



Oregon

Kate Brown, Governor

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MEMORANDUM

TO: Water Resources Commission
FROM: Thomas M. Byler, Director *TMB*
SUBJECT: Agenda Item K, November 19, 2015
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions:

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

Positions filled include: Deputy Director; Senior Water Resource Development Advisor; Fiscal Manager; Water Rights Application Analyst; Water Right Services Division Support; Assistant Watermaster; Chief Groundwater Technician; Transfer Specialist; and Public Service Representative 3.

II. Commission Follow Up

A. Klamath Regulation and Stock Water Update

The last day of irrigation season was October 31, 2015 for much of the Klamath Basin. Some previously adjudicated sub-basins, such as the Wood River drainage, saw the close of the irrigation season at the end of September. Like much of the state in 2015, Klamath experienced minimal snowpack, hot summer temperatures, and very low streamflows. This resulted in deep regulation for much of the basin.

Above Klamath Lake, where the Klamath Tribes hold instream determined claims, regulation at times went back to time immemorial during the irrigation season. On the upper Sprague River, users with priority dates older than 1905 made the most of the limited supply by sharing water through a rotation system, while ensuring that the Tribe's specified instream flows were met. A determined claim for the Klamath Marsh fixes a minimum stage level throughout the year. This claim, held by the Klamath Tribes, was called on and, for the first time, resulted in users tributary to the upper Williamson River (above the Klamath Marsh) receiving shutoff notices.

In addition to the 2015 demands of regulation, watermaster staff were able to install eight permanent streamflow gages at locations critical to managing water for instream determined claims.

The Commission's adoption of a temporary preference of water for stock and human consumption in May 2015 allowed water right holders to continue to appropriate stock water after the shutoff notices were filed. This year, those claiming a stock water preference were required to submit a Stock Water Preference Notice to the watermaster. Thirty-eight water right holders submitted notice to the watermaster. As part of the notice, the water right holder was required to identify "steps taken to secure alternate stock water supply to meet future needs." Most identified a plan for the construction of one or more stock water wells. A search through the Department's Well Log Database shows that eight livestock wells were constructed in 2013, followed by five more in 2014. Despite reported difficulty in securing well drillers for the work, 47 livestock wells were drilled through October of 2015.

B. Harney Groundwater Update

As a result of declining aquifer levels in the Greater Harney Valley area, the Department stopped issuing new groundwater permits pending the completion of a more comprehensive groundwater study. Subsequently, the Department has been working closely with the community and has committed to consider near-term options to address local water needs, which could necessitate rulemaking.

Dwight French and Ivan Gall led the third Rules Advisory Committee meeting in Burns on October 28. Most of the discussion centered around a proposal that had been recently prepared by local members of the RAC. The proposal includes the issuance of a limited number of time limited permits and calls for increased regulation of illegal uses in the basin. In addition, the proposal asks the Department to make a strong commitment, if not a guarantee, to acquire the resources to complete the study by May of 2020. There have been three ideas for issuing a limited amount of permits during the study period. Each proposal has some support from members of the RAC and community. This local proposal is under review by the Department.

Groundwater staff have drafted a study plan for the basin groundwater study. Staff will provide updates to the RAC and other interested citizens on the data collection as the study progresses.

A fourth RAC meeting is being scheduled for the end of November. It is anticipated that staff will have proposed rules ready for adoption at either the February or May, 2016, commission meeting.

C. Budget and Legislative Update

The 2016 Legislative Session is scheduled to begin on February 1. The Department has discussed potential priorities around drought, but as of the writing of this report, no decision has been made to pursue these proposals.

The Department has begun initial internal discussions about legislative concept and budget proposals for the 2017 session. In addition, staff have reached out to stakeholders to seek input at this early phase. Commissioners should contact Racquel Rancier if they have thoughts on legislation and budget proposals that the Department should consider for 2017. Staff will bring more developed proposals to the Commission for discussion in February, 2016. Legislative concepts must be submitted to the Department of Administrative Services by April 15, 2016; however, placeholder legislative concepts may be submitted through June 24, 2016. The schedule for budget development has not yet been released; however, agency request policy option packages are typically due in May or June.

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. In addition, the order did not adequately explain why short-term drops in flow would not adversely affect the

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.

Young's attorney has requested an extension of time to file a petition for review with the Oregon Supreme Court.

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. However, the case is still held in abeyance. The Department has not received notice that the case has been dismissed.

Willamette Water Co., an Oregon corporation, v. Oregon Water Resources Commission and WaterWatch of Oregon Inc., Oregon Court of Appeals Case No. A157428

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 due November 4, 2015. The Court of Appeals has not scheduled a time for oral argument.

Moore v. WRD, Oregon 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. The State's brief has been 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, 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 0.313 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.

The parties have reported to the court that they agree that the water described in the certificate no longer exists and that it is a right of record only. As a result, the water rights under the certificate may no longer be at issue in the case.

Wilbur Akins v. Oregon Water Resources Department, Clackamas County 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.

Akins' attorney filed a *Notice of Dismissal without Prejudice* with Clackamas County Circuit Court.

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

This case involves a petition for judicial review of a final order to regulate a junior groundwater use in response to a call by a senior user in the Klamath Basin. The Sees originally filed petitions for judicial review for two 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 in the Klamath Basin. This involves a Department regulation notice ordering that surface water use for irrigation stop in favor of a senior water right. 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.

Stanley S. Stonier and Dolores E. Stonier v. Oregon Water Resources Department and Commission: Marion County Circuit Court Case No. 15CV23126 – Petition for Judicial Review of a Final Order

This case also involves a petition for judicial review of a regulation notice issued by the Department in the Klamath Basin. The Department regulated groundwater use following a call by a senior water right holder. The filing of the petition automatically stayed enforcement of the order.

Briefs are being prepared, a status hearing is scheduled for December 14, 2015.

Thomas W. Mallams and Beverly Mallams v. Oregon Water Resources Department and Commission, Marion County Circuit Court Case No. 15CV23345 – Petition for Judicial Review of a Final Order

This case involves a petition for judicial review of a regulation notice issued by the Department in the Klamath Basin. The Department regulated groundwater use following a call by a senior water right holder. The filing of the petition automatically stayed enforcement of the order. Briefs are being prepared.

Briefs have not been submitted. The Court has not scheduled a hearing date.

Scott T. Crouthamel and Carlyln S. Crouthamel v. Water Resources Department and Commission: Umatilla County Circuit Court Case No. CV151431 – Petition for Judicial Review of a Final Order

This is also a case involving a petition for judicial review of a water regulation matter. In this instance, the watermaster issued an order requiring a diversion dam to be removed in the Umatilla Basin. The state is in the process of preparing its response for filing in Umatilla County Circuit Court. As with the other petitions for judicial review, the filing of this petition automatically stayed enforcement of the order.

IV.

Schedules	Location	Commission/Board	Date
Board of Forestry	Salem		November 5-6
Land Conservation and Development Commission	Salem		December 3-4
Parks and Recreation Commission	The Dalles/Hood River		November 18
Fish and Wildlife Commission	Portland		December 4
State Land Board	Salem		December 8
Environmental Quality Commission	n/a		n/a
Watershed Enhancement Board	McMinnville		January 26-27, 2016
Board of Agriculture	Portland		December 15-17

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 Divisions 200/210/215/240	Reconcile Competing Definitions of Aquifer; Well Sealing Standards; Dedicated Measuring Tube; Clarifying Abandonment Standards	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	First half of 2016	Underway
Division 51	Update of Hydroelectric Rules	Dwight/Mary	Yes	No	Nov. 2015	Consider adoption
Division 512	Malheur Lake Basin Program	Dwight/Ivan	Yes	Yes	First half of 2016	Underway
Temporary Rules	Extension of Reservations	Racquel	Yes	No	Nov. 2015	Consider adoption

Rule Division	Topic	Lead Staff	Rules Advisory Committee Anticipated	GWAC Input Anticipated	Target WRC Date	Status
Permanent Rules Division 509	Extension of Reservations Burnt River Reservations	Racquel	Yes	No	Feb. 2016	Underway