January 15, 2024

The Honorable Tina Kotek
Governor
State of Oregon
900 Court Street, Suite 254
Salem, Oregon 97301-4047

Re: An appeal for gubernatorial leadership to modernize Oregon's water laws

Dear Governor Kotek:

We are writing to you in response to an invitation from the Governor's Natural Resources Office for input on state efforts to address key barriers preventing the state's achievement of its water security and resiliency goals. We are a concerned group of Oregon water law attorneys with over 100 years of combined experience. We have worked with a diverse range of water-related stakeholders, testified on water issues before Oregon legislative committees, served on state agency rules advisory committees, appeared before administrative hearings officers in water rights contested case proceedings, represented clients on a multitude of water quantity and quality disputes at all levels of our state court system, served in natural resources-related roles in state and federal government, and educated and trained Oregon law students and lawyers in water law.

We are fully cognizant of the varied viewpoints on Oregon's water laws and policies, having represented parties across the full spectrum of positions, and we certainly do not have all the answers. However, we wholeheartedly agree that Oregon water issues are at a critical inflection point, which is why we have accepted this invitation to share our concerns and ideas about possible ways to advance state water policy.

For more than a century, the state has granted rights to tens of thousands of Oregonians to use and store water. The state's surface waters are largely spoken for during the summer, with little to no water available for new appropriations—and even many existing water rights holders—during this period. Similarly, instream flows suffer from the same lack of available water. Meanwhile, many groundwater sources are being strained or are already critically overdrawn. Summers in the Pacific Northwest are getting hotter, and droughts are increasing in frequency and severity. While snowpack, precipitation, and runoff patterns are changing, Oregon's laws and policies are not adapting to address those changes. Instead, Oregon's water laws and the administrative structures implementing those laws are simply not suited to meet the present and future needs of our state, whether for current water right holders, those seeking new water supplies, those looking to sustain and enhance the natural environment, or all of the state's residents who depend on and value the state's water resources. Oregon's water management is at a tipping point, necessitating decisive action and adaptation. We respectfully urge gubernatorial attention and leadership to address these needs.

Nearly all constituencies with an interest in water—farmers and ranchers, industries, municipalities, conservation and environmental groups, Native American Tribes, socially vulnerable communities, and interested Oregonians who do not hold water rights—are

increasingly dissatisfied with Oregon's water laws and practices. The dissatisfaction stems from opaque, years-long, and, at times, arbitrary decision making; an overemphasis on process to the detriment of substance; a lack of predictable, transparent, and timely outcomes creating uncertainties for long-term investment decisions; extensive planning without follow-up implementation; critical shortcomings in the administration and regulation of water use for all purposes; decisions made despite a paucity of data; and a chronic lack of adequate funding. In short, Oregon's water, which belongs to the public, is being mismanaged despite the best efforts of state employees trying to carry out their public obligations.

The time is now for fresh and proactive leadership to rationalize and update Oregon's water laws. The legislature recently took an energetic interest in water issues, including a welcome infusion of funding. This is a good start, but much more is needed to achieve the scale of change required to responsibly meet present-day and future demands. With guidance and strategic direction from your administration, we believe a more comprehensive approach with up-front objectives can help set the stage for a more coordinated and efficient set of legislative proposals leading to meaningful reforms. This letter details some of the "why" and "what" for a proposed approach and calls upon your administration to begin work with the necessary stakeholders to develop a suite of proposals (the "how") that would make substantive differences.

We are well aware that this is not an easy undertaking, but we also believe that when it comes to the state's management of its precious water resources, continuation of the status quo is not an acceptable option. With an appropriate range of incentives, a balance of compromises, and meaningful state funding and support, we are confident that progress can be made.[1]

I. The Importance of Water

Oregon's water resources mean many things to the diverse individuals, groups, and constituencies who call Oregon home. For some, water is the foundation or a key building block for their livelihoods. Others highly value water for its ecological purposes—such as fish and wildlife habitat—and for broader public uses, including recreation, scenic values, and overall quality of life. Oregon's rivers, lakes, and aquifers provide critical drinking water supplies for the entire state, from the largest municipalities to individual well owners. For Oregon's Indigenous communities, water carries cultural and spiritual meaning; in their words, "Water is sacred. Water is life."[2]

Regardless of how water is valued, and what one group may view as the most important use or purpose in relation to others, there is a common desire for the effective use, management, and protection of Oregon's water resources. Unfortunately, efforts to improve water resources

[1] The views expressed in this letter are solely those of the authors, and do not necessarily represent, and should not be attributed to, the positions or viewpoints of former or current clients represented by the authors, their respective firms, or their places of employment.

[2] Tribal Water Task Force, Summary Report at 1 (2023).

management have been sporadic, inconsistent, and chronically underfunded. Objectives and priorities are often left unidentified or only vaguely stated, with on-the-ground implementation seemingly disconnected from or even at odds with those objectives and priorities. And the many residents of the state who do not hold water rights—including communities of color and low-income communities—have not had meaningful opportunities to be heard in connection with critical issues of water supply, allocation, and quality, even though they will feel the impacts acutely.

We believe Oregonians have reached a collective moment where a shared agenda for Oregon's water future is imperative. For all stakeholders, the alternatives to reaching agreement are grim, as competition for increasingly scarce resources will only increase. And while we believe that there is universal acknowledgement that the current system is not adequate, we also recognize that change is hard. People have adapted to the status quo, and many will likely resist the desperately needed modernization of state water laws because of uncertainty and risk associated with changing a familiar system, no matter how flawed. That resistance should not, however, thwart state action; rather, the necessary changes will require broad civic leadership and reasonable compromise from all Oregonians.

The state must move into a new era of water management guided by a shared sense of purpose. With this overarching goal in mind, we offer this call to the enterprise of the state—the legislative, judicial, and executive branches of our government—to discharge their constitutionally assigned roles to enact, interpret, and enforce modern water laws designed to meet the needs of current and future generations of Oregonians. There has never been a more critical time for government to work for the people of Oregon.

As Governor, you are uniquely positioned to lead the effort to design a water resources policy agenda, to courageously move us into the next era of water protection and management that creates a more resilient system designed to better serve the environment, the economy, and the cultural needs and interests of *all* Oregonians. We believe that over the next 12 months, this agenda could be shaped by discussion, collaboration, and compromise, with what may well turn out to be modest but targeted actions in 2025, but that could set the stage for broader, more comprehensive reforms in future legislative sessions.

II. Key Studies and Reports

Oregon's water resources, water laws and policies, and pressing water issues have been the subject of numerous studies and reports, from a variety of sources and a multitude of perspectives. (A California report is included for an additional perspective.) Without endorsing any particular viewpoint or proposed solution, we draw your attention to the following reports and documents:

- 2012 OWRD Integrated Water Resources Strategy
- 2016 Secretary of State Audit Report, Oregon Water Resources Department

- 2017-2022 Oregon's Integrated Water Resources Strategy Progress Report
- 2019 OWRD/Oregon's 100-Year Water Vision
- 2022 Oregon Water Justice Framework
- 2022 Oregon Business Council Study: Securing Oregon's Water Future
- 2022 Updating California Water Laws to Address Drought and Climate Change
- 2023 Tribal Water Task Force Summary Report
- 2023 Secretary of State Advisory Report 2023-04: State Leadership Must Take Action to Protect Water Security for All Oregonians
- 2023 Sixth Oregon Climate Assessment
- 2023 Business Case for Investing in Water in Oregon

While by no means an exhaustive list, collectively these reports provide a robust body of work setting forth a wide range of concerns of Oregonians relating to the state's management of its water resources. What is striking are the overlapping themes among the reports despite varied authorship and perspectives. Rather than add yet another report to the already extensive body of work, we have endeavored to synthesize what we believe are the key common themes into a concise list of priority areas. (The reports and documents listed above are collectively referred to below as the "Reference Water Reports.")

III. Priority Areas

Several priority areas stand out when reviewing the Reference Water Reports. Those areas include concerns about (in no particular order): (a) the critical need for efficient collection, sharing, and use of high quality water data; (b) the need for robust, coordinated water planning and management systems premised on integrated and place-based principles; (c) the need for a less rigid, more efficient water rights administrative system; (d) the need for better recognition and integration of Oregon's Native American Tribes and their traditional knowledge into state water policy development and administration; (e) the need for more attention to water security and equitable access to water resources by all Oregonians; and (f) the need for sufficient and sustained funding to appropriately manage water resources and administer water rights. We briefly describe each priority area further below.

A. Priority Area 1: The need for efficient collection, sharing, and use of high quality water data.

The Reference Water Reports consistently and almost uniformly point to the lack of adequate data as a primary barrier to modernizing the management of Oregon's water resources. Oregon lacks a coordinated, integrated, and accessible system for understanding surface water and ground water availability, water use, and water demand, for both out-of-stream and instream uses. While current state law requires some water users to measure and/or report their water use, and while the Oregon Water Resources Department ("OWRD") has some avenues for requiring measurement and reporting requirements in certain areas under certain conditions, there are major gaps in measurement and even greater deficiencies in reporting water use. Only approximately 17 percent of the state's water right holders are required to measure and report their water use, and some 20 percent of those do not report despite being required to do so. Additional use measurement, stream gaging, groundwater studies, water demand projections, and quantification of instream water rights and needs are all required to provide the necessary information for effective water management.

The lack of available and useable water data hampers Oregon's ability to effectively, efficiently, and timely develop and implement state and regional water plans, administer and enforce existing water rights, evaluate new water rights and transfer applications, incentivize conservation activities, and otherwise allow water users the needed flexibility to adapt to changing climate patterns and evolving needs. The deficiencies persist despite recent incremental legislative efforts to improve data accessibility.

We urge you, as Governor, to consider making the collection, coordination, integration, and accessibility of data related to water availability, water use, and water demand a key legislative and executive priority. We anticipate that such efforts may very well involve financial support, directives, and incentives. Without this essential building block firmly in place, little progress will be made in addressing many of the other shortcomings in the state's current approach to managing the state's water resources, which are outlined below.

B. Priority Area 2: The need for robust, coordinated water planning and management systems premised on integrated and place-based principles.

OWRD has engaged in several robust water-related planning efforts in recent years—not the least of which has been the development of the Integrated Water Resources Strategy ("IWRS"). However, a number of the Reference Water Reports criticize the lack of clarity as to how and by whom the IWRS is to be implemented, particularly by agencies other than OWRD. Although minimal staffing and funding were provided to OWRD for IWRS implementation and coordination in the 2023 legislative session, that package does not fully fund plan implementation and does not address other agencies' roles in carrying out the plan or the relationship of the IWRS to other natural resource plans.

Another significant recent planning effort is the regional "place-based integrated water resources planning" program, which was launched as a pilot project in 2015. Plans have been completed for the Mid-Coast, Lower John Day, and Upper Grande Ronde basins; a planning effort in the Harney Basin failed. Some of the Reference Water Reports criticize the lack of clarity as to the state agencies' roles in supporting this planning program and the lack of clarity as to responsibility for implementing the plans, as well as how those plans are to be coordinated with the IWRS. The 2023 legislature extended the authority for the place-based planning program, and provided minimal staffing and funding for additional plans and for support from OWRD, the Oregon Department of Environmental Quality ("DEQ"), and the Oregon Department of Agriculture ("ODA"), but did not address the larger issues of implementation responsibility or integration with the IWRS and other agency plans.

Some of the Reference Water Reports also criticize the general lack of coordination and unclear lines of responsibility among state agencies with water-related authorities—specifically, OWRD, DEQ, the Oregon Department of Fish and Wildlife ("ODFW"), ODA, and the Oregon Health Authority. This lack of coordination results in delayed, fragmented, duplicative, and conflicting decision-making concerning water rights permitting, water management activities, and other water-related agency actions.

We recommend that you create a mechanism to coordinate decision making and planning on water between OWRD, DEQ, and ODFW. It is imperative that these agencies work together to clarify their respective roles in implementing the IWRS, and to further clarify their roles and responsibilities with regard to water rights permitting and other water-related agency actions. We also recommend prioritizing efforts to formalize, expedite, and fully fund the regional planning process statewide (for both planning and implementation), and to clarify the relationship of the regional plans to the IWRS. Each of the three completed plans took six years. OWRD could be requested to develop a process to cut that time in half. Participating state agencies could be directed and funded to provide the necessary information and technical assistance for the planning processes, including necessary climate data. Oregon's Native American Tribes could be funded to participate fully in regional planning, as could other groups of unrepresented Oregonians.

C. Priority Area 3: The need for a less rigid, more efficient water rights administrative system.

The Reference Water Reports describe an inefficient and ineffective administrative system that is failing to produce timely, transparent, defensible, and data-based decisions on water use applications. The system is extremely frustrating to all stakeholders—whether permit or transfer applicants, third parties who disagree with OWRD's decisions, or the non-water-rights-holding public who cannot or do not participate in the process but expect good water resources management.

OWRD receives several hundred water use applications every year—for permits, transfers, and other approvals—and the numbers are growing. In the 1990s, the agency faced an application crisis, with a backlog of 6,000 permit applications. The legislature responded in 1995 by expediting certain procedures and providing minimal additional staff and funding, which helped resolve the immediate crisis but did not address other systemic problems.[3]

OWRD's initial decision on an application is only the beginning, and the bottleneck has simply moved to a later stage of the process. Applicants and other interested parties can "protest" OWRD's decisions. A protest generates a requirement for a trial-type contested case hearing before an Administrative Law Judge ("ALJ") from the Office of Administrative Hearings ("OAH"). The ALJ's decision is then reviewed by the OWRD Director, and in some cases by the Oregon Water Resources Commission, and the final agency decision may be subjected to judicial review. Both protests and petitions for judicial review are on the increase as water use becomes more contentious. OWRD now has a backlog of well over 100 protests, and about 30 active cases in the courts.[4] Some of these applications were first submitted to the agency more than three decades ago. Only a few protests are scheduled for contested case proceedings annually due to lack of staff and budget for the legal costs, meaning that the agency will not catch up on the current backlog anytime soon.

Although some stakeholders may benefit from delays and opaque decision making, overall, an inefficient and ineffective administrative process is bad for management of the public resource and thus undermines all parties' interests. Crucially, the problem is not simply one of funds and staff—although those factors play a large role. Delays and poor decision making also result from the lack of transparency and clarity in the substantive decision-making standards. Without going into extensive detail, the criticisms include the lack of transparency and clarity as to (1) how OWRD determines and applies the public interest review required by statute for permit applications; (2) the level of deference, if any, given by OWRD or the ALJs to other agencies' comments and participation in OWRD contested cases; (3) the role of OWRD itself in defending against a protest;[5] (4) the proper scope of issues and evidence to consider in a contested case, compared to the agency's record when it made its decision; and (5) the proper role for the Director and Commission in their review of an ALJ decision.

[3] Once OWRD begins processing a water use application, the decision-making timeline is specified by mandatory deadlines provided in statutes and rules; OWRD's current level of staffing and funding enables the agency to initially process most simple permit applications within several months and most transfer applications within two years, though many can take much longer. The 1995 changes thus helped eliminate the initial application review backlog.

[4] Filing a petition for judicial review typically results in an automatic stay of OWRD's decision, thus potentially adding several more years to the process of getting to a final determination.

[5] Even though the purpose of a contested case is to determine the correctness of OWRD's proposed decision, the agency takes the position that it is not a full "party" to the contested case and expects the applicant and protestant to handle the laboring oars in defending or challenging the decision.

Additionally, cases are randomly assigned to ALJs at the OAH, and most have no expertise or familiarity with water law, thus decreasing the efficiency of hearings and increasing the potential for error. Furthermore, previous contested case decisions are not readily available to applicants, protesters, or the public, so there is no useable record of the agency's "case law" to help streamline later cases. Finally, OWRD's original decisions and the follow-on decisions by the OAH, the agency on appeal, and the courts are all hampered by the lack of reliable and accessible data on water availability and use as described in section III.A above.

The administrative decision-making system is simply not up to the task of efficiently and effectively managing Oregon's water resources—now or in the future. The system has not kept up with permit and transfer applications and protests for decades, and the problem will only worsen moving forward. Some of the "fixes" could be relatively easy—i.e., train a panel of ALJs to handle water cases and create an accessible database of previous decisions. But fully addressing the limitations of the current system will require concerted leadership by your office. We respectfully request that you consider convening a process to improve OWRD's decision-making system.

D. Priority Area 4: The need for better recognition and integration of Oregon's Native American Tribes and their traditional knowledge in state water policy development and administration.

Some of the Reference Water Reports discuss in detail the need to recognize and more proactively incorporate traditional ecological (or Indigenous) knowledge as part of the use and management of the state's water resources. These reports observe that for too long, this critical knowledge has been marginalized, or ignored entirely, by state policy makers and water resource managers. That is not to say that the state has failed to make progress in recognizing the value of tribal knowledge, but that progress has been uneven and many times dependent on individual leadership as opposed to a robust statewide policy that could more appropriately integrate traditional tribal knowledge into state water policy development and administration.

The Tribal Water Task Force Summary Report contains several recommendations, including, but not limited to, integration of cultural values, state agency coordination with tribes, increasing opportunities for place-based tribal co-management of water resources, development and funding of projects aimed at restoring water-dependent tribal resources, and identifying and addressing data and information gaps that impact tribal interests. We encourage you to remember, however, that each of Oregon's nine federally recognized tribes are distinct, constitutionally recognized sovereign entities, meaning that each tribe has the power and the right to choose whether and how to participate in state water policy development and administration. Questions of data-sovereignty will also be an important piece of the process as consultation and engagement with tribes gets underway.

As a first step, we urge you to engage in a robust government-to-government consultation with each Oregon tribe, individually, to receive direction as to if and how each may wish to participate

in this important effort. We would also urge you to pay particular attention to the capacity of each tribe to engage in meaningful and sustained consultation and, possibly, to develop ways for the state to augment that capacity. Finally, we recommend that you consider such consultations and discourse to be a cornerstone of any water resources policy agenda that you may choose to advance; we believe doing so will lead to better resource outcomes.

E. Priority Area 5: The need for more attention to water security and equitable access to water resources by all Oregonians.

The Reference Water Reports recognize the need to give attention to issues of equity in water resources management on behalf of all Oregonians, including those who are impacted and may be harmed by water management decisions but who may not themselves hold water rights. Communities throughout the state would benefit from a renewed recognition of the long-standing principle of Oregon's water law that water is a public resource that must be managed to meet the public's needs, including those who do not hold water rights, consistent with principles of prior appropriation and the need to adapt more proactively to changing climate patterns. Such an approach should direct OWRD to promulgate new rules and issue guidance to give substantive and consistent meaning to the public interest review required by existing Oregon water law, and to integrate it with a streamlined administrative process as described above. We recommend guidance on the public interest review during the water rights administration processes to facilitate more efficient and predictable outcomes and give concrete meaning to broader public values in the process.

F. Priority Area 6: The need for sufficient and sustained funding to appropriately manage water resources and administer water rights.

The Reference Water Reports consistently recognize the chronic underfunding of the water rights administration, management, and planning systems. The lack of funding in the system impacts all stakeholders. Mechanisms to create sustained and equitable funding for managing water resources are critical to moving any agenda forward, as many other western states have recognized for their own state water management efforts. Without sustained funding, the current system is unable to generate timely and substantively consistent water rights decision-making, which is urgently needed to address our current water resource challenges.

To confront the demands and realities of making the water rights administration system work for all Oregonians as discussed earlier in this letter, we believe the state should consider development of a sustainable funding strategy that can be used to train staff, personnel, and watermasters across the state within the existing water division structure to make resources available in local communities and offer more active management and decision making consistent with regional plans and the statewide IWRS. Such funding could also provide resources for OWRD and OAH to process cases efficiently and effectively for more meaningful and prompt resolution of issues to support on-the-ground management. Sustainable funding can also support capacity building in

historically under-represented and excluded communities to participate in the water management process to ensure more efficient resolution of important public issues. We encourage you to prioritize examining and evaluating the sustainable funding programs that have been established within other western states to develop a viable funding approach for Oregon.

IV. Appeal for Leadership

Thank you for the opportunity to provide input on the development of broad water policy priorities to help guide state efforts in addressing key barriers to the state's achievement of critical water management goals. We hope that you find this letter informative and, perhaps, the foundation for the development of a water resources agenda aimed at modernizing Oregon's water laws and policies to better serve the environment, economy, and cultural needs and interests of all Oregonians.

Respectfully,

Adell Amos:
Clayton R. Hess Professor of Law
University of Oregon

David Filippi:
Partner
Stoel Rives LLP

Janet Neuman:
Retired Professor of Law
Lewis and Clark Law School
Retired Senior Counsel, Tonkon Torp LLP

Josh Newton:
Partner
Best Best & Krieger LLP

cc: Geoff Huntington
Senior Natural Resources Advisor
Office of the Governor

TINA KOTEK
GOVERNOR

April 11, 2024

Adell Amos
aamos@uoregon.edu

Janet Neuman
janneuman@comcast.net

David Filippi
David.Filippi@stoel.com

Josh Newton
Josh.Newton@bbklaw.com

RE: Water Policy Priorities for Oregon

Dear Adell, David, Janet, and Josh:

Thank you for your letter concerning the development of water policy priorities to advance the State's water security and resiliency goals. I appreciate your willingness to share your time and expertise on an issue of vital importance and impact to all Oregonians.

I found our conversation helpful in providing context and important perspective on how Oregon might take a more proactive pathway to address issue areas of strategic importance to improve management of Oregon's water resources. Already, we are taking initial steps to address some of the opportunities you have raised. While there will be more to come, the following are underway:

- This week, I am directing the Oregon Water Resources Department (OWRD) to pause the ongoing process to revise the State's Integrated Water Resources Strategy to ensure that, when adopted, the strategy will be structured to articulate more definitive outcomes that will best serve the water needs and interests of all Oregonians. Your call out of the imperative for "up-front objectives" to set the stage for more coordination resonates with me, and the process for revising this strategy document is a perfect opportunity and venue for discussing meaningful outcomes that multiple agencies and stakeholders can join together to work toward.
- We have adjusted the recruitment process for the new OWRD director to allow the finalists for the position the opportunity to read your letter, have a conversation with all of you, and then discuss your call for leadership directly with me in their final interview. I am looking for strong vision and leadership from the next director, and your letter will certainly contribute to that process.
- The convergence of new and incoming directors at the Department of Agriculture, the Department of Fish and Wildlife, the Oregon Watershed Enhancement Board, and OWRD offers a tremendous opportunity to truly integrate our approach to tackling water management and other natural resource challenges facing our state. My staff will be working closely with these new directors and the rest of the

> Natural Resources cabinet to establish clear budget and policy priorities aimed at helping Oregon's natural and working landscapes be more resilient in the face of accelerating impacts from a changing climate. More effective water management will be central to that discussion.

With all this in mind, I have also added capacity to my natural resource policy staff in order to dedicate additional attention to water issues. In the near term, that will be most visible in conversations my office will be having with a variety of constituencies to elicit feedback on the issues raised in your letter and suggestions for how we can build a coalition of interests willing to work together to better position our state to manage our water resources more effectively, efficiently, and equitably into the future.

You brought a lot of expertise and time to the table with your January 15, 2024, letter. I thank you for that. I look forward to talking and working with you again in the future.

Sincerely,

Governor Tina Kotek