



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 L, December 8, 2017
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions

Since the August meeting, the Department has hired three new employees, had one position transfer and five promotions. Positions filled include a Human Resources Manager, an Accountant 4, two Watermasters, a Business Application Developer, a Payroll Accounting Technician, a Programmer/Data Analyst, a Data Technician and a Restoration Program Technician.

II. Commission Follow Up

A. Klamath Basin Update

Summertime regulation continued through September and October. Regulation was lifted on October 31, 2017. On November 6, the Klamath Tribes, with concurrence of the Bureau of Indian Affairs, requested regulation from the Watermaster to protect the Tribes' instream water claims for winter flows. The Watermaster is monitoring the instream claims, and has validated the call for the Klamath Marsh levels and the Sycan River claim. Regulation notices to cease surface water use have been sent to the affected water users. District 17 staff continue to monitor instream flows throughout the Basin.

Between September 1, 2017 and November 17, 2017, the District 17 staff installed new telemetered stream flow gauges on Sevenmile Creek and Trout Creek. The gage on Sevenmile Creek helps with water management and inflow forecasting for Upper Klamath Lake. The gage on Trout Creek monitors a Tribal determined claim for instream flow.

B. ODFW Transfer and Exchange Application Update

On October 27, 2017, Governor Brown sent a letter to Oregon Department of Fish and Wildlife (ODFW) Director Curt Melcher, asking him to withdraw their exchange application related to Oxbow Springs Fish Hatchery. The Governor said both ODFW and Oregon Water Resources Department had already "expended significant resources" on the exchange process and said it was "irresponsible to incur additional significant state costs for an uncertain outcome." On October 31,

2017, Director Melcher submitted a letter to the Department withdrawing the exchange application. The Department issued the final order withdrawing application T-11109 on November 2, 2017.

C. Umatilla Water Supply Project

In 2015, the Legislature authorized \$11 million in Lottery Bond proceeds to assist with financing water supply projects in the Umatilla Basin. These funds were authorized to invest in infrastructure projects that will deliver water primarily to lands that are currently not irrigated or are under-irrigated. The Department entered into a grant agreement with the Port of Morrow to implement two projects with these funds. The Port of Morrow is working to enter into a sub-agreement with the East Improvement District for one of the projects, an irrigation pipeline referred to as “East Project.” The Department is waiting to receive a project plan and budget, which describe the details of the project’s tasks, construction schedule, and budget. This project plan and budget along with evidence of sufficient water to fill the proposed pipeline, and all project permits/regulatory approvals are required prior the release of any funds.

The Department is also processing eight new Columbia River surface water rights and the associated mitigation for projects funded by this grant. The Department issued the first permit (S-55061) on May 2, 2017. The Department issued a notice of limited reconsideration on June 26, 2017 in order to clarify two permit conditions, which were negotiated by the water right holder’s agent, the Department, and another party to avoid a protest of the water right. The Department is working with the water right holder’s agent and the other party to clarify the conditions. The permit remains in effect during reconsideration and was used during the 2017 irrigation season. The Department intends to reissue the permit with the clarified conditions by the end of the calendar year.

D. Mosier Update

Mosier Commingling Well Repair and Replacement Program

The Wasco County Soil and Water Conservation District (SWCD) has selected a well drilling contractor to permanently abandon 15 priority comingling wells and construct replacement wells in the Mosier area with \$1 million in cost-share funds made available by Senate Bill 5507 in 2015. Site visits were conducted at the well sites in October and some well construction designs were modified based on discussions and analyses by the SWCD, their consultant, the driller, and Department hydrogeologist and well inspector staff. A start card has been submitted for the first well, and construction is scheduled to begin in November.

Mosier Deep Supply Wells

Two deep supply wells are being constructed with Water Project Grants and Loans (SB 839) funds awarded by the Commission in May 2016. The goal of the project is to reduce demand on the upper and administratively withdrawn Columbia River Basalt aquifers near Mosier to improve long-term groundwater supply availability and streamflows in Mosier Creek. Well #1 has been drilled to a depth of 1220 feet below ground surface and the final production casing was installed and sealed into the borehole as of late October, 2017. The driller estimates the well will be completed in December 2017. Wasco County SWCD, their contracted driller, Department staff,

and the owners of Well #1 and Well #2 met in late October to discuss the project budget and well design modifications to Well #2 based on recent drilling experience with Well #1.

E. Walla Walla Subbasin Groundwater Update

Public meetings are scheduled to be held in Milton-Freewater on December 11 and in Weston on December 12. Department staff will summarize recent changes to the Walla Walla Subbasin rules, and introduce Department and federal NRCS funding sources available to assist with flowmeter purchase and installation. After the presentation, there will be an Open House with information stations and Department staff available for discussion.

Staff continue to collect and assess water levels, well interactions, aquifer hydraulics and geologic data in the Walla Walla Subbasin. Department staff visited a network of 80 basalt wells on the Oregon side of the subbasin in November to collect manual water level data. A subset of these wells (66) was measureable and/or unused during the irrigation season, and six of these wells are instrumented with automated high frequency water level recording equipment.

Because of the lack of year-round observation wells, the Department has been awarded funding assistance from the USGS National Groundwater Monitoring Network Program, and is currently reviewing bids to construct one dedicated deep basalt monitoring well near Milton Freewater. Additionally, the Department plans to contract with the USGS to reinstate water level data collection at historic USGS basalt groundwater monitoring locations in the Washington portion of the subbasin to develop a more comprehensive view of current groundwater level conditions in the basin.

F. Harney Basin Groundwater Study Update

Department staff met with the Groundwater Study Advisory Committee (GSAC) on October 17, 2017. The meeting included a presentation regarding the effects of climate variability on the hydrologic system of the Harney Basin, a work session regarding groundwater monitoring activities, and a presentation regarding new geologic mapping conducted by the Department of Geology and Mineral Industries (DOGAMI). The meeting concluded with a fieldtrip to some of the local geologic outcrops lead by DOGAMI staff. The meeting was attended by nearly 40 individuals, including Representative Bentz, Representative Helm, and Representative Smith. County Commissioner Owens organized a site visit to his irrigation efficiency pilot site in Crane for the state representatives and several GSAC members later that day.

The Department's Technical and Field Services staff from three offices collected groundwater and surface water data over the course of several weeks in late October and early November. Water levels were collected from 235 wells across the basin and streamflow seepage runs were conducted on reaches of the Silvies River, Silver Creek, and the Donner und Blitzen River during this period. Two eddy-covariance climate monitoring stations were installed by the University of Nevada-Reno Desert Research Institute and Department staff in September; one in an irrigated alfalfa field and one in a native rangeland environment. These stations are currently measuring a suite of climate data, including precipitation and evapotranspiration, which will be used in the Groundwater Study and by other interested parties including local irrigators, OSU, and federal agencies. Before these

stations were installed there were no climate stations operating in the Malheur Lake Basin. Department staff worked with the Harney County Watershed Council to develop an OWEB Monitoring Grant application to fund data processing and analysis from the two sites. DEQ is initiating work to sample wells for a groundwater quality monitoring effort. The Department will work closely with DEQ and USGS to coordinate data collection efforts in the Basin.

G. Scenic Waterway Update

Nehalem Scenic Waterway

Recent progress on the scenic waterway process has been focused on the Nehalem River in the northwest corner of the state. In October 2017, Oregon Parks and Recreation Department (OPRD) staff gave a presentation to the Clatsop County Commission. In response, the Clatsop County Commission sent a letter in support of the scenic waterway designation. A similar offer to present to the Tillamook County Commission was declined. The Tillamook County Commission later submitted a letter of opposition for the Nehalem's possible inclusion in the scenic waterway program.

So far, approximately 1400 public comments on the Nehalem scenic waterway have been received by OPRD. The majority of the comments are form letters of support. OPRD staff are working on recording the relevant information from each comment and compiling them.

A progress report is being developed to present to the OPRD Commission at their February 2018 meeting. The report will outline the responses received and that the Nehalem River segment does meet the criteria for designation.

H. New Groundwater Data System

In the Technical Services Division, the Groundwater Section built and maintained an electronic database of field-located observation wells with associated hydraulic and geologic data beginning in the 1990s. This database was extensively used by groundwater staff in performing water right application reviews, basin studies, and other work of the section. A significant portion of this dataset has recently been migrated to an enterprise database called the Groundwater Site Information System (GSIS). The GSIS was built and will be maintained into the future by the information services section in partnership with the Groundwater Section. Migration of additional Groundwater Section data to the enterprise database will continue.

The new GSIS system is built on a web-accessible platform and includes enhanced connection to existing department data, which promotes greater access to groundwater data for both staff and the general public. For example, access to the GSIS system has been integrated into the Water Rights Information Query system allowing staff and public to easily obtain well information for groundwater rights correlated to GSIS sites. GSIS data is currently available to the public in a tabular format, and a web-mapping application is being tested internally. Data and information associated with groundwater sites may include the following:

- Location with horizontal and vertical error estimates
- Measured water levels

- Cross-reference well logs for the same site
- Cross-referenced water rights information for the same site
- Lithologic data (digitized from well logs)
- Stratigraphic interpretation - planned
- Well construction data (digitized from well logs)
- Well pumping test data (reported) - planned
- Recorder water level - planned
- Geochemistry – planned
- Cross-referenced reported water use and water level data - planned

I. Groundwater Work Plan Update

The Department continues to work on groundwater issues identified in earlier staff reports, including the challenges of groundwater permit reviews. As staff engage in the Department's strategic planning process, these items will be offered up for discussion. The Strategic Planning process will continue throughout 2018 and results / recommendations will be brought to the Commission.

III. Litigation Update

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 continue to work with Blue Mountain Angus's Counsel exploring possible solutions to their stock water needs.

The Court of Appeals has not scheduled a date for oral arguments.

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 Company (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 held oral argument on November 22, 2016. The Court affirmed the order of the Commission.

Larry J. Sees and Joan A. Sees, Garret J. Duncan and Cameron M. Duncan, and Stanley S. Stonier and Dolores E. Stonier v. Oregon Water Resources Department and Water Resources Commission, Marion County Circuit Court Consolidated Case Nos. 15CV18272, 15CV19347, 15CV23126, 16CV24087 and 16CV24120, Judge Channing J. Bennett, – Petitions for Judicial Review of Final Orders

These cases involve petitions for judicial review of final orders issued to regulate junior groundwater users in response to a call by a senior user in the Klamath Basin in 2015 and notices spanning a two-year period. Each petition resulted in different court case numbers. All of these cases are similar and have been consolidated into case No. 15CV18272.

The Department, working with the Attorney General's Office, presented testimony on the consolidated case during the Marion County Circuit Court trial which began on March 13, 2017. The Court heard this matter over a six day period. The Court issued an Opinion Letter on July 10, 2017. The Court found that the State followed the process required by the rules and relied on the best information available at the time and the State's findings of hydraulic connection and its stream relief calculations are supported by substantial evidence. Accordingly, the Court affirmed the Departments orders.

Counsel for the Sees filed objections to the Court's findings. A hearing was scheduled for August 22, 2017 to hear the objections. Marion County Circuit Court Affirmed the State's decision and a General Judgment was entered on August 24, 2017.

Sees filed an appeal on September 19, 2017.

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, Thomas M. Hart – Petition for Judicial Review of a Final Order

In 2016, the watermaster received a call for distribution of water from the Klamath Tribes. The call involved the Tribes' time immemorial instream rights in the upper Williamson River basin along with the marsh elevation right on the Klamath Marsh. After validating the call for water, the watermaster sent regulation notices to water users junior to the time immemorial rights. The Department is working with the Attorney General's Office on this case.

Various motions have been filed. In one filing, the Klamath Tribes argued that the case should be dismissed since they are a necessary and indispensable party to this court case. The Court subsequently denied the Tribes' motion to dismiss.

Klamath Tribes have filed a Mandamus Proceeding with the Oregon Supreme Court asking that the Court compel the Marion County Circuit Court to dismiss the TPC and Hyde Family's petition for

judicial review (Case No. 16CV27427). The Tribes are arguing that they are a necessary and indispensable party who are not named in the case.

The Oregon Supreme Court denied the petition for writ of mandamus on June 1, 2017.

Marion County Circuit Court has scheduled the trial on case No. 16CV27427 to begin on March 5, 2018.

Thomas W. Mallams and Beverly Mallams v. Oregon Water Resources Department and Commission, Marion County Circuit Court Case No. 16CV23679, Judge Audrey J. Broyles – 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. There was little activity relating to this case pending the ruling on the Sees, Stonier case. The case has not been scheduled for hearing.

WaterWatch v Oregon Water Resources Department, Marion County Circuit Court Case No. 16CV11938, Judge Audrey J. Broyles – 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. A hearing on motions was held on April 11, 2017. The Court issued an order dismissing the case on May 18, 2017.

WaterWatch filed a notice of appeal with the Oregon Court of Appeals on June 14, 2017.

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

This issue began several years ago. It involves the illegal storage of water and the subsequent notching of the dams by the State. This is the second filing in US Federal District Court.

The court adopted the findings and recommendations of Magistrate Judge Clark. The recommendations included the following: Motions to dismiss presented by state and federal defendants should be granted; and, Mr. Harrington should be given an opportunity to amend and refile his Complaint as it pertains to those Oregon state defendants entitled to qualified immunity. The court allowed until January 1, 2017 for Mr. Harrington to file an amended complaint. Harrington filed a motion for an extension of time until February 1, 2017. The State filed a motion requesting dismissal. Harrington filed a motion to deny the State's motion to dismiss; State replied in support of motion to dismiss. The court dismissed this appeal because it was filed from a non-appealable order on June 7, 2017. Judgment has been entered.

Harrington has filed an appeal.

ELH, LLC v Oregon Water Resources Department, Umatilla County Circuit Court, Case 16CV20883, Judge Michael J. Gillespie

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.

The Court has dismissed the Department from this case.

Tumalo Irrigation District v. Oregon Water Resources Department, Deschutes County Circuit Court, Case No.16CV01703

In a second petition for judicial review, Tumalo Irrigation District challenged the Department's order on reconsideration, which affirmed the violation of unauthorized storage of water in two ponds within the District and cancelled a limited license. The petition was filed in Deschutes County Circuit Court.

The parties have been meeting in search of settlement. Agreement has not been reached to date.

A hearing has been scheduled for February 27, 2018, in Deschutes County Circuit Court.

Dan and Nina Micke v Oregon Water Resources Department and Commission, Marion County Circuit Court Case, Judge Tracy A. Prall, Case No. 16CV17876

Dan and Nina Micke were issued a regulation notice to release waters stored in two reservoirs in the course of water distribution to satisfy the call of a senior water right holder. The Micke's filed a petition for judicial review. Various motions were filed by both the Petitioner and the State. The court entered a Judgment of General Dismissal on March 17, 2017.

The petitioners have filed a notice of appeal with the Oregon Court of Appeals.

New Klamath Filings in 2017

The following Petitions for Judicial Review of water use regulation Orders have been filed in Marion County Circuit Court. All of these involve the regulation of water in Klamath County.

NBCC, LLC; AGRI WATER, LLC; ROGER NICHOLSON; NICHOLSON INVESTMENTS, LLC; MARYNICHOLSON, as trustee of the Nicholson Loving Trust; MARTIN NICHOLSON; GOOSE NEST RANCHES, LLC; RANDALL KIZER; FORT KLAMATH LAND COMPANY, LLC; RASCAL RANCH, LLC; GERALD H. HAWKINS, as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust; JOHN B. OWENS, as a trustee of the John and Candace Owens Family Trust; HARLOWE RANCH, LLC; JACOX RANCH, LLC; and E. MARTIN KERNS, Petitioners, v. OREGON WATER RESOURCES DEPARTMENT, and TYLER MARTIN, Case No. 17CV21859

A petition for judicial review of final orders in other than contested case was filed on May 26, 2017 for the Wood River and/or its tributaries Fort Creek, Annie Creek, and Sun Creek for the purpose of

irrigation and stock watering. An amended petition for judicial review was filed on June 20, 2017 to include the final orders.

STEVE M. MOSBY, as Trustee of the MOSBY FAMILY TRUST, v. OREGON WATER RESOURCES DEPARTMENT, and TYLER MARTIN, Case No. 17CV22113

A petition for judicial review of final orders in other than contested case was filed on May 30, 2017 for use of water from Sand Creek for irrigation and livestock watering, and from a well located in proximity to Sand Creek. A status hearing was held on July 24, 2017. A notice of intent to dismiss was filed by Marion County Circuit Court on July 28, 2017.

THOMAS W. MALLAMS AND BEVERLY MALLAMS, v. WATER RESOURCES DEPARTMENT of the State of Oregon and WATER RESOURCES COMMISSION of the State of Oregon, Case No. 17CV26590

A petition for judicial review of final orders in other than contested case was filed on June 23, 2017 for use of water from a well for irrigation purposes. On August 1, 2017, Marion County Circuit Court granted an order to consolidate 16CV23679 and 17CV26590.

STANLEY S. STONIER AND DOLORES E. STONIER, v. WATER RESOURCES DEPARTMENT of the State of Oregon and WATER RESOURCES COMMISSION of the State of Oregon, Case No. 17CV26659

A petition for judicial review of final orders in other than contested case was filed on June 26, 2017 for use of water from two wells.

This case with voluntarily withdrawn on October 17, 2017.

LARRY J. SEES, JOAN A. SEES, GARRETT J. DUNCAN, and CAMERON M. DUNCAN, v. WATER RESOURCES DEPARTMENT of the State of Oregon and WATER RESOURCES COMMISSION of the State of Oregon, Case No. 17CV26774

A petition for judicial review of final orders in other than contested case was filed on June 26, 2017 for use of water from three wells for the use of irrigation.

This case with voluntarily withdrawn on October 17, 2017.

TPC, LLC, an Oregon Limited Liability Company, and Dayton O. Hyde and Gerda V. Hyde, as General Partners of the Hyde Family Limited Partnership, Petitioners, v. OREGON WATER RESOURCES DEPARTMENT, and TYLER MARTIN, Case No. 17CV26962

A petition for judicial review of final orders in other than contested case was filed on June 23, 2017 for use of water from the Williamson River for irrigation and livestock watering. An amended petition for judicial review was filed on July 21, 2017 to include the final orders.

Of the six petitions received in 2017 to-date, four of the filings are the same or similar to filings made in previous years. NBCC, et al and Steve Mosby are new filings this year. The Department is working with the Oregon Attorney General's office to respond to all of these filings.

IV. Commission/Board Schedules for 2017

<i>Commission/Board</i>	<i>Location</i>	<i>Date</i>
Board of Forestry	Salem	Jan. 3, 2018
Land Conservation and Development Commission	Hood River	Jan. 25-26, 2018
Parks and Recreation Commission	Oregon City	Jan. 21-22, 2018
Fish and Wildlife Commission	Salem	Dec. 8, 2017
State Land Board	Salem	Dec. 12, 2017
Environmental Quality Commission	Portland	Jan. 18-19, 2018
Watershed Enhancement Board	Florence	Jan. 30-31, 2018
Board of Agriculture	Salem	Feb. 20-22, 2018

Attachments:

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 54 (New Rule Division)	Hydro conversion to instream	Mary Grainey	Yes	No	2018	Underway
Division 86 Water Management and Conservation Plans	Option for smaller municipal water suppliers	Dwight French, Chris Kowitz	Yes	No	2018	Underway
Division 87 (New Rule Division)	Municipal Reclaimed Water	Dwight French, Kerri Cope	Yes	No	2018	Underway
*Division 300 Definition	Definition updates	Dwight French, Mabelle Bamberger	Yes	No	2018	Planning
*Division 310 Water Right Application Process	Conversion of Memos to rules and clarify opportunity for settlement discussion after a protest has been filed	Dwight French, Mabelle Bamberger	Yes	No	2018	Planning
*Division 500 Basin Program Preamble	Minor updates	Dwight French, Mabelle Bamberger	Yes	No	2018	Planning

Rule Division	Topic	Lead Staff	RAC Planned or Convened?	GWAC Input Expected?	Target WRC Date	Status
Division 77 Instream Water Rights	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight French, Laura Wilke	Yes	No	2018	Planning

- Division 300, 310, and 500 are planned to be done together.