

March 18, 2021

Hon. Ken Helm, Chair
House Water Committee

Re: HB 3103-1

Dear Chair Helm:

On behalf of the League of Oregon Cities and the Oregon Water Utility Council, we write in support of HB 3103-1.

The bill is essentially a housekeeping measure to restore the status quo prior to the Oregon Water Resources Department's recent reinterpretation of its authority to transfer storage water rights under ORS Chapter 540.

HB 3103-1 would clarify that the Department has the authority to "transfer," i.e. change the use approved under storage water rights. The Department itself believed it had that authority and has issued many such transfers over several decades. However, in a one-page handout dated February 7, 2018, Department staff concluded to the contrary, which was later supported by a Department of Justice letter opinion dated August 31, 2018.

The confusion stems from 1995 amendments to ORS Chapter 540 concerning transfers. Before 1995, ORS 540.510 provided that the "owner of any certificated water right" may apply to the Department for a transfer of the place of use, point of diversion or the "use theretofore made of the water in all cases" without losing priority of right. According to then Director Martha Pagel in her testimony dated January 17, 1995, the Department proposed amendments to make it clear that transfers of decreed water rights could be treated the same as certificated rights under this Chapter, and further clarified the process for transfers of primary rights in relation to supplemental rights.

The apparent intent of the 1995 amendments was to broaden, not narrow, availability of transfers for vested, or near-vested, water rights. To do that, a definition was added to ORS 540.505 of "water use subject to transfer" that included:

- (a) An adjudication under ORS chapter 539 as evidenced by a court decree;
- (b) A water right certificate
- (c) A water use permit for which a request for issuance of a water certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250; or
- (d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission.

Nowhere in that definition are certificated storage rights differentiated from other rights. In fact, in the 23 years since enactment of the 1995 amendments, the Department continued to process and grant transfers to change the character of use under certificated storage water rights. The Department's 2018 change of position came from textual comparisons of other provisions in the law that did not describe storage of water as a "use." Simply stated, the Department therefore concluded that storage rights could not be a "use subject to transfer," despite the plain language of ORS 540.505, above.

Regardless of the correctness of the Department's interpretation, it has created enough uncertainty that clarifying legislation is needed. HB 3103-1 would make a narrow, surgical change to ORS 540.510 and 540.520, respectively, to restore everyone's prior understanding of the ability of the Department to approve transfers of storage water rights:

A holder of a water right certificate that authorizes the storage of water may change the type of use identified in the water right certificate, as described in subsection (1)(a) of this section, without losing priority of right.

This simple change would remove any doubt that storage water rights are among water uses subject to transfer.

We are aware that some have raised concerns about the unintended consequences of this bill, such as making it too easy to convert storage water rights to instream uses. This bill would only restore the status quo before the Department's reinterpretation. Whatever the law allows for instream water rights, fishery protections or any other kinds of transfers would be unaffected by HB 3103-1.

For these reasons, we urge support for HB 3103-1.

Thank you for the opportunity to comment. Please let me know if there is further information I can provide to aid the Committee.

Chair Ken Helm
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Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, appearing to read "Richard M. Glick". The signature is stylized and cursive.

Richard M. Glick

cc: Joel Cary
Tracy Rutten Rainey
Niki Iverson