



WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

SB 946-1

Testimony of WaterWatch of Oregon
By Kimberley Priestley

Senate Committee on Environment and Natural Resources
April 2, 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 SB 946-1

Oregon's transfer statutes allow century old water rights that do not meet modern day environmental standards to be transferred to new uses, new places and/or to change diversion points. This is an archaic system that allows harmful uses into the future without any modern day environmental review and/or conditioning. These statutes have long been in need of updating.

SB 946-1 does not provide the wholesale updating that is needed to bring transfer statutes into the twenty-first century to ensure a sustainable water future for both instream and out-of-stream uses. Rather, SB 946-1 will make current problems even worse by expanding current authority to allow for the changes to "stored water". While changes in character of use are less problematic (see e.g. SB 51) the changes proposed in SB 946-1 with regards to moving the location of a storage projects from one location to another without any environmental review could perpetuate, and add to, long-standing environmental harms. Concerns with this bill include, but are not limited to:

- 1. This bill would allow the building of new storage projects without requiring the new reservoir permit:** Under existing statutes, all new reservoirs must obtain a reservoir right. ORS 537.400. Permitting of reservoirs is critical to ensuring protection of the public interest as the OWRD reviews these projects in light of a myriad of standards, including but not limited to: water use efficiency and avoidance of waste, threatened, endangered or sensitive species, water quality, recreation, economic development, local comprehensive plans, water availability and adherence to basin plan classifications, among other things. OAR 690-310-0120. Similarly, Oregon's storage policies call for storage to be planned and implemented in a manner that protects and enhances the public health, safety, welfare and the state's natural resources, and calls on the state to evaluate new reservoirs against a myriad of standards including social, technical, economic, land use, environmental (e.g. impacts on streamflows, fisheries, wildlife, wetlands, habitat, biological diversity, water quality and opportunities for mitigation). OAR 690-410-080(2). The proposal in SB 946-1 would allow the movement of storage projects from one location to another (in other words, the building of new reservoirs) without any review except injury and enlargement; in other words, the state would be prohibited from reviewing these projects in light of Oregon's longstanding storage policies. This is not good public policy.

- 2. The bill allows the building of new storage projects without any environmental review associated with the transfer of the water right:** As noted, Oregon's water transfer laws allows old water rights to serve new uses, move to new diversion points, or change place of use without any environmental review. This system effectively nullifies Oregon's ability to protect instream values on hundreds of streams across the state and creates an unfair system that allows changes to old environmentally harmful water rights that benefit the water right holder without also requiring that this new version of the water right meet modern day environmental standards. The failure of the transfer statutes to allow for any environmental review has long been recognized as a problem needing to be addressed at the state level (see attached 1998 Memo from the Oregon Water Resources Department to its Commission, pg. 2). SB 946-1 will expand this problem as the bill expands the world of transfers. The state should not be expanding current transfer authority without also addressing long standing problems that exist in these statutes today.
- 3. The bill would allow the building of new reservoirs without allowing the state to attach any modern day conditions of use.** One of the longstanding problems of the transfer statutes is that the state cannot attach any modern day conditions of use to the water right, aside from the very limited ability to require screens when there is a change in point of diversion,. This means that even the most basic of conditions that would attach to all new reservoirs today, such as measurement and reporting of water use, are not allowed under the transfer statutes. This would be true of the changes in the location of storage projects proposed in SB 946-1. For instance, the state could not attach screening requirements to changes from on channel to off channel proposed to SB 946-1 because that is not a change in point of diversion. This perpetuates ongoing problems associated with old outdated water rights. This is not good public policy.
- 4. The bill fails to provide sideboards to ensure the "good" on channel to off channel projects that is being used as justification for this bill.** In Senator Dembrow's transfer workgroup the user groups repeatedly stated that they needed changes to the transfer laws related to storage water rights so that they could move forward with "good projects" that would get stream spanning dams off Oregon's waterways. This is what framed the discussion as far as movement of storage projects. This argument was also central to user group opposition to SB 51, which would have focused just on changes to character of use of stored water (see e.g. OFB testimony on SB 51). Contrary to representations made by the user groups, SB 946-1 fails to require that if a project is moved from on channel to off channel that the water right holder must remove the dam. Without this requirement this could in fact end up harming fish and rivers even more. In other words, this bill does not ensure the "win win" projects that the user groups are touting as justification for this bill. It is also important to note that section 3(6)(a)(D) does NOT address this. This section is simply a recitation of existing fish passage laws. Under current law, if a water right is changed that triggers fish passage requirements. Thus, whether or not this provision was in SB 946-1, fish passage is still the law. In a nutshell, that SB 946-1 does not require dam removal means that this bill will not be limited to "good projects" that that will improve things for fish and rivers. SB 946-1 Section 3(6)(a)(D) is meaningless as written as it is already existing law.
- 5. This bill is not limited to movement of "small" reservoirs.** Similarly, in Senator Dembrow's workgroup the user groups asserted that movement of "small" ponds would have little to no environmental impact. First of all, if that contention were in fact true than requiring environmental review should not be problematic. But more to the point, this bill does not in fact limit the movement of storage projects (either on channel to off or off to off) to small ponds. Generally, small

ponds are noted as 9.2 af or smaller (statute, rules, policies). Reservoirs of 50 and 100 acre feet cannot be classified as “small” ponds; any assertion that these thresholds will protect against environmental harm is unfounded.

- 6. The bill appears to insulate the movement of storage projects from current transfer standards that prohibit enlargement:** The only standards that currently apply to transfers are that the transfer cannot injure another water right holder and the transfer cannot result in the enlargement of a water right. Rules that require documentation of use in the past five years to help the state make these determinations. SB 946-1 appears to insulate a reservoir owner from the latter by putting into statute under the definition of “place of use” that that place of use as it relates to storage means the area submerged by the water stored in the reservoir or pond at “maximum fill”. Maximum fill has nothing to do with what has actually been stored.
- 7. This bill would grandfather in the very contentious Tumalo water ski park ponds that are currently under appeal.** Section 4 grandfathers in any changes of water rights that have been approved and become final by operation of law, which makes sense. But, notably, Section 4 also grandfathers in water rights that are under appeal (regardless of size). This means that the highly contentious Tumalo water ski parks in Central Oregon would be grandfathered in. These were a subject of a bill in 2018 that did not pass and should not be snuck in under this bill.
- 8. This bill has not received adequate time for consideration.** This bill is not the result of Senator Dembrow’s transfer workgroup. The -1 amendments have been drafted behind closed doors and were not made public until less than 24 hours before today’s hearing. This has put the public at a distinct disadvantage and stymied any open discussion on the bill. This is bad public policy and not how laws should be made.

Conclusion: This bill and the -1 amendment squander an opportunity to amend the transfer statutes so that transfers can be used as a tool not only to benefit water right holders, but to lead Oregon to a sustainable water future that meets both instream and out-of-stream needs. This bill is contrary to many recommendations of the Integrated Water Resources Strategy to advance instream protections, contrary to the Governor’s 100 year water vision’s goals as to protection of fish and wildlife habitat, and the absolute antithesis of “irrigation modernization”. This bill will expand transfer statutes without addressing long standing environmental harms that these statutes allow. WaterWatch does not oppose changing the transfer statutes to allow for changes to water rights for stored water, but these changes should not be done without addressing long standing harms that current transfer statutes allow.

We urge the Committee to reject this bill.

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Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Geoff Huntington, Deputy Director

SUBJECT: Agenda Item I, July 10, 1998
Water Resources Commission Meeting

Briefing on Proposed Legislative Concepts for the 1999 Legislative Session

I. Issue Statement

This is the latest report to Water Resources Commission members to discuss potential legislative concepts which may be submitted to the 1999 Legislature. Commission direction and advice will be used by staff to continue the development of the concepts.

II. Background

The process to develop legislative concepts for the 1999 session began in late 1997. Department staff have held numerous discussions on potential legislative ideas both internally and with a group of interested stakeholders. Based on discussions at these meetings, Department staff submitted 16 preliminary legislative concepts to the Department of Administrative Services (DAS) on April 15. These concepts were approved by DAS and the Governor's Office, and subsequently submitted to Legislative Counsel on May 27 for drafting into bill form. The list of legislative concepts was shared with the Commission at its March 31 meeting. A copy of the list is contained in Attachment 1.

At the time of writing this report, two meetings have been held with stakeholders to discuss legislative concepts. Several of the legislative concepts were discussed in detail at the Commission meeting on May 15. A third stakeholder meeting is scheduled for June 29, and a Commission workshop is scheduled for July 2, to discuss LC 11, a concept focusing on stewardship and supply issues.

There are more administrative deadlines to meet before the end of the year. The deadline for submitting substantive and administrative detail on the concepts to Legislative Counsel for final drafting is July 31. Pre-session filing of agency bills must occur by December 15, 1998.

At upcoming meetings, staff will continue discussions with Commission members to determine which of the 16 legislative concepts should be pursued next session, and to finalize the language for each.

III. Discussion

At the last meeting, staff briefed Commission members on five of the 16 concepts. For purposes of this report, staff will focus discussion on several other concepts which could have potentially significant policy impacts.

A. Transfers

Through discussions with staff and stakeholders, the Department has developed a number of legislative ideas relating to the transfer program. If incorporated into a legislative proposal, the ideas would do the following:

1. Allow a holder of a water right for industrial purposes to change the type of use from specific uses (boiler operation) to general uses (industrial) provided there is no injury.
2. Allow a holder of a supplemental water right to change the type of use to a primary right provided the original primary right is either canceled or transferred to a supplemental use. Changing the place of use of the original primary right would be prohibited under this idea due to injury and enlargement concerns.
3. Amend ORS 540.520 to allow the Department to request information that is necessary to evaluate a transfer application, but is not specifically called for in statute or rule.
4. Amend ORS 540.520 to allow the Department to return a transfer application and fees to the applicant if it determines that the application is incomplete or defective.
5. Amend ORS 540.580 to repeal the provision which prohibits districts from making a second permanent transfer in place of use within five years after the original transfer.
6. Amend ORS 540.580 to clarify that provisions of that statute apply to "water uses subject to transfer" as defined in ORS 540.505(4). The current language in this section of the statute refers only to certificated or decreed rights, which is unnecessarily restrictive.
7. Amend ORS 540.580 to increase the time allowed for the Department to publish public notice of a petition for a permanent transfer from seven to 15 days. The current seven-day requirement to publish notice is difficult and sometimes impossible to meet, depending on when the Department receives a district petition.
8. Amend ORS 540.530 to provide a review to determine whether a proposed change in point of diversion causes an appreciable impact to stream flows which will result in harm to fish or aquatic species listed under the state or federal endangered species act.

9. Amend ORS 540.530 to allow a mitigation opportunity for a proposed transfer that would injure existing rights or result in harm to a listed species.
10. Create a processing deadline for pending transfer applications.
11. Require the Department to issue a final order or schedule a contested case hearing on new transfer applications within 180 days after receipt of a completed application.

B. Fees

At the May Commission meeting, Department staff discussed, in general terms, the idea of pursuing fee increases in certain program areas to better cover the costs associated with processing applications. Staff have discussed the fee increase concept internally and with stakeholders. Fee increases have been considered for water right applications, transfers, small reservoirs, extensions, and certain protests. At this time, staff do not have a definite course of action to recommend to the Commission. We will present a more detailed briefing on this issue at the Klamath Falls meeting.

C. Stewardship and Supply

A Commission workshop will be held on July 2, 1998, to begin discussions with Commission members, stakeholders and staff about a basin-level approach to addressing stewardship and supply needs. Staff will brief Commissioners who were unable to attend the workshop on the substance of the meeting. Discussion among the full Commission will be used to guide the Department's focus on this concept.

IV. Summary

The purpose of this report is to continue the dialogue between Commission members and staff on proposed legislative concepts for the 1999 legislative session. Staff will use Commission comments and suggestions to further develop these concepts.

Attachment:

WRD Proposed 1999 Legislative Concepts

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