



**SB 425**  
**Testimony of Kimberley Priestley**  
**WaterWatch of Oregon**  
**Submitted to the Senate Committee on Environment and Natural Resources**  
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Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of natural flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers to sustain fish, wildlife, recreation and other public uses of Oregon's rivers, lakes and streams. We also work for balanced water laws and policies. WaterWatch has members across Oregon who care deeply about our rivers, their inhabitants and the effects of water laws and policies on these resources.

**WaterWatch urges you to support SB 425.**

**Problem statement:** Under Oregon law, a holder of a water right can change the type of use, place of use or point of diversion as long as that change does not cause "injury" to another existing water right. Injury is defined as a proposed transfer resulting in another, existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0100.

Where an instream water right exists, the instream right is protected against injury in the same manner as a consumptive water right. However, on the hundreds of Oregon stream reaches that do not have an instream water right in place to protect streamflows, or where an application has been made for an instream water right and a protest has been filed, the WRD cannot consider the effect of a proposed transfer on existing streamflows. This is so even if the transfer would completely dewater a fish bearing stream.

Examples of the types of transfers that could harm rivers if no instream water right is in place:

- A change in the diversion point from a downstream point on the stream to an upstream point.
- A change in the place of use that results in return flow changes at a point either downstream of the historical return flow location, or even on another stream.

In both these cases, where there are no intervening existing water rights to claim injury, the change could end up dewatering, or otherwise compromising, a formerly flowing section of stream.

Because most of Oregon's streams are over appropriated most months of the years, the majority new consumptive water uses are being supplied by either groundwater, stored water or, increasingly, transfers of old water rights to new uses. Transfer applications are on the rise and constitute roughly half the application pool in front of the Water Resources Department.

As reliance on water right transfers grow, the need to address this gap in the law becomes more pressing. Millions of federal, state and private dollars are being spent to try to restore streamflows across the state. This gap in the law allows some transfers of existing water rights to undermine restoration effort and to allow further harm to already degraded streams.

SB 425 simply seeks to preserve the existing status quo for fish and wildlife. Not a high bar, but a necessary one as the State works towards the recovery of listed species and embarks upon implementing the Integrated Water Resources Strategy.

**Proposed Solution under SB 425:** Amend the transfer statutes to require the WRD to make a finding that the proposed transfer will not result in a loss of instream habitat.

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**Common concerns/questions with regards to SB 425:**

**1. Would this bill allow environmental review of the underlying water right?**

**NO.** SB 425 does not provide for any review of the underlying water right to see if that right causes a loss of habitat. Rather it only calls for the review if the change to the underlying right would cause additional loss of habitat.

In other words, if farmer Sue has a water right that impacts a five mile stretch of instream habitat and she proposes a transfer that will continue to have the same effect on that same stretch of river, this bill would not require additional review. However, if farmer Sue proposes a change that would result in a changed impact to the stream so that ten miles of habitat were impacted instead of five, SB 425 would require an evaluation as to whether the impact on the additional five miles of habitat only constitutes a loss of habitat.

**2. This is a new concept: True or False**

**False.** This concept for a streamflow and/or fish review of transfers dates back to the late 1990's. In fact, the WRD developed a similar concept in 1998 that was focused on preventing transfers from impacting streamflows in a way that would affect sensitive and endangered species. The WRD presented this concept to the Water Resources Commission as a possible legislative concept for the 1999 session.

Additionally, WaterWatch raised similar concepts throughout the development of the Integrated Water Resources Strategy. And while not called out specifically, SB 425 is certainly consistent with the intent of the Strategy to develop further protections for streamflows.

**3. "This bill is too broad; would you be open to amendments?"**

**Yes.** In response to comments we have heard from both agencies and interest groups about the breadth of this proposed standard. WaterWatch has indicated that it is willing to amend and narrow the standard of review. The intent of this bill is in fact very narrow. The intent of this bill is to ensure that changes resulting from transfers of existing water rights simply do no additional harm to streamflows. Narrowing the standard from "no loss of instream habitat for native fish and wildlife" to something akin to "no impact to streamflows" would be acceptable.

Another suggestion made to WaterWatch is to narrow the bill to apply only to changes in point of diversion. According to WRD, applications to change the point of diversion upstream constitute approximately 10% of their transfer workload. As WRD receives approximately 200 transfer applications a year, narrowing the bill to changes in points of diversion would limit applicability to approximately 20 transfer applications a year.

#### **4. How many transfer applications would this impact?**

As intended, this would affect few transfer applications. The vast majority of transfers are approved without a finding of injury. Information from WRD shows that of the 714 transfer final orders issued by the WRD since January 1, 2010, only 11 were denied due to findings of injury or enlargement. This is 1.5 % of the transfers during that period. Given that the standard proposed in SB 425 is intended to resemble an “injury” standard for streams that don’t have an instream water right, we would not expect SB 425 would impact a significant number of new transfer applications.

That said, as of March 1, the WRD had indicated that a “strict reading” of SB 425, as drafted, would require the agency to send all applications on streams where there was not an instream water right to ODFW for review. This would mean that approximately 50% of transfer applications would be affected.

WRD has indicated that changing the standard in SB 425 to “no impact to streamflows” would significantly decrease the pool of affected transfers. Additionally, if review was limited to changes in point of diversion, SB 425 would affect approximately twenty transfer applications a year.