

## White Paper: House Bill 3369

---

### **I. Introduction**

House Bill 3369, enacted during Oregon’s 2009 Legislative Session, contains three key elements. First, the measure facilitates a \$2.5 million allocation to a specific aquifer storage and recharge project in the Umatilla Basin. Second, the legislation creates a grant fund and loan program for eligible water development projects in the Umatilla Basin as well as the Columbia River Basin. Third, the legislation calls for the development of an Integrated Water Resources Strategy (IWRS) to “meet Oregon’s in-stream and out-of-stream water needs”.<sup>1</sup> This paper discusses each of the measure’s key components and the manner in which it is now being implemented.

### **II. Understanding HB 3369 And The Associated Political Dynamics**

#### **A. Umatilla Specific Provisions**

House Bill 3369, in conjunction with SB 5535, facilitated a \$2.5 million allocation to a specific water storage project in the Umatilla Basin. It should be noted that no agricultural organization opposed this allocation. However, the chief proponents of the Umatilla Basin project agreed to include provisions in HB 3369 that were unrelated to the Umatilla Basin project so as to provide an incentive for Democrat lawmakers to support the legislation. These provisions called for the implementation of new stringent environmental standards for future development projects in the Columbia River Basin, as well as for the development of an IWRS.

Water for Life (WFL) viewed the IWRS and other provisions inserted into HB 3369 as having devastating long-term consequences for water users throughout the state. WFL believed these long-term consequences outweighed the benefits resulting from the one-time allocation of funds to the Umatilla Basin and opposed the legislation upon such basis.

WFL was also concerned that provisions in the bill designed to appeal to agricultural water users would not actually provide benefits to the resource community. For example, in addition to facilitating a specific one-time allocation of funds for a project in the Umatilla Basin, HB 3369 established grant and loan programs that would be accessible to other water users in the Columbia River Basin. Such programs, in theory, could provide a significant benefit to agricultural water users. However, HB 3369 was drafted in a manner that allowed the Umatilla Basin project to receive funding without having to comply with the requirements that would apply to all other grant and loan applicants. In

---

<sup>1</sup> HB 3369 §44(3)(a)

WFL's view, these requirements that would apply to all projects other than the Umatilla Project were designed so that projects primarily aimed at enhancing in-stream flows would qualify for public funding, whereas projects aimed at storing water for out-of-stream uses would not qualify for public financing.

Whether proponents of the Umatilla Basin project could have obtained the funding facilitated by HB 3369 without having to support the IWRS and other detrimental aspects of the legislation is a question that can never be affirmatively answered. What is certain is HB 3369 became law. The Umatilla Basin succeeded in obtaining its desired \$2.5 million allocation and environmental stakeholders secured a number of programs that WFL believes will have substantial adverse effects on agricultural water users over the long term.

### **B. Grant/Loan Requirements**

One key component of HB 3369 is that it creates grant and loan programs for water development projects. In the abstract, the agricultural community appeared nearly unanimous in its support for grant and loan programs to develop water development projects in the state. However, the specific programs established by HB 3369 raised a number of concerns for Water for Life and certain others within the agricultural sector.

During the 2009 Legislative Session, WFL argued application requirements for the grant and loan programs established through the bill appeared designed to ensure that environmentally oriented projects would qualify for funding with substantially greater ease than agricultural projects. For example, the law pertaining to grant applications specifically gives preference to projects that (1) "recharge aquifers in limited and critical ground water areas," (2) "are designed to deliver the greatest net environmental public benefit," (3) "include in-stream flow restoration components," (4) "conserve water," or (5) "provide for stored water to be used for restoring or augmenting stream flows in a manner that conserves, maintains and enhances water quality, aquatic life, fish life or other ecological values." *See*, HB 3369 §22(2). It is certainly possible for an agricultural water storage project to accomplish each of the foregoing objectives on some level as an incident to the project's primary agricultural objective. However, as funding for water storage projects is limited, the Department will inevitably be required to make side by side comparisons of projects, granting funding to some and denying funding to others. In a side by side comparison of water storage projects, an environmental water storage project that is created for the express purpose of enhancing in-stream flows and improving water quality will have a greater net environmental benefit than an agricultural project that provides some environmental benefits incidental to its primary agricultural purpose. As HB 3369 requires the department to give priority to projects that meet the foregoing factors and deliver the "greatest net environmental public benefit," the law essentially requires the Department to give environmentally oriented projects precedence over agriculturally oriented projects that provide incidental environmental benefits.

In addition, WFL argued the application requirements interjected dangerous undefined terms and concepts into Oregon statute. WFL argued these terms were antithetical to agriculture and were intended to establish a precedent allowing future legislators to employ these concepts in other statutes and policies to the detriment of agriculture or other out-of-stream uses. In particular, WFL pointed to the fact HB 3369 repeatedly refers to “peak” and “ecological” flows as part of the definition of “net environmental public benefit” used throughout HB 3369. *See*, HB 3369 §18(2)(d). The terms “peak” and “ecological” flows are not defined and have never before been included within Oregon statute. During the session, WFL argued that peak and ecological flows could easily be interpreted to include every drop of water that would exist in-stream in the absence of any human activity. This is particularly true since there is no scientific consensus as to the definition of these terms, which means the interpretation of these terms will be subject to the whims of Oregon state agencies. WFL argued that inserting these amorphous and scientifically ungrounded terms into Oregon statute would create a precedent for including such terms elsewhere in Oregon’s water law statutes to the detriment of agriculture.

Finally, WFL argued the grant and loan programs in HB 3369 subverted the doctrine of prior appropriation and conflicted with Oregon’s in-stream water rights act. For example, HB 3369 §23(2)(a) provides that a water storage project must be designed so at least 25% of the so-called new water from the project is dedicated for the purpose of providing net environmental public benefits or in-stream benefits. Further, provisions in HB 3369 §23(5) state that a project must be “operated in a manner that actually dedicates the percentage of new stored water for net environmental public benefit or in-stream benefit that the project was designed to dedicate for those purposes.” Related provisions found at §23(4) provide “the department shall quantify and **legally protect** the increment of new water returned in stream...”

Read together, the above provisions call for at least 25% of new water from a storage project to be absolutely protected in-stream. In other words, the water will be protected in-stream irrespective of whether there is a senior water user on the stream otherwise entitled to utilize the water. Thus, in effect, the so-called new water from storage projects will be given super-priority over all other water rights on stream. Though it has been asserted by other parties that HB 3369 provides “legal protection” for environmental water by relying on “existing statutory provisions,” that is not in fact the case.

WFL argued the results of HB 3369 failing to rely on existing statutory provisions are several. First, HB 3369 contravenes a key limitation of the Oregon In-stream Water Rights Act (ORS 537.332). The In-stream Water Rights Act authorizes ODFW, DEQ, and Oregon Parks & Recreation to request in-stream water rights for specific purposes, but limits the amount that can be requested to the “amount of water necessary” to support the identified in-stream uses. HB 3369 provides for water to be protected in-stream irrespective of whether such protection is necessary or not.

Second, HB 3369 departs from the In-stream Water Rights Act by legally protecting water in-stream without regard to priority date. Under the In-stream Water Rights Act, in-stream water rights are granted the same characteristics as any other water right, assigned a priority date, and otherwise regulated in accordance with the doctrine of prior appropriation. HB 3369 §23, by contrast, appears to contemplate a new type of in-stream right that is legally protected in a manner that ensures the water associated with the right is actually dedicated to in-stream use. This in effect creates a new type of water right that has super priority over all other rights on a stream or basin.

Third, HB 3369 expressly does not rely on the Oregon Conserved Water Statutes, which provide a model for how new water created through conservation or storage may be protected in a manner that is consistent with the In-stream Water Rights Act and the doctrine of prior appropriation. As may be seen below, ORS 637.470(3) expressly relies on the existing statutory framework to protect new water in-stream:

*After determining the quantity of conserved water, if any, required to mitigate the effects on other water rights, the commission shall allocate 25 percent of the remaining conserved water to the state and 75 percent to the applicant, unless the applicant proposes a higher allocation to the state or more than 25 percent of the funds used to finance the conservation measures comes from federal or state public sources. If more than 25 percent of the funds used to finance the conservation measures comes from federal or state public sources and is not subject to repayment, the commission shall allocate to the state a percentage equal to the percentage of public funds used to finance the conservation measures and allocate to the applicant a percentage equal to the percentage of other funds used to finance the conservation measures. If the commission determines that the water allocated to the state is necessary to support in-stream flow purposes in accordance with ORS 537.332 to 537.360, the water shall be converted to an in-stream water right. If the water allocated to the state is not necessary to support in-stream flow purposes, it shall revert to the public for appropriation by the next user in priority. In no event, however, shall the applicant receive less than 25 percent of the remaining conserved water unless the applicant proposes a higher allocation to the state.*

WFL's contention during the session was that HB 3369 does not mirror the above language of the conserved water statutes or otherwise rely on existing law to define how new water from storage projects will be protected. Rather, the measure simply indicates that such rights shall be protected absolutely, contravening the In-stream Water Rights Act and doctrine of prior appropriation since the water that is not needed to support in-stream uses does not revert to the public for appropriation by the next user in priority as is the case under Oregon's longstanding conserved water statutes quoted above.

Proponents of the Umatilla Basin project contested WFL's arguments concerning the preconditions for obtaining a loan or grant under HB 3369 by suggesting it would be fairly easy for applicants to comply with the bill's conditions. The proponents' argument was difficult for WFL to disprove, as the proponents were able to point to their own example of being able to qualify for financing with little difficulty. However, as WFL pointed out, HB 3369 was drafted in a manner that specifically exempted the Umatilla Basin project from the requirements and preconditions applicable to all other projects in the state. Thus, the proponents were essentially comparing apples to oranges by arguing their own example demonstrated the fallacy of WFL's arguments. However, the complexity of HB 3369 precluded many lawmakers from recognizing that HB 3369 subjected the Umatilla Basin to different requirements than those applicable to grant and loan applicants from all other parts of the state. Moreover, with WFL and OWRC being the only two agricultural organizations expressing concerns with these requirements, lawmakers were able to assume from the neutral position taken by other organizations that WFL's concerns regarding the requirements were overstated.

### **C. Statewide Water Resources Strategy**

The third key component of HB 3369 is that it mandates the development of a statewide water resources strategy. On some level, practically all agricultural organizations agreed the development of plans to ensure that Oregon's future water needs are met is a prudent and worthwhile endeavor. However, the provisions of HB 3369 calling for the development of such a strategy were troubling to the agricultural community in two material respects.

First, certain agricultural groups argued the process for developing the strategy set forth in HB 3369 lacked vision insofar as it directed government officials, rather than the public, to take primary responsibility for developing the water policy that will guide Oregon for years to come. In addition, it was argued that HB 3369 elevates the role of Oregon's environmental agencies in establishing the direction of Oregon water policy. For example, under HB 3369, the Department of Environmental Quality and Department of Fish and Wildlife are expressly required to be involved in the development of the "integrated water resources strategy" provided for in the bill. *See*, §44(3). In addition, these two agencies are required to be involved in the development of data on Oregon's in-stream and out-of-stream water needs. Such provisions have the effect of elevating the role of Oregon's environmental agencies in the development of Oregon water policy. In this regard, WFL suggested the IWRS was inconsistent with longstanding policies set forth in Oregon statute. For example, ORS 536.220(c) provides in relevant part:

The economic and general welfare of the people of this state have been seriously impaired and are in danger of further impairment by the exercise of some single-purpose power or influence over the water resources of this state or portions thereof

by each of a large number of public authorities, and by an equally large number of legislative declarations by statute of single-purpose policies with regard to such water resources, resulting in friction and duplication of activity among such public authorities, in confusion as to what is primary and what is secondary beneficial use or control of such water resources and in a consequent failure to utilize and control such water resources for multiple purposes for the maximum beneficial use and control possible and necessary.

In addition, ORS 536.220(2)(a) provides:

It is in the interest of the public welfare that a coordinated, integrated state water resources policy be formulated and means provided for its enforcement, that plans and programs for the development and enlargement of the water resources of this state be devised and promoted and that other activities designed to encourage, promote and secure the maximum beneficial use and control of such water resources and the development of additional water supplies be carried out by a **single state agency** which, in carrying out its functions, shall give proper and adequate consideration to the multiple aspects of the beneficial use and control of such water resources with an impartiality of interest except that designed to best protect and promote the public welfare generally.

During the 2009 Oregon Legislative Session, WFL argued that a state water resources strategy that enhances the role of multiple environmental agencies in the development of water policy is not in the best interest of agricultural water users. Similarly, WFL opposed the strategy contained in HB 3369 on the grounds that it emphasized in-stream uses over out-of-stream uses and directed agencies responsible for developing the policy to develop “plans related to the challenges presented by climate change.” *See*, HB 3369 §44(1)(d)(D). WFL argued the challenges presented by climate change were not an appropriate focal point for a statewide water resources strategy and a statewide water resources strategy should seek to balance in-stream and out-of-stream needs, rather than being weighted heavily in favor of in-stream uses.

Many agricultural groups besides WFL shared in the concerns regarding the IWRS stated above. In fact, it is probable that proponents of the Umatilla Basin project ultimately shared these concerns. However, the Umatilla Basin project proponents viewed the benefits of the \$2.5 million allocation as overshadowing these concerns and with the exception of WFL and OWRC the remainder of the agricultural community remained neutral on HB 3369 notwithstanding their shared concerns regarding the IWRS.

### III. Issues Associated With Implementation

HB 3369 requires water development projects to meet an array of requirements before being eligible for the grant and loan programs the bill establishes. One of the many requirements is for the project to create a “net environmental public benefit”. The legislation defines the term as follows:

“Net environmental public benefit” means the improvement of ecological conditions, compared with a preproject baseline, that relate to one or more of the following:

(a) Water, velocity, temperature, stream flow levels and other stream flow conditions that provide for critical life history needs of state or federally listed sensitive, threatened or endangered fish species and that maintain or enhance population viability of those species.

(b) Stream flow conditions that support the life stages of native fish species or that will allow for the reintroduction of native fish species.

(c) Return flows to surface water bodies from aquifer recharge projects or from other underground water storage projects, and the in-stream protection for those return flows designed to have in-stream benefits.

(d) Protection of peak flows at above-ground and underground storage projects.

(e) Protection of ecological flows at above-ground and underground storage projects.

(f) Water temperature, dissolved oxygen content and other water quality conditions, and progress towards the attainment of water standards that are not being met in the relevant water body.

(g) Ground water quality or quantity.

(h) Aquatic or riparian habitat restoration or enhancement.

(i) Eliminating nonpoint source pollutant transport.

As may be seen, the term “net environmental public benefit” contains numerous factors. In addition, it should be kept in mind that whether a project provides a net environmental public benefit is only one of many other requirements that an applicant for a loan or grant established by HB 3369 must satisfy.

One of Water for Life’s primary concerns with HB 3369 during the 2009 Legislative Session was that it interjected the terms “peak and ecological flows” into Oregon statute. Specifically, these terms are used in HB 3369 as a subdefinition of the term “net environmental public benefit”. Water for Life’s concern with introducing the terms peak and ecological flows into Oregon statute was that policymakers would subsequently attempt to use the term in other statutory and policy contexts.

The work being conducted on the IWRS indicates that Water for Life's concerns were well founded. Following the adoption of HB 3369, a work group was organized to further define the meaning of the terms peak and ecological flows. This work group is known as the Ecological Flow Technical Advisory Group (EFTAG). The group is meeting on an ongoing basis, ostensibly for the purpose of clarifying the definitions of peak and ecological flows so they can be meaningfully employed in the context of the grant and loan programs established through HB 3369.

The ongoing activities of the EFTAG work group are of concern to WFL for two reasons. First, WFL believes the workgroup is giving undue attention to the terms peak and ecological flows. As explained above, the terms are only a subdefinition of the term "net environmental public benefit," which in itself is only one of several criteria that an applicant must satisfy to obtain a grant or loan under HB 3369. Thus, it appears these terms are receiving an undue level of attention. No similar work group has been convened to clarify the meaning of the broader term "net environmental public benefit" of which peak and ecological flows are merely a subpart. Moreover, no similar work group has been convened to examine any of the other subdefinitions of "net environmental public benefit." Based on the text of HB 3369, there is no reason to conclude the terms peak and ecological flows are more deserving of work group attention than the broader term "net environmental public benefit" or many of the other terms contained in the bill.

Secondly, WFL is concerned with how the terms peak and ecological flows are regularly surfacing in discussions that are related to the development of the IWRS called for in HB 3369. For example, a Draft Ecology and Ecosystems Issue Paper issued on November 19, 2009 as part of the integrated water resources strategy meetings provides as follows:

"As Oregon analyzes ways to meet future water needs, many stakeholders want assurance that the state will not meet out-of-stream demands at the expense of Oregon's ecosystems. Under House Bill 3369, passed in 2009, OWRD and its partners must undertake a public process to define and protect "peak and ecological flows" in the award of grants and loans to implement water resource projects. The definition of these terms will be an important part of Oregon's integrated water resources strategy, because of the need to balance the ecological functions of streams with the potential to capture and store high winter flows as part of Oregon's water supply portfolio."

Notwithstanding the above, there is no legal basis for discussions of peak and ecological flows to be taking place in the context of the integrated water resources strategy. HB 3369 specifically identifies the topics that are to be addressed in the integrated water resources strategy and the peak and ecological flows are not one of those topics. A review of HB 3369 indicates the provisions of the bill dealing with the development of an integrated water supply strategy (Sections 44-45) do not make any reference to the terms

peak and ecological flows. Moreover, these terms are not contained anywhere else in statute, beyond the new statutory provisions pertaining to the grant and loans programs created pursuant to HB 3369.

It might be stated in response to the above assertion that peak and ecological flows are appropriately being addressed as part of the integrated water resources strategy because HB 3369 specifically calls for the strategy to address in-stream needs. This argument is without merit, however, because peak and ecological flows are not part of Oregon's public policy pertaining to in-stream water rights specifically or in-stream needs generally. For example, Oregon statute at ORS 537.332(2) defines the term "in-stream flow" to mean: "the **minimum** quantity of water necessary to support the public use requested by an agency". An integrated water resources strategy aimed at protecting peak and ecological flows is inconsistent with existing Oregon policy pertaining to in-stream water rights. Whereas terms such as peak and ecological flows are aimed at protecting the maximum quantity for in-stream use, Oregon's public policy on in-stream flows, set forth in statute, is in all instances directed at protecting the minimum quantity of water necessary to protect certain (defined) in-stream values. Interjecting discussions of peak and ecological flows into this discussion is not in keeping with Oregon's public policy pertaining to in-stream flows or otherwise consistent with the purpose and intent of the provisions of HB 3369 calling for the development of an integrated water resources strategy.

As the agricultural community is becoming increasingly concerned with discussions of peak and ecological flows being improperly interjected into discussions surrounding the development of the IWRS, the question becomes: what can the agricultural community do to address this problem? In this regard, it appears several constructive avenues are available. First, the agricultural community should coordinate efforts and make their concerns known to the Water Resources Department through written and oral correspondence. Second, insofar as the Department's actions are not keeping with the legislative intent of HB 3369, members of the agricultural community should be contacting their local lawmakers and asking their lawmakers to address this concern with the agency. Third, members of the agricultural community must participate and engage in the process surrounding the IWRS to the greatest extent possible. Though the IWRS process is heavily tilted in favor of in-stream interests and agricultural participants will likely not be able to change its overall direction, it would be remiss for the agricultural sector not to participate in the process and make their objections known.