



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 G, September 30, 2011
Water Resources Commission Meeting

Director's Report

I. Current Events:

Current Water Conditions: September is the last month of a very good water year for Oregon. Snowpack was well above average for the year and helped replenish our depleted reservoirs and ground water aquifers. Of particular note is the Klamath Basin where a good snow pack allowed irrigators to give ground water a much needed rest. Although the observed Klamath Basin groundwater recovery is small, it shows a reverse in a worrisome declining trend over the last several years.

Total statewide accumulated precipitation for the water year ranges from a low of 92% of normal in the northwest corner of the state to a high of 144% of normal in the southeast corner of the state. Statewide, total accumulated precipitation averages about 115% of normal. Statewide, our major reservoirs range from slightly below average to well above average. Most major irrigation reservoirs are in much better shape than they were at the same time last year, and will have good carryover as we begin the new water year.

The US Drought Monitor has not designated any portion of Oregon as below normal water conditions. The three month forecast for December through February is for below normal temperatures in the western half of Oregon, and above normal precipitation for most of the state.

II. Commission Follow Up

2011 Budget and Legislative Wrap-Up: The 2011 Legislative Session ended with important, and positive, outcomes for the Department. Attached is a two-page summary of the Department's Legislatively Adopted Budget, as well as key pieces of water-related legislation that passed.

The Department's budget detail resides in two bills, House Bill 5049 and Senate Bill 5508. As indicated in the summary table, the Department's General Funds decreased for the 2011-13 Biennium; however, the Department's other funds and lottery funds experienced an increase. This is due to a number of "pass through" funding (grants and loans) that will benefit Oregon communities as they pursue water development projects. The Legislature continued two limited duration positions, using General Fund dollars, to develop Oregon's Integrated Water Resources Strategy.

Page 2 outlines budget reductions, including two full-time positions and several across-the-board reductions that all agencies experienced. Page 2 also summarizes the six water resources-related policy bills approved by the Legislature. Four originated with the Department, and two originated with Legislators.

July Western States Water Council Wrap-Up: The last week of July, Oregon hosted the Western States Water Council meeting in Bend. Participants included nearly 80 attendees from 13 states, plus a large contingent from Washington D.C. Federal attendees included Ann Castle, Assistant Secretary for Water and Science at Interior, as well as representatives from another six agencies. Participants also included managers and staff from several irrigation districts around the state. The meeting featured a number of public policy discussions, technical presentations, committee reports, and a workshop focused on innovations in water right transfers. Sponsors from both the public and private sector demonstrated their strong support for the work of the Western States Water Council and helped to ensure a well attended and productive meeting.

Columbia River Treaty: 2014/2024 Review: Since 1964, the Columbia River Treaty (Treaty) has provided significant hydropower and flood control benefits to the United States and Canada through coordinated river management. The Treaty contains two provisions of particular note: 1) in 2024, the 60 years of flood control space in Canadian reservoirs that the U.S. purchased in 1964 will expire, and 2) the Treaty allows either Canada or the U.S. the option to terminate most of the Treaty provisions on or after September 16, 2024, with a minimum of 10 years advance written notice. Thus, the year 2024 is the first year a notice of termination would take effect assuming written notice of termination is given by the Canadian or U.S. governments by 2014.

Given the significance of these and other provisions of the Treaty, the U.S. Army Corps of Engineers (USACE) and the Bonneville Power Administration (BPA), the agencies that implement the Treaty on behalf of the U.S., are conducting a multi-year effort (known as The 2014-2024 Columbia River Treaty Review) to understand the implications of Treaty termination, continuation or modification scenarios for post-2024 Treaty planning and Columbia River operations.

The 2014-2024 Columbia River Treaty Review will result in the delivery, by USACE and BPA, of a recommendation to the U.S. Department of State by September 2013 as to whether or not it is in the best interest of the U.S. to: (1) continue the Treaty; (2) terminate the Treaty; or, (3) seek to negotiate with Canada on modification or amendment to the Treaty. Continuation of the Treaty may be managed by USACE and BPA but any amendment or termination of the Treaty must be decided by the U.S. State Department and President and any amendments must be approved by the U.S. Senate (with an equivalent process in Canada).

A Sovereign Review Team, consisting of representative of the states of Oregon, Washington, Idaho, and Montana, 15 NW Tribes, and various federal agencies, has been established to provide policy guidance for the 2014-2024 Columbia River Treaty Review. The Department is helping staff Governor Kitzhaber's appointee (Joan Dukes, Northwest Power and Conservation Council) to the closed-door discussions held by the Sovereign Review Team.

Next Steps for Peak and Ecological Flows: HB 3369, passed by the 2009 Legislature, requires protection of peak and ecological flows for storage projects that are financed by certain state grant and loan programs. In 2010, the Department organized a Technical Advisory Committee tasked with writing a white paper that describes the state of the science on protection of peak and ecological flows. The white paper was completed in December 2010, and the Water Resources Commission was given several reports on the contents. Although the members of the committee were largely in agreement as to the contents, there was a minority opinion that more work is needed before the Department moves ahead with statewide implementation. In August 2011, Department staff met with various interest groups to discuss the next steps in implementing protection measures for peak and ecological flows. HB 3369 requires that rules for protection of peak and ecological flows be in place before grants and/or loans can be awarded. There was widespread agreement among the interest groups that more time should be given to consideration of the white paper findings before statewide rules are developed. As an alternative, there was agreement that the Department move ahead with rules that target only the Umatilla Basin Critical Groundwater Storage Project currently underway in the Umatilla Basin. However, many interest groups expressed a desire that the agreement to move ahead as described be predicated on a commitment by the Department that a broader look at this issue be undertaken in a timely manner.

HB 3369 included provisions for loan funds that are available to fund the project. With rules in place that target the Umatilla project, it will be possible to consider a future loan application to fund the project. It is not known, at this time, precisely when or if a loan application will be received from the project developers, but the Department is moving ahead with development of rules for the protection of peak and ecological flows that will be specific to the Umatilla Basin Critical Groundwater Storage Project so that the process is ready when needed. A rules advisory committee has been established. October is the target for a public hearing, with consideration of rule adoption by the Commission in January 2012.

Next Steps for Willamette Storage Discussions-Accessing Willamette Stored Water:

The Department continues to work with the US Army Corps of Engineers (COE) and the Bureau of Reclamation (BOR) to determine whether contracts can be issued to use water stored behind COE dams in the Willamette Basin for uses other than irrigation. The three agencies will be discussing the scheduling of meetings with stakeholders. The meetings will be held to receive input from stakeholders as to current and future needs of water, and, where in the Basin those needs will be likely to occur.

The COE continues to be interested in investigating a potential small scale allocation of stored water for municipal purposes. To date, the COE has not received a Federal allocation of funds to pay for the work.

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 Oregon Water Resources 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's 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 was 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. A Marion County Circuit Court Judge issued a ruling denying the request for the TRO on January 7, 2010.

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.

A hearing was held on July 28, 2011 to hear arguments on the State's motion to dismiss. The Judge ruled in favor of the State at the conclusion of the hearing.

While our attorneys were conferring about the proposed order on the motion to dismiss, Water-for-Life filed a request for reconsideration and then subsequently filed a notice of voluntary dismissal. Apparently, Water-for-Life filed the voluntary dismissal to avoid entry of an order that memorializes the rulings the judge made at the July 28 hearing on the motion to dismiss. Oregon law allows for voluntary dismissal before the judgment is entered. Under the law, a notice of voluntary dismissal results in the automatic dismissal of the case without prejudice. Dismissal without prejudice means that plaintiffs could re-file their case without following the conditions set forth in the judge's July 28, 2011 oral ruling.

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 was held the first full week of December 2010. 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.

The Noble's petitioned the Clackamas County Circuit Court for attorney fees. The Judge ruled that Nobles were not entitled to attorney fees, however, did award court costs.

Noble has appealed the ruling of the Clackamas County Circuit Court in relation to the merits of the case. The Court of Appeals has not scheduled oral arguments as of this date.

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.

It was reported that Mr. Cummings 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 was set for Jury Trial on July 21st. Cummings agreed to the plea agreement the morning of the trial. As part of the plea agreement, Cummings agreed to a stipulated forfeiture of the drilling rig.

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. Oral argument is set for May 24th.

This is an appeal from a final order issued by the Department 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.

Oral argument before the Oregon Court of Appeals was held on May 24, 2011. The Court has not issued a written opinion at this time.

John M. Mosby v. Scott Runels, Margie Runels and the Oregon Water Resources Department

Mosby filed a motion to make inactive defendant (OWRD) an active defendant.

This case involves a dispute between Mosby and Runels regarding the division of water. The place of use is within the Klamath Basin and involves water right claims within the Klamath Adjudication and water rights acquired through the water right permit process. The Case was initiated in the mid-90s. A former OWRD employee acted as a Special Master for the Klamath County Circuit Court and established a temporary regulation process until such time as the Klamath Basin Adjudication is enforceable. The Klamath County Circuit Court dismissed OWRD as a defendant at that time.

A hearing was held in Klamath County Circuit Court on August 9, 2011 to hear arguments regarding the motion to reactivate OWRD as a defendant. The Court has not issued its ruling at this time.

Rulemaking resulting from 2011 Legislation: Implementing HB 2133 and HB 2135:

Our Water Right Services Division has a rulemaking underway to implement HB 2133 and HB 2135. The rules should be before the Commission for adoption at our meeting in January of 2012.

HB 2133 allows the Department to adopt rules allowing dissemination and receipt of documents via electronic means. This has the potential to save the Department time and money in copying and mailing costs as well as provide consenting applicants a potentially faster processing time.

HB 2135 reduces the newspaper notice requirement from 3 and 4 weeks to two weeks in several instances. The Department needs to amend our rules in several divisions to conform to this new legislation.

In addition, the Department is making several other adjustments to rules.

This rulemaking affects 12 separate divisions of Department rules. As of this writing, all of the adjustments appear to be non-controversial.

The Rules Advisory Committee meetings were held in August and the public comment period is scheduled to begin on October 1, 2011.

If you have any questions please contact Dwight French at 503-986-0819 or dwight.w.french@state.or.us.

Rulemaking Updates: Please refer to the attached Anticipated Rulemaking Schedule.

III. Commission/Board Schedules	Location	Date
State Land Board	Salem	Oct. 11, 2011
Environmental Quality Commission	Astoria	Oct. 20-21, 2011
Dept. of Geology and Mineral Industries	TBA	TBA
Parks and Recreation Commission	John Day	Sept. 21, 2011
Fish and Wildlife Commission	Pendleton	Oct. 7, 2011
Board of Forestry	Forest Grove	Nov. 3-4, 2011
Land Conservation and Development Commission	Grants Pass	Oct. 5-7, 2011
Board of Agriculture	TBA	TBA
Oregon Watershed Enhancement Board	TBA	TBA
Water Resources Commission	TBA	TBA

Attachments: Rulemaking Schedule
Legislative Summary