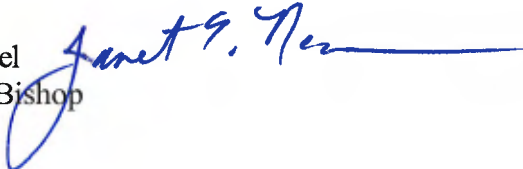


MEMORANDUM

To: Chair Clem, House Committee on Rural Communities, Land Use, and Water
Vice Chair Helm
Vice Chair Post
Committee Members

From: Janet E. Neuman, Senior Counsel
Attorney for Tom and Dorbina Bishop 

Date: April 27, 2015

Subject: Testimony on Senate Bill 267-A

This testimony is submitted on behalf of my clients, Tom and Dorbina Bishop, in reference to Senate Bill 267, as amended, which is scheduled for public hearing in your Committee on April 28, 2015. The Bishops are residents of Bend and patrons of the Tumalo Irrigation District. SB 267-A extends and clarifies a pilot program for irrigation districts to temporarily transfer the place that they apply irrigation water.

Irrigation districts are already allowed by current law to temporarily or permanently transfer the place of use of irrigation water under ORS 540.570 (temporary transfers) and 540.580 (permanent transfers). However, sometimes even the temporary transfer review process, which can take several months, may not meet a district's immediate seasonal needs to move a limited amount of irrigation water around among the patrons who are served by the district. A pilot program was thus put into place by the legislature in 2003 to try out an even more expedited process that would give irrigation districts additional flexibility to respond to situations where the regular temporary transfer process may take too long to meet a district's needs. SB 267-A extends the pilot program and adds clarifying language about the program. *See* Testimony in Support of SB 267 submitted on March 9, 2015 to the Senate Environment and Natural Resources Committee by the Oregon Water Resources Department ("OWRD") and by the Oregon Water Resources Congress ("OWRC") (attached).

In addition to the written testimony attached to this letter, representatives of both OWRD and OWRC testified in person at the March 9th Senate Committee Hearing that one of the purposes of the amendment is to clarify that the pilot program for temporary transfer of water use within irrigation districts applies only to water used *for irrigation*. Tom Byler, Director of OWRD, noted that using the pilot program only to change the place of irrigation "has been our expectation from the beginning, but this would make it clear." Mr. Byler said further: "Our

feeling was that the bill was pretty clear that it was intended to be irrigation uses, but that wasn't expressly clear, and we felt there was no harm in making that clear."¹

April Snell, Executive Director of OWRC, also testified in favor of the amended bill, saying that the amendments "clarify some existing provisions of the program." She noted that the purpose of the pilot program is to provide irrigation districts with the flexibility to respond to situations such as seasonal cropping changes and family emergencies preventing an irrigator from using water on particular lands.²

OWRD's and OWRC's written and oral statements make it clear that the expedited procedures given to irrigation districts in the pilot program addressed in SB 267-A are part of the overall continuum of expedited procedures available to districts in ORS Chapter 540—all of which are specifically designed to give districts the flexibility to move irrigation water around to the most appropriate lands where water is needed at any given time.

When the current language of ORS 540.570 and 540.580 was adopted, the testimony in favor of those provisions was similar to the testimony now offered by OWRD and OWRC on SB 267-A. In 1995, at the request of the Oregon Water Resources Congress ("OWRC"), the legislature adopted Senate Bill 494, which added most of the language now codified in the permanent transfer provisions in ORS 540.580. Jan Boettcher, then OWRC Executive Director, submitted testimony to the Senate Water and Land Use Committee explaining that the bill was intended to help irrigation districts "achieve better management and more flexibility in water use." She said "the reason flexibility is so important is that we have experienced more than 7 years of drought and to use that water most beneficially, we have to apply it to the lands which provide the highest economic benefit" and to the districts' "best agricultural lands."³

The current language in ORS 540.570 on temporary transfers was added in 2003, again at the request of OWRC.⁴ OWRC's explanation of the temporary transfer language was similar to

¹ The pertinent testimony of Mr. Byler can be found between approximately Minute Markers 7 and 15, available at http://oregon.granicus.com/MediaPlayer.php?clip_id=8539 <http://protect-us.mimecast.com/redirect/eNpdjsEKwjAQRp8155pSi1ALosWzIli3goTN0kabbEg3goj_7iqevA5v3sxTRQQoVfvzqVvWXdWoQiUcHAUJYyJG4EWetXcewcysgbwgkGcmjwnI4n8bIkt0NQFZB8zehB1TuFH4daOzqq2bQuU0CTgyx7Yv-5JkV6AhmeDE_6H78oDWmeNkHph0HOMWJhcvzm6aVb0W1x3T_P1avd4OsEMD>

² *Id.*, beginning at approximately Minute Marker 15.

³ See Comments of Jan Boettcher on behalf of the Oregon Water Resources Congress in support of SB 494, Feb. 21, 1995 (attached).

⁴ Initially, the language was proposed in House Bill 3281, but by the end of the session, the pertinent language had been folded into Senate Bill 820, as explained by the Department in their 2003 legislative recap: "SB 820 contains elements of four water bills from this session: HB 3281 regarding temporary transfers in irrigation districts; HB 3047 regarding wastewater reuse in urban areas; and HB 3215 and HB 3217, both regarding water right transfers in the Deschutes Basin." <http://www.oregon.gov/owrd/pages/law/2003bills.aspx>

the 1995 explanation on permanent transfers. In testimony to the House Water Committee, OWRC said that the bill would "simply allow" the irrigation district "to better serve the water users in the district and enable them to use their water in the best manner to produce the best crops given the soil, weather and water conditions of that season."⁵ Indeed, the statutory language itself clearly refers to changes in the place of irrigation from one parcel to another. For example, ORS 540.570(1)(a) says "the rate, duty and total number of acres to which water is to be applied under the water use subject to transfer" cannot exceed existing limits on the water use. Reference to rate, duty, and the application of water to a certain number of acres only makes sense when referring to changing the place of use of *irrigation*. Furthermore, the statute discusses "affected landowners" as those whose lands are directly involved in the change of place of irrigation (the "from" and "to" lands). See ORS 540.570(3) and (4).

Nothing in ORS 540.570 or 540.580, or in the SB 267 pilot program, exempts irrigation districts from obtaining appropriate permits for new storage facilities or to use the transfer procedures for a transfer of the place of storage of water—and certainly not to storage facilities without valid storage permits.⁶ In extending the pilot program under SB 267-A, it is important to stress that the expedited transfer authority provided for districts does not exempt districts from otherwise applicable permit requirements, including necessary storage permits. All of the special processes available to irrigation districts are instead designed to aid them in fulfilling their primary purpose—that of delivering irrigation water to their patrons.

My clients appreciate the opportunity to submit comments on SB 267, as amended.

cc: Tom and Dorbina Bishop
Ian Davidson, Committee Administrator

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⁵ See Memorandum from Kristina McNitt, on behalf of the Oregon Water Resources Congress, to Chair Jenson and Members of the House Water Committee re: HB 3281—District Temporary Transfers & Pilot Project, April 17, 2003 (attached). As explained in footnote 4 above, HB 3281 became part of SB 820.

⁶ ORS 537.130(1) requires "any person intending to acquire the right to the beneficial use of any of the surface waters of this state" to obtain a permit "*before beginning construction . . . of any distributing or controlling works, or performing any work in connection with the construction.*" (Emphasis added.) Section 2 of the same statute prohibits anyone from *using, storing, or diverting* any water "until after the department issues a permit." (Emphasis added.) Finally, ORS 537.400(1) (entitled "reservoir permits") restates that "all applications for reservoir permits shall be subject to the provisions of ORS 537.130."