

MEMORANDUM

To: DBWC Planning Team
From: DBWC Staff
Date: October 6, 2020
RE: DBWC Action Proposal: rule-making letter to state

Background

Transferring primary storage rights instream permanently is a key component of the basin strategy to restore flows in the Upper Deschutes River. The Oregon Water Resources Department (OWRD) has stated that it has statutory authority to do this, but that it needs rule-making before it can (see attached memo from OWRD). It indicates that a rules advisory committee will be formed in the coming months.

DBWC Action to Consider

Send a DBWC letter to OWRD stating that it is a basin priority and requesting that rule-making be initiated.

From: [WOODCOCK Douglas E * WRD](#)
To: [Shon Rae](#); [JARAMILLO Lisa J * WRD](#); [HRANAC Teri K * WRD](#); [Kimberley Priestley](#); [Mike Taylor](#); [trippm10@gmail.com](#); [Joanne Richter](#); [Kimberley Priestley](#); [Tod Heisler](#); [LeslieClark](#); [Mike Britton](#); [Ron Nelson](#); [Bobby Brunoe](#); [Natasha Bellis](#); [Scott Aycock](#); [Craig Horrell](#); [Kate Fitzpatrick](#); [David Filippi](#); [LeslieClark](#); [GORMAN Kyle G * WRD](#)
Subject: Storage Discussion
Date: Friday, August 7, 2020 1:12:50 PM

Hello,

Below is the Department's position on transfers of storage rights to instream uses. There is a lot going on right now and I very much appreciate your patience on this.

I hope this finds you all safe and healthy. Please do not hesitate to contact me if you have any questions.

Best,
Doug

The Department has received a request for a letter (this email) explaining its position regarding the permanent transfer of primary storage rights to instream rights.

It is the Department's position that it does not have authority to authorize transfers of the **primary storage rights under ORS 540**, because the right to store water is not a "water use subject to transfer." This issue has been discussed in more detail in handouts provided by the Department previously. In contrast, **ORS 537.348 (pertaining to instream transfers and leases)** does not refer to "water uses subject to transfer," instead stating that "an existing water right" may be transferred or leased instream. It's the Department's position that an existing water right could include a primary right to store water under the statute.

However, the Division 77 rules, the rules that establish the policy, procedures, criteria, standards and definitions for how we process transfers and leases of instream rights, as currently written, narrows the authority to "water uses subject to transfer" and do not include any references to the ability to transfer primary storage rights instream. Rulemaking is required to address this. In contrast, the Division 77 rules relating to leases specifically authorize the leasing of primary storage rights. Although the leasing rules would benefit from revision, we believe they provide explicit authority that is clear enough to continue to allow leasing.

The Department is pursuing a rulemaking to clarify the administrative rules that govern instream water rights to allow for the permanent transfer of stored water to instream rights. A rules advisory committee will be formed in the coming months. Until the Division 77 rulemaking is concluded likely later next year, I would encourage entities to utilize the temporary lease option when pursuing the transfer of the primary storage right to instream uses.

Douglas Woodcock

DEPUTY DIRECTOR

Oregon Water Resources Department

725 Summer Street NE, Suite A Salem, OR 97301 | Office: 503-986-0878



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