



WaterWatch of Oregon Protecting Natural Flows In Oregon Rivers

HB 2765 Testimony of WaterWatch of Oregon by Kimberley Priestley House Committee on Rules May 11, 2023

Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of natural flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers and aquifers to sustain fish, wildlife, recreation, and other public uses of Oregon's waters. We also work for balanced water laws and policies. WaterWatch has members across Oregon who care deeply about our rivers, their inhabitants and the effects of water laws and policies on these resources.

WaterWatch opposes HB 2765 (with or without the -2 amendments)

What HB 2765 does: This bill would grant South Suburban Sanitary District (District) exclusive authority to use or sell water which the District currently discharges into the Klamath system. The bill provides carve-out to current reclaimed water statutes (and the checks and balances contained therein), and essentially grants a legislative water right to the District without any consideration of the effect on the environment or other water right holders. The bill also specifically prohibits use of this water to meet federal or state fishery requirements.

What the -2 Amendments do: The -2 amendments add a provision that purports to provide 25% of the reclaimed water to the refuges, however as noted below the amendments as drafted fail to ensure this.

HB 2765 provides a "one off" exemption to existing statutes that govern use of reclaimed water: Oregon law already allows for additional uses of "reclaimed water" without having to get a new water right, however, to do this a water right holder must first obtain authorization under the reclaimed water right statutes (ORS 537.132). Importantly, under this process ODFW must determine that the use of reclaimed water would not have a significant negative impact on fish and wildlife. This bill, on the other hand, has no such checks and balances.

HB 2765 grants the District a legislative water right that trumps all downstream senior water rights: This bill would grant what amounts to a "super" water right for the "reclaimed" water that could not be regulated off for senior water right holders, of which there are many on the Klamath River below the District's discharge point. This sets horrible precedent and basically turns the prior appropriation doctrine that governs water allocation in Oregon on its head.

HB 2765 and the -2 amendments do not ensure water to the Klamath Refuges for birds: Testimony on OLIS on the original bill indicates there was widespread belief that this water will go to Klamath basin refuges. There is nothing in the original bill that requires this. The -2 amendments purport to address this by making 25% of the annual volume of the water available to the refuge, but as drafted this does not provide certainty that the refuge will

actually get this water and/or get this water when it is needed. Of note, the -2 amendments only “make available” rather than direct delivery, leaving open the question of whether this water will only go to the Klamath Refuge if someone pays for it. Additionally, the 25% applies to “annual volume” not daily discharge, without any certainty that it would be delivered to the refuge when the birds need the water.

HB 2765 prohibits use of this water to meet state or federal fishery requirements, and by doing appears to be attempting a legislative carve out to the Federal and State Endangered

Species Acts: This bill specifically prohibits the use of this water to meet state or federal fishery requirements. As such, the bill appears to be trying to legislate an exemption to both the state and federal Endangered Species Acts. This type of protection is not something that any other water right in Oregon enjoys, sets bad precedent, and raises Supremacy Clause issues in relation to the federal Endangered Species Act.

Conclusion: This bill provides a legislative carve that contravenes existing reclaimed water statutes and the few checks and balances those laws have in place, turns the prior appropriation doctrine on its head to create a “super water right” that cannot be regulated off for senior rights and sets very bad precedent on a number of levels, including trying to insulate the District from ESA requirements. Moreover, the bill and the -2 amendments do nothing certain for the Klamath Refuge. We urge rejection of this bill.

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