



Senate Environment and Natural Resources Committee
Senator Chris Edwards, Chair

Background Testimony for Senate Bill 206 and 264

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Senate Bill 206 and 264 with amendments address a number of issues related to water in the Klamath Basin. This testimony is intended to provide background with a high-level overview of the issues and brief description of the purposes of the bills.

I. Background

Overview of Oregon Water Law

In 1909, the Legislature adopted the Oregon Water Code, which established a system for the distribution of water use based upon the doctrine of prior appropriation. Under the doctrine of prior appropriation, when there is not sufficient water to meet all water rights, holders of senior water rights can make a “call” for water. The senior user is entitled to receive all of his or her water, before a junior user. For example, a senior user with a priority date of 1910 can make a call for water and users with a priority date that is junior to that right (after 1910) may be shut off in order to satisfy that senior right. The Oregon Water Resources Department (OWRD) is responsible for carrying out this management system on behalf of water right holders.

In many parts of Oregon, landowners began using water well before the 1909 Water Code was enacted. An “adjudication” is an administrative and judicial proceeding to identify, quantify and document water rights pre-dating the Water Code as well as rights held by the federal government or tribes. Until the Department conducts an adjudication, it cannot enforce the water rights of these pre-1909 and federal/tribal reserved claims.

The first phase of an adjudication is administrative, with OWRD reviewing claims and the administrative law judge’s proposed orders, and ultimately determining claims in a Findings of Fact and Final Order of Determination (FFOD). Once the FFOD is delivered to the circuit court, the claims become “determined claims.” The second phase of the adjudication involves court review of the FFOD and resolving exceptions to the claims. After hearing exceptions, the Court issues a water rights decree affirming or modifying the FFOD. The determined claims then become “decreed rights,” prompting the issuance of water right certificates. The water right certificate is valid as long as the water is used according to the provisions of the water right at least once every five years. Certificated water rights are eligible to be permanently or temporarily transferred or leased instream.

According to Oregon law, the watermaster can regulate in favor of determined claims upon the Director delivering the FFOD to the court, but unlike certificated or decreed rights, determined water right claims are not eligible for temporary transfers or instream leases. This limits the ability of the determined claim holder to shift water to more productive lands, to lease water instream to protect from forfeiture due to nonuse, or to lease water instream for payment.

A permanent transfer is a change in the point of diversion, place of use, or type of use. Temporary transfers only allow for a change in the place of use of a water right for up to five years, as well as a change in the point of diversion, if necessary to carry out the change in the place of use. Temporary transfers do not allow for a change in the type of use. A lease allows for the temporary use of a water right for an instream purpose for a period of up to five years. In both instances, the change cannot result in injury to existing water rights and the department may revoke a lease or temporary transfer if, at any time, the Department determines that the use is causing injury to an existing water right.

The Klamath Basin Adjudication

The Klamath Basin Adjudication began in 1975. The Department received 730 claims and 5,660 contests to those claims. In 2013, the Department issued a Final Order of Determination and referred the case to the Klamath County Circuit Court. Now that the administrative phase of the adjudication is complete, the Department can manage the basin according to the doctrine of prior appropriation while the adjudication proceeds through the Klamath County Circuit Court.

Negotiation of Settlement Agreements

Unmet water needs of many of the Klamath River Basin's water interests—from farmers and ranchers to Indian tribes, commercial salmon fishermen and wildlife refuges—have resulted in intense conflicts, particularly in dry water years.

For example, in 2001, a dry water year, Klamath Reclamation Project farmers saw their irrigation water drastically reduced. According to a 2003 Oregon State University Extension report, just under half of the Klamath Reclamation Project acreage received enough water to irrigate a crop, and state and federal emergency payments to the region totaled at least \$35 million.

In 2002, federal agencies reduced the environmental flows required in the Klamath River and allowed the Klamath Reclamation Project to divert close to 400,000 acre-feet for irrigation purposes. A severe disease outbreak in the Lower Klamath River contributed to the death of tens of thousands of migrating salmon. The Pacific Coast Federation of Fishermen's Association sued the U.S. Bureau of Reclamation, alleging that irrigation deliveries to the Klamath Reclamation Project had violated the Endangered Species Act.

These events highlighted the need for a negotiated settlement. After several years of negotiations, in early 2010, the Klamath Basin Restoration Agreement (KBRA) and the associated Klamath Hydroelectric Settlement Agreement were signed.

The Klamath Basin Restoration Agreement (KBRA) is intended to result in effective and durable solutions which will: (i) restore and sustain natural fish production and provide for full participation in ocean and river harvest opportunities of fish species throughout the Klamath Basin; (ii) establish reliable water and power supplies which sustain agricultural uses, communities, and National Wildlife Refuges; and (iii) contribute to the public welfare and the sustainability of all Klamath Basin communities.

Parties in the off-project area of the basin were not able to come to agreement in negotiations for the KBRA. However, subsequent negotiations resulted in an agreement in early 2014. The 2014 Upper Klamath Basin Comprehensive Agreement seeks to: (i) support the economic development interests of the Klamath Tribes; (ii) provide a stable, sustainable basis for the continuation of agriculture in the Upper Klamath Basin; (iii) manage and restore riparian corridors along streams that flow into Upper Klamath Lake in order to achieve proper functioning conditions permanently; and (iv) resolve controversies regarding certain water right claims and contests in the Oregon Klamath Basin Adjudication.

The Upper Klamath Basin Comprehensive Agreement requires the formation of a Joint Management Entity (JME) as an Oregon tax-exempt non-profit corporation, responsible for administration of certain provisions of the Agreement. The JME will include a Board of Directors (Board) responsible for decision-making, comprised of representatives of the Klamath Tribes, the United States, the State (OWRD), and the Landowner Entity.

II. Proposed Purposes of Legislative Proposals

SB 264 -1 Amendment

This bill relates to the Upper Klamath Basin Comprehensive Agreement. Under the agreement, OWRD has agreed to seek legislative authority to participate as a voting member of the JME. This authority is being sought in Senate Bill 264. In addition, the amendment proposes to allow holders of determined claims in the off-project area to be allowed to temporarily transfer or lease instream their determined claims.

SB 206 -1 and -2 Amendments

Amendments to Senate Bill 206 propose to allow holders of determined claims in the on-project area to be allowed to temporarily transfer or lease instream the determined claims. The -1 amendment would allow the on-project area to temporarily transfer determined claims, while the -2 amendments would allow the on-project area to temporarily transfer or lease instream their determined claims.

A map of the on-project and off-project areas is included.