



HB 3421

Testimony of WaterWatch of Oregon Submitted to the House Energy and Environment Committee

April 17, 2017

Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of natural flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers to sustain fish, wildlife, recreation and other public uses of Oregon's rivers, lakes and streams. We also work for balanced water laws and policies. WaterWatch has members across Oregon who care deeply about our rivers, their inhabitants and the effects of water laws and policies on these resources

WaterWatch opposes HB 3421 and the -1 amendments

Under Oregon law all ponds and reservoirs must have a reservoir permit in place before they are constructed. ORS 537.400, ORS 537.130(1) & (2). The permitting process for reservoirs is very important because that is where public interest factors must be evaluated to ensure that other water right holders are not injured and that the public interest in the resource is protected. During the permitting process the state evaluates the proposed use to, among other things, ensure that water is available, that the use is will not injure other water right holders, that flows protected for state scenic waterways will not be diminished, that impacts to water quality are considered and that endangered, threatened and sensitive fish are protected.

What HB 3421 and the -1 amendments would do: At its core, this bill will legalize reservoirs/dams that are diverting and storing water illegally. The bill would allow this without subjecting the use to OWRD evaluation under long-standing permitting standards that are designed to ensure that new water use does not harm other water users or the public interest. The -1's narrow the scope to legalizing illegal reservoirs that are taking waters from rivers that are legislatively withdrawn, without any consideration for the reasons for the legislative protection of the said rivers in the first place. Rivers that would be impacted by the -1's include the state scenic waterways of the Deschutes (Tumalo), Rogue and Sandy Rivers, as well as the waterfalls of the Columbia River Gorge and Silver Falls State Park and beloved recreational lakes such as Diamond Lake and Lake of the Woods. The -1's will also impact legislative withdrawals that protect water for future municipal use.

WaterWatch opposes HB 3421 and the -1 amendments for the following reasons:

- This bill/-1's legalizes currently illegal storage (and associated withdrawals) without any regard to whether water is available: One of the most basic screens the state applies when deciding whether a water use should be approved is whether water is available. Statute, rule and numerous state policies all prohibit the state from giving away more water than rivers have to offer. These laws were put in

place to protect water right holders. This bill allows illegal uses to continue regardless of whether the state can find water is available, in other words, regardless of the state of the resource. It is important to note that most surface water sources across the state are over appropriated, meaning not only is there no more water to give but existing consumptive and instream water rights are often not met. See the attached Tumalo Creek and Big Butte Creek water availability tables for example.

- The bill/-1 does not recognize nor protect the reasons for the legislative withdrawals in the first place: Legislative withdrawal of a river is a very rare action that typically has been done to protect rivers, lakes and waterfalls for the enjoyment of all Oregonians and/or to protect water for future municipal use. This bill does not even pretend to try to protect the underlying reason for the withdrawal; the bill and amendments do not require any analysis of what legalizing the illegal use will do to the values the original legislative withdrawal was designed to protect. See attached list of protected streams under ORS 538.
- The bill/-1 does not allow the OWRD—on its own volition--to deny a registration because of injury: The -1's do not include a provision that would allow OWRD (on its own volition) to deny a registration because OWRD determines it will injure an existing water right holder. The only avenue granted to the OWRD to consider injury is if the "injured" water right holder files formal objections to the reservoir. This lack of authority strips away an important review that the OWRD undertakes in virtually all water allocation and reallocation processes. This puts farmers, cities, industry and instream resources at serious risk and sets very bad precedent.
- This bill/-1 sets up an entirely new concept for mitigation which would allow injury of a water right without consent of the water right holder (whether instream or out-of-stream): If a water right holder objects to the storage project because it would injure their existing water right, the -1's allow the OWRD to still approve an illegal reservoir "subject to reasonable mitigation efforts adequate to address the injury." This is a standard not seen anywhere else in statute. All other OWRD water right allocation and reallocation processes prohibit injury unless there is direct consent by the water right holder to be injured (for consumptive users) or the agency who has applied for an instream right (but only if net benefit to fish habitat can be provided). See 540.530(1). This bill allows the OWRD to approve the illegal use even if the injured water right holder objects to the "reasonable mitigation". This sets very dangerous precedent; and gives greater privileges to people who have broken the law than exists for those who have followed it.
- This bill/-1 will undermine the State Scenic Waterway Act: At least three of the rivers that the -1's touch are either State Scenic Waterways or tributaries to one, including Deschutes (Tumalo), Rogue and Sandy Rivers. The State Scenic Waterway Act prohibits new uses that will diminish new flows; it also prohibits dams from being on protected waterways. This bill does not include this as a review factor and in fact appears to try to prohibit consideration of these special designations/protections.
- This bill/-1 is not limited to small ponds: The bill allows grandfathering in of reservoirs that hold less than 9.2 acre feet or have dams of 10 feet or less. This standard is one mimics the standard in the "alternative reservoir" process; a standard that was supposed to limit that process to small ponds but instead, because of the "or", has been exploited to allow storage projects well in excess of 9.2 acre feet---the range has been anywhere from 20, 50, 100 or 400 acre feet, to an astounding 149,288 acre feet. See attached summary from 2007 that outlines the size of reservoirs as of that date.

- By statute, water is a public resource yet this bill/-1 does not allow for general public comment: This bill would only allow someone who can claim that an existing water right would be injured to “object¹” to the legalization of the illegal use. This is a lesser standard than current permitting laws allow and undermines one of the very basic premises underlying water law in Oregon.
- This bill/-1 is unnecessary: To address concerns about the number of unpermitted pond/reservoirs across the state in the early 1990’s, the legislature passed a series of ponds bills in 1993-1995 that were intended to address this problem once and for all (see ORS 537.405, ORS 537.407, ORS 537.409). Relevant to the discussion before you today on HB 3421 and the -1 amendments, the bills allowed an exemption of state permitting requirements for ponds that were in existence on or before January 1, 1995 and registered with the WRD before 1997 (ORS.537.405(1)&(2), OAR 690-340-0010(1)(e)). The WRD undertook an aggressive public outreach campaign and thousands of ponds were registered under this statute. This was a compromise deal and one that was not supposed to be repeated. This bill ignores past efforts by the Legislature.
- This bill/-1 undermines economic investments: At time when users and conservation groups alike are spending millions of dollars on efficiency projects and other water development projects to shore up supplies and restore river flows, this bill would give a green light to illegal users who are diverting water in direct conflict with these efforts. Tumalo Creek provides a good example: millions of public and private dollars have been spent to pipe/line Tumalo Irrigation District’s water supplies and restore water to the Creek yet this bill would allow illegal uses to trump all that good work (Tumalo is a withdrawn creek under ORS 538).
- This bill/-1 is unfair to all Oregon citizens that have followed the law: At its core this bill rewards illegal use. This sets very bad precedent for the state and is very unfair to law abiding Oregonians.

Conclusion: We would urge the Committee to reject HB 3421. This bill undermines legislative protection of beloved rivers for people who built reservoirs illegally. At a time when the state is seeing increasing conflicts over water, climate change impacts on supply, endangered species concerns and increasing competition for water, granting amnesty to those who have broken the law is not in the best interest of Oregonians. This bill would set smart water management backwards.

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¹This bill revives the concept of “objections”; something that was purposely expunged from OWRD statute and rule in the mid-1990’s. It is unclear what bill proponent’s intent is with this.

Chapter 538

2013 EDITION

Withdrawal of Certain Waters From Appropriation; Special Municipal and County Water Rights

DIVERSION BY MORROW COUNTY

- 538.010 Waters diverted from Ditch Creek; rights of use and appropriation; certificate; time limitation
- 538.020 Acquisition of property necessary for storage and diversion

WITHDRAWALS FROM APPROPRIATION

- 538.110 Tumalo Creek, Deschutes County; diversion prohibited; excepted uses; existing rights
- 538.120 Silver Creek, Marion County, and Brushes Creek, Curry County, and tributaries; diversion prohibited
- 538.125 Certain appropriations vested notwithstanding ORS 538.120
- 538.130 Condemnation of lands for park; vested and riparian rights not affected
- 538.140 Diamond Lake and tributaries; diversion, interruption or appropriation of waters prohibited; excepted uses
- 538.150 Hackett Creek, Clackamas County, and tributaries; appropriation, condemnation and diversion prohibited; protection of fish
- 538.160 Hackett Creek; vested rights not affected; condemnation of land for park not prevented
- 538.170 Johnson Creek in Multnomah and Clackamas Counties; limitations on appropriation or diversion
- 538.180 Johnson Creek; existing rights; condemnation of land for park
- 538.190 Lake of the Woods and tributaries, Klamath County; diversion, interruption or appropriation of waters prohibited; excepted uses
- 538.200 Streams forming waterfalls near Columbia River Highway; withdrawal from appropriation or condemnation; diversion or interruption prohibited

- 538.210 Condemnation of lands for park not prevented; vested and riparian rights not affected; condemnation of lands or appropriation of waters for fish culture not prevented
- 538.220 Waters of Mill and Barr Creeks, Jackson County, withdrawn; exceptions
- 538.230 Vested water rights not affected; condemnation for park not prevented
- 538.251 Tributaries of Columbia River; limitations on appropriation or diversion
- 538.260 Existing rights not affected; appropriation and use for certain purposes permitted
- 538.270 Rogue River; withdrawal from appropriation; excepted water uses; tributaries
- 538.280 McNulty Creek; withdrawal from appropriation; exceptions
- 538.290 McNulty Creek; existing rights not affected
- 538.300 Milton Creek and tributaries; withdrawal from appropriation; exception; existing rights

MUNICIPAL WATER SUPPLY

- 538.410 Confirmation of water rights acquired prior to February 24, 1909, for municipal supply; rejection of applications injurious to municipal supply; statements of supply
- 538.420 Portland's right to waters of Bull Run and Little Sandy Rivers; vested rights not impaired; applicability of law
- 538.430 Medford and Eagle Point Irrigation District; right to waters of Big Butte Creek; generation, sale and distribution of electric energy by irrigation district
- 538.440 Bend; right to waters of Tumalo Creek
- 538.450 Pendleton; right to waters of Umatilla River; notice of intent; agreement with tribes



Water Availability Analysis Detailed Reports

TUMALO CR > DESCHUTES R - AT MOUTH
DESCHUTES BASIN

Water Availability as of 4/17/2017

Watershed ID #: 70752 ([Map](#))
Date: 4/17/2017

Exceedance Level: 50%
Time: 9:13 AM

Water Availability Analysis	Consumptive Uses and Storages	Instream Flow Requirements	Reservations
Water Rights	Watershed Characteristics		

Water Availability Calculation

Monthly Streamflow in Cubic Feet per Second
Annual Volume at 50% Exceedance in Acre-Feet

Month	Natural Stream Flow	Consumptive Uses and Storages	Expected Stream Flow	Reserved Stream Flow	Instream Flow Requirement	Net Water Available
JAN	68.30	47.40	20.90	0.00	47.00	-26.10
FEB	67.30	52.10	15.20	0.00	47.00	-31.80
MAR	68.70	60.80	7.92	0.00	68.70	-60.80
APR	76.60	93.20	-16.60	0.00	76.60	-93.20
MAY	147.00	175.00	-28.10	0.00	82.00	-110.00
JUN	221.00	213.00	7.78	0.00	47.00	-39.20
JUL	111.00	152.00	-40.80	0.00	32.00	-72.80
AUG	65.40	105.00	-39.20	0.00	32.00	-71.20
SEP	63.10	95.60	-32.50	0.00	47.00	-79.50
OCT	65.30	80.20	-14.90	0.00	65.30	-80.20
NOV	70.40	59.50	10.90	0.00	47.00	-36.10
DEC	68.70	48.90	19.80	0.00	47.00	-27.20
ANN	66,000.00	71,500.00	4,950.00	0.00	38,600.00	0.00

Download Data ([Text - Formatted](#), [Text - Tab Delimited](#), [Excel](#))



Water Availability Analysis Detailed Reports

BIG BUTTE CR > ROGUE R - AB MOUTH
ROGUE BASIN

Water Availability as of 4/17/2017

Watershed ID #: 31530710 ([Map](#))
Date: 4/17/2017

Exceedance Level: 50%
Time: 9:17 AM

Water Rights	Consumptive Uses and Storages	Instream Flow Requirements	Reservations
Water Rights		Watershed Characteristics	

Water Availability Calculation

Monthly Streamflow in Cubic Feet per Second
Annual Volume at 50% Exceedance in Acre-Feet

Month	Natural Stream Flow	Consumptive Uses and Storages	Expected Stream Flow	Reserved Stream Flow	Instream Flow Requirement	Net Water Available
JAN	285.00	326.00	-41.10	0.00	0.00	-41.10
FEB	355.00	396.00	-41.10	0.00	0.00	-41.10
MAR	389.00	430.00	-41.10	0.00	0.00	-41.10
APR	343.00	390.00	-47.30	0.00	0.00	-47.30
MAY	225.00	280.00	-55.30	0.00	0.00	-55.30
JUN	138.00	202.00	-63.80	0.00	0.00	-63.80
JUL	120.00	194.00	-73.70	0.00	0.00	-73.70
AUG	112.00	179.00	-67.50	0.00	0.00	-67.50
SEP	104.00	161.00	-57.40	0.00	0.00	-57.40
OCT	146.00	189.00	-42.60	0.00	0.00	-42.60
NOV	141.00	182.00	-41.10	0.00	0.00	-41.10
DEC	264.00	305.00	-41.10	0.00	0.00	-41.10
ANN	158,000.00	195,000.00	0.00	0.00	0.00	0.00

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Alternate Reservoir Applications

Total Applications Received Since July 1, 1995 (since legislation adopted): 1037

Summary of all Applications by Outcome

Application Outcome	Number of Application	% of total
Approved	883	85.1%
Pending	77	7.4%
Denied	56	5.4%
Withdrawn	21	2.0%

Summary of all Applications by Dam Height

Dam Height	Total Applications	% of Total
Up to 10 feet	901	87%
10.1 feet and higher	100	10%
Not Recorded in Database	36	3%

Summary of all Applications by Acre- Feet (AF)

Acre Feet (AF)	Total Applications	% of Total
Up to 9.2 AF	897	87%
9.3 AF - 20 AF	68	7%
20.1 AF - 50 AF	38	4%
50.1 AF - 100 AF	15	1%
100.1 AF - 200 AF	12	1%
200.1 AF and greater	7	0.7%

Summary of all Applications by Type of Use*

Type of Use	Percent of Applications*
Multiple purpose	55%
Wildlife	15%
Livestock	10%
Fire Protection	5%
Aesthetics	2%
Recreation	1%
Other	12%

*Note that applications can identify more than one use. Therefore, the percent identified is the percent of all uses, not of the total applications. Other includes irrigation, aquaculture, domestic, mining, power, quasi-municipal, pollution abatement, forest management, and commercial.