

Howard G. Arnett
P.O. Box 546
Bend, Oregon 97709
(541) 388-3563
hga@karnopp.com

STATEMENT OF HOWARD ARNETT REGARDING HB 2244

**OREGON HOUSE OF REPRESENTATIVES
COMMITTEE ON WATER**

SALEM, OREGON

February 11, 2021

Greetings, Chairman Helm and members of the House Committee on Water. My name is Howard Arnett and I am an attorney in private practice in Bend, Oregon where, since 1980, I have specialized in representing Indian tribes and tribal members in a variety of legal matters. I am also Professor of Practice at the University of Oregon School of Law where I teach courses on Indian law and related subjects.

I write today to testify in support of HB 2244 and urge its passage in order to provide fundamental fairness to the Klamath Tribes and permit the Tribes to utilize its adjudicated, and therefore legally established, water rights. Although my law practice involves the representation of Indian tribes, my views on HB 2244 are my own and do not represent the official position of any of my tribal clients, past or present, or the position of the University of Oregon on this legislation.

Indian water rights, as I am sure the Committee members know, are unique. Contrary to the "use it or lose it" bedrock principle of Western water law, Indian water rights are "reserved" for future uses, which may be either consumptive or instream uses, or both. In addition, the "priority date" of Indian water rights, that is to say the date the "reservation" of Indian water rights becomes effective and legally enforceable is either the date in the 19th Century when the Indian reservation was established or even earlier, at a point in the Indians' pre-history called "time immemorial". The Klamath Tribes' adjudicated water rights include both consumptive rights with a priority date of the 1864 establishment of the Klamath Reservation and instream-flow rights with a priority date of time immemorial.

The Klamath Tribes' water rights are not theoretical, claimed rights. Since the 2013 phase one Klamath Basin Adjudication determination, these rights have been quantified and enforceable. And, because of their priority dates of 1864 and time immemorial, they are senior to virtually all

other water rights holders in the area. In other words, in a conflict between senior and junior rights holders, the Klamath Tribes is legally entitled to "call", or pre-empt the junior rights holders in order to fulfill the Tribes' senior quantified rights.

Unfortunately, the Klamath Tribes has repeatedly been prevented from utilizing certain of its adjudicated water rights because of the "automatic stay" provision of ORS 536.075(5). The unprincipled use of the statute's "automatic stay" on the enforcement of adjudicated rights, which is triggered by the mere filing of a petition for judicial review by a junior water rights holder, with no need to show any likelihood of success on the merits, has had the effect of undermining the Tribes utilization of its rights established through the Klamath Basin Adjudication. Because litigation of a junior rights holder's petition for judicial review almost always takes longer than the irrigation season at issue, the "automatic stay" provided by the statute gives the junior rights holder a victory without having to prove anything or establish any merit to the petitioner's claim. Dismissal of petitions following the irrigation season only to be refiled prior to the next season, and thereby gain a new automatic stay, is clear evidence of this cynical and unfair strategy.

The Oregon water code should not be allowed to unfairly frustrate enforcement of adjudicated senior water rights, especially those of an Indian tribe, the Klamath Tribes, which has survived termination of its federally recognized status and pursued adjudication and quantification of its Treaty-based water rights for nearly four decades. Now, just when the Klamath Tribes is finally able to use its adjudicated senior water rights to protect its Treaty based natural resources (fish, wildlife, and plants), junior rights holders' serial use of the "automatic stay" provision threatens to block the realization of those rights. If junior rights holders feel they have a good faith basis and provable facts supporting their petitions, let them seek an injunction or stay of the enforcement order under customary legal procedures and principles. Due process requires nothing less. In the meantime, the abused and unfair "automatic stay" mechanism of ORS 536.075(5) should be limited in the targeted manner set out in HB 2244.

Thank you.