



Oregon

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Testimony for House Bill 3365
House Committee on Agriculture, Land Use, Natural Resources and Water
Representative Ken Helm, Chair

Submitted by: Bryn Hudson, Legislative Coordinator
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Thank you for the opportunity to provide information related to House Bill 3365 and the -1 amendments, which authorize place of use transfers, point of diversion transfers, and split-season, split-rate, split-duty transfers without application to the Department within and between several irrigation districts in the Deschutes Basin. This information is provided for informational purposes and the Department is not taking a position at this time.

Background

The use of water under a water right is restricted to the terms and conditions described in the water right certificate: place of use, point of diversion, and type of use. In general, the water right holder must file a transfer application with the Department to change a point of diversion or appropriation, type of use, place of use, or any combination of these. Irrigation or other districts meeting qualifying criteria may utilize various transfer processes for certain changes that occur within the district boundaries.

All transfer processes, regardless of whether they involve a district, are required to not result in injury or enlargement of the water right. According to Department rules, "Injury" means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled. The definition of enlargement is discussed and included in the next section below.

In addition, as background, rate references the amount of water that can be diverted at any given point in time, whereas "duty" references the volume of water that can be applied during a specified time period or season in total. For example, gallons per minute is a rate, whereas the total number of gallons used is a volume.

Department's Understanding of HB 3365 and -1 Amendments

HB 3365 and the -1 amendment: (1) authorizes place of use transfers and point of diversion transfers both between and within districts for certain districts in the Deschutes Basin, without making application to the Department, and (2) allows for split-season, split-rate, or split-duty transfers without application to the Department, between specified irrigation districts in the Deschutes Basin.

The -1 amendment appears to require that transfers for split-rate, split-duty and split-season go through the Deschutes River Conservancy's (DRC) Deschutes Water Bank, which may allow for enlargement. The Department understands from conversations with DRC that their intent would be to not allow additional water use under the bill than what has been occurring, however, that is not prohibited or addressed in the bill itself. As such, there is no clarity in the law about how these transfer processes would proceed, nor what effect they could have on water use. The

Department needs to have more conversations with the districts, DRC, and bill proponents to understand their approach to implementation, even if not required by the bill. Based on our experiences with other programs, these matters, however, are complicated to assess and even if transactions are limited to historical use (which we note is not required or defined), the transfers could result in increases to consumptive use.

Currently, transfers that are allowed without application to the Department under Oregon law are the simplest transfers to evaluate for injury to other existing water rights and enlargement of the right: these are temporary place of use changes within district boundaries. These types of transfers are authorized for up to 15 participating districts under a program called the irrigation district pilot project, which is set to sunset in 2030 (see additional information at end of this testimony). This bill would authorize both place of use and point of diversion changes both within and outside of district boundaries, between districts in the Deschutes Basin, without application to the Department. It would also allow split-rate, split-duty, and split-season changes between the districts; split-rate and split-duty are not currently authorized under Oregon law and split-season leasing has only been authorized under Oregon law with significant pre-change and post-change monitoring to prevent enlargement and injury. The allocation of conserved water program may also be considered to have some similarities; however, that program reduces the rate and duty that could be used on existing lands and makes the applicant's portion of conserved water available for use on new lands, however, significant monitoring is required to ensure there is no injury or enlargement to other users.

While the -1 amendments do add some sideboards similar to other programs, it does not add the provision that the "land from which the water use is being transferred cannot receive any water under the right being transferred during the irrigation season" is not included for split rate, split duty, or split season changes. This means the land from which the water use is being transferred can continue to receive water under the right, while other new lands can also receive water; this is the very definition of "enlargement" according to the Department's existing definition of enlargement that has been used for transfers. The bill could result in increased water use under this scenario where both the to and from lands get irrigated. The bill might benefit from clarity over the intent.

Under rule, "enlargement" means "an expansion of a water right and includes, but is not limited to: (a) Using a greater rate or duty of water per acre than currently allowed under a right; (b) Increasing the acreage irrigated under a right; (c) Failing to keep the original place of use from receiving water from the same source; or (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation." This bill allows for (b) and (c) to occur.

Water right rates and duties are intended to be maximums, and it is not common or necessary for the full rate and duty to be diverted (and could in fact be considered waste if it were). Some districts hold water rights with a high duty and/or rate limitation, and do not use the full volume of water allowed under the right. Typically, the un-used water is then available to the junior users. Without requiring the district lands from which the water right is being transferred to be dried up (as all other district and regular transfer processes require) or some other sideboard that would prevent an increase in water use, the bill would allow an increase in total water use from what has been traditionally used, up to the full rate and duty of the water right. This is currently considered to be enlargement and would result in denial of a normal water right transfer and would still be considered enlargement for all other water users in the state outside of this bill. An

increase in consumptive use is likely due to evapotranspiration from additional acres and additional transmission/conveyance losses.

Section 2(5) appears to apply some of the requirements that are required in other programs. However, it does not appear to require the agency be made aware of the rate/duty being transferred, which is pertinent because the bill authorizes split rate/duty (unlike other programs). The bill could be clearer about when both districts must meet the requirements versus when only the “district in which the downstream diversion occurs”. Watermasters are responsible for water management and need to understand where water is being diverted.

The Department acknowledges that there are significant water management challenges in the basin and is committed to working with the basin to explore innovative water management solutions. The Department has hired a staff position to help with that work and would welcome the opportunity to work with basin interests to modernize our water laws while minimizing unintended consequences. The Department would welcome the opportunity to work with and further discuss the bill with proponents, if this bill moves forward.