



Oregon State Legislature
Representative Helm and Representative Owens

WATER RIGHT CONTESTED CASE PROCESS REFINEMENTS (HB 3544)

The -2 amendment to House Bill 3544 is a starting place for discussion/revision as input is received.

The water right contested case backlog has grown steadily over the years, with more than 200 protests now pending. The current process is not providing timely decisions and is expensive. To resolve the backlog in a timely and cost-effective manner, while still providing adequate process, this legislative package refines contested case processes to:

- 1) **Save time and resources** for all parties to contested cases;
- 2) **Reduce current and prevent future backlogs** of water rights transaction protests; and
- 3) **Provide a clear, consistent process** for parties to present evidence and arguments and for the Water Resources Department (OWRD) to make timely decisions based on law and substantial evidence.

Uniform Processes: Currently, each application type has separate protest and hearing statutes with varying requirements. This package establishes uniform protest and hearing requirements for all applications to improve consistency, transparency, and administrative efficiency.

Dependable Schedule and Timelines: Current statutory timelines are arbitrary and often infeasible. Schedules can vary widely, with frequent delays and lengthy, expensive hearings. This package requires OWRD to establish a default schedule for different types of cases, with no more than 180 days between case referral and hearing date. Exceptions to the default schedule will be allowed when justified.

Clear Referral Procedures: This package requires OWRD to publicly post a hearing schedule, including factors used to prioritize hearings. Parties will be notified in advance of referring a hearing, along with how to obtain relevant files and the opportunity to engage in settlement prior to the date of referral.

Efficient Final Orders: This package clarifies that, for all protests, an OWRD proposed order automatically become a final order if protestants default or withdraw the protest. In addition, it clarifies that there is no need for a hearing if all contested case issues were already resolved by settlement.

Settlement Opportunities: This package provides clear authority that OWRD can utilize the Office of Administrative Hearings to conduct settlement conferences for OWRD water right programs and, while most settlements occur before referral, allows a settlement judge to be assigned when beneficial to do so.

Accessible Hearing Locations: Currently, hearings on transfers must be physically held where the water right is located, adding cost and logistical challenges such as finding suitable locations that meet American Disabilities Act requirements. This package establishes remote hearings as the default, with exceptions allowed and established hearing office locations preferred for in-person hearings.

Standing and Intervention: The process to intervene in support of a proposed final order (PFO) is cumbersome, allows late intervention that can cause delays, and creates more administrative work. This package changes the current two-step process to a one-step process where the petition and fee to intervene in support of a PFO must be received within 30 days of the protest deadline.

Streamlined Issue Identification, Summary Determination, and Discovery: Discovery, motions for summary determination, and issue identification can be some of the most time-consuming and costly parts of a hearing process. This package refines these processes to reduce the time and cost of hearings:

- **Issue identification:** In standard surface and groundwater applications, there is a currently a requirement to raise issues with specificity and for the scope of hearings to be limited to properly raised issues. However, ambiguity in current statutes has led to inconsistent compliance. This package will clarify the requirement for all cases, including transfers or extensions.
- **Motions for Summary Determination:** This package allows for a threshold determination at the time of referral whether motions for summary determination will be allowed in a proceeding, based on whether most or all the issues raised are likely to present genuine issues of material fact.
- **Discovery Process:** This package establishes a clear set of information to be provided upon request by a party or OWRD before a hearing, such as contact information, witnesses, evidence, and responses to written interrogatories. Other requests would be made through the public records request process. In addition, an order on a motion for discovery is deemed final and not appealable.

Streamlined Exceptions: Currently, page limits are generally not applied to exceptions, which can result in unnecessarily long filings that must be considered before proceeding. This package directs page limits for exceptions and limits exceptions filed with the Commission to issues of interpretation of statutes and rules.

Consistency of Legal Rulings: Currently, Administrative Law Judges (ALJ) may be asked to rule on legal issues already determined and upheld in prior cases. This package increases efficiency by allowing ALJs to rely on legal rulings from prior final orders, provided that the final order followed a contested case and is publicly accessible online; OWRD verifies the legal interpretation remains the same; the final order has not been overruled on the relevant issue; and the legal issue was properly raised and preserved for appeal.

Applicability to Backlog: The process improvements above will significantly increase timeliness and transparency of future hearings and processes. However, the current backlog of contested cases remains. Therefore, this package also applies relevant provisions to currently pending contested cases and protests.

Conforming Amendments: The bulk of the amendment draft is comprised of conforming amendments that point towards Sections 2 and 3 and delete text that is repetitive or conflicting. Most substance is contained in Sections 2 and 3.