



THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

MEMORANDUM

TO: Senate Environmental and Natural Resources Committee
FROM: Confederated Tribes of the Warm Springs Reservation of Oregon
DATE: May 31, 2017
SUBJECT: House Bill 2099

Senator Dembrow and Members of the Committee:

The Confederated Tribes of the Warm Springs Reservation respectfully offer the following testimony on House Bill 2099:

Confederated Tribes of the Warm Springs Reservation Interests in the Hood River Basin

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony on behalf of the Confederated Tribes of the Warm Springs Reservation (Tribes). The Tribes' interests in the Hood River predate the Endangered Species Act, Oregon statehood, and even the European migration to the new world. The entire Hood River Basin lies within the aboriginal territory of the Tribes. The Tribes' rights to hunt, fish and gather in the Hood River were reserved by the Tribes' 1855 Treaty. Thus, the Tribes have significant ongoing interests in the Hood River Basin and how its waters are managed and regulated.

The Tribes' goal in the Hood River is to restore fish and wildlife populations and natural habitats throughout the Basin. Since 1991 the Tribes' Hood River Program has been actively engaged with various Hood River basin stakeholders to support watershed restoration projects that restore stream flows and fish passage. Our approach is to work collaboratively with the major water users to achieve instream benefits while maintaining the economic vitality of the valley. To date, the Tribes have allocated and administered the expenditure of over \$10 million in its efforts to restore stream flows and to improve fish runs and habitat conditions in the basin.

The West Fork of the Hood River is a major component of the Hood River fishery, and stream flows in Lake Branch Creek, a tributary to the upper West Fork, are essential to the health of this fishery. Maintaining existing stream flows in Lake Branch Creek and in the West Fork are critical to the Tribes' restoration program. Since the Tribes began its restoration effort, we have seen a steady increase in fish use in the upper West Fork, including in Lake Branch Creek. Lake Branch

Creek is accessible to the entire assemblage of species present in the West Fork. Rainbow trout/steelhead, primarily summer run, and Chinook salmon, primarily spring run, are the most commonly observed species. In addition, the US Fish & Wildlife Service has designated Lake Branch Creek as critical habitat for Bull Trout and Lower Columbia Coho salmon.

After the reintroduction of Spring Chinook to the West Fork in the early 1990's, Lake Branch has been documented as a commonly used spawning stream. Since spawning surveys of spring Chinook in the West Fork watershed began in 1997, Chinook redds have been observed in 15 of the 19 years of these surveys. In some years, up to 20% of the Chinook redds in the entire West Fork were observed in the less than 1 mile reach of Lake Branch Creek below the falls.

The Tribes installed a water temperature monitoring device in Lake Branch Creek nears its confluence with the West Fork in 1999. Lake Branch Creek is subject to two Oregon Department of Environmental Quality (ODEQ) temperature standards, a 13°C standard for salmon and steelhead spawning use from August 15 to June 15, and a 16°C standard for core cold water habitat use year round. The water temperatures we have recorded at the Lake Branch Creek site have remained below these water temperature standards, even during the significant drought in 2015. There is no question that Lake Branch Creek provides essential water quality habitat for salmonids.

The Oregon Department of Fish and Wildlife (ODFW) has monitored stream flows near the mouth of Lake Branch Creek since 1997. Typically, base flows in Lake Branch Creek occur from late July to early September, though the low-flow period can extend well into October in some years. During the summer to fall low-flow period, typical base flow is in the range of 34 to 55 cfs. However flows as low as 9 cfs have been measured.

With over 60% of summer flows currently withdrawn from the Hood River for consumptive uses, it is not surprising that NOAA Fisheries and the ODFW have identified flow restoration as the primary recovery action for listed fish stocks in the Hood River Basin (See: ODFW 2010, Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead. Oregon Department of Fish and Wildlife, Salem, OR.)

Analysis of House Bill 2099

HB 2099 proposes amendments to Oregon Revised Statute (ORS) 537.230. ORS 537.230 sets out the process for a permit holder to secure an extension of time to complete development of water use under the permit. Once an entity, including a city, receives a water right permit under Oregon's water code, it has a limited amount of time to complete construction of water delivery infrastructure and to make beneficial use of water.¹ Failure to complete such development and use can result in cancelation of the permit. However, ORS 537.230 has a provision to allow permit

¹ The deadline for completing construction and application of water to beneficial use is commonly called the "C Date." When a water right certificate is issued on a permit, only the amount of water actually beneficially used can be certificated.

holders to seek an extension of time to complete development. It is this provision, as it applies to municipalities that is the subject of HB 2099.

Tribes' Argument on HB 2099

The Tribes take no position on ORS 537.230 or the amendments proposed in HB 2099, except as these amendments affect stream flow in the Hood River, specifically the flow in Lake Branch Creek. HB 2099 proposes two amendments to ORS 537.230 that could drastically impact the flow in Lake Branch Creek. These amendments would allow the City of Hood River to increase diversions of water under two of its water rights permits without evaluation of the impact of these increased diversion on listed fish species.² If the City is allowed to divert the full amount authorized under Permits S-8387 and S-15312 without any environmental review, Lake Branch Creek could in fact be dewatered during extreme low flow periods.

Currently, ORS 537.230(2)(c) requires a “persistence review” for a city to divert any undeveloped portion of its municipal permit.³ The “persistence review” requires the Oregon Water Resources Department (OWRD) to condition use of the undeveloped portion of the municipal right so as to “maintain ... the persistence of fish species ... listed as sensitive, threatened or endangered” under state or federal law. The Tribes believe this persistence review will help provide protection of minimum flows in Lake Branch Creek. Therefore, the Tribes oppose the proposed amendments to ORS 537.230 that could result in diminishing the stream flow protection required under current law.

The Tribes position on the amendments to ORS 537.230 is based upon its desire to protect stream flows in the Hood River and its tributaries, especially flows in Lake Branch Creek. The Tribes suggest that there are alternative options to achieve this goal, separate and apart from the persistence review procedure under ORS 537.230(2)(c). For example, a minimum streamflow requirement has proven to be a very effective tool in the protection of critical fish habitat. The Tribes' goal is to protect the habitat quality and capacity of Lake Branch Creek to help fish recovery in the Hood River Basin. It should be noted that instream water right Certificate 75620 establishes minimum flows in Lake Branch Creek to provide required stream flow for migration, spawning, egg incubation, fry Emergence and juvenile rearing for a number of fish species. The Tribes agree that

² The City of Hood River holds two water right permits authorizing diversion of water from springs on Lake Branch Creek. Permit S-8387 authorizes diversion of 19.0 cfs. Permit S-15312 authorizes diversion of 2.0 cfs. At the “C Date” for Permit S-8387 the City was beneficially using 6.4 cfs. At the “C Date” for Permit S-15312 the City was beneficially using 1.8 cfs. Section 1(2)(a) of HB 2099 would increase the amount deemed as beneficially used under Permit S-8387 to 10.4 cfs. Section 1(2)(a) would not change the use calculation under Permit S15312. Section 6 of HB 2099 would increase the amount deemed as beneficially used under Permit S-8387 to 19.0 cfs. Under Permit S-15312 the \$6 amount would be 2.0 cfs.

³ Under current law, the developed amount is calculated at the permit C Date. The “undeveloped portion is the difference between the amount actually beneficially used at the C Date and the amount authorized under the permit.

the minimum flows set out in Certificate 75620 appear to be appropriate for protection of the Lake Branch Creek fishery.⁴

The Tribes have worked cooperatively with a number of stakeholders in the Basin to establish procedures for protection of minimum stream flows. The key is to cooperatively identify days, weeks or months when minimum flows are essential to maintain critical habitat, and then identify the level of these minimum flows. Flexibility in water use and alternate supply options must be a part of such solutions.

Senator Dembrow and Members of the Committee, the Tribes thank you for this opportunity to be heard on this important legislation.

⁴ The priority date of instream water right Certificate 75620 is December 6, 1991. This priority date is earlier than the C-dates for both Permit S-8387 and Permit S-15312.
