

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Agenda Item C, October 11, 2002
Water Resources Commission Meeting

Director's Report

I. Commission Follow Up:

Instream Leasing: As of October 1, 2002, 143 active standard leases and one split-season lease were in place, with 224 cfs being protected instream. In addition to 40 already active leases, the Department received 112 applications in 2002. Eight lease applications are currently pending, including one for the 2003 season. The average processing time is 35 days, including the time to provide weekly notice and the 21-day public notice period.

The Department has received injury challenges on seven instream lease applications. All of these issues have been resolved, some involving further modification to the lease application.

Klamath Basin Follow-up: In July 2002, the Department held a meeting with the organizations that submitted a petition to initiate rulemaking to close the Klamath Basin to further appropriations. At the meeting, staff shared in-depth information from the Department's ground water investigations in the Klamath Basin and discussed past and current ground water and surface water permitting activities. Meeting participants also discussed potential gaps in the Department's information sources and permitting process and assessed alternatives that may address these gaps. Staff originally planned to brief the Commission at its October 2002 meeting on the gaps and alternatives identified during this discussion but have deferred the briefing until February 2003 to allow for a more comprehensive evaluation.

In the meantime, staff are sharing information with interested parties, meeting with stakeholder representatives and developing proposed final orders for ground water permit extensions in the Bonanza area. Staff are also developing a primary/supplemental ground water use database for the basin to evaluate whether "new" ground water uses are for irrigating "new" lands or for adding flexibility to existing water rights. To enhance coordination, the Department is now providing copies of all ground water applications in the basin to local field offices of Oregon Department of Fish and Wildlife (ODFW) and Department of Environmental Quality (DEQ). Finally, staff are evaluating whether there is a need to limit new surface water or ground water uses by type, use, or season.

Other ongoing activities in the Klamath Basin include:

- Bonanza Corps of Engineers Hydrologic Study - The U.S. Corps of Engineers (Corps) has initiated a study of the operation of the Lost River and the associated relationship to the Bonanza Springs and use of ground water by Bonanza residents. The residents of the Town of Bonanza (Town) have individual wells that draw from an aquifer that is hydraulically connected to the Lost River via Bonanza Big Springs. The Horsefly Irrigation District (HID) impounds the Lost River from April through September to operate diversion pumps above and below the Town. HID operations, in conjunction with other factors, can adversely influence the quality of water in the Town's aquifer — domestic wells near Bonanza Big Springs become contaminated whenever the ground water elevation drops below the river elevation at Bonanza Big Springs.

The Town of Bonanza proposes a free flowing river as the solution to this water quality problem. This approach would that require HID re-engineer their water diversion system. HID believes a free flowing river would be expensive and impractical and that a community water system is the solution. From the Town's perspective, a community system is too expensive and does nothing to prevent ground water contamination.

The State and Klamath County requested that the Corps perform an independent technical assessment of the water resource issues in the Bonanza area. The Klamath County Commission will act as facilitator for the Corps in coordinating with the federal, state and local agencies. In cooperation with the Department, Klamath County will act as the non-Federal Sponsor for this study. The cost of phase 1 of the assessment is \$65,600. Klamath County is providing \$20,000, and the Department is providing \$12,800 in in-kind services. The Corps will match the remaining cost. The first phase of the study is expected to be completed in the next 12 months and will provide a consensus definition of the problem, a comprehensive data gathering process, and consensus solutions to the problem.

- Bonanza Ground Water Study – Staff are currently drafting a Lost River Subbasin ground water investigation report for peer review. Review of the report is tentatively scheduled for January 2003. Following peer review, the Department will concurrently draft the final report, determine the status of the Bonanza area five-year permits, share the results with ground water users and interested parties at public meetings, and solicit feedback. A final report is tentatively scheduled for March 2003. In the meantime, the Department has been sharing its understanding of the ground water system and conducting additional field work, including a well elevation survey to improve project water level analyses.
- Klamath Drought Plan - With funds provided by the Bureau of Reclamation (BOR), the Department has been developing a drought plan for the Klamath Basin. The plan

is presently in draft format and includes a proposal for surface water monitoring that was prepared by George Taylor, State Climatologist, and a proposal for ground water monitoring that was prepared by Department Hydrogeologist, Ken Lite. The plan also contains information about water demand in the basin, basin hydrology, and a recommended drought response structure. After completion of internal review, the plan will be presented to water users in the Klamath Basin and other interested parties for their review and comment. The process is scheduled for completion by April 2003.

Deschutes Ground Water Mitigation Rules: At its September 13, 2002, meeting, the Commission adopted Deschutes Ground Water Mitigation rules (OAR Chapter 690, Division 505) and Mitigation Bank and Mitigation Credit rules (OAR Chapter 690, Division 521). The rules became effective on September 27, 2002, when the Department filed the rules with the Secretary of State's office. The final rules have been posted on the Department's web page. Staff are working internally to develop the processes and structure to implement the rules. The Department intends to hold a rule implementation meeting with state agencies and stakeholders. Staff are also developing a plan to get information to applicants and existing water users regarding the rules and mitigation requirements and options.

Willamette Valley Ground Water Workshop: On September 24, 2002, the Department and the Department of Land Conservation and Development (DLCD) jointly hosted the "Willamette Valley Workshop: Linking Land Use and Ground Water Supplies." The workshop gave the Department an opportunity to strengthen its relationships with local governments in the Valley and to begin identifying opportunities for the local and state entities to collaboratively address limited ground water supplies.

Based on a survey of participants, the workshop was a great success. There was lively dialog among the diverse group of participants; over 60 people representing county planning departments and commissions, state and federal agencies, and numerous other interests. The workshop participants also expressed a strong interest in seeing further discussion of this issue. To that end, Department staff are developing a summary of the workshop and will be working with DLCD and the counties to identify "next steps."

2001-03 Budget Execution Update: The Fifth Special Session of the 2001 Legislature met in September to develop a plan for addressing a projected \$482 million deficit in the General Fund. The plan for balancing the budget proposes a temporary increase in personal income and corporate taxes, borrowing from future tobacco lawsuit settlement payments, and implementation of targeted program cuts. The tax increase referral is scheduled for a vote on January 28, 2003. If the tax increase fails, a 3.6% reduction of all General Fund budgets would be implemented. This reduction, taken over the remaining five months of the Biennium, could be in excess of 25% of unexpended General Fund budgets and would require an \$820,000 reduction in the Department's budget. The Department is planning for this contingency with restrictions on purchases and contracting and filling vacant positions.

The budget shortfall actions taken by the Department during this Biennium have had an adverse affect on programs such as Oregon Plan assistance in the Northwest Region, statewide geographic information system applications, ground water data maintenance, and data input. Positions left vacant during this Biennium also represent a lost opportunity to address integrated water management needs, especially in areas such as the Klamath Basin.

II. Current Events:

Current Water Conditions: October 1st was the beginning of the 2003 water year. The 2002 water year ranged from near normal or slightly above normal in the Lower Deschutes/Hood River Basin to below normal in much of the rest of the state. However, because of the drought conditions for most of the state in 2001, soil moisture and ground water in 2002 did not fully recover to "normal" conditions. This is especially evident in the Klamath Basin where the Department has been closely monitoring ground water conditions.

Experts estimate that current ocean conditions and other predictive indicators closely resemble conditions in 1974. Western Oregon is expected to be cooler than average with average to above average precipitation. In Eastern Oregon, precipitation is expected to be near average with temperatures ranging from average in the beginning of the precipitation season to cooler than average in the later part of the precipitation season.

Western States Water Council: In early October 2002, Meg Reeves attended a meeting of the Western States Water Council in Wichita, Kansas. The meeting included a presentation by BOR Commissioner John Keys regarding ESA issues, the Bureau's 2003 budget, and implementation of security plans for Bureau projects. The Council approved a letter to the Department of Interior (DOI) with recommendations for improving implementation of the ESA and a letter to DOI with suggestions for expediting general state water right adjudications. The Council also approved revisions to its position on reauthorization of the Clean Water act.

Marmot Decommissioning Settlement Agreement: Portland General Electric (PGE), federal and state agencies, including the Department, and other stakeholders (such as the City of Sandy, American Rivers and WaterWatch) have reached agreement in principle on the decommissioning of PGE's hydroelectric projects on the Sandy and the Little Sandy. PGE's water right grants PGE 800 cfs from the Sandy River and the Little Sandy River.

Under Oregon law, hydroelectric water rights are converted to instream water rights five years after the water use ceases, upon expiration of the water right, or upon consent of the water right holder. The water right is to be converted to an instream water right for up to the full amount of the water upon a finding by the Director that the conversion will not result in injury to existing water rights. In accordance with this statute, PGE's water right will be converted instream after the project ceases operation, estimated to be in 2007. All

of PGE's water right will be converted instream while protecting existing water rights and, as currently proposed, 600 cfs will go instream in the Sandy River and 200 cfs will go instream in the Little Sandy River. On the Sandy River, this instream right will be protected from the confluence of the Sandy and Bull Run Rivers upstream of the Sandy River. Similarly, on the Little Sandy River, the instream right will be protected from the tailrace of the powerhouse on the Bull Run River upstream on the Little Sandy River. The settlement agreement is scheduled to be signed on October 24, 2002, and Governor Kitzhaber is expected to attend.

Oregon Water Law Conference: On November 14 and 15, 2002, Department staff will participate in a two-day Oregon Water Law Conference hosted by the Seminar Group in Portland, Oregon. Staff presentations will cover the Deschutes Basin ground water mitigation rules, the status of the transfer rulemaking and other issues related to transfers, community water supply issues, and professional ethics.

Northwest Environmental Conference and Tradeshow: On October 15 and 16, 2002, Meg Reeves will participate in the Northwest Environmental Conference in Portland, Oregon. The conference will provide basic information to help businesses operate within environmental compliance guidelines, information on innovations in environmental management, discussions of the latest technologies, and roundtable sessions on environmental topics.

2002 Farm Bill Implementation: The Farm Security and Rural Investment Act of 2002 (Farm Bill) includes conservation programs such as the Wetlands Reserve Program, Wildlife Habitat Incentive Program, Farmland Protection Program, Environmental Quality Incentives Program (EQIP), and Conservation Reserve Program (CRP). Funding for these conservation programs will exceed \$750 million in fiscal year (FY) 2002. The Farm Bill also includes \$50 million for water conservation activities in the Klamath Basin.

The Natural Resource Conservation Service (NRCS) and the Farm Services Administration (FSA) have formed the Oregon Technical Advisory Committee to provide guidance for implementation of the Farm Bill in Oregon. The Department is a member of the Committee. The Environmental Quality Incentives Program is ready for implementation in Oregon and will distribute cost-share and incentive payment funds. NRCS is also forming advisory groups to recommend priority projects for EQIP funds in Oregon which are estimated to be \$13.5 million in FY 2003 and approximately \$19.5 million in FY 2004.

III. Committee/Task Force Updates:

Senate Bill 710 Work Group: The Senate Bill 710 Work Group completed its report to the Full Joint Natural Resources Committee in August 2002. The report identified existing water trading tools for addressing ground water conflicts between municipal and non-municipal ground water users, and will be available on the Department's website.

The Work Group is hoping to present its report to the Natural Resources Committee during the 72nd Legislative Assembly.

Endangered Species Act (ESA)/Water Law Work Group: As follow-up to the ESA/Water Law Work Group and to promote continued coordination on ESA issues, the Department has initiated a series of presentations on state water law for federal agency staff. Topics covered in the presentation include the doctrine of prior appropriation, the water right permitting process, and voluntary tools for restoring streamflows. The Department has made presentations to staff at the U.S. Fish and Wildlife Service in April 2002, staff at the Bureau of Land Management in May 2002, and staff at the National Marine Fisheries Service in September 2002. The Department is currently planning a presentation for staff at the U.S. Department of Agriculture.

IV. Rulemaking:

Transfers: The Transfer Rules Advisory Committee has met twice since the August Commission meeting to discuss modifications to the transfer rules and have agreed on a strategy for moving forward with rule changes. Staff are continuing to work with the Committee to develop rules on which there is general consensus and to move forward with hearings on those rules. Staff will also explore alternatives with the Committee for addressing unresolved issues related to transfer rules and to develop rules addressing those issues under a longer timeframe. Chief among these issues are injury review standards. At the Committee's request, staff are scheduling a discussion of the unresolved policy issues for the February 2003 Commission work session.

V. Litigation Update:

Hale/Hoskins V. Oregon Water Resources Department

Oregon Court of Appeals – On October 2, 2002, the court affirmed the Department's final order denying petitioner's request to include their lands within the boundaries of a certificate for the use of irrigation water from the Umatilla River. The court agreed with the Department that under the Water Rights Act "perfection" of a water right includes an element of continuity of use. The court's opinion can be found at <http://www.publications.ojd.state.or.us/A1073030.htm>.

League of Oregon Cities v. State of Oregon

Oregon Supreme Court – On October 4, 2002, the Oregon Supreme Court ruled that Ballot Measure 7, approved in the 2000 general election, was unconstitutional. Measure 7 would have required governments to compensate private real property owners for the cost of "restrictive" regulations that reduced the value of their real property. The court said that because the ballot measure had the effect of amending more than one provision of the constitution, it violated the separate-vote requirement in the Oregon Constitution. The separate vote requirement provides that when two or more amendments are submitted to voters, each has to be voted on separately. More specifically, the court decided that Measure 7 amended the "free exercise" clause of the Oregon Constitution, as well as the "takings" clause of the Constitution. Because the measure exempted "the use of a property for the purpose of selling pornography, performing nude dancing, selling

alcoholic beverages or other controlled substances, or operating a casino or gaming parlor” from the protections the measure provided, it permitted governments to choose not to pay some property owners, based on the particular activity the property owner engaged in. According to the court, this placed “a price tag upon the property owner’s right of free expression.” In other words, the exemption for certain property owners from the protections of Measure 7, acted to restrict their freedom of expression.

United States v. Adair

Federal District Court for the District of Oregon – Oregon’s appeal of a federal district court decision on the question whether the federal court should exercise jurisdiction given the pendency of Oregon’s Klamath Basin adjudication. The state’s brief will be filed with the Ninth Circuit Court of Appeals on Friday, October 11. Because the issue presented is of interest throughout the west, other states are considering filing “friend of the court” briefs.

VI. Commission/Board Schedules

	Location	Date
Environmental Quality Commission (EQC)	Portland	Dec 12
Oregon Watershed Enhancement Board (OWEB)	TBA	Jan 16-17
Land Conservation and Development Commission (LCDC)	TBA	Oct 24-25
Parks and Recreation Commission	TBA	Nov 21
Fish and Wildlife Commission	Portland	Oct 10-11
Fish and Wildlife Commission	Portland	Nov 8
State Land Board	Salem	Dec 10
State Board of Forestry	Coos Bay	Oct 23-24

*TBA = to be announced