



To: House Committee on Water
Chair Helm
Vice-Chair Owens
Vice-Chair Reardon
Rep. Breese-Iverson
Rep. Leif
Rep. Reynolds
Rep. Wilde
Rep. Witt

From: Caylin Barter, Oregon Water Program Manager

Date: February 11, 2021

RE: Support for HB 2244 -- A Narrowly-Tailored Fix to OWRD's Automatic Stay Problem

Chair Helm and Members of the Committee:

Thank you for the opportunity to provide testimony on HB 2244, which amends ORS 536.075(5) related to automatic stays of enforcement for certain 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 strongly support HB 2244**, which (1) closes a statutory loophole that has enabled a narrow segment of junior water users to evade shut-off orders during times of shortage, and (2) preserves the enhanced due process protections available to water right holders in all other cases while enhancing instream values and protecting 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

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721 NW Ninth Avenue, Suite 300 • Portland, Oregon 97209 USA • tel: 503.222.1804 • fax: 503.222.1805

info@wildsalmoncenter.org • www.wildsalmoncenter.org

(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.

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 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 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. 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.

HB 2244 presents a discrete solution: amend ORS 536.075(5) to eliminate the automatic stay in the narrow circumstances that have led to its abuse:

- HB 2244 applies only to final orders that “regulated off” a water use (i.e., it *does not* apply to other types of final orders from OWRD or the Water Resources Commission).
- HB 2244 applies only to regulation in favor of a narrow subset of water rights (i.e., it *does not* apply to regulation 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.
- HB 2244 does not foreclose petitioner from seeking a stay under ORS 183.482(3) (i.e., it does not afford an automatic stay, but OWRD *may* grant a stay if showing made of irreparable injury to petitioner and colorable claim of error in order).

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.”

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

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. **HB 2244’s inclusion of instream water rights within its modified stay framework 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 is far narrower than previous legislation that proposed to eliminate automatic stay

HB 2244 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 also believe that HB 2244 strikes an equitable balance and should relieve many of the concerns associated with the 2019 bill.

We support HB 2244 as a fair and reasonable approach that enhances predictability in water rights regulation while preserving due process protections, instream values, and Tribal water rights on a statewide scale.