



Oregon

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**Update on Water Rights and Transfers Backlog Reduction Efforts
House Committee on Agriculture, Land Use, Natural Resources and Water
Representative Ken Helm, Chair**

Submitted by: Bryn Hudson, Legislative Coordinator

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Thank you for the opportunity to provide information related to the Department's water rights and transfers protest backlog reduction efforts. This information is provided for informational purposes and the Department is not taking a position at this time.

Background on Protests related to Water Right Transactions

The Department is responsible for processing applications for new water use authorizations, as well as processing proposed changes to existing water rights (called transfers), and efforts to prove up on water right permits in order to obtain a water right certificate. In general, most types of water rights transactions involve a public comment period as well as protest period before a final order is issued. If a protest is filed by the applicant or by a third party, the Department will proceed to seek resolution to the issues with the parties through a settlement agreement, or where resolution cannot be reached, refer the case to the Office of Administrative Hearings for a contested case hearing. If a contested case hearing is held, the Administrative Law Judge (ALJ) will issue a proposed order. Parties generally may file exceptions to the ALJ proposed order. The Director generally issues the final order before it can then be appealed in the Court of Appeals. Depending on the complexity of the matter, the issues once referred can take a year to go through hearings process. More information on contested cases can be found in the Department's 2019 report to the legislature on litigation and contested cases available on the [Department's website](#).

Protest Backlog

The Department's backlog of protests is a result of consistent underinvestment in staff to undertake the work at the Department, the Office of Administrative Hearings (OAH), and the Department of Justice (DOJ). With the lack of resources, the Department has had to make decisions about which cases to move forward, often based on readiness of the parties and if it seemed unlikely that a settlement could be reached. Typically, we have only been able to move 1-2 cases per biennium to hearing.

It is important to recognize that the staffing impacts of contested case hearings are not limited to the Department's protest staff. Hearings often require resources from a variety of staff, such as hydrologists, hydrogeologists, watermasters, caseworkers, protest coordinators, and their managers. Hearings also require DOJ and OAH resources, in addition to the Department. In some cases, they may also involve and require participation of other agencies such as ODFW and DEQ.

2021 Legislative Investment and Progress Made

In 2021, the Legislature invested \$2.2 million General Fund, to facilitate the referral and completion of administrative hearings or other procedures, such as reaching a settlement agreement, to alleviate the protest backlog related to water right decisions. The Department hired two limited duration positions to work with the existing protest program coordinator, to help complete this work, bringing program capacity up to 3 FTE temporarily. Note that for the most part during this biennium, two of the three positions have been filled due to turnover in one of the limited duration positions. The remainder of the funds not used for staffing are allocated to paying for Department of Justice and Office of Administrative Hearings costs. The OAH hired new Hearing Officers, allowing for significant work for OAH to start in December 2021. DOJ assigned an attorney to assist with select protests beginning in late 2021 and also hired another attorney to support the backlog reduction project in April 2022. Department staff provided training to OAH and DOJ staff in December of 2021. To date, the Department has spent just under half of the \$2.2 million.

At the beginning of this biennium (June 30, 2021), the protest backlog was 125. Since July 1, 2021, the Department has resolved protests on 25 applications. Another 24 protested applications have been referred to the OAH for a contested case hearing. Settlements are expected on several of these cases prior to the hearing process being completed. It is not uncommon for a contested case hearing to last 1.5 years. For this reason, only one protested application that was referred to the OAH this biennium, has had a hearing and final orders issued in this biennium. Since the 2021 investments, the Department has accomplished more work on reducing the backlog than in any other biennium since the processing statutes were overhauled in 1995.

Despite these significant efforts to reduce the protest backlog, there are some factors that remain outside the Department's control. As of January 31, 2023, the Department's current caseload, including those cases at OAH, has grown to 245; this is largely due to the fact that in February 2022, the Department received 112 new protests to instream water right applications filed by ODFW.

For the 245 pending protests, 24 were protested by the applicant and 224 were protested by third parties (three of the protested applications were protested by both the applicant and a third party). The types of applications protested include: 186 instream water right applications, 23 applications for a new water right permit, 10 applications for a transfer, and 26 applications for an extension of time to develop their water right.

Lessons Learned from 2021-2023 Protest Backlog Reduction Efforts

The Department is always working to resolve protests via settlement, prior to moving through the formal hearing process. Since the 2021 investment, the Department has been able refer 24 cases to OAH (25 others have been resolved), compared to previous biennial averages of 1-2 cases referred, and has learned a variety of lessons over the last biennium.

Investments need to span multi-biennia for all three agencies: Eliminating the protest backlog is a multi-year effort. Contested cases can take 12-24 months on average to go through the entire contested case process and often involve staff with other workloads, limiting how many can reasonably be completed in one biennium. Recruiting, onboarding, and training was a large workload and time investment this biennium for the limited duration protest staff, and it can be difficult to retain these staff for the full term as people tend to prefer and seek out permanent positions. Retaining these existing staff, as well as funding for Office of Administrative Hearings hearing officers for attorneys at the Department of Justice would help to maintain momentum on

current backlog reduction efforts. There needs to be capacity in all three for a smooth workflow; otherwise, the bottleneck will simply relocate, and the backlog will continue to grow.

Working through protests helps the agency improve its permitting processes: As the Department works through protests, it has identified areas for improvement in its proposed final orders and preliminary determinations. Lessons learned from protests processed this biennium have enabled the Department to improve the legal sufficiency and clarity of its documents.

Providing opportunity for settlement can be cost-effective: Currently, timelines for negotiations are flexible and allow more time for parties to potentially settle rather than move to an Administrative Hearing. This process is almost always a more cost-effective solution for the Department and parties.