



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: February 6, 2014

TO: Chair, Honorable Brad Witt
House Agriculture and Natural Resources Committee

FROM: Jas Jeffrey Adams, Attorney-In-Charge
Natural Resources Section

SUBJECT: HB 4044; HB 4064

RECOMMENDED ACTION

This testimony is presented with respect to HB 4044 and HB 4064. The Department of Justice takes no policy position on passage of HB 4044 and 4064. This testimony is provided to highlight the effect of changes in law described in bill, particularly those that modify legal procedures and standards governing dispute resolution and orderly regulation of water rights.

1. REGULATION OF WATER RIGHTS SETTLED IN ADJUDICATIONS

- **Regulation** is the *management* of determined water rights under the prior appropriation system:
 - Ensuring that water right holders exercise determined water rights within their defined scope
 - Shutting off junior water right holders in times of water shortage, so that more senior water right holders can exercise their rights according to their priority date, as already determined
- **HB 4044/4064: Written notice:** Before undertaking regulatory action to implement the Final Order of Determination, the Oregon Water Resources Department (OWRD) must issue a written notice of planned action that would condition or limit water right, or that the water right holder believes impairs the value of a water right previously granted. §3(1)(a).
- **HB 4044/4064: Imposes the Highest Possible Civil Standard of Proof:** Written notice must include detailed findings and holdings based on clear and convincing evidence, which must include report of qualified hydrologist on hydrologic conditions at specific well site that support regulatory action. §3(3) & (4).
 - Clear and convincing evidence requires highly probable proof of extraordinary persuasiveness. This rigorous standard is primarily reserved for fraud, deprivation of personal or civil liberties, or other highly intrusive government actions such as termination of paternal rights, paternity actions or civil commitment. *See Brown v. MacDonald*, 2013 WL 6834836 (Or App 12/26/13).
- **Usual civil standard of proof** is by preponderance of evidence, meaning that a fact is more probably true than not.
 - That standard presents a reasonable burden in establishing and proving most civil claims, which are then ultimately resolved by the trier of fact, such as a jury.

2. NEW COURT CONSTRAINTS RESULTING FROM PROPOSED LEGISLATION

- **OWRD precluded from raising issues or evidence not stated in initial written notice**
 - **Current civil procedure** requires notice sufficient to indicate the nature of the intended action and providing an opportunity to contest
 - **Current procedure** does not require including in the notice the entirety of court pleadings and proof but rather allows parties involved in litigation to amend pleadings, offer new evidence into record with leave of court. See ORCP 12; 23; OEC 102; 103. That promotes judicial economy and assures full resolution of relevant facts and legal contentions in dispute.
 - **Under HB 4044/4064, OWRD is limited to facts, grounds, legal theories, finding, holdings** stated in written notice, if water right holder brings action to stay, modify or prevent OWRD from regulating water use to protect determined water rights. §4(2).
 - **This effectively requires** OWRD to set forth entire case in the initial notice, including all legal theories and all evidentiary proof. This raises the cost and burden of filing a notice and restrains court discretion throughout the litigation.
- **OWRD effectively precluded from withdrawing orders for reconsideration:**
 - **Current law** allows Oregon agencies to withdraw its orders for reconsideration before the hearing on the merits. ORS 183.482(6) and 183.484(4). This is a form of alternative dispute resolution that promotes judicial economy by allowing for resolution before formal adjudication.
 - Under HB 4044/4064, if the party challenging the regulating action does not agree to withdrawal, the court may continue the proceeding and issue a judgment. §4(2).
 - **Prevailing party awards:** If OWRD withdraws a final order without the consent of petitioner, petitioner is automatically deemed prevailing party entitled to attorney fees and costs plus higher of \$5,000.00 or double actual damages as liquidated damages. §4(3). That provides a strong disincentive for attempting reconsideration.

CONCLUSION

HB 4044 and 4064:

- Require extensive hydrologic reports and clear and convincing evidence in written notice of planned action to regulate junior water rights to protect senior claims.
 - The extra layer of evidence that must be collected would have the effect of returning to the *previous* practice in basins (such as the Klamath Basin) where senior water rights had not been formally recognized and determined until recently.
- Effectively require OWRD to set forth its entire court case in its initial written notice, which may constrain OWRD's ability to effectively regulate water use under priority rules.
- Effectively prevent OWRD from withdrawing its orders for reconsideration to promote judicial economy and streamline the proceeding.
- Authorize awards of attorney fees plus liquidated damages of at least \$5000 to only nominally prevailing parties.
- Propose numerous changes to Oregon's process for implementing adjudications, any of which could invite new litigation that would delay the progress of the Klamath Adjudication and future adjudications, even if the claims so raised were unsuccessful.

DOJ CONTACT

For further information, please contact Aaron Knott at aaron.d.knott@doj.state.or.us or 503-798-0987.