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VIA EMAIL

MEMORANDUM

TO: Senate Committee on Environment and Natural Resources

FROM: Janet Neuman, Senior Counsel

DATE: April 2, 2019

SUBJECT: Senate Bill 946

Chair Dembrow, Vice Chair Olsen, and Members Bentz, Prozanski, and Roblan, thank you for considering these comments on SB 946. I represent Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust. The Bishops live in a rural residential area west of Bend in unincorporated Deschutes County. They strongly oppose SB 946 for policy and process reasons, and also based on their own personal experience.

For the past five years, the Bishops, along with several of their neighbors, Central Oregon Land Watch, Friends of the Tumalo Wildlife Corridor, and many others, have been fighting an unpermitted development constructed on approximately 160 acres in the Tumalo Deer Winter Range adjacent to the Bishops' home. Without required permits or any water rights, the developers excavated more than 282,000 cubic yards of material and built two large recreational lakes, including a competition-style water ski lake and a second recreational lake, which are planned to be the centerpiece of a luxury housing development. They filled the lakes with water belonging to the Tumalo Irrigation District and then sought OWRD's approval by way of a transfer to change the "place of use" of water stored by the District in Upper Tumalo Reservoir to their private recreational lakes. OWRD eventually issued orders denying the transfers, but the District's water remains in the developers' lakes and the disputes about the development continue in the Court of Appeals and before the Land Use Board of Appeals. As further explained below, SB 946 is one of several efforts to extricate the developers and the District from these ongoing disputes.

SB 946 is bad policy. Current law allows changes in the type of use, place of use, or point of diversion for any water use other than "storage." (ORS 540.505-540.589) Changing the place of use ("POU") or point of diversion ("POD") for stored water—and even changing the type of use in some circumstances—raises significant issues. These issues are detailed in the attached document entitled *"Storage Transfer Sub-Work-Group-'Homework', Jan Neuman, on behalf of Thomas and Dorbina Bishop, 11-15-18."*[1] Briefly, issues of concern include: indirectly authorizing construction and use of brand new water storage facilities without the public interest

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[1] The context for these comments is discussed further below.

review and public participation otherwise required for OWRD to issue a new storage permit; the prospects for inappropriately allowing privatization of water by moving it from publicly-owned storage facilities to privately-owned facilities for private purposes; and environmental impacts that are different than the impacts that were reviewed in conjunction with the primary storage permit but that escape review in a transfer proceeding.

SB 946 also flaunts fair process. This proposal represents an end-run by several stakeholders around an ongoing work group convened to discuss the controversial and complex issue of "storage transfers." A version of SB 946 was proposed in the 2018 session as SB 1558, in a transparent effort by the developers who constructed the unpermitted reservoirs next to the Bishops' property to legitimize their attempt to fill the water ski lake and second recreational lake with water "transferred" from the Tumalo Irrigation District's Upper Tumalo Reservoir. The bill, which had not been discussed or vetted beyond its narrow proponents, was opposed by water user groups and conservation groups alike, as well as by the Bishops and others.

To address the controversial proposal, Senator Dembrow convened a work group (and eventually a smaller "sub-work group") during the legislative interim to discuss transfers of stored water and to try to develop a consensus proposal. The work group met for several hours and exchanged and discussed written materials. However, the group did not complete its discussions or come to consensus prior to the beginning of the current session. SB 946 represents an inappropriate end run around the work group's efforts by several interest groups who want to push through their own proposal without addressing *any* of the issues raised by other group members. In fact, the bill seems to be proposing retroactive approval for some existing projects under certain circumstances.

One particular point discussed in the work group meetings deserves emphasis. Conservation members of the work group and the Bishops asked on numerous occasions for a clear statement from the water users of why broad storage transfer authority is needed, and what "problem" exists that requires this solution (other than trying to legitimize the lakes next to the Bishops' property). But this justification has never been provided. It is both bad policy and bad procedure to move SB 946 forward without a clear demonstration of need.

SB 946 codifies bad policy and flaunts the work group process that your committee convened to address storage transfers. Furthermore, the Bishops' personal experience is the poster child showing that broadly authorizing "storage transfers"—as if moving storage were just like moving irrigation water around from one field to another, or like changing the type of use for water already stored in a permitted reservoir to broaden the possible secondary beneficial uses—will lead to further abuse of the water transfer process similar to what the Bishops' neighborhood is experiencing.

Late on April 1, a "dash 1" amendment was posted on the committee's website. The Bishops offer a few preliminary comments, though they have not had sufficient time for a thorough review. Although the amendment addresses a few issues raised in the work group discussions, it would not rectify core concerns about moving stored water to new facilities at new locations as

described above. For instance, the amendment imposes some limits on the volume of stored water that could be transferred, but those volumes (50 acre feet and 100 acre feet for off-channel and on-channel storage rights, respectively) are still considerably larger than the size of facility that current law exempts from a full permit review process, which is only 9.2 acre feet. The amendment proposes to restrict transfers to locations "on the same property," but that vague reference is not clear. Furthermore, the amendment contains broad retroactive approval language that is confusing and of uncertain effect—including its potential effect on the two very large artificial lakes adjacent to the Bishops' property.

The Bishops urge you not to move SB 946 forward—with or without the proposed amendment. Thank you.

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Storage Transfer Sub-Work-Group-"Homework"
Jan Neuman, on behalf of Thomas and Dorbina Bishop
11-15-18

Preliminary Comments

The initial question is *why* we are discussing broad changes to the storage transfer laws. As several people mentioned at the first meeting, it is not clear what problem, if any, we are trying to solve. OWRD has only identified a narrow request to clearly authorize changes in the character of use of stored water, which the Department has allowed in the past and which none of the work group members have spoken against.

Neither nurseries, nor irrigation districts, nor municipalities nor agricultural user groups have clearly identified any problem they want to fix. When OWRD presented draft language for changes to the transfer process at the first meeting of the sub-work-group, staff said that the Department has no position on the draft and it was being presented only to start the discussion. However, the draft has now become the baseline proposal, even though no member of the group is promoting it. This puts the work group in the position of commenting on a proposal that no one has actually offered or justified.

The November 8th email asked the recipients to "identify the specific scenarios on the list that you think water right holders will want to be able to make to their storage rights," thus implicitly acknowledging that those "wants" have not yet been identified. And although what water users want is important and relevant, the public interest and what the public and other stakeholders might want is equally important when considering creation of new storage reservoirs.

At the first meeting, some work group members said that perhaps nurseries or agricultural water users should be able to move a small pond from one place to another on their property, but it is not clear that our current discussion is even relevant to many pond owners. Note that OWRD said the discussion draft does not address the pond reservation statutes, which covers thousands of small agricultural ponds. And, as discussed further below, OWRD has allowed minor relocation of small facilities in the past without objection.

If irrigation districts want to create systems of re-regulating reservoirs, they should plan for those systems and get permits for the new reservoirs. If they want to move some of the water from one facility to another without losing a priority date, it seems they could already do so with a secondary permit or by simply identifying an existing reservoir as

the source of water for the new reservoir. In fact, as many districts have been converting their open canal systems to pressurized piping delivery systems, both the amount of water used and the need for surface storage may decrease. It is questionable public policy to allow holders of water storage rights to transfer those rights to other property owners' lands in situations where the original water users no longer need to store as much water to accomplish their authorized beneficial use. In any event, if irrigation districts had a strong desire to amend the transfer statutes, the Oregon Water Resources Congress would surely develop a targeted proposal for discussion by stakeholders, as the Congress does regularly at the request of its member districts.

Changing the transfer statutes as described in some of these scenarios bestows a new and valuable right upon existing water right holders—a right to change the place of storage to another location with minimal review. This right can even be "monetized" by selling the right to other parties who want the stored water on their property for their own use. My clients oppose using the transfer process to allow landowners to create new water features on their property, using water currently stored elsewhere in permitted reservoirs, such as irrigation district reservoirs, without obtaining storage permits for newly constructed reservoirs.

Specific comments on the listed scenarios follow. The highlighted language is from Ms. Patrino's homework email.

SCENARIO 1

Correction of a storage reservoir footprint, or point of diversion (technical fix)

The changes described in Scenario 1 are significantly different than the changes described in Scenarios 2, 3, and 4. In fact, the Department apparently felt it had the authority to approve this first type of change until recently, and had approved several such technical fixes or minor changes in the past without objection, as listed in the November 2, 2018 email from Ms. Rancier to the work group. This scenario is less problematic for a few reasons:

- in order to issue a reservoir permit in the first place, the Department needs to review the application against all of the criteria under 537.130, 537.140, 537.153(2), 537.170(8), and 537.400 (and associated administrative rules), including a full public interest review.

- if the change is truly just a technical correction—meaning that the written permit or certificate incorrectly described the intended location or point of diversion—then the change does not have any substantive impact whatsoever.[1]
- even if the change is not simply a correction, but it represents a minor realignment or relocation of an already-permitted reservoir, staying within the same size of facility and within the same general vicinity and land ownership, then the change is rarely going to alter or increase the impacts that were already reviewed in conjunction with granting the permit.[2]
- these are exactly the types of changes approved by OWRD in the past without objection.

SCENARIO 2

Change to the character of use of a storage right

In some limited circumstances, this type of change can potentially raise more complicated issues. A storage right is essentially a non-consumptive right—with the exception of minor consumption for livestock—and a secondary right is required in order to remove the water from storage and *use* it elsewhere. Therefore, in many situations, changing the character of use of stored water will not likely have significant impact *in and of itself* and the impacts can be assessed on review of the secondary permit.[3] However, some changes in types of use for water *in place* could affect already-issued secondary permits or impose new impacts. For instance, as Ms. Rancier pointed out during the first meeting and acknowledged in her discussion draft, changing the character of use of the stored water could invalidate existing secondary permits issued for other uses. Also, changing the use of stored water from a relatively "passive" in-place use, such as storage for irrigation, to an active in-place use, such as recreation

[1] *E.g.*, T-7181; T-9210; and T- 9543 (all corrections only as to location).

[2] *E.g.*, T-10112; T-10582; T-10642; T-10945; T-10977(water moved from one permitted reservoir to another permitted reservoir); T-11435; T-11481; T-6668; T-7619; T-8138 T-9539 (consolidated three small ponds into one). Six of the 14 transfers on OWRD's list were permit amendments, suggesting that the storage facilities may not even have been built yet. As indicated in footnote 2, three of them represented corrections only, rather than actual location changes. And in all of these cases, it appears that the new location was "swapped out" for the old location, meaning that no water was stored at the original location after the transfer. T-10582 involved the most distance between the original and the new reservoir, but it was still within the same land ownership and operation (tree farm) and the original location did not store water after the transfer.

[3] However, secondary permits for the use of stored water are subject to a somewhat expedited review as compared to an initial permit application. *See* ORS 537.147.

(especially motorized) significantly increases the impacts of the reservoir itself compared to what was reviewed for the initial permit, particularly in protected wildlife habitat or other sensitive areas. If a change in character of use is coupled with a change in place of use and point of diversion, the impacts multiply accordingly.

SCENARIOS 3 AND 4

Scenarios 3 and 4 raise a number of problematic issues. An applicant for an initial permit to store water must provide a considerable amount of information to the Department—including preliminary plans and specifications for the storage facility. (*See* OAR 690-310-0040.) OWRD must then conduct a full review of the proposed use of water, including a public interest review, and provide an opportunity for public comment. Depending on project location, the public interest review may also involve the Division 33 administrative rules for impacts to sensitive, threatened, or endangered species, which give important roles to ODFW and DEQ—roles that are not replicated in other agencies' permit reviews The review by OWRD, other agencies, and the public is all based on the project *as described in the application*—including the specific point of diversion, the specific storage location, the specific type of use, and the specific size and nature of the proposed storage facility. By contrast, transfer applications do not require as much information and do not go through a comprehensive public interest review; transfer applications are reviewed only for enlargement of the water right and for injury to other water rights. Allowing changes to essential components of the originally permitted facility (such as the POD location or the construction and location of the storage facility) in a transfer proceeding would unreasonably allow a number of impacts to escape full review.

SCENARIO 3

Change to a reservoir point of diversion (pipe/canal), off-channel reservoir – (i.e., no location change of the reservoir/dam)

- upstream or downstream

Moving a POD *will* affect streamflows. The nature, degree, and location of the impacts will vary depending on whether the POD is moved upstream or downstream, and also on factors that will vary case by case. Only some of these impacts will be addressed by enlargement and injury review. One example given at the first meeting is the possible dewatering of a stretch of stream by moving a POD upstream, when there is no instream water right to claim injury from the transfer. Moving a POD downstream could

theoretically increase instream flows between the old and new location, but it could also have adverse localized impacts based on its new location.

SCENARIO 4

Change to the location of a reservoir (which may also include a POD change):

- Reservoir moves from off-channel to off-channel:
  - New "to" reservoir or existing "to" reservoir?
  - All or some of water?
- Reservoir stays on-channel, location is moved downstream or upstream:
  - New "to" reservoir or existing "to" reservoir?
  - All or some of water?
- Reservoir is moved from on-stream to off-stream location:
  - New "to" reservoir or existing "to" reservoir?
  - All or some of water?

For purposes of discussion, I'm going to assume that Scenario 4 involves changes that are not simply corrective or minor, as described under Scenario 1 above. This scenario is the most problematic, as it has the potential to allow construction of completely new storage facilities—on or off channel, by anyone—without any actual reservoir permits from OWRD, and thus without the public interest review and other reviews required for initial storage permit applications. If the "to" reservoir already exists, presumably it has a permit or certificate, and its construction, design, location, and impacts have thus been reviewed. But if the "to" reservoir is new, then it does not have a permit or certificate, and allowing it to be built from scratch with only a transfer review and without consideration of the public interest would be a very significant change from current law.

During the discussion at the first meeting of the sub-work group, several participants suggested that exempting these scenarios from OWRD's normal permit review is not a problem for two reasons: (1) because "other permits" would be required that would substitute for OWRD's review; and (2) because the water user already has a water right at the "from" location, and if a new storage permit were required for the new location, then it would also come with a later priority date, which would defeat the benefit of making the change by a transfer. However, as discussed further below, water storage permits are the bailiwick of OWRD. Nothing in the Water Code suggests that other agency permits should take the place of OWRD's required statutory reviews for a new reservoir built as part of a transfer any more than would be the case when a new reservoir is built as part of an original storage application. Furthermore, as noted

earlier, current law already provides other ways to preserve a priority date for the use of stored water, such as a secondary permit to store water at a new location.

Off channel to off channel.

In the abstract, off-channel storage certainly has less impact on streamflows and instream values than on-channel storage. However, that does not mean that changing from one location off-channel to another location off-channel will be without impacts. Nor does it mean that other permits or reviews can fully substitute for OWRD's review. For the public interest to be protected, a new storage facility should be subject to OWRD's review and the associated public and agency comment.

Moving storage further away from the source could increase conveyance losses. Splitting up water among two or more storage facilities would increase evaporation. A change in location of stored water could affect groundwater recharge. The two locations may be under different ownership and control, with different interests in use of the water. These and other impacts should be evaluated by OWRD.

As noted earlier, permitting a water storage facility is inherently the bailiwick of OWRD, regardless of whether such a facility also requires other permits. Other state agencies (especially ODFW) do not have the same role in local land use reviews or federal permit reviews that they do in the water rights process. OWRD's and these other agencies' unique roles should not be sidestepped.

On-channel to on-channel, move upstream or downstream.

Moving a reservoir moves the in-place impacts of the storage from one part of the stream to another. Moving downstream could theoretically increase instream flows between the old and new location and such changes will not necessarily always be beneficial. Moving a reservoir upstream would have the same impact as moving a POD upstream—possibly dewatering a stretch of the stream if there is no instream right in place. In any event, the minimal standards for evaluating transfers would not fully address the impacts of storing water at a new on-channel location.

On-stream to off-stream.

This scenario "sounds good" because it offers to remove a stream-blocking structure. However, similar to the discussion of moving an off-channel facility from one location to another off-channel location, such a move is not without impacts (such as increased conveyance losses, impacts to streamflows or groundwater recharge, transfer of control over the storage water facility to a different water user (including possible privatization of a storage right originally held by a public entity), and a reduced role for ODFW and DEQ in other agency processes). Allowing this type of change through a transfer proceeding allows construction of a brand new reservoir at a completely new location without the same level of review that a new storage facility would ordinarily receive by OWRD—the agency responsible for water storage permits and for protection of the public interest in water management decisions.

All or some of water.

Each of the scenarios contains this bullet point. In addition to all of the issues described above, the prospect of moving only a portion of the water from one location to another potentially increases conveyance and evaporative losses. In some instances, adding additional storage facilities and conveyance systems could implicate public safety concerns. Furthermore, if both locations are still storing water, there is a considerable chance for enlargement unless strict measurement conditions are placed on the transfer. Allowing transfer of a portion of the storage right in a situation where the water user has not been using the full permitted capacity at the original location could increase historical water use in a way that might not be considered enlargement under the transfer rules.

Other considerations:

- Quantity of water being moved from one location to another (Detroit Lake vs a backyard gold fish pond);

Certainly, the impacts would be different depending on the quantity of water proposed for a change in location. But statutes require storage permits for both small and large *new* facilities (alternate reservoirs vs. regular reservoirs), and the point is that transfers would not be reviewed to the same extent as either of those. Current law codifies the policy that all water storage facility, regardless of size, should be subject to OWRD's review and approval, and that siting and construction of such facilities should not be left entirely to the determinations of water users.

- Drying up existing location vs. keeping a portion at the existing location.

As discussed above, continuing to store water at both locations presents considerable enlargement issues.

Ms. Patrino's email requested the following:

Please send back to me **on or before next Thursday, November 15**:

1. Any changes or additions to the list above.
2. Identify the specific scenarios on your list that you think water right holders will want to be able to make to their storage rights.
3. A list of the specific evaluation criteria – in addition to injury and enlargement – that you would like to discuss. Ex., fish passage.

The comments above demonstrate why it is difficult to respond as requested. My clients see no reason to propose broad changes to the transfer statutes. No compelling case for doing so has been made by any interest group. OWRD has approved changes in character of use and minor changes in POD or storage location without objection in the past. My clients' position is that changes in location for stored water should only be approved when doing so is in the public interest and the receiving facility has a valid storage permit, or the changes are de minimis. Current law is sufficient to handle those situations.

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