



# Oregon

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Water Resources Commission Meeting  
Agenda Item M, July 29, 2005

### **Staff Recommendation Regarding Petition for Withdrawal or Emergency Rulemaking - Klamath Basin**

#### **I. Issue Statement**

WaterWatch of Oregon and ten other organizations (Petitioners) have petitioned the Commission to either initiate emergency rulemaking under ORS 183.390 and 183.335(5) to close the Klamath and Lost River Basins to further appropriation via a basin program rule or take immediate action under ORS 536.410 to withdraw from further appropriation all of the unappropriated surface and ground waters of the Klamath and Lost River Basins. The petition is provided as Attachment 1.

For the reasons outlined below, staff recommend the Commission deny the request for emergency rulemaking and deny the request for withdrawal. Staff also recommend that the Commission utilize the work session at its October meeting for a status review of Department activities in the basin and briefings from the full spectrum of Klamath Basin water users, conservation and tribal interests.

#### **II. Background**

On July 5, 2005, the Water Resources Department received a request from Petitioners asking that the Commission take immediate action under ORS 536.410 to withdraw from further appropriation all of the unappropriated surface and ground waters of the Klamath and Lost River Basins. As an alternative to a withdrawal, Petitioners request that the Commission initiate an emergency rulemaking under ORS 183.390 and 183.335(5) to restrictively classify the subject waters via a basin program rule to prevent further appropriations. Under either alternative, the petition does not propose to constrain emergency uses of water in times of drought; statutorily exempt ground water uses; or constrain any application for new uses currently pending before the Department.

The basis of Petitioners' request includes the argument that the action "is necessary to avoid serious harm and prejudice to the public interest, protect existing rights and claims, prevent aquifer depletion, ensure compliance with the laws and policies of the State of Oregon and to ensure a coordinated approach to the use and control of Klamath River Basin waters." A similar petition was submitted in 2002 which the Commission denied. Petitioners argue that, in the 3 years since the last petition, water management decisions have contributed to "the catastrophic deaths of tens of thousands of adult salmon and steelhead and led to widespread ocean fisheries closures, seriously exacerbating the already existing water crisis, and have done nothing to protect -much less restore- the ecology of the basin."

Petitioners request that the Commission maintain a withdrawal or closure by basin classification until the following actions are complete:

1. Ongoing ground water studies have been completed and they demonstrate additional ground water development is sustainable;
2. A final order of determination in the Klamath Basin adjudication has been entered;
3. Water is available for future appropriation after meeting instream and tribal needs and existing rights;
4. Measurement and reporting devices have been installed on all major diversions; and
5. The Department has implemented an aggressive enforcement program.

### **III. Discussion**

#### **A. *The Resource***

Since the last petition to the Commission in 2002, the Department has made, and continues to make, substantial progress in developing tools for effective water management in the Klamath Basin. The adjudication is progressing according to expectations, several ground water studies have been completed, a water availability analysis has been completed for the Lost River Basin, and the USGS/OWRD basin ground water study is providing a substantial knowledge base for water management decisions. Additionally, federal funding has enabled the department to maintain a ground water technician working full time in the basin, and a senior watermaster position was recently established for the Klamath Falls office.

Many streams in Oregon, including the Klamath River and its tributary streams within Oregon, are over-appropriated during the dry, high water use months of the year. The Commission recognized this situation thirteen years ago and took action by adopting its Water Allocation Policy (OAR 690-410-070). Under the Commission's Water Allocation Policy, water for new appropriations must be available on an 80 percent exceedance basis (8 out of 10 years). Under the allocation policy, water is not available for appropriation for a direct flow right from the Klamath River or its tributaries above the state line within Oregon any month of the year.

A preliminary evaluation of Klamath Basin direct flow permit applications, dating back to 1993, indicates that none of the subject permits allow for consumptive, direct flow use from the Klamath River or its tributaries that join the river within Oregon. For tributaries that meet the Klamath River south of the state line and the Lost River, six permits have been issued since 1993 for de minimus domestic and stockwater use, totaling approximately 0.5 cfs.

Given the over-appropriated condition of most streams during the low flow, high water use times of year, water users wishing to augment existing supply (and preserve summer-time flows) are turning to off-season storage and ground water use. The Department's allocation of surface water for off-season storage is guided by the Commission's Water Allocation Policy and avoids periods of the year when flows are low and expected demands are typically not met. In allocating water for storage, the Department normally evaluates applications on a 50 percent exceedance basis, meaning that water must be available to appropriate for storage five out of ten years. Under this allocation scheme, water is currently available to appropriate for storage from the Klamath River and its tributaries, and the Lost River and its tributaries, within Oregon during some of the high flow and off-season months of the year.

In the Klamath Basin, off-season storage is a key component to augmenting water supplies. Increasing supply without further aggravating the basin's over-appropriated condition will require a combination of off-season storage and ground water use that does not adversely affect surface water flows. Off-season storage is a key component in settling contests in the Klamath Basin adjudication. In addition, off-season storage is a likely alternative source of water to augment wetlands and facilitate riparian restoration efforts. Moreover, the Congressionally enacted Klamath Basin Water Supply Enhancement Act of 2000 (which the State of Oregon supported) authorizes feasibility studies for increasing storage capacity and/or yield of Klamath Project facilities while improving water quality and the protection of fish and wildlife. Several such studies are underway (e.g., Gerber Reservoir).

In their depiction of the basin's over-appropriated condition, Petitioners put special emphasis on the need to stop new ground water appropriations. Much of their argument is based on their understanding of hydraulic connection between surface water and ground water, their belief that allowing new ground water use only serves to continue appropriating new water rights in a basin that is already in crisis as a result of over-appropriation, and a belief that new ground water uses will exacerbate the problem of an already unsustainable ground water resource. Staff have invested a lot of time and resources in studies of Klamath Basin ground water. Staff use this knowledge, along with their understanding of surface water hydrology and the water availability models for both the Klamath River Basin and the Lost River Basin, to evaluate new applications for ground water use. This is the same process that is used to comply with the Commission's Water Allocation Policy, and is intended to prevent over-allocation. The Water Allocation Policy (OAR 690-410-070) was adopted ten years ago. Under the Commission's Water Allocation Policy, after considering existing appropriations and related expected demands on the water, water for new appropriations must be available on an 80 percent exceedance basis (8 out of 10 years). Under this allocation policy, water is not available for appropriation for a direct flow right from the Klamath River or its tributaries above the state line within Oregon any month

of the year. With the exception of November, water is not available for a direct flow right from Lost River or its tributaries. The Department's actions have been consistent with this information and policy and further rulemaking is not warranted from a direct flow surface water allocation perspective. With the exception of emergency use drought permits, new ground water rights are not issued in the event there is a finding that hydraulic connection exists between the proposed use and surface water, and there is a finding of potential for substantial interference under OAR Chapter 690, Division 9.

***B. The Process***

Petitioners' primary request is that the Commission take immediate action in the form of a withdrawal. Under ORS 536.410, the Commission may withdraw unappropriated waters from further development for all or any uses with the above noted exceptions. The withdrawal is created by an order of the Commission after public notice and a public hearing is held on the necessity for the withdrawal. The Commission may take such action if it determines that it is necessary to ensure compliance with state water policy, or in the public interest to conserve water resources. Any Commission order of withdrawal must state the reason for the withdrawal and its duration. The Commission may subsequently amend or revoke the order. There is no requirement to affirmatively accept or deny a petition for withdrawal and there are no statutory time lines for such action.

In the alternative, Petitioners ask the Commission to initiate an emergency rulemaking under ORS 183.335(5) to classify the waters of the Klamath Basin as closed to further appropriations with the noted exceptions. ORS 183.390 provides that an interested person may petition the Commission to promulgate, amend or appeal a rule. Within 90 days of such a request, the Commission must either deny the request or initiate rulemaking proceedings. Under ORS 540.340(1), the Commission has the authority to, by rule, "classify and reclassify the lakes, streams, underground reservoirs or other sources of water supply in this state as to the highest and best use and quantities of use thereof for the future in aid of an integrated and balanced program for the benefit of the state as a whole." The effect of a classification is to designate the purposes for which unallocated water may be developed within specific river basins. Classifications are adopted through rulemaking processes and are incorporated into basin programs. The Commission must provide public notice and hold at least one public hearing in the affected area before adopting or amending classifications.

With respect to ground water classifications, ORS 537.780 provides additional standards. Under this statute the Commission may not:

Adopt any rule restricting ground water use in an area unless the rule is based on substantial evidence in the record of the Water Resources Department to justify the imposition of restrictions.

**C. Staff Recommendation**

Staff recommend denial of Petitioners' request for withdrawal under ORS 536.410 and emergency rulemaking under ORS 183.390 and 183.335 for the following reasons. A draft Final Order denying the petition for emergency rulemaking is Attachment 2 (no order is required for denying the withdrawal petition).

- (1) The seasonal over-appropriation of the Klamath River and its tributaries above the state line within Oregon, and the Lost River Basin and its tributaries, has already been recognized by the Commission in its Water Allocation Policy. The Department's implementation of the policy through its permitting decisions with respect to direct flow allocations is not exacerbating the seasonal over-appropriation. A withdrawal or rulemaking to restrictively classify surface water during the low-flow, high use season is not warranted given the restrictions on new appropriations already imposed by the Water Allocation Policy.
- (2) Off-season storage during high flow, low water demand months is an alternative for augmenting water supplies, preserving (summertime) natural flows, and restoring wetlands and riparian zones. In the Klamath Basin, off-season storage is likely to be a key component in settling contests in the adjudication and in Congressionally authorized efforts currently underway in the basin to augment supply for multiple uses.

Under the Commission's current water allocation policy, water is only available for storage in the Klamath Basin during the high flow, off-season months. Taking the storage alternative "off the table" through a withdrawal or rulemaking is not warranted and could be counterproductive to activities underway to augment supplies for multiple uses, improve water quality, restore wetlands and riparian zones, and preserve natural flows during low flow months.

- (3) With respect to an emergency rulemaking, under ORS 537.780 the Commission may not adopt any rule restricting ground water use unless the rule is based on substantial evidence in the record of the Department to justify the imposition of restrictions. In this case, sufficient evidence is not available to warrant such a basinwide restriction either by rule or withdrawal. Data collected by the Department to date indicates there has been a decline in groundwater levels, in some locations up to 30 feet in depth. The decline in groundwater levels has been a result of below normal precipitation in recent years and increased pumping as part of the Bureau of Reclamations's pilot water bank program that has been used to replace project water needed for ESA purposes. This is anticipated to be a temporary program, and ground water levels are expected to stabilize. A basinwide withdrawal or rulemaking to restrictively classify the basin's ground water is neither warranted nor supported by substantial evidence in the records of the Department. Where problems have been documented (e.g., Bonanza Springs, City of Malin, and shallow domestic wells) the Department is working cooperatively with all parties to resolve them.

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The Commission may wish to consider utilizing the work session at its October meeting for a comprehensive discussion of Department activities in the basin.

Attachments:

1. Petition for Withdrawal or Emergency Rulemaking (without attachments)
2. Draft Final Order Denying Petition for Emergency Rulemaking