

House Bill 3165

Sponsored by Representative GILLIAM; Representative CLEM (at the request of Oregon Water Utility Council)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Imposes conditions on change of use for water in excess of specified amount if water right authorizes storage of water in federal storage project located in Willamette Basin.

A BILL FOR AN ACT

1
2 Relating to water right transfers for water stored in Willamette Basin federal storage projects;
3 creating new provisions; and amending ORS 537.211, 537.470, 540.520, 540.524 and 540.585.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 540.520 is amended to read:

6 540.520. (1) Except when the application is made under ORS 541.327 or when an application for
7 a temporary transfer is made under ORS 540.523, whenever the holder of a water use subject to
8 transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires
9 to change the place of use, the point of diversion, or the use made of the water, an application to
10 make such change, as the case may be, shall be filed with the Water Resources Department.

11 (2) The application required under subsection (1) of this section shall include:

12 (a) The name of the owner;

13 (b) The previous use of the water;

14 (c) A description of the premises upon which the water is used;

15 (d) A description of the premises upon which it is proposed to use the water;

16 (e) The use which is proposed to be made of the water;

17 (f) The reasons for making the proposed change; and

18 (g) Evidence that the water has been used over the past five years according to the terms and
19 conditions of the owner's water right certificate or that the water right is not subject to forfeiture
20 under ORS 540.610.

21 (3) If the application required under subsection (1) of this section is necessary to allow a change
22 in a water right pursuant to ORS 537.348, is necessary to complete a project funded under ORS
23 541.375, or is approved by the State Department of Fish and Wildlife as a change that will result in
24 a net benefit to fish and wildlife habitat, the department, at the discretion of the Water Resources
25 Director, may waive or assist the applicant in satisfying the requirements of subsection (2)(c) and
26 (d) of this section. The assistance provided by the department may include, but need not be limited
27 to, development of an application map.

28 (4) If the application is to change the point of diversion, the transfer shall include a condition
29 that the holder of the water right provide a proper fish screen at the new point of diversion, if re-
30 quested by the State Department of Fish and Wildlife.

31 **(5) If the application is to change the use made of water having a cumulative total of at**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 **least 500 acre-feet under one or more water rights that authorize the storage of water in**
2 **federal storage projects located in the Willamette Basin, the director may not approve the**
3 **application unless:**

4 (a) **The applicant demonstrates that the requested change will not reduce the amount of**
5 **water to which holders of existing surface water rights have been historically entitled; and**

6 (b) **The Water Resources Department convenes a work group of affected stakeholders**
7 **and the director determines after consultation with the work group that the transfer will**
8 **provide an equitable allocation of the stored water to authorized uses.**

9 [(5)] (6) Upon the filing of the application the department shall give notice by publication in a
10 newspaper having general circulation in the area in which the water rights are located, for a period
11 of at least three weeks and not less than one publication each week. The notice shall include the
12 date on which the last notice by publication will occur. The cost of the publication shall be paid
13 by the applicant in advance to the department. In applications for only a change in place of use or
14 for a change in the point of diversion of less than one-fourth mile, and where there are no inter-
15 vening diversions between the old diversion of the applicant and the proposed new diversion, no
16 newspaper notice need be published. The department shall include notice of such applications in the
17 weekly notice published by the department.

18 [(6)] (7) Within 30 days after the last publication of a newspaper notice of the proposed transfer
19 or the mailing of the department's weekly notice, whichever is later, any person may file, jointly or
20 severally, with the department, a protest against approval of the application.

21 [(7)] (8) Whenever a timely protest is filed, or in the opinion of the [*Water Resources*] director
22 a hearing is necessary to determine whether the proposed changes as described by the application
23 would result in injury to existing water rights, the department shall hold a hearing on the matter.
24 Notice and conduct of the hearing shall be under the provisions of ORS chapter 183, pertaining to
25 contested cases, and shall be held in the area where the rights are located unless all parties and
26 persons who filed a protest under this subsection stipulate otherwise.

27 [(8)] (9) An application for a change of use under this section is not required if the beneficial
28 use authorized by the water use subject to transfer is irrigation and the owner of the water right
29 uses the water for incidental agricultural, stock watering and other uses related to irrigation use,
30 so long as there is no increase in the rate, duty, total acreage benefited or season of use.

31 [(9)] (10) A water right transfer under subsection (1) of this section is not required for a general
32 industrial use that was not included in a water right certificate issued for a specific industrial use
33 if:

34 (a) The quantity of water used for the general industrial use is not greater than the rate allowed
35 in the original water right and not greater than the quantity of water diverted to satisfy the au-
36 thorized specific use under the original water right;

37 (b) The location where the water is to be used for general industrial use was owned by the
38 holder of the original water right at the time the water right permit was issued; and

39 (c) The person who makes the change in water use provides the following information to the
40 [*Water Resources*] department:

41 (A) The name and mailing address of the person using water under the water right;

42 (B) The water right certificate number;

43 (C) A description of the location of the industrial facility owned by the holder of the original
44 water right at the time the water right permit was issued; and

45 (D) A description of the general industrial use to be made of the water after the change.

SECTION 2. ORS 537.211 is amended to read:

537.211. (1) The approval of an application referred to in ORS 537.140 or 537.400 shall be set forth in a water right permit issued by the Water Resources Department. The permit shall specify the details of the authorized use and shall set forth any terms, limitations and conditions as the department considers appropriate including but not limited to any applicable condition required under ORS 537.289. A copy of the permit shall be filed as a public record in the department. The permit shall be mailed to the applicant, and upon receipt of the permit the permittee may proceed with the construction of the necessary works and may take all action required to apply the water to the designated beneficial use and to perfect the proposed appropriation.

(2) Except as provided in subsection (6) of this section, if an application under ORS 537.140 or 537.400 indicates that the applicant does not have written authorization or an easement permitting access to nonowned land crossed by the proposed ditch, canal or other work, the department may issue a final order approving the application if the approval includes a condition requiring the applicant to obtain such written authorization, or easement or ownership of such land and to provide the department with a copy of the written authorization, easement or evidence of ownership.

(3) If an application referred to in ORS 537.140 or 537.400 is rejected, the department shall enter a written order setting forth the reasons for the rejection. The applicant shall take no action towards construction of the works or use of the water. The department shall mail a copy of the order to the applicant.

(4) The holder of a water right permit may change the point of diversion, change the point of appropriation, change the point of diversion to allow the appropriation of ground water or use the water on land to which the right is not appurtenant if:

(a) The use of water on land to which the right is not appurtenant, the change of point of diversion or the change in point of appropriation does not result in injury to an existing water right;

(b) For a proposed change in the place of use of the water, the land on which the water is to be used is owned or controlled by the holder of the permit and is contiguous to the land to which the permit is appurtenant;

(c) All other terms of the permit remain the same, including but not limited to the beneficial use for which the water is used and the number of acres to which water is applied;

(d) Prior approval is obtained from the district if the water is transported or conveyed by an irrigation district organized under ORS chapter 545, a drainage district organized under ORS chapter 547, a water improvement district organized under ORS chapter 552, a water control district organized under ORS chapter 553 or a district improvement company or a corporation organized under ORS chapter 554;

(e) The holder of the permit provides written notice to the department at least 60 days before making any changes to the lands, point of diversion or point of appropriation described in the permit;

(f) The holder of the permit complies with the publication requirements of ORS 540.520 [(5)] **(6)**, if applicable;

(g) Diversion is provided with a proper fish screen, if requested by the State Department of Fish and Wildlife; and

(h) For a request to transfer the point of diversion to allow the appropriation of ground water, the proposed change meets the standards set forth in ORS 540.531 (2) or (3).

(5) Notwithstanding the requirements of subsection (4)(b) of this section, the holder of a water right permit may change the place of use of all or any portion of water under the permit to land that

1 is not contiguous to the land to which the permit is appurtenant if:

2 (a) The change to noncontiguous land is in furtherance of mitigation or conservation efforts
 3 undertaken for the purposes of benefiting a species listed as sensitive, threatened or endangered
 4 under ORS 496.171 to 496.192 or the federal Endangered Species Act of 1973 (16 U.S.C. 1531 to 1544),
 5 as determined by the listing agency; and

6 (b) All other requirements of subsection (4) of this section are met.

7 (6) For an application made by or on behalf of a public corporation, the department may issue
 8 a permit approving the application without requiring the applicant to obtain prior written authori-
 9 zation or an easement permitting access to nonowned lands affected by the proposed project. How-
 10 ever, nothing in this subsection shall be construed to allow any person to trespass on the lands of
 11 another person.

12 (7) When the department receives notice under subsection (4)(e) of this section, the department
 13 shall publish the notice in the department's weekly public notice of water right applications.

14 (8) If the use of water under the permit is for operation of a chemical process mine as defined
 15 in ORS 517.953:

16 (a) Review of the application and approval or denial of the application shall be coordinated with
 17 the consolidated application process under ORS 517.952 to 517.989. However, such review and ap-
 18 proval or denial shall take into consideration all policy considerations for the appropriation of water
 19 as set forth in this chapter and ORS chapter 536.

20 (b) The permit may be issued for exploration under ORS 517.702 to 517.740, but the permit shall
 21 be conditioned on the applicant's compliance with the consolidated application process.

22 (c) The permit shall include a condition that additional conditions may be added to the use of
 23 water when a water right certificate is issued, or when the use of water is changed pursuant to ORS
 24 540.520 and 540.530 to use for a chemical process mine operation.

25 (9) As used in this section, "contiguous" includes land separated from the land to which a water
 26 right is appurtenant by roads, utility corridors, irrigation ditches or publicly owned rights of way.

27 **SECTION 3.** ORS 537.470 is amended to read:

28 537.470. (1) Upon receipt of an application for allocation of conserved water under ORS 537.465,
 29 the Water Resources Commission shall give notice of receipt of the application in accordance with
 30 ORS 540.520 [(5)] (6).

31 (2) The commission shall allocate conserved water as provided in subsection (3) of this section
 32 and approve modifications of water rights as provided in subsection (6) of this section. The com-
 33 mission may not allocate conserved water pursuant to an application under ORS 537.465 if the ap-
 34 plication is filed more than five years after the conservation measure was implemented.

35 (3) After determining the quantity of conserved water, if any, required to mitigate the effects
 36 on other water rights, the commission shall allocate 25 percent of the remaining conserved water
 37 to the state and 75 percent to the applicant, unless the applicant proposes a higher allocation to the
 38 state or more than 25 percent of the funds used to finance the conservation measures comes from
 39 federal or state public sources. If more than 25 percent of the funds used to finance the conservation
 40 measures comes from federal or state public sources and is not subject to repayment, the commission
 41 shall allocate to the state a percentage equal to the percentage of public funds used to finance the
 42 conservation measures and allocate to the applicant a percentage equal to the percentage of other
 43 funds used to finance the conservation measures. If the commission determines that the water allo-
 44 cated to the state is necessary to support in-stream flow purposes in accordance with ORS 537.332
 45 to 537.360, the water shall be converted to an in-stream water right. If the water allocated to the

1 state is not necessary to support in-stream flow purposes, it shall revert to the public for appropri-
 2 ation by the next user in priority. In no event, however, shall the applicant receive less than 25
 3 percent of the remaining conserved water unless the applicant proposes a higher allocation to the
 4 state.

5 (4) The commission shall notify the applicant and any other person requesting notice, of the
 6 action the commission intends to take under subsection (3) of this section. Any person objecting to
 7 the proposed allocation may file a protest requesting a contested case hearing before the commis-
 8 sion.

9 (5) The modification of water rights under an allocation of conserved water may not require a
 10 separate request for transfer under ORS 540.520.

11 (6) After the commission completes the allocation of conserved water under subsection (3) of this
 12 section, the commission shall issue orders for proposed new certificates covering the changes in the
 13 original water rights. Once the conservation project is completed, separate new certificates pre-
 14 serving the previously established priority of rights shall be issued to cover the unaffected portion
 15 of the water rights and separate new certificates indicating the priority of rights as set forth in ORS
 16 537.485 shall be issued to cover the right to the use of the allocated water.

17 **SECTION 4.** ORS 540.524 is amended to read:

18 540.524. (1) Notwithstanding ORS 540.510 or 540.670, upon approval of an application submitted
 19 to the Water Resources Department, the holder of both a primary water right originating from a
 20 surface water source and a supplemental water right permit or certificate originating from a ground
 21 water source may substitute the use of the supplemental water right for the primary water right.
 22 A substitution may not be made under this subsection if the use of the supplemental water right
 23 results in an enlargement or expansion of the primary water right. This subsection does not au-
 24 thorize a change in place of use, type of use, point of diversion or point of appropriation.

25 (2) An application required under subsection (1) of this section shall be submitted on forms
 26 provided by the department. The department may request additional information if necessary to
 27 assist with the injury evaluation. Each application shall be submitted with the fee described in ORS
 28 536.050 (1)(s).

29 (3) Upon receiving an application under subsection (1) of this section, the department shall
 30 provide notice, accept protests and conduct hearings on protests in the manner described in ORS
 31 540.520 [(5), (6) and (7)] **(6), (7) and (8)**.

32 (4) The Water Resources Director shall issue an order approving or denying the substitution. If
 33 the proposed substitution will result in injury to other water rights, the director shall prohibit or
 34 condition the use to avoid or mitigate the injury. The director shall issue an order approving or
 35 denying the substitution within 90 days after the department receives an application under sub-
 36 section (1) of this section.

37 (5) For the purpose of ORS 540.610, a substituted primary surface water right shall be treated
 38 as a supplemental water right, and a substituted supplemental ground water right shall be treated
 39 as a primary water right.

40 (6) A completed and approved substitution of a supplemental ground water right for a primary
 41 surface water right under this section may be terminated upon a request by the water right holder
 42 or by an order of the director if the director determines that the use of the ground water as the
 43 primary water right causes injury to other water rights. Upon termination, the substituted primary
 44 and supplemental water rights shall revert back to their original status.

45 **SECTION 5.** ORS 540.585 is amended to read:

1 540.585. (1) In accordance with the provisions of this section, a person may request that the
 2 Water Resources Department approve the temporary transfer of the place of use and type of use and
 3 temporarily change the point of diversion if necessary to convey water to the new temporary place
 4 of use, of all or a portion of a water right, for a period not to exceed 25 years if:

- 5 (a) The person holds a water use subject to transfer;
- 6 (b) The type of use specified in the original water use subject to transfer is irrigation;
- 7 (c) The person to whom the right is transferred is:

8 (A) Located within the Deschutes River Basin; and

9 (B) A city, a quasi-municipal corporation, a domestic water supply district formed under ORS
 10 chapter 264, a water supplier as defined in ORS 448.115 or a water authority formed under ORS
 11 chapter 450;

12 (d) The proposed use is municipal use; and

13 (e) The proposed temporary transfer will not result in injury to any existing water right.

14 (2) An application for a temporary transfer under this section shall:

15 (a) Be submitted in writing to the Water Resources Department;

16 (b) Be accompanied by the appropriate fee for a change in the place of use and type of use as
 17 set forth in ORS 536.050;

18 (c) Include the information required under ORS 540.520 (2); and

19 (d) Include any other information the Water Resources Commission by rule may require.

20 (3)(a) Any portion of the use of a water right that is not temporarily transferred under this
 21 section may be used on the designated part of the lands described in the original water right permit,
 22 certificate or adjudication under ORS chapter 539 as evidenced by a court decree, if the use does
 23 not encompass more than the remaining portion of the lands, enlarge the water right or increase the
 24 rate, duty, total acreage benefited or season of use.

25 (b) The Water Resources Department shall designate the lands on which water may be applied
 26 under this subsection and shall prescribe mapping, measurement and recording requirements under
 27 this subsection.

28 (4) Upon expiration of a temporary transfer period, all uses of water for which a temporary
 29 transfer is allowed under this section shall revert automatically to the terms and conditions of the
 30 original water right permit, certificate or adjudication under ORS chapter 539 as evidenced by a
 31 court decree.

32 (5) The time during which water is used under an approved temporary transfer order does not
 33 apply toward a finding of forfeiture under ORS 540.610.

34 (6) The department may revoke a prior approval of a temporary transfer at any time if:

35 (a) The department finds that the transfer is causing injury to any existing water right; or

36 (b) The person fails to comply with the requirements prescribed by the department pursuant to
 37 subsection (3) of this section.

38 (7) The department shall provide notice, in the manner provided in ORS 540.520 [(5)] (6), that
 39 the department received an application for a temporary transfer under this section.

40 (8) The department may:

41 (a) Prescribe the duration of the temporary transfer period allowed under this section, up to 25
 42 years;

43 (b) Impose conditions in the terms of the temporary transfer, including revocation of the transfer
 44 for noncompliance with applicable state, local or federal laws; and

45 (c) Determine the parties that may participate in the review of applications submitted under this

1 section.

2 **SECTION 6. The amendments to ORS 540.520 by section 1 of this 2011 Act apply to change**
3 **of use applications that are approved or denied by the Water Resources Director on or after**
4 **the effective date of this 2011 Act.**

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