

WATER RESOURCES



WATER BILLS THAT CAN CIRCLE THE DRAIN

By OCA's Water Resources Chair Sarah Liljefelt

In last month's edition of the Oregon Cattleman, OCA's Political Advocate Rocky Dallum highlighted various bills he anticipated would arise during the short session of the Oregon Legislature, including proposals related to water resources. True to Rocky's prediction, the new House Water Committee held hearings during the first week of the short session on two bills that OCA has been watching with concern.

House Bill 4069 is a proposal to enable the Oregon Water Resources Department (the Department) to require water use reporting for any water right the Department requires to measure water use. The Department already has statutory authority to require water right holders to measure water use, whether or not that requirement is a condition stated in the water right document, so HB 4069 would give the Department further, related authority. Of course, additional water use data is not in itself a bad thing – water use data can, for example, allow the Department to more accurately determine how much water is being used, potentially opening up water resources for further use that were previously determined to be fully appropriated based on the “paper water rights” issued.

However, HB 4069 may cause additional regulatory burden and expense for water users throughout the State. That burden and expense is not justified because the Department is currently unable to effectively organize, analyze and utilize any additional data submitted to the agency. Moreover, the proposal creates a risk for activist groups to use reported water use data to attempt to cancel water rights that may appear to be unused for five or more years under Oregon's forfeiture statute. An increase in cancellation proceedings will cost both water users and the state substantial expense to conduct contested case hearings on such allegations.

OCA has been engaging in discussions with legislators on a water use reporting proposal for several years and this year Representative Helm is proposing amendments to HB 4069 that will address some of

the concerns voiced by OCA members. The amendments require agency rulemaking to consider the administrative need for water use reporting prior to requiring such reporting. Further, the proposed amendments would provide that water use data is not itself evidence of non-use of water for the purpose of forfeiture. While OCA still does not support HB 4069 in its current form at this time, we are encouraged by the positive direction of the discussions surrounding this proposal and will continue to participate in these discussions.

House Bill 4086 is a proposal that would drastically change the administration of water rights in Oregon. Currently, when the Department receives a call for water from a senior water user, the Department issues orders to junior water users to shut off water use. The Department's shut off orders are issued without due process hearings, and therefore a safeguard exists in Oregon's water code that allows affected water users to challenge the Department's shut off orders within sixty days by filing a “petition for judicial review.” That filing stays enforcement of the Department's order until a judge decides if the Department's order was correct or incorrect. The law provides that the Department can deny the stay if the agency determines substantial public harm will result and the Department has historically used this power to protect senior water users. Further, other protections exist in the law to prevent challengers from abusing the system, such a statute authorizes the award of attorney fees to the prevailing party where a petitioner has no objectively reasonable basis for their claim and a rule of civil procedure and case law that prevents a party from relitigating the same claim or issue has already been decided.

HB 4086 proposes to remove the stay safeguard from the water code and replace it with a system where a challenging water user would need to petition the court for a stay after filing their petition for judicial review. The petitioning water user would need to prove a likelihood of success on the mer-

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its at trial and would need to post an unspecified undertaking in the form of a bond or letter of credit to compensate the senior water user and pay the Department's attorney fees. This proposal reverses the burden of proof that is on the Department to show the shut off order was according to the law and based upon substantial evidence. Further, the proposal would place an insurmountable burden on the petitioner who does not have the benefit of discovery in their case yet, and is not financially able to seek judicial review if they are unable to continue to earn a living by using water to grow a crop.

The proponents of HB 4086 are members of the Klamath Tribes in cooperation with Representatives Wilde and Sanchez, and the bill is a response to an (anticipated & predictable) increase in litigation in response to the Department's new water control regulations for the Upper Klamath Basin. After a couple years of increased litigation in response to new rules, the level of water litigation in the Basin was back to normal in 2019. The proponents have testified that water users are abusing the stay "loophole," but in fact not a single example can be cited. Thus, the bill is a gross overreaction to a local issue that does not actually exist, which would chill the administration of justice statewide.

OCA submitted written testimony to the House Water Committee on both bills, as well as oral testimony. OCA will stay alert to these and other bills affecting the water resources of our members during the short session. •



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