



Klamath Water Users Association

Written Testimony of Dave Cacka, Board Member
Submitted to the House Agriculture and Natural Resources Committee
February 6, 2014

Re: House Bills 4044 and 4064

Chair Witt, Vice-Chairs Esquivel and Frederick and members of the committee, my name is Dave Cacka. My family's farm has been in continuous operation in the Klamath Basin for 105 years. I am here today as a board member representing the Klamath Water Users Association (KWUA). I am providing this testimony in opposition to HB 4044 and 4064 and urging you and the committee to reject these unnecessary and harmful bills.

KWUA is a non-profit corporation that has represented Klamath Irrigation Project farmers and ranchers in its current form since 1953, but its roots stretch back to 1905. Our members include rural and suburban irrigation districts and other public agencies as well as private individuals. The area represented by KWUA members is home to over 1200 family farms and ranches and encompasses nearly 170,000 acres. The mission of the organization is to preserve, protect and defend the water and power rights of the landowners of the Klamath Basin while promoting wise management of ecosystem resources.

Locally these bills have been advertised as strictly dealing with groundwater regulation by the Oregon Water Resources Department ("Department" or "OWRD") and as an effort to simply apply sound science to the Department's regulatory practices. Our review of the legislation results in very different conclusions, and convinces us that enactment of the bills would be harmful to the family farms and ranches of the Klamath Project.

First, these pieces of legislation will apply to both groundwater AND surface water. Second, this legislation would tie the hands of the Department when it comes to regulating water rights in the Klamath Basin. This is extremely ironic and untimely, since there has essentially been no state water right regulation prior to 2013 due to the absence of a final Order of Determination from the state in the Klamath Basin Adjudication ("Adjudication") process.

Klamath River Basin Adjudication

On March 7, 2013, OWRD submitted its Findings of Fact and Order of Determination ("FOD") for the Klamath Adjudication to the Klamath County Circuit Court. The FOD is the

culmination of a 38-year administrative process, and provides the basis for water rights-based regulation in the Upper Klamath Basin until the Circuit Court has issued a decree which will occur after its trial on any exceptions to the order that parties may file. The FOD represents a significant investment from the state of Oregon as well as many stakeholder groups who have been involved in the proven state water adjudication process. It is the culmination of a long, and costly legal process and represents OWRD's determination of the validity of certain rights to Klamath Basin water diverted or used in Oregon.

Between the issuance of the FOD by OWRD and the final decree by the Circuit Court, OWRD is required by law to regulate water used according to the findings and order. A party may seek a stay to prevent the OWRD from regulating according to part or all of the FOD, but to do so it must be willing to pay the damages that may result from the FOD not being enforced. To date, several requests for stay have been filed and denied by the Circuit Court.

The provisions of the proposed legislation will restrict or eliminate the ability of the Department to regulate water based on current statute. After only one year of implementation, an unprecedented 38-year process, representing significant financial and human resource investment would be rendered moot. These bills would tell parties who invested and played by the rules in order to finally get their water rights recognized and enforced, that the rules have changed. They would say that we should, overnight, change the way that water law has been administered in Oregon for many generations. There is no need for this legislation, and there would be harm.

The Legislation Undermines Existing and Proven Oregon Water Law

The legislation affects surface water regulation as well as groundwater. Section 3(a) of HB 4064 defines "Adversely affecting or aggrieving" to mean "*a Water Resources Department action or proposed final order that ... (B) Imposes conditions, limitations or restrictions that would result in a materially lesser water right than the water right sought by the applicant; or (C) Conditions, limits, restricts or otherwise impairs the value of a water right or use previously granted to a water right holder.*"

Section 3 (1) (C) (b) Defines determination order rights to mean "*water rights established and determined by the Water Resources Director in an order of determination under ORS 539.130 that is pending adjudication by a circuit court.*"

So even though sections 2 to 4 of this act amend the groundwater section of state statute, they describe rights established under ORS 539.130. The only rights established under that statute are surface water rights. Further, the legislation goes on to establish a new legal standard of "clear and convincing evidence". This standard is considerably higher than the "preponderance of evidence standard" that would remain in effect for regulation occurring to

benefit senior water right holders. Our view is that this shifts the burden of shortage to senior water right holders. These and other provisions of the legislation clearly affect all water rights in the Klamath Basin and unquestionably undermine the entire Adjudication process, western water law, and the Prior Appropriations Doctrine (first in time, first in right). Additionally, the legislation calls for very specific, expensive, and likely unattainable scientific standards which would apply to ground water regulation state wide. These provisions fly in the face of expert testimony from scientists, engineers and others that were part of the basis for the FOD.

Fiscal Impact of Proposed Legislation

Section 3(6) (a) of HB 4064 states: *“The department shall maintain a list of qualified hydrologists available to prepare reports under this section. Except as provided in paragraph (b) of this subsection, a qualified hydrologist chosen by the department and a qualified hydrologist chosen by the water right applicant or a water right holder shall mutually select a qualified hydrologist to prepare a report.”*

Section 3 (7) then states that: *“The department shall pay all costs of choosing and selecting qualified hydrologists under subsection (6) of this section and of reports by selected qualified hydrologists prepared for possible use under this section...”*

These sections coupled with others in the legislation would be of significant cost to the state. Is the Legislature prepared to significantly increase the budget of the Department accordingly? Or would enforcement of water rights in the Klamath Basin revert to no regulation because of lack of funding?

The provisions of these bills directed to the regulation of ground water are not limited to the Klamath Basin and would significantly impair the Department’s ability to prevent injury to individual, municipal, and industrial water rights, and to protect Oregon aquifers.

Groundwater Interference Related to Water Right Regulation

The legislation lays out another series of costly, unnecessary and frankly impossible “hoops” that the department would have to jump through in order to satisfy a “call” for water.

KWUA supports proper notification of individuals or entities that are proposed to be regulated. We also support basing these decisions on the best available information. That is exactly what occurs today under the Departments own policy. For example, Oregon Administrative Rule (OAR) 690-009-0040, **Determination of Hydraulic Connection and Potential for Substantial Interference**, reads as follows:

- (1) The Department shall determine whether wells produce water from an unconfined or confined aquifer. Except for wells that satisfy the conditions in section (2) of this rule

the Department shall further determine whether the aquifer is hydraulically connected to the surface water source. The basis of the determination shall be information provided on the Water Well Report for any well in question. If there is no Water Well Report available or if the information provided is inadequate, the Department shall make the determination on the basis of best available information. **Such information may include other Water Well Reports, topographic maps, hydrogeologic maps or reports, water level and other pertinent data collected during a field inspection, or any other available data or information that is appropriate, including any that is provided by potentially affected parties.** (emphasis added)

Additionally, proponents of this legislation seem to argue that if the state is going to regulate a junior water right holder in favor of a senior water right holder, there must be a “*substantial and quantifiable effect on the superior water right*”. The current policy of the Department already accounts for this logical standard. OAR 690-009-0050, **Ground Water Controls**, states in part that:

- (2)(a) Prior to controlling the use of any well greater than 500 feet from a surface water source, **the Department shall determine whether any control would provide relief to the surface water supply in an effective and timely manner.** The Department shall make the determination on the basis of the best available information, employing at least one of the methods set forth in OAR 690-009-0040(4)(d)...(emphasis added)

Therefore, if regulation of a junior water right holder does not have an effective and timely result for fulfilling a call from a senior water right holder, the Department’s own policy would be to allow the junior go back to using water or otherwise continue to use water consistent with their right.

Effects on Collaborative Settlement Efforts

Over the years there have been numerous attempts by stakeholders in the Klamath Basin to settle seemingly intractable water and water right disputes. To date, all these efforts have failed. However, for the first time a comprehensive settlement has been agreed to by many parties. The Klamath Basin Restoration Agreement (KBRA) was signed by over 40 separate parties including irrigation districts, drainage districts, the Klamath Tribes, various conservation groups and others, including the state of Oregon.

Other local organizations including the Resource Conservancy, the Sprague River Water Resource Foundation and the Fort Klamath Critical Habitat Landowners group who were not party to the KBRA and who represent individual irrigators and other water right holders have

signed onto an Agreement in Principle with the Klamath Tribes and others to support a companion agreement to the KBRA which is intended to once and for all put an end to many decades of brutal and exhausting local water conflicts. This monumental effort is a product of the Klamath Basin Task Force created by Senators Ron Wyden and Jeff Merkley, Congressman Greg Walden and Governor John Kitzhaber. We are very concerned that this legislation could undercut these productive efforts. Now is not the time to tinker with state water laws that pertain to the Klamath Basin.

Conclusion

We are not clear on the problem that is trying to be fixed. Is the state water adjudication process that has been in place for over 100 years not working? Do lawmakers from other parts of the state hear from constituents that the first in time, first in right prior appropriations doctrine is not working? Have other western states adopted complex processes like this as part of their water code or statutes? Would this be unique to Oregon?

This legislation is a solution looking for a problem that does not exist. The bill does not solve anything and will create problems and create more controversy and strife in a Basin that has seen its share. It is redundant and it will cost the state taxpayers hundreds of thousands of dollars every year. The repercussions to senior water right holders in the Klamath Basin, including but certainly not limited to our members, would be significant. Should this legislation pass, senior priority water right holders may be deprived of the benefit of their long established rights. This flies in the face of Oregon water law, western water law, and the Prior Appropriations Doctrine.

For the reasons stated above, we urge you to reject HB 4044 and 4064.

Respectfully,

Dave Cacka
Board Member
Position 2, Representing Klamath Irrigation District