



Oregon

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MEMORANDUM

TO: Senator Jeff Golden, Chair
Senate Committee on Natural Resources

C: Laura Kentnesse, Legislative Policy and Research Office

FROM: Bryn Hudson, Legislative Coordinator

SUBJECT: Response to Questions on Senate Bill 455 and SB 710

During the February 1, 2023, Senate Committee on Natural Resources public hearings the Water Resources Department committed to following up on requests for further information on SB 455, SB 710 and SB 713. Responses to the questions are provided below.

1. SB 455: Do current OWRD funding programs cover the authorized project costs in SB 455?

OWRD has two active programs that can fund Aquifer Storage and Recovery (ASR) and Artificial Groundwater Recharge (AR). Department Feasibility Study Grants fund qualifying costs of studies to evaluate the feasibility of developing water conservation, reuse, and storage projects. This competitive funding opportunity helps individuals and communities investigate whether a project is worth pursuing. ASR and AR testing projects are eligible studies and have both been funded under this program. Since 2008, OWRD has funded 15 ASR/AR studies for \$1.99 million. Additional expenditures, such as water treatment, debt service payments, ongoing operations and maintenance outside of project testing, OWRD permitting fees, and energy costs would not be eligible for reimbursement, but some may count as cost-match.

Feasibility Study Grants require a 50% cost match of the total cost of the feasibility study, up to \$500,000. Any local government, Indian tribe, or person may apply for funding. The current primary funding source for Feasibility Study Grants are General Funds, meaning the funds must be spent within the biennium in which they were appropriated. For the past several biennia, OWRD has also received Lottery Revenue Bond proceeds for this program, which allows for longer 3–4-year studies. This creates a hurdle for longer-term studies. Additionally, we do not have authority to issue loans under this program.

Water Project Grants and Loans is another program that can fund ASR and AR. This program can fund the costs to plan, design, and construct a water supply project that will achieve economic, environmental, and community benefits. This program has a 25% cost match requirement. Any local government, Indian tribe, or person may apply for funding. Currently, the program is only issuing grants; while OWRD has the authority to issue loans through this

program, that aspect of the program has not been set up due to lack of capacity. This program is a competitive grant program and requires that projects provide public benefits in all three categories: social/cultural, environmental, and economic. Since 2016, OWRD has issued two grants for two ASR projects totaling approximately \$4.7M in grant funding.

Both of these grant programs include additional requirements in statute for storage projects that impound surface water on a perennial stream, divert water from a stream that supports sensitive, threatened or endangered fish, or divert more than 500 acre-feet of surface water annually, including ASR and AR. Namely feasibility studies must conduct a series of analyses laid out in ORS 541.566(2) that evaluate ecological impacts to surface water environments. Projects funded through Water Project Grants and Loans will have conditions placed on the storage water rights to protect streamflow required to maintain the ecological functions of winter flows balanced with the need to store water called seasonally varying flows (ORS 541.689 and OAR 690-093-0130).

2. SB 710: What further analysis does OWRD have on this bill?

While science has long recognized the connection between groundwater and surface water, managing this reality can be difficult. Some groundwater applications propose new uses that are connected to surface water, which, if approved, would injure senior surface water rights. This makes it more difficult to obtain new groundwater permits. Similarly, to protect senior surface water right holders, junior groundwater users that impact surface water may be regulated off to provide water for the senior surface water use.

SB 710 introduces a new standard within Section 1 of the bill, that overrides existing metrics for determining “substantial” impairment or interference as provided in commission rule (OAR Divisions 690-008 and -009). The bill focuses on impacts to surface water caused by pumping one or more wells included in a single application rather than considering several factors that allow consideration of cumulative pumping impacts and the timing of impacts on surface water caused by geologic and environmental factors. As written in Section 1(1), the impairment or interference can only be determined when there are observable impacts to “water appropriated under an individual water use” thereby precluding protection of public instream uses such as State or Tribal instream water rights. As written, the bill removes protection for a significant class of protected senior surface water rights (Section 2) and reduces protection of existing groundwater and surface water rights for the issuance of new groundwater rights (Section 3).

Reiterating our response regarding our current practice; we evaluate all available and pertinent data and information when assessing impairment or interference between a well and other senior groundwater and surface water users, consistent with the current language of ORS 537.780(2)(b). Our analysis is inclusive of site-specific evidence, where it exists, and interprets that evidence in the context of the best available data and information about the hydrology of the subject area. As described in our written testimony to the Committee on February 1, the bill would presumably result in site-specific data being elevated above, and outside the context of, other data. This could potentially result in decisions made without the benefit of referring to significant amounts of peer-reviewed scientific analysis that describes the hydrologic systems of the state, in many cases wholly or partially funded by the State of Oregon.

3. What are the Department’s legal expenditures?

Water scarcity and increasing competing demands for the resource, when combined with the complexity of water law, has led to increased Department costs for legal services provided by the Oregon Department of Justice for nearly a decade. The Department’s legal costs have exceeded the allotted budget since the 2011-13 biennium (see table 1).

Table 1. Department monthly and biennial budget and expenses for legal services.

Biennium	Average Monthly		Biennial		
	Budget	Expenses	Budget	Expenses	Budget Shortfall
2011-2013	\$31,942	\$39,332	\$766,606	\$943,958	(\$177,352)
2013-2015	\$30,815	\$50,721	\$739,561	\$1,217,297	(\$477,736)
2015-2017	\$33,479	\$75,203	\$803,502	\$1,804,872	(\$1,001,370)
2017-2019	\$91,173	\$71,717	\$2,188,154*	\$1,769,218	\$418,936**
2019-2021	\$67,013	\$66,662	\$1,608,317*	\$1,599,893	\$8,424 (reverted)
2021-2023	\$77,871	\$101,748	\$1,868,910	\$2,441,945	(\$573,035)***

*Includes Emergency Board funding. Base budget was 17-19=\$835,628 and 19-21=\$952,038.

**Reverted to General Fund. Without E-Board funding, shortfall would have been \$933,590.

***Expenses and shortfall for 21-23 are projected. Actuals are through the December invoice.

In 2019, the Water Resources Department was directed by the Oregon Legislature to submit a report on contested cases and litigation actions from 2015, including past, current, and pending items as of July 1, 2019. A summary of the 2019 Budget Note Report is included below. The full 2019 Budget Note Report on Contested Cases and Litigation is available online: https://www.oregon.gov/owrd/wrdreports/2019_Report_on_Contested_Cases_and_Litigation.pdf

The Department often finds itself in situations where some parties want the Department to take regulatory action and other parties do not want the Department to act, which further complicates management and can lead to legal disputes. While it is often discussed that our actions are leading to litigation, the Department has also been sued by parties for not taking action that they wanted.

The number of contested or litigated decisions as outlined in each section are small in comparison to the number of actions taken. For context, between January 2015 and June 1, 2019, the Department issued 107 proposed final orders for regular new surface water applications, 556 proposed final orders for regular new groundwater right applications, 446 regular transfer preliminary determinations, 264 alternate reservoir final orders, and 598 proposed final orders on permit extensions. In 2018 alone, watermasters and their assistants conducted over 7,500 regulatory actions to protect senior out-of-stream uses and instream water rights.

The Department is not able to recuperate legal expenses when we are sued, even if we are successful in court; therefore, we are not awarded our legal expenses which could be used to offset our increasing litigation costs.