



Oregon

Kate Brown, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item H, June 15, 2018
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions

Since the March meeting the Department has hired one new employee, processed a transfer, made one limited duration appointment permanent and promoted one staff member. Positions filled include two Payroll Technicians, one Assistant Watermaster and one Well Licensing Specialist.

II. Commission Follow Up

A. Umatilla Water Supply Project

The Department has an \$11 million grant agreement with the Port of Morrow to implement one or more infrastructure projects that will deliver water primarily to lands that are currently not irrigated or are under-irrigated. These funds come from a direct appropriation from the Legislature in 2015 to assist with financing water supply projects in the Umatilla Basin. The Port of Morrow is in the process of entering into a sub-agreement with the East Improvement District for construction of an irrigation pipeline referred to as "East Project." In mid-January, the Department received a project plan and budget for the East Project. Of the \$11 million grant, \$7 million would go to help construct a pump station on the Columbia River two miles northeast of Hermiston, and an approximately 9 mile long pipeline that would travel south from the Columbia River down into the Stage Gulch Critical Groundwater Area. The maximum capacity of the new pipeline will be 200 cfs, sufficient capacity to convey new water rights associated with this project as well as other existing rights. The Port of Morrow and East Improvement District are working to secure construction permits and hope to start construction in the fall of this year. Since the March Commission meeting, the two project partners have secured a number federal and state permits needed.

The Department is also processing eight new Columbia River surface water rights and their associated mitigation for the East Project and any other projects funded by this grant. Two of the eight permits have been issued. Another Final Order has been issued for a third water right application that recently secured mitigation and is working to demonstrate compliance with select

permit conditions prior to permit issuance. The Department continues to process the five other applications and their mitigation.

B. Mosier Update

Mosier Commingling Well Repair and Replacement Program

Four comingling wells have been replaced by a drilling contractor retained by the Wasco County Soil and Water Conservation District (SWCD). The driller is contracted 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 the Legislature in 2015. As of early June, the driller was working to abandon and replace a fifth well, and plans to continue work through the summer and fall to complete the contract.

Mosier Deep Supply Wells

Two deep supply wells were planned for construction utilizing Water Project Grant 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 and streamflows in Mosier Creek. Well 1 was drilled to a depth of 1,223 feet below ground surface, where a high pressure water bearing zone was encountered. Several months of work were required before the driller sealed-off the upper water bearing zones and controlled the underlying high pressure zone in January, and complications with casing set depth during placement of the final well seal necessitated additional work before the well was completed in April. The extraordinary and unique challenges of drilling and completing Well 1 resulted in a significant budget overrun.

Wasco County SWCD, the contracted driller, Department staff, and the owners of Well 2 met in mid-April to discuss the project budget and well design modifications to Well 2 based on drilling experience with Well 1. The SWCD applied to Water Project Grants and Loans during the 2018 grant cycle for an additional \$671,724 in funds necessary to drill and complete Well 2.

C. Walla Walla Subbasin Groundwater Update

Staff continue to collect water levels and assess well interference, aquifer hydraulics, and geologic structures in the Walla Walla Subbasin. Construction of a dedicated basalt observation well near Milton-Freewater was completed to a total depth of 740 feet below ground surface in April.

The Department has taken on an OSU master's degree candidate as a summer intern and contracted with the U.S. Geological Survey (USGS) to collect and analyze groundwater samples from up to 25 basalt wells for stable isotope and other geochemical analyses. This work will support determination of hydraulically connected groundwater subareas in the Walla Walla Subbasin that may be the basis of future management units and/or areas within which basalt groundwater users may propose voluntary agreements for aquifer management.

As of early June, the Department has approved measurement cost share agreements with 21 basalt well owners affected by the Serious Water Management Problem Area (SWMPA) designation totaling approximately \$29,000. The SWMPA designation goes into effect January 1, 2019.

Department staff plan to hold a series of public meetings in the basin this winter to review the SWMPA requirements, communicate the Department's plans for compliance checks, and answer any remaining questions from the community.

D. Willamette Basin Review Feasibility Study Update

The Army Corps of Engineers (Corps) is continuing onto the next phases of the Willamette Basin Review Feasibility Study. The next phase includes consultation with the National Marine Fisheries Services on the proposed action. Prior to engaging on consultation, the Corps formally requested a letter from the state regarding our support for the allocation volumes and the proposed water management plan. A letter was sent to the Corps on May 14, 2018.

The Department has been meeting with agency partners, the Governor's Office, and stakeholders since late January to discuss concerns and answer questions regarding the allocations proposed in the November 2017 draft integrated report. The Department, in its letter, asked the Corps to move forward with Allocation Alternative C, which re-distributes the joint-use storage space of 300,000 acre-feet to three main sectors—irrigation, municipal and industrial, and fish and wildlife. This alternative brings each sector closer to its peak demand estimate calculated in the draft report and it further addresses concerns raised during public comment and discussions among agencies and stakeholders.

Several key questions remain around how implementation will work in a dry water year, when storage is insufficient to meet all contractual obligations. The Department will be forming a working group made up of various interests to further the conversation surrounding implementation of the Willamette Basin Review.

The Study's completion date has been extended from August 2018 to the end of the 2018 or possibly early 2019. The extension will allow more time for a federal review process that must occur prior to completion of a Chief's Report.

E. Place Based Planning Update

In early May, the Department along with Sustainable Northwest and Oregon Consensus brought together a delegation from each of the four planning groups to share lessons learned and best practices. The planning groups see a need to stay connected throughout the planning process and continue to look for opportunities to learn from and support each other.

The Department has initiated a partnership with the Climate Impacts Research Consortium (CIRC), who is available to provide support to the four planning groups as they analyze climate change impacts to water supply and demand and develop adaptation strategies. The assistance offered by CIRC will be a valuable asset to the planning groups and will add credibility to their final plans.

The Ford Family Foundation, along with the conveners of each of the planning groups and members of the Department are initiating an ongoing Learning Partnership this summer. With financial assistance from the Foundation, the four planning groups will be able to attend and

observe meetings of the other groups and also spend time building essential connections and skills to elevate their work.

The Place-Based Planning Groups each continue to make progress in the five planning steps:

- The **Upper Grande Ronde** group anticipates completing Step 3 and having a summary report out this summer. Four working groups (municipal, agriculture, instream, and natural hazards) have been working to compile and synthesize information for the Step 3 summary report.
- The **Mid-Coast** group initiated Step 3 and have three working groups (instream/ecology, self-supplied, municipal/district supplied) that are compiling and synthesizing information to understand current and future water needs/demands.
- The **Lower John Day** group is working to finalize its Step 2 summary report and has begun work on Step 3. Partners are critical to assembling the technical information for the report.
- The **Harney** group has four working groups (vegetation management, municipal/domestic, agriculture [groundwater], and ecological) that meet regularly to characterize the water situation from different perspectives and understand current water uses and needs.

F. Drought Update

Thus far in 2018 the Governor has declared drought in four Oregon counties: Klamath, Grant, Harney, and Lake Counties. The Governor's Executive Orders call upon state agencies such as the Water Resources Department, Department of Agriculture, and Office of Emergency Management to provide technical support to counties during drought. The Executive Orders expire on December 31, 2018. Drought declaration requests from Baker and Douglas Counties were pending at the time of this request.

A dry winter with below normal snowpack has created drought conditions throughout much of the state. Warmer, drier conditions are forecast for the summer months. The U.S. Drought Monitor now places most of the state in D1 "Moderate" Drought Conditions, with D2 "Severe" Drought Conditions in the southeast corner of the state. Oregon's Water Supply Availability Committee and Drought Readiness Council continue to meet regularly to track water conditions and process any requests for Governor's drought declarations. To track drought declarations throughout the summer, please visit:

https://apps.wrd.state.or.us/apps/wr/wr_drought/declaration_status_report.aspx.

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.

On May 11, 2018, the Court ordered that this case be reactivated – opening brief is due June 8, 2018.

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.

On November 15, 2017, the Court affirmed the Commission did not err in denying the company's permit application.

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 Department's 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.

Petitioners motion for summary judgment was granted and signed by Judge Thomas M. Hart on March 2, 2018.

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: (1) Motions to dismiss presented by state and federal defendants should be granted; and, (2) 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 and the State replied in support of the 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. On May 24, 2018, the Court of Appeals affirmed dismissal of the case.

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.

On April 14, 2017, petitioners filed a notice of appeal with the Oregon Court of Appeals.

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; Agriwater, LLC; Roger Nicholson; Nicholson Investments, LLC; Mary Nicholson, 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.

Petitioners filed a notice of voluntary dismissal on February 9, 2018. Marion Circuit Court Judge Courtland Geyer signed the general judgment of dismissal on February 12, 2018.

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.

Petitioners filed a notice of voluntary dismissal on January 23, 2018. Marion Circuit Court Judge Lindsay R. Partridge signed the general judgment of dismissal on January 30, 2018.

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.

Marion County Circuit Court Judge Bennett signed a stipulated general judgment of dismissal on March 6, 2018.

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 was voluntarily withdrawn on October 17, 2017. Marion County Circuit Court Judge Bennett signed a judgment of dismissal on December 15, 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 was voluntarily withdrawn on October 17, 2017. Marion County Circuit Court Judge Bennett signed a judgment of dismissal on December 15, 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.

Petitioners motion for summary judgment was granted and signed by Judge Thomas M. Hart on March 2, 2018.

IV. Commission/Board Schedules for 2018

<i>Commission/Board</i>	<i>Location</i>	<i>Date</i>
Board of Forestry	Salem	July 24, 2018
Land Conservation and Development Commission	Salem	July 26-27, 2018
Parks and Recreation Commission	Condon	Sept. 18-19, 2018
Fish and Wildlife Commission	Salem	August 3, 2018
State Land Board	Salem	August 14, 2018
Environmental Quality Commission	Portland	July 12-13, 2018
Watershed Enhancement Board	Cascade Locks	June 26-27, 2018
Board of Agriculture	North Bend	Sept. 25-27, 2018

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 54 (New Rule Division)	Hydro conversion to instream	Mary Graine	Yes	No	Late 2018	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	2018	Planning
Division 86 Water Management and Conservation Plans	Option for smaller municipal water suppliers	Dwight French, Chris Kowitz	Yes	No	Late 2018	Underway
Division 87 (New Rule Division)	Municipal Reclaimed Water	Dwight French, Kerri Cope	Yes	No	Late 2018	Underway
*Division 300 Definition	Definition updates					
*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	Yes	No	2019	Planning
*Division 500 Basin Program Preamble	Minor updates					