



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item A, May 15, 2015
Water Resources Commission Meeting

Klamath Drought Emergency Temporary Rulemaking

I. Introduction

In this agenda item, the Commission is asked to consider temporary rules in Klamath County that would authorize a preference for human consumption and stock water use for up to 180 days or the duration of the Governor's declared drought, whichever is shorter.

II. Background

Governor Brown declared a drought emergency in Klamath County under Executive Order No. 15-03 on April 6, 2015 (Attachment A). The Upper Klamath Landowner Improvement District submitted a request to the Commission, dated May 4, 2015, for a preference for stock water (See Attachment B). In addition, the Commission received a request for a preference for human consumption from the U.S. Department of the Interior, National Park Service, Crater Lake National Park dated on May 6, 2015 (see Attachment C). Also included is a May 11, 2015 comment letter from Don Gentry, Chairman of the Klamath Tribes (See Attachment D).

Many of the water rights in the Klamath Basin include domestic and stock water along with irrigation. Under ORS 536.750(1)(c), the Commission may grant a preference for stock water and human consumption, when the Governor declares a state of drought emergency in an area. In 2013 and 2014, the Commission adopted administrative rules granting a preference for water use for human consumption and livestock in Klamath County in response to the Governor-declared drought emergency. At this time, no rules exist that authorize a preference of use for human consumption or stock water use in Klamath County.

III. Discussion

The intent of these temporary rules is to grant the preference for stock water and human consumption during the 2015 Governor-declared drought emergency in Klamath County. Under this authority, holders of water rights for stock water and human consumption uses that would otherwise be shut off during a call by a senior water user are allowed to continue use of that water for those purposes during the period of the drought declaration in Klamath County, or for 180 days after the effective date of the rules, whichever is sooner. As explained in the attached letters requesting the preference, for some water users there are no readily available alternative sources of water for stock water or human consumption uses.

The Department recognizes that drought tools, such as the livestock and human consumption preference, offer critical, immediate options to help water users to make it through a difficult water year. At the same time, however, water used under the preference reduces the quantity of water available to senior water right holders. This is not a desirable or sustainable result. For that reason, the Department strongly encourages Klamath Basin water users to develop alternative approaches and water delivery systems to better meet their needs in dry years. In addition, when the Commission does authorize the preference it is important for water right holders exercising the preference to use only the minimum amount necessary and as efficiently as possible.

The water user community has begun work to obtain more secure sources of supply to meet stock water and human consumption needs. The Department acknowledges and appreciates this effort. The Department will continue working with water users in the basin to minimize the impacts of a drought preference. Implementing alternative sources of supply and water delivery systems would limit the need for water users to seek the preference on a repeated basis in the future, and put the basin on par with other basins in the state that have longer experience under a regulated system.

In recognition of the continuing need for the basin to make progress towards more secure sources, the proposed rules would require that water right holders provide notice to the watermaster of the intent to utilize the preference on a form developed by the Department (See Attachment F). The notice will inform the watermaster as to which water users are seeking to utilize the stock water preference, the points of diversion to be used, and the number of stock to be served. This will assist with management of the stock water preference and help the Department better understand the needs in the community.

IV. Action Item

The Commission is asked to consider adoption of the temporary rules OAR Chapter 690, Division 22, which will allow holders of water rights for stock water and human consumption uses in Klamath County - that would otherwise be shut off during a call by a senior water user - to continue use of that water for those purposes. This preference would allow water right holders to continue to divert and use water for stock water and human consumption purposes only during the period of a governor-declared drought, or for 180 days, whichever is shorter. The rules being proposed for adoption are included in Attachment E.

V. Alternatives

The Commission may consider the following alternatives:

1. Adopt administrative temporary rules, OAR Chapter 690, Division 22, as proposed.
2. Modify and adopt administrative rules, OAR Chapter 690, Division 22.
3. Do not adopt the rules.

VI. Recommendation

The Director recommends Alternative 1, to adopt administrative rules OAR 690, Division 22.

Attachments

- A. Governor Brown drought emergency declaration in Klamath County
(Executive Order No. 15-03)
- B. May 4, 2015 drought preference request letter from the Upper Klamath Landowner Improvement District
- C. May 6, 2015 drought preference request letter from Crater Lake National Park
- D. May 11, 2015 letter from the Klamath Tribes
- E. Proposed temporary rules for OAR Chapter 690, Division 22
- F. Stock Water Preference Notice Form

Tom Paul
503-986-0882

**EXECUTIVE ORDER NO. 15-03****DETERMINATION OF A STATE OF DROUGHT EMERGENCY IN CROOK, HARNEY, AND KLAMATH COUNTIES DUE TO DROUGHT, LOW SNOW PACK LEVELS, AND LOW WATER CONDITIONS**

At the request of Crook County (by Order 2015-15 dated March 18, 2015), Harney County (by Resolution 2015-03 dated March 18, 2015), and Klamath County (by Resolution 2015-0317 dated March 17, 2015), and based on the recommendations of the Drought Council and the Water Availability Committee, and pursuant to ORS 401.165 and ORS 536.740, I find the continuing dry conditions, low snowpack, and lack of precipitation have caused natural and economic disaster conditions in Crook, Harney, and Klamath Counties.

Projected forecasts are not expected to alleviate the severe drought conditions, and the drought is having significant economic impacts on agriculture, livestock, and natural resources in Crook, Harney, and Klamath Counties.

The dry conditions present hardships for these communities: crops, agricultural and recreational investments are at risk; animals and plants that rely on Oregon's surface water supplies are threatened; and the risk of wildfires across the state is greatly increased. Current conditions are being monitored and analyzed by state agencies including the Department of Agriculture, the Department of Water Resources, and the Oregon Office of Emergency Management.

A timely response to the severe drought conditions is vital to the safety of persons, property and economic security of the citizens and businesses of Crook, Harney, and Klamath Counties. I am therefore declaring that a severe, continuing drought emergency exists in Crook, Harney, and Klamath Counties, and directing the following actions.

IT IS HEREBY ORDERED AND DIRECTED:

I. The Oregon Department of Agriculture is directed to coordinate and provide assistance in seeking federal resources to mitigate drought conditions and assist in agricultural recovery in Crook, Harney, and Klamath Counties.

II. The Department of Water Resources and the Water Resources Commission are directed to coordinate and provide assistance to water users in Crook, Harney, and Klamath Counties as the Department and Commission determine deem necessary and appropriate in accordance with ORS 536.700 to 536.780.



EXECUTIVE ORDER NO. 15 - 03
PAGE TWO

III. The Office of Emergency Management is directed to coordinate and assist as needed with assessment and mitigation activities to address current and projected conditions in Crook, Harney, and Klamath Counties.

IV. All other state agencies are directed to coordinate with the above agencies and to provide appropriate state resources as determined essential to assist affected political subdivisions and water users in Crook, Harney, and Klamath Counties.

V. This executive Order expires on December 31, 2015.

Done at Salem, Oregon, this 6th day of April, 2015.



Handwritten signature of Kate Brown in cursive script.

KATE BROWN
GOVERNOR

ATTEST:

Handwritten signature of Jeanne Atkins in cursive script.

Jeanne Atkins
SECRETARY OF STATE

UPPER KLAMATH LANDOWNER IMPROVEMENT DISTRICT

May 4, 2015

Oregon Water Resources Commission
725 Summer St NE Suite A
Salem, Oregon 97301

Dear Oregon Water Resources Commission:

The Upper Klamath Landowner Improvement District is requesting the Commission grant temporary rules for the use of surface water for stock water in the Off-Project Area of the Klamath Basin in Klamath County for a duration of 180 days during this season's drought.

The Upper Klamath Landowner Improvement District has been conducting outreach and landowner education on off-site livestock water sources, infrastructure and rules for usage during a drought. Landowners signed up last season for project to develop livestock wells and watering troughs with Federal assistance programs through Farm Service's Agency and Natural Resource Conservation Service. Both programs are assisting a small percentage of landowners, as there was not enough funding to cover all of the projects. Many landowners who did not receive funding from the assistance programs are implementing livestock watering projects with private funding. Planning and engineering design is on-going with these projects. Unfortunately, there are a very limited number of well drillers available in the area for livestock wells. Landowners have been on well driller lists for months and are still waiting.

Due to the delay from the design, funding and shortage of well drillers, the Upper Klamath Landowner Improvement District is asking that the Oregon Water Resources Commission consider and grant temporary rules for the use of surface water for stock water during the 2015 drought. This will allow time for landowners to complete stock water projects still have stock water available.

Thank you for your time and consideration.

Sincerely,



Randall Kizer, President



United States Department of the Interior
NATIONAL PARK SERVICE

Crater Lake National Park
Post Office Box 7
Crater Lake, Oregon 97604



IN REPLY REFER TO:

L54(CRLA)

May 6, 2015

Oregon Water Resources Commission
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Request for Adoption of Temporary Rule Granting Preference to Human Consumption Use in Klamath County During a Declared Drought

Dear Commissioners:

The National Park Service, as the federal agency responsible for management of Crater Lake National Park (or, the park), requests that the Commission adopt a temporary rule granting preference to human consumption use in Klamath County during a declared drought, as allowed under ORS 536.750(1)(c).

Governor Kate Brown declared a drought in Klamath County on April 6, 2015. At this time, snow melt in the upper Klamath Basin in Oregon is well below normal and stream flows are declining. The Oregon Water Resources Department has begun regulation of water rights in the upper Klamath Basin, including the Wood River sub-basin, the source of water for Crater Lake National Park. As you know, Crater Lake National Park, which many consider to be the crown jewel of the Cascades, is a significant natural resource in Oregon, an important part of the public interest. More than a half million people visit the park each year to enjoy its scenery, wildlife, natural resources, and other natural objects.

The park is also a significant contributor to the region's economy. According to our latest regional economic data, in 2012 more than 545,000 visitors spent over \$61 million in communities within 60 miles of the park, which supported 769 jobs. Park visitor numbers for 2014 were even higher, with over 585,000 visitors coming to the park. 2015 is expected to be another record-breaking year. Also, over 400 people are employed directly at the park during the peak summer season. Water for human consumption is essential to allow visitor use of the park, and the supporting personnel.

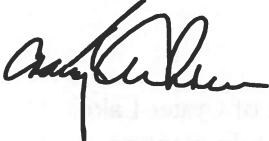
In response to the 2013 water crisis, the park made many significant efforts to conserve water and be an efficient user of water. The park put into effect a number of mandatory water conservation practices, including: (i) installation of low-flow fixtures, such as toilets, showerheads, faucets, and washing machines, in all park facilities and residences; (ii) establishing no-irrigation landscaping; (iii) elimination of vehicle washing; (iv) providing drinking water by request-only in all park restaurants; and (v) encouraging guests in park lodging to reuse sheets and towels to cut down on the water used to launder linens. Water conservation themes are also incorporated into all interpretive and outreach messages.

Without water for human consumption, the park cannot accommodate visitors or staff and we would have to close the park to the public until the regulation of water use is restored. Over 400 employed positions in the park would also be affected and in the case of seasonal staff, terminated. Without the human consumption preference, the park's surface water rights may be regulated off in this drought year since those water rights are junior to a number of others. The Park will continue to explore other options for supplying drinking water but none of those options are feasible before the likely regulation for 2015.

The human consumption preference would permit the park, as well as others, to continue to use water for human consumption purposes during the allowed period. The preference would allow continued operation of the park for the visitor season which runs into October.

In sum, we encourage the Commission to adopt a temporary rule granting preference to human consumption. We believe that such human consumption preference would greatly benefit the public interest and that without the preference serious harm would result to the public interest. If you have any questions, I can be reached at 541.594.3001 (office) or craig.ackerman@nps.gov.

Sincerely,



Craig Ackerman
Superintendent

Cc: Barbara Scott-Brier



The Klamath Tribes

May 11, 2015

Oregon Water Resources Commission
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Requests for a Temporary Rule Granting Preference to Stock Watering and Human Consumption in Klamath County

Dear Commissioners:

The Klamath Tribes are aware that requests have been made for temporary, emergency rules to allow preference for human and stock water consumption during the drought declared by Governor Brown. As we explained in some detail when a similar proposal was made last year, these proposals come at the direct expense of the Tribes' water rights. We are loath to see their recurrence, especially as their justification wears thinner. Last year's letter from Chairman Gentry to the Rules Coordinator, September 19, 2014, attached here, remains valid in all its essential concepts. We reiterate the concepts whose relevance remains unchanged and add further thoughts in this year's context.

The Perpetual Story of the "Temporary" Rules

As we explained at some length in the Chairman's 2014 letter, in a basin like the Klamath there is no extra water for the Department to allocate to needy stockmen, so water dedicated to the proposed purposes necessarily comes at someone else's expense. Thus the requested rule is not just a matter of administratively providing emergency relief to certain citizens; it is a volitional and direct request that the Commission provides relief by taking water not from the State or the Department, not from the United States nor the County, but from the Tribes and perhaps other senior water right holders. This year's request is no different.

We are also told each year that such rules are invoked only in the Klamath Basin because only the Klamath is in transition and needs time to adapt to changed conditions. But there is little such

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adaptation evident from the stockwater proposals. (Though, encouragingly, the National Park Service request regarding human consumption does evidence serious effort to adapt to changes.) Indeed, to the best of our knowledge, cattle are still brought *into* the Basin for spring and summer pasturing, as though the drought were not a factor. The “transition” necessity wears very thin.

Also, it warrants noting that when, as the saying goes, the shoe was on the other foot there was no equivalent effort, when drought struck, to get others to provide emergency water for the relief of the Tribes’ resources. That is, there was no proposed rulemaking to provide water to tribal fisheries at the expense of other water uses in the Basin. It is of course too late to correct that now, but those facts are nonetheless part of the landscape in which the current proposal arises. And they add emphasis to the need, now that the Tribes are again asked to provide relief to others, to make clear that the period of adaptation is closing, and to assure that exemptions to the prior appropriation doctrine are absolutely necessary and are as narrow as possible.

Applicability of the Requested Rules to Federal Reserved Rights

It continues to seem to us unlikely that the proposed rules could be enforced at the expense of the Tribal water rights. As federally reserved and treaty reserved water rights, the Tribes’ water rights cannot be involuntarily reduced or compromised by state action. Both federal and state courts have made this clear. Rules that reduce or compromise the Tribes’ water rights in unlimited amounts are particularly inappropriate.

By submitting these comments we do not in any way make concessions about, or contradict, that principle. Rather, we seek to work with the Commission and others to develop outcomes of the state rulemaking process that will not require invocation of that principle in an already difficult situation. We believe others share this intent and will work with us in good faith. But, again, this process of transition cannot be allowed to become an annual event.

Content of a Proposed Rule

At the outset we note that the Commission should consider a separate rule for each use – human consumption and stock watering. In any event, the proposed rules need to be as narrow as possible.

Efficiency of use of emergency water. The rules should require the most efficient possible use of emergency water. Previous rules could be read to allow sufficient diversion of water to fill a long, leaky canal in order to deliver water to stock at considerable distance from the water source. This is wasteful and those whose water rights are being compromised in order to provide the emergency water should not be forced to bear this additional burden.

More, it is not unheard of that such “stockwater” might be used, along a long, leaky canal, to irrigate lands that would otherwise not have a right to irrigation water. We know the Commission does not intend or condone such abuse, but the rules should be written in a way that more effectively empowers the Department to prohibit it.



Again, if the waste of water came at the state's expense it might be possible to live with loose emergency rules. But that is not the case. And if the Commission wants to have senior water users contribute emergency water, then those water users are more than justified in requiring the Commission to do all in its power to minimize that contribution. Requiring efficient delivery of water by piping or trucking to remote stock seems a quite reasonable demand on junior water users who otherwise would get no water whatsoever.

The rules must minimize flow reductions in Basin streams. The proposed rules must prevent the complete dewatering of a stream and consequent destruction of fisheries. Such dewatering is plainly not a fair request to make of the Tribes and must be avoided.

The purpose of the emergency water for stock is to prevent loss of that resource to stockmen. That purpose must not be achieved at the price of destroying the Tribes' resources. Such a result would be a complete inversion of everything that water law, and the Commission, stand for.

Our comment here is consistent with section 3.20 of the recent Upper Basin Comprehensive Agreement in which the Department and others with direct interest in this matter have committed to avoiding dewatering of streams. The proposed rules could take advantage of the enormous amount of work that went into the Comprehensive Agreement by incorporating into the rules the concepts and quantities pertaining to the Agreement's "Specified Instream Flow" (SIF).

Rules should not allow for expansion of demand. Any rules must not allow the demand for emergency water to expand as the human and livestock populations in the Basin grow. Such growth can cause the "emergency" rules to overwhelm the seniority system. Again, this is too much to ask of senior water rights holders who are contributing the emergency water.

People in the Basin have already been given years to adapt to the realities of the limited water supply and to limit, not expand, demand. The rules must encourage this limitation, not accommodate continued growth in demand.

Rules should provide penalties for abuse. Undeniably, the proposed rules invite junior water right holders to take water that they otherwise would not have a right to take. There needs to be a disincentive to abuse this opportunity. Either the rules should include explicit penalties for abuse, or they should refer directly to other enforcement and penalty mechanisms available to the Department. Otherwise, experience teaches that junior water users can be expected to take more water than is strictly needed under a tight emergency watering regime.

Conclusion

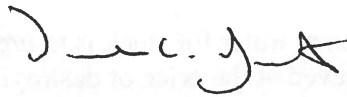
The requested rules reflect a distressing similarity to earlier proposals for emergency relief. We cannot avoid concern that the Klamath Basin's transition to sustainable water demand is hampered, not advanced, by accommodating annual emergency measures. Again, if the emergency water were coming at the expense of the state or the county an ongoing cycle of such rules might be acceptable. But it is not. It is coming at the expense of Tribal rights and resources.



If the Commission is to entertain the requested emergency rules the Klamath Tribes strongly urge that (i) the Commission makes clear that such requests are viewed by the Commission with great skepticism and are very unlikely to be granted in the future, and (ii) that they specify that the emergency relief is available only when the Specified Instream Flows established in the Upper Basin Comprehensive Agreement are being met.

Thank you for your time and consideration

Very Truly Yours,



Donald C. Gentry, Chairman





The Klamath Tribes

September 19, 2014

Rules Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Email: rule-coordinator@wrdd.state.or.us

Re: Klamath Tribes' Comments on Proposed OAR Chapter 690 Division 22
Rulemaking: RULE CAPTION: Preference for Human Consumption and Stock Water
Use in Klamath County during Governor-Declared Drought

Dear Rules Coordinator:

The Klamath Tribes are deeply concerned about the Proposed Rulemaking described above and appreciate this opportunity to comment and seek further review of the proposal. In short, we are concerned that the Proposed Rulemaking may not be well-founded and it asks senior water rights holders like the Tribes to contribute emergency water without providing sufficient safeguards to assure the contribution is limited to what is truly necessary. Also, the proposal to make such provisions permanent is inappropriate, and a specific sunset provision should be included.

General Effect of the Proposed Rules

At the outset we note that the rules work a significant change in application of the prior appropriation doctrine that is the foundation of water law in Oregon. In short, the proposed rules elevate stock watering and human consumption to the highest priority, above all otherwise senior water rights including those of the Klamath Tribes that enjoy a "time immemorial" priority date.

That outcome may be acceptable in certain very limited circumstances. But in the forefront of the discussion must be kept the unavoidable fact that water dedicated to these purposes necessarily comes at someone else's expense. During a drought in a basin like the Klamath, there is no extra water for the Department to allocate to needy stockmen. Thus this rulemaking is not

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just a matter of providing emergency relief to certain citizens; it is a volitional and direct decision that the relief will be provided not by the State or the Department, not by the United States nor by the County, but by the Tribes and perhaps other senior water right holders.

As a result, it is reasonable for the Tribes and the Department to insist that the proposed rules be tightly drawn as to both the conditions of their invocation, their duration, and the processes of their application. As we explain below, the proposed rules are not so drawn.

Also, it warrants noting that when, as the saying goes, the shoe was on the other foot there was no equivalent effort, when drought struck, to get others to provide emergency water for the relief of the Tribes' resources. That is, there was no proposed rulemaking to provide water to tribal fisheries at the expense of other water uses in the Basin. It is of course too late to correct that now, but those facts are nonetheless part of the landscape in which the current rulemaking is taking place. And they add emphasis to the need, now that the Tribes are asked to provide relief to others, to assure that exemptions to the prior appropriation doctrine are absolutely necessary, are not prolonged inappropriately, and are as narrow as possible.

Promulgating New, Permanent Rules Now Is Unnecessary, Inappropriate, and Premature

The rules currently in place were intended to provide emergency relief for 180 days then expire. For several reasons, making them permanent is not appropriate. First, the rules are, after all, *emergency* rules to help distressed stockmen through an immediate crisis. The rules are not intended to provide stockmen with permanent relief from drought (again, we note, at the ongoing expense of the Tribes). Rather, the rules provide the opportunity – and a substantial one, at that, lasting six months through nearly all the irrigation season – for people to take steps to adapt to conditions. If people have not taken the necessary actions, it is not the responsibility of the Department to require that the Tribes provide continued relief.

Second, the likely impact of expiration of the emergency rule is not great. The Bureau of Reclamation's Klamath Project, whose call on the Klamath system is a large part of the basis for invoking the emergency rule, is near the end of its irrigation season and its call will soon end. Also, the other operative call in the Basin, by the Klamath Tribes, is limited in quantity to the Specified Instream Flow agreed to by the many parties to the Upper Klamath Basin Comprehensive Agreement, so it has a very limited impact on access to stock water or water for human use.

Third, the Basin is at or near the time of year when much of its livestock is shipped to other locations for the winter. Thus, the need for extending the emergency rules is much reduced. More, this shipping is the kind of step for which the emergency rules, as noted above, have carved out time. If that time was not well used by stockmen, it is not the responsibility of the Tribes or the Department to provide continued relief.



In all, the legitimate and likely impact of allowing the emergency rule to expire as initially contemplated does not begin to justify indefinitely compromising the senior water rights of the Klamath Tribes by making the rule permanent. The same is true of human consumption where people have had six months to secure alternative sources. Again it is not the responsibility of the Department or the Tribes to provide ongoing emergency relief.

An extension of the rule through next year, 2015, with the rule automatically expiring at the end of that year, would begin to address the necessary limitations. And it would send a clear message that emergency relief of this type will end soon because it is intended only to provide a short transition time as people adjust to the new situation in the Klamath Basin.

Applicability of the Rules to Federal Reserved Rights

It seems to us unlikely that the proposed rules in any form could be enforced at the expense of the Tribal water rights. As federally reserved and treaty reserved water rights, the Tribes' water rights cannot be involuntarily reduced or compromised by state action. Both federal and state courts have made this clear. Rules that reduce or compromise the Tribes' water rights in unlimited amounts and for indeterminate lengths of time are particularly inappropriate.

By submitting these comments we do not in any way make concessions on, or contradict, that principle. Rather, we seek to work with the Department and others to develop outcomes of the state rulemaking process that will not require invocation of that principle in an already difficult situation. We believe others share this intent and will work with us in good faith.

Content of the Proposed Rules

In the following comments we do not mean to take issue with the overall goals of the proposed rules, to wit, providing emergency water for stock and human use to alleviate declared droughts during a transition period. Quite possibly it may be worth OWRD to consider a separate rule for each use – human consumption and stock watering. As discussed above, however, the proposed rules need to be as narrow as possible. As currently drafted, they do not satisfy that requirement. We illustrate that with the following examples, discussions, and recommendations.

Efficiency of use of emergency water. The rules should require the most efficient possible use of emergency water. As written, the proposed rules can be read to allow sufficient diversion of water to fill a long, leaky canal in order to deliver water to stock at considerable distance from the water source. This is wasteful and those whose water rights are being compromised in order to provide the emergency water should not be forced to bear this additional burden.

More, it is not unheard of that such “stockwater” users find ways to, along a long, leaky canal, irrigate lands that would otherwise not have a right to irrigation water. We know the Department does not intend or condone such abuse, but the rules should be written in a way that more effectively empowers the Department to prohibit it.



Again, if the waste of water came at the state's expense it might be possible to live with loose emergency rules. But that is not the case. And if the Department wants to have senior water users contribute emergency water, then those water users are more than justified in requiring the Department to do all in its power to minimize that contribution. Requiring efficient delivery of water by piping or trucking to remote stock seems a minimal demand on junior water users who otherwise would get no water whatsoever.

Duration of application of the proposed rules. The proposed rules, once invoked by the Governor's declaration of a drought, potentially apply indefinitely. This seems backwards because it essentially makes the emergency rules permanent until further action demobilizes them. It puts the momentum behind continuing application of the rules by making the burden one of showing the drought has eased, rather than showing the drought, and the need for application of the extraordinary rules, continues.

The burden should not be on those donating water for emergency relief to demonstrate why they should get their water back. To the contrary, the burden should be on those continuing to want emergency water to show that the situation continues to warrant extraordinary relief.

But more importantly, the rules should reflect their fundamental reason for existence in the Klamath Basin. That is, it has been decided (not necessarily with the assent of the Tribes) that a period of transition should be provided during which water users can adjust to the new situation regarding enforcement of water priorities in the Basin. Thus any extension or modification of the current rule should include a "sunset" provision of no later than the end of 2015. And it is important that the Department and the Commission take steps to remind people who make use of these rules that the rules will not be available much longer.

The rules must minimize flow reductions in Basin streams. As written, the proposed rules do not prevent the complete dewatering of a stream and consequent destruction of fisheries. This is plainly not a fair request to make of the Tribes and must be avoided.

The purpose of the emergency water for stock is to prevent loss of that resource to stockmen. That purpose must not be achieved at the price of destroying the Tribes' resources. Such a result would be a complete inversion of everything that water law, and the Department, stand for. The proposed rules must eliminate that possibility.

Our comment here is consistent with section 3.20 of the recent Upper Basin Comprehensive Agreement in which the Department and others with direct interest in this matter have committed to avoiding dewatering of streams. The proposed rules could take advantage of the enormous amount of work that went into the Comprehensive Agreement by incorporating into the rules the concepts and quantities pertaining to the Agreement's "Specified Instream Flow" (SIF). Any extension or modification of the rules should provide that the emergency drought rules apply only when the SIFs are being met.



The rules should not allow for indefinite expansion of human and stock demand. As written, the proposed rules allow the demand for emergency water to expand as the human and livestock populations in the Basin grow. Such growth can cause the “emergency” rules eventually to overwhelm the seniority system. Again, this is too much to ask of senior water rights holders who are contributing the emergency water.

People in the Basin need to adapt to the realities of the limited water supply and to limit, not expand, demand. The rules must encourage this limitation, not accommodate continued growth in demand. Here again, this problem can be addressed by having a specific expiration date for the rules.

The application of the proposed rules to Klamath County alone is suspect. Our understanding is that there are two reasons why the proposed rules are drafted to apply only to Klamath County. Neither is convincing, and the first raises serious concerns.

The first reason offered is that water users in other basins are accustomed to being regulated off, have made drought preparations by developing stock ponds or the like, or have otherwise accommodated the need to cope with drought. In contrast, the Klamath Basin is unique and must be given time to adapt to the new realities of enforcement of water priorities and rights.

It is jarring, to say the least, to learn that the Klamath Tribes are thus virtually the only water right holder in Oregon being asked by the Department to compromise their water rights in order to provide emergency water to junior users because of drought. This remarkable fact adds terrific emphasis to nearly every other paragraph in this letter.

The second reason is that the Governor is required to issue drought declarations on a county-by-county basis. That may be so, but it does not alleviate the difficulties described above.

We are troubled by the Klamath-only aspect of the proposed rules and need reassurance that the unique demands made of senior water rights holders in the Klamath Basin are legitimate. If it is true that the Klamath Basin needs time to achieve the sophistication described as being present in other basins, then the proposed rules should sunset soon.

The proposed rules should provide penalties for abuse. Undeniably, the proposed rules invite junior water right holders to take water that they otherwise would not have a right to take. There needs to be a disincentive to abuse this opportunity. Either the proposed rules should include explicit penalties for abuse, or they should refer directly to other enforcement and penalty mechanisms available to the Department. Otherwise, experience teaches that junior water users can be expected to take more water than is strictly needed under a tight emergency watering regime.



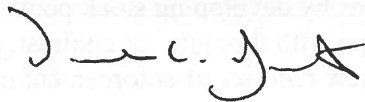
Conclusion

The proposed rules demand of senior water rights holders extraordinary contributions of emergency water for the benefit of junior users. Again, if the emergency water were coming at the expense of the state or the county a loose and indefinite set of rules might be acceptable. But it is not. It is coming at the expense of Tribal rights and resources. Consequently the rules must be made as tight, and short-lived as possible.

The Tribes' preference is that the temporary emergency rules be allowed to expire as originally contemplated. But if the rules are extended and/or modified, we strongly recommend (i) that they expire by their own terms no later than the end of 2015, and (ii) that they specify that the emergency relief is available only when the Specified Instream Flows established in the Upper Basin Comprehensive Agreement are being met.

Thank you again for your time and attention.

Very truly yours,



Don C. Gentry
Chairman

- cc: Tom Paul
- Doug Woodcock
- Richard Whitman
- Racquel Rancier



May 15, 2015

**OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 22
EMERGENCY WATER PROVISIONS – KLAMATH COUNTY**

690-022-0050

Purpose and Authority

- (1) The purpose of these rules is to implement ORS 536.750(1)(c), which authorizes the Commission, pursuant to a gubernatorial declaration that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date.
- (2) These rules address an immediate threat to the health and welfare of the people of Oregon that would otherwise occur if regulation of senior water rights in Klamath County curtailed or prohibited use of surface water for human consumption and stock watering as defined in these rules.
- (3) These rules are effective upon filing. During the effective period of these rules and a drought declaration under ORS 536.740 in Klamath County, the Commission grants a preference in Klamath County of use for water rights for human consumption or stock watering as provided in this rule. The temporary preference of use shall only apply to Klamath County and shall remain in effect only during the effective time period of the Governor’s Executive Order no.15-03 signed by Governor Kate Brown on April 6, 2015, or 180 days, whichever is shorter.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0052

Definitions

Unless the context requires otherwise, the words and phrases used in Division 22 have the following meaning:

- (1) “Commission” means the Oregon Water Resources Commission.
- (2) “Department” means the Oregon Water Resources Department.
- (3) “Human Consumption” means the use of water for the purposes of drinking, cooking, and sanitation.
- (4) “Stock Watering” means the use of water for consumption by domesticated animals and wild animals held in captivity as pets or for profit.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0054

Applicability of Preference for Stock Watering

During the effective period of a drought declaration under ORS 536.740 in Klamath County, and notwithstanding any provision of law to the contrary, the Commission grants a temporary preference for stock watering as follows:

- (1) The preference described in this rule applies only to the diversion or use of water within Klamath County.

Proposed temporary rules for consideration of the Oregon Water Resources Commission at its May 15, 2015 meeting.

- (2) Uses of water for stock watering, to the extent authorized under a water right certificate, permit, decree, or findings of fact and order of determination issued in an adjudication subject to ORS Chapter 539, are granted a preference over all other water uses regardless of the priority date of the water right for stock watering.
- (3) Water users in the Klamath Basin who want to exercise the stock water preference shall provide a notice to the Watermaster on a form prescribed by the Department. The notice shall identify the water right or determined claim authorizing stock water use along with the authorized point of diversion(s) that will be used to deliver the stock water and other information as required.
- (4) Water right holders exercising the stock water preference shall use the most efficient means of delivery available to them and divert the minimum amount necessary to meet the stock watering needs.
- (5) The diversion of water under the stock water preference shall not result in the complete dewatering of a stream.
- (6) Water right holders exercising the stock water preference established in this rule shall assure curtailment of water uses unrelated to the preference.
- (7) The option for a water right holder to exercise the stock watering preference only applies to a water right holder being regulated by the watermaster in order to satisfy a senior water right.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0055

Applicability of Preference for Human Consumption

During the effective period of a drought declaration under ORS 536.740 in Klamath County, and notwithstanding any provision of law to the contrary, the Commission grants a temporary preference for human consumption as follows:

- (1) The preference described in these rules applies only to the diversion or use of water within Klamath County.
- (2) Uses of water for human consumption, to the extent authorized under a water right certificate, permit, decree, or findings of fact and order of determination issued in an adjudication subject to ORS Chapter 539, are granted a preference over all other water uses regardless of the priority date of the water right for human consumption.
- (3) Water right holders exercising the human consumption preference shall use the most efficient means of delivery available to them and divert the minimum amount necessary to meet the human consumption watering needs.
- (4) Water right holders exercising the human consumption preference established in this rule shall assure curtailment of water uses unrelated to the preference.
- (5) The option for a water right holder to exercise the human consumption preference only applies to a water right holder being regulated by the watermaster in order to satisfy a senior water right.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0056

Regulation of Water under Preferences

- (1) The Department will regulate water rights in Klamath County in accordance with the preference for water rights for stock watering and human consumption use as provided in OAR 690-022-0054 and OAR 690-022-0055.
- (2) The preferences established under this rule division do not authorize a water right holder exercising the preference to make a call for water.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750



Stock Water Preference Notice

Oregon Revised Statute 536.750(1)(c) authorized the Water Resources Commission to grant a preference of use to rights for human consumption or stock watering. Governor Kate Brown declared a drought in Klamath County under Executive Order No. 15-03 on April 6, 2015. The Water Resources Commission adopted temporary emergency administrative rules 690-022-0050 through 0056 granting a preference of use for human consumption and stock water on May 15, 2015. Temporary rule 690-022-0054 requires water users wishing to utilize the preference for stock water use to provide notice to the Watermaster assigned to Klamath County. Submission of this form to the Watermaster will satisfy the notice requirement.

The stock water use preference applies when a water right authorizing such use is regulated off by the Watermaster in response to a call for water by a water user with a senior priority date. The result is that the quantity of water diverted under the preference is not available to the senior water user. This is not a desired or sustainable result. For this reason, you are encouraged to develop alternative supplies to meet the stock water needs.

Only that quantity of water required to meet the stock water use need may be diverted. All other authorized use is to be regulated off. The water user is expected to take all measures available to minimize the quantity of water diverted to meet the stock water use. If possible, measures such as piping or trucking the water to stock water troughs or tanks are the preferred methods.

CONTACT INFORMATION

- NAME OF WATER USER: _____
- ADDRESS: _____
- CONTACT TELEPHONE NUMBER: _____

WATER USE AUTHORIZATION (Only List Number For Water Use Authorization Being Used)

- WATER RIGHT PERMIT No.: _____
- WATER RIGHT CERTIFICATE No.: _____
- WATER RIGHT TRANSFER No.: _____
- CLAIM No. OF CLAIM INCLUDED IN ORDER OF DETERMINATION FILED WITH KLAMATH COUNTY CIRCUIT COURT FILED ON MARCH 7, 2013: _____

WATER USE AUTHORIZATION DETAILED INFORMATION

- AUTHORIZED SOURCE OF WATER: _____
- POINT OF DIVERSION(S) TO BE USED TO MEET STOCK NEED:

- NUMBER TO STOCK TO BE SERVED: _____
- ESTIMATED DATE WHEN STOCK ARE TO BE MOVED: _____

WATER DELIVERY METHOD

- CLOSED PIPELINE FROM WATER SOURCE TO STOCK TANK OR TROUGH
- TRUCK AND HAUL TO STOCK TANK OR TROUGH
- OPEN CANAL
- OTHER (EXPLAIN):

STEPS BEING TAKEN TO SECURE ALTERNATE STOCK WATER SUPPLY TO MEET FUTURE NEEDS:
(Such as: construction of a well or filing of water right application for stock water pond)

Submit Form to: **Scott White, Watermaster District 17**
305 Main Street
Klamath Falls, OR 97601