



Oregon

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Before the

House Agriculture and Natural Resources Committee
Representative Brad Witt, Chair

Testimony on House Bill 4044 and House Bill 4064

February 6, 2014

Thank you for the opportunity to provide testimony on House Bills 4044 and 4064, which would modify the process for the Water Resources Department (WRD) to regulate junior users for senior determination order water rights, as well as modify the process for issuing new water rights.

Although the bill is added to the groundwater statutes, it appears to the Department that the broad language in section 3(3) may not be limited to groundwater wells; therefore, the Department believes that the bill as written, could also apply to regulation of surface water for senior determination order rights and new surface water rights.

Effect on Regulation for Determination Order Rights

Across the state, the basic tenet of water rights is “first in time, first in right.” Therefore, when there is not enough water to fulfill all water users’ needs, senior water rights are entitled to receive all of their water before junior users. The department does not initiate regulation of junior water rights unless a senior user is not receiving his full water right and contacts the department requesting regulation. The Department will only regulate when it determines that the call is valid and that regulation of the junior right will provide a benefit to that senior user.

House Bills 4044 and 4064 establish new requirements and a higher burden of proof, when the department is asked to regulate a junior groundwater or surface water user in order to provide water to a senior determination order water right. This means that all of the department’s current practices including the level of proof required for regulating junior users would stay the same, except when the regulation is to provide water to a senior determination order right. Determination order rights include both federal and tribal claims, as well as state pre-1909 vested water right claims for purposes such as irrigation or municipal use that were developed prior to 1909.

The bill would require the department to issue a “notice of planned action” containing “all facts, grounds and legal theories relied upon by the Department” to “support the planned action” and include “detailed findings and holdings” based on a higher standard of proof. It would also preclude the WRD, in defending its action to regulate a junior user for a senior determination right, from supplementing the record in circuit court as is currently allowed. These added requirements could result in additional time to prepare the written notice of planned action, likely require additional staff resources, increase the costs of regulation, and ultimately increase the time it takes to provide timely and effective regulation of junior surface water and junior groundwater rights to protect a senior determined claim. These effects would be heightened where the action is to regulate a junior groundwater use. This would, at least temporarily,

shift the burden of water shortages to the senior determined water right holder, contrary to the doctrine of prior appropriation.

Further, costs would be incurred due to the expansion of the definition of “prevailing party” for the purposes of awarding costs and attorney fees, as well as the creation of entirely new provisions that would allow liquidated damages in the amount of \$5,000 or “double the actual damages,” whichever is greater.

Provisions Regarding Issuance of New Water Rights

Under existing law, when the Department reviews a water right application, it must determine by “a preponderance of evidence” that: the proposed use is allowed in a basin program or given preference; water is available; the proposed use will not injure other water rights; the use complies with Water Resources Commission rules; and the proposed water use will not impair the public interest or welfare. If one of these criteria is not met, the Department must deny the application, unless it can modify or condition the permit to meet these standards.

For example, a proposed use may be restricted or denied because water is not available or because a proposed use will injure an existing water use. Protection of the public interest may include conditioning a proposed use to protect sensitive, threatened or endangered fish species, protect state scenic waterways or otherwise assure consistency with the Commission’s rules and basin program plans. A groundwater use may also be restricted or conditioned to protect existing users from interference by a new well.

The bills provide that if the Department’s decision rejects, conditions, restricts or limits the proposed water right that results “in a materially lesser water right” than sought, the proposed final order (PFO) must include “all facts, grounds and legal theories” and include “detailed findings and holdings” based on a higher standard of proof. It would also preclude the WRD, in defending its action to deny, condition, limit or restrict a new water right, from supplementing the record as is currently allowed, or from withdrawing the proposed final order in a contested case hearing. This will result in additional time to prepare the proposed final order, increase the costs of issuing new water rights, and ultimately increase the time it takes to issue new water rights. These effects would be heightened for groundwater applications. Ultimately, the higher standard along with these other changes would likely make it more difficult for the Department to restrict new uses to protect existing ones or to condition a new use to protect the public interest. This would benefit new uses at the expense of existing uses and the public interest.

Furthermore, the applicant will be considered a “prevailing party” for the purposes of attorney fees and liquidated damages if the applicant requests a contested case hearing, and during the hearing or on judicial review, the WRD withdraws the PFO or the applicant obtains substantial modification in the contested case or on judicial review. These would result in additional costs to the department for acting to protect the public interest and existing water users.

Provisions Specific to Wells: New Water Rights and Regulation for Determination order rights

The bills establish additional requirements when the Department must regulate junior groundwater rights in order to protect senior determination order rights, or when the Department determines that it must restrict or condition a proposed ground water use to protect the public welfare and existing users. In these instances, the Department must first contract for a report from a “qualified hydrologist” and the report must contain specific data outlined in the bill from the particular well site. The department believes that the data being requested can only be determined once a well has been drilled; therefore, it would preclude the Department from issuing permits to wells that have not been drilled, or it would require the Department to drill the well. In terms of regulation and permitting, these data requirements would delay

regulation or the issuance of new permits until all of this information could be collected, likely by about three months per well.

The bill also requires that the qualified hydrologist, who performs these additional studies and reports, must be mutually selected by a hydrologist chosen by the Department and a hydrologist chosen by the applicant or holder. The Department will be required to pay the costs of choosing and selecting qualified hydrologists, preparing the report, and providing the reports to the applicant or holder. It is important to note, that the Oregon State Board of Geologist Examiners differentiates between “hydrologists” and “hydrogeologists,” with hydrogeologists conducting work on groundwater and generally requiring registration with the Board.

The Department’s interpretation of the field testing required to meet the standards in the bill are estimated to cost \$80,000 per well to conduct the data collection and develop the required report. The bill requires that these costs are to be born solely by the Department. Over the previous ten years, the Department has received on average, 130 applications per year for new groundwater permits across the state. In addition, the Department is currently investigating 130 wells for potential regulation to satisfy determined order rights. The fiscal impact of obtaining this data for 130 wells could be about \$10 million dollars.

Currently, the department is already required to determine on a case-by-case basis whether substantial interference is occurring and to determine whether the regulation would be effective and timely. The department utilizes local information for each well site that includes a well log, water level measurements, and pump test data, as available, as well as regional and other local information. The Department only regulates when a valid call is made by a senior water user, and then only when the Department determines it will provide a benefit to that senior user. The Department believes it has the tools and data sufficient to make these determinations, without conducting the data collection that would be required by these bills.

Conclusion

Due to the requirements in these bills, the Department would incur significantly more costs, permitting or regulation would take more time, and junior water users and applicants would be protected at the expense of senior users and the public interest.