



## MEMORANDUM

**TO:** Water Resources Commission

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

**SUBJECT:** Agenda Items J & K, November 21-22, 2019  
Water Resources Commission Meeting

**Commission's Consideration of Exceptions to Director's Final Order  
for Water Right Application R-87871 in the Name of East Valley Water District**

### **I. Introduction**

On November 22, 2019, the Commission anticipates making a decision regarding the exceptions to the Director's Final Order in the Matter of Water Right Application R-87871 in the Name of East Valley Water District. Oregon law requires the Commission to consider the exceptions to the Director's Final Order and to issue a modified Final Order or affirm the Director's Final Order.

### **II. Background**

On February 21, 2013, East Valley Water District submitted an application to the Department for a water storage permit. The application proposed to store 12,000 acre-feet of water, primarily for irrigation, in a reservoir located on Drift Creek, near Silverton, Oregon. On July 22, 2014, the Department issued its Proposed Final Order (PFO) approving application R-87871, with conditions.

Joel D. Rue, Bruce P. Jaquet, Robert B. Qualey, Steve Lierman, David Doerfler, Zach Taylor, Tom and Karen Fox, and John and Sharon Fox (collectively, the Rue Protestants) and the public interest group WaterWatch of Oregon, Inc. (WaterWatch) filed protests to the PFO on September 8, 2014. The protests asserted, among other issues, that the proposed use would impair or be detrimental to the public interest under ORS 537.153(2); that the proposed use does not comply with the rules of the Water Resources Commission regarding water appropriation, instream flow protection, impacts of water storage projects, access rights, peak and ecological stream flows, the IWRS and off-channel storage policy, and sensitive, threatened, or endangered fish species; that the proposed use will impair or be detrimental to the public interest under ORS 537.170(8); and that the PFO did not adequately address public comments opposing the project.

On November 3, 2016, the Department referred the protests to the Office of Administrative Hearings (OAH) for a contested case hearing. An Administrative Law Judge (ALJ) with OAH conducted a two-week contested case hearing in Salem, Oregon, from June 18 through June 29, 2018. At the hearing, the Department, East Valley Water District, the Rue Protestants, and WaterWatch were each represented by counsel. At the hearing, thousands of pages of exhibits were admitted into the record, and dozens of witnesses provided oral testimony.

The ALJ issued a 93-page Proposed Order on February 25, 2019. The ALJ's Proposed Order largely affirmed the Department's Proposed Final Order, with some recommended modifications. On March 27 and 28, East Valley Water District, the Rue Protestants, and WaterWatch each filed exceptions to the ALJ's Proposed Order with the Department.

The Director considered the parties' exceptions and issued a Final Order on September 13, 2019. The Rue Protestants and WaterWatch timely filed exceptions to the Director's Final Order with the Commission on October 3, 2019.

### **III. Consideration of Exceptions to the Director's Final Order**

At the June 13, 2019, Commission meeting, the Commission appointed a subcommittee of commissioners to review the anticipated exceptions to the Director's Final Order. The appointed subcommittee comprised Commissioners Bruce Corn, Joe Moll, and Meg Reeves.

The subcommittee and Commission considered the exceptions to the Director's Final Order. The Commission must either (1) issue a modified Final Order or (2) deny the exceptions and affirm the Director's Final Order. ORS 537.173; OAR 690-002-0190.

### **IV. Next Steps - Issuance of Commission's Final Order**

On November 21, 2019, the subcommittee will present the subcommittee's recommendations regarding the consideration of exceptions made to the Director's Final Order.

On November 22, 2019, the full Commission will hear oral argument, recess the public meeting in order to deliberate, and then reconvene the public meeting to vote on whether to allow one or more exceptions and issue a modified Final Order or deny the exceptions and affirm the Director's Final Order.

### **V. Alternatives**

The Commission may consider the following alternatives:

1. Issue a modified final order.
2. Deny the exceptions and affirm the Director's Final Order.

**VI. Recommendation**

The Subcommittee recommends the Commission adopt Alternative 1.

Rachel Weisshaar, Assistant Attorney General, Oregon Department of Justice, Renee Moulun, Assistant Attorney in Charge, Oregon Department of Justice  
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**Attachments:**

Attachment A: Memorandum of the Subcommittee

Attachment B: Director's Final Order

Attachment C: Rue Protestants' Exceptions

Attachment D: WaterWatch of Oregon's Exceptions