

## Criteria for Evaluating Transfer Applications

The standards and procedures used by the Water Resources Department (WRD) in evaluating transfer applications are described in Oregon Revised Statute (ORS) 540 (<http://www.leg.state.or.us/ors/>) and in Oregon Administrative Rules (OAR) Chapter 690, Divisions 380 and 77 (<https://sos.oregon.gov/archives>). These criteria and procedures apply to applications to:

- 1) Permanently change the use, place of use, point of diversion (P.O.D.) or point of appropriation (P.O.A.) of a water use;
- 2) Temporarily change the place of use of a water use; and
- 3) Temporarily change the type of use from irrigation to municipal use in the Deschutes River Basin.

Transfers of a water right to an instream water right are also processed using these criteria and procedures.

This is a summary, prepared by the Water Resources Department, of criteria and procedures that are generally applicable to transfer applications. The summary is necessarily general, and may not specifically address every applicant's fact situation. The summary is intended as general guidance for applicants, and not as a substitute for reference to applicable statutes and rules.

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In reviewing transfer applications under ORS 540.505 to 540.585, the Department will consider the following criteria:

- Compliance with statewide planning goals and acknowledged comprehensive plans [OAR 690-005-0010 through 690-005-0060] except for water right transfers
  - Where existing and proposed uses would be located entirely within lands zoned for exclusive farm use as provided in ORS 215.203 or within irrigation districts;
  - Which involved changes in place of use only;
  - Which do not involve the placement or modification of structures including but not limited to water diversion, impoundment, or distribution facilities, water wells, and well houses; and
  - Which involve irrigation water uses only.
- Water has been used over the past 5 years in accordance with the terms and conditions of the water right and that the right is not subject to forfeiture under ORS 540.610 [OAR 690-380-4010(2)(a)]
- The water user is ready, willing, and able to exercise the right under the existing authorization [OAR 690-380-4010(2)(b)]
- The proposed change will not result in enlargement of the right [OAR 690-380-4010(2)(c)]
- The proposed change will not result in injury to existing water rights [OAR 690-380-4010(2)(d)] except for P.O.D. transfers where the holders of the injured water rights have consented to the proposed change [OAR 690-380-5030]
- *P.O.D./P.O.A. Transfers*: In most cases the proposed change in P.O.D. or P.O.A. must be from the same source of surface water or same aquifer as the original water right [OAR 690-380-2110]

- *P.O.D. Transfers*: Consultation with the Oregon Department of Fish and Wildlife (ODFW) regarding installation of fish screening or by-pass device for transfer applications for a change in P.O.D. [OAR 690-380-5060]
- *Surface P.O.D. to Groundwater P.O.A. Transfers [OAR 690-380-2130]*: Transfer applications for changes from a surface P.O.D. to a groundwater appropriation are subject to the following additional criteria:
  - Must be an unconfined aquifer hydraulically connected to the authorized surface source
  - New groundwater withdrawal must affect surface water source similarly to the original authorized point of diversion
  - New groundwater withdrawal must be within 500 feet of the surface water source. When the surface water source is a stream, the new groundwater withdrawal must be located within 1000 feet upstream or downstream of the original P.O.D. unless the applicant submits evidence from a licensed geologist demonstrating the following:
    - 1) Groundwater withdrawal from an unconfined aquifer hydraulically connected to the authorized surface source;
    - 2) No enlargement of original water right and no injury to other water right holders; and
    - 3) New groundwater withdrawal will have similar affect on surface water source to the original authorized point of diversion.
- *Surface P.O.D. to Groundwater P.O.A. Transfers in the Deschutes Basin Ground Water Study Area [OAR 690-380-2130(3)]*: Transfer applications for changes from a surface P.O.D. to a groundwater appropriation in the Deschutes Basin Ground Water Study Area are subject to the following additional criteria:
  - New groundwater withdrawal appropriates groundwater from an aquifer that is hydraulically connected to the authorized surface water source
  - New groundwater withdrawal affects surface water source hydraulically connected to the original authorized point of diversion
- *Temporary Transfers in Place of Use*: Transfer cannot exceed 5 years [OAR 690-380-8000]
- *Deschutes River Basin Temporary Transfers from Irrigation Use to Municipal Use*: Transfer cannot exceed 25 years [OAR 690-380-8004]
- *Transfers of an Existing Water Right to an Instream Right*: Amount and timing of instream flow is allowable within the limits and use, including return flows, of the original water right and the proposed reach is appropriate [OAR 690-077-0075(2)]
- *Transfer of an Existing Water Right to an Instream Right*: Public purpose served [OAR 690-077-0075(2)(c)]

## **Transfer Application Procedures and Review**

The Water Resources Department processes a transfer application using the following procedure:

1. The applicant submits a complete application for transfer and the appropriate fees to the WRD.
2. WRD gives notice of the transfer application in the Department's weekly notice and provides a 30-day public comment period.
3. WRD evaluates the application considering any comments received and prepares a draft preliminary determination. The draft preliminary determination is provided to the applicant who has at least 30 days to amend the application to address any issues identified by the Department.
4. WRD issues the preliminary determination and provides notice in the Department's weekly notice, by mail to any person who filed comments, and in a newspaper having a general circulation in the area in which the water uses subject to transfer are located. Newspaper notice is not required for a change in place of use or for a change in P.O.D. of less than one-fourth mile and where there are no intervening diversions between the existing P.O.D. and the proposed P.O.D. For the transfer of an existing water right to an instream right, the Department provides additional notice to affected Indian tribes and planning departments of any affected local governments.
5. Protests against the approval of a transfer must be received by WRD within 30 days after the last publication of the newspaper notice or the mailing of the Department's weekly notice, whichever is later.
6. If no protests are received, WRD will issue a final order approving or rejecting the transfer consistent with the preliminary determination. If a protest is received, WRD will hold a contested case hearing. Notice of the hearing will be under the provisions of ORS 183.310 to 183.500, pertaining to contested cases. A contested case hearing is held in the area where the proposed transfer is located unless all parties who filed a protest stipulate otherwise.
7. If the land described in the transfer application has an appurtenant supplemental water right or permit that is not included in the transfer application, WRD will notify the applicant and the deeded owner that the supplemental water right or permit will be canceled before issuing the order approving the transfer of the primary water right. Notice by the Department will be sent by certified mail, return receipt requested. The applicant has 30 days from the date of the notice to either modify the application to include the supplemental water right or withdraw the application. If the application is not withdrawn or modified, the Director will issue an order canceling the supplemental water right before issuing the order approving the transfer of the primary water right. WRD will not approve transfer of a supplement water right if it would result in injury to existing water rights. If the Department approves the transfer of the primary water right but not the supplemental water right, the Department will notify the applicant of the intent to cancel the supplemental water right or permit before issuing the order approving the transfer of the primary water right unless the applicant withdraws the transfer application within 90 days.
8. Upon satisfactory proof of completing the change or changes authorized by a transfer approval order, WRD issues a proposed certificate of water right describing the right determined complete under the provisions of the transfer approval order [OAR 690-380-6040]. Satisfactory proof must include one of the following:

- a. determination that appropriation of water to beneficial use under the terms of the transfer approval order was completed to the extent authorized,
  - b. determination that appropriation of water to beneficial use under terms of the transfer approval order was completed to an extent less than authorized. Such determination shall constitute proof for that portion of the appropriation.
9. WRD mails the proposed certificate first class to the transferee with a notice that the transferee or landowner has 60 days from the date of mailing to request the Department to reconsider the contents of the proposed certificate of water right [OAR 690-380-6060].
10. If no request for reconsideration is received, the Department issues a water right certificate pursuant to ORS 540.530(2) and the transfer approval order.
11. If the Department determines that proof has been made to the full extent granted by the approval order, a certificate is issued without the necessity of a proposed certificate.
12. If the Department receives a petition for reconsideration of the content of a proposed certificate, the Director can
  - a. approve the petition without certification and issue a certificate with the changes included, or
  - b. schedule a field verification of the requested changes and, based on that field verification, approve or deny the request, or
  - c. deny the request by letter to the requesting party.
13. If field verification is scheduled, a new proposed certificate is prepared and sent to the transferee after field verification is complete. Petitions for reconsideration of a new proposed certificate must be submitted within 60 days of mailing. The petition can be approved or denied by an order of the Director.
14. Temporary Transfers: The Department may revoke approval of a temporary transfer at any time if the Department finds that the transfer is causing injury to an existing water right. When WRD issues a temporary transfer approval order, conditions necessary to protect other water rights can be included in the order. All uses for which a temporary transfer is allowed revert automatically to the terms and conditions of the water subject to transfer upon expiration of the temporary transfer period, or earlier if requested in writing by the applicant.
15. P.O.D. Transfers: Following consultation with ODFW regarding the necessity of fish screening or by-pass devices, the Department may condition a transfer order to require a fish screen at the new point of diversion.
16. Transfers of existing water rights to instream rights: If the application satisfies the criteria for review, the Director approves the transfer and issues a certificate which is held in trust by WRD. A copy of the certificate is mailed to the applicant. If a protest is filed or the application does not meet the review criteria, the Director and protestants, if any, negotiate to develop a proposed instream water right that is satisfactory to all parties. The Director issues a certificate for any negotiated instream water right transfer that satisfies all parties. If a protest of a proposed transfer cannot be resolved during negotiation, the Department conducts a contested case hearing according to the provisions of ORS 183 to determine whether the proposed instream water right should be denied, modified, or conditioned.