



CENTRAL OREGON LANDWATCH

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*Protecting Central Oregon's natural environment
and working for sustainable communities.*

March 14, 2013

The Honorable Brian Clem, Chair
House Land Use Committee
900 Court St., NE, H-284
Salem, OR 97301

Re: House Bill 3362

Dear Representative Clem and Committee Members:

I am writing on behalf of Central Oregon LandWatch to express its opposition to the proposed provisions of HB3362 which would impose the "raise it or waive it" elements of ORS 197.763 to legislative decisions. This proposed change is neither warranted nor advisable.

As examples, I would like to briefly recount LandWatch's experience with two legislative processes of the City of the Bend, one involving a proposed urban growth boundary expansion and the other a proposed Water Public Facilities Plan.

With regard to the proposed urban growth boundary expansion, it would have been virtually impossible to raise all relevant issues in order to then bring them up on appeal where the City made so many last minute changes in its legislative proposals. Also, the City engaged in a "document dump" of new materials into the record just minutes before the Record closed. There was no way for the public to even be aware of the documents and their contents, let alone be able to comment upon them.

With regard to a recent Water Public Facilities Plan, LandWatch did raise specific objections to the City's proposal. One of the objections was that there was insufficient detail or breakdown of the costs associated with a major water project. Months later, just before the City Council finally approved the Water PFP, the Staff did a response to LandWatch's objections, claiming that, in fact, there was a sufficient breakdown on costs. LUBA ended up ruling in LandWatch's favor on that issue.

Another issue LandWatch raised was the City's proposed application of the Water PFP and provision for service outside of the Bend urban growth boundary. LCDR in the UGB case had ruled that such service was impermissible without a goal exception and ruled that the City should do a Water PFP for lands within the UGB. LandWatch objected to

the City's apparent plan to go ahead with the Water PFP applying outside the UGB on lands to the west of Bend. Again, approximately six months later and just before the City Council approved the Water PFP, the Staff disputed that any service was being planned for areas outside the UGB and mentioned that the only places being served were Widgi Creek and the Seventh Mountain Resort. Only after filing a Notice of Intent to Appeal and reviewing the entire Record prepared by the City did LandWatch find that the City, in fact, was providing for new service outside of the UGB to the Tetherow Destination Resort. Not until the Record was prepared by the City did LandWatch see this information (which again was contrary to representations made by the Staff that the only service was to Widgi Creek and the Seventh Mountain Resort). LUBA again ruled in LandWatch's favor, finding that it was impermissible for the provision of expanded water service outside the UGB without a Goal 11 exception. The irony here is that on remand the City changed its mind once again, determining that it was not going to provide additional service to Tetherow and, in fact, had already done those improvements in earlier years.

In addition to the problems of incorrect information being provided by the City and document dumps of information being entered into the Record when the public has had no opportunity to comment upon it, a further problem we have seen with the City of Bend is that its legislative amendments often incorporate by reference voluminous studies and other documents, each with up to 100 to 300 pages in contents. It is extremely difficult to understand the scope and basis of such legislative amendments in order to pursue a "raise it or waive it" process. This is in contrast to quasi-judicial proceedings where it is very clearly laid out what is being proposed.

Attached to this testimony is a letter of LandWatch commenting on the City's Water PFP and then the Staff's Findings to respond to those comments, with relevant sections marked. The Water PFP was adopted right after Staff's Findings were released.

Thank you for this opportunity to comment.

Very truly yours,



PAUL DEWEY

PD:ao
Enclosures



Central Oregon LandWatch

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November 10, 2011

Bend Planning Commissioners
City of Bend
P.O. Box 431
Bend, OR 97709

Re: PZ-11-154: Water Public Facility Plan

Dear Commissioners:

I am writing on behalf of Central Oregon LandWatch to provide preliminary comments in advance of your November 14 hearing on the water public facility plan ("PFP"). Thank you again for continuing the hearing on October 10.

Though I had to leave your October 10 hearing early, I heard a number of Commissioners' questions regarding the City's proposed surface water project involving Tumalo Creek ("SWP"). I know that it has been asserted by some that the SWP has already been decided by the City Council and that it is not appropriate for the Planning Commission to be addressing it now.

To the contrary, it is entirely appropriate and necessary for the Planning Commission to address the SWP. First of all, it is a critical part of the PFP which you are being asked to approve. In fact, it is by far the biggest line item in the list of projects included in the PFP at \$57,750,000. The City's earlier 1996 water PFP and General Plan did not include the SWP. Including the SWP in the General Plan's PFP is one of the reasons for the PFP.

Second, a basic requirement of PFPs under Goal 11 is delineation and approval of major projects such as the SWP. It is through the PFP and its adoption under Goal 11 that land use approval and public review occur for these projects.

As explained later in this letter, LandWatch requests that the Planning Commission remove the SWP from this PFP. It is not needed as there is a viable groundwater option. Removing the SWP would not get rid of the City's surface water rights. Instead, those rights could be leased instream until and if the City decides to use them.

As currently proposed by the City, the water PFP and its associated materials are inadequate in a number of ways. Before addressing these inadequacies, though, it is important to understand what is at risk here in particular with regard to the SWP, both economically and environmentally.

The economic context of this decision is critical. Not only are we in the grips of the toughest economic times since the Great Depression, but the City of Bend is facing massive new sewer infrastructure and other financial demands. The cost of all the new infrastructure and other demands will fall on the backs of Bend ratepayers and taxpayers. At a time such as this, it is not appropriate for the City to incur any unnecessary costs. When other far less expensive options are available, they should be selected. Now is not the time for the City to be taking on extra costs. To get a sense of how out of proportion the proposed SWP is, see the attached Exhibit, "Portland versus Bend - planned surface water improvement projects," (one page by Pete Schneider), which is a comparison of proposed surface water treatments by Portland and Bend. (Note that Portland does not have the groundwater option that Bend does.)

Similarly, the environmental context of this decision is critical. The flow of Tumalo Creek over Tumalo Falls, the flow of Tumalo Creek through Shevlin Park, the millions of dollars invested in fish habitat restoration work on Tumalo Creek, and the flow of Tumalo Creek water into the Middle Deschutes are of great visual, recreation and economic importance to the people of Central Oregon.

At a time when there is virtually unanimous support for getting more water back into our Central Oregon rivers (which, by the way, Sisters, Redmond and Prineville have apparently already done with their surface water rights), the City of Bend is proposing to expand and maximize withdrawals of water from Tumalo Creek. It is not just the additional 2.1 cfs that the City would probably take with the proposed larger pipe (that it currently cannot take due to smaller pipes). The City apparently also hopes to take far more than it has historically taken because of a possible shift in water rights from Tumalo Irrigation District ("TID") to Bend. Junior water rights that the City has not been able to take due to TID's senior water rights may become available as TID pipes more of its water. Currently the City can use only around 7.2 mgd ("millions of gallons/day") of Tumalo Creek water in the summer and only uses around 7-9 mgd in the winter, but under the SWP it proposes taking as many as 18 mgd. The intentions of the City are made clear in the 2011 Optimatics Report at page 5:

"[T]he optimized solutions were designed to maximize use of available surface water supply." (Emphasis added.)

The SWP system proposed to be incorporated into the PFP and General Plan could have a dramatic and negative impact on Tumalo Creek.

INADEQUACIES OF THE PFP.

The inadequacies of the PFP, and the SWP in particular, include fundamental errors in the Optimatics Report and other reports being incorporated by reference into the PFP, the lack of consistency between the PFP and other goals of the existing City General Plan and the failure of the PFP to adequately address the requirements of Goal 11.

Errors in the Optimatics Report and other reports.

There are four fundamental problems with the Optimatics Report and other reports that are to be incorporated by reference into the PFP. First of all, the description of water rights is unclear at best and is incorrect and inconsistent in fundamental ways.

The Optimatics Report and the proposed General Plan Chapter 8 show 13.5 mgd as being provided by \$57,750,000. Where water rights limitations in the summer currently limit use to 7.2 mgd and actual winter use is limited to 7-9 mgd, that is a gross misrepresentation of what the PFP and SWP are providing. If there is, in fact, a plan to use more water in the future, the City must explain how that will happen.

Additionally, the projection of water demand in the Optimatics Report and other materials is completely unrealistic. See, for example, the chart and descriptions of the projected increase in water demand at pages 8 and 11 of the Optimatics Report. On its face, this projected growth is ridiculous, as we all know from our own experience. Additionally, see the attached Exhibit, "MAXIMUM DAY DEMAND," (four pages, by Bill Buchanan), which are diagrams charting the actual decrease in current water demand compared with what the City's consultants have projected in their reports.

Furthermore, the analysis of economics in the Optimatics Report and other materials is limited to operating costs, ignoring critical capital costs. There is no basis for the City in a Goal 11 document which is to address financial cost and feasibility to simply examine operating costs instead of also addressing capital costs. The capital costs of the SWP, of course, are massive. See the attached "ECONOMICS" analysis (two pages by Bruce Aylward) where he examines errors in the economic assumptions of the SWP.

The PFP is not consistent with other provisions of the General Plan.

A fundamental Goal 2 requirement is that amendments to a comprehensive plan be consistent with unamended provisions. The maximization of use of surface water from Tumalo Creek is not consistent with provisions of the General Plan calling for protection of Tumalo Creek and trout habitat.

There has also been no Goal 5 Economic, Social, Environmental and Energy ("ESEE") analysis of impacts on County and City Goal 5 – protected resources, including Tumalo Creek.

As discussed below under the requirements of Goal 11, the PFP and SWP also fail to satisfy the General Plan goal of "reasonable cost."

The PFP does not satisfy the requirements of Goal 11.

Goal 11 and its administrative rules provide several criteria by which a PFP is to be determined as adequate or not. The basic requirement is that public facilities be provided in a "timely, orderly and efficient arrangement" to serve as a framework for development. The PFP fails to

satisfy the Goal 11 requirements in its depiction of costs and funding mechanisms, in failing to provide "orderly and efficient" development, in not showing that the SWP is reliable and in developing a system that extends outside the urban growth boundary.

The PFP listing of projects and gross sums such as the \$57,750,000 for the SWP is an inadequate breakdown of costs, particularly for such a large item. It is particularly necessary for the City to break down the costs of these projects into smaller amounts where projects like the SWP are so large in size. One example of why it is necessary is that the figure of \$57,750,000 given in the PFP for the SWP is apparently already seriously outdated. Other projections show the current expected cost of the project to be \$63-72 million.

The materials in the Optimatics Report and other reports which are incorporated by reference into the PFP also fail to adequately address the cost and funding mechanisms associated with the SWP where they only address pumping costs, not capital costs, as described above. Though the capital costs of \$57,750,000 are identified, the Optimatics Report and other incorporated reports don't explain these costs.

Funding mechanisms and their ability to fund each public facility project must be analyzed. OAR 660-011-0010(1)(g). The PFP's terse description of funding mechanisms as including system development charges ("SDCs") and increased rates is also inadequate. For such a large project as the SWP there needs to be some cogent breakdown of what funding mechanisms will be financing what costs. As shown on the attached chart, "City of Bend Water Rate Increase Forecast," (one page), ratepayers could be hit with substantial increases. The cumulative effects of other increases in rates for sewer facilities should also be addressed.

The PFP is not shown to be "orderly and efficient" when the extreme capital costs of the project are considered. It would be far more "orderly and efficient" for the City to rely on its groundwater resource which is discussed below.

A further fundamental requirement of Goal 11 as well as of the City's General Plan is that the projects included in a PFP be "reliable." The SWP included in the PFP is by no means reliable where it is located in a watershed that in the coming years will suffer a catastrophic fire. This prediction has been made by the Forest Service for years and is not disputed by anyone. Instead, the City claims that its filtration system associated with the SWP will partly deal with sedimentation and other problems after a fire has occurred. However, the City and its consultants have also acknowledged that additional infrastructure will be required to deal with the results of a catastrophic fire. The Planning Commission will find no analysis of this additional project and certainly no breakdown of costs associated with it. There is simply no assessment or basis for an assessment of reliability of this system which is subject to catastrophic failure.

Though it is recognized by the City that the PFP is to only address areas within the urban growth boundary, the Optimatics Report at pages 8-9 clearly shows that the analysis extends far outside the UGB on the west and northwest sides of Bend. This analysis for a system that extends beyond the UGB is simply not permitted under Goal 11.

THE SWP SHOULD BE REMOVED FROM THE PFP.

All references in the PFP and General Plan Chapter 8 amendments to the SWP should be deleted and the incorporation by reference of documents which address the SWP should be qualified to exclude that SWP material. The SWP should not be adopted into the PFP.

Instead of the proposed SWP, the Planning Commission should support utilization of groundwater which includes the far less expensive development of groundwater wells. It should be noted that because of the lack of reliability of surface water that backup groundwater wells are necessary anyway. Because of the City's decreasing water demand and the City's ongoing development of groundwater wells to provide the necessary backup for its surface water use we are fortunate in having a completely adequate groundwater system that is available.

Note also that this substitution of groundwater for the SWP does not mean a loss of the surface water option for the City in the future. The City can easily lease its surface water rights instream and thereby preserve those rights for the future should it ever be decided that it would be economical and advisable for the City to use its surface rights. Though there are those in the City who have claimed that there is some risk involved with such leasing, there has been no analysis explaining what risk there is. If the Planning Commission wishes this issue to be addressed in more detail, then it should ask for representative from the Deschutes River Conservancy and the Upper Deschutes Watershed Council to testify on it. Again, it needs to be recognized that other jurisdictions, including the cities of Sisters, Redmond and Prineville, are doing this leasing option, so there is no reason for the City of Bend not to do so.

For more information on the groundwater option and analyses of the proposed SWP, see the attached "WHITEPAPER," (eight pages by Bill Buchanan), and "Facts concerning the Surface Water Improvement Project" [SWIP] [November 4, 2011]), (two pages by Pete Schneider).

Thank you again for this opportunity to comment and if you have questions I would be glad to address them.

Very truly yours,

PAUL DEWEY

PD:ao

cc: Board

**Supplemental Findings of the Bend City Council in Support of Adoption of a Goal
11 Water Public Facility Plan for the Bend Urban Growth Boundary
April 2012**

I. Purpose

The purpose of these findings is to respond to testimony on the proposed Water Public Facility Plan (PFP), which are now part of the record before the Bend City Council. The testimony includes a November 10, 2011 letter from Paul Dewey on behalf of Central Oregon Landwatch and testimony from other parties submitted into the record related to the Surface Water Improvement Project (SWIP) on or before the Bend Planning Commission's November 14, 2011 hearing.

II. Findings

A. Testimony related to Surface Water Improvement Project.

The Planning Commission received the following testimony directed toward the Surface Water Improvement project:

1. October 10, 2011 letter from Paul Dewey, Central Oregon Landwatch.
2. November 10, 2011 letter from Paul Dewey, Central Oregon Landwatch, including the following attachments:
 - a. City of Bend Water Rate Increase Forecasts
 - b. Economics white paper
 - c. Facts concerning the Surface Water Improvement Project (November 4, 2011)
 - d. Series of charts starting with Maximum Daily Demand
 - e. Portland vs. Bend white paper
 - f. March 16, 2011 White Paper from Bill Buchanan
3. November 10 2011 email from M. Teresa Lawrence
4. November 14, 2011 email from Barbara Kenyon
5. November 14, 2011 letter from Toby Bayard, Stop the Drain Campaign
6. November 14, 2011 testimony from Cheryl Stops, Petroleum Geologist
7. November 14, 2011 testimony from Douglas Werme
8. November 10, 2011 letter (submitted 11/14/2011) from Mark Yinger, Hydrogeologist
9. Several charts (Exhibits 6 through 10) submitted by Bill Buchanan 11/14/2011
10. November 14, 2011 Bend Creek Water Project: A Drain on Ratepayers and the River, submitted by Bill Buchanan

FINDING: The City Council understands that the above-referenced testimony raised the following issues before the Planning Commission, which are summarized below:

- the energy costs estimated for the SWIP;
- the potential impacts of the SWIP on Tumalo Creek;
- whether the SWIP was consistent with the goals of Chapter 8 of the Bend Area General Plan (BAGP), Public Facilities;
- whether the City should abandon its surface water rights and rely solely on groundwater;

estimates for several projects needed for the City's service area that are Class 5 estimates. The record contains the explanation from the City Engineer that the costs of these projects are considered a Class 5 estimate, meaning the project has an estimated level of accuracy of plus 100% to minus 50%. These cost estimates provide a basis from which the City can develop a budget for funding these improvements when they are needed. The PFP includes the required discussion of funding mechanisms under OAR 660-011-0010(1)(g).

4. The PFP satisfies the requirements of Goal 11

FINDING: The City Council finds that the proposed PFP satisfied Goal 11, and its implementing administrative rule at OAR 660-011. These findings are included in the September 2011 "Findings in Support of Adoption of the Goal 11 Water Public Facility Plan for the Bend Urban Growth Boundary."

OAR 660-011-0010(1)(g) requires "a discussion of the provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system." The Water PFP describes the city's use of SDCs, utility rates, and the capital improvement program. Opponent's testimony does not define or identify a standard of adequacy for Goal 11 and why the proposed PFP does not meet this standard.

The November 10, 2011 letter challenges the legitimacy of the cost estimate of \$57,750,000 for the surface water project as inadequate. The testimony indicates that the current expected costs of the project are \$63-\$72 million. The current cost estimates at 30% design for the pipeline and water treatment plant are \$62.6 million and \$5.6 million for hydroelectric and intake facilities, with further cost refinement expected at 60% design in early 2012. The City Council finds that as a Class 5 estimate for a specific CIP project, the estimate in the PFP is within the acceptable range of accuracy for this PFP, and that other financial, CIP, budgeting, rate-making, and policy-level decision making related to infrastructure are the appropriate processes for specific project funding. The Water PFP relies upon the Optimization Study (2011) by Optimatics which does explain how the costs were calculated for the respective projects. The City Council finds that this expert study was prepared in a manner that satisfied the requirements of the Public Works Department, and that the November 10, 2011 letter and the evidence upon which it relies undermines the credibility of this work.

With respect to funding mechanisms, the November 10 letter further argues that the PFP fails to satisfy OAR 660-011-0010(1)(g) because the description of funding mechanisms is terse, inadequate, and that the costs of the Surface Water Project should be further broken down. In addition, this testimony further alleges that city utility ratepayers will face substantial increase in utility rates as a result and that the cumulative effects of these and other rate increases should also be addressed. OAR 660-011-0010(1)(g) requires the following:

(g) A discussion of the provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system.

The November 10 testimony argues that Surface Water Project listed in the Water PFP is not "reliable," and therefore violates both Goal 11 and the City's General Plan, because the watershed in which the Project is located will be the subject of a catastrophic fire. The City Council finds that this testimony does not cite to either the language of OAR 660-011 or Chapter 8 of the General Plan to provide some support for this position. The filtration treatment option for the Surface Water Project chosen by the City Council is specifically intended to protect water quality due to a turbidity event in event of a fire in the watershed. The City Council also finds that the source of surface water from the Tumalo Creek has been relied upon for almost 100 years. The City Council understands that City staff regularly coordinate with the United States Forest Service (USFS) to reduce the risk of fire in the watershed. The City Council finds that the assessment of risk is a policy choice and that the design options for the SWIP have adequately taken this into consideration.

Finally, the November 10 testimony argues that the Optimatics Report shows an analysis of areas outside of the UGB and that this violates Goal 11. The City Council finds that this is not correct. Page 9 of the Optimization Study clearly shows that a "Planning Area Boundary" that includes the City's utility boundary within the UGB. This same Planning Area Boundary includes some lands to the west and the north that are not included in the UGB. Goal 11 does not prohibit the analysis of areas for water service. The improvements proposed in the Report tables are intended to improvement delivery of water to the city's service area within the existing UGB. The only service improvements to areas outside the UGB are to those areas that are already served, including the Inn at the 7th Mountain and Widgi Creek. ✓

Based on the forgoing Supplemental Findings, and the September 2011 Findings in Support of Adoption of the Goal 11 Water Public Facility Plan for the Bend Urban Growth Boundary, the City Council finds that Goal 11, and the Goal 11 administrative rule at OAR 660-011 have been satisfied.