



March 18, 2021

**House Committee on Water
Representative Helm, Chair**

**Testimony on Transfers of Stored Water
Submitted by Racquel Rancier, Policy Manager**

Thank you for the opportunity to provide information related to House Bills 2144, 3091, and 3103, which all address the Oregon Water Resources Department's authority to approve transfers of stored water rights. This testimony is provided for informational purposes and the Department is not taking a position on these bills.

Background

A water right is necessary to *use* or *store* water in Oregon. Rights to *use* water specify the place where the water is used, the type of use of the water, and the point that the water is diverted from a water source, such as a stream, reservoir, or well. If there is a desire to change one of these three components of a water *use* right, one must apply for a "transfer."

Similarly, rights to *store* water specify the location of the reservoir, the location of the dam (if applicable), the point where water is diverted (if applicable), and the purpose/type of use for which the water is stored. Rights to *store* water are known as "primary" rights, and act as a source of water supply for "secondary" rights that *use* the stored water for purposes such as irrigation or municipal uses.

While transfers have been common for rights to *use* water, transfers for rights to *store* water have been less common, and the Department has debated internally over the years whether there is clear authority for storage rights to be changed through the transfer process. Water law has a long history in common law, dating back to the 1800s, with the Water Code being adopted in 1909. While there have been some updates to meet societal demands for changes in how water is managed, much of the text is still very similar to the original 1909 code. As a result, determining legislative intent and interpreting the statutes can be a challenge.

Prior to 2018, the Department occasionally received and processed applications for changes in the point of diversion, location of reservoirs, and, more often, changes in the type of use identified in the right to store water (e.g. from irrigation to multi-purpose). Recent proposals to change the location of stored water and an expectation of increased interest in transfers of storage rights resulted in the Department taking a closer look at its authority. In 2018, a Department of Justice review concluded that current law, with some exceptions, does not authorize the transfer of storage rights. As a result, while the Department has attempted to conform the law to new needs, in this instance the existing authorities do not clearly provide the Department with authorization to change storage rights.

House Bill 2144:

The Department understands that without the ability to change primary storage rights, water right holders will not be able to manage water as necessary to meet emerging needs, opportunities, or challenges. The Department believes that a fix is necessary to allow changes to storage water rights to change the location of stored water, the type of use, and the point of diversion. As a result, the Department intended to work with stakeholders during the interim of 2019-2021 on a potential solution. With COVID, budget reductions, and wildfires, the Department's did not have the capacity to work on a solution. Initial interviews with stakeholders did not identify a clear path forward. As a result, the Department introduced House Bill 2144 as a placeholder in the event that a path forward was identified. Given Representative Helm's leadership on this issue during this session, the Department has deferred work on this bill and it remains a placeholder that the Department does not seek to move forward in its current form.

House Bill 3103

House Bill 3103 and the -1 amendment would allow for changes to the type of use of a right to store water. It does not authorize changes in the location of stored water or the point of diversion of a right to store water.

House Bill 3091

House Bill 3091 and the associated -1 amendment would establish a task force to work on transfers in the location of stored water.

The -4 amendment would provide the option for a person holding a right to store water that intends to apply to transfer a right to store water to obtain a declaratory ruling from the Department within 60 days of the petition being submitted on the Department's authority to transfer rights to store water and to be able to petition the Supreme Court directly for judicial review of the declaratory ruling.

The current authority to petition a state agency for a declaratory ruling is provided in ORS 183.410 and the process is outlined in the Department of Justice's model rules of procedure in Oregon Administrative Rules [137-002](#).

While the -4 states that the provisions of OAR 183.410 do not apply, it does state that *"The petition and the department's review of the petition must be consistent with the requirements prescribed by rule by the Attorney General pursuant to ORS 183.410 for the form of a petition and the procedures for submission, consideration and disposition of a petition, to the extent that the requirements established by the rules are not inconsistent with the requirements established by this section and section 3 of this 2021 Act."*

The following is addressed by OAR 137-002

137-002-0010 – Contents of the Petition for Declaratory Ruling

137-002-0020 – Response and Notification to Petitioner and Persons in Petition

137-002-0025 – Process to Petition for Intervention in Declaratory Rulings and for the Department to Approve or Decline Intervention

137-002-0030 – Notice of Declaratory Ruling Hearing and Serving of All Petitions

137-002-0040 – Declaratory Ruling Procedure including Hearing Proceeding and Oral Argument

137-002-0050 – Presiding Officer’s Proposed Declaratory Ruling and Right to Oral Argument

137-002-0060 Issuance and Contents of Declaratory Ruling

Given the 60-day timeframe for issuing a declaratory ruling proposed in the –4 amendment, the Department does not believe that there would be sufficient time to carry out the process elements of OAR 137-002. This short timeframe could result in limiting or eliminating the opportunity for intervenors to petition or for a hearing with oral argument. As such, this would limit the evidence in the record to the petitioner’s filing and the Department’s declaratory ruling.