Oregon
Kate Brown, Governor

Water Resources Department
North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item J, February 26, 2016
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions:

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

Positions filled include: Field Services Administrator; Water Right Rules Coordinator; two Receptionists; Hydrogeologist; Water Right Applicaton Caseworker; Water Resources Development Coordinator; Grant Program Specialist; Water Right Division Support; and two Water Resources Data Technicians.

II. Commission Follow Up

A. Klamath Regulation and Stock Water Update

There are no active calls for water regulation at this time. Year-round instream rights and determined claims are currently satisfied by natural flows. However, the Klamath Tribes have asked for the Department to assist them with determining what benefit a wintertime call would provide if the instream determined claims were not met.

There has been much discussion with water users in the Klamath Basin about the need to secure water supplies for livestock. The significant increase in well construction activity for stock water wells last year suggests the community is taking this seriously. At the November 2015 Commission meeting, the Department reported that as of the end of October there had been 47 stock water wells constructed in the Klamath Basin in 2015. There were 10 additional stock water well completions in the final two months of 2015, bringing the total to 57 for the year.

Staff are also working closely with the Bureau of Reclamation and water users to address complex issues raised last year around the regulation of junior users for a Klamath Project (Project) call. These issues include questions relating to: validating a Project call; quantifying

Project demand; and quantifying the amount of water provided to the Project as a result of regulation of junior users. Staff have been installing surface water gages on tributary streams to Upper Klamath Lake to help address information needs related to some of these questions.

Scott White, Klamath Basin Watermaster, left state service on January 29, 2016 to take the position as Executive Director of the Klamath Water Users Association. Scott was an excellent Watermaster and we appreciate his efforts during the first three years of large-scale regulation in the Klamath Basin. We look forward to working closely with Scott in his new position.

B. Umatilla Water Supply Project

At the last Commission meeting, J.R. Cook of the Northeastern Oregon Water Association, provided an overview and update on the Umatilla Water Supply Project. This project seeks to address the water supply challenges in the Umatilla basin through three infrastructure projects: Central, East, and West. Notable progress has been made on the Central Project since November. The Central Project consists of upgrading a pump station and constructing a pipeline to withdraw water out of the Columbia River for agricultural use during the irrigation season.

In early January, Westland Irrigation District (lead entity for the Central Project) filed two water right permit applications for a total of 51.5 cfs of water from the Columbia River. The Department is in the process of conducting its Initial Review of the applications, working with the applicant and others to address Division 33 mitigation and other requirements. In early February, the Port of Morrow, acting as the fiscal agent for Westland Irrigation District and a soon-to-be-formed lead entity for the East Project, filed a grant application with the Department requesting $11 million in grant funds allocated to the Department during the 2015 Legislative Session in HB 5030. Four million is requested for the Central Project and $7 million is requested for the East Project. The Department is currently processing that application.

C. Smith River Reclassification

At the November 2015 meeting, the Commission directed the Department to begin a basin program rulemaking to consider reclassifying the waters of the Smith River and its tributaries for instream purposes. The Department has begun to formulate a list of potential rules advisory committee members and intends to convene the rules advisory committee in the spring.

D. State Disposition of Water Rights

On November 6, 2015, Governor Kate Brown sent a letter asking the Commission "to consider developing future policy regarding the disposition of state held water rights." The Commission appointed a subcommittee to work with Department staff on this matter. Due staff workloads, subcommittee work will begin in the spring.

On January 13, 2016, the "Keep Nestle Out of the Gorge Coalition," submitted a letter requesting the Governor to direct the Commission to look at a number of issues relating to criteria that should be used in the disposition of state water rights and water resources, as well as prohibiting "the privatization and commercial bottling of state public water resources."

E. 2015 Statewide Long-Term Water Demand Forecast

The 2015 Statewide Long-Term Water Demand Forecast (2015 Demand Forecast) is now complete and available online, including all appendices (Scroll to Recommended Action 2A http://www.oregon.gov/owrd/Pages/law/integrated_water_supply_strategy.aspx). The 2015 Demand Forecast satisfies IWRS Recommended Action 2A and highlights areas of the state where increases in demand may require further efforts to understand and meet water supply needs. These estimated increases are driven by projections for a warmer climate and increasing population. The 2015 Demand Forecast also highlights areas of the state where updated evapotranspiration information would be helpful for improving forecasted demand and responding to water planning concerns generally.

Statewide, Oregon could need up to an additional 1.3 million acre-feet of water annually. The counties with the largest estimated volumetric increases in total diversion demand by 2050 for agriculture, municipal, and industrial needs combined are Klamath (158.8 TAF/yr), Lake (152.8 TAF/yr), Harney(117.0 TAF/yr), Malheur (83.2 TAF/yr), and Washington (63.0 TAF/yr) counties. The first four counties accounted for approximately 45 percent of all irrigated acres in Oregon in 2014. If that acreage remains irrigated and planted with the same crops grown during the same season, those farms will require more water simply because of increasing temperatures. The fifth, Washington County, is projected to have the largest change in population by 2050 (~300,000 additional people).

F. Drought/Water Conditions

As of February 17, 2016, water year-to-date precipitation ranges are above 100 percent of normal. Most of the snow measuring sites in the state are reporting normal to above normal snowpack levels as of February 17. Snowpack in the Willamette and Hood/Sandy/Lower Deschutes basins, however, are the lowest in the state, at 83 percent and 81 percent of normal. Temperatures in the coming two months will determine whether mountain precipitation continues to fall as snow or turns to rain, which will have a large impact on the summer water supply picture. While snowpack is in good shape for the time being, we are only about halfway through the typical snow accumulation period. Continued cold storm cycles are needed to ensure that the snowpack remains normal to above normal as we approach the typical winter peak in March and April.

NOAA's Climate Prediction Center calls for weather conditions to bring above normal temperatures for the next three months. The February-March-April (FMA) 2016 temperature outlook favors above-normal temperatures across the entire Pacific Northwest. The FMA 2016 precipitation outlook for the northern third of Oregon is for below-median precipitation. The outlook for the southern two-thirds of the state is for equal chances of above- or below-normal precipitation.

The summer streamflow forecasts predict normal to well above-normal streamflows for the summer water supply season. Some of the highest forecasts are in southeastern Oregon, where the snowpack is the highest with respect to normal conditions. However, many of the major irrigation reservoirs are still reporting well below-normal storage levels, which is one of the

factors contributing to the continuation of the drought status in parts of southern and eastern Oregon by the US Drought Monitor. The southeast corner of the state has been hit the hardest with a multi-year drought, resulting in current reservoir storage volumes of less than 30 percent of average. Lake Owyhee and Warm Springs Reservoirs in the Owyhee and Malheur basins, as well as Cottonwood Reservoir in Lake County, are among the lowest in the state.

G. Willamette Basin Reservoir Study Update

After signing the cost-share agreement in August 2015, the Corps of Engineers issued a contract to David Miller and Associates (DMA) to complete several tasks for the Willamette Basin Reservoir Study. DMA is developing the municipal and industrial demand estimates and will also lead in the development of a set of water supply alternatives, as required under the National Environmental Policy Act (NEPA). In late December, the Department hosted a meeting with a small working group of municipalities to discuss the approach and considerations for developing current and future projections.

The Oregon Department of Agriculture (ODA) has been working on developing estimates for current and future agricultural demands. ODA has held several meetings with agricultural stakeholders to explain the approach and to obtain feedback. Estimating agricultural demands has taken longer than anticipated, due in part, to computational modeling issues experienced last fall. Work completed by ODA will help the Department meet its cost-share obligations.

In late January, the Department and the Corps brought other state and federal agencies together to discuss flow requirements for fish and wildlife needs. The Oregon Department of Fish and Wildlife, National Marine Fisheries Service, and the U.S. Fish and Wildlife Service participated in the meeting. Conservation groups were also invited. The Corps is currently proposing to use flow targets established in the 2008 Willamette Biological Opinion, but recognizes that there may be the opportunity to model alternative flow scenarios for the purposes of the study. State and federal partners are compiling information from flow studies that have occurred in recent years, with a particular focus on the lower Willamette River mainstem.

The Department is currently working with the Corps' communications staff and NEPA experts to design and schedule public scoping meetings where all stakeholders will be invited to participate.

The Corps has established five major milestones for the study. The first major milestone deadline is April 1, 2016. The purpose of this first milestone is to share initial demand estimates and an array of possible alternatives with the Corps' Vertical Team. This Team includes senior level staff from the Portland District, Northwest Division office, and Headquarters staff in Washington, D.C..

The President's Fiscal Year '17 budget was released in mid-February. Federal funding for the study is not included in the President's Budget, however, the Corps did receive funding to continue the study within its Fiscal Year '16 workplan.

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) filed a motion and supporting declarations to seek a withdrawal order from the court withdrawing the motion to enforce the provision of the Silvies River Decree. We are now waiting to hear back from the Court.

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 the 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 has re-referred this matter to the Office of Administrative Hearings.

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.

The Oregon Supreme Court has denied review.

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.

Staff have been working with Blue Mountain Angus's Counsel exploring possible solutions to their stockwater needs. Discussions are continuing.

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 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 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. Reply briefs are due February 18, 2016. 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.

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.

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.

The parties are going through the discovery process at this time. The Court has not set a hearing date.

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 occurred on 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 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.

No court date has been set.

Bayou Golf Course, Inc. v. Oregon Water Resources Department etal
Yamhill County Circuit Court Case NO.14CV09985 – Complaint

This complaint alleges that the Department and others failed to remove logs from a railroad trestle causing water to back up onto golf course property.

No court date has been set.

IV.

Schedules	Location	Commission/Board Date
Board of Forestry	Salem	March 9, 2016
Land Conservation and Development Commission	Gold Beach	March 10-11, 2016
Parks and Recreation Commission	Eugene	April 26-27, 2016
Fish and Wildlife Commission	Salem	March 18, 2016
State Land Board	Salem	April 12, 2016
Environmental Quality Commission	TBD	April 20-21, 2016
Watershed Enhancement Board	LaGrande	April 26-27, 2016
Board of Agriculture	Corvallis	March 29-31, 2016

Attachment 1: Rulemaking Calendar

Oregon Water Resources Department
Current/Anticipated Rulemaking

Rule Division	Topic	Lead Staff	RAC Planned or Convened?	GWAC Input Expected?	Target WRC Date	Status
Division 509	Extending Reservations of Water for Economic Development for Burnt River Areas of the Powder Basin	Racquel, Brenda	Yes	No	Feb. 2016	Comment period closed Feb. 4
Division 79	Procedures for Extending Reservations of Water for Economic Development	Racquel, Brenda	Yes	No	April 2016	Comment period closes March 4
Division 512	Malheur Lake Basin Program	Dwight, Ivan	Yes	Yes	April 2016	Public hearings March 30
Divisions 200, 205, 210, 215, and 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	2016	Underway
Division 517	Smith River	Racquel, Machelle, Tim	Yes	TBD	2016	Planned