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Laura Hartt
Oregon Water Resources Department
725 Summer St. NE, Salem, OR 97301

February 6, 2026

Re: Final Comments on Proposed Division 380 Rules Revision

Dear Laura,

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Department of Natural Resources, we would like to provide our final comments as a Rules Advisory Committee member on the proposed Division 380 rules revision:

Division 380 – Water Right Transfers

Under the definition of "enlargement" in OAR 690-380-0100, we appreciate that you were responsive to our earlier comments and included our proposed insertion (underlined) to (2)(c), such that it read:

> *(c) Failing to keep the original place of use from receiving water from the same source under the same water right;*

However, in the final proposed rule, this revision was removed. **We ask that you please restore this inserted language.** Specifying that a POU may not be transferred if it continues receiving water from the same source *under the same water right* would help clarify what the "same source" entails, i.e., the source listed on the water right. This would provide much clearer guidance to watermasters in their transfer reviews and improve the process for all involved. Such a clarification is minor and uncontroversial,

and necessary only in 690-380-0100(2)(c) and the newly added rule language in 690-380-2200(2). As transfer applications increase with the dwindling availability of water, this minor—but critical—clarification to Division 380 will forestall considerable problems going forward.

The Problem with Current Rules

The ambiguity in the existing definition of "enlargement" under 690-380-0100(2)(c), which does not explicitly define "same source," has created issues for watermasters, who have been inconsistent in their application of this rule. While it would seem logical to conclude that the "same source" of a right being transferred is the source listed on the water right itself, in practice, the interpretation of this language has varied widely depending on the watermaster district. In some basins, watermasters interpret the "same source" as the source specified on the water right. In other districts, watermasters define groundwater and surface water as the "same source" and disqualify any place of use (POU) transfer if a field is within the same floodplain as its surface water stream. This is not an equal application of the law, and we respectfully ask that you restore our proposed clarification for the following reasons:

1. **Groundwater is not the same "source" as surface water.**

Groundwater is not considered the same "source" as surface water when it comes to the agency's regulation of water users; it is inconsistent to treat it as the same source for transfers. Under Chapter 690, Division 9, the agency may regulate surface water and groundwater conjunctively, but it must first demonstrate that the surface and groundwater sources are hydraulically connected. Then, if sources are hydraulically connected, the agency must further demonstrate that there is a "potential for substantial interference" between these sources. However, even in these cases, the rules are clear that hydraulically connected surface water and groundwater are still considered two separate sources when it comes to regulation.[1] Interpreting them as the "same source" when it comes to transfers is an inconsistent application of the law.

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[1] "Hydraulic connection" is not synonymous with "same source"; in fact, quite the opposite, as the definition under 609-009-0020(4) makes clear:

> *"Hydraulic Connection" means saturated conditions exist allowing water to move **between two or more sources** of water, either between groundwater and surface water or between groundwater sources.*

2. Continued sub-Irrigation from another "source" is not enlargement.

In watermaster districts where the transfer of water right acres within the floodplain has been denied, the rationale has been that these fields continue to be sub-irrigated by shallow, hydraulically connected groundwater. However, Chapter 690, Division 9 is explicit that hydraulic connection is between *"two or more sources,"* not different manifestations of the same source. In such instances, the agency's guidance in its Technical Operations Manual is clear that this is not enlargement, stating that:

> *"Continued irrigation of the "From" lands from another source does not constitute enlargement."*

The Manual further elaborates, adding that:

> *". . . the continued sub-irrigation of low-gradient lands after a transfer is not an enlargement if the authorized source under the transferred right is separate and distinct from the source of the sub-irrigation."*[2]

The question of what constitutes the "same source" is critical to this analysis, and indeed the Technical Operations Manual devotes an entire section to the issue (aptly titled *"What is the Same Source?"*).[3] Nowhere in this discussion does the manual suggest that groundwater and surface water are the same source. Rather, the guidance cites the language in 690-380-2110(2) that underscores that surface water right transfers are restricted to the same source of surface water, and groundwater rights transfers are restricted to the same source aquifer.[4]

3. A valid water right is entitled to its full rate and duty at its point of diversion.

Sub-irrigated acres clearly have water rights, and water clearly is diverted and applied to sub-irrigated acres. This fact has been verified by the courts and the agency. For decreed rights, the ability to fully use the right was demonstrated in an adjudication proceeding. For permitted rights, the ability to divert and apply water to all acres was demonstrated in a claim of beneficial use before the right was certificated. If water

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[2] WRD Technical Operations Manual (2010). Chapter 11.01, Water Right Transfer Reviews, p. 13.
[3] *Ibid,* pg. 14.
[4] OAR 690-380-2110(2) states:

> *"Except as provided in ORS 540.531 and OARD 690-380-2130, a change in point of diversion is restricted to the same source of surface water. A change in point of appropriation under a water right or certificate of registration modification is restricted to the same aquifer."*

rights are valid, and not subject to forfeiture for non-use, the full rate and duty should be available at the point of diversion, irrespective of any sub-irrigated acres.

This final point is particularly salient for the transfer of rights from irrigation to instream use. If sub-irrigated acres from hydraulically connected groundwater are interpreted as being ineligible for transfer, we actually see a situation where *less* water can be called to the point of diversion (POD) when the water right is transferred to instream use. This means that instream flows are actually better off if a right is left in irrigation use, because at least the full rate can then be called to the POD.

This, of course, is a preposterous outcome, and presumably not what the intent of the Legislature was when it created the Instream Water Rights Act of 1987 and recognized "instream use" as a beneficial use. However, this is precisely what is occurring in districts where there is confusion about the transfer eligibility of sub-irrigated acres.

Conclusion

We think the more likely actual intent of the original rule language in OAR 690-380-0100(2)(c) was to prevent the enlargement of a water right that would arise if the same source of water specified on the water right were diverted and applied to *both* the original POU and the new POU to which the right is being transferred. This is a common sense, plain-language reading of the rule. And, indeed, such a practice would result in more water being diverted from the stream than the water right holder is legally entitled to, thereby enlarging the right and depriving others of water to which they are legally entitled. Nonetheless, the current lack of clarity on what constitutes "same source" has led to wildly different interpretations of this rule and an unequal application of the law.

Thankfully, the remedy is easy, minor, and non-controversial. It is also very compatible with the agency's stated goals for this rulemaking, which included "tak[ing] the opportunity to make other policy and process improvements to impacted rule divisions."[5]

[5] Email correspondence from OWRD Tribal Liaison to CTUIR Chairman Gary Burke re OWRD's Invitation to Serve on RAC, dated August 1, 2025.

Similarly, we believe this is a prime example of where we can all work together to demonstrate responsiveness to Governor Kotek's Executive Order 25-26 to improve agency programs and tools that increase the resilience of natural and working landscapes. Instream transfers provide a tool for us to collaboratively restore instream flows with willing landowners; however, if these tools are not working, then we are left with no good options to work collaboratively—and that is not somewhere any of us wants to be.

We thank you for your time and respectfully request that you restore this important clarification,

Anton Chiono
Habitat Conservation Project Leader
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

Encl: CTUIR email re Division 380 dated 1.30.2026

Anton Chiono

From: Anton Chiono
Sent: Friday, January 30, 2026 9:59 AM
To: RANCIER Racquel R * WRD; JARAMILLO Lisa J * WRD
Cc: Eric Quaempts
Subject: Division 380 Rulemaking and Definition of "Enlargement"

Good Morning Racquel & Lisa,

I'm hoping you might be available for a quick call to follow up on a provision of the Division 380 rulemaking that pertains to the definition of enlargement in 690-380-0100 2(c). This subparagraph defines "enlargement" as "failing to keep the original place of use from receiving water from the same source."

During the latest Division 380 rulemaking, CTUIR asked that OWRD add "under the same water right" to the end of subparagraph 690-380-0100 2(c). This was to address an ambiguity that has been creating an inconsistent administration of transfers across the state. The issue was a lack of clarity as to what the same "source" was, with some watermasters interpreting the rule to mean that any natural sub-irrigation of a place of use renders it ineligible for transfer. Unfortunately, this has led some watermasters to refuse to allow the transfer of any acres within a river's floodplain—an interpretation that of course has dire implications for our efforts to collaboratively restore stream flows through floodplain restoration and instream transfers.

In the original rule revision draft, OWRD heard our input and included this change to 690-380-0100 2(c)—but, unfortunately, it was removed again from the final rule draft. This is very problematic, and we think it's important to consider the following points:

- OWRD currently allows the diversion and application of the full rate for water rights with sub-irrigated acres; if the full rate is eligible for diversion from a stream and application to sub-irrigated acres, the full rate should be eligible for transfer;

- If sub-irrigated acres are ineligible for transfer, those acres should not have received a water right in the first place—but these places of use clearly have water rights, and water clearly has been diverted and applied to sub-irrigated acres. We know this because, for certificates to have been issued, the claims of beneficial use must have demonstrated the ability to divert and apply water to all acres of a water right;

- Groundwater is not the same "source" as surface water when it comes to regulation; it is inconsistent to treat them as the same source for transfers. As you of course know, aside from a very small number of subbasins across the state, groundwater users and surface water users are not managed conjunctively; to not treat groundwater and surface water as the same source for regulation, but then to treat them as the same "source" when it comes to transfers, is an inconsistent application of the law.

The good news is that the fix is relatively minor (and indeed we'd already nearly had it in the original revision of the rules!). There are only two places in Division 380 that "under the same water right" needs to be added to make the rules consistently reflect this throughout: 690-380-0100 2(c) and 690-380-2200. Also good news is that, because this is something that theoretically is problematic for any type of transfer, this fix should be embraced and supported by water stakeholders from across the spectrum.

Finally, we believe this is a prime example of where OWRD can demonstrate responsiveness to Governor Kotek's Executive Order 25-26 to improve programs and tools that increase the resilience of natural and working landscapes. Instream transfers provide a tool for us to collaboratively restore stream flows with

willing landowners; however, if these tools are not working, then we are left with no good options to work collaboratively—and that is not somewhere any of us wants to be.

We appreciate your time and consideration on it. We do not want to request formal consultation on the rulemaking, but we will if necessary. However, I am hoping we can resolve this simply by talking through it.

Thank you again,

Anton

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