



March 16, 2021
House Committee on Water
Representative Ken Helm, Chair

Informational Testimony on House Bill 2616
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The purpose of this testimony is to provide information to the committee regarding the background and history of laws, issues, and legislation related to House Bill 2616, as well as to provide a brief overview of the Water Resources Department’s interpretation of House Bill 2616. The Department has no position on House Bill 2616 at this time.

History and Overview of Water Laws and Legislation

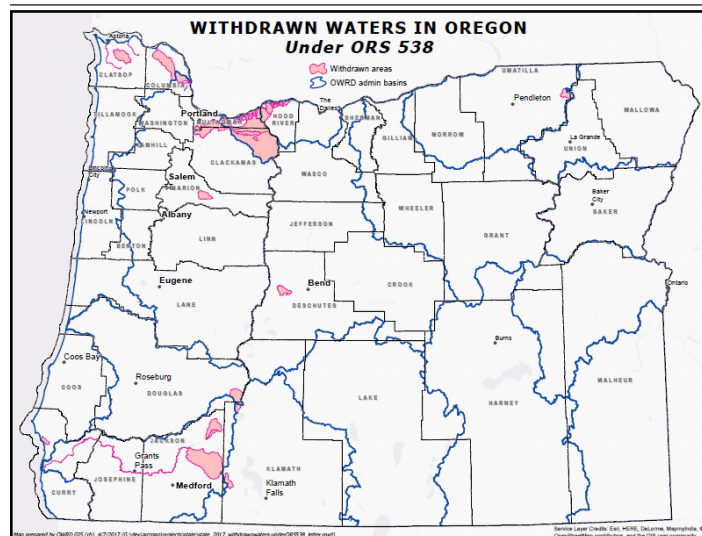
In 1909, the Oregon Legislature passed the Water Code, requiring any person intending to use the waters of this state to obtain a water right. When the Department first accepts a water right application, it must first determine whether the use of the water is allowed under the statute.

Withdrawals

Over time, the Legislature has set aside certain streams for specific purposes or prohibited issuance of water right permits from those streams. These “withdrawals” are codified in Oregon Revised Statutes Chapter 538 and are shown in the map to the right in pink.

For example, several streams are withdrawn to protect the waterfalls of the Columbia River Gorge under ORS 538.200.

In another example, in the Big Butte Creek watershed, the only new uses allowed by statute are municipal uses for the City of Medford, with some exceptions for the Eagle Point Irrigation District. As a result, the Department cannot legally consider an application for a permit to appropriate or store water in the Big Butte Creek watershed for other purposes (see ORS 538.430).



Ponds Legislation

In the early 1990s, it was recognized that there were thousands of existing ponds and reservoirs across the state that did not have water rights. As a result, in 1993, the Oregon Legislature passed House Bill 2153 to provide owners statewide, including within withdrawn areas, the opportunity to have these ponds and reservoirs legally registered with the Department within a two-year timeframe. In 1995, the Oregon Legislature passed House Bill 2376, which made some modifications and essentially allowed an additional two years to register or obtain water rights.

Permitting of Ponds Today

In an attempt to prevent the need for additional registration legislation in the future, House Bill 2376 (1995) also established an alternate reservoir process for reservoirs with impoundment structures less than 10 feet in height or storing less than 9.2 acre-feet (1 acre-foot = ~326,000 gallons). Today, this process is codified in ORS 537.409; however, with some exceptions, owners of ponds within most withdrawn areas in ORS Chapter 538 cannot apply for a permit under this process.

Unauthorized Ponds

Today, the Department still finds ponds and reservoirs that do not have a water authorization. The Department seeks to work with these owners to help them get into compliance when a water right can be obtained, however, where there are no options, the Department requires removal of the reservoir or actions to prevent unauthorized storage of water. Requiring removal of dams can be contentious and lead to litigation as discussed in more detail below.

In addition to the pond on the tax lot identified in House Bill 2616, an initial survey of other properties in the area has identified that there are unauthorized ponds on other tax lots and neighboring properties. The Department has not yet notified the owners of these unauthorized uses due to other workload priorities.

Case of Unauthorized Uses in the Big Butte Creek Watershed Leading to Litigation

From 2002-2018, a series of civil and criminal cases were filed in state and federal courts related to reservoirs without water rights across intermittent creek channels. After several court cases, a court ordered the owner to open the headgates and drain the reservoirs and placed him on probation for 12 months. After complying, he eventually began storing water again. In 2010, criminal proceedings were brought. In 2012, criminal proceedings ended with the owner being convicted of nine misdemeanor counts of violating Oregon water law, involving jail time, probation, and payment of a fine. The court ordered the reservoirs to be drained and dams breached. In response, he attempted to convey property interests to others in an effort to prevent the enforcement of court orders. By 2014, his actions again resulted in this probation being violated, and the court ordered the Department to drain the reservoirs and breach the dams. The Department complied with the court's orders in 2014. In 2016, the owner filed a complaint in U.S. District Court, asking the court to prevent state action, redress for unlawful arrest, award of damages, and more. The Court dismissed the case. He filed an appeal, but in 2018, the Ninth Circuit dismissed the case.

Rainwater Harvesting

Although not as directly related to this legislation, when a pond or reservoir is discovered that does not have a legal water authorization, there have been assertions that the storage is "rainwater harvesting." ORS 537.141(1)(h) allows for the collection of rainwater from an impervious surface, such as a roof or a parking lot, without a water right. Outside of this exception, collecting waters that run off the surface and eventually join streams does not constitute "rainwater harvesting" and *does* require a water authorization.

Department Understanding of HB 2616

HB 2616 allows an owner of a reservoir located on a specified tax lot within the Big Butte Creek watershed and that has been in existence prior to January 1, 2000, to apply to register the reservoir by July 1, 2022. By July 1, 2023, the owner of the property must provide proof that the reservoir stores no more than 9.2 acre-feet of water, is less than 10-feet tall, has outlet works to release water, and has fish passage. The bill requires the reservoir owner to measure flows into and out of the reservoir and to submit reports to the Department. The Department is required to order removal of the reservoir if the owner fails to register or fails to comply with requirements of the registration throughout the life of the reservoir.

The agency's understanding is that the reservoir that is currently on the specified tax lot does not currently meet these requirements, and that the owners understand that they will need to make investments to modify the

reservoir to ensure that it does. The bill does not address unauthorized ponds or reservoirs outside of the one tax lot.

The bill establishes that the registration is exempt from the need to obtain a water right, and that the water may not be used outside of the reservoir, except for fire suppression. It allows the reservoir to be regulated by the watermaster for water rights and subordinates the reservoir to other rights. The bill also specifies application procedures and the basis for rejecting an application for registration, which sunset in January 2025.