



April 17, 2017
House Committee on Energy and Environment
Representative Ken Helm, Chair

Testimony on House Bill 3421
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Thank you for the opportunity to provide testimony on House Bill 3421 and the -1 amendment. The purpose of this testimony is to provide information to the committee regarding the background and history of related laws and legislation, as well as to provide a brief overview of the Water Resources Department's interpretation of the -1 amendment to House Bill 3421. The Department has no position on the bill or the -1 amendment at this time.

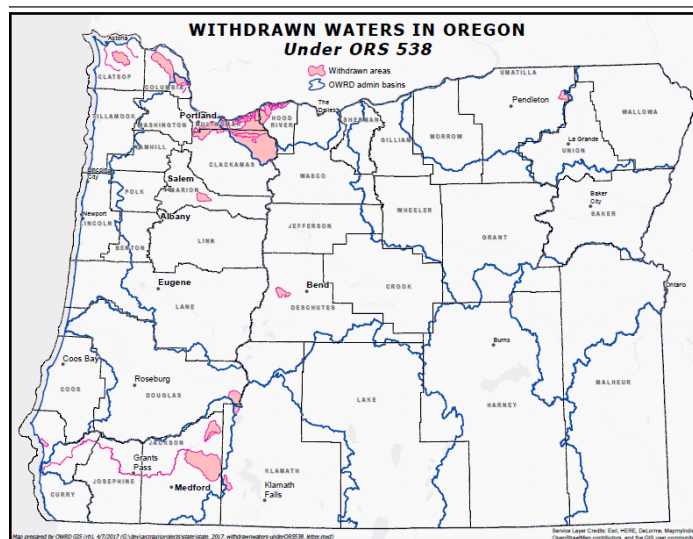
History and Overview of Water Laws and Legislation

In 1909, the Oregon Legislature passed the Water Code, requiring any person intending to use the waters of this state to obtain a water right from the Department. When the Department first accepts a water right application, it must first determine whether the use of the water is allowed under the statute.

Withdrawals

Over time, the Legislature has set aside certain streams for specific purposes, or prohibited issuance of water right permits from those streams. These "withdrawals" are codified in Oregon Revised Statutes Chapter 538 and are shown in the map to the right.

For example, in the Big Butte Creek watershed, the only new uses allowed by statute are municipal uses for the City of Medford, with some exceptions for the Eagle Point Irrigation District. As a result, the Department cannot legally consider an application for a permit to appropriate or store water in the Big Butte Creek watershed for other purposes (see ORS 538.430).



Ponds Legislation

In the early 1990s, it was recognized that there were thousands of existing ponds and reservoirs across the state that did not have water rights. As a result, in 1993, the Oregon Legislature passed House Bill 2153 to provide owners statewide, including within withdrawn areas, the opportunity to have these

ponds and reservoirs legally registered with the Department within a two-year timeframe. In 1995, the Oregon Legislature passed House Bill 2376, which made some modifications and essentially allowed an additional two years to register or obtain water rights.

To prevent the need for additional registration legislation in the future, House Bill 2376 also established an alternate reservoir process for reservoirs less than 10 feet in height or storing less than 9.2 acre-feet (1 acre-foot = ~326,000 gallons). Today, this process is codified in ORS 537.409; however, with some exceptions, owners of ponds within most withdrawn areas in ORS Chapter 538 cannot apply for a permit under this process.

Rainwater Harvesting

Although not as directly related to this legislation, when a pond or reservoir is discovered that does not have a legal water authorization, there have been assertions that the storage is “rainwater harvesting.” Collecting waters that run off the surface and eventually join streams does not constitute “rainwater harvesting” and *does* require a water authorization. However, ORS 537.141(1)(h) provides an exception that *allows* for the collection of rainwater from an impervious surface, such as a roof or a parking lot, without a water right.

The Departments Interpretation of the -1 Amendment

The comments below focus on the -1 amendment, which replaces the measure. The -1 amendment allows an owner of a reservoir that has been in existence since on or before January 1, 2000 to apply to register the reservoir by January 31, 2022. The Department interprets this to mean that the reservoir must have existed prior to January 2, 2000, and that it *continues* to exist today. The reservoir must be in an area that is withdrawn by the legislature under ORS Chapter 538, and store less than 9.2 acre-feet in volume or be less than 10-feet tall. The bill allows the reservoir to be regulated by the watermaster for a senior water right and allows the watermaster, even after approval of the registration, to require headgates, measuring devices, and outlet controls as necessary to address water distribution. The priority date for the purposes of regulation is the date of application for registration.

Among other requirements, the bill requires that the application include information from Oregon Department of Fish and Wildlife stating that the reservoir does not have a significant detrimental impact on existing fishery resources, or that it can be modified not to. The Department believes that this could include modifications to the reservoir, its operations, or other means to mitigate the impact. If the application requirements are not met, the bill authorizes the Department to reject the application.

If the application requirements are met, the Department publishes notice of the application and any person may object to the application to allege that it injures an existing water right. The bill allows the Department to issue a conditional final order approving the application that stipulates actions to be taken to address injury to an existing water right, to address significant impacts to fishery resources, to equip the structure with appropriate outlet works and devices, or to reduce the reservoir to meet the size limits. If options to address these issues cannot be identified, or if the owner fails to make the required modifications after a conditional order, the Department may deny the registration.

Finally, the reservoir owner is allowed to apply through the existing process under ORS 537.147 to use the water stored in the reservoir (called a secondary permit).