



1320 Capitol Street NE, Suite 150
Salem, Oregon 97301
503-361-8941
oca@orcattle.com

February 6, 2020

House Committee on Water
Representative Ken Helm, Chair
Members of the Committee
Email: hwtr.exhibits@oregonlegislature.gov

RE: HB 4086 – Stay of Appealed Water Resources Department Orders – OPPOSE

Chair Helm and Committee Members,

Thank you for the opportunity to provide comment on House Bill 4086. My name is Sarah Liljefelt, and I am a partner at Schroeder Law Offices. My office focuses its practice on water law, and we represent farmers, ranchers, special districts, municipalities, and other water users in six western states, including Oregon. I am here today on behalf of the Oregon Cattlemen's Association ("OCA"), as Chair of OCA's Water Resources Committee, in opposition to House Bill ("HB") 4086.

OCA's members are farmers and ranchers in the State of Oregon. As you know, farmers and ranchers are reliant upon water to grow crops for the State of Oregon and export to other states and countries. There are a lot of hurdles these days for agricultural producers, and one of those hurdles is the ability to seek judicial review of agency decisions producers believe to be incorrect while maintaining the *status quo*. If farmers and ranchers are unable to maintain the *status quo* while obtaining neutral decisions from Oregon courts, they are put in the difficult position of needing to expend resources on litigation to save their livelihoods, while at the same time not being able to earn a living.

The current text of Oregon Revised Statute ("ORS") 536.075(5) is a due process safeguard that provides an opportunity for hearing prior to taking private property (i.e., water rights that are appurtenances to real property). The Oregon Water Resources Department ("OWRD") issues two types of final orders: 1) orders in contested cases, wherein OWRD and any affected parties present evidence to an administrative law judge prior to issuance of a final order; and 2) orders in *other than* contested cases, wherein OWRD issues an order without any opportunity for hearing or input by affected parties. OWRD's orders to shut off water use are orders in *other than* contested cases. ORS 536.075(5) stays enforcement of OWRD's shut off orders until the affected parties have a chance to create records and hold fair hearings. HB 4086 proposes to put the cart before the horse, allowing OWRD to take private property before the opportunity for due process hearings.

HB 4086 proposes to take away the current due process safeguard, and replace it with a substantially more cumbersome and expensive system that would require the challenging parties to petition the circuit courts for stays of OWRD's final orders during the litigation. Either the challenging parties must pay an unspecified

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undertaking in the form of a bond or letter of credit, or, if indigent, must prove they are likely to prevail on the merits and waiver is just and equitable. Addressing the indigent circumstance first, HB 4086 is itself unjust because the challenging party is at a substantial disadvantage at the commencement of litigation, before any discovery has occurred, and before they have obtained expert consultant services. HB 4086 would require parties to complete a year's worth of work in the 60-day deadline to file a petition for judicial review under ORS 183.484(2).

Regarding HB 4086's proposed undertaking provisions, the bill is similar to ORS Chapter 539, relating to general stream adjudications. Under ORS Chapter 539, the Legislature established a procedure to adjudicate claimed water rights with priority dates prior to enactment of the State's surface water code in 1909. Pre-code claims are first adjudicated by administrative law judges in contested case hearings, resulting in OWRD final orders. Next, any exceptions to OWRD's decisions are adjudicated by the circuit courts, and appeals may be taken from the resulting judgment, called the Decree. Under ORS Chapter 539, parties may seek to stay OWRD's final orders that were the result of contested case hearings. ORS 539.130(4). In order to obtain a stay, the petitioning party must file a bond or letter of credit with the circuit court "in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced." ORS 539.180.

HB 4086 proposes to take ORS Chapter 539's provisions even further. While the stay provisions in ORS Chapter 539 only apply to OWRD final orders that resulted from contested case hearings, HB 4086 proposes to put the burden on petitioning parties who have never been provided the opportunity for due process hearings. Moreover, while ORS Chapter 539's stay provisions are designed to protect potentially injured parties whose water rights have been confirmed by contested case hearings, HB 4086 proposes to additionally line OWRD's coffers in the event the agency prevails (which is almost assured in many cases under the Oregon Administrative Procedures Act that instructs courts to defer to agency interpretations of relevant regulations and statutes). In the converse, petitioning parties can only obtain attorney fees if the circuit court determines OWRD "acted without a reasonable basis in fact or in law," a very high burden for petitioners to meet. ORS 183.497(1).

Finally, HB 4086 proposes a troubling stay provision with regard to contested cases. Subsection (9) of the proposed text states that the proposed stay provisions do not prohibit OWRD from granting a stay with "reasonable conditions" under ORS 183.482(3) in contested case proceedings, which is a separate process from the automatic stay provisions for judicial review actions under ORS 536.075(5). Subsection (9) goes on to say, "if the commission or department grants a stay and imposes reasonable conditions...subsections (6) to (8) of this section do not apply while the commission or department stay and reasonable conditions remain in force." Subsections (6) to (8) are the sole means for obtaining a stay under HB 4086. Therefore, the bill proposes that OWRD has the sole authority to decide what conditions for a stay are "reasonable," and petitioners cannot seek an alternate stay from the Oregon Court of Appeals upon filing a petition for judicial review. Therefore, HB 4086 also removes the safeguard of allowing the Court of Appeals to determine the bounds of a reasonable stay in the case of contested case appeals.

On May 21, 2019, the Oregon House Energy & Environment Committee held an informational hearing on House Bill 3430 (2019), and invited OWRD to present testimony. OWRD Director Tom Byler explained that the motivation behind the similar 2019 bill was the amount of litigation OWRD experienced from the Klamath Basin in response to its regulation shut off orders over the last few years. Thus, the bill sponsors were seeking a state-wide solution to a local perceived problem. Moreover, the rise in litigation in the Klamath Basin is directly attributable to *how* OWRD decided to regulate water users in the Klamath Basin and change its applicable administrative rules every year or two. Furthermore, OWRD already has the authority to deny a stay under the

current text of ORS 536.075(5) when substantial public harm will result, but failed to utilize that tool in the Klamath Basin. Therefore, the motivation for HB 4086 is misguided and evidences the fact that this bill is completely unnecessary.

Finally, other tools already exist to prevent persons from filing petitions for judicial review without proper basis. Oregon Rule of Civil Procedure 17 requires that all filings submitted to the circuit and appellate courts are supported by fact and law, and provides that civil sanctions may be issued against parties that bring unsupported claims for improper purposes. ORS 20.105 authorizes the award of attorney fees to a prevailing party when there is no objectively reasonable basis for asserting a claim, defense or ground for appeal (similar to the standard applied to OWRD under ORS 183.497). Finally, the principle of *res judicata* (or claim preclusion) and Oregon Rule of Civil Procedure 54 prevent a party from raising the same claim year after year to avoid water use regulation. Therefore, numerous safeguards are already in place to ensure water users do not abuse the stay provision in ORS 536.075(5), including OWRD's ability to deny stays under the same statute.

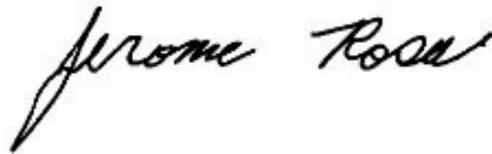
In conclusion, the ultimate effect of HB 4086 is to take private property without due process, and the result is a chilling effect on the administration of justice. ORS 536.075(5) is an extremely important safeguard, ensuring due process as related to water right final orders throughout the State of Oregon. It allows petitioners to bring judicial review actions while maintaining the *status quo*. If the Legislature were to enact HB 4086, there will be immediate and pervasive effects on water users. The product of HB 4086 will be to prevent access to justice due to the creation of insurmountable financial barriers. HB 4086 is unnecessary because numerous procedures already exist to deny the stay when appropriate, and prohibit abuse of the system.

The Oregon Cattlemen's Association is opposed to HB 4086, and urges the Committee members to vote against HB 4086. Thank you for your time and careful consideration.

Sincerely,



Sarah Liljefelt
Water Resources Committee Chair,
Oregon Cattlemen's Association



Jerome Rosa
Executive Director,
Oregon Cattlemen's Association