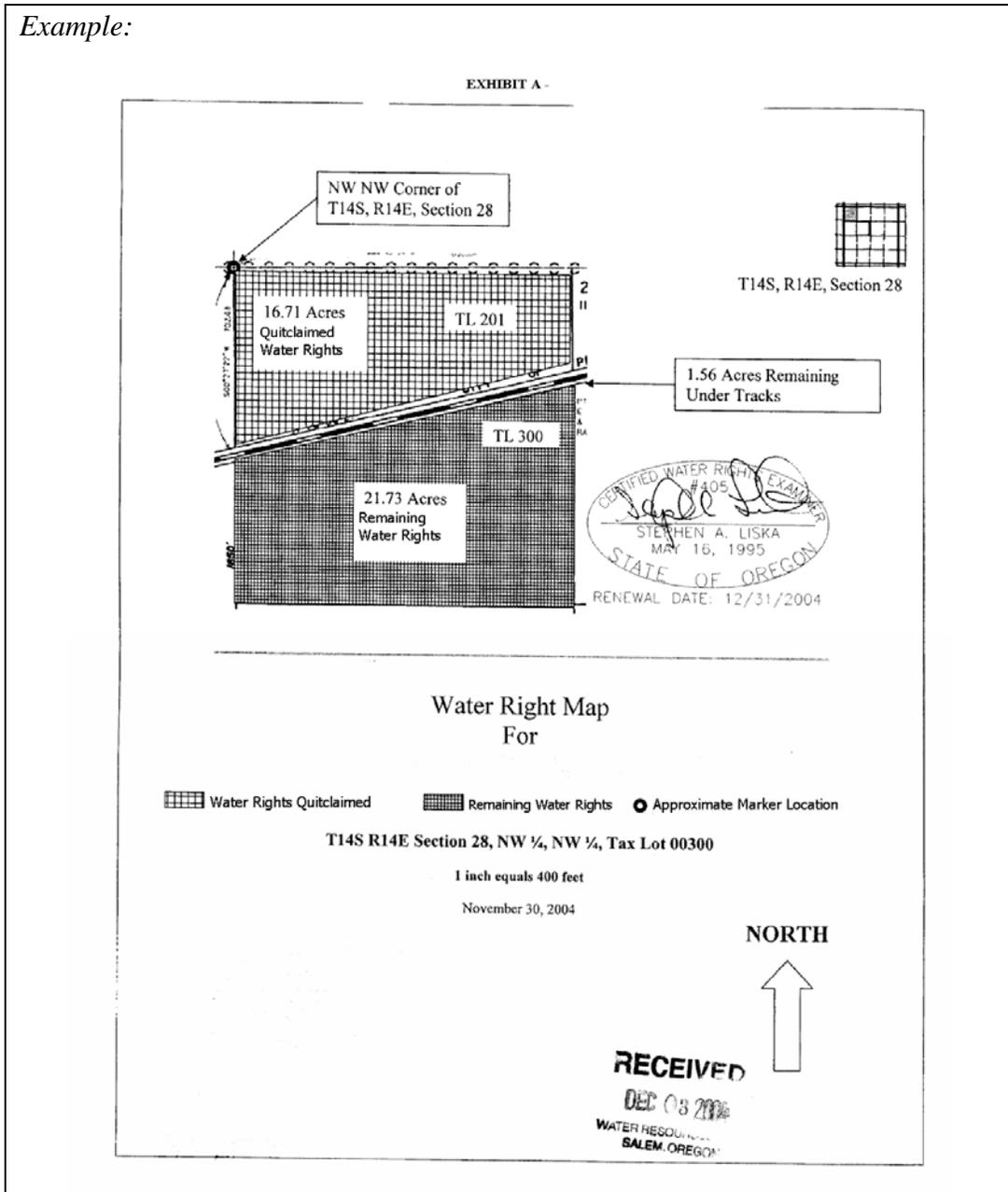
3. Map to Clarify Description of Property Conveyed

A map may be necessary to depict or clarify the lands to which appurtenant water rights are retained or conveyed. At a minimum, the Department recommends that such a map satisfy standards for a water right transfer as found in OAR 690-380-3100 because the purpose of the property transaction generally is to allow subsequent application to transfer a water right. In most

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cases, transfer application maps must be prepared by a Certified Water Right Examiner (CWRE). Thus, a CWRE may be a logical choice to prepare a map depicting or clarifying the lands to which the water rights involved in the property transaction are appurtenant.

Example:



4. Statutory Requirements

The form and content of Water Right Conveyance Agreements or other agreements may be subject to additional statutory requirements. For example, a properly executed quitclaim deed

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must meet the minimum standards for conveying and recording of property transactions as described by ORS Chapter 93. ORS 93.865 states that quitclaim deeds may be made in the form included in the following example:

Example based on ORS 93.865:

____ (name) ____, Grantor, releases and quitclaims to ____ (name) ____, Grantee, all right, title and interest in and to the *water rights appurtenant to the* following described real property: (Describe the property conveyed.)

(Following description of property, here insert statement required under ORS 93.040(1).)

The true consideration for this conveyance is \$ _____. (Here comply with the requirements of ORS 93.030.)

Dated this ____ day of _____, 2_____.

NOTE: The reference to appurtenant water rights in italics is added and is not included in ORS 93.865. In the context of the statutory language, the “property” quitclaimed is the water right, **not** the land to which the right is appurtenant.

5. Irrigation Districts and Other Water Conveyance Districts and Corporations

The Department recommends that land owners located within special districts contact the district office to determine whether the district has its own forms or policies for patrons proposing water right transfers.

6. Legal Counsel and Assistance

Parties involved in real estate and other transactions in which the interest in real property and the interest in the appurtenant water rights are to be severed should obtain legal counsel and assistance in preparing the necessary documents to ensure compliance with any relevant statutory requirements.

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