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Senate Committee on Natural Resources and Wildfire Recovery
Senator Golden, Chair

Informational Testimony on HB 2244 A

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The purpose of this testimony is to provide information to the committee regarding the current law on stays of enforcement of final orders under Oregon's water laws. The Department is not taking a position on the bill at this time.

ORS 536.075 – Oregon Water Law Automatic Stay Provision

The Department distributes water rights based on a priority system—regulating (shutting off) junior water rights to meet the needs of senior water rights when there is insufficient supply to meet all needs. This regulation of junior water rights to meet the needs of senior users is enforced through final orders in other than contested cases, as are regulatory orders to address using water without a water right in violation of Oregon's water laws.

ORS 536.075(5) stays the enforcement of a regulatory order if a petition for judicial review is filed within 60 days of the order's issuance. This means that while judicial review is pending, the junior user that was regulated to provide water to a senior user, or the individual with no water right that was regulated for using water without authorization, can continue to use water even if this takes water from one or more senior water right holders. The Department's Director or Commission may take action to deny the stay based on a finding of substantial public harm; however, the Department cannot undertake such action until the Department is made aware of the petition for review, which is not always promptly served. The denial of the stay can take several weeks to prepare and issue, which can be a challenging period of time for the senior user(s) to not receive water.

In 2015, in response to regulation final orders, the Department began to see petitions for judicial review assert the automatic stay provision. Between early 2015 and February 2021, 40 petitions for judicial review have been filed against Department final orders. Of those, 31 of the 40 petitions for judicial review were from the Klamath Basin, most of which pertained to the Department's regulation of groundwater in the basin to benefit the Klamath Tribes' senior instream determined claims. Since 2015, the Department has taken action to deny the stays in seven instances. A summary of the history of regulation of groundwater in the Klamath basin is included at the end of this testimony.

ORS 536.075 Compared to the Oregon Administrative Procedures Act in Regards to Stays

ORS 536.075 governs stays of final orders of the Department, instead of the Oregon Administrative Procedures Act in ORS Chapter 183, which provides the authority for final orders and stays for

many state agencies. The following outlines some distinctions between the laws, in particular relating to stays of enforcement of final orders.

Stays under the Oregon Administrative Procedures Act (APA)

The Oregon APA typically governs petitions for review of agency orders. For final orders in other than a contested case, ORS 183.484 provides that a petitioner must file within 60 days following the date the order is served, or 60 days after a request for reconsideration is denied. In their filing, the petitioner must state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order, and the grounds upon which the petitioner contends the order should be reversed or remanded.

The APA and associated rules for stays require that, before getting a stay relating to a petition for judicial review, the petitioner must show that they are being (1) irreparably harmed, and (2) that there is a colorable claim of error. In addition, if a stay is granted, the person has to post a bond to cover the cost of whoever they are harming by the stay being in effect. OAR 137-004-0090 (model rules pertaining to stays in other than contested cases) requires the petitioner for the stay to identify potential injury to other parties that would be incurred by the stay, propose actions to minimize that injury, and if the injury cannot be mitigated – the amount of a bond or letter of credit that is reasonable. OAR 137-004-0090 gives interested parties 10 days after notice to respond with their interest in participating in a stay proceeding. The agency has 30 days to issue an order in response to the stay request.

Stays Under ORS 536.075

ORS 536.075 is different from the APA and associated rules. For example, it does not require a petitioner to assert either irreparable harm or a colorable claim of error in order to receive a stay. Instead, under ORS 536.075(5), the act of filing a petition for judicial review automatically stays enforcement of the order, so even if a petition is ultimately dismissed, the automatic stay remains in effect until a final determination is made by the court, unless the Department or Commission takes action to deny the stay finding substantial public harm. In addition, under ORS 536.075 the petitioner is not liable for the costs of the stay that are borne by senior water users.

The Department's Understanding of House Bill 2244 A

House Bill 2244 A amends ORS 536.075 and provides that if the Commission or Department denies a stay and a petitioner requests a hearing on the denial of the stay, the court shall hold the hearing within 21 days. The bill specifies that the denial shall remain in effect until the hearing has been held and the court has issued a decision concerning the denial. In addition, the bill provides that for a petition for judicial review on a final order that has regulated off water use in favor of a determined claim, an in-stream water right held by a state agency, or a water right or determined claim held by, or in trust for, a federally recognized Indian tribe, the stay does not go into effect until such time as the petition for review is served to the Commission or Department and proof of service is filed with the court. Finally, the bill provides that the Department must provide the petition for review to a tribe when the tribe is the senior water right holder that regulation is occurring in favor of.

Background on Klamath Basin Water Issues

There are longstanding disputes in the Klamath Basin over water, dating back to the beginning of the Klamath Basin Adjudication in 1975. In 2013, the Department issued a Final Order of Determination in the adjudication and referred the case to the Klamath County Circuit Court. With the administrative phase of the adjudication complete, the law requires the Department to enforce the water rights by priority in the basin according to prior appropriation, while the adjudication proceeds through the court. Regulation of surface water for determined claims began in 2013. As part of the adjudication and based on court decisions, the Klamath Tribes were found to have determined claims for many of the streams in the basin, with a priority date of time immemorial.

The Klamath Basin is fully appropriated during all months, requiring extensive water use regulation. This difficult situation is made worse during times of drought, which the basin has experienced frequently in recent years. Considerable time and effort has been made over the years to address water needs and water management issues within the basin in partnership with stakeholders. The basin has and will continue to be an area of significant focus for the Department in the foreseeable future as water issues continue to be contentious between water users.

Much of the work to find solutions to the challenges faced in the basin date back to disputes in the early 2000s, which prompted renewed efforts to try to negotiate settlement agreements to resolve many of the water issues in the basin. These negotiations led to Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement. Subsequent negotiations in the off-project area of the basin, concluded with an agreement in early 2014 called the 2014 Upper Klamath Basin Comprehensive Agreement (UKBCA).

Groundwater in the Klamath Basin

In response to increased groundwater pumping in the Upper Klamath Basin in the 1990s and 2000s, the U.S. Geologic Survey (USGS) in cooperation with the Department began a comprehensive study and analyses of the basin hydrogeology. As shown in the table below, the investigations have found significant hydraulic connection between groundwater and surface water in the Klamath Basin.

Report Title	Foundational Inputs	Key Conclusions
USGS SIR 2007-5050 – Ground-water hydrology of the upper Klamath Basin, Oregon, and California	<ul style="list-style-type: none"> • Geologic maps • Geochemistry data • Field reconnaissance • Data from over 1,000 well logs in the basin • Over 80 references from published and unpublished reports 	<ul style="list-style-type: none"> • 1.8 million acre-feet of groundwater are discharged annually to surface water • More than 60% of the total inflow to Upper Klamath Lake can be attributed directly to groundwater discharge
USGS SIR 2012-5062 - Groundwater simulation and management models for the upper Klamath Basin, Oregon, and California	<ul style="list-style-type: none"> • Information from USGS SIR 2007-505 • Updated geologic data • Calibrated to groundwater level data from over 500 individual wells and estimates of groundwater discharge to streams at over 50 locations 	<ul style="list-style-type: none"> • Simulated hydrologic responses to pumping wells • Estimated significant impacts to surface water (stream depletion) in all documented simulations

These two reports represent the best available information on the hydrogeology of the Upper Klamath Basin and form the basis for the Department's understanding of the groundwater system and groundwater-surface water interaction in the basin. Both reports were peer reviewed following the [fundamental scientific practices](#) of the USGS.

In early 2015, the Water Commission adopted Division 25 (2015) administrative rules which addressed the regulation of wells in the off-project area of the Upper Klamath Basin, based on provisions within the UKBCA. The final version included a provision that the rules would no longer apply if the UKBCA was terminated and that groundwater regulation would occur under existing statewide rules. Regulation of groundwater for senior surface water rights led to increased litigation. From 2015 to 2017, 50 wells were regulated pursuant to the 2015 Division 25 rules and six lawsuits were filed challenging regulation. At the end of 2015, the KBRA expired as federal legislation was not passed approving and implementing the agreement.

A trial was held in Marion County Circuit Court on the Department's regulation of groundwater in the Klamath Basin. In 2017, the Marion County Circuit Court found that the State followed the process required by the 2015 Division 25 rules and relied on the best information available at the time. The Court also found that the State's findings of hydraulic connection and its stream relief calculations were supported by substantial evidence. The judgement was appealed by the landowners to Oregon Court of Appeals. The Court of Appeals affirmed the lower court ruling.

In December 2017, the Secretary of the Interior published a "Negative Notice" terminating the UKBCA, finding that all of its conditions could not be achieved. Upon termination, the Department's 2015 Division 25 administrative rules were no longer in effect. Regulation of wells during the 2018 irrigation season occurred under Division 9 rules that apply to surface water-groundwater regulation statewide. This resulted in regulation of 140 wells. Fourteen lawsuits were filed challenging the regulation.

In late 2018, the Department proposed a two-step path forward, intended to improve understanding of the basin hydrology and result in a long-term management approach for surface water-groundwater management in the basin. The first step would be to adopt temporary rules that would be in place while a longer solution was developed, working with the community to develop permanent rules.

In 2019, the Department adopted interim 2019 Division 25 rules to regulate groundwater in favor of senior surface water rights. For the 2019 irrigation season, using the interim 2019 Division 25 rules, the Department regulated 5 wells. One groundwater user filed a petition for judicial review challenging the regulation order and underlying statutory authority.

In 2020, the Marion Circuit Court ruled in favor of the petitioner/groundwater user, making findings regarding due process requirements to regulate groundwater. Based on the Court's order, a critical groundwater proceeding is required before regulation of groundwater in the basin can begin again. The Department does not have staff resources to dedicate to such an effort at this time; however, the Department is exploring interim measures such as establishing a serious water management problem area, which would require measurement and reporting.