

HB 4086 -1, -2, -3 STAFF MEASURE SUMMARY

House Committee On Water

Prepared By: Misty Freeman, LPRO Interim Director

Meeting Dates: 2/6, 2/11

WHAT THE MEASURE DOES:

Establishes that filing of a petition in circuit court or Court of Appeals shall not stay a final order from Oregon Water Resources Commission (OWRC) or Oregon Water Resources Department (OWRD) unless: petitioner moves court for a stay of the order; court determines petitioner is likely to prevail on merits; and petitioner has filed a bond, irrevocable letter of credit, or other undertaking required by court. Authorizes court to impose reasonable undertaking. Authorizes court to order payment by petitioner out of the undertaking of reasonable attorney fees and costs to OWRC or OWRD if court finds against petitioner or if petitioner voluntarily withdraws petition. Applies to petitions for judicial review filed on or after effective date of this Act. Takes effect on 91st day following adjournment sine die.

ISSUES DISCUSSED:

EFFECT OF AMENDMENT:

-1 Replaces measure. Establishes that filing of a petition in circuit court or Court of Appeals shall not stay a final order from Oregon Water Resources Commission (OWRC) or Oregon Water Resources Department (OWRD) unless petitioner shows that: petitioner will suffer irreparable injury if stay is not granted; such injury outweighs any harm that will result if order is stayed; and there is colorable claim of error in the order. Authorizes each party whose water use is enforced under order to participate in hearing on motion to stay order. Authorizes court to grant motion and impose reasonable conditions for stay such as requiring petitioner to file bond, irrevocable letter of credit or other undertaking, or require documents to be filed within specified time. Establishes that provisions for petitioning stay of final order outlined in HB 4086 do not apply to proceedings under ORS Chapter 539, Rights of Federally Recognized Indian Tribes Determination of Water Rights, and that determination of OWRD Director pursuant to federally recognized Indian tribes may be stayed by circuit court only as provided in ORS 539.180 or excepted or otherwise challenged only as provided in ORS 539.150. Applies provisions to petitions for judicial review and exceptions or other challenges to a determination of OWRD Director filed on or after effective date of Act. Takes effect on 91st day following adjournment sine die.

-2 Requires court to commence hearing to determine whether to grant or deny stay no later than five judicial days after the party files the request.

-3 Replaces measure. Replaces measure. Establishes that filing of a petition in circuit court or Court of Appeals shall not stay a final order from Oregon Water Resources Commission (OWRC) or Oregon Water Resources Department (OWRD) unless petitioner shows that: petitioner will suffer irreparable injury if stay is not granted; such injury outweighs any harm that will result if order is stayed; and there is colorable claim of error in the order. Authorizes each party whose water use is enforced under order to participate in hearing on motion to stay order. Authorizes court to grant motion and impose reasonable conditions for stay such as requiring petitioner to file bond, irrevocable letter of credit or other undertaking, or require documents to be filed within specified time. Establishes that provisions for petitioning stay of final order outlined in HB 4086 do not apply to proceedings under ORS Chapter 539, Rights of Federally Recognized Indian Tribes Determination of Water Rights. Applies provisions to petitions for judicial review filed on or after effective date of Act. Takes effect on 91st day following adjournment sine die.

BACKGROUND:

Like most western states, Oregon follows the “prior appropriation” doctrine of water use, often referred to as “first in time, first in right.” This means that when there is insufficient water to satisfy all water rights, water users with senior priority dates make a “call” to receive water, and users with junior water rights are shut off until the rights of the senior users making the call are satisfied.

Adjudication is the process by which pre-1909 vested water rights are quantified and documented through an administrative and judicial procedure. Approximately two-thirds of the state has been adjudicated. The administrative phase of adjudication concludes with the presentation of the Adjudicator’s findings of fact and a final order of determination filed by the Oregon Water Resources Department (OWRD) with the applicable court. The judicial phase of the process is the review of the final order by the courts. Adjudication claimants or contestants who dispute OWRD’s determination have an opportunity to file exceptions to be reviewed by the court. The court ultimately issues a water rights decree affirming or modifying the final order of determination, and OWRD issues water right certificates in accordance with the court’s decree.

House Bill 4086 would remove the routine stay of enforcement by OWRD prompted by the filing of a petition with the court to contest a final order. Instead, a stay would be granted if a petitioner makes a motion for the stay, the court rules that the petitioner is likely to prevail on the merits of the case, and the petitioner puts up a bond or other financial surety from which attorney fees and costs to OWRD or the Oregon Water Resources Commission may be deducted, should the court find against the petitioner or if the petitioner voluntarily withdraws the filing. Provisions would apply to petitions for judicial review filed on or after the effective date of the Act.