



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item F, February 18, 2011
Water Resources Commission Meeting

Director's Report

I. Current Events:

Current Water Conditions: During the month of January snowpack or snow water equivalent diminished significantly. Snowpack currently (February 2, 2011) ranges from a high of 93% of normal in the Owyhee Basin to a low of 68% of normal in the Willamette Basin. On January 1 snowpack ranged from a high of 164% of normal in the Lake County/Goose Lake Basin to a low of 108% in the Hood, Sandy and Lower Deschutes Basin. With the exception of the Coast Range, total precipitation remains above normal for the state ranging from 102% of normal in the Willamette Basin to a high of 132% of normal in the Owyhee Basin. We will need an above normal February to meet the predicted streamflow forecast that the U.S. Drought Monitor made on January 1. If February is a continuation of January conditions, we could see below normal streamflow in much of Oregon this irrigation season.

II. Commission Follow Up

Litigation Update: *Water for Life, Inc., et al v. Oregon Water Resources Department, et al, Marion County Circuit Court*

Water-For-Life has filed an action against the Department for its participation in the Klamath Basin Restoration Agreement (KBRA). (Marion County Circuit Court Case No. 096-23629). The Department was a participant in the KBRA discussions, although not in a lead position. The Department role has been to ensure that any agreements resulting from the KBRA are consistent with Oregon Water Law. A small portion of the draft restoration agreement has the potential to resolve five or six of the remaining Contests associated with the Klamath Adjudication. Discussions associated with development of the KBRA have been underway for about four years. The Department does not believe that there is merit to the Water-For-Life lawsuit.

Late on December 31, 2009, the Department was served with a request for a Temporary Restraining Order (TRO) filed by Water-For-Life. The TRO requested that the Marion County Circuit Court restrain the Department from further participation in the KBRA process. Although a Marion County Circuit Court Judge issued a ruling denying the request for the TRO on January

7, 2010, this issue is not yet resolved. A hearing scheduled for January 14, 2010 was subsequently cancelled following the Judge's ruling. The proponents filed an amended Complaint, a hearing on the merits of the case will be scheduled in the future.

The final version of the KBRA was released to the public on January 8, 2010. The Department believes that the current version of the KBRA is consistent with Oregon Water Law.

On August 20, 2010, Water For Life filed an amended complaint.

A second amended complaint was filed late in December 2010. Motions are now being filed in response to this amended complaint.

This case is still pending in Marion County Circuit Court. No court date has been set.

Deborah Noble et al v. Oregon Water Resources Department, et al (Lytle), Clackamas County Circuit Court

This case is filed in Clackamas County Circuit Court and is a petition for Judicial Review of a water right permit. An alternate reservoir application was filed on a small (1 acre foot) existing reservoir and the Nobles are raising issues regarding impacts to fish. The hearing is was held the first full week of December. The Judge ruled that the Department's Final Order, authorizing the issuance on the Lytle alternate reservoir, was issued in violation of statutory provision. The ruling states that the information and data contained in the application was insufficient to meet the statutory eligibility criteria. However, the Judge concluded that a reasonable person could agree with the agency's conclusions in the Final Order and permit.

The Judge remanded the case to the Department for further action.

Deborah Noble et al v. Oregon Water Resources Department, et al (Obirst), Clackamas County Circuit Court

This case is filed in Clackamas County Circuit Court and is a petition for Judicial Review of a water right permit. An alternate reservoir application was filed on a small reservoir and the Nobles are raising issues regarding impacts to fish. This is very similar to the Noble v WRD case involving the Lytle water right application. Discussions are continuing with the Noble attorney to resolve this matter.

Oregon Water Resources Department v. William Cummings, Jr., Cummings Well Drilling, Lake County Circuit Court

The Water Resources Department filed an action in Lake County Circuit Court to enjoin William Cummings Jr. and Cummings Well Drilling from drilling wells. Mr. Cummings was formerly licensed as a well constructor with the State of Oregon, but his well constructors license was suspended several years ago for numerous infractions and for failure to pay an assessed civil penalty. This is the first use of this enforcement tool since the Commission delegated authority during its meeting February 19, 2010. No court date has been scheduled.

It was reported that Mr. Cummings has continued to contract with landowners to provide well construction services. The Commission, at its June 4, 2010 meeting, authorized the Director to take action under ORS 537.780(1)(i) to seize the well drilling rig. On July 15, 2010, the Criminal Justice section of the Attorney General's Office, in conjunction with the Water Resources Department, seized the well drilling rig. The rig was set up over a well on private property in Lake County. The landowners provided their full cooperation and allowed access to their property for the seizure. The watermaster is assisting the landowners in their efforts to have the well completed in compliance with Oregon Laws relating to well construction.

The Attorney General's Office, Criminal Justice Section is handling this matter in Lake County Circuit Court. The case is set for Jury Trial on April 22nd. Mr. Cummings sent a note saying he wants to give a "counter offer" to an earlier initial plea offer developed by the state.

Wolfgang Nebmaier and Vajra Ma v. Water Resources Department and others

This case involves Judicial Review of a Final Order in a Contested Case. The contested case was the result of the Department receiving affidavits alleging forfeiture of water rights. The water use included domestic use and irrigation of 0.6 acre. The contested case resulted in a finding that the portions of the water rights in question had been forfeited. Nebmaier and Vajra Ma filed Exceptions with the Commission. The Commission denied the Exceptions. The case is now pending before the Oregon Court of Appeals.

John Steel v Water Resources Commission, Water Resources Department and Symbiotics, LLC

This is a petition for Judicial Review of a Final Order of the Commission regarding a hydroelectric license. This matter is before the Oregon Court of Appeals. No date has been set for the Court to hear oral arguments.

This is an appeal from a final order issued by the Commission approving a water right permit for Symbiotics, LLC to divert water for a hydroelectric generating unit in the Row River at Dorena Dam near Springfield. Symbiotics also sought a license for a hydroelectric project. The Petitioner, John Steel, seeks to have the final order granting both the water right and license set aside on grounds it was issued contrary to Oregon Law and was not supported by substantial evidence in the record. The Department believes that its actions are supported by law.

Daniel Micke v Water Resources Department and the Water Resources Commission and others

This is a petition for Judicial Review of a Final Order approving issuance of a permit to store water. The reservoir is located in Lake County and this matter was filed in Marion County Circuit Court. The case has been ongoing for some time. Numerous meetings and discussions have occurred with Micke's legal counsel to resolve this matter. A settlement agreement has been tentatively agreed to by the parties. A Hearing Status Conference before the Marion County Circuit Court is scheduled January 24, 2011. We will be requesting that the Court schedule a date for hearing.

Petes Mountain Homeowners Association and others v The Oregon Water Resources Commission and Department and Petes Mountain Water Company Inc.

This is a petition for Judicial Review of a Final Order approving a water right permit amendment. The case was filed in Clackamas County Circuit Court. The court ruled in favor of the water company and Department. This ruling was subsequently appealed to the Oregon Court of Appeals. The Court of Appeals reversed the ruling of the Circuit Court and remanded back to the Circuit Court. The Circuit has not scheduled a hearing at this time.

III. Commission/Board Schedules	Location	Date
State Land Board	TBA	TBA
Environmental Quality Commission	Portland	Feb. 16-18, 2011
Dept. of Geology and Mineral Industries	Portland	Feb. 11, 2011
Parks and Recreation Commission	Banks	March 16, 2011
Fish and Wildlife Commission	Florence	March 11, 2011
Board of Forestry	Salem	March 9, 2011
Land Conservation and Development Commission	Salem	March 3-4, 2011
Board of Agriculture	Salem	March 10-11, 2011
Oregon Watershed Enhancement Board	Salem	March 15-16, 2011
Water Resources Commission	Salem	May 12-13, 2011