WATER LEAGUE

Water League engages the public in water stewardship.

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April 30, 2025

To: Senate Committee On Natural Resources
Senator Jeff Golden, Chair
Senator Todd Nash, Vice-Chair
Senators Fred Girod, Floyd Prozanski, and Kathleen Taylor

RE: Water League supports HB 3372 A-7 and rejects attempts to derail the bill on unfounded claims that it is unnecessary or redundant.

Dear Chair Golden, Vice-Chair Girod, and Committee Members,

Representative Anna Scharf has dramatically reversed her stance on 1/2 acre gardeners selling their plants and produce. She went from leading the opposition on behalf of seven agricultural advocacy organizations in the past few weeks to suddenly claiming HB 3372 A is unnecessary because the law already permits small farmers to irrigate their 1/2 acre backyard gardens from their domestic exempt use wells as "Commercial Use." This high-stakes political maneuver hinges on a deficient memo from Legislative Counsel that directly contradicts the longstanding advice from the Attorney General.

There is no other way to address this serious concern that threatens the legal pathway for 1/2 acre backyard gardeners to participate in their local farmers' markets than to directly address Representative Scharf's public statements and the text of the Legislative Counsel. We acknowledge this unfortunate circumstance. Below is our brief letter, followed by a more in-depth analysis.

On April 22, 2025, the day of the House vote on HB 3372-5, Representative Scharf submitted a Floor Letter arguing, in part, that the bill:

> Incentivizes increased use:...this measure encourages more users and opens the door to widespread, unregulated commercial use.

> Moves the goalposts for lawful users: Farmers who followed the rules...are now watching the state authorize commercial uses without any of those requirements.
>
> This bill creates a legal pathway for new, profit-driven commercial users to bypass the water right permitting process entirely, elevating exempt use to a near-equivalent of a water right...
>
> HB 3372A contradicts Oregon's recent efforts to protect and manage groundwater resources in overdrawn or sensitive basins where new rights are no longer viable.

Despite these and many other protectionist objections in the Floor Letter, HB 3372 A passed the House 41–16.

Since its introduction, HB 3372 A has drawn substantial public and political support for 1/2 acre backyard gardeners selling at farmers' markets. Representative Scharf's objections to the bill in her April 22, 2025, Floor Letter failed to stop that support. Now, to great surprise, Representative Scharf has pivoted away from the strident protectionist stance objecting to the commerce and now claims that the 1/2 acre backyard gardeners have always had the right to sell their produce under the pretense of a misguided last-minute Legislative Counsel (LC) memo she requested that claims the "commercial purpose" in ORS 537.545(1)(f) allows irrigation for small farms. With this interpretation in hand, Representative Scharf publicly accused OWRD of misinterpreting the law by shutting down 1/2 acre gardeners, positioning herself as the champion of the very small farmers. This shift directly contradicts her recent previous statements on the record that such sales are an anathema.

We ask: if the presumption were true that 1/2 acre backyard gardeners who sold produce at their farmers' markets were always operating under the law as exempt "Commercial Uses" in ORS 537.545(1)(f), but now strident objections to such commerce disappear under that type of use, then why harangue HB 3372 A? This bill seeks to permit the same activity under the more appropriate "Irrigation Use" category in ORS 537.545(1)(b), particularly given the Oregon Department of Justice's longstanding guidance that watering plants constitutes "Irrigation Use" regardless of what happens to the plants and produce.

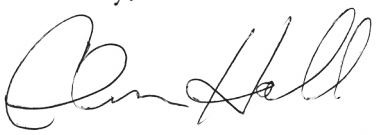
The 2008 Oregon Attorney General Advice (DOJ File No. 690302 GN0836-06) clearly states that "Commercial use" under ORS 537.545(1)(f) does not include Irrigation Use, which is a distinct, separately regulated water use from the Commercial and Industrial water use types. The recent LC memo contradicts the AG's longstanding and formal legal analysis. Representative Scharf presented the deficient LC memo, rushed it to the public hearing in an attempt to invalidate the need for the bill, and then shifted blame onto OWRD,

accusing staff of overreach and unlawfully targeting innocent small farmers. To be clear: Representative Scharf cited the memo from Legislative Counsel as a pretext that OWRD did not understand the law despite OWRD's adherence to the 2008 Attorney General's advice and the General Counsel Division's regular helicoptering over the department.

Were the LC to rescind their recent memo that Representative Scharf requested, and the authority of the AG advice on the topic were to hold unequivocally as it has since 2008, would Representative Scharf still maintain her newfound support for 1/2 acre gardeners under HB 3372 A? If not, then why is it OK to irrigate plants for sale under the presumption that it's "Commercial Use" but not OK if it's "Irrigation Use"?

HB 3372 A grants exempt domestic well users the legal right to sell plants and produce grown in their gardens (or where lawns currently are), which they've always been entitled to irrigate but not to sell from. This bill ends 70 years of inequity that has favored 5,000 gallons per day (GPD) for all manner of Commercial and Industrial profitable business water uses on exempt use domestic wells, but prohibited sales from their already-irrigated 1/2 acre backyard gardens. If the irrigation use by small 1/2 acre farmers is worthy of support on the basis that it is a "Commercial Use," then, equitably speaking, there is no justification for continued obstruction on the basis that irrigation is an "Irrigation Use." We think Representative Scharf's advocacy has inadvertently clarified this circumstance.

Sincerely,



Christopher Hall
Executive Director

<u>The following discussion is a more in-depth analysis</u>

Representative Scharf, in her capacity as an elected official, used her position to request from Legislative Counsel their answer to this question: "What would qualify as a "commercial purpose" under ORS 537.545 (1)(f)." LC framed her question: "As an example of a potential commercial purpose, you described a small farm that uses ground water for irrigation, food processing or other activities related to the business of the small farm."

Representative Scharf asked LC if that statute permits irrigation of a backyard garden to

allow domestic well users to show up at the farmers' market. Incredibly, LC rushed an informal answer, saying: "We believe a court would likely conclude that a small farm's production of farm products for exchange or sale qualifies as a "commercial purpose" under ORS 537.545 (1)(f)." The LC's assessment directly contradicts the Attorney General's advice from 2008 that states the exact opposite: Commercial Use is a specific type of water use, and it is not to be confused with Irrigation Use, which is also a specific type of water use, and that any plot of land with plants on it that is watered, whether the end product is sold or not, is Irrigation Use.

Apparently, neither Representative Scharf nor the Legislative counsel attorneys had access to or read the AG advice DOJ File No.: 690302 GN0836-06. If they had, I cannot imagine they would have dared to openly contradict the much more powerful and higher authority of the Oregon Department of Justice.

Given the broad support for HB 3372 A, Representative Scharf shifted gears under the shrewd calculation that letting the status quo continue is better than ensconcing into law that 1/2 acre gardeners can sell their irrigated produce. In the now obsolete Floor Letter from April 22, 2025, Representative Scharf argued "This bill creates a legal pathway for new, profit-driven commercial users to bypass the water right permitting process entirely, elevating exempt use to a near-equivalent of a water right..." This argument was the crux of their objection. But now Representative Scharf claims that the 1/2 acre gardeners selling their plants and produce were always legal and had an exempt right to irrigate under "Commercial Use." Representative Scharf is now "elevating exempt use to a near-equivalent of a water right;" however, it is under the Commercial Use, not Irrigation Use, banner.

In the Senate Committee hearing on HB 3372 A on Tuesday, April 29, 2025, Representative Scharf testified that [**emphasis added**]:

> When we heard this bill in the House and committee, **I wondered why commercial agricultural farming was not considered a commercial purpose under ORS 537.545(1)(f), an industrial or commercial purpose, in the amount not exceeding 5,000 gallons per day.** And why we needed to complicate the bill with a brand new provision defining a commercial garden added into section (1)(b), which is watering any lawn or a noncommercial garden not exceeding 1/2 acre, as Representative Owens explained.

This statement strongly suggests that Representative Scharf was unaware of the DOJ's opinion on the topic; she would not have wondered if she had been aware of the advice.

HB 3372 A is necessary because the law changed in 1955; it went from ORS 537.530 permitting "watering of lawns and **gardens for profit** and not exceeding one half acre in area," to 537.545(1)(b) "watering any lawn or **a noncommercial garden** not exceeding 1/2 acre." That change from the previous ORS 537.530 to 537.545(1)(b) is a direct legislative lineage. The LC memo is wrong because it disregards the factual basis that ORS 537.545(1)(b) replaced ORS 537.530. No other provision of ORS 537.545 replaced that pertinent ORS 537.530 language.

The LC improperly asserts that the Commercial Use in subsection (1)(f) governs the irrigation of a garden when plants and plant products are sold. This is a serious and consequential misconstruction of the law: watering plants is an Irrigation Use regardless of whether those plants are sold or kept for personal use. The LC improperly conflates the lowercase "c" commercial garden dictionary definition with the capital "C" Commercial Use of water as defined in OAR 690-300-0010(6).

As the 2008 AG advice, DOJ File No.: 690302 GN0836-06, clearly states [**emphasis added**]:

> The context of ORS 537.545(1) establishes that "commercial purpose" does not include exempt ground water use for irrigation.
>
> Context includes other provisions of the same statute. In this case, other provisions of ORS 537.545 describe three specific instances where exempt ground water may be used to water or apply water to land. First, the statute allows "watering" of any lawn or "noncommercial garden" not exceeding one-half acre in area. Second, the statute allows "watering" of lawns, grounds and fields not exceeding ten acres in area "of schools located within a critical ground water area." Third, the statute allows "land application" of effluent and reused ground water under limited conditions. **Because the statute prescribes those specific instances where exempt ground water may be used to water land, it appears that the legislature intended to limit permissible watering or land application only to the specific instances described explicitly in the text.** Thus, the text of ORS 537.545(1)(b) allows watering of "non commercial gardens" and distinguishes and prohibits the watering of "commercial gardens" by negative implication. **If the legislature had intended to allow watering of all gardens under one-half acre, whether commercial or not, then it would have referred simply to the watering of "gardens." Further, if one interprets "commercial purpose" to implicitly allow other commercially-related irrigation then such interpretation directly conflicts with the rest of the statute by rendering**

> **the specific references to permissible irrigation as unnecessary and therefore meaningless.**
>
> In construing legislative intent, a court will also view the statute at issue in the context of other preexisting statutes. **Referring to other statutes that describe types of beneficial uses of water, it is clear that the legislature consistently refers to "irrigation" when it intends to use the word "irrigation" rather than implying that irrigation is a latent component of other water uses.** Instead, the legislature consistently differentiates irrigation from other types of water use including industrial use or domestic use. Likewise, if the legislature had intended for irrigation to be a component of "commercial purpose" it would have so stated.
>
> In conclusion, we believe a court would likely find that "commercial purpose" as provided in ORS 537.545(1)(f) does not include water use for irrigation.

The LC memo contradicts the Attorney General's advice and is woefully incomplete in its legal analysis. The rush job by the LC, just barely finished in time for the April 29, 2025, 1:00 PM public hearing, never tried to cite the AG's Opinion for a rebuttal. We suspect neither Representative Scharf nor the LC staff were aware of DOJ File No.: 690302 GN0836-06. If they were, then the decision to rush a facile opinion through the LC would be to pit the LC against the AG, which would be an extraordinary political act. To be clear, we do not think Representative Scharf and the LC were aware of the AG's Opinion, and we would be astounded to find out otherwise.

Representative Scharf testified in the April 29, 2025, Senate Committee public hearing that [**emphasis added**]:

> Here's exactly what Legislative Council says: "In short, we believe a court would likely conclude that a small farm production of farm products for exchange or sale qualifies as a commercial purpose under ORS 537.545(1)(f). **Therefore, I believe what we have done is come up against an individual or individuals within an agency [OWRD] that did not understand the law and took it upon themselves to notify small farms that they were in violation of state statute and the agency not wanting to admit that they had made a mistake, when in fact those small farms couldn't actually do anything about it. The agency overstepped.**

Representative Scharf uses the improper LC memo to make the leap that the OWRD acted unlawfully and harmed domestic well users, which is an astonishing claim. Now, the LC has been used as a hammer to hit a state agency on the pretense of a faulty legal memo that is no

match for the legal scholarship and authority of the Oregon Department of Justice, which did not rush through its 2008 advice on the matter. While we agree that OWRD abused its discretion by spending its limited human and financial resources on sacking small produce sellers who used their domestic wells to irrigate their gardens, never once did the agency and its staff act unlawfully. The effort to enact HB 3372 A is to change the law, which we fully expect OWRD would also follow.

Representative Scharf's accusation of OWRD acting unlawfully has significant legal ramifications, especially since the elected official is using her position to set up citizens to believe they have been harmed by OWRD acting unlawfully. What happens if these citizens sue OWRD under pretenses promulgated by Representative Scharf in her attempt to use the LC opinion as a political tool to kill HB 3372 A? That would be a significant legal jeopardy.

With no sense of irony, Representative Scharf declared in the April 29, 2025, Senate Committee hearing [**emphasis added**]:

> **We should ask that the state agency interpret the law correctly. The laws that we write in this building and that Legislative Council has interpreted legally**. I further suggest that we do not need this piece of legislation. Rather, what we should be doing, as a legislative body, is telling water resources that they need to educate their water masters as to the legal definition of commercial purpose in the exempt statute, as it exists, and they need to retract any and all cease and desist letters that were sent to any and all small farms out there in any of these districts by their agency immediately, and fix the problem.

Conclusion:

OWRD has been operating under the authority of the Oregon Department of Justice legal advice since 2008, which states Commercial Use of water does not include watering gardens under any circumstances because watering plants is always Irrigation Use. While Water League stridently objects to the regulatory action OWRD staff engaged in, which was shutting off exempt use water to small backyard gardeners irrigating their plants for subsequent farmers' market sales, we hold that OWRD was indeed following the law, misguided and inequitable as that law is and has been since 1955. HB 3372 A is the only reasonable solution to this problem.