



**Date:** April 2, 2019

**To:** The Honorable Michael Dembrow, Chair  
Senate Committee on Environmental and Natural Resources



## Senate Bill 946-1

### Shannon Hurn, Deputy Director for Fish and Wildlife Programs

Thank you for the opportunity for the Oregon Department of Fish and Wildlife (Department) to provide the following comments on Senate Bill 946-1.

SB 946-1 proposes to allow holders of a storage water right to apply to the Oregon Water Resources Department (OWRD) for a change in the character of use of the water or change in place of use under two scenarios:

- (a) moving the place of use for an on-channel reservoir to an off-channel location on the same property; and
- (b) moving the place of use for an off-channel reservoir to another off-channel location on the same property.

Neither scenario allows changing the location of the existing point of diversion.

It is Oregon's way to find solutions to challenging water management issues. The Department is supportive of identifying low risk transfer opportunities, and the two scenarios developed have the potential to provide mutually beneficial solutions to both water users and fish and wildlife. The Department supports removing on-channel reservoirs, as they are often barriers to fish passage and alter the natural hydrology of a stream system. However, even though the full proposal limits the scenarios in which storage rights can be transferred, the bill as currently written may still have unintended consequences for fish, wildlife, and habitats.

Currently, a new water right application for storage undergoes an ODFW analysis that assesses a full suite of impacts to fish and wildlife and allows the Department to recommend conditions and mitigation to offset those impacts, when applicable. OWRD's Division 33 was adopted by the Water Resources Commission in mid-1990's specifically to determine detrimental impacts to sensitive, threatened and endangered fish from proposed new water uses in response to the numerous ESA listings occurring at the time. Transfer applications do not include this assessment, but are, instead, restricted to an assessment of injury to an instream water right and the need for fish screening. Due to a recent DOJ opinion, transferring storage is not allowed, thus movement of storage water would go through the traditional water right process. Although this bill appears

limited in scope for allowing storage transfers, constructing a new reservoir through the transfer process may have unintended impacts to fish and wildlife without adequate environmental review, conditioning, and mitigation.

#### Fish Passage

Allowing movement of a reservoir to an off-stream location may not fully support recovery of listed fish species because, under the current language, it will not adequately address Oregon's fish passage statutes and rules. The language states that the applicant must only agree to remove or modify the dam associated with the water right to facilitate fish passage. Facilitating fish passage through modification does not equate to providing fish passage that meets state criteria nor does it provide any requirement or criteria for restoration of the channel itself. The Department recommends the bill language be amended to provide fish passage consistent with Oregon fish passage criteria and require an ODFW fish passage approval.

#### Fish Screening

Changing the type of use through a transfer under this proposal excludes fish screening, as screening is only required for a change in point of diversion (ORS 540.520(4)). The Department recommends the bill language be amended to provide consistency with Oregon's fish screening criteria and require an ODFW-approved fish screen, where applicable.

#### Instream Flow

The bill will allow storage rights to be transferred instream to benefit instream flow, but may also allow unintended impacts to the amount of water instream, depending on the original type of use. For example, if the current storage right lists the beneficial use as fish, wildlife, or recreation, the reservoir will generally remain full year-round and outflow will generally equal inflow. OWRD considers these uses non-consumptive. However, if the type of use is changed to irrigation (a consumptive use), the reservoir will be filled annually and capacity will be lowered during the irrigation season, impacting the amount of habitat in the reservoir and the amount of flow passed downstream. This bill does not allow for an ODFW analysis of impacts to biologically necessary flows for fish. Additionally, it is unclear how WRD would interpret enlargement with the amended bill, potentially reducing the amount of water in the stream after the transfer has occurred, thereby impacting fish and wildlife.

#### Other Impacts

Although the Department supports moving reservoirs off channel, off channel reservoirs are not risk free. Depending on the location, reservoirs may impact wetlands, riparian habitat, and wildlife corridors. The transfer process does not allow for an assessment or mitigation of these impacts. In summary, ODFW is supportive of allowing low risk transfers. Minor amendments to the bill language would allow limited storage transfers while minimizing impacts to fish, wildlife, and habitats to create the mutually beneficial solutions that this bill seeks to achieve.

#### **CONTACTS:**

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