

Analysis
Water Resources Department
Contested Cases Report

Analyst: Matt Stayner

Request: Acknowledge receipt of the report

Analysis: Included in the budget report for 2019 House Bill 5043, the budget bill for the Oregon Water Resources department was the following budget note:

The department is directed to compile information regarding actions that the agency has taken that resulted in the agency being party to a contested case hearing or legal action since 2015. This includes past, current, and pending items as of July 1, 2019. For each case, the department must identify the legal question being addressed, the underlying statute(s) or administrative rule(s) that were, or are, the basis for the action that the agency undertook, and the fundamental basis or reasoning for the dispute against the agency's actions. If a statute or administrative rule is identified as being foundational to actions taken by the agency that are subject to multiple contested cases or other legal proceedings, the agency must provide a statement regarding the purpose for the statute or rule, what the agency is attempting to achieve by taking action on the statute or rule, and how future litigation regarding those actions might be avoided in the future. The agency is directed to report this information to the Joint Committee on Ways and Means in a format approved by the Legislative Fiscal Office by January 1, 2020.

In accord with the budget note, the agency submitted their report to the Co-Chairs of the Interim Joint Committee on Ways and Means December 31, 2019.

The report is broken into four sections, generally, with general information and context provided first followed by a presentation of litigation and contested cases that involve adjudication of existing water rights second, then litigation and contested cases dealing with applications for new rights, permit extensions, transfers, and cancellations. The report finishes with cases dealing with water distribution and regulation, well construction enforcement, and miscellaneous cases.

The report provides specificity on cases as needed and makes general observations about cases with similar circumstances or facts. The report presents a water regulatory framework that is both complex and contentious. Several cases remain pending, or unresolved for the entire period that the report covers.

Legislative Fiscal Office Recommendation: Approve the request



Oregon
Kate Brown, Governor

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December 31, 2019

The Honorable Senator Betsy Johnson, Co-Chair
The Honorable Senator Elizabeth Steiner Hayward, Co-Chair
The Honorable Representative Dan Rayfield, Co-Chair
Interim Joint Committee on Ways and Means
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

RE: Water Resources Department Budget Note Report on Litigation and Contested Cases

Dear Co-Chairpersons:

During the 2019 Legislative Session, a budget note was adopted directing the Oregon Water Resources Department (Department) to submit a report to the Joint Committee on Ways and Means on contested cases and litigation by January 1, 2020. The report is to include actions the agency has taken that resulted in the agency being party to a contested case hearing or legal action since 2015, and to include past, current, and pending items as of July 1, 2019. The budget note directed the Department to identify the legal question being addressed, the underlying statute(s) or administrative rule(s) that were, or are, the basis for the action that the agency undertook, and the fundamental basis or reasoning for the dispute against the agency's actions for each case.

If a statute or administrative rule is identified as being foundational to actions taken by the agency that are subject to multiple contested cases or other legal proceedings, the note directed the agency to provide a statement regarding the purpose for the statute or rule, what the agency is attempting to achieve by taking action on the statute or rule, and how future litigation regarding those actions might be avoided in the future.

As directed, the Department has developed the report pursuant to the budget note. A copy of the report is attached. Please let us know if you have questions, or if you would like a presentation on this report to the Joint Ways and Means Committee, or a subcommittee.

Sincerely,

The Honorable Senator Betsy Johnson, Co-Chair
The Honorable Senator Elizabeth Steiner Hayward, Co-Chair
The Honorable Representative Dan Rayfield, Co-Chair
Interim Joint Committee on Ways and Means
December 31, 2019

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Thomas M. Byler
Director

cc: Matt Stayner, Legislative Fiscal Office
Linnea Wittekind, Department of Administrative Services
Jason Miner, Governor's Office

Encl. *Report on Contested Cases and Litigation: 2019 Budget Note Report*

REPORT ON CONTESTED CASES AND LITIGATION

OREGON



WATER RESOURCES
DEPARTMENT

2019 BUDGET NOTE REPORT
STATE OF OREGON

REPORT ON CONTESTED CASES AND LITIGATION

2019 BUDGET NOTE REPORT STATE OF OREGON

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Executive Summary

The Water Resources Department was directed by the Oregon Legislature to submit a report on contested cases and litigation actions from 2015, including past, current, and pending items as of July 1, 2019. Water is key to the health of Oregon's economy, environment, and communities. It can also be a contentious resource that may become more so as demands increase for water, unless Oregon invests in the tools necessary to build communities of collaboration around water. This report provides an overview of crosscutting observations, and then discusses contested cases and litigation actions by breaking them down into subcategories following the lifecycle progression from applying for a water right to then its use and regulation pursuant to the system of prior appropriation.

ISSUES. Cross-cutting issues are summarized in brief below and include:

Number of Contested or Litigated Decisions are Small in Comparison to the Number of Actions Taken.

For context, between January 2015 and June 1, 2019, the Department issued 107 proposed final orders for regular new surface water applications, 556 proposed final orders for regular new groundwater right applications, 446 regular transfer preliminary determinations, 264 alternate reservoir final orders, and 598 proposed final orders on permit extensions. In 2018 alone, watermasters and their assistants conducted over 7,500 regulatory actions to protect senior out-of-stream uses and instream water rights.

Water is a Limited Resource. Surface water and groundwater are fully appropriated in some parts of the state. As both become fully appropriated, it is harder to find water for new uses, this can increase the likelihood of disputes over Department actions.

Surface Water and Groundwater Connection Increases Management Challenges and Exacerbates Scarcity. While science has long recognized the connection between groundwater and surface water, managing this reality can be difficult. Some groundwater applications propose new uses that are connected to surface water, which, if approved, would injure senior surface water rights. This makes it more difficult to obtain new groundwater permits. Similarly, to protect senior surface water right holders, junior groundwater users that impact surface water may be regulated off to provide water for the senior surface water use.

Shifting from Abundance to Limited Supply: The Difficulty of Change. Issuing additional water rights in areas where there is insufficient supply, increases the number of junior users that watermasters must regulate annually in managing and distributing water to senior users. There has been increased interest in data to inform how much water is available and to manage water resources more sustainably, particularly in regards to groundwater, where new allocation can have long-term implications for senior groundwater users.

Scarcity Increases Management Challenges: The Easy Solutions are Gone. The demand for water continues to rise, causing individuals to seek creative solutions to address their needs, including untested interpretations or modifications to the law. As a result, water management decisions are becoming more complicated and subject to interpretation.

Increased outreach and communication tools to help people understand the limited nature of the resource and potential solutions may help to prevent and reduce challenges associated with unauthorized uses of water.

Water Laws are Numerous, Complex, and Often Built on Case Law. Over time, water laws have grown increasingly more complex and sometimes difficult to understand, often based on a whole body of case-law. This slows decision-making and increases the likelihood of disputes.

Collaborative, Innovative, and Proactive Solutions Take Time, Data, and Resources to Develop and Implement. The State needs to proactively invest in data, innovation, collaboration, and planning, as well as the staff needed to understand and negotiate complex water issues to support identification and implementation of solutions, and seek to prevent or reduce litigation.

ORGANIZATION. As outlined below, the report is broken out into sections based on topic area. Each section provides an overview of contested cases and legal actions, identifies key themes, and provides recommended actions. Categories with the most contested cases and litigation are Groundwater Applications, Permit Extensions, and Water Distribution and Regulation.

Adjudications. Adjudications in Oregon involve a formal administrative and judicial process to quantify, document, and regulate water right claims that began before the adoption of the Oregon Water Code of 1909, or federal and tribal reserved rights. The Klamath Adjudication is the only adjudication in Oregon currently being undertaken.

Applications for New Water Rights. The report breaks out applications for new water rights into subcategories: surface water, reservoirs, alternate reservoirs, groundwater, and instream. One of the most common reasons for denial of new water right applications and associated disputes, was that surface water was not available, or groundwater was over-appropriated.

Permit Extensions. Permits for a new water use contain time limits to develop the water use. If additional time is needed, a permit holder may request an extension of time. The majority of the protests filed were filed by holders where the Department proposed to deny an extension, or where non-applicants sought to prevent the extension. This is unsurprising given that holders want to maintain their interest in a water right permit, and given the limited nature of the resource.

Transfers. Transfers provide a method to permanently change the point of diversion or appropriation, the place of use, or the beneficial use of the right. The majority of the protests filed were by non-applicants asserting injury. This speaks to the shared nature of the resource in that changes to how water is used can impact other water users.

Cancellations. The cancellation proceeding determines whether a water right evidenced by a certificate has been partially or entirely forfeited by a failure to use the water for a period of five or more successive years. The Department believes that the cancellation laws could benefit from additional review and modification.

Water Distribution and Regulation. A water right does not necessarily guarantee water for the holder, as water that is available for use in any given year fluctuates based on weather conditions. Water is distributed based on the priority system, meaning older rights have priority in times of shortage, and junior (newer) uses must shut off. Cases are sorted into the following categories: cases involving use of water without a water right; cases involved water distribution for senior water rights; cases involving parties seeking to require the Department to take regulatory action, where it had not; and cases involving water measurement.

Well Construction Enforcement. The Well Construction Program protects Oregon's groundwater aquifers from depletion, waste, contamination, and loss of artesian pressure. The Department had only two contested cases and legal actions related to well construction.

Miscellaneous Cases. This section of the report includes cases that were individual issues.

Introduction

Request for Report: 2019 Budget Note

During the 2019 Legislative Session, a budget note was adopted directing the Oregon Water Resources Department (Department) to submit a report to the Joint Committee on Ways and Means on contested cases and litigation by January 1, 2020. The report is to include actions the agency has taken that resulted in the agency being party to a contested case hearing or legal action since 2015, and to include past, current, and pending items as of July 1, 2019. The budget note directed the Department to identify the legal question being addressed, the underlying statute(s) or administrative rule(s) that were, or are, the basis for the action that the agency undertook, and the fundamental basis or reasoning for the dispute against the agency's actions for each case.

If a statute or administrative rule is identified as being foundational to actions taken by the agency that are subject to multiple contested cases or other legal proceedings, the agency must provide a statement regarding the purpose for the statute or rule, what the agency is attempting to achieve by taking action on the statute or rule, and how future litigation regarding those actions might be avoided in the future.¹

Report Organization

Under Oregon law, water is a public resource, and water users must apply for and receive a water right in order to use water. The Department processes and evaluates new water right applications, which when approved, ultimately serve as a record for the Department's management and distribution of water for instream and out-of-stream purposes.

For the purposes of this report, the Department has broken the contested cases and litigation into subcategories, mostly following the lifecycle of a water right through from determination or establishment of the right (via adjudication or application and permit issuance), to putting the water to use, and finally through to the management and distribution of water according the system of prior appropriation.

More specifically, the first section of the report outlines litigation associated with the adjudication of water rights. Adjudications quantify claims to water rights for water use that began prior to the 1909 Water Code, and water uses established for federal or tribal purposes.

The second section includes contested cases and litigation associated with the evaluation of applications for new water rights. If a new water right is approved, a permit is issued. The permit holder must complete construction and put the water to use within timelines specified in the permit. If the permit holder needs more time to complete construction and put the water to use, the permit holder can request an "extension of time." The third section provides information on contested cases and litigation associated with the denial or approval of requests for extensions of time.

Once the water has been put to beneficial use, the permit holder must submit a "claim of beneficial use" which shows the extent of development and results in issuance of a water right certificate. Water right

¹ Contested cases are not the same as litigation and often are settled before going to hearing. Settlement is a method for the parties and Department to resolve the dispute, if there are options that can be amenable to the parties. For example, on water right applications, applicants will often reduce their rate or modify their request during the settlement process in order to meet legal requirements. The Department often does not need the assistance of the Department of Justice attorneys in addressing contested case matters unless it goes to hearing. This is important to note because the list of contested cases contained in this report do not necessarily reflect the amount of attorney workload and litigation costs. Given that actual hearings or litigation are a smaller subset of the cases on this list, it is important to recognize this in evaluating the impacts on legal expenses.

holders can apply for a “transfer” to make changes to their existing water rights. Failure to use the water right once every five years can result in “cancellation” of a water right, based on the premise under the doctrine of prior appropriation that the water is a public resource and others should be able to use that water to maximize the beneficial use of the resource.

The above programs provide ample due process opportunities for an applicant, another water right holder, or the public to protest or dispute agency decisions. These protests, if not otherwise resolved, can lead to administrative contested cases and litigation proceedings.

Once a water right is obtained, the Department is responsible for distributing and managing water based on those water rights of record and consistent with the system of priority. The system of priority means that in times of shortage, the oldest rights (senior) get the water and users with newer water rights (junior) are shut off. The Department also regulates individuals that are using water without a water right in violation of Oregon law – also known as unauthorized uses.

Finally, the Department also administers programs related to well construction practices in order to prevent contamination of groundwater, and the commingling or draining of aquifers. This is addressed in the second to last section. Miscellaneous individual cases (some involving individual water right transaction cases) are addressed in the final section.

Level of Detail and Analysis of Report: Beginning of the Conversation

This report does not attempt to articulate the details of each case, as to do so would render it so lengthy and overly complex that it would not be useful. For example, one of the contested cases listed in the table under reservoirs had more than 400 exceptions filed by one protestant. Explaining the disputes for that case alone could be a standalone report. As such, while the Department has tried to identify the issues and disputes presented within cases at a high level, the nuances of each case and the complexity of the specific matters are not reflected.

While the summaries are brief for most cases, the Department has included a more extensive litigation history for several cases. These more detailed examples highlight how some disputes can turn into multi-year issues exceeding a decade or more and may involve multiple court filings, sometimes in different courts. These ongoing and seemingly intractable disputes are difficult to predict and mean that litigation costs for some disputes may continue on for years.

Because the Department prefers to work with stakeholders in developing policy, this report identifies areas where rules or statutes could be modified, but it does not necessarily identify what actions would be taken. The Department believes that the best policies are made when they are informed by individuals both internal and external to the Department. Toward that end, the Department continues to seek ways to build capacity to engage in collaborative processes relating to water management at local and statewide levels. If the goal is to reduce litigation and disputes, policies need to be developed with the involvement of individuals that are interested or affected. As such, this report identifies where further policy discussions and analysis may be warranted. Some of these discussions may need to occur at a statewide level, and some may be more appropriate for a basin, subbasin, or local scale.

Given that water quantity (water rights) issues across the West have historically been contentious, and since legislative and rule changes may prompt new disputes as new laws are tested (see, for example, discussion of legislative and rule changes in the municipal extensions section and discussion of groundwater rulemaking in the Klamath Basin), a reduction in contested cases or litigation should not be the only measure of success. Collaborative solutions and agreements should also be part of the solution

to assure that we are meeting the ultimate purpose of water management: to assure sufficient and sustainable water supplies to meet current and future needs, both for instream and out-of-stream purposes. It is not an overstatement to say that water is the foundation for our communities, our health, our economy, and our ecosystems, and it is integral to all that we care about as Oregonians. In recognition of the fundamental importance of water, the Department is committed to working with the legislature to identify areas of focus to further the conversation and serve the public to meet these broader goals.

Cross-Cutting Issues

Number of Contested or Litigated Decisions are Small in Comparison to the Number of Actions Taken

Water can be a contentious resource, and it is only expected to become more so as demands increase for both groundwater and instream and out-of-stream purposes. While it is true that the Department has seen an increase in costs associated with litigation, the reality is the number of agency actions disputed is low in comparison to the number of actions taken. As such, the Department has included numbers of total actions for context.²

Between January 1, 2015 and June 1, 2019, the Department issued:

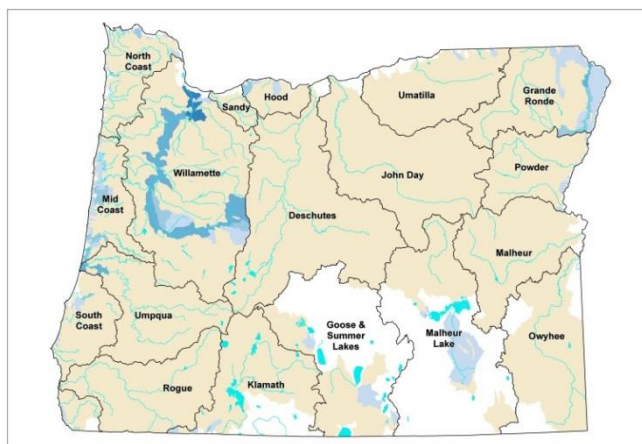
- 107 proposed final orders for regular new surface water applications;
- 556 proposed final orders for regular new groundwater right applications;
- 446 regular transfer preliminary determinations;
- 264 alternate reservoir final orders; and
- 598 proposed final orders on permit extensions.

In regard to water management and distribution, in 2018 alone, watermasters and their assistants conducted over 7,500 regulatory actions to protect senior out-of-stream uses and instream water rights.

Water is a Limited Resource

Surface Water is Fully Appropriated

Most of the state’s surface waters are fully allocated during the summer months. The map shows where water may be available for allocation from surface water during the month of August (blue/purple) and where water is not available (tan).



AUGUST AVAILABLE STREAMFLOW
Calculated at 80% Exceedance

Surface Water Bodies
Lakes
Streams
Administrative Boundaries
OWRD Basins

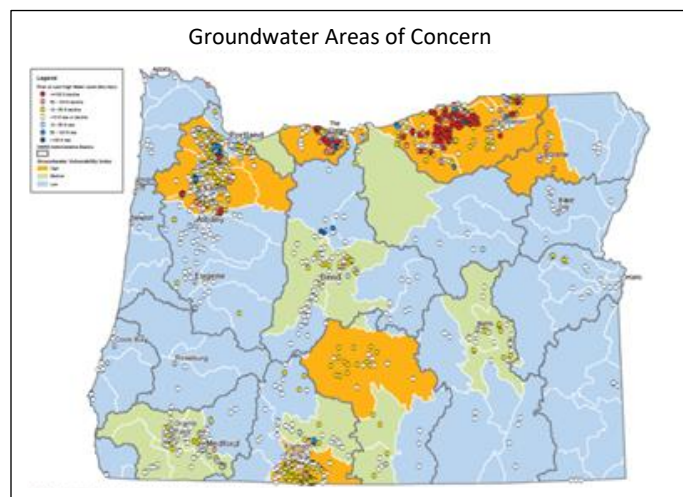
Available Streamflow (CFS)
No Data
No Water Available
0.1 - 10
10.1 - 100
100.1 - 1000
1000.1 - 10000
>10000

Groundwater is Fully Appropriated in Some Parts of the State

As surface water has become fully allocated, people have turned to groundwater. Similar to surface water, in some locations in the state, groundwater aquifers are no longer capable of sustaining additional development.

Areas that are shown in green or orange in the figure on the next page titled “Groundwater Areas of Concern” may have groundwater level declines, surface water connectivity, or other management challenges that can limit the issuance of new water rights or result in regulation.

² Since the cases provided in the following pages of this report include actions that were pending between 2015 and July 1, 2019, the report contains cases wherein the Department made or proposed decisions (e.g., issued a preliminary determination, proposed final order, or final order), prior to January 2015. These summary numbers go to June 1, 2019 instead of July 1, 2019 because decisions usually have a time period in which to dispute the agency action. Most decisions made in June 2019 would likely still be in the initial period for filing a protest.



Surface Water and Groundwater Connection Increases Management Challenges and Exacerbates Scarcity

Groundwater discharges to streams across Oregon, making up the majority of streamflow during the late season when snowmelt is gone, and rainfall has subsided. Consider how many streams continue to flow during the summer where there is no rainfall, snowpack, glaciers, or reservoirs to support flows. The reason a stream is still flowing in the summer is groundwater

discharging through springs and seeps.

The connection between groundwater and surface water increases the complexity of water management. As both groundwater and surface water become fully appropriated, hydraulic connection between groundwater and surface water increases the challenges of finding new water. New groundwater rights can be a challenge to obtain where the new groundwater use is found to injure existing senior surface water rights.

In other basins, impacts to scenic waterway flows can also result in the denial of an application for a groundwater right, if it is determined that: (a) the proposed use will measurably reduce surface water flows in the scenic waterway, or (b) groundwater appropriations cumulatively will measurably reduce scenic waterway flows. “Measurably reduce” is defined in statute as reducing flows by one cubic foot per second (cfs) or one percent of the average daily flow, whichever is less.³

For example, the Deschutes Basin Groundwater Mitigation program was established in response to the threshold being met in the Deschutes Basin for impacts from groundwater pumping on surface water. The purpose of that program is to mitigate the impacts of groundwater pumping from new groundwater rights on state scenic waterway flows. Other basins that have met the threshold do not have a formal mitigation program, and thus, mitigation is ad-hoc.

In addition, the connection between groundwater and surface water means that junior groundwater rights may be regulated to meet the needs of a senior surface water right holder, as has occurred in both the Klamath Basin and a portion of the Umatilla Basin.

Regulation of junior groundwater rights in the Klamath Basin for senior surface water rights has been the source of significant litigation. It is important to recognize that in 2013, the management of water in the Klamath Basin changed significantly due to the determination of senior surface water claims in the Klamath Adjudication. Prior to that, no regulation for or against the claims had occurred, many of which are now recognized as the senior most rights in the basin. This change in the management regime in 2013 was a sudden shift for many water users, particularly those that were regulated for the first time as junior users. The junior users included both surface water rights and groundwater rights.

³ ORS 390.835(12)

Several states in the West have laws related to the management of groundwater affecting surface water. Oregon is not unique in experiencing litigation on this front as evidenced by ongoing cases in Idaho, and more recent cases in neighboring states. A few examples of recent litigation include:

- In Idaho, disputes over wells pumping from the Eastern Snake River Plain Aquifer and their impact on surface water, including springs, began in the 1980s. This resulted in the 1984 Swan Falls Agreement, the initiation of the Snake River Basin Adjudication, and then a series of calls for water by senior surface water users that resulted in further negotiations and litigation. The issues in Idaho demonstrate the challenging, complex, and contentious nature of these groundwater and surface water management issues, as well as the potential for innovative solutions.⁴
- In 2016, Washington’s Supreme Court issued the [Hirst decision](#), finding that exempt wells impact surface water instream flows protected under Washington’s instream flow rules.⁵ [4]
- In a 2018 [California Court of Appeals decision](#), the Court affirmed that the county and the State Water Resource Control Board have a duty to consider the potential adverse impact of pumping groundwater on the public trust uses of the Scott River, a navigable waterway.⁶ [5]

Shifting from Abundance to Limited Supply: The Difficulty of Change

On the permitting side, for many decades following enactment of the 1909 Water Code, the State issued permits without much consideration for the availability of the resource and potential impacts to senior users. That changed in the 1980s, as the Department began to consider how much water was actually available both to protect existing water users on the same source, given limited field staff capacity, and to provide the new user with a more reliable water right. Issuing additional water rights in areas where there is insufficient supply, increases the number of junior users that watermasters must regulate annually in managing and distributing water to senior users.

As more water has been allocated, streams and aquifers are becoming fully appropriated, and there is not enough water available to allow for new water uses in many areas. As basins near full-appropriation, proposed new uses often can only be approved with complicated conditions, such as variable monthly pumping rates, shortened seasons of use, or other restrictions or requirements. Complicated permit conditions can be difficult for the permit holder to comply with and are also more difficult for the Department to monitor and manage.

For groundwater, unsustainable appropriation depletes the long-term water supply for all users. In addition, junior groundwater pumping that reduces surface water flows does so to the detriment of senior surface water rights. For example, in some areas of the state, pumping of groundwater has reduced discharges from springs, impacting those that rely on those springs. While there is continued demand to allow for new water uses; it is better for existing water users if the Department does not over-appropriate the resource in a manner that then requires curtailment or threatens that existing uses will not be able to be sustained into the future. If permanent curtailment of junior users is required in aquifers to protect the remaining supply for senior users, the junior users lose their investment.

⁴ Fereday, J.C., Meyer, C.H., Creamer, M.C. (November 8, 2019). *Idaho Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*. Online at:

<https://www.givenspursley.com/assets/publications/handbooks/handbook-waterlaw.pdf>

⁵ *Whatcom County v. Hirst, Futurewise, et al.* (2016). Online at:

<https://fortress.wa.gov/ecy/wrdocs/WaterRights/wrwebpdf/91475-3opinion.pdf>

⁶ *Environmental Law Foundation v. State Water Resources Control Board* (2018). Online at:

<https://law.justia.com/cases/california/court-of-appeal/2018/c083239.html>

Towards that end, there has been increased interest in data to inform how much water is available and to manage water resources more sustainably.

In regard to water management and distribution, when there is a change from the status quo, some water users may seek to protect their interests through litigation. For example, in the Klamath Basin, every year there is simply not enough water for all the desired uses. While this is true in other basins in the state, these basins have experienced water distribution based on the system of prior appropriation for decades and water users understand and are accustomed to regulation. In the Klamath Basin, however, junior surface water and groundwater users had been using water for decades before the administrative phase of the adjudication was completed in 2013 and the first significant regulation began. This shift in management of the resource in favor of newly determined senior water rights has been a difficult adjustment for the community.

The limited nature of both surface water and groundwater resources, likely means that the use and management of water will continue to be a challenging issue as basins reach full appropriation. To minimize conflict and support solutions, recognizing the importance of water in Oregon, the Department encourages voluntary solutions and agreements. If voluntary solutions are not identified, the Department is responsible for distributing water based on the prior appropriation system, in favor of senior water right holders. Supporting collaborative planning work, efforts to obtain settlement, and data to inform decision making are all ways for the State to help resolve and reduce future disputes.

Scarcity Increases Management Challenges: The Easy Solutions are Gone

In many cases, due to the limited nature of water resources, the “easy” water supply solutions are gone. However, the need and demand for water continues to increase. In an effort to maximize the beneficial use of the resource, there are continued efforts to explore creative interpretations of the law or complicated modifications to the laws. These interpretations or modifications can lead to solutions but may result in additional disputes. Such efforts have led to many programs authorized in rules and statutes since 1909, and, in some instances, complicated permit conditions that have made water management more challenging.

Individuals that are found using water without a water right do not have easy or inexpensive solutions to get into compliance and obtain a legally authorized source. If an individual has made investments without having a legal source of water, they may seek to dispute findings that water is not available, or to dispute the Department’s authority to regulate. These instances often put undue pressure on the desire for an applicant to obtain approval of a permit, even in areas where there is clearly no water available. The Department always recommends that individuals interested in developing a project that requires the use of water check with the Department early – even before purchasing the property. Furthermore, many water right processes allow for participation by third parties such as the public or other water right holders; therefore, it is impossible to predict the outcome of a decision with certainty. Increased data, outreach, and communication tools could help people understand the limited nature of the resource, and anticipate the challenges and solutions before making investments.

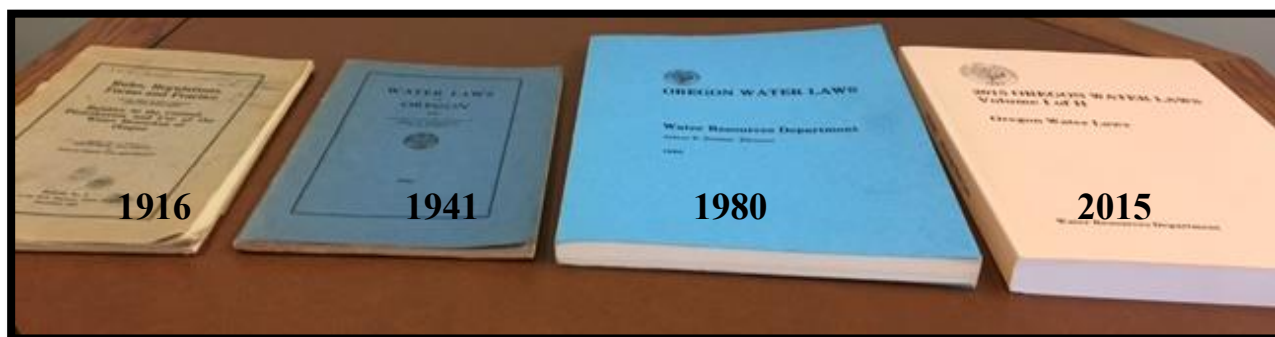
Water Laws are Numerous, Complex, and Often Built on Case Law

Before adoption of the Water Code in 1909, water was distributed in Oregon through the common law doctrine of prior appropriation—if you could divert it and maintain that diversion, you could use it (and in some cases, a different body of law called the riparian doctrine which is beyond the scope of this

report). Water claims were staked like mining claims and recorded in the county courthouse. The need for a more orderly system of allocating, managing, and recording the use of this limited resource prompted adoption of the 1909 Water Code, codifying the distribution of water through the system of prior appropriation.

Rights that pre-date the Water Code are still in place today, meaning the Department manages and distributes water for water rights (once adjudicated) that are in some cases over 150 years old.

Meanwhile, over time the laws have grown increasingly more complex and, in some cases, difficult to understand, often based on a whole body of case-law developed through litigation. As shown in the picture below of Oregon's Water Laws, the statutes have grown significantly over time (and this does not take in to account case law). Litigation over water is not new, and, as a result, water law is built on a significant body of statutes, rules, and case law. This makes administration of the laws a challenge, particularly as many of the statutes age, and the history behind some of the provisions are lost with time. These challenges can slow decision-making and while increasing the likelihood of disputes and litigation.



Collaborative, Innovative, and Proactive Solutions Take Time, Data, and Resources to Develop and Implement

Water is the foundation for our communities, our health, our economy, and our ecosystems, and it is integral to all that we care about as Oregonians. Collaborative solutions and agreements, where possible, should be part of the solution and to assure sufficient and sustainable water supplies to meet current and future needs, both for instream and out-of-stream purposes.

As new needs emerge and there is insufficient water to meet all demands, potential solutions to water challenges often stretch the limits of the existing laws and can have unanticipated impacts. Resolving these issues and developing innovative solutions often requires data and technical analyses to prevent unintended consequences, involve stakeholders, and support solutions and decisions that are substantiated and defensible. Finding solutions also takes a commitment of all parties to work towards a solution, and can often require a significant investment of time by all involved parties.

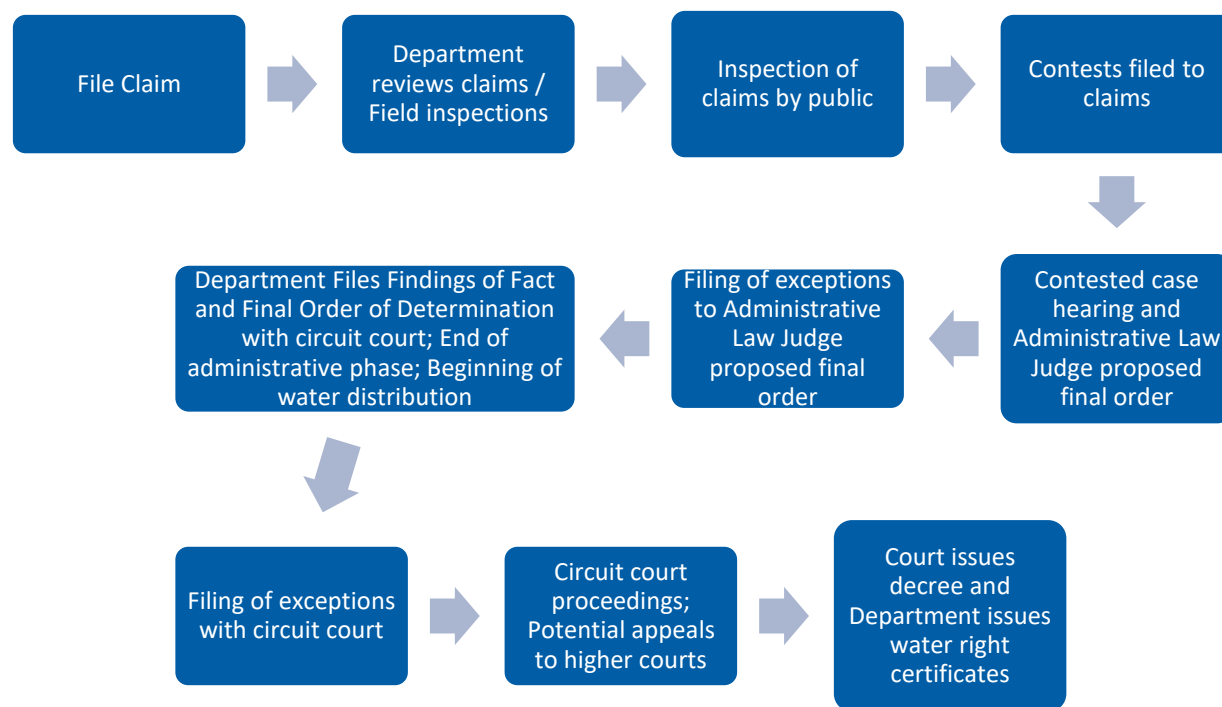
The State needs to proactively invest in data, innovation, collaboration, and planning, as well as the staff needed to understand and negotiate complex water issues to support identification and implementation of solutions.

Adjudications

In many parts of Oregon, landowners began using water long before the Oregon Water Code was enacted. Passage of the Water Code by the Legislature in 1909 established a centralized administrative system for acquiring rights to the use of surface water and codified management of water rights within a prior appropriation system. Claims to the use of surface water that predate the Water Code are quantified and documented through a formal administrative and judicial process known as adjudication and are eventually regulated according to priority date.

The adjudication process by its nature is a legal process. The first phase is administrative wherein the Department undertakes work to determine if the claims are valid, which may include contested case hearings before an administrative law judge. Once the Director issues the findings of fact and final order of determination, the order is filed with the circuit court and exceptions may be filed. The court then begins the judicial phase of the process, which eventually results in the issuance of a final decree. The Department issues water right certificates in accordance with the decree.

Figure 1 Adjudication Process



Adjudicating water right claims allows senior users to make calls for water in times of shortage. Without the adjudication process, these claims cannot make calls for water and junior users can continue to use water that would otherwise benefit the senior water user. It also leaves these senior users at a disadvantage as they cannot apply for transfers, leases, or allocations of conserved water, which limits their flexibility as well as their ability to engage in more innovative solutions to water management challenges. However, as seen in the Klamath Basin, adjudications can be disruptive to communities, as junior users adjust to no longer being able to use water as they had previously, likely for decades.

Federal and tribal reserved water rights can add increased complexity to the adjudication process. Prior to the Klamath Adjudication, adjudications in Oregon did not involve federal and tribal reserved water rights; these less complex adjudications took less time to complete.

In 1952, Congress passed the McCarran Amendment, waiving federal sovereign immunity in suits involving comprehensive stream adjudications of water rights.⁷ Prior to that, states could not require federal participation in adjudications. Thereafter, the laws around federal and tribal reserved rights evolved as more adjudications and associated decisions made their way through the courts.⁸

In 1975, the United States filed suit in Federal Court for a declaration of water rights within the boundaries of the former Klamath Reservation.⁹ In response to the filings in Federal Court, the State of Oregon initiated the Klamath Adjudication a few months later. Following statutorily required field and streamflow inspections, notice was given to file claims by 1991. Due to the *United States v. Oregon* litigation (1990-1994), federal agencies, the Klamath Tribes, and certain other water users in the Klamath Reclamation Project had until 1999 to file claims. See the table later in this section for more information.

About two-thirds of the state has undergone an adjudication; although, many of those adjudications did not address federal or tribal reserved water rights. The Klamath Adjudication has proven to be more complex than previous adjudications – with multiple actions in the federal courts over its history.

Adjudications in the West:

Oregon's Klamath Adjudication is not unique. Other states have seen timelines spanning several decades for adjudications involving basins with federal and tribal reserved water rights. For example, proceedings related to the Little Colorado River Adjudication and the Gila River Adjudication in Arizona have roots back to the 1970s, with the larger scope adjudications beginning in the 1980s. These adjudications are still pending.¹⁰

In another example, the Snake River Basin Adjudication in Idaho began in 1987. It spanned nearly 87 percent of Idaho and resulted in more than 158,600 decreed water rights. The Snake River Basin Adjudication Court addressed more than 43,000 contested cases. During that time, the Idaho Supreme Court issued 36 opinions in the adjudication, and the U.S. Supreme Court issued one. This adjudication wrapped up in 2004, relatively quickly considering the number of water rights determined. State judicial and administrative costs were approximately \$94 million.¹¹

The Department does not recommend changes to the adjudication statutes at this time. The State of Oregon's laws regarding adjudications have been determined through litigation by the 9th Circuit Court of Appeals to be a comprehensive stream adjudication for the purposes of determining federal reserved water rights, meaning that the federal government has waived sovereign immunity and must participate

⁷ McCarran Amendment (1952) 43 U.S.C. § 666.

⁸ United States Department of Justice (2015). "McCarran Amendment." Online at:

<https://www.justice.gov/enrd/mccarran-amendment>

⁹ *United States v. Adair*. 723 F.2d 1394 (1983). Online at:

<https://www.leagle.com/decision/19832117723f2d139411918>

¹⁰ Maricopa County, Judicial Branch of. (n.d). Arizona's General Stream Adjudications. Online at:

<http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication>

¹¹ Vonde, A.Y., et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53 (2016). Online at:

<https://www.uidaho.edu/-/media/UIDaho-Responsive/Files/law/law-review/articles/volume-52/52-1-vonde-ann-y.pdf?la=en&hash=5ADC6EDE6DC834BB9319AF91562F5A85BBA49C6A>

in the adjudication.¹² Changes to the statutes could result in those issues being re-litigated. In addition, the court and participants in the adjudication are relying on the existing statutes to make their decisions. An adjudication –by its very nature – is a legal matter. No rule or statutory changes would change that. However, the State of Oregon can continue to promote settlements as a means to address some of the issues that that can result in protracted litigation and conflict in adjudications. In some instances, that may mean providing funding to support collaborative or settlement efforts, as well as to implement solutions and agreements.

Quantifying Federal and Tribal Reserved Water Rights – The Settlement Approach:

Federal and tribal reserved rights have the potential to claim vast quantities of water, resulting in water rights with varying priorities that can in some instances be the most senior water rights in a basin. While there have been several attempts at settlement in the Klamath Basin, ultimately, all of the attempts have either failed or the settlement agreements have been terminated after a lack of progress on implementation.

Settlements present the opportunity for parties to bargain for a variety of benefits and reduce the winner take all situations that can happen with litigation. As such, some states have strongly favored this approach. For example, the Snake River Basin Adjudication incorporated both the Fort Hall Indian Water Rights Agreement and the Snake River Basin Water Rights Agreement addressing tribal reserved water right claims.¹³ This approach, however, requires federal participation and often requires federal legislation and funding.

Montana has set out to quantify federal and tribal reserved water rights across the state through compacts. As described on the Montana Department of Natural Resources and Conservation website, “The 1979 Montana Legislature established the Reserved Water Rights Compact Commission (RW RCC) as part of the state-wide general stream adjudication process to negotiate settlements with Montana Indian tribes and federal agencies claiming reserved water rights within the State of Montana...Eighteen reserved water right compacts have been negotiated and ratified by the Montana Legislature including seven Montana Indian reservations, national parks, forests and wildlife refuges, and federally designated wild and scenic rivers.”¹⁴

In addition, an evaluation of the Klamath Adjudication process should be conducted once it is complete to determine whether changes to the process should be made. This evaluation should include a method that obtains input from the parties involved, including their attorneys. Furthermore, it may also be worth determining whether other models of adjudication could provide a more streamlined approach for future adjudications. Further analysis would be necessary.

Applicable Statutes and Rules: ORS 539; OAR 690-028; and 690-030

¹² *US v Oregon*. (1994) 44 F.3d 758.

¹³ Vonde, A.Y., et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53 (2016). Online at: <https://www.uidaho.edu/-/media/UIDaho-Responsive/Files/law/law-review/articles/volume-52/52-1-vonde-ann-y.pdf?la=en&hash=5ADC6EDE6DC834BB9319AF91562F5A85BBA49C6A>

¹⁴ Montana Department of Natural Resources & Conservation (n.d). *Reserved Water Right Compact Implementation*. <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission>

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Judicial Review: Litigation Pending	1975/2014 Klamath Basin Adjudication	<p>A total of 730 claims were filed. Open inspection of claims commenced in the fall of 1999, while the deadline for filing contests was in 2000. A total of 5,664 contests were filed. Only 24 claims were not contested. On March 7, 2013, the Department issued its Findings of Fact and Final Order of Determination and referred the case to the Klamath County Circuit Court. On February 28, 2014, the Department issued its Amended and Corrected Findings of Fact and Final Order of Determination (ACFFOD) and subsequently filed it with the Court. These filings completed the administrative phase of the Klamath Basin Adjudication. Claimants or contestants who dispute the Department's determinations had an opportunity to file exceptions with the Court for the judicial phase of the adjudication process. There are nearly 200 filed statements of exceptions identifying thousands of individual exceptions. Of the 730 determined claims, roughly 285 had exceptions filed on them. Most of the exceptions identify particular partial final orders of determination. The exceptions will likely be broken out and heard by claim type including Walton claims and Klamath Termination Act claims; pre-1909 claims outside the Klamath Project and Klamath Project Claims; and federal reserved water right claims of the United States, Klamath Tribes, and allottees.¹⁵ General categories of exceptions and issues the Court will consider are outlined at a high-level below:</p> <ul style="list-style-type: none"> a) Procedural and legal issues such as those involving, "The Court's Jurisdiction; the validity, lawfulness, or effectiveness of the Amended and Corrected Findings of Fact and Final Order of Determination as a whole; issues concerning the rights of parties to pursue exceptions or requests to be heard; the Court's authority to alter a partial order of determination to which no exception has been filed; the Court's authority to issue a partial judgment..."¹⁶; a standard of review for the proceeding; whether the introduction of non-record evidence will be acceptable; the burden of production and proof; the availability and timing of discovery; and the applicability of the Oregon Rules of Civil Procedure.¹⁷ b) Exceptions to claims that are due to typographical errors or other undisputed minor corrections.¹⁸ c) Other substantive issues that have not been addressed above.¹⁹

¹⁵ Klamath County Circuit Court (2/11/2015). *Letter of Case Management Recommendations from the Klamath Adjudication Case Management Committee*. Online at:

https://www.courts.oregon.gov/courts/klamath/resources/Documents/rec_water_resources.pdf

¹⁶ Klamath County Circuit Court (3/11/2016). Case Management Order #15. Online at:

https://www.courts.oregon.gov/courts/klamath/resources/Documents/Case_Mgmt_Order15.pdf

¹⁷ Klamath County Circuit Court (2016). Case Management Order #21. Online at:

https://www.courts.oregon.gov/courts/klamath/resources/Documents/Case_Mgmt_Order21.pdf

¹⁸ Klamath County Circuit Court (12/10/2015). Case Management Order #14. Online at:

https://www.courts.oregon.gov/courts/klamath/resources/Documents/Case_Mgmt_Order14.pdf

¹⁹ Letter of Case Management Recommendations from the Klamath Adjudication Case Management Committee (2/11/2015). Online at:

https://www.courts.oregon.gov/courts/klamath/resources/Documents/rec_water_resources.pdf

<p>Judicial Review: Litigation Resolved</p>	<p>2016 Mallams – 1:16-cv- 00441-CL</p>	<p>The complaint (42 U.S.C. § 1983) alleged that the plaintiffs’ rights under the Fourteenth Amendment were violated because notice and opportunity to be heard in the administrative phase of the adjudication was not provided, and that the final order of the determination in the Klamath adjudication was issued without plaintiffs and other groundwater users receiving notice or an opportunity to be heard. The plaintiffs were noticed as early as 1975 and involved in the surface water adjudication process. The plaintiffs voluntarily dismissed the case without prejudice. The Court issued an order of dismissal.</p>
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Applications for New Water Rights

The purpose of the review of new water right applications is to ensure that the public interest is served in allocating the use of this public resource. Water is a limited resource, and yet it is the underpinning of most of what we value, from economic development and food, to ecosystem function for species and recreation, to our everyday basic needs of drinking water and sanitation. The statutes charge the agency with taking actions that “encourage, promote and secure the maximum beneficial use and control of such water resources.”²⁰ The laws recognize the importance of water serving the general public welfare and recognize the “multiple aspects of the beneficial use and control.”²¹

This section and its subsections focus on the submittal of a water right application to obtain a new water right permit. Other sections will focus on the process for requesting an extension of time or a transfer.

For water right transactions, contested cases and legal proceedings typically can be categorized as:

- The applicant disagrees with the proposed denial of the application or protests the proposed conditions required for approval of an application;
- An existing water right holder, typically in the area, disputes proposed approval of the application out of concerns that it will result in injury to their water use;
- A non-applicant that is not a water right holder disputes the proposed approval; or
- In some cases, both a non-applicant and an applicant protest a decision, often for different reasons.

At a high level, the process that is followed for water right applications is outlined in the diagram later in this section. The process is similar for transfers and extensions in regard to the process for filing protests, hearings, and exceptions, providing ample opportunity for due process and to dispute Department decisions. The alternate reservoir process discussed in more detail below follows an expedited process.

There is no limit to the number of exceptions or the number of pages that can be filed for the protests and exceptions process. As a result, contested cases can be quite extensive and complex, with significant staff time and legal expenses invested in hearing, evaluating, and responding to each exception. In some instances, the same exceptions are re-filed at every step in the process until it gets to the court, where the scope of issues on review are more limited. The Department has begun to discuss whether to modify its rules in a manner that might address the re-submittal of similar arguments, but it has not determined whether such an approach is appropriate.

One of the most common reasons for denial of new water right applications and associated disputes, is that surface water is not available or groundwater is over-appropriated. As identified in the Integrated Water Resources Strategy and the Department’s Strategic Plan, the Department seeks to improve the accessibility of data and tools for the public to be able to understand the status of water resources in an area. The long-term goal is help applicants gain a better understanding of how their applications will be reviewed and the challenges associated with obtaining water rights; this will allow them to file

²⁰ ORS 536.220. See also ORS 536.220(1)(b) “The economic and general welfare of the people of this state have been seriously impaired and are in danger of further impairment...by an equally large number of legislative declarations by statute of single-purpose policies with regard to such water resources, resulting in friction and duplication of activity ... and in a consequent failure to utilize and control such water resources for multiple purposes for the maximum beneficial use and control possible and necessary.”

²¹ ORS 537.220 (2)(a)

applications with a higher chance of success, or to withhold filing in areas where water is not available and the likelihood of obtaining a new right is low.

Finally, as shown in the summary tables in this section, often when the Department denies a proposed new use, this prompts a protest and settlement discussions with the applicant. Settlement is focused on addressing the reasons the Department has cited for not being able to issue the permit, extension, or transfer. For new rights, in instances of injury or lack of water available, settlement terms that may result in shifting from a denial to approval may include the applicant agreeing to a lesser rate of use, fewer months of use, additional measurement conditions, or other changes. As such, settlement often involves some kind of change in the proposed use or the conditions of issuance that allow the Department to make a finding that the use is in the public interest. While this approach helps new applicants obtain water rights, it means the new water rights that are issued may be significantly more complex and difficult to manage in order to prevent impacts on senior users and unauthorized use.

Figure 2 Water Rights Application Process – Applicable to Surface Water, Groundwater, and Regular Reservoir Applications

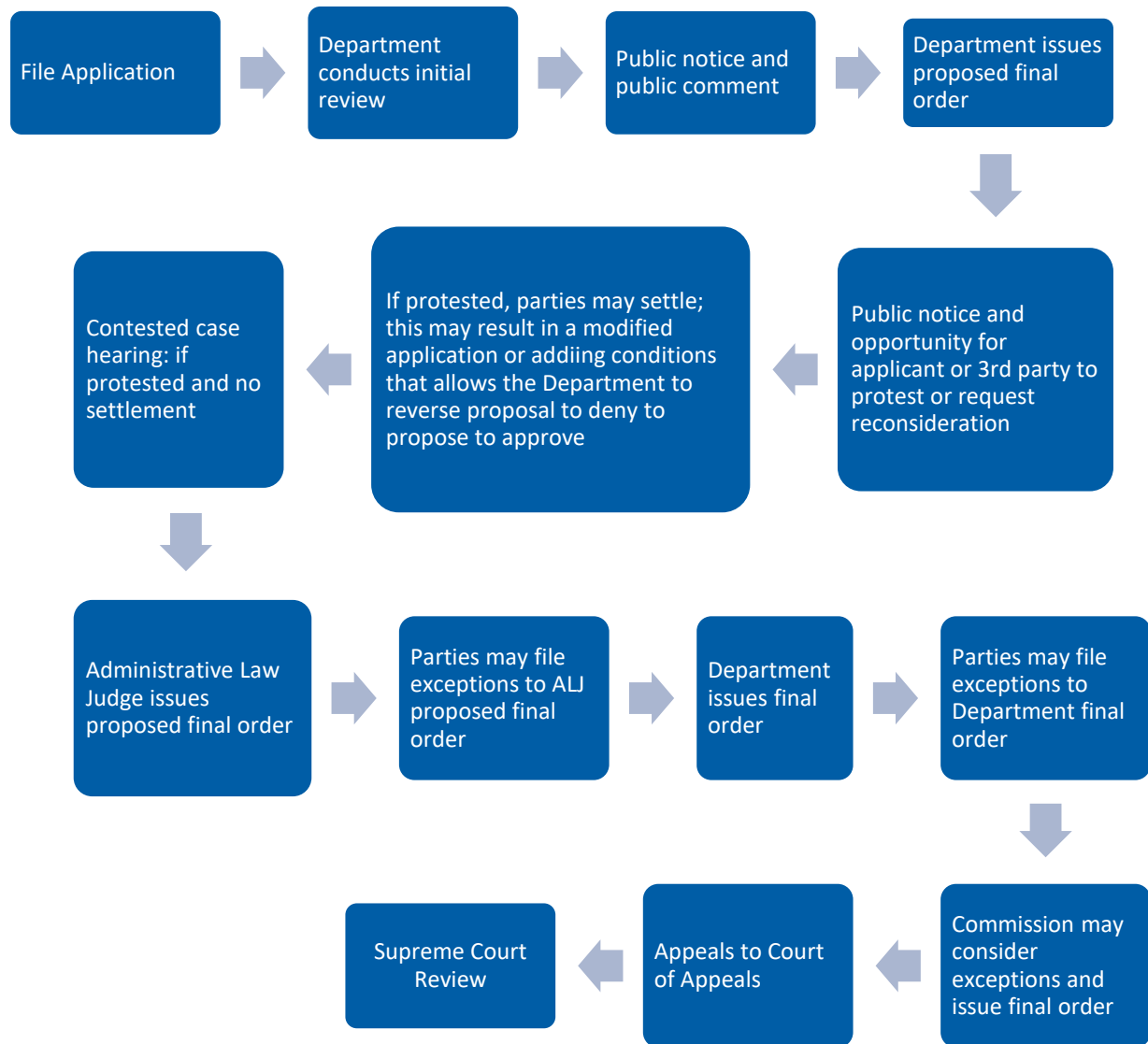
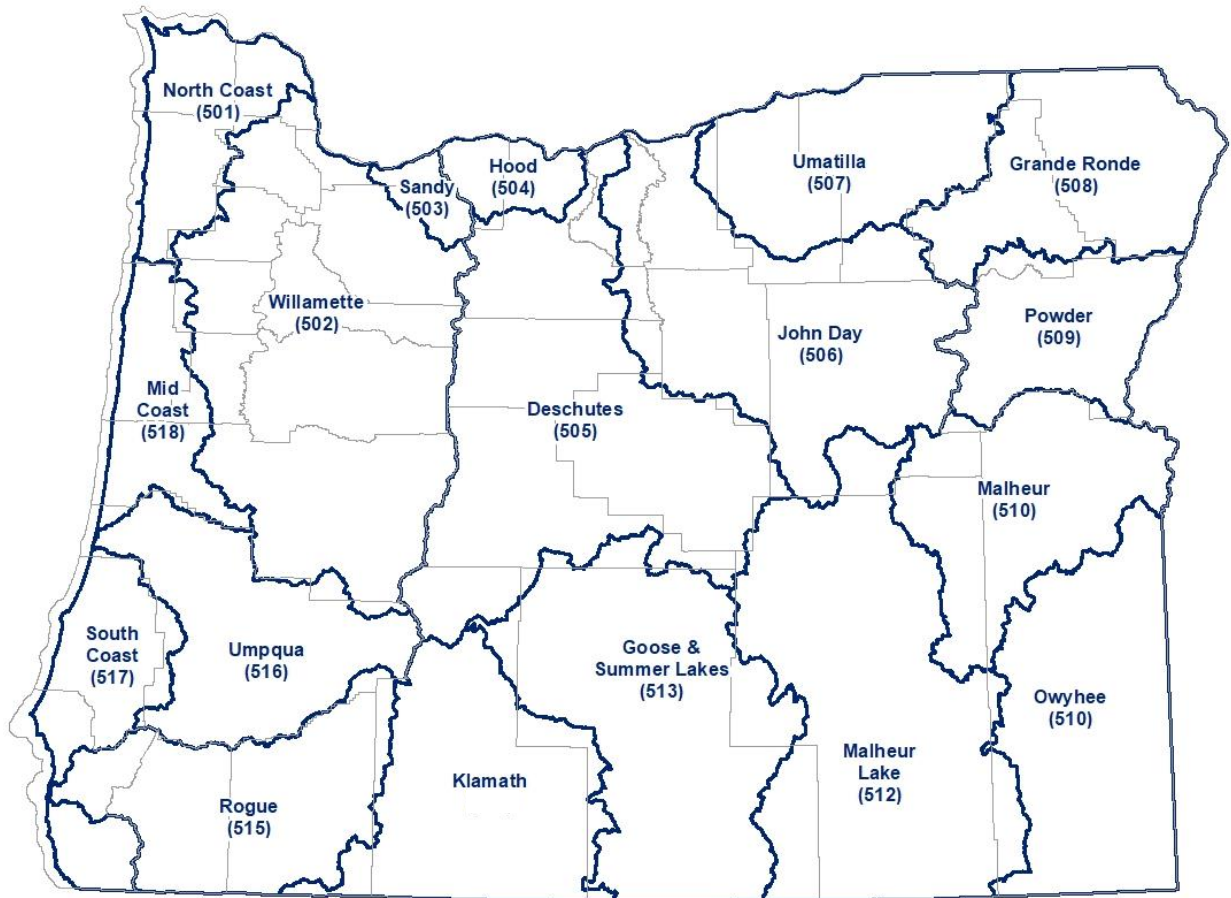


Figure 3 Map of basins for basin program rules that are often a consideration for new water rights. The numbers indicate the rule division number.



Surface Water Applications

The Department's public interest review of an application is set out in ORS 537.153(2), which states that there is a "rebuttable presumption" that a water use proposed in a permit application is in the public interest if: the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340, if water is available, if the proposed use will not injure other water rights, and if the proposed use complies with rules of the Water Resources Commission (Commission).

This presumption is "a rebuttable presumption and may be overcome by a preponderance of evidence that either" the criteria for establishing the presumption are not satisfied or the proposed use will impair or be detrimental to the public interest.²² In some cases, "the proposed use can be modified or conditioned to meet the presumption criteria." To find that it is not in the public interest, the Department must identify the specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected.²³ If the Department determines that the public interest presumption is established, the Department must further evaluate the proposed use, any comments received, and any other available information to determine whether the presumption is overcome.

If the Department finds that the presumption is overcome, the Department must deny the application "unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of a permit will not impair or be detrimental to the public interest."²⁴ ORS 537.170(8) lists the factors that the Department (or Commission, if applicable) must consider if, after a protest is filed, the Department or Commission determines that the presumption is overcome but that the permit should, notwithstanding that fact, be issued because it will not impair or be detrimental to the public interest.²⁵

Based on the below trends, water availability was the most common reason for disputes on surface water applications. See the discussion above on cross-cutting issues. Disputes over compliance with OAR 690-033 was another reason for a few cases. As noted previously, proposals to deny applications often prompt settlement discussions which may result in changes to the application or the addition of conditions that can then allow an application to be approved.

The Commission adopted water allocation rules in the late 1980s, although at that time, many streams had been fully appropriated. The rules provide that the Department will issue permits only if water is available at the 80 percent exceedance level – commonly thought of as water being available eight out of 10 years (or that there will be no water available for the new use two years in a 10-year period). This provides greater certainty that new water rights will have some access to water and will not be required to shutoff every year. Issuing new water rights when water is not available increases the likelihood that

²² ORS 537.153(2).

²³ ORS 537.170(8) "(a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public. (b) The maximum economic development of the waters involved. (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control. (d) The amount of waters available for appropriation for beneficial use. (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved. (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights. (g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534."

²⁴ OAR 690-310-0120(5); see also ORS 537.170(8).

²⁵ OAR 690-310-0120(5).

the beneficial use cannot be accomplished and adds to the regulatory burden on field staff. As such, the Department does not recommend changes to these rules, as they prevent further rights from being issued where there is unlikely to be water available to supply that beneficial use.

OAR 690-033 sets public interest standards for threatened, endangered, or sensitive fish species. The purpose of these rules is to determine if new water uses may affect the habitat of sensitive, threatened or endangered fish species, and to assist in the protection and recovery of declining fish populations. At the time the rules were adopted, they were in response to potential listings of several fish stocks under the Endangered Species Act. The Department has not identified specific changes to these rules at this time that would result in reduced litigation or disputes.

Applicable Statutes and Rules: ORS 537.130, 537.140; 537.150; 537.153; 537.170; 537.211; OAR 690-005; 690-033; 690-300; 690-310; 690-400; Basin program rules for each application are included in the summary below -even if the rules were not the reason for the protest.

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
		Department issued proposed order denying a surface water application, finding that the presumption was not established; Applicant protested
Case Resolved	2018 S-88363	The applicant protested asserting that water is available. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-517 South Coast Basin Program.
Case Resolved	2018 S-88126	The applicant protested asserting that the use did comply with the rules of the Commission, specifically OAR 690-033. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-511 Owyhee Basin Program.
Case Resolved	2017 S-88285	The applicant protested asserting that the use could be conditioned to comply with the rules of the Commission, specifically OAR 690-033 and the basin program rule. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-502 Willamette Basin Program.
Case Resolved	2017 S-88112	The applicant protested asserting that the use could be conditioned to comply with the rules of the Commission, specifically OAR 690-033. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-508 Grande Ronde Basin Program.
Case Resolved	2014 S-87854	The applicant protested asserting that water is available. The protest was withdrawn, and a final order denying the application was issued. 690-505 Deschutes Basin Program.
Case Resolved	2009 S-80438	The applicant protested asserting that water is available. The application was withdrawn, and a final order on withdrawal was issued. 690-502 Willamette Basin Program.
Case Resolved	2009 S-80465	The applicant protested asserting that water is available. The application was withdrawn, and a final order on withdrawal was issued. 690-502 Willamette Basin Program.
Case Pending	2018 S-88081	The applicant protested asserting that water is available. A hearing is pending. 690-513 Goose and Summer Lakes Basin Program.
Case Pending	2018 S-88279	The applicant protested asserting that water is available. A hearing is pending. No basin program in the Klamath Basin.
Case Pending	2009 S-74056	The applicant protested asserting that water is available. A hearing is pending. 690-502 Willamette Basin Program.
Case Pending	2006 S-86203	The applicant protested asserting that water is available. A hearing is pending. 690-502 Willamette Basin Program.
		Department issued proposed order approving a surface water application, finding that the presumption was established; Non-applicant and/or Applicant Protested
Case Resolved	2015 S-87600	The applicant protested asserting that certain conditions on the use were unneeded. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-513 Goose and Summer Lakes Basin Program.

Case Resolved	2015 S-87980	A non-applicant protested asserting that the presumption was not established because the use was not allowed in the basin program. The application was withdrawn and a final order on withdrawal was issued. 690-508 Grande Ronde Basin Program.
Litigation: Resolved	2015 Willamette Water Co. – A157428 S-87330	The Department issued a proposed final order proposing to issue a permit with conditions. The applicant and a non-applicant filed protests in 2010. A contested case hearing was held in 2011. The Administrative Law Judge issued a proposed order recommending denial of the application on several grounds. The applicant and non-applicant both filed exceptions with the Department. In 2014, after consideration of the exceptions and the record, the Director issued a final order recommending denial of application S-87330. The Company and non-applicant both filed exceptions. The Commission considered the exceptions and affirmed the Department's final order. The applicant subsequently petitioned for review of the Commission's final order in the Court of Appeals. The Court held oral argument on November 22, 2016. The Court affirmed the order of the Commission.

Reservoir Applications

Two water right permits are required in order to store water in a reservoir and apply that water to a beneficial use. The “primary” permit authorizes the permittee to appropriate and store the water; the “secondary” permit authorizes the permittee to apply the stored water to a beneficial use. Primary and secondary permit applications are subject to the general statutory provisions governing appropriation of water, “except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit.”²⁶

The criteria are similar for reservoir applications as outlined in the surface water section. The Department must find that the proposed use will not impair or be detrimental to the public interest because water is available without injury to other water rights, the proposed use is allowed in the basin program, and the proposed use complies with rules of the Commission.

The list below focuses on applications to obtain a primary storage permit. Most of the disputes below involve OAR 690-033, which sets public interest standards for threatened, endangered, or sensitive fish species. The purpose of these rules is to determine if new water uses may affect the habitat of sensitive, threatened or endangered fish species, and to assist in the protection and recovery of declining fish populations. At the time the rules were adopted, they were in response to potential listings of several fish stocks under the Endangered Species Act. The Department has not identified specific changes to these rules at this time that would result in reduced litigation or disputes.

Applicable Statutes and Rules: ORS 537.130, 537.140; 537.150; 537.153; 537.170; 537.211; 537.248; and 537.400; OAR 690-005; 690-033; 690-300; 690-310; and 690-400. *Basin program rules for each application are included in the summary below -even if the rules were not the reason for the protest.*

²⁶ ORS 537.400(1).

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
		Department issued proposed order denying a reservoir application, finding that the presumption was not established. Applicant Protested
Case Resolved	2017 R-88155	The applicant protested asserting that the proposed use could be conditioned to comply with the rules of the Commission, specifically OAR 690-033. Pursuant to a settlement agreement conditions were included and a final order approving the application and a draft permit were issued. 690-505 Deschutes Basin Program.
Case Resolved	2017 R-88284	The applicant protested asserting that the proposed use could be conditioned to comply with the rules of the Commission, specifically OAR 690-033. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-502 Willamette Basin Program.
Case Resolved	2014 R-87881	The applicant protested asserting that water is available. The application was withdrawn and a final order on withdrawal was issued. 690-505 Deschutes Basin Program.
Case Resolved	2013 R-83356	The applicant protested asserting that water is available, and non-applicants requested standing. Pursuant to a settlement agreement, a final order approving the application was issued. 690-517 South Coast Basin Program.
Case Resolved	2009 R-87044	The applicant protested asserting that the use could be conditioned to comply with the rules of the Commission, specifically OAR 690-033. A draft settlement agreement was sent to the applicant, but the applicant did not wish to pursue the permit further. A final order denying the application was issued. 690-505 Deschutes Basin Program.
Case Pending	2018 R-88386	The Department recommended that the application be denied because the proposed use does not comply with other rules of the Commission, specifically ORS 690-033. The applicant protested asserting that the proposed use could be conditioned to comply with the rules. A non-applicant, the landowner, protested asserting that the applicant did not have the landowner's permission to construct the reservoir and requested that the permit require the applicant to first get written authorization from the landowner and to complete the project within a specific time period. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-505 Deschutes Basin Program.
Cases Pending	2018 R-88385 2018 R-88384	(Same applicant as the case in the row above) The applicant protested asserting that the proposed use could be conditioned to comply with the rules. The Department recommended that the application be denied because the proposed use does not comply with other rules of the Commission, specifically ORS 690-033. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-505 Deschutes Basin Program.
Cases Pending	2017 R-88157 2017 R-88156	(Same applicant as cases in the row above) The Department recommended that the application be denied because the proposed use does not comply with other rules of the Commission, specifically ORS 690-033 and water is not available. The applicant protested asserting that there is insufficient evidence that water is not available. Settlement

		discussions are on-going. If there is no settlement, a hearing will be held. 690-505 Deschutes Basin Program.
		Department issued proposed order denying a reservoir application, finding that the presumption was not established: Applicant and Non-Applicants Protested
Case Pending	2006 R-84628	Department issued a proposed order denying a reservoir application for the purpose of aquifer recharge, finding that the presumption was not established. The applicant protested asserting that water was available, and the proposed use would not cause a net loss of habitat of sensitive fish species under OAR 690-033. Three non-applicants protested asserting that the proposed use was not in the public interest because of impacts on scenic waterway flows and instream water rights. The applicant has modified the application since filing. A hearing is pending. 690-505 Deschutes Basin Program.
		Department issued proposed order approving a reservoir application, finding that the presumption was established: Non-Applicant Protested
Case Pending	2016 R-88041	A non-applicant protested asserting that the presumption was not established or was overcome. The application has been on hold. If there is no settlement, a hearing will be held. 690-518 Mid-Coast Basin Program.
Case Pending	2014 R-87871	Two protests were filed by non-applicants asserting that the proposed use was not in the public interest because of impacts to the stream and to neighboring landowners. A hearing was held in 2018. The Administrative Law Judge issued a proposed order on February 25, 2019, affirming the findings in the Department's proposed order. More than 400 exceptions were filed by one protestant in this case. The Director considered exceptions to the ALJ's proposed order and issued a final order to approve the application. Exceptions were again filed, which were considered by the Commission. The Commission issued a final order, denying the application in November 2019 finding that the proposed use "impairs or conflicts with the beneficial purpose of...an existing in-stream water right" and that there were not conditions included "to fully protect" the instream water right. See ORS 537.170(8)(f). Parties now have the opportunity to file a petition for judicial review with the Court of Appeals. 690-502 Willamette Basin Program.

Alternate Reservoir Applications

Alternate Reservoir applications go through an expedited process outlined in ORS 537.409, instead of the process identified in ORS 537.400 and in the sections above. These reservoirs must be less than three million gallons or less than 10 feet tall to go through the alternate reservoir process.

The criteria used to evaluate these reservoirs is limited by statute primarily to: (1) No injury to existing water rights; (2) Water availability; and (3) No significant detrimental impact on fishery resources. In addition, statutory withdrawals and state scenic waterways are considered.

Given the limited number of cases and ability to identify patterns, no law changes are proposed at this time.

Applicable Statutes and Rules: ORS 537.409; ORS 538.110 to 538.450; ORS 390.805-390.940

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Cases Pending	2019 R-88189 R-88190	The Department issued final orders denying two reservoir applications for an applicant in Harney County because the proposed use would injure an existing water right. The applicant requested a contested case hearing pursuant to ORS 537.409(5). Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Judicial Review: Litigation Resolved	2015 Noble – A148021	The petitioner challenged a final order approving an alternate reservoir application out of concern for impacts to fish. The Department found the alternate reservoir did not pose a detrimental impact to fishery resources and did not injure an existing water right. The Court of Appeals ruled that the applicable standard for assessing detrimental impact to existing fishery resources under ORS 537.409 is whether a reservoir poses a “significant detrimental impact” to such resources. The Court affirmed that substantial evidence supported the Department's underlying findings regarding injury to water rights and detrimental impact to fishery resources. The Oregon Supreme Court denied the petition for review.

Groundwater Applications

The Department receives, reviews, and processes applications for new groundwater rights. ORS 537.621(2) requires the Department to approve the groundwater application and issue a permit if it finds the proposed use will ensure the preservation of the public welfare, safety, and health because the proposed use meets the following criteria: it is allowed in the applicable basin program rules, it complies with the rules of the Commission, it aligns with the policy statements of the Groundwater Act of 1955 (ORS 537.525), and water is available without injury to other water rights.

Groundwater is a complex resource. The availability of groundwater for use and development varies widely, depending on geologic conditions (the underlying sediments and rock that make up the aquifer systems), weather and climate, how readily the aquifers recharge, how groundwater interacts with surface water, and the extent of previous development pressures on the aquifer resource. The principals of hydrogeology, or groundwater science, have been well established for many decades; however, understanding specific local conditions in aquifer systems is difficult and complex because it occurs beneath the land surface, may interact with springs and streams, and the amounts of groundwater use and recharge are not quantified very well for many basins. A full understanding of this complex resource requires integration of geologic and hydrologic data from wells, streams, and springs, as well as broader field studies at a basin scale. The Department uses a number of data sources to understand the groundwater resource and inform water right application decisions.

Where wells are found to be hydraulically connected to surface water (springs, rivers, and lakes and streams), Department hydrogeologists assess whether there is a potential for substantial interference with surface water.²⁷ If there is a potential for substantial interference, then surface water availability is also considered during a groundwater application review.

If a preponderance of evidence shows that one or more of the criteria above are not met, then the presumption is not established, and the Department may issue an order proposing to deny the application or may propose to issue a permit containing conditions or limitations to mitigate.

Similar to previous discussions above, settlement negotiations regarding groundwater applications often involve a reduction in rate or volume of groundwater, measurement conditions, actions to mitigate impacts on surface water, or moving a well away from the vicinity of another well or surface water source to minimize interference.

Of the cases in the table below, where the Department proposed to deny a new groundwater use and the applicant protested, in most cases, the final outcome was denial unless the applicant through settlement reduced their proposed rate or sought to mitigate their impacts on surface water. The denials are generally the result of: (1) Over-appropriation; (2) No water available within the capacity of the resource; or (3) Impacts on a surface water source where there is no water available.

There are almost as many protests filed on applications the Department proposed to approve as there are protests on the Department's proposals to deny an application. The protests filed on denials were by applicants, while the protests on approvals were filed by non-applicants. This is a symptom of the resource nearing or being fully allocated, with non-applicants being very interested in impacts from potential new uses.

Some non-applicant protests asserted that water was not available or that the groundwater appropriation would impact surface water flows. Other protests by non-applicants included several in

²⁷ OAR 690-009

which an existing irrigator sought to protect their senior surface water rights from being diminished by proposed new groundwater use in the Umatilla Basin, a basin with a long history of groundwater challenges. Some non-applicant protestants included other groundwater users asserting injury. Many of the issues were in the Goose and Summer Lakes Basin near areas that have been fully appropriated (Christmas Valley Groundwater Limited Area), the Klamath Basin which has both hydraulic connection with over-appropriated surface water as well as groundwater declines in some areas, and the Malheur-Lakes Basin where the Commission established the Harney Groundwater Area of Concern in 2016.

The Department believes that there is a need to further review and evaluate existing rules. The Department had begun discussions with the Commission following the 2016 Secretary of State Audit and the 2016 Draining Oregon article by The Oregonian. Further efforts to undertake improvements to groundwater allocation rules have been halted, as staff have been challenged to deal with the workloads associated with ongoing issues in the Klamath, Harney, Rogue, and Walla Walla subbasins, while also evaluating groundwater applications in a timely manner. Such an update to the rules would necessarily require input from stakeholders and members of the legal and scientific community, requiring agency staff resources that it does not currently have the capacity to undertake.

As the Department and others have highlighted in recent years, additional groundwater data continues to be needed in some parts of the state. The Department has heard from some water users about the importance of having sufficient data to be able to prevent over-appropriation before it happens. This is because the issuance of new permits beyond what is sustainable reduces the resource for existing users and jeopardizes junior users' investments if it is necessary to regulate or curtail future water use. Junior users may benefit in the short-term, but, long-term, everyone relying on that resource may be affected if over-appropriation occurs. Curtailing groundwater use, as discussed in the water management and distribution section, can become contentious. As such, it will continue to be important to focus on the Department collecting and analyzing data to be able to more proactively manage the resource.

One potential issue the Department commonly sees on groundwater applications is that landowners will pay to have the well drilled before obtaining a water right permit. While this is not unlawful, it may result in the application for the well being unable to be approved because it is too close to a stream, does not meet well construction standards, may interfere with other wells, or is in an area where groundwater supplies are declining. Establishing infrastructure before a water right is approved puts undue pressure on approval and may result in the applicant and Department incurring additional unneeded expenses. The Department strongly advises against this practice but has not been able to identify a means to proactively address the issue.

Applicable Statutes and Rules: ORS 537.615 through 537.629; OAR 690-005; 690-009; 690-300; and 690-310. *Basin program rules for each application are included in the summary below -even if the rules were not the reason for the protest.*

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
		Department issued a proposed order denying a groundwater application, finding that the presumption was not established: Applicant protested.
Case Resolved	2017 G-17984	The applicant protested asserting that the Department's finding that the groundwater source is over-appropriated is in error. A final order denying the application was issued. No permit was issued. 690-513 Goose and Summer Lakes Basin Program.
Case Resolved	2017 G-17911	The applicant protested asserting that the Department's finding that the groundwater source is over-appropriated is in error. A final order denying the application was issued. No permit was issued. 690-513 Goose and Summer Lakes Basin Program.
Case Resolved	2017 G-17945	The applicant protested asserting that the Department's finding that the groundwater source is over-appropriated is in error. A final order denying the application was issued. No permit was issued. 690-513 Goose and Summer Lakes Basin Program.
Case Resolved	2016 G-17928	A review of the application determined that there was the potential for substantial interference thus a surface water availability determination needed to be made. The applicant protested asserting that the Department's assessment of surface water availability is in error. The applicant reduced the requested rate of water, and pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-502 Willamette Basin Program.
Case Resolved	2005 G-16301	The applicant protested asserting that the Department's assessment of surface water availability was in error. The protest was withdrawn in 2015 and a final order denying the application was issued. Klamath Basin (no basin program rules).
Case Resolved	2015 G-17990	The applicant protested asserting that the Department's assessment of water availability is in error. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-513 Goose and Summer Lakes Basin Program.
Case Resolved	2014 G-17613	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. 690-512 Malheur Lake Basin Program.
Case Resolved	2014 G-17680	The applicant protested asserting that the Department's assessment of water availability is in error. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-502 Willamette Basin Program.
Case Resolved	2011 G-17444	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the protest and a final order denying the application was issued. Klamath Basin (no program rules).
Case Resolved	2010 G-17084	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. 690-502 Willamette Basin Program.
Case Resolved	2010 G-16877	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. 690-505 Deschutes Basin Program.

Case Resolved	2009 G-16823	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. Klamath Basin (no program rules).
Case Resolved	2009 G-16946	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. Klamath Basin (no program rules).
Case Resolved	2008 G-16545	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. Klamath Basin (no program rules).
Case Resolved	2005 G-13732	The applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the protest and a final order denying the application was issued. 690-517 South Coast Basin Program.
Case Pending	2018 G-17648	The applicant protested asserting that the Department's finding that the groundwater source is over-appropriated is in error. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-507 Umatilla Basin Program.
Case Pending	2016 G-17966	The applicant protested asserting that the presumption was established because the assessment of water availability is in error. A hearing is pending. 690-513 Goose and Summer Lakes Basin Program.
Case Pending	2009 G-16664	The applicant protested asserting that the presumption was established because the groundwater source is not hydraulically connected to surface water. A hearing is pending. Klamath Basin (no program rules).
Case Pending & Judicial Review Litigation Resolved	2007 G-16512 2015 Becker – 15CV05069	Contested Case: The applicant protested asserting that the presumption was established because the groundwater source is not hydraulically connected to surface water. A contested case hearing was held in June and July 2015. The ALJ issued a proposed order in September 2015, finding that there was not a preponderance of evidence. The Department issued an amended proposed order finding there was a preponderance of evidence that the proposed use will measurably reduce the surface water flows. The applicant has secured mitigation and a settlement agreement is being developed. 690-508 Grande Ronde Basin Program. Litigation: Applicant filed a petition for Writ of Mandamus with the Circuit Court in March 2015 requesting a groundwater right permit be issued and that the Court stay the contested case proceeding. The Court lifted the stay on contested case hearing and dismissed circuit court case in June 2015.
Judicial Review: Litigation Resolved	2015 Young – A153699	The applicant challenged a final order denying a water right application, questioning the Department's methodology in determining the zone of impact where mitigation would be required. A proposed order denying the application was issued. A contested case hearing was held, and an Administrative Law Judge issued a proposed order supporting the Department's action. The Department issued a final order consistent with that proposed order. The Court of Appeal affirmed the Department's final order without opinion in August 2015. The Oregon Supreme Court denied review. 690-505 Deschutes Basin Program.

		Department issued proposed order approving a groundwater application, finding that the presumption was established: Non-applicant protested
Case Resolved	2017 G-18276	A non-applicant protested asserting that the assessment of water availability is in error because it is not based on sufficient data, that the proposed use does not comply with several provisions of the rules of the Commission, and the public interest presumption is overcome. A final order approving the application and a permit were issued. 690-513 Goose and Summer Lakes Basin Program.
Case Resolved	2017 G-18166	A non-applicant protested asserting that the proposed use would injure existing water rights. A final order approving the application and a permit were issued. 690-502 Willamette Basin Program.
Case Resolved	2014 G-17711	A non-applicant protested asserting that the Department's assessment of water availability is in error. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-512 Malheur Lake Basin Program.
Case Resolved	2014 G-17790	A non-applicant protested asserting that the Department's assessment of water availability is in error. The applicant withdrew the application and a final order on withdrawal was issued. 690-512 Malheur Lake Basin Program.
Case Resolved	2014 G-17704	A non-applicant protested asserting that the Department's assessment of water availability is in error. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-512 Malheur Lake Basin Program.
Case Resolved	2014 G-17677	A non-applicant protested asserting that the Department's assessment of water availability is in error. Pursuant to a settlement agreement, a final order approving the application and a permit were issued. 690-512 Malheur Lake Basin Program.
Case Pending	2018 G-18394	A non-applicant protested asserting that the Department must first assess the potential of the proposed use for a cumulative adverse impact on streamflow or surface water supply, and that the proposed use would injure the protestant's senior surface water rights. A hearing is pending. 690-507 Umatilla Basin Program.
Case Pending	2017 G-18333	A non-applicant protested asserting that the Department must first assess the potential of the proposed use for a cumulative adverse impact on streamflow or surface water supply, and that the proposed use would injure the protestant's senior surface water rights. A hearing is pending. 690-507 Umatilla Basin Program.
Case Pending	2017 G-18342	A non-applicant protested asserting that the proposed use would injure the protestant's groundwater rights and that the assessment of water availability is in error because it is not based on sufficient data. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-515 Rogue Basin Program.
Case Pending	2017 G-18208	A non-applicant protested asserting that the presumption was not established because the assessment of water availability is in error because it is not based on sufficient data. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-512 Malheur Lake Basin Program.

Case Pending	2017 G-18285	A non-applicant protested asserting that the presumption was not established because the assessment of water availability is in error because it did not account for interference with nearby intermittent surface water. A hearing is pending. 690-504 Hood Basin Program.
Case Pending	2016 G-18131	A non-applicant protested asserting that the Department must first assess the potential of the proposed use for a cumulative adverse impact on streamflow or surface water supply, and that the proposed use would injure the protestant's senior surface water rights. A hearing is pending. 690-507 Umatilla Basin Program.
Case Pending	2016 G-18115	A non-applicant protested asserting that the Department must first assess the potential of the proposed use for a cumulative adverse impact on streamflow or surface water supply, and that the proposed use would injure the protestant's senior surface water rights. A hearing is pending. 690-507 Umatilla Basin Program.
Case Pending	2016 G-17638	A non-applicant protested asserting that the finding that water was available was not based on sufficient evidence. Settlement discussions are on-going. If there is no settlement, a hearing will be held. 690-512 Malheur Lake Basin Program.
Case Pending	2012 G-17433	A non-applicant protested asserting that land-use approval has not been completed, there is insufficient protection for fishery resources, stream impacts were underestimated, and the application should have been assessed in conjunction with a reservoir application. Settlement discussions initially led to agreement but failed. A hearing was initiated in 2016, then put on hold due to non-responsiveness of the applicant. 690-517 South Coast Basin Program.
Case Pending	2005 G-16401	A group of non-applicants protested asserting that proposed use, in connection with the applicant's other water rights, was not in the public interest. The application has been on extended hold to accommodate extended settlement negotiations. 690-504 Hood Basin Program.
Judicial Review: Litigation Resolved	2016 Oregon Desert Farms – A157433	A non-applicant protested and challenged an order approving a groundwater right permit issued for industrial use and power development. The applicant stated that it had an easement. The non-applicant, who was the landowner, protested the legal validity of that easement. The Administrative Law Judge found that the application was complete, and that the legal validity of the easement was a matter for circuit court. The Department issued the final order and affirmed its final order on reconsideration, before the Commission considered exceptions and affirmed the Department's final order. The Court of Appeals dismissed the case. OAR 690-513 Goose and Summer Lake Basin Program.

Instream Water Right Applications

Oregon has a longer history than many western states of protecting water for instream purposes. In 1915, legislation prohibited out-of-stream water allocations from streams that form waterfalls in the Columbia Gorge. In 1955, the State established minimum perennial instream flows. In 1970, the State Scenic Waterways Act was passed by the voters. However, it wasn't until 1987 that the modern Instream Water Rights Act came into effect, recognizing instream flows as a beneficial use to be protected like other water rights and opening up the possibility of leasing or permanently transferring water instream.

Oregon's Instream Water Rights Act was designed to protect instream flows through the establishment of water rights applied for by state-agencies to protect water instream for fish, pollution abatement, and recreational purposes. The Department of Environmental Quality, Department of Fish and Wildlife, and the Parks and Recreation Department are the agencies authorized to submit applications to protect water instream. These instream rights are then held in trust on behalf of the public by the Department. These rights are usually set for a certain stream reach or at a specific point on the stream. Instream water rights have an established priority date, which means they can be regulated in the same way as other out-of-stream water rights.

Since the Act was passed in 1987, more than 500 of the State's minimum perennial stream flows have been converted to instream water rights, and more than 900 instream water right applications have been processed and approved. Agencies filed the majority of these instream water rights in the early-to-mid-1990s, which in some basins makes them junior to most out-of-stream uses. However, there are parts of the state where these rights are senior to some water rights, and those junior users are regulated off to meet the "call" of the senior instream water right.

See the previous section on Surface Water Right Applications for more discussion on general criteria regarding establishing the presumption of the public interest under ORS 537.153(2).

There were about 950 instream water right applications filed between 1989 and 1991. About 125 of them were protested in 1996. Since then, 80 have been resolved, six of which were settled or withdrawn in recent years; however, about 60 applications are still pending settlement or a contested case hearing.

ODFW has recently begun filing new instream water right applications. In 2017, 15 new instream water right applications were protested. More recently, 80 applications filed in the North and South Coast basins were not protested and certificates were issued in November of 2019.

As shown in the summary of cases pending below, efforts to date have primarily focused on settlement. It is likely, however, that the only way the remaining disputes will be resolved is to go to a contested case hearing. Although the law has been in place since the late 1980s, some protestants have concerns about the establishment of new state-held instream water rights and are not interested in settlement. Proceeding to contested case hearings on some of the applications will better define the issues, disputes, and legal questions. The contested case hearings may identify some rule or statute changes that could be made to make the process clearer and reduce the potential disputes, but no changes to rule or statute that would result in a reduction in litigation have been identified at this time.

Applicable Statutes and Rules: ORS 537.332 through 537.360; ORS 537.130, 537.140; 537.150; 537.153; 537.170; and 537.211; OAR 690-005; 690-033; OAR 690-077; 690-300; 690-310; and 690-400.

Applications were filed and protested in one of the following Basin Programs: 690-504 Hood Basin Program; 690-505 Deschutes Basin Program; 690-506 John Day Basin Program; 690-508 Grande Ronde

Basin Program; 690-509 Powder Basin Program; 690-513 Goose and Summer Lakes Basin Program; 690-515 Rogue Basin Program; 690-516 Umpqua Basin Program.

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Case Resolved	1996; 6 cases/applications*	The Department issued proposed orders approving instream applications on six stream segments, finding that the presumption was established under ORS 537.153(2). Protests generally asserted that the need for the proposed stream flows cannot be substantiated by the applicant agency in light of possible future out-of-stream needs, the applications are deficient, water is not available, and the proposed use would injure senior rights and prevent new appropriations for out-of-stream uses. Resolved by settlement agreement or because protest was withdrawn. 690-516 Umpqua Basin Program; 690-513 Goose and Summer Lakes Basin Program.
Case Pending	2017; 15 cases/applications*	The Department issued proposed orders approving instream applications on 15 stream segments, finding that the presumption was established. Protests generally assert that the need for the proposed stream flows cannot be substantiated by the applicant agency in light of possible future out-of-stream needs. Settlement discussions are on-going. 690-504 Hood Basin Program.
Case Pending	1996; 61 cases/applications*	The Department issued proposed orders approving instream applications on 61 stream segments, finding that the presumption was established. Protests generally assert that the need for the proposed stream flows cannot be substantiated by the applicant agency in light of possible future out-of-stream needs, the applications are deficient, water is not available, and the proposed use would injure senior rights and prevent new appropriations for out-of-stream uses. Settlement appears unlikely for most of the protests, but the Department is proceeding with further discussions, and some may be referred for hearing in the future. 690-505 Deschutes Basin Program; 690-506 John Day Basin Program; 690-508 Grande Ronde Basin Program; 690-509 Powder Basin Program; 690-513 Goose and Summer Lakes Basin Program; 690-515 Rogue Basin Program.

*Permit numbers are not included here to save space; they can be made available upon request.

Permit Extensions

Once the Department determines that a new water use can be allowed, a permit is issued. The permit will contain time limits to develop the water use. Many water right permits include conditions requiring water meters or measuring devices to be installed, and water use or water level reports to be submitted to the Department. Other conditions may also be placed on the permit, such as installing and maintaining fish screens.

Permits generally require the water user to develop the water use within five years and to be in compliance with the terms and conditions of the permit. If additional time is needed, the permit holder may request an extension of time to complete construction and apply the water to the full beneficial use pursuant to ORS 537.230 or 537.630. An extension of time is a process in which the Department can approve additional time for a permit holder to perfect the beneficial use of water as authorized by the permit. An extension of time may provide the ability for a permit holder to extend dates to complete construction (B-date) and complete application of water (C-date).

An extension of time may be approved if the permit holder has demonstrated reasonable diligence in developing the beneficial use of water as authorized under the permit and the Department can find good cause to do so.

To obtain approval of an extension, the applicant must have begun construction on the project within the time period required by applicable statute, be able to complete the project within the time period requested for the extension, and show good cause to approve the extension. Considerations for good cause include but are not limited to: reasonable diligence; the cost to apply the water to use; good faith; market for water or power to be supplied; the present demands for the water or power; the income or use to provide returns on investment; other governmental requirements delaying completion; unforeseen events; and whether denial will result in undue hardship and there are no other reasonable alternatives.²⁸

For extensions, settlement terms may mean that the applicant agrees that there will be no further extensions, that development will be limited to a certain date, or that the extension will only be allowed for curing deficiencies.

The majority of the protests filed on proposed final orders for extensions of time were filed by permit holders where the Department proposed to deny the extension. This is unsurprising given that holders want to maintain their interest in a water right permit.

For context, the water right system operates under the premise that water is a public resource and that the beneficial use of that resource should be maximized. As such, speculation is discouraged, and if a water right holder is not using or no longer needs the use of water, that water should be allowed to be used by the junior appropriators in accordance with priority date. With some exceptions, the expectation of the prior appropriation system is that the water is put to use timely, so that junior users have an understanding of the likelihood of their use being regulated off. In instances where development takes years to complete, other junior users may develop a dependence on that water only to have a senior but unused portion suddenly develop.

Up until the mid-1990s, extensions were approved on an annual basis as a matter of course. However, as water limitations have become a reality, the Department now looks at extensions more closely, particularly to determine if further development under the extension will exacerbate existing supply

²⁸ See OAR 690-315-0040 for non-municipal, including additional considerations, in addition to those above.

constraints. Resource limitations such as a fully appropriated resource or the failure to even start development (which may signal speculation) are common reasons for denial of an extension that seeks to extend the time to develop and use more water.

The Department continues to work towards improving communications and information for permit holders so that they and their consultants understand the criteria for approval and that extensions are not automatically granted. Some applicants or their agents assume that extensions will be approved; helping applicants to understand the expectations further in advance may help them to make decisions about development under the permit before an extension is needed.

In regard to changes to the laws, the Department notes that the criteria for extensions are fairly broad. This can invite both applicants and non-applicants to protest Department decisions because of the seemingly wide-ranging nature of considerations. Further discussions would be needed to determine the appropriate approach to this issue.

Applicable Statutes and Rules: ORS 537.230; 539.010 (5); ORS 537.260; ORS 537.630 (2); and OAR 690-315.

Non-Municipal Extensions

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
		Department Proposed to Deny; Permit Holder Protested
Case Resolved	2019 G-16958	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit, failed to comply with permit conditions, failed to apply water to beneficial use, and did not show good cause for the permit to be extended. The applicant protested and asserted that the denial would cause undue hardship and provided additional information regarding unforeseen circumstances that delayed development of the permit. Settlement discussions resulted in a final order approving the extension but limiting the time allowed to complete development.
Case Resolved	2019 G-14594	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit, failed to comply with permit conditions, failed to apply water to beneficial use, and did not show good cause for the permit to be extended. The applicant protested and asserted that the unmet conditions could be cured. Settlement discussions resulted in a settlement agreement and final order approving the extension but requiring completion of a permit amendment and compliance with conditions.
Case Resolved	2018 G-16411	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder failed to complete the proposed wells or complete a permit amendment to add existing wells to the permit. In addition, the groundwater resource is over-appropriated, and development of the remainder of the permit is not within the capacity of the resource. The applicant protested and asserted that the basis for denial was not within the authority of the Department. Settlement discussions resulted in a settlement agreement and final order approving the extension but limiting the development of the permit to the existing beneficial use.
Case Resolved	2018 G-13570	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested but did not provide evidence of diligence and good cause. A final order denying the extension was issued.
Case Resolved	2017 G-16663	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the

		permit to be extended. The permit holder protested and provided additional evidence of development. A final order approving the extension was issued.
Case Resolved	2017 G-15267	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested but did not provide evidence of diligence and good cause. A final order denying the extension was issued.
Case Resolved	2016 G-12927	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested but did not provide evidence of diligence and good cause. The permit holder withdrew the extension application and a final order on withdrawal was issued.
Case Resolved	2016 G-17282	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested and provided evidence of diligence and good cause. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Resolved	2016 G-17041	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Resolved	2016 G-17132	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested but did not provide evidence of diligence and good cause. A final order denying the extension was issued.
Case Resolved	2016 G-13934	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested and provided additional evidence of development. A superseding PFO was issued. No protests were received. A final order approving the extension was issued.
Case Resolved	2015 G-16737	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested. Settlement discussions resulted in a settlement agreement and final order approving the extension.

Case Resolved	2015 G-13993	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested asserting a need for the permit. A final order denying the extension was issued.
Case Resolved	2015 G-17135	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder did not demonstrate diligence in the development of the permit or show good cause for the permit to be extended. The permit holder protested. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Pending	2019 R-87130	The Department issued a proposed order denying a reservoir permit extension of time because the permit holder did not demonstrate diligence in the development of the permit, failed to comply with permit conditions before storing water, and did not show good cause for the permit to be extended. The applicant protested asserting that the information in the application submitted by an agent was inaccurate. Settlement discussions are ongoing. If there is no settlement, a hearing will be held.
Case Pending	2018 G-17068	The Department issued a proposed order denying a groundwater permit extension of time because the permit holder failed to comply with permit conditions and did not demonstrate good faith. In addition, the groundwater levels have declined excessively, as defined in OAR 690-008-0001(4). The applicant protested asserting that the failure to comply with the conditions could be cured. Settlement discussions are ongoing. If there is no settlement, a hearing will be held.
Case Pending	2017 R-70065 R-72059 S-70066 S-72060	The Department issued proposed orders denying two reservoir permit extensions of time and their associated secondary use permit extensions of time because the permit holder did not demonstrate diligence in the development of the permits, failed to comply with permit conditions before storing water, and did not show good cause for the permits to be extended. The applicant protested asserting that the failure to comply with the conditions could be cured. Settlement discussions are ongoing.
Case Pending	2017 G-16364	The Department issued a proposed order denying a groundwater permit extension of time because no water has been appropriated to date, the groundwater resource is over-appropriated, and development of the remainder of the permit is not within the capacity of the resource. The applicant protested and asserted that the basis for denial was not within the authority of the Department. Settlement discussions are ongoing.
Case Pending	2017 G-16359	The Department issued a proposed order denying a groundwater permit extension of time because no water has been appropriated to date, the groundwater resource is over-appropriated, and development of the remainder of the permit is not within the capacity of the resource. The applicant protested and asserted that the basis for denial was not within the authority of the Department. Settlement discussions are ongoing.

		Department Proposed to Deny; Permit Holder and Non-Applicant Protested
Case Pending	2015 R-84101	The Department issued a proposed order denying a surface water permit extension of time because the permit holder did not demonstrate diligence in the development of the permit, comply with permit conditions, or show good cause for the permit to be extended. Applicant and non-applicants protested asserting conflicting claims of compliance with the requirement to begin construction and conditions. Settlement discussions resulted in a settlement agreement and final order approving the extension but limiting the development of the permit.
		Department Proposed to Approve; Permit Holder Protested
Case Resolved	2018 G-16776	The Department issued a proposed order approving a groundwater permit extension of time. The permit holder protested asserting the extension period was too short. The protest was withdrawn and a final order approving the extension was issued.
Case Resolved	2018 G-11728	The Department issued a proposed order approving a groundwater permit extension of time. The permit holder protested asserting the condition requiring a permit amendment before water use was a hardship. A final order approving the extension was issued.
		Department Proposed to Approve; Non-Applicant Protested
Case Pending	2018 G-16385	The Department issued a proposed order approving a groundwater permit extension of time. A non-applicant protested asserting construction did not begin and there has been no reasonable diligence and no good cause shown. A hearing is pending.
Case Pending	2018 S-73290	The Department issued a proposed order approving a surface water permit extension of time because the permit holder demonstrated good cause and good faith, and the unmet conditions are curable. A non-applicant protested asserting that the permit holder's failure to comply with the conditions should require denial of the extension. A hearing is pending.
Case Pending	2015 R-84100	The Department issued a proposed order approving a reservoir permit extension of time because the permit holder demonstrated diligence in the development of the permit, complied with permit conditions, and showed good cause for the permit to be extended. Non-applicants protested asserting the permit holder failed to comply with conditions. Settlement discussions resulted in a settlement agreement and final order approving the extension but limiting the development of the permit.
Litigation: Resolved	2018 18CV55723, A169580 Gould	The Department issued a proposed final order proposing to extend the time. A third party filed a protest. The Department issued a final order approving the time extension, but with conditions. The petitioner filed a Petition for Judicial Review in the Circuit Court, and with the Oregon Court of Appeals. The petitioner had residential wells, which could be impacted by the applicant's commercial development plans. The petitioner sought to set aside the extension and remand the order claiming the Department lacked authority and erred when considering

		<p>the applicant's evidence. A declaration that the appeals rights notice language was misleading was also requested. As permitted by ORS 183.482(6), the Department withdrew its order and filed an order on reconsideration, finding that the protestant raised significant disputes and that a contested case hearing should be held. The Court of Appeals dismissed the case in light of the order on reconsideration. The Circuit Court dismissed the case after the petitioner filed a Notice of Voluntary Dismissal.</p>
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Municipal Extensions

Water right holders generally have five years to develop water under a permit or request an extension of time. In the late 1990s, new interpretations of the Department's authorities led to a shift in policy for municipal water rights. The Department had originally determined that municipal permits could only be extended in five-year increments, but later determined that extensions should be issued for a longer time period to allow development. This change in Department policy led to several rulemaking efforts in 1998 related to extensions of water right permits. During these rulemaking efforts, municipal extensions were put on hold, and it was eventually determined that a separate process was needed from other permits.

The Department formed a community water supply work group in November of 1998 to review permit extensions and other issues related to these water systems. Municipal permit holders were exempted from the obligation to seek a permit extension until 2001, in order to allow further work on policy development. Some of these systems continued to develop water under these permits while determinations were made on the extensions process.

By December of 2000, it became apparent that the work group needed more time; the Commission extended the exemption for municipal use permits to seek an extension to July 1, 2003. By that time, there were more than a hundred municipal use permits with extension applications awaiting the outcomes of the work group.

In April of 2002, rules were amended that provided the municipal permit holders with the option to apply for a permit extension under the existing extension rules; however, they were not required to apply for an extension until July 2003. In 2003, new rules were adopted for municipal permit extensions, which required a Water Management and Conservation Plan as a condition of an extension.

In 2004, the Court of Appeals in *Waterwatch v. North Bend* stated that municipalities only had five years to develop their permits, which resulted in House Bill 3038 (2005). House Bill 3038 (2005) provided municipalities 20 years to develop their permits, and allowed for extensions for a longer period of time. The legislation required the development of Water Management and Conservation Plans as a condition of an extension. In addition, for permits issued prior to November 2, 1998, it required that for the first extension issued after June 28, 2005, that the use of the undeveloped portion of water be conditioned to maintain the persistence of listed fish species.

The Department's finding related to fish persistence must be based upon existing data and advice from ODFW. The Department consults with ODFW and then determines if use of the undeveloped portion of the permit would maintain the persistence of listed fish species in the portions of the waterway(s) affected by water use under the permit. If the use would not maintain the persistence of listed fish species, further conditions to maintain the persistence must be placed upon the undeveloped portion of the permit. These conditions typically range from partial curtailment to full curtailment of the undeveloped portion when the target flows are not being met.

The Department did not begin processing most municipal extensions for permits issued prior to November 2, 1998, until 2006. Due to the new requirement for fish persistence review by ODFW, the Department did not process the extensions in order, but rather sent them over in batches based on geography for review efficiency purposes. Because this was the first time that ODFW was conducting fish persistence reviews, the first batch of extensions took time to review and develop a methodology.

The issuance of extensions several years later led to a series of lawsuits, involving both the fish persistence standard, as well as the determination of the "undeveloped portion of the permit." The

Cottage Grove case, which was decided by the Court of Appeals in 2013, focused on the definition of “undeveloped portion of the permit.” This case was appealed to the Supreme Court, which dismissed the case in 2015 (see case included in the table below). This ultimately led to a series of legislative proposals over several sessions, eventually culminating in the passage of House Bill 2099 (2017). Many of the extensions are still pending review for fish persistence at ODFW.

The Department does not have any recommendations for legislative or rule changes at this time, particularly given that this policy arena has been in flux over the past 20 years.

Applicable Statutes and Rules: ORS 537.230; 539.010 (5); ORS 537.260; ORS 537.630 (2); and OAR 690-315.

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Judicial Review Requested; Litigation Pending	2015 Lower Clackamas Water Districts – No. A148872 S-43365 S-47144 S-50819 S-57226 S-5942 S-60632 S-28676 S-11007	<p>The Department issued eight proposed final orders, all to municipal water suppliers with points of diversion in the lower Clackamas River proposing to approve surface water permit extensions of time. The Department found the permit holders demonstrated diligence in the development of the permit, complied with permit conditions, and showed good cause for the permit to be extended. The applicants and a non-applicant protested asserting the conditions placed on the extension were either excessive and lacked substantial evidence or were insufficient to maintain the persistence of listed fish species. A hearing was held, the Administrative Law Judge’s proposed order found the conditions met the requirements of the rule, and a final order approving the extension was issued. The non-applicant filed petitions for judicial review with the Oregon Court of Appeals, claiming that the conditions were not protective enough to maintain the persistence of fish species. The Court remanded the order.</p> <p>A hearing on remand was held, the Administrative Law Judge’s proposed order found the record contained the evidence and reasoning required by the remand order, and a final order on remand was issued. The final order is now on appeal to the Court of Appeals; this is the second time this matter has been before the Court.</p>
Judicial Review; Litigation Resolved	2014 City of Cottage Grove – S42117; A147071; SC S062036	<p>The permit holder filed an application to extend a water right permit. A non-applicant protested the proposed order approving the extension of time. The protestant argued that the fish persistence standards applied to the undeveloped portion of the permit at the time the last extension expired, which was in 1999. The Department and the permit holder argued that the fish persistence standards applied to the undeveloped portion of the permit at the time of the request for an extension. Following a contested case hearing, the Department issued a final order granting the extension. The permit holder then filed the claim of beneficial use and requested that a water right certificate be issued. The Department issued the certificate. The non-applicant filed a petition for judicial review with the Oregon Court of Appeals. The Court reversed and remanded with instructions to vacate the City’s water right certificate and to reconsider the permit extension in accordance with the Court’s opinion. The State joined the City in petitioning for review by the Oregon Supreme Court. The Supreme Court accepted the petition and held oral arguments in 2014. The Supreme Court dismissed the petition for review in 2015, upholding the Court of Appeals ruling.</p>

Case Resolved	2013 S-39480	Department issued a proposed order approving a reservoir permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested asserting that the conditions placed on the extension were insufficient to maintain the persistence of listed fish species. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Resolved	2007 S-41825	Department issued a proposed order approving a surface water permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested asserting that the conditions placed on the extension were insufficient to maintain the persistence of listed fish species. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Resolved	2007 G-3361	Department issued a proposed order approving a groundwater permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested asserting that the conditions placed on the extension were insufficient to maintain the persistence of listed fish species. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Resolved	2007 G-9502	Department issued a proposed order approving a groundwater permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested asserting that the conditions placed on the extension were insufficient to maintain the persistence of listed fish species. Settlement discussions resulted in a settlement agreement and final order approving the extension.
Case Pending	2012 R-32825	Department issued a proposed order approving a reservoir permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested asserting that the permit should be considered municipal and be subject to fish persistence, the extension would allow development that would be harmful to fisheries resources and injure instream water rights, the extension should be denied for failure to begin construction, and the time requested to complete development should be denied. Settlement discussions are ongoing.
Case Pending	2010 S-44208	Department issued a proposed order approving a surface water permit extension of time because the permit holder has demonstrated good cause and good faith. A non-applicant protested. To comply with a later Appellate Court ruling, the application will be re-reviewed and will be subject to fish persistence conditions. Fish persistence advice from ODFW is pending.

Transfers

Permanent transfers provide a method to permanently change the point of diversion or appropriation, the place of use, or the beneficial use of the right from that for which the right was originally issued. The water right holder must obtain approval of a permanent transfer from the Department before making any of these changes. Other types of transfers may be temporary.

An application for a permanent transfer generally requires a map prepared by a certified water right examiner. The applicant must submit an application describing: the current water right; the proposed changes; evidence of water use in the past five years; land ownership or consent by the landowner; and, in most cases, compliance with local land use plans. The water may continue to be used in accordance with the current water right until the transfer application is approved. The proposed change in use may only occur once the final order approving the permanent transfer is issued.

To approve a transfer application, the Department must determine that the proposed change will not enlarge the water right and will not injure other existing water rights. Like with new water right applications, there is a public comment period and a protest period. Protests are either settled or referred to contested case hearing.

The Department, working with the applicant, may attach conditions to eliminate enlargement of the right or potential injury to other water rights in order to allow approval of the proposed change. If conditions will not eliminate injury or enlargement, the application is denied. For transfers, settlement terms may include measurement, monitoring, or other actions to prevent injury or enlargement.

After the transfer is approved, the applicant must make the change. In the case of a change in the type of use or place of use, any portion of the water right involved in the transfer that is not changed is lost. Following completion of the change, a certified water right examiner must prepare a final proof map and site report to be submitted with the applicant's claim of beneficial use. The map and claim of beneficial use describe the completed change and the extent of beneficial water use under the modified water right. A new water right certificate will be issued to confirm the modified water right.

The majority of the protests filed were by non-applicants asserting injury. This speaks to the shared nature of the resource in that changes to a water right, or in how water is used, can impact other water users. The Department does not have any recommendations for changes at this time; protecting existing uses of water from injury is important in the management of this essential, but shared, resource.

Applicable Statutes and Rules: ORS 540.505 through ORS 540.532; OAR 690-380

Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Applicants Protested		
Case Resolved	2016 T-11907	The Department issued a preliminary determination approving a change in point of appropriation. The applicant protested asserting the Department had no legal basis for monitoring and measuring conditions. Settlement discussions resulted in a settlement agreement and final order approving the transfer.
Case Pending	2018 T-12837	The Department issued a preliminary determination denying a change in point of appropriation because it would cause injury to an instream water right. The applicant protested requesting consent to injury. A consent to injury decision is pending. If there is no settlement, a hearing will be held.
Judicial Review; Litigation Pending	2014 Blue Mt. Angus –A156669	This case is a petition to the Oregon Court of Appeals for review of a final order denying a transfer (T-10898). Applicant 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. In May of 2018, the Court ordered that this case be reactivated. In June of 2018, the Court of Appeals granted a motion to hold the appeal in abeyance. Additional extensions have been granted to allow the applicant time to submit an amended application. Staff continue to work with applicants Counsel on the amended map and application.
Non-Applicants Protested; Applicant Litigated		
Judicial Review; Litigation Resolved	2015 Tumalo Irrigation District –15CV28751; 16CV01703 Note cases also involve water distribution and management issue.	In 2015, the petitioner requested a permanent, in-district transfer of water from a named reservoir to two ponds constructed and filled for recreation. The Department issued a preliminary determination approving a district's change in place of use. A non-applicant protested asserting injury to the district's water deliveries to protestant. An order on protest was issued concluding the protest did not assert injury to an existing right, and that the issues raised must be heard by the district under ORS 540.580(8). A final order denying the application was issued. The Department denied the district's request for transfer based on a lack of land-use approval from the county and a determination that the in-district transfer statute did not authorize a change in location of stored water. In October 2015, the district filed a petition for judicial review (15CV28751) was challenging the Department's denial of the permanent in-district transfer. The parties met in search of settlement. In December 2016, the petitioners filed a motion to withdraw the first petition for judicial review (15CV28751) with the Circuit Court and a general order of dismissal was entered.

		<p>Meanwhile, the Department also issued an enforcement order against the petitioner asserting unauthorized diversion and storage of water in two ponds. The enforcement order constituted a notice of violation and required the District to obtain authorization for storage of water by December 2015. The enforcement order was issued in conjunction with a limited license that authorized diversion of a specified amount of water for maintenance and storage of water in the pounds. In October 2015, the Department withdrew its enforcement order and associated limited license on reconsideration. In November 2015, the Department issued an order on reconsideration, reaffirming the conclusion that diversion of water into one pound was unauthorized and excess storage of water in the other pond was also unauthorized. In January 2016, the petitioner filed a petition for judicial review (16CV01703) challenging the Department's November 2015 order on reconsideration. Settlement efforts continued and in February 2018, the parties signed a stipulated general judgment and the case was closed.</p>
		Non-Applicants Protested
Case Resolved	2016 T-12072	The Department issued a preliminary determination approving a change in point of appropriation and place of use. A non-applicant protested asserting injury. Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Case Resolved	2016 T-12239	The Department issued a preliminary determination approving a change in character of use. Two non-applicants protested asserting error in the language regarding the authorized use of a quantity of stored water, and that terms of the preliminary determination were inconsistent with the federal law authorizing the transfer. Settlement discussions resulted in a settlement agreement and final order approving the transfer.
Case Resolved	2016 T-11719	The Department issued a preliminary determination approving a change in point of diversion. A non-applicant protested asserting injury. Settlement discussions resulted in a settlement agreement and final order approving the transfer.
Case Resolved	2016 T-11108 T-11249	The Department issued a preliminary determination approving a change in point of appropriation. Non-applicants protested asserting the changes were not authorized by statute, the applications were invalid, and the Department failed to determine compliance with statewide planning goals. A hearing was held in early 2016. A proposed order granted a motion for summary determination and a final order approving the application was issued.
Case Resolved	1999 T-8309 T-8310	The Department issued a preliminary determination approving change in points of appropriation, place of use, and character of use. Non-applicants protested asserting injury and enlargement. A hearing was held in 2001. A proposed order was issued approving the applications with removal of certain acres. A final

	T-8311 T-8312	order in contested case was issued in 2018, and a final order approving the application was issued in 2019. An order on reconsideration was issued later in 2019, extending the date of completion.
Case Pending	2018 T-12919	The Department issued a preliminary determination approving a change in point of appropriation. Non-applicants protested jointly asserting the proposed change will injure existing nearby domestic water rights. Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Case Pending	2018 T-12595	The Department issued a preliminary determination approving a change in point of appropriation and place of use. A non-applicant protested asserting an approved assignment of a portion of the permit was done in error, therefore, the applicant has no legal right to transfer a portion of the certificate. Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Case Pending	2018 T-11669	The Department issued a preliminary determination approving a change in point of diversion. A non-applicant protested asserting injury. Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Case Pending	2018 T-12248	The Department issued a preliminary determination approving a change in place of use. Non-applicants protested asserting injury and enlargement. Settlement discussions are on-going. If there is no settlement, a hearing will be held.
Judicial Review; Litigation Resolved	2016 Central Oregon Irrigation District –16CV2022	A credit union foreclosed on a property. The property owner quitclaimed the water rights to remove any right to water on that property. The rights are held by an irrigation district. The district later filed an in-district application to transfer water rights off of the property onto two others. The credit union claimed it held a security interest in the water rights, suing the district, two individuals, an LCC, and the Department for a declaration that the credit union was part owner of the water rights being transferred, and seeking an injunction on approval of the transfer and damages. The Department filed to dismiss the action against the Department and the motion was granted.

Cancellations

A water right remains valid as long as beneficial use of the water is continued without a lapse of five or more successive years. With few exceptions, such as municipalities, if any portion of a water right is not used for five or more successive years, that portion of the right may be subject to cancellation. For context, the water right system operates under the premise that water is a public resource and that the beneficial use of that resource should be maximized. As such, if a water right holder is not using or no longer needs the use of water, the law seeks to allow others to use that water, so as to maximize the benefits of water use in the state. Cancelling unused water rights could allow others to access new water rights if the cancellation results in the source no longer being fully appropriated.

It is important to note that, diverting less than the full amount of water allowed under the right will not result in forfeiture, as long as the water right holder is ready, willing, and able to use the full amount and has a water system capable of handling the entire rate and duty as described in the water right.²⁹ This is commonly misunderstood, as is the fact that cancellations can be rebutted by a number of factors in ORS 540.610.

Cancellation of a forfeited water right is not automatic and requires a legal proceeding to determine whether or not the period of non-use has occurred. The cancellation proceeding determines whether a water right evidenced by a certificate has been partially or entirely forfeited by a failure to make beneficial use of the water under the terms and conditions of the certificate for a period of five or more successive years. Administrative proceedings to determine the validity of a water right are typically initiated when individuals with firsthand knowledge provide sworn affidavits asserting non-use. Once affidavits are filed, notice of the proposed cancellation of the right is provided to the water right holder. A contested case hearing is held if the holder of the right protests the proposed cancellation. If the holder does not protest, the right is cancelled. Similarly, a legal proceeding is not necessary if the landowner voluntarily authorizes cancellation.

The Department believes that the cancellation laws could benefit from additional review and modification. The current laws do not provide the Department with sufficient authority to reject affidavits that may not have merit.

Applicable Statutes and Rules: ORS 540.610-540.670; OAR 690-017

²⁹ ORS 540.610(3)

Status	Year Filed/ID	Legal Question Addressed and Fundamental Basis for Dispute
Certificate Owner Protested Cancellation		
Case Resolved	2017 C-38341	A hearing was held. A proposed order recommending the cancellation was issued. A final order was issued cancelling the certificate.
Case Pending	2018 C-29901, C-29902, C-29903, C-39456	A hearing is pending.
Case Pending	2018 C-25341, C-17372, C-7692	A hearing is pending.
Case Pending	2018 C-826	A hearing is pending.
Case Pending	2017 C-2366 & C-22086	A hearing was held. A proposed order recommending neither certificate be cancelled was issued. A final order is pending.
Certificate Owner Protested; 3rd Party Affidavits Withdrawn		
Case Resolved	2016 C-48255	A hearing was initiated. The affidavits were withdrawn and the matter settled.
Case Resolved	2016 C-46885	A hearing was initiated. The affidavits were withdrawn and the matter settled.
Case Resolved	2015 C-57729 (<i>Olsen v. Ogletree</i>)	This case involves one certificate covering two properties. One owner filed affidavits of nonuse on the portion of the other owner's use. The other owner then filed affidavits against the first owner prompting a separate cancellation case below. A hearing was initiated. The affidavits were withdrawn and the matter settled.
Case Resolved	2015 C-57729 (<i>Ogletree v. Olsen</i>)	See description on above case. A hearing was initiated. The affidavits were withdrawn and the matter settled.
Other		
Litigation: Case Resolved	2015 Brimstone Natural Resources Co. –14CV1460	The petitioner filed a (quiet title) complaint challenging the validity of a water right, after purchasing one of multiple tax lots, which historically functioned as one property. The parties agreed that the water described in the certificate no longer existed and that it is a right of record only, removing the water right as an issue in the otherwise ongoing case.

Water Distribution and Regulation

In general, in order to use water in Oregon, one must have a water right.³⁰ A water right permit or certificate does not guarantee water for its holder. Satisfaction of water rights are determined in accordance with the Prior Appropriation Doctrine – its principals are often referred to as “first in time, first in right.” This means that older water rights on a stream are the last to be regulated during times of low streamflow. For water rights established after adoption of the Water Code in 1909, the priority date is typically the date the Department received and accepted the application for a permit to use water. For rights established prior to adoption of the Water Code, the priority date generally reflects the date on which water use began.

When there is insufficient water to satisfy all water rights, water users with senior priority dates can make a “call” to receive water regardless of the needs of junior users. Department watermasters assess the available supply to determine if the call is valid. If the call is validated, regulation of junior rights begins until the senior right is satisfied. When junior water right holders are notified of a senior user’s call via a regulation order, they are required to shut off their water use. If there is a surplus beyond the needs of the senior right holder, the water right holder with the next oldest priority date can take water under their right and so on down the line until there is no surplus.

Watermaster authorities are established in statute and rule.³¹ The watermaster also works to address illegal uses.

Staff follows up with field checks to ensure that water use is in compliance with regulation orders. Although voluntary compliance with Oregon water law is achieved the vast majority of the time, there are violations of water law that require formal enforcement action. Water use violations generally involve storing water or diverting and using water without a water right. Gathering evidence to prove that an individual is using water without a water right can be difficult, as has been seen recently with emerging crops such as hemp and marijuana.

Individuals who wish to challenge a final regulatory order may do so through the “other than contested case” process pursuant to ORS 536.075, meaning a petition for judicial review is filed and circuit court procedure is followed by the parties accordingly. There is no contested case process. Another option is the individual may request reconsideration of the order.

Cases involving water distribution and management are broken out into the following categories in the sections below:

1. Cases involving use of water without a water right (unauthorized use).
2. Cases involving water distribution for senior water rights, which are further broken out into surface water rights that were regulated off and groundwater rights that were regulated off to meet the senior call.
3. Cases involving parties seeking to require the Department to take regulatory action, where it had not.
4. Cases involving water measurement.

Observations on Stays:

ORS 536.075(5) stays the enforcement of the regulatory order if a petition for judicial review is filed within 60 days of the orders issuance. This means that while judicial review is pending, the junior user

³⁰ see ORS 537.130 or 537.535

³¹ see primarily, 540.045; OAR 690-250

that was regulated to provide water to a senior user, or the individual with no water right that was regulated for using water without authorization, can continue to use water even if this takes water from a senior water right holder. However, the Department's Director or Commission may deny the stay based on a finding of substantial public harm. The denial of the stay can take several weeks to prepare and issue, which can be a challenging period of time for the senior user to not receive water.

In recent years, the Department has denied the stay in some instances mostly based on a finding of substantial public harm for surface water, and that failing to deny the stay would result in a senior water right holder not receiving water to which the holder is entitled—a foundational principle of Oregon's water management system.

In one example, a junior surface water right holder, who was also storing water without a water right, refused to comply with a regulation order and filed a petition for judicial review, taking water from a downstream senior user. The Department denied the stay to provide relief to the senior user. The junior user filed a petition for judicial review on the order denying the stay. This resulted in an automatic stay on the order denying the stay, creating essentially a seemingly circular loophole, and allowing a junior and unauthorized user to take water outside the system of prior appropriation. While this fact scenario has only happened once, this sequence of events, if repeated on a broader scale in the future, could undermine senior water rights.

Denying the stay takes time and leaves the senior user without water during the time period in which the Department develops the record and makes its finding. The Department to date has not denied the stay on petitions for judicial review of groundwater regulation orders in the Klamath Basin, in part because of the significant disputes on those types of cases and the importance of allowing individuals to make their case.

The issue of automatic stays has become a matter of interest for several parties and has drawn the attention of some members of the Commission. In 2019, legislation was introduced on behalf of the Klamath Tribes to modify the stay provisions. The Department anticipates further legislative conversations on this matter in the future.

Cases Involving Unauthorized Use of Water Without a Water Right

The cases in the table below involve the Department taking action to regulate off the use or storage of water where no water right has been obtained, in violation of the law. These unauthorized uses can be difficult to resolve, due to the investments made, and the fact that new water rights cannot be issued in many parts of the state to allow them to more easily get into compliance with the law. Individuals that have made investments to develop a water source without having obtained authorization to use the water often dispute the Department’s actions to try to keep their investment.

Given that these cases involve using water in violation of the law, the Department does not have any proposed solution. Adding clarity for buyers during property transactions may help new buyers better understand where they do not have water rights. However, that does not address how to prevent individuals from using water without authorization before it becomes a regulatory matter. Investment in communications and outreach staff could help individuals better know the law, as could investment in field staff to better cover areas across the state.

Year Filed	Rule/Statute	Legal Question Addressed and Fundamental Basis for Dispute
		Cases in which Department issued an order to cease water use or storage due to lack of a water right (Unauthorized Use of Water)
2018 Stroemple – 18CV20093; 18CV33351 Litigation: Resolved	ORS 537.130; ORS 540.045; OAR 690-250	<p>In response to a call for water from a water right holder, the watermaster found the petitioner was diverting water from a stream into unpermitted reservoirs. A final regulation order was issued citing use of water without a valid water right and water supply was insufficient to satisfy senior water rights. The petitioner filed a petition for judicial review to set aside the final order as outside of the Department's authority, primarily citing the call for water by the senior user as futile. The petitioner said he was diverting water into a ditch (bulge-in-system) to irrigate his property.</p> <p>While the first case was pending, the Department issued an order denying stay, finding substantial public harm based on continued diversion of water, which prevented water from reaching the downstream senior water users. The petitioner filed a second petition for judicial review to set aside the order denying stay as outside of the Department's authority. The petitioner claimed the underlying call for water was futile and the Department failed to determine beneficial use or to regulate junior water users. Based on a stipulation of the parties, the court consolidated the petitions for judicial review while the parties pursued mediation. The court dismissed the case after the parties reached a settlement agreement.</p>

<p>Harrington and Farm of the Family Recreation Association</p> <p>2018 A152096 103843MI A156927 13cv01826 A155824</p> <p>2017 CL 17-35610</p> <p>2016 1:16-CV-00200-</p>	<p>ORS 540.045; OAR Chapter 690, Division 250</p> <p>ORS 538.430 6 criminal charges 11/2002</p> <p>Storing water without a water right</p> <p>537.130 540.720 540.710</p>	<p>The plaintiff's reservoirs were built without water rights. From 2002-2018, a series of civil and criminal cases were filed in state and federal courts. The plaintiff was unsuccessful in arguing that the state could not regulate diffuse surface waters. After several court cases, a court ordered him to open the headgates and drain the reservoirs and placed the plaintiff on probation for 12 months. After complying, the plaintiff eventually began storing water again. In 2010, criminal proceedings were brought. In 2012, criminal proceedings ended with the plaintiff being convicted of nine misdemeanor counts of violating Oregon water law, involving jail time, probation, and payment of a fine. The court ordered reservoirs to be drained and dams breached. In response, the plaintiff attempted to convey property interests to others in an effort to prevent the enforcement of court orders. By 2014, the plaintiff's actions again resulted in the plaintiff's probation being violated, and the court ordered the Department to drain the reservoirs and breach the dams. The Department complied with the court's orders in 2014. In 2016, the plaintiff filed a complaint in US District Court, asking the court to prevent state action, redress for unlawful arrest, award of damages, and more. The court found: (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. The case was dismissed. The plaintiff filed an appeal, but in 2018, the Ninth Circuit dismissed the case because it was filed from a non-appealable order.</p>
<p>2016 Crouthamel – CV151431</p>	<p>540.045 537.130</p>	<p>The Department issued a final order requiring an illegal diversion dam storing and diverting water without a water right to be removed. The petitioner challenged a final order requiring the diversion dam to be removed. A settlement agreement was signed, and the case was dismissed in August 2016.</p>
<p>2015 Akins – CV150705 15</p>	<p>540.045 537.535</p>	<p>The Department notified the landowner that water could not be used from a well without a water right, but water use continued. The well is located in a groundwater-limited area. The petitioner challenged the final order for use of</p>

		water without a water right. The petitioner completed the irrigation season and withdrew the case, which was dismissed.
2018 Schrock –2:18 - cv - 01264-SU; 2:18 - cv - 01264-SI	ORS 540.045; OAR Chapter 690, Division 250 537.535	The watermaster issued a final order regulating off groundwater to lands with no water right. Voluntary compliance was achieved at first, but then groundwater use resumed. The Department shut off the irrigation system and mediation was pursued between the plaintiff, the County, and the Department. The plaintiff filed a complaint in US District Court, seeking declaratory judgement that the Department lacked authority to interfere with their private purchase of land and possessory interest in a Miller Patent, by requiring a water right. The Court dismissed the matter, concluding the plaintiff failed to establish standing because land ownership could not be demonstrated, and the patent did not prohibit state regulation of water.
Tumalo Irrigation District 2015 15CV28751; 16CV01703	T 11915 540.570 540.580 (Perm)	See case description above under transfers.
Cases involving Water Right Certificate Error; Regulation		
2018 Kalkhoven –18CV34480; 18CV53444	ORS 540.045; OAR Chapter 690, Division 250 537.130	The Department issued a regulatory order as there was not a water right authorizing use from a specified surface water source for irrigation. The petitioner asserted legal error, lack of substantial evidence, and abuse of discretion but then filed a notice of voluntary dismissal. A petition to amend the Pine Creek Decree was filed in its stead. The Department and petitioner worked through the Circuit Court to understand an error on the water right certificate tracing back to the 1930's. A certificate was issued correctly describing the water right for official records.

Cases Involving the Regulation of Junior Water Users for Senior Water Right Holders

The cases in this section involve the Department acting to regulate for a senior water right or determined claim. Most of the cases are within the Upper Klamath Basin; therefore, much of the discussion here will focus on management of water within the Klamath Basin.

Management of Water within the Klamath Basin

The Klamath Basin represents one of the most complex water management challenges in Oregon, with multiple listed species requiring lake levels or river flows, four Tribes between Oregon and California, a 200,000-acre federal irrigation project, and significant amounts of groundwater discharging into springs and rivers that support streamflow. Like many arid areas in the Western United States, the needs for water in the Klamath Basin often exceed the available resources to meet them on a year-to-year basis, resulting in extensive water use regulation. Considerable time and effort have been made over the years to address water needs and water management issues within the basin, but no collaborative solutions have emerged, and litigation has continued.

In recent years, there has been considerable controversy concerning the regulation of junior groundwater rights that interfere with senior surface water determined claims. This has resulted in numerous lawsuits challenging the Department's regulation actions and supporting science. In 2019, the Department launched an effort to engage basin water users in understanding basin hydrology and developing a long-term approach for conjunctive management of surface and groundwater rights in the Upper Basin area.

Background on Attempts at Settlement and Regulation in the Klamath Basin

Water management has been contentious since the Klamath Basin Adjudication for surface water began in 1975, with some periods of collaboration. Unmet water needs of many of the Klamath River Basin's water interests—from farmers and ranchers to Indian tribes, commercial salmon fishermen and wildlife refuges—have resulted in intense conflicts, particularly in dry water years.

Tensions in the basin became particularly significant in 2001, when Klamath Reclamation Project farmers saw their irrigation water drastically reduced by the Bureau of Reclamation during a particularly dry water year, due to endangered species act listed species.

In 2002, federal agencies reduced the environmental flows required in the Klamath River to satisfy the Endangered Species Act (ESA) and allowed the Klamath Reclamation Project to divert close to 400,000 acre-feet for irrigation purposes. A severe disease outbreak in the Lower Klamath River contributed to the death of tens of thousands of migrating salmon. The Pacific Coast Federation of Fishermen's Association sued the U.S. Bureau of Reclamation, alleging that irrigation deliveries to the Klamath Reclamation Project had violated the ESA.

These events highlighted the need for a negotiated settlement. After several years of negotiations, in early 2010, the Klamath Basin Restoration Agreement (KBRA) and the associated Klamath Hydroelectric Settlement Agreement were signed.

The Klamath Basin Restoration Agreement (KBRA) was "intended to result in effective and durable solutions which will: (i) restore and sustain natural production and provide for full participation in harvest opportunities of fish species throughout the Klamath Basin; (ii) establish reliable water and

power supplies which sustain agricultural uses and communities and National Wildlife Refuges; [and] (iii) contribute to the public welfare and the sustainability of all Klamath Basin communities.”³²

In 2013, the Department issued its Findings of Fact and Final Order of Determination and referred the case to the Klamath County Circuit Court. Once the administrative phase of the adjudication was completed, the statutes require the Department to manage the basin according to the doctrine of prior appropriation while the adjudication proceeds through the Klamath County Circuit Court. Regulation of surface water rights and determined claims began in 2013, and fundamentally changed how water was managed in the Upper Klamath Basin. See the adjudication section and cross-cutting issues sections for more on the Klamath above.

Parties in the off-project area of the basin were not able to come to agreement in negotiations for the KBRA. However, subsequent negotiations resulted in an agreement in early 2014. The 2014 Upper Klamath Basin Comprehensive Agreement (UKBCA) sought to: “(1) To support the economic development interests of the Klamath Tribes; (2) To provide a stable, sustainable basis for the continuation of agriculture in the Upper Klamath Basin; (3) To manage and restore riparian corridors along streams that flow into Upper Klamath Lake in order to achieve proper functioning conditions permanently; and (4) To resolve controversies regarding certain water right claims, contests, and exceptions in the ongoing Klamath Adjudication.”³³

The KBRA required congressional approval and funding; however, Congress did not act within the time frame set within the KBRA, and the agreement expired on December 31, 2015. This resulted in the terms of the UKBCA not being able to be met, which prompted the parties to meet and confer, as well as attempt mediation. Efforts were unsuccessful, and the Secretary of Interior issued a negative notice determination signaling the termination of the UKBCA in December 2017, unless judicial review of the termination was sought.³⁴

Hydrologic Understanding of the Klamath River Basin, Oregon

U.S. Geologic Survey (USGS) and Department investigations have found significant hydraulic connection between groundwater and surface water in the Klamath Basin. In response to increased groundwater pumping in the Upper Klamath Basin in the 1990s and 2000s, the USGS in cooperation with the Department began a comprehensive study and analyses of the basin hydrogeology. This effort built on and incorporated existing, published reports as well as unpublished data and analyses pertaining to the geology, hydrology, and hydrogeology in the basin.

USGS Scientific Investigations Report (SIR) 2007-5050, USGS SIR 2012-5062, and the references cited therein, represent the best available information on the hydrogeology of the Upper Klamath Basin and form the basis for the Department’s framework of the groundwater system and groundwater-surface water interaction in the basin. These two reports were peer reviewed following the fundamental

³² See page 4 of the Klamath Basin Restoration Agreement (February 18, 2010). Online at: <http://www.edsheets.com/Klamath/Klamath%20Basin%20Restoration%20Agreement%202-18-10signed.pdf>

³³ See page 5 of the Upper Klamath Basin Comprehensive Agreement (April 18, 2014). Online at: <http://www.klamathrenewal.org/wp-content/uploads/2017/09/Upper-Klamath-Basin-Comprehensive-Agreement.pdf>

³⁴ U.S. Department of Interior. “Notice Regarding Upper Klamath Basin Comprehensive Agreement.” 82 Fed. Reg. 61,582. (12/28/2017). Online at: <https://www.federalregister.gov/documents/2017/12/28/2017-28050/notice-regarding-upper-klamath-basin-comprehensive-agreement>

scientific practices of the USGS.³⁵ Figure 4 provides a summary of the foundation and results of those two investigative studies.³⁶

Figure 4 Summary of USGS Reports Related to Groundwater in the Klamath Basin: Reports are Peer Reviewed Under USGS Standards

Report Title	Foundational Inputs	Key Conclusions
USGS SIR 2007-5050 – Ground-water hydrology of the Upper Klamath Basin, Oregon and California ³⁷	<ul style="list-style-type: none"> • Geologic maps • Geochemistry data • Field reconnaissance • Data from over 1,000 well logs in the basin • Over 80 references from published and unpublished reports 	<ul style="list-style-type: none"> • 1.8 million acre-feet of groundwater are discharged annually to surface water • At least 60% of the total inflow to Upper Klamath Lake can be attributed directly to groundwater discharge
USGS SIR 2012-5062 – Groundwater simulation and management models for the Upper Klamath Basin, Oregon and California ³⁸	<ul style="list-style-type: none"> • Information from USGS SIR 2007-505 • Updated geologic data • Calibrated to groundwater level data from over 500 individual wells and estimates of groundwater discharge to streams at over 50 locations 	<ul style="list-style-type: none"> • Simulated hydrologic responses to pumping wells • Estimated significant impacts to surface water (stream depletion) in all documented simulations

³⁵ U.S. Geological Survey Manual Chapter 502.3, Fundamental Scientific Practices: Peer Review. Promulgated 11/03/2016 by Jose R Aragon, Associate Director for Administration. Online at: <https://www2.usgs.gov/usgs-manual/500/502-3.html>

³⁶ Oregon is not unique in its methods or approach to groundwater science. For example, the USGS does basin study reports and groundwater science across the United States. Idaho has used modeling in their groundwater management efforts. California has included groundwater budgets and models as part of their Best Management Practices for the Sustainable Groundwater Management Act.

A USGS report describes the science and methods for assessing interference by wells. See Barlow, P.M., and Leake, S.A., (2012), *Streamflow depletion by wells—Understanding and managing the effects of groundwater pumping on streamflow: U.S. Geological Survey Circular 1376*. Online at <https://pubs.usgs.gov/circ/1376/>

See California Best Management Practices for the Sustainable Groundwater Management Act, including documents related to BMP 4-5 for development of water budgets and modeling. Online at: <https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management/Best-Management-Practices-and-Guidance-Documents>.

See also Idaho Water Resources Department, which has developed and used models in groundwater management. Online at: <https://idwr.idaho.gov/water-data/projects/>.

³⁷ Gannett, M.W., Lite, K.E. Jr., La Marche, J.L., Fisher, B.J., and Polette, D.J., (2007), *Ground-water hydrology of the upper Klamath Basin, Oregon and California: U.S. Geological Survey Scientific Investigations Report 2007-5050*. Online at: <https://pubs.er.usgs.gov/publication/sir20075050>

³⁸ Gannett, M.W., Wagner, B.J., and Lite, K.E., Jr., 2012, *Groundwater simulation and management models for the upper Klamath Basin, Oregon and California: U.S. Geological Survey Scientific Investigations Report 2012-5062*. Online at: <https://pubs.er.usgs.gov/publication/sir20125062>

Groundwater Regulation in the Klamath Basin

In early 2015, the Commission adopted OAR Chapter 690, Division 025 rules which addressed regulation of wells in the off-project area of the Upper Klamath Basin based on provisions in the UKBCA. Division 025 included a provision that the rules would no longer apply if the UKBCA was terminated, and that groundwater regulation would occur under existing statewide rules, OAR Chapter 690, Division 009.

Wells were regulated under the Division 25 rules for three irrigation seasons from 2015-2017. The regulation affected about 50 wells. Six lawsuits were filed in response to the regulation during that period. In 2017, consolidated cases for several landowners went to trial in Marion County Circuit Court where the Department prevailed. The Circuit 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 and sound science. The landowners appealed and the case was dismissed as moot in a ruling from the Oregon Court of Appeals.

On December 28, 2017, the Secretary of the Interior published a "Negative Notice" terminating the UKBCA, finding that all of its conditions could not be achieved. Upon termination of the UKBCA, the Division 025 rules were no longer in effect.

Regulation of wells during 2018 occurred under the statewide Division 009 rules. More wells (140) were regulated under the Division 009 rules than had been regulated under the Division 025 rules, because the Division 025 rules had been based on a negotiated agreement with the senior users. Fourteen lawsuits were filed in 2018 in response to regulation of groundwater rights in 2018.

Proposed Path Forward

This last winter, the Department proposed a two-step process intended to result in a long-term management approach for groundwater management in the Klamath Basin. The first step was adoption of interim Division 025 rules relating to the regulation of wells for the 2019 and 2020 irrigation seasons in the Upper Klamath Basin, which resulted in about seven wells being subject to regulation (compared to the 140 wells subject to regulation under Division 009). The interim rules will control how groundwater regulation occurs in the basin through March 2021, creating a period of time to focus on the second step of the process

The second step includes Department staff meeting with water users and holding an open house event to discuss basin hydrology, and surface water and groundwater management options in the Klamath Basin. Following this public outreach, the Department will work with a rules advisory committee to develop proposed permanent rules specific to long-term surface and groundwater management in the Upper Klamath Basin. The Klamath Tribes, water users, conservation groups, and local governments will be asked to provide assistance and input in the development of the permanent rules.

Figure 5 Summary of Groundwater Regulation in the Upper Klamath Basin, Oregon

Time Period	Rules for Well Regulation	# of Wells Subject to Regulation	Comments
2015 – 2017	OAR 690-025 (Division 25)	50	These rules were adopted to follow provisions of the Upper Klamath Basin Comprehensive Agreement (UKBCA).
2018	OAR 690-009 (Division 9)	140	The UKBCA was terminated by the Federal Secretary of the Interior in December 2017. This resulted in 690-025 rules no longer being in effect, causing the Department to regulate under the statewide 690-009 rules.
2019 – 2020	Amended OAR 690-025 (Revised Division 025)	7	These rules minimize regulation of wells in the Upper Klamath Basin to allow the Department and basin/community interests to work on permanent rules addressing long-term water management and well regulation.
2021 – Beyond	To be determined	To be determined	The Department will work with basin/community interests to develop permanent rules for water management in the Klamath Basin.

Year Filed	Rule/Statute	Legal Question Addressed and Fundamental Basis for Dispute
		Cases in which the Department issued an order to regulate a junior groundwater user to meet the call for water by a senior surface water user
2015 / 2016 / 2017 / 2018 Mallams – 15CV23345; 16CV23679; 17CV26590; 18CV19777	ORS 537.525; 540.045; 539.170 OAR 690-25 and/or 690-09; 690- 250	The petitioner irrigates lands near the Sycan River in the Klamath Basin from a well. The well was regulated off beginning in 2015, to meet the call of senior surface water rights. Each year, the petitioner filed a petition for judicial review of the regulatory final orders in other than contested case and then requested dismissal of the petition following the irrigation season. ORS 536.075(5) stays enforcement of the regulatory order after a petition for judicial review is filed. All cases have been dismissed.
2015/2016/ 2017 Sees, Duncan, Stonier – 15CV18272; 15CV19347; 15CV23126; 16CV24087; 16CV24120; A165952	ORS 537.525; 540.045; 539.170 OAR 690-25 and/or 690-09; 690- 250	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 2016. Each petition resulted in different court case numbers, but because these cases are similar, they have been consolidated into case No. 15CV18272. The Marion County Circuit 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. The Court affirmed the Department’s orders. Counsel for the Sees filed objections to the Court’s findings. Sees filed an appeal on September 19, 2017. Oral arguments were held with the Oregon Court of Appeals on August 21, 2019. On September 25, 2019, the Court issued an opinion dismissing the case as moot.
2018 Topham – 18CV18092	ORS 537.525; 540.045 539.170 OAR 690- 009; 690-250	In April 2018, the Department received and validated a call to fulfill a senior surface water right and issued a final regulatory order in accordance with OAR 690-009. The petitioner holds junior groundwater rights, and the Department determined that regulation of the wells was appropriate to protect the senior surface water rights. In May 2018, the petitioner filed a petition for judicial review, seeking to set aside the Department's regulatory orders as erroneous. The petitioner argued the wells are not hydraulically connected nor substantially interfering with surface water sources. Additionally, arguing regulation would not provide effective and timely relief, and the call for water from a senior right holder was futile. In April 2019, the petitioner voluntarily withdrew the case.
2018 Brooks – 18CV26126;	ORS 537.525; 540.045; 539.170	In April 2018, the Department received and validated a call to fulfill a senior instream water right, determined the petitioners’ wells were subject to regulation, and issued a final regulatory

Duarte – 18CV26125; Edwards – 18CV28865; Jacobs – 18CV26118; Krueger – 18CV20167; Martin – 18CV26120; Melsness – 18CV26153; Miller – 18CV26130; Newman – 18CV26124; Wilks – 18CV26122; Emery – 18CV34039	OAR 690- 009; 690-250	order in accordance with OAR 690-009. The Petitioners’ hold junior groundwater rights. The final orders prohibited groundwater to be pumped from wells located within one mile of a surface water source, because the groundwater is hydraulically connected to, and the use interfered with, surface waters. Multiple petitioners filed separate but similar petitions for judicial review seeking to set aside the orders as unlawful. The petitions for judicial review challenged the Department’s overall authority to regulate the use of groundwater rights. Arguments included regulation could not occur because: 1) Locations were outside of a designated, critical groundwater area; 2) A contested case hearing was not held; 3) Substantial evidence was lacking; 4) More junior users were not regulated; 5) Wells were drawing from a confined aquifer; and 6) Effective and timely relief was not achieved. The Circuit Court dismissed the cases as moot after the parties entered into Settlement Agreement(s). No error or violation of the law was acknowledged within the settlement by any party.
		Cases in which the Department issued an order to regulate a junior surface water right for a senior surface water user
2014 Klamath Drainage District –1403195CV)	540.045; 539.170 690-250	The Department issued a regulatory order to the petitioner to pass stored water released by the Bureau of Reclamation under a limited license authorization past the petitioner’s point of diversion. In August 2014, the petitioner filed a petition for judicial review of the Department’s regulation order. The petitioning attorney withdrew the petition and the Court subsequently issued a dismissal order in 2016.
2015-17 TPC/Hyde – 17CV26962; 16CV27427; 15CV20875; A167380	540.045; 539.170 690-250 540.150	From 2015 to 2017, the watermaster received calls from the Klamath Tribes for distribution of water to protect their senior instream determined claim on the upper Williamson River and the marsh elevation determined claim for the Klamath Marsh. The watermaster validated the call and issued regulation orders each year. The petitioners filed petitions for judicial review, arguing that the State should enforce the provisions of a Klamath Adjudication settlement agreement. The petitioners’ motion for summary judgment was granted by the Circuit Court. Case is pending at the Court of Appeals.
2016 Micke – 16CV17866; A164638	540.045 690-250	The Department issued a final order, and an amended final order, requiring the petitioner to release water from reservoirs on their property in response to a call from a senior storage right holder downstream. The petitioner filed a petition for judicial review and subsequent appeal, seeking to set aside the final order as erroneous. The Circuit Court entered a judgment of general dismissal; the Court of Appeals affirmed the case without opinion.

2015 Baltzor Cattle Co. – 15CV1147	540.045; 690-250	The petitioner filed a petition for judicial review challenging a final regulatory order directing surface water use to stop due to insufficient water supply to satisfy a senior water right. The Director issued an order denying the automatic stay. The petitioner voluntarily withdrew the case after surface water was no longer available. The case was not heard by the Court and was dismissed in May 2015.
2017 NBCC – 17CV21859	540.045; 539.170 690-250	In 2017, the Department issued final orders requiring petitioners to cease irrigation to satisfy a senior instream determined claim in the Klamath Basin. Petitioners jointly filed a petition for judicial review, seeking to set aside the final order asserting the Department lacked substantial evidence (inaccurate stream discharge measuring), the senior call was futile, and the Department lacked authority overall. By filing petitions for judicial review, the enforcement of the regulatory orders were automatically stayed pursuant to statute, with the effect being that irrigators could resume diverting water. In July 2017, after the Director made a finding of substantial public harm, the Department issued orders denying the automatic stay for each of the orders under review, which required the water users to cease diverting water. The petitioners jointly filed a petition for reconsideration and request to stay the order denying the original stay, on the basis that they would suffer irreparable injury to their business, the order was erroneous, and granting the stay would not result in substantial public harm. The Department denied the petitioners' stay request for failure to show irreparable injury or legally recognizable harm that would be redressed in court. The petitioners filed a notice of voluntary dismissal in February 2018. The Circuit Court signed the general judgment of dismissal in February 2018.
Regulation of both groundwater and surface water rights		
2017 Mosby – 17CV22113	540.045; 539.170 690-250	The watermaster regulated the plaintiff's surface and ground water rights to satisfy a call for water made by senior surface water determined claims in the Klamath Basin. The petitioner challenged the final order prohibiting use of water from Sand Creek for irrigation and livestock watering and from a well in proximity to Sand Creek. The case was dismissed in January 2018, after Department staff determined regulation of the surface water and groundwater rights would not provide water to the senior rights.

Cases Involving Parties Seeking to Compel Agency Action to Regulate

The cases in the table below involved the petitioner seeking to have the Department take regulatory action. In the cases in the prior table, the senior user wants the Department to regulate, and the junior user does not. In the below cases, the Department has declined to take regulatory action, and individuals are seeking the court to require the Department to take an action. This demonstrates that the Department is often in the middle of disputes between parties that often want different actions, due to the shared nature of water as a finite public resource. If the Department acts, it may get sued by the party that it takes action against, and if it declines to act, a different party may sue the Department for not taking action.

Year Filed	Rule/Statute	Legal Question Addressed and Fundamental Basis for Dispute
		Cases in which third party sued department due to department not taking regulatory action
2018 Klamath Irrigation District – 18CV18112 A168798 Litigation Resolved	ORS 540.210	<p>As part of its dispute with the Bureau of Reclamation, the petitioner filed a petition to compel agency action in the Circuit Court, requesting the Department take exclusive charge of Upper Klamath Lake for the purpose of dividing or distributing water to water right holders. In response to a general judgement ordering the Department to "take charge," the Department issued a preliminary order seeking additional information from the petitioner and the federal agency to determine compliance with the Klamath Basin Adjudication's amended and corrected findings of fact and order of determination and Oregon water law. The Department issued this preliminary order in order to obtain information to resolve the disagreement between the parties. Later in the irrigation season, the Bureau made additional water available from Upper Klamath Lake for water right holders but cautioned about the need to remain in compliance with other mandates, such as the 2013 Biological Opinion and a 2017 court order. The Department terminated its actions after the petitioner confirmed it no longer had an immediate need for the Department to divide and distribute the water.</p> <p>The Department had also appealed the Circuit Court ruling. Following the end of the irrigation season, the petitioner indicated to the Department that they had received their water, and there was no longer a dispute. The Court of Appeals issued an order of dismissal and appellate judgment in December 2018.</p>
2016 ELH, LLC – 16CV20883	540.045 540.270	In June 2016, the petitioners jointly filed a petition for judicial review and complaint for injunction, requesting the Court require the Department to regulate the distribution of irrigation water delivered through the District, in favor of senior water right holders also within the District. The Department argued it did not have

<p>Litigation: Resolved</p>		<p>authority to regulate within the District given ORS 537.270, unless the District requested the Department to do so. The Circuit Court dismissed the Department from the case in December 2017.</p>
<p>2014 Bayou Golf Course, Inc. – 14CV09985 Litigation Resolved</p>		<p>The petitioner filed a complaint alleging the Department and others failed to remove logs from a railroad trestle instream, causing water to back up onto golf course property. The Department’s position was that it does not have authority or duty to remove logs from the stream and the railroad trestle, and that it should not be involved in this suit. The Court dismissed the Department from the case in May 2016, but then provided an opportunity for the petitioner to refile the case. A court date was scheduled for September 2016. Case was dismissed.</p>

Cases involving Water Measurement

Requiring an individual to install a water measurement device can be helpful in distributing water and determining whether the use is authorized. Authority for watermasters to require measurement is provided in ORS 540.310.

Year Filed	Rule/ Statute	Legal Question Addressed and Fundamental Basis for Dispute
Cases involving water measurement for water distribution		
2014 Buchanan – 1408350CV	540.310 690-250-0060	The watermaster requested the installation of a new headgate and measuring device on a large irrigation diversion to enable regulation to protect senior water right holders during times of water shortage. The petitioner challenged the final order requiring the installation of a headgate and measuring device. The case was withdrawn and dismissed in 2015. The headgate and measuring device were ultimately installed.
See summary for dates: In Re Silvies Decree - Case No. 1403 / Braymen et. al.– 0212-353CV; 02-06134CV; 02-10-298CV	Silvies River Decree, Harney Circuit Court	<p>This issue dates back to a surface water regulation at the confluence of the Silvies River and Foley Slough in 2002. The watermaster’s order regulating off junior users for downstream senior rights was challenged. The cases resulted in a settlement in 2006, requiring the Department to conduct several actions. One action involved filing a motion to enforce the water right decree, by asking the decree court to order water users to pay for construction of a water control structure at the confluence to aid in management and enforcement of water rights consistent with the Silvies River Decree. The motion to enforce the decree was filed in 2008. Subsequent work by local water users resulted in installations of headgates and measuring devices at significant diversions in the basin, simplifying water management and distribution. The litigation was suspended while staff and water users implemented a process not requiring court intervention. The Department concluded that regulation in accordance with the decree was being satisfied with existing water management tools including headgates and measuring devices by at least 2015, at which time the Department notified the Court that it withdrew the motion to enforce the decree as it was no longer needed.</p> <p>Two water users alleged the Department violated the 2006 settlement Agreement, and in February 2019, the circuit court entered judgment against the Department. The water users are seeking to require the installation of a water control structure as contemplated in 2006. To do so would cost several million dollars. The Department asserts that the expenditure is not necessary to manage Silvies River water as per the decree. On November 4, 2019, the Court of Appeals granted a motion for stay of the Harney County Circuit Court decision for the duration of the appeal.</p>

Well Construction Enforcement

The Well Construction Program protects Oregon's groundwater aquifers from depletion, waste, contamination, and loss of artesian pressure. More specifically, the program administers well constructor licensing exams, issues licenses and trainee cards, runs the well constructor continuing education program, interprets well construction rules and requirements, issues special construction standards, processes landowner well construction permits, issues well identification labels, runs the exempt groundwater use recording program, and administers the geotechnical hole program.

In coordination with the Field Services Division well inspectors, Well Construction Program staff routinely review statute and rule requirements with well constructors and landowners to ensure compliance with minimum well construction, maintenance, repair, and abandonment standards. Although voluntary compliance is typically achieved, there are periodic violations that require formal enforcement action to finally resolve. Well construction violations typically involve notice and report deficiencies, as well as construction practices that could lead to contamination, waste, or depletion of groundwater aquifers.

The enforcement process begins with attempts to gain voluntary compliance. At the beginning of the process for well constructors, the Department contacts the violator asking for conformity with the regulations. If unsuccessful with voluntary compliance, well constructors are issued a notice of violation, followed by an assessment of civil penalty, proposed order, and opportunity for hearing. There is a substantial amount of work that goes into gathering evidence in the field, assembling the record, and drafting the necessary legal documents for the hearing process. This building of the record is necessary in every case, whether it is addressed voluntarily or goes through enforcement, since the Department cannot predict how the matter will proceed. The Department is largely successful in efforts to achieve voluntary compliance with regulatory matters

Generally Applicable Statutes and Rules: Licensing of water and monitoring well constructors (ORS 537.747), landowner well construction permits (ORS 537.753(4)), as well as the inspection and verification that constructed wells meet minimum well construction standards (ORS 537.780(1)). OAR 690-200, 690-205, 690-210, 690-215, 690-220, and 690-240, address driller licensure, construction, maintenance, repair, and well abandonment requirements.

Law / Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
OAR 690-210-0150(2); 690-215-0045(2) Litigation: Resolved	2015 Moore – A157869	<p>In 2012, the Department issued a notice of violation and alleged the petitioner, a licensed well constructor, violated well construction standards. In the notice, the Department proposed to impose civil penalties and to suspend the authorizing license. The petitioner had deepened several wells in a manner that resulted in commingling of aquifers and failed to properly case and seal several additional wells. The petitioner requested a contested case hearing and an Administrative Law Judge found the Department’s notice violated the Administrative Procedures Act. The Department issued an amended proposed order, offering findings of fact and conclusions of law affirming the Department’s notice. The petitioner filed exceptions to the Department’s order, claiming erroneous findings of fact and interpretations of law, a lack of substantive evidence to establish violations, and a lack of notice to the regulated community. The Commission considered the petitioner’s exceptions, before issuing a final order affirming the Department’s amended proposed order. The petitioner filed a petition for judicial review with the Oregon Court of Appeals, challenging the Commission’s final order. In 2016, the Court affirmed the order without opinion.</p>
ORS 537.747(1) and (3); OAR 690-240-0065(1) Case Pending	2018 Schneider	<p>The Department issued a proposed order denying an application for a monitoring well license because the applicant does not have the experience necessary to meet requirements, or experience that is equivalent to the experience necessary to meet requirements. The applicant requested a hearing. The administrative law judge’s order affirmed the Department’s denial of the license. Exceptions have been filed.</p>

Miscellaneous Cases

The following cases below are individual issues.

Topic/ Law / Status	Year/ID#	Legal Question Addressed and Fundamental Basis for Dispute
Hydroelectric Lease Instream Water Right ORS 537.348; OAR 690-077- 0016 thru 0077 Litigation: Pending	2016 Warm Springs Hydro – A165160; 16CV11938	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. A non-applicant asked the Court to require the right to be converted to an instream water right. The Court issued an order dismissing the case. The non-applicant filed a notice of appeal with the Oregon Court of Appeals. Oral arguments were held on August 30, 2018. A decision is pending.
Correction of Scrivener’s Error on Water Right Certificate ORS 537.250; OAR 690-350- 0010 Judicial Review: Litigation Resolved	2016 Giottonini – 16CV00206	Water right permit R-14792 was issued in 2009. The permit contained a condition stating the permittee shall not construct, operate, or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The water right certificate was issued in 2010 but did not contain the condition requiring fish passage. The scrivener’s error was subsequently discovered. A superseding water right certificate was issued in 2015, which contained the fish passage requirement. In 2016, the petitioner challenged the issuance of the superseding certificate in Wheeler County Circuit Court. The petitioner subsequently withdrew the case. The petitioner challenged the conditions contained in a water right certificate. The petitioner requested the case be withdrawn.
Split a Permit ORS 537.225; OAR 690-325 Case Pending	2019 T-12965	Splitting a permit allows a landowner of record to assign all or part of a water right permit from the current permit holder to one or more additional permit holders. The assignment results in the issuance of a replacement permit to reflect the assignment. In this case, the Department issued a preliminary determination approving an assignment and a split permit because the proposed change would not injure existing water rights or result in enlargement. The applicant protested, asserting the rate should be allocated differently between the permit holders. Settlement discussions are ongoing. If there is no settlement, a hearing will be held.

<p>Drought Permit</p> <p>ORS 536.750(1)(a); 536.700-536.750. OAR 690-019-0040; OAR 690-019</p> <p>Judicial Review: Litigation Resolved</p>	<p>2015 Doverspike – 1409377CV</p>	<p>An approved emergency water use drought permit allows a water user to temporarily replace water not available under an existing water right. The most common drought permit allows the use of groundwater as an alternative to an existing surface water right. Emergency water use permits are issued through an expedited process and are valid for one year or the term of the drought declaration, whichever is shorter.</p> <p>The petitioner challenged a final order denying a drought application for supplemental irrigation of 2,374 acres from 10 wells in Harney County for the 2014 irrigation season. The Department determined the large amount of groundwater requested, 7,125 acre-feet, was not available. A settlement agreement was signed, and the case was dismissed.</p>
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