



**TESTIMONY –**  
**HB 2244**  
**House Committee on Water**  
**February 11, 2021**

Chair Helm, Vice Chair Owens and Members of the Committee:

Thank you for the opportunity to provide testimony on House Bill 2244. The Oregon Cattlemen's Association's ("OCA") and the Oregon Farm Bureau Federation ("OFB") whose members are farmers and ranchers in the State of Oregon. As you know, farmers and ranchers are reliant upon water to care for their livestock and 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 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.

HB2244 is a piece of legislation directed at yet-to-be-determined water claims in the Klamath River Basin in Klamath County, Oregon in the interest of Tribes and State agencies. Although not readily apparent in the text of HB 2244, the references in the bill to Section 1 of Chapter 445, Oregon Laws 2015 relate only to pre-Water-Code (pre-1909) water right claims in the Klamath River Basin. Such "determined claims," as defined in Section 1 of Chapter 445, Oregon Laws 2015, are not actually "determined" in the normal sense of the word. These claims have not been confirmed by the Klamath County Circuit Court at this time, as required by ORS Chapter 539 for general stream adjudications of pre-Water-Code claims. Although the holders of such claims may currently make calls for water based on priority (ORS 539.140(4)), the claims have not been confirmed and are subject to change by the State court system.

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 uses are orders in ***other than*** contested cases. These are the types of orders targeted by HB 2244. ORS 536.075(5) acts as an important due process safeguard to stay enforcement of OWRD’s shut off orders until the affected parties have a chance to create records and hold fair hearings in front of neutral decisionmakers. HB 2244 proposes to put the cart before the horse, allowing OWRD to take private property before the opportunity for due process hearings when the shut off orders are made in favor of Klamath River Basin claims held by Tribes or others, or instream water use rights held by the State.<sup>1</sup>

Previous iterations of HB 2244 (HB 3430, 2019 & HB 4086, 2020) proposed to delete ORS 536.075(5) altogether or create confusing and expensive hurdles, while the current version of the bill makes ORS 536.075(5) ineffective only as to Klamath Basin claims held by the Tribes or State agencies. While HB 2244 is more narrowly tailored to the issue being addressed, it is still fatally flawed. HB 2244 proposes taking private property without due process in favor of particular claim holders. It denies water right holders the opportunity to create a record and have a hearing prior to denial of their real property rights.

Moreover, OWRD already has authority to deny stays for orders in other than contested cases under ORS 536.075(5). The statute provides that OWRD may deny the stay when substantial public harm will result from stay of OWRD’s order. OWRD has used this authority when it has deemed necessary. HB 2244 seeks to overrule OWRD’s expertise about what is

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<sup>1</sup> Interestingly, HB 2244 states in proposed Section (5)(b) that the stay will also prevent OWRD from approving stays for ***contested case orders*** when Tribal claims or instream water rights held by State agencies are involved. This provision, however, is by its own terms only effective as to “a final order of the commission or department that regulated off a diversion, appropriation or other water use.” Such final orders to regulate off water rights are issued as orders in ***other than*** contested cases, not as contested case orders, and therefore HB 2244 appears to conflate the process for regulation of an existing water right with the process for granting a new water right permit. In the case of issuance of a new water use permit, the review of which would be by contested case, cutting off OWRD’s ability to grant a stay would mean that a contested new permit would always go into effect and allow water use while the contested case and appeal were ongoing – that is, the opposite of preserving the *status quo*. We assume that is not the intention of HB 2244, and thus we are pointing this out as a likely error in referencing ORS 183.482(3)(b).

necessary for proper administration of water resources under the agency's statutory purview, and to deny the stay outright in favor of certain claim holders. Further, there is a clear procedural means for challenging OWRD's decision to deny the ORS 536.075(5) stay, as such a decision is also a final order subject to judicial review, while there is no similar due process procedure provided under HB 2244.

Finally, other tools already exist to prevent persons from filing petitioners for judicial review without proper basis, and thus invoking the ORS 536.075(5) stay improperly. 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 2244 is to take private property without due process in favor of Tribes and State agencies, 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 2244, there will be immediate and pervasive effects on water users. The product of HB 2244 will be to prevent access to justice due to the creation of insurmountable financial barriers water users will face when they are denied their water rights that allow them to earn a living while also engaging in costly litigation. HB 2244 is unnecessary because numerous procedures already exist to deny the stay when appropriate and prohibit abuse of the system.

OCA and OFB are opposed to HB 2244, and urge the Committee members to vote against the bill. However, OCA and OFB are also sensitive to the interests of senior water users including the Tribes and look forward to finding consensus in solutions that protect due process. Thank you for your time and careful consideration.

**HB 2244 Joint OCA & OFB Testimony**

**February 11, 2021**

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