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Oregon Farm Bureau Testimony on HB 3166, -1 Amendments

House Committee on Water

April 8, 2021

Chair Helm and Members of the Committee,

Thank you for the opportunity to submit testimony on the -1 amendments to HB 3166, which would create a new program within the Oregon Department of Water Resources that would require measurement and reporting of water use in priority basins across Oregon. 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 for their farms and ranches to remain viable.

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 maintain our water rights without undue cost and management burden.

As an initial matter, the Oregon Farm Bureau appreciates the significant time and energy that the committee and all stakeholders have put into this process. Solving our state's complex water issues is not an easy task, and we appreciate the good faith conversations that have happened and that led to the development of these amendments. Oregon Farm Bureau believes strongly in basing our state's management on sound data and believes that better decisions will come through the state's investment in water data. In late January, we presented a framework for approaching the need to invest in water data that contains an incremental approach to investing in increased measurement and reporting. While we saw elements of that approach in the -1 amendments, many of the safeguards we suggested to ensure that this data was useful for water management while protecting water users were missing. To that end, the framework presented in the -1 amendments still raises significant concerns for our membership. While we are willing to remain at the table and continue to work toward agreement, we oppose the -1 amendments to HB 3166 at this time.

Background on Water Data and Agriculture

OFB has engaged in good-faith regarding the conversations around better management of the state's water resources through data collection since at least 2017. In recent discussions, OWRD identified a general desire for more data to inform their management decisions and long-term planning, which included both streamflow gauges/observation wells and measurement data. While communities have also wanted more data in their place-based planning efforts, it is becoming apparent that increased measurement and reporting may not always been the most cost effective or resource effective method of obtaining use data – technologies such as evapotranspiration are being used across the west to estimate water use on farm and have proven useful in water planning. As a fundamental matter, we do not believe that more data collection will lead to better management of the resource without first fully funding and utilizing existing OWRD programs or evaluating opportunities for additional storage.

We want to be clear that water users are not opposed to water use data. However, the notion that agricultural water users don't know their own water use without measurement and reporting technology is false. Water users have a very clear understanding of their water use – calculations can be done based on energy use data, the size of pump and irrigation equipment, and run time of that equipment. Thus, for water users, the question becomes whether and on what terms they should be required to install a state-approved measuring device and report their water use to the state for use by the state and third parties. In that conversation, cost, time investment, potential misuse of the data, and utility of the data all become key factors that should be addressed prior to instituting a requirement to report water use.

Feedback on -1 Amendments to HB 3166

To that end, we presented a framework earlier this session that provided an outline for how to begin to comprehensively address the state's water data issues and ensure that the state does not address only one piece of the water data puzzle – and one that would impose significant costs on water users - without addressing the other pieces that are needed for that data to be useful. We also sought to ensure that we do not reinvent the wheel and that we work off of existing programs and infrastructure, using a pilot program and subsequent report to the legislature to evaluate the effectiveness and need to expand the pilot program. While we appreciate the elements of that framework that were part of the HB 3166 -1 amendments, we offer the following comments on the areas that the -1 amendments must address to meet the pillars of water data management outlined above:

The Program Should Remain A True Pilot

OFB requests that you delete Section 2 Subsection (5) that would give the Commission automatic authority to designate additional basins. It is imperative that the legislature begin this program as a true pilot to better understand the cost, necessity and utility of

the water data outlined in the -1 amendment, and not impose additional burden and cost on water users until we more fully understand whether this is the correct approach. The program should be limited to the initial pilot regions.

The Program Must Invest in All Needed Data to Create a Water Budget

As discussed above, the Department identified two instances where water measurement data can be useful 1) in water planning and 2) in water management, but only if that data is effectively “live time” and saves water masters from having to read meters in the field. Given that the burden of live time reporting would be extraordinarily high in most parts of the basin and that the Significant Water Management Problem Area (SWMPA) program already deals with water management, the -1 amendments focus on planning and the creation of water budgets. For this to be effective, we need to ensure that in Section 2 Subsection (2)(c) and Section 2 Subsection (4) cover observation wells in addition to stream gauges. Critically, we also need to ensure that measurement will only be required where the gauges, observation wells, and other data exist and are collected to enable the creation of the water budget. Without this information, the reporting data will not be useful in creating water budgets, and we would be imposing costs on the users with no broader benefit to the public or the Department.

The Program Must Only Require Annual Reporting

OFB requests that you delete Section 7 Subsection 3(b)(C) so that OWRD doesn't have ultimate discretion about imposing reporting requirements more frequent than annual reports. For our members, reporting must occur at the end of the irrigation season, when they are not in the midst of their busiest time of year. For water rights that specify reporting, that reporting should continue as specified in the right, but for new reporting obligations, they must be annual only.

The Program Must Allow More Flexibility

There are several areas we identified where the program should have increased flexibility. For example, in Section 7 Subsection (4)(b), the bill needs to provide for an emphasis on alternative technologies. This is also true in Section 2. There are places where evapotranspiration data may be better for created water budgets, or where streamflow gauging is going to provide a much more accurate picture of consumptive water use. The Department should embrace and use these technologies where possible, and not require measurement and reporting where other methods are available. To that end, in Section 2, we recommend adding that the Department should evaluate where alternatives to measurement could be used to develop the budget.

We also recommend you add increased flexibility for cases of economic hardship, including exceptions to Section 7 Subsection (4)(c), and allow the department to increase the cost share in cases of economic hardship.

The Cost Share Program Needs Improvement

The Cost Share Program needs improvement to meet the demands of this program and other needs of the Department. In Section 7 Subsection (5), we would like need clarity about why maintenance of measurement devices does not qualify for cost share funding. In Section 9, we would like to include a mechanism for cost share funding. We also request that you remove the provisions in Section 9 that would prioritize the priority basins in this program for cost share funding over other basins where the Department is requiring measurement. Our members feel strongly that if OWRD is going to require measurement for any reason, the cost share program needs to be available and money needs to be available for maintenance.

The Program Must Exclude Irrigation Districts and Their Patrons

As you are aware, irrigation districts already measure water that they divert and deliver to their patrons. Their program has been in effect for years, and this program shouldn't alter their requirements. Further, districts already measure and report water use for their district, it would be redundant and unnecessary for their patrons to have to measure and report water use.

The Program Must Contain Forfeiture Protections

It is vital that HB 3166 ensure that the data that is reported by water users cannot be used against them in a forfeiture proceeding. We recommend the following language in lieu of the language proposed in the bill:

(a) Information obtained by the Department as a result of measuring and reporting required pursuant to this Act shall only be used by the State in the development of water budgets, to determine water availability in a basin, and for planning purposes. Such information shall not otherwise be used against a water right holder by the Department or any third-party in any civil, administrative, or criminal proceeding.

Other Substantive Comments:

Water Budget

We understand that some groups have concerns or would like clarification on the term "water budget." While OFB believes the term is adequately defined in the legislation, we want to note that some basins are calling a similar concept a "water balance" and using it in planning to determine when a system has surplus water and when the system is running at a deficit. We look forward to continuing to work with stakeholders and the legislature to ensure the more clear term is used and that it is well defined.

Pilot Areas

We echo the comments of the other agricultural water users in noting that 3-5 basins or subbasins could represent an incredibly large (and expensive undertaking) for the state and recommend limiting the pilot to three basins or subbasins that meet the selection priorities.

Streamflow Priority Section

Our members also had concerns that the priority areas could result in pretty much any basin statewide meeting the priority criteria and suggest tightening the list of priority factors.

Add Oregon Department of Agriculture to Outreach.

We recommend modifying Section 2 Subsection (2) to add ODA to list of agencies that are charged with outreach to stakeholders.

Clarify Who has Access to Information

We continue to believe that all reporting data should not be subject to public disclosure, except at an aggregated scale.

Technical Clarifications Needed:

In addition to the substantive comments above, the following technical clarifications are needed to ensure the bill is clear and able to achieve its intent:

1. Need to clarify the relationship between these new provisions and the SWMPA provisions.
2. Section 2 Subsection (3) and Section 7 seem to contain some potentially conflicting mandates and need to be clarified.
3. At any rate, Section 2 Subsection (3) needs to direct a rulemaking to ensure stakeholder participation in development of those items.
4. Section 12 needs clarity on the procedure OWRD will use to impose the measurement/reporting requirements. Will they be similar to ORS 540.310(2)? Will orders in other than contested cases be issued per ORS 536.075(1)? The bill needs to clarify what this process will be.
5. The Section 6 report to the legislature should be qualitative and explain how this information is used, how it is helpful, and why it should be expanded or extended
6. Section 7 Subsection (2) should fix the definitions for which kinds of water rights are affected as suggested by other groups.
7. Section 7 Subsection (4) should require that OWRD procedures, requirements, exceptions, and alternative methods for compliance be promulgated through rulemaking.

Thank you for the opportunity to submit comments, and please let me know if you have any questions.

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