



# 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

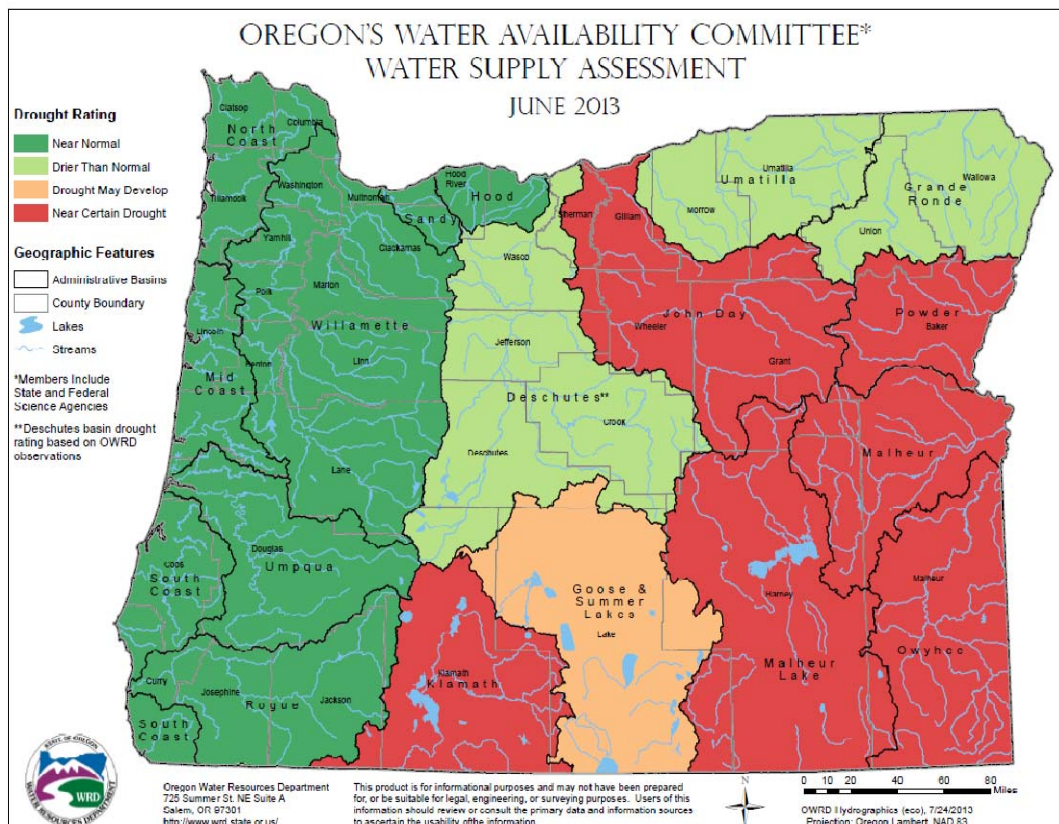
**SUBJECT:** Agenda Item M, November 15, 2013  
Water Resources Commission Meeting

### Director's Report

#### I. Current Events:

Current Water Conditions: The National Climatic Data Center described January through August 2013 temperatures in Oregon as "above normal," while precipitation was "below normal."

During 2013, the Governor issued drought declarations in four Oregon counties--Baker, Gilliam, Klamath, and Malheur counties. Harney, Grant, and Wheeler counties also faced near certain drought conditions, as noted on the map below.



The October-November-December (OND) 2013 temperature outlook predicts above-normal temperatures in much of the west. For Oregon, projections for November 2013 through January 2014 predict average temperature and precipitation statewide, with the exception of the extreme northeast corner of the state, where above-average precipitation is predicted.

### New Staff & Staff Promotions

Since the July 1 start of the fiscal year through October, the Department has filled 26 positions. This significant recruitment activity is due to a number of retirements, as well as reinvestment in the Department in the FY 2013-2015 budget. Budget packages added 15 permanent positions and the Department has filled nine of these positions. Seventeen of these positions were filled with internal recruitments, creating additional openings and opportunities for advancement. Staff new to the Department bring four bachelor's degrees, four master's degrees, and one doctoral degree.

## **II. Commission Follow Up**

### Litigation Update:

#### ***Deborah Noble et al v. Oregon Water Resources Department, et al (Lytle), Oregon Court of Appeals***

This case was heard in Clackamas County Circuit Court and was a petition for Judicial Review of an alternate reservoir application filed on a small (1 acre foot) existing reservoir. The Nobles raised issues regarding impacts to fish resulting from the reservoir. 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.

Noble has appealed the ruling of the Clackamas County Circuit Court in relation to the merits of the case. The Court of Appeals is scheduled to hold oral arguments in July. No ruling from the Court at this time.

#### ***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's 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. On June 27, 2012, the Court of Appeals affirmed the case without Opinion. The Court denied a request filed by Nebmaier for reconsideration.

The Oregon Supreme Court has once again denied the latest request to reconsider. The Department is waiting for the Court to issue the Judgment.

**WaterWatch v. Oregon Water Resources Department (City of Cottage Grove)**

The City of Cottage Grove filed an application to extend a water right permit issued in its name. WaterWatch protested the order approving the extension of time. Following a Contested Case Hearing the Department issued a Final Order granting the extension to the City.

WaterWatch filed a petition with the Oregon Court of Appeals for Judicial Review of the Order issued in a contested case. The Court of Appeals heard oral argument on September 10, 2012. The Department is now waiting for a ruling from the court.

**WaterWatch v. Oregon Water Resources Department (Lower Clackamas Water Districts)**

This case stems from several applications for extensions of time. It involves several water districts that divert water from the lower portion of the Clackamas River. WaterWatch protested the approval of the various extensions of time. Since the issues were similar, the eight cases were consolidated into a single contested case. Following the contested case hearing, the Department issued orders approving the extensions of time. WaterWatch filed three petitions for Judicial Review with the Oregon Court of Appeals. Department staff prepared and filed the record with the Court of Appeals. To date, the Court has not scheduled a date and time for oral argument.

**State of Oregon v. Gary Harrington (Jackson County Circuit Court)**

On July 11, 2012, a Jackson County Circuit Court Jury convicted Harrington on nine counts, each related to the unauthorized use of water. Harrington has stored and used water illegally by placing dams across channels on his property and preventing the flow of water out of these artificial reservoirs without obtaining a water right permit. The height of each dam varies; two dams stand about ten feet tall and the third stands about 20 feet tall. The total amount of water collected behind these dams totals about 40 acre feet. The watermaster first identified Harrington's illegal water use more than ten years ago and initiated enforcement action to discontinue his illegal use of water.

The Court sentenced Mr. Harrington to 30 days in jail and three years' probation, and imposed a \$1,500 fine. He was ordered to open the headgates and to keep them open. The Judge also ordered the dams to be breached after the water is drained. However, water continues to be stored. Mr. Harrington was sentenced to additional time in jail for the continued storage of water. The Department is awaiting a Judgment from the Court on this continuing violation.

**Farm of the Family Recreation Association v. Water Resources Department and others**

This case is the most recent in a series of legal actions over the past decade concerning Gary Harrington and the storing of water without a water right. The Farm of the Family Recreation Association alleges it acquired, from Gary Harrington, the property where the three reservoirs are located. The Association argues therefore, that Gary Harrington is not authorized to drain or breach the dams. The Jackson County Circuit Court dismissed the case, ruling in favor of the

State. The Farm of the Family Recreation Association's attorney filed objections to the Court's Order. The objections are under consideration.

**Westland Irrigation District v. Water Resources Department**

Westland Irrigation District filed a petition with Marion County Circuit Court for Judicial Review of water right certificate 87872. Water right certificate 87872 was issued to the U.S. Bureau of Reclamation. The right is for supplemental irrigation within West Extension Irrigation District from return flows generated by the use of McKay Reservoir storage.

The parties are in discussions to reach a settlement agreement. No court date has been set.

<b>III. Commission/Board Schedules</b>	<b>Location</b>	<b>Date</b>
Board of Forestry	Salem	November 14, 2013
Land Conservation and Development Commission	Tillamook	November 14-15, 2013
Parks and Recreation Commission	Corvallis	November 20, 2013
Dept. of Geology and Mineral Industries	Portland	November 25, 2013
Fish and Wildlife Commission	Portland	December 6, 2013
State Land Board	Salem	December 10, 2013
Environmental Quality Commission	Portland	December 11-12, 2013
Water Resources Commission	Salem	February 13-14, 2014
Watershed Enhancement Board	Portland	January 28-29, 2014
Board of Agriculture	TBA	TBA

Attachment: Rulemaking Calendar

## Water Resources Department Anticipated Rulemaking

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
New Division: SB 200 Implementation	Split a Permit into Multiple Ownerships..new program	Dwight	Yes	No	Early 2014	Underway
Division 51	Streamline hydroelectric protests with OAH	Dwight	Yes	No	Early 2014	Underway
Division 220	Extend reporting requirements for bentonite abandonment of water wells from Jan. 2014 to Dec. 2017	Brenda/Ivan/ Enforcement	Yes	Yes	Mid 2014	Planned
Division 20	Minor changes to improve clarity and specificity of dam safety rules	Brenda/Keith	Yes	No	Late 2014	Planned
Division 350	Limited License Fees Update	Dwight/Tim	Yes	No	Mid 2014	Underway
New Division: SB 839 Implementation	1. SVF Approach 2. Rating / Evaluating Projects 3. Making Loans	1. Brenda 2. Brenda/Tracy 3. Tracy	1. Yes 2. Yes 3. Yes	1.No 2.No 3.No	1. Late 2014 2. Early 2015 3. Early 2015	1. Underway 2. Planned 3. Planned