

House Committee on Water
OFB Testimony on HB 3091 and 3103
March 18, 2021

Chair Helm and Members of the Committee,

The Oregon Farm Bureau supports the -4 amendment to HB 3091 and opposes HB 3103, both as drafted and as amended. By way of background, the Oregon Farm Bureau (OFB) is the state's largest general agricultural trade association, representing nearly 7,000 farm and ranch families in the state, many of whom rely on irrigation.

Water is the lifeblood for Oregon's farmers and ranchers; it is essential for the Oregon's agricultural economy and many farms and ranches in Oregon cannot operate without secure access to irrigation water. Agriculture contributes an estimated \$50 billion dollars to the state's economy, making it Oregon's second largest economic driver. Given the importance of water to all of Oregon's 220+ commodities, it is critical that we ensure that we have the full ability to transfer the stored water that many farmers rely on for their operations.

In early 2018, OWRD reversed nearly 100 years of precedent by announcing that they did not believe that they had statutory authority to allow changes to the purpose of use identified in a right to store water or to change the location of reservoirs. Despite the major nature of this change, OWRD did not announce it in any formal capacity, and instead opted to take no action on a storage transfer application pending in front of it. Only after that user pushed the Department, did they announce their change in position, and some months later produce a document entitled "Changes in Reservoir Rights" (hereinafter "Position Paper"), dated February 7, 2018.

This conclusion in the OWRD Position Paper that they lack the authority to transfer water is not supported by the statutory references offered in the one-page Position Paper, nor has OWRD to date provided any case law, legislative history, or other authority in support of its conclusion. Notably, the analysis fails to reference or address the primary statutes controlling changes ("transfers") in existing water rights, ORS 540.505 through 540.520, and fails to include numerous other statutes and administrative rules that support the opposite conclusion and are consistent with OWRD past practices in allowing changes to be made in water rights issued for reservoir storage purposes. In short, the Position Paper is not based on sound legal reasoning

and has been rejected as incorrect by several water attorneys who have practiced water law for decades.

In conversations around transfer of stored water, OFB has been clear since the beginning that the issues must be resolved together, and that there could be severe unintended consequences of a piecemeal resolution. Since the issue was first raised in 2018, the conversations around the Oregon Water Resources Department's authority to transfer stored water have not gotten off the ground, in part because many of the same groups that are advocating for the passage of HB 3103 and resolution of the "type of use" transfers cannot reach agreement on the standards that should apply to place of use or point of diversion transfers should be handled.

With that in mind, OFB supports the -4 amendment to HB 3091, which would help expedite decision on this issue by the Oregon Supreme Court. Given that the Position Paper is ill-supported and upended nearly 100 years of precedent, we think that a decision through the Court system is the quickest path to a complete resolution of this issue, we believe that is the path the Committee should pursue. If the Court strikes down the decision, as we think they will, the issue WILL NOT need to come back to the legislature and it will be resolved.

OFB opposes HB 3103, both as drafted and with the -1 amendment, because while it would resolve one component of the transfer issue while leaving the remaining issues unresolved. To be clear, we agree that the authority to transfer the type of use should be restored, but only as part of a complete resolution of the transfer of stored water issue. While you've heard a lot from the municipal providers about the need to move this issue forward because of the Willamette Reallocation, I have water users who need to move nursery ponds, who rely on failing dams that will need to be reconstructed, and who have points of diversions that have washed out and need to be moved. All of those uses will require a transfer, and will be left without any clear path for resolution of those issues either now or in a future session. While we appreciate the intent to come back next session and resolve the place of use and point of diversion issues, the two sides remain very far apart, with many of the groups who support HB 3103 standing strong in their position that they are not willing to compromise on the very issues that will need to be resolved to have a legislative path forward. With that in mind, if HB 3103 moves forward, it may foreclose a legal challenge, but would leave two very critical issues for our members unresolved. We cannot support this result.

Thank you for the opportunity to provide testimony on HB 3091 and HB 3103 and please contact us if you have any questions.

Contact: Mary Anne Cooper, maryanne@oregonfb.org