



To: Senate Committee on Natural Resources and Wildfire Recovery
Chair Golden
Senator Heard
Senator Kennemer
Senator Patterson
Senator Prozanski

From: Caylin Barter, Oregon Water Program Manager

Date: May 12, 2021

RE: Support for HB 2244 A -- A Narrowly-Tailored Step toward Stopping Automatic Stay Abuse

Chair Golden and Members of the Committee:

Thank you for the opportunity to provide testimony on HB 2244 A, which amends ORS 536.075 related to automatic stays of enforcement for certain water right shut-off orders issued by OWRD.

Wild Salmon Center works with partners to conserve healthy wild salmon fisheries across the North Pacific. Streamflow is key to that conservation effort. Many salmon runs in Oregon are listed as endangered, and low flows are limiting their recovery. These problems are worsening due to climate change and increased demand for water. Wild Salmon Center has a stake in improving agency processes that protect instream values and contribute to fair and predictable water rights administration. That is why **we support HB 2244 A**, which (1) requires a party filing a legal challenge to a water shut-off order to provide notice of the suit to OWRD in three narrow instances in order to have the shut-off stayed, and (2) preserves the enhanced due process protections available to water right holders through the automatic stay while acknowledging the unique aspects of instream water rights and Tribal water rights.

OWRD's automatic stay provision deviates from Oregon's Administrative Procedures Act

Oregon's system of prior appropriation depends on OWRD being able to quickly regulate off water uses according to priority date in order to preserve senior uses during times of shortage. Regulation orders are issued as "final orders in other than contested cases," meaning that junior users are not provided a hearing before their water use is curtailed in favor of senior water rights. This system recognizes that Watermasters need to be able to make swift adjustments to protect senior rights. But a water user subject to regulation is not without recourse -- they can challenge the shut-off by filing a petition for judicial review (PJR) of the final order.

Oregon's Administrative Procedures Act sets forth default agency processes related to PJRs, including stays. The petitioner can request a stay of the enforcement of the agency order by showing that: (1) the petitioner will suffer irreparable harm if the order is not stayed; (2) there is a colorable claim of error in the order; and (3) granting the stay will not result in public harm. Even if the standard for a stay is met, the agency can condition it: for instance, by requiring posting of a bond.

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However, in 1985, the legislature inverted the model rules on stays when it comes to PJRs of final orders issued by OWRD. Under ORS 536.075, the filing of a PJR *automatically stays* enforcement of the order *unless* OWRD determines that specific substantial public harm will result.

Automatic stays are on the rise, largely due to enforcement of senior rights in Klamath Basin

The automatic stay provision sat mostly dormant for nearly three decades. But it sprang to life following the release of the “Order of Determination” in 2013 in the Klamath Basin Adjudication. This step in the long-running general stream adjudication finally vested OWRD with the authority to begin regulating by priority date in favor of senior determined claims, which includes Tribal water rights for instream flows that bear a “time immemorial” priority date and are necessary to protect treaty-reserved fishing rights .

Thirty-two PJRs of OWRD final orders were filed between 2015 and 2019, and 27 of the 32 were filed by junior users challenging regulation by priority date in the Klamath Basin. OWRD denied the stays in six instances based on the “substantial public harm” standard, though in order to develop the specific factual findings necessary to deny the automatic stays on this basis, the Department had to redirect staff time away from other Department tasks. Under the current law, the automatic stay allows junior water use to continue unabated, to the detriment of the senior use, until issuance of a final order specifically denying the stay, or until the end of irrigation season.

HB 2244 A solves a pernicious enforcement problem while preserving due process protections

OWRD is facing a narrow problem: certain junior water users, primarily in the Klamath Basin, are wielding the automatic stay provision to avoid getting shut off in favor of senior rights -- particularly Tribal instream rights. If allowed to continue, these actions risk undermining public confidence in the Klamath Basin Adjudication, the agency’s enforcement capabilities, and the overall system of prior appropriation. And they specifically threaten the sovereignty of the Klamath Tribes to exercise their treaty-reserved fishing rights, which can only be protected by maintaining instream flows necessary to support native fish species.

HB 2244 A doesn’t solve the problem, but it is a step in the right direction: it amends ORS 536.075 to require a person who appeals a shut-off order that was issued in favor of certain water rights to provide notice of the appeal to OWRD in order to take advantage of the automatic stay provision. While we strongly preferred previous versions of the bill, we still support this version because it addresses the most egregious part of the automatic stay that denies notice to senior Tribal water right holders affected by a PJR challenging enforcement in favor of those very rights.

- HB 2244 A applies only to final orders that “regulated off” certain water uses (i.e., it *does not* apply to other types of final orders from OWRD or the Water Resources Commission).
- HB 2244 A applies only to regulation in favor of a narrow subset of water rights (i.e., it *does not* disturb the applicability of the automatic stay in cases where the Department regulates in favor of the vast majority of water rights that fall *outside* of the following categories):
 - determined claims in the Upper Klamath Basin¹
 - instream water rights held by a state agency
 - Tribal water rights or Tribal determined claims.

¹ As defined in section 1, chapter 445, Oregon Laws 2015: “As used in this section, ‘determined claim’ means a water right in the Upper Klamath Basin determined and established in an order of determination certified by the Water Resources Director under ORS 539.130.”

- HB 2244 A merely requires the petitioner to serve the Department with the petition (i.e., the petitioner still gets the protection of the automatic stay; they just have to provide notice).
- HB 2244 A requires expedited review of the petition by the circuit court within 21 days if OWRD denies the automatic stay under the “substantial public harm” standard (i.e., affected petitioners are fast-tracked to the top of the court docket if the automatic stay is denied, in recognition of the importance of water for all beneficial uses).
- HB 2244 A requires OWRD, upon receipt of a petition that appeals a shut-off in favor of a Tribal water right, to send the petition to the affected Tribe within five days (i.e., the bill provides Tribes bare notice of legal proceedings that affect the exercise of treaty-reserved fishing rights).

Instream water rights held by state agencies are properly included in HB 2244 A

An instream water right is defined as “a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water instream for public use.” Oregon recognizes instream water rights as having “the same legal status as any other water right,” meaning a junior out-of-stream right can be regulated off in favor of an instream right consistent with the prior appropriation doctrine. That said, only approximately 1,500 instream water rights currently exist, most bearing junior priority dates from the 1990s. In times of shortage, it is rare that an instream water right is in a senior position relative to a water right for out-of-stream use; therefore, regulation *in favor* of an instream right merits a presumption *against staying* a shut-off order since public uses are likely at risk of harm if the junior withdrawals continue, and OWRD is likely to deny stays on that basis. **HB 2244 A’s inclusion of instream water rights within the scope of petitions requiring notice to OWRD in order to activate the automatic stay is reasonable**, because regulation in their favor is both uncommon and necessary to preserve the public benefits they provide by nature of their very existence.

HB 2244 A is far narrower than previous legislation that proposed to eliminate automatic stay

HB 2244 A has a much smaller footprint compared to the previous fix presented to the legislature in 2019. That bill would have eliminated the entire automatic stay provision for all final orders issued by OWRD or the Commission, in effect aligning the agency’s stay process with Oregon’s model rules of administrative procedure. Concerns were raised that the legislation was an overbroad response to what is primarily a regional enforcement issue related to the Klamath Basin, and it was suggested that a more tailored solution could be developed without fully abandoning the due process intent behind the automatic stay. While we would welcome consistency across agencies’ stay processes, we believe that HB 2244 A strikes an equitable balance and should relieve many of the concerns associated with the 2019 bill.

We support HB 2244 A as a fair and reasonable step in the right direction that enhances predictability in water rights regulation while preserving due process protections, Klamath Basin Adjudication progress, instream values, and Tribal water rights.