



Informational Meeting on HB 3430 Before the House Committee on Energy and Environment

May 21, 2019

**Testimony of Tom Byler, Director
Oregon Water Resources Department**



HB 3430 – Automatic Stay

- **ORS 536.075 sets out the processes available to parties associated with final orders issued by the Water Resources Commission and Water Resources Department**
- **ORS 536.075 addresses both final orders in contested a case and final orders in other than contested case**
- **HB 3430 proposes to repeal ORS 536.075(5)**

ORS 536.075(5) Overview

- **The filing of a petition for judicial review of a final order of the Water Resources Commission or Water Resources Department shall stay enforcement of the order**
- **The Commission or Department may deny the stay upon a determination that substantial public harm will result if the order is stayed**
- **The Commission or Department denial shall be in writing and specifically state the substantial public harm that will result from allowing the stay**

Comparison of Stay Processes for Final Orders in Other than Contested Cases

Oregon Water Code

ORS 536.075(5)

- Stay is automatic upon filing of petition for judicial review
- Commission or Department may deny stay on determination of substantial public harm

Oregon APA - ORS 183.484

(Model Rules 137-004-0090)

- Petition for reconsideration of final order may also request stay
- Petition must state facts and reasons to show stay should be granted:
 - Irreparable injury if not stayed;
 - Colorable claim of error in order; and
 - Stay will not result in substantial public harm
- Agency must grant/deny within 30 days
 - Granting of stay may include conditions (bond, irrevocable letter of credit)

Recent Experience with Automatic Stay Provision – Distribution of Water Rights

- **OWRD distributes water rights based on a priority system—regulating (shutting off) junior water rights in favor of senior water rights when water is short**
- **Regulation of junior water rights is enforced through final orders in other than contested cases**
- **2015 - OWRD began to see petitions for judicial review associated with regulation final orders assert the automatic stay provision**



Recent Experience with Automatic Stay Provision – Distribution of Water Rights

- **The automatic stay allows continued water use by junior water right holder pending completion of judicial review process**
- **It is unlikely judicial review process can be completed during the current season of water use**
- **It takes time and resources for the Water Resources Department or Commission to develop necessary factual findings and issue a final order to deny the automatic stay**

Recent Experience with Automatic Stay Provision – Distribution of Water

- **Since 2015, 32 petitions for judicial review asserted the automatic stay provision, precluding regulation according to relative priority dates**
 - **Petitions from Umatilla, Willamette, Malheur Lake and Klamath basins**
 - **Six stays have been denied by OWRD (all surface water)**
- **Klamath Basin**
 - **2013/14 – Basin Adjudication Administrative Findings submitted, regulation begins**
 - **Basin accounts for 27 of the 32 petitions for judicial review with automatic stays related to regulation of water rights**



Examples of Petitions for Judicial Review and Automatic Stay

- **Petition for judicial review filed by junior surface water right holder after being regulated by OWRD to protect senior surface water right**
- **Petition for judicial review filed by water user who had no water right**
- **Petition for judicial review filed by junior groundwater right holder after being regulated for senior surface water right**
 - **Klamath Basin case pending before Oregon Court of Appeals**

Questions?