



February 22, 2023

Representative Ken Helm, Chair
Representative Annessa Hartman, Vice-Chair
Representative Mark Owens, Vice-Chair
House Committee on Agriculture, Land Use, Natural Resources, and Water

Re: Trout Unlimited Supports HB 3164

Dear Chair Helm, Vice-Chairs Hartman and Owens, and Members of the Committee,

Trout Unlimited (“TU”) is a non-profit organization dedicated to the conservation of cold-water fish (such as trout, salmon, and steelhead) and their habitats. TU has more than 350,000 members and supporters nationwide, including many members in Oregon.

HB 3164 would make permanent a valuable instream leasing tool, known as a “split season lease.” Split season leases authorize “split” use of a water right within a single season, meaning the water right holder may use the water for a portion of the water year, and then lease that water to a third party for instream use during the same year. The statutory authority for this form of instream lease sunsets in January 2024.

Trout Unlimited supports HB 3164 because it removes the sunset on a valuable instream leasing program, and allows longtime program participants to continue enrolling in the program. Oregon’s split season lease program now faces its third sunset (in January 2024). This bill: (1) permanently authorizes the program by removing that sunset (in Section 2 of the bill), and (2) removes the so-called “10-year-cap” in ORS 537.348(2), which limits the total period that a single water right may participate in the split season lease program to ten years (in Section 1 of the bill).

Background

Existing law authorizes split season leases, but places two types of time limitations on those arrangements. Specifically, the law provides that (1) the *term* of any instream lease—split season or otherwise—may not exceed 5 years, and (2) water rights may not *participate* in the split season lease program for more than a total of 10 years. This bill would not change the 5-year lease term requirement for instream leases generally, but would delete the 10-year-cap on split season lease program participation.

TU’s Experience

TU uses the split season lease program, particularly in northeast Oregon. By working with landowners to lease water for instream use on a “split season” basis in the late summer or fall,

we work closely with the agricultural community to place water instream during periods that fish need it most. We have built strong relationships with farmers and ranchers in the course of our instream flow restoration program.

In our experience, split season leases provide important benefits for fish and wildlife and a reliable revenue stream for landowner partners. Unfortunately, we are now seeing some valued split season relationships hit the 10-year-cap, which means that some of the most ecologically valuable arrangements (having provided ecological uplift over the course of a decade) would age-out of the program if this bill only removed the statutory sunset.

Example

Under a typical split season lease, an irrigator might divert water from a stream from May 1 – July 31 to water a crop, and then a non-profit would lease the water right for instream use to benefit migrating salmon from August 1 – September 30.

Like any other instream lease, split season transactions are on terms negotiated by the lessor and lessee, solely on a “willing” lessor/lessee basis, and subject to approval by Oregon Water Resources Department (WRD). WRD conducts an analysis of whether a proposed split season lease might “injure” other users or “enlarge” the subject water right.¹ After WRD approves a split season lease, the parties carry out the transaction, with WRD retaining authority to revoke or modify the lease terms if the Department later finds injury or enlargement.²

Value for Fish, and Flexibility for Lease Parties

Streamflows in July, August, and September are often at their warmest and lowest flow conditions of the year. In certain streams, this can create inhospitable conditions for native fish species (including spring chinook, summer steelhead, coho salmon, and bull trout), particularly during their fall spawning migrations.

The split season lease program affords lease parties important flexibility by allowing them to determine mutually agreeable periods of use for their respective purposes. Without the split season lease program, landowners and entities like TU would only have the option to engage in full-year instream leases (i.e., an “all or nothing” deal, in which the water right is placed instream for the entire water year).

Explanation of Apparent “Messiness” in HB 3164

At first glance, HB 3164 appears to include extensive revisions to the instream leasing statute, but that messiness is misleading.

The conventions of bill drafting require legislative counsel to revise the version of a statute that will be in effect *after* a sunset date. Here, the split season leasing program sunsets in January

¹ See OAR 690-077-0077(1)-(15) (describing WRD process for reviewing any instream lease application, including review for injury or enlargement).

² OAR 690-077-0077(4) (authorizing WRD to modify or terminate a lease that causes injury or enlargement).

2024. Accordingly, legislative counsel needed to draft HB 3164 upon the version of ORS 537.348 that would be in effect *after* the January 2024 sunset for the split season leasing program. Therefore, nearly all of the apparent new language in the legislation (i.e., bolded text in HB 3164) is a technical matter of *adding back* language that is already in ORS 537.348, for the period after the sunset date.

In effort to show the textual changes between the statute currently in effect, and the version that would be established by this bill, please see Attachment 1 (which provides a redline comparison of the (1) version of ORS 537.348 in effect as of February 2023, and (2) the version of ORS 537.348 that would be established by HB 3164 and in effect as of February 2024).

Bottom line, this bill essentially makes permanent the current version of ORS 537.348, with minor revisions that primarily regard removal of the 10-year-cap.

Conclusion

The split season lease program allows a single water right to be used for both agricultural production and instream purposes in a single year. It is efficient and appropriate for the legislature (1) to make the program *permanent* in statute, rather than extend the sunset for a third time, or allow the successful program to end, and (2) provide modest additional flexibility to lease parties by allowing a single water right to participate for more than 10 years, by removing the 10-year-cap.

Thank you for this opportunity to provide comments, and please let me know if you have questions.

Sincerely,

James Fraser
Oregon Policy Advisor
Trout Unlimited
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Attachment 1

“Redline” of existing statute (2021 Edition), plus HB 3164 edits (shown in Trackchanges)

537.348 Purchase, lease or gift of water right for conversion to in-stream water right; priority dates; split use.

(1) Any person may purchase or lease all or a portion of an existing water right or accept a gift of all or a portion of an existing water right for conversion to an in-stream water right. Any water right converted to an in-stream water right under this section shall retain the priority date of the water right purchased, leased or received as a gift. At the request of the person the Water Resources Commission shall issue a new certificate for the in-stream water right showing the original priority date of the purchased, gifted or leased water right. Except as provided in subsections (2) to (6) of this section, a person who transfers a water right by purchase, lease or gift under this subsection shall comply with the requirements for the transfer of a water right under ORS 540.505 to 540.585.

(2) Subject to subsections (3) to (6) of this section, any person who has an existing water right may lease all or a portion of the existing water right for use as an in-stream water right for a specified period without the loss of the original priority date. During the term of the lease, the use of the water right as an in-stream water right shall be considered a beneficial use. The term of the lease may not exceed five years. The term of the lease may be renewed. There is no limitation on the number of times that the lease may be renewed. ~~However, the total period for which a water right may be leased for split use as described in subsection (3) of this section may not exceed 10 years regardless of the number of leases or renewals of leases issued for the water right.~~

(3) A lease of all or a portion of an existing water right for use as an in-stream water right under subsection (2) of this section may allow the split use of the water between the existing water right and the in-stream water right during the same calendar year, provided:

- (a) The uses of the existing water right and the in-stream water right are not concurrent; and
- (b) The holders of the water rights measure and report to the Water Resources Department the use of the existing water right and the in-stream water right.

(4) A person who has an existing water right and wishes to lease the water right as described in subsection (2) of this section must file a request and obtain department approval of the lease. Upon receipt of the request, the department shall provide notice of the request by inclusion in the weekly notice published by the department. Any allegation of injury must be delivered to the department no later than 21 days after publication of the request in the weekly notice.

(5) After publishing notice of a request made under subsection (2) of this section and allowing time for the delivery of allegations of injury, the department shall issue an order approving the request if the department finds that the leasing of the water right for in-stream use can be effected without injury to other existing water rights or can be conditioned to prevent injury to other existing water rights. If the lease is for the split use of water between the existing water right and the in-stream water right during the same calendar year, the conditions imposed in the order approving the request must include, but need not be limited to, compliance with subsection (3) of this section.

(6) The department at any time may revoke or modify an order issued for a lease under subsection (2) of this section if the department determines that the use of the water right for in-stream use under the lease has resulted in or may result in injury to an existing water right.