



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item C, August 22, 2008  
Water Resources Commission Meeting

#### **Director's Report**

##### **I. Current Events:**

Current Water Conditions: As of the beginning of August the U.S. Drought Monitor reports 68.1% of the state is abnormally dry, up from 34.5% on May 1; 18.5% of the state is experiencing moderate drought, and 3.7% of the state is experiencing severe drought. The southeast corner of the state is the driest part of Oregon, while the Willamette Valley, North Coast and Mid Coast have normal conditions.

According to the Oregon Surface Water Supply Index, on August 1, 2008, only the South Coast Basin was rated below average water conditions with an index of -2.25. The Willamette and Lower Deschutes Basins are above average.

According to the latest projections from the Climate Impacts Group at the University of Washington, average annual temperature is projected to increase 2.2°F (1.2°C) by the decade of the 2020s, 3.5°F (2.0°C) by the decade of the 2040s, and 5.9°F (3.3°C) by the decade of the 2080s, relative to 1970-1999 average temperature. The projected change in average annual temperature is substantially greater than the 1.5°F (0.8°C) increase in average annual temperature observed in the Pacific North West during the 20th century (Mote 2003). While individual models produce changes as much as -10% or +20% by the 2080s (Table 1), the Climate Impacts Group's best estimate of change is that average annual precipitation will increase only 1 to 2%.

The seasonal climate forecast by the NOAA Climate Prediction Center is for a greater than 33% chance of below normal August-September-October temperatures for western Oregon and Washington, a greater than 40% chance for below normal temperatures at the Oregon coast, and an equal chance of below, equal to, or above normal temperatures for the remainder of the PNW. The precipitation forecast for the same period is for a greater than 30% chance of below normal precipitation over much of the region, exceeding 40% in eastern Oregon and Washington, and western Idaho. Southeast Idaho, northwest Oregon, and western Washington are forecast to have an equal chance of below, equal to, or above normal precipitation.

Senate Committee on Rules and Executive Appointments: On June 26, Director Ward was reconfirmed by the Oregon Senate for another four-year term as the Director of the Water Resources Department. Two new Commissioners were also appointed and confirmed. John

Roberts from Medford, and Jeanne LeJeune from Portland, were appointed to serve on the Water Resources Commission for the next four years.

Western States Water Council: Director Ward completed his two year term as Chair of the Western States Water Council, Water Resources Committee, and was recently elected to serve as the Secretary Treasurer.

The Oregon Global Warming Commission: Director Ward is an ex-officio member of the Global Warming Commission. The full Commission has met twice during 2008 and conducts most of its work through committees and subcommittees. The goal of the Commission is to evaluate and recommend public policies that will help the state of Oregon mitigate and adapt for climate change conditions. The Natural Resources Committee and its Water Subcommittee, which Director Ward co-chairs with Joe Whitworth of Oregon Trout, have discussed the state of Oregon's freshwater resources, climate change research conducted by the University of Washington's Climate Impacts Group, opportunities for water efficiency and the Governor's H<sub>2</sub>O Initiative, to help the Commission better perform its role as an advisory body.

Umatilla Basin Aquifer Recovery Project: State Engineer Barry Norris manages this project for the Department, working closely with project contractors IRZ Consulting, Ground Water Solutions Inc., HDR Engineering, and others. The goal of the project is to learn more about the potential for Aquifer Storage and Recovery and Artificial Recharge, as they relate to Columbia River supplies and storage conditions in the Umatilla Basin. The project will investigate the need for water quality treatment, and transmission and distribution infrastructure. The project team holds monthly meetings in the Basin, and has been applying water to the pilot project area of Echo Meadows since Spring 2008. The project will have one year's worth of data available to present to the 2009 Legislature.

Aquifer Storage and Recovery and Artificial Recharge Partnership: The Department has partnered with the Department of Human Services and Department of Environmental Quality to create outreach and educational materials geared toward communities that are interested in evaluating and pursuing ASR/AR opportunities. Agency staff members are developing a power point presentation and handouts for use as presentation materials. Agencies have scheduled several presentations during 2008 and 2009.

Exempt Use Workshops: The Department continues to participate in "Exempt Use" workshops hosted by Portland State University's Policy Consensus Center. Facilitated by Sam Imperati, the workshop series was convened by Representative Jackie Dingfelder and funded by several state agencies, including the Department. Participants include environmental groups, water users, and local and state government representatives, and grew out of efforts in the 2007-09 Legislative Session to address the growing phenomena of "exempt-use" wells throughout Oregon. The goal of the workshop is to determine if any and what legislation may be appropriate to bring to the 2009 Legislative Session.

Interagency Coordination: The Information Services staff has developed a way for the Department to send documents, electronically, to our agency partners for review and comment. The Department coordinates closely with the Oregon Department of Fish and Wildlife, Department of Environmental Quality, and other state and federal agencies to review and set conditions for water right applications and transfers. In the past, this has involved large volumes of paper, postal

delivery, and a manual tracking system. In August, the Department launched the initial stages of an on-line communication and tracking system that will speed up the process, and help the Department with overall efficiency.

Position Updates:

- Abigail Brown is a Sea Grant Fellow with Oregon State University and will be working with us through the summer and up coming school year. Abby will be developing an educational program for the Department aimed at individuals, neighborhood associations and community groups interested in measuring water levels and water use from their own water supply wells. Her work will focus on the Eola Hills neighborhood outside Salem. Abby has a lot of experience working with watershed groups and educational programs.
- Angela Burrigh has accepted the Hydrographics Technician position for the South Central Region. She is from Alaska where she was employed by the Alaska Department of Fish and Game, working as a Biologist in their Fisheries division.
- Greg Nelson has accepted the position as the Regional Water Right Specialist in the Field Services Division's Water Supply and Conservation Section starting July 1. Greg has 24 years working with the Department, ranging from Assistant Watermaster to Basin Planner and District Transfer Specialist.
- Bob Rice began working as our new Grant Program Specialist in the Administrative Services Division's Water Conservation, Reuse and Storage Grant Program starting July 1. Bob has 18 years of experience in the Department, ranging from John Day stream coordinator to South West Region Field Liaison, and In-stream Leasing and Flow Restoration Coordinator.
- Kim French is the successful applicant for the grant support specialist position in Administrative Services. The Water Conservation, Reuse and Storage grant came about through SB 1069 during the recent 2008 Legislative session. Kim will be joining Bob Rice in implementing that legislation.
- Terra Schultz began working for the Department on July 14. She has been hired as the Stream Restoration Specialist (Oregon Plan) in Pendleton. Terra has an educational background in biology and had previously worked for Oregon Department of Fish and Wildlife.

**II. Commission Follow Up**

Update on the Oregon Water Supply and Conservation Initiative (OWSCI): Attached is the June 2008 OWSCI update, with progress reports on the four project components. HDR is in the process of completing its work on the demand assessment and conservation inventory components, and will hold its final technical review group in late August, and its final stakeholder group meetings August 25<sup>th</sup> in Salem. Director Ward and Brenda Bateman, Senior Policy Coordinator, briefed three interim Legislative committees on the Initiative during June and July. (See Attachment 1)

2009-2011 Budget Updates: Attached is a summary list of the Department's 2009-11 budget requests, as of August 2008. Also attached are more detailed budget narratives for each policy option package. The budget represents a request for \$14.5 million in new general fund dollars, in addition to lottery funds, federal funds, and other funds. The request for new personnel total 49 FTE, spread over 51 positions. The Department submitted the full budget request to the Department of Administrative Services on August 1. The budget will then go from there to the Governor's Office for consideration. (See Attachment 2)

2009 Legislative Concepts: Attached is a summary list of the Department's 2009 Legislative Concepts, with their newly assigned legislative concept numbers. The Department has an opportunity to finalize the proposed language for concept before it goes to the legislature. (See Attachment 3)

H2O Initiative: Entitled "Headwaters to Ocean," or H<sub>2</sub>O, this Initiative is designed to focus on the critical water-related needs facing Oregon today. The Governor's office held a series of stakeholder meetings throughout the summer to receive input on the May 2008 draft of the H2O Initiative. In general, stakeholders felt the Initiative was timely and necessary, but also quite broad in scope and expensive to implement. An H2O Advisory Group met during July and August to try to pare down the scope of the Initiative and focus on a few key areas. The next iteration of the H2O Initiative is still in the drafting stages, but appears as though its general approach will continue to focus on getting agencies and communities the budget resources they need to meet Oregon's future water needs.

### **III. Litigation Update**

*Fort Vannoy Irrigation Dist. v WRC (Oregon Supreme Court)* A landowner within Fort Vannoy Irrigation District filed a water right transfer application asking to change the point of diversion from a diversion point(s) managed by the district to a new point of diversion on property owned by the applicant. The transfer application included five separate water rights, two of which are evidenced by water right certificates issued in the name of the Irrigation District.

The Water Resources Department reviewed the water right transfer application and determined that the proposed change in point of diversion would not result in injury to existing water rights. The Department issued an Order approving the change. The District protested approval of the transfer, resulting in a contested case hearing. The Hearings officer issued a proposed order upholding the Department's approval of the transfer. The District then appealed to the Water Resources Commission. The Commission considered and subsequently rejected the District's arguments and issued a final order approving the transfer.

The District appealed the Commission's Final Order approving the water right transfer to the Oregon Court of Appeals. The Court of Appeals issued a ruling in July 2007, reversing the Commission's decision and remanding the matter back to the Commission. The Court concluded that if a water right certificate is issued in the name of a district then the district is the holder of the water right. Additionally, the Court concluded that the holder of the water right is the entity who is authorized to request changes to water rights. The Court does not recognize the landowner as the water right holder unless the right is issued in the name of the landowner.

Neither the Oregon Attorney General nor the Department agreed with the Court of Appeals ruling. The Attorney General's Office petitioned the Oregon Supreme Court for review. Oral arguments took place on May 13, 2008 in Enterprise, Oregon. The Oregon Supreme Court issued a ruling in July 2008 affirming the decision of the Court of appeals. The Department is working with the Attorney General's office to determine the impact of this decision and how to move forward with processing water right transfer applications. Additionally, the AG's office is looking to determine if changes should be made in future adjudications.

***Harrington I (Oregon Court of Appeals)*** This case is related to the Department's denial of water right applications requesting permission to store water in the Big Butte Creek basin in southern Oregon. This basin was classified for the exclusive use of the City of Medford by the Oregon Legislature in 1925. The Jackson County Circuit Court ruled in the Department's favor. The Harringtons subsequently filed an appeal with the Oregon Court of Appeals. The Court of Appeals issued a ruling affirming Circuit Court decisions on Harrington I and II. Harrington has defaulted on the additional time the Court granted in which to petition for appeal. No appeals have been filed with the Oregon Supreme Court.

***Harrington II (Oregon Court of Appeals)*** This case is related to actions of the watermaster in regulating the water stored in the Harrington reservoirs without benefit of a water right. The Jackson County Circuit Court ruled in favor of the Department. This case was also appealed to the Oregon Court of Appeals, which affirmed the Circuit Court decisions.

***Harrington III (Federal Court)*** The Federal District Court issued a ruling, which grants the State's motions for Summary Judgment. This was a "1983" discrimination filing. Harrington alleged that the Department acted to discriminate against him in his efforts to obtain legal authorization for the reservoirs that are on his property. The Department invested considerable staff hours responding to requests of discovery. Additionally, several Department staff members were deposed. Oral arguments on the State's motion for Summary Judgment were heard on August 1, 2007. The Federal Magistrate granted the state's motion of Summary Judgment on September 27, 2007. The Attorney General's Office submitted a claim of \$158,000.00 for costs and attorney fees. Harrington appealed the Court's decision to the 9<sup>th</sup> Circuit Court.

The Department recently received word that the 9<sup>th</sup> Circuit Court dismissed this case at Harrington's request.

***Micke v WRD (Marion County Circuit Court)*** This case relates to the storage of water in a reservoir without benefit of a water right permit. The reservoir in question is located within the Goose and Summer Lake Basin in Lake County. In 2002, the watermaster determined that water was being stored in the reservoir without benefit of a water right. He contacted the Mickes and instructed them to release the water from the reservoir. The Water Resources Department subsequently received a water right application to store water in the Micke's reservoir. The Lakeview Water Users Association filed a protest to the water right application's Proposed Final Order (PFO). The parties recently met to resolve the issues. A tentative agreement has been reached.

In March of 2007, it was discovered that Mickes were once again storing water in the reservoir. The Mickes were served with a Notice of Violation (NOV) for storing water without benefit of a water right. The Mickes filed for Judicial Review of the Notice of Violation in Marion County Circuit Court. After this action was filed, but before it was served on the Department, the Mickes received their Notice of Assessment of a civil penalty.

The protest on the water right application has been withdrawn. Some issues remain prior to issuance of the permit. We expect the court action to be dismissed in the near future.

***Noble v WRD (Lytle) (Clackamas County Circuit Court)*** The Nobles are seeking Judicial Review of several water right applications (and permits) for some small reservoirs in the Beaver Creek

basin in Clackamas County. Three different owners are involved as defendants in three similar cases. The Department filed a motion to consolidate the cases; the motion was denied by the Circuit Court. The Department has responded to public information requests, requests for depositions of several Department staff, and has participated in settlement discussions with the Nobles and the applicants. The parties in the Martin case have entered into a settlement agreement and that case has been dismissed by the Circuit Court. The parties in the Vityuk case have also entered into a settlement agreement and the case has been dismissed by the Circuit Court. No trial date has been set to deal with the Lytle case. The Department reconsidered an order issued to the Lytles for a storage permit. The Department has subsequently issued a new Order. The Noble's have filed a new action for Judicial Review relating to the Lytle Order in Clackamas County Circuit Court. The attorneys are involved in discovery and depositions. A trial date is scheduled for later this year.

***Noble v WRD (Martin – Beaver Lake Nursery) (Clackamas County Circuit Court)***

(See Noble v WRD (Lytle) above)

***Noble v WRD (Vityuk) (Clackamas County Circuit Court)***

(See Noble v WRD (Lytle) above)

***Noble v WRD (Lytle) (Clackamas County Circuit Court)***

(See Noble v WRD (Lytle) above)

***Webber v WRD et al (Federal District Court)***

The latest litigation suit filed in Federal District Court is a Civil Rico and Civil Rights Complaint and Demand for Jury Trial of all Claims filed by John Carl Webber, Jr. of Prineville, Oregon. Mr. Webber was found irrigating more than one-half acre of non-commercial lawn and garden from a well without the benefit of a water right. He continued using the water on the 3.0 plus acres following the issuance of a Notice of Violation, which resulted in the assignment of a civil penalty. This case is continuing to generate significant time and expense for the Department. To date, no hearing date has been scheduled.

**IV. Commission/Board Schedules**

	<b>Location</b>	<b>Date</b>
Board of Forestry	Astoria	Sep. 3-4, 2008
Fish and Wildlife Commission	Forest Grove	Sep. 11-12, 2008
State Land Board	TBA	Oct. 14, 2008
Land Conservation and Development Commission	Prineville	Oct. 15-17, 2008
Environmental Quality Commission	TBA	Oct. 23-24, 2008
Parks and Recreation Commission	Ashland	Sep. 18, 2008
Oregon Watershed Enhancement Board	The Dalles	Sep. 16-17, 2008
Board of Agriculture	TBA	TBA
Dept. of Geology and Mineral Industries	TBA	TBA