



# Staff Report

**TO:** Water Resources Commission  
**FROM:** Ivan Gall, Director  
**DATE:** February 26, 2026  
**SUBJECT:** Agenda Item E  
Water Resources Commission

## IN THE MATTER OF WATER RIGHT APPLICATION R-87871 IN THE NAME OF EAST VALLEY WATER DISTRICT: FURTHER PROCEEDINGS ON REMAND FROM THE OREGON SUPREME COURT

### I. Introduction

The Water Resources Commission considered further proceedings on Water Right Application R-87871 in the Name of East Valley Water District at the December 11, 2025, Commission meeting and issued a proposed order on remand on December 18, 2025. The service of the proposed order to the East Valley Water District, applicant, and WaterWatch of Oregon, Inc., protestant in the original proceeding (hereafter, protestant), initiated a 30-day period during which the parties were able to submit exceptions to the proposed order. The proposed order also provided that the applicant and protestant would be able to provide oral argument at a later date. The agenda item includes time for oral arguments from the applicant and protestant in public session, an optional executive session at the request of the Commission to consult with counsel to consider written legal advice (the executive session would be conducted pursuant to ORS 192.660(2)(f) and would be closed to the public), and public session where the Commission may choose to present a decision on the matter and provide related instructions to the Department or identify further proceedings as they see appropriate.

### II. Integrated Water Resources Strategy Recommended Action

Not applicable.

### III. Background

On August 7, 2025, the Oregon Supreme Court issued an opinion in the matter of Water Right Application R-87871 in the Name of East Valley Water District. The Supreme Court affirmed in part and reversed in part an earlier decision of the Court of Appeals (*East Valley Water v. Water Resources Commission*, 328 Or App 790 (2023)) and reversed the final order issued by the Water Resources Commission denying East Valley Water District's application to store water. Further, the Supreme Court remanded the case to the Water Resources Commission for further proceedings. Pursuant to the Supreme Court's remand, the Water Resources Commission considered the application at its meeting on December 11, 2025, and issued a

proposed final order on remand.

Below is a timeline of significant events related to this topic:

- February 2013: East Valley Water District applied to store 12,000 acre feet of water in a reservoir constructed on Drift Creek, a tributary to the Pudding River, during the storage season of October 1 through April 30 (R-87871).
- July 2014: The Department issued a proposed final order to approve the application.
- September 2014: A protest was filed by a group of individual protestants, collectively known as the Rue Protestants, and Water Watch.
- November 2016: The Department requested that the Office of Administrative Hearings conduct a contested case hearing.
- February 2019: The administrative law judge (ALJ) assigned to the case issued a proposed order recommending the Department approve the application with minor modifications.
- September 2019: The Director issued a final order affirming the ALJ's proposed order, to which the protestants filed exceptions.
- November 2019: The Commission issued a final order denying the application (Commission Order).
- November 2023: Court of Appeals affirmed the Commission's order, Or App 790 (2023).
- August 2025: Supreme Court affirmed in part and reversed in part the decision of the Court of Appeals and reversed the Commission's final order, 374 Or 148 (2025).
- December 2025: Pursuant to the Supreme Court opinion, the Water Resources Commission considered further proceedings on the application and issued a proposed order on remand, which was served to the applicant and the protestant on December 18, 2025. The proposed order provided the applicant and the protestant an opportunity to file written exceptions to the proposed order as well as a future opportunity to present oral arguments related to such exceptions.
- January 2026: Exceptions to the proposed order on remand were timely received from the applicant on January 16, 2025, and the protestant on January 20, 2025.

#### IV. Discussion

In the final order denying R-87871, the Commission found that “the proposed appropriation impairs or conflicts with the beneficial purpose of Certificate 72591, an existing in-stream water right” and that there is “no basis to conclude that the means to protect the right are available in this instance” (Commission Order, p. 52). Upon this finding and the consideration of ORS 537.170(8)(f), the Commission concluded “that the presumption is overcome and the appropriation will impair or be detrimental to the public interest” (Commission Order, p. 52). The Oregon Supreme Court found that the Commission correctly interpreted that the statutorily protected public interest in vested and inchoate water rights (ORS 537.170(8)(f))

applied to both the quantity of water guaranteed to the senior water-right holder and beneficial use associated with those water rights and that not protecting this public interest right may be a valid basis for denying an application. However, the Court found that the Commission failed to fully consider all seven public interest factors in ORS 537.170(8) in its evaluation of the application. The incorrect interpretation by the Commission of the need to explicitly consider all seven factors under ORS 537.170(8) was cited as the cause to reverse the Commission's final order and remand the application to the Commission to undertake further proceedings.

The Commission issued a proposed order on remand on December 18, 2025, which proposes to deny the application. Within the proposed order, the Commission included sections on consideration of the ORS 537.170(8) public interest factors as well as balancing of the ORS 537.170(8) public interest factors. Additionally, the proposed order clarified the inclusion of its reasoning for providing balancing information as follows:

“rather than risk the possibility of another remand in this matter should a reviewing court conclude otherwise, the Commission provides the following balancing of the public interest factors. The Commission's decision to balance the public interest factors in this case does not reflect a policy or practice of the Department or Commission with respect to the evaluation of any future application.” (pg. 6)

## **V. Conclusion**

Following the issuance of the proposed order on remand on December 18, 2025, the Commission must now consider any exceptions filed, allow an opportunity for oral argument related to any filed exceptions by the applicant and the protestant, and determine further proceedings regarding East Valley Water District's application to store water.

## **VI. Alternatives**

The Commission may consider the following alternatives:

1. Enter a new final order for application R-87871 and provide further instructions to the Department.
2. Identify further proceedings on application R-87871 as they see appropriate.

## **VII. Recommendation**

At the request of the Commission, legal advice regarding alternatives available to the Commission may be provided and discussed in an Executive Session on this topic.

### **Attachments:**

1. Proposed Order on Remand issued by the Commission on December 18, 2025.
2. Exceptions filed by the applicant on January 16, 2025.
3. Exceptions filed by the protestant on January 20, 2025.

WRC Agenda Item E

February 26, 2026

Page 4

Eliot Crafton

503-493-8610

Jesse Ratcliffe

503-400-2944



Final Order allowed some of the exceptions and denied others but essentially affirmed the ALJ's Proposed Order allowing the application with conditions.

At an Oregon Water Resources Commission ("Commission") meeting on June 13, 2019, the Commission appointed a subcommittee of commissioners to review the exceptions to the Director's Final Order.<sup>1</sup> The appointed subcommittee comprised Commissioners Bruce Corn, Joe Moll, and Meg Reeves. On October 3, 2019, the Rue Protestants and WaterWatch of Oregon timely filed exceptions to the Director's Final Order.

At a Commission public meeting on November 21, 2019, the subcommittee made its recommendations to the full Commission. On November 22, 2019, the full Commission allowed oral argument and deliberated on the disposition of the exceptions filed to the Director's Final Order. The Commission then voted unanimously to issue a Final Order that was consistent with the subcommittee's recommendations. On November 25, 2019, the Commission issued its Final Order in Contested Case, which concluded that the proposed use will impair or be detrimental to the public interest and must be denied.

EVWD petitioned for judicial review of the Commission's Final Order in Contested Case, and the Court of Appeals affirmed. The Supreme Court affirmed the decision of the Court of Appeals in part and reversed in part. The Court reversed the Commission's Final Order in Contested Case and remanded the case to the Commission for further proceedings. *East Valley Water v. Water Resources Comm'n*, 374 Or 148 (2025).

The Commission now issues this Proposed Final Order on Remand, which readopts the Director's Final Order and the Commission's Final Order in Contested Case, except as modified herein, concludes that the proposed appropriation will impair or be detrimental to the public interest, and proposes to deny application R-87871.

## II. SCOPE OF REMAND

The scope of the Court's remand is narrow. The Court held that the Commission erred "when it interpreted ORS 537.170(8) to require consideration of all seven public interest factors only if it intended to grant EVWD's application despite having determined that the presumption had been overcome." *East Valley* at 182. The Court concluded that, "upon determining that the public interest presumption had been overcome, the commission was then required by ORS 537.170(8) to consider all seven of the public interest factors listed in that subsection before making its final determination that EVWD's proposed use would impair or be detrimental to the public interest." *Id.* at 176. The Court remanded the order to the Commission "for further proceedings under the correct interpretation of the law." *Id.* at 182.

The Commission's sole task on remand is therefore to "consider" the ORS 537.170(8) public interest factors and issue an order on EVWD's application reflecting that consideration.

---

<sup>1</sup> OAR 690-002-0190(2)(c) authorizes formation of a subcommittee to review the exceptions filed to the Director's Final Order and to provide a report to the Commission.

### III FINDINGS OF FACT

The Commission adopts and incorporates by reference, without any modifications, all Findings of Fact from the Director's Final Order.

### IV. ULTIMATE FINDINGS OF FACT

1. In-stream water right 72591 is a certificated right on Drift Creek with a priority date of October 18, 1990, that provides for specified monthly amounts of water to flow from river mile 11 to the mouth of Drift Creek.
2. The beneficial purpose of Certificate 72591 is to provide required stream flows as stated on the face of the water right for cutthroat trout migration, spawning, egg incubation, fry emergence and juvenile rearing.
3. The proposed appropriation would inundate a portion of the reach protected by Certificate 72591.

### V. CONCLUSIONS OF LAW

1. Having considered the ORS 537.170(8) public interest factors, the Commission concludes that the proposed use will impair or be detrimental to the public interest.
2. As described in the Commission's Final Order in Contested Case, the application must be rejected because, on this record, there are no modifications that will allow the proposed use to comport with the public interest to allow for approval.

### VI. OPINION

The broader regulatory framework governing applications for the storage of water is discussed at length in the Director's Final Order, the Commission's Final Order in Contested Case, and in the Court's opinion. Briefly, EVWD established the presumption that the proposed appropriation will not impair or be detrimental to the public interest as required by ORS 537.153(2). This presumption was overcome as provided in ORS 537.153(2)(b), by a preponderance of evidence that the proposed appropriation would impair or be detrimental to the public interest based on the ORS 537.170(8)(f) public interest factor. Because the presumption was overcome, the Commission now makes "the final determination of whether the proposed use or the proposed use as modified in the proposed final order would impair or be detrimental to the public interest by considering" the listed public interest factors. ORS 537.170(8).

#### A. Consideration of the ORS 537.170(8) Public Interest Factors

Each of the ORS 537.170(8) public interest factors is listed and considered in turn.

*(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.*

The Commission adopts and incorporates by reference the Department's consideration of factor (a), with the following additional discussion. Director's Final Order at 81-83. The Department interpreted factor (a) as follows:

[T]he factor invites an analysis of whether, when possible, the proposed use will allow water to be used for all purposes, including those specified in the rule. In other words, the analysis focuses on whether the proposed use can co-exist with other important uses of the water.

*Id.* At 82. The Department concluded that the proposed appropriation can co-exist with fish and wildlife use as a result of mitigation conditions, and therefore concluded that the proposed appropriation will not impair or be detrimental to the public interest based on consideration of factor (a).

The Commission has considered factor (a) and finds it unnecessary to disturb this conclusion. As described below, the Commission concludes that the proposed appropriation will impair or be detrimental to the public interest based on consideration of factor (f), which operates to protect specific water rights, including Certificate 72591, as opposed to categories of uses.

*(b) The maximum economic development of the waters involved.*

The Director's Final Order Findings of Fact 164 -171 describe the economic benefits from the project, which include increased farm revenues resulting from higher-value crops that can be grown on irrigated land. Economic costs include the loss of approximately 400 acres of farm and timber land resulting from inundation. The Commission also adopts and incorporates by reference the Department's consideration of factor (b), which acknowledges an economic benefit resulting from use of the stored water for irrigation. Director's Final Order at 83-84. The Commission concludes that the proposed appropriation will not impair or be detrimental to the public interest based on the consideration of this factor.

*(c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.*

The Commission adopts and incorporates by reference the Department's consideration of factor (c), which concludes that there is no evidence in the record that the "proposed dam or reservoir will have any impact on these issues." Director's Final Order at 84. The Commission concludes that the proposed appropriation will not impair or be detrimental to the public interest based on the consideration of this factor.

*(d) The amount of waters available for appropriation for beneficial use.*

The Commission adopts and incorporates by reference the Department's consideration of factor (d), which concludes that water is available for the proposed storage. Director's Final Order at 85. The Commission concludes that the proposed appropriation will not impair or be detrimental to the public interest based on the consideration of this factor.

(e) *The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.*

The Commission adopts and incorporates by reference the Department's consideration of factor (e), which concludes that the proposed storage will not result in wasteful, uneconomic, impractical or unreasonable use of the waters involved. Director's Final Order at 85-86. The Commission concludes that the proposed appropriation will not impair or be detrimental to the public interest based on the consideration of this factor.

(f) *All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.*

The Commission adopts and incorporates by reference the Commission's consideration of factor (f) from the Commission's Final Order in Contested Case, Section V.B (pages 6-11), which concludes that the proposed appropriation will impair or conflict with the beneficial purpose of Certificate 72591, an existing in-stream water right, and that the record in this matter does not provide a basis to conclude that the means to protect Certificate 72591 would be available if the proposed appropriation was to be approved. The Commission concludes that the proposed appropriation will impair or be detrimental to the public interest based on the consideration of this factor.

(g) *The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.*

The Commission adopts and incorporates by reference the Department's consideration of factor (g), which concludes that the proposed appropriation is consistent with ORS 536.295 to ORS 536.350 and the Commission rules implementing these statutes, and that ORS 538.505 to 537.534 pertain to groundwater and are inapplicable here. Director's Final Order at 87. The Commission concludes that the proposed appropriation will not impair or be detrimental to the public interest based on the consideration of this factor.

### *Conclusion*

The Commission has considered the ORS 537.170(8) public interest factors. Based on its consideration, the Commission determines that the proposed appropriation would impair and be detrimental to the public interest because it will impair or conflict with the beneficial purpose of Certificate 72591, a senior instream water right, and because the record in this matter does not provide a basis to conclude that the means to protect Certificate 72591 would be available if the proposed appropriation was to be approved.

### **B. Balancing of the ORS 537.170(8) Public Interest Factors**

In its appeal, EVWD argued that "to 'consider' the public interest factors as required under ORS 537.170(8), the commission must 'balance' those considerations against one another before reaching its final determination whether to grant East Valley's application." *East Valley* at 182. The Court declined to address this argument, stating instead that "[t]o the extent that the

commission or other participants dispute the district's contention that 'consider[ation]' under ORS 537.170(8) requires the commission to balance the various public interest factors, the parties are free to make their competing arguments to the commission on remand." Anticipating that East Valley will renew its argument, the Commission addresses it here.

ORS 537.170(8) does not require a "balancing" of the public interest factors. The statute provides that the Commission "shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order would impair or be detrimental to the public interest by *considering*" the public interest factors. (Emphasis added).

The relevant dictionary definition of "consider" is: "(1) to think about carefully: such as (a) to think of especially with regard to taking some action; (b) to take into account." <https://www.merriam-webster.com/dictionary/consider> (Accessed on December 16, 2025). Therefore, the Commission satisfies its obligation to consider the public interest factors when it takes the factors into account and thinks carefully about them when making its decision on the application. The plain text meaning of "consider" does *not* require the balancing of the factors against each other. In other words, the Commission need not attempt to formally assign weight to the public interest factors and then determine whether the assigned weight tips in favor or against a finding of impairment or detriment to the public interest. Rather, it is sufficient that the Commission has, as described above, thought carefully about and taken into account each of the factors, and concluded, based on its consideration, that the public interest in preventing the impairment of or conflict with the purpose of Certificate 72591 requires denial of East Valley's application.

However, rather than risk the possibility of another remand in this matter should a reviewing court conclude otherwise, the Commission provides the following balancing of the public interest factors. The Commission's decision to balance the public interest factors in this case does not reflect a policy or practice of the Department or Commission with respect to the evaluation of any future application.

The Commission has concluded that the factors other than (f) do not demonstrate an impairment or detriment to the public interest. The Commission does not lightly dismiss its conclusions with respect to these factors. However, the Commission interprets ORS 537.180(8) as reflective of the legislature's judgment that any one of the listed factors are significant enough to the public interest to potentially result in a conclusion that the proposed appropriation would result in impairment or detriment, regardless of consistency with the remaining factors. The prevention of waste, for example, is foundational to western water law. Given its importance, an application consistent with the remaining factors but constituting clear and significant waste of water would likely be determined to impair or be detrimental to the public interest.

The Commission concludes that, on the record of this application, the significance of the impairment and detriment to the public interest based on factor (f) outweighs the consistency with the public interest demonstrated as to the other factors. The record demonstrates that the proposed appropriation would frustrate the beneficial purpose of a senior water right held in trust in for the benefit of the people of Oregon. This represents a detriment to two separate and significant public interests – the protection of senior water rights in the system of prior

appropriation and the establishment and protection of rights whose purpose benefits the public as a whole.

### VII. PROPOSED ORDER

For the reasons stated in this Proposed Order on Remand, the Commission proposes to DENY Application R-87871.



---

Vice-Chair  
Oregon Water Resources Commission

DATED: December 17, 2025

### NOTICE OF RIGHT TO FILE EXCEPTIONS

The parties may file exceptions to the Commission's Proposed Order on Remand. Parties must file any exceptions within 30 days following the date of service of this Proposed Order (*i.e.* the date on which this Proposed Order was mailed). Parties must mail or hand-deliver a hard copy of their exceptions to the Department at its Salem offices or email a copy of their exceptions to the Department at the email address listed on the Certificate of Service. Parties must also email an electronic copy to all of the email addresses listed on the Certificate of Service. Exceptions must be in writing, clearly and concisely identify the portions of the Proposed Order excepted to, and cite to appropriate portions of the record.

If a party files an exception to this Proposed Order, the Department must refer the exception to the Water Resources Commission. The Commission must consider the party's arguments contained in the exceptions prior to issuing a Final Order. The Commission will hear oral argument on any exceptions filed at a future Commission meeting. The Commission will notify the parties in writing at least 14 days in advance of the date, time, and length of oral argument presentation. The Commission may form a subcommittee to review the exceptions and provide a report to the Commission prior to the Commission issuing a final order. OAR 690-002-0175.

1 **BEFORE THE**  
2 **OREGON WATER RESOURCES COMMISSION**

3 **IN THE MATTER OF WATER**  
4 **RIGHT APPLICATION R-87871**

**EAST VALLEY WATER DISTRICT’S**  
**EXCEPTIONS TO PROPOSED ORDER**  
**ON REMAND**

5 IN THE NAME OF EAST VALLEY  
6 WATER DISTRICT,  
7 *Applicant,*

8 WATERWATCH OF OREGON, INC.,  
9 *Protestant in Original*  
10 *Proceeding.*

Agency Case No.: R-87871

11 Pursuant to OAR 690-002-0175, Applicant East Valley Water District (“East  
12 Valley”) submits these exceptions to the Proposed Order on Remand dated December 17,  
13 2025 (“Proposed Order”) issued by the Oregon Water Resources Commission (the  
14 “Commission”). These exceptions are timely filed because they are submitted to the Oregon  
15 Water Resources Department (“Department”) via electronic mail within 30 days of service of  
16 the Proposed Order. *See* OAR 690-002-0175(2)-(3). East Valley urges the Commission to  
17 issue a final order granting water right application R-87871 (the “Application”), with an  
18 explicit condition to preclude impairment or detriment to the beneficial purpose of Certificate  
19 72591.

20 **I. INTRODUCTION**

21 This matter is before the Commission on remand from the Oregon Supreme Court in  
22 *East Valley Water District v. Oregon Water Resources Commission*, 374 Or 148, 574 P3d  
23 453 (2025). In *East Valley*, the court held that the Commission acted under an erroneous  
24 interpretation of law when it denied the Application. ORS 537.170(8) (2025) requires the  
25 Commission to determine whether the Application would impair or be detrimental to the  
26 public interest by considering seven public interest factors. The court held that the  
Commission failed to consider all seven public interest factors as required by law and  
therefore remanded to the Commission for consideration of the Application “under the

**STOEL RIVES LLP**  
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
Main 503.224.3380 Fax 503.220.2480

1 correct interpretation of the law.” *East Valley*, 374 Or at 181-82.

2 The Commission is now charged with determining whether the proposed use of water  
3 is in the public interest. It must do so by considering the seven factors that define the public  
4 interest in ORS 537.170(8). A perfunctory exercise of “showing your work” to defend the  
5 conclusion reached in the Commission’s previous final order is insufficient. The  
6 Commission must actually consider all of the public interest factors.

7 The Proposed Order does not do so and fails on three separate accounts. First, the  
8 Proposed Order jumps to the conclusion that the proposed reservoir would harm cutthroat  
9 trout without considering contrary evidence in the record, including evidence that the  
10 reservoir would *benefit* trout by providing increased flows and lower temperatures in the  
11 summer months, during periods when Drift Creek has been observed to run dry. Second, the  
12 Proposed Order wrongly concludes that the storage right cannot be conditioned to protect  
13 cutthroat trout, despite findings that conditions developed by the Oregon Department of Fish  
14 and Wildlife (“ODFW”) and Oregon Department of Environmental Quality (“DEQ”) are  
15 adequate to protect other Salmonids. Finally, despite the clear directive from the Oregon  
16 Supreme Court, the Proposed Order *again* proposes to deny the Application based entirely on  
17 one of the seven public interest factors, public interest factor (f), forsaking the Commission’s  
18 duty to evaluate the Application based on “*the* public interest.” ORS 537.170(8) (emphasis  
19 added).

20 Considering, or thinking carefully, about whether the proposed use is in the public  
21 interest means recognizing that approval of a proposed use can advance the public interest  
22 and, conversely, that denying a proposed use can be detrimental to the public interest. It also  
23 means recognizing that Oregon’s water resources are limited and the demands for those  
24 resources are high, which is why ORS 537.170(8) requires weighing all seven public interest  
25 factors—not just one of them—to accommodate those competing needs, both instream and  
26 out of stream. Where multiple beneficial uses can be met and protected, particularly through

1 use of conditions, ORS 537.170(8) declares the public interest in doing so. Here,  
 2 consideration of six of the seven public interest factors clearly demonstrates that approval of  
 3 the Application is in the public interest. Adopting findings that those public interest factors  
 4 “do not demonstrate \* \* \* detriment to the public interest,” with no thought to the *detriment*  
 5 to the public interest from *denying* the Application, does not amount to the careful thinking  
 6 required of the Commission. (*See* Proposed Order at 6.) The Commission can advance the  
 7 public interest by approving the Application, conditioned as proposed by East Valley.  
 8 Denying the Application would be detrimental not only to East Valley but to the public  
 9 interest at large, particularly given the precedent that would be set for all future water right  
 10 applications in Oregon.

## 11 II. PROCEDURAL BACKGROUND

12 East Valley filed the Application in 2013 to obtain a water right to store water in a  
 13 new reservoir on Drift Creek. The Department issued a proposed final order recommending  
 14 approval of the Application. Two sets of protests to the Department’s proposed final order  
 15 were filed, and the matter was referred to an administrative law judge (“ALJ”) for a contested  
 16 case hearing.

17 In 2018, the ALJ presided over a 10-day hearing, where written and oral testimony  
 18 was provided by the parties and numerous witnesses. Following the hearing, the ALJ issued  
 19 a proposed order that recommended approval of the Application. The Director of the  
 20 Department subsequently issued a final order (the “Director’s Final Order”) approving the  
 21 Application, with minor modifications to the ALJ’s proposed order.

22 WaterWatch of Oregon, Inc. (“WaterWatch”) filed exceptions to the Director’s Final  
 23 Order, and the Commission appointed a subcommittee to consider those exceptions. At a  
 24 public hearing on November 21, 2019, the subcommittee recommended to the full  
 25 Commission that the Application be denied, based on a previously unannounced  
 26 interpretation of public interest factor (f) that directly conflicted with the interpretation

1 advanced by the Department throughout the contested case. The following day, on  
 2 November 22, 2019, the Commission heard oral arguments from the parties. The  
 3 Commission did not allow submission of any written testimony or evidence in response to  
 4 the subcommittee’s recommendation or its newly announced interpretation of law. On  
 5 November 25, 2019, the Commission issued its final order denying the Application (the  
 6 “Commission’s Final Order”). East Valley appealed the Commission’s Final Order—first to  
 7 the Oregon Court of Appeals and then to the Oregon Supreme Court. The Oregon Supreme  
 8 Court held that the Commission acted under an erroneous interpretation of law and remanded  
 9 the matter to the Commission. *East Valley*, 374 Or at 181-82.

### 10 III. EXCEPTIONS

11 The preponderance of the evidence in the record supports only one result in this  
 12 case—approval of the Application. As explained below, three separate and distinct bases  
 13 exist upon which the Commission should reject the recommendation set forth in the Proposed  
 14 Order. *First*, the proposed storage right would not impair or conflict with the purpose of the  
 15 existing instream water right on Drift Creek. *Second*, even if there is some risk of  
 16 impairment to or conflict with the existing instream water right, the Commission can  
 17 condition approval of the Application to protect against such effect. *Third*, the proposed use  
 18 *is* in the public interest when all seven public interest factors are given due consideration.

#### 19 A. **The Proposed Order Erroneously Concludes That the Proposed Storage Right 20 Would Impair or Conflict with the Purpose of Certificate 72591.**

21 The Proposed Order erroneously concludes, without substantial evidence, that the  
 22 proposed reservoir “will impair or conflict with the beneficial purpose of Certificate  
 23 72591[.]” (Proposed Order at 5.) The “purpose and/or use” of Certificate 72591, as stated  
 24 on the face of the certificate, is to “[p]rovid[e] required stream flows for cutthroat trout for  
 25 migration, spawning, egg incubation, fry emergence, and juvenile rearing.” The certificate  
 26 also specifies the monthly minimum stream flows required for such purposes. That is,

1 Certificate 72591 sets forth both its *beneficial purpose* (i.e., “[p]roviding required stream  
2 flows” for cutthroat trout) and the *measure* to assess whether the purpose is satisfied (i.e., the  
3 monthly minimum stream flows). If the monthly minimum stream flows are provided, then  
4 the purpose of the instream right is met.

5 The Proposed Order attempts to rewrite Certificate 72591 by replacing its stated  
6 purpose to “[p]rovid[e] required stream flows” with a requirement to protect the life stages of  
7 cutthroat trout, regardless of whether minimum stream flows are provided. Similarly, the  
8 Proposed Order ignores the quantitative standard set forth in Certificate 72591 for  
9 determining whether the purpose is satisfied. That approach, however, is not supported by  
10 the certificate itself or the record in this case. Further, the weight of the evidence does not  
11 support a finding that the proposed use will impair or conflict with the life stages of cutthroat  
12 trout—a finding that appears to be based entirely on assumptions about the effects of dams.  
13 The Commission should consider the evidence in the record and find otherwise.

14 **1. The proposed storage right would protect the purpose of Certificate**  
15 **72591 by requiring live flow to be passed through the reservoir to**  
16 **“[p]rovid[e] required stream flows.”**

17 The Proposed Order adopts the Commission’s prior finding that  
18 “[i]f a portion of the reach [of Certificate 72591] is inundated to allow storage  
19 of up to 12,000 acre feet of water, and absent evidence in the record to the  
20 contrary, the Commission concludes that the beneficial purpose of the flows to  
21 support the life stages of cutthroat trout is frustrated.”

22 (Commission’s Final Order at 10.) On that basis alone, the Commission determined that the  
23 “inundation *appears* to defeat the beneficial purpose” of Certificate 72591. (*Id.* (emphasis  
24 added).)

25 The Commission does not argue that the proposed storage right would interfere with  
26 the purpose of the instream right to “[p]rovid[e] required stream flows” for cutthroat trout.

27

28

1 The Director found—and the Commission adopted the Director’s finding<sup>1</sup>—that East Valley  
 2 would be required to allow live flow to pass through the reservoir to provide the required  
 3 stream flows for cutthroat trout, as set forth in Certificate 72591. (Director’s Final Order at  
 4 36 (Findings of Fact ¶¶ 215-217).) So long as the proposed use under the Application  
 5 ensures that live flow is not stored when needed to satisfy the minimum flows set forth in  
 6 Certificate 72591, there is no impairment or detriment to the purpose of Certificate 72591.  
 7 Thus, the record supports a finding that the proposed use, without further conditions, would  
 8 not interfere with “[p]roviding required stream flows for cutthroat trout,” as required by  
 9 Certificate 72591. Although the Director’s Final Order sufficiently conditioned the proposed  
 10 use to satisfy the minimum flows set forth in Certificate 72591, to the extent the Commission  
 11 believes a more explicit condition is necessary, Section III.B below proposes such a  
 12 condition.

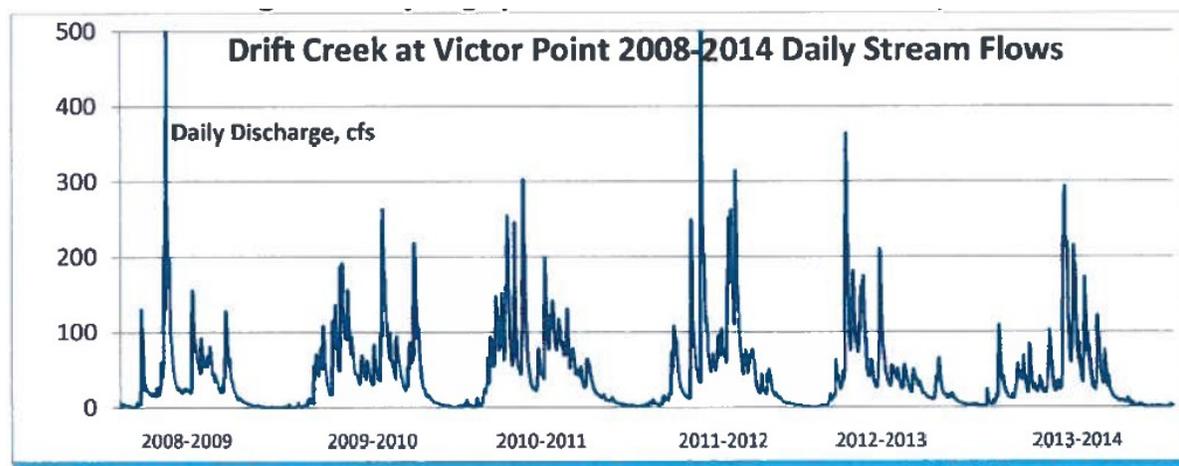
13 **2. Evidence in the record indicates that the proposed storage right would**  
 14 **benefit rather than harm cutthroat trout.**

15 Instead of applying the straightforward analysis set forth in the Director’s Final Order  
 16 as described above, the apparent basis of the Proposed Order is that the proposed use—while  
 17 protecting the purpose of the instream right to “[p]rovid[e] required stream flows”—would  
 18 otherwise interfere with the life stages of cutthroat trout intended to be served by those  
 19 stream flows. The record does not support this finding; the Proposed Order just assumes it to  
 20 be the case.

21 To the contrary, substantial evidence exists in the record that the proposed reservoir  
 22 would *benefit*, rather than harm, cutthroat trout. The Commission adopted factual findings  
 23 that Drift Creek currently does not support the key life stages of cutthroat trout during  
 24 summer months. In the Director’s findings of fact—which the Commission adopted without  
 25 \_\_\_\_\_

26 <sup>1</sup> The Proposed Order “adopts and incorporates by reference, without any  
 modifications, all Findings of Fact from the Director’s Final Order.” (Proposed Order at 3.)

1 modification—he found that Drift Creek’s “temperature from mid-June to September is too  
 2 warm for \* \* \* trout rearing and migration” due to “hot water, reduced summer water flow,  
 3 and a lack of trees and other vegetation to shade the creek water.” (Director’s Final Order at  
 4 41 (Findings of Fact ¶¶ 257, 259).) The Director explained that “Drift Creek provides  
 5 limited fish habitat in large part because of its current high water temperatures.” (*Id.* at 82;  
 6 Proposed Order at 4 (adopting Director’s finding).) Indeed, as illustrated in the following  
 7 figure from the record, stream flow data over a six-year period shows that Drift Creek runs  
 8 dry or nearly dry in many years during late summer months.



17 (Ex. EV13 at 34.)<sup>2</sup> In other words, existing conditions on Drift Creek do not provide the  
 18 stream flow specified in Certificate 72591.

19 East Valley submitted expert testimony that one benefit of the reservoir for cutthroat  
 20 trout is that it “would release additional volume[s] of the water in the summer,” which would  
 21 have the effect of “lowering the water temperature.” (Decl. of Caldwell at 3; *see also* Decl.  
 22 of Dekrey at 2.) In other words, the reservoir “has the potential to decrease water

23

24 <sup>2</sup> Consistent with the Director’s Final Order, Exhibits from the contested case hearing  
 25 administrative record are cited as (Ex. [“A” for Department Exhibits, “EV” for East Valley  
 26 Exhibits, “WW” for WaterWatch Exhibits, and “R” for Rue Exhibits] [number] at [page].)  
 Declarations are cited as (Decl. of [Declarant Last Name] at [page].) Testimony from the  
 hearing transcripts are cited as (Tr. at [page].)

1 temperature on Drift Creek \* \* \* thereby mitigating the primary factor limiting rearing  
 2 capacity of cutthroat trout.” (Decl. of Caldwell at 3; *see also* Ex. EV15 (Drift Creek  
 3 Cutthroat Trout Rearing Capacity Analysis).) The Proposed Order disregards this evidence.

4 To the extent the record contains evidence indicating that the proposed reservoir  
 5 would interfere with the life stages of cutthroat trout, the Proposed Order does not identify it.  
 6 As the Director explained,

7 “WaterWatch offered no evidence that the existence of the dam and reservoir,  
 8 after fish passage or exemption requirements are met, will prevent meeting the  
 9 1990 instream water right’s stated purposes for stream flows, for migration,  
 spawning, egg incubation, fry emergence, and juvenile rearing of Cutthroat  
 Trout.”

10 (Director’s Final Order at 65.) Nor does the Proposed Order explain why evidence in the  
 11 record of theoretical harm to cutthroat trout (to the extent it exists) is more reliable or  
 12 credible than the evidence cited above, which suggests that the proposed reservoir would  
 13 *benefit* rather than harm cutthroat trout.<sup>3</sup> To duly consider whether the proposed storage  
 14 right is the public interest, the Commission cannot cherry pick evidence that the reservoir  
 15 would harm cutthroat trout while ignoring evidence that it would benefit cutthroat trout.

16 In sum, the purpose of Certificate 72591 is to “[p]rovid[e] required stream flows” for  
 17 specific life stages of cutthroat trout. Whether the purpose of the instream right is protected  
 18 depends therefore on whether minimum stream flows are provided as stated in the certificate.

19 \_\_\_\_\_  
 20 <sup>3</sup> The Court of Appeals identified limited testimony that would support a finding that  
 21 the proposed reservoir would “conflict with” the needs of cutthroat trout. *E. Valley Water*  
 22 *Dist. v. Or. Water Res. Comm’n*, 328 Or App 790, 810-12, 539 P3d 789 (2023), *aff’d in part,*  
 23 *rev’d in part*, 374 Or 148 (2025). The lower court cited testimony from two ODFW staff  
 24 persons and one WaterWatch witness, Conrad Gowell. *Id.* Notwithstanding testimony from  
 25 individual staff, ODFW ultimately recommended **approval** of the Application and  
 26 determined that the Application *can* be conditioned to avoid impacts to STE fish species.  
 (Director’s Final Order at 42 (Finding of Fact ¶ 267).) And as discussed in Section III.B,  
 there is no evidence that ODFW’s determination does not apply equally to cutthroat trout.  
 ODFW’s and DEQ’s determinations likewise also undermine Mr. Gowell’s testimony, which  
 disregards the conditions recommended by those expert agencies. In fact, the ALJ  
 determined that Mr. Gowell’s testimony regarding whether impacts of the project on listed  
 fish could be mitigated was not evidence that a reasonably prudent person would rely on and  
 therefore was speculative. (Director’s Final Order at 110.)

1 In this case, the proposed reservoir would provide the required stream flows. The Proposed  
 2 Order dismisses consideration of stream flows, however, and focuses on other potential  
 3 impacts to cutthroat trout. The Proposed Order’s finding that the reservoir would defeat the  
 4 “purpose of the flows to support the life stages of cutthroat trout” is based on assumptions,  
 5 not facts, and disregards credible evidence of *benefits* to cutthroat trout without analysis or  
 6 explanation; therefore, the Proposed Order does not provide adequate grounds to deny the  
 7 Application.

8 **B. The Proposed Order Wrongly Determines That the Proposed Storage Right**  
 9 **Cannot Be Conditioned to Protect the Purpose of Certificate 72591.**

10 Proceeding on the assumption that the proposed storage right would frustrate the  
 11 purpose of Certificate 72591, the Proposed Order further determines that there is no basis in  
 12 the record to conclude that the storage right can be conditioned to protect the purpose of the  
 13 instream right. (Proposed Order at 5.) Based on evidence in the record, including conditions  
 14 developed by ODFW and DEQ to protect fish in Drift Creek, the Commission should find  
 15 otherwise.

16 In addition to cutthroat trout, Drift Creek provides limited (i.e., low-quality) habitat to  
 17 other fish species, including the Upper Willamette Winter Steelhead. (Director’s Final Order  
 18 at 37 (Finding of Fact ¶ 225).) Pursuant to OAR 690-033-0000 *et seq.*, known as the  
 19 “Division 33 rules,” the Department formed an interagency team, consisting of ODFW and  
 20 DEQ, to evaluate whether the proposed use might affect the habitat of sensitive, threatened,  
 21 or endangered (“STE”) fish, including Winter Steelhead. (*Id.* at 37 (Finding of Fact ¶ 220).)  
 22 The purpose of the team was to determine whether conditions can be included in the permit  
 23 to avoid detriment to STE fish species. *See* OAR 690-033-0220(1). After review of the  
 24 Application, both ODFW and DEQ recommended that the Department approve it with  
 25 conditions. (Director’s Final Order at 42 (Finding of Fact ¶ 267).)

26

STOEL RIVES LLP  
 760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
 Main 503.224.3380 Fax 503.220.2480

1 The Director made findings—which the Proposed Order adopts<sup>4</sup>—that:

2 “To help protect fish habitat, both ODFW and DEQ imposed conditions,  
 3 which require [East Valley] to mitigate impacts from the dam and reservoir on  
 4 Drift Creek fish. \* \* \* [E]vidence from fish and wildlife experts suggests that  
 water may be stored from Drift Creek, while conserving water usage and  
 habitats for fish and wildlife.

5 “\* \* \* \* \*

6 “The Protestants contend that the conditions recommended by ODFW and  
 7 DEQ will be ineffective. However, evidence in the record does not effectively  
 counter the testimony of agency representatives.”

8 (*Id.* at 83.)

9 Cutthroat trout are not an STE species and therefore were not evaluated as part of the  
 10 Division 33 review process. (*Id.* at 41 (Finding of Fact ¶ 254).) Nonetheless, both Winter  
 11 Steelhead and cutthroat trout are members of the Salmonid family. (*Id.* at 39, 41 (Findings of  
 12 Fact ¶¶ 239, 255).) The fact that ODFW developed conditions to adequately protect Winter  
 13 Steelhead strongly suggests that the proposed use can be conditioned to adequately protect  
 14 cutthroat trout. And nothing in the record suggests otherwise. In fact, the Director observed  
 15 that “WaterWatch \* \* \* did not present evidence showing that the conditions for listed fish  
 16 are inadequate to reduce potential impacts on Cutthroat Trout and Coho Salmon, which share  
 17 the Salmonid family with Winter Steelhead, for which ODFW has proposed protecting  
 18 conditions.” (*Id.* at 69; *see also id.* at 68.) The Director specifically *rejected* arguments that  
 19 conditions to protect STE fish species are inadequate to protect non-STE fish. (*Id.* at 98  
 20 (finding that WaterWatch failed to “introduce a preponderance of evidence showing that the  
 21 conditions to protect listed fish are not adequate to protect non-listed fish”); *see id.* at 102.)

22 Absent evidence to the contrary, the Commission should rely on the expert analysis  
 23 provided by ODFW and DEQ in the contested case hearing and the reasoned analysis of the  
 24 Director. Department staff acknowledged in testimony to the ALJ that the “Department has  
 25 \_\_\_\_\_

26 <sup>4</sup> The Proposed Order adopts and incorporates the Director’s consideration of public  
 interest factor (a) on pages 81-83 of the Director’s Final Order. (Proposed Order at 4.)

1 limited expertise in fisheries and fish biology” and therefore “defers to the technical expertise  
 2 of ODFW and DEQ in concluding whether STE fish species may be impacted by a project,  
 3 and *whether the project can be conditioned to avoid that impact.*” (Director’s Final Order at  
 4 37 (Finding of Fact ¶ 222) (emphasis added).) In this case, both ODFW and DEQ concluded  
 5 that the proposed water storage right can be conditioned to protect fish, including Winter  
 6 Steelhead. There is no evidence in the record to suggest that the agencies’ conclusions  
 7 should not apply equally to another Salmonid species on Drift Creek—cutthroat trout.

8 Furthermore, the record does not support the Commission’s finding that additional  
 9 information about the “reservoir construction, operation, and conveyance of water to the  
 10 proposed place of use” or “how the reservoir’s impact on the beneficial purpose of the  
 11 [instream] right will be managed” is required to allow the Commission to develop conditions  
 12 to protect the purpose of Certificate 72591. (*See* Commission’s Final Order at 11.) ODFW  
 13 and DEQ were able to develop conditions to protect STE species and recommend approval of  
 14 the Application based on existing information in the record about the reservoir. The  
 15 Commission does not explain why it needs *more* information about the proposed reservoir to  
 16 establish conditions to protect cutthroat trout.

17 Also relevant here, the conditions imposed by ODFW and DEQ for STE species leave  
 18 opportunity for the agencies to evaluate specific mitigation strategies in subsequent  
 19 permitting processes. The Director’s findings—adopted by the Proposed Order—explain:

20 “the specifics of the mitigation plans will be addressed in subsequent  
 21 permitting processes. If [East Valley] does not demonstrate during those  
 22 processes that mitigation plans are likely to succeed, the project will not go  
 forward. Again, obtaining a water storage permit from the Department does  
 not give [East Valley] *carte blanche* to build the dam or reservoir.”

23 (Director’s Final Order at 83.) Thus, not all details of the storage project must be resolved at  
 24 the water permit stage. The Commission can impose conditions that allow implementation  
 25 details to be resolved in mitigation plans that are not yet developed.

26

1 Finally, the Proposed Order points to the “prevention of waste” as being  
 2 “foundational to western water law.” (Proposed Order at 6.) The Proposed Order suggests  
 3 that, given the importance of preventing waste, “an application consistent with the remaining  
 4 factors but constituting clear and significant waste of water would likely be determined to  
 5 impair or be detrimental to the public interest.” (*Id.*) But the Department and Commission  
 6 routinely address the prevention of waste by including relevant conditions to prohibit waste  
 7 in permits, as was the case here. (*See Ex. A1 at 137 (draft permit).*) The Department is able  
 8 to enforce prohibitions against waste through its enforcement authority, just as it enforces  
 9 other terms and conditions of water rights. *See Fort Klamath Critical Habitat Landowners,*  
 10 *Inc. v. Woodcock*, 334 Or App 509, 527-28, 557 P3d 543 (2024) (“[W]aste is a question of  
 11 enforcement, and wasting water, like other unlawful uses of water, is regulated by the  
 12 watermaster.”) Like a condition prohibiting waste, here, the Commission has authority to  
 13 include a condition in the permit issued to East Valley prohibiting use of water that would  
 14 interfere with the life stages of cutthroat trout. For example, the Commission could include  
 15 in its final order granting the application a “Vested Rights Condition,” such as the following:

16 “The use of water allowed herein may be made only at such times when  
 17 sufficient water is available to provide required stream flows for the  
 18 migration, spawning, egg incubation, fry emergence, and juvenile rearing of  
 cutthroat trout within the reach of Drift Creek described in Certificate 72591.”

19 The proposed Vested Rights Condition is consistent with the conditions recommended by the  
 20 Director to be included in the proposed permit to protect fish. (*See Director’s Final Order at*  
 21 *144-46.*)

22 In sum, existing evidence in the record belies the Proposed Order’s finding that “the  
 23 record \* \* \* does not provide basis to conclude that the means to protect Certificate 72591  
 24 would be available if the proposed appropriation was approved.” (*See Proposed Order at 5.*)  
 25 In fact, there is more than enough evidence for the Commission to conclude that the proposed  
 26 storage right *can* be conditioned to protect the purpose of the instream right. The Proposed

1 Order erroneously applies ORS 537.170(8) by treating denial of the Application as the only  
 2 permissible outcome, without separately evaluating whether approval with conditions would  
 3 avoid any impairment or detriment to the public interest. If the Commission intends to  
 4 evaluate the effect of the proposed use on the life stages of cutthroat trout (rather than stream  
 5 flows), then it cannot abdicate responsibility for preparing related conditions.

6 **C. The Proposed Order Fails to Consider the Public Interest Factors as Required**  
 7 **by ORS 537.170(8).**

8 ORS 537.170(8) directs the Commission to “consider[.]” seven public interest factors  
 9 to determine whether a proposed use would impair or be detrimental to the public interest.  
 10 On appeal of the Commission’s Final Order, the Oregon Supreme Court held that the  
 11 Commission failed to consider the public interest factors as required by statute. *East Valley*,  
 12 374 Or at 180. The court therefore remanded to the Commission, directing it to do so. *Id.* at  
 13 181. The court also invited the parties to make arguments before the Commission as to  
 14 whether, as part of its consideration, the Commission must “balance” the seven public  
 15 interest factors—or whether the Commission may make its decision based on one factor,  
 16 without weighing that factor against all the others. *See id.* at 182. Regardless of whether  
 17 “balancing” is required, the text, context, and intent of ORS 537.170(8) make clear that each  
 18 public interest factor must be considered in relation to the other factors to evaluate whether a  
 19 proposed use is in the public interest. The superficial “consideration” set forth in the  
 20 Proposed Order is insufficient and suffers from the same deficiencies that resulted in the  
 21 current remand.

22 In the Proposed Order, the Commission makes two alternative findings regarding its  
 23 duty to “consider[.]” the public interest factors. First, the Proposed Order concludes that the  
 24 Commission meets its burden by “tak[ing] the factors into account and think[ing] carefully  
 25 about them”; it concludes that ORS 537.170(8) “does not require a ‘balancing’ of the public  
 26 interest factors.” (Proposed Order at 6.) Second, in case ORS 537.170(8) *does* require

1 balancing of the factors, the Proposed Order finds that “the significance of the impairment  
2 and detriment to the public interest based on factor (f) outweighs the consistency with the  
3 public interest demonstrated as to the other factors.” (*Id.*) Accordingly, the Proposed Order  
4 proposes to deny the Application.

5 Despite the court’s directive, and its expectation that the “underlying aspects” of the  
6 Commission’s final order would “likely [] differ on remand,” *East Valley*, 374 Or at 182 n  
7 25, the Proposed Order essentially re-adopts the Commission’s prior reasoning and relies  
8 entirely on public interest factor (f) to deny the Application, with no meaningful  
9 consideration of how the other public interest factors weigh in favor of approval. To the  
10 extent that the Proposed Order does attempt to balance the public interest factors in the  
11 alternative, it improperly elevates the status of instream water rights above all other water  
12 rights and disregards the benefit to the public interest from approval of the Application,  
13 without analysis or explanation.

14 **1. ORS 537.170(8) requires the Commission to balance all seven public**  
15 **interest factors.**

16 The purpose of the public interest test in ORS 537.170(8) is to determine “*the* public  
17 interest” and evaluate whether issuance of a new water right would “impair” or “be  
18 detrimental” to it. ORS 537.153(2) (emphasis added); ORS 537.170(8) (same). Properly  
19 read in that context, the seven public interest factors represent “specific” public interests  
20 (ORS 537.153(2)), all of which the Commission must “consider[]” in reaching its ultimate  
21 public interest determination (ORS 537.170(8)).

22 Practically, a determination of the “public interest” cannot be based solely on a single  
23 listed factor, as some of the factors refer to interests that may be inherently in tension with  
24 another factor. *Compare* ORS 537.170(8)(b) (public interest in “maximum economic  
25 development of the waters involved”) *with* ORS 537.170(8)(a) (public interest in conserving  
26 water for “commercial and game fishing and wildlife”). Thus, the seven public interest

1 factors must be considered as a whole to determine whether a proposed use would impair or  
2 be detrimental to the public interest.

3           The legislative history of ORS 537.153 and 537.170 reflects this principle. The  
4 public interest presumption and associated requirements, now codified at ORS 537.153 and  
5 537.170, resulted from 1995 legislation intended to streamline the water right permitting  
6 process and enhance certainty for applicants. *See* SB 674 (1995); Or Laws 1995, ch 416.  
7 Throughout the 1995 legislative process, both the Department and WaterWatch advised  
8 legislators that the then-existing version of the public interest test required balancing the  
9 public interest factors and advocated for legislators to maintain that approach. Then-Director  
10 of the Department, Martha Pagel, provided written testimony stating that “[t]he existing  
11 public interest statutes—*which already require a weighing and balancing a wide variety of*  
12 *factors*—have worked well over time.” Testimony, House Water Policy Commission  
13 Hearing, SB 674-A, May 9, 1995, Ex K at 4 (statement of Martha Pagel) (emphasis added),  
14 attached to these exceptions as Exhibit 1. WaterWatch likewise stated, “[u]nder current law,  
15 the public interest is defined in ORS 537.170[8] as consisting of seven factors, all of which  
16 must be considered in order to determine that a use will not impair or be detrimental to the  
17 public interest.” Testimony, House Water Policy Commission Hearing, SB 674-A, May 9,  
18 1995, Ex L at 2 (statement of WaterWatch of Oregon) (emphasis in original), attached to  
19 these exceptions as Exhibit 2.

20           In sum, the only logical reading of ORS 537.170(8) is that each of the seven public  
21 interest factors must be considered in relation to the other factors and given due consideration  
22 to determine “the public interest,” and nothing in the history of the 1995 legislation suggests  
23 that the legislature intended to alter this requirement.

24

25

26



1 the face of the legislature’s clear declaration that an “in-stream water right shall have the  
 2 same legal status as any other water right[.]” *See* ORS 537.350(1). It therefore cannot  
 3 justify the finding that the “public interest based on factor (f) outweighs” the public interest  
 4 represented by the other factors.

5       **3. The Proposed Order does not “think carefully” about the public interest**  
 6       **factors and disregards the harm to the public interest from denying the**  
 7       **Application.**

8 Despite claiming to “think carefully” about each public interest factor, the Proposed  
 9 Order mischaracterizes the Director’s findings with respect to the six public interest factors  
 10 that weigh in favor of approval of the Application and ignores the *detriment* to the public  
 11 interest that results from *denying* the Application.

12 The Proposed Order adopts the Director’s findings, with very minimal or no  
 13 modifications, for all the public interest factors except for factor (f). (Proposed Order at 4-5.)  
 14 Based on those findings, the Proposed Order concludes for each factor that “the proposed  
 15 appropriation will not impair or be detrimental to the public interest based on consideration  
 16 of this factor.” (*Id.* at 4-5.) The Proposed Order concludes in summary that “the factors  
 17 other than (f) do not demonstrate an impairment or detriment to the public interest.” (*Id.* at  
 18 6.)

19 The Proposed Order’s conclusion that the factors other than (f) do not demonstrate  
 20 public interest detriment misses the point that many (if not all) of those factors demonstrate  
 21 public interest *benefit*. If the Commission intends to “think carefully” about all of the public  
 22 interest factors, then it must account for the *benefit* to the public interest from the proposed  
 23 use and the parallel impairment or detriment that would result from denying the use.

24 For example, if the Commission judged the public interest based solely on factor (b)  
 25 (as it has done for factor (f)), then approval of the Application would be the only possible  
 26 outcome. Factor (b) declares the public interest in “[t]he maximum economic development  
 of the waters involved.” ORS 537.170(8)(b). The record shows that the proposed reservoir

1 would increase the value of surrounding farmland, allow for cultivation of higher value  
 2 crops, and benefit the economy of Marion County and the State of Oregon. (Director’s Final  
 3 Order at 28-29 (Findings of Fact ¶¶ 164, 165).) The substantial investment by East Valley’s  
 4 members in the proposed reservoir and other alternative sources of irrigation water further  
 5 drives home this point. (See Tr. 2611:4-2615:5.) More broadly, accelerating Oregon’s  
 6 economic growth and retaining and growing Oregon’s businesses are among the State’s  
 7 highest priorities; the proposed use advances these priorities, without compromising other  
 8 priorities. See Office of Oregon Governor, *Oregon’s Prosperity Roadmap* at 3-4 (Dec.  
 9 2025), attached to these exceptions as Exhibit 3. Despite this, the Proposed Order treats  
 10 public interest factor (b) as a neutral consideration. Doing so highlights the lack of  
 11 meaningful consideration given to any of the public interest factors besides factor (f).

12 The consideration of public interest factor (a) in the Proposed Order is another  
 13 example. The Oregon Constitution declares that “beneficial use [of water] \* \* \* is necessary  
 14 to the development and welfare of the state” and “a public use.” Or Const, Art I, § 18. This  
 15 core tenant is reflected in factor (a), which declares the public interest in “[c]onserving the  
 16 highest use of the water for all purposes \* \* \* .” ORS 537.170(8)(a). Said another way,  
 17 Oregon’s water resources are finite and valuable, and so where multiple beneficial uses of  
 18 water can be accommodated—like the instream right and proposed storage right in this  
 19 case—factor (a) recognizes the public interest in doing so.

20 The Proposed Order accepts the Director’s findings that “[t]here is no question that  
 21 irrigation is a beneficial use, and, for purposes of [factor (a)], one of the enumerated highest  
 22 uses of water.” (Director’s Final Order at 82; Proposed Order at 4.)

23 As well, the Department has recognized that surface water sources are over-  
 24 appropriated (and increasingly subject to shut-off notices) and groundwater supplies are off  
 25 limits to new appropriations in large portions of East Valley’s district boundaries. (See  
 26 Director’s Final Order at 9 (Findings of Fact ¶¶ 10, 12); Tr. 827:23-829:19, 1034:5-1035:14,

1 1270:25-1274:6; Ex. EV98, 99.) East Valley’s efforts to identify a sustainable and reliable  
 2 source of irrigation water were driven in part by the Department’s own requirements. *See*  
 3 (Director’s Final Order at 10, 12-15); OAR 690-502-0180(3). The Department’s former  
 4 Director testified that East Valley members need another water source to support existing  
 5 agriculture, as well as future crops. (Director’s Final Order at 10 (Finding of Fact ¶ 13).)  
 6 Addressing the need for an alternative source for irrigation water through the proposed  
 7 storage right would allow beneficial use of water for irrigation. The proposed storage right  
 8 would also allow water to be available for flow augmentation during the summer under a  
 9 secondary water right, which could provide various benefits to fish and wildlife. (*See, e.g.*,  
 10 Director’s Final Order at 24, 81; Decl. of Dekrey at 2-3.) Again, the Proposed Order  
 11 disregards that denial of the Application would preclude use of water for these purposes,  
 12 reflecting a tunnel-visioned focus on a single public interest factor.

13 On a broader scale, and relevant to most if not all the public interest factors, the  
 14 Commission must consider the public interest in preserving water storage as a viable option  
 15 for future water supply. Instream water rights have been issued for an estimated 11,350 river  
 16 miles in the state, and many more instream water right applications are pending.<sup>5</sup> If the  
 17 Commission determines that storage of water on any stream with an instream right “would  
 18 result in impairment or detriment [to the public interest],” based solely on factor (f) and  
 19 “regardless of consistency with the remaining factors,” then the Commission will have  
 20 foreclosed development of new water storage on all streams with instream rights. (*See*  
 21 Proposed Order at 6.) The Commission should not proceed down this path without  
 22 considering the public interest in new water storage, which is a fundamental flaw in the  
 23 Proposed Order.

24

---

25 <sup>5</sup> *See* Or. Dep’t of Fish and Wildlife, *Instream Water Rights in Oregon* (last updated  
 26 Aug. 25, 2025), available at <https://storymaps.arcgis.com/stories/483b62a9bb0d41dfa60cdaad93616401>.

1 Most surface water sources in Oregon are over-appropriated, and declining  
 2 groundwater levels is a serious and growing concern in many parts of the state. New water  
 3 storage is one of the few options available to provide alternative sources of water to meet  
 4 existing and growing demand. The Oregon Board of Agriculture has recognized the public  
 5 interest in making public investments to expanded water storage capacity. *See* Oregon State  
 6 Board of Agriculture Resolution No. 107 (June 6, 2025), attached to these exceptions as  
 7 Exhibit 4. New and sustainable sources of water are important for all Oregonians. In  
 8 briefing before the Oregon Supreme Court, *amici curiae* parties—including the League of  
 9 Oregon Cities, the Oregon Water Utility Council, and the Special Districts Association of  
 10 Oregon, which together represent municipal water suppliers across Oregon—testified that  
 11 many of their “members may find themselves in a situation where applying for new water  
 12 rights is a necessity to serve a growing population.” Brief of *Amici Curiae* Oregon Water  
 13 Utility Council, League of Oregon Cities, and Special Districts Association of Oregon in  
 14 Support of Brief on the Merits at 11, *East Valley Water Dist. v. Oregon Water Resources*  
 15 *Comm’n* (S070604) (July 11, 2024) attached to these exceptions as Exhibit 5. This need is  
 16 made more difficult by the effects of climate change, drought, and wildfires. (*Id.* at 16.)  
 17 Elevating instream rights above all other public interest factors—as the Proposed Order does  
 18 here—affects the ability of water providers to obtain new water rights to adapt to changing  
 19 populations, needs, and climate. (*Id.* at 17.)

20 In sum, adopting the Director’s findings for all but one of the factors with little to no  
 21 modification, and concluding that those findings do “not demonstrate \* \* \* detriment to the  
 22 public interest”—with no consideration of the detriment to the public interest from *denying*  
 23 the Application—does not amount to the careful thinking required by statute and claimed by  
 24 the Proposed Order. The Proposed Order has far-reaching consequences for new water  
 25 storage projects in Oregon, which the Commission must consider when evaluating the public  
 26 interest.

IV. CONCLUSION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

For the reasons set forth in these exceptions, East Valley requests that the Commission issue a final order approving the Application with the Vested Rights Condition proposed in Section III.B, and as supported by substantial evidence in the record.

DATED: January 16, 2026.

STOEL RIVES LLP



KIRK B. MAAG, OSB No. 105507  
kirk.maag@stoel.com  
DAVID E. FILIPPI, OSB No. 965095  
david.filippi@stoel.com  
MERISSA A. MOELLER, OSB No. 153926  
merissa.moeller@stoel.com  
HAYLEY K. SILTANEN, OSB No. 164825  
hayley.siltanen@stoel.com

*Attorneys for East Valley Water District*

**STOEL RIVES LLP**  
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
Main 503.224.3380 Fax 503.220.2480

# Oregon

Before the  
House Committee on Water Policy

## TESTIMONY ON SB 674-A

Presented by: Martha O. Pagel, Director  
Water Resources Department

WATER  
RESOURCES  
DEPARTMENT

May 9, 1995

### Introduction

I appreciate this opportunity to testify on SB 674-A, a measure that would establish a new water right application process.

### Background

In 1909, the Legislature enacted Oregon's Water Code. The Code declared that the waters of the state are owned by the public and that a state permit is required before water can be used for most purposes. Through the years, the fundamental principles of the Oregon Water Code have remained the same, including the appurtenancy of a water right to a particular parcel of land, the priority system that protects senior water right holders and the requirement that water be put to beneficial use without waste. Over the same time period, the application review process has become increasingly complex. This complexity has been driven by the increasing demands for a limited supply of water and the need to take great care in allocating the remaining water supplies.

Nearly a century's worth of application processing add-ons and adjustments and a very large number of applications has led to a backlog of water right applications. The backlog has resulted in unacceptably long waiting times for applicants and increased uncertainty about water supplies for the public-at-large. A new application processing procedure is clearly needed.

The Department has worked closely with the Oregon Water Resources Congress, Senator Rod Johnson, and others to develop the major concepts reflected in SB 674-A. In general, the Department is supportive of the process described in the bill. However, there were a number of technical issues which the Senate Committee did not have time to address, as well as several policy issues on which full agreement was not reached. These issues will be addressed in the Department's proposed amendments for your consideration.

BILL NO. 674A EXHIBIT K  
HOUSE WATER POLICY  
DATE 5.9.95 PAGES 8  
SUBMITTED BY: Martha Pagel, WRRD



Commerce Building  
158 12th Street NE  
Salem, OR 97310-0210  
(503) 378-3739  
FAX (503) 378-8130

Page 22 of 74

Exhibit 1

Page 1 of 7

Testimony on SB 674-A  
 May 9, 1995  
 Page 2

### What the bill does

SB 674-A would establish a detailed water rights application process and impose specific timelines on the Water Resources Department to make decisions on such applications.

Specifically, SB 674-A would:

- Create a two-tier application review process to provide an applicant with a report early in the process outlining the Department's preliminary determinations on an application. After receiving this report, an applicant may choose to continue the process or withdraw with a refund of all but \$50 of the application fee.
- Recast the application process more in the mold of Oregon's Administrative Procedures Act, thereby reducing the number of opportunities for objections.
- Establish standards for a public interest presumption.
- Establish tighter, but clearer, criteria for standing.
- Raise the protest fee to \$200.
- Change the role of the Water Resources Commission.
- Identify a date by which pending applications will be addressed.

It is also important to note what the bill would not do. SB 674-A would not:

- Raise water right application fees.
- Change the fundamentals of the Oregon Water Code: protection of senior rights; beneficial use without waste; and the link between water and lands.

### Discussion

The Department supports most of the major concepts contained in SB 674-A, including the two-tier review process, the public interest presumption, increased protest fees and mandatory timelines for decision-making. However, the Department and Commission believe several important changes are needed to make the bill more workable and fair. The remainder

Testimony on SB 674-A  
May 9, 1995  
Page 3

of our testimony describes these changes and some process-related clarifications that the Department believes are necessary.

- *Instream Water Rights*

For reasons of both equity and practicality, the Department strongly supports the provisions in SB 674-A that would include instream right applications in the new process. Public instream uses are of great importance to the economy, ecology and identity of Oregon and therefore warrant inclusion in this clearer, shorter process. To exclude instream water right applications would also introduce a serious practical problem in our priority-date-based water allocation system. Put simply, one type of water right application (e.g., out-of-stream) would have to wait on the processing of the other type of application (e.g., instream) in order to determine what amount of water is available for appropriation. This creates an unnecessary and confusing system which could undo any good otherwise achieved in this bill.

The Department strongly opposes the provisions in SB 674-A that would create a two-tiered process in which an instream right is issued as a permit that is then subject to review in two years to determine whether the amount of the instream right should be reduced. (Section 20, pages 12-13, SB 674-A) From the outset of the discussions on SB 674, the focus has been on streamlining and improving the current water right application process, without making substantive changes in water law. The provisions in section 20 of SB 674-A would substantively change the law related to instream water rights. Recent action by this committee added the section 20 provisions to HB 2754-A, thereby preserving the option for the Legislative Assembly to address these substantive issues in that vehicle if it wishes to do so.

The Department also opposes the provision on page 21, lines 30-32, in SB 674-A that would require the issuance of a permit for an out-of-stream use if the agency misses a timeline. Because this provision does not apply to instream applications, it poses the same problems of equity and practicality discussed above, and also adds considerable confusion with regard to the writ of mandamus provision in SB 674-6 — a provision the Department can support.

Lastly, the Department does not believe it is necessary to add a definition of "instream flow" to the statutes. The lack of such a definition has not posed any application processing problems. However, the Department does not oppose the definition in SB 674-A provided it is understood that the reference to "minimum quantity of water necessary" means the minimum necessary to serve the management objective of the applicant agency.

Testimony on SB 674-A  
May 9, 1995  
Page 4

- *Public Interest*

While the Department does support the establishment of a presumption to assist with public interest determinations, it does not support the addition of the word “significantly” to the public interest standard reflected in SB 674-A. We believe such an addition will raise more questions than it answers, especially in an expedited process. The existing public interest statutes — which already require a weighing and balancing of a wide variety of factors — have worked well over time. Numerous judicial and contested case decisions have been based on and interpreted the current statutory language, giving us a solid track record of how the existing wording should be applied. A change in the wording would introduce confusion and uncertainty.

- *Public Participation/Protest Fee*

The Department believes there must be a balance between public participation and processing efficiency — and believes SB 674-A maintains an appropriate balance. We support the periodic provision of public notice throughout the new process and appreciate the bill’s use of our existing weekly public notice to achieve this. Furthermore, the bill’s explicit instruction to the agency to request public comments through this notice represents a statutory recognition of the importance of public input in the water rights process. At the same time, the process includes an efficient approach to comment response by allowing the department to respond in a cumulative fashion in the proposed final order, rather than on an individual basis.

However, the Department believes public participation in the water rights application process could be improved by the establishment of a two-part protest/standing fee. This approach would allow interested persons to protest or retain standing for a reasonable fee, and then require the payment of an additional fee to participate if a contested case is scheduled. This approach would increase access to the process while offering the same protection against frivolous participation as the \$200 single protest fee proposed in the bill. It also offers a solution to a problem not otherwise addressed in SB 674-A. Persons satisfied with a proposed final order would not be expected to protest. However, if they don’t protest and others do and the application is sent to contested case, they will not have standing to participate. A two-step process offers a good solution to that problem.

Finally, the Department continues to support an amendment to SB 674-A that would authorize two or more Commission members to refer an application to contested case to resolve issues important to the public. The Department also believes that the Director should be able to send an application to a

Testimony on SB 674-A  
May 9, 1995  
Page 5

contested case if it is necessary to resolve either factual disputes or policy issues.

- *Ground and Surface Water Application Process*

The Department believes that SB 674-A makes the application process for ground and surface water applications as consistent as possible. In doing so, it is not the Department's intent to change any existing substantive standard in order to achieve consistency. We support provisions that retain the essential requirements peculiar and specific to groundwater, while establishing as many similarities between ground and surface water application processing as possible.

- *Process-Related Clarifications*

In reviewing SB 674-A, the Department has identified the need for a number of technical changes on the points listed below. These changes are reflected in the Department's proposed amendments and the most significant of these changes are described below.

- (1) Clarify that hydroelectric applications are not subject to the timelines and certain other provisions of SB 674-A.
- (2) Clarify language related to the "raise it or waive it" provisions in section 13, pages 9-10 of SB 674-A.
- (3) Delete provisions amending the limited license statutes (these changes were included in HB 2184-A).
- (4) Add timelines and clarify the process for requesting additional information from the applicant.
- (5) Add a "finding of the Department" as a demonstration that the public interest presumption is not met.
- (6) Clarify that the examination fee must be paid before an application is considered complete.
- (7) Allow 60 days for the Commission to grant or deny exceptions to maintain consistency with Commission's meeting cycle.

We believe the implementation of the new process could begin immediately upon enactment, thanks to the clarity and detail of SB 674-A. However,

Testimony on SB 674-A  
May 9, 1995  
Page 6

immediate rulemaking will be required to repeal existing rules made obsolete by the bill's enactment and to conform other rules to the bill's new processes.

### Summary

With the exceptions noted above, the Department supports the application process proposed in SB 674-A because it helps us meet our goal of giving final answers faster. Some answers will be "yes," some "no." The overall purpose of the bill is to speed up the process, not change existing decision-making standards. The increased speed is leveraged by explicitly increasing the accountability of all participants: the Department will be held to tight timelines; protesters will have to meet more detailed criteria and pay more to participate; and applicants will have to submit complete and accurate information up-front to establish and retain a priority date.

The Department accepts the new accountability in SB 674-A and is fully committed to swift and successful implementation. We have worked closely with the bill's sponsor in identifying workable mandatory timelines. We believe the timelines specified in the bill are as tight as they can be and still be workable. Our success in meeting them, however, is ultimately dependent upon a number of factors:

- First, we must have sufficient staff. We have quantified additional staff needs and have identified funds already earmarked for the agency in the Governor's recommended budget to meet those needs. In addition, we plan on reassigning a number of existing staff to application processing.
- Second, our staff calculations are based on the assumption that applications will continue at the existing rate of about 100 per month.
- Third, reservoir applications submitted pursuant to the 1993 ponds bill (HB 2153) will not be subject to the new process (as clarified in the SB 674-A). Because these reservoirs are already in existence and not subject to enforcement unless causing specific injury, they represent a very different type of application which can be processed under different methods. In addition, a separate process for evaluating these applications is being proposed in HB 2376-A.
- Fourth, the Department is exercising what we believe is reasonable judgment in assuming that not every application will be referred to a contested case hearing. The new process takes the agency into unknown territory with regard to contested case management, including mandatory timelines for coming to a final decision. If for reasons unknown to us today,

Testimony on SB 674-A  
May 9, 1995  
Page 7

great numbers of applicants exercise their right to protest and send their applications to hearing, our staff and timing estimates may not be accurate.

We appreciate the willingness of Representative Norris, Senator Johnson, the Oregon Water Resources Congress and many others to work with the Department on the development of SB 674-A. We are encouraged by the progress made on the bill thus far and look forward to continuing to work with all interested parties to further improve the bill.

-----

# WaterWatch

BILL NO: SB 674A EXHIBIT L  
 HOUSE WATER POLICY  
 DATE 5.9.95 PAGES 5  
 SUBMITTED  
 BY: WaterWatch

TESTIMONY OF WATERWATCH OF OREGON

BEFORE THE HOUSE WATER COMMITTEE

ON SB 674 A-ENGROSSED

MAY 9, 1995

WaterWatch opposes this bill as currently drafted. WaterWatch is not opposed to changes in the current application process for ground and surface water uses in order to eliminate of the backlog. WaterWatch is, however, opposed to any changes that would (1) restrict public participation in the application process which allocates the publicly owned water resource, (2) weaken substantive standards currently existing in the law that protect the public interest in water, (3) do not also apply to instream water right applications and (4) substantively amend the Instream Water Rights Act. SB A-Engrossed goes beyond the narrow goal of eliminating the backlog.

In order to get the bill "back on track" we offer the following comments and specific amendments:

### Instream Water Right Applications

We supported the amendments on the Senate side that applied the new process outlined in this bill to instream water right applications. Page 12, Section 19. We oppose the amendments which substantively altered the Instream Water Rights Act by requiring instead of a certificate, issuance of a two year permit which would be reviewed at the end of two years to determine whether the amount of the instream water right "is appropriate". Pages 12-13, Section 20. We also oppose amendments that appear to limit the amount that can be allowed for instream flows to the "minimum quantity" necessary. Page 21, Section 32. This language is unclear and confusing and depending upon the interpretation of the language, could seriously weaken the ability of the State to protect flows for fish. These amendments are substantive amendments to SB 674 - and should be outside of the scope of

this process oriented bill. In addition, these concepts are already incorporated in HB 2754. WaterWatch offers -28 amendments which would delete these two provisions.

Substantive Changes to the Public Interest Standard

WaterWatch is opposed to the substantive changes SB 674 A-Engrossed makes to the existing law. Under current law, the public interest is defined in ORS 537.170(5) as consisting of seven factors, all of which must be considered in order to determine that a use will not impair or be detrimental to the public interest. These standards include whether water is available, whether the "maximum economic development of the waters" occurs, and "conserving the highest use of the water for all purposes" including instream flow purposes. In addition, the statute places special weight on ensuring that new uses of water serve the "highest public benefit". We oppose the following substantive alterations of the existing public interest standard:

(1) The bill allows a presumption that a use is in the public interest if it meets only a few of the public interest factors that currently exist in the statute. Page 7, Section 11(2) and Page 17, Section 25(2). In addition, the bill as currently drafted, only allows the presumption to be overcome if a comment or protest is filed that "demonstrates" that the proposed use will harm the public interest. Page 7, Section 11(2)(b), Page 17, Section 25(2)(b). These amendments are a substantive alteration and weakening of the public interest standard which WaterWatch can not support. WaterWatch urges adoption of the -32 amendments which would delete this presumption.

(2) SB 674 deletes the existing requirement in the statute that new uses of water result in the "highest public benefit". Page 10, Section 13, lines 5-7. WaterWatch offers amendments to restore this language.

(3) We oppose language that further weakens the public interest standard by requiring rejection of an application only if the proposed use would "significantly" impair or be detrimental to the public interest. Page 7, Section 11(2)(b), Page 17, Section 25(2)(b). We support the Department's amendments which delete the term "significantly".

\$200 Protest Fee - Impairing the public's ability to participate in the process

WaterWatch is not opposed to the concept of a fee for a protest. Section 1(k). Currently the fee for protests is \$25. We are, however, opposed to the high fee of \$200 proposed in SB 674. This fee amount is likely to shut out or discourage the public from participating in the process. There is a fine line between a fee that ensures that a Protester is "serious" about protesting an application and a fee that discourages public participation. This high fee will likely be a heavy burden on individuals. We urge adoption of the WaterWatch's -22 amendments which would lower the fee from \$200 to \$50.

In addition we support the Department's amendments which would propose a split fee process. Currently, the bill does not provide a process by which someone who is in support of the proposed final order can participate in later proceedings if the agency proposes to change the final order. The split fee concept, as we understand it, would allow those who support the final order and who want to file a "statement of interest" in the application in order to preserve their ability to protest if the order is changed, can include with their statement a lesser fee - say \$25. Then, if changes are proposed, the person could file the remainder of the protest fee if they wished to become a Protester. Otherwise, people who wish to support the proposed order and want to ensure no changes are made contrary to their support, would have to file a \$200 protest fee just to voice their support and maintain their ability to participate in the process.

Writ of Mandamus

SB 674 allows out-of-stream and ground water applicants to petition a court to compel the department to issue a permit if the agency has failed to act within the time period specified in the statute. Page 12, Section 17(4) and Page 21, Section 31(4). The bill also provides that the only way the agency can avoid issuance is to show that the proposed use will cause a violation of only one of the public interest factors - that it would cause injury to existing rights.

WaterWatch can support a bill that provides an applicant with a way to force the Department to take action to either issue the final order or schedule a contested case. We can not support SB 674 as currently drafted because it requires issuance, regardless of the effects on the resource and the public interest. This provision will have adverse effects on the resource if the agency fails to act within the specified time. It could result in permits being issued even if no water is available for the proposed use.. In addition, this provision further disadvantages instream values because these provisions do not also apply to instream applications. We support the Department's proposed amendments to these mandamus provisions which would require the agency to take action.

#### Contested Case

We do not support the provision in SB 674 which eliminates the Director's ability to send an application to contested case only if the applicant requests one or a protest is filed. Page 8, Section 11 (7) and Page 18, Section 26,(7). In addition, we oppose limiting the Director's discretion on the reasons to send an application to contested case. The Director should be able to schedule a contested case, regardless of whether or not a protest has been filed if she finds that there are factual disputes, policy issues, a high level of public concern or the use may impair or be detrimental to the public interest. We urge adoption of our -27 amendments which would restore must of the language originally proposed in SB 674.

We also oppose the provisions which narrow who can participate in a contested case to only those who have filed protests to the application. Page 9, Section 13(2), Page 19, Section 27(2). If a contested case is scheduled, interested persons should be able to participate in the contested case. We urge adoption of WaterWatch's -24 amendments which would apply the standards in the Administrative Procedures Act for who can participate in a contested case if one is scheduled. In the absence of the split-fee concept mentioned above, this provision would cover those situations where interested persons

supported the proposed order and subsequent changes to the order are contrary to the persons support by allowing them to participate further in the process.

To retain consistency with the -24 amendments, the -26 amendments which allow any party to a contested case to file exceptions to the order resulting from the contested case should also be adopted.

Water Resources Departments proposed amendments

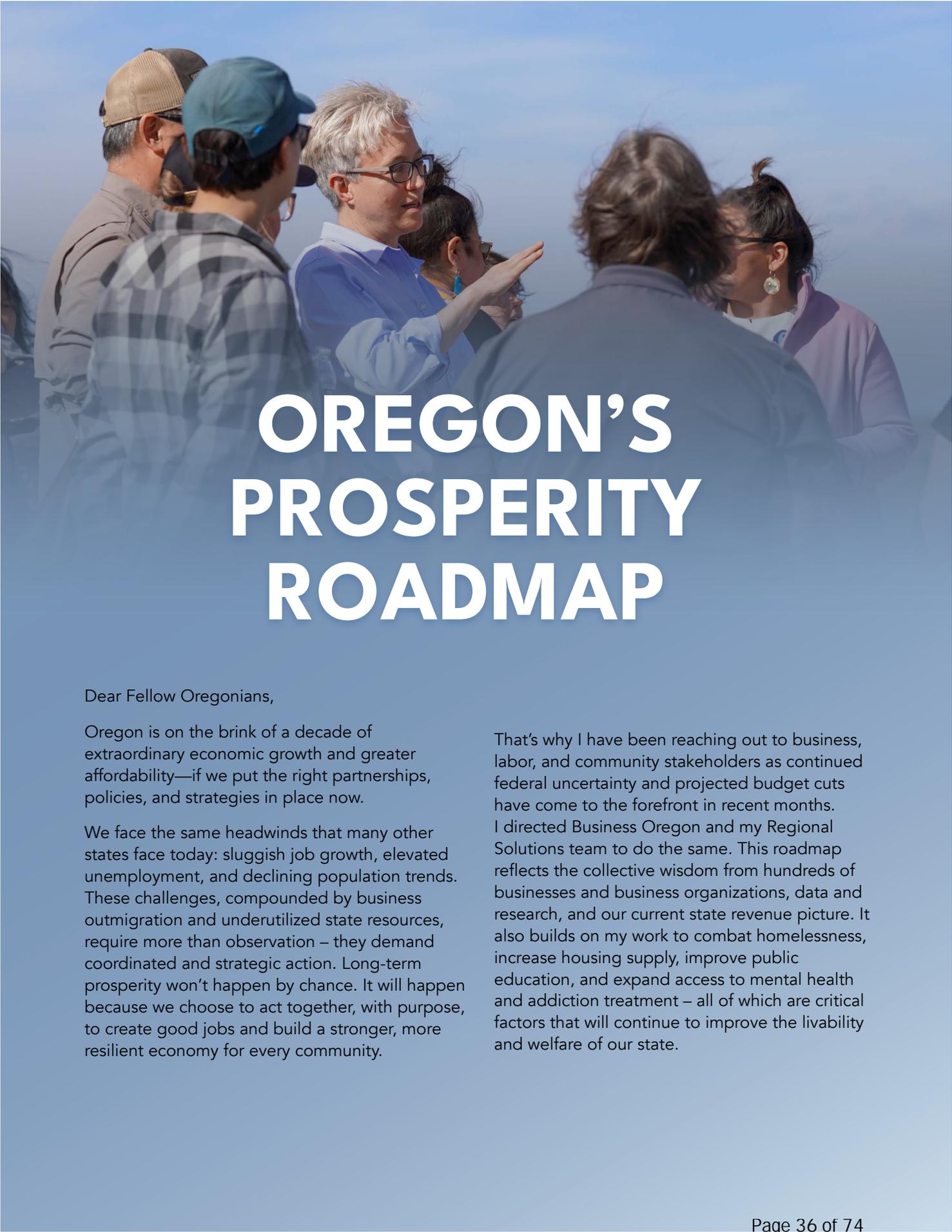
At the time of drafting this testimony, WaterWatch had yet to receive the Departments proposed amendments. However, the Department has shared with us, in concept form, the amendments they are proposing. WaterWatch supports the concepts that the Department is putting forward in these amendments, several of which are covered in our earlier testimony. Adoption of these amendments and the Department's amendments, are crucial if WaterWatch is to support this bill.

In sum, we urge you to adopt our amendments. Thank you for the opportunity to comment.

# OREGON'S PROSPERITY ROADMAP







# OREGON'S PROSPERITY ROADMAP

Dear Fellow Oregonians,

Oregon is on the brink of a decade of extraordinary economic growth and greater affordability—if we put the right partnerships, policies, and strategies in place now.

We face the same headwinds that many other states face today: sluggish job growth, elevated unemployment, and declining population trends. These challenges, compounded by business outmigration and underutilized state resources, require more than observation – they demand coordinated and strategic action. Long-term prosperity won't happen by chance. It will happen because we choose to act together, with purpose, to create good jobs and build a stronger, more resilient economy for every community.

That's why I have been reaching out to business, labor, and community stakeholders as continued federal uncertainty and projected budget cuts have come to the forefront in recent months. I directed Business Oregon and my Regional Solutions team to do the same. This roadmap reflects the collective wisdom from hundreds of businesses and business organizations, data and research, and our current state revenue picture. It also builds on my work to combat homelessness, increase housing supply, improve public education, and expand access to mental health and addiction treatment – all of which are critical factors that will continue to improve the livability and welfare of our state.

One thing is immediately clear: we already have a strong foundation. Oregon is known for innovation, entrepreneurship, diverse industries, and thriving businesses of every size. With a highly skilled workforce, a world-class research university network, established industry clusters, and a collaborative business culture, Oregon is uniquely equipped to achieve sustainable growth.

Oregon's lower-cost West Coast location, offering direct access to the Pacific Rim, further strengthens its appeal as a hub for advanced manufacturing, clean energy, and global trade. Our exceptional quality of life, marked by clean air, abundant fresh water, and a stunning natural environment, makes it not only a smart place to do business but also a desirable place to live, work, and raise a family.

Now we must bring our full potential to bear. By uniting around a statewide vision and coordinating our talents and assets, we can ensure Oregon doesn't just keep up but leads in sustained economic growth.

As we put this roadmap into action, we must lead with data to inform our approach and reality test our overall goals.



The most recent Economic and Revenue Forecast provides three key areas of focus for our work:

- **Hiring:** Projected job creation has been revised downward over the medium term.
- **Unemployment:** Oregon's unemployment rate is expected to remain elevated through 2026, given moderate GDP growth and cooling labor market conditions.
- **Population:** Oregon's population growth is projected to average just 0.5% annually, with recent estimates showing a downward revision in migration and retention.

Two recent studies by the University of Oregon and ECONorthwest echo these concerns and shed light on the factors driving people and businesses to leave the state:

- [External Business Recruitment: Why are businesses leaving Oregon—and what can we do to keep them?](#)
- [2025 State of the Economy: The Value of Jobs: What kinds of jobs are we creating, and for whom?](#)

In response to this data and research, I directed my office to develop a statewide economic strategy built around three overarching goals and a set of strategic initiatives designed to achieve those goals.

These strategies are just the beginning. Just as we relied on creative, ambitious leaders and everyday Oregonians to craft this roadmap, I'm counting on Oregonians across the state to help make it real. We are all partners in building an Oregon where entrepreneurs are eager to start businesses - where economic opportunity and good-paying jobs are within reach for every Oregonian, in every corner of our state. Together, we can and will create an economy that works for everyone. An economy where innovation thrives, families prosper, and no one gets left behind. So let's get to work!

*Tina Kotch*

# STRATEGIC GOALS FOR OREGON'S ECONOMY



**1. Accelerate Oregon's Economic Growth:** Achieve a sustained state Gross Domestic Product (GDP) growth rate – meaning an increase in the state's economic output – that outpaces the national average. A real-world example of this would be a business expanding its operations, e.g., manufacturing more products, hiring additional workers to meet increased demand, and ultimately generating more revenue from higher sales. This goal reflects Oregon's commitment to building a dynamic, resilient, and inclusive economy, one that drives innovation, supports high-quality living-wage jobs, and delivers long-term prosperity for all Oregonians.

- **Goal:** Grow Oregon's GDP in alignment with our historical pattern of outpacing national activity. To facilitate this outcome, the roadmap establishes a near-term target of growing GDP from 1.7 to 2.2 which could increase general fund resources by more than \$4 billion through the 2029-31 biennium.



**2. More living wage jobs, now:** Catalyze job growth by investing in high-opportunity sectors, expanding workforce development programs, strengthening regional economic ecosystems, and leveraging public-private partnerships. A real-world example of this kind of strategy is a coordinated, two-pronged approach. First, a post-secondary education institution partners with local businesses and the state to create a new training or certificate program tailored to emerging industry needs. Second, once the program is in place, employers launch a hiring process for newly created positions that specifically require the training, ensuring a direct pipeline from education to employment. This approach not only addresses current labor market demands but also prepares Oregon's workforce for the jobs of the future, equipping Oregonians with the skills and credentials needed to thrive in a rapidly evolving economy. Oregon will foster the conditions necessary to generate meaningful employment across all communities – urban, rural, and underserved.

- **Goal:** Move from #23 in the CNBC Workforce Rank into the top 10 states in the country. America's Top States for Business Workforce category measures the availability, quality, and productivity of the state's labor pool. It evaluates several metrics, including worker availability/shortages, education levels, worker training and development, net migration, labor force participation rate, productivity, and health.



**3. Retain and Grow Oregon Businesses:** Set up Oregon businesses to thrive by expanding access to capital, technical assistance, and critical infrastructure. A real-world example of this is establishing a pool of public funds that businesses can apply for, paired with technical assistance and accelerated permitting. This support allows companies to expand their operations here at home – online through streamlined approvals and on the ground through growth that spans city blocks or even acres. Through targeted support and strategic investment, the state will help to empower businesses to scale, innovate, and deepen their roots in Oregon’s economy.

- **Goal:** Move from #39 in the CNBC Top States for Business Overall Rank into the top 10 states in the country. America’s Top States for Business is an annual, data-driven analysis that ranks all states on the factors that matter most to companies when making site selection decisions. The study is designed to identify which states are best at creating a competitive and prosperous environment for business and economic growth.

## NEXT STEPS

### 1. Recruit Additional Leadership and Expertise to Grow and Drive this Roadmap

- Establish in my office the position of Chief Prosperity Officer to refine and expand on the above strategic goals, such as establishing clear timelines and deliverables, coordinating cross-agency efforts, and serving as a central point of contact for business and community stakeholders.
- Establish the Governor’s Prosperity Council to provide guidance to my office and the Chief Prosperity Officer. The Council will be a nimble, diverse group of experts representing every corner of the state, critical sectors, and labor and will be responsible for supporting economic and workforce initiatives and advising on additional or enhanced recommendations in alignment with the strategic goals.

### 2. Establish a new FastTrack Program

- My office will introduce legislation in 2026 to remove barriers to growth and incentivize investment. This bill will establish a new FastTrack Program tasked with supporting large projects that have the potential to create jobs and grow Oregon’s GDP. The FastTrack program will be modeled after “FAST 41” at the federal level and similar programs in Pennsylvania, Maryland, and Michigan.



### 3. Reduce Barriers to Investment and Growth

- Direct relevant state agencies to submit permit inventories and identify opportunities to streamline and/or accelerate existing permitting, licensing, or certification processes.
- Invest in and expedite critical infrastructure like energy, broadband, transportation, and water and wastewater systems so business and industry can expand and break ground faster. Specifically, the roadmap seeks to increase investment in the industrial site readiness fund.
- Amplify regional economic development strategies and support local efforts to utilize unique regional resources, talent pools, and market opportunities to build economic strength around the state.

### 4. Modernize and Strengthen Oregon's Economic Development Tools

- Review and update existing tools, such as enterprise zones and the Strategic Investment Program, to improve flexibility, transparency, and administrative functionality.
- Direct Business Oregon to complete a state economic development strategy to address key topic areas such as Capital Access and Entrepreneurship, Business Retention and Expansion, Business Recruitment, Workforce Development, Sector Alignment, Infrastructure, and Incentive Modernization.

### 5. Explore Targeted Tax Changes to Spur Living Wage Job Creation, Increase GDP

- Direct the Chief Prosperity Officer and Governor's Prosperity Council to develop recommendations for consideration in the 2027 legislative session in alignment with strategic goals.

### 6. Partner with Businesses and Communities for Results

- Create a Global Trade Desk to expand opportunities for global commerce, deliver better customer service, and actively promote Oregon as a premier destination for foreign investment and long-term trade partnerships.
- Enhance business outreach with major employers to gather ongoing feedback and stay ahead of emerging challenges and opportunities.
- Direct state agencies to prioritize economic development and support key projects through the Governor's Office Regional Solutions Program.





*Office of Oregon Governor*  
**TINA KOTEK**

<b>Oregon State Board of Agriculture Resolution</b>	
<b>Title:</b> Priority for Agricultural Use of Water	<b>Number:</b> 107 <b>Effective Date:</b> 06/06/2025
<b>Board members:</b> Allen, Boyer, Dill, Kliewer, Lopez, Maag, Miller, Norris, Orem, Zielinski <b>ODA Staff Contact:</b> Isaak Stapleton	<b>Next Review Date:</b> 00/00/2028 <b>Date of Last Review/Revision:</b> 06/06/2025 <b>Original Resolution Date:</b> 04/12/1984
<b>Board Chair:</b> Elin Miller	Signature on file

### Background

- I. Agriculture is a major industry in Oregon, providing a vital and important economic base for citizens of the state.
- II. Agriculture is a recognized beneficial use of water and must be equitably considered as in the public interest; and
- III. As Oregon faces increasingly frequent and severe drought conditions, driven in part by climate change, it is critical that communities come together to engage in comprehensive, basin-wide water supply planning and watershed investments that meet all needs. Oregon agriculture has a long history of engaging in conservation projects which have provided positive environmental benefits in all basins around Oregon. These include irrigation modernization initiatives, water banking efforts, and watershed restoration partnerships. Agricultural producers continue to engage in implementing voluntary conservation, water efficiency upgrades, and climate-resilient water strategies. This work is valuable and should be continued.

### Resolution

The Board of Agriculture believes that agriculture, along with other beneficial uses and users of water, must be equitably included, formally represented, and actively engaged in all water resource planning and management activities in the state; and

Current and future agricultural uses of water must be accounted for as the state develops new instream water rights. We support the continued use of agricultural water reservations under ORS 537.356 and recommend reviewing and updating existing reservations to ensure they align with present and future agricultural needs.

The Board supports public investments in agricultural water infrastructure, including support for irrigation efficiency, water reuse systems, and expanded water storage capacity.

The Board also emphasizes the importance of collaboration among agricultural, municipal, tribal, and public partners to ensure balanced water allocation and equitable outcomes across all sectors.

### Summary

Agricultural uses of water should be considered equally with all other beneficial uses in water resource planning and management activities within Oregon.

IN THE SUPREME COURT OF THE STATE OF OREGON

EAST VALLEY WATER DISTRICT,  
Petitioner, Petitioner on Review,

v.

OREGON WATER RESOURCES COMMISSION, OREGON WATER  
RESOURCES DEPARTMENT, and WATERWATCH OF OREGON, INC.,  
Respondents, Respondents on Review,

and

JOEL RUE et al.,  
protestants below.

---

On Judicial Review of the Final Order of the Oregon Water Resources  
Commission issued November 25, 2019

---

Oregon Supreme Court  
Case No. S070604

---

**BRIEF OF *AMICI CURIAE* OREGON WATER UTILITY COUNCIL,  
LEAGUE OF OREGON CITIES, AND SPECIAL DISTRICTS  
ASSOCIATION OF OREGON  
IN SUPPORT OF BRIEF ON THE MERITS**

*Counsel listed on next page*

Olivier Jamin, OSB #173805  
DAVIS WRIGHT TREMAINE  
560 SW 10th Ave, Suite 700  
Portland OR 97205  
Tel: 503-241-2300  
olivierjamin@dwt.com

Attorneys for Amicus Curiae Oregon  
Water Utility Council, League of  
Oregon Cities, and Special Districts  
Association of Oregon

Denise Fjordbeck, OSB #822578  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Tel: 503-378-4402  
denise.fjordbeck@doj.state.or.us

*Attorneys for Respondent  
Oregon Water Resources Department  
and Oregon Water Resources  
Commission*

Steven L. Shropshire, OSB #944375  
Marika E. Sitz, OSB #215191  
JORDAN RAMIS PC  
360 SW Bond Street, Suite 510  
Bend, Oregon 97702  
Tel: 541-550-7900  
steve.shropshire@jordanramis.com  
marika.sitz@jordanramis.com

*Attorneys for Amici Curiae Oregon  
Water Resources Congress and  
Oregon Association of Nurseries*

*July 2024*

Kirk B. Maag, OSB #105507  
Merissa Moeller, OSB #153926  
STOEL RIVES LLP  
760 SW Ninth Ave., Suite 3000  
Portland, OR 97205  
Tel: 503-294-9221  
kirk.maag@stoel.com  
merissa.moeller@stoel.com

*Attorneys for Petitioner*

Thomas M. Christ, OSB #834064  
SUSSMAN SHANK LLP  
1000 SW Broadway, Suite 1400  
Portland, OR 97205  
Tel: 503-227-1111  
tchrist@sussmanshank.com

Brian J. Posewitz, OBS #914002  
213 SW Ash Street, Suite 208  
Portland, OR 97204  
Tel: 503-295-4039  
brian@waterwatch.org

*Attorneys for Respondent  
WaterWatch of Oregon, Inc.*

## TABLE OF CONTENTS

	<b>Page</b>
I. INTEREST OF AMICI .....	1
II. QUESTIONS PRESENTED ON REVIEW .....	3
III. PROPOSED RULES OF LAW .....	4
IV. STATEMENT OF THE CASE .....	4
V. LEGAL BACKGROUND .....	4
VI. SUMMARY OF ARGUMENT.....	7
VII. ARGUMENT.....	11
A. The Opinion will directly impact new water right applications filed by <i>Amici</i> 's members.....	11
B. The Court of Appeals decision may impact the regulation of <i>Amici</i> 's members' existing water rights.....	14
C. The Opinion will threaten the ability of municipal water providers and water utilities to serve Oregon communities.....	16
D. The Opinion may impact <i>Amici</i> 's members' ability to apply for transfers of existing water rights.....	18
E. The Opinion jeopardizes ongoing water allocation efforts.....	19
F. The Opinion is inconsistent with current instream water right applications.....	22
VIII. CONCLUSION .....	22

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>E. Valley Water Dist. v. Or. Water Res. Comm'n</i> , 328 Or App 790, 539 P3d 789 (2023) .....	2, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23
<i>Fort Vannoy Irrigation Dist. v. Water Res. Comm'n</i> , 345 Or 56, 188 P3d 277 (2008) .....	14
<i>Oliver v. Skinner</i> , 190 Or 423, 226 P2d 507 (1951) .....	8
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009) .....	10
<i>Teel Irrigation Dist. v. Water Res. Dep't</i> , 323 Or 663, 919 P2d 1172 (1996) .....	8
<i>TPC, LLC v. Or. Water Res. Dep't</i> , 308 Or App 177, 482 P3d 121 (2020) .....	14
<b>STATUTES</b>	
Or Laws 1937, ch 235, § 1 .....	10
ORS 536.295 .....	9
ORS 537.130 .....	11
ORS 537.130(2) .....	5
ORS 537.153 .....	3, 4, 5, 9
ORS 537.153(2) .....	5, 7
ORS 537.153(2)(b) .....	6
ORS 537.153(3)(e) .....	5, 7
ORS 537.160(1) .....	7
ORS 537.170 .....	3, 4, 5, 6, 10

ORS 537.170(6) .....	7
ORS 537.170(8) .....	6
ORS 537.170(8)(a).....	12
ORS 537.170(8)(a)-(g).....	12
ORS 537.170(8)(b) .....	12
ORS 537.170(8)(c).....	12
ORS 537.170(8)(f) .....	4
ORS 537.211(1) .....	5
ORS 537.332(2) .....	8
ORS 540.505 .....	18
ORS 540.510(1)(a).....	18
ORS 540.530.....	18
ORS 540.530(1) .....	18
<b>REGULATIONS</b>	
OAR 690-325-0030(3).....	8, 13
OAR 690-380-0100(3).....	13

## I. INTEREST OF AMICI

The League of Oregon Cities (“LOC”), the Oregon Water Utilities Council (“OWUC”), and the Special Districts Association of Oregon (“SDAO”) (collectively “*Amici*”) file this brief in support of Petitioner East Valley Water District’s (“Petitioner”) Brief on the Merits.

OWUC comprises public water utilities, large and small, from across Oregon. OWUC is a committee of the Pacific Northwest Section of the American Water Works Association (“PNWS-AWWA”), the largest non-profit scientific and educational association dedicated to managing and treating water for domestic and industrial use. As part of its mission, OWUC promotes public policies, legislation, and regulations to ensure that Oregon’s communities have adequate supplies of high-quality water at the lowest economic and environmental costs. OWUC has an interest in this case because the issues before the Court may affect the ability of OWUC’s members to plan for and deliver adequate water supplies to the communities they serve.

Founded in 1925, LOC is a voluntary statewide association representing all of Oregon’s 241 incorporated cities. Its mission is to “support[] city leaders and state legislators in building a strong Oregon by connecting with all Oregon cities, sharing vital information and advocating on their behalf.” LOC advocates for improved quality of municipal services through technical

assistance, research, and education. LOC's interest in this case and, therefore, the interest of its 241 members, arises because the Court of Appeals' decision could affect the ability of all cities in Oregon to provide some of the core services for which they are incorporated.

SDAO was formed in 1979 to give special districts a stronger and united voice at the Oregon Legislature. SDAO provides advocacy with state administrative agencies and other units of government, training, information resources, and other support programs. Membership consists of approximately 950 local government members, including domestic water suppliers, irrigation districts, and water improvement and water control districts. SDAO's interest in this case, and therefore the interest of its 950 members, arises because the Court of Appeals' decision could affect the authority of local governments and special districts in Oregon, and, potentially, their ability to provide core services for Oregonians.

Together, *Amici's* members provide water to a great majority of Oregonians. All of those members rely on well-founded principles of prior appropriation and Oregon water law to provide clean water to Oregonians. Many water providers represented by *Amici* hold water rights authorizing the use of water from a river or stream on which there are also instream water rights. If allowed to stand, the erroneous Court of Appeals' decision, reported at 328 Or App 790, 539 P3d 789 (2023) (the "Opinion"), would mark a dramatic

shift in Oregon water law that would jeopardize the ability of those water providers to protect their water rights and manage our state's most precious resource.

There are two issues before the Court. The first is whether Oregon's Water Code, and more specifically ORS 537.170(8)(f), which identifies a public interest in "vested and inchoate rights" to state waters, encompasses qualitative and subjective considerations when engaging in said public interest review, as opposed to only objective, quantitative factors. The second is whether ORS 537.153 and ORS 537.170 allow the Oregon Water Resources Commission (the "Commission") to conclude that an application for a new water right would "impair or be detrimental to the public interest," based on a *sua sponte* and novel legal interpretation of a single "Public Interest Factor" without evaluating the six other factors specified by statute. In responding in the affirmative to both questions, the Court of Appeals' ruling threatens *Amici's* ability to apply for new water rights or transfer existing water rights, jeopardizing the ability of water providers to provide key services for Oregonians. Accordingly, *Amici* respectfully request that this Court correct the Court of Appeals' erroneous ruling.

## II. QUESTIONS PRESENTED ON REVIEW

*Amici* join in Petitioner's statement of question presented for review:

1. Does ORS 537.170(8)(f), which identifies a public interest in “vested and inchoate rights” to state waters, as well as in “the means necessary to protect such rights,” encompass qualitative, subjective, or abstract considerations, such as a right to particular stream characteristics desirable for a senior instream water right holder?

2. Do ORS 537.153 and ORS 537.170 allow the Oregon Water Resources Commission to conclude that an application for a new water right would “impair or be detrimental to the public interest,” based on a *sua sponte* and novel legal interpretation of a single “Public Interest Factor,” without evaluating the six other factors specified by statute and even though all subsidiary factual findings support approving the application?

### **III. PROPOSED RULES OF LAW**

*Amici* join in Petitioner’s proposed rules of law.

### **IV. STATEMENT OF THE CASE**

*Amici* incorporate by reference Petitioner’s statement of the case.

### **V. LEGAL BACKGROUND**

Oregon follows the water law doctrine of prior appropriation, also referred to as “first-in-time, first-in-right.” By putting water to beneficial use, for example by diverting water from a stream to use on their land, a person establishes a right to that water to the exclusion of others and would be granted a priority date preventing more junior users (users applying for a water right

later) from interfering with that right. The adoption of the Water Rights Act of 1909 codified two principles of Oregon water law. First, a water right is required to use water.<sup>1</sup> *See* ORS 537.130(2) (“[A] person may not use, store or divert any waters until after the department issues a permit to appropriate the waters.”). Second, a person must put that water to “beneficial use,” i.e. using it for the purpose approved in the water right, to “perfect” the water right and obtain a certificate from the Oregon Water Resources Department (“OWRD”). ORS 537.211(1).

When reviewing an application for the right to use water, Oregon water law requires application of the “Public Interest Test” required under ORS 537.153 and 537.170. This Public Interest Test sets forth legal procedures and burdens of proof governing a new water right application. Upon meeting certain statutory criteria, a water right application is presumed to be in the “public interest” and at this point OWRD will issue the requested water right unless the presumption is rebutted. ORS 537.153(2), (3)(e); ORS 537.170(6). Members of the public may file written protests to rebut the presumption by showing by a preponderance of evidence that the proposed water use “would impair or be detrimental to the public interest” based on seven statutory “Public Interest Factors.” ORS 537.153(2)(b); ORS 537.170(8)(a)-(g). This includes a

---

<sup>1</sup> There are some exemptions for limited groundwater uses that are not implicated in this case.

consideration and balancing of all seven statutory Public Interest Factors as a whole to determine whether the presumption has been overcome. To ultimately conclude that the presumption is overcome and a new water right application will “impair or be detrimental to the public interest,” ORS 537.170(8), the Commission must identify a “preponderance of evidence” in the record, ORS 537.153(2)(b), and issue a written order based on both substantial evidence and substantial reasoning.

This case rests on the Court of Appeals’ erroneous interpretation of Public Interest Factor (f), which identifies a public interest in “[a]ll vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.” ORS 537.170(8)(f). Public Interest Factor (f) is well understood to mean that a “junior” water right cannot interfere with the *quantity* of water available to satisfy a “senior” water right. In fact, even in these proceedings, OWRD, the ALJ, and the Director of OWRD all agreed with that interpretation, until the politically-appointed Commission reversed course with a novel interpretation of Public Interest Factor (f), inserting a highly subjective and blurry qualitative analysis into the public interest review. The Court of Appeals affirmed this erroneous legal interpretation and held that Public Interest Factor (f) protects a senior instream water right holder’s interest in qualitative stream characteristics necessary to avoid “frustrat[ing] the actual purpose and use of a senior water right.” *E. Valley*

*Water Dist. v. Or. Water Res. Comm'n*, 328 Or App 790, 806, 539 P3d 789 (2023). The Court of Appeals went further in its erroneous ruling and concluded that the reviewing agency did not have to consider other Public Interest Factors before denying an application based on Public Interest Factor (f) in clear contradiction of the plain meaning of the statute. *Id.* at 806-12.

The Court of Appeals' erroneous interpretation elevates the status of instream water rights above all other types of water rights in contradiction with more than a century of Oregon water law and prior appropriation doctrine principles. By inserting subjectivity and unpredictability into the public interest review, the Opinion threatens the ability of any member of the public to secure a new water right or to successfully apply for a transfer in order to adapt to climate change and other changing conditions around the state. *Amici*, who represent the vast majority of municipal water users in the state, would all be negatively impacted by this dramatic shift in Oregon water law.

## VI. SUMMARY OF ARGUMENT

It has been a bedrock principle of Oregon water law that the state must issue a requested water right if a proposed use of water is in the “public interest” and complies with other legal requirements. ORS 537.153(2), (3)(e); ORS 537.160(1); ORS 537.170(6). Like many western states, Oregon follows the water doctrine of prior appropriation: all water in the state belongs to the public and anyone wishing to use water to the exclusion of others must apply

for a water right. If granted, the holder of the water right may apply the water to the allowed “beneficial use” and receive a water right certificate, which represents a vested water right that is permanent and protected so long as the water is used in accordance with the terms of the certificate. *Teel Irrigation Dist. v. Water Res. Dep’t*, 323 Or 663, 668, 919 P2d 1172 (1996). Once granted, the doctrine of “injury” protects a certificated water right against more junior water rights by ensuring that the more senior user receives the *quantity* of water it is legally entitled to when water is available. OAR 690-325-0030(3); *Oliver v. Skinner*, 190 Or 423, 448, 226 P2d 507 (1951).

This fundamental principle of Oregon water law applies to instream water right certificates just like any other water right certificate by entitling the holder of the right to have a minimum instantaneous rate of flow left in the stream for the designated public use. ORS 537.332(2). Public Interest Factor (f), at issue in this case, is known to Oregon water law practitioners as codifying this principle, mainly that if water is available for appropriation, *i.e.*, the water right application will not “injure” existing water rights holders, then the application is in the public interest. This is strictly objective and quantitative analysis: senior users are entitled to receive a particular rate and quantity of water from a stream (or well) to use at a certain location and for a particular use, based on the priority of the right. Nothing in the Oregon Water Code, in past jurisprudence, or in the OWRD’s practice over the last hundred years suggests that the legal

doctrine of injury applies differently to instream water rights. The Court of Appeals' novel interpretation to add a subjective, qualitative analysis to the injury test has no legal basis and is contrary to foundational principles of Oregon water law.

The Court of Appeals also affirmed the Commission's novel approach to the Public Interest Test. When the presumption of public interest under ORS 537.153(2) is overcome, the director of OWRD or the Commission must make a final determination of whether the proposed use would impair or be detrimental to the public interest by considering seven "Public Interest Factors." The factors are: (a) conserving the highest use of the water for all purposes; (b) the maximum economic development of the waters involved; (c) the control of the waters of this state for all beneficial purposes; (d) the amount of waters available for appropriation for beneficial use; (e) the prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved; (f) all vested and inchoate rights to the waters of this state and the means necessary to protect such rights; and (g) the state water resources policy formulated under ORS 536.295. While there may be rare instances where one single factor overcomes the presumption of public interest, that statute clearly requires the director or the Commission, as applicable, to consider all factors and explain why the factors as a whole establish a "preponderance of evidence" that the proposed water use "will impair or be detrimental to the public interest." ORS

537.153(2)(b); ORS 537.170(8). This requirement is consistent with prior versions of the statute, which required a public interest analysis to have “due regard” for the applicable factors, Or Laws 1937, ch 235, § 1, an approach that the Department, the Commission, and courts have followed for more than 80 years.

Instead, the Commission acted contrary to long-standing practice and to the plain language of the statute by denying Petitioner’s application after considering only factor (f) and applying that factor erroneously by inserting subjective, qualitative considerations into the factor (f) analysis. The Commission’s order and the Court of Appeals thus misapplied the Public Interest Test of the Oregon Water Code and failed to provide any substantial evidence or reasoning to back that decision. As highlighted in Petitioner’s Brief on the Merits, the Court of Appeals’ interpretation is inconsistent with Oregon’s rules of statutory interpretation as laid out in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

The Commission’s decision, affirmed by the Court of Appeals, inserts a subjective and uncertain qualitative analysis into the otherwise well-settled water right application process. This new interpretation is contrary to the language of relevant statutes, judicial precedent, and historical practice, and marks a dramatic shift in Oregon water law. It inserts dangerous uncertainty and a loss of predictability into Oregon’s critical water allocation system and

Oregon's water right regulation system. If affirmed, the Opinion would fundamentally reshape Oregon water law; would negatively impact the ability of *Amici's* members to apply for new water rights and manage their water resources; may impact the regulation of *Amici's* members' water rights; may impact the ability of *Amici's* members to apply for transfers of water rights, would threaten the ability of drinking water providers to serve Oregon communities; would jeopardize current water reallocation efforts; and would be inconsistent with current instream water rights applications.

## VII. ARGUMENT

### **A. The Opinion will directly impact new water right applications filed by *Amici's* members.**

As previously explained, except for a limited set of water uses that are exempt from a permit requirement, any prospective water user must submit an application to OWRD to obtain a new water right. ORS 537.130. Many of *Amici's* members may find themselves in a situation where applying for new water rights is a necessity to serve a growing population. Instream water rights cover most of Oregon's stream systems, and as a result the vast majority of water users in Oregon will be left dealing with the unruly situation created by the Court of Appeals.

Oregon's rebuttable presumption that a new water right application is in the public interest if certain objective statutory criteria are met may be overcome through a showing that the proposed water use would impair or be

detrimental to the public interest. This requires an evaluation of the Public Interest Factors set forth at ORS 537.170(8)(a)-(g). Under the Court of Appeals' interpretation, the public interest review may rely on a single Public Interest Factor rather than a comprehensive review of all the Public Interest Factors set forth in ORS 537.170(8)(a)-(g). This holding opens the door for the Commission and OWRD to forego any sort of balancing test and instead focus on a single factor to reach a desired outcome, which is particularly unwise for an appointed body like the Commission. This major shift from a balancing test to a single-factor evaluation could result in unbalanced evaluations for new water right applications that do not appropriately weigh all the Public Interest Factors and fail to consider important statutory criteria such as “[c]onserving the highest use of the water for all purposes” (ORS 537.170(8)(a)); “maximum economic development of the waters involved [in a water right application]” (ORS 537.170(8)(b)); and “control of the waters of this state for all beneficial purposes” (ORS 537.170(8)(c)). It is also a recipe for never-ending litigation over the inconsistent application of the Public Interest Factors.

The Opinion's interpretation of Public Interest Factor (f) also marks a substantial change to the long-held understanding of this factor, as shown in the proceedings below where OWRD, the Director of OWRD, and the ALJ all interpreted Public Interest Factor (f) in accordance with historical practice as codifying the legal concept of “injury”: a junior water right may not interfere

with the *quantity* of water available to satisfy a senior right. *See e.g.* OAR 690-380-0100(3); OAR 690-325-0030(3). Instead of following this principle, the Court of Appeals' introduced qualitative and subjective considerations regarding the specific character of an individual instream water right that will result in significant confusion and uncertainty for future water right applications. *See* 328 Or App at 806. Water rights applicants will be left wondering which particular stream characteristics OWRD or the Commission may choose to focus on to justify a decision, a subjective exercise that will naturally lead to litigation. With no legal basis, Footnote 12 in the Opinion, which suggests that instream water rights may be entitled to legal protections beyond the protections enjoyed by other water rights, also elevates instream water rights above all other rights with no legal or judicial basis to do so. *Id.* at 803 n 12. This marks a seismic shift in the quantitative approach to water rights and disregards the precedent of applying the objective quantitative injury standard in its consideration of new water right applications. The Court of Appeals' analysis is prone to subjective and inconsistent decisions which may result in the denial of access to water with no valid basis in direct contradiction with statutory language and more than 80 years of precedent.

The Opinion creates a significant measure of uncertainty and unpredictability for the public interest review and the overall water right application process and undermines core principles of Oregon water law,

leaving *Amici's* members and other prospective water right applicants to suffer the consequences.

**B. The Court of Appeals decision may impact the regulation of *Amici's* members' existing water rights.**

While the Opinion addresses the water right application process for new water rights applications, it may also have implications for the regulation and curtailment of existing water rights. Oregon water law recognizes that water rights with more recent priority dates, called “junior” water rights, will be the first to be curtailed during times of shortage in favor of water rights with older priority dates, called “senior” water rights. *See e.g., Fort Vannoy Irrigation Dist. v. Water Res. Comm'n*, 345 Or 56, 64, 188 P3d 277 (2008); *TPC, LLC v. Or. Water Res. Dep't*, 308 Or App 177, 185, 482 P3d 121 (2020). In times of shortages, OWRD applies a quantitative metric to regulate water use to prohibit junior water rights from using their authorized quantity of water in order to allow senior water rights continued access to the seniors' authorized quantity of water. As with new water right applications, this has always been an objective, quantitative analysis. However, the Court of Appeals' decision to elevate instream water rights above all other rights and insert subjective, qualitative standards in the injury analysis may very well open the door for OWRD to similarly introduce qualitative considerations when regulating junior water rights in favor of senior instream water rights.

Given the amount of existing instream water rights in Oregon, covering approximately 11,000 river miles across the state, it is inevitable that some of *Amici's* members water rights (and other water users) be at odds senior instream water rights in times of shortages. Water rights holders have long understood that the quantity of water available to them may be subject to curtailment in favor of more senior water rights in times of water shortage. However, the Opinion arguably elevates the status of instream rights above other water rights in the state and may create a situation in which water rights holders are now subject to curtailment when water quality is not sufficient to sustain more senior instream water rights, even if quantity is sufficient, creating an unacceptable level of risk and uncertainty in managing water resources.<sup>2</sup> Water rights holders could be subject to curtailment based not on measurable water availability, but instead based on physical, chemical or biological criteria such as water temperature or habitat quality. This introduces great subjectivity into a regulatory system that has always been based on transparency and objectivity. Under Oregon water law, water rights holders can anticipate regulation and plan accordingly for potential shortages. For municipal water providers and water utilities, this regulatory certainty is essential to forecast water demand in

---

<sup>2</sup> This is not to say that water quality is not an important consideration in managing water resources, but water quality concerns are generally addressed by other agencies that have relevant expertise, such as the Oregon Department of Environmental Quality or the Oregon Department of Fish and Wildlife.

response to population forecast and ensure drinking water availability for Oregon communities. Instead, the Opinion creates a significant regulatory uncertainty due to the introduction of physically, chemically or biologically-based subjective criteria will result in serious disruptions to *Amici's* members' operations and may lead to years of litigation due to the new subjectivity of the decision-making process.

**C. The Opinion will threaten the ability of municipal water providers and water utilities to serve Oregon communities.**

*Amici* OWUC, SDAO, and LOC represent water utilities and municipalities from across the state and ensure that people throughout Oregon have access to adequate water supplies. This mission has been made increasingly difficult by the effects of climate change, wildfires, and drought, and requires certainty and predictability in how agencies and courts interpret the Oregon Water Code. For more than a century, OWRD has interpreted Public Interest Factor (f) to consider whether the proposed new water right or transfer did not cause a quantitative injury to existing water rights, as directed by the applicable statutes. However, the Commission ended this long-standing practice overnight to add a subjective qualitative component to the injury analysis for instream water rights without any basis in law. The Court of Appeals went even further in this erroneous legal interpretation by suggesting that instream water rights may be entitled to legal protections beyond the protections afforded to

consumptive water rights, elevating instream water rights above all other rights in the state. 328 Or App at 803 n 12.

This new interpretation may have devastating consequences as Oregon has about 1,500 instream water rights covering more than 11,000 river miles, an estimate that is limited to instream rights for fish and wildlife and does not even account for instream water rights authorized for recreation, pollution abatement, and navigation. As a result, many consumptive water rights are likely to be subject to this new erroneous interpretation because a senior instream water right is located on the same stream. This reality will dramatically affect the ability of *Amici* to manage their water supplies and serve the public interest by making it exponentially more difficult to obtain new water rights or change characteristics of existing water rights in response to the effects of climate change or to adapt to changing populations and needs. Under the Court of Appeals' novel interpretation, OWRD may be able to deny a new water right application even if water is available for appropriation in order to satisfy the "actual purpose and use" of a senior instream water right, a nebulous concept that will lengthen and throw confusion into any water right proceeding. 328 Or App at 806. The same reasoning could apply to the injury analysis conducted for requests for transfers of water rights, setting a dangerous precedent for Oregon water law. The Court of Appeals' error needs be corrected.

**D. The Opinion may impact *Amici*'s members' ability to apply for transfers of existing water rights.**

While the Opinion does not address applications to transfer existing water rights, it creates a dangerous precedent by inserting qualitative considerations into the application process that could open the door for similar considerations when applying for a transfer request. Water rights come with specific characteristics, such as the character of use and the location of the point of diversion or the place of use. The water transfer statutes, ORS 540.505 to ORS 540.530, dictate the procedure required to change those characteristics without losing the existing priority of the water right. ORS 540.510(1)(a). Water users increasingly rely on transfers to change the point of diversion or character of use of their water rights and adapt to constantly changing conditions, and as such transfers are an essential tool to adapt to drought and other issues. For example, a municipality relying on stored water for its drinking water supplies but concerned about aging infrastructure may need to transfer its water rights to retrofit its reservoir or build a new one and ensure its population's access to drinking water. Similarly to applications for new water rights, once certain statutory criteria are met, the Commission must approve the transfer request. Specifically, if the Commission "finds that a proposed change can be effected without injury to existing water rights," the Commission "shall" approve the requested change. ORS 540.530(1).

The statutory provisions governing water rights transfers are thus rather simple: a water right, after a showing of beneficial use, becomes a water certificate. The holder of a water certificate may apply to change the character of use, point of diversion, or place of use for that water certificate. If the Commission finds the change does not cause injury to existing water rights, it shall approve the transfer request. Just like applications for new water rights, the transfer statutes do not differentiate between different types of water rights. Just like applications for new water rights, the concept of injury for transfer requests has always been understood to be confined to an objective, quantitative analysis. Despite clear statutory language and historical practice, the Commission and the Court of Appeals suddenly added a subjective, qualitative element to the injury analysis in new water rights applications. It would not be far-fetched to imagine a court applying the same erroneous reasoning to transfer requests. This would further erode the foundations of Oregon water law by opening all transfer requests, an important mechanism to adapt to changing supplies and conditions and offer water users flexibility in managing their water supplies, to a new murky and uncertain standard.

**E. The Opinion jeopardizes ongoing water allocation efforts.**

The Opinion will undoubtedly jeopardize reallocation efforts in the Willamette River Basin, a stark example of how the Opinion will reshape and disrupt well-settled principles of Oregon water law. The Willamette Valley

Project (“WVP”), operated by the U.S. Army Corps of Engineers (“USACE”), was authorized by the Flood Control Acts of 1938 and 1950. The reservoirs in the WVP have “conservation storage” of 1.64 million acre-feet. The originally authorized purposes for the reservoirs were flood control, navigation, hydroelectric power, irrigation, potable water supply, and reduction of stream pollution. To date, the water stored in the WVP has been used for all of the authorized purposes, except for potable water supply.

Beginning in June 1996, the USACE began working cooperatively with the State of Oregon and stakeholders as part of what became the Willamette Basin Reservoir Study (“Study”). The Study was intended to evaluate whether changes in the operation, storage and allocation of water in the existing Willamette Basin reservoirs would better serve current and future water resource needs.

Work on the Study was paused in 2000 following listing of Willamette River stocks of salmon and steelhead as threatened under the Endangered Species Act (“ESA”). The USACE then engaged in formal consultations with the National Marine Fisheries Service (“NMFS”) concerning continued WVP operations as a whole. The resulting biological opinion (“Bi-Op”) was issued in 2008.

In 2013, USACE reinitiated the Study to examine the potential for reallocation of a portion of WVP storage for municipal and industrial use.

OWUC members contributed to and actively participated in the Study. The recommended plan under the Study was to reallocate stored water as follows: 1,102,600 acre-feet (69%) to fish and wildlife protection, 327,650 acre-feet (21%) to agriculture and irrigation uses, and 159,750 acre-feet (10%) to municipal and industrial uses. Years of consultation followed with NMFS under the ESA. On December 18, 2019, the Chief of Engineers finally issued a report on the Study for transmission to Congress recommending the reallocation plan described above, and Congress approved the Study in 2020. *See* Water Resources Development Act of 2020, HR 7575, 116th Cong. 401-02 (as passed by House, July 29, 2020). Now that the reallocation plan has been approved, storage water rights must be transferred, one way or another, to other uses like fish and wildlife, municipal and industrial, and instream water rights. By potentially introducing new qualitative considerations into the transfer process or issuance of new water rights, the Opinion jeopardizes more than two decades of efforts, litigation, and compromise to reach an agreement in the Willamette Basin for reallocation of stored water. Many of *Amici's* members have now incorporated the adopted reallocation plan into their water forecasts, and the Opinion could very well create a dangerous water shortage for those users by depriving them of water that would otherwise been available because of the Court of Appeals' new qualitative considerations.

## **F. The Opinion is inconsistent with current instream water right applications.**

The Oregon Department of Fish and Wildlife (ODFW) estimates instream water rights for fish and wildlife purposes cover approximately 11,000 river miles across the state, as such the reach of the Opinion is already quite dramatic. ODFW announced plans to apply for approximately 270 new instream water rights in the Willamette River Basin. ODFW and OWRD argue that the new instream water rights will not impact existing senior water rights. This may have been true under well-established principles of Oregon water law. However, that statement blatantly ignores the impact of the Court of Appeals' erroneous decision. By inserting subjective, qualitative considerations into the Public Interest Test, the Opinion opens the door for existing and new instream rights to dramatically impact senior water rights holders. Those senior users may either be regulated because of subjective, qualitative considerations or may lose their ability to change the characteristics of their water rights through transfers, as explained above. The Opinion's negative impacts on all water users will continue to grow as more instream water rights area applied to.

## **VIII. CONCLUSION**

Water scarcity has made the careful management of water resources around the state critical. The Commission's and Court of Appeals' novel and erroneous interpretation of Oregon law overturns decades of practice and inserts tremendous unpredictability and uncertainty into the water right application

process that threatens the ability of all water users to apply for new water rights or transfer existing water rights to adapt to the effects of climate change. For the foregoing reasons, *Amici* respectfully requests that the Court adopt EVWD's First and Second Proposed Rules of Law and reverse the Court of Appeals Opinion in full.

DATED this 11th day of July, 2024.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: */s/ Olivier Jamin*

---

Olivier Jamin, OSB #173805  
560 SW 10<sup>th</sup> Ave, Suite 700  
Portland OR 97205  
olivierjamin@dwt.com

*Attorneys for Amicus Curiae Oregon Water  
Utility Council, League of Oregon Cities, and  
Special Districts Association of Oregon*

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND  
TYPE SIZE REQUIREMENTS UNDER ORAP 5.05**

I certify that (1) this brief complies with the word count limitation in ORAP 5.05 and (2) the word count of this brief as described in ORAP 5.05(1)(b) is 5,238.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(1)(d).

DAVIS WRIGHT TREMAINE LLP

By: s/ Olivier Jamin

Olivier Jamin, OSB #173805  
olivierjamin@dwt.com

*Attorneys for Amicus Curiae Oregon Water  
Utility Council, League of Oregon Cities, and  
Special Districts Association of Oregon*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that, on July 11, 2024, I filed the foregoing BRIEF OF AMICI CURIAE OREGON WATER UTILITY COUNCIL, LEAGUE OF OREGON CITIES, AND SPECIAL DISTRICTS ASSOCIATION OF OREGON IN SUPPORT OF BRIEF ON THE MERITS with the State Court Administrator by using the Court's electronic filing system. I served the same on the following parties by using the Court's electronic filing system and via email:

Kirk B. Maag, OSB #105507  
Merissa Moeller, OSB #153926  
STOEL RIVES LLP  
760 SW Ninth Ave., Suite 3000  
Portland, OR 97205  
Tel: 503-294-9221  
kirk.maag@stoel.com  
merissa.moeller@stoel.com

*Attorneys for Petitioner*

Denise Fjordbeck, OSB #822578  
OREGON DEPARTMENT  
OF JUSTICE  
1162 Court Street NE  
Salem, OR 97301-4096  
Tel: 503-378-4402  
denise.fjordbeck@doj.state.or.us

*Attorneys for Respondent  
Oregon Water Resources Department  
and Oregon Water Resources  
Commission*

Thomas M. Christ, OSB #834064  
 SUSSMAN SHANK LLP  
 1000 SW Broadway, Suite 1400  
 Portland, OR 97205  
 Tel: 503-227-1111  
 tchrist@sussmanshank.com

Brian J. Posewitz, OBS #914002  
 213 SW Ash Street, Suite 208  
 Portland, OR 97204  
 Tel: 503-295-4039  
 brian@waterwatch.org

*Attorneys for Respondent  
 WaterWatch of Oregon, Inc.*

Steven L. Shropshire, OSB #944375  
 Marika E. Sitz, OSB #215191  
 JORDAN RAMIS PC  
 360 SW Bond Street, Suite 510  
 Bend, Oregon 97702  
 Tel: 541-550-7900  
 steve.shropshire@jordanramis.com  
 marika.sitz@jordanramis.com

*Attorneys for Amici Curiae Oregon  
 Water Resources Congress and  
 Oregon Association of Nurseries*

Dated this 11th day of July, 2024.

DAVIS WRIGHT TREMAINE LLP

By: *s/ Olivier Jamin*  
 \_\_\_\_\_  
 Olivier Jamin, OSB #173805

*Attorneys for Amicus Curiae Oregon Water  
 Utility Council, League of Oregon Cities, and  
 Special Districts Association of Oregon*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on January 16, 2026, I filed the foregoing EAST VALLEY WATER DISTRICT’S EXCEPTIONS TO PROPOSED ORDER ON REMAND by first-class U.S. mail and email on the following persons at the addresses listed below:

Denise Ruttan	Ivan Gall
Legal Secretary	Director
Natural Resources Section	Oregon Water Resources Department
Oregon Department of Justice	725 Summer Street NE, Suite A
1162 Court St NE	Salem, OR 97301,
Salem OR 97301	Ivan.k.gall@water.oregon.gov
denise.ruttan@doj.oregon.gov	

I further certify that on January 16, 2026, I served a true and correct copy of the foregoing EAST VALLEY WATER DISTRICT’S EXCEPTIONS TO PROPOSED ORDER ON REMAND by first-class U.S. mail and email on the following persons at the addresses listed below:

Brian Posewitz	Jesse Ratcliffe
213 SW Ash Street, Suite 208	Oregon Department of Justice
Portland, OR 97204	1162 Court St NE
brian@waterwatch.org	Salem, OR 97301
	jesse.d.ratcliffe@doj.oregon.gov
Thomas M. Christ	
Sussman Shank LLP	
1000 SW Broadway, Suite 1400	
Portland, OR 97205	
tchrist@sussmanshank.com	

DATED: January 16, 2026.                      STOEL RIVES LLP

  
 \_\_\_\_\_  
 KIRK B. MAAG, OSB No. 105507  
 kirk.maag@stoel.com  
 DAVID E. FILIPPI, OSB No. 965095  
 david.filippi@stoel.com  
 MERISSA A. MOELLER, OSB No. 153926  
 merissa.moeller@stoel.com  
 HAYLEY K. SILTANEN, OSB No. 164825  
 hayley.siltanen@stoel.com

*Attorneys for East Valley Water District*

**STOEL RIVES LLP**  
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
Main 503.224.3380 Fax 503.220.2480

BEFORE THE OREGON WATER RESOURCES COMMISSION

1		
2		)
3	IN THE MATTER OF WATER RIGHT	)
4	APPLICATION R-87871	)
5		)
6	IN THE NAME OF EAST VALLEY WATER	)
7	DISTRICT,	)
8	<i>Applicant</i>	)
9		)

**WATERWATCH OF OREGON'S  
EXCEPTIONS TO PROPOSED FINAL  
ORDER**

**I. INTRODUCTION**

WaterWatch of Oregon supports the proposed final order to deny the application. WaterWatch submits exceptions to parts of the proposed order simply to preserve its rights on any appeal.

**II. BACKGROUND**

East Valley Water District proposes to put a large dam and reservoir, without fish passage, in the middle of Drift Creek, a tributary to the Pudding River used by cutthroat trout, coho salmon, steelhead and lamprey. The District would take the land it needs for the project, using its power of eminent domain, from family farmers who don't want the project.

The Commission decided unanimously in 2019 to deny the application after finding it would impair or be detrimental to the public interest in protecting existing water rights; namely, an instream water right protecting Drift Creek for the benefit of cutthroat trout. The Oregon Court of Appeals upheld that decision. The Oregon Supreme Court upheld it, too, but remanded the case for the Commission to expressly "consider" all of the "public interest" factors in ORS 537.170(8) (which a dissenting justice and WaterWatch thought the Commission already did, at least implicitly).

Now before the Commission is a proposed order on remand. The proposed order would make clear that the Commission considered all the public interests factors when it

1 denied the District’s application, and that it would reach the same result if it “balanced” all  
2 the factors.

3 WaterWatch supports the proposed order. WaterWatch appreciates the Commission’s  
4 thoughtful and detailed analysis of what remains to be done on remand, which is not re-  
5 litigation of every issue in this already overlong case. WaterWatch agrees: that “[t]he scope  
6 of the Court’s remand is narrow”; that express consideration of all public interest factors does  
7 not alter the conclusion that the proposed permit would impair or be detrimental to the public  
8 interest; that “consideration” of the other public interest factors does not require “balancing”  
9 them against each other; and that balancing them would lead to the same conclusion anyway.

10  
11 Simply to preserve its rights on any appeal, WaterWatch submits exceptions with  
12 respect to some portions of the proposed order.  
13

### 14 **III. STATEMENT IN SUPPORT OF PROPOSED ORDER**

15 WaterWatch believes the Commission *did* consider all the public interest factors ORS  
16 537.170(8) when it issued its final order in 2019. The Commission took the time to quote  
17 them in its order and, in addition, to say that it “must consider” them. (*See* Final Order  
18 (2019), p. 5.) WaterWatch doubts the Commission failed to do what it said it must do. The  
19 opposite seems clear: the Commission decided, all things considered, that the proposed dam  
20 and reservoir were not in the public interest. Otherwise, the Commission would have granted  
21 East Valley’s application.  
22

23 As a Commission member said at the last meeting, all the Commission needs to do  
24 now is “show more of [its] work.” The proposed order does that, explaining how, even if the  
25 proposed use would not impair the public interest under any other factor in ORS 537.170(8),  
26

1 it would still impair the public interest overall, given its impact, under factor (f), on the  
 2 existing instream water right protecting Drift Creek for the benefit of cutthroat trout.

3 To be sure, WaterWatch believes the proposed use would impair the public interest  
 4 under other factors, too. (See exceptions below.) However, even accepting the Director’s and  
 5 the Commission’s findings of non-impairment on those factors, the impairment of public  
 6 interest under factor (f) justifies denial of the permit. The proposed findings on the other  
 7 factors, which largely incorporate the Director’s findings, are essentially findings of  
 8 neutrality – findings of non-impairment as opposed to findings of benefits to the public  
 9 interest.<sup>1</sup> As such, they do not offset the impairment of the public interest under factor (f). So,  
 10 the overall result of the proposed use is impairment. And that impairment is substantial. As  
 11 the Commission previously found, the proposed permit would “frustrate the purpose of [the]  
 12 existing in-stream water right” and thus impair that right. (See Final Order, p. 11.) The Court  
 13 of Appeals found substantial evidence to support that finding, *East Valley Water v. Water*  
 14 *Resources Commission*, 328 Or App 790, 808-12 (2023), and the Supreme Court did not  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23

---

24 <sup>1</sup> Even if another public interest factor could be construed to *support* the District’s proposal,  
 25 instead of just not opposing it, it is too late for the District to make that argument. The  
 26 Director’s final order did not say that, and the District did not except to the Director’s final  
 order. It is also too late for the District to submit additional evidence on the subject. The  
 record was closed at the end of the contested case hearing in 2018.

1 disturb it, so it is now the law for this case.<sup>2</sup> Given the importance of protecting existing  
 2 water rights under Oregon law, and the clear impairment of that interest, factor (f) is decisive,  
 3 even if public interests recognized in the other factors would not be impaired.

4 The law does not require the Commission to “balance” the public interest factors. The  
 5 legislature didn’t include the word “balance” in ORS 537.170(8), as it did in other statutes  
 6 directing an agency to consider various factors when making a decision. *See, e.g.*, ORS  
 7 465.315(1)(d) (DEQ shall choose a remediation plan that “balances the following factors: \* \*  
 8 \*.”); ORS 417.827(6) (“When determining whether to designate an entity as an Early  
 9 Learning Hub, the [Early Learning Council] shall balance the following factors: \* \* \*”); ORS  
 10 496.182(8)(a)(A) (directing a “land owning or managing agency” to “balance the statutory  
 11 requirements, rules and policies applicable to the agency’s program” in determining what  
 12 role the land will serve in conserving endangered species).

15 Nor did the legislature assign weights to the various factors. If the legislature wanted  
 16 the Commission to balance the factors in ORS 537.170(8), it would have assigned weights to  
 17 them or directed the Commission to do so. Moreover, the factors don’t lend themselves to  
 18 balancing because there are so many and they are not in clear opposition to one another. For  
 19 example, one does not need to accept “wasteful” use of water (factor (e)) to get “maximum  
 20

---

21 <sup>2</sup> East Valley argued at length to the Court of Appeals that putting a dam and reservoir in the  
 22 middle of Drift Creek, blocking fish migration and destroying three miles of flowing water  
 23 habitat, would not harm cutthroat trout; even claiming that its dam and reservoir might  
 24 improve things because one of its experts, who had never even seen Drift Creek, said it might  
 25 help a little in the lower part of the stream depending on numerous assumptions about how  
 26 the District managed the water. WaterWatch responded at length to all those arguments and  
 they were soundly rejected by the Court of Appeals, *East Valley Water v. Water Resources  
 Commission*, 328 Or App 790 at 808-12. The District did not seriously make those arguments  
 on appeal to the Supreme Court (they were not among the “questions presented”), and the  
 Supreme Court did not address them or make them a topic for remand.

1 economic development” (factor (b)). Just the opposite: maximum development comes from  
2 non-wasteful use of water.

3 In any case, WaterWatch agrees that, even if the factors are “balanced,” the result is  
4 the same, and that it would be wise for the Commission to say that to prevent a further  
5 remand if a reviewing court decides that “balancing” is required. As discussed above, the  
6 impairment under factor (f) – irreparable harm to an existing water right – is clearcut, as the  
7 Commission found and the courts affirmed. It’s also weighty, especially in a water law  
8 system founded on the common-law doctrine of prior appropriation, under which the first  
9 person to apply water to beneficial use is entitled to keep using it thereafter, uninterrupted by  
10 applicants who come later. WaterWatch agrees, as the proposed order states at pages 6-7, that  
11 factor (f) assumes additional weight when the existing right is an instream right, because an  
12 instream right is “held in trust \* \* \* for the benefit of the people of the State of Oregon,”  
13 ORS 537.332(3); *i.e.*, for “public” use.<sup>3</sup>

14  
15  
16 So, even if all the factors are “balanced,” and even accepting the Department’s and  
17 the Commission’s proposed analysis of those factors, East Valley’s application to dam Drift  
18 Creek should be denied on grounds it would impair or be detrimental to the public interest.

#### 19 20 **IV. EXCEPTIONS TO PROPOSED ORDER**

21 As noted above, WaterWatch supports the proposed order to deny the permit.  
22 However, to be clear, WaterWatch does not agree with every aspect of it. To preserve the  
23

24  
25 <sup>3</sup> While WaterWatch agrees with this point, it suggests clarifying that the Commission is not  
26 giving instream water rights special status relative to other water rights but merely  
recognizing the public nature of the beneficial purpose they protect.

1 record as to the portions with which WaterWatch does not agree, WaterWatch submits the  
2 following exceptions, roughly in the order in which the matter excepted to appears in the  
3 proposed order:

4           1.       WaterWatch excepts to the statement in the “Background” that the  
5 Department’s final order in 2019 “essentially affirmed the ALJ’s Proposed Order.” (PFO at  
6 2.) The Department’s order deviated from the ALJ’s proposed order in significant ways,  
7 including elimination of proposed measurement conditions to protect the instream water right  
8 immediately below the dam (instead of just at the mouth of the stream), and a requirement to  
9 clarify with the Oregon Department of Fish and Wildlife the need to protect “peak and  
10 ecological flows” – high flows performing important ecological functions – in addition to  
11 flows protected by the instream right. (*See* Director’s Final Order, p. 1 n. 1; p. 64, no. 51; p.  
12 80 n. 81; pp. 101-02, No. 17.)

13  
14  
15           2.       WaterWatch excepts to incorporation in the Proposed Final Order of all  
16 findings of fact in the Director’s Final Order. (PFO, p. 3.) In support of this exception,  
17 WaterWatch incorporates its exceptions to the Director’s Final Order with respect to the  
18 findings with which it disagreed. (*See* WaterWatch’s Exceptions to Director’s Final Order,  
19 pp. 4-16, 23, 60-63 (Attachment 10), 215-58 (Attachment 13).)

20  
21           3.       WaterWatch excepts to the statement that “EVWD established the  
22 presumption that the proposed appropriation will not impair or be detrimental to the public  
23 interest.” (PFO, p. 3.) In support of this exception, WaterWatch incorporates its exceptions to  
24 the Director’s Final Order on this issue. (*See* WaterWatch’s Exceptions to Director’s Final  
25 Order, pp. 15-17, 23, 154-57 (Attachment 11), 181-191 (Attachment 12).)

26



**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies he filed the foregoing document, pursuant to the proposed order, by emailing it to:

Denise Ruttan  
Legal Secretary  
Natural Resources Section  
Oregon Department of Justice  
denise.ruttan@doj.oregon.gov

The undersigned further certifies he served the foregoing document on the following parties/counsel:

East Valley Water District

Kirk Maag  
Merissa Moeller  
Stoel Rives LLP  
760 SW Ninth Avenue, Ste 3000  
Portland, OR 97205  
kirk.maag@stoel.com  
merissa.moeller@stoel.com

Oregon Water Resources Department

Jesse D Ratcliffe  
Oregon Department of Justice  
1162 Court St. NE  
Salem, OR 97301  
(503) 400-2944  
jesse.d.ratcliffe@doj.oregon.gov

By electronic mail.

DATED: January 20, 2026.

s/ Brian Posewitz

\_\_\_\_\_  
Thomas M. Christ  
Sussman Shank LLP

Brian J. Posewitz  
WaterWatch of Oregon

For WaterWatch of Oregon

CERTIFICATE OF SERVICE

**WaterWatch of Oregon**

213 SW Ash St, Suite 213  
Portland, Oregon 97204  
503-295-4039