

**Supplemental Testimony of the Klamath Tribes  
Before the House Committee on Water  
In Support of HB 2244**

**February 11, 2021**

This supplemental written testimony is being submitted by Donald C. Gentry, Chairman of the Klamath Tribes. On behalf of the Tribes, I would again like to thank Chairman Helm and the Committee for the opportunity to provide testimony in favor of Representative Wilde's HB 2244.

We submitted written comments prior to today's hearing, and provided live testimony at the hearing today as well. But I feel compelled to provide this supplemental testimony to respond to statements made in opposition during today's hearing, statements which significantly mischaracterize the history of the Tribes' water rights, the abuse of the automatic stay, and the ability for that abuse to continue.

First, the opponents of HB 2244 predict disastrous results if the bill is signed into law and the novel automatic stay provision is no longer permitted in the three limited instances described in the bill. Yet none of the opponents could explain why it is that every other state in the arid West manages to maintain healthy agricultural production without the existence of an automatic stay. There will be no such disastrous consequences. As in every other prior appropriation state, Oregon Water Resources Department will continue to respond to and investigate facts on the ground related to a "call" made by a senior water right against a junior; as in every other prior appropriation state, OWRD will issue an order regulating the junior off the system if there is not sufficient water to satisfy both the junior and senior rights; and as in every other prior appropriation state, if a junior feels that OWRD is in error, the junior can file a petition for judicial review and request a temporary restraining order and preliminary injunction to stay the order.

Second, the opponents of HB 2244 say that the automatic stay is not about senior water rights versus junior water rights, but it is about whether OWRD is complying with the law. But OWRD's enforcement regime is about arbitrating between junior and senior water rights. An enforcement order issued by OWRD is not issued for OWRD's benefit; it is issued to protect a senior water right from being taken by a junior. OWRD is not "taking" anything from the junior water right holder. It is simply protecting the senior water right holder's ability to use the water to which the senior is entitled as a matter of prior appropriation doctrine. OWRD is balancing use of rights between two competing water rights holders. The existing automatic stay process in fact deprives the senior water right of the ability to use its water without due process. The automatic stay of enforcement goes into effect immediately upon filing – and requires no notice or opportunity for a hearing for the senior water right being deprived of its property right. The existing statute is the violation of due process – as it allows a junior water right holder to continue to divert water belonging to the senior water right until the litigation is completed.

Third, the opponents of HB 2244 seek to rewrite the concept of prior appropriation, by their repeated assertions that agriculture uses of water somehow deserve primacy. One of the opponents even described agriculture use water rights as "sacred." But water law, and the prior appropriation doctrine, was created by legislatures. It was developed as a means of

allocating a scarce resources. Under that system, senior water rights holders have a property right that can be enforced against juniors. That system does not carve out an exception for junior agricultural water rights to supersede senior Tribal rights – reserved through Treaty in exchange for the cession of land on which those agricultural activities take place – because the senior Tribal rights are for instream flows or lake levels. Opponents talk about the “sacred” nature of water rights, but in the same breath would appear to discount the Tribes’ water rights, treating as something less than the property right that they are.

Fourth, despite the opponents’ protestations of the death of agriculture if this targeted bill is passed, the only example they provided for the use of the automatic stay involved a challenge to groundwater regulation in the Upper Klamath Basin. The litigants in that case, as Representative Reschke noted, got OWRD to back down after forcing OWRD to spend tens of thousands of dollars defending that litigation, which was based on procedural challenges to OWRD’s development of the applicable groundwater rule. Yet the attorneys who represented the litigants in those cases, a couple of whom testified, did not explain why they would not have been able to obtain a stay of enforcement in those cases by doing what every other litigant in Oregon and every other water right litigant in every other State would have had to do: by moving for a temporary restraining order and preliminary injunction. I also think that it is important to note that our data shows that since OWRD backed off its prior groundwater enforcement and began using interim groundwater regulations in the Klamath Basin, we have seen the lowest levels of cumulative inflow into the Upper Klamath Lake in a 40 year period of record as of 2-11-21. OWRD may have backed off its prior approach because of the procedural challenges that litigants succeeded on, but the preliminary data so far appears to suggest that that prior approach was in fact correct, and that those junior groundwater users are in fact depleting surface flows. In other words, those junior water rights are using water that belongs to the Tribes by virtue of prior appropriation doctrine.

Finally, there was some discussion of the litigation filed against enforcement orders that targeted the Hyde Family and TPC. As Representative Wilde noted, despite the fact that the Court of Appeals issued a temporary stay in favor of OWRD’s continued enforcement against the Hydes, in 2020 the Hydes filed another petition for judicial review and obtained a stay of OWRD’s enforcement for several critical weeks – allowing them to continue to take water out of stream that the Tribes were entitled to keep instream by virtue of the Tribes’ senior water right. Notably, late in 2020, the Oregon Court of Appeals ruled against the Hydes and required dismissal of their petition for judicial review. And while one of the opponents characterized that decision as based on jurisdictional rather than substantive grounds, it is important to note that this “jurisdictional” ground exactly mirrors what HB 2244 would accomplish: it recognizes that the claims the Hydes are trying to raise regarding an ongoing issue in the Klamath Basin Adjudication should be litigated in that forum.

Again, I thank you for the opportunity to offer this supplemental testimony, and strongly urge that the Committee vote in favor of HB 2244.