

Senate Bill 425

Sponsored by Senator PROZANSKI (at the request of WaterWatch of Oregon) (Presession filed.)

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**.

Requires that application to change place of use, point of diversion or use made of water be evaluated to determine whether granting of application would result in loss of in-stream habitat for native fish or native wildlife in stream reach not protected by existing in-stream water right. Prohibits granting application that would result in loss. Allows revocation of approval if change results in loss of habitat.

A BILL FOR AN ACT

1
2 Relating to preventing habitat loss in streams; creating new provisions; and amending ORS 537.132,
3 537.211, 537.803, 540.510, 540.520, 540.523, 540.524, 540.530, 540.531, 540.570 and 540.585.

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

5 **SECTION 1.** ORS 537.211 is amended to read:

6 537.211. (1) The approval of an application referred to in ORS 537.140 or 537.400 shall be set
7 forth in a water right permit issued by the Water Resources Department. The permit shall specify
8 the details of the authorized use and shall set forth any terms, limitations and conditions as the
9 department considers appropriate including but not limited to any applicable condition required
10 under ORS 537.289. A copy of the permit shall be filed as a public record in the department. The
11 permit shall be mailed to the applicant, and upon receipt of the permit the permittee may proceed
12 with the construction of the necessary works and may take all action required to apply the water
13 to the designated beneficial use and to perfect the proposed appropriation.

14 (2) Except as provided in subsection (6) of this section, if an application under ORS 537.140 or
15 537.400 indicates that the applicant does not have written authorization or an easement permitting
16 access to nonowned land crossed by the proposed ditch, canal or other work, the department may
17 issue a final order approving the application if the approval includes a condition requiring the ap-
18 plicant to obtain such written authorization, or easement or ownership of such land and to provide
19 the department with a copy of the written authorization, easement or evidence of ownership.

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

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

27 (a) The [*use of water on land to which the right is not appurtenant, the*] change of point of di-
28 version or [*the*] change in point of appropriation, **or the use of water on land to which the right**
29 **is not appurtenant:**

30 (A) Does not result in injury to an existing water right; **and**

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 **(B) Does not result in a loss of in-stream habitat for native fish or native wildlife in a**
2 **stream reach that is not protected by an existing in-stream water right;**

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

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

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

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

16 (f) The holder of the permit complies with the publication requirements of ORS 540.520 (5), if
17 applicable;

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

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

22 (5) Notwithstanding the requirements of subsection (4)(b) of this section, the holder of a water
23 right permit may change the place of use of all or any portion of water under the permit to land that
24 is not contiguous to the land to which the permit is appurtenant if:

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

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

30 (6) For an application made by or on behalf of a public corporation, the department may issue
31 a permit approving the application without requiring the applicant to obtain prior written authori-
32 zation or an easement permitting access to nonowned lands affected by the proposed project. How-
33 ever, *[nothing in this subsection shall be construed to]* **this subsection does not** allow any person
34 to trespass on the lands of another person.

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

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

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

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

45 (c) The permit shall include a condition that additional conditions may be added to the use of

1 water when a water right certificate is issued, or when the use of water is changed pursuant to ORS
2 540.520 and 540.530 to use for a chemical process mine operation.

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

5 **SECTION 2.** ORS 537.803 is amended to read:

6 537.803. (1) When an application for appropriation of water submitted under ORS 537.211,
7 537.400, 537.620, 543.210, 543.290 or for a change in the place of use of an existing water right sub-
8 mitted under ORS 540.520 proposes use of water outside the basin of origin, the application shall
9 include, in addition to any other information required, an analysis of the following:

10 (a) The amount of water in the basin of origin available for future appropriation.

11 (b) Projected future needs for water in the basin of origin.

12 (c) Benefits presently and prospectively derived from the return flow of water used within the
13 basin of origin that will be eliminated by the proposed out-of-basin use.

14 (d) The correlation between surface water and ground water in the basin of origin, and whether
15 the proposed use will be harmful to the supply of either.

16 (e) Injury to existing water rights of other appropriators or interference with planned uses or
17 developments within the basin of origin for which a permit has been issued or for which an appli-
18 cation is pending.

19 (f) Whether the proposed use will adversely affect the quantity or quality of water available for
20 domestic or municipal use within the basin of origin.

21 (g) Whether the proposed use will adversely affect public uses, as defined in ORS 537.332, in the
22 basin of origin.

23 **(h) Whether the proposed use would result in a loss of in-stream habitat for native fish
24 or native wildlife in a stream reach that is not protected by an existing in-stream water
25 right.**

26 [(h)] (i) Alternative sources of water for the proposed use that would not rely on transfer of
27 water out of its basin of origin.

28 (2) This section [shall apply] **applies** only to an application filed on and after October 3, 1989.

29 (3) This section [shall] **does** not apply to an application for exchange of water under ORS
30 540.533 to 540.543.

31 (4) This section [shall] **does** not apply to an application for the transfer of less than 0.5 cubic
32 feet per second of water.

33 (5) Subsection (1) of this section [shall] **does** not apply to an appropriation or diversion by a city
34 to facilitate regional municipal water service if the city has historically transported water between
35 the basin of origin and proposed receiving basins identified in the application.

36 **SECTION 3.** ORS 540.510 is amended to read:

37 540.510. (1) Except as provided in subsections [(2) to (8)] **(3) to (9)** of this section, all water used
38 in this state for any purpose shall remain appurtenant to the premises upon which it is used and
39 no change in use or place of use of any water for any purpose may be made without compliance
40 with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to
41 transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and
42 place of use, the point of diversion or the use theretofore made of the water in all cases without
43 losing priority of the right theretofore established. A district may change the place of use in the
44 manner provided in ORS 540.572 to 540.580 in lieu of the method provided in ORS 540.520 and
45 540.530.

1 (2) When an application for change of the use or place of use for a primary water right is sub-
 2 mitted in accordance with this section, the applicant also shall indicate whether the land described
 3 in the application has an appurtenant supplemental water right or permit. If the applicant also in-
 4 tends to transfer the supplemental water right or permit, the applicant also shall include the infor-
 5 mation required under ORS 540.520 (2) for the supplemental water right or permit. If the applicant
 6 does not include the supplemental water right or permit in the transfer application, the Water Re-
 7 sources Department shall notify the applicant that the supplemental water right or permit will be
 8 canceled before the department issues the order approving the transfer of the primary water right,
 9 unless within 30 days the applicant modifies the application to include the supplemental water right
 10 or permit or withdraws the application. The department may approve the transfer of the supple-
 11 mental water right or permit in accordance with the provisions of ORS 540.520 and 540.530. The
 12 department *[shall]* **may** not approve the transfer of a supplemental water right or permit if the
 13 transfer would result in enlargement of the original water right or injury to an existing water right
 14 **or result in a loss of in-stream habitat for native fish or native wildlife in a stream reach**
 15 **that is not protected by an existing in-stream water right.** If the department approves the
 16 transfer of the primary water right but does not approve the transfer of the supplemental water
 17 right or permit, the department shall notify the applicant of the department's intent to cancel that
 18 portion of the supplemental water right or permit described in the transfer application before the
 19 department issues the primary water right transfer order, unless the applicant withdraws the
 20 transfer application within 90 days.

21 [2] (3) Subject to the limitations in ORS 537.490, any right to the use of conserved water al-
 22 located by the Water Resources Commission under ORS 537.470 may be severed from the land and
 23 transferred or sold after notice to the commission as required under ORS 537.490.

24 [3(a)] (4)(a) Any water used under a permit or certificate issued to a municipality, or under
 25 rights conferred by ORS 538.410 to 538.450, or under the registration system set forth in ORS
 26 537.132, may be applied to beneficial use on lands to which the right is not appurtenant if:

27 (A) The water is applied to lands *[which]* **that** are acquired by annexation or through merger,
 28 consolidation or formation of a water authority, *[so]* **as** long as the rate and use of water allowed
 29 in the original certificate is not exceeded;

30 (B) The use continues to be for municipal purposes, *[and]* would not interfere with or impair
 31 prior vested water rights **and would not result in a loss of in-stream habitat for native fish or**
 32 **native wildlife in a stream reach that is not protected by an existing in-stream water right;**
 33 or

34 (C) The use is authorized under a permit granted under ORS 468B.050 or 468B.053 and for which
 35 a reclaimed water registration form has been filed under ORS 537.132.

36 (b) As used in this subsection, "municipality" means a city, a port formed under ORS 777.005 to
 37 777.725, 777.915 to 777.953 and 778.010, a domestic water supply district formed under ORS chapter
 38 264, a water supplier as defined in ORS 448.115 or a water authority formed under ORS chapter 450.

39 [4] (5) Pursuant to the provisions of ORS 540.570 or 540.585, any water used under a permit
 40 or certificate issued to a district may be applied to beneficial use on lands within the district to
 41 which the right is not appurtenant.

42 [5] (6) The relocation of a point of diversion as necessary to follow the movements of a nat-
 43 urally changing stream channel does not constitute a change in point of diversion for purposes of
 44 ORS 540.520 if:

45 (a) The diversion point stays within 500 feet of the point of diversion on record with the Water

1 Resources Department;

2 (b) The change does not move the diversion point upstream or downstream beyond the diversion
3 point of another appropriator; and

4 (c) The diversion is provided with a proper fish screen, if requested by the State Department
5 of Fish and Wildlife.

6 [(6)] (7) *[In the event that]* If government action results in or creates a reasonable expectation
7 of a change in the surface level of a surface water source that impairs or threatens to impair access
8 to a point of diversion authorized by a water right permit, certificate or decree, the owner of the
9 water right may change the point of diversion or add an additional point of diversion in accordance
10 with the provisions of this section in lieu of complying with the requirements of ORS 540.520 and
11 540.530. Before changing the point of diversion, the water right owner shall provide written notice
12 of the proposed change to the Water Resources Department. Within 15 days after receipt of such
13 notice, the department shall provide notice by publication in the department's public notice of water
14 right applications. Within 60 days after the department receives notice from the owner, the Water
15 Resources Director, by order, shall approve the change unless the director finds the changes will
16 result in injury to other existing water rights. All other terms and conditions of the water right
17 shall remain in effect.

18 [(7)] (8) The sale or lease of the right to the use of conserved water under ORS 537.490 does
19 not constitute a change of use or a change in the place of use of water for purposes of ORS 540.520.

20 [(8)] (9) Ground water applied to an exempt use as set forth in ORS 537.141 or 537.545 may be
21 subsequently applied to land for irrigation purposes under ORS 537.141 (1)(i) or 537.545 (1)(g) without
22 application for a change in use or place of use under this section.

23 **SECTION 4.** ORS 540.520 is amended to read:

24 540.520. (1) Except when the application is made under ORS 541.327 or when an application for
25 a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for
26 irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the
27 place of use, the point of diversion, or the use made of the water, an application to make such
28 change, as the case may be, shall be filed with the Water Resources Department.

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

30 (a) The name of the owner;

31 (b) The previous use of the water;

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

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

34 (e) The use that is proposed to be made of the water;

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

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

39 (3) If the application required under subsection (1) of this section is necessary to allow a change
40 in a water right pursuant to ORS 537.348, is necessary to complete a project funded under ORS
41 541.932, or is approved by the State Department of Fish and Wildlife as a change that will result in
42 a net benefit to fish and wildlife habitat, the department, at the discretion of the Water Resources
43 Director, may waive or assist the applicant in satisfying the requirements of subsection (2)(c) and
44 (d) of this section. The assistance provided by the department may include, but need not be limited
45 to, development of an application map.

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

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

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

16 (7)(a) **The department shall hold a hearing on the proposed changes** if a timely protest is
 17 filed[,] or **if**, in the opinion of the Water Resources Director, a hearing is necessary to determine
 18 whether the proposed changes as described by the application would result in [*injury to existing*
 19 *water rights, the department shall hold a hearing on the matter.*]:

20 (A) **Injury to an existing water right; or**

21 (B) **A loss of in-stream habitat for native fish or native wildlife in a stream reach that**
 22 **is not protected by an existing in-stream water right.**

23 (b) Notice and conduct of the hearing shall be under the provisions of ORS chapter 183, per-
 24 taining to contested cases, and shall be held in the area where the rights are located unless all
 25 parties and persons who filed a protest under this subsection stipulate otherwise.

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

30 (9) A water right transfer under subsection (1) of this section is not required for a general in-
 31 dustrial use that was not included in a water right certificate issued for a specific industrial use if:

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

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

37 (c) The person who makes the change in water use provides the following information to the
 38 Water Resources Department:

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

40 (B) The water right certificate number;

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

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

44 **SECTION 5.** ORS 540.523 is amended to read:

45 540.523. (1) In accordance with the provisions of this section, any person who holds a water use

1 subject to transfer may request that the Water Resources Department approve the temporary
 2 transfer of place of use and, if necessary to convey water to the new temporary place of use, tem-
 3 porarily change the point of diversion or point of appropriation for a period not to exceed five years.
 4 An application for a temporary transfer shall:

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

6 (b) Be accompanied by the appropriate fee for a change in the place of use as set forth in ORS
 7 536.050;

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

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

10 (2) Notwithstanding the notice and waiting requirements under ORS 540.520, the department
 11 shall approve by order a request for a temporary transfer under this section if the department de-
 12 termines that the temporary transfer will not [*injure any existing water right.*] **result in:**

13 (a) **Injury to any existing water right; or**

14 (b) **A loss of in-stream habitat for native fish or native wildlife in any stream reach that**
 15 **is not protected by an existing in-stream water right.**

16 (3) All uses of water for which a temporary transfer is allowed under this section shall revert
 17 automatically to the terms and conditions of the water use subject to transfer upon expiration of the
 18 temporary transfer period.

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

21 (5) The department may revoke a prior approval of the temporary transfer at any time if the
 22 department finds that the transfer is [*causing*] **resulting in:**

23 (a) Injury to any existing water right[.]; **or**

24 (b) **A loss of in-stream habitat for native fish or native wildlife in any stream reach that**
 25 **is not protected by an existing in-stream water right.**

26 (6) Any map that may be required under subsection (1) of this section need not be prepared by
 27 a certified water right examiner.

28 (7) The lands from which the water right is removed during the period of a temporary transfer
 29 shall receive no water under the transferred water right.

30 (8) When an application for a temporary change of the place of use for a primary water right
 31 is submitted in accordance with this section, the applicant also shall indicate whether the land de-
 32 scribed in the application has an appurtenant supplemental water right or permit. If the applicant
 33 also intends to temporarily transfer the supplemental water right or permit, the applicant also shall
 34 include the information required under ORS 540.520 (2) for the supplemental water right or permit.
 35 If the applicant does not include the supplemental water right or permit in the temporary transfer
 36 application, the Water Resources Department shall notify the applicant that the supplemental water
 37 right or permit will be canceled before the department issues the order approving the temporary
 38 transfer of the primary water right, unless within 30 days the applicant modifies the application to
 39 include the supplemental water right or permit or withdraws the application. The department may
 40 approve the temporary transfer of the supplemental water right or permit in accordance with the
 41 provisions of this section. The department may not approve the temporary transfer of a supplemental
 42 water right or permit if the temporary transfer would result in:

43 (a) Enlargement of the original water right [*or*];

44 (b) Injury to an existing water right[.]; **or**

45 (c) **A loss of in-stream habitat for native fish or native wildlife in a stream reach that**

1 **is not protected by an existing in-stream water right.**

2 (9) If the department approves the temporary transfer of the primary water right but does not
3 approve the temporary transfer of the supplemental water right or permit, the department shall no-
4 tify the applicant of the department's intent not to allow the temporary transfer of the supplemental
5 water right or permit before the department issues the order for the temporary transfer of the pri-
6 mary water right. If the department does not allow the temporary transfer of the supplemental right,
7 the supplemental right shall remain appurtenant to the land described in the application, but may
8 not be exercised until the primary right reverts to the original water use. If the primary water right
9 does not revert soon enough to allow use of water under the supplemental right within five years,
10 the supplemental right shall become subject to cancellation for nonuse under ORS 540.610.

11 [(9)] (10) In issuing an order under subsection (2) of this section, the department shall include
12 any condition necessary to:

13 (a) Protect other water rights[.]; or

14 (b) **Avoid causing a loss of in-stream habitat for native fish or native wildlife in a stream**
15 **reach that is not protected by an existing in-stream water right.**

16 **SECTION 6.** ORS 540.524 is amended to read:

17 540.524. (1) Notwithstanding ORS 540.510 or 540.670, upon approval of an application submitted
18 to the Water Resources Department, the holder of both a primary water right originating from a
19 surface water source and a supplemental water right permit or certificate originating from a ground
20 water source may substitute the use of the supplemental water right for the primary water right.
21 A substitution may not be made under this subsection if the use of the supplemental water right
22 results in an enlargement or expansion of the primary water right. This subsection does not au-
23 thorize a change in place of use, type of use, point of diversion or point of appropriation.

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

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

31 (4) The Water Resources Director shall issue an order approving or denying the substitution. If
32 the proposed substitution will result in injury to other water rights, **or will result in a loss of in-**
33 **stream habitat for native fish or native wildlife in a stream reach that is not protected by**
34 **an existing in-stream water right**, the director shall prohibit or condition the use to avoid or
35 mitigate the injury. The director shall issue an order approving or denying the substitution within
36 90 days after the department receives an application under subsection (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 **or causes a loss of in-stream habitat for**
44 **native fish or native wildlife in a stream reach that is protected by an existing in-stream**
45 **water right.** Upon termination, the substituted primary and supplemental water rights shall revert

1 back to their original status.

2 **SECTION 7.** ORS 540.530 is amended to read:

3 540.530. (1)(a) If, after hearing or examination, the Water Resources Commission finds that a
4 proposed change can be effected without injury to [*existing water rights*] **an existing water right,**
5 **and without loss of in-stream habitat for native fish or native wildlife in a stream reach that**
6 **is not protected by an existing in-stream water right,** the commission shall make an order ap-
7 proving the transfer and fixing a time limit within which the approved changes may be completed.

8 (b) If, after hearing or examination, the commission finds that a proposed change in point of
9 diversion cannot be effected without injury to [*existing water rights,*] **an existing water right, ex-**
10 **cept as provided in paragraph (c) of this subsection,** upon receipt by the commission of an affi-
11 davit consenting to the change from every holder of an affected water right, the commission may
12 make an order approving the transfer and fixing a time limit within which the approved changes
13 may be completed.

14 (c) **If, after hearing or examination, the commission finds that a proposed change in point**
15 **of diversion cannot be effected without a loss of in-stream habitat for native fish or native**
16 **wildlife in a stream reach that is not protected by an existing in-stream water right, the**
17 **commission shall make an order:**

18 (A) **Denying the transfer;**

19 (B) **Conditioning the transfer to avoid the loss; or**

20 (C) **Conditioning the transfer in a manner that the State Department of Fish and Wildlife**
21 **recommends for producing a net benefit.**

22 [(c)] (d) If, after hearing or examination, the commission finds that a proposed change in point
23 of diversion cannot be effected without injury to an in-stream water right granted pursuant to a
24 request under ORS 537.336 or an in-stream water right created pursuant to ORS 537.346 (1), the
25 Water Resources Department may consent to the change only upon a recommendation that the de-
26 partment do so from the agency that requested the in-stream water right. The agency that requested
27 the in-stream water right may recommend that the department consent to the change only if the
28 change will result in a net benefit to the resource consistent with the purposes of the in-stream
29 water right.

30 [(d)(A)] (e)(A) If an in-stream water right would be injured by a proposed change under para-
31 graph [(c)] (d) of this subsection, the department shall obtain a recommendation from the agency
32 that requested the in-stream water right. If the recommendation of the agency is to consent to the
33 change, the department shall provide public notice of the recommendation and, consistent with state
34 laws regarding cooperation with Indian tribes in the development and implementation of state
35 agency programs that affect tribes or rights and privileges of tribes, the department shall consult
36 with affected Indian tribes.

37 (B) The recommendation of an agency under this paragraph must be in writing and, if the rec-
38 ommendation is to consent to the change, must describe the extent of the injury to the in-stream
39 water right, the effect on the resource and the net benefit that will occur as a result of the proposed
40 change. The recommendation may include any proposed conditions that are necessary to ensure that
41 the proposed change will be consistent with the recommendation.

42 (C) In determining whether a net benefit will result from the proposed change, the recommen-
43 dation of an agency must include an analysis of the cumulative impact of any previous changes un-
44 der paragraphs (b) and [(c)] (d) of this subsection that allow injury to the affected in-stream water
45 right.

1 (D) A person may comment on the recommendation of an agency. The comment must be in
 2 writing and must be received by the department within 30 days after publication of notice under this
 3 paragraph. If a written comment received by the department requests a meeting on the proposed
 4 change, the department and the agency that requested the in-stream water right shall hold a joint
 5 public meeting within 90 days of the receipt of the comment requesting a meeting.

6 [(e)(A)] (f)(A) If, after review of public comments and consultation with the agency that re-
 7 quested the in-stream water right, the agency that requested the in-stream water right does not
 8 withdraw its recommendation to consent to the change, the department may approve the change
 9 consistent with the requirements of paragraphs (b) and [(c)] (d) of this subsection.

10 (B) An order approving a change under paragraph [(c)] (d) of this subsection shall include
 11 written findings on the extent of the injury to the in-stream water right, the effect on the resource
 12 and the net benefit that will occur as a result of the change. The order shall include any conditions
 13 necessary to ensure that the change will be consistent with the findings and ensure that the change
 14 will result in a continued net benefit to the resource consistent with the purposes of the in-stream
 15 water right.

16 (C) In determining whether a net benefit will result from the change, the order of the depart-
 17 ment must include an analysis of the cumulative impact of any previous changes approved under
 18 paragraphs (b) and [(c)] (d) of this subsection that allow injury to the affected in-stream water right.

19 [(f)] (g) The time allowed by the commission for completion of an authorized change under
 20 [paragraphs (a) to (e) of] this subsection may not be used when computing a five-year period of
 21 nonuse under the provisions of ORS 540.610 (1).

22 (2)(a) If a certificate covering the water right has been previously issued, the commission shall
 23 cancel the previous certificate or, if for an irrigation district, the commission may modify the pre-
 24 vious certificate and, when proper proof of completion of the authorized changes has been filed with
 25 the commission, issue a new certificate or, if for an irrigation district, modify the previous certif-
 26 icate, preserving the previously established priority of rights and covering the authorized changes.
 27 If only a portion of the water right covered by the previous certificate is affected by the changes,
 28 a separate new certificate may be issued to cover the unaffected portion of the water right.

29 (b) If [the] a change authorized under subsection (1) of this section is necessary to allow a
 30 change in a water right pursuant to ORS 537.348, is necessary to complete a project funded under
 31 ORS 541.932, or is approved by the State Department of Fish and Wildlife as a change that will re-
 32 sult in a net benefit to fish and wildlife habitat, the Water Resources Department, at the discretion
 33 of the Water Resources Director, may waive or assist the applicant in satisfying any of the proof
 34 of completion requirements of paragraph (a) of this subsection. The assistance provided by the de-
 35 partment may include, but need not be limited to, development of a final proof survey map and claim
 36 of beneficial use.

37 (3) Upon receiving notification of the merger or consolidation of municipal water supply entities,
 38 or the formation of a water authority under ORS chapter 450, the commission shall cancel the pre-
 39 vious certificates of the entities replaced by the merger, consolidation or formation and issue a new
 40 certificate to the newly formed municipality or water authority. The new certificate shall preserve
 41 the previously established priority of rights of the replaced entities and shall allow beneficial use
 42 of the water on any lands acquired in the merger, consolidation or formation.

43 **SECTION 8.** ORS 540.531 is amended to read:

44 540.531. (1) Notwithstanding ORS 537.515 and 537.535, an owner of a surface water use subject
 45 to transfer may apply for a transfer of the point of diversion to allow the appropriation of ground

1 water if the proposed transfer complies with the requirements of subsection (2) or (3) of this section
 2 and with the requirements for a transfer in point of diversion specified in ORS 540.520 and 540.530.

3 (2) The Water Resources Department may allow a transfer of the point of diversion under sub-
 4 section (1) of this section if:

5 (a)(A) The new point of diversion appropriates ground water from an aquifer that is hydrau-
 6 lically connected to the authorized surface water source;

7 (B) The proposed change in point of diversion will not result in enlargement of the original
 8 water right or in injury to other water right holders;

9 **(C) The proposed change in point of diversion will not result in a loss of in-stream habitat**
 10 **for native fish or native wildlife in a stream reach that is not protected by an existing in-**
 11 **stream water right;**

12 [(C)] (D) The use of the new point of diversion will affect the surface water source similarly to
 13 the authorized point of diversion specified in the water use subject to transfer; and

14 [(D)] (E) The withdrawal of ground water at the new point of diversion is located within 500 feet
 15 of the surface water source and, when the surface water source is a stream, is also located within
 16 1,000 feet upstream or downstream of the original point of diversion as specified in the water use
 17 subject to transfer; or

18 (b) The new point of diversion is not located within the distance requirements set forth in par-
 19 agraph [(a)(D)] (a)(E) of this subsection, the holder of the water use subject to transfer submits to
 20 the department evidence prepared by a licensed geologist that demonstrates that the use of the
 21 ground water at the new point of diversion will meet the criteria set forth in paragraph (a)(A) to
 22 [(C)] (D) of this subsection.

23 (3) Notwithstanding subsection (2) of this section, the department shall allow a transfer of the
 24 point of diversion under subsection (1) of this section in the Deschutes Basin ground water study
 25 area if:

26 (a) The new point of diversion appropriates ground water from an aquifer that is hydraulically
 27 connected to the authorized surface water source;

28 (b) The proposed change in the point of diversion will not result in enlargement of the original
 29 water right or in injury to other water right holders; [and]

30 **(c) The proposed change in the point of diversion will not result in a loss of in-stream**
 31 **habitat for native fish or native wildlife in a stream reach that is not protected by an existing**
 32 **in-stream water right; and**

33 [(c)] (d) The use of the new point of diversion will affect the surface water source hydraulically
 34 connected to the authorized point of diversion specified in the water use subject to transfer. The
 35 department may not require that the use of the new point of diversion affect the surface water
 36 source similarly to the authorized point of diversion specified in the water use subject to transfer
 37 under this subsection.

38 (4) All applicable restrictions that existed at the original point of diversion shall apply at the
 39 new point of diversion allowed under this section.

40 (5) The new point of diversion shall retain the original date of priority. However, if within five
 41 years after approving the transfer, the department finds that the transfer results in substantial in-
 42 terference with existing ground water rights that would not have occurred in the absence of the
 43 transfer, the new point of diversion shall be subordinate to any existing right injured by the trans-
 44 ferred water right or permit.

45 (6)(a) The department shall approve an application to return to the last authorized surface water

1 point of diversion if a holder of a water use subject to transfer submits an application to the de-
2 partment within five years after the department approves a transfer under this section.

3 (b) The department shall approve an application to return to the last authorized surface water
4 point of diversion after five years of the date the department allows a transfer under subsection (3)
5 of this section if a holder of a water use subject to transfer submits an application to the depart-
6 ment, and the return will not result in injury to an existing water right **or result in a loss of in-**
7 **stream habitat for native fish or native wildlife in a stream reach that is not protected by**
8 **an existing in-stream water right.**

9 (7) For transfers allowed under this section, the department shall require mitigation measures
10 to prevent depletion from any surface water source not specified in the permit or certificated or
11 decreed water right, except that the department may not require mitigation measures if the transfer
12 complies with subsection (3) of this section.

13 (8) The Water Resources Commission shall adopt rules that prescribe:

14 (a) The process for reviewing applications submitted under this section;

15 (b) The persons to whom the department shall provide notice of the receipt of an application
16 submitted under this section; and

17 (c) The persons who may participate in the process of reviewing applications submitted under
18 this section.

19 (9) As used in this section:

20 (a) "Deschutes Basin ground water study area" means the part of the Deschutes River Basin
21 that is designated by the Water Resources Commission by rule.

22 (b) "Similarly" means that the use of ground water at the new point of diversion affects the
23 surface water source specified in the permit or certificated or decreed water right and would result
24 in stream depletion of at least 50 percent of the rate of appropriation within 10 days of continuous
25 pumping.

26 **SECTION 9.** ORS 540.570 is amended to read:

27 540.570. (1) *[Provided that]* **If** the proposed transfer complies with all of the provisions of this
28 subsection, and will not result in injury to any existing water right **or result in a loss of in-stream**
29 **habitat for native fish or native wildlife in any stream reach that is not protected by an ex-**
30 **isting in-stream water right**, a district with a manager may, for one irrigation season, temporarily
31 transfer the place of use of water appurtenant to any land within the legal boundaries of the district
32 to an equal acreage elsewhere within the legal boundaries of that district or temporarily transfer
33 the type of use identified in a right to store water. A temporary transfer of the place of use may
34 occur if:

35 (a) The rate and duty, and the total number of acres to which water will be applied under the
36 transfer, do not exceed existing limits on the water use subject to transfer;

37 (b) The type of use authorized under the water use subject to transfer remains the same; and

38 (c) The land from which the water use is being transferred does not receive any water under
39 the right being transferred during the irrigation season in which the change is made.

40 (2) *[Provided that]* **If** the proposed transfer complies with all the provisions of this subsection
41 and will not result in injury to or enlargement of an existing water right **or result in a loss of**
42 **in-stream habitat for native fish or native wildlife in a stream reach that is not protected**
43 **by an existing in-stream water right**, a district with a manager may, for one irrigation season,
44 temporarily change the point of diversion or appropriation combined with a change in place of use,
45 change the point of diversion *[in the event that]* **if** an emergency prevents the district from diverting

1 water from its authorized point of diversion, change the point of diversion to allow for the appro-
 2 priation of ground water or change a primary right to a supplemental right if:

3 (a) The land on which the water is to be used is within the district's legal boundaries established
 4 pursuant to ORS chapter 545, 547, 552, 553 or 554;

5 (b) The other terms of the permit or certificate remain the same, including the beneficial use for
 6 which the water is used and the number of acres to which water is applied;

7 (c) The diversion is provided with a proper fish screen, if required by the Water Resources De-
 8 partment; and

9 (d) For a proposal to transfer the point of diversion to allow for the appropriation of ground
 10 water, the proposed change meets the standards set forth in ORS 540.531 (2).

11 (3) When a district or an owner or an owner's agent within a district who is subject to the
 12 charges or assessments of the district wishes to use water on alternate acreage within the district,
 13 if the district has approved the owner's request, the district shall submit to the department a peti-
 14 tion seeking a temporary transfer under this section. The district shall submit the petition prior to
 15 making the proposed change. The petition may contain changes to one or more tax lots within the
 16 district and shall:

17 (a) Include the information required under ORS 540.574 (3);

18 (b) Be accompanied by a map in a form satisfactory to the department and certified by the dis-
 19 trict. If the water right is on a tract of land of five acres or less, the assessor's tax map with a
 20 notation of the acres of water right shall be sufficient for identification of the tract and place of
 21 use;

22 (c) Include a statement that a written authorization for the transfer from each landowner af-
 23 fected by the particular temporary transfer is on file with the district;

24 (d) Include any other information required by rules of the Water Resources Commission; and

25 (e) Include a fee in the amount required under ORS 536.050 (1)(i).

26 (4) The district shall notify each affected landowner that the department may reject the transfer
 27 or may require mitigation to avoid injury to other water rights. Upon receipt of a completed petition
 28 under subsection (3) of this section, the department shall place a summary of the petition in the
 29 weekly notice published by the department. The department shall accept written public comments
 30 on the petition for 30 days following publication of the weekly notice. **In determining whether to**
 31 **condition, reject or revoke a temporary transfer**, the department shall consider comments that
 32 pertain to the potential for:

33 (a) Injury to an existing water right [*or to*];

34 (b) The enlargement of the water use subject to transfer [*in determining whether to condition,*
 35 *reject or revoke a temporary transfer.*]; **or**

36 (c) **A loss of in-stream habitat for native fish or native wildlife in a stream reach that**
 37 **is not protected by an existing in-stream water right.**

38 (5) Use of water on lands from which the right is transferred and in the new temporary location
 39 during the same irrigation season or calendar year is prohibited and may subject the district and
 40 the landowner to civil penalties.

41 (6) The department may condition, reject or revoke a temporary transfer at any time to the ex-
 42 tent necessary to avoid injury if the department finds the transfer is causing injury to an existing
 43 water right **or resulting in a loss of in-stream habitat for native fish or native wildlife in a**
 44 **stream reach that is not protected by an existing in-stream water right.**

45 (7) Upon expiration of the temporary transfer period, all uses of water for which a temporary

1 transfer is allowed under this section shall revert automatically to the terms and conditions of the
2 original water right permit, certificate or adjudication under ORS chapter 539 as evidenced by a
3 court decree.

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

6 **SECTION 10.** ORS 540.585 is amended to read:

7 540.585. (1) In accordance with the provisions of this section, a person may request that the
8 Water Resources Department approve the temporary transfer of the place of use and type of use and
9 temporarily change the point of diversion if necessary to convey water to the new temporary place
10 of use, of all or a portion of a water right, for a period not to exceed 25 years if:

11 (a) The person holds a water use subject to transfer;

12 (b) The type of use specified in the original water use subject to transfer is irrigation;

13 (c) The person to whom the right is transferred is:

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

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

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

19 (e) The proposed temporary transfer will not result in injury to any existing water right **or re-**
20 **sult in a loss of in-stream habitat for native fish or native wildlife in any stream reach that**
21 **is not protected by an existing in-stream water right.**

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

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

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

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

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

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

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

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

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

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

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

44 **(b) The department finds that the transfer is causing a loss of in-stream habitat for na-**
45 **tive fish or native wildlife in any stream reach that is not protected by an existing in-stream**

1 **water right; or**

2 [(b)] (c) The person fails to comply with the requirements prescribed by the department pursuant
3 to subsection (3) of this section.

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

6 (8) The department may:

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

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

11 (c) Determine the parties that may participate in the review of applications submitted under this
12 section.

13 **SECTION 11.** ORS 537.132 is amended to read:

14 537.132. (1) The provisions of ORS 537.130 requiring application for a permit to appropriate
15 water shall not apply to the use of reclaimed water, if:

16 (a) The use of reclaimed water is authorized by the national pollutant discharge elimination
17 system or water pollution control facilities permit issued pursuant to ORS 468B.050 or 468B.053;

18 (b) The Department of Environmental Quality, in reviewing an application for a permit pursuant
19 to ORS 468B.050 or 468B.053, has consulted with the State Department of Fish and Wildlife on the
20 impact to fish and wildlife to determine that the application of reclaimed water under ORS 537.130,
21 537.131, 537.132, 540.510 and 540.610 shall not have a significant negative impact on fish and wildlife;
22 and

23 (c) The Department of Environmental Quality has determined the use of reclaimed water is in-
24 tended to improve the water quality of the receiving stream.

25 (2) Any person using or intending to use reclaimed water shall file with the Water Resources
26 Department a reclaimed water registration form setting forth the following:

27 (a) Name and mailing address of the registrant;

28 (b) The date the use of reclaimed water is initiated;

29 (c) Source of reclaimed water supply, including a description of the location of the reclaimed
30 water treatment facility and the name and mailing address of the owner and operator of the facility;

31 (d) Nature of the use of the reclaimed water;

32 (e) Amount of reclaimed water used or proposed to be used;

33 (f) Location and description of the ditch, canal, pipeline or any other conduction facility used
34 or to be used to transport the reclaimed water from the treatment facility to the place of use;

35 (g) A statement declaring the existence of a written contract or agreement to provide reclaimed
36 water including the name and address of the reclaimed water provider and the date and terms of
37 such contract or agreement;

38 (h) A description of the season of use and the place of use of the reclaimed water, and any re-
39 strictions applicable to the use of the reclaimed water; and

40 (i) If the reclaimed water is used in lieu of using water under an existing water right, the ap-
41 plication, permit and certificate number of such right, or if the right is granted pursuant to a decree
42 of circuit court, the volume and page number setting forth the right.

43 (3) If a municipality has discharged waste water into a natural watercourse for five or more
44 years, and the discharge represents more than 50 percent of the total average flow of the natural
45 watercourse and if such discharge would cease as a result of the use of reclaimed water in accord-

1 ance with the provisions of [*ORS 540.510 (3) and this section, the director of the department*] **this**
2 **section and ORS 540.510 (4), the Water Resources Director** shall notify any persons who, ac-
3 cording to the **Water Resources** Department records, have a water right that may be affected by
4 the cessation of the discharge by the municipality.

5 (4) If a person holding an affected water right demonstrates to the department that the cessation
6 of discharge by the municipality substantially impairs the ability to satisfy a water right, the person
7 shall be entitled to a preference to the use of the reclaimed water. However, the delivery of the
8 reclaimed water to the person claiming such preference shall be accomplished through a conveyance
9 facility or channel other than a natural watercourse.

10 (5) If a municipality has a less expensive alternative for the disposal and distribution of the re-
11 claimed water, the municipality shall not be obligated to incur expenses or cost beyond the expenses
12 or costs of such alternative.

13 (6) The Water Resources Commission shall adopt rules to implement the notice and preference
14 provisions and impairment evaluation standards of this section.

15 **SECTION 12. The amendments to ORS 537.132, 537.211, 537.803, 540.510, 540.520, 540.523,**
16 **540.524, 540.530, 540.531, 540.570 and 540.585 by sections 1 to 11 of this 2013 Act apply to ap-**
17 **plications filed on or after the effective date of this 2013 Act.**

18