



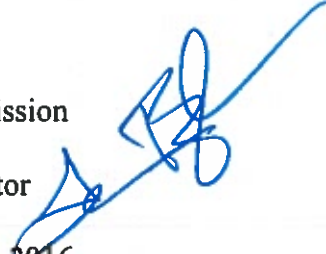
Oregon

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 G, May 20, 2016
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions:

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

Positions filled include: Adjudication/Extension Specialist, Certificate Specialist, two Professional Engineers, two Planning Coordinators, Restoration Program Technician, Well Inspector, Groundwater Manager, two Water Right Support, Watermaster, Receptionist, Transfer and Conservation Section Manager, Senior Water Right Coordinator, Payroll Specialist, and Executive Support.

II. Commission Follow Up

A. Klamath Regulation and Stock Water Update

Regulation

Regulation began on April 12, 2016 with a call between water users on small streams west of Klamath Marsh. The regulation was minimal. On May 13, 2016 the Klamath Tribes, with concurrence of the U. S. Bureau of Indian Affairs, called on 13 streams for regulation of junior diversions for the benefit of the time immemorial instream determined claims. The calls for water were based upon the specified instream flow (SIF) formulas, as outlined in the Upper Klamath Basin Comprehensive Agreement (UKBCA). These flows generally reflect a lesser amount of water called on by the Tribes, consistent with the Upper Basin irrigators continuing to make progress on instream lease and riparian agreements. The Watermaster will monitor the conditions and commence regulation, consistent with the UKBCA, when the SIF flows are not met.

Gages

As part of the UKBCA, the Department is charged with installing 13 near-real time surface water gages at SIF measurement locations. Three gages remain to be installed at monitoring sites on Upper Fivemile Creek, Trout Creek, and Whiskey Creek. Two sites have been delayed due to the need to conduct complex archaeology/cultural surveys; one site is delayed due to landowner concerns, and difficulty with proper site selection to provide accurate measurement. Site visits were conducted by OWRD, federal and tribal staff during the week of May 16th to facilitate progress with the installations. OWRD staff will install a gage on Upper Sevenmile Creek this summer to monitor a diversion and instream water rights. Staff are also evaluating a site for a possible gaging station installation at the mouth of Sevenmile Creek to help quantify inflows to Upper Klamath Lake. This will be a challenging site due to backwater conditions from the lake.

Stockwater

As previously reported, the most efficient means of landowner's securing water for their stock is the construction of stockwater wells. Stockwater wells can be drilled near where the stock reside, thus eliminating long conveyance ditches currently in use. A handful wells were drilled in 2013 and 2014, and a total of 57 stock wells were constructed in the Klamath Basin in 2015. Ten additional stock wells have been drilled this year, though April 2016.

B. North Fork Smith River Activities

South Coast Basin Program Rulemaking – At the November 2015 meeting, the Water Resources Commission directed the Department to begin a basin program rulemaking to consider classifying the waters of the North Fork Smith River subbasin for instream purposes. Racquel Rancier, Senior Policy Coordinator, is leading this effort with the assistance of Mabelle Bamberger, Water Right Rules Coordinator. Staff have begun developing materials necessary for the rulemaking process and a list of potential rules advisory committee members. The Department intends to have this item before the Commission in October.

Since the last Commission meeting, other efforts have been underway to protect the North Fork Smith River watershed. These activities are separate from the Water Resources Department activities in the area.

Outstanding Resource Waters –The Department of Environmental Quality (DEQ) received a petition for rulemaking to designate the North Fork Smith river and its tributaries as Outstanding Resource Waters. At its April 20 meeting, the Environmental Quality Commission (EQC) directed DEQ to initiate rulemaking proceedings.

Outstanding Resource Waters (ORWs) are high quality waters that constitute an outstanding state resource due to their extraordinary water quality or ecological values, or where special protection is needed to maintain critical habitat areas. Oregon's ORW policy is part of DEQ's antidegradation policy. To date, no waters have been designated as an ORW in Oregon.

Water Resources Department staff have been in contact with DEQ staff to coordinate on communications and to try prevent confusion so the public can fully engage in each process. DEQ has indicated that early 2017 is the tentative schedule for EQC consideration of the ORW rules.

Federal Activities – Almost all of the lands within the North Fork Smith River Watershed are managed by the United States Forest Service (USFS). The following summary on federal activities is excerpted from pages 1-2 of the Rogue River-Siskiyou National Forest and Bureau of Land Management Medford and Coos Bay Districts' *2015 Southwestern Oregon Mineral Withdrawal Environmental Assessment* dated April 2016.

- On February 3, 2015, the Southwestern Oregon Watershed and Salmon Protection Act of 2015 (S. 346 and H.R. 682) was introduced to Congress. The Act proposes to withdraw certain lands located in Curry County and Josephine County, Oregon, from all forms of mineral entry, appropriation, leasing, or disposal under public land laws, subject to valid existing rights.
- While Congress considers legislation to permanently withdraw these areas, the agencies need to maintain current environmental conditions on the lands identified. Therefore, on behalf of the Forest Service, the BLM submitted a petition/application to the Secretary of the Interior for a 5-year withdrawal for the federal lands...The Secretary of the Interior approved the withdrawal petition...
- The notice segregates for two years the lands described in the Southwestern Oregon Watershed and Salmon Protection Act from settlement, sale, location, and entry under the public land laws, location and entry under the United States mining laws, and operation of the mineral and geothermal leasing laws. It also proposes a 5-year temporary withdrawal from operation of those same laws to follow the segregation...The segregation is in effect until June 29, 2017, unless the application is denied or canceled, a public land order for withdrawal is signed, or Congress passes the proposed legislation...
- Under withdrawal, no new mining claims may be located, mineral entry would be prohibited, and no mineral leasing is allowed...Existing mining claims may be developed after a minerals validity examination determines that a discovery of a valuable mineral deposit existed at the time of the segregation...To date, no existing claims have been proven valid under the BLM's validity examination process.

The USFS released its Environmental Assessment on the withdrawal on April 27, 2016 and is accepting public comment for 30 calendar days.

C. Disposition of State-held 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. Racquel Rancier, Senior Policy Coordinator, is staffing this effort and has been conducting an initial scoping of the work involved in this project. She will be contacting the subcommittee members in the coming

months to share information and obtain further direction. The Department's goal is to have this on the Commission's agenda in October, so that work can be completed by the end of the year.

As reported in the last Director's Report, 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. The Department met with representatives to hear their ideas and answer questions about the process.

D. Spotted Frog Litigation and Settlement

The Center for Biological Diversity filed suit against the U.S. Bureau of Reclamation (BOR) in December of 2015, citing violations of the Endangered Species Act (ESA) by causing harm to the ESA-listed Spotted Frog through BOR's management of Crane Prairie and Wickiup reservoirs in Deschutes County. In January 2016, WaterWatch of Oregon filed a similar suit against the BOR and three irrigation districts, North Unit Irrigation District, Central Oregon Irrigation District, and Tumalo Irrigation District. These actions were followed by a Motion for Preliminary Injunction in February 2016, filed jointly by the Center for Biological Diversity and WaterWatch of Oregon, against the BOR and the three irrigation districts that utilize the water stored in these reservoirs. The motion requested the Court order the defendants to immediately adopt alternative reservoir operations. The State was granted amicus status and participated as a friend of the court.

A hearing on the Motion for Preliminary Injunction was held in March at the U.S. District Court in Eugene, Oregon. On April 6, 2016, the Court issued an order denying the motion, but directing the parties to enter into judicial settlement proceedings. The first of the settlement proceedings is scheduled in Eugene on June 1.

E. Municipal Extensions and Fish Persistence

In December 2013, the Court of Appeals issued a decision which changed the way in which the Department defines the undeveloped portion of pre-1998 municipal water right permits for the purposes of considering requests for an "extension of time" to develop the permits. The Court ruling expanded the amount of water that would undergo fish persistence review and require development of a water management and conservation plan. Some municipal permit holders have expressed concerns about the change, because the ruling subjects water that has already been developed to fish persistence review and conditioning.

Legislation was introduced in both the 2015 and 2016 Legislative Sessions, but was not enacted into law. The Department has since received letters from Representatives Clem and Krieger, as well as Senator Boquist indicating that they intend to pursue legislation in the 2017 session to address this issue. The letters ask the "Governor's Office [to] convene a working group to find a balanced solution that minimizes impact on municipal water supplies and fish species" and requests that the Department compile data to inform that work. In addition, the letters ask the Department to "not issue proposed final orders or final orders on extensions for the affected

permits until July 2017, unless the permit holder or their agent requests that the department move forward.”

The Department intends to comply with their requests and is currently developing a outreach materials to inform potentially affected municipal water right holders of the matter and collect further information. Racquel Rancier, Senior Policy Coordinator, is lead staff on this effort.

F. Harney County Update

As outlined below, a number of activities are underway in the Malheur Lake Basin. As a result, staff have been meeting regularly to ensure that Department activities are coordinated and that the community is kept well informed.

Since adopting the Division 512 Malheur Lake Basin Program Rules in April, Department staff in the Water Rights Section have been working with landowners who filed applications for new groundwater rights prior to the effective date of the rules. Staff are helping landowners understand their options under the new rules and explaining permit conditions. Water Rights staff will track the status of existing groundwater permits, certificates, and groundwater applications within the Greater Harney Valley Groundwater Area of Concern.

On May 4, staff met with Harney County Commissioners in Burns to discuss appointments to the groundwater study advisory committee. Only five applications from interested citizens had been received, so the group extended the application deadline for another two weeks in order to solicit broader interest from citizens and stakeholders. Staff from the Groundwater Section continue to meet with landowners and actively collect data in the basin, including locating wells and measuring groundwater levels. It is anticipated that the Department will be drilling approximately 10 observation wells in the basin this summer and fall.

Staff are also developing a grant agreement for the place-based planning effort. In the meantime, a sub-committee of the Harney County Watershed Council has met several times to discuss strategies for initiating place-based planning in the area. The Watershed Council intends to engage Oregon Consensus to assist with building a collaborative process that includes a balanced representation of water interests.

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. The Oregon Department of Justice (DOJ) filed a motion and supporting declarations requesting the court withdraw the motion to enforce the provision of the Silvies River Decree. Settlement discussions are underway.

**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. The hearing that was scheduled for May 10 and 11 has been postponed.

**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.

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 in a Contested Case denying water right application S-87330 filed by Willamette Water Co. (Company) for 34 cubic feet per second 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 have been filed. 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. Briefs have been filed. Argument is scheduled for May 17, 2016.

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.

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 Court has scheduled a status conference in September.

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.

The Court has not scheduled a hearing date.

Settlement discussions are underway.

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 submitted, discovery to follow. The Court has not set a hearing date.

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.

The Mallams' withdrew this case from Marion County Circuit Court and filed in Federal District Court.

Thomas W. Mallams and Beverly Mallams v. Thomas Byler and Tyler Martin, US Federal District (Medford) – Civil Rights Action (42 U.S.C. § 1983)

This complaint states that the Department did not provide notice of the Klamath Adjudication to holders of groundwater rights.

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.

A hearing settlement conference is scheduled for June 9, 2016 in Umatilla County.

Bayou Golf Course, Inc. v. Oregon Water Resources Department et.al. 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. The Department filed a motion for dismissal with the Court. The Court heard arguments in relation to the motion. The Court dismissed the Department from the case.

WaterWatch v Oregon Water Resources Department, Marion County Circuit Court Case No.16CV11938 – Petition for Judicial Review and Petition to Compel Agency Action

This case involves a petition for judicial review of an Order approving the instream lease of a hydroelectric right. WaterWatch is also asking the Court to require that the right be converted to an instream water right.

IV. Commission/Board Schedules

<i>Commission/Board</i>	<i>Location</i>	<i>Date</i>
Board of Forestry	Salem	June 8
Land Conservation and Development Commission	Albany	May 19 & 20
Parks and Recreation Commission	Medford/Ashland	June 28 & 29
Fish and Wildlife Commission	Salem	June 9 & 10
State Land Board	Salem	June 14
Environmental Quality Commission	John Day	June 8 & 9
Watershed Enhancement Board	Otter Rock	July 26 & 27
Board of Agriculture	John Day	June 6, 7 & 8

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 504	Hood Basin, Reservations of Water for Economic Development	Brenda, Machelle	Yes	No	Aug. 2016	Hearing Planned
Divisions 200, 205, 210, 215, and 240	Reconcile Competing Definitions of Aquifer; Well Sealing Standards; Dedicated Measuring Tube; Clarifying Abandonment Standards	Brenda, Kris	Yes	Yes	Aug. 2016	Hearing Planned
Division 508, 510, 511	Grande Ronde, Malheur and Owyhee Basins, Reservations of Water for Economic Development	Brenda, Machelle	Yes	No	Oct. 2016	Underway
Division 517	Smith River	Racquel, Machelle	Yes	TBD	2016	Planned
Division 54 (New)	Hydro Conversion to Instream	Mary Grainey	Yes	No	2017	Planned
Division 77	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight, Laura	Yes	No	2017	Underway

