



**May 24, 2021**

**Senate Committee on Natural Resources and Wildfire Recovery  
Senator Golden, Chair**

**Informational Testimony on HB 2244A and -A18 and -A19 Amendments**

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The purpose of this testimony is to provide information to the committee regarding the -A18 and -A19 amendments. Written testimony on the HB 2244A was previously submitted into the record. The Department is not taking a position on the bill or the amendments at this time.

### **ORS 536.075 – Oregon Water Law Automatic Stay Provision**

ORS 536.075(5) stays the enforcement of a regulatory order if a petition for judicial review is filed within 60 days of the order's issuance. This means that while judicial review is pending, the junior user that was regulated to provide water to a senior user, or the individual with no water right that was regulated for using water without authorization, can continue to use water even if this takes water from one or more senior water right holders. The Department's Director or Commission may take action to deny the stay based on a finding of substantial public harm; however, the Department cannot undertake such action until the Department is made aware of the petition for review, which is not always promptly served.

### **The Department's Understanding of the -A18 and -A19 Amendments**

There are primarily two differences between the -A18 and -A19 amendments. Both involve changes to obtaining a stay following the filing of a petition for judicial review of a final order that has regulated off water use in favor of a senior water right of record or senior determined claim.

The -A18 requires serving the Department and filing proof of service with the court in order for the stay to go into effect, and also provides that the Water Resources Department will notify the person (person is defined in ORS 536.007) or tribe that made the call for water.

The -A19 does not require service to the Department in order to obtain the stay. Instead, the amendment would require mailing a copy of the petition to the Department within three days of filing. The amendment also provides that the Department will notify the senior water right holder or senior determined claim holder.

### **Serving the Department**

After filing a petition for judicial review with the court, the petitioner has 60 days to serve the Department; otherwise, the petition will not be considered by the court. Serving the Department begins the formal process, triggering a response or motion to dismiss from the Department.

As the Department understands the law, any competent person that is 18 years or older – and is not a party to the action or their attorney – can serve the Department. Serving the Water Resources Department is a fairly simple task. For example, the Department of Justice represents the Water Resource Department and has a person available during business hours to accept service. In addition, the attorney filing the petition may reach out to the Department of Justice attorneys that represent the Water Resources Department and ask if they will accept service via email. Another option is to serve the Department at its Salem office or one of twenty other region or watermaster offices. Please note this information is intended to provide examples and is not intended to provide legal advice or substitute for consultation of the Oregon Rules of Civil Procedure.

### **Mailing**

The –A19 amendment does not specify what type of mail in which the petition must be sent in order to obtain the stay, or whether it must be registered via certified or registered mail. As such, the Department may need to rely on the postmark date in order to determine if the three day mailing timeframe was met in order for the stay to be in effect. According to the USPS website, mail service typically takes one to three days. Once received by the Department, the mailing can take one to two days internally to make it to the Director. As such, the mailing could be received by the Director within a few days to more than a week following the filing.

In reviewing the amendment, the Department’s understanding is that the mailing is not to take the place of the currently required formal service to the Department or proof of service filing in the court. It would be beneficial to clarify the legislative intent on this aspect or to explicitly clarify the amendment to state that. If the intent is for the mailing to take the place of the formal service, then it would be beneficial to understand how this interfaces with the Oregon Rules of Civil Procedure.

### **Holder of the Water Right versus Person or Tribe Making the Call**

The Department sometimes receives calls for water from entities that are not the holder of the water right. For example, the holder of the water right may live in a different state and lease the land to a person that actually uses the water and makes the call for it. In addition, the Bureau of Indian Affairs holds the Klamath’s Tribes’ water rights in trust, while the Klamath Tribes have initiated the calls for water.