



# Oregon

Kate Brown, Governor

## Water Resources Department

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Thomas M. Byler, Director

**SUBJECT:** Agenda Item C, June 16, 2022  
Water Resources Commission Meeting

### Director's Report

#### I. Current Events and Updates

##### A. Klamath Basin Update

Regulation has been in effect on the Wood, Williamson, and Sprague River systems for most of the spring. Stream baseflow continues to be at very low levels such that Tribal instream determined claim flow values are not met. The Klamath Watermaster office has two vacant Assistant Watermaster positions, impacting regulatory activities and the ability to operate and maintain gaging stations, measure observation wells, and conduct dam safety inspections. Active recruitment is underway for both positions, but the positions have been difficult to fill. The Department hired two seasonal temporary employees to assist the Klamath Falls office with complaints regarding dry domestic wells. As of June, 2022 approximately 138 new complaints have been received since January 1, 2022.

The U.S. Bureau of Reclamation (BOR) is monitoring inflows into Upper Klamath Lake (UKL) and receiving forecasted inflow data from the Natural Resource Conservation Service. The BOR is using this information to adaptively manage the Klamath Project. The amount of water that is allocated for irrigation can increase or decrease monthly depending on the combined actual flows and forecast numbers. The BOR's 2022 Klamath Project Operations Plan (Project), which was issued in April, stated that they would manage the Project to meet an end of season UKL elevation of 4138.15. Through an agreement with U.S. Fish and Wildlife Service, it was decided that any additional inflows would be divided between increasing lake elevation and additional irrigation allocation. The initial forecast allocation for irrigation was 50,000 acre feet (af) for irrigation during the 2022 irrigation season. Inflow numbers have increased and the BOR is currently managing for an end of season UKL elevation of 4138.5 and 74,500 af of water for irrigation this season. The Project has already diverted 25,000 af of the 74,500 af allocation. Spring precipitation and cool weather has kept irrigation demand down.

## **B. Reopening State Offices and Reimagining the Workplace**

Earlier this year, the Governor issued an Executive Order that terminated the COVID-19 state of emergency declaration in Oregon and rescinded the COVID-19 vaccination requirement for executive branch state employees, paving the way for state office buildings that were closed to the public to reopen on May 2, 2022. The Water Resources Department opened its lobby doors to the public for the first time in over two years on May 2. During the first week our doors were open, there were only a few customers dropping off items or meeting staff for prearranged appointments.

The Department remains committed to reimagine how and where the work of the agency occurs while maintaining high standards for staff and program productivity. The Department formed a staff team tasked with assisting the agency as it transitions to a more modern work environment. In early May, the Work Reimagined Team, aided by a group of managers, developed guiding principles for remote work and provided the process for managers to designate work types (hybrid, in office, or full time remote) for each position in the agency. The Work Reimagined Team's current focus is on gathering feedback and making recommendations to leadership around workspace needs in the Salem office. The Work Reimagined space planning efforts are expected to be implemented over a long period of time and may include recommendations for future projects for the agency to consider.

## **II. Litigation Update**

### **Circuit Court Filings**

#### ***Golden Rule Farms, Inc. v. Oregon Water Resources Department; Harney County Circuit Court, Case No. 19CV53051***

On December 10, 2019, a petition for judicial review was filed by a water right holder in Harney County against a Department final order denying an extension of time for lack of diligence to complete construction and apply water to a beneficial use under a water right permit. The case was voluntarily dismissed by the petitioner and an order dismissing the case was entered in July 2020. An order granting motion to reinstate the case was issued in August 2020. An order staying the proceedings pending the Court of Appeals' rulings in Case Nos. A172879 and A172880 was issued in August 2021.

#### ***Fern Valley Estates Improvement District v. Water Resources Department, Water Resources Commission, and Oregon Health Authority; Jackson County Circuit Court, Case No. 20CV19061***

This case involves water well construction deficiencies for two wells that supply a public water system in Jackson County. Enforcement commenced with a notice of violation being issued to Fern Valley Estates Improvement District on May 2, 2020. On May 27, 2020, the District filed a petition for judicial review in Jackson County Circuit Court. The case has been extended several

times to give the parties an opportunity to resolve the issues. Settlement was reached between the parties, and on June 7, 2022, an order of dismissal was issued by the court.

**Klamath Basin Adjudication; Klamath County Circuit Court**

This adjudication is the process for determining claims to the use of surface water in the Klamath River Basin. On-going since 1975, the first phase was the review and determination of these claims by the Oregon Water Resources Department, including the hearing of contests to claims and the issuance of proposed orders by administrative law judges from the State's Office of Administrative Hearings. This phase of the process was completed with the Department's issuance of and filing of the Adjudicator's Findings of Fact and Final Order of Determination with Klamath County Circuit Court on March 7, 2013.

The process is now in the second phase, which is the review of the Final Order of Determination by the courts. Adjudication claimants or contestants who dispute the Department's determination of their claims or contests had an opportunity to file exceptions with the Klamath County Circuit Court. The court is now reviewing these exceptions and will ultimately issue a water rights decree affirming or modifying the Final Order of Determination. The Department will issue water right certificates in accordance with the final decree once it is issued by the court.

**Fort Klamath Critical Habitat Landowners, Inc., et al. v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 21CV37688**

On September 22, 2021, the Fort Klamath Critical Habitat Landowners, Inc. filed an amended petition for judicial review opposing a temporary transfer of the place of use and points of diversion of a determined claim from the Wood River Valley, above Upper Klamath Lake (UKL), to the Lower Klamath National Wildlife Refuge below UKL. The court granted an extension of time for this case on December 29, 2021. On January 20, 2022, the petitioners filed a second amended petition for judicial review. A hearing date has not been set.

**Annunziata Gould. v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 21CV48665**

On December 22, 2021, Deschutes County resident Annunziata Gould filed a petition for judicial review of a final order of the Department granting a temporary change in place of use and points of groundwater appropriation in the Deschutes Basin. Temporary transfer applicant, Pinnacle Utilities, filed a motion to intervene in the case, which was approved. A hearing date has not been set.

**Klamath Irrigation District v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 21CV39570**

On October 1, 2021, Klamath Irrigation District (KID) filed a petition for judicial review in Marion County Circuit Court. The petition was filed in response to an order issued by the Department on April 6, 2021, to the U.S. Bureau of Reclamation regarding releases of stored water from Upper Klamath Lake. The order to Reclamation was issued in compliance with an order from Marion County Circuit Court directing the Watermaster to prevent releases of stored water in excess of water rights entitled to the use of that water. Petitioners and the Department jointly filed a motion to stay the case, which was signed by the court April 15, 2022.

**WaterWatch of Oregon v. Oregon Water Resources Department; Marion County Circuit Court, Case Nos. 21CV32178**

On August 6, 2021, WaterWatch of Oregon filed a petition for judicial review of a final order of the Department allowing the Port of Morrow to withdraw groundwater from two additional locations under an existing permit. An amended petition was filed November 12, 2021. A hearing was held on March 30, 2022, where the court granted the Department's motion to dismiss. Petitioner WaterWatch has 45 days to file an amended petition. Petitioner dismissed case on April 11, 2022.

**Pinnacle Utilities, LLC v. Oregon Water Resources Department; Deschutes County Circuit Court, Case Nos. 22CV08683**

On March 11, 2022, Pinnacle Utilities filed a petition for judicial review challenging an order of the Department denying a limited license application. A hearing date has not been set.

**Bridge Creek Ranch, LLC v. Oregon Water Resources Department; Marion County Circuit Court, Case No. 22CV05598**

On February 11, 2022, Bridge Creek Ranch filed a peremptory or alternate writ of mandamus in Marion Circuit Court directing the Department to process a transfer application for a change in point of diversion of a storage right certificate or show cause for not doing so. Petitioner additionally filed the same in the Oregon Supreme Court which was subsequently denied on April 7, 2022. Parties have proposed an alternative writ and requested a status conference with the Circuit Court to explain mandamus proceedings. A hearing schedule has not been set.

**Court of Appeals Filings**

**Golden Rule Farms, Inc. v. Oregon Water Resources Department; Court of Appeals, Case No. A172879 and A172880**

On December 13, 2019, a petition for judicial review was filed by a water right holder in Harney County against a Department final order denying an extension of time for lack of diligence to complete construction and apply water to beneficial use under a water right permit. Opening brief was filed December 4, 2020. On February 23, 2021, the Department filed a notice of withdrawal of the final orders for reconsideration. The Department reissued the orders denying extension of time on June 11, 2021. Oral argument in this case was heard on February 10, 2022.

***WaterWatch of Oregon v. Oregon Water Resources Department, et al; Oregon Court of Appeals, Case No. A169652, S32410 and S37839 (Lower Clackamas River)***

WaterWatch appealed a Department order supplementing and clarifying previous orders on municipal water rights, pursuant to a remand from the Court of Appeals. The Department approved municipal permit extensions in 2010, which WaterWatch appealed, and the court remanded the orders to OWRD for clarification. A hearing was held and the order on remand was issued in 2018. WaterWatch appealed. Oral arguments were heard January 8, 2021. The parties are awaiting a decision.

***East Valley Water District v. Oregon Water Resources Commission, et al; Oregon Court of Appeals Case No. A173292***

This appeal, filed with the court in January 2020, challenges an order of the Oregon Water Resources Commission that denies a reservoir application filed by the water district. Multiple extensions on filing briefs were requested by the parties. Petitioners East Valley Water District and WaterWatch of Oregon filed opening briefs on February 25, 2021. On July 27, 2021, WaterWatch's petition for judicial review was dismissed for lack of standing, and WaterWatch's motion for reconsideration of that order was denied on October 4, 2021. Court briefings have been filed.

***Klamath Irrigation District v. Oregon Water Resources Department; Oregon Court of Appeals, Case No. A176270 (Marion Circuit Case No. 20CV17922)***

On May 14, 2020, Klamath Irrigation District (KID) filed a Complaint for Declaratory and Injunctive Relief in Marion County Circuit Court. The complaint was filed under ORS 183.490 and ORS 540.740. KID is seeking an injunction compelling the Department to carry into effect the Amended and Corrected Order of Determination (ACFFOD) in the Klamath Adjudication by ordering the Bureau of Reclamation (BOR) not to divert stored water through the Link River Dam for instream purposes unless or until it obtains a water right or instream lease authorizing the use of water for such purpose, obtains a stay of the ACFFOD pursuant to ORS 539.180, or obtains a final judgment providing that federal law authorizes the BOR to use stored water in UKL reservoir for instream purposes without securing a water right in accordance with state law and the Reclamation Act.

A hearing was held in Marion County Circuit Court on June 18, 2020. On July 30, 2020, Judge Bennett issued an opinion letter approving the KID's motion for partial summary judgment on the injunction claim under ORS 540.740 and denying the Department's motions on the same claim. An order was issued October 13, 2020, by the court. In June 2021, the Department appealed the Circuit Court order. On December 27, 2021, the Oregon Court of Appeals issued an order granting a stay and expediting the case.

***Klamath Irrigation District v. Oregon Water Resources Department; Oregon Court of Appeals, Case No. A175510 (Marion Circuit Case No. 20CV17922)***

This appeal also stems from Marion Circuit Court case number 20CV17922, and is brought forth by Pacific Coast Federation, WaterWatch, and the Yurok Tribe appealing the orders denying their motions to intervene in the limited judgement from that case.

***Middle Fork Irrigation District v. Oregon Water Resources Commission, et al; Oregon Court of Appeals, Case No. A177625***

On February 23, 2021, Middle Fork Irrigation District filed a petition to compel agency action, seeking an order from the court directing the Commission to begin proceedings to forfeit a hydroelectric water right in Hood River County. The water right is held by Pacific Power for the Powerdale Hydroelectric Project and is the subject of a Department rulemaking process for converting hydroelectric water rights to instream water rights. In April 2021, the Department filed a motion to dismiss, and on October 6, 2021, the court held oral argument on the motion. An order granting the order to dismiss was issued on October 28, 2021, in favor of the Department. On December 22, 2021, the plaintiff filed a notice of appeal. On March 1, 2022, the court dismissed the appeal.

**U.S. District Court**

***Klamath Irrigation District v. United States Bureau of Reclamation; U.S. District Court, Medford, Oregon, Case Nos. 1:21-cv-00504-AA***

On March 29, 2021, the Klamath Irrigation District filed an emergency motion for preliminary injunction against the Bureau of Reclamation in Klamath County Circuit Court, which is managing the judicial phase of the Klamath adjudication. The preliminary injunction was filed to prevent the Bureau of Reclamation from using stored water contrary to the water rights determined in the Amended and Corrected Findings of Fact and Order of Determination. On April 5, 2021, the Bureau of Reclamation filed notice with the court of removal of the case to the U.S. District Court of Oregon. On April 12, 2021, Oregon Water Resources Department filed a motion to intervene in the case, which was granted. On April 20, 2021, Klamath Irrigation District filed a motion to remand the case back to Klamath County Circuit Court.

The hearing on remand was held at U.S. District Court on May 20, 2021. On April 25, 2022, the court denied the motion to remand.

***United States of America v. Oregon Water Resources Department; U.S. District Court, Medford, Oregon, Case Nos. 1:21-cv-1442***

On October 1, 2021, the United States filed a complaint challenging the April 6, 2021 final order of the Department issued against the Bureau of Reclamation relating to the release of stored water from Upper Klamath Lake, as well as two notices of violation. Additionally, the complaint contained a petition for judicial review under the Oregon Administrative Procedures Act. A hearing was held on a motion to stay, which was subsequently granted on March 3, 2022.

***Yurok Tribe, et al. v. United States Bureau of Reclamation and National Marine Fisheries Service; U.S. District Court, Northern California, Case Nos. ND CA3:19-cv-0445***

In 2019, Yurok Tribe and others challenged the final Biological Opinion under multiple Endangered Species Act and National Environmental Policy Act provisions. Klamath Water Users Association and Klamath Tribes filed as intervenors in the case. In October 2021, the United States filed a crossclaim in this case against the Department to bring the State of Oregon into the federal case. The crossclaim centered around the April 6, 2021 order issued by the Department to the Bureau of Reclamation relating to the release of stored water from Upper Klamath Lake. On April 7, 2022, the Department filed a counterclaim against the United States. Oral argument has not been set.

***Klamath Tribes v United State Bureau of Reclamation; U.S. District Court, Medford, Case No. 1:22-cv-00680-AA***

The Klamath Tribes allege that the Bureau of Reclamation (BOR) 2022 Klamath Project Operation Plan will result in illegal take of C’waam and Koptu sucker in Upper Klamath Lake (UKL) in violation of the Endangered Species Act. The BOR is managing UKL surface elevations at levels below those identified in the UKL Biological Opinion. This case will be heard in U.S. District Court in Medford.

**III. Upcoming Commission/Board Schedules**

<b><u>Commission / Board</u></b>	<b><u>Date</u></b>
Land Conservation and Development Commission	July 21-22
Parks and Recreation Commission	June 14-15
Fish and Wildlife Commission	June 23-25
State Land Board	August 9

Environmental Quality Commission  
Watershed Enhancement Board  
Board of Agriculture

July 21-22  
July 26-27  
August 16-18

**Attachments:**

1. Rulemaking Calendar



## Oregon Water Resources Department Current/Anticipated Rulemaking

Rule Division	Topic	Lead Staff	GWAC Input Expected?	Target WRC Date	Status
<b>NEW</b>	Groundwater Allocation	Doug Woodcock	Yes	2022	Under Staff Discussion
<b>TBD</b>	Stays	Doug Woodcock	No	2022	Temp Rules Prepared for WRC Decision
<b>TBD</b>	Implementation of HB 4061 (2022)	Vacant	No	TBD	Not Started
<b>Division 10 – Critical Groundwater Areas (CGWA)</b>	Conform Rules with ORS 537.730–742 / Establish Framework for CGWA Designations	Ivan Gall, Justin Iverson	Yes	2022	Preparing for RAC Meetings / Further Action Awaiting Hiring of Staff
<b>Division 54 (New Rule Division)</b>	Conversion of Hydroelectric Water Right to Instream Water Right	Dwight French, Mary Grainey	No	2022	Rules Prepared for WRC Decision
<b>Division 77 – Instream Water Rights</b>	Updates to Rules / Streamline District Lease Process / Consistency with SB 199 (2013) & SB 206 (2015) / Instream Leases and Transfers of Stored Water	Dwight French, Lisa Jaramillo, Sarah Henderson	No	TBD	On Hold – Need to Reconvene RAC

<b>TBD – Klamath Groundwater</b>	Regulation of Wells in the Klamath Basin	Ivan Gall	Yes	TBD	Not Started
<b>Division 340 (Formerly New Rule Division 87)</b>	Municipal Reclaimed Water Registrations	Dwight French, Kerri Cope	No	TBD	On Hold
<b>Divisions 200 205 &amp; 240 – Well Construction Licensing</b>	HB 3030 and SB 688 Implementation Relating to Temporary Authorizations for Armed Forces Spouses	Kris Byrd	Yes	TBD	On Hold
<b>Division 215</b>	Replace Erroneously Repealed Section Relating to Dedicated Measuring Tubes (690-215-0200)	Kris Byrd	No	TBD	On Hold
<b>Divisions 190 225 &amp; 260</b>	Updates to Rules / HB 2145 (2021) Implementation Relating to Exempt Map and Recording Fee / Civil Penalties	Kris Byrd, Travis Kelly	No	TBD	On Hold
<b>Division 380 – Water Right Transfers</b>	HB 3103 (2021) Implementation Relating to Stored Water Character of Use Transfers	Dwight French, Lisa Jaramillo	No	TBD	On Hold - Preparing Draft Rules
<b>Division 512 – Malheur Lake Basin Program</b>	Update to Rules Following Publication of Groundwater Study	Ivan Gall, Justin Iverson	Yes	TBD	Not Started