



# Oregon

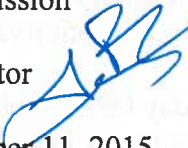
Kate Brown, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item G, September 11, 2015  
Water Resources Commission Meeting

#### Director's Report

#### I. Current Events:

##### New Staff & Staff Promotions:

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

Positions filled include: Hydrologic Technician; Water Resource Policy Analyst; Restoration Program Technician; Secretary; Watermaster; Certificate Specialist; Field Water Right Technician; Human Resources Manager; Receptionist; and a Senior Water Resources Development Advisor.

#### II. Commission Follow Up

##### A. Update on the Scenic Waterway Study Process and Upcoming Designation Recommendation

In June 2015, staff updated the Commission regarding the public process that the Oregon Parks and Recreation Department (OPRD) and the Department had begun in order to develop rules and set flows for the proposed Scenic Waterways on the Chetco and Molalla rivers. The process uses local, community-based Advisory Groups to create a Draft Management Plan and Draft Flow Recommendation for each of the proposed Scenic Waterways.

In April, OPRD and the Department held the first collaborative meeting with the Advisory Groups for each river. These groups, made up of local landowners, community leaders, and land managers, met again in late June to finalize the Draft Management Plan and Draft Scenic Waterway Flow Recommendation documents.

The resulting documents were presented in open-house style public meetings on July 14 (Chetco) and July 20 (Molalla). Both meetings included high levels of attendance by the public and staff from both agencies. OPRD collected written comments at the public meetings, and noticed two main areas of interest throughout the sessions: 1) interest in the impacts of the designation to private property rights, and 2) interest in the types and levels of protection for the rivers themselves. Generally, verbal feedback from the meetings supported Scenic Waterway designation for both rivers.

The public meetings kicked off thirty-day OPRD public comment periods for the Draft Management Plan and Draft Scenic Waterway Flow Recommendation documents. Comment ended on August 13 for the Chetco and August 19 for the Molalla. Once OPRD and Department staff summarize the public comments, the agencies will work with the Advisory Groups to respond to the comments. If there is still general support for designation, the Department will request two action items at the November Commission meeting:

1) Request for Designation Recommendation

OPRD will present information from the Scenic Waterway Studies and Draft Management Plans, including a summary of the public process and comment around the pilot Advisory Group process. OPRD will then request that the Commission concur with recommending to designate portions of the Molalla and Chetco rivers for inclusion in the Scenic Waterway Program. If the Governor adopts the scenic waterway designations, OPRD will use the associated Draft Management Plans as a starting point for its formal rule-making process for each designated river.

2) Request for Setting of Scenic Flows

If the Commission concurs with scenic waterway designation recommendations for the Molalla and/or Chetco Rivers, the Department will seek Commission approval for proposed scenic waterway flows, contingent upon the Governor's designation of the waterways.

More information on the Scenic Waterway Program, the Advisory Group process, or to submit public comment, visit: <http://bit.ly/scenicwaterways>.

**B. Update on Development of Oregon Water Resources Monitoring Strategy for Surface Water and Groundwater**

A primary objective of the Integrated Water Resources Strategy (IWRS) is to understand the status of Oregon's water resources. IWRS Recommended Action 1B (improve water resource data collection and monitoring) and 1C (coordinate interagency data collection, processing, and use in decision-making) support this objective.

In March 2015, Department staff reported to the Commission on the development of a Monitoring Strategy for Surface Water and Groundwater data collection. Its primary purpose is to identify monitoring network objectives and criteria that will be used to evaluate the effectiveness of current and proposed measurement sites for both surface and groundwater.

A standardized form has been developed to assist the Department in evaluating requests for new data collection sites, including gages and observation wells. As part of the form, the requester will be asked to articulate how the future monitoring site will meet the overall objectives of the Monitoring Strategy. The Department will use this information and evaluation criteria to determine the effectiveness of each requested site and determine where our resources can be most effectively used.

The Monitoring Strategy will also contain an analysis and overarching description of:

- Why the Department needs a Monitoring Strategy.
- Department programs that rely on surface water and groundwater data collected and processed by the state and its partners.
- Protocols used to establish and maintain new monitoring sites.

Department staff plan to present the draft Monitoring Strategy during the November 2015 meeting, along with materials used to develop and support the Monitoring Strategy.

#### **C. Willamette Basin Reservoir Study**

In August, a new feasibility cost-share agreement was signed by the agencies, officially starting the Willamette Basin Reservoir Study. The U.S. Army Corps (Corps) of Engineers has requested its first payment from the state. For this federal fiscal year, the Department will provide an estimated \$450,000 to support the study. The Corps recently issued a request for proposals for support services relating to planning, economic, and environmental analysis. The Corps plans to issue contracts and have a fully formed project delivery team by the end of September.

#### **D. Harney County GW Update**

At the June 2015 Commission meeting, Ivan Gall provided a presentation that described the declining groundwater levels in the Greater Harney Valley area surrounding Burns, Oregon.

As a result of the groundwater decline, the Department is not issuing new groundwater permits pending completion of a more comprehensive groundwater study for the area. In the meantime, the Department has committed to explore near-term options to help address local water needs, including a rulemaking to establish a mitigation approach to allow flexibility under currently allocated permits.

Department staff formed a rules advisory committee (RAC) and prepared a discussion-draft of rules. The RAC meetings were held in Burns on July 14 and August 4. At the first RAC meeting, Ivan Gall provided a background presentation to the RAC, similar to the one provided to the Commission, and the draft rules were discussed. The draft included the creation of a new groundwater limited area that would limit new uses of groundwater to exempt uses only. The draft also proposed a time-limited opportunity that would allow new permits to be issued if an equal amount of groundwater from an existing permit or certificate were cancelled. RAC members made many suggestions to the draft rules that were incorporated into a second draft.

Staff are discussing next steps with RAC members and other interested members of the public.

#### **E. Klamath Regulation**

The Klamath Tribes called for regulation in April for the Wood, Williamson, and Sprague River drainages based on their concern that specified instream flows were not being met. The priority date for those instream flows is time immemorial. The Klamath Project and associated irrigation districts made a call for their 1905 water in mid-June. Currently, the Wood, lower Williamson and Sprague River drainages are regulated for the 1905 Klamath Project priority, as the older instream rights are currently being satisfied. Some smaller streams have been regulated to time immemorial to satisfy senior instream water rights, which include Scott Creek, Jackson Creek, Irving Creek, Deep Creek, and Whiskey Creek.

In May 2015, the Klamath Tribes, for the first time, made a call to satisfy a determined claim on the Klamath Marsh. The claim identifies a minimum water elevation each month to be maintained on the marsh with a priority date of time immemorial. The watermaster verified the call and all uses around the lake, excepting some stock water uses, have been regulated off.

#### **F. Klamath Stock Water Update**

In May 2015, the Commission adopted temporary rules allowing a preference for human consumption water and stock water in the Klamath Basin. To take advantage of the stock water preference, these rules require that a water user must have a water right for stock water and provide a notice to the watermaster of the intention to utilize the preference. In the 2015 irrigation season, the watermaster received 39 stock water notices in the Klamath Basin.

Several users have contacted the Natural Resources Conservation Service (NRCS) for funding stock water improvements. The NRCS reports that 62 stock wells are planned utilizing Environmental Quality Incentives Program (EQUIP) funding for 2014 - 2017. Each well will have 1-2 troughs attached to the well, and most within 50-feet of the well. Once installed, this will result in efficiency improvement over the traditional delivery of surface water through miles of open ditches. The watermaster reports that additional wells not relying on NRCS funds are also planned. Well driller availability continues to be an issue in the Klamath Basin.

### III. Litigation Update

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

The 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.

#### ***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 to develop water under their permits. WaterWatch protested the approval of the various extensions of time. Since the issues were similar, the eight protests 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 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 cases to the agency. The Court held that notwithstanding the Department's 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, lacked both substantial evidence and substantial reason." Specifically, the court found that the Department's order did not adequately explain what, in terms of fish persistence, a "short-term" drop in flow means versus "long-term" flow, and the order 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 order 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; and that 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 and the Oregon Department of Fish and Wildlife to respond to the remand.

**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 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 issued its decision on August 12, 2015, affirming the Department's final order without 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 have retained new legal counsel and are again represented. Blue Mountain requested that the record be corrected. The Department issued an order to correct the record. 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. The Administrative Law Judge 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 are being filed. 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. Briefs are being filed. 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 at this time.

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

In December 2014, 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 application 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 from dredge seepage for the irrigation of 25 acres. Since issuance of the certificate, the property may have been divided and the 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 Hearings 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 Court signed the Order and Judgment dismissing the case, entering the Judgment on June 3, 2015.

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



**Wilbur Akins v. Oregon Water Resources Department:  
Clackamas Count Court Case No.CV 150705 15 – Petition for Judicial Review of a Final  
Order**

This case was filed following the watermaster issuing a notice of violation (final order in other than a contested case) for use of water without a water right. The watermaster found Akins applying water to acreage from a well located within a groundwater limited area near Boring. The landowner was notified that water could not be used from the well since there was no water right. Water use continued, resulting in the notice of violation.

Oregon Revised Statute 536.075 states that any party affected by a final order of the Department may petition for judicial review of that order. The filing of a petition automatically stays enforcement of the order. The stay is in place unless the Department finds that substantial public harm will result from allowing the stay.

Briefs have not been filed and the Court has not scheduled a hearing date.

**Larry J. Sees and Joan A. Sees and, Garret J. Duncan and Cameron M. Duncan v.  
Oregon Water Resources Department and Water Resources Commission:  
Marion County Circuit Court case No. 15CV 18272 and 15CV 19347 – Petitions for  
Judicial Review of Final Orders**

The Sees' own property in the upper Klamath Basin. They hold water rights from a well for irrigation. The watermaster received a call from the Klamath Project (Bureau of Reclamation and various irrigation districts) claiming that there was not sufficient water to meet their senior water rights. The watermaster investigated the call for water and determined that there was insufficient flow entering Upper Klamath Lake to satisfy the water demand. The watermaster then began regulating off all junior water rights to the Project's 1905 priority date. Regulation included surface water, and groundwater rights which were determined to provide effective and timely benefit to the senior water right holder. The Sees received a notice to stop diverting water for irrigation from their well(s).

Water use was observed after the first notice was issued. This resulted in the issuance of a second notice. The Sees filed petitions for judicial review for each of the regulation notices resulting in two different court case numbers. These two cases have now been consolidated into No. 15CV 19347. Briefs have not been submitted. The Court has not scheduled a hearing date.

As with the Akins case, Oregon Revised Statute 536.075 states that any party affected by a final order of the Department may petition for judicial review of that order. The filing of a petition automatically stays enforcement of the order. The stay is in place unless the Department finds that substantial public harm will result from allowing the stay.

**TPC, LLC v. Oregon Water Resources Department:**  
**Marion County Circuit Court case No. 15 CV 20875 -- Petition for Judicial Review of a**  
**Final Order**

TPC is another petition for judicial review of a final order in other than a contested case. This is a regulation notice ordering that water use for irrigation stop in favor of a senior water right in the Klamath Basin. Again, the filing of the petition automatically stayed enforcement of the order.

No briefs have been filed. The Court has not scheduled a hearing date.

<b>IV. Commission/Board Schedules</b>	<b>Location</b>	<b>Date</b>
Board of Forestry	TBD	November 5-6
Land Conservation and Development Commission	Astoria	September 24-25
Parks and Recreation Commission	Tillamook	September 23
Fish and Wildlife Commission	Florence	October 9
State Land Board	Salem	October 13
Environmental Quality Commission	Klamath Falls	October 14-15
Watershed Enhancement Board	John Day	October 27-28
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 8 Division 200	Reconcile Competing Definitions of Aquifer	Brenda/Ivan/Kris	Yes	Yes	2016	Underway
Division 77	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight/Laura	Yes	No	2016	Planned
Division 51	Streamline hydroelectric protests with OAH	Dwight/Mary	Yes	No	Nov. 2015	Public comment period closed Aug. 5, 2015
Division 512	Malheur Lake Basin Program	Dwight/Ivan/Tim	Yes	Yes	Feb. 2016	On Hold

