



Oregon

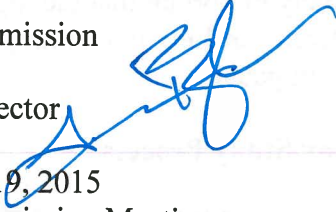
Kate Brown, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director 

SUBJECT: Agenda Item H, June 19, 2015
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions:

Since the March meeting, the Department has hired two new employees, transferred one staff and promoted one staff.

Positions filled include: Water Restoration Specialist, Certificate Specialist, Water Policy Analyst, and a Hydrologic Technician.

II. Commission Follow Up

Archaeology Awareness Training - April 7-10, 2015

For three and a half days in April, Oregon Parks and Recreation Department hosted a training for state agency staff. Eight Water Resources Department staff from Field Services, Technical Services and the Director's Office attended the event. The program provided an overview of archaeological issues on lands in Oregon. The intent was to broaden the cultural awareness of state employees and provide information on the consultation process with Native American tribes.

The training featured professional archaeologists and cultural specialists from the Oregon State Historic Preservation Office, Oregon universities, private consulting firms, and several Native American tribes. These experts provided instruction, practical demonstrations and applicable hands-on field work. The sessions provided an integrated perspective from both the scientific and Native American communities, including lectures, demonstrations and on-site visits to local archaeological sites. Additionally, the recognition of both prehistoric and historic sites, the importance of archaeological preservation, and applicable federal and state regulations were addressed.

Staff gained a better understanding and awareness of the importance of cultural resources and that maintaining such cultural resources is critical to maintaining the tribe's sense of identity. Properties that hold traditional cultural value are of critical significance to the community, and any damage or intrusion is deeply offensive and even harmful to the tribe that values them. It is extremely important that identification and protection of traditional cultural resources be considered carefully in planning for any ground disturbing activities at a site, such as installing stream gauges.

Update on Scenic Waterway Study Process

Recommended Action #11B of the 2012 Integrated Water Resources Strategy recommends the designation of additional scenic waterways where needed. Oregon Parks and Recreation Department (OPRD) and Water Resources Department (WRD) have been working together to complete Scenic Waterway Studies for portions of the Molalla and Chetco Rivers as part of a Scenic Waterway designation process. A major part of these studies is a Draft Management Plan: a document which describes land management rules, management recommendations, and flow needs as described by the people who live on or near the proposed reaches. The Draft Management Plan is a non-binding guidance document which will be delivered as part of a Scenic Waterway Study to both the Parks and Recreation and Water Resources Commissions.

In April, staff from OPRD and WRD facilitated a 2-hour kick-off meeting for each of the proposed Scenic Waterway Advisory Committees. These Advisory Committees, consisting of local landowners, community leaders, and land managers, were briefed on the role of the Draft Management Plan that they would be helping to create over the next few months. In addition, the Advisory Committees were introduced to the Scenic Waterway Flow framework discussed during the previous Water Resources Commission meeting.

In mid-June, OPRD and WRD staff will facilitate a second Advisory Committee meeting for each proposed waterway to review a version of the Draft Management Plan compiled by OPRD and WRD staff. The Advisory Committee comments will be used to adjust the Draft Management Plan, which will then be released for public comment and used to facilitate a public workshop for each proposed waterway in mid-July.

After the public comment period, OPRD and WRD will compile the results and present the full Scenic Waterway Study and Draft Management Plan for each waterway to both the Parks and Recreation Commission and the Water Resources Commission. The commissions will have an opportunity to review the Scenic Waterways Studies and the Draft Management Plans, before determining whether to recommend that the Governor designate the scenic waterways. The Parks and Recreation Commission, with concurrence from the Water Resources Commission, will make recommendations to the Governor.

Additionally, if the Governor adopts the scenic waterway designation, the associated Draft Management Plan, or components of it as directed by the Commissions, can be used when writing rules for each of the proposed scenic waterways in the same way that rules exist for all other scenic waterways.

Water Demand Forecast

Recently, the Department contracted with MWH Global to update the state's water demand forecast. This forecast was last conducted in 2008. The 2012 Integrated Water Resources Strategy (IWRS) calls for an updated forecast, as part of recommended action #2A.

During 2015, MWH, together with its subcontractor ET Plus, will help the state project its water needs into the future, in the agricultural and municipal water use sectors. Instream water needs will be forecast using internal staff from the Water Resources Department, Department of Fish and Wildlife, and Department of Environmental Quality. The agricultural demand projection has the added benefit of improving the Department's understanding of crop specific water-use through the application of best available scientific approaches, another key part of recommended action #2A.

The MWH contract will run through the remainder of the biennium and conclude on June 30, 2015. Results from this project will be in a format that is consistent with the 2008 report for comparison purposes. The results will also be used to engage stakeholders in discussions, as the state begins to develop the 2017 update of the Integrated Water Resources Strategy.

Upper Deschutes Basin Study Update

The Upper Deschutes Basin Study workgroup approved a plan of study and memorandum of agreement this past April. Watershed Professionals Network, a consulting firm that contributed to the Hood River Basin study, will help develop a Project Management Plan to guide the WaterSMART Basin Study process. Basin partners hope to identify water management tools and options, strategies, and scenarios to help stakeholders sustainably and responsibly manage water supplies for municipal, agricultural, and environmental uses. Addressing climate change is a major theme of the basin study and the WaterSMART program in general. The two year study is scheduled to begin this September. There is significant basin interest in this study and stakeholder participation has been high.

Klamath Regulation Update

Regulation began on April 1 with a call for water on Sand Creek to satisfy a senior right of 1864. This is early, as calls for water in 2013 and 2014 did not come until late May or early June. On April 21, the Klamath Tribes called for regulation of water for the Wood, Williamson, and Sprague River drainages for times when the specified instream flows are not met. Larkin Creek, a tributary to the Williamson River, and Whisky Creek, a tributary to the Sprague River, are currently regulated off to meet the time immemorial instream rights. The Wood River has been regulated to 1905. A series of storms passing through during the latter half of May temporarily raised stream flows and kept regulation where it was through the end of the month. The increased flows delayed the need for the Klamath Project to make a call for their irrigation water, which is now expected to occur in June.

Klamath Stock Water Update

At the May 15, 2015 meeting, the Commission requested a progress update of improvements on stock water delivery in the Klamath Basin. Several users in the Basin have made arrangements to have wells drilled or have modified their stock water delivery systems. For the majority of users, the drilling of stock wells is most practical. The central impediment in moving forward on this appears to be well driller availability. Staff will provide updates to these and other ranch's progress at future Commission meetings.

Sprague River

- Modoc Point Irrigation District has currently drilled three stock wells and has three more scheduled with a driller.
- River Springs Ranch has 17 stock wells scheduled with a driller.
- Gould's Ranch has extended pipe to multiple stock troughs from an existing well.
- Deming Creek Ranch has installed solar panels in the river to feed multiple stock troughs via enclosed pipe.

Wood River

- Owens Ranch has a driller scheduled for July to drill multiple stock wells.
- Hawkins Ranch has a driller scheduled for September for multiple stock wells.
- Lee Traynham is drilling a well to serve for both irrigation and livestock under an existing permit.
- Roger Nicholson has 7-8 stock wells scheduled with a driller.
- Martin Nicholson has multiple stock wells scheduled with a driller.

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 Case No. A148021

This issue arises from 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.

On November 11, 2014, the Oregon Supreme Court denied review of the case.

The Appellate Judgment was issued on March 18, 2015.

WaterWatch v. Oregon Water Resources Department (Lower Clackamas Water Districts), Court of Appeals Case No. A148872

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), Oregon Court of Appeals Case No: A152096

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 stood about ten-feet tall and the third was approximately 20-feet tall. The total amount of water collected behind the dams totaled about 40 acre-feet. The watermaster first identified Harrington's illegal water use and initiated enforcement action more than ten years ago.

After repeated failures to obey the Court's orders and the terms of his probation, the Court directed the Department to remove the outlet works to ensure that they could no longer store water. This work was completed on June 17, 2014.

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.

On December 24, 2014, the Oregon Court of Appeals affirmed the Jackson County Circuit Court conviction of Harrington. The Judgment has been entered, and the decision was not appealed.

Farm of the Family Recreation Association v. Water Resources Department and others, Oregon Court of Appeals, Case No A155824

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 FOFRA acquired property where the reservoirs are located and has the right to impound diffuse surface water; an 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. Further detail of each legal action is outlined below.

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). Oral argument was 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). At this time, FOFRA has not petitioned the Supreme Court for review.

James Young v. Oregon Water Resources Department, Court of Appeals Case No. A153699

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 occurred on April 17, 2015. The Court has not yet issued an opinion.

Blue Mountain Angus, LLC. v. Oregon Water Resources Department, Oregon Court of Appeals Case No: A156669

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.

The petitioners are no longer represented. They have indicated that they no longer wish to continue with their appeal. The Attorney General has filed a motion to dismiss with the Court of Appeals on May 19, 2015.

No hearing date has been set.

Oregon Desert Farms v. Oregon Water Resources Department and Water Resources Commission, Oregon Court of Appeals Case No: A157433

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. 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 yet to schedule oral argument.

It was reported in the Lakeview newspaper that the City of Lakeview and Oregon Desert Farms have settled this matter. The Department has not received notice that the case has been dismissed.

Before the Oregon Court of Appeals Case Number: 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. Opening briefs were to be filed by May 15, 2015. 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. Moore filed a request that the time to file opening briefs be extended. This is the third request for an extension. 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.

**James Buchanan and Barbara 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.

Opposing council voluntarily dismissed the case.

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

The Governor declared a drought emergency in Harney County on February 13, 2014. During a Governor declared drought, the Department is able to receive and process applications to address drought impacts. 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 met with Mr. Doverspike on February 4, 2015. Since then, the case has been settled and the Court issued an order on March 6, 2015, dismissing the case.

**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.

**Michael A. Becker, Realtor v. Water Resources Department
Union County Court Case No. 15CV05069 -- Writ of Mandamus**

Michael Becker filed a ground water right application in August 2005. After review of the application the Department proposed to deny. Mr. Becker requested that the application be placed on administrative hold while he collected additional information. This matter was forwarded to the Office of Administrative Hearing with a request to hold an administrative hearing to collect the facts.

Mr. Becker then filed a motion for a Writ of Mandamus with Union County Circuit Court requesting that the Court order that the permit be issued. The State filed a motion to dismiss and appeared in Circuit Court on May 4, 2015. The Judge ruled in favor of the State's motion to dismiss. The State's attorney submitted a draft Order and Judgment to the Court for their consideration.

The matter is still pending before an Administrative Law Judge in the Office of Administrative hearings.

Baltzor Cattle Company v. Oregon Water Resources Department and others Malheur County Circuit Court Case No. 15CV1147

On April 3, 2015, Baltzor Cattle Co. filed a Petition for Judicial Review of a final order issued by the watermaster. This case involves a final order issued to directing that water use stop due to insufficient supply to satisfy senior water rights. The case was not heard by the Court.

On May 5, 2015, plaintiff's filed a Notice of Dismissal and proposed Judgment of Dismissal with the Court.

The Court issued the Judgment to dismiss.

IV. Commission/Board Schedules	Location	Date
Board of Forestry	Salem HQ	July 23
Land Conservation and Development Commission	Burns	July 23-24
Parks and Recreation Commission	Joseph/Enterprise	June 24
Fish and Wildlife Commission	Salem HQ	August 7
State Land Board	Salem	August 11
Environmental Quality Commission	Astoria	August 12-13
Watershed Enhancement Board	Prineville	July 28-29
Board of Agriculture	Boardman	September 22-24

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 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	No	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
Division 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan/Kris	Yes	Yes	Mid 2015	Underway

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Division 77	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight/Laura Wilke	Yes	No	2016	Planned
Division 51	Streamline hydroelectric protests with OAH	Dwight/Mary	Yes	No	Nov. 2015	Underway
Division 512	Malheur Lake Basin Program	Dwight/Ivan/Tim	Yes	Yes	Nov. 2015	Planned