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February 6, 2020

House Committee on Water  
Representative Ken Helm, Chair  
Members of the Committee  
Email: [hwtr.exhibits@oregonlegislature.gov](mailto:hwtr.exhibits@oregonlegislature.gov)

**RE: HB 4069 – Water Use Reporting – OPPOSE**

Chair Helm and Committee Members,

Thank you for the opportunity to provide comment on House Bill 4069. My name is Sarah Liljefelt, and I am a partner at Schroeder Law Offices. My office focuses its practice on water law, and we represent farmers, ranchers, special districts, municipalities, and other water users in six western states, including Oregon. I am here today on behalf of the Oregon Cattlemen's Association ("OCA"), as Chair of OCA's Water Resources Committee, in opposition to House Bill ("HB") 4069.

In general, HB 4069 states that if the Oregon Water Resources Department ("OWRD") requires a person or entity to measure water use, OWRD can also require the person or entity to report water use to OWRD, though the bill is completely silent on the terms of such water use reporting. OCA opposes HB 4069 for the reasons that: 1) it is unnecessary, 2) OWRD is unable to review or use any additional data submitted to the agency, 3) it will impose potentially large costs on water users without correlating benefits to the State, and 4) it creates the potential for expensive and unwarranted litigation regarding forfeiture.

First, OWRD has included as conditions in its water use permits and certificates for many years that water users must either measure their water use, or (in older permits) that OWRD may require the water users to measure water use in the future. When such permits include that condition, OWRD also requires water use reporting to OWRD, or states that OWRD *may require* reporting in the future. See attached example permit. Therefore, OWRD already requires water use measurement and reporting in its water use permits and certificates, or *may require* many water users to measure and report water use at any time, but has not elected to require such water users to do so. OWRD's lack of enforcement of these already-existing permit conditions shows that OWRD does not actually have a use or desire for the water use reporting proposed by HB 4069.

Additionally, OWRD already has the authority to require water users without water use measurement conditions in their permits or certificates to install measurement devices on any point of diversion or appropriation when the local watermaster deems such action necessary for proper water distribution. ORS 540.310 and OAR 690-250-0060. Therefore, additional measurement is already occurring in those situations where OWRD deems measurement necessary for proper water administration. OWRD has not required all

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water users to measure their water use, presumably again because OWRD has not found such measurement to be necessary or useful in all situations.

Second, OWRD is already unable to review and analyze water use data that is provided to the agency. Similar to OWRD's lack of review of well drilling logs that are submitted to the agency (see testimony related to HB 2331 and 2331A (2019)), OWRD does not review water use reporting for any purpose other than determining whether a water user has "proved up" on their water use permit in order to be issued a water right certificate. The data is not used for any larger purposes, such as correcting water availability analyses for surface water streams, or anything else. Any additional water use data submitted to OWRD will be filed away and unused like so much other information and data already submitted to OWRD. If the Legislature would like water users to report water use to OWRD, OWRD should first have personnel and a program in place and ready to utilize the data in response to a valid need for such data. In fact, OWRD should put in place personnel and programs to utilize data already submitted to the agency before it is provided with further data (for example, a well drilling log review program).

Third, the potential costs to each individual water user could be very high. For water use reporting, OWRD typically requires totalizing flow meters in order to report water use by volume (gallons or acre-feet), as opposed to more simplistic water meters, flumes, weirs, etc. that allow users to measure their rate of diversion. See attached OWRD water use reporting form that requires volumetric reporting. Altering water users' infrastructure to install totalizing flow meters may cost thousands of dollars in some instances, and would require more frequent trips to points of diversion/appropriation, sometimes in very remote locations or across other persons' properties, in order to record meter readings. Water users in Oregon developed their water use infrastructure based on conditions included in their water use permits, and requiring infrastructure alterations "after-the-fact" can be very expensive and burdensome. The costs are not justified because OWRD cannot and will not utilize the data, and therefore HB 4069 proposes to impose potentially significant costs and burdens on water users without correlating benefits.

Fourth, it is inevitable that certain activist groups will attempt to use the reported water use information to allege forfeiture of water use rights under ORS 540.610. However, in Oregon the nonuse of water for five or more years only creates the presumption of forfeiture, and the water user can rebut the presumption with any of 14 affirmative defenses. ORS 540.610(2). The filing of affidavits of nonuse by activists will lead to an unknown number of contested cases in which water users will be forced to endure expensive litigation to prove their affirmative defenses. Already, contested case proceedings are backed up several years – OWRD has delayed referring contested cases to the Office of Administrative Hearings for many years due to OWRD's financial inability to participate in the litigation. HB 4069 would open the door to additional contested case litigation that OWRD is unable to resolve in a timely manner, and that creates unwarranted expense for water users throughout the State.

The proposed amendments to HB 4069 resolve some, but not all, of OCA's concerns outlined above. If the Committee votes in favor of HB 4069, OCA recommends the following additional modifications to the bill:

- 1) Specify the scope of water use reporting; that is, require that the Commission's rules only request annual reporting of no more than monthly data to ensure the reporting requirement is not overly burdensome on water users;
- 2) Regarding the -2 amendments, take the "consideration" factors a step further; that is, require that the Commission's rules state that OWRD must have specific and valid reasons to require water use

reporting from water users (including but not limited to the “consideration” factors), as well as have the necessary personnel and program in place to organize, analyze, and utilize any data reported to OWRD for the identified purposes;

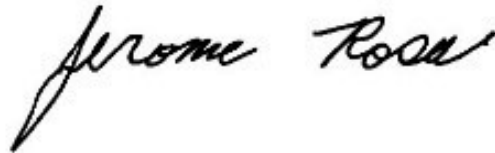
- 3) Establish a fund to assist water users to install measurement devices to allow reporting for those water users who are financial unable to incur the costs of required infrastructure changes;
- 4) Require the Commission in its rules to establish a “safe harbor” period to allow water users to come into compliance with new measurement and reporting requirements (suggest three years); and
- 5) Specify that failure to report water use is not grounds for cancellation of vested or perfected water use rights that do not already have reporting requirements, and outline any consequences for failure to report water use data that may be required.

The Oregon Cattlemen’s Association is opposed to HB 4069, and urges the Committee members to vote against HB 4069. However, should the Committee vote in favor of HB 4069, OCA requests that the Committee amend HB 4069 in line with the proposed -1 through -3 amendments, as well as the additional suggestions outlined above. Thank you for your time and careful consideration.

Sincerely,



Sarah Liljefelt  
Water Resources Committee Chair,  
Oregon Cattlemen’s Association



Jerome Rosa  
Executive Director,  
Oregon Cattlemen’s Association

STATE OF OREGON

COUNTY OF MARION

PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS PERMIT IS HEREBY ISSUED TO

PAUL JENSON - JB SOD & SEED  
5289 BLUEGRASS LANE  
SILVERTON, OREGON 97381

503-581-7823

to use the waters of A WELL in the PUDDING RIVER BASIN for IRRIGATION OF 105.0 ACRES.

This permit is issued approving Application G-12472. The date of priority is APRIL 4, 1991. The use is limited to not more than 1.31 CUBIC FEET PER SECOND, or its equivalent in case of rotation, measured at the well.

The well is located as follows:

SW 1/4 SW 1/4, SECTION 23, T 5 S, R 2 W, W.M.; 80 FEET NORTH AND 1900 FEET WEST FROM NORTH 1/4 CORNER OF SECTION 26.

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second (or its equivalent) and 2.5 acre-feet for each acre irrigated during the irrigation season of each year.

The use shall conform to such reasonable rotation system as may be ordered by the proper state officer.

A description of the proposed place of use under this permit is as follows:

NE 1/4 SW 1/4 15.0 ACRES  
NW 1/4 SW 1/4 12.8 ACRES  
SW 1/4 SW 1/4 20.7 ACRES  
SE 1/4 SW 1/4 19.1 ACRES

SECTION 23

NE 1/4 NW 1/4 13.2 ACRES  
NW 1/4 NW 1/4 18.6 ACRES  
SW 1/4 NW 1/4 0.8 ACRE  
SE 1/4 NW 1/4 4.8 ACRES

SECTION 26

TOWNSHIP 5 SOUTH, RANGE 2 WEST, W.M.

The well shall be constructed in accordance with the General Standards for the Construction and Maintenance of Water Wells in Oregon. The works shall be equipped with a usable access port, and may also include an air line and pressure gauge adequate to determine water level elevation in the well at all times.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order.
- B. The permittee shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.

- C. The Director may require the permittee to keep and maintain a record of the amount (volume) of water used and may require the permittee to report water use on a periodic schedule as established by the Director. In addition, the Director may require the permittee to report general water use information, the periods of water use and the place and nature of use of water under the permit. The Director may provide an opportunity for the permittee to submit alternative reporting procedures for review and approval.

Prior to receiving a certificate of water right, the permit holder shall submit the results of a pump test meeting the department's standards, to the Water Resources Department. The Director may require water level or pump test results every ten years thereafter.

Actual construction work shall begin on or before DECEMBER 12, 1995 and shall be completed on or before October 1, 1996. Complete application of the water shall be made on or before October 1, 1997.

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

This permit is for beneficial use of water without waste. The water user is advised that new regulations may require use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water shall be limited when it interferes with any prior surface or ground water rights.

The Director of the Water Resources Department has found that the proposed use of water described by this permit as conditioned, will not impair or be detrimental to the public interest.

Issued this date, December 12, 1994.

MAR MARTHA O. PAGEL

Water Resources Department  
Martha O. Pagel  
Director

