



HB 2853

Testimony of WaterWatch of Oregon Kimberley Priestley Submitted to the House Energy and Environment Committee February 21, 2019

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 2853

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 2853 does: At its core, this bill will legalize reservoirs/dams that are currently 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 The bill will legalize illegal reservoirs that are taking waters from rivers that are legislatively withdrawn, without any consideration for the reasons for the legislative protection of the said rivers in the first place.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 bill include, but are not limited to, 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. HB 2853 will also impact legislative withdrawals that protect water for future municipal use.

WaterWatch opposes HB 2853 for the following reasons:

- HB 2853 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.

- HB 2853 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.
- HB 2853 will undermine the State Scenic Waterway Act: At least three of the rivers that HB 2853 touches 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 scenic waterway flows. This bill does not include this as a review factor and in fact appears to try to prohibit consideration of these special protections.
- HB 2853 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.
- HB 2853 allows annual refilling of the reservoir for consumptive uses: The bill allows the owner to apply for a secondary water right to use the water for consumptive uses (irrigation, etcetera), which means that this bill would allow the owner to pull water from an otherwise withdrawn stream to fill the reservoir year after year.
- HB 2853 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 2853, 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.
- HB 2853 does not allow the OWRD—on its own volition--to deny a registration because of injury: The bill does 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.

- HB 2853 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, HB 2853 would 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.
- By statute, water is a public resource yet HB 2853 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.
- HB 2853 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 that good work (Tumalo is a withdrawn creek under ORS 538).

Conclusion: We would urge the Committee to reject HB 2853. 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.