

Nicole Mardell

From: Smith, Adam <asmith@schwabe.com>
Sent: Wednesday, October 25, 2023 10:55 AM
To: Nicole Mardell; Deschutes2040
Subject: COID Comments [IWOV-PDX.FID4535317]
Attachments: COID Comp Plan Comments_10_25_23.PDF

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[EXTERNAL EMAIL]

Nicole,

Please find the attached correspondence from our firm, representing COID. Please also provide the comments to the Planning Commission, and include the comments in the record for File No. 247-23-000644-TA.

Thanks,
-Adam

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October 25, 2023

VIA E-MAIL

Deschutes County Planning Commission
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D. Adam Smith

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RE: Deschutes County 2040 (Comprehensive Plan Update)
Our File No.: 136697-256185

Dear Commissioners:

Our firm represents Central Oregon Irrigation District (“COID”). On behalf of COID, please accept this letter related to Deschutes County’s Comprehensive Plan update, entitled *Deschutes County 2040* (“Comprehensive Plan” or the “Plan”). In general, COID is concerned that the draft plan includes several statements that are inconsistent with Oregon law, the Statewide Planning Goals, the stated purpose of the Comprehensive Plan, or are otherwise problematic. Further, COID is concerned that the Plan does not reflect the history of collaborative efforts between irrigation districts, governmental entities, and other interested parties with regards to addressing water policy issues in Deschutes County. Instead, the language utilized in the draft Plan unnecessarily places the interests of irrigation districts and the County at odds. Accordingly, COID is concerned that the current draft Plan is both misleading to the public and fails to foster the continued collaboration that our community needs going forward. These concerns are detailed below, with each problematic statement quoted directly from the draft Comprehensive Plan followed by brief description of the specific issue. After those primary concerns, COID additionally provides succinct comments addressing a handful of Goals, Policies, and other statements throughout the Comprehensive Plan which are directly relevant to COID.

Water Supply and Irrigation – Page 3-3

“Much of Deschutes County is served by six irrigation districts (Map 3-1) – these are special entities created for the purpose of delivering water to their patrons. These districts are effectively non-profit water user associations. In addition to irrigation, these districts also supply other services including municipal, industrial, and pond maintenance.”

COID encourages the County to more accurately classify irrigation districts as quasi-municipal corporations chartered under ORS Chapter 545 and operating as political subdivisions of the State of Oregon. Characterizing irrigation districts as “non-profit water user associations” effectively downplays the significance of irrigation districts and their longstanding statutory authority. It is imperative that the Plan appropriately describe irrigation districts such as COID, particularly given the numerous references to irrigation districts when it comes to water issues described throughout the Plan.

Water Supply and Irrigation – Page 3-3

“Existing farms with senior water rights in general have relatively generous irrigation rights, which have rarely been fully utilized, and are expected to have sufficient water to cope with increasing temperatures and drought conditions in the future.”

COID is concerned that describing senior water rights as “relatively generous” and further stating that such rights “have rarely been fully utilized” is needlessly pejorative and not grounded in fact. Further, it is unclear why the current Comprehensive Plan draft specifically states that certain holders of water rights may be able to cope with future climatic conditions. For one, doing so does not contribute to any goal or policy to “provide a blueprint for land use and conservation and development,” the stated purpose of the Comprehensive Plan. [Comprehensive Plan, i-5].

Second, this statement encroaches on and misinterprets the jurisdiction of the Oregon Water Resources Department (OWRD). It is the OWRD who is statutorily authorized to assign water rights in Oregon. The OWRD is not entitled to issue overly “generous” water rights, but rather may only appropriate water for “beneficial use.” [ORS 537.120]. These water rights are then subject to additional “beneficial use” requirements under ORS 540.610, where an owner of a water right will forfeit their right if they fail to use all the water appropriated for a period of five successive years. [ORS 540.610]. COID urges the County to consider this statutory context when making statements pertaining to holders of senior water rights.

Additionally, the Introduction section of the Comprehensive Plan states that the “goals and policies” outlined in the Plan “are based on existing conditions and trends.” [Comprehensive Plan, i-5]. The Plan also notes that “Oregon State Law requires...Comprehensive Plans that are consistent with state and regional goals, laws, administrative rules and other requirements and guidelines.” [Comprehensive Plan, i-6]. Despite this, the current draft fails to reference any “existing conditions or trends” that substantiate the claim that senior water rights “have rarely been fully utilized.” The phrasing used is also arguably misleading as it conflates issues of water scarcity due to climatic conditions with the laws and procedures governing the appropriation of water in Oregon. We urge the County to reconsider its claims pertaining to holders of senior irrigation rights in light of the applicable statutory scheme and by making reference to existing conditions or trends.

Water Resources – Page 5-3

“Water laws are seen as antiquated by many and issues related [to] water levels in private residential wells, irrigation allocation to farmers, and protection of habitat areas for dependent species arise frequently.”

Although again unnecessarily divisive, this statement perhaps accurately reflects a viewpoint held by certain members of the public. COID is concerned that the above-quoted statement nonetheless could be interpreted as reflecting a majority viewpoint or even reflecting the County’s own position. Additionally, merely pointing out one negative view without then fully exploring alternative viewpoints is counterproductive. COID is additionally concerned that these kinds of one-sided statements cut against the collaborative efforts that COID and others equally involved in addressing water issues in our community have worked hard to establish. COID also recommends that the County not waste resources pursuing local planning efforts that are predicated on overturning well established water laws that have been in place for well over a century. Instead, COID is confident that our State’s well established water laws can continue to be legislatively amended to meet our community’s needs into the future. And, COID is confident that the County can successfully adopt a Plan for our community that equally respects our well established water laws.

Water Resources – Page 5-3

“Ongoing development and piping of canals (which limits artificial groundwater recharge while conserving canal water) also exacerbate the issue.”

COID urges the County to proceed cautiously when making broad statements about the alleged negative impacts of piping irrigation canals, given the multitude of environmental, societal, and economic benefits that piping provides. COID further urges the County to refrain from making one-sided statements regarding the piping of irrigation canals, which has far broader implications beyond groundwater.

In the statement quoted above, the County baselessly claims that the piping of canals contributes to the decline of groundwater levels. Interestingly, just prior to this statement in the Plan, the County cites to a credible source of authority in regard to the cause of groundwater decline: the “2021 report by the Oregon Department of Water Resources.” The County cites to this report in stating that groundwater decline is attributable to “drier conditions since the late 1990s, a warming trend in the basin, and decreased snowpack.” It is unclear why the County cites to a credible report to determine the causes of groundwater decline in the County, but follows this with an unsubstantiated claim that the piping of canals also contributes to this issue. Notably, the OWRD’s “2021 Oregon Groundwater Resource Concerns Assessment” report does not mention piping as a source of declining groundwater resources. [OWRD, *2021 Oregon Groundwater Resources Concerns Assessment*.]

It is also important to note that groundwater levels are an indicator of water scarcity. The very purpose of piping irrigation canals is to create more efficient irrigation systems, ultimately to conserve water. The County may also want to consider noting that water in irrigation canals is lost due to evaporation, and that this lost water cannot be used by an end user or contribute to

groundwater reserves. [Ambrook Research, “Some of Oregon’s Irrigation Systems Are More Than 100 Years Old, and It Shows,” Oct 24, 2022, <https://ambrook.com/research/environment/deschutes-river-oregon-irrigation-canal>].

For example, the open nature of irrigation canals requires the COID to withdraw nearly double the amount of water it would need to if these canals were piped, in order to deliver the same volume of water to the end user. [COID, <https://coidpiping.com/#phase1map>]. Piping irrigation canals also reduces energy use, increases agricultural production, reduces water use, enhances environmental conditions, and generates renewable energy production opportunities. [COID, <https://coidpiping.com/#phase1map>].

COID would also like to point out that the statement quoted above appears to contradict the Plan’s Policy 5.2.3, which sets out a policy to “[s]upport conservation efforts by irrigation districts, including projects to provide incentives for water conservation, such as piping of canals.” [Comprehensive Plan, 5-9].

Water Resources – Page 5-3

“The high desert climate of Central Oregon poses many challenges with water supply and allocation. ... A 2021 report by the Oregon Department of Water Resources found that groundwater levels through Deschutes County are declining, by as much as 50 feet of total decline in the central part of the basin. ... Deschutes County has limited jurisdiction of water use, instead playing a coordination role with irrigation districts, water users, and owners of private wells.”

When read in context of the description of declining groundwater levels and “many challenges with water supply,”, this section concluding sentence acknowledging that “Deschutes County has limited jurisdiction of water use” could be read as placing the blame for these issues on the other listed entities – i.e. irrigation districts, water users, and owners of private wells. COID encourages the County to omit or rephrase statements, such as the one quoted above, to avoid unintentionally suggesting that any class of water rights holders have been poor stewards of their water resources.

It should also be noted that this appears to be the only instance in the Plan where the County specifically makes note of its “limited jurisdiction” when it comes to addressing water issues. Accordingly, the County is well advised to continue fostering a collaborative approach when it comes to these water issues as that is realistically the only way for the County to achieve the numerous water related Goals and Policies enumerated throughout the Plan.

Water Resources – Page 5-9

“Interest in a re-evaluation of water rights for urban, agricultural, and ‘hobby farm’ uses.”

This statement illustrates certain Deschutes County residents’ interest in “re-evaluating” water rights for certain users. To provide clarification, it may be helpful to include a statement explaining that the County does not have the authority or the expertise to unilaterally reevaluate water rights for these uses. Furthermore, the County may wish to consider its requirement to adhere to Oregon’s Statewide Land Use Planning Goals & Guidelines. For example, Goal 3 is

“to preserve and maintain agricultural lands.” [OAR 660-015-0000(3)]. This goal may be inconsistent with a broad statement that could be interpreted as suggesting that water rights for agricultural uses should be curtailed.

Water Resources – Page 5-9

“Develop regional, comprehensive water management policies that balance the diverse needs of water users and recognize Oregon water law.”

COID notes that Goal 5.1 as quoted above is a good example of the types of edits that the current draft Plan is lacking. COID suggests that the Goal should instead likely be phrased as follows” “Support regional, comprehensive water management solutions that balance the diverse needs of water users and recognize Oregon water law.” COID’s suggested phrasing more accurately reflects the reality that the County may not have the expertise in-house or the authority to unilaterally develop water management policies, and instead must continue to play a collaborative role in doing so along with other entities such as irrigation districts.

Additional Comments on Goals and Policies in the Comprehensive Plan

The following list highlights various goals, polices, and other statements provided in the Plan that are particularly applicable to COID. Each quotation is accompanied by a brief response indicating COID’s concurrence or concern. As these goals and polices may have a material effect on COID and in turn its customers, COID at the very least urges the County to elaborate on and otherwise clarify its intentions reflected in each statement.

Policy 2.2.2. “Help coordinate regional planning efforts with other agencies on land use policies and actions that impact their jurisdictions.” (Page 2-10)

→ COID supports this goal and hopes to see it come to fruition. In the past, the lack of coordination between COID, Deschutes County, and other interested jurisdictions has been a source of public confusion.

Policy 2.2.11.d. “For Exclusive Farm Use zones, partitions shall be allowed based on state law and the County Zoning Ordinance.” (Page 2-11)

→ Given that such partitions may be hindered due to COID delivery requirements, COID recommends that such issues are identified early in the application process.

“Because the total volume of water available for agricultural and human usage is fixed, strategies to decrease water usage...will become more crucial.” (Page 3-3)

→ COID agrees with this sentiment and is supportive of working to reduce inefficient usage of our water resource. Given that this must be done within existing legal frameworks established by State and Federal law, COID recommends that the County add additional clarity.

“Agricultural uses continue to be affected by conflicts with adjacent or surrounding non-farm uses.” (Page 3-3)

→ COID disagrees with this statement and recommends it be deleted from the Plan. “Right to Farm” statutes already address this issue at the state level, leaving the County without much room or opportunity to further address the issue without causing conflicts.

“Community members opposed rezoning low productivity farmland with poor soil to allow greater opportunities for housing, while supporting rezoning of this land to preserve open space.” (Page 3-7)

→ COID is neutral on this statement, and asserts simply that from its perspective farmland should not be rezoned if it is being farmed, regardless of soil quality. But if unused for agricultural activity and no associated water rights, COID has no objection to rezoning land with poor soil quality.

Goal 3.1. “Preserve and maintain agricultural lands, operations, and uses to support Deschutes County’s agricultural economy.” (Page 3-7)

→ COID agrees with this goal because irrigation districts primarily deliver water for agricultural uses.

Policy 3.1.1. “Retain agricultural lands through Exclusive Farm Use zoning.” (Page 3-7)

→ COID supports this policy because, again, irrigation districts primarily deliver water for agricultural use.

Policy 3.1.3. “Develop comprehensive plan policy criteria and code to provide clarity on when and how EFU parcels can be converted to other designations.” (Page 3-7)

→ COID agrees with this policy and recommends additional detail be added to the Plan to provide clarity on the County’s intentions.

Policy 3.2.1. “Encourage farming by promoting the raising and selling of crops, livestock and/or poultry.” (Page 3-7)

→ COID supports this policy for the reasons previously stated.

Policy 3.2.3. “Support and encourage small farming enterprises through a variety of related strategies and programs, including, but not limited to, niche markets, organic farming, food council, buy local, farmers markets, farm to-table activities, farm stands or value-added products, or other programs or strategies.” (Page 3-7)

→ COID supports this policy for the reason previously stated.

Policy 3.2.4. “Work cooperatively with irrigation districts, public agencies and representatives, and landowners to promote and support agricultural uses and operations, including through use of rural reserves, conservation easements, transfer of development rights programs, land acquisition, and other preservation strategies.” (Page 3-8)

→ COID supports this policy, but recommends that additional detail be added to Plan to provide clarity on the County’s intentions. If nothing else, COID further notes that any such “preservation strategies” must be consistent with existing Federal and State laws.

Policy 3.2.8. “Use land use policy and development code requirements, including right-to-farm provisions, as well as coordination with other jurisdictions to minimize conflicts between residential uses and agricultural uses and continue to promote the viable operation of agricultural uses.” (Page 3-8)

→ COID agrees with this policy but recommends additional detail be added to the Plan to provide clarity on the County’s intentions.

“It is important to underscore that the primary water resource management process occurs outside of the state land use planning system. Oregon land use and water management are not integrated; there are no overarching administrative rules that consider statewide water management in conjunction with land use planning.” (Page 5-5)

→ COID is neutral on this statement, but recommends that the County specifically ensure that the Plan and the goals and policies articulated therein do not conflict with Federal and State law governing our community’s water resources.

“Deschutes county is fortunate to be underlain on the Western side by relatively young volcanic lava sponge...The great advantage this provides is that the resulting summer flows into the Deschutes basin are not as dependent on overground flow of snowmelt, and therefore are expected to maintain a relatively stable water supply even as snowpack decreases into the next century.” (Page 5-6)

→ COID agrees with this statement and reiterates that the Deschutes River is one of the most stable rivers in in the western United States.

“Because the groundwater in the Deschutes Basin is directly connected to the flow of the Deschutes River, all additional groundwater use must be mitigated by decreased use of groundwater elsewhere through the Oregon Water Resources Department’s Deschutes Groundwater Mitigation program. This can include retiring of other water rights, or the release of water into the waterway. A mitigation permit must be obtained before a new groundwater right can be accessed.” (Page 5-7)

→ COID agrees with the statement and the necessity of mitigating groundwater resources and the use of mitigation permits. Further to maintain its current operations, COID notes that it does not anticipate giving up its existing water rights or otherwise providing mitigation credits.

“The majority of the irrigation in Deschutes County comes from reservoirs which are mostly spring fed from the Cascades. Reservoirs serve the dual purpose of supplying water for irrigation and ensuring sufficient streamflow in the lower Deschutes River. The water levels in these lakes have been low in recent years due to drought in the region. When water is limited, the supply rate is determined by the age of water rights, with the more senior water permits having priority over the youngest. The Swalley and Central Irrigations are the most senior in the county, while the North Union Irrigation District is the most junior.” (Page 5-8)

→ COID kindly recommends that the County re-write this section to correct typos and to address awkward phrasing.

Goal 5.1. “Develop regional, comprehensive water management policies that balance the diverse needs of water users and recognize Oregon water law.” (Page 5-9)

→ COID agrees with the importance of developing such policies that conform to applicable law. COID further agrees that entities such as irrigation districts that are actively engaged in managing and/or utilizing water rights should be central partners included in the development of these policies.

Policy 5.1.1. “Participate in Statewide and regional water planning...” (Page 5-9)

→ COID supports this policy, and recommends that those entities such as irrigation district should be central partners in developing such policies.

Policy 5.1.2. “Support grants for water system infrastructure improvements, upgrades, or expansions.” (Page 5-9)

→ COID supports this policy and is willing to provide additional information to the County to document its efforts to liaison with farms to apply for and receive grants supporting irrigation system improvements.

Policy 5.1.3. “Consider potential impacts on water quality and availability in surrounding areas as part of the siting, planning, and approval processes for Destination Resorts and other large-scale developments.” (Page 5-9)

→ COID agrees that water quantity and quality are important considerations for large-scale developments. COID further encourages the County to consult irrigation districts prior to making assumptions regarding water use and mitigation.

Policy 5.2.1.d. “Encourage and educate the community about on-farm efficiency measures, including upgrades to equipment.” (Page 5-10)

→ COID supports this policy and reminds the County that COID liaisons with farmers to improve irrigation systems and to receive grants for improvements.

Policy 5.2.3. “Support conservation efforts by irrigation districts, property owners and other water users, including programs to provide incentives for water conservation, such as piping of canals and laterals, water banking, exchanges of water rights, voluntary transfers of in-stream flows, onsite efficiency measures, and other means.” (Page 5-10)

→ COID agrees with this policy. COID recommends additional edits to the Plan clarifying COID’s efforts to continue piping and modernizing its irrigation system.

Goal 5.5. “Coordinate land use and water policies to address management and allocation of water in Deschutes County.” (Page 5-12)

→ COID agrees with this goal, and recommends additional clarity regarding the need to include irrigation districts in such coordination efforts considering such district's role in the allocation of water to end users.

Policy 5.5.5. “Coordinate with the irrigation districts to ensure irrigated land partitions and lot line adjustments are not approved without notice to the affected district.” (Page 5-12)

→ COID agrees that irrigation districts should be provided the opportunity to comment on partition applications so that they can recommend appropriate conditions of approval.

“The districts are created for the purpose of delivering water to their patrons. As such they are effectively non-profit water user associations. In addition to irrigation uses, these districts also supply a number of other services, including municipal, industrial, and pond maintenance, warranting coordination with municipalities.” (Pages 12-4-5)

→ COID agrees that irrigation districts should be included in policy conversation and provided opportunities to work closely with the County and other impacted municipalities given the significant and diverse roles that irrigation districts play in the County. COID again reiterates that irrigation districts are not “effectively non-profit water user associations.” As noted above, irrigation districts are instead quasi-municipal corporations chartered under ORS Chapter 545 and operating as political subdivisions of the State of Oregon.

“Approval of these facilities...” (referring to hydroelectric energy generation) “...have previously been contentious with many community members expressing concern about wildlife and impacts to other basin users. Irrigation districts have expressed interest in reducing barriers to permitting these types of developments to promote renewable energy development using man-made waterways.” (Page 14-4)

→ COID disagrees with this statement as it is misleading. Rather than advocating for “reducing barriers,” COID suggests that irrigation districts have instead urged the County to update the Deschutes County Code so that it appropriately address in-conduit hydroelectric projects instead of only in-channel hydroelectric projects. In that regard, COID agrees that the Deschutes County Code should be so updated.

Conclusion

For the foregoing reasons, COID urges the Deschutes County Planning Commission to reconsider the specific statements quoted and discussed above.

Specifically, COID urges the County to take greater efforts to ensure that the statements contained in the Comprehensive Plan are based in fact with supporting data then appropriately cited within the Plan. More broadly, COID urges the County to reconsider statements in the draft Comprehensive Plan that could be viewed as taking sides on complicated water issues, or which could be interpreted as being unnecessarily divisive. Lastly, COID urges the County to include statements within the Comprehensive Plan that clearly articulate the limits on the County's

statutory authority when it comes to regulating water rights or regulating our community's water resources.

COID thanks the Planning Commission and County staff for the opportunity to comment on the draft Deschutes County 2040 Comprehensive Plan, and COID looks forward to communicating further with the County as the drafting process continues. COID also welcomes any opportunity to continue meeting with County staff in person to answer questions and provide further information regarding the above-listed concerns. Please do not hesitate to contact us with any questions regarding scheduling such a meeting.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Adam Smith', with a stylized flourish extending to the right.

D. Adam Smith

DASM

PDX\37619131.5