



# Oregon

Kate Brown, Governor

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## MEMORANDUM

**TO:** Water Resources Commission  
**FROM:** Thomas M. Byler, Director  
**SUBJECT:** Agenda Item C, June 24, 2020  
Water Resources Commission Meeting

### Director's Report

#### I. Current Events and Updates

##### A. Umatilla Water Supply Project Update

The Department has an \$11 million grant agreement with the Port of Morrow 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 East Project is using \$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 estimated total project cost is approximately \$53.7 million. The Port of Morrow and East Improvement District partnered on this project, which is in the middle of construction. COVID-19 may impact the construction timeline, due to material procurement delays; however, the partners currently expect to complete construction this summer.

The Columbia Irrigation District (CID) Project or West Project is using \$4 million in grant funds to construct a new irrigation pipeline parallel to CID's existing pipeline, as well as perform other infrastructure upgrades to the system booster stations and canal. The total cost of the CID Project is approximately \$28.9 million. The Department is pleased to report that the CID Project completed construction and started delivering Columbia River water in spring of 2020.

The Department is also processing eight new Columbia River surface water rights and associated mitigation for the projects funded by this grant. Seven of the eight permits have been issued. The Department continues to process the final application, which is awaiting mitigation prior to permit issuance.

## **B. Klamath Basin Update**

Below normal precipitation and snow pack is resulting in low stream flows. The Klamath Tribes submitted a call in early March for water to satisfy their instream water rights which were recognized in the Amended Corrected Finding of Fact and Order of Determination (ACFFOD) in the Klamath Adjudication.

The watermaster validated the call by measuring stream flows and confirmed that stream flows were less than the rate of flow which is entitled under the instream rights. Notices were sent to all surface water users in the Williamson River basin directing that water use would no longer be allowed. Regulation is also occurring in the Wood River basin. Flows there have been sufficient to meet the Tribal instream water rights and some other rights with senior priority dates. The watermaster and staff continue to monitor and adjust the usage as appropriate.

A Petition for Judicial Review of regulation orders issued to the Hyde family was filed in Marion County Circuit Court. Filing a Petition for Judicial Review results in an automatic stay of the regulation order (ORS 536.075). The Director issued an order denying the stay after finding that continued use of water by the Hyde's would cause substantial public harm. The Hyde's have filed previous petitions in prior years, one of which the case is now pending before the Court of Appeals.

The Bureau of Reclamation (BOR) issued the Project Operation Plan for 2020 in early April. The plan states that up to 140,000 acre feet of water will be available for irrigation use within the project. The BOR states that full delivery is 350,000 acre feet. After the April announcement, the weather pattern turned warm and dry prompting concern that far less than 140,000 AF would be available. The Klamath Basin has experienced a cooler and wetter May and June. The current weather pattern has somewhat eased the tensions in the basin.

Irrigators within the project are turning to groundwater to make up some of the shortage. There are 35,000 acres of supplemental water rights from groundwater in Oregon. In addition, the Governor issued an executive order in early March declaring drought in Klamath County. The drought declaration enables irrigators to file applications for drought permits. Drought permits allowing supplemental irrigation of 20,000 acres from groundwater were issued between March 1 and May 31, within the Oregon portion of the Klamath Project. Drought permit applications continue to be filed. In the past, the BOR has provided funding to monitor groundwater pumping and water levels within the project; however, that funding is no longer available. Staff are continuing to seek funding to continue collecting this critical data.

The Klamath Irrigation District filed a motion for an Alternate Writ of Mandamus in Marion County Circuit Court against the department in mid-April. The Writ was issued directing the department to take exclusive charge of Upper Klamath Lake under ORS 540.210. The Commission delegated authority to the Director to issue subpoenas, collect information and conduct an informational hearing.

Subpoenas requesting information have been issued to the BOR, Klamath Irrigation District and PacifiCorp. Water users around Upper Klamath Lake have been contacted and have been requested to supply information about where they divert water and how much they divert. Some water users who divert water from the Klamath River below Upper Klamath Lake are also being contacted and are being asked to provide water use and diversion information. Staff are analyzing the information.

A Stipulated Judgement of Dismissal ended this court action in mid-May. The Klamath Irrigation District subsequently filed a Complaint for Declaratory and Injunctive Relief under ORS 540.740 in Marion County Circuit Court. Staff are working with legal counsel to respond to the filing and to prepare for a hearing. The complaint is alleging that the watermaster is not carrying out the provisions of the ACFFOD.

### **C. Walla Walla Subbasin Update**

In late 2019, the Department entered into a one-year cost share agreement with the United States Geological Survey (USGS) to begin to collect data in the Walla Walla subbasin, review existing data and reports on the basin, and develop a multi-year groundwater basin study scope of work. The groundwater basin study will address the entire Walla Walla Basin and will be conducted in cooperation with the Washington Department of Ecology, the Oregon and Washington Water Science Centers of the USGS, and in coordination with the Confederated Tribes of the Umatilla Indian Reservation. These five entities have continued to meet via teleconferences to maintain coordination and provide progress updates. In mid-June the USGS presented an annotated study outline to the group and continued to gather input to further develop and refine the study scope of work.

The Department is also participating in the Walla Walla Water 2050 process led by the State of Washington. The Washington Legislature directed the Washington Department of Ecology to work with basin stakeholders to develop a 30-year strategic integrated water resources plan for the Walla Walla Basin. While this is an Ecology-led planning process, both states are interested in considering the water management needs for the basin as a whole, to the extent possible. The Department serves on the Strategic Plan Advisory Committee as well as a number of working groups.

The Department also engages regularly with Washington Department of Ecology and the Confederated Tribes of the Umatilla Indian Reservation to discuss individual and joint efforts as co-managers of the Walla Walla Subbasin.

### **D. Willamette Reservoir Reallocation Update**

A milestone in the USACE Willamette Basin Feasibility Study was met in December 2019 with the signing of the Chief's Report. The Chief of Engineers then transmitted the report containing the recommended reallocation volumes and management proposal to the Assistant Secretary of the Army for Civil Works (ASA (CW)) and Congress. ASA (CW) provided comments on the Report, and the Corps responded. The ASA (CW) then transmitted the report to the Office of Management and Budget (OMB) for input on the project in relation to the programs of the President.

Following OMB's review the ASA may direct USACE to sign the Finding of No Significant Impact (FONSI), stating the project will have no significant impact to the environment. After signature of the FONSI the Corps will notify the State of Oregon and other interested parties.

On March 20, 2020, several environmental groups, including WaterWatch of Oregon, Northwest Environmental Defense Center, and WildEarth Guardians, filed a preliminary injunction alleging the Corps violated Section 7(d) of the ESA by completing the Willamette Basin Review Reallocation Study in advance of the concluding the Willamette Valley System Operation and Maintenance EIS's Section 7 consultation. The Government filed its opposition to the preliminary injunction on April 14, 2020. The Plaintiffs filed their reply on April 28, 2020. The Oregon Farm Bureau and Oregon Water Utility Council have intervened on behalf of the Government. The preliminary injunction hearing took place on May 26, 2020.

## **E. Revenue Forecast and State of Oregon Agency Budgets**

COVID-19 is having a significant impact on the daily lives of all Oregonians, with many facing severe economic hardships. In preparation for action after the May 20 revenue forecast, the Governor directed all agencies to provide the Department of Administrative Services with an 8.5 percent General Fund cost-savings recommendations list by May 8 for the 2019-2021 biennium. [Click here to view the Department's list of recommended cost-saving measures.](#)

These proposed cost-savings measures are based on the premise that the reductions would be implemented based on the Governor's allotment reduction authority, which requires reductions to be taken evenly across appropriations. The Oregon Water Resources Department has five appropriations: Director's Office, Water Rights Services, Field Services, Administrative Services, and Technical Services. The Legislative Fiscal Office has prepared a [brief](#) on this authority. It is important to note that cost-savings measures included on the list are intended to be one-time savings, and not intended to be or reflect agency priorities for permanent reductions.

The State of Oregon's [revenue forecast](#) released in late May, states that "the baseline (most likely) scenario, General Fund and other major revenues have been reduced relative to the March forecast by \$2.7 billion in the current biennium and \$4.4 billion in the 2021-23 budget period...Fortunately, Oregon is better positioned than ever before to weather a revenue downturn.

Automatic deposits into the Rainy Day Fund and Education Stability Fund have added up over the decade-long economic expansion, and stood at \$1.6 billion in April. In addition to dedicated reserve funds, the General Fund had over one billion dollars in projected balances before the recession hit."

At this time, the Governor has not yet exercised allotment authority. The Department is continuing to hold off on making budget decisions that commit resources until there is further clarity.

## II. Litigation Update

### Circuit Court Filings

#### **Brooks v. Byler, Watson, and Water Resources Department, Marion County Circuit Court Case No. 19CV27798**

This case involves a petition for judicial review, filed August 24, 2019, of a regulation order issued by the Department in Klamath County that regulated groundwater in favor of the Tribes' senior surface water rights. A hearing on motion for summary judgement was held on February 10, 2020. On March 10, 2020, the court issued an order granting the Petitioner's motion and denying the Department's motion. The Department did not appeal.

#### **Klamath Irrigation District v. Oregon Water Resources Department, Marion County Circuit Court (2020) 20CV15606**

On April 17, 2020, Klamath Irrigation District (KID) filed a Petition for Alternative Writ of Mandamus in Marion County Circuit Court. The Alternative Writ of Mandamus is to compel the Department to perform its nondiscretionary duties arising under ORS 540.210, 540.410, and 540.720 to take charge of Upper Klamath Lake reservoir (UKL), in response to KID's April 3, 2020 Notice of Dispute pursuant to ORS 540.210. KID requested that the Department issue an order either allowing or prohibiting the Bureau of Reclamation (BOR) from diverting 50,000 AF of stored water in UKL through Link River Dam for purposes of a "flushing flow." Alternatively, KID requested an order requiring the Department to appear and show cause as to why it should not take charge of UKL.

A hearing was held on April 20, 2020. The judge issued the Writ on April 21, 2020. The court commanded the Department to take charge of UKL pursuant to ORS 540.210 and ORS 540.210(2). Specifically, it ordered the Department, effective April 21, 2020, to take exclusive charge of UKL for the purpose of dividing and distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir, and to continue the work until the necessity ceases to exist.

The court issued a Stipulated General Judgment of Dismissal on May 12, 2020 after receiving information from the Department that it had complied with the Writ.

#### **Taylor A. Hyde and John L. Hyde v. Oregon Water Resources Department and Dani Watson, Watermaster, Marion Circuit Court, Case No. 20CV16967**

On May 4, 2020, Taylor and John Hyde filed a Petition for Judicial Review in Marion Circuit Court of Watermaster regulatory orders directing the Hydes to cease diverting surface water in the Sprague River and Williamson River drainages following a valid call by senior surface water determined claims. On May 20, 2020, the Department issued an Order Denying Stay, reinstating the enforcement of the regulatory orders pending hearing. A Judge has been assigned but a hearing date has not been set.

**Klamath Irrigation District v. Oregon Water Resources Department, Marion County Circuit Court (2020) 20CV17922**

On May 14, 2020, Klamath Irrigation District (KID) filed a Complaint for Declaratory and Injunctive Relief in Marion County Circuit Court. The complaint was filed under ORS 183.490 and ORS 540.740. KID is seeking an injunction compelling the Department to carry into effect the Amended and Corrected Order of Determination (“ACFFOD”) in the Klamath Adjudication by ordering the Bureau of Reclamation (BOR) not to divert stored water through the Link River Dam for instream purposes unless or until it: obtains a water right or instream lease authorizing the use of water for such purpose, obtains a stay of the ACFFOD pursuant to ORS 539.180, or obtains a final judgment providing that federal law authorizes the BOR to use stored water in UKL reservoir for instream purposes without securing a water right in accordance with state law and the Reclamation Act. The hearing on this matter is set for June 18, 2020.

**Fern Valley Estates Improvement District v. Water Resources Department, Water Resources Commission, and Oregon Health Authority; Jackson County Circuit Court Case No. 20CV19061**

This case involves well construction deficiencies for two wells that supply a public water system in Jackson County. Enforcement commenced with a Notice of Violation being issued to Fern Valley Estates Improvement District on May 2, 2020. On May 27, 2020, the District filed a Petition for Judicial Review in Jackson County Circuit Court. A hearing date has not been set.

**Court of Appeals Filings**

**Brayman, et al. v. Oregon Water Resources Department and Oregon Water Resources Commission, Harney County Circuit Court, Consolidated Case No. 02-06-134-CV and 02-10-298-CV**

This longstanding issue, dating back to 2002 in Harney County, concerns management and enforcement of water rights consistent with the Silvies River Decree and the Department’s alleged violation of a settlement agreement. On November 4, 2019, the Court of Appeals granted the State a motion for stay of the Harney County Circuit Court decision for the duration of the appeal.

**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. 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.

Staff have worked with Blue Mountain Angus' Counsel to receive materials necessary to continue processing the Blue Mountain Angus transfer application. The Department is awaiting input from the Oregon Department of Fish and Wildlife and Oregon Department of Parks and Recreation. The Court has issued a new filing deadline of September 8, 2020 for the Department to issue an order on reconsideration.

**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 affirming the lower court's ruling in favor of the Department was issued June 10, 2020.

**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.

TPC and Hyde 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. Oral arguments were heard on November 6, 2019.

On May 19, 2020 the court dismissed TPC, LLC. from the case, as requested by TPC. The case is proceeding with Hydes as the lone petitioner.

**III. Upcoming Commission/Board Schedules**

<b><u>Commission/Board</u></b>	<b><u>Location</u></b>	<b><u>Date</u></b>
Land Conservation and Development Commission	Virtual	July 23-24
Parks and Recreation Commission	Virtual	June 16
Fish and Wildlife Commission	TBD	July - TBD
State Land Board	TBD	August 11
Environmental Quality Commission	TBD	July 16-17
Watershed Enhancement Board	Virtual	September 9
Board of Agriculture	Ontario	September 22-24

**Attachments:**

1. Rulemaking Calendar

Last Revision: 06/12/2020

## Oregon Water Resources Department Current/Anticipated Rulemaking

Rule Division	Topic	Lead Staff	GWAC Input Expected?	Target WRC Date	Status
<b>Division 54 (New Rule Division)</b>	Hydro conversion to instream	Mary Graine	No	TBD	On Hold
<b>Division 77 Instream Water Rights</b>	Consistency with SB 199 (2013) – allowing lease applications to be processed more efficiently	Dwight French, Lisa Jaramillo, Sarah Henderson	No	TBD	On Hold
<b>TBD – Klamath Groundwater</b>	Regulation of wells in the Klamath Basin	Ivan Gall	Yes	TBD	Not started
<b>Division 87 (New Rule Division)</b>	Municipal Reclaimed Water Registrations	Dwight French, Kerri Cope	No	2021	On Hold
<b>Division 77</b>	Instream Leases and Transfers of Stored Water	TBD	No	TBD	Not Started
<b>Division 205 &amp; 240 - Well Construction Licensing</b>	HB3030 and SB 688 Implementation	Kris Byrd	Yes	2020	Rules Advisory Committee