



# Oregon

Kate Brown, Governor

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## MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Item J, October 14, 2016  
Water Resources Commission Meeting

### Director's Report

#### I. Current Events:

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

Since the August meeting, the Department has hired four new employees, one transfer, and promoted four staff. Positions filled include: 2 Hydrogeologists, Supply & Conservation Coordinator, Office Specialist, Assistant Hydrographer, Application Caseworker, Water Use Reporting Analyst, Administrative Specialist, and District Transfer Advisor.

In addition, Paul Hutter has left the Department; therefore, Lisa Snyder will be taking on responsibilities as Interim Administrative Services Division Administrator until that position is filled.

#### 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. As of September, a total of 33 new stock water well log reports had been received by the Department in 2016.

###### Regulation

Watermaster staff in the Klamath Basin have been actively regulating since late May. Regulation was primarily in response to calls by the Klamath Tribe for specified instream flows. Regulation initially occurred on smaller tributaries to the Sprague and Wood Rivers, expanding to the mainstem Sprague River in July, followed by the Wood River in September. In some cases regulation was to time immemorial, meaning all consumptive rights on the stream system were regulated off. Regulation included junior groundwater and surface water users.

## **B. Harney Basin Groundwater Update**

The Department installed six new dedicated observation wells in the Harney Basin study area since August 2016. Additional observation wells are planned to be installed in early 2017. The next meeting of the Groundwater Study Advisory Committee is scheduled for October 20. The Committee will discuss the location of additional observation wells, a volunteer groundwater level monitoring program, and the study scope of work during this meeting.

## **C. Municipal Extensions**

As discussed in the May 2016 Director's Report, a December 2013 Court of Appeals decision 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.

Legislation was introduced in both the 2015 and 2016 Legislative Sessions, but was not enacted into law. The Department received letters from three legislators asking 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 requested that the Department compile data to inform that work.

The Department has since been conducting a survey of municipalities to try to ascertain those that may be affected by the Court's decision. The Governor's Office has convened a workgroup consisting of staff, legislators, and stakeholders. The workgroup met in September and intends to meet again in late 2016.

## **H. Budget Update**

The Agency's Request Budget was submitted in August. No new policy option packages can be submitted by the agency at this time. The next phase in the budget process is development of the Governor's Recommended Budget, which is expected to be released in December. This will be the budget that the agency will support during the 2017 Legislative Session.

## **I. Integrated Water Resources Strategy Update**

The Policy Advisory Group held its third meeting in Salem on September 14, 2016. Seventeen members were in attendance, in addition to staff from IWRS agencies, members of the public, and Commissioner Baumgartner. Staff brought information to the group in the form of one-page briefers, in order to follow up on questions posed in previous meetings. These documents included topics such as the legislatively-mandated Drought Task Force, Public Safety (Oregon's Dam Safety Program), the Pesticide Stewardship Partnership Program, Water Management and Conservation Plans, and Instream Protections.

The group continued its brainstorming exercise around these topics and others. It concluded the day with a conversation about what its final report might look like and where the group was starting to see areas of agreement. The group's final meeting of the year will take place on December 7 in Salem.

The group will meet one final time during 2017 to get a first look at the proposed draft of the Integrated Water Resources Strategy.

The Agency Advisory Group also met during the month of September. The group includes Project Team members from the Water Resources Department, Department of Fish and Wildlife, Department of Agriculture, Department of Environmental Quality, and sibling agencies from the natural resources and economic development sectors. The group is currently working on edits to the 2012 Integrated Water Resources Strategy, updating text, data, statistics, maps, and graphs. Agency representatives are also looking at the original recommended actions and noting whether any of the sub-bullets need to be adjusted to reflect progress, or correct mistakes. Any additional recommended actions that come from the Policy Advisory Group will need background text and narrative. The Agency Advisory Group will help pull such text together, before any drafts go out for public comment in 2017.

#### **J. Task Force on Cannabis Environmental Best Practices**

The final report of the Task Force on Cannabis Environmental Best Practices was issued in September 2016. The task force recommended that the Oregon Legislature consider the following to encourage environmental best practices in cannabis production:

- 1. Help producers and other stakeholders access information and technical assistance to support use of environmental best practices with regard to energy and water in cannabis production.*
- 2. Support creation of third party certification system to encourage efficient use of water and energy in cannabis production.*
- 3. Support completion of research into environmental best practices, as well as other needed research.*
- 4. Explore the issue of water regulations for small farms.*

The full report is available online at:

[www.oregon.gov/olcc/marijuana/Documents/CEBP/CEBP\\_Report\\_083016\\_final.pdf](http://www.oregon.gov/olcc/marijuana/Documents/CEBP/CEBP_Report_083016_final.pdf)

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

The Task Force on Drought Emergency Response has met five times as of September 27, with two more meetings scheduled in October. House Bill 4113 (2016) established the 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 Department is providing staff support to the task force. During the first three meetings, task force members heard proposals and brainstormed ideas to

address challenges related to drought. The task force is now in the process of discussing those items in more depth and identifying recommendations.

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:

[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**

##### Current Status

On June 10, 2016, an administrative law judge issued a proposed order upholding OWRD's approval of the point of diversion transfers. The transfers only apply to ODFW's historic use of Oxbow Springs and the final order is an action separate from the exchange. OWRD is expecting to issue a final order in the transfer proceeding in late October 2016. The final order may be appealed to the Court of Appeals within 60-days of issuance.

##### Next Steps

For ODFW and the City of Cascade Locks to be able to trade water, the exchange application process must be completed. The exchange process includes a public interest review. The exchange application comment period closed in October 2010, and OWRD received about 4,500 timely comments. At this time, there is no specific timeline set to reinstate the exchange. When that occurs there will be new opportunities for public participation and comment.

#### **M. 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 have been working with staff on the report. State agencies were also consulted in August 2016 to ensure recommendations were feasible and that existing policies were accurately reflected. Prior to the report going to the Commission for discussion, the Department will provide an opportunity for public comment.

#### **N. 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. The rulemaking was scheduled to be before the Commission at the October 2016 meeting; however, the Department received a timely request on September 28 to postpone the decision and extend the public comment period for 30 days. Therefore, consideration of the proposed rules will not be before the Commission until January, unless a special meeting is held before then.

## **O. Place-Based Planning**

The four Place-Based Planning pilot areas have all been working to build a collaborative and integrated process, consistent with the Draft Guidelines for Planning Step 1. Each of the groups have secured facilitation support and conducted significant stakeholder outreach. Three of the four pilots have successfully planned and executed a public “kick-off” meeting. Over the next several months each group will be developing governance agreements, work plans, and communication/outreach strategies. For more information, visit the website: [http://www.oregon.gov/OWRD/Pages/Place\\_Based\\_Planning.aspx](http://www.oregon.gov/OWRD/Pages/Place_Based_Planning.aspx).

## **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 process is continuing.

**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 scheduled oral argument on November 22, 2016.

**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. 15CV18272 and 15CV19347 – 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 in 2015. 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.

The Court has scheduled a status conference for September 26, 2016.

**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. 16CV24120 – Petition for Judicial Review of a Final Order**

Regulation notices were sent to water users in the Sprague River system in July 2016, in response to a call for the Klamath Tribes' time immemorial instream water right. Sees filed a Petition for Judicial Review of the regulation order in Marion County Circuit Court.

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 Department is tracking this case.

**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.

The Court has scheduled a status conference for November 2, 2016.

Settlement discussions are underway.

**TPC, LLC and Dayton o. Hyde and Gerda V. Hyde v. Oregon Water Resources Department and Tyler Martin: Marion County Circuit Court Case No.16CV27427 – Petition for Judicial Review of a Final Order**

In 2016, the watermaster received a call for water in relation to Klamath Tribes time immemorial rights on the Upper Klamath Marsh and instream water rights in the upper Williamson River basin. After validating the call for water, the watermaster sent regulation notices to water users junior to the time immemorial rights for the Marsh, Williamson River and tributaries. The

Department is working with the Attorney General's Office to respond to Marion County Circuit Court.

**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 involves a petition for judicial review of a regulation notice issued in 2015 by the Department in the Klamath Basin. The Department regulated groundwater use following a call by a senior water right holder.

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 Case No. 16CV24087 – Petition for Judicial Review of a Final Order**

Regulation notices were sent to water users in the Sprague River system in July 2016, in response to a call for the Klamath Tribes' time immemorial instream water right. Stonier filed a Petition for Judicial Review of the regulation order in Marion County Circuit Court.

**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 in 2015. 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 and Commission, Marion County Circuit Court Case No. 16CV23679 – Petition for Judicial Review of a Final Order**

Regulation notices were sent to water users in the Sprague River system in July 2016, in response to a call for the Klamath Tribes' time immemorial instream water right. Mallams filed a Petition for Judicial Review of the regulation order in Marion County Circuit Court. The department is tracking this case.

**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, which they did. 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 also 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. It involves the illegal storage of water and the subsequent breach of the dams by the State. 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 involves 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 in the district.

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

**Tumalo Irrigation District v. Oregon Water Resources Department,, Case No.15CV28751**

The Tumalo Irrigation District filed a petition for judicial review regarding a Department denial of a permanent in-district transfer of 125 AF of water from Upper Tumalo Reservoir to two interconnected ponds constructed and filled for recreation. The transfer denial centered on the lack of land-use approval from Deschutes County and a determination that the in-district transfer statute does not authorize a change in place of use of stored water (that is, storing the water at a new location). The Department issued an enforcement order to address the in-district filling of the ponds without authorization and a limited license to pursue another source of water for the ponds. The petition was filed in Deschutes County Circuit Court. The case has not been scheduled.

**Tumalo Irrigation District v. Oregon Water Resources Department, Case No.16CV01703**

In a second petition for judicial review Tumalo Irrigation District challenges the Department's order on reconsideration, which affirmed the violation of unauthorized storage of water in two ponds within the District and cancelled the limited license. The petition was filed in Deschutes County Circuit Court. The case has not 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	Oct 12, 2016
Land Conservation and Development Commission	Redmond	Nov 17-18, 2016
Parks and Recreation Commission	Cannon Beach	Nov 15-16, 2016
Fish and Wildlife Commission	Salem	Nov 7, 2016
State Land Board	Salem	Dec 13, 2016
Environmental Quality Commission	Ashland	Nov 2-3, 2016
Watershed Enhancement Board	Ashland	Oct 25-26, 2016
Board of Agriculture	West Linn	Nov 29, 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 517 South Coast Basin Program	Classifying the surface waters in the Smith River watershed	Racquel Rancier	Yes	No	Jan. 2017	Comment period extended to October 28.
Division 54 (New Rule Division)	Hydro conversion to instream	Mary Grainey	Yes	No	2017	Underway
Division 77 Instream Water Rights	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight French, Laura Wilke	Yes	No	2017	Underway

