



# Oregon

Kate Brown, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item J, August 19, 2016  
Water Resources Commission Meeting

#### Director's Report

##### I. Current Events:

###### A. New Staff & Staff Promotions

Since the May meeting, the Department has hired six new employees and promoted four staff. Positions filled include: Transfer Caseworker; two Hydrogeologists; two Hydrologists; Transfer and Conservation Section Manager; Part-Time Receptionist; Executive Support; Water Resource Data Tech; and Watermaster.

In addition, Paul Hutter will be serving as Interim Administrative Services Division Administrator until that position is filled.

###### B. Current Conditions

Precipitation for July was above normal for much of the state. This helped reduce water demand and helped to improve streamflow as well. While this was instrumental in improving water supply conditions statewide, it is not expected to continue in appreciable amounts for the rest of the growing season.

The temperature outlook predicts above-normal temperatures through October. While July temperatures were, for the most part, below normal, NOAA's Climate Prediction Center is calling for above normal temperatures for the August through October outlook period. Climate conditions are favorable for the development of La Niña—albeit a weak La Niña—bringing potentially cooler and wetter conditions this winter to the Pacific Northwest.

Statewide average streamflows for July were over 60 percent of normal. This is an improvement over the 44 percent in June and a marked improvement over the 32 percent seen during the same period in 2015. While streamflows have improved in most areas west of the Cascade Range, basins that appear to be the most heavily stressed are the John Day, Umatilla, Powder, Goose & Summer Lake (35 to 40 percent), and the Malheur and Malheur Lake Basins (50 and 51 percent). In spite of the recent unseasonably showery weather, streamflows in some of these basins remain at very low levels. If temperatures return to above-normal or even close to normal conditions, it will likely contribute to a marked reduction in streamflow.

Reservoir levels are better than at this time last year, but dropping quickly. Reservoir storage levels across the state are higher compared to this time last year, as water managers were able to benefit from springtime run-off. Rivers that are fed by reservoirs are in better shape than those that are not; water shortages may be apparent soon in areas without access to storage. However, all reservoirs are now being drawn down, supplying irrigation and municipal water, as well as instream flows for fisheries. By the end of the summer, reservoir levels will likely mirror 2015 levels.

The Drought Monitor shows 100 percent of the state abnormally dry. As of August 2, the entire state was in the D0 category (abnormally dry). The Mid Coast and Eastern Oregon regions – approximately 50 percent of the state – were also listed in the D1 category (moderate drought).

The fire potential outlook is normal for most of Oregon. The National Interagency Fire Center's (NIFC) monthly outlook is currently indicating above-normal significant fire potential in southeastern Oregon for July and August, with normal significant wildland fire potential expected for the remainder of the state throughout the July through October outlook period. Recent rainfall and cooler temperatures in July improved the fire outlook, compared to this time last month.

### **C. Cascadia Rising Exercise**

The Oregon Water Resources Department participated in Cascadia Rising, the largest seismic drill ever conducted in the Pacific Northwest. The June exercise simulated a 9.0 magnitude earthquake along the Cascadia Subduction Zone resulting in a tsunami and tested coordination of local, state, federal and tribal governments, along with the private sector. Under Oregon's emergency response system, OWRD has a support role in infrastructure (dam safety) and water supply issues.

OWRD is also part of the Governor's Disaster Cabinet under [Executive Order 16-07](#). The cabinet was activated as part of Cascadia Rising simulation with agency heads making recommendations to the Governor on the response to and recovery from a disaster.

## **II. Commission Follow Up**

### **A. Klamath Regulation and Stock Water Update**

#### Stockwater

Department staff continue to provide information on alternative stock water solutions for ranchers in the Klamath Basin that may be regulated off this year. In 2015 a total of 57 wells were drilled in the Klamath Basin for stock water purposes. Through July of 2016, a total of 26 new stock water well log reports have been received by the Department.

#### Regulation

Watermaster staff in the Klamath Basin have been actively regulating since late May 2016. Regulation to date has primarily been focused around protection of specified instream flows for the Klamath Tribe. Initially regulation occurred on smaller tributaries to the Sprague

and Wood Rivers. In July, regulation began to protect flows on the Lower Sprague River, which involved regulation of both junior groundwater and surface water users.

### **B. North Fork Smith River Rulemaking**

In response to a petition to withdraw the waters of the Smith River, the Commission at its November 2015 meeting instead directed the agency to begin a rulemaking to classify the waters of the area of interest for instream purposes.

In preparing a draft set of the rules for the rules advisory committee, staff determined that it did not have substantial evidence at the time to justify moving forward with limiting the allowed classified exempt groundwater uses. ORS 536.340(3)(a) requires the Commission to review the proposed action to determine whether the proposal is consistent with ORS 537.780 before taking any action to begin rulemaking that would limit new groundwater uses that are exempt under 537.545. ORS 537.780(2)(a) requires that the Commission have substantial evidence to restrict exempt groundwater uses. If new information is provided or obtained, the Commission could begin a new rulemaking to classify the exempt uses. *Note:* This means that pursuant to the Department's existing interpretation of its rules, mining activities associated with an industrial water use could occur under the 5,000 gallons per day exemption.

A Rules Advisory Committee was held on June 30 in Brookings to discuss modifications to the draft rules and the statement of need and cost of compliance. Proponents of the rulemaking provided information on why they believed the rulemaking was necessary, and discussed the economic benefits of recreation and fisheries to the area. Other members of the committee expressed concerns about the rulemaking, stating that it was not necessary and that mining could be done in a responsible manner. The information provided by the Rules Advisory Committee was essential in developing rulemaking notices, which will help members of the public understand if the rulemaking may affect them.

The Department will be noticing the rules and opening the public comment period in September. A public hearing will be held in Brookings in late September. The public hearing draft of the rules will propose to classify the surface waters of the Smith River Basin for instream uses, livestock and human consumption, while the groundwater uses are proposed to be classified for exempt uses only. The Department's goal is to have this rulemaking for consideration before the Commission in October.

### **C. Disposition of State-held Water Rights**

Staff have developed a draft report that reviews existing state policies regarding the disposition of state real property, as well as Oregon's water laws. The draft report reviews best practices from other agencies and highlights potential considerations for the disposition of state-held water rights. Commissioners Baumgartner and Williams were appointed to work with staff on this matter and received a copy of the draft report. After confirming they agreed with the approach, the report was shared with state agencies in order to ensure that the report properly characterizes existing programs, and to also ensure that actions recommended in the report are feasible. Staff are awaiting feedback from the agencies and will hold an interagency meeting on the report in

late August. The report is tentatively targeted to come before the Commission in October, with a public comment period expected to occur in September.

#### **D. Harney Basin Groundwater Update**

The first Groundwater Study Advisory Committee meeting was held in Burns on July 27th. Staff presented a proposal for conducting the study in conjunction with the USGS, proposed observation well locations to be drilled, and provided an update on recent data gathered as part of the study. The Committee elected a chair, discussed goals for the Committee, and provided preliminary feedback to Department staff for future meetings.

#### **E. Willamette Basin Review Feasibility Study Update**

Agency partners continue to focus on study tasks pertaining to estimating current and future agricultural demands. There have been several meetings between the Department, US Army Corps of Engineers, and the Oregon Department of Agriculture in recent months. In August, the agencies also met with representatives from the agricultural industry. Discussions have focused on ways to further refine the analysis by developing a range of future demand scenarios that consider soils, land-use, and proximity to the Federal reservoirs. The diversity of crops grown and the sheer number of existing agricultural water rights in the basin, coupled with an export-driven market, make it somewhat challenging to estimate future water needs for this sector. The Corps of Engineers has adjusted the study schedule for this task.

#### **G. Milton-Freewater Update**

In May 2016, Department hydrogeologists were asked to provide a presentation to over 50 local irrigators in Milton-Freewater summarizing the hydrogeological setting of the area, as well as recent groundwater level trends for both the alluvial aquifer and the underlying basalt aquifer system. Groundwater levels in the basalt aquifer system have been declining between two and five feet per year. Senior groundwater users are concerned about the stability of the resource; well yields for older wells have reportedly declined. Staff have begun to collect, organize, and analyze groundwater level, groundwater use, and well construction information from more wells in the basin, recognizing the potential need for a future reduction in groundwater use from the basalt aquifer system to stabilize groundwater levels and protect senior users. Staff are scheduling additional public meetings to share data, and work with local irrigators on solutions that maximize the beneficial use of the resource, while protecting senior users.

#### **H. Legislative Update**

The Department's Legislative Concepts have all been approved by the Governor's Office for drafting by Legislative Counsel. As discussed at the last meeting, the Department has four concepts, two of which are placeholders, that include: (1) water rights transactions and dam safety fees, (2) well construction fees and bonds, (3) a placeholder for proposals that come from the Task Force on Emergency Drought Response, and (4) a placeholder to address partial decrees in the Klamath Adjudication.

**I. Upcoming Consideration of Adoption of Div 508, 510, 511 Rules**

Oregon Administrative Rules, Divisions 508 (Grande Ronde), 510 (Malheur), and 511 (Owyhee) rulemaking efforts have been underway to consider proposed amendments to the three Basin Programs to extend reservations of water for economic development. The proposed rules are scheduled to come before the Commission for action in October 2016.

**J. Cannabis Update**

Racquel Rancier, Senior Policy Coordinator, was appointed by the Governor to serve on the Task Force on Cannabis Environmental Best Practices. The task force has discussed the role of certification programs and commodity commissions in helping promote environmental best practices. In addition, Department staff have provided two presentations to the task force on Oregon's water laws. A copy of the final report will be provided to the Commission in September.

**K. Task Force on Drought Emergency Response**

House Bill 4113 (2016) established a task force to review the State's existing drought response tools, identify potential gaps, and make recommendations on tools and information needed to ensure that the State is prepared to respond during a drought in the future. The task force is made up of members from a diverse set of interests; eleven members were appointed by the Governor and four members were appointed by the Legislature. Senator Arnie Roblan and Representative Ken Helm are two of the members appointed by the Legislature and were also appointed by unanimous vote of the members of the task force to serve as Co-Chairs. The Department is charged with providing staff support for the task force.

The task force has met twice, with the next meeting scheduled for August 15th. A report of the task force is due to the Commission and Legislature by November 1. More information about the task force is available online: [http://www.oregon.gov/owrd/Pages/HB\\_4113.aspx](http://www.oregon.gov/owrd/Pages/HB_4113.aspx).

**L. Oregon Department of Fish and Wildlife (ODFW) Transfer and Exchange Applications**

ODFW has submitted transfer applications to add two points of diversion of water rights on East and Middle Springs, tributaries to Little Herman Creek. Bark and Food & Water Watch protested the transfer applications. On June 10, 2016, an administrative law judge (ALJ) issued a proposed order proposing to approve the point of diversion transfers for ODFW's fish hatchery water rights. On July 7, 2016 the protestants filed exceptions to the ALJ's proposed order. After reviewing the exceptions, OWRD will issue a final order in the transfer proceeding, which will be followed by a 60-day appeal period. The point of diversion transfers are necessary, regardless of whether ODFW moves forward on a proposal to exchange a portion of the water with the City of Cascade Locks. ODFW's exchange application is pending.

### 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 and a hearing was conducted. The contested case process has been extended.

**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 stock water 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. The Court issued the Appellate Judgment affirmed without opinion. The period to appeal has passed, and the Department will now pursue repair of the wells.

**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 was not required to respond to the petition. The petitioning attorney withdrew the petition and the Court subsequently issued a dismissal order.

**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 2015 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.

**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**

A 2016 call for water was submitted to the watermaster asking for regulation to protect Tribal instream water rights above Upper Klamath Lake. The call was validated and regulation notices were issued. As a result, Sees have filed another Petition for Judicial Review in Marion County Circuit Court. The Department will be responding to this most recent filing.



**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 2015 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 2015 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.

**Stanley S. Stonier and Dolores E. Stonier v. Oregon Water Resources Department and Commission: Marion County Circuit Court**

A 2016 call for water was submitted to the watermaster asking for regulation to protect Tribal instream water rights above Upper Klamath Lake. The call was validated and regulation notices were issued. As a result, Stonier filed another Petition for Judicial Review in Marion County Circuit Court. The Department will be responding to this most recent filing.

**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 2015 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.

The Mallams' withdrew this case from Federal District Court. The Court issued an order of dismissal.

**Thomas W. Mallams and Beverly Mallams v. Oregon Water Resources Department**

A 2016 call for water was submitted to the watermaster asking for regulation to protect Tribal instream water rights above Upper Klamath Lake. The call was validated and regulation notices were issued. As a result, the Mallams' have filed another Petition for Judicial Review in Marion County Circuit Court. The Department will be responding to this most recent filing.

**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. As with the other petitions for judicial review, the filing of this petition automatically stayed enforcement of the order. Crouthamel entered into a settlement agreement with the Department. The case has been dismissed.

**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. The Court provided an opportunity for the complainant to refile the case. The case was refiled and a court date is scheduled for September 28, 2016.

**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 asking the Court to require that the right be converted to an instream water right. No hearing date is scheduled at this time.

**Harrington v. Oregon Water Resources Department and others, US Federal District Court, Case 1:16-CV-00200-CL**

This issue began several years ago, resulting in a series of court decisions. The matter involves the illegal storage of water, which resulted in the need for the State to notch the dams to prevent

further storage of water in violation of the law. This is the second filing in US Federal District Court. The State has filed a motion to dismiss with the Court.

**Giottonini v. Oregon Water Resources Department, Wheeler County Circuit Court , Case 16-CV-00206 – Petition for Judicial Review**

This case involved regulation and conditions contained in a water right permit.

The petitioner requested the case be withdrawn. The Court issued a dismissal order.

**MidOregon Federal Credit Union v. Central Oregon Irrigation District, Oregon Water Resources Department and others, Deschutes County Circuit Court, Case 16CV2022**

This case involves a water right transfer filed by the Central Oregon Irrigation District which proposes to change the place of use of water.

**ELH, LLC v. Oregon Water Resources Department, Umatilla County Circuit Court, Case 16CV20883**

This case involves the management and delivery of water within Westland Irrigation District. The complaint is requesting a preliminary and permanent injunction requiring the Department to regulate the distribution of water to the district.

Filings are being prepared. No court date has been scheduled.

**IV. Commission/Board Schedules**

<b><i>Commission/Board</i></b>	<b><i>Location</i></b>	<b><i>Date</i></b>
Board of Forestry	Salem	Sept. 7, 2016
Land Conservation and Development Commission	Salem	Sept. 22-23,2016
Parks and Recreation Commission	Bend	Sept. 13-14, 2016
Fish and Wildlife Commission	Welches	Sept. 2, 2016
State Land Board	Salem	Oct. 11, 2016
Environmental Quality Commission	Ashland	Nov. 2-3, 2016
Watershed Enhancement Board	Ashland	Oct. 25-26, 2016
Board of Agriculture	Pendleton	Sept. 12-14, 2016

Attachment 1: Rulemaking Calendar

**Oregon Water Resources Department  
Current/Anticipated Rulemaking**

<b>Rule Division</b>	<b>Topic</b>	<b>Lead Staff</b>	<b>RAC Planned or Convened?</b>	<b>GWAC Input Expected?</b>	<b>Target WRC Date</b>	<b>Status</b>
<b>Division 508, 510, 511</b>	Grande Ronde, Malheur and Owyhee Basins, Reservations of Water for Economic Development	Brenda, Machelle	Yes	No	Oct. 2016	Hearings completed July 28
<b>Division 517</b>	Smith River	Racquel, Machelle	Yes	TBD	Oct. 2016	Hearing scheduled for Sept. 29
<b>Division 54 (New)</b>	Hydro Conversion to Instream	Mary Grainey	Yes	No	2017	Planned
<b>Division 77</b>	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight, Laura	Yes	No	2017	Underway