



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item K, May 30, 2014  
Water Resources Commission Meeting

#### Director's Report

#### I. Current Events:

##### New Staff & Staff Promotions

Since the March meeting, the Department has hired two new employees and promoted five staff. The Department would like to congratulate Mike McCord, who has been promoted to Northwest Region Manager.

Positions filled include: Hydrologic Technician, Water Resources Data Technician, Well Construction Program Coordinator, Receptionist, Director's Office Support, Hydrogeologist, and Administrative Services Division Support.

#### II. Commission Follow Up

##### Willamette Basin Reservoir Study Update

The President's Fiscal Year (FY) 2015 Budget was released in early March. It did not include funding to start the Willamette Basin Reservoir Study. This is largely because the Coast Fork Surplus Water Report, which proposes to allow the use of 437 acre-feet of stored water for the City of Creswell, was not approved prior to release of the President's Budget. Nationally, the Corps is watching Districts' ability to complete existing planning projects before approving new funding requests, such as the Reservoir Study.

The current federal budget includes \$200,000 to complete the Surplus Water Report, and the Project Management Plan (PMP) for the Reservoir Study. Upon completion of the Surplus Water Report, resources will be devoted to development of the PMP. The Corps recently released a draft Environmental Assessment for use of the 437 acre-feet of stored water, and will be taking public comment through May 20, 2014.

The Surplus Water Report, Environmental Assessment, and draft storage agreement will be forwarded to the Corps' Northwestern Division (NWD) for review and approval. Following the NWD review, all documents will be routed to Corps Headquarters and the Assistant Secretary of the Army (ASA) of Civil Works. The ASA's Office is responsible for approving the storage agreement and making a funding decision on the Reservoir Study. In the meantime, the Department and basin stakeholders continue to coordinate with the Corps, working with Oregon's congressional delegation to secure federal funding.

### **III. Litigation Update**

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

On an alternate reservoir application for a small (1 acre-foot) existing reservoir, the Nobles filed a petition for Judicial Review raising issues regarding impacts to fish. The hearing was held in December 2010 in Clackamas County Circuit Court. The Judge ruled that the Department's Final Order authorizing the alternate reservoir was issued in violation of statutory provision because the information and data contained in the application was insufficient to meet the statutory eligibility criteria. However, the Judge determined that a reasonable person could agree with the Department'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. Oral arguments before the Court of Appeals have taken place, but the court has not issued a ruling.

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

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

After the issuance of the extension of time, the City filed the Claim of Beneficial use for the extended water right permit and requested that the water right certificate be issued. Following review of the Claim, the Department issued the certificate. No petitions for reconsideration or Judicial Review were filed.

WaterWatch filed a petition with the Oregon Court of Appeals for Judicial Review of the water right extension order issued following the contested case. The Court of Appeals heard oral argument on September 10, 2012 and ruled in favor of WaterWatch. The Court reversed and remanded with instructions to vacate the City of Cottage Grove's water right certificate and to reconsider the permit extension request in accordance with the Court's opinion.

The State joined the city in petitioning for review by the Oregon Supreme Court. The Court accepted the petition and has scheduled oral arguments for September 18, 2014.

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

Several water districts that divert water from the lower portion of the Clackamas River filed applications for extensions of time. WaterWatch protested the approval of 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. Oral argument was held on November 15, 2013, and a decision is now pending before the court.

*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, related to the unauthorized use of water. Harrington stored and used water illegally, placing dams across channels on his property and preventing the flow of water out of these artificial reservoirs without a water right permit. Two dams stand about ten-feet tall and the third is approximately 20 feet tall. The total amount of water collected behind the dams totals about 40 acre-feet. The watermaster first identified Harrington's illegal water use and initiated enforcement action more than ten years ago.

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 and Mr. Harrington was sentenced to additional time in jail.

The Department will be accessing the property to enforce the Courts order, including making sure the reservoirs are drained and subsequently breached.

*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 (Association) alleged it acquired, from Gary Harrington, the property where the three reservoirs are located. The Association argued 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 Association's attorney filed objections to the Court's Order.

The Court granted the State's motion to dismiss the case. The general judgment to dismiss with prejudice was issued on November 8, 2013.

*WaterWatch of Oregon, Inc., v. Oregon Water Resources Department*

WaterWatch filed a petition for judicial review of a final order in Marion County Circuit Court (case no. 13C23741). The case involves the Department's approval of a limited license for the use of water from a sump in Spring Creek for placer mining. Spring Creek is within the Deschutes Basin.

The Department worked with the Attorney General's Office to respond to the petition. The State and plaintiff agreed to submit documents without oral argument. The Court ruled to dismiss the case.

*James Young v. Oregon Water Resources Department*

James Young filed an application to construct well(s) and use ground water within the Deschutes Basin. After reviewing the application, it was determined that mitigation credits would be required before the application could be approved. Insufficient credits exist to mitigate the proposed new use in the zone of impact. As a result, the Department issued a proposed order to deny the application. The applicant requested a contested case hearing and the Administrative Law Judge issued a proposed order supporting the Department's actions. Subsequently, the Director issued a Final Order consistent with the proposed order.

Mr. Young has filed a petition for Judicial Review of the Director's final order with the Oregon Court of Appeals. To date, the Court has not scheduled a time for oral argument.

*Blue Mountain Angus, LLC. v. Oregon Water Resources Department*

This case is a petition to the Oregon Court of Appeals for review of a final order denying T-10898. Blue Mountain Angus filed a water right transfer application to change the point of diversion and place of use under Water Right Certificate 25844. The Department denied the transfer because the Department was unable to make findings of no injury or enlargement. Motions and responses are being filed with the Court.

<b>IV. Commission/Board Schedules</b>	<b>Location</b>	<b>Date</b>
Board of Forestry	Salem	June 4
Land Conservation and Development Commission	Ontario	July 24, 25
Parks and Recreation Commission	Klamath Falls	June 25
Dept. of Geology and Mineral Industries Board	Portland	June 16
Fish and Wildlife Commission	Salem	June 5, 6
State Land Board	Salem	June 10
Environmental Quality Commission	TBD	June 18, 19
Watershed Enhancement Board	Keizer	June 12
Board of Agriculture	Salem	June 3, 4, 5

## Water Resources Department Anticipated Rulemaking

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
New Division: Klamath Basin Rules	Implementation of Klamath Settlement Agreement	Brenda/Doug/Ivan	Yes	Yes	Aug 2014	Underway
Division 22	Permanent Klamath Drought Rules for Domestic and Stock	Racquel	Yes	No	Aug 2014	Underway
Division 325	Split a Permit into Multiple Ownerships, new program	Dwight/Kelly	Yes	No	Aug 2014	Underway
Division 20	Minor changes to improve clarity and specificity of dam safety rules	Brenda/Keith	Yes	No	Nov 2014	Underway
Division 340 Division 382 Division 310	Limited License, Road Watering, and Certificate of Registration fees, and Water Right Application refunds	Dwight/Tim	Yes	No	Nov 2014	Underway

Last Revision: 5/13/14

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
New Division: SB 839 Implementation	1. SVF Methodology 2. Scoring/Ranking Projects 3. Terms of Loans	1. Brenda 2. Brenda/Tracy/ Racquel 3. Tracy	1. Yes 2. Yes 3. Yes	1. No 2. No 3. No	1. Nov 2014 2. Nov 2014 3. Nov 2014	1. Underway 2. Underway 3. Underway
Division 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan/Kris	Yes	Yes	Early 2015	Planned
Division 210	1. Clarify Well Construction Rules and Drawings 2. Columbia River Basin Special Area Standards	Brenda/Kris/Ivan	Yes	Yes	Early 2015	Planned
Division 217	Requirement of Pump Testing	Brenda/Ivan	Yes	Yes	Mid 2015	Planned
Division 51	Streamline hydroelectric projects with OAH	Dwight/Mary	Yes	No	Late 2015	Underway