



Oregon


Kate Brown, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director 

SUBJECT: Agenda Item K, November 16, 2018
Water Resources Commission Meeting

Director's Report

I. Current Events:

New Staff & Staff Promotions

Since the September meeting the Department has hired one new employee, promoted one staff member and processed one lateral transfer. Positions filled include a hydrogeologist, a region manager, and an assistant watermaster.

II. Commission Follow Up

A. Umatilla Water Supply Project Update

The Department has an \$11 million grant agreement with the Port of Morrow to implement one or more infrastructure projects to 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 working with two project partners on two separate projects.

The first project is the "East Project," which intends to use \$7 million of the grant funds to help construct a pump station on the Columbia River and a nine mile long pipeline that would travel south down into the Stage Gulch Critical Groundwater Area (CGWA). The maximum capacity of the new pipeline will be 200 cfs. The Port of Morrow and East Improvement District are working to secure construction permit.

The second project (the "CID Project") proposes to use \$4 million in grant funds to construct a new irrigation pipeline parallel to Columbia Improvement District's (CID) existing pipeline, as well as perform other infrastructure upgrades to the system booster stations and canal. CID submitted a revised project in early October, which the Department reviewed and approved. The project plan is now under review by the Oregon Department of Justice, and if approved will be appended to the Port of Morrow grant agreement.

The Department is also processing eight new Columbia River surface water rights and 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. The permit holder 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 proposals. The permits cannot be issued until mitigation is secured.

In September, the Governor requested the Department and Regional Solutions work with interests in the Umatilla Basin to form a Basalt Stabilization Work Group. The work group was tasked with producing a set of recommendations on approaches to basalt aquifer water level stabilization. The work group has been convened by Regional Solutions and the Department is participating as an advisory member. The first meeting for the work group was held on October 15, 2018 and the second meeting is scheduled for November 15, 2018. Conversations to date have focused on the status of the CGWAs and options to stabilize the basalt aquifers, with a particular focus on a potential pilot that would reduce groundwater extraction by replacing allocated groundwater with surface water from the Columbia River. The pilot would then monitor groundwater level responses. Further discussion is needed to explore this concept.

This focus on the Umatilla Basin CGWAs departs from the strategy previously shared with the Commission in March 2018 (Agenda Item A – Review of Conditions in Critical Groundwater Areas). In March, the Department discussed with the Commission that given limited resources, it would focus on efforts to understand the groundwater resources and establish administrative areas as appropriate in those areas without current protections (as opposed to re-evaluating the protections in established areas that continue to see declines). Renewed focus on the Umatilla Basin will likely delay current basalt groundwater evaluation efforts in the Fifteenmile Creek basin near The Dalles.

C. Mosier Commingling Well Repair and Replacement Program Update

Seven commingling wells have been replaced by a drilling contractor retained by the Wasco County Soil and Water Conservation District (SWCD). The driller is contracted to abandon 15 priority commingling wells and construct replacement wells in the Mosier area with \$1 million in cost-share funds made available by the Legislature in 2015. The funding agreement with the SWCD has been extended until June 30, 2019, and the SWCD anticipates that 14 wells will be repaired or replaced during the contract period. The driller returned to the Mosier area in early November after about a one-month absence to do rig maintenance and attend to other business. The driller has mobilized a second drill rig to the site and plans to use both of his rigs to finish the Mosier work.

D. Walla Walla Subbasin Groundwater Update

The Serious Water Management Problem Area designation adopted by the Commission goes into effect January 1, 2019, in the Walla Walla Subbasin. The Department will hold two public meetings in Milton-Freewater on December 13 and 14 to review the SWMPA requirements, communicate the Department's plans for compliance checks, and answer any remaining questions from the community.

The Department has not received any additional measurement cost share applications since early June 2018. The Department has agreements for cost-share dollars totaling approximately \$29,000 in place with 21 basalt well owners affected by the Serious Water Management Problem Area (SWMPA) designation. The program will be re-advertised during the December public meetings.

E. Klamath Update

Regulation

The call for regulation by the Klamath Tribes, holder of senior determined claims, expired on November 1, 2018. In past years, the Klamath Tribes have called on the instream determined claims during winter months, which can result in regulation of junior rights and determined claims. Currently, water right holders with a year round season of use, or a use that extends beyond October 31, may exercise their right or determined claim. These winter time uses are typically for livestock, storage, industrial, domestic, and municipal or quasi-municipal uses.

On September 6, 2018, the Water Resources Commission delegated authority to the Director to issue orders granting a preference for human consumption and stock water use. This delegation of authority expires January 1, 2019. On September 21, 2018, the Director issued a final order in other than contested case, providing for a temporary preference for specified water right holders to use water for human consumption or stock watering. The temporary preference will expire on December 31, 2018 or on the date that the Governor's declared drought ends, whichever is sooner. The final order, issued by the Director, includes those specific entities that were approved to exercise the preference for human consumption use or stockwatering.

The Bureau of Reclamation is working on a new biological opinion for project operations in the basin, with the intent of finalizing that document before the 2019 irrigation season. This document will likely influence how the Bureau of Reclamation allocates water in the Klamath Project.

Streamflow

Upper Klamath Lake levels remain lower than long-term historical levels. The lake began to fill in late October. Streamflows – as measured at gaging stations with long-term periods of record – remain at unusually low levels.

Looking Forward

The Department continues to evaluate ways to streamline and improve data collection in the Klamath Basin, and improve processes around regulation of junior users to protect senior water right and determined claim holders.

F. Deschutes Water Summit Update

The State, along with the Confederated Tribes of Warm Springs, convened the Deschutes Water Summit on October 20-21, 2018. The event provided a time to: reconnect those working on water-related issues in the basin, share information, identify concerns and needs, and begin charting a path forward. The event was attended by over 150 people, representing approximately 70 organizations. The meeting was a mix of presentations and panel discussions on activities and

issues in the Upper, Middle, and Lower Deschutes River. Follow-up meetings are being planned to maintain the momentum generated during the Summit.

G. Willamette Basin Review Update

As reported at the September Commission meeting, the United States Army Corps of Engineers (Corps) re-entered into consultation with the National Marine Fisheries Service (NMFS) on whether the reallocation of water in the Willamette Reservoirs would jeopardize ESA-listed fish species. NMFS indicated they would strive to have a biological opinion on this issue for the Corps by the end of November 2018, thus keeping the Corps on their modified project schedule.

On October 15, 2018, NMFS submitted a letter to the Corps stating the consultation would consider the effects the proposed reservoir reallocation may have on all 16 listed species and their critical habitats in the Willamette, Columbia, and Snake rivers, as well as areas off the Pacific Coast that support the Southern Resident Killer Whales. This is a broader evaluation than the Corps had anticipated in the consultation, but it is consistent with the Willamette 2008 Biological Opinion. The letter further stated NMFS would provide a biological opinion to the Corps by January 26, 2019. The Corps has stated the delay will require a waiver from the Assistant Secretary of the Army to develop a new project schedule.

H. Key Performance Measure Update

Each year, the Department compiles and submits a report on 14 Key Performance Measures. The Department's 2018 Key Performance Measures Report is available online at: https://www.oregon.gov/owrd/wrdreports/APPRProposed_WRD_2018.pdf (or search the Publications and Reports section on www.oregon.gov/owrd/).

Key Performance Measures (KPMs) are reviewed by the Joint Ways and Means Subcommittee on Natural Resources during the Department's budget presentation. The Subcommittee approves the measures as well as the targets for those measures when the Subcommittee approves the Department's budget. With feedback from stakeholders, staff, and the Commission, the Department considered proposing changes to three key performance measures for the Subcommittee to consider. After receiving input from the Legislative Fiscal Office and Department of Administrative Services, the Department proposed changes to two Key Performance Measures. Specifically, this includes deleting KPM #6 (percent of water management related datasets collected by WRD that are available to the public on the internet), and replacing KPM #2 (ratio of the streams regulated to protect instream water rights to all streams regulated) with the following measure: "*Number of regulatory orders issued to protect instream water rights.*"

I. Onboarding

Onboarding is the process during the first six months of employment, in which staff acquire the necessary knowledge, skills, and behaviors to become effective employees. Early staff input during the Strategic Planning efforts identified that a more structured onboarding process would greatly benefit agency operations. The Department is developing an onboarding process to ensure it

consistently provides employees with the right information and training when hired into a new position. Human Resources has been leading a three-person, cross-divisional team to scope and plan this work, and anticipates initial products will be circulated internally in late 2018/early 2019.

J. Scenic Waterway Update

In May 2017, Oregon Parks and Recreation Department (OPRD) evaluated 17.5 miles of the Nehalem River for possible designation as a Scenic Waterway. An advisory group composed of local landowners, recreationists, government agencies, and interest groups was established in order to develop draft management plans for land and water use within the proposed Scenic Waterway. Since then, there have been two advisory committee meetings and two public comment periods. Public testimonials generally expressed support for the Scenic Waterway designation, as well as the corresponding draft flow recommendation provided by Oregon Water Resources Department (OWRD).

The public meeting on September 6, 2018, initiated a 30-day public comment period for the draft management plan and draft flow recommendation. OPRD will summarize the comments and work with the advisory committee to respond to the comments. If general support for the designation still remains, in November 2018, the Oregon Parks and Recreation Commission (OPRC) will make a decision on whether to designate the Nehalem River study reach as a Scenic Waterway. If the OPRC approves the designation, OWRD will seek concurrence on the Scenic Waterway designation and approval of the proposed Scenic Waterway flow recommendation from the Oregon Water Resources Commission (OWRC). If both OPRC and OWRC agree with the recommendation to designate as a Scenic Waterway, both recommendations will be forwarded to the Governor's Office for review.

III. Litigation Update

2018 U.S. District Court Filings

Schrock, Duane Michael et al v. Water Resources Department, United State District Court Case No. 2:18-CV-01264-SU

A complaint for declaratory judgment and preliminary and permanent injunction was filed on July 16, 2018.

2018 Circuit Court Filings

Topham Family Trust v. Oregon Water Resources Department, Marion County Circuit Court Case No. 18CV18092

A petition for judicial review of final orders in other than contested case was filed on May 3, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Klamath Irrigation District v. Oregon Water Resources Department, Marion County Circuit Court Case No. 18CV18112

A petition to compel agency action was filed on May 6, 2018, regarding dividing or distributing the water of various users. KID notified DOJ on October 16, 2018, that they have concluded their irrigation deliveries and no longer require the Department to divide or distribute the water.

Mallams, et al. v. Water Resources Department, Klamath County Circuit Court Case No. 18CV19777

A petition for judicial review of final orders in other than contested case was filed on May 16, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Plaintiffs filed a notice of dismissal without prejudice on July 13, 2018. On July 23, 2018, Judge Wogan signed the dismissal.

Stroemple v. Oregon Water Resources Department, Marion Circuit Court Case No. 18CV20093

A petition for judicial review of final order in other than contested case was filed on May 16, 2018, for the regulation of water from surface water for irrigation.

Stroemple v. Oregon Water Resources Department, Marion Circuit Court Case No. 18CV33351

A petition for judicial review of final order in other than contested case was filed on July 31, 2018, for the Order Denying Stay issued by the Department on June 1, 2018. A stipulated motion to dismiss was granted by the court October 23, 2018.

Krueger, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV20167

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on May 17, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Newman, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV26124

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Brooks, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV26126

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Wilks Ranch Oregon Ltd., v. Water Resources Department, Marion County Circuit Court Case No. 18CV26122

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Jacobs v. Water Resources Department, Marion County Circuit Court Case No. 18CV26118

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Melsness, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV26153

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Duarte, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV26125

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Miller, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV26130

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on June 25, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Edwards, et al. v. Water Resources Department, Marion County Circuit Court Case No. 18CV28865

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on July 10, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Emery v. Water Resources Department, Marion County Circuit Court Case No. 18CV34039

A petition for judicial review of final orders in other than contested case, and complaint for declaratory judgment and injunction was filed on August 3, 2018, for the regulation of groundwater use for senior surface water rights in the Klamath Basin.

Kalkhoven v. Oregon Water Resources Department, Marion Circuit Court Case. No. 18CV34480

A petition for judicial review of final order in other than contested case was filed on August 7, 2018, for the regulation of water from surface water for irrigation.

Court of Appeals Filings

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. On June 22, 2018, the Court of Appeals granted a motion to hold the appeal in abeyance through July 23, 2018.

Sees, Duncan, and Stonier v. Oregon Water Resources Department and Water Resources Commission, Oregon Court of Appeals Case No. A165952

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. The Court also found that the State's findings of hydraulic connection and its stream relief calculations were 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.

WaterWatch v. Oregon Water Resources Department, Oregon Court of Appeals Case No. A165160

This case involves an order in an other-than contested case issued by the Department, specifically the renewal of an instream lease of a water right held by Warm Springs Hydro, LLC. WaterWatch asked 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. Oral arguments were held August 30, 2018. A decision is pending.

Micke v. Oregon Water Resources Department and Commission, Oregon Court of Appeals Case No. A164638

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 Mickes filed a petition for judicial review. Various motions were filed by both the petitioners 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.

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 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.

TPC, LLC., and Hyde v. Oregon Water Resources Department, Oregon Court of Appeals Case No. A167380

On March 21, 2018, the State of Oregon filed a motion for stay of judgment pending appeal on TPC and Hyde Case No. 16CV27427 and 17CV26962. The petitioners requested attorney fees and a request for findings and conclusions. The State opposed the request. The petitioners opposed the State's response on May 7, 2018.

Hyde's filed an appeal on June 5, 2018. On August 17, 2018, the Appellate Commissioner issued an order granting a motion to stay the trial court's judgment for the duration of the appeal.

IV. Commission/Board Schedules for 2018

<i>Commission/Board</i>	<i>Location</i>	<i>Date</i>
Board of Forestry	TBD	TBD
Land Conservation and Development Commission	Seaside	Nov 15 & 16, 2018
Parks and Recreation Commission	Lebanon	Nov 27 & 28, 2018
Fish and Wildlife Commission	Salem	Dec 7, 2018
State Land Board	Salem	Dec 18, 2018
Environmental Quality Commission	Portland	Nov 15 & 16, 2018
Watershed Enhancement Board	Cannon Beach	Jan 15 & 16, 2019
Board of Agriculture	McMinnville	Nov 27, 28 & 29, 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	2019	Underway
Division 77 Instream Water Rights	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight French, Lisa Jaramillo, Sarah Henderson	Yes	No	2019	Planning
Division 86 Water Management and Conservation Plans	Option for smaller municipal water suppliers	Dwight French, Chris Kowitz	Yes	No	Nov 2018	Underway
Division 87 (New Rule Division)	Municipal Reclaimed Water Registrations	Dwight French, Kerri Cope	Yes	No	Early 2019	Underway
Division 77	Instream Leases and Transfers of Stored Water	TBD	Yes	No	TBD	Planning
*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					