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April 4, 2023

House Committee on Agriculture, Land Use, Natural Resources, and Water
Chair Ken Helm,
Vice-Chair Mark Owens,
Vice-Chair Annessa Hartman,
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in Support of HB 3365-1

Dear Chair Helm, Vice-Chair Owens, Vice-Chair Hartman, and Members of the Committee:

We sincerely thank you for the opportunity for the Oregon Water Resources Congress (OWRC), the Deschutes Basin Board of Control (DBBC), and the Deschutes River Conservancy (DRC) to provide testimony in support of HB 3365-1 during the Committee meeting last night, on April 4, 2023. We very much appreciated the thoughtful questions from Committee members, as well as the testimony provided by others.

This letter briefly addresses some of the questions from the April 3 public hearing, and several written comments as well.

First, during the hearing, reference was made to the Oregon Water Resources Department's (OWRD) written testimony dated April 3, 2023 (submitted for informational purposes) regarding the potential for split-rate, split-duty and split-season leasing to result in enlargement, as that term is currently defined in the Department's rules. As we explained during the hearing, this is exactly the reason why legislation is needed in order to authorize the types of temporary transfers being contemplated in the Deschutes Basin.

We fully agree that current OWRD rules prohibit enlargement, where enlargement is defined to include circumstances in which a water right transfer results in more acreage being irrigated than authorized by the underlying water right. Meanwhile, the primary purpose of a split-rate, split-duty, or split-season lease is to use the same amount of water authorized under the original water right on more lands than what was originally authorized. As discussed during the hearing, the Deschutes Basin has instances in which a water user would like to irrigate their land early in the season, but then have their remaining-season water (which they would otherwise be entitled) used on lands in another district later in the season. Current statutes only allow this split-season lease where the split (or late season water) is used for instream purposes. Here, the split (or late season water) could be used for irrigation. And again, specific to a split-season lease where the late-season water would go to users in North Unit Irrigation District (NUID), that late-season water could replace stored water that would otherwise be used for the same late-season irrigation in NUID. In turn, the stored water could then be held and released and left instream in the Deschutes River during the winter to benefit Oregon spotted frogs.

The mission of the Oregon Water Resources Congress is to promote the protection and use of water rights and the wise stewardship of water resources

Another example of a potential temporary water transfer under HB 3365-1 is a split-duty lease. Again, for illustration purposes only, assume a water user in one district currently has an allocation of two acre-feet per acre to irrigate their land. And further assume that the water user can get one cutting of hay with each acre foot. Accordingly, using their full allocation, the water user would get two cuttings of hay with two acre-feet in one irrigation season. With a split-duty lease, the water user could decide to only use one acre-foot during the irrigation season (resulting in one cutting of hay), and then temporarily transfer the second acre-foot to another water user in another district. The “TO” water user would then have an additional acre foot under the “FROM” water right to add on top of the allocation they are receiving from their own district. This may be a critical, temporary transfer if the TO water user is only receiving a very minimal allocation from their own district, whether due to drought conditions, efforts to add to instream flows to support species listed under the Endangered Species Act (ESA), or both.

Again, in the above illustrations, these temporary transfers may be viewed as “enlargements,” as the FROM lands are not being dried up for some or all of the irrigation season, while the FROM and TO lands are receiving water under a water right that was originally limited to the FROM lands. At the same time, the districts are not expanding the total number of irrigated acres, and they are not increasing the total amount of water (in terms of rate or duty) being diverted and used under the water rights at issue. Instead, the districts are merely moving water in a way that gets the most out of existing water rights for both irrigators and fish and wildlife purposes. Moreover, it should be noted that current transactions run through the DRC’s Deschutes Water Bank already result in increased winter instream flows in the Deschutes River, and we fully expect HB 3365-1 to have the same result.

In short, HB 3365-1 would not allow actual enlargement by enabling a greater rate or duty of water per acre than currently allowed under a right, or by allowing for the diversion of more water at a new point of diversion than is legally available to that right at the original point of diversion. However, it would allow for technical enlargement based on current OWRD rules by increasing the acreage irrigated under a right, and by allowing the original place of use (the FROM lands) to continue to receive water under the right for part of the season.

With the above in mind, there are a couple of related concerns that need to be addressed. In particular, WaterWatch of Oregon testified that the bill “would allow movement of wasted water to other lands.” This is absolutely false. As set forth in the illustrations above, the FROM user would otherwise be beneficially using all the subject water on their own lands but for their voluntary decision to allow for what would otherwise be a portion of their allocation to be used on other lands by other water users who may have a greater need for the water. Moreover, the movement of water also facilitates increasing instream flows to benefit ESA-listed species. The bill does nothing to create a “legal right to water that is wasted.”

Additionally, concerns were raised that this could be viewed as an “end-run” around OWRD, given that the districts and DRC would be evaluating and managing these inter-district transfers rather than OWRD. Several points here. First, the districts are local governments, stewards of the water rights they hold, already charged with distributing water to their patrons, and the Department does not get involved with such distribution absent the request of the districts (ORS. 540.270). Second, as OWRD noted, there is already a district transfer pilot project (SB 130, 2021 Session) that allows a limited number of districts to evaluate and manage intra-district temporary transfers without Department review and approval of each individual transfer.

HB 3365-1 simply expands this concept in a narrow way, by creating a pilot program limited to specified districts in the Deschutes Basin, limited to transfers that are voluntary and temporary, and limited to transactions that are run through the DRC's Deschutes Water Bank. And as is the case with the temporary transfers already being run through the bank, these additional transactions will not occur without agreement from all participating districts and water users, as well as the DRC.

Finally, we would underscore that this is a pilot program aimed at making temporary transfers between districts more streamlined. Assurances were added with the -1 amendments, but the very nature of a pilot program is to allow those on the ground the opportunity to make the program work. Prior efforts have been stymied by the "red tape" associated with more traditional transfer processes, and otherwise attempting to sort out the terms and conditions of every possible transfer scenario in advance defeats the very essence of the bill. While there has been much talk about local basin planning and implementation, this bill finally opens the door to making that happen.

We appreciate the Committee's thoughtful consideration of HB 3365-1 and continue to urge your support.

Sincerely,

A handwritten signature in blue ink, appearing to read "April Snell".

April Snell
Executive Director