



Oregon

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Testimony for House Bill 2929
House Committee on Agriculture, Land Use, Natural Resources and Water
Representative Ken Helm, Chair

Submitted by: Bryn Hudson, Legislative Coordinator
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Thank you for the opportunity to provide information related to House Bill 2929, which provides the Oregon Water Resources Department the authority to seek injunctive relief in circuit court for violations to certain water use provisions. This information is provided for informational purposes and the Department is not taking a position at this time.

Background

Generally, in order to use water in Oregon, one must obtain a water right from the Water Resources Department. Oregon's water laws are based on the principle of prior appropriation often referred to as "first in time, first in right." This means the first person to obtain a water right on a stream is the last to be shut off in times of low streamflow. The priority date of a right is typically the date the Department received the application for a permit to use water.

When there is insufficient water to satisfy all water rights, water users with senior priority dates can make a "call" to receive water regardless of the needs of junior users and watermasters may issue orders to junior users to shutoff or reduce use to distribute water to the senior user. If there is a surplus beyond the needs of the senior right holder, the water right holder with the next oldest priority date can take as much as necessary to satisfy needs under their right and so on down the line until there is no surplus.

Traditional Enforcement Process

Local watermaster staff address complaints, distribute water, and respond to illegal water use. Depending on the issue, the Department may issue a regulatory order, measurement device, or headgate notice, prior to engaging in formal enforcement. The first step of formal enforcement process is to issue a Notice of Violation, which directs the individual to take an action to comply with Oregon Water Law. In calendar year 2022, Department staff issued 153 Notices of Violation for violations of Oregon Water Law. If there is non-compliance with the Notice of Violation, a Notice of Assessment is issued to begin the process of assessing civil penalties.

Before issuing a Notice of Assessment, staff must develop a thorough record with proper documentation and evidence to support the civil penalties proposed. This often includes significant time spent by field staff to confirm non-compliance at the site of the violation. Sometimes, access can be an issue as some of these locations are not visible from public access points and permission to access the site may be difficult to obtain. A person may request a contested case hearing to challenge the Notice of Assessment, which would then become final after completion of the contested case and exhaustion of any appeals. In some cases, while civil penalties are being adjudicated, the violation of Oregon Water Law continues, which may impact

other water users from obtaining water to which they are lawfully entitled or result in harm to water or other public resources.

Injunctive Relief

The Department's statutes do not contain authority to apply to the courts for a temporary or permanent injunction to seek immediate relief from violations to the laws governing the appropriation and use of ground and surface water that will irreparably harm other water users or the public interest.

Injunctive relief is a civil remedy which results in a court order prohibiting a person from doing some specified act or commanding someone to undo some wrong or injury. A court will order injunctive relief if it appears from the facts stated in the complaint that irreparable injury is taking place or will take place absent the injunction. Irreparable injury means an injury that is beyond the possibility of repair or beyond possible compensation in damages. In determining whether to order injunctive relief, courts balance the harm asserted by the party seeking the injunction against harm to the opposing party's interest and the public if the injunction is issued.

Until recently, the Department has not had authority to seek injunctive relief, which is a common authority that many other regulatory agencies have in order to prevent harm. The Department now has the authority to seek injunctive relief for two existing programs: dam safety (ORS 540.781; 2019) and well construction (ORS 537.781; effective July 1, 2023). The Department has not yet utilized the remedy of injunctive relief under either the well construction or dam safety programs.

Department's Understanding of HB 2929 -2

HB 2929 -2 provides the Department the authority to seek injunctive relief from a Court when the Department has information that a person has engaged in water use violations such as:

- Diversion, use or storage of either surface or groundwater without a water right (this does not include exempt uses),
- Continued water use or interference with a locked headgate after being regulated off by a watermaster,
- Use of water to which another person is entitled without authorization, or
- Willful waste of water to the detriment of another

Under this bill, the Department may be able to seek an injunction to obtain immediate relief from the effects of illegal water use, if the standards of evidence are met. Injunctive relief provides a remedy that cannot be attained by any other process available to the Department and allows more timely remediation of situations of unlawful water use.

This bill would not guarantee that the Department would be successful in obtaining an injunction; rather it would give the Department the ability to petition for injunctive relief in a circuit court.