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## **Summary of 2023 Legislative Concept for South Suburban Sanitary District (09/06/2022)**

South Suburban Sanitary District proposes legislation to maximize the environmental and other public benefits of its existing treated wastewater discharges into Lake Ewauna. The District is an Oregon special district responsible for treating municipal and industrial wastewater in the Klamath Falls area. Currently, the District discharges its treated wastewater directly into Lake Ewauna—a reservoir that forms the headwaters of the Klamath River—pursuant to a permit issued by the Oregon Department of Environmental Quality. The District’s wastewater discharges contribute new, clean water to the Klamath River that would not otherwise reach the river without the District’s efforts. The District is an important contributor to stream flows in a water-starved area, with benefits to water quality and protected species.

The District is facing expensive upgrades to its treatment system in order to comply with new wastewater discharge permitting requirements. Given the necessary investment of public dollars to make those upgrades, the District would like to ensure that its discharge method continues to maximize environmental and other public benefits going forward. As one example, the District would like the option to use the Klamath River as a natural conveyance system to direct treated wastewater to enhance stream flows in the Lower Klamath National Wildlife Refuge during certain times of the year and to downstream water users in need of additional supplies during other times of the year. Unfortunately, the District’s discharge options are currently limited by existing Oregon law. Under existing law, the District does not clearly maintain legal control of its treated wastewater once it is discharged into Lake Ewauna. Therefore, the District does not clearly have a legal right to ensure that its wastewater can be reused to benefit fish and wildlife habitat or downstream water users once it is discharged into the Klamath River.

Under existing law, the District’s only real option to maintain legal control of its wastewater is to cease discharging into Lake Ewauna. The District could do that by constructing a pipeline to convey its treated wastewater for re-use to downstream water users. This approach would not require any legislation, and it would eliminate the need for system upgrades to enable the District’s continued discharges into Lake Ewauna. However, it would also eliminate the existing environmental benefits of maintaining the discharges instream between the point of discharge by the District and the point of withdrawal by downstream users. And, it would require significant investments of public money to construct the pipeline necessary to convey the District’s wastewater outside the stream channel.

Alternatively, with a narrow legislative fix, the District could continue discharging its treated wastewater into Lake Ewauna and use the Klamath River as a natural conveyance system. This approach would also allow the District to convey its wastewater to downstream fish and wildlife habitat like the Lower Klamath National Wildlife Refuge, as well as downstream water users, effectively recycling its treated wastewater for additional uses. In addition, the District’s wastewater would *also* continue to contribute to instream flows while being conveyed. This is the District’s preferred approach, because it maintains existing stream flows to the points of diversion of the downstream users, maximizes environmental and other public benefits, and avoids the need for expensive piping. Oregon law does not currently allow this approach, but the District’s proposed legislation would make it possible.

## A. Legal Backdrop

In Oregon, water is a public resource owned by the state. State law authorizes members of the public to use or otherwise control the state's water under various circumstances. However, there are limits on how long a water user can control specific molecules of water. An authorized water user may recycle the same water repeatedly—until the moment that the water user relinquishes control of the water.<sup>1</sup> Once control is relinquished, the water becomes a public resource once again.<sup>2</sup>

How water is recycled matters under the law. For example, an irrigation district may recapture and reuse water that seeps from fields into the district's canals.<sup>3</sup> Likewise, a municipal water utility can recycle and reuse treated wastewater within its own built infrastructure without relinquishing control of the water. In contrast, if either a district or utility were to intentionally discharge wastewater into a *stream*, they would risk having relinquished control of that water.<sup>4</sup> Neither the district nor the utility could then reuse that water without a new authorization from the state.<sup>5</sup>

Under current state law, once wastewater regains its status as part of a natural stream, it is considered “live flow” generally available to the public. Existing water right holders may rely on live flow to fulfill their water rights. In addition, any member of the public may apply to the Oregon Water Resources Department for a new water right to use live flow. This is the very problem the District faces: The moment that the District's wastewater reaches Lake Ewauna, the District loses its right of control, and other members of the public may claim that water whether in Lake Ewauna or downstream in the Klamath River.

Theoretically, a discharger like the District can simply apply for a water right to regain control of its wastewater. But, in areas with over-appropriated water sources like in the Klamath Basin, it is not at all certain that the Oregon Water Resources Department could grant a new water right. Moreover, any new water right would have a “priority date” junior to existing water rights diverting from that same stream. In times of water shortage, the state may shut off junior water users to fulfill the rights of more senior users. Therefore, junior water users often lack certainty that they will actually be able to appropriate the water that the state has authorized—particularly in the Klamath Basin.

In short, applying for a new water right under current law would not solve the District's problem. The process of applying for a new water right would transform the exact same molecules of wastewater that the District previously controlled at the time of discharge into a less reliable source of water in the eyes of the law.

## B. Proposed Legislative Concept

The District is proposing a narrow legislative fix to this problem. The proposal draws from other Oregon statutes where the legislature has designated specific surface waters of the state for the exclusive use of a public entity.<sup>6</sup> It also draws from legislation previously enacted by the California Legislature to solve a similar

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<sup>1</sup> See, e.g., *Cleaver v. Judd*, 238 Or 266, 271, 393 P2d 193 (1964) (explaining that, if an irrigation district recaptures wastewater for reuse within its own boundaries, other members of the public “have no cause of action for having been deprived of the water”).

<sup>2</sup> See, e.g., *Jones v. Warm Springs Irr. Dist.*, 162 Or 186, 198, 91 P2d 542 (1939) (“Where, after use by a prior appropriator, water is discharged into a stream for the purpose of drainage or as a convenient method of disposing of it, and without any intent upon the part of the owner of the right to reserve or recapture it, it works an abandonment of such water, and water thus discharged becomes part of the natural stream and is subject to reappropriation and to the same rights as the water naturally flowing therein[.]”).

<sup>3</sup> *Cleaver*, 238 Or at 271.

<sup>4</sup> See *Jones*, 162 Or at 198.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., ORS 538.530 (withdrawing all waters of Big Butte Creek, as well as its springs and tributaries, from appropriation by the public and designating those waters for the exclusive use of the City of Medford for the benefit of the city); ORS 538.450 (withdrawing all waters of the north fork of the Umatilla River, as well as its springs and tributaries, from appropriation by the public and designating those waters for the exclusive use of the City of Pendleton and Umatilla County for the general use and benefit of the public).

problem faced by the Sacramento Regional County Sanitation District.<sup>7</sup> The District’s legislative concept would provide a legal pathway for the District to maintain legal control of its treated wastewater even after it reaches a surface water, without the risk that other members of the public could claim the District’s wastewater as available live flow. The proposal is specific to the District, and it would not create a similar pathway for any other water user.

The District’s proposal contains three key elements:

*First*, the bill would grant the District the exclusive right to use its treated wastewater for the general use and benefit of people or fish and wildlife within or outside of the District’s service boundaries. As a condition of this legislative grant, the District would be required to continue complying with all Oregon Department of Environmental Quality requirements for its wastewater discharges.

*Second*, the bill would recognize that the District’s existing wastewater discharges are adding new water to the Klamath River that would not otherwise necessarily exist. The bill would clarify that these discharges are not considered part of the natural streamflow and are not legally available to any member of the public other than the District or to fulfill any state or federal legal requirements pertaining to fish and wildlife.

*Third*, the bill would recognize that the District may sell or otherwise utilize its new water right for any public purpose, including to benefit fish and wildlife—just as the District could if the District were to maintain control of its treated wastewater by conveying it in a pipe.

### **C. Conclusion**

If passed, the District’s proposal would maximize the environmental and economic benefits of existing stream flow with a simple technical fix. Without this legislation, the District’s only option to direct its treated wastewater would be to pursue a costly piping project. This legislation offers an opportunity to protect an existing clean, reliable source of water to the Klamath River, while also enabling further reuse of that water to benefit fish and wildlife habitat and people downstream. In particular, the District’s proposal would help to mitigate at least some of the harm resulting from the severe, multi-year drought we are experiencing in the Klamath Basin, which has impacted many migratory birds and other wildlife species that rely on food grown on land irrigated by downstream water users and the Wildlife Refuges to survive.

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<sup>7</sup> Assembly Bill 134 (2011) (codified at Cal. Water Code § 1486).