

MEMORANDUM

TO: Water Resources Commission

FROM: Paul R. Cleary, Director

SUBJECT: Water Resources Commission Meeting
Agenda Item G, June 7, 2002

Staff Recommendation Regarding Petition for Withdrawal or Emergency Rulemaking - Klamath Basin

I. Issue Statement

WaterWatch of Oregon and nineteen other organizations (Petitioners) request that the Commission either initiate emergency rulemaking under ORS 183.390 and 183.335(5) to close the Klamath and Lost River Basins to further appropriation via a basin program rule or take immediate action under ORS 536.410 to withdraw from further appropriation all of the unappropriated surface and ground waters of the Klamath and Lost River Basins. The petition is Attachment 1. For the reasons outlined below, staff recommend the Commission deny the request for emergency rulemaking and deny the request for withdrawal. Staff also recommend that the Commission utilize the work session at its October meeting for a status review of Department activities in the basin and briefings from the full spectrum of Klamath Basin water users, conservation and tribal interests.

II. Background

On May 28, 2002, Petitioners submitted a request that the Commission take immediate action under ORS 536.410 to withdraw from further appropriation all of the unappropriated surface and ground waters of the Klamath and Lost River Basins. As an alternative to a withdrawal, Petitioners request that the Commission initiate an emergency rulemaking under ORS 183.390 and 183.335(5) to restrictively classify the subject waters via a basin program rule to prevent further appropriations. Under either alternative, the petition does not propose to constrain emergency uses of water in times of drought; statutorily exempt ground water uses; any application for new uses currently pending before the Department; or ground water not found to be in hydraulic connection with surface waters in the basin. For the purposes of the petition, Petitioners have defined “hydraulically connected ground water” to mean that water can move between the aquifer and a surface water source. (Petition at 21).

The basis of Petitioners’ request is many-fold and includes arguments that: (1) current streamflows in the basin are insufficient to meet the many competing needs and beneficial uses; (2) uncertainty exists regarding the nature and extent of claims and existing rights in the Klamath

Basin adjudication; (3) uncertainty exists regarding the extent of surface and ground water available for appropriation; and (4) continued issuance of new water rights to use water from the Klamath system will only “perpetuate and exacerbate the water crisis in the basin.” Finally, Petitioners urge the Commission to keep the requested withdrawal or rule in effect until the Commission can make findings that: (1) a final order of determination has been entered in the Klamath Basin Adjudication; (2) measurement and reporting devices have been installed on all major ground and surface water diversions in the basin; (3) an aggressive program that regulates all existing water users in the basin is implemented; (4) ongoing ground water studies are concluded showing further development is sustainable and doesn’t interfere with surface waters; and (5) water is available for further appropriation after the needs of fish, wildlife, Native American Tribes, existing water right holders, and down river communities are met. (Petition at 20 and 23).

III. Discussion

A. The Resource

Petitioners liken the situation in the Klamath Basin to an overdrawn checking account and take the general position that writing more checks for water (issuance of water rights to use Klamath Basin water) will only worsen the current situation. However, in their analogy Petitioners fail to distinguish between the appropriation of direct flow surface water, off-season storage, and ground water. The Petitioners also may not be aware of the substantial progress the Department is making in the adjudication; the significant amount of staff and funding resources that are being dedicated to improved water management in the basin; the positive preliminary results of ongoing ground water evaluations and monitoring; and the Department’s request for federal funding assistance to sustain and enhance these efforts (see Attachment 2).

With respect to direct diversion of surface water, it is well known that most streams in Oregon, including the Klamath River and its tributary streams within Oregon, are over-appropriated during the dry, high water use months of the year. The Commission recognized this situation ten years ago and took action by adopting its Water Allocation Policy (OAR 690-410-070). Under the Commission’s Water Allocation Policy, after considering existing appropriations and related expected demands on the water, water for new appropriations must be available on an 80 percent exceedance basis (8 out of 10 years). Under this allocation scheme, water is not available for appropriation for a direct flow right from the Klamath River or its tributaries above the state line within Oregon any month of the year. The Department’s actions have been consistent with this information and policy and further rulemaking is not warranted from a direct flow surface water allocation perspective.

A preliminary evaluation of Klamath Basin direct flow permit applications, dating back to 1993, indicates that none of the subject permits allow for consumptive, direct flow use from the Klamath River or its tributaries that join the river within Oregon. For tributaries that meet the Klamath River south of the state line and the Lost River, six permits have been issued since 1993 for de minimus domestic and stockwater use, totaling approximately 0.5 cfs.

Given the over-appropriated condition of most streams during the low flow, high water use times of year, water users wishing to augment existing supply (and preserve summer-time flows) are turning to off-season storage and ground water use. The Department's allocation of water for off-season storage is guided by the Commission's Water Allocation Policy and avoids periods of the year when flows are low and expected demands are typically not met. In allocating water for storage, the Department normally evaluates applications on a 50 percent exceedance basis, meaning that water must be available to appropriate for storage five out of ten years. Under this allocation scheme, water is currently available to appropriate for storage from the Klamath River and its tributaries within Oregon during the high flow and off-season months of January, March, April, and May. Preliminary research for this staff report indicates that since 1997 the Department has issued approximately 42 permits to appropriate approximately 1,600 acre-feet of Klamath Basin water during high flow, low demand months.

In the Klamath Basin, off-season storage is a key component to augmenting water supplies. Increasing supply without further aggravating the basin's over-appropriated condition will require a combination of off-season storage and ground water use that does not adversely affect surface water flows. Off-season storage is a key component in settling contests in the Klamath Basin adjudication. In addition, off-season storage is a likely alternative source of water to augment wetlands and facilitate riparian restoration efforts. Moreover, the Congressionally enacted Klamath Basin Water Supply Enhancement Act of 2000 (which the State of Oregon supported) authorizes feasibility studies for increasing storage capacity and/or yield of Klamath Project facilities while improving water quality and the protection of fish and wildlife. Several such studies are underway (e.g., Gerber Reservoir).

In their depiction of the basin's over-appropriated condition, Petitioners do not distinguish between the ground water resource and surface water. The Department has no evidence of a ground water crisis in the Klamath and Lost River Basins. In fact, based on studies the Department is currently conducting in the Shasta View Irrigation District, the Upper Klamath Basin, and in the Bonanza area, data indicate that the aquifer is stable and that water use to date has not diminished the long-term sustainability of the ground water resource. Except in limited circumstances, we have no evidence that a ground/surface connection is adversely affecting surface water. Outside those limited circumstances, if ground water development is impacting surface water supplies, it is not apparent where or how much. Nor is it apparent at this time where to expect surface water impacts. Virtually all data accumulated to date suggest that the basin's ground water resource can sustainably support current development and some additional development. Indeed, the above noted Water Supply Enhancement Act authorizes feasibility studies of the potential for development of additional Klamath Basin ground water supplies to improve water quality and quantity in the basin for multiple-purpose benefits.

B. The Process

Petitioners' primary request is that the Commission take immediate action in the form of a withdrawal. Under ORS 536.410, the Commission may withdraw unappropriated waters from

further development for all or any uses. The withdrawal is created by an order of the Commission after public notice and a public hearing is held on the necessity for the withdrawal. The Commission may take such action if it determines that it is necessary to ensure compliance with state water policy, or in the public interest to conserve water resources. Any Commission order of withdrawal must state the reason for the withdrawal and its duration. The Commission may subsequently amend or revoke the order. There is no requirement to affirmatively accept or deny a petition for withdrawal and there are no statutory time lines for such action.

In the alternative, Petitioners ask the Commission to initiate an emergency rulemaking under ORS 183.335(5) to classify the waters of the Klamath Basin as closed to further appropriations with the above noted exception. ORS 183.390 provides that an interested person may petition the Commission to promulgate, amend or appeal a rule. Within 30 days of such a request, the Commission must either deny the request or initiate rulemaking proceedings. Under ORS 540.340(1), the Commission has the authority to, by rule, "classify and reclassify the lakes, streams, underground reservoirs or other sources of water supply in this state as to the highest and best use and quantities of use thereof for the future in aid of an integrated and balanced program for the benefit of the state as a whole." The effect of a classification is to designate the purposes for which unallocated water may be developed within specific river basins. Classifications are adopted through rulemaking processes and are incorporated into basin programs. The Commission must provide public notice and hold at least one public hearing in the affected area before adopting or amending classifications.

With respect to ground water classifications, ORS 537.780 provides additional standards. Under this statute the Commission may not:

Adopt any rule restricting ground water use in an area unless the rule is based on substantial evidence in the record of the Water Resources Department to justify the imposition of restrictions.

C. Staff Recommendation

Staff recommend denial of Petitioners' request for withdrawal under ORS 536.410 and emergency rulemaking under ORS 183.390 and 183.335 for the following reasons. A draft Final Order denying the petition for emergency rulemaking is Attachment 3 (no order is required for denying the withdrawal petition).

- (1) The seasonal over-appropriation of the Klamath River and its tributaries above the state line within Oregon has already been recognized by the Commission in its Water Allocation Policy. The Department's implementation of the policy through its permitting decisions with respect to direct flow allocations is not exacerbating the seasonal over-appropriation. A withdrawal or rulemaking to restrictively classify surface water during the low-flow, high use season is not warranted given the restrictions on new appropriations already imposed by the Water Allocation Policy.

- (2) Off-season storage during high flow, low water demand months is an alternative for augmenting water supplies, preserving (summertime) natural flows, and restoring wetlands and riparian zones. In the Klamath Basin, off-season storage is likely to be a key component in settling contests in the adjudication and in Congressionally authorized efforts currently underway in the basin to augment supply for multiple uses.

Under the Commission's current water allocation policy, water is only available for storage in the Klamath Basin during the high flow, off-season months. For the Klamath River and its tributaries within Oregon, this includes the months of January, March, April, and May. Taking the storage alternative "off the table" through a withdrawal or rulemaking is not warranted and could be counterproductive to activities underway to augment supplies for multiple uses, improve water quality, restore wetlands and riparian zones, and preserve natural flows during low flow months.

- (3) With respect to an emergency rulemaking, under ORS 537.780 the Commission may not adopt any rule restricting ground water use unless the rule is based on substantial evidence in the record of the Department to justify the imposition of restrictions. In this case, no evidence warrants such a basinwide restriction either by rule or withdrawal. Data collected by the Department to date indicate that the aquifer is stable and, except in limited circumstances, there is no evidence that a ground/surface connection is adversely affecting surface water. A basinwide withdrawal or rulemaking to restrictively classify the basin's ground water is neither warranted nor supported by substantial evidence in the records of the Department. Where problems have been documented (e.g., Bonanza Springs, City of Malin, and shallow domestic wells) the Department is working cooperatively with all parties to resolve them.

The Commission should consider utilizing the work session at its October meeting for a status review of Department activities in the basin and for briefings from the full spectrum of Klamath Basin water users, conservation, and tribal interests.

Attachments:

1. Petition for Withdrawal or Emergency Rulemaking (without attachments)
2. Request for Federal Funding Assistance; Summary of Water Management Activities; Status of Adjudication Cases
3. Draft Final Order Denying Petition for Emergency Rulemaking