



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Thomas M. Byler, Director

**SUBJECT:** Agenda Item J, November 21, 2014  
Water Resources Commission Meeting

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

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

##### Current Water Conditions:

Dry weather has dominated the West for much of the last several months, resulting in low lake, reservoir, and stream levels. According to the [US Drought Monitor](#), 55.6 percent of the West was experiencing moderate to exceptional drought at the end of September.

Despite precipitation events during the month of October, extreme to exceptional drought continues in California, Oregon, and Nevada due to the water deficit present after more than three years of drought.

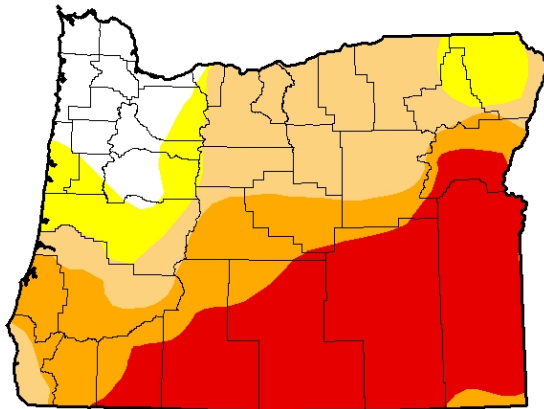
El Niño is associated with warmer winters and below-average rain fall in Oregon. Current atmospheric and oceanic observations indicate a potential transition to El Niño conditions in late autumn and winter. A weak El Niño event is most probable; however there remains a chance of either a low to moderate El Niño event or continued neutral conditions during the upcoming outlook period.

The temperature outlook for November-December-January (NDJ), indicates an increased likelihood of above-normal mean temperatures for the far west.

The NDJ precipitation outlook indicates improved odds of below-median precipitation for parts of the Pacific Northwest.

**U.S. Drought Monitor  
 Oregon**

**October 28, 2014**  
 (Released Thursday, Oct. 30, 2014)  
 Valid 8 a.m. EDT



Drought Conditions (Percent Area)

|  | None  | D0-D4 | D1-D4 | D2-D4 | D3-D4 | D4   |
|--|-------|-------|-------|-------|-------|------|
| <b>Current</b>                                     | 9.54  | 90.46 | 80.24 | 55.07 | 35.30 | 0.00 |
| <b>Last Week</b><br><i>10/21/2014</i>              | 1.56  | 98.44 | 83.79 | 56.26 | 35.30 | 0.00 |
| <b>3 Months Ago</b><br><i>7/29/2014</i>            | 1.75  | 98.25 | 75.50 | 55.62 | 19.91 | 0.00 |
| <b>Start of Calendar Year</b><br><i>12/01/2013</i> | 0.19  | 99.81 | 62.59 | 24.96 | 1.30  | 0.00 |
| <b>Start of Water Year</b><br><i>9/01/2014</i>     | 1.56  | 98.44 | 76.61 | 56.26 | 35.30 | 0.00 |
| <b>One Year Ago</b><br><i>10/28/2013</i>           | 37.46 | 62.54 | 38.38 | 24.86 | 1.30  | 0.00 |

*Intensity:*  
 Yellow: D0 Abnormally Dry  
 Light Orange: D1 Moderate Drought  
 Orange: D2 Severe Drought  
 Red: D3 Extreme Drought  
 Dark Red: D4 Exceptional Drought

*The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. See accompanying text summary for forecast statements.*

**Author:**  
 Brian Fuchs  
 National Drought Mitigation Center



<http://droughtmonitor.unl.edu/>

New Staff & Staff Promotions:

Since the August meeting, the Department has hired 11 new employees, transferred four staff and promoted two staff.

Positions filled include: Burns Assistant Watermaster, Salem Assistant Watermaster, Receptionist, Pendleton Well Inspector, Water Right Application Case Worker, Extension Specialist, Water Right Technician, Transfer Specialist, Bend Hydrologic Technician, Hydrogeologist, Water Availability Technician and Conservation Specialist.

On October 1, Tom Byler assumed the role of Director and Tom Paul resumed his duties as Deputy Director. Director Byler was formerly the Executive Director of the Oregon Watershed Enhancement Board.

**II. Commission Follow Up**

Willamette Basin Reservoir Study Update:

The Corps finalized the Surplus Water Letter Report earlier in July, approving the use of 437 acre-feet of storage for the City of Creswell's municipal needs. City representatives are currently working with the Corps' Portland District to finalize language in the contract. The agreement, along with the approved report, will be transmitted to the Office of the Assistant Secretary of the Army of Civil Works for review and approval. In addition to a signed

agreement between the City and the Corps, a storage transfer application to change the type of use will need to be submitted to and approved by the Department, as well as a new permit application to use stored water.

This past summer, the U.S. Army Corp of Engineers (Corps) started developing the Project Management Plan to guide the Reservoir Study process. The Department and the Corps hosted a stakeholder meeting in September to discuss a preliminary draft and solicit input from basin interests and other agencies. Several suggestions were made during the meeting and about a dozen entities submitted written comments, many of which were aimed at clarifying the federal requirements for the study. During the meeting, staff from Oregon Department of Agriculture provided an overview of a potential approach for estimating current and future agricultural water demand in the Willamette Basin. The Corps has not secured funding or authority to start the Reservoir Study during this current federal fiscal year.

#### Klamath Regulation Update:

The 2014 irrigation season was far different than 2013, the year water-use regulation was conducted for the first time in the Klamath Basin. This year water users generally knew what to expect and how regulation would be implemented. Stream flows were as bad as, or worse than, 2013, and the Governor again declared a drought emergency in Klamath County. The Klamath Project called on their live-flow water in early June under a priority date of 1905. With the exception of the stock and human consumption preference granted by the Commission, all junior uses tributary to Klamath Lake were regulated off.

This was the first year of implementing regulation under the Upper Klamath Basin Comprehensive Agreement. That agreement provides for Specified Instream Flows (SIF) that generally represent a lesser “call threshold” for stream regulation than the full tribal instream claims. In 2014, this had the effect of delaying some of the tribal calls for water because the targets were met later into the year, and resulted in some of the oldest (but junior to the tribal right) priority users collaborating to rotate their water use to assure the SIF targets were maintained.

In May of 2014, the Commission directed the Department to put together a rules advisory committee to develop draft rules for the Commission’s consideration that address groundwater regulation in the Klamath and that are consistent with the Upper Klamath Basin Comprehensive Agreement. The committee has been formed and has conducted its first meeting. Department staff have sought to make this a highly transparent and public process, issuing press releases for each RAC meeting, establishing an email distribution list for the public to stay informed, and holding open houses for the public to interface with staff and ask questions. It is anticipated that the Department will return to the Commission in Spring 2015 to present the rules for consideration.

### 2015 Legislative Update

In the 2014 Election, Democrats retained control of the House and increased their majority by one (35-25). Democrats also picked up at least one additional seat in the Senate, which will potentially allow them to more consistently move their agenda forward. As of this writing, State Senate District 15 was still too close to call.

### Reservations Update

The Oregon Department of Agriculture (ODA) is in the process of preparing information on water demands in order to apply for extensions on the reservations. ODA staff have been organizing foundational geographic information system (GIS) data, which they expect to complete by the end of December. Climate data will be used in conjunction with the GIS data to estimate potential evapotranspiration and irrigation water demand for current and future conditions. In addition, ODA is conducting outreach with agricultural and other water users to help refine water demand estimates.

### Fish Salvage Efforts on the Deschutes River During Wickiup Reservoir Ramp-Down

In 2013, as Wickiup Reservoir switched from releasing water for irrigation to storing, fish were stranded in a side-channel of the Deschutes River near Lava Island. This was the first time Department staff were made aware of the problem. As a result, Department staff began monitoring the side-channel to better understand when it dries up in response to changes in Deschutes River flow levels. Stakeholders in the community expressed an interest in organizing a fish salvage effort this year. Utilizing the information the Department collected, staff along with Trout Unlimited, Bend Casting Club, The Deschutes River Conservancy, Oregon Department of Fish and Wildlife, and the U.S. Forest Service coordinated with the irrigation districts on a strategy to manage releases from the reservoir in a manner that would facilitate the fish salvage efforts. These groups also actively worked to recruit volunteers. The fish salvage effort occurred over several days and over 6,000 fish were relocated from the side channel. While this highlights the water management challenges in the basin, it also demonstrates that the community is dedicated to working together to meet the water needs for both instream and out-of-stream purposes.

### Columbia River Treaty Update

Although the Columbia River Treaty (Treaty) has no end date, it does provide that either party can unilaterally terminate the treaty beginning on September 16, 2024. To terminate the treaty, the party must provide 10 years notice. Hence, September 16, 2014 was the first day that either country could provide notice of its intent to terminate. As reported previously, at the regional level, the Province of British Columbia in their BC Decision, recommended seeking improvements within the Treaty's existing framework. Similarly, the U.S. Regional Recommendation recommended seeking a modernized Treaty. To date, neither the United States nor Canada has signaled an interest in terminating the treaty.

The U.S. Regional Recommendation, which was submitted to the U.S. Department of State in December 2013, suggested that the U.S. government make a decision by mid-2014 to move forward with negotiating a modernized Treaty and that the United States complete the renegotiation process no later than 2015. The President is ultimately responsible for determining whether to pursue negotiations to change the Treaty and, if so, the matters that would be addressed in negotiations with Canada. Prior to such a decision, the Department of State is responsible for overseeing the formal federal “Circular 175 Procedure” and making a national interest determination. Information about the Circular 175 Procedure is available on the U.S. Department of State’s website at: <http://www.state.gov/s/l/treaty/c175/>. As of late October, the U.S. government had not made a decision on whether to move forward with negotiating a modernized Treaty, and the timeline for making such a decision was still undetermined.

While the Department of State conducts its review and makes a decision, Department staff have and will continue to monitor and identify opportunities to engage and stay informed. In September and October, staff attended conferences on the Treaty, which featured governmental officials from British Columbia and Canada, as well as the U.S. Federal agencies and Department of State.

During both of these conferences it was pointed out that the Treaty is flexible and that there may be the ability to address issues that are not currently contained in the Treaty through the exchange of documents, side-agreements, and diplomatic notes instead of through modifications to the Treaty. These other options would not require ratification by the Senate. The Department will provide updates as further information about these potential other avenues become available.

### **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. At issue were the Department’s findings that the alternate reservoir did not pose a significant detrimental impact to fishery resources and did not injure an existing water right. 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. Regardless, the judge determined that a reasonable person could agree with the Department’s conclusions in the Final Order and permit.

Noble appealed the ruling of the Clackamas County Circuit Court in relation to the merits of the case. Oral argument was conducted before the Court of Appeals.

The Court of Appeals ruled that the applicable standard for assessing detrimental impact to existing fishery resources under ORS 537.409 is whether a reservoir poses a “significant

detrimental impact” to such resources. The Court also held that the circuit court correctly concluded that substantial evidence supported the Department’s findings regarding injury to water rights and detrimental impact to fishery resources. The Court concluded by affirming the ruling of the Clackamas County Circuit Court.

A petition for Supreme Court review is pending.

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

The City of Cottage Grove filed an application to extend a water right permit. 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 protested the order approving the extension of time. The primary issue was whether the Department was required to evaluate and condition the extension of time for fish persistence standards that had been put into law before the extension and certificate were issued. WaterWatch argued that the fish persistence standards applied to the undeveloped portion of the permit at the time of the last extension (1999). The Department and the City of Cottage Grove argued that the fish persistence standards applied to the undeveloped portion of the permit at the time of the request for an extension. Following a contested case hearing, the Department issued a Final Order granting the extension.

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 held oral arguments on November 3, 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 was drained. However, water continued to be stored and Mr. Harrington was sentenced to additional time in jail. Eventually, the Court directed the Department to remove the outlet works to ensure that they could no longer store water.

As directed by the Court, the Water Resources Department arranged for and supervised work to notch the three dams. Work began at approximately 6:00 am on June 17, 2014. Work was completed with all equipment off of the property by 4:00 pm on the same day.

Harrington appealed the conviction to the Oregon Court of appeals. Oral argument is scheduled for December 4, 2014.

**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 were 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. This case has been appealed to the Oregon Court of Appeals. Briefs are being submitted, no date for argument has been set.

On June 17, 2014, the day work was under way to enforce the Court's order, the Association filed a motion for stay of the Circuit Court order to drain and breach the three dams. The Court of Appeals denied the motion on June 18, 2014.

**James Young v. Oregon Water Resources Department**

James Young filed an application to construct well(s) and use groundwater 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 required by the Deschutes Basin mitigation rules. 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.

**Before the Oregon Court of Appeals Case Number: CA A157433**

**Oregon Desert Farms v. Oregon Water Resources Department and Water Resources Commission**

This case is a petition for judicial review related to water right application G-17165 filed by the city of Lakeview for industrial use and power development. The water right was protested by Oregon Desert Farms. A contested case hearing was held June 11, 2013. The final order was issued followed by a request for reconsideration. Oregon Desert Farms filed exceptions to the order. Exceptions were considered by the Commission on May 29, 2014. The Commission affirmed the Department's final order. The Court has not scheduled a time for oral argument at this time.

**Before the Oregon Court of Appeals Case Number: CA A157428**

**Willamette Water Co., an Oregon corporation, v. Oregon Water Resources Commission and WaterWatch of Oregon Inc.**

This case is a petition for Judicial Review related to water right application S-87330 filed by Willamette Water Co. for municipal water use. On November 5, 2008, Willamette Water Co. submitted application No. S-87330 to the Oregon Water Resources Department for a permit to use 34 cubic feet per second (cfs) of water from the McKenzie River for a quasi-municipal use. The Department issued a Proposed Final Order on January 26, 2010, that proposed to issue a permit with conditions. The Company and WaterWatch of Oregon filed protests on March 12, 2010.

A contested case hearing was held on April 27, 2012. Administrative Law Judge Han issued a Proposed Order recommending denial of the application on several grounds. The Company and WaterWatch both filed exceptions with the Department. On March 7, 2014, after consideration of the exceptions and the record, the Director issued a Final Order in Contested Case recommending denial of application S-87330. The Company and WaterWatch both filed exceptions on March 31, 2014. The Commission considered the exceptions and on May 29, 2014 affirmed the Department's final order.

The Court of Appeals has not scheduled a time for oral argument.

**Moore v. WRD, Court of Appeals case No. A157869**

Moore filed a petition for Judicial Review of a final order issued by the Water Resources Commission. Moore was found in violation of Oregon's minimum well construction standards. The record has been filed with the court. Argument has not been scheduled.



| <b>IV. Commission/Board Schedules</b>         | <b>Location</b> | <b>Date</b>    |
|---|-----------------|----------------|
| Board of Forestry                             | Salem           | Jan. 7, 2015   |
| Land Conservation and Development Commission  | tbd             | tbd            |
| Parks and Recreation Commission               | tbd             | tbd            |
| Dept. of Geology and Mineral Industries Board | Salem           | Jan. 5, 2015   |
| Fish and Wildlife Commission                  | Salem           | Dec. 5, 2014   |
| State Land Board                              | Salem           | Dec. 9, 2014   |
| Environmental Quality Commission              | Portland        | Jan. 7-8, 2014 |
| Watershed Enhancement Board                   | tbd             | tbd            |
| Board of Agriculture                          | tbd             | tbd            |

Attachment 1: Rulemaking Calendar

Last Revision: 11/10/2014

## Water Resources Department Anticipated Rulemaking

| Rule Division                                | Topic   | Lead Staff   | Rules Advisory Committee Anticipated | GWAC Input Anticipated  | Target WRC Date               | Status                                    |
|--|---|--|--------------------------------------|-------------------------|-------------------------------|---|
| Division 23                                  | Klamath Basin Groundwater   | Brenda/Doug/Ivan                                     | Yes                                  | Yes                     | Early/Mid 2015                | Underway                                  |
| Division 325                                 | Split a Permit into Multiple Ownerships, new program  | Dwight/Kelly   | Yes                                  | No                      | Nov 2014                      | Underway                                  |
| Division 20                                  | Minor changes to improve clarity and specificity of dam safety rules                                      | Brenda/Keith   | Yes                                  | No                      | 2015                          | Underway                                  |
| Division 340<br>Division 382<br>Division 310 | Limited License, Road Watering, and Certificate of Registration fees, and Water Right Application refunds | Dwight/Tim   | Yes                                  | No                      | Nov 2014                      | Underway                                  |
| Division 93                                  | 1. SVF Methodology<br>2. Scoring/Ranking Projects<br>3. Terms of Loans                                    | 1. Brenda<br>2. Brenda/Tracy/<br>Racquel<br>3. Tracy | 1. Yes<br>2. Yes<br>3. Yes           | 1. No<br>2. No<br>3. No | 1. 2015<br>2. 2015<br>3. 2015 | 1. Underway<br>2. Underway<br>3. Underway |

Last Revision: 11/10/2014

| Rule Division              | Topic   | Lead Staff         | Rules Advisory Committee Anticipated | GWAC Input Anticipated | Target WRC Date | Status   |
|----------------------------|---|--------------------|--------------------------------------|------------------------|-----------------|----------|
| Division 8<br>Division 200 | Reconcile competing definitions of aquifer  | Brenda/Ivan/Kris   | Yes                                  | Yes                    | Mid 2015        | Planned  |
| Division 210               | Clarify well construction rules   | Brenda/Kris/Ivan   | Yes                                  | Yes                    | Nov 2014        | Underway |
| Division 217               | Requirements of pump testing  | Brenda/Ivan        | Yes                                  | Yes                    | Mid 2015        | Planned  |
| Division 51                | Streamline hydroelectric protests with OAH  | Dwight/Mary        | Yes                                  | No                     | 2015            | Underway |
| Division 77                | Incorporating SB 199 (2013) split-season leasing changes and making improvements to lease processing. | Dwight/Laura Wilke | Yes                                  | No                     | Fall 2015       | Planned  |

Last Revision: 11/10/2014

| <b>Rule Division</b> | <b>Topic</b>  | <b>Lead Staff</b>  | <b>Rules Advisory Committee Anticipated</b> | <b>GWAC Input Anticipated</b> | <b>Target WRC Date</b> | <b>Status</b> |
|----------------------|---|--------------------|---|-------------------------------|------------------------|---------------|
| Division 522         | Clarifying that permits granted through mitigation program that are subsequently cancelled cause the 200 cfs cap to increase by the amount of water cancelled | Dwight/Laura Wilke | Yes   | No                            | June 2015              | Planned       |
| Division 33          | Updating a rule cross-reference in division 33  | Dwight/Jon         | Yes   | No                            | Nov 2014               | Underway      |