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MEMORANDUM

To: Sara Petrocine
From: Richard M. Glick
Merissa Moeller
Date: April 27, 2018
Subject: OWUC—Analysis of Storage Water Rights Transfers

Per your request, we have reviewed a 2019 OWRD legislative concept (dated March 5, 2018) concerning transfers in the character of use of certificated storage water rights. We have also reviewed a supporting "handout" dated February 7, 2018, prepared by Department staff, which concludes that the Department currently lacks authority to approve such transfers. We see no basis to question the Department's authority to do so. Therefore, there is no need for new legislation to fix a problem that does not exist.

OWRD has historically processed and approved transfer applications to change the character of use for storage water rights. We are aware of no instance in which these transfers raised questions or controversies regarding OWRD's authority to make the change. For example, a transfer application (H-150) was approved by OWRD in February 1965 that changed the character of use for a storage right from log storage to storage for fish culture. This practice has continued through recent decades. OWRD approved a character of use change through Transfer T-12120 for the U.S. Bureau of Reclamation's storage water right Certificate 72755. The transfer authorized the storage of 437 acre-feet in Cottage Grove and Dorena Reservoirs for municipal and industrial use, which the certificate originally authorized for irrigation use.

It is important to note that OWRD is the non-federal sponsor for the Willamette Basin Review Feasibility Study. The Draft Integrated Feasibility Report and Environmental Assessment ("draft Feasibility Report"), at page iii, states that "Reclamation's storage rights need to undergo a transfer review process to change the character of use to reflect uses other than irrigation." Section 1.9.2 of the draft Feasibility Report provides a discussion of the process OWRD would follow in processing such a transfer application. Nowhere in the draft Feasibility Report is any concern expressed about the Department's authority to follow that process. The draft Feasibility Report itself cost about $3MM, and the assumed transferability of stored water is an essential element in Willamette Valley municipal water supply planning. Reallocation discussions have been continuing for about 20 years on this premise. Raising questions today

about the Department's ability to follow through could unnecessarily unsettle discussions with the Corps of Engineers and other stakeholders.

In addition to being inconsistent with the Department's past practices, the conclusions in the Department's handout are not consistent with existing law. In the handout, the Department concluded that, "in most cases, the transfer statutes do not allow changes to rights to store water, such as changes in the character of the stored water or the location of the stored water." That is because, the Department argues, storage in most cases is not a standalone beneficial use, but is dependent upon a secondary water right to make beneficial use of the stored water. The Department's conclusion is based on a contextual analysis of the Oregon Water Rights Act and, primarily, on the Department's interpretation of the defined statutory term "water use subject to transfer" in ORS 540.505-.520. We disagree with the Department's interpretation.

As a preliminary matter, ORS 537.400 provides that applications for reservoir permits are to follow the same procedure as other water rights applications under ORS 537.130 and 137.140. ORS 537.400 also speaks to the need for a secondary permit if stored water is to be applied to a beneficial use. However, ORS 537.250, which requires proof of perfection of the right in order to issue a certificate, does not differentiate between storage rights and others. Once proof is made to its satisfaction, the Department "shall" issue the certificate. *See* ORS 537.250(1). The certificate "shall be conclusive evidence of the priority and extent of the appropriation." *See* ORS 537.270.

As to transfers, the legislature has directed the Department to process storage transfers as it would any other water right. This reading is based on a statutory interpretation of the transfer statutes, which accounts for the statutory text, context, and legislative history, consistently with the methodology laid out in *State v. Gaines*, 346 Or 160, 171 (2009). This is the methodology that a court would apply to interpret the Department's authority and, in fact, is consistent with the Oregon Supreme Court's interpretation of the transfer statutes, as set out in *Fort Vannoy Irrigation Dist. v. Water Resources Com'n*, 345 Or 56, 78 (2008).

1. **The legislature intended the term "water use subject to transfer" to broadly encompass all types of water rights.**

The fundamental purpose of statutory interpretation in Oregon is to determine and implement legislative intent. ORS 174.020(1)(a); *State v. Meek*, 266 Or App 550, 555, 338 P3d 767 (2014) ("The legislature's intent is our lodestar."). To determine legislative intent, Oregon law provides a consistent and methodical statutory interpretation framework. The first and best evidence of legislative intent is the relevant statutory text itself. *Gaines*, 346 Or at 171.

The starting place is ORS 540.510(1), which provides that the holder of "any water use subject to transfer" may apply for a transfer:

> "Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530.

> However, the holder of *any water use subject to transfer* may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established." (Emphasis added.)

ORS 540.505(4) defines "water use subject to transfer" to mean a "water use established by" any one of four specific mechanisms:

> "(a) An adjudication under ORS chapter 539 as evidenced by a court decree;
>
> "(b) A water right certificate;
>
> "(c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250; or
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> "(d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission."

If the Water Resources Commission "finds that a proposed change can be effected without injury to existing water rights," the Commission "*shall*" issue the transfer. ORS 540.530(1)(a) (emphasis added). Thus, if an applicant seeks to transfer a "water use subject to transfer" and the proposed transfer meets the injury test, the Department *must* issue the transfer. There is no discretion not to issue the transfer.

In its handout, the Department argues that it does not have authority to issue storage transfers, because storage is not a "use" and, therefore, cannot be a "water use subject to transfer." But the Oregon Supreme Court has already rejected the basis of that argument. *Fort Vannoy Irr. Dist. v. Water Resources Com'n*, 345 Or 56, 78 (2008). In *Fort Vannoy*, the Court drew a distinction between the "water use subject to transfer" and the beneficial use authorized by the applicable source of the water right, which in that case was a certificate. After engaging in an analysis of the text, context, and legislative history of the transfer statutes, the Court reasoned:

> "For example, ORS 540.520, which governs applications for changes of use, place of use, and point of diversion, provides, in part: (8) An application for a change of use under this section is not required *if the beneficial use authorized by the water use subject to transfer* is irrigation and [additional conditions are met].
>
> "(Emphasis added.) That provision treats "beneficial use" and the "water use [established by a water right certificate]" as distinct from one another; the former is authorized by the latter.
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> * * *

> "To summarize, the "water use subject to transfer" involved in this case is the water use established by each certificate issued to the district. In turn, the statutory context supports the conclusion that the corresponding definition of the phrase "water use subject to transfer" in ORS 540.505(1)(b)—"a water use established by * * * [a] water right certificate"—refers to the certificated water right itself, not merely the use of the water provided under the certificate."

Id. at 78-80.

Thus, the Department's focus is misplaced. The threshold question is not whether storage itself is a water "use," but whether a storage right is a "water use subject to transfer," as the legislature defined that statutory term of art in ORS 540.505(4). Until the February 7 handout, the Department's policy and practice had been to treat a storage certificate as a "water use subject to transfer"—the same as for other types of water rights. That practice was consistent with the statutory definition of a "water use subject to transfer" as a water right evidenced by a certificate, and the Department's practice of issuing both permits and certificates for storage rights.

2. A change in the "use" of a storage right includes both a change to the beneficial use and the method of use.

As the Department has noted, storage rights are different from other types of water rights, in that they often encompass both a primary right to store water and a secondary right to beneficially use that stored water. *See, e.g.*, ORS 537.400 (discussing procedure to apply for and perfect rights identified in reservoir permits). As this state has long recognized, the secondary right is a right to a specific "type" of beneficial use, and the storage right is a right to a "method" of use. *See, e.g.*, Atty Gen Op (May 25, 1951) (interpreting a former version of ORS 540.520 and explaining that storage is a "method" of beneficially using water); *Fort Vannoy*, 345 Or at 79 (explaining that a beneficial use is a specific "type of use" authorized under that right). The "type" and "method" of beneficial use are two indivisible features of a single storage right or "use." They are two sticks in the bundle that makes up a water right for storage.

The transfer statutes broadly authorize a change in the "use made" (character of use) of any "water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason." ORS 540.520(1). For a storage right, a change in the character of use can encompass a change in the beneficial use ("type" of use), separate from the storage right ("method" of use). The transfer statutes do not direct the Department to isolate the type of use from the method of use.

Conclusion

A contextual analysis of the water code indicates that a storage right is fundamentally treated the same as any other water right. As a matter of statutory interpretation, there is strong support for a conclusion that the legislature has directed the Department to treat all types of water rights, including storage rights, essentially equally for transfer purposes. Therefore, there is no apparent need for statutory amendments. Pursuing such legislative changes could unnecessarily complicate the process for reallocation of the Corps' Willamette projects.