

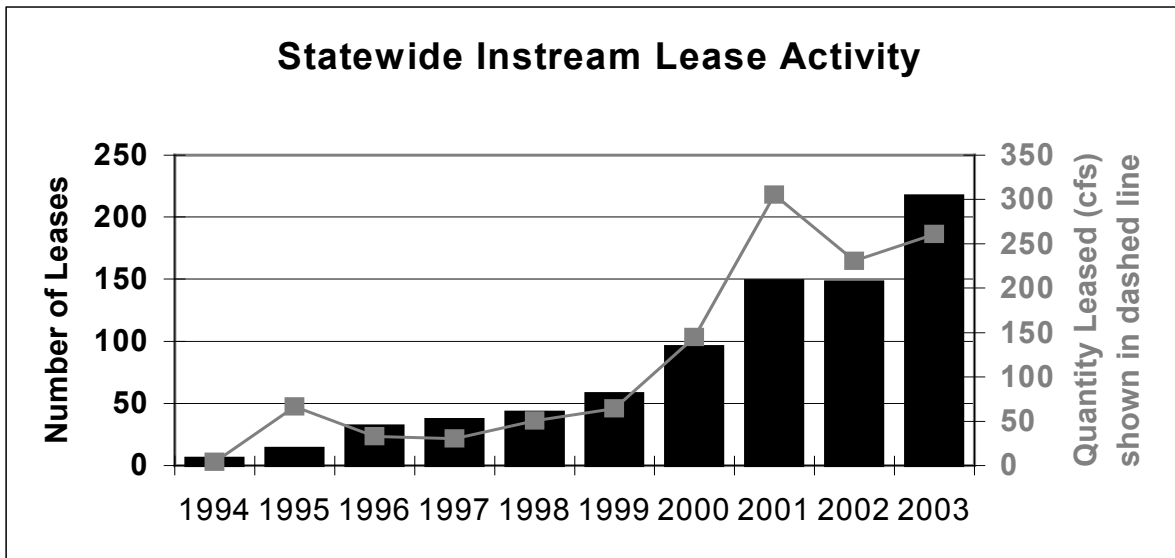
MEMORANDUM

TO: Water Resources Commission
FROM: Paul R. Cleary, Director
SUBJECT: Agenda Item G, March 12, 2004
Water Resources Commission Meeting

Director's Report

I. Commission Follow Up

Instream Leasing: As shown in the graph below, the instream lease program continues to grow since the program's inception in 1994. In 2003, there were 217 active leases with 260 cubic feet per second (cfs) leased instream. 167 of these leases were signed in 2003. The number of active leases increased almost 50% from last year. This increase was due, in part, to some irrigation districts choosing to do individual leases in 2003 instead of the pooled lease approach of prior years.



The table below lists the instream leasing activity by basin in 2003. The Deschutes, Umpqua, Willamette, John Day, Rogue and South Coast Basins had the most leasing activity, although the Klamath Basin had the second highest quantity of water leased.

Instream Lease Activity in 2003			
Basin Number	Basin Name	Number of Leases	Quantity Leased (cfs)
1	North Coast	0	0
2	Willamette	20	23.4
3	Sandy	0	0
4	Hood	4	1.6
5	Deschutes	97	81.9
6	John Day	20	38.7
7	Umatilla	8	2.7
8	Grande Ronde	2	0.9
9	Powder	0	0
10	Malheur	1	0.9
11	Owyhee	1	0.4
12	Malheur Lake	0	0
13	Goose & Summer Lakes	0	0
14	Klamath	3	65.1
15	Rogue	16	12.2
16	Umpqua	31	15.8
17	South Coast	14	17.1
18	Mid Coast	0	0
	Total	217	260.7

To promote the instream leasing program, the Department provided an instream lease training in January 2004. The training was offered to organizations such as the Deschutes Resources Conservancy, Klamath Basin Rangeland Trust, and Oregon Water Trust. These organizations currently account for more than 60% of the streamflow restoration applications submitted statewide.

The Commission is required by rule to review the instream leasing program in 2004 (OAR 690-077). Over the next several months, staff will work with stakeholders to complete an overall review of the program and other more specific review elements required by the leasing rule. Staff anticipate presenting the program review to the Commission at its October 2004 meeting.

Klamath Basin: In February 2004, Paul Cleary and Department staff attended and made several presentations at an Upper Klamath Basin Science Workshop sponsored by the U.S. Department of the Interior. The workshop provided a forum for scientists, irrigation districts, regulators, and

water users to discuss recent studies and projects; and to identify future research and data needs in the Basin. Topics covered in the four-day meeting included surface water and ground water hydrology, water quality issues, and sucker ecology. Follow-up meetings are proposed to facilitate the collection of the priority data identified during the workshop.

Sustainability Plan: The Department submitted its final Sustainability Plan to the Sustainability Board on January 16, 2004. The Board approved the plan at its February 20, 2004. Over the next year, the Department will be working on tasks identified in the plan and will periodically report to the Commission on its sustainability efforts.

Notice and Concurrence Work Group: The Department has established a work group with diverse representation to look at issues of “notice” and “concurrence” as they relate to voluntary water right cancellations, allocations of conserved water, and water right transfers. The work group had a kick-off meeting in December 2003; a meeting focusing on voluntary water right cancellations in January 2004; and a meeting on March 2, 2004, to begin discussions regarding allocations of conserved water. The Department’s objectives in establishing the work group are to ensure the protection of existing water rights; develop policies, legislative concepts or administrative rules that unify the water user community; and to establish clear understandable, efficient, and equitable processes and procedures for the various transitions.

II. Current Events

Current Water Conditions: The Surface Water Supply Index for the state was slightly below normal as of February 1, 2004, but trending upward. After a slow start in the first part of the water year, water availability conditions improved significantly during the month of January. Accumulated streamflow for the water year statewide is slightly below normal. Streamflow forecasts range 96% to 145% of normal in the north and southeast areas of the state, and 70% to 107% of normal in the rest of the state. Reservoir content, a major concern for irrigators, improved 10% during January to a statewide average of 54%. This compares to a statewide average of 65% in February of last year. Snowpack ranges from 114% of normal in the Umatilla Basin to 139% of normal in the Owyhee Basin. This compares to a range of 25% to 73% of normal at this time last year.

Budget Update: The failure of Ballot Measure 30 earlier in January has complicated the financial picture for state agencies. Loss of the revenue that would have been generated by this measure has created an approximately \$800 million hole in the state’s 2003 -2005 budget.

The measure was crafted with an automatic disappropriation of \$545 million in case of failure, primarily from the large General Fund recipients in the state budget such as Human Resources, Corrections, and Education. Water Resources is not included in that disappropriation. However,

because the disappropriation does not reduce the budget by the entire \$800 million needed, WRD may be called upon to help make up the difference as part of an across-the-board General Fund reduction, depending on the outcome of future revenue forecasts.

Regulatory Streamlining (Customer Service Survey): As part of its activities under the Governor's Regulatory Streamlining Executive Order (EO-03-01), the Department has developed and is initiating a Customer Service Plan. Among other plan elements, the Department will initially assess customer service satisfaction through Focus Group interaction; mail-in surveys provided with final decision documents; and an on-line survey of individuals assessing the Department's internet web-page. The mail-in "transaction survey" was initiated mid-February 2004 and the on-line survey is currently being developed.

Customer Service: 2003 was a banner year for the Department's strategy of using technology to deliver services and information. Use of the Department's web services more than doubled in 2003 – jumping from 600,000 to over 1.3 million hits. Much of this increase can be attributed to the addition of our water rights database to our growing list of web-accessible data resources. Our continuing efforts to improve the quality and quantity of the data available also contributed to the increase.

Umatilla Basin Ground Water: In November 2003, the Umatilla County Planning Commission created a Umatilla County Critical Ground Water Task Force. The 20-member committee is charged with identifying short- and long-term solutions to ground water problems within the designated critical ground water areas in the Basin, and creating a "2050 Plan" that assures ground water for broad community needs through 2050. The first two meetings of the task force were focused on committee orientation, mission, and goals. Department ground water staff presented current ground water levels and supply at their March 4, 2004, meeting in Hermiston.

Oregon Water Coalition Meeting: Paul Cleary and Tom Paul attended the January 27, 2004, annual meeting of the Oregon Water Coalition in Hermiston. Cleary was the luncheon speaker and also participated on a panel discussion of water right ownership. During the meeting, Tyler Hansell was honored for his many years of dedication and service on the Oregon Water Resources Commission.

Ground Water Advisory Committee (GWAC): Marilyn Reeves and John Stadeli were introduced as new committee members at the January 30, 2004, GWAC meeting. At that meeting, Department staff briefed GWAC on various rulemaking efforts including modification of the Willamette Basin Program relating to five-year limited ground water permits; modification of the well construction rules; new and modified rules addressing water right transfers in the Deschutes Basin; and special area well construction rules near Lakeview. The next GWAC meeting is tentatively planned for April 16, 2004.

Oregon Ground Water Association (OGWA) Seminar: Department staff presented a two-hour continuing education course at the February 6, 2004, OGWA Spring Technical Seminar in Springfield. The course covered well construction; continued education rule requirements; proposed rulemakings on well construction; and the new Amity Hill/Walnut Hills Ground Water Limited Area.

Annual Performance Measures Report: In January 2004, the Department submitted its Annual Performance Measure Report to the Oregon Progress Board. The Department has 13 performance measures tracking activities that advance its mission and goals, and to improve agency efficiency. This report is available on the Department's new web page entitled "Priorities and Performance." This web page houses our performance measures report, sustainability plan, customer service plan, regulatory streamlining plan, and other reports. The website can be accessed at the following address:
<http://www.wrd.state.or.us/law/performance.shtml>.

Reimbursement Authority: House Bill 2551 (2003 Oregon Laws) establishes a pilot project that provides the Department the authority to enter into a voluntary agreement with an applicant for expedited agency action on an application or other request for regulatory action. Under such an agreement, the applicant pays the cost to hire additional staff, contract for services, or provide additional services to the applicant not otherwise available. The bill sunsets January 2, 2006.

Since enactment of the bill, the Department initiated a Request for Information (RFI) to solicit information, including price estimates, from interested contractors. Based on the 27 responses to the RFI the Department developed a Request for Proposal (RFP) that closes on March 4, 2004. The program contemplated in the RFP will establish three "pools" of pre-qualified contractors that would be available to perform reimbursement authority work and prepare draft documents reflecting appropriate agency action. The three pools are water right transfers, water right permit extensions, and water rights certificates. The program should be available for applicants by March 22, 2004.

III. Rulemaking

District Water Right Transfers: In November 2003, the Department assembled a Rules Advisory Committee (RAC) to assist in the development of rules to implement district transfer sections of Senate Bill 820 from the 2003 Legislative Session. Among other things, Senate Bill 820 provides additional flexibility for districts to temporarily transfer water rights on a seasonal basis. The legislation also established a pilot project to explore alternative methods for conducting water right transfers within district boundaries. The Department expanded this rulemaking to address all elements of district water right transfers. The RAC has held four meetings to review and discuss draft rules for district water right transfers. Staff expect the work of the RAC and

hearing draft rules to be completed in May 2004; and anticipate presenting rules for Commission consideration in October 2004.

Certified Water Right Examiner Rules (OAR Chapter 690, Division 14): The Department has initiated a public rulemaking to make adjustments to the Commission's rules that govern preparation of Claims of Beneficial Use by Certified Water Right Examiners. Claims of Beneficial Use are required to be submitted after water use development is completed pursuant to a transfer final order or permit. The rules, unchanged since their adoption in 1988, bring the standards in line with subsequent legislative changes and aim to improve the consistency of the material submitted to the Department. This should lead to increased efficiencies in the certificate program. A public hearing is planned for late April 2004. The Department anticipates presenting final proposed rules to the Commission at its May 2004 meeting.

Repeal of Divisions 3, 11, and 26; and Amendment of Divisions 310 and 340: The Department initiated a public rulemaking proposing to repeal rules that are outdated or no longer necessary due to statutory changes. The Department is also proposing to amend a number of rules in order to implement laws adopted by the 2003 Legislature. Specifically, the Department is proposing to repeal OAR Chapter 690, Divisions 3, 11, and 26 relating to time lines for processing applications; water right application map requirements; and filing spring water use registrations. Statutory changes over time have made these rules outdated and unnecessary. Several rules under Division 310 are proposed for amendment in order to implement Senate Bill 82 (2003 Oregon Laws) regarding requirements for easements on state-owned lands and House Bill 2268 (2003 Oregon Laws) regarding statutory fees. Rules in Division 340 regarding water use under a limited license are proposed for amendment in order to adjust the examination and recording fee.

A public hearing on the proposed rules was held January 27, 2004; no oral testimony was provided. The written comment period closed February 10, 2004; one written comment was provided regarding the proposed fee adjustment for limited licenses. The Department anticipates presenting the proposed rules to the Commission at its May 2004 meeting.

OAR Chapter 690, Division 502, Willamette Basin Program: The Department has initiated a public rulemaking process proposing to adopt a rule under the Willamette Basin Program (OAR Chapter 690, Division 502). The proposed rule would provide an opportunity for certain holders of five-year limited ground water permits to submit an application for a ground water permit without the five-year limitation.

In January 1992 the Commission adopted modifications to the Willamette Basin Program that included numerous restrictive ground water classifications and limitations. In that rulemaking, the Commission established several "Ground Water Limited Areas" to address concerns about declining ground water levels. The Commission's rules established a date of October 4, 1991, as the date pending ground water applications would be subject to the new rules. However, the rules also established provisions that new ground water permits in the "Ground Water Limited Areas"

may be issued for a period not to exceed five years, with an opportunity to be extended for additional five-year periods if the ground water resource can sustain the continued use.

Over the last several years, a number of the holders of these “five-year permits” have expressed their opinion that the Commission’s 1992 rulemaking was unfair and that the ground water resource in their area is stable and therefore a “normal” conditioned permit should be allowable. The proposed rule would modify the Willamette Basin Program to allow certain holders of five-year limited permits, with a priority date of October 4, 1991, or earlier, to submit a ground water application and not be subject to the classifications or restrictions established by the applicable Ground Water Limited Area. Applications under the proposed rules will be subject to all current application processing rules and review requirements.

A public rulemaking hearing was held in Salem on February 23, 2004; no testimony was provided at that hearing. The written comment period closes March 9, 2004.

IV. Litigation Update

Marks v. Water Resources Department Umatilla County Circuit Court – In May 2002, legal action was filed in Umatilla Circuit Court against the Department challenging its regulation of a water user for using water without a water right. While legal action is still pending, the landowners have deepened an existing well and obtained a water right permit to cover lands that have been irrigated. The landowners have also filed a transfer application and received an order from the Department approving the transfer of surface water rights delivered by Hermiston Irrigation District. A trial is set for April 2004; however, the parties are working on settlement of the case.

Brayman et al v. Lewis et al Harney County Circuit Court – This involves several legal challenges to the watermaster’s regulation of water in Foley Slough, a distributary channel of the Silvies River in Harney County. As part of settlement discussions, the parties have developed a draft water management plan and have distributed the plan for comment.

Fitzgerald Ranch, Inc., et al v. Oregon Water Resources Department
Lake County Circuit Court – Petitioner Fitzgerald Ranch, Inc., et al is seeking judicial review of a water right certificate the Department recently issued to Adel Irrigation District.

Kerivan et al v. Oregon Water Resources Commission Oregon Court of Appeals – In September 1999, a number of water right holders on Sucker Creek in Josephine County submitted affidavits of non-use and requested that the Department initiate cancellation of certain irrigation water rights on Sucker Creek. The Department returned the affidavits explaining that the irrigation water rights sought to be canceled for non-use were already canceled in connection with their

transfer to instream use in 1998 and early 1999. The water users sought judicial review in Josephine County Circuit Court of the Department's refusal to initiate cancellation proceedings. The Circuit Court upheld the Department's action.

In July 2003, the Court of Appeals affirmed the opinion of the Josephine County Court and concluded "the newly issued water right certificates are conclusive evidence of the priority and extent of the appropriation" and that the "department's refusal to act was proper." In October 2003, Kerivan et al filed a petition for review with the Oregon Supreme Court. In January 2004 the Supreme Court denied review of the case; therefore, the Court of Appeals ruling stands.

WaterWatch et al v. Oregon Water Resources Commission Oregon Court of Appeals – In November 2002, WaterWatch of Oregon and thirteen other individuals, businesses, and organizations filed a petition for Judicial Review of the Commission's Deschutes Ground Water Mitigation rules, and Mitigation Bank and Mitigation Credit rules (OAR Chapter 690, Divisions 505 and 521). Petitioners submitted their opening brief on June 26, 2003. The Department filed its brief on November 5, 2003; and WaterWatch et al filed their reply brief on December 9, 2003. Oral argument before the Court will likely be this spring.

V. Commission/Board Schedules	Location	Date
Environmental Quality Commission (EQC)	Portland	April 8 - 9, 2004
Oregon Watershed Enhancement Board (OWEB)	Hood River	March 16 - 17, 2004
Land Conservation and Development Commission (LCDC)	Hood River	March 10 - 12, 2004
Parks and Recreation Commission	Medford	April 15, 2004
Fish and Wildlife Commission	Gold Beach	March 19, 2004
Board of Agriculture	Maupin	May 24, 2004
State Land Board	Salem	April 13, 2004
Board of Forestry	TBA	TBA
Dept. of Geology and Mineral Industries (DOGAMI)	Portland	March 9, 2004