

Process For
ODFW staff internal review of
Water Right Transfers that Injure In-stream Water Rights.
April 5, 2006

Authority

ORS 540.530 allows for the transfer of a water right to injure another water right if the injured water right holder consents to the injury. In the case of an injury to an in-stream water right ORS 540.530 (1)(c) allows the Water Resources Department (who holds in-stream water rights in trust for the state) to consent to injury only if the agency who applied for the in-stream water right recommends that WRD consent to the injury. For the recommendation and consent to injury to occur the agency that requested the in-stream water right must find that the transfer will result in a net benefit to the resource. (See OAR 690-380-5040).

Injury to an In-stream Water Right

The most common injury to an in-stream water right from a transfer will be when a Point of Diversion (POD) is moved upstream in a segment that has an in-stream water right. Remember if there is no in-stream water right there is no injury or if the in-stream water right flows continue to be met after the transfer there is no injury. (Please note WRD bases their injury test on whether a water right is injured NOT whether a fisheries resource is injured).

Transfer Process as It Relates to an In-stream Water Right

There are numerous steps involved in a transfer that affects an instream water right. They are:

1. Transfer application submitted
2. WRD review of application
3. WRD "Draft Preliminary Determination"
4. Possible application modifications
5. WRD "Preliminary Determination"
6. ODFW review and response action
7. 30-day comment period on injury
8. Review comments (confirm or modify)
9. WRD Order

Transfer Application

Officially for this process to start a water right holder must submit an application to WRD requesting the transfer of a water right. (Many transfer applicants will probably seek information before they apply about whether the transfer will injure other water rights and for in-stream water rights that are injured what they will need to do to get ODFW's recommendation of a net benefit. (So ODFW may be negotiating with the applicant well before an application is submitted).

WRD Review of Application

Once an application is received then WRD must review the application to determine if the proposed transfer would cause an injury to an in-stream water right. WRD is the authority required to make this determination about injury, ODFW does not make this determination. (You should be aware that WRD will make their injury determination based on injury to the in-stream water right NOT injury to the fisheries resource.)

WRD “Draft Preliminary Determination

If WRD determines, through their “Draft Preliminary Determination”, that there is an injury to the in-stream water right they will inform the applicant. The applicant now has the choice of continuing, withdrawing the application or modify the application. At this point, if WRD has determined the transfer will injure an in-stream right, the applicant may contact ODFW to see how they can make the transfer a net benefit for the resource. (Please note WRD will not yet have officially notified ODFW.) ODFW will need to work with the applicant to identify the resources at risk and explore possible ways to achieve a net benefit.

Possible Application Modifications

If modifications are made to the application which result in not injuring the in-stream water right then the transfer continues through the transfer process without a need to get a recommendation from ODFW. This most likely would occur when water is replaced in the same proportion that it is being lost (ie bucket for bucket replacement).

WRD “Preliminary Determination” (Official Start for ODFW)

If the transfer still injures an in-stream water right and the applicant wishes to move forward WRD will make a “Preliminary Determination”. This begins the 45 day protest period. WRD will send a letter of determination to ODFW requesting a recommendation on whether the transfer will result in a net benefit to the resource. In some cases ODFW may have already been working with the applicant. In others, this will be the first time the applicant contacts ODFW. The applicant may also wait for ODFW’s determination and then either accept the determination or go through the contested case process and not attempt to work out a net benefit with ODFW. Note: ODFW does not need to make its recommendation within the 45 day protest period, but can continue working with the applicant if necessary.

ODFW Action

After ODFW receives the “Preliminary Determination of Injury to an In-stream Water Right” the District Biologist will need to begin use the “Evaluation Process” outlined below to determine whether the transfer will result in a net benefit to the resource. .

ODFW can make two determinations:

- 1) The transfer does not provide a net benefit for the resource. In this case, ODFW writes a letter to WRD that finds that the transfer has no net benefit for the resource (the letter should probably include a description of the resources that would be injured, the habitat category, and why ODFW determined it was not a net benefit); or

- 2) ODFW determines the transfer will result in a net benefit to the resource. In this case, ODFW writes a letter to WRD recommending that WRD concur in allowing injury to an in-stream water right. ODFW's letter must include
 - a) A description of the injury to the in-stream water right;
 - b) A description of the effect of the injury on the resource;
 - c) An evaluation of the net benefits that will occur including any cumulative impacts of previous transfers; and
 - d) Any proposed conditions necessary to ensure that the net benefits are maintained.
 - ODFW should also include the habitat category of the injured segment and how the net benefits provided address the category requirements and the relationship to the injury if any.

30-Day Comment Period on Injury

Once WRD receives ODFW's letter recommending concurrence to allow injury to an in-stream water right WRD will announce a 30-day comment period on ODFW's recommendation. A public meeting can be requested, if requested one will be held and ODFW will need to present its findings at the meeting.

After the comment period and/or a public meeting ODFW must review the comments and then reaffirm its recommendation to WRD to injure an in-stream water right or withdraw its recommendation.

WRD Order

If ODFW reaffirms its recommendation of net benefit and allowance of injury, then WRD will issue an order approving the transfer and consent to the injury. The order shall include;

- a) Findings on the extent of the injury;
- b) Findings on the net benefit; and
- c) Any conditions necessary to ensure the continued net benefit.

Note: Whichever determination is made you should be aware that ODFW's recommendation could be challenged through the Fish and Wildlife Commission, the circuit court and/or through the WRD contested case process. Therefore, whichever determination ODFW makes needs to be well justified and documented.

ODFW's Responsibilities - Evaluation Process

This section outlines, in depth, the process for ODFW's evaluation of whether a proposed transfer injures an in-stream water right (ISWR).

WRD "Preliminary Determination"

After WRD develops the "Preliminary Determination", WRD will send ODFW an official letter requesting ODFW's determination on whether a proposed transfer that injures an in-stream water right has a net benefit to the resource when they develop the Preliminary Determination. (It is possible the applicant will have already been in contact ODFW before this. ODFW should wait to submit a letter of determination until we officially receive the request from WRD)

WRD should provide with the request:

1. Maps showing current and proposed point of diversion (POD) and/or place of use.
2. Water availability tables for both the current and proposed PODs.
3. Copy of the transfer application.
4. Copy of the current water right proposed for transfer.
5. Copies of pertinent certificates, permits, and decrees affected by the transfer.
6. Reference to pertinent stream flow data.
7. Type of use, current and proposed.
8. ISWR flows tables.
9. Amount of water available to user at present POD (regardless of the actual water right amount) and proposed POD.
10. Amount of water in cubic feet per second (cfs) being transferred.
11. Priority dates of water right(s) to be transferred.

Once ODFW receives this information we will need to begin the evaluation process by following these steps:

Step 1 - Determine Habitat Category

The agency's mitigation policy (OAR 635-415) will be used to determine the habitat categories affected by the transfer.

Interpretation of the Mitigation Policy Categories for actions affecting water flows for fish: OAR 635-0415-0025(1) through (4)

- "'Habitat Category 1' is irreplaceable, essential habitat for a fish or wildlife species, population, or a unique assemblage of species and is limited on either a physiographic province or site-specific basis, depending on the individual species, population or unique assemblage."

Guidance: Only unique habitats that can't be replaced, such as a lake with a fish species or unique assemblage only found there, such as some sculpins or chubs in the SE and south central parts of the state; also possibly known Oregon chub habitats in the Willamette. Migration corridors will generally not fall into Category 1 if impacts are related to water flows or partial habitat disruption, both of which can be mitigated with replacement flows or habitat.

Note: Most other fish habitat related to flows will fall into either category 2, 3, or 4. Rarely would you have category 5 or 6 for water habitats (maybe if there are no fish there now, there were no fish in the past and no fish are anticipated in the future or if the only fish being affected are exotics).

- "'Habitat Category 2' is essential habitat for a fish or wildlife species, population, or unique assemblage of species and is limited either on a physiographic province or site-specific basis depending on the individual species, population or unique assemblage."

*Guidance: Includes most migration corridors and holding pools, many spawning areas, some rearing areas. If its Category 2 its limited habitat which means it will be hard to replace. If there are similar habitats that the population can access elsewhere and the loss or reduction of the habitat here is not critical to the population then maybe its Category 3 habitat. If the impact can't be avoided, in-kind and in proximity mitigation with a net benefit to the affected species, population or unique assemblage is the goal. Basically, either replace water for water or like habitat for like habitat **most likely in the area of impact**. For instance you can't agree to eliminate or reduce migration flows in one area to improve migration flows in another area or to improve riparian habitat somewhere else. If you can and think the proposed mitigation is overall beneficial for the population then it's probably Category 3 habitat not Category 2.*

Further considerations: In the case of fish "in proximity" means the same population of fish has the opportunity to use the replacement habitat. For fish this may mean within the same sub basin. For example, water must be provided within the stream that is losing water so that it will provide a net benefit in the habitat type that is lost. Water can be provided up stream or down stream or on a tributary to the stream affected by the transfer, but the provided water must provide for the same type of habitat that is being lost. If spawning habitat is impacted then spawning habitat must be provided that is the same quality and quantity as that being lost. For example, you cannot replace lost spawning habitat with rearing or migration habitat. You must be careful to identify all of the habitat that is being affected by a water right transfer to assure that unintended consequences do not result from the transfer. Or if the replacement habitat is elsewhere in the basin, assure that the transfer does not prohibit access to other parts of the stream or otherwise negatively affect the population. For example, if you identify spawning habitat loss but the transfer also impacts migration upstream.

- "Habitat Category 3" is essential habitat for fish and wildlife, or important habitat for fish and wildlife that is limited either on a physiographic province or site-specific basis, depending on the individual species or population.

Guidance: Includes most rearing habitat, some spawning habitat, healthy riparian corridors, large wood jams and other similar important and often limited habitats. If the impact can't be avoided, the goal is in-kind and in-proximity mitigation that achieves no net loss of habitat for the affected species, population or unique assemblage. It is possible under category 3 to mitigate away from the area of impact by providing the same quantity and quality of what is being lost as long as it is benefiting the same population being affected by the action and you are replacing the same amount of water or habitat that is being lost. Be careful here, putting more water in a neighboring stream that already has adequate flows is not mitigation for the species being affected.

- "'Habitat Category 4' is important habitat for fish and wildlife species. " . If impacts are unavoidable, ODFW requires either in-kind or out-of-kind and in-proximity or off-proximity mitigation to achieve **no net loss in either** quantity or quality of habitat. Although the mitigation rules do not require a net benefit for this category the transfer statute does require a net benefit, therefore, a net benefit must also be provided.

Guidance: Includes rearing and riparian habitats, river reaches where passage is not a problem, deep river or stream channels that are plentiful or average quality. If this habitat were replaced by other types of habitat, the affected fish would be able to move to the replacement habitats and the population would not be impacted. If the impact can't be avoided, the goal is reliable in-kind or out-of-kind, in-proximity or off-proximity habitat mitigation to achieve no net loss in either pre-development habitat quantity or quality. This is where you have wider discretion as to what kinds of mitigation to accept. Ask yourself if it is logical and relevant to fish and wildlife to accept this type of mitigation and whether you can adequately justify (in writing) the mitigation.

- “Habitat Category 5’ - High Potential to become either essential or important habitat.” If impacts are unavoidable, ODFW requires mitigation that contributes to essential or important habitat.

Guidance: Impacts from transfers to habitats in this category can be mitigated by improving essential or important fish habitat. Although the ODFW mitigation rules do not require a net benefit for this category, the transfer statute does require a net benefit. Improvements to essential and important fish habitat will usually result in a net benefit. .

- “Habitat Category 6’ - Low Potential to become either essential or important habitat.” The goal is to minimize impacts. Although the mitigation rules do not require a net benefit for this category the transfer statute does require a net benefit, therefore, a net benefit must also be provided.

Guidance: Although the goal in this category is to minimize impacts, the transfer rules require a net benefit be provided. Habitats in this category can be mitigated by providing either a net benefit in the quality or quantity of the habitat for a similar population.

OVERALL CONSIDERATIONS

The scale of impacts of the proposed action will affect which habitat category is chosen. The extent of a species, population or unique assemblage will also affect which habitat category will apply. For example, if a species has isolated populations above barriers or in potholes, the habitats affected will likely fall into the more restrictive habitat mitigation categories. Different habitat categories may apply for a species or population whose habitats are interconnected through migratory corridors. For instance, rearing habitat for a fish species that can easily make use of the same or better habitat elsewhere may result in the habitat being defined as category 4. If this habitat is more limited then it may be category 3.

ODFW biologists will need to identify in which habitat categories the segment(s) of stream affected by the transfer are, the importance of the habitat to the species, and the justification of why the biologist believes the segment(s) fall in these categories.

Step 2 – Discussions with the Applicant on Mitigation Options

Although not technically required the biologist evaluating the transfer application should contact the applicant to discuss information needs, concerns and requirements for mitigation and net benefit. Once the “Preliminary Determination “ is received from WRD, the biologist

should send an official letter to the applicant indicating ODFW has received their proposed transfer and are in the process of evaluating it for a net benefit to the resource.

ODFW should keep in mind that most applicants will not have much of an understanding of what the impacts from the proposed transfer will be or what are the potential options available for making the transfer a net benefit for the resource. ODFW will need to provide some insight and guidance as to what could be provided as a net benefit given the habitat category that is being injured by the transfer. Additionally, ODFW may wish to guide the applicant in choosing the most appropriate options that provide the best mitigation for the species being impacted.

Mitigation

Considering net benefits and mitigation to provide a net benefit.

- The first consideration should be to try to avoid the impact. Explore with the applicant possible alternatives to the transfer (stored water, transfer of different rights that do not injure the in-stream water right, water conservation etc.) This may not be successful because of cost and the applicant desire for additional water.
- For categories 1-3, water must be provided or similar habitat. Categories 4-6 allow other mitigation alternatives.
- The net benefit or mitigation must match the habitat category.
- Mitigation, replacement habitat and the net benefit must be apparent to others reviewing ODFW's recommendation (remember you may need to defend your decisions, during a public meeting, to the Fish and Wildlife Commission and during a contested case hearing).
- If a new structure is being built at the new POD, providing screening and passage is not mitigation as it is required by law. Only if the water is being transferred to an existing POD, that is not being substantially modified, can screening and passage be considered mitigation and part of the net benefit.
- There must be a demonstration of net benefit. You should breakout what the impacted habitat is, what the injury is, how the injury is mitigated and what provides the net benefit so it is obvious to everyone.

Additional Information and Studies

ODFW may need to request additional information and studies from the applicant before a determination can be made on whether the proposed transfer would result in a net benefit to the resource .

The applicant is not required to provide any of this additional information. ODFW will need to negotiate with the applicant to determine what can be provided versus what we believe is needed . Ultimately, without the needed information, ODFW may be prevent from determining whether there is a net benefit from the transfer. In this case, ODFW might recommend that WRD not concur with the injury to the in-stream water right. The applicant should be made aware that providing the additional information would facilitate ODFW's evaluation. Additionally, if ODFW staff does not believe the impact from the transfer can be

mitigated or no net benefit can be provided, this should be communicated to the applicant. The applicant should not pursue information and perform studies unnecessarily.

Potentially desirable information

The District Biologist must request the information he or she believes is needed to make a net benefit determination. The following is a list of potential information and studies that might be requested. Not all this information will be needed for any one evaluation. This is simply a list that the biologist can reference. Additionally, ODFW may have some of this information and will not need to request it from the applicant.

- 1) Habitat inventory for section of stream impacted as defined by the Oregon Aquatic Habitat Restoration and enhancement guide.
- 2) Proposal for providing "net benefit" to the resource.
- 3) Fish surveys.
- 4) What are the types of diversion structures at the existing and proposed PODs.
- 5) Water quality data (if available).
- 6) Flow data (if available).
- 7) What are the benefits of the project?:
 - Improved flows in same or different reach?
 - Improved fish passage/access to habitat (this may be required and therefore not counted as part of the net benefit)?
 - Improved riparian habitat conditions (fencing, tree planting, etc.)?
 - New fish screens at POD (this may be required and therefore not counted as part of the net benefit)?
 - Instream habitat improvements?
 - Conservation easements (prevent degradation of good habitat)?
 - Others as appropriate.

Step 3 - Evaluation

Questions to Answer during Evaluation of Transfer

- Does the habitat category change depending on the time of year?
- Is the water use occurring during a critical period for fish and wildlife?
- How significant is the impact of the transfer on the habitat in the affected segment?
- What is the amount of water flow (cfs) being moved? What percent of the remaining flow does it represent? Is it during a critical flow period? What is the distance of the impact? What is the rate and duty of the transfer?
- When is the in-stream water right being met and when is it not being met and how does that relate to critical life stages of a species and the available habitat both in the affected reach and elsewhere? (Such as, does this transfer affect 1% of the available habitat in the basin or 50%?)
- What are the fish species present and their critical life history stages?
- Is this section of the stream listed as water quality limited on the 303(d) list? Why is it listed? And will changes in the flow affect the water quality of the stream segment?

ODFW's recommendation that WRD concur with injury to an in-stream water right must be in writing and include a description of the extent of the injury. It must also include the effect of the injury, an evaluation of the net benefit that will occur, and any condition needed to ensure the net benefit continues to occur.

Step 4 - Response to WRD

ODFW must put their findings and justifications in writing to WRD.

1) If ODFW recommends that WRD concur with the injury to the In-stream Right then at a minimum ODFW's letter must include the following items:

- A description of the injury to the in-stream water right;
- A description of the effect of the injury on the resource;
- An evaluation of the net benefits that will occur including any cumulative impacts of previous transfers; and
- Any proposed conditions necessary to ensure that the net benefits are maintained.

2) If ODFW does not recommend concurrence to injure an in-stream right ODFW still should write a letter to WRD stating we cannot concur to the injury and include a description of the resources that would be injured, the habitat category, and why ODFW determined the transfer did not result in a net benefit.

Step 5 - Reaffirming Recommendation

If a public comment/meeting is initiated then ODFW must review the comments received and in writing either reaffirm its recommendation to WRD or withdraw the recommendation.

Note: There are very limited circumstances where ODFW can include a condition in the permit that would require passage. The main one is if passage is being provided as mitigation, then whatever conditions are necessary to ensure that net benefits are maintained can be included as a condition in the permit. This would most likely occur when a water right is being moved up stream to a preexisting POD that does not have passage and the transferee proposes to provide passage as part of the mitigation for making the transfer that injures an in-stream right. Otherwise in most cases ODFW cannot include a condition to require passage in a transferred water right even if it is required under the fish passage statute. The passage statutes still apply, but passage would need to be addressed separately and not included as a condition of the water right permit. ODFW can still require screening as a condition in a water right that is being transferred.

To Recap the Sequence of Events

- 1) WRD will send a letter with a “Preliminary Determination”(with application and background information) to ODFW requesting an evaluation of whether a transfer they have determined injures an in-stream water right has a net benefit for the resource. (You will most likely be contacted before this by the applicant because WRD will send a preliminary determination to the applicant indicating the transfer will injure an in-stream water right and asking the applicant whether they want to proceed. The applicant will then most likely contact ODFW to discuss whether the transfer has a net benefit or how to create one.)
- 2) ODFW will need to determine what habitat category the reach of stream being affected by the transfer would fall into. The habitat category will determine what types of mitigation would be acceptable.
- 3) ODFW will need to write a letter to the applicant asking for information needed by ODFW for making a determination of whether the transfer has a net benefit to the resource (Some of the information may have been provided with the application if the applicant has already been in discussions with ODFW). This step can be skipped if ODFW already has all the information it needs to make a determination.
- 4) ODFW evaluates the transfer application to determine whether there is a net benefit to the resource. (There may be multiple contacts and negotiations with the applicant at this stage to gather additional information or modify the application to create a net benefit)
- 5) ODFW makes its determination and writes one of two letters to WRD.
 - Recommends that WRD not concur with injury of the in-stream water right, then WRD must deny the transfer (In which case one of three things will happen: The applicant may contact ODFW to discuss net benefit; challenge WRD’s determination (and ODFW’s); or drop the transfer application).
 - If ODFW recommends that WRD concur with the injury of the in-stream water right because it has a net benefit to the resource then the process continues (be sure to include the required elements in the letter).
- 6) WRD will put ODFW’s recommendation out for public comment for 30 days. (If a public meeting is requested one will be held and ODFW will need to present its findings at the meeting).
- 7) ODFW will need to review all the public comments and write one of two letters to WRD.
 - Withdraw its recommendation to concur in the injury of the in-stream water right, then WRD must deny the transfer (In which case one of three things will happen: The applicant may contact ODFW to discuss net benefit; challenge WRD’s determination (and ODFW’s); or drop the transfer application); or
 - Reaffirms its recommendation for WRD to concur in the injury of the in-stream water right, then WRD will consent to the injury and issue an order approving the transfer.