



**Testimony of Brian Posewitz
SB 712 First Public Hearing
Senate Committee on Environment and Natural Resources
March 16, 2015**

Chair Edwards, members of the committee, my name is Brian Posewitz. I am a staff attorney for WaterWatch of Oregon. I am here to testify in opposition to SB 712.

Senate Bill 712 proposes to change a law that was passed in 2005. I was working in a private law firm then, but I was heavily involved in negotiating the 2005 law as a *pro bono* attorney and board member for WaterWatch.

The basic problem addressed by the 2005 law was this:

Normally, a water use permit is issued only when someone is ready, willing and able to put the water to use. That's an important part of our system of water law because it connects priority dates to actual use and not just speculative paper filings. It's also important because a permit application gets evaluated based on circumstances at a time close to when the actual water use begins.

Municipal water providers admittedly need to obtain water for anticipated future demand as well as current needs. However, instead of creating a separate system for doing that, they have kind of warped the permit system by getting permits long before they plan to use any water, and by then getting repeated extensions of the statutory deadline to put the water to use.

One problem with this approach is that it results in potential new water uses today, sometimes on sensitive streams, based on outdated analysis of whether the use makes sense in light of changing circumstances such as environmental concerns and alternative sources of water.

A court case in 2004 cast doubt on the validity of old municipal permits that had been repeatedly extended without any use. That led to the compromise bill in 2005, which was supported by WaterWatch, municipal water providers and the Water Resources Department. Under the compromise, water providers got 20 years instead of five years as the initial permit deadline to put water to use. They also got statutory protection for all the past permits put in doubt by the court case.

The conservation community got primarily one thing: when permits issued before 1998 got extensions to put unused water to use, conditions would be put on the "undeveloped portion" of the permit to "maintain the persistence" of fish listed as endangered, threatened or sensitive

under state of federal law. (There was also a requirement for a “water conservation plan,” which all parties supported.)

The law took effect immediately upon passage and applied, by its terms, “to requests for extensions of time . . . made before, on or after the effective date of this 2005 Act, whether or not construction has commenced under a permit prior to the request.” (HB 3038, Section 5.)

We assumed that the water use that would be conditioned to protect fish was any water use that required the extension – that is, any water that had not been put to use by the previous deadline. After passage of the law, however, some water providers took the position that the only water use subject to fish protections was the water that was not used before the date that the extension request was actually granted, which was often long after the previous deadline expired. Under their position, they could avoid conditions to protect fish entirely by simply delaying their extension requests, and the processing of those requests, until after they had put all water to use, even if that was long after the previous deadline.

A court case in 2013 said that our understanding was what the Legislature intended.

Now the water providers are trying to unilaterally re-write the compromise we reached in 2005. They are essentially asking you to exempt, from the review to protect fish, any water used before December 11, 2013. (The bill would also exempt them from water conservation plans, but we are told that will be changed.)

We oppose this bill because it would substantially rewrite the bargain we reached in 2005. It would exempt an unknown amount of water, on unknown streams, from a fish review that was the primary benefit the conservation community received in exchange for the significant compromises it made in 2005.

My colleague Lisa Brown will explain these issues in more detail.

Thank you for the opportunity to testify and I would be happy to answer any questions.

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