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Oregon water protest backlog grows despite \$3 million reduction project

By MATEUSZ PERKOWSKI Capital Press
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An open canal flows among fields in Eastern Oregon. The state's backlog of water transaction protests has grown despite a \$3 million reduction project.

Mateusz Perkowski/Capital Press

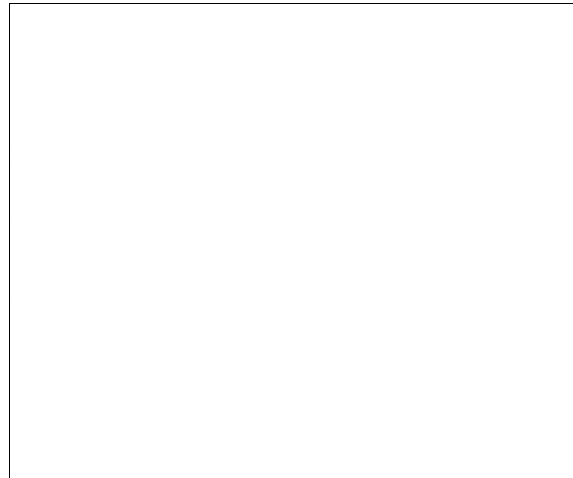
Oregon's backlog of water transaction protests has continued growing despite a \$3 million investment meant to reduce it, though the problem would've been worse without that spending.

For farmers and ranchers, backlogged protests can mean waiting for years to obtain decisions on water rights transactions that affect their ability to irrigate and grow or maintain their operations.

Chat

In 2021, state lawmakers approved the \$3 million to pay for the ~~time~~^{cost} that administrative judges, government attorneys and water regulators needed to reduce the backlog.

The backlog then consisted of 138 protests filed against decisions made by the state's [Water Resources Department](#), such as applicants who challenged the denial of water rights or environmental advocates who opposed their approval.



38 cases resolved

Over the past two years, OWRD has resolved 38 of those protests but so many new ones have been filed that the backlog has now grown to 230 cases, Dwight French, OWRD's water rights services division administrator, said during the recent Oregon Water Law conference.



Dwight French

Chat

“We got more protests in than we were able to resolve,” French said. “This number broke our hearts — not our spirits, but our hearts.”

More than 110 protests against in-stream water rights in Douglas County, obtained last year by the state’s Fish and Wildlife Service, represent the majority of the new cases responsible for the backlog increase.

The OWRD approved the in-stream water rights, which intend to protect flows for fish, but the county government opposes those decisions because they could leave less water available for agriculture and other uses.

Budgets for only three cases

However, without the additional spending, the OWRD could have faced an even greater backlog burden, since the agency typically only has enough money in its litigation budget for three or fewer cases to receive contested case hearings per biennium.

Typically, each contested case hearing costs OWRD about \$50,000 to \$100,000 in addition to other lawsuits facing the agency, he said. “You never know how much it’s going to cost but you have to be prepared.”

When asked in 2021 how much it would cost to clear out the entire protest backlog, the agency determined it would need about \$50 million, which would include hiring outside attorneys to assist the state’s Department of Justice.

“They didn’t have enough staff to help the agency with that many hearings,” French said.

Armed with the \$3 million, the agency hit “fast forward on all fronts,” tackling several types of protests spread out across the state, focusing on those that had been pending the longest, he said.

Among the resolved cases, 21 protests were withdrawn after being referred for a hearing, which the agency thought might happen as the number of referrals increased, French said.

“We were excited to test our theory and that’s what happened,” since protestants changed their mind about proceeding with the contested case process, he said.

The good news is that OWRD's backlog reduction project resulted in a more seasoned group of attorneys and administrative judges who have experience with water disputes, potentially making future cases more efficient to resolve, French said.

However, during the current 2023-2025 biennium, OWRD has received only \$500,000 for additional protest processing, so the agency won't be able to devote as many resources toward reducing the backlog.

"It's way better than nothing but it's quite a drop from \$3 million," French said.

The agency itself withdrew five decisions that had led to protests after finding errors in its review process, he said. That taught OWRD to analyze protests carefully as they're filed, so flawed decisions don't have to potentially wait years for a hearing.

Protests that remain pending for a long time may involve new attorneys or family members who aren't familiar with the issue, he said. "The sooner you get into this stuff, the easier it is to resolve."

Likewise, French advised water attorneys to be willing to negotiate with OWRD and potentially avoid the contested case process altogether.

"If you think there's an opportunity for a settlement, let's talk about that ASAP," he said.

Mateusz Perkowski