



Oregon

Kate Brown, 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: Thomas M. Byler, Director

SUBJECT: Agenda Item I, March 13, 2015
Water Resources Commission Meeting

Director's Report

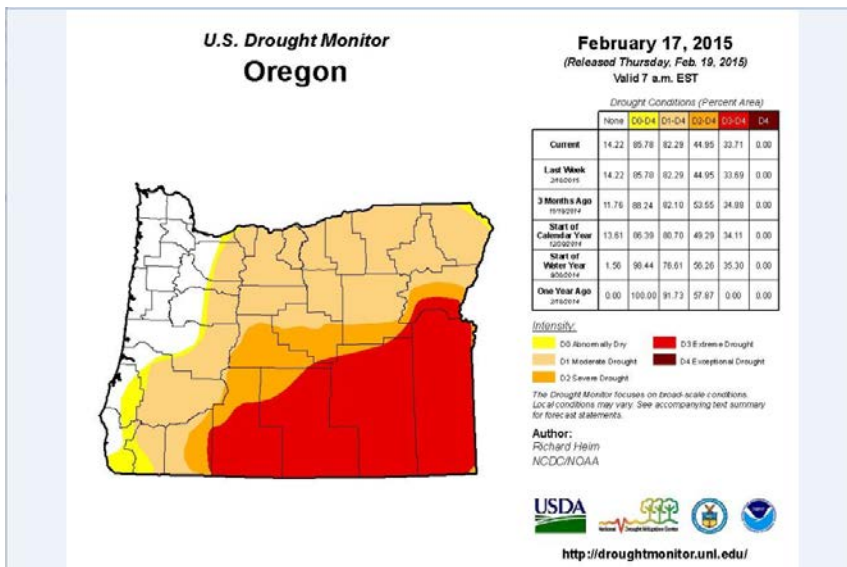
I. Current Events:

Current Water Conditions:

For the second year in a row, Oregon's mountains are experiencing record low snowpack levels. Across the state, near normal precipitation has fallen since the water year began, but temperatures have been unusually warm, causing most precipitation to fall as rain. As a result, Oregon has a well below normal March 1 snowpack. Most of the snow measurement sites in the Cascade and Siskiyou Mountains are at or near record low levels as of March 1. Without significant snowfall in March, streams and rivers that are typically fed by snowmelt will likely be well below normal this summer.

According to the National Resource Conservation Service (NRCS) SNOTEL network, mid-February snowpack ranked in the lowest 5 percent of the historical record at many stations throughout Oregon, in fact, in most western states. Persistent above-normal temperatures continue to melt the snowpack at a rapid pace at many SNOTEL stations in the Pacific Northwest and Rockies.

The National Weather Service Climate Prediction Center monthly and seasonal outlooks predict below average precipitation. The outlook for March-May 2015 indicates elevated chances of above-normal temperatures across Oregon. The March-May 2015 precipitation outlook indicates elevated chances for below-average precipitation in the western and central parts of Oregon. For the rest of the state, an equal chance of above or below normal precipitation is indicated. It is unlikely that any precipitation falling during March would have a significant impact on drought conditions through May, especially given the below normal snowpack conditions. Therefore, drought persistence is forecasted.



New Staff & Staff Promotions:

Since the November meeting, the Department has hired four new employees, transferred one staff and promoted three staff.

Positions filled include: Tillamook Watermaster, Receptionist, Water Right Application Analyst, Water Right Technician, Transfer Specialist, Hydrogeologist, Hydrographer, and a Adjudication Specialist.

II. Commission Follow Up

Willamette Basin Reservoir Study Update:

In February, President Obama released his Federal Fiscal Year (FY) 2016 Budget. The Willamette Basin Reservoir Study did not receive funding in the President’s Budget for FY16; however, the U.S. Army Corp of Engineers (Corps) received notification that \$450,000 had been approved as part of the FY15 work plan. The Corps now has the funding and authority to begin the Willamette Basin Reservoir Study. The Department will work closely with the Corps, stakeholders, and other agency partners to finish the contracting and water right process for the surplus water letter report in the next few months. Efforts will quickly shift to the larger study, likely in early spring.

County Funded FTE

During the November Commission meeting, the Department was asked to provide information on number of staff funded by the counties. The following counties provide funding for field staff: Baker (2.30 FTE), Clackamas (0.49 FTE), Crook (0.30 FTE), Deschutes (0.30 FTE), Douglas (2.0 FTE), Harney (0.50 FTE), Jackson (2.0 FTE), Jefferson

(0.30 FTE), Klamath (1.10 FTE), Marion (0.20 FTE), Morrow (0.10 FTE), Multnomah (0.25 FTE), Tillamook (0.57 FTE), Umatilla (2.94 FTE), Union (0.90 FTE), Washington (2.0 FTE).

Well Said Newsletter:

The Department publishes the “Well Said” Newsletter on a quarterly basis. It includes news and updates from the Department’s Well Construction and Compliance Section. The audience for the newsletter is the well drilling community as well as others interested in groundwater and Oregon’s well construction program. The newsletters are mailed to all licensed drillers in the state and emailed to other interested individuals. The newsletter is available on-line at: <http://www.oregon.gov/owrd/pages/gw/forms.aspx>.

III. Litigation Update

In re the Silvies River Decree - Harney County Circuit Court case No. 1403

The Water Resources Department initiated this matter in 2008 to enforce provisions of the Silvies River Decree related to the regulation of water to protect senior water rights and to fulfill a settlement agreement that resolved petitions for judicial review of enforcement orders. The litigation has been suspended ever since, as region staff and water users implemented a process not requiring court intervention. Presently, the Department believes regulation in accordance with the Decree is being satisfied using existing tools. Oregon Department of Justice (DOJ) is preparing a motion and supporting declarations to seek an order from the court to keep the litigation in inactive status.

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 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.

The Supreme Court denied the petition for review on November 20, 2014. The Court has not entered the Judgment as of this date.

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 proposed 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, which was in 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.

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 held oral arguments on November 3, 2014. Subsequently, the Supreme Court decided to dismiss the petition for review on February 5, 2015, thereby upholding the Court of Appeals ruling. The Department is working with DOJ to determine appropriate next steps.

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 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 with conditions to maintain the persistence of fish species listed as sensitive, threatened or endangered under state or federal law in the portions of the waterways affected by water use under the permit.

WaterWatch filed three petitions for judicial review with the Oregon Court of Appeals claiming that the conditions were not protective enough to maintain the persistence of fish species. Oral argument was held on November 15, 2013, and Court issued its decision on December 31, 2014.

The Court reversed and remanded all three cases to the agency. The Court held that notwithstanding the Departments correct interpretation of ORS 537.230(2)(c), “the Department’s determination that the permits, as conditioned, will maintain the persistence of listed fish species, in the affected waterway, lacks both substantial evidence and substantial reason.” Specifically, the court found that the Department did not adequately explain what, in terms of fish persistence, a “short-term” drop in flow means versus “long-term” flow, and the Department did not adequately explain why short term drops in flow will not adversely affect this persistence of listed species. The court also found that the Department failed to explain how the conditions ensure that the diversion of the undeveloped portion of the municipal permits do not contribute to the long-term failure to meet fish persistence flows.

The Court agreed with the Department that the policy of the statute focuses on long-term fish population health in the affected waterway; the statute does not express a policy that no habitat may be impaired, or that no individual fish may be allowed to perish or leave. The Court also rejected WaterWatch’s other challenges to the Final Orders. The Department is working with DOJ on how best to proceed.

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. Mr. Harrington 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 in violation of the terms of his probation 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, and was completed by 4:00 pm with all equipment off of the property.

The State filed a petition with the Jackson County Circuit Court to recover the cost of notching the three dams. A Supplemental Judgment was issued awarding the full amount of the request to the Department on November 17, 2014. This Supplemental Judgment is now included as a condition of Harrington's probation.

Harrington had also appealed the conviction to the Oregon Court of Appeals. On December 24, 2014, the Court affirmed the ruling of the Jackson County Circuit Court.

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

The Farm of the Family Recreation Association (FOFRA) has filed multiple legal actions and motions to prevent enforcement of water laws and court orders related to Gary Harrington (see above case). These include: appeal of Jackson County Circuit Court civil action (case A155824) in which FOFRA sued the Department alleging it acquired property where the reservoirs are located and has the right to impound diffuse surface water; appeal of the Jackson County Circuit Court Judgment in the criminal action against Gary Harrington, which ordered removal / breach of the three dams (case A156927); and, a motion to stay removal / breach of the three dams.

FOFRA filed a civil action against the Department in Jackson County Circuit Court (case 13cv01826). FOFRA asked the court to declare that it is the lawful (quiet title) owner of the property where the Harrington reservoirs are located and that FOFRA has the right to impound diffuse surface water. The court denied both requests, and dismissed the case, ruling in the State's favor. FOFRA subsequently appealed to the Oregon Court of Appeals (case A155824). Briefs have been submitted. Oral argument is March 31, 2015.

FOFRA also attempted to intervene in the criminal action against Gary Harrington (Jackson County Circuit Court case 103843MI) to stop the removal/breach of the three dams. FOFRA petitioned the Circuit Court to intervene and objected to the scope of the proposed order to breach the three dams and drain the reservoirs (entered on April 21, 2014), as well as to the requirements of probation related to Harrington's criminal conviction for storing water without a water right. FOFRA alleged that it owns the property where the reservoirs are located and the Court's ruling impacted its property. The Circuit Court denied FOFRA's motion to intervene and FOFRA appealed to the Court of Appeals (case A156927).

On June 17, 2014, the day work was under way to enforce the Circuit Court's order to breach the dams and drain the reservoirs, FOFRA filed a motion for stay to stop the activities. The Court of Appeals denied the motion on June 18, 2014. The Court of Appeals granted the State's motion to dismiss the entire appeal on July 23, 2014. The Court issued a general judgment to dismiss with prejudice together with costs.

On December 24, 2014, the Court of Appeals affirmed Jackson County Circuit Court's conviction of Gary Harrington without opinion (case A152096).

James Young v. Oregon Water Resources Department

James Young filed an application to construct well(s) and use groundwater within the Deschutes Basin. The applicant disputed the methodology used by the Department to determine the zone of impact where mitigation would be required. No mitigation plan was submitted to the Department. 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. Oral argument is scheduled for April 17, 2015.

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 a transfer (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.

No hearing date has been set.

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 application was protested by Oregon Desert Farms, but the Department issued a final order approving the application and issued a permit to the city. Oregon Desert Farms petitioned for reconsideration of the Department's final order, and a contested case hearing was held June

11, 2013. In its final order on reconsideration, the Department affirmed its prior approval of the permit.

Oregon Desert Farms filed exceptions to the Department's final order. Exceptions were considered by the Commission on May 29, 2014. The Commission affirmed the Department's final order and Oregon Desert Farms subsequently petitioned for review of the Commission's order in the Court of Appeals. The Court has not yet scheduled oral argument.

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 of a final order denying water right application S-87330 filed by Willamette Water Co. (Company) for 34 cubic feet per second (cfs) of water from the McKenzie River for quasi-municipal use. The Department issued a Proposed Final Order on January 26, 2010, proposing to issue the permit with conditions. The Company and WaterWatch of Oregon filed protests on March 12, 2010.

A contested case hearing was held on November 14 - 16, 2011. 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 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 Willamette Water Company subsequently petitioned for review of the Commission's final order in the Court of Appeals. The Court of Appeals has not scheduled a time for oral argument.

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

The Department issued a Notice of Violation alleging that Mr. Moore, a well driller, violated well construction standards. Mr. Moore objected to the Notice and requested a contested case hearing which was held August 5 - 6, 2013. The Administrative Law Judge (ALJ) found that as a matter of law, the Department's notice violated the Administrative Procedures Act (APA), and so made no findings regarding the alleged violations.

The Department issued a final order reversing the ALJ's conclusion that the Notice violated the APA and made findings of fact and conclusions of law affirming the Department's notice. Mr. Moore filed exceptions to the Department's final order which were considered by the Water Resources Commission. The Commission subsequently issued a final order affirming the Department's order.

Moore filed a petition for Judicial Review of the Commission's final order in the Oregon Court of Appeals. Argument has not been scheduled.

Klamath Drainage District v. Oregon Water Resources Department
Klamath County Circuit Court case No. 1403195CV

This case is a petition for Judicial Review of a regulation order issued by the watermaster against the Klamath Drainage District. The Klamath Drainage District filed a petition for judicial review of the Department's final order in Klamath County Circuit Court in August 2014, but did not prosecute the case, which is now moot. The case is pending in Klamath County Circuit Court. The State has not been required to respond to the petition. Counsel for the parties are discussing the form of a voluntary dismissal by petitioner.

James Buchanan and Barbars Buchanan v. Oregon Water Resources Department
Harney County Circuit Court case No. 1408350CV

This case involved a petition for Judicial Review of a Final Order, which required the installation of a headgate and measuring device. There is an existing headgate at the site that is in disrepair, and no measuring device. The watermaster requested the installation of the new devices to enable regulation to protect senior water right holders during times of water shortage. The Petition was filed beyond 60 days after the issuance of the final order and opposing counsel agreed to dismiss.

Steven Doverspike and Doverspike Land LLC. V. Oregon Water Resources Department
Harney County Circuit Court case No. 1409377CV

The Governor declared drought in Harney Count on February 13, 2014. During a Governor declared drought, the Department is able to receive and process drought applications for supplemental irrigation. If approved, a drought permit is valid until the end of the calendar year in which it is issued, or until the drought is undeclared, whichever comes first. Mr. Steven Doverspike filed a petition for Judicial Review of a Final Order denying a drought application for supplemental irrigation of 2,374.77 acres from 10 wells for the 2014 irrigation season. The Department received the drought application on June 20, 2014. Staff determined that water was not available to satisfy the quantity (7,125 acre feet) being requested. The Department issued a final order on July 3, 2014, denying the application.

The Department has not filed a response with Harney County Circuit Court, but has prepared a motion to dismiss. The Department met with Mr. Doverspike on February 4. The Court has not set any dates.

Attorneys are working on a settlement agreement which is intended to result in dismissal.

Brimstone Natural Resources Co. v. Oregon Water Resources Department and others
Josephine County Circuit Court case No. 14CV1460

A Complaint (Declaratory Judgment; Quiet Title) was filed in Josephine County Circuit Court by Brimstone Natural Resources Co. It appears that this matter involves a water right filed on November 15, 1943. The application requested enough water to irrigate 30 acres from dredge seepage. Water right certificate 15764 was issued on June 30, 1949, for up to .313 cubic feet per second (cfs) from dredge seepage for the irrigation of 25 acres. Since issuance of the certificate, the property may have been divided and place of use may involve three or more tax lots now, of which Brimstone allegedly owns one. Brimstone appears to be challenging the validity of the water right in this complaint.

Briefs have not been filed. The Court has not set a date for Argument.

IV. Commission/Board Schedules	Location	Date
Board of Forestry	TBD	April 22 - 23
Land Conservation and Development Commission	Salem	May 21 - 22
Parks and Recreation Commission	Salem	April 15
Dept. of Geology and Mineral Industries Board	TBD	TBD
Fish and Wildlife Commission	Bend	April 24
State Land Board	Salem	April 14
Environmental Quality Commission	Salem	April 15 - 16
Watershed Enhancement Board	Salem	April 28 - 29
Board of Agriculture	TBD	TBD

Attachment 1: Rulemaking Calendar

Water Resources Department Anticipated Rulemaking

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 25	Klamath Basin Groundwater	Doug/Ivan	Yes	Yes	March 2015	Underway
Division 20	Improve clarity and specificity of dam safety rules	Brenda/Keith	Yes	No	March 2015	Underway
Division 200 Division 210 Division 240	Mosier special area standards Modernizing figure and table references Correcting “silt” definition Correcting clerical error in monitoring well text	Kris Byrd	Yes	Yes	June 2015	Underway
Division 93	SB 839 Implementation	Tracy /Tom B/ Racquel / Brenda	Yes		June 2015	Underway
Division 522	Clarifying that permits granted through mitigation program that are subsequently cancelled can be added back to the 200 cfs cap	Dwight/Laura Wilke	Yes	No	June 2015	Underway

Last Revision: 3/3/2015

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan/Kris	Yes	Yes	Mid 2015	Underway
Division 77	Gaining consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight/Laura Wilke	Yes	No	Fall 2015	Planned
Division 51	Streamline hydroelectric protests with OAH	Dwight/Mary	Yes	No	Fall 2015	Underway
Division 217	Requirements of Pump Testing	Brenda/Ivan	Yes	Yes	Late 2015/ Early 2016	Planned