



FRIENDS OF THE COLUMBIA GORGE

SUBMITTED VIA E-MAIL

May 14, 2015

Tom Byler, Director
Attn: Transfers and Conservation Services
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301
Director@wrd.state.or.us

Re: ODFW's Water Rights Transfer Application No. T-12029

Dear Mr. Byler,

Friends of the Columbia Gorge ("Friends") has reviewed and would like to comment on the Oregon Department of Fish and Wildlife's ("ODFW") water rights transfer application number. T-12029. Friends is a non-profit organization with approximately 5,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Our membership includes hundreds of citizens who reside, work, or recreate within the Columbia River Gorge National Scenic Area ("CRGNSA" or "National Scenic Area").

Friends opposes ODFW's transfer application covering Certificate Nos. 24625 and 56519 and encourages the Oregon Water Resources Department and the Water Resources Commission (collectively "OWRD") to deny the application. OWRD's rules require the agency to consider the application on its face, irrespective of the separate transfer application submitted by the City of Cascade Locks (No. T-T-12028). Nonetheless, Friends notes that a primary purpose of the "cross-transfer" would be to facilitate the development of a Nestle water bottling plant in Cascade Locks. Friends does not support development of the proposed water bottling plant. Moreover, characterizing the previously proposed exchange as a "cross-transfer" appears to illegally circumvent the public interest review that is required for exchanges.

I. Introduction

ODFW's proposed transfer in conjunction with the City of Cascade Locks' transfer application, No. T-12028), has been characterized as a "cross-transfer" of water rights. It appears that the cross-transfer that would violate state laws. The cross-transfer would result in a prohibited enlargement of ODFW's water rights; would result in an unauthorized surface water to ground water transfer; and would result in an unauthorized municipal water right. The proposed transfer would result in such a fundamental change to ODFW's water right, it is contrary to the original purpose and intent of the water right permit, and contrary to the rules governing transfers. By improperly seeking to use the water right transfer process instead of the water exchange process, ODFW effectively evades public interest review. Approval of this water right transfer would violate OWRD's responsibility to manage Oregon's publicly-owned water in the public's interest.

ODFW's application materials explain that the transfer would include multiple changes to water rights Nos. 24625 and 56519. The changes to Certificate No. 24625 would include a change to the place of use from the fish hatchery to the future site of the proposed Nestle bottling facility. This would constitute a change in the character of use from "fish culture" to "municipal use," and a change in the point of diversion from Little Herman Creek to the Middle and East Oxbow Springs. The changes to Certificate No. 24625 would also include two additional points of diversion at the Middle and East Oxbow Springs to serve the existing fish hatchery use. ODFW's proposed changes to Certificate No. 56519 would also add points of diversion for fish hatchery use to the Middle and East Oxbow Springs and change the character of use for all points of diversion to include uses not authorized under the water rights.

OWRD is required to evaluate ODFW's application on its face and determine whether it would comply with the relevant statutes and regulations, without consideration of the possibility of replacement water from the City's municipal supply. Despite this requirement ODFW and the City of Cascade Lock's seek to have the application considered in conjunction with the City's transfer application T-12028. ODFW cannot avoid undergoing public interest review for an exchange and also rely on the City's transfer application as evidence in the current application. This approach is fundamentally inconsistent and appears to be a clear attempt to avoid accountability under the public interest test for exchanges.

Pursuant to Oregon Administrative Rule 690-380-4000, Friends filing public comments on the application, and request that the Department deny the application.

II. The Application violates the requirements of ORS 540.520

ORS 540.520(2) sets out the requirements for a transfer application to change the place of use, the point of diversion, or the use. These requirements include a description of "[t]he use that is proposed to be made of the water" and "[t]he reasons for making the proposed change."¹

¹ ORS 540.520(2)(e) and (f).

It appears that ODFW's application fails to provide the reasoning for the proposed transfer of the 0.5 cfs portion of water right Certificate No. 24625. The transfer application form states: "Explain in your own words what you propose to accomplish with this transfer application and why[.]"² ODFW's response failed to explain *why* the proposed transfer is proposed. Instead, ODFW merely repeats that the proposed transfer would be a transfer, without any actual description of the proposed use or the reasons for the proposed change. ODFW stated: "[t]he 0.5 cfs portion will be transferred to the City and will include changes to place of use, character of use and point of diversion (the springs)."³

In contrast, ODFW explains that the transfers related to the 9.5 cfs of Certificate No. 24625 would be "to serve the existing fish hatchery," and the proposed changes to ODFW Certificate #56519 would be "so the entire water right can be used for [hatchery/domestic/irrigation] purposes from all PODs."⁴ This underscores the glaring absence of any reasoning for the proposed transfer of 0.5 cfs from Certificate No. 24625.

With respect to the 0.5 cfs for right No. 24625, ODFW fails to provide the information required by ORS 540.520(2)(e) and (f). Based on this omission, OWRD should deny the application. If ODFW seeks to fix the omission it should be required to submit a revised application and OWRD should issue a new opportunity for public comment.

II. OWRD must ensure that the transfers would not enlarge the underlying water rights.

A transfer application must be denied where the transfer would result in an enlargement of the water right.⁵ The requirement that ODFW document "[t]he previous use of the water"⁶ should inform OWRD's determination of whether the transfer would enlarge the right. ODFW's historic use was to pass the water through the fish hatchery and back into Little Herman Creek. This is a non-consumptive fish hatchery use. The proposed transfer to the City of Cascade Locks would result in the complete removal of the water from the creek and the watershed for the ultimate purpose of bottling the water for consumer use. As a result, the requested transfer proposes a change from the non-consumptive fish hatchery use to a fully consumptive water bottling use. This fundamental change will constitute an enlargement of the water right.

A water right certificate is issued to recognize "the beneficial use contemplated in the permit."⁷ A review of the original water rights applications for ODFW's water right certificate No. 24625 and the fish hatchery system works shows that the permit for the entire 10.0 cfs fish hatchery water right was granted for a non-consumptive uses. A related water right application reinforces

² T-12029 at 4.

³ *Id.*

⁴ T-12029 at 4, 16.

⁵ OAR 690-380-500(c). "Enlargement" means an expansion of a water right and includes, but is not limited to: using a greater rate or duty of water per acre than currently allowed under a right; failing to keep the original place of use from receiving water from the same source; or diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation. OAR 690-380-0100(2)(a), (c), (d).

⁶ ORS 540.520(2)(b).

⁷ ORS 537.260(2).

that the hatchery use is non-consumptive.⁸ The historic and current use is to return the water to the watershed.

This transfer application should be considered independent of the City's transfer application, which means OWRD must determine whether there will be enlargement to the water right in Certificate No. 24625. The requested transfer will expand the use of the water from essentially remaining entirely within the creek to being removed altogether. The fact the ODFW will receive municipal well water to replace the 0.5 cfs of spring water is irrelevant to the Department's consideration of enlargement. Therefore, the Department must deny the transfer application because it will result in an unauthorized enlargement of ODFW's water right. If ODFW seeks to rely on water exchanged with the City of Cascade Locks, it should apply for a water exchange.

Additionally, the transfer will cause an enlargement because the original place of use, the hatchery, will continue to receive water from the same source, East and Middle Oxbow Springs.⁹ ODFW would transfer 0.5 cfs to the City but continue to use water from the springs at the hatchery. If any portion of the legally transferred 0.5 cfs would not actually be diverted for Nestle, the water would likely be diverted for use at the hatchery. This could result in ODFW enlarging its diversion. Unless OWRD requires binding conditions to ensure ODFW would only divert the remaining 9.5 cfs of water, such as real-time volume measurements, there is a substantial risk the transfer would result in an enlargement of the hatchery use.

The Department must also ensure that the proposed additional points of diversion for ODFW's Certificate Nos. 24625 and 56519 do not result in enlargement of the respective water rights. The proposed changes appear to contemplate that ODFW would retain the remaining 9.5 cfs from Certificate No. 24625 and 8.82 cfs of Certificate No. 56519 for use from their original point of diversion in Little Herman Creek and the new points of diversion at Middle and East Oxbow Springs. The Department must ensure that having three points of diversion for each water right will not result in ODFW "triple-dipping" and diverting more water than is legally available under those rights.

Additionally, neither the transfer statute nor the Department's regulations appear to contemplate allowing an additional point of diversion in this circumstance. In fact, the transfer statute does not mention "additional point of diversion."¹⁰ Additional points of diversion appear to be available only in the limited situation where "*government action* results in or creates a reasonable expectation of a *change in the surface level* of a surface water source that *impairs or threatens to impair access to a point of diversion* authorized by a water right permit..."¹¹ The authority to add points of diversion bears no relation to the actions proposed by ODFW. If there is a change in surface level that impairs access to the point of diversion, that result would be caused by ODFW's own actions. ODFW cannot take government action that impairs its own access to its water rights. Similarly, ODFW cannot transfer a water right to the City with the full

⁸ Reservoir Permit No. R-1659; see OWRD file for Application No. 26283 (Cert. No. 24625), Preliminary Data for Proof of Appropriation (referring to Application R-29590 (Permit R-1659) for description of works).

⁹ OAR 690-380-0100(2)(c).

¹⁰ ORS 540.520, see OAR 690-380-2110, -2120, & -2130.

¹¹ ORS 540.510(6) (emphasis added).

understanding that an alternative diversion point is necessary for the City to make use of the water.

III. The transfer would improperly transfer surface water to groundwater

OAR 690-380-2130(7) provides that when transferring a surface water point of diversion to a groundwater appropriation “[t]he original point of diversion of surface water shall not be retained as an additional or supplemental point of diversion.” This application seeks to transfer the point of diversion for 0.5 cfs of Certificate No. 24625 to the City of Cascade Locks for the ultimate purpose of selling spring water to Nestle for bottling. In order market the water as “spring water” Nestle must capture that water at the spring or tap it underground prior to it reaching the surface. Nestle would apparently need to convert the surface water diversion to a groundwater point of appropriation by developing new infrastructure at the springs. At the same time, ODFW would apparently maintain its surface water points of diversion for the remaining 9.5 cfs of Certificate No. 24625. This would appear to violate the plain meaning of OAR 690-380-2130(7). OWRD must ensure that the transfer would not allow an unauthorized transfer from surface water diversion to groundwater appropriation.

IV. The transfer would not be in the public interest

ODFW has previously filed several other applications seeking to transfer the authorized point of diversion for a 0.5 cfs portion of Certificate 24625 and then to exchange that 0.5 cfs of water with the City of Cascade Locks for an equal amount of municipal water in return.¹² The prior application by ODFW and the City would have undergone this public interest review.¹³ The current application appears to be an attempt at circumventing public interest review with word play, renaming the proposed “exchange” as a “cross-transfer.” OWRD should not allow ODFW and the City of Cascade Locks to circumvent public interest review with this type of language game.

This underscores a significant catch-22 in the ODFW and the City’s strategy. OWRD must review ODFW’s application on its face and independent from the City of Cascade Lock’s application. However, the only way ODFW can demonstrate compliance with the transfer rules is to reference the ultimate goal of exchanging water with the City of Cascade Locks. That cross-transfer necessarily requires looking beyond ODFW’s application and admits that the proposal is an exchange. ODFW cannot have it both ways. The proposal is either an exchange subject to public interest review or it is a single transfer of a water right transfer that fails to demonstrate compliance with the water right transfer regulations.

More importantly, ODFW’s approach is exposed as creating a loophole for avoiding public interest review. Allowing a water right holder to repackage an “exchange” as a “cross-transfer” would set a negative precedent and frustrate the purpose of requiring public interest review for

¹² T-11249 and T-11109. Friends hereby incorporates its prior comments on ODFW’s applications.

¹³ ORS 540.537(1)(c).

all exchanges. OWRD should not allow a contradictory interpretation of its regulations to set a precedent for avoiding public interest review.

V. OWRD’s mission is to restore and protect stream flows and watersheds to ensure long-term sustainability

OWRD’s mission is to “restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon’s ecosystems, economy, and quality of life.” Further, water resources are held by the state in trust for its citizens. As part of its mission and public trust duty, OWRD must act to protect water resources for future generations of Oregonians.

Allowing ODFW and the City of Cascade Locks to avoid public interest review and the necessary consideration of the ultimate use of the Oxbow Springs is in direct conflict with OWRD’s mission. Without public interest review OWRD cannot determine if the exchange would restore and protect stream flows and ensure the long-term sustainability of the resource for the citizens of Oregon.

This transfer, in conjunction with the transfer application filed by the City (T-12028), would allow the sale of Oxbow Springs water to Nestle for a water-bottling plant. If the Department approves the two connected transfer applications T-12029 and T-12028 it will be facilitating the bottling of Oregon’s water without the necessary review of whether it is in the public interest.

VI. The transfer would be an unauthorized municipal use.

If OWRD chooses to review the cross-transfer as a combined application, then it must conclude that ODFW would illegally obtain a municipal water right. The only way ODFW can transfer its water rights to the City is if the City transfers its water right to ODFW. This would result in ODFW holding a water right permit for municipal use.

A municipal water right is “the delivery and use of water through the water service system of a municipal corporation for all water uses usual and ordinary to such systems.”¹⁴ Municipal water uses include domestic water use, irrigation of lawns and gardens, commercial water use, industrial water use, fire protection, etc.¹⁵ A municipal corporation is defined as “any county, city, town or district as defined in ORS 198.010 or 198.180(5) that is authorized by law to supply water for usual and ordinary municipal water uses.”¹⁶ A quasi-municipal water use is “the delivery and use of water through the water service system of a corporation other than a public corporation created for the purpose of operating a water supply system, for those uses usual and ordinary to municipal water use....”¹⁷

ODFW is not authorized to hold a water right for municipal use because ODFW is not a municipal corporation and does not operate a water service system for delivery of water for usual and ordinary municipal water uses. “A water right for municipal use is distinguished by the fact

¹⁴ OAR 690-300-010(29).

¹⁵ Id.

¹⁶ OAR 690-380-010(28).

¹⁷ OAR 690-380-010(40).

that the water is delivered through a municipal water system, not by the ultimate use of the water....”¹⁸ The pipeline system that will run from Oxbow Springs to Nestle’s bottling facility will not be a part of a water service system of a municipal corporation. Thus, the transfer proposes an unauthorized municipal water use.

VII. OWRD should address potential water shortage issues.

Under the OWRD’s rules, if both ODFW’s and the City’s transfers are approved, then Certificate 24625 will be cancelled and new permits will issue for the respective 9.5 cfs and 0.5 cfs rights. OWRD should consider and determine which of the two newly created certificates will take priority in times of water shortage. The Department’s rules and Oregon statutes do not dictate a particular order of priority between non-consumptive beneficial uses such as fish hatchery operations and consumptive uses such as water bottling. This unresolved question could harm ODFW’s water rights and create administrative burdens on all affected agencies.

VIII. Conclusion

Friends opposes the proposed water rights transfer because it would improperly circumvent the public interest review normally required for an exchange of water rights. ODFW’s attempt at circumventing this requirement creates clear violations of the water transfer rules. OWRD should find that the application does not comply with the applicable rules because it violates the above-cited provisions of state law.

Sincerely,



Richard Till
Conservation Legal Advocate

¹⁸ 1993 Or AG 19, *9-10.